

**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

NOTICE OF MOTION

The plaintiff will make a motion to Justice Cullity on December 3-5, 2007,
at the court house, 361 University Avenue, Toronto, Ontario, M5G 1T3.

PROPOSED METHOD OF HEARING: The motion is to be heard
orally.

THE MOTION IS FOR:

- (a) an order that the within action be certified as a class proceeding pursuant to the *Class Proceedings Act, 1992*, S.O. 1992, c. 6, ss. 2 and 5;

(b) an order defining the Class as:

All persons resident in Canada who:

- (i) own a Class Vehicle; and/or
- (ii) have previously owned a Class Vehicle and who claim they paid or were charged for the cost of investigating, repairing and/or replacing an IMG, or for any other failure related to the Design Deficiencies;

(c) an order that the within proceeding is certified on the basis of the

following common issues:

- (i) Did the defendants owe a duty of care to the plaintiffs and Class members including the duty to ensure that the IMG was of merchantable quality?
- (ii) Did the defendants breach the standard of care in:
 - (1) the design and manufacture of the IMG;
 - (2) failing to recall the Class Vehicles;
 - (3) failing to provide a proper warning about the operation of the IMG?
- (iii) Did the defendants actively conceal the Design Deficiencies from the Class members or did it fail to disclose the Design Deficiencies to the Class members?
- (iv) Did the Defendants engage in an unfair practice within the meaning of ss. 14, 15, and 17 of the *Consumer Protection Act, 2002* or equivalent in other provinces and/or make a false or

misleading misrepresentation within the meaning of s. 52 of the *Competition Act*, by:

- (1) failing to disclose the Design Deficiencies to the Class members; and
 - (2) actively concealing the Design Deficiencies?
- (v) Are the defendants liable to pay punitive and exemplary damages and if so in what amount?
- (vi) Can global damages or other monetary relief be assessed in whole or in part, in an aggregate fashion, based on the cost of replacing the IMGs on all the Class Vehicles, or by any other method?
- (vii) Apart from damages, is any other remedy appropriate, including the recall of all Class Vehicles?
- (viii) Are the defendants constructive trustees for all or any Class members of all or any part of the proceeds of the sales of the replacement IMGs and related parts? If so, in what amount and for whom are such proceeds held?
- (ix) Are the defendants liable to account by virtue of the remedy of waiver of tort to any or all the Class members on a restitutionary basis for all or any part of the proceeds of the sales of the replacement IMGs and related parts? If so, in what amount, and for whose benefit is such accounting to be made?

- (d) an order that Kenneth David Stewart and Darlene Simpson be appointed as the representative plaintiffs for the Class;
- (e) an order that the notice of certification to the Class shall be given pursuant to the litigation plan attached to the affidavit of Celeste Poltak, filed;
- (f) an order that the defendants shall be responsible for all costs associated with the notice of certification;
- (g) an order that the members of the Class who elect to opt out of the class proceeding must do so within a period of time to be fixed by the judge after the date of the order certifying the action by filing an opt out form as further described in the litigation plan attached to the affidavit of Celeste Poltak, filed;
- (h) an order requiring the defendants, at the return of this motion, or at a date to be fixed by the court, to deliver to the plaintiff an affidavit listing to the best of their knowledge, information and belief, the following information, hereinafter referred to as “the defendants’ information”:
 - (i) a list of names of the members of the Class known to the defendants, including, in particular, any information as to whether each Class member owns a Class vehicle with an IMG;
 - (ii) the names of any other Class members or potential Class members as they become known to the defendants; and
 - (iii) their best information as to the number of Class members in Canada on a province by province basis;

- (i) an order requiring the defendants forthwith to disclose and produce for inspection any and all insurance policies under which an insurer may be liable to satisfy all or a part of a judgment in this action or to indemnify or reimburse the defendants for any money paid in satisfaction of a judgment;
- (j) an order granting the plaintiff leave to apply to the court pursuant to s. 32(1) of the *Class Proceedings Act, 1992*, without notice of the defendants, to obtain approval of an agreement respecting fees and disbursements between the solicitors and the representative plaintiff and to settle the information to be inserted in the notice relating to fees and related or similar solicitor client matters;
- (k) an order granting the plaintiff leave to disclose to counsel in the class actions commenced in other jurisdictions, including in the United States, documents, productions, exhibits and transcripts of examinations for discovery in this action and in the trial of the common issues and to receive any and all documents from counsel in those actions if counsel for the plaintiff in their sole discretion consider this to be in the best interest of the Class members;
- (l) an order requiring the defendants to preserve all documents in their power, possession or control in any way related to the matters in issue, including identification of all relevant parties and witnesses;
- (m) an order stating the nature of the claims asserted on behalf of the Class to be:

- (i) negligence in the design and manufacture of the IMG and the failure to ensure the IMG was of merchantable quality and fit for its intended purpose;
- (ii) negligence in the failure to identify the defects in the design and manufacture of the IMG;
- (iii) negligence in the failure to recall all Class vehicles and to replace the IMG in all Class vehicles;
- (iv) negligence in the failure to warn Class members of the risk of failure of the IMG with resulting corollary damage;
- (v) breach of the *Competition Act* and the *Consumer Protection Act, 2002* and equivalent in provinces other than Ontario;
- (vi) waiver of tort;
- (n) an order stating the relief sought by the Class members to be:
 - (i) determination of all issues of the defendants' liability arising from the defendants' negligence or other wrongful conduct;
 - (ii) entitlement of the Class members to recall of Class vehicles and replacement of all IMGs with the updated version;
 - (iii) the entitlement of the Class members to damages or other monetary relief, including punitive damages; and
 - (iv) damages or other monetary relief;
- (o) their costs of this motion on a substantial indemnity basis, plus GST;
- (p) such other order as counsel may advise and this Honourable Court permit.

THE GROUNDS FOR THE MOTION ARE:

1. The statement of claim discloses a cause of action against the defendants.
2. There is an identifiable class which will be represented by the representative plaintiff.
3. The claims of the Class members raise common issues respecting the within litigation.
4. A class proceeding is the preferable procedure for the resolution of the common issues.
5. The representative plaintiff:
 - (a) will fairly and adequately represent the interests of the Class;
 - (b) has proposed a litigation plan which sets out a workable method for the advancement of the proceeding on behalf of the Class, including notification of Class members;
 - (c) does not have any interest in conflict on the common issues with the interests of the other Class members.

6. It is fair, just and reasonable that the defendants should disclose all defendants' information about the Class members.
7. The most efficient and least expensive method of notifying Class members is achieved if, as a condition precedent to the delivery of the notice, the defendants are required to produce all defendants' information concerning the Class members.
8. The notice program is a reasonable method of notifying the Class members.
9. It is reasonable that the defendants should pay the full cost of the notice program.
10. The directions as to the conduct of the class proceeding are sought to ensure a fair and expeditious determination of this action.
11. In class proceedings, especially where they involve identical issues in different jurisdictions, there is no public policy reason that militates in favour of confidentiality of production or documents dealing with common issues of liability as between counsel with similar interests.
12. *The Class Proceedings Act, 1992.*

13. Rules 1, 2, 12, 30.02(1)-(3) and 30.1.01 of the Rules of Procedure.
14. Such grounds as counsel may advise and this Honourable Court permit.

THE FOLLOWING DOCUMENTARY EVIDENCE will be used at the hearing of the motion:

- (a) the affidavit of Celeste Poltak, sworn February 21, 2007;
- (b) the affidavit of Bill Abouatallah, sworn February 14, 2007;
- (c) the affidavit of Richard Smythe, sworn February 22, 2007;
- (d) the affidavit of Kenneth David Stewart, sworn February 21, 2007;
- (e) the affidavit of Darlene Simpson, sworn February 21, 2007;
- (f) the affidavit of Jack Carr, sworn January 29, 2007;
- (g) the amended statement of claim, amended April 26, 2006 and the proposed further amended statement of claim;
- (h) such other documentary evidence as counsel may advise and this Honourable Court permit.

February 21, 2007

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