

Court File No. CV-10-40251500CP

**ONTARIO
SUPERIOR COURT OF JUSTICE**

B E T W E E N:

JOSEPH MICHAEL O'NEILL

Plaintiff

- and -

GENERAL MOTORS OF CANADA LIMITED

Defendant

PROCEEDING UNDER THE *CLASS PROCEEDINGS ACT, 1992*

**STATEMENT OF DEFENCE
TO THE COMMON ISSUES**

1. The Defendant, General Motors of Canada Limited ("GMCL"), denies all statements made in the Fresh as Amended Statement of Claim, except as specifically admitted herein.

The Issues in the Class Proceeding

2. GMCL consented to the terms of an order dated October 20, 2011 (the "Consent Order"), wherein Strathy J. certified parts of the Plaintiff's claim as a class proceeding.

3. The Consent Order defined the Class as:

- a) all salaried and executive retirees of GMCL who retired from GMCL between January 1, 1995 and October 20, 2011, and
- b) all surviving spouses and dependent children beneficiaries of any deceased persons described in (a),¹

¹ For greater clarity, this means: in respect of people described in paragraph (a) who died prior to October 20, 2011, all surviving spouses of such deceased people, and where there is no surviving spouse or where the surviving spouse died prior to October 20, 2011, all dependent children of such deceased people described in paragraph

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but *excludes*:

- i. former employees of Canadian Automotive Manufacturing Inc. ("CAMI") who became employees of GMCL as a result of the amalgamation of CAMI and GMCL effective January 1, 2011 and
- ii. retirees of divested units Electro-Motive Canada Co ("EMC", formerly London Diesel); General Dynamics Land Systems – Canada Corporation ("GDLS", formerly GM Defense); Peregrine Oshawa Inc. (and its successor Automotive Component Systems of Canada, Inc. ("ACSYS")); or Peregrine Windsor Inc. (and its successor Lear Corporation Canada Ltd.) where post-retirement benefits are not provided by GMCL,

(the "Class").

4. The Consent Order certified the Plaintiff's claims in:

- (a) Contract (restricted to the objective meaning of a limited number of documents);
- (b) unjust enrichment (only on behalf of surviving spouse and dependent Class members in the alternative to the claim in contract if that claim fails for lack of privity); and
- (c) negligent misrepresentation (though not the elements of reliance, the reasonableness of this reliance and damages).

5. The Fresh as Amended Statement of Claim pleads causes of action, facts and allegations which do not form part of the class proceeding or common issues trial.²

(a), in all cases such surviving spouses and dependents being persons eligible under GMCL's benefit plans without regard to the changes to eligibility requirements under GMCL's benefit plans effective January 1, 2009.

² For example, breach of fiduciary duty, breach of duty of good faith and (on behalf of retiree Class members) unjust enrichment at paragraphs 24, 29 to 32, and 41 to 42 of the Fresh as Amended Statement of Claim.

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6. At a case conference on November 7, 2011, GMCL advised (and the Plaintiff consented and the Court approved) that this Statement of Defence would set out GMCL's defence to only those parts of the Plaintiff's claim certified as common issues.

7. GMCL reserves its position regarding any individual issues, which it will particularize more fully in the event that individual proceedings occur.

Overview of Defence: GMCL Has the Right to Modify Post-Retirement Benefits

8. GMCL voluntarily established the post-retirement benefit programs at issue, including various health care, life insurance and executive benefits.

9. At all times, GMCL had the right to modify or terminate the post-retirement benefits.

10. GMCL never promised that the post-retirement benefits would remain unchanged or unreduced, or that benefits would be guaranteed at a certain level throughout retirement.

11. GMCL's right to modify or terminate post-retirement benefits was regularly communicated to salaried and executive employees, including the Plaintiff.

12. Between 2007 and 2009, GMCL was faced with unprecedented and company-threatening economic circumstances. Consequently, GMCL announced modifications to certain post-retirement benefits provided to salaried and executive retirees, and their surviving spouses and dependents, which were designed to save money and help the company survive. GMCL was entitled to make these modifications.

13. GMCL denies that the Class has or had any right, vested or otherwise, to receive from GMCL in perpetuity post-retirement benefits at any specific levels, or at all. The Class

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members' claims to the contrary are inconsistent with the intentions of the parties, the Class-wide communications and conduct between them, and the terms and conditions of the post-retirement benefit programs.

The Parties

14. GMCL is a company incorporated under the laws of Canada.

15. GMCL manufactures and assembles vehicles, and markets General Motors-branded vehicles and related services through its authorized dealerships across Canada.

16. The Plaintiff, Joseph O'Neill, was an hourly employee of GMCL from 1964 to 1979 and a salaried employee from 1979 to 2002. In 2002, the Plaintiff retired voluntarily from GMCL (i.e. not under an early retirement program).

GMCL Provides Post-Retirement Benefits

17. GMCL provides its salaried retirees (including retiree Class members - group (a) in the definition of the Class, above) and certain dependents with post-retirement benefit coverage. These post-retirement benefits broadly consist of healthcare and life insurance benefits. Some available benefits coverage involves an element of choice on the part of the retiree.

18. Employees who hold executive positions form a subset of GMCL's salaried workforce. Employees who retire from executive positions at GMCL (including executive retiree Class members), and their families, are provided with the same healthcare and life insurance benefits as their non-executive salaried counterparts. Executive retirees and their families also receive additional executive post-retirement benefits.

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19. After a retiree dies, GMCL continues to provide certain post-retirement benefits to their eligible surviving spouse and dependent children (including surviving spouse and dependent Class members - group (b) in the definition of the Class, above). Some benefits involve an element of choice on the part of the retiree and/or the surviving spouse.

20. GMCL entered into contracts of employment, which were amended from time to time, with each of the retiree Class members while they were active employees of GMCL.

21. GMCL denies it entered into direct contracts with surviving spouse and dependent Class members. GMCL specifically denies the allegation at paragraph 9 of the Fresh as Amended Statement of Claim that GMCL and each relevant employee contemplated that surviving spouses and dependents would be legally entitled (contractually or otherwise) to or would claim post-retirement benefits. To the contrary, GMCL only voluntarily provides post-retirement benefits to surviving spouse and dependent Class members.

22. In any event, GMCL's provision of post-retirement benefits to surviving spouse and dependent Class members was subject to GMCL's right to modify or terminate the benefits.

GMCL's Right to Modify or Terminate Post-Retirement Benefits

23. GMCL specifically denies the allegation at paragraph 12 of the Fresh as Amended Statement of Claim that post-retirement benefits vested irrevocably as employees worked, or at any other time. Since the inception of the benefit programs, GMCL had the right to modify or terminate post-retirement benefits.

24. In providing post-retirement benefits, GMCL did not intend for these benefits to vest at any time, including during the employee's active employment and at retirement.

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25. At all relevant times, GMCL expressly retained the right to modify or terminate the post-retirement benefits. At all relevant times, based on the communications and GMCL's conduct, the Class knew or ought to have known that GMCL had reserved this right.

26. Class members never had a guarantee of, nor a right to, the continuation of benefits on retirement or following retirement, or to any given level of benefits, as these were always benefits payable at GMCL's sole and absolute discretion.

27. Furthermore, GMCL did not intend improvements to benefits made after retirement to vest as they were provided. The assertions otherwise at paragraphs 12 and 13 of the Fresh as Amended Statement of Claim are specifically denied.

28. GMCL always had the right to modify or terminate post-retirement benefits. It never made promises or acted in a contrary fashion.

29. To notify employees during their active employment of this right, GMCL began in 1994 (at the latest) to explicitly and uniformly communicate in writing that GMCL reserved its right to modify or terminate all of its benefit programs, including post-retirement benefits.

30. For example, from 1994 onwards GMCL began to include a notice in its 'You and Your Benefits' booklet that stated:

General Motors reserves the right to amend, modify, suspend or terminate any of its programs (including benefits) and policies by action of its Board of Directors or other committee expressly authorized by the Board to take such action. The programs, benefits and policies to which a salaried employee is entitled are determined solely by the provisions of the applicable program, benefit or policy. Absent an express delegation of authority from the Board of Directors, no one has authority to:

- commit the Corporation to: any program, benefit, policy or provision under a program, benefit or policy not provided for under the written terms of applicable programs, benefits or policies; or

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- change the eligibility criteria or any other provisions of such programs, benefits or policies.

31. All Class members were provided with written communications including the reservation of rights prior to their retirements and the 2007-2009 modifications of benefits in question.

32. GMCL's right to modify or terminate post-retirement benefits was incorporated into all retiree Class members' contracts of employment.

33. GMCL specifically denies the allegation at paragraphs 8 and 9 of the Fresh as Amended Statement of Claim that the post-retirement benefits represented deferred compensation under the contracts of employment.

New Hires

34. From 1999 onwards, GMCL provided notice of its right to modify or terminate post-retirement benefits to newly hired Class members in their offers of employment or in a written benefit summary provided at their hiring. These Class members were therefore also on notice of GMCL's right for the entirety of their active employment.

Early Retirements

35. Some retiree Class members also signed early retirement agreements which specifically acknowledged GMCL's right to modify or terminate post-retirement benefits. These Class members also released and discharged GMCL from all claims, actions, causes of action, and/or demands related to their employment or the cessation of employment at GMCL in their respective early retirement agreements. As such, they are barred from bringing their claims.

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Prior Modifications to Benefits

36. GMCL exercised its right to modify post-retirement benefits multiple times before the 2007-2009 modifications at issue in this claim including, from time to time, instituting decreases in benefit coverage. In particular, salaried retirement benefits frequently followed and tracked active employment benefit changes.

37. Any improvement to post-retirement benefits was gratuitous for retirees at the time the improvement was implemented, for the reasons above and given that the retirees had stopped working for GMCL.

Difficult Economic Situation Facing GMCL

38. GMCL faced an unprecedented and serious economic situation in 2008 and 2009. Due to the financial difficulties GMCL experienced, GMCL was at serious risk of bankruptcy. GMCL's original parent company, General Motors Corporation, entered into bankruptcy proceedings in July 2009. GMCL was able to narrowly avoid bankruptcy by putting together a business plan in order to qualify for government loans. The plan, which was approved by the lending governments (Federal and Ontario), required a variety of stakeholders, including retirees, to accept financial reductions and constraints.

Changes to the Post-Retirement Benefits

39. In view of the difficult economic circumstances it faced, and among other survival techniques that GMCL implemented including salary reductions for active salaried and executive employees, changes to hourly workers' benefit coverage, and changes to bondholder and dealer relationships, GMCL modified post-retirement benefits for salaried retirees.

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40. Between 2007 and 2009 GMCL announced and began implementing a number of modifications, terminations and reductions to post-retirement benefits, some of which affected some Class members.

41. GMCL was within its rights to modify the post-retirement benefits in 2007-2009, just as it had been within its rights to do so previously.

Contractual Claim

42. For the reasons set out above, GMCL denies Class members ever had a right, vested or otherwise, to receive post-retirement benefits at any relevant time, including during his or her active employment, at retirement, or during his or her retirement.

43. In any event, in modifying the post-retirement benefits, GMCL denies that it breached its contract of employment with retiree Class members. Under each contract of employment, GMCL had the right to modify post-retirement benefits.

44. In paragraphs 10 and 11 of the Fresh as Amended Statement of Claim, the Plaintiff relies on a number of documents. To the extent any such documents referred to benefits and did not expressly contain a notice of GMCL's right to modify post-retirement benefits, such benefits were nevertheless subject to this right.

Unjust Enrichment Claim

45. Under the Consent Order, the Plaintiff advances a claim of unjust enrichment/*quantum meruit* on behalf of the surviving spouse and dependent Class members in the alternative if these Class members' contractual claims are unsuccessful because they are found not to have had a direct contractual relationship with GMCL.

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46. As stated above, GMCL denies that it has direct contractual relationships with surviving spouse and dependent Class members. GMCL employed the retiree Class members, not their families.

47. GMCL voluntarily provides post-retirement benefits to surviving spouse and dependent Class members. GMCL denies that these Class members have any enforceable legal right to post-retirement benefits.

48. GMCL denies that it was enriched by the surviving spouse and dependent Class members. Surviving spouse and dependent Class members have not enriched GMCL.

49. GMCL further denies that it was enriched by the work of retiree Class members based on representations that they would receive vested post-retirement benefits, as per paragraphs 26 and 28 of the Fresh as Amended Statement of Claim. At all relevant times GMCL reserved its right to modify or terminate the post-retirement benefits of the retiree Class members.

50. Furthermore, GMCL denies the allegations at paragraphs 10, 11 and 26 that it was enriched by the work of retiree Class members based on any representations made after their retirement, the retiree Class members having already supplied their work before receiving any such representations.

51. Having provided no enrichment to GMCL, GMCL denies that surviving spouse and dependent Class members have suffered any corresponding deprivation.

52. In the alternative, GMCL denies that it was enriched unjustly. Any benefit which GMCL acquired from any Class members (retirees, surviving spouses or dependents) and any deprivation which any Class members suffered occurred pursuant to the retiree Class members'

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contracts of employment with GMCL. Any enrichment is based on a juristic reason. These contracts gave GMCL the right to modify or terminate post-retirement benefits.

Negligent Misrepresentation Claim

53. Under the Consent Order, the Plaintiff advances a claim of negligent misrepresentation solely in respect of a letter regarding GMCL's Basic Life Insurance (the "Life Insurance Letter").

54. The Life Insurance Letter stated:

Clarica Life Insurance Company records show that you now have [a specified amount] of continuing life insurance in effect for the rest of your life. (emphasis added)

55. The Life Insurance Letter was sent to only some of the retiree Class members post-retirement once the member's amount of life insurance was reduced to a specified amount based on a formula under the program.

56. GMCL denies that the Life Insurance Letter made representations that retiree Class members were entitled to a fixed Basic Life Insurance benefit for any duration of time as alleged at paragraphs 11 and 34 of the Fresh as Amended Statement of Claim. GMCL specifically denies that the Life Insurance Letter is misleading, inaccurate or untrue if GMCL also had the right to modify or terminate benefits, as alleged at paragraph 35 of the Fresh as Amended Statement of Claim.

57. The Life Insurance Letter simply described the status of the Basic Life Insurance benefit at the time the statement was made. Such "point in time" valuations of pensions and benefits are commonly distributed by employers and there was no inaccuracy in the statement. In any event, Class members knew or ought to have known that the provision of life insurance was

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subject to GMCL's right to modify or terminate all benefits. GMCL therefore denies that the Life Insurance Letter was misleading, inaccurate or untrue.

58. GMCL denies that it was negligent in making any representations. GMCL exercised reasonable care to ensure that the Life Insurance Letter was not misleading, inaccurate or untrue.

59. GMCL denies that any representations otherwise constitute negligent misrepresentations.

60. As per paragraph 11 of the Fresh as Amended Statement of Claim, GMCL denies that it made the representation to surviving spouse and dependent Class members.

61. GMCL denies that it was in a special relationship and/or owed a duty of care to Class members who received the Life Insurance Letter. GMCL denies that there is a relationship of sufficient proximity between it and the Class members.

62. GMCL specifically reserves its position as to the Plaintiff's reliance and the reasonableness of this reliance on the Life Insurance Letter. Whether a Class member's reliance was reasonable has specifically been identified as an individual issue by the Consent Order.

Limitation Period Defence

63. GMCL relies upon the Ontario *Limitations Act* and pleads, on the basis of the facts set out above, that the Class members' claims are statute-barred insofar as they related to modifications made before May 6, 2008 (the plaintiff having commenced proceedings on May 6, 2010).

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64. In the alternative, any applicable limitation period is not determinable on a Class-wide basis and is an individual issue for subsequent individual determination.

Damages

65. For the reasons set out above, GMCL denies that the Class is entitled to damages in respect of either the contractual or unjust enrichment claims.

66. If this Court finds that damages are owed, GMCL denies that they can be assessed on an aggregate basis. In particular, the cost savings GMCL may have experienced are not an appropriate calculation of the damages the Class members may have suffered.

67. The quantum of damages claimed is exaggerated and without any basis.

68. GMCL denies that the modification of healthcare and insurance coverage constitutes a loss unless a Class member suffers an insurable event under this coverage.

69. Furthermore, in the alternative, if this Court finds that any of the Class members are owed some or all of the damages claimed in the Fresh as Amended Statement of Claim, which GMCL denies, the damage award must be offset by the substantial economic and other benefits as well as mitigation income received by the Class members (including payments from GMCL as a result of taking advantage of early retirement offers).

70. Determining damages for the negligent misrepresentation claim has not been certified as a common issue under the Consent Order. Furthermore, any loss resulting from the modification of Basic Life Insurance (which is denied) would lie with the estate beneficiaries of deceased retirees (not retiree Class members) or with the beneficiary of the life insurance policy, which may or may not be the surviving spouse or dependent Class members.

71. GMCL denies that it has acted in any fashion that would justify an award of punitive damages as claimed in paragraph 1(d) of the Fresh as Amended Statement of Claim.

Relief Sought

72. GMCL asks that this action be dismissed with costs (including legal fees, disbursements and taxes).

December 5, 2011

Osler, Hoskin & Harcourt LLP
Box 50, 1 First Canadian Place
Toronto, Ontario, Canada M5X 1B8

J. Brett Ledger (LSUC# 18851E)
Laura Fric (LSUC# 36545Q)
Eric Morgan (LSUC# 60531Q)
Tel: 416.862-6687
Fax: 416.862.6666
Lawyers for the Defendant

TO: SACK GOLDBLATT MITCHELL LLP
20 Dundas Street West
Suite 1100
Toronto, ON M5G 2G8

Steven Barrett (LSUC# 24871B)
Louis Sokolov (LSUC# 34483L)
Darrell Brown (LSUC# 29398U)
Christine Davies (LSUC# 57390F)
Tel: (416) 977-6070
Fax: (416) 591-7333

Lawyers for the Plaintiff

JOSEPH MICHAEL O'NEILL
Plaintiff

-and-

GENERAL MOTORS OF CANADA LIMITED
Defendant

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OSLER, HOSKIN & HARCOURT LLP

Barristers & Solicitors

P. O. Box 50

1 First Canadian Place

Toronto ON M5X 1B8

J. Brett Ledger (LSUC# 18851E)

Laura Fric (LSUC# 36545Q)

Eric Morgan (LSUC# 60531Q)

Tel: 416.862-6687

Fax: 416.862.6666

Lawyers for the Defendant

Matter No. 1123268