

**CITATION:** General Motors of Canada Limited v. Abrams, 2011 ONSC 5338  
**COURT FILE NO.:** 09-CV-393974CP  
**DATE:** September 13, 2011

**ONTARIO  
SUPERIOR COURT OF JUSTICE**

**BETWEEN:**

**General Motors of Canada Limited**

Plaintiff

- and -

**Barbara Abrams, Bernie Heming, Les MacDonald, Jackie Finn, Tony Sisti and  
Ken Lewenza and Peter Kennedy on their own behalf respectively and on behalf of  
all members of the National Automobile, Aerospace, Transportation and General  
Workers Union of Canada (CAW – Canada)**

Defendants

Proceeding under the *Class Proceedings Act, 1992*

**COUNSEL:**

- D. Stamp and C.T. Lockwood for the Plaintiff
- P.H. Griffin, R. Slaght, and B. Gray for the Defendants Barbara Abrams, Bernie Heming, Les MacDonald, Jackie Finn and Tony Sisti
- M. Gold, S. Archer, and J. Ptak for the Defendants Ken Lewenza and Peter Kennedy
- A. Farrer and L.C. Brown for certain objectors

**HEARING DATES:** August 24 and 26, September 12, 2011

**PERELL, J.**

**REASONS FOR DECISION**

**A. INTRODUCTION AND OVERVIEW**

[1] In 2008 and 2009, the world economy experienced a recession, and in North America, the automobile industry, which employs, directly or indirectly, hundreds of thousands of Canadians and Americans was substantially and adversely affected. This proposed class action is part of the fall-out of what was an economic crisis from which the economy has yet to recover. In this motion, the court is being asked to certify a proposed class action and to approve a settlement under the *Class Proceedings Act, 1992*, S.O. 1992, c. C.6.

[2] Pursuant to the *Class Proceedings Act, 1992*, General Motors of Canada Limited (GM Canada), a car manufacturer, commenced this proposed class action against its

retired employees. It sought a declaration that it can unilaterally alter or terminate their health care benefits. The former employees were sued as a defendant class.

[3] Residents of Québec were excluded from the proposed class action because there is a parallel proceeding in Québec.

[4] The Defendants in the Ontario action are Barbara Abrams, Bernie Heming, Les MacDonald, Jackie Finn, and Tony Sisti, as proposed representative defendants, and Ken Lewenza and Peter Kennedy on their own behalf and on behalf of all members of the National Automobile, Aerospace, Transportation and General Workers Union of Canada ("CAW").

[5] Before the proposed class action was commenced, as a result of demands made by the governments of Canada and the United States - which demands were made as a precondition to assisting GM Canada and its parent corporation to survive the economic crisis and to remain in business - GM Canada and CAW agreed that GM Canada would no longer provide health care benefits to its current or to its retired hourly employees. Instead of the benefits being paid for by GM Canada, an independent health care trust would be established, and the trust would assume the responsibility for the provision of health care benefits.

[6] This agreement was reached without the participation of the retired employees of GM Canada.

[7] But the negotiations with respect to establishing the health care trust were resumed, and the proposed class representatives for the retirees in the Ontario class proceeding and in the parallel proceeding underway in Québec participated in the new rounds of negotiations.

[8] After more than 18 months, the negotiations ultimately led to a settlement agreement. The terms of the settlement were being revised right up until the hearing of the motion, and the settlement follows a factually similar class proceeding commenced by Chrysler Canada Inc., another automobile manufacturer, against its retired employees. I certified the Chrysler class action and approved the settlement in that action; see: *Chrysler Canada Inc. v. Gatens*, [2010] O.J. No. 4185 (S.C.J.).

[9] As I will note below, however, there are differences in the settlement in the *Chrysler Canada* action, and the settlement proposed by the parties to this litigation. The settlement in this action is not as favourable as the settlement in the *Chrysler* action.

[10] The settlement in the *Chrysler* action and, in the case at bar, both involve the establishment of the Auto Sector Retiree Health Care Trust. This trust will administer all future post-retirement health care benefits to those eligible to receive them. Under the settlement, the class members are required to release their claims for health care benefits against GM Canada, its parent corporation, and the CAW, amongst others.

[11] Under the Settlement Agreement, the trust obligations to the beneficiaries will be funded by a combination of a lump sum cash payment and the issuance of

promissory notes from GM Canada to the trustees. The funding, however, will be insufficient to maintain the health care benefits at the same standard as provided in the past.

[12] The parties now move for certification of this action as a class action under the *Class Proceedings Act, 1992*, and they move for approval of their Settlement Agreement.

[13] In written objections and by attendance at the hearing, some putative class members objected to the settlement, and they ask the court not to approve it. These objectors submit that CAW, the Representative Defendants and GM Canada have been unethical in settling the litigation.

[14] Other objectors submit that the settlement is inadequate and not in the best interests of the class. They too ask that the settlement be rejected.

[15] I have carefully considered the objections, but for the Reasons for Decision that follow, I am persuaded that the criterion for certification are satisfied in the case at bar and, with sadness for the plight of some of the retirees, I am also persuaded that the proposed settlement should be approved by the court.

### **B. EVIDENTIARY BACKGROUND**

[16] The evidence for the certification motion and for the settlement approval hearing was provided by:

- John Patrick Stapleton, Executive Director, Manufacturing and Labour Relations Finance of General Motors Company. He is responsible for managing all financial activities for North American manufacturing, engineering, and labour relations.
- Terri Retzler, an Assistant Project Manager with Crawford Class Actions Services, which is a division of Crawford and Company (Canada) Inc., which has been administering the notice program for this hearing.
- Leslie MacDonald, a representative defendant and a member of the Steering Committee constituted to provide advice and instructions to class counsel in the proposed class action.
- Thomas D. Levy, Senior Vice President and Chief Actuary of the Segal Company. The Segal Company are actuaries retained by the proposed Representative Defendants to provide actuarial advice with respect to the proposed settlement.
- Jennifer Fiddian-Green, an accountant and a forensic accountant. She is a partner of Grant Thornton LLP, an audit, tax, and consulting firm retained by proposed Class Counsel to provide financial advice about the settlement.
- James Stanford, an economist for CAW, who provides analytical and empirical research to the CAW for its collective bargaining and who opined about the

quality of the proposed settlement and who provided information about the background history to the negotiations.

- Sym Gill, the Director, Pension and Benefits Department for CAW and a trustee of the Auto Sector Retiree Health Care Trust.

[17] At the settlement approval hearing, I also heard submissions from counsel for some of the objectors and from eighteen retirees who spoke at the hearing.

### **C. FACTUAL BACKGROUND**

[18] I will add some facts during the discussion of the criteria for certification as a class proceeding and during the discussion of whether to approve the settlement, but the essential background facts with respect to the litigation, the settlement negotiations, and the settlement agreement are as follows.

[19] The National Automobile, Aerospace, Transportation and General Workers Union of Canada (“CAW”) is the largest private sector union in Canada. It represents hourly employees of GM Canada. The Defendants Ken Lewenza and Peter Kennedy are the President and Secretary-Treasurer, respectively, of the CAW.

[20] The Defendants and proposed Representative Defendants Barbara Abrams, Bernie Heming, Les MacDonald, and Tony Sisti are CAW retiree members that were employees at GM Canada plants in Oshawa, St. Catherines, and Windsor, Ontario. The Defendant Jackie Finn is the surviving spouse of a CAW retiree member.

[21] Each of the proposed Representative Defendants has long personal histories with GM Canada and impressive records as advocates and representative for their fellow employees or fellow retirees. The proposed Representative Defendants have also made impressive and valuable contributions providing community service for other Canadian citizens.

[22] The Plaintiff GM Canada is a wholly-owned subsidiary of General Motors Holdings LLC., which in turn is a wholly-owned subsidiary of General Motors Company, an American corporation. In the history of the automotive industry, the entities known as General Motors have been amongst the world’s largest and most important automakers.

[23] In 2008 and 2009, the world’s economy was in turmoil. The economic crisis had devastating consequences for GM Canada and its parent corporation, General Motors Company. The combination of frozen credit markets, rising unemployment, declining incomes, currency exchange values, and high oil prices caused new vehicle sales to plummet. For example, demand for pickup trucks, which provided significant revenue and profit, dropped an unprecedented 50%. GM Canada’s Truck Plant was closed.

[24] On June 1, 2009, General Motors Company filed for creditor protection under Chapter 11 of United States Bankruptcy Code. In Canada, GM Canada was also poised to enter an insolvency proceeding in the absence of significant company-wide restructuring.

[25] GM Canada did not have the financial liquidity to fund continued operations. Credit was not available from financial markets, and GM Canada and its parent corporation were on the verge of insolvency. To survive and continue in business, it was necessary that they restructure and rationalize their operations.

[26] As of June 30, 2009, there were approximately 28,000 GM Canada hourly retirees, surviving spouses, and eligible dependents across Canada in receipt of post-retirement health care benefits. The value of claims attributable to health care benefits for this group amounted to more than \$100 million annually. This was a substantial annual expense for GM Canada.

[27] As a matter of its collective bargaining agreements, GM Canada provided health care benefits for its retired hourly employees and for their surviving spouses and eligible dependents. This obligation was not secured in any manner. This can be contrasted with the situation relating to pension payments, where payments were made from a trust fund with assets that were separate and apart from GM Canada's assets. At the time of the financial crisis, however, the pension trust fund was substantially underfunded.

[28] GM Canada and GMC sought emergency funding from Canadian, Ontario, and U.S. governments to complete a restructuring. In its bid to obtain funding, GM Canada prepared detailed viability plans for the Canadian and Ontario governments. These plans were prepared in conjunction with GMC's preparation and submission of viability plans to the United States Department of the Treasury.

[29] The Governments of Canada and Ontario indicated that they would not provide financial support to GM Canada and its parent unless their restructuring would ensure future viability and sustainability. One of the elements of the restructuring was the need for GM Canada to achieve competitive all-in labour rates. To secure the necessary government approvals, GM Canada revised its restructuring plan to address the various concerns raised by the governments.

[30] One condition of government financing was that the CAW open its collective agreement with GM Canada, which was not due to expire until September 2011. The governments demanded that GM Canada achieve substantial reductions in the cost of labour.

[31] For GM Canada, these reductions were necessary because in the restructuring plan, GM Canada would operate independently on a stand-alone "contract manufacturing" basis. This meant that General Motors Company could elect to assign responsibility for manufacturing product to plants outside Canada. For GM Canada to be viable under such an arrangement, it was essential for GM Canada to be cost competitive.

[32] When the Governments of Canada and Ontario were satisfied with the proposed restructuring plans, they agreed to a combined investment of \$10.6 billion in GM Canada.

[33] It was a pre-condition of this financial assistance that a health care trust be established. The amount of money for the health care trust was determined by the governments who were concerned about GM Canada's financial viability after the restructuring. The trust would replace and allow GM Canada to terminate the benefit plans that provided health care to class members and to its active employees as of June 8, 2009. Once established, the health care trust would be solely responsible for providing post-retirement health care benefits.

[34] As a matter of collective bargaining, GM Canada and CAW began negotiations with respect to the future health benefit costs of its active employees. The negotiations were complex and also involved meetings with federal officials to obtain an amendment to the *Income Tax Act (Canada)* to create a new tax-assisted vehicle for delivering post-retirement health care benefits.

[35] At the time of the negotiations about health care benefits, the CAW was also negotiating with respect to the other source of retiree income – the General Motors Canadian Hourly-Rate Employees Pension Plan. There was a serious problem for existing and future employees because for almost two decades, GM Canada had taken advantage of a provision in Ontario's pension regulations that allowed it to avoid funding on a solvency basis. The outcome of these negotiations, as set out in section 13 of Ontario Regulation 321/09, was that GM Canada was obliged to make a contribution of \$3.28 billion to the Pension Plan by Sept 2, 2009, and an additional \$164 million was required for each year for the next five years.

[36] On May 21, 2009, GM Canada and CAW entered into a Framework Agreement, which set out the principles governing the conception, goals and operation of an independent health care trust.

[37] On June 1, 2009, following the announcement of the tentative agreement between GM Canada and CAW, the Governments of Canada and Ontario both approved GM Canada's revised restructuring plan without the need for a court-supervised process. On June 8, 2009, GM Canada and CAW reached a negotiated resolution that involved GM Canada funding a health care trust.

[38] GM Canada and CAW entered into a Term Sheet dated June 26, 2009, which set out the fundamental terms necessary for the establishment of the health care trust. The Term Sheet provided that GM Canada would contribute \$1.8 billion to establish the trust fund.

[39] Mr. Stafford deposed that the negotiations between CAW and GM Canada were constrained by the directives of the governments but were hard fought. He stated that compromises were required to obtain government funding and to avoid the bankruptcy and liquidation of GM Canada. In his view, the resulting health care trust, while not fully funded, was an improvement from the pre-existing situation where the health care benefits were financed on an unsecured pay-as-you go basis by GM Canada from its annual revenues.

[40] The level of funding for the health care trust required by the Term Sheet was not determined with reference to the cost of continuing the same benefits or existing benefit levels provided by the GM Canada Benefit Plan, but rather with reference to its ability to pay as determined by the lenders.

[41] The health care trust was established in connection with a restructuring of Chrysler Canada Inc., another car manufacturer that received government assistance. The trust was established pursuant to an Agreement and Declaration of Trust dated December 7, 2010. The trust is continued by an Amended and Restated Agreement dated August 12, 2011, which reflects the terms of the Settlement Agreement now reached by the parties to this class action.

[42] As a pre-condition to the creation of the health care trust, the Term Sheet between GM Canada and the CAW stipulated that GM Canada would be “legally released from all obligations with respect to payment of retiree health care benefits to all seniority employees as of the effective date of the GMCL/CAW Contract (June 8, 2009) and retired participants (and eligible surviving spouses and dependants).”

[43] GM Canada’s retirees played no part in the negotiations between the Canadian and American governments, the General Motors corporations, and the CAW.

[44] GM Canada’s class action was designed to bring the already retired employees; i.e., those employees who retired before June 8, 2009, into the arrangements for health care benefits.

[45] In its statement of claim, GM Canada seeks a declaration about the nature and scope of any contract or other binding legal obligation formed at the time of retirement concerning the provision of post-retirement health care benefits by GM Canada. GM Canada also seeks a declaration that it is entitled to unilaterally alter or terminate its provision of post-retirement health care benefits to Class Members, as well as, the manner of delivery of such health care benefits.

[46] In this class action, GM Canada takes the position that it had a unilateral right, which it allegedly exercised numerous times between 1980 to 2008, to alter the provision of health care benefits to retirees, including changing the extent of benefits and increasing co-payments from retirees.

[47] For the class proceeding, GM Canada proposes the following definition of the defendant class:

All persons who resided outside of the Province of Québec on December 22, 2009 and who fall within the following class of persons (“Class Members”, or the “Class”):

(a) “CAW Retirees”, being all former employees of GM Canada who, as of June 8, 2009, had Retired from employment with GM Canada and who at the time of retirement were covered by a collective agreement negotiated and entered into by the CAW-Canada and GM Canada, covering GM Canada employees represented by the CAW-Canada (the “Collective Agreement”), and were eligible to receive post-retirement health care benefits which GM Canada provides or provided to the Class from time to time pursuant to a Collective Agreement (the “Retiree Health Care Benefits”), including, without limitation, a person who became an employee of either:

(i) Electro-Motive Canada Co. as a result of the sale of GM Canada's electromotive diesel business; or

(ii) General Dynamic Land Systems – Canada Corporation as a result of the sale of GM Canada's defence business,

and who, on or before June 8, 2009, returned to GM Canada and Retired pursuant to a Collective Agreement with eligibility to receive Retiree Health Care Benefits;

(b) "Surviving Spouses", being all persons who, as of the date of certification and settlement approval, are:

(i) the surviving spouses of a deceased person who was, while living:

(A) a CAW Retiree; or

(B) an hourly employee of GMCL who died prior to June 8, 2009, was covered by a Collective Agreement at the date of his or her death, and at the date of his or her death was eligible to receive an immediate pension under the GM Canada hourly pension plan,

where such surviving spouses are eligible for Retiree Health Care Benefits; or

(ii) the surviving spouses of a deceased person who was an hourly employee of GM Canada who died prior to June 8, 2009 and was covered by a Collective Agreement at the date of his or her death, where such surviving spouses were, immediately prior to January 1, 2010, provided with lifetime Retiree Health Care Benefits; and

(c) "Dependents", being all persons who, as of the date of certification and settlement approval, are surviving dependents of a deceased person who was, while living, a CAW Retiree and/or, if applicable, a Surviving Spouse, and who are eligible for Retiree Health Care Benefits. For further clarity, a person is not a Dependent for the purpose of this definition if the CAW Retiree is survived by a Surviving Spouse.

[48] Although some miniscule adjustments may still be necessary between the Ontario and Québec class action, the class for the Ontario class action consists of 24,850 members. Of these, all but 93 reside in Canada. The others reside in the United States and other countries. All Class Members can be specifically identified by reference to the records maintained by GM Canada. The records include current mailing addresses for all members of the proposed Class.

[49] After the June 26, 2009 term sheet was signed, a Steering Committee of GM Canada retirees was formed to represent the class members in the proposed class proceedings. The members of the Steering Committee are the defendants and proposed representative defendants Barbara Adams, Bernie Heming, Leslie MacDonald, Jackie Finn, and Tony Sisti.

[50] The Steering Committee retained Lenczner Slaght Royce Smith Griffin LLP as counsel for the class proceedings. Ronald Slaght and Peter Griffin had chief responsibility for the retainer.

[51] On the recommendation of Messrs. Slaght and Griffin, the Steering Committee retained the Segal Company as consulting actuaries. Thomas D. Levy, an actuary with



over 40 years of experience and his colleague Riley St. Jacques provided the actuarial advice.

[52] On behalf of the Steering Committee, Lenczner Slaght Royce Smith Griffin LLP retained the financial advisory group at Grant Thornton LLP to examine GM Canada's financial position in relation to its ability to provide additional financing to the health care trust. Its mandate was to assess GM Canada's capacity to fund the trust in an amount greater than required by the Term Sheet and to examine the financing structure proposed for the health care trust. The consultants requested but did not receive financial information about GM Canada's parent corporation.

[53] After entry into the Term Sheet, GM Canada, CAW, and the Representative Defendants in Ontario and in Québec resumed negotiations. The negotiating was intense. The negotiations included a thorough review of the economics of the proposed trust.

[54] The negotiations produced the addition of a supplementary promissory note from GM Canada in the amount of \$179 million. The negotiations ultimately led to a proposed settlement of the proposed class action.

[55] Highlights of the proposed Settlement Agreement are as follows:

- The Class Members release their claims with respect to the provision of Retiree Health Care Benefits against, among other persons, the Class Representatives, Ken Lewenza, Peter Kennedy, the CAW, all past, current and future members of the CAW, GM Canada, and GM Canada's parent and subsidiary corporations.
- GM Canada is to contribute a fixed and capped amount of money to an independent health care trust (i.e., the ASRHCT). The trust will provide post-retirement health care benefits to retired former hourly employees of GM Canada and to their surviving spouses and eligible dependents.
- The trust is administered by a board of ten trustees of which five are defined as "Independent Trustees" and five are defined as "Member Trustees." The Member trustees are selected by CAW.
- The Independent Trustees are: Mr. Michael Decter, an economist and investment manager; Ms. Sandra Dudley, a specialist in pensions and benefits; Mr. Randolph McGlynn, the Chief Executive Officer of the Ontario Teachers Insurance Plan; Mr. Andrew Smith, an executive with over forty years experience in the financial services industry, and Ms. Helen Stevenson, the former Assistant Deputy Minister of Health and Executive Officer of Ontario Public Drug Programs.
- The Member Trustees, all of whom are associated with CAW are: Peter Kennedy, National Secretary-Treasurer at the CAW's Ninth Constitutional Convention; Lewis Gottheil, legal counsel to CAW; Jo-Ann Hannah, national representative with the CAW Pensions and Benefits Department; Jeff

Wareham, National Staff Representative in the Pensions and Benefits Department of the CAW; and Sym Gill, Director, Pension and Benefits Department for the CAW.

- GM Canada is to make a cash payment of \$1 billion (paid into escrow in July 2009) plus interest plus monthly health care contributions received from Class Members since January 1, 2010, less the cost of retiree health care benefits paid from January 1, 2010 to the implementation date of the proposed settlement and less associated eligible expenses.
- GM Canada is to issue a \$800 million promissory note, bearing interest from January 1, 2010 to be paid in five instalments of approximately \$255 million each between 2014 and 2018.
- GM Canada is to issue a \$179 million supplementary promissory note, bearing interest from January 1, 2010 to be paid in two instalments of \$130 million each in 2014 and 2015.
- The Trustees are required to maintain Separate Retiree Accounts with respect to both GM Canada and Chrysler, as well as with respect to any future Participating Employers. The Trust Agreement provides that under no circumstances may a Separate Retiree Account be available to meet the liabilities of, or liable for, or responsible for the obligations of the Trust to any Participant in another Plan.
- GM Canada will pay the reasonable professional fees of Class counsel and actuarial experts retained on behalf of the Class.
- GM Canada will pay all administrative costs arising from communications with Class members.
- The Trust and its Trustees will be completely independent and separate from GM Canada.
- Following the cash payment and issuing of the promissory notes, GM Canada will no longer provide retiree health care benefits for the Class Members, including any who opt-out.
- All future claims for post-retirement health care benefits for Class Members - except any who opt-out - will be exclusively funded by the ASRHCT and administered by the trustees.
- Any contribution and co-payment that a Class Member is currently paying to GM Canada in relation to retiree health care benefits will in the future be paid to the ASRHCT - except that any Class Members who opts-out will not have contributions or co-payments as they will not be receiving post-retirement health care benefits.
- To the extent that Class Members exercise their right to opt-out of the settlement, GM Canada retains a right to void the settlement if the number of

opt-outs exceeds a number determined by GM Canada in its absolute discretion (viz. 100 opt-outs). This condition can be waived by GM Canada.

[56] To decide this motion, a few comparisons and contrasts between the settlement in the *Chrysler* action and the settlement in the case at bar are necessary. The rationale and the structure of the settlements are similar. A health trust is established with funding established by an initial cash payment and the delivery of unsecured promissory notes to be paid later. One major contrast is that it appears that the funds for the Chrysler retirees - if paid - will be adequate to pay the pre-existing health care benefits. The payment of funds from Chrysler extend over a longer period of time and Chrysler's payments will not be completed until 2024. Chrysler's initial payment was \$175 million, in contrast to the \$1,000 million (1 billion) dollar payment to be made by GM Canada.

[57] It is to be noted that the payments due by GM Canada under the promissory notes are unsecured. There is no assurance that GM Canada will be able to pay when the notes become due. However, once a payment is made to the trust fund, it can be used only to provide health care benefits. The trust funds are not available to GM Canada or GM Canada's creditors, if GM Canada experiences financial difficulties in the future.

[58] Sadly for the retirees, it is also to be noted that the expert evidence indicates that the contributions by GM Canada to the health care trust fund will not be sufficient to maintain the health care benefits at their current levels. It is expected that the trustees of the Auto Sector Retiree Health Care Trust will have to reduce or otherwise modify benefits to ensure that the available funds will be sufficient to look after the needs of current and future retirees and also will be sustainable for the lifetimes of the Covered Group's members. The trustees will have full authority to change benefits and eligibility criteria.

[59] The actual level of post-retirement health care benefits that the trust fund will be able to provide will depend on a number of factors including the cost of benefits, the longevity of the covered group's members, the investment returns earned by the trust, and its administration and investment expenses.

[60] It was Mr. Levy's opinion that the expected fund ratio as of November 1, 2011, (the anticipated settlement implementation date) is 0.8107. The expected present value of future benefit payments is \$2,456 million. The projected member contributions are \$82 million and the expected value of the proposed settlement funding is \$1,909 million. The proposed settlement funding is thus expected to be adequate to provide 81 per cent of the value of the plan as of November 1, 2011.

[61] It is Mr. Levy's opinion that the settlement is a fair and reasonable resolution in all the circumstances.

[62] The Ontario and Québec Retiree Representatives support and recommend the proposed settlement. The rationale for the recommendation is set out in paragraphs 36 to 38 of Ms. MacDonald's affidavit which state:

36. While this settlement is far from ideal, the Steering Committee firmly believes that this settlement is the best that can be achieved in the present situation, and marks a significant improvement from the initial settlement offer proposed by GMCL.

37. In reaching this conclusion, the Steering Committee has specifically considered, *inter alia*, the following negative aspects of this settlement proposal:

- (a) the risk that GMCL will become insolvent and be unable to make one or all of the scheduled payments to the HCT in the years from 2014-2018 (the Steering Committee is also cognizant of the fact that this same risk would exist if Retiree Health Care Benefits continued to be provided by GMCL directly);
- (b) the HCT and the CAW will be unable to seek additional payments from GMCL should the HCT run into financial difficulties, or should the actuarial predictions of our advisors prove incorrect;
- (c) GMCL retirees who do not opt-out of this settlement (if approved) will relinquish their legal claim against GMCL for post-retirement Health Care Benefits;
- (d) the legal claims of some retirees could, if adjudicated, be found to entitle those retirees to greater Health Care Benefits than would be provided under the proposed settlement;
- (e) the fact that the future payments to be made by GMCL are unsecured;
- (f) retirees will receive significantly lower levels of Health Care Benefits under this settlement than are being currently provided by GMCL; and
- (g) in addition to providing retiree health care benefits to class members, this health care trust will also provide health care benefits to certain active GMCL Employees (as more fully set out in the draft Settlement Agreement) when they retire.

38. Notwithstanding these negative aspects to the proposed settlement, the Steering Committee has concluded the proposed settlement should be approved by the court based, *inter alia*, on the following positive features:

- (a) Retirees will receive a significant up-front cash contribution of \$1 billion (net of the costs of benefits paid since January 1, 2010), offset by interest on the \$1 billion since that date) which will remove some of the risk relating to GMCL becoming insolvent in the future, and becoming unable to pay any amounts toward retiree Health Care Benefits;
- (b) assuming GMCL makes the scheduled payments in the years from 2014-2018, there will be no risk that retirees will suffer the drastically reduced health care benefits should GMCL enter bankruptcy after 2018;
- (c) under the proposed settlement, assuming all payments are made, it is predicted that retirees will continue to receive a high proportion of their current Health Care Benefits for an indefinite period of time;
- (d) the risks relating to adjudicating this dispute through litigation will be eliminated; removing the risk that GMCL retirees could be found to be entitled to an amount lower than the proposed settlement; and,

(e) Retirees will receive, on assumptions Segal considers reasonable, between about 77% to 84% of current benefits indefinitely.

[63] The CAW supports and recommends the proposed settlement.

[64] By orders dated July 4, 2011 and August 10, 2011, I appointed Crawford Class Action Services to administer and disseminate a notice about the certification motion and about the motion for settlement approval. The orders provided for a direct notice program.

[65] As part of the notice program, information meetings with class members were held on August, 2, 4, 5, and 9, 2011 at Niagara Falls, Oshawa, Windsor, and London, Ontario. Approximately, 4,100 retirees attended the meetings.

[66] Crawford Class Action Services received 73 timely objections from class members and three late objections. Ms. Retzler's affidavits attached the documentary material submitted by the objectors. Eighteen objectors, who were in attendance at the settlement approval hearing, came forward and spoke to the court. They made eloquent and impressive presentations about why, in their opinion, the settlement should be rejected.

[67] There were many different objections. Some objections were procedural. Some class members objected to the process of the negotiations and of the class proceedings as being undemocratic and unfair. Some members objected to the failure to involve the retired employees in the initial negotiations with the Canadian and American governments. Some class members objected to the composition of trustees for the health care trust and how they were initially selected or invited to participate by the CAW.

[68] Some objections were substantive. Some class members objected that their benefits were vested and could not be changed. Some class members relied on *Dayco (Canada) Ltd. v. National Automobile, Aerospace and Agricultural Implement Workers Union of Canada (CAW-Canada)*, [1993] 2 S.C.R. 230 to assert that their rights could not be extinguished. Some class members argued that any change would be illegal.

[69] Some class members objected to the projected diminishment of the health care benefits. Some class members objected to CAW's commitment not to seek additional funds for the trust fund in future collective bargaining negotiations. Some class members objected to the fact that the promissory notes from General Motors were unsecured. Some class members objected to the prospect that the trustees of the trust fund may increase the amount of co-payments. Some class members objected that it was unfair that those who opted-out of the settlement were excluded from the trust fund benefits. Some class members wished the terms of the trust indenture be made more rigorous in regulating the trustees. Some class members doubted the viability and the sustainability of the trust fund.

[70] Some objections were about the morality of the settlement. Some class members objected because they believed that GM Canada and General Motors Company had reneged on binding commitments and was being disloyal to their former employees. Some class members accused the CAW of disloyalty or of fear mongering in supporting

the settlement. Some class members accused either or both of GM Canada or CAW of bargaining in bad faith. Some class members believe that GM Canada and General Motors Company are using the cover of the economic crisis to feather the nest of its shareholders with increased profits.

[71] Some objections were personal and sad. Some class members felt personally betrayed. Some class members objected that any reduction of benefits was and would cause them financial hardship and harmful worry and stress. Some class members described their medical conditions to explain why they were dependent on no diminishment in their health care benefits. Some class members were frightened and dismayed by the creation of the health care trust. I was told that one retiree suffered a stroke because of anxiety over her future health care.

#### **D. CERTIFICATION AS A CLASS PROCEEDING**

[72] Pursuant to s. 5(1) of the *Class Proceedings Act, 1992*, the court shall certify a proceeding as a class proceeding if: (a) the pleadings disclose a cause of action; (b) there is an identifiable class; (c) the claims or defences of the class members raise common issues of fact or law; (d) a class proceeding would be the preferable procedure; and (e) there is a representative plaintiff or defendant who would adequately represent the interests of the class without conflict of interest and there is a workable litigation plan.

[73] Where certification is sought for the purposes of settlement, all the criteria for certification must still be met: *Baxter v. Canada (Attorney General)* (2006), 83 O.R. (3d) 481 (S.C.J.) at para. 22. However, compliance with the certification criteria is not as strictly required because of the different circumstances associated with settlements: *Bellaire v. Daya*, [2007] O.J. No. 4819 (S.C.J.) at para. 16; *National Trust Co. v. Smallhorn*, [2007] O.J. No. 3825 (S.C.J.) at para. 8; *Nutech Brands Inc. v. Air Canada*, [2008] O.J. No. 1065 (S.C.J.) at para. 9.

[74] In its amended statement of claim, GM Canada seeks a declaration against its retired employees. The issues raised in this proceeding are of immediate importance to both GM Canada and each member of the Class. The action concerns the nature and scope of the rights and obligations of the parties with respect to the class members' future health care benefits. All of the proposed class members are directly affected by the issues raised.

[75] Section 97 of the *Courts of Justice Act*, R.S.O. 1990 empowers the Superior Court to make binding declarations of right and, in my opinion, this *lis* or contest between the parties satisfies the first criterion for certification as a class action. Claims for declaratory relief may satisfy the cause of action criterion for certification. See: *Kranjcec v. Ontario* (2004), 69 O.R. (3d) 231 (S.C.J.); *Ormrod v. Etobicoke (Hydro-Electric Commission)* (2001), 53 O.R. (3d) 285 (S.C.J.).

[76] The definition of the class is set out above. It is a workable definition; all Class Members can be specifically identified by reference to the records maintained by GM

Canada or its agents with respect to the provision of post-retirement health care benefits. These records include current mailing addresses for all members of the proposed Class. In my opinion, the class definition satisfies the second criterion for certification.

[77] The following common issues are raised in respect of all members of the proposed Class:

1. Do the Class Members have any legal or equitable entitlement, whether by contract or other enforceable obligation formed at the time of retirement or otherwise, to receive Retiree Health Care Benefits from GM Canada and, if so, what is the nature and extent thereof?; and
2. Is GM Canada entitled to unilaterally alter or terminate:
  - (a) its provision of Retiree Health Care Benefits to the Class Members; and/or
  - (b) the manner of delivery of Retiree Health Care Benefits to the Class Members?

[78] Turning to the preferable procedure criterion, where there is a cause of action, an identifiable class, common issues, and a settlement, there is a strong basis for concluding that a class proceeding is the preferable procedure because certification would serve the primary purposes of the *Class Proceedings Act, 1992*; namely, access to justice, behavioural modification, and judicial economy.

[79] Certification provides the settling parties the powerful and flexible mechanisms of the Act to implement their settlement. Several cases have recognized that where certification is sought for the purposes of implementing a settlement, there is a strong argument that the preferable procedure criterion has been satisfied. See: *Coleman v. Bayer Inc.*, [2004] O.J. No. 1974 (S.C.J.) at para. 80; *Paramount Pictures (Canada) Inc. v. Dillon*, [2006] O.J. No. 2368 (S.C.J.) at para. 36.

[80] In the case at bar, the parties have reached a resolution of the matters in dispute between them on the terms set out in the Settlement Agreement. Certification of this action as a class proceeding will permit the court to give effect to this negotiated settlement and to bind all affected parties. Moreover, certification will permit the court to satisfy itself as to the appropriateness of, and oversee the implementation of, the Settlement Agreement.

[81] I am satisfied that the preferable procedure criterion is satisfied in the case at bar.

[82] I am also satisfied that the Representative Defendants will fairly and adequately represent the interests of the class members. They are recipients of retirement health care benefits from GM Canada and have a direct pecuniary interest in the outcome of this proceeding. They have been members of the committee charged with providing directions to proposed class counsel, and they have informed themselves about the issues raised in this proceeding and have engaged in communication with other members of the Class. While some retirees disagree with the opinions of the members of the advisory committee, the proposed representative defendants have no conflicts of interest with their fellow class members.

[83] In their settlement agreement, there is a workable methodology for notifying the class members of the settlement and for implementing the settlement.

[84] I am satisfied that the fifth criterion for certification as a class action has been satisfied.

[85] With all the criteria satisfied, I approve the certification of this action as a class proceeding under the *Class Proceedings Act, 1992*.

### **E. SETTLEMENT APPROVAL**

[86] Under s. 29 (2) of the *Class Proceedings Act, 1992*, a settlement of a class proceeding must be approved by the court to be binding on the parties.

[87] To approve a settlement of a class proceeding, the court must find that in all the circumstances the settlement is fair, reasonable, and in the best interests of those affected by it: *Dabbs v. Sun Life Assurance*, [1998] O.J. No. 1598 (Gen. Div.) at para. 9; *Parsons v. Canadian Red Cross Society*, [1999] O.J. No. 3572 (S.C.J.) at paras. 68-73.

[88] In determining whether to approve a settlement, the court, without making findings of facts on the merits of the litigation, examines the fairness and reasonableness of the proposed settlement and whether it is in the best interests of the class as a whole having regard to the claims and defences in the litigation and any objections raised to the settlement: *Baxter v. Canada (Attorney General)* (2006), 83 O.R. (3d) 481 (S.C.J.) at para. 10.

[89] When considering the approval of negotiated settlements, the court may consider, among other things: (a) likelihood of recovery or likelihood of success; (b) amount and nature of discovery, evidence or investigation; (c) settlement terms and conditions; (d) recommendation and experience of counsel; (e) future expenses and likely duration of litigation and risk; (f) recommendation of neutral parties, (g) if any; number of objectors and nature of objections; (h) the presence of good faith, arms-length bargaining and the absence of collusion; (i) the degree and nature of communications by counsel and the representative parties with class members during the litigation; and (j) information conveying to the court the dynamics of and the positions taken by the parties during the negotiation: *Dabbs v. Sun Life Assurance Company of Canada* (1998), 40 O.R. (3d) 429 (Gen. Div.) at pp. 440-44, aff'd (1998), 41 O.R. (3d) 97 (C.A.), leave to appeal to S.C.C., [1998] S.C.C.A. No. 372; *Parsons v. The Canadian Red Cross Society*, [1999] O.J. No. 3572 (S.C.J.) at paras. 71-72; *Frohlinger v. Nortel Networks Corp.*, [2007] O.J. No. 148 (S.C.J.) at para. 8; *Kelman v. Goodyear Tire and Rubber Co.*, [2005] O.J. No. 175 (S.C.J.) at paras. 12-13; *Vitapharm Canada Ltd. v. F. Hoffmann-La Roche Ltd.* (2005), 74 O.R. (3d) 758 (S.C.J.) at para. 117; *Sutherland v. Boots Pharmaceutical plc*, [2002] O.J. No. 1361 (S.C.J.) at para. 10.

[90] A reasonable and fair settlement is inherently a compromise and a reasonable and fair settlement will not be and need not be perfect from the perspective of the aspirations of the parties. That some class members are disappointed or unsatisfied will not disqualify a settlement because the measure of a reasonable and fair settlement is



not unanimity or perfection. See: *Baxter v. Canada (Attorney General)*, [2006] O.J. No. 4968 (S.C.J.) at para. 21; *Dabbs v. Sun Life Assurance Company of Canada* (1998), 40 O.R. (3d) 429 (Gen. Div.) at p. 440, aff'd (1998), 41 O.R. (3d) 97 (C.A.), leave to appeal to S.C.C., [1998] S.C.C.A. No. 372.

[91] In assessing the fairness and reasonableness of a proposed settlement, a factor to consider is evidence of hard bargaining and due diligence by competent and experienced counsel aided by competent and conscientious experts. In the case at bar, the lawyers for both sides are exceptionally talented and they were aided by experts with very impressive credentials and experience. It is apparent that considerable efforts were made to obtain the information to make an informed decision. Thus, the lawyers' recommendations, particularly the recommendation of class counsel for the Representative Defendants, are a substantial factor favouring approving the settlement.

[92] Based on what I heard from the objectors and based on their written objections, it would appear that the communications with the individual class members during the negotiations was poor and rushed after the final settlement was reached. This factor does not favour the settlement. However, balanced against it, there is the factor that the Steering Committee was comprised of retirees who were dedicated, responsible, resolute, and strong-minded in their efforts to negotiate a better settlement than reached by GM Canada and the CAW.

[93] A major objection by the retiree objectors was that there were five CAW appointed trustees and no representative trustee for the retirees. It was pointed out that the CAW had only a reputational interest in the health care trust while the retirees had a quality of life interest in the performance and decisions of the trustees about the health care benefits. The response from the parties supporting the settlement to this objection was that the governance model for the health care trust was based on expertise in managing a health care trust. It was submitted that this expertise together with the fiduciary obligations of the trustees would best serve the beneficiaries of the trust.

[94] My opinion is that this response by the parties to the objectors on the issue of governance was inadequate, and that it is a true weakness in the settlement that the retirees do not have a more direct role in the governance of on a trust that so affects the quality of their lives in retirement. That said, this imperfection in the settlement, is not, in my opinion, a sufficient basis to reject the settlement

[95] All the trustees, however appointed, have fiduciary responsibilities to the beneficiaries, and the initial complement of trustees has blue ribbon qualifications. There is no impediment to the present or future trustees from establishing and institutionalizing advisory committees or focus groups to obtain the views of the beneficiaries of the trust, and I recommend that they do so. In a letter to the court dated September 9, 2011, Gordon Graham, the Executive Director of the health care trust stated that the trustees would consider mechanisms to learn the views of the retirees.

[96] In the future, there is no impediment to the CAW using its appointment power to select retirees as trustees and that would be a sensible decision with or without institutionalizing a trustee position for the retirees. There is no impediment to stop the

present or future trustees from establishing a robust communications and reporting program with the retirees and, once again, I recommend that the trustees do so.

[97] In assessing the fairness and reasonableness of a proposed settlement, a factor to consider is whether the benefits of the settlement provide a reasonable alternative to the benefits that might be achieved by pursuing the litigation. In the case at bar, this factor weighs heavily in favour of approving the settlement because the class members have little to gain and much to lose in leaving it to the courts to decide whether to grant the declaration sought by GM Canada. As I noted in *Chrysler Canada Inc. v. Gatens*, [2010] O.J. No. 4185 (S.C.J.), a reasonable settlement avoids a no-win situation for the class members. Thus, I stated at para. 69:

In arriving at this conclusion [that the settlement was fair, reasonable and in the best interests of the class], one of the most persuasive factors was that the settlement provided a better alternative to class members than a class proceeding, which, win or lose, imperilled the Class Members' retirement benefits. If the Class Members were unsuccessful in defending the class action, their benefits would be unilaterally terminated, but if they successfully defended the class action, their benefits would be lost by the failure of the Chrysler Canada restructuring. The settlement avoids a no-win choice and would appear to be in the best interests not only of the Class Members but to be the preferable course for Chrysler Canada, its existing employees, and other Canadian employees.

[98] While the settlement is not perfect, it is, in the circumstances, much preferable to the alternative of liquidation and dissolution.

[99] A factor to consider in evaluating the fairness of a settlement to the class members is the prospect of achieving success on the merits, but as Mr. Griffin pointed out during argument, it is an arid victory to obtain a judgment from a defendant unable or made unable to pay it. Mr. Griffin submitted that while the Representative Defendants believed that they had a very strong case, they also believed that the risks of pressing forward with the litigation were too great.

[100] I cannot decide the merits of the parties' respective cases in the context of a settlement approval hearing, but it does strike me that Mr. Griffin's and the Representative Defendants' assessment is correct. They probably do have a strong case on the merits, but they probably also are correct that the prudent course is to settle this case doing the best that they can in improving the settlement that had been reached by GM Canada and CAW.

[101] The objectors, and for that matter the members of the Steering Committee, pointed out weaknesses in the eventual settlement proposed for this class action, particularly in comparison with the fully-funded health care trust settlement for the Chrysler retirees in their class action. In considering this objection, it is important to keep in mind that the plaintiff in this class action is GM Canada, which was the former employer of the retirees. The plaintiff is not GM Canada's parent corporation, and, as noted above, there appears to be a genuine risk of an empty judgment against GM Canada. That said, the settlement also releases the parent corporation and that is a significant weakness to the settlement that was pointed out by many objectors.

[102] The Representative Defendants and the class members confronted the realities and the risk associated with the fact that GM Canada's parent corporation will not contribute to the settlement. Whether General Motors Company could or should ethically or legally contribute to the settlement and ensure that there is a fully-funded health care trust, the practical reality is that General Motors Company will not make that commitment.

[103] In this environment, the Representative Defendants and their counsel have achieved some success and have apparently done their best to improve the funding for the settlement. It remains the case that the weakness of the settlement in not providing a fully-funded health care trust is overmatched by the pragmatic and prudent truth of the axiom that a bird in the hand is worth more than two in the bush.

[104] This brings me to a brief comment about the objection that the settlement agreement approves immoral conduct. This objection is premised on GM Canada and General Motors Company having a moral commitment to the class members to provide fully-funded health care benefits.

[105] For the CAW and for the Representative Defendants, the proposed settlement presents an ethical problem much like the much discussed "The Trolley Problem" introduced by philosopher Philippa Foot in 1978. In this thought experiment, a trolley is running out of control down a track where a mad philosophy has tied five people. There is a switch that will divert the trolley down a different track where, unfortunately, there is a single person tied to the track. The ethical question is do you flip the switch or do nothing?

[106] The CAW and the Representative Defendants did not cause the problem of the termination or diminishment of health care benefits, and they have adopted the utilitarian response of flipping the switch of a settlement, where accepting a large immediate payment but a reduction in benefits is a greater good for the class members than the alternative of potentially having no benefits at all should they lose the litigation or win a dry judgment.

[107] The proposed settlement presents a different ethical problem for GM Canada and General Motors Company. It appears that they have the economic crisis and the constraints imposed by their government rescuers as their ethical justification for stopping or adjusting the health care benefits of the retirees. In other words, GM Canada and General Motors Company justify their conduct by necessity and by the imperative of survival for themselves and for their current employees.

[108] The ethical objection to GM Canada and General Motors Company conduct is that assuming they would otherwise honour a commitment to their retirees, current necessity would not justify not honouring their commitment if circumstances were to change for the better in the future. The objectors might accept that GM Canada and General Motors Company had no choice but to change its obligations, but they object if necessity later becomes opportunism, ingratitude, and greed.


[109] Based on the evidentiary record before the court, it seems that GM Canada's present motivation is necessity not opportunism. Notwithstanding the suspicions of the objectors, because General Motors Company did not disclose its current financial circumstances, I cannot comment about its genuine motivation.

[110] In any event, and this is the crucial point, for the purposes of approving or rejecting the settlement in the case at bar, it is not for the court to make ethical judgments about the present or future moral conduct of the parties to this litigation and their privies. Rather, the court's role is to make judgments in accordance with the law. Although one purpose of class actions statutes is behaviour modification, in the civil law context of a class proceeding, the court's primary concern is about legal wrongdoing not moral wrongdoing. Under the law, to approve a settlement of a class proceeding, without making a determination of the legal merits, the court must find in all the circumstances, the settlement is fair, reasonable, and in the best interests of those affected by it.

[111] The focus of the court's attention is on what is today in the best interests of the class members as a class in this class action. Applying the legal tests that are applicable, in my opinion, the settlement is fair, adequate, reasonable, and in the best interests of the Class Members.

**F. CONCLUSION**

[112] In accordance with the *Class Proceedings Act, 1992* and for the above reasons, I certify this action as a class proceeding and I approve the settlement.

  
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Perell, J.

**Released:** September 13, 2011

**CITATION:** General Motors of Canada Limited v. Abrams, 2011 ONSC 5338  
**COURT FILE NO.:** 09-CV-393974CP  
**DATE:** September 13, 2011

**ONTARIO  
SUPERIOR COURT OF JUSTICE**

**BETWEEN:**

**General Motors of Canada Limited**

Plaintiff

- and -

**Barbara Abrams, Bernie Heming, Les  
MacDonald, Jackie Finn, Tony Sisti and Ken  
Lewenza and Peter Kennedy on their own behalf  
respectively and on behalf of all members of the  
National Automobile, Aerospace, Transportation  
and General Workers Union of Canada (CAW –  
Canada)**

Defendants

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**REASONS FOR DECISION**

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**Perell, J.**

**Released:** September 13, 2011