

# \$5-million claim for negligence and breach of contract Niagara Region lawyer wants former firm to pay up

BY MICHAEL MCKIERNAN  
For Law Times

**A** Niagara Region lawyer wants \$5 million from his old law firm, after claiming its negligence cost him the chance to pursue a claim related to his failed attempt to establish a Mitsubishi car dealership.

Luciano Butera completed his articles and worked for a short time as a lawyer at St. Catharines, Ont. firm Chown Cairns LLP before leaving to start the dealership in Niagara Falls, Ont. in late 2002.

But when low sales and high overheads put the dealership on its knees financially within three years, Butera turned to his old colleague Harry Korosis, a senior partner at Chown Cairns, to sue the car company for allegedly misleading him about the venture's chances of success from the outset.

However, the relationship turned sour when Ontario Superior Court Justice Peter Hambly dismissed Butera's action, ruling that the claim was filed after the expiration of the two-year limitation period.

"Beneath the legal reasoning in this case there is a sad human story," wrote Hambly back in 2012, as he ordered Butera to pay Mitsubishi \$150,000 for its costs' of the summary judgment motion.

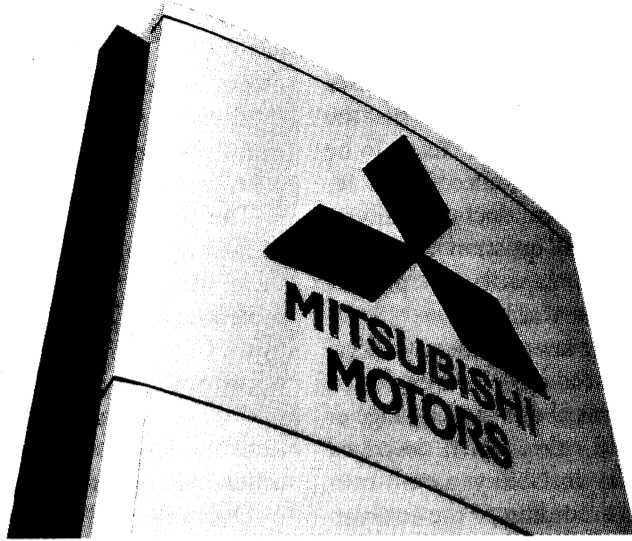
A failed appeal followed, before Butera turned his sights on Korosis and the law firm where he served his legal apprenticeship, adding another tragic twist to the tale.

The \$5-million claim for negligence and breach of contract, which has not been tested in court, claims that Chown Cairns should have filed the statement of claim earlier or recognized the potential limitation period issues with the case once the firm was retained.

The firm denies the allegations, blaming Butera's own late discovery of his claim for the missed deadline, and claiming in a statement of defence, also untested in court, that Butera didn't deliver his own rough draft of the statement of claim to the firm until after the expiry of the limitations period set by Hambly. In any case, the firm says Butera suffered no damages as a result of its actions, since he never stood a chance of recovering any money from Mitsubishi.

"It's a pretty high standard to require a lawyer to go back and analyze all the documents to find out when exactly you knew or should have known about your claim," says Peter Dillon, a franchise lawyer unrelated to the case, who is a partner with Siskinds LLP in London, Ont. "The case is a bit of a quagmire, but I will follow it with interest."

Butera, who has since returned to practice as in-house



Luciano Butera is pursuing a \$5-million claim for negligence and breach of contract against his former firm.

counsel for NextGear Capital, a lending provider for car dealers, was following in the footsteps of his immigrant father when he jumped into the motor industry, having helped out in the operation of his father's used-car business while attending school, and again later when his father acquired a Kia dealership selling new cars.

Mitsubishi had a U.S. presence, but it had yet to expand operations north of the border when the automaker and Butera opened negotiations about establishing Niagara Mitsubishi in 2001. The younger Butera incorporated companies for the operation of the dealership and the ownership of its land, and he signed a dealer agreement with Mitsubishi in September 2002, predicting sales in the first 12 months of 252 new vehicles, plus an average of 350 new cars per year after that.

In fact, the dealership's best year, 2003, resulted in the sale of only 127 new vehicles. By 2005, the same year the dealership ceased selling cars, just 29 new vehicles left the lot.

Butera voiced his concerns in a letter to Mitsubishi's Canadian headquarters on April 11, 2005, asking for a rent subsidy and reimbursement for some of his expenses.

"It has become increasingly apparent that our investment was excessive and not required when compared to the dealership's actual sales volume. It is clear that the initial targets and projections set forth by [Mitsubishi Motor Sales of Canada] were inaccurate thus misleading the amount of investment made," he wrote in the letter.

A few months later, the dealership abandoned car sales, but it continued a service business before closing altogether in October 2007. Butera's claim against Chown Cairns states that he and his companies have amassed losses in excess of \$4 million as a result of the failure of the dealership.

According to Hambly's judgment, Butera claims to have instructed Korosis to sue Mitsubishi in October 2006 after

coming across an article about disgruntled dealers from New Jersey who pursued the car manufacturer under the state's franchise laws after their businesses collapsed.

Butera's initial claim, filed in October 2007, alleged he only entered into the agreement as a result of misrepresentations made by Mitsubishi, and accused the company of failing to comply with disclosure obligations under Ontario's franchise legislation, the Arthur Wishart Act.

However, Butera's letter to Mitsubishi, plus his past experi-

ence as a lawyer and in the motor industry, came back to haunt him when Hambly delivered his judgment, concluding that the claim was filed a few months outside the two-year limitations period.

"I find that the day that Butera knew that he had a case against the defendants was April 11, 2005 at the latest and that if he did not know by that date that given his abilities and experience that he ought to have known by that date and substantially before that date," Hambly wrote (<http://canlii.ca/t/fsk3t>) in the Aug. 31, 2012 decision.

Hambly went on to find that even if he was wrong on that limitations issue, Mitsubishi's forecast about future performance should be considered "an expression of opinion," not misrepresentation. He also concluded that the Wishart Act did not apply because the dealer agree-

sure was lacking from the franchisor, it applies only within two years of the agreement.

On May 27, Chown Cairns won the latest battle in the saga when Ontario Superior Court Justice Edward Belobaba granted it summary judgment dismissing part of Butera's claim. Belobaba agreed with the firm that since Butera never appealed Hambly's findings on the lack of misrepresentation by Mitsubishi, he should not be able to claim "lost opportunity" damages related to that part of his original action. The rest of the claim is proceeding to trial, according to Belobaba's judgment.

Toronto legal malpractice lawyer Michael Lesage, also unconnected to the case, says he is uncomfortable with Belobaba's ruling because of Chown Cairn's involvement in the original appeal, which failed to challenge

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Justice Peter Hambly

ment did not require Butera to make a payment or continuing payments to Mitsubishi.

Dillon says there was room to challenge Hambly's conclusion about the application of the Wishart Act, but he says it may only have been of limited use to Butera. Although the Act provides franchisees a right of rescission in cases where disclo-

Hambly's ruling on misrepresentation. The firm's defence says that Butera retained a new lawyer to argue the appeal, but it remained as co-counsel, playing a "supportive role."

"It seems like one of these decisions is likely to spawn further litigation rather than truly work to resolve the issue," Lesage says. **LT**

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