



Amended pursuant to Supreme Court Civil Rule 6-1(1)(a)
Original filed on October 20, 2015

No. S-158649
Vancouver Registry

In the Supreme Court of British Columbia

Between

Charles MacKenzie, Laura Jolicoeur and Denis Jolicoeur

PLAINTIFFS

and

Volkswagen Aktiengesellschaft, Volkswagen Group Canada Inc.,
Audi Aktiengesellschaft, and Audi Canada Inc.

DEFENDANTS

Brought under the *Class Proceedings Act*, R.S.B.C. 1996, c. 50

AMENDED NOTICE OF CIVIL CLAIM

This action has been started by the Plaintiffs for the relief set out in Part 2 below.

If you intend to respond to this action, you or your lawyer must

- (a) file a response to civil claim in Form 2 in the above-named registry of this court within the time for response to civil claim described below, and
- (b) serve a copy of the filed response to civil claim on the Plaintiffs.

If you intend to make a counterclaim, you or your lawyer must

- (a) file a response to civil claim in Form 2 and a counterclaim in Form 3 in the above-named registry of this court within the time for response to civil claim described below, and
- (b) serve a copy of the filed response to civil claim and counterclaim on the Plaintiffs and on any new parties named in the counterclaim.

JUDGMENT MAY BE PRONOUNCED AGAINST YOU IF YOU FAIL to file the response to civil claim within the time for response to civil claim described below.

Time for response to civil claim

A response to civil claim must be filed and served on the Plaintiffs,

- (a) if you reside anywhere in Canada, within 21 days after the date on which a copy of the filed notice of civil claim was served on you,
- (b) if you reside in the United States of America, within 35 days after the date on which a copy of the filed notice of civil claim was served on you,

- (c) if you reside elsewhere, within 49 days after the date on which a copy of the filed notice of civil claim was served on you, or
- (d) if the time for response to civil claim has been set by order of the court, within that time.

CLAIM OF THE PLAINTIFFS

Part 1: STATEMENT OF FACTS

Overview

1. Emission testing is conducted on vehicles to ensure they are not contributing excessively to pollution in the environment. Many countries have enacted legislation which sets out the standards, rules and regulations for what are considered acceptable levels of emissions. The *Canadian Environmental Protection Act, 1999* (CEPA 1999) and its associated regulations including the *On-Road Vehicle and Engine Emission Regulation SOR/2003-2* sets out the emissions standards for Canada.

2. This action arises as result of the Defendants' intentional circumvention of the emission standards on their vehicles in Canada for their own financial gain. The Defendants sold certain models and years of vehicles in Canada knowing but concealing the fact that the levels of emissions from these vehicles were higher than allowed by law. The Defendants' vehicles at issue include the diesel engine models, of:

- (a) Volkswagen Jetta, model years 2009 to 2015;
- (b) Volkswagen Jetta SportWagen, model years 2009 to 2014;
- (c) Volkswagen Beetle, model years 2012 to 2015;
- (d) Volkswagen Beetle Convertible, model years 2013 to 2015;
- (e) Volkswagen Golf, model years 2010 to 2015;
- (f) Volkswagen Golf SportWagen, model years 2015;
- (g) Volkswagen Passat, model years 2012 to 2015;
- ~~(g)~~(h) Volkswagen Touareg, model years 2009 to 2016;
- (i) Audi A3, model years 2010 to 2015;
- (j) Audi A6 Quattro, model years 2014 to 2016;

- (k) Audi A7 Quattro, model years 2014 to 2016;
 - (l) Audi A8, model years 2014 to 2016;
 - (m) Audi A8L, model years 2014 to 2016;
 - (n) Audi Q5, model years 2014 to 2016;
 - (o) Audi Q7, model years 2009 to 2016; and
 - (p) Porsche Cayenne, model years 2013 to 2016.
- (the “Affected Vehicles”)

The Parties

The Plaintiffs

3. The Plaintiff, Charles MacKenzie is a resident of North Vancouver, British Columbia. He leased an Affected Vehicle, a 2013 Volkswagen Jetta, from a dealership in Richmond, British Columbia. He chose this vehicle as it was a “green vehicle” with the “clean diesel” technology. It was marketed as having low emissions and great fuel economy.

4. The Plaintiffs Laura Jolicoeur and Denis Jolicoeur are residents of Knutsford, British Columbia. They purchased an Affected Vehicle, a 2012 TDI Jetta from a dealership in Abbotsford, British Columbia. They purchased the Affected Vehicle on the basis that it had a powerful engine, great mileage particularly while driving on the highway and “clean diesel” that was more environmentally friendly than other vehicles.

5. The Plaintiffs bring this action on behalf of themselves and on behalf of a class of residents in British Columbia who purchased or leased Affected Vehicles, (the “Class Members”, to be further defined in the Plaintiffs’ application for certification.)

The Defendants

6. The Defendant, Volkswagen Aktiengesellschaft “Volkswagen AG” is a manufacturer of Volkswagen brand automobiles with its headquarters in Germany. It is one of the largest

automakers in the world. Volkswagen AG carries on business in Canada, including in British Columbia.

7. The Defendant, Volkswagen Group Canada Inc. is a corporation incorporated pursuant to the laws of Canada. Its head office is in Ajax, Ontario. It is registered to carry on business in British Columbia with an address for delivery in British Columbia. At all material times, Volkswagen Group Canada Inc. was a subsidiary of Volkswagen AG.

8. Audi Aktiengesellschaft ("Audi AG") is a manufacturer of automobiles located in Germany. Volkswagen AG is the majority shareholder of Audi AG. Audi AG carries on business in Canada, including British Columbia.

9. Audi Canada Inc. ("Audi Canada") is a corporation incorporated pursuant to the laws of Canada. Its head office is in Ajax, Ontario. It is registered to carry on business in British Columbia with an address for delivery in British Columbia. At all material times Audi Canada was a subsidiary of Audi AG.

10. At all material times, the Defendants functioned as a joint, global enterprise for the promotion and sale of the Affected Vehicles. The business of each Defendant is inextricably interwoven and they operate collectively for their mutual benefit and profit. Within this joint enterprise, the Defendants individually and jointly designed, developed, tested, manufactured, distributed, marketed and placed into the stream of commerce the Affected Vehicles in Canada, and in particular British Columbia. At all material times the Defendants were the sole distributors of the Affected Vehicles in Canada selling them through their dealer and retailer networks.

Nature of the Claim

11. Starting at least as early as 2009 and continuing to the present date, the Defendants installed sophisticated devices into the Affected Vehicles to mask the true measure of their emissions levels. The devices installed by the Defendants had the ability to activate the emission

control system of the vehicle during emissions testing and to suppress it during regular use of the vehicle (the “Defeat Device”).

12. The Defeat Device uses a software algorithm that is able to detect if the vehicle is undergoing official emissions testing. It is programmed for two calibrations. The first calibration is the “Dyno Calibration”, referring to the equipment used in emissions testing, called a dynamometer. During Dyno Calibration, the Defeat Device activates the emission control systems as it senses the vehicle is having the official emissions testing. In Dyno Calibration, the Affected Vehicles are able to meet the emissions standards by reducing the level of pollutants emitted. In this calibration, the performance of the engine and the fuel economy of the vehicle is reduced.

13. At all other times, the Defeat Device switches the engine to run in “Road Calibration”. While operating in Road Calibration, the emission control system is bypassed or rendered inoperative and the engines have better performance and better fuel economy but the level of pollutants emitted is much higher. For example, the pollutant nitrogen oxide is increased by a factor of 10 to 40 times more than allowed by law.

14. When operating in Road Calibration, the Affected Vehicles do not meet Canadian regulatory standards for emissions. Additionally, s. 11 (b)(2) of the *On-Road Vehicle and Engine Emission Regulation* SOR/2003-2 prohibits vehicle manufacturers and importers from equipping a vehicle with a defeat device.

15. On September 18, 2015, the U.S. Environmental Protection Agency (“EPA”), the U.S. body that regulates emission standards in the U.S., issued a Notice of Violation to the Defendant Volkswagen AG, the Defendant Audi AG and to Volkswagen Group of America, Inc. The Notice of Violation stated that its investigation had revealed that the Defendants’ manufactured and installed Defeat Devices into the Affected Vehicles. And in doing so, had violated several sections of the *Clean Air Act*.

16. Evidence of emissions problems related to specific models of the Affected Vehicles first emerged in the United States in 2014 prompting the California Air Resources Board (“CARB”)

to start investigating. According to reports from the EPA, the Defendants initially attributed the discrepancy to “various technical issues and unexpected in use conditions.” It was not until the CARB and EPA would not approve the Defendants’ 2016 model year diesel vehicles that the Defendants disclosed that they had designed and installed a Defeat Device in the Affected Vehicles.

17. On September 22, 2015, the Defendant, Volkswagen AG posted a statement to the public on their website (www.volkswagenag.com) that the company was “working at full speed to clarify irregularities concerning a particular software used in diesel engines.” It further stated that “[d]iscrepancies relate to vehicles with Type EA 189 engines, involving some eleven million vehicles worldwide. A noticeable deviation between bench test results and actual road use was established solely for this type of engine.”

18. On September 22, 2015, the Government of Canada announced that Environment Canada had opened an investigation to determine whether the Defendants had violated the *Canadian Environmental Protection Act, 1999* and its associated regulations by installing the Defeat Devices in the Affected Vehicles. The Government of Canada estimates that about 100,000 Affected Vehicles were sold in Canada.

18.1 On November 2, 2015, the EPA issued a Notice of Violation to the Defendant Volkswagen AG, the Defendant Audi AG, Porsche AG, Volkswagen Group of America, Inc and Porsche Cars North America, Inc. It stated that the EPA and Environment Canada had tested more vehicles and determined that defeat devices were installed in certain model year 2014-2016 diesel light-duty vehicles equipped with 3.0 litre engines. The defeat devices enabled the vehicles to perform differently when being tested for compliance with emission standards than during normal operation and use. During normal operation and use, the tailpipe emissions were found to be up to 9 times the permitted nitrogen oxide standard levels.

18.2 On November 20, 2015, the Defendants told the EPA that the issues identified in the November 2, 2015, Notice of Violation extends to all 3.0 litre diesel engines from models years 2009 through 2016.

19. This Notice of Violations and the subsequent statements by the Defendants resulted in worldwide media coverage drawing attention to the problems associated with the Affected Vehicles. The intense media exposure of this defect in the Affected Vehicles has caused a reduction in the resale value of all Affected Vehicles in British Columbia.

20. The Defendants charged a substantial premium for the Affected Vehicles. They marketed them as having “clean diesel” with high performance and fuel economy. The Defendants even won awards for their technology. Two of the Affected Vehicles were “Green Car of the Year”: the 2009 VW Jetta TDI, which won in 2008, and the 2010 Audi A3 TDI, which won in 2010. These awards are given to vehicles with environmentally friendly energy and technologies.

21. Prior to September 22, 2015, the Defendants:

- (a) made false representations about the level of performance, fuel efficiency and emissions from the Affected Vehicles;
- (b) made false representations that the Affected Vehicles met regulatory standards in Canada when they did not;
- (c) failed to disclose that they had installed the Defeat Devices in the Affected Vehicles to mislead government authorities and consumers with respect to the level of pollutants emitted by the Affected Vehicles;
- (d) failed to disclose that the Affected Vehicles do not meet Canadian emissions standards when operating outside of the emissions testing environment; and
- (e) failed to disclose that the Affected Vehicles could not live up to high performance standards while emitting a low level of emissions.

(the “Representations”)

22. When the Plaintiffs purchased or leased the Affected Vehicles, they were not aware that a Defeat Device was installed. Had they known that the Representations made by the Defendants were false and misleading, they would not have purchased or leased the Affected Vehicle or paid a premium price to do so.

Jurisdiction

23. The Plaintiffs rely on ss. 3, 7 and 10 of the *Court Jurisdiction and Proceedings Transfer Act*, SBC 2003, c 28 and plead that there is a real and substantial connection between the subject matter of this action and the Province of British Columbia for the following reasons:

- (a) the Defendants or some of them carried on business in British Columbia and elsewhere in Canada;
- (b) the Defendants marketed, distributed and/or sold the Affected Vehicles in Canada, including in British Columbia;
- (c) the three proposed representative Plaintiffs reside in British Columbia; and the Plaintiffs' damages were sustained in British Columbia

Part 2: RELIEF SOUGHT

24. The Plaintiffs claim, on their own behalf and on behalf of a class of similarly situated persons:

- (a) an order certifying this action as a class proceeding and appointing them as a representative plaintiffs under the *Class Proceedings Act*, RSBC 1996, c 50;
- (b) general damages and special damages for loss of use and enjoyment of their Affected Vehicles;
- (c) declaratory relief as well as statutory damages under the *Business Practices and Consumer Protection Act*, S.B.C. 2004, c. 2;
- (d) statutory damages pursuant to section 36 of the *Competition Act*, RSC 1985, c C-34 for losses and damages suffered as a result of conduct that is contrary to Part VI of the *Competition Act*, RSC 1985, c C-34;
- (e) restitutionary damages for unjust enrichment and waiver of tort;
- (f) punitive damages;
- (g) pre-judgment and post-judgment interest pursuant to the *Court Order Interest Act*, RSBC 1996, c 79;
- (h) investigative costs and the costs of this proceeding on a full-indemnity basis pursuant to section 36 of the *Competition Act*, RSC 1985, c C-34; and
- (i) such further and other relief this Honourable Court deems just.

Part 3: LEGAL BASIS

Generally

25. The Plaintiffs plead and rely on the *Class Proceedings Act*, RSBC 1996, c 50, the *Business Practices and Consumer Protection Act*, S.B.C. 2004, c. 2, the *Competition Act*, RSC 1985, c C-34, the *Court Order Interest Act*, RSBC 1996, c 79, the *Court Jurisdiction and Proceedings Transfer Act*, SBC 2003, c 28, and the common law generally, including negligence, unjust enrichment and waiver of tort.

Causes of Action

Breach of the Business Practices and Consumer Protection Act

26. The Defendants' solicitations, offers, advertisements, promotions, sales and supply of the Affect Vehicles for personal use by the Plaintiffs and Class Members were "consumer transactions" within the meaning of the *Business Practices and Consumer Protection Act*, S.B.C. 2004, c. 2 ("Consumer Protection Act"). With respect to those transactions, the Plaintiffs and Class Members who leased or purchased are "consumers" and the defendants are "suppliers" within the meaning of the Consumer Protection Act.

27. The Defendants' conduct in their solicitations, offers, advertisements, promotions, supply and sales of the Affected Vehicles had the capability, tendency or effect of deceiving or misleading consumers regarding the fuel efficiency, performance and emissions of the Affected Vehicles. The Defendants' conduct and Representations as set out in paragraph 21 of this claim are deceptive acts and practices within the meaning of s. 4 and contrary to s. 5 of the Consumer Protection Act. The Defendants' deceptive acts and practices included the failure to properly disclose all material facts in particular the installation of the Defeat Devices in the Affected Vehicles.

28. As a result of the Defendants' deceptive acts and practices, the Plaintiffs and Class Members have suffered loss and damages. The Plaintiffs seek declaratory relief, damages and statutory compensation pursuant to ss.171 and 172 of the Consumer Protection Act. on their own behalf and on behalf of Class Members.

29. The declaratory relief sought by the Plaintiffs in this case includes an order under s.172 of the Consumer Protection Act that the Defendants advertise a judgement against them.

30. It is not necessary for the Plaintiffs and Class Members to establish reliance on the Defendants' deceptive acts or practices in order to establish a breach of the Consumer Protection Act and a remedy for that breach. In the alternative, if reliance is required to establish statutory breach and/or remedy, such reliance may be assumed or inferred on the facts of this case. In the further alternative, there was actual reliance by the Plaintiffs and Class Members on the Defendants' deceptive acts and practices.

Breach of the Competition Act

31. The Defendants breached s.52 of the *Competition Act*, RSC 1985, c C-34 when they made the Representations as set out in paragraph 21 to the public. The Representations were made for the purpose of promoting their business interest and were false and misleading in a material respect. The Representations were intended to induce the Plaintiffs and Class Members into leasing or purchasing an Affected Vehicle.

32. Pursuant to section 36 of the *Competition Act*, RSC 1985, c C-34, the Plaintiffs and Class Members are entitled to recover from the Defendants an amount equal to the loss or damage suffered by them, together with any additional amount that the Court may allow.

Fraudulent misrepresentation

33. The Defendants made the Representations as set out in paragraph 21 regarding the quality of the Affected Vehicles in their solicitations, offers, advertisements, promotions, and sales to the public. The Representations were made to create a specific image of the Affected Vehicles

as being of premium quality meeting all the legal requirements to be sold in Canada, including emissions standards. The Defendants knew the Representations were untrue, or in the alternative, the Defendants were reckless as to whether the Representations were true or false.

34. These Representations were made by the Defendants to induce the public to purchase or lease the Affected Vehicles. As a result of the Representations made by the Defendants, the Plaintiffs and Class Members purchased or leased Affected Vehicles and have suffered a consequential loss. The Affected Vehicles are not premium quality vehicles that meet the all the legal requirements to be sold in Canada as portrayed by the Defendants.

Unjust Enrichment

35. The Defendants were unjustly enriched as a result of the revenues received from selling and leasing the Affected Vehicles and their component parts to the Plaintiffs and Class Members. This revenue received for the Affected Vehicles resulted from wrongful or unlawful acts by the Defendants. Permitting the Defendants to retain the benefits provided by the Plaintiffs and Class Members would be inequitable.

36. The Plaintiffs and Class Members suffered a corresponding deprivation as a consequence of purchasing the Affected Vehicles. There is no juristic reason or justification for the enrichment of the Defendants and the deprivation and loss experienced by the Plaintiffs and Class Members. Restitution should be paid to the Plaintiffs and Class Members by the Defendants.

Waiver of Tort

37. The conduct of the Defendants was unlawful and inequitable. The revenue from the sales of the Affected Vehicles are ill-gotten profits.

38. The Defendants should be compelled to disgorge the profits of their wrongdoing. Restitution should be paid to the Plaintiffs and Class Members by the Defendants.

Causation and Damages

39. As a result of the Defendants' negligence and breach of the Consumer Protection Act and the *Competition Act*, the Plaintiffs and Class Members have suffered and will continue to suffer loss and damage. Such loss and damage was foreseeable by the Defendants.

40. Particulars of the loss and damage suffered by the Plaintiffs and Class Members which were caused or materially contributed to by the aforementioned acts of the defendants include:

- (a) Diminished value of the Affected Vehicles on the basis that the Affected Vehicles do not meet Canadian emissions standards;
- (b) Rental costs and other expenses while Affected Vehicle are recalled for repairs;
- (c) Reduced performance including horsepower and fuel efficiency after the Affected Vehicles are repaired to meet Canadian emissions standards;
- (d) Future additional fuel costs after the Affected Vehicles are repaired to meet Canadian emissions standards;
- (e) Loss of enjoyment of the Affected Vehicles;
- (f) Diminution of value of the Affected Vehicles for resale purposes; and
- (g) Such further and other damages to be proven at trial.

Punitive Damages

41. The conduct of the Defendants warrants a claim for punitive damages. They have conducted themselves in a high-handed, wanton and reckless manner, and without regard to interests of the Plaintiffs and Class Members or the impact of increased emissions in the environment to society as a whole. As previously described, the Defendants were deceitful and acted in a fraudulent manner by surreptitiously installing Defeat Devices into the Affected Vehicles. The Defeat Devices were designed to prevent emissions data from being accurately

reported. The Defendants' tricked the Canadian authorities, the Plaintiffs and Class Members into believing that the Affected Vehicles met the emissions standards while maintaining a high level of fuel efficiency and performance.

42. The Defendants' deliberate violations of their statutory and common law obligations were intended to produce maximum profit for themselves at the expense of the Plaintiffs and Class Members.

43. This case raises issues of general deterrence. A punitive damage award in this case is necessary to express society's condemnation of conduct such as the Defendants', to achieve the goal of both specific and general deterrence.

**ENDORSEMENT ON ORIGINATING PLEADING OR PETITION
FOR SERVICE OUTSIDE BRITISH COLUMBIA**

The Plaintiffs claims the right to serve this pleading on the Defendants outside British Columbia on the grounds that:

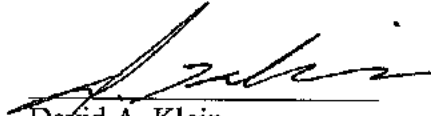
- (a) this action concerns a tort committed in British Columbia pursuant to section 10(g) of the *Court Jurisdiction and Proceedings Transfer Act*, SBC 2003, c 28; and
- (b) this action concerns a business carried on in British Columbia, pursuant to section 10(h) of the *Court Jurisdiction and Proceedings Transfer Act*, SBC 2003, c 28.

Plaintiffs' address for service:
Suite 400, 1385 West 8th Avenue
Vancouver, BC V6H 3V9
Fax number address for service: (604)874-7171

Place of trial: Vancouver

The address of the registry is: 800 Smithe Street
Vancouver, BC V6Z 2E1

Date: October 19, 2015



David A. Klein,
Lawyer for the Plaintiffs

Rule 7-1 (1) of the Supreme Court Civil Rules states:

- (1) Unless all parties of record consent or the court otherwise orders, each party of record to an action must, within 35 days after the end of the pleading period,
- (a) prepare a list of documents in Form 22 that lists
 - (i) all documents that are or have been in the party's possession or control and that could, if available, be used by any party at trial to prove or disprove a material fact, and
 - (ii) all other documents to which the party intends to refer at trial, and
 - (c) serve the list on all parties of record.

Appendix**Part 1: CONCISE SUMMARY OF NATURE OF CLAIM:**

This is a proposed class proceeding brought by the Plaintiffs on behalf of themselves and on behalf of a class of residents who purchased or leased the Defendants' diesel engine vehicles fitted with defeat devices. As early as 2009, the Defendants covertly installed defeat devices into their diesel engine vehicles to conceal the fact that the levels of emissions from these vehicles were higher than allowed by law. The defeat devices were installed to mislead government authorities and consumers into believing that the vehicles complied with Canadian regulations. The Defendants engaged in deceptive acts and practices that breached statutory and common law obligations for their own financial gain. As a result of the Defendants' actions, the Plaintiffs and the class have suffered losses.

Part 2: THIS CLAIM ARISES FROM THE FOLLOWING:

A personal injury arising out of:

- a motor vehicle accident
- medical malpractice
- another cause

A dispute concerning:

- contaminated sites
- construction defects
- real property (real estate)
- personal property
- the provision of goods or services or other general commercial matters
- investment losses

- the lending of money
- an employment relationship
- a will or other issues concerning the probate of an estate
- a matter not listed here

Part 3: THIS CLAIM INVOLVES:

- a class action
- maritime law
- aboriginal law
- constitutional law
- conflict of laws
- none of the above
- do not know

Part 4:

Business Practices and Consumer Protection Act, S.B.C. 2004, c. 2

Class Proceedings Act, RSBC 1996, c 50

Competition Act, RSC 1985, c C-34

Court Order Interest Act, RSBC 1996, c 79

Court Jurisdiction and Proceeding Transfer Act, SBC 2003, c 28

Canadian Environmental Protection Act, 1999 (CEPA 1999)