

[3] In brief, the underlying action arises from the Volkswagen diesel emissions scandal when the North American public became aware that TDI diesel-powered Volkswagen and Audi brand vehicles (the “Vehicles”), promoted as “Clean” diesel vehicles, in fact violated emissions standards in North America and contained unlawful software defeat devices (“Defeat Devices”) to conceal that fact.

[4] This class action, which has been certified in part, seeks compensation for individuals who purchased or leased the Vehicles, including those who had purchased or leased a Vehicle but have since disposed of it or whose lease ended prior to the date the emissions violations and Defeat Devices used to conceal those violations became known to the public.

[5] For the reasons below, I grant the plaintiff’s motion to certify the claims alleging breaches of CEPA as against the Canadian Defendants, and the claims in conspiracy against all defendants. I dismiss VCCI’s motion to decertify the claims against it.

BACKGROUND

[6] In 2017, the plaintiff, Stuart MacKinnon brought a claim against various Volkswagen corporate entities, on behalf of former owners and lessees of 2009-2016 Volkswagen and Audi 2.0L and 3.0L TDI vehicles (the “Vehicles”). In September 2015, the public learned that although these diesel-fueled Vehicles had been marketed as “clean,” they had been manufactured with devices which concealed the fact that their emissions were not as claimed. Regulatory investigations and litigation ensued.

[7] The plaintiff sought to certify his claims on behalf of former owners and lessees who had been excluded from two consumer class action settlements. Those former owners did not qualify for the settlements in those actions because they had sold or disposed of their Vehicles before the misrepresentations became publicly known. Those purchasers were excluded from those settlements on the assumption that they had suffered no harm.

[8] For reasons given in *Mackinnon v. Volkswagen Group Canada Inc., et al.*, 2024 ONSC 4988, Justice Akbarali certified this action based on several causes of action and common issues against the Defendants.

Leave to Certify-Conspiracy

[9] Akbarali, J. declined to certify the plaintiff’s claim in conspiracy, because he had failed to particularize those allegations against each of the defendants. The plaintiff was granted leave to amend and seek certification of the conspiracy claim.

[10] The Claim now sets out in detail pleaded facts in support of the claim in conspiracy. The Claim refers to, and relies on indictments, guilty pleas, corporate statements, evidence and statements of fact, to allege a broad inter-corporate conspiracy to deceive the public about the emissions characteristics of the Vehicles.

[11] The proposed common issue in conspiracy reads as follows:

Are the Defendants, or any of them, liable for conspiracy for the engineering, design, development, installation, testing, manufacture, marketing, distribution, sale and/or lease of the diesel engines (containing the Defeat Device) and the Vehicles generally?

Leave to Certify-CEPA

[12] Akbarali J. also found that the plaintiff had established common issues in his claim related to breaches of the *CEPA* as against the German corporate defendants, VW AG and Audi AG, for importing emissions non-compliant Vehicles into Canada.

[13] In a supplementary endorsement released on December 14, 2024, Akbarali J. held that, if the Plaintiff wanted to certify a claim under *CEPA* as against the Canadian Defendants, based on allegations that they had sold or leased the Vehicles in violation of s. 153 of *CEPA*, he should amend the “*CEPA* allegations” in the claim and move to certify the *CEPA* claims against those Defendants.

[14] The plaintiff seeks those amendments based on the Claim as follows:

- Amended para. 1(e) will clarify that: (i) the declaration of breach of *CEPA* is sought, not against all of the “Defendants” (as para 1(e) currently provides), but rather against VW AG, Audi AG and the Canadian Defendants; and (ii) the breach of *CEPA* also involves (as referred to in the existing body of the Claim) the “selling” of the Vehicles (which under *CEPA* includes both sale and lease) and not just the “importing” the Vehicles. The plaintiff submits that the 1(e) amendments relate to the remedy he seeks and clarify against whom those remedies are sought.
- Amended paras. 88 and 80 set out in detail the alleged breaches of the *CEPA* in that part of the claim, thus grouping those facts, which had previously been pleaded elsewhere under the appropriate heading to make it clear that the plaintiffs rely on the allegations of importing, sale and leasing of the Vehicles in Canada by the Canadian Defendants.

[15] The Plaintiff submits that these amendments are sufficiently pled and that the evidence in the record clearly confirms – and the Defendants admit - that the Canadian Defendants distributed, sold and leased the Vehicles in Canada and that the Vehicles breached *CEPA*. That evidence is sufficient, in the Plaintiff’s submission to find there is ‘some basis in fact’ for the common issues based on breaches of *CEPA*. The Plaintiff submits that the *CEPA* claims against the Canadian Defendants should therefore be certified and added to the *CEPA* common issue already certified as against VW AG and Audi AG.

[16] That proposed common issue (with new portions underlined below) reads as follows:

Was the importation, sale or lease of the Vehicles in Canada unlawful, in contravention of the *CEPA*, and if so, are the Defendants, Volkswagen AG,

and/or Audi AG, Volkswagen Canada, Audi Canada, and/or VWCCI responsible for such importation, sale or lease and contravention(s)?

- i. If so, did the Class Members (or any of them) suffer loss or damage as a result thereof and are they entitled to recover such loss, damage and costs under section 40 of *CEPA*, from Volkswagen AG, and/or Audi AG, Volkswagen Canada, Audi Canada and/or VWCCI?

VCCI's Motion to Decertify

[17] According to paragraph 17 in the Claim, VCCI is “a Canadian federally incorporated company...[which] offers retail financing and customer lease financing for the Vehicles in Canada. [VCCI] is a wholly owned indirect subsidiary of [VWAG].”¹

[18] Paragraph 18 of the Claim alleges that all of the defendants (including VCCI) “at all material times ...participated in or assisted with the marketing of the Vehicles as “clean diesel” vehicles, as being environmentally friendly and were ... aware of the Representations defined and discussed below.”

[19] Akbarali, J. certified the following common issues in relation to the VCCI Certified Claims:

- (a) Did the Defendants make some or all of the Representations? If so, which Representations, when, and how?
- (b) Did the Defendants (or any of them) contravene Part VI of the Competition Act?
 - (i) If so, did the Class Members (or any of them) suffer loss or damage because, as a result of the alleged misrepresentations made in breach of the Canadian Environmental Protection Act, the Vehicles should not have been available for purchase in Canada, and/or because they overpaid for the Vehicles? If so, are they entitled to recover such loss and costs as available under section 36 of the Competition Act from the Defendants (or any of them)?
- (c) Did the Defendants know that the Representations were false when they were made to the Plaintiff and other Class Members?
- (d) Were the Defendants reckless as to whether the Representations were false when they were made to the Plaintiff and other Class Members?

¹ In these reasons, the Claim refers to the Fourth Amended Statement of Claim filed by the plaintiff on July 14, 2025.

- (e) Did the Defendants (or any of them) owe a duty of care to the Plaintiff and other Class Members with respect to the Representations? (i) If so, did the Defendants (or any of them) breach that duty of care? How?
- (f) Did the Defendant VCCI make or engage in any false, misleading, deceptive or unconscionable representations, any unconscionable or deceptive acts or practices, or any unfair business practice or unfair practice (as those terms may apply) within the meaning of the Consumer Protection Act, 2002, SO 2002, c 30, the Business Practices Act, RSPEI 1988, c B-7, The Trade Practices Act, RSNL 1990, C T-7, the Consumer Protection and Business Practices Act, SNL 2009, the Business Practices and Consumer Protection Act, SBC 2004, c 2, the Consumer Protection Act, RSA 2000, c C-26.3, The Consumer Protection Act, SS 1996, c C-30.1, The Consumer Protection and Business Practices Act, SS 2013, c C-30.2, and/or The Business Practices Act, CCSM c B120?
 - (i) If so, are the Class Members, or any of them, entitled to damages under the Consumer Protection Act, 2002, SO 2002, c 30 and/or The Business Practices Act, CCSM c B120?

(collectively, the “VCCI Certified Common Issues”)

[20] These are the Common Issues the defendants seek to decertify on the basis that certification in the first instance rested on their admission (now withdrawn) that they made the Representations.

THE ISSUES ON THE MOTIONS

[21] There are three issues:

- (i) Should the CEPA claims be certified against the Canadian Defendants and/or VCCI?
- (ii) Should the conspiracy claims be certified?
- (iii) Should the claim against VCCI be decertified?

[22] Before analyzing the issues, I set out the applicable legal principles.

LEGAL FRAMEWORK

Motions to Certify Based on Amended Pleadings

[23] Plaintiffs may amend their pleadings, where limitation periods might otherwise apply, to include alternative claims for relief where those alternative claims are based on a set of facts already pleaded: *Klassen v. Beausoleil*, 2019 ONCA 407, 34 C.P.C. (8th) 180, at paras. 24-30; *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, r. 26.01.

[24] As the Court of Appeal explained in *Klassen* at paras. 24-25:

[24] I begin with the text of r. 26.01 of the *Rules*. It provides:

On motion at any stage of an action the court shall grant leave to amend a pleading on such terms as are just, unless prejudice would result that could not be compensated for by costs or an adjournment. [Emphasis added.]

[25] The rule is framed in mandatory terms: the court must allow the amendment, unless the responding party would suffer non-compensable prejudice, the proposed pleading is scandalous, frivolous or vexatious, or the proposed pleading fails to disclose a reasonable cause of action: *158844 Ontario Ltd v. State Farm Fire and Casualty Co.*, 2017 ONCA 42, 135 O.R. (3d) 681, at para. 25; *Iroquois Falls Power Corp. v. Jacobs Canada Inc.*, 2009 ONCA 517, 264 O.A.C. 220, at paras. 15-16.

[25] Thus, in the circumstances where the same facts are recast as alternative legal relief, a limitation period will not defeat the amendment to the pleading: *Klassen*, at para. 28.

[26] A further potential hurdle awaits the amending plaintiff seeking certification of additional causes of action. The new cause of action must fulfill s. 5(1)(a) of the *CPA*. The pleaded claim may be challenged on the basis that it is plainly defective because it discloses no reasonable cause of action, or because it contains only bare, unsupported allegations: *Das v. George Weston Limited*, 2018 ONCA 1053, 43 E.T.R. (4th) 173, at paras. 73 – 74, leave to appeal refused, [2019] S.C.C.A. No. 69; *Carter v. Ford Motor Company of Canada*, 2021 ONSC 4138, 76 C.C.L.T. (4th) 206, at para. 70.

[27] The assessment is confined to the wording of the proposed pleading, which is presumed to be true. No evidence is admissible at this stage, although the court is entitled to examine documents which the plaintiff has incorporated into the pleading by reference in the pleading: *Das* at para. 74; *Web Offset Publications Ltd. v. Vickery*, (1999) 43 O.R. (3d) 802 (C.A.), at p. 803.

Motions to Decertify

[28] Section 10(1) of the *CPA*, permits, among other things, the court to decertify a proceeding “where it appears to the court that the conditions mentioned in subsections 5(1) and (2) [of the *CPA*] are not satisfied with respect to a class proceeding.”

[29] A motion for decertification is not an appeal of the certification order. The moving party must establish that a decision to certify the action as a class proceeding would no longer be made in light of new evidence, subsequent facts, or other subsequent developments occurring after the certification motion that demonstrate that the action no longer meets the certification criteria set out in section 5(1) of the *CPA*: *Levac v. James*, 2019 ONSC 5092, at para. 18; *Pearson v. Inco Limited*, 2009 CanLII 9371 (Ont. S.C.), at para 24.

ANALYSIS OF THE ISSUES

Issue 1: Should the *CEPA* Claims be certified against the Canadian Defendants and/or VCCI?

[30] The Plaintiff submits that the amendments to the cause of action for breaches of *CEPA* by the Canadian Defendants should be approved because they are based on a set of facts that have already been pleaded: *1100997 Ontario Limited v. North Elgin Centre Inc.*, 2016 ONCA 848, 409 D.L.R. (4th) 382, at paras. 19-23; *Shwaluk v. HSBC Bank of Canada*, 2023 ONCA 538, 35 C.C.L.I. (6th) 173, at paras. 45-46; *Total Meter Services Inc. v. GVM Integration*, 2025 ONCA 321, 61 B.L.R. (6th) 8, at para. 29.

[31] The Plaintiff pleads relief under *CEPA*: s. 153(1) which prohibits any company from selling any vehicle unless it complies with emissions standards. The Plaintiff further relies on s. 40 of *CEPA* which provides:

40. Any person who has suffered loss or damage as a result of conduct that contravenes any provision of this Act or the regulations may, in any court of competent jurisdiction, bring an action to recover from the person who engaged in the conduct

- (a) an amount equal to the loss or damage proved to have been suffered by the person; and
- (b) an amount to compensate for the costs that the person incurs in connection with the matter and proceedings under this section.

[32] The Canadian Defendants do not dispute that the pleading has asserted breaches of the *CEPA* and (with the exception of VCCI, discussed below) that they sold and leased the Vehicles in Canada.

[33] The Canadian Defendants oppose the amendments on several grounds. First, they assert that a claim based on s. 40 and s. 153(1) cannot succeed because they sought to act in conformity with *CEPA*. They submit that the pleadings do not allege that the Canadian Defendants knew of the scheme to obtain EPA certificates in the United States, but that they relied on the attestation the the Vehicles met the requisite standards. Once EPA certificates were obtained, the Vehicles were “deemed to conform” to Canadian standards under *CEPA*. The Canadian Defendants submit that to their benefit on this point, the Claim includes the pleaded fact that when the breaches became public, VGCA and Audi Canada immediately issued a stop sale order and

prohibited sales of the affected Vehicles in Canada. Thus, the Canadian Defendants submit that the pleadings fail to plead the necessary elements of causation and intent/negligence.

[34] I disagree. It is sufficient for the Plaintiff to allege breach of the provisions of *CEPA*, and loss because he purchased a Vehicle that was not compliant with *CEPA* in Canada and it was not worth what he paid for it, or which he should never have been offered to purchase. While at trial the Canadian Defendants may seek to establish that the misrepresentations and true attributes of the Vehicles were completely unknown to them, the potential existence of such a defence does not mean the cause of action under *CEPA* as against them is doomed to fail. The question of proof of intent including negligence, whether by direct or circumstantial evidence, is for trial. The stop sale order does not undermine the pleading nor render the action doomed to fail on this basis. It is a pleaded fact of an action that could co-exist with knowledge, negligence, or a lack of knowledge.

[35] The Plaintiff has pleaded knowledge and/or negligence on the part of the Canadian Defendants as to the marketing strategy, the Representations and the harm to purchasers, including at paras. 19, 87m, 87o and para. 90 of the Claim.

[36] The proposed *CEPA* amendments build on the prior decision by Akbarali, J. to certify *CEPA* causes of action as against VWAG and Audi AG based on the act of importing the Vehicle and her finding that the statutory claims under *CEPA* were properly pleaded given the objectives of the legislation:

None of the case law the parties referred me to supports the defendants' position that the cause of action pleaded under *CEPA* is doomed to fail. It is not plain and obvious that a cause of action permitting a plaintiff to recover damages for economic loss is inconsistent with the text, context, and purpose of *CEPA*. Such a cause of action might provide an enforcement mechanism, or another incentive, encouraging compliance with *CEPA* in furtherance of its objectives. The issue should be left to be determined on a full record at trial.

Mackinnon v. Volkswagen Group Canada Inc., et al., at para. 83.

[37] I adopt this reasoning and apply it to the Canadian Defendants in the context of the amended Claim.

[38] I find that the amendments to the *CEPA* causes of action are adequately pleaded and support certification of those causes of action, subject to my comments below concerning the arguments unique to VCCI.

VCCI and the CEPA

[39] VCCI makes an alternative submission, unique to its situation, which is that the pleaded breach of s. 153(1) of *CEPA* is certain to fail as against VCCI because “sell” is defined in section 3 of *CEPA* to include: (i) offering for sale or lease; (ii) having in possession for sale or lease; or (iii) delivering for sale or lease. VCCI submits that this definition does not capture the “offering

of financial products related to the purchase or lease of a vehicle,” which is a description of its services. Given that the pleading describes the Plaintiff as having purchased his vehicle from a dealership which subsequently assigned the lease to VCCI, VCCI states that the action is doomed to fail because the Claim does not plead that it did “sell” as defined above.

[40] I disagree. The breadth of what is meant by “delivering for lease” “offering for lease” or “having in possession for lease” will depend upon an application of section 3 to all the facts established at trial. VCCI was the lessor of the vehicle to the Plaintiff lessee. This is remedial consumer protection legislation which attracts a broad purposive interpretation of its provisions. The “offering of financial products for the lease of a vehicle” may well fall within the definition of “offering for lease”. I conclude that it is not plain and obvious that the *CEPA* allegations as against VCCI are doomed to fail. I also certify the *CEPA* claim relative to VCCI.

Issue 2: Should the Conspiracy Claims be Certified?

Adequacy of the Plead Claim in Conspiracy

[41] The Plaintiff has amended his Claim to set out the particulars of the acts of the Defendants to support the claim in conspiracy, pursuant to leave granted by Akbarali, J. These allegations are set out in detail over 34 pages in the body of the Claim and a 5-page appendix. The details of the acts allegedly taken in furtherance of the unlawful means conspiracy arise from documents incorporated by reference in the Claim including from Grand Jury indictments, plea agreements, agreed statements of fact, consent agreements and decrees and from admissions by some of the Defendants in the statement of defence.

[42] Unlawful means conspiracy arises from an agreement between two or more persons to do something by way of unlawful conduct in circumstances where the defendants know that damage to the plaintiff is likely to ensue and such damage does in fact ensue: *Nicholls v. Richmond (Municipal corporation)*, (1984) 52 B.C.L.R. 302 (SC), at paras. 34-36. Unlawful conduct includes tortious conduct independent of the conspiracy, or offences under statute: *Future Health Inc. v. General Accident Assurance et. al.*, 2016 ONSC 2149, at paras. 34 & 61-62; *Canada Cement LaFarge Ltd. v. British Columbia Lightweight Aggregate Ltd.*, [1983] 1 S.C.R. 452, at p. 472; *Nicholls*, at para. 36; *Agribands Purina Canada, Inc. v. Kasamekas*, 2011 ONCA 460, 106 O.R. (3d) 427, at para. 38. See also: *Robinson v. Medtronic*, 2010 ONSC 1739; *Peter v. Medtronic Inc.*, (2007) 50 C.P.C. (6th) 133 (Ont. S.C.); *Smith v. National Money Mart Co.* (2006), 80 O.R. (3d) 81 (C.A.); *LeFrancois v. Guidant Corp.*, (2008) 56 C.P.C. (6th) 269 (Ont. S.C.); *Pro-Sys Consultants Ltd. v. Microsoft Corporation*, 2013 SCC 57, 3 S.C.R. 477; *Axiom Plastics Inc. v. E.I. DuPont Canada Co.*, (2007) 87 O.R. (3d) 352, (S.C.).

[43] An adequate pleading in conspiracy will include particulars of:

- a. the relationship among the parties/defendants;
- b. the agreement between or among the defendants;

- c. the purpose or object of the conspiracy;
- d. the overt acts alleged to have been done by each of the alleged conspirators in furtherance of the conspiracy; and
- e. the injury or damage caused to the plaintiff as a result of the conspiracy.

Savary v. Tarion, 2021 ONSC 2409, 157 O.R. (3d) 363.

[44] The Plaintiff submits that the level of detail in the Claim supports a finding that the pleading is adequate and easily meets the test in s. 5(1)(a) of the *CPA*.

[45] The Canadian Defendants submit that the Plaintiff has failed to plead sufficient detail about their culpability in the alleged conspiracy. They rely on the requirement that multiple related corporations must be treated as distinct from each other for the purpose of pleadings in conspiracy: *Lilleyman v. Bumble Bee Foods LLC*, 2023 ONSC 440 at para. 106 aff'd 2024 ONCA 606, 173 O.R. (3d) 682, leave to appeal refused, [2024] S.C.C.A. No. 406.

[46] The Canadian Defendants submit that the conspiracy allegations draw a clear distinction between their conduct and the conduct of the Foreign Defendants. The Foreign defendants are alleged to have “generally executed a coordinated strategy not to disclose and to conceal”, “directed”, “designed”, “installed”, and “implemented”, the defeat device, thereby agreeing to conspire. The alleged conduct of the Canadian Defendants is limited to the failure to disclose information, based on their alleged knowledge. Thus, the Canadian Defendants argue that the pleaded conspiracy is that of the Foreign Defendants and did not involve them. They submit that their activities: selling and leasing non-emissions-compliant vehicles, and making the misrepresentations, all happened after the agreement had been formed by the Foreign Defendants. The Canadian Defendants simply followed directives from the Foreign Defendants.

[47] I disagree that the pleading is deficient and cannot succeed against the Canadian Defendants. The pleading is not a set of bald allegations, rather it pleads knowledge and acts undertaken by the Canadian Defendants in furtherance of the alleged conspiracy. VW Canada and Audi Canada have formally admitted in a Consent Agreement with the Competition Bureau to misrepresenting the Vehicles and violating the *Competition Act*. There is reliable detail of the criminal acts of individuals within the Foreign Defendant corporations, and pleaded facts as to knowledge and acts done by the Canadian Defendants that mean this cause of action is not “doomed to fail” simply because there have not been criminal findings in Canadian courts against officers or directors of those corporate entities. The Plaintiff need not assert details that will not be available until the discovery phase to adequately plead conspiracy. He has provided adequate particulars which could allow a trier of fact to find that the unlawful act conspiracy was widespread across the organization and the various corporate entities that make up the Volkswagen defendants, including the Canadian Defendants.

Some Basis in Fact to Find a Conspiracy Common Issue

[48] The Plaintiff submits that the Defendants admitted in their Statement of Defence or in their public statements, to the use, incorporation and concealment of the Defeat Device, the Vehicles breaching the *CEPA* emissions standards/requirements, and the import and sale (which includes sale or lease under *CEPA*) of the Vehicles.

[49] All of the Defendants, except for VCCI, have formally admitted to making misrepresentations in fact that the Vehicles were “clean”, that is, environmentally friendly. VW Canada and Audi Canada formally admitted in a Consent Agreement with the Competition Bureau that they misrepresented the Vehicles and violated the *Competition Act*. The Canadian Defendants have admitted in the Statement of Defence to selling and leasing the Vehicles in Canada, and that such selling (sale or lease) was prohibited by or breached *CEPA*. VW AG, Audi AG, VW USA and/or some of their employees have admitted or been found guilty in the US and/or elsewhere - or have been indicted by grand juries (or otherwise) for – conspiracy in respect of, among other things, the use of the Defeat Device, the misleading marketing campaign, and the import, sale and lease of the Vehicles in breach of the emissions standards applicable in all of North America.

[50] The Plaintiff submits that this record supports a finding that the minimal evidentiary standard to show that an alleged conspiracy could have occurred has been met: *Lilleyman*, at paras. 29-30 & 67-77.

[51] The Canadian Defendants submit that there is “absolutely no evidence to support that the Canadian Defendants ever agreed to conspire or engaged in the conspiracy alleged by the Plaintiff.” They submit that the plea agreements, agreed statements of fact, Grand Jury indictments, criminal complaint, consent agreements, information(s), consent/partial consent decrees, and various public statements/admissions by the Defendants do not implicate the Canadian Defendants in any conspiracy. Further, the Canadian Defendants submit that any conspiracy involved only the Foreign Defendants and any acts they did were in accordance with directives.

[52] I disagree. The details of the unlawful acts across the organization, the convictions, the public admissions by officers of some of the corporate defendants and the pleaded details of the span of the unlawful conduct to achieve sales of the Vehicles in the North American market, and the interconnectedness of the corporations amply demonstrate that this is not a frivolous or unmeritorious claim in conspiracy. Proof of a conspiracy is available through direct or circumstantial evidence and the drawing of inferences. The record contains these elements, and this is prior to discovery. The test for a common issue to be tried is well known: is there some minimal evidence in support of the claim? See: *Price v. Smith & Wesson Corporation*, 2025 ONCA 452, 4 C.C.L.T. (5th) 184, at para. 90; *Pro-Sys*, at paras. 102, 126; *Lilleyman*, at para. 74.

[53] The Canadian Defendants’ submission amounts to requiring the Plaintiff to prove their knowledge and complicity to the same level of detail as is available against the officers and employees of the Foreign Defendants to support certification. Respectfully, that is not the test at certification.

[54] I conclude that the claim in conspiracy should be certified.

Issue 3: should the Claim against VCCI be Decertified?

The Pleadings Sufficiency: s. 5(1)(a)

[55] The defendant, VCCI seeks to decertify the claim as against it, because it withdrew its admission of having made the Representations by consent order on February 28, 2025. In brief, VCCI submits that it became lumped in with the other defendants due to a drafting error in paragraph 3 of its Statement of Defence which admitted that the corporate defendants, including VCCI, made false representations about the environmental friendliness of its vehicles. VCCI submits that its admission was fundamental to its inclusion in the action and cites several paragraphs from the decision to certify made by Akbarali, J.

[56] For example, in relation to the claim for negligent misrepresentation, VCCI submits that in the reasons certifying that claim, Akbarali, J. noted the corporate distinctions between VCCI and the other VW defendants, and relied on the unqualified admission made by the Defendants collectively in the statement of defence:

The defendants may be correct that VCCI is a wholly unsuited defendant for the misrepresentation and deceit pleadings. But there can be no mistaking that the misrepresentation allegations in para. 69-70 are made with respect to all defendants, including VCCI. The defendants have admitted those paragraphs. That is the end of the analysis from a pleadings perspective. The claim is properly pleaded against all defendants. Whether it is meritorious against VCCI is not part of this analysis.

Mackinnon v. Volkswagen Group Canada Inc., et al., at paragraph 48.

[57] Akbarali, J. applied a similar analysis to the other claims certified against VCCI.

[58] After VCCI withdrew its admission on consent, the parties exchanged further pleadings. The Plaintiff amended and filed the Claim. In response to the Claim, the defendants delivered an amended statement of defence on August 1, 2025 (the “Amended Defence”). VCCI removed the admission at paragraph 3 that had been in the previous version of its statement of defence.

[59] At paragraph 88(g) of the Claim, the Plaintiff asserts that VCCI “did make and repeat the Representations about the Vehicles being ‘clean diesel’ (or otherwise environmentally friendly and compliant with Emissions Standards) as part of the internet or website material for, and other publicly available statements, promotional materials, marketing or advertising made by, VCCI”.

[60] VCCI submits that the action should be decertified because without the admission, it is plain and obvious that the VCCI Certified Claims are doomed to fail and thus those claims no longer meet the test under s. 5(1)(a) of the *CPA*. Further, there is no basis in fact to support the VCCI Certified Common Issues, under s. 5(1)(c) of the *CPA*.

[61] VCCI submits that there are no plausible material facts connecting the subsidiary leasing company to representations about the environmental friendliness of the vehicles. It submits that the plaintiff has pleaded “bald” facts concerning VCCI’s role which Akbarali, J. discussed in her reasons for certification as follows:

[43] The claim defines VCCI as “a Canadian federally incorporated company...[which] offers retail financing and customer lease financing for the Vehicles in Canada. [VCCI] is a wholly owned indirect subsidiary of [VWAG].” The defendants argue that the defect in the pleading is that there is no other allegation about the scope of VCCI’s corporate role, and the misrepresentation allegation is wholly unsuited to the nature of VCCI’s corporate identity. They point to the lease agreement in which the lessee agrees, among other things, that VCCI is not responsible for the statements or actions of any dealer selling or servicing the vehicle.

[62] I disagree that the pleadings do not meet the test under s. 5(1)(a) of the *CPA* relative to VCCI. The pleadings, as amended, contain more than bald allegations. They describe and allege misrepresentation across the organization from the top down to its in-house leasing subsidiary, VCCI, using branding and marketing material touting its vehicles “clean diesel” attributes and using the branding phrase throughout its marketing materials, “TDI Clean Diesel”. The pleadings particularize how the representations were made. At para. 88 (g) of the Claim, the plaintiff particularizes one example of VCCI’s inclusion on its website, VWFinance/vwfinance.ca, of mileage estimates with reference to the “2012 Passat TDI Clean Diesel”. While the defendants submit that the pleading referred to “www.vw.ca” a website the defendants assert was exclusively controlled by Volkswagen Group Canada, Inc., the Claim alleges that the Representations are linked to VCCI’s website using its registered business name of “VW Finance.” Thus, I do not find the Claim deficient on its face for pleading a website that may have been managed or controlled by another related Volkswagen corporate entity.

[63] VCCI also relies for its assertions of a deficient claim on the lease agreement, incorporated by reference in the Claim, which provides that VCCI is not responsible for the statements or actions of any dealer selling or servicing the Vehicles. I do not find this point to be persuasive. The Claim as amended does not allege liability on the part of VCCI for dealer statements or actions: it alleges liability on the part of VCCI itself for participating and benefiting from the repeated references to TDI Clean Diesel made by its parent company and affiliates, and in its own website material.

[64] VCCI was the leasing and financing subsidiary corporation, and, in that capacity, a generous reading of the pleadings supports an allegation that it was a part of a broader project to sell and lease environmentally deficient vehicles and to conceal those deficiencies from the public and regulators. Its part in the equation, as pleaded, was to enable the financing of the Vehicles, thus subjecting members of the Class who leased their vehicles through VCCI to allegedly inflated prices of the Vehicles, and related associated costs of financing the purchase of the Vehicles, including interest.

[65] These amended allegations as against VCCI were not before Akbarali, J. At that time, the (disputed) admission may have played a more prominent role, my task is to assess the Claim on the motion to decertify, rather than the prior version (the Third Amended Claim). I conclude that although VCCI has withdrawn its admission, this does not render the Claim deficient. The Claim is sufficient on its face, and it is not doomed to fail. It includes sufficient detail. I cannot conclude that it is deficient on the basis that it contains only bald, implausible allegations which are incapable of proof against VCCI. To the contrary, the Plaintiff has described several routes to proof that VCCI made marketing misrepresentations in line with those made by the related and parent companies.

The Common Issue Question s. 5(1)(c)

[66] VCCI alternatively submits that the claims against it no longer meet the requirements of section 5(1)(c) of the *CPA*, because the plaintiff has not tendered evidence for each proposed common issue establishing some basis in fact that: (a) the issue actually exists; and (b) that the proposed issue can be answered in common across the entire class: *Kuiper v. Cook (Canada) Inc.*, 2020 ONSC 128 (Div Ct), 149 O.R. (3d) 521, at para. 36; *Marcinkiewicz v. General Motors of Canada Co.*, 2022 ONSC 2180, 81 C.P.C. (8th) 95, at para. 97; *Simpson v. Facebook, Inc.*, 2022 ONSC 1284 (Div Ct), 160 O.R. (3d) 629, at para. 25.

[67] VCCI submits that the only additional evidence to show that the issue “exists” to support a finding that it made the Representations, comes from three pieces of hearsay evidence, attached to an affidavit from a law clerk at Class counsel’s firm:

- (a) a screenshot of the LinkedIn profile of Volkswagen Financial Services Canada;
- (b) various screenshots from Volkswagen Group Canada Inc.’s website, www.vw.ca, taken using the Wayback Machine; and
- (c) screenshots from the LinkedIn profiles of two employees of VCCI.

[68] First, given the nature of the test on certification, which is to show some basis in fact that an issue exists, versus proof of the fact asserted, I disagree with VCCI that this is inadmissible hearsay. These are items of evidence which are capable of supporting a finding that there is some basis in fact to find that VCCI was engaged in marketing, and that the plaintiff may be able to show at trial that VCCI used the TDI Clean Diesel representation as part of offering its services to customers who purchased the Vehicles. This flows from the test on certification which does not require proof on the merits.

[69] Second, VCCI submits that the affiant’s evidence that web searches for content relative to the URL for vwfinance redirected her to the website for www.vw.ca/en/promotions/vwfinance-language-selection.html, means that there is no link between VCCI and the Representations.

[70] And finally, VCCI submits that the two LinkedIn profiles for employees engaged in marketing at VCCI, in its submission, do not support a finding that VCCI was engaged in marketing or in making the impugned Representations to the public.

[71] I disagree. First, the common issues which were certified as against VCCI relate to Representations made to the Plaintiff and to members of the Class. This can include using the references to TDI Clean Diesel, whether on its own promotional materials, websites and other media. While at this stage, there are minimal indicators of marketing using TDI Clean Diesel by VCCI, there is something available to that effect, prior to any disclosure or production of information about what marketing its employees were engaged in during the relevant times. The evidence tendered shows some evidence that a vwfinance website exists and that there are archived examples of VCCI's website available on the "Wayback Machine" showing the use by VCCI on multiple dates of the phrase "Clean Diesel" or "TDI Clean Diesel" on various of its pages/webpages. Although it is not clear at this stage how or why that link now redirects the user to vw.ca, the significance of that fact has yet to be fully illuminated by a complete record.

[72] The Plaintiff has tendered extracts from the Government of Canada trademarks database. That database listed a 2008 application by VW Canada to register "Clean Diesel" as a trademark. The application indicated that the "Clean Diesel" wording or proposed trademark was intended to be used by VW Canada or its "licensee" including in association with "car and truck leasing". VCCI's business was to provide financing for VW and Audi in Canada. The inference is available from this piece of evidence that the plaintiff may be able to establish that the mark was used by VCCI as part of its promotional activities.

[73] There is evidence that there were marketing personnel at VCCI, and no doubt more information will become available during discovery. At this early stage, and given the ubiquity of the marketing across the organization (which includes VCCI as a subsidiary) of the Vehicles being environmentally friendly cars, and the efforts made to conceal the truth from the public and regulators, I would add to the minimal evidence proffered by the plaintiff, the inference that there is some basis in fact to find that VCCI made similar Representations, as part of marketing its services.

[74] Finally, on a motion to decertify, the burden is on the moving party. VCCI could have tendered evidence about the vwfinance website, its marketing and use or lack of use of references to TDI Clean Diesel as part of its offerings to customers who were interested in purchasing and leasing the Vehicles. Instead, VCCI chose to approach its motion to decertify by attacking the Plaintiff's evidence and raising merit-based arguments, as one might if the onus was on the opposing party and the trier of fact was attempting to make a final determination on the point.

[75] The Defendants, including VCCI, will have their remedies to challenge the substance of the allegations, either on a motion for summary judgment or at trial. At this preliminary stage, I find that the allegations against VCCI should not be decertified.

Conclusion

[76] The motion to decertify is dismissed. The motions to certify the conspiracy and claims under *CEPA* are granted.

[77] If the parties are unable to agree on the costs of the motions they may propose a timetable for the exchange of submissions on costs.

Leiper J.

Released: December 12, 2025

CITATION: MacKinnon v. Volkswagen Group Canada, Inc., 2025 ONSC 6942
COURT FILE NO.: CV-17-582746-00CP
DATE: 20251212

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:

STUART MACKINNON

Plaintiff

– and –

VOLKSWAGEN GROUP CANADA, INC.,
VOLKSWAGEN AKTIENGESELLSCHAFT,
VOLKSWAGEN GROUP OF AMERICA, INC., AUDI
CANADA, INC., AUDI AKTIENGESELLSCHAFT,
and VW CREDIT CANADA, INC.

Defendants

REASONS FOR DECISION

Leiper J.

Released: December 12, 2025