CITATION: Mackinnon v. Volkswagen Group Canada Inc., et al., 2024 ONSC 4988
COURT FILE NO.: CV-17-582746-00CP
DATE: 20240909

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Stuart Mackinnon

AND:

Volkswagen Group Canada, Inc., Volkswagen Aktiengesellschaft, Volkswagen Group of America, Inc., Audi Canada, Inc., Audi Aktiengesellschaft, Audi of America Inc., and VW Credit Canada, Inc.

BEFORE: J.T. Akbarali J.

COUNSEL: *David O'Connor and Adam Deser*, for the plaintiff

Cheryl Woodin, Ilan Ishai and Peter Douglas, for the defendants

HEARD: June 26 and 27, 2024

Proceeding under the *Class Proceedings Act, 1992*

ENDORSEMENT

Overview

[1] This putative class action was denied certification by Belobaba J. in 2021: *Mackinnon v. Volkswagen*, 2021 ONSC 5941, 23 B.L.R. (6th) 221. That decision was overturned by the Divisional Court: *MacKinnon v. Volkswagen Group Canada Inc.*, 2022 ONSC 5501, 163 O.R. (3d) 721 (Div. Ct.). The Divisional Court, among other things, ordered that "the matter is remitted to a different judge of the Ontario Superior Court of Justice to re-hear the balance of the certification motion, apart from the question of whether the proposed class suffered harm and the question of whether there is a plausible methodology for measuring damages on a class-wide basis."

[2] This motion is the re-hearing of the certification motion, within the parameters identified by the Divisional Court.

Background

[3] This action relates to a scheme in which diesel-powered Volkswagen and Audi brand vehicles (referred to as "TDI vehicles") were fitted with an unlawful defeat device designed to subvert automobile emission regulations.

[4] The defendants are related members of the Volkswagen and Audi group of companies. Volkswagen Aktiengesellschaft ("VWAG") is the German parent company. Volkswagen Group Canada Inc. ("VW Canada") is VWAG's wholly owned Canadian subsidiary which distributes Volkswagen-branded vehicles in Canada. VW Credit Canada Inc. ("VCCI") is a Canadian leasing and financing company that assists Volkswagen customers with financing for their vehicle leases or purchases.

[5] Volkswagen Group of America Inc. ("VWUS") is an American corporation which is a wholly owned subsidiary of VWAG. It is involved in the marketing and distribution of Volkswagen-branded vehicles in North America. Audi of America, Inc. is not a separate corporation, but is a division of VWUS. Because it is not a separate entity, the parties agree that Audi of America, Inc. must be removed from the action, so I will say no more about it.

[6] Audi Aktiengesellschaft ("Audi AG") is a German car manufacturer and is the parent company of the Audi group. About 99.55% of Audi AG's shares are controlled by VWAG. Audi Canada Inc. ("Audi Canada") is the distributor of the Audi-branded vehicles in Canada, and is a wholly owned indirect subsidiary of VWAG.

[7] The plaintiff's claim alleges wrongdoing by these corporate entities, arising from the defeat device.

[8] The TDI vehicles were marketed as having features such as more torque, lower fuel consumption, reduced CO_2 emissions, and an ultra-low emissions system. Some of these advertised attributes were true, but some were not. It is common ground that the defeat device increased vehicle performance by reducing the effectiveness of the emissions control system when the vehicle was not undergoing emissions testing. The result was that emissions increased; particularly, nitrogen oxide ("NOx") emissions. This defeat device caused the vehicles in question to emit NOx beyond permitted levels and in excess of the levels disclosed to regulators and represented in advertisements.

[9] The defeat device was discovered in May 2014, after researchers from West Virginia University tested vehicles and determined that they exceeded NOx emissions standards by between 5 to 25 times. Investigations, and regulatory and criminal proceedings, began against certain Volkswagen entities and employees by various government agencies.

[10] After initial denials of wrongdoing, VWAG and VWUS admitted to American regulators in September 2015 that they had designed and installed the defeat device in the TDI vehicles. Volkswagen AG reached a plea agreement with American authorities. It pleaded guilty to conspiracy, obstruction of justice and introducing imported merchandise into the United States by means of false statements. A number of VWAG employees and VWUS employees also pleaded guilty to criminal charges.

[11] Not surprisingly, class proceedings were also commenced. Those proceedings were eventually settled through court-approved settlements, including one in Ontario. This settlement was approved by Belobaba J., but it excluded certain owners and lessees of Volkswagen and Audi TDI vehicles.

[12] Consequently, in September 2017, the plaintiff commenced this putative class action seeking recovery on behalf of a class made up of distinct groups whose members were excluded from the settlements. The class is described as:

> All persons (including their estates or legal or personal representative[s]) resident in Canada, who own, owned, lease, or leased a Vehicle which was originally sold or leased in Canada and who:
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> a. leased a 2.0L Vehicle from [VCCI], the term of which lease expired or was terminated before September 18, 2015 or leased a 3.0L Vehicle the term of which lease expired or was terminated before November 2, 2015;
>
> b. sold or transferred title (including those who ceased to hold or surrendered title) to their 2.0L Vehicle before September 18, 2015 or sold or transferred title (including those who ceased to hold or surrendered title) of their 3.0L Vehicle before November 2, 2015;
>
> c. leased their 2.0L or 3.0L Vehicle from an entity other than [VCCI];
>
> d. owned a 2.0L Vehicle on September 18, 2015 or owned a 3.9L Vehicle on November 2, 2015, which had a branded title "Dismantled", "Junk," "Salvage", or "Mechanically Unfit" on the respective aforesaid date;
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> e. owned a 2.0L Totalled Vehicle on September 18, 2015, or owned a 3.0L Totalled Vehicle on November 2, 2015 (as "Totalled Vehicle" is defined in the 2.0L and 3.0L Settlement Agreements); and/or
>
> f. owned a 2.0L Vehicle on September 18, 2015 but who, on a date between the Pre-Approval Notice Date and fifty-nine days immediately thereafter, inclusive of those dates, transferred title of the Vehicle to an insurance company because their Eligible Vehicle was totalled or appraised as a total loss.

[13] The class is subject to exclusions which I need not set out here.

[14] As I have noted, this action proceeded to a certification motion before Belobaba J. He denied certification, finding that there was no basis in fact to conclude there was evidence of compensable loss, or a plausible methodology to measure loss on a class-wide basis.

[15] The Divisional Court overturned that decision and remitted certification back to another judge of the Superior Court of Justice to rehear the motion "apart from the question of whether the proposed class suffered harm and the question of whether there is a plausible methodology for measuring damages on a class-wide basis."

[16] The defendants sought leave to appeal the Divisional Court's order to the Court of Appeal but leave was not granted.

[17] Accordingly, the motion proceeded before me. The parties each take a different interpretation of the impact of the Divisional Court's decision, and the scope of the motion that is before me.

Issues

[18] This motion raises the following questions:

a. What is this court's mandate in view of the decision of the Divisional Court remitting this matter for a rehearing "apart from the question of whether the proposed class suffered harm and the question of whether there is a plausible methodology for measuring damages on a class-wide basis"?

b. Should certification be granted? This requires me to consider the following questions:

i. Do the pleadings disclose a cause of action? The pleaded causes of action advanced on this motion are: (i) negligent misrepresentation and deceit/fraud; (ii) breach of warranty, both express and implied; (iii) conspiracy; (iv) unjust enrichment; (v) breach of the *Canadian Environmental Protection Act, 1999*, S.C. 1999, c. 33; (vi) breach of the *Competition Act*, R.S.C., 1985, c. C-34; and (vii) breach of provincial consumer protection legislation.

ii. Is there an identifiable class of two or more persons that would be represented by the proposed representative plaintiff?

iii. Do the claims of the class members raise common issues?

iv. Is a class proceeding the preferable procedure?

[19] The only element of the certification test that is not in dispute is the requirement that there be a representative plaintiff who would fairly and adequately represent the interests of the class, has produced a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the class and notifying class members, and does not have, on the common issues for the class, an issue in conflict with the interests of the other class members.

Scope of the Divisional Court's Order

[20] A great deal of time was spent during the hearing on the question of the scope of the Divisional Court's order. The parties agree that the Divisional Court determined that there was some basis in fact to conclude that there is a plausible methodology for measuring damages on a

class-wide basis. It is the impact of the court's order with respect to "whether the proposed class suffered harm" that is at issue.

[21] To understand the disagreement, it is necessary to back up to the original certification motion, which was principally focused on damages issues.

[22] On the plaintiff's theory, the harm or loss the putative class members suffered is that they overpaid for their vehicles because they paid a premium to purchase vehicles with a diesel package that was represented to include a feature that they did not receive (the low NOx emissions), and they have adduced a plausible methodology to measure the loss on a class-wide basis.

[23] According to the defendants, Belobaba J. dismissed the original certification motion because (i) the plaintiff failed to establish some basis in fact for the existence of a compensable loss suffered by the putative class members; and (ii) even if there were some evidence of a compensable loss, the plaintiff failed to establish some basis in fact that there is a plausible methodology to measure the loss on a class-wide basis. Put differently, Belobaba J. found no basis in fact to suggest that the value paid for the low emissions feature could be isolated and quantified in monetary terms. He also found that there was no factual basis to conclude that the plaintiff's proposed methodology was capable of measuring loss on a class-wide basis.

[24] These were the key issues on the original certification motion. What approach did the Divisional Court take?

[25] The parties point me to paras. 15-16 of the Divisional Court decision, where Morgan J. wrote:

> It is important to note that the issue of controversy was not *whether* harm was suffered by the proposed class. That, too, was taken as a given under the circumstances of the case. Rather, the controversial question for the parties and for the court below was whether it could be determined *how much* this harm was worth. As the motion judge put it, at paras 18-19:
>
> > [18] There is no doubt that the pre-disclosure owners and lessees of the impugned VW and Audi vehicles paid a diesel-engine premium, in some cases, of several thousand dollars more than what they would have paid for the gasoline-engine equivalent. There is also no doubt that the pre-disclosure owners and lessees had received many of the diesel-related benefits when they sold or returned their vehicle — such as improved fuel economy, increased torque and longer engine life. However, it is also clear that they did not receive the promised low emission or clean diesel benefit.
> >
> > [19] The question, however, is whether there is any evidence that the pre-disclosure plaintiff paid anything extra for the clean diesel feature. That is, can the low emissions or clean diesel feature that was not provided as promised be isolated and quantified in monetary terms for the purposes of

> this proposed class action? And, if so, has the plaintiff presented a plausible methodology for measuring this loss on a class-wide basis?

> [16] In other words, it was accepted as a starting point that class members "acquired less value than what they expected to acquire – by purchasing a product which was represented to be 'proven' by science or in clinical trials to help provide the claimed effects, but which was not proven to do so": *Drynan v. Bausch Health Companies Inc.*, 2021 ONSC 7423, at para 257. Or, as an Australian court observed in another emissions-related class action, it was "glaringly obvious…that the presence of the Core Defect in the Relevant Vehicles reduced the value of the vehicles at the time they were supplied and each consumer therefore received a vehicle that was less valuable than the one they bargained for, resulting in an overpayment": *Williams v. Toyota Motor Corporation*, [2022] FCA 344, at paras 173, 330.

[26] The defendants take issue with Morgan J.'s characterization that it "was taken as a given" that the proposed class suffered harm. It agrees that the class did not receive something it expected to receive (the low NOx emissions), and if that is what Morgan J. meant, they agree. But if Morgan J. was suggesting that it was a given that the class suffered compensable harm, they argue that they have never accepted that proposition, and Belobaba J. did not accept it either. The defendants state that the motion for reconsideration is, apart from the issues identified by the Divisional Court, a rehearing, in which I am not bound by any findings of fact or conclusions made by either Belobaba J. or the Divisional Court, and I am free to consider the question of compensable harm afresh: *Price v. H. Lundbeck A/S*, 2022 ONSC 7160, at paras. 70-73, aff'd 2024 ONSC 845 (Div. Ct.), at paras. 39-41.

[27] The plaintiff argues that the Divisional Court has determined, for purposes of certification, the question of harm and methodology of calculating loss on a class-wide basis, which necessarily includes the findings it made in support of those conclusions: *The Catalyst Capital Group Inc. v. VimpelCom Ltd.*, 2019 ONCA 354, 145 O.R. (3d) 759, at paras. 30-38. The plaintiff argues I am bound by the conclusion that the proposed class suffered harm.

[28] I note that, in seeking leave to the Court of Appeal, the defendants raised the point regarding compensable harm in its factum, calling the finding:

> an obvious misapprehension of the decision of the certification judge and the issues on the appeal… Whether compensable harm was suffered by any class member was in fact a key issue in dispute between the parties, and was the primary basis for the certification judge's decision. The certification judge found that the plaintiff failed to adduce any evidentiary basis for the existence of the alleged low NOx emissions price premium, and therefore failed to provide any evidence that the putative class members suffered any compensable harm. The Court overturned the motion judge's dismissal of certification without any analysis of the primary ground on which that dismissal rested.

[29] The defendants also argued that the Divisional Court erred in law by "conflating the requirement for some basis in fact for a compensable loss with a requirement for establishing the actual amount of the loss suffered."

[30] The defendants summed the argument up as follows:

> By simply assuming the existence of compensable loss without an evidentiary basis, and in doing so reversing the certification judge's factual finding on that fundamental issue, the Court erred in law and failed to show the appropriate deference to the discretionary findings of the certification judge. Through failing to even acknowledge the primary issue that led to the certification judge's denial of certification (*i.e.* no evidence of a compensable loss) as an issue on appeal, the Court engaged in the type of hollow analysis that the Supreme Court of Canada has warned against: impermissibly lowering the evidentiary standard required to meet the test for certification "from *some basis in fact* to *mere speculation*."

[31] In my view, the question of the scope of the Divisional Court's order has been made more complicated than it need be.

[32] I agree that I must approach this motion as a hearing *de novo* on all matters, except those which I am instructed by the Divisional Court not to address.

[33] The order is clear that two questions fall outside the scope of this rehearing:

a. Whether the proposed class suffered harm; and

b. Whether there is a plausible methodology for measuring damages on a class-wide basis.

[34] These questions are the same as the two questions posed by Belobaba J. in para. 19 of his reasons. The question of whether the proposed class suffered harm relates to Belobaba J.'s question: "can the low emissions or clean diesel feature that was not provided as promised be isolated and quantified in monetary terms for the purposes of this proposed class action?" The Divisional Court has answered both in the affirmative for purposes of the certification motion.

[35] This conclusion is consistent with the treatment of the point in the defendants' argument to the Court of Appeal. This is how the defendants understood the Divisional Court's reasons. The defendants do not agree with the Divisional Court's order. But their appeal route has ended. While I accept that I am conducting a hearing *de novo* on most issues, I am not inclined to be drawn into an appellate role reviewing the Divisional Court's determination, and particularly not when the Court of Appeal has declined to exercise that role itself.

[36] In summary on this issue, I conclude that I am conducting a hearing *de novo*. I am not bound by prior findings and conclusions on this certification motion except that:

a. There is some basis in fact to conclude that the low emissions or clean diesel feature that was not provided as promised can be isolated and quantified in monetary terms of the purposes of this proposed class action. This is the "harm" question answered by the Divisional Court.

b. There is some basis in fact to conclude that there is a plausible methodology for measuring damages on a class-wide basis.

General Principles Applying to Certification Motions

[37] At a certification motion, the court does not resolve conflicting facts and evidence, nor engage in a robust analysis of the merits of a claim. The outcome of a certification motion is thus not predictive of the success of the common issues trial. However, neither does the certification motion "involve such a superficial level of analysis into the sufficiency of the evidence that it would amount to nothing more than symbolic scrutiny": *Pro-Sys Consultants Ltd. v. Microsoft Corporation*, 2013 SCC 57, [2013] 3 S.C.R. 477, at paras. 99, 102, 103 and 105.

[38] On a certification motion, the plaintiff is required to show some basis in fact for each of the certification requirements set out in the *Class Proceedings Act, 1992*, S.O. 1992, c 6, other than the requirement that the pleadings disclose a cause of action. The focus is on whether the form of the action allows it to proceed as a class action. Thus, the question is not whether there is some basis in fact for the claim itself, but whether there is some basis in fact that establishes the certification requirements: *Pro-Sys*, at paras. 99-100.

Analysis of Certification Criteria

S. 5(1)(a) – do the pleadings disclose a cause of action?

[39] The court assesses whether the pleadings disclose a cause of action on the same standard of proof as a motion to dismiss: assuming all facts pleaded to be true, is it plain and obvious that the plaintiff's claim cannot succeed? See *Pro-Sys* at para. 63.

[40] Material facts pleaded are accepted as true, unless they are patently ridiculous or incapable of proof. Pleadings are read generously. However, bare allegations and conclusory legal statements based on assumptions or speculation are not material facts. They are not assumed to be true for the purposes of determining whether a viable cause of action has been pleaded: *Whitehouse v. BDO Canada LLP*, 2021 ONSC 2454, 156 O.R. (3d) 54 (Div. Ct.), at para. 19.

[41] There are many causes of action pleaded in the plaintiff's claim. The plaintiff has abandoned his claim in negligence. All of the remaining causes of action are contested by the defendants. I analyze each one in turn.

Negligent Misrepresentation and Deceit/Fraud

[42] The defendants concede that these causes of action are properly pleaded against all defendants, except for VCCI.

[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.

[44] The plaintiff notes that, in his claim, after identifying the defendants individually, he identifies the defendants collectively as "VW." In para. 69 of the claim, the plaintiff pleads:

> VW made, approved or authorized a number of consistent, common and uniform Representations in, among other things, their written warranties, vehicle manuals, television and radio, media releases, internet, social media and print advertising, website(s), sales brochures, posters, dealership displays and other marketing materials in relation to the Vehicles.

[45] "Representations" is then defined, at para. 70, to include common and consistent representations made by VW to the effect that the TDI vehicles met or exceeded all relevant emissions standards and Federal, Provincial and Territorial emissions regulations, the TDI vehicles were environmentally friendly and beneficial to the environment due to their low fuel consumption and low emissions, and the TDI vehicles provided superior performance.

[46] The statement of defence very carefully unpacks each paragraph in the statement of claim to set out the facts that are admitted and denied by the defendants, including a careful analysis of which allegations are admitted or denied in respect of each individual defendant.

[47] In para. 3 of the statement of defence, paras. 69 and 70 are admitted without qualification. The plaintiff notes that an admission in a pleading is a formal admission, and no motion has been brought to withdraw these admissions as they relate to VCCI.

[48] 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.

Breach of Express Warranty

[49] The plaintiff pleads that the defendants breached the terms of the express warranty provided. The warranty is in the record.

[50] Under its terms, VW Canada warrants that the TDI vehicle:

a. was designed, built and equipped so as to conform at the time of sale with all applicable regulations of Environment Canada, and applicable provincial requirements; and

b. is free from defects in material and workmanship which causes the vehicle to fail to conform with Environment Canada regulations for 2 years after the date of first use or delivery of the vehicle to the original retail purchaser or original lessee or until the vehicle has been driven 40,000 km, whichever occurs first.

[51] The warranty goes on to limit VW Canada's obligation as follows:

> If within this period a defect in material or workmanship causes the vehicle to fail to conform with applicable emissions regulations and the vehicle is brought to the workshop of any authorized Volkswagen dealer in Canada, the dealer will make repairs as may be required by these regulations free of charge.

[52] A similar express warranty was granted by Audi Canada in respect to the Audi TDI vehicles.

[53] The problem for the plaintiff is that the express warranty limits the obligation of VW Canada and Audi Canada to repairing a defect in material or workmanship. Despite the fact that the vehicle is warranted to have been designed to comply with environmental regulations, the warranty itself provides no recourse for design failure under the warranty, and provides no avenue to make a claim for damages.

[54] It is plain and obvious that the express warranty does not promise to remedy any design defect in the emissions control system. Moreover, it is plain and obvious that any remedy available under the warranty is limited to repair only.

[55] Similarly, the express statutory warranties in Saskatchewan, New Brunswick and Nova Scotia are subject to the same limits as the express contractual warranty, in that the remedy for their breach is repair, not damages. Moreover, I note that most of the proposed groups that collectively make up the putative class have vehicles that were totalled or disposed of prior to the discovery of the defeat device. There would have been no vehicles to repair under warranty for these class members.

[56] Like Perell J. in *Carter v. Ford Motor Company of Canada*, 2021 ONSC 4138, 76 C.C.L.T. (4th) 206, at paras. 124-126, I conclude that the express warranty claim does not satisfy the cause of action criterion. It is bound to fail.

Breach of Implied Warranty

[57] The parties agree that the causes of action for common law and statutory breach of implied warranty require privity of contract between the plaintiff and defendant: *Engen v. Hyundai Auto Canada Corp.*, 2022 ABQB 189, 41 Alta. L.R. (7th) 341, at para. 8, aff'd 2023 ABCA 85, 57 Alta. L.R. (7th) 317, at para. 36; *Carter*, at paras. 131-132.

[58] The only relevant defendant is thus VCCI, as it is the only defendant with respect to which some of the class members had a contractual relationship.

[59] Under the lease agreement in the record, the customer agrees to lease the vehicle from the dealer, and on the signing of the agreement, the dealer assigns the lease and the leased vehicle to VCCI. At the same time, VCCI assigns its assignable rights under the manufacturer's limited warranty to the customer.

[60] VCCI argues that, while it had a relationship of privity with some of the class members, the lease agreement makes it clear that it has nothing to do with warranties, and in fact, the lease agreement specifically disavows any role for VCCI in any warranty. The lease agreement provides (emphasis in original):

> [VCCI] agrees to assign to you its assignable rights under the manufacturer's limited warranties applicable to the Vehicle and more fully described in the manufacturer's warranty manual provided to you with delivery of the Vehicle. [VCCI] does not provide any warranties in respect of the Vehicle and that the only warranties are those provided by the manufacturer and any optional extended warranty that you may have purchased.
>
> **You agree that [VCCI] does not endorse or provide any services under any service contract or any coverage under any extended warranty that you have purchased.**

[61] The services VCCI provides under the lease agreement are financing services. It makes no commercial sense to conclude that, in a lease that expressly disavows any role of VCCI in warranting the vehicle, a claim for implied warranty can be made against VCCI. If privity of contract with a financing company were all that were required, a third-party financing company could be held responsible for implied warranties in respect of a vehicle.

[62] In my view, to plead a viable claim in warranty against VCCI, the privity at issue must relate to the provision of the vehicle and its related (express, contractual, statutory or implied) warranties. Here, the privity between VCCI and the putative class members relates to a contractual relationship that involves financing only.

[63] I thus conclude that the claim for implied breach of warranty is bound to fail.

Conspiracy

[64] In *Lilleyman v. Bumblebee Foods LLC*, the court reviewed the requirements to properly plead a claim in civil conspiracy, citing *Normart Management Ltd. v. West Hill Redevelopment Co Ltd.* (1998), 37 O.R. (3d) 97 (C.A.), at para. 21: 2023 ONSC 4408 ("*Bumblebee* ONSC"), at paras. 101-107, aff'd 2024 ONCA 606. Among other things, material facts of the actions in furtherance of the conspiracy must be plead and connected to the actors. "[I]n a conspiracy pleading, it is necessary to set out discretely the particular acts of each co-conspirator so that each defendant can know what he or she is alleged to have done as part of the conspiracy. [I]t is not appropriate to

group some or all of the defendants together into a general allegation that they conspired to injure the plaintiff": *Bumblebee* ONSC, at para. 102.

[65] The court reiterated that conspiracy allegations require pleading with particularity, including details of the acts alleged against each defendant, as each is entitled to know the case they must meet. If alleged conspirators are associated corporations, "the separate corporate legal personalities of the alleged conspirators must be respected and their individual roles in furtherance of the conspiracy particularized…": *Bumblebee* ONSC, at paras. 103, 104 and 106.

[66] The conspiracy claim is not properly pleaded. It does not respect the separate corporate identities of the defendants. Rather, it pleads the actions of "VW" as a group without specificity.

[67] The plaintiff argues that he can amend his pleading to address this criticism if necessary. The defendants argue that the plaintiff has had years to fix this defect and has failed to do so. They invoke presumed prejudice, by reason of the passage of time. They further argue that the evidence in the record to support conspiracy claims does not support claims against all defendants, and that the only evidence of conspiracy that exists in the record relates to VWAG and to some extent, VWUS.

[68] I am inclined to allow the plaintiff the opportunity to amend his claim to properly plead conspiracy. I do not agree that there is presumed prejudice for two reasons. First, conspiracy has been pleaded since the outset of this action. There is no limitation period issue because the pleading clearly alleges conspiracy against all defendants, who have thus been on notice that their role in the events involving the defeat device is in question. Second, the fraud and criminal conduct involving the defeat device were, to put it mildly, a big deal. I cannot fathom that all related companies have not determined what they knew and what involvement they did or did not have in the scheme in the course of the investigations and regulatory and criminal proceedings that resulted.

[69] Moreover, I note that there is no evidence of any actual prejudice to the defendants.

[70] As a result, the plaintiff shall have the opportunity to amend his conspiracy claim and properly particularize it. The question of whether conspiracy is a claim that ought to be certified must therefore await an amended pleading, and further argument.

Unjust Enrichment

[71] To establish unjust enrichment, it is accepted that the plaintiff must show (i) an enrichment of or benefit to the defendants; (ii) a corresponding deprivation of the plaintiff; and (iii) the absence of a juristic reason for the enrichment: *Moore v. Sweet*, 2018 SCC 52, [2018] 3 S.C.R. 303, at para. 37.

[72] The defendants argue that unjust enrichment is not properly pleaded for several reasons. I need only address one.

[73] In *Palmer v. Teva Canada Limited*, 2024 ONCA 220, 98 C.C.L.T. (4th) 9, at para. 100, the Court of Appeal held that where the material facts pleaded in support of the claim are that the plaintiffs paid for a product and received it, there is no adequate pleading of deprivation. It explained, "Purchasers of defective products do not suffer a "deprivation" for the purpose of the law of restitution when they in fact received the products in issue. …Liability for a claim arising from a defective product is better found in negligence." See also *Spring v. Goodyear Canada Inc.*, 2021 ABCA 182, 26 Alta. L.R. (7th) 241, at para. 49; *Nissan Canada Inc. v. Mueller*, 2022 BCCA 338, at para. 115, leave to appeal refused, [2022] S.C.C.A. No. 446.

[74] There is thus no tenable pleading of a deprivation in this case. The putative class members paid for a vehicle, and they got one. It had one feature (NOx emissions) that did not meet their expectations. But in many other ways, it did meet their expectations. It was able to transport them from place to place. It offered better fuel efficiency and torque. The material facts pleaded in this case do not show a deprivation. The putative class members' claim is misaligned with unjust enrichment. Liability for a claim arising from circumstances like those pleaded are better found elsewhere, such as in negligent misrepresentation.

Canadian Environmental Protection Act

[75] The claim under *CEPA* is advanced against VWAG and Audi AG under s. 40. This section provides that any person who has suffered loss or damage as a result of conduct that contravenes any provision of the Act may bring an action to recover from the person who engaged in the conduct an amount equal to the loss or damage proved to have been suffered by the person, and for costs.

[76] The defendants state that the *CEPA* claim is untenable in its entirety. They argue that the meaning ascribed to the section by the plaintiff is inconsistent with the purpose of the legislation.

[77] The modern approach to statutory interpretation is governed by Driedger's modern principle: "Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament": *Rizzo & Rizzo Shoes Ltd. (Re)*, 1998 CanLII 837 (SCC), [1998] 1 S.C.R. 27, at para. 21, quoting from Elmer Driedger, *Construction of Statutes*, 2d ed. (Toronto: Butterworths, 1983), at p. 87. To ascertain the context, the court must conduct a textual, contextual, and purposive analysis of the statute or provision in question: *Ayr Farmers Mutual Insurance Company v. Wright*, 2016 ONCA 789, 134 O.R. (3d) 427, at para. 28; *Canada (Canadian Human Rights Commission) v. Canada (Attorney General)*, 2011 SCC 53, [2011] 3 S.C.R. 471.

[78] *CEPA*'s preamble makes a number of statements with respect to its environmental purpose, including that its primary purpose is to "contribute to sustainable development through pollution prevention".

[79] The purpose of *CEPA* has also been recognized by the courts as being "to prevent pollution and to protect the environment and human health in order to contribute to sustainable development": *R. v. Volkswagen AG*, 2020 ONCJ 398, 36 C.E.L.R. (4th) 133, at para. 8.

[80] The defendants argue that the purpose of *CEPA*, that is, the protection of the environment, requires that the civil cause of action in s. 40 be connected to that purpose. In this case, the plaintiff is not suing on an environmental injury, but rather, seeks to recover economic loss.

[81] In *Kalra v. Mercedes Benz*, 2017 ONSC 3795, 15 C.E.L.R. (4th) 145, at para. 29, on a certification motion, Belobaba J. found that the *CEPA* was properly pleaded. He rejected the defendants' argument that damage to property was necessary for a sustainable claim, and found the *CEPA* claim was not doomed to fail.

[82] In *Egan et al. v. National Research Council of Canada et al.*, 2021 ONSC 4561, at para. 38, R. Smith J. found it was not plain and obvious the plaintiff's *CEPA* claim arising out of the release of a toxic substance was bound to fail.

[83] 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.

[84] I am satisfied that the *CEPA* claim is properly pleaded and is not doomed to fail.

Competition Act

[85] The cause of action under the *Competition Act* arises from ss. 36 and 52.

[86] Section 52(1) creates an offence in relation to competition. It provides that "[n]o person shall, for the purpose of promoting, directly or indirectly, the supply or use of a product or for the purpose of promoting, directly or indirectly, any business interest, by any means whatever, knowingly or recklessly make a representation to the public that is false or misleading in a material respect."

[87] Section 36(1) creates civil liability. In part, it provides that any person who has suffered loss or damage as a result of conduct that is contrary to certain provisions, including s. 52(1), may sue for and recover from the person who engaged in the conduct an amount equal to the loss or damage proved to have been suffered by him.

[88] The parties agree that the cause of action under the *Competition Act* is properly pleaded with respect to all defendants except VCCI.

[89] VCCI argues that no material facts are pleaded against VCCI. With respect to the pleading of misrepresentation, it submits that VCCI had nothing to do with the representations at issue, and specifically disassociates itself from the representations made by the seller in the lease agreement.

[90] I have already noted that, while I agree there is a misalignment between the financing company and the misrepresentations, there is a formal admission in the pleading that VCCI made

the representations. For the purposes of s. 5(1)(a), this cause of action is properly pleaded against VCCI.

Consumer Protection Legislation

[91] The plaintiff has pleaded causes of action for breach of consumer protection legislation in certain provinces and territories: Ontario, British Columbia, Alberta, Saskatchewan, Manitoba, Prince Edward Island and Newfoundland.

[92] The defendants argue that:

a. Privity of contract is required by the statutes of Ontario, PEI and Newfoundland, and there is no privity with anyone other than VCCI;

b. No facts are pleaded that VCCI violated the consumer protection legislation anywhere;

c. The necessary material facts have not been pleaded with respect to British Columbia, Alberta, Saskatchewan, PEI, and Newfoundland and Labrador.

Privity

[93] The parties agree that privity is not required to advance a claim under the legislation in British Columbia, Alberta, Saskatchewan or Manitoba.

[94] The debate about privity arises with respect to the legislation in Ontario, PEI, and Newfoundland and Labrador. The plaintiff alleges that it is not plain and obvious that privity is required. The defendant argues that the case law has determined that privity is required.

Ontario

[95] In Ontario, s. 17(1) of the *Consumer Protection Act, 2002*, S.O. 2002, c. 30, Schedule A, prohibits unfair practices.

[96] Section 18(1) of the *Consumer Protection Act* provides that "any agreement, whether written, oral or implied, entered into by a consumer after or while a person has engaged in an unfair practice may be rescinded by the consumer and the consumer is entitled to any remedy that is available in law, including damages."

[97] Section 18(2) provides that a consumer is entitled to recover the amount by which their payment under the agreement exceeds the value that the goods or services have to the consumer, or to recover damages, or both, if rescission is not possible because the return or restitution of the goods or services is no longer possible, or because rescission would deprive a third party of a right acquired in good faith and for value.

[98] The remedies in s. 18 were considered by Strathy J. (as he then was) in *Singer v. Schering-Plough Canada Inc.*, 2010 ONSC 42, at para. 87. He wrote:

> The remedy of rescission, under s. 18, or alternatively damages, can only be available as between a consumer and the "supplier" with whom he or she contracted. The remedy under s. 98 only entitles the consumer to a refund if the "supplier" has "charged a fee or an amount in contravention of this Act or received a payment in contravention of this Act." As between the manufacturer and the consumer in this case, there is no agreement to rescind and no money to refund.

[99] Thus, Strathy J. found that privity was required to advance a claim under s. 18.

[100] Justice Strathy's decision in *Williams v. Canon Canada Inc.*, 2011 ONSC 6571, at para. 206 is to the same effect:

> The plaintiffs plead that they purchased their cameras from retailers and not from Canon. There is no "consumer agreement" with Canon for the purchase and sale of the plaintiffs' cameras. This has a direct impact on the remedies available to the plaintiffs under the *Consumer Protection Act, 2002*. If there is no agreement with Canon for the purchase of the cameras, there is no agreement to rescind and the alternative remedies under the statute are not available either.

[101] In *Richardson v. Samsung*, 2018 ONSC 6130, Justice Rady declined to certify a putative class action, in part because of lack of privity under the *Consumer Protection Act*. She relied on *Singer* and *Williams*, concluding, at para. 36:

> The pleading in this case suffers from the same defects as identified in *Singer* and *Williams*. There is no privity of contract between the plaintiff and the defendant. None is pleaded. Indeed, the plaintiff pleads that he purchased his Note7 from a third party identified as Imagine Wireless. It is plain and obvious that this claim cannot succeed.

[102] The decision in *Richardson* was appealed to the Divisional Court. The court there did not embark on an analysis of privity, but found that Rady J. had "properly relied on *Singer* … for the proposition that there must be contractual privity to advance a claim under s. 18." The court dismissed the appeal.

[103] More recently, the same conclusion that privity is required was reached by Perell J. in *Hoy v. Expedia Group Inc.*, 2022 ONSC 6650, 171 O.R. (3d) 114, at para.132. See also *Marcinkiewicz v. General Motors of Canada Co.*, 2022 ONSC 2180, at para. 145, and *Palmer v. Teva Canada Ltd.*, 2022 ONSC 4690, at paras. 247-248, aff'd 2024 ONCA 220, 98 C.C.L.T. (4th) 9 ("*Palmer* ONSC").

[104] The plaintiff argues that these decisions ought to be reconsidered because none of them mention of s. 18(12) of the *Consumer Protection Act*. They also argue that s. 17(3) is relevant.

And they rely on the decision of the Court of Appeal in *Arora v. Whirlpool Canada LP*, 2013 ONCA 657, 118 O.R. (3d) 113.

[105] Section 18(12) provides that "[e]ach person who engaged in an unfair practice is liable jointly and severally with the person who entered into the agreement with the consumer for any amount to which the consumer is entitled under this section."

[106] Section 17(3) provides that it is not an unfair practice for a person, on behalf of another, to print, publish, distribute, broadcast or telecast a representation that the person accepted in good faith for printing, publishing, distributing, broadcasting or telecasting in the ordinary course of business. In other words, publishers of advertising are not liable for the contents of the advertising they publish.

[107] In my view, assuming without deciding that this is an appropriate case for me to reconsider the Divisional Court's decision in *Richardson*, nothing about these provisions leads to a conclusion that privity is not required to claim a remedy under s 18. Concluding that s. 18 does not require privity is inconsistent with the structure of the provision.

[108] As I have noted, the remedies created by s. 18 are found in subsections (1) and (2). Under s. 1, it is apparent that privity is required. There can be no rescission without privity. The remedies under (2) are available where rescission is not possible for reasons that are consistent with the common law on when rescission is not available.

[109] In addition, s. 18(7) requires that, prior to commencing an action under the *Consumer Protection Act*, notice must be delivered to the person with whom the consumer contracted at the address set out in the agreement.

[110] Section 18(12) extends liability on a joint and several basis to joint wrongdoers after liability is found under s. 18(2). In other words, a consumer must first be entitled to a remedy under s. 18(2) before s. 18(12) can apply.

[111] Further, the plaintiff is incorrect when it says that s. 18(12) was not mentioned in any of the cases that concluded that privity is required. Section 18(12) was identified in *Hoy*.

[112] Section 17(3) does not assist the plaintiff. Section 17(1) does not create a civil cause of action; rather, it gives effect to the regulatory regime under which parties may be found guilty under s.116 of the *Act* of an offence if they engage in unfair practices regardless of any contractual relationship with consumers. Section 17(3) thus exempts advertisers, not from liability under s. 18(12), but from liability from an offence under s. 116.

[113] Nor do I find that the decision in *Arora* has overtaken the decision of the Divisional Court in *Richardson*. In *Arora*, in *obiter* (because the plaintiff had abandoned its claim under consumer protection legislation), the Court of Appeal stated that the *Consumer Protection Act* permits a consumer to claim against a manufacturer who engages in an "unfair practice," including deceptive representation, and that damages are an available remedy. "In certain cases where rescission is not available, remedies for an unfair practice include recovery of an amount by which payment under

the consumer agreement exceeds the value that the goods have to the consumer": *Arora*, at para. 109. The Court of Appeal also referred to the requirement to give notice in the *Consumer Protection Act*, but it did not refer to the fact that the notice had to be given "to the person with whom the consumer contracted." The Court of Appeal's decision does not consider the statutory scheme having regard to all of its elements, likely because it was making brief comments in *obiter*. The plaintiff has ascribed too much importance to *Arora*.

[114] The plaintiff also relies on decisions in *Rebuck v. Ford Motor Company*, 2018 ONSC 7405, *Drynan,* and *Kalra,* where the courts found that it was not settled law that a consumer agreement is required in order to bring a claim for unfair practices under the *Consumer Protection Act*. I note that *Rebuck* and *Kalra* were decided before the Divisional Court decision in *Richardson*.

[115] In *MacKinnon v. Pfizer Canada Inc.*, the court concluded that, "*Richardson* remains the governing Ontario authority on whether privity is required under the Ontario *CPA*," and noted that the Divisional Court was not bound by the lower-court decisions in *Rebuck* and *Kalra*: 2023 BCSC 2223, at para. 32. The court found that *Drynan*'s conclusion of privity was called into question by its reliance on *Rebuck* and *Kalra,* and its failure to consider whether it was bound by *Richardson.*

[116] To the extent *Drynan*, *Rebuck*, and *Kalra* have determined that privity is an unsettled issue in the context of s. 18 of the *Consumer Protection Act*, I respectfully disagree with the decisions in these cases.

[117] In my view, the line of cases beginning with *Singer*, recently reiterated in *Hoy*, and determined in a binding manner in *Richardson,* are the law in the province of Ontario.

[118] I adopt the words of Perell J. in *Palmer* ONSC, at para. 248, which are very similar to his words at para. 145(i) of *Marcinkiewicz*:

> [*Richardson*], which was affirmed by the Divisional Court, *Williams*, which was affirmed by the Divisional Court, and *Singer* are authority that consumers who do not have a contractual relationship with the supplier do not have a claim for unfair practices under Ontario's *Consumer Protection Act, 2001*. Until the above line of cases is expressly overturned by the Court of Appeal, they are binding decisions. I, therefore, cannot and do not follow the lower court decisions that assert that the point remains unsettled. While I agree with the Plaintiffs' argument that I can depart from *stare decisis* and reconsider "settled rulings" of higher courts when a new legal issue is raised; however, the proper interpretation of Ontario's *Consumer Protection Act, 2001* is not a new legal issue.

[119] In summary, I find that privity is required to seek damages under s. 18 of the *Consumer Protection Act*, until a higher court instructs otherwise.

Prince Edward Island

[120] I draw the same conclusion for Prince Edward Island, where the provisions mirror the legislation in Ontario.

Newfoundland and Labrador

[121] In the case of Newfoundland and Labrador, the plaintiff argues that an amendment to the legislation has removed the requirement of privity. The plaintiff argues that the case law that found that privity was required in Newfoundland and Labrador originated from *Singer*, where, at the time of argument, the prior version of the statute was in effect. The relevant provision at that time read:

> Where a consumer has entered into a consumer transaction with a supplier and has suffered damages as a result of an unfair trade practice or unconscionable act or practice, he or she may start an action in a court against the supplier.

[122] An amendment to the legislation now provides:

> Where a consumer has suffered damage as a result of an unfair business practice or unconscionable act or practice, he or she may start an action against a supplier.

[123] In an action under the current legislation, the court may declare the act or practice to be unfair or unconscionable, and may award damages for a loss suffered.

[124] "Supplier" is defined in the Act as "a person who, as a principal or agent, in the course of his or her business (i) offers or advertises the sale of goods or services to a consumer, (ii) engages in a consumer transaction with a consumer, or (iii) manufactures, imports, produces or assembles goods, and includes an assignee of the rights and obligations of a supplier."

[125] The defendants rely on s. 7(2) of the Act which provides that "an unfair business practice may occur, before, during or after a consumer transaction notwithstanding that the consumer transaction is not completed or a consumer has not suffered loss or damage." They also rely on s. 8(2) of the Act which provides that "an unconscionable act or practice may occur before, during or after a consumer transaction." According to the defendant, these provisions make privity a pre-requisite. They argue that the definition of supplier encompasses a manufacturer because it is possible for a manufacturer to be in privity with a consumer.

[126] I have some difficulty with this argument, especially at this stage of the proceedings. The legislative evolution is a particularly instructive component of the context of this provision: see generally *Merk v. International Association of Bridge, Structural, Ornamental and Reinforcing Iron Workers, Local 771*, 2005 SCC 70, [2005] 3 S.C.R. 425, where Binnie J. stated that the entire context includes the legislative history. Amendments made by the legislature in Newfoundland and Labrador specifically removed the reference to a consumer transaction in the operative provision in the legislation. It is also assumed that the legislature uses words carefully and deliberately so that the provision reflects its intended meaning. When the provision is viewed in the entire context, it is clear that meaning must be ascribed to the change.

[127] Moreover, the definition of supplier does not exclude those with whom a consumer has no privity. While ss. 7(2) and 8(2) reference a consumer transaction, it is not plain and obvious that they operate to limit liability to only those with whom the consumer has contracted, as opposed to

simply requiring that there must have been a contract with someone. Moreover, those provisions existed in the pre-amendment version of the statute when privity was clearly required.

[128] The case law that concludes privity is required in Newfoundland, such as *Hoy*, does not expressly address the amendment to the legislation. It appears that the amendment may not have been brought to the attention of the judges who determined the issue.

[129] I have not been directed to any appellate authority that is on point and binds me to conclude that the Newfoundland and Labrador Act requires privity.

[130] At this stage, I find that it is not plain and obvious, in view of the amendments to the statute, that privity is required.

[131] Accordingly, I conclude that privity is required to maintain an action for breach of consumer protection legislation in Ontario and Prince Edward Island.

VCCI

[132] The next issue that arises is whether the claim has been properly plead as against VCCI.

[133] This question raises the same issue I dealt with above in the context of implied warranties.

[134] I repeat my earlier conclusion with respect to those jurisdictions that require privity: to plead a viable claim against VCCI, the privity at issue must relate to the alleged unfair practices.

[135] In this case, VCCI has admitted that it made the false representations, and there is no motion to withdraw in front of me. I cannot conclude, in view of the admission, that it is plain and obvious that VCCI's privity with the class members does not relate in any way to the representations, when it has admitted it made them.

[136] VCCI argued that if it risked liability for the consumer protection legislation claims, so would a third-party lessor. I cannot accede to this argument. Presumably, a third-party lessor would not have admitted making the representations that VCCI did. This distinguishes VCCI's situation from a third-party lessor.

[137] Accordingly, the claim against VCCI is not bound to fail on the basis that its privity is unrelated to the claims that require privity.

[138] Moreover, in the provinces and territories where privity is not required, the pleading that VCCI made the misrepresentations, and the admission of the pleading in the statement of defence, leads me to conclude that, for the purposes of s. 5(1)(a), the claim against VCCI is not bound to fail.

Have the necessary facts been pleaded?

[139] This issue relates to whether reliance is required under certain consumer protection legislation. The defendants argue that the legislation in British Columbia, Alberta, Saskatchewan, and Newfoundland and Labrador (and perhaps PEI; it is not clear) require reliance.

[140] The plaintiff pleads reliance in the statement of claim, albeit in the section dealing with negligent misrepresentation, not consumer protection legislation. But the pleading is to be read generously, and the pleading of reliance is clearly found in it.

[141] The defendant's challenge to reliance is better understood in the context of the common issues, which is where I will address it.

Summary on s. 5(1)(a)

[142] In the result, the claims that have survived the s. 5(1)(a) analysis are:

a. Misrepresentation and deceit as against all defendants;

b. *Competition Act* claims, as against all defendants;

c. *CEPA* claim as against VWAG and Audi AG;

d. Consumer protection legislation claims:

i. As against VCCI only arising out of the statutes in Ontario and Prince Edward Island;

ii. As against all defendants arising out of the statutes in Newfoundland and Labrador, British Columbia, Alberta, Saskatchewan and Manitoba.

[143] The plaintiff is granted leave to particularize his conspiracy pleading, and afterwards I will determine whether the conspiracy claim shall be certified.

<u>Section 5(1)(b) – is there an identifiable class?</u>

[144] For this criterion to be satisfied, there must be a rational relationship between the class, the cause of action, and the common issues, and the class must not be unnecessarily broad or over-inclusive: *Pearson v. Inco Ltd., et al.*, 2006 CanLII 913, 78 O.R. (3d) 641, at para. 57 (ON CA).

[145] In determining whether there is an identifiable class, the court asks whether the plaintiff has defined the class by reference to objective criteria, such that a person can be identified to be a class member without reference to the merits of the action. The class must be bounded, and not of unlimited membership, or unnecessarily broad, and have some rational relationship with the common issues: *Hollick v. Toronto (City)*, 2001 SCC 68, [2001] 3 S.C.R. 158, at para. 17, *Cloud v. Canada (Attorney General)* (2004), 73 O.R. (3d) 401 (C.A.), at para. 45. The class definition needs to identify all those who may have a claim, will be bound by the result of the litigation, and are entitled to notice: *Bywater Toronto Transit Commission*, (1998) 43 O.R. (3d) 367 (Gen. Div.).

Defining the class is a technical, rather than substantive, challenge: *Waldman v. Thomson Reuters Corp.*, 2012 ONSC 1138, 99 C.P.R. (4th) 303, at para. 122.

[146] The defendant argues that the class is defined as certain groups of people, not sub-classes, and include both those who sold before the existence of the defeat device became known, and certain groups of excluded persons from the original class action, including those who leased through third party lessors, and those whose vehicles were not roadworthy.

[147] The defendant describes their argument under this criterion as follows:

> In order to certify a class proceeding relating to the alleged classes comprised of Excluded Persons, there must be some basis in fact that there exists two or more members of each [of] those proposed classes. As a result, in addition to the absence of: (a) viable causes of action asserted on behalf of those groups of persons; (b) some basis in fact that their claims could be determined in common (even within their own groups); and (c) any basis in fact that pursuing the idiosyncratic claims – to the extent they exist – of persons excluded from settlements is the preferable procedure; there is no evidence of a single person in any of those proposed classes pursuing a claim. The absence of any basis in fact for two or more persons in these proposed classes is fatal to certification of a class proceeding on their behalf.

[148] This description concentrates mostly on criteria for certification other than s. 5(1)(b). In fact, it is mostly on those other criteria that the defendants rely.

[149] In oral argument, the defendants somewhat clarified their position on class definition.

[150] The defendant argues that no material facts were pleaded in support of the claims of those whose vehicles were not roadworthy when the defeat device was discovered or those whose vehicles were sold prior to its discovery, particularly with respect to damages.

[151] This argument raises issues already determined by the Divisional Court and I do not consider it for that reason.

[152] With respect to those who leased their vehicles from third party lessors, the defendant argues that the owners of those vehicles were eligible for settlement. As a result, the vehicles leased by those class members were already the subject of compensation. The rights of class members in this grouping would be determined by their individual contracts with the lessor.

[153] The defendants direct me to a settlement agreement which demonstrates that the settlement excluded anyone who leased their vehicle from a third-party lessor. The definition section reveals that the issue is not as clear-cut as the defendants explained. For example, the agreement defines an “eligible lessee” and makes it clear that no person who holds a lease issued by a third-party lessor will be an eligible lessee. However, the owner of an eligible vehicle does not qualify as an “eligible owner” while the eligible vehicle is under lease to any third-party. It provides that in exceptional cases a third-party leasing company may make specific arrangements with VW such that, without cancelling the lease, the leasing company may be treated as an Eligible Owner.

[154] There may be merit to the defendants' argument about compensation being paid in respect of the vehicles leased from third-party lessors, but I have not been directed to evidence that allows me to reach that conclusion.

[155] The defendants argue that there has to be some evidence on which I can conclude that there are two or more people in each of these class groupings. This is an issue I recently addressed in *Longair v. Akumin Inc. et al.*, 2024 ONSC 3675, at paras. 196-198:

> [196] In *Keatley Surveying Ltd. v. Teranet Inc.*, 2014 ONSC 1677, at para. 84, the Divisional Court held that s. 5(1)(b) of the CPA does not require evidence of a desire among class members to pursue an action. It requires there is an identifiable class of two or more persons that would be represented by the representative plaintiff.
>
> [197] The Divisional Court went on in *Keatley* to identify reasons why requiring evidence from class members could be problematic, for example, in an employment case where class members may not wish to identify themselves due to fear of retaliation from an employer: paras. 86-90. There is no need for evidence from other class members where the existence of the class is not dependent on personal or subjective criteria, as is the case here.
>
> [198] Moreover, I note that the legislation requires an identifiable class, not an identified class. An identifiable class is one that meets the requirements I reviewed above, including where membership is defined objectively, and without regard to the merits of the claim. We do not need to know the names of the class members, or any of them; we need to be sure we can identify whether someone falls into the class or not such that they are bound by the result of the proceeding (subject to opt-out rights). The objective nature of the class definition proposed provides some basis in fact to conclude that at least two class members can be (not are) identified.

[156] *Longair* was different because in that case, the issue was the existence of a class of noteholders (to which the representative plaintiff did not belong), and there was evidence that notes had been traded.

[157] The plaintiff argues that the fact that a number of the groupings were excluded from the original settlement is some evidence that they exist. The defendants deny that the settlement agreement can serve as evidence of the existence of groups of putative class members.

[158] I agree with the defendants that excluding a group of people from a settlement does not necessarily prove that they exist. But it is apparent from this settlement agreement that certain classes of people were excluded because they likely exist. For example, common experience tells us it is likely that some of the TDI vehicles were totalled in accidents before the existence of the defeat device became known. I can take judicial notice of the fact that car accidents occur regularly and involve all sorts of vehicles, some of which can be expected to be TDI vehicles. Accordingly, for purposes of this case, I am prepared to conclude that there is some evidence of the existence of the proposed classes who were excluded from the settlement. The evidence of Mr. MacKinnon

also provides some basis in fact to conclude that there are people who returned their vehicles to the dealership on expiry of their leases before the existence of the defeat device was made known.

[159] I conclude that this criterion is made out.

Section 5(1)(c) - Are there issues in common?

[160] Common issues are defined in the *CPA* as "common but not necessarily identical issues of fact, or common but not necessarily identical issues of law that arise from common but not necessarily identical facts."

[161] To satisfy this requirement of the certification test, the plaintiffs must establish that there is some basis in fact to conclude that: (i) the proposed common issues actually exist; and (ii) the proposed common issues can be answered in common across the entire class and will significantly advance the claims of the entire class: *Simpson v. Facebook*, 2021 ONSC 968, 469 D.L.R. (4th) 699, at para. 43, *Pioneer Corp. v. Godfrey*, 2019 SCC 42, [2019] 3 S.C.R. 295, at para. 105, *Batten v. Boehringer Ingelheim (Canada) Ltd.*, 2017 ONSC 53, at para. 162, aff'd 2017 ONSC 6098 (Div. Ct.), leave to appeal refused, M48535 (28 February, 2018) (Ont. C.A.).

[162] When considering whether a claim raises a common issue, the court asks whether it is necessary to resolve the issue in order to resolve each class member's claim, and whether the issue is a substantial ingredient of each of the class members' claims. The issue is a substantial ingredient of each claim if its resolution will advance the case or move the litigation forward, and if it is capable of extrapolation to all class members: *Vivendi Canada Inc. v. Dell'Aniello*, 2014 SCC 1, [2014] 1 S.C.R. 3, at para. 46.

[163] I turn to consider the common issues that the plaintiff has proposed, except for those related to the claims which I have found do not pass the s. 5(1)(a) hurdle.

Common Issues that are Unnecessary to Consider

[164] The plaintiff decided against pursuing common issue (m), relating to negligence.[1] Common issues (h), (n), and (r) relate to breach of express and implied warranty, and unjust enrichment. I need not consider these claims because I found that they fail the s. 5(1)(a) criterion.

[165] Common issues (f) and (g) relate to conspiracy. Since I gave the plaintiff leave to amend his pleading on this issue, the common issues relating to conspiracy fall to be considered at a future date.

[1] I adopt the lettering used in the plaintiff's list of common issues, found in Schedule 3 of its certification factum.

Proposed Factual Common Issues

[166] The plaintiff proposes the following common factual issues:

a. What is the defeat device? What does the defeat device do?

b. Do some or all of the vehicles contain the defeat device? If so, which ones?

c. Did the defendants make some or all of the representations? If so, which representations, when and how?

d. Did the defendants misrepresent to the Canadian government that the vehicles met environmental emissions standards?

e. Was the importation of the vehicles into Canada unlawful, in contravention of the *CEPA*?

[167] The defendants argue that there is no basis in fact for the existence of these issues or their commonality as against the Canadian defendants. They also argue that there is no dispute about these facts, which were admitted by VWAG in its plea agreement. Under this agreement, it specifically agreed not to contest the admissibility of, or contradict, the facts set out in the plea agreement in any proceeding.

[168] The plaintiff relies on *Fulawka v. Bank of Nova Scotia*, 2012 ONCA 443, 111 O.R. (3d) 346, at paras. 86-87, where Winkler C.J. held that an admission in the absence of a certification order fails to bind the defendant *vis-à-vis* the proposed class in any meaningful way.

[169] The factual matters set out above must be resolved in any trial on the merits in this action.

[170] However, in view of the plea agreement, there is no practical utility in certifying questions (a) and (b) above. That information is ascertainable by reference to the plea agreement and VWAG cannot contest it. Practically speaking, no defendant can contest the information from the plea agreement. Certifying these issues would not meaningfully advance the litigation.

[171] Proposed common issue (c), regarding which defendants made representations and their content is, however, a common issue. The “some basis in fact” for common issue (c) is that the defendants have admitted making the representations in their statement of defence.

[172] Proposed common issues (d) and (e) relate to representations to the Canadian government about the TDI vehicles meeting environmental standards and breach of *CEPA*. The record contains an agreed statement of facts entered into as part of VWAG and Audi AG’s plea agreement with Environment Canada. It explains that Canadian and American environmental regulations were harmonized, and a company could rely on a certificate of conformity from the American EPA as evidence in Canada of the vehicle’s compliance with NOx standards. According to the agreed statement of facts, VWAG and Audi AG were the entities responsible for the importation of TDI

vehicles into Canada, in effect piggybacking on the misrepresentations made to American authorities.

[173] There is no basis in fact that I can identify to tie the importation of the TDI vehicles into Canada to any entity other than VWAG and Audi AG, neither of which can realistically contest the admissions that they have made. The *CEPA* cause of action is only pleaded as against VWAG and Audi AG. There is no practical utility to certifying proposed common issue (d) because it will not meaningfully advance the litigation.

[174] Common issue (e) was argued by the parties as part of the factual common issues. However, the answer to the question requires drawing a legal conclusion to establish a cause of action under s. 40 of the CEPA. It should be certified because it will materially advance the class's claims under the CEPA and can be decided in common.

Proposed Common Issues regarding the Competition Act, Negligent Misrepresentation, Fraudulent Misrepresentation and Consumer Protection Legislation

[175] The plaintiff proposes the following common issues:

> (i) Did the defendants contravene Part VI of the *Competition Act*?
>
> (j) Did the defendants know that the representations were false when they were made to the plaintiff and other class members?
>
> (k) Were the defendants reckless as to whether the representations were false when they were made to the plaintiff and other class members?
>
> (l) Were the defendants reckless as to whether the representations were false when they were made to the plaintiff and other class members? If so,
>
> > (i) Did the defendants owe a duty of care to the plaintiff and other class members?
> >
> > (ii) If so, did the defendants breach their duty? How?
> >
> > (iii) In the circumstances of this case, can the reliance of each plaintiff and other class members on the representations be inferred?
>
> (o) Does the *Consumer Protection Act* or the equivalent consumer protection statutes apply to the defendants? If so, which defendants?
>
> (p) Does the *Consumer Protection Act*, or the equivalent consumer protection statutes, apply to the claims of the plaintiff and all other class members?

(q) Did the defendants, or any of them, make any false, misleading or deceptive representations within the meaning of the *Consumer Protection Act*, or the equivalent consumer protection statutes? If so:

(i) Were any of such representations unconscionable?

(ii) Are the class members, or any of them, entitled to damages?

[176] I now turn to the defendants' position on the proposed *Competition Act* and negligent misrepresentation common issues. The defendants argue that there is some basis in fact that the issues exist with respect to VW Canada and Audi Canada, but not with respect to any other defendants. The defendants also argue that the issues cannot be determined in common across the proposed class for all defendants.

[177] With respect to consumer protection legislation, the parties agree that there is some basis in fact for these common issues as it relates to Manitoba, except for VCCI. However, in light of VCCI's admission that it made the misrepresentations, I find there is some basis in fact to establish that these issues are common to all defendants under the Manitoba statute.

[178] With respect to Ontario, PEI, Newfoundland and Labrador, British Columbia, Alberta, and Saskatchewan, the defendants argue that there is no basis in fact for the existence of these proposed common issues.

[179] With respect to all provinces, the defendants argue that the consumer protection legislation issues cannot be determined in common across the proposed class for all defendants.

Reliance

[180] One common objection the defendants raise is that negligent misrepresentation, fraudulent misrepresentation, consumer protection legislation, and the *Competition Act* claims all require reliance, which cannot be determined in common.

Reliance – Negligent and Fraudulent Misrepresentation

[181] There is no dispute that reliance is a required element to establish negligent or fraudulent misrepresentation: *Peters v. SNC-Lavalin Group Inc.,* 2021 ONSC 5021, at para. 232, aff'd 2023 ONCA 360, 166 O.R. (3d) 756.

Reliance – Competition Act

[182] There is no dispute that, to establish a claim under s. 36 of the *Competition Act*, a claimant must establish a causal link between the misrepresentations and the alleged injury suffered. In the defendants' view, in cases involving what they describe as a non-core misrepresentation to the public, the causal link at issue must be detrimental reliance.

[183] Section 36(1) of the *Competition Act* provides that any person "who has suffered loss or damage as a result of" conduct contrary to, among other things, s. 52 of that Act, may sue for and recover "an amount equal to the loss of damage proved to have been suffered by him".

[184] In *Hoy*, at para. 113, Perell J. found that a claim under the *Competition Act* requires that the class members suffer loss as a result of the defendant's conduct. This requires the plaintiff to plead and prove that the misrepresentation was relied on to the class member's detriment, that is, that the class member suffered damages arising from the misrepresentation.

[185] In *Matoni v. CBS Interactive Multimedia*, 2008 CanLII 1539 (ON SC), at para. 40, Hoy J. found that in order to obtain damages under s. 36(1), a causal connection between the alleged breach of s. 52 and the damages claimed under s. 36 must be proven. Strathy J. reached the same conclusion in *Singer*, at para. 107-108, holding:

> Section 52(1.1) only removes the requirement of proving reliance for the purpose of establishing the contravention of s. 52(1). The separate cause of action, created by s. 36 in Part IV of the *Competition Act*, contains its own requirement that the plaintiff must have suffered loss or damage '*as a result*' of the defendant's conduct contrary to Part VI. It is not enough to plead the conclusory statement that the plaintiff suffered damages as a result of the defendant's conduct. The plaintiff must plead a causal connection between the breach of the statute and his damages. […] this can only be done by pleading that the misrepresentation required him to do something – i.e., that he relied on it to his detriment.

[186] In *Lewis v. Uber*, 2023 ONSC 6190, at para. 74, I agreed with Perell J. that reliance is a requisite for a claim under the *Competition Act*.

[187] The parties have satisfied me that I characterized the test too strongly in *Lewis*. It is not reliance that is required to establish a claim under s. 36 of the *Competition Act*, but a causal connection. In most cases, however, that causal connection will be reliance.

[188] There are some cases that have found a causal connection exists where the misrepresentation at issue renders the product useless. For example, in *Drynan*, there was a core representation at issue that a product was "proven," scientifically or clinically, to help produce certain physical effects; in reality, it was not proven to do any such thing. In *Krishnan v. Jamieson Laboratories Inc.*, 2021 BCSC 1396, 60 B.C.L.R. (6th) 369, at issue was a health product that claimed to be glucosamine sulphate, but the product in fact did not contain glucosamine sulphate at all.

[189] In *Krishnan*, Ward J. certified a common issue regarding a *Competition Act* claim based on the causation theory that the glucosamine sulphate products should not have been distributed at all, because they did not comply with certain health regulations.

[190] In *Vallance v. DHL Express*, 2024 BCSC 140, Matthews J. found that the causation element of a *Competition Act* claim can be advanced through a pleading of detrimental reliance or

through a pleading that the defendants' misleading representations caused the plaintiff to spend more than they would have had the representation not been made.

[191] The plaintiff advances similar causation theories to *Krishnan* and *Vallance* in this case.

[192] I conclude that, for the *Competition Act* claims, a causal connection is required, which will often be reliance, but not always.

Reliance – Consumer Protection Legislation

[193] The defendants argue that reliance is a constituent element for claims under the consumer protection legislation of PEI, British Columbia, Alberta, Saskatchewan, and Newfoundland and Labrador.

[194] On reviewing the provisions of those Acts, I note:

a. The Act in PEI requires that an unfair practice induced the consumer to enter into the agreement;

b. The Acts in Newfoundland and Labrador, British Columbia, Alberta, and Saskatchewan use different words to import a causation requirement (i.e., "suffered damage as a result of an unfair business practice," "suffered damage or loss due to an unfair practice," "suffered a loss as a result of a contravention of this Act.")

[195] Neither Ontario nor Manitoba require a causative element in their consumer protection legislation.

Analysis – Reliance and Causation

[196] To the extent reliance is an element of the claims, it is not amenable to class-wide treatment. As Perell J. held in *Peters*, at paras. 232-235, reliance is the problematic constituent element of misrepresentation from a class action perspective. It is idiosyncratic, raising a question of fact as to the plaintiff's state of mind.

[197] In *Ramdath v. George Brown College of Applied Arts and Technology*, 2015 ONCA 921, 392 D.L.R. (4th) 490, at para. 88, the Court of Appeal found that reliance will not normally be a common issue in a class action, as it will depend on the individual history of each class member.

[198] I accept that there are times when inferred reliance may be amenable to class-wide determination. However, in this case, the plaintiff's proposed common issue of inferred reliance cannot be certified. Inferred reliance makes sense when dealing with a core representation. In this case, there is no core representation. The TDI vehicles were represented to have a number of features, most of which they actually had. Unlike a product bought to obtain glucosamine sulphate that has no glucosamine sulphate, the TDI vehicles were not worthless; they were worth less than originally thought because they did not have one particular feature, that is, the low NOx emissions.

[199] The plaintiff argues that the Divisional Court's decision, which includes the statement that "all [class members] desired to buy clean emissions vehicles" means that there is a uniform representation with a common import. In my view, read as a whole and in context, the Divisional Court was not straying into the question of whether there is a common issue of inferred reliance because all class members desired to buy clean emissions vehicles. That was not the focus of its reasons, or of the appeal before it. Certainly nothing in the Divisional Court's order suggests that it was making a finding about the proposed common issue involving inferred reliance.

[200] In my view, proposed common issue (l)(iii) cannot be certified because it cannot be determined in common.

[201] There is some basis in fact for the plaintiff's causation theory that the misrepresentations made in breach of *CEPA* caused the class members to suffer loss because the vehicles should not have been available for purchase in Canada, and they overpaid for the vehicles. Like *Krishnan*, I am satisfied that these issues can be determined in common.

[202] However, with respect to the consumer protection legislation, to the extent there is an inducement or causation element in the provincial legislation, in my view, it suffers from the same problem as the negligent misrepresentation and fraudulent misrepresentation claims. Under the consumer protection legislation, the focus is on the consumer, and not on interactions between the defendants and the Canadian government. The question of whether the vehicles should have been available for sale in Canada does not arise.

[203] The question is whether the individual consumer was induced to purchase or lease the TDI vehicle by the misrepresentations alleged, or whether the misrepresentations caused them to pay more for their vehicle than they otherwise would have.

[204] That question is the equivalent of inferred reliance which, for the reasons I have already explained, cannot be determined in common where, as here, the representation in question is not a core representation.

[205] As a result, I would not certify the common issue relating to damages under the provincial consumer protection legislation in Prince Edward Island, British Columbia, Alberta, Saskatchewan, and Newfoundland and Labrador.

[206] To the extent the defendants argue that there is no basis in fact to make out the other common issues relating to these claims, I recall again the admissions made with respect to the representations. The admissions amount to some basis in fact grounding the certification of these claims.

Proposed Common Issues relating to Damages

[207] The plaintiff proposes the following common issues relating to damages:

(s) If one or more of the above common issues are answered affirmatively, can the amount of damages payable by the defendants be determined on an aggregate basis? If so, in what amount and who should pay such damages to the class?

(t) Should punitive and/or aggravated damages be awarded against the defendants?

(u) Are the defendants liable on a restitutionary basis:

(i) to account to any of the plaintiff and class members on a restitutionary basis, for any part of the proceeds of the sale of the vehicles (disgorgement)? If so, in what amount and for whose benefit is such an accounting to be made?

(ii) alternatively, should a constructive trust be imposed on any part of the proceeds of the sale of the vehicles for the benefit of the plaintiff and class members, and, if so, in what amount, and for whom are such proceeds held?

[208] Common issue (s) falls under the scope of the Divisional Court's decision. Having found that there is a plausible methodology for measuring damages on a class-wide basis, common issue (s) must be certified.

[209] The defendants argue that there is no basis in fact for common issue (t). They rely on the decision of the Supreme Court of Canada in *Whiten v. Pilot*, 2002 SCC 18, [2002] 1 S.C.R. 595. At para. 123, the Court held that punitive damages must be proportionate, after taking into account the other civil and criminal penalties which a defendant has or is likely to suffer for the same misconduct.

[210] The defendants note the Ontario Court of Justice decision *Volkswagen AG*, where, at paras. 73-74, the court found that the proposed sentence, including the proposed fine of $196,500,000, was "sufficient in achieving the required deterrence and denunciation", and "provides an adequate degree of deterrence and denunciation in seeking to protect the environment and the health of Canadians." In addition, as I have noted, the defendants have settled other class actions relating to the defeat device, including in Ontario.

[211] In my view, there is some basis in fact for the proposed common issue relating to punitive and aggravated damages. First, the fine was ordered against Volkswagen AG. If other defendants are found liable in this action, there is a live question as to whether VWAG's fine can be considered denunciation of their conduct. Second, there is ample evidence in the record of VWAG's wrongdoing. Whether the decision of the Ontario Court of Justice is conclusive with respect to punitive damages in an action brought by these class members is one that ought to be argued, and any defence based on collateral attack of the criminal decision, or adequate denunciation, can be made on a full record. In my view, that is not a question that ought to be conclusively determined at the certification stage in the face of a record demonstrating significant wrongdoing by VWAG.

[212] Finally, common issue (u) relates to restitution, either through disgorgement or constructive trust.

[213] The disgorgement damages arising from a negligent design was also proposed as a common issue in *Carter*. Perell J. held in *Carter*, at para. 170, that this was not a certifiable common issue because "the election to choose disgorgement as an alternative remedy is not a common issue and is an idiosyncratic matter for individual class members." I agree and would not certify this proposed common issue because it cannot be determined in common.

[214] There is no challenge mounted to the constructive trust common issue, unless none of the common issues relating to the alleged claims can be certified. At the same time, there is no real argument from the plaintiff about why there is a basis in fact for certifying a constructive trust issue.

[215] Having received no argument on the constructive trust question, I conclude that it ought not to be certified. I see no basis in fact to conclude that a common issue regarding a constructive trust remedy exists, but I do see risk of unnecessarily complicating the proceeding by bringing in trust concepts into what is really a case for damages.

[216] I would not certify proposed common issue (u).

Conclusion on Common Issues

[217] Based on the foregoing analysis, I certify the following common issues:

a. Did the defendants make some or all the representations? If so, which representations, when, and how?

b. Was the importation of the vehicles into Canada unlawful, in contravention of the *CEPA*?

c. Did the defendants contravene Part VI of the *Competition Act*?

d. Did the defendants know that the representations were false when they were made to the plaintiff and other class members?

e. Were the defendants reckless as to whether the representations were false when they were made to the plaintiff and other class members? If so,

    i. Did the defendants owe a duty of care to the plaintiff and other class members?

    ii. If so, did the defendants breach their duty? How?

f. Does the *Consumer Protection Act*, or the equivalent consumer protection statutes, apply to the defendants? If so, which defendants?

g. Does the *Consumer Protection Act*, or the equivalent consumer protection statutes, apply to the claims of the plaintiff and all other class members?

h. Did the defendants, or any of them, make any false, misleading or deceptive representations within the meaning of the *Consumer Protection Act*, or the equivalent consumer protection statutes? If so:

    i. Were any of such representations unconscionable?

    ii. Are the class members, or any of them, entitled to damages under the statutes of Ontario or Manitoba?

i. If one or more of the above common issues are answered affirmatively, can the amount of damages payable by the defendants be determined on an aggregate basis? If so, in what amount and who should pay such damages to the class?

j. Should punitive and/or aggravated damages be awarded against the defendants?

Section 5(1)(d) – Preferable Procedure

[218] In order to determine whether a class proceeding is the preferable procedure, the court must consider the importance of the common issues in relation to the claims as a whole: *Hollick*, at para. 30.

[219] In *Bennett v. Lenovo (Canada) Inc.*, 2017 ONSC 5853, at paras. 84, 86, Perell J. summarized the criteria relevant to a preferable procedure analysis:

a. whether a class proceeding would be better than other methods, such as joinder, test cases, or other means of resolving the dispute;

b. whether a class proceeding represents a fair, efficient, and manageable procedure that is preferable to any alternative method of resolving the claims;

c. whether a class proceeding is the preferable procedure is judged by reference to the purposes of access to justice, behaviour modification, and judicial economy, and by taking into account the importance of the common issues to the claims as a whole, including the individual issues.

[220] This proceeding pre-dates the recent amendments to the *CPA* such that the criteria in s. 5(1.1) of the *CPA* need not be considered.

[221] The defendants argue that a class proceeding is not the preferable procedure. They argue that certification of the claim will not meet the goals of access to justice or judicial economy, largely repeating earlier arguments that causes of action are doomed to fail, or claims turn on idiosyncratic issues of reliance. They also argue that the proceeding will not accomplish the goal of behaviour modification because there is no further need to discourage the behaviour that has already been admitted and discouraged through fines and settlements.

[222] I agree that behaviour modification is not a factor in favour of certifying this claim. The defendants, at least considered as a related group, have suffered the consequences of their fraudulent behaviour, through fines, guilty pleas, public investigations, settlements, and likely diminished reputation.

[223] But the class also seeks access to justice. The real question is whether this class proceeding is the preferable procedure to advance their claims, in view of the individual issues.

[224] In my view, it is. There is no impediment to advancing the *CEPA* claim, which does not raise individual issues.

[225] Similarly, the *Competition Act* claim does not raise individual issues, given the alternate causation theory the plaintiff advances.

[226] Once those claims are live, much of the common law misrepresentation and consumer protection legislation claims engage the same factual background. The same conclusions that will need to be drawn in the *CEPA* and *Competition Act* claims will also inform conclusions that are required for the common law misrepresentation claims and the consumer protection legislation claims. The individual issues regarding reliance and causation will be the subject of individual trials, if necessary, at the conclusion of the common issues trial.

[227] There is no other method proposed, or practically available, to advance this class's claims. There is nothing unfair or unworkable about a class action to resolve the common issues I have identified as capable of certification. A class proceeding would advance access to justice for the class.

[228] I therefore conclude that a class proceeding with the narrowed scope set out in these reasons, is the preferable procedure in this case.

Section 5(1)(e) – Representative Plaintiff

[229] To be an adequate representative plaintiff, a proposed plaintiff must be able to fairly and adequately represent the class, have developed a plan for proceeding, and not have a conflict with the class. She must be prepared and able to vigorously represent the interests of the class: *Rosen v. BMO Nesbitt Burns Inc.*, 2013 ONSC 2144, 9 C.C.E.L. (4th) 315, at para. 73.

[230] As I have noted, the defendants do not take issue with this criterion.

[231] The proposed representative plaintiff meets all the criteria set out above. His affidavit reveals that he understands his role and obligations as representative plaintiff. No one has raised any potential conflict between the proposed representative plaintiff and the class. I see none.

[232] Accordingly, I am satisfied that this criterion is met.

Costs

[233] The parties have agreed that the successful party on this motion shall be entitled to $60,000 in costs.

[234] Although not all of his claims survived, the plaintiff is the most successful party on this motion, and shall receive his costs of $60,000 all-inclusive, within thirty days.

[235] The parties shall consult with each other to prepare a draft order, approved as to form and content, for my signature.

J.T. Akbarali J.

Date: September 9, 2024