

Court File No.: CV-16-550271  
-COCP

**ONTARIO  
SUPERIOR COURT OF JUSTICE**

BETWEEN:

**YOGESH KALRA**

Plaintiff

- and -

**MERCEDES-BENZ CANADA INC., DAIMLER AG, MERCEDES-BENZ USA, LLC and  
MERCEDES-BENZ FINANCIAL SERVICES CANADA CORPORATION**

Defendants

Proceeding Under the *Class Proceedings Act, 1992*

**STATEMENT OF CLAIM**

TO THE DEFENDANT

A LEGAL PROCEEDING HAS BEEN COMMENCED AGAINST YOU by the plaintiff. The claim made against you is set out in the following pages.

IF YOU WISH TO DEFEND THIS PROCEEDING, you or an Ontario lawyer acting for you must prepare a statement of defence in Form 18A prescribed by the *Rules of Civil Procedure*, serve it on the plaintiff's lawyer or, where the plaintiff does not have a lawyer, serve it on the plaintiff, and file it, with proof of service, in this court office, WITHIN TWENTY DAYS after this statement of claim is served on you, if you are served in Ontario.

If you are served in another province or territory of Canada or in the United States of America, the period for serving and filing your statement of defence is forty days. If you are served outside Canada and the United States of America, the period is sixty days.

Instead of serving and filing a statement of defence, you may serve and file a notice of intent to defend in Form 18B prescribed by the *Rules of Civil Procedure*. This will entitle you to ten more days within which to serve and file your statement of defence.

IF YOU FAIL TO DEFEND THIS PROCEEDING, JUDGMENT MAY BE GIVEN AGAINST YOU IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU. IF YOU WISH TO DEFEND THIS PROCEEDING BUT ARE UNABLE TO PAY LEGAL FEES, LEGAL AID MAY BE AVAILABLE TO YOU BY CONTACTING A LOCAL LEGAL AID OFFICE.

IF YOU PAY THE PLAINTIFF'S CLAIM, and \$» for costs, within the time for serving and filing your statement of defence, you may move to have this proceeding dismissed by the court. If you believe the amount claimed for costs is excessive, you may pay the plaintiff's claim and \$400.00 for costs and have the costs assessed by the court.

TAKE NOTICE: THIS ACTION WILL AUTOMATICALLY BE DISMISSED if it has not been set down for trial or terminated by any means within five years after the action was commenced unless otherwise ordered by the court.

Date: April 5, 2016

Issued by Ashley Miller  
Local registrar

Address of court office 393 University Avenue  
10<sup>th</sup> Floor  
Toronto, ON M5G 1E6

TO: **MERCEDES-BENZ CANADA INC.**  
98 Vanderhoof avenue  
Toronto ON M4G 4C9

**DAIMLER AG**  
Corporate Headquarters  
Mercedesstr. 137  
70327 Stuttgart  
Germany

**MERCEDES-BENZ USA, LLC**  
303 Perimeter Center Mark, Suite 202  
Atlanta, Georgia 30346

c/o The Corporation  
Trust Company, Corporation Trust Center  
1209 Orange Street  
Wilmington, Delaware 19801

**MERCEDES-BENZ FINANCIAL SERVICES CANADA CORPORATION**  
2680 Matheson Boulevard East, Suite 500  
Mississauga ON L4W 0A5

## CLAIM

1. In this Statement of Claim, in addition to the terms that are defined elsewhere herein, the following terms have the following meanings:

- (a) **"Daimler AG"** means Daimler Aktiengesellschaft;
- (b) **"Mercedes Canada"** means Mercedes-Benz Canada Inc.;
- (c) **"Auxiliary Emissions Control Device"** or **"AECD"** means any element of design in a vehicle that senses temperature, vehicle speed, engine RPM, transmission gear, manifold vacuum or any other parameter for the purpose of activating, modulating, delaying or deactivating the operation of any part of an emissions control system;
- (d) **"CEPA"** means the *Canadian Environmental Protection Act 1999*, S.C. 1999, c. 33, as amended;
- (e) **"CFR"** means the Code of Federal Regulations of the United States, as amended;
- (f) **"CJA"** means the *Courts of Justice Act*, R.S.O. 1990, c. C-43, as amended;
- (g) **"Class"** or **"Class Members"** means all persons in Canada, except for Excluded Persons, who own, owned, lease or leased one of the Vehicles;
- (h) **"Competition Act"** means the *Competition Act*, R.S.C. 1985, c. C-34;
- (i) **"Consumer Protection Act"** means the *Consumer Protection Act, 2002*, S.O. 2002, c. 30, Sched. A;
- (j) **"CPA"** means the *Class Proceedings Act, 1992*, S.O. 1992, c. 6, as amended;
- (k) **"Defeat Device"** means an AECD that reduces the effectiveness of the emissions control system under conditions that may reasonably be expected to be encountered in normal vehicle operation and use, unless:

- (i) those conditions are substantially included in the emissions test procedures of the United States or Canadian governments;
  - (ii) it is needed to protect the vehicle against damage or accident; and,
  - (iii) its use does not go beyond the requirements of engine starting.
- (l) **"Defendants"** means Mercedes-Benz Canada Inc., Daimler AG, Mercedes-Benz USA, LLC and Mercedes-Benz Financial Services Canada Corporation;
- (m) **"Emissions Standards"** means the regulations on vehicle and engine emissions set out in Title 40, chapter I, subchapter C, part 86 of the CFR, as well as those made under CEPA in the *On-Road Vehicle and Engine Emission Regulations* SOR/2003-2, as amended;
- (n) **"EPA"** means the United States Environmental Protection Agency;
- (o) **"EP Act"** means the *Environmental Protection Act*, R.S.O., 1990, c. E. 19 as amended including O. Reg. 361/98
- (p) **"EPA Certificate"** means a certificate of conformity to U.S. federal standards issued by the EPA under Title 40, chapter I, subchapter C, part 86 of the CFR;
- (q) **"Equivalent Consumer Protection Statutes"** means the *Business Practices and Consumer Protection Act*, S.B.C. 2004, c.2, the *Fair Trading Act*, R.S.A. 2000, c. F-2, the *Consumer Protection and Business Practices Act* S.S. 2013, c. C-30.2, the *Business Practices Act*, C.C.S.M., c. B120, the *Consumer Protection Act*, C.Q.L.R., c. P-40.1 and the *Consumer Protection and Business Practices Act* S.N.L. 2009, c. C-31.1, as amended;
- (r) **"Excluded Persons"** means:
- (i) the Defendants and their officers and directors;
  - (ii) the authorized motor vehicle dealers of the Defendants and the officers and directors of those dealers; and,

- (iii) the heirs, successors and assigns of the persons described in subparagraphs (i) and (ii);
- (s) "**Kalra**" means Yogesh Kalra;
- (t) "**Mercedes USA**" means Mercedes-Benz USA LLC;
- (u) "**NOx**" means nitrogen oxides;
- (v) "**Representations**" means the representations and omissions made by the Defendants described in paragraph 41;
- (w) "**Vehicles**" means the following diesel-powered Mercedes BlueTEC vehicles: ML320, ML350, GL320, E320, E250, S350, R320, R350, E Class, GL Class, ML Class, R Class, S Class, GLK Class, GLE Class and Sprinter of any and all years.

## **RELIEF SOUGHT**

- 2. The Plaintiff, on his own behalf and on behalf of all Class Members, seeks:
  - (a) an order certifying this action as a class proceeding and appointing the Plaintiff as the representative plaintiff;
  - (b) a declaration that each of the Defendants misrepresented the characteristics of the Vehicles intentionally or negligently;
  - (c) a declaration that the Defendants breached the express and implied warranties in relation to the Vehicles;
  - (d) a declaration that the Defendants violated CEPA by importing the Vehicles into Canada;
  - (e) a declaration that the Defendants violated Part VI of the Competition Act;
  - (f) a declaration that the Defendants engaged in unfair practices contrary to Part III of the Consumer Protection Act and the equivalent provisions in the Equivalent Consumer Protection Statutes;

- (g) declarations that it is not in the interests of justice to require notice be given pursuant to s. 18(15) of the Consumer Protection Act (and any equivalent provisions of the Equivalent Consumer Protection Statutes) and waiving any such notice provisions;
- (h) an order for the rescission of the purchase of the Vehicles as well as the rescission of any financing, lease or other agreements with any of the Defendants related to the Vehicles;
- (i) statutory damages pursuant to CEPA, the Competition Act, the Consumer Protection Act and the Equivalent Consumer Protection Statutes in an amount to be determined by this Honourable Court;
- (j) a declaration that each of the Defendants were negligent in the engineering, design, development, research, manufacture, regulatory compliance, marketing and distribution of the Vehicles;
- (k) an order for restitution flowing from the Defendants' unjust enrichment;
- (l) general and special damages in the amount of \$500,000,000;
- (m) punitive damages and/or aggravated damages in the amount of \$100,000,000;
- (n) a reference to decide any issues not decided at the trial of the common issues;
- (o) prejudgment and post judgment interest pursuant to the CJA;
- (p) costs of the prosecution of this proceeding pursuant to s. 40 of the CEPA;
- (q) costs of the investigation and prosecution of this proceeding pursuant to s. 36 of the Competition Act;
- (r) costs of this action pursuant to the CPA, alternatively, on a full or substantial indemnity basis plus the cost of administration and notice pursuant to s. 26(9) of the CPA plus applicable taxes; and

(s) such further and other relief as to this Honourable Court seems just.

## **OVERVIEW**

3. The Defendants design, manufacture, distribute and market diesel automobiles, which contain a type of engine known as "BlueTEC". The Defendants aggressively market vehicles containing BlueTEC engines as being "clean", "green" and "eco-friendly" while delivering superior performance and fuel efficiency. These vehicles occupy a large portion of the luxury segment of the Canadian diesel auto market.

4. In the wake of what is commonly referred to as 'dieselgate', involving the alleged use of Defeat Devices in Volkswagen, Audi and Porsche brand diesel vehicles, various independent and government agencies began scrutinizing the emissions of other manufacturers' diesel vehicles, including those produced by the Defendants.

5. Such scrutiny demonstrated that not only do BlueTEC engines emit significantly higher levels of dangerous pollutants than is permissible under North American law, but the efficacy of BlueTEC emissions reduction technology is markedly reduced in weather conditions colder than 10 degrees Celsius. Representatives of Daimler AG have publically admitted the truth of these facts, at least with regards to its C Class BlueTEC vehicles.

6. In Canada, where it is colder than 10 degrees for extensive portions of the year, BlueTEC engines fail to perform their emissions cleaning functions and are, as a result, substantially unsuitable for use in this country in their current form.

7. The Defendants promoted the Vehicles to the Canadian public as if they represent a 'greener' alternative to gasoline-powered vehicles with a "reduced impact on the environment". This marketing was misleading and untrue. The Vehicles emit NOx, a dangerous and harmful chemical compound, in amounts that exceed legal levels when being operated in the ordinary course, a shortcoming which is exacerbated in colder conditions.

## **THE PARTIES**

8. Kalra resides in Mississauga, Ontario. As of February 26, 2016, he owned one of the Vehicles, namely, a 2009 Mercedes BlueTEC R320.

9. Daimler AG is a German car manufacturer headquartered in Stuttgart, Germany. Daimler AG and its wholly owned subsidiaries are responsible for the engineering, design, development, research, manufacture, regulatory compliance, marketing and distribution of the Vehicles.

10. Mercedes Canada is a Canadian federally incorporated company, directly or indirectly owned and controlled by Daimler AG, with its head office in Toronto, Ontario. Mercedes Canada is the sole distributor of the Mercedes-branded Vehicles in Canada. Mercedes Canada does not manufacture any automobiles in Canada, but is involved with, has responsibilities for and provides directions for the engineering, design, development, research, regulatory compliance, marketing and distribution of the Vehicles in or for Canada.

11. Mercedes-Benz Financial Services Canada Corporation is a Nova Scotia incorporated company with its head office in Halifax, Nova Scotia. Its principal place of business in Ontario is in Mississauga. It offers retail financing and customer lease financing for the Vehicles in Canada. Mercedes-Benz Financial Services Canada Corporation is a wholly-owned indirect subsidiary of Daimler AG.

12. Mercedes USA is a Limited Liability Company organized and existing under the laws of the State of Delaware with its principal place of business in Atlanta, Georgia. It is involved with, has responsibilities for and provides direction for the business operations of Mercedes Canada. Mercedes USA is a wholly owned indirect subsidiary of Daimler AG.

13. Each of the Defendants knew or ought to have known of the Defeat Device in the engines and software of the Vehicles, the Vehicles' excessive emissions and/or of the other misconduct set out herein, and failed to disclose the truth to the Canadian public.

14. The Defendant Daimler AG exercised control over the other Defendants. The incorporation and use of the Defeat Device in the engines and software of the Vehicles and the Representations regarding the Vehicles as set out herein were authorized, approved, directed and controlled by Daimler AG. Daimler AG is jointly and severally liable for the liability of the other defendants.

## **THE CLASS**

15. The Class comprises all persons and corporations in Canada, except for Excluded Persons, who own, owned, lease, or leased one of the Vehicles.

## **HISTORY OF BLUETEC**

16. Since approximately the mid-2000s, consumers in Canada have displayed an ever-increasing preference for environmentally friendly automobiles. However, consumers' traditional desire for high levels of performance and fuel efficiency has not subsided. This shift in tastes coincided with tighter government regulations, requiring all automobiles to comply with stricter emissions standards.

17. Some car manufacturers began to design and produce electric or hybrid cars in response to the change in consumer preferences. Others, such as the Defendants, focussed their efforts on developing fuel-efficient, clean diesel engines.

18. These diesel-focussed automakers had been exploiting the sizeable market for diesel cars in Europe for decades, where emissions standards have historically been much lower than in North America. By developing new diesel engine systems, with ostensibly lower emissions, the North American diesel automobile market opened up to these automakers for the first time in the late 2000s.

19. Diesel engines produce much higher levels of NO<sub>x</sub> and other pollutants than gasoline engines. The new 'clean' diesel engines purported to be revolutionary – they had to be – as diesel engines are inherently dirty and produce a materially different type of exhaust than gasoline powered engines. NO<sub>x</sub> is a particular problem with traditional diesel engines.

20. NO<sub>x</sub> emissions are dangerous air pollutants. They produce harmful particulate matter in the air which reacts with sunlight in the atmosphere to create ozone. Exposure to NO<sub>x</sub> causes or contributes to asthma and other respiratory illnesses and poses a particular threat to the elderly and children. It is for this reason that regulators assign strict limits on the levels of NO<sub>x</sub> that may be emitted by diesel automobiles.

21. BlueTEC, which was the Defendants' approach to 'clean diesel' technology, purports to alter dangerous chemicals in engine emissions to 'clean' them before being released via the exhaust system into the atmosphere. BlueTEC engines inject a chemical called urea to trap NOx particles before they are released. Urea is rich in ammonia, which can convert NOx into less harmful chemicals, such as oxygen and nitrogen. Once the NOx is converted, the BlueTEC system releases the 'cleaner' chemicals harmlessly into the atmosphere.

22. The urea solution in BlueTEC vehicles is branded 'AdBlue'. It is contained in a tank under each Vehicle. Vehicle Owners must pay to have their AdBlue tanks refilled regularly.

### **BLUETEC ENGINES ARE NOT 'CLEAN'**

23. BlueTEC technology does not sufficiently reduce NOx, and other dangerous emissions, to bring the Vehicles in line with the Emissions Standards. When operating in real-world conditions, the Vehicles emit pollutants including NOx in excess of legally prescribed limits in Canada and the United States.

24. In addition, the Defendants have installed their BlueTEC vehicles with a Defeat Device that turns off the NOx reduction system when ambient temperatures drop below 10 degrees Celsius. Mercedes has admitted that a shut-off device exists in the engine of its C-Class BlueTEC when it operates in such conditions. Daimler AG representatives have baldly asserted that the shut off is necessary to 'protect the engine'.

25. Vehicle emissions tests are typically conducted indoors, in conditions warmer than 10 degrees Celsius. The Vehicles normally pass official emissions tests in these artificial circumstances. In the majority of real-world conditions in Canada, where it is colder than 10 degrees much of each year, the Vehicles will emit NOx at uncontrolled and illegally excessive levels.

26. Mercedes did not disclose to the public that BlueTEC engines, when operating ordinarily:  
a) emit pollutants at rates above the permissible legal and regulatory limits; and/or, b) emit higher volumes of pollutants in ambient conditions that are colder than approximately 10 degrees Celsius.

## **CANADIAN EMISSIONS LAWS AND REGULATIONS**

27. The Vehicles and their engines are required to meet the Emissions Standards in order to be sold, used or licensed in Canada. The Emissions Standards are aligned with those of the United States.

28. At all material times, the Defendants were required to comply with, and knew or should have known that the Vehicles were required to comply with Canadian laws and regulations regarding Emissions Standards, including CEPA and the regulations thereto and to Provincial and Territorial emissions legislation and regulations.

29. All persons, including the Defendants, are prohibited from assembling, manufacturing, importing and/or selling into Canada vehicles, engines or equipment unless the Emissions Standards are met.

30. The vehicles and/or engines that have been issued an EPA Certificate certifying that they meet Emissions Standards are eligible for sale and use in Canada as set out in the regulations under CEPA.

31. Canadian and US emissions regulations have a full prohibition against equipping a vehicle or engine with a Defeat Device. There are limited exceptions to the prohibition that are not applicable to this proceeding.

32. Pursuant to the Emissions Standards:

(a) 'defeat device' means an auxiliary emission control device that reduces the effectiveness of the emission control systems that may reasonably be expected to be encountered in normal vehicle operation and use.

(b) 'auxiliary emission control device' means any element of design that senses temperature, vehicle speed, engine RPM, transmission gear, manifold vacuum, or any other parameter for the purpose of activating, modulating, delaying, or deactivating the operation of any part of an emission control system.

(c) 'element of design' means, in respect of a vehicle or engine,

- (i) any control system, including computer software, electronic control systems and computer logic;
  - (ii) any control system calibrations;
  - (iii) the results of systems interaction; or,
  - (iv) any hardware items.
- (d) 'emission control system' means a unique group of emission control devices, auxiliary emission control devices, engine modifications and strategies and other elements of design used to control exhaust emissions from a vehicle.

33. The Defendants knowingly, intentionally or negligently incorporated into the Vehicles an Auxiliary Emissions Control Device that was, or amounted to, a Defeat Device. Alternatively, the Defendants sold and distributed the Vehicles when they knew or ought to have known, of the use of the Defeat Device in the Vehicles. The purpose of the Defeat Device was to evade Emissions Standards and other Canadian, Provincial and Territorial laws, regulations and policies about emissions standards and to mislead regulators and consumers about the performance of the Vehicles.

34. As referred to above, the Defeat Device allows the Vehicles to meet the Emissions Standards during emissions tests, while permitting far higher emissions during the normal operation of the vehicles. The Defeat Device in the Vehicles worked by switching on the full emissions control systems only when the Vehicles are operating in conditions warmer than 10 degrees Celsius. The testing of the Vehicles in Canada took place indoors in conditions warmer than 10 degrees Celsius. Therefore, the emissions control systems were not used or applied under normal vehicle driving operation. As a result, the Vehicles produce far greater levels of emissions and pollutants during actual road operation.

35. In addition to, and separate from, the operation of the Defeat Device, the Vehicles generally emit pollutants, including NO<sub>x</sub>, in amounts that exceed the limits set out in the Emissions Standards during real-world operation in many circumstances.

36. As a result of the acts of the Defendants, each owner or lessor of a Vehicle is or may be in violation of Federal, Provincial and Territorial environmental laws, regulations and policies, including the CEPA and its regulations and the EP Act.

37. The emissions from the Vehicles during normal driving conditions exceed Canadian and American laws and regulations and allow emissions (including NOx) and pollution at dangerous levels, which affect the health and safety of Canadians. Among other failures, the Defendants failed to warn the Class Members of the foregoing notwithstanding that the Defendants knew or ought to have known that the Defeat Device did not comply with Emissions Standards and defeated the common, safe environmental outcomes contemplated by Federal, Provincial and Territorial laws and regulations.

38. The fact that the Vehicles do not satisfy the Emissions Standards subjects the Class Members to potential penalties, sanctions and the denial of the right to use the Vehicles.

## **REPRESENTATIONS**

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

40. As used in this Statement of Claim, the term "Representations" includes the following common and consistent representations made by the Defendants (whether expressly or by omission) to the effect that:

- (a) the Vehicles met or exceeded all relevant Federal, Provincial and Territorial emissions regulations;
- (b) the Vehicles were an environmentally friendly, clean or "green" purchasing option that would be comparatively beneficial or less detrimental to the environment due to their low fuel consumption and low emissions; and/or,

- (c) the Vehicles provided a high level of performance while maintaining their environmentally friendly nature.

41. The Representations were made by the Defendants to the Plaintiff and the Class Members.

### **BREACH OF EXPRESS AND IMPLIED WARRANTIES**

42. The Defendants warranted to the Plaintiff and the Class Members that the Vehicles would be reasonably fit for the purposes of driving on roads in Canada and that the vehicles were free from defects.

43. Mercedes Canada provided the purchasers of the Vehicles with a written warranty that provides and represents, *inter alia*, that each Vehicle 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.

44. The written warranty also warranted that the Vehicles' emissions control systems were free from defects in materials and workmanship that would cause the Vehicles to fail to conform with relevant Federal, Provincial and Territorial emissions requirements.

45. Despite the foregoing warranties and representations, the Vehicles were sold or leased when they were intentionally or negligently manufactured, designed, tested, assembled, built and equipped not to comply with Federal, Provincial and Territorial regulatory requirements, and the Defendants concealed or failed to disclose that non-compliance from Class Members and government regulators.

46. The engines and related software are warranted parts within the Vehicles. The Vehicles are therefore defective under the terms of the warranty and any similar or related extended warranties.

47. Because of the installation of the Defeat Devices and the high NOx emissions and other pollutants from the Vehicles, they are not reasonably fit or of a reasonably acceptable quality for the purposes of driving on roads in Canada and contain defects.

48. Mercedes Canada has breached its contracts with the Class Members and as a result the Class Members have suffered damages.

### **NEGLIGENT MISREPRESENTATION**

49. The Defendants were in a proximate and special relationship with the Plaintiff and the Class Members by virtue of, among other things:

- (a) Their design and manufacture of the engines and Vehicles in question;
- (b) Their skill, experience and expertise in the design and manufacturing of automotive engines and vehicles generally;
- (c) The fact that Class Members had no means of knowing or investigating the regulatory non-compliance of the Vehicles;
- (d) The fact that Class Members had no means of knowing or investigating the existence or use of the Defeat Device; and
- (e) The need for Class Members to rely on the Representations and integrity of the Defendants in respect of the Vehicles and attributes.

50. The Defendants owed a duty of care to the Plaintiff and the Class Members. It was intended by the Defendants and reasonably foreseeable that the Class Members would reasonably rely upon the Representations when purchasing the Vehicles and would suffer the damages described herein as a result.

51. The Representations were false and were made negligently.

52. The Plaintiff and Class Members reasonably relied on the Representations in deciding whether to purchase the Vehicles. Their reliance can be inferred on a class-wide basis from the purchase of the Vehicles. Had the Representations not been made, the Vehicles would not have been permitted for sale in Canada, the Class Members would not have made the purchase and would not have paid a higher price for the diesel engines as set out herein.

53. The Plaintiff and the Class Members suffered damages as a result of relying on the Representations in purchasing the Vehicles. The Defendants are liable to pay damages to the Class Members.

## **NEGLIGENCE**

54. The Defendants owed a duty of care to the Plaintiff and the Class Members to ensure that the Vehicles were engineered, designed, developed, tested and manufactured free of dangerous defects and without the Defeat Device, that the Vehicles were in compliance with the Emissions Standards and that the Vehicles were lawfully imported into Canada. Moreover, the Defendants owed the Class Members a duty to warn that the Vehicles incorporated and used a Defeat Device and were non-compliant with Emissions Regulations.

55. The Defendants knew and it was reasonably foreseeable that the Class Members would trust and rely on the Defendants' integrity in purchasing the Vehicles. The Defendants also knew and it was reasonably foreseeable that, if the Vehicles contained dangerous defects or were non-compliant with the Emissions Standards, the value of the Vehicles would diminish and the Vehicles could be subject to recalls, which would cause damages to the Class Members.

56. The reasonable standard of care expected in the circumstances required the Defendants to act fairly, reasonably, honestly, candidly and with due care in the course of engineering, designing, developing, testing and manufacturing the Vehicles and having them certified, imported, marketed and distributed. The Defendants, through their employees, officers, directors and agents, failed to meet the reasonable standard of care and similarly failed to warn the Class Members.

57. The negligence of the Defendants resulted in damage to the Plaintiff and the other Class Members. Had the Defendants complied with the required standard of care, the Vehicles would have been sold without the Defeat Device, would not have been imported into Canada, would have operated in compliance with Emissions Standards or alternatively, they would have been offered and/or acquired at prices that represented their true value.

58. As a result of the Defendants' Representations, the Plaintiff and Class Members suffered damages.

## **UNJUST ENRICHMENT**

59. The Defendants caused the Plaintiff and the Class Members to pay for a dangerous and illegal product that they should not have purchased or, in the alternative, for which they should have paid less than they did.

60. As a result, the Defendants were enriched by the payment or overpayment.

61. The Plaintiff and Class Members suffered a deprivation equal to the Defendants' enrichment.

62. There is no juristic reason for the Defendants' enrichment and the Class Members' corresponding deprivation. The Class Members are entitled to restitution for the Defendants' unjust enrichment.

## **STATUTORY CAUSES OF ACTION**

### **CEPA**

63. The Defendants imported the Vehicles into Canada in violation of CEPA and the Emissions Standards. Had the Defendants not violated CEPA and the Emissions Standards, the Class Members either would not have bought the Vehicles or the Vehicles would have been free from defects that caused a diminution of their value. The Class Members have therefore suffered loss or damages as a result of the Defendants' contravention of CEPA and the Emissions Standards.

64. Pursuant to s. 40 of CEPA, the Class Members have suffered loss and damage as a result of the Defendants' contraventions of CEPA and as such, the Defendants are liable to pay the Class Members an amount equal of their loss or damage arising from those contraventions.

### **COMPETITION ACT**

65. The Defendants made the Representations to the public and in so doing breached s. 52 of the Competition Act because the Representations:

- (a) were made for the purpose of promoting the supply or use of the Vehicles for the business interests of the Defendants;
- (b) were made to the public; and,
- (c) were false and misleading in a material respect.

66. Pursuant to s. 36 of the Competition Act, the Defendants are liable to pay the damages resulting from their breach of s. 52 thereof.

### **CONSUMER PROTECTION ACT AND EQUIVALENT CONSUMER PROTECTION STATUTES**

67. The Plaintiff and Defendants are located in Ontario for the purposes of the Consumer Protection Act. The Plaintiff and Class Members are consumers for the purposes of the Consumer Protection Act.

68. The Plaintiff and Class Members in Ontario who purchased the Vehicles for personal, family or household purposes are consumers for the purposes of the Consumer Protection Act.

69. Class Members resident in British Columbia, Alberta, Saskatchewan, Manitoba and Newfoundland and Labrador, who purchased the Vehicles for personal, family or household purposes are consumers located in those provinces for the purposes of the Equivalent Consumer Protection Statutes. The Defendants carried on business in those provinces and were, among other things, suppliers for the purposes of the Equivalent Consumer Protection Statutes.

70. The Representations were false, misleading, deceptive or unconscionable and constituted an unfair practice under the Consumer Protection Act and Equivalent Consumer Protection Statutes.

71. The Representations are false, misleading or deceptive representations under the Consumer Protection Act and Equivalent Consumer Protection Statutes because the Defendants knew, or ought to have known that, among other things:

- (a) the Vehicles did not have the performance characteristics, uses, benefits or qualities as set out in the Representations;
- (b) the Vehicles were not of the particular standard, quality or grade as set out in the Representations;
- (c) the Vehicles did not provide the specific price advantage as set out in the Representations; and/or
- (d) the Representations used exaggeration, innuendo and/or ambiguity as to a material fact and failed to state a material fact in respect of the Vehicles.

72. The Plaintiff pleads that the Representations are unconscionable under the Consumer Protection Act and Equivalent Consumer Protection Statutes because the Defendants knew or ought to have known that:

- (a) the price for the Vehicles exceeded the price at which similar goods or services were readily available to similar consumers;
- (b) the Class Members were unable to receive all expected benefits from the Vehicles;
- (c) the consumer transactions were excessively one-sided in favour of the Defendants;
- (d) the terms of the consumer transactions were so adverse to the Class Members as to be inequitable; and,
- (e) because of such further conduct concealed by the Defendants and unknown to the Plaintiff.

73. The Plaintiff also states that the Representations were made on or before the Plaintiff and other Class Members entered into the agreements to purchase the Vehicles.

74. The Plaintiff and Class Members are entitled to rescission of the purchase, lease or other related agreements and/or damages pursuant to s. 18 of the Consumer Protection Act and equivalent provisions of the Equivalent Consumer Protection Statutes.

75. The Class Members are entitled, to the extent necessary and pursuant to section 18(15) of the Consumer Protection Act, to a waiver or any notice requirements under the Consumer Protection Act or of the Equivalent Consumer Protection Statutes, particularly as the Defendants have concealed the actual state of affairs from the Class Members.

### **GENERAL AND SPECIAL DAMAGES**

76. The Class Members cannot get their Vehicles repaired because there is no fix available for the Vehicles. If a fix were to become available, it would substantially degrade performance characteristics of the Vehicles. As a result, the Vehicles will not perform as they did when purchased. This will result in a decrease in value of each Vehicle and Class Members will have to pay more for fuel.

77. As a result of the dangerous and harmful defects in the Vehicles, the failure by the Defendants to disclose the existence of the Defeat Device, and the extent of the Vehicles' emissions of pollutants, including NOx, the Class has suffered damages. The value of each of the Vehicles is reduced. The Defendants should compensate each Class Member for their losses.

78. The Plaintiff and many Class Members live in Provinces and Territories that require emissions testing when vehicles are sold or their permits renewed. As such, the Class Members face the loss of use or the denial of the right to use the Vehicles under local, Provincial, Territorial or Federal laws or regulations, and the costs associated with the use of other automobiles or other expenses as a result thereof.

79. The Defendants' negligence and misconduct in relation to the Vehicles, and the resulting reputational damage to the Vehicles, has impaired and will impair the ability of the Class Members to sell Vehicles at their anticipated fair market price.

80. The Class Members have or will have lost time, lost income and suffered inconvenience and special damages arising from any necessary repair to the Vehicles, loss of use of the

Vehicles during any such repair periods and the cost associated with the use of other automobiles or other expenses during such periods.

81. Because the emissions testing regime in the Provinces and Territories rely on the integrity of vehicles' EPA testing and EPA Certificates as a baseline, the Class Members face the prospect that Canada's Provinces and Territories may change their testing regulations so that the Vehicles will fail unless the on-road emissions are once again brought back into compliance with the Emissions Standards. This uncertainty further depresses the resale market for the Vehicles.

82. In order for the Vehicles to be brought back in line with the Emissions Standards, the Vehicles' performance standards and fuel efficiency will have to be lowered and reduced. As a result, and among other things, the value of each of the Vehicles will be irreparably diminished.

83. The Plaintiff pleads that the Class Members' damages were sustained in Ontario and in the rest of Canada.

### **PUNITIVE DAMAGES**

84. The Defendants' conduct described above was deliberate, unlawful, arrogant, high-handed, outrageous, reckless, wanton and constituted a deliberate disregard for the best interests of the Class Members and the Canadian public. The Defendants went to extraordinary measures to conceal the conduct in question and the actual emissions made by the Vehicles from the Class Members and the government regulators. The Defendants are liable to pay punitive and aggravated damages.

### **WAIVER OF TORT**

85. In the alternative to damages, the Plaintiff pleads that the Class Members are entitled to claim "waiver of tort" and thereby to claim an accounting or other such restitutionary remedy for disgorgement of the revenues generated by the Defendants as a result of the sale of the Vehicles, due to the failure of the Defendants to disclose the Defeat Device, the Vehicles' non-compliance with the Emissions Standards and their unlawful import into Canada under the CEPA to the regulators and to the Class Members.

86. The Plaintiff claims that his entitlement to such an election is appropriate for, among other things, the following reasons:

- (a) Revenue was acquired in a manner in which the Defendants cannot in good conscience retain;
- (b) The integrity of the marketplace would be undermined if an accounting was not required;
- (c) Absent the Defendants' tortious conduct the Vehicles could not have been marketed nor would the Defendants have received any revenue in Canada for them; and,
- (d) The Defendants engaged in wrongful conduct by putting into the marketplace the vehicles whose value would diminish and which could be subject to recalls, both of which would or may cause loss or damage to the Class Members.

#### **THE RELEVANT STATUTES**

87. The Plaintiff pleads and relies upon the following statutes:

- (a) *Class Proceedings Act, 1992*, S.O. 1992, c. 6, as amended;
- (b) *Competition Act*, R.S. 1985, c. C-34, as amended, and the regulations thereto, sections 36(1) and 52(1);
- (c) *Consumer Protection Act 2002*, S.O. 2002, c. 30 as amended, and the regulations thereto, sections 2, 5, 9(1), 14, 15, 16, 17, 18, and 19;
- (d) *Fair Trading Act*, R.S.A. 2000, c. F-2 as amended, and the regulations thereto, sections 5,6,7,7.2,7.3, and 13;
- (e) *Business Practices and Consumer Protection Act*, S.B.C. 2004, c. 2 as amended, and the regulations thereto, sections 4,5,8,9,10, 171 and 172;

- (f) *The Business Practices Act*, C.C.S.M. c. B120 as amended, and the regulations thereto, sections 2,3,4,5,6,8, and 23;
- (g) *Trade Practices Act*, R.S.N.L. 1990, c. T-7 as amended, and the regulations thereto, sections 5,6,7, and 14;
- (h) *Consumer Protection and Business Practices Act* S.N.L. 2009, c. C-31.1 as amended, and the regulations thereto, sections 7, 8, 9 and 10;
- (i) *Consumer Protection Act*, C.Q.L.R. c. P-40.1 as amended, and the regulations thereto, sections 215, 218, 219, 220, 221, 222, 228, 239, 252, 253, 271, and 272;
- (j) *The Consumer Protection and Business Practices Act* S.S. 1996, c. C-30.1 as amended, and the regulations thereto, sections 5,6,7,8,14, and 16;
- (k) *Canadian Environmental Protection Act*, 1999, S.C. 1999, c. 33, as amended, and the regulations thereto;
- (l) *Environmental Protection Act*, R.S.O. 1990, c. E.19, as amended, and the regulations thereto, sections 21, 22 and 23;
- (m) *Climate Change and Emissions Management Act*, S.A. 2003, c. C-16-7, as amended, and the regulations thereto, section 60;
- (n) *Motor Vehicle Act*, R.S.B.C. 1996, c. 318, as amended, and the regulations thereto, sections 47, 48, 49, and 50;
- (o) *The Climate Change and Emissions Reductions Act* C.C.S.M., c. C315, as amended, and the regulations thereto, sections 13 and 14;
- (p) *The Environmental Management and Protection Act* S.S. 2010, c. E-10.22, as amended, and the regulations thereto, sections 51, 52, 53 and 54;
- (q) *Environmental Quality Act*, C.Q.L.R. c. Q-2, as amended, and the regulations thereto, sections 51, 52 and 53;

- (r) *Clean Air Act*, S.N.B. 1997, c. C-5.2, as amended, and the regulations thereto, section 46;
- (s) *Environment Act*, S.N.S. 1994-95, c. 1, as amended, and the regulations thereto, sections 111 and 112;
- (t) *Environmental Protection Act*, R.S.P.E.I. 1988, c. E-9, as amended, and the regulations thereto, section 25;
- (u) *Environmental Protection Act*, S.N.L. 2002, c. E-14.2, as amended, and regulations thereto, section 34;
- (v) *Environment Act*, R.S.Y. 2002, c. 76, as amended, and the regulations thereto, section 145;
- (w) *Environmental Protection Act*, R.S.N.W.T. (Nu) 1988, c. E-7, as amended, and the regulations thereto, section 34; and,
- (x) *Negligence Act*, R.S.O. 1990, c. N.1, as amended and the equivalent Provincial and Territorial legislation.

## **PLACE OF TRIAL**

88. The Plaintiff proposes that this action be tried in the City of Toronto.

## **SERVICE**

89. This originating process may be served without court order outside Ontario in that the claim is:

- (a) in respect of real or personal property in Ontario (Rule 17.02(a));
- (b) in respect of the interpretation of a contract in respect of real or personal property (Rule 17.02(c));

- (c) in respect of a contract where the contract was made in Ontario, the contract provides that it is to be governed by or interpreted in accordance with the law of Ontario, and a breach of contract has been committed in Ontario (Rules 17.02(f))
- (d) in respect of a tort committed in Ontario (Rule 17.02(g));
- (e) authorized by statute to be made against a person outside Ontario by a proceeding commenced in Ontario (Rule 17.02(n)); and,
- (f) against a person carrying on business in Ontario (Rule 17.02(p)).

April 5, 2016

**Koskie Minsky LLP**  
20 Queen Street West, Suite 900, Box 52  
Toronto, ON M5H 3R3

**Kirk Baert** LSUC#: 309420  
Tel: 416-595-2117  
Fax: 416-977-3316

**James Sayce** LSUC#: 58730M  
Tel: 416-542-6298  
Fax: 416-204-2809

**Lenczner Slaght LLP**  
130 Adelaide Street West, Suite 2600  
Toronto, ON M5H 3P5

**Peter H. Griffin** LSUC#: 19527Q  
Tel: 416-865-2291  
Fax: 416-865-3558

**Andrew Skodyn** LSUC#: 42129P  
Tel: 416-865-2882  
Fax: 416-865-3702

**Ren Bucholz** LSUC#: 60376P  
Tel: 416-865-2860  
Fax: 416-865-2852

Lawyers for the **Plaintiff**

Yogesh Kalra  
Plaintiff and Mercedes-Benz Canada Inc. et al.  
Defendants

Court File No.:

CV-16-550271-00CP

**ONTARIO  
SUPERIOR COURT OF JUSTICE**

Proceeding commenced at Toronto

Proceeding under the *Class Proceedings Act, 1992*

**STATEMENT OF CLAIM**

**Koskie Minsky LLP**

20 Queen Street West, Suite 900, Box 52  
Toronto, ON M5H 3R3

**Lenczner Slaght LLP**

130 Adelaide Street West, Suite 2600  
Toronto, ON M5H 3P5

Lawyers for the Plaintiff