

**CITATION:** Quenneville v. Volkswagen, 2016 ONSC 959  
**COURT FILE NO.:** CV-15-537029-CP  
**DATE:** 20160212

**SUPERIOR COURT OF JUSTICE - ONTARIO**

**RE:** Matthew Robert Quenneville, Luciano Tauro, Michael Joseph Pare, Therese H. Gadoury, Amy Fitzgerald, Renee James, Al-Noor Wissanji, Jack Mastromattei and Jay MacDonald, *Plaintiffs / Moving Parties*

**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., / *Defendants*

**AND:**

Merchant Law Group LLP, *Responding Party*

**BEFORE:** Justice Edward P. Belobaba

**COUNSEL:** *David F. O'Connor and J. Adam Dewar* for Plaintiffs/Moving Parties

*Anthony Tibbs and Chris Simoes* for Merchant Law Group / Responding Party

*Robert Bell* for Volkswagen Defendants

**HEARD:** February 3, 2016

**BREACH OF CARRIAGE ORDER**

[1] In breach of the Carriage Agreement and Court Order of December 4, 2015 granting carriage of the Ontario Volkswagen Class Action to a consortium of eight law firms, the Merchant Law Group ("MLG") sent a misleading email in January to some 9500 recipients urging them, in essence, to join an MLG class action.

[2] Approximately 3500 of the targeted recipients were Ontario residents and thus putative class members of the Ontario Action. Of these, about 150 acted on MLG's misstatements and signed the MLG retainer agreement that was attached to the email.

- Page 2 -

[3] It is beyond dispute that MLG agreed not to contest carriage in Ontario; its carriage motion was dismissed as abandoned and its own Ontario action was stayed. The Court Order issued the same day stated that "Class Counsel in this action [Quenneville] are granted carriage in this proposed national class action in Ontario" and that "no other similar class action shall be issued or be continued without leave of this Court." The certification motion in the Ontario Action is scheduled to be heard in June of this year.

[4] Having agreed that carriage of the Ontario Action had been granted exclusively to Class Counsel, MLG sent out the January 22, 2016 email in an undisguised attempt to scoop potential class members with misleading information.

[5] MLG submits that the email did nothing more than discuss the advantages of "individual lawsuits," that it said nothing about MLG pursuing its own class action, and did not try to solicit Ontario recipients to join the MLG class action. I reject these submissions. It is plain from the retainer agreement attached to the January 22 email that MLG intended to proceed either by way of class action or mass (individualized) litigation at its discretion. MLG also admitted in its factum that "The [email] and proposed contingency fee retainer agreement, taken together" indicated that MLG would proceed with "*class proceedings* ... [or] by way of individual or joinder action" (emphasis added). In short, MLG was soliciting the 9500 email recipients (3500 of whom were Ontario residents) to join what could well become an MLG class action.

[6] Class Counsel were not only concerned about the blatant attempt to scoop putative Ontario class members in breach of the December 4 agreement and Court Order but were also concerned about:

- the improper if not illegal content of the retainer agreement that was attached to the MLG email;
- the misleading denigration of class proceedings versus individual lawsuits that was made even more problematic because MLG has filed sworn affidavits in its Saskatchewan VW Action attesting to the preferability of the class proceeding;
- MLG offering to "opt-out" the class members so that they can join a possible mass (individual) lawsuit;

[7] I advised Class Counsel at the hearing that I did not intend to venture beyond the core complaint (as I saw it) – that MLG was trying to scoop Ontario residents in breach of the Carriage Agreement and Court Order of December 4, 2015. I told the parties that I would leave for another day the additional concerns just noted and also whether any of these matters are even within this court's jurisdiction.

- Page 3 -

[8] However, I made it clear to both sides that I was prepared to deal with the "class action" aspects of the January 22 email and the core complaint about soliciting Ontario residents. Fortunately, as the hearing progressed MLG agreed to the following:

- (i) MLG would immediately send out a "clarifying email" to the 9500 recipients, and if necessary a second email to the 3500 Ontario recipients, correcting the misinformation contained in the January 22 email – the wording of said clarifying email to be agreed to by Class Counsel and MLG, failing which MLG would send out the draft prepared or approved by this court;
- (ii) MLG would not execute any of the 150 retainer agreements received from Ontario residents;
- (iii) MLG would provide all parties and the court with an affidavit confirming the above.

[9] In my view, MLG was wise to de-escalate the matter and propose this sensible resolution. Class Counsel, however, urged that I go further and grant an injunction preventing MLG from sending similar emails in the future. I declined to do so. I advised counsel that if there were any further breaches of the Court Order, the appropriate remedy was a motion for contempt of court that could be brought before me on 24 hours notice.

[10] Counsel on both sides then agreed to draft the "clarifying email" so that it could be sent out as soon as possible. However, they were unable to agree on several points and asked me to either approve one or the other version or suggest my own language. I approved Class Counsel's version in the main but agreed with MLG that paragraph 4 should be limited to Ontario residents. A copy of the final, court-approved version that was sent out to the 9500 recipient-group on February 8, 2016 is attached in the Appendix.

#### **Disposition**

[11] On consent, order to go as set out in my hand-written endorsement of February 3, 2016 and as summarized above in paragraph 8.

#### **Costs**

[12] Class Counsel submitted a costs outline seeking just over \$100,000 on a substantial indemnity basis. MLG says that the amount being sought is excessive in the extreme and contrary to the hourly rates that are set out in the Grid. MLG adds that no costs should be awarded because MLG offered to send out a "clarifying email" several days before the hearing.

[13] The email that MLG was willing to send out prior to the hearing bears little resemblance to what was agreed to at the hearing and finalized by this court several days thereafter. Class Counsel was right to bring this motion and insist that significant action be taken.

- Page 4 -

[14] Class Counsel was wrong, however, to seek an array of wide-ranging relief that went far beyond the bounds of the core complaint and was likely beyond this court's jurisdiction. Class Counsel's costs request, once determined, must therefore be reduced by at least one-half.

[15] Also, Class Counsel's hourly rates (identified by his or her initials) must be adjusted as follows to comport with the rates set out in the Grid: DFO (\$325); HS (\$350); JAD (\$250); KG (\$160); and GP (\$140). The total fees component (as adjusted) using a partial indemnity base is therefore \$45,548. Adding the disbursements and taxes, this comes to about \$52,000. This amount is reduced by one half (as noted above) to \$26,000.

[16] MLG's breach of the Court Order is deserving of censure and condemnation and, therefore, by definition, is reprehensible. An elevated costs award is therefore justified but only for the \$26,000 portion that is properly payable to Class Counsel. The partial indemnity amount of \$26,000, multiplied by 1.5, results in a substantial indemnity costs award of \$39,000, rounded up to \$40,000 all-inclusive.

[17] Standing back and considering all the circumstances, including the factors set out in Rule 57.01(1), I find it fair and reasonable to fix costs at \$40,000 payable by MLG to Class Counsel forthwith.



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Belobaba J.

Date: February 12, 2016

**APPENDIX: EMAIL SENT OUT ON FEB. 8, 2016**

***IMPORTANT NOTICE***

**Volkswagen (VW) and Audi Diesel Emissions Litigation**

*This notice is being sent with the approval of the Honourable Mr.  
Justice Belobaba of the Superior Court of Justice in Ontario.*

The Merchant Law Group LLP ("MLG") sent an email (dated January 22, 2016) and a proposed "Contingency Fee Agreement and Instructions" to persons who had previously provided their

- Page 5 -

contact information to MLG. Certain background information was not set out in the January 22<sup>nd</sup> MLG email, including the following:

- (1) On December 4, 2015, a request by MLG to take control (carriage) of the VW and Audi emissions litigation in Ontario was dismissed as abandoned by Justice Belobaba (who is the class action case management judge appointed to supervise the Ontario case). Justice Belobaba awarded control (carriage) of the proposed national class action in Ontario to a separate set of plaintiffs who are represented by a different group of law firms ("Class Counsel"). At the request of Class Counsel, Justice Belobaba set a date for the certification motion in Class Counsel's action for June 2016.
- (2) MLG is still requesting to take control (carriage) of other VW and Audi class actions in Canada (including in Saskatchewan and Alberta). Class Counsel and their clients are contesting the requests by MLG and are seeking to control the class actions commenced in those other provinces.

Ontario residents who have signed a Contingency Fee Agreement and Instructions Form and returned it to MLG should be aware that MLG will not be signing or relying upon that Agreement, as MLG has realized that such an Agreement (as currently written) would not be valid pursuant to requirements in Ontario.

Persons who have received communications from MLG (and all other potential class members) should know that they do not need to enter into an individual retainer with any law firm in order to participate in a class action. Each potential class member will have the choice to participate in any class action if and when the class action is later authorized (certified) by the Court. No one needs to make a decision to opt-out of (be excluded from) any class action at this time.

If any potential class member has any questions about these issues, they can contact Class Counsel by visiting [www.volkswagenclassaction.com](http://www.volkswagenclassaction.com) or calling toll free 1 800 281-3120.

*February 4, 2016*

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