
CANADA / JUDGMENT

Chartrand v. Google LLC

2021 BCSC 7

COURT

Supreme Court of British Columbia

DECIDED

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2021 BCSC 7 Chartrand v. Google LLC

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Chartrand v. Google LLC,

2021 BCSC 7

Date: 20210112

Docket: S1711066

Registry: Vancouver

Between:

Elizabeth Judie Chartrand

Plaintiff

And

Google LLC

Defendant

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

Before: The Honourable Madam Justice Tucker

Reasons for Judgment

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Place and Date of Hearing:

Vancouver, B.C.

December 10, 2020

Place and Date of Judgment:

Vancouver, B.C.

January 12, 2021

Table of Contents

I. BACKGROUND. 3

II. Nature of the ClaimS. 4

III. the BC ACTION. 6

IV. Key Terms of Settlement Agreement. 6

V. Approval of Settlement Agreement. 7

A. The Legal Framework. 7

B. General Discussion. 9

C. Cy Pres Distribution As Mechanism.. 12

D. Cy Pres Distribution Terms. 13

E. Conclusion. 14

VI. Approval of Fees, Disbursements and Honoraria. 15

A. Counsel Fees & Disbursements. 15

B. Honoraria. 15

VII. Disposition. 17

I. BACKGROUND

- [1] On November 24, 2020, the plaintiff filed a notice of application (the "Notice of Application") seeking an order approving a settlement agreement dated November 30, 2018 (the "Settlement Agreement"), as well as an order regarding counsel fees, disbursements and honoraria. The defendant, Google LLC ("Google"), supports the approval of the Settlement Agreement on the terms sought. It takes no position on the second order sought by the plaintiff.
- [2] The plaintiff's notice of civil claim in this matter was filed under the Class Proceedings Act, RSBC 1996, c. 50 [CPA] on November 28, 2017 ("BC Action"). As originally filed, the BC Action named Kipling Warner as the sole plaintiff. Mr. Warner was subsequently removed as a party and Elizabeth Chartrand was added as plaintiff in substitution: Warner v. Google LLC, 2020 BCSC 1108 at paras. 95-98 ("July 2020 Decision").
- [3] The BC Action is multi-jurisdictional. The class comprises Canadian residents who used smartphones running the Android mobile operating system ("Android O/S") in Canada in 2017, except persons residing in Ontario or Quebec.
- [4] Parallel actions were filed for residents of Ontario and Quebec respectively: Emond et al. v. Google LLC, CV-18-590521-00CP (Toronto) ("ON Action"); Lima v. Google LLC, No 500-06-000941-183 (Montreal) ("QB Action"). The three claims (collectively, the "Actions") are being managed co-operatively. The BC Action is the lead action.
- [5] The BC Action was certified by consent for purposes of settlement, and publication of notice was ordered: see July 2020 Decision. The ON and QB Actions were similarly certified by orders made in the Ontario and Quebec courts.
- [6] The Settlement Agreement is national in scope and pertains to all three Actions.

II. Nature of the Claims

- [7] The description below does not purport to constitute findings of fact on the merits. Rather, it is a summary of the general concept of the claim as posited by the parties in argument for the purpose of this application and provides context for my assessment of the Settlement Agreement.
- [8] The Actions advance tort and restitutionary claims founded on alleged breaches of privacy arising from the alleged non-consensual transmission and/or collection of smartphone data by Google. More specifically, the data in issue consists of the identification number or code of the cell towers used to connect a particular Android O/S smartphone to a cell network ("Cell ID Data").

- [9] In Cell ID Data, the smartphone is identifiable only as a product (i.e., by unit serial number). The user of the particular smartphone transmitting Cell ID Data cannot be deduced from Cell ID Data alone. Further, as tower service areas can be very large, and data does not provide any indication of signal strength, the geographic location of a smartphone cannot be determined with any specificity by reference to Cell ID Data.
- [10] Cell ID Data could, however, if considered alongside significant additional data obtained from other sources (e.g., sales records) assist someone in deducing the identity of a user or a more precise geographical location of the smartphone. (There is no assertion that such additional information is readily available to Google or to the general public.)
- [11] In or about 2013, Google concluded that Cell ID Data, considered in conjunction with two further forms of smartphone-generated data ("Associated Data"), could be used to identify cell network congestion. As a forward-looking measure, Google began building a network congestion reporting feature ("Feature") into Android O/S in 2014. If enabled, the Feature would transmit Cell ID Data and Associated Data from an Android O/S smartphone to Google when the smartphone was used.
- [12] Google ultimately abandoned the network congestion identification project, and the Feature was never enabled for that purpose.
- [13] In or around 2015, Google concluded that it could use Associated Data to improve the connections between its messaging system and Android O/S smartphones ("messaging project"). To that end, Google created a server-side code to collect transmitted Associated Data and, in January 2017, enabled the Feature.
- [14] From January through December 2017, Android O/S smartphones transmitted Cell ID Data and Associated Data to Google whenever a login request was made on the smartphone. Google's server-side code collected the Associated Data for the messaging project, logging it in Google's messaging server. Collected Associated Data was stored in the messaging server for 28 days, and then discarded in accordance with a Google policy.
- [15] Google never created a parallel server-side code to collect and log transmitted Cell ID Data. Subject to exception, transmitted Cell ID Data was "immediately discarded" by Google. The possible exception arose when the login request sent was defective. If so, the messaging server re-routed the defective request to a different server for entry in an error log ("Error Log"). Any data linked to a defective login request is listed in the Error Log as part of the entry.
- [16] Thus, in those instances where a defective login request with linked Cell ID Data was transmitted by a smartphone, the linked Cell ID Data was captured in the Error Log. Data in the Error Log is stored for 14 days, and then deleted in accordance with a Google policy.

[17] Relatively few login requests made are, in fact, defective. Further, the majority of those login requests re-routed to the Error Log during the claim period had missing or corrupted Cell ID Data. Thus, while a vast quantity of Cell ID Data was transmitted to Google over 2017, only a small fraction of it was ever collected by entry into the Error Log.

[18] The Feature was disabled by Google at the end of 2017.

III. the BC ACTION

[19] The BC Action was filed on November 28, 2017.

[20] On January 30, 2018, Google filed a response, denying any wrongdoing and, disputing, among other things, the appropriateness of proceeding by class action.

[21] On March 1, 2018, the plaintiff filed a notice of application seeking to have the BC Action certified. A schedule was set for the exchange of certification application materials and a December 2018 hearing date was set.

[22] Between March and December, the parties exchanged 11 affidavits (six by expert witnesses) and written submissions on the certification application. Google sought and obtained a sealing order over sensitive information in the court file. The plaintiff also delivered an application to strike two Google affidavits.

[23] Prior to a hearing on the contested certification application, the parties to the Actions participated in a mediation. On November 30, 2018, they concluded minutes of settlement on a national basis. The minutes were subsequently fleshed out and captured in a formal agreement - the Settlement Agreement.

IV. Key Terms of Settlement Agreement

[24] Under the Settlement Agreement, Google has agreed to pay CAD \$1,000,000 to resolve the Actions, without any admission of liability.

[25] The Settlement Agreement provides for cy pres distribution of the settlement funds (net of class counsel fees, disbursements, taxes, the required payment to the Fonds d'aide aux actions collectives, and any honoraria). The proposed recipients are the Law Foundation of British Columbia ("LFBC"), the Law Foundation of Ontario and the Fondation du Barreau du Quebec (collectively, the "Law Foundations"). The Law Foundations are to take in equal shares (to the extent possible). A schedule to the Settlement Agreement outlines terms regarding the Law Foundations' use of the distribution funds.

[26] The Settlement Agreement is subject to court approval in each Action, and the terms of the agreement establish a comprehensive procedure for that process. If this Court grants final approval of the Settlement Agreement, parallel approvals will be sought in Ontario and Quebec. If those orders are granted, then approximately 30 days after the last of them, the Settlement Agreement will become final. Forty-five days after that, Google will remit the distributions to the Law Foundations in accordance with the Settlement Agreement.

[27] The LFBC has provided an affidavit in support of the plaintiff's application in which it outlines its mandate and relevant experience and expresses acceptance of the terms of Schedule A to the Settlement Agreement regarding use of the distribution funds.

V. Approval of Settlement Agreement

A. The Legal Framework

- [28] Under the CPA, s. 35, "[a] class proceeding may be settled only with the approval of the court, and on terms the court considers appropriate". Once approved, a settlement binds every class member who has not opted out of the class proceeding. The CPA does not set out a test for settlement approval.
- [29] The parties submit that the Settlement Agreement meets the test for approval established by the jurisprudence: i.e., that it is a fair and reasonable agreement and in the best interests of the class as a whole (*Cardozo v. Becton, Dickinson, and Company*, 2005 BCSC 1612 at para. 16). A settlement is not required to be perfect in order to be approved under the CPA, but rather must come "within a range or zone of reasonableness": *Bodnar v. The Cash Store Inc.*, 2010 BCSC 145 at para. 17.
- [30] Public policy favors the settlement of complex litigation. There is a strong presumption of fairness where a settlement has been negotiated at arm's length. Experienced class counsel are well-positioned to assess the risks and rewards of the litigation, and counsel's recommendation may be given considerable weight by the court. See *Jones v. Zimmer GMBH*, 2016 BCSC 1847 at para. 36.
- [31] This Court has endorsed 10 factors for consideration in assessing the reasonableness of a settlement: *Cardozo* at para. 17; *Jones* at para. 42; *Fakhri v. Alfalfa's Canada, Inc. (c.o.b. Capers Community Market)*, 2005 BCSC 1123 at para. 8. Those factors are:
- a) the likelihood of recovery, or the likelihood of success;
 - b) the amount and nature of discovery evidence;
 - c) settlement terms and conditions;
 - d) recommendations and experience of counsel;
 - e) future expense and likely duration of litigation;
 - f) recommendations of neutral parties, if any;
 - g) number of objectors and nature of objections;
 - h) presence of good faith and absence of collusion;
 - i) degree and nature of communications by counsel and the representative plaintiff with class members during litigation; and

j) information conveying to the court the dynamics of, and the positions taken by the parties during, the negotiation.

[32] In *Jeffery v. Nortel Networks*, 2007 BCSC 69 at para. 28, Justice Groberman (as he then was) observed that these factors reflect four heads of inquiry:

1. Has counsel of sufficient experience and ability undertaken sufficient investigations to satisfy the court that the settlement is based on a proper analysis of the claim?
2. Is there any reason to believe that collusion or extraneous considerations have influenced negotiations such that an inappropriate settlement may have been reached?
3. On a cost/benefit analysis, is the class well-served by accepting the settlement as opposed to continuing litigation?
4. Has sufficient information been provided to the class members and, if so, are they generally favourably disposed to the settlement?

B. General Discussion

[33] The legal issues here are complex. Google has raised a myriad of defences, procedural and substantial. The plaintiff faces significant risk at the certification stage as well as in any trial of the common issues. Appeals are virtually inevitable: the findings required at the certification and trial stages would be of real import to both Google and class counsel as a matter of precedent.

[34] The expert evidence exchanged to date has been sufficient to enable counsel to identify the key factual and legal issues, and to realistically assess whether further disclosure would likely make any significant difference.

[35] Counsel on both sides are experienced class action litigators. Their shared support for the Settlement Agreement reflects abundant collective expertise.

[36] There is no basis to suspect the Settlement Agreement is anything but a genuine, arm's length compromise reached after due consideration of both parties' interests. The minutes of settlement were negotiated after a full exchange of materials on a contested certification application and with the assistance of an experienced mediator, the Honourable Mary-Ellen Boyd.

[37] With regard to the settlement amount, the parties have provided the following precedents for consideration:

Case

Class size

Settlement Amount

Elkoby c. Google inc./Google, 2018 QCCS 2623

Approx. 12 million

\$1,000,000

Drew v. Walmart Canada, 2017 ONSC 3308: Data breach

Approx. 650,000

\$1,250,000

Evans v. Bank of Nova Scotia, 2014 ONSC 2135

Approx. 165

\$1,155,000

Maksimovic v. Sony of Canada Ltd, 2013 CanLII 41305: Cyber-attack gained access to account-holder information

Approx. 3,500,000

\$1,000,000

Hemeon v. South West Nova District Health Authority, 2015 NSSC 287: Former employee accessed patient medical records

Approx. 1,000

\$1,000,000

Nicole Del Vecchio v. Amazon.com, Inc., Case

No. Cl 1-366RSL (WD Washington): Circumventing users' privacy settings

U.S

\$1.9 million USD

Daniel Mater a v. Google Inc., Case No. 5:15-cv-04062 (ND California): Email scanning

California/U.S.

\$2.2 million USD

Jane Doe v. Twitter Inc., et al., Case No. CGC-10-503630, in the Superior Court of the State of California, County of San Francisco: Unauthorized sharing of user data

California

\$2.9 million USD

[38] As noted by counsel in submission, the existing jurisprudence is insufficient to enable the value of a privacy claim to be assessed by mapping it on a spectrum of prior cases. The facts are too variable and the precedents too few. However, the existing cases suggest the

following factors are of significance in valuation: the perceived severity of the alleged breach in terms of impact on class members; the apparent moral blameworthiness of the defendant's conduct; and the apparent scope of the breach. Unfortunately, those factors are of little assistance here given the lack of shared ground between the parties' positions.

- [39] Here, the parties disagree on the point at which an arguable breach of privacy would be demonstrated on the facts. The plaintiff asserts Google breached the privacy of Android O/S smartphone users when it enabled the Feature and caused their smartphones to transmit their Cell ID Data to Google. Google asserts there is no arguable breach of privacy unless and until Google collects and logs user's Cell ID Data into a Google server. The plaintiff posits millions of deliberate breaches. Under Google's approach, any breaches are not only few in number, but also arguably inadvertent. Unsurprisingly, the parties have starkly different views as to the claim's potential value.
- [40] The settlement here reflects the parties' respective cost versus benefit analysis of the risks of continuing litigation. As it so happens, the risks to be weighed were more conceptual than benchmark driven. The number was agreed to be very experienced counsel dealing at arm's length. I see no reason to question it. I am satisfied the amount is within the zone of fair and reasonable in the circumstances.
- [41] I am also satisfied that sufficient information has been made available to the members of the class by means of notice and publication.
- [42] No class member has made an objection in the BC Action. (Although Mr. Warner's earlier submissions suggested an objection might be forthcoming (see July 2020 Decision, paras. 15-28), he did not seek to revisit the issue.)
- [43] No class member has opted out of the BC Action.
- [44] No class member has opted out of the ON and QB Action. The materials indicate that two objections were filed in the ON Action.

C. Cy Pres Distribution As Mechanism

- [45] The appropriateness of the parties' proposed means of distribution is a matter for court consideration, even absent any objection: see CPA, s. 33(1).
- [46] Cy près distribution is a well-established distribution mechanism: see *Sun-Rype Products Ltd. v. Archer Daniels Midland Co.*, 2013 SCC 58 at para. 25. The potential for cy pres distribution was contemplated by s. 34(1) of the CPA as it stood when the Notice of Application was filed, as continues to be the case under ss. 36.1 and 36.2 of the current CPA.
- [47] However, cy pres distribution is inherently a departure from the objective of compensation: *Sun-Rype* at paras. 26-27. As such, the parties' adoption of cy pres distribution as their chosen mechanism must be justified. Convenience and efficiency alone are insufficient.

- [48] Here, under the plaintiff's theory of breach, the class members and breaches number well into the millions. The settlement amount is CAD \$1,000,000. Individual entitlements would amount to cents per class member, and the administrative cost of individual distribution would inevitably exceed the net funds for distribution.
- [49] On the other hand, under the defendant's theory, breaches occurred only when and if specific Cell ID Data was logged into the Error Log. Even assuming the identity of a particular user could be deduced from Cell ID Data by considering it alongside additional data, the Error Log was expunged back in 2017. It is not possible to determine the particular Cell ID Data actually logged.
- [50] Individual distribution is not practicable under either theory. I am satisfied cy pres distribution is justified and appropriate in this case.

D. Cy Pres Distribution Terms

- [51] Where cy pres distribution is found to be an appropriate means of distribution in the circumstances, there is a further question as to whether the proposed terms of donation and the recipient are appropriate in light of the nature of the claim.
- [52] The approval of a settlement agreement providing for cy pres distribution involves a consideration of whether the proposed donation will indirectly benefit the class and/or have the consequence of behaviour modification. This was noted by Justice Perell in *Sorenson v. easyhome Ltd.*, 2013 ONSC 4017:
- [28] By benefiting the class, at least indirectly, the cy prè distribution provides access to justice, and the expenditure at the expense of the defendant may provide some behaviour modification.
- [29] The court should have regard to the objectives of access to justice for class members and behaviour modification of the defendant as factors in considering whether or not to approve a particular cy prè distribution: *Cassano v Toronto Dominion Bank* (2009), 98 OR (3d) 543 (SCJ) at paras. 14-49. In *Managing Class Action Litigation: A Pocket Guide for Judges* (3rd ed.) (Federal Judicial Center, 2010) at p.19, B.J. Rothstein & Thomas E. Willging have the following suggestions for judges considering approval of a cy prè distribution:

Cy prè relief must come as close as possible to the objective of the case and the interests of the class members. Question whether the class members might feasibly obtain a personal benefit. Look for evidence that proof of individual claims would be burdensome or that distribution of damages would be costly. If individual recoveries do not seem feasible, examine the proximity or distance between the cy prè recipient's interests or activities and the particular interests and claims of the class members. When cy prè relief consists of distributing products to charitable organizations or others, press for information about whether the products in question have retained their face value or might be out-of-date, duplicative, or of marginal value.

- [30] Cy près relief should attempt to serve the objectives of the particular case and the interests of the class members. It should not be forgotten that the class action was brought on behalf of the class members and a cy près distribution is meant to be an indirect benefit for the class members and an approximation of remedial compensation for them. ...
- [53] The LFBC's mandate involves serving the public interest. It is a well- established, transparent and accountably governed entity. Section 36.2(1) of the CPA designates the LFBC as the default recipient of 50% of any undistributed class action settlement funds, and further authorizes the court to direct the remaining 50% to the LFBC as well (if the court finds it appropriate).
- [54] The legislation makes LFBC an approved recipient whenever individual distribution fails to exhaust settlement funds. It follows that the LFBC will generally be an appropriate recipient for cy pres distribution, provided there is a rational correspondence between the nature of the claim, the anticipated use of the donated funds, and the goals of indirectly benefiting the class and promoting behaviour modification.
- [55] The material before me includes an affidavit by the Chair of LFBC's Board of Governors addressing the terms of use outlined by the parties in Schedule A to the Settlement Agreement. Those terms create a preference use in funding LFBC projects or work at the intersection of technology and privacy. The amount of funds available for allocation to administrative overhead is also limited. The LFBC affidavit provides examples of past projects involving privacy rights in the context of technology.
- [56] I am satisfied that donation to LFBC will indirectly benefit the class. In terms of behavioural modification, there is a rational connection between advancing privacy rights and motivating potential defendants to better respect those rights in the first instance.

E. Conclusion

- [57] Having regard to the factors and questions for consideration, I am of the view that the Settlement Agreement is fair, reasonable, and in the best interest of the class as a whole.
- [58] The materials disclose two objections made in the ON Action. Both relate to cy pres distribution as the chosen mechanism of distribution. I have addressed cy pres distribution as it arises generally in this application.
- [59] The specific objections filed in the ON Action will, of course, be considered by the Ontario Court.

VI. Approval of Fees, Disbursements and Honoraria

A. Counsel Fees & Disbursements

- [60] The retainers signed by Mr. Warner and Ms. Chartrand contain the same terms. Both provide for a contingency fee of 33.33%, which is within the typical range for class actions in this province: see, for example, *Pro-Sys Consultants Ltd. v. Infineon Technologies AG*, 2014 BCSC 1936 at paras. 53 and 56; *Stanway v. Wyeth Canada Inc.*, 2015 BCSC 983 at para. 52.
- [61] In this matter, the plaintiff was represented by senior class counsel who brought extensive collective and individual expertise and experience to the retainer. They would be able to command significant hourly fees for performing similar work on a fee-for-service basis.
- [62] Substantial work was undertaken by class counsel in the Actions. Materials and arguments for a contested certification application were exchanged. Class counsel prepared for and attended a mediation that resulted in a national settlement. The Settlement Agreement is extensive and thorough and would have required a considerable investment of drafting and review time. Class counsel also ran the litigation without the benefit of any third-party financing.
- [63] Finally, the settlement amount agreed upon in this case is (by class action litigation) only a moderate one. The contingency fee amount sought has no hallmarks of a windfall in the circumstances.
- [64] I conclude that counsel's fees and disbursements plus applicable taxes should be approved.

B. Honoraria

- [65] An honourarium of \$3,500 is sought for Mr. Warner, and one of \$1,000 for Ms. Chartrand.
- [66] The CPA does not provide for compensation for acting as plaintiff. An honorarium is awarded at the discretion of the court.
- [67] An honorarium is given to compensate a plaintiff for accepting litigation risk and making a quantum meruit contribution: *Parsons v. Coast Capital Savings Credit Union*, 2010 BCCA 311 at paras. 18-22. However, honoraria are required to be nominal in value in order to avoid the creation of conflict of interest: *McKinnon v. Vancouver City Savings Credit Union*, 2004 BCSC 1604 at paras. 7-8. Nominal is a relative term.
- [68] As noted, the settlement amount here is relatively modest by class action standards. Assuming the net funds were individual distributed at zero administrative cost, individual class members would have received cents apiece.
- [69] Mr. Warner was an extremely involved plaintiff up to the point in time when the minutes of settlement were concluded. He reviewed pleadings, documents, evidence, and submissions. He provided his considerable technological expertise. He attended the mediation in person.

- [70] The BC Action was settled by the minutes of settlement. The minutes of settlement provided for a cy pres recipient to be selected by agreement of all parties. Mr. Warner was disqualified from acting as plaintiff as a result of his position on the selection of a cy pres recipient. Notwithstanding his eventual disqualification, Mr. Warner made a very substantial quantum meruit contribution to the litigation.
- [71] Correspondingly, and without implying Ms. Chartrand made no contribution at all, she was effectively substituted in to enable the cy pres terms of the Settlement Agreement to be finalized. She did not take on any litigation risk and her only responsibility of any significance was to familiarize herself with the Settlement Agreement.
- [72] In the unusual circumstances, compensation of \$2,000 will be payable to Mr. Warner, and compensation of \$500 will be payable to Ms. Chartrand. Honoraria payments made are to be reflected as disbursements.

VII. Disposition

- [73] An order is granted approving the Settlement Agreement in the form of order attached as Schedule A to the Notice of Application.
- [74] With the exception of the honoraria amounts, an order is granted approving payment of counsel fees, disbursements, and honoraria in the form of order attached as Schedule B to the Notice of Application.
- [75] The honoraria for Mr. Warner and Ms. Chartrand are, respectively, set in the amounts of \$2,000 and \$500.

Tucker J.

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