

CANADA / JUDGMENT

Cronk v. LinkedIn Corporation

2023 BCSC 2165

COURT

Supreme Court of British Columbia

DECIDED

20 October 2023

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2023 BCSC 2165 Cronk v. LinkedIn Corporation

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Cronk v. LinkedIn Corporation,

2023 BCSC 2165

Date: 20231020

Docket: S205247

Registry: Vancouver

Between:

Robert Andrew Cronk

Plaintiff

And

LinkedIn Corporation

Defendant

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

Before: The Honourable Justice Francis

Oral Reasons for Judgment

In Chambers

Counsel for the Plaintiff:

K. McLaren

A. Majidi

Counsel for the Defendant:

H. Mallabone

H. Goodridge, Articled Student

Place and Date of Hearing:

Vancouver, B.C.

October 13, 2023

Place and Date of Judgment:

Vancouver, B.C.

October 20, 2023

Overview

- [1] THE COURT: In this application, the plaintiff seeks an order approving the settlement of this class proceeding, as well as an order approving counsel fees, disbursements, and an honorarium for the proposed representative plaintiff. The defendant, LinkedIn Corporation ("LinkedIn") supports the application approving the settlement and takes no position on fees, disbursements, or the plaintiff's honorarium.
- [2] The action was commenced on May 22, 2020, against LinkedIn pursuant to the Class Proceedings Act, R.S.B.C. 1996, c. 50 [CPA], for alleged violations of privacy legislation.
- [3] The plaintiff's claim relates to personalized advertisements called Dynamic Ads that LinkedIn displays to users ("Dynamic Ads"). Dynamic Ads are described in the notice of civil claim as:
- personalized ads that change for each member. Dynamic ads use member's profile photo, name, and job function to create customized ads for each member. Each member sees their personalized information. Member profile information is not displayed to other members.
- [4] According to the notice of civil claim, Dynamic Ads are a default setting for LinkedIn users, and they are activated without the express consent of the user.
- [5] In the notice of civil claim, the plaintiff claims that Dynamic Ads breach the provincial privacy acts of British Columbia, Saskatchewan, Manitoba, and Newfoundland and Labrador. Broadly speaking, each of these statutes creates a tort actionable without proof of damage, where a person uses the name or portrait of another person without consent for advertising purposes. The plaintiff claims damages on his own behalf and on behalf of class members for the defendant's breach of the statutory tort.

- [6] On February 19, 2021, LinkedIn filed a response to civil claim denying the plaintiff's allegations and any liability.
- [7] A sequencing application was heard on March 12, 2021. Subsequent to that hearing, I issued reasons for judgment, ordering that a summary trial application brought by LinkedIn should be heard concurrently with the certification application.
- [8] The parties exchanged materials for the certification application and the summary trial application, which included a number of expert reports. In late 2022, the plaintiff conducted cross-examinations of two of LinkedIn's affiants. Settlement discussions ensued. In March 2023, an agreement in principle was reached between the parties. A final settlement agreement was executed by all parties on May 18, 2023 (the "Settlement Agreement").
- [9] Pursuant to the terms of the Settlement Agreement, the plaintiff applied for consent certification and approval of the notice to the class members. On May 23, 2023, I made an order certifying the action for the purposes of settlement and approving notice to class members.
- [10] Notice was given to class members in the manner approved by the court. There were some objections. Two objectors appeared at the hearing of the settlement approval application and addressed the court. Thirteen written objections were received by class counsel.

Terms of Settlement

- [11] Under the Settlement Agreement, LinkedIn has agreed to pay a settlement amount of \$510,000 to resolve the litigation without admission of liability. The parties have proposed that the settlement amount, after deduction for class counsel fees, disbursements, including the cost of notice and applicable taxes, and any honorarium payment to the individual representative plaintiff, be distributed by way of cy-près donation to the Law Foundation of British Columbia (the "Law Foundation"). The Law Foundation will use the cy-près donation to fund projects at its sole discretion.
- [12] The representative plaintiff has approved the terms of the Settlement Agreement and class counsel's fee request. The Law Foundation has provided an affidavit in support of the settlement.

Legal Authorities

- [13] Under s. 35 of the CPA, "[a] class proceeding may be settled only with the approval of a judge", and once approved binds every class member "who has not opted out of or been excluded from the class proceeding".

- [14] In considering whether to approve a settlement of a class proceeding, the court must look at whether the settlement is "fair and reasonable and in the best interests of the class as a whole". A class action settlement is not required to be perfect, but the settlement must "fall within a range or zone of reasonableness to be approved": *Cardozo v. Becton, Dickinson and Company*, 2005 BCSC 1612 at para. 16; *Bodnar v. The Cash Store Inc.*, 2010 BCSC 145 at para. 17.
- [15] Public policy favours the settlement of complex disputes. There is a strong presumption of fairness where a settlement has been negotiated at arm's length. Experienced class counsel is in a unique position to assess the risks and rewards of the litigation, and their recommendation will be given considerable weight by the reviewing court: *Jones v. Zimmer GMBH*, 2016 BCSC 1847 at para. 36.
- [16] There are a number of factors that a court may consider in assessing whether a settlement is reasonable. These include:
- a) the likelihood of success;
 - b) the amount and nature of discovery evidence;
 - c) the settlement terms and conditions;
 - d) the recommendations and experience of counsel;
 - e) the future expense and likely duration of litigation;
 - f) the recommendation of neutral parties, if any;
 - g) the number of objectors and the nature of the objections;
 - h) the presence of good faith and the absence of collusion;
 - i) the degree and nature of communications by counsel and the representative plaintiffs with class members during the litigation; and
 - j) any information conveying to the court the dynamics of and the positions taken by the parties during the negotiation: *Cardozo v. Becton, Dickinson and Company*, 2005 BCSC 1612 at para. 17.

Is the Settlement Fair and Reasonable?

- [17] In this case, the plaintiff submits that the settlement is fair and reasonable and in the best interests of the class. The plaintiff submits that this is complex litigation with a myriad of possible defences available to LinkedIn. There is a risk that the plaintiff would not be successful at certification, or at the common issues trial. Even if successful at trial, the plaintiff would likely face the prospect of appeal.

- [18] I am satisfied that Hammerco Lawyers LLP and Mathew P. Good Law Corporation are experienced class counsel in the specialized area of class action litigation, and particularly class action litigation involving technology companies and breaches of privacy legislation. There is sufficient evidence before me to conclude that class counsel has weighed the risk and benefit of continued litigation against the certainty of timely recovery effected by the proposed settlement. I am also satisfied that class counsel has adequately researched the legal issues in the case and identified relevant litigation risk factors that support a decision to settle this class action pursuant to the terms of the Settlement Agreement.
- [19] The plaintiff submits and I accept that the following two issues will be central to certification and, ultimately, a merits trial:
- a) the issue of whether displaying a user's own name and likeness to only that user in a Dynamic Ad constituted a breach of the various province's privacy legislation; and
 - b) whether a user's acceptance of LinkedIn's "User Agreement" and "Privacy Policy" constituted consent to the use of a user's own name and likeness in a Dynamic Ad.
- [20] The likely outcome of these two issues if the certification application were to proceed is far from clear. Few cases involving alleged non-consensual collection and/or transmission of data have been certified to date and a number of privacy class actions across Canada have been unsuccessful at the certification stage: *Kish v. Facebook*, 2021 SKQB 198; *Simpson v. Facebook*, 2021 ONSC 968; *Beaulieu c. Facebook inc.*, 2021 QCCS 3206; *Lehouillier-Dumas c. Facebook inc.*, 2021 QCCS 2074; and *Setoguchi v. Uber B.V.*, 2021 ABQB 18.
- [21] I am satisfied that there was significant risk to the plaintiff that the class proceeding would not be certified, and if certified, would be unsuccessful at trial. Success at trial would most likely be followed by an appeal. Settlement was therefore a prudent path for class counsel to pursue.
- [22] In terms of the value of the settlement, settlements are valued based on the "perceived severity of the alleged breach in terms of the impact on class members": *Chartrand v. Google LLC*, 2021 BCSC 7 at para. 38.
- [23] In this case, the severity of any breach of privacy legislation in terms of the impact on individual class members is curtailed by the fact that Dynamic Ads only show a user's likeness to that user. No class member was subject to having their photograph displayed to anyone other than themselves. In my view, this important fact militated against a larger settlement amount.
- [24] Class counsel helpfully summarized comparable settlements in cases involving the alleged non-consensual collection and/or transmission of data:
- a) In *Chartrand v. Google LLC*, 2021 BCSC 7, the class size was 12 million class members. The settlement was \$1 million, and the per capita value for class members was 8 cents.

- b) In *Elkoby c. Google inc./ Google*, 2018 QCCS 2623, a decision from the Quebec Court, the class size was 12 million. The settlement was \$1 million, and the per capita value for class members was 8 cents.
 - c) Finally, in *Loewenthal v. Sirius XM Holdings, Inc. et al.*, 2021 ONSC 4482, a decision of the Ontario Superior Court, the class size was 2 million. The settlement was \$150,000, and that was net of counsel fees, and the per capita value for class members was 8 cents.
- [25] In this case, the per capita value for class members under the settlement agreement is approximately 17 cents, and it would be less than 7 cents after subtracting the fees and disbursements that are claimed by class counsel.
- [26] A general review of the litigation risks faced by the plaintiff with respect to both certification and trial, in my view, supports the conclusion that the settlement and the settlement amount are fair and reasonable and should be approved. However, I must also specifically consider the objections of those individuals who took the time to attend court and/or to write to class counsel to register their objections.
- [27] After notice of settlement was given to class members, class counsel received 13 objections and 124 opt outs out of 3,013,791 class members.
- [28] In assessing whether a settlement is fair, reasonable, and in the best interests of the class, the court must consider as one part of its analysis the number of objectors and the nature of objections made to the settlement. In this case, the number of objections is very small relative to the class members.
- [29] Two individual class members, Mr. Kingsley and Mr. Sato, attended the settlement approval hearing and made submissions to the court.
- [30] Mr. Kingsley raised a number of specific concerns about notice and the process of dealing with class members. This included concerns about the design of the opt out form, the inadequacy of providing notice via email, and the short deadline to opt out. He also raised substantive concerns about the settlement, including that it does not contain any provision to remediate the situation that was the subject matter of the lawsuit and the fact that the cy-près donation is to the Law Foundation of BC and not to the law foundations of other provinces. Mr. Sato's concerns were primarily procedural, that the ramifications of the lawsuit were not clear to him from the notice he was provided.
- [31] The written objections were primarily about the remaining settlement funds being paid to the Law Foundation, rather than to class members. Some objectors also expressed the same concern as Mr. Kingsley that the cy-près donation ought not go to the Law Foundation of BC, but instead should be spread out over charitable organizations in all provinces in which class members reside.
- [32] I will consider first the procedural and then the substantive objections to the settlement.

- [33] Turning first to the procedural objection about the adequacy of notice, the settlement agreement contemplates that LinkedIn will deliver notice of the settlement via email directly to class members in accordance with a notice protocol agreed to by the parties.
- [34] A.B. Data Ltd. was the entity responsible for giving notice to class members. A.B. Data Ltd. is in the business of administrating class action cases, and over the last 15 years has performed notice and claims administration for hundreds of class actions.
- [35] Mark Cowen of A.B. Data deposed to the means by which notice was provided to class members. Mr. Cowen deposed that A.B. Data received 4,373,396 email addresses from LinkedIn for identified potential class members. After going through a de-duplication and validation process, it determined that there were 3,368,070 valid and distinct email addresses for class members. A number of steps were taken to make sure that the emails containing notice were not flagged as spam. The notices were sent via email, and Mr. Cowen reported a 97.76% delivery rate.
- [36] It is important to note that the law does not require actual notice to each class member. The fact the email was not a guaranteed means of reaching every class member does not mean that the notice protocol was deficient. Across Canada, notice protocols that involve notice by publication in a newspaper have been regularly approved by our courts, despite it being obvious that a newspaper will not be read by every potential class member. A 97.76% delivery rate to the emails associated with the LinkedIn accounts of identified potential class members is, in my view, adequate.
- [37] I am satisfied that the notice protocol set out in my order of May 23, 2023 has been properly observed by class counsel and that appropriate notice has therefore been given to the class members. While Mr. Kingsley has pointed out some shortcomings in the design of the opt out form, I do not find that these design flaws are sufficient to make me conclude that class members were impeded in obtaining notice, deciding whether to opt out, or in registering their objections if they have them.
- [38] I turn now to the substantive objections. As discussed above, most of the written objections were to the fact that the settlement funds are payable to the Law foundation and not to the individual class members.
- [39] Cy-près settlements are common in breach of privacy class actions. As noted by Justice Gomery in *Leonard v. The Manufacturers Life Insurance Company*, 2020 BCSC 1840 at para. 104, "[t]he rationale for the cy-près distribution of the settlement funds to charity is that the amount is too small in relation to the size of the class for distribution to class members to be practicable". In this case, if the settlement funds were divided by class members, the amount payable per class member before subtracting counsel fees and disbursements will be approximately 17 cents. Given the large size of the class and the modest settlement amount, which I have found is appropriate in light of the litigation risk faced by the plaintiff, I accept that a cy-près distribution is the only reasonable approach.

- [40] Mr. Kingsley, who took the time to make thoughtful and well-reasoned objections to the settlement, did not object to a cy-près distribution. He noted that where no direct monetary harm can be identified, a cy-près distribution to charity is suitable. However, he had two primary substantive concerns about the settlement. The first is the lack of terms requiring the defendant to remediate the privacy issues raised by Dynamic Ads. The second is that only the Law Foundation, rather than the law foundations or charities in other provinces, benefits from the settlement. This concern was raised also by other objectors who sent in written objections.
- [41] On the first issue, remediation, I note that there has been no acceptance of liability on the part of the defendant. The settlement reflects the assessment on the part of class counsel as to the risks they would face in establishing liability. The defendant still denies liability, therefore there is no settlement option available to class counsel that would involve the changes that Mr. Kingsley would like to see on the LinkedIn platform.
- [42] On the second issue, the payment to the Law Foundation, I would like to start by addressing precisely what the Law Foundation is, since it does appear that a number of the objectors believe that the cy-près payment is proposed to be paid to the Law Society of British Columbia, the professional governing body of lawyers in British Columbia, rather than to the Law Foundation. The Law Foundation is a charity whose mandate involves serving the public interest by promoting access to justice and administering grants to programs that improve access to justice. As noted by Justice Tucker in *Chartrand*, the Law Foundation is a "well established, transparent, and accountably governed entity". Section 36.2(1) of the CPA designates the Law Foundation 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 Law Foundation if the court finds it appropriate.
- [43] Josh Patterson, the executive director of the Law Foundation, provided an affidavit in support of the application to approve the settlement. He deposed that the Law Foundation can make grants from cy-près awards to other non-profit organizations to improve access to justice in British Columbia, as well as in the other provinces or nationally. On the basis of his evidence, I am satisfied that the Law Foundation has the experience and infrastructure to use cy-près awards to administer grants to a large number of non-profit organizations active in a wide range of areas that further access to justice in British Columbia and across the country.
- [44] Considering all of the evidence, including the objections, I find that the proposed settlement is appropriate, is in the range of other similar settlements, and reflects the very real risk that the plaintiff would be unsuccessful at certification, or at a merits-based trial. The proposed cy-près distribution will provide an indirect benefit to class members and will also provide an incentive for behaviour modification by the defendant. The settlement is therefore approved.

Fee Approval

[45] Class counsel seeks an order approving the retainer agreement with the representative plaintiff, Mr. Cronk, as well as approving legal fees in the amount of \$178,500, which amounts to a 35% contingency fee, and disbursements in the amount of \$120,796.39.

[46] Under s. 38 of the CPA, "an agreement respecting fees and disbursements between the solicitor and a representative plaintiff is not enforceable unless approved by the court".

[47] In *McLean v. Cathay Pacific Airways Limited*, 2021 BCSC 1456, Justice Kent noted that:

[45] It has long been recognized that for class proceedings legislation to achieve its policy goals, counsel must be well rewarded for their efforts, and the contingency agreements they negotiate with clients should be respected.

[48] The factors considered in assessing whether a fee is fair and reasonable are:

- a. the results achieved;
- b. the risks undertaken;
- c. the time expended;
- d. the complexity of the matter;
- e. the degree of responsibility assumed by counsel;
- f. the importance of the matter to the client;
- g. the [skill and competence demonstrated by] counsel;
- h. the ability of the class to pay;
- i. the client and the class' expectation; and,
- j. fees in similar cases.

Green v. Tecumseh Products of Canada Limited, 2016 BCSC 217 at para. 57.

[49] Class counsel in this case are experienced class action lawyers with specific experience in privacy and technology claims. Privacy law is a rapidly developing area. This case required skilled, knowledgeable, and experienced counsel to pursue privacy claims against a sophisticated technology company.

[50] This was complicated litigation due to the procedural complexity of class actions, the substantive legal complexity of the pleaded causes of action, and the uncertainty of the legal landscape of privacy law in Canada.

[51] A contingency fee of 33% is frequently held to be valid in class proceedings: *Pro-Sys Consultants Ltd. v. Infineon Technologies AG*, 2014 BCSC 1936 at para. 56, *Denluck v. The Board of Trustees for the Boilermakers' Lodge 359 Pension Plan*, 2021 BCSC 242 at para. 42. In this case, the fee sought as reflected in the retainer agreement is slightly higher, in the

amount of 35%. The docketed time and value at regular hourly rates for the work performed by class counsel is in excess of \$200,000. Class counsel is therefore seeking a rate that is considerably less than what they would have received had they been paid an hourly rate with no additional premium to account for the risk taken on by counsel in advancing the class proceeding.

- [52] In all the circumstances, considering the work performed and risks taken by class counsel, I find it is appropriate to approve the fee sought by class counsel in the amount of \$178,500, plus applicable taxes, and the payment of disbursements in the amount of \$120,796.39, plus any incidental disbursements. Both are payable as a first charge on the settlement funds.

Payment of Honorarium

- [53] Where a representative plaintiff can show that he or she rendered active and necessary assistance in the preparation or presentation of the case and that such assistance resulted in monetary success for the class, the representative plaintiff may be compensated by an honorarium: *Karasik v. Yahoo! Inc.*, 2021 ONSC 1063 at para. 182.
- [54] In my view, the honorarium sought in this case is reasonable and is in keeping with similar awards in other cases (see, for example, *Thomas v. ByteDance Ltd., Tiktok Ltd.*, 2022 BCSC 297 at para. 52). As such, I approve a \$1,500 honorarium for Mr. Cronk to be paid out of the settlement funds.
- [55] So the two orders shall issue on the terms which were set out in the draft orders that were provided at the hearing by counsel.

"Francis, J."

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