

CANADA / JUDGMENT

Thomas v. ByteDance Ltd., Tiktok Ltd.

2022 BCSC 297

COURT

Supreme Court of British Columbia

DECIDED

25 February 2022

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IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Thomas v. ByteDance Ltd., Tiktok Ltd.,

2022 BCSC 297

Date: 20220225

Docket: S209073

Registry: Vancouver

Between:

Lisa Thomas

Plaintiff

And

TikTok Inc. and TikTok Pte. Ltd.

Defendants

- and -

Docket: S193384

Registry: Vancouver

Between:

A.C., an infant by her Litigation Guardian Robert Andrew Cronk

Plaintiff

And

musical.ly Inc., musical.ly And Bytedance Technology Co.

Ltd.

Defendants

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

Before: The Honourable Mr. Justice Edelmann

Reasons for Judgment

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Place and Date of Hearing:

Vancouver, B.C.

January 28, 2022

Place and Date of Judgment:

Vancouver, B.C.

February 25, 2022

I. Overview

[1] The plaintiffs in this and a related class action seek the approval of a settlement as well as legal fees, disbursements, and honoraria.

II. Background

- [2] The TikTok app is used on smartphones and other devices to permit users to, among other things, make short videos and share them with other users on the platform. Beginning in about 2014, musical.ly Inc. made available an app known formerly as "musical.ly". In 2017, the defendants TikTok Inc. and TikTok Pte. Ltd. (collectively, "TikTok") made available an app known as TikTok. In 2017, ByteDance Ltd. acquired musical.ly Inc, which changed its name to TikTok Inc. Over the course of 2018, the musical.ly app's back-end operations and technology were phased out and, in August 2018, the musical.ly app's users were combined with the users of the TikTok app. At that time, the TikTok app continued to be distributed in Canada and the musical.ly app ceased to be available.
- [3] There were two actions commenced in British Columbia relating to the privacy interests of users of the TikTok app and its predecessor, musical.ly.
- [4] A.C. an infant by her Litigation Guardian Robert Andrew Cronk v. musical.ly Inc., SCBC Vancouver Registry No. S193384 [Cronk] was filed in March 2019. In brief, Cronk alleges that the TikTok app collected private information from underaged users without proper consent, in breach of a minors' privacy. The claim seeks damages under the Privacy Act, RSBC 1996, c 373, the Infants Act, RCBC 1996, c 223, and at common law.
- [5] Thomas v. ByteDance Ltd., Tiktok Ltd., SCBC Vancouver Registry No. S209073 [Thomas], was filed in September 2020. In brief, the claim alleges that TikTok, through the TikTok app on Android devices, deliberately collected users' MAC addresses in breach of Google's policies and users' privacy.
- [6] The plaintiffs in Cronk and Thomas sought to explore a global resolution of all claims. With the assistance of an experienced mediator, a settlement was reached and subsequently reduced to a written agreement. As part of the settlement agreement, the Notice of Civil Claim ("NOCC") in the Thomas action will be amended to include claims covered in the Cronk action. In addition, the proposed amended NOCC is also expanded to cover some additional factual allegations, not originally pleaded in either Thomas or Cronk, that were alleged and settled as part of class action litigation advanced in the United States.
- [7] On October 17 and 18, 2021, after an application for consent certification and approval of notice to the class members, I made an order certifying Thomas for the purpose of settlement and approved notice to class members as set out in a modified settlement agreement.

III. Notice to Class Members

- [8] Section 11 of the settlement agreement set out that notice was to be provided (in English and French) to class members in the following manner:
 - a) Sent by email by Class Counsel or an administrator to the email addresses

identified by the Defendants for Class Members;

- b) Sent by email by Class Counsel to any class member that has registered with them regarding this action;
- c) Posted on Class Counsel's website;
- d) Published on one occasion in a 1/8 of a page advertisement in the Globe and Mail (national edition, in English) and the Journal de Montreal (in French); and
- e) Sent by the Defendants on one occasion as a notification to potential Class Members on the TikTok platform ("In Platform Notice") within 40 business days following the issuance of the Certification and Notice Approval Order or as soon as reasonably possible thereafter.

[9] Sections 11(b)-(e) had been completed when this application was filed.

[10] As set out in 11(e), notice by TikTok in-app direct notice was distributed to all active TikTok accounts in Canada on December 9, 2021. The in-app notice was distributed in English to accounts with specific data corresponding to Canadian locations in the same manner that TikTok would distribute other TikTok in-app notifications using the inbox feature. The English language notice stated: "If you used TikTok in Canada on or before 28-OCT-21, you may be affected by a class action settlement- for details: <https://bit.ly/3nBB2aX>". An equivalent notice in French was distributed to Canadian users who had their preferred language settings in the TikTok app set to French.

[11] The in-app notices included a direct link to a dedicated class action settlement webpage on class counsel's website which included details about opting out. After the in-app notice went out, approximately 389,458 unique visits were made to the settlement website.

[12] Regarding the section 11(a) notice by email, counsel encountered privacy concerns when attempting to fulfill this requirement. The exercise of sending millions of emails would have required the engagement of three separate service providers. In the view of counsel for both parties, the privacy policies maintained by two of the service providers were inadequate and the potential for misuse of the email addresses, inadvertent or otherwise, was a real and serious concern. As noted by the Court of Appeal in *Logan v. Hong*, 2013 BCCA 249, privacy interests must be taken into consideration in the process of giving notice. I note the very issues raised in these claims relate to the privacy interests of the class members, and counsel have quite appropriately sought to avoid any further privacy breaches in the course of seeking redress for the class. On the evidence before me, I accept that the privacy risk posed by the delivery of millions of emails through three separate service providers, two of which had inadequate privacy assurances, outweigh the comparatively low benefit of delivering the email notices in addition to the notice already provided.

- [13] The in-app notice has proven to be a very effective manner of notice. As noted by Kent J. in *McLean v. Cathay Pacific*, 2021 BCSC 1456 at para. 83, the law does not require actual notice to each class member (see also *Silver v. IMAX*, 2013 ONSC 1667 at para. 111; *Canada Ltd. v. Cozy Corner Bedding Inc.*, 2020 ONCA 235 at para. 31; and *Airia Brands Inc. v. Air Canada*, 2017 ONCA 792 at para. 86).
- [14] Based on the number of visits to the dedicated website, I am satisfied that information about the settlement was widely disseminated amongst class members. In my view, it is reasonable to assume that the bulk of the visits to the website would have been class members. I also accept that a significant number of additional class members would have seen the in-app notice without clicking on the link, or would have become aware of the notice through other means. Taking the overall notice mechanisms into consideration I am satisfied that there has been sufficient notification of class members for the purposes of s.19 of the Class Proceedings Act, [RSBC 1996], c. 50, ("CPA"), despite the email notice not being sent out as originally foreseen.

IV. Approval of Settlement

- [15] In *Fakhri v. Alfalfa's Canada, Inc. (c.o.b. Capers Community Market)*, 2005 BCSC 1123 at para. 8, Gerow J. summarized the factors to consider in approving a class action settlement:
- [8] The test for approval is whether the settlement is fair and reasonable and in the best interests of the class as a whole. Factors which courts have considered in making that determination include:
1. the likelihood of recovery, or the likelihood of success;
 2. the amount and nature of discovery evidence;
 3. settlement terms and conditions;
 4. recommendations and experience of counsel;
 5. future expense and likely duration of litigation;
 6. recommendations of neutral parties, if any;
 7. number of objectors and nature of objections;
 8. presence of good faith and absence of collusion;
 9. degree and nature of communications by counsel and the representative plaintiffs with class members during litigation;
 10. information conveying to the court the dynamics of, and the positions taken by the parties during the negotiation.
- [16] 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?

[17] I will address these factors in the following sections.

A. Terms of Settlement Agreement

- [18] The Settlement Agreement is national in scope and pertains to both Actions. Under the Settlement Agreement, the Defendants have agreed to pay a settlement amount of CAD \$2,000,000 to resolve the litigation plus disbursements reimbursement of \$26,629, without admission of liability. The parties have proposed that the settlement amount, after deduction for fees, honoraria, disbursements and taxes, be distributed by way of cy-près distribution. The proposed recipients are the Law Foundation of British Columbia (50%), the Canadian Centre for Child Protection (16.67%), Kids Help Phone (16.67%), and the Boys & Girls Club Canada (16.66%).
- [19] Class counsel are experienced in the specialized area of class action litigation, particularly litigation involving technology companies and breaches of relevant privacy legislation. The mediation and settlement were facilitated by a senior mediator and the negotiations were at arms' length. The representative plaintiffs have approved the terms of the settlement and class counsel's fee request.
- [20] I accept on the materials before me that the parties in both actions were faced with considerable uncertainty about the prospects of the claim on its merits. Whichever party was unsuccessful at certification would likely have appealed the results and trial would likely be many years away. This is complex litigation with a myriad of possible defences available to the defendants. There is a considerable risk that the plaintiffs would not be successful at certification or at the common issues trial. Even if successful at trial, the plaintiffs faced the prospect of lengthy appeals.
- [21] Certification and liability would turn on what constitutes a breach of privacy under the Privacy Act in the complex context of modern smartphone telecommunications. The Plaintiffs had the benefit of considerable expert opinion. The legal and factual issues are substantially unsettled, as noted by Tucker J. in *Chartrand v. Google LLC*, 2021 BCSC 7 and Gomery J. in *Leonard v. The Manufacturers Life Company*, 2020 BCSC 1840. Like in *Chartrand*, the parties in these cases disagreed fundamentally on the point at which an arguable breach of privacy would be demonstrated on the facts. The plaintiff in *Thomas*

asserted that MAC addresses are a kind of personal information that can be deserving of protection while the defendants argued that no case has ever come to that conclusion. Similar issues arose around the claims related to underage users.

- [22] The Plaintiffs also note the increasing uncertainty about the prospects for both certifications and on the merits of these types of cases. Since the filing of these cases, a number of privacy claims have been unsuccessful in obtaining certification, including *Del Giudice v. Thompson*, 2021 ONSC 5379, *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*, 2021 ABQB 18. These decisions would appear consistent with Gomery J.'s assessment in *Leonard* that the prospects for certification in a contested proceeding in a common law province of the breach of the privacy claim in that case were poor.
- [23] In my view, it is also relevant that the conduct complained of is past conduct. As set out in TikTok's certification evidence in *Cronk*, users under age 13 are prohibited from using the service. In 2017, TikTok introduced an "age gate" to prevent underage users from using the service. TikTok has also created a formal procedure for closing an underage user's account. In 2019, TikTok implemented a content moderation process that includes monitoring for underage user accounts and deleting them. In addition, as a result of the related U.S. settlements, TikTok has undertaken not to collect various forms of data unless expressly disclosed in its privacy policy. These changes accrue to the benefit of Canadian users and impose a presumptive end date on the conduct at issue.
- [24] Counsel presented the Court with tables setting out a number of settlements in privacy-related cases in both Canada and the United States similar to those set out in *Chartrand v. Google LLC*, 2021 BCSC 7 at para. 37. Tucker J. noted the limited number of precedents and wide variation of the underlying facts making such comparisons of limited assistance. However, I am satisfied that the settlement in this case is well within the range of other settlements in this area.

B. Objections

- [25] Pursuant to the notice referred to in my order of October 28, 2021, any members of the class who wished to object to the settlement terms were to notify class counsel by January 14, 2022, and those who wished to opt-out of the class proceedings were to notify class counsel by January 17, 2022. As of the relevant dates, 61 individuals had opted out and no notices of objection had been received.
- [26] On January 25, 2022, a Notice of Civil Claim was filed in this Court on behalf of Barbara Hamilton in a proposed class action against the defendants by her counsel Glyn Hotz. Mr. Hotz sought to make submissions as an "interested party" at the hearing of this application to raise concerns on behalf of the putative class members in the Hamilton action about the scope of the proposed release. Mr. Hotz did not seek to file any affidavits, a notice of

objection or an application before me. The only materials he sought to rely on were the Notice of Civil Claim and some written submissions on the scope of release. Based on the facts set out in the NOCC, it would appear Ms. Hamilton is a class member and an active user of the TikTok app.

[27] Although Mr. Hotz sought to frame his submissions as those of an "interested party", there is little question he was raising an objection to the settlement terms on behalf of Ms. Hamilton and the putative class members in that action. What was notably lacking, however, was any explanation for the failure to opt-out or provide a notice of an objection within the deadlines. In submissions before me, Mr. Hotz sought to explain how long the Hamilton proceeding had been in preparation and when he became aware of the present actions. Ultimately, he sought to make submissions on the scope of the proposed release which he said would impact the rights of class members as they related to the Hamilton action.

[28] Section 15 of the CPA addresses the participation of class members in the proceedings

15 (1) In order to ensure the fair and adequate representation of the interests of the class or any subclass or for any other appropriate reason, the court may, at any time in a class proceeding, permit one or more class members to participate in the proceeding.

(2) Participation under subsection (1) must be in the manner and on the terms, including terms as to costs, that the court considers appropriate.

[29] It would appear evident the CPA is seeking to balance two important elements of class proceedings as it relates to class members. On the one hand, the ability of class members to express their views about a proposed settlement serves an important function. In the non-adversarial setting of a settlement hearing, the Court must rely on class counsel to advance the interests of the class. Even in cases in which a class is represented by counsel of the highest calibre, there may well be aspects of the settlement they have overlooked and the perspective of a dissenting voice can be beneficial. The role of objectors in class proceedings was discussed by Sigurdson J. in *Burnett v. St. Jude Medical, Inc.*, 2008 BCSC 1163:

[15] The leading authority on the role of objectors appears to be *Dabbs v. Sun Life Assurance Co. of Canada*, [1998] O.J. No. 1598 (Q.L.)(Ont. Gen. Div.). In that case, Sharpe J., as he then was, said at 20-21:

In general, the procedural rights of all participants in the approval process must reflect the nature of the process itself and the special role of the court. The matter cannot be viewed in strictly adversarial terms. The plaintiff and the defendant find themselves in common cause, seeking approval of the settlement. The objectors have their own specific concerns which, upon examination, may or may not be reflective of the interests of the class as a whole.

In view of the fact that the purpose of the exercise is to ensure that the interests of the unrepresented class members are protected, the court is called upon to play a more active role than is called for in strictly adversarial proceedings. It is important that the court itself remain firmly in control of the process and that the matter not be treated as if it were a dispute to be resolved between the proponents of the settlement on the one side and the objectors on the other.

- [30] The participation of the objectors in Burnett ultimately led to the conclusion that the settlement as it was drafted was not fair and reasonable to all the class members.
- [31] As noted in the passage cited above, however, it is also important for the court to maintain control of the process to ensure fairness to all concerned parties. In part, this means having a clear process for the participation of class members at a settlement hearing. The first step in the process that was established in this case was for the objectors to provide notice in advance of the hearing. This would have allowed for a discussion among counsel about the best approach for addressing the objections. It also would have allowed counsel for the parties to plan their time in the weeks prior to the settlement hearing. An eleventh-hour objection achieves neither of those goals, in particular when it is not even clearly framed as an objection.
- [32] Mr. Hotz is not a stranger to class action proceedings. Providing notice to class counsel at the eleventh hour of an intention to make substantive submissions at the settlement hearing is precisely what my order sought to avoid. Class counsel were required to scramble to respond to submissions that rely on a rather prolix 48-page Notice of Civil Claim in which argument and anticipated evidence are rather freely interspersed with the facts and legal basis of the claim, making the actual substance of the pleadings somewhat challenging to assess. While I did hear submissions from Mr. Hotz, this should not be taken as tacit approval of the manner in which the concerns raised were brought before the Court. I do not propose to engage in detail with the submissions made in relation to the impact of the proposed release on the Hamilton action. I will, however, address the issue of the scope of the release in more general terms.

C. Scope of Release

- [33] In *Loewenthal v. Sirius XM Holdings, Inc. et al.*, 2021 ONSC 4482, Akbarali J. discussed the consideration of the scope of release by the Court in the context of settlement approval:
- [33] I agree with the objector that, when assessing a settlement, the court must direct its mind to the scope of the release that is proposed: *Berg v. Canadian Hockey League*, 2020 ONSC 6389, at paras. 52-53. Counsel for the Canadian defendants was frank that, without a release, the defendants would have wanted to proceed with their summary judgment motion, so as to avoid a proliferation of privacy-based claims to which it would have to respond. The release is an integral part of the deal reached between the parties.

[34] In my view, even if there were no objections raised it is incumbent on the court to assess the nature of scope of the release being sought when approving the settlement of a class action proceeding. In the case before me, the scope of the released claims is defined as follows in the settlement agreement:

Released Claims means any and all manner of claims, demands, actions, suits, debts, judgments, losses, causes of action, whether class, individual or otherwise in nature, whether personal or subrogated, damages of any kind (including compensatory, punitive or other damages) whenever incurred, liabilities of any nature whatsoever, including interest, costs, expenses, class administration expenses, penalties, and lawyers' fees (including Class Counsel Fees), known or unknown, suspected or unsuspected, foreseen or unforeseen, actual or contingent, and liquidated or unliquidated, in law, under statute or in equity, or that may be created or recognized in the future by statute, regulation, judicial decision, or in any other manner, relating in any way to any conduct anywhere related to, arising from, or described in the pleadings filed in the Proceedings (or which could have been alleged in the Proceedings) prior to the date hereof including, without limitation, any such claims which have been, might have been, are now, or could have been asserted by any Plaintiff or any Class Member in an individual or representative capacity, directly or indirectly, whether in Canada or elsewhere, arising out of, based upon, or related to, in whole or in part, the alleged facts and circumstances underlying the claims and causes of action set forth in (or that could have been raised in) the Proceedings.

[35] While I accept that on its face, the scope of the release is quite broad, it must be understood in the context of the interpretation of releases. This was recently discussed by the Supreme Court of Canada in *Corner Brook (City) v. Bailey*, 2021 SCC 29:

[36] First, as Cass observes, "A distinctive feature of releases is that they are often expressed in the broadest possible words": p. 83 (footnote omitted). A general release, if interpreted literally, could prevent the releasor from suing the releasee for any reason, forever. While such a release may not be enforceable for other reasons (e.g., unconscionability), the circumstances may also often indicate that such extreme consequences are not what the parties objectively intended. As the Court of Appeal for British Columbia put it in *Strata Plan BCS 327*, "While releases signed in the course of a settlement of a dispute are often worded in a broad and general fashion, appearing to cover the end of the world, they must be considered in the context of the dispute": para. 26. This context can serve as a limiting factor to the breadth of wording found in a release. []

[43] Distinctions can be drawn between claims based on facts known to both parties (as in this case) and claims based on facts that were not known to both parties (as in *Biancaniello*). Such distinctions may be relevant when interpreting a release and assessing whether the claim at issue is the kind of claim the parties mutually intended to release. The ultimate question is whether the claim is of the type of claim to which the release is directed. This will depend on the wording and surrounding circumstances of the release in each case.

- [36] The wording used in the release before me is not dissimilar to that used in Loewenthal. Akbarali J. made the following comments on the release:
- [34] However, I disagree with the objector that the release is drafted too broadly in this case. It is a broad release, but it responds to the extraordinarily broad claims made in the statement of claim. Unlike Berg, where the proposed release raised the concern that it could bar claims in other existing class actions, the release proposed in this case does not extend beyond the claims asserted in the statement of claim.
- [35] The objector argues that the release extends to all claims "known or unknown, suspected or unsuspected, foreseen or unforeseen " and that this is too broad. I agree that if that was the breadth of the release it would be too broad. But those words are limited by words that follow in the definition of "Released Claims" contained in the Settlement Agreement. For example, they are limited by the phrase "relating to any conduct alleged in the subject matter of this Action, or which could have been alleged pertaining to the subject matter in the Action." Those words circumscribe the subject matter of the release to the claims related to the allegations around the defendants' collection, storage, and use of the class members' personal information.
- [37] In *Leonard v. The Manufacturers Life Insurance Company*, 2020 BCSC 1840, Myers J. addressed a similarly worded release which was the subject of an objection:
- [117] I should observe that, so far as the class is concerned, the "Proceedings" are limited to the common issues. The release bars claims engaging the common issues, but not claims grounded in some other legal theory or cause of action, if there is any that could be advanced arising out of the same conduct. Such claims would not be claims grounded in "any conduct, act or omission which was or could have been alleged in the Proceedings".
- [38] In my view, the same comments are applicable to the release before me and I find the scope of the release to be reasonable in the circumstances.
- [39] The only additional factor in this case is that the settlement contemplates amendment of the Notice of Civil Claim in Thomas to include not only the claims from Cronk, but also factual allegations made in U.S. litigation against TikTok Inc. relating to biometric privacy that were not previously advanced in Canada. The situation in Illinois is substantively different because of the presence of a unique statutory framework specifically dealing with biometric privacy and specifically providing for statutory damages for breaches. I accept that class counsel considered the viability in Canada of those claims and their inclusion in a settlement agreement is a reasonable compromise on behalf of class members. I will therefore allow the proposed amendments and do not find that their inclusion renders the scope of the release unreasonable in the circumstances.

V. Cy-près Distribution

- [40] Given the wording of s.33 of the CPA, it would seem apparent that this Court is to consider the appropriateness of the parties' proposed means of distribution even absent any objection. As noted by the Supreme Court of Canada in *Sun-Rype Products Ltd. v. Archer Daniels Midland Co.*, 2013 SCC 58 at para. 25, cy-près distribution is a well-established distribution mechanism which is contemplated in what is now ss. 36.1 and 36.2 of the CPA. The approval of a settlement agreement providing for cy-près distribution involves a consideration of whether the proposed donation will indirectly benefit the class and/or have the consequence of behaviour modification (see *Sorenson v. Easyhome Ltd.*, 2013 ONSC 4017).
- [41] As noted by Myers J. in *Leonard v. The Manufacturers Life Company*, 2020 BCSC 1840 at para 104, the "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 the class members to be practicable. It would amount to less than \$1 per class member". In the case before me, the amount per class member would be even lower than that considered by Myers J. I am satisfied that in the circumstances of this case, the distribution of the settlement funds to class members is not feasible.
- [42] Four recipients have been selected by the parties to achieve the appropriate "indirect benefit" contemplated by these types of awards.
- [43] Sections 36.1 and 36.2 of the CPA require that 50% of undistributed settlement funds must be donated to the Law Foundation of British Columbia, which has agreements to redistribute a portion of the funds to sister organizations across the country. Even setting aside the statutory requirement, I accept on the evidence before me that the Law Foundation is an appropriate recipient as it pursues work in the public interest, including funding projects and organizations with respect to children and privacy rights.
- [44] The remaining three recipients, the Canadian Centre for Child Protection, Kids Help Phone, and Boys and Girls Clubs Canada have experience in the protection of the privacy rights of children, including in the online sphere. Although the recipients will use the money to fund grants for projects at their discretion, a preference will be given to projects at the intersection of children, technology and privacy which has a clear connection to the interests of the class members.
- [45] I am satisfied that the proposed cy-près distribution of the settlement funds will provide an indirect benefit to class members, and given the overall value of the settlement will also provide an incentive for behaviour modification both by the defendants and other companies who collect similar types of personal information. The proposed cy-près distribution is therefore approved.

A. Counsel Fees & Disbursements

[46] Under the CPA, s 38,

[A]n agreement respecting fees and disbursements between a solicitor and a representative plaintiff is not enforceable unless approved by the court.

[47] The factors that the Court is to consider in assessing the reasonableness of class counsel fees were set out in *Catalyst Paper Corp. v. Atofina Chemicals Inc.*, 2009 BCSC 1659 at para. 65:

- 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 quality and skill of counsel;
- h) the ability of the class to pay;
- i) the client and the class' expectation; and
- j) fees in similar cases.

[48] Class counsel are experienced in both the specialized field of class actions and more particularly in the context of mass privacy-related claims. The litigation had a number of aspects rendering it complex in addition to the procedural complexity of class actions in general. The litigation was based on causes of action in the quickly evolving legal landscape of privacy law, with sophisticated defendants very familiar with the technology at issue.

[49] Counsel successfully prosecuted this case for over two years of litigation and settlement negotiations with the defendants. Certification materials were prepared and delivered in both cases. Counsel devoted hundreds of hours of their own time, as well as considerable monetary and internal resources to the prosecution of the actions. Taking into consideration that additional hours will be required to bring the case to completion, the fees being requested are commensurate with the amounts that would have been billed on a fee-for-service basis. Given the expense and complexity of this litigation, it was not feasible for class members to have retained class counsel on a fee-for-service basis. The representative plaintiffs have approved the fees sought.

- [50] The retainer agreements in both Thomas and Cronk provide for a contingency fee of 25%, which is what is being requested by counsel. As noted by Mayer J. in *Denluck v. The Board of Trustees for the Boilermakers' Lodge 359 Pension Plan*, 2021 BCSC 242, contingency fees in the range of 33% have been recognized by Canadian courts as reasonable and presumptively valid.
- [51] Taking all of the factors into consideration, I accept that the legal fees sought by class counsel are reasonable in the circumstances.

B. Honoraria

- [52] An honorarium of \$1,500 is sought for the representative plaintiffs in both the Cronk and the Thomas actions. In *Parsons v. Coast Capital Savings Credit Union*, 2010 BCCA 311, the Court of Appeal discussed the granting of honoraria to representative plaintiffs in recognition of both litigation risk and personal contribution which is appropriately recognized on a quantum meruit basis. In my view, the honoraria sought in the present case are reasonable and in keeping with similar awards in other cases, and the contributions set out in the materials before me warrant recognition. Honoraria of \$1,500 to A.C. by her guardian ad litem, Robert Cronk and \$1,500 to Ms. Thomas are therefore awarded to recognize their contributions to the successful result in the case.

VI. Conclusion

- [53] In conclusion, the settlement agreement reached between the parties is approved. The form of the orders will reflect those attached to the notice of application.

"Edelmann, J."

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