

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Pro-Sys Consultants Ltd. v. Microsoft Corporation*,
2020 BCSC 229

Date: 20200221
Docket: L043175
Registry: Vancouver

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

Between:

Pro-Sys Consultants Ltd. and Neil Godfrey

Plaintiffs

And

Microsoft Corporation and Microsoft Canada Co./Microsoft Canada CIE

Defendants

Before: The Honourable Mr. Justice Myers

Reasons for Judgment: Notice of Settlement and Claims Process

Counsel for the Plaintiffs:

Reidar Mogerman, Q.C.
Naomi J. Kovak
Michelle L. Segal
Katie I. Duke

Counsel for the Defendants:

D. Geoffrey Cowper, Q.C.
Alexandra Mitretodis
Nathan Surkan, Articled Student

Place and Date of Hearing:

Vancouver, B.C.
January 30, 2020

Place and Date of Judgment:

Vancouver, B.C.
February 21, 2020

Background

[1] In September 2018, I approved the settlement of this class action (2018 BCSC 2091). The settlement agreement was subsequently approved in Ontario and Quebec.

[2] The matters now before me deal with disputes over the notification process which largely hinge on the interpretation of the settlement agreement. The notification plan was developed by the plaintiff using Ogilvy Montreal Inc., a marketing communications agency.

[3] The settlement agreement divided users into two groups: individual consumers and volume licensees. As is no doubt obvious, volume licensees would be businesses, government and other institutional users, as opposed to individuals. The notice plan has provisions that discretely addresses these groups. The individual users are primarily to be notified by way of an indirect plan, such as advertisements; the business users by direct contact.

[4] The claims process and use of Epiq Class Action Services Canada Inc. as claims manager is agreed to and that application will go by consent.

The settlement agreement and its interpretation

[5] The relevant provisions of the settlement agreement are:

3.3 Notice of Settlement Approval Hearing

The Notice of Settlement Approval Hearing shall be substantially in the forms attached hereto as Schedule C1, C2, C3 and C4.

The Notice of Settlement Approval Hearing shall be disseminated via the methods provided for in Schedule D.

3.4 Notice of Settlement Approval and Claims Procedures

a) The Parties shall agree as to the form of the Notice of Settlement Approval and Claims Procedures and the dissemination of the Notice of Settlement Approval and Claims Procedures primarily targeting Class Members who are not Volume Licensees and if there is no agreement by order of the BC Court, or other court if appropriate. The Notice of Settlement Approval and Claims Procedures may only be disseminated via the methods provided for in Schedule D, magazines,

newspapers, static banner internet and mobile display advertisements, and broadcast television and radio advertisements.

- b) The Plaintiffs will provide reasonable notice of the story boards for any television and radio advertisements. The Defendants will be entitled to suggest reasonable changes and will be permitted to apply to the BC Court in the event of disagreement, or other court if appropriate.
- c) The Parties shall agree on the budget for the implementation of the television and radio advertisements and if there is no agreement by order of the BC Court, or other court if appropriate.
- d) In addition to this, Microsoft shall provide Class Counsel with Microsoft's End User Data for Volume Licensees, which shall permit Class Counsel and the Claims Administrator to contact Class Members directly about the Settlement Approval and Claims Procedures.
- e) The reasonable cost of locating and directly contacting Class Members will be paid by Microsoft and included in the claims administration and notice costs.

[emphasis added.]

3.5 Notice Costs

Microsoft shall pay all reasonable notice costs.

SCHEDULE D

PLAN OF DISSEMINATION OF NOTICE OF SETTLEMENT APPROVAL HEARING

- 1. A Canada-wide press release will be issued that includes a social media dissemination feature using Twitter.
- 2. The Notices shall be distributed in the following manner:
Published once in the appropriate language in each of the following, subject to available dates and reasonable costs:
 - a) The Globe and Mail (National Edition) (English) (1/6th of a page);
 - b) The Vancouver Sun (English) (1/6th of a page);
 - c) Le Soleil (French) (1/3rd of a page);
 - d) La Presse (French) (1/3rd of a page); and
 - e) The Montreal Gazette (English) (1/3rd of a page).

Published once in English and French in the electronic industry magazine "IT World", subject to available dates and costs.

Sent to relevant consumer and industry organizations with a request for voluntary notification to their members including the following:

- a) Consumer Association of Canada;

- b) Retail Council of Canada; and
- c) Electro-Federation Canada.

Posted on Microsoft Canada's website and on Class Counsels' respective websites.

Sent by email or first class mail to the provincial procurement agencies and to the largest 100 Canadian municipalities.

Sent by email or first class mail by Class Counsel to any person who requests it.

[emphasis added.]

[6] In *Canada Post Corp. v. Lépine*, 2009 SCC 16 at para. 42, the court stressed the importance of meaningful notification to class members. While that general principle may inform the interpretation of an agreement which has already been approved by the court, it does not allow the court to re-write the agreement. That is something the court may not do even at the earlier stage when the court is asked to approve a proposed settlement: *Lavier v. MyTravel Canada Holidays Inc.*, 2011 ONSC 3149, leave to appeal denied 2011 ONSC 5559 (Div. Ct.). Accordingly, the disputed matters are to be governed by the settlement agreement alone.

[7] Before addressing the discrete issues, I will make some observations on these provisions.

[8] In the quote from the agreement set out above above, I emphasized the words "may only be disseminated" in clause 3.4(a). The implication of this wording is obvious: the enumerated mechanisms of approval are, unless otherwise indicated, exclusive. Therefore, clause 3.4 (a) allows for notification only via "magazines, newspapers, static banner internet and mobile display advertisements, and broadcast television and radio advertisements" and the mechanisms provided for in Schedule D, which I will deal with later.

[9] Clause 3.4(d) adds to the mechanisms provided for in clause 3.4(a) because it begins with the words "in addition to this". This clause is clearly meant to address the volume licensees.

[10] Several of the plaintiff's arguments hinge on clause 3.4(e). In effect, they use it as a stand-alone provision authorising any form of reasonable notice. That cannot be the case. That type of provision could have easily been provided for. Moreover, it makes no sense to have such a general provision when the balance of clause 3.4 and Schedule D provide for clearly defined notice mechanisms. I think clause 3.4(e) primarily refers to the cost of contacting the customers disclosed by Microsoft pursuant to clause 3.4(d).

[11] The plaintiff also seeks to segregate the first sentence from the second sentence in clause 3.4(a). It essentially argues that the first sentence applies only to non-volume licensees and is therefore not limited by the second sentence. Therefore, it says, there are no limits to the notice mechanisms for the volume users.

[12] While the clause could have been more clearly drafted, I do not agree. If the plaintiff's interpretation was correct, with respect to volume users, there would only be an agreement to agree, with the court left to make up terms in the absence of an agreement. That is an interpretation – and a role of the court – that ought to be avoided where there is an alternative interpretation.

The specific issues

[13] In no particular order, I will now deal with the specific issues raised by the parties.

Newspapers and Consumer Groups

[14] The plaintiffs propose on publishing advertisements in newspapers beyond those specified in Schedule D. Similarly, the plan provides for asking multiple consumer groups beyond those specified in Schedule D to distribute the notice.

[15] In my view, the list of the consumer and industry organizations must be taken to be non-exclusive, because it is preceded by "including the following". Those words do not precede the list of newspapers. There is some rationale for the distinction: presumably the consumer groups will distribute notice by way of web site

postings or along with other communications to their members, and these will not incur a cost. Newspaper advertisements are the opposite.

[16] The plan must therefore be limited to the newspapers listed in Schedule D. There is no restriction to the consumer organizations.

Notice to publicly traded Canadian corporations

[17] The plaintiff proposes that notice be given to the largest 1,000 publicly traded Canadian corporations. That is not provided for in the agreement and I decline to approve that.

Call Centre

[18] The plaintiff proposes setting up a call centre to make telephone contact with businesses and organizations who are likely volume licensees. Microsoft objects on the basis that this is not provided for by the agreement.

[19] It is true that there is no provision for the operation of a call centre. However, clause 3.4(d) contemplates contact with the customers in Microsoft's end-user database but there is no mechanism to allow for that.

[20] In my view, therefore, clause 3.4(d) contemplates telephone contact with those users, and follow-up contact to locate businesses that may have moved, changed their phone number, merged or otherwise. As I indicated above, it is the cost of that contact that is largely dealt with in clause 3.4(e). That said, the agreement does not contemplate a general telephone campaign to locate likely volume licensees.

[21] I have not ignored the plaintiff's argument that the database is not 100% accurate, however that does not mean that I can override the contract. Moreover, the indirect notice will no doubt also capture the attention of some volume licensees and the specifically provided for advertisement in IT World is targeted to businesses. In short, the agreement could have provided for a broader campaign, but it did not.

[22] A call centre for the more limited purpose I have delineated is therefore approved.

Use of names from other class action settlements

[23] The plaintiff wishes to use databases from two other competition class actions which were settled, those involving Dynamic Random Access Memory (DRAM) and Liquid Crystal Display (LCD). The rationale for this is said to be two-fold:

- a) In those settlements, claimants were asked to check a box giving permission to use their contact information for notice in some class actions cases that were anticipated to settle. (The case at bar was not one of those specified cases); and
- b) DRAM is used in virtually all computers. LCD is a dominant computer monitor display technology. Therefore, many of the claimants in those class actions would also be users of Microsoft products encompassed in this action.

[24] There are two reasons I do not approve this. First, as the plaintiff it is not something provided for in the settlement agreement.

[25] Second, although the claims manager for the DRAM and LCD cases is content to hand over the data, I would be extremely reluctant to court-sanction the use of personal data where the individuals have not given permission.

[26] The plaintiff in its reply made passing reference to s. 18(1)(a) of the *Personal Information Protection Act*, SBC 2003 c. 63, which provides:

- (1) An organization may only disclose personal information about an individual without the consent of the individual, if
 - (a) the disclosure is clearly in the interests of the individual and consent cannot be obtained in a timely way,

However, the point was not fully argued. Moreover, I am not sure that the section applies, because the case at bar was extant at the time of the DRAM and LCD settlements and it would have been possible to have it added to the form. I therefore

query whether it can be said that consent could not have been obtained in a timely manner.

[27] I make no finding on this, since I have not had the benefit of argument or research.

Television and catch-up web sites

[28] The settlement agreement provides for advertisements on “broadcast television”. The proposed plan provides for a single 30-second commercial for broadcast on traditional cable and satellite television and on specific online broadcast television catch-up websites. Catch-up sites allow on-line access of television content originally or simultaneously disseminated through traditional means such as cable.

[29] Microsoft argues that catch-up sites are not included in broadcast television. It relies on an affidavit from its Senior Communications Manager, Mr. Carter, which delineates the different types of television delivery services:

- (a) cable television, where television content is delivered through coaxial cable;
- (b) satellite television, where television content is delivered via radio waves;
- (c) Internet Protocol Television (“IPTV”), where television content is delivered over the internet via a privately managed network; and
- (d) Over-the-top (“OTT”) television, where television content is delivered over the open internet using devices such as Smart TVs, gaming consoles, and streaming sticks, from a range of different sources. These sources include:
 - (i) OTT standalone services, like HBO NOW, where consumers can access content from a single provider; and
 - (ii) OTT aggregators, like YouTube and Netflix, where viewers can stream to access content from multiple providers.

Tellingly, he does not list “broadcast television”. For that matter, he does not mention the oldest method of television transmission which is still available – broadcast over the airwaves. No doubt this is because of the popularity of cable television.

[30] The articles which Mr. Carter attaches only serve to indicate there is no clear delineation between the various categories and that the traditional category divisions have become obsolete. For example, in the first article by Josh Chasin published on IADB.com in 2017, the author states:

My nephew is now 24, but I remember trying to explain to him the difference between broadcast and cable when he was five. When I was a kid, I watched a static-filled channel 2 until one day we got cable, and it was revelatory how it changed the experience. I realized that my nephew, born in 1993, had never been in a home without cable, so explaining the difference between ESPN or Disney versus CBS was meaningless to him. It's not about whether it's TV or video, broadcast vs cable-it's about the experience.

[31] I do not think an overly technical approach should be used to determine this issue. Unlike the Canadian Radio-television and Telecommunications Commission, I am not determining eligibility for a broadcast license or broadcast policy. Rather, as I have said, the settlement agreement is to be construed with its context and objectives in mind. Looking at the matter objectively, I do not think the parties meant to limit television advertisements to traditional broadcast television which would be too narrow and limiting to appropriate notification.

[32] I therefore approve using catch-up television.

Search engine marketing

[33] Clause 3.4(a) provides for “static banner internet and mobile display advertisements”.

[34] The plaintiffs propose employing search engine marketing (SEM). Essentially this is a paid-for service that allows for a specified search result to come up at the top of a list of an internet search on Google and other search engines. For example, if a user were to search Google for “Microsoft Class Action” the claims administrator’s website static ad would appear on the front page of the search results.

[35] Microsoft objects to this because it is not specifically provided for in the agreement.

[36] In my view, this is ancillary to web advertising and is therefore included in static web searches. Put another way, it is so closely related to web advertising that if it were not intended to be used, it ought to have been specifically excluded. This is especially so given Microsoft's technical expertise that it brought to the table in negotiating the settlement agreement.

Facebook advertisements

[37] The plaintiff's plan proposes using static banner Facebook advertisements that will appear on the newsfeeds of Canadian Facebook users in the target demographic. The ads will allow users to click through to the claims administrator's website.

[38] Microsoft questioned whether these ads are truly static due to concerns that users could "like", "comment" or "share" the advertisements. Before the hearing, the plaintiff clarified that Facebook users will be able to "share" the advertisements, but will not be able to "like" or comment on them. Given this clarification, the plaintiff submits that the ads are "static". I agree.

Temporary Facebook page and staff to respond to queries

[39] The notice plan contemplates the creation of a temporary Facebook page and a community/social media management team to answer questions from class members received through social media. The allocated cost is \$28,700.

[40] Microsoft objects on the basis that it will have no control over the messaging.

[41] A notice plan of any complexity has to contemplate communications from class members. Facebook has become a major means of commercial communication. I think the operation of a Facebook page is ancillary to the plan as a whole and falls within the scope of the settlement agreement. That said, any postings (as opposed to the response to queries from class members) must be in line with the approved static internet advertising and any variation from that must approved by Microsoft.

Public relations campaign

[42] The plan includes a public relations component that, quoting from the plaintiff's argument, "will amplify the reach of the notice campaign and bring it greater credibility with the public." It involves further dissemination of notice via radio, newspapers, magazines and blogs. As described, "the goal is to maintain control of the messaging received by the public, and to establish and maintain credibility for the notice campaign."

[43] This is not specifically or impliedly provided for by the settlement agreement. I therefore decline to order it.

Continued use of Ogilvy

[44] Microsoft objects to the use of Ogilvy.

[45] Apparently, Ogilvy was initially under the impression that this class action followed a guilty plea for competition offences, as was the case with other cases it had administered. There was no guilty plea here. Based on that and the plan proposed by Ogilvy, Microsoft says Ogilvy is tainted and should be replaced by another firm proposed by Microsoft.

[46] I first note that the settlement agreement does not require that Microsoft approve an advertising agency, nor require the parties to agree on one.

[47] Second, any misunderstanding of Ogilvy has been corrected. They have not acted in an egregious manner demonstrating an inability to carry out the notice plan in a fair manner. They are an experienced company.

[48] There is therefore no reason to replace them.

Concluding remarks

[49] I would not want my comments to be taken as an evaluation of the effectiveness of any of the elements of the proposed plan, whether accepted or rejected by me. The goal of the plaintiff to achieve maximum notification to the class

is laudible. Nevertheless, the notice plan is constrained by the terms of the agreement and the task before me was to interpret the agreement.

[50] I think this case highlights that as much detail as possible for a notice plan should be included in the settlement agreement. The corollary is that as little as possible should be left for the parties to agree to, with the court being left to break any impasses. This begs the question as to the principles a court is to apply if a matter is outside the contract. Courts are equipped to interpret agreements, not to make them.

[51] Finally, since this is likely to be the last contested motion I will have to deal with on this case (hope springs eternal) I thank counsel – including all those listed on my previous judgments – for their professionalism and cooperation throughout this long and complicated litigation.

“E.M. MYERS J.”