IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Pro-Sys Consultants Ltd. v. Microsoft Corporation,* 2018 BCSC 2091

Date: 20181127
Docket: L043175
Registry: Vancouver

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

Between:

Pro-Sys Consultants Ltd.
Neil Godfrey

Plaintiffs

And

Microsoft Corporation
Microsoft Canada Co./Microsoft Canada Cie

Defendants

Before: The Honourable Mr. Justice Myers

Corrected Reasons: These Reasons for Judgment were corrected on the cover page on November 28, 2018

Reasons for Judgment: Settlement and Fee Approval

Counsel for the Plaintiffs:	J.J. Camp, Q.C. Reidar Mogerman David G.A. Jones Naomi J. Kovak
Counsel for the Defendants:	D. Geoffrey Cowper, Q.C., James M. Sullivan, Q.C. Robin L. Reinertson Alexandra Mitretodis
Place and Date of Hearing:	Vancouver, B.C. September 21, 2018
Further written submissions:	November 14, 2018
Place and Date of Judgment:	Vancouver, B.C. November 27, 2018

[1] On September 21, I heard applications for approval of a settlement of this class action and for approval of class counsel's fees. At the hearing, I approved the settlement with reasons to follow. I reserved on the fee approval issue and during the course of considering the issue requested and received further details regarding the claimed disbursements.

[2] These are my reasons for the settlement approval and my decision on the fee approval.

I. BACKGROUND

[3] As I have described in numerous prior judgments, this case is an indirect purchaser competition class action. Pro-Sys alleges that Microsoft committed various anti-competitive wrongs enabling it to charge higher prices for a number of its products. The class members are indirect purchasers who acquired their Microsoft software from re-sellers who, in turn, purchased the software either directly from Microsoft, or indirectly from other re-sellers. (Although Microsoft licenses its software, for ease of reference I will refer to the transactions as purchases of a product.)

[4] Pro-Sys pleaded causes of action for the common law torts of intentional interference with economic interests and conspiracy. It claims damages pursuant to the civil remedies provision in s. 36 of the *Competition Act*, R.S.C. 1985, c. C-34, for breaches of s. 45 (conspiracy), and s. 52 (false and misleading representations) of that *Act*. Pro-Sys also claims unjust enrichment and waiver of tort.

[5] The B.C. action was filed in November, 2005. Similar actions were filed in Ontario and Québec. Counsel, working cooperatively, agreed that the prime battleground would be British Columbia and obtained orders from the Ontario and Québec courts to hold those matters in abeyance.

[6] In March, 2010, after numerous pre-certification applications heard by me and before that by Justice Tysoe (as he then was), I certified the case: 2010 BCSC 285.

The Court of Appeal reversed the certification: 2011 BCCA 186. The Supreme Court of Canada reversed the Court of Appeal: 2013 SCC 57. The class was:

> All persons resident in British Columbia who, between December 23, 1998 and March 11, 2010 (inclusive), indirectly, and not for the purpose of further selling or leasing, purchased a genuine license for any full or upgrade version of:
>
> (i) Microsoft's Word or Excel applications software or any full or upgrade version of Microsoft's Office, Works Suite, or Home Essentials applications suites, intended for use on Intel-compatible personal computers ("Microsoft Applications Software"); or
>
> (ii) Microsoft's MS-DOS or Windows operating systems software intended for use on Intel-compatible personal computers ("Microsoft Operating Systems").

[7] Following that, the case was also certified in Ontario and Québec, with counsel working cooperatively. Collectively, the certification orders were Canada-wide.

[8] This case pushed the limits of manageability. Virtually any non-Apple personal computer user since 1998 was a class member. Further, extensive use was to be made of evidence given in similar class actions against Microsoft brought in the United States. In an effort to corral the case into something that could be tried efficiently – or tried at all – a trial procedure was agreed upon and incorporated into a trial management order ("TMO"), which was the result of extensive dialogue between myself and counsel.

[9] Describing the TMO at the most general level, it provided for each side to submit its case in a written "memorial". The parties were entitled to draw extensively on evidence from specified earlier cases in the United States. The TMO excluded the operation of numerous court rules, unless the court determined otherwise. Experts were to give their direct evidence in writing and be cross-examined at an oral hearing. Even with all this, the oral hearing was scheduled to take six months.

[10] The TMO provided that the trial was to commence on the filing of the plaintiffs' memorial. The plaintiffs filed their memorial on September 5, 2016 and Microsoft on November 20, 2017. The expert reports were filed at the same time. The oral hearing was scheduled to commence July, 2018 and run through to December, 2018. Therefore, by the time the settlement was reached, all of the evidence had been exchanged and submitted to the court electronically (below, para. 14); the trial was in process.

[11] The discovery involved disclosure in excess of 13 million documents totaling 24 million pages.

[12] The plaintiffs' case-in-chief included:

- the memorial, totaling 1,120 pages;
- 11 expert reports, totaling 3,151 pages;
- more than 2,500 supporting documents; and
- approximately 250 transcripts.

[13] Microsoft's case-in-chief included:

- the memorial and annexes, totaling 1,599 pages;
- the defendants' eight affidavits, totaling 791 pages;
- eight expert reports, totaling 1,321 pages;
- more than 2,700 supporting documents; and
- approximately 191 transcripts.

[14] The only way to manage and try the case effectively was to sidestep paper completely and handle it electronically. For the purpose of the trial, the memorial and expert reports, with hyperlinks to the documents and transcripts, were loaded on

a cloud-based system where each side and the court could make annotations that were not visible to anyone but the author and his or her team.

II. THE SETTLEMENT

[15] I will give a broad summary of the settlement agreement here. The full agreement (attached to the order approving notice of this settlement approval hearing) is available on Microsoft's web site: https://query.prod.cms.rt.microsoft.com/cms/api/am/binary/RE2vc4c.

[16] The settlement is a national one and therefore the figures I refer to here are for the whole country.

[17] Microsoft is required to fund the settlement including counsel fees to a maximum of $517,000,000 (rounding the figures to the nearest million). In addition, it is to pay notice costs and the costs of administering the settlement. Through a somewhat convoluted calculation, which I will not detail, the minimum settlement value is $312,000,000. The actual amount will depend on the claims put forward by class members – or "take-up rate" – under the settlement process, as I will describe.

[18] The settlement agreement divides class members into two categories. Volume licensees are class members who indirectly purchased the relevant products through Microsoft's volume licensing programme. Consumer class members are non-volume licensees.

[19] The agreement sets out a claims deadline: class members must submit their claims within 10 months from the notice of publication of the settlement approval. Claims are to be filed on line. Proof of purchase will only be required for consumer claims in excess of $250 and volume licensee claims in excess of $650.

[20] While the value of what the volume licensee and consumer purchasers receive is the same, they receive it in different forms. Consumers receive cash payment. Volume licensees receive vouchers. The vouchers are redeemable for a wide range of specified Microsoft products. The vouchers have to be redeemed

within three years of the claims review deadline, which is defined as being 60 days after the claims deadline (see previous paragraph).

[21] The volume licensees will obviously have purchased Microsoft products through volume licence agreements. Consequently, as deposed by an industry expert, it is likely that they will have pre-existing plans to renew their IT infrastructure within the three-year redemption period for the volume licensee vouchers, and their plans will already involve upgrades for which they can use the vouchers.

[22] The following are the amounts that class members are entitled to for each of the products they purchased:

Operating systems	13.00
Office productivity suites	8.00
Excel	6.50
Word and word processing applications	6.50

[23] If the claims made by the class members do not exhaust the maximum value of the settlement fund, a portion (see the following paragraph) of the unclaimed amount will be distributed with vouchers to schools in Canada. Half of the school vouchers may be redeemed for Microsoft software, and half may be redeemed for listed hardware or professional development services.

[24] There are two phases to the calculation and distribution of the school vouchers:

a. Stage 1 occurs within 30 days of the claims review deadline (above, para. 19). It is calculated as follows: $258,665,750 minus 50% of class counsel fees and minus 50% of the sum of the issued consumer cash payments and volume licensee vouchers.

b. Stage 2 occurs after the redemption deadline for volume licensee vouchers. The amount of the vouchers at this stage will be 100% of

> the value of the unredeemed volume licensee vouchers that were issued, plus 100% of any uncashed cheques provided to consumer class members.

[25] The value of any unredeemed school vouchers will be distributed *cy-près* according to a scheme set out in the distribution.

III. SETTLEMENT APPROVAL

[26] Section 35 of the *Class Proceedings Act* provides that the court must approve a class action settlement on the terms the court considers appropriate The court cannot re-write the settlement; it must approve it or reject it: *McKay v. Air Canada*, 2015 BCSC 1874 at para. 34.

[27] As discussed in *McKay*, the courts have set out lists of factors to consider in approving a settlement. I will not repeat them here because the overriding concern is whether the settlement is fair, reasonable, and in the best interests of the class. As Cullity J. noted in *Nunes v. Air Transat A.T. Inc.*, [2005] O.J. No. 2527 (Ont. S.C.J.), at para. 7, and has been repeated in subsequent cases, there is a strong presumption of fairness when competent class action counsel recommend a settlement and a settlement should only be rejected if it does not fall within a zone of reasonableness.

[28] To put the matter differently and pragmatically, there would have to be extraordinary factors present – particularly when there are no objectors – to refuse to approve a settlement in an effort to force the parties back to the bargaining table or through to trial.

[29] No class member has objected to the settlement. In that regard, it is notable that the class comprises volume licence holders, many of whom no doubt have a significant enough interest to merit an objection to the settlement.

[30] The case was fraught with legal and factual risk. This is not a traditional horizontal price-fixing conspiracy case. The plaintiffs alleged that Microsoft engaged

in an unlawful and anti-competitive campaign that had the purpose and effect of destroying competition in the markets for Intel-compatible PC OS and office productivity applications software. The plaintiffs further alleged that Microsoft engaged in practices to hamper or exclude competition, including entering into unlawful contracts with competitors, personal computer makers, and independent software vendors, and by making deceptive and false or misleading statements to competitors, industry participants, and the public. The conduct at issue dated back to 1988.

[31] The plaintiffs alleged that Microsoft's conduct amounted to a conspiracy in breach of the common law and the *Competition Act*. However, there was a serious risk that the court would find that the Microsoft's conduct did not constitute a conspiracy, but rather was unilateral or monopolistic conduct that is not unlawful and actionable in Canada. Unlike many other price-fixing class actions, Microsoft had not previously been found guilty of a criminal price-fixing conspiracy.

[32] Embedded in part in this issue is whether a claim can be based on the conduct of Microsoft in the United States, even if the conduct was unlawful in the United States and affected the Canadian market.

[33] Assuming it could be shown that Microsoft's conduct was actionable, a major factual battle was whether its continued market dominance and ability to charge what was alleged to be supra-competitive prices was based on the misconduct, or, rather, Microsoft's initial legitimate success and consequent network effects of its software, which became the *de facto* PC standard. This was the subject of expert evidence.

[34] To succeed on liability, the plaintiffs would have to demonstrate class-wide harm at the indirect purchaser level. Even if the plaintiffs proved that Microsoft's actionable conduct allowed it to overcharge its direct customers, a serious factual issue was whether those direct customers passed the increases on to the class members. This was the subject of econometric modelling by each side, which, not surprisingly, came to different conclusions.

[35] Another risk was the possibility that the courts would find the *Competition Act* to be a complete code. This issue has been the subject of debate over the past several years. Although the BC and Ontario Court of Appeals have both held that a tort claim can be based on a breach of the *Competition Act*, in *Sony Corporation, Sony Optiarc, Inc., Sony Optiarc America Inc., Sony of Canada Ltd., Sony Electronics, Inc., et al. v. Neil Godfrey*, 2018 CanLII 51179 (SCC), the Supreme Court of Canada granted leave on this issue. If this argument is accepted, the plaintiffs would only be able to assert a statutory claim for conspiracy, which carries a narrower set of remedies. For instance, there is no right to punitive damages in a claim pursuant to the *Competition Act*; nor is waiver of tort likely applicable.

[36] There is no doubt that a trial judgment would be appealed no matter which party was successful and that leave would be sought to the Supreme Court.

[37] The amount of the settlement is clearly significant.

[38] While the amount of each individual class member may be low (the volume licensees' claims will be higher), the process of making a claim is simple and straightforward.

[39] The distribution to schools is well thought out and laudable. Counsel provided an affidavit from Mr. Mehsikomer, a former technology planner at the Minnesota Department of Education, who described the benefits to the Board of a similar school voucher programme under a settlement of the class action against Microsoft in Minnesota. He noted that the voucher programme provided school districts with a significant boost of funds with which to upgrade technology infrastructure, software and hardware.

[40] The settlement is more than reasonable. There is no reason not to approve the it.

IV. FEE APPROVAL

[41] Section 38 of the *Class Proceedings Act* requires the court to approve the fee agreement made between counsel and the representative plaintiff. If the agreement is not approved, the court may set the fees and disbursements. In some cases, this is done in stages as the plaintiff settles with some but not all the defendants. In this case there is in effect one defendant and the case has been settled in its entirety. The minimum ($312 million) and maximum ($517 million) recoveries are known.

[42] Class counsel seek approval of fees of $100,983,828 plus $6.4 million for disbursements, of which $3.6 million is for expert fees. These amounts include taxes. As I noted above, the approval of the settlement is not contingent on the approval of the fees.

[43] The fee is an aggregate one for counsel in British, Québec and Ontario. As noted earlier, counsel agreed that the prime battleground would be British Columbia.

[44] Counsel in the respective jurisdictions are:

British Columbia	Camp Fiorante Matthews Mogerman
Ontario	Strosberg Sasso Sutts LLP
Québec	Bouchard Pagé Tremblay

In addition, in Québec, Belleau Lapointe worked on the case. As I will detail below, because the action was fought in B.C., Camp Fiorante Matthews Mogerman did the vast majority of the work. As also set out below, lawyers in the United States had a substantial role in the case. (They are to be compensated out of the fees received by class counsel.)

[45] The retainer agreement with the representative plaintiffs provides for a contingency fee of 33%. In Ontario and Québec, the retainer agreement was for 30%, the maximum allowed in those provinces. The proposed fees would amount to 19% of the maximum settlement and 31% of the estimated minimum settlement value, not including administration and notice costs. However, the estimated

minimum settlement value is based upon the assumption that no class members will file a claim under the Settlement Agreement. That is obviously unduly pessimistic, especially given the number of businesses that are class members, which will have larger incentives to make claims than individuals.

[46] $15,147,574 of the fee amount is to be held back until 60 days after the claim deadline, which is 10 months from the notice of publication of the settlement approval. After class counsel have reported on notice, claims administration and the take-up rate they can apply for approval for the holdback to be paid out.

[47] The holdback provides incentive to class counsel to see the matter through the claims process, or as Masuhara J. said in *Jardine v. Certainteed Corporation*, 2017 BCSC 364 at para. 14, to ensure that class counsel are aligned with class members. As he noted, an important role of class counsel is to ensure the claims and distribution process is working smoothly so that the maximum amount ends up in the hands of the class members.

[48] Another function of the holdback in this case is that if only the minimum settlement amount is achieved it would allow the court to adjust the fee downward to match the 30% contingency agreements in Ontario and Québec.

[49] In British Columbia, the courts have taken the view that the contingency agreement between counsel and the representative plaintiff is the starting point and the fee ought only to be reduced if there is a principled reason: *Bodnar v. The Cash Store Inc.*, 2010 BCSC 145 at para. 25–6, citing *Endean v. CRCS*, 2000 BCSC 971. As Smith J. (as he then was) said in *Endean*:

> [85] In my opinion, to say that the fee is "simply too much" invites a completely arbitrary assessment, one that depends upon the subjective opinions and whims of the particular judge hearing the application. If the proposed fees are to be reduced on the ground that they impair the integrity of the profession, some principled basis must be suggested for doing so. None has been suggested and I cannot agree that the proposed fee should be reduced by an arbitrary amount ostensibly to protect the integrity of the profession.

At para. 53 of *Endean*, Smith J. noted that the value of the settlement was $1,600,000,000.

[50] This court has been critical of and rejected an approach based on a multiplier of counsel's hourly rates (also referred to as the lodestar method): *Endean*. So has the court in Ontario: *Martin v. Barrett*, [2008] O.J. No. 2105 (Ont. S.C.J.) at paras. 38–39; *Cassano v. Toronto Dominion Bank*, [2009] O.J. No. 2922 (Ont. S.C.J.) at paras. 59–63; *Rosen v. BMO Nesbitt Burns Inc.*, 2016 ONSC 4752 at paras. 22–24.

[51] There is statutory rationale for a fee agreement's primacy: s. 38 of *Class Proceedings Act* refers to the court having to approve the written agreement between class counsel and the representative plaintiff. The *Act* does not set out any criteria according to which the approval should be granted and those used by the courts are primarily judicial constructs, drawing in part from approvals of contingency fees in cases other than class actions.

[52] In the final analysis, the court must be convinced that the fee is reasonable. Although "windfall" has often been used in this context, I do not find it to be helpful. At best, it states the conclusion that a fee is unreasonable; it does not help in the analysis. This is because, amongst other reasons, the courts have recognised that class action fees should encourage – *i.e.*, reward – counsel for taking on difficult and risky cases. That means there is nothing untoward with a case representing a major upside for counsel, when there is also a major downside. That cannot be considered a "windfall". That said, there *may* be situations when it is important to look at the fee in comparison to the work done. I am thinking here of cases that settle quickly and in which the fee agreement does not have a graduated percentage dependant on the stage that the result is obtained. The case at bar settled in mid-trial so this is not one of those situations.

[53] The matter may also be stated in the negative: the court should ensure that counsel have not commenced an action that uses the class action legislation and judicial system to obtain a result in which they are the only or major beneficiaries.

[54] I will not set out a list of factors the courts have looked at in determining whether a fee is reasonable; this has been done frequently in other cases. I will consider the factors that are particularly germane to this case.

[55] I have already alluded to the risk and complexity of this case when dealing with the settlement approval.

[56] In terms of work done, as I said above, both parties' cases-in-chief had been submitted. The settlement was achieved mid-trial and in contrast to cases that settle shortly after certification and appeals from the certification order, most of the heavy-lifting for trial had been done. The complexity and work done to achieve this should not be underestimated. For example, there was five-day hearing just so the sequencing and conduct of the oral hearing (which was what the settlement avoided) could be determined.

[57] I referred above to the volume of documents that had been reviewed and some of the other work that had been completed.

[58] There have been 22 written decisions in Canada, mostly in or arising out of British Columbia, where counsel agreed the action would be initially fought.

[59] This is a convenient time to discuss the role of U.S. counsel. A substantial amount of work was done by consulting counsel in the United States, under an agreement to share the costs of disbursements pending approval, and to share the fees ultimately approved. The agreement preserves the authority and responsibility of Canadian counsel in relation to the prosecution of this action, and provides that the work of U.S. counsel is to be delivered as needed and instructed by class counsel.

[60] The representative plaintiffs were informed of and approved the relationship between class counsel and U.S. counsel, including the fee arrangements.

[61] U.S. counsel successfully argued a number of applications under 28 U.S.C. § 1782 to collect discovery evidence from witnesses in the United States. This

enabled the plaintiffs to conduct depositions of six former Microsoft personnel, including Mr. Ballmer, Microsoft's former CEO.

[62] Further applications in the United States were made concerning the ability to use U.S. evidence from U.S. proceedings in this case. (As I mentioned above, the trial management order allowed for the use of documents and transcripts from certain U.S. proceedings.)

[63] There have been a total of 18 written judicial decisions in the United States.

[64] Canadian counsel depose that the U.S. counsel shared the workload in developing the case for trial. They took an active role in formulating a mediation settlement strategy and attended the mediation, which ultimately resulted in the settlement. In dealing with the settlement approval above, I referred to the risk of the trial judgment. However, there was also a serious risk regarding certification.

[65] At the time this action was commenced, there had not been a successful contested certification of a case founded on breach of the *Competition Act* in Canada. The two contested *Competition Act* cases were denied certification: *Chadha v. Bayer Inc.* (1999), 45 O.R. (3d) 29 (S.C.J.) and *Price v. Panasonic Canada*, [2002] O.J. No. 2362 (Ont. S.C.J.). It was therefore not clear that a claim brought on behalf of a class of indirect purchasers could be certified.

A. Comparison to hourly rates

[66] I said that the lodestar method of determining a class counsel fee was not the accepted or preferred method. Nevertheless, counsel have provided the data so I will refer to it. The data has been provided based on the hourly rates at the time the work was done and at the current hourly rates:

Law Firm	Total Docketed Time (without applicable taxes) at Historical Hourly Rates	Total Docketed Time (without applicable taxes) at Current Hourly Rates
CFM	$9,398,619.00	$11,060,217.00
Strosberg	$442,773.50	$618,862.50
Bouchard	$136,933.80	$136,933.80
Belleau	$115,945.65	$118,946.15
TOTAL	**$10,094,271.95**	**$11,934,959.45**

[67] It follows from what I said above regarding the involvement of U.S. counsel that the value of their hourly rates should be considered. It is:

Law Firm	Total Docketed Time (without applicable taxes) at Historical Hourly Rates	Total Docketed Time (without applicable taxes) at Current Hourly Rates
Zelle	US$2,440,195.50	US$2,440,195.50[1]
RMH & Hellmuth	US$7,468,765.75	US$8,106,592.75
Hinkle	US$4,278,332.50	US$4,636,568.00
Kirby & Gralewski	US$7,725,562.50	US$8,956,476.25
Lieff	US$7,912,204.50	US$8,279,284.00
TOTAL	**US$29,825,060.75**	**US$32,419,116.50**
TOTAL IN CANADIAN DOLLARS[2]	**C$39,222,937.39**	**C$42,634,380.11**

[68] Using rounded numbers, the total hourly fee value for all counsel in Canadian dollars, without taxes, at historical rates, is therefore $49.3 million. The $100.1 million fee request is therefore an approximate multiple of 2, which cannot be said to be unreasonable.

[69] I conclude, therefore, that the amount of the proposed fees is reasonable.

[1] No change between Zelle's Historical Hourly Rates and Current Hourly Rates

[2] All conversions between Canadian dollars and U.S. dollars are done at the exchange rate of 1.3151, which is the exchange rate as of the date of the Settlement Agreement (July 11, 2018).

V. DISBURSEMENTS

[70] Turning to disbursements, as mentioned above, counsel seek a total of $6,206,871 plus taxes. The breakdown by category is:

Disbursements	
Courier	$9,603.91
Court Registry Fees	$6,218.47
Court Reporter	$41,555.44
Document Management	$1,448,491.70
Meals	$46,873.39
Experts	$3,600,760.28
Fax	$183.03
Long Distance	$20,193.79
Miscellaneous - Binding, Other	$12,479.14
Outside Professionals	$188,400.03
Photocopying	$146,105.69
Photocopying – External	$43,591.36
Postage	$101.20
Process Service	$4,342.62
Published Notices	$62,267.03
Registry Agent	$23,610.39
Search	$3,715.07
Witness Fee/Deposition	$0.00
Research	$103,052.29
Records	$5.00
Travel	$445,321.26
Sub-Total	**$6,206,871.10**
Taxes	$199,980.07
Grand Total	**$6,406,851.17**

[71] The most costly item is expert fees. I have been given the breakdown by expert. I have read the reports prepared for certification and trial. They were prepared by leading experts in their fields, were complex and all were germane to the issues. I therefore do not have concerns with this item.

[72] The second most costly item is document management. As I said above, all documents were put on a cloud-based system and the memorials and expert reports

were hyperlinked to the documents, which I used extensively. Having seen the detailed listing of the expenses, I also do not have a concern about this item.

[73] With respect to travel, counsel advise:

(a) Accommodation charges were restricted to rates charged at standard business hotels (Sheraton, Hilton, Marriott) or similarly priced alternatives.

(b) Meal expenses were restricted to $20 per person for breakfast, $25 per person for lunch, and $50 per person for dinner, plus applicable taxes.

(c) Air travel was booked as economically as possible, with reimbursements for business class travel only being claimed for flights in excess of three hours unless exception circumstances existed.

[74] I have also seen detailed lists of the other charges. This, of course, amounts to a somewhat cursory review. It is not a taxation; however, in view of my familiarity with the case I do not think one is merited, nor is it or should it be the ordinary practice.

[75] While the materials disclose that the class representatives have no issue with the fee, I do not believe they reviewed the detailed disbursement list, which was recently provided to me. My approval of the disbursements is, therefore, subject, to the class representatives filing an affidavit that they have reviewed the disbursements and have no issue with them.

VI. CONCLUSION

[76] The settlement had been approved at the hearing.

[77] Subject to the proviso in para. 75, the fees and disbursements are approved.

"E.M. MYERS, J."