

**CITATION:** Connell v. Laurentian University et al, 2020 ONSC 7942  
**COURT FILE NO.:** 1076/17 CP  
**DATE:** 20201217

**SUPERIOR COURT OF JUSTICE - ONTARIO**

**RE:** Sarah Connell, Plaintiff

**AND:**

Laurentian University of Sudbury and Spencer Brydges, Defendants

**BEFORE:** Leitch J.

**COUNSEL:** M. Baer and E. Assini, for the plaintiff

A. Cameron and S. Armstrong, for the defendant Laurentian University of Sudbury

G. Nayerahmadi for the defendant Spencer Brydges

**HEARD:** October 19, 2020

**ENDORSEMENT**

[1] The plaintiff seeks an order certifying this action as a class proceeding pursuant to [s. 5\(1\)](#) of the [Class Proceedings Act, 1992, S.O. 1992 c. 6](#) (the “[CPA](#)”) as against the defendant Spencer Brydges; an order approving the Settlement Agreement dated May 22, 2019 with the defendant Spencer Brydges (the “Settlement Agreement”); an order approving the Certification and Settlement Approval Notice and the related Notice Plan and appointing Epiq Class Action Services Canada, Inc. (“Epiq”) as Notice and Opt-out Administrator pursuant to the *CPA*.

**Background Facts**

[2] This action was commenced on May 8, 2017 and the current version of the claim, the Amended Amended Statement of Claim was filed November 13, 2019.

[3] The plaintiff asserts a cause of action for breach of contract and warranty, negligence, breach of privacy, and intrusion upon seclusion alleging that Laurentian University of Sudbury (“Laurentian”) failed to secure the plaintiff’s and class members’ personal information and allowed such information to be compromised, stolen and or disclosed through a data breach perpetrated by Mr. Brydges.

- [4] The plaintiff and Mr. Brydges entered into an agreement dated May 22, 2019 to resolve this litigation.
- [5] Notice of the proposed certification of the action against, and the settlement with, Mr. Brydges and this settlement approval motion was given to class members in accordance with an approved notice plan.
- [6] Class Counsel filed a supplementary affidavit of Ms. Bruneau, a Senior Vice President of Epiq, in which she deposed that the class member data provided by Laurentian was of a very high-quality since 92% of the putative class members were reached by direct notice.
- [7] Ms. Bruneau also reported that 3,574 notices were emailed with a successful email rate of 96%.

### **Certification**

- [8] Certification of an action as a class proceeding is mandatory where the following criteria listed in [s. 5\(1\)](#) of the [CPA](#) are met:
- (a) the pleadings disclose a cause of action;
  - (b) there is an identifiable class of two or more persons that would be represented by the representative plaintiff;
  - (c) the claims of the class members raise common issues;
  - (d) a class proceeding would be the preferable procedure for the resolution of the common issues; and
  - (e) there is a representative plaintiff who,
    - (i) would fairly and adequately represent the interests of the class,
    - (ii) has produced a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the class and of notifying class members of the proceeding, and
    - (iii) does not have, on the common issues for the class, an interest in conflict with the interests of other class members.
- [9] As Class Counsel noted, the certification requirements need not be as rigorously applied in the settlement context.
- [10] As previously set out, the plaintiff alleges that Mr. Brydges perpetuated a data breach at Laurentian as a result of which, class members' personal information was compromised.

- [11] The causes of action, advanced against Mr. Brydges include breach of privacy and intrusion upon seclusion.
- [12] Mr. Brydges has consented to certification of this action and his Counsel has acknowledged that the claims against him are adequately pled and therefore disclose a cause of action.
- [13] The definition of the proposed class is as follows:
- All individuals who Laurentian University sent notice to in early 2017 indicating that such individual's personal information may have been accessed, compromised, and/or disclosed, excluding the following: (i) individuals who are members of the Laurentian University Faculty Association; (ii) individuals who are members of the Laurentian University Staff Union; (iii) individuals who are members of the Canadian Union of Public Employees; (iv) senior management and executives of Laurentian; and (v) the Defendant, Spencer Brydges.
- [14] I am satisfied that this definition easily meets the certification criteria of the *CPA*. As Class Counsel observed, the members of the class can be identified with precision and can be directly notified of certification.
- [15] The proposed common issues to be certified for settlement purposes with respect to Mr. Brydges are as follows:
1. Did the defendant, Spencer Brydges, cause an invasion, without lawful justification, of the Class Members' private affairs?
  2. Would a reasonable person regard the invasion by Brydges as highly offensive causing stress, humiliation, or anguish?
- [16] I am satisfied that the claims of class members raise these common issues and certification will avoid duplicative fact finding and legal analysis.
- [17] I am also satisfied that a class proceeding is a preferable procedure for the resolution of these common issues with Mr. Brydges. As Class Counsel noted, certification of this action for settlement purposes with Mr. Brydges will achieve the objectives of a class proceeding particularly judicial economy and access to justice.
- [18] Finally, I am satisfied that the proposed representative plaintiff is able to fairly and adequately represent the class without any conflict of interest. She has been involved in the action from the outset, has sworn an affidavit in support of the settlement with Mr. Brydges and has a workable plan for continuing the action on behalf of the class and notifying the class of the certification, the approval of the settlement and the opportunity to opt out of the class.

## **Settlement Approval**

- (i) **The terms of the settlement**

[19] Mr. Brydges has agreed to provide a statement relating to an incident that occurred between January 21 and January 25, 2017 impacting the information technology databases of Laurentian. He has agreed to be examined on such statement, will swear an affidavit in support of certification and make himself available for examination for discovery if requested. He has also agreed to provide other information as set out in the Settlement Agreement.

[20] As noted by his Counsel, Mr. Brydges has significant technical knowledge and can provide information from a technical point of view with respect to the weaknesses and vulnerabilities of the system which he accessed.

(ii) **The factors for consideration in approving negotiated settlements**

[21] In *Dabbs v. Sun Life Assurance Co. of Canada*, [1998] O.J. No. 1598 (Gen. Div.), Sharpe J. (as he then was), provided a procedural framework for hearing a motion for approval of a settlement in a class proceeding. While Sharpe J. indicated that his ruling was intended to provide guidance to the parties and objectors in that case, the factors that he outlined have been endorsed by many other courts on settlement approval motions (see for example *Nunes v. Air Transat A.T. Inc.*, [2005] O.J. No. 2527, 20 C.P.C. (6th) 93 (S.C.) and *Osmun v. Cadbury Adams Canada Inc.*, 2010 ONSC 2643, aff'd 2010 ONCA 841, leave to appeal to S.C.C. refused [2011] S.C.C.A. No. 55.

[22] At paragraph 13 of *Dabbs*, Sharpe J. endorsed the following criteria listed in Herbert B. Newberg & Alba Conte, *Newberg on Class Actions*, 3d ed. (Colorado Springs: McGraw-Hill, 1992) at para. 11.43:

1. Likelihood of recovery, or likelihood of success;
2. Amount and nature of discovery evidence;
3. Settlement terms and conditions;
4. Recommendation and experience of counsel;
5. Future expense and likely duration of litigation;
6. Recommendation of neutral parties, if any;
7. Number of objectors and nature of objections;
8. The presence of good faith and the absence of collusion

[23] In *Nunes*, Cullity J. provided a very helpful summary of the principles to be applied on a motion for settlement approval. As he noted at paragraph 7, the party seeking approval has the burden of satisfying the court that the settlement should be approved. The court must be satisfied that the proposed settlement is fair, reasonable, and in the best interests of the

class. The court does not simply rubber stamp a proposal, but it is not the court's function to substitute its judgment for that of the parties or to attempt to renegotiate a proposed settlement.

- [24] As Cullity J. described it at paragraph 7, in order to reject a proposed settlement “and require the litigation to continue, a court must conclude that the settlement does not fall within a zone of reasonableness.”
- [25] As he continued at paragraph 7, courts encourage “resolution of complex litigation through the compromise of claims” and such an approach is also “favoured by public policy”. It is fair to say, as he noted, that a proposed settlement “negotiated at arm's length by counsel for the class” has “a strong initial presumption of fairness”.

(iii) **Should this Settlement Agreement be approved?**

- [26] Class Counsel indicated that the Settlement Agreement was negotiated in good faith at arm's length by experienced Counsel for each party.
- [27] In addition, as described in the plaintiff's factum, “given both the impecuniosity of Brydges and the wealth of information that Brydges has regarding the alleged data breach, settlement with Brydges was in the best interests of the Settlement Class in continuing to litigate the strongest case possible against Laurentian” .
- [28] Further, as Class Counsel outlined in their factum, they had significant information available to evaluate the merits of the settlement despite the fact that there has not yet been any discovery.
- [29] In addition, as Class Counsel outlined, since publication of the notice of certification and of the settlement approval hearing, they have been contacted by 22 class members but there has been only one objection filed. Having reviewed this objection, I agree with Class Counsel that many of the questions raised by the objector will be answered through Mr. Brydges' fulfillment of the terms of the Settlement Agreement.
- [30] Finally, the settlement is fully recommended by experienced Class Counsel and by the representative plaintiff.
- [31] Considering the foregoing factors, I am satisfied that in all of the circumstances the Settlement Agreement is a fair and reasonable resolution of this action in relation to Mr. Brydges, and that is in the best interests of the Class Members.

**Notice of certification and settlement approval**

- [32] I am satisfied that the proposed form of notice and notice plan takes into account the considerations listed in s.17(3) of the *CPA*. Ms. Bruneau has deposed that the proposed notice plan for disseminating the certification and settlement approval notice, which will

repeat the steps completed for the preapproval notice, is a highly effective method of providing notice.

- [33] I am also satisfied that Epiq should be appointed as the Notice and Opt-out Administrator to perform the duties of disseminating the notice of certification and settlement approval and to receive any opt-out forms.

**Orders granted**

- [34] For the foregoing reasons, I have signed the form of order presented by Class Counsel certifying this action as a class proceeding as against the defendant Spencer Brydges, approving the Settlement Agreement, approving the Certification and Settlement Approval Notice and the related Notice Plan and appointing Epiq Class Action Services Canada, Inc. (“Epiq”) as Notice and Opt-out Administrator.



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Justice L.C. Leitch

**Date:** December 17, 2020