IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Warner v. Google LLC,*
2020 BCSC 1108

Date: 20200729
Docket: S1711066
Registry: Vancouver

Between:

Kipling Warner

Plaintiff

And

Google LLC

Defendant

Before: The Honourable Madam Justice Tucker

Reasons for Judgment

Counsel for the Plaintiff, via teleconference:	P.H. Furtula
Counsel for the Defendant, via teleconference:	T.M Cohen, Q.C.
Counsel for the Attendee, Elizabeth Chartrand, via teleconference	D. Lennox
Counsel for the Attendee, Klein Lawyers LLP and Good Barrister, via teleconference	C. Dennis, Q.C.
Place and Date of Hearing:	Vancouver, B.C. June 5, 2020
Place and Date of Judgment:	Vancouver, B.C. July 29, 2020

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[1] Before me are two applications brought with respect to a proposed class action under the *Class Proceedings Act*, RSBC 1996, c. 50 [*CPA*].

[2] In short, counsel of record seeks orders substituting the named plaintiff and certifying the claim, while the named plaintiff, in turn, seeks an order substituting counsel of record.

I. FACTS AND BACKGROUND

A. The BC Action

[3] The notice of civil claim in this action was filed on November 28, 2017 ("BC Action"). It alleges Google LLC ("Google") collected data, without consent, from residents of Canada, excepting those in Quebec and Ontario, with smartphones running the Android mobile operating system ("Android O/S"). The data in question consists of the identification numbers or codes of the cell towers ("Cell ID") used to connect the smartphone to the network in January through December 2017. The collection is alleged to constitute actionable breaches of the *Privacy Act*, RSBC 1996, c. 373, and to found restitutionary claims of unjust enrichment.

[4] Parallel class actions were filed for Android O/S smartphone users resident in Quebec and Ontario ("QB Action" and "ON Action"). All three actions allege breaches of privacy rights and interests.

[5] Mr. Klein approached Mr. Warner to act as the named plaintiff in the BC Action. Mr. Warner is a software engineer who is or has been a plaintiff in a number of class actions, including others with Klein Lawyers LLP and/or Good Barrister as class counsel, and was known to Mr. Klein in that capacity. Mr. Warner agreed to be the named plaintiff in the BC Action, but stipulated that he wanted to be kept informed and involved in the claim.

[6] Mr. Warner signed a retainer agreement, dated November 22, 2017, with Klein Lawyers LLP regarding the BC Action ("Retainer"). The Retainer is brief and includes the following provisions:

> I, Kipling Warner, retain Klein Lawyers LLP to act on my behalf with respect to a class action claim for damages arising from privacy breaches by Google in Android operating system cellular devices. If appointed by the court, I agree to act as representative plaintiff in this case and to fill the responsibilities described in Schedule A to the agreement. I authorize you to take all necessary steps, incur all reasonable expenses, and employ such agents and counsel as you consider necessary.
>
> …
>
> If I terminate the services of Klein Lawyers LLP before a settlement or judgement, they will have a right to a reasonable fee based on services rendered and time spent by the lawyers and paralegals. …

[7] The BC Action was filed by Klein Lawyers LLP and Mathew P. Good Law Corporation (operating as "Good Barrister") as co-counsel. For purposes of this decision, unless context or clarity requires otherwise, I will refer to counsel of record in the BC Action simply as "Klein LLP".

[8] The QB Action was filed by Klein Avocats Plaideurs Inc., with Sergio Lima as named plaintiff: *Lima v. Google LLC*, No.500-06-000941-183 (Montreal). The ON Action was filed by Klein Lawyers LLP in Ontario, with Glen Emond and Graeme MacQueen as named plaintiffs: *Emond and MacQueen v. Google LLC*, CV-18-590521-00CP.

[9] On January 30, 2018, Google filed a response in the BC Action.

[10] On May 16, 2018, Justice Voith was assigned to case manage the BC Action.

B. The Mediated Settlement

[11] Following the exchange of certification materials, a mediation involving the parties to all three actions was conducted in BC. A national settlement was reached and set out in minutes of settlement dated November 30, 2018 ("Minutes of Settlement").

[12] Mr. Warner attended the mediation in person and approved the Minutes of Settlement. The named plaintiffs in the ON and QB Actions were kept informed by their respective counsel and also approved the Minutes of Settlement.

[13] The Minutes of Settlement include various conditions subsequent, including final court approval, however, it is undisputed that the Minutes of Settlement are binding.

[14] The Minutes of Settlement include the following terms:

> A settlement agreement will be prepared by counsel for Google LLC ("Google") and agreed to by the parties substantially in the form approved by the Quebec Superior Court in *Michael Elkoby v. Google Canada Corp et al* [file omitted], modified as appropriate and to reflect the following terms.
>
> …
>
> Subject to and following receipt of court approval, Google will pay the all-inclusive amount of $1,000,000 in full and final settlement of this claim (the "Settlement Funds").
>
> From the Settlement Funds will be paid counsel's fees, taxes, disbursements, the cost of notice and any payments required to be made under Quebec law to the Fond d'aide aux actions collectives and the cost of notice, with the remainder of the settlement amount will be paid in *cy-pres* format, the recipients of which will be determined by mutual agreement of the Parties and subject to court approval.
>
> [Emphasis added]

C. The *Cy-près* Impasse

[15] After the mediation, the parties to the Minutes of Settlement began drafting a national settlement agreement by the exchange of proposed drafts. One of the matters left for determination as part of this process was the identification of *cy-près* recipients acceptable to all parties.

[16] Mr. Warner made it clear that he wanted the *cy-près* donation to go to the Free Software Foundation, Inc. ("FSF"). FSF is an American non-profit organization affiliated with Dr. Richard Stallman. Mr. Warner holds Dr. Stallman and his work in the software industry in high regard. FSF is not registered in Canada and has no Canadian subsidiary, although it occasionally participates in Canadian industry events.

[17] On or about February 20, 2019, Mr. Warner provided Mr. Good with a draft donation letter he had drawn up donating the *cy-près* monies to FSF. The draft is in

the form of a personal letter from Mr. Warner to FSF's Executive Director. It is lengthy and includes the following:

> I, Kip Warner, hereby transfer, convey and pay over this donation to the FSF. This donation is an irrevocable gift subject only to the restrictions stated in this letter. …
>
> Purpose
>
> I would like 90% of this donation to be restricted to the following specific purpose: the support of research and development of all required software and hardware for a cellular modem and related software to enable individuals to create and use cellular telephones designed to respect and enhance the privacy and civil liberties of those using the cellular telephone with design constraints informed by the precautionary principle in respect of any potential adverse health risks that may arise from their radio-frequency electromagnetic radiation.
>
> …
>
> On 30 November, 2018, my counsel and I entered into lengthy, albeit constructive, settlement discussions with the defendant. I authorized a settlement on behalf of all class members in British Columbia, Ontario and Quebec.
>
> Part of being a lead plaintiff is the obligation to always act in the public interest. The fundamental objectives the court recognizes in class proceedings are the needs for access to justice where it may have otherwise not been possible, judicial economy, and behavioural modification.
>
> I made a judgment call during settlement negotiations after careful reflection on the latter. Behavioural modification likely could not have been achieved through the division of settlement funds into nominal quantities distributed across a large class size. It also likely could not have been achieved through a rebate or voucher on new mobile handset encouraging millions to obtain new ones while simultaneously providing a substantial profit margin to the same people who created the problem in the first place.
>
> …
>
> [Emphasis added.]

[18] Mr. Good appears to have had primary responsibility for communicating with Mr. Warner on behalf of Klein LLP. Mr. Good has provided affidavits describing his post-Minutes of Settlement discussions with Mr. Warner regarding the *cy-près* recipient. Mr. Good's affidavit attaches a number of emails sent between Mr. Warner and Klein LLP and copies of Mr. Good's contemporaneous notes of the discussions. To Mr. Good's considerable credit, his file notes are both detailed and legible.

[19] Mr. Good's affidavit of November 7, 2019 includes the following:

> 15. By about May 2019, the settlement document was essentially finalized. The only remaining sticking point was the identities of the recipients of the *cy-pres* funds. Up to this point, I had had several conversations or exchanges with Mr. Warner about which organisation(s) would receive the funds. I was aware of Mr. Warner's desire that the funds go to FSF. In our discussions, I tried to temper his enthusiasm for that recipient, but I did not think it was likely Google would ever agree. However, I did make efforts to present the FSF proposal in the best possible light for consideration by the counter party.
>
> 16. I subsequently was informed and then advised Mr. Warner that the FSF was not acceptable as a recipient to the other side. I urged him to consider the B.C. and Ontario Law Foundations, and the Fondation du Barreau in Quebec, as appropriate recipients of the *cy-pres* funds. I also informed him that the Law Foundation is the usual recipient of *cy-pres* awards in this province (and across Canada), and that the default under the *Class Proceedings Act* is now that a minimum of 50% of any undistributed amounts must go to that institution. I also told Mr. Warner about the good works done by the Law Foundations and explained that it uses its resources for the benefit of the whole of society, and not just for lawyers, and that funds on behalf of a class of Canadians should go to a Canadian organisation.
>
> …
>
> 20 … the other plaintiffs in the Ontario and Quebec actions confirmed that they approved of the Law Foundations as appropriate recipients for the *cy-pres* funds. …
>
> [Emphasis added.]

[20] Mr. Warner also provided affidavit evidence regarding his discussions with Mr. Good and Mr. Klein after the Minutes of Settlement. Mr. Warner indicates that he did not take notes of these discussions.

[21] To the extent that Mr. Warner's recollection of the conversations in question differs somewhat from Mr. Good's notes, I accept Mr. Good's notes as the more reliable evidence of what was said. Mr. Good's notes were taken contemporaneously. They also capture relevant legal distinctions, whereas Mr. Warner's recollections are expressed in broader and more colloquial terms.

[22] I have reviewed the affidavits and attachments filed. I am not going to recount in detail the affiants' respective versions of the communications. I am satisfied that there is no substantial conflict. Mr. Warner and Mr. Good are describing, in good faith, the same communications, but doing so in ways that reflect their respective assumptions and expertise.

[23] Mr. Warner and Klein LLP had different sets of assumptions and expectations, and each interpreted the other's statements in accordance with their own set. Mr. Warner and Mr. Good, in particular, made ambiguous statements to one another, metaphorically nodded in agreement, and carried forward in accordance with their individual understandings.

[24] The key communications were those of June 3 and 10, 2019.

[25] On June 3, 2019, Mr. Warner reiterated his view that the *cy-près* donation should go to FSF. Mr. Good and Mr. Klein responded that Google had already rejected FSF, and that the ON and QB Action plaintiffs and Google were all willing to donate to the British Columbia, Ontario and Quebec law foundations ("Law Foundations"). Mr. Warner then floated the idea that the others might agree to donate to a Canadian FSF subsidiary, if FSF created one. Mr. Klein told Mr. Warner to get back to them within a week regarding a proposed subsidiary or steps would have to be taken to address the *cy-près* impasse.

[26] Mr. Warner and Mr. Good both attest that Mr. Klein said that if the impasse continued, Mr. Warner would have to "fire" Klein LLP or Klein LLP would have to "fire" Mr. Warner to enable the matter to move forward. Mr. Klein's statement is reflected in Mr. Good's notes. Mr. Good's notes indicate that at the very end of the meeting, Mr. Warner was told that he could "tell the court", if he didn't agree.

[27] On June 10, 2019, Mr. Warner, Mr. Klein and Mr. Good were scheduled to meet in person. Mr. Warner sought to postpone, but Mr. Good emailed back that Klein LLP wanted to meet as planned. In response, Mr. Warner sent an email that simply said:

> I'm not going to go ahead with David's proposal. The best option is to find another lead plaintiff.

[28] Mr. Good took that email to mean that Mr. Warner was not going to raise the issue of a Canadian subsidiary with FSF, and that Klein LLP should find a replacement plaintiff because Mr. Warner did not want any further involvement. After

receiving the email, Mr. Good phoned Mr. Warner. According to Mr. Good, Mr. Warner confirmed that he was "done" with the BC Action and that it would be best to use someone else for the settlement. Mr. Good's notes and his email to Mr. Klein shortly after the call both indicate that Mr. Good understood that Mr. Warner wanted to be removed as plaintiff, but would allow his name to stand until a substitution was made. Mr. Good believed Mr. Warner was aware that he could, as a class member, object to settlement terms when court approval of a settlement was sought. Mr. Good thought Mr. Warner intended to object to the Law Foundations at that stage of the proceeding. In the circumstances, Mr. Good's interpretation was a reasonable one.

[29] From June 10th forward, Mr. Good thought Mr. Warner was simply waiting for confirmation the substitution had been done. While Mr. Good and Mr. Warner spoke several times after June 10th, they were involved and interested in matters apart from the BC Action. With regard to the BC Action, their updating conversations were as ambiguous as the originals.

[30] Klein LLP identified another class member, Elizabeth Chartrand, who was willing to be substituted in as named plaintiff. Ms. Chartrand signed a retainer agreement with Klein Lawyers LLP with respect to the BC Action. On August 16, 2019, Klein LLP submitted a requisition for a consent order substituting Ms. Chartrand for Mr. Warner.

[31] Klein LLP, acting on behalf of Ms. Chartrand, finalized settlement terms with the other parties to the Minutes of Settlement. A document dated August 22, 2019, was signed by counsel for the settlement parties ("Settlement Agreement"). Ms. Chartrand is a party to the Settlement Agreement; Mr. Warner is not. The Settlement Agreement provides for *cy-près* donations to the Law Foundations.

[32] The Settlement Agreement recitals record Google's consent to Ms. Chartrand's substitution. Section 13 permits the Settlement Agreement to be terminated if Ms. Chartrand's substitution is denied, or if the Settlement Agreement is not judicially approved in its entirety.

[33] On or about September 18, 2019, Klein LLP's August 16, 2019, requisition was rejected by the Registry on the basis that Ms. Chartrand had not signed the consent order.

[34] On September 30, 2019, Klein LLP filed a notice of application seeking orders substituting Ms. Chartrand and certifying the BC Action by consent pursuant to the Settlement Agreement ("September Application"). The September Application was filed with an October 4, 2019, hearing date.

[35] Regarding substitution, the September Application simply states that Mr. Warner is "no longer able to act for personal reasons". Klein LLP did not copy Mr. Warner with the September Application. Neither of those facts is remarkable if the matter is viewed from Mr. Good's perspective. The phrase "personal reasons" is commonly used to protect legal privilege when the law does not require any particular reason to be established, and Mr. Good understood that Mr. Warner only wanted confirmation once the substitution was done.

[36] Mr. Warner's understanding was, in fact, very different from Mr. Good's.

[37] Mr. Warner considered his June 10, 2019, email a rejection of Mr. Klein's proposal regarding the Law Foundations. He expected to be served with a substitution application, and he intended to oppose it. He wanted to argue that he should be entitled to instruct Klein LLP to continue to seek agreement to FSF.

[38] Mr. Warner had been told that he had a right to put his position before the court if he disagreed with class counsel. He disagreed with Klein LLP. Mr. Warner's expectation that it would occur at the substitution stage was not unreasonable in the circumstances.

D. The September Realization

[39] The September Application brought the competing conceptions to a head.

[40] Mr. Warner saw the September Application on Court Services On-line. Given his expectations, he found it alarming and contacted Mr. Klein. Following some

discussion about who said what in June, Mr. Warner clearly stated that he would not consent to being removed. Mr. Warner says he then asked Mr. Klein to notarize an affidavit setting out Mr. Warner's objections to the substitution, and that Mr. Klein told him he was no longer a client.

[41] On October 1, 2019, Mr. Klein wrote Mr. Warner summarizing his understanding of how matters stood.

[42] At 4:53 p.m. on October 1, 2019, Ms. Furtula emailed Klein LLP that she was "in the process of being retained" to represent Mr. Warner and would seek to adjourn the October 4 hearing. She asked if the adjournment could go by consent. Mr. Klein emailed back declining to agree. At 5:00 p.m. on October 1, 2019, Mr. Warner sent Klein LLP an email directing it "send all correspondence on this file to my counsel, Ms. Furtula".

[43] On October 3, 2019, Mr. Klein emailed Ms. Furtula that the Registry had informed him that Justice Voith was unavailable on October 4, 2019.

[44] Later on October 3, 2019, Google's counsel forwarded Klein LLP an (unopened) email she had received from Mr. Warner. The email attached Mr. Warner's Notice of Intention to Act in Person, dated October 1, 2019, and filed on October 3, 2019, in the BC Action.

[45] On October 4, 2019, Mr. Klein emailed Mr. Warner a letter that included the following:

> …
>
> As set out in my letter of October 1st, your instructions provided on June 10, 2019 were to substitute you as plaintiff in this action. Further to those instructions, we took steps to substitute you as plaintiff. The Notice of Intention to Act in Person that you have filed is therefore a nullity.
>
> This is [a] case managed class proceeding. An individual cannot act on his or her own behalf in a class proceeding.
>
> I understand that you wish to express a view on settlement approval in this matter. Your ability to do so is a matter for the case management judge to address. We have

> requested that a date be made available before the judge to deal with this issue. We will provide you with the date once it has been set down by the Registry.
>
> [Emphasis added.]

[46] On October 8, 2019, Mr. Warner wrote the Registry to complain that the September Application had been reset for November 19, 2019, without his being consulted.

[47] On November 7, 2019, Klein LLP filed the instant notice of application ("Plaintiff Substitution Application"), again seeking orders substituting Ms. Chartrand and certifying the BC Action. Unlike the September Application, the application includes affidavit materials and legal argument regarding substitution. An order striking the Notice of Intention to Act in Person is also sought. The hearing date set by the Plaintiff Substitution Application was November 19, 2019, which is presumably the date provided by the Registry in response to Klein LLP's inquiry.

[48] On November 8, 2019, Mr. Klein emailed Mr. Warner stating, in part:

> … It appears you have now terminated our representation of you in this matter. We will not be responsible for any additional costs that are attributable to actions taken by you on or after November 4, 2019, when we do not represent you. …

[49] Mr. Warner attests that he formally retained Ms. Furtula to represent him in the BC Action on November 13, 2019. On November 18, 2019, Ms. Furtula wrote the Registry advising she would seek an adjournment at the November 19, 2019, hearing. On November 19, 2019, Ms. Furtula filed a Notice of Change of Solicitor to act on behalf of Mr. Warner in the BC Action.

[50] On November 19, 2019, Ms. Furtula, Ms. Cohen and Mr. Lennox appeared in court. Justice Voith adjourned the applications generally, ordering the parties to file all necessary materials by November 29, 2019, for the next scheduled hearing.

[51] On November 29, 2019, Ms. Furtula filed a response to the Plaintiff Substitution Application and a further application seeking to substitute her firm, Westpoint Law Group, in as counsel of record in the BC Action ("Counsel Substitution Application").

[52] In December 2019, I replaced Voith J. as case management judge.

II. THE SUBSTITUTION APPLICATIONS

[53] There are two substitution applications before me: the Plaintiff Substitution Application and the Counsel Substitution Application.

A. Parties' Positions

[54] The Plaintiff Substitution Application is brought under R. 6-2(7)(b)(i) and (ii) of the *Supreme Court Civil Rules*, B.C. Reg. 168/2009 [*Rules*], the Court's inherent jurisdiction, and ss. 12 and 4(1)(e) of the *CPA*.

[55] Rule 6-2 includes the following provisions:

> **Adding, removing or substituting parties by order**
>
> (7) At any stage of a proceeding, the court, on application by any person, may, subject to subrules (9) and (10),
>
> (a) order that a person cease to be party if that person is not, or has ceased to be, a proper or necessary party,
>
> (b) order that a person be added or substituted as a party if
>
> (i) that person ought to have been joined as a party, or
>
> (ii) that person's participation in the proceeding is necessary to ensure that all matters in the proceeding may be effectually adjudicated on.
>
> **Procedure if party added, removed or substituted by order**
>
> (8) Unless the court otherwise orders, if an order is made under subrule (7) adding, removing or substituting a party,
>
> (a) the originating pleading or petition must be amended in accordance with these Supreme Court Civil Rules, a reference to the order must be endorsed on that amended pleading or petition and Rule 6-1 (4) to (7) applies, …
>
> **Effect of order**
>
> (11) Unless the court otherwise orders, if a person becomes a party in substitution for a former party, all things done in the proceeding before the person became a party have the same effect in relation to that person as they had in relation to the former party, but the substituted party must file a notice of address for service in Form 9.

[56] Broadly stated, Klein LLP's position is that Mr. Warner's conduct following the Minutes of Settlement indicates he cannot "fairly and adequately represent the interests of the class" for purposes of s. 4(1)(e)(i) of the *CPA*.

[57] Section 2 of the *CPA* states:

> 2(1) A resident of British Columbia who is a member of a class of persons may commence a proceeding in the court on behalf of the members of that class.
>
> (2) The member who commences a proceeding under subsection (1) must
>
> (a) make an application to the court for an order
>
> (i) certifying the proceeding as a class proceeding, and
>
> (ii) subject to subsection (4), appointing the member as the representative plaintiff for the class proceeding, …

[58] Section 4 of the *CPA* includes:

> 4 (1) Subject to subsections (3) and (4), the court must certify a proceeding as a class proceeding on an application under section 2 or 3 if all of the following requirements are met:
>
> (a) the pleadings disclose a cause of action;
>
> (b) there is an identifiable class of 2 or more persons;
>
> (c) the claims of the class members raise common issues, whether or not those common issues predominate over issues affecting only individual members;
>
> (d) a class proceeding would be the preferable procedure for the fair and efficient resolution of the common issues;
>
> (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, an interest that is in conflict with the interests of other class members.
>
> [Emphasis added.]

[59] Klein LLP also relies on s. 12 of the *CPA*, which reads:

> **Court may determine conduct of proceeding**
>
> 12 The court may at any time make any order it considers appropriate respecting the conduct of a class proceeding to ensure its fair and expeditious determination and, for that purpose, may impose on one or more of the parties the terms it considers appropriate.

[60] In *British Columbia v. Apotex Inc*., 2020 BCCA 186 (In Chambers), a decision issued on July 2, 2020, Justice Grauer held that s. 12 of the *CPA* only applies to certified proceedings, and thus cannot ground a pre-certification application. While *Apotex* was issued following the June 5 hearing before me, further submissions from the parties were not required. The Plaintiff Substitution Application specifically relies on Rule 6-2 and the Court's inherent jurisdiction; there is no need to resort to s. 12 of the *CPA* to determine these applications.

[61] It is convenient to quote some portions of the Plaintiff Substitution Application at this point, both as an outline of Klein LLP's argument for Mr. Warner's removal and as context for Mr. Warner's response:

> 26. During the process of preparing a formal, written settlement agreement, Mr. Warner became fixated on the matter of the choice of recipient for the *cy-pres* funds. …
>
> …
>
> 33. On October 3rd, Mr. Warner purports to have filed a Notice of Intention to Act in Person. He appears to object to the settlement in some way, but his actions are nonsensical and inconsistent with the instructions he previously gave. …
>
> …
>
> 35. Mr. Warner is no longer suitable as a representative plaintiff. …
>
> …
>
> 47. Mr. Warner disagreed with the advice of class counsel and the wishes of the other representative plaintiffs about the choice of beneficiaries for the *cy-pres* award. He wanted to privilege an organization closer to his own views. As a result of that impasse, Mr. Warner gave express instructions in writing and confirmed by phone to be substituted in place of a new plaintiff, who would endorse the settlement. In reliance on those instructions, a new plaintiff (Ms. Chartrand) retained counsel, and Google entered into the final version of the Settlement Agreement with the four plaintiffs, with the Law Foundations as the *cy-pres* beneficiaries.
>
> …
>
> 49. Mr. Warner now appears to have changed his mind about the substitution and seems to want to derail or modify the settlement in some way to suit his personal agenda. What exactly he wants remains unclear.
>
> 50. Mr. Warner gave clear instructions to counsel to be substituted. The other plaintiffs and the defendants have taken important steps in reliance on his substitution. Mr. Warner should not now be permitted to prejudice the other plaintiffs (Ms. Chartrand in BC, Messrs. Emond and MacQueen in Ontario, and Mr. Lima in Quebec), class members, the defendant, or the

> Court by his actions. Settlement approval is already underway in Ontario and Quebec – Mr. Warner should not be allowed to hold courts and class members across the country hostage because he wants a platform to express his idiosyncratic views.
>
> 51. … Here, the parties are at certification and the Court must exercise its supervisory jurisdiction over the proceedings to protect the interests of the class members from the actions of a rogue plaintiff. …
>
> …
>
> 53. With respect to the choice of *cy-pres* recipients, in *Sorenson v. easyhome Ltd*., 2013 ONSC 4017, Justice Perell held that "[h]owever well meaning, the prospect of a *cy-pres* distribution should not be used by Class Counsel, defence counsel, the defendant or a judge as an opportunity to benefit charities with which they may be associated of which they may favour." To this list should be added named plaintiffs, who should not be able to hold up a settlement until it goes to their pet project or an organization with which they are affiliated, …

[62] Ms. Furtula asserts that the Retainer does not entitle Klein LLP to substitute Mr. Warner at its discretion. She submits that Mr. Warner is a "genuine" plaintiff, with relevant expertise, who has actively participated in the litigation. She asserts that Mr. Warner has acted properly, whereas Klein LLP has overstepped its proper role by disregarding Mr. Warner's instructions on the *cy-près* issue.

[63] Ms. Furtula cites *Fantl v. Transamerica Life Canada*, 2009 ONCA 377 [*Fantl CA*] at para. 67, where Chief Justice Winkler said:

> [67] Sections 33(1) and (4) of the *CPA*, which provide for contingency fees and a multiplier effect on fees to reward risk and success, are intended to provide sufficient incentives for lawyers to take on class proceedings that would not otherwise be attractive. This is the entrepreneurial aspect of class proceedings legislation that enhances access to justice. The *CPA* does not, nor was it ever intended to, provide lawyers with a vested interest in the subject matter of the lawsuit entitling them to override the choices of the representative plaintiff in the litigation, including the choice of counsel.

[64] Ms. Furtula also alleges that Klein LLP breached its duty of loyalty to Mr. Warner. Conceding the possibility of initial miscommunication, she submits the duty was breached by Klein LLP's conduct September 30, 2019. The breaching conduct is generally described as acting "adversarial" vis-à-vis Mr. Warner.

[65] Ms. Furtula's argument focusses on the scheduling and content of the Plaintiff Substitution Application. The alleged breaches are specified as follows:

a) failing to inform Mr. Warner of their application to substitute him as representative;

b) refusing to agree to adjourn the October 4, 2019 hearing;

c) setting the Plaintiff Substitution Application for November 19, 2019 without consulting Mr. Warner for his availability;

d) refusing to reschedule the November 19, 2019 hearing after being advised Mr. Warner was unavailable;

e) describing Mr. Warner's actions as "nonsensical" and "inconsistent with instructions he previously gave", which is not true;

f) submitting to the court that Mr. Warner is "no longer suitable" as a representative plaintiff;

g) stating that Mr. Warner wants to "derail or modify the settlement… to suit his own personal agenda";

h) stating that "Mr. Warner should not be allowed to hold court and class members across the country hostage because he wants a platform to express his idiosyncratic views";

i) describing Mr. Warner as a "rogue plaintiff"; and

j) arguing that "named plaintiffs … should not be able to hold up a settlement until it goes to their pet project or an organization with which they are affiliated", with the implication that Mr. Warner is such a person.

[66] The Counsel Substitution Application reasserts the points made in response to the Plaintiff Substitution Application, and seeks an order substituting Ms. Furtula's firm in as counsel of record in the BC Action.

[67] Google supports Klein LLP's position throughout.

B. Mr. Warner as Representative Plaintiff

[68] As discussed by Justice Butler at paragraphs 39 and 40 of *Richard v. HMTQ*, 2007 BCSC 1107, the court has a significant role in overseeing class proceedings, both before and after certification, and a responsibility to protect the interests of absent class members. This includes oversight of issues arising from disagreement between intended class counsel and a named plaintiff about the best interests of the class.

[69] The Plaintiff Substitution Application raises the issue of whether Mr. Warner is qualified to act as a representative plaintiff for purposes of *CPA*, s. 4(1)(e). If he is not, the BC Action cannot be certified with him as the plaintiff.

[70] Mr. Warner is a knowledgeable, informed and engaged plaintiff and actively assisted in bringing the litigation to the stage of the Minutes of Settlement. It is only his conduct following the Minutes of Settlement that is alleged to disqualify him from continuing on through certification.

[71] Klein LLP relies on *Sandhu v. HSBC Finance Mortgages Inc*., 2016 BCCA 301, which emphasized that the appointment of a qualified plaintiff is an important check in ensuring the integrity of class proceedings:

> [36] A representative plaintiff must vigorously advance the claims on behalf of others and refrain from seeking undue personal gain. The power of class proceedings advanced in the interest of access to justice for claimants, carries with it an obligation to maintain the integrity of this exceptional system of redress.

[72] The *Sandhu* facts involved apparent extortionate conduct (para. 38). Accordingly, the Court was not called upon to finely weigh the form or degree of self-interest that will disqualify someone from acting as representative plaintiff.

[73] In *Azar v. Strada Crush Limited*, 2019 ONSC 4436, Justice Thomas faced a less stark set of facts. Mr. Azar, following certification, sought to have new class counsel appointed. In turn, class counsel, Mr. Juroviesky, sought a finding that Mr.

Azar was not qualified to continue as the representative plaintiff. Mr. Azar had been introduced to Mr. Juroviesky through Mr. Juroviesky's paralegal, Robert Nunes. Mr. Juroviesky and Mr. Nunes had subsequently fallen out, resulting in a legal dispute between them in which Mr. Nunes was represented by Mr. Singer. Mr. Singer was the counsel Mr. Azar sought to have appointed in place of Mr. Juroviesky.

[74] Justice Morgan concluded that Mr. Azar should be removed:

> [9] The real question here is, what is in the best interests of the class? From the Plaintiff's affidavit, I know that he was first introduced to Mr. Juroviesky by Robert Nunes, a paralegal and former business partner of Mr. Juroviesky's. It would seem that Mr. Juroviesky and Mr. Nunes had a parting of the ways sometime during the past year, and that Mr. Nunes hired Mr. Singer to represent him in suing Mr. Juroviesky. At the same time, Mr. Nunes introduced the Plaintiff to Mr. Singer and, presumably, convinced him to hire Mr. Singer and to fire Mr. Juroviesky.
>
> [10] Mr. Nunes accompanied the Plaintiff to the hearing before me and sat together with him in court. But I do not have to guess at the friendly relations between them. A full five paragraphs of the Plaintiff's affidavit filed in support of the motion to change class counsel are devoted to a defense of Mr. Nunes in his business dispute with Mr. Juroviesky. He sets out the financial dispute between them and goes out of his way to say – gratuitously, in the context of the present motion – that Mr. Nunes "was unjustifiably treated [by] Mr. Juroviesky" and advocates for Mr. Juroviesky to pay Mr. Nunes more money.
>
> [11] <u>It seems to me that in seeking to terminate the retainer of class counsel who successfully took a difficult case through the certification stage, and in seeking instead to appoint the lawyer representing his friend who is in a business dispute with class counsel, the Plaintiff has not put forward the best interest of the class he represents. Rather, he has put his own interest first</u> in choosing Mr. Nunes' personal lawyer over the lawyer who has a proven track record in this very case. If this had occurred at or just prior to certification, I would have had to conclude that the criteria stipulated in ss. 5(1)(e)(i) (fairly and adequately represent the class) and 5(1)(e)(ii) (no conflict of interest with the class) of the *CPA* have not been met.
>
> [12] Since those criteria for a suitable representative Plaintiff would not have been met at the time of certification, they likewise are not met now. The class deserves to have a representative Plaintiff devoting his time and attention to the litigation and instructing class counsel in respect thereto. It should not have a Plaintiff that hires and fires class counsel based on matters other than class counsel's conduct of the class action litigation. Whether Mr. Juroviesky owes Mr. Nunes money or Mr. Nunes owes Mr. Juroviesky money is a distraction which should not play into the representative Plaintiff's approach to this case. The rest of the class care about this case, not the Nunes v. Juroviesky case.
>
> [Emphasis added.]

[75] As I read the decision, Justice Morgan was not articulating a “best interests” test at paragraph 9 of his decision, but rather situating the court’s jurisdiction to address the issue. Justice Morgan went on to specifically find that Mr. Azar was not qualified to continue under of s. 5(1)(e)(i) of the Ontario statute – a provision equivalent to s. 4(1)(e)(i) of the *CPA*.

[76] In *Azar*, the conduct that demonstrated Mr. Azar’s willingness to put his own interests first was his application to substitute counsel. More broadly, he was disqualified because he was prepared to disrupt the class proceeding to further a personal interest. Mr. Azar was not capable of fairly and adequately representing the class because he was prepared to give instructions based on priorities that were not shared by the class.

[77] The decisions in *Fantl v. Transamerica Life Canada* (2008), 60 C.P.C. (6th) 326, 166 A.C.W.S. (3d) 1045 (Ont. S.C.J.) [“*Fantl SC*”], and on appeal in *Fantl CA*, are also of assistance.

[78] Mr. Fantl was the named plaintiff in an intended class proceeding. The filing firm, Roy Elliot Kim O’Connor LLP (“REKO”), dissolved prior to certification. Some former partners seeded two new firms, Roy Elliot O’Connor LLP (“REO”) and Kim Orr Barristers PC (“KO”). Mr. Fantl had been persuaded to act as plaintiff by Mr. Roy, now with REO. Mr. Kim, now with KO, had been lead counsel on the *Fantl* action.

[79] Following dissolution, it fell to Mr. Fantl to choose a firm to continue the action. He chose REO. Mr. Kim then brought an application alleging that Mr. Fantl’s choice constituted a failure to act in the best interests of the class and seeking to have KO appointed as counsel of record. Mr. Kim also sought an order replacing Mr. Fantl as the named plaintiff.

[80] Justice Perell held that Mr. Fantl had the right to choose any counsel adequate to serve the interests of the class, including REO. In *Fantl CA*, Winkler C.J.O. agreed with Perell J.’s result, but framed the test on review differently:

> [48] The parties vigorously disputed the test to be applied when the court reviews a representative plaintiff's choice of counsel. In his reasons, the motion judge correctly identified the issues and canvassed the relevant case law in deciding that question. In my view, he made no error in holding that the choice of counsel upon REKO's dissolution was a matter for Mr. Fantl to deal with and that his decision did not warrant interference by the court. Nonetheless, I would arrive at that result for different reasons and based on a different analysis than that of the motion judge.
>
> [49] The appellant has argued that this court should evaluate Mr. Fantl's choice of counsel by determining whether he was acting in the "best interests of the class" in so choosing. On the other hand, the respondent contends that the motion judge was correct in applying a test of adequacy to Mr. Fantl's choice of counsel. In my view, both approaches miss the mark. Once the court's jurisdiction is engaged, any review by the court of a decision as to choice of counsel must be directed to three factors:
>
> > (1) Has the plaintiff chosen competent counsel? (2) Were there any improper considerations underlying the choice made by the plaintiff? (3) Is there prejudice to the class as a result of the choice?
>
> [50] Unless this inquiry reveals something unsatisfactory to the court, it ought not to interfere with the choice of counsel made by the plaintiff. The court is not a substitute decision-maker for the plaintiff in the litigation. Accordingly, any intervention based on its supervisory jurisdiction must be limited to situations where there is cogent evidence that steps taken may have an adverse impact on the absent class members.
>
> …
>
> [63] Turning to the second factor, there is no evidence of any improper purpose or motive on the part of the plaintiff in making his decision to retain REO. The appellant points to the plaintiff's friendship with Mr. Roy, one of the partners of REO, as the driving factor in choice of counsel. While that was a consideration, it was not the only factor for the plaintiff's choice of counsel. As noted by the motion judge and as indicated in the record, Mr. Fantl was attracted to REO because of the competence of counsel, which is not disputed, and its reputation in class action work.
>
> [64] In any event, I would not accept that the fact of an acknowledged friendship between the plaintiff and his counsel of choice would constitute an improper purpose in and of itself. An improper purpose would be one where the plaintiff was seeking to gain a personal advantage, the hope of an advantage not shared by the class members or was motivated in some way that was inconsistent with the interests of the class.
>
> [Emphasis added.]

[81] *Fantl CA* is instructive regarding the concept of improper purpose in the context of plaintiff instructions. The court is not a substitute decision-maker for the plaintiff, and it will not lightly intervene. However, it is obliged to intervene where

there is “cogent evidence that steps taken may have an adverse impact on the absent class members”.

[82] A person cannot be appointed as a representative plaintiff pursuant to *CPA* s. 8(1)(b), unless the person fulfils the “would fairly and adequately represent the interests of the class” requirement under s. 4(1)(e)(i). Where the court is satisfied on the evidence that a person has given or may give litigation instructions tainted by improper purpose, the s. 4(1)(e)(i) requirement is not met. An improper purpose in this context is one of the nature outlined in *Fantl CA*: i.e., seeking to obtain a personal advantage, acting with the hope of obtaining an advantage not shared by other class members, or acting with a motivation that is inconsistent with the best interests of the class.

[83] In the present case, Mr. Warner’s post-Minutes of Settlement instructions have been driven by his desire to see the *cy-près* funds go to FSF. Mr. Warner asserts that funding FSF will optimize the behaviour modification achieved by the litigation.

[84] A *cy-près* donation is made in lieu of direct compensation to class members, and thus should indirectly benefit those class members. The courts have recognized behavioural modification as a relevant factor in assessing whether any particular *cy- près* donation does, in fact, benefit class members.

[85] In *Sorenson v. easyhome Ltd*., 2013 ONSC 4017, Perell J. stated:

> [27] As a general rule, *cy près* distributions should not be approved where direct compensation to class members is practicable: …. However, where the expense of any distribution among the class members individually would be prohibitive in view of the limited funds available and the problems of identifying them and verifying their status as members, a *cy près* distribution of the settlement proceeds is appropriate: ….
>
> [28] By benefiting the class, at least indirectly, the *cy près* distribution provides access to justice, and the expenditure at the expense of the defendant may provide some behaviour modification.
>
> [29] The court should have regard to the objectives of access to justice for class members and behaviour modification of the defendant as factors in considering whether or not to approve a particular *cy près* distribution: *Cassano v Toronto Dominion Bank* (2009), 98 OR (3d) 543 (SCJ) at paras.

> 14-49. In *Managing Class Action Litigation: A Pocket Guide for Judges* (3rd ed.) (Federal Judicial Center, 2010) at p.19, B.J. Rothstein & Thomas E. Willging have the following suggestions for judges considering approval of a *cy près* distribution:
>
> > *Cy près* relief must come as close as possible to the objective of the case and the interests of the class members. Question whether the class members might feasibly obtain a personal benefit. Look for evidence that proof of individual claims would be burdensome or that distribution of damages would be costly. If individual recoveries do not seem feasible, examine the proximity or distance between the *cy près* recipient's interests or activities and the particular interests and claims of the class members. When *cy près* relief consists of distributing products to charitable organizations or others, press for information about whether the products in question have retained their face value or might be out-of-date, duplicative, or of marginal value.
>
> [30] *Cy près* relief should attempt to serve the objectives of the particular case and the interests of the class members. It should not be forgotten that the class action was brought on behalf of the class members and a *cy près* distribution is meant to be an indirect benefit for the class members and an approximation of remedial compensation for them. ...

[86] Ms. Furtula asserts Klein LLP should have put the issue of Mr. Warner's *cy-près* instructions before the court prior to concluding the Settlement Agreement. Klein LLP says it would have, had Mr. Warner's actual position on June 10, 2019, been made clear. I have accepted that there was genuine miscommunication prior to September 30, 2019. In the circumstances, the execution of the Settlement Agreement should neither advantage nor disadvantage either side. I will disregard the terms and existence of the Settlement Agreement in determining whether Mr. Warner is qualified to be appointed as a representative plaintiff,

[87] As above, Klein LLP relies on *Sorenson* in its application and, in particular, paragraph 30 of that decision:

> [30] … However well meaning, the prospect of a *cy près* distribution should not be used by Class Counsel, defence counsel, the defendant, or a judge <u>as an opportunity to benefit charities with which they may be associated or which they may favour</u>. To maintain the integrity of the class action regime, the indirect benefits of the class action should be exclusively for the class members.
>
> [Emphasis added.]

[88] Klein LLP argues that the underlined statement applies equally to class action plaintiffs. I disagree. First, plaintiffs, unlike those listed in *Sorenson*, are class members. Second, it is not uncommon for a plaintiff to be personally involved in a field or industry related to the subject matter of a class action. Thus, a plaintiff may well have an innocuous connection to an otherwise appropriate *cy-près* recipient. For example, association with, membership in or sponsorship of an organization may be *pro forma* or near-universal in some fields. The application of a low-level, bright-line exclusion in relation to plaintiffs risks the exclusion of reputable and responsibly-governed entities that may be not only appropriate but logical *cy-près* recipients.

[89] What a plaintiff cannot do, however, is give instructions regarding *cy-près* donation that are tainted by improper purpose in the sense described in *Fantl CA*.

[90] Here, Mr. Warner has an association with a person, Dr. Stallman, who is said to be affiliated with FSF. There is no evidence before me regarding Mr. Warner's personal relationship with Dr. Stallman (Mr. Warner disputes his characterization as a mentor) or regarding Dr. Stallman's affiliation with FSF. I am unable to determine on the evidence whether the connection between Mr. Warner and FSF itself supports an inference of improper purpose.

[91] What is before me, however, is Mr. Warner's draft donation letter. I am satisfied from the tenor and form of the letter (e.g., the framing of the *cy-près* donation as a personal gift, the use of the term "lead plaintiff", the lack of reference to the other parties to the Minutes of Settlement) that Mr. Warner anticipates, and may receive, a personal benefit in the form of personal recognition for any donation to FSF. Further, that recognition would sound within the software industry, which is Mr. Warner's personal professional milieu.

[92] I accept that Mr. Warner has a good faith belief that using the monies to support FSF projects would assist in modifying the behaviour of Google and similar industry actors. I accept that any personal benefit would be collateral. However, a collateral benefit is sufficient to establish improper purpose as outlined in *Fantl CA*.

[93] I conclude that directing the monies to FSF would provide Mr. Warner with a cognizable benefit that is separate and distinct from any benefit to other class members.

[94] Further, there is no evidence suggesting Google would reconsider its position regarding FSF if there were a Canadian subsidiary. Notably, Google supports Klein LLP's position on the applications before me. There is no evidence FSF is willing to create a Canadian subsidiary. There is no evidence the Ontario and Quebec plaintiffs would agree to FSF. Continued pursuit of agreement to FSF is without promise and will result in delay. I am satisfied that the instructions Mr. Warner seeks to give would be prejudicial to the best interests of the class.

[95] I find that Mr. Warner is not qualified to be appointed as a representative plaintiff under *CPA*, s. 8(1)(b), and, therefore, the BC Action cannot be certified with him as representative plaintiff. Mr. Warner is removed as plaintiff in the BC Action.

[96] To the extent that Mr. Warner's objection is premised on the assertion that he is the better representative plaintiff, the argument need not be addressed. Mr. Warner is not qualified for appointment under *CPA*, s. 8(1)(b); it is not a comparative exercise.

[97] Ms. Chartrand's affidavit demonstrates she is aware of the parameters of the BC Action, owned an Android O/S smartphone during the material time period, and is willing to act as plaintiff. While Ms. Furtula argued that Ms. Chartrand did not specifically attest to having used her phone during the material period, I am prepared to infer that she did. I note that Google accepts Ms. Chartrand as a class member.

[98] Ms. Chartrand is not required to show any particular expertise in the subject matter. She owned an Android phone, knows what privacy is and considers it important, and objects to the collection of Cell ID without her consent. I see no reason to doubt that she will pursue the BC Action capably and vigorously and can

represent the class fairly and adequately. That is all that is required: *Western Canadian Shopping Centres Inc*. *v. Dutton,* 2001 SCC 46.

C. Klein LLP as Class Counsel

[99] Mr. Warner's response to the Plaintiff Substitution Application and his own Counsel Substitution Application are premised on the assertion that Klein LLP has breached its duty of loyalty to him. While Ms. Chartrand has been accepted as a substitute plaintiff, one aspect of Ms. Furtula's argument is that Klein LLP is disqualified from continuing as Ms. Chartrand's counsel.

[100] Ms. Furtula's argument puts the nature of the solicitor-client relationship in the class action context front and centre. Ms. Furtula relies on Perell J.'s reasons in *Fantl SC* for the proposition that intended class counsel and the named plaintiff have a solicitor-client relationship both before and after certification. At paragraph 68, Perell J. states:

> [68] In my opinion, one implication from the presence of a genuine plaintiff is that the traditional rules that govern the relationship between a lawyer and a plaintiff should be the starting point. There is undoubtedly a lawyer and client relationship between the named plaintiff and the solicitor of record. This lawyer and client relationship is also reflected by the written retainer agreement set out above, which has been drafted for a class action and which incorporates the traditional rules that: the client has the right to make the critical decisions and give instructions; the client may discontinue or settle the action; and the client may change lawyers.

[101] Ms. Furtula says that Mr. Warner is a genuine client and that, as the BC Action has not been certified, Klein LLP owes no competing solicitor-client duty to the class. She argues that, accordingly, the duty of loyalty in a solicitor-client relationship applies here between Mr. Warner and Klein LLP in the same way it applies in traditional litigation. (I note there is no assertion that Mr. Klein or Mr. Good have violated the *Code of Professional Conduct for British Columbia* as members of the Bar.)

[102] With regard to the duty itself, she cites *R. v. Neil,* 2002 SCC 70 at para. 19:

> 19 The aspects of the duty of loyalty relevant to this appeal do include issues of confidentiality in the *Canada Trust* matters, but engage more particularly three other dimensions:
>
> (i) the duty to avoid conflicting interests, including the lawyer's personal interest.
>
> (ii) a duty of commitment to the client's cause (sometimes referred to as "zealous representation") from the time counsel is retained, not just at trial, i.e. ensuring that a divided loyalty does not cause the lawyer to "soft peddle" his or her defence of a client out of concern for another client, and,
>
> (iii) a duty of candour with the client on matters relevant to the retainer. If a conflict emerges, the client should be among the first to hear about it.
>
> [Citations omitted.]

[103] Ms. Furtula also relies on the governing principles of the duty as set out by Chief Justice McLachlin in *Canadian National Railway Co. v. McKercher LLP*, 2013 SCC 39 [*McKercher LLP*] at paras. 19-47. The passages cited include the following:

> [19] A lawyer, and by extension a law firm, owes a duty of loyalty to clients. This duty has three salient dimensions: (1) a duty to avoid conflicting interests; (2) a duty of commitment to the client's cause; and (3) a duty of candour: *Neil*, at para. 19. I will consider each in turn.
>
> 1. <u>Avoiding Conflicts of Interest</u>
>
> ...
>
> (f) *The Bright Line Rule*
>
> [27] In *Neil*, this Court (*per* Binnie J.) stated that a lawyer may not represent a client in one matter while representing that client's adversary in another matter, unless both clients provide their informed consent. Binnie J. articulated the rule thus:
>
> > The bright line is provided by the general rule that a lawyer may not represent one client whose interests are directly adverse to the immediate interests of another current client — *even if the two mandates are unrelated* — unless both clients consent after receiving full disclosure (and preferably independent legal advice), and the lawyer reasonably believes that he or she is able to represent each client without adversely affecting the other. [Emphasis in original; para. 29]
>
> [28] The rule expressly applies to both related *and* unrelated matters. It is possible to argue that a blanket prohibition against concurrent representation is not warranted with respect to unrelated matters, where the concrete duties owed by the lawyer to each client may not actually enter into conflict. However, the rule provides a number of advantages. It is clear. It recognizes that it is difficult — often impossible — for a lawyer or law firm to neatly

compartmentalize the interests of different clients when those interests are fundamentally adverse. Finally, it reflects the fact that the lawyer-client relationship is a relationship based on trust. The reality is that "the client's faith in the lawyer's loyalty to the client's interests will be severely tried whenever the lawyer must be loyal to another client whose interests are materially adverse": *Restatement of the Law, Third: The Law Governing Lawyers* (2000), vol. 2, § 128(2), at p. 339.

[29] The parties and interveners to this appeal disagreed over the substance of the bright line rule. It was variously suggested that the bright line rule is only a rebuttable presumption of conflict, that it does not apply to unrelated matters, and that it attracts a balancing of various circumstantial factors that may give rise to a conflict. These suggestions must be rejected. Where applicable, the bright line rule prohibits concurrent representation. It does not invite further considerations. As Binnie J. stated in *Strother v. 3464920 Canada Inc.*, 2007 SCC 24, [2007] 2 S.C.R. 177, "[t]he 'bright line' rule is the product of the balancing of interests not the gateway to further internal balancing": para. 51. To turn the rule into a rebuttable presumption or a balancing exercise would be tantamount to overruling *Neil* and *Strother*. I am not persuaded that it would be appropriate here to depart from the rule of precedent.

[30] However, the bright line rule is not a rule of unlimited application. The real issue raised by this appeal is the scope of the rule. I now turn to this issue.

(g) *The Scope of the Bright Line Rule*

[31] The bright line rule holds that a law firm cannot act for a client whose interests are adverse to those of another existing client, unless both clients consent. It applies regardless of whether the client matters are related or unrelated. The rule is based on "the inescapable conflict of interest which is inherent" in some situations of concurrent representation: *Bolkiah v. KPMG*, [1999] 2 A.C. 222 (H.L.), at p. 235, cited in *Neil*, at para. 27. It reflects the essence of the fiduciary's duty of loyalty: ". . . a fiduciary cannot act at the same time both for and against the same client, and his firm is in no better position": *Bolkiah*, at p. 234.

[32] However, *Neil* and *Strother* make it clear that the scope of the rule is not unlimited. The rule applies where the *immediate legal* interests of clients are *directly* adverse. It does not apply to condone tactical abuses. And it does not apply in circumstances where it is unreasonable to expect that the lawyer will not concurrently represent adverse parties in unrelated legal matters. The limited scope of application of the rule is illustrated by *Neil* and *Strother*. This Court found the bright line rule to be inapplicable to the facts of both of those cases, and instead examined whether there was a substantial risk of impaired representation: *Neil*, at para. 31; *Strother*, at para. 54.

[33] First, the bright line rule applies only where the *immediate* interests of clients are *directly* adverse in the matters on which the lawyer is acting. ...

...

[35] Second, the bright line rule applies only when clients are adverse in *legal* interest. …

[36] Third, the bright line rule cannot be successfully raised by a party who seeks to abuse it. In some circumstances, a party may seek to rely on the bright line rule in a manner that is "tactical rather than principled": *Neil*, at para. 28. …

[37] Finally, the bright line rule does not apply in circumstances where it is unreasonable for a client to expect that its law firm will not act against it in unrelated matters. In *Neil*, Binnie J. gave the example of "professional litigants" whose consent to concurrent representation of adverse legal interests can be inferred:

> In exceptional cases, consent of the client may be inferred. For example, governments generally accept that private practitioners who do their civil or criminal work will act against them in unrelated matters, and a contrary position in a particular case may, depending on the circumstances, be seen as tactical rather than principled. Chartered banks and entities that could be described as professional litigants may have a similarly broad-minded attitude where the matters are sufficiently unrelated that there is no danger of confidential information being abused. These exceptional cases are explained by the notion of informed consent, express or implied. [para. 28]

In some cases, it is simply not reasonable for a client to claim that it expected a law firm to owe it exclusive loyalty and to refrain from acting against it in unrelated matters. As Binnie J. stated in *Neil*, these cases are the exception, rather than the norm. Factors such as the nature of the relationship between the law firm and the client, the terms of the retainer, as well as the types of matters involved, may be relevant to consider when determining whether there was a reasonable expectation that the law firm would not act against the client in unrelated matters. Ultimately, courts must conduct a case-by-case assessment, and set aside the bright line rule when it appears that a client could not reasonably expect its application.

...

(j) *Summary*

[41] The bright line rule is precisely what its name implies: a bright line rule. It cannot be rebutted or otherwise attenuated. It applies to concurrent representation in both related *and* unrelated matters. However, the rule is limited in scope. It applies only where the *immediate* interests of clients are *directly* adverse in the matters on which the lawyer is acting. It applies only to legal — as opposed to commercial or strategic — interests. It cannot be raised tactically. And it does not apply in circumstances where it is unreasonable for a client to expect that a law firm will not act against it in unrelated matters. If a situation falls outside the scope of the rule, the applicable test is whether there is a substantial risk that the lawyer's representation of the client would be materially and adversely affected.

[42] I now turn to the other dimensions of the duty of loyalty which are relevant to the present appeal.

2. <u>The Duty of Commitment to the Client's Cause</u>

> [43] The duty of commitment is closely related to the duty to avoid conflicting interests. In fact, the lawyer must avoid conflicting interests precisely so that he can remain committed to the client. Together, these duties ensure "that a divided loyalty does not cause the lawyer to 'soft peddle' his or her [representation] of a client out of concern for another client": *Neil*, at para. 19.
>
> [44] The duty of commitment prevents the lawyer from undermining the lawyer-client relationship. As a general rule, a lawyer or law firm should not summarily and unexpectedly drop a client simply in order to avoid conflicts of interest with existing or future clients. This is subject to law society rules, which may, for example, allow law firms to end their involvement in a case under the terms of a limited scope retainer: see, for example, Law Society of Upper Canada, *Rules of Professional Conduct* (online), r. 2.02(6.1) and (6.2); Law Society of Alberta, *Code of Conduct* (online), Commentary to r. 2.01(2); Nova Scotia Barristers' Society, *Code of Professional Conduct* (online), rr. 3.2-1A and 7.2-6A.
>
> 3. The Duty of Candour
>
> [45] A lawyer or law firm owes a duty of candour to the client. This requires the law firm to disclose any factors relevant to the lawyer's ability to provide effective representation. As Binnie J. stated in *Strother*, at para. 55: "The thing the lawyer must not do is keep the client in the dark about matters he or she knows to be relevant to the retainer" (emphasis deleted).
>
> [46] It follows that as a general rule a lawyer should advise an existing client before accepting a retainer that will require him to act against the client, even if he considers the situation to fall outside the scope of the bright line rule. At the very least, the existing client may feel that the personal relationship with the lawyer has been damaged and may wish to take its business elsewhere.
>
> [47] I add this. The lawyer's duty of candour towards the existing client must be reconciled with the lawyer's obligation of confidentiality towards his new client. In order to provide full disclosure to the existing client, the lawyer must first obtain the consent of the new client to disclose the existence, nature and scope of the new retainer. If the new client refuses to grant this consent, the lawyer will be unable to fulfill his duty of candour and, consequently, must decline to act for the new client.
>
> [Emphasis added.]

[104] In *McKercher LLP,* at para. 61, McLachlin C.J.C. identified three possible bases for disqualification following a breach of the duty of loyalty: (1) to prevent the possible improper use of confidential information; (2) to prevent the possibility of impaired representation; and/or (3) to maintain the repute of the administration of justice. Ms. Furtula relies solely on the third basis in asserting that Klein LLP should be disqualified from the BC Action.

[105] I agree that a genuine plaintiff has a solicitor-client relationship with intended class counsel pre-certification, and that Mr. Warner was a genuine plaintiff. It does not follow, however, that the classic duty of loyalty applies without adjustment. As noted by Perell J. in *Fantl SC*, the application of legal ethics is one of the many ways in which class proceedings are *sui generis*:

> [7] The Ontario Law Reform Commission at p. 201 of its 1982 *Report on Class Actions* was prescient that problems of the nature posed by this motion might arise. Under the heading "Legal Ethics," the report states:
>
> > That difficult questions may arise from an attempt to integrate a new class action procedure with existing canons of legal ethics cannot be denied. However, we are of the view that these difficulties arise not from inherent flaws in the class action remedy, but rather from the fact that the present rules of legal ethics were formulated to govern litigation between individuals and, therefore, were not designed to apply to problems peculiar to litigation arising from mass wrongs and brought on behalf of large numbers of persons.
>
> [8] As will appear from the discussion below, it is necessary to adjust carefully the historical rules that govern the relationship between lawyer and client for the imperatives of a class proceeding. After this adjustment, my conclusion is that although KO has standing to bring this motion and the Court has jurisdiction to strike out the notice of change of solicitors and to appoint a replacement representative plaintiff, KO's motion should be dismissed, but without prejudice to Mr. Fantl engaging Mr. Kim in the future as Mr. Fantl may be advised.
>
> [Emphasis added.]

[106] The *CPA* and the obligations created by it implicitly qualify any written or unwritten retainer agreement between intended class counsel and a named plaintiff. The relationship between intended class counsel and a named plaintiff is itself *sui generis* from its inception. While intended class counsel may not owe solicitor-client duties to class members prior to certification, intended class counsel does have a relationship with, and does owe certain duties to, potential class members. Thus, intended class counsel's duty of loyalty to a named plaintiff is inherently qualified from the outset by the existence of those concurrent duties. In other words, intended class counsel never owe an exclusive duty of loyalty to the plaintiff in the traditional sense.

[107] Further, where class counsel and a representative plaintiff disagree about what will serve the best interests of the class, the immediate legal interests of the representative plaintiff (who is a class member) and those of the class are not adverse. There is a divergence in views as to where the interests of the class actually lie, but only one set of interests. There are no interests in contradiction, only unclear interests.

[108] In *Fantl SC*, Mr. Fantl argued that the duty of loyalty prevented Mr. Kim, a lawyer who had represented him at REKO, from bringing an application against him. In dismissing that argument, Perell J. stated:

> [77] The point that the solicitor and client relationship between the class and the lawyer acting for the representative plaintiff begins post-certification is seemingly helpful to Mr. Fantl because it allows him to argue that before certification, Mr. Kim cannot claim to be acting for the proposed class members, and thus the case at bar simply becomes an illustration of disloyalty by a lawyer and breaches of contract, fiduciary duty, and the rules of professional conduct to the client that Mr. Kim actually has; namely, Mr. Fantl.
>
> [78] Mr. Fantl's argument, however, in my opinion, goes too far. Although, there may not be a solicitor and client relationship between a proposed class member and the lawyer of the representative plaintiff before certification, there is a potential solicitor and client relationship, and the needs of the *Class Proceedings Act, 1992* require that there be a *sui generis* relationship between lawyer and potential class members or at least some responsibilities imposed on the lawyer acting for the representative plaintiff that are owed to the potential class members. In *Heron v. Guidant Corp*., [2007] O.J. No. 3823 (S.C.J.) at para. 10, leave to appeal refused 2008 CanLII 204 (ON SCDC), [2008] O.J. No. 48 (S.C.J.), Cullity, J. stated:
>
> > [Proposed class members and class members] are not parties to the proceedings but they are not strangers. Their rights are as much at stake as those of the plaintiffs. It is consistent with their *sui generis* status, and the objectives of the *CPA*, that their interests should not be vulnerable to deficiencies in the ability of the named plaintiff to represent them.
>
> …
>
> [80] More to the point of the case at bar is Nordheimer, J.'s concern that pre-certification, the integrity of the class proceeding should not be undermined. Thus, Mr. Fantl cannot make the simple argument that before certification the rights associated with his position as a plaintiff are unfettered by the Court's jurisdiction. There is a *sui generis* relationship between the solicitor of record and the proposed class members, and the Court has the jurisdiction to protect the interests of the proposed class members. In the context of the case at bar, this concern about the interests of the proposed class means that Mr. Kim, who along with his former associates at REKO

> apparently has been working for some time for the benefit of the owners of Transamerica policies, at least, has the standing to ask the Court to address the issue of who will represent the class if and when the action is certified.
>
> [Emphasis added]

[109] As noted by Winkler J. in *Caputo v. Imperial Tobacco Ltd.* (2005), 74 O.R. (3d) 728, 250 D.L.R. (4th) 756 (Ont. SCJ): "Counsel, although taking instructions from the representative plaintiffs, must also ensure that those plaintiffs are properly advised, both as to their duty to the class as a whole and that the prosecution of the action must be carried out in a manner that advances the interests of the class" (para. 41). Notwithstanding such advice, a plaintiff may give instructions that raise issues as to whether they are capable of fairly and adequately representing the class.

[110] Counsel have a responsibility, not only to the intended class but to the court, to address a proposed plaintiff's qualification to be appointed pursuant to ss. 4(1)(e) and 8(1)(b). The duty of loyalty, as it applies in this context, cannot prohibit counsel from raising the issue of qualification before the court. Such a prohibition would directly undermine the *CPA*'s objective of fair and efficient class proceedings.

[111] That being the case, I am unable to see how the conduct complained of amounts to a breach of the duty of loyalty in the circumstances at hand.

[112] Further, I am unable to see how the scheduling of the hearing and the tone of Plaintiff Substitution Application would amount to a breach of the duty of loyalty, even in its traditional form. In my view, the matters complained of sound in professional conduct: see, for example, *Law Society of Upper Canada v. Mary Martha Coady*, 2009 ONLSHP 0051 at paras. 196-97.

[113] No breach of the duty of loyalty has been established.

[114] In any event, removing Klein LLP at the present stage of the proceedings would not be necessary to avoid bringing the administration of justice into disrepute. To the contrary, it would introduce unnecessary cost and delay to the prejudice of the class.

III. THE CERTIFICATION APPLICATION

[115] As I have accepted Mr. Chartrand as substituted named plaintiff and have held that Klein LLP is entitled to continue as counsel, I will address the consent certification application based on the Settlement Agreement.

[116] Although counsel did not specifically request a multi-jurisdictional certification, that is what is required. The Settlement Agreement defines the class under the BC Action as follows:

> [A]ll Canadian residents who used a smartphone running Android operating system in Canada between January 1, 2017 and December 31, 2017, except persons included in the Ontario Class, the Quebec Class and any person who opts out of any Proceedings or are otherwise excluded under the definition of “Class Members” or “Class”.

[117] The relevant definitions of the *CPA* are as follows:

> **Definitions**
>
> 1. In this Act:
>
> "class proceeding" means a proceeding, including a multi-jurisdictional class proceeding, that is certified as a class proceeding under Part 2;
>
> …
>
> "multi-jurisdictional class proceeding" means a proceeding that is brought on behalf of a class of persons that includes persons who do not reside in British Columbia;

[118] The class as defined clearly includes “persons who do not reside in British Columbia” and thus falls squarely within the statutory definition of a “multi-jurisdictional class proceeding”.

[119] The BC Action was commenced in 2017, prior to the multi-jurisdictional class proceeding amendments to the *CPA*. Section 44(4) (enacted 2018-16-10, effective October 1, 2018 (BC Reg 129/2018)) provides:

> 44 …
>
> (4) If a proceeding was commenced under this Act before the coming into force of this section, and the proceeding is certified as a class proceeding after the coming into force of this section, persons who would have been

> members of the class, but for not being resident in British Columbia, are included as members of the class.

[120] Thus, the issue is whether the test for a multi-jurisdictional certification is met. Considerations relevant to regular and multi-jurisdictional class certifications are set out in s. 4.

> **Class certification**
>
> 4 (1) Subject to subsections (3) and (4), the court must certify a proceeding as a class proceeding on an application under section 2 or 3 if all of the following requirements are met:
>
> (a) the pleadings disclose a cause of action;
>
> (b) there is an identifiable class of 2 or more persons;
>
> (c) the claims of the class members raise common issues, whether or not those common issues predominate over issues affecting only individual members;
>
> (d) a class proceeding would be the preferable procedure for the fair and efficient resolution of the common issues;
>
> (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, an interest that is in conflict with the interests of other class members.
>
> (2) In determining whether a class proceeding would be the preferable procedure for the fair and efficient resolution of the common issues, the court must consider all relevant matters including the following:
>
> (a) whether questions of fact or law common to the members of the class predominate over any questions affecting only individual members;
>
> (b) whether a significant number of the members of the class have a valid interest in individually controlling the prosecution of separate actions;
>
> (c) whether the class proceeding would involve claims that are or have been the subject of any other proceedings;
>
> (d) whether other means of resolving the claims are less practical or less efficient;

(e) whether the administration of the class proceeding would create greater difficulties than those likely to be experienced if relief were sought by other means.

(3) If a multi-jurisdictional class proceeding or a proposed multi-jurisdictional class proceeding has been commenced elsewhere in Canada and involves the same or similar subject matter to that of the proceeding being considered for certification, the court must determine whether it would be preferable for some or all of the claims of the proposed class members, or some or all of the common issues raised by those claims, to be resolved in the proceeding commenced elsewhere.

(4) When making a determination under subsection (3), the court must

(a) be guided by the following objectives:

(i) to ensure that the interests of all parties in each of the relevant jurisdictions are given due consideration;

(ii) to ensure that the ends of justice are served;

(iii) to avoid irreconcilable judgments, if possible;

(iv) to promote judicial economy, and

(b) consider relevant factors, including the following:

(i) the alleged basis of liability, including the applicable laws;

(ii) the stage that each of the proceedings has reached;

(iii) the plan for the proposed multi-jurisdictional class proceeding, including the viability of the plan and the capacity and resources for advancing the proceeding on behalf of the proposed class;

(iv) the location of class members and representative plaintiffs in each of the proceedings, including the ability of representative plaintiffs to participate in the proceedings and to represent the interests of class members;

(v) the location of evidence and witnesses.

[121] The additional provisions specific to multi-jurisdiction certification are as follows:

Orders in multi-jurisdictional certification

4.1 (1) The court may make any order it considers appropriate in an application to certify a multi-jurisdictional class proceeding, including an order

(a) certifying the proceeding as a multi-jurisdictional class proceeding, if

(i) the requirements in section 4 (1) are met, and

> (ii) the court determines, having regard to section 4 (2) and (3), that British Columbia is the appropriate venue for the multi-jurisdictional class proceeding,
>
> (b) refusing to certify the proceeding, if the court determines that it should proceed as a multi-jurisdictional class proceeding in another jurisdiction, or
>
> (c) refusing to certify a portion of a proposed class, if that portion of the class contains members who may be included within a proposed class proceeding in another jurisdiction.
>
> (2) If the court certifies a multi-jurisdictional class proceeding, it may
>
> (a) divide the class into resident and non-resident subclasses,
>
> (b) appoint a separate representative plaintiff for each subclass, and
>
> (c) specify the manner in which and the time within which members of each subclass may opt out of the proceeding.

[122] As the Settlement Agreement is a national settlement, I find there are no issues under ss. 4(2) and (3) for purposes of s. 4.1(1)(a). I am satisfied British Columbia is an appropriate venue for the multi-jurisdictional class proceeding.

[123] The Settlement Agreement details the certification, notification and approval conditions for the BC, ON and QB Actions, and provides a procedure for the class proceeding processes and notices, in addition to establishing the settlement terms.

[124] Where the parties agree on a class description and have settled the substantive issues, only a *prima facie* case for certification is required to be established: *Haney Iron Works Ltd. v. Manufacturers Life Insurance Co*., 169 D.L.R. (4th) 565, [1998] B.C.J. No. 2936 (S.C.) (cited to QL) at paras. 16-19; *Rezmuves v. Hohots*, 2019 ONSC 4871 at para. 8.

[125] The Settlement Agreement provides that when the courts of all three engaged jurisdictions (BC, Ontario and Quebec) grant certification/authorization, notice of the proposed settlement is to be published within 30 days of the last of those orders. The form of notice to be given is provided in Schedule B of the Settlement Agreement.

[126] The notice of proposed settlement will advise that there is an opt-out period of 45 days. Sixty days after publication of the notice, second hearings are proposed to be held in each jurisdiction for approval of the Settlement Agreement terms.

[127] One cause of action under the BC Action is a claim for statutory damages under the *Privacy Act*. The *Privacy Act* makes it a tort, actionable without proof of damage, for "a person willfully and without a claim of right, to violate the privacy of another." The pleading as framed comes within the terms of the statute.

[128] The second cause of action is for unjust enrichment. The pleading as framed is viable and applies to both the BC Action class members resident in British Columbia and those resident elsewhere in Canada.

[129] The BC Action creates an identifiable class of two or more persons.

[130] The proposed common issue is "whether between January 1, 2017, and December 31, 2017, Class Members' Cell ID was transmitted to Google and, as a result, Google breached any right protected under common law or under any federal or provincial legislation". I find that to be a suitable common issue in light of the causes of action set out. I note that the answer to the common issue does not have to be the same for every class member.

[131] The number of members in the class is large, the commonality of the common issue is strong, and the injuries suffered by the class members on an individual basis are not financially significant. I find that a class proceeding is the preferable procedure for the claims.

[132] Ms. Chartrand is capable of fairly and adequately representing the class. She has no conflict of interest with other class members on the common issue. The Settlement Agreement is itself a workable plan.

[133] I have reviewed the Settlement Agreement and the attached Schedule B Notice of Settlement Approval.

[134] I find the Notice of Settlement Approval is clear and easily understood.

[135] As noted, I am satisfied that British Columbia is an appropriate venue for the BC Action as a multi-jurisdictional class proceeding. The parallel Ontario and Quebec proceedings have been settled on a national basis under the Settlement Agreement. The outcome treats the interests of the class members in all three actions, including those covered by the BC Action but resident in jurisdictions other than British Columbia, uniformly and with due consideration.

[136] The national Settlement Agreement promotes judicial economy.

IV. ORDERS

[137] Klein LLP's application to substitute Ms. Chartrand for Mr. Warner as plaintiff is allowed. The substitution is without prejudice to Mr. Warner's entitlement to receive an honorarium with respect to his period as plaintiff.

[138] The parties are directed to amend the style of cause in accordance with Rule 6-2.

[139] Mr. Warner's Notice of Intention to Act in Person is struck as a nullity.

[140] Ms. Furtula's Notice of Change of Solicitor, filed further to Mr. Warner's Notice of Intention to Act in Person, is struck as a nullity.

[141] Mr. Warner's application to substitute Westpoint Law Group for Klein LLP is dismissed.

[142] The application for certification and approval of Notice of Settlement Approval is allowed.

[143] Counsel are directed to draft a multi-jurisdictional certification order reflecting the substantive terms outlined in Klein LLP's notice of application, and appending the Settlement Agreement, and to submit it for review through the Registry.

"Tucker J."