Court of Appeal for Saskatchewan
Docket: CACV4034

Citation: *Larocque v Yahoo! Inc.*, 2023 SKCA 63
Date: 2023-05-25

Between:

Emily Larocque

Appellant
(Plaintiff)

And

Yahoo! Inc. and Yahoo! Canada Co.

Respondents
(Defendants)

Before:	Leurer, Tholl and Kalmakoff JJ.A.
Disposition:	Appeal dismissed, other than to remit the question of costs
Written reasons by: In concurrence:	The Honourable Mr. Justice Leurer The Honourable Mr. Justice Tholl The Honourable Mr. Justice Kalmakoff
On appeal from: Appeal heard:	2022 SKQB 136, Regina November 29, 2022
Counsel:	E.F. Anthony Merchant, K.C., Anthony Tibbs and Iqbal Brar for Emily Larocque Craig Dennis, K.C. and Owen James for Yahoo! Inc. and Yahoo! Canada Co.

Leurer J.A.

I. INTRODUCTION

[1] The issue in this appeal is whether a proposed class action should be permanently stayed because the claims it makes have been settled through a certified Ontario class proceeding.

[2] Emily Larocque is the plaintiff in an action commenced in the Court of Queen's Bench [Saskatchewan action] against Yahoo! Inc. and Yahoo! Canada Co. [collectively Yahoo]. She is seeking to represent Canadian residents who suffered losses because of breaches of Yahoo's data systems by having her action certified under *The Class Actions Act*, SS 2001, c C-12.01 [*CAA*].

[3] A class-wide resolution of all the claims against Yahoo arising from the data breaches has been achieved through the court approval of a settlement of an Ontario class proceeding: *Karasik v Yahoo! Inc.* (9 February 2021) Toronto, CV-16-566248-00CP (2021 ONSC 1063) (Ont Sup Ct) [*Ontario Approval Decision*]. To meet a condition of this settlement, a judge of the Court of Queen's Bench [Judge] ordered that Ms. Larocque's action be permanently stayed: *Larocque v Yahoo! Inc.*, 2022 SKQB 136 [*Stay Decision*].

[4] Ms. Larocque appeals from the *Stay Decision*, alleging that the Judge erred in granting this permanent stay. I do not agree and would dismiss Ms. Larocque's appeal.

II. BACKGROUND

A. The actions

[5] At the times that are relevant to this appeal, Altaba Inc. operated an internet business through Yahoo. As part of this, Yahoo offered email accounts to the public. In 2016, Yahoo disclosed that it had suffered breaches to its systems that resulted in the widespread release of customer information. All of this led to lawsuits in many jurisdictions. It also resulted in the sale of Yahoo's business and the winding-up of Altaba Inc. in Delaware, where it was incorporated.

[6] On December 16, 2016, Natalia Karasik and several others commenced an action in the Ontario Superior Court of Justice [Ontario action] pursuant to the *Class Proceedings Act, 1992*,

SO 1992, c 6. The Ontario action advanced claims against Yahoo on behalf of all Canadian residents who had a Yahoo account at any time between January 1, 2012 and December 31, 2016. It was placed under the case management of Perell J.

[7] The Saskatchewan action was commenced on May 16, 2017, as a proposed class action under the *CAA*. The Judge was designated by Popescul C.J.Q.B. to hear Ms. Larocque's certification application. In accordance with the practice in this province, the Judge has also heard all of the applications that have been brought in relation to the Saskatchewan action.

[8] It is common ground that the Ontario action and the Saskatchewan action both seek damages for the same acts and omissions of Yahoo on behalf of the same class of people. However, as Ms. Larocque is at pains to point out, there are differences in the causes of action asserted in each proceeding. Most materially, the Saskatchewan action seeks damages based upon an alleged breach of *The Privacy Act*, RSS 1978, c P-24, and similar legislation in British Columbia, Manitoba and Newfoundland and Labrador.

B. The Settlement Agreement

[9] On July 6, 2020, the parties to the Ontario action entered into a settlement agreement [Settlement Agreement]. It purports to resolve all of the claims against Yahoo arising from the data breaches made by all Canadian residents, unless they opt out of the settlement. Under the terms of the Settlement Agreement, Yahoo is to establish a fund of $15 million USD in compensation for those claims and to pay legal fees and administration costs. After conversion to Canadian dollars and accumulated interest, the Judge identified the gross amount of the settlement to be $20,383,430.80, from which a settlement fund of $16,121,091.84 was constituted (see: *Stay Decision* at para 17).

[10] Shortly after the Settlement Agreement was entered into, a motion was brought before the Ontario court for a consent order certifying the Ontario action as a class proceeding for settlement purposes. The motion also requested approval of the method of notifying class members of the settlement. Notice of the Ontario certification motion was provided to Ms. Larocque.

[11] Ms. Larocque applied to be added as a party to the motion to certify the Ontario action. She appeared before Perell J. and made submissions at the hearing with the aim of having the certification motion dismissed or stayed. He denied her request and certified the Ontario action for settlement purposes only, subject to the terms of the Settlement Agreement and the other conditions set out in the certification order: *Karasik v Yahoo! Inc*. (26 August 2020) Toronto, CV-16-566248-00CP (2020 ONSC 5103) (Ont Sup Ct) at para 6 [*Ontario Certification Decision*]. The certified settlement class was defined as consisting of "all Canadian residents with a Yahoo account at any time during the period January 1, 2012 through December 31, 2016". Ms. Larocque falls within this definition.

[12] One of the conditions attached to the *Ontario Certification Decision* was that the settlement be approved by the Ontario court at a later fairness hearing. In his reasons for dismissing Ms. Larocque's intervention and for granting the conditional certification order, Perell J. observed that his orders were "without prejudice to Ms. Larocque opposing the approval of the settlement in the Ontario action and appearing with representation at the settlement approval hearing" (*Ontario Certification Decision* at para 6).

[13] The *Ontario Certification Decision* also approved the notices of the settlement and the settlement approval hearing to be given to the class, and the procedure for them to opt out of the settlement. The corresponding order, issued the same day, provided that "any person who validly opts out of the Settlement Class shall be excluded from the Settlement Class, shall not be bound by the Settlement Agreement, shall have no rights with respect to the Settlement Agreement, and shall receive no payments as provided in the Settlement Agreement". The appropriate notices were later given. Although she received notice of her right to do so, Ms. Larocque did not opt out of the settlement.

[14] Because of the conditional settlement of the Ontario action, the Judge adjourned the hearing of the application to certify the Saskatchewan action until after the Ontario court had rendered a final decision about the settlement. An appeal from the decision to do so has been dismissed by this Court in a judgment that is being released concurrently with these reasons: *Larocque v Yahoo! Inc.*, 2023 SKCA 62.

[15] The *Ontario Approval Decision* issued on February 9, 2021. In it, Perell J. gave his reasons for approving the Settlement Agreement over the objection of Ms. Larocque and others. He concluded, after much detailed analysis, that "the settlement proposed in the immediate case falls within the zone of reasonableness, which allows for a range of possible resolutions and is an objective standard" (at para 164). In the result, Perell J. found that "the settlement in the [Ontario action] is fair, reasonable, and in the best interests of the Class Members including Ms. Larocque" (at para 188). On this basis, he approved the settlement and class counsel fees.

[16] The final settlement of the Ontario action is subject to several conditions precedent, which Yahoo may, at its sole discretion, waive. One of these is that the Saskatchewan action be "permanently stayed or dismissed as a class action (although it may continue as an individual action)" (*Ontario Approval Decision* at para 108(b)). To meet this requirement, Yahoo applied to the Judge for a permanent stay of the Saskatchewan action. It is the grant of that permanent stay that led to this appeal.

C. The *Stay Decision*

[17] The Judge began by identifying the issues. He found that only two of Ms. Larocque's many arguments "present any meaningful dispute" (at para 5). The first of these pertained to the Court's jurisdiction to grant a permanent stay. On this issue, Ms. Larocque asserted that the Court's jurisdiction to grant a stay "can only be exercised when [the court is] deciding the preferability criterion in a certification application". She said that, because her certification application has not yet been scheduled, "the Court has no jurisdiction to consider a permanent stay" (at para 5). Ms. Larocque's second meaningful objection related to the reasonableness of the Settlement Agreement. In relation to this, the Judge found that he was "required to address essentially the same question considered by Perell J., namely, whether the terms of the settlement are fair, reasonable and in the best interests of the class as a whole, including those class members who would also form part of the proposed class in the [Saskatchewan] action" (at para 6). As part of this, he noted that a "specific factor that arose in this case surrounded the plaintiff's assertion that the settlement does not adequately account for the impact of specific privacy legislation" in Saskatchewan, British Columbia, Manitoba and Newfoundland and Labrador (at para 7).

[18] Having identified the issues, the Judge summarized the background facts. Following this, he restated Ms. Larocque's main objections as issues, which he then used as the framework to structure his reasons. He did so under two headings: (a) "Issue 1: Does the Court have jurisdiction to consider and decide the application for a permanent stay?"; and (b) "Issue 2: Is the settlement of the Ontario action in the best interests of the class as a whole, including persons and corporations who would be members of the proposed class in the [Saskatchewan] action, if certified?" He answered both questions in the affirmative. I will review his reasons for these answers later in this judgment.

[19] As a bottom line, the Judge ordered that the Saskatchewan action be permanently stayed. He also granted Yahoo costs against Ms. Larocque.

III. ISSUES

[20] A decision to grant or refuse a stay of an action involves the exercise of discretion: *Herold v Wasserman*, 2022 SKCA 103 at para 23, 473 DLR (4th) 281 [*Herold*]. One basis for appellate intervention in a discretionary decision is "where the judge failed to correctly identify the legal criteria which governed the exercise of their discretion or misapplied those criteria, thereby committing an error of law. Such errors may include a failure to give any or sufficient weight to a relevant consideration" (*Kot v Kot*, 2021 SKCA 4 at para 20, 63 ETR (4th) 161. See also: *Rimmer v Adshead*, 2002 SKCA 12 at para 58, [2002] 4 WWR 119; and *Herold* at para 24).

[21] It is with an apparent eye to this standard of review that Ms. Larocque alleges that the Judge committed eleven errors of law in his analysis leading to the grant of the permanent stay of her action and in ordering costs against her. One of these issues relates to the question of the Judge's jurisdiction to order a stay outside of a consideration of her certification application. Another issue relates to his order of costs. Her remaining points challenge the Judge's decision that class members' best interests are served by approving the settlement.

[22] Given all of this, Ms. Larocque's submissions are appropriately considered in the context of answering the following four questions:

(a) Did the Judge err by considering Yahoo's stay request outside of a hearing into Ms. Larocque's certification application?

(b) Did the Judge err in his best interests analysis?

(c) Did the Judge err by ordering costs against Ms. Larocque?

(d) What costs should be ordered in relation to this appeal?

IV. ANALYSIS

A. Jurisdiction

1. Legislation

[23] Yahoo relied on ss. 6(2), 6.1(b), 14 and 15 of the *CAA*, as well as ss. 29 and 37 of *The Queen's Bench Act, 1998*, SS 1998, c Q-1.01 [*QBA*], as providing the Judge with jurisdiction to order a permanent stay of the Saskatchewan action.

[24] Sections 14 and 15 of the *CAA* were not referred to by the Judge in the *Stay Decision*. There was a good reason for him to ignore them. These provisions empower a court to make certain types of orders in relation to the conduct of a "class action". Of the two, s. 15 might be seen to be most relevant because it provides that a "court may, at any time, *stay* or sever any action related to the class action on any terms the court considers appropriate" (emphasis added). However, because s. 2 of the *CAA* defines a "class action" to mean "an action certified as a class action" pursuant to that statute, the powers given in ss. 14 and 15 can only be exercised in the context of a certified class action (see: *Herold* at para 28). In this case, because the Saskatchewan action has not been certified, neither ss. 14 nor 15 were relevant to Yahoo's stay request.

[25] Section 6(2) of the *CAA* provides that if a multi-jurisdictional class action, or proposed multi-jurisdictional class action, has been commenced elsewhere in Canada that involves subject matter that is the same as or similar to that of a proposed Saskatchewan class action, "the court shall determine whether it would be preferable for some or all of the claims or common issues

raised by those claims of the proposed class members to be resolved in that class action". Section 6(3) requires that, for the "purposes of making a determination pursuant to subsection (2), the court shall" be guided by a list of enumerated objectives set out in s. 6(3)(a) and "consider all relevant factors", including five that are specifically mentioned. Section 6.1(1) provides that a "court may make any order it considers appropriate in an application to certify a multi-jurisdictional class action", including "an order refusing to certify the action if the court determines that it should proceed as a multi-jurisdictional class action in another jurisdiction" (s. 6.1(1)(b)). I will reproduce all of ss. 6(2), 6(3) and 6.1 later in these reasons.

[26] Finally, ss. 29 and 37 of the *QBA* state in their material parts as follows:

> **Multiplicity of proceedings avoided**
>
> **29**(1) The court shall grant to the parties to an action or matter all remedies to which the parties appear to be entitled with respect to any legal or equitable claims that they have properly brought forward so that:
>
> (a) all issues in controversy between the parties are determined as completely and finally as possible; and
>
> (b) a multiplicity of legal proceedings concerning the issues is avoided.
>
> (2) Relief pursuant to subsection (1) may be granted either absolutely or on any terms and conditions that a judge considers appropriate.
>
> …
>
> **Stay of proceedings**
>
> **37**(1) Nothing in this Act prevents a judge from directing a stay of proceedings in any action or matter before the court if the judge considers it appropriate.
>
> (2) Any person, whether a party or not to an action or matter, may apply to the court for a stay of proceedings, either generally or to the extent that may be necessary for the purposes of justice, if the person may be entitled to enforce a judgment, rule or order, and the proceedings in the action or matter or a part of the proceedings may have been taken contrary to that judgment, rule or order.
>
> (3) On an application pursuant to subsection (2), a judge shall make any order that the judge considers appropriate.

2. The Judge's reasons

[27] Before the Judge, Ms. Larocque argued that, because of the requirements of ss. 6 and 6.1, he could only order a permanent stay of her action in the context of deciding her certification application. In making this argument, she relied on *R v Brooks*, 2009 SKQB 54, [2009] 7 WWR 137 [*Brooks*], *Brittin v The Minister of Human Resources and Skills Development Canada*, 2013 SKQB 318, 429 Sask R 70 [*Brittin*], *Ammazzini v Anglo American PLC*, 2016 SKQB 53

[*Ammazzini 2016*], aff'd *Ammazzini v Anglo American PLC*, 2016 SKCA 164, 405 DLR (4th) 119 [*Ammazzini CA*], and *Ammazzini v Anglo American PLC*, 2019 SKQB 60, [2019] 10 WWR 339 [*Ammazzini 2019*], leave to appeal dismissed, 2019 SKCA 142, 48 CPC (8th) 1.

[28] The Judge rejected Ms. Larocque's submissions on this point. He first found that the "Court's general authority and jurisdiction to stay an action is grounded in" ss. 29 and 37 of the *QBA* (at para 25). In connection with s. 29(1), he observed that it "contains mandatory language". He concluded that "where the Court determines that there is a properly avoidable multiplicity of proceedings, it is duty bound to grant a remedy to avoid it". He added that a "stay would be the obvious and most likely remedy in such a circumstance" (at para 26). He found that s. 37 "provides somewhat broader discretion", in that it "recognizes the authority of a judge of [the] Court to direct a stay of proceedings where appropriate" (at para 27).

[29] Following this analysis, the Judge discussed the Court's "specific authority to stay a Saskatchewan based multi-jurisdictional class action", which he found to be "recognized through" various parts of the *CAA*, including ss. 6(2) and 6(3) (at para 29). He observed that, although "these provisions do not expressly reference the Court's authority to stay a class action commenced in Saskatchewan, [*Ammazzini CA*] stands for the proposition that such authority is implicit in the preferability analysis" (at para 32). He then continued:

> [32] … Where the Court is satisfied that the preferability analysis favours the pending resolution of all claims or common issues in the multi-jurisdictional action commenced elsewhere, it may direct a "conditional" stay of the Saskatchewan proceeding. Following a resolution of the out-of-province claim, whether by trial or settlement, the Court may direct a "permanent" stay of the class action commenced in Saskatchewan.

[30] After a further review of the case authorities, the Judge rejected Ms. Larocque's argument that "the *Brooks* and *Brittin* decisions stand for the proposition that, outside of a certification application, [the Court of Queen's Bench] cannot consider the preferability analysis contemplated by s. 6(2) and (3) of the *CAA*" (at para 43). He found that, although in *Brooks* Zarzeczny J. had deferred the stay request made in that case to the hearing of the certification proceeding, "such a deferral should not be taken to mean that the Court could not otherwise address a stay request, whether conditional or permanent" (at para 45). He also concluded that, "in applying the Court's general authority to direct a stay under the *QBA*, [he could] consider a variety of matters, including

the preferability analysis contemplated by s. 6(2) and (3)" (at para 47). He gave two reasons for this conclusion.

[31] The first was that "s. 37 of the *QBA* provides broad discretion to the Court to make stay orders provided that such discretion is properly based on evidence and is not inconsistent with recognized principles of law". The Judge found that "the preferability analysis in s. 6(2) and (3) engages such a principle of law if the evidence supports its application" (at para 47).

[32] Second, he determined that, "even though this issue is not being decided in the context of the plaintiff's certification application, [he could not] ignore the fact that a certification application has been filed and that, but for this application, it would have proceeded". He found it to be "within the Court's discretion to give priority to substance over form and engage the preferability analysis in deciding whether to grant a permanent stay" (at para 48). As a bottom line, the Judge found that he had "jurisdiction to consider and decide the application for a permanent stay" that had been brought before him by Yahoo (at para 49).

3. Ms. Larocque's arguments

[33] In this Court, Ms. Larocque renews the arguments she made to the Judge. She correctly observes that both her action and the Ontario action are multi-jurisdictional class actions because they seek to certify a class that includes persons who reside in this province and persons who do not. This makes applicable those parts of ss. 6 and 6.1 that pertain to such actions.

[34] Ms. Larocque's key submission is that the Judge misunderstood the effect of the *CAA* on his authority to order a permanent stay outside of a hearing of her certification application. She invites this Court to conclude that, under s. 6(2), a Saskatchewan class action or proposed class action can only be stayed because of the existence of a competing multi-jurisdictional class action in the context of a certification hearing, at which the court is to assess whether it is preferable for some or all of the claims to be resolved in that competing class action. In part, she says this is the only supportable understanding of the legislation because the factors referred to in s. 6(3) are "inextricably interlinked", which I take to mean both to one another and to the question of whether certification should be granted. She also argues that the Legislature could not have intended litigants to do an "end-run" around ss. 6(2) and 6(3) by allowing a court to grant a stay by applying ss. 29 or 37 of the *QBA* without qualification.

[35] Before I begin my consideration of Ms. Larocque's submissions, it is important to inventory an argument that she does not make. Specifically, Ms. Larocque does not take issue with the Judge's conclusion that the Court of Queen's Bench – now Court of King's Bench – has the authority to direct a permanent stay of a class action in circumstances where class members' claims have been settled via a different class action. This is an appropriate concession and one that is well-grounded in the applicable authorities.

[36] Much of the law case law relating to the grant of stays of proceedings to prevent an abuse of process has developed in circumstances in which it can be said that the requirements for a defence of *res judicata* or issue estoppel are not made out. As has been observed by Richards J.A. (as he then was), superior courts of justice "have long exercised an inherent jurisdiction to control their proceedings and process so as to prevent interference with the proper administration of justice" (*Boehringer Ingelheim (Canada) Ltd. v Englund*, 2007 SKCA 62 at para 33, 284 DLR (4th) 94 [*Boehringer Ingelheim*]). In *Onion Lake Cree Nation v Stick*, 2018 SKCA 20 at para 46, [2018] 5 WWR 111, Ryan-Froslie J.A. stated, with reference to *Boehringer Ingelheim*, that the Court of Queen's Bench's inherent jurisdiction to control its own processes "includes the power to direct a stay of proceedings where appropriate". Based on these authorities, in *Herold*, it was decided that even if ss. 29(1) and 37(1) did not explicitly permit a judge to grant a stay to a non-party, he nonetheless "had such authority as an adjunct to the authority of the Court of King's Bench to control its own processes" (at para 30).

[37] I have emphasized that the Judge's authority to grant a permanent stay is unchallenged by Ms. Larocque so as to be clear that, although she framed her argument as involving a challenge over the Judge's jurisdiction, her contention is not that the Judge did not have the authority to order a stay. Instead, her proposition is that it is a power that exists but is one that is attenuated or qualified by a requirement that is imposed by the *CAA* that it be exercised only in the context of a hearing of her application to certify the Saskatchewan action as a class action. In this regard, the starting point for all of her submissions under this head is that s. 6(2) evinces "the express intention of the Legislature that multijurisdictional class action considerations be a part of the certification analysis itself". Accordingly, her arguments center on a question of statutory interpretation. This, of course, raises a question of law, to be reviewed on a correctness basis.

4. Proper interpretation of ss. 6 and 6.1

[38] Consideration of Ms. Larocque's arguments requires this Court to interpret ss. 6 and 6.1 of the *CAA*. I will do so, with a focus on the "text, context, and purpose" of the provisions at play in this appeal, to use the shortened paraphrase of the modern approach to statutory interpretation referenced in *R v McColman*, 2023 SCC 8 at para 31, 478 DLR (4th) 577, and as codified in s. 2-10 of *The Legislation Act*, SS 2019, c L-10.2.

[39] Sections 6(2) and 6.1(b) of the *CAA* were part of a package of amendments made to that Act through *The Class Actions Amendment Act, 2007*, SS 2007, c 21, which came into force in April 2008. They implemented the recommendations made in the Uniform Law Conference of Canada Civil Law Section's *Report of the Uniform Law Conference of Canada's Committee on the National Class and Related Interjurisdictional Issues: Background, Analysis, and Recommendations* (Vancouver: BC, March 2005). The 2008 amendments allowed for the certification of a class action that would include non-Saskatchewan residents on an "opt-out" basis.

[40] More broadly, the 2008 amendments were intended to address the chaotic situation that can sometimes unfold when multiple class actions are commenced in several provinces dealing with the same or similar matters. In this regard, the 2008 amendments introduced the concept of a "multi-jurisdictional class action", defining the phrase to mean "an action that is brought on behalf of a class of persons that includes persons who reside in Saskatchewan and persons who do not reside in Saskatchewan" (s. 2). Section 4(2)(c) was added to the *CAA*, requiring an applicant for certification to "give notice of the application for certification to the representative plaintiff in any multi-jurisdictional class action, or any proposed multi-jurisdictional class action, commenced elsewhere in Canada that involves the same or similar subject-matter". Also included in the amendments, was a provision that a person receiving such notice now has the right to "make submissions at the certification hearing" (s. 5.1). The evident intent is to afford persons who are promoting a class proceeding in another province that overlaps with a proposed Saskatchewan class action the right to appear before the Saskatchewan court and offer submissions as to how that overlap might be handled. It was through these two provisions that Ms. Karasik has a right to appear and make representations at any certification hearing that might be held in the Saskatchewan action.

[41] Prior to the 2008 amendments, s. 6 addressed only the basic test for the certification of a class action, that is, the well-known requirements that: (a) the statement of claim discloses a cause of action; (b) there is an identifiable class; (c) there are common issues; (d) a class action would be a preferable procedure for resolution of the common issues; and (e) there is an appropriate representative plaintiff. Because of the reforms, s. 6 was renumbered as s. 6(1) and the following new provisions were added to s. 6:

Class Certification

…

6(2) If a multi-jurisdictional class action, or a proposed multi-jurisdictional class action, has been commenced elsewhere in Canada that involves subject-matter that is the same as or similar to that of the action being considered pursuant to this section, the court shall determine whether it would be preferable for some or all of the claims or common issues raised by those claims of the proposed class members to be resolved in that class action.

(3) For the purposes of making a determination pursuant to subsection (2), the court shall:

(a) be guided by the following objectives:

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

(ii) ensuring that the ends of justice are served;

(iii) avoiding, where possible, the risk of irreconcilable judgments;

(iv) promoting judicial economy; and

(b) consider all relevant factors, including the following:

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

(ii) the stage each of the actions has reached;

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

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

(v) the location of evidence and witnesses.

[42] In addition to adding to s. 6, s. 6.1 was introduced into the *CAA*, as follows:

Orders in multi-jurisdictional certification

6.1(1) The court may make any order it considers appropriate in an application to certify a multi-jurisdictional class action, including the following:

(a) an order certifying the action as a multi-jurisdictional class action if:

(i) the criteria set out in subsection 6(1) have been satisfied; and

> (ii) having regard to subsections 6(2) and (3), the court determines that Saskatchewan is the appropriate venue for the multi-jurisdictional class action;
>
> (b) an order refusing to certify the action if the court determines that it should proceed as a multi-jurisdictional class action in another jurisdiction;
>
> (c) an order refusing to certify a portion of a proposed class if the members of that portion of the class contains members who may be included in a pending or proposed class action in another jurisdiction.
>
> (2) If the court certifies a multi-jurisdictional class action, the court 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 action.

[43] The overall effect of these amendments was succinctly and accurately summarized by Popescul J. (as he then was) in *Thorpe v Honda Canada Inc.*, 2011 SKQB 72, [2011] 8 WWR 529:

> [125] … The amendment was intended to address some of the difficult issues that were arising with increasing frequency relating to overlapping multi-jurisdictional class action proceedings in different jurisdictions. The ULCC recommendations were designed to address, with the objectives of fairness, efficiency and continuity in mind, the chaos that inevitably ensues when there are conflicting actions in different jurisdictions involving the same litigants.
>
> [126] The purpose and effect of the amendment, therefore, is not to extend jurisdiction to the courts that would otherwise not exist but, rather, to promote efficient litigation by limiting the overlapping of class action litigation.

[44] Justice Zarzeczny made much the same point in *Brooks*, when he stated that ss. 6(2), 6(3) and 6.1 are about "[t]raffic control" as between actions that seek to certify the same or similar claims (*Brooks* at para 21. See also: *Ammazzini CA* at para 44). This understanding becomes even more obvious with a detailed examination of these provisions.

[45] Section 6(2) directs a court to consider one issue, being "whether it would be preferable for some or all of the claims or common issues raised by those claims of the proposed class members *to be resolved* in that class action" (emphasis added). By positing the question as to whether it is preferable for some or all of the claims made in a Saskatchewan proposed class action "to be resolved" in a different class action, the legislation is speaking in the future tense. It is also making a direction about a matter that must be considered by a court before ordering that a class action be certified. In other words, s. 6(2) directs an inquiry that must be made before a class action can be certified.

[46] Section 6(3) sets out the factors that the court "shall" consider for the purposes of making a determination pursuant to s. 6(2). A review of these factors convinces me that the concern is related to the choice of which proceeding the class members should advance through contested litigation. In this regard, among the objectives that are to be accounted for is "avoiding, where possible, the risk of irreconcilable judgments" (s. 6(3)(a)(iii)). The relevant factors referred to in s. 6(3)(b) pertain to a comparison of the merits of the contested claims. These include the "alleged basis of liability" (s. 6(3)(b)(i)), the "stage each of the actions has reached" (s. 6(3)(b)(ii)), the "plan for the proposed multi-jurisdictional class action", including specifically its viability "for advancing the action on behalf of the proposed class" (s. 6(3)(b)(iii)), the location of the representative plaintiffs and class members and the "ability of representative plaintiffs to participate in the actions" (s. 6(3)(b)(iv)), and the "location of evidence and witnesses" (s. 6(3)(b)(v)).

[47] Finally, s. 6.1(1) allows a court to "make any order it considers appropriate *in an application to certify a multi-jurisdictional class action*" (emphasis added). Again, the focus is on the certification application. I easily accept that the general power conferred by s. 6.1 would include the ability to grant a stay. However, the non-inclusive list of orders that then follow are all about whether the action or issues in it should be litigated in that action or the competing multi-jurisdiction class action. All of this makes sense because s. 6, as a whole, is concerned about whether the action then before the Saskatchewan court is suitable for certification as a class action.

[48] Bringing all this together, when a Saskatchewan court is called to determine whether to certify a class action, and there exists a multi-jurisdictional class action that involves the same or similar claims, the court must determine whether it would be preferrable that some or all of the claims or common issues raised on behalf of the proposed class members be litigated in the proposed class action then "up" for certification or in the competing multi-jurisdictional class action. However, the stay request in this case is about something very different than that. The question that confronted the Judge, and which this Court must now consider, is whether *any* Saskatchewan claim should go forward in the face of the settlement. Said slightly differently, ss. 6(2), 6(3) and 6.1 of the *CAA* have little, if anything, to do with the issue before the Judge in this case. This is because, at their core these provisions are not intended to address the question as to whether class claims should be litigated because they have been settled.

[49] Sometimes, when a request is made to permanently stay an action because the claims it seeks to advance have been settled, there may be a question as to whether the court granting the judgment or order that resolves the case had the authority to do so. In this case, this is not an issue; Ms. Larocque in no way suggests that Perell J. did not have the jurisdiction to order that class members' claims (including her own) be resolved through the approved settlement. In this circumstance, the question is really about recognition and enforcement of the *Ontario Approval Decision*, as well as Ms. Larocque's additional submission that the stay should be refused because the settlement is improvident. These are very different questions than whether the claims should be litigated in the Saskatchewan action or the Ontario action.

[50] In this overall context, there is little room for consideration of the factors referred to in s. 6(3)(b) that the court is to have regard to when making an order under s. 6(2). Of these enumerated factors, the only one that potentially relates to the question that confronted the Judge in this case was the "alleged basis of liability, including the applicable laws" (s. 6(3)(b)(i)). This consideration does not bear on the question of *jurisdiction* raised by Ms. Larocque, that is, whether it was appropriate for the Judge to entertain the application to permanently stay Ms. Larocque's action before hearing her certification request. Instead, to the extent the basis of liability was important to the Judge's decision, it relates to the providence of the settlement to class members in provinces where privacy legislation arguably gave rise to additional bases for liability or damages.

[51] The points that I have just made can be further illustrated by considering the relevance of ss. 6(2), 6(3) and 6.1 in a context where an action is brought after a class action has been settled. This would have been the case if the Saskatchewan action had been commenced *after* the settlement of the Ontario action had been made final. In that such a circumstance, there would have been no room whatsoever for consideration of whether Ms. Larocque's action was a preferrable forum to adjudicate class members' claims. Instead, the sole inquiry would be whether the *Ontario Approval Decision* should be recognized.

[52] Summarizing all of this, nothing in ss. 6 or 6.1 of the *CAA* deals expressly with the question that confronted the Judge in this case – that is, if he could order a permanent stay of the Saskatchewan action without considering the application to certify it as a class action. The

proposition that underpins Ms. Larocque's argument is that s. 6(2) contains an implicit direction about *when* in all cases the certification application must be held in relation to other applications that are appropriately brought in the context of that action. However, this misses the point behind ss. 6(2), 6(3) and 6.1, as I have just explained. In both detail and overall direction, these provisions assist a court in determining *where* and *how* a disputed claim should go forward. However, the provisions do not speak to *when* the certification application must in all cases be heard. Even more clearly, the provisions have little to nothing to say about whether class claims should be allowed to move forward in the face of a settlement of them. In short, neither the language of ss. 6 and 6.1 nor the purpose of the 2008 amendments compel a conclusion that the Judge could only have ordered a permanent stay when considering the application to certify the Saskatchewan action as a class action.

[53] There are also practical reasons not to give effect to Ms. Larocque's argument. For example, although the pre-certification settlement of a class action inevitably involves a consent certification, very often it will be in the parties' interests to settle before the certification application is heard. However, on the logic of Ms. Larocque's position that a permanent stay can only be granted if the court also considers a proposed certification application, as soon as a competing multi-jurisdictional class action is commenced, it would be impossible for a proposed class action to be settled until the application to certify the competing class action has been heard. Also, Ms. Larocque's proposed interpretation would, in many cases, require the parties and the court to dedicate resources to inquiries that do not bear on the issues the court must decide.

[54] Accordingly, rather than promoting the objectives of the *CAA*, Ms. Larocque's suggested interpretation of it will, in some cases at least, defeat them. Chief Justice Richards recognized this in *Ammazzini CA*, when rejecting the argument that a temporary stay of a proposed Saskatchewan class action can only be granted in the context of determining certification:

> [58] In addition, the formalistic approach advocated by the appellants would work at cross purposes with at least some of the underlying objectives of s. 6. More particularly, it would not promote judicial economy. Rather, it would tend to create duplicative and unnecessary fact-finding and legal analysis. Nor would the appellants' approach increase access to justice in that, by obliging sometimes unnecessary effort, it would tend to increase the cost of legal services necessary to advance a class action file.

I will discuss *Ammazzini CA* in more detail in a moment.

[55] As I read them, the cases relied upon by Ms. Larocque support, rather than refute, the conclusion I have just expressed. I will review these authorities in the order that they were decided.

[56] *Brooks* involved a request by defendants and third parties to a proposed class action to stay that action because it constituted an abuse of process. The abuse was said to be associated with the commencement by the plaintiff and those with whom he was associated of multiple class actions in several jurisdictions, which were argued to be "duplicitous, duplicative of judicial resources and perhaps, of greatest concern to the applicants, a tremendous and costly expenditure of time and money" (at para 14). Justice Zarzeczny dismissed the applications on the basis that, "virtually all, if not all of the concerns raised by the applicants in support of their stay applications are intended to be, and for that matter, mandated to be considered by the court during the certification application of this class action". It was in this context that he also stated that "'[t]raffic control' as between the nine or ten existing class actions commenced in the other provincial jurisdictions previously noted is the responsibility of this court upon certification as now required by subsections 6(2) and (3) of the Act" (at para 21). As I read this, and several other, passages from *Brooks*, it was integral to Zarzeczny J's conclusion that he understood the dispute to be about which, among several, ongoing proposed class actions provided the appropriate procedural vehicle to advance class members claims post-certification on a contested basis. In short, on the facts of *Brooks*, s. 6(2) was very much in play.

[57] *Brittin* is similarly distinguishable. In that case, the defendant and a plaintiff in a parallel action commenced in the Federal Court of Canada both applied to stay the action. Justice Schwann (as she then was) dismissed the applications with leave to raise their arguments at the time of certification. She stated:

> [45] I adopt the reasoning in *Brooks*. The *CAA*, as amended, contemplates the very circumstance highlighted by this application. The defendants have every right to raise concerns about preferability of forum, the interests of the parties, promoting judicial economy and juridical advantage to the plaintiffs. All of those issues can and will be addressed at the certification stage and as such, I see no reason why they need be addressed now. …

As in *Brooks*, and in contrast to the situation here, the contest was over the procedural forum in which class members' claims would be litigated.

[58] Like the facts here, *Ammazzini CA* involved competing groups of plaintiffs, there arising out of the right to advance claims for alleged diamond price-fixing. One proposed class action was commenced in Saskatchewan by Daniel Ammazzini. He sought certification of his action for all Canadian residents other than those resident in British Columbia. Proposed class actions were brought in other provinces, including in B.C. on behalf of residents of that province, and in Ontario on behalf of residents of Canada other than B.C. The B.C. and Ontario plaintiffs were working cooperatively, but in competition with Mr. Ammazzini. They had agreed that the B.C. action would proceed first. While all this was taking place, Mr. Ammazzini's action was proceeding in this province. By the time the Saskatchewan proceedings came before Currie J., an order certifying the B.C. action for B.C. residents had been granted but was under appeal, and the application to certify the Ontario action was scheduled but had not been heard. Justice Currie heard several applications, including: (a) Mr. Ammazzini's certification application; and (b) those of the Ontario and B.C. plaintiffs for a conditional temporary stay of the Saskatchewan action. The latter request was based on "the principles set out in ss. 6 and s. 6.1 of the [*CAA*] and principles relating to abuse of process". Justice Currie identified both bases to be "grounded in the fundamental power of the court to direct a stay of proceedings, as set out in ss. 29 and 37" of the *QBA* (*Ammazzini 2016* at para 13).

[59] Justice Currie reserved his decision on all these matters, but later issued *Ammazzini 2016* in relation to the stay applications. He dismissed the British Columbia plaintiff's application. He did this because Saskatchewan residents were not included in the certified class, and hence the B.C. action was not a multi-jurisdictional class action. However, he granted the conditional temporary stay requested by the Ontario plaintiff pending the outcome of the Ontario certification application. In ordering this, he comprehensively reviewed ss. 6(2) and 6(3), and expressed his conclusion that "Ontario, rather than Saskatchewan, is the appropriate venue for the multi-jurisdictional class action, provided the Ontario action is certified" (at para 58). Because he had granted a temporary stay on this basis, he determined that he was not required to consider if the Ammazzini action should be stayed as an abuse of process. He concluded also that he did not have to decide Mr. Ammazzini's certification application. He said, however, that if the conditional stay he ordered was lifted, he would "make that determination" (at para 64).

[60] This Court dismissed an appeal from *Ammazzini 2016* in *Ammazzini CA*. The appellant's principal argument was that Currie J. had taken things out of sequence "by failing to decide the certification issues in the Ammazzini Action before asking whether it should be stayed" (*Ammazzini CA* at para 55). Chief Justice Richards, who wrote the judgment for the Court on that occasion, was "not persuaded by this line of argument". Among his reasons were that "s. 6 of the [*CAA*] is not structured so as to impose a rigid general requirement that a judge must first decide all of the issues bearing on whether a class action should be certified before proceeding under s. 6(2)". Instead, he found that s. 6(2) "says only that the judge must determine whether it would be preferable for some or all of the claims or common issues raised by those claims to be resolved in a different class action" (at para 56). It was in this context that Richards C.J.S. offered the comments made in paragraph 58, quoted earlier.

[61] Chief Justice Richards found that, rather than imposing a requirement that multi-jurisdictional issues only be considered when determining certification, s. 6(2) mandated something much less. He agreed that to "make the determination contemplated by s. 6(2), a judge will need to have a very firm grip on the nature and particulars of the proposed class action", but he found that this was "something different than demanding that he or she work through all of the particulars of s. 6(1)" (at para 57). He also found, on the facts, that Currie J. had done this, and that he had also worked through each of the factors referred to in s. 6(3)(b). Based on all of this, Richards C.J.S. concluded that the "appellants have demonstrated no specific or concrete way in which it might be thought that the certification judge's analysis was compromised because he had not first worked his way through to a conclusion with respect to the matters listed in s. 6(1) relating to whether the Ammazzini Action should be certified" (at para 61).

[62] On the facts of *Ammazzini CA*, the temporary stay was granted only after the full certification application had been heard; Currie J. simply deferred his decision on that matter that had otherwise been fully mooted before him. Ms. Larocque latches on to the fact that the certification application had been *heard*, although not decided, as a basis to distinguish that case from what occurred here, where her certification application had not been heard before the permanent stay was ordered.

[63] I do not see this as a relevant distinction. Rather, the argument in the *Ammazzini* proceedings that the stay should not have been granted without having decided the issue of certification was even stronger than the parallel submission made here. I say this because, in *Ammazzini CA*, the question confronting the Court was over which of two competing class actions should be litigated. That is the very point behind the 2008 amendments, making readily understandable why s. 6(2) was at play when *Ammazzini 2016* and *Ammazzini CA* were decided. However, in this case, the question is whether *any* class action should be litigated at all, because of the Ontario settlement. As I have explained, that is not the focus of ss. 6(2), 6(3) and s. 6.1.

[64] Ms. Larocque also relies on *Fantov v Canada Bread Company, Limited*, 2019 BCCA 447, 43 CPC (8th) 189 [*Fantov CA*], affirming *Asquith v George Weston Limited*, 2018 BCSC 1557, 38 CPC (8th) 286 [*Fantov SC*]. These decisions arose out of a complicated dispute about competing proposed class actions pertaining to alleged bread price-fixing, against defendants referred to in the judgment as the "Bread Defendants". Many lawsuits were commenced in many jurisdictions. One of these was a claim by a group in British Columbia (the Asquith Action) which sought the certification of a class limited to residents of that province. Meanwhile, another group commenced several lawsuits, including in Ontario (the David Action) and B.C. (the Fantov Action), and were represented by the same counsel, who were affiliated with a consortium of four other law firms [Consortium] that had filed bread price-fixing claims in other Canadian jurisdictions. The two sets of plaintiffs (Asquith and Fantov/David) had very different intentions with respect to the two B.C. proceedings. In this regard the Asquith plaintiffs intended to actively pursue the litigation in B.C. on behalf of that province's residents. However, the Consortium intended to "park the *Fantov Action* pending completion of the *David Action*" (*Fantov CA* at para 10). In explaining this, the judge assigned to manage the litigation had "noted that the Consortium had filed the *Fantov Action* primarily to give the Consortium standing to stay any action in B.C. in favour of the *David Action*" (at para 16).

[65] The case management judge ordered that the Asquith plaintiffs be given carriage of the litigation in British Columbia, and found that the Fantov Action was "duplicative of the Asquith Action and it would be an abuse of process for [it] to continue". On these two bases, she directed that the Fantov Action be stayed, provided that the stay might be lifted if "the Asquith Action is discontinued or withdrawn at some point in the future" (*Fantov SC* at para 86). The Consortium

and the Bread Defendants appealed the judge's refusal to stay the Asquith Action and the grant of a stay of the Fantov Action. The British Columbia Court of Appeal dismissed both appeals, but for reasons that differed from those given by the case management judge.

[66] First, Goepel J.A., speaking for the Court, found that "the applications of the Consortium and the Bread Defendants to stay the *Asquith Action* in favour of the *David Action* on grounds other than an abuse of process are premature". Accordingly, he dismissed their appeals from the refusal to order this stay "without prejudice to the right of the Consortium and the Bread Defendants to raise those same issues at the certification hearing" (*Fantov CA* at para 69). In his explanation of this, he reviewed amendments to the *Class Proceedings Act*, RSBC 1996, c 50, that parallel the 2008 amendments in this province. He quoted extensively from *Brooks* and stated that he "agree[d] with and adopt[ed] the reasons of Justice Zarzeczny" (at para 66).

[67] As I read Goepel J.A.'s reasons, at their core is the idea that all of the arguments advanced by the Consortium and the Bread Defendants as to why the Asquith Action should be stayed should be considered as part of the application to certify that claim as a class action because they related to the certification issues. As he explained, "[t]he judge hearing the certification application will have to weigh those submissions and determine, given the legislative criteria and the evidence led on the certification hearing, whether the *Asquith Action* should be certified and/or whether some or all of the claim should be heard in another jurisdiction" (at para 73).

[68] Justice Goepel agreed that the Fantov Action should be stayed as an abuse of process. In this regard, he found that the multi-jurisdictional class actions amendments gave the Consortium the right to appear and make submissions at the certification application. Accordingly, the abuse he found related to the fact that the Fantov Action served no useful or necessary purpose as providing a basis for the Consortium to seek standing at the application to certify the Asquith Action as a class action:

> [72] Given the new legislation, I find the *Fantov Action* is an abuse of process. Given the jurisprudence and legislative scheme that existed when the *Fantov Action* was commenced, it arguably once had a legitimate purpose. It no longer does so. The Consortium will have standing at the certification hearing to make all necessary submissions that the David Action should be the preferred vehicle to determine the Bread Claims. I agree with the case management judge that that *Fantov Action* should be stayed.

[69] I do not agree with Ms. Larocque that *Fantov CA* means that, in this case, Yahoo's application for a permanent stay could only be considered in the context of a decision on her certification request. I reiterate that the basic difference between the facts of that case and those here – namely, the request for a stay of the Asquith Action in *Fantov CA* involved a situation where there was a contest over which of two competing actions should be selected for the purposes of prosecuting class members' claims. Central to Goepel J.A.'s conclusion that the Consortium's arguments should be addressed at the hearing of the application to certify the Asquith Action was that the arguments bore on whether that action should be certified for that purpose. As I have explained, that is not the central question in this case.

[70] Ms. Larocque also relies on the following distinction offered by Goepel J.A. in *Fantov CA* of *Ammazzini CA* and *Ravvin v Canada Bread Company*, 2019 ABQB 686 [*Ravvin QB*]:

> [63] I do not agree with counsel for the Consortium that [*Ammazzini CA*] and [*Ravvin QB*] stand for the broad proposition that under the new legislation a stay of proceedings in multi-jurisdictional class actions can be decided in the absence of a certification application. In both [*Ammazzini CA*] and [*Ravvin QB*], certification applications had been filed. What the cases do stand for is the more limited proposition that a judge need not first *decide* whether certification would be granted before considering the question of stay and carriage.
>
> (Emphasis added)

[71] Ms. Larocque invites this Court to conclude that Goepel J.A. was attaching significance to the fact that the certification application had been heard in *Ammazzini CA*. I do not read this passage in this way and, as already explained, I also do not view *Ammazzini CA* this narrowly. Instead, I take it to decide a more basic point, which is that, as a matter of jurisdiction, even a temporary stay of a multi-jurisdictional class action can be granted prior to determining issues pertaining to the proposed certification of that action as a class action, so long as the appropriate considerations that bear on the question of the exercise of judicial discretion are accounted for. This was the view taken by the Alberta Court of Appeal in its decision upholding *Ravvin QB*: *Ravvin v Canada Bread Company, Limited*, 2020 ABCA 424, [2021] 4 WWR 1 [*Ravvin CA*].

[72] The *Ravvin* litigation arose out of the same basic facts as the *Fantov* litigation, but in the province of Alberta. In *Ravvin QB*, Rooke A.C.J.Q.B. gave his reasons for directing a stay of two Alberta actions "and any other action that has been or may be commenced in Alberta with respect

to the facts pleaded in the [David Action]" (at para 4). In their *per curiam* decision upholding the grant of this stay, Veldhuis, Crighton and Antonio JJ.A. wrote as follows:

> [50] At the outset we remarked that this issue does not lend itself to a hard and fast rule. Relative to the issues before this panel, we adopt the rationale of the Saskatchewan Court of Appeal and state that stay applications under s. 5(6) of the Alberta [*Class Proceedings Act*, SA 2003, c C-16.5] may be decided in circumstances where the case management judge has a sufficient understanding of the nature and particulars of the proposed class proceeding.
>
> [51] Allowing the court this flexibility reflects the evolving treatment of multi-jurisdictional proceedings and the objectives of class proceedings generally. It is also consistent with earlier case law recognizing the circumstances in which case management judges may hear applications in advance of certification. …

[73] On the facts, the Alberta Court of Appeal was satisfied that, even though certification had not been argued, Rooke A.C.J.Q.B. "had jurisdiction under s. 5 of the [*Class Proceedings Act*, SA 2003, c C-16.5] to hear the Retailer Respondents' stay applications" (at para 56). It was also satisfied that he "had an ample record before him in which to consider the criteria in ss. 5(6)-(8)", that his "conclusions on these particular factors are entitled to deference" and they could "find no basis to suggest that he considered irrelevant factors" (at para 61).

[74] To summarize, each of *Brooks*, *Brittin*, *Ammazzini CA*, *Fantov CA* and *Ravvin CA* was concerned about the grant of a stay of a proposed class action where the foundational dispute was over which of several competing class actions should provide the procedural forum within which a contested class claim should be litigated. As I have explained, this is a very different question than whether a permanent stay should be ordered because the claims have been, or should be, settled. More fundamentally, *Ammazzini CA* affirms that, to the extent that s. 6(2) is even at play in this sort of situation, it can be satisfied by an inquiry into the relevant considerations outside of any determination of an extant certification application.

5. Conclusion on jurisdiction

[75] I am satisfied that the Judge was correct to conclude that his jurisdiction to permanently stay the Saskatchewan action had not been displaced by the *CAA*. More specifically, he correctly concluded that the *CAA* did not require that Ms. Larocque's certification application be heard before consideration was given to Yahoo's request for a permanent stay.

B. Best interests

1. The Judge's reasons

[76] Yahoo and Ms. Larocque invited the Judge, in his assessment of whether to grant the requested permanent stay of the Saskatchewan action, to take into account the same factors that would apply if he were considering the question of whether to approve the settlement. The Judge agreed to this approach and began his reasons in relation to this issue by identifying, based on his reading of *Ammazzini CA*, that his responsibility when considering whether to grant a permanent stay because of the Ontario settlement was "to assess the reasonableness and appropriateness of the settlement" (at para 50). He identified *Perdikaris v Purdue Pharma*, 2018 SKQB 86, 78 CCLI (5th) 88 [*Perdikaris*], as "the now leading authority on court approval of class action settlement" (at para 54). In that case, Barrington-Foote J. (as he then was) set out the criteria to be applied by a court when considering the approval of a class action settlement pursuant to s. 38 of the *CAA*.

[77] The Judge explained that "the question [as to] whether to approve a settlement cannot be measured to a nicety", and that, while "there are factors to be considered, there is no central and objectively defined principle of law that allows a judge to draw an easily discernible distinction between a good settlement and a bad one". For this reason, he accepted that the "fundamental question is simply whether, having regard to the policy reasons identified above, the settlement falls within a 'zone of reasonableness'". He added that "[n]ot surprisingly, such a zone will cover a wide range of bargains as well as a wide range of the possible compensatory benefits payable to class members" (at para 53). He observed that, at root, "the court must be satisfied that the settlement is fair, reasonable, and in the best interests of the class as a whole" (at para 54, quoting *Perdikaris* at para 14). Following this, he entered into a detailed discussion of whether the case law assists in making this determination.

[78] Having done all of this, the Judge identified the "real issue" to be "whether the class is well served by accepting the settlement as opposed to proceeding to trial" (at para 56). He answered this question in the affirmative.

2. Ms. Larocque's arguments

[79] Ms. Larocque takes no issue with the test the Judge identified to assess whether to approve the settlement. However, in her factum, Ms. Larocque argues that the Judge erred in its application. Many of her submissions overlap and, accordingly, I have grouped my consideration of them under headings that do not directly correspond with those used in her factum.

[80] Ms. Larocque attempts to position most of her arguments as allegations of errors of law that reduce to the suggestion that the Judge misidentified or misapplied applicable principles. As I will explain, I read the *Stay Decision* as not evincing any such errors.

3. Exercise of independent judgment

[81] Ms. Larocque's first argument is that the Judge "erred in law in failing to meaningfully adjudicate the fairness and reasonableness of the settlement" and by "simply accepting Mr. Justice Perell's analysis thereof". Said more simply, I understand Ms. Larocque to invite this Court to conclude that the Judge had abdicated in his role to determine if the settlement was fair and reasonable.

[82] There is no merit to these submissions. To the contrary, I am satisfied that the Judge came to his own independent conclusion that the settlement was fair and reasonable and did not blindly follow Perell J.'s determination of this issue. Later in these reasons, I pose, but do not answer, the question as to whether the Judge was *required* to conduct his own independent assessment of the fairness and reasonableness of the settlement. However, I am convinced that he did, in fact, undertake the task that the parties urged him to complete.

[83] The Judge first identified Ms. Larocque's challenge to the fairness and reasonableness of the Settlement Agreement in his introduction to his reasons. He also explained the judicial task he understood that he was called upon to undertake, in these terms:

> [6] The second issue pertains to the reasonableness of the settlement in the Ontario action. For this issue, I have been required to address essentially the same question considered by Perell J., namely, whether the terms of the settlement are fair, reasonable and in the best interests of the class as a whole, including those class members who would also form part of the proposed class in the [Saskatchewan] action. As I approached this task, the reasons for the settlement approval in Ontario have some persuasive force. This is particularly so when one notes the approval judge's long experience and expertise in class proceedings (which far surpasses mine). Even so, I recognize that I am not bound by

> the decision of Perell J. I have considered, afresh, the factors that inform the reasonableness of the settlement of a class action. Such factors include the likelihood of recovery for success at trial, the specific terms and conditions of the settlement, recommendations and experience of counsel and the presence of arm's length bargaining in the absence of any collusion.

[84] As can be seen from this passage, the Judge understood that he was "required to address essentially the same question considered by Perell J." He recognized that "the reasons for the settlement approval in Ontario have some persuasive force". However, he also felt he was "not bound by the decision of Perell J." He then stated that he had "considered, afresh, the factors that inform the reasonableness of the settlement" (at para 6). These statements pre-emptively answer the argument now made by Ms. Larocque in this Court. A review of the rest of the *Stay Decision* also convinces me that the Judge did exactly what he said he would – that is, undertake his own independent assessment of the fairness and reasonableness of the settlement.

[85] After setting out the legal test, the Judge observed that Ms. Larocque was making to him many of the same arguments she had advanced before Perell J. as reasons to refuse to approve the Ontario settlement. The Judge noted that Ms. Larocque was asking the "Court to take a stand based on the assurance that the proposed class in the [Saskatchewan] action, particularly those living in the four provinces with statutory causes of action, will receive much better compensation than that provided for in the settlement" (at para 59).

[86] Against this background, the Judge then entered into a detailed consideration of the privacy legislation in Saskatchewan, British Columbia, Manitoba and Newfoundland and Labrador, as well as some of the cases that have considered these statutes. Near the end of this analysis, he summarized Perell J.'s conclusion about this point in the *Ontario Approval Decision* as being that the prospect of class members establishing liability under any of the provincial statutes "was, at best, uncertain and, at worst, formidable" (at para 68). He then ended his overview about Ms. Larocque's statute-based arguments by observing that, aside from the "speculative and unprovable aspects of the plaintiff's aspirations, Perell J. concluded that her objections to the settlement missed the point of the settlement approval process". He described the "issue at hand" to be "whether the settlement was fair and reasonable – not whether the class would do better if it pursued an uncertain claim" (at para 69). Following all of this, the Judge concluded on the issue

of whether the settlement was in the best interests of the class as a whole by offering the following additional analysis:

> [70] As mentioned, the plaintiff's position in this application is little different from the argument she advanced before Perell J. While I accept that the conclusion in [the *Ontario Approval Decision*] is not binding on me, I find no meaningful basis for me to disagree with it. Moreover, the plaintiff's argument here held no greater merit than it did in the submissions for settlement approval. I say this for two somewhat interrelated reasons.
>
> [71] First, the plaintiff's argument that the settlement approval did not account for her prospects at trial is mischievous, if not outright misleading. While Perell J. obviously considered and compared privacy breach settlements, his comments, recited in this fiat, clearly show that he was mindful of the anticipated problems and uncertainty associated with proving a more substantial case under the provincial privacy legislation. In particular, he properly focussed on the expected difficulties in establishing the requisite mental element and causation, as well as the problems associated with proving something more than nominal damages on a class basis.
>
> [72] Secondly, I find the plaintiff continues to overstate the expected benefit of proceeding to trial under the provincial privacy legislation. The notion that there will be "assured" compensation, greater than that to be realized by this settlement, remains highly speculative and probably quite doubtful. Assured compensation is certainly not supported by any of the material before me. None of the pleaded facts or filed evidence suggest that either defendant committed any wilful, substantial or unreasonable act that violated the privacy of any proposed class member. Further, neither the pleaded facts nor the filed evidence suggest that any of the defendants' employees committed any such violation. As such, there can be no claim against either defendant based on vicarious liability.
>
> [73] As I see the plaintiff's submission, she is not meaningfully challenging the reasonableness or fairness of the settlement, at all. Instead, she is seeking to re-write the rulebook on settlements by asking the Court to disregard its supervisory role and embrace her cause. In short, the plaintiff is essentially asking the Court to endorse her gamble that she will do better, either by taking the case to trial or harassing the defendants to pay more than the $20.4 million settlement figure. In this context, it is difficult not to agree with the assessment of Perell J. that the plaintiff misses the point of the entire exercise.

[87] In this Court, Ms. Larocque focuses on one of the Judge's statements in paragraph 70 – that is, that he found "no meaningful basis" to disagree with Perell J.'s assessment of the reasonableness and fairness of the settlement – as an indication that he did not perform his own assessment of the reasonableness of the settlement. However, as I have explained, the Judge was clear at the outset of his reasons that he considered that the *Ontario Approval Decision* was not binding on him. His subsequent analysis allows a reader to easily follow why he came to the same conclusion as Perell J. in relation to this issue.

[88] In a final point under this head, Ms. Larocque uses the fact that the Judge agreed with Perell J. as support for her argument that he did not exercise his own independent judgment.

However, I see nothing surprising in the fact that the Judge came to share Perell J.'s view about all of this. As he stated at the outset, he was "required to address essentially the same question considered by Perell J." (at para 6). The fact that two jurists come to the same conclusion on essentially the same record should be seen as reassuring, not as something indicative of error.

[89] In summary, the Judge came to his own independent conclusion that the settlement fell within the "zone of reasonableness". He performed the adjudicative role that the parties had agreed he should fulfil, that is, to assess the fairness and reasonableness of the settlement.

4. Measure of reasonableness

[90] Ms. Larocque invites this Court to conclude that the Judge erred by measuring the reasonableness of the settlement against other settlements, rather than against her prospects at trial. This argument is derived from the Judge's statement that "the issue at hand was whether the settlement was fair and reasonable – not whether the class would do better if it pursued an uncertain claim" (at para 69), and his endorsement of a similar statement made by Perell J. found at paragraph 163 of the *Ontario Approval Decision*. Finally, she points to the Judge's statement that she was "essentially asking the Court to endorse her gamble that she will do better, either by taking the case to trial or harassing the defendants to pay more than the $20.4 million settlement figure" (at para 73).

[91] This submission is based on a misinterpretation of the *Stay Decision*. Read in its entirety, I am satisfied that the Judge did exactly what he set out to do – that is, determine if the settlement fell within a "zone of reasonableness". Rather than evincing error, as Ms. Larocque contends, the passages that she points to convince me that the Judge undertook the necessary analysis of the benefits and risks to the class as a whole and of the alternatives of approving the settlement or allowing the claim to proceed. Most emphatically, the Judge demonstrated that he understood he was not to measure the reasonableness of the settlement against other settlements when he rebuffed Ms. Larocque's argument that Perell J. had made this very error:

> [71] … While Perell J. obviously considered and compared privacy breach settlements, his comments, recited in this fiat, clearly show that he was mindful of the anticipated problems and uncertainty associated with proving a more substantial case under the provincial privacy legislation. In particular, he properly focussed on the expected difficulties in establishing the requisite mental element and causation, as well as the problems associated with proving something more than nominal damages on a class basis.

[92] In summary, there is no merit to Ms. Larocque's various arguments that the Judge used the wrong yardstick to measure the reasonableness of the settlement.

5. Potential liability under provincial privacy legislation

[93] Most of Ms. Larocque's arguments pertaining to the reasonableness of the settlement derive from how the Judge accounted for Yahoo's potential liability under provincial privacy legislation. There are many streams to her submissions, but all flow from s. 2 of *The Privacy Act*, and its equivalents. That provision states that it is "a tort, actionable without proof of damage, for a person wilfully and without claim of right, to violate the privacy of another person". The statutes of British Columbia and Newfoundland and Labrador contain similar wording (see: *Privacy Act*, RSBC 1996, c 373, s 1(1); and *Privacy Act*, RSNL 1990, c P-22, s 3(1)). The Judge concluded, with reference to several authorities, that it was "reasonably clear that a 'wilful violation' will require something more than an intention to commit an act that results in a violation of privacy" (at para 62). Ms. Larocque takes no issue with this statement. However, in various ways, she invites this Court to find error in other parts of his analysis, most particularly by submitting that, while the statutes each require an intentional breach of privacy, the case law leaves open the possibility that recklessness may be sufficient to ground liability under their provisions.

[94] Ms. Larocque first submits that the Judge wrongfully interpreted the legislation to apply only if the proposed class members were "intended or known targets". The Judge did not use these words in the *Stay Decision*. The suggestion that he nonetheless erred in this way is grounded in his statement that the facts alleged by Ms. Larocque "suggest that a third-party intruder [i.e., the persons who hacked Yahoo's systems] may have wilfully violated the privacy of account holders' private information" (at para 64). In contrast, he concluded that the proposed class members would have difficulty in showing that Yahoo's acts or omissions met the definition of a wilful violation of their privacy rights. Ms. Larocque's assertion that the Judge interpreted the legislation to apply only if the proposed class members were "intended or known targets" is therefore built from the fact that he saw strength in the claim against the hackers, but much less in the claim against Yahoo.

[95] Before the Judge, Ms. Larocque had referred to *Hynes v Western Regional Integrated Health Authority*, 2014 NLTD(G) 137 (SC) [*Hynes*], "for the proposition that a failure to establish

meaningful safeguards would be sufficient to establish a wilful violation" (*Stay Decision* at para 64). The Judge found that Ms. Larocque had overstated the import of that decision:

> [65] In my view, the plaintiff misrepresents and overstates the analysis in *Hynes*. In that case, the plaintiffs commenced a proposed class action alleging that one of the defendant's employees had improperly accessed class members' personal health information. The parties agreed to bifurcate the certification application, allowing the Court to begin by addressing the existence of a disclosed cause of action and an identifiable class. One of the asserted causes of action was a claim under the [Newfoundland and Labrador *Privacy Act*]. The defendant accepted that such a cause of action could proceed against the employee who committed the wilful violation, but not against the defendant, itself.
>
> [66] The defendant's argument did not persuade the Court. At para. 20 of *Hynes*, Goodridge J. stated that the statutory cause of action against the defendant would stand but only if the common law doctrine of vicarious liability applied. Based on authority from the Supreme Court of Canada (see *Bazley v Curry*, [1999] 2 SCR 534 at para 41), he acknowledged that it was "an arguable point". With that acknowledgement, Goodridge J. properly concluded that it was not plain and obvious such a cause of action would fail against the defendant.
>
> [67] Further to this point, it should be noted that the British Columbia Court of Appeal came to a similar conclusion in *Ari v Insurance Corporation of British Columbia*, 2015 BCCA 468, 392 DLR (4th) 671.

[96] In this Court, Ms. Larocque argues that the Judge "disregarded the fact [that in *Hynes*] it was the Respondents' agents who designed their user database, who built the technology which stored the unprotected information that was ultimately disclosed, and that their failure to employ even the most basic of security practices was what enabled the privacy breach in the first place". The suggestion is that Yahoo's actions here were similar. However, this misreads *Hynes*.

[97] The Judge did not distinguish *Hynes* because of the differences between the defendants' conduct in that case and Yahoo's conduct in this case. Rather, he concluded that, because *Hynes* involved a motion to strike, it did not decide the point that Ms. Larocque was arguing. In other words, contrary to Ms. Larocque's statement that it stood "for the proposition that a failure to establish meaningful safeguards would be sufficient to establish a wilful violation", it simply held that it was not plain and obvious that the claim would fail as a matter of law (*Stay Decision* at para 64). That the Judge was making this point is illustrated by his reference to *Ari v Insurance Corporation of British Columbia*, 2015 BCCA 468, 392 DLR (4th) 671 [*Ari*], which he noted "came to a similar conclusion" as Goodridge J. in *Hynes* (at para 67). *Ari* also involved a motion to strike, but with materially different facts than either *Hynes* or this case. The additional decisions that Ms. Larocque brought forward in this Court, *Campbell v Capital One Financial Corporation*,

2022 BCSC 928, *Obobo v Trans Union of Canada, Inc.*, 2021 ONSC 7297, and *Agnew-Americano v Equifax Canada Co.*, 2019 ONSC 7110, are similarly distinguishable.

[98] The Judge also did not completely discount Ms. Larocque's legal theory. Rather, he coupled the difficulty he saw to be associated with the legislative requirement that a breach of privacy be shown to be wilful with other obstacles that he saw as standing in the way of establishing a statutory cause of action. This is best shown in his review of the reasons given by Perell J. in the *Ontario Approval Decision*, which he accurately summarized as concluding that "the prospect of establishing such liability was, at best, uncertain and, at worst, formidable" (at para 68), and which he stated he found "no meaningful basis" to disagree with (at para 70). These difficulties went beyond the requirement to show a wilful breach and included the question as to "whether the benchmark of the awards in individual breach of privacy cases would be applied to a mass group claim" (at para 68, quoting the *Ontario Approval Decision* at para 158).

[99] I see no error in this aspect of the Judge's legal analysis. He came to no definitive conclusion with respect to the statutory causes of action. At its highest, this part of Ms. Larocque's argument reduces to a complaint about the amount of discount that should have been applied to her claim because of the legal difficulties that it presents. The assessment of this falls within the realm of the Judge's discretion in the circumstances of this case.

[100] For the same basic reason, I reject Ms. Larocque's argument that the Judge reasoned on the basis that the "available evidence did not, on the merits, support a conclusion that this 'wilful' activity occurred". This submission ignores the fact that, by way of evidence, Ms. Larocque gave the Judge little more than a set of admissions made by Yahoo that its data systems had been breached. This was several steps away from proving recklessness, assuming that, at the end of the day, the wilfulness requirement can even be met by showing reckless conduct. However, the more important point is that the Judge did not reach the kind of definitive conclusion that Ms. Larocque seeks to attribute to him about the facts or the law.

[101] Very much related to the last set of arguments, Ms. Larocque submits that the Judge placed an impermissible burden on her to prove class members' claims and ignored the possibility that, at trial, the class might obtain a judgment above the settlement amount. In this regard, she writes that the Judge erred by "implicitly imposing a requirement that [she] establish that, at trial, she

would succeed in 'proving something more than nominal damages on a class basis'", quoting paragraph 71 of the *Stay Decision*. In a like vein, Ms. Larocque contends that the Judge had erred in law by "judging the merits of the evidence before him and making a determination that the liability of the Defendants for punitive damages for their conduct after the discovery of the subject breaches, and prior to discovery in general, could never amount to more than [$20.4 million dollars]". Yet, later in her factum, Ms. Larocque asserts that the Judge "had no basis at law, or on the evidence before him, to conclude that damages, including punitive damages, would be capped at the Ontario settlement amount". By way of one last illustration of this stream of arguments, Ms. Larocque submits, with particular reference to paragraph 73 of the *Stay Decision*, that the Judge "blithely dismissed the notion that [the class] might at the common issues trial secure a judgment exceeding the value of the proposed settlement".

[102] The starting point for all of these submissions is that, under the provincial privacy statutes, a monetary award may be given even in the absence of any specific special damages being proven. This, Ms. Larocque said to the Judge, and repeats in this Court, is sufficient to warrant certification of a class action – at least, one encompassing residents of the four provinces with such legislation. However, contrary to Ms. Larocque's submission, the Judge did not, implicitly or otherwise, ignore this possibility. The Judge even more certainly did not require her to establish that, at trial, class members would obtain more than nominal damages, or conclude that, if her claim were to go to trial, there was no chance that the class might recover more than the settlement amount.

[103] To understand this conclusion, it is first helpful to confirm that the Judge had a clear eye on the arguments that Ms. Larocque was making. His understanding of Ms. Larocque's position that class members resident in the four provinces with privacy legislation had potential remedies not available in provinces like Ontario was demonstrated early in the *Stay Decision*, when he wrote as follows:

> [7] A specific factor that arose in this case surrounded the plaintiff's assertion that the settlement does not adequately account for the impact of specific privacy legislation in four provinces; Saskatchewan, British Columbia, Manitoba and Newfoundland and Labrador. This legislation provides for a tort that is actionable without proof of damage. Based on the plaintiff's view that the defendants are obviously liable under the causes of action provided for in the legislation, she argues that awards for even nominal damages would justify a substantially greater overall settlement. Alternatively, even if liability under the legislation is not obvious, the plaintiff contends that the Court should deny the stay based on the proposition that, for the proposed class, it would be worth the risk to allow the [Saskatchewan] action to go forward.

[104] Later in his reasons, the Judge considered the prospects of the class establishing liability and recovering more than nominal damages under the four provinces' privacy legislation. Much of this was captured by his quotations from the *Ontario Approval Decision*, which incorporated reasoning that he later adopted. I read nowhere in his analysis a statement that can reasonably be construed as having expected Ms. Larocque to prove, at this point, that more than nominal damages would be recovered. To illustrate this conclusion, I would again reproduce paragraph 71 of the Judge's reasons, emphasizing not only the words that Ms. Larocque has quoted in support of her argument under this head, but those that provide a context for understanding their meaning:

> [71] First, the plaintiff's argument that the settlement approval did not account for her prospects at trial is mischievous, if not outright misleading. While Perell J. obviously considered and compared privacy breach settlements, his comments, recited in this fiat, clearly show that he was mindful of the a*nticipated problems and uncertainty associated with proving a more substantial case under the provincial privacy legislation. In particular, he properly focussed on the expected difficulties in establishing the requisite mental element and causation, as well as the problems associated with proving something more than nominal damages on a class basis*.
>
> (Italics added to provide context; underlined words as quoted by Ms. Larocque)

[105] When paragraph 71 is read as a whole, I am satisfied that, rather than implicitly imposing a requirement that Ms. Larocque show that the class would recover something more than nominal damages at trial, the Judge was simply accepting that the entitlement to such damages was not the sure thing that she made it out to be.

[106] I agree with Ms. Larocque that if the Judge had imposed a requirement that she *prove* she would obtain more than nominal damages, or if he had required her to *prove* that the class would obtain more than the settlement amount, he would have erred in law. The assessment of the fairness and reasonableness of the settlement was largely about weighing the value of future uncertainties, not the least of which were the prospects of the class having success on the merits of their claims and the quantum of recovery were they to succeed. However, the Judge did not require Ms. Larocque to prove that class members would obtain something more than nominal damages or any particular amount. What he did do – and I would reiterate that Ms. Larocque takes no issue that this was his fundamental task – was assess whether the "settlement falls within a 'zone of reasonableness'" (*Stay Decision* at para 53).

[107] In conclusion about all of the arguments considered under this heading, the Judge did not err in how he factored the defendants' potential liability under provincial privacy legislation into his assessment of whether the settlement was fair and reasonable and in the overall best interests of the class as a whole.

[108] I would add one footnote to this statement. Manitoba's statute, *The Privacy Act*, RSM 1987 c P125, CCSM c P125, is worded differently than the legislation found in Saskatchewan, British Columbia and Newfoundland and Labrador. Manitoba's Act states that a "person who substantially, unreasonably, and without claim of right, violates the privacy of another person, commits a tort against that other person" (s. 2(1)). The Judge noted this distinction and also observed that he had "not found any cases that have addressed the question whether this wording raises a mental element associated with the statutory tort". He added that his "reading of the authorities is that the nature of the facts considered in each case did not lend themselves to addressing that question" (at para 61). In this appeal, Ms. Larocque did not press the point that, because of the differences in the Manitoba statute, a Saskatchewan court might certify a class action based on a breach of that province's statute but decline to certify one based on a breach of other provinces' statutes. I therefore have eschewed any consideration of Manitoba's Act.

6. Adequacy of the record

[109] One specific part of Ms. Larocque's argument relates to the record the Judge relied upon when undertaking his assessment of the strength of her claim. She writes in her factum that he had "only the partial benefit of the Plaintiff's certification record, prepared on the *some basis in fact* standard for the certification test, and nothing more" (emphasis in original). Accordingly, she says, the Judge erred in law in assessing her claim as "highly speculative and probably quite doubtful" (*Stay Decision* at para 72).

[110] There are several reasons to reject this submission. First, Ms. Larocque once again takes the Judge's words out of context. The Judge did not say that class members' claims were highly speculative and quite doubtful. Rather, he said that the "notion that there will be 'assured' compensation, greater than that to be realized by this settlement, remains highly speculative and probably quite doubtful" (at para 72). Second, the Judge cannot be faulted for making a decision based on the evidence the parties gave him. I see nothing in the record to suggest that the Judge

was invited to refuse to consider the stay request because the record before him did not allow him to carry out the task given to him. If Ms. Larocque had more evidence that related to the merits of her claim or otherwise bore on the fairness and reasonableness of the settlement, she should have brought that it forward.

[111] It is inevitable that, in most cases at least, when considering whether to approve a settlement, the court will have much less evidence than would be available at trial. After all, one of the reasons parties often have for settling a claim is to avoid the time, expense and uncertainty associated with assembling the evidence that a trial would demand. In this case, at the end of the day, the Judge was required to assess, on the basis of the information he was given, if the settlement fell within the zone of reasonableness. He made that determination, and I can find no error in his conclusion on this issue.

7. Relevance of the Delaware holdback

[112] As matters now stand, an order has been made by Delaware's Court of Chancery placing $800 million USD in escrow as security for any liability that Altaba Inc. may face because of the Saskatchewan action. See: *In re Altaba, Inc.*, 241 A.3d 768 (Del Ch 2020); and *In re Altaba, Inc.*, 2022 Del. Ch. LEXIS 86. Ms. Larocque's last argument in relation to the reasonableness of the settlement is that the Judge erred in not accounting for the existence of this security, and the efforts she had expended in obtaining the order requiring it to be posted, when weighing the reasonableness of the settlement.

[113] The Judge did not refer to the Delaware holdback in the *Stay Decision* and Yahoo notes that the Delaware orders were not part of the record before the Judge. Considering this, it is not clear to me if the submissions advanced in this Court regarding the holdback were made to the Judge. If they were not, that would be a reason not to consider this argument.

[114] In any event, I do not see how the existence of this security bears on the reasonableness of the settlement. In this regard, as I understand it, the amount was fixed based on what the Delaware court calculated to be the maximum amount of all class members' *claims*. Therefore, the Delaware court order determining the amount of security did not constitute a judicial determination about the *likelihood of the class succeeding* in proving those claims. It is also relevant that, in finding

the settlement to be reasonable, the Judge did not apply a discount based on any potential difficulty in recovering any judgment that might be obtained after a trial.

[115] In these circumstances, the security ordered by the Delaware court has no more relevance in the assessment of the reasonableness of the settlement than the plaintiffs' statement that they are seeking judgment in a particular amount against Yahoo. In the latter regard, Ms. Larocque does not contend that the Judge misunderstood in any material way the nature or amount of her claim, at least in a way that impacted his overall assessment of a reasonable zone for settlement. Accordingly, the existence of the Delaware holdback has no bearing on the overall reasonableness of the settlement in this case.

8. Conclusion on best interests

[116] The Judge did not err in concluding that the settlement was fair and reasonable, and, therefore, in the best interests of the class as a whole. Overall, Mr. Larocque's arguments reduce to a request that this Court reweigh the factors the Judge accounted for in reaching this determination. Under the applicable standard of review, that is not this Court's role. I would therefore dismiss this ground of appeal.

C. Costs in the Court of Queen's Bench

[117] Ms. Larocque appeals from the order of costs made against her by the Judge. She offers arguments relating to process and substance.

[118] As to process, Ms. Larocque says that the costs were ordered without her being given the opportunity to offer submissions. In this regard, in her brief filed with the Judge, she had asked that the issue of costs be deferred until after the merits of the application for a permanent stay had been determined, but the Judge proceeded to order them without hearing from any party. This leads to her points of substance. In her factum, she provides a lengthy argument as to what principles should guide a court in an award of costs in a class actions context. She says that, applying these principles, even though she was unsuccessful in her opposition to the application for a permanent stay, costs should not have been awarded against her.

[119] For its part, Yahoo agrees that the Judge made his costs order without hearing from Ms. Larocque. However, it defends the award of costs in its favour as being within the permissible scope of the Judge's discretion.

[120] Section 40(1) of the *CAA* provides that the Court of King's Bench "may" award costs that it "considers appropriate with respect to any application, action or appeal". Section 40(2) then sets out additional factors that the court may, in its discretion, consider when determining whether to make a costs award:

> **40**(2) In determining whether a costs award should be made pursuant to subsection (1), the court or the Court of Appeal may take into account one or more of the following:
>
> (a) the public interest;
>
> (b) whether the action involved a novel point of law;
>
> (c) whether the action was a test case;
>
> (d) access to justice for members of the public using class action proceedings;
>
> (e) any other factor that the court or the Court of Appeal considers appropriate.

[121] These provisions were introduced into the *CAA* by s. 2 of *The Class Actions Amendment Act, 2015*, SS 2015, c 4. Prior to these amendments, s. 40(1) provided that, subject to limited exceptions, the Court of Queen's Bench, as it then was, was not to "award costs to any party to an application for certification". A more comprehensive discussion of these amendments appears in *MacInnis v Bayer*, 2023 SKCA 37 at paras 126–132.

[122] In *Ammazzini CA*, Richards C.J.S. declined to give guidance on the operation of the then-new costs provisions, preferring instead "to reserve such efforts for a case that presents an appropriate costs problem more directly and that does so against the background of a more fully evolved body of decisions in the Court of Queen's Bench" (at para 81). He did, however, express the view that "s. 40 of the [*CAA*] clearly does not contemplate that costs in class action matters should reflexively follow the cause" (at para 84).

[123] Given that the costs order was made without receiving Ms. Larocque's submissions, I would set it aside and remit the issue of costs to the Judge. I would do so without suggesting whether the costs award made here was appropriate or inappropriate.

D. Costs in this Court

[124] This leaves for consideration the question of costs of this appeal. Section 40 of the *CAA* applies equally to proceedings in this Court as it does in the Court of King's Bench. If this were a regular action, this would be an appropriate case for an award of costs in favour of Yahoo because it has achieved success in this appeal, other than the remittance of the question of costs in relation to the previous proceedings in that court to the Judge. However, the issue arises whether any of the factors referred to in s. 40(2) temper the application of the rule applicable to a regular or ordinary action.

[125] This is not a case where the question of costs in this Court can be easily separated from costs in the court or tribunal from which the appeal has been taken. In this regard, this Court does not have the benefit of the Judge's assessment as to whether any of the factors referred to in s. 40(2) are at play in the context of the litigation as a whole. I have also already echoed Richards C.J.S.'s conclusion in *Ammazzini CA* that it is desirable that a body of jurisprudence be allowed to develop in the Court of King's Bench surrounding these provisions before this Court places its stamp – or, at least, its heavy stamp – on s. 40. This is exemplified here, where it might also be seen by some to be inconsistent for this Court to remit the issue of costs to the Judge but then weigh in on issues that might constrain him in his consideration of the matter returned to him for his decision. Finally, I am also cognizant of the fact that this Court's tariff of costs would, in any event, provide for a costs award that, in the context of the stakes of this litigation, be modest. Considering all of this, I would decline to order any costs to any party for the proceedings in this Court.

E. Other matters

[126] As a final order of business, it is appropriate to catalogue three matters that these reasons do not decide.

[127] First, in its factum, Yahoo invited this Court to conclude that, since Ms. Larocque had participated through counsel in the Ontario settlement approval hearing, "issue estoppel precludes her from contesting Perell J.'s finding on the reasonableness of the Settlement". It is not clear from the record that this argument had been made to the Judge, as he makes no reference to it in the *Stay Decision*. Given this fact alone, I would have been reluctant to entertain this issue in this

appeal. In any event, in oral argument, Yahoo advised that it was not pursuing this submission. Accordingly, I decline to offer comment on its merit.

[128] Second, it was accepted by the parties that Perell J. had jurisdiction to make the orders and grant the judgment that will give effect to the settlement. This includes, of course, binding all class members, including those resident outside of Ontario, to its terms, and releasing the claims they may have against Yahoo. Whether this was because the parties simply accept that a provincial superior court can, in all cases where common questions are shared by residents and non-residents alike grant judgments extinguishing the claims of non-residents on an opt-out basis, or because Yahoo's terms of service included an agreement by users that they would submit to the jurisdiction of Ontario courts, or some other reason, was not explained. There remain unresolved issues relating to the circumstances in which jurisdiction may be assumed by a court over non-resident class members on an opt-out basis. See, for example: *Canada Post Corp. v Lépine*, 2009 SCC 16, [2009] 1 SCR 549; *Meeking v Cash Store Inc.*, 2013 MBCA 81, 367 DLR (4th) 684; and *Airia Brands Inc. v Air Canada*, 2017 ONCA 792, 417 DLR (4th) 467. For this reason, and because the parties proceeded on the basis that the Ontario court had jurisdiction over all members of the certified class, I again do not comment on these issues.

[129] Third, I reiterate that the Judge was asked to assess Yahoo's request for a permanent stay by considering the same factors that would have applied if he were approving the settlement. The Judge proceeded in this way because he understood that this was the direction of this Court in *Ammazzini CA*, and was also how Currie J. understood matters when ordering a permanent stay in that litigation (see: *Ammazzini 2019*). As I have discussed, *Ammazzini CA* involved the grant of a *temporary* stay, not a permanent stay in the face of a judgment by another court that had jurisdiction to effectively dispose of class members' claims. Nonetheless, Richards C.J.S. gave several reasons for rebuffing the submission that the certification judge in that case had erred by deferring to the courts of Ontario and leaving them to protect the residents of Saskatchewan. One of these reasons was that "when the certification judge decides whether to permanently stay the Ammazzini Action, he will necessarily be alert to the question of whether the Settlement Agreement protects or responds to the interests of the proposed class members in the Ammazzini Action, including those resident in Saskatchewan" (at para 74). The Judge accepted that this direction meant that, even though Perell J. had made an order that would, when its conditions were

satisfied or waived, extinguish class members' claims, it remained incumbent on him to assess the reasonableness of the settlement before giving effect to it.

[130] An inquiry into the reasonableness of the settlement implies that, if the Judge had found that the settlement was *not* reasonable, the permanent stay would not have been granted, even if Yahoo waived the condition requiring the stay of the Saskatchewan action. This also implies that, in that circumstance, Ms. Larocque would have been entitled to proceed with her action – not only on her own behalf, but on behalf of the proposed class – even in the face of the unchallenged acceptance of the fact that Perell J. had jurisdiction to make an order that in effect extinguished the claims of those class members. The differences between the facts of *Ammazzini CA* and those here at least arguably leave open the question as to whether a court, in circumstances like this one, should inquire into the reasonableness of the settlement or simply into whether the preconditions for the recognition of the judgment of the court that has previously approved the settlement have been met.

V. CONCLUSION

[131] For the reasons I have given, I would remit the question of costs in relation to the proceedings in the Court of Queen's Bench to the Judge and I would dismiss the remainder of Ms. Larocque's appeal without any order of costs for or against any party.

"Leurer J.A."

Leurer J.A.

I concur. "Tholl J.A."

Tholl J.A.

I concur. "Kalmakoff J.A."

Kalmakoff J.A.