QUEEN'S BENCH FOR SASKATCHEWAN

Citation: **2020 SKQB 263**

Date: **2020 10 14**
Docket: QBG 1245 of 2017
Judicial Centre: Regina

BETWEEN:

EMILY LAROCQUE

Plaintiff

- and -

YAHOO! INC. and YAHOO! CANADA

Defendants

Counsel:

E.F. Anthony Merchant, Q.C. and Anthony A. Tibbs	for the plaintiff
Craig P. Dennis, Q.C. and Owen J. James (with their agent, Kenneth A. Ready, Q.C.)	for the defendants
Theodore P. Charney and Devra Charney	for Natalia Karasik, Rahul Suryawanshi and Elie Chami

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FIAT
October 14, 2020

ELSON J.

Introduction

[1] On October 13, 2020, I rendered an interim fiat on this matter, adjourning the certification hearing, earlier scheduled for November of this year, to a later date. In the interim fiat, I wrote that a subsequent fiat would issue setting out the reasons for my

decision. This is that fiat.

[2] The matter before the Court pertains to two class actions in separate provinces. One action is this proposed class action [*Larocque* action], which was issued out of this Court on May 16, 2017. The other action is a now conditionally certified class proceeding in Ontario, styled as *Karasik v Yahoo! Inc. and Yahoo! Canada Co.*, Court File No. CV-16-566248-00 CP [*Karasik* action]. The *Karasik* action was issued out of the Ontario Superior Court of Justice [OSCJ] on December 16, 2016.

[3] Both the *Larocque* and *Karasik* actions purport to be national class actions, arising from the same alleged wrongful conduct on the part of the defendants. Certification of the *Larocque* action is presently scheduled to be heard by this Court on November 25 to 27, 2020. The parties to the *Karasik* action have filed applications to stay the *Larocque* action, on a conditional basis, in favour of the Ontario proceeding. Further, the parties to the *Karasik* action have entered into a settlement agreement, following which the OSCJ issued a consent certification order for settlement purposes. An application for court approval of the settlement agreement is presently scheduled for January 8, 2021.

[4] The parties to the *Karasik* action now seek to have the certification hearing on the *Larocque* action adjourned to a date after the OSCJ hears and determines the request for settlement approval. Alternatively, they ask the Court to hear the stay applications before hearing the certification. The plaintiff in the *Larocque* action, Emily Larocque, vigourously opposes this request. Ms. Larocque contends that the hearing should proceed as scheduled and that the stay applications can be heard in conjunction with it. She posits that hearing and deciding the stay applications before hearing certification runs contrary to the relevant jurisprudence.

[5] For the reasons that follow, I am satisfied that the hearing of the certification application should be adjourned to a date after the OSCJ has decided

whether to approve the settlement agreement.

Background

[6] The respective plaintiffs in the *Larocque* and *Karasik* actions claim to represent a national class of people alleged to have sustained losses caused by the defendants. The defendants in both actions are two companies that have provided, and continue to provide, a range of internet website services. Both actions arise from three separate data breaches alleged to have occurred in August 2013, November 2014 and during the years 2015 and 2016. As pleaded, both claims allege that the defendants failed to prevent the data breaches and that class members suffered losses therefrom. The losses are said to include identity theft, increased risk of identity theft and financial damages for the cost of extra credit monitoring.

[7] The material filed in support of the adjournment request, which was also filed in support of the request for a conditional stay of the *Larocque* action, describes the relevant history of proceedings pertaining to the *Karasik* action. The parties to that action entered into a settlement agreement on July 6, 2020. Following this, on August 5, 2020, a motion was brought before the OSCJ for a consent order certifying the *Karasik* action for settlement purposes, as well as approval of the required notices and their dissemination. Subsequently, on August 26, 2020, the *Karasik* action was certified for settlement purposes by the order of Perell J.

[8] The conditional certification order provides for a "settlement class", consisting of all Canadian residents with Yahoo! accounts at any time during the period January 1, 2012, through December 31, 2017, inclusive. Based on the pleading in the *Larocque* action, it appears that Ms. Larocque is a member of the settlement class, subject to the right to opt out. As mentioned, the certification order is for settlement purposes only and is subject to the terms of the settlement agreement, which is attached as a schedule to the order. The order contemplates a hearing to approve the settlement

agreement, scheduled for December 4, 2020. That said, I am advised by counsel that this hearing is now set for January 8, 2021.

[9] The conditions for certification are set out in paragraph 9 of the certification order. Among other things, it specifies that: (1) if the settlement agreement is terminated for any reason; or (2) any of the specified conditions in the settlement agreement are not satisfied, the certification order will be set aside, on a without prejudice basis, and the class proceeding will be immediately decertified.

[10] The settlement agreement contemplates a settlement fund in the Canadian equivalent of $15 million USD. It further sets out three categories of claims. As counsel for the plaintiff in the *Larocque* action pointed out when this request was heard, none of the categories contemplate compensation for members of the class who would have lawful claims for nominal damages.

[11] Article XIV of the settlement agreement includes three conditions precedent, all of which are said to be for the benefit of the defendants, and can be waived by them, at their sole discretion. Significantly, for the present request, the second of these conditions is that the *Larocque* action, after the appeal period, be permanently stayed as a class action (but may continue as an individual action) or dismissed.

[12] When the certification order was issued, Perell J. issued reasons for his decision. See *Karasik v Yahoo! Inc.*, 2020 ONSC 5103. In his reasons, Perell J. recorded the fact that Ms. Larocque sought leave to intervene in the motion before him, and to oppose it for multiple reasons. Perell J. also noted that, in addition to the *Karasik* and *Larocque* actions, there were parallel proposed class actions in the United States, British Columbia, Alberta and Québec. Authorization (certification) of the Québec action was denied. See *Bourbonnière v Yahoo! Inc.*, 2019 QCCS 2624.

[13] Before describing Ms. Larocque's argument against the consent certification order, and the settlement agreement on which it is based, I think it helpful to note certain pre-certification history pertaining to the *Karasik* action. That history is reflected in the material filed before Perell J. Rather than summarizing that history in my own words, it is wiser simply to recite the court's observations from paragraphs 13 to 15, where Perell J. described this history as follows:

> [13] Pre-certification, the proposed Representative Plaintiffs in the Ontario action sought and received an order appointing Charney Lawyers PC, the proposed Class Counsel for the national Ontario action, as representative counsel in the dissolution of Altaba Inc. under the corporate law of the State of Delaware. Charney Lawyers PC sought the representation order to act on behalf of the creditors who have claims against Yahoo in the proposed Ontario national class action.
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> [14] The background to the representation order was that in 2017, Altaba, formerly known as Yahoo, sold Yahoo to Verizon Communications Inc., but Altaba retained fifty percent of the liabilities for the privacy breaches that are the subject matter of the class action. On October 4, 2019, as part of a windup, Altaba decided to distribute its assets to its shareholders while setting aside sufficient funds to pay potential creditor claims. Altaba and Charney Lawyers PC, proposed Class Counsel in the Ontario action, reached an agreement by which Altaba agreed to hold back $50 million against claims for damages arising out of the privacy breaches in the class action in Ontario. A request to approve the holdback agreement is pending before the Delaware Court.
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> [15] Ms. Larocque, represented by Merchant Law Group, has entered an objection to the plan of dissolution in the Delaware Court, on the basis that a $50 million holdback is inadequate and that a holdback of $1.68 billion is appropriate. Although Ms. Larocque apparently was granted standing to make submissions in the Delaware Court, she has also applied for a representation order in Saskatchewan.

[14] Ms. Larocque premised her opposition to the certification of the *Karasik* action on the assertion that the relevant settlement agreement is wholly inadequate. In her view, this assertion particularly applies to class members from four provinces (British Columbia, Saskatchewan, Manitoba, and Newfoundland and Labrador), where privacy legislation would arguably expose the defendants to liability for greater

damages than those contemplated by the settlement agreement.

[15] This assertion was not substantially different from the argument made before me in the conference call of October 9, 2020. At that time, Ms. Larocque, relying in part on the decision of the Saskatchewan Court of Appeal in *Bigstone v St. Pierre*, 2011 SKCA 34, [2011] 5 WWR 594, argued that nominal damages of at least $1,000 per individual would be justified. In a brief written submission, which accompanied the argument, Ms. Larocque's counsel wrote the following:

> We *know* there was a breach. Yahoo notified. Summary judgment on those common issues would probably be granted. Yahoo has admitted that there are 5 million across Canada. The four provinces cumulatively have 22% of the Canadian population, which by Yahoo's numbers is 1.1 million Yahoo users whose privacy was breached.
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> ...
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> $1,000 x 1.1 million = $1.1 billion – Yahoo has the money, which is held up in the Delaware Chancery Court. Yahoo has sold its company, and seeks to pay the money out to shareholders depriving Saskatchewan and other people of the *per se* nominal damages intended by our Legislature.

[16] Notably, Ms. Larocque did not seek a stay of the *Karasik* action, based on her action being preferable. I suspect this may have partly been attributable to the fact that Ontario legislation did not yet provide for a stay based on a preferable multi-jurisdictional class action commenced elsewhere in Canada. At that time, amendments to the Ontario legislation, which would so provide, had been enacted but not yet proclaimed. It is my understanding that, as of October 1, 2020, the amendments are now effective. Accordingly, a definition of a multi-jurisdictional action, along with ss. 5(6), (7) and (8) of the *Class Proceedings Act, 1992*, SO 1992, c 6, among other provisions, have been added. These provisions read as follows:

> **1**(1) In this Act
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> ...

"multi-jurisdictional class proceeding" means a proceeding,

(a) brought on behalf of a class of persons that includes residents from two or more provinces or territories of Canada, and

(b) certified as a class proceeding under this Act or under the law of another Canadian jurisdiction, as the case may be;

...

5(6) If a class proceeding or proposed class proceeding, including a multi-jurisdictional class proceeding or proposed multi-jurisdictional class proceeding, has been commenced in a Canadian jurisdiction other than Ontario involving the same or similar subject matter and some or all of the same class members as in a proceeding under this Act, the court shall determine whether it would be preferable for some or all of the claims of some or all of the class members, or some or all of the common issues raised by those claims, to be resolved in the proceeding commenced in the other jurisdiction instead of in the proceeding under this Act.

(7) In making a determination under subsection (6), the court shall,

(a) be guided by the following objectives:

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

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

(iii) avoiding irreconcilable judgments where possible,

(iv) promoting judicial economy; and

(b) consider all relevant factors, including,

(i) the alleged basis of liability in each of the proceedings, and any differences in the laws of each applicable jurisdiction respecting such liability and any available relief,

(ii) the stage each proceeding has reached,

(iii) the plan required to be produced for the purposes of each proceeding, including the viability of the plan and the available capacity and resources for advancing the proceeding on behalf of the class,

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

(v) the location of evidence and witnesses, and

> (vi) the ease of enforceability in each applicable jurisdiction.
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> (8) The court, on the motion of a party or class member made before the hearing of the motion for certification, may make a determination under subsection (6) with respect to a proceeding under this Act, and, in doing so, may make any orders it considers appropriate respecting the proceeding, including,
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> (a) staying the proceeding; and
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> (b) imposing such terms on the parties as the court considers appropriate.

These additional provisions are not identical to the counterpart provisions of *The Class Actions Act*, SS 2001, c C-12.01 [*CAA*], including the relevant definition as well as ss. 6(2) and (3). In particular, the definitions of multi-jurisdictional proceedings differ. Despite the differences, I think their significance appears to be quite similar.

[17] In his reasons, Perell J. was mindful of the enacted but not yet proclaimed amendments to the Ontario statute, and applied them to the consideration of Ms. Larocque's motion. Even so, he dismissed the motion for intervention, but did so "without prejudice" to her right to challenge the settlement agreement at the approval hearing.

[18] It should be noted that Ms. Larocque also challenged the conditional certification of the *Karasik* action on the preferable procedure criterion. Perell J. addressed this challenge in the context of the overall process before the court. In this respect, he wrote the following at paragraphs 38 to 41:

> [38] It should be noted that metaphorically speaking, Ms. Larocque would be shooting herself in the head, so-to-speak, if she challenged the other certification criteria because she would be giving Yahoo lethal ammunition to defeat the certification motion in Saskatchewan by disputing the other certification criteria, which are essentially identical in Saskatchewan and Ontario.
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> [39] In any event, the only certification criteria challenged by Ms. Larocque in the immediate case, is the preferable procedure criterion. However, there is no meaningful preferable procedure argument that Ms. Larocque can make because it is indisputable that an action

> certified for settlement purposes is preferable to an uncertified and vigourously contested action in another jurisdiction.
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> [40] There is no prejudice to Ms. Larocque in this indisputable fact and conclusion because, as already noted, she could oppose the settlement in Ontario, and if her opposition is successful, the consent certification will be rescinded, and moreover and more to the immediate point, it should be mentioned again that the settlement in Ontario is conditional on the Saskatchewan action being permanently stayed or dismissed as a class action (although it may continue as an individual action).
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> [41] Thus, if Yahoo or the Plaintiffs in the Ontario action are unsuccessful in having the Saskatchewan action stayed or dismissed, there will be no settlement in Ontario and, once again, the certification order in Ontario will be set aside. Ms. Larocque can make all her arguments to the court in Saskatchewan and if she is successful, then she will have the corollary success of rescinding the consent certification and preempting the settlement approval hearing.

Law and Analysis

[19] In his remarks during the conference call, Ms. Laroque's counsel made two principal submissions about the procedure he believes should be followed in this matter. The first is that the stay applications, filed as late as they are, could only be considered as part of the certification process. In this respect, he argued that the Court should heed the comments of the British Columbia Court of Appeal in *Fantov v Canada Bread Company, Limited*, 2019 BCCA 447, 43 CPC (8th) 189, where Goepel J.A., at paragraphs 63 to 66, endorsed the view that the matter of preference for another multi-jurisdictional class action should be considered within the evidentiary context of certification. As I read the specific comments in paragraph 63, Goepel J.A. did not see this view as necessarily inconsistent with the decisions in *Ravvin v Canada Bread Company*, 2019 ABQB 686, for which an appeal is pending, and *Ammazzini v Anglo American PLC*, 2016 SKCA 164, 405 DLR (4th) 119. He saw these authorities as standing for "the more limited proposition that a judge need not first decide whether certification would be granted before considering the question of stay or carriage."

[20] Counsel's second submission was that, aside from connection between certification and stay proceedings, it is not appropriate for this Court to defer any aspect of Ms. Larocque's proposed class action, including the timing of the certification application, to the court of another province. In this regard, counsel asserts that it is not appropriate for the court of another province to make decisions that run contrary to what the Legislature of this province has enacted.

[21] In the present case, I do not believe it necessary for me to engage in a discussion about the need to combine the certification application and the stay applications into one hearing. In this respect, I am satisfied that, were it not for the current proceedings in the *Karasik* action, it would be more than appropriate for the Court to hear the applications at the same time.

[22] As for the argument that this Court should not defer to the exercise of jurisdiction of another court with respect to a similarly based multi-jurisdictional class action, I do not share counsel's view that such deference is as inappropriate as he suggests. In my view, ss. 6(2) and (3) of the *CAA* implicitly recognizes the legitimate prospect of deference in the preferable claim analysis for competing multi-jurisdictional class actions. See *Ammazzini* and *Ammazzini v Anglo American PLC*, 2019 SKQB 60, [2019] 10 WWR 339, leave to appeal to Court of Appeal refused, 2019 SKCA 142, 48 CPC (8th) 1.

[23] In my view, this is an appropriate case for this Court to adjourn Ms. Larocque's certification application to a date after Perell J. has ruled on the settlement approval request. It is apparent to me that, no matter the outcome of that proceeding, a hearing on the *Larocque* action will, subject to possible appeals, surely follow. If the settlement agreement is approved, one or both of the parties in the *Karasik* action will seek a permanent stay of the *Larocque* action as a class action. If approval is refused, the settlement agreement is terminated and the *Karasik* action is

decertified. Accordingly, Ms. Larocque would be able to proceed with her certification application and do so unhindered by a stay application based on the *Karasik* action. Given that a hearing will inevitably arise from either outcome, I am satisfied that the promotion of judicial economy is better served by adjourning the certification application to a date after the OSCJ has ruled on the request to approve the settlement agreement in the *Karasik* action.

Conclusion

[24] In the result, the certification hearing, presently scheduled for November 25 to 27, 2020, is adjourned *sine die*. It shall be rescheduled after the Ontario Superior Court of Justice has rendered a final decision whether to approve the settlement agreement in the *Karasik* action.

[25] The costs with respect to this request shall be left for consideration to the hearing that will follow the decision on settlement approval, whenever it is heard and decided.

J.
R.W. Elson