# QUEEN'S BENCH FOR SASKATCHEWAN

Citation: **2022 SKQB 136**

Date: **2022 05 25**
Docket: QBG 1245 of 2017
Judicial Centre: Regina

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BETWEEN:

EMILY LAROCQUE

PLAINTIFF

\- and -

YAHOO! INC. and YAHOO! CANADA CO.

DEFENDANTS

**Counsel:**

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| E.F. Anthony Merchant, Q.C. and Anthony A. Tibbs | for the plaintiff |
| Craig P. Dennis, Q.C. | for the defendants |
| Theodore P. Charney | for Natalia Karasik, Rahul Suryawanshi and Elie Chami (Ontario plaintiffs) |

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FIAT
May 25, 2022

ELSON J.

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## Introduction

[1] On May 16, 2017, the plaintiff commenced this action [Larocque action] as a proposed multi-jurisdictional class action pursuant to *The Class Actions Act*, SS 2001, c C-12.01 [*CAA*]. In a nutshell, the Larocque action pertains to three data breaches

between 2013 and 2016. The plaintiff alleges that the breaches caused identity theft to the members of the proposed class or left them at risk to identity theft.

[2] On December 16, 2016, exactly five months before the plaintiff issued the Larocque action, a substantially similar multi-jurisdictional class action was commenced in Ontario. That action, styled as *Karasik et al v Yahoo! Inc. and Yahoo! Canada Co.*, CV-16-566248-00CP [Ontario action], was certified and the parties have now entered into a settlement agreement. On January 8, 2021, Perell J., of the Ontario Superior Court of Justice, approved the settlement. The approval is conditional on this Court granting a permanent stay of the Larocque action.

[3] The Larocque action has not been certified. The plaintiff applied for certification, but I adjourned the hearing of that application in my fiat of October 14, 2020, reported at *Larocque v Yahoo! Inc.*, 2020 SKQB 263. In that fiat I also directed a conditional stay of the Larocque action pending the disposition of the application to approve the settlement of the Ontario action.

[4] In this application, brought by the defendants, I have been asked to direct a permanent stay of the Larocque action. The plaintiff unsuccessfully objected to the settlement of the Ontario action and vigorously opposed the granting of a permanent stay. In doing so, she raised several objections in both proceedings.

[5] In the present application, I find only two of the plaintiff's objections present any meaningful dispute. Those objections inform the two central issues in this decision. The first issue pertains to the Court's jurisdiction to grant a permanent stay. The plaintiff asserts that such jurisdiction can only be exercised when deciding the preferability criterion in a certification application. Because the certification of the

Larocque action has not yet been scheduled, she argues that the Court has no jurisdiction to consider a permanent stay.

[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 Larocque 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.

[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 Larocque action to go forward.

[8] For the reasons that follow, I am neither impressed nor persuaded by the plaintiff's submissions on the issues in dispute. More importantly, I find there is no meaningful basis to find that the settlement is unfair, unreasonable or that it fails to serve the best interests of the class as a whole. Accordingly, I direct the permanent stay to issue.

**Background**

[9] As mentioned in the Introduction, the Ontario action was issued out of the Ontario Superior Court of Justice on December 16, 2016. It was pleaded as a multi-jurisdictional class action brought on behalf of all persons residing in Canada, excluding the defendants and the defendants' executives, whose account information was stolen or accessed in three data breaches. The breaches are said to have occurred in 2013, 2014 and during a period in the years 2015 and 2016. The last of these three breaches is described in the claim as the "Cookies Breach". A concise summary of the actions appears in the decision of Perell J. in *Karasik v Yahoo! Inc.*, 2020 ONSC 5103, where the Court granted a consent certification of the Ontario action for settlement purposes and dismissed the plaintiff's application to stay or dismiss the request for a consent certification. That description, at para. 8 of the decision, reads as follows:

> 8 The actions are against Yahoo, a publicly traded technology company incorporated pursuant to the laws of Delaware and headquartered in Sunnyvale, California. Yahoo offers online products and services for users, including email. Yahoo! Canada is responsible for administering and managing Yahoo user accounts registered in Canada. It is alleged that Yahoo: (a) failed to employ sufficient security measures to protect the proposed Class Members' personal information; (b) delayed notifying impacted individuals of the data breaches; and (c) responded inadequately to the data breaches. In the actions, it is alleged that Class Members suffered identity theft or an increased risk of identity theft and incurred expenses for credit monitoring to mitigate the risks associated with the data breaches. For the purposes of certification of the Ontario action, the proposed Representative Plaintiffs sue for: (a) negligence; and (b) breach of the *Civil Code of Quebec* [footnotes omitted].

[10] Aside from the above description of the claim, I think it is helpful for me to note some observations about the allegations in the statement of claim for the Ontario action. Among the material facts alleged, the plaintiffs pleaded that Yahoo! Inc. published and/or sent notices to its account holders advising of the data breaches in question. According to the claim, the first notice, dated September 22, 2016, advised that, in late 2014, a third-party intruder stole user account information, including certain personal information relating to account holders. The notice further indicated that 500 million accounts were affected. The second notice, said to have been dated December 14, 2016, advised that, in August 2013, an unauthorized third party had stolen account information belonging to one billion users. The notice was also said to have indicated that this breach did not come to the attention of Yahoo! Inc. until November 2016. As for the third notice, the plaintiffs pleaded that, commencing in February 2017, Yahoo! Inc. began issuing notices in which it advised about "cookie forging", a process which would allow an intruder to access users' accounts without a password. These notices described the company's belief that this process may have been used in 2015 or 2016 to access certain accounts.

[11] For the purposes of this application, there are two noteworthy observations about the claim in the Ontario action. The first observation relates to the alleged particulars about the defendants' conduct in relation to the data breaches. Other than pleading a failure to protect the stolen information as well as a delay in reporting the intrusions, the plaintiffs did not assert or suggest that the defendants were guilty of any wilful conduct intended to cause the data breaches. The second observation is that the plaintiffs did not plead any causes of action in tort based on the privacy legislation in Saskatchewan, British Columbia, Manitoba or Newfoundland and Labrador.

[12] Although presented somewhat differently than in the Ontario action, the statement of claim in the Larocque action includes the same material facts. In it, the

plaintiff relies on the notices pertaining to the 2013 and 2014 data breaches. The third data breach is more specifically pleaded in relation to the plaintiff's personal experience in 2015. According to the claim, the plaintiff's personal information with the defendants was compromised on July 5, 2015. The claim does not expressly plead that this compromise pertained to the cookie forging described in the Ontario action. Importantly, and as was the case in the Ontario action, the plaintiff did not plead any material facts to assert or suggest that the defendants were guilty of any wilful conduct intended to cause the data breaches.

[13] However, unlike the Ontario action, the claim in the Larocque action included causes of action in tort based on the privacy legislation in the four provinces earlier mentioned. Indeed, the plaintiff actually listed 13 provincial statutes, including the four statutes identified above. In my view, this was overkill. There is no doubt that the plaintiff's argument in this application was confined to the four statutes in question.

[14] Following the references to the legislation, the plaintiff described the statutory cause of action in paras. 66-67 of her claim as follows:

> 66. By failing to maintain the security of its network and confidentiality of the personal information provided to it by the Plaintiff and Class Members, the Defendants through its employees, wilfully and without claim of right, recklessly violated the privacy of the Plaintiff and Class Members, contrary to the Privacy Legislation.
>
> 67. Pursuant to the Privacy legislation, the Plaintiff and Class Members are afforded a remedy and entitled to a claim for damages.

[15] Returning to a discussion about the Ontario action, that action has been case managed by Perell J. throughout. According to the material filed in respect of this application, the plaintiffs in the Ontario action delivered their motion record for certification in January 2018 followed by the defendants' response in February and March 2019 and then followed by the plaintiffs' reply material in July and September

2019. The record further suggests that extensive cross-examination was conducted by the parties in anticipation of a certification motion scheduled to be heard in March 2020. That hearing was adjourned pending settlement discussions in the first half of 2020.

[16] The parties in the Ontario action entered into a settlement of the proceeding on July 6, 2020. This was followed by an application for the consent certification, which I have already referenced. Following the consent certification, the claims administrator under the settlement disseminated the court-ordered notice of certification and settlement. The notice provided class members with advice of their right to opt out of the class action within 90 days of the notice being disseminated to the class. It is noteworthy that the plaintiff in this action elected not to opt out of the settlement. The parties to the Ontario action assert that, by this election, the plaintiff's claims against the defendants are released.

[17] Under the terms of the settlement approved by Perell J., the total gross amount of the settlement is $20,383,430.80. This consists of the gross settlement sum of $20,325,683.58 plus accumulated interest to the date of the settlement approval of $57,747.22. After deduction for fees, disbursements and taxes and a specific levy attached to the settlement fund, the net claim fund amounted to $16,121,091.84 as at the date of the approval.

[18] The settlement approval decision is cited as *Karasik v Yahoo! Inc.*, 2021 ONSC 1063 [*Karasik No. 2*]. In addressing the fairness and reasonableness of the settlement, Perell J. reviewed 36 breach of privacy class actions covering a period from 2000 to 2021. These authorities were discovered through his own research. Of the 36 reported cases, 27 had been certified/authorized. In four cases, certification was refused and authorization was refused in two cases. This reflected a success rate of approximately 80 percent.

[19] Of the 36 reported cases, Perell J. noted that settlements were approved in 11 cases. He summarized the particulars of those cases at para. 137 and created a chart that set out relevant details such as class size, value of the settlement, per capita value for class member (where available) and the associated counsel fee. The class sizes ranged from a low of 38 members to a high of 6.6 million. One action, *Chartrand v Google LLC*, 2021 BCSC 7 [*Chartrand*], involved a class size described as "well into the millions". The per capita value for each class member, where it could be precisely identified, ranged from a low of "cents on the dollar" (*Chartrand*) to a relative maximum of $258 or $450. These two higher per capita settlements involved class sizes of 333 and 8,525 members, respectively.

[20] From his analysis of the cases, Perell J. made two key observations. The first was that class actions for invasion of privacy have a low risk of not being certified. He made this observation despite a roughly 20% failure rate. In his view, the failed cases did not achieve certification or authorization simply because they were weak on their particular facts.

[21] For the purpose of this application, the more important observation pertained to the cases' prospect of success on the merits. Although none of the cases Perell J. reviewed had gone to trial, the settlements led him to observe that the defendants had "very strong cases". He attributed this to two things: (1) the risk of harm from lost, stolen or misused information had not been actualized; and (2) class members were faced with "ultra-enormous difficulty in establishing specific causation". This led to the conclusion that it would require a trial before defendants in such actions would be prepared to consider settlements involving more than "notional-nominal general damages". The essence of these observations is reflected in paras. 139-141 of *Karasik No. 2*, where Perell J. wrote the following:

> [139] The sample of cases does not provide information about the likelihood of success on the merits because none of the cases have gone that far. However, it can be deduced from the sample of cases that have had settlements approved that the defendants have very strong cases. The reason for their strength can be explained by the circumstance that in the settled cases, the risk of harm from the lost, stolen, or misused personal information has not been actualized. Moreover, in a point that I will return to below, when I discuss the merits of the settlement in the immediate case, class members are confronted with ultra-enormous difficulty in establishing specific causation. The sample settlements reflect very modest *per capita* recoveries for class members and there is the aura of nuisance value settlements from mega-wealthy organizations or settlements designed to maintain good commercial relationships with clientele.
>
> [140] The settlements in the above sample, by and large, reveal that Class Counsel's aspirations for enormous *per capita* awards of general damages (moral or symbolic damages) for intrusion on seclusion or breach of privacy statutes have been rebuffed by the settling defendants.
>
> [141] It seems that it will take a trial decision awarding more than notional-nominal general damages, to break the will of defendants, who as I have already noted are sustained by the strength of their defences on causation and by the difficulties associated with proving negligence or the wilfulness required to establish liability for the privacy statutes or the intentionality required to establish liability for intrusion on seclusion.

[22] Perell J. summarized his reasons for approving the settlement of the Ontario action at paras. 156-165. Excluding his comments on the plaintiff's objections to the settlement approval, which I will address later in this decision, the reasoning is set out in paras. 160-162 and 164-165 of *Karasik No. 2*:

> [160] Although the current state of the law indicates that it will be difficult for a defendant to resist certification in a privacy breach class action, the current case law indicates that defendants have a strong bargaining position in settlement negotiations. The settlement in the immediate case is a product of that hard non-conclusive bargaining with a defendant that given the nascent case law had meaningful litigation risk arguments if the action proceeded to trial.
>
> [161] As noted above, the defendant in the immediate case had the bargaining chip that in the immediate case, there was no evidence of actual financial harm suffered by any Class Member apart from the inconvenience of wasted time some actual expenses.

> [162] Class Counsel made more than adequate investigations of the factual and legal issues in the immediate case and in my opinion there recommendation of the settlement that responded to these factual circumstances was sound, as was the instructions of the Representative Plaintiffs.
>
> ....
>
> [164] I have done a detailed analysis of approved settlements in privacy class actions and those settlements are not speculative. The above analysis of the approved settlements in privacy class actions for cases that advanced the statutory causes of action and intrusion on seclusion claims, suggests that the settlement proposed falls within the zone of reasonableness, which allows for a range of possible resolutions and is an objective standard.
>
> [165] Since all the other settlement factors point toward approving the settlement in the immediate case, I, therefore, approve the settlement.

**Issues**

[23] As referenced in the Introduction, there are two central issues to be decided in this application. They are as follows:

> Issue 1: Does the Court have jurisdiction to consider and decide the application for a permanent stay?
>
> Issue 2: Is the settlement of the Ontario action in the best interests of the class as a whole, including class members who would also be members of the proposed class in the Larocque action?

[24] As also referenced in the Introduction, the second issue engages questions related to the privacy legislation in four provinces. These questions form a substantial part of the plaintiff's objection both to the settlement and to the granting of a permanent stay.

**Issue 1: Does the Court have jurisdiction to consider and decide the application for a permanent stay?**

*Statutory Framework and Related Authorities*

[25] This Court's general authority and jurisdiction to stay an action is grounded in two provisions of *The Queen's Bench Act, 1998*, SS 1998, c Q-1.01 [*QBA*], s. 29 and s. 37. These provisions read as follows:

> **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.
>
> …
>
> **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.

[26] Two aspects of these provisions are noteworthy. First, s. 29(1) contains mandatory language. As such, s. 29(1)(b) of the *QBA* expressly directs the Court to grant all remedies to which a party to an action may be entitled so that "a multiplicity

of legal proceedings concerning the issues is avoided." Although I have been unable to find any authorities that specifically address the nature of this mandatory direction, it seems to me 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. A stay would be the obvious and most likely remedy in such a circumstance.

[27] Section 37 of the *QBA* provides somewhat broader discretion. This provision recognizes the authority of a judge of this Court to direct a stay of proceedings where appropriate. A long-standing authority on the nature of this discretion is the Saskatchewan Court of Appeal judgment in *Leier v Shumiatcher (No. 2)* (1962), 39 WWR 446 (Sask CA) [*Leier*]. There, Davies J. (*ad hoc*) recognized the extraordinary nature of a stay of proceedings, but also observed the need for flexibility and judicial responsibility associated with the discretion to make such an order. He wrote the following at page 447:

> Considerable argument was addressed to the court as to the circumstances under which a discretion to stay proceedings may be exercised, and the extent and limitation thereof. There is the principle, sanctioned by high and respected authority, that the discretion should be exercised only under extraordinary circumstances: *Rowe v. Brandon Packers Ltd.* (1961) 35 W.W.R. 625, 35 C.R. 410 (Man. C.A.), and the cases therein considered. I am, however, respectfully of the opinion that the right to exercise a discretion should not be curtailed by any inflexible rule of law, but should be guided in each instance by the merits of the matter under review. I am convinced that a judge, whose duty it is to exercise the discretion, has not only an inherent right to do so, but where the attainment of justice demands, an obligation and an unfettered right to do so, subject to any limitations imposed by statute or the rules of court: *Re Trade Union Act; Re Blackwoods Beverages Ltd. and Dairy Employees, Truck Drivers and Warehousemen, Local No. 834* (No. 1) (1956) 18 W.W.R. 481, at 486. The exercise of the discretion must not, of course, be capricious or arbitrary, but must have as its foundation admissible evidence of record from which the judge may reasonably draw conclusions. Where a discretion has been exercised without evidence, or (what is tantamount to it) evidence from which no reasonable conclusion should be drawn, the discretion has been based on a wrong principle of law and cannot stand: *Boychuk v. Korzenowski*, [1924] 2 W.W.R. 750 (Sask. C.A.). …

See also *Onion Lake Cree Nation v Stick*, 2018 SKCA 20, [2018] 5 WWR 111, and *Canadian Pacific Railway Company v Kelly Panteluk Construction Ltd.*, 2020 SKCA 123.

[28] With respect to multi-jurisdictional class actions commenced in Saskatchewan, the law also grants specific authority to stay such a proceeding. The plaintiff argues that this specific authority is not engaged in this application. While I will address the specifics of her argument later in this decision, I think it is important to describe the applicable statutory framework and note the leading case law on the operation of that framework.

[29] The statutory framework for the Court's specific authority to stay a Saskatchewan based multi-jurisdictional class action is recognized through four provisions of the *CAA*, all appearing in Part II of the statute. The four provisions, which specifically pertain to multi-jurisdictional class actions, were included in the 2008 amendments to the *CAA* (passed by the Legislature in 2007, *The Class Actions Amendment Act, 2007*, SS 2007, c 21). They are s. 4(2)(c), s. 5.1, s. 6(2) and s. 6(3).

[30] The framework begins with s. 4(2)(c) of the *CAA*, which contains a notice requirement. It obliges an applicant for certification in Saskatchewan to give notice of the application to representative plaintiffs in other multi-jurisdictional class actions that involve the "same or similar subject matter". The significance of the notice is reflected in s. 5.1, which permits a person who received a notice under s. 4(2)(c) to make submissions at the certification hearing.

[31] The third and fourth relevant provisions of the *CAA* are s. 6(2) and (3). These provisions engage a preferability analysis between the Saskatchewan proceeding

and a multi-jurisdictional proceeding commenced elsewhere. In the context of this dispute, s. 6(2) and (3) deserve specific attention. They read as follows:

> **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:
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> (i) the alleged basis of liability, including the applicable laws;
>
> (ii) the stage each of the actions has reached;
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> (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.

[32] While these provisions do not expressly reference the Court's authority to stay a class action commenced in Saskatchewan, *Ammazzini v Anglo American PLC*, 2016 SKCA 164, 405 DLR (4th) 119 [*Ammazzini CA*], stands for the proposition that such authority is implicit in the preferability analysis. 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.

[33] An understanding of the comments in *Ammazzini CA* is assisted by a brief review of its facts. In that case, proposed class actions were commenced in British Columbia, Ontario and Saskatchewan which alleged overcharging for gem grade diamonds. The action in British Columbia was advanced solely on behalf of residents in that province. The Ontario action, commenced in 2010, was a multi-jurisdictional class proceeding in which the proposed representative plaintiff sought to represent a multi-jurisdictional class consisting of all Canadians, except British Columbia residents. In the Saskatchewan action, commenced in 2011, the proposed representative plaintiff sought to represent a class essentially identical to the class proposed in the Ontario action. In the certification proceedings on the Saskatchewan action, the plaintiffs in the British Columbia and Ontario actions applied for a conditional stay of the Saskatchewan action. In *Ammazzini v Anglo American PLC*, 2016 SKQB 53 [*Ammazzini No. 1*], this Court dismissed the application by the British Columbia plaintiffs but allowed the application by the Ontario plaintiff, Kirk Brant. In doing so, the Court concluded that s. 5.1 of the *CAA* afforded Mr. Brant standing to bring the application and granted the conditional stay.

[34] The appeal from *Ammazzini No. 1* was dismissed in *Ammazzini CA*. The Court directed the dismissal despite its conclusion that the certification judge erred in finding that s. 5.1 of the *CAA* allowed Mr. Brant to bring the conditional stay application. On this point, the Court observed, at paras. 52-54, that the certification judge had an independent obligation to conduct the preferability analysis called for by s. 6(2) and (3). Indeed, the Court noted that the certification judge had expressly alluded to this obligation even if Mr. Brant had not brought the stay application.

[35] The Court in *Ammazzini CA* also addressed the argument, advanced by the Saskatchewan plaintiff, that the certification judge had improperly deferred to the Ontario court, thereby denying Saskatchewan residents access to their own courts. Richards C.J.S. found the submission unconvincing. More particularly, he identified five problems associated with it. His comments on the fourth and fifth of these problems specifically pertained to the preferability analysis, including the approach expected of the certification judge when deciding whether to grant a permanent stay based on an eventual settlement. On this point, Richards C.J.S. wrote the following at paras. 74-75:

> 74 Fourth, the appellants ignore the fact 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. This same question will necessarily be front and centre if and when Mr. Brant applies in Ontario to have the settlement approved.
>
> 75 Fifth, and perhaps most significantly, the appellants' submissions on this point take no account of the plain wording of the provisions of the *Act* that relate most directly to it. Section 6(2), as emphasized above, is entirely clear. In an effort to avoid chaotic and unproductive overlap in class action litigation, a certification judge must consider whether it would be preferable for some or all of the claims or common issues raised in a Saskatchewan action to be resolved in a class action commenced elsewhere in Canada. This is a policy choice made by the Legislature and the appellants have shown no basis on which it can be ignored or overridden by the courts.

[36] Eventually, this Court directed a permanent stay in *Ammazzini v Anglo American PLC,* 2019 SKQB 60, [2019] 10 WWR 339 [*Ammazzini No. 2*], application for leave to appeal denied 2019 SKCA 142, 48 CPC (8th) 1.

[37] The plaintiff does not quarrel with the application of the framework in *Ammazzini CA* and *Ammazzini No. 2*. In fact, she argues that the context in which the matters were decided – a certification application in Saskatchewan – reflects the only jurisdictional setting in which this Court could address it. The plaintiff's counsel vigorously asserted that the Court's jurisdiction to grant either a conditional or permanent stay is confined to the operation of s. 6(2) and (3) of the *CAA*, and that these provisions can only operate in a certification application. To support her position, the plaintiff relies heavily on the decisions of this Court in *R v Brooks*, 2009 SKQB 54, [2009] 7 WWR 137 [*Brooks*], additional reasons on costs at 2009 SKQB 66, [2009] 7 WWR 148 and *Brittin v The Minister of Human Resources and Skills Development Canada*, 2013 SKQB 318, 429 Sask R 70 [*Brittin*], as well as the decision of the British Columbia Court of Appeal in *Fantov v Canada Bread Company, Limited*, 2019 BCCA 447.

[38] Before referencing the authorities commended by the plaintiff, I think some jurisprudential context, predating the 2008 amendments, may be helpful. Such context is reflected in the decision of the Saskatchewan Court of Appeal in *Englund v Pfizer Canada Inc.*, 2007 SKCA 62, 299 Sask R 298 [*Englund*]. In *Englund*, the plaintiffs brought a proposed multi-jurisdictional class action in Saskatchewan on behalf of Canadian residents who had allegedly sustained damage after taking prescribed medication manufactured and/or distributed by the defendants. The same plaintiffs had also commenced a substantially similar action in Ontario. One of the defendants applied to stay the Saskatchewan action. It argued that Saskatchewan was not a convenient forum for the litigation and that the plaintiffs commencing identical

proceedings in two jurisdictions amounted to an abuse of process. This Court dismissed the application but that decision was later reversed by the Court of Appeal. At para. 40 of *Englund*, Richards J.A. (as he then was) accepted that it would not always or necessarily be an abuse of process for a plaintiff to launch claims against the same defendant on the same subject matter in multiple jurisdictions. That said, where such actions would serve no legitimate purpose, courts were being used in a manner that was vexatious and abusive. As such, the Court directed a stay but only if the plaintiff did not discontinue the Ontario proceeding.

[39] In *Brooks*, the plaintiff brought a proposed class action in Saskatchewan against the Federal Government, alleging that he and members of the proposed class sustained injury and damage caused by toxic materials used at a Canadian Forces Base in New Brunswick. In the meantime, actions had been commenced in other jurisdictions, including an action in Newfoundland and Labrador, which had been certified. The defendant and third parties applied for a permanent or interim stay of the Saskatchewan action. They grounded their application on the related actions in other provinces, including the assertion that the Saskatchewan action amounted to an abuse of process.

[40] Zarzeczny J. dismissed the application on two premises. First, he found there were notable differences between the provincial actions such that, unlike the circumstances in *Englund*, the abuse of process argument lacked merit. Secondly, he concluded that the stay application should more appropriately have been left to the hearing of the plaintiff's certification application.

[41] The plaintiff seizes on the second premise. She commends my attention to certain passages, at paras. 18 and 20-23 of the decision, where Zarzeczny J. described the significance of the 2008 amendments relating to competing multi-jurisdictional

class actions (which he described as the "2007 amendments"). I think a recital of paras. 21-28 reflects a better representation. Although I generally dislike extensive block quotes from decisions, I think the circumstances here call for a full recital. These paragraphs read as follows:

> 21 The court has concluded 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. "Traffic 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. The "objectives" and "relevant factors" by which the court is to be guided and which it must consider involve the very considerations upon which the applicants base their stay applications. They include avoiding, where possible, the risk of irreconcilable judgments, the promotion of judicial economy, the consideration of the laws applicable, the stage each action has reached, the plan for the proposed multi-jurisdictional class action and the location of the representative plaintiffs, class members, evidence and witnesses.
>
> 22 The discretion granted by the legislature to the court with respect to any certification orders it may issue as outlined in s.6.1 of the Act is very broad. That discretion must be exercised having regard to the criterion set out in subsection 6(2) of the Act. That may prompt a conclusion that deference should be given to an existing class action commenced in another jurisdiction. The discretion of the court is further circumscribed by the objectives and relevant factors set out in subsection s.6(3).
>
> 23 The court has concluded that when this new multi-jurisdictional class action framework, especially s.6, is considered as a whole, it is clear that the concerns raised by the applicants in support of their stay application (being some of the same concerns as were addressed by the Court of Appeal in *Englund*), have been eclipsed. They are now specifically and legislatively required to be addressed by the court at the certification stage and after a certification hearing has been conducted. It is at that time when the full and further information which the court may require and which it is mandated to consider by s.6 of the Act will be fully before the court and the court can consider the imposition of any conditions, limitations or otherwise to any certification order which it may consider to be appropriate in the whole of the circumstances. Inviting the court, as the applicants in the present case have done, to consider these issues in a preliminary application is premature and an unnecessary duplication of resources

and expense.

24 That is not to say that there might not arise some circumstances where an application to stay a multi-jurisdictional class action for abuse of the court's process might be appropriate, however, the court has concluded that this is not one of them.

25 This court recognizes that the approach, both legislative and judicial, to the certification and adjudication of multi-jurisdictional class actions is in a dynamic phase of development in Canada and among its various jurisdictions. These issues present new and likely numerous challenges both for parties involved in them and the courts. New approaches and likely court-to-court communications and protocols will need to be developed. Issues of forum non conveniens, jurisdiction, the scope of comity and recognition of extra provincial orders issued in multi-jurisdictional class action suits illustrate only some of the challenges to be addressed.

26 Many of these issues and proposals for a functional, pragmatic and rational approach to the recognition of multi-jurisdictional class action judgments is discussed by Professor Janet Walker of the Osgood Hall Law School, York University in her article "Recognizing Multi-Jurisdiction Class Action Judgments Within Canada: Key Questions — Suggested Answers", (2008), Vol. 46 Canadian Business Law Journal p. 450, (Canada Law Book). As this author observes at page 463 commenting upon these challenges and the new amendments to the Sask. Act:

> The considerations described above are reasons for recognizing class action judgments from other courts, but they can also provide guidance in the processes of defining the class, measuring the adequacy of representation and the litigation plan, resolving contested carriage motions, and assessing the adequacy of the proposed relief in the settlement hearing.
>
> In some cases, these considerations would be enough to determine where a multi-jurisdiction class action would best be decided, but in other cases, these requirements might be met in more than one jurisdiction. To assist in addressing these situations, *s.6 of the Saskatchewan Class Actions Act* now provides guidance to courts in determining when to certify a multi jurisdiction class action in circumstances in which there is a competing multi-jurisdiction class action —

27 This court acknowledges the continuing challenges that are raised with respect to the judicial management and handling of multi-jurisdictional class actions (see for example *Wuttunee v. Merck Frosst Canada Ltd.*, 2008 SKQB 229, 312 Sask. R. 265, *Tiboni v. Merck Frosst Canada Ltd.* (2008), 295 D.L.R. (4th) 32 [Ont Sup Ct] at paras.

21, 33-41). As observed by Richards in *Englund* at para. 31:

> 31 We appreciate that the phenomenon of overlapping and parallel class actions commenced in different jurisdictions has become increasingly significant. There is now an active national debate as to how the difficulties posed by such proceedings might best be addressed. See, for example: *Report of the Uniform Law Conference of Canada's Committee on the National Class and Related Interjurisdictional Issues: Background, Analysis, and Recommendations*, Vancouver, B.C. March 9, 2005. However, this appeal does not require us to engage in an exploration of the general approach which Saskatchewan courts should take in the face of typical overlapping multi-jurisdictional class proceedings, i.e. proceedings where different proposed representative plaintiffs, acting in separate jurisdictions, have commenced similar claims. ...
>
> 28 What Richards J.A. observed in para. 31 the court not being required to consider in *Englund*, this court is now required to consider illuminated by the light of the 2007 multi-jurisdictional class action amendments to the Sask. Act. As I have concluded, these amendments directly and conclusively answer the question as to when the various and important considerations raised by the stay applications presented to this court should appropriately be considered — namely, at the certification application stage.
>
> [Emphasis added]

[42] In *Brittin*, the plaintiff's proposed class action related to a lost portable hard drive that contained personal information of more than 500,000 participants in the Canadian Student Loan Program. Several other parties commenced similar actions in other provinces and there was also an action commenced in the Federal Court that purported to consolidate all the claims. Canada applied for an order striking out the statement of claim in the Saskatchewan action for want of jurisdiction. In the alternative, it sought an order to stay the action pending the outcome of a certification motion pending in the Federal Court. Schwann J. (as she then was) dismissed the application in all respects. At para. 45, she expressly adopted the reasoning in *Brooks* and applied them to the circumstances before her:

> 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. Parenthetically, I would add the following to this conclusion. As observed by the Court of Appeal in *Englund*, *supra*, the doctrine of abuse of process is aimed at preventing the misuse of the courts (*Englund*, para. 37); and not to shield the defendants from the added burden of defending multiple actions.

*Analysis*

[43] To briefly repeat the plaintiff's argument, she contends that the *Brooks* and *Brittin* decisions stand for the proposition that, outside of a certification application, this Court cannot consider the preferability analysis contemplated by s. 6(2) and (3) of the *CAA*. She particularly relies on the passage in para. 23 of *Brooks*, which I have emphasized above.

[44] Respectfully, I disagree with the plaintiff's interpretation of the decision in *Brooks* as well as the construction she places on s. 6(2) and (3). I am also satisfied that there is nothing in the comments of Schwann J. in *Brittin* that truly supports the plaintiff's argument.

[45] Dealing specifically with the decision in *Brooks*, I interpret the comments of Zarzeczny J. simply as a direction that the parties to a certification application, and the judge who hears it, must address s. 6(2) and (3), where there are competing multi-jurisdictional class actions. That said, I do not interpret my former colleague's words to mean that these provisions necessarily preclude consideration of a stay application pursuant to the Court's general authority under ss. 29 and 37 of the *QBA*. In saying this, I recognize that Zarzeczny J. essentially deferred the stay request before him to the certification proceeding, where the Court would have no choice but to address s. 6(2) and (3) of the *CAA*. In my view, such a deferral should not be taken to mean that the Court could not otherwise address a stay request, whether conditional or permanent.

[46] To reinforce this point, it is noteworthy that, while Zarzeczny J. did not expressly refer to this Court's general authority to grant a stay, he implicitly recognized its existence in para. 24 of his decision. There, he expressly acknowledged that his preceding comment should not be seen as discarding the Court's authority to stay a multi-jurisdictional class action based on an abuse of process.

[47] I am also satisfied that, in applying the Court's general authority to direct a stay under the *QBA*, I can consider a variety of matters, including the preferability analysis contemplated by s. 6(2) and (3). I say this for two reasons. First, according to *Leier* and the cases that have followed it, 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. In my view, the preferability analysis in s. 6(2) and (3) engages such a principle of law if the evidence supports its application.

[48] Secondly, even though this issue is not being decided in the context of the plaintiff's certification application, I cannot ignore the fact that a certification application has been filed and that, but for this application, it would have proceeded. In such a scenario, I would have been obliged to address s. 6(2) and (3). In this context, it seems to me that it is 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. To do otherwise would be to ignore the reality of what is before me.

[49] In short, I am satisfied that the Court does have jurisdiction to consider and decide the application for a permanent stay.

**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 Larocque action, if certified?**

*Law Relating to Settlement Approval*

[50] In this application, the comments in *Ammazzini CA* make it clear that my responsibility is to assess the reasonableness and appropriateness of the settlement. In *Ammazzini No. 2*, Currie J. held that this was key to his determination whether to grant a permanent stay. He then went on to consider the factors that will inform a court's decision whether to approve a class action settlement. Essentially, he addressed the question in the same way as he would have done if a request for settlement approval had come before him under s. 38 of the *CAA*. This provision requires court approval for the settlement, discontinuance or abandonment of a Saskatchewan class action.

[51] It is axiomatic to observe that settlements of civil litigation, as a rule, do not require court approval. This rule does not apply in cases where the parties expected to benefit from a settlement are unable to participate in the negotiation of the settlement, and a court is required to sign-off to ensure a reasonable level of fairness. The inability to participate in negotiations typically arises either from disability or from the party's absence from the settlement discussions.

[52] The settlement of a class action is an example of the latter situation. Except for the representative plaintiff, most class members are not privy to the negotiations that lead to settlements. For this principal reason, class action legislation includes provisions, such as s. 38 of the *CAA*. The policy reasons behind the requirement for court approval are succinctly described in Warren K. Winkler, Paul M. Perell, Jasminka Kalajdzic & Alison Walker, *The Law of Class Actions in Canada* (Toronto: Thomson Reuters, 2014) at 300-301, where the authors wrote the following:

> In a settlement in conventional litigation, the parties directly affected bargain and enter the settlement consensually. The dynamic is different, however, in class actions since representative plaintiffs are rarely active participants in the negotiations, and affected class members never participate. In addition, the high stakes in class actions create the potential for collusive settlements, or settlements favouring the interests of the representative plaintiff(s) to the detriment of the remaining class members. There is also the fear that defendants will use the class action as a means to obtain the release of numerous claims at a substantial discount to the actual value of the claims. For these reasons, court oversight is deemed necessary to protect both the class and the administration of justice.
>
> ...
>
> Since most class actions settle, the integrity and the legitimacy of class actions as a means to secure access to justice largely depends upon the court properly exercising its role in the settlement approval process. Court approval of the settlement ensures that the immediate parties are not violating the legislation, abusing the administration of justice, or settling improper or inadequate reasons. The court has an obligation under class proceedings legislation to protect the interests of the absent class members, both in determining whether the settlement meets the test for approval, and in ensuring that the administration and implementation of the settlement are done in a manner that delivers the promised benefits to the class members.

[53] The approval of a settlement is one of the most vexing problems a class actions judge will face. The question whether to approve a settlement cannot be measured to a nicety. 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. The fundamental question is simply whether, having regard to the policy reasons identified above, the settlement falls within a "zone of reasonableness". Not 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.

[54] In Saskatchewan, the now leading authority on court approval of class action settlements is the decision of Barrington-Foote J. (as he then was) in *Perdikaris*

*v Purdue Pharma*, 2018 SKQB 86, 17 CPC (8th) 119 [*Perdikaris*]. At paras. 14-18 of *Perdikaris*, the Court reviewed the authorities that describe the nature and the reasonable limitations associated with the judicial supervision of a class action settlement, beginning with the earlier leading decision of this Court in *Driediger v Ashley Furniture Industries Inc.*, 2010 SKQB 437, 364 Sask R 130 [*Driediger*]:

> 14 The test to be applied on an application to approve a class action settlement pursuant to s. 38 of the *Act* is uncontroversial. Laing C.J.Q.B. (as he was then) summarized that test in *Driediger v. Ashley Furniture Industries Inc.*, 2010 SKQB 437, 364 Sask. R. 130 (Sask. Q.B.) [*Driediger*]. As he there noted, the court must be satisfied that the settlement is fair, reasonable, and in the best interests of the class as a whole. As he also noted, citing *Parsons v. Canadian Red Cross Society* (1999), 40 C.P.C. (4th) 151 (Ont. S.C.J.), the issue is not whether the settlement meets the demands of a particular member of the class. Nor is it whether the settlement is perfect, but whether it falls within a "zone of reasonableness".
>
> 15 Similarly, as Sharpe J. (as he then was) noted in *Dabbs v. Sun Life Assurance Co. of Canada* (1998), 40 O.R. (3d) 429 (Ont. Gen. Div.) (WL):
>
>> 30 ... settlements "must be seriously scrutinized by judges" and that they should be "viewed with some suspicion". On the other hand, all settlements are the product of compromise and a process of give and take and settlements rarely give all parties exactly what they want. Fairness is not a standard of perfection. Reasonableness allows for a range of possible resolutions. A less than perfect settlement may be in the best interests of those affected by it when compared to the alternative of the risks and costs of litigation.
>
> 16 The need for serious judicial scrutiny, to protect the rights of the many class members not before the court, also underpinned the following comments by Belobaba J. in *Sheridan Chevrolet Cadillac Ltd. v. Furukawa Electric Co.*, 2016 ONSC 729 (Ont. S.C.J.) [*Sheridan Chevrolet*]:
>
>> 10 ...The boiler-plate for settlement approval comes down to something like this: *"We're experienced class counsel; we know what we're doing; there were lots of litigation risks; we negotiated the best possible deal for the class members; trust us."* [emphasis in original]

. . .

> 12 If class action judges are to do their job (and be more than rubber-stamps) in the settlement approval process, and ensure that the settlement amount is indeed fair and reasonable and in the best interests of the class (and not just class counsel) then at the very least class counsel should provide affidavit evidence explaining why the actual settlement amount is fair and reasonable or more specifically, clear reasons why the settlement amount is in the "zone of reasonableness."

> 17 I agree. Further, I agree with the following statement by Belobaba J. in *AFA Livförsäkringsaktiebolag v. Agnico-Eagle Mines Ltd.*, 2016 ONSC 532, 90 C.P.C. (7th) 201:
>
> > 12 I agree with American jurist Richard Posner that "a high degree of precision cannot be expected in valuing a litigation, especially regarding the estimation of the probability of particular outcomes." However, as Posner goes on to explain, a "ball park valuation" is nonetheless achievable and he urges the settlement approval judge to make every effort to "translate his intuitions about the strength of the plaintiff's case and the range of possible damages ... into numbers that would permit a responsible evaluation of the reasonableness of the settlement. [footnotes omitted]
>
> 18 *Middlemiss v. Penn West Petroleum Ltd.*, 2016 ONSC 3537 [*Middlemiss*], and *Sheridan Chevrolet* are to the same effect. In both of those cases, Belobaba J. required the production of further evidence before approving a settlement. In *Middlemiss*, he also noted that "[e]arly stage settlements understandably attract more judicial scrutiny than, say, settlements achieved in the eve of the common issues trial". In one sense, this is not an early stage settlement, as the Ontario, Québec and Nova Scotia claims were all filed in 2007. However, the settlement was concluded before any application for leave or certification was heard.

[55] Barrington-Foote J. also noted the approach followed by Laing C.J.Q.B. in *Driediger*, where the then Chief Justice endorsed and applied the criteria for settlement approval discussed in *Jeffery v Nortel Networks Corp.*, 2007 BCSC 69, 68 BCLR (4th) 317 [*Jeffery*]. In *Jeffery*, Groberman J. had identified a non-exhaustive list of criteria to determine whether a class action settlement fell within the zone of reasonableness. He also summarized the essence of these criteria through four broad

questions. At para. 13 of *Driediger*, Chief Justice Laing discussed both the criteria and the four broad questions as follows:

> 13 In *Jeffery v. Nortel Networks Corp.*, 2007 BCSC 69, 68 B.C.L.R. (4th) 317, Groberman J. at para. 18 noted the factors to be considered in approving a class proceeding settlement are now well established. He went on to recite them as follows:
>
> 1. Likelihood of recovery or likelihood of success;
> 2. Amount and nature of discovery, evidence or investigation;
> 3. Settlement terms and conditions;
> 4. Recommendations and experience of counsel;
> 5. Future expense and likely duration of litigation;
> 6. Recommendations of neutral parties, if any;
> 7. Number of objectors and nature of objections; and
> 8. The presence of arms-length bargaining and the absence of collusion.
>
> At paras. 19 and 20, Groberman J. went on to note:
>
> > 19 In *Fakhri v. Alfalfa's Canada Inc.*, 2005 BCSC 1123, 20 C.P.C. (6th) 70 at para. 8, Gerow J. added two additional factors to this list:
> >
> > 9. degree and nature of communications by counsel and the representative plaintiffs with class members during litigation; [and]
> > 10. information conveying to the court the dynamics of, and the positions taken by the parties during the negotiation.
> >
> > 20 In *Reid v. Ford Motor Co.*, 2006 BCSC 1454, at paragraph 11, Gerow J. produced a slightly different list, this time adding the following as a factor:
> >
> > 11. if counsel fees were negotiated in the settlement, and if so, how big a factor are they; ...
>
> At para. 28, Groberman J. summarized the foregoing factors as follows:
>
> > 28 In summary, then, the court must consider four broad questions before approving the settlement of a class actions:

> • Has counsel of sufficient experience and ability undertaken sufficient investigations to satisfy the court that the settlement is based on a proper analysis of the claim?
>
> • Is there any reason to believe that collusion or extraneous considerations have influenced negotiations such that an inappropriate settlement may have been reached?
>
> • On a cost/benefit analysis, are the plaintiffs well-served by accepting the settlement rather than proceeding with the litigation? and
>
> • Has sufficient information been provided to the members of the class represented by representative plaintiffs, and, if so, are they generally favourably disposed to the settlement.

*Adequacy of the Settlement – Consideration of Privacy Legislation*

[56] Although the plaintiff's submissions arguably engage all four broad questions, I am satisfied that the real dispute is resolved by an answer to the third question – whether the class is well served by accepting the settlement as opposed to proceeding to trial. The plaintiff's answer to this question is an unequivocal "No".

[57] When the application to approve the settlement of the Ontario action came before Perell J., the plaintiff advanced detailed objections to the settlement. Not surprisingly, she asserted some of those objections in this application. In *Karasik No. 2*, Perell J. summarized the plaintiff's objections as follows:

> [91] … Her objections may be summarized as follows:
>
> a. Ms. Larocque submits that unlike most settlement approval motions, where, given the absence of an advocate to challenge the providence and the integrity of the settlement, in the immediate case, the probity of the proposed settlement can be tested in the crucible of an adversarial process.
>
> b. Ms. Larocque submits that the parties to the Ontario Action and their counsel arrived at the settlement by engaging in a "race to the bottom". Ms. Larocque submits that the court has the advantage of hearing from a strong and committed rival Class Counsel with knowledge about the possible improvidence,

imprudence, and perfidy of the settlement reached by Class Counsel and Counsel for the Defendant in the immediate case.

c. Ms. Larocque submits that in other cases, the absence of an adversarial context has led to perfunctory settlement approval hearing that are not in the interest of the class action regime; however, in the immediate case, the rival class action in Saskatchewan provides an opportunity to determine whether a proper settlement has been reached.

d. Ms. Larocque submits that court should be skeptical about the probity of a settlement negotiated before certification has been argued when putative Class Counsel is under the pressure of losing its investment in the file because of a competing certification process in another jurisdiction.

e. Ms. Larocque submits the court should be skeptical about the instructions of Representative Plaintiffs to accept a settlement particularly when they will do better than the Class Members by an award of an honorarium and because, in general, it is a pretense that Representative Plaintiffs give instructions, when the truth is that Plaintiffs are the recruited minions of Class Counsel.

f. Ms. Larocque submits that the proposed settlement is of such limited financial benefit for the more than 5.0 million Class Members that it not in the best interests of the class as a whole or of any individual Class Member.

g. Ms. Larocque submits that the proposed settlement is "woefully inadequate to protect the interests of *at least* British Columbia, Saskatchewan, Manitoba, and Newfoundland and Labrador" where privacy legislation would expose Yahoo to much higher liability.

h. Ms. Larocque submits that the statutory regimes which are being relied on in the Saskatchewan Action support significant *per capita* general damages awards and an aggregate award of damages for the Class Members.

[58] The essence of the plaintiff's argument before me is not much different. Through her counsel, she contends that the settlement of the Ontario action is little more than a "minimalistic/giveaway". While she acknowledges that the settlement might be appropriate when compared with other class action settlements for breach of privacy, she asserts that it does not adequately account for the "all but assured" compensation

to be expected at trial. In this respect, I think it appropriate to quote an excerpt from the written submission presented by the plaintiff's counsel. This excerpt, which immediately follows from counsel's description of the approach used in the settlement approval of the Ontario action, reads as follows:

> 126. This, respectfully, is an erroneous approach to the analysis and leads to the perpetuation that plagued all of these early, pre-certification settlements of privacy breach class actions: they are all *de minimus* settlements that provide virtually no compensatory benefits to the class.
>
> 127. Where here, with privacy legislation, we are all but assured a proper compensation, the Court, following the intent of the Legislature, can begin to put a stop to this kind of minimalistic/give-away settlement.
>
> 128. Justifying a poor settlement by reference to a host of equally poor prior settlements is, on its face, a wrong approach. Instead, considering (sic) must be given to *what are the alternatives* ***in this case*** *and is something* ***really*** *better than nothing*?
>
> [Emphasis in the original]

[59] The plaintiff posits that the circumstances of this case favour a "fervent and strong judicial response". In effect, she asks this Court to take a stand based on the assurance that the proposed class in the Larocque 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. This calls for a consideration of the legislation in those provinces, as well as some of the authorities that have considered this legislation.

[60] The provincial privacy statutes in question are: (1) *The Privacy Act*, RSS 1978, c P-24 [Sask *PA*]; (2) *Privacy Act*, RSBC 1996, c 373, [BC *PA*]; (3) *The Privacy Act*, RSM 1987, c P125 [Man *PA*]; and (4) *Privacy Act*, RSNL 1990, c P-22 [NL *PA*]. The relevant provisions of each statute, which create a tort for violations of privacy and define or exemplify such violations, are as follows:

a. Sask *PA*, s. 2 and s. 6:

> **2** 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.
>
> ....
>
> 6(1) The nature and degree of privacy to which a person is entitled in any situation or in relation to any situation or matter is that which is reasonable in the circumstances, due regard being given to the lawful interests of others.
>
> (2) Without limiting the generality of subsection (1) in determining whether an act, conduct or publication constitutes a violation of the privacy of a person, regard shall be given to:
>
> (a) the nature, incidence and occasion of the act, conduct or publication;
>
> (b) the effect of the act, conduct or publication on the health and welfare, or the social, business or financial position, of the person or his family or relatives;
>
> (c) any relationship whether domestic or otherwise between the parties to the action; and
>
> (d) the conduct of the person and of the defendant both before and after the act, conduct or publication, including any apology or offer or amends made by the defendant.

b. BC *PA*, s. 1:

> **1(1)** It is a tort, actionable without proof of damage, for a person, wilfully and without a claim of right, to violate the privacy of another.
>
> **(2)** The nature and degree of privacy to which a person is entitled in a situation or in relation to a matter is that which is reasonable in the circumstances, giving due regard to the lawful interests of others.
>
> **(3)** In determining whether the act or conduct of a person is a violation of another's privacy, regard must be given to the nature, incidence and occasion of the act or conduct and to any domestic or other relationship between the parties.

**(4)** Without limiting subsections (1) to (3), privacy may be violated by eavesdropping or surveillance, whether or not accomplished by trespass.

c. Man. *PA*, s. 2:

2(1) A person who substantially, unreasonably, and without claim of right, violates the privacy of another person, commits a tort against that other person.

2(2) An action for violation of privacy may be brought without proof of damage.

....

3 Without limiting the generality of section 2, privacy of a person may be violated

(a) by surveillance, auditory or visual, whether or not accomplished by trespass, of that person, his home or other place of residence, or of any vehicle, by any means including eavesdropping, watching, spying, besetting or following;

(b) by the listening to or recording of a conversation in which that person participates, or messages to or from that person, passing along, over or through any telephone lines, otherwise than as a lawful party thereto or under lawful authority conferred to that end;

(c) by the unauthorized use of the name or likeness or voice of that person for the purposes of advertising or promoting the sale of, or any other trading in, any property or services, or for any other purposes of gain to the user if, in the course of the use, that person is identified or identifiable and the user intended to exploit the name or likeness or voice of that person; or

(d) by the use of his letters, diaries and other personal documents without his consent or without the consent of any other person who is in possession of them with his consent.

d. NL *PA*, s. 3:

**3(1)** It is a tort, actionable without proof of damage, for a person, wilfully and without a claim of right, to violate the privacy of an individual.

> **(2)** The nature and degree of privacy to which an individual is entitled in a situation or in relation to a matter is that which is reasonable in the circumstances, regard being given to the lawful interests of others; and in determining whether the act or conduct of a person constitutes a violation of the privacy of an individual, regard shall be given to the nature, incidence, and occasion of the act or conduct and to the relationship, whether domestic or other, between the parties.

[61] Each of the above provisions create a tort, actionable without proof of damage, when a person violates the privacy of another. Three statutes stipulate a specific mental element associated with the violation of privacy, requiring that the violation must have been committed "wilfully" and "without claim of right" or "without a claim of right". The Man *PA* does not contain the same wording. It stipulates that the violation must have been committed "substantially, unreasonably, and without claim of right". Although it may be arguable, I have not found any cases that have addressed the question whether this wording raises a mental element associated with the statutory tort. My reading of the authorities is that the nature of the facts considered in each case did not lend themselves to addressing that question.

[62] As for the legislation in the other provinces, it is reasonably clear that a "wilful violation" will require something more than an intention to commit an act that results in a violation of privacy. In *Hollinsworth v BCTV*, [1999] 6 WWR 54 (BCCA) [*Hollinsworth*], Lambert J.A. addressed s. 1 of the BC *PA* and gave the word "wilfully" a narrow construction. At para. 29, he wrote the following:

> 29 .... In my opinion, the word "wilfully" does not apply broadly to any intentional act that has the effect of violating privacy but more narrowly to an intention which the person doing the act knew or should have known would violate the privacy of another person.

[63] This construction was expressly adopted by Klatt J. in *Kumar v Korpan*, 2020 SKQB 256 at para 33. Moreover, other decisions of this Court have construed "wilfully" in a manner that is remarkably consistent with the description in

*Hollinsworth*. See *Peters-Brown v Regina District Health Board*, [1996] 1 WWR 337 (Sask QB) at paras 32-33 and 35; *Cole v Prairie Centre Credit Union Ltd.*, 2007 SKQB 330 at para 45, [2008] 1 WWR 115; and *Bierman v Haidash*, 2021 SKQB 44 at para 42, [2021] 4 WWR 728.

[64] In the circumstances of the present case, the pleaded material facts suggest that a third-party intruder may have wilfully violated the privacy of account holders' private information. In the plaintiff's view, this should not mean that the defendants can escape liability in tort under the applicable provincial privacy statutes. On this point, she suggests that the decision in *Hynes v Western Regional Integrated Health Authority*, 2014 NLTD(G) 137, 357 Nfld. & PEIR 138 [*Hynes*], stands for the proposition that a failure to establish meaningful safeguards would be sufficient to establish a wilful violation under the legislation.

[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 NL *PA*. 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.

[68] In *Karasik No. 2*, Perell J. addressed the plaintiff's submission about the defendants' potential liability under the provincial privacy statutes. He concluded that the prospect of establishing such liability was, at best, uncertain and, at worst, formidable. He also questioned whether the inquiry into wilful violations of privacy involved fact specific issues related to a person's expectation of privacy. His comments in these regards are set out in paras. 156-158:

> [156] Given the causes of action that the Representative Plaintiffs did plead, it is at least understandable why the plaintiffs in the immediate case did not plead these statutes. Under these statutes, whether the plaintiff has a reasonable expectation of privacy and whether there has been an invasion of privacy is a fact specific inquiry in the circumstances of each case. Moreover, where an element of the statutory privacy tort is that the defendant's violation was wilful, the plaintiff must show that the defendant's conduct was a purposeful violation of the plaintiff's privacy; wilful means more than the defendant did an act that violated the plaintiff's privacy or that the plaintiff carelessly or accidentally caused the plaintiff's privacy to be breached and the plaintiff must show that his or her conduct would violate the plaintiff's privacy. In other words, there is a significant and difficult to prove the mental element to be proven in the statutory privacy torts.
>
> [157] In the immediate case, had the Representative Plaintiffs pled the privacy statutes, they would have been met with arguments and the same bargaining chips as confronts the other causes of action. In the immediate case, with the absence of any trial judgments, the defendants had good arguments that defences based on causation and the absence of the mental elements for liability would present formidable obstacles to the plaintiffs' success.
>
> [158] Moreover, the privacy statutes might not have been all that useful in the immediate case because it remains to be seen whether the

> benchmark of the awards in individual breach of privacy cases would be applied to a mass group claim.

[69] 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. 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. The court's final comment on the point appears at para. 163.

> [163] Apart from being speculative and unprovable, Ms. Larocque's objections that the outcome of the Saskatchewan Action may be better misses the point that the issue before the court in Ontario is about the fairness and reasonableness of the settlement in the Ontario Action. Ms. Larocque's objection misses the point that there is no settlement criterion that a settlement in the hand is better than the prospects of a better settlement in a rival class action. The point in the immediate case, is the not so simple issue of whether the settlement in the immediate case meets the test for approval.

*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 *Karasik No. 2* 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.

**Conclusion**

[74] In the end, I am satisfied that this action must be permanently stayed, and I so order.

[75] As in the case of *Ammazzini No. 2*, the defendants shall have one set of costs, under column 3, from the Saskatchewan plaintiff. The plaintiffs in the Ontario and Larocque actions shall bear their own costs.

J.
R.W. ELSON