CITATION: Karasik v. Yahoo! Inc., 2021 ONSC 1063
COURT FILE NO.: CV-16-566248-00CP
DATE: 2021/02/09

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:	)	
	)	
NATALIA KARASIK, RAHUL SURYAWANSHI and ELIE CHAMI	)	*Theodore P. Charney, Devra Charney* and *Caleb Edwards* for the Plaintiffs
Plaintiffs	)	
- and -	)	
	)	
YAHOO! INC. and YAHOO! CANADA CO.	)	*Craig Dennis* and *Owen James* for the Defendants
Defendants	)	*Anthony Tibbs* and *Iqbal Brar* for objector Emily Larocque
	)	
	)	**HEARD**: January 8, 2021

PERELL, J.

REASONS FOR DECISION

A. Introduction

[1] In this certified national class action under Ontario's *Class Proceedings Act, 1992*,[1] which I shall refer to as the "Ontario Action", Natalia Karasik, Rahul Suryawanshi, and Elie Chami are the Representative Plaintiffs. They sue Yahoo! Inc. and Yahoo! Canada Co. (collectively "Yahoo").

[2] Class Counsel in the Ontario Action are Charney Lawyers P.C. of Ontario and Garcha & Company of British Columbia. Class Counsel are part of a consortium that includes the counsel in an action in Alberta against Yahoo in which James H. Brown & Associates and Higgerty Law are the lawyers of record. There is also an action in British Columbia in which Garcha & Company are the lawyers of record.

[3] The Representative Plaintiffs and Class Counsel in the Ontario Action move for: (a) approval of a $20.3 million settlement, (b) approval of Class Counsel's $4.9 million plus disbursements and taxes fee request, and (c) approval of honoraria for the Representative Plaintiffs of $7,500 each.

[4] A Class Member, Emily Larocque, who has commenced a proposed national class action in Saskatchewan, opposes the motions brought by the Representative Plaintiffs and Class Counsel. Ms. Larocque is represented at the settlement approval hearing by the Merchant Law Group LLP, her lawyers in the Saskatchewan Action.

[5] Although a class member in the Ontario Action, Ms. Larocque's preferred Class Counsel for an action against Yahoo are the Merchant Law Group, her lawyers in her Saskatchewan Action. On Ms. Larocque's behalf, the Merchant Law Group filed a 150-page objection to the approval of

[1] S.O. 1992. c. 6.

the settlement of the Ontario Action.

[6] The Merchant Law Group also orchestrated a campaign to elicit Class Member opposition to the settlement in the Ontario Action and to recruit support for the Saskatchewan Action, for which it is in the process of seeking certification. At the eleventh hour of the settlement approval motion, at the instigation of the Merchant Law Group over a hundred objections were delivered opposing the settlement in the Ontario Action.

[7] The Merchant Law Group is waging what for practical purposes is a multijurisdictional war for carriage of a national class action against Yahoo. Through Ms. Larocque's objection, the Merchant Law Group, which believes it will extract a more substantial settlement or judgment against Yahoo, challenges the settlement in the Ontario Action as collusive, overly risk adverse, improvident to the point of worthlessness, and unworthy of approval.

[8] Class Counsel and Yahoo's Counsel took umbrage to the Merchant Law Group's attack and to the suggestion that there was a collusive settlement. Class Counsel and Yahoo's Counsel counterattacked by challenging the integrity of the Merchant Law Group, and Yahoo's Counsel brought a motion to have the Merchant Law Group produce its mediation brief from a mediation involving the Saskatchewan Action. However, Ms. Larocque claimed settlement privilege with respect to the mediation brief.

[9] For reasons that I will explain below, I shall dismiss the preliminary motion for the production of Ms. Larocque's mediation brief.

[10] And I will disregard the mudslinging between the law firms. The *ad hominem* attacks about the integrity of the Merchant Law Group are not relevant to the issues on this settlement approval motion.

[11] A settlement approval motion is the time to determine whether the proposed settlement is fair, reasonable, and in the best interests of the collective comprised of Class Members. A settlement approval motion is not a carriage contest, nor is it a trial about the likelihood of whether another class action will be certified, nor is it about the likelihood that if certified that rival action would provide more access to justice and a better outcome for the Class Members. It is, of course, conceivable that the Merchant Law Group or some other counsel in some other jurisdiction could achieve a better outcome but that is not the issue before the court. Whether another court will enforce the judgment of the Ontario court or allow a rival class to proceed are issues for that court, not this one. A settlement approval motion is not the occasion to decide definitively the liability and quantification of damages issues that can only be decided at common issues and individual issues trial. The genuine issue before this court in Ontario is whether it should approve a proposed settlement in a national class action pursuant to s. 29 of the *Class Proceedings Act, 1992* and in accordance with the principles of evaluation of settlement worthiness that have been developed in the case law.

[12] Because of the arguments of the parties and the objector in the immediate case, it shall be necessary for me to do a deep dive into the methodology a court uses to assess the merits of a class action settlement and to determine whether the settlement in the immediate case should be approved. Because of the arguments of the parties and the objector in the immediate case, it shall be necessary for me to examine the nascent class action case law about privacy breach class actions.

[13] To foreshadow the outcome, in the immediate case, for the reasons that follow, I find that the settlement in the Ontario Action is fair, reasonable, and in the best interests of the Class Members, including Ms. Larocque. I approve the Settlement. I approve a Class Counsel fee of $3.0 million (not $4.9 million). I do not approve the honoraria.

B. The Parties and the Principal Actors

[14] During the relevant time, Yahoo was a publicly traded technology company incorporated pursuant to the laws of Delaware and headquartered in Sunnyvale, California. Yahoo offered several Internet products, including Yahoo Mail, which is an email service.

[15] During the relevant time, Yahoo Canada was a subsidiary incorporated pursuant to the laws of Nova Scotia. It is headquartered in Toronto, Ontario. It was responsible for administering and managing Yahoo accounts registered in Canada.

[16] In 2017, Yahoo sold its operating business to Verizon Communications Inc. However, Yahoo remained liable for data breaches that had occurred during the relevant period. Verizon agreed to contribute 50% to the liabilities related to data breaches. In 2017, in a reorganization Yahoo was renamed Altaba Inc. Thus, the style of cause should be amended accordingly.[2]

[17] As a further complication to the factual background of the immediate case, to be discussed further below, it should be noted that Altaba is in the process of being dissolved as a corporation in proceedings in Delaware. Money, however, has been set aside for the claims of creditors including the Class Members of the Ontario Action.

[18] During the relevant time, the Representative Plaintiffs were users of Yahoo Mail, which is an email service. Mr. Chami is a resident of Québec. Ms. Karasik is a resident of Ontario. Mr. Suryawanshi is a resident of Alberta. Each of the Representative Plaintiffs had their email accounts compromised by cyberattacks from hackers.

[19] Ms. Larocque is a resident of Saskatoon, Saskatchewan. Her Yahoo email account was compromised on July 5, 2015 when her passwords were changed without her authorization. She, however, was able to retrieve her password through a verification process after which she changed her password on her email and on other accounts to protect her confidential information.

C. The Alleged Misconduct

[20] In August 2013, there was a cyberattack, by a still unidentified hacker, against Yahoo's worldwide user database. The hacker extracted information from approximately three billion accounts, including the user account information of about 5.0 million Canadians. The information extracted included names, email addresses, telephone numbers, dates of birth, hashed passwords (using the MD5 algorithm) and, in some cases, encrypted or unencrypted security questions and answers.

[21] Yahoo was not aware of the August 2013 cyberattack until November 2016, when U.S.

[2] On February 20, 2019, an action under the style of cause *Chami v. Altaba Inc., et al.* was filed in Ontario Superior Court of Justice at Toronto with court file number CV-19-00614734-00CP to toll the limitation period against Altaba and Verizon.

federal law enforcement agencies brought the theft of information to Yahoo's attention.

[22] In or about November and December 2014, the Yahoo email database was again hacked and information from approximately 500 million accounts was stolen. Yahoo believes that the 2014 cyberattack was sponsored by the Federal Security Service of the Russian Federation and executed by a criminal on the FBI's "most wanted" cyber list and on Interpol's red notice list.

[23] Yahoo was aware of the 2014 cyberattack shortly after it occurred, but it did not disclose it to the public until September 2016.

[24] In the years between the 2013 cyberattack and Yahoo's disclosure of it, stolen user account information from the Yahoo UDB was offered for sale on the dark web.

[25] In 2015 and 2016, the perpetrators responsible for the 2014 cyberattack engaged in targeted and untargeted computer cookie-minting efforts, which allowed them to access accounts without a password. Computer cookies are data sent from a website to a browser's computer and stored on the web browser's computer. The data helps the website operator keep track of the browser's internet activity.

[26] Based on Yahoo's outside forensic expert's analysis, between 6,500 and 6,700 accounts were targeted, including approximately 128 Canadian accounts. However, based on Yahoo's outside forensic expert's analysis, approximately 32 million accounts were affected through the untargeted cookie-minting effort, including approximately 3.4 million Canadian accounts.

[27] Yahoo believes that the targeted cookie forgery was used to access the content of certain mail accounts believed to belong to people of interest to Russian intelligence. In respect of the untargeted cookie-minting effort, Yahoo believes that the vast majority of accounts affected were accessed for the purpose of harvesting the contact information to facilitate spam (mass computer) marketing.

[28] Beginning on September 22, 2016, Yahoo sent a notice with respect to the 2014 cyberattack entitled "Important Message Regarding Your Account Security" via email to some, but not all, of its Canadian users. The notice advised the users of the 2014 cyberattack but not the 2013 cyberattack.

[29] Beginning on December 14, 2016, Yahoo notified its customers about the 2013 cyberattack. Yahoo sent a standard-form notice via email entitled "Important Security Information for Yahoo Users" to Canadian users believed to have been affected by the 2013 Breach, including the three representative Plaintiffs. The notice, which is similar to the notice sent with respect to the 2014 cyberattack, stated, in part:

> **What Happened?**
>
> Law enforcement provided Yahoo in November 2016 with data files that a third party claimed was Yahoo user data. We analyzed this data with the assistance of outside forensic experts and found that it appears to be Yahoo user data. Based on further analysis of this data by the forensic experts, we believe an unauthorized third party, in August 2013, stole data associated with a broader set of user accounts, including yours. We have not been able to identify the intrusion associated with this theft. We believe this incident is likely distinct from the incident we disclosed on September 22, 2016.

> **What Information Was Involved?**
>
> The stolen user account information may have included names, email addresses, telephone numbers, dates of birth, hashed passwords (using MD5) and, in some cases, encrypted or unencrypted security questions and answers.
>
> […]
>
> **What You Can Do?**
>
> We encourage you to follow these security recommendations:
>
> Change your passwords and security questions and answers for any other accounts on which you used the same or similar information used for your Yahoo account.
>
> Review all of your accounts for suspicious activity.
>
> Be cautious of any unsolicited communications that ask for your personal information or refer you to a web page asking for personal information.
>
> Avoid clicking on links or downloading attachments from suspicious emails.

[30] In the years between the 2013 cyberattack and Yahoo's disclosure of it, some Class Members, including the Representative Plaintiffs, periodically changed their passwords, which significantly reduces the risk of cybercrime although the actual number who changed their passwords is unknown.

[31] In February 2017, Yahoo sent a security notification via email to some of its Canadian users, including Mr. Chami and Mr. Suryawanshi regarding the cookies breach.

[32] In mid-September 2017, Yahoo discovered that the 2013 cyberattack was more extensive than originally thought. Yahoo discovered that all the data associated with all of the accounts that were in Yahoo's user database at the time of the 2013 cyberattack had been hacked. This revelation came about when in early 2017, a Russian cybercriminal offered the whole Yahoo database for sale at a Russian language internet underground forum. A threat intelligence firm advised Yahoo of the sale, and in September 2017, the threat intelligence firm purchased the database on behalf of Yahoo. It is not known, but it is possible, that contrary to its promise, the nefarious vendor of the hacked information kept a copy of the information from the database.

[33] As the discussion below will reveal, in late September 2017, the first of several class actions in Canada and the United States were commenced against Yahoo.

[34] Beginning on October 3, 2017, Yahoo sent another notice via email to additional users who were identified as affected by the 2013 cyberbreach. In a press release, Verizon explained that although Yahoo had disclosed that more than 1.0 billion of the approximately 3.0 billion accounts existing in 2013 had been affected, the company recently obtained new intelligence and that all Yahoo accounts were affected by the 2013 cyberattack.

D. Yahoo's Liability and the Injuries Suffered by the Class

[35] It is estimated that five million Canadians are Class Members. It is known that all of the Class Members suffered the risk of harm from the misappropriation and possible misuse of their

personal information. However, it is not known how many Class Members suffered the actuality of harm from the extraction of their personal information. The risk of harm may be mitigated by email users that before or after becoming aware of hacking took safeguards to protect their own personal information. The risk of harm may not be actualized because the hacker may not use or misuse some of the hacked information.

[36] In the immediate case, although there was evidence that some Class Members responded to the notice of the cyberbreaches by incurring the expense of obtaining credit monitoring or identify theft insurance or enhanced data protection, there was no evidence that any individual Class Member has been or was the victim of identity theft tied to the cyberattacks.

[37] It should be observed that it is always the case that the extent of the potentiality and the actuality of harm from cyberattacks is unknown, unknowable, or capable of being proven only with considerable difficulty. This observation is relevant because in a massive breach of privacy, the difficulty of connecting a breach of privacy with harm consequent on the breach is something that defendants can and do use as a bargaining chip to reduce exposure to liability.

[38] In this last regard, in the immediate case, the duration and the degree of risk of harm varied across the five million Class Members. Class Members who guarded their personal information by prudent and timely password changes were at less risk during the period in which Yahoo did not give notice of the cyberattack. Further, in the immediate case, the Class Members entered their own personal information into Yahoo's worldwide user database and some of that information was garbage information, which is to say that the data was mistaken, inaccurate, disguised, or out-of-date or and in some instances the information was simply false and therefore its loss of confidentiality would not cause harm and these Class Members were at less risk. In the immediate case, on an individual basis, the purloined information may have been adequate for some nefarious uses, like annoying advertising or marketing campaigns, but the hacked information may have been inadequate for more serious misuses, such as identity theft. Moreover, even if a Class Member actually suffered a harm from the misuse of his or her personal information, he or she might have difficulty in proving that the harm was a consequence of the cyberattacks on the Yahoo worldwide user database or had some other explanation.

[39] In the immediate case, insofar as the plaintiffs themselves are concerned, there is some information about the risk of harm and the actuality of harm. As mentioned above, Yahoo was reorganized as Altaba Inc. and Altaba Inc. is in the process of being dissolved as a corporation. In the dissolution proceedings, Mr. Chami, Ms. Karasik, and Mr. Suryawanshi made claims for compensation, that provide some insight into the injuries suffered by the Class Members.

a. Mr. Chami made a claim for $25,672.09, comprised of: $10,000 for intrusion upon seclusion for two cyberattacks; $12,500 for intrusion upon seclusion with respect to the cookie breaches; $1,600 for credit monitoring expenses and for future credit monitoring for two years; $175 damages for inconvenience and wasted time for seven hours at $25/hr; and $10 for punitive damages (his proportional share of a $50 million punitive damages award).

b. Mr. Suryawanshi made a claim for $25,885.98, calculated similarly to Mr. Chami's claim.

c. Ms. Karasik made a claim $13,231.95. Her claim was lower as she made a claim

with respect to one cyberattack.

[40] However, using Mr. Chami's claim as an example, it should be observed that if the general (moral or symbolic) damages component is removed from the calculation of damages and the expense of credit monitoring is removed from the claim, the measure of the loss is just $175 damages for inconvenience and wasted time for seven hours at $25/hr. and $10 for punitive damages.

[41] These last observations are significant because, as I shall explain further below, the extant case law about approved settlements reveals that general (moral or symbolic) damages awards tend to be minuscule.

E. The Plaintiffs' Class Action

[42] As set out in the Amended Fresh as Amended Statement of Claim, the causes of action advanced by the Plaintiffs are: (a) negligence, (b) breach of contract, (c) breach of confidence, (d) intrusion upon seclusion, (e) unjust enrichment/waiver of tort, and (f) breaches of Québec's *Consumer Protection Act*[3] and the *Civil Code of Québec*.[4]

[43] For the purposes of the consent certification motion, the causes of action advanced by the Representative Plaintiffs are: (a) negligence, and (b) on behalf of Québec Class Members, breach of articles 35-37 of the *Civil Code of Québec*.

[44] It is to be noted that causes of action based on the privacy statutes of British Columbia, Saskatchewan, Manitoba, and Newfoundland and Labrador"[5] have never been a part of the Ontario Action.

[45] The Class is defined in the Certification Order as all Canadian residents with Yahoo accounts at any time during the period January 1, 2012 through December 31, 2016. It is estimated that the class is comprised of approximately 5 million Canadians.

[46] The certified common issues for settlement purposes are as follows:

> *Negligence*
>
> (1) Did one or both of the defendants owe the Class Members a duty of care to take reasonable steps to establish, maintain and enforce appropriate security safeguards against a cyberattack to limit the exposure of the Class Members' account information?
>
> (2) Did the one or both of the defendants owe the 2014 and Cookie Class Members a duty to warn/notify those Class Members in a reasonably timely manner with sufficient information about those Breaches?
>
> (3) Did one or both of the defendants breach the standard of care reasonably expected of them in the circumstances? If so, how?

---

[3] CCQLR c. P-40.1
[4] CQLR c CCQ-1991.
[5] *Privacy Act*, RSBC 1996, c 373; *Privacy Act*, CCSM c P125; *Privacy Act*, RSS 1978, c P-24; *Privacy Act*, RSNL 1990, c P-22.

(4) Did one or both of the defendants have a duty to offer class members credit monitoring type services?

Breach of articles 35, 36, and 37 of the CCQ

(5) With respect to Class Members resident in Québec, are one or more of the defendants liable to the Classes for breaches of articles 35, 36, and/or 37 of the *CCQ*?

Damages

(6) Are the defendants or any one of them liable for damages to the Class for negligence and breach of the *CCQ*?

F. Procedural History of the Ontario Action and the Parallel Proposed Class Actions

[47] On September 26, 2016, Garcha & Company, co-Class Counsel in the Ontario Action, commenced a proposed national class action in British Columbia under the style of cause *Gill v. Yahoo! Canada and Yahoo! Inc.* with court file number S-168873 (the "British Columbia Action"). The British Columbia Action is being case managed by Justice Morellato.

[48] On December 16, 2016, the Representative Plaintiffs commenced the Ontario Action.

[49] On December 23, 2016, an action under the style of cause *Sidhu et al. v. Yahoo! Canada, Altaba* was commenced in Alberta Court of Queen's Bench at Edmonton with court file number 1603-22837 (the "Alberta Action"). Counsel in the Alberta Action are James H. Brown & Associates and Higgerty Law. A judge has not yet been assigned to case manage the Alberta Action, and the parties to the Alberta Action are currently in the process of obtaining an order for a dismissal of the action.

[50] On January 26, 2017, an action originally commenced under the style of cause *Michel Demers v. Yahoo! Inc. and Yahoo! Canada Co.*, later amended to *Brigitte Bourbonnière v. Yahoo! Inc. and Yahoo! Canada Co*., was commenced in Québec Superior Court at Montreal with court file numbers 500-06-000841-177 and 500-06-000842-175 (the Québec Action.). Counsel in the Québec Action are the Merchant Law Group.

[51] On May 16, 2017, in Saskatchewan, Emily Larocque commenced a proposed national class action against Yahoo with respect to the cyberattacks. The action was commenced in the Saskatchewan Court of Queen's Bench at Regina. Counsel in the Saskatchewan Action are the Merchant Law Group. Justice Elson is case managing the Saskatchewan Action.

[52] On November 20, 2017, in the British Columbia Action, Yahoo sought a case management direction and requested that a stay motion be heard before the certification motion. Justice Morellato reserved judgment.

[53] On January 18, 2018, the Plaintiffs in the Ontario Action delivered their motion record in support of certification. The motion was supported by affidavits from the Plaintiffs and Tina Yang, a lawyer then of Class Counsel.

[54] On February 27, 2018, at a case conference, I scheduled the certification motion in the Ontario Action for March 21-22, 2019.

[55] On February 28, 2018, in the British Columbia Action, Justice Morellato dismissed the

motion to schedule Yahoo's stay motion before the certification motion.[6] The certification motion was scheduled for a hearing commencing on June 17, 2019.

[56] In April 2018, the U.S. Securities and Exchange Commission announced that Yahoo's successor company, Altaba, had agreed to pay a $35 million fine to settle charges that it misled investors and customers by not informing them of the 2014 cyberattack until September 2016, despite knowing about it in late 2014.

[57] In September 2018, in light of the settlement reached in U.S. multidistrict actions consolidated under *Re: Yahoo! Inc. Customer Data Security Breach Litigation*, Case No. 5:16-MD-02752, Class Counsel in the Ontario Action and counsel for Yahoo decided to proceed to mediation.

[58] On December 13, 2018, there was a mediation session. Class Counsel in the British Columbia, Alberta, and Ontario Actions formed a consortium that negotiated with Yahoo. The Merchant Law Group was included in those settlement discussions, but it negotiated separately with Yahoo. The mediator was Jed Melnick, who had mediated the U.S. Settlement. The mediation was not successful.

[59] It was at this mediation session that the Merchant Law Group prepared the mediation brief that is the subject of the preliminary motion mentioned above.

[60] On December 10, 2018, the Plaintiffs in the Ontario Action delivered a supplementary motion record, which was comprised of an expert report from Ashkan Soltani. Mr. Soltani is a computer technologist, and he opined about the scope of the data breaches, provided some basis in fact for the common issues, and identified the nature of the damages suffered by the putative Class Members.

[61] On December 18, 2018, the Plaintiffs in the Québec Action brought a motion for authorization. Yahoo brought a cross-motion for *lis pendens*, which would have stayed the Québec Action. Justice Tremblay reserved judgment.

[62] On February 19, 2019, at a case conference in the Ontario Action, I rescheduled the certification motion for June 17-18, 2019.

[63] By March 25, 2019, Yahoo delivered its responding materials in the Ontario Action, which were comprised of: (a) the affidavit of Sean Zadig, who was a cybersecurity manager for Yahoo; (b) the affidavit of Seema Reddy, who was General Legal Counsel to Yahoo Canada during the relevant time; (c) the affidavit of Dr. Edgar Whipple, who was a Senior Principal Software Development Engineer and the architect of the Yahoo database; (d) the expert report of Dr. Anindya Ghose, who has a Ph.D. in information systems and who is a professor at the Leonard N. Stern School of Business at New York University; and (e) the expert report of Kevvie Fowler, who is a Deloitte Partner and Global & Canada Incident Response Leader.

[64] On June 10, 2019, in the Québec Action, Justice Tremblay refused to authorize the action.[7] Yahoo's cross-motion became moot. The putative Class Members from Québec are part of the certified class in the Ontario Action.

---

[6] *Gill v. Yahoo! Canada Co.*, 2018 BCSC 290.
[7] *Bourbonnière c. Yahoo! Inc.*, 2019 QCCS 2624.

[65] In June 2019, the certification motions in the British Columbia Action and in the Ontario Action did not proceed, as the parties were not ready. The certification motion in Ontario was rescheduled to be heard on October 31 and November 1, 2019.

[66] On July 3, 2019, the Plaintiffs delivered their reply record in the Ontario Action, which was comprised of a lawyer affidavit from Ms. Yang, affidavits from the Plaintiffs, and a supplemental report from Mr. Soltani to respond to Yahoo's expert, Dr. Ghose.

[67] Dr. Whipple's analysis of the Yahoo's database prompted Class Counsel to request access to the entire Yahoo database, and on August 1, 2019, the Plaintiffs in the Ontario Action brought a production motion. By the time the motion was argued, there was only one production request outstanding, and I dismissed the motion by reasons for decision dated August 7, 2019.[8]

[68] On September 24, 2019, the Plaintiffs in the Ontario Action delivered a supplementary reply record, together with their factum on certification. The supplementary reply record was comprised of the Amended Fresh as Amended Statement of Claim, a lawyer affidavit from Ms. Yang, an affidavit from Mr. Suryawanshi and an affidavit from Mr. Soltani, attaching a supplemental report, which responds to Dr. Whipple's opinion.

[69] By letter on October 7, 2019, Altaba advised Class Counsel that in corporate dissolution proceedings in Delaware, all claims against Altaba must be received before December 11, 2019. Any claim not received before the deadline would be barred. Class Counsel in the Ontario Action immediately responded that given that the Ontario action had not yet been certified, the notice did not constitute notice to the putative Class Members. Class Counsel subsequently took steps to represent the putative Class Members with respect to the American proceedings.

[70] The certification motion in the Ontario Action again did not proceed as scheduled for October 31, 2019. The parties agreed to vacate the dates and to attend a second mediation. The certification motion was rescheduled to proceed on March 2-3, 2020.

[71] On December 3, 2019, Class Counsel submitted claims on behalf of the Plaintiffs in the Ontario action in the U.S. dissolution proceedings.

[72] On January 14, 2020, a second mediation took place in Toronto. The Honourable Frank Newbould, Q.C. was the mediator. The Merchant Law Group did not participate in this mediation. At this mediation session, the parties reached an agreement on a sum of funds to be set aside by Altaba ($50 million U.S.D.) as a holdback against claims for damages arising out of the privacy breaches in the Ontario Action. A settlement in principle, however, was not reached.

[73] After the second mediation, the settlement discussions continued, and the certification dates were again vacated.

[74] On February 26, 2020, Yahoo moved for an Order to stay the Saskatchewan Action. Yahoo relied on a forum selection clause in its user agreements. The contractual provision requires disputes to be adjudicated in Ontario under Ontario law. Yahoo sought to have the stay motion heard in advance of certification, but to date, Justice Elson has not set a date for Yahoo's stay motion.

[75] On March 3, 2020, Charney Lawyers PC of Class Counsel sought a pre-certification

[8] *Karasik v. Yahoo Inc*., 2019 ONSC 4670.

representation order appointing it as representative counsel in the dissolution of Altaba under the corporate law of Delaware. In a decision released on March 5, 2020, I granted the requested order.[9]

[76] The settlement negotiations for the Ontario Action continued, and on July 2, 2020, the parties to the Ontario Action signed a Settlement Agreement.

[77] On July 21, 2020, the settlement of the U.S. actions consolidated under *Re: Yahoo! Inc. Customer Data Security Breach Litigation*, Case No. 5:16-MD-02752-LHK received final court approval.

[78] On August 5, 2020, the parties to the Ontario action moved on consent for an Order: (a) certifying the action for settlement purposes; (b) approving a notice to the class of the certification and of the proposed settlement; and (c) approving the notice plan as to the manner of disseminating the notice.

[79] In August, in the Ontario action, Ms. Larocque brought a cross-motion for leave to intervene as an added party to the consent certification motion and she sought to have the certification motion dismissed or stayed. She argued that the settlement was inadequate and improvident.

[80] On August 26, 2020, I certified the Ontario Action for settlement purposes. I dismissed Ms. Larocque's motion. However, the Certification Order was made without prejudice to Ms. Larocque appearing with representation at the settlement approval hearing, where she could make submissions about the merits and fairness of the settlement.[10]

[81] In August 2020, in Saskatchewan, the Plaintiffs in the Ontario Action moved for an Order staying the Saskatchewan Action, on a conditional basis, pending the outcome of the settlement approval hearing in the Ontario Action, and in October 2020, in the Saskatchewan Action, Yahoo brought an application for an order to stay the Saskatchewan Action in accordance with the provisions of Saskatchewan's *Class Action Act*[11]. Yahoo submitted that it is preferable for the claims raised in the Saskatchewan Action to be resolved in the Ontario Action.

[82] On October 9, 2020, in the Saskatchewan Action, all counsel appeared before Justice Elson at a case management conference, and on October 13, 2020 with reasons that followed the next day, Justice Elson issued an interim Order adjourning the certification hearing in the Saskatchewan Action to be rescheduled after a final decision was made on the Settlement Approval motion in the Ontario Action.[12]

[83] Ms. Larocque sought leave to appeal Justice Elson's decision to adjourn the certification hearing, and she did so on an urgent basis. On October 28, 2020, the motion for leave to appeal was heard. On November 6, 2020, Justice Caldwell granted leave to appeal from the adjournment of the certification hearing, but he declined to expedite the appeal. The appeal of the adjournment decision has not been perfected or scheduled.

[84] The current status of the various class actions is that: (a) authorization as a class action was denied for the Québec Action; (b) approval will be sought to end the British Columbia Action; (c)

---

[9] *Karasik v. Yahoo! Inc*., 2020 ONSC 1440.
[10] *Karasik v. Yahoo! Inc.*, 2020 ONSC 5103.
[11] *The Class Actions Act*, SS 2001, c. C-12.01, ss. 6(2)-6(3) and 15.
[12] *Larocque v Yahoo! Inc*., 2020 SKQB 263.

approval will be sought to end the Alberta Action; (d) the certification motion for the Saskatchewan Action remains to be scheduled and there are unscheduled motions to stay the Saskatchewan action on jurisdictional grounds; and (e) Class Counsel involved in the British Columbia, Alberta, and Ontario Actions seek approval of the settlement reached in the Ontario Action.

[85] On December 24, 2020, the Representative Plaintiffs filed their motion record and factum for the settlement approval hearing, including submissions in response to the factum filed by the Merchant Law Group on behalf of an objector, Ms. Larocque.

G. Opt-Outs

[86] RicePoint Administration Inc. the claims administrator, administered the notice program for the consent certification and for the settlement approval hearing.

[87] RicePoint received 158 timely opt-outs, 140 of which were determined to be valid and 18 of which were determined to be invalid. RicePoint deemed an opt-out invalid when the filer either failed to provide an explanation as to why they wanted to opt out or failed to fully complete the opt-out form.

H. Objections

[88] Over the 2020 Christmas holidays, RicePoint received 127 objections from objectors who had been informed, recruited, or assisted by the Merchant Law Group that provided them with a computer-generated template form to complete to file objections.

[89] The Representative Plaintiffs submit that I should give little or no weight to these late arriving objections because the Merchant Law Group's communications with Class Members contravened s. 17 of the *Class Proceedings Act, 1992* which governs notices to Class Members.[13]

[90] Since the objections do not add anything to the detailed submissions made on behalf of Ms. Larocque, it is not necessary to rule on whether s. 17 of the *Class Proceedings Act, 1992* was contravened. I simply note that objectors to class action settlements are rare and that as a raw number, 127 objectors is a large number of objectors. However, as a number relative to the size of the class in the immediate case, the presence of 127 objectors simply reveals that Ms. Larocque is not alone in raising objections to the settlement in the immediate case. In any event, Ms. Larocque's objections will need to be addressed.

[91] Ms. Larocque did not opt out of Ontario Action notwithstanding her role as proposed Representative Plaintiff in the Saskatchewan Action. Ms. Larocque objects to the proposed settlement of the Ontario Action. 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.

---

[13] See *Fantl v. ivari*, 2018 ONSC 4443; *Quenneville v. Volkswagen*, 2016 ONSC 959; *Mangan v. Inco Ltd*. (1998), 38 O.R. (3d) 703, [1988] O.J. No. 551 (Gen. Div.).

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.[14]

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.

I. The Proposed Settlement of the Ontario Action

[92] If the Court approves the Settlement Agreement, the Defendants will pay $20,325,683.58, plus interest to settle the Claims of the Class Members in return for a Release and a dismissal of the Action. Claims will be paid out of the balance of the Settlement Fund remaining after deductions for: (a) legal fees and disbursements, (b) administrative expenses for the settlement administration, (c) honoraria for the Representative Plaintiffs, and (d) a 10% Levy payable to the Law Foundation. The $20.3 million was based on converting $15.0 million (USD) into Canadian funds.

[93] The Net Settlement Fund available to Class Members was estimated to be $12.6 million.

---

[14] *Privacy Act*, RSBC 1996, c 373; *Privacy Act*, CCSM c P125; *Privacy Act*, RSS 1978, c P-24; *Privacy Act*, RSNL 1990, c P-22.

There is no possibility of reversion to Yahoo.

[94] Class Counsel provided the chart below breaking down the settlement. To that chart, I have made alternative entries having regard to the reduced Class Counsel fee that I shall be approving in the immediate case.[15]

NET SETTLEMENT FUND CALCULATION	
Gross Settlement	**$20,325,683.58**
Plus Accumulated Interest to date	$57,747.22[16]
TOTAL GROSS SETTLEMENT	**$20,383,430.80**
Contingency fee of 24% Approved contingency fee	$4,892,023.39 **[$3,000,000]**
Credit for $59,985.00 US received from Altaba on July 7, 2020.[17]	$-77,652.43
Net fee	$ 4,814,370.96 **[$2,922,347.57]**
HST on fee of 13%	$625,868.22 **[$390,000.00]**
Disbursements (inclusive of taxes and CPF reimbursement)	$62,713.09
Estimated Claims Administration	$457,093.00[18]
Law Foundation Disbursements	$261,174.30
Honorarium	$22,500 (3 plaintiffs) **[$0.00]**
TOTAL FEES/DISBURSEMENTS/TAXES	**$6,243,719.57** **[$4,093,328.76]**
GROSS SETTLEMENT LESS FEES, DISBURSEMENTS, TAXES	**$13,979,469.23** **[$16,290,102.04]**
Law Foundation Levy 10% of Settlement Fund less fees, disbursements, and taxes	$1,397,946.92. **[$1,629,010.20]**
NET CLAIM FUND	**$12,581,522.31** **[$16,121,091.84]**

[15] I deleted the rows with respect to holdbacks for administrative expenses as I doubt that the money will go unspent and be added to the classes' recovery.
[16] At the date the current term deposit matures (March 25, 2021), the settlement amount will earn an additional $53,611.22 in interest.
[17] This is the Canadian dollar amount (less bank fees) which Charney Lawyers received.
[18] RicePoint's costing is based on a range of potential take-up rates. The $457,093 is the low end of up to five tenths of one percent.

[95] Because of the reduction of the Class Counsel Fee, which I alluded to in the Introduction to these Reasons for Decision and which I will explain below, I have re-estimated the Gross Settlement Less Fees to be $16.3 million, the Law Foundation Levy to be $1.63 million, and the Net Settlement Fund available to Class Members to be $16.1 million.

[96] The settlement is intended to compensate: (a) all Class Members who attest to suffering financial harm or expenses such as out-of-pocket costs due to one or more of the cyberattacks, and (b) Class Members who did not incur pecuniary damages but attest to spending time responding to one or more of the data breaches. There is no requirement of proving causation.

a. Class Members who suffered actual harm, or spent money to prevent harm, are eligible to receive compensation of up to $25,000, and up to 15 hours at $25 per hour for time spent responding to the data breaches.

b. Class Members who did not suffer actual harm are eligible to receive compensation for wasted time and inconvenience in the amount of $25 per hour per data breach, and $375 in total for the three data breaches if they received Notice of all three data breaches. A family of two with more than one Yahoo account could potentially recover $750.

[97] The Settlement Agreement provides a claims-based compensation scheme with three streams for compensation. The Net Settlement Fund will be distributed in response to Claims asserted by Class Members as follows:

Claims Category	**Amount Payable**
Category A Claims brought in respect of Out-of-Pocket Costs and by Paid Users and Small Business Users. Claims must be approved by the Claims Administrator	Up to $4 million, capped at $25,000 per Class Member, will be distributed in response to Claims for: (i) Cash Reimbursement for documented out-of-pocket costs or expenditures as defined in Section 1(zz) of the Settlement Agreement that a Class Member actually incurred due to one or more of the Data Breaches, including unreimbursed fraud losses or charges (collectively "Misconduct). The Misconduct must have occurred between August 11, 2013 and December 31,2017; Cash Reimbursement for preventative measures, such as the costs incurred for obtaining credit monitoring services, insurance or credit freezes; and time spent responding to one or more of the Data Breaches at $25 per hour to a maximum of fifteen hours for each Class Member in the aggregate for all three Data Breaches. (ii) Cash reimbursement for up to 25% of the cost of services paid for by Paid Users between August 1, 2013 and December 31, 2016. (iii) Cash reimbursement for up to 25% of the cost of services paid for by Small Business Users between August 1, 2013 and December 31, 2016.
Category B Claims brought for Alternative Compensation. Claims must be approved by the Claims Administrator	The balance of the Net Settlement Fund will be distributed to Class Members who do not request payment under Category A but instead request compensation for wasted time and inconvenience. Alternative Compensation Claims shall be eligible to receive $25 per hour for each hour spent responding to one or more of

Claims Category	Amount Payable
	the Data Breaches, not to exceed $125 for each Data Breach where the Class Member received Notice of the Data Breach.
Category C Claims brought for Credit Services. Claims must be approved by the Claims Administrator	Settlement Members who submit an Alternative Compensation Claim Form and who qualify for Alternative Compensation may elect to waive that compensation in favour of Credit Monitoring Services, should there be a sufficient number of class members who opt for it and a sufficient residue to purchase the Services.

a. Paid User means Class Members that paid Yahoo for advertisement free or premium email services during the Class Period. Small Business User means Settlement Class Members that paid for Yahoo or Aabaco Small Business services between August 1, 2013 and December 31, 2016.

b. The estimated number of Paid Users is 10,000. The cost of services paid for by Paid Users varied from $19.99 per year to $49.99 per year, depending on the year. Based on the assumption that each Paid User paid for services for all three years at an average cost of $40 per year, cash reimbursement for 25% of the cost amounts to a recovery of approximately $120 per Paid User. Based on a take-up rate of 0.6% (i.e., sixth tenths of one percent), the total estimated Paid User claims would amount to $7,200.

c. The estimated number of Small Business Users is 5,500. The cost of services paid for by Small Business Users varied from about $34.99 per year to $120 per year, depending on the services. Based on the assumption that each Small Business User paid for services for all three years at an average cost of $80 per year, cash reimbursement for 25% of the cost amounts to a recovery of approximately $132 per Small Business User. Based on a take-up rate of 0.6% (i.e., sixth tenths of one percent), the total estimated Small Business User claims would amount to $7,920.

d. Class Counsel does not expect that Paid Users or Small Business Users will make a significant impact on the amounts available to other Class Members.

[98] Pursuant to the Settlement Agreement, Class Members must submit a Claim Form to the Claims Administrator to make a Category A Claim. Class Members must submit an Alternative Compensation Claim Form to make a Category B Claim or, alternatively, a Category C Claim. Class Members can submit claims during the Claims Period, which commences on the Effective Date, as defined in the Settlement Agreement, and ends six months later.

[99] If the total of the Category A Claims exceeds $4 million, any excess funds after Category B Claims have been paid will go to fund Category A Claims. If there remains a shortfall in funds in respect of Category A Claims, then the available funds will be distributed to Category A Claims on a pro rata basis.

[100] If the total of the Category A Claims is less than $4 million, the available funds will be distributed to top up any shortfall in funds in respect of Category B Claims, or, if there is no shortfall in Category B Claims, to fund Credit Monitoring Services, if enough class members opt for those services.

[101] If the total of Category B Claims, excluding those who elect Credit Monitoring Services

(i.e., Category C Claims) exceeds the portion of the Net Settlement Fund allocated to Category B Claims, then Category C Claims will be treated as Category B Claims and the available funds will be distributed to Category B Claims on a pro rata basis.

[102] If the total of Category B Claims, excluding those who elect Credit Monitoring Services (i.e., Category C Claims), is less than the portion of the Net Settlement Fund allocated to Category B Claims, any excess funds will pay for Credit Monitoring Services but only in the event these excess funds are sufficient to purchase Credit Monitoring Services. Class Counsel will make reasonable efforts to purchase the best product available with the funds available, with a goal of two years of Credit Monitoring Services. If the surplus is insufficient to purchase Credit Monitoring Services for Class Members who elect Credit Monitoring Services, all Category C Claims will be treated as Category B Claims and paid accordingly, and Credit Monitoring Services will not be purchased.

[103] Any money left in the Net Settlement Fund after these expenditures (i.e., the residue) will be allocated equally to all Class Members whose Claims were at least partially approved, excluding Claims submitted solely in respect of Paid User services and Small Business User services.

[104] Class Counsel have reviewed publicly available statistics to estimate the number of Class Members who experienced actual harm. These statistics suggest that the number of Class Members who suffered actual harm will not overwhelm the funds available to Category A claimants. Similarly, the expected number of claimants under Category B is unlikely to overwhelm the funds available.

[105] The Class Members in the instant case who request compensation for actual losses must submit documentation supporting the losses. The Class Members who request compensation for wasted time and inconvenience responding to one or more of the Data Breaches must submit an Alternative Compensation Claim Form, accompanied by an attestation in respect of the time spent responding to one or more of the Data Breaches. Hence, it is anticipated that only Class Members who actually spent time or incurred losses or expenses responding will submit Claims.

[106] Class Counsel is of the opinion the take-up rate will likely be in the range of 0.6% to 0.8% of the Class, meaning in the range of 30,000-40,000 Class Members, with the vast majority advancing Category B claims for time spent responding to the Data Breaches. Therefore, Class Counsel believes that the value of the Net Settlement Fund will likely be sufficient to fully compensate all Class Members who file claims for actual harm and for time spent responding to the Data Breaches. If there is a shortfall which cannot be made up from excess funds in another category, then the Class Members in the category with a shortfall will share *pro rata*.

[107] Class Counsel recommends approval of the settlement as fair, reasonable and in the best interests of Class Members. The Representative Plaintiffs have given instructions to seek approval of the settlement. Class Members numbering 231 took the time to send emails to the Administrator supporting the settlement or indicating that they intended to participate in the settlement.

[108] The Settlement is conditional on the following conditions precedent, which Yahoo may, at its sole discretion, waive:

> a. the U.S. Settlement receiving final court approval, regardless of whether that approval is appealed – the U.S. Settlement was finally approved on July 21, 2020,

b. the Saskatchewan Action being, after the Appeal Period, permanently stayed or dismissed as a class action (although it may continue as an individual action), and

c. the number of Class Members excluding themselves from the Settlement before the Opt-Out Deadline not exceeding the Confidential Opt-Out Threshold – this condition may be taken to have been satisfied or waived by the motion for settlement approval.

[109] Thus, the only proposed outstanding condition of settlement is the staying or dismissal of the Saskatchewan Action. If the Settlement is not approved, the parties intend to reschedule the certification motion.

J. Levy

[110] Class Counsel received financial support from the Class Proceedings Fund. A Levy is payable in favour of the Fund in the amount of 10% of the settlement net of legal fees and disbursements and applicable taxes.[19] The Class Proceedings Funds made a payment in the amount of $261,174.30 in disbursements. Based on the above noted reduction of Class Counsel's fee and other adjustments, the award to the Class Proceedings Fund is $1,629,010.20.

K. The Preliminary Motion for Production of the Merchant Law Group's Mediation Brief

[111] Yahoo asked that Ms. Larocque's brief from the mediation session be produced. It submitted that production is necessary for the Court to evaluate Ms. Larocque's objection to the settlement. Yahoo's submission was made largely because Yahoo took umbrage to the suggestion in Ms. Larocque's submissions that in the immediate case, there had been a "race to the bottom," which is to say a collusive settlement between Class Counsel and Yahoo in the Ontario Action. I can be brief in rejecting this request by Yahoo.

[112] I begin by noting, as I will explain below, that during oral argument, the Merchant Law Group made a more temperate submission for Ms. Larocque, and thus there is now less reason, if there ever was any reason, to ignore that the mediation brief is protected by the categorical or class privilege for settlement discussions.

[113] Yahoo's argument was that in the circumstances of the immediate case that Ms. Larocque had by the argument made by her counsel, the Merchant Law Group, waived the privilege[20] and that the information contained in the mediation brief would assist the court in evaluating her objection to the settlement and in evaluating the settlement. In my opinion, however, in the circumstances of the immediate case, there was no waiver and no reason on the grounds of fairness or otherwise of treating the settlement privilege as waived.

---

[19] Class Proceedings, O. Reg. 771/92, s. 10, made under the *Law Society Act*, R.S.O. 1990 c. L.8

[20] Yahoo relied on: *LLS America LLC (Trustee of) v. Dill*, 2018 BCSC 2316; *Tallman Truck Centre Ltd. v. K.S.P. Holdings Inc*., [2018] O.J. No. 5121 (Master); *Kaplan v. Casino Rama Services Inc*., 2018 ONSC 354; *Nguyen v. Dang*, 2017 BCSC 1409. *Livingston v. I.M.W. Industries Ltd*. 2015, BCSC 1627; *Sable Offshore Energy Inc. v. Ameron Intenational Corp*, 2013 SCC 37; *The Trustees of the Drywall Acoustic Lathing and Insulation Local 675 Pension Fund v. SNC Group Inc.*, 2013 ONSC 6297; *Hallman Estate (Re)*, [2009] O.J. No. 3890 (S.C.J.); *Meyers v. Dunphy*, 2007 NLCA 1; *Marion v. Wawanesa Mutual Insurance Co.*, 2004 ABCA 213; *Bank Leu AG v. Gaming Lottery Corp.*, [1999] O.J. No. 3949 (S.C.J.), aff'd [2000] O.J. No. 1137 (Div. Ct.); *S. & K. Processors Ltd. v. Campbell Ave. Herring Producers Ltd.* (1983), 35 C.P.C. 146 (B.C.S.C.).

[114] More to the point, I would not be assisted about the negotiation posture of the Merchant Law Group and its settlement submissions about a settlement that never came into fruition and that was made in the Saskatchewan Action. Even more to the point, even if settlement privilege was waived, I see no relevancy to the issues that I have to decide on this settlement approval motion of the mediation brief for a different action, because whatever that brief for the Saskatchewan Action contains, it would be inadmissible as hearsay, immaterial, and irrelevant and as being more prejudicial than having any probative worth in the Ontario Action.

L. General Principles of Settlement Approval

[115] Section 29 of the *Class Proceedings Act, 1992* requires court approval for the discontinuance, abandonment, or settlement of a class action. Section 29 states:

> *Discontinuance, abandonment and settlement*
>
> 29.(1) A proceeding commenced under this Act and a proceeding certified as a class proceeding under this Act may be discontinued or abandoned only with the approval of the court, on such terms as the court considers appropriate.
>
> *Settlement without court approval not binding*
>
> (2) A settlement of a class proceeding is not binding unless approved by the court.
>
> *Effect of settlement*
>
> (3) A settlement of a class proceeding that is approved by the court binds all class members.
>
> *Notice: dismissal, discontinuance, abandonment or settlement*
>
> (4) In dismissing a proceeding for delay or in approving a discontinuance, abandonment or settlement, the court shall consider whether notice should be given under section 19 and whether any notice should include,
>
> (a) an account of the conduct of the proceeding;
>
> (b) a statement of the result of the proceeding; and
>
> (c) a description of any plan for distributing settlement funds.

[116] Section 29(2) of the *Class Proceedings Act*, *1992*, provides that a settlement of a class proceeding is not binding unless approved by the court. To approve a settlement of a class proceeding, the court must find that, in all the circumstances, the settlement is fair, reasonable, and in the best interests of the class.[21]

[117] In determining whether a settlement is reasonable and in the best interests of the class, the following factors may be considered: (a) the likelihood of recovery or likelihood of success; (b) the amount and nature of discovery, evidence or investigation; (c) the proposed settlement terms and conditions; (d) the recommendation and experience of counsel; (e) the future expense and likely

[21] *Kidd v. Canada Life Assurance Company*, 2013 ONSC 1868; *Farkas v. Sunnybrook and Women's Health Sciences Centre*, [2009] O.J. No. 3533 at para. 43 (S.C.J.); *Fantl v. Transamerica Life Canada*, [2009] O.J. No. 3366 at para. 57 (S.C.J).

duration of the litigation; (f) the number of objectors and nature of objections; (g) the presence of good faith, arm's-length bargaining and the absence of collusion; (h) the information conveying to the court the dynamics of, and the positions taken by, the parties during the negotiations; and (i) the nature of communications by counsel and the representative plaintiff with Class Members during the litigation.[22]

[118] In determining whether to approve a settlement, the court, without making findings of fact on the merits of the litigation, examines the fairness and reasonableness of the proposed settlement and whether it is in the best interests of the class as a whole having regard to the claims and defences in the litigation and any objections raised to the settlement.[23] An objective and rational assessment of the pros and cons of the settlement is required.[24]

[119] The case law establishes that a settlement must fall within a zone of reasonableness. Reasonableness allows for a range of possible resolutions and is an objective standard that allows for variation depending upon the subject-matter of the litigation and the nature of the damages for which the settlement is to provide compensation.[25] A settlement does not have to be perfect, nor is it necessary for a settlement to treat everybody equally.[26]

[120] Generally speaking, the exercise of determining the fairness and reasonableness of a proposed settlement involves two analytical exercises. The first exercise is to use the factors and compare and contrast the settlement with what would likely be achieved at trial. The court obviously cannot make findings about the actual merits of the Class Members' claims. Rather, the court makes an analysis of the desirability of the certainty and immediate availability of a settlement over the probabilities of failure or of a whole or partial success later at a trial. The court undertakes a risk analysis of the advantages and disadvantages of the settlement over a determination of the merits and of the risks assumed by Class Counsel in prosecuting the action as a class action. The second exercise, which depends on the structure of the settlement, is to use the various factors to examine the fairness and reasonableness of the terms and the scheme of distribution under the proposed settlement.[27]

[121] Comparing and contrasting the details of the certain settlement with a rough and ready assessment of the likely outcome of a trial is not an easy task. The timing of the settlement (before certification, after certification but before discovery, or after the action is ready for trial) may affect the court's ability to evaluate the merits of the settlement. In any event, it is a difficult task because the assessment is made in the context of an approval process where the parties are no longer in an adversarial posture and where Class Counsel's altruism as champion for the Class Members is heavily tempered by the entrepreneurial model that is used for class action litigation in which

---

[22] *Kidd v. Canada Life Assurance Company*, 2013 ONSC 1868; *Farkas v. Sunnybrook and Women's Health Sciences Centre*, [2009] O.J. No. 3533 at para. 45 (S.C.J.); *Fantl v. Transamerica Life Canada*, [2009] O.J. No. 3366 at para. 59 (S.C.J.); *Corless v. KPMG LLP*, [2008] O.J. No. 3092 at para. 38 (S.C.J.); *Jeffery v. Nortel Networks Corp*., 2007 BCSC 69; *Fakhri v. Alfalfa's Canada, Inc*., 2005 BCSC 1123.
[23] *Baxter v. Canada (Attorney General)* (2006), 83 O.R. (3d) 481 at para. 10 (S.C.J.).
[24] *Al-Harazi v. Quizno's Canada Restaurant Corp*. (2007), 49 C.P.C. (6th) 191 at para. 23 (Ont. S.C.J.).
[25] *Parsons v. Canadian Red Cross Society*, [1999] O.J. No. 3572 at para. 70 (S.C.J.); *Dabbs v. Sun Life Assurance Company of Canada* (1998), 40 O.R. (3d) 429 (Gen. Div.).
[26] *McCarthy v. Canadian Red Cross Society* (2007), 158 ACWS (3d) 12 at para. 17 (Ont. S.C.J.); *Fraser v. Falconbridge Ltd*., [2002] O.J. No. 2383 at para. 13 (S.C.J.).
[27] *Welsh v. Ontario*, 2018 ONSC 3217.

typically Class Counsel has enormously much more to gain than an individual Class Member. Moreover, there is the concern that defendants will use the class action as a means to obtain the release of numerous claims at a substantial discount, which would make class actions a means to license wrongdoing rather than a pathway to justice.

[122] Breaking the evaluative process of assessing the merits of a settlement down into tasks, typically it involves:

a. The task of making an assessment of the likelihood that the plaintiff will prove the defendant's liability for the elements of the cause of action being prosecuted.

b. The task of making an assessment of the likelihood that the defendant will prove his or her technical defences and his or her substantive defences and counterclaims.

c. The task of making an assessment of whether the plaintiff suffered damages and whether the defendant's misconduct caused those damages (general and specific causation).

d. The task of determining the heads of compensable damages including pecuniary and non-pecuniary, general, special, aggravated, and punitive.

e. The task of quantifying the heads of damages.

f. Where a restitutionary remedy or disgorgement is available, the task of making an assessment of whether the defendant was unjustly enriched and measuring that enrichment.

[123] In evaluating the merits of a class action settlement, in some cases, there may be extraneous or pragmatic factors in play, including: (a) the existence of rival competing class actions; (b) asymmetrical information and knowledge about the evidence on liability and on damages; (c) the involvement of regulators; (d) the competence of the negotiators; (e) the competence of any mediator; (f) the capability of the defendant to pay; (g) the availability of insurance, (h) the presence of co-defendants; (i) the weight of reputational interests; and (j) public and media pressure.

[124] Class action settlements present added complexities and problems to the task of assessing the merits of a settlement and in particular in determining whether the settlement is fair, reasonable, and in the best interests of the Class Members. For present purposes, I can identify the following complexities:

a. The merits of class action settlements are assessed in relation to the purposes of class proceedings statutes; namely in descending order of importance: access to procedural and substantive justice; behaviour modification; and judicial economy and the avoidance of a multiplicity of proceedings.

b. Different genres of class action have widely different risk assessments and different genres of class actions are at different stages of development.

c. It is very difficult to determine the comparative qualitative and quantitative aspects of the absolute justice of the trial judgement when the common issues trial will be followed by a myriad of individual trials; *i.e.*, when aggregate damages is not available.

d. Class Counsel because of the contingency fee and entrepreneurial model used for

class actions has more to gain than an individual Class Member from the settlement and thus there may be a willingness to settle beyond a fair and reasonable compromise.

e. Defence Counsel will be seeking to secure a settlement where the defendant pays as little as possible in exchange for releases from as many Class Members as possible (more "bang for the buck"). Thus, it is not uncommon for settlement agreements to expand the class size.

f. Save in the rare cases where an objector appears to oppose the settlement, there is no adversarial process to test the merits of the settlement.

M. Breach of Privacy Class Actions

[125] As noted above, given the concerted opposition of Ms. Larocque and of her proposed Class Counsel, the Merchant Law Group, it is necessary to do a deep dive into the case law about privacy breach class actions, which are a burgeoning genre of cases but nascent because, although many cases have been certified, none have yet proceeded to a trial. The analysis of the state of law about privacy class actions bears on many of the factors that are relevant to settlement approval and also to fee approval in the immediate case.

[126] The deep analysis is necessary because underlying the arguments of Class Counsel is the notion that the settlement in the immediate case is a good settlement having regard to the risks associated with privacy class actions in general.

[127] Underlying the Merchant Law Group's arguments is the notion that the Saskatchewan Action will have a better outcome than that achieved by the proposed settlement of the Ontario Action. The merits of the Merchant Law Group's proposition once again, requires a consideration of privacy class actions in general.

[128] Thus, in the immediate case, the arguments of the rival lawyers are derivatives of the current state of the law about the risks and rewards of privacy class actions.

[129] Further, the analysis of the current state of the law about the risks and rewards of privacy class actions underlies my analysis below of whether to approve the settlement in the immediate case, which I do approve, and of whether to approve a Class Counsel fee of $4.9 million, which I do not approve but reduce to $3 million.

[130] My research has yielded 36 reported privacy class actions from 2000 to 2021. Five main factual patterns can be identified in the law about privacy breach claims in class actions. All of these fact patterns have yielded certified class actions. The five main factual patterns, which may combine in a complex case involving multiple defendants are:

1. The defendant loses the class members' personal information and there is the risk or the reality that the information will be or has been disseminated to be used for malign purposes including fraud and identity theft.

2. The defendant or an employee or agent of the defendant steals the personal information of the class members and there is the risk or the reality that the information will be or has been disseminated to be used for malign purposes including fraud and identity theft.

3. The defendant public or private sector organization violates provincial or federal privacy statutes in its handling of the personal information of the class members with or without the risk that the information will be used for malign purposes including fraud and identity theft.

4. A named or unnamed external cybercriminal defendant hacks the computer of the private or public sector organization defendant and misappropriates a copy of the personal information of the class members found on the organization's database and there is the risk or the reality that the information will be or has been disseminated to be used for malign purposes including fraud and identity theft.

5. The defendant receives personal information that he or she knows or ought to know has been unlawfully obtained and uses and does not disclose the receipt of the personal information. The use of the information may be for malign purposes including fraud and identity theft.

[131] My research reveals that the major or main causes of action advanced in the reported privacy class actions, amongst other causes of action, are:

1. breach of confidence
2. breach of contract
3. breach of fiduciary duty
4. breach of s. 7 of the *Canadian Charter of Rights and Freedoms*[28]
5. breach of federal *Personal Information Protection and Electronic Documents Act* (PIPEDA)[29] and or *Privacy Act*[30]
6. breach of provincial privacy legislation
    i. British Columbia's *Freedom of Information and Protection of Privacy Act*,[31] *Personal Information Protection Act*[32] and *Privacy Act*[33]
    ii. Saskatchewan's *Privacy Act*[34]
    iii. Manitoba's *Privacy Act*,[35] *Intimate Image Protection Act*[36]
    iv. Ontario's *Freedom of Information and Protection of Privacy Act*,[37] *Personal Health Information Protection Act, 2004*[38] ("PHIPA") and *Personal Information and Protection of Electronic Documents Act* ("PIPEDA")[39]

[28] RSC 1985, App. II, No. 44, Schedule B.
[29] SC 2000, c. 5.
[30] RSC 1985, P-21.
[31] RSBC 1996, c. 165.
[32] SBC 2003, c. 63.
[33] RSBC 1996, c 373.
[34] RSS 1978, c P-24.
[35] CCSM c P.125.
[36] CCSM c. I.87.
[37] RSO 1990, c. F.31.
[38] SO 2004, c. 3.
[39] SO 2000, c. 5.

v. Québec's *Charter of Human Rights and Freedoms,*[40] *Civil Code of Québec*[41]
vi. Newfoundland and Labrador's *Privacy Act,*[42] *Personal Health Information Act* [43]

7. invasion of privacy:
   i. intrusion on seclusion
   ii. publicity to private life (public disclosure of embarrassing private facts)
8. negligence, and
9. unjust enrichment[44]

[132] Of the 36 reported cases, 3 cases are pre-certification or pre-authorization; namely:

1. *Winder v. Marriot International Inc.*[45]
2. *Del Giudice v. Thompson*[46]
3. *MacBrayne v. LifeLabs BC Inc.*[47]

[133] Of the 36 reported cases, 27 have been certified or authorized; namely:

1. *Haskett v. Equifax Canada Inc.*[48]
2. *Rideout v. Health Labrador Corp.*[49]
3. *Speevak v. Canadian Imperial Bank of Commerce*[50]
4. *Ari v. Insurance Corp. of British Columbia*[51]
5. *Douez v. Facebook, Inc*.[52]
6. *Rowlands v. Durham Region Health*[53]

---

[40] R.S.Q. c. C-12.
[41] RLRQ, c. CCQ-1991 (the "CCQ"), art. 35-40.
[42] RSNL 1990, c P-22.
[43] SNL 2008, c. P-7.01.
[44] The Supreme Court of Canada has recently held that waiver of tort does not, in any case, constitute an independent cause of action: *Atlantic Lottery Corp. Inc. v. Babstock*, 2020 SCC 19.
[45] 2019 ONSC 5766 (carriage); *Winder v. Marriott*, 2020 ONSC 7701 (stay of parallel national and regional class actions in British Columbia, Alberta, Québec, and Nova Scotia).
[46] 2020 ONSC 2676 (carriage). In addition to the Ontario national class action there were national class actions in British Columbia and Alberta, a Québec class action, and a maritime regional class action in Nova Scotia. A multijurisdictional joint hearing was scheduled, and the result was that all of the actions with the exception of the Ontario action were stayed; see *Winder v. Marriot International Inc*., 2020 ONSC 7701.
[47] 2020 ONSC 2674 (carriage), leave to appeal ref'd 2020 ONSC 4268 (Div. Ct.).
[48] (2003), 63 O.R. (3d) 577 (C.A.), rev'g [2001] O.J. No. 4949 (S.C.J.), leave to appeal to the SCC refd [2003] S.C.CA. No. 208.
[49] 2005 NLTD 116
[50] 2010 ONSC 1128.
[51] *Ari v. Insurance Corp. of British Columbia*, 2013 BCSC 1308 (motion to strike common law tort claims), affd. 2015 BCCA 468; *Ari v. Insurance Corp. of British Columbia*, 2017 BCSC 2212 (certification), varied 2019 BCCA 183; *Ari v. Insurance Corp. of British Columbia*, 2020 BCSC 1087 (third party proceedings)
[52] *Douez v. Facebook, Inc* , 2014 BCSC 953 (plaintiff's certification motion granted and defendant's stay motion refused); *Douez v. Facebook, Inc.* 2015 BCCA 279 (stay granted), rev'd 2017 SCC 33; *Douez v. Facebook, Inc*, 2018 BCCA 186 (certification affirmed), leave to appeal to the SCC refd [2018] S.C.C.A. No. 298; *Douez v. Facebook, Inc.*, 2019 BCSC 715 (certification order amended to add Class Members from Manitoba, Saskatchewan, and Newfoundland and Labrador).
[53] 2011 ONSC 719 and 2011 ONSC 2171.

7. *Maksimovic v. Sony of Canada Ltd*.[54]
8. *Evans v. Wilson*[55]
9. *Murray v. Capital District Health Authority (cob East Coast Forensic Hospital)*[56]
10. *Hynes v. Western Regional Integrated Health Authority*[57]
11. *Hemeon v. South West Nova District Health Authority*[58]
12. *Lozanski v. Home Depot Inc*.[59]
13. *Canada v. John Doe*[60]
14. *Daniells v. McLellan*[61]
15. *Zuckerman v. Target Corporation*[62]
16. *Drew v. Walmart Canada Inc*.[63]
17. *Bennett v. Lenova* (Canada) Inc.[64]
18. *M.M. v. Family and Children's Services of Lanark Leeds and Grenville*[65]
19. *Condon v. Canada*[66]
20. *Doucet v. Royal Winnipeg Ballet (c.o.b. Royal Winnipeg Ballet School)*[67]
21. *Tocco v. Bell Mobility Inc.*[68]
22. *Haikola v. Personal Insurance Co.*[69]
23. *Agnew-Americano v. Equifax Co*.[70]
24. *Stewart v. Demme*[71]
25. *Tucci v. Peoples Trust Co.*[72]
26. *Leonard v. Manufacturers Life Insurance Co*.[73]
27. *Chartrand v. Google LLC*[74]

---

[54] 2013 ONSC 1241.
[55] 2014 ONSC 2135, leave to appeal to Div. Ct. ref'd, 2014 ONSC 6014.
[56] 2015 NSSC 61 (certification) and 2016 NSCC 141 (joinder motion), var'd 2017 NSCA 28 and 2017 NSCA 29.
[57] 2014 NLTD 137 (certification Part 1). The action was certified in 2016: see *Hynes v. Western Regional Integrated Health Authority*, 2018 NLSC 164 (pre-trial motion).
[58] 2015 NSSC 287 (discovery motion).
[59] 2016 ONSC 5447.
[60] 2015 FC 916, var'd 2016 FCA 191.
[61] *Daniells v. McLellan*, 2016 ONSC 3854 (Rule 21 challenging plaintiff's eligibility to be representative plaintiff); *Daniells v. McLellan* 2017 ONSC 3466 (certification).
[62] 2017 QCCS 110 (authorization).
[63] 2016 ONSC 8067.
[64] 2017 ONSC 1082 and 2017 ONSC 5853.
[65] 2017 ONSC 7665.
[66] 2014 FC 250, var'd 2015 FCA 159.
[67] 2018 ONSC 4008.
[68] 2019 ONSC 2916.
[69] 2019 ONSC 5982.
[70] *Agnew-Americano v. Equifax Co*., 2018 ONSC 275 (carriage); *Agnew-Americano v. Equifax Co*., 2019 ONSC 7110 (certification).
[71] 2020 ONSC 83 (certification and summary judgment motion).
[72] 2017 BCSC 1525, varied 2020 BCCA 246.
[73] *Leonard v. Manufacturers Life Insurance Co.*, 2016 BCSC 534 (certification denied); *Leonard v. Manufacturers Life Insurance Co.*, 2019 BCSC 598 (consent certification refused on jurisdictional grounds), rev'd 2019 BCCA 540 (consent certification to be heard on its merits); *Leonard v. Manufacturers Life Insurance Co.* 2020 BCSC 1051 (objectors standing to oppose certification); *Leonard v. Manufacturers Life Insurance Co.* 2020 BCSC 1840 (consent certification and settlement approval).
[74] *Warner v. Google LLC*, 2020 BCSC 1108 (consent certification for settlement purposes).

[134] Of the 36 reported cases, certification was refused in 4 cases and authorization was refused in 2 cases; namely:

1. *Cole v. Prairie Centre Credit Union*[75]
2. *Mazzonna v. DaimlerChrysler Financial Services Canada Inc*.[76]
3. *Ladas v. Apple Inc.*[77]
4. *Broutzas v. Rouge Valley Health System*[78]
5. *Kaplan v. Casino Rama Services Inc*.[79]
6. *Li c. Equifax Inc*.[80]

[135] The above sample of cases suggests that the ratio of unsuccessful certification or authorization motions to successful motion in privacy class actions is 6:27, which is a success rate of approximately 80%.

[136] Of the 36 reported cases, there have been no trial determinations, but settlements have been approved in 11 cases, as follows:

1. ***Speevak v. Canadian Imperial Bank of Commerce***.[81] The Canadian Imperial Bank of Commerce ("CIBC") in breach of PIPEDA misdirected faxes intended for one of its departments to two third-party businesses. The faxes disclosed customers' names, social insurance numbers, account numbers, amounts, addresses and telephone numbers and customer signatures Thirty-eight bank customers were affected. There was no evidence that the disclosure of the confidential information resulted in identity theft or any financial losses to the Class Members. The plaintiff sued for: (a) breach of contract; (b) negligence; and (c) breach of PIPEDA. Justice Strathy, as he then was, certified the action for settlement purposes and approved the settlement. The terms of the settlement were that each Class Member could submit a claim for damages save punitive damages and the CIBC would admit liability and make a settlement offer. If the offer was refused, the claim would be assessed by an arbitrator. If the arbitration award was more than the amount of CIBC's initial offer, the Class Member's legal fees would be paid by CIBC. Otherwise, the Class Member would bear his or her own legal costs. 10% of any payment would be paid directly by the CIBC to the Class Proceedings Fund. The right to claim for identity theft in the future was preserved. CIBC also agreed to pay $100,000 to a registered charity. Class Counsel was to receive approximately $50,000 for costs up to the mediation and partial indemnity costs from the mediation to the settlement approval hearing.

2. ***Rideout v. Health Labrador Corp***.[82] A gynecological clinic discovered that

[75] 2007 SKQB 330.
[76] 2012 QCCS 958.
[77] 2014 BCSC 1821.
[78] 2018 ONSC 6315.
[79] 2019 ONSC 2025.
[80] 2019 QCCS 4340.
[81] 2010 ONSC 1128.
[82] *Rideout v. Health Labrador Corp*. 2005 NLTD 116 (certification); *Rideout v. Health Labrador Corp*., 2007 NLTD 150 (settlement approval).

medical instruments had not been properly sterilized and notified the 333 patients by correspondence and by a public announcement to get tested for infectious diseases. The plaintiff sued on behalf of the patients and their families. The plaintiff alleged that the clinic had been negligent and had breached the privacy rights in the manner in which it gave notice and in the manner in which it tested for infections which allegedly would disclose their identity. Justice Russell certified the action and certified the claims for: (a) breach of contract, (b) breach of fiduciary duty, (c) breach of the *Privacy Act*, (d) loss of consortium, (e) loss of guidance, care and companionship, and (e) negligence. No patients were identified as having been infected, and Justice Russell approved a settlement in which in addition to making changes to its sterilization practices and procedures and providing an apology, the clinic agree to pay $450 to uninfected patients and $100 to uninfected spouses from the settlement fund of $179,850. The hospital also agreed to pay for the notice program and to pay up to $93,572 in legal fees, $12,500 in disbursements and $13,100 in HST. Patients diagnosed during the notice period with an infection had 90 days to commence an action. The release did not preclude claims from future diagnosis of infection. Justice Russell approved the counsel fee of $119,171.50, all inclusive. The fee was equal to 32% of the class members' recovery. The approved fee of $93,571.50 was a multiplier of 0.6 of the value of the docketed time of $166,935.

3. ***Rowlands v. Durham Region Health*.**[83] An employee of a public health authority lost a USB key that held unencrypted personal and confidential information of 83,524 individuals who received a vaccine inoculation at a clinic. There was no evidence that the information on the lost USB had actually been used or misused and apart from anxiety from the risk of harm from the data breach that any Class Member had suffered actual pecuniary harm. The plaintiff sued for: (a) breach of confidence, (b) breach of fiduciary duty, (c) breach of s. 7 of the *Charter*, (d) breach of privacy, (e) damages for breach of PHIPA, (f) negligence, and (g) aggravated, exemplary, and punitive damages. Justice Lauwers approved the settlement in which the Class Members received no compensation but a Class Member who believed that he or she had suffered economic harm could submit a claim and allow the public health authority an opportunity to mitigate the harm. If the Class Member was unsatisfied with the mitigation, then the claim would be evaluated by an Administrator who would adjudicate whether damages were caused and if so make an award of damages. Appeals of the administrator's decision were to be heard by an arbitrator. Under the settlement agreement, Class Counsel received $500,000 inclusive of taxes and disbursements, plus 25 per cent of claims paid in the future.

4. ***Maksimovic v. Sony of Canada Ltd*.**[84] An on-line gaming service with approximately 3.5 million users was hacked, and the hacker obtained personal information and credit card information. The plaintiff sued for: (a) breach of contract, (b) intrusion on seclusion, and (c) breach of privacy rights. There was no

[83] 2012 ONCS 3948.
[84] 2013 ONSC 4604.

evidence of any financial harm caused by the cyberattack. Justice Perell approved the settlement in which the Class Members (a) received a refund of unused user time; (b) received game and service benefits; (c) reimbursement for expenses incurred as a direct result of the cyberattack up to a maximum of $2,500 per claim. Under the settlement Class Counsel was to receive a fee of $265,000 inclusive of fees, disbursements, and taxes, which was less than Class Counsel's docketed time of $300,000.

5. ***Lozanski v. Home Depot Inc.*** [85] A computer hacker breached a database of approximately 500,000 accounts of Home Depot's payment card system extracting payment card information and email addresses. Home Depot announced the breach and offered its customers a package of free credit monitoring and identify theft insurance. It provided and paid for approximately 45,000 packages. There was no evidence that any of the customers suffered any damages from the database breach. In several class actions in Canada, Home Depot was sued for breach of contract and breach of privacy rights. Home Depot negotiated settlements of the class actions. Justice Perell approved the settlement valued to be worth $400,000 after anticipated take-up of the benefits. The settlement was comprised of: (a) $250,000 for credit monitoring and identity theft insurance on a first come, first served basis; (b) a $250,000 settlement fund for documented claims for time spent remedying issues relating to the data breach for up to five hours at $15 per hour and for substantiated losses to be paid pro-rata, if necessary, up to a maximum of $5,000 per claimant; (c) $100,000 for the notice program; (d) $100,000 for estate administration; and (e) up to $407,000 for legal fees and expenses. Although Class Counsel requested a fee of $407,000, Justice Perell approved Class Counsel fee of $120,000, all inclusive, for a consortium of Class Counsel from two class actions.

6. ***Drew v. Walmart Canada Inc.*** [86] Third parties breached the database for Walmart's photo printing service where personal contact information and credit card information was stored. Class size was estimated to be 1.2 million. The plaintiff sued for: (a) breach of contract, (b) negligence, (c) breach of fiduciary duty, (d) breach of confidence, (e) breach of privacy, (f) intrusion upon seclusion, (g) damage for breach of PIPEDA, and (h) unjust enrichment. Justice Perell approved the settlement in which without admitting liability Walmart was exposed to an expenditure of $1.25 million. The money was to be used: (a) to pay Class Counsel's fees of $250,000; (b) $350,000 for a credit monitoring plan for Class Members on a first come, first served basis; (c) $400,000 for Class Member expense claims on a first come, first served basis with a per capita maximum of $5,000 and prorated after the 90-day claims period if the maximum cumulative total is reached. To receive the compensation for out-of-pocket losses, unreimbursed charges and time spent remedying issues fairly traceable to the data breach, the Class Member must attest that he or she has not already been compensated, in part or in full by insurance, an employer, a financial institution or in any other manner. A Class

[85] 2016 ONSC 5447.
[86] 2017 ONSC 3308.

Member making a claim for compensation may receive $15/hr. for documented time or without documentation $15/hr. for up to two hours of time spent remedying the losses or charges. The $250,000 for Class Counsel did not include a premium above docketed time.

7. ***Bennett v. Lenova (Canada) Inc***.[87] The defendant computer manufacturer bundled a software program that had a security defect that would permit a hacker to obtain the computer user's private information. A second version of the software sent private information to the software developer's computers. Approximately 11,000 computers with the imbedded software were sold. The plaintiff sued for: (a) breach of contract; (b) breach of the implied warranties of the *Sale of Goods Act* for consumer purchasers; (c) intrusion upon seclusion for all purchasers; and (d) for purchasers in British Columbia, Saskatchewan, Manitoba, and Newfoundland and Labrador, respectively, a contravention of privacy statutes. As against the software developer, Justice Perell approved a settlement in which the defendant paid $151,547 and agreed to co-operate in the prosecution of the action against the non-settling defendant.

8. ***Condon v. Canada***[88] The federal Ministry of Human Resources and Skills Development that administered the Canada Student Loan Program lost an unencrypted hard drive that included the names, dates of birth, addresses, Social Insurance Numbers ("SINs") and student loan balances of 583,000 persons. There was no evidence that any person had been harmed by the loss of the hard drive. There was no evidence that the information even had been discovered. The plaintiff sued for (a) breach of contract; (b) intrusion upon seclusion; (c) negligence; (d) breach of confidence; and (e) violation of Québec law. Justice Gagné certified the claims for breach of contract, intrusion on seclusion, and violation of Québec law, and the Federal Court of Appeal added the claims for negligence and breach of confidence. Justice Gagné approved the settlement in which the federal government established two funds. One fund was an uncapped fund for Class Members who could prove actual loses. The second fund was a capped $17.5 million fund to Class Members who completed a simple claim form that they were class members for which they were entitled to a fixed payment of $60 as compensation for loss of time and inconvenience. The $17.5 million fund was calculated based on the estimate that 30 percent of the class would apply for compensation and that after payment of Counsel fee expense, there would be sufficient funds. The federal government also agreed to fund the cost of a direct mail program to publicize the settlement at a cost estimated at $600,000. Justice Gagne regarded the settlement as a good settlement that will serve as a benchmark for future privacy breach class actions and encourage organizations to take privacy seriously for fear of facing serious litigation consequences. Justice Gagné approved a contingency fee of 30% of the $17.5 million capped settlement fund, plus disbursements and taxes; *i.e*., $5.25 million plus the disbursements and taxes.

[87] 2017 ONSC 6578.
[88] 2018 FC 522.

9. ***Haikola v. Personal Insurance Co***. [89] The Class Members were 8,525 policy holders of automobile insurance issued by the defendant. The Class Members had made claims for payment of accident benefits and as part of the application were required to provide the insurer with credit card information. After a complaint and an investigation, the Privacy Commissioner ruled that the defendant insurer had breached PIPEDA. The plaintiff brought a class action for breach of contract. Justice Glustein certified the action and approved the settlement and also Class Counsel's contingency fee agreement and fee. Under the settlement, the defendant would pay $2,200,000, all inclusive. Legal fees and the expense of administration was to be paid out of the settlement fund with the balance distributed pro rata to the Class Members. Class Members who were still insured by the defendant would be compensated without filing a claim. Former insured were obliged to file a claim. Assuming a take-up rate of about 55% for the 27% of the Class Members no longer insured, the anticipated value of each claim would be $180 per claimant. From the settlement fund, Class Counsel was to receive $500,000 plus disbursement ($20,000) and taxes ($65,000). Class Counsel's fee was a 22.7% contingency fee, which was a multiplier of docketed hours of 1.16.

10. ***Leonard v. Manufacturers Life Insurance Co***.[90] Using software developed by Davis + Henderson LP, mortgage brokers passed on personal information of applicants for mortgages, including their name, age, address, and mortgage amount to Manufacturers Life, an insurance company that sold mortgage payment insurance to mortgagees in the event of disability or death. Manufacturers Life used the information to market its mortgage insurance products and to contact potential purchasers. Manufacturers Life's regulator fined it $150,000 plus costs of $31,000 for this marketing scheme. In a proposed class action, involving a class of 6.6 million Canadians who had contacted mortgage brokers and including 650,000 who had purchased mortgage insurance, the plaintiffs claimed that there had been a misuse of their personal information. In 2016, Justice Trustcott dismissed the motion for certification. While the dismissal of the certification motion was under appeal, the parties settled and moved for a consent certification for settlement purposes. The motion for a consent certification was initially dismissed on jurisdictional grounds, but the British Columbia Court of Appeal ordered that the motion be heard on its merits. Then, Justice Gomery certified the claims for settlement purposes. The certification and the settlement were opposed by Class Counsel from an uncertified rival national class action in Saskatchewan that advanced claims of breach of privacy both as a statutory and as a common law tort, and breach of contract. The terms of the national settlement excluding Québec were that Manufacturers Life would pay $4.25 million which would be allocated to disbursement and a legal fee of up to $900,000 to Class Counsel. The balance would be distributed *cy-près* to two non-profit public interest organizations. Justice Gomery approved the settlement and Class Counsel's fee request. The settlement

[89] 2019 ONSC 5982.
[90] 2020 BCSC 1840 (consent certification and settlement approval).

was opposed by rival Class Counsel. Justice Gomery approved the Class Counsel fee of $900,000 which was a contingency fee of 21% and a multiplier of 1.2 of Class Counsel's recorded time and hourly rates.

11. **Chartrand v. Google LLC** [91] During 2017, Google android smartphones had the capacity to capture data that combined with data from cell phone towers could deduce the identity of a user and a precise location of the smartphone. Although the additional information was not available to the public or readily available to Google, Google was sued in British Columbia in a national class action with parallel actions in Ontario and Québec for breach of privacy statutes and for unjust enrichment. Justice Tucker certified the action for settlement purposes. Class size was described as "well into the millions". Justice Tucker approved the settlement in which Google agreed to pay $1.0 million. The $1.0 million, net of Class Counsel fees, disbursements, taxes, honoraria, and the required payment to the Fonds d'aide aux actions collectives, was to be distributed *cy près* to the Law Foundation of British Columbia, the Law Foundation of Ontario and the Fondation du Barreau du Québec. Justice Tucker approved a Class Counsel fee of 33.33% plus disbursements and taxes.

[137] The following chart compares and contrasts certain aspects of the approved settlements and the settlement in the immediate case:

	Class Size	**$ Value of Settlement**	***Per capita* value for class member**	***Counsel Fee***
Speevak v. Canadian Imperial Bank of Commerce	38	Uncapped claims process + $100,000 to charity	N/A	$50,000 for costs up to the mediation and partial indemnity costs from the mediation to the settlement approval hearing.
Rideout v. Health Labrador Corp.	333	Settlement fund of $179,850 plus administrative costs plus legal fees of $119,171.50.	$450 to uninfected patients and $100 to uninfected spouses.	$119,171.50, all inclusive. The approved fee was a multiplier of 0.6 of the value of the docketed time of $166,935.
Rowlands v. Durham Region Health.	83,524	Uncapped claims process	N/A	$500,000 inclusive of taxes and disbursements, plus 25 per cent of claims paid in the future.

[91] 2021 BCSC 7 (settlement approval).

	Class Size	**$ Value of Settlement**	***Per capita* value for class member**	***Counsel Fee***
Maksimovic v. Sony of Canada Ltd.	3.5 million	Refunds of unused service + reimbursement for claims capped at $2,500	N/A	$265,000 inclusive of fees, disbursements, and taxes, which was less than Class Counsel's docketed time of $300,000.
Lozanski v. Home Depot Inc.	500,000	$1.1 million comprised of: (a) $250,000 for credit monitoring and identity theft insurance on a first come first served basis; (b) $250,000 for documented claims for time spent remedying issues relating to the data breach for up to five hours at $15 per hour and for substantiated losses to be paid pro-rata, if necessary, up to a maximum of $5,000 per claimant; (c) $100,000 for the notice program; (d) $100,000 for estate administration; and (e) up to $407,000 for legal fees and expenses.	$2.20	$120,000 all inclusive
Drew v. Walmart Canada Inc.	1.2 million	Walmart paid up to $1.25 million for: (a) Class Counsel' fees of $250,000; (b) $350,000 for a credit monitoring plan for Class Members on a first come, first served basis, (c) $400,000 for Class Member expense claims on a first come, first	$1.00	$250,000 all inclusive.

	Class Size	**$ Value of Settlement**	***Per capita* value for class member**	***Counsel Fee***
		served basis with a per capita maximum of $5,000 and prorated after the 90-day claims period A Class Member making a claim for compensation may receive $15/hr. for documented time or without documentation $15/hr. for up to two hours of time spent remedying the losses or charges.		
Bennett v. Lenova (Canada) Inc.	11,000	The defendant paid $151,547 and agreed to co-operate in the prosecution of the action against the non-settling defendant.	$13.78	N/A
Condon v. Canada	583,000	The federal government established two funds. One fund was an uncapped fund for Class Members who could prove actual loses. The second fund was a capped $17.5 million fund to Class Members who completed a simple claim form that they were class members for which they were entitled to a fixed payment of $60 as compensation for loss of time and inconvenience. The federal government also agreed to fund the cost of a direct	$31.00 + uncapped individual claim	30% of the $17.5 million capped settlement fund plus disbursements of plus taxes; i.e., $5.25 million plus the disbursements and taxes.

	Class Size	**$ Value of Settlement**	***Per capita* value for class member**	***Counsel Fee***
		mail program to publicize the settlement at a cost estimated at $600,000.		
Haikola v. Personal Insurance Co.	8,525	$2.2 million all inclusive. Legal fees and the expense of administration was to be paid out of the settlement fund with the balance distributed pro rata to the Class Members.	$258.00	$500,000 plus disbursement ($20,000) and taxes ($65,000) Class Counsel's fee was a 22.7% contingency fee and a multiplier on docketed hours of 1.16.
Leonard v. Manufacturers Life Insurance Co.	6.6 million	$4.25 million which would be allocated to disbursement and a legal fee of up to $900,000 to Class Counsel. The balance would be distributed *cy-près* to two non-profit public interest organizations.	$0.64	$900,000 which was a contingency fee of 21% and a multiplier of 1.2 of Class Counsel's recorded time and hourly rates.
Chartrand v. Google LLC	"well into the millions"	$1.0 million, which net of Class Counsel fees, disbursements, taxes, honoraria, and the required payment to the Fonds d'aide aux actions collectives would be distributed cy près to the Law Foundation of British Columbia, the Law Foundation of Ontario and the Fondation du Barreau du Québec.	"cents on the dollor"	$330,000 plus disbursements, plus taxes
Karasik v. Yahoo! Inc.	5.0 million	$20.3 million	$4.00	$3.0 million

[138] From the above analysis, which samples the case law, it may be deduced that class actions for damages for invasion of privacy have a low risk of not being certified. The above sample reveals a 20% percent failure rate, but an examination of the cases that failed to achieve certification or authorization were weak cases on their particular facts, and thus, based on this sample of cases, the likelihood of success at certification for is very high.

[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.

N. Discussion and Analysis of the Proposed Settlement of the Ontario Action

1. Introduction

[142] Because of the arguments of Ms. Larocque, it was necessary in the immediate case to do the above analytical deep dive into the privacy class action case law, and it is now necessary to apply that analysis in assessing the qualitative and quantitative merits of the class action settlement in the immediate case.

[143] In the immediate case, because of the allegations made by the Merchant Law Firm on behalf of Ms. Larocque, it is first necessary to examine whether the settlement in the immediate case is the product of collusion; one type of which is know as a "race to the bottom." Then, it is necessary to carefully examine the qualitative and quantitative merits of the settlement agreement. There was no suggestion that the distribution scheme in the immediate case was unfair or unreasonable or inappropriate.

2. Is the Ontario Action Settlement Collusive?

[144] I begin the analysis of whether the settlement in the immediate case is collusive by noting that the oral argument of counsel of the Merchant Law Group was quite temperate and much less strident in tone and less critical in particular of Class Counsel and of Counsel for Yahoo than the

filed submissions made by Ms. Larocque.

[145] Ms. Larocque's written objections suggest that that there may have been a "race to the bottom" in the immediate case, which I take to be an allegation that Class Counsel sold out the Class Members and sought approval of a settlement that was provident for Class Counsel and improvident for Class Members.

[146] The oral submissions, however, were the tamer submissions that: (a) where, as in the immediate case there is a rival class action and evidence that Yahoo has avoided negotiating with rival Class Counsel, the court needs to be extraordinarily vigilant and questioning about whether the proposed settlement is in the best interests of the Class Members; and (b) where, as in the immediate case, the Representative Plaintiffs are receiving benefits beyond those available to the Class Members, again the court needs to be extraordinarily vigilant and questioning about whether the proposed settlement is in the best interests of the Class Members.

[147] Thus, in oral argument, the Merchant Law Group relented in suggesting that there was collusion in the immediate case and rather asked that I scrupulously analyze the qualitative and quantitative aspects of the proposed settlement because if I did, the Merchant Law Group submitted that I would come to the conclusion that it was a poor settlement based on a poorly conceived class action that failed to plead the statutory privacy causes of action available in British Columbia, Saskatchewan, Manitoba, and Newfoundland and Labrador.

[148] As noted above in the discussion of general principles, the law about settlement approval already includes an analysis of the presence of good faith, arm's-length bargaining and the absence of collusion. The required judicial skepticism is baked-in into the settlement criteria, and applying it in the immediate case, I find the presence of good faith arm's-length hard bargaining.

[149] In the immediate case, there is no evidence of collusion or a race to the bottom. Yahoo has taken appropriate steps to avoid a multiplicity of proceedings by seeking to have the Québec Action and the Saskatchewan Actions stayed. The genuine problem of a "race to the bottom" occurs where a defendant does not take steps to stay rival class actions in order to enter into a collusive settlement with its favoured opponent. That is not what occurred in the case at bar.

[150] It was not necessary for Class Counsel or Defence Counsel in the immediate case to launch a counterattack against the probity of the Merchant Law Group. Ms. Larocque was certainly entitled to retain the Merchant Law Group to prosecute a proposed class action in Saskatchewan and whether the Saskatchewan court will stay the Saskatchewan Action and/or enforce the releases of Yahoo that are part of the settlement that I am approving in Ontario are matters for the Saskatchewan court.

[151] As I indicated at the outset of these Reasons for Decision, a settlement approval motion is not a carriage fight, and there is no motion before this court to stay the Ontario proceedings to address the multiplicity of proceedings that has occurred across Canada as a result of the cyberattacks against Yahoo. I am not interested or helped by the mudslinging between counsel. I most particularly am not helped by the pure speculation and unverifiable belief that the Merchant Law Group will secure a better outcome for the class should it move forward with the national action in Saskatchewan.

[152] Settlement approval is unquestionably the most important and the most difficult task of judges case managing class actions and I agree that in in the absence of an adversarial nexus, it is

necessary to be scrupulous in searching for collusion which is to say that Class Counsel has sold out the class. I find no evidence of collusion in the immediate case. What I find is hard bargaining with reasonable and responsible due diligence and preparation.

O. Should the Court Approve the Proposed Settlement in the Ontario Action?

[153] Turning to the other factors in determining whether to approve a settlement, I can be brief in saying that to varying degrees or weights, the factors favour the approval of the settlement in the immediate case.

[154] A settlement approval motion in a class proceeding is not like a dog show where an award is given for best in the genre or best in the show, and given the state of the current case law, what can be said is the above analysis of other settlements confirms that the settlement in the immediate case falls within the range of reasonableness.

[155] The Merchant Law Group's major criticism of the Ontario Action and the source of its speculative optimism for the Saskatchewan Action is the absence in the Ontario Action and the presence in the Saskatchewan Action of the privacy statutory actions and the anticipated availability of significant general damages. In British Columbia, Saskatchewan, and Newfoundland and Labrador, each province has enacted a statute entitled the *Privacy Act*, which creates a statutory tort for a person who wilfully and without claim of right violates the privacy of another. Manitoba has a *Privacy Act*, but it does specify wilful conduct as an element of the statutory cause of action but rather requires conduct that substantially and unreasonably without colour of rights violates the privacy of another person. The Merchant Law Group relies heavily on the statutory claims for invasion of privacy.

[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 to privacy and whether there has been an invasion of privacy is a fact specific inquiry in the circumstances of each case.[92] 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 the defendant knew that his or her conduct would violate the plaintiff's privacy.[93] In other words, there is a significant and difficult to prove mental element to be proven in the statutory privacy torts.

[157] In the immediate case, had the Representative Plaintiffs pled the privacy statues, they would have been met with formidable arguments and the same bargaining chips as confronts the other causes of action. In the immediate case, with the the absence of any trial judgments, the defendants had good arguments that defences based on causation and the absence of the mental

---

[92] *Heckert v. 5470 Investments Ltd*., 2008 BCSC 1298 at para. 76; *Davis v. McArthur*, [1970] B.C.J. No. 664 at pp. 763-764 (C.A.), rev'g [1969] B.C.J. No. 249 (S.C.).

[93] *Kumar v. Korpan*, 2020 SKQB 256 at paras. 30-36; *Duncan v. Lessing*, 2018 BCCA 9; *Cole v Prairie Centre Credit Union Ltd.*, 2007 SKQB 330; *Watts v. Klaemt*, 2007 BCSC 662; *Hollinsworth v BCTV*, [1999] 6 WWR 54 (B.C.C.A.); *Peters-Brown v Regina District Health Board*, [1996] 1 WWR 337 (Sask. Q.B.) aff'd [1997] 1 WWR 638 (Sask. C.A.).

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.

[159] The few significant awards in individual breach of privacy cases arose in cases with facts that an objective observer would find disturbing as occurred in *Jones v. Tsige*.[94] In that famous case, the defendant was an employee of the Bank of Montreal, who on at least 174 occasions, scrutinized the banking records of the plaintiff, who was the ex-wife of the defendant's ex-common law husband. The plaintiff was awarded $10,000 in damages for intrusion on seclusion. Justice Sharpe, however, made it clear that general damages for invasion of privacy would be modest.

[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 a 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 and for some Class Members 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 their recommendation of the settlement that responded to these factual circumstances was sound, as was the instructions of the Representative Plaintiffs.

[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.

[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, including the cases that advanced the statutory causes of action and intrusion on seclusion claims, suggests that the settlement proposed in the immediate case falls within the zone of reasonableness, which allows for a range of possible resolutions and is an objective standard.

[165] Since all the other settlement factors point toward approving the settlement in the immediate case, I, therefore, approve the settlement.

P. Fee Approval

1. General Principles

[166] Section 32(2) of the *Class Proceedings Act, 1992* requires that an agreement respecting

[94] 2012 ONCA 32.

fees and disbursements between a solicitor and a representative party is not enforceable unless approved by the court, on the motion of the solicitor.

[167] The fairness and reasonableness of the fee awarded in respect of class proceedings is to be determined in light of the risk undertaken by the lawyer in conducting the litigation and the degree of success or result achieved.[95] Factors relevant in assessing the reasonableness of the fees of class counsel include: (a) the factual and legal complexities of the matters dealt with; (b) the risk undertaken, including the risk that the matter might not be certified; (c) the degree of responsibility assumed by class counsel; (d) the monetary value of the matters in issue; (e) the importance of the matter to the class; (f) the degree of skill and competence demonstrated by class counsel; (g) the results achieved; (h) the ability of the class to pay; (i) the expectations of the class as to the amount of the fees; and (j) the opportunity cost to class counsel in the expenditure of time in pursuit of the litigation and settlement.[96]

[168] These risks of a class proceeding include all of liability risk, recovery risk, and the risk that the action will not be certified as a class proceeding.[97] However, the recognition of risk is not a privileged factor in the determination of a reasonable fee because the risk factor does not differentiate between a bad settlement and good one.[98]

[169] Fair and reasonable compensation must be sufficient to provide a real economic incentive to lawyers to take on a class proceeding and to do it well.[99]

[170] Accepting that Class Counsel should be rewarded for taking on the risk of achieving access to justice for the Class Members, they are not to be rewarded simply for taking on risk divorced of what they actually achieved.[100] Placing importance on providing fair and reasonable compensation to Class Counsel and providing incentives to lawyers to undertake class actions does not mean that the court should ignore the other factors that are relevant to the determination of a reasonable fee.[101] The court must consider all the factors and then ask, as a matter of judgment, whether the fee fixed by the agreement is reasonable and maintains the integrity of the profession.[102]

2. Fee Approval: Analysis and Discussion

[171] In the immediate case, the docketed time and value at regular hourly rates spent up to December 22, 2020 by Class Counsel is 2,763.3 hours, for a total value of $1,478,968.22, approximately $1.5 million.

---

[95] *Parsons v. Canadian Red Cross Society*, [2000] O.J. No. 2374 at para. 13 (S.C.J.); *Smith v. National Money Mart*, 2010 ONSC 1334 at paras. 19-20, varied 2011 ONCA 233; *Fischer v. I.G. Investment Management Ltd.*, [2010] O.J. No. 5649 at para. 25 (S.C.J.).

[96] *Smith v. National Money Mart*, 2010 ONSC 1334, varied 2011 ONCA 233; *Fischer v. I.G. Investment Management Ltd.*, [2010] O.J. No. 5649 at para. 28 (S.C.J.).

[97] *Gagne v. Silcorp Ltd.*, [1998] O.J. No. 4182 t para. 17 (C.A.); *Endean v. Canadian Red Cross Society*, 2000 BCSC 971 at paras. 28 and 35.

[98] *Smith v. National Money Mart*, 2010 ONSC 1334 at para. 126, varied 2011 ONCA 233.

[99] *Gagne v. Silcorp Ltd*. (1998), 41 O.R. (3d) 417 (C.A.); *Parsons v. Canadian Red Cross Society* (2000), 49 O.R. (3d) 281 (S.C.J.); *Vitapharm Canada Ltd. v. F. Hoffmann-La Roche Ltd.*, [2005] O.J. No. 1117 at paras. 59-61(S.C.J.); *Sayers v. Shaw Cablesystems Ltd.*, 2011 ONSC 962 at para. 37.

[100] *Welsh v. Ontario*, 2018 ONSC 3217 at para. 103.

[101] *Smith Estate v. National Money Mart Co*., 2011 ONCA 233 at para. 92.

[102] *Commonwealth Investors Syndicate Ltd. v. Laxton*, [1994] B.C.J. No. 1690 at para. 47 (B.C.C.A.).

[172] If the settlement is approved, Class Counsel anticipate spending additional time on post-settlement tasks. Class Counsel will be required to prepare and deliver materials and appear in the Saskatchewan Action to satisfy the conditions precedent to the Settlement Agreement. It is anticipated that the Saskatchewan Courts will hear one or more stay motions, potentially a certification motion and an appeal. There will be dismissal motions and appearances in British Columbia and Alberta. Class Counsel will spend more time working with RicePoint on the claims administration process and responding to class member inquiries.

[173] In the immediate case, the Representative Plaintiffs entered into contingency fee retainer agreements with Class Counsel, providing that Class Counsel are to be paid only in the event of a successful settlement or judgment. The contingency fee retainer agreements provide that Class Counsel will be paid 33.33% of any recovery in the Action. In the immediate case, Class Counsel are seeking a contingency fee of 24%. This is a fee request of $4.9 million. Class Counsel also seeks payment of disbursements and applicable taxes. The 24% fee is equivalent to a 3.3x multiplier without taking into account the future work required to implement the settlement.

[174] I do not approve the $4.9 million plus disbursements and taxes fee request. I accept that this was a complex, hard-fought case. Class Counsel conducted extensive legal and factual research in support of the claim and worked closely with an expert in preparing for a contested certification hearing. Extensive arm's-length settlement negotiations, including two day-long mediations, ultimately resulted in the Settlement Agreement. I have approved the settlement, but I would not regard it as anything other than fair and reasonable and in the best interests of the class as a whole.

[175] There were undoubtedly litigation risks in the immediate case, but Class Counsel much overstated the risk that the case would not be certified. My analysis of the reported privacy class that reached the certification or authorization stage suggests that a case as strong as the immediate one, where Yahoo delayed in notifying the Class Members of the security breaches, had only a modest risk of not being certified.

[176] The substantial litigation risk in the immediate case is the risk of losing at trial given the difficulties of causation, proving the requisite mental state for liability, the usual difficulties of establishing conduct below the standard of care, and the prospect that the benchmarks for general (moral) damages in individual actions will not carry over to aggregated damages awards in class actions. Those risks explain why it was reasonable to recommend a settlement in the immediate case.

[177] Where these observations take me is that Class Counsel deserves a premium for securing what was a reasonable but certainly not outstanding settlement, but they do not deserve a premium commensurate with taking on the more formidable risk of prosecuting the action to a trial judgment. That risk was actually avoided by settling the action.

[178] In my opinion, a premium that is a multiplier of 2.0 is a fair recompense for the risk that Class Counsel actually took on and a better reflection of the results achieved for the Class, which actually become better by reducing Class Counsel's piece of the settlement pie.

[179] I am confirmed in the fairness of this award by comparing it to the Counsel fees awarded in other cases, as described above.

[180] In the immediate case, to award a multiplier of 3.3 is to award counsel for risks that they

did not take on. This observation does not detract from my approval of the settlement, which in the circumstances of the immediate case, was a sound decision for counsel to recommend. However, Class Counsel should receive compensation for the risks that they actually took on and an award that reflects the success achieved by settlement.

[181] For these reasons, I award Class Counsel a fee of $3.0 million plus disbursements plus taxes.

Q. Honorarium

[182] Where a representative plaintiff can show that he or she rendered active and necessary assistance in the preparation or presentation of the case and that such assistance resulted in monetary success for the class, the representative plaintiff may be compensated by an honorarium.[103]

[183] However, the court should only rarely approve this award of compensation to the representative plaintiff.[104] Compensation for a representative plaintiff may only be awarded if he or she has made an exceptional contribution that has resulted in success for the class.[105] Compensation to the representative plaintiff should not be routine, and an honorarium should be awarded only in exceptional cases.

[184] In determining whether the circumstances are exceptional, the court may consider among other things: (a) active involvement in the initiation of the litigation and retainer of counsel; (b) exposure to a real risk of costs; (c) significant personal hardship or inconvenience in connection with the prosecution of the litigation; (d) time spent and activities undertaken in advancing the litigation; (e) communication and interaction with other class members; and (f) participation at various stages in the litigation, including discovery, settlement negotiations and trial.[106]

[185] Class Counsel is seeking approval of an honorarium of $7,500 to be awarded to each of the three representative Plaintiffs, to be paid from the Settlement Fund.

[186] In my opinion, the honoraria requests in the immediate case should not be granted. In my opinion, the Representative Plaintiffs' contribution while laudatory was not exceptional or extraordinary. Honorarium should not be awarded as a routine matter.

[187] Plaintiffs in normal litigation, who are exposed to costs consequences do not receive a payment for giving instructions to their lawyer. Representative Plaintiffs are Class Members, and as a matter of principle, they should recover no more than any other Class Member. As a matter of principle, a representative plaintiff should have no incentive to recommend a settlement other than that he or she genuinely believes that it is in the best interests of the Class of which he or she is a member.

---

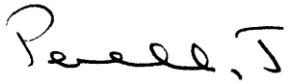
[103] *Windisman v. Toronto College Park Ltd*., [1996] O.J. No. 2897 at para. 28 (Gen. Div.).
[104] *Sutherland v. Boots Pharmaceutical plc*, *supra*; *Bellaire v. Daya*, [2007] O.J. No. 4819 at para. 71. (S.C.J.); *McCarthy v. Canadian Red Cross Society*, [2007] O.J. No. 2314 (S.C.J.).
[105] *Toronto Community Housing Corp. v. ThyssenKrupp Elevator (Canada) Ltd.*, 2012 ONSC 6626; *Markson v. MBNA Canada Bank*, 2012 ONSC 5891 at paras. 55-71.
[106] *Robinson v. Rochester Financial Ltd.*, 2012 ONSC 911 at paras. 26-44.

R. Conclusion

[188] For the above reasons, I find that the settlement in the Ontario Action is fair, reasonable, and in the best interests of the Class Members including Ms. Larocque. I approve the Settlement. I approve a Class Counsel fee of $3.0 million. I do not approve the honoraria.

[189] Because settlement approval motions are typically unopposed and because typically Class Member objectors are self-represented, it is typical not to award costs on settlement approval motion. The settlement approval motion in the immediate case, however, was not typical. Therefore, I will consider whether it is appropriate to award costs in the immediate case to be paid by the Merchant Law Group and not Ms. Larocque personally.

[190] If demanded, Class Counsel has twenty days from the release of these Reasons for Decision to deliver written costs submissions to be followed by the Merchant Law Group's submissions within a further twenty days.



Perell, J.

Released: February 9, 2021

CITATION: Karasik v. Yahoo! Inc., 2021 ONSC 1063
COURT FILE NO.: CV-16-566248-00CP
DATE: 2021/02/09

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:

NATALIA KARASIK, RAHUL SURYAWANSHI and ELIE CHAMI

Plaintiffs

- and -

YAHOO! INC. and YAHOO! CANADA CO.

Defendants

REASONS FOR DECISION

PERELL J.

Released: February 9, 2021