**Court of Appeal for Saskatchewan**
**Docket: CACV3713**

**Citation: *Larocque v Yahoo! Inc.*, 2023 SKCA 62**
**Date: 2023-05-25**

Between:

**Emily Larocque**

*Appellant*
*(Plaintiff)*

And

**Yahoo! Inc. and Yahoo! Canada Co.**

*Respondents*
*(Defendants)*

And

**Natalia Karasik**

*Respondent*
*(The Class Actions Act s. 5.1 participant)*

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| Before: | Leurer, Tholl and Kalmakoff JJ.A. |
| Disposition: | Appeal dismissed |
| Written reasons by:<br>In concurrence: | The Honourable Mr. Justice Leurer<br>The Honourable Mr. Justice Tholl<br>The Honourable Mr. Justice Kalmakoff |
| On appeal from:<br>Appeal heard: | 2020 SKQB 263, Regina<br>November 29, 2022 |
| Counsel: | E.F. Anthony Merchant, K.C., Anthony Tibbs and Iqbal Brar for Emily Larocque<br>Craig Dennis, K.C. and Owen James for Yahoo! Inc. and Yahoo! Canada Co.<br>No one appearing for Natalia Karasik |

**Leurer J.A.**

## I. INTRODUCTION

[1] This appeal requires this Court to confirm the broad discretion that the judges of the Court of King's Bench – formerly the Court of Queen's Bench – have over the conduct of civil actions in that court.

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

[3] Many other actions arose out of the same events. One was an Ontario claim brought by Natalia Karasik [Ontario action].

[4] On October 13, 2020, a judge of the Court of Queen's Bench [Judge] directed that the hearing of Ms. Larocque's certification application be adjourned *sine die* to be "rescheduled after the Ontario Superior Court of Justice has rendered a final decision whether to approve the settlement agreement in the [Ontario] action" (*Larocque v Yahoo! Inc.*, 2020 SKQB 263 at para 24 [*Adjournment Decision*]).

[5] Ms. Larocque appeals from the *Adjournment Decision*, alleging that the Judge erred in adjourning the certification application. I do not agree and would dismiss her appeal.

## II. BACKGROUND

### A. The actions

[6] At the times that are relevant to this appeal, Altaba Inc. operated an internet business through Yahoo. As part of this, Yahoo offered email accounts to the public. In 2016, Yahoo disclosed that it had suffered breaches to its systems that resulted in the widespread release of customer information. All of this led to many lawsuits in many jurisdictions. Two of these actions are at the heart of this appeal.

[7] The Ontario action was commenced in the Ontario Superior Court of Justice on December 16, 2016, with the intent that it be certified as a class action pursuant to the *Class Proceedings Act, 1992*, SO 1992, c 6. It was placed under the case management of Perell J. The Saskatchewan action was issued on May 16, 2017, as a proposed class action under the *CAA*. In accordance with s. 4(2) of that Act, the Judge was designated by Popescul C.J.Q.B. to hear Ms. Larocque's certification application. It is common ground that the two actions seek damages for the same acts and omissions of Yahoo, although, as Ms. Larocque is at pains to point out, there are differences in the causes of action asserted in each proceeding.

[8] Ms. Larocque's notice of application for certification was filed just over one year after her claim was issued. She completed her evidentiary record in support of certification in October of 2018. In her factum, Ms. Larocque asserts that she has "been trying *vigorously* to set this matter down for certification" since that date (emphasis in original). This appears to be a fair characterization of the record of proceedings in her case. Nonetheless, for reasons that are not relevant here, her case did not move along promptly. Her certification application was eventually scheduled to be heard in November of 2020.

[9] In advance of that, on February 26, 2020, Yahoo filed an application [Forum Selection Application]. It sought an order that the Saskatchewan action be stayed based on the proposition that Yahoo's Canadian customers have all agreed, under their terms of service with Yahoo, that any claims against it be made in Ontario, and be decided under that province's laws. Whether it was because of the declaration of the COVID-19 pandemic shortly after this, or for other reasons, it would be many months before the parties were able to appear before the Judge to discuss the scheduling of the Forum Selection Application.

[10] Meanwhile, the Ontario action proceeded towards the hearing of a certification application. Evidence was filed, cross-examinations held, and a certification application was set down for hearing in March of 2020. Those dates were then vacated pending the outcome of settlement discussions.

## B. The Ontario settlement

[11] In early July of 2020, the parties to the Ontario action entered into a settlement agreement [Settlement Agreement]. It purports to resolve the claims against Yahoo of all Canadian residents unless they opt out of the settlement. It does this by establishing a settlement fund of $15 million USD, in exchange for which Yahoo and other named parties are to be released from all claims arising out of the data breaches. This amount is to be used to satisfy the claims of Canadian class members, and to pay legal fees and administration costs.

[12] Shortly after the settlement was reached, a motion was brought before the Ontario court for a consent order certifying the Ontario action for settlement purposes and other related relief, including approving the method of disseminating the notice of certification and proposed settlement to the class. Notice of the Ontario certification motion was provided to Ms. Larocque.

[13] Ms. Larocque brought a motion for leave to intervene as an added party to the consent certification motion in the Ontario action. Her counsel appeared before Perell J. and made submissions with the aim of having the certification motion dismissed or stayed. On August 26, 2020, Perell J. dismissed her application and certified the Ontario action for settlement purposes only, subject to the terms of the Settlement Agreement and the other conditions set out in the certification order: *Karasik v Yahoo! Inc*. (26 August 2020) Toronto, CV-16-566248-00CP (2020 ONSC 5103) (Ont Sup Ct) [*Ontario Certification Decision*]. One of the conditions attached to the *Ontario Certification Decision* was that the settlement be approved at a later fairness hearing. These orders were made "without prejudice to Ms. Larocque opposing the approval of the settlement in the Ontario action and appearing with representation at the settlement approval hearing" (at para 6).

[14] One other part of the *Ontario Certification Decision* was the approval of the notices to be given to the certified class members, and the provision for them to opt out of the settlement. The certification order provided that "any person who validly opts out of the Settlement Class shall be excluded from the Settlement Class, shall not be bound by the Settlement Agreement, shall have no rights with respect to the Settlement Agreement, and shall receive no payments as provided in the Settlement Agreement". The appropriate notices were given. It is common ground that Ms. Larocque did not opt out of the settlement.

## C. The stay applications and the adjournment request

[15] Two days after the *Ontario Certification Decision* was made, on August 28, 2020, Ms. Karasik filed a request for a case conference in the Saskatchewan action to hear an application for an order staying that action "pending the outcome of the settlement approval hearing" in the Ontario action. Later, on October 2, 2020, she served a notice of application seeking: (a) an order that the Saskatchewan action be stayed "in favour of" the Ontario action; (b) a "case management direction" that her application for this order be heard before Ms. Larocque's certification application; and (c) costs. The stated basis for this relief included that it was "preferable for the claims raised in [the Saskatchewan action] to be resolved in the Ontario Action". The notice of application also indicated that the application was "intended to be heard concurrently with the [Forum Selection Application]".

[16] Ms. Larocque, Yahoo and Ms. Karasik appeared before the Judge at a case management conference on October 9, 2020. The following applications were then outstanding: (a) Ms. Larocque's application to certify her claim as a class action, scheduled to begin on November 25, 2020; (b) Yahoo's Forum Selection Application; (c) the application by Ms. Karasik to stay the Saskatchewan action until after the outcome of the settlement approval hearing in the Ontario action was known, that application then scheduled for January 8, 2021; and (d) Yahoo's application for an order staying the Saskatchewan action.

[17] Before the Judge, Ms. Larocque took the position that her certification application should proceed, as scheduled, on November 25, 2020, and that the two stay applications could be heard at the same time. Yahoo and Ms. Karasik each took the position that Ms. Larocque's certification application should be adjourned to a date after Perell J. had heard and determined the application to approve the settlement of the Ontario action. In the alternative, they asked the Judge to hear the stay applications before hearing Ms. Larocque's certification application.

### D. The *Adjournment Decision*

[18] The Judge rendered an interim fiat on October 13, 2020, adjourning the certification hearing and directing that it "shall be rescheduled after the Ontario Superior Court of Justice has rendered a final decision whether to approve the settlement agreement" in the Ontario action (at para 24). In that interim fiat, he also wrote that a subsequent fiat would issue setting out the reasons for his decision. These reasons were given in the *Adjournment Decision* released the next day.

[19] The Judge began his reasons by providing background in more detail than I have given in this judgment. As part of this, he provided an overview of why Ms. Larocque was opposed to the Settlement Agreement, and why she viewed her own action as a vehicle through which class members should expect to receive greater compensation. He also reviewed the reasons given by Perell J. for granting a conditional certification of the Ontario action. He quoted passages from the *Ontario Certification Decision* that confirmed that Ms. Larocque was entitled to oppose the approval of the Settlement Agreement which established that, if her opposition was successful, the Ontario consent certification would be rescinded.

[20] Following this review, the Judge identified Ms. Larocque as offering two principal submissions relating to the scheduling of these matters. The first was that "the stay applications, filed as late as they are, could only be considered as part of the certification process" (*Adjournment Decision* at para 19). The Judge disagreed. In this regard, he accepted as correct that "a judge need not first decide whether certification would be granted before considering the question of stay or carriage", quoting from *Fantov v Canada Bread Company, Limited*, 2019 BCCA 447 at para 63, 31 BCLR (6th) 318.

[21] Ms. Larocque's second submission was that "it is not appropriate for this Court to defer any aspect of [her] proposed class action, including the timing of the certification application, to the court of another province" (at para 20). On this issue, the Judge concluded that he did have to "engage in a discussion about the need to combine the certification application and the stay applications into one hearing", adding that, "were it not for the current proceedings in the [Ontario] action, it would be more than appropriate for the Court to hear the applications at the same time" (at para 21).

[22] As for the specific submission made by Ms. Larocque that he "should not defer to the exercise of jurisdiction of another court with respect to a similarly based multi-jurisdictional class action", the Judge stated that he did "not share counsel's view that such deference is as inappropriate as he suggests". Instead, he concluded that s. 6(2) and (3) of the *CAA* "implicitly recognize the legitimate prospect of deference in the preferable claim analysis for competing multi-jurisdictional class actions" (at para 22). He then concluded his analysis by explaining why he ordered an adjournment of the hearing of Ms. Larocque's certification application:

> [23] In my view, this is an appropriate case for this Court to adjourn Ms. Larocque's certification application to a date after Perell J. has ruled on the settlement approval request. It is apparent to me that, no matter the outcome of that proceeding, a hearing on the [Saskatchewan] action will, subject to possible appeals, surely follow. If the settlement agreement is approved, one or both of the parties in the [Ontario] action will seek a permanent stay of the [Saskatchewan] action as a class action. If approval is refused, the settlement agreement is terminated and the [Ontario] action is decertified. Accordingly, Ms. Larocque would be able to proceed with her certification application and do so unhindered by a stay application based on the [Ontario] action. Given that a hearing will inevitably arise from either outcome, I am satisfied that the promotion of judicial economy is better served by adjourning the certification application to a date after the [Ontario Superior Court of Justice] has ruled on the request to approve the settlement agreement in the [Ontario] action.

[23] It is from this decision that Ms. Larocque now appeals.

## III. ISSUES

[24] Ms. Larocque has been given leave to appeal on a single ground, stated in her amended notice of appeal as follows:

> The Learned Chambers Judge erred in law by *deciding*, without argument and without the issues having been briefed or any evidence considered, to adjourn *sine die* the Plaintiff's Motion for Certification. While an application for a stay had been brought by the Defendants on October 2, 2020, and an impermissible application for a stay had been brought by Ms. Karasik, no reasonable opportunity was afforded for any meaningful response from the Plaintiff, no submissions were filed, and no responding evidence had been filed.
>
> (Emphasis in original)

[25] I would simplify this ground and frame it as a question of whether the Judge erred in law by adjourning Ms. Larocque's certification application pending the outcome of the Ontario application to approve the Settlement Agreement. In addition, as I will explain, an issue has emerged as to whether this appeal is now moot. Therefore, the outcome of Ms. Larocque's appeal is determined by the answers to the following two questions:

(a) Is this appeal moot and, if it is, should this Court decide it on its merits?

(b) Did the Judge err in law by adjourning Ms. Larocque's certification application pending the outcome of the Ontario application to approve the Settlement Agreement?

## IV. ANALYSIS

### A. The mootness issue

[26] Some additional background will help set the stage for my consideration of this issue.

[27] Yahoo had opposed the grant of leave to appeal to Ms. Larocque on several bases, one of which was that the appeal would almost certainly be rendered moot by events that were likely to occur before the appeal could be argued and decided.

[28] Justice Caldwell, who heard the application for leave to appeal, was not persuaded by this argument: *Larocque v Yahoo! Inc.* (6 November 2020) Regina, CACV3713 (Sask CA). He observed that, at the point of the grant of leave to appeal, in October of 2020, proceedings in the Saskatchewan action were at a standstill because they had been adjourned *sine die*. As part of the overall submissions relating to delay, Ms. Larocque had asked him to impose deadlines on the parties to ensure the appeal marched along promptly. However, he declined to do so because Ms. Larocque's appeal was an expedited appeal under *The Court of Appeal Rules*. As he noted, under those Rules, "the perfection—and, therefore, the timing—of an expedited appeal is largely, although not entirely, within the control of the appellant" (at para 12).

[29] As it happened, Ms. Larocque did not take advantage of the opportunity to expedite her appeal. If she had, I have little doubt that it could have been heard in the early months of 2021.

[30] Ms. Larocque's appeal sat in abeyance for more than one year. In March of 2022, in accordance with *The Court of Appeal Rules*, the Registrar referred this appeal to the Court for dismissal on the ground that it appeared to have been abandoned. Ms. Larocque asked that her appeal be allowed to proceed notwithstanding the delay in its prosecution. A panel of this Court agreed that it could go forward: *Larocque v Yahoo! Inc.* (20 May 2022) Regina, CACV3713 (Sask CA). On that occasion, the Court concluded that it was "not for this panel to determine, in the context of this *particular* show cause hearing, whether the matter is moot" (emphasis in original). Its decision further noted that it was "left for the panel who hears the matter to decide if the appeal is moot" (at para 9).

[31] As I will briefly explain, I am satisfied that this appeal *is* moot, but it should not be dismissed for that reason. Some further description of the events after the grant of the adjournment will help explain this conclusion.

[32] While Ms. Larocque idled in her prosecution of this appeal, proceedings continued in both the Ontario action and the Saskatchewan action. Justice Perell heard the application for final approval of the Ontario settlement on January 8, 2021. Ms. Larocque appeared, through counsel, in opposition to its grant. In the result, Perell J. approved the Settlement Agreement: *Karasik v Yahoo! Inc.* (9 February 2021) Toronto, CV-16-566248-00CP (2021 ONSC 1063) (Ont Sup Ct) [*Ontario Approval Decision*]. In doing so, he specifically rejected the arguments made by Ms. Larocque as to why the settlement was improvident to the class.

[33] On March 4, 2021, following the grant of final approval of the settlement of the Ontario action, the Judge heard Yahoo's permanent stay application. He did so before entertaining Ms. Larocque's full certification application. In the result, he granted Yahoo's application and directed that the Saskatchewan action be permanently stayed: *Larocque v Yahoo! Inc.*, 2022 SKQB 136 [*Stay Decision*]. Ms. Larocque has separately appealed from the *Stay Decision*. By way of a judgment that is being delivered contemporaneously with these reasons, this Court has dismissed Ms. Larocque's appeal from the *Stay Decision*: *Larocque v Yahoo! Inc.*, 2023 SKCA 63 [*Stay Appeal Decision*].

[34] Considering this additional background, I am satisfied that the issue in this appeal is moot. Nonetheless, I am of the view that this Court should answer the question it raises.

[35] An issue is moot if a decision "will not have the effect of resolving some controversy which affects or may affect the rights of the parties" (*Borowski v Canada (Attorney General)*, [1989] 1 SCR 342 at 353 [*Borowski*]). In this case, the resolution of the question as to whether the Judge should have adjourned Ms. Larocque's certification application cannot affect her interests. This is because the outcome in the stay application has effectively pushed the issue of the adjournment aside, as the certification application cannot proceed in any event until the outcome of the appeal from the *Stay Decision* is resolved. Ms. Larocque conceded this point in argument. Nonetheless, she urges this Court to decide the appeal on its merits.

[36] *Borowski* recognized that courts retain jurisdiction to decide moot issues. Justice Sopinka, speaking for the Supreme Court on that occasion, indicated that, in determining whether to do so, a court "should consider the extent to which each of the three basic rationalia for enforcement of the mootness doctrine is present" (at 363). In *Dearborn v Saskatchewan (Financial and Consumer Affairs Authority)*, 2017 SKCA 63 at para 16, Richards C.J.S. explained that this involves a consideration of "(a) the presence of an ongoing adversarial context, perhaps because of the collateral consequences of the outcome of the appeal, (b) the importance of conserving judicial resources, and (c) the need for a court to be sensitive to its proper law-making function, *i.e.*, its role as an adjudicator of disputes affecting the rights of parties". As outlined in *Borowski*, this is "not to suggest that it is a mechanical process". In this regard, there is no requirement that each of these factors be present, or that they be applied in a particular way. The principles "may not all support the same conclusion". Indeed, the "presence of one or two of the factors may be overborne by the absence of the third, and vice versa" (at 363).

[37] In this case, I am satisfied that the interests identified in *Borowski* invite an answer to the issue that has been raised in this appeal. Although this question is not a live one between these parties, class action litigation is prevalent in this province and a resolution of this appeal on its merits may assist in the future conduct of other cases. Moreover, both parties have expended significant resources towards securing an answer to this question and their respective positions in relation to it are not materially altered by the issue becoming moot. Accordingly, this is not a situation where this Court should be concerned that the arguments on the merits have not been thoroughly aired. Finally, I have regard to the fact that the mootness issue has been present throughout the conduct of this appeal. It was identified at the stage of the request for leave to

appeal, yet leave was granted. Further, a panel of this Court did not dismiss this appeal for want of prosecution, even in the face of the facts that have now caused this appeal to be moot.

[38] In summary, taking all these factors together, I am satisfied that this appeal should be decided on its merits.

## B. The adjournment issue

[39] Rule 1-5(1) of *The Queen's Bench Rules* [*Rules*] allows a judge of the Court of King's Bench, subject to any specific provision of the *Rules*, to "make any order with respect to practice or procedure, or both, in an action, application or proceeding before the Court". The *Rules* then provide, without limiting this broad power, the specific authority, among other things, to "adjourn or stay all or any part of an action, application or proceeding" (Rule 1-5(2)(h)).

[40] Yahoo invites us to conclude that this discretion is heightened in the context of managed class proceedings because of s. 14 of the *CAA* and Rule 4-7(1). Section 14 provides that the court "may, at any time, make any order it considers appropriate respecting the conduct of a class action to ensure a fair and expeditious determination". As explained in the *Stay Appeal Decision*, s. 14 has no application in this case, because the Saskatchewan action is not yet a class action.

[41] Rule 4-7(1) prescribes certain powers to a case management judge, including to "make any procedural order that the judge considers necessary" (Rule 4-7(1)(f)). In relation to this Rule, as already noted, the Judge was designated by Popescul C.J.Q.B. to hear the certification application, pursuant to s. 4(2)(a) of the *CAA*. Mechanically, the appointment would have occurred by way of application to the Chief Justice under Rule 3-90. Rule 4-5(3), which appears in Division 2 of Part 4 of the *Rules*, titled *Court Assistance in Managing Litigation*, states that an "action commenced or continued pursuant to [the *CAA*] must have a designated judge *for case management* appointed pursuant to rule 3-90" (emphasis added) but does not say expressly that the Division applies. It is unnecessary to determine the applicability or scope of Rule 4-7(1) because, unless a specific statute or Rule governs, the decision to grant or refuse an adjournment is already a discretionary one, bridled only by the need to act judicially, with all that entails. See: *Yashcheshen v Teva Canada Ltd.*, 2022 SKCA 49 at para 32, [2022] 8 WWR 60; and *Beauchamp v Beauchamp*, 2021 SKCA 148 at para 78 [*Beauchamp*].

[42] This means that Ms. Larocque can succeed on this ground only if the Judge "made a palpable and overriding error in their assessment of the facts, including as a result of misapprehending or failing to consider material evidence" or "failed to correctly identify the legal criteria which governed the exercise of their discretion or misapplied those criteria" or "fail[ed] to give any or sufficient weight to a relevant consideration" (*Kot v Kot*, 2021 SKCA 4 at para 20, 63 ETR (4th) 161 [*Kot*]).

[43] In considering the question as to whether the Judge committed such an error, it is important to have a tight focus on what he ordered and the reasons for having done so. In this regard, the Judge stated clearly that his intent was to adjourn the applications then pending before him. For her part, Ms. Larocque sought to characterize matters as if the Judge effectively granted a *stay* of her action.

[44] The Judge's own description of the order he made is consistent with that offered by the authors of *Halsbury's* who state that "[s]trictly speaking, an adjournment is an order by the court that the hearing and disposition of a proceeding shall be deferred until a later date. If an 'adjournment' is granted until later on the same day, the hearing is more properly said to be 'recessed' or 'stood down'. A proceeding may be adjourned to a fixed date or indefinitely; in the latter case the adjournment is said to be made *sine die* (i.e., without date)" (Halsbury's Laws of Canada (online), *Civil Procedure*, "Trials: Preliminary Motions: Adjournments" (XI.3(2) at HCV-225 "Nature of Adjournment" (2021 Reissue)). This explanation is substantially the same as that offered by Saunders J.A. in *Njoroge v British Columbia (Human Rights Tribunal)*, 2021 BCCA 245 at para 5, who described an adjournment as being "really in the nature of a direction". Justice Saunders added that an adjournment should not be treated "as an order" that is amenable to a review under s. 9(6) of the *Court of Appeal Act*, RSBC 1996, c 77, as, in that Court, it was only a way for the judge to "manage his courtroom as he saw appropriate in the circumstances before him". Of course, nothing in either of these descriptions attempts to distinguish an adjournment from a temporary stay.

[45] I do not find it helpful to the disposition of this appeal to dive into what might become a metaphysical distinction between an adjournment and a temporary stay because Ms. Larocque did not explain, at least in a way that I could understand, how the label that was attached to what the

Judge did in this case affected his power to do it. The reason for this is that the *Adjournment Decision* did not in any way affect the substantive rights of any party. Instead, it simply put over to another day the hearing of Ms. Larocque's certification application and, with it, Yahoo's Forum Selection Application and stay application, as well as the stay application served by Ms. Karasik.

[46] Ms. Larocque suggests otherwise. She does this by first submitting that the Judge refused to consider her certification application. For example, her factum states that the Judge had "an independent obligation to consider certification on the merits and to determine *in the context of certification* whether deference is owed to a multi-jurisdictional class action commenced elsewhere" (emphasis in original). Based on this starting point, Ms. Larocque then catalogues all manner of considerations that she says should be accounted for in the context of the hearing of the certification application itself.

[47] However, the Judge did not say that he would not consider her certification application and, in doing so, put to the side the matters that Ms. Larocque identifies. He simply said that he would not entertain her certification request until he knew the outcome of the hearing to approve the Settlement Agreement. Even more specifically, as I read the *Adjournment Decision*, as a bottom line, the Judge concluded that it was premature to proceed to a certification hearing when it would imminently be decided whether there was going to be a certified class action that would potentially subsume the proposed class in the case before him and, at very least, create a circumstance that he would have to consider when he determined whether to certify the Saskatchewan action.

[48] The same erroneous starting point stands behind the contention, contained in the statement made in Ms. Larocque's amended notice of appeal, that "no reasonable opportunity was afforded for any meaningful response from the Plaintiff, no submissions were filed, and no responding evidence had been filed". I accept that, if the Judge had acted in a procedurally unfair way, there might be a basis for appellate intervention within the *Kot* principles (see: *Yashcheshen v Janssen Inc.*, 2022 SKCA 140 at para 13). However, I see no unfairness in the process the Judge followed to determine to grant an adjournment.

[49] The demands of procedural fairness are, in large measure, a function of the impact or effect of the order that is made. Undoubtedly, a court called upon to decide the merits of a certification request, including one that includes multi-jurisdictional issues, must ensure that the parties are given a chance to be heard. Nothing in the *Adjournment Decision* is inconsistent with this requirement. The Judge was alert to this, as is evident from the care he took not to engage in any of the certification issues. However, when an *adjournment* is requested, in most circumstances it is enough that the judge is sufficiently alert to how the parties' interests will be affected if the hearing is put over to another day or looking at matters more broadly, is attuned to whether the interests of justice support the proceedings being delayed. Nothing in the record suggests that the Judge needed any more evidence than what was already before him to be able to assess this, and to be able to reach the conclusion that it was premature to proceed to the certification hearing because of the imminent developments in Ontario. In the latter regard, he also explained how the result of the certification application could change, depending on the various possible outcomes of the application to approve the Settlement Agreement.

[50] Relatedly, Ms. Larocque submits that her statement of claim advances causes of action that are not at stake in the Ontario action, most materially, those based on an alleged breach of *The Privacy Act*, RSS 1978, c P-24, and similar legislation in British Columbia, Manitoba and Newfoundland and Labrador. I accept that this is the case. However, this fact does not mean that the Judge erred in setting Ms. Larocque's certification application over to be heard after the outcome of the application to approve the Settlement Agreement was known. The reason for this is twofold.

[51] First, the Judge had identified that Ms. Larocque was opposed to the Ontario settlement because, in her view, it was "wholly inadequate", particularly for claims of class members in provinces "where privacy legislation would arguably expose the defendants to liability for greater damages than those contemplated by the settlement agreement" (at para 14). He acknowledged that, while Perell J. had dismissed Ms. Larocque's intervention application at the certification stage, she had been given leave to present argument at the approval stage. All this meant that the applicability and impact of the privacy legislation was likely to be an important question before Perell J. when he came to consider the request to approve the Settlement Agreement. This proved to be the case. As Perell J. put it, because of Ms. Larocque's opposition to the settlement approval,

it was "necessary [for him] to do a deep dive into the case law about privacy breach class actions" (*Ontario Approval Decision* at para 125). This was equally the case when it came time for the Judge to consider granting a permanent stay of the Saskatchewan action after the Ontario settlement was approved. In this regard, an entire section of the *Stay Decision* is devoted to this issue.

[52] Second, and in any event, the adjournment of the certification hearing did not render the details of the causes of action Ms. Larocque advanced irrelevant or redundant. They would have featured in the argument on the certification application, had it proceeded. As the Judge observed, if the Ontario settlement was not approved, "Ms. Larocque would be able to proceed with her certification application" (*Adjournment Decision* at para 23).

[53] Ms. Larocque alleges that "the adjournment of the certification hearing caused a significant prejudice to [her] and to the proposed class". This is said to follow because the "Ontario Superior Court subsequently considered and approved a settlement that, although nominally contingent on this proceeding being discontinued or dismissed, could extinguish the claims of the class". However, this "prejudice" – if it can be called that – flows not from the grant of the adjournment, but from the *Ontario Approval Decision*. The finalization of the settlement approved in that decision remains contingent on whether the Saskatchewan action is finally stayed. That issue is what is at stake in the appeal from the *Stay Decision*. No part of the outcome of the *Stay Decision* or the appeal from it turns on the grant of the adjournment of the certification hearing itself.

[54] For these two reasons, the fact that Ms. Larocque has identified cases where overlapping class actions have been certified is wholly beside the point. The adjournment of the Saskatchewan action's certification hearing was not the event that precluded this possibility. Instead, Ms. Larocque's certification application will not go ahead because of the permanent stay of proceedings ordered following the approval of the Ontario settlement.

[55] Ms. Larocque objects to Ms. Karasik's standing to request an adjournment of the Saskatchewan certification hearing. In making this argument, she points to *Ammazzini v Anglo American PLC*, 2016 SKCA 164, 405 DLR (4th) 119 [*Ammazzini*], in which this Court made clear that a person in a position like Ms. Karasik has a limited right to participate in a certification hearing and is not entitled to seek a stay of the proceedings:

> [51] I note, as well, that the certification judge's reading of s. 5.1 tends to stretch that provision beyond its purpose. That purpose, it will be recalled, is merely to ensure that a certification judge has the advantage of a full and accurate picture of other class proceedings, and the views of the representative plaintiffs in those proceedings. This information is necessary so he or she can effectively determine, as *per* s. 6(2), whether it would be preferable for some or all of the claims or common issues raised to be resolved outside of Saskatchewan. *There is nothing* in the background of s. 5.1, be it the Uniform Law Conference report or the debates in the Legislative Assembly, *to suggest the Legislature intended* to go so far as *to allow representative plaintiffs in extra-provincial class actions to initiate proceedings* that would directly affect the course of a class action commenced in Saskatchewan. In the end, therefore, *I agree that s. 5.1 does not authorize a representative plaintiff who appears pursuant to that provision to bring an application for a stay.*
>
> (Emphasis added by Ms. Larocque in her factum)

[56] Section 5.1 of the *CAA* provides that a "person who receives notice of an application for certification pursuant to clause 4(2)(c) may make submissions at the certification hearing". Section 4(2)(c) requires a party seeking to certify a class action in this province to give certain notices, including "to the representative plaintiff in any multi-jurisdiction class action, or any proposed multi-jurisdictional class action, commenced elsewhere in Canada that involves the same or similar subject matter".

[57] The fact that Ms. Karasik's adjournment request came after a settlement was reached may provide a basis to distinguish *Ammazzini*. Moreover, I am not certain that it stands for the proposition that a party entitled to make submissions at a certification hearing would not also be entitled to request an adjournment of it, while recognizing that their limited role may also impact whether this is appropriate in the circumstances. For these reasons, if not others, the Judge would have been required to grapple with whether that case stood in the way of the grant of an adjournment at Ms. Karasik's request if he had granted it solely on that basis. However, I do not need to decide these issues, because the Judge was clear that *Yahoo* had also requested the adjournment of Ms. Larocque's certification application. As a defendant to Ms. Larocque's action,

and the respondent to the certification application, there is no doubt that among Yahoo's procedural entitlements was the right to ask for adjournments, in the usual way.

[58] Lastly, Ms. Larocque argues that it was improper for the Judge to grant the adjournment request without Yahoo first serving a formal notice of application. I reject this proposition out of hand.

[59] It is a common and accepted practice in the Court of King's Bench that adjournments are granted on the oral motion of a party who has sufficient standing to be heard. Once a proceeding is commenced and comes before a judge, that judge has broad control over its procedural direction. This must include the power to grant adjournments based on an oral application of one of the parties before the court, subject only to any constraints that may be created by a rule of court or legislation.

[60] A similar argument to that made by Ms. Larocque here was described in *Beauchamp* as being "contrary to all accepted practice in this province, where adjournments are routinely granted based on the oral request of a respondent made on the return of a notice of application" (at para 74). While, in this case, the adjournment request was not made on the return date of Ms. Larocque's notice of application, I cannot see how that affects the existence or scope of discretion that the Judge enjoyed in the context of the case management hearing at which the adjournment was ordered.

[61] As a bottom line under this heading, the Judge did not err in law by adjourning Ms. Larocque's certification application pending the outcome of the Ontario application to approve the Settlement Agreement.

## V. CONCLUSION

[62] For the reasons I have given, I would dismiss Ms. Larocque's appeal. As for costs, I see no reason to depart from the usual rule that, as the successful party, Yahoo is entitled to the costs of this appeal as against Ms. Larocque. In this regard, this appeal had little merit and I see no basis for the application of any of the special factors that are referred to in s. 40(2) of the *CAA* that may militate against the application of the usual rule in other circumstances. I would order that Yahoo's

costs be taxed under Column 3 of the *Tariff of Costs in the Court of Appeal*. These costs shall include its costs in relation to the application for leave to appeal and its response to the show cause hearing.

"Leurer J.A."

Leurer J.A.

I concur.

"Tholl J.A."

Tholl J.A.

I concur.

"Kalmakoff J.A."

Kalmakoff J.A.