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New Ontario class action rules tested in \$20.3-million Yahoo! cyberbreach settlement

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In what the lawyer for the plaintiffs is calling the largest cyberbreach class action settlement so far in Canada, Yahoo! Inc. and Yahoo! Canada have agreed to pay \$20.3 million to about five million Canadians affected by Yahoo! data breaches from 2013 to 2016.

The Aug. 26 settlement certification decision in [Karasik v. Yahoo! Inc. 2020 ONSC 5103](#) is also the first in Ontario under recent amendments to the *Class Proceedings Act, 1992*, (CPA) dealing with multijurisdictional class actions, said lead counsel for the plaintiffs, Ted Charney, senior partner at Toronto-based Charney Lawyers.



Ted Charney, Charney Lawyers

Led by representative plaintiffs Natalia Karasik of Ontario, Rahul Suryawanshi of Alberta and Elie Chami of Quebec, the class represents any Canadian resident with a Yahoo! account at any time between Jan. 1, 2012, through Dec. 31, 2016, and is still open to prospective plaintiffs at www.yahooprivacybreach.com. The settlement is still subject to an approval hearing scheduled for Dec. 4, 2020.

Yahoo! Inc., the Sunnyvale, Calif.-based global web services provider now owned by Verizon Media, did not reveal the major 2013 and 2014 data breaches until late 2016, initially reporting one billion user accounts had been affected. It later announced in October 2017 that all three billion of its user accounts were impacted, with cyber thieves stealing confidential information such as names, e-mail addresses, telephone numbers and encrypted or unencrypted security questions and answers. In a third breach, Yahoo! also reported that hackers in 2015 and 2016 used forged cookies to access the e-mail accounts of Yahoo! clients. The breaches are considered the largest ever discovered in the history of the Internet.

Yahoo! argued that the cyberbreaches were state-sponsored attacks and it accepted no liability. A U.S. class action against Yahoo! involving 190 million class members was settled in July for US\$125 million.

In Canada, Charney launched a national class action in Ontario in 2016, and others were commenced in British Columbia, Alberta, Saskatchewan and Quebec. Class counsel in the B.C. and Alberta actions ultimately joined forces with Charney. And during the Quebec certification hearing, Charney successfully argued to have the proceedings stayed pending the outcome of the Ontario class action.

In the case before Ontario Superior Court Justice Paul Perell, Charney sought certification for \$20.3 million mediated settlement, which was reached July 6 after two, day-long mediation sessions one year apart. The Saskatchewan lead plaintiff, Emily Larocque, and Saskatchewan class counsel Merchant Law Group LLP aimed through a separate motion to have the Ontario certification motion dismissed or stayed so a certification motion scheduled in Saskatchewan for November could proceed. Among its reasons seeking to derail the Ontario settlement, Merchant Law Group argued the settlement in the Ontario class action was not for enough money.

Justice Perell dismissed the Saskatchewan motion to intervene and granted Charney's motion for a consent certification for settlement purposes.

It is "indisputable," he wrote, "that an action certified for settlement purposes (in Ontario) is preferable to an uncertified and vigorously contested action in another jurisdiction."

He ruled, however, that the settlement in Ontario is conditional on the Saskatchewan action being permanently stayed or dismissed as a class action, and that Larocque and Merchant Law may still oppose it at the settlement approval hearing in December.

Under the amended *Class Proceedings Act, 1992*, he determined, Larocque only had standing to make submissions, not to be a party to the proceedings with a party's right to file evidence.

Charney said the \$20.3-million settlement for five million class members is proportionally better than the U.S. settlement and surpasses the previous record for a digital privacy breach of \$17.5 million reached in 2018 in *Condon v. Canada* 2018 FC 522 in which

Charney acted as co-class counsel. That case involved the loss of a portable hard drive that contained the dates of birth, addresses, student loan balances and social insurance numbers of approximately 583,000 borrowers enrolled in the Canada Student Loans Program from 2000 to 2006.

Charney said the Bill 161 amendments related to multijurisdictional class actions now bring the Ontario CPA more in line with class action legislation in British Columbia, Alberta and Saskatchewan, which allows courts in those provinces at a certification motion to decide if it is in the best interests of class members to participate in a class action in another province rather than certify the class action that's before them in their province.

The amendments better reflect the multijurisdictional dynamic of national class actions, which have become more common, and provide a mechanism for those types of situations to be resolved in Ontario, he added. They were passed by the government of Ontario Premier Doug Ford in July as part of Bill 161, the *Smarter and Stronger Justice Act, 2020*. The legislation received royal assent on July 8, but has not yet been proclaimed. Justice Perell applied the amendments to the decision in anticipation of the law's proclamation, said Charney.

The decision in *Karasik* also applies the Canadian Judicial Protocol for the Management of Multi-jurisdictional Class Actions and the Provision of Class Action Notice, developed by the Canadian Bar Association's Task Force on Class Actions in 2018.

The decision "is basically a forecast for how these cases from other jurisdictions will come into play when we have a certification motion here in Ontario," said Charney. "So I would commend this to anybody that practises class actions in Ontario."

The Yahoo! class action was particularly challenging, he noted, because it involved three different cyberbreaches and the defendant was a U.S.-based technology company that had sold its assets to Verizon and was in the middle of liquidation proceedings. It also included a voluminous record with six experts, eight cross-examinations in Toronto, Calgary, Montreal, New York and San Francisco, numerous motions and a representation order.

In addition, cyberbreach class action litigation remains in its infancy, said Charney, and privacy causes of action are not well developed in the law.

“Nobody has had a trial yet about intrusion upon seclusion in the context of a cyberbreach,” he told *The Lawyer’s Daily*. “There’s been a few certification motions but there’s very little of anything else in terms of developed law that would inform the types of damages that can potentially be awarded in these cases. We don’t have any substantive appellate decisions that thoroughly review cyberbreach litigation at this stage.”

Craig Dennis, a partner with Vancouver-based McEwan Partners who acted as counsel for the defendants, and Anthony Tibbs, a Regina, Sask.-based lawyer with Merchant Law Group, did not respond to requests for an interview.

If you have any information, story ideas or news tips for [The Lawyer’s Daily](#) please contact John Schofield at john.schofield@lexisnexis.ca or call 905-415-5891.