

**ONTARIO
SUPERIOR COURT OF JUSTICE**

BETWEEN:)	
)	
NATALIA KARASIK, RAHUL SURYAWANSHI and ELIE CHAMI)	
Plaintiffs)	<i>Theodore P. Charney, Caleb Edwards and K.S. Gracha for the Plaintiffs</i>
- and -)	
YAHOO! INC. and YAHOO! CANADA CO.)	
Defendants)	<i>Craig Dennis, K.C. and Mark Evans for the Defendants</i>
)	HEARD: In writing
Proceeding under the <i>Class Proceedings Act, 1992</i>)	

PERELL, J.

REASONS FOR DECISION

A. Introduction

[1] This is a certified and settled class action under the *Class Proceedings Act, 1992*.¹ Over three years ago in February 2021, I approved a \$20.3 million settlement and a \$3.0 million Class Counsel Fee.²

[2] Class Counsel are Charney Lawyers P.C. of Ontario and Garcha & Company of British Columbia. These firms were part of a consortium that included James H. Brown & Associates and Higgerty Law, which had carriage of a companion class action in Alberta. There was also an action in British Columbia in which Garcha & Company were the lawyers of record.

[3] It was an enormously contentious settlement approval motion. The Merchant Law Group, which was seeking to certify a rival class action in Saskatchewan, orchestrated a campaign to elicit Class Member opposition to the settlement in Ontario. In my Reasons for Decision, I stated at paragraph 11:

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

¹ S.O. 1992.

² *Karasik v. Yahoo! Inc.*, 2021 ONSC 1063.

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. [...] 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. [...] 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.

[4] I approved the settlement notwithstanding the opposition of the Merchant Law Group. The settlement approval, however, was conditional on the parallel proceedings, *Larocque v. Yahoo!* (in Saskatchewan), *Gill v. Yahoo!* in B.C., and *Sidhu v. Yahoo!* in Alberta being permanently stayed or dismissed.

[5] It has taken three years to satisfy the conditions of the settlement approval. Class Counsel now makes six requests; namely:

- a. approval of a second notice program to Class Members;
- b. approval of additional Class Counsel Fees;
- c. an Order that Class Counsel may come back to court seeking additional fees after the completion of the claims process.
- d. approval of the allocation of interest on the settlement funds, which have been held in trust pending the finalization of the settlement;
- e. approval of the recalculation of the levy of the Class Proceedings Fund of the Law Foundation of Ontario; and
- f. retroactive payment of Class Counsel fees of \$31,720, or \$35,843.60 after tax on account of the omission of the dockets of Andrew Eckart

B. The Notice Program and Claims Administration

[6] Given the over three year passage of time since the conditional settlement approval, RicePoint, the Settlement Administrator recommends an additional notice program of the claims process.

[7] RicePoint recommends a combination of direct email and digital media campaign for this second round of notice. RicePoint and Class Counsel have drafted a form of notice which focuses on the claims process.

[8] The program recommended by RicePoint will cost approximately \$157,480.00.

[9] This is a sensible recommendation consistent with the purposes of the *Class Proceedings Act, 1992*, and I approve the program, the notice, and the expenditure.

C. Counsel Fee

[10] In the immediate case, resolving the conditions to the settlement approval was no simple matter. Not satisfying the conditions entailed the risk for Class Counsel that the settlement would unwind, and they would receive no Counsel Fee.

[11] The pathway to payment was being blocked by the Merchant Law Group's, *Larocque*

action in Saskatchewan. It took three hearings before the Saskatchewan courts to remove that road block.

[12] In addition to their work in Saskatchewan, Class Counsel have been responding to hundreds of inquiries from Class Members and working with RicePoint in its administration of the notice plan and in its preparations for the distribution of the settlement fund.

[13] Class counsel's additional time has a value before taxes of \$246,265.14. Disbursement are is \$1,905.43.

[14] It is appropriate to apply the same multiplier that I used in the initial settlement approval decision, i.e., a multiplier of 2.0, to the additional services provided by Class Counsel.

[15] Applying this multiplier to the additional time before taxes yields a Counsel Fee of \$492,530.28.

[16] To this sum, I add \$50,000 as payment in advance for Class Counsel's responding in the future to inquiries and helping Class Members through the claims process once the second round of notice is distributed.

[17] As noted above, rather than an advance payment, Class Counsel requested an Order that it may be permitted to come back before the court to request compensation for additional time spent on the administration of the settlement. This approach is a wasteful use of scarce judicial resources. The conventional practice is for Class Counsel to estimate the future expenditures and include them when Class Counsel makes its Counsel Fee request.

[18] I, therefore, approve an additional Counsel Fee of **\$541,869.22**, all inclusive, plus disbursements of \$1,905.43 payable from the settlement fund.

D. Retroactive Fee Approval

[19] After the settlement approval motion, Class Counsel discovered that it had omitted to include in its fee request the docketed time of Andrew Eckart of \$31,720 or \$35,843.60 with tax. Class Counsel requests that this sum now be paid.

[20] Although the amount is trifling, I am not approving this request, which, in effect, is a request pursuant to Rule 59.06 of the *Rules of Civil Procedure*, which states:

Amending, Setting Aside or Varying Order

Amending

59.06 (1) An order that contains an error arising from an accidental slip or omission or requires amendment in any particular on which the court did not adjudicate may be amended on a motion in the proceeding.

[21] I have already adjudicated on the matter of Counsel's fees based on the information provided to the court. It was Class Counsel's error, and they have to wear it.

E. Interest on the Settlement Fund

[22] Under the conditionally approved settlement, the settlement fund was to be used to pay the

expenses of the administration of the settlement, the Class Proceedings Funds' levy, Class Counsel's fee, with the balance to be distributed to the Class Members.

[23] Pending the finalization of the settlement, the settlement funds have been held in trust.

[24] The settlement fund was \$ 20,325,683.58. It was invested in GICs, which will come due on May 1, 2024. The interest earned on the GICs is \$2,125,676.41.

[25] In the initial settlement approval decision, I approved a counsel fee of \$3.0 million plus \$62,713.09 in disbursements.

[26] Interest on Class Counsel's fees and disbursements amounts, on a *pro rata* basis, equals \$320,301.01.

[27] Since Class Counsel have not been paid for over three years, it is appropriate that they receive **\$320,301.01** of the interest earned on the settlement fund, and I so order.

F. Class Proceedings Fund Levy

[28] The levy of the Class Proceedings Fund needs to be recalculated.

[29] The Law Foundation is entitled to its disbursements, plus 10% of the amount to be distributed to the Class Members after payment of Class Counsel's fees and disbursements.

[30] At the time of the settlement approval hearing, the levy was determined to be \$1,629,010.20 with disbursements of \$261,174.30 for a total of \$1,890,184.50.

[31] The levy needs to be readjusted to take into account the \$2,125,676.41 increase in the settlement fund (from the investment in GIC's) less; (a) Class Counsel's share of the interest (\$320,301.01), (b) Class Counsel's additional Counsel Fee (\$541,869.22); (c) disbursements of \$1,905.43; and (d) the cost of the second notice plan (\$157,480.00). In other words, the Class Proceedings Fund is entitled to an additional \$110,412.08 (10% of \$1,104,120.75).

[32] The Fund's revised levy is \$1,739,422.28 plus disbursements of \$261,174.30 for a total levy of **\$2,000,596.58**.

G. Conclusion

[33] Orders accordingly.

Perell, J.

Released: March 13, 2024

CITATION: Karasik v. Yahoo! Inc., 2024 ONSC 1498
COURT FILE NO.: CV-16-566248-00CP
DATE: 20240313

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