Where to Draw the Line on Pre-Certification Discovery: Karasik v. Yahoo

October 09, 2019

In the recent decision of Justice Perell in *Karasik v. Yahoo Inc*., a motion by the representative plaintiffs for production of Yahoo's Canadian user database was dismissed. While Perell J. applied well-established principles in reaching this conclusion, the motion illustrates the rule that documentary production prior to certification will be limited within the confines of being proportionate, relevant and necessary to certification itself.

By way of background, in 2016 several representative plaintiffs commenced a proposed class action against Yahoo advancing privacy torts and certain statutory claims arising from large data breaches that occurred in 2013, 2014 and 2016. It was widely believed that the Russian state security service was responsible for the cyber-attacks that compromised Yahoo user accounts worldwide.

In response to the plaintiffs' certification materials, the defendants delivered several affidavits, including one sworn by an expert in information systems in response to the plaintiffs' expert evidence.

Prior to cross-examinations, the plaintiffs made 20 requests for information and documents referred to in the responding affidavits. While Yahoo delivered substantially all of the requested information, it objected to a request for the production of Yahoo's database of its 16.9 million Canadian users. The database had been provided to the defendants' expert to assist in preparing her report.

The plaintiffs brought a motion to compel production. Justice Perell set out the guiding principles that govern pre-certification documentary discovery:

1. There is no automatic right to discovery at the certification stage;
2. The onus is on the party seeking the documents to explain why the documents are relevant to the issues on certification, which is by its nature procedural and does not go to the merits of the action. Bald assertions that the documents may be relevant will not suffice;
3. At the pre-certification stage, proportionality is of particular concern, and the production must be confined to what is necessary to inform the certification hearing; and

4. A guiding principal is fairness, in that production should not be unduly burdensome, yet a party should not hold back production otherwise needed by its opponent to inform the focussed purposes of the certification hearing.

Perell J. held that the plaintiffs did not establish why the extensive database was needed to permit cross-examination of the defendants' expert. While the expert extracted information from the database to draw her conclusions, there was no suggestion that the information was inaccurate or why access to the data was necessary to allow for cross-examination on the expert's methodology. Justice Perell also noted that Yahoo had otherwise made extensive production and that the request for the database was disproportionate in the circumstances of the motion.

While the motion reasons are not extensive, or novel, the decision addresses the application of proportionality to discovery in the class actions context. In the typical litigation setting, the parties can often reach agreement on the scope of documentary production, as both sides will be subject to the same production obligations, and will also be subject to similar burdens in terms of meeting those obligations. This is not the case in class actions, where an informational asymmetry results from the fact that practically all of the relevant records are typically in the hands of the defendants. While plaintiffs should not be prejudiced by an inability to rely on documents truly relevant and necessary to meeting the test for certification, discovery should not be permitted to be used as a lever to push for settlement through imposing wide-ranging and onerous production obligations on defendants.

By

Bevan Brooksbank

Expertise

Class Action Defence, Disputes, Cybersecurity Disputes, Cybersecurity, Privacy & Data Protection

BLG | Canada's Law Firm

As the largest, truly full-service Canadian law firm, Borden Ladner Gervais LLP (BLG) delivers practical legal advice for domestic and international clients across more practices and industries than any Canadian firm. With over 800 lawyers, intellectual property agents and other professionals, BLG serves the legal needs of businesses and institutions across Canada and beyond – from M&A and capital markets, to disputes, financing, and trademark & patent registration.

blg.com

BLG Offices

Calgary

Centennial Place, East Tower
520 3rd Avenue S.W.
Calgary, AB, Canada
T2P 0R3

T 403.232.9500
F 403.266.1395

Ottawa

World Exchange Plaza
100 Queen Street
Ottawa, ON, Canada
K1P 1J9

T 613.237.5160
F 613.230.8842

Vancouver

1200 Waterfront Centre
200 Burrard Street
Vancouver, BC, Canada
V7X 1T2

T 604.687.5744
F 604.687.1415

Montréal

1000 De La Gauchetière Street West
Suite 900
Montréal, QC, Canada
H3B 5H4

T 514.954.2555
F 514.879.9015

Toronto

Bay Adelaide Centre, East Tower
22 Adelaide Street West
Toronto, ON, Canada
M5H 4E3

T 416.367.6000
F 416.367.6749

The information contained herein is of a general nature and is not intended to constitute legal advice, a complete statement of the law, or an opinion on any subject. No one should act upon it or refrain from acting without a thorough examination of the law after the facts of a specific situation are considered. You are urged to consult your legal adviser in cases of specific questions or concerns. BLG does not warrant or guarantee the accuracy, currency or completeness of this publication. No part of this publication may be reproduced without prior written permission of Borden Ladner Gervais LLP. If this publication was sent to you by BLG and you do not wish to receive further publications from BLG, you may ask to remove your contact information from our mailing lists by emailing unsubscribe@blg.com or manage your subscription preferences at blg.com/MyPreferences. If you feel you have received this message in error please contact communications@blg.com. BLG's privacy policy for publications may be found at blg.com/en/privacy.

© 2026 Borden Ladner Gervais LLP. Borden Ladner Gervais LLP is an Ontario Limited Liability Partnership.