IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *McLean v. Cathay Pacific Airways Limited,* 2021 BCSC 1456

Date: 20210726
Docket: S199228
Registry: Vancouver

Between:

James Rodney McLean

Plaintiff

And

Cathay Pacific Airways Limited

Defendant

Corrected Judgment: The front page of this judgment was corrected on August 6, 2021

Before: The Honourable Mr. Justice Kent

Reasons for Judgment

Counsel for Plaintiff:	Mathew Good Kevin McLaren Simon Lin Alexia Majidi
Counsel for Defendant:	James M. Sullivan, QC Nicole Henderson Joshua Hutchinson
Place and Date of Hearing:	Vancouver, B.C. February 12, 2021 July 12, 2021
Place and Date of Judgment:	Vancouver, B.C. July 26, 2021

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I. INTRODUCTION AND OVERVIEW

[1] On October 24, 2018, Cathay Pacific Airways Limited ("Cathay Pacific") announced a major data breach affecting up to 9.4 million passengers. As a result of this data breach, certain private information (including full names, passport numbers, credit card numbers, and other sensitive data) pertaining to Cathay Pacific's passengers was exposed including that of passengers from Canada.

[2] One of the affected Canadian passengers, Mr. James Rodney McLean, issued this class-action against Cathay Pacific seeking damages and other relief arising from the data incident disclosed by Cathay Pacific on April 24, 2018. The parties subsequently reached a settlement agreement conditional upon certification of the action as a class proceeding and Court approval of the settlement.

[3] On February 12, 2021, I issued an order certifying the action as a class proceeding for settlement purposes only, pursuant to the *Class Proceedings Act*, R.S.B.C. 1996, C. 50 ("CPA"). The parties now appear before me for approval of the

settlement agreement and an order approving the legal fees and disbursements of Class Counsel and a small honorarium payable to Mr. McLean.

[4] There are approximately 230,000 Class Members. The appropriate notices were distributed to Class Members by way of direct email (for members whose email address was known) and by newspaper publications across Canada. Only five persons objected to the settlement and 160 persons elected to opt-out of the proceeding (a total of 0.07% of the Class Members).

[5] None of the five objectors attended the application for settlement approval. Having read all of the application materials before the hearing, and after hearing submissions from counsel, I granted the approval orders sought. I stated that written reasons for judgment would follow for the benefit of the class members. These are the reasons; I have essentially adopted the submissions in the Notice of Application, with some minor modifications, because I entirely agree with them..

II. FURTHER HISTORY OF PROCEEDINGS

[6] This action was commenced on August 16, 2019, by way of a Notice of Civil Claim filed on that date. That pleading was subsequently amended on October 19, 2020.

[7] On September 15, 2020, the defendant filed its Response to Civil Claim denying all the allegations and all liability.

[8] On October 24, 2019, Madam Justice Adair of this Court was appointed as the case management judge for this proceeding. The matter was subsequently reassigned to me in February 2021.

[9] On December 6, 2019, the plaintiff delivered his Notice of Application for certification. In support of the motion, the plaintiff delivered expert reports from two subject-matter experts: Dr. Jeffrey Boase (on privacy and a methodology for determining losses); and the Honourable Anthony Rogers, Q.C. (on Hong Kong law and the report of the Hong Kong privacy commissioner into the data incident). In

addition, the plaintiff delivered an affidavit from himself, and a lengthy legal assistant affidavit including hundreds of pages of documents obtained from the defendant's records and various public sources.

[10] The parties agreed to a schedule for the delivery of certification materials.

[11] The first JMC was held on July 9, 2020. At that time, the schedule for certification was finalized, with a hearing set for February 8-12, 2021.

[12] The defendant's responding certification materials were delivered on September 15, 2020. The defendant's Application Response set out the contours of its argument against certification. The defendant also filed a lengthy and detailed affidavit from a representative of Cathay Pacific detailing internal investigations into the data incident and providing extensive information about the make-up of the Class Members that have ties to Canada.

[13] On October 15, 2020, the plaintiff delivered reply materials, including a report from the investigation into the data incident that had been released in the interim by the UK privacy commissioner. The plaintiff also amended his Notice of Civil Claim to reflect the findings in the UK report and the disclosures in Cathay Pacific's affidavit materials on certification. Along with his affidavit materials, the plaintiff delivered his written argument on certification.

[14] The plaintiff initiated settlement discussions in December 2019. Pursuant to a notice to mediate in November 2020, a mediation was held in advance of the scheduled certification hearing, after the matter had been extensively briefed and the parties were ready to proceed with the contested certification application. Simon Margolis, Q.C. was the mediator.

[15] On December 21, 2020, an agreement-in-principle was reached at the mediation and subsequently reduced to a written agreement, dated January 12, 2021 (the "Settlement Agreement").

[16] On February 12, 2021, on hearing the plaintiff's application for certification for settlement purposes, and approval of notices to the Class Members, I made an order certifying this action by consent and ordered that notices be distributed to the Class.

[17] The defendant confirmed that there are 228,766 Class Members. The defendant has email contact information for 197,682 out of the 228,766 Class Members. The notices were translated into French, Simplified Chinese, and Traditional Chinese. The notices have now been distributed by way of direct e-mail to the Class Members and by newspaper publications across Canada.

[18] At the time this application was filed, five objections had been received, and 160 opt-outs had been received out of 228,766 Class Members (0.07% of the Class Members). Counsel advised that no further objections or opt-outs were received between the date of the filing of this application and the hearing before me.

[19] As noted above, the parties now apply for settlement approval in accordance with the terms of the Settlement Agreement, along with the approval of fees, disbursements and honorarium. Approval of the Settlement Agreement is not dependent on the approval of Class Counsel fees.

[20] Under the Settlement Agreement, the defendant has agreed to pay a Settlement Amount of CAD$ 1,550,000 to resolve the litigation, without admission of liability. A compensation fund will be established and administered by Class Counsel to pay provable loss claims submitted by Class Members. The parties have proposed that the settlement amounts remaining, after compensation payments, deduction for Class Counsel fees, disbursements (including costs of notice), applicable taxes, and any honorarium to the representative plaintiff, be distributed by way of *cy-pres* donation to the Law Foundation of British Columbia as contemplated by the *Class Proceedings Act*, ss. 36 and 36.1.

[21] The $1,550,000 settlement funds have been held in trust by counsel for the defendant since January 2021 in an interest-bearing trust account, which will accrue for the benefit of the Class (if the settlement is approved).

[22] The plaintiff is now seeking approval of the settlement. The Settlement Agreement sets out a straightforward claim procedure for distribution of the settlement funds to Class Members (the "Distribution Protocol").

[23] The Law Foundation of British Columbia has provided an affidavit in support of the settlement and the *cy-pres* distribution for any funds that remain after distribution of approved claims to Class Members under the Distribution Protocol.

[24] The representative plaintiff has approved the terms of the settlement and Class Counsel's fee and disbursement request.

III. CLASS ACTION SETTLEMENT APPROVAL PRINCIPLES

[25] Under the *Class Proceedings Act,* s 35, "[a] class proceeding may be settled only with the approval of a judge" and, once approved, binds every class member "who has not opted out of or been excluded from the class proceeding".

[26] The Class Proceeding Act does not set out the test for settlement approval. However, the jurisprudence is that the court looks to whether the settlement is "fair and reasonable and in the best interests of the class as a whole". A class action settlement is not required to be perfect; rather, the settlement must "fall within a range or zone of reasonableness to be approved": C*ardozo v. Becton, Dickinson and Company*, 2005 BCSC 1612 at para. 16; *Bodnar v. The Cash Store Inc.*, 2010 BCSC 145 at para. 17.

[27] Public policy favors the settlement of complex disputes. There is a strong presumption of fairness where a settlement has been negotiated at arm's length. Experienced Class Counsel is in a unique position to assess the risks and rewards of the litigation and her/his recommendation is given considerable weight by the reviewing Court: J*ones v. Zimmer GMBH*, 2016 BCSC 1847 at para. 36

[28] The Court cannot modify the terms of a negotiated settlement. All it can do is approve or reject the settlement: *Jones v. Zimmer GMBH*, 2016 BCSC 1847 at para. 37.

[29] Canadian courts have identified 10 factors to consider when assessing the reasonableness of a settlement:

a. the likelihood of recovery, or the likelihood of success;

b. the amount and nature of discovery evidence;

c. settlement terms and conditions;

d. recommendations and experience of counsel;

e. future expense and likely duration of litigation;

f. recommendations of neutral parties, if any;

g. number of objectors and nature of objections;

h. presence of good faith and absence of collusion;

i. degree and nature of communications by counsel and the representative plaintiffs with class members during litigation;

j. information conveying to the court the dynamics of, and the positions taken by the parties during the negotiation.

Cardozo v. Becton, Dickinson and Company, 2005 BCSC 1612 at para. 17; *Jones v. Zimmer GMBH*, 2016 BCSC 1847 at para. 42

IV. APPLICATION OF THE FACTORS FOR APPROVAL IN THIS CASE

[30] The settlement in this case is fair and reasonable and in the best interests of the Class, and consistent with settlements involving similar data incidents. As set out below, the settlement falls within the “zone of reasonableness”. Public policy favours the settlement of these claims.

[31] The defendant is an air carrier whose passenger business depleted approximately 99% in the past year due to COVID-19. The defendant is domiciled in Hong Kong and the Court has been advised that it is facing significant financial challenges.

[32] As a result, there is a realistic prospect that enforcing any judgment might be a complex and costly process without any guarantee of recovery.

[33] The settlement negotiations were conducted at an arm's length and facilitated by an experienced mediator, Simon Margolis, Q.C. This Court has previously approved class action settlements that were mediated by Mr. Margolis.

[34] Mathew P Good Law Corporation, Evolink Law Group, Hammerco Lawyers LLP, and Champlain Lawyers are experienced in the specialized area of class action litigation, particularly litigation involving airlines. They have weighed the risks and benefits of continued litigation against the certainty of timely recovery established in the proposed settlement.

[35] Other relevant factors which were not foreseeable at the start of this litigation include:

a. The COVID-19 pandemic has substantially changed the litigation landscape, especially for matters that involve the travel industry. At the time of entering into the settlement, there was a real risk that the effects of COVID-19 will continue to affect the travel industry into the foreseeable future. Another court has recognized the COVID-19 pandemic as a real risk for litigation involving the travel industry, and considered this as a factor in approving settlements. Since entering into the settlement (approximately six months ago), the COVID-19 circumstances for air carriers have not improved, and appear to have worsened (*Aps v. Flight Centre Travel Group*, 2020 ONSC 6779 at paras. 35-36);

b. The case law, both in respect of certification of data breach class actions and merits trial for data breach class actions is maturing rapidly, with outsize impacts on existing cases. The Alberta Court has recently refused certification of a class action involving a data breach claim against Uber similar to this case. As noted above, the Quebec Court dismissed a data breach class action on its merits. These decisions are confirmatory of Class Counsel's risk assessment in this case; and,

c. While the recent court cases may be reversed on appeal, this change of landscape coupled with the uncertainty arising from COVID-19 substantially altered the probability that Class Members may be left out-of-pocket at the conclusion of this litigation. An early resolution, and ensuring Class Members are made whole as much as possible for their out-of-pocket losses is preferable over a protracted litigation with macro-risks that are out of the Class and Class Counsel's control.

[36] The settlement is consistent with prior settlements involving data incidents as summarized in para. 26(b) of Affidavit No 2 of S Lin. Notably, this Court recently approved a substantially identical settlement with the same distribution protocol (*Sipos v. Netlink Computer Inc.,* 2021 BCSC 183), although this settlement is a better result financially for class members than *Sipos.*

[37] The plaintiff has also submitted an affidavit in favour of the settlement being approved. I accept that affidavit evidence.

[38] There are five objections to the settlement received by Class Counsel. These objections appear to touch upon both approval of settlement and approval of fees, disbursements, and honorarium. The objections are summarized later in these reasons.

[39] This proposed settlement is not a direct *cy-pres* award situation where the funds are directly donated to charity and class members would receive no recovery. Direct *cy-pres* awards are frequently used when distribution to class members may be too costly, or if the settlement funds are too small for distribution. To be clear, this is a compensation fund settlement.

[40] After deduction of fees, disbursements, and honorarium, the remaining settlement funds in this case will be open for Class Members to submit claims pursuant to the distribution protocol (the same protocol approved in *Sipos v. Netlink Computer Inc.*, 2021 BCSC 183). If all funds are distributed to the Class Members, there will be no remittance to the Law Foundation of BC.

[41] If, and only if, any funds remain after distribution to Class Members, the plaintiff proposes that the remaining funds be remitted to the Law Foundation of British Columbia. Sections 36.1 and 36.2 of the *Class Proceedings Act* mandates that 50% of any remaining settlement funds must be donated to the Law Foundation of British Columbia.

[42] By way of the Settlement Agreement, the parties agreed that the remaining 50% also be remitted to the Law Foundation for two reasons: (1) there is uncertainty in the amount of funds that may remain, and the costs of choosing another charity may outweigh the benefits; (2) the Law Foundation of British Columbia has significant experience in allocating funds for the public interest.

[43] The factors described above strongly militate in favour of Court approval of the Settlement Agreement.

Approval of Fees, Disbursements and Honouraria

[44] Under the *Class Proceedings Act*, s. 38, "[a]n agreement respecting fees and disbursements between a solicitor and a representative plaintiff is not enforceable unless approved by the court".

[45] It has long been recognized that for class proceedings legislation to achieve its policy goals, counsel must be well rewarded for their efforts, and the contingency agreements they negotiate with clients should be respected.

[46] In *Pro-Sys Consultants Ltd. v. Infineon Technologies AG*, 2014 BSCS 1936 at para. 54, Justice Masuhara wrote:

> The considerations in approving fees should recognize not only meritorious effort in achieving a positive result but also encourage counsel to take on difficult and risky class action litigation.

[47] In *White v. Attorney General of Canada*, 2006 BCSC 561 at para. 31, Justice Cullen wrote:

> In the circumstances, counsel, in taking on the case involving a significant commitment of time and the ongoing payment of disbursements incurred a significant risk to their own economic interests, which if not adequately

> compensated for, would discourage similar willingness in the bar to take on difficult cases on such a basis in the future. In such circumstances, there is clearly the expectation of a higher fee than in a non-contingency fee basis.

[48] The factors considered in assessing whether a fee is fair and reasonable are:

a. the results achieved;

b. the risks undertaken;

c. the time expended;

d. the complexity of the matter;

e. the degree of responsibility assumed by counsel;

f. the importance of the matter to the client;

g. the quality and skill of counsel;

h. the ability of the class to pay;

i. the client and the class' expectation; and,

j. fees in similar cases.

(see, *Cardozo v. Becton, Dickinson and Company*, 2005 BCSC 1612 at para. 25, see also *Green v. Tecumseh Products of Canada Limited*, 2016 BCSC 217 at para. 57)

[49] Class counsel successfully navigated this case to the certification stage and conducted settlement negotiations with the defendant at the appropriate time, when it became apparent that COVID-19 may have a profound impact on the potential recovery for the Class. Class Counsel devoted considerable monetary and internal resources to the prosecution of the actions prior to entering into the settlement, including procuring multiple expert reports, and in-depth investigation into the defendant’s data incident.

[50] This was complicated litigation. It involved 1) the procedural complexity of class actions, 2) the cross-border nature of this class action, which involved a non-resident defendant and foreign law, 3) substantive legal complexity given the nature of the litigation and the novel cause of action being alleged (i.e., intrusion upon

seclusion is a novel cause of action that has not yet been recognized under BC law, although the BC Court of Appeal has left that door open), 4) potential causation concerns in relation to the Class Members' claims, or individual claims.

[51] Class counsel is experienced in the specialized field of class actions, particularly class actions involving airlines. Along with Justice Ward Branch of this Court, Mathew Good is co-author of the leading text *Class Actions in Canada, 2d ed*.

[52] Given the expense and complexity of this litigation, there was no feasible way that Class Members could have retained Class Counsel on a fee for service basis. The representative plaintiff has approved the fees sought.

[53] Class Counsel devoted considerable resources to this case, including funding the expert expenses and disbursements of $41,466.30. Class Counsel did not seek any third-party litigation financing in this case. In doing so, Class Counsel incurred added financial risk, but saved money for class members.

[54] Class Counsel will absorb the website development costs for www.cxdataincident.ca. Class Counsel will also be waiving their entitlement to interest on the disbursements.

[55] A contingency fee of 33.33% in a class action has frequently been held to be presumptively valid. That is the fee that Class Counsel are seeking here; *Pro-Sys Consultants Ltd. v. Infineon Technologies AG*, 2014 BCSC 1936 at paras. 53, 56; *Denluck v. The Board of Trustees for the Boilermakers ' Lodge 359 Pension Plan*, 2021 BCSC 242 at para. 42.

[56] Class Counsel invested hundreds of hours in the prosecution of this case, and is expected to spend many more hours in reviewing and adjudicating each Class Members' claims.

[57] Courts in British Columbia have long awarded honouraria to representative plaintiffs "in recognition of the effort expended on behalf of the class members". Honouraria at this stage of proceedings have typically been in the range of $3,000 to

$4,000. The amount sought here is $1,500 to recognize the representative plaintiff's contributions to the successful result: *Parsons v. Coast Capital Savings Credit Union*, 2010 BCCA 311, *Steele v. Toyota Canada Inc*, 2015 BCSC 1040, paras 37-39 *Cantlie v. Canadian Heating Products Inc*, 2015 BCSC 1225, paras 49-53

The Objections

[58] Class Counsel received a total of five objections during the opt-out period:

a. Objections relating to remitting funds to the Law Foundation of British Columbia from:

   i. Sam Chiu dated March 8, 2021 (the "**Chiu Objection"**)

   ii. Connie Wou dated March 16, 2021 (the "**Wou Objection**")

   iii. Ken Tran dated March 15, 2021 (the "**Tran Objection**")

b. Objection of Eman Galang dated April 23, 2021 (the "**Galang Objection**")

c. Objection of Cecil Lui dated April 23 and 24,2021 (the "**Lui Objection**")

[59] Class Counsel submits, and I agree, that these objections are based on misconceptions, or are otherwise without merit.

The Chiu Objection, Wou Objection, and Tran Objection

[60] The Chiu Objection consists solely of the statement "I do not agree to donate the remaining settlement funds to the Law Foundation of British Columbia." No reasons were provided why Mr. Chiu did not want the remaining funds to be donated to the Law Foundation of British Columbia.

[61] The Wou Objection, which is in Chinese, is substantially similar to the Chiu Objection. Similarly, Ms. Wou also did not provide a substantive reason why the remaining funds should not be donated to the Law Foundation of British Columbia.

[62] The Tran Objection actually voices agreement and support for: (1) the distribution of compensation; fees for Class Counsel, and fees for legal works.

However, Mr. Tran objected to donating funds to the Law Foundation of British Columbia.

[63] It appears that Mr. Chiu's, Ms. Wou's, and Mr. Tran's objections do not go to the settlement overall, or the distribution protocol. These objections relate solely to who should receive the remaining 50% of the settlement funds, if any remain. By statute, 50% of those funds must go to the Law Foundation of BC in any event. Indeed, Mr. Tran actually voiced his support for the settlement and Class Counsel fees.

[64] The present case is not a "mega-fund" case, especially when the settlement funds are actually intended to be distributed to Class Members pursuant to the distribution protocol. The *cy-pres* distribution to the Law Foundation is only in the event there are funds remaining.

[65] There is no sound reason to require the parties to go through a separate process to select another charity for distributing 50% of the remaining funds. The Law Foundation has the necessary expertise and experience, and is mandated to spend the funds in the public interest. This Court addressed a similar concern recently in *Chartrand v. Google LLC*, 2021 BCSC 7 at para 51 et seq., and found that *cy-pres* distribution to the Law Foundation is appropriate.

The Galang Objection

[66] The Galang Objection is solely in relation to Class Counsel's fees and disbursements, although not apparently to their quantum. The Galang Objection is not in relation to the settlement terms, or distribution to Class Members.

[67] Mr. Galang claims that he is a member of the Class and that he claimed having received an e-mail on March 8, 2021. However, Mr. Galang's email address e.galang@vandex.com is not on the list provided by Cathay Pacific. It is not clear if Mr. Galang is in fact a Class Member. The substance of Mr. Galang's objection will be addressed in any event.

[68] Mr. Galang's objection appears to be based on a fundamental misconception that Class Counsel has to obtain consent and approval from each and every Class Member in relation to the litigation, including obtaining instructions, and seeking consent over disbursements and fee arrangements. That is not correct.

[69] That is contrary to the purpose of class actions, which provides for the appointment of a representative plaintiff that represents the interest of the Class and makes litigation decisions for the Class. The *Class Proceedings Act* specifically contemplates that fee agreements are entered into between Class Counsel and the representative plaintiff, with Court oversight and supervision. Indeed, s. 38 of the *Class Proceedings Act* specifically refers to "agreement respecting fees and disbursements between a solicitor and a representative plaintiff."

[70] While Class Counsel is duty-bound to act in the best interest of the Class, the Class Members are not "parties" to the retainer agreement, the settlement agreement, or this Court action. This is a settled principle endorsed by the Court of Appeal:

> [13] The next question is whether class members should be treated as parties to a settlement agreement for the purpose of an appeal of a settlement order, assuming without deciding, that a party may appeal a settlement order.
>
> [14] The structure of the *CPA* draws important distinctions between the status of a representative plaintiff and class members. The representative plaintiff, on certification of the proceeding by court order, is the party with authority to conduct and control the litigation on behalf of the class. Class members, subject to defined rights and protections built into the *CPA*. Including the right to opt out of the proceeding, are bound by the decisions the representative plaintiff makes up to and including termination of the class proceeding by settlement or trial. Class members who do not opt out lose what has been described as "litigation autonomy"—the price paid to receive the benefit from a class proceeding. Generally speaking, the interests of class members are protected by the overall supervisory jurisdiction of the court. For example, a proposed settlement requires court approval.
>
> [15] Class proceedings involve trade-offs of benefits and burdens to create a balance between fairness and efficiency. Class members gain benefits such as access to justice, cost savings, and the ability to avoid duplicative proceedings and, in exchange, assume burdens including the loss of litigation autonomy if they do not opt out. As Justice Perell observed in *Berry v. Pulley*, 2011 ONSC 1378. a case involving the right of a class member to accept a settlement offer made directly to the class member by a defendant, a "litigant's

right to settle an action is taken away when he or she is a class member in a [certified] class proceeding": at para. 46. He explained the policy rationale:

> [62] ... [W]hile the *Class Proceedings Act*. 1992. S.O. 1992. C. 61 through the means of a representative action has the effect of taking away the rights of class members to settle their own claims during the communal stages of the class action, the Act uses these means in order to achieve its ends of access to justice, behaviour management and judicial economy.

[16] Generally, insofar as class members have procedural rights, those are identified and provided for in the *CPA*. For the purposes of the *CPA*, a class member is not a party. While an order approving a settlement may bind a class member who has not opted out, a class member does not have the legal status of a party in relation to the settlement or its approval by the court. It follows that a class member does not have an automatic status as a party to appeal an order approving settlement (assuming such an order is appealable under s. 6 of the *CAA*).

Coburn and Watson's Metropolitan Home, 2019 BCCA 308 leave to appeal to SCC dismissed; cited in *Home Depot of Canada Inc. v. Hello Baby Equipment Inc.*, 2020 SKCA 7 at para. 11 and *Bancroft-Snell v. Visa Canada Corporation*, 2019 ONCA 822 at para. 22

[71] A class action is not a joinder of multiple plaintiffs who are represented by the same or different counsel. The rights of Class Members have been carefully tailored in the *Class Proceedings Act* to ensure the class action regime works.

[72] In this instance, the representative plaintiff Mr. McLean has reviewed and approved Class Counsel's fee request and the disbursements. Mr. McLean acknowledged and consented to the sharing of fees between Class Counsel. This fully addresses Mr. Galang's concern that there must be client approval. The client is the representative plaintiff, the only counter-party to the retainer agreement, as contemplated in the *Class Proceedings Act* and the appellate guidance.

The Lui Objection

[73] The Lui Objection is somewhat unusual. Objectors are typically class members who come forward because they believe that the settlement may not be sufficient to cover their losses, or in other ways unfair to the objector or the Class Members.

[74] In this case, Mr. Lui raises a myriad of objections that go in different and somewhat contradictory directions, including his assertion that the settlement is

"unfair to the settling defendant" (emphasis added) and baseless claims of conflict of interest against both Mr. Sullivan, Q.C. (counsel for the defendant) and Mr. Good (co-counsel for the plaintiff).

[75] Mr. Lui is requesting this Court to dismiss the entire class action to the prejudice of the Class Members. Mr. Lui does not explain in any way how that could be in the interest of the Class Members.

[76] Most significantly, at the outset, Mr. Lui asked how he can receive $20,000 for alleged "losses" prior to the objection/opt-out deadline:

> I have a loss of about C$20,000 (rough estimate by myself) for the tort and the intentional infliction of emotional distress for Cathay Pacific's wrongdoing in the incident. How can I recover the C$20,000 for my loss before 23 April 2021?

[77] Class Counsel advised Mr. Lui to seek independent legal advice, which Mr. Lui declined to do. Mr. Lui was specifically informed that the distribution protocol does not allow claiming psychological or similar damages.

[78] Class Counsel also requested Mr. Lui to particularize the alleged $20,000 losses for this Court to fully appreciate understand the objection, but Mr. Lui also refused to provide any particulars:

> 3. My losses, as stated in my earliest email, are my 'rough estimate' then, and possibly estimated including iied. I do not have anything to add at this point. I might re-estimate IF the case is dismissed or I withdraw my objection.
>
> [emphasis in original]

[79] Mr. Lui raises seven objections in his April 24, 2021 email, which will be addressed in turn.

[80] Mr. Lui's first 3 objections deal with class size. It appears that Mr. Lui does not understand that the BC class action regime is based on an "opt-out" system for both residents and non-residents. Counsel advised the Court that this was fully explained to Mr. Lui in writing but the latter refuses to accept it.

[81] The *Class Proceedings Act* was specifically amended in 2018 to allow for an opt-out for non-residents. This class action was filed after that amendment came into force. To the extent Mr. Lui disagrees with the *Class Proceedings Act,* his objection should be directed to the lawmakers. The present class only includes Canadians and individuals who reside in Canada. This fully respects the requirement that the matter has a "real and substantial connection" to this jurisdiction. It is also consistent with other certification decisions, settlement approvals, and even constitutional challenges to the opt-out approach to certification: see *Harrington v. Dow Corning Corp.*, 2000 BCCA 605 *Sipos, supra* (worldwide settlement class); *Bergen v. WestJet Airlines Ltd.*, 2021 BCSC 12 (worldwide class); *Meeking v. Cash Store Inc. et al.*, 2013 MBCA 81 (constitutionality); *McKay v. Air Canada*, 2016 BCSC 1671 (national classes)

[82] Mr. Lui also made the assertion that the class is somehow incomplete and underinclusive, and therefore unfair. It appears Mr. Lui may have misunderstood or perhaps refused to accept the explanations provided to him by Class Counsel. The Class consists of 228,766 members. Cathay Pacific only had email addresses for 197,682 members. In other words, there were 31,084 members for whom Cathay Pacific did not have email addresses. In that sense, the email list provided by Cathay Pacific was not exhaustive, but that does not alter the composition of the Class somehow.

[83] Class Counsel distributed notices by way of direct email to the 197,682 members, posting on Class Counsel's dedicated website (www.cxdataincident.caf) and newspaper publications. This provided the Class Members an opportunity to elect whether to opt-out. The law does not require actual notice to each Class Member: see *Silver v. IMAX*, 2013 ONSC 1667 at para. 111 3113736; *Canada Ltd. v. Cozy Corner Bedding Inc.*, 2020 ONCA 235 at para. 31; *Airia Brands Inc. v. Air Canada*, 2017 ONCA 792 at para. 86.

[84] Notices by way of e-mail and newspaper publications have been accepted by courts across Canada. The email notices were clearly effective and were opened at least 168,993 times. Class Counsel also received in excess of 500 emails from Class

Members and over 100 phone calls, including objections, opt-outs, and other inquiries.

[85] Mr. Lui's 4th and 5th objections deal with an alleged conflict of interest because Mr. Sullivan, Q.C. is a Governor of the Law Foundation of British Columbia and a member of its Board of Governors. Here, it should be noted that Members of the Board of Governors of the Law Foundation are volunteers that receive no remuneration.

[86] Mr. Lui alleges that there is a conflict because the Law Foundation of BC will receive any settlement funds that remain after satisfying all of the Class Members' proven claims. The allegation is misconceived for two reasons:

a. 50% of any remaining funds must go to the Law Foundation of BC as required by s. 36.1 and 36.2 of the *Class Proceedings Act*.

b. It was Class Counsel, not Mr. Sullivan, who recommended the remaining 50% also be donated to the Law Foundation. In any event, Mr. Sullivan is an unpaid volunteer and derives no monetary benefit from this donation to the statutory public interest organization.

[87] Mr. Lui's 6th objection is that because Mr. Good worked at Blake, Cassels & Graydon LLP (solicitors for the defendant) prior to June 2017, he is somehow in a "conflict of interest". Mr. Good did indeed work at Blakes, however he left that firm in 2017 and had never worked for Cathay Pacific. This action was not filed until two years after his departure from Blakes. Mr. Lui's objection is simply unfounded speculation and has no merit.

[88] I also do not accept Mr. Lui's objection that Class Counsel's interest is not aligned with that of the class members. The settlement is a favourable outcome for the class. To the extent the objection relates to the payment of legal fees as a contingency, it is already pointed out above that such contingency fees have frequently been held to be presumptively valid.

[89] In his objection, Mr. Lui also asked to be appointed as a representative plaintiff. However, no such application has been filed and a suitable representative plaintiff has already been appointed.

[90] It should also be pointed out that Mr. Lui was provided with the necessary telephone information so that he could participate in the hearing before me. As stated earlier, Mr. Lui did not in fact appear at the hearing.

V. SUMMARY AND CONCLUSION

[91] In the result, I am satisfied that the settlement agreement between the parties is fair and reasonable in the circumstances of the case and that is also in the best interests of the class members. I therefore grant the approval order in the form attached as Schedule A to the plaintiff's Notice of Application filed June 9, 2021.

[92] I am also satisfied that counsel's fees and disbursements are fair and reasonable and that the award of a modest honorarium to Mr. McLean is appropriate. Accordingly, I grant the order in the form attached as Schedule B to the plaintiff's Notice of Application filed June 9, 2021.

"Kent J."