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Transportation Notes: Court Approves $1.5 Million Settlement of Cathay Pacific Data Breach Class Action

September 20, 2021

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In the recent decision *McLean v. Cathay Pacific Airways Limited*,[1] the Supreme Court of British Columbia approved a settlement of a class action brought against Cathay Pacific Airways Limited ("**Cathay Pacific**") for a data breach that occurred in 2018.

The Class Action

On October 24, 2018, Cathay Pacific announced that it had experienced a data breach exposing the names, passport numbers, credit card numbers, and other private information of up to 9.4 million passengers worldwide.

On August 16, 2019, James Rodney McLean commenced a Canada-wide class action against Cathay Pacific in the Supreme Court of British Columbia on behalf of approximately 230,000 Canadian residents affected by the data breach.

The Settlement Agreement

The parties entered into a written settlement agreement on January 12, 2021. The main terms of the settlement agreement are summarized below:

1. Without admitting liability, Cathay Pacific will pay $1,550,000 (the "**Settlement Funds**").
2. Using the Settlement Funds, class counsel will establish a compensation fund to pay provable loss claims submitted by class members.
3. Any Settlement Funds remaining after payment of class members' loss claims, class counsel fees, disbursements, taxes, and honorarium to the representative plaintiff McLean shall be donated to the Law Foundation of British Columbia.

The settlement agreement was contingent on the certification of the action as a class action and court approval of the settlement. Under s. 35 of the British Columbia *Class Proceedings Act*, RSBC 1996, c. 50 (the "**CPA**") a class action can only be settled with approval of a judge.

The action was certified as a class action for settlement purposes on February 12, 2021. The parties subsequently sought judicial approval of the settlement agreement.

Court Approval of the Settlement Agreement

In British Columbia, the test for approving a class action settlement is whether the settlement is "fair and reasonable and in the best interests of the class as a whole."[2] The court can only approve or reject a settlement. It cannot modify the settlement's specific terms.

Justice Kent of the Supreme Court of British Columbia identified 10 factors by which to assess the reasonableness of a settlement:

1. the likelihood of recovery, or the likelihood of success;
2. the amount and nature of discovery evidence;
3. settlement terms and conditions;
4. recommendations and experience of counsel;
5. future expense and likely duration of litigation;
6. recommendations of neutral parties, if any;
7. number of objectors and nature of objections;
8. presence of good faith and absence of collusion;
9. degree and nature of communications by counsel and the representative plaintiffs with class members during litigation;
10. information conveying to the court the dynamics of, and the positions taken by the parties during the negotiation.

Justice Kent highlighted the following factors favouring court approval of the settlement agreement:

- The settlement agreement was negotiated at arm's length (the parties were acting independently from one another) with the help of an experienced mediator and experienced counsel.
- Given recent Canadian court decisions dismissing data breach class actions, there was a risk that class members could go through years of litigation only to have their case against Cathay Pacific dismissed. By contrast, an early out-of-court settlement would allow class members to recoup at least some of their losses.
- Cathay Pacific's passenger business had depleted approximately 99% over the past year due to the COVID-19 pandemic. Without a voluntary settlement, class members might not be able to enforce any judgment that they might obtain against the air carrier.

Objections to the Settlement

Only five class members raised objections to the settlement agreement.

Three of those objections were to the term of the settlement agreement that leftover Settlement Funds would be donated to the Law Foundation of British Columbia. Justice Kent disagreed with this objection, noting that, in any event, ss. 36.1 and 36.2 of the CPA requires 50% of remaining settlement funds to be donated to the Law Foundation of British Columbia. The objecting class members had provided no sound reason why the parties should be put to the expense of choosing another charity to donate the other 50% of remaining Settlement Funds when the Law Foundation already had the necessary expertise, experience, and mandate to use any donated funds in the public interest.

Justice Kent found that the objections raised by the other two objecting class members were based on misconceptions of the British Columbia class actions regime. He rejected arguments that class counsel was required to obtain approval of legal fees and disbursements from each class member, that the class was underinclusive because it only included Canadian residents, and that counsel for the parties were in a conflict of interest because of their volunteer work or previous employment.

Concluding that it was fair, reasonable, and in the best interests of the class members, Justice Kent granted an order approving the settlement agreement.

[1] 2021 BCSC 1456.

[2] 2021 BCSC 1456 at para 26.

The information and comments herein are for the general information of the reader and are not intended as advice or opinion to be relied upon in relation to any particular circumstances. For particular application of the law to specific situations, the reader should seek professional advice.

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