Federal Court of Appeal | Cour d'appel fédérale

Date: 20230816

Docket: A-138-21

Citation: 2023 FCA 176

CORAM: **GLEASON J.A.**
WOODS J.A.
LASKIN J.A.

BETWEEN:

DORA BERENGUER

Appellant

and

SATA INTERNACIONAL - AZORES AIRLINES, S.A.

Respondent

Heard by online video conference hosted by the registry on November 23 and 24, 2022.

Judgment delivered at Ottawa, Ontario, on August 16, 2023.

REASONS FOR JUDGMENT BY: WOODS J.A.

CONCURRED IN BY: GLEASON J.A.
LASKIN J.A.

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REASONS FOR JUDGMENT

WOODS J.A.

[1] The appellant commenced a proposed class action in the Federal Court seeking relief for herself and other passengers of a foreign airline who experienced flight delays on flights to or from Canada. The action was dismissed on the basis of preliminary motions (2021 FC 394) and the appellant has appealed to this Court.

[2] The respondent, SATA Internacional – Azores Airlines, S.A., is a Portuguese airline that operates passenger flights to and from various cities in Canada. Its main hub is at Ponta Delgada, Azores, Portugal.

[3] The appellant, Dora Berenguer, is a resident of Alberta. In 2017, the appellant was a passenger on one of the respondent's flights from Toronto to Ponta Delgada. The appellant claims to be entitled to compensation in the amount of 600 euros due to a delay in the flight of more than four hours.

[4] The appellant alleges that her entitlement to compensation stems from the contract of carriage. She claims that the contract incorporates terms in relation to flight delay that are in a regulation of the European Union: Regulation (EC) No. 261/2004 of the European Parliament and the Council of the European Union [EU 261].

I. The motions in the Federal Court

[5] Two motions were brought before Lafrenière J. of the Federal Court.

[6] In one, the appellant moved for an order to certify the action as a class proceeding pursuant to r. 334.16 of the *Federal Courts Rules*, S.O.R./98-106 [Rules]. The Federal Court dismissed the motion on the basis that the appellant failed to satisfy the five required conditions in r. 334.16(1). Two were not satisfied at all: the amended statement of claim did not disclose a reasonable cause of action, and the class action was not the preferred procedure. In addition, the

Court found that some of the proposed common issues failed to satisfy the commonality requirement.

[7] In the other motion, the respondent moved to have the amended statement of claim struck out without leave to amend pursuant to r. 221(1)(a) of the Rules on the ground that it failed to disclose a reasonable cause of action. The Federal Court granted this motion on two grounds. First, it determined that the action was doomed to fail because the Federal Court lacked jurisdiction to hear the matter. Second, it determined that the claim, which is for fixed compensation without proof of damage, was barred by the *Montreal Convention*, an international treaty having the force of law in Canada by virtue of the *Carriage by Air Act*, R.S.C. 1985, c. C-26.

[8] Accordingly, the motions judge granted the motion to strike out the amended statement of claim without leave to amend and dismissed the motion to certify the action as a class proceeding. The appellant has appealed to this Court on both aspects of the decision.

II. Amended statement of claim

[9] This section summarizes the relevant allegations in the amended statement of claim.

[10] The appellant claims that in 2017 she was on one of the respondent's flights from Toronto to the Azores. The flight arrived more than four hours after the scheduled arrival time.

[11] The appellant pleads that EU 261 provides for standardized levels of compensation for circumstances that include flight delays where the delay is not due to extraordinary circumstances.

[12] The appellant claims that the respondent incorporated this regulation into its contracts of carriage for passenger flights to and from Canada and has contractually agreed to apply EU 261 in the event of long flight delays.

[13] In support of this allegation, the pleading claims that the current contract of carriage applicable to passenger flights to and from Canada provides:

> Applicable to / from Canada, the carrier fully complies EC Regulation 261/2004 dated 11th February 2004, published in 17th February 2005, in what concerns rules for indemnity and assistance to passengers in case of denied boarding and cancellation or considerable flight delays.

[14] The appellant alleges that she demanded compensation from the respondent for the flight delay in accordance with EU 261. She claims she did not receive the compensation as required under the contract of carriage.

[15] The claim is filed on behalf of a proposed class of members (Class Members) consisting of:

> … all individuals anywhere in the world who, from August 14, 2012, have travelled on an aircraft (or two aircrafts in the case of direct connections) operated by [the respondent] (including those where [the respondent] maintains

> commercial control) to and/or from Canada and arrived at the final destination more than three hours after the scheduled arrival time, but excluding individuals who already received full cash compensation from [the respondent] in accordance with EU 261/2004.

[16] The claim asserts that Class Members are in similar or identical circumstances to the appellant.

[17] The appellant claims that the express provisions of EU 261 do not require a Class Member to make a demand directly to the respondent or to file a complaint with the aviation regulators before being entitled to receive compensation.

[18] The relief sought includes:

1. a declaration that the Defendants breached the express and/or implied terms of their contract of carriage to pay cash compensation in accordance with EU 261/2004;

2. an Order that the Defendants pay compensation to each Class Member in the form of standardized and/or liquidated damages of:

    i. 300 euros for delay of more than three hours but less than four hours in arriving at the Class Member's final destination; and

    ii. 600 euros for delay of more than four hours in arriving at the Class Member's final destination;

3. an Order pursuant to Rule 334.28(1) and (2) for the aggregate assessment of monetary relief, conversion to Canadian currency as of the time of trial, and such distribution to the Plaintiff and members of the Class.

III. Issues and standard of review

[19] The appeal engages three issues:

1. Did the Federal Court err in concluding that the pleading should be struck out for lack of jurisdiction?

2. Did the Federal Court err in concluding that the pleading should be struck out because the claim is barred by the *Montreal Convention*?

3. Did the Federal Court err in concluding that the conditions for certification as a class proceeding were not satisfied?

[20] The issues are subject to appellate standards of review as set out in *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235. Determinations of fact and mixed fact and law are entitled to deference and attract the palpable and overriding error standard of review. Determinations of law (including extricable legal questions) are subject to correctness review.

[21] The next section briefly outlines principles relating to a motion to strike out a pleading.

IV. Applicable principles regarding striking out pleadings for failure to disclose a reasonable cause of action

[22] Rule 221(1)(a) provides that a pleading may be struck out for failure to disclose a reasonable cause of action:

221 (1) On motion, the Court may, at any time, order that a pleading, or anything contained therein, be struck out, with or without leave to amend, on the ground that it	**221 (1)** À tout moment, la Cour peut, sur requête, ordonner la radiation de tout ou partie d'un acte de procédure, avec ou sans autorisation de le modifier, au motif, selon le cas :
(a) discloses no reasonable cause of action or defence, as the case may be,	**a)** qu'il ne révèle aucune cause d'action ou de défense valable;
. . .	. . .

[23] Rule 221(1)(a) is a high bar. To strike out a pleading on this basis, it must be plain and obvious that the pleading fails to disclose a reasonable cause of action (*Nevsun Resources Ltd. v. Araya*, 2020 SCC 5, [2020] 1 S.C.R. 166 at para. 64 [*Nevsun*]; *R. v. Imperial Tobacco Canada Ltd.*, 2011 SCC 42, [2011] 3 S.C.R. 45 at para. 17).

[24] The Supreme Court has held that Rule 221(1)(a) may be applied if it is plain and obvious that the Federal Court lacks jurisdiction to hear a matter (*Windsor (City) v. Canadian Transit Co.*, 2016 SCC 54, [2016] 2 S.C.R. 617 at para. 24 [*Windsor*]).

[25] More generally, in a motion under r. 221(1)(a) the facts as pleaded are assumed to be true except to the extent that they are "manifestly incapable of being proven" (*Nevsun* at para. 64).

[26] In addition, the Court may not rely on any evidence (r. 221(2)), except where the evidence concerns a question of jurisdiction. This Court has recognized that evidence may be considered for purposes of Rule 221(1)(a) if the issue concerns a jurisdictional question (*MIL Davie Inc. v. Société d'Exploitation et de Développement d'Hibernia Ltée* (1998), 226 N.R. 369, 85 C.P.R. (3d) 320 at paras. 7-8 (F.C.A.)).

V. Issue 1 – Did Federal Court err in concluding that the pleading should be struck out for lack of jurisdiction?

[27] The appellant suggests that the Federal Court erred when it concluded that it is plain and obvious that the Federal Court has no jurisdiction to hear this matter.

[28] This Court has applied the standard of correctness to this issue (*Pembina County Water District v. Manitoba (Government)*, 2017 FCA 92 at para. 35, 409 D.L.R. (4th) 719).

A. *Applicable legal principles regarding jurisdiction*

[29] The scope of the Federal Court's jurisdiction has been considered by the Supreme Court in several decisions. The most relevant in this appeal are *Quebec North Shore Paper Co. v. Canadian Pacific Ltd.* (1976), [1977] 2 S.C.R. 1054, 9 N.R. 191 [*Quebec North Shore*]; *McNamara Construction (Western) Ltd. v. The Queen*, [1977] 2 S.C.R. 654; *Rhine v. The Queen*, [1980] 2 S.C.R. 442 [*Rhine*]; *ITO-Int'l Terminal Operators v. Miida Electronics*, [1986] 1 S.C.R. 752 at p. 766, 28 D.L.R. (4th) 641 [*ITO*]; and, most recently, *Windsor*.

[30] I would also note two decisions of this Court which provide a good summary of the relevant law: *Peter G. White Management Ltd. v. Canada (Minister of Canadian Heritage)*, 2006 FCA 190 [*Peter G. White*] and *744185 Ontario Incorporated v. Canada*, 2020 FCA 1 [*Air Muskoka*].

[31] As a result of this jurisprudence, the following principles are well established:

> (a) Jurisdiction is subject to a three part test commonly known as the ITO test: (1) Does a statute grant jurisdiction to the Court? (2) Is there an existing body of federal law that nourishes the grant of jurisdiction and is essential to the disposition of the case? (3) Is the case based on a valid law of Canada (*ITO*).
>
> (b) For purposes of applying step 1 of the ITO test to s. 23 of the Federal Courts Act, the action must be created or recognized under federal law (*Windsor*).
>
> (c) For purposes of applying step 2 of the ITO test to a breach of contract claim, the test may be satisfied if there is a sufficiently detailed federal regulatory scheme that applies to the contract (*Rhine*).

[32] The *Windsor* decision adds a further principle but it is not controversial in this case. The majority in *Windsor* cautioned that the ITO test is to be applied to the "essential nature of the claim" regardless of how the claim is framed in the pleading. In this case, it is clear that the claim as framed in the pleading is the same as the claim's essential nature. The claim is for breach of contract.

[33] I now turn to the ITO test, beginning with statutory grant of jurisdiction.

B. *Step 1 - Statutory grant of jurisdiction*

(1) Section 23 of *Federal Courts Act*

[34] The jurisdiction of the Federal Court is statutory. As such, the statutory basis for jurisdiction must be identified. In this case, the jurisdiction question rests on s. 23 of the *Federal*

Courts Act, R.S.C. 1985, c. F-7. As set out below, s. 23 applies to specific subject matters listed in (a) – (c):

23 Except to the extent that jurisdiction has been otherwise specially assigned, the Federal Court has concurrent original jurisdiction, between subject and subject as well as otherwise, in all cases in which a claim for relief is made or a remedy is sought under an Act of Parliament or otherwise in relation to any matter coming within any of the following classes of subjects:	**23** Sauf attribution spéciale de cette compétence par ailleurs, la Cour fédérale a compétence concurrente, en première instance, dans tous les cas — opposant notamment des administrés — de demande de réparation ou d'autre recours exercé sous le régime d'une loi fédérale ou d'une autre règle de droit en matière :
(a) bills of exchange and promissory notes, where the Crown is a party to the proceedings;	**a)** de lettres de change et billets à ordre lorsque la Couronne est partie aux procédures;
(b) aeronautics; and	**b)** d'aéronautique;
(c) works and undertakings connecting a province with any other province or extending beyond the limits of a province.	**c)** d'ouvrages reliant une province à une autre ou s'étendant au-delà des limites d'une province.

[35] The Federal Court determined (at para. 41) that the claim falls within (b) aeronautics, or (c) works and undertakings. It was not more specific on the issue. It is clear that the claim falls within one or both of these subject matters. As nothing turns on this in this appeal, it does not merit further discussion.

[36] The dispute centres on a different aspect of s. 23: whether the "claim for relief is made or a remedy is sought under an Act of Parliament or otherwise." Determining the meaning of this phrase is difficult, as illustrated by the split decision of the Supreme Court (5-4) in *Windsor*.

[37] The majority in *Windsor* described that the issue in that case was whether it is sufficient that the claim is "in relation to" a federal statute (*Windsor* at para. 49). The majority concluded that this is not sufficient as it does not give effect to the words "is sought under an Act of Parliament or otherwise" (*Windsor* at paras. 51-52). Instead, the majority concluded that "the claimant's *cause of action*, or the right to seek relief, must be created or recognized by [federal law]" (*Windsor* at para. 41; emphasis in original).

[38] Three of the minority judges in *Windsor* favoured a broader interpretation of this phrase: "It is sufficient if the relief sought is intimately related to rights and obligations conferred by an Act of Parliament, even if the relief ultimately flows from a different legal source" (*Windsor* at para. 94).

[39] The question in this case is whether the claim falls within the "created or recognized" test adopted by the majority.

(2) Application of s. 23

[40] The appellant submits that the claim is created or recognized under federal law because the claim is based on the terms and conditions of carriage, which are federally regulated as a tariff.

[41] It is useful to remember that, although the Federal Court's decision is reviewed on a standard of review is correctness, this is not a decision on the merits and the plain and obvious

test applies to the preliminary motion (*Windsor* at para. 24). As explained below, I conclude that the claim satisfies step 1 of the ITO test on the plain and obvious standard because there is a good argument that the claim is "recognized" under federal law.

[42] At the time of the appellant's alleged flight delay in 2017, the relevant contract of carriage was subject to regulation under the *Canada Transportation Act*, S.C. 1996, c. 10 [CTA] and the *Air Transportation Regulations*, S.O.R./88-58 [Regulations]. The regulatory scheme was amended in 2019, but the amendments are not relevant to the appellant's claim and will not be discussed.

[43] Under the applicable regulatory scheme in the CTA, the Canadian Transportation Agency [Agency] issues licences for scheduled international air service. The licences may be subject to terms and conditions on specified matters which include "tariffs, fares and carriage of passengers" (CTA, ss. 69(1), 71(1)). The term "tariff" means a schedule containing the terms of the contract of carriage (CTA, s. 55(1)).

[44] The CTA also authorizes the Agency to make regulations, including regulations respecting the terms and conditions of carriage (CTA, s. 86(1)(h)). Clause 122(c)(v) of the Regulations, as it read at the relevant time, required the tariff to state the carrier's policy regarding flight delays. It read:

122 Every tariff shall contain	**122** Les tarifs doivent contenir :
. . .	. . .

(c) the terms and conditions of carriage, clearly stating the air carrier's policy in respect of at least the following matters, namely,	**c)** les conditions de transport, dans lesquelles est énoncée clairement la politique du transporteur aérien concernant au moins les éléments suivants :
. . .	. . .
(v) failure to operate the service or failure to operate the air service according to schedule,	**v)** l'inexécution du service aérien ou le non-respect de l'horaire prévu pour le service aérien,
…	**…**

[45] The tariff is required to be filed with the Agency (Regulations, s. 110(1)). Importantly, s. 110(4) of the Regulations requires the carrier to apply the terms and conditions specified in the tariff:

110 (4) Where a tariff is filed containing the date of publication and the effective date and is consistent with these Regulations and any orders of the Agency, the tolls and terms and conditions of carriage in the tariff shall, unless they are rejected, disallowed or suspended by the Agency or unless they are replaced by a new tariff, take effect on the date stated in the tariff, and *the air carrier shall on and after that date charge the tolls and apply the terms and conditions of carriage specified in the tariff*. [Emphasis added.]	**110 (4)** Lorsqu'un tarif déposé porte une date de publication et une date d'entrée en vigueur et qu'il est conforme au présent règlement et aux arrêtés de l'Office, les taxes et les conditions de transport qu'il contient, sous réserve de leur rejet, de leur refus ou de leur suspension par l'Office, ou de leur remplacement par un nouveau tarif, prennent effet à la date indiquée dans le tarif, et *le transporteur aérien doit les appliquer à compter de cette date*. [Emphasis added.]

[46] The amended statement of claim alleges that the contract of carriage provides for the compensation that the appellant seeks. The parties do not dispute that this allegation is assumed to be true for purposes of the motion.

[47] By requiring the carrier to comply with the terms and conditions specified in the tariff, it is arguable that the Regulations recognize the contractual obligations of the carrier to passengers. Since these obligations are pleaded as including the compensation that the appellant seeks, it is not plain and obvious that the Regulations do not recognize the appellant's claim.

[48] The Federal Court rejected this view, noting that the Court had already decided the issue in *Donaldson v. Swoop Inc.*, 2020 FC 1089 [*Donaldson*]. The motions judge followed this decision for reasons of judicial comity and noted that it was not manifestly wrong (reasons at para. 60). *Donaldson* is discussed below.

[49] Ms. Donaldson sought certification of a class action against major Canadian airlines for failure to provide refunds for contracts that were frustrated by the COVID-19 pandemic. As in this case, one of the arguments was that s. 23 grants jurisdiction to the Federal Court by virtue of the regulatory scheme in the CTA.

[50] The motions judge in *Donaldson* did not consider the regulatory scheme for air transportation in any detail. Instead, the judge relied on an inference drawn from a provision dealing with railway transportation in the CTA. Subsection 116(5) of the CTA provides a cause of action to an "aggrieved" person if a railway fails to comply with service obligations. These are

obligations created by statute and are separate from a railway's tariff (CTA, Division IV, Rates, Tariffs and Services).

[51] *Donaldson* cites a reference to s. 116(5) in *Windsor* (at paragraph 54):

> … Other federal causes of action that might satisfy s. 23 include … the *Canada Transportation Act*, S.C. 1996, c. 10, s. 116(5) (a person "aggrieved by any neglect or refusal of a company to fulfil its service obligations has . . . an action for the neglect or refusal against the company").

[52] The judge in *Donaldson* made an inference regarding jurisdiction from s. 116(5): "There is a clear difference between the air carrier and railway sections, signaling the legislator's intent to only extend jurisdiction to the latter. … Both forms of transportation have tariffs, but only one recognizes an independent cause of action." (*Donaldson* at paras. 44-45).

[53] By comparing the air carrier and railway sections, the Court appears to conclude that s. 116(5) applies to railway tariffs. This is not the case, as Division IV of the CTA makes clear. Subsection 116(5) only applies to obligations created by statute and does not extend to tariffs.

[54] Another concern with the reasoning in *Donaldson* is that s. 116(5) does not on its face deal with jurisdiction. It simply provides a cause of action. In my view, there is no reason to conclude that Parliament was motivated by jurisdictional concerns in enacting this provision.

[55] I conclude that the Court in *Donaldson* erred when it concluded that s. 116(5) of the CTA implies there is a general scheme for jurisdiction of courts in the CTA.

[56] It is convenient to mention here the reason that the majority in *Windsor* referred to s. 116(5) of the CTA. The Court referred to this provision as an example of a possible cause of action that satisfies s. 23 of the *Federal Courts Act*. Subsection 116(5) does this by creating a cause of action. However, the Supreme Court cited this as an example that might satisfy s. 23. There is no reason to think that the Supreme Court's reference to s. 116(5) was intended to be more than this. The majority did not limit the application of s. 23 to actions that are created under federal law. It also includes actions that federal law recognizes.

[57] For these reasons, I conclude that it is not plain and obvious that step 1 of the ITO test is not satisfied.

C. *Step 2 – Federal body of law*

[58] In *Quebec North Shore*, the Supreme Court determined that s. 101 of the *Constitution Act, 1867* is relevant to the interpretation of s. 23 of the *Federal Courts Act*. Accordingly, the jurisdiction of the Federal Court must relate to the administration of the laws of Canada. Step 2 of the ITO test speaks to this: there must be an existing body of federal law which is essential to the disposition of the case and which nourishes the statutory grant of jurisdiction. The term "essential" was described by the majority in *Windsor* (at paragraph 69) as providing a high bar.

[59] The Federal Court concluded that step 2 is not satisfied because the appellant's claim is sourced in contract law and EU 261, not federal law (reasons at paras. 61, 63).

[60] However, this conclusion does not take into account the Supreme Court's decision in *Rhine*. It determined that contractual claims may, in certain circumstances, satisfy the step 2 requirement. The general principles are stated in *Peter G. White*, at paragraphs 59-60:

> […] the fact that a plaintiff's cause of action is in tort or contract does not necessarily preclude the matter from federal jurisdiction. Contract and tort, Laskin C.J. said in *Rhine v. The Queen; Prytula v. The Queen*, 1980 CanLII 220 (SCC), [1980] 2 S.C.R. 442, at page 447 "cannot be invariably … deemed to be, as common law, solely matters of provincial law."
>
> . . .
>
> […] when parties' rights arise under and are extensively governed by "a detailed statutory framework", disputes may be adjudicated in the Federal Court: *Rhine and Prytula.* The difficulty with applying this principle is to know how comprehensive the federal legislation must be in order to constitute a "detailed" framework.

[61] This test, if satisfied, will be sufficient to satisfy step 2 of the ITO test. As mentioned, step 2 is a high bar (*Windsor* at para. 69), but it must be remembered that the plain and obvious standard applies. In my view, the regulatory scheme in this case is sufficiently detailed to meet this standard.

[62] Under the CTA, the Agency issues licences for scheduled international air service and the licences may be subject to terms or conditions on specified matters which include tariffs (CTA, ss. 69(1), 71(1)).

[63] Pursuant to ss. 110(1) and 110(4) of the Regulations, the air carrier's tariff is to be filed with the Agency and the carrier "shall … charge the tolls and apply the terms and conditions of carriage specified in the tariff." Further, the tariff must set out the carrier's policy in respect of

flight delays and the terms and conditions must be fair and reasonable (Regulations, ss. 122(c)(v), 111(1)).

[64] In general, the CTA has "considerable power and discretion over carriers." (reasons at para. 120). Accordingly, it is reasonably arguable that the degree to which the CTA and the Regulations govern the contracts of carriage is sufficient to satisfy the plain and obvious test with respect to step 2 of the ITO test.

[65] In addition to the regulatory scheme, the appellant submits that the *Carriage by Air Act* is an additional federal law that enhances step 2. As discussed in the next section relating to the *Montreal Convention*, the appellant's claim can succeed only if the action is not barred by the Convention, which has the force of law by virtue of the *Carriage by Air Act*. I agree with the appellant that this law is essential to the disposition of the action and nourishes the grant of jurisdiction.

[66] For these reasons, I conclude that it is not plain and obvious that step 2 of the ITO test is not satisfied.

D. *Step 3 – Valid law of Canada*

[67] Finally, the ITO test requires that "the law on which the case is based must be 'a law of Canada' as the phrase is used in s. 101 of the *Constitution Act, 1867*" (*Windsor* at para. 34). Put

another way, the law must be constitutionally valid. This test is satisfied. It is not plain and obvious that any federal law that is relevant in this case is constitutionally invalid.

E. *Conclusion*

[68] For the reasons above, I conclude that the amended statement of claim is not doomed to fail for lack of jurisdiction in the Federal Court.

VI. Issue 2 – Did Federal Court err in concluding that the pleading should be struck out because the claim is barred by the *Montreal Convention*?

[69] The Federal Court provided another reason to strike out the amended statement of claim. It concluded that it is plain and obvious that the claim will fail because it is barred by the *Montreal Convention*.

[70] This issue primarily involves statutory interpretation and therefore is subject to review on the standard of correctness (*TELUS Communications Inc. v. Wellman*, 2019 SCC 19, [2019] 2 S.C.R. 144 at para. 30).

[71] Articles 19 and 29 of the *Montreal Convention* are central to this issue.

Article 19	Article 19
The carrier is liable for damage occasioned by delay in the carriage by air of passengers, baggage or cargo. Nevertheless, the carrier shall not be liable for damage occasioned	Le transporteur est responsable du dommage résultant d'un retard dans le transport aérien de passagers, de bagages ou de marchandises. Cependant, le transporteur n'est pas

by delay if it proves that it and its servants and agents took all measures that could reasonably be required to avoid the damage or that it was impossible for it or them to take such measures.	responsable du dommage causé par un retard s'il prouve que lui, ses préposés et mandataires ont pris toutes les mesures qui pouvaient raisonnablement s'imposer pour éviter le dommage, ou qu'il leur était impossible de les prendre.
Article 29	Article 29
In the carriage of passengers, baggage and cargo, any action for damages, however founded, whether under this Convention or in contract or in tort or otherwise, can only be brought subject to the conditions and such limits of liability as are set out in this Convention without prejudice to the question as to who are the persons who have the right to bring suit and what are their respective rights. In any such action, punitive, exemplary or any other non-compensatory damages shall not be recoverable.	Dans le transport de passagers, de bagages et de marchandises, toute action en dommages-intérêts, à quelque titre que ce soit, en vertu de la présente convention, en raison d'un contrat ou d'un acte illicite ou pour toute autre cause, ne peut être exercée que dans les conditions et limites de responsabilité prévues par la présente convention, sans préjudice de la détermination des personnes qui ont le droit d'agir et de leurs droits respectifs. Dans toute action de ce genre, on ne pourra pas obtenir de dommages-intérêts punitifs ou exemplaires ni de dommages à un titre autre que la réparation.

[72] The Federal Court determined that Articles 19 and 29 limit a claim for damages for flight delay to the actual damages incurred (reasons at para. 66). The motions judge stated that since the appellant does not allege that actual damages were sustained, the claim is barred by the Convention.

[73] At the hearing, the appellant raised several arguments in support of its view that the *Montreal Convention* does not bar the claim. It is likely that these issues raise sufficient doubt on the issue that it is not plain and obvious that the claim is barred.

[74] However, a decision of this Court released after the appeal was heard makes it clear that the Federal Court erred in finding that the claim was doomed to fail because of the Convention: *International Air Transport Association v. Canadian Transportation Agency*, 2022 FCA 211 [*IATA*], leave to appeal to SCC requested, file no. 40614.

[75] *IATA* concerns air passenger rights regulations that deal with flight delays. They came into force in 2019. The issue before the Court was whether this law is contrary to the *Montreal Convention*. In a decision written by de Montigny J.A., this Court determined that the Convention does not prohibit Canada from introducing laws that provide standardized compensation for flight delays.

[76] In the course of its detailed reasons, the Court considered the impact of the Convention on a claim for breach of contract relating to obligations under the regulations. The Court concluded that the claim would not run afoul of the Convention (*IATA* at paras. 133, 135-141).

[77] The relevant point about the *IATA* decision is that it makes it clear that the Federal Court erred in striking out the pleading on the basis of the *Montreal Convention*. It cannot be said that it is plain and obvious that the *Montreal Convention* bars the appellant's claim.

[78] As a result of my findings on the first two issues, I conclude that the Federal Court erred in striking out the pleading on the basis that it did not disclose a reasonable cause of action. The pleading should not have been struck out on this basis.

VII. Issue 3 – Did the Federal Court err in concluding that the conditions for certification as a class proceeding were not satisfied?

[79] The appellant moved for certification of the action as a class proceeding.

[80] The Class Members proposed by the appellant are:

> … all individuals anywhere in the world who, from August 14, 2012, have travelled on an aircraft (or two aircrafts in the case of direct connections) operated by [the respondent] (including those where [the respondent] maintains commercial control) to and/or from Canada and arrived at the final destination more than three hours after the scheduled arrival time, but excluding individuals who already received full cash compensation from [the respondent] in accordance with EU 261/2004.

[81] The specific reach of the proposed class action is not known at this point, but it is likely to be very wide, encompassing hundreds of flights and their passengers residing anywhere in the world, as long as the relevant aircraft were operated by the respondent on a flight to and/or from Canada.

[82] Rule 334.16 prescribes five criteria that must be met to obtain an order of certification. They are:

1. The pleadings disclose a reasonable cause of action.

2. There is an identifiable class of two or more persons.

3. The claims of the class members raise common questions of law or fact.

4. A class proceeding is the preferable procedure for the just and efficient resolution of the common questions.

5. There is an appropriate representative plaintiff.

[83] The Federal Court considered each requirement and determined that the proposed class proceeding did not satisfy two of them: that the pleading disclose a reasonable cause of action, and that the action be the preferable procedure to resolve common issues.

[84] The appellant submits that the Federal Court erred on both findings. As for whether the pleading discloses a reasonable cause of action, the conclusion on this in the context of the respondent's motion to strike out the pleading is equally applicable to this certification requirement. The legal test is the same (*Brake v. Canada (Attorney General)*, 2019 FCA 274 at para. 54). Accordingly, the only outstanding issue is whether the Federal Court erred when it concluded that the class action was not the preferable procedure for the just and efficient resolution of the common issues.

[85] The motions judge concluded that there is a preferable procedure through the Agency's "informal facilitation process and formal adjudicative process" (reasons at para. 117).

[86] This finding should not be interfered with unless there is an error in principle or a palpable and overriding error (*AIC Limited v. Fischer*, 2013 SCC 69, [2013] 3 S.C.R. 949 at para. 65 [*AIC*]; *Canada (Attorney General) v. Jost* 2020 FCA 212 at para. 21). There is no such error in this case.

[87] The Federal Court determined that the preferability condition was not satisfied because the appellant relied on unsatisfactory evidence consisting of speculation and conjecture (reasons at paras. 116-118). The appellant submits that the Court should have determined that the respondent did not satisfy its burden of proof.

[88] Both parties bear an evidentiary burden on this issue. The Federal Court noted the correct test from *AIC* (reasons at para. 111). The respondent has an evidentiary burden to raise a preferable option. This must be supported by some evidence. If the respondent's burden is satisfied, the burden then remains with the appellant to establish some basis in fact for the preferability criterion.

[89] The appellant submits that the respondent did not satisfy its burden to raise the Agency as a preferable procedure because it did not lead evidence as to the "nature or efficacy" of the Agency's procedures. However, the burden is not on the respondent to establish that this procedure is preferable. Its burden was just to provide some evidence about the preferability of the suggested alternative (reasons at para. 111).

[90] In this case, it was open to the Federal Court to have found the respondent's evidentiary burden was satisfied by evidence which describes the applicable legislative scheme, especially when one considers that the appellant tendered no evidence on the question of preferability. It was also open to the Federal Court to consider the legislative and regulatory provisions applicable to the Agency in assessing preferability. The motion judge's reasons make it clear that

he took these provisions into account in his decision (reasons at para. 120). I see no reason to require further evidence from the respondent.

[91] The appellant also submits that the Federal Court failed to consider two decisions of the Agency which suggest that the Agency may refuse to hear a claim that relates to foreign law (Decision No. 18-C-A-2019 at para. 10; Decision No. 10-C-A-2014 at paras. 99-102, 112-113). In my view, these decisions do not assist the appellant.

[92] In the 2014 decision, the Agency stated that it could not consider a claim made under EU 261. However, the appellant's claim is under the contract of carriage, not EU 261. The most that can be said is that EU 261 is relevant to the disposition of the appellant's claim. The claim is not made under that law.

[93] In the 2019 decision, the Agency stated that it would not require British Airways to incorporate the provisions of EU 261 in its tariff. There is no reason to think that this decision has any bearing on whether the Agency would facilitate or adjudicate a claim that does incorporate EU 261 in the carrier's tariff.

[94] Accordingly, there is no reversible error in the Federal Court's determination that the preferable procedure requirement in r. 334.16 is not satisfied.

VIII. Conclusion

[95] In the result, I conclude that:

1. The Federal Court erred in concluding that it was plain and obvious that the pleading did not disclose a reasonable cause of action.

2. The Federal Court did not err in concluding that the requirements for certification were not satisfied.

[96] Therefore, I would allow the appeal and set aside the Federal Court's order to the extent that it struck out the amended statement of claim.

[97] I would not award costs as none were sought.

"Judith Woods"
J.A.

"I agree.
Mary J.L. Gleason J.A."

"I agree.
J.B. Laskin J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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