Federal Court  Cour fédérale

Date: 20210503

Docket: T-1517-18

Citation: 2021 FC 394

Ottawa, Ontario, May 3, 2021

PRESENT: The Honourable Mr. Justice Lafrenière

PROPOSED CLASS PROCEEDING

BETWEEN:

DORA BERENGUER

Plaintiff

and

SATA INTERNACIONAL – AZORES AIRLINES, S.A.

Defendant

ORDER AND REASONS

[1] There are two motions before the Court. In the first one, Dora Berenguer [the Plaintiff], moves pursuant to Rule 334.12(2) of the *Federal Courts Rules*, SOR/98-106 [*Rules*], to certify the underlying action seeking compensation for delayed flights against SATA Internacional – Azores Airlines, SA [the Defendant or SATA], as a class proceeding and to appoint the Plaintiff as the representative to act on behalf of affected passengers. The second one is brought by the

Defendant for an order striking the Amended Statement of Claim, without leave to amend, and dismissing the proceeding on the ground that the pleadings do not disclose a viable cause of action.

I. Overview

[2] I set out below a brief overview of this dispute in order to provide some context to the analysis that follows.

[3] The Plaintiff is an Alberta resident. She commenced the within proposed class proceeding by way of a Statement of Claim issued August 14, 2018.

[4] The Defendant is a company incorporated pursuant to the laws of Portugal, with a principal place of business in Portugal. It operates as a commercial airline that schedules flights to and from various cities in Canada.

[5] The claim was initially brought against a second commercial airline, WOW Air ehf; however it was discontinued after the company ceased operations in March 2019.

[6] The Plaintiff's claim, as amended on January 14, 2019, relates to the alleged failure by the Defendant to pay compensation in accordance with European Union Regulation (EC) No. 261/2004 [EU 261] to passengers who experienced delays on flights operated by the Defendant to and/or from Canada and arrived at the final destination more than three hours after the scheduled arrival time. EU 261 is a consumer protection measure adopted by the European

Parliament and the Council of the European Union in 2004 that establishes common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights.

[7] The Plaintiff seeks a declaration that the Defendant breached the express and/or implied terms of its contract of carriage to pay cash compensation in accordance with EU 261 and an order that the Defendants pay compensation to each Class Member.

[8] The Plaintiff defines the proposed class as follows:

> This Action is brought on behalf of members of a class consisting of the Plaintiff and 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 a Defendant (including those where the Defendant 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 respective Defendant in accordance with EU 261/2004.

II. Factual Background

[9] The parties' motions were argued together as many of the issues overlapped and are largely intertwined: *Berenguer v. WOW Air ehf*, 2019 FC 407.

[10] The Defendant's motion raises a threshold jurisdictional issue. The Defendant submits that this Court has no jurisdiction to hear the action, whether viewed as one seeking relief directly under EU 261 or on the basis of a breach of an alleged contractual obligation to comply

with it, as it is plain and obvious that the relief claimed is not sought "under an Act of Parliament or otherwise" as required by s. 23(c) of the *Federal Courts Act*, RSC 1985, c. F-7 [FCA].

[11] For her part, the Plaintiff submits that jurisdictional objection is premised on a mischaracterization of the basis of her claim. She maintains that there is a strong argument that the claim is recognized, created, and/or determined to some material extent by federal law and that accordingly, at this preliminary stage, the jurisdictional objection ought to be rejected. The Plaintiff further argues that the criterion set out in section 334.16(1)(a) of the *Rules* has been met. She says that on a plain and ordinary reading of the Amended Statement of Claim, there is an arguable case that the Defendant expressly, or by necessary implication, contractually agreed to apply EU 261.

[12] In deciding whether a reasonable cause of action is disclosed, the Court must assume that the facts pleaded are true, unless they are manifestly incapable of being proven: *Operation Dismantle Inc. v. The Queen*, [1985] 1 SCR 441, at p 455.

[13] Bare allegations and conclusory legal statements based on assumption or speculation are not material facts; they are incapable of proof and, therefore, they are not assumed to be true for the purposes of a motion under Rule 221(1)(a) or Rule 334.16(1)(a).

[14] Rule 174 requires that every pleading "contain a concise statement of the material facts on which the party relies". However, the Plaintiff's pleadings are replete with conclusory statements that allege a cause of action as if it was a material fact or that provide opinions and

speculations as if they were proven material facts. They read more like a factum than a statement of claim.

[15] Examples of conclusory and argumentative allegations in the Amended Statement of Claim are reproduced below:

> 18. Each of the Defendants incorporated EU 261/2004 into their respective contracts of carriage for passenger flights to/from Canada and have contractually agreed to apply EU 261/2004 in the event of long flight delays.
>
> 21. EU 261 /2004 cannot be contracted out of, limited, or waived, as provided in Article 15 - Exclusion of Waiver under EU 261 /2004:
>
> > 1. Obligations vis-à-vis passengers pursuant to this Regulation may not be limited or waived, notably by a derogation or restrictive clause in the contract of carriage.
> >
> > 2. If, nevertheless, such a derogation or restrictive clause is applied in respect of a passenger, or if the passenger is not correct/y informed of his rights and for that reason has accepted compensation which is inferior to that provided for in this Regulation, the passenger shall still be entitled to take the necessary proceedings before the competent courts or bodies in order to obtain additional compensation.
>
> 22.1 EU 261/2004, even without resorting to incorporation principles under contract law, applies to each of the Defendants by virtue that EU 261 /2004 has been adopted in (or extended to) the laws of each of Defendants' respective countries.
>
> 22.2. Considering EU 261/2004 applies to each of the Defendants (for all flights regardless where their flights depart from), and EU 261/2004 specifically provides that, by law, rights under EU 261/2004 cannot be derogated or limited, any attempt by a Defendant (such as WOW Air) to exclude within their contract of carriage some portions of EU 261/2004 protection is void and/or otherwise unenforceable…

III. The *Montreal Convention* Reinforces Contractual Application of EU 261/2004

23. The *Convention for the Unification of certain Rules for International Carriage by Air* (also known as the *Montreal Convention*) is an international treaty in respect of an airline's liability for international transport that is incorporated into Canadian law by virtue of the *Carriage by Air Act*, R.S.C., 1985, c. C-26.

24. Article 27 of the *Montreal Convention* reiterates the freedom to contract principle and provides that airlines may enter into a contract of carriage that exceeds the minimum requirements under the Montreal Convention.

25. By voluntarily incorporating EU 261/2004 into their own contracts of carriage, the Defendants contractually agreed to apply EU 261/2004, as permitted under Article 27 of the *Montreal Convention*.

IV. Interpretation of EU 261/2004

26. The European Court of Justice (CJEU), the highest court of the European Union in respect of all matters under European Union law, including EU 261/2004, has provided guidance on the proper interpretation of EU 261/2004 in a number of decisions. Decisions of the CJEU are binding interpretations of EU law.

27. The amount of cash compensation each passenger shall receive under Article 7 of EU 261/2004 is measured by the delay between the passenger's scheduled arrival time at the "final destination" and the time the subject aircraft's door is opened for disembarkment at the "final destination": ·

> a. Delay between three to four hours: 300 euros to each Class Member.
>
> b. Delay greater than four hours: 600 euros to each Class Member.

28. The CJEU confirmed that the arrival time for purposes of EU 261/2004 is not the time the aircraft "touched down" but rather the time the first aircraft door is opened (*Germanwings GmbH v Ronny Henning* (C-452/13)).

29. In the case of two directly connecting flights, a passenger's "final destination" is the destination of the last flight as provided under Article 2(h) of EU 261/2004 (*Air France v Folkerts* (C-

11/11) and re-confirmed recently by the England and Wales Court of Appeal (*Gahan v Emirates* [2017] EWCA Civ 1530).

30. The CJEU confirmed that the standardized cash compensation in Article 7 of EU 261/2004 applies to flights that are delayed more than three hours because long delays of more than three hours amounts to a "cancellation":

> *Sturgeon v Condor, and Bock v Air France* (C-402/07 and C-432/07) - November 19, 2009
>
> 2. Articles 5, 6 and 7 of Regulation No 261/2004 must be interpreted as meaning that passengers whose flights are delayed may be treated, for the purposes of the application of the right to compensation, as passengers whose flights are cancelled and they may thus rely on the right to compensation laid down in Article 7 of the regulation where they suffer, on account of a flight delay a loss of time equal to or in excess of three hours, that is, where they reach their final destination three hours or more after the arrival time originally scheduled by the air carrier. Such a delay does not, however, entitle passengers to compensation if the air carrier can prove that the long delay was caused by extraordinary circumstances which could not have been avoided even if ail reasonable measures had been taken, namely circumstances beyond the actual control of the air carrier.
>
> *Nelson v Deutsche Lufthansa AG and R (TU/ Travel, British Airways, easyJet and IATA*) v Civil Aviation Authority (2012) C-581/10 and C-629/10
>
> 1. Articles 5 to 7 of Regulation (EC) No 261/2004 of the European Parliament and of the Council of 11 February 2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights, and repealing Regulation (EEC) No 295/91, must be interpreted as meaning that passengers whose flights are delayed are entitled to compensation under that regulation where they suffer, on account of such flights, a loss of time equal to or in excess of three hours, that is, where they reach their final destination three hours or more after the arrival time original/y scheduled by the air carrier. Such a delay does not, however, entitle passengers to compensation if the air carrier can prove that the long delay is caused by extraordinary circumstances which could not have been

> avoided even if ail reasonable measures had been taken, namely circumstances beyond the actual control of the air carrier.
>
> 31. The Defendant airlines can avoid paying compensation only if the Defendants themselves can establish that the delay for the subject flight was due to "extraordinary circumstances". The Defendants bear the burden to prove the "extraordinary circumstances" as provided in Article 5(3) of EU 261/2004:
>
> > 3. An operating air carrier shall not be obliged to pay compensation in accordance with Article 7, if it can prove that the cancellation is caused by extraordinary circumstances which could not have been avoided even if ail reasonable measures had been taken.
>
> 32. "Extraordinary circumstances" does not include technical problems which come to light during maintenance of aircraft or on account of failure to carry out such maintenance (*Wallentin-Hermann v Alitalia-Linee Aeree ltaliane SpA* (Case C-549/07)).
>
> 32.1. Nor does a labour disruption (i.e. strike) automatically constitute an "extraordinary circumstance", which remains the burden of the airline to establish on a case-by-case basis (*Krüsemann v. TUlfly GmbH*, (Case C-195/17)).
>
> 33. The express provisions of EU 261/2004 do not require a Class Member to make a demand directly with a Defendant airline or to file a complaint with the aviation regulators before being entitled to receive cash compensation.
>
> …
>
> 49. Section 23(c) of the *Federal Court Act* [*sic*] provides that the Federal Court has jurisdiction.
>
> 50. The members of the Class are within the territorial jurisdiction of this Court as the respective flights originate from Canada or have Canada as its destination and there is a “real and substantial connection” with Canada.

[16] While Rule 175 of the *Rules* provides that a party may include in their pleading allegations as to the law, they never bind the Court on such issues: *Harmony Consulting Ltd. v.*

G.A. Foss Transport Ltd., 2012 FCA 226, at para 41. For the purposes of the present motions, the Court is therefore not obliged to accept as a proven material fact the conclusion that there is a cause of action. Rather, the Court must examine whether the genuine material facts, which are not argument or conclusory statements, disclose a reasonable cause of action. I have set out those facts below.

[17] Paragraph 17 of the Amended Statement of Claim pleads that EU 261 "is a consumer protection measure that provides standardized levels of cash compensation for various matters including flight delays and/or denied boarding."

[18] At paragraph 19, the Plaintiff sets out Rule 16 of the Defendant's contract of carriage entitled "Responsibility for Schedules and Operations":

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

[19] At paragraphs 23 and 24, the Plaintiff refers to the Convention for the Unification of Certain Rules for International Carriage by Air, done at Montreal on May 28, 1999, being Schedule VI to the *Carriage by Air Act*, RSC 1985, c. C-26, Art 27 [*Montreal Convention*]. The Plaintiff relies on Article 27 of the *Montreal Convention* that provides that "airlines may enter into a contract of carriage that exceeds the minimum requirements under the Montreal Convention."

[20] The Plaintiff sets out her personal circumstances that give rise to her claim for compensation at paras 35 to 39 of the Amended Statement of Claim. She alleges that she held a confirmed reservation and a boarding pass for a flight operated by the Defendant departing on September 1, 2017 from Toronto, Ontario, to Ponta Delgada, Azores, Portugal. The Plaintiff's flight was scheduled to depart at 9:00 PM, but was delayed and rescheduled to depart the next day on September 2, 2017 at 7:30 AM. The Plaintiff was ultimately transported to her final destination, arriving more than four hours after the originally scheduled arrival time. The Plaintiff alleges that the delay was not due to exceptional circumstances. She wrote to the Defendant demanding compensation of 600 euros regarding the delay in accordance with EU 261. The Defendant refused to pay any compensation.

[21] The Plaintiff further alleges at paras 40 to 46 of the Amended Statement of Claim that other individuals have experienced flight delays of more than three hours on flights operated to or from Canada by the Defendant and have not been paid the standardized cash compensation she alleges they are entitled to receive.

[22] Paragraph 51 sets out the relief sought on behalf of the Plaintiff and other members of the proposed class. At the core of the claim are the requests for: (a) a declaration that the Defendant breached the express and/or implied terms of its contract of carriage to pay cash compensation in accordance with EU 261 and (b) an order that the Defendant pay compensation to each Class Member in the form of standardized and/or liquidated damages.

[23] Finally, the Amended Statement of Claim sets out the basis for the Federal Court's jurisdiction at paragraphs 48 through 50:

> 48. This Action concerns aeronautics with a subsisting body of federal laws including:
>
> a. *Aeronautics Act*, RSC, 1985, c. A-2
>
> b. *Carriage by Air Act*, RSC, 1985, c. C-26
>
> c. *Canada Transportation Act*, SC 1996, c. 10
>
> d. *Air Transportation Regulations*, SOR/88-58
>
> e. Federal common law, including the law relating to breach of contracts

III. Issues to be Determined

[24] On the one hand, the Plaintiff seeks to certify this action as a class proceeding pursuant to Part 5.1 of the *Rules*. On a motion for certification, the Court must examine if the conditions for certification provided at Rule 334.16(1) have been met. The first condition is whether "the pleadings disclose a reasonable cause of action": subsection 334.16 (1)(a).

[25] On the other hand, the Defendant seeks an order striking the Amended Statement of Claim and dismissing the action pursuant to Rule 221(1)(a). The test for striking out a statement of claim for failing to disclose a reasonable cause of action is whether it is "plain and obvious" that the claim must fail.

[26] The test to be applied under Rule 334.16(1)(a) is the same as that on a motion to strike brought under Rule 221(1)(a). As stated by the Federal Court of Appeal in *Brake v. Canada*

(Attorney General), 2019 FCA 274, at para 54: "the party seeking certification need only show that the cause of action is not doomed to fail. Put another way, it must not be "plain and obvious" that the cause of action as pleaded will fail…" The only difference is that, in a motion to certify, the burden is on the plaintiff whereas, in a motion to strike, the burden is on the defendant: *Momi v. Canada (Minister of Citizenship and Immigration),* 2006 FC 738 at para 34.

[27] Given that the certification motion and the motion to strike require the Court to determine whether a reasonable cause of action is disclosed in the Plaintiff's pleadings, and that this particular question is vital to the final determination in both motions, I propose to deal with this matter first before addressing the four other certification issues set out in Rule 334.16 in a substantive way.

[28] The issues before me may therefore be simply stated as follows:

A. Whether it is plain and obvious that the Amended Statement of Claim does not disclose a reasonable cause of action.

B. If the Court answers the first issue in the negative, whether the class action proceeding should be certified based on the other factors set out in Rule 334.16(1) of the *Rules*.

IV. Analysis

A. *Whether it is plain and obvious that the Amended Statement of Claim does not disclose a reasonable cause of action.*

[29] Unlike motions for summary judgment or summary trial, motions to strike pleadings pursuant to Rule 221(1)(a) may not rely on any evidence. An exception is made where the

motion is based upon a want of jurisdiction: *Mil Davie Inc. v. Société d'Exploitation et de Développement d'Hibernia Ltée*, [1998] FCJ No 614 (CA).

[30] The Defendant proffered the Affidavit of Rodrigo Vasconcelos de Oliveira in response to the motion for certification. Mr. de Oliveira is a lawyer licensed to practise law in Portugal who purports to provide expert opinion evidence related to EU and Portuguese law, and how they apply to EU 261.

[31] The Plaintiff objects to the admissibility of the expert evidence on various grounds. However, the Defendant concedes that the affidavit is not relevant nor necessary to the determination of whether the Plaintiff has pleaded a reasonable cause of action. I will therefore defer dealing with the Plaintiff's objection at this time.

(1) Test to be applied on a motion to strike

[32] The Defendant bears the burden of proving that it is plain and obvious – accepting the facts as pleaded – that the Federal Court has no jurisdiction to hear this matter. The onus of proof on the Defendant is a heavy one, as the Court must be satisfied "beyond doubt that the allegation cannot be supported and is certain to fail at trial because it contains a radical defect" (*Hunt v Carey Canada Ltd*., [1990] 2 SCR 959 at paras 32-34).

[33] A claim should not be struck simply because it is complex, or because a plaintiff puts forward a novel cause of action. The focus instead is on whether the allegations of material facts

in the claim, construed generously, give rise to a cause of action: *Conohan v. Cooperators*, 2002 FCA 60, at paragraph 15.

(2) Jurisdiction

[34] The motions presented by the parties raise the always delicate and thorny issue of jurisdiction of this Court. It must be borne in mind from the start that the Federal Court is a statutory court and can only exercise jurisdiction under a statutory grant of power.

[35] The Supreme Court of Canada set out in *ITO - International Terminal Operators Ltd. v. Miida Electronics Inc*., [1986] 1 SCR 752 [*ITO*] the seminal test establishing the essential requirements to support a finding of jurisdiction in the Federal Court. For this Court to have jurisdiction to hear a matter, three conditions must be met:

1. There must be a statutory grant of jurisdiction by the federal Parliament.

2. 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.

3. 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 (*ITO*, at para 11).

(i) Essential Nature of the Plaintiff's Claim

[36] In *744185 Ontario Inc. v. Canada*, 2020 FCA 1 [*Air Muskoka*] at para 31, the Federal Court of Appeal stated that in analyzing whether a claim falls within the Federal Court's

jurisdiction, it is first necessary to characterize the claim to determine its essential nature, or to ascertain the "pith and substance" of the claim, referencing the decision of the Supreme Court of Canada in *Windsor (City) v. Canadian Transit Co.*, 2016 SCC 54 [*Windso*r] at paras 26-27:

> [26] The essential nature of the claim must be determined on "a realistic appreciation of the practical result sought by the claimant" (*Domtar Inc. v. Canada (Attorney General*), 2009 FCA 218, 392 N.R. 200, at para.28, per Sharlow J.A.). The "statement of claim is not to be blindly read at its face meaning" (*Roitman v. Canada*, 2006 FCA 266, 353 N.R. 75, at para.16, per Décary J.A.). Rather, the court must "look beyond the words used, the facts alleged and the remedy sought and ensure . . . that the statement of claim is not a disguised attempt to reach before the Federal Court a result otherwise unreachable in that Court" (ibid.; see also *Canadian Pacific Railway v. R.*, 2013 FC 161, [2014] 1 C.T.C. 223, at para. 36; *Verdicchio v. R.*, 2010 FC 117, [2010] 3 C.T.C. 80, at para. 24).
>
> [27] On the other hand, genuine strategic choices should not be maligned as artful pleading. The question is whether the court has jurisdiction over the particular claim the claimant has chosen to bring, not a similar claim the respondent says the claimant really ought, for one reason or another, to have brought.

[37] The Plaintiff has framed her pleadings as a claim for breach of contract. She alleges that the Defendant, within its own contract of carriage, contractually incorporated and agreed to comply with the flight delay/cancellation rules under EU 261. The action seeks to enforce the Defendant's contractual obligation to pay compensation. The Defendant agrees with this view.

[38] While both parties agree that at its heart this proceeding is a contractual dispute, they disagree on whether the relief claimed is sought "under an Act of Parliament or otherwise" as required by s. 23 of the *FCA* and the Supreme Court of Canada's interpretation of this provision.

[39] Before embarking on an analysis of the parties' arguments, it is important to note that my task is not to decide whether or not this Court has jurisdiction to entertain the claim. Rather, at this preliminary stage, I am simply required to determine whether it is plain and obvious that it does not have jurisdiction.

(ii) The *ITO* Test

[40] With respect to the first part of the *ITO* test (statutory grant of jurisdiction), the Plaintiff principally relies upon subsections 23(b) and 23(c) of the *FCA*:

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) […]	(a) […]
(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.

[41] For the purpose of the two motions, I am satisfied the Plaintiff's claim falls arguably under the field of aeronautics or works and undertakings as defined in section 23 of the *FCA*.

Moreover, no argument has been advanced that jurisdiction over the claim for relief has been otherwise specially assigned to another court.

[42] The jurisdictional dispute is focused instead on whether the second and third elements of the *ITO* test, which hinge upon the existence of "a body of federal law" and "law of Canada", as well as the requirement in section 23 of the *FCA* that the claim for relief be made or a remedy be sought "under an Act of Parliament or otherwise", have been met.

[43] The Defendant acknowledges that the *Montreal Convention* is part of Canadian federal law by virtue of the *Carriage by Air Act* and that this Court has jurisdiction to hear and decide carriage by air disputes. This is consistent with the conclusion of the Federal Court of Appeal in *Prudential Assurance Co. v. Canada,* [1993] 2 FC 293 (CA) [*Prudential Assurance*], recognized in *Windsor* at para 44.

[44] However, the Court's jurisdiction over carriage by air disputes is contingent upon the claim being founded on the *Montreal Convention: Donaldson v Swoop,* 2020 FC 1089 at para 30 [*Donaldson*]; *Bensol Customs Brokers Ltd v Air Canada,* [1979] FCJ No 73, [1979] 2 FC 575 (CA) [*Bensol*] at para 10.

[45] In *Thibodeau v. Air Canada,* 2014 SCC 67 at paras 37-38 [*Thibodeau*], the Supreme Court of Canada explained that the *Montreal Convention* codifies the scope and nature of various civil obligations arising during the course of international carriage by air:

> [37] The *Montreal Convention* makes clear that it provides the exclusive recourse against airlines for various types of claims

> arising in the course of international carriage by air. It provides that *all* "action[s] for damages" in the carriage of passengers, baggage and cargo are subject to the conditions and limitations of liability set out in its provisions. The provision could hardly be expressed more broadly; it applies to "any action for damages, however founded". This breadth is equally reflected in the French text: ". . . *toute action en dommages-intérêts, à quelque titre que ce soit* . . . ."
>
> [38] This exclusivity principle is expressed even more clearly in the *Montreal Convention* than it was in the *Warsaw Convention*. Article 24 of the *Warsaw Convention* introduces its exclusion of other claims by referring to "the cases covered by" Articles 17 to 19. Article 29 of the *Montreal Convention*, in contrast, introduces its exclusion of other claims by using the terms "[i]n the carriage of passengers, baggage and cargo". By using this broader language, it articulates even more clearly the state signatories' intention to exclude any actions not specifically addressed in Articles 17 to 19…

[46] The Defendant submits that the Plaintiff's claim is bound to fail as a matter of law in that it does not respect the exclusivity principle as laid down in the *Montreal Convention*. Central to this argument is Article 29 of the *Montreal Convention*, which provides:

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.

[47] According to the Defendant, it is clear that the Plaintiff has consciously founded her claim on contract law, EU 261 and the European Court of Justice's interpretation of EU 261. The Defendant maintains that to the extent that any federal law is even relevant to the Plaintiff's claim, at best, it is a mere bystander, and is certainly not essential. For the reasons that follow, I agree.

[48] In *Apotex Inc. v. Allergan, Inc.*, 2016 FCA 155, the Federal Court of Appeal held that contractual issues can be addressed by the Federal Court where it is "part and parcel of a matter over which the Court has statutory jurisdiction". Justice Stratas explained at para 13:

> [13] On the issue of jurisdiction, I agree with the Federal Court and substantially adopt its analysis. I would add the following. Contract law, when viewed in a vacuum, is normally under provincial jurisdiction. However, the Federal Court has jurisdiction when the contract law issue before the Court is part and parcel of a matter over which the Federal Court has statutory jurisdiction, there is federal law essential to the determination of the matter, and that federal law is valid under the constitutional division of powers: *ITO-Int'l Terminal Operators v. Miida Electronics*, 1986 CanLII 91 (SCC), [1986] 1 S.C.R. 752, 28 D.L.R. (4th) 641; *Canadian Transit Company v. Windsor (Corporation of the City)*, 2015 FCA 88, 384 D.L.R. (4th) 547.

[49] However, in *Windsor* at para 41, the Supreme Court of Canada cautioned that the second element under section 23 of the *FCA* requires that the cause of action must either be "created or recognized" under federal laws:

> [41] Quebec North Shore makes clear that s. 23 grants jurisdiction to the Federal Court only when the claimant is seeking relief under federal law. As I read Quebec North Shore, the

> implication is that the claimant's cause of action, or the right to seek relief, must be created or recognized by a federal statute, a federal regulation or a rule of the common law dealing with a subject matter of federal legislative competence. This is what it means to seek relief "under" federal law in s. 23.

[50] The Plaintiff has not pleaded a cause of action seeking damages occasioned by delay which would be sustainable under Article 19. Instead, she seeks damages for breach of contract, pleading that the Defendant breached its Canadian tariff in not paying her compensation owed under EU261.

[51] Apparently cognizant of the pre-emptive effect of the *Montreal Convention* in Canada and that the damages she seeks are not recoverable under its Article 19, the Plaintiff alleges in her pleadings that Article 27 of the Convention "permits" her cause of action for breach of contract. Article 27 reads as follows:

27. Nothing contained in this Convention shall prevent the carrier from refusing to enter into any contract of carriage, from waiving any defences available under the Convention, or from laying down conditions which do not conflict with the provisions of this Convention.	27. Rien dans la présente convention ne peut empêcher un transporteur de refuser la conclusion d'un contrat de transport, de renoncer aux moyens de défense qui lui sont donnés en vertu de la présente convention ou d'établir des conditions qui ne sont pas en contradiction avec les dispositions de la présente convention.

[52] The Plaintiff submits that Article 27 of the *Montreal Convention* specifically recognizes the principle of freedom to contract, permitting air carriers and passengers to enter into further contractual remedies that do not conflict with the *Montreal Convention*.

[53] The theory and basis of the Plaintiff's proposed class proceeding is that the Defendant has voluntarily incorporated EU 261 into its contract of carriage applicable to its international commercial air services to and from Canada, as permitted under Article 27 of the *Montreal Convention*. The Plaintiff intends to argue at trial that the *Montreal Convention* is merely a federal statute that is super-imposed on a body of common law in relation to common carriers, including contracts.

[54] This is at best a tautological argument that has no merit. The simple fact is that this Court's jurisdiction is engaged only if the right to seek relief is created or recognized by Canadian federal law. No matter how the Plaintiff frames, labels or dresses up her claim, it remains that the compensation regime upon which she relies to support her claim is created under European law.

[55] On its face, the parameters and meaning of Article 27 are clear: it allows the carrier to refuse to contract, to waive any of its Convention defences, or to impose conditions or requirements on passengers or shippers so long as these conditions do not conflict with any rule in the *Montreal Convention*. It says nothing about whether a carrier can contractually agree to apply provisions of an instrument like EU 261, nor does it allow parties to contract out of fundamental precepts of the *Montreal Convention*, such as Articles 19 and 29.

[56] Even if it is assumed that the alleged contractual agreement to apply EU 261/2004 is permitted by Article 27, this does not mean that the source of the Plaintiff's claim is the Canadian law. Whatever might be said about it, Article 27 does not create a right of action.

[57] I find support for that conclusion in a judgment of the Court of Justice of the European Union (CJEU) in (C-344/04) *R (o/a IATA and ELFAA) v Department for Transport* [2006] ECR I-403 [*IATA*]. The CJEU held that the compensation that carriers subject to EU 261 are required to provide to passengers under its terms is not governed by the *Montreal Convention*. The Court concluded that compensation to which Article 19 applies is individual damage requiring proof of loss caused by the delay, whereas that payable under EU 261 is a standardised sum for each passenger not requiring proof of loss. Relevant portions of *IATA* decision central to the CJEU's reasoning are reproduced below.

> 37 Article 6 of Regulation No 261/2004 provides that, in the event of a long delay to a flight, the operating air carrier must offer to assist and take care of the passengers concerned. It does not provide that the carrier may escape such obligations in the event of extraordinary circumstances which could not have been avoided even if all reasonable measures had been taken.
>
> 38 IATA and ELFAA submitted in their applications to the referring court and submit before this Court that Article 6 of Regulation No 261/2004 is accordingly incompatible with the Montreal Convention which contains, in Articles 19 and 22(1), clauses excluding and limiting the air carrier's liability in the event of delay in the carriage of passengers and which provides, in Article 29, that any action for damages, however founded, can only be brought subject to the conditions and limits set out in the Convention.
>
> 39 As to those submissions, Articles 19, 22 and 29 of the Montreal Convention are among the rules in the light of which the Court reviews the legality of acts of the Community institutions since, first, neither the nature nor the broad logic of the Convention precludes this and, second, those three articles appear, as regards their content, to be unconditional and sufficiently precise.
>
> 40 It is to be noted with regard to the interpretation of those articles that, in accordance with settled case-law, an international treaty must be interpreted by reference to the terms in which it is worded and in the light of its objectives. Article 31 of the Vienna Convention of 23 May 1969 on the Law of Treaties and Article 31 of the Vienna Convention of 21 March 1986 on the Law of Treaties between States and International Organisations or between

International Organisations, which express, to this effect, general customary international law, state that a treaty is to be interpreted in good faith in accordance with the ordinary meaning to be given to its terms in their context and in the light of its object and purpose (see, to this effect, Case C-268/99 *Jany and Others* [2001] ECR I-8615, paragraph 35).

41 It is clear from the preamble to the Montreal Convention that the States party thereto recognised 'the importance of ensuring protection of the interests of consumers in international carriage by air and the need for equitable compensation based on the principle of restitution'. It is therefore in the light of this objective that the scope which the authors of the Convention intended to give to Articles 19, 22 and 29 is to be assessed.

42 It is apparent from those provisions of the Montreal Convention, which are contained in Chapter III headed 'Liability of the carrier and extent of compensation for damage', that they lay down the conditions under which any actions for damages against air carriers may be brought by passengers who invoke damage sustained because of delay. They limit the carrier's liability to 4 150 SDRs for each passenger.

43 Any delay in the carriage of passengers by air, and in particular a long delay, may, generally speaking, cause two types of damage. First, excessive delay will cause damage that is almost identical for every passenger, redress for which may take the form of standardised and immediate assistance or care for everybody concerned, through the provision, for example, of refreshments, meals and accommodation and of the opportunity to make telephone calls. Second, passengers are liable to suffer individual damage, inherent in the reason for travelling, redress for which requires a case-by-case assessment of the extent of the damage caused and can consequently only be the subject of compensation granted subsequently on an individual basis.

44 It is clear from Articles 19, 22 and 29 of the Montreal Convention that they merely govern the conditions under which, after a flight has been delayed, the passengers concerned may bring actions for damages by way of redress on an individual basis, that is to say for compensation, from the carriers liable for damage resulting from that delay.

45 It does not follow from these provisions, or from any other provision of the Montreal Convention, that the authors of the Convention intended to shield those carriers from any other form of intervention, in particular action which could be envisaged by

> the public authorities to redress, in a standardised and immediate manner, the damage that is constituted by the inconvenience that delay in the carriage of passengers by air causes, without the passengers having to suffer the inconvenience inherent in the bringing of actions for damages before the courts.
>
> 46 The Montreal Convention could not therefore prevent the action taken by the Community legislature to lay down, in exercise of the powers conferred on the Community in the fields of transport and consumer protection, the conditions under which damage linked to the abovementioned inconvenience should be redressed. Since the assistance and taking care of passengers envisaged by Article 6 of Regulation No 261/2004 in the event of a long delay to a flight constitute such standardised and immediate compensatory measures, they are not among those whose institution is regulated by the Convention. The system prescribed in Article 6 simply operates at an earlier stage than the system which results from the Montreal Convention.
>
> 47 The standardised and immediate assistance and care measures do not themselves prevent the passengers concerned, should the same delay also cause them damage conferring entitlement to compensation, from being able to bring in addition actions to redress that damage under the conditions laid down by the Montreal Convention.
>
> [Emphasis added.]

[58] Under the framework established by the CJEU, a passenger who experiences delay in international air carriage has two separate avenues for claiming compensation: (1) standardized damages pursuant to EU 261, and (2) individual damages requiring proof of loss caused by delay pursuant to Article 19 of the *Montreal Convention*. The two sources of possible compensation do not overlap; they are entirely distinct from one another – a passenger can claim both, according to the rules governing each form of compensation.

[59] The logic of *IATA* is consistent with the approach taken by the Supreme Court of Canada in *Thibodeau* at para 4 that it is Canada's duty to comply with its international undertaking to

establish and give effect to limitations on liability for international air carriers. In concluding that an award of damages for breach of language rights during international carriage by air was not permitted by the *Montreal Convention*, the Supreme Court stated at para. 6:

> [6] …To hold otherwise would do violence to the text and purpose of the *Montreal Convention*, depart from Canada's international obligations under it and put Canada off-side a strong international consensus concerning its scope and effect [*Thibodeau* at para 6].

[60] Beyond the provisions of Article 27 of the *Montreal Convention*, the Plaintiff intends to argue that her cause of action is recognized under the *Air Transportation Regulations*, SOR/88-58 [*ATR*]. She contends that the Defendant's tariff is a contract contemplated and recognized under section 110 of the *ATR*, which is part of a detailed statutory framework. However, the very same arguments were rejected by Mr. Justice Michael Manson in *Donaldson* at paras 42 to 52. While the *Donaldson* decision is not binding on me, reasons of judicial comity invite me to follow the decision given that no material facts are shown to be distinguishable and the Plaintiff has not demonstrated that it is manifestly wrong.

[61] In the end, it is the source of the claim that matters here. It is plain and obvious that the source of the Defendant's alleged liability in this case is not the *Carriage by Air Act* or any other Canadian law. The Plaintiff has chosen to make a claim sourced in contract law and EU 261/2004, not federal law.

[62] The arguable issue test for jurisdiction is a low threshold to meet; however, it is nevertheless a threshold. In my view, this is one of those cases where the Plaintiff has failed to

meet the threshold. Simply stating that there is an arguable case that this Court has jurisdiction to entertain the Plaintiff's claim does not make it so.

[63] The Plaintiff's assertion that the Federal Court has jurisdiction over her claim does not pass the first stage of analysis under s. 23 of the *FCA* and the *ITO* test. It is not sufficient if the Federal Court may have to consider some federal law as a necessary component of the disposition of the Plaintiff's case. Given that no body of federal law "essential to the disposition of the case and which nourishes the statutory grant of jurisdiction" has been pleaded, it is plain and obvious that no tenable cause of action is possible. Since there is no reason to suppose that the Plaintiff could improve her case by any amendment to the pleadings, I would grant the Defendant's motion to strike.

(3) Exclusivity Doctrine

[64] I should add that even if I am incorrect in this finding, I am nonetheless of the view that it is plain and obvious that the claim has no prospect of success.

[65] As was held by the Supreme Court of Canada in *Thibodeau*, the key provision at the core of the *Montreal Convention*'s exclusive set of rules for liability is Article 29. This provision makes clear that the *Montreal Convention* provides the exclusive recourse against airlines for various types of claims arising in the course of international carriage by air. Article 29 establishes that in relation to claims falling within the scope of the *Montreal Convention*, "any action for damages, however founded" may only be brought "subject to the conditions and such limits of liability as are set out in this Convention".

[66] Article 19 of the *Montreal Convention* establishes that the carrier is liable for damage occasioned by delay. The Plaintiff has not alleged that she has sustained any damages, let alone damage occasioned by delay. In light of Article 29, which states that non-compensatory damages shall not be recoverable, it follows that the only relief available under the *Montreal Convention* are those damages that have been actually *sustained*. In my view, Article 27 does not allow parties to contract out of fundamental precepts of the Convention, including Articles 19 and 29, which would require the claimant to prove their damages.

[67] For the above reasons, the Defendant's motion to strike the proceeding for failing to disclose a reasonable cause of action is granted.

B. *If the Court answers the first issue in the negative, whether the class action proceeding should be certified based on the other factors set out in Rule 334.16(1) of the Rules.*

[68] For the reasons discussed above, the Plaintiff does not have a legally viable cause of action in this Court. It follows that she does not satisfy the cause of action criterion for certification and, therefore, the action cannot be certified as a class action on this basis alone.

[69] Although not strictly necessary, for the sake of completeness, I shall assume that my conclusions above are incorrect, and shall proceed on the assumption that this Court has jurisdiction to entertain the claim.

[70] The analysis on a certification motion pursuant to Rule 334.16(1) of the *Rules* is primarily procedural. The class representative must show some basis in fact for each element,

without delving into the merits of the action (*Pro Sys Consultants Ltd. v Microsoft Corp.*, 2013 SCC 57, paras 102-104 [*Pro Sys*]). This does not require evidence on a balance of probabilities or the resolution of conflicting facts and evidence (*L'Oratoire Saint-Joseph du Mont-Royal v J.J.*, 2019 SCC 35 at paras 58-59).

(1) Whether the Plaintiff's Pleadings Disclose a Reasonable Cause of Action

[71] Rule 334.16(1)(a) requires simply that the pleadings disclose a reasonable cause of action or, in other words, an arguable case. This is a relatively low threshold.

[72] At the reasonable cause of action stage in the analysis, like the jurisdictional analysis, the facts are assumed to true.

[73] The Defendant submits that the Plaintiff has not pleaded a viable cause of action. An alleged contractual agreement merely to abide by pre-existing statutory or regulatory obligations cannot found a breach of contract claim. Moreover, the Plaintiff pleads nothing more than that the Defendant agreed to comply with a binding EU law and has therefore not pleaded a reasonable cause of action.

[74] The Defendant points to a number of decisions that have held that EU 261 is not judicially enforceable outside the courts of the European Union member states. By way of example, in an unreported decision released on July 11, 2019 in *Barcelos v. Azores Airlines* [Barcelos], Deputy Judge Prattas of the Toronto Small Claims Court, Ontario Superior Court of

Justice, held that the claim for compensation made by the plaintiff, Marco Barcelos, for a delayed flight under EU 261 could not be enforced by a Canadian court.

[75] Like the Plaintiff, Mr. Barcelos framed his action as a breach of contract claim. He claimed that because the defendant's tariff stated that the defendant "fully complies" with EU 261, the entire regulation and associated case law interpreting it from European courts was incorporated into the contract and could be enforced as a breach of contract in an Ontario court. The Defendant took the position that Mr. Barcelos' claim disclosed no reasonable cause of action for breach of contract because the wording of the tariff did not incorporate the text of EU 261 or jurisprudence from the European Court of Justice by reference, in particular *Sturgeon v Condor Flugdienst GmbH*, Joined Cases C-402/07 and C-432/07, [2009] ECR I-10923 [*Sturgeon*]. Given that the claim was framed as a breach of contract, Deputy Judge Prattas looked at the wording of the defendant's tariff itself and concluded that "on its plain wording no monetary compensation for delay is provided" in the defendant's tariff. He also agreed with the defendant that the words "fully complies" in the tariff did not incorporate EU 261 and the *Sturgeon* decision by reference such that the obligation to compensate passengers for long delays became a contractually enforceable promise outside Europe. Deputy Judge Prattas further concluded that EU 261 could not be directly enforced in Canadian courts, as the wording of EU 261 did not support an argument that Canadian courts were "competent courts or bodies" under Article 15(2) of the EU 261.

[76] In *Dochak v. Polskie Linie Lotnicze LOT S.A.,* 189 F.Supp.3d 798 (2016), the United States District Court in Illinois held that contractual language providing that "passengers are

entitled to rights provided for in the Regulation (EC) No 261/2004 of the European Parliament" was akin to a notice provision, and did not evince an intent to incorporate those regulations.

[77] These decisions are well reasoned and certainly present a formidable obstacle to the Plaintiff's success. However, I note that they delve substantially into the merits, reviewing the tariff in detail and applying principles of contractual construction. Moreover, they may be distinguished in that no argument appears to have been made regarding the interplay between Articles 19, 25, 27 and 29 of the *Montreal Convention*.

[78] The Plaintiff's cause of action rests on the assumption that the Defendant's tariff incorporates EU 261 and that the terms of the contract are enforceable under the *Montreal Convention* regime or some other Canadian law.

[79] Whether a stipulation to abide by a pre-existing statutory or regulatory obligation can be considered an enforceable provision is matter of some debate (*Canada v John Doe*, 2016 FCA 191 [*John Doe*]; *Broutzas v Rouge Valley Health Systems*, 2018 ONSC 6315 [*Broutzas*]; *Condon v Canada*, 2014 FC 250 [*Condon*], *Tucci v Peoples Trust Company*, 2017 BCSC 1525 [*Tucci*], *Kaplan v. Casino Rama*, 2019 ONSC 2025 [*Kaplan*].

[80] In *Condon*, the Court found that it was not plain and obvious that incorporation of policies and legislation could not found a claim for breach of contract (*Condon*, at paras 35-51). In contrast, the Court in *John Doe* found that promises failing to go beyond pre-existing statutory

duties could not create contracts; however, they may be enforceable through other means such as reliance (*John Doe*, at paras 46-48).

[81] In *Broutzas* at para 217, the Ontario Superior Court of Justice concluded that statutory obligations cannot form the basis for implied terms of contract. In addition, in *Kaplan* at paras 25-28, the Court found that the breach went beyond what was dictated by the statutory requirements by referring to their own policy and "industry standards." However, the British Columbia Supreme Court in *Tucci*, stated at para 73, "it is always open to parties to incorporate legislative requirements into their contracts, absent of course some defence such as illegality."

[82] In applying the plain and obvious standard, the Supreme Court of Canada has cautioned that the Court's approach should be generous and err on the side of permitting novel or arguable claims to proceed to trial, and not impede the evolution of the law: *R v Imperial Tobacco Canada Ltd*, 2011 SCC 42 at paras 19-21.

[83] The fact that the Plaintiff may face an uphill battle in proving her claim should not deprive it of the opportunity to do so. Complex questions of mixed fact and law can only be addressed in the context of a motion for summary judgment, a motion for summary trial, or at trial.

[84] It is not the Court's role at the certification stage to render a final decision on this issue. In my view, it is not plain and obvious that by referencing EU 261 in the tariff, the Defendant did

not intend to incorporate this as a term of the contract. This issue is novel, necessitating a full evidentiary record for the Court to reach a proper determination on the merits.

[85] Assuming therefore that this Court has jurisdiction and that a reasonable cause of action has been pleaded, I shall then proceed to determine whether the Plaintiff has satisfied the remaining factors set out in Rule 334.16(1), as set out below:

(b) there is an identifiable class of two or more persons;	b) il existe un groupe identifiable formé d'au moins deux personnes;
(c) the claims of the class members raise common questions of law or fact, whether or not those common questions predominate over questions affecting only individual members;	c) les réclamations des membres du groupe soulèvent des points de droit ou de fait communs, que ceux-ci prédominent ou non sur ceux qui ne concernent qu'un membre;
(d) a class proceeding is the preferable procedure for the just and efficient resolution of the common questions of law or fact; and	d) le recours collectif est le meilleur moyen de régler, de façon juste et efficace, les points de droit ou de fait communs;
(e) there is a representative plaintiff or applicant who (i) would fairly and adequately represent the interests of the class, (ii) has prepared a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the class and of notifying class members as to how the proceeding is progressing, (iii) does not have, on the common questions of law or fact, an interest that is in conflict with the interests of other class members, and (iv) provides a	e) il existe un représentant demandeur qui : (i) représenterait de façon équitable et adéquate les intérêts du groupe, (ii) a élaboré un plan qui propose une méthode efficace pour poursuivre l'instance au nom du groupe et tenir les membres du groupe informés de son déroulement, (iii) n'a pas de conflit d'intérêts avec d'autres membres du groupe en ce qui concerne les points de droit ou de fait communs, (iv) communique un sommaire des conventions

summary of any agreements respecting fees and disbursements between the representative plaintiff or applicant and the solicitor of record	relatives aux honoraires et débours qui sont intervenues entre lui et l'avocat inscrit au dossier.

[86] Before addressing the certification conditions, as a preliminary matter, I must first address the issue of Mr. de Oliviera's expert evidence as it relates to the certification motion.

[87] The Plaintiff's objection to the Defendant's expert evidence is two-fold. First, she submits that the opinion evidence of Mr. de Oliviera is inadmissible because the proposed expert is not qualified as he is not impartial, not independent, and not unbiased. Second, she submits that the proposed expert evidence is not relevant nor necessary for certification.

[88] Mr. de Oliviera states in his affidavit that he is acting for the Defendant in a case to be heard before the Court of Ponta Delgada arising out of a claim for compensation under EU 261. He is also a member of the Board of Directors of a foundation created by decree of the Portuguese government to establish a private, not-for-profit institution for the promotion of relations between Portugal and the United States.

[89] Mr. de Oliviera states that as a result of his expertise as a lawyer and his experience as a member of the Azorean Regional Government, he is familiar with EU 261 relating to passenger rights in air transport, how it has been interpreted, applied and enforced in Portugal and, at a more general level, across European Union Member States.

[90] The Plaintiff submits that the proposed expert's duty of loyalty to his client would be in direct conflict with providing an impartial, independent, and unbiased opinion to this Court. Moreover, his role in the very government that wholly owns the Defendant airline further casts doubt on whether he can act in an unbiased manner.

[91] Expert opinion evidence is subject to stringent substantive and procedural requirements prior to its admission into court and depends on the application of the following criteria: (a) relevance; (b) necessity in assisting the trier of fact; (c) the absence of any exclusionary rule; and (d) a properly qualified expert: *R. v. Mohan*, 1994 CanLII 80 (SCC), [1994] 2 SCR 9.

[92] I question why the Defendant elected to retain this particular affiant rather than another lawyer from Portugal to provide background information in this case. However, the mere fact that Mr. de Oliveira was retained by the Defendant to request a reference to the CJEU in a matter relating to EU261 and is a member of a Board of Directors of a government foundation is not disqualifying.

[93] That said, I disagree with the Defendant that the proposed expert evidence relates only to uncontroversial, basic concepts and aspects of EU261. The following topics are covered extensively in the de Oliveira affidavit:

a) EU Law and the Role of the Court of Justice of the European Union
b) The Right to Compensation for Delayed Flights under EU 261
c) EU 261 Claims-Handling Bodies

d) Whether the Passenger Must Assert a Claim to be Entitled to EU 261 Compensation

e) EU 261 Jurisprudence in EU Member States' National Courts

f) Recognition and Enforcement of Foreign Judgments in Portugal

[94] Much of the proposed opinion evidence provided by Mr. de Oliviera consists of legal argument. Moreover, he engages in spin or advocacy when addressing certain topics, such as paras. 32-37, 56-66, 71-73, 76 and 81-85 of his affidavit in which he directly impugns or questions the merits of the Plaintiff's action. In addition, Mr. de Oliviera presents evidence from only one perspective, discounting evidence that might support a different conclusion.

[95] In the circumstances, I conclude that the affidavit does not meet the threshold admissibility requirements and should not be taken into account.

(2) Identifiable Class

[96] There are three criteria to apply for finding the existence of an identifiable class: (1) the class must be defined by objective criteria; (2) must be defined without reference to the merits of the action; (3) there must be a rational connection between the common issues and the proposed class definition (*Paradis Honey Ltd. v Canada*, 2017 FC 199, at para 23 [*Paradis Honey Ltd.*]). The proposed representative plaintiff must show that the class definition is sufficiently narrow that it meets these criteria.

[97] The Plaintiff's proposed class is as follows:

> 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 Defendant (including those where the Defendant 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 Defendant in accordance with EU 261/ 2004.

[98] The Defendant takes issue with the objective criteria on the basis that the class definition lacks sufficient clarity because it incorporates the concepts of "final destination" and "directly connecting flights." According to the Defendant, there is no evidence as to what, if any, parameters the Plaintiff proposes should be used to determine this question on an individual basis.

[99] In my view, the Plaintiff's submissions at paragraphs 74 to 79 of her memorandum are a full answer to the Defendant's objection.

> 74. …It bears noting that "final destination" is defined in art. 2(h) of EU 261 and "directly connecting flight" is referenced within that definition, which SATA acknowledges.
>
> 75. With great respect, SATA's argument fails for three reasons. Firstly, a class definition tracking statutory language is preferred and addresses any overbreadth concern, creates a direct relationship between the class and common issues, and there will be clear criteria to apply (by reference to the statute). Secondly, and most importantly, SATA incorporated that exact language into its tariffs. It does not lie in SATA's mouth to now claim that words in its own tariff is unclear. Finally, as stated below, both SATA and members themselves know whether there was a "directly connecting flight".
>
> 76. SATA's evidence suggests that Class Members with "directly connecting flights" can simply be gleaned from those Class Members' itineraries, which would be in SATA's possession (as demonstrated from SATA's evidence). Common sense suggests that many Class Members would also have records of

> their own itineraries. The itineraries will permit a determination of whether a Class Members have a "directly connecting flight" and those that do not, which in any event is not to be resolved at certification.
>
> 77. SATA provides some examples of passengers who "would appear to fit" within the Class. With great respect, some of those examples are premised on a misinterpretation of their own tariff terms. SATA seems to be suggesting some "boundary" cases within the Class that may necessitate an individual inquiry at a later stage. In any event, the exceptions do not drive the rule and does not detract from the fact that the Plaintiff has already defined a proper class, as required.
>
> 78. SATA confirms that the vast majority of passengers on SATA (or SATA controlled) flights that delayed for more than three hours, which is about 86% of passengers, do not have a "directly connecting flight". For these passengers, there will be no need for any individual review of whether a "directly connecting flight" caused a late arrival.
>
> 79. For the remaining 14% of passengers that have a "directly connecting flight" after the SATA (or SATA controlled) flight, the Plaintiff does not dispute that the late arrival needs to be attributed to the SATA (or SATA controlled) flight before damages are payable. With great respect, any potential for individual inquiries and whether any individual can, as a matter of fact, bring themselves within the class definition is not a consideration under Rule 334.16(1)(b), but rather under preferable procedure (Rule 334.16(1)(d)). It bears noting that for some of these situations the determination is likely to be straightforward as the SATA flight may have arrived after the "directly connecting flight" departed. In any event, it would be open for the Court to determine whether this aspect of the Class could be amended or severed after discovery occurs. It is surely not a reason to deny certification for the whole Class.

[100] I agree with the Plaintiff that the terms in question are capable of definition and the trier of fact will be able to use these markers to identify the class. The proposed class is defined by plainly objective criteria that will allow Class Members to self-identify. Class Members, themselves, would know whether or not they have travelled on a flight operated by the

Defendant, or one sub-contracted by the Defendant, to/from Canada and arrived at their "final destination" more than three hours late, irrespective of whether there was a "directly connecting flight" or not. In any event, the Defendant has detailed records on flights that were delayed for more than three hours and would be able to ascertain whether a particular passenger had a directly connecting flight.

[101] The Defendant further submits that the proposed definition is unnecessarily overbroad as it includes every individual in the world who both (1) travelled on a flight to or from Canada within the class period and (2) arrived at that individual's "final destination" more than three hours after their scheduled arrival time. The Defendant submits that on its face, this current definition includes individuals to whom it has no obligation under EU 261 and/or the Plaintiff's theory of contractual liability.

[102] However, the determination of whether the plaintiffs are in the proposed class essentially centers upon a determination of the rights available under EU 261 - it goes to the merits of the Plaintiff's claim. As such, it need not be resolved at the certification stage. The same can be said about the Defendant's argument that Article 35 of the *Montreal Convention* extinguishes all actions for damages not commenced within a two year period.

[103] All class members claim breach of contract and seek standardized compensation as provided under EU 261. The class is not unnecessarily broad. All class members share the same interest in the resolution of whether a contract was formed, whether the Defendant breached the contract and whether compensation is payable as a result.

(3) Common Questions

[104] In *Pro Sys* at para 108, the Supreme Court of Canada listed a series of factors to consider when analyzing the commonality of the questions:

> (1) The commonality question should be approached purposively.
>
> (2) An issue will be "common" only where its resolution is necessary to the resolution of each class member's claim.
>
> (3) It is not essential that the class members be identically situated *vis-à-vis* the opposing party.
>
> (4) It not necessary that common issues predominate over non-common issues. However, the class members' claims must share a substantial common ingredient to justify a class action. The court will examine the significance of the common issues in relation to individual issues.
>
> (5) Success for one class member must mean success for all. All members of the class must benefit from the successful prosecution of the action, although not necessarily to the same extent.

[105] Furthermore, a common question can exist even if the answer given to it might vary from one member of the class to another (*Vivendi Canada Inc. v Dell'Aniello,* 2014 SCC 1 at paras 45-46 [*Vivendi*]).

[106] The Plaintiff has sought certification of the following issues:

> Applicability of the EU261/2004
>
> 1. Did the Defendant explicitly contractually incorporate EU261/2004 into its contracts of carriage with each Class Member?

2. If the answer to question 1 is No, is it an implied term of the Defendant's contract of carriage with each Class Member that the Defendant will comply with EU261/2004?

3. By virtue of the contractual incorporation (or as an implied term of the contract of carriage), is the Defendant bound to comply with all protections under EU261/2004, including any binding interpretations thereof?

4. To the extent the Defendant attempted to contractually limit the scope of EU261/2004, is such limitation valid under EU261/2004 and/or ordinary principles of contract law (including illegality, unenforceability, and/or severance)?

Class Period

5. Does the six-year limitation period under section 39(2) of the *Federal Courts Act* apply in this instance?

6. If question 5 is No, what is the applicable limitation period?

Flights Delayed During the Class Period

7. During the class period (as provided under questions 5-6 above), how many flights (that are captured within the class definition) resulted in passengers arriving at their final destination more than three hours later than the scheduled arrival time?

8. For each of the delayed flights under question 7, is the Defendant intending to advance a defense that the flight was delayed due to "extraordinary circumstances" (as defined by binding jurisprudence of the European Court of Justice)?

9. For each of the delayed flights selected by the Defendant under question 7, does each delay fit within the confines of "extraordinary circumstances"?

10. In the event the Court finds that there was no merit to the Defendant's assertion of "extraordinary circumstances" under question 9 above, should the Defendant pay costs in respect of some or all of the adjudication of those defense(s), pursuant to Rule 334.39(1) of the *Federal Courts Rules*?

Payment of Damages

11. For any delayed flights under question 7 (minus those that were selected under question 8) plus all flights under question 9 that do not fit within the confines of "extraordinary circumstances",

> should the Defendant pay compensation of 300 EUROS or 600 EUROS to each Class Member, depending on the length of the delay?
>
> 12. How much, in equivalent Canadian currency, should the Defendant pay under question 11 above?
>
> 13. Is the Defendant liable to pay court-ordered interest?
>
> 14. Can an aggregate assessment of damages be made pursuant to Rule 334.28(1) of the *Federal Court Rules*?

[107] I am satisfied that the Plaintiff has met the commonality requirement as it relates to questions 1 - 6. Although there may be some individual assessment of a class member's eligibility to claim compensation, no individual can succeed in his or her claim to recover compensation without establishing the existence of a contract, the breach thereof and the enforceability of EU 261 in Canada.

[108] Question 7 is not a common issue; it does not serve to advance the resolution of every class member's claim. Indeed, determining the number of flights that were delayed by more than three hours is not necessary to resolve or an ingredient in any class member's claim. Questions 8, 9 and 10 are also not common in the sense required. A class member on Flight X has no interest in whether or not Flight Y was delayed due to "extraordinary circumstances" or any of the factual and legal issues that might be involved in making that determination. The Plaintiff's suggestion that flights might be grouped together "into various categories for collective adjudication" is an admission that these issues are not common across the class. It follows that question 11 and 12 are not common issues.

[109] In addition, questions 10 and 13 are not appropriate common issues. Any party can argue that costs or interest should be awarded under Rule 334.39 if of the view that the circumstances warrant it.

[110] Finally question 14 is obviously not an issue in this case as the Plaintiff is seeking standardized compensation and not damages.

(4) Preferable Procedure

[111] When analyzing the criterion of preferable procedure, the ultimate question is whether other available means are preferable, and not whether a class action would fully achieve those goals (*AIC Ltd v Fischer,* 2013 SCC 69, at para 16 [*AIC*]). The Supreme Court has described the burden of proof when assessing the preferable procedure:

> The party seeking certification of a class action bears the burden of showing some basis in fact for every certification criterion: *Hollick*, at para. 25. In the context of the preferability requirement, this requires the representative plaintiff to show (1) that a class proceeding would be a fair, efficient and manageable method of advancing the claim, and (2) that it would be preferable to any other reasonably available means of resolving the class members' claims: *Hollick*, at paras. 28 and 31. A defendant can lead evidence "to rebut the inference of some basis in fact raised by the plaintiff's evidence": M. Cullity, "Certification in Class Proceedings — The Curious Requirement of 'Some Basis in Fact'" (2011), 51 *Can. Bus. L.J.* 407, at p. 417.
>
> With regard to the second aspect of the preferability requirement — that is, the comparative analysis — the representative plaintiff will necessarily have to show some basis in fact for concluding that a class action would be preferable to other litigation options. However, the representative plaintiff cannot be expected to address every conceivable non-litigation option in order to establish that there is some basis in fact to think that a class action would be preferable. Where the defendant relies on a specific non-litigation alternative, he or she has an evidentiary burden to raise it. As

> Winkler J. (as he then was) put it in *Caputo v. Imperial Tobacco Ltd.* (2004), 236 D.L.R. (4th) 348 (Ont. S.C.J.): ". . . the defendants cannot simply assert to any effect that there are other procedures that would be preferable without an evidentiary basis . . . . It must be supported by some evidence" (para. 67). However, once there is some evidence about the alternative, the burden of satisfying the preferability requirement remains on the plaintiff (*AIC* at paras. 48-49).

[112] It follows that the Plaintiff bears the burden of proving that (1) that a class proceeding would be a fair, efficient and manageable method of advancing the claim, and (2) that it would be preferable to any other reasonably available means of resolving the class members' claims. The Plaintiff is not required to show, however, that it is preferable to every procedure, only those within reason.

[113] The Plaintiff submits that a class action proceeding in this case would achieve the goals of class proceedings: access to justice, judicial economy, and behavioural modification (*AIC* at para 22). According to the Plaintiff, without a class action, it is unlikely that the class members' claims would be advanced at all because of the cost of individual litigation compared to the value of the claims.

[114] The Plaintiff maintains that the two alternative procedures proposed by the Defendant - filing a complaint to the Portugal national enforcement body [ANAC] or filing a complaint with the Canadian Transport Agency [CTA] - are not viable alternatives for the claims.

[115] I agree with the Plaintiff that the fact a complaint may be filed with ANAC affords no support for the proposition that this enforcement body is to be preferred. First, I note that

ANAC's opinions are not final or enforceable the way a Portuguese court's order would be. Secondly, this Court has rejected such non-binding procedures that give rise to no monetary damages as being a viable alternative to a class proceeding: *Condon*, at paras. 108, 111-115.

[116] In terms of the CTA procedure, the Plaintiff submits as follows:

> 121. With respect to SATA's assertion for making a CTA complaint, there is also no evidence that the CTA will review all 176 flights in question, which again raises concerns whether there can be effective behavioural modification. There is also no evidence that they will adjudicate the claims for all passengers on the same flight, and there will be no access to justice. Furthermore, the CTA is not equipped to handle 28,000 individual complaints brought by the Class, and would overwhelm the CTA.
>
> 122. Furthermore, the CTA is a merely a statutory tribunal whose statutory mandate is narrowly restricted to applying its enabling statute (i.e. the Canada Transportation Act) and accompanying regulation.130 The CTA itself has confirmed that it may not be able to directly or indirectly adjudicate claims under EU 261.131 In contrast, this Court has plenary jurisdiction to determine any matters arising out of its original jurisdiction.

[117] For the reasons that follow, I am not satisfied that a class action would be a preferable to the informal facilitation process and formal adjudicative process offered by the CTA.

[118] First, the Plaintiff bears the onus to prove some basis in fact for her position that the CTA will fail to act on complaints. She cannot rely on the absence of evidence to prove a fact; facts without evidence are bald assertions. The Plaintiff engages in speculation and conjecture when she claims that the CTA will be overwhelmed and is not equipped to handle voluminous complaints.

[119] Second, the Plaintiff has not provided any authority for her proposition that this Court somehow has greater jurisdiction than the CTA to adjudicate carriage by air disputes.

[120] The CTA is an independent, quasi-judicial tribunal. It makes decisions on a wide range of matters involving air and extra-provincial rail and marine modes of transportation under the authority of Parliament. The CTA has considerable power and discretion over carriers, including the authority to examine and interpret the Defendant's tariff. Where it determines that a carrier has not properly applied its terms and conditions of carriage, the CTA has broad power to order the carrier to take the corrective measures that the Agency considers appropriate; it may also order payment of compensation to passengers adversely affected.

[121] I agree with the Defendant that an application to the CTA explicitly requesting it to determine whether EU 261 is incorporated into the Defendant's tariff such that it is enforceable in Canada would an effective means of resolving the question on which the Plaintiff's proposed action is founded and serve as a precedent for other similar claims.

(5) Representative Plaintiff

[122] The fifth and final criterion for certification as a class action is that there is a representative plaintiff who would adequately represent the interests of the class without conflict of interest and who has produced a workable litigation plan.

[123] Whether the representative plaintiff can provide adequate representation depends on such factors as: his or her motivation to prosecute the claim; his or her ability to bear the costs of the litigation; and the competence of his or her counsel to prosecute the claim.

[124] On this last criterion, I can be brief and simply say that the Plaintiff satisfies all the aspects of the representative plaintiff criterion. I find that all the objections raised by the Defendant are trivial and can easily be addressed in case management.

V. Conclusion

[125] For the above reasons, the motion to strike for want of jurisdiction is granted and the action is dismissed. The certification motion is dismissed as the Plaintiff has failed to discharge her onus of meeting all five criteria for certification**.**

VI. Costs

[126] The Defendant has requested costs of its motion. However, it has failed to establish any conduct of the Plaintiff that unnecessarily lengthened the duration of the proceeding, any step taken by the Plaintiff that was improper, vexatious or unnecessary, or any other exceptional circumstances to justify an award of costs in favour of the Defendant, as required by Rule 334.39 of the *Rules*. The no costs provision applies by default to any certification process before this Court. In the circumstances, each party shall bear their own costs.

ORDER IN T-1517-18

THIS COURT ORDERS that:

1. The Plaintiff's motion for certification of the proposed class action as against the Defendant, SATA Internacional – Azores Airlines, SA is dismissed.

2. The Defendant's motion to strike the Amended Statement of Claim is granted, without leave to amend.

3. There shall be no order as to costs.

"Roger R. Lafrenière"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1517-18
STYLE OF CAUSE:	DORA BERENGUER v SATA INTERNACIONAL – AZORES AIRLINES, S.A.
PLACE OF HEARING:	MONTRÉAL, QUÉBEC
DATE OF HEARING:	OCTOBER 21, 22 AND 23, 2019
FURTHER WRITTEN SUBMISSIONS:	FEBRUARY 19, 2021 MARCH 1, 2021 MARCH 2, 2021
ORDER AND REASONS:	LAFRENIÈRE J.
DATED:	MAY 3, 2021

APPEARANCES:

M[e] Jérémie John Martin M[e] Sébastien A. Paquette Mr. Simon Lin	FOR THE PLAINTIFF
Mr. Carlos P. Martins Mr. Andrew MacDonald Ms. Emma Romano	FOR THE DEFENDANT

SOLICITORS OF RECORD:

Champlain Avocats Montréal, Québec	FOR THE PLAINTIFF
Evolink Law Group Burnaby, British Columbia	
WeirFoulds LLP Toronto, Ontario	FOR THE DEFENDANT