

Federal Court



Cour fédérale

Date: 20250603

Docket: T-1517-18

Citation: 2025 FC 992

Ottawa, Ontario, June 3, 2025

PRESENT: The Honourable Mr. Justice Lafrenière

PROPOSED CLASS PROCEEDING

BETWEEN:

DORA BERENGUER

Plaintiff

and

**SATA INTERNACIONAL – AZORES
AIRLINES, S.A.**

Defendant

ORDER AND REASONS

I. Overview

[1] The Plaintiff, Dora Berenguer, commenced a proposed class action in 2018 seeking relief for herself and other passengers who experienced delays on flights to or from Canada operated

by the Defendant, Azores Airlines, S.A., a Portuguese airline previously known as SATA Internacional.

[2] The Plaintiff claims in her pleading to be entitled to compensation in the amount of 600 euros stemming from the Defendant's contract of carriage, due to a flight delay of more than four hours that she experienced as a passenger. She claims that the contract incorporates terms in relation to flight delay contained 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].

[3] Following a hotly contested three-day hearing, the Plaintiff's motion for certification of the action as a class proceeding was dismissed. After exhausting all her appeal rights, the Plaintiff now moves to schedule a new certification motion for hearing.

[4] The Plaintiff's motion gives rise to two principal issues: whether the Court has any remedial jurisdiction under Rule 385 and/or Rule 334.2 of the *Federal Courts Rules*, SOR/98-106 [Rules] to permit the Plaintiff to "rectify defects" identified in a final order refusing certification, and if not, whether there are special circumstances that would warrant displacing the principle of finality.

[5] For the reasons that follow, I conclude that there is no remedial jurisdiction which would allow me to re-open the certification motion under the Rules. The Plaintiff is effectively requesting leave to relitigate a critical issue for certification after her previous application for such relief was refused by a final order that has been affirmed on appeal. Moreover, the Plaintiff

has failed to establish any special circumstances or valid reasons which would justify what is essentially a do-over. In my view, to grant the motion would offend the principles of finality and of judicial economy, as well as the integrity of the administration of justice.

[6] To start, it is necessary to briefly set out the procedural history that led to the present motion.

II. Procedural History

[7] On motion of the Defendant, the Plaintiff's statement of claim, as amended, was struck for failing to disclose a reasonable cause of action by Order dated May 3, 2021. The Plaintiff's motion for certification was also dismissed on the basis that the preferable procedure criterion set out in Rule 334.16(1)(d) had not been met in light of the informal facilitation and formal adjudicative processes offered by the Canadian Transportation Agency [CTA]: *Berenguer v SATA Internacional – Azores Airlines, SA*, 2021 FC 394 [Certification Decision].

[8] On August 16, 2023, the Federal Court of Appeal [FCA] set aside the Order striking the Plaintiff's claim; however, it upheld the dismissal of her motion for certification [Judgment]. The FCA concluded that there was no reversible error in my determination that the preferable procedure requirement in Rule 334.16 was not satisfied: *Berenguer v Sata Internacional - Azores Airlines, SA*, 2023 FCA 176.

[9] The Plaintiff brought a motion before the FCA pursuant to Rule 397 seeking reconsideration of the Judgment. She argued that the FCA should have considered Rule 60,

which permits gaps in the evidence to be remedied. She also sought clarification as to whether the proposed class action should be allowed to continue. In terms of relief, the Plaintiff requested an order to include in the Judgment either: (1) the words “[t]he appellant’s class action certification motion is adjourned and returned to the Federal Court,” or (2) the words “[t]he appellant’s class action certification motion remains dismissed, with liberty to re-apply.”

[10] One day before the FCA rendered its decision on the Rule 397 motion, the Plaintiff applied to the Supreme Court of Canada for leave to appeal the Judgment.

[11] On October 17, 2023, the FCA dismissed the Plaintiff’s motion in an unreported decision. The FCA found that the Plaintiff’s request for relief under Rule 60 was not a matter that should have been dealt with because it was not previously raised on appeal. On the same basis, the FCA also declined to deal with the Plaintiff’s request for clarity as to whether the proposed class action should be allowed to continue. It noted that this finding was not intended to foreclose the Plaintiff’s right to raise the issue with the Federal Court, “which may decide what rights, if any, [she] has to continue the class action via a fresh motion for certification.”

[12] On April 11, 2024, the Plaintiff’s application for leave to appeal to the Supreme Court of Canada was denied: *Dora Berenguer v Sata Internacional- Azores Airlines, SA*, 2024 CanLII 30076 (SCC).

[13] On April 16, 2024, the Plaintiff informally requested the CTA to entertain a test case to determine whether EU 261 is incorporated in the Defendant’s tariff. One month later, the CTA

responded that, to the extent that the Plaintiff's request was related to a passenger's entitlements under an air carrier's tariff, this is the type of question that would typically be resolved through its air travel complaints resolution process.

[14] Dissatisfied with the CTA's response, the Plaintiff served and filed a fresh notice of motion for certification on July 24, 2024. During a case management conference held in September 2024, the Plaintiff was directed to bring the present motion instead, limited to determining what rights she has, if any, to continue the class action via a proposed fresh certification motion. Hence, the present motion has been brought.

[15] Before turning to the parties' arguments, a few words should be said concerning the common law doctrines of *functus officio* and issue estoppel.

III. Doctrines of *Functus Officio* and Issue Estoppel

[16] The common law doctrine of *functus officio* holds that once a decision-maker has rendered a decision, they have discharged their duty and exhausted their authority: *Canadian Broadcasting Corp v Manitoba*, 2021 SCC 33 at para 32 [CBC]. A court loses jurisdiction, and is thus said to be *functus*, once the formal judgment has been entered: *CBC* at para 33. Subject to limited exceptions, the function of correcting judgments is reserved to the appellate court.

[17] The doctrine of issue estoppel provides that, once a judicial proceeding finally decides an issue, neither party can relitigate that issue. It exists to ensure finality, preserve scarce judicial

resources, prevent parties from exposure to additional legal costs and reduce the risk of undue litigation: *Canada v Greenwood*, 2024 FCA 22 at para 35 [*Greenwood*].

[18] The two doctrines are, in effect, two sides of the same coin; both are based on the principle of finality.

[19] In *Greenwood*, the FCA set out the three preconditions for issue estoppel to apply (para 36, citing *Danyluk v Ainsworth Technologies Inc*, 2001 SCC 44 at para 25 [*Danyluk*]):

(1) The same question has been decided;

(2) The judicial decision which is said to create the estoppel was final; and,

(3) The parties to the judicial decision or their privies were the same persons as the parties to the proceedings in which the estoppel is raised or their privies.

[20] The FCA noted that while certification orders do not dispose of the entire proceeding, “they may yield final rulings on issues going to the merits of the case”: *Greenwood*, at para 40.

IV. Analysis

[21] The Plaintiff advances several arguments in support of her position that I am not *functus* in this matter and that her proposed fresh certification motion is not barred by issue estoppel. They boil down to the following.

[22] The Plaintiff submits that issue estoppel does not apply in this case because the proposed fresh certification motion does not raise the same question previously decided in the Certification

Decision. She maintains that the Certification Decision “primarily” decided two issues: (a) her “first” motion for class action certification under Rule 334.16; and (b) the Defendant’s motion to strike the entire action under Rule 221. According to the Plaintiff, her motion for certification was dismissed simply “on a technicality of a lack of evidence” on the CTA’s capacity at that time to handle tens of thousands of complaints.

[23] The Plaintiff further submits that the FCA “completely restored” her proposed class proceeding and, consequently, the Certification Decision remains “equivocal” on whether the Plaintiff may bring a fresh certification motion to address curable deficiencies relating to commonality and, relatedly, to preferability.

[24] The Plaintiff maintains that this Court has a broad remedial jurisdiction under its case management powers in Rule 385 and/or Rule 334.2 to allow her to rectify curable deficiencies in her certification motion – a remedial jurisdiction that has yet to be exercised and thus is not covered by issue estoppel.

[25] The Plaintiff submits, in the alternative, that there are material changes in circumstances that arose while the Certification Decision was under appeal, such as new evidence which was not available at the time of the certification hearing, that serve as strong exceptions to the doctrine of issue estoppel in this case and eliminate the basis on which certification was refused.

[26] I will address each of the Plaintiff’s arguments in turn.

A. *Remedial Discretion*

(1) The Court's Jurisdiction under Rule 385

[27] The Plaintiff submits that Rule 385 is a source of powers upon which I can draw in this instance to permit her to rectify “the non-fundamental defects previously identified” in the Certification Decision. I disagree. This argument is based on the false premise that the Court's general powers under Rule 385 somehow allow a case management judge to revisit a final order refusing certification.

[28] The powers of a case management judge are set out in Rule 385(1), which reads in part as follows:

385 (1) Unless the Court directs otherwise, a case management judge or a prothonotary assigned under paragraph 383(c) shall deal with all matters that arise prior to the trial or hearing of a specially managed proceeding and may

(a) give any directions or make any orders that are necessary for the just, most expeditious and least expensive outcome of the proceeding;

[...]

385 (1) Sauf directives contraires de la Cour, le juge responsable de la gestion de l'instance ou le protonotaire visé à l'alinéa 383c) tranche toutes les questions qui sont soulevées avant l'instruction de l'instance à gestion spéciale et peut :

a) donner toute directive ou rendre toute ordonnance nécessaires pour permettre d'apporter une solution au litige qui soit juste et la plus expéditive et économique possible;

[...]

[29] The Plaintiff cites *WN Pharmaceuticals Ltd v Krishnan*, 2023 BCCA 72 at para 67 [Krishnan] to argue that the powers of a case management judge have historically included the “broad powers of amendment to cure a deficiency in an action brought in class form,” and that there is no requirement for a specific rule or provision to give effect to this power to allow amendments to cure a deficiency. The Plaintiff claims I have yet to exercise my discretion under Rule 385(1)(a) to allow her to bring forward a second class action certification motion. With respect, her argument is based on a misreading of *Krishnan*, and no such discretion exists under Rule 385.

[30] Rule 385(1) provides that a case management judge “shall deal with all matters that arise prior to the trial or hearing of a specially managed proceeding” [emphasis added]. Although I was assigned as case management judge of the proceeding back in 2018, when adjudicating the Plaintiff’s motion for certification I was wearing the hat of a certification judge assigned to hear the matter under Part 5.1 of the Rules, and not that of a case management judge.

[31] *Krishnan* simply confirms that a “chambers judge,” in other words, a certification judge, has the discretion to adjourn a certification application to permit amendments to pleadings and to adduce further evidence, as expressly contemplated by s. 5(6) of British Columbia’s *Class Proceedings Act*, RSBC 1996, c 50 [CPA]. While there is no similar provision in Part 5.1 of the Rules, Rule 334.11 provides that, to the extent they are not incompatible with the rules relating to class proceedings, the rules applicable to actions apply in such proceedings.

[32] This includes Rule 60, which provides that, “[a]t any time before judgment is given in a proceeding, the Court may draw the attention of a party to any gap in the proof of its case ... and permit the party to remedy it on such conditions as the Court considers just.” Rule 75 also sets out the general rule that the Court may, “at any time,” allow a party to amend a document on terms that will protect the rights of all parties. However, “at any time” cannot not be interpreted so as to allow a party to move for such relief after judgment.

[33] At no time during the hearing of the certification motion, and at no point before the Certification Decision was released, did the Plaintiff seek leave to correct any deficiencies in her motion material. Although a judge has broad discretion to provide relief at any time prior to judgment, that right is extinguished after judgment has been signed: *Halford v Seed Hawk Inc*, 2004 FC 455 at para 6.

[34] The Plaintiff has provided no support for the proposition that a case management judge’s general powers under Rule 385 somehow allow the case manager to reconsider a final order by a certification judge. Rule 385 simply has no application here.

(2) The Court’s Jurisdiction under Rule 334.2

[35] The Plaintiff submits that, after declining to certify the proceeding, I left unexercised a discretionary power under Rule 334.2.

[36] Rule 334.2 reads as follows:

334.2 If a judge refuses to certify a proceeding as a class proceeding or decertifies a proceeding, the judge may permit the proceeding to continue as one or more proceedings and may make any appropriate order in that regard.

334.2 Le juge qui refuse ou retire l'autorisation peut autoriser la poursuite de l'instance sous forme d'une ou de plusieurs instances et rendre toute ordonnance appropriée.

[37] The Plaintiff is technically correct. The issue of continuation of the action was not addressed in the Certification Decision given my conclusion that it was plain and obvious that the Plaintiff's pleading did not disclose a reasonable cause of action. As this finding was overturned by the FCA, it remains open to the Plaintiff to apply for permission to continue the proceeding under the ordinary rules governing actions.

[38] The Plaintiff insists, however, that Rule 334.2 empowers a court to allow a proposed class proceeding to be reanimated as a class proceeding after certification has been refused, and to order that particular deficiencies be rectified before it may continue. I disagree. The Plaintiff's interpretation of Rule 334.2 has no grounding in the text of the rule or in any jurisprudence or other authority. Quite the opposite.

[39] The Plaintiff cites Ward K. Branch and H. Michael Rosenberg, *Class Actions in Canada*, 2d ed (Thomson Reuters, 2025), § 5.11 Alternative Orders, as authority for the proposition that this Court has broad powers under Rule 334.2 to permit a proposed class proceeding to continue as a proposed class proceeding and order that particular deficiencies be rectified before it may continue. However, that is not what the authors say. They simply confirm that a certification

judge is not precluded from adjourning a certification motion or allowing a plaintiff to re-apply for that relief. There is no suggestion that provisions such as Rule 334.2 empower certification judges to reanimate a certification motion after issuing an order that refuses certification.

[40] Moreover, in *MacKinnon v National Money Mart Company*, 2006 BCCA 148 [*MacKinnon*], a case upon which the Plaintiff herself relies on, the British Columbia Court of Appeal [BCCA] rejected the same proposed interpretation of section 9 of the CPA, which contains similar language as Rule 334.2:

9. If the court refuses to certify a proceeding as a class proceeding, the court may permit the proceeding to continue as one or more proceedings between different parties and, for that purpose, the court may

- (a) order the addition, deletion or substitution of parties,
- (b) order the amendment of the pleadings, and
- (c) make any other order that it considers appropriate.

[41] The BCCA noted in *MacKinnon* at para 34 that the ordinary and plain meaning of the words used, their context and the history of the development of class actions legislation in Canada do not support an interpretation of a court's powers following a refusal to certify as encompassing new attempts to certify; this would be contrary to the purposes of judicial economy and access to justice, which animate Canadian class actions legislation.

[42] The commentary under section 9 of the *Uniform Class Proceedings Act* [UCPA], adopted by the Uniform Law Conference of Canada in 1996, is to the same effect:

If a court refuses to certify a proceeding as a class proceeding, section 9 allows the court to permit the proceeding to continue as a

“non-class” proceeding and to order the addition, deletion or substitution of parties, the amendment of the pleadings or to make any other order the court considers appropriate. In this way, the plaintiff(s) can still pursue a legal remedy despite the fact that the court has refused to certify the matter as a class proceeding.

[43] Moreover, in recommending a rule to set out the powers of the Court after refusing to certify a class proceeding, the Federal Court Rules Committee’s “Class Proceedings in the Federal Court of Canada - Discussion Paper,” (June 9, 2000) was inspired by the Quebec, Ontario, and British Columbia class proceedings legislation and the UCPA, which “all provide that, if the Court refuses to certify a class proceeding, the litigation may proceed as an ordinary proceeding.”

[44] In the circumstances, I find that the clear intention of Rule 334.2 is confined to allowing a plaintiff to continue a proceeding under the ordinary rules, as a non-class proceeding.

(a) *Conclusion on Remedial Discretion*

[45] As the certification judge, I maintained complete control over the hearing process and retained unimpeded jurisdiction to adjudicate matters raised in the Plaintiff’s certification motion. This included the inherent discretion to allow the parties to amend their pleadings or adduce further evidence before rendering the Certification Decision.

[46] The Plaintiff was fully aware prior to the certification hearing that the Defendant disputed her position that the proposed class action would be a fair, efficient and manageable method of advancing the claim, or that it would be preferable to other available procedures. Notably, the

Defendant wrote at paragraph 109 of its responding written representations that an application to the CTA “explicitly requesting it to determine whether EU261 is incorporated into Azores Airlines’ tariff such that it is enforceable in Canada is an effective means of resolving the question on which the plaintiff’s proposed action is founded.”

[47] Despite being on notice of the Defendant’s position, the Plaintiff elected not seek leave to amend her pleading, nor to adduce counter evidence.

[48] The Plaintiff says that she could not have requested an opportunity to remedy curable deficiencies in the certification motion in light of my finding that there were “fundamental defects” in her pleading which led to it being struck. This argument has no merit since the issue of preferability was independent of the viability of the Plaintiff’s cause of action.

[49] While I agree with the Plaintiff that in certification motions, and in the post-certification period, courts can be quite active and flexible because of the complex and dynamic nature of class proceedings, “the role of courts in these areas, active and flexible though it may be, does not extend to an obligation to grant adjournments, even when not sought, in order to permit those seeking certification to cooper up their motion or to help them meet the substantive certification requirements under Rule 334.16”: *Buffalo v Samson Cree Nation*, 2010 FCA 165 at paras 12-13.

[50] A failure to adduce the necessary and/or sufficient evidence is not a mere technicality; the Plaintiff was required to put her best foot forward in her motion for certification and she simply failed to do so. The doctrine of issue estoppel bars all issues that were or could have been raised

in the earlier proceeding: *Canada v MacDonald*, 2021 FCA 6 at para 14, citing *Danyluk* at paras 18-19.

[51] The Plaintiff is effectively seeking a “do-over” with respect to an issue that was or could have been thoroughly considered on the certification motion, and in respect of which she relied on admittedly deficient evidence. The order refusing certification, affirmed on appeal, is final. Accordingly, the doctrines of *functus officio* and *res judicata*, in the form of issue estoppel, are engaged.

(3) Plaintiff’s Grounds to Set Aside Issue Estoppel

[52] The FCA stated in *Greenwood* that “there are circumstances where the doctrine of issue estoppel can be set aside, namely in the event of an appeal, a material change in circumstances, or new evidence” (para 42, citing Donald J Lange, *The Doctrine of Res Judicata in Canada*, 5th ed (Toronto: LexisNexis, 2021) at 328).

[53] The Plaintiff argues that, if issue estoppel applies, I should exercise my discretion to set the Certification Decision aside due to four material changes in the circumstances, listed as follows:

- A. The two fundamental defects noted in the Certification Decision were rectified on appeal.
- B. Legislative changes to the CTA’s dispute resolution process have changed the preferability analysis.

C. The CTA's new dispute resolution process is a significant burden to the taxpayer.

D. The CTA is clearly being overwhelmed now.

[54] The first alleged material change in circumstances is easily disposed of. The FCA concluded in its Judgment that I erred in finding that this Court lacked subject-matter jurisdiction under s. 23 of the *Federal Courts Act*, RSC 1985, c F-7, and that the exclusivity principle under the Montreal Convention precluded the claims raised in the Plaintiff's action. According to the Plaintiff, the fact that the FCA set aside my order striking the Plaintiff's claim and "completely restored" her pleading is clearly a material change in circumstances. However, the fact that the FCA set aside the order on jurisdictional grounds is not a new matter or a change in circumstances on which the reopening of her failed certification motion could be allowed. The FCA did not find it appropriate to remit the certification motion to this Court in its Judgment, as it had the power to do. Nor was it prepared to revisit the matter when moved to reconsider. The Plaintiff's position is not legally tenable as it entirely ignores the principle of finality.

[55] The next three alleged material changes in circumstances are essentially one in the same. In 2023, the *Canada Transportation Act*, SC 1996, c 10 was amended, including some changes to the CTA's dispute resolution process. The Plaintiff argues that as a result of these amendments, there are material changes that would impact the preferable procedure analysis for certification. I disagree.

[56] My finding in the Certification Decision was that the Plaintiff adduced no evidence to show that the CTA will fail to act on complaints (para 118). The Plaintiff argues that legislative amendments to the CTA's dispute resolution process make it legally and practically impossible for affected passengers to invoke previously decided CTA complaints as precedent. Specifically, where complaints used to be heard by Members of the CTA and their decisions were made public, complaints are now assigned to dispute resolution officers who issue decisions that are largely confidential, unless both parties consent to publication. In oral submissions, the Plaintiff characterized these amendments as both a change in the law and facts.

[57] However, a change in the law is not a strict exception but rather a ground upon which the Court *may* decide to set aside the doctrine of issue estoppel. The following comments from the Ontario Court of Appeal in *Smith Estate v National Money Mart Co*, 2008 ONCA 746 at para 42 are instructive on this point:

[42] Particularly when read in the light of *Danyluk*, *Minott* does not lay down an iron-clad guarantee that a litigant who has fought an issue and lost will always be accorded the benefit of a change in the law. A litigant has no automatic or presumptive right to relitigate an issue on account of a change in the law: the matter rests upon the discretion of the court to ensure that the finality principle is applied in a manner consistent with the interests of justice. The "special circumstances" qualification on issue estoppel...qualifies the rigorous application of issue estoppel, not with another strict exception, but rather with a discretion to ensure that the interests of justice are met.

[Emphasis added.]

[58] In *Sanofi-Aventis Canada Inc v Pharmascience Inc*, 2007 FC 1057 [*Sanofi-Aventis*], Justice Anne Mactavish noted at paras 47-48 that there is some dispute in the jurisprudence as to whether a change in the law is a factor that warrants setting aside the doctrine of issue estoppel,

and that “neither the Federal Court of Appeal or the Supreme Court of Canada has ever found that a change in the law would justify relaxing the application of issue estoppel.”

[59] Furthermore, a change in the law for the purpose of issue estoppel refers to subsequent jurisprudence on an issue which was decided. When a later decision renders a finding in an earlier decision “clearly wrong,” a court may exercise its discretion not to apply issue estoppel; this is not the case before me: *Lange*, *supra* at 281; *Sanofi-Aventis* at para 60.

[60] Rather than seeking to re-litigate a narrow issue based on a specific change in law, the Plaintiff is asking me to re-open the entire case in a matter contrary to the doctrine of *res judicata*, as described by Justice Marshall Rothstein, writing for the FCA in *Metro Can Construction Ltd v The Queen*, 2001 FCA 227 at para 5:

There is a fundamental difference between permitting an issue that has been decided [to be] relitigated and redetermined in subsequent litigation on the basis of a change in the law on the one hand, and reopening a previously decided case on the basis of a change in the law on the other. It is only the latter that would lead to the reconsideration of an indefinite number of previous cases, a result not reconcilable with the rationale for the *res judicata* doctrine.

[61] Specifically with respect to legislative amendments, unless the retroactivity of a statutory amendment expressly deprives litigants of their judgment, the judgment is binding for estoppel purposes; similarly, subsequent legislation does not deprive earlier judgments of their estoppel power unless in explicit and unmistakable terms: *Lange*, *supra* at 290, citing *Hornby Island Trust Committee v Stormwell*, 1988 CanLII 3143 (BCCA) at paras 24-27 [*Hornby Island*] and *Davis v Davis*, 1928 CanLII 693 (ABCA) at pp 361-362 [*Davis*].

[62] In *Hornby Island* and *Davis*, courts applied issue estoppel even in light of amendments and new legislation directly impacting the substantive rights of litigants; the case for setting aside issue estoppel is even less compelling in the circumstances at bar. The 2023 amendments affect the dispute resolution process, and not the Plaintiff's substantive right to compensation.

[63] The Plaintiff concedes that the CTA has the power to apply a decision to different passengers of the same flight. The fact that the putative class members come from more than one flight does not make the CTA's dedicated process for dealing with the complaints either legally or practically impossible. While the amendments make changes to the dispute resolution process, they do not foreclose the CTA from acting on complaints. The material facts remain consistent with the findings that grounded my conclusion on preferable procedure in the Certification Decision.

[64] The Plaintiff submits that my finding in the Certification Decision – that this Court does not have greater jurisdiction than the CTA to adjudicate air travel disputes – no longer holds true. She notes that while CTA Members' decisions used to be judicially reviewed by the FCA, under the amended dispute resolution process, decisions of the CTA's new complaint resolution officers are judicially reviewed by the Federal Court.

[65] I disagree with the Plaintiff's suggestion that now, as a reviewing court, the Federal Court has a greater jurisdiction than the CTA to handle air travel disputes. The Federal Court's role on judicial review is not to venture into issues that an administrative decision-maker is incapable of addressing – in fact it would be inappropriate for the Court to do so. The process envisioned by

Parliament is that these disputes would be determined by the CTA *before* being considered by the Federal Court: see e.g., *Singh v Canada (Citizenship and Immigration)*, 2023 FC 875 at paras 59-60.

[66] As recently noted by the FCA in *Canada v Hirschfield*, 2025 FCA 17 [*Hirschfield*], claims of proposed class members that come within the “full and exclusive jurisdiction” of an administrative body “may not be adjudicated – except by way of judicial review following a decision of the [administrative body] – in the Federal Court”; in such cases, “[i]t is self-evident that a procedure the Court has no jurisdiction to hear and determine cannot be a preferable procedure” (para 78). Put another way, plaintiffs cannot override the jurisdictional boundaries created by Parliament by characterizing their claims as a class proceeding. To find otherwise would be an error in law of “failing to address the breadth and exclusivity of Parliament’s conferral of authority on the [CTA]” (*Hirschfield* at para 78).

[67] The Plaintiff conceded in both written and oral submissions that, when she argued that the CTA was overwhelmed during the certification hearing held in 2019, this was speculative. She admits that the CTA’s statistics have since revealed that it was not in fact being overwhelmed with complaints at the time. She argues however, that new evidence now shows “beyond doubt” that the CTA is drastically overwhelmed and experiencing a significant backlog, and that there will be a significant cost to the public in resorting to the CTA’s dedicated process.

[68] While the Plaintiff’s evidence establishes that the CTA’s backlog of cases has increased significantly over the past few years and that it may be more expensive for a claimant to advance

their claim, there is no indication that the dedicated statutory process for dealing with air travel disputes is either impractical or dysfunctional.

V. Conclusion

[69] The general principle is that judicial decisions are final, and consequently the setting aside of such a decision must be based on exceptionally serious and compelling grounds. This is necessary to ensure certainty in the judicial process as well as to preserve the integrity of that process. The doctrine of issue estoppel clearly applies in this case and none of the Plaintiff's arguments for bringing a proposed fresh certification motion are persuasive. The Plaintiff's request to schedule a new certification motion for hearing is accordingly denied.

[70] No costs were sought for this motion, and none are awarded.

ORDER IN T-1517-18

THIS COURT ORDERS that:

The Plaintiff's motion is dismissed, without 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: BY VIDEOCONFERENCE

DATE OF HEARING: NOVEMBER 26, 2024

ORDER AND REASONS: LAFRENIÈRE J.

DATED: JUNE 3, 2025

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