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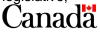
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AIR LAW

Related subjects: Federal Court Jurisdiction; Practice; Transportation

Appeal from Federal Court decision dismissing proposed class action seeking relief for appellant, other passengers of foreign airline who experienced flight delays on flights to or from Canada — Respondent Portuguese airline operating passenger flights to and from various cities in Canada — Appellant claiming to be entitled to compensation due to delay in flight of more than four hours — Alleging that her entitlement to compensation stemming from contract of carriage — Federal Court dismissed motion for order to certify action as class proceeding on basis appellant failed to satisfy five required conditions in Federal Courts Rules, SOR/98-106, r. 334.16(1) — Granted respondent's motion to have appellant's amended statement of claim struck out without leave to amend pursuant to r. 221(1)(a) — Determined that action doomed to fail because Federal Court lacked jurisdiction to hear matter, that claim, which is for fixed compensation without proof of damage, barred by Convention for the Unification of Certain Rules Relating to International Carriage by Air, signed at Montréal, May 28, 1999, being Schedule VI to the Carriage by Air Act, R.S.C., 1985, c. C-26 (Montreal Convention) — Issues whether Federal Court erred in concluding that: (1) pleading should be struck out for lack of jurisdiction; (2) pleading should be struck out because claim barred by Montreal Convention; (3) conditions for certification as class proceeding not satisfied — To decide first issue, whether pleading should be struck for lack of jurisdiction, three-step ITO-Int'l Terminal Operators v. Miida Electronics, [1986] 1 S.C.R. 752 test applied (ITO test) — Claim satisfying step 1 of ITO test on plain, obvious standard because there is good argument that claim "recognized" under federal law — Licences issued by Canadian Transportation Agency may be subject to terms. conditions on specified matters which include "tariffs, fares and carriage of passengers" - By requiring carrier to comply with terms, conditions specified in tariff, arguable that Air Transportation Regulations, SOR/88-58 (Regulations) recognizing contractual obligations of carrier to passengers - Since these obligations pleaded as including compensation that appellant seeks, not plain, obvious that Regulations do not recognize appellant's claim — Federal Court rejected this view, followed Donaldson v. Swoop Inc., 2020 FC 1089 — However, Court in Donaldson erred when it concluded that Canada Transportation Act, S.C. 1996, c. 10 (CTA), s. 116(5) implies there is a general scheme for jurisdiction of courts in CTA - For these reasons, not plain, obvious that step 1 of ITO test not satisfied — Next, reasonably arguable that degree to which CTA, Regulations govern contracts of carriage sufficient to satisfy plain, obvious test with respect to step 2 of ITO test -Carriage by Air Act essential to disposition of action, nourishes grant of jurisdiction — Finally, with respect to step 3 of ITO test, not plain, obvious that any federal law relevant in this case is constitutionally invalid — Amended statement of claim therefore not doomed to fail for lack of jurisdiction in Federal Court — As to second issue, whether pleading should be struck out because barred by Montreal Convention, International Air Transport Association v. Canadian Transportation Agency, 2022 FCA 211, released after hearing of present matter, making it clear that Federal Court erred in finding that claim doomed to fail because of Montreal Convention — Montreal Convention not prohibiting Canada from introducing laws that provide standardized compensation for flight delays — Finally, as to third issue, Federal Court did not err when it concluded that requirement in r. 334.16 (class proceeding preferable procedure for just, efficient resolution of common questions) not satisfied — Open to Federal Court to find respondent's evidentiary burden satisfied by evidence which describes applicable legislative scheme — Also open to Federal Court to consider legislative,

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regulatory provisions applicable to Canadian Transportation Agency in assessing preferability — In conclusion, Federal Court erred in concluding it was plain, obvious that pleading did not disclose reasonable cause of action — Federal Court did not err in concluding that requirements for certification not satisfied — Federal Court order set aside to extent that it struck out amended statement of claim — Appeal allowed.

BERENGUER V. SATA INTERNACIONAL - AZORES AIRLINES, S.A. (A-138-21, 2023 FCA 176, Woods J.A., reasons for judgment dated August 16, 2023, 26 pp.)

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