Federal Court  Cour fédérale

Date: 20201126

Docket: T-428-20

Citation: 2020 FC 1089

Ottawa, Ontario, November 26, 2020

PRESENT: The Honourable Mr. Justice Manson

BETWEEN:

JANET DONALDSON

Plaintiff

and

SWOOP INC., WESTJET AIRLINES LTD., AIR CANADA, AIR TRANSAT A.T. INC. AND SUNWING AIRLINES INC.

Defendants

ORDER AND REASONS

I. Introduction

[1] The Plaintiff, Ms. Janet Donaldson, seeks certification and appointment as the representative Plaintiff, in a proposed class action against the Defendants, WestJet Airlines Ltd. [WestJet], Swoop Inc., Sunwing Airlines Inc., Air Canada and Air Transat A.T. Inc. [collectively

"the Defendants"], for a refund of the original forms of payment for airfare contracts allegedly frustrated by the pandemic.

[2] The Plaintiff is a British Columbia resident who had confirmed bookings for air travel with WestJet, and did not receive a refund of her prepaid form of payment, but instead was offered a future credit against travel. The Plaintiff flew with WestJet and had no confirmed bookings with the other airlines. She now seeks to represent a class of individuals [the Class]:

> "residing anywhere in the world who, before March 11, 2020 had a confirming booking for travel on a flight operated by WestJet, Swoop, Sunwing, Air Canada, or Air Transat, on a booking scheduled to depart on or after March 13, 20209 until the Travel Advisory is fully withdrawn, including a subclass of persons who had a confirmed booking on a COVID-19 Suspended Flight immediately prior to a Defendant deciding to suspend or cancel that flight;
>
> but excluding persons that:
>
> (1) already cancelled their bookings prior to the Travel Advisory; (2) had a full refund to the original form of payment in progress prior to March 27, 2020;(3) acquired their air tickets on a Swoop or WestJet operated flight from Swoop's or WestJet's code-share partners; (4) had a booking that allows full refunds for any reason, without any charges or fees, and have received their full refunds to their original form of payment for that booking; and (5) had commenced travel on their original or revised bookings."

[3] The Defendants are major airlines based in Canada. The Plaintiff relies on contracts of carriage [Tariffs] as the source of the Defendants' obligations towards the Plaintiff, alleging that the parties' Tariffs have been frustrated by the COVID-19 pandemic.

[4] More specifically, the Plaintiff claims that under the doctrine of frustration of contract, the Class is entitled to a refund to their original forms of payment. In the alternative, the Plaintiff

claims that pursuant to the express or implied terms of the Tariffs, the Class has a consumer right to a refund for unused air tickets when a Defendant is unable to provide services within a reasonable time.

[5] The certification motion is opposed by the Defendants, who have countered with motions of their own seeking the dismissal of the proposed class action on the grounds that this Court has no jurisdiction to entertain the proceeding. The Defendants make reference to Rule 221 of the *Federal Courts Rule*s, SOR/98-106 [*Rules*] in their notices of motion; however it is clear from their submissions that they rely solely on Rule 221(1)(a).

II. Background

A. *Timeline*

[6] The COVID-19 pandemic has significantly affected numerous industries and Canadian society as a whole. This dispute specifically relates to the consequences of flight cancellations catalyzed by this global pandemic.

[7] On March 11, 2020, the World Health Organization declared COVID-19 a global pandemic [WHO Declaration]. In response, Canadian authorities implemented numerous measures to protect against the spread of this virus.

[8] One such measure directly affected the parties to this litigation. On March 13, 2020, the Canadian government issued a travel advisory against non-essential travel [the Travel Advisory]. The Plaintiff alleges that in response to the Travel Advisory, the Defendants by their own initiative suspended some or all of their scheduled flights.

[9] The Plaintiff submits that the Defendants continue to refuse to reimburse the Plaintiff or the Class their original forms of payment for these flights cancellations and/or suspensions. For ease of reference, I will refer to both cancellations and suspensions as cancellations.

B. *Defendant Airlines' Tariffs*

[10] Pursuant to section 57 of the *Canadian Transportation Act,* (S.C. 1996, c. 10) [*CTA*] no airline may operate an air service unless they are licensed. Furthermore, the *CTA* imposes certain conditions on licence holders with regards to tariffs:

Tariffs to be made public

67 (1) The holder of a domestic licence shall

(a) display in a prominent place at the business offices of the licensee a sign indicating that the tariffs for the domestic service offered by the licensee, including the terms and conditions of carriage, are available for public inspection at the business offices of the licensee, and allow the public to make such inspections;

(a.1) publish the terms and conditions of carriage on any Internet site used by the licensee for selling the domestic service offered by the licensee;

(b) in its tariffs, specifically identify the basic fare between all points for which a domestic service is offered by the licensee; and

(c) retain a record of its tariffs for a period of not less than three years after the tariffs have ceased to have effect.

Prescribed tariff information to be included

Publication des tarifs

67 (1) Le licencié doit :

a) poser à ses bureaux, dans un endroit bien en vue, une affiche indiquant que les tarifs et notamment les conditions de transport pour le service intérieur qu'il offre sont à la disposition du public pour consultation à ses bureaux et permettre au public de les consulter;

a.1) publier les conditions de transport sur tout site Internet qu'il utilise pour vendre le service intérieur;

b) indiquer clairement dans ses tarifs le prix de base du service intérieur qu'il offre entre tous les points qu'il dessert;

c) conserver ses tarifs en archive pour une période minimale de trois ans après leur cessation d'effet.

Renseignements tarifaires

(2) Les tarifs comportent les renseignements exigés par règlement.

Interdiction

(2) A tariff referred to in subsection (1) shall include such information as may be prescribed.

No fares, etc., unless set out in tariff

(3) The holder of a domestic licence shall not apply any fare, rate, charge or term or condition of carriage applicable to the domestic service it offers unless the fare, rate, charge, term or condition is set out in a tariff that has been published or displayed under subsection (1) and is in effect.

(3) Le titulaire d'une licence intérieure ne peut appliquer à l'égard d'un service intérieur que le prix, le taux, les frais ou les conditions de transport applicables figurant dans le tarif en vigueur publié ou affiché conformément au paragraphe (1).

[11] The *CTA* defines tariffs as:

tariff means a schedule of fares, rates, charges and terms and conditions of carriage applicable to the provision of an air service and other incidental services.

tarif Barème des prix, taux, frais et autres conditions de transport applicables à la prestation d'un service aérien et des services connexes.

[12] The *Air Transportation Regulations,* SOR/88-58 [*Regs*] impose additional obligations for international carriage services:

Filing of Tariffs

110 (1) Except as provided in an international agreement, convention or arrangement respecting civil aviation, before commencing the operation of an international service, an air carrier or its agent shall file with the Agency a tariff for that service, including the terms and conditions of free and reduced rate transportation for that service, in the style, and containing the information, required by this Division.

(2) Acceptance by the Agency of a tariff or an amendment to a tariff does not constitute approval of any of its provisions, unless the

Dépôt des tarifs

110 (1) Sauf disposition contraire des ententes, conventions ou accords internationaux en matière d'aviation civile, avant d'entreprendre l'exploitation d'un service international, le transporteur aérien ou son agent doit déposer auprès de l'Office son tarif pour ce service, conforme aux exigences de forme et de contenu énoncées dans la présente section, dans lequel sont comprises les conditions du transport à titre gratuit ou à taux réduit.

(2) L'acceptation par l'Office, pour dépôt, d'un tarif ou d'une modification apportée à celui-ci ne constitue pas l'approbation de son

tariff has been filed pursuant to an order of the Agency.

(3) No air carrier shall advertise, offer or charge any toll where

(a) the toll is in a tariff that has been rejected by the Agency; or

(b) the toll has been disallowed or suspended by the Agency.

(4) Where a tariff is filed containing the date of publication and the effective date and is consistent with these Regulations and any orders of the Agency, the tolls and terms and conditions of carriage in the tariff shall, unless they are rejected, disallowed or suspended by the Agency or unless they are replaced by a new tariff, take effect on the date stated in the tariff, and the air carrier shall on and after that date charge the tolls and apply the terms and conditions of carriage specified in the tariff.

(5) No air carrier or agent thereof shall offer, grant, give, solicit, accept or receive any rebate, concession or privilege in respect of the transportation of any persons or goods by the air carrier whereby such persons or goods are or would be, by any device whatever, transported at a toll that differs from that named in the tariffs then in force or under terms and conditions of carriage other than those set out in such tariffs.

contenu, à moins que le tarif n'ait été déposé conformément à un arrêté de l'Office.

(3) Il est interdit au transporteur aérien d'annoncer, d'offrir ou d'exiger une taxe qui, selon le cas :

a) figure dans un tarif qui a été rejeté par l'Office;

b) a été refusée ou suspendue par l'Office.

(4) Lorsqu'un tarif déposé porte une date de publication et une date d'entrée en vigueur et qu'il est conforme au présent règlement et aux arrêtés de l'Office, les taxes et les conditions de transport qu'il contient, sous réserve de leur rejet, de leur refus ou de leur suspension par l'Office, ou de leur remplacement par un nouveau tarif, prennent effet à la date indiquée dans le tarif, et le transporteur aérien doit les appliquer à compter de cette date.

(5) Il est interdit au transporteur aérien ou à ses agents d'offrir, d'accorder, de donner, de solliciter, d'accepter ou de recevoir un rabais, une concession ou un privilège permettant, par un moyen quelconque, le transport de personnes ou de marchandises à une taxe ou à des conditions qui diffèrent de celles que prévoit le tarif en vigueur.

[13] The Plaintiff claims that the Defendants all hold licenses under the *CTA* to operate flights on a scheduled or chartered basis to, from and within Canada. Therefore, the Defendants are required to publish their Tariffs, as was the case here, and ensure that these Tariffs remain compliant with the applicable legislation.

C. *The Plaintiff's Class Certification Request*

[14] The Plaintiff pleads the following causes of action:

> a. The doctrine of frustration under contract law in respect of the Tariffs; or
>
> b. Alternatively, the Defendants breached the express or implied contract terms in the Tariffs providing that passengers have a fundamental right to a refund when the airline does not deliver the services within a reasonable time.

[15] Furthermore, the Plaintiff claims these contractual breaches entitle the Class to full recovery of the monies paid to the Defendants and that this remedy should be granted notwithstanding the cancellation being outside of the carrier's control. At the hearing, the Plaintiff argued that the claim related to full recovery of the original form of payment made (money, points, credit, etc.); however the pleading itself only refers to refunding "the moneys received."

[16] The Plaintiff brings this motion pursuant to Rule 334.16(1) of the *Rules* and asks the Court to certify the proceeding for the following reasons:

> Certification of this action is consistent with the underlying purposes of class actions: access to justice, judicial economy and behavioural modification. The common questions are at the heart of this litigation and are common across all Class Members, and the only means of resolving the claims fairly and efficiently. The Plaintiff submits that she has met the certification requirements and this action ought to be certified.
>
> Even should this Court have any residual concerns as to whether the certification criteria are met, considering this case involves protection of consumer rights the Court should consider erring on the side of caution and certify the action to ensure access to justice for the consumers, who have no other avenue for recourse.

[17] As stated earlier, the Defendants submit that this Court does not have the necessary jurisdiction to entertain the proposed class action as required by the *Federal Courts Act*, RSC, 1985, c. F-7 [*FCA*].

[18] Each Defendant submitted their own briefs, making similar, if not identical arguments concerning the certification motion. At a high level, the Defendants have pleaded the following:

> First, the Plaintiff has sought to plead and pursue claims against Defendants with whom she did not deal and against whom she has no cause of action.
>
> Second, the Plaintiff has not proposed an identifiable class that bears a rational connection to the proposed common issues. There is simply no basis for a single, world-wide class of every prospective class member, who had different contracts of carriage, with varying terms and conditions, with five different airlines, in circumstances where whether their contracts were frustrated or breached turn on individual facts and circumstances.
>
> Third, the Plaintiff has pleaded her claims and led her evidence in a way that is intended to appear common when, in fact, the nature of her claims and the evidence required to resolve them are inherently individual. The claims against each Defendant are different. Each has their own fares, with their own terms and conditions with respect to refunds, cancellation or changes, and their own tariffs, many of whom have specific provisions addressing force majeure generally and pandemics specifically. These differences bear on whether and to what extent the doctrine of frustration can apply at all to a class member and on the express and implied terms to which they are subject. Whether any particular class member can succeed in a claim for frustration or breach of contract will depend on the circumstances relating to that particular flight including the terms and conditions to which it is subject
>
> Simply put, the Plaintiff's proposed common issues will not avoid duplication of fact finding and legal analysis, are not common across the class, and will not advance the litigation.
>
> Fourth, the Plaintiff has pursued only some of her claims in this action while there are other class actions, including one brought by the Plaintiff herself in British Columbia, and in Quebec based on

> the same facts, that allege a broader range of causes of action and remedies. This proceeding cannot be the preferable procedure for the resolution of these claims when they are only a subset of a broader range of claims made by the Plaintiff and others in other proceedings.
>
> Fifth, the Plaintiff has failed to plead the facts underlying the causes of action. Further, the Plaintiff's causes of action are simply founded upon the Advisories and the Plaintiff fails to consider multiple other intrinsic and extrinsic factors that may have contributed to flight cancellations.

III. Issues

[19] The issues are:

A. Whether the Court should grant the Defendants' motion pursuant to Rule 221(1)(a) of the Rules?

B. In the event the Court concludes that it has jurisdiction, whether the proposed class action should be certified in accordance with Rule 334.16(1) of the Rules?

IV. Analysis

A. *The Defendants' Motions*

[20] The Defendants seek to strike the proceeding under Rule 221 of the *Rules* on the grounds that it is plain and obvious that the Federal Court has no jurisdiction in this matter. Rule 221(1)(a) reads:

Motion to strike	**Requête en radiation**
221 (1) On motion, the Court may, at any time, order that a pleading, or anything	221 (1) À tout moment, la Cour peut, sur requête, ordonner la radiation de tout ou partie d'un acte de procédure, avec ou sans

contained therein, be struck out, with or without leave to amend, on the ground that it	autorisation de le modifier, au motif, selon le cas :
(a) discloses no reasonable cause of action or defence, as the case may be,	a) qu'il ne révèle aucune cause d'action ou de défense valable;

(1) Burden

[21] On a Rule 221(1)(a) motion, the burden is on the moving party (*Edell v Canada,* 2010 FCA 26 at para 5). The Defendants therefore bear 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.

(2) Plain and Obvious

[22] The onus of proof on the Defendants in this case 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 [*Hunt*]).

[23] Furthermore, the Supreme Court in *Hunt* clarified that the novelty of the issue, complexity of the case or the strength of the defence should not bar the Plaintiff from proceeding with her case. The test is assuming the facts can be proved, whether the outcome of the case "is plain and obvious" or "beyond a reasonable doubt" (*Hunt* at paras 32-33). As such, motions like these will be granted exceptionally and only in the clearest of cases where "there is no legal justification for a protracted and expensive trial" (*Atlantic Lottery Corp. Inc. v Babstock*, 2020 SCC 19 at para 19).

(3) Jurisdiction

(a) *Scope of the Federal Court's Jurisdiction*

[24] The Supreme Court of Canada has warned against unduly limiting the Federal Court's jurisdiction. In *Canada (Human Rights Commission) v Canadian Liberty Net*, 1998 CanLII 818 (SCC), [1998] 1 SCR 626 at paras 33-34, the Court held:

> The statutory position of the Federal Court has changed since *Board v. Board*, a case in which the possible jurisdiction of the Exchequer Court was not even considered, because its jurisdiction at that time was so marginal. The passage of the *Federal Court Act* in 1971 substantially expanded the jurisdiction of the Exchequer Court (and changed its name to the Federal Court of Canada), and by necessary implication, removed jurisdiction over many matters from the provincial superior courts. The new Federal Court of Canada was granted an expanded jurisdiction, not only by specific enumeration of new subject matters, as, for example, in s. 23(*c*) of the Act, but also in a more general fashion. In essence, by virtue of ss. 3, 18, and 18.1, it was made a court of review and of appeal which stands at the apex of all the administrative decision-makers on whom power has been granted by individual Acts of Parliament. Significant confusion had developed prior to the Act as superior courts in different provinces reached conflicting outcomes as to the disposition of applications for judicial review from these administrative decision-makers, as to the proper test for standing, and as to the geographical reach of their decisions (I. Bushnell, *The Federal Court of Canada: A History, 1875-1992* (1997), at p. 159). The growth of administrative decision-makers adjudicating a myriad of laws within federal competence, without a single court to supervise that structure below the Supreme Court of Canada, created difficulties which an expanded Federal Court was intended to address.
>
> These are the historical and constitutional factors which led to the development of the notion of inherent jurisdiction in provincial superior courts, which to a certain extent has been compared and contrasted to the more limited statutory jurisdiction of the Federal Court of Canada. But in my view, there is nothing in this articulation of the essentially remedial concept of inherent jurisdiction which in any way can be used to justify a narrow,

> rather than a fair and liberal, interpretation of federal statutes granting jurisdiction to the Federal Court. The legitimate proposition that the institutional and constitutional position of provincial superior courts warrants the grant to them of a residual jurisdiction over all federal matters where there is a "gap" in statutory grants of jurisdiction, is entirely different from the proposition that federal statutes should be read to find "gaps" unless the words of the statute explicitly close them. The doctrine of inherent jurisdiction raises no valid reasons, constitutional or otherwise, for jealously protecting the jurisdiction of provincial superior courts as against the Federal Court of Canada.

[25] However, the Federal Court, as a statutory court, is subject to constraints and can only exercise jurisdiction under a federal statutory grant of power. In *ITO - International Terminal Operators Ltd. v Miida Electronics Inc*., [1986] 1 S.C.R. 752 [*ITO*], the Supreme Court established the seminal test setting out the essential requirements to support a finding of jurisdiction in the Federal Court [*ITO* test]. This test was reaffirmed in *Windsor (City) v Canadian Transit Co*., 2016 SCC 54) [*Windsor (City)*].

(b) *Essential Nature of the Plaintiff's Claim*

[26] Before applying the *ITO* test, the Court must first identify the essential nature of the Plaintiff's claim (*Windsor (City)* at para 25). To do so, the Court may have to look beyond the pleadings:

> 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).
>
> 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 (*Windsor (City)* at paras 26-27).

[27] The Plaintiff characterizes her claim at paragraph 40 of her Memorandum of Fact and Law as follows:

> considering that air carriers Tariffs are governed by a comprehensive federal statutory framework, does the Class have a claim against the Defendants for breach of contract in not complying with their Tariff(s) and/or the underlying laws of common carriage.

[28] The Defendants counter that the dispute is:

> nothing more than a breach of contract claim between private parties and that it is plain and obvious that the Federal Court does not have jurisdiction to hear it. The fact that the Defendants are airlines, or that the Plaintiff has inserted the names of numerous federal statutes into her pleading, does not give this court jurisdiction.

[29] While both parties agree that at its heart this proceeding is a contractual dispute, the parties diverge on the enforceability of the Tariffs in the Federal Court. The Plaintiff refers only to the *CTA* and the *Regs* in her Statement of Claim, and does not rely on either the *Carriage by Air Act* or the *Aeronautics Act*. However, these statutes are implicitly included in the factual pleas relating to contracts of carriage and are referred to in paragraphs 63 and 64 of the claim.

[30] For the reasons that follow, I find that the Plaintiff's claim based on the material facts pleaded is a contractual dispute that falls within one of the classes of subjects outside the scope of the *Montreal Convention* (*Thibodeau v Air Canada*, 2014 SCC 67 at para 47 [*Thibodeau*]), and that section 23(b) of the *FCA* does not give this Court jurisdiction over the contractual dispute between the parties, which is the core of the Plaintiff's claim.

(c) *The ITO Test*

[31] For this Court to have jurisdiction to hear a matter, three conditions must be met:

> (i) There must be a statutory grant of jurisdiction by the federal Parliament.
>
> (ii) 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.
>
> (iii) 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) Statutory Grant of Jurisdiction

[32] The Plaintiff claims that section 23 (b) of the *FCA* grants jurisdiction over this action. However, section 23 (b) grants jurisdiction to the Federal Court only when three criteria are met:

> (1) jurisdiction must not have been "specially assigned" to another court;
>
> (2) the claim for relief must be made, or the remedy must be sought, "under an Act of Parliament or otherwise"; and,
>
> (3) the claim for relief must be made, or the remedy must be sought, "in relation to" (1) aeronautics.

[33] In *Windsor (City)* at paragraph 41, the Supreme Court of Canada articulated that the claim or remedy sought must be recognized or created by federal law:

> *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 [emphasis added].

[34] Only the second and third criteria as set out in section 23(b) are in dispute. The Plaintiff submits that section 23 (b) grants jurisdiction because the claim for relief or the remedy sought is under an act of Parliament or otherwise:

> where "otherwise" would necessarily include non-statutory laws within federal jurisdiction. If the legislators intended to only include federal statutes, the legislature would not have included "or otherwise".

[35] The term "or otherwise" as interpreted by the Plaintiff includes:

> a. The contractual relationship between airlines and passengers, is subject to a detailed statutory framework that is sufficient for establishing jurisdiction.
>
> b. There are common law principles within the exclusive purview of Parliament that underlies the contractual relationship between airlines and passengers, which are federal law that falls within the "or otherwise" stipulation in s. 23 of the Federal Courts Act.

[36] The Defendants take a more narrow interpretation of statutory grant of jurisdiction, stating that the claim must arise from a specific statute. The Defendants' position is that while the Plaintiff pleads two statutes, the *Canada Transportation Act* and the *Aeronautics Act*, as part

of a "comprehensive federal statutory framework" governing her claim; neither of these statutes creates or recognizes a cause of action. Nor does the *Carriage by Air Act,* which the Plaintiff does not plead specifically but indirectly relies on through the 1981 *Warner-Lambert* decision referenced in her claim. The following summarizes the Defendants' position on this issue:

> … Contracts are a matter of provincial, not federal, "common law" (or in Quebec, civil law).There is a long line of cases from the Supreme Court and Court of Appeal that confirm that the Federal Court does not generally have jurisdiction over contract claims. The only exception is those circumstances in which a federal statute creates or enforces contractual obligations. As the Court of Appeal recently held, "parties cannot assert a contractual claim in the Federal Court against another private party to obtain a damages remedy" in the absence of a specific statutory grant of jurisdiction.

[37] I find that no (i) federal statute in this proceeding grants jurisdiction to this Court nor does an (ii) existing regulatory framework or (iii) the federal common law.

[38] While the Plaintiff does not explicitly mention in her Statement of Claim the *Carriage by Air Act* and the *Montreal Convention,* I find that on the facts as pleaded these statutes are implicit in the claim. In *Bensol Customs Brokers Ltd. et al. v Air Canada* (1979), 99 D.L.R. 3d) 623 [*Bensol*], the Federal Court of Appeal considered this Court's jurisdiction to hear matters outside the scope of the *Warsaw Convention* (the precursor to the *Montreal Convention*). In that case, the Court found that jurisdiction flowed from the *Warsaw Convention*:

> The author of the statement of claim obviously thought that the liability created by the Warsaw Convention did not supersede the tortious liability that may exist under another applicable law. Assuming that opinion to be well-founded, it merely follows, in my view, that the appellants' claim, in so far as it is founded on tort, would not be made under a federal statute and would not be within the jurisdiction of the Court. This would not, however, affect the jurisdiction of the Court to hear and decide the

> appellants' claim in so far as it is founded on the Warsaw Convention (*Bensol*, at para. 10) [emphasis added].

[39] This reasoning was subsequently confirmed by the Supreme Court of Canada in *Windsor (City)* at paragraph 44:

> By contrast, s. 23 did confer jurisdiction in *Prudential Assurance Co. v. Canada*, [1993] 2 F.C. 293 (C.A.), which was a claim for damages brought under the federal *Carriage by Air Act*, R.S.C. 1985, c. C-26 . *Bensol Customs Brokers Ltd. v. Air Canada*, [1979] 2 F.C. 575 (C.A.), was another claim for damages under the federal *Carriage by Air Act* in which s. 23 was held to confer jurisdiction. The claimants in that case brought a tort claim as well; however, the majority of the Federal Court of Appeal held that s. 23 did not confer jurisdiction over the tort claim.

[40] When the *Montreal Convention* does have application, it acts as a statutory grant of jurisdiction. However, it does not apply to all aspects of carriage by air:

> …the *Montreal Convention* of course does not deal with all aspects of international carriage by air: it is not comprehensive. But within the scope of the matters which it does address, it is exclusive in that it bars resort to other bases for liability in those areas: M. Clarke, *Contracts of Carriage by Air* (2nd ed. 2010), at pp. 8 and 160-62; G. N. Tompkins, Jr., "The Continuing Development of Montreal Convention 1999 Jurisprudence" (2010), 35 *Air & Space L.* 433, at pp. 433-36 (*Thibodeau*, at para. 47).

[41] Chapter III of the *Montreal Convention* sets out the liability of air carriers. The three pertinent articles of that chapter are Articles 17-19. Article 17 relates to injuries sustained on board the flight or in the course of embarkation or disembarkation. Article 18 considers cargo damage and Article 19 addresses damages occasioned by delay. None of these articles apply to the Plaintiff in this action. Moreover, the Plaintiff has not argued that any of these articles apply.

[42] Since the Plaintiff's action as pleaded cannot properly be classified as a *Montreal Convention* claim, this Court does not have jurisdiction. The cases relied upon by the Plaintiff in support of this Court's jurisdiction are distinguishable because they were decided pursuant to the *Montreal Convention* (*Warner-Lambert Canada Ltd. v Canadian Pacific Airlines Ltd*., 1981 CanLII 2627 (FC) [*Warner-Lambert*]; *Prudential Assurance Co. v Canada*, 1993 CanLII 2948 (FCA) [*Prudential Assurance*]).

[43] With respect to the *Aeronautics Act,* I accept the Defendants' position that this Act does not recognize or create a cause of action in contract (*744185 Ontario Inc. v Canada,* 2020 FCA 1 at para 62 [*744185 FCA*]).

[44] The Plaintiff contends that the regulatory scheme imposed on the airlines through the *CTA* grants this Court jurisdiction. I disagree. There is a clear difference between the air carrier and railway sections, signaling the legislator's intent to only extend jurisdiction to the latter. As the Supreme Court recognized in *Windsor (City)* at paragraph 54:

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

[45] There is no similar air carrier provision, signalling that the legislator wanted to extend liability only to railway operators and not air carriers. Both forms of transportation have tariffs, but only one recognizes an independent cause of action. Those cases cited by the Plaintiff that support expanding this Court's jurisdiction citing case law used in railway cases is clearly distinguishable. Moreover, the *CTA's* regulatory framework provides a forum for aggrieved

passengers (e.g. sections 37, 65-67, 85) by way of application to the Canadian Transportation Agency [the Agency] and the right to appeal to the Federal Court of Appeal, not the Federal Court (*CTA*, s. 41(1)).

[46] The Plaintiff refers this Court to *Apotex Inc. v Ambrose*, 2017 FC 487 [*Apotex*], in support of her position that a regulatory framework can act as a statutory grant of power. This decision has no application in this proceeding. In *Apotex*, this Court made a specific distinction between claims under section 23, like in this case, and section 17(5)(b) in that case:

> The jurisdictional question in *City of Windsor* involved section 23, which explicitly states that the Federal Court has jurisdiction in cases where a claim for relief is sought "under an Act of Parliament or otherwise". Justice Karakatsanis interpreted this to mean that the right to seek relief must arise directly from federal law, and not merely in relation to federal law (*City of Windsor* at paras 46 to 48). However, section 17(5)(b) does not have this limitation; rather, it states that the Federal Court has jurisdiction with respect to claims for relief "sought against any person for anything done or omitted to be done in the performance of the duties of that person as an officer, servant or agent of the Crown" (*Apotex*, at para. 50).

[47] As this Court found in *Apotex*, the relief sought under section 23 of the *FCA* must arise directly from federal law, not from a regulatory framework. Therefore, the Plaintiff's argument on this point also fails.

[48] The Plaintiff further submits that this Court has jurisdiction under the "federal common law", such that this Court has jurisdiction over any common law claim where the area of law falls exclusively within the jurisdiction of the federal government. Again, on the facts as pleaded here, I find no support for this position.

[49] Two criteria must be present to grant jurisdiction pursuant to federal common law: (1) the federal legislature must have exercised legislative jurisdiction over the subject matter; and (2) there must be an existing body of federal common law as contemplated by the Supreme Court of Canada in *Roberts v Canada*, [1989] 1 SCR 322 [*Roberts*] at paras 29-31. I reach this conclusion based on Wilson J's reasoning in that decision:

> …Professor Evans may be right that Quebec North Shore and McNamara Construction deny the existence of a federal body of common law co-extensive with the federal legislature's unexercised legislative jurisdiction over the subject matters assigned to it. However, I think that the existence of "federal common law" in [page340] some areas is expressly recognized by Laskin C.J. and the question for us, therefore, is whether the law of aboriginal title is federal common law (*Roberts*, at para. 29).

[50] The Supreme Court in *Windsor (City)* held the Federal Court did not have jurisdiction over the matter in that case as the action was not recognized nor created by statute. In *Bensol* at paragraph 10, the Federal Court of Appeal held that if a tort claim fell outside of the *Warsaw Convention* then the Court did not have jurisdiction. Similarly, in *Warner-Lambert* at paragraph 7, the Court reasoned that it would not have jurisdiction if the claims relied solely on tort law. In addition, the Federal Court of Appeal in *744185 FCA* at paragraphs 56-60, rejected extending contractual liability to third parties, even if the subject matter was closely linked to aviation.

[51] These cases highlight the fact that there is no freestanding federal common law grant of jurisdiction. On the facts as pleaded, there is no basis to found this Court's jurisdiction on federal common law. This is not analogous to a proceeding under the *Patent Act*, RSC 1985, P-4 or the *Copyright Act*, RSC 1985, C-45, which may have ancillary licensing, or contractual issues that

are incidental to the underlying federal legislation and contextually form part of the federal common law associated with these Acts.

[52] It is clear from the foregoing that the Court does not have jurisdiction, as the Plaintiff's claim is neither created nor recognized by an Act of Parliament.

(ii) Federal Law Essential to Disposition

[53] Federal law must be "essential to the disposition of the case," in that it must have an important role to play in the outcome of the case (*Windsor (City)* at paras 70-71). In *Bensol*, the Court went so far to say that the claim does not have to be made exclusively under the Act, as long as that was the material feature of the action (*Bensol* at para 11). I find that the doctrine of frustration as pleaded by the Plaintiff is not a federal law, nor ancillary to a federal law or statute that is essential to the disposition of this case.

(iii) Law of Canada

[54] There is a significant overlap with this element and the previous one. Typically no difficulty arises "if the dispute is to be determined on the basis of an existing federal statute" (*Roberts* at para 14). As I rejected the Plaintiff's arguments regarding the regulatory framework and federal common law, I equally conclude that this condition is not fulfilled.

V. Conclusion

[55] The history of this Court as a statutory court has seen its jurisdiction evolve. Although a statutory court, the Supreme Court of Canada has refused to limit this Court's jurisdiction through the inherent jurisdiction doctrine. Whenever this Court does have jurisdiction pursuant to the *FCA*, there will inevitably be some incidental encroachment on provincial jurisdiction. The Federal Court being Canada's bilingual and bijural court, with jurisdiction over the whole dominion of Canada, is well equipped to deal with complex issues with national scope.

[56] However, the Plaintiff in this case is asking this Court to extend its jurisdiction beyond that which has been granted by law. This Court has jurisdiction to adjudicate air carriage disputes under the *Montreal Convention*, but this proceeding is outside the scope of that convention.

[57] The regulatory framework surrounding airfare is similarly insufficient to ground this Court's jurisdiction. A careful reading of the *CTA*, which provides for an independent cause of action to carriage by rail *in contrario* to carriage by air, makes this the only reasonable conclusion. Moreover, this Court is not prepared to extend jurisdiction to all carriage by air disputes based on the Plaintiff's characterization of the federal common law.

[58] As this case is not based on or recognized by any statute, regulation or applicable federal common law principle, it is plain and obvious that this Court has no jurisdiction, and the Statement of Claim ought to be struck without leave to amend.

[59] Given my decision that it is plain and obvious that the Court has no jurisdiction and that the Plaintiff's Statement of Claim should be struck without leave to amend, I find that it is unnecessary and would be improper to decide the Plaintiff's motion for certification.

VI. Costs

[60] Neither party made submissions as to costs therefore, no costs will be granted.

ORDER IN T-428-20

THIS COURT ORDERS that:

1. The motion to strike the Statement of Claim without leave to amend is granted;

2. The proposed class action as against the Defendants, WestJet, Swoop, Sunwing, Air Canada, and Air Transat is dismissed;

3. There shall be no orders as to costs.

"Michael D. Manson"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-428-20
STYLE OF CAUSE:	JANET DONALDSON V SWOOP INC ET AL.

HEARING HELD BY VIDEOCONFERENCE ON NOVEMBER 2, 2020 FROM VANCOUVER, BRITISH COLUMBIA (COURT AND PARTIES), TORONTO, ONTARIO (PARTIES), MONTREAL, QUEBEC (PARTIES) AND BURNABY, BRITISH COLUMBIA (PARTIES)

DATE OF HEARING:	NOVEMBER 2, 2020
ORDER AND REASONS:	MANSON J.
DATED:	NOVEMBER 26, 2020

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