

Federal Court of Appeal



Cour d'appel fédérale

Date: 20260916

Docket: A-224-25

Citation: 2026 FCA 154

**CORAM: STRATAS J.A.
HECKMAN J.A.
WALKER J.A.**

BETWEEN:

DORA BERENGUER

Appellant

and

SATA INTERNACIONAL - AZORES AIRLINES, S.A.

Respondent

Heard at Vancouver, British Columbia, on September 16, 2026.
Judgment delivered from the Bench at Vancouver, British Columbia, on September 16, 2026.

REASONS FOR JUDGMENT OF THE COURT BY:

WALKER J.A.

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REASONS FOR JUDGMENT OF THE COURT

(Delivered from the Bench at Vancouver, British Columbia, on September 16, 2026).

WALKER J.A.

[1] The appellant, Ms. Berenguer, appeals an order and reasons of the Federal Court dated June 3, 2025 (2025 FC 992, *per* Lafrenière J.) (FC Order), dismissing her motion to determine what rights she had, if any, to continue her proposed class action via a fresh motion for certification. Applying the doctrines of *functus officio* and *res judicata* in the form of issue

estoppel, the Federal Court found that it had no remedial jurisdiction to re-open the certification motion and refused to exercise its discretion to set aside issue estoppel. The Court concluded that Ms. Berenguer could not bring a second certification motion in reliance on Rules 385(1) and 334.2 of the *Federal Courts Rules*, S.O.R./98-106 (the Rules).

[2] Very briefly, in 2021, the Federal Court: (a) struck Ms. Berenguer’s statement of claim against the respondent, SATA Internacional – Azores Airlines, S.A. (SATA), for failing to disclose a reasonable cause of action; and (b) dismissed Ms. Berenguer’s certification motion for failure to meet the preferable procedure criterion in Rule 334.16(1)(d) (2021 FC 394) (Certification Decision). On appeal, this Court set aside the order striking the statement of claim but found no error in the Federal Court’s determination that Ms. Berenguer’s evidence on preferable procedure was insufficient, noting that she “tendered no evidence on the question of preferability”, and upheld the dismissal of the certification motion (2023 FCA 176, leave to appeal to SCC refused, 40949 (11 April 2024)) (FCA Appeal Decision). This Court also dismissed Ms. Berenguer’s motion to reconsider the FCA Appeal Decision (FCA Reconsideration Order).

[3] Ms. Berenguer seeks to adduce new evidence in this appeal but we will dismiss her motion. Although the new evidence was not available in the 2019-21 period, Ms. Berenguer has not satisfied the criteria for admission set out in *Palmer v. R.*, [1980] 1 S.C. R. 759 (see also *Barendregt v. Grebliunas*, 2022 SCC 22 at paras. 27, 29 (*Barendregt*)). It is clearly not fair or just, or in the interests of justice, to admit the new evidence (*Barendregt*, at paras. 36-37). The motion is an attempt by Ms. Berenguer to remedy the lack of evidence originally presented and,

five years after the Certification Decision, to rely on evidence of recent proposed (not actual) legislative changes and an increase in complaint backlog at the Canadian Transportation Agency (CTA) to reopen this proceeding.

[4] Ms. Berenguer raises two main issues on appeal. She argues that the Federal Court erred in law (1) in finding the first condition for issue estoppel (the same question) had been met; and (2) in failing to exercise its discretion to set aside issue estoppel.

[5] The applicable standards of review in this appeal are as follows: correctness on pure questions of law and extricable questions of law, and palpable and overriding error on factually suffused findings of mixed fact and law and findings of fact (*Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235).

[6] For the following reasons, we see no basis to intervene in the FC Order and will dismiss the appeal.

[7] Ms. Berenguer first argues that the Federal Court erred in law in concluding that the question she now raises was addressed at certification, such that the first of the three ‘*Danyluk*’ conditions for the application of issue estoppel was not met (*Danyluk v. Ainsworth Technologies Inc.*, 2001 SCC 44 at paragraph 25 (*Danyluk*) (see also *Canada v. Greenwood*, 2024 FCA 22 at para. 36 (*Greenwood*)). Ms. Berenguer states that the remedial question of whether she should “be permitted to rectify the evidentiary deficiencies in the CTA’s complaint handling capacity” is a new question that was specifically not foreclosed by the FCA Reconsideration Order.

[8] There is no merit to Ms. Berenguer's assertion of an unaddressed remedial question. She argues that the question was not "distinctly put in issue and directly determined" by the Federal Court, citing *Danyluk* at paragraph 24, but ignores the remainder of the Supreme Court's statement that "the estoppel extends to material facts and the conclusions of mixed fact and law... that were necessarily (even if not explicitly) determined in the earlier proceeding". The questions of preferable procedure and the evidence required to establish it were very clearly and necessarily in issue before the Federal Court.

[9] In addition, we are not persuaded by Ms. Berenguer's argument that the Federal Court erred in law in failing to refer to the Supreme Court's decision in *Sanis Health Inc. v. British Columbia*, 2024 SCC 40 (*Sanis*). The FC Order is not contrary to *Sanis*.

[10] Ms. Berenguer focusses on the Supreme Court's reference to a certifying court's general supervisory jurisdiction over a class proceeding and obligation to "make sure the interests of the class members are protected" (*Sanis* at para. 69). However, the partial phrase cited is taken out of context. The Supreme Court did not establish a new framework for a certifying court's role after dismissing a motion for certification, nor does the *Sanis* decision suggest that issue estoppel can be overcome by an overarching and continuing duty to class members in a failed class proceeding. The Federal Court was not required during the certification hearing to consider whether to order an adjournment and permit Ms. Berenguer "to cooper up" her certification motion (*Buffalo v. Samson Cree*, 2010 FCA 165 at para. 13), nor was it required to grant the current motion.

[11] Further, Ms. Berenguer's reliance on Rules 385 and 334.2 as a basis for the Federal Court's continuing jurisdiction is misplaced. We find no error in the Court's analysis of the two Rules. Rules 385 and 334.2, correctly interpreted, do not override the doctrine of issue estoppel. We find no conflation of the doctrines of *functus officio* and issue estoppel by the Federal Court.

[12] In summary, we find no error of law or palpable and overriding error in the Federal Court's analysis of the doctrine of issue estoppel or in its conclusion that issue estoppel had been engaged.

[13] Ms. Berenguer also submits that the Federal Court erred in failing to exercise its discretion to set aside issue estoppel in this case and to allow her certification motion to be reargued. Again, we do not agree.

[14] The Federal Court correctly acknowledged 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" (*Greenwood* at para. 42). The Federal Court also thoroughly considered Ms. Berenguer's arguments and evidence justifying the exercise of its discretion, including the impact of the FCA Appeal and Reconsideration Decisions and subsequent legislative and evidentiary changes in the CTA's dispute resolution process. We see no basis on which the Federal Court could be said to have committed a palpable and overriding error. Ms. Berenguer's insistence that the Federal Court erred in failing to consider "potential injustice" to class members as the most important factor in whether to exercise its discretion does not overcome in this case the fundamental importance of finality in the judicial system. If accepted,

Ms. Berenguer's arguments and motion would effectively reduce the doctrine of finality to naught.

[15] Accordingly, we will dismiss the motion to admit fresh evidence and the appeal without costs, given that these proceedings are related to the earlier certification proceedings.

"Elizabeth Walker"

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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APPEARANCES:

Simon Lin	FOR THE APPELLANT
Andrew Macdonald	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Evo Link Law Burnaby, British Columbia	FOR THE APPELLANT
WeirFoulds LLP Toronto, Ontario	FOR THE RESPONDENT