

SMALL CLAIMS COURT OF NOVA SCOTIA
Cite: **Paine v Air Canada 2017 NSSM 7**

SCCH No. 460569

BETWEEN:

Nicole Paine, Mackaela Paine and Lana MacAdam

Claimants

– and –

Air Canada

Defendant

Adjudicator: Augustus Richardson, QC

Heard: April 4th, 2017

Decision: April 25th, 2017

Appearances: Dr Gabor Lukacs, for the claimants
Michael Blades, and Mario Garcia, A/C, for the defendant

DECISION

[1] This is a claim based on Air Canada’s Domestic General Rules Tariff (the “AC Tariff”). In brief, the claimants say that they were denied boarding their scheduled flight because of overbooking; and that as a consequence they are entitled to \$800.00 each (for a total of \$2,400.00).

[2] I heard the testimony of the claimant Nicole Paine; her husband Jesse Paine; and her mother (and fellow claimant) Lana MacAdam.

[3] The defendant called one witness, Mr Ashutosh Handa, one of its customer service managers, who had dealt with the claimants at the time giving rise to this claim.

[4] I note by way of parenthetical comment, and in support of the advantages of the informal processes of this court, that during the hearing (in the evening in Halifax) Mr Handa was in India. He watched and listened to the testimony of the claimants and Mr Paine—and then later gave his own testimony—via Skype, first on counsel’s laptop and, when its battery power ran out, on counsel’s tablet. Mr Handa was even able to review documents and exhibits that were

held up to the laptop's or tablet's camera. He listened and watched the entire proceedings. He was examined and cross-examined, in full view of everyone in the court room. Neither side appeared to be inconvenienced in any way by this use of technology. I would recommend its use in other cases.

[5] The claimants are a mother and her young daughter (Nicole and Mackaela Paine), and Nicole Paine's mother, Lana MacAdam. They, along with Ms Paine's infant, had been scheduled to fly out of Vancouver on an Air Canada flight. They were destined for Sydney, Cape Breton.

[6] They arrived at the airport, and entered the check in line, within the time recommended by Air Canada. (They could not use the automated kiosk system because they were travelling with an infant.) The line was long. A number of the Air Canada service personnel left their stations to attend a meeting. The claimants reached the sole remaining check in agent still within the recommended time to clear security and board. However, the agent appeared to be confused during the process, and at some point announced that the claimants had missed the boarding time and that the gate was now closed. Hence they could not get on their scheduled flight.

[7] They were then routed to a later flight that was departing about an hour later. That flight was destined to land in Toronto, where the claimants were to catch a flight for Halifax that would depart shortly after the Vancouver flight landed. The claimants got through security and arrived at the gate for their new flight. This flight experienced some delay, and the boarding process was delayed. It then appeared that the claimants' boarding passes did not have assigned seats. They were asked to wait. Mr Ashutosh Handa arrived to provide assistance. He told the claimants that he would find seats for them. He entered the plane. He spoke to passengers, explained that there was a family travelling together, and was able to secure the agreement of some to change seats so as to provide a row of seats together (albeit one separated by an aisle) for the claimants. He then left the plane and met the claimants on the bridge. However, by this time the claimants had become worried about whether they would be able to catch their connecting flight in Toronto. Their fear (which I am satisfied on the evidence was reasonable) was that they might miss the connection and be forced to stay overnight in Toronto. They decided to decline the flight, and take a later one the next day.

[8] The central question before me concerns what happened at the Vancouver check in desk. If the claimants were denied boarding on their scheduled flight because it had been overbooked they would be entitled to compensation pursuant to Rule 245C (Denied Boarding Compensation) of the AC Tariff. Rule 245AC of the AC Tariff provides that compensation is payable to a passenger when Air Canada "is unable to provide previously confirmed space due to there being

more passengers holding confirmed reservations and tickets than for which there are available seats on a flight.” The application of Rule 245AC in such cases is discussed at some length in *Lachance v. Air Canada* 2014 NSSM 14, and will not be repeated here. Suffice it to say that where Rule 245AC applies the amount of that compensation depends upon the length of the consequent delay in the passenger’s travel plans. If it was six hours or more passengers are entitled to compensation of \$800.00 each: Rule 245AC(E)(2).

[9] The claimants advance two arguments. First, they allege that they were denied boarding on their scheduled flight because it was overbooked. They base their allegation on the facts noted above, in addition to the following. The claimants testified—and I accept—that moments after they were told that they could not board because the gate had closed a check in agent called out to those waiting in line, asking something along the lines of “Is anyone else getting on the flight to Toronto?” When number of people in the line put their hands up she said “Oh, that’s too many people.” From this the claimants conclude that there must have been at least one or two vacant seats (otherwise why would the agent have asked whether anyone else was going to Toronto) caused by their alleged inability to get on the first flight. From that fact they then argue that the real reason they were denied boarding was not because the gate had closed (because again, if the gate closing meant that they could not get on it surely meant that no one could get on), but rather because the flight had been overbooked, leaving fewer than three seats available (meaning that a party of three with an infant, as they were, could not be boarded).

[10] The onus of proof on this point—one that is central to their claim—is on the claimants. The difficulty is that there was no direct evidence that the claimants were denied boarding because the flight was overbooked. The fact that the agent asked whether there was anyone else booked on the Toronto flight may support the claimants’ argument. But it may also have represented an attempt by the agent to get one, two or three “easy” passengers (for example, single adults with no check in luggage) who might be able to race to the gate and get on the plane notwithstanding that the gate had closed to the claimants. Similarly, the fact that the electronic records of Air Canada contain a notation that the claimants had not boarded the second flight “due to O/S” or “due to OS” cannot without more be interpreted to mean “over sold.” In this regard I note that Mr Handa, who gave his testimony in a straightforward fashion (and appeared sympathetic to the plight of the claimants at the time), was not asked in cross examination for the meaning of “OS” or “O/S.” Hr Handa also testified that Air Canada did keep check in records that would indicate whether or not a particular flight had been overbooked. Those documents had not been requested or subpoenaed by the claimants. I was accordingly not persuaded on a balance of probabilities that the claimants were denied booking because of overbooking on the part of Air Canada.

[11] The claimants' second argument was based on policy. Dr Lukacs submitted that the purpose of Rule 245AC was to encourage Air Canada not to overbook—or, if it did, to provide compensation to those passengers it had delayed because of its decision to overbook. He submitted that care should be taken to ensure that Air Canada did not attempt to evade the application of Rule 245AC by providing check-in service that was so poor that it could claim that passengers had failed to board because they had missed their boarding time rather than because the flight was in fact overbooked. In this case the claimants with confirmed reservations had arrived at the airport within the times recommended by Air Canada, but had been unable to reach the gate in time because of delays caused by Air Canada itself (by calling agents away from the check-in desk when passengers were waiting to check in). In such a case the onus of proving that the reason for the delay was not overbooking should fall on Air Canada. Otherwise, Dr Lukacs argued, Air Canada could evade Rule 245AC by creating a smoke screen. It could cause delays in the check in process that would disguise what was really happening—denials of boarding due to overbooking. Air Canada by its own evidence had records that would establish whether it had overbooked the flight. It was in the best position to establish its case. It had not provided records. I should draw an adverse inference from its failure to do so. And I should place the onus on Air Canada to prove that what happened was not the result of overbooking, so as to ensure that Rule 245AC was not undermined.

[12] I was not persuaded on the evidence before me that I ought to follow the route laid out for me by Dr Lukacs. The general rule is that he or she who asserts bears the burden of proof of that assertion. There are a few exceptions to that general rule, but they generally relate to situations where the defendant alone has the evidence necessary to establish a material fact—evidence that is not otherwise available to the claimant. These exceptions do not apply in this case. The claimants could have subpoenaed Air Canada's records. Had they done so they could have easily established whether or not their flight was overbooked.

[13] For these reasons I must dismiss the claim.

DATED at Halifax, Nova Scotia
this 25th day of April, 2017

Augustus Richardson, QC
Adjudicator