

IN THE SMALL CLAIMS COURT OF NOVA SCOTIA

Cite: *Lachance v. Air Canada*, 2014 NSSM 14

**Claim:** SCCH 425125

**Registry:** Halifax

**Between:**

Daniel Joseph Serge Lachance

Claimant

v.

Air Canada

Defendant

**Adjudicator:** Augustus Richardson, QC

**Heard:** April 15, 2014

**Appearances:** Gabor Lukacs, for the claimant  
Manon Gagnon, for the defendant

**By the Court:**

[1] On February 2<sup>nd</sup> 2014 the claimant Mr Lachance boarded the defendant Air Canada's flight AC 289, flying from Vancouver to Whitehorse. His ticket, his seat and his flight had been confirmed by Air Canada on January 22<sup>nd</sup>, and his boarding pass for the flight had been issued on February 1<sup>st</sup>. However, shortly after boarding the plane he was asked to leave because, as it turned out, someone else had been booked on that flight for the same seat. Mr Lachance was re-booked onto the next flight to Whitehorse, which departed Vancouver more than 8 hours later.

[2] The issue here is whether Air Canada on these facts is required to compensate Mr Lachance \$800.00 as "Denied Boarding Compensation" pursuant to Rule 245A of the Canadian Domestic General Rules Tariff No. 1 ("CDGR-1"). Mr Lachance says that he is. Air Canada, on the other hand, says that Mr Lachance was not "denied boarding" and that he was rather re-booked in the ordinary course of its operations. Accordingly no compensation is payable.

## The Hearing

[3] I heard the evidence of Mr Lachance on his own behalf. I heard the evidence of Ms Ilana Menn, a manager who works at the defendant's operations centre, on behalf of Air Canada. A number of exhibits were entered into evidence. As well, there were three groups of documents under Air Canada's amended statement of defence (identified as Tabs 1, 2 and 3) which, while not formally entered as exhibits, were referred to extensively by both parties at the hearing.

[4] There was only one factual issue over which there was serious dispute between the parties. That dispute concerned what flight Mr Lachance was on when he travelled from Toronto to Vancouver. The rest of what divided the parties had more to do with the interpretation and application of Air Canada's terms and conditions of carriage (the "Tariff") than it did with what actually happened. In these circumstances I will simply set out my findings of fact based on the evidence without providing an exhaustive precise of the testimony, save where it is necessary to deal with the one dispute over the facts. Generally, when I refer to "the evidence of Air Canada" I am referring to the testimony of Ms Menn or of the contents of various of the documentary exhibits.

## The Facts

[5] Mr Lachance decided to travel via Air Canada on February 2, 2014 from Halifax, Nova Scotia to Whitehorse, Yukon. On or about January 22, 2014 he booked his itinerary on Air Canada through his travel agent. The itinerary was marked "confirmed" which, on the evidence, meant that Air Canada had confirmed the bookings and the flights: Ex. C1. His scheduled, confirmed itinerary was as follows:

- a. AC 603    Halifax to Toronto                      depart: 5:30 a.m.    arrive: 7:08 a.m.
- b. AC 153    Toronto to Vancouver                      depart: 8:00 a.m    arrive 10:07 a.m.
- c. AC 289    Vancouver to Whitehorse                      depart: 12:30 p.m.    arrive 3:05 p.m.

[6] All times on the itinerary were local times.

[7] I pause here to note that based on the *scheduled* arrival and departure times Mr Lachance had 52 minutes from his scheduled arrival in Toronto to his scheduled departure on AC 153. In other

words, and assuming all went to schedule, he had 52 minutes to get from the arrival gate for AC 603 in Toronto to the departure gate in Toronto for AC 153. The amount of time between scheduled arrivals and departures plays an important role in Air Canada's booking system. Each airport is assigned a Minimum Connection Time ("MCT") for connecting flights. In the case of the Toronto airport the MCT is 45 minutes: see Tab 2. Air Canada's evidence, which I accept, is that its booking system would not permit a passenger to *confirm* connecting flights that displayed a difference in arrival and departure times of less than the MCT. Mr Lachance was able to book and confirm his itinerary because the 52 minute difference between the scheduled arrival and departure times in Toronto was greater than 45 minutes. We will return to this point later.

### **Electronic Check-In on February 1<sup>st</sup>**

[8] On February 1, 2014 Mr Lachance checked in online for the three scheduled flights. Air Canada sent him an email confirmation which included his electronic boarding pass for each of the three flights: Ex. C2. The message was sent to his phone. The message contained electronic links that, when clicked, would display the relevant electronic boarding pass which would enable him to get through security and through the boarding gate for each flight: Ex. C2.

### **The Flight Out of Halifax on February 2<sup>nd</sup>**

[9] The morning of February 2<sup>nd</sup> Mr Lachance showed up at the Halifax airport and boarded flight AC 603. He testified that he used his electronic boarding pass to do so. The fact that he boarded AC 603 was also confirmed by AC's Departure Control System ("DCS"). The DCS is designed to keep track of Air Canada's passengers, to show "exactly what flights the passenger is on," and is generated within 24 hours of a flight. The DCS for Mr Lachance shows his status as "boarded" at 09:15Z: Ex. D12. The letter "Z" is a reference to Greenwich Mean Time, which on that date was four hours ahead of Halifax. Hence Mr Lachance boarded AC 603 at 5:15 a.m. Halifax time, which is consistent with the scheduled departure time of 5:30 a.m.

[10] AC 603 was in fact for some reason delayed in its actual departure time. Each airport tracks actual versus scheduled departure times, and this information is conveyed to Air Canada. Air Canada's "DailyOps Airports" report shows that AC 603's scheduled departure time out of Halifax was delayed by 18 minutes: Tab 2. This means that as of the actual departure of AC 603 the MCT at Toronto for AC 153 had dropped from 52 minutes to 34 minutes. The MCT was now

less than less than the MCT that had been established for connecting flights at the Toronto airport: Tab 2.

### **The Change in Electronic Scheduling en route**

[11] Air Canada's evidence was that actual versus scheduled departure times at airports are continuously monitored by its Passenger Rebooking System ("PRS"). On occasion the PRS receives information that suggests that one leg of an itinerary may not be able to meet its MCT for the destination airport. When that happens the PRS system *automatically* offloads the passenger from the next scheduled flight in the booked itinerary and re-books him or her on the following flight for that leg of the journey. All of this takes place "in minutes."

[12] That is what happened to Mr Lachance. Unbeknownst to him, at 10:32Z (roughly 1.25 hours after AC 603 left Halifax, and so while Mr Lachance was still in the air) the PRS system automatically "offloaded" him—took him off of—AC 153 to Vancouver and "exchanged" his existing ticket for a new one on the next flight after AC 153, being AC 181: Ex. D12; Tab 2. AC 181 had a departure time of 10:00 a.m. local time: Tab 2.

[13] At the same time—that is, 10:32Z—the PRS also offloaded Mr Lachance from AC 289 to Whitehorse, and exchanged his existing ticket for new one on the next flight after AC 289 to Whitehorse, being AC 291, with a departure time of 8:55 p.m. local time: Tab 2.

[14] Once this happened Mr Lachance's booked seat on AC 289 became a vacant seat. Since it was now vacant it became available for re-booking. And, as we shall see, on February 2<sup>nd</sup> that is in fact what happened.

[15] All of this happened automatically. All of this happened while Mr Lachance was in the air, travelling on AC 603 from Halifax to Toronto. All of it happened before he arrived in Toronto. And none of it happened to his knowledge.

[16] I should also note that Air Canada's evidence was that once this kind of re-scheduling takes place the system does not "check back" to see if there had been any further changes in the estimated arrival times. The change, once made, is not revisited.

## The Flight Out of Toronto

[17] Mr Lachance's evidence was that he did make his scheduled and confirmed connecting flight—AC 153—out of Toronto. Air Canada vigorously disputed this evidence.

[18] Air Canada's position throughout the hearing was that Mr Lachance was in error. He was not, according to its records, on AC 153. His PRS made clear that he had been offloaded from AC 153 and re-ticketed (and re-loaded) onto AC 181 to Vancouver. Air Canada argued that its position was supported by the fact that AC 603's delayed arrival time of 7:45 left Mr Lachance too little time to get to the departure gate for AC 153's scheduled departure time of 8:00 a.m. Mr Lachance in his testimony had "guesstimated" the time it took to get off the plane at 5 minutes and the time to travel between gates at 5-10 minutes. Air Canada's position was that the gate for an 8:00 a.m. departure time would in ordinary course have been closed some time before that time. The time necessary to deplane and then travel between gates did not allow Mr Lachance enough time to get on AC 153. Therefore he must have been on AC 181.

[19] I was not persuaded by Air Canada's reasoning on this point. I was satisfied on a balance of probabilities that Mr Lachance was in fact able to board his scheduled, confirmed flight of AC 153.

[20] There are several reasons for this conclusion.

[21] First, there was Mr Lachance's direct testimony to the effect that he did get on AC 153. He also testified that the boarding pass he used to get on AC 153 was the electronic one that had been issued to him by Air Canada the night before. That boarding pass was for AC 153, not AC 291.

[22] I pause here to note that Mr Lachance was able to use his "old" boarding pass because, according to Air Canada, its electronic boarding pass system is not connected to its PRS system. A change in the PRS that results in the offloading and rebooking of a passenger does not automatically void the original boarding pass.

[23] Second, after boarding his flight to Vancouver Mr Lachance used his credit card to purchase something to eat from the "Onboard Café." He received a receipt. The receipt is dated February 2<sup>nd</sup>, and indicates that it was issued on AC 153: Ex. C3. Air Canada had no evidence to explain why its Onboard Café receipt would display the wrong flight number.

[24] Third, if Air Canada was correct in its position that Mr Lachance “must” have been on AC 181 to Vancouver, he would, according to its records, have arrived in Vancouver at 12:06 p.m. local time: DailyOps Airports Report, Tab 2. But Mr Lachance’s evidence, supported by another receipt, was that once he arrived in Vancouver he purchased some more food at a local café in the Vancouver airport. That receipt (Ex. C4) indicates that the purchase was made at 10:44 a.m., which is before the scheduled arrival time for AC 181. It is, however, after the scheduled arrival time of AC 153. In other words, for Air Canada’s position to work it had to explain how Mr Lachance could have purchased food in Vancouver when he was, at least based on the scheduled arrival time for AC 181, still in the air. No such explanation was offered.

[25] Fourth, and somewhat indirectly, there was no evidence concerning the actual departure time of AC 153, as there was, for example, for AC 603: Tab 2. That being the case the fact that the *scheduled* departure time for AC 153 was 8:00 p.m. is not necessarily proof that that is when the departure gate was actually closed and the flight “pushed back” from the terminal. There could have been some delay that would have pushed back the gate closing time. In short, there is nothing to contradict Mr Lachance’s direct evidence that however long it actually took him to get from the Halifax arrival gate to the Vancouver departure gate he was still able to get on AC 153.

[26] The DCS record does not support Air Canada’s position either. As noted, according to Air Canada the DCS is supposed to track its passengers. The DCS for Mr Lachance shows that he “boarded” AC 530, which we know to be the case. It also shows that (as we shall learn was eventually the case) he “boarded” AC 291. What it does *not* show, however, was that he boarded AC 181 out of Toronto. What it shows instead was that at 10:32Z he was “checked in” to flight AC 181. In other words, in this case what the DCS was tracking was Mr Lachance’s *ticket* for flight AC 181, not his actual presence on board.

[27] Based on this evidence I was satisfied that notwithstanding what Air Canada’s PRS system had done while Mr Lachance was in transit from Halifax to Toronto, he was in fact able to make his connecting flight—AC 153—out of Toronto to Vancouver. He did fly on AC 153 to Vancouver. He did not fly on AC 181. The PRS’s “concern” at 10:32Z that Air Canada might not be able to deliver Mr Lachance to his connecting flight in Toronto was not realized in actuality. He did make—and Air Canada was able to deliver him—to his originally scheduled flight out of Toronto.

## **The Flight Out of Vancouver**

[28] Mr Lachance testified that after his arrival in Vancouver he purchased something at a café (as above noted). He arrived at the departure gate for AC 289 in good time. Boarding was called. He went to the gate, displayed the electronic boarding pass he had been issued the day before, and was allowed to enter the plane. He found his seat and stowed his carry on bag. Shortly after that another passenger boarded. He had a boarding pass for the same seat. Mr Lachance was asked to leave the plane, and he did. The steward on the plane could not explain how it was that someone else now had Mr Lachance's seat. He then went to the gate agent, who also was not able to explain what had happened. He was issued a \$10 meal voucher, and given a printed ticket for the next flight to Whitehorse, which was to depart roughly eight and a half hours later. That was AC 291, which he eventually boarded with no further incident.

## **Mr Lachane's Complaint to Air Canada and Its Response**

[29] Before boarding AC 291 on February 2<sup>nd</sup> Mr Lachance went onto Air Canada's website to lodge a complaint about what had happened. He noted that "[i]t seems Air Canada double booked the seat:" Ex. C7. On February 17<sup>th</sup> he received a response from a Air Canada customer relations agent. After apologizing for the inconvenience he had experienced she went on to note as follows:

“Air Canada overbooks certain flights in order to operate at full capacity. We do so cautiously, and in the majority of cases the process is effective. The result benefits the airline by ensuring full utilization of seating, while allowing customers greater access to the flight of their choice. It is also one of the ways we are able to keep fares competitively priced.

“Although this is a familiar practice throughout our industry, we do this strategically, and with an eye to minimizing disruptions of the sort you experienced. On occasion, however, we do find ourselves in the unfortunate position of having to deny boarding to a customer:” Ex. C7.

[30] She concluded by offering, “[a]s a gesture of goodwill” a savings of 15% off of the base fare of his next booking with Air Canada: Ex. C7.

[31] Mr Lachance responded on the same day. He thanked the agent “for acknowledging that I have been involuntarily denied boarding due to overbooking.” He went on to ask that Air Canada “pay me compensation accordingly:” Ex. C8.

[32] The agent responded on February 19<sup>th</sup>. She noted as follows:

“You were original rebooked from your original flight and when a passenger is rebooked onto the next flight they are on a standby list hence the situation with you. It would not be considered denied booking:” Ex. C8.

[33] Mr Lachance responded on February 20<sup>th</sup>. He noted that in his view the agent was mistaken. He pointed out that he had been confirmed on ACT 289. He added that he “was not a ‘stand-by’ passenger on Flight 289, as your message suggests, but rather, I held confirmed reservation for that flight:” Ex. C9

[34] He explained that his complaint was that even though he had been confirmed on AC 289, he was not allowed on the flight. Rather, he was “told that I had to leave the flight because another gentleman had my seat too:” Ex. C9. He repeated his request for “denied boarding” compensation.

[35] The agent responded on March 7<sup>th</sup>. She repeated that “you were not denied boarding *according to our records* hence no compensation is eligible:” Ex. C10 (emphasis added). She added that her office “considers this matter closed:” Ex. C10.

### **What the Debate Between Mr Lachance and Air Canada’s Customer Service Was All About**

[36] The basic issue was whether Mr Lachance had been “denied boarding” as the result of overbooking on the part of Air Canada. The answer to that question flows from—and is dependent upon—the wording of Air Canada’s Tariff of terms and conditions of carriage.

### **The Tariff**

[37] Pursuant to s.67(1) of the *Canada Transportation Act*, SC 1996, C.10 Air Canada is required to have and display a Tariff of its rates and terms and conditions of carriage. Pursuant to



s.67(3) of that Act “[t]he 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.”

[38] Pursuant to s.107(1) of the *Air Transportation Regulations*, SOR/88-58, “[e]very tariff shall contain ...

“(n) the terms and conditions of carriage, clearly stating the air carrier’s policy in respect of at least the following matters, namely,

...

(iii) compensation for denial of boarding as a result of overbooking.”

[39] Neither “denial of boarding” nor “overbooking” is defined in the Act or in the Regulations.

### **Rule 245AC of Air Canada’s Tariff**

[40] Mr Lachance relies on Rule 245AC of the CDGR-1. It is titled “Denied Boarding Compensation” and provides in part that

“When AC 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, AC shall implement the provisions of this Rule.”

[41] The rule supplies the following relevant definitions:

A(4) Confirmed space (reservation) is that which applies to a specific AC flight, date and fare type as requested by a passenger and which is verified in AC’s reservations system and is so noted on his ticket.

A(5) Oversold is that condition which is the result of there being more passengers with confirmed reservations and tickets than there are seats available on a flight.

[42] Sub-Rule (E) of Rule 245AC provides the conditions under which compensation to a passenger who has been denied boarding.

[43] First, the passenger “must present himself for carriage in accordance with this tariff, having complied fully with AC’s applicable reservation, ticketing, reconfirmation, check-in and boarding requirements within the time limits and at the location set out in Rule 135:” Rule 245AC(E)(1)(a).

[44] Second, the passenger is not entitled to compensation “if his reservation has been cancelled pursuant to Rule 135 (CANCELLATION OF RESERVATIONS) (C) (Airport Check-in Time limits):” Rule 245AC(E)(1)(b)(ii).

[45] Provided these conditions are met, the passenger who has been denied boarding is entitled, where the resulting delay is over 6 hours (as was the case here), \$800.00: Rule 245AC(E)(2).

[46] Rule 245AC(E)(3) provides that where it is payable, such compensation “will” be offered on the delay the denial is made and payment by mail shall be made “as soon as practicable by mail or other means after the time the failure to accommodate has occurred.”

### **Rule 240AC of the Tariff**

[47] Air Canada in its defence relies in part on Rule 240AC (“Failure to Operate on Schedule or Failure to Carry”).

[48] Rule 240AC(C)(A)(2) generally provides that all times shown in timetables “are approximate and not guaranteed.”

[49] Rule 240AC(B) provides the following relevant definitions:

- (4) Misconnection occurs at a connecting point when a passenger holding confirmed space on an original receiving carrier is unable to use such confirmed space because the delivering carrier was unable to deliver him to the connecting point in time to connect with such receiving carrier’s flight.

(8) Schedule irregularity includes any of the following occurring on the day of departure, but does not refer to disruptions resulting from labour disturbances and/or strikes:

(a) delay in scheduled departure or arrival of an AC flight resulting in a misconnection ...

[50] Rule 240AC(C) (“Schedule Irregularity”) then outlines what steps Air Canada will take “[w]hen a passenger will be delayed due to a schedule irregularity involving an AC flight, or the invocation of the provisions of Rule 35 [not relevant] and/or Rule 135 (Cancellation of Reservations–paragraph (A)).”

### **Rule 135AC of the Tariff**

[51] As noted, the entitlement to compensation for a denied boarding is subject to certain conditions, including compliance with Rule 135AC.

[52] Rule 135AC (“Cancellation of Reservations”) contains a number of relevant provisions:

(A) AC will cancel reservations of any passenger whenever such action is necessary:

...

(3) advisable by reason of weather or other conditions beyond its control (including, but without limitation, acts of God, force majeure, labour disturbances, strikes, civil commotions, embargoes, wars, hostilities or disturbances) actual, threatened or reported.

[53] Sub-Rule (C) of Rule 135AC deals with airport check-in and boarding time limits. Sub-Rule (C)(2) states that the passenger “must” check-in at least 30 minutes before the scheduled departure time.

[54] Sub-Rule (C)(3) provides that the passenger “must be available for boarding at the gate at least 20 minutes prior to scheduled departure time of the flight on which he/she holds a reservation and must arrive properly documented and ready to travel.”

[55] Sub-Rule (C)(4) provides as follows:

“If the passenger fails to meet any of these requirements, the carrier will reassign any pre-reserved seat and/or cancel the reservation of such passenger. Departure will not be delayed for passengers who arrive too late for such formalities to be completed before scheduled departure time. Carrier is not liable to the passenger for loss or expense due to passenger(s) failure to comply with this provision.”

### **Air Canada’s Position**

[56] Air Canada’s position at the hearing was that it abided by its Tariff. It recognized its duty to pay compensation where there was a “denied boarding.” But this case did not involve a denied boarding. Air Canada’s submitted that a “denied boarding” occurred only in the context of a seat that was “confirmed” as of the date and time the passenger presented him- or herself for boarding. In the case before me Mr Lachance had been offloaded from flight AC 289 as of 10:32Z on February 2<sup>nd</sup> and re-booked on Flight AC 291. This had happened hours before he presented himself for boarding AC 289. Hence at that point he was no longer “confirmed” on AC 289. He no longer had a “confirmed” seat on the flight. To be “denied boarding” required a passenger to have a confirmed seat, and in this case Mr Lachance did not have one. That being the case Rule 245AC did not apply.

[57] Air Canada also took the position that in general it was liable only for delays arising from factors within its control. But it could not be held responsible for delays in flights that were caused by factors outside of its control—and which obligated Air Canada to re-assign seats and flights.

[58] With respect to the rescheduling that took place at 10:32Z while Mr Lachance was en route from Halifax to Toronto, Air Canada took the position that it was entitled to manage its operations in such a way as to maximize its loads. Once its system was alerted to the possibility that a passenger might arrive late and miss his or her connecting flight, Air Canada was entitled to take the passenger off that flight and put him or her on the next flight. It did not have to ask the passenger. It did not have to wait to see whether or not the passenger actually made the connecting flight. It could make the decision before that point, while the possibility remained just that—a possibility. Any other conclusion would result in Air Canada operating flights that were at

less than full capacity. It would also prejudice other passengers who might have been able to use the seat that the incoming passenger might miss.

[59] Air Canada also submitted that Mr Lachance had arrived in Toronto later than his scheduled arrival time. It argued that Mr Lachance's arrival in Toronto was, as of 10:32Z, less than the required MCT for connecting flights at Toronto. That being the case he ran afoul of Rule 135AC(C)(3) and (4) because:

- a. he was not available for boarding at the gate at least 20 minutes prior to the scheduled departure time, and
- b. having failed to meet that requirement, Air Canada entitled to reassign his pre-reserved seat to another passenger.

[60] Air Canada also persisted in its argument that Mr Lachance could not possibly have been on AC 153, and that he must instead have been on AC 181. Since AC 181 was the new booking, then Mr Lachance had also to be on the new (and later) flight to Whitehorse.

## **Discussion and Decision**

### **General Principles**

[61] This case turns on the proper interpretation of the Tariff. As noted above, Air Canada is obligated to set out the terms and conditions of carriage of domestic passengers "clearly." The Tariff in essence creates a contract of adhesion between Air Canada and the passenger. The former drafts the wording; the latter has no say in that drafting. Given Air Canada's obligation to be "clear," and given that it drafted the Tariff, I am satisfied that any ambiguity—if ambiguity exists—is to be read against Air Canada.

[62] The other point of general principle is this. The Convention for the Unification of Certain Rules for International Carriage by Air (Montreal, 28 May 1999), otherwise known as the Montreal Convention, has been made part of the law of Canada by virtue of the *Carriage by Air Act*. While the Convention was intended to apply to international flights, I see no reason why its principles should not be used as an aid in the interpretation of domestic carriage contracts. Indeed, that would appear to be the view of the Canadian Transportation Agency: see *Complaint*

by *Gabor Lukacs against Air Canada*, CTA Interlocutory Decision No. LET-C-A-80-2011, paras.41, 71-72.

[63] With that in mind, I note that Article 19 (Delay) of the Montreal Convention provides as follows:

“The carrier is liable for damage occasioned by delay in the carriage by air of passengers, baggage or cargo. Nevertheless, the carrier shall not be liable for damage occasioned by delay if it proves that it and its servants and agents took all measures that could reasonably be required to avoid the damage or that it was impossible for it or them to take such measures.”

[64] In other words, a carrier is liable for delay in the carriage of passengers *unless* (and the onus is on the carrier) the delay is caused by factors beyond its reasonable control. And indeed, Air Canada in this case appeared to recognize this liability as applying to it, inasmuch as one of its arguments was that the re-scheduling its PRS performed was for reasons beyond its control.

### **Application of These Principles to the Facts**

[65] As set out above, and as I have found, the re-scheduling that resulted in Mr Lachance being removed from AC 289 in Vancouver happened automatically at 10:32Z, while he was in the air en route to Toronto from Halifax. It happened because the delay out of Halifax resulted in a *projected* compression of the MCT at Toronto below the mandated 45 minutes.

[66] The first question to be addressed is whether the situation at Vancouver constituted a “denied boarding.” Looking Rule 245AC one would think that it was. Mr Lachance had a “*previously* confirmed space.” As it turned out, however, that space was not provided to him because there were “more passengers holding confirmed reservations and tickets than for which there were available seats on a flight.” Hence it was, on its face, a “denied boarding.”

[67] Air Canada says however that there was no “previously confirmed space” because Air Canada had, as of 10:32Z, “unconfirmed” that space. It had notionally offloaded him from the flight. It had taken away his seat on that flight and put him on a later flight. As of his arrival in Vancouver his “previously confirmed space” was now on the later flight, AC 291. Hence there was no “denied boarding” because Mr Lachance was not entitled to board in the first place.

[68] The first point is that—as I have emphasized—the Rule refers to a “previously” confirmed space. If the word “previously” had been missing there would be more room for Air Canada’s interpretation. After all, if Air Canada had ceased to confirm a space then the space could not said to be confirmed. But the rule includes the word “previously.” This changes the meaning of the phrase. What is now important is not just that a seat was “confirmed,” but that it was “*previously* confirmed.” And when Mr Lachance boarded AC 289 he did in fact have a seat that had been previously confirmed, notwithstanding that it was in fact no longer confirmed.

[69] Air Canada then rests its alleged right to do what it did on two other grounds:

- a. Rule 135 (Cancellation of Reservations)(C)(Airport check-in times), and
- b. Rule 240AC – it was a “mis-connection,” not a “denied boarding.”

### **Did Rule 135 Apply?**

[70] For convenience, I repeat the relevant sections of Rule 135(C) here. Sub-Rule (C) of Rule 135AC deals with airport check-in and boarding time limits. Sub-Rule (C)(2) states that the passenger “must” check-in at least 30 minutes before the scheduled departure time.

[71] Sub-Rule (C)(3) provides that the passenger “must be available for boarding at the gate at least 20 minutes prior to scheduled departure time of the flight on which he/she holds a reservation and must arrive properly documented and ready to travel.”

[72] Sub-Rule (C)(4) provides as follows:

“If the passenger fails to meet any of these requirements, the carrier will reassign any pre-reserved seat and/or cancel the reservation of such passenger. Departure will not be delayed for passengers who arrive too late for such formalities to be completed before scheduled departure time. Carrier is not liable to the passenger for loss or expense due to passenger(s) failure to comply with this provision.”

[73] The difficulty here is that on the facts Mr Lachance

- a. had checked in to flight AC 289 more than 30 minutes prior to its scheduled departure time (in fact, had checked in the day before), and

- b. was available at the boarding gate in Vancouver at least 20 minutes prior to the scheduled departure time of flight AC 289.

[74] Rule 135AC(C) does not say that Air Canada can re-assign or cancel reservations because it thinks *hours before* the scheduled boarding time that there is *a possibility* that the passenger will not be able to meet the requirement of being at the gate at least 20 minutes prior to departure. Its focus is on actual events—an actual check-in, an actual arrival at the gate. That this is the correct interpretation is strengthened by the fact that Rule 135AC(C)(4) expressly states that a flight will not be held for passengers “*who arrive too late for such formalities to be completed before scheduled departure time*” (emphasis added).

[75] A plain reading of Rule 135AC(C) accordingly makes clear that it authorized Air Canada to re-assign or cancel reservations only where the passenger *in fact* fails to check in at least 30 minutes prior to departure; or *in fact* fails to arrive at the departure gate at least 20 minutes prior to the departure time. But where a passenger complies with those requirements Air Canada has no right under Rule 135AC(C) to cancel or re-assign his or her seat.

[76] Mr Lachance had not failed to meet any of these conditions. He had satisfied them. Hence Air Canada could not rely on Rule 135AC(C)(4) to reassign or cancel his seat on AC 289.

### **Was This a “Mis-Connection” Rather Than a “Denied Boarding”?**

[77] Again for convenience, I repeat the definition of “mis-connection” here:

- (4) Misconnection occurs at a connecting point when a passenger holding confirmed space on an original receiving carrier is unable to use such confirmed space because the delivering carrier was unable to deliver him to the connecting point in time to connect with such receiving carrier’s flight.

[78] A “scheduling irregularity” must be something that results in a mis-connection: Rule 240AC(B)(8)(a). A “misconnection” occurs *at* a connecting point. It occurs “*because* the delivering carrier *was* unable to deliver him to the connecting point in time to connect with such receiving carrier’s flight.” Was that what happened here? The answer must be ‘no.’ Air Canada, regardless of what its PRS system “thought” as of 10:32Z, was in fact able to deliver Mr



Lachance to the connecting point (Toronto) “in time to connect with such receiving carrier’s flight.” And as it turned out, it was also able to deliver Mr Lachance to Vancouver in time to connect with flight AC 289.

### **Air Canada’s Initial Characterization of What Happened in Vancouver**

[79] At para.29 above I set out a portion of the email Mr Lachance received from Air Canada’s customer service agent on February 17<sup>th</sup>. In those two paragraphs the agent admits that Air Canada over books flights “in order to operate at full capacity.” She explains that the result “benefits the airline by ensuring full utilization of seating.” She also suggests that it allows customers “greater access to the flight of their choice,” ignoring, of course, the fact that in this case the customer who was given “greater access” was not Mr Lachance, but rather the passenger to whom Mr Lachance’s seat was given.

[80] What is interesting is that notwithstanding that the agent acknowledged that Air Canada was “in the unfortunate position of having to deny boarding to a customer” she did not then offer the compensation that Rule 245AC required Air Canada to offer in such a circumstance. Instead she offered a 15% discount on his next booked flight. She failed to follow Air Canada’s own Tariff.

[81] The agent did later change her position as to what had happened, as the email exchange cited above reveals. But as I have found, what happened was in fact what she had originally acknowledged it to be—a denied booking. That initial acknowledgement lends further support to—but is not necessary to—my conclusion that what happened was indeed a denied booking within the meaning of Rule 245AC.

### **Was There a Delay Caused by Factors Outside the Control of Air Canada?**

[82] The difficulty with Air Canada’s suggestion that the delay coming out of Halifax was something beyond its control is that there was no evidence as to why the delay occurred. Hence there was no evidence as to whether the delay was caused by something in or outside of Air Canada’s control. The onus of establishing that the delay was caused by something outside of its control lay with Air Canada. It failed to meet that onus. It cannot accordingly fall back on that defence.

## Closing the Floodgates

[83] At the hearing Air Canada argued strongly that a finding that what had happened to Mr Lachance was a “denied boarding” would have a serious—if not fatal—impact on its ability to manage its operations in a profitable and efficient manner. I was not persuaded that this would be the case.

[84] There is nothing in this decision that should have any impact at all on Air Canada’s operations. It has already agreed pursuant to the terms and conditions it has outlined in its Tariff. A decision that when there is a “denied boarding” it will pay compensation.

[85] Air Canada’s “floodgate” argument is simply an attempt to bolster what it says is the correct interpretation of Rule 245AC. Air Canada’s interpretation would result in it being able to cause a “previously confirmed space” to cease to be “previously confirmed” simply by unilaterally offloading the passenger and cancelling his or her confirmation “in order to operate at full capacity” (to use the words of its customer service agent). As I have already noted, that interpretation ignores the word “previously.” A “confirmed space” can cease to be “confirmed” once it is changed. But a “previously confirmed” space does not cease to have been “previously confirmed” once it is changed. The other point of course is that if Air Canada’s interpretation were accepted then it is difficult to see when Air Canada would ever have to pay compensatory damages for denying boarding to a passenger whose seat had been “previously confirmed.”

[86] Air Canada’s argument also ignores what I take to be the underlying rationale for Rule 245AC. The Rule is based on the recognition that *both* parties to the contract of carriage—Air Canada *and* the passenger—have an interest in the commitments that have been made by each to the other once a ticket is confirmed. The passenger commits to showing up on time. Air Canada commits not to delay a passenger in his or her trip (subject of course to factors beyond its control). Rule 245AC recognizes that if Air Canada decides to over book “in order to operate at full capacity” then it may do so. But in that event it must also compensate a “previously confirmed” passenger for any resulting delay caused by that over booking. That *quid pro quo* strikes me as only fair and reasonable. A passenger’s time has value. He or she has organized that time around the previous commitment made by Air Canada with respect to departure times. If Air Canada decides to change that commitment solely for reasons of maximizing its own profits, why should it not compensate the passenger for the impact of that decision on the passenger’s time?

[87] I acknowledge that the question posed here raises different issues if the decision to change a previously confirmed ticket is made necessary by factors beyond Air Canada’s control

(such as, for example, bad weather or strikes). But as already noted here, Air Canada in the case before me made no effort to explain why it was that its flight out of Halifax was delayed.

## **Conclusion**

[88] For the above reasons and on the above facts, I was satisfied that

- a. what happened in Vancouver was a “denied boarding” within the meaning of Rule 245AC;
- b. it was not a “mis-connection” within the meaning of Rule 240AC because Air Canada was in fact able to deliver Mr Lachance to Toronto “in time to connect with” AC 153, and then again in time to connect with AC 289; and
- c. Air Canada was not entitled on the facts to cancel Mr Lachance’s confirmed reservation on AC 289 pursuant to Rule 135 because
  - i. he had in fact checked in, and
  - ii. he had in fact presented himself at the Vancouver gate at least 20 minutes prior to the scheduled departure time.

[89] Mr Lachance was accordingly entitled to \$800.00 “as soon as practicable” and I so order that to be paid.

[90] Mr Lachance also seeks general damages for Air Canada’s breach of Rule 245AC in the amount of \$100.00, the limit of such damages that can be awarded in this court. In my opinion such an award is appropriate. Air Canada failed to comply with an obligation that its customer service agent initially acknowledged existed, and instead acted as if some other form of compensation was appropriate for what had happened. It ignored, in other words, its own Tariff.

[91] To add insult to injury it took the position that Mr Lachance was “mistaken” as to what flight he was on when he left Toronto for Vancouver. I think too I can take judicial notice of the fact that Air Canada presents itself to the public as a professional carrier which can be relied upon to provide positive travel experiences to its customers; to treat them with respect; and to honour their booked and confirmed itineraries to the extent possible. Air Canada recognized

when it entered into its contract of carriage with Mr Lachance that a long and unexpected delay spent in an airport is neither a pleasant nor a happy experience, and that such a delay would cause some distress to him. (Indeed, this understanding is reflected in the fact that the compensatory damages payable under Rule 245AC increase with the length of the delay.) This then is an appropriate case for damages: see, for e.g., *Fidler v. Sun Life Assurance Co. of Canada* 2006 SCC 30. All of this supports an award of \$100.00 for general damages for Air Canada's breach of its Tariff.

[92] I will accordingly order Air Canada to pay

- a. \$800.00 compensation under its Tariff for denial of boarding;
- b. \$100.00 for general damages; and
- c. \$150.00 costs for the filing fee and other travel expenses associated with service.

DATED at Halifax, Nova Scotia  
this 17<sup>th</sup> day of April, 2014

Augustus Richardson, QC