

Docket: 2008-3997(ATA)G

BETWEEN:

HOPE AIR,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeals heard on November 16, 2010 at Toronto, Ontario.

Before: The Honourable Gerald J. Rip, Chief Justice

Appearances:

Counsel for the Appellant: Jacques Bernier

Counsel for the Respondent: Eric Noble
Laurent Bartleman

JUDGMENT

The appeals from the assessments numbered 2007905SOR104, 2007905SOR102, 20071203SOR111, 20071203SOR101, 20071203SOR102, 20071203SOR104, 20071203SOR104, 20071203SOR105, 20071203SOR106 and 20071203SOR107 made under the *Air Travellers Security Charge Act* are dismissed, without costs.

Signed at Ottawa, Canada, this 6th day of May, 2011.

"Gerald J. Rip"

Rip C.J.

Citation: 2011 TCC 248
Date: 20110506
Docket: 2008-3997(ATA)G

BETWEEN:

HOPE AIR,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR JUDGMENT

Rip C.J.

[1] Hope Air is a charitable organization registered in accordance with provisions of the *Income Tax Act* ("ITA"). From time to time it receives gifts of airline points to pursue its charitable activities. Hope Air uses these points to donate air travel to individuals who require medical care not available in their community and who cannot otherwise afford the cost of the travel. The question in this appeal by Hope Air is whether it is required by section 11 of the *Air Travellers Security Charge Act* ("Act") to pay to the Crown a charge in respect of the air transportation services it acquires and which it then donates to the said individuals for no consideration. The Minister of National Revenue assessed the appellant on the basis it was liable for charges for periods during January 4, 2002 to June 30, 2007¹.

[2] Subsection 11(1.1) of the *Act* provides that:

Every person who acquires from a designated air carrier all or part of an air transportation service that includes a chargeable emplanement shall pay to	Quiconque acquiert d'un transporteur aérien autorisé tout ou partie d'un service de transport aérien qui comprend un embarquement assujéti doit payer à Sa
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¹ The periods assessed are described in paragraph 11 of the Partial Statement of Agreed Facts incorporated in these reasons.

Her Majesty a charge as determined under this *Act* in respect of the service. Majesté le droit déterminé selon la présente loi relativement au service.

(1.1) No charge is payable in respect of an air transportation service that is acquired:

(1.1) Aucun droit n'est exigible relativement au service de transport aérien qui, selon le cas:

...

(b) by a registered charity from an air carrier for no consideration, if the service is donated by the charity to an individual for no consideration and in pursuit of its charitable purposes.

...

b) est acquis par un organisme de bienfaisance enregistré d'un transporteur aérien à titre gratuit, si l'organisme fait don du service à un particulier à titre gratuit et dans le cadre de la poursuite de ses fins de bienfaisance.

[3] The issue in this appeal is whether Hope Air acquired the air transportation for no consideration (« à titre gratuit »), pursuant to paragraph 11(1.1)(b) of the *Act*. The parties agree that the transportation was donated by Hope Air to an individual for no consideration and Hope Air did so in pursuit of its charitable purposes.

[4] The appeal proceeded on the basis of the testimony of Mr. Douglas Keller-Hobson, Executive Director of Hope Air, and Ms. Michele Meier, General Manager, Corporate Affairs, Group Aeroplan, and on the following Partial Statement of Agreed Facts:

THE APPELLANT

1. The appellant is a registered charity whose purpose is to organize air transportation for individuals who need medical care but cannot afford the cost of travelling. These individuals are the patients and, where applicable, their medical escorts (collectively the "Clients").
2. The appellant has been in operation for over 24 years. It currently organizes approximately 2,500 flights per year across Canada, mostly on commercial airlines.

AIR CANADA DONATIONS TO HOPE AIR

3. Aeroplan members can donate or relinquish their Aeroplan Points, also known as Aeroplan Miles, to approved registered charities such as the Stephen Lewis Foundation, Médecins sans Frontières and Air Canada's charitable giving program, Kids' Horizons.

4. Air Canada has donated Aeroplan Points to the appellant on various occasions during the periods at issue in this appeal. The periods at issue in this appeal are between April 1, 2002 and June 30, 2007 (collectively, the "Relevant Period").
5. Each year during the Relevant Period, Air Canada donated the Aeroplan Points to the appellant in one annual instalment. For each of those years, the process was as follows:
 - (a) The appellant approached Air Canada in the summer or fall to have an idea of the support Air Canada would offer to the appellant in the forthcoming (calendar) year. For that purpose, the appellant completed a questionnaire, a representative sample of which is found at Tab 8 of the Joint Book of Documents².
 - (b) After considering the appellant's request for support, Air Canada would, in the fall of each year, confirm its support (in passes and Aeroplan Points) to the appellant for the forthcoming year and advise the appellant accordingly. The level of support from Air Canada to the appellant has varied over the years.
 - (c) In these communications with Air Canada, the appellant dealt with: (1) Lyse Charette, Director, Provincial Government and Community Relations up to 2004; and (2) Micheline Villeneuve, Kids' Horizons Manager, from 2005 until today.
6. The Aeroplan Points donated by Air Canada are deposited into Hope Air's Aeroplan account. Once a flight is arranged for a Client by the appellant using Aeroplan Points, the appellant's Aeroplan account is debited by the number of points corresponding to the flight in question. Air Canada donates the Aeroplan Points to the appellant on the understanding that the appellant uses those points only for arranging flights for Clients. At all material times, the appellant used Aeroplan Points only to arrange flights for Clients.
7. The appellant did not pay any money to Air Canada for the Aeroplan Points. However, the appellant acknowledges the support of Air Canada and its Kids' Horizon program (and that of other donors as well) in its promotional materials. The appellant does not issue tax receipts to Air Canada in respect of the Aeroplan Points.
8. On occasion, the appellant has asked Air Canada to provide the appellant with an estimate of the monetary value of the flights for which points and passes are donated by Air Canada to the appellant. The appellant used this information only in its promotional materials to state that 90% of all

² Tabs in Joint Book of Documents are not included in these reasons.

contributions it received (i.e., donations in cash and in kind) go directly to its charitable mission, spending only 10% on administration and fundraising annually.

REFUND CLAIMS AND SUBSEQUENT EVENTS

9. Beginning in 2003, the appellant made 10 claims for refund of the charges it had paid under the *Air Travellers Security Charge Act* (Canada) (the "Act") based on the exception under subsection 11(1.1), which makes the charge (the "Charge") under the *Act* inapplicable to registered charities. The refund claims covered the Relevant Period and totalled \$56,303.81. The refund claims are included in the Joint Book of Documents (Tabs 10 to 19). The supporting schedules have been omitted because they list personal information relating to the Clients.
10. The Minister of National Revenue (the "Minister") assessed the appellant's ten applications. The Minister allowed the portion of the appellant's claim for a refund of the Charge which related to air transportation services acquired by use of flight passes, which were donated by Air Canada (and other air carriers). The Minister denied the portion of the appellant's claim for a refund of the Charge which related to air transportation services acquired by redemption of Aeroplan Points donated by Air Canada.
11. This portion amounts to \$41,657.83. The particulars of the assessments are identified in the pleadings and are as follows:

No.	Application No.	Assessment No.	Assessment Date	Period Assessed	Original Refund Claim	TCC Appeal Refund Claim
1	200307070201	2007905SOR104	05.09.07	01.04.02 to 31.12.02	\$21,425.22	\$21,425.22
2	200307030302	2007905SOR102	05.09.07	01.01.03 to 31.05.03	7,016.02	7,016.02
3	200708130401	20071203SOR111	03.12.07	06.10.03 to 10.12.03	3,709.51	3,646.56
4	200711260602	20071203SOR101	03.12.07	01.01.04 to 30.06.04	2,953.08	2,423.01
5	5200708130403	20071203SOR102	03.12.07	01.07.04 to 31.12.04	2,994.09	2,002.88
6	200708130404	20071203SOR104	03.12.07	01.01.05 to 30.06.05	4,168.99	1,435.66
7	200708130405	20071203SOR104	03.12.07	01.07.05 to 31.12.05	2,614.79	752.30

8	200708130406	20071203SOR105	03.12.07	01.01.06 to 30.06.06	3,191.45	1,400.78
9	200708130407	20071203SOR106	03.12.07	01.07.06 to 31.12.06	2,448.80	654.30
10	200708130408	20071203SOR107	03.12.07	01.01.07 to 30.06.07	5,781.86	901.10
TOTAL					\$56,303.81	\$41,657.83

12. The Minister confirmed the assessments. The Notices of Confirmation were each dated September 18, 2008.

13. In determining the appellant's refund under the *Act*, the Minister made the following assumptions:

- (a) At all relevant times, the appellant was a registered charity;
- (b) At all relevant times, the appellant organized air transportation for individuals who needed to travel for medical care but could not afford the cost of transportation;
- (c) At all relevant times, the air transportation services acquired by the appellant were donated to an individual for no consideration;
- (d) At all relevant times, Air Canada was a designated "air carrier" within the meaning of the *Act*;
- (e) During the Relevant Period, Air Canada donated transportation services to the appellant by way of a combination of flight passes and its Aeroplan Points customer loyalty program;
- (f) During the Relevant Period, Aeroplan Points were relinquished to Air Canada by its customers through the Air Canada designated charitable giving program and, in turn, Air Canada donated the Aeroplan Points to various registered charities;
- (g) During the Relevant Period, the appellant used the Aeroplan Points to acquire air transportation services in pursuit of its charitable purposes; and
- (h) In redeeming the Aeroplan Points to acquire air transportation, the appellant acquired air transportation services from Air Canada for consideration.

14. The facts stated in paragraph 13(a) to (g) above are true (and so is the fact that the Minister assumed those facts in determining the appellant's refund, as alleged in paragraph 11 of the Reply).
15. The appellant takes issue with the statement in paragraph 13(h) above. In particular, while the appellant agrees that it acquired air transportation services from Air Canada, it is the appellant's position that it did so for no consideration.

AEROPLAN AND AEROPLAN POINTS

16. The Aeroplan program was established in 1984 and was operated by Air Canada. From January 1, 2002 until 2005 the Aeroplan program was operated by a wholly-owned limited partnership, subsidiary or affiliate of Air Canada. The Aeroplan program is currently operated by Aeroplan Canada Inc., which has as its parent company Groupe Aeroplan Inc., a public company. The Aeroplan program has been operated by a separate legal entity from Air Canada since no later than January 1, 2002 (such separate legal entity from Air Canada since no later than January 1, 2002 (such separate legal entity or entities are hereinafter referred to as "Aeroplan").
17. Air Canada and Aeroplan have each been carrying on their respective businesses from at least January 1, 2002 onwards.
18. The popularity of Aeroplan Points has grown since the program was introduced in 1984. The use of frequent flyer points, not just Aeroplan's but those of other airlines as well, is common in today's world.
19. The general terms and conditions of Aeroplan as of November 14, 2010 are attached as Schedule A to this statement³. Other than the provisions dealing

³ Schedule A is not included in these reasons except for the following provisions:

3. Aeroplan Miles or rewards are personal and cannot be assigned, traded, willed or otherwise transferred (other than with the consent of Aeroplan Canada Inc. and in accordance with the Terms and Conditions of the Aeroplan program) and any assignment or transfer in violation of these rules will be void and may, at the discretion of Aeroplan Canada Inc., result in the loss of membership or the cancellation of the affected reward or Aeroplan Miles, as the case may be;

9. Members shall be responsible for any taxes, departure fees, security charges, levies or other charges imposed by or with the authority of any government or governmental authority in respect to any rewards or reward travel; any surcharge imposed by an airline; and any service fee imposed by Aeroplan.

with the expiry of Aeroplan Points the parties believe that the terms and conditions are the same as those which were in effect during the Relevant Period.

20. Effective January 1, 2002, commercial arrangements were put in place between Aeroplan and Air Canada to address the terms upon which they would transact in respect of the Aeroplan program. Under these commercial arrangements
- (a) Aeroplan derives its revenue from the sale of Aeroplan Points and marketing services to a number of partners. Among the partners with whom Aeroplan has entered into commercial arrangements are Air Canada, banks, gasoline companies, rental car agencies and hotel companies ("Aeroplan Partners"). Sales of Aeroplan Points to Aeroplan Partners (including Air Canada) is the primary source of revenue for Aeroplan. Air Canada is the most significant Aeroplan Partner. Prior to 2002, Air Canada (through the Aeroplan program) entered into similar agreements with Aeroplan partners.
 - (b) Accordingly, Air Canada pays money to Aeroplan for Aeroplan Points which Air Canada uses to distribute as rewards to Aeroplan Members for goods or services.
 - (c) The price at which Aeroplan Points are purchased by each partner from Aeroplan is negotiated separately with each partner, and is commercially sensitive information.
 - (d) Aeroplan Members accumulate Aeroplan Points. Upon redemption of the Aeroplan Points by the Members, Aeroplan purchases, from its Aeroplan partners, the goods and services for which the Aeroplan Points have been redeemed by the Aeroplan Members.
 - (e) Accordingly, Aeroplan pays money to Air Canada in respect of each flight for which Aeroplan Points have been redeemed by Aeroplan Members. Aeroplan is obligated to purchase, on an annual basis, a minimum number of reward travel seats on Air Canada and its affiliates, which number is based generally on the number of seats utilized in previous years.
 - (f) Historically, Aeroplan Points that are not expected to be redeemed by the Aeroplan Members represent approximately 17% of the Aeroplan Points purchased by the various Aeroplan Partners ("Breakage").

MISCELLANEOUS

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14. Aeroplan Miles in an account belong to the account holder, and not to the person or company who paid for the passenger ticket, hotel stay, car rental, or any transaction entered into with another Aeroplan partner.

21. When the appellant redeems Aeroplan Points for flights on Air Canada, the appellant's status as a registered charity is irrelevant to the terms upon which it is eligible to redeem Aeroplan Points for flights.
22. Via the Aeroplan website, during the booking process Aeroplan members can purchase Aeroplan Miles to "top up" their balance of Aeroplan Miles to the level required to acquire a reward flight, up to a maximum of 50% of the total mileage required. The current price for such Miles is stated on the Aeroplan website to be \$0.03 (Cdn) per Mile (plus applicable taxes).
23. Air Canada provided "promotional passes" to charities (such as the appellant) or other persons (such as those referred to in the letter dated November 12, 2003 from Air Canada to the appellant). Promotional passes could be used for flights, subject to certain terms and conditions, for example, relating to flight booking classes, etc. (not unlike regular airline fares). To the extent that a promotional pass had been used to acquire a seat on a particular flight, such seat would subsequently be unavailable to be otherwise sold by Air Canada.

[5] Mr. Keller-Hobson confirmed many of the agreed facts. He recalled that historically Hope Air has relied on Canada's major national airlines, currently WestJet and Air Canada, as well as smaller regional airlines, to donate empty capacity which Hope Air then arranges to give to people in need. The national airlines have discussions with Hope Air at the beginning of each year as to what the anticipated needs of Hope Air will be. The airlines make a decision and give Hope Air an annual grant, which may be promotional passes and, in the case of Air Canada, Aeroplan Points as well.

[6] For regional airlines, Mr. Keller-Hobson stated, Hope Air is able to obtain space if there is empty capacity on these airlines at the time required. There have been occasions before 2010 when Hope Air had to purchase seats on commercial flights. Mr. Keller-Hobson explained this was a "very, very rare circumstance", usually when a person is stranded in a location and could not get back home. Starting in 2010, however, the British Columbia government gives funding so Hope Air can now purchase commercial flights within British Columbia. In all other provinces, Hope Air uses only donated passes or points.

[7] Mr. Keller-Hobson explained there are three criteria for eligibility to obtain flights with Hope Air. The first is financial need, the second is that the individual must be going to a locality with an approved medical appointment and the third is that Hope Air has availability on the route required (which may not always be the

case). Hope Air "rarely" turns down someone because he or she does not meet the criteria.

[8] The average household income of people provided with free flights by Hope Air is below the poverty line, the average income is about \$22,000. These people live in rural Canada and major centres, often in single-parent families, and include a very high number of cancer and organ transplant patients. Hope Air flies "a lot of people" to Toronto for treatment with specialists. Mr. Keller-Hobson said that at the relevant times none of the provincial governments provided air travel as part of health care so, he stated, "whoever falls down into that gap and needs to travel long distance comes to us for assistance".

[9] Further, any patient who is 18 years of age and under is provided with a free seat for a medical escort, which may be a parent or a social worker. If a doctor certifies that a medical specialist is required to accompany the patient, then Hope Air will provide a seat to that person as well.

[10] Every year, on average, Mr. Keller-Hobson stated, Air Canada donates about a 100 promotional return-flight passes to Hope Air. In addition Hope Air will receive about 3 million Aeroplan Points. Hope Air gives nothing, no money, and nothing in kind to Air Canada in return for the points or the passes; Hope Air does not issue any tax receipts to Air Canada for the points or for the passes. Hope Air does publicly acknowledge the gift of points from Air Canada, however.

[11] When Hope Air redeems Aeroplan Points to arrange a flight for a patient, it does so through the Aeroplan website. Hope Air does not deal directly with Air Canada. Hope Air will then decide if the number of points required for the flight is an efficient use of points, in order to maximize the number of flights it can provide with the points donated. The number of points for a flight is influenced by many factors, including the time of day of the travel. If the ticket is not an efficient use of points (short flight between two proximate cities), Hope Air may pay for the flight instead.

[12] Hope Air's position is that it does not pay Air Canada for the Aeroplan points it receives, but rather receives them as a donation. In turn, it uses these points to acquire passage on Air Canada. In its view, the word "consideration" in paragraph 11(1.1)(b) means consideration in money or in kind, which is consideration susceptible of being paid or payable. There is "no consideration" passing between Hope Air and Air Canada and Hope Air is not paying any consideration for the points.

[13] Ms. Meier testified for the Crown. She is an officer with Group Aeroplan and is responsible for "corporate social responsibility". She explained that the Aeroplan website lists different charities or programs to which Aeroplan members may donate their points. Kids' Horizons is such a program, although it is not a charity itself. Members donate points to the program online and Aeroplan's only role, she stated, is simply to make the program available and then manage the work of transferring points from a member's account to the program or charity account. Air Canada itself, she explained, does not purchase Aeroplan Points to give to charities.

[14] Aeroplan treats donated points to Hope Air in the same way it treats points collected by Aeroplan members. She stated that "We know when we track what happens in our members accounts. So we know if miles have been transferred to a charity. It is like a redemption ... from a donation perspective. ... we have tracked exactly what's going into a member's accounts [and] ... what's going out of a member's account".

Parties' Positions

[15] The appellant's principle argument is that it did not acquire the flights in issue for consideration, since the flights were acquired for no cost. The appellant stated that a "textual, purposive, and contextual" interpretation of section 11 of the *Act* shows that the flights acquired were meant to be exempt from the security charge. Appellant's counsel made several arguments in support of its position.

[16] First, counsel argued that "consideration" is a term that is inherently ambiguous, and so must be interpreted in a way to best give effect to the purpose of the exemption. A contextual analysis of the term, with respect to the *Act*, shows "consideration" should be taken to mean something "paid or payable", which means money. The common law concept of consideration is not appropriate to this particular statute since applying that meaning would produce an absurd result. He also argued that since the appellant acquired the Aeroplan points by donation, the flights Hope Air acquired cost nothing. Since nothing was exchanged, no consideration was paid, and the flights are compliant with the requirements of the exemption.

[17] Appellant's counsel also referred to the disparate terms in the French and English versions of the *Act*. The English version uses "for no consideration" in the exemption, the French version uses "à titre gratuit". Further, in other parts of the *Act*, for example, subsection 11(2), the French word "contrepartie" is used in the same way "consideration" is used in the English. The ambiguity of "consideration", he

suggested, can be resolved by looking at the French version of the *Act* and the use of the term "contrepartie", which indicates "consideration" was intended to mean "money".

[18] The appellant also contended that the underlying purpose of the exemption is to prevent the security charge from applying to flights acquired and given away to individuals for charitable purposes. Since the flights in question were acquired and given away under such circumstances, the flights are in accord with the purpose of the exemption and the appeal should be allowed.

[19] The respondent, on the other hand, takes the position that the security charge under the *Act* applies any time a person acquires air travel. The exemption under paragraph 11(1.1)(b) operates for charities only in limited circumstances, where a flight is acquired and given away for no consideration. The word "consideration" in the *Act* is no different than its definition in common law. It is "some right, interest, profit, or benefit accruing to one party, or some forbearance, detriment, loss, or responsibility, given, suffered, or undertaken by the other"⁴. Frequent flyer points have value, so when the appellant exchanges Aeroplan points for flights, it acquires those flights for consideration, the value of the points: *Johnson v. Canada*⁵.

[20] Respondent's counsel also submitted that there is no difference between the French and English versions of paragraph 11(1.1)(b). Both "no consideration" and "à titre gratuit" share the same meaning.

[21] Counsel for the respondent took issue as well with the limited meaning of "consideration" put forward by the appellant. In his view, the appellant derives its argument by looking at a provision, subsection 11(2) of the *Act*, which only deals with timing of the charge.

Analysis

[22] In *Johnson*, the appellant had flown from Thunder Bay to Chicago for medical treatment using Aeroplan points. He tried to claim the value of the flight as a medical expense for tax purposes. The Minister of National Revenue refused, saying that since the flight was paid for with Aeroplan points, which have no value, the ticket also had no value. Paris J. considered the meaning of the phrase "an amount paid" in

⁴ *Currie v. Misa*, (1875) L.R. 10 Ex, 153 at 162 L.R. Cited with approval in *Albert Pearl (Management) Ltd. v. J.D.F. Builders Ltd.*, [1975] 2 S.C.R. 846.

⁵ 2010 TCC 321, 2010 DTC 1213.

subsection 118.2(2) of the *ITA*, the meaning of "amount" in section 248 of the *ITA* and relevant case law concerning the meaning of the phrase "amount paid". He opined that:

... the phrase "amount paid" would include payments made by means of a transfer of a right or thing where the value of the right or thing can be expressed in terms of an amount owing, and is not limited to a transfer or delivery of money alone⁶.

[23] Justice Paris also noted the comments of Bowie J. in *Hallett*⁷ who explained that:

If the value of payments in kind were not payments for the purposes of the Act the profits derived from a great many business transactions would be immune from taxation; it is for that reason that Parliament defined "amount" the way it did.

[24] Paris J. declined to follow the treatment of "amount paid" in *Blais*⁸. He stated that limiting "pay" to a transfer of money or a handing over of funds was not appropriate. With regards to Aeroplan points, Paris J. held that they had a value that could be an "amount paid":

I find that the points given up by the Appellant for the ticket were a right, since they were exchangeable for air transportation services at his request, and that they had a value that could be expressed in money since the services for which they could be exchanged was offered for sale to arm's length parties at a fixed price ... By redeeming his points, the Appellant gave what was due for the services and therefore "paid" for them within the ordinary meaning of that word.

[25] While *Johnson* determined that points have a value for purposes of the *ITA*, it would not be unreasonable to conclude that points have a value for the purpose of the *Act* as well. Aeroplan points have a commercial value; one may receive air transport in exchange for the points; the points are given in consideration for the flight. Or, they are the "contrepartie" a person is giving to the air carrier so that the air carrier will provide flight passage. In the appeal at bar, there is an onerous contract between Hope Air and Air Canada for the flights.

⁶ *Ibid.* at para 15.

⁷ *Hallett v. Canada*, [2003] 1 CTC 2400 at para 4 (TCC).

⁸ *Blais v. Canada*, [1990] 2 CTC 2005, 92 DTC 1497.

[26] The Supreme Court in *Québec c. Notre-Dame de Bonsecours*⁹ declared that ordinary principles of statutory interpretation apply when interpreting tax legislation. Ambiguity in statutes was no longer to be construed in favour of any party by default, but rather, would be "resolved openly by reference to legislative intent"¹⁰. The Court went further, acknowledging that statutes can have several policies and purposes underlying them:

By submitting tax legislation to a teleological interpretation it can be seen that there is nothing to prevent a general policy of raising funds from being subject to a secondary policy of exempting social works. Both are legitimate purposes which equally embody the legislative intent and it is thus hard to see why one should take precedence over the other.¹¹

[27] Later, in *Rizzo & Rizzo Shoes Ltd.*¹², an appeal dealing with the Ontario *Employment Standards Act* ("ESA"),¹³ the Supreme Court cited with approval the following passage from *Elmer Driedger on Construction of Statutes*:¹⁴

Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

[28] The issue in *Rizzo* was whether employees of a bankrupt employer could make a provable claim in bankruptcy for termination pay and severance under the *ESA*. The Court found that it was contrary to the purposes of the *ESA* to exclude employees who lost their jobs as a result of their employer's bankruptcy.

[29] The Court held that statutory interpretation cannot be founded on the wording of the legislation alone. The words of an act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the act, its object and the intention of Parliament. Further, section 12 of Canada's *Interpretation Act*, similar to section 10 of Ontario's *Interpretation Act*, provides that every act is "deemed remedial", and directs that every act "shall be given such fair, large and liberal construction and interpretation as best ensures the attainment of its object."

⁹ *Québec c. Notre-Dame de Bonsecours (Corp.)*, [1994] 3 SCR 3, [1995] 1 CTC 241, 95 DTC 5017.

¹⁰ *Ibid.* at para 32.

¹¹ *Ibid.* at para 34.

¹² [1998] 1 S.C.R. 27.

¹³ R.S.O. 1980, c. 137, ss. 7(5), 40(1), 40a and *Employment Standards Amendment Act*, 1981, S.O. 1981, c. 22, ss. 2(3).

¹⁴ Driedger, Elmer, *The Construction of Statutes*, 2ed. (Toronto:Butterworths, 1983) at 87.

[30] The Supreme Court also provided a procedure for interpreting bilingual legislation in *Daoust*,¹⁵ specifically where there are differences in the French and English versions of an Act. The approach has been summarized in *The Law of Bilingual Interpretation* by former Justice Michel Bastarache, as the following:

1. The first step consists of examining the two versions to determine whether there is a discordance between the two versions. "Discordance" here has the same meaning as "conflict" does in many of the earlier cases: the important notion here is simply that the two versions are different. If the two versions are the same, there really is no issue. If there is discordance, the interpreter must proceed to the next step.
2. The second step consists in determining the nature of the discordance, and determining the shared meaning. There are three possibilities here:
 - a. The versions are in "absolute conflict". Each is clear and no shared meaning can be found.
 - b. One version is ambiguous and the other clear. The clear version provides the shared meaning.
 - c. One version is broad and the other narrow. The narrow version provides the shared meaning....
3. The third step consists of an appeal to extrinsic methods of determining the intention of the legislator with respect to the provision. There are two possibilities here:
 - a. The extrinsic evidence of intent allows for a choice between the two conflicting versions as to which provides the true meaning of the provision.
 - b. The extrinsic evidence of intent is examined to ensure that the shared meaning is not inconsistent with it.¹⁶

[31] As stated previously, the appellant has submitted that the term "consideration" is ambiguous and so must be interpreted. Counsel declared that the proper interpretation of consideration is something capable of being paid, meaning money, and not the common law meaning.

¹⁵ *R. v. Daoust*, 2004 SCC 6, [2004] 1 SCR 217, 316 N.R. 203, 235 D.L.R. (4th) 216.

¹⁶ Michel Bastarache et al., *The Law of Bilingual Interpretation*, 1st ed (Markham, ON: LexisNexis, 2008) at 47-48.

[32] With regards to the ambiguity of "consideration", the appellant appears to confuse ambiguity with scope. The definition of "consideration" in *Currie* suggests that just about anything of value can fit under the term 'consideration', and this has been the case for over a hundred years¹⁷. However, this does not mean the term is ambiguous; it simply means that the term is so broad that a great deal can fit under it. If Parliament's intent was that anything given in exchange for air travel will cause the security charge to be payable, then using the term "consideration" was entirely appropriate to communicate that intent.

[33] However, the appellant added that the ambiguity in the term "consideration" can be resolved by looking at the French version of the *Act*. That version uses "contrepartie"; the appellant argues the word "contrepartie" supports a meaning of consideration limited only to something paid or payable, meaning money. I do not agree.

[34] Appellant's counsel is of the view that his position is supported by the use of the word "contrepartie" in the French version of paragraphs 11(2)(b) and (c)¹⁸ and argued that since the words "aucune contrepartie" are used in paragraphs 11(2)(b) and (c) and not "à titre gratuit", the legislator must have meant that "à titre gratuit" and "aucune considération" have different meanings, and in particular that "à titre gratuit" does not mean "for no consideration".

[35] I have difficulty accepting this reasoning. The difference in the French wording is one of semantics. The expression "à titre gratuit" is used in paragraph 11(1.1)(b) because it agrees with the language structure of that provision. It is proper use of the phrase to unite "un service de transport aérien [...] acquis [...] à titre gratuit". The legislator made an exception to a payment of a charge when a

¹⁷ Cited with approval in *Albert Pearl (Management) Ltd. v. J.D.F. Builders Ltd.*, [1975] 2 S.C.R. 846.

¹⁸

The charge in respect of the air transportation service is payable

...

(b) if no consideration is paid or payable for the service, at the time a ticket is issued for the service; or

(c) if no consideration is paid or payable for the service and no ticket is issued for the service, at the time of emplanement.

Le droit relatif au service de transport aérien est exigible au moment suivant :
[...]

b) si aucune contrepartie n'est payée ou exigible pour le service, le moment où un billet visant le service est délivré;

c) si aucune contrepartie n'est payée ou exigible pour le service et si aucun billet n'est délivré pour le service, le moment de l'embarquement.

charity acquired air transportation from an air carrier for no consideration; "à titre gratuit" satisfies this exception as do the words "no consideration". There is no conflict between the two official versions of paragraph 11(1.1)(b) of the *Act*. Both versions support the ordinary meaning of the English word "consideration".

[36] Reference to the *Civil Code of Quebec* ("*Civil Code*") is instructive to assist in resolving this problem. The *Civil Code* distinguishes between an onerous contract and a gratuitous contract. Article 1381 reads as follows:

A contract is onerous when each party obtains an advantage in return for his obligation.	Le contrat à titre onéreux est celui par lequel chaque partie retire un avantage en échange de son obligation.
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When one party obligates himself to the other for the benefit of the latter without obtaining any advantage in return, the contract is gratuitous.	Le contrat à titre gratuit est celui par lequel l'une des parties s'oblige envers l'autre pour le bénéfice de celle-ci, sans retirer d'avantage en retour.
--	--

[37] According to Article 1553 of the *Civil Code*:

Payment means not only the turning over of a sum of money in satisfaction of an obligation, but also the actual performance of whatever forms the object of the obligation.	Par paiement on entend non seulement le versement d'une somme d'argent pour acquitter une obligation, mais aussi l'exécution même de ce qui est l'objet de l'obligation.
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[38] I doubt that air transportation provided by Air Canada to Hope Air is a gratuitous contract, that is, a "contrat à titre gratuit". To repeat what I said earlier: when Hope Air acquires passage for a patient, it is giving up points, something of value, in return for the passage. In civil law, this is a payment. Aeroplan purchases a flight for Hope Air, with Air Canada, for consideration: Hope Air redeems points on Aeroplan for passage on Air Canada, which Aeroplan has obligated itself to provide. There is no gratuitous contract. The contract between Hope Air, a holder of Aeroplan points, and Aeroplan is, in civil law, an onerous contract. There is consideration passing between Aeroplan and Hope Air.

[39] In fact, what paragraph 11(1.1)(b) is saying in both languages is this: if the charity acquires air transportation from the airline for free, without any conditions, there is no charge. On the facts before me there is no free passage when Aeroplan points are used.

[40] There remains to consider the meaning of "consideration" within the whole statute in order to determine the purpose and scope of the exemption. This requires a textual, contextual, and purposive analysis of not only the term, but the provision, and the *Act* as a whole. The appropriate interpretation of "consideration" will be one that supports not only the purpose of the exemption, but also the purpose of the statute.

[41] The overall scheme of the *Act* is to provide a way to enforce, administer, and collect a charge on air travel. The *Act* in this case is more akin to a taxing statute such as the *Income Tax Act*. The issue at bar concerns exemption from that charge for specific charitable activities. Therefore, the provision at issue should not be interpreted to include as many potential beneficiaries as possible, as in *Rizzo*¹⁹. Rather, *Bonsecours*²⁰ should be followed, and all purposes and policies underlying a statute should be considered when interpreting it.

[42] Looking at the *Act* as a whole, Parliament has created a technical scheme for the collection of the security charge. The charge is meant to apply to all air travel in Canada, and the term "no consideration", with the very broad scope of the meaning of "consideration" from the common law and the meaning of "à titre gratuit" from the civil law, was used to accomplish this.

[43] Contained within this scheme is the narrow exemption that prescribes in very specific terms and language when it will apply: when a registered charity (under the *ITA*) acquires air travel from "a person who carries on a business of transporting individuals by air" and gives it to an individual for its charitable purposes, that flight is exempt from the charge²¹. Therefore, both transactions, donation of points to Hope Air and acquisition of air travel by Hope Air, must be completed for no consideration. The meaning of "no consideration" must coincide with its use elsewhere in the statute, meaning anything of value given in exchange for the ticket.

[44] The appellant insisted that the exemption was intended to apply to any flights given for charitable purposes. It does not make sense, counsel suggested, that the exemption does not operate solely because Aeroplan points were used to acquire the flight. In support of this argument, counsel referred to Hansard records where the purpose of the exemption was debated. On the second reading of the exemption, Mr. James Bezan, M.P. stated:

¹⁹ *Rizzo*, *supra* note 11.

²⁰ *Bonsecours*, *supra* note 8.

²¹ See the definition of 'air carrier' under s. 2 of the *ACT*.

Bill C-40 proposes that the air travellers security charge will not be payable for air travel that is donated by an air carrier at no cost to a registered charity as long as the charity donates the air travel to an individual, also at no cost, in pursuit of the charitable purpose.²²

[45] Further, on third reading, the Honourable Rick Dykstra commented:

Third and finally are air travel security charge measures. The bill would relieve the charge in respect of air travel donated by an air carrier to a registered charity that arranges free flights for individuals as part of its charitable purposes. It means that certain charities that arrange free air transportation services for people who cannot otherwise afford the cost of flights for medical care will not have to pay the air travel security charge.²³

[46] These comments, unfortunately, do not support the argument of the appellant. Both these speakers refer to the flight itself being donated for no cost, and do not speak to flights acquired using donated Aeroplan points redeemed through the Aeroplan program.

[47] I note that the exemption in subsection 11(1.1) was added to the *Act* several years after the *Act* was created²⁴. The term "consideration" was already being used within the scheme, and there is no indication Parliament intended the meaning of that term to change when the exemption was added.

[48] The transactions at issue here are also non-compliant with the exemption for another reason. The exemption requires that the air travel at issue must be acquired from an air carrier. An "air carrier" is defined in the *Act* as a person who provides air travel services. When Hope Air redeems Aeroplan points for flights, it does so through Aeroplan (an entirely separate legal entity from Air Canada), not through the air carrier, Air Canada. It is Aeroplan that purchases the flight from Air Canada for the benefit of the Hope Air passenger. Neither side addressed the possibility that in these circumstances Aeroplan is acting as an agent for Hope Air when it acquires these flights. However, I would not have dismissed the appeal on this basis only. As

²² *House of Commons Debates*, Vol. 141 No. 099 (30 January 2007) at 1245 (Mr. James Bezan).

²⁴ *House of Commons Debates*, Vol. 141 No. 153 (14 May 2007) at 1635 (Hon. Rick Dykstra). SC 2007, c. 18, s. 145, but deemed in-force April 1, 2002.

argued, the transportation services were not acquired in the manner required to obtain the exemption.

[49] Hope Air provides a valuable and essential service to people who need it. Unfortunately, Aeroplan points have a value and when one reads paragraph 11(1.1)(b) one is presented with a *quid pro quo* between Hope Air and Aeroplan: Hope Air gives Aeroplan points; Hope Air returns the points to Aeroplan for passage on an Air Canada flight. For whatever reason, Parliament did not exempt from the charge the use of points as consideration for the flights when it amended the *Act*. As a result, the money available for Hope Air to carry on its charitable activities is reduced to the extent it is forced to pay charges on the flights it acquires for its charitable works. The Crown may wish to consider whether, in such circumstances, it is just to return the charges or whether it is in the public interest to remit the amount of the charges to Hope Air pursuant to subsection 23(2.1) of the *Financial Administration Act*.

[50] The appeal will be dismissed without costs.

Signed at Ottawa, Canada, this 6th day of May, 2011.

"Gerald J. Rip"

Rip C.J.

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