Docket: 2012-1261(GST)G

BETWEEN:

CANADIAN IMPERIAL BANK OF COMMERCE,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on April 10 and 11, 2017, at Toronto, Ontario

By: The Honourable Justice Henry A. Visser

Appearances:

Counsel for the Appellant:	Al Meghji, Al Nawaz-Nanji, Andrew Boyd
Counsel for the Respondent:	Marilyn Vardy, Craig Maw

JUDGMENT

The Appeal made under the *Excise Tax Act* by Notice of Assessment dated March 25, 2011, is dismissed.

The parties shall have 30 days from the date hereof to reach an agreement on costs, failing which the Respondent shall have a further 30 days to file written submissions on costs and CIBC shall have yet a further 30 days to file a written response. Any such submissions shall not exceed 10 pages in length. If the parties do not advise the Court that they have reached an agreement and no submissions are received, costs shall be awarded to the Respondent as set out in the Tariff.

Signed at Ottawa, Canada, this 16th day of April 2019.

"Henry A. Visser"

Visser J.

Citation: 2019 TCC 79
Date: 20190416
Docket: 2012-1261(GST)G

BETWEEN:

CANADIAN IMPERIAL BANK OF COMMERCE,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR JUDGMENT

Visser J.

[1] The Canadian Imperial Bank of Commerce ("CIBC") is seeking a rebate for GST paid in error of approximately $44.6 million in relation to payments it made to Aeroplan Limited Partnership ("Aeroplan") under the Aeroplan Mile loyalty program (the "Aeroplan Mile Program"). Therefore, this appeal requires the determination of whether the supplies made by Aeroplan to CIBC in respect of the Aeroplan Mile Program were subject to GST during the period under appeal. For the reasons that follow, it is my view that they were subject to GST, and that as a result CIBC did not pay GST in error and is therefore not eligible to claim the rebate at issue in this Appeal.

I. OVERVIEW

[2] During the period from March 25, 2005 to February 26, 2007 (the "Period"), CIBC was an accumulation partner of the Aeroplan Mile Program operated by Aeroplan. Pursuant to agreements between the parties, CIBC made substantial payments (the "Aeroplan Payments")[1] in the Period to Aeroplan for its participation in the Aeroplan Mile Program. The Aeroplan Payments were

[1] The Aeroplan Payments, inclusive of GST and QST, totalled $937,283,283.24 during the period March 25, 2005 to February 28, 2007 (see Statement of Agreed Facts (Partial), paragraph 15). The Respondent argues that any amounts paid on February 27 and 28, 2007 are outside of the rebate claim period, which it argues ended on February 26, 2007.

substantially computed with reference to the number of Aeroplan Miles issued by Aeroplan to CIBC's customers during the Period. Pursuant to section 165 of Part IX of the *Excise Tax Act* (the "Act")[2], Aeroplan charged, and CIBC paid, goods and services tax ("GST")[3] on the Aeroplan Payments on the basis that the supplies made by Aeroplan to CIBC during the Period (the "Aeroplan Supplies") were taxable supplies for the purposes of the *Act*.

[3] CIBC subsequently took the position that the Aeroplan Supplies made by Aeroplan to CIBC were supplies of exempt financial services and were therefore not subject to GST under the *Act*. In that respect, CIBC filed a General Application for Rebate of GST/HST (Form GST189 E (06)) (the "Rebate Form") pursuant to section 261 of the *Act* with the Minister of National Revenue (the "Minister") on March 26, 2007 in the amount of $44,631,063.32 for the Period on the basis that it had paid GST in error on the Aeroplan Supplies.[4] On May 13, 2009, CIBC revised the amount of the rebate claimed (the "Rebate") to $44,784,563.64 (an increase of $153,500.32) due to an alleged incorrect calculation of input tax credits which the Appellant had claimed in respect of the Aeroplan Supplies in the relevant periods.[5] On March 25, 2011, the Minister issued a Notice of Assessment (the "Assessment") pursuant to section 297 of the *Act* in respect of CIBC's rebate application, denying the rebate in full[6] on the basis that the Aeroplan Supplies were taxable supplies.[7] CIBC has appealed that Assessment to this Court. In a Notice of Motion filed by the Respondent on January 18, 2013 in this matter, the Respondent notes that the Appellant has also claimed an additional $79,838,793.63 of similar GST rebates for periods between February 27, 2007 and June 30, 2010. Those additional rebates claimed by CIBC are not directly at issue in these appeals.[8]

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2 *Excise Tax Act*, R.S.C. 1985 , c. E-15, as amended.

3 References herein to GST include any applicable HST exigible pursuant to the *Act*.

4 See Statement of Agreed Facts (Partial), paragraphs 16 and 26, and Exhibit A-1, Joint Book of Documents, Tab 47.

5 See Statement of Agreed Facts (Partial), paragraph 27 and Exhibit A-1, Joint Book of Documents, Tab 52.

6 See Statement of Agreed Facts (Partial), paragraph 31 and Exhibit A-1, Joint Book of Documents, Tab 56.

7 See Statement of Agreed Facts (Partial), paragraph 30 and Exhibit A-1, Joint Book of Documents, Tab 55.

8 Notice of Motion, at paragraph 4. While those amounts are not directly at issue in this appeal, the Respondent notes at paragraph 6 of its Notice of Motion that the outcome of this Appeal may impact on the ultimate disposition by the Minister of the Appellant's objections to the Minister's disallowance of those rebate claims. It is unknown if there are any similar rebate claims outstanding for periods after June 2010.

II. ISSUES

[4] CIBC's basis for the Rebate it claimed pursuant to section 261 of the *Act* shifted over time. In its letter of March 26, 2007, and the accompanying Rebate Form[9], as well as in its correspondence of May 13, 2009,[10] CIBC took the position that the Aeroplan Supplies were exempt supplies of financial services. In its Notice of Appeal filed on March 28, 2012, CIBC initially took the position that the Aeroplan Supplies were exempt supplies of financial services, or alternatively that the Aeroplan Mile Program was a joint venture or in the further alternative that the Aeroplan Miles were gift certificates. Prior to trial, however, CIBC amended its Notice of Appeal a number of times and abandoned some of its positions, so that at trial CIBC only raised a single issue and basis for its positon as follows:

> The issue in this Appeal is whether the Aeroplan Payments were consideration for Aeroplan's issuance or sale of a "gift certificate" as contemplated by section 181.2 of the Act.[11]

[5] In essence, CIBC argues that the Aeroplan Miles issued by Aeroplan to CIBC's customers were "gift certificates", and that the Aeroplan Supplies were therefore deemed not to be a supply pursuant to section 181.2 of the *Act* and were therefore not subject to GST pursuant to the *Act*.

[6] In her Fresh as Amended Reply to Further Amended Notice of Appeal (the "Fresh Reply"), the Respondent set out the following three issues at paragraph 28 thereof in relation to this Appeal:

> a) Is there any element of potential double recovery of tax paid as a result of ITCs previously claimed by the [A]ppellant and allowed by the Minister for the period under appeal?
>
> b) Did the [A]ppellant satisfy the requirements for making a valid rebate application within the limitation period?
>
> c) Was Air Canada/Aeroplan issuing or selling "gift certificates"?

[7] At trial, Counsel for the Respondent further narrowed these issues by abandoning the first issue set out above. As such, the primary issue in this Appeal

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9 See Exhibit A-1, Joint Book of Documents, Tab 47.

10 See Exhibit A-1, Joint Book of Documents, Tab 52.

11 See paragraphs 15, 20 and 21 of the Appellant's Further Amended Notice of Appeal, dated November 25, 2015, and filed with the Court on December 7, 2015.

is whether the Aeroplan Supplies made by Aeroplan to CIBC (and by extension the Aeroplan Payments made by CIBC to Aeroplan) during the Period under appeal were taxable supplies subject to GST, or whether they were excluded from the application of GST by being deemed not to be a supply pursuant to section 181.2 of the *Act*. In this respect, the parties have characterized the issue as being whether the Aeroplan Payments were in consideration for the issuance or sale of "gift certificates" by Aeroplan to CIBC or its customers. In the alternative, the Respondent characterized the issue as being whether the Aeroplan Payments were in consideration for the supply of a promotional and marketing service by Aeroplan to CIBC. In essence, the primary issue in this Appeal is whether the Aeroplan Supplies should be characterized for GST purposes as a taxable supply of promotional and marketing services or whether they should be characterized as a supply of "gift certificates" which are deemed by section 181.2 not to be a supply.

[8] A secondary issue in this Appeal relates to the computation of CIBC's rebate claim and is only relevant if the Appellant is successful in respect of the primary issue. In particular, the secondary issue is whether $2,254,282.60 of GST claimed by CIBC, which was paid on February 28, 2007, being two days after the February 26, 2007, end of the rebate claim Period as set out in the Appellant's Rebate Form, can be recovered by CIBC as a rebate in this Appeal. In this respect, the Appellant argues that the Rebate Form contained a small, non-material, clerical error regarding the rebate period end date, and that it should be entitled to recover the $2,254,282.60 of GST paid on February 28, 2007 notwithstanding the clerical error. The Respondent argues that the February 28, 2007 payment was made after the Period under appeal before this Court, and that therefore the Appellant cannot recover that amount pursuant to this Appeal.

[9] For the reasons that follow, it is my view that the Aeroplan Supplies were taxable supplies of promotional and marketing services by Aeroplan to CIBC. In the alternative, it is also my view that the Aeroplan Miles at issue in this Appeal were not "gift certificates" for the purpose of section 181.2 of the *Act*, and that therefore section 181.2 did not apply to deem the Aeroplan Supplies not to be a supply for the purposes of the *Act*. As a result, it is my view that the Aeroplan Supplies were subject to GST for the Period and the Assessment under appeal, and that the Minister therefore properly denied CIBC's Rebate application. Although the secondary issue is moot as a result of my determination of the primary issue, it is my view that CIBC could claim a rebate in respect of the $2,254,282.60 of GST paid on February 28, 2007 if CIBC was otherwise entitled to claim the Rebate.

III. BACKGROUND FACTS

[10] The facts in this case are generally not in dispute. The parties submitted a Statement of Agreed Facts (Partial) which is set out at Appendix "A". The parties also submitted a Joint Book of Documents[12] which includes, *inter alia*, copies of the relevant agreements governing the relationship between CIBC and Aeroplan during the Period, as well as copies of the Rebate Form and the invoices which are the subject of the Aeroplan Payments and the Rebate under Appeal. In addition, the Appellant called Stephen Webster to testify. Mr. Webster joined CIBC in 1992 and, at the time of trial, was vice president of travel cards at CIBC. His responsibilities included management of the Aeroplan Mile Program for CIBC. Mr. Webster testified about how CIBC used Aeroplan to market financial services, and about how the relationship between the companies worked and how both companies interacted with customers. He also described how Aeroplan Miles were distributed as loyalty rewards and given away to attract and retain customers. Mr. Webster also explained that customers of CIBC's various financial products accumulated Aeroplan Miles at different rates. I found Mr. Webster to be a credible witness. Each of the parties also submitted discovery read-ins.[13]

[11] The Aeroplan Mile Program was originally owned and operated by Air Canada prior to transferring it to Aeroplan. CIBC and Air Canada entered into a Credit Card Agreement in relation to the Aeroplan Mile Program dated as of January 1, 1995, as amended by a Credit Card Amending Agreement dated October 18, 1999, and by letter dated April 25, 2000 (collectively, the "1995 Agreement"). On April 1, 2003, Air Canada obtained an order from the Ontario Superior Court of Justice under the *Companies' Creditors Arrangement Act* (Canada) in relation to its financial restructuring (the "CCAA Order"). Subsequently, and concurrent with the establishment of a $350 million credit facility by CIBC to Air Canada, Air Canada and CIBC entered into a new Credit Card Agreement, dated April 16, 2003 (the "2003 Credit Card Agreement"), which replaced the 1995 Agreement.[14] The 2003 Credit Card Agreement was itself amended by and subject to the following additional agreements:

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12 See Exhibit A-1, Joint Book of Documents, Volumes 1-2.

13 See Exhibit A-2, Read-ins From Examination For Discovery Of John Phillips, Exhibit R-1, Respondent's Book of Read-Ins and Exhibit R-2, Respondent's Supplementary Read-Ins.

14 See Exhibit A-1, Joint Book of Documents, Tab 1.

a) Letter agreement dated October 31, 2003 between Air Canada and CIBC;[15]

b) Letter agreement dated November 28, 2003 between Air Canada and CIBC;[16]

c) Letter agreement dated April 7, 2004 between Air Canada and CIBC;[17]

d) Assignment and Assumption Agreement dated July 5, 2004, between Air Canada (as Assignor), Aeroplan Limited Partnership (as Assignee) and CIBC;[18]

e) Assignment and Assumption Agreement dated June 29, 2005 between APLN Limited Partnership (formerly Aeroplan Limited Partnership) (as Assignor), Aeroplan Limited Partnership (as Assignee), CIBC and Air Canada;[19]

f) Amending Agreement dated September 28, 2006 between CIBC and Aeroplan Limited Partnership;[20]

g) Amending Agreement dated October 2, 2006 between CIBC and Aeroplan Limited Partnership;[21] and

h) Letter agreement dated November 16, 2006 between CIBC and Aeroplan Limited Partnership.[22]

[12] The 2003 Credit Card Agreement, as amended and assigned, governed CIBC's participation in the Aeroplan Mile Program during the Period under appeal, and therefore also forms the basis of the Aeroplan Supplies and the Aeroplan Payments which are the subject of this Appeal.[23]

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15 See Exhibit A-1, Joint Book of Documents, Tab 2.

16 See Exhibit A-1, Joint Book of Documents, Tab 3.

17 See Exhibit A-1, Joint Book of Documents, Tab 4.

18 See Exhibit A-1, Joint Book of Documents, Tab 5.

19 See Exhibit A-1, Joint Book of Documents, Tab 6.

20 See Exhibit A-1, Joint Book of Documents, Tab 7.

21 See Exhibit A-1, Joint Book of Documents, Tab 8.

22 See Exhibit A-1, Joint Book of Documents, Tab 9.

23 The 2003 Credit Card Agreement, as amended and assigned by the aforementioned agreements, will collectively be referred to as the "2003 Credit Card Agreement", unless

IV. LAW AND ANALYSIS

A. Introduction – Primary Issue - are the Aeroplan Supplies Taxable Supplies?

[13] Section 165 of the *Act* provides that GST applies to taxable supplies made in Canada. Subsection 123(1) of the Act provides that a ""taxable supply" means a supply that is made in the course of a commercial activity". Subsection 123(1) of the *Act* defines a "commercial activity" as follows:

> "commercial activity" of a person means
>
> > (a) a business carried on by the person (other than a business carried on without a reasonable expectation of profit by an individual, a personal trust or a partnership, all of the members of which are individuals), except to the extent to which the business involves the making of exempt supplies by the person,
> >
> > (b) an adventure or concern of the person in the nature of trade (other than an adventure or concern engaged in without a reasonable expectation of profit by an individual, a personal trust or a partnership, all of the members of which are individuals), except to the extent to which the adventure or concern involves the making of exempt supplies by the person, and
> >
> > (c) the making of a supply (other than an exempt supply) by the person of real property of the person, including anything done by the person in the course of or in connection with the making of the supply;

[14] Subsection 123(1) of the Act defines "exempt supply" to mean "a supply included in Schedule V" of the *Act*. Part VII of Schedule V of the *Act* provides that certain supplies of financial services are exempt from GST, excluding certain exported financial services that are zero-rated supplies pursuant to Part IX of Schedule VI of the *Act*. In this case, while CIBC initially argued that the Aeroplan Supplies were exempt supplies of financial services pursuant to the *Act*, it abandoned this position prior to trial. I also note that neither party argued that Aeroplan was not carrying on a business in Canada during the Period or that the Aeroplan Supplies were not otherwise taxable supplies. As such, the Aeroplan Supplies made by Aeroplan to CIBC during the Period will be subject to GST unless a relieving provision of the *Act* applies, such as section 181.2 which deems certain supplies of gift certificates not to have been made.

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required otherwise by the context. For ease of reference, references herein to Aeroplan include references to Air Canada or AC, and *vice versa*, unless required otherwise by the context.

[15] As previously noted, in this case CIBC claimed the Rebate pursuant to section 261 of the *Act* on the basis that it paid GST in error in respect of the Aeroplan Supplies. In this respect, CIBC argues that the Aeroplan Supplies are not subject to GST because they are "gift certificates", and therefore deemed not to be supplies pursuant to section 181.2 of the *Act*. In contrast, the Respondent argues that the Aeroplan supplies are not "gift certificates", or in the alternative that they are the supply of a promotional or marketing service. Before addressing the specific arguments raised by the parties in relation to the "gift certificate" provisions set out in section 181.2 of the *Act*, it is, in my view, necessary to characterize the Aeroplan Supplies for GST purposes and determine if they are a single supply of property or services. If the Aeroplan Supplies are a multiple supply of property and or services, it is also necessary to determine if the supply of one or more of the multiple supplies is incidental to another supply such that section 138 of the *Act* applies to deem the incidental supply to be part of the other supply.[24] After characterizing the Aeroplan Supplies for GST purposes, it is then necessary to determine if they are subject to GST or if they are the supply of gift certificates and therefore deemed not to be a supply for GST purposes pursuant to section 181.2 of the *Act* (and therefore not subject to GST).

B. Characterization of the Aeroplan Supplies

[16] The test for characterizing single versus multiple supplies for GST purposes was set out and discussed in *Calgary (City) v. R.*, 2012 SCC 20 at paragraphs 31 – 46 as follows:

> 31 While not precisely on point, guidance on the question of whether there were one or two supplies in this case may be drawn from the way in which courts have dealt with whether a supplier has made a single supply comprised of a number of constituent elements, or multiple supplies of separate goods and/or services.
>
> 32 In determining whether a supplier has made a single supply or multiple supplies, the relevant principles were summarized by Justice Rip (as he then was) in *O.A. Brown Ltd. v. R.*, [1995] G.S.T.C. 40 (T.C.C.). His approach was confirmed by the Federal Court of Appeal in *Hidden Valley Golf Resort Assn. v. R.*, [2000] G.S.T.C. 42 (Fed. C.A.).

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[24] It might be argued that the test for single versus multiple supplies as developed by Canadian Courts has, to a certain extent, integrated the section 138 incidental supply rule into the single compound supply test.

33 In *O.A. Brown*, the appellant O.A. Brown Ltd. ("OAB") bought livestock for customers, but on its own account and at its own risk, not as agent for its customers. Customers would contact OAB's salesman to place an order specifying the type of cattle they required. OAB charged its customers disbursements, such as the cost of branding and inoculations, and a clearing commission, in addition to the cost of livestock. Livestock is a zero-rated supply for GST purposes, which means that the vendor neither pays GST on his acquisition of the livestock, nor collects it from his customers. The Minister assessed GST on the commission and the other disbursements. The main issue in the appeal was whether OAB supplied a service of acquiring livestock according to its customers' specifications, or whether it was supplying livestock and other supplies, in which case it should have collected and remitted GST on the other supplies.

34 Justice Rip found that the *Value Added Tax* statute in the United Kingdom contained many provisions similar to our GST (*Value Added Tax Act* (UK), 1983, c. 55). In the English cases the issue had been defined as whether the supply in question comprises a compound supply or a multiple supply. A compound supply is a single supply with a number of constituent elements which, if supplied separately, some would have been taxed and some not. Multiple supplies are made and taxed separately.

35 *O.A. Brown* established the following test to determine whether a particular set of facts revealed single or multiple supplies for the purposes of the ETA:

> The test to be distilled from the English authorities is whether, in substance and reality, the alleged separate supply is an integral part, integrant or component of the overall supply. One must examine the true nature of the transaction to determine the tax consequences. [p. 40-6]

36 When reaching his decision, Justice Rip made the following observation:

> ... one should look at the degree to which the services alleged to constitute a single supply are interconnected, the extent of their interdependence and intertwining, whether each is an integral part or component of a composite whole. [p. 40-6]
>
> (Citing *Mercantile Contracts Ltd. v. Customs & Excise Commissioners*, File No. LON/88/786, U.K. (unreported).)

37 Justice Rip also noted the importance of common sense when the determination is made. McArthur T.C.J. made a similar observation in *Gin Max Enterprises Inc. v. R.*, 2007 TCC 223, [2007] G.S.T.C. 56 (T.C.C. [Informal Procedure]), at para. 18:

> From a review of the case law, the question of whether two elements constitute a single supply or two or multiple supplies requires an analysis of the true nature of the transactions and it is a question of fact determined with a generous application of common sense...

38 Applying the test, Justice Rip found that the disbursements and commission were not charged for services that were "distinct supplies, independent of the whole activity" (p. 40-8) Only if taken together did the activities of buying, branding, inoculation, and other disbursements form a useful service. He concluded:

> In substance and reality, the alleged separate supply, that of a buying service, is an integral part of the overall supply, being the supply of livestock. The alleged separate supplies cannot be realistically omitted from the overall supply and in fact are the essence of the overall supply. The alleged separate supplies are interconnected with the supply of livestock to such a degree that the extent of their interdependence is an integral part of the composite whole. ... The appellant is making a single supply of livestock and the commission and disbursements charged are part and parcel of the consideration for that supply. They do not amount to separate supplies. [pp. 40-8 to 40-9]

39 In *O.A. Brown*, Rip J. characterized the commission, inoculation, branding and transportation costs not as distinct services but as inputs for the cattle and part of the cost of supplying the cattle. If this approach is followed, the public transit facilities would not be a separate supply, but would be an input to, or part and parcel of, the supply of the municipal transit service to the Calgary public.

40 *Maritime Life Assurance Co. v. R.*, [2000] G.S.T.C. 89 (Fed. C.A.), also supports the proposition that work preparatory to, or in order to make a supply, does not become a separate service subject to GST. In *Maritime Life*, the taxpayer, Maritime Life Assurance Co., issued insurance policies of various kinds, including a number of deferred annuity contracts. The holder of such a policy would pay periodic premiums to Maritime Life as consideration for the right to receive, on a specified future date, a payment of money or an annuity of equivalent value.

41 The Tax Court judge found two kinds of services were being provided to Maritime Life's policy holders, the insurance services represented by the issuance and administration of the policies, and the services represented by its management of the segregated funds. The Federal Court of Appeal held that the only supply Maritime Life made to the policy holders was the provision of the policies. Maritime Life administered the policies and maintained the investments that backed its obligations under the policies, but that was the work it had to do to

ensure that it remained in position to fulfil its policy obligations. The Federal Court of Appeal reasoned that the work should not be treated as a service that Maritime Life provided to the policy holders, any more than the work undertaken by a cleaning service to keep its cleaning equipment in good repair is a service provided to its clients. Applying the same reasoning in the present case, the acquisition and construction of the transit facilities, work undertaken by the City to develop a municipal transit service that meets the needs of the Calgary public, would not be treated as a supply that is separate from the supply of the municipal transit service itself.

42 Applying the *O.A. Brown* test, the question in this appeal is whether, in substance and reality, the alleged separate "transit facilities services" supply is an integral part, integrant or component of the overall supply of "public transit services". According to the jurisprudence, if one supply is work of a preparatory nature to another supply (an "input" to that supply), then the input is a part or component of the single overall supply.

43 In my opinion, the true nature of the City's "transit facilities services", a determination to be made with common sense, was work of a preparatory nature to the supply of a municipal transit service to the public. Transit facilities were constructed, acquired, and made available in order to supply a municipal transit service to the Calgary public. This would point to the allegedly separate "transit facilities services" being in fact a component of the overall supply of "public transit services" to the Calgary public.

44 Further, the single supply/multiple supplies analysis, as it has emerged, presupposes that several distinct elements or components of a supply can be identified before the analysis can be performed. In the present case, the alleged separate supplies are so interconnected that it would be difficult to identify distinct elements or components.

45 The purchase of an LRT vehicle (part of the alleged "transit facilities services" provided to the Province), and the operation of that vehicle as part of a municipal transit service (part of the "public transit services" provided to the Calgary public), are distinct activities. However, these activities are better seen as steps taken in order to produce a municipal transit service than they are seen as distinct elements or components of that transit service. The City's acquisition and construction of the transit facilities served the purpose of enabling the City to provide a transit service to the public. The end result of those activities was that a municipal transit service, featuring several expansions and improvements, could be operated. Nothing else was produced as a result of the activities. In this regard, this case is analogous to *O.A. Brown*, in which all disbursements and services for which customers were charged ultimately enabled OAB to deliver livestock as ordered by its customers. Further, the transit facilities have no use and provide no service except to the extent to which they are deployed for use within the Calgary

> municipal transit service. The interdependence and interconnectedness of the "transit facilities services" and the "public transit services" is obvious.
>
> 46 The application of the test for a separate supply would indicate that there is only one supply in the circumstances. However, in the leading separate supply cases, the allegedly separate supplies are provided to single recipients. The cases do not contemplate a situation in which there are allegedly two recipients of the supply or supplies. In addition to the *O.A. Brown* test, there are other relevant factors to consider. Here, it has been argued that the "transit facilities services", which ultimately benefit the Calgary public, provide a separate and distinct benefit to the Province. To determine whether the Province received any service or benefit from the City, the nature of the respective obligations of the City and Province under the Agreements, having regard to the statutory context, must be analyzed.

[17] The test for determining whether there are single or multiple supplies in a given situation was also discussed by the Federal Court of Appeal in *Global Cash Access (Canada) Inc. v. R.*, 2013 FCA 269, at paragraphs 21 – 26 as follows:

> Procedural history
>
> 21 The Casinos initially believed that the commissions it received from Global in respect of Funds Access Service transactions were exempt from GST. Accordingly, they did not collect GST from Global on the commissions. The Minister of National Revenue concluded otherwise and initially assessed Global for the uncollected GST. The Casinos paid the GST and were reimbursed by Global. Global then filed a rebate application on the basis that the GST had been paid in error. The Minister did not agree and assessed Global for the GST. The notice of assessment permitted Global to object and, when that did not succeed, to appeal to the Tax Court.
>
> 22 As indicated above, the issue before the Tax Court was whether the commissions paid by Global to the Casinos were consideration for a "financial service" supplied by the Casinos. Justice Woods concluded that what the Casinos supplied to Global in exchange for the commission was a bundle of supplies comprised of three elements, described as follows at paragraph 63 of her reasons:
>
> > 63. Accordingly, there are three main aspects to the bundle of supplies by the Casinos: (1) allowing kiosks on the premises, (2) providing support services at the cashier cages such as transaction procedures and initiating transactions on behalf of patrons, and (3) cashing Global's cheques.
>
> 23 She held that these three elements were not sufficiently interdependent to constitute a "single supply", and that none of the three elements could properly be

> characterized as incidental to the other. Therefore, she considered it necessary to determine which of the three elements, if any, fell within the statutory definition of "financial service". She concluded that only the third element, "cashing Global's cheques", fell within the statutory definition. She estimated that the third element represented 25% of the total value of what the Casinos supplied to Global and on that basis she concluded that only 25% of the commission was exempt from GST.

Discussion

> 24 The parties agree that this was a case of a single supply by the Casinos, not a supply of several things of which only one was within the statutory definition of "financial service". I agree.
>
> 25 It is clear from the contract and from the undisputed facts that none of the three elements of the supply as identified by Justice Woods had commercial efficacy on its own. More importantly, there is no evidence that Global would have been prepared to pay consideration to the Casinos for any of the three elements on its own. Since the three elements are integrally connected and there is a single consideration, there is a single supply.
>
> 26 To determine whether that single supply falls within the statutory definition of "financial service", the questions to be asked are these: (1) Based on an interpretation of the contracts between the Casinos and Global, what did the Casinos provide to Global to earn the commissions payable by Global? (2) Does that service fall within the statutory definition of "financial service"?

[18] The Federal Court of Appeal also noted the following with respect to this test in *Club Intrawest v. R.*, 2017 FCA 151, at paragraphs 80 – 82:

> 80 In order to determine whether an overall supply consists of more than one supply, that is whether a supply consists of a compound supply or multiple supplies, one must determine whether an "alleged separate supply is an integral part, integrant or component of the overall supply. ... One factor to be considered is whether or not the alleged separate supply can be realistically omitted from the overall supply." (*O.A. Brown*, paragraphs 22-23).
>
> 81 More recently, in *Global Cash Access*, this Court looked to the commercial efficacy of an arrangement in order to determine the predominant element of a single supply. As that predominant element fell within the statutory definition of "*financial service*" in subsection 123(1) of the Act, and did not fall within any statutory exception, the consideration received by the taxpayer in exchange for the supply was not subject to GST.
>
> 82 What I take from *Global Cash Access* is that when applying the Act regard must be had to the predominant element of a single supply. It is an error of law to

> apply the Act having regard to services that do not form the predominant element of a single supply (see also: *Great-West Life Assurance Co. v. R.*, 2016 FCA 316, [2016] G.S.T.C. 118, [2016] F.C.J. No. 1408 (Fed. C.A.), at paragraph 43).

[19] Before applying the *O.A. Brown* test as described by the Supreme Court of Canada in *Calgary (City)* and the Federal Court of Appeal in *Global Cash Access* and *Club Intrawest*, it is first necessary to determine what supplies (or elements thereof) Aeroplan was making to CIBC in respect of the Aeroplan Supplies. In this case, the Aeroplan Supplies were made by Aeroplan to CIBC pursuant to the 2003 Credit Card Agreement which, as previously noted, governed CIBC's participation in the Aeroplan Mile Program during the Period under appeal. At paragraphs 3-14 of the Statement of Agreed Facts (Partial) set out in Appendix "A" hereto, the parties summarized the operation of the Aeroplan Mile Program as follows:[25]

> Aeroplan Mile Program
>
> 3. Air Canada operated a loyalty program (the "Aeroplan Mile Program"), which was subsequently transferred to Aeroplan Limited Partnership.
>
> 4. CIBC entered into an agreement with Air Canada dated as of April 16, 2003, as amended from time to time (the "Agreement"), which was subsequently assigned to Aeroplan Limited Partnership.
>
> 5. Pursuant to the Agreement, CIBC added the "Aeroplan Miles" reward feature to certain CIBC Visa Cards ("Visa AeroCards") and certain mortgages ("AeroMortgages").
>
> 6. The Agreement, inclusive of the relevant amendments, consisted of the following:
>
> a. Credit Card Agreement dated as of April 16, 2003 between CIBC and Air Canada
>
> b. Letter amending agreement dated October 31, 2003 between CIBC and Air Canada

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[25] The quotation provided from the Statement of Agreed Facts (Partial) includes definitions which are used within the Statement of Agreed Facts (Partial) but which may not coincide with the definitions set out and otherwise used within these reasons for judgment. This quotation also excludes any footnotes included within the Statement of Agreed Facts (Partial). Those footnotes are included in the Statement of Agreed Facts (Partial) set out in full in Appendix "A" to these reasons for judgement.

c. Letter amending agreement dated November 28, 2003 between CIBC and Air Canada

d. Letter amending agreement dated April 7, 2004 between Air Canada and CIBC

e. Assignment and Assumption Agreement dated July 5, 2004 between Air Canada, Aeroplan Limited Partnership ("Old Aeroplan") and CIBC

f. Assignment and Assumption Agreement dated June 29, 2005 between APLN Limited Partnership (formerly Old Aeroplan), Aeroplan Limited Partnership, CIBC and Air Canada

g. Amending Agreement dated as of September 28, 2006 between CIBC and Aeroplan Limited Partnership

h. Amending Agreement dated as of October 2, 2006 between CIBC and Aeroplan Limited Partnership

i. Letter amending agreement dated November 16, 2006 between Aeroplan Limited Partnership and CIBC

7. The Aeroplan Mile Program generally operated as follows:

a. Aeroplan entered into agreements with various suppliers of property or services (each, an "Accumulation Partner") under which the Accumulation Partners added the Aeroplan Mile loyalty reward feature to certain of their consumer products.

b. An Aeroplan member could earn Aeroplan Miles as and when the member purchased eligible products from any Accumulation Partner.

c. The Accumulation Partner in each case would advise Aeroplan of the amount of the member's purchases eligible for Aeroplan Miles and the Accumulation Partner would pay Aeroplan for those Aeroplan Miles.

d. Aeroplan would issue the Aeroplan Miles to the member.

e. Once a sufficient number of Aeroplan Miles had been accumulated by the member in his or her Aeroplan account maintained with Aeroplan, the member could redeem the Aeroplan Miles with Aeroplan toward the acquisition of property or services ("Rewards") chosen from a menu of Rewards made available by Aeroplan from time to time.

f. Aeroplan would purchase the Rewards from suppliers (referred to as its "Redemption Partners") with which it had agreements for the supply of Rewards.

g. The member would receive his or her chosen Rewards.

8. In CIBC's case, the Aeroplan Mile Program generally operated as follows in respect of its Visa AeroCard product:

a. CIBC would issue a Visa AeroCard to a customer ("Cardholder"), and if the Cardholder was not already an Aeroplan member, CIBC would, on behalf of the Cardholder, request Aeroplan to enroll the Cardholder as an Aeroplan member.

b. The Cardholder would charge purchases to his or her Visa AeroCard account.

c. At the end of the billing period for the Cardholder's Visa AeroCard account, CIBC would invoice the Cardholder and collect the amount owing on the account from the Cardholder, pursuant to a Cardholder Agreement between CIBC and the Cardholder.

d. CIBC would indicate on the Cardholder's Visa AeroCard account statement that the Cardholder had earned an amount of Aeroplan Miles as a result of the credit card purchase transactions.

e. The Cardholder would generally, but not always, earn one Aeroplan Mile for each dollar of purchases charged to the Cardholder's Visa AeroCard account – the precise number of Aeroplan Miles so earned per dollar of purchases using the Visa AeroCard sometimes varied.

f. CIBC would advise Aeroplan of the amount of the Cardholder's purchases eligible to earn Aeroplan Miles and Aeroplan would issue the Aeroplan Miles to the Cardholder by crediting the Cardholder's Aeroplan member account with those Aeroplan Miles.

g. Aeroplan would then invoice CIBC for the Aeroplan Miles at the cost specified in Appendix "D" of the April 16, 2003 Credit Card Agreement or at the cost as modified and set out in the subsequent amendments to the Agreement.

h. Provided the Cardholder's Visa AeroCard account remained in good standing, the Cardholder could earn Aeroplan Miles as described above. If and when the Visa AeroCard account was no longer in good standing, the Cardholder would cease being entitled to earn Aeroplan Miles until his or her account was restored to good standing.

i. Subject to any applicable terms and conditions specified in the Agreement and the relevant Cardholder Agreement and Benefits Guide, an Aeroplan member could accumulate Aeroplan Miles in the member's Aeroplan account and, upon accumulating a sufficient number of Aeroplan Miles, the member could redeem all or some of the Aeroplan Miles with Aeroplan for property or services as Rewards offered by Aeroplan at that time.

9. A Cardholder Agreement and a Benefits Guide were provided by CIBC to Visa AeroCard Cardholders, which generally set out the benefits and the terms and conditions of having a CIBC Visa AeroCard. These documents included a general description of the benefits and certain terms and conditions specifically associated with the Aeroplan Miles reward feature of the Visa AeroCard.

10. There were certain other circumstances in which CIBC awarded Aeroplan Miles to customers, for example, where a customer paid interest on a CIBC AeroMortgage, opened a new account with CIBC or where CIBC awarded the Aeroplan Miles as a customer service gesture. In these cases, CIBC paid Aeroplan for the Aeroplan Miles so awarded, which were credited by Aeroplan to the customer's Aeroplan member account.

11. Aeroplan made available a menu of Rewards, which varied from time to time, being property and services that Aeroplan would purchase from Redemption Partners with which it had agreements. Rewards available at various times included, among other things, airline flights, stays in hotels and resorts, car rentals, electronics, a broad selection of brand-name merchandise, concert tickets, spa packages, meals at restaurants, and gift cards from a network of over 20 well-known national retailers such as Gap, the Body Shop, Holt Renfrew, Pier One and Pottery Barn, to name a few.

12. Aeroplan generally had discretion to change the Rewards made available to Aeroplan members and/or the number of Aeroplan Miles required to obtain any given Reward.

13. Upon redemption of Aeroplan Miles by an Aeroplan member, Aeroplan would incur the cost to acquire the desired Reward from the Redemption Partner.

14. In October 2006, Aeroplan announced that, beginning on January 1, 2007, Aeroplan Miles unused after seven years would expire. Aeroplan Miles accumulated prior to January 1, 2007 would expire on December 31, 2013. This seven-year expiry policy was subsequently cancelled and various modifications to the Aeroplan Mile Program were implemented as of January 1, 2014. Effective July 1, 2007, generally Aeroplan members were

> required to transact with the Aeroplan Mile Program through either one accumulation or one redemption within the last 12 months, or the accumulated Aeroplan Miles would expire. However, under the letter agreement of November 16, 2006 between CIBC and Aeroplan, Aeroplan agreed that CIBC would have the right to purchase from Aeroplan one Aeroplan Mile for each Cardholder whose Aeroplan Miles would otherwise expire under the new One-Year Expiry Rule with the result that no existing or future Cardholder's Aeroplan Miles wou1d expire pursuant to this Rule.

[20] I will now deal with the 2003 Credit Card Agreement which, in summary, included the following provisions:[26]

a) section 3 – the 1995 Agreement was repudiated;

b) section 4 – CIBC agreed to produce, issue and administer various credit cards, including the CIBC Aerogold VISA Card, and Aeroplan agreed to provide membership in the Aeroplan Mile Program to all cardholders and credit Aeroplan Miles to all cardholders in accordance with the terms of the 2003 Credit Card Agreement;

c) section 5 – Aeroplan agreed to undertake various referral activities for CIBC, including:

   i. providing CIBC with information relating to Aeroplan members "as may be required by CIBC for promotion planning and model development …";

   ii. providing CIBC with its list of Aeroplan members at least three times per 12 month period for the purposes of enabling the parties to undertake mailings to the persons shown on the list of material related to CIBC's cards;

   iii. allow CIBC to place insertions in four mailings per 12 month period to selected Aeroplan members and include CIBC card applications in Aeroplan Welcome Kits;

   iv. the insertion of articles about the CIBC cards would be placed in three of the six Aeroplan Bulletins issued per year;

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[26] See Exhibit A-1, Joint Book of Documents, Tab 1.

v. providing space for CIBC card applications to be displayed at Maple Leaf Lounges and other Air Canada counter locations; and

vi. providing space for advertising of the cards at airport bridge poster locations;

d) (section 6 – CIBC, at its own cost, was to review all card applications and forward a card and Card Welcome Kit to each approved applicant. CIBC, at its own cost, was also to provide Aeroplan with a list of applicants who were not Aeroplan members, and Aeroplan would then issue an Aeroplan Account number to the applicant and advise CIBC of the Aeroplan Account number. CIBC was granted the sole and exclusive right to manage and administer its VISA services and credit card program;

e) section 7 – CIBC and Aeroplan would mutually design the CIBC cards, and CIBC would at its own cost produce the cards;

f) (section 8 – the parties agreed to undertake promotion of the CIBC cards, including:

i. the parties would jointly develop a marketing plan for the CIBC Cards each year, including the allocation of costs therefor;

ii. the Marketing Budget for the promotion of the CIBC Cards would be in accordance with Appendix "B" of the 2003 Credit Card Agreement;

iii. a party could not advertise using the name, trademark etc. of the other party without their prior consent;

iv. CIBC would display card applications at all of its retail branches;

v. CIBC would permit Aeroplan to have up to three insertions in card statements each year;

vi. Aeroplan agreed not to dilute the Aeroplan program so that it would become materially uncompetitive;

vii. The parties agreed to review opportunities to enhance Aeroplan features on the CIBC Cards;

viii. The parties agreed that the cost of an Aeroplan Mile for a Corporate Card would be as set out in section 2 of Appendix "D" of the 2003 Credit Card Agreement;

ix. The parties agreed to certain minimum incremental fees in respect of new products and features that would be payable by CIBC to Aeroplan and the number of Aeroplan Miles that would be issued by Aeroplan in respect thereof;

x. CIBC was entitled to designate a specified number of its customers who used CIBC/Aeroplan co-branded financial services products as being qualified for access to Air Canada Maple Leaf Lounges and as being qualified for Aeroplan Prestige status, in both cases for a fee to be paid by CIBC to Aeroplan.

xi. Pursuant to the Advantex Benefit service, CIBC Cardholders would receive additional Aeroplan Miles for purchases at participating merchants in categories such as dining, golf, entertainment and small inns and resorts. CIBC would pay fees for these additional Aeroplan Miles in accordance with section 5 of Appendix "D" of the 2003 Credit Card Agreement; and

xii. The parties would continue discussions in relation to the development and implementation of "Project Maple";

g) section 9 – provides for the payment of fees by CIBC to Aeroplan in accordance with Appendix "D" of the 2003 Credit Card Agreement;

h) section 10 – sets out certain affinity program requirements, including certain covenants of Aeroplan in respect of the use of trade names and marks;

i) section 11 - set out restrictions on the use of the parties trade marks, service names, logos or other proprietary designations by the other party;

j) section 12 – the parties are to cooperate to ensure the efficient transmission of information between each other and the parties are to share the cost of changes required to CIBC systems; and

k) section 13 – provides for the crediting of Aeroplan Miles to approved applicant Cardholders both in respect of an initial number of Aeroplan Miles

and in respect of ongoing purchases made by Cardholders on their CIBC Cards. Aeroplan Miles were also to be issued in respect of customer retention programs and as a customer service gesture.

[21] As previously noted, the 2003 Credit Card Agreement was amended by a series of additional agreements as set out above. While I will not describe all of them in detail, I note the following:

(a) The April 7, 2004 Letter Agreement amended some of the fees payable pursuant to section 2 of Appendix "D" of the 2003 Credit Card Agreement;

(b) In the September 28, 2006 Amending Agreement, the parties added a Revitalization Initiative to the 2003 Credit Card Agreement as set out in a new Appendix "M" to the 2003 Credit Card Agreement, which included adding a Mileage Maximizer initiative to the CIBC Aerogold VISA Card and Small Business Card whereby Cardholders could in specified circumstances obtain 1.5 Aeroplan Miles per dollar spent on qualifying purchases. Aeroplan also agreed to provide promotional support of the Mileage Maximizer initiative, including access to Aeroplan's marketing channels including email distributions and displays of CIBC marketing content on Aeroplan's website;

(c) In the October 2, 2006 Amending Agreement, the parties renewed the Advantex Benefit feature used in conjunction with CIBC's Cards and also set out the fees to be paid by CIBC in respect of any Aeroplan Miles to be issued pursuant thereto; and

(d) In the November 16, 2006 Letter Agreement, the parties agreed to reduce the price paid by CIBC to Aeroplan in respect of the 2003 Credit Card Agreement in relation to changes to the Aeroplan Program announced on October 16, 2006. Pursuant to those changes, an Aeroplan Member who did not have at least one accumulation or redemption transaction with the program in a twelve month period would lose all of his or her Aeroplan Miles. Pursuant to the agreement, CIBC had the right to purchase one Aeroplan Mile for each CIBC Cardholder whose Aeroplan Miles might expire under the one year expiry rule so that no CIBC Cardholders would lose their Aeroplan Miles. Aeroplan also agreed to an aggregate price reduction of future fees to be paid under the 2003 Credit Card Agreement. The

parties also cancelled the September 28, 2006 Amending Agreement and set out new terms in respect of the Mileage Maximizer initiative.

[22] In my view, section 9 of the 2003 Credit Card Agreement is instructive in characterizing the Aeroplan Supplies for GST purposes. Section 9 provides as follows:

> 9. Referral Fees
>
> In consideration of AC referring or arranging for Aeroplan Members and other members of the public to make Card Applications and in consideration of AC performing its other obligations herein which are incidental to the foregoing, CIBC shall pay to AC in respect of the Cardholders a fee calculated in accordance with Appendix "D".

[23] Appendix "D" of the 2003 Credit Card Agreement is the "FEE AND COST OF AEROPLAN MILE SCHEDULE". It sets out the various amounts that CIBC was required to pay Aeroplan under the 2003 Credit Card Agreement. In summary, Appendix "D" provides that:

a) Section 1 of Appendix "D" provides for the payment of Referral Fees to Aeroplan pursuant to section 9 of the 2003 Credit Card Agreement, and reads in part as follows:

> 1. Referral Fees (Section 9(a))
>
> (a) In consideration of AC referring or arranging for Aeroplan members and other members of the public to make Card Applications and in consideration of AC performing its other obligations herein which are incidental to the foregoing, CIBC shall pay to AC, in respect of the Cardholders a fee calculated as follows:
>
> the sum of:
>
> (i) the total dollars of purchased goods and services billed to all Card Accounts for which at least a minimum payment has been received (other than cash advances, interest, and Card fees and less credit vouchers);
>
> less
>
> (ii) the total dollars outstanding of all Card Accounts for which CIBC has not received a minimum payment within 6 months of billing,

> all Card Accounts of Cardholders who have declared bankruptcy and all Card Accounts written off by CIBC in accordance with its usual practices other than outstanding dollars in respect of cash advances and Card fees;
>
> multiplied by the "Cost of an Aeroplan Mile" as defined below: …

b) Section 1 of Appendix "D" also provides for the possible issuance of additional CIBC Cards that would participate in the Aeroplan Mile Program. It also provides that all amounts payable under the 2003 Credit Card Agreement are exclusive of taxes, and that CIBC would pay any such taxes in addition to the amounts otherwise payable under the 2003 Credit Card Agreement;

c) Section 2 of Appendix "D" provides for the fees payable in respect of an Aeroplan Mile for a Corporate Card;

d) Section 3 of Appendix "D" provides for the Minimum Incremental Fees payable pursuant to section 8 of the 2003 Credit Card Agreement;

e) Section 4 of Appendix "D" provides for fee payable by CIBC pursuant to section 8 of the 2003 Credit Card Agreement in respect of Lounge access and Prestige Status;

f) Section 5 of Appendix "D" provides for the fee payable in respect of the Advantex Benefit pursuant to section 8 of the 2003 Credit Card Agreement;

g) Section 6 of Appendix "D" sets out the cost per Aeroplan Mile to CIBC for products offered under Project Maple.

h) Section 7 of Appendix "D" provides for the maximum quantum of the pool of Aeroplan Miles to be used for customer retention programs for an upcoming 12 month period.

[24] The invoices submitted by Aeroplan to CIBC in respect of the operation of the Aeroplan Mile Program during the Period are set out in Exhibit A-1, tabs 23-46, and are summarized in the schedule attached to the Rebate Form.[27] They cover Aeroplan's monthly billing to CIBC from February 1, 2005 to January 31, 2007. In respect of each month, Aeroplan would issue invoices to CIBC dealing with each

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[27] See Exhibit A-1, Joint Book of Documents, Tab 47.

of CIBC's Aeroplan related products, including the CIBC Visa Aerogold card, promotions relating to the CIBC Visa Aerogold card, the CIBC Aero Business card, promotions relating to the CIBC Aero Business card, the CIBC Aero corporate card, and the CIBC Aero Classic card. Subject to some minor exceptions, the invoices each include a description which references "Participation of CIBC … in the Aeroplan Program". In addition, the amount owing on each invoice references the number of Aeroplan Miles and the applicable rate per Aeroplan Mile for each activity, including net card purchases, sign up miles, marketing promotions and bonuses, as applicable. The applicable amount of GST and QST is also set out on each invoice. There are also credits or other adjustments for matters such as rejected Aeroplan Miles or credit notes.

[25] As previously noted, CIBC initially characterized the Aeroplan Supplies as being exempt supplies of financial services in the Rebate Form, its correspondence of March 26, 2007 and May 13, 2009, and in its initial Notice of Appeal dated March 28, 2012. Based on the wording of its initial Notice of Appeal dated March 28, 2012, it would appear that CIBC considered the Aeroplan Supplies to be a single supply, as there is no reference therein to multiple supplies or to section 138 of the *Act*. However, in its Further Amended Notice of Appeal dated November 25, 2015, CIBC argued the following at paragraph 20:

> The only actual supply made by Aeroplan to CIBC under the Aeroplan Program was the issuance or sale of Aeroplan Miles, which constitute a "gift certificate" under the Act.

[26] Although CIBC did not explicitly reference single versus multiple supplies or section 138, it has, in essence, pleaded and argued at trial that the Aeroplan Supplies were a single supply which should be characterized as the supply of property (being the Aeroplan Miles), and that the Aeroplan Miles should be characterized as "gift certificates" for the purposes of the *Act*. In that respect, CIBC argued that the 2003 Credit Card Agreement should be "read as a whole and the labels used by the parties are not determinative of the true character of what they describe."[28] CIBC also argued that "[w]hile incentivising customers to acquire and

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[28] See Written Submissions of the Appellant, at paragraph 117, citing *PACCAR Financial Services Ltd. v. Win-Storm Trucking Inc.*, 2001 ABQB 596, [2001] A.J. No. 941 at paragraphs 9-10, and *Viceroy Rubber and Plastics Ltd v MNR*, 93 DTC 347 at 352, and *Vauban Productions v. Minister of National Revenue*, [1975] 75 D.T.C. 5371 (F.C.T.D.) at p. 5373.

use Visa AeroCards was undoubtedly CIBC's commercial purpose, the transaction between CIBC and Aeroplan was the sale and purchase of Aeroplan Miles."[29]

[27] At paragraph 19(s) of the Respondent's Fresh as Amended Reply to Further Amended Notice of Appeal, the Respondent noted the following assumption of fact made by the Minister:

> under the Agreement, the appellant made payments to Air Canada / Aeroplan based on the Cost of an Aeroplan Mile and the payments were consideration for a supply of Aeroplan Miles, which Cardholders would use to redeem for flights;

[28] This is consistent with the Respondent's primary position that the Aeroplan Supplies should be characterized as a supply of property for the purposes of the *Act*, albeit not as gift certificates. I note, however, that the parties did not fully include that assumption in the Statement of Agreed Facts (Partial).[30] I also note that the Respondent argued, in the alternative, that the Aeroplan Supplies should be characterized as a supply of a service for the purposes of the *Act*. In this respect, the Respondent also included the following assumption at paragraph 19(j) of the Respondent's Fresh as Amended Reply to Further Amended Notice of Appeal:

> *Aeroplan supplied marketing and promotional services*
>
> j) under the Agreement, Air Canada / Aeroplan agreed to provide "referral services" including the following marketing and promotional activities:
>
> i. provide Aeroplan member information to the appellant for the appellant's Card promotion planning and development;
>
> ii. provide Aeroplan member lists to the appellant for mailings by the appellant to promote CIBC Cards;
>
> iii. permit the appellant to place insertions in Air Canada / Aeroplan mailings to promote CIBC Cards;
>
> iv. provide space for advertising CIBC Cards and displaying Card applications in Air Canada's Maple Leaf Lounges and Airport locations;

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29 See Written Submissions of the Appellant, at paragraph 119.

30 Paragraph 8(g) of the Statement of Agreed Facts (Partial) includes the first part of the assumption set out in paragraph 19(s) of the Respondent's Fresh as Amended Reply to Further Amended Notice of Appeal, but does not include the second part which assumes that "the payments were consideration for a supply of Aeroplan Miles".

v. provide membership in Aeroplan at no cost to every applicant approved by the appellant;

vi. jointly develop an annual marketing plan for the CIBC Card and share promotion costs;

vii. be responsible at its own cost for the Aeroplan Welcome Kit;

viii. administer and maintain all aspects of the issuance and redeeming of reward certificates for accumulated Aeroplan mileage points at its own cost;

ix. agree to increase the seats available for the redemption of Aeroplan Miles and to resolve customer seat redemption issues;

x. agree to provide media/marketing support for CIBC Aeroplan products;

[29] Considering all of the evidence, it is my view that the Aeroplan Supplies included the following elements as set out in the 2003 Credit Card Agreement:

a) Pursuant to section 4 of the 2003 Credit Card Agreement, Aeroplan agreed to:

   i. provide all CIBC Cardholders with membership in the Aeroplan Mile Program; and

   ii. credit Aeroplan Miles to such members in accordance with the 2003 Credit Card Agreement; and

b) Pursuant to, *inter alia*, sections 5 and 8 of the 2003 Credit Card Agreement, Aeroplan agreed to undertake specified referral activities or services and marketing in respect of CIBC's Cards. These marketing and promotional services are described in paragraph 19(j) of the Respondent's Fresh as Amended Reply to Further Amended Notice of Appeal.

[30] As previously noted, the parties in this case have both argued in essence that the Aeroplan Supplies should be characterized as a single supply by Aeroplan to CIBC for GST purposes. In this respect, it is my view that the various elements of the Aeroplan Supplies are all constituent elements of a single compound supply, being the supply of the Aeroplan Mile Program by Aeroplan to CIBC. It is also my view that the individual elements of the Aeroplan Supplies are highly

interconnected and each forms an integral part or component of the overall supply of the Aeroplan Mile Program by Aeroplan to CIBC. I also note that there is no evidence that CIBC would have been prepared to pay consideration to Aeroplan for any of the separate elements on their own, and Aeroplan issued invoices to CIBC in respect of its "participation in the Aeroplan Program" for each of CIBC's credit cards, generally computed with reference to the number of Aeroplan Miles issued during the relevant billing period. In this respect, it is also my view that CIBC was the only "recipient" of the Aeroplan Supplies, as that term is defined pursuant to subsection 123(1) of the *Act*.

[31] The question remains, however, as to whether the Aeroplan Supplies should be characterized as a single compound supply of property or a single compound supply of services. Based on the *O.A. Brown* test as developed by the Supreme Court of Canada in *Calgary (City)* and the Federal Court of Appeal in *Global Cash Access* and *Club Intrawest*, this characterization is undertaken by considering all of the elements of the single compound supply and determining which of those elements is the predominant element of the single compound supply. In other words, what is the true nature or raison d'être of the single compound supply.

[32] In my view, the Aeroplan Mile Program is a marketing and promotional program or service. In my view, the true nature or raison d'être of the Aeroplan Mile Program, the 2003 Credit Card Agreement and the resulting Aeroplan Supplies is to market and promote applications for and increased use of participating CIBC credits cards (and other participating CIBC financial products such as mortgages). The wording of both the 2003 Credit Card Agreement and Aeroplan's invoices to CIBC makes this clear. As previously noted, both section 9 and Appendix "D" of the 2003 Credit Card Agreement clearly indicate that the Aeroplan Payments are "[in] consideration of AC referring or arranging for Aeroplan Members and other members of the public to make Card Applications and in considered of AC performing its other obligations herein which are incidental to the foregoing". In effect, section 9 of the 2003 Credit Card Agreement explicitly stipulates that the marketing and promotional services (the referral activities) are the predominant element of the Aeroplan Supplies and further provides that all other supplies are incidental thereto. In addition, each of the monthly invoices issued by Aeroplan to CIBC in respect of the Aeroplan Supplies stipulates that the invoice is for "participation of CIBC … in the Aeroplan

Program". I also note the following testimony of Mr. Webster regarding why CIBC chose Aeroplan and CIBC's business rationale for using Aeroplan:[31]

> CIBC chose Aeroplan, I think, for two key reasons and these have remained, I think, pretty constant throughout the time we have offered Aeroplan.
>
> One is that the Air Canada Frequent Flyer Programme, Aeroplan, is appealing to frequent flyers, and frequent flyers are an appealing demographic group for CIBC, in that they tend to spend more money and they are a profitable group of clients from a credit card perspective.
>
> The second reason which is closely related to the first is that by offering Aeroplan miles when you use your credit card it encourages clients to consolidate their spending on our card, rather than spending on competitive credit cards. [32]
>
> …
>
> So our business rationale was that they were a very attractive reward that clients wanted, and so would allow us, as I said, to attract more customers to CIBC, which we did, and that they would use their card more which they did.[33]

[33] Overall, it is my view that the marketing and promotional services are the predominant element of the Aeroplan Supplies, and that the Aeroplan Payments were computed with reference to the number of Aeroplan Miles which were issued in a particular billing period as a convenient method for calculating the value of the marketing and promotional services provided by Aeroplan to CIBC.[34]

[34] Had I determined that the individual elements of the Aeroplan Supplies were separate and therefore multiple supplies, I would have also determined that section 138 of the *Act* would have applied to deem the supply of the Aeroplan Miles to be incidental to the marketing, promotion and other services provided by Aeroplan to CIBC such that the multiple supplies would be deemed by section 138 to be a supply of a service, being the supply of the Aeroplan Mile Program by Aeroplan to CIBC.

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31 Transcript of Proceedings at page 26, lines 16-28.

32 Transcript of Proceedings at page 26, lines 16-28.

33 Transcript of Proceedings at page 33, lines 13-17.

34 There was, in my view, a conflict between (i) some of the evidence presented at trial (in particular, the testimony of Mr. Webster and the 2003 Credit Card Agreement) and (ii) some of the facts as set out in the Minister's assumptions and in the Statement of Agreed Facts (Partial) in relation to the characterization of the Aeroplan Supplies. To the extent that there was a conflict, I have preferred the evidence presented at trial (in particular, the testimony of Mr. Webster and the 2003 Credit Card Agreement).

[35] Based on all of the foregoing, it is my view that the Aeroplan Supplies were a single compound supply of promotional and marketing services by Aeroplan to CIBC. In the alternative, if the supply of the Aeroplan Supplies included multiple supplies, one of which was the separate supply of Aeroplan Miles, it is my view that the supply of the Aeroplan Miles was incidental to the supply of promotional and marketing services by Aeroplan to CIBC, such that the supply of the Aeroplan Miles is deemed by section 138 of the *Act* to be a part of the supply of the promotional and marketing services made by Aeroplan to CIBC. In either event, the Aeroplan Supplies which were made by Aeroplan to CIBC should, in my view, be characterized as the supply of a service for the purposes of the *Act*. As it is my view that a gift certificate for the purposes of section 181.2 of the *Act* must be a form of property, and the definition of service in subsection 123(1) of the *Act* specifically excludes property, it is my view that a service cannot be a gift certificate for the purposes of section 181.2 of the *Act*. As such, it is my view that the supply of the Aeroplan Supplies by Aeroplan to CIBC during the Period cannot be characterized as a supply of gift certificates for the purposes of section 181.2 of the *Act*. As a result, it is my view that the Aeroplan Supplies were taxable supplies for the purposes of the *Act*, and that CIBC therefore properly paid GST in respect of the Aeroplan Supplies and Aeroplan Payments. In my view, this conclusion is dispositive of all of the issues raised by the parties in this Appeal. I will, however, discuss the other issues raised by the parties in this Appeal.

C. Are Aeroplan Miles Gift Certificates

[36] Notwithstanding my conclusion that the Aeroplan Supplies were supplies of services and therefore cannot be a supply of gift certificates for the purposes of section 181.2 of the *Act*, I will in the alternative consider if the Aeroplan Supplies were supplies of "gift certificates" for the purposes of section 181.2 of the *Act* on the premise that the Aeroplan Supplies should be characterized as a single compound supply of intangible property (in the form of the Aeroplan Miles).[35] For the reasons that follow, it is my view that the Aeroplan Miles (and by extension the Aeroplan Supplies) at issue in this Appeal were not "gift certificates" within the meaning of section 181.2 of the Act.

[37] Section 181.2 of the *Act* reads as follows:

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35 The Aeroplan Supplies might be characterized as a single compound supply of intangible property had I concluded that the Aeroplan Supplies were a single compound supply and that the Aeroplan Miles were the predominant element of the Aeroplan Supplies.

> 181.2 Gift certificates — For the purposes of this Part, the issuance or sale of a gift certificate for consideration shall be deemed not to be a supply and, when given as consideration for a supply of property or a service, the gift certificate shall be deemed to be money. [emphasis added]

[38] The phrase "gift certificate" is not defined in the *Act*, and appears in only a few instances in the *Act*. For our purposes, the most relevant of those other instances is in section 181, which deals with the treatment of coupons for GST purposes, where subsection 181(1) defines "coupon" as follows:

> "coupon" includes a voucher, receipt, ticket or other device but does not include a gift certificate or a barter unit (within the meaning of section 181.3). [emphasis added]

[39] As noted, the definition of "coupon" is defined broadly on an inclusive basis, but specifically excludes a "gift certificate". As such, gift certificates are generally carved out of the coupon rules in section 181 of the *Act*, and are dealt with in accordance with section 181.2 of the *Act*, assuming they meet the requirements of that provision. It is important to note, however, that a gift certificate that is not issued or sold for consideration could potentially be excluded from the operation of both sections 181 and 181.2 of the *Act*.[36] I also note that it is at least theoretically possible that something might be a gift certificate but not a coupon.[37]

[40] Section 181.2 describes two linked transactions. It describes both the issuance or sale of a gift certificate (the first transaction) and its subsequent redemption (the second transaction). In particular, it provides that the issuance or sale of a gift certificate for consideration is deemed not to be a supply for GST purposes, and is thus not subject to GST. In addition, it provides that the subsequent redemption of the gift certificate in exchange for goods or services should be treated as a payment with money. The supply of the goods or services is thus subject to GST, if applicable, and the total price, including any applicable GST, is reduced by the amount of the redeemed gift certificate. The two

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[36] Section 181 excludes all "gift certificates" from the definition of "coupon", but section 181.2 arguably only addresses gift certificates issued or sold for consideration.

[37] The exclusion of a "gift certificate" from the definition of "coupon" does not, in my view, imply that all "gift certificates" must of necessity otherwise be included in the definition of "coupon". They are merely excluded if otherwise caught by the definition. In practice, however, because of the breadth of the definition of "coupon", many, if not most, gift certificates would be caught by the phrase "other device" and therefore included in the definition of coupon but for the gift certificate exclusion.

transactions are arguably linked, as the reference to "the gift certificate" (used in the context of the second transaction) in section 181.2 arguably means that only a gift certificate that is issued or sold for consideration (in the first transaction) will be deemed not to be a supply (for the purposes of the first transaction) and will be treated as money when redeemed (for the purposes of the second transaction). As a result, it is arguable that a gift certificate that is not issued or sold for consideration will not be treated as money pursuant to section 181.2 when redeemed, even if it otherwise meets the criteria for being a gift certificate. I note, however, that this Appeal only deals with the potential application of the first of such transactions, being the issuance or sale of a gift certificate for consideration.

[41] The principles of statutory interpretation applicable in this case are well established and were summarized by the Supreme Court of Canada in *Canada Trustco Mortgage Co. v. Canada*, 2005 SCC 54, at paragraph 10 as follows:

> 10 It has been long established as a matter of statutory interpretation that "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": see *65302 British Columbia Ltd. v. R.*, [1999] 3 S.C.R. 804 (S.C.C.), at para. 50. The interpretation of a statutory provision must be made according to a textual, contextual and purposive analysis to find a meaning that is harmonious with the Act as a whole. When the words of a provision are precise and unequivocal, the ordinary meaning of the words play a dominant role in the interpretive process. On the other hand, where the words can support more than one reasonable meaning, the ordinary meaning of the words plays a lesser role. The relative effects of ordinary meaning, context and purpose on the interpretive process may vary, but in all cases the court must seek to read the provisions of an Act as a harmonious whole.

[42] While section 181.2 of the *Act* appears very straightforward in terms of how it should be applied for GST purposes, it is often difficult to apply in practice for a number of reasons, including the following:

(a) because the phrase "gift certificate" is not defined in the *Act*;

(b) because of the variety of similar promotional devices and transactions that have been developed for use by businesses in Canada; and

(c) because there a number of other provisions of the *Act* which may apply, depending on how a particular promotional device or transaction is characterized for the purposes of the *Act*.

[43] In my view, the meaning of "gift certificate", from a textual perspective, is unclear. In the absence of any given definition or list or required attributes, it is often difficult to determine if section 181.2 applies for GST purposes in respect of a particular device or transaction, or whether another provision of the *Act* should apply. For example, the following provisions of the *Act* set out the GST rules for dealing with the following kinds of promotional devices or transactions:

(a) section 181 – treatment of coupons (excluding gift certificates and barter units);

(b) section 181.1 – treatment of rebates (such as manufacturer's rebates);

(c) section 181.2 – treatment of gift certificates issued for consideration;

(d) section 181.3 – treatment of barter exchange networks (barter units);

(e) section 232(1) – adjustments, refunds or credits of tax;

(f) section 232(2) – adjustment (reduction of consideration);

(g) section 232(3) – credit and debit notes; and

(h) section 232.1 – promotional allowances.

[44] Considering the variety of promotional and other devices and transactions developed for use by businesses in Canada, the line between the application of these various GST provisions is often blurred. For example, in *Nestlé Canada Inc. v. R.*, 2017 TCC 33, the issue was whether "instant rebate coupons" (or IRCs) (which reduced the purchase price of Nestlé products purchased by consumers at Costco Wholesale Canada Ltd.) should be treated as coupons (pursuant to section 181) or promotional allowances (pursuant to section 232.1) for GST purposes. If the instant rebate coupons were treated as coupons for the purposes of section 181 of the Act, Nestlé was potentially eligible for a GST input tax credit in respect of the instant rebate coupons pursuant to subsection 181(5) of the *Act*. In that case, Lamarre ACJ concluded that the "instant rebate coupons" were promotional allowances for GST purposes, and that therefore section 232.1 of the *Act* applied to the instant rebate coupons. In making that determination, Lamarre ACJ noted the following at paragraphs 28-30 and 37-45 in discussing the potential application of sections 181 and 232.1 in the circumstances of that case:

> 28 What makes matters confusing in the present situation is that, during the relevant period, Nestlé made available to Costco customers paper coupons (which

were handed out to customers when they entered the Costco warehouses, as stated in the Appellant's written submissions at para. 12), and it is not disputed that the IRCs were considered by Nestlé as having the same characteristics as the paper coupons. This is reflected by the fact that the GST/HST charged to the Costco customers who benefited from IRCs was charged on the pre-discount price, as is required by subsection 181(2) when a registrant accepts as consideration for a taxable supply a coupon that entitles the recipient of the supply to a reduction of the price equal to a fixed dollar amount specified on the coupon. Furthermore, the Nestlé-Costco transaction seemed to imply a coupon arrangement for both the paper coupons and the IRCs, as they were governed by the terms of the same contract between Nestlé and Costco.

29 But even though Nestlé and Costco treated the IRCs as coupons, this is not sufficient for them to be characterized as such. For them to be so characterized, the terms of section 181 must be met. The FCA, in *Tele-Mobile*, made it clear that there cannot be a coupon unless something is submitted by the purchaser for acceptance as full or partial consideration for the taxable supply, and the coupon thus tendered, whether physical or electronic, must entitle the purchaser to a reduction of the price equal to a fixed dollar amount specified on the physical or electronic device.

30 In the present case, when the Nestlé product was purchased by the customer, the customer did not tender any coupon (physical or electronic) to the cashier. The Costco membership card, although it granted access to Costco products, did not contain any specific information about the IRCs, as no fixed dollar amount reduction for the particular Nestlé product was specified on that card.

…

37 The conclusion that the IRCs fit better within the definition of a promotional allowance than of a coupon also makes sense as a matter of policy.

38 Under subsection 181(2), Costco is required to collect GST/HST on the pre-discount price of the Nestlé products.

39 Subsection 181(2) thus requires the customer to overpay GST/HST on the Nestlé products and then deems the customer to have paid only the GST/HST attributable to the post-discount price. The reason for implementing this practice was explained by counsel for the Respondent in his oral submissions, in which he referred the Court to the policy underlying the treatment of discount coupons. The object of the practice was to simplify the treatment of coupons for small grocers, who, in the 1990s, did not have easy access to cash registers that, for the purpose of the application of the GST/HST, could distinguish between coupons for taxable supplies and coupons for non-taxable (or zero-rated) supplies.

> 40 This excess GST/HST does not go to the government however. Instead, subsection 181(5) allows the provider of the coupon, here Nestlé, to obtain an input tax credit for the excess GST/HST paid by the Costco customer.
>
> 41 The benefit represented by this additional input tax credit, received at the customer's expense, is why Nestlé is claiming that its transactions fit within the section 181 coupon regime, instead of the section 232.1 promotional allowance regime. By contrast, under the section 232.1 promotional allowance regime, the customer pays GST/HST on the reduced price of the supply.
>
> 42 In the present case, Nestlé and Costco treated the discount as falling under the coupon regime at the customer's expense.
>
> 43 The Federal Court of Appeal, in *Tele-Mobile*, was concerned that a relaxation of the tendering requirement would allow any discount arrangement to be considered a coupon, which in turn would require the customer to overpay GST/HST and result in the provider of the coupon obtaining the benefit of this excess payment through an input tax credit. Such an interpretation would diminish the significance of the — arguably token — formality of the tendering requirement that must be met in order for the supplier to obtain the input tax credit. Thus, customers would always pay too much GST/HST and coupon providers would always get the benefit of an input tax credit, which, from a certain perspective, is like the government providing a quasi-subsidy to coupon providers through the GST/HST regime. Such an interpretation of the legislation would also render one provision, here section 232.1, virtually meaningless and would thus be contrary to the statutory interpretation guidelines established by the Supreme Court of Canada (See *Canada (Attorney General) v. JTI-Macdonald Corp.*, *supra*).
>
> 44 According to the interpretation of section 181 set out in the *Tele-Mobile* case, Parliament requires the customer to tender some kind of coupon as a bright-line condition that must be met before the provider of the coupon can obtain the benefit of an input tax credit for the excess GST/HST paid by the customer. If this requirement is not met, the transaction will fall under the promotional allowances regime, which constitutes a residual category.
>
> 45 I accordingly conclude that the IRCs were promotional allowances, not coupons. Nestlé will therefore not be able to claim ITCs on the IRCs and the customer will not recover the tax overpaid. In a promotional allowance context, GST/HST should have been collected only on the post-discount price. In that context, I realize that the Minister has received a windfall. …

[45] Similar tensions and concerns arise in this case. CIBC argues that Aeroplan Miles are gift certificates for the purposes of section 181.2 of the *Act*, and that therefore it was eligible to claim the Rebate in respect of the GST it argues it paid in error. The Respondent argues, however, that the Aeroplan Miles were not gift

certificates for the purposes of section 181.2 of the *Act*, and that CIBC properly paid GST in respect of the Aeroplan Supplies (and Aeroplan Miles) and therefore was not eligible to claim the Rebate in respect of GST paid in error. The Respondent also argues that, in considering whether the Aeroplan Miles were gift certificates, this Court does not have to determine if the Aeroplan Miles were another type of promotional device or transaction for the purposes of the *Act* (such as, for example, coupons). Rather, the Court only has to determine if the Aeroplan Miles were, or were not, gift certificates for the purpose of the *Act*. I agree. While it may be beneficial or necessary to consider the wording of various other provisions of the *Act* which may apply to Aeroplan Miles when undertaking a textual, contextual and purposive analysis of section 181.2, that does not require the Court to positively determine that Aeroplan Miles should be treated, for example, as coupons if the Court determines they are not gift certificates.

[46] Section 181.2 of the *Act* was considered in both *Canasia Industries Ltd. v. R.*, 2003 TCC 33 and *Royal Bank of Canada v. R.*, 2007 TCC 281.

[47] At paragraphs 19-36 of *Canasia*, Garon CJ, as he then was, noted the following in considering whether travel certificates were gift certificates for the purposes of section 181.2 of the *Act*:

> 19 The question in issue is whether the sale by the Appellant of a travel certificate of the type described above constitutes a supply of a gift certificate within the purview of section 181.2 of the *Excise Tax Act*.
>
> 20 Section 181.2 of the *Excise Tax Act* reads as follows:
>
> > 181.2 Gift certificates — For the purposes of this Part, the issuance or sale of a gift certificate for consideration shall be deemed not to be a supply and, when given as consideration for a supply of property or a service, the gift certificate shall be deemed to be money.
>
> 21 In construing this enactment and more particularly the phrase "gift certificate" it is useful, as has been mentioned many times by the courts, to bear in mind the modern rule of statutory interpretation formulated by E.A. Driedger in Construction of Statutes (2nd ed., 1983) at p. 87:
>
> > 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.

22 The term “gift certificate” is not defined in the *Excise Tax Act*. It is therefore necessary to refer to dictionary definitions.

23 In the Canadian Oxford Dictionary, Oxford University Press 1998, the expression “gift certificate” is defined thus:

> gift certificate n. N Amer. a certificate or voucher presented as a gift and exchangeable for a specified value of goods, usu. at a specific store.

24 In the Ninth New Collegiate Dictionary, A Merriam-Webster, 1986, the definition of the phrase “gift certificate” is as follows:

> gift certificate n (1942) : a certified statement entitling the recipient to select merchandise in the establishment of the issuer to the amount stated thereon

25 In ascertaining the import of section 181.2 of the *Excise Tax Act*, it is useful to keep in view the provisions of section 13 of the *Official Languages Act*, which reads:

> Any journal, record, Act of Parliament, instrument, document, rule, order, regulation, treaty, convention, agreement, notice, advertisement or other matter referred to in this Part that is made, enacted, printed, published or tabled simultaneously in both languages, and <u>both language versions are equally authoritative</u>. [Emphasis [Garon CJ]]

26 It is therefore useful to refer to the French version of section 181.2 of the *Excise Tax Act*, which is couched in the following terms:

> 181.2 Certificats-cadeaux — Pour l'application de la présente partie, la délivrance ou la vente d'un certificat-cadeau à titre onéreux est réputée ne pas être une fourniture. Toutefois, le certificat-cadeau donné en contrepartie de la fourniture d'un bien ou d'un service est réputé être de l'argent.

27 It is apparent from the French version of section 181.2 of the *Excise Tax Act* that the phrase corresponding to “gift certificate” is “certificat-cadeau”.

28 The term “certificat-cadeau” is not found in the well-known French dictionaries such as Grande Encyclopédie Larousse 1971, Quillet 1975, Grand Larousse Universel 1989, Nouveau Larousse Encyclopédique 2001 and Le Grand Robert de la langue française 2001. On the other hand, in the Multidictionnaire des difficultés de la langue française, by Marie-Eva de Villers, a Canadian publication, this locution is commented upon as follows: “Calque de l'anglais

"gift certificate" pour chèque-cadeau." In the same dictionary, "chèque-cadeau" is defined as follows: "Bon autorisant une personne à recevoir un produit, un service" which could be loosely translated as follows: a voucher authorizing a person to receive a product, a service. In Le Robert & Collins Super Senior, the phrases "gift token, gift voucher" are translated by the compound "chèque-cadeau".

29 In the course of argument, counsel for both parties referred to a number of commercial situations involving the use of the term "gift certificate". No evidence has been adduced as to the various types of gift certificates. However, it seems commonly accepted that a gift certificate is a very broad term for a voucher which entitles the bearer to redeem it according to its governing terms for goods or services or for a value towards the purchase price of goods or services. It is common ground here that the term "gift certificate" is a colloquial term that encompasses any variety of documents evidencing any variety of entitlements.

30 There seems to be two types of usual situations where it is recognized by counsel by both parties that we are dealing with gift certificates. In one type of situation, a firm provides to an interested person a voucher with a stated monetary value, say $100 for a price of $100. The purchaser of the voucher in turn generally makes a gift to a third party by handing over the voucher for no consideration. In this situation, section 181.2 of the *Excise Tax Act* has the effect of deferring GST to the second transaction when the certificate is returned to the issuer in exchange for goods or services. It is admitted that in such a case, the first transaction involving the purchase of the certificate for its stated value does not attract tax. In the second situation, the issuer of the gift certificate simply gives the voucher for free to a customer or a prospective customer. The certificate does not have a stated value. This operation is not covered by section 181.2 of the *Excise Tax Act* because it is not issued for a consideration.

31 From these examples, the wording of section 181.2 of the *Excise Tax Act* and the dictionary definitions, it should be ascertained what are the constituent elements of a gift certificate.

32 As I have just indicated, a gift certificate must have been issued for consideration in view of the requirement laid down in section 181.2 of the *Excise Tax Act*. It is not necessary that the consideration be equal to the stated value if one appears on the certificate since the requirement in the latter section is simply that there must be a consideration.

33 What is essential is that the bearer of the certificate who could be anyone to whom the certificate was transferred by the original purchaser of the certificate or by a subsequent bearer, is entitled to receive free of charge from the issuer of the certificate either a product or a service or the stated value towards a product or service. I do not think it is important that the bearer of the certificate may have paid something or given consideration for securing the gift certificate from the

original purchaser of the certificate or some subsequent intermediary. In my view, the concept of "gift certificate" in the context of a situation contemplated by section 181.2 of the *Excise Tax Act* necessarily implies that the product or service referred to in the certificate is provided free of charge to the certificate holder when the certificate is redeemed by its issuer. Otherwise, the reference to the "gift" portion in the phrase "gift certificate" is meaningless.

34 In the present case, the bearer of the certificate who acquired it from the purchaser of the certificate or from a subsequent holder is not entitled to receive free of charge from the issuer The Travel Card Center, Inc. the air travel portion of the certificate because he must have previously satisfied the following conditions:

> 1. He must pay the registration fee of $39.95 U.S. to The Travel Card Center, Inc. I think that it can reasonably be inferred that this amount represents in reality the cost of processing the request. Also, the amount in question is referred to in the certificate as a "registration fee". This condition probably does not preclude the travel certificate from being a gift certificate. On balance, I am inclined to disregard this condition.
>
> 2. The second condition is that the bearer of the certificate, as appears from paragraphs 17 and 18 of the Agreed Statement of Facts, has a minimum stay period of seven or more days depending on the destination in a selected hotel at the destination of choice from The Travel Card Center, Inc. The bearer of the certificate is required to pay for the accommodation selected by the issuer of the certificate.

35 In my view, the second condition is a substantial element of the overall travel package. It cannot obviously be said that the bearer is entitled to receive from the issuer of the certificate free of charge the air travel portion of the package because of the existence of this second condition, which carries with it a substantial expenditure for the bearer of the certificate. In this regard, David M. Sherman in Canada GST Service appears to have adopted a similar approach with respect to the application of section 181.2 of the *Excise Tax Act* to a factual situation. His following observations regarding the distinction between a discount coupon and a gift certificate are especially instructive:

> The distinction between a coupon and a gift certificate may not always be obvious. Suppose a clothing store sells a regular client, for 1¢, a document that says "GIFT CERTIFICATE — Worth $50 on any purchase of $75 or more". Is this document a gift certificate or a discount coupon? If there were no requirement for a purchase of $75 or more, it would clearly be a gift certificate. If the purchase requirement were, say, $1,000, it would almost certainly be a discount coupon despite its title. In this case, the certificate clearly

> has a value of its own and is not being used purely as a marketing device to sell $75 worth of clothes.
>
> 36 I therefore conclude that the travel certificate herein is not a gift certificate within the ambit of section 181.2 of the *Excise Tax Act*. [emphasis added]

[48] At paragraphs 43-61 of *Royal Bank of Canada*, Hershfield J. noted the following in considering whether payments made by the Royal Bank of Canada ("RBC") to Canadian Airlines International Ltd. ("CAIL") under an affinity credit card agreement (pursuant to which CAIL issued frequent flyer points to specified RBC credit card holders) were made in respect of gift certificates for the purposes of section 181.2 of the *Act*:

> B. Gift Certificates
>
> 43 In the alternative, the Appellant argues that the purchase of the Points should not be subject to GST upon acquisition because the Points are gift certificates as described in section 181.2. The Appellant relies on section 181.2 to defer payment of tax until the Points are redeemed by the cardholder.
>
> 44 Section 181.2 states:
>
> > 181.2 Gift certificates — For the purposes of this Part, the issuance or sale of a gift certificate for consideration shall be deemed not to be a supply and, when given as consideration for a supply of property or a service, the gift certificate shall be deemed to be money.
>
> 45 The Technical Notes to the section indicate that the sale of a gift certificate is not considered to be a supply (despite consideration) and therefore will not attract GST. Only when a gift certificate is subsequently exchanged for goods or services is its redemption value to be treated as part of the consideration for those goods or services.
>
> 46 At this point, in order to help put matters in perspective, a few preliminary observations need to be made:
>
> • The term "gift certificate" is not defined in the *Act* so that the common understanding of what that term embraces will have to be considered. According to the CRA, a gift certificate must have a stated or face value. As the Points have no such stated or face value, administrative practice dictates that they cannot be gift certificates.
>
> • There is another type of instrument dealt with in section 181 in an entirely different way. This instrument is called a "coupon" and is simply defined as a

device other than a gift certificate. In general terms, unlike a gift certificate, a coupon is not treated on its use by a consumer as consideration paid by the consumer. That is, the ultimate consumer pays tax on the value of the consideration paid for the services or goods acquired *net* of the coupon reduction amount. Respondent's counsel argues that the sale of Points is a sale of coupons which, unlike the sale of gift certificates, is a taxable supply. On that basis when credit card holders redeem Points for air travel, no GST is payable pursuant to section 181 which reflects the CRA's current assessing practices.

• To help distinguish between the two instruments, the CRA has conveniently (or arguably necessarily) prescribed characteristics to them that are not prescribed in the *Act*. The CRA has administratively prescribed that a gift certificate must have a stated value and that it must be acquired for an amount equal to that stated value. Coupons may or may not have a stated value and, generally at least, would offer a discount as opposed to a free supply and would be issued without consideration.

47 Dealing firstly with the Respondent's argument that the Points cannot be gift certificates for want of a stated or face value, I find no support in the *Act* or case law for such position. Still, the Respondent argues that because a gift certificate is deemed under the *Act* to be "money" there is an implicit requirement in the legislation for a stated value when section 181.2 is read together with the definition of "money" in subsection 123(1):

> "money" includes any currency, cheque, promissory note, letter of credit, draft, traveller's cheque, bill of exchange, postal note, money order, postal remittance and other similar instrument, whether Canadian or foreign, but does not include currency the fair market value of which exceeds its stated value as legal tender in the country of issuance or currency that is supplied or held for its numismatic value;

48 This definition certainly imports a necessity that "money" have a stated value. Respondent's counsel then in effect asks: "How can section 181.2 deem something to be that which it cannot be given that it lacks a fundamental characteristic of what it is deemed to be?" Of course that is exactly what a deeming provision does. Respondent's counsel then argues that deeming the certificate to be money without requiring it to have stated value makes the deeming provision unworkable. How can it operate as money when it lacks the very feature that it needs to operate as money? This argument presupposes a limited definition of what a gift certificate is. Such presupposition is not warranted based on case authorities or any provision of the *Act*.

49 As to a common understanding of what a gift certificate is, perhaps it is presumptuous to think that there is such a thing. Respondent's counsel's argument

that I read in an implicit requirement for a stated value for an instrument to be a gift certificate might have merit if, for example, the common understanding of a gift certificate is that it affords its user some discretion as to its use as money does. If that is the case, a certificate for a "basic exterior car wash" at Joe's Car Wash which has no stated value would not be a "gift certificate" regardless that it might say that on its face and that I acquired it as such. As the purchaser of such a certificate my understanding would be that I had acquired a gift certificate. On the other hand, the user of such a certificate might expect that such a certificate is GST prepaid which is to say that the common understanding of the user in this case may be that the car wash certificate is not a "gift certificate" as that term is used in the *Act*.

50 While it may be presumptuous to suggest that the term "gift certificate" means one thing or another, it is not presumptuous to think that pronouncements of this Court as to how to interpret the term, will not be ignored. A clear statement has been made by this Court that a gift certificate as used in section 181.2 does not have to have a stated value and may be for identifiable goods or services. In *Canasia Industries Ltd. v. R.* , while noting that the term "gift certificate" is a colloquial term that may be applied in a variety of forms and transactions, then Chief Justice Garon provided a description of the constituent elements of a gift certificate:

> What is essential is that the bearer of the certificate who could be anyone to whom the certificate was transferred by the original purchaser of the certificate or by a subsequent bearer, is entitled to receive free of charge from the issuer of the certificate either a product or a service or the stated value towards a product or service. I do not think it is important that the bearer of the certificate may have paid something or given consideration for securing the gift certificate from the original purchaser of the certificate or some subsequent intermediary. In my view, the concept of "gift certificate" in the context of a situation contemplated by section 181.2 of the *Excise Tax Act* necessarily implies that the product or service referred to in the certificate is provided free of charge to the certificate holder when the certificate is redeemed by its issuer. Otherwise, the reference to the "gift" portion in the phrase "gift certificate" is meaningless.

51 This passage does not suggest that a gift certificate must have a stated value on its face to be a gift certificate. It says that a gift certificate must be for free goods or services *or* have a stated value toward a product or service. If the certificate entitles the holder to an identifiable supply, it can still be a gift certificate. As well, in *Canasia*, then Chief Justice Garon notes that the consideration paid to purchase the gift certificate need not be equal to the stated value "*if* one appears on the certificate since the requirement in the latter section is simply that there must be a consideration." The "if" clearly suggests that a

stated value need not appear on a gift certificate as a condition of it being a gift certificate. Further, I note that there is no reference to the need for a gift certificate to have a stated value in either of the Technical Notes to section 181.2 or subsection 157(2).

52 While I appreciate the Respondent's position — that this Court should recognize that section 181.2 requires that a gift certificate be treated like money which requires it to have "money" attributes — I am faced with what appears to me to be a sensible analysis by this Court which comes to a different conclusion in allowing that a gift certificate could include an instrument entitling the bearer to an identifiable supply at no charge. I am not prepared then, nor is it necessary on the facts of this case, to undermine such jurisprudence which puts emphasis on giving the word "gift" some meaning. In this regard, *Canasia* stands for the principle that a gift certificate would *not* include an instrument that only gives the bearer conditional rights. This qualification imports both a common and legal understanding of what a gift is.

53 In *Canasia*, this Court was asked to determine whether travel certificates which were redeemable for round-trip airfare to vacation resort destinations were gift certificates. They were held not to be gift certificates as the bearer was *not* entitled to anything unless both a processing fee was paid and at least seven nights accommodation at specific hotels at the destination were paid for. The Court noted that by ordinary usage and a common understanding, a gift certificate would not include an instrument that required a substantial outlay before it could be used. The travel certificates were not gift certificates under section 181.2 because they did not entitle the holder to unconditional free goods and services.

54 Similarly, the purchase of the Points in the case at bar was only one step in the midst of a series of requirements and events — credit card use, payments by RBC as Points are issued, continued credit card use as necessary to permit accumulations of Points, the reward program not being cancelled, and a surrender of such number of Points regarded at the time of surrender as sufficient to secure a particular air travel service at no cost. No single step, including the purchase or issuance of Points, gives unconditional rights to anything.

55 As well, making what I believe to be the same point, the Respondent argues that the Points cannot be considered to be a gift certificate under a common understanding of that term as there is no fixed correlation between the Points issued and their use. Travel rewards are subject to change. The value of the Points ultimately depends on the number of Points accumulated over time and the number of Points required at the time of conversion in order to receive travel rewards. Further, CAIL can cancel the Points at any time so there is no right or entitlement to anything at the time of their issuance. There is no identifiable gift of or right to anything at that time. I concur with this reasoning.

56 These conclusions are sufficient to support a finding that the Points are not gift certificates. As such, there is no provision deeming the supply of Points not to be a supply.

57 While nothing further need be said about this alternative argument, some observations concerning the Respondent's argument that the Points be considered to be section 181 "coupons" seem necessary.

58 The Respondent argues that the Points should be considered as a "coupon" as defined in section 181 of the *Act*. Under the *Act*, unlike a gift certificate which is treated as a right to have the price payable for goods or services satisfied in whole or in part, with GST payable when the certificate is redeemed, a coupon is treated as a right to obtain a particular good or service at a reduced price. When the coupon is redeemed, it reduces the taxable value to the consumer of the particular good or service acquired with the coupon to the net amount paid.

59 The relevant subsections of section 181 provide as follows:

> 181. (1) Definitions — The definitions in this subsection apply in this section.
>
> "coupon" includes a voucher, receipt, ticket or other device but does not include a gift certificate or a barter unit (within the meaning of section 181.3).
>
> ...
>
> (4) Acceptance of other coupons — For the purposes of this Part, if a registrant accepts, in full or partial consideration for a supply of property or a service, a coupon that may be exchanged for the property or service or that entitles the recipient of the supply to a reduction of, or a discount on, the price of the property or service and paragraphs (2)(a) to (c) do not apply in respect of the coupon, the value of the consideration for the supply is deemed to be the amount, if any, by which the value of the consideration for the supply as otherwise determined for the purposes of this Part exceeds the discount or exchange value of the coupon.

60 While a principal feature of a coupon is that it is a discount vehicle, section 181 does not preclude by its language a discount equal to the full price of goods or services on redemption of the coupon. The consideration that is taxable under the foregoing provision is the amount "if any" by which the price of the goods or services exceeds the discount. That there could be a nil excess of the price payable after the discount illustrates that the Points can indeed be coupons even though they can only be used in fixed blocks that are sufficient to ensure that the taxable excess is always nil.

> 61 Accordingly, I agree with the Respondent that it is not inconsistent with terms of the *Act* to treat the Points as coupons. However, that said, it is important that I add that I have reservations about appearing to give a general endorsement of CRA's administrative practises relating to the application of section 181 and the distinctions it seeks to make between coupons and gift certificates. In my view, the provisions are not easily applied as the CRA seeks to apply them. This leaves the state of the law uncertain — a situation that begs for legislative clarification. Without such clarification, the *Act* will impose collection and remittance obligations on suppliers who will have little guidance as to the outcome of a dispute relating to such obligations should one arise.

[49] The Minister's interpretation of the meaning of "gift certificate" is set out in the revised version of P-202 – Gift Certificates, which was issued in April 2012 and replaced the previous version dated February 20, 1996. The revised P-202 was effective January 1, 1991, and provides as follows:

> Under section 181.2 of the ETA, the issuance or sale of a gift certificate for consideration is deemed not to be a supply and therefore does not attract GST/HST. When the gift certificate is subsequently redeemed, it is treated as consideration or a part thereof for the supply of the property or services. GST/HST may apply at that time depending on the tax status of the supply.
>
> The term "gift certificate" is not defined in the ETA. The Canada Revenue Agency considers a gift certificate to have all of the following attributes:
>
> 1. It has a monetary exchange value that is evident on the certificate or that is easily determined by the parties involved in the transaction. The monetary exchange value may, for example, be specified on the face of the certificate or it may be stored on the certificate electronically. In certain cases, the customer may be permitted to add additional amounts to the monetary exchange value of the certificate. Alternatively, the gift certificate may be for a particular supply of property or a service that is identified on the certificate.
>
> 2. It is issued or sold for consideration by the supplier of the property or service or another party for use at a particular supplier. The consideration paid for the certificate may not necessarily be the same as the monetary exchange value.
>
> 3. It is accepted as payment or partial payment of the consideration for a supply of property or a service offered by the supplier of that property or service.
>
> 4. It does not require the bearer to do anything to redeem the certificate other than to present it as a means of payment or partial payment for the property or services being acquired. The holder of the certificate should not be required to meet other conditions, such as, making a purchase of a particular value (i.e., a required minimum value) or purchasing one item to exchange the gift certificate for another item (e.g., buy one, get one free) in order to redeem the certificate.

> 5. It does not have any intrinsic value. The certificate should not have any value other than its monetary exchange value.
>
> For purposes of the ETA, "gift certificate" includes a gift card provided the gift card meets all the conditions to be considered a gift certificate.
>
> When the gift certificate is redeemed for a taxable supply of property or services, the supplier of the property or services is to determine whether the amount accepted as payment for the consideration charged for the taxable supply includes or excludes an amount of tax. The supplier should review all relevant agreements including its business practices to make that determination. [emphasis added]

[50] The Respondent argues that Aeroplan Miles (and by extension the Aeroplan Supplies) are not gift certificates for the purpose of section 181.2 of the *Act* because they do not meet all of the essential qualities of gift certificates within the meaning of section 181.2 of the Act. In this respect, the Respondent argues that the Minister's interpretation of the meaning of gift certificate as set out in the April 2012 version of GST/HST Policy Statement P-202 – Gift Certificates should be adopted by this Court. The Respondent also argues that Aeroplan Miles are not gift certificates because they do not meet all of the criteria set out in P-202, and in particular because (i) Aeroplan Miles do not have a stated or an evident or easily determined monetary exchange value, (ii) Aeroplan Miles are generally awarded to a consumer for use of their CIBC Cards or patronage at particular establishments (rather than being issued or sold for consideration like a pre-paid gift certificate), and (iii) the issuance of an Aeroplan Mile does not in and of itself give the bearer a right to anything.

[51] The Respondent further submits that an Aeroplan mile does not give the bearer a right to any identifiable good or service or have any evident or easily determined monetary exchange value. As a result, an Aeroplan Mile does not meet the tests set out in the *Canasia Industries* and *Royal Bank of Canada* cases. The Respondent also argues that a contextual approach to the interpretation of section 181.2 supports the Minister's positon set out in P-202 that a gift certificate must have an evident monetary exchange value at the time of its issuance or sale. In this respect, the Respondent notes that the Appellant has acknowledged that an Aeroplan Mile does not have a stated value on its face at the time of issuance.[38]

[52] Section 123(1) of the *Act* sets out the definitions of the words "money", "property", "service" and "supply" for the purposes of the *Act* as follows:

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[38] See Exhibit R-1, Respondent's Discovery Read-ins, Tab 43.

> "money" includes any currency, cheque, promissory note, letter of credit, draft, traveller's cheque, bill of exchange, postal note, money order, postal remittance and other similar instrument, whether Canadian or foreign, but does not include currency the fair market value of which exceeds its stated value as legal tender in the country of issuance or currency that is supplied or held for its numismatic value;
>
> "property" means any property, whether real or personal, movable or immovable, tangible or intangible, corporeal or incorporeal, and includes a right or interest of any kind, a share and a chose in action, but does not include money;
>
> "service" means anything other than
>
> (a) property,
>
> (b) money, and
>
> (c) anything that is supplied to an employer by a person who is or agrees to become an employee of the employer in the course of or in relation to the office or employment of that person;
>
> "supply" means, subject to sections 133 and 134, the provision of property or a service in any manner, including sale, transfer, barter, exchange, licence, rental, lease, gift or disposition;
>
> [emphasis added]

[53] The Respondent argues that the foregoing definitions support its contextual approach to the meaning of gift certificates. In particular, the definition of money references its stated value as legal tender, and the definitions of supply, property and service effectively carve money out of the definition of supply. In this respect, the Respondent argues that in enacting section 181.2, Parliament intended to treat the issuance or sale of gift certificates which have a stated or easily determined monetary exchange value (such as pre-paid gift certificates or gift cards) as being akin to cash or other forms of money for GST purposes, so that all forms of monetary consideration would have equal GST treatment. However, because Aeroplan Miles do not have a fixed or stated monetary exchange value, the Respondent submits they should not be deemed to be money for GST purposes.

[54] The Respondent also relies on the decision of the Federal Court of Appeal in *Falls Management Co. v. Canada (Minister of Health)*, 2006 FCA 69 which examined a loyalty program offered by casinos. In distinguishing between prepaid gift certificates and loyalty points, the Federal Court of Appeal noted the following in finding that the loyalty points were not "monetary consideration":

[13] The key to the disposition of this appeal rests on a clear understanding of the relationship between the casinos and their patrons. Fundamentally, gaming patrons risk a sum of money on the basis of the outcome of an unpredictable event. Whether one is a club member matters not; the risks and costs to a member or non-member are the same.

[14] No annual fee or initiation charge is required to become a club member eligible to accrue and redeem reward points. Membership is free. Members can join on-line by providing the casinos with personal information such as their name, mailing address, e-mail address, phone number, gender, date of birth and special interests. Photo identification is also required.

[15] According to a deponent for the casinos, the objective of the loyalty program is the collection and maintenance of important information relating to casino patrons. In argument, counsel for the casinos suggested that this information was consideration for the bargain between the casinos and their club members and is shared with other commercial establishments such as car rentals, restaurants, hotels and the like. However, unlike other reward programmes referred to in evidence (Petro-Points, HBC Rewards and Shoppers Optimum Points) which contain detailed privacy statements respecting and protecting the privacy of their members, the casinos documentation does not mention the collection and maintenance of club member information or its eventual distribution to other commercial concerns. In these circumstances, in my view, it is untenable to suggest that the information provided is consideration for the award of and redemption of club points.

[16] In sum, there is nothing in the casinos documents that suggest that the reward program is anything but a free offering to casino patrons. This view is reinforced by the fact that the program can be cancelled by the casinos at any time and the reward points forfeited without recourse.

[17] There is no monetary consideration involved in the redemption of club points for tobacco products and the Applications Judge made a palpable and overriding error when he determined that reward points were akin to cash. Club accounts do not represent sums of money like a bank account. They are merely a repository for a member's accumulated points. The value of accumulated points varies among redeemable products or services based solely on the casinos own determination of the appropriate value for each service or product to be redeemed. Nothing in the documents suggest that accumulated points have a fixed base value and common point of monetary reference (i.e. 100 points has a value of $10.00 that may be redeemed for selected goods or services) nor can they be redeemed for cash.

[18] The Applications Judge correctly noted that the use of the adjective 'monetary' narrows the meaning of the word 'consideration'. *The Oxford English Dictionary* (2d ed., Oxford: Oxford University Press, 1998.) defines 'monetary' as

> "of or relating to coinage or currency, especially that of a particular country; relating to money in the form of coins, notes or other units of account." Clearly, cash, cheques, credit card and debit transactions and pre-paid gift certificates easily come within that definition but the value of points redeemed for tobacco products in these narrow circumstances is not the equivalent of 'monetary consideration' as required to satisfy paragraph 29(*b*) of the Act.
>
> [emphasis added]

[55] The Respondent argues that the decision of the Federal Court of Appeal in *Falls Management* supports the Minister's interpretation of "gift certificate" for the purposes of section 181.2 of the Act as set out in P-202, and in particular the requirement that a gift certificate have a stated monetary exchange value at the time of issuance. In this respect, the Respondent argues that Aeroplan Miles do not meet this requirement because they do not have a stated monetary exchange value at the time of their issuance and because the number of Aeroplan Miles that are required to be redeemed for any given reward can be changed at the discretion of Aeroplan and because the monetary cost of the rewards is not disclosed to CIBC or Aeroplan Members.

[56] The Respondent also argues that the Minister's position as set out in P-202 and the position of this Court as set out in the *Canasia Industries* and *Royal Bank of Canada* cases both identify as an essential attribute of a gift certificate for the purposes of section 181.2 a requirement that the bearer must not be required to do anything to use or redeem the certificate other than simply present it as a means of payment for the property or service being purchased. In other words, there should be no conditions attached which restrict the use of the device if it is to be considered a gift certificate.[39] In this respect, the Respondent argues that an Aeroplan Mile does not confer a right on a member to acquire any goods or services because various conditions and contingencies have to be met[40] at any time before an Aeroplan member can redeem Aeroplan Miles for rewards. Rather, the Respondent contends that Aeroplan members simply have the right to participate in the Aeroplan Mile Program and to a possible future reduction or discount of the price (including a full reduction in some cases) of the various rewards which

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39 In *Canasia*, the offending condition was a requirement that the bearer of the travel certificate incur a substantial expenditure for hotel accommodations in order to receive air travel.

40 Such as spending money on a CIBC credit card to earn Aeroplan Miles, undertaking transactions to avoid Aeroplan Miles from expiring, and having enough Aeroplan Miles to redeem for a desired product or service from Aeroplan (which had the right to change the number of Aeroplan Miles required for any given reward).

Aeroplan may offer at any given time and for the number of Aeroplan Miles required by Aeroplan from time to time.

[57] The Respondent relies on the conclusion of this Court in *Royal Bank of Canada* that frequent flyer points issued by Canadian Airlines International Ltd. to credit card holders using an RBC Visa Canadian Plus credit card were not gift certificates within the meaning of section 181.2 of the *Act*. In that case it was held that the points did not give the holders thereof unconditional rights to anything and there was no correlation between the points issued and their use. The Respondent argues the same is true for Aeroplan Miles.[41]

[58] The Respondent also argues that because *Royal Bank of Canada* is very similar to this case, the principle of judicial comity applies such that I should follow that decision unless I am convinced it is wrong. In support of this position, the Respondent cites *Eli Lilly Canada Inc. v. Apotex Inc.* 2015 FC 875 at paragraph 92, *Apotex Inc. v. Allergan Inc.*, 2012 FCA 308 at paragraph 48, *Almrei v. Canada (Citizenship and Immigration)*, 2007 FC 1025, at paragraph 62 and *Houda International Inc. v. Canada*, 2010 TCC 622.

[59] CIBC argues that Aeroplan Miles (and by extension the Aeroplan Supplies) are gift certificates for the purpose of section 181.2 of the Act because they meet all of the essential qualities of gift certificates within the meaning of section 181.2 of the Act. In this respect, CIBC argues that (i) CIBC paid for the Aeroplan Miles and (ii) Aeroplan Miles, like a typical gift certificate, entitle CIBC customers to acquire property or services for little or no consideration. CIBC also argues that the conditions that the Respondent relies on in arguing that the Aeroplan Miles are not gift certificates (as set out in the April 2012 version of P-202 – Gift Certificates) are immaterial in determining whether Aeroplan Miles are gift certificates because they have nothing to do with a customer's ability to acquire property or services for little or no other consideration. In this respect, the Appellant notes that Mr. Webster testified that an Aeroplan member, when redeeming Aeroplan Miles, was not required to make additional payments or buy additional goods, other than taxes, so long as the member had sufficient Aeroplan Miles.[42]

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41 Interestingly, as noted by Justice Hershfield in *Royal Bank of Canada*, at paragraph 12, Canadian Airlines International commenced proceedings under the *Companies Creditors Arrangement Act* in March 2000 and subsequently merged with Air Canada.

42 See Transcript of Proceedings, Webster testimony, at pages 32:28 – 33:10. It is unclear if Mr. Webster's reference to "taxes" included only applicable GST, or also included all other applicable charges and fees in respect of the redemption of Aeroplan Miles for a

[60] CIBC also made the following arguments with respect to the legislative history and context of the gift certificate rules in section 181.2 of the *Act*, and their application to Aeroplan Miles:

a) Special rules were provided in the *Act* for the treatment of any device that can be exchanged for property or a service or that entitles the bearer to a reduction of, or a discount on, the price of property or a service. The Appellant referred to these devices as "Exchange Devices".

b) Under the *Act* as originally enacted, these special rules were set out in section 157 and 181 of the Act. Subsection 157(1) dealt with the treatment of coupons and subsection 157(2) dealt with the treatment of gift certificates, which were not defined. Section 181 dealt with coupons where a third party paid the supplier for the redemption of a coupon.

c) The rules for Exchange Devices were thus originally divided into two sets, namely (i) the rules set out in subsection 157(1) and section 181 which were applicable to all Exchange Devices other than gift certificates (referred to by the Appellant as the "Coupon Rules"), and (ii) the rules set out in subsection 157(2) applicable to gift certificates (referred to by the Appellant as the "Gift Certificate Rules".

d) The Coupon Rules and the Gift Certificate Rules constituted a complete code for Exchange Devices.

e) The Coupon Rules and the Gift Certificate Rules were amended in 1993, with retroactive effect to the introduction of the GST. The Gift Certificate Rules were moved to section 181.2 and the wording was slightly changed, but with the same intended result. In addition, the Coupon Rules were consolidated into section 181 and elaborated, including with a definition for "coupon". The term gift certificate was not defined and was excluded from the definition of coupon.

f) The fact that a "gift certificate" was excluded from the definition of "coupon" in section 181 means that it otherwise would be a coupon.

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reward such as a travel reward, including international travel. Mr. Webster also testified that "the most frequent redemption by clients is air travel" (see Transcript of Proceedings, Webster testimony, at pages 32:13-14).

g) Based on the legislative scheme, Parliament devised a complete code whereby, for GST purposes, every device that can be exchanged for property or services or that entitles the bearer to a reduction or discount on the price of property or services is dealt with under either the Gift Certificate Rules (as a gift certificate) or under the default Coupon Rules (as a coupon).

h) Because Exchange Devices affect the amount that a purchaser is required to pay, the GST rules for Exchanges Devices are important because they impact how GST is calculated.

i) Aeroplan Miles are an Exchange Device because they are a device that can be exchanged for property or a service offered as a reward.

j) When a CIBC customer redeemed Aeroplan Miles, the customer was entitled to a partial or full reduction in the price the customer had to pay to acquire property or services offered as Rewards.

k) Canadian Courts have determined the nature of Aeroplan Miles to be a right to acquire property or services in exchange for the Aeroplan Miles and have not distinguished the character of the Aeroplan Miles at issuance from their character at redemption. In *Johnson v. The Queen*, 2010 TCC 321, at paragraph 26, Justice Paris held that, for the purposes of the *Income Tax Act* (Canada), Aeroplan Miles constitute a right that has a value capable of being expressed in money. In *Hope Air v. The Queen*, 2011 TCC 248, at paragraph 25, Rip CJ, as he then was, decided that, for the purposes of the *Air Travellers Security Charge Act* (Canada), Aeroplan Miles, which were donated to a charity, constituted a valuable right, being a right to receive air transportation services from Air Canada in exchange for the Aeroplan Miles. In *Nathan v. Hoare*, 2014 ONSC 1820, Justice Backhouse ordered the transfer or Aeroplan Miles from the husband to the wife in determining the division of property on separation.

l) The conclusion that Aeroplan Miles constitute rights to acquire property or services in exchange for the Aeroplan Miles is also consistent with the U.K. Supreme Court's view adopted, for purposes of the U.K. Value Added Tax, with respect to the points under the Nectar program operated in the U.K. by Aeroplan's parent. In that case, reported as *HMRC v. Aimia Coalition Loyalty UK Limited*, [2013] UKSC 15, the U.K. Supreme Court noted the following at paragraphs 7-9:

> [7] … to refer to 'points' being 'issued', 'purchased' and 'redeemed' is to speak metaphorically. The 'points' are a means of describing the collectors' contractual rights to receive goods and services at no cost or at a reduced cost. The sponsors pay LMUK for the grant of those rights to collectors. LMUK uses part of its receipts from the sponsors to pay the redeemers to provide collectors with the goods and services in accordance with their rights. LMUK derives its profits from the difference between its receipts from the sponsors and its payments to the redeemers.
>
> [8] In essence, therefore, when sponsors pay LMUK for the points issued to collectors, they are paying LMUK for granting the collectors the right to receive goods and services in exchange for their points. The redeemers provide the collectors with the goods and services to which their points entitle them, and LMUK pays the redeemers the redemption value of the points. It is thus by means of the redeemers' performance of their contractual obligations to LMUK that LMUK fulfils the obligations which it has undertaken to the sponsors and collectors and so carries on its business.
>
> [9] Since points are used by collectors to obtain goods or services, they may be regarded as a means of payment for those goods or services. The amount paid for the right to obtain the goods or services is the amount paid to LMUK by the sponsors for the issue of the points which the collector uses. The amount received by the redeemer, following the provision of the goods or services, is the lesser amount which it is paid by LMUK.

m) Aeroplan Miles meet all of the constituent elements of a gift certificate as set out by this Court in *Canasia*. In *Canasia*, Garon CJ concluded that there are two constituent elements of a gift certificate within the meaning of the *Act*, namely (i) it must be issued for consideration, and (ii) the bearer of the gift certificate must be entitled to receive, free of charge from the issuer of the certificate, either a product or a service or value towards a product or service when the certificate is redeemed by its issuer. In *Canasia*, the travel certificates were not gift certificates because the bearer had to incur a substantial expenditure in respect of accommodation. Garon CJ also noted that the term gift certificate "is a colloquial term that encompasses any variety of documents evidencing any variety of entitlements."[43]

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43 *Canasia*, at paragraph 29.

n) Both the Minister in P-202 - Gift Certificates and the courts in *Tele-mobile Company Partnership v. Canada*, 2012 TCC 256 at 27, aff'd 2013 FCA 149, have accepted that gift certificates or coupons may include electronic devices.

o) Aeroplan Miles are electronic Exchange Devices that qualified as gift certificates for the purpose of section 181.2 because (i) they were sold for consideration and (ii) when a CIBC customer redeemed Aeroplan Miles with Aeroplan, the customer was entitled to receive free of charge from Aeroplan, property or a service chosen from among the available rewards offered by Aeroplan at the time or the exchange value of the redeemed Aeroplan Miles toward the acquisition of the reward.

p) The test established in *Canasia* was accepted in *Royal Bank of Canada*.

q) The parties agree that CIBC paid Aeroplan for the Aeroplan Miles, and therefore the first part of the test in *Canasia* is satisfied. Therefore the only issue is the second part of the *Canasia* test.

r) In *Royal Bank of Canada*, the Court found that the first part of the test in *Canasia* was met because the frequent flyer points were issued and sold for consideration but that the second part of the test in *Canasia* was not met because of conditions relating to the issuance and accumulation of the points.

s) The Court in Royal *Bank of Canada* did not have the benefit of considering the analysis and findings of the U.K. Supreme Court in *Aimia* discussed previously.

t) The Court in *Royal Bank of Canada* was correct in using the test set out in *Canasia*, but misapplied the second part of the *Canasia* test by focusing on the conditions involved in the issuance and accumulation of points rather than on the redemption of the points. The test in *Canasia* focuses on whether, at the time of redemption, the bearer is able to redeem the certificate toward the acquisition of property or services without having to satisfy a condition that carries with it a substantial expenditure for the bearer. *Canasia* stands for the proposition that the property or services for

which a device is exchanged must be "provided free of charge to the certificate holder when the certificate is redeemed by its issuer."[44]

u) In this case, conditions relating to the issuance and accumulation of Aeroplan Miles are not relevant to the test set out in *Canasia*. For example, any conditions relating to the accumulation of Aeroplan Miles by making purchases on credit cards or to the continued ability to earn Aeroplan Miles by keeping a credit card in good standing do not relate to conditions relating to the redemption of Aeroplan Miles at the time of redemption.

v) There were circumstances where CIBC customers were awarded Aeroplan Miles otherwise that as a result of making purchases on their CIBC credit cards, such as where CIBC awarded Aeroplan Miles on a complimentary basis as a customer service gesture or as an introductory basis for obtaining a CIBC financial product, such as a credit card.

w) The number of Aeroplan Miles required for redemption towards a particular property or service from time to time is a factor relating to the accumulation of Aeroplan Miles, and is not a condition forcing a substantial outlay on redemption.

x) The fact that the type of rewards that were available from time to time changed and the number of Aeroplan Miles required for a given reward changed from time to time is not a condition forcing a substantial outlay on redemption.

y) The fact that the ability of a member to redeem Aeroplan Miles was contingent on the non-cancellation of the Aeroplan Mile Program is not a condition forcing a substantial outlay on redemption. The continued operation of the issuer of a gift card (and the issuer's ability to meet its redemption commitments) is a risk or condition in respect of every gift card.

z) The fact that Aeroplan Miles might expire (pursuant to the twelve month rule or the seven year rule) is not a condition forcing a substantial outlay on redemption. The Minister's published position is that the existence of an expiry date for an Exchange Device does not affect the determination as to

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[44] *Canasia*, at paragraph 33.

whether the device is a gift certificate within the meaning of section 181.2 of the *Act*.[45]

aa) The Respondent has not alleged any condition that required a cardholder to make any substantial outlay on redemption that would vitiate the "gift" portion of the gift certificate.

bb) A cardholder was not required to incur any substantial expenditure or do anything else to redeem the Aeroplan Miles other than to present them as full or partial consideration for the property or services being acquired as Rewards, and as a result the second part of the test in *Canasia* is satisfied.

cc) In *Royal Bank of Canada*, while the Court concluded that there is no identifiable gift or right to anything at the time points are issued, the Court accepted that the points could constitute coupons under section 181 of the *Act* at the time of redemption.[46]

dd) The character of Aeroplan Miles does not change from the time of issuance to redemption, but rather at all times constitute a right to acquire property or services at no cost or at a reduced cost to the bearer in exchange for Aeroplan Miles. As such, Aeroplan Miles are an Exchange Device both at the time of issuance and at the time of redemption and were at all times gift certificates within the meaning of section 181.2 of the *Act*.

ee) The fact that a cardholder had to accumulate Aeroplan Miles before they could be redeemed toward the acquisition of Rewards does not mean that the character of the individual Aeroplan Miles changed from what they were at the time of issuance to what they were at the time of redemption. This is similar to a person saving enough money to purchase a product or a pre-paid gift card which has to be topped up before it can be used to buy a product, which is accepted by the Minister as being a gift certificate in P-202 - Gift Certificates. Traditional paper gift certificates could also be accumulated before being redeemed.

ff) Other than form, Aeroplan Miles are like pre-paid gift cards, as both function as Exchange Devices.

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45 See *GST/HST Questions for Revenue Canada 2012*, Canadian Bar Association, February 23, 2012, Question 34.

46 *Royal Bank of Canada*, at paragraphs 55-61.

gg) An introductory award of 15,000 Aeroplan Miles for signing up to a new CIBC credit card was enough Aeroplan Miles to redeem for a short haul domestic flight.

hh) There is no authority in case law or the Act that suggests that a gift certificate must have a stated value as an essential attribute. Rather, the Court in *Royal Bank of Canada* rejected this requirement.[47] Likewise, there is no authority that a gift certificate must have a monetary exchange value that is readily determinable at all times. When a cardholder wished to acquire a particular reward by redeeming Aeroplan Miles, it was clear to the cardholder how many Aeroplan Miles the cardholder needed to do so. In *Coopersmith c. Air Canada*, 2009 QCCQ 5521, at 72, the Court of Quebec rejected the concept that Aeroplan Miles have no exchange value, but rather concluded that they do have an economic value.

ii) The fact that Aeroplan did not deal strictly with a particular redemption partner does not disqualify Aeroplan Miles from being gift certificates for GST purposes, based on the test set down in *Canasia* and accepted in *Royal Bank of Canada*. In addition, there is no such requirement in the *Act*.

jj) Because the Aeroplan Miles were sold for consideration, they should be treated under the *Act* as gift certificates, not coupons. While an Exchange Device that meets the second test in *Canasia* may potentially be either a gift certificate or a coupon, if it is issued for consideration it is properly dealt with as a gift certificate pursuant to section 181.2.

kk) The rules in section 181 and 181.2 deal with the calculation of GST at the time of redemption of an Exchange Device, which determines the amount of GST that a recipient of a taxable supply must pay at the time of redemption.

ll) If there is no consideration for an Exchange Device, no GST is payable with respect to its issuance or sale. However, if an Exchange Device is issued or sold for consideration, a rule is needed to deal with how that supply itself is to be treated for GST purposes. The only Exchange Device rule that deals specifically with the situation where the device is issued or sold for consideration is the gift certificate rules in section 181.2, which do so in a manner that ensures that the object of the *Act* is achieved.

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47 *Royal Bank of Canada*, at paragraph 47.

mm) When the coupon rules were first introduced in subsection 157(1), the Explanatory Notes thereto provided that subsection 157(1) "deals with the treatment of coupons issued for no consideration".[48] As such, the coupon rules do not contemplate a situation where a coupon is issued or sold for consideration. Rather, a device issued or sold for consideration is dealt with under the gift certificate rules in section 181.2 of the *Act*.

nn) Section 181.2 provides that the issuance or sale of a gift certificate is deemed not to be a supply, and is thus ignored for GST purposes. As a result, no GST is paid on the amount paid to acquire a gift certificate. The second deeming rule in section 181.2 deems the gift certificate to be money when it is redeemed. These two rules are designed to ensure that a gift certificate is treated like money from the time it is issued to the time it is redeemed, as the sole purpose or function of a gift certificate is to serve as a money substitute when it is given in exchange for property or services.

oo) Treating an Exchange Device sold for consideration like money under section 181.2 ensures that GST only applies once on the value of the device at the point the final consumer redeems the device and acquires property or services. GST is then calculated based on the GST applicable to the purchase of the particular property or service, such that, for example, no GST applies to the purchase of a zero-rated supply such as groceries or specified international travel.

pp) Aeroplan Miles fall within the gift certificate rules as a money substitute. The Aeroplan Miles in question in this appeal were redeemable with Aeroplan for various property and services from various redemption partners and were not restricted to a particular property or service provided by the issuer. They are thus distinguishable from the frequent flyer points at issue in *Royal Bank of Canada* which were only redeemable for the air travel services provided by the issuer, CAIL. In addition, Aeroplan Miles could be redeemed for either fully taxable supplies or zero-rated supplies for GST purposes. If Aeroplan Miles are treated as a gift certificate under section 181.2, then GST only applies (as applicable) to the final purchase of a product or service, at which time the applicability of GST to the product or service is known.

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[48] *Special Report: Bill C-62 Explanatory Notes* (North York: CCH Canada Limited, 1991), s. 157(1).

qq) If Aeroplan Miles are treated as coupons or another type of property for GST purposes, they would be subject to GST when issued or sold for consideration. Because CIBC is a financial institution engaged in GST exempt activities, it would not fully recover any such GST in the form of input tax credits. A consumer or other non-registered person who purchased Aeroplan Miles would also not be able to recover any GST they paid on the purchase of Aeroplan Miles. The result is that some amount of GST would be borne on the value of the Aeroplan Miles, even where they are redeemed for zero-rated products that are supposed to be GST free. This treatment is not consistent with the scheme and object of the *Act*.

rr) Overall, CIBC paid for Aeroplan Miles that qualified as gift certificates under section 181.2 of the *Act* and met all of the constituent elements of a gift certificate within the meaning of the *Act*, namely (i) that they were issued for consideration and (ii) at the point of redemption, a customer was able to redeem Aeroplan Miles toward the acquisition of property or services offered as rewards without having to satisfy any condition requiring a substantial outlay by the customer. The Aeroplan Miles served as a money substitute when given in exchange for property or services, and treating the Aeroplan Miles as money at all times is consistent with the scheme and object of the Act because GST would thus apply only to the supply to the final consumer of the property or services for which the Aeroplan Miles were redeemed, and at the appropriate tax rate applicable to that final supply. Since CIBC paid consideration for Aeroplan Miles which qualified as gift certificates for the purposes of section 181.2 of the *Act*, the supply of the Aeroplan Miles was deemed by section 181.2 not to be a supply, and therefore CIBC paid GST in error in respect of the Aeroplan Supplies (or Aeroplan Miles) and is therefore entitled to the requested Rebate pursuant to section 261 of the Act.

[61] Having considered *Canasia*, *Royal Bank of Canada*, the Minister's position set out in *P-202 - Gift Certificates* and the positions of the parties, I will now return to my textual, contextual and purposive analysis of section 181.2 as required by *Canada Trustco*. While I agree with some aspects of the decisions and positions set out in each of the foregoing, I do not fully agree with the decisions and positions set in each case.

[62] As previously noted, section 181.2 contemplates two transactions. The first deals with the issuance or sale of a gift certificate. The second deals with the subsequent redemption of the gift certificate. From the text of section 181.2, it is

apparent that the following two criteria must be met for a particular device to be caught by the first transaction described in section 181.2:

a) the device must be issued or sold for consideration;[49] and

b) the device must be a "gift certificate".

[63] It is important to note that these are (subject to the discussion below regarding the definition of "gift certificate") separate criteria, and that the requirement for "consideration" is not an element of a gift certificate. A device that otherwise meets the definition of "gift certificate" might therefore still be a "gift certificate" even if it is issued for no consideration.

[64] While the second transaction contemplated by section 181.2 (being the redemption of the gift certificate) is not directly at issue in this Appeal, I note that the text of section 181.2 indicates that the following two criteria must be met for a particular device to be caught by the second (redemption) transaction in section 181.2:

a) the device must be given as consideration for a supply of property or a service; and

b) the device must meet the criteria for the first transaction, and therefore must be a "gift certificate" that was issued or sold for consideration.[50]

[65] The two criteria set out above for the first section 181.2 transaction both lead to uncertainty, namely (i) how much consideration is required and (ii) what is a "gift certificate". I will deal with each of these in turn.

[66] Section 181.2 merely stipulates that a gift certificate must be issued or sold for "consideration". It does not, for example, stipulate that it be issued or sold for fair market value consideration or for an amount equal to the face or stated value of

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[49] It is unclear if a particular device could be created or otherwise exist in circumstances where it was neither issued nor sold. If so, that might suggest a third criterion (i.e., that it be issued or sold, as opposed to coming into existence in some other manner).

[50] As previously noted, the use of the words "the gift certificate" with reference to the redemption transaction (as opposed to using the words "a gift certificate" for the redemption transaction) implies that the gift certificate referenced in the redemption transaction is the same one referenced in the first transaction, being a gift certificate issued or sold for consideration.

the gift certificate. In the absence of language to the contrary, I agree generally with the conclusions in *Canasia* and *Royal Bank of Canada* that a gift certificate may be issued at a discount (to the face or stated value of the gift certificate) and still meet the "consideration" criterion in section 181.2. However, it is unclear if the amount of the discount should ever disqualify a gift certificate from meeting the "consideration" criterion in section 181.2. For example, if the discount on the issuance or sale of a particular gift certificate was so substantial that the consideration (paid for the issuance or sale of the gift card) was merely nominal, *quaere* if the substantial discount could in any circumstance disqualify the gift certificate from meeting the "consideration" criterion in section 181.2.[51]

[67] I also note that issuing a gift certificate at a discount may impact the amount of GST paid by a person redeeming the gift certificate compared to the GST treatment that may result from structuring or treating the discount in a different manner so that it falls under a different section of the *Act*.[52] For example, if a retailer sells a taxable product for $100 in a harmonized province with a GST rate of 15%, a customer would pay $15 of GST when purchasing the product. If instead the customer was able to purchase a pre-paid gift card with a face value of $100 at a $99 discount (so that the consideration for the issuance of the pre-paid gift card was $1), and the customer then purchased the $100 taxable product from the retailer and paid for the product with the pre-paid gift card, the customer would still pay GST of $15 on the purchase of the product pursuant to section 181.2. If one of the other provisions of the *Act* applied so that the customer paid GST on the net discounted price (of $1), the customer would pay GST of $0.15. However, in the absence of a clear definition of "gift certificate" or a stipulation in section 181.2 of the *Act* regarding the quantum of the consideration required in the context of section 181.2, this potential "overpayment" of GST by a consumer (from the consumer's perspective) when purchasing and redeeming a discounted gift card is an issue that must (in my view) be left for Parliament to resolve.

[68] In this case, it is clear that CIBC paid Aeroplan for the Aeroplan Supplies (and by extension the Aeroplan Miles), and therefore the Aeroplan Miles were, in my view, issued for consideration. I do not understand the Respondent to be arguing otherwise or to argue that they were issued for a discount. I would, however, note that pursuant to the 2003 Credit Card Agreement, the cost of the

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51 In other words, is the "consideration" criterion subject to any form of de *minimis* or other minimum threshold test?

52 Such as those previously listed above, including section 232.1 or section 181 (depending on which coupon method is used).

Aeroplan Supplies (computed with reference to the issuance of Aeroplan Miles) varied both over time and with respect to the CIBC product or promotion the Aeroplan Miles were issued with respect to. Based on the foregoing, it is my view that the quantum of consideration paid by CIBC for the Aeroplan Supplies (and Aeroplan Miles) in the context of the potential application of section 181.2 of the *Act* is not in issue in this Appeal.

[69] I will now turn to the meaning of "gift certificate" for the purposes of section 181.2 of the *Act*, which is an issue in this Appeal as it relates to the potential application of section 181.2 to the supply of the Aeroplan Miles (as part of the Aeroplan Supplies) by Aeroplan to CIBC. As previously noted, in my view the legislative text is unclear. The legislative text indicates that a "gift certificate" is excluded from the definition of "coupon" in section 181 and included in section 181.2 when issued or sold for consideration, and is then deemed to be money when redeemed. However, the text does not provide any guidance as to what a "gift certificate" is.

[70] In *Canasia*, Garon CJ (as he then was) noted the following with respect to the types of devices and transactions that might be considered in the context of the meaning of gift certificate:[53]

> 30 There seems to be two types of usual situations where it is recognized by counsel by both parties that we are dealing with gift certificates. In one type of situation, a firm provides to an interested person a voucher with a stated monetary value, say $100 for a price of $100. The purchaser of the voucher in turn generally makes a gift to a third party by handing over the voucher for no consideration. In this situation, section 181.2 of the *Excise Tax Act* has the effect of deferring GST to the second transaction when the certificate is returned to the issuer in exchange for goods or services. It is admitted that in such a case, the first transaction involving the purchase of the certificate for its stated value does not attract tax. In the second situation, the issuer of the gift certificate simply gives the voucher for free to a customer or a prospective customer. The certificate does not have a stated value. This operation is not covered by section 181.2 of the *Excise Tax Act* because it is not issued for a consideration.

[71] The first example provided by Garon CJ in *Canasia* is in essence a classic pre-paid gift certificate or pre-paid gift card issued for consideration equal to the face or stated amount of the device. In my view, it is clear that such a device is a "gift certificate" for the purposes of section 181.2 of the *Act*.

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53 *Canasia*, at paragraph 30.

[72] I also agree with Garon CJ where he noted, in *Canasia*, that "the term 'gift certificate' is a colloquial term that encompasses any variety of documents evidencing any variety of entitlements"[54] It is also my view that the word "gift" in the context of a "gift certificate" is a colloquial reference to the common practice of an individual purchasing such a device from a retailer (for consideration equal to the face or stated value of the device) and "gifting" it to another person on a special occasion, such as on that other person's birthday. That other person would then redeem the "gift certificate" at the retailers business as full or partial payment for goods or services. I therefore disagree with the decisions in *Canasia* and *Royal Bank of Canada* to the extent that they stand for the proposition that the word "gift" must be given some effect to in interpreting the meaning of "gift certificate", other than simply as a general description of such a device in the same way that the word "Kleenex" is generically used as a reference to a "facial tissue". As such, it is my view that the word "gift" in "gift certificate" merely refers to the common practice of "gifting" the device itself, and not to any of the attributes of such a device.

[73] Overall, from a textual perspective, it is my view that the meaning of "gift certificate" is unclear, but given that it has a colloquial meaning, a textual interpretation of the meaning of "gift certificate" would suggest that a "gift certificate" includes devices similar to the classic pre-paid gift card or certificate issued for full consideration and as described in the first example in paragraph 30 of *Canasia*. However, from a textual perspective, it is unclear what other types of devices (if any) might be included in the meaning of "gift certificate".

[74] I will now consider the context and purpose of the meaning of "gift certificate" for the purpose of section 181.2. The general scheme of the *Act* is that the supply of a device (such as a coupon or gift certificate) for consideration in the course of a commercial activity will be a taxable supply and therefore subject to GST, subject to the application of a relieving provision such as section 181.2. As previously noted, the supply of Aeroplan Miles by Aeroplan for consideration (in Canada) is therefore a taxable supply and subject to applicable GST unless section 181.2 applies.

[75] Pursuant to provisions such as sections 181, 181.1, 181.2, 181.3, 232, and 232.1, Parliament has provided special provisions to deal with promotional and other devices and transactions which have been developed for use in Canada, including coupons, barter units, manufacturers' rebates, gift certificates and

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54 *Canasia*, at paragraph 29.

promotional allowances. As previously noted, it is often difficult to apply these rules in practice because of the similarities of some of these types of devices and transactions. Both this case and the *Nestlé* case discussed previously are examples of the difficulty in applying these rules to any given situation. As both *Nestlé* and this case also show, the impact from a GST perspective on businesses within a given supply chain and the final consumer may vary depending on which special provision applies. The amount of GST collected by the Minister will also vary accordingly.

[76] I also note that the general scheme of the *Act* is that most businesses (making taxable supplies) in Canada that are registered for GST purposes pay GST, as applicable, in respect of their inputs, and then recover such GST through input tax credits. GST is thus notionally removed from the supply chain and passed on to final consumers in the form of applicable GST at the time of sale. However, businesses which make exempt supplies,[55] such as CIBC, generally do not fully recover the GST they pay on their inputs. The GST is thus notionally imbedded in the supply chain and potentially passed on to consumers through potentially higher prices. As a result, the normal scheme of the *Act* is that CIBC (like other businesses making exempt supplies) may not fully recover all of the GST that it pays on its inputs, unless a relieving provision of the *Act* applies. As businesses making only taxable supplies would generally fully recover any GST they pay to Aeroplan as an accumulation partner of the Aeroplan Mile Program, the issue faced by CIBC regarding the possible non recovery of GST paid in respect of the Aeroplan Supplies is generally inherent in the scheme of the *Act* as it applies to businesses making exempt supplies.

[77] CIBC argued that this may result in some double taxation if a customer had to pay GST when they redeemed Aeroplan Miles in exchange for a taxable reward. I note, however, that there generally was little evidence presented at trial regarding the application of GST when a person redeemed Aeroplan Miles.[56] It is thus, for example, unclear if Aeroplan treated the Aeroplan Miles as a coupon on redemption. It was the positon of the Respondent in both *Royal Bank of Canada* and in this case that Aeroplan Miles should be characterized as coupons. As noted in *Royal Bank of Canada*, at paragraphs 59-60, if subsection 181(4) of the *Act*

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55 Pursuant to which the businesses do not charge GST to their customers for their exempt supplies, such as financial services.

56 As previously noted, Mr. Webster referred to the payment of applicable taxes when a member redeemed Aeroplan Miles, but he did not elaborate on the amount of any fees, charges, other taxes or GST applicable when a member redeemed Aeroplan Miles.

applies on the redemption of Aeroplan Miles, GST would potentially only apply to the amount by which the price of the reward (including any applicable fees, charges and other taxes which may apply to a reward, such as on airfare) exceeds the amount of Aeroplan Miles applied to reduce that price (i.e., GST would apply to the net purchase price).[57] There may thus be little to no GST payable by an Aeroplan Member redeeming Aeroplan Miles, and little to no GST taxation or double taxation would result. In contrast, if Aeroplan Miles were treated as gift certificates as proposed by the Appellant, Aeroplan Members would have to pay any applicable GST on the full price (or value) of all rewards (that are taxable supplies) acquired from Aeroplan on the redemption of Aeroplan Miles, including on the value of the Miles redeemed.[58] CIBC's position that section 181.2 should apply to Aeroplan Miles would thus potentially shift the GST burden from CIBC to Aeroplan Members (or to Aeroplan if it failed to collect GST from members on the redemption of Aeroplan Miles).

[78] Section 181.2 provides that gift certificates issued for consideration are deemed to be "money" when redeemed. As previously noted, the Respondent argues that the definitions of "money", "property", "service", and "supply" (as set out above) in subsection 123(1) of the *Act* support its contextual approach to the meaning of gift certificates, and in particular to a requirement that a device must have a stated value to be a gift certificate. In this respect, I note that "money" is excluded from the definition of "property" and "service", and thus the provision of money is not a supply for GST purposes. The Respondent thus argues that a "gift certificate" issued for consideration is accorded the same treatment by section 181.2 by deeming the issuance or sale of the gift certificate not to be a supply. The determination of GST is thus deferred to the time at which a gift certificate is redeemed, at which time the application of GST thereto can be determined based on the tax status of the product purchased. The Respondent thus argues that a gift certificate should have the same or similar attributes as money. In P-202 – Gift Certificates, the Minister takes the positon that a gift certificate must have a monetary exchange value that is evident on the certificate or that is easily determinable by the parties or the gift certificate may be for a particular supply of property or a service that is identified on the certificate. The Appellant argues this is not a requirement, and cites both *Canasia* and *Royal Bank of Canada*, both of which disagreed with the Respondent's position.

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57 Subject, of course, to any relieving rules, such as any applicable zero-rating rules.

58 Subject, of course, to any relieving rules, such as any applicable zero-rating rules.

[79] For GST purposes, it is my view that the purpose and effect of section 181.2 is similar to subsection 168(9), as both effectively defer the GST treatment of an amount paid to a later time when it is applied or redeemed, as the case may be. In this respect, I note that section 168(9) of the *Act* deals with deposits, and provides that a deposit will not be considered to be consideration for a supply until the supplier applies the deposit as consideration for the supply.

[80] Overall, considering the text, context and purpose of section 181.2 within the scheme of the *Act* as a whole, it is my view that Parliament intended a gift certificate to be an equivalent to money, and to have attributes similar to money. Therefore in my view, a gift certificate must have a stated monetary value expressed on its face physically or retrievable electronically. In my view, Parliament intended a gift certificate to include a classic pre-paid gift certificate or card issued or sold for consideration similar to the first example set out by Garon CJ in *Canasia* at paragraph 30. It is my view that a gift certificate is thus in essence a storage mechanism for money, and must have attributes similar to that of money. This is, in my view, the essential attribute that a device must have to fall within the meaning of "gift certificate" for the purpose of section 181.2 of the Act. This essential attribute in my view is also the lens through which all other attributes should be considered when determining whether a particular device is a gift certificate for the purposes of section 181.2 of the *Act* (e.g., such as what conditions may apply). As such, it is my view that a gift certificate does not include a device which entitles a person to redeem it for a specified product or service. I therefore respectfully disagree with the positions to that effect set out in *Canasia*, *Royal Bank of Canada* and *P-202 - Gift Certificates*.

[81] I agree with the Respondent that a device which has intrinsic value would generally not be considered to be a "gift certificate". However, the supply of any such device may be a multiple supply or a single compound supply for GST purposes. As such, it may be necessary to first characterize the supply of the device for GST purposes, and determine if the supply is a single compound supply or a multiple supply (and if so, if one part is incidental to the other such that section 138 applies). It would then be necessary to determine how GST applies to the supply of the device. As such, from a GST perspective, the impact of the device's attribute which has intrinsic value may be made while determining the characterization of supply of the device generally (rather than as an element of the definition of gift certificate).

[82] The parties spent a considerable amount of argument discussing the conditions that may apply to a device within the meaning of gift certificate for the

purposes of section 181.2 of the *Act*. In this respect, I note that the definition of "money" in subsection 123(1) includes devices, such as cheques, which may expire or go stale. I also note that some pre-paid gift cards may have previously had expiry dates, but that some provinces have passed legislation to restrict the application of expiry dates on some pre-paid gift cards.[59] As such, it is my view that some conditions may apply to a device within the meaning of gift certificate, but that any such conditions must be considered in light of my view that the essential attribute of a gift certificate is that it must have attributes similar to that of money. Thus, for example, a reasonable expiry date, if permitted by law, may be acceptable. In addition, the bearer must be entitled to have the balance of the stored monetary value applied to the purchase price of goods and or services purchased from the issuer of the device (or any other person who lawfully will accept the device as payment). In my view, other conditions must be considered on a case by case basis.

[83] In this case, it is my view that Aeroplan Miles do not have attributes similar to money. In particular, and fatally, they do not have a stated monetary value. While Aeroplan Miles no doubt have value to an Aeroplan member, and that value can be determined pursuant to a valuation, that is not equivalent to having a stated monetary value on their face or retrievable electronically. Overall, it is my view that Aeroplan Miles are not the kind of device contemplated by Parliament within the meaning of "gift certificate" for the purposes of section 181.2 of the *Act.* It is also my view that this is in accord with a textual, contextual and purposive analysis of section 181.2 that is harmonious with the *Act* read as a whole.

[84] Based on all of the foregoing, it is my view that neither the Aeroplan Miles nor the Aeroplan Supplies were gift certificates in the circumstances of this case for the purposes of section 181.2 of the *Act*. As it is beyond the scope of my decision, I will not determine if either the Aeroplan Miles or the Aeroplan Supplies should be characterized as coupons for the purposes of section 181 of the *Act*.[60]

A. Secondary Issue – Rebate for GST Paid outside of the Appeal Period

[85] Although it is my view that the secondary issue raised by the Respondent in this Appeal is moot as a result of my determination of the primary issue, I will

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59 In Ontario, for example, see the *Consumer Protection Act*, 2002, and in particular section 25.3 of Ontario Regulation 17/05.

60 As previously noted, the Minister and the Respondent take the position that Aeroplan Miles are coupons within the meaning of section 181 of the *Act*.

nonetheless address this issue. As previously noted, the secondary issue is whether $2,254,282.60 of GST claimed by CIBC (the "February 2007 Amount"), which was paid by CIBC on February 28, 2007, can be recovered by CIBC as a rebate in this Appeal. This is an issue because the Rebate Form describes the "period covered" as March 25, 2005 to February 26, 2007 and the payment date for the February 2007 Amount is two days after that period. For the reasons that follow, it is my view that CIBC would be entitled to a rebate of the February 2007 Amount if it had been successful on the primary issue.

[86] CIBC argues that the rebate application (as set out on the Rebate Form) properly includes the February 2007 Amount because it is listed in the invoice summary attached as a schedule to the application. CIBC claims that entering February 26, 2007 instead of February 28, 2007 as the period end date is a non-material clerical error. The application is intended to encompass all of the payment months in the invoice summary and the Minister has all of the information necessary to grant the Rebate. CIBC also argues that applications for rebates under subsection 261(1) of the *Act* are claimed with respect to "an amount" rather than a period. There is no requirement to fit within a period as long as the application is filed within two years after the GST amount is paid in accordance with section 261(3). CIBC thus maintains that it meets the requirements of the *Act*. In support of the position that clerical errors should not invalidate a rebate application, CIBC cites *Modes Crystal Inc. v. R.*, 2013 TCC 33 at paragraph 24; and *Senger-Hammond v. R.* (1996), [1997] 1 C.T.C. 2728 (T.C.C.) at page 2734.

[87] CIBC also argues that the Minister considered and accepted the February 2007 Amount when she assessed the Rebate. The Minister was fully aware of the dates while conducting the assessment because they were listed on the invoices. CIBC asserts that the Minister cannot change her position after making an assessment without issuing a reassessment. In support of this position, CIBC cites *Devon Canada Corporation v. R.*, 2015 FCA 214 at paragraphs 30-31. Further, CIBC reasons that the Minister's argument on this issue is improper because it results in a fundamentally different assessment. CIBC relies on *Walsh v. R.*, 2008 TCC 282 at paragraph 20, in which the Respondent's new argument on appeal was unsuccessful because it did not support the reassessment at issue.

[88] The Respondent argues that the rebate application is limited to amounts paid between March 25, 2005 and February 26, 2007. She claims that CIBC did not provide any of the prescribed information required to consider a period that included February 28, 2007. The February 2007 Amount may have been payable during the Period but it was not paid until after the Period. Rebates can only be

claimed with respect to amounts that were paid. Therefore the Minister could not have allowed the February 2007 Amount as part of the Rebate.

[89] The Minister submits that the Notice of Appeal was not drafted to include the February 2007 Amount. CIBC's Further Amended Notice of Appeal lists the Period as March 25, 2005 to February 26, 2007. The Minister states that the Court does not have jurisdiction to consider the February 2007 Amount because it was paid outside of the Period. In support of this position, the Minister relies on *Burkman v. R.*, [1997] G.S.T.C. 98 (T.C.C.); *Adamson v. R.*, [2002] 2 C.T.C. 2469 (T.C.C.); and *Reale v. R.*, 2004 TCC 41. Each of these cases was an appeal from an assessment for a particular tax year or tax years. They all involved Appellants who sought relief in tax matters outside of the tax years at issue.

[90] Subsection 261(1) of the *Act* reads as follows:

> Where a person has paid an amount
>
> (a) as or on account of, or
>
> (b) that was taken into account as,
>
> tax, net tax, penalty, interest or other obligation under this Part in circumstances where the amount was not payable or remittable by the person, whether the amount was paid by mistake or otherwise, the Minister shall, subject to subsections (2) to (3), pay a rebate of that amount to the person.

[91] Section 261 does not refer to any period as the basis for a rebate application. Rather, eligibility for the rebate is determined with respect to an amount that was paid and a number of other temporal limitations, such that a section 261 rebate is restricted by the following three temporal limitations:

a) Pursuant to subsection 261(1), the amount must have already been paid by the person at the time the rebate application is filed;

b) Pursuant to subsection 261(3), the rebate application must be filed within two years after the day the amount was paid or remitted by the person claiming it; and

c) Pursuant to subsection 261(4), a person cannot make more than one rebate application per month.

[92] There are further restrictions set out in sections 261 and 263 of the *Act*, including restrictions preventing a person from claiming a rebate in respect of an amount that was previously claimed as a rebate or an input tax credit.

[93] Based on the wording of section 261, a person can file multiple rebate applications for tax paid in error covering time periods which overlap, multiple discrete claims in the same period, or one large claim covering up to two years of GST payments (as long as in each case the various time and other restrictions are complied with).

[94] In this case, CIBC appears to have complied with the temporal requirements in the *Act*. In this respect, I note that:

a) CIBC paid the February 2007 Amount on February 28, 2007;

b) CIBC filed the Rebate Form on March 26, 2007; and

c) The Rebate Form was the only rebate application identified for the month of March 2007.

[95] CIBC had a number of options for how it could claim the Rebate. For example, it could have submitted one rebate application per month starting with a March 26, 2007 application that covered March 25, 2005 to March 25, 2007, and so on. There are no restrictions in this regard other than the temporal limitations listed above.

[96] Subsection 262(1) stipulates that an application for a rebate "shall be made in prescribed form containing prescribed information and shall be filed with the Minister in prescribed manner." The parties do not dispute the form and manner of the filing of the Rebate in this case.

[97] Pursuant to subsection 123(1) of the *Act*, "prescribed" has the following meaning for the purposes of the *Act*:

> "prescribed" means
>
> (a) in the case of a form or the manner of filing a form, authorized by the Minister,
>
> (b) in the case of the information to be given on a form, specified by the Minister,

> (c) in the case of the manner of making or filing an election, authorized by the Minister, and
>
> (d) in any other case, prescribed by regulation or determined in accordance with rules prescribed by regulation;

[98] In this case, the "period covered" is prescribed information on form GST189 E (06). At the top of this form, taxpayers are referred to guide RC4033(E) Rev. 06, *General Application for GST/HST Rebates*, which on page 7 describes the period covered as:

> The period the rebate application covers is usually the period covered by the dates shown on the invoices you record on the back of the application and on any attached supplements. However, this period must fall within the filing deadlines outlined for each reason code in the next section. [emphasis added]

[99] The guide lists amounts paid in error under "reason code 1" and provides instructions for completing such rebate applications on page 8. Under the "filing deadline", the guide describes the conditions imposed by subsections 261(3) and (4) of the *Act*.

[100] As noted above, the guide defines the period covered by reference to dates listed on the invoices on the back of the application and attached supplements. CIBC included the February 2007 Amount in the schedule attached to the application and listed it under the invoice section on the back of the application. The date of the last invoice included in the February 2007 Amount is February 26, 2007. Thus, in my view, CIBC correctly identified the period covered based on the Minister's guide. As such, it is my view that there was no clerical error in describing the period covered on the Rebate Form.

[101] There does not appear to be anything in the guide which would limit a rebate for tax paid in error to include only amounts that were paid within the "period covered" as listed on the rebate form, or excluding amounts paid outside of the period covered. For the purposes of this issue, the guide is not inconsistent with the legislation. While in other types of rebate applications the "period covered" may affect the substance of a claim, in this case it does little more than alert the Minister as to whether the application may be compliant with the two year limitation period in subsection 261(3).

[102] In my view, CIBC could have listed the end date for the period covered as any date after February 26, 2007 up to the date that the application was submitted.

Even if CIBC had made a clerical error with respect to the period covered, it is my view that this would not impact on its ability to succeed in a rebate claim as the period covered as entered on the rebate application is not material (or relevant) to the legislative requirements for claiming a rebate for tax paid in error. While it is no doubt somewhat helpful to the Minister in reviewing a rebate application, those dates do not necessarily correlate with the time limits set out in section 261 of the *Act*.

[103] Following the receipt of a rebate application, subsection 297(1) of the *Act* requires the Minister to consider the application and assess the amount of the rebate, if any, payable to the applicant. Pursuant to subsection 297(2), the Minister may reassess or make an additional assessment of the amount of a rebate. I note that subsections 297(1) and (2) do not make reference to any time period in respect of the rebate application, but rather only reference the rebate application and the assessment or reassessment thereof.

[104] Subsection 301(1.1) of the *Act* states that an objection must be filed within 90 days after the day the notice of assessment is sent to the person. It must be "in the prescribed form and manner setting out the reasons for the objection and all relevant facts". The parties have not raised any issue regarding the objection. This provision does not mention "prescribed information" and there is no reference to a time period.

[105] Section 306 of the *Act* provides that a person who has filed a notice of objection to an assessment may appeal to have the assessment vacated or a reassessment made. Section 306 does not make any reference to the time period set out on a rebate application.

[106] Section 307 of the *Act* provides that appeals under the *Act* to this Court (other than one referred to in section 18.3001 of the *Tax Court of Canada Act*) follow the rules set out in the *Tax Court of Canada Act* (RSC 1985, c T-2). Rules 21 and 48 of the *Tax Court of Canada Rules (General Procedure)* (SOR/90-688a) requires that the Notice of Appeal in this case be made using Form 21(1)(a). Paragraph (b) of that form states the following:

> Identify the assessment(s) under appeal: include date of assessment(s) and, if the appeal is under the *Income Tax Act*, include taxation year(s) or, if the appeal is under the *Excise Tax Act*, the *Customs Act*, the *Air Travellers Security Charge Act*, the *Excise Act, 2001* or the *Softwood Lumber Products Export Charge Act, 2006*, include the period to which the assessment(s) relate(s), [emphasis added]

[107] The general requirement under these rules is that the Appellant identify the assessment under appeal. This requirement is followed by the manner of identification: i.e. the tax year or period. In many cases the assessment is identified by the tax year or period; however, in a rebate application, where the assessment is of an amount that was paid, the period does not necessarily identify the assessment. For example, a taxpayer could submit overlapping notices of appeal where the period covered is the same but the rebates are different. Under such circumstances the period does not identify the assessment in issue. While the period should be included in rebate applications because it is prescribed information, it is not necessarily material information. In this case, CIBC identified the assessment under appeal and provided information regarding the Period which accurately described the period covered according to guide RC4033. In this respect, it is my view that there was no error in CIBC's Further Amended Notice of Appeal which would interfere with this Court's jurisdiction to hear the issue.

[108] Based on all of the foregoing, it is my view that CIBC properly included the $2,254,282.60 of GST paid on February 28, 2007 in its application for the Rebate on the Rebate Form and that CIBC could claim a rebate in respect of the $2,254,282.60 of GST paid on February 28, 2007 if CIBC was otherwise entitled to claim the Rebate.

[109] In light of my findings, CIBC's other arguments regarding whether it was open to the Minister to raise this issue are moot.

V. CONCLUSION

[110] Overall, it is my view that the Aeroplan Miles and the Aeroplan Supplies were not gift certificates for the purposes of section 181.2 of the *Act*. As a result, it is my view that Aeroplan properly charged CIBC for GST in respect of the Aeroplan Supplies and the Aeroplan Payments, and that therefore CIBC was not entitled to the Rebate at issue in this Appeal.

[111] Based on all of the foregoing, CIBC's appeal is dismissed.

VI. COSTS

[112] Costs are awarded to the Respondent. The parties shall have 30 days from the date hereof to reach an agreement on costs, failing which the Respondent shall have a further 30 days to file written submissions on costs and CIBC shall have yet

a further 30 days to file a written response. Any such submissions shall not exceed 10 pages in length. If the parties do not advise the Court that they have reached an agreement and no submissions are received, costs shall be awarded to the Respondent as set out in the Tariff.

Signed at Ottawa, Canada, this 16th day of April 2019.

"Henry A. Visser"

Visser J.

Appendix "A"

Statement of Agreed Facts (Partial)

The parties to this proceeding admit, for the purposes of this proceeding only, the truth of the following facts and the authenticity of the documents referred to in the Statement of Agreed Facts (Partial) as that term is defined in the *Tax Court of Canada Rules (General Procedure).*

The parties agree that this Statement of Agreed Facts (Partial) does not preclude either party from calling evidence to supplement the facts agreed to herein or to establish other facts not set out herein, it being accepted that such evidence may not contradict the facts agreed to herein.

A. *Canadian Imperial Bank of Commerce ("CIBC")*

1. At all material times, CIBC was a Schedule I bank pursuant to the *Bank Act* (Canada) that was resident in Canada and registered under Part IX of the *Excise TaxAct,* R.S.C. 1985, c. E-15, as amended (the "Act") for purposes of the goods and services tax ("GST").

2. At all material times, CIBC served its customers through three main lines of business: retail and business banking, wealth management and wholesale banking. As part of its retail banking business, CIBC issued Visa-branded credit cards ("CIBC Visa Cards") and mortgages to customers.

B. *Aeroplan Mile Program*

3. Air Canada operated a loyalty program (the "Aeroplan Mile Program"), which was subsequently transferred to Aeroplan Limited Partnership.

4. CIBC entered into an agreement with Air Canada dated as of April 16, 2003, as amended from time to time (the "Agreement"), which was subsequently assigned to Aeroplan Limited Partnership.

5. Pursuant to the Agreement, CIBC added the "Aeroplan Miles" reward feature to certain CIBC Visa Cards ("Visa AeroCards") and certain mortgages ("AeroMortgages").

6. The Agreement, inclusive of the relevant amendments, consisted of the following:

a. Credit Card Agreement dated as of April 16, 2003 between CIBC and Air Canada[1]

b. Letter amending agreement dated October 31, 2003 between CIBC and Air Canada[2]

c. Letter amending agreement dated November 28, 2003 between CIBC and Air Canada[3]

d. Letter amending agreement dated April 7, 2004 between Air Canada and CIBC[4]

e. Assignment and Assumption Agreement dated July 5, 2004 between Air Canada, Aeroplan Limited Partnership ("Old Aeroplan") and CIBC[5]

f. Assignment and Assumption Agreement dated June 29, 2005 between APLN Limited Partnership (formerly Old Aeroplan), Aeroplan Limited Partnership, CIBC and Air Canada[6]

g. Amending Agreement dated as of September 28, 2006 between CIBC and Aeroplan Limited Partnership[7]

h. Amending Agreement dated as of October 2, 2006 between CIBC and Aeroplan Limited Partnership[8]

i. Letter amending agreement dated November 16, 2006 between

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1 Credit Card Agreement, Joint Book of Documents, Tab 1.

2 Letter, Joint Book of Documents, Tab 2.

3 Letter, Joint Book of Documents, Tab 3.

4 Letter, Joint Book of Documents, Tab 4.

5 Assignment and Assumption Agreement, Joint Book of Documents, Tab 5.

6 Assignment and Assumption Agreement, Joint Book of Documents, Tab 6. The term "Aeroplan" means Air Canada, Old Aeroplan, APLN Limited Partnership or Aeroplan Limited Partnership, as applicable in each case.

7 Amending Agreement, Joint Book of Documents, Tab 7.

8 Amending Agreement, Joint Book of Documents, Tab 8.

Aeroplan Limited Partnership and CIBC[9]

7. The Aeroplan Mile Program generally operated as follows:[10]

   a. Aeroplan entered into agreements with various suppliers of property or services (each, an "Accumulation Partner") under which the Accumulation Partners added the Aeroplan Mile loyalty reward feature to certain of their consumer products.

   b. An Aeroplan member could earn Aeroplan Miles as and when the member purchased eligible products from any Accumulation Partner.

   c. The Accumulation Partner in each case would advise Aeroplan of the amount of the member's purchases eligible for Aeroplan Miles and the Accumulation Partner would pay Aeroplan for those Aeroplan Miles.

   d. Aeroplan would issue the Aeroplan Miles to the member.

   e. Once a sufficient number of Aeroplan Miles had been accumulated by the member in his or her Aeroplan account maintained with Aeroplan, the member could redeem the Aeroplan Miles with Aeroplan toward the acquisition of property or services ("Rewards") chosen from a menu of Rewards made available by Aeroplan from time to time.

   f. Aeroplan would purchase the Rewards from suppliers (referred to as its "Redemption Partners") with which it had agreements for the supply of Rewards.

   g. The member would receive his or her chosen Rewards.

8. In CIBC's case, the Aeroplan Mile Program generally operated as follows

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9 Letter, Joint Book of Documents, Tab 9.

10 Aeroplan Income Fund Initial Annual Information Form, March 2, 2006, at page 9, Joint Book of Documents, Tab 10, and Aeroplan Annual Report. 2007, pages 22, 24 and 26, Joint Book of Documents, Tab 21.

in respect of its Visa AeroCard product:[11]

a. CIBC would issue a Visa AeroCard to a customer ("Cardholder"), and if the Cardholder was not already an Aeroplan member, CIBC would, on behalf of the Cardholder, request Aeroplan to enroll the Cardholder as an Aeroplan member.

b. The Cardholder would charge purchases to his or her Visa AeroCard account.

c. At the end of the billing period for the Cardholder's Visa AeroCard account, CIBC would invoice the Cardholder and collect the amount owing on the account from the Cardholder, pursuant to a Cardholder Agreement between CIBC and the Cardholder.

d. CIBC would indicate on the Cardholder's Visa AeroCard account statement that the Cardholder had earned an amount of Aeroplan Miles as a result of the credit card purchase transactions.

e. The Cardholder would generally, but not always, earn one Aeroplan Mile for each dollar of purchases charged to the Cardholder's Visa AeroCard account - the precise number of Aeroplan Miles so earned per dollar of purchases using the Visa AeroCard sometimes varied.

f. CIBC would advise Aeroplan of the amount of the Cardholder's purchases eligible to earn Aeroplan Miles and Aeroplan would issue the Aeroplan Miles to the Cardholder by crediting the Cardholder's Aeroplan member account with those Aeroplan Miles.

g. Aeroplan would then invoice CIBC for the Aeroplan Miles at the cost specified in Appendix "D" of the April 16, 2003 Credit Card Agreement or at the cost as modified and set out in the subsequent amendments to the Agreement.

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[11] Aeroplan Income Fund Initial Annual Information Forms for 2006-2008, Joint Book of Documents, Tabs 10-12; Cardholder Benefits Guides, Joint Book of Documents, Tabs 13-15; Sample Cardholder Agreements, Joint Book of Documents, Tabs 16-18; Sample Aerogold VISA Statement, Joint Book of Documents, Tab 19; Credit Card Agreement Between ClBC and Aeroplan, Joint Book of Documents, Tab 1.

h. Provided the Cardholder's Visa AeroCard account remained in good standing, the Cardholder could earn Aeroplan Miles as described above. If and when the Visa AeroCard account was no longer in good standing, the Cardholder would cease being entitled to earn Aeroplan Miles until his or her account was restored to good standing.

i. Subject to any applicable terms and conditions specified in the Agreement and the relevant Cardholder Agreement and Benefits Guide, an Aeroplan member could accumulate Aeroplan Miles in the member's Aeroplan account and, upon accumulating a sufficient number of Aeroplan Miles, the member could redeem all or some of the Aeroplan Miles with Aeroplan for property or services as Rewards offered by Aeroplan at that time.

9. A Cardholder Agreement and a Benefits Guide were provided by CIBC to Visa AeroCard Cardholders, which generally set out the benefits and the terms and conditions of having a CIBC Visa AeroCard.[12] These documents included a general description of the benefits and certain terms and conditions specifically associated with the Aeroplan Miles reward feature of the Visa AeroCard.

10. There were certain other circumstances in which CIBC awarded Aeroplan Miles to customers, for example, where a customer paid interest on a CIBC AeroMortgage, opened a new account with CIBC or where CIBC awarded the Aeroplan Miles as a customer service gesture.[13] In these cases, CIBC paid Aeroplan for the Aeroplan Miles so awarded, which were credited by Aeroplan to the customer's Aeroplan member account.

11. Aeroplan made available a menu of Rewards, which varied from time to time, being property and services that Aeroplan would purchase from Redemption Partners with which it had agreements.[14] Rewards available at various times included, among other things, airline flights, stays in hotels and resorts, car rentals, electronics, a broad selection of brand-

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12 Examples of a Benefits Guide Cardholder Agreement and Cardholder Agreement are at Tabs 13-15 and 16-18, respectively, of the Joint Book of Documents.

13 Credit Card Agreement, Joint Book of Documents, Tab 1, section 13.

14 Aeroplan Annual Report, 2007, pages 22-26, Joint Book of Documents, Tab 21.

name merchandise, concert tickets, spa packages, meals at restaurants, and gift cards from a network of over 20 well-known national retailers such as Gap, the Body Shop, Holt Renfrew, Pier One and Pottery Barn, to name a few.[15]

12. Aeroplan generally had discretion to change the Rewards made available to Aeroplan members and/or the number of Aeroplan Miles required to obtain any given Reward.

13. Upon redemption of Aeroplan Miles by an Aeroplan member, Aeroplan would incur the cost to acquire the desired Reward from the Redemption Partner.[16]

14. In October 2006, Aeroplan announced that, beginning on January 1, 2007, Aeroplan Miles unused after seven years would expire.[17] Aeroplan Miles accumulated prior to January 1, 2007 would expire on December 31, 2013.[18] This seven-year expiry policy was subsequently cancelled and various modifications to the Aeroplan Mile Program were implemented as of January 1, 2014.[19] Effective July 1, 2007, generally Aeroplan members were required to transact with the Aeroplan Mile Program through either one accumulation or one redemption within the last 12 months, or the accumulated Aeroplan Miles would expire. However, under the letter agreement of November 16, 2006 between CIBC and Aeroplan, Aeroplan agreed that CIBC would have the right to purchase from Aeroplan one Aeroplan Mile for each Cardholder whose Aeroplan Miles would otherwise expire under the new One-Year Expiry Rule with the result that no existing or future Cardholder's Aeroplan Miles wou1d expire pursuant to this Rule.[20]

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15 Cardholder Benefits Guides, Joint Book of Documents, Tabs 13-15; and Aeroplan Income Fund Initial Annual Information Form, March 2, 2006, at page 10, Joint Book of Documents, Tab 10.

16 See, for example, Aeroplan Income Fund Initial Annual Information Form, March 2, 2006 at page 5, Joint Book of Documents, Tab 10; Aeroplan Annual Report, 2006 at pages 12 and 15, Joint Book of Documents, Tab 20, and Aeroplan Annual Report, 2007 at pages 24 and 26, Joint Book of Documents, Tab 21.

17 Aeroplan Annual Report, 2007, Joint Book of Documents, Tab 21 at page 24.

18 Aeroplan Annual Report, 2007, Joint Book of Documents, Tab 21 at pages 22 to 24.

19 Aeroplan Annual Report, 2014, Joint Book of Documents, Tab 22 at page 90.

20 Letter, Joint Book of Documents, Tab 9 at page 2.

(1) Payments of Aeroplan Invoices

15. Over the period from March 25, 2005 to February 28, 2007, CIBC made the following total payments to Aeroplan under the Agreement for each respective billing period, pursuant to the aggregate of any invoices issued by Aeroplan for the particular billing period (the "Invoices"):[21]

Billing Period	Total Payment Inclusive of GST and QST	GST Portion of Payment
February 1 to 28, 2005	$33,819,392.33	$2,058,124.29
March 1 to 31, 2005	$30,873,434.93	$1,878,844.12
April 1 to 30, 2005	$36,177,018.76	$2,201,600.79
May 1 to 31, 2005	$34,850,651.97	$2,120,882.96
June 1 to 30, 2005	$39,502,342.51	$2,403,967.80
July 1 to 31, 2005	$37,160,673.58	$2,261,462.43

Billing Period	Total Payment Inclusive of GST and QST	GST Portion of Payment
August 1 to 31, 2005	$42,768,426.27	$2,602,729.70
September 1 to 30, 2005	$40, 374,493.59	$2,457,043.72
October 1 to 31, 2005	$38,067,628.81	$2,316,656.38
November 1 to 30, 2005	$$40,163,443.52	$2,444,199.98
December 1 to 31, 2005	$42,353,978.74	$2,572,533.06
January 1 to 31,	$37,628,668.69	$2,289,942.89

21 ClBC Awards Settlement and Invoices, Joint Book of Documents, Tab 23 (Billing Period February 1 to 28, 2005) to Tab 46 (Billing Period January 1 to 31 , 2007).

2006		
February 1 to 28, 2006	$37,444,118.97	$2,278,711.86
March 1 to 31, 2006	$33,755,632.27	$2,054,244.09
April 1 to 30, 2006	$38,115,733.93	$2,319,583.89
May 1 to 31, 2006	$39,416,883.30	$2,398,767.08
June 1 to 30, 2006	$42,640,928.73	$2,245,244.16
July 1 to 31, 2006	$39,071,502.78	$2,057,297.20
August 1 to 31, 2006	$40,919,233.29	$2,154,588.85
September 1 to 30, 2006	$43,668,864.09	$2,299,689.58
October 1 to 31, 2006	$38,566,268.56	$2,030,694.27
November 1 to 30, 2006	$43,757,630.00	$2,304,043.70
December 1 to 31, 2006	$43,373,749.97	$2,283,830.63
January 1 to 31, 2007	$42,812,583.65	$2,254,282.60
Total	$937,283,283.24	$54,288,966.03

16. On March 26, 2007, Stephen Bobkin of CIBC filed with the Canada Revenue Agency ("CRA") the following in respect of amounts paid by CIBC to Aeroplan: (i) a General Application for Rebate of GST/HST (Form GST189 E (06)); (ii) a summary of the Aeroplan Invoices issued to CIBC for the billing periods listed above (the "Invoice Summary"); and (iii) a covering letter. The first page of the rebate application form indicated that the last day of the claim period was February 26, 2007.[22]

17. The total payment, and the GST portion of the total payment, for each billing period set out in the Invoice Summary corresponded to the

[22] Rebate application form, Invoice Summary and covering letter, Joint Book of Documents, Tab 47.

aggregate amounts payable for the billing period, and the aggregate GST portion of the payments, as set out in the Invoices issued by Aeroplan to CIBC for the billing period.

18. The Invoice Summary correctly identified the month and year of CIBC's payments to Aeroplan for the relevant billing periods. The Invoice Summary did not identify the particular day of the month on which CIBC n1ade the payments to Aeroplan.

19. The last payment listed in the Invoice Summary, in the amount of $42,812,583.65, which included GST of $2,254,282.60 (the "February 2007 Amount"), was for the January 2007 billing period. CIBC paid the February 2007 Amount to Aeroplan on February 28, 2007.

20. The February 2007 Amount reflected the total amount of GST payable by CIBC to Aeroplan for the January 2007 billing period pursuant to five Invoices (two dated February 21, 2007; two dated February 3, 2007 and one dated January 30, 2007) and one credit note dated February 26, 2007 issued by Aeroplan to CIBC. CIBC prepared a summary settlement sheet summarizing these Invoices and credit note ("CIBC Awards Settlement").

21. The CIBC Awards Settlement for the January 2007 billing period contains a footer in the bottom right-hand comer indicating a date and time, i.e. "2/26/2007 1:35 PM." This footer indicates that the CIBC Awards Settlement was printed at 1:35 p.m. on February 26, 2007. The same CIBC Awards Settlement shows a "Payment Date" in the top left- hand corner, i.e. "28-Feb-07." This Payment Date indicates that CIBC paid Aeroplan the February 2007 Amount on February 28, 2007.[23]

22. By email dated March 27, 2007, Stephen Bobkin wrote to the CRA auditor, Ms. Elaine Lam, who was, at that time, CIBC's regular GST auditor, to advise her that he had filed the rebate application and that he would provide her with a copy when she would next be at her office at

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[23] CIBC Awards Settlement and bundles of Invoices and credit note for February 2007 Amount, Joint Book of Documents, Tab 46.

CIBC's premises. Ms. Lam responded by email of the same date.[24]

23. On June 5, 2007, Elaine Lam issued a Request for Information to CIBC in respect of the rebate claim.[25] Among other things, the Request for Information asked CIBC to provide a copy of the rebate application form with a signature in the correct place in Part F of the form.

24. On August 9, 2007, Stephen Bobkin wrote to Elaine Lam that he had signed the rebate application form under Part E in error and provided a copy of the rebate application form signed under Part F.[26]

25. On November 22, 2007, Elaine Lam issued a Proposal for Adjustment to CIBC in respect of the rebate application.[27] The Minister did not subsequently issue an assessment to CIBC to disallow the rebate application pursuant to that particular Proposal for Adjustment.

26. The Invoice Summary set out, *inter alia*, the amount of GST that CIBC paid to Aeroplan (each a "GST Payment") for each billing period, as well as the grand total of those GST Payments ($54,288,966.03). However, in recognition of the fact that any rebate otherwise payable to CIBC would have to be reduced by the amount of input tax credits ("ITCs") in respect of the GST Payments as required by section 263 of the Act, the amount of the rebate that Mr. Bobkin indicated on the first page of the rebate application form ($44,631,063.32) was net of CIBC's estimate at that time of its expected total ITC claim in respect of the GST Payments.

27. In an email dated May 13, 2009, Mr. Bobkin first provided, among other things, two sample sets of the Aeroplan Invoices to Elaine Lam – one for the March 1 to 31, 2005 billing period and one for the February 2007 Amount (representing the January 1 to 31, 2007 billing period).[28]

28. On February 15, 2011, Elaine Lam issued a Proposal For Adjustment to

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24 Copy of email chain, Joint Book of Documents, Tab 48.
25 Request for Information, Joint Book of Documents, Tab 49.
26 Copy of letter with note, Joint Book of Documents, Tab 50.
27 Proposal for Adjustment with attachments, Joint Book of Documents, Tab 51.
28 Copy of May 13, 2009 email, Joint Book of Documents, Tab 52.

CIBC in respect of the rebate application.[29]

29. On March 24, 2011, Elaine Lam signed an Audit Report in respect of CIBC's rebate application.[30]

30. On March 24, 2011, Elaine Lam issued a letter to Stephen Bobkin indicating that the audit of the rebate application had been completed and attaching a Statement of Audit Adjustments indicating that the rebate was denied because GST was paid on taxable supplies.[31]

31. On March 25, 2011, the Minister issued a Notice of Assessment in respect of the rebate application, indicating that the rebate was denied as detailed in the Statement of Audit Adjustments issued on March 24, 2011.[32]

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29 Proposal for Adjustment without attachments, Joint Book of Documents, Tab 53.

30 Copy of Prepayment Audit Report, Joint Book of Documents, Tab 54.

31 Copy of letter with attachment, Statement of Audit Adjustments, Joint Book of Documents, Tab 55.

32 Notice of Assessment, Joint Book of Documents, Tab 56.

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APPEARANCES:

Counsel for the Appellant:	Al Meghji, Al Nawaz-Nanji, Andrew Boyd
Counsel for the Respondent:	Marilyn Vardy, Craig Maw

COUNSEL OF RECORD:

For the Appellant:

Name:	Al Meghji, Al Nawaz-Nanji, Andrew Boyd
Firm:	Osler, Hoskin & Harcourt LLP

For the Respondent:	Nathalie G. Drouin Deputy Attorney General of Canada Ottawa, Canada