Federal Court of Appeal | Cour d'appel fédérale

Date: 20190610

Docket: A-161-17

Citation: 2019 FCA 173

CORAM: **STRATAS J.A.**
WEBB J.A.
LASKIN J.A.

BETWEEN:

MARK SMITH

Appellant

and

HER MAJESTY THE QUEEN

Respondent

Heard at Calgary, Alberta, on June 11, 2018.

Judgment delivered at Ottawa, Ontario, on June 10, 2019.

REASONS FOR JUDGMENT BY: LASKIN J.A.

CONCURRED IN BY: STRATAS J.A.
WEBB J.A.

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REASONS FOR JUDGMENT

LASKIN J.A.

I. Overview

[1] The issue in this appeal is whether an airport parking pass provided to Mark Smith, a flight attendant, by his employer, a commercial airline, was a "benefit" under paragraph 6(1)(*a*) of the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.). By that provision, Mr. Smith's income is to include the value of benefits of "any kind whatever" received or enjoyed in respect of, in the

course of, or by virtue of his employment. A judge of the Tax Court of Canada concluded that the value of the parking pass was a paragraph 6(1)(*a*) benefit: *Smith v. The Queen*, 2017 TCC 62, 2017 D.T.C. 1031 (Ouimet J.).

[2] Mr. Smith now appeals to this Court. Both he and the respondent, the Crown, invoke the case law holding that where something is provided to an employee primarily for the employer's benefit, it is not a "benefit" received or enjoyed by the employee within the meaning of paragraph 6(1)(*a*). The parties take different views, however, on who was the "primary beneficiary" of the parking pass, and on how that should be determined in this context.

[3] Mr. Smith argues that two factors establish that the parking pass primarily benefitted his employer: the remote location and unusual hours of Mr. Smith's employment, and his employer's stated belief that providing a parking pass to flight attendants enhanced their reliability and flexibility. Mr. Smith submits that the Tax Court judge's analysis of these factors shows that he misunderstood the meaning of "benefit" in paragraph 6(1)(*a*).

[4] The Crown disagrees. It argues that Mr. Smith's commuting costs, including those related to parking, were personal, and that Mr. Smith benefitted when his employer relieved him of the cost of parking. The Crown also disputes the significance of the employer's stated business purpose in paying for parking, pointing to the Tax Court judge's finding that the provision of parking passes to flight attendants did not in fact make them more reliable or flexible, relative to flight attendants who commuted other than by car.

[5] Whether employer-provided parking is a taxable benefit is a difficult issue, one that has troubled tax practitioners and the courts for many years. I propose that Mr. Smith's appeal be dismissed, though for reasons that differ in a number of respects from those of the Tax Court judge. I agree with the Crown that parking, like all costs of commuting to work, is ordinarily a personal expense. In my view, it remains personal even if an employee must, as a practical matter, pay for parking as a result of the location of his or her work or the impracticability of using public transit. Therefore, save in exceptional circumstances, examples of which are discussed below, parking paid for by an employer represents an economic benefit to the employee. I further agree with the Crown that, in the circumstances of this case, Mr. Smith's parking costs remained personal, despite the employer's business purpose in paying for them, and that Mr. Smith therefore received a "benefit" within the meaning of paragraph 6(1)(*a*). However, this appeal presents an opportunity for this Court to clarify what role, if any, the factors considered by the Tax Court judge should play when the taxation of the value of a parking pass is in dispute, and in particular how the concept of "primary beneficiary" should bear on the analysis.

[6] In my view, the fundamental inquiry under paragraph 6(1)(*a*) is whether an employer has conferred something of economic value on an employee. But the receipt of value can be mutual, and often is. The concept of the "primary beneficiary" is useful in such cases because it captures a variety of considerations that may be relevant depending on the facts – the employer's purpose in providing something to an employee, for example, or the relationship between what has been provided and the employee's duties or conditions of employment. The factors do not give rise to

their own tests, however. They merely assist in determining whether the employee has received or enjoyed something of economic value.

[7] I agree with Mr. Smith that his employer had a business purpose in paying for parking – incentivizing flight attendants to use a reliable mode of transport – and that it therefore benefitted from doing so. However, as I explain below, his employer's business purpose does not support the inference that Mr. Smith received no economic value from the provision of the parking pass, or the conclusion that the value he received was merely incidental. Another way of framing this conclusion is to say that Mr. Smith's parking costs remained personal, whatever the value his employer received in subsidizing them.

[8] As a result, I would conclude that Mr. Smith received a paragraph 6(1)(*a*) benefit, and would accordingly propose that the appeal be dismissed.

II. Background facts

[9] Mr. Smith has been a flight attendant with Jazz Aviation LP, a Canadian commercial airline, for more than 25 years. At the relevant time, Mr. Smith lived in a residential community in northwest Calgary. It took him about 25 minutes to drive from his home to the Calgary International Airport, which is located in the northeast quadrant of the city. While at the airport, he made use of the parking pass that Jazz Aviation provided to him.

[10] The Minister of National Revenue reassessed Mr. Smith's 2011 taxation year to include the value of the parking pass in his income. In doing so, the Minister relied on the following

assumptions: (1) Mr. Smith was employed by Jazz Aviation, (2) Mr. Smith was based as a flight attendant out of the airport, (3) Jazz Aviation provided Mr. Smith with a pass for parking at the airport, (4) Mr. Smith parked at the airport while working, (5) Mr. Smith did not reimburse Jazz Aviation for the cost of the parking pass, and (6) the annual fair market value of the parking pass was $504.

III. Tax Court decision

[11] Mr. Smith appealed the reassessment to the Tax Court of Canada. In his notice of appeal, he asserted that he received no substantial benefit from the pass, that Jazz Aviation enjoyed the practical and economic advantages flowing from its use, and that the Minister was therefore wrong to include its value in his income.

[12] Mr. Smith argued that, in considering whether the value of the parking pass was taxable under paragraph 6(1)(*a*), the Tax Court judge was required to consider the nature and location of the airport, the hours Mr. Smith worked, the lack of availability of public transit, and whether Jazz Aviation was the primary beneficiary of the provision of parking. He pleaded that Jazz Aviation required him to report for work outside of ordinary working hours, starting as early as 5:00 a.m. and ending as late as 1:00 a.m., and that at these hours public transit was not available. He also pleaded that he was required to work mandatory overtime without advance notice, to report to work on short notice, and to adhere to modified shift schedules. Finally, he pleaded that these requirements were particular to work in the airline industry, that Jazz Aviation provided its flight attendants with parking passes because it “minimize[d] the risk to Jazz Aviation of

suffering losses resulting from late or absent employees," and that doing so resulted in a "significant benefit" to Jazz Aviation: Appeal Book at 20-21.

[13] In reply, the Minister asserted that Mr. Smith was the exclusive, or primary, beneficiary of the parking pass, because he did not use his vehicle in the course of his employment duties and "would have contracted for, and paid the same amount for, the parking": Appeal Book at 29. The Minister further submitted that any benefit accruing to Jazz Aviation was minor and incidental and did not change the result of the analysis.

[14] Mr. Smith's appeal to the Tax Court was conducted under the informal procedure provided for in the *Tax Court of Canada Act*, R.S.C. 1985, c. T-2. The Tax Court judge heard evidence from Mr. Smith, who testified with respect to his schedule and the lack of public transit to and from the airport during the hours he was required to report for work. Mr. Smith also gave evidence that he and other flight attendants were subject to a "three strikes" policy, by which they could face the prospect of termination if they were late to work three or more times. During cross-examination, he was asked whether, if Jazz Aviation did not pay for parking, he would pay for it himself, and answered that in that case he would "explore all options available to [him]": Appeal Book at 158.

[15] The Tax Court judge also heard evidence from Kirk Newhook, Vice-President of Employee Relations for Jazz Aviation. Mr. Newhook testified that Jazz Aviation was a "feeder airline" that carried passengers for Air Canada between smaller airports and larger international airports, and that Jazz Aviation's compensation from Air Canada was based on the proportion of

flights departing on time. He also testified that Jazz Aviation's profitability was ultimately driven by the wage cost of its flight crews, meaning that Jazz Aviation staffed its airplanes to meet only minimum crew requirements. As a result, a delay by one crew member in reporting to work would delay departure. Mr. Newhook testified that Jazz Aviation therefore stressed the "reliability factor" when hiring flight attendants, since it was "such an essential part of the business": Appeal Book at 58. He also explained that Jazz Aviation kept a certain number of flight attendants on reserve as an "insurance policy" for on-time performance: Appeal Book at 68-69.

[16] With respect to the provision of parking passes, Mr. Newhook's evidence was that they were paid for by Jazz Aviation as required by its collective agreement with the Canadian Flight Attendant Union, and that Jazz Aviation had done so since at least 1993. Asked (Appeal Book at 71-72) whether he had ever been party to any discussion about ceasing to provide parking to flight attendants, he responded that he had been, and that Jazz Aviation had decided it wasn't going to "go there":

> [W]e didn't want to risk any of the implications of having people go – go look for alternate ways to get to the airport that weren't as reliable as what we currently have. So we wouldn't want to see people not show on time because that – that's my biggest fear […] when those phone calls coming in [sic] saying that somebody is missing, it starts – it starts a process where we start to look for substitutes. And to have that occur more than it actually does today would put a lot of stress on the organization. And then it puts a lot of stress on whether you're going to operate on time. So we dismissed it fairly quickly actually as something that we decided that we were going to continue to pay […].

[17] Mr. Newhook also gave evidence that Jazz Aviation did not require its flight attendants to own a car or to commute to work by car. He testified that it would be "incredibly difficult" to

make owning a car a condition of employment, given the low rate of pay for entry-level flight attendants. As a result, he explained that Jazz Aviation "[left] it up to flight attendants to decide how they [were] going to be punctual": Appeal Book at 87.

[18] Finally, the Tax Court judge heard evidence from Shawnah Whittaker, General Manager of Ground Transportation and Parking for the Calgary Airport Authority. Ms. Whittaker testified that Jazz Aviation paid for its employees to park at the "Green Lot" at the airport, which had over 2,500 spaces, never filled completely, and was accessible 24 hours a day, seven days a week. She also gave evidence that, at the relevant time, any person who worked at the airport could obtain a parking pass, regardless of whether an employer paid for it.

[19] In his reasons disposing of Mr. Smith's appeal, the Tax Court judge held (at paras. 26-29), citing *The Queen v. Savage*, [1983] 2 S.C.R. 428 at 441, 83 D.T.C. 5409, that the value of the parking pass would be taxable under paragraph 6(1)(*a*) if the parking pass conferred an economic benefit on Mr. Smith in connection with his employment that was not exempt under the *Income Tax Act*. The Tax Court judge then observed that, as an element of this test, to be taxable the parking pass had to primarily benefit Mr. Smith and not his employer. He stated that if Jazz Aviation was the primary beneficiary of the parking pass, and any personal enjoyment by Mr. Smith was merely incidental to its business purpose, the value of the parking pass would not be taxed as employment income under paragraph 6(1)(*a*).

[20] In applying this test, the Tax Court judge first considered whether paying for the parking pass benefited Jazz Aviation. He concluded (at para. 32) that Jazz Aviation did not pay for the

parking passes because it believed that doing so would make its flight attendants more reliable and flexible. The Tax Court judge noted that Jazz Aviation paid for parking under the terms of the collective agreement, and that Mr. Newhook had not testified that those terms were an "insurance policy," like its practice of keeping flight attendants on reserve duty. The Tax Court judge also noted that Jazz Aviation did not require its flight attendants to travel to work by car, but rather allowed its employees to determine what mode of transportation they would use in order to be punctual. He concluded (at para. 35) that Mr. Newhook had given no evidence that Jazz Aviation "paid for the flight attendants' parking passes because of any commercial realities of the airline industry or any factors specific to that industry."

[21] The Tax Court judge also concluded (at para. 38) that the evidence did not demonstrate that flight attendants who commuted to work by car and parked at the airport were more reliable than those who used other means of transportation. He stated (at para. 39) that, on the evidence, Jazz Aviation "received the same level of service from its flight attendants, no matter how they chose to commute to work."

[22] The Tax Court judge then considered Mr. Smith's personal circumstances. He accepted (at para. 40) that Mr. Smith had to commute to the airport by car, and that he therefore "had to have a parking pass in order to work for Jazz out of the Calgary airport and, obviously, in order to report to work on time." He also concluded that "Mr. Smith's using his parking pass allowed Jazz to have Mr. Smith as an employee." However, the Tax Court judge reiterated (at para. 43) that he was "not presented with evidence of any correlation between the use of parking at the Calgary airport and a benefit to Jazz either for the flight attendants in general or for Mr. Smith

particularly." He stated that there was no evidence that Mr. Smith performed duties or tasks different from those of other flight attendants, no evidence that he would be difficult for Jazz Aviation to replace, and no evidence of the cost of replacing him. As a result, he concluded (at paras. 45 and 48) that "the evidence did not show that Jazz received any benefit at all from Mr. Smith's use of the parking pass," but rather that it paid for parking as a result of the requirements of the collective agreement.

[23] With respect to the benefit to Mr. Smith, the Tax Court judge concluded (at para. 46) that Mr. Smith received the benefit of having his parking pass paid for by Jazz Aviation, and that this was an economic benefit measurable in monetary terms. As a result, the Tax Court judge found (at para. 47) that Mr. Smith was the "primary beneficiary" of the parking pass, and that its value was therefore taxable under paragraph 6(1)(*a*).

IV. The parties' arguments on appeal

[24] In their written materials filed on appeal to this Court, the parties focussed on whether the Tax Court judge applied a test inconsistent with existing case law to determine who primarily benefitted from the provision of the parking pass.

[25] Mr. Smith argued that the Tax Court judge did so in two ways – first, by wrongly requiring Mr. Smith to show that Jazz Aviation could not have reduced its operating costs by terminating Mr. Smith's employment and hiring another flight attendant who did not need parking, and second, by improperly considering whether flight attendants who travelled to work by car were more reliable and flexible than those who travelled by other means. Mr. Smith

argued that the Tax Court judge should have limited his analysis to Mr. Smith's own circumstances. The thrust of Mr. Smith's argument was summarized in his notice of appeal, in which he stated that the Tax Court judge erred "in finding that parking that was necessary for an employee to meet the conditions of employment [was] a benefit to the employee and not a benefit to the employer," because "[m]aking it possible for an employee to do the job the employer wants done is by definition a benefit to the employer": Appeal Book at 3. For its part, the Crown submitted in its memorandum that the Tax Court judge correctly stated the relevant legal principles, duly considered Mr. Smith's personal circumstances, and reached conclusions that were appropriate based on the evidence before him.

[26] However, in oral argument the parties addressed more broadly the purpose behind paragraph 6(1)(*a*) and, in particular, its role in capturing the value of "personal" employee expenses that are paid for by employers.

[27] Mr. Smith's counsel submitted the cost of parking in Mr. Smith's case was not "personal," because it arose from Mr. Smith's employment, owing to the location of the airport and his hours of work. Mr. Smith's counsel further submitted that this view of paragraph 6(1)(*a*) – that it does not capture payments covering costs that arise from employment – was reflected in the various analytical factors expressed in the case law. He also stressed that it was difficult to reconcile the Tax Court judge's conclusion that paying for parking provided no benefit to Jazz Aviation with Mr. Newhook's evidence that Jazz Aviation was unwilling even to consider stopping paying for parking because it feared jeopardizing its current levels of employee reliability and flexibility.

[28] In response, Crown counsel argued that commuting costs, including parking costs, are ordinarily "personal," and that reporting for work on time is a requirement for all employees and not one unique to Mr. Smith's job as a flight attendant. Crown counsel further submitted that none of Mr. Smith's circumstances properly led to the inference that parking was, for Mr. Smith, an "employment" cost and not a "personal" one. With respect to the evidence speaking to Jazz Aviation's motives for continuing to pay for parking, Crown counsel submitted that it was for the courts, and not employers, to discern whether something is a benefit in a given case.

V. Standard of review

[29] The Tax Court judge's conclusion that the parking pass was a "benefit" within the meaning of paragraph 6(1)(*a*) required him to apply the law to the facts of Mr. Smith's case. This is a question of mixed fact and law reviewable for palpable and overriding error: see *Canada v. Bartley*, 2008 FCA 390 at para. 9, 382 N.R. 397. The Tax Court judge's factual findings underlying his conclusion are reviewable on the same standard: *Housen v. Nikolaisen*, 2002 SCC 33 at para. 10, [2002] 2 S.C.R. 235.

[30] Mr. Smith concedes that the Tax Court judge correctly cited the governing legal principles. However, he submits that the Tax Court judge altered them in application by considering irrelevant factors. Decisions on extricable legal issues of this nature are reviewable for correctness: *Housen* at paras. 33-35; *Teal Cedar Products Ltd. v. British Columbia*, 2017 SCC 32 at paras. 44-45, [2017] 1 S.C.R. 688; *Schroter v. Canada*, 2010 FCA 98 at para. 25, 2010 D.T.C. 5062.

VI. Analysis

[31] Division B of Part I of the *Income Tax Act* deals with the computation of income for tax purposes; subdivision A of that division bears the heading "Income or Loss from an Office or Employment." Subsection 5(1) of that subdivision sets out the "basic rule" that "a taxpayer's income for a taxation year from an office or employment is the salary, wages and other remuneration, including gratuities, received by the taxpayer in the year."

[32] Subsection 6(1) bears the heading "Amounts to be included as income from office or employment." By paragraph 6(1)(*a*), any benefits received "in respect of, in the course of, or by virtue of" the taxpayer's employment form part of the taxpayer's employment income:

Amounts to be included as income from office or employment **6** (1) There shall be included in computing the income of a taxpayer for a taxation year as income from an office or employment such of the following amounts as are applicable **Value of benefits** (*a*) the value of board, lodging and other benefits of any kind whatever received or enjoyed by the taxpayer, or by a person who does not deal at arm's length with the taxpayer, in the year in respect of, in the course of, or by virtue of the taxpayer's office or employment, except any benefit […]	**Éléments à inclure à titre de revenu tiré d'une charge ou d'un emploi** **6** (1) Sont à inclure dans le calcul du revenu d'un contribuable tiré, pour une année d'imposition, d'une charge ou d'un emploi, ceux des éléments suivants qui sont applicables : **Valeur des avantages** *a*) la valeur de la pension, du logement et de tout autre avantage que reçoit ou dont jouit le contribuable, ou une personne avec laquelle il a un lien de dépendance, au cours de l'année au titre, dans le cadre ou en raison de la charge ou de l'emploi du contribuable, à l'exception des avantages suivants :

[33] As set out above, subsection 5(1) includes in employment income any "other remuneration" received by the taxpayer, and a similarly broad definition of "income" has been found in Canadian income tax legislation since its introduction in 1917: see the *Income War Tax*

Act, 1917, S.C. 1917, c. 28, s. 3(1); Brian J. Arnold and Jinyan Li, "The Appropriate Tax Treatment of the Reimbursement of Moving Expenses" (1996) 44:1 Can. Tax J. 1 at 9. In 1927, the *Income War Tax Act, 1917* was amended to expressly include "personal and living expenses when such form part of the profit, gain or remuneration of the taxpayer": R.S.C. 1927, c. 97, s. 3(*e*). A provision substantively similar to what is now paragraph 6(1)(*a*) first appeared in paragraph 5(*a*) of *The Income Tax Act*, S.C. 1948, c. 52 beside the marginal note "Income from office or employment," and included in income "the value of board, lodging and other benefits […] received or enjoyed by [the taxpayer] in the year in respect of, in the course of or by virtue of the office or the employment […]." The wording of the provision was amended in 1956 to capture benefits "of any kind whatsoever": S.C. 1956, c. 39, s. 1. A further amendment in 1971 changed "whatsoever" to "whatever": S.C. 1970-71-72, c. 63, s. 1.

[34] The purpose of paragraph 6(1)(*a*) is to include in employment income all forms of compensation received by employees, whether in money or in money's worth. This ensures equitable tax treatment of employees who are paid in cash and those who are paid in kind: see "The Appropriate Tax Treatment of the Reimbursement of Moving Expenses" at 4; *M.N.R. v. Phillips (C.A.)*, [1994] 2 F.C. 680 at 691, 701, 94 D.T.C. 6177 (C.A.), leave to appeal refused, [1994] 3 S.C.R. ix; *Canada (Attorney General) v. Henley*, 2007 FCA 370 at para. 14, 2008 D.T.C. 6017; *Lowe v. Minister of National Revenue* (1996), 195 N.R. 201 at para. 8, 96 D.T.C. 6226 (F.C.A.).

[35] The Supreme Court of Canada considered paragraph 6(1)(*a*) in *The Queen v. Savage*. In that case, the taxpayer received a $300 award from her employer for passing examinations

relating to her field of employment. The Supreme Court held that the meaning of "benefits of whatever kind" was "clearly quite broad," capturing any "material acquisition that confers an economic benefit on the taxpayer": at 440-441, excerpting from *R. v. Poynton*, [1972] 3 O.R. 727 at 738, 72 D.T.C. 6329 (C.A.); see also *Blanchard v. Minister of National Revenue* (1995), 185 N.R. 66 at para. 3, 95 D.T.C. 5479 (F.C.A.), leave to appeal to S.C.C. refused (1996), 203 N.R. 320n. The Supreme Court concluded that the payment was a paragraph 6(1)(*a*) benefit, as it conferred economic value on the employee. The Court also concluded (at 441) that the payment had been received "in relation to or in connection with" employment, because the employee "took the course to improve [her] knowledge and efficiency in the company business and for better opportunity of promotion." In so concluding, the Supreme Court described the company policy behind the award, noting that it was designed "to encourage self-upgrading of staff members" and make them more "valuable."

[36] It is clear from the Supreme Court's analysis in *Savage* that the fact that an employer has a business purpose in conferring something of economic value on its employees does not necessarily take it outside paragraph 6(1)(*a*). Indeed, as this Court has observed, an employer generally "sees and seeks an advantage when [it] confers a benefit to an employee": *Canada v. Spence*, 2011 FCA 200 at para. 22, 420 N.R. 389. Business purpose is not therefore determinative of whether an employer has conferred something of economic value on an employee.

[37] This principle is reflected in the case law. For example, in *Cutmore (R.H.) et al. v. M.N.R.*, [1986] 1 C.T.C. 2230, 86 D.T.C. 1146 (T.C.C.), an employer had paid for senior

members of its executive group to have their income tax returns prepared by tax specialists. The appellant, a member of this group, disputed that he had received anything of value, since he was capable of competently preparing his tax returns without assistance. The Tax Court held that it had "no difficulty" in concluding (at 2233) that the employer had made a "bona fide business decision motivated by the desire to protect [its] reputation for integrity." However, in reliance on *Savage*, the Tax Court held (at 2235) that the payments were "benefits" within the meaning of paragraph 6(1)(*a*), despite the employer's business purpose in making them or "the fact that acceptance [could] be considered to have been a requirement of […] employment." The analysis in *Cutmore* was considered favourably by this Court in *Phillips* (at 705), in highlighting that whether something is a paragraph 6(1)(*a*) benefit does not turn on its subjective value to the employee.

[38] More recently, in *McGoldrick v. The Queen*, 2003 TCC 427 at para. 22, 2003 D.T.C. 1375 (Informal Procedure), the Tax Court considered whether the value of cafeteria meals provided to employees was taxable. The employer in that case, a casino, prohibited its employees from bringing their own food onto the premises for sanitation reasons, and the location of the casino made eating elsewhere impracticable. The employees were therefore provided with a meal at the employee cafeteria. The Court accepted that the casino had a business purpose in providing meals. However, it concluded that the employer had nonetheless subsidized the employee's "ordinary every day" meal expenses, and that the value of this subsidy was a paragraph 6(1)(*a*) benefit. This Court upheld that disposition on appeal: *McGoldrick v. Canada*, 2004 FCA 189, 2004 D.T.C. 6407.

[39] The principle underpinning *McGoldrick* – that a payment is a "benefit" if it subsidizes a personal cost – was drawn from this Court's decision in *Canada (Attorney General) v. Hoefele (C.A.)* (1995), [1996] 1 F.C. 322 at 332, 95 D.T.C. 5602 (C.A.), leave to appeal to S.C.C. refused (1996), 204 N.R. 398n. There, this Court confirmed the purpose of paragraph 6(1)(*a*) in taxing employee "enrichment," and held that an employee's economic position is bettered when an employer covers his or her "ordinary, everyday expenses." The Tax Court also applied this principle in *Leduc (Succession De) v. R.* (1995), [1996] 1 C.T.C. 2873, 1995 CarswellNat 1373 (WL) (T.C.C.), a case dealing with payments meant to subsidize higher costs of living. In finding that the payments were paragraph 6(1)(*a*) benefits, the Tax Court wrote (at 2892), that the provision captures "payment[s] of ordinary, everyday expenses," which it defined as "expenses that all persons must bear for their sustenance wherever they may work and wherever they may live in this country." This Court affirmed the reasoning in *Leduc* in a later case dealing with similar facts: *Dionne v. Ministre du Revenu national* (1998), 235 N.R. 309 at para. 2, 99 D.T.C. 5282 (F.C.A.).

[40] Consistent with these authorities, the parties to this appeal agree that paragraph 6(1)(*a*) captures the reimbursement or subsidization of personal employee costs. I note that this interpretation of paragraph 6(1)(*a*) is in harmony with paragraph 6(1)(*b*), which brings into employment income, among other things, allowances for "personal" expenses. Further, as this Court recognized in *Phillips* (at 699-701), this interpretation of paragraph 6(1)(*a*) properly gives effect to its equalizing purpose. In that case, this Court wrote that personal costs are "matters of personal choice unrelated to employment," and, with respect to commuting costs in particular,

that "[e]very employee incurs some expense travelling to and from work. This is a necessary cost of being available for employment."

[41] The "personal" nature of commuting costs is well-established in the case law. In *Daniels v. Canada (Attorney General)*, 2004 FCA 125 at para. 7, 2004 D.T.C. 6276, this Court explained the reasoning behind this classification:

> [T]ravel expenses incurred by a taxpayer in travelling to and from his home to his place of work are considered personal expenses. They are not travelling costs encountered in the course of the taxpayer's duties. Rather, they enable him to perform them (see *Ricketts v. Colquhoun*, [1926] A.C. 1, 95 L.J.K. 82; *Hogg v. R.*, [2002] 4 F.C. 443, 2002 FCA 177, affirming [2001] 1 C.T.C. 2356; *O'Neil v. R.*, 2000 CarswellNat 1788, 2000 D.T.C. 2409, [2001] 1 C.T.C. 2091; *Luks v. Minister of National Revenue*, 1958 CarswellNat 297, [1958] C.T.C. 345, [1959] Ex. C.R. 45, 58 D.T.C. 1194).

[42] This authority disposes of Mr. Smith's argument that paying for his parking primarily benefitted his employer because it enabled his employer to have him as an employee. This Court has held that it is irrelevant that an employee would not have accepted a position without the provision of a particular benefit: *Desrosiers v. Ministre du Revenu national* (1999), 240 N.R. 169 at para. 10, 99 D.T.C. 5279 (F.C.A.). Further, it is in my view irrelevant that Mr. Smith was required by his employer to work at a location with paid parking and at hours that made it difficult for him to commute other than by car. Mr. Smith's commuting costs originated in his personal decision as to where to live: see Kim Brooks, "Delimiting the Concept of Income: The Taxation of In-Kind Benefits" (2004) 49 McGill L.J. 255 at 271 and 295. Indeed, Mr. Smith indicated in his testimony that after the year at issue he relocated closer to the airport.

[43] This is not to say that the costs of commuting, including parking costs, are always paragraph 6(1)(*a*) benefits if reimbursed or paid for by an employer. I note that subsection 6(6) of the *Income Tax Act* specifically excludes from the ambit of subsection 6(1) "any amount received or enjoyed by the taxpayer" in respect of, among other things, transportation expenses incurred commuting to special work sites or remote employment locations.

[44] It is also the case that expenses that are ordinarily "personal" may sometimes not fall into this category. In these circumstances, their payment or reimbursement will not be a "benefit" under paragraph 6(1)(*a*). This will turn on such factors as the relationship between the expense and the employee's duties or the conditions of the employee's work, and the employer's purpose in paying – in short, factors captured by the concept of the "primary beneficiary" as articulated in various decisions of this Court: see, in particular, *Lowe* at paras. 14-19.

[45] For instance, in *Huffman v. Canada* (1990), 71 D.L.R. (4th) 385, 90 D.T.C. 6405 (F.C.A.), this Court considered whether the reimbursement of clothing expenses to a plainclothes police officer fell within paragraph 6(1)(*a*). In that case, the evidence demonstrated that the officer was required to wear a jacket and overcoat while on duty, that this clothing had to be larger than his off-duty clothing to accommodate work-related equipment, and that the nature of his work caused extra wear on his clothing. This Court agreed with the trial judge's reasoning that "[t]he plaintiff was required, in order to carry out his duties as a plainclothes officer […] to incur certain expenses regarding his clothing, and reimbursement of these expenses should not be considered as conferring a benefit under s. 6(1)(a)": at 388, excerpting from *Huffman v. Minister of National Revenue* (1988), 24 F.T.R. 206 at para. 13, 89 D.T.C. 5006 (T.D.). Similarly, in

Guay v. Ministre du Revenu national (1997), 216 N.R. 101, 97 D.T.C. 5267 (F.C.A.), this Court held that the reimbursement of certain educational costs was not a paragraph 6(1)(*a*) benefit because those costs were imposed by "the very nature" of the employment: at para. 11; see also *Guay v. Canada (Attorney General)*, 2005 FCA 97 at para. 4, 2005 D.T.C. 2517.

[46] Also instructive on this point is the Québec Court of Appeal's reasoning in *Bernier c. Québec (Sous-ministre du Revenu)*, 2007 QCCA 1003, [2007] R.J.Q. 1519, leave to appeal refused, 2008 CanLII 3194 (SCC). That case concerned an engineering company's reimbursement of political contributions it encouraged its employees to make in order to preserve government contracts. The Court of Appeal held that those reimbursements were not "benefits" under section 37 of the *Taxation Act*, R.S.Q., c. I-3. In reference to this Court's decisions in *Huffman* and *Guay*, Justice René Dussault suggested (at paras. 69-72) that it is useful to ask whether "[l]a dépense est-elle personnelle ou découle-t-elle, plutôt, de la nature même de l'emploi?"

[47] This explains why an important factor in cases concerning employee parking is whether the employee uses a vehicle in the course of his or her employment duties. For example, in *Anthony v. The Queen*, 2010 TCC 533 at para. 41, 2010 D.T.C. 1356 (Informal Procedure), the Tax Court had no hesitation in concluding that employee parking at a private boarding school was a paragraph 6(1)(*a*) benefit, writing that none of the appellant employees "were required to use their vehicle in the course of their employment," and that it was difficult to see how the employer "could have otherwise been the primary beneficiary of the parking arrangement" in

those circumstances. Although that case was decided under the informal procedure, the Tax Court's findings were affirmed on appeal: *Anthony v. Canada*, 2011 FCA 336, 428 N.R. 223.

[48] In this case, Mr. Smith was not required to use a vehicle in the course of his duties. However, he argues that, given the importance of reporting for work on time in his field of employment, and the role airport parking plays in facilitating employee punctuality, the cost of parking was effectively imposed by, and became part of, his employment duties. On this point, he vigorously disputes the Tax Court judge's finding that Jazz Aviation received no benefit from paying for parking.

[49] This argument is similar to that advanced by one of the appellants in *Adler v. The Queen*, 2007 TCC 272, 2007 D.T.C. 783 (General Procedure), an executive who submitted that a parking pass facilitated his working longer hours and therefore carrying out his employment duties, and that this benefitted his employer. However, the Tax Court found in that case that the costs of parking remained inextricably linked to the appellant's personal choices: at para. 112; see also the discussion in *Schroter* at paras. 8-11.

[50] I agree with Mr. Smith that the record establishes Jazz Aviation's business purpose in paying for employee parking and that it received value from doing so. I further agree that it was irrelevant whether it would have been more economical for Jazz Aviation to terminate Mr. Smith's employment and hire a flight attendant who did not commute to work by car. In my view, the Tax Court judge's analysis on these points shows the dangers of overemphasizing the concept of the "primary beneficiary," instead of focussing on whether the employee has received

something of economic value. The point is well made by Professor Kim Brooks, who writes (at 271) in "Delimiting the Concept of Income: The Taxation of In-Kind Benefits" that

> the more important the good or service in the direct performance of the work of employees, the less likely it is to be providing a personal benefit to employees. The ultimate question that must be answered is, of course, whether or not employees are deriving a personal benefit from the provision of a particular good or service, not whether the good or service is being provided for employment-related purposes. However, the fact that the good or service is necessary for the discharge of employment-related activities is relevant in drawing an inference about whether it is also providing a personal benefit to employees. If employees could not do their job without the particular good or service, it is less likely to be serving a personal purpose. This inference is strongest if the good or service does not appear to be necessary for employees to do their job. In this case, the inference that it is providing a personal benefit to employees is compelling.

[51] In this case, it is in my view determinative that Jazz Aviation did not require its flight attendants to commute to work by car, but was content to preserve the personal nature of employees' commuting choices. This fact demonstrates that the cost of parking at the airport was a consequence of Mr. Smith's personal choices and not bound up in his employment duties or in the nature of his work as a flight attendant. In *Schroter*, this Court held (at para. 35) that parking of the "sort at issue" in that case was "an ordinary, every day expense." The same is true here, and this fact is dispositive of Mr. Smith's appeal.

[52] Finally, I note that Mr. Smith also submitted that the Tax Court judge erred in placing the onus of proof on him instead of on the Minister, though this position was not forcefully advanced in oral argument. In any event, the question of onus does not arise here in view of the clarity of the evidence before the Tax Court judge on the dispositive issue.

[53] For these reasons, I would dismiss the appeal with costs. Having considered the parties' submissions on costs, I would fix them at $2,000, all-inclusive.

"J.B. Laskin"

J.A.

"I agree.
David Stratas J.A."

"I agree.
Wyman W. Webb J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-161-17

(APPEAL FROM A JUDGMENT OF THE HONOURABLE SYLVAIN OUIMET DATED APRIL 21, 2017, (DOCKET NUMBER 2015-3969(IT)I)).

STYLE OF CAUSE:	MARK SMITH v. HER MAJESTY THE QUEEN
PLACE OF HEARING:	CALGARY, ALBERTA
DATE OF HEARING:	JUNE 11, 2018
REASONS FOR JUDGMENT BY:	LASKIN J.A.
CONCURRED IN BY:	STRATAS J.A. WEBB J.A.
DATED:	JUNE 10, 2019

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