Docket: 2007-1374(GST)G

BETWEEN:

COSTCO WHOLESALE CANADA LTD.,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on October 27, 2010, at Toronto, Ontario

Before: The Honourable Justice Campbell J. Miller

Appearances:

Counsel for the Appellant:	William I. Innes, Neil E. Bass and David E. Spiro
Counsel for the Respondent:	Marilyn Vardy, Sharon Lee and Suzanne M. Bruce

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JUDGMENT

The appeals from reassessments made under the *Excise Tax Act*, notices of which are dated December 15, 2006, and bear numbers 04BP-0622 2125 8018 for the period September 3, 2001 to September 1, 2002, 04BP-0630 4072 9219 for the period September 2, 2002 to September 28, 2003 and 04BP-0630 4072 6380, for the period September 1, 2003 to August 29, 2004, are allowed and the reassessments are vacated. Costs are to be addressed in accordance with paragraph 47 of my reasons.

Signed at Ottawa, Canada, this 30th day of November 2010.

"Campbell J. Miller"

C. Miller J.

Citation: 2010TCC609
Date: 20101130
Docket: 2007-1374(GST)G

BETWEEN:

COSTCO WHOLESALE CANADA LTD.,

Appellant,

and

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Respondent.

REASONS FOR JUDGMENT

C. Miller J.

[1] There is a risk in writing reasons for a judgment, in a matter that has been referred back from the Federal Court of Appeal, of tediously restating the facts. I refrain from doing so but suggest the parties read my Reasons of March 10, 2009 for a more detailed background.

[2] Briefly, Costco Wholesale Canada Ltd. ("Costco") and Amex Bank of Canada ("Amex") entered two agreements coincidentally, the Merchant Agreement and the Co-Branded Agreement, which together called for a payment of a merchant fee of X percent by Costco to Amex and Y percent by Amex to Costco, resulting in an effective fee of Z percent from Costco to Amex. The Respondent assessed Costco for GST on the Y percent on the basis it was a supply of something from Costco to Amex, in which Costco should have collected the GST.

[3] In March 2009, I gave Judgment allowing the Appellant's appeal on the basis that there was only a supply for consideration flowing from Amex to Costco, and that the quarterly payments (Y) from Amex to Costco were effectively a rebate of part of the fee, not a payment for any supply from Costco to Amex. In the alternative, I found if there was a supply of something from Costco to Amex, for which the quarterly payments were made, it was an exempt supply of financial services. The Respondent appealed.

[4] It is evident from the Federal Court of Appeal decision that the Respondent's position was that the supply from Costco to Amex was a supply of property, being the right of exclusivity, for consideration equal to the full amount of the quarterly payments (Y), a position not raised by the Respondent in her pleadings.

[5] The matter was referred back to me by the Federal Court of Appeal with the direction that "it may be decided, taking into consideration the defined meaning of "property" based on the existing evidence or any further evidence which the Tax Court Judge may decide to allow". Shortly after this direction, the parties and I agreed that the issues needing to be addressed by this direction were the following:

a) Do the rights of exclusivity as provided in paragraphs 2.11(a) and (b) of the Co-Branded Agreement constitute property as defined in section 123 of the *Excise Tax Act* (the "*Act")*?

b) Did Costco make a supply of those rights of exclusivity to Amex?

c) If so, were the rights each, or collectively, a single supply?

d) If the rights were not separately or together a single supply, but components of a multiple supply, how do sections 138 or 139 of the *Act* apply, if at all?

e) Depending on the Court's findings in c) or d), what part, if any, of the payments (Y) made pursuant to paragraph 3.01(a) of the Co-Branded Agreement, was consideration for the supply of the rights of exclusivity?

[6] I allowed the Appellant to recall two of its witnesses, Ms. Hawkins from Amex and Ms. Gilpin from Costco, who both briefly expanded their previous testimony, primarily as it pertained to the role of exclusivity in the deal between Costco and Amex. I also permitted the Respondent to call the director of commodities tax for Costco, Ms. Assaraf, who the Respondent subpoenaed.

[7] The following are the additional relevant facts from such evidence:

<u>From Ms. Hawkins (Amex's representative)</u>:

- there are two main elements to the deal: exclusive card acceptance and the Co-Branded arrangement, but her view was that of the two, the Co-Branded arrangement was the more important.

- the following factors were the principles considered in getting to the net merchant rate of Z:

    - nature of the industry

    - high volume

    - the precedent set in the United States

    - types of transactions

    - speed of pay

- exclusivity was not a key driver of the rate, though important to the deal.

- Amex profited greater from use of co-branded cards outside Costco.

- the rebate (Y) related to exclusive card acceptance.

From Ms. Gilpin (Costco's representative):

- the key to Costco in the deal was to get the rate Z, which was achieved because of the volume that could be offered by Costco

- Costco was less concerned with exclusivity and solely concerned with getting to the net merchant rate of Z

- Costco believed Amex was a good fit due to the similar profile of customers and the fact that both entities had a large business customer base

- Y had no meaning to Costco as it was Amex's idea

- Costco was interested in obtaining a general purpose credit card for its members, but only at the appropriate rate

Ms. Assaraf (also a Costco representative)

- the quarterly payments of Y were made by cheque

- she signed the letter of November 5 to Canada Revenue Agency (CRA), making representations on this matter, in which she stated the following:

> The arrangement relating to the acceptance of Amex cards by Costco is an exclusive arrangement for "in warehouse" purchases. That is, other than purchases made with Costco's private label credit card, customers can only use the Amex card for in warehouse purchases as an alternative to payment by cash or debit card. As a result of this preferred supplier status, Amex agreed to charge an effective discount rate of Z percent and this effective rate is implemented by way of the Y percent rebate payment provided under section 3.01(a) of the Card Agreement. This discount rate rebate structure was used by Amex to ensure the confidentiality of the reduced discount rate negotiated with Costco.

While Ms. Assaraf signed this letter on behalf of Costco, she indicated that it had been drafted by Costco's lawyers. She suggested the preferred supplier status was not because of exclusivity but due to the huge volume that could be offered by Costco.

Appellant's Position

[8] Mr. Innes stated the Appellant's position is simple: regardless of the tax treatment of exclusivity under the *Act*, at no time did Costco make a supply of exclusivity to Amex under the Co-Branded Card Agreement. The Appellant contends that my earlier decision on this fundamental point is not affected by whether exclusivity is property under the *Act*. The Appellant argues that my earlier finding that the right of exclusivity was simply a bargaining tool and was not to be considered a supply of anything (property or services) by Costco to Amex is unaltered. In addressing the issues identified earlier, the Appellant answers as follows:

a) for purposes of this litigation, the Appellant does not take issue with the proposition that the contractual rights granted by Costco to Amex under paragraphs 2.11(a) and (b) of the Co-Branded Agreement are choses in action that constitute property for the purposes of the *Act*.

b) the conduct of Costco in complying with its contractual obligations to Amex pursuant to paragraphs 2.11(a) and (b) of the Co-Branded Agreement did not constitute the making of a supply to Amex. Rather, such conduct was an "attribute" of the financing arrangement between Costco and Amex whereby Amex agreed to provide financial services to Costco. In this regard, the Appellant stresses the contractual covenant in section 2.11 of the Co-Branded Agreement is more in the nature of an attribute (e.g. a debtor will maintain a AAA credit rating or a contractor will employ only non-union personnel), not something being supplied, but a descriptor of their relationship. Without the supply of services from Amex to Costco, there could be no purchase of any exclusivity rights.

c) If Costco could be seen to be making a supply to Amex pursuant to the terms of the Co-Branded Agreement (which the Appellant submits was not the case), then the conduct of the Appellant in providing rights of exclusivity to Amex pursuant to the terms of that agreement amounted to components of a single supply.

d) Section 138 would deem the supply of exclusivity to Amex to be the provision of a financial service since that supply would be incidental to the other supplies made by the Appellant under the Co-Branded Agreement; similarly, section 139 would have the same effect since the total of all amounts paid to Costco pursuant to paragraph 3.01(a) was less than 50% of the total of all amounts, each of which would be the consideration for the supply of exclusivity had it been supplied separately.

e) Nil.

Respondent’s Position

[9] The Respondent takes the position there were reciprocal supplies; the rights of exclusivity were essential to the deal and were property, property supplied to Amex by Costco for an amount clearly identified as Y in the Co-Branded Agreement. It is simply not plausible, argues the Respondent, that Costco would give exclusivity rights to Amex for nothing. So, the Respondent answers yes to the issues a) and b) and draws a direct link between the payment of Y and the supply of the rights of exclusivity, therefore answering issue e) that the full amount of Y is consideration for such rights. With respect to issue c), the Respondent now maintains that it is no

longer feasible to look at all services and property provided by Costco to Amex as a single supply, rather Costco was making two separate supplies: one, a supply of exclusivity rights and two, a supply of marketing, promotional and administrative services in connection with the Co-Branded cards. This approach would, therefore, not engage sections 138 or 139 (issue d)). However, even if there were multiple supplies and sections 138 or 139 were engaged, the rights of exclusivity could not be seen as incidental to the other property or services.

[10] Finally, the Respondent argues that if I must resort to the definition of financial services, I must apply retroactively the July 12, 2010 amendments to the definition of "financial service" contained in Bill C9, which definition would exclude services or property from Costco to Amex as financial services.

Analysis

[11] I have repeated the relevant provisions, 2.11 and 3.01 (a) and (b) of the Co-Branded Agreement as Appendix A to these Reasons.

[12] The following definitions from the *Act* are also relevant to the analysis: section 123(1):

> "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;
>
> …
>
> "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;
>
> …
>
> "taxable supply" means a supply that is made in the course of a commercial activity;

[13] I wish to be clear at the outset that I heard no evidence that has caused me to change my view of the deal between Costco and Amex; that is, it was a deal first for the acceptance by Costco of the Amex card, and only the Amex card, at its Canadian stores for a net merchant fee charged by Amex of Z, and second for the co-branded card arrangement pursuant to which Costco provides marketing services to Amex for what is called a bounty fee (which is not the subject of this dispute). The difficulty arises because buried in the Co-Branded Agreement is a quarterly payment from

Amex to Costco (Y), which is not explicitly related to consideration for anything in particular. The reason, I find, is because it was simply a secret rebate to get to the real fee charged by Amex to Costco. Period - full stop.

[14] I will proceed to go through the arguments regarding property, supply and consideration, as they were so thoroughly addressed by the parties. But, this is dragging me into an artificial, or perhaps a better description is a manufactured, agreement, shaped by the technical provisions of the *Act* rather than by the common sense commercial view of the business deal. It is the tax tail wagging the dog! The question should not be how can we make this business deal fall into the tax regime, but how does the tax regime apply to this business deal.

Property

[15] While both parties agree that rights of exclusivity are property within the definition of property in the *Act*, it is helpful to clarify what that property is. Certainly the rights of exclusivity can be captured as a "right of any kind", yet it is more specifically a contractual right of action Amex has against Costco: a chose in action. As Justice Noel commented in the case of *RCI Environnement Inc. v. The Queen*[1], rights, such as agreements not to compete, are property within the broad *Income Tax Act* definition.

[16] This right, property, arises at the time of the entering of the agreement. It cannot exist independently of an agreement – it is a contractual right of action, therefore, obviously requires a contract. This is unlike tangible property which exists independently of any agreement. Bear in mind, I am not addressing the provision or supply of property, just the nature of the property itself.

[17] The Appellant suggests this type of property, this right of action, is more aptly described as an attribute, similar to a debtor agreeing to maintain a AAA credit rating or the loan will go into default, or a contractor agreeing not to employ non-union personnel. The Appellant provides some comments on "attributes" from the *Canadian Medical Protective Association v. The Queen*[2] case of former Chief Justice Bowman. Former Chief Justice Bowman's comments related to expertise, which I frankly do not put in the same category as the chose in action before me. A closer

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1 2008 FCA 419.

2 2008 TCC 33.

parallel may be a covenant that Costco agrees to maintain a certain level of sales volume or even agrees to a certain level of growth over a seven-year period. These rights would also be swept into the *Act*'s broad definition of property. It would seem that any covenant upon which a party to a contract might sue, any chose in action, could, according to the Respondent, be a property that may attract GST. I have an uneasy feeling that such an approach could open every contract to review to see if such contractual covenants, properties, would unintentionally transmogrify a contract for a supply of one thing from a vendor to a purchaser to a contract for the supply of two things, one from the vendor to purchaser and another from the purchaser back to the vendor. Given the nature of this type of property, I find that it cannot simply follow that because there is a property there must be a supply of this particular type of property.

[18] Indeed, the Appellant goes further than this and suggests that if there is a supply of anything it is not of property, but a supply of a service. The Appellant argues:

> "The only right the Appellant did not have after signing the Co-Branded Agreement that the Appellant had before, was the right it shared with every other merchant to issue its own charge card or accept any charge card from any issuer with whom it chose to sign an agreement. Whatever the Appellant gave up in assuming its obligations under section 2.11, it was not "property". It follows therefore, that if the exclusivity under the Co-Branded Agreement was a supply by the Appellant to Amex, such supply is properly characterized as a "service" for purposes of the *Act*."

This leads to a discussion of supply and of consideration.

Supply

[19] Again, I am dealing with a very broad definition. It is also useful to reproduce section 133 of the *Act*.

> 133 For the purposes of this Part, where an agreement is entered into to provide property or a service,
>
> (a) the entering into of the agreement shall be deemed to be a supply of the property or service made at the time the agreement is entered into; and
>
> (b) the provision, if any, of property or a service under the agreement shall be deemed to be part of the supply referred to in paragraph (a) and not a separate supply.

[20] A supply is a provision of property in any manner. Pursuant to section 133, where an agreement is entered into to provide property, the entering into of the agreement shall be deemed to be a supply of the property made at the time the agreement is entered into, and the subsequent actual provision of the property is deemed to be part of its supply. So, with this type of property, a right in action, the property comes into existence and is supplied coincidentally. But what is the subsequent provision of the property? It is Costco simply living up to the covenant it has made. It does not actually do anything, provide anything. It is merely just the coming into existence of the covenant in the contract that is meant to be the supply. While it is easy to appreciate the Respondent's argument that the rights of exclusivity are property and, as such, upon the entering of the agreement creating the property, section 133 deems there to be a supply, how does this alter my previous finding that the fundamental deal was a supply of Amex credit card services to Costco for Z? Costco agreed to not honour any other cards. How does this differ, for example, from renting a car and promising not to drive it on gravel roads? The car rental agency is supplying a car for pavement driving only; that is the supply. Here, Costco gets Amex's credit card services at Z provided it does not honour other cards (drive off paved roads). Amex is supplying its credit card services to a credit card-less customer – that is the supply. While neither side raised it, if Costco breached its covenant or car renter drove on gravel roads, and Amex or rental agency successfully recovered some amount, I presume section 182 would click in to subject such payment to GST, yet if the Respondent is right, the property, the chose in action, would already have been subjected to GST.

[21] If the rights of action vis-à-vis exclusivity are the supply of property, then what about all the other covenants Costco has provided in the Merchant Agreement? While I was not directed to these, I gleaned from the Merchant Agreement that Costco agrees to, amongst others:

- accept the card at all Canadian locations
- create a charge record
- verify the card is not altered
- ensure the card is used within valid dates
- verify the card is signed

- obtain authorization
- complete a record of credit
- submit all charges within seven days
- disclose refund policy to card members
- display Amex signs, decals, icons, etc.
- not accept the card for capital obligations
- test equipment
- train employees

[22] In signing the Merchant Agreement, wherein Costco agrees to be charged X by Amex, Costco has also supplied all these rights of action to Amex by obliging itself to do or not do a number of things. Presumably, if Costco did not live up to its many obligations, Amex could bring an action against Costco. Yet, surely these all relate to the supply by Amex of its credit card services. Technically, they are no different from Costco's agreement to not honour other cards. Is this simply a matter of degree; is it a matter of form?

[23] The Appellant answers this by calling the contractual covenant an attribute, an attribute that also happens to be a property under the *Act*, but not one that, with any commercial common sense, should be viewed as being provided by Costco to Amex for purposes of levying the GST. Does this overcome the Respondent's technical argument that, by adding the definition of property to section 133 to a separate payment going from Amex to Costco, one is inevitably led to a supply of property for consideration? It does, if one appreciates that these intangible properties cannot be separate stand alone properties: they can and do only arise as a result of the supply of the credit card services by Amex. None of these "choses in action" would be supplied in isolation; none would be supplied without the contract for the supply from Amex to Costco and consequently GST should only arise when there is a breach or if there is an explicit agreement for payment related to a specific chose in action. I will deal with this in discussing consideration.

[24] This situation is unlike *Vanex Truck Service Ltd. v. R.*[3] to which I was referred, where *Vanex* re-supplied fuel, licence and insurance to owner-operators of trucks. It was clear there were two supplies – one of the owner-operator services to *Vanex* and the other of the right to fuel, licence and insurance, effectively re-supplied by *Vanex*. The agreement was clear. The owner-operators had the option to obtain these supplies directly, not having to go through *Vanex*. Such supplies could exist independently of the supply of services by the owner-operators.

[25] This leads me full circle to my conclusion in the first round. Notwithstanding rights of exclusivity are intangible property, they are not what was supplied in this commercial deal for credit card services.

Consideration

[26] I am going to jump to the fifth issue addressing consideration, for even if the *Act* is to be interpreted as sweeping into its net these contractual covenants as supplies of property, I find the Respondent has not proven on balance that Y represents consideration for such supply. Subsection 165(1) of the *Act* imposes GST "on the value of the consideration for the supply".

[27] The Respondent points to the heading of Article 3.01, "compensation" to argue that the agreement explicitly identifies Y as compensation and, therefore, it must be consideration for something. I had already found in my prior Reasons that Y is effectively a rebate: the agreement was for the supply of American Credit Card services for Z. Is my conclusion altered now, if the rights of exclusivity are found to be a supply of property? No, the consideration simply went one way: from Costco to Amex of Z. The Respondent refers to the definition of consideration as including "any amount that is payable for a supply by operation of law". The Respondent connects the dots by suggesting because there is an amount payable pursuant to Article 3.01(*a*) (therefore, by operation of law) there is consideration. The Respondent goes on to complete the circle by arguing the evidence supports a direct link between the payment and the rights of exclusivity, the supply.

[28] Before analyzing this further, I note that this was not an argument raised by the Respondent in her pleadings. This has arisen from my findings in my original Reasons. I agree with the Appellant that in such circumstances, it is for the

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[3] 2001 FCA 159.

Respondent to prove on balance that some or all of Y is in fact consideration for the rights of exclusivity.

[29] Article 3.01(*a*) of the Co-Branded Agreement makes no mention that the quarterly payments are consideration for the rights of exclusivity. The section is silent. However, as I found previously, this is because the amount Y is simply a rebate, a rebate intended to be kept confidential. It reduces Amex's charge to Costco. It is not consideration from Amex to Costco notwithstanding the form is that of a payment from Amex to Costco: it remains a reduction of the fee flowing from Costco to Amex for the supply of services from Amex to Costco.

[30] I do not believe paragraph 153(1)(*a*) of the *Act* assists the Respondent: it reads:

> 153(1) Subject to this Division, the value of the consideration, or any part thereof, for a supply shall, for the purposes of this Part, be deemed to be equal to
>
> (a) where the consideration or that part is expressed in money, the amount of the money; and
>
> …

[31] This presupposes the payment is consideration flowing from Amex to Costco, which I have concluded it is not: it is a secret reduction of the consideration from Costco to Amex. The Respondent identifies the sole issue at this point as whether the payments were for a supply by Costco or simply gratuitous, claiming it is simply not plausible that such payments, in an arm's length situation, would be gratuitous. I do not believe this is the appropriate question as it continues to focus on Y, which I find is simply a reduction of X. Y is a percentage meant to remain private, not intended to reflect anything more than that. The question to be addressed at this point, <u>if I accept that Costco has supplied property and Y is consideration for something</u>, is whether none, some or all of the payments (Y) represent the value of consideration for that property (rights of exclusivity), to be taxable pursuant to subsection 165(1). My sense is that it is this element of the analysis which the Federal Court of Appeal was driving at. Interestingly, in addressing this as a valuation issue, neither party provided me with any valuations, connecting Y to exclusivity or any other contractual covenant or supply. The Appellant claims the value is nil and the Respondent claims the value equals the full amount of the payment. Both rely on the evidence from Costco and Amex witnesses from Canada. Neither presented any evidence of valuators or of American individuals responsible for negotiating X, Y and Z in the United States, which percentages were simply adopted in Canada.

[32] The Respondent argues the evidence is clear that exclusivity was an important part of the deal, and, relying heavily on the November 4, 2005 letter from Ms. Assaraf to the CRA, that Y relates entirely to the supply of the exclusivity rights. The Appellant acknowledges exclusivity is an important part of the deal but that it went into getting to the rate of Z, along with many other factors. The Appellant argues that the Respondent cannot prove what value is specifically attributable to exclusivity rights. Given the Respondent has the burden of proof and has not met it, no amount can be identified as the value of the consideration for the exclusivity rights. I agree with the Appellant.

[33] Addressing this now then as a valuation issue, (although I want to reiterate my view here that Y is simply a fiction, a secret to get to Z.) I have not been convinced, based on the evidence before me, that all of Y is the value of the consideration for the exclusivity rights. Maybe some part of it is but how much is entirely left to speculation.

[34] The Respondent argued that in my prior Reasons I found Y related to the exclusive acceptance of Amex cards. The Respondent referred to paragraphs 27, 30(i) and 32 of my earlier Reasons. What I found was that Costco got a better rate due to exclusivity, which goes entirely to the determination of Z. What else does the Respondent rely upon to prove Y is the value of the consideration for the exclusivity rights?

[35] First, the Respondent relies on the letter of November 5, 2005 from Ms. Assaraf. This letter, however, does not say that Y represents the value of the exclusivity rights. It does say exclusivity played a role in getting to Z and that the X minus Y equals Z formula was simply used to maintain confidentiality. This supports Costco's view, through the testimony of Ms. Gilpin, that Costco was only concerned about Z.

[36] Further, Ms. Assaraf, who wrote the letter, testified that preferred supply status had more to do with high volume than anything else, though the letter does not explicitly say that. In reading this letter as a whole, it remains clear Costco's position is that Y is simply a rebate and the only supply is from Amex to Costco for Z.

[37] Second, the Respondent relies on comments of the Appellant's counsel at the hearing in December 2008. Specifically:

a) As a result of the agreement between Costco and Amex, the in-house credit card of Costco was phased out and the only credit card that could be used inside the warehouses was Amex.

This was obviously an enormous commercial advantage to Amex, based on the evidence and just common sense, and it was prepared to do a very lucrative deal with Costco to achieve this exclusivity.

The essential elements of the Merchant Agreement and Co-Brand Agreement were the exclusive acceptance of all American Express cards at the Costco warehouses, and the establishment and administration of the Amex-Costco co-branded consumer cards and co-branded small business cards.

b) a suggestion that it is not reasonable to assume the Article 3.01(a) quarterly payments (Y) relate to the peripheral hodge-podge of services involved in the Co-Branded Agreement.

[38] The Respondent argues the Appellant's counsel cannot now suggest some portion of Y is allocable to obligations other than exclusivity. I did not conclude that the Appellant's counsel was suggesting that any portion of Y was anything other than a rebate, factoring into the calculation of Z. My view of the Appellant's position has always been that it is simply inappropriate to view Y as consideration for anything, notwithstanding an acknowledgment exclusivity was an important part of the deal.

[39] Finally, the Appellant relies on the testimony of Ms. Hawkins and Ms. Gilpin. Ms. Hawkins, Amex's representative, did not deny exclusivity was an important part of the Amex Costco deal; indeed, she acknowledged it was one of two main elements. This view was supported by extracts from news releases. Yet, Ms. Hawkins also made two clarifying points: one, her view was that the second main element, the Co-Branded arrangement was more important; two, though exclusivity was important it did not drive the rate. She identified the driving factors as the nature of the industry (warehouse club industry), the high volume (which could be grown through the Co-Branded arrangement and acceptance of Amex cards generally), the precedent agreement from the United States, and to a lesser extent, the types of transactions and speed of payment.

[40] I found nothing in Ms. Gilpin's recent testimony that supports the position that Y is compensation for the rights of exclusivity. Costco's sole concern was Z. As Ms.

Gilpin testified: "we wanted a general purpose credit card for our members", and she was adamant this would only be achieved at the rate Z.

[41] I draw the following conclusions with respect to any possible allocation of the value of the consideration to rights of exclusivity. First, rights of exclusivity were a factor in Costco achieving its desired rate of Z with Amex. But, there were many other factors considered by Amex in agreeing to charge only Z. There were also many other covenants or choses in action as part of the commercial deal between Costco and Amex. There was no evidence of negotiations surrounding the determination of Y. There was also no comparative evidence of the value of components of a net discount fee. I can envisage situations of varying degrees of a credit card company – wholesaler arrangement:

a) credit card company A is just one of the major credit card companies whose card is accepted and there is no co-branded arrangement;

b) credit card company A is just one of the major credit card companies whose card is accepted yet some other credit card company has a co-branded agreement;

c) credit card company A is just one of the major credit card companies whose card is accepted but it has the co-branded card agreement;

d) credit card company A is the only credit card whose card is accepted but it has no co-branded agreement;

f) credit card company A is the only credit card accepted plus it has a co-branded agreement.

I would suppose, though heard no evidence in this regard, expert or otherwise, that each of these situations might result in a different net rate.

[42] There is insufficient evidence to allocate any of the factors that went into the determination of Z between the determination of X or Y, and given my earlier view that the two agreements are to be read as one, and given that the only reason for having Y was to keep Z confidential, the only approach in assessing value is to look at Z, the net merchant fee, and not some artificial Y, especially where the agreement is silent as to what Y relates. It would then be appropriate to ask if Z represents the net consideration for supplies flowing in opposite directions (a conclusion I have not reached). Has there been sufficient proof to clearly allocate consideration flowing in

each direction? The Respondent argues that the quarterly payment in and of itself is proof of consideration. She relies on Justice Noel's statement in the GST case of *Commission Scolaire des Chêne and Her Majesty the Queen*[4]:

> [18] Consideration under the Act is easily discernable when the obligation to pay arises under a contract. It is more difficult to identify when the obligation to pay arises from a source other than a contract, as contemplated in paragraph (*b*) of the definition of the term "recipient" in section 123. It is that difficulty that lead to the requirement of a "direct link" recommended by Technical Interpretation Bulletin B-067 regarding the "goods and services tax treatment of grants and subsidies" ("Bulletin B-067"). In this case, the judge below concluded that there was no such link.
>
> [19] Under the Act, in order for a payment to constitute consideration, it must have been made pursuant to a legal obligation (contractual or otherwise) and must be closely enough linked to a supply that it may be regarded as having been made "for" that supply (see the definition of the term "consideration" in section 123). That is why a direct link is required.

[43] While there may be a link between exclusivity and the Y payment, the Respondent has not proven that the payment relates entirely to the rights of exclusivity.

[44] If I am correct in viewing Y as a rebate, the proposition from the *Commission Scolaire des Chênes* case does not apply. But, even if Y is consideration for something, I reiterate that the Respondent simply has not proven to me that the full amount of Y is consideration only for the rights of exclusivity. Why would none of the other property or services have any value attributed to them? Just because Mr. Innes suggested in argument in December 2008 that Y is unlikely to relate to the "hodge-podge" of other services provided by Costco, I ask why not. Also, given there are two main elements to the deal, why should all of Y relate just to one? If the bounty fee is a small (1.5%) percentage of "consideration" to Costco, yet the Co-Branded deal is a major factor (indeed the most important one according to Ms. Hawkins) in getting to Z, it suggests to me a bit more went into getting to Z than just exclusivity rights. For example, under section 2.03(e) of the Co-Branded Agreement Costco gives access to Amex to its membership list. Given Ms. Hawkins' testimony of the significant benefit to Amex of a co-branded cardholder using the card outside

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4 2001 FCA 264.

Costco, this covenant by Costco is huge. Where is the consideration for this? It is not part of the bounty fee. Why could it not be thrown into the factors considered in Y? The Respondent has not proven on balance any allocation of Y to any elements of the deal.

[45] I combine these views with the lack of any valuation evidence, the lack of any evidence in negotiations that put any numerical value to exclusivity rights, the wording of Article 3.01(a) that specifically avoids stating it is consideration for anything, and I weigh that against statements that exclusivity was important to the deal, and I find the Respondent has not proven a value for consideration attributable to exclusivity rights.

[46] Given that conclusion, I find it unnecessary to address the application of sections 138 or 139 of the *Act*, nor the implication of the recent amendments (Bill C-9) to the definition of financial services.

[47] In summary, I heard no additional evidence to sway me from the view that Y is only related to Z, which goes to the supply from Amex to Costco, not to any supply from Costco to Amex. Further, if there was a supply of property from Costco to Amex, being the exclusivity rights, the Respondent has failed to prove what consideration, if any, is allocable to that property. For these reasons, I stand by my earlier Amended Judgment of March 10, 2009. The Appellant did not want to address costs until receiving my Judgment and the Respondent wanted the right to respond. The Appellant shall therefore provide written representations on costs to me and the Respondent by December 31, 2010, and the Respondent shall provide written representations in response by January 21, 2011. If I receive no representations from the Appellant by December 31, 2010, I award costs in accordance with the tariff to the Appellant.

Signed at Ottawa, Canada, this 30th day of November 2010.

"Campbell J. Miller "

C. Miller J.

APPENDIX "A"

Excerpts from the American Express/Costco Co-Branded Card Program Agreement dated November 4, 1999

…

Section 2.11. Exclusivity.

(a) In Canada, during the term of this Agreement, neither Costco nor its parent company, subsidiaries or affiliates will (i) issue a General Purpose Card; (ii) issue a House Card which has a rewards component based upon spend behaviour; (iii) issue a general purpose stored value card; (iv) issue a stored value card accepted only at Costco establishments which has a rewards component based upon spend behaviour; (v) in conjunction with any other card issuer, association or network (A) issue, market, or co-brand with respect to, any House Card (subject to the penultimate sentence of this subsection (a)) or General Purpose Card, (B) issue, market, or co-brand with respect to, a general purpose stored value card, or a stored value card accepted only at Costco establishments that has a rewards component based on spend or other transaction behaviour; or (vi) engage in, or allow its customer lists to be used for, promotions of any form of payment vehicle (other than simply indicating acceptance) or any product containing a Prohibited Mark defined in Section 2.11 (b) below. It is understood and agreed that the above restrictions shall not apply to the House Card being issued by Associates Financial Services of Canada Ltd. on the Effective Date or other House Card product (provided that Costco shall not have more than one House Card regardless of the issuer) so long as such House Card does not have a rewards component based on spend, other transaction behaviour or other continuity-based (i.e, on-going rather than one off promotions) rewards component. A stored value card with a rewards component based on spend or other transaction behaviour shall not be construed hereunder to include a discounted stored value card.

(b) In Canada, with the exception of (i) *INTENTIONALLY DELETED*, and (ii) a House Card not prohibited under Section 2.11 (a) above, Costco agrees to the following: Other than an Amex Card, Costco (and their parent company, subsidiaries and affiliates which own or operate Costco Warehouses in Canada) shall not, for the first seven Contract Years of this Agreement, accept for the purchase of goods and services at Costco Warehouses any charge, credit, Off-Line Debit, stored value or smart card which contains any of the following name brands, logos or marks ("Prohibited Marks"): Visa, MasterCard, Discover, Novus, Diner's Club (and the successor brand names, logos or marks of any of the foregoing) or a newly created

national credit card association or network brand name, logo or mark, provided, however, that Costco has the right to continue to accept any and all forms of payment for the following transactions or businesses: Costco's gasoline stations, catalogue- or mail order- based transactions, travel programs, electronic commerce via the Internet or other network which accesses the Costco website(s), Costco Membership Fees transacted through Costco's regional offices (provided, however, that Costco shall prompt for use of the Amex Card on such transactions by asking the customer if he or she would like to put the Membership Fee on the American Express Card), government purchase programs involving purchases from Costco by government agencies and/or private persons or entities who are required to use a particular payment vehicle because of a contract with governments, (it being understood that Costco shall not promote acceptance of any of the products with Prohibited Marks for such transactions and businesses). In addition, Costco shall not display in any manner at or in Costco Warehouses (including but not limited to signage or decals) acceptance of on-line debit products having the Prohibited Marks even if such on-line products are accepted for payment. Within 120 days after the seventh Contract Year, and subject to the notice requirement under Section 5.01 (e) hereof, Costco may begin accepting any charge, credit, debit, stored value or smart card containing the Prohibited Marks. If within 120 days after the seventh Contract Year, Costco does not begin accepting a card containing a Prohibited Mark, then Costco shall be prohibited from accepting any such card for the remainder of the term of this Agreement (for example, (x) if Costco does not begin accepting any products with Prohibited Marks, then Costco shall be prohibited from accepting any such products for the remaining term of this Agreement, or (y) if Costco begins accepting Visa within the 120 day period, but not MasterCard, then Costco shall not accept MasterCard or any other products with the Prohibited Marks other than Visa for the remaining term of this Agreement). Costco represents and warrants that compliance with this Section 2.11 (b) shall not violate any agreement Costco may have in place with respect to such other card products.

…

Section 3.01. Compensation.

(a) Within thirty (30) days after the end of each calendar quarter during the term of this Agreement, Costco shall be paid an amount equal to "Y"% of the Costco Net Volume of Charges during that calendar quarter. Provided that for the time period ending January 31, 2000, the amount paid to Costco shall equal ___% (instead of "Y"%) of the Costco Net Volume of Charges during that period. Provided further that, if by April 8, 2000 Costco does not complete its information systems requirements to support the issuance of the Co-Branded Consumer Cards, then for the time period beginning April 8, 2000 through the date Costco completes its information systems requirements, the amount paid to Costco shall equal ___% (instead of "Y"%) of the Costco Net Volume of Charges during that period. (It is understood that, to make a payment promptly, Amex may be required to use Net

Annual Volume of Charge figures which are tentative, and therefore may require adjustments in a future calendar quarter.)

(b) In exchange for the marketing efforts provided by Costco as contained in Section 2.02 (a) above, Costco shall be paid for each 12-month period beginning with the issuance of the first Co-Branded Card, the amount specified in the charts below for each Co-Branded Consumer Card Account and each Co-Branded Small Business Card Account acquired during that 12-month period. All payments are inclusive of applicable Taxes. **"Acquired"**, for purposes of this subsection (b) means that a Co-Branded Card Account was approved, a Basic Card is issued by Amex, and the Basic Card is not cancelled prior to the end of the calendar quarter in which it was approved. The number of Accounts Acquired is determined for each such 12-month period independently under the charts below as if each 12-month period begins with 0 Acquired Accounts, i.e., there is no accumulation from one 12-month period to the next 12-month period. Payments under this subsection (b) shall be made within thirty (30) days after the end of each calendar quarter in a given 12-month period.

…

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