

BETWEEN:

ZOMARON INC.,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

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Appeal heard on January 23 **and January 24**, 2019, at Toronto, Ontario

Before: The Honourable Justice K. Lyons

Appearances:

Counsel for the Appellant:	Jacob Yau
	Yves St-Cyr
Counsel for the Respondent:	Charles M. Camirand

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**AMENDED JUDGMENT**

The appeals made under the *Excise Tax Act*:

1. of the reassessment by notice dated January 12, 2016 for the reporting period from January 1, 2013 to December 8, 2013; and
2. of the assessment by notice dated March 24, 2015 for the reporting period from April 1, 2014 to June 30, 2014;

are allowed and the reassessment and assessment are referred back to the Minister of National Revenue for reconsideration and reassessment, in accordance with the Reasons for Judgment, on the basis that the supply of services rendered by the appellant for consideration received is an exempt supply of arranging for a financial service.

Costs are awarded to the appellant. The parties shall have 30 days from the date of this Judgment to reach an agreement on costs. Failing that, the parties shall have 30 days to file written submissions on costs. Submissions shall be no more than 10 pages.

**This Amended Judgment is issued in substitution of the Judgment dated February 28, 2020 to amend the hearing dates as well as typographical errors in paragraph 21 and footnote 34.**

Signed at **Ottawa, Canada**, this **13** day of **March** 2020.

“K. Lyons”

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**Lyons J.**

BETWEEN:

ZOMARON INC.,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

**AMENDED REASONS FOR JUDGMENT**

Lyons J.

[1] Zomaron Inc. (“Zomaron” or the “appellant”) appeals the reassessment and assessment for the periods in issue made by the Minister of National Revenue. The Minister included in Zomaron’s net tax harmonized sales tax collectible on fees it received as consideration for its services in respect of Elavon Canada Company (“Elavon”) and First Data Loan Company, Canada (“First Data”) providing merchants with payment processing services for credit and debit card (“card”) transactions accepted by merchants for goods and services sold by merchants to customers.

[2] Elavon and First Data paid fees to Zomaron for its services which included, amongst other things, Zomaron negotiating with and obtaining from prospective merchants a commitment to receive card payment processing services from Elavon and First Data.

**I. Issue**

[3] The issue is whether supply rendered by Zomaron in consideration for the fees it received from Elavon and First Data constitutes an exempt “financial service” within the meaning of paragraph (l) of the definition in subsection 123(1) of Part IX of the *Excise Tax Act* (the “Act”) or a taxable supply.

[4] Zomaron asserts it was an intermediary “arranging for” card processing payment processing services, a financial service, to be provided by Elavon and First Data to merchants. Accordingly, Zomaron’s services in respect of the goods and services tax/harmonized sales tax in issue (collectively “GST”) constitutes a

financial service defined in subsection 123(1) of the *Act*, and is therefore exempt from GST pursuant to Schedule V, Part VII of the *Act*. Conversely, the respondent contends Zomaron's supply of services were preparatory and promotional that fall within an exception to the definition of financial services by virtue of the application of paragraph 123(1)(r.4) of the *Act* and thus is a taxable supply.

[5] Tarique Al-Ansari is the president and Chief Executive Officer of Zomaron to whom the executive management team reports. Mia Huntington is the Senior Vice President and General Manager of Elavon. Ms. Huntington's testimony was largely consistent with that of Mr. Al-Ansari's evidence. I found both to be credible witnesses.

## **II. Facts**

### *Partial Agreed Statement of Facts*

[6] The parties tendered a Partial Agreed Statement of Facts ("PASF") and agreed to certain exhibits as evidence.<sup>1</sup> The PASF, in part, states as follows:

1. The assessments are for the periods from January 1, 2013 to December 8, 2013 and from April 1, 2014 to June 30, 2014 (collectively, the "Period").
2. The amounts in dispute relate solely to consideration paid by Elavon Canada Company ("Elavon") and First Data Loan Company, Canada ("First Data") to the Appellant during the Period. During the Period, payments received by Elavon accounted for approximately 99% of the total consideration received by the Appellant.
3. The relationship between the Appellant (Zomaron Inc.) and Elavon commenced in October 2009 when the parties entered into a standard-form agreement used by Elavon to set out and formalize certain basic obligations of both Elavon and an ISO/MSP partner (the "Elavon Agreement"). A copy of the Elavon Agreement is attached as Exhibit "1". A copy of the agreement with First Data (the "First Data Agreement") is attached as Exhibit "2".
4. Elavon and First Data are "merchant acquirers" or "merchant processors", (collectively, the "Acquirers/Processors") providing merchants with payment processing services for credit and debit card transactions (i.e. Visa, MasterCard, American Express and Interac). The Acquirer/Processor's customers are the merchants at whose premises or on whose websites such payment cards are used by cardholders to pay for goods and services.

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<sup>1</sup> Paragraphs 23 to 25 of the PASF are not included as Zomaron conceded the issue involving an input tax credit and will no longer be arguing sections 138 and 139 of the *Act*. References to the language "in conjunction with", used to refer to multiple supplies, is no longer relevant.

5. The Acquirers/Processors acquire merchants through various channels, including the use of Independent Sales Organizations (“ISOs”) and Member Service Providers (“MSPs”). The Appellant is a registered ISO (for Visa) and MSP (for Mastercard). ISOs/MSPs are registered with Visa or Mastercard and must comply with various rules and regulations, including the payment network regulations established by these credit brands.

6. The Appellant is primarily responsible for, *inter alia*, seeking out prospective merchants to receive card payment services provided by the Acquirers/Processors, negotiating with the prospective merchants the rates and fees of such card payment services, and may also negotiate certain terms and conditions related to such card payment services, to the extent provided in the Merchant Application form, attached as Exhibit “3”, in the case of Elavon. The terms and conditions that are included by reference in the Merchant Application are collectively attached as Exhibit “4”. The equivalent Merchant Application and terms and conditions relevant to First Data are attached as Exhibit “5” and Exhibit “6”, respectively.

7. The Merchant Application form is submitted to the Acquirers/Processors. Once approved by the Acquirer/Processor, the merchant becomes contractually bound to the Acquirer/Processor according to the terms negotiated in the Merchant Application and the terms and conditions included by reference.

8. Every time a payment card is used to pay for a good or service sold by a merchant to its customer, there are several layers of fees charged by various parties to the merchant. The aggregate fee charged by Visa and MasterCard (the card brands) and the card issuer (e.g. TD Bank, CIBC, Scotiabank, etc.) on all credit card transactions is called an “interchange fee”. The interchange fee covers the costs of the issuing bank and card providers and will vary depending on several factors, including the type of card (debit, credit or rewards cards) and the type of transaction and related risk (e.g. a retail transaction vs online transaction over the internet). For instance, a Visa card with travel points/rewards used on an eCommerce website will have a higher interchange fee than credit cards that have no rewards.

9. For each payment processing transaction it does for a merchant, the Acquirer/Processor charges a separate fee on each transaction, which is in addition to the interchange fee. The aggregate of the interchange fee and the Acquirer/Processor’s fee is known as a “buy rate”.

10. The Appellant’s revenue for the service it supplies to the Acquirer/Processor are calculated according to the formula contained in schedule “A” to the Elavon Agreement or schedule “A” to the First Data Agreement, as the case may be.

11. Generally, the Appellant’s revenue is calculated based on the difference between the amount that it negotiates with a prospective merchant and the buy rate (the “markup”). This mark-up is shared between the Appellant and the Acquirer/Processor. The Appellant’s share increases according to the monthly

volume and size of the payment processing transactions processed by the Acquirer/Processor to the merchants recruited by the Appellant.

12. If the Appellant negotiates a rate with the merchant that is higher than the buy rate, the Appellant will profit from a transaction. If, however, the Appellant negotiates a rate that is less than the buy rate, it will incur a loss. Due to interchange fees varying across 100+ different card types, an Appellant may negotiate rates at a loss position for some transaction types and at a profit position for others as a pricing strategy in order to entice prospective merchants. Ultimately it is on the Appellant, to balance negotiating a competitive price with merchants and remaining profitable.

13. In addition to the duties and obligations set out in this standard-form agreement, the appellant provides numerous services to the Acquirers/Processors, including the following:

- The Acquirers/Processors rely on the Appellant to, *inter alia*, locate prospective merchants, complete with a prospective merchant the Merchant Application, and gather information including verifying if the merchant continues to comply with payment network requirements.
- The Appellant has considerable autonomy in respect of the negotiations involved with prospective merchants. This includes setting, establishing, and adjusting, *inter alia*, the following:
  - o rates and pricing in respect of each and every type of payment card;
  - o length of contract; and
  - o sale price, installation
  - o and, in the case of Elavon, merchant support.

14. The Acquirer/Processor is not involved in the negotiation process with prospective merchants. The Appellant may negotiate prices that are above or below the established buy rates, for example the Appellant may offer pricing to a merchant that is below the buy rate as a pricing strategy. In such circumstances, and subject to paragraph 20, the Appellant would incur a loss on each card transaction at that merchant.

15. As part of completing a Merchant Application, and in order to determine appropriate pricing during negotiations with prospective merchants, the Appellant analyzes all of the relevant factors, such as:

- type of business or industry;
- level of competition;

- volume of transactions;
- merchant location;
- size of each transaction;
- types of cards that customers would use at any particular merchant; and
- methods used by a merchant to process a card (such as via POS device, Internet, telephone, or otherwise).

16. The Appellant verifies the legitimacy of the merchant's business, including conducting site surveys and reporting any indication that the merchant's activities are anything other than *bona fide* sales of products or services and aids in ongoing compliance with policies such as anti-money laundering and know-your-customer requirements of the payment industry.

17. The Appellant spends considerable amount of time, effort and funds in delivery of these services, to ensure its employees are trained to explain the acquiring services to merchants, in conducting the verification of merchants and, in the case of Elavon, providing training services to merchants.

18. As consideration for its services, the appellant receives a portion of the transaction fee. The Appellant's compensation is tied directly to the merchant transactions throughout the entire term of the relationship. The Appellant receives a portion of the fee paid by the merchant for every transaction processed through the Acquirer/Processor. The Appellant does not receive any separate remuneration for any administration or customer services rendered.

19. Both the merchant and the Acquirers/Processors have a high degree of reliance on the Appellant in its performance of these activities. The Appellant maintains an on-going relationship with both the merchant and the Acquirers/Processors.

20. The Acquirer/Processor reserves the right to accept or deny any potential merchant, on the basis of credit worthiness and associated risk of the particular business. The Appellant's approval rate on merchants submitted to Elavon was over 98% during the Period.

21. For the services provided to the Acquirers/Processors, the Appellant received a total of \$1,189,863.71 and \$454,044.66 for its 2013 and 2014 reporting periods, respectively.

22. The Appellant did not collect and remit GST/HST in respect of the supplies at issue, taking the position that they were "financial services" within the meaning of subsection 123(1) of the *Excise Tax Act* (the "Act") and were exempt from GST/HST pursuant to Schedule V, Part VII of the Act.

[7] For brevity, in these reasons I will refer to the Acquirers/Processors, Elavon and First Data, collectively as the “Processors.” I will also refer to the Elavon Agreement and the First Data Agreement collectively as the “Agreements.”

*Witnesses*

[8] Mr. Al-Ansari testified that, in seeking and soliciting prospective merchants, Zomaron educates merchants, partly using websites, on the payment processing industry (“Industry”) and the use of Zomaron’s services over those of other ISO/MSPs. Before becoming an ISO/MSP, Zomaron was required to find a partnering acquirer/processor; this entails several steps.<sup>2</sup> An ISO/MSP must then register with Visa and MasterCard, and Zomaron did so. Only then, he said, can an ISO/MSP sign up merchants to accept card payment processing services with acquirers/processors. An annual due diligence process is conducted by acquirers/processors.<sup>3</sup>

[9] Elavon is a merchant acquirer providing businesses with payment processing services for card transactions at the merchant’s premises or websites. It distributes payment processing services through multiple distribution channels. Ms. Huntington said these include ISOs/MSPs and some non-ISO/MSP channels like inside sales, tele-sales, and sales representatives. ISOs/MSPs provide services related to payment processing and approximately 65% of all revenues earned by Elavon in Canada are generated through the ISO/MSP channel. The level of service provided by an ISO/MSP to a merchant depends on the ISO/MSP; this gives an ISO/MSP the opportunity to differentiate themselves. She described Zomaron as providing the highest level of service to maintain the customer base. Zomaron represents between 5.5% to 6% of all of Elavon’s revenues in Canada.

[10] Ms. Huntington produced a letter from Elavon sent to Canada Revenue Agency in December 2017. It indicated, in part, that Elavon relied heavily on Zomaron and as an ISO/MSP it is responsible for identifying target market segments, lead generation, pipeline management of self-sourced opportunities, requirements gathering and solution design, point of sale equipment, as well as

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<sup>2</sup> Submitting a business plan identifying the strategy, targeted industries, geographic considerations, markets and value added offers. Most ISO/MSPs enter the Industry with a particular background and strategically target segments of it related to their pre-existing experience. As part of this process, there is a \$10,000 fee to Visa and a \$10,000 fee to MasterCard. The registration also involves background checks (any criminal history, fraud charges and bankruptcies) and an inspection of the company’s financials.

<sup>3</sup> Includes a site inspection, submissions of financials, and ongoing proof of existence of the ISO/MSP with the government.



negotiating processing rates and terms with prospective merchants. After the merchant account is established, the ISO/MSP provides ongoing, first-line customer service to the merchant.”<sup>4</sup> Her testimony was consistent with its content.

[11] During the Period, 2000 merchants of varying sizes in various industries processed \$2 billion worth of transactions annually and had signed up for payment processing accounts through Zomaron.<sup>5</sup> Currently, Zomaron has over 5000 merchants.

[12] Zomaron is required to comply with the governing rules and regulations of payment networks and other organizations. All of Zomaron’s sales agents are registered individuals with the Processors and are trained by Zomaron on the card payment processing Industry. They are also trained regarding the rules of the Financial Consumer Agency of Canada (“FCAC”)’s Code of Conduct (the “Code”) and fee negotiations.<sup>6</sup> Zomaron is subject to these rules and the Code, all of which are designed to protect merchants and provide guidelines to ISOs/MSPs upon signing up merchants, disclosing fees, switching processors, and the right to terminate agreements. Zomaron must submit information to FCAC to demonstrate compliance with the Code.

### *The Industry*

[13] Generally, MasterCard and Visa provide the infrastructure within the Industry to participants to facilitate processing of card payments and transfer of funds electronically. MasterCard and Visa allow financial institutions to issue credit and debit cards to customers who then use the cards to purchase goods or services from merchants. Elavon, as a Processor, processes the card transactions via the network enabling the merchant to accept the card payments and then receive the funds for same.

[14] Industry participants and their respective roles are as follows:

- i) The ISO/MSP connects a merchant with an acquirer/processor.

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<sup>4</sup> Exhibit A2, tab 13, paragraph 3. Letter authored by her, Elavon’s tax department and its legal counsel to describe Elavon’s relationship with Zomaron and its role.

<sup>5</sup> Merchants can include car dealers, vets, optometrists, dentists, restaurants, general grocery stores, law firms, hospitals, and charities.

<sup>6</sup> Exhibit 16.

- ii) The acquirer sets up the merchant account. The payment processor is the network that communicates the transaction electronically from the merchant's place of business through to payment networks.<sup>7</sup>
- iii) Combined, the acquirer/processor set up the processing account enabling the acceptance of the card payment by the merchant in its place of business and the processor then collects funds from the card issuer and deposits same into the merchant's bank account and debits fees from the account monthly.
- iv) The payment network or card brand (Visa, MasterCard, American Express and Interac) connects the card issuer (for example, TD Bank) with the merchant.
- v) The card issuer issues the card to the cardholder/customer whom uses the card as payment to purchase goods or services from the merchant.

[15] Appendix I to these reasons is an overview depicting the flow of a transaction within the Credit Card Payment Processing network. To illustrate a typical transaction, assume the following: During negotiations, Zomaron and the merchant agreed that the merchant would pay 2% on all transactions that the merchant accepts from customers using such cards. The merchant, a flower shop, sells flowers to a customer for \$100. TD Bank, the card issuer of the TD MasterCard, and MasterCard, the card brand, is the payment network that connects the TD Bank with the merchant. Elavon collects \$100 from TD Bank (the customer's issuing bank as it is a TD MasterCard) and deposits the \$100 to the merchant's bank account the next day.<sup>8</sup> The merchant nets \$98. At month's end, Elavon collects the \$2 merchant fee (2%) from the merchant's bank account which is then shared by various Industry participants as follows.

[16] Of the \$2 fee, Elavon pays \$1.50 (the interchange fee) to the card issuer and payment network (\$1.30 and 20 cents, respectively).<sup>9</sup> The remaining 50 cents (the "mark-up") is the revenue shared between Elavon and Zomaron; this is a negotiated split of 30% - 70%, respectively. Therefore, Elavon retains 15 cents and pays Zomaron 35 cents, representing its portion of the fee as consideration for services. Zomaron has the discretion to negotiate the mark-up with the merchant.

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<sup>7</sup> Companies can be either or both.

<sup>8</sup> A merchant processing account is maintained by the Processor; it contains information such as the number of transactions, amount owing to the Processor and the ISO/MSP.

<sup>9</sup> Interchange fee varies based on several factors, including card type and risk; this fee covers the costs of the issuing bank and card providers. The Industry has fixed fees for various card types as agreed to between Visa, MasterCard and the issuers (banks).

During the Period, Zomaron retained 70% of the mark-up with Elavon and 75% of the mark-up with First Data.

*Merchant Application*

[17] In describing the negotiation process and how the merchant's fees are determined, Mr. Al-Ansari referred to the document named "Merchant Application/Zomaron Merchant Services" (the "Application") and said Zomaron has complete autonomy over all aspects of the Application. The Application is used by Zomaron in its interactions with merchants to input information.<sup>10</sup> For example: the final negotiated fees for various card types; processing services; the merchant's commercial bank account information to enable Processors to deposit funds and debit fees monthly; the merchant's selection of payment processing equipment; and the merchant's background information.

[18] The Application also includes merchant representations, the terms and conditions.<sup>11</sup> During cross-examination, Mr. Al-Ansari stated that, though they are not clearly separated in the Application, the Application encompasses both Elavon's and Zomaron's terms and conditions. He pointed to the hyperlinks included on page 3 of the Application and Elavon's merchant operating guide and terms of service. If accepted by Elavon, it and the merchant become contractually bound based on the terms and conditions negotiated and those incorporated into the signed Application that had been forwarded to Elavon; no further agreement exists between Elavon and the merchant. Zomaron's service terms and conditions are on page 5 of the Application.

[19] To determine the risk associated with the merchant and ultimately negotiate the rates, Zomaron considers the merchant's industry averages and analyses the merchant's last three months of payment processing history provided by the merchant's current processor. Mr. Al-Ansari said that determining the appropriate price, rates, and fees involve a multitude of factors that requires extensive business analysis so it can then conduct negotiations with merchants.

[20] Determining the rates engages multiple factors, such as: whether cards are physically presented (less risk) or payment is accepted over the phone (more risk); the average transaction size and monthly volume of transactions; the seasonality of

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<sup>10</sup> Zomaron can meet with the merchant, its controller, accountant, or technical personnel in negotiating the rates back and forth.

<sup>11</sup> Other information consists of whether the merchant has been part of any claims, lawsuits, bankruptcy, or has ever been terminated or suspended by another payment processor.

the merchant's business; the card types that the merchant accepts (or wants to) and its clientele; the sophistication of the merchant's phone system; tip option; merchant surcharge feature for payment under a certain amount; and the frequency and mode (automatic or manual) that the merchant prefers to receive the money that is processed through the transactions. Cost varies based on the nature of the merchant's business, the type of goods or services sold and whether these are consumed or received immediately (less risk) or received at a later date (more risk).

[21] Different Industry pricing methods also exist. In tiered pricing, card types are grouped for simplicity. Enhanced pricing (mostly for sophisticated merchants) provides greater transparency as merchants or its staff want to understand the different card types and features. Zomaron would charge "cost plus" or an "enhanced cost plus pricing" to the transaction in addition to the negotiated fee. **Interac** fees operate on a debit network rather than credit network, thus the negotiated fee will be a fixed fee.

[22] In addition to the basic transaction rates, Zomaron has the sole discretion to determine the fees to the merchant for other services or costs related to the card transactions.<sup>12</sup> Elavon will provide Zomaron with the cost of these other services and Zomaron has the discretion to mark up the cost and earn revenue, pass the cost along to the merchant, or price the service at a loss to Zomaron. While for some of these additional fees the mark-up is not shared between Zomaron and Elavon, the majority of the mark-ups are split between the two. Zomaron's competitive advantage, Mr. Al-Ansari said, is it can lower the payment processing rates and can offer dedicated and local support and service to its merchants.

[23] Once the Application is signed, Elavon usually has no ability to adjust or change these rates. Ms. Huntington confirmed that Zomaron has full autonomy over pricing of transactions, as per Mr. Al-Ansari's testimony, and said only in rare and extreme cases would Elavon approach Zomaron regarding pricing. For example, if Zomaron overlooked a rate or fee, Elavon would flag this and Zomaron would revisit this with merchant. Elavon would only provide input upon Zomaron's request. Even if there was an underperforming fee, she stated that Elavon would simply reach out to Zomaron and discuss the pricing, but ultimately

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<sup>12</sup> For example, Zomaron can negotiate a rate with the merchant for a monthly statement fee for the merchant's processing account, a monthly minimum fee charged to a merchant for underperforming volumes of transactions, American Express fees, settlement fees for the cost associated with Elavon transferring the funds into the merchant's bank account, and the authorization fee charged by Elavon to Zomaron for each transaction made by the merchant.

Zomaron has the right to implement the loss pricing strategy. Elavon merely provides Zomaron with a “buy rate”. The interchange fee and Elavon’s fee combined is the buy rate. Zomaron’s revenue is based on the difference between the amount it negotiates with a prospective merchant and the buy-rate.

[24] After the Application is completed and signed by the merchant, Zomaron’s sales agent forwards it to Zomaron’s office. Zomaron then performs a verification call, reviews the terms, fees and rates, submits the information electronically to Elavon and then connects the merchant with Elavon.

[25] In the Industry, the risk-reward is quite vast, Ms. Huntington said. She explained that Elavon may be transferring millions of dollars to a merchant during a year but only making pennies on each transaction. In determining the risk level, Elavon resorts to the use of actuarial sciences. The information in the Application provided by Zomaron and Elavon puts a lot of effort into understanding the merchant’s business and the financial risk.

[26] Upon receipt of an Application, Elavon’s underwriting team performs checks (credit, background and regulatory), satisfies screening requirements, reviews the nature of the merchant’s business and financials and conducts a risk analysis as to the products or services. Elavon has the right to accept or deny any potential merchant underwritten on the basis of credit worthiness and associated risk of the particular business.<sup>13</sup> When Elavon issues a merchant account, it is effectively agreeing to underwrite a loan to the merchant given that Elavon deposits the funds from the transaction shortly after the transaction is approved. This poses a significant financial risk to both.<sup>14</sup> For risk prevention, Elavon monitors the merchants and the transactions. Pre-approval, if Elavon wants modifications to be made to the Merchant Agreement, Elavon instructs Zomaron and it contacts the merchant. Once approved, Elavon sets up a merchant processing account and notifies Zomaron.

[27] Zomaron then acquires devices and sets up the merchant’s business with terminals and related equipment linked to the merchant processing account with

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<sup>13</sup> First Data’s Agreement, paragraph 8, refers to the merchant fee as being recommended by Zomaron and subject to First Data’s final approval.

<sup>14</sup> For example, the issuing bank will usually agree with the customer if there is a disputed transaction (such as delayed delivery or company is defunct) and the amount needs to be refunded. If the customer seeks a refund (chargeback), Elavon must collect the funds from the merchant, who bears the ultimate financial responsibility. However, Elavon may be unable to recoup funds from the merchant as the merchant may have gone out of business or is doing poorly.

the Processors so that the Processors can start processing card payment transactions. Zomaron provides ongoing service and support for the merchant processing terminals.

[28] Post sign-up, if a merchant experiences problems or wants to modify the price, Zomaron deals with it. In the latter instance, Zomaron will submit a “rate change form” to Elavon.

[29] Elavon very rarely communicates directly with merchants. All communication occurs between Zomaron and the merchant. Contacting the ISO/MSP rather than the Processor is an Industry standard. If a merchant contacts Elavon, a “pop-up box” appears in its system with Zomaron’s contact information. Elavon will redirect the merchant to Zomaron by transferring the caller or by providing the contact information. If a merchant contacted Elavon to change a rate or receive a lower fee, invariably Elavon refers the merchant to Zomaron. If a merchant called Elavon requesting cancellation of the account, Elavon defers the request to Zomaron to deal with and Zomaron attempts to save the account. For minor issues, however, like a terminal paper jam, Elavon will assist.

### *Agreements*

[30] References to “sections” below refer to the sections in the respective Agreements.

[31] Mr. Al-Ansari said that the services provided by Zomaron for First Data and the terms and conditions in the First Data Agreement governing their relationship are virtually the same as those performed for Elavon, and Zomaron had less activity as it relates to First Data during the Period. I concur that there are similarities as between the Agreements. Hence, most of the focus in these reasons will be on the Elavon Agreement but the reasoning will equally apply to First Data.

#### *(1) Elavon Agreement*

[32] Explanations provided by Mr. Al-Ansari and Ms. Huntington of the services provided by Zomaron for Elavon are consistent and congruent with the contents of the Elavon Agreement; they each had a similar understanding as to the terms and conditions.

[33] The preamble to the Elavon Agreement reads in part:

PURPOSE OF AGREEMENT: The purpose of this agreement is to set forth the terms and conditions under which MSP shall refer to Elavon and Member

prospective merchants meeting the qualifications of Elavon and Member for the purpose of providing to such merchants financial transaction processing services, and to set forth the compensation Elavon and Member shall pay to MSP for such referrals and other services as described herein.

[34] The term “Merchant Agreement” is defined in section 1.1.10 as follows:

Merchant Agreement shall mean a written agreement between (i) Elavon (and a Member to the extent required by the Payment Network Regulations), and (ii) a merchant, pursuant to which the merchant undertakes to honor Financial Transaction Devices.

[35] Section 2 describes the duties and obligations of Zomaron. Sections 2, 2.1, 2.2, 2.3, 2.5, 2.10, 2.10.1 to 2.10.3, 2.12 and 2.14 state:

## 2. DUTIES AND OBLIGATIONS OF MSP.

2.1 Recruitment of Merchants. MSP will actively, and through the use of all reasonable efforts, market the Merchant Services offered by Elavon and Member to prospective merchants. Such marketing services and assistance shall include, without limitation, the distribution by MSP of promotional and informational materials and supplies relating to the Merchant Services provided by Elavon.

2.2 Underwriting/Approval. All such referrals shall be communicated by MSP to Elavon in an approved manner. Elavon shall process any referral and corresponding merchant application in accordance with the credit and risk policies & underwriting guidelines and other practices and procedures then in effect for Elavon and Member (collectively, the “Underwriting Guidelines,” attached hereto as “Schedule A”). Such Underwriting Guidelines may be modified or amended from time to time and communicated to MSP in an acceptable manner as prescribed herein. Elavon and Member each reserve the right in their sole discretion to refuse to sign a Merchant Agreement with any merchant referred by MSP.

2.3 Merchant Agreements. Merchants referred by MSP and accepted by Elavon and Member have a direct business relationship with Elavon and Member and are required to enter into a Merchant Agreement that will govern the relationship between Merchant, Elavon and Member. MSP will not be a party to any such Merchant Agreement. Elavon will provide MSP with access to the approved form of merchant application and copies of the Merchant Agreements (currently comprised of “Terms of Service” and “Merchant Operating Guide”) that must be provided to all merchants in connection with the services offered.

2.5 Ownership of Referred Merchants. MSP acknowledges and agrees that any merchant that is a party to a Merchant Agreement does and shall have a direct business relationship with Elavon (and a Member to the extent required by

the Payment Network Regulations). Subject to the Payment Network Regulations, and notwithstanding anything to the contrary in any Merchant Agreement, Elavon shall administer and control the Merchant Agreements and the relationship created thereby (such control shall include, without limitation, decisions regarding the continuance, amendment, assignment or termination of such Merchant Agreement).

2.10 Services Provided by MSP. In addition to the duties of MSP described elsewhere in this Agreement, MSP shall provide certain services to the Referred Merchants on behalf of Elavon and Member as set forth below. In the event of a failure to provide an adequate level of service, Elavon may, in its discretion, discontinue payment of any residuals for the affected Referred Merchant. As such, MSP shall provide the following services on behalf of Elavon and Member to the Referred Merchants:

2.10.1 Training. MSP shall provide to each Referred Merchant the necessary training with regard to the procedures and Payment Network Regulations applicable to the acceptance of FTDs, the operation of terminal equipment and the use of Elavon products and services. MSP shall initially train the Referred Merchants and will include, when appropriate, distribution of a merchant set-up kit. MSP shall also train new employees of the Referred Merchant as MSP deems necessary, provided, however, that regardless of the method of training employed by MSP, such training shall comply with the provisions of this Agreement.

2.10.2 Merchant Support. MSP shall provide reasonable ongoing support to each Referred Merchant and will make every reasonable effort to remedy any customer service problems encountered by such Referred Merchants. MSP shall supervise such personnel it may engage as employees or agents in activities hereunder. MSP shall have sole responsibility for all such personnel and shall assure full compliance by all such personnel with the terms and provisions of this Agreement.

2.10.3 Proof of Existence. MSP will provide appropriate proof of existence for each Referred Merchant in accordance with the Underwriting Guidelines.

2.12 Excluded Types of Merchants. MSP agrees that neither MSP nor any of its employees, affiliates, subsidiaries or agents will solicit an existing customer or merchant of Elavon or Member, or their respective parents, subsidiaries or affiliates.

2.14 Advertising/Sales Materials. All advertising and/or sales materials used by MSP shall be in compliance with the Payment Network Regulations. Elavon will give MSP notice of any non-compliance of which it becomes aware.

[36] Section 11 sets out the compensation buyout. Sections 11 and 11.3 state:



## 11. COMPENSATION BUY-OUT

11.1 Compensation Buyout. Elavon shall have the option, in its sole discretion, to offer to make a one-time payment to MSP to buy out MSP's rights to receive Compensation for a Referred Merchant or group of Referred Merchants under this Agreement (the "Residual Buy-Out Payment").

11.3 Transfer Option. Notwithstanding the solicitation restrictions set forth in this Agreement, MSP may seek to move those Referred Merchant accounts opened with Elavon to another processor or financial institution, provided that each merchant to be moved has processed with Elavon for a minimum of three (3) years. Elavon's ownership of any such accounts to be moved will not terminate until receipt of written notice from each Merchant. MSP must give Elavon at least 90 days notice of its intent to exercise its rights under this provision.

[37] In response to questions put to him, Mr. Al-Ansari testified that references to "shall refer" and to "such referrals" in the preamble do not accurately describe the services Zomaron provided. Rather, it took several steps leading to the successful acceptance by merchants of the financial transaction processing of payments.<sup>15</sup> Ms. Huntington indicated that "shall refer" means recruiting, prospecting, soliciting and bringing together. Clearly, the Agreements, the PASF and witness testimony confirm Zomaron provided "other services" beyond recruiting.<sup>16</sup>

[38] Even though section 2.1 states Zomaron will "market" Merchant Services offered by Elavon, Mr. Al-Ansari refuted that as a misstatement and said that Zomaron does not have a relationship with Elavon's marketing department. Typically, ISOs/MSPs do not conduct marketing services similar to a marketing agency and they have multiple partnering Processors. Processors include such provisions in an agreement so that ISOs/MSPs use their best efforts to sign up merchants with them instead of another Processor. Both witnesses said that Zomaron does not carry out any marketing, promoting, or advertising activities on behalf of Elavon. I accept their explanations on these aspects in light of other evidence that is consistent with that.

[39] With respect to section 2.3 and the reference to a "direct business relationship" between the merchant and Elavon, Mr. Al-Ansari indicated that simply means that the financial services are offered directly by Elavon. That is,

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<sup>15</sup> Exhibit A-1 – tab 1 Member Service Providers and Sales and Service Agreement for MasterCard, Visa, and other Payment Networks, page 1.

<sup>16</sup> Paragraphs 2.10 and 2.10.1 to 2.10.3 of the Elavon Agreement. Such as training endeavours involving procedures, regulations, operation of terminal equipment, and use of Elavon's products.

Elavon deposits the funds into and debits the fees from the merchant's bank account. Ms. Huntington said the Elavon Agreement had to be drafted that way because Zomaron was not a Visa or MasterCard member. Perhaps she was referring to something else or was mistaken as her comment about membership appears to conflict with Mr. Al-Ansari's testimony to the contrary. I accept his evidence on that.

[40] Regarding section 2.5 and Elavon's ability to control, Ms. Huntington explained that that was merely intended to allow Elavon to close a merchant account because of any potential concerns from a risk or loss prevention perspective.

[41] The reference in section 11 to "Compensation buyout" was characterized by Ms. Huntington as providing the ISO/MSP with an exit strategy where Elavon can buy back the residuals that the ISO/MSP would have received over time and Elavon can take ownership of that merchant. That occurs frequently within the Industry.

[42] As to the section 11.3 "Transfer option", Mr. Al-Ansari said that effectively permits Zomaron to move a merchant's open account from one Processor to another. He remarked that these provisions show the complexity in the Industry where the direct relationship is with the Processors for such purposes but Zomaron owns the merchant relationship. Ms. Huntington's explanation was, because the Industry is very competitive and rate compression is quite frequent, the provisions caution against constant merchant transferring such that Elavon requires the merchant to stay for a minimum of three years.

## *(2) First Data Agreement*

[43] The recitals of the First Data Agreement (titled the Marketing Agreement) state:

### RECITALS

A. First Data has established and maintains a Merchant Program for the processing and settlement of Bank Card Transactions.

B. First Data wishes to contract with ISO to market the Program to prospective Merchants, and ISO is willing to perform such services, on the terms and conditions set forth in this Agreement.

[44] The terms "Merchant" and "Program Standards" are defined as follows:

“Merchant” means each merchant, with a location or multiple locations in Canada, solicited by ISO on behalf of and approved by First Data, to be a party to a Merchant Agreement.

“Program Standards” means the credit criteria, standards and policies and procedures established by First Data, to be used by ISO in connection with the solicitation of prospective Merchants and other policies, procedures, fines and penalties established by First Data, that are designed to promote Merchant satisfaction, to preserve relationships with existing Merchants, to facilitate the growth of the Program, and to ensure the financial safety or soundness of First Data and its Program. Attached as Schedule B is a list of certain categories of merchants who are always unacceptable under the Program. The Program Standards, including but not limited to the list of unacceptable businesses in Schedule B, may be modified by First Data from time to time in its sole discretion.

[45] Section 2 describes the obligations of Zomaron to First Data. It states, in part, that:

2. Obligations of ISO.

(a) ISO shall use its best efforts to solicit prospective merchants to execute Merchant Agreements with First Data and shall promote First Data’s Program as its preferred offering. “Preferred Offering” means that ISO will utilize First Data’s Program unless .... In furtherance of ISO’s solicitation of Merchants, ISO will (i) communicate to Merchants the existence and availability of the Program, provided that the nature and content of such communication shall be in the reasonable discretion of First Data; (ii) distribute promotional materials approved by First Data regarding the Program, to its Merchants; and (iii) perform other reasonable services which ISO and First Data deem desirable to promote and market the Program.

(b) ISO shall instruct existing and potential Merchants to furnish First Data with such financial information as First Data may from time to time request. ISO will use its best efforts to call to First Data’s attention any information that it reasonably considers relevant to a determination of any existing or potential Merchants creditworthiness, and ISO shall follow the Program Standards in soliciting prospective Merchants.

(c) ISO shall obtain such information and take such action as First Data may from time to time reasonably require in connection with their processing of prospective Merchants, including:

(i) Fully complete and submit, to First Data, a Merchant Application for each Merchant;

(ii) Implement and document procedures to verify that each Merchant conducts or intends to conduct a bona fide business operation, including Merchant identification verification and due diligence with respect to Merchant's facilities, equipment, inventory and any required business licenses/permits. ISO will provide First Data with a copy of said procedures upon written request;

(iii) Upon written request, submit a written inspection report to First Data in such form as First Data may from time to time designate; and

(iv) Obtain and submit to First Data, as appropriate, any information required by First Data, including a fully completed Merchant Agreement, financial statements, Bank Card statements and corporate resolutions for each Merchant.

[46] Section 7 describes Merchant Agreements. Paragraphs 7 (b) and (c) state:

7(b) First Data shall, in its sole discretion, make the final decision as to whether or not a prospective Merchant is accepted into the Program.

7(c) All, Merchant Agreements and Merchant accounts and records shall be and remain the exclusive property of First Data. ISO acknowledges and agrees that all Merchant Agreements and Merchant accounts and records are owned by First Data and may not be transferred, assigned, sold or exchanged by ISO.

[47] Section 8 describes the discount rate and states:

8. ISO Merchant Discount Rate ("MDR"). ISO's MDR charged to the Merchant under the Merchant Agreement, as the "Merchant Processing Fees Per Transaction", shall be recommended by ISO, but in all cases will be subject to final approval by First Data in its sole discretion, which approval shall not be unreasonably withheld.

[48] Section 15 describes the promotion materials and states:

15. Promotional Materials; Marks.

(a) Upon request by ISO, First Data will provide ISO and Merchants, at First Data's then-current charges, with Program promotional materials and supplies, including Transaction documents, credit vouchers and other forms. Upon termination of this Agreement, ISO and Merchants shall immediately discontinue and shall no longer use any promotional materials identifying First Data, or containing any trade name, trademark, service mark, or logotype associated with Bank Cards or First Data (collectively, the "Marks"), except to the extent such use may be authorized under a separate agreement.

[49] Mr. Al-Ansari was challenged during cross-examination about the title “Marketing Agreement” (that is, the First Data Agreement) and the term “marketing” and other similar terms as it relates to First Data.<sup>17</sup> He disavowed again that Zomaron provided any marketing, promoting or advertising activities for First Data (or for Elavon). Nor did Zomaron have a relationship with First Data’s marketing department or have any of its marketing material. Zomaron develops its own promotional materials for soliciting merchants, advertises online and receives referrals from the local Chamber of Commerce. Most merchants reached out to Zomaron and those that signed up with Zomaron moved from a former payment processor. I accept his evidence that the stated purpose of the Agreement (marketing the Program to prospective Merchants) and other assertions regarding marketing, promotions, and advertising are inaccurate and that the title Marketing Agreement is a misnomer. I will return to these aspects later in these reasons.

[50] Section 7(c) states that “all Merchant Agreements and Merchant accounts and records are owned by First Data and may not be transferred, assigned, sold or exchanged by ISO”. Mr. Al-Ansari explained that whilst Zomaron has the right to transfer the merchant to another Processor, Processors want to retain ownership over their respective Agreement and account so that Zomaron cannot move accounts overnight.

[51] Except as noted, again I accept the explanations by both witnesses regarding the sections in the respective Agreements.

### **III. Parties’ positions**

[52] Zomaron’s position is that the fees it received from the Processors was consideration for a “financial service” within the definition of paragraph 123(1)(l) because Zomaron was an intermediary “arranging for” a financial service in connecting merchants that needed a particular financial service with the Processors who offered that service. Zomaron facilitated the entire process leading to the successful acceptance by merchants of financial transaction processing of payments delivered by the Processors. As such, it is not subject to GST.

[53] The respondent’s position is that Zomaron performed services that were preparatory to a financial service and promotional in nature. It recruits and maintains the merchant client base for the Processors which culminates in the submission of completed Applications. Since such promotional services are excepted from the definition of financial services pursuant to paragraph

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<sup>17</sup> Exhibit A1 – Tab 2, Marketing Agreement.

123(1)(r.4), the supply does not qualify as “arranging for” a financial service.

[54] All references to provisions that follow in these reasons are to the *Excise Tax Act*.

#### **IV. Statutory framework**

[55] GST is imposed on all taxable supplies made in Canada under subsection 165(1).<sup>18</sup> To determine if GST is exigible, it is necessary to characterize the supply in issue.

[56] The relevant definitions within subsection 123(1) are as follows:

“Taxable supply” means “a supply that is made in the course of a commercial activity.”

“Commercial activity” of a person means “a business carried on by the person ... except to the extent which the business involves the making of exempt supplies by the person.”<sup>19</sup>

“Exempt supply” means “a supply included in Schedule V”. Part VII of Schedule V provides that certain supplies of financial services are exempt from GST.<sup>20</sup>

“Financial service” means, in general, an activity listed in one of the inclusions paragraphs (a) to (m) to the definition, and is not then in the exclusions paragraphs (n) to (t).

[57] The relevant parts of the definition in this appeal are in subsection 123(1), paragraph (l). It reads:

“financial service” means

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<sup>18</sup> For participating provinces, subsection 165(2) imposes the provincial portion of harmonized sales tax where a taxable supply is made in a participating province. Combined subsections 221(1) and 228(2) imposes an obligation on a supplier to collect GST when making a taxable supply and requires a supplier to remit the net tax, respectively, determined under section 225, to the Receiver General. Tax is calculated at the statutory rate on the value of the consideration for the supply.

<sup>19</sup> Zomaron’s activities were provided in the course of its business and thus were supplied in the course of commercial activity unless the supply involved the making of an exempt supply.

<sup>20</sup> Exported financial services that are zero-rated supplies pursuant to Part IX of Schedule VI are excluded.

[...]

(l) the agreeing to provide, or the arranging for, a service that is

(i) referred to in any of paragraphs (a) to (i), and

(ii) not referred to in any of paragraphs (n) to (t)...

[...]

but does not include

[...]

(r.4) a service (other than a prescribed service) that is preparatory to the provision or the potential provision of a service referred to in any of paragraphs (a) to (i) and (l), or that is provided in conjunction with a service referred to in any of those paragraphs, and that is

(i) a service of collecting, collating or providing information, or

(ii) a market research, product design, document preparation, document processing, customer assistance, promotional or advertising service or a similar service.

## **V. Analysis**

[58] I agree with the parties that using the card payment processing services rendered by Elavon and First Data, the Processors, to merchants constituted financial services.

[59] Again, the issue for determination is whether the services supplied by Zomaron to or on behalf of the Processors based on the respective Agreements and on the undisputed facts constitutes a financial service.

[60] Before addressing that question, it is necessary to determine whether the overall supply consists of a single compound supply or multiple supplies. The test to determine that was developed in *Calgary (City) v R*, 2012 SCC 20, [2012] 1 S.C.R. 689, based on the test set out by Justice Rip (as he then was) in *O.A. Brown Ltd. v Canada*, [1995] G.S.T.C. 40, [1995] T.C.J. No. 678, (“*O.A. Brown*”).<sup>21</sup> In *O.A. Brown*, this Court found, that a compound supply is a single supply with a

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<sup>21</sup> *Calgary (City)*, paragraphs 31 to 46. The Court found that the true nature of the City’s transit facilities service (separate supply) was preparatory to the supply of public transit facilities.

number of constituent elements which, if supplied separately, some would have been taxed and some not. Multiple supplies are made and taxed separately.<sup>22</sup>

[61] In determining the character of the overall supply, Justice Rip sought its “essence” and applied the following test: namely, whether an “alleged separate supply is an integral part, integrant or component of the overall supply.” Thus, the true nature of the transaction is to be examined to determine the tax consequences. It was noted that “One factor to be considered is whether or not the alleged separate supply can be realistically omitted from the overall supply.”<sup>23</sup> Justice Rip observed that “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.” Further, common sense is important when the determination is made.

[62] The test was developed further in *Global Cash Access (Canada) Inc. v The Queen*, 2013 FCA 269, [2013] F.C.J. No. 1271 (“*Global*”).<sup>24</sup> At paragraph 25, the Court noted that none of the three elements of the supply identified at the trial level had “commercial efficacy” on its own.<sup>25</sup> That, combined with the fact that there was no evidence that *Global* would have been prepared to pay consideration to the casinos for any of the three elements on its own, meant the three elements are “integrally connected and there is a single consideration, there is a single supply.”

[63] Applying common sense, the Agreements and undisputed facts suggest that the services Zomaron provided were inextricably intertwined and integrally connected to one another to the degree it must be considered a single supply as none of the elements would have commercial efficacy on its own and Zomaron received a single consideration (portion of the mark-up on each transaction processed by the Processors). I agree with the parties and find as a fact that Zomaron provided “a single compound supply”, rather than several distinct

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<sup>22</sup> Justice Rip noted that the *Value Added Tax (UK) 1983, c.55* statute contained similar provisions to the *Excise Tax Act*. In *O.A. Brown*, the Court found that it was the buying service because it was integral to the overall supply of livestock and determined that only a single supply was provided as the buying service was indivisible from the other services offered.

<sup>23</sup> Paragraphs 22 and 23. The test is distilled from English authorities.

<sup>24</sup> The Court held that there was a single supply of services provided by the casinos to *Global* that fell within paragraph (g) of the definition of financial service in “the making of any advance, the granting of any credit or the lending of money.” *Global’s* business was to provide credit card holders with cash. *Global* contracted with casinos to ensure patrons could obtain cash on casino’s premises such that there is an advance of cash to a patron that is then repayable by *Global*.

<sup>25</sup> See *Club Intrawest v R*, 2017 FCA 151, paragraph 80.



supplies.

[64] In *Global*, the Court then turned to the question of whether that single supply meets the statutory definition of a “financial service.” It developed and applied a two-step test necessitating the following questions:

- (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”?

[65] In *Great-West Life Assurance Co v The Queen*, 2016 FCA 316, [2016] G.S.T.C. 118 (“*Great-West*”), the Court elaborated on what is envisaged by the two questions in *Global*.<sup>26</sup> First, *all* services provided under the contract must be identified for the consideration received. Second, a determination must then follow of *only* the “predominant elements” of the supply if it is a single compound supply to ascertain whether the supply is included in the definition of “financial service” because only the predominant elements are taken into account in applying the inclusions and exclusions in the definition.

A. *Supply Zomaron provided to Processors*

[66] As to the first step, I must determine all the services Zomaron supplied for the fees received from the Processors related to card payment processing services received by merchants from the Processors.

[67] Under the respective Agreements as previously detailed:

- a. Zomaron agreed to recruit prospective merchants for Elavon related to card payment processing services and provided other services (training and on-going support) to merchants on behalf of Elavon; and
- b. Zomaron agreed to: solicit prospective merchants for First Data related to card payment processing services; choose First Data as its “Preferred Offering”; instruct merchants to provide First Data with financial and other

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<sup>26</sup> Paragraphs 47 and 48. In *Great-West*, the supply was a single compound supply comprised of various services related to the determination and payment of benefits under group health benefit plans on behalf of a registrant insurance plan to pharmacies.

information; send a completed, signed Merchant Application to First Data; verify the merchant's business operation is *bona fide*; and provide inspection reports to First Data upon request.

[68] Elavon's December 2017 letter confirms Zomaron provided additional services to those listed in the standard form Agreements.

[69] The PASF summarizes the services Zomaron supplied. These services comprise the following:

- a. locate prospective merchants;
- b. gather and analyze information involving merchant-specific factors in preparation for negotiation;
- c. negotiate (rates, fees, pricing and duration of contract) with and have prospective merchants complete and execute the Application for Elavon and the Merchant Application and the Merchant Agreement for First Data to enable the merchants to receive card payment processing services from the Processors;
- d. negotiate possibly certain terms and conditions as circumscribed by the Application (for Elavon only);
- e. provide ongoing merchant support (for Elavon only); and
- f. verify if the merchant continues to comply with payment network requirements.

[70] The foregoing are all the services Zomaron provided to the Processors.

[71] Mr. Al-Ansari said that Zomaron's compensation is entirely dependant on whether a financial service is ultimately provided by a Processor to a merchant. On a monthly basis, Zomaron receives a portion of each transaction fee, the "mark-up", which is shared by it and the Processors. Zomaron's share increases according to the volume and quantum of the payment processing transactions processed by the Processors to the merchants recruited by Zomaron.

*B. Is the single supply a financial service?*

[72] Turning to the second step of the *Global* test, I am to determine the predominant element(s) of the single supply to decide if that supply constitutes a

“financial service” as defined in subsection 123(1).

[73] In *Great-West*, the Court underscored at the second step the import of taking into account only the predominant elements of the supply. In *Club Intrawest v R*, 2017 FCA 151, [2017] G.S.T.C. 51, the Court echoed that point in stating, at paragraph 82, that:

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 [...]

[74] Thus, in *Global* and *Great-West*, the Court highlighted the importance of the predominant element(s) of the supply in determining whether the supply falls within the inclusions and the exclusions paragraphs in the “financial service” definition in subsection 123(1), one of the inclusions being paragraph (1).

[75] Paragraph (1) of the statutory definition, set out at paragraph 57 of these reasons, includes the term “arranging for” a financial service. It must be determined whether Zomaron’s supply was “arranging for” a financial service and what is the predominant element of the supply.

[76] Zomaron argues that the predominant element of the supply it provided was as an intermediary in “arranging for” merchants to use the Processor’s card payment processing services. The respondent counters that the predominant element comprise the provision of preparatory and promotional services in which Zomaron recruits and maintains the client base of merchants for the Processors. As such, the Processors are paying for the promotion of their services, which culminates in the submission of a completed Application. Further, the compensation structure supports a finding of a promotional predominant element since the fee sharing structure incentivises Zomaron to recruit more merchants.

### *Arranging For*

[77] Whilst the parties agree that the jurisprudence adopted a low threshold for establishing whether a service constitutes the “arranging for” a supply, they disagree as to whether the 2010 amendments to the “financial services” definition changed the scope of the term “arranging for.”

[78] The respondent asserts these amendments narrowed the scope of that term and that this Court’s interpretation in *Promotions D.N.D. Inc. c R*, 2006 TCC 63, [2006] G.S.T.C. 10, (“*Promotions D.N.D.*”), improperly broadened its scope by

applying a low threshold; this was akin to a legislative amendment.<sup>27</sup> Applying a low threshold in the interpretation of “arranging for”, the respondent contends, is inconsistent with the plausible meaning of the wording in paragraph (1) and unsupported by a textual, contextual, and purposive analysis. Consequently, the pre-2010 case law may only be applicable to a certain extent.

[79] In contrast, Zomaron asserts that the amendments did not introduce new requirements for a service to be “arranging for”. The low threshold remains intact and the definition provided by the Federal Court of Appeal in *Canadian Medical Protective Association v R*, 2009 FCA 115, [2009] G.S.T.C. 65 (“*CMPA*”) supports a broad elastic meaning depending on the context.<sup>28</sup>

[80] In *Promotions D.N.D.*, the Court found that the service of the intermediary and the final provision of the financial service must be linked in purpose. To qualify as “arranging for” in paragraph (1), the supply must be linked to the transition between the acquisition of the financial service and the provision of that financial service. Therefore, the term “arranging for” captured the use of an intermediary in the provision of financial services. Recently, in *Canadian Imperial Bank of Commerce v R*, 2018 TCC 109, [2018] G.S.T.C. 57 (“*CIBC*”), Chief Justice Rossiter relied on and applied the approach and principle in *Promotions D.N.D.*

[81] Generally, principles of statutory interpretation in taxation statutes provide that, if the text of a statute is clear, it must be applied. Where, however, the text admits of more than one reasonable interpretation, greater emphasis on and recourse to context, purpose and the scheme of the legislation may be necessary and may reveal or resolve latent ambiguities which may not have initially been obvious. If latent or explicit ambiguities exist, courts must also look at the context and the purpose of the provision to determine the most plausible interpretation.

[82] The meaning of “arrange for” from a textual perspective seems straightforward. The dictionary definitions of the term “arrange” means to “plan or provide for; cause to occur” or to “make preparation for” or “plan.”<sup>29</sup>

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<sup>27</sup> In *Promotions D.N.D.*, the Court determined that this included the promotion and distribution of credit cards in public places. *President’s Choice Bank v R*, 2009 TCC 170 and *CIBC* applied the low threshold; the former predated the 2010 amendment, the latter did not.

<sup>28</sup> The Court found that discretionary investment management fees were not excluded because managers could only provide advice to themselves.

<sup>29</sup> *Canadian Oxford Dictionary*, 2d ed, *sub verbo* “arrange” (page 72).

[83] Paragraph (1) envisages an agreement to provide, or the “arranging for”, a financial service included by any of paragraphs (a) to (i) of the definition of financial service, and is not then excluded by any of paragraphs (n) to (t) of the definition.

[84] The other inclusions provide additional context to paragraph (1), showing the linkage. These other inclusions read as follows:

*financial service* means:

- (a) the exchange, payment, issue, receipt or transfer of money, whether effected by the exchange of currency, by crediting or debiting accounts or otherwise,
- (b) the operation or maintenance of a savings, chequing, deposit, loan, charge or other account,
- (c) the lending or borrowing of a financial instrument,
- (d) the issue, granting, allotment, acceptance, endorsement, renewal, processing, variation, transfer of ownership or repayment of a financial instrument,
- (e) the provision, variation, release or receipt of a guarantee, an acceptance or an indemnity in respect of a financial instrument,
- (f) the payment or receipt of money as dividends (other than patronage dividends), interest, principal, benefits or any similar payment or receipt of money in respect of a financial instrument,
- (f.1) the payment or receipt of an amount in full or partial satisfaction of a claim arising under an insurance policy,
- (g) the making of any advance, the granting of any credit or the lending of money,
- (h) the underwriting of a financial instrument,
- (i) any service provided pursuant to the terms and conditions of any agreement relating to payments of amounts for which a credit card voucher or charge card voucher has been issued [...]

[85] The respondent submits that the specificity of the financial service listed in paragraphs (a) to (i) support a narrow interpretation of “arranging for” and that the purpose of paragraph (1) is for an intermediary to supply the arranging for each and

every financial service transaction. The argument seemed to be that, to qualify as “arranging for”, Zomaron would need to be involved in each ensuing payment transaction otherwise it would not be aligned with the narrower purpose of the legislation.

[86] The question is whether the proposed interpretation limits the statute in a way that Parliament did not intend.

[87] On July 12, 2010, subsection 123(1) was amended to clarify the tax treatment of financial service under Part IX and to amend the definition of “financial service.” The amendments are deemed to have come into force on December 17, 1990.

[88] In enacting the legislative changes, the Technical Notes [April 2010] indicate:

Subsection 123(1) contains definitions of terms used in Part IX of *the Excise Tax Act* (the “Act”) relating to the goods and services tax and the harmonized sales tax (GST/HST). Subsection 123(1) is amended to clarify the tax treatment of financial services under Part IX, specifically to amend the definition “financial service” and to add new definitions “asset management service” and “management or administrative service”.

[89] Regarding subsection 123(1) “financial service”, the Notes also state:

The term “agreeing to provide” is generally intended to refer to activities of a principal to a transaction of agreeing to provide a service referred to in any of paras. (a) to (i). The term “arranging for” is generally intended to include intermediation activities (or activities of bringing together the parties to a service referred to in any of paras. (a) to (i)) that are normally performed by financial intermediaries described in subpara. 149(1)(a)(iii) such as agents, brokers and dealers in financial instruments or money.

[...]

Para. (1) is amended to provide, for greater certainty, that it does not include the agreeing to provide, or the arranging for, a service that is referred to in any of paras. (n) to (t). However, the amendment would not affect the arranging for, a financial service, such as the issuance of an insurance policy or a mortgage, as those services are provided by financial intermediaries such as agents or brokers and are not described in the exclusions from the definition “financial service” referred to in any of paras. (n) to (t).

[...]

New para. (r.4) clarifies that the definition “financial service” does not include a service that is preparatory to a service referred to in any of paras. (a) to (i) and (l) of the definition “financial service”, or that is provided in conjunction with such a service, and that is

- a service of collecting, collating or providing information, or
- a market research, product design, document preparation, document processing, customer assistance, promotional or advertising service or a similar service.

Where any intermediary provides a number of services as part of an agreement to provide, or arrange for financial services, only those services that are described in the two bullets above would either be preparatory to a service referred to in any of paras. (a) to (i) and (l) or provided in conjunction with a service referred to in any of paras. (a) to (i) and (l) and would be excluded from the definition “financial service” by para. (r.4).<sup>30</sup>

[90] It seems to me from the Notes that Parliament was focussed on the new paragraphs, such as (r.4), that contain the exceptions in order to bring greater clarity in specific areas.

[91] I am not persuaded by the respondent’s arguments outlined below that suggest there was a narrowing of the scope of “arranging for”, in the manner suggested, pursuant to the amendments that require involvement in every specific transaction. That is unsupported by the language in paragraph (l) when it refers to “arranging for a service”, not “arranging for a transaction.”<sup>31</sup>

[92] Another difficulty I have is I do not draw from reading the decision in *Mac’s Convenience Stores v R*, 2012 TCC 393, [2012] G.S.T.C. 119 (“*Mac’s*”) the principle that, because *Mac’s* was not involved in the individual transactions, it did not “arrange for” the financial service as the respondent appeared to suggest. In other words, an intermediary must be involved in every individual financial transaction otherwise it would not be “arranging for” a financial service.<sup>32</sup> Apart

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<sup>30</sup> Paragraphs 521 to 523

<sup>31</sup> The respondent’s argument appears akin to an argument made in the UK decision *Customs & Excise Commissioners v Civil Service Motoring Association*, (1998), 1998 BVC 21. The English Court of Appeal rejected that argument.

<sup>32</sup> *Mac’s Convenience Stores* involved automated banking machines owned or leased by CIBC that were placed in Mac’s stores so that its customers could withdraw cash. The core element of the supply to CIBC was found to be the mere provision of space in Mac’s stores. The Court acknowledged that the CRA’s policy was obsolete (pre-dated the 2010 amendments) that discussed the scope of “arranging for.” Nevertheless, the Court chose to rely on it, in part, in

from Justice Hogan considering multiple factors in finding that *Mac's* was not involved beyond providing space in its stores, whether *Mac's* had to be involved does not appear to have been considered or discussed.

[93] In any event, a comparison of that case to the present case on the facts is distinguishable, in my view. Zomaron was involved in facilitating the entire negotiation process. It has complete autonomy in calculating and negotiating the applicable fee that is charged on every transaction during the term of the relationship with the merchant. Zomaron receives a portion of that fee paid for each transaction processed by the Processors. It is responsible for: setting, establishing, and adjusting rates and pricing in respect of each and every card type; length of contract; some terms and conditions; and a multitude of other factors outlined at paragraphs 18 to 22 of these reasons as part of the negotiation process. As well, there is installation of equipment, and, in the case of Elavon, merchant support. Asserting it is necessary for Zomaron to somehow have greater involvement beyond that in every transaction seems untenable in the context of that Industry and how participants operate.

[94] The respondent relies on the notion of an intermediary contained in the 1989 GST/HST technical paper. It reads:

Arranging for the purchase, sale or placement of a financial instrument will also be regarded as a financial service. Consequently, the services provided by insurance agents, mortgage brokers and investment dealers will be treated as tax-exempt supplies.

[95] I do not interpret the technical paper to be as narrow or as restrictive as the respondent suggests.

[96] The Technical Notes in 2010 indicate that the term “arranging for” is *generally* intended to include intermediation activities or activities of bringing together the parties to a service referred to in any of paragraphs of the inclusionary paragraphs *normally* performed by such financial intermediaries in financial instruments or money.

[97] In my view, the Notes and dictionary definitions combined, applying a unified approach, indicate that Parliament intended that the concept of “arranging

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concluding that when an intermediary's services qualify for “arranging for” one must consider all the surrounding facts of the transaction including the degree of involvement of the intermediary in the supply of the financial services and if applicable the normal activities of an intermediary in a given industry.



for” to mean “bringing together parties to a service.” This is the essence of the concept.<sup>33</sup> Additionally, it suggests to me to call for the intermediary to have a sufficient amount of involvement to then “cause to occur” or effect the financial service without involvement in every transaction.

[98] This is not inconsistent with the principle in *Promotions D.N.D.* and that line of cases which provide that an intermediary’s service constitutes “arranging for” when the service provided is linked in purpose to the provision of a financial service. I concur with that line of cases. The scope of the term “arrange for” appears unaffected by the 2010 amendments as it relates to the low threshold.<sup>34</sup>

[99] Respectfully, I disagree with the respondent’s submission as framed regarding the authority to bind as being a determinative factor. I also have reservations about some of the cases relied on as it seems to me that some are distinguishable or not on point. The respondent is correct that some cases have considered authority to bind as a factor and I agree it could be a factor. (*CMPA* involved investment managers’ authority to directly complete the buy and sell orders. See also, *General Motors of Canada Ltd. v R*, 2009 FCA 114, [2009] F.C.J. No. 447 (“*General Motors*”). In *Barr v R*, 2018 TCC 86, [2018] G.S.T.C. 43, for example, the Court found that the threshold was not met when the intermediary had no authority to commit to the financial transaction thus the brokers were not “arranging for” a financial service. However, I note that was but one of several factors the Court considered. In *Applewood Holdings Inc. v R*, 2018 TCC 231, [2018] G.S.T.C. 93, it is true that there was authority to sell insurance products to its customers but the authority to bind was not placed in issue nor discussed by the Court. In my view, that factor alone is not determinative.

[100] Even though Zomaron did not have authority to bind the Processors, the evidence reveals that during negotiations Zomaron had considerable latitude and autonomy to set pricing, rates and fees, etc., and did that within a complex pricing

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<sup>33</sup> The phrase “bringing together” in the context of a financial service formed part of the Court’s analysis in the decision in *Rojas v R*, 2016 TCC 177 in which Justice D’Arcy allowed the Informal Procedure appeal in circumstances where the appellant had considerably less authority, involvement and influence than Zomaron.

<sup>34</sup> It was noted in *CIBC* that the Courts finding that Visa was “arranging for” the credit services was reinforced by the UK decision referred to in footnote 31 in these reasons in which the Court found that developing and maintaining standard arrangements to govern the issuance of credit cards was arranging for a financial service; this decision involves similar VAT legislation. The decision was also cited and referenced by Associate Chief Justice Lamarre in *President’s Choice Bank*.

structure. Ms. Huntington corroborated that Elavon had no ability to change rates once Zomaron negotiated these and it was only in the rarest of cases that Elavon would go back to Zomaron. As it relates to Elavon, Zomaron could also negotiate some terms and conditions. The detailed Application itself includes some aspects that affect both Zomaron and Elavon as it relates to the merchant; a hyperlink was also included as previously detailed. It is obvious to me, based on the evidence, that Zomaron had to look at multiple factors and features during the negotiating process that would ultimately impact and bind the Processors if Processors accepted the merchants after conducting credit worthiness and risk analysis. At the end of the day, what Zomaron handed to the Processors was a signed commitment from the merchant's perspective who were agreeing to be bound subject to the Processors approval.

[101] I find that Zomaron acted as a financial intermediary in facilitating the ability of the merchants to receive card payment processing services from the Processors. In bringing them together, Zomaron delivered to the Processors fully negotiated merchants requiring card payment processing services. This caused to occur the successful acceptance of merchants by the Processors so that Processors could deliver the processing services to merchants. All that remained for Elavon was a credit check and risk analysis before setting up the merchant's processing account. Ms. Huntington said Elavon viewed Zomaron's role as critical in effecting the card payment processing services. I further find that there is a clear linkage between what Zomaron does, what it is being paid to do, and the provision of the Processors financial services to merchants. Zomaron's supply was linked in purpose to the supply of card payment processing services delivered by the Processors to merchants. I conclude that Zomaron's supply amounts to "arranging for" the processing services offered by the Processors within the meaning of paragraph (1).<sup>35</sup>

[102] Now turning to the question as to what is the predominant element of the supply. Both parties agree that, in determining the predominant element of the supply, it should be found objectively by looking at what the supply was as perceived from the purchaser's perspective. Also, a supply can be the culmination of its various inputs which the respondent acknowledges is oftentimes the case. This approach was taken by Chief Justice Rossiter in *CIBC* in which he concluded

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<sup>35</sup> Before *Global* and *Great-West*, the appellate court in *General Motors* and *Royal Bank v R*, 2007 FCA 72 had used language such as "dominant" and "essential characteristic" of the supply of services in determining whether a supply was a financial service. Latterly, the language is the predominant element or the predominant purpose.

that from the perspective of the purchaser the true value added service being transacted for is this culmination or end result.<sup>36</sup> Hence, the Court can look at the culmination of its various inputs and the product being delivered, not individual inputs.

[103] In *Global*, the predominant element can be identified as one which the commercial efficacy of the transaction critically depends. The Court determined at the second step that of the three elements (identified under the first step), the third element --access to the Casino's cash to pay patrons-- was critical and on which "the commercial efficacy of the arrangement depends." Access to cash was therefore vital to the arrangement, without which there was no point to the first two elements.

[104] In the present case, the respondent suggests that Zomaron performed merchant recruiting services that were preparatory to a financial service and were promotional in nature which culminate in completed Applications and this is the predominant element. The difficulty with this is Mr. Al-Ansari said that no compensation, mark-up or otherwise is tied to any services related to promoting or advertising and Zomaron does not market or promote for the Processors.<sup>37</sup>

[105] Again, I accept his evidence that to "market First Data" meant, in that context, that Zomaron was to sign up more merchants with First Data than Elavon as this tends to be consistent with the term "Preferred Offering" in section 2 of the First Data Agreement. However, I was less convinced that "marketing" simply meant Zomaron had the ability to choose between Processors. Based on the evidence, it is more plausible that Zomaron within its own operation had some form of promotion regarding the Processors albeit was not paid by the Processors. Mr. Al-Ansari said that Zomaron was only paid for the successful acquisition of a merchant.

[106] I am inclined to accept most of this evidence and I find that Zomaron did not provide promotional services for the Processors and noting the evidence outlined in paragraph 49 of these reasons. Specifically, Mr. Al-Ansari said that Zomaron spends little time promoting or talking about its partnering Processors and only

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<sup>36</sup> It was found that the final product was a payment platform which allowed Visa to facilitate the transactions between issuers, acquirers and merchants. All other elements of the supply were peripheral elements or inputs in the creation of the final product. The Court relied on the appellate decisions *Canadian Medical Protective Assn. v R*, 2009 FCA 115 and *Great-West*.

<sup>37</sup> In *Applewood Holdings*, Justice Pizzitelli found it was clear that the compensation was based solely on the sales of insurance products and that there was no link that the appellant was being compensated for any other services.

discusses them if the merchant enquires into the flow and transfer of funds to the merchant and it chooses which Processor would best suit a merchant.

[107] In my view, the vital element of Zomaron's supply was as an intermediary "arranging for" payment processing services leading to Processors successfully acquiring merchants. Without this, there would be no point to the constituent elements. Accordingly, the end product, the final result, the essence for what the Processors is paying Zomaron for is to "arrange for" merchants to use the Processor's card payment services. This, I find, is the predominant element of the supply provided by Zomaron to Elavon and First Data. As such, the predominant element of "arranging for" falls within paragraph 123(1)(l) of the definition of financial service.

[108] Paragraph (r.4) specifically excludes from the statutory definition of "financial service" certain services that are preparatory to the provision or potential provision of a service referred in any of the inclusions and exclusions paragraphs, and that is in the nature of management, administrative, marketing or promotional activities.

[109] The respondent's main argument regarding paragraph (r.4) is that it applies because, under the Agreements, Zomaron is providing a financial service that includes promotional services that is preparatory to the provision of a financial service as previously outlined.

[110] Given my findings on the promotional activities, these would not even form part of the constituent elements of the supply and paragraph (r.4) would not apply. Even if the supply provided by Zomaron to the Processors involved services of a promotional nature, since these do not represent the predominant element of the supply, paragraph (r.4) has no application based on the Court's comments in *CIBC* that, "[paragraph] (r.4) encapsulating ancillary elements of the supply being provided is not sufficient for the exception to be satisfied, as the services listed in the definition must include the predominant element of the supply."<sup>38</sup>

## **VI. Conclusion**

[111] For the foregoing reasons, I conclude that the services supplied by the appellant constituted "arranging for" a financial service within the meaning of

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<sup>38</sup> *CIBC*, paragraph 110. The Court relied on Justice Owen's decision in *Great-West Life Assurance Co. v R*, 2015 TCC 225 in which at paragraphs 89 and 90 he interpreted paragraph 37 of *Global*.

paragraph (1) of subsection 123(1) of the *Excise Tax Act*. As such, the fees it received as consideration from Elavon and First Data during the Period are exempt from harmonized sales tax.

[112] The appeal is allowed. Costs are awarded to the appellant. The parties shall have 30 days from the date of this Judgment to reach an agreement on costs. Failing that, the parties shall have 30 days to file written submissions on costs. Submissions shall be no more than 10 pages.

**This Amended Reasons for Judgment is issued in substitution of the Reasons for Judgment dated February 28, 2020 to amend the hearing dates as well as typographical errors in paragraph 21 and footnote 34.**

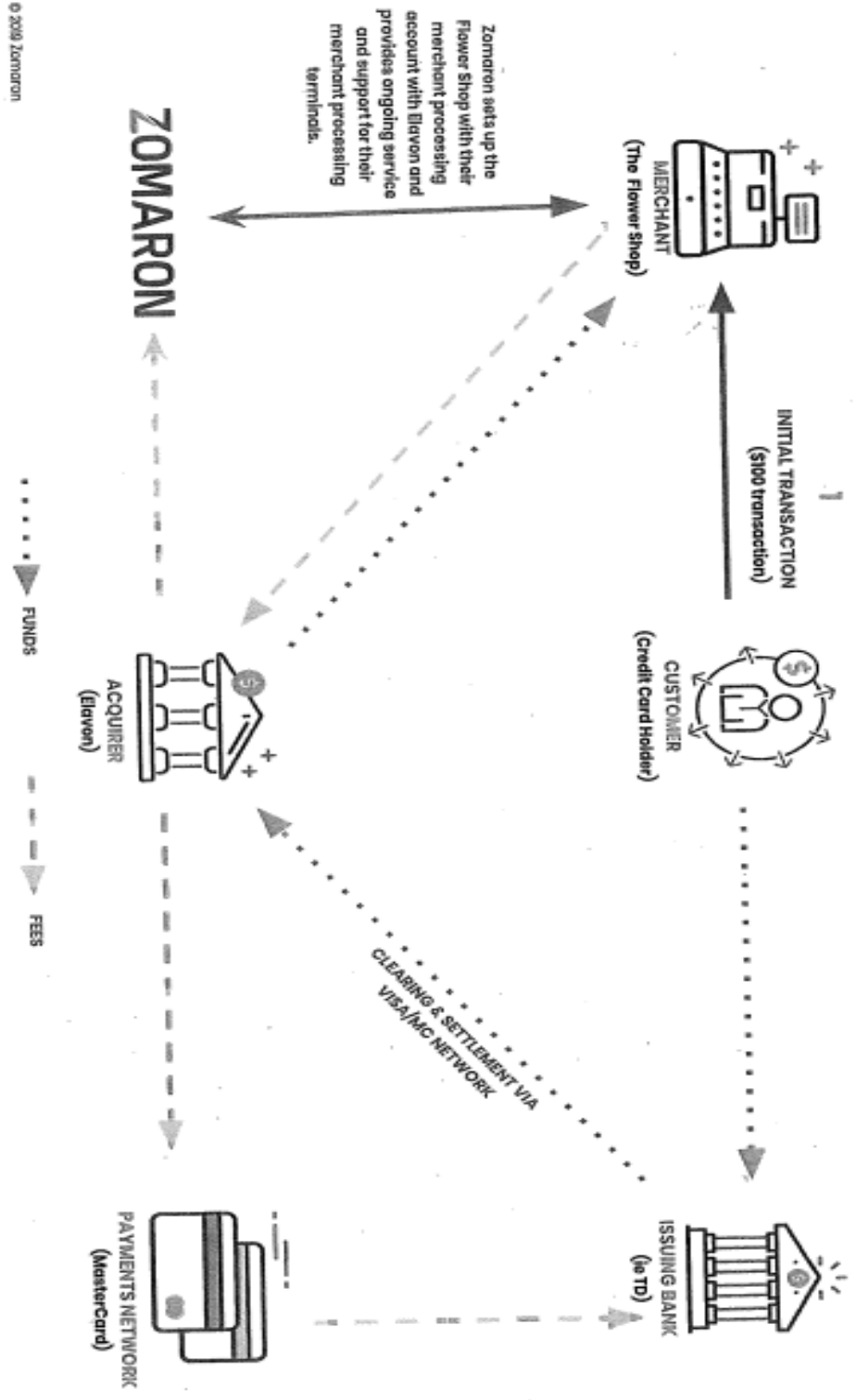
Signed at **Ottawa, Canada**, this **13** day of **March** 2020.

“K. Lyons”

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**Lyons J.**

# Credit Card Payment Processing Overview



Appendix I Diagram

CITATION: 2020 TCC 35

COURT FILE NO.: 2016-1542(GST)G

STYLE OF CAUSE: ZOMARON INC. and HER MAJESTY  
THE QUEEN

PLACE OF HEARING: Toronto, Ontario

DATE OF HEARING: January 23 **and 24**, 2020

REASONS FOR JUDGMENT BY: The Honourable Justice K. Lyons

DATE OF JUDGMENT: February 28, 2020

**DATE OF AMENDED  
JUDGMENT** **March 13, 2020**

**DATE OF AMENDED  
REASONS FOR JUDGMENT** **March 13, 2020**

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