

Docket: 2007-1374(GST)G

BETWEEN:

COSTCO WHOLESALE CANADA LTD.,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

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Appeals heard on December 1 and 2, 2008, at Toronto, Ontario,  
By: The Honourable Justice Campbell J. Miller

Appearances:

Counsel for the Appellant: William I. Innes,  
**Neil E. Bass (December 2, 2008)**  
and Wendy Brousseau  
Counsel for the Respondent: Harry Erlichman, Suzanne Bruce  
and Sharon Lee

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**AMENDED 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, with costs, and the reassessments are vacated.

Signed at Ottawa, Canada, this **10th day of March, 2009**.

“Campbell J. Miller”

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C. Miller J.

Citation: 2009 TCC 134  
Date: 20090310  
Docket: 2007-1374(GST)G

BETWEEN:

COSTCO WHOLESALE CANADA LTD.,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

**AMENDED REASONS FOR JUDGMENT**

Miller J.

[1] Costco Wholesale Canada Ltd. (“Costco”) and American Express (“Amex”) had an arrangement that was set out in two contracts between them: a Merchant Agreement and a Co-Branded Agreement. Pursuant to the Merchant Agreement, Amex charged Costco a percentage fee (“X”) based on the volume of sales charges (the “Discount”). Pursuant to the Co-Branded Agreement, Amex agreed to pay Costco a percentage (“Y”) of the aggregate of charges submitted by Costco. The effect was to achieve a net rate of X minus Y or Z. The Canada Revenue Agency considered that the payment (Y) from Amex to Costco was consideration for a taxable supply by Costco to Amex, and assessed Costco for unremitted GST for a three-year period from September 3, 2001 to August 29, 2004. The pleadings do not identify the amounts involved, nor do they identify the percentages represented by X, Y or Z. Costco’s position is that provision for Y in the Co-Branded Agreement was a confidential way to achieve the net rate of Z and did not represent consideration for a supply of anything from Costco to Amex. In the alternative, if there was a supply from Costco to Amex, Costco maintains it was a supply of financial services, and consequently exempt from GST. The Respondent’s position is that there were a number of supplies made by Costco to Amex pursuant to the terms of the Co-Branded Agreement, and notwithstanding it may have been the intention of Costco and Amex to structure it this way to keep the net fee (X minus Y)

confidential from the public domain, the correct interpretation of the written contracts is that Amex made the payment of Y to Costco for taxable supplies.

[2] This is entirely a matter of interpreting the two contracts to ascertain the deal between Costco and Amex. Was the deal that Amex charged Costco Z for accepting the Amex card? Or was the deal that Amex charged Costco X for accepting the Amex card and Costco charged Amex Y for supplies including accessing its membership list, exclusivity rights and assisting in the promotion and sale of the Co-Branded Amex/Costco card?

### Facts

[3] Two witnesses testified for Costco, Ms. Gilpin, an Assistant Vice-President of Marketing for Costco and Ms. Hawkins, a Vice-President of Marketing for Amex.

[4] Costco is a major wholesaler of goods in North America. One need only attempt to shop there on a Saturday afternoon to appreciate its popularity. In 1999, Costco U.S. entered a relationship with Amex in the United States, which led to their Canadian counterparts doing the same. The Canadian arrangement mirrored the American arrangement, including the rate charged by Amex to Costco. The arrangement was documented in two contracts, both signed November 4, 1999. The first contract is entitled “Agreement for American Express Card Acceptance” and referred to by the witnesses as the Merchant Agreement or Card Acceptance Agreement. The second agreement is entitled “American Express/Costco Co-Branded Card Program Agreement”, referred to as simply the Co-Branded Agreement. I have attached the relevant excerpts from these two agreements: Schedule “A” for the Co-Branded Agreement and Schedule “B” for the Merchant Agreement.

[5] According to Ms. Hawkins, there were two major elements to the arrangement between Costco and Amex:

- (i) Exclusive card acceptance at Costco of the Amex card; and
- (ii) Co-Branded cards: that is a joint Costco membership and Amex credit card such that both Amex and Costco were referenced on the one card.

[6] The Merchant Agreement sets out under “Payment” the fee charged by Amex to Costco for acceptance of the Amex card. This is called the Discount and it is a percentage (X) of sales charges made by customers using any and all Amex cards.

Both Ms. Gilpin and Ms. Hawkins testified that X did not represent the net fee charged to Costco, as that information is highly industry sensitive and the Merchant Agreement is not particularly confidential. So, according to both witnesses, Costco and Amex agreed to a rebate (the percentage Y) which would effectively reduce the net fee (X minus Y) to Z. This rebate, according to the witnesses, is to be found in the Co-Branded Agreement at subsection 3.01(a). There is no reference in that subsection to the term “rebate”. The exhibits of these two agreements presented at trial had the actual percentages redacted so that this information would not become public. Access to the Co-Branded Agreement is limited to just a handful of Costco and Amex executives.

[7] The arrangement appears to have been confirmed in an internal Costco e-mail to Ms. Gilpin dated May 11, 2001 in which Z is acknowledged as the Amex merchant fee.

[8] The Co-Branded Agreement establishes a program between Costco and Amex for a joint card; that is, a card that combines the Amex credit card and the Costco membership card. Article III is entitled “Compensation to Costco”. In subsection 3.01(b), a fee is determined for every such card approved by Amex. This was referred to as a bounty fee by the witnesses. In subsection 3.01(b), it specifically indicates that that fee is for services provided by Costco pursuant to subsection 2.02(a) (Marketing by Costco) of the Co-Branded Agreement. The amount of that payment by Amex to Costco is not part of the assessments before me.

[9] Subsection 3.01(a) of the Co-Branded Agreement provides for quarterly payments from Amex to Costco of Y of “Costco Net Volume of Charges”. “Costco Net Volume of Charges” is defined in the Co-Branded Agreement as:

**“Costco Net Volume of Charges”** means, for purposes of this Agreement, the aggregate of Charges submitted by Costco pursuant to the Costco Card Service Agreement and received and accepted by Amex, less credits, adjustments and amounts charged back by Amex pursuant to Amex’s rights to full recourse under the Costco Card Service Agreement.

In effect Y applies to all Amex credit card sales, not just sales from Co-Branded cards. Similarly, the discount (X) in the Merchant Agreement applies to charges on all Amex cards, not just charges arising on Co-Branded cards. Ms. Hawkins testified that in the early stages of the arrangement, the Co-Branded cards were only 10% of all Amex cards charged, though this later rose to approximately 20%.

[10] Both witnesses testified that Costco received the rebate (Y) without having to do anything. It arose simply as part of the exclusive card acceptance arrangement. According to the witnesses, none of the rebate (Y) related to marketing of the Co-Branded card.

[11] Subsection 3.01(a) goes on to reduce the rebate amount (Y) (effectively making the fee to Costco greater) for the first couple of months. Also, in the first few months of the arrangement Amex wanted to keep pressure on Costco to get its information systems up and running so it reduced the rebate until Costco “completes its information system requirements”. It is important to note the difference in wording between subsections 3.01(a) and 3.01(b). Subsection 3.01(b) specifically sets out what the payment is for (marketing efforts pursuant to subsection 2.02(a)), whereas subsection 3.01(a) is silent in this regard.

[12] There are two other provisions, subsection 3.01(c) and section 3.02 which also cover compensation from Amex to Costco. Subsection 3.01(c) compensates for usage of the joint card and section 3.02, drafted in a manner worthy of inclusion in the *Income Tax Act*, compensates for the difference between amounts Costco earned from new membership fees and a percentage of charges incurred at Costco.

[13] Subsection 2.02(a) of the Co-Branded Agreement sets out several pages of Costco’s marketing obligations vis-à-vis the Co-Branded program. Section 2.03 of the Co-Branded Agreement (“General Obligations of Costco”), while mainly concerning obligations related to the Co-Branded Program such as training employees about attributes of the Co-Branded cards, also requires Costco to maintain its membership program and to be responsible for “all activities associated with servicing Costco members”.

[14] Other provisions of note in the Co-Branded Agreement are section 2.07, pursuant to which Costco grants Amex a non-exclusive license to use Costco's trademark and section 2.11 pursuant to which Costco grants Amex exclusivity and agrees not to accept competitors' cards. Finally, an addendum to the Co-Branded Agreement made pursuant to section 2.03 sets forth the "standards and procedures for the collection, capture and transfer of Co-Branded card applications and related information to Amex". Effectively, Costco was responsible to obtain application data and ensure its security.

### Analysis

[15] The issue is a simple one. Is the payment (Y) in subsection 3.01(a) of the Co-Branded Agreement consideration for a supply of something by Costco to Amex or, is it simply a reduction of the fee (X) in the Merchant Agreement from Costco to Amex. Basically, what supply does this payment relate to? If Y is consideration for a supply from Costco to Amex, is that supply an exempt supply on the basis it falls under the definition of financial service?

### Interpretation of the Contracts

[16] I can readily conclude that the quarterly payment by Amex of Y pursuant to subsection 3.01(a) of the Co-Branded Agreement had the effect of reducing the net fee charged by Amex to Costco in a confidential way. According to the two witnesses, this is what the parties had intended, although I will have more to say on that question later in my Reasons. But, because the contracts have this effect, does it necessarily follow that the quarterly payment from Amex to Costco is not, for *Excise Tax Act*<sup>1</sup> purposes, a payment for the supply of something from Costco to Amex? The Respondent argues that because the payment of Y is set forth in the Co-Branded Agreement under the heading "Compensation" (making no mention that it is effectively a rebate of the discount charged by Amex to Costco pursuant to the Merchant Agreement), and because Costco obliges itself to do certain things under the Co-Branded Agreement, the payment under subsection 3.01(a) must be payment by Amex to Costco for those obligations. In interpreting these contracts, the question to be answered is to what supply do these payments relate: a supply from Amex to Costco (i.e., a rebate) or a supply from Costco to Amex?

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<sup>1</sup> R.S.C. 1985, c. E-15, as amended.

[17] In answering this question, and in interpreting these contracts, the parties agreed that the principles of contractual interpretation to be relied upon are well summarized by the Ontario Court of Appeal in *3869130 Canada Inc. v. I.C.B. Distribution Inc.*:<sup>2</sup>

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Broadly stated ... a commercial contract is to be interpreted,

- (a) as a whole, in a manner that gives meaning to all of its terms and avoids an interpretation that would render one or more of its terms ineffective;
- (b) by determining the intention of the parties in accordance with the language they have used in the written document and based upon the "cardinal presumption" that they have intended what they have said;
- (c) with regard to objective evidence of the factual matrix underlying the negotiation of the contract, but without reference to the subjective intention of the parties; and (to the extent there is any ambiguity in the contract),
- (d) in a fashion that accords with sound commercial principles and good business sense, and that avoids a commercial absurdity.

(a) *A commercial contract is to be interpreted as a whole, in a manner that gives meaning to all of its terms and avoids an interpretation that would render one or more of its terms ineffective.*

[18] The first issue to determine is whether the two contracts are so intertwined as to be read as one. The Merchant Agreement in the section entitled "Entire Agreement" specifically includes the "relevant portions" of the Co-Branded Agreement. The Co-Branded Agreement incorporates parts of the Merchant Agreement, for example, by defining Costco "Net Value of Charges" to mean the aggregate of charges submitted by Costco pursuant to the Merchant Agreement. The two agreements were entered into contemporaneously. The termination provisions of both provide that if the other agreement is terminated, it may also be terminated by either party upon written notice. In *I.C.B. Distribution*

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<sup>2</sup> 2008 ONCA 396.

*Inc.*, the Court adopts the following passage from “*The Law of Contracts*”<sup>3</sup> by Professor John McCamus:

Many transactions, especially large commercial transactions such as the purchase and sale of a large and complex business, may involve the execution of several agreements. In such contexts, it is an interesting question, then, whether in the interpretation of one of the agreements, regard may be had to the others. *The basic principle is that such regard may be had only where the agreements essentially form components of one larger transaction. Where each agreement is entered into on the faith of the others being executed and where it is intended that each agreement form part of a larger composite whole, assistance in the interpretation of any particular agreement may be drawn from the related agreements.*

[Emphasis added by Blair J.A.]

[19] I conclude that the circumstances require, and the agreements themselves demand, they be read together to fully determine the extent of the deal between the two parties. They are components of one larger transaction.

[20] Subsection 3.01(a) is the provision of the Co-Branded Agreement requiring interpretation. If, instead of using the term “Net Volume of Charges” in subsection 3.01(a), I insert the full definition of that term into subsection 3.01(a), that subsection then reads, in part, as follows:

...Costco shall be paid an amount equal to Y% of the aggregate of Charges submitted by Costco pursuant to the Merchant Agreement.

[21] In the Merchant Agreement, Amex obliges itself to pay Costco the face amount of charges minus the discount of X, being the amount charged for accepting the card. Reading this provision together with subsection 3.01(a) of the Co-Branded Agreement, it is clear the parties have agreed that Amex is to receive X minus Y or Z%. What is missing from subsection 3.01(a) is any express indication that Y is a rebate and precisely to what Y is intended to relate. Subsection 3.01(a) is unlike subsection 3.01(b) which clearly indicates the consideration set out therein is for marketing efforts required pursuant to subsection 2.02(a) of the Co-Branded Agreement. Due to this lack of clarity and because Costco obliges itself in many other respects in the Co-Branded Agreement, and because subsection 3.01(b) is compensation only for the subsection 2.02(a) marketing efforts, does it necessarily follow that subsection 3.01(a) must be for the remaining obligations in the Co-

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<sup>3</sup> (Toronto: Irwin Law Inc., 2005) at 715.



Branded Agreement? No, I suggest such an interpretation ignores the interconnection of the two agreements, and reads into subsection 3.01(a) words that are not there.

[22] Nothing in subsection 3.01(a) ties the general obligation to pay Y to any obligation of Costco under the Co-Branded Agreement. If there are charges submitted pursuant to the Merchant Agreement, Amex pays Costco Y. The charges are the only element in subsection 3.01(a) that suggests what supply the payment is connected to, and that is nothing relating to the Co-Branded card, but only the acceptance of all Amex cards on charges on the sale of Costco goods. The provision does go on to vary Y in the event Costco does not meet its information system requirements to support issuing the Co-Branded cards. While that may relate to the Co-Branded cards, it covers a period prior to the periods before me and does not impact on how I interpret the general obligation to pay Y. That obligation in context of the entirety of the two agreements relates solely to the determination of the net discount. The Merchant Agreement refers to “relevant portions” of the Co-Branded Agreement, without specifying exactly what are the relevant portions, but given that the Merchant Agreement deals entirely with the acceptance by Costco of the Amex card generally, it only makes commercial sense that anything to do with that subject is relevant. So what parts of the Co-Branded Agreement deal with all Amex cards and not just Co-Branded cards? The obvious answer is subsection 3.01(a).

[23] The Respondent argues all compensatory provisions of the Co-Branded Agreement must be read collectively as consideration for all supplies rendered by Costco. This ignores the specific language of subsection 3.01(b) that explicitly states that the 3.01(b) fee (the bounty fee) pertains only to Costco’s subsection 2.02(a) marketing obligations.

[24] This leaves open to question how to connect Costco’s other obligations with the appropriate consideration. What are Costco’s other obligations? Specifically, the Respondent raises sections 2.03, 2.05, 2.07 and 2.11 which obligate Costco to:

- collect application forms for the Co-Branded cards and transmit that information to Amex;
- provide Amex access to its members list;
- maintain and operate the Costco membership program;
- provide Amex with a response rate on marketing efforts described in subsection 2.02(a);

- train its employees about the Co-Branded cards;
- disclose to its members the cost of its fee;
- grant Amex a non-exclusive license to use Costco trademarks in connection with the Co-Branded cards;
- grant Amex exclusivity and agree not to accept competitor credit cards; and
- to make information system changes.

[25] I note that, apart from the granting of exclusivity, all other obligations relate to the issuance of the joint card. Further, these obligations are all supportive of Costco's marketing obligations found in subsection 2.02(a). This suggests to me that the deal Amex sought from Costco, vis-à-vis the Co-Branded card, was for Costco to promote the issuance of the cards through expanding Amex's customer base. Again, with the exception of the exclusivity provisions, the essence of the Co-Branded Agreement was the promotion of the Co-Branded card. All these other obligations relate directly to successfully marketing the Co-Branded card. Even the agreement to grant Amex a non-exclusive license to use Costco's trademark relates just to the Co-Branded card. The bounty fee (subsection 3.01(b)) is specifically directed at consideration for marketing efforts of the Co-Branded cards as required by subsection 2.02(a). The Respondent argues that this consideration was not significant or sufficient to cover all Costco's obligations, beyond the subsection 2.02(a) marketing efforts. I had no evidence of actual dollar amounts to draw any conclusion as to its significance. What I do conclude, however, is that Costco's obligations, other than subsection 2.02(a) marketing efforts, were incidental to those marketing efforts, supporting such efforts. While subsection 3.01(b) is prefaced with the words "in exchange for the marketing efforts provided by Costco as contained in subsection 2.02(a)", this should not preclude a finding that incidental marketing obligations are likewise covered.

[26] The Respondent also argues that subsection 3.01(c) and section 3.02, the other two compensation provisions, are for marketing efforts, not for any other Costco obligations. But that is just what the Co-Branded Agreement is all about - the marketing of the joint card. There are four elements to compensation in the Co-Branded Agreement: subsections 3.01(a), 3.01(b) and 3.01(c) and section 3.02. The latter three relate specifically to the joint card: only subsection 3.01(b) identifies the compensation as consideration for subsection 2.02(a) marketing efforts. Viewing the

agreement as a whole, I conclude subsections 3.01(b) and 3.01(c) and section 3.02 together are compensation to Costco for all obligations in connection with the joint card. I see no such connection with the compensation set out in subsection 3.01(a), which is compensation based on all Amex cards – not just the joint card. Had the Merchant Agreement not specifically incorporated the relevant portions of the Co-Branded Agreement, one might be left to wonder why subsection 3.01(a) was included. The only connection to anything in the Co-Branded Agreement would be the right of exclusivity granted by Costco to Amex. This needs further explaining.

[27] What is the right of exclusivity granted by Costco to Amex? It assures Amex that Costco will not honour any other credit cards. If a customer wants to use credit at Costco, the customer must use Amex. This is certainly significant. But is it a good or service from Costco to Amex? No. It is a bargaining tool. It is akin to a purchaser of a fleet of cars seeking a discounted price due to volume. It is significant that the compensation pursuant to subsection 3.01(a) from Amex to Costco is based on all Amex card sales. It is also significant Costco does nothing to obtain payment. If sales are made with Amex cards, Costco gets paid. Again, without the Merchant Agreement read together with the Co-Branded Agreement one might query this compensation, as it is a type of blanket fee that bears no relation to the Co-Branded card. Read with the Merchant Agreement, however, it becomes clear: Costco gets a better rate because it can offer this exclusivity. This goes directly to the fee charged by Amex, not to any obligation of Costco relating to the Co-Branded Agreement.

(b) *Intention discerned from language of agreements and regard to factual matrix*

[28] The second and third principles of contractual interpretation can be taken together as these principles address the search for the parties' intention. I do not take these principles to preclude parol evidence, though it is clear (see *General Motors of Canada Ltd. v. R.*<sup>4</sup> for example) that direct evidence of the parties' subjective understanding is inadmissible. Objective extrinsic evidence is permissible as is evidence of the factual matrix underlying the negotiation of the contract. This is important, especially in a case such as this where two contracts are entered contemporaneously and cross-reference one another. Why was this done? What were the circumstances? As Lord Wilberforce stated in *Reardon Smith Line v. Hansen-Tangen*.<sup>5</sup>

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<sup>4</sup> 2008 FCA 142.

<sup>5</sup> [1976] 3 All E.R. 570 (U.K. H.L.) at p. 574, cited in *Geoffrey L. Moore Realty Inc. v. Manitoba Motor League*, 2003 MBCA 71 at para. 16.

...No contracts are made in a vacuum: there is always a setting in which they have to be placed. The nature of what is legitimate to have regard to is usually described as “the surrounding circumstances” but this phrase is imprecise: it can be illustrated but hardly defined. In a commercial contract it is certainly right that the court should know the commercial purpose of the contract and this in turn presupposes knowledge of the genesis of the transaction, the background, the context, the market in which the parties are operating.

[29] The Court of Appeal of Ontario has adopted this approach in *I.C.B Distribution Inc.*:

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[52] No doubt, the dictionary and grammatical meaning of the words (sometimes called the “plain meaning”) used by the parties will be important and often decisive in determining the meaning of the document. However, the former cannot be equated with the latter. The meaning of a document is derived not just from the words used, but from the context or the circumstances in which the words were used. Professor John Swan puts it well in *Canadian Contract Law* (Markham, Ont.: Butterworths, 2006) at 493:

There are a number of inherent features of language that need to be noted. Few, if any words, can be understood apart from their context and no contractual language can be understood without some knowledge of its context and the purpose of the contract. Words, taken individually, have an inherent vagueness that will often require courts to determine their meaning by looking at their context and the expectations that the parties may have had.

[30] It is equally important to consider the factual context to clarify any vagueness. The ambiguity facing me is the lack of a direct expressed link between the payment in subsection 3.01(a) of the Co-Branded Agreement and the supply to which it relates. The provision (unlike subsection 3.01(b)) is simply silent. What then are the circumstances that can shed light on the meaning of this provision:

- (i) Critical to the overall deal between Costco and Amex was the exclusive acceptance of all Amex cards by Costco.

- (ii) The Canadian agreement followed the negotiation of the same deal in the United States, resulting in similar contracts with the three percentages, X, Y and Z.
- (iii) Confidentiality was key.
- (iv) There was no obligation on Costco to do anything to receive the Y - it simply flowed from a customer's use of an Amex card.

[31] The Respondent argues that if confidentiality was key, the parties would not need a 37-page document to hide it. I disagree. What better way to bury something? The Respondent also argues that by reading the subsection 3.01(a) compensation as simply a rebate renders the terms setting out Costco's obligations ineffective. Again, I disagree. The Co-Branded Agreement, as I have indicated, contains other compensatory provisions, which have a closer link to the obligations than subsection 3.01(a). Finally, the evidence of an internal memo after the agreements have been in operation for some time confirms the true nature of the deal, that is, that Amex's net fee was X minus Y or Z.

(c) *What interpretation accords with sound commercial principles and good business sense and avoids commercial absurdity?*

[32] I conclude it is an absurdity for Amex to pay a percentage on all Amex credit card purchases at Costco in exchange for services that relate to the Co-Branded cards only. That is simply out of kilter. The agreement that Amex will be the only credit card recognized by Costco (exclusivity) goes entirely to the determination of the fee Amex agrees to charge Costco. The fact that the fee has been divided in a somewhat obscure manner, which has been thoroughly explained and justified, does not alter the underlying commercial deal between these two parties of a supply by Amex to Costco for X minus Y or Z%. That is the only good business sense interpretation.

[33] My conclusion on the first issue is sufficient to allow the appeal without deciding the alternative issue. However, I will address the alternative argument and consider, if the payment of Y from Amex to Costco is consideration for a supply, then what is the nature of that supply? The Appellant argues that the supply in this regard is an exempt supply of a financial service. The Respondent argues that the exclusive promotion, marketing and administrative services relating to the Co-Branded cards go well beyond "financial services" and constitute a taxable supply.

[34] Financial service is an exempt supply. The starting point then is the definition of financial service found in subsection 123(1) of the *Excise Tax Act*. This reads in part:

123(1) In section 121, this Part and Schedules V to X,

"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,
- ...
- (g) the making of any advance, the granting of any credit or the lending of money,
- ...
- (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,
- ...
- (l) the agreeing to provide, or the arranging for, a service referred to in any of paragraphs (a) to (i), or

but does not include

- (n) the payment or receipt of money as consideration for the supply of property other than a financial instrument or of a service other than a financial service,
- ...
- (q) the provision, to an investment plan (as defined in subsection 149(5)) or any corporation, partnership or trust whose principal activity is the investing of funds, of
  - (i) management or administrative service, or
  - (ii) any other service (other than a prescribed service),

if the supplier is a person who provides management or administrative services to the investment plan, corporation, partnership or trust,

...

- (t) a prescribed service.

[35] Subsection 4(2) of the *Financial Services (GST/HST) Regulations*<sup>6</sup> exclude the following from the definition of financial service as a prescribed service:

- (a) the transfer, collection or processing of information, and
- (b) any administrative service, including an administrative service in relation to the payment or receipt of dividends, interest, principal, claims, benefits or other amounts, other than solely the making of the payment or the taking of the receipt. [Emphasis added]

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<sup>6</sup> SOR/91-26.

[36] What supply is at issue? As the Respondent pointed out, a supply is defined and characterized by asking, as a matter of common sense, “what did the recipient acquire for the money that it paid?” There are two ways to address that issue. First, as the Respondent suggests, the consideration set out in subsections 3.01(a), 3.01(b), 3.01(c) and section 3.02 are best read together such that all payments are for all supplies under the Co-Branded Agreement; and that the true nature of what was to be supplied pursuant to the Co-Branded Agreement were marketing and administrative services. The Respondent argues those marketing and administrative services go well beyond any “financial service” as defined in the *Act*. And, even if I were to find some part of the supply constituted an element of “arranging for” the supply of a financial service, as was determined in *Les Promotions D.N.D. Inc. v. Her Majesty the Queen*,<sup>7</sup> this is a minor component of the overall services provided by Costco.

[37] The second way to review the issue of what supply is at issue is to isolate the consideration in subsection 3.01(a) from the other compensatory provisions, noting that subsection 3.01(b) pertains explicitly to marketing efforts. In effect, the supplies to which subsection 3.01(a) must relate are the supplies other than subsection 2.02(a) marketing efforts. Costco’s obligations, other than pursuant to subsection 2.02(a) are found in sections 2.03, 2.05, 2.07 and 2.11, and outlined in paragraph 24 of these Reasons.

[38] I will first address the Respondent’s approach that the consideration in subsection 3.01(a) is to be read as part of the whole package of compensation for all supplies provided by Costco under the Co-Branded Agreement. It is clear from the first operative section of the Co-Branded Agreement, section 2.01, that Costco’s obligation to Amex is to market the Co-Branded card, market Amex card acceptance and accept Amex cards in Canada under the Merchant Agreement. Given the terms of acceptance are primarily covered under the Merchant Agreement, the supply from Costco to Amex in the Co-Branded Agreement is to market the joint Costco/Amex credit card. The agreement then goes on for several pages under subsection 2.02(a) to describe those marketing efforts required of Costco. Added to this are the other obligations I have previously outlined. Together, what is it Costco is supplying? Costco is supplying an immense network of stores and personnel through which Amex and only Amex can obtain new cardholders. The Respondent labels this as marketing and administration. It is less important how Costco’s activities are labelled as to understand exactly what those activities are, and what they are intended to

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<sup>7</sup> 2006 TCC 63, 2006 CarswellNat 5690.



provide to Amex. They are facilitating services of an intermediary between a major credit card company and its potential customers. I see no distinction between the circumstances in *Les Promotions D.N.D. Inc.*, where the services were the promotion and solicitation of applications for credit cards, and the circumstances before me. Any distinguishing facts do not topple the overall essence of what was being supplied by Costco and *Les Promotions D.N.D. Inc.*

[39] The following words of Justice Lamarre Proulx in *Les Promotions D.N.D. Inc.* are equally applicable to Costco:

37 The services provided during the transition between the acquisition of the service and the provision of the service sought are exempt, provided that they are linked in their purpose. Thus, in this case, between the person obtaining credit and the financial institution granting it there is an intermediary, and that is the appellant. The appellant's services are an integral part of the business of the person agreeing to provide the service of granting credit.

[40] I agree with the Appellant's contention that Costco did everything *Les Promotions D.N.D. Inc.* did and more: trained employees in the Amex card application, solicited applications, assisted in the completion of the applications, received the applications back from customers, reviewed for completeness and forwarded them to Amex. Costco was an integral part of Amex's business of granting credit and issuing credit cards. I find this case is on all fours with *Les Promotions D.N.D. Inc.* and I reach the same conclusion; that is, Costco was an intermediary arranging for the issuance of credit cards and granting of credit by Amex. This falls squarely within the definition of financial service and is consequently exempt.

[41] The Respondent goes on to argue that, in any event, such services from Costco are prescribed services pursuant to paragraph (t) of the definition of financial service. This exception does not save the Respondent's position. *Les Promotions D.N.D. Inc.* was clear that "the services provided by the Appellant are not in the nature of the collection or processing of information, or of administrative services". Costco is in a stronger position in this regard, more in the nature of an equal participant in the promotion of the card. Its services go well beyond data collection or administration. This is further evident from the very fact the card was not just a credit card but was Costco's membership card as well. I agree with this Court's observations in *Royal Bank of Canada v. Her Majesty the Queen*.<sup>8</sup>

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<sup>8</sup> 2005 TCC 802.

18 ...This provision has been considered only twice by this Court, and neither case sheds any light on the meaning of the expression “any administrative service” (“les services administratifs”). The *Canadian Oxford Dictionary* (2<sup>nd</sup> Ed.) gives this definition at page 17:

administrative: concerning or relating to the management of affairs.

Other dictionaries, both French and English, are no less vague. Clearly this expression is both broad and elastic in meaning, but it seems clear that when read in its context within the statutory scheme of Part IX of the *Act*, and relative to the definition of “financial service” (“service financier”) in particular, it is intended to exclude from that definition such ancillary services as data processing, record keeping and the like, but not those activities enumerated specifically in the first part of the definition for inclusion within it, of which arranging for the distribution of securities is certainly one. In my view paragraph (*t*) of the definition and the *Regulations* have no application in this case.

[42] Is my conclusion any different if I isolate Costco’s obligations not covered by subsection 2.02(a) of the agreement? In viewing those specific activities together, I conclude they too relate to the sale and ultimate use of the Co-Branded card. When I consider the combination of paragraphs (*g*) and (*l*) of the definition of financial service as the arranging for the granting of any credit, I readily conclude that is precisely what these obligations related to. This too is consistent with this Court’s finding in *Les Promotions D.N.D. Inc.* Clearly, Costco’s only objective in agreeing to these obligations was to have Co-Branded cards issued; that is, the bringing into existence of a financial product.

[43] Further, paragraph (*i*) of the definition of financial service which refers to any service provided pursuant to the terms of any agreement relating to payments of amounts for which credit card vouchers have been issued is so broad as to easily capture Costco’s obligations, especially if read in conjunction with the expression “agreeing to provide” such services, even where these obligations are not the direct “marketing efforts” obligation of subsection 2.02(a).

[44] In summary, I have been satisfied that the only supply to which the payment in subsection 3.01(a) relates is Amex’s supply of its credit card services to Costco, not the supply of anything by Costco to Amex. The payment in subsection 3.01(a) is indeed what the Amex and Costco representatives indicated, a rebate of part of the gross fee. This is gleaned from reading the agreements together, and if ambiguous, the parol evidence and subsequent extrinsic evidence clarify that was the substance of the agreement. Further, even if the payment from Amex to Costco was for a supply of something, that something can only be financial services, which are exempt. The

appeal is allowed on the basis that the amount, Y, referred to as the rebate, was not subject to GST under the *Excise Tax Act*. Costs to the Appellant.

Signed at Ottawa, Canada, this **10th day of March, 2009**.

“Campbell J. Miller”

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C. Miller J.

## SCHEDULE "A"

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

...

## ARTICLE I

### DEFINITIONS

#### Section 1.01. Defined Terms.

The following terms shall have the following meanings as and when used in this Agreement:

...

"Costco Card Service Agreement" means the agreement between Costco and Amex, dated November 4, 1999, whereunder Amex Cards are accepted by Costco for the purchase of goods and services, as such agreement is renewed, succeeded or amended.

...

"Costco Net Volume of Charges" means, for purposes of this Agreement, the aggregate of Charges submitted by Costco pursuant to the Costco Card Service Agreement and received and accepted by Amex, less credits, adjustments and amounts charged back by Amex pursuant to Amex's rights to full recourse under the Costco Card Service Agreement.

...

## ARTICLE II

### ESTABLISHMENT AND ADMINISTRATION OF THE PROGRAM GENERALLY

#### Section 2.01. The Program.

(a) Pursuant to the terms and conditions of this Agreement, Amex and Costco hereby establish the Co-Branded Card Program in Canada (the "Program"), pursuant to which generally: Amex shall issue Co-Branded Consumer Cards and extend credit to Co-Branded Consumer Cardholders pursuant to the terms of the Co-Branded Consumer Cardholder Agreement; Amex shall issue Co-Branded Small

Business Cards for use by Co-Branded Small Business Cardholders pursuant to the terms of the Co-Branded Small Business Cardholder Agreement; Amex will market Costco Membership and Amex Card acceptance to Amex Cardholders; Costco will market Co-Branded Consumer Cards and Co-Branded Small Business Cards; Costco will operate the Costco Membership Program; and Costco will accept Amex Cards in Canada under the Costco Card Service Agreement and market Amex Card acceptance. It is understood that to address competition, innovations in the marketplace, customer needs and the strategic objectives of the parties, the parties may determine to modify the Program, including the mix of Co-Branded Cards. Any such modifications shall be implemented only upon a written amendment to this Agreement signed by all parties hereto.

...

**Section 2.03.**                    **General Obligations of Costco.**

(a) For each Applicant (who must first be a Costco Member), Costco shall collect the Co-Branded Card application and the information needed to complete a Co-Branded Card application, and transfer said application and information to Amex in accordance with the procedures and minimum standards in Schedule 7. Before issuance of the first Co-Branded Card, the parties shall enter into an addendum setting forth mutually agreed upon standards and procedures. Costco shall comply with all disclosure and other regulatory requirements specified by Amex when conducting the above activities. Other than the first sixty (60) days of the Winddown Period as specifically provided in Section 5.02 (b) (iv), Costco shall not access or use any information identifying Co-Branded Cardholders as Co-Branded Cardholders or other Amex Cardholders for use in any marketing activities whatsoever without the prior written approval of Amex, said approval not to be unreasonably withheld, it being understood that, without Amex's approval, Costco may use such identifying information to suppress a mailing to Co-Branded Cardholders that would be redundant to a recent mailing or conflict with another mailing or marketing activity at that time. Any information identifying Co-Branded Cardholders as Co-Branded Cardholders in Costco's files or databases shall be purged 120 days after termination of this Agreement.

...

(c) Costco shall transmit at its expense to Amex all Costco Member information necessary to be included on the back of the Co-Branded Card within two (2) Business Days of notification to Costco by Amex that a new Co-Branded Card Account has been approved.

(d) Costco shall accept reward coupons earned by Co-Branded Consumer Cardholders as described in Section 2.14 below.

(e) At Amex's request, and subject to Costco's confidentiality policies (including prior approval of third party vendors) and Costco's approval which shall not be unreasonably withheld, Costco shall provide Amex access to the Costco Member list for the sole purpose of acquiring Co-Branded Cardholders. Costco shall segment the Costco Member list based upon mutually agreed upon specifications, which agreement shall not be unreasonably withheld by Costco. Costco shall bear any costs it incurs in creating such lists and transmitting them to Amex or a designated third party.

(f) Costco shall provide Amex with response rates on the marketing efforts described in Section 2.02(a) above, mutually agreed upon information to determine level of usage of Co-Branded Cards by Co-Branded Cardholders as a percentage of overall purchases at Costco Warehouses by such Co-Branded Cardholders, and other information regarding the performance of the Program as mutually agreed by the parties.

(g) Costco shall notify Amex promptly of Costco Member cancellations and once a month of any other known material changes in the Costco membership status pertinent to servicing Co-Branded Cardholders.

(h) Costco, at its expense, shall maintain and operate the Costco Membership Program while this Agreement is in effect. Attached to this Agreement as Schedule 4 is the Costco Membership Program terms and conditions as of the Effective Date of this Agreement. Costco agrees to notify Amex in writing of any material modifications to the terms and conditions contained in Schedule 4 as early as practicable.

(i) Costco shall be responsible for all activities associated with servicing Costco Members and will comply with all applicable laws and regulations governing the administration of the Costco Membership Program. Costco shall handle all inquiries relating to the Costco Membership Program. If Costco receives an inquiry that should be directed to Amex, Costco's customer service representative shall notify the Co-Branded Cardholder of the appropriate Amex toll free (1-800) telephone number to call.

(j) Costco shall train its relevant employees about the functionality and attributes of Co-Branded Cards as provided in Section 2.14 below and Amex Card acceptance.

...

**Section 2.05.**

**Billing for Costco Membership Fee.**

(a) The Co-Branded Card application shall disclose to the Applicant that, if approved, the Costco Membership Fee shall be automatically charged to the Co-Branded Card Account, unless the Applicant opts out of such by following the opt out procedures prominently set forth in the Co-Branded Card application. In the event of regulatory or material consumer concerns or complaints, Amex or Costco shall have the right to modify this process to instead require the Applicant, in the Co-Branded Card application, to opt for the Costco Membership Fee to be automatically charged to the approved Co-Branded Card Account. It is Costco's responsibility to ensure that the amount and frequency of the Costco Membership Fee is disclosed on the Costco Membership Program marketing materials and agreements. If a refund for the Costco Membership Fee billed to a Co-Branded Card, or portion thereof, is due, then Costco shall use best efforts to ensure that said refund shall be issued as a credit to the Co-Branded Card Account.

(b) It is Costco's responsibility to notify Associates Financial Services of Canada Inc. ("Associates") to stop charging the Costco Membership Fee in the event an Applicant holding a House Card issued by Associates opts to have the Costco Membership Fee automatically charged to the Co-Branded Card Account instead of the House Card account.

...

**Section 2.07.**                    **Use of Marks.**

(a) Costco hereby grants to Amex a non-exclusive license to use the Costco Marks in connection with the Program, subject to the limitations set forth in this Section 2.07. Such license shall be irrevocable as long as this Agreement remains in effect and shall continue in effect after any termination of this Agreement as provided in, and subject to the limitations contained in, Section 5.02(c)(i) hereof. Amex acknowledges and agrees that the grant of the foregoing license shall not be construed as the grant of any right, title or interest in the Costco Marks (except the right to use the Costco Marks in connection with the Program) and that the Costco Marks are the sole and exclusive property of Costco. For so long as this Agreement is in effect and the Costco Marks are being used by Costco, Costco Marks shall appear on the back of Co-Branded Cards as provided in Schedule 6 hereto and Co-Branded Account billing statements. Amex shall not have the right to sublicense Costco Marks without prior written consent of Costco.

...

**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 2.12.**                    **Covenants With Respect to the Program.**

(a) Costco covenants and agrees with Amex that: (i) at all times during which this Agreement is in effect, Costco shall observe and comply with, and maintain in full force and effect, the Costco Card Service Agreement, as from time to time amended or replaced, and (ii) Costco shall comply in all material respects with its obligations under any and all federal, provincial and local laws, rules and regulations (including, without limitation, consumer protection laws, rules and regulations) applicable to it, the Costco Membership Program or the Program.

...

**ARTICLE III**

**COMPENSATION TO COSTCO**

**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 canceled 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.

...

**Section 3.02. Payment if New Costco Member Requirements Not Met.**

Within sixty (60) days after the end of each Contract Year, Costco shall be paid the amount, if eligible under this Section 3.02, by applying the following calculations:

(i) Determine the number of Canadian Costco Members who are also Canadian consumer or small business Amex Cardholders (as defined by Amex) as of a date which may not precede the Effective Date of this Agreement but shall be no later than five (5) Business Days after the Effective Date of this Agreement (said date hereinafter referred to as the **“Baseline Date”**). The resulting number is hereinafter referred to as the **“Baseline Number”**. The Adjusted Baseline Number for purposes of the calculations in (ii) below, shall be determined as follows: The Adjusted Baseline Number for the first Contract Year shall be the product of the Baseline Number multiplied by \_\_\_\_%. The Adjusted Baseline Number for each subsequent Contract Year shall be the product of the Adjusted Baseline Number for the prior Contract Year multiplied by \_\_\_\_%. For purposes of this Subsection 3.02, Costco Members means primary Costco Members only.

(ii) At the end of each Contract Year, (A) re-determine the number of Canadian Costco Members who were also Canadian consumer or small business Amex Cardholders (other than Co-Branded Cardholders) as of the last day of that Contract Year; (B) subtract from the result in (A) the remainder of the Adjusted Baseline Number minus the number of Canadian consumer or small business Amex Cardholders on the Baseline Date who have become Co-Branded Cardholders (it being understood and agreed that, due to the termination and acquisition of Amex

Cardholders since the Baseline Date, this latter number will be based upon a reasonable process to arrive at an estimate); (C) multiply the result in (B) by \_\_\_\_, with the result referred to as “Y”; (D) subtract the number of Co-Branded Cardholders at the end of the Contract Year who were Costco Members on the Baseline Date from the total number of Co-Branded Cardholders at the end of the Contract Year, and multiply the remainder by \_\_\_\_, with the result referred to as “Z”; (E) add Y (only if Y is a positive number) and Z, with the sum referred to as the “**New Costco Member Number**”. Costco agrees to provide Amex with the complete Costco Member lists to conduct the above analyses or for other uses approved in writing by Costco in advance, in accordance with Costco’s policies on access and use of such lists. Amex Cardholders used in (i) above and this subsection (ii) shall consist only of those Cardholders with Amex Issued cards.

(iii) For each Contract Year, multiply the New Costco Member Number by the Gold Star Costco Membership Fee (currently \$\_\_\_\_), with the product stated in dollars; and

(iv) Multiply the Net Volume of Charges incurred at Costco Warehouses located in Canada during that Contract Year by \_\_\_\_%. If the product of such multiplication is more than the resulting dollar amount from subsection (iii) directly above, then Costco shall be paid the difference between said product and the dollar amount from subsection (iii) above.

...

## **SCHEDULE "B"**

Excerpts from Agreement for American Express® Card Acceptance  
dated November 4, 1999

...

### **PAYMENT**

We will pay you in Canadian Dollars for the face amount of Charges you submit, minus: 1) our Discount; 2) any amounts you owe us; and 3) any Credits you issued. We will send payment to you in accordance with the payment plan you select. You may not receive payment on behalf of any other entity.

#### **Discount Rate**

The Discount is the amount we charge you for accepting the Card. The Discount rate is X% and will apply to all Charges made using Cards. The Discount will be deducted from our payments.

...

### **CONFIDENTIALITY**

Subject to your rights with respect to Co-Branded Cardholders and our rights with respect to Costco Members as specifically provided in the Co-Branded Card Program Agreement, you shall not use for marketing, sell or disseminate a list compiled specifically of those Cardmembers who use Cards to make purchases from you, and we shall not use for marketing, sell or disseminate a list compiled specifically of your customers.

...

### **TERM & TERMINATION**

This Agreement will commence on November 4<sup>th</sup>, 1999 (*Effective Date*) and continue for a period of ten (10) years (*Initial Term*). This Agreement shall be automatically renewed after the Initial Term annually for additional one (1) year terms (each a *Renewal Term*) and will remain in effect until terminated by either party upon written notice to the other party. The termination will be effective one hundred and twenty (120) days after receipt of such notice. If the American Express/Costco Co-Branded Card Program Agreement is terminated in accordance with its terms, then this Agreement may be terminated by either party upon written notice to be effective upon the effective date of the termination of the Co-Branded

Card Program Agreement, subject to Amex Cardholders use of Amex Cards during the Winddown Period under the Co-Branded Card Program Agreement.

...

**ENTIRE AGREEMENT**

This Agreement, including all schedules, exhibits and attachments hereto, and the relevant portions of the Co-Branded Card Program Agreement between the Parties, contains the entire agreement of the parties with respect to the subject matter hereof, and supersedes any previous agreement, oral or written heretofore, made with respect to the subject matter hereof.

...

CITATION: 2009 TCC 134

COURT FILE NO.: 2007-1374(GST)G

STYLE OF CAUSE: COSTCO WHOLESALE CANADA LTD.  
and HER MAJESTY THE QUEEN

PLACE OF HEARING: Toronto, Ontario

DATE OF HEARING: December 1 and 2, 2008

REASONS FOR JUDGMENT BY: The Honourable Justice Campbell J. Miller

DATE OF **AMENDED**  
JUDGMENT: **March 10, 2009**

APPEARANCES:

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**Neil E. Bass (December 2, 2008)**  
and Wendy Brousseau

Counsel for the Respondent: Harry Erlichman, **Suzanne Bruce**  
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