

Dockets: 2015-1845(GST)G
2015-4539(GST)G

BETWEEN:

CANADIAN IMPERIAL BANK OF COMMERCE,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeals heard on February 6, 8, 21 and 22, 2018, at Toronto, Ontario

Before: The Honourable Eugene P. Rossiter, Chief Justice

Appearances:

Counsel for the Appellant: Al Meghji
Alexander Cobb
Al-Nawaz Nanji
Counsel for the Respondent: Marilyn Vardy
Kelly Smith-Wayland

AMENDED JUDGMENT

The appeals from the assessments made under the *Excise Tax Act*, notices of which are dated:

1. March 31, 2015 with respect to the period from April 1, 2012 to November 30, 2013;
2. March 25, 2011 with respect to the period from September 20, 2003 to October 31, 2004;
3. June 22, 2011 with respect to the period from November 3, 2004 to July 14, 2006;
4. June 22, 2011 with respect to the period from October 7, 2006 to July 29, 2008; and

5. March 31, 2014 with respect to the period from October 21, 2009 to July 22, 2011;

are dismissed in accordance with the attached **Amended Reasons for Judgment**.

This Amended Judgment and Amended Reasons for Judgment are issued in substitution for the Judgment and Reasons for Judgment issued June 22, 2018.

Signed at Ottawa, Canada, this **12th** day of **July**, 2018.

“E.P. Rossiter”

Rossiter C.J.

Citation: 2018 TCC 109

Date: **20180712**

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AMENDED REASONS FOR JUDGMENT

Rossiter C.J.

[1] This appeal involves determining whether the supply provided to Canadian Imperial Bank of Commerce (“CIBC”) by Visa satisfies the definition of a financial service under section 123 of the *Excise Tax Act* (“ETA”). For the reasons that follow, I am of the opinion that the supply provided by Visa is not a financial service and is accordingly not an exempt supply for the purposes of the ETA.

I. Executive Summary

[2] The CIBC issues Visa credit cards and utilizes a credit card payment system operated and managed by Visa Canada Corporation and its affiliates. As part of the process, fees are paid to Visa. CIBC paid the Goods and Services Tax (“GST”) on the fees and seeks a rebate as the provision of services is an exempt supply for the purposes of the ETA. As part of this supply, Visa provided a number of services for CIBC in exchange for financial consideration provided by CIBC of fees.

[3] The issue before the Court is whether or not these services constitute a taxable or exempt supply for the purposes of the ETA, specifically whether these services meet the definition of a financial service under section 123 of the ETA. The Appellant’s position is that the services provided by Visa meet the definition of a financial service, specifically paragraphs (a), (i) and (l) of the definition in subsection 123(1), and is not excluded by the exceptions found at paragraphs (q.1), (r.3), (r.4), (r.5) and (t) of the definition. The Respondent asserts that the services are not included in the financial services definition and if they are included are

kicked out of the definition in subsection 123(1) by virtue of paragraphs (q.1), (r.3), (r.4), (r.5) and (t).

[4] After hearing the evidence and considering the submissions of the parties, this Court concludes that the fees and services are in respect of a taxable supply for GST purposes and are not exempt from GST, as provided in the reasons hereafter.

II. Facts

(1) Partial Agreed Statement of Facts and Evidence

[5] A Partial Agreed Statement of Facts has been filed. I believe these facts fairly and accurately set out the facts which are relevant to the consideration of this appeal. The Partial Agreed Statement of Facts are as follows:

Canadian Imperial Bank of Commerce (“CIBC”)

1. CIBC is a Schedule I bank pursuant to the *Bank Act (Canada)* that is, and was at all material times, resident in Canada and registered under Part IX of the *Excise Tax Act*, R.S.C. 1985, c. E-15, as amended (the “Act”) for purposes of the goods and services tax (“GST”) and harmonized sales tax (“HST”).
2. At all material times, CIBC operated branches in provinces in which the HST applied and in provinces in which the HST did not apply. CIBC thus qualified as a “selected listed financial institution” as defined by subsection 123(1) of the Act.
3. At all material times, as part of its retail banking business, CIBC issued Visa-branded credit cards (each, a “CIBC Visa Credit Card”) to its customers.
4. A CIBC Visa Credit Card generally permitted the cardholder to pay for purchases with credit granted by CIBC, as described below.

Visa Canada Corporation

5. Visa Canada Association (“VCA”) was a member-owned corporation without share capital whose members consisted of several Canadian financial institutions, including CIBC.

6. Visa Canada Corporation (“VCC”) is a corporation organized under the laws of Nova Scotia, by way of amalgamation on October 27, 2007 between Visa Canada Inc. and 3222171 Nova Scotia Limited, a subsidiary of Visa Inc. Visa Canada Inc. was the successor to VCA, as part of the restructuring of the global Visa enterprise in October 2007 (the “2007 Restructuring”).
7. VCC is an indirect subsidiary of Visa Inc., a public corporation incorporated under the laws of Delaware.
8. As part of the 2007 Restructuring, CIBC entered into a services agreement with VCA dated October 1, 2007 and entered into an amended and restated services agreement with VCC dated January 1, 2013 (collectively, the “Services Agreement”). Hereinafter, “Visa Canada” refers to VCA or to VCC, as applicable.
9. Visa Canada was at all material times resident in Canada and registered under Part IX of the Act for GST/HST purposes.
10. Visa Canada, in conjunction with its affiliates, (collectively, “Visa”) develops, operates, manages, and promotes a proprietary global retail electronic payments network that facilitates global commerce through the transfer of value and information among system users or “participants”, which include financial institutions, merchants and consumers, businesses and other organizations that use Visa-branded payment instruments.
11. Visa Canada is not a Schedule 1 bank pursuant to the *Bank Act* (Canada). Neither Visa Canada, nor any of the Visa affiliates: (i) issue credit or debit cards or other payment instruments; (ii) extend credit to cardholders; or (iii) determine interest rates or fees charged to cardholders or merchants.
12. Visa Canada charged fees to CIBC and other customers (also referred to as its “Members”), which are “Acquirers” and “Issuers” (as described below). Prior to the Services Agreement, these fees were imposed under the Visa Rules (as defined below) and thereafter were imposed under the Services Agreement.
13. The part of the Visa payments network that this case is concerned with involves the use of the CIBC Visa Credit Card as a payment instrument for payment transactions (hereinafter, the “Visa Payment System”).

The Visa Payment System

14. The Visa Payment System is the set of instruments, procedures, rules and technology by which transaction information and funds are transferred among system participants such that a Visa Credit Card holder can purchase goods and services from a participating merchant by immediately accessing, at the point-of-purchase, credit granted by the cardholder's card-issuing financial institution.

15. The essential participants involved in a typical Visa Credit Card payment transaction are:
 - (a) The cardholder, who uses the Visa Credit Card to pay for goods and services.

 - (b) The merchant, who accepts the Visa Credit Card as payment for goods and services.

 - (c) The Issuer, who issues the Visa Credit Card to the cardholder, assigns the associated line of credit to the cardholder and provides the lending services to the cardholder that arise from the cardholder's use of the Visa Credit Card.

 - (d) The Acquirer, who enters into the agreement with the merchant (the "Merchant Agreement") under which the merchant agrees to accept Visa Credit Cards as payment for goods and services. The Acquirer effects payments to merchants.

 - (e) Visa, which develops, operates and manages the Visa Payment System.

16. The following are the essential steps involved in a typical Visa Credit Card payment transaction.
 - (a) The cardholder presents the Visa Credit Card to the merchant in payment for goods or services.

 - (b) The merchant's point-of-sale device reads, and transmits to the Acquirer, the cardholder's Visa Credit Card account number and other data encoded on the card, as well as the necessary transaction information, including the amount that the cardholder wishes to charge to the Visa Credit Card account (the "Credit Amount").

 - (c) The Acquirer combines the cardholder account and transaction information into an authorization request and transmits it to Visa.

- (d) Visa routes the authorization request to the Issuer for review.
- (e) The Issuer checks the status of the cardholder's account, including the available credit limit, and returns either an approval message or a decline message to Visa.
- (f) Visa routes the approval or decline message to the Acquirer.
- (g) The Acquirer transmits the approval or decline message to the merchant's point-of-sale device.
- (h) If the transaction is approved, the merchant proceeds to conclude the transaction with the cardholder.
- (i) The merchant transmits to the Acquirer a record of the completed transaction, typically as part of a file of such records that includes account numbers and transaction amounts.
- (j) The Acquirer formats the transaction information into a clearing record and combines all such records into a single daily batch file that it sends to Visa.
- (k) Visa sorts the clearing records it receives from all Acquirers according to the responsible Issuers and, in the case of each Issuer,
 - (i) provides the Issuer with all clearing records for the transactions for which the Issuer is responsible, stated in the currency in which the Issuer bills the cardholders, and
 - (ii) calculates and advises the Issuer of the net settlement amount payable by the Issuer in respect of those transactions, being the amount required to cover the total of the Credit Amounts for the transactions, net of certain applicable fees and charges.
- (l) The Issuer sends funds to Visa's designated settlement bank for deposit to Visa's settlement account in the amount of the Issuer's net settlement obligation.
- (m) Visa calculates the settlement amount payable to each Acquirer in respect of the transaction clearing records submitted by the Acquirer, being the Credit Amounts for those transactions, net of certain applicable fees and charges.

- (n) Visa directs its settlement bank to transfer funds due to the Acquirer from Visa's settlement bank account to the Acquirer's designated settlement bank account.
 - (o) The Acquirer deposits or credits to the merchant's designated bank account funds due to the merchant in respect of the transaction records that were submitted by the merchant to the Acquirer, to cover the Credit Amounts for those transactions net of any fees the merchant is required to pay to the Acquirer in accordance with their Merchant Agreement.
 - (p) The Issuer provides the cardholder with a statement of account detailing the Credit Amounts charged to the cardholder's Visa Credit Card account during the period covered by the statement and specifying a balance due date.
 - (q) The cardholder pays the Issuer the Credit Amounts, and any interest thereon, according to the terms of the agreement between the Issuer and the cardholder (the "Cardholder Agreement"). The Issuer typically charges the cardholder interest if the balance shown on the account statements is not paid in full by the specified due date.
17. With respect to a Visa Credit Card payment transaction, there are fees paid by the Acquirer to the Issuer, fees paid by the merchants to Acquirers, and fees paid by the cardholder to CIBC, as well as fees paid by CIBC to Visa Canada in respect of the bundle of rights and services provided by Visa Canada to CIBC (the "Visa Supply"). The only fees at issue in this appeal are the fees paid by CIBC to Visa Canada.
18. There are situations where a Visa Credit Card payment transaction is reversed. For example, in a case where there has been fraudulent use of a Visa Credit Card, the Issuer has the right to reverse the transaction (or "return" it to the Acquirer) by initiating what is called a "Chargeback". In these situations, the amount initially paid by the Issuer in respect of the Credit Amount of the transaction is "charged back" to the Acquirer. The Acquirer may, within a certain period of time, dispute or challenge the Issuer's Chargeback. Visa establishes and enforces rules relating to Chargebacks and maintains a dispute resolution process with respect to Chargeback disputes.

The Visa Rules

19. Visa establishes, monitors compliance with, and enforces a common set of standards, rules, policies, processes and procedures (collectively, the “Visa Rules”) that govern all aspects of the Visa Payment System.
20. For a Member to be entitled to participate in the Visa Payment System, Visa requires that the Member comply with the Visa Rules.
21. The Visa Rules are comprised of the Visa by-laws, *Visa International Operating Regulations* and *Visa Regional Operating Regulations*, and include guides and other forms of directives supplementary to the foregoing.
22. The Visa Rules are voluminous, covering everything from the fundamental policies governing the Visa Payment System (referred to by Visa as is “Core Principles”), to detailed specifications for data and money transfers.

Establishing standards for participation in the Visa Payment System

23. Visa generally require persons that wish to participate in the Visa Payment System as Issuers or Acquirers to be regulated or organized under the applicable laws relating to financial institutions or to be wholly-owned by such an institution.
24. The Visa Rules allow Members to contract with third-parties to facilitate issuing or acquiring activities, subject to certain conditions. Such third-parties must be registered with Visa. The contracting Members are responsible for all errors, acts and omissions of the third-parties, including their agents and vendors.
25. The Visa Rules require Acquirers to make investigations to screen prospective merchants before entering into Merchant Agreements in order to determine that the prospective merchant is financially responsible and to ensure that the prospective merchant will comply with the substance of the *Visa International Operating Regulations* as well as applicable law.

Defining the respective financial responsibilities of the participants

26. The Visa Rules govern the respective financial responsibilities of the participants in the Visa Payment System towards each other.
27. Issuers are financially responsible for transactions that are accepted by merchants in accordance with the Visa Operating Regulations, and properly processed by the relevant Acquirers. Acquirers are obligated to

pay or credit each merchant's settlement account the amounts due to the merchant promptly after the merchant has properly submitted the related records of authorized transactions to the Acquirer.

Setting certain minimum cardholder service standards

28. The Visa Rules require Merchants to comply with certain minimum Visa Card acceptance standards.
29. The Visa Rules also impose certain minimum service standards with which Issuers must comply. The Visa Rules require that all Visa Credit Cards issued by an issuer must entitle the cardholders to make purchases of goods and services and to obtain cash disbursements, and that the Issuer is responsible for accepting and attempting to honour all Visa Credit Card transactions, subject to the Issuer's Chargeback rights. Other examples are: (i) requirements that particular premium card plans include certain minimum benefits to the cardholder; (ii) common standards for how Issuers must deal with transactions disputed by cardholders; and (iii) prohibitions against imposing a minimum cardholder liability amount with regard to unauthorized Visa Credit Card payment transactions. However, neither Visa Canada, nor any of its affiliates enter into agreements with cardholders.

Fulfilling the Authorization Function where Necessary

30. In circumstances where an Issuer's systems (or those of its third-party agent) are temporarily unavailable to respond to authorization requests, Visa is available to perform the authorization function on behalf of the Issuer (referred to as "stand-in authorization"), based on parameters that are provided to Visa by the Issuer for that purpose.
31. During the relevant period, CIBC utilized the stand-in authorization service on an as-needed basis when its systems, or those of its third-party processor, were temporarily unavailable to respond to authorization requests, which occurred relatively infrequently.

Establishing Default Interchange Fee Rates for Issuers and Acquirers

32. Visa sets default interchange fee rates for Acquirers and Issuers to use where they choose not to negotiate those fees bilaterally.
33. During the relevant period, CIBC chose to use the default interchange fee rates established by Visa.

Enforcement and Risk Protection

34. Visa regularly monitors its customers, especially those with significant settlement exposure, to assess their risk, which can threaten the integrity of the Visa Payment System. Visa applies, as it deems necessary, a variety of risk control measures, which may include imposing requirements on a customer to post collateral or provide other guarantees in respect of the customer's settlement obligations, blocking the authorization and settlement of certain transactions, limiting a customer's use of certain types of agents, prohibiting initiation of acquiring relationships with certain high-risk merchants and suspending or terminating a customer's right or a merchant's right to participate in the Visa Payment System.
35. Visa monitors participants' compliance with the Visa Rules and can deny, suspend or terminate participation in the Visa Payment System (including by merchants) for non-compliance with the Visa Rules or to guard against suspected violations of laws, including money-laundering or financing of terrorist activities.

Visa Canada's Supply to CIBC

36. At all material times, Visa Canada provided a bundle of rights and services to CIBC (i.e. the Visa Supply).
37. Prior to the effective date of the Services Agreement dated October 1, 2007, VCA provided the Visa Supply to CIBC pursuant to CIBC's membership in VCA and VCA's By-laws, various trade-mark licence agreements and the various documents that comprised the Visa Rules at that time (collectively, the "Original Agreement").
38. After the effective date of the Services Agreement, VCC provided the Visa Supply to CIBC pursuant to the terms of the written Services Agreement (hereinafter a reference to the "Visa Supply Agreement" is a reference to the Original Agreement or the Service Agreement, as applicable), which incorporated by reference the continued trade-mark licence agreements and the Visa Rules, also as amended from time to time.
39. Pursuant to the Visa Supply Agreement, CIBC paid to Visa Canada, on a periodic basis, various fees for the Visa Supply. CIBC also paid to Visa Canada amounts as GST/HST calculated on those fees.

CIBC's Rebate Claims

40. During the period from September 1, 2003 to November 30, 2013, CIBC paid amounts as GST/HST calculated on fees paid for the Visa Supply that was received by CIBC for each of the billing periods to which the fees related.
41. The total amount paid as GST/HST (the “Total Tax”) included amounts paid as tax under subsection 165(1) of the Act (the “Federal Component Tax”) and also, in respect of periods after June 2010, amounts paid as tax under subsection 165(2) of the Act (the “Provincial Component Tax”).
42. CIBC filed applications for rebates under section 261 of the Act in respect of the Total Tax (collectively, the “Rebates”).
43. CIBC claimed the Rebates on the basis that, in its view, the Visa Supply constituted a GST/HST exempt supply of a “financial service”, as defined in subsection 123(1) of the Act and, therefore, CIBC had paid the Total Tax in error.

Assessments under Appeal

44. The Minister of National Revenue (the “Minister”) denied the Rebates by way of the following assessments that CIBC appeals (collectively, “the Assessments”):
 - (a) assessment dated March 25, 2011 (the “First Assessment”) in respect of the period from September 30, 2003 to October 31, 2004, denying CIBC’s rebate claim in the amount of \$2,032,567.36 (which amount claimed was, on objection, subsequently reduced by CIBC to \$1,909,509.22), comprised entirely of Federal Component Tax (the “First Rebate Claim”);
 - (b) assessment dated June 22, 2011 (the “Second Assessment”) in respect of the period from November 3, 2004 to July 14, 2006, denying CIBC’s rebate claim in the amount of \$3,532,473.69, comprised entirely of Federal Component Tax (the “Second Rebate Claim”);
 - (c) assessment dated June 22, 2011 (the “Third Assessment”) in respect of the period from October 7, 2006 to July 29, 2008, denying CIBC’s rebate claim in the amount of \$3,189,275.02, comprised entirely of Federal Component Tax (the “Third Rebate Claim”);

- (d) assessment dated March 31, 2014 (the “Fourth Assessment”) in respect of the period from October 21, 2009 to July 22, 2011, denying CIBC’s rebate claim in respect of Tax in the amount of \$6,388,523.47, of which \$3,100,320.42 consisted of Federal Component Tax (the “Fourth Rebate Claim”); and
 - (e) assessment dated March 31, 2015 (the “Fifth Assessment”) in respect of the period from April 1, 2012 to November 30, 2013, denying CIBC’s rebate claim in the amount of \$3,105,338.66, consisting only of the Federal Component Tax portion of the total Tax paid in respect of that period (the “Fifth Rebate Claim”).
45. CIBC served the Minister with the following notices of objection to the Assessments:
- (a) a notice of objection dated June 20, 2011 to the First Assessment;
 - (b) a notice of objection dated August 22, 2011 to the Second Assessment;
 - (c) a notice of objection dated August 22, 2011 to the Third Assessment;
 - (d) a notice of objection dated June 18, 2014 to the Fourth Assessment (the “Fourth Objection”); and
 - (e) a notice of objection dated June 8, 2015 to the Fifth Assessment.
46. The Minister confirmed the First, Second and Third Assessments in separate notices of confirmation dated January 20, 2015.
47. CIBC filed its appeal of the Fourth Assessment to this Court after more than 180 days had elapsed since CIBC had served the Fourth Objection without the Minister having made a reassessment or having notified CIBC that the Fourth Assessment had been vacated or confirmed.
48. The Minister confirmed the Fifth Assessment in a notice of confirmation dated July 17, 2015.

(2) Other Findings of Fact

[6] In addition to the Partial Agreed Statement of Facts, I also make the following findings of fact based upon the evidence presented.

[7] Visa has more branded credit and debit cards in circulation, more transactions and greater total volume than any of its competitors.

[8] Visa's business consists primarily of:

- i) a family of well-known, widely accepted payment brands which Visa licenses to customers for use in their payment program;
- ii) management and promotion of its brand for the benefit of its customers through advertising, promotional and sponsorship initiatives and by encouraging card usage and merchant acceptance;
- iii) a wide range of branded payments product platforms which Visa's customers use to develop and offer credit, debit, prepaid and cash access programs for the cardholders;
- iv) transaction processing services (primarily authorization, clearing and settlement) to its customers through Visa Net, its secure, centralized and global processing platform;
- v) various other value-added services including *inter alia*, risk management, dispute resolution management and information processing services;
- vi) development of new products and services to enable its customers to offer efficient and effective payment methods to its cardholders and merchants; and adoption and enforcement of a common set of rules adhered to by its customers to ensure the efficient and secure function of its payments network and maintenance and promotion of the Visa brands.

[9] In Visa International's 10-K filing with the SEC, Visa values its risk from possible settlement losses (estimated using their proprietary model) as being less than 1 million dollars as of September 30th, 2009. Included on Visa's balance sheet is collateral of \$812 million and a brand valued at \$2.6 billion (listed under intangible assets). Advertising and marketing in 2009 totalled \$918 million dollars, with total operating expenses being \$3.373 billion dollars.

[10] Attached hereto as Schedule “A” is a diagram of how a typical credit card payment transaction would occur.

(3) Witnesses

(a) Appellant

[11] Steven Webster was the Appellant’s first witness. He was employed by CIBC for 26 years and testified that the consumer obtains a credit card from CIBC by first submitting an application to CIBC. CIBC assesses the application based on the credit profile of the individual to determine if CIBC will issue a credit card, and if so, what would be the appropriate limit. Visa has no involvement in this process and no role in issuing the credit card. Visa is however involved in consenting to the credit card design.

[12] Mr. Webster indicated that Visa is important for CIBC’s business as it gives CIBC clients the ability to purchase goods and services at a wide array of possible merchants by enabling the transfer of money from their clients to the merchant. Visa does this by setting up the rules and regulations that govern the Visa system, which among other benefits creates trust in the Visa platform so that merchants believe that when the credit card is presented and they get an authorization, they will get paid. Visa also provides the physical infrastructure and network systems which allows for transactions to be authorized by CIBC.

[13] Mr. Webster estimated that the credit division at CIBC is fairly small with only 150 employees but that other operating groups that are comprised of roughly 1,500 employees provide support for the credit card group, including the contact centre, the fraud group and the back office operations group. When asked about the degree of interaction between CIBC and Visa, Mr. Webster stated that the two are in constant contact, with the example being given of chargebacks, with thousands of such transactions being processed a day, and the credit card group at CIBC talking to Visa on a daily basis. CIBC’s agreement is with Visa Canada.

[14] In terms of the revenue that is earned from Visa, Mr. Webster indicated that CIBC earns money from its credit card business in three principle ways:

1. Net interest income, which is the difference between the interest CIBC charges clients who do not pay their bill in full at the end of the month and the cost to CIBC of funding these receivables. The risk of non-payment is born by CIBC.

2. Interchange, which is a percentage of the purchase volume that goes through the Visa network which is the price that acquirers pay issuers for the services that the issuer provides. Visa establishes the default interchange rates, with the interchange rate being deducted from the amount that is reimbursed to the merchant. These default rates set by Visa are what is used by CIBC, though CIBC does have the option of deviating from these default rates by negotiating a different rate with individual acquirers separately.
3. Annual fees charged to users of the credit card.

[15] Mr. Webster described the role of an acquirer as being to sign agreements with merchants to participate in the VISA payment system, with Visa deciding on who can become an acquirer. The acquirers will then sign up individual merchants and provide them with point of sale terminals. The acquirers will charge their own fee on each transaction that is in addition to the interchange fee charged by CIBC. During cross-examination, Mr. Webster stated that he regarded the service being provided in exchange for the interchange fees as being the providing of authorization and the taking on the risk in the transaction that the client would not pay CIBC back.

[16] Mr. Webster also testified that CIBC settles its accounts with Visa on a daily basis, but that Visa bills CIBC on a monthly basis based on a calculation of all the transactions that have occurred involving CIBC clients who are Visa card holders. On a Visa credit card, the first six numbers on the card are referred to as the BIN number, which identifies the card as a Visa and also which bank issued the card; this allows Visa to identify where to route the transaction. Once the transaction information has been received by CIBC, it will go through their authorization system, which involves checking if the transaction is fraudulent and if the client has sufficient credit to make the purchase. The authorization practice is outsourced by CIBC to Total Systems. They act on CIBC's instructions with CIBC setting out the parameters of the authorization. There is a service agreement between Total Systems and CIBC stipulating that CIBC bears the risk. The acquirer has no say whether the transaction is authorized or not, nor does Visa. In the event that the verification systems are not operational, Visa can stand in for the acquirer and can authorize the transaction based upon a set of criteria given to them by the acquirer. For CIBC, this was estimated by Mr. Webster to happen a hand full of times per year. Authorization for a transaction only takes a second or two. After the authorization, the cardholder completes the payment to the merchant and the

merchant is registered in the system as having been paid, with authorization being received by the merchant.

[17] At the end of the day, the merchant will settle all of the day's transactions with the acquirer who then settles with Visa. In the event the acquirer does not pay the merchant, Visa will pay the merchant as Visa guarantees payment for valid authorized transactions. Visa then sorts through the transaction records by issuer and routes all CIBC transactions to CIBC for the day. CIBC would then reconcile these claims with their records and deduct the interchange fees and charge backs that they are owed, after which point they will send the remaining outstanding balance to Visa for all of the day's transactions that involved CIBC issued cards. CIBC settles with Visa before it gets paid by the cardholder, with CIBC issuing a monthly statement to the cardholder and setting a period of time for payment, with Visa having no participation in the billing and collection process, or in the ongoing management of the creditor's accounts (such as adjustments made to the customer's credit limit based on changes to their risk profile).

[18] Mr. Webster confirmed that once the monies are wired to Visa it is Visa's money. If the transaction is in a foreign currency, the transaction is settled in Canadian dollars and CIBC would bear the foreign exchange risk.

[19] When asked about what would happen in the event that a customer was charged twice when there was only supposed to be one charge, Mr. Webster explained that the customer would first call CIBC and then CIBC would follow the Visa rules on charge-backs and assuming it wasn't a valid charge, would reverse the charge. If the merchant alleges that the second charge was a valid charge, CIBC can accept or challenge it, usually by consulting with the customer, while the merchant in turn would consult with the acquirer. If the issue has not been resolved, the matter will go to arbitration where Visa will step in, adjudicate the dispute and decide who is accountable for the transaction. Arbitration was admitted to be relatively rare in practice, with Mr. Webster estimating that only 2 percent of disputes proceed to arbitration. In the event that the chargeback is found to be legitimate, the charge would come off the cardholders account and CIBC would net that amount from its settlement obligation with Visa, with the acquirer being responsible for collecting the outstanding amount from the merchant.

[20] In discussing the importance of Visa to CIBC, it was acknowledged by Mr. Webster that although CIBC might be able to create their own payment platform in Canada, such a platform would not allow CIBC customers to purchase goods and services anywhere in the world to a degree that would rival Visa's.

[21] Mr. Webster identified the importance of the Visa trademark brand to CIBC as being:

- i) Visa spends money on advertising to build their brand, the end result of which is that clients are able to recognize the utility of the card and that it can be used around the world;
- ii) Its brand has global recognition; and
- iii) The client trusts the card.

[22] Mr. Webster also testified that Visa's promotion of the Visa brand is not specifically for CIBC and that it is entirely Visa's decision as to who participates in the Visa payment system and how that system operates. The Visa rules are described as being relatively static, with the system changing very slowly over time. When rule changes do occur, permission from CIBC is not required.

[23] During cross-examination, Mr. Webster agreed with the suggestion that before 2007, Visa Canada was a not for profit association with 11 members, of which CIBC was one. Voting rights were determined based on purchase volume, so CIBC, in conjunction with other financial institutions, were admitted to have had the bulk of the voting rights. Mr. Webster also admitted that he is not aware of any instances where Visa had to make good on its guarantee because an acquirer went bankrupt, or for any other reason.

[24] The Appellant's second witness was Paul Vessey, who among other roles, served as the director of Visa Canada's board, an international director at Visa International, Chief Operating Officer at Visa USA and head of credit card operations at TD Bank. He indicated that Visa Canada had an IPO in 2007. He described Visa as being an electronic payments company that provides the infrastructure to allow for financial institutions to issue credit cards and for merchants to receive payment for products sold to customers that used the cards. Visa provides the mechanisms which facilitate the movement of funds and allow a seamless payment process to take place. Specifically, Visa provides its payment system, which is referred to as a dual message system, offering near instant verification followed by the movement of money in order to settle the account. Mr. Vessey admitted during cross-examination that in addition to the transfer of funds that Visa also transmits data and other information through its system. He also admitted that the three aspects of the Visa payment platform are transaction processing services, product platforms and payments network management, with

clients being granted licenses to use the Visa brand and to gain access to the Visa network.

[25] When asked about the services which Visa provides to an issuer, Mr. Vessey listed the usage of their network for the purposes of authorization, clearing and settlement, a detailed set of rules and regulations, administrative services such as dispute resolution with merchants and promotional services to help them sell and market cards. For the rules and regulations, these are developed entirely by Visa and are meant to ensure a consistent customer experience, covering everything from designating where the brand should be affixed on the card that the issuer issues, to the manner in which they connect with VISA, how they settle, how authorization messages look, how they need to be delivered, the amount of time the acquirer has to pay the merchant and how cards are accepted.

[26] Mr. Vessey referred to one of the benefits of Visa as being the large size of their Merchant Acceptance Network, which refers to the network of merchants globally who will accept Visa cards. Between 2003 and 2013, Mr. Vessey was aware of a number of initiatives undertaken by Visa to increase its customer base including an attempt to increase Visa's acceptance rate at grocery stores and sponsorships of various events such as the Olympics.

[27] Mr. Vessey also elaborated on what he thought were the benefits of Visa. Consumers benefit from the Merchant Acceptance Network as the greater the acceptance base is for Visa cards, the greater the amount of utility that the card has for them. Merchants benefit as giving customers the ability to make purchases using Visa gives them the opportunity to sell more goods. Financial institutions benefit as greater profit occurs when customers spend more, which the large size of the Visa network incentivizes them to do. Another benefit provided by Visa is the assurances that it provides to customers and merchants that it is a safe and secure method of payment. This is done in part by guaranteeing that when a transaction is authorized by an issuer, that the merchant will receive the agreed upon price from their acquirer.

[28] When asked about risks that Visa was exposed to, Mr. Vessey listed fraud risk, sovereign risk, merchant risk and foreign exchange risk. For fraud risk, which party bears the responsibility for the liability will vary based on the circumstances. If a merchant does not follow the rules, the merchant will bear the costs. An acquirer would be liable if, for example, they did not pass on the transaction record in an appropriate way. An issuer will normally bear the cost if all of the rules were complied with and an authorization was given, unless Visa has been found to have

been at fault, in which case Visa would bear the cost. Mr. Vessey admitted that he could not think of any examples where Visa would be liable.

[29] Although the liability for fraud lies with the issuer, Visa is continually working on its network to ensure that losses from fraud remain low.

[30] Sovereign risk refers to the risk faced by Visa from countries where the solvency of their financial institutions is major concern (such as Venezuela); this poses a risk for Visa when customers of banks in these countries use Visa credit cards and Visa needs to collect the settlement amount from these banks. Steps that Visa takes to mitigate these risks include having a risk management division which monitors the solvency of financial institutions, and if necessary, taking collateral from these banks. This is important as in the event that an issuer does not settle with Visa on time, it is still Visa's responsibility to settle with the acquirers.

[31] For merchant risk, Visa's risk management division will actively monitor financially distressed merchants and consult with their acquirers, and if necessary, will ask for collateral from these acquirers. Although it is the merchant acquirer's responsibility, under the Visa rules, for the merchants to get paid, Visa can be liable if, for example, a valid purchase was made by a Visa customer prior to that merchant going bankrupt and not delivering the good or service to the Visa customer. In such a case, if the transaction was authorized, Visa would be liable to this customer for the value of this good or service.

[32] With regards to foreign exchange risk, Visa is continually settling globally in multiple currencies. As a result, Visa is managing a very large foreign exchange position all over the world between settlements and issuers. This necessitates the need to hedge this risk as much as possible. Mr. Vessey states that although Visa Canada faces some foreign exchange risk, they would face far less risk than Visa International.

[33] Speaking about the "stand in processing service" that Visa provides to approve transactions when the issuer's verification system is down, Mr. Vessey estimated that on a per issuer basis that this would not happen very often but that there is not a moment that goes by where Visa is not standing in for somebody in the world.

[34] Asked about the indemnity that Visa provides, Mr. Vessey explained that this indemnity extends even to some transactions that are not processed on Visa's system, with the examples of countries which process credit card transactions on

domestic networks, as well as the use of third party processors that are doing transactions on behalf of both acquirers and issuers. This indemnity is critical for financial institutions as otherwise they would have to understand the underlying risk profile of a merchant that might be located half a world away and be otherwise completely unknown to them.

[35] Mr. Vessey confirmed that Visa Canada, and not Visa International, is the corporation that did business in Canada and Visa Canada would not have been involved with riskier countries like Venezuela and Greece. He also confirmed that before the 2007 IPO, Visa Canada was a not for profit business, where its association members funded its day-to-day operations. After the 2007 IPO, Visa was restructured so that the business in Canada, the United States and Latin America were consolidated into one business.

(b) Respondent

[36] The Respondent's sole witness was Rachel Brandes, former Vice-President of Finance and current CFO for Visa Canada. She described Visa Canada's business as facilitating payments through an electronic payment network where businesses and consumers can pay or be paid anywhere in the world. Visa provides the commercial rights to issuers and acquirers to use the Visa network and license their trademark, as well as provide the processing services, marketing services, product development, risk and fraud management, maintenance of the rules and operating regulations and authorizations as well as the clearing of transactions. Ms. Brandes agreed with the suggestion that Visa is a method of payment and a payment company, which offers to CIBC a service of facilitating the transfer of money and information between issuers, acquirers and merchants. She also agreed with the suggestion that Visa's activities are interrelated, and each activity is dependent upon and supportive of the others. When asked about what distinguishes Visa from all of the other payment platforms in the world, Ms. Brandes' answer was the Visa brand.

[37] Ms. Brandes indicated that the only Visa entity that carries on business in Canada is Visa Canada. She admitted that as far as she is aware, Visa Canada has never had to pay settlement losses or any other amounts as a result of a default by an acquirer or issuer. As far as risk from fraud is concerned, under the Visa rules, this risk is borne by the acquirer or the issuer.

[38] Ms. Brandes explained how the handling of settlement losses by Visa changed pre and post restructuring. Pre-restructuring, Visa was a not-for-profit

membership association, and the owners of the association were the financial institutions. In the event of a settlement loss, if an issuer didn't settle with an acquirer, Visa would not settle with the acquirer if the acquirer was owned by the defaulting issuer. Visa would next use any collateral that Visa had from the issuer to cover the settlement loss. If this was insufficient to cover the loss, the next step would be to short settle with the other acquirers in the system to cover those losses. If this still didn't cover the loss, Visa would look to the global loss sharing arrangement, which was in place with Visa International, where Visa Canada would be responsible for the first million dollars of the settlement loss, plus their pro rata share, and the other Visa regions would also be responsible for a portion of that settlement loss. However, this global loss sharing arrangement was never actually used by Visa Canada. Visa Canada also had a risk stabilization fund that was funded by their members in case of a settlement loss, but this fund was never used to pay out any settlement losses.

[39] Post restructuring, Visa Canada no longer has the ability to short settle with its members, and so would look to Visa Inc. to make up any shortfall. However, this has never been required from Visa Inc.

[40] In assessing the risk posed to Visa, Ms. Brandes concluded that the level of risk to Visa is very low and that Visa has never paid any payments in relation to any loss. There were some instances of the issuer being late in payment into a settlement account but this was always short term and fixed.

[41] With regards to foreign exchange risk, Ms. Brandes explained that pre-IPO Visa Canada was only responsible for domestic settlements, which were done purely in Canadian currency and therefore posed no foreign exchange risk. Visa International was responsible for international settlements and accordingly reported foreign exchange gains and losses on their financial statements.

[42] Post restructuring, Visa International handles both domestic and international settlement.

[43] For chargebacks, Ms. Brandes confirmed that pursuant to the chargeback rules, liability for a chargeback would be both with an issuer or an acquirer and not with Visa.

[44] When asked about the size of the Visa network, Ms. Brandes confirmed that Visa processes about 65,000 transactions per second and handles about \$7.4 trillion US annually in sales. Settlements between issuers and acquirers are done through a

designated bank account that Visa has with Scotiabank, which is funded purely by the issuers. Scotiabank would be the one to actually wire the money, but Visa administers the process. Each issuer and acquirer would have their own designated settlement bank accounts from which Visa pushes and pulls money from.

[45] Ms. Brandes explained that with regards to the Visa rules, for participants that break the rules, Visa has the authority to monetarily fine them, require them to post collateral and even kick them out of the system entirely. She also agreed that Visa's total possible risk exposure (if all financial institutions in the world failed simultaneously) was 42 billion dollars, but that through Visa's risk management efforts, the risk adjusted exposure of Visa to settlement losses is less than 1 million dollars.

III. Issues

[46] The Respondent describes the issue as whether Visa Canada made an exempt supply of financial services to CIBC as defined in subsection 123(1) of the ETA during the appeal periods.

[47] The Appellant describes the issue in the following terms: What is the "essential character" or the "substance" of a single compound supply from Visa to CIBC given the fact that the parties have agreed that there was a single compound supply and, secondly, having made that determination, whether the essence of that supply is a "financial service" as defined by the financial service definition.

IV. Applicable Statutory Provisions

[48] Subsection 123(1) of the ETA states 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,

...

(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 that is

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

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

...

but does not include

...

(q.1) an asset management service,

...

(r.3) a service (other than a prescribed service) of managing credit that is in respect of credit cards, charge cards, credit accounts, charge accounts, loan accounts or accounts in respect of any advance and is provided to a person granting, or potentially granting, credit in respect of those cards or accounts, including a service provided to the person of

(i) checking, evaluating or authorizing credit,

(ii) making decisions on behalf of the person in relation to a grant, or an application for a grant, of credit,

(iii) creating or maintaining records for the person in relation to a grant, or an application for a grant, of credit or in relation to the cards or accounts, or

(iv) monitoring another person's payment record or dealing with payments made, or to be made, by the other person,

(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,

(r.5) property (other than a financial instrument or prescribed property) that is delivered or made available to a person in conjunction with the rendering by the person of a service referred to in any of paragraphs (a) to (i) and (l),

...

(t) a prescribed service; (service financier)

[49] Section 4(1) of the Financial Services and Financial Institutions, GST/HST Regulations, SOR/91-26 state as follows:

4 (1) In this section,

“instrument” means money, an account, a credit card voucher, a charge card voucher or a financial instrument;

“person at risk”, in respect of an instrument in relation to which a service referred to in subsection (2) is provided, means a person who is financially at risk by virtue of the acquisition, ownership or issuance by that person of the instrument or by virtue of a guarantee, an acceptance or an indemnity in respect of the instrument, but does not include a person who becomes so at risk in the course of, and only by virtue of, authorizing a transaction, or supplying a clearing or settlement service, in respect of the instrument.

(2) Subject to subsection (3), the following services, other than a service described in section 3, are prescribed for the purposes of paragraph (t) of the definition financial service in subsection 123(1) of the Act:

(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.

(3) A service referred to in subsection (2) is not a prescribed service for the purposes of paragraph (t) of the definition financial service in subsection 123(1) of the Act where the service is supplied with respect to an instrument by

(a) a person at risk,

...

(c) an agent, salesperson or broker who arranges for the issuance, renewal or variation, or the transfer of ownership, of the instrument for a person at risk or a person that is a member of the same closely related group as the person at risk.

V. Analysis

[50] This appeal involves determining whether the supply provided to CIBC by Visa satisfies the definition of a financial service under section 123 of the ETA.

[51] Under the ETA, GST is imposed on the recipient of a “taxable supply”, with a supply being defined under section 123 of the ETA as being “the provision of a property or a service in any matter whatever.” This rather broad definition is accordingly then scaled back by excluding from taxable supplies so called “exempt supplies”, which is defined in subsection 123(1) as being a supply that is included in schedule V of the ETA. One such exempt supply is the provision of a financial service.

[52] The test to apply to determine whether a single supply constitutes a “financial service” is succinctly described by the Federal Court of Appeal in *Global Cash Access (Canada) Inc. v The Queen*, 2013 FCA 269, [2013] GSTC 141 (FCA), at paragraph 26, as follows:

To determine whether that single supply falls within the statutory definition of “financial service”, the questions to be asked are these: (1) Based on an interpretation of the contracts between the Casinos and Global, what did the Casinos provide to Global to earn the commissions payable by Global? (2) Does that service fall within the statutory definition of “financial service”?

[53] The first step then is to define the supply that Visa is providing CIBC.

A. What Supply is Visa providing CIBC?

[54] In trying to define the supply that Visa is providing CIBC, there are multiple potential supplies, including:

- i. Transaction processing, which involves the routing of payment information and related data to facilitate the authorization and settlement of transactions between issuers, acquirers and merchants;
- ii. Licensing of the Visa brand;
- iii. Payment network management including maintenance of the Visa network, data processing, rule making and adjudication;
- iv. Brand management and promotion.

[55] Rather than try to argue that Visa provides several distinct supplies, the parties have agreed that the service being provided by Visa does constitute a single supply, specifically a single compound supply, which was defined in *Great-West Life Assurance Co. v The Queen*, 2015 TCC 225, at paragraph 65, as being a single supply comprised of several distinct but indivisible components that are “intertwined, interdependent and integral to one another.”

[56] The approach to be taken for characterizing a single compound supply was first discussed in *OA Brown v The Queen*, [1998] GSTC 40 (TCC), at paragraph 21, where the task of characterizing a compound supply was described as being to find the “quality of the final compound supply for tax purposes.” *OA Brown* involved determining whether a service which bought livestock according to the instructions of its customers was providing a distinct service from providing livestock (which is a zero rated supply) for the purposes of the section 123 of the ETA, when in the course of providing the service the Appellant also incurred the cost of feeding, inoculation, transportation and insurance (which the Appellant sought reimbursement for) for the livestock.

[57] In attempting to characterize the supply, the Court sought to find the “essence” of the overall supply, which it found to be the buying service, due to it being integral to the overall supply of livestock. At the same time, the Court determined that only a single supply was provided as the buying service was indivisible from the other services offered.

[58] In *Great West Life*, at paragraph 69, the task of characterizing the supply being provided for a single compound supply was defined as being to find the “essential or predominant character of the supply.” At the Federal Court of Appeal in *Great-West Life Assurance Co. v. R.*, 2016 FCA 316, the test for characterizing a supply was distilled down at paragraph’s 47 and 48 to first listing all of the

elements of the supply. Following which, it is then necessary “to determine the predominant elements of the supply if it is a single compound supply”, as it is “only the predominant elements that are taken into account in applying the inclusions and exclusions in the “financial service” definition.” The supply that required characterization in *Great West Life* was a single compound supply comprised of various services related to the determination and payment of benefits under group health benefits plans on behalf of a registrant insurance plan to pharmacies.

[59] Like in *Great West Life*, characterising the supply that Visa is providing, after listing all of the elements of the supply, involves finding the predominant element of the supply being provided, as opposed to the elements of the supply that are merely ancillary. The question that remains is how to determine what the “predominant” element of the supply provided by Visa is. To answer this question, I asked the parties to provide written submissions on this issue.

[60] The Appellant regards the test for determining the predominant element as being to look for the “commercial efficacy” of the supply, a term which they derive from *Club Intrawest v. R*, 2017 FCA 151, within which, at paragraph 81, the court summarizes the approach taken in *Global Cash* as being the finding of the “commercial efficacy of an arrangement in order to determine the predominant element of a single supply.”

[61] The Appellant’s suggested interpretation of the phrase “commercial efficacy” are the elements of the supply that help to achieve the commercial objectives for which the supply was used for. In the case of Visa, they suggest that this was the acting as a financial intermediary by assisting in the transfer of money between the issuers, acquirers and merchants.

[62] The Respondent on the other hand regards the finding of the predominant elements to be determined based on objectively looking at the goods and services for which CIBC was paying Visa for. They also suggest that the predominant elements of the supply are distinct from the necessary or essential elements of the supply, or to the final end result of the supply.

[63] The Respondent refers to the example of *Mesto Zamberk v Financni reditelstvi v Hradci Kralov*: C-18 /12, 2014 STC 1703 (Court of Justice of the European Union), a Court of Justice of the European Union decision (later confirmed as being the applicable test in UK VAT cases in *Metropolitan International Schools Limited*) where the Court sought to identify the predominant

element of a supply of a waterpark in order to find whether the supply in question was connected to a sport. To answer this question, the Court held at paragraph 30 that this question needed to be assessed objectively based on the qualitative and quantitative elements of the supply, by looking at it from the perspective of a typical consumer. At paragraphs 33 and 34, this is said to include looking at the facilities offered by the park, their size in relation to the park as a whole and whether these facilities were purely recreational in nature or whether they could also be used for athletic activities. The Court however also noted at paragraph 36 that the subjective views of each customer should not be considered, with the analysis being limited to the consideration of objective factors.

[64] An example of this test being applied is in *Levob*, 2006 STC 766 (ECJ) where it was ruled that, for customized software, it should be characterized as a good rather than a service as the customization of the software was neither minor nor peripheral but rather was the predominant element of the supply. On page 7, paragraph 2, this was said to be because of the fact that the customization of the software played an important role in making the software useful for the professional activities of the purchaser.

[65] In the UK decision *Metropolitan International Schools Limited*, 2017 UKUT 0431 (TCC) , the Court was tasked with answering whether the supply of distance learning services should be treated as being the supply of books. The Court found at paragraph 109 that from the perspective of the students, the school provided a blended course, where books were an important but not essential element of the service being provided. Accordingly, the service being provided was not found to be the zero rated supply of books. Although it was unnecessary to go further and actually characterize the supply, the Court indicated at paragraph 110 that the supply lacked a single predominant element and instead concluded that the supply was one of educational services. In instances where a supply lacks a single predominant element, the Court states at paragraph 55 that the supply cannot fall into the exemption:

There may be cases where the weighing up of the relevant characteristics of the supply does not produce a predominant element. In such a case a straight predominance test cannot provide a positive answer to what the character of the supply may be, though that may not matter much if the question is a question as to what the characterisation is not – for example, if the question is whether or not the supply falls within a given exemption. In such cases, if the supply has no single predominant characteristic, then the supply will not fall within the exemption.

[66] Based on these decisions, the Respondent argues that the Court should look objectively to determine what CIBC considered itself to be paying for, and should not depend on the subjective intentions of CIBC as expressed by their agents. The Respondent further argues that considering the objective factors, such as the complexity of maintaining the Visa network, the speed at which the Visa Net system was able to clear and settle transactions and the huge sums of money spent by Visa on advertising, marketing and promotional services, as well as the high value of the Visa brand name, all lead to the conclusion that the electronic transfers of money was not the predominant element of the supply and that the supply instead had multiple predominant elements such as right to use the Visa brand name, data transmission services and the right to access Visa's proprietary network.

[67] In considering the Appellant's and the Respondent's arguments, they both seem to be in agreement that the predominant element of the supply should be found by objectively looking at what the supply was perceived as being from the purchaser's perspective. I however disagree with the Respondent's suggestion that the predominant element of the supply cannot be the summation or end result of the different elements of the service being provided. Often times, a supply is nothing if not a culmination of its various inputs, where from the perspective of the purchaser, it is this culmination or end result, and not the constituent elements which make up this end result, that is the true value added service which is being transacted for.

[68] The suggestion that the end result cannot be the predominant element of the supply also appears to be inconsistent with the findings in *Great West Life* and *Canadian Medical Protective Association*. Within *Great West Life*, the services being provided by Emergis, the Appellant, were listed as being as follows:

- (i) provide real-time, electronic pharmacy Transactions capture from the Provider's point-of-service, verification of eligibility of Claimant, adjudicate in accordance with Benefit Plan Designs provided by Great-West and confirm Transaction payment status to the Providers.
- (ii) maintain the Provider network to allow electronic submission of drug Transactions.
- (iii) assist in the development of standards for electronic transactions processing and keep Great-West informed of developments.

(iv) operate a support desk (English and French) for Providers to answer questions and assist in problem resolution.

(v) maintain relations with major software vendors and support regarding their provider software management packages relating to the processing of drug Transactions, changes required to support new products and validation of vendor software.

(vi) ensure the adjudication software will adhere to legislative requirements, when possible with the information provided, the whole in accordance with the Change Management Procedure in Schedule E when appropriate.

(vii) maintain DIN price and formulary files for use in the adjudication process.

(viii) maintain DUR files for use in the adjudication process.

(ix) maintain the appropriate version of the Transaction submission message.

(x) provide real-time monitoring of Transactions processing and ensure continuity of service.(xi) maintain the Provider files for use in the adjudication process.

(xi) create end of day Transaction Log Files that includes [sic] all Transactions submitted by the Provider for Great-West, including same day voids, prior day voids, and rejected Transactions. (This information is contained within the ELOG and VLOG).

(xii) check to ensure no other payment has been issued for the same Transaction by Emergis.

(xii) Emergis will keep on-line drug adjudication Transactions for a period of ninety (90) days.

[69] Justice Owen concluded that (i) was the predominant element of the supply, with the other elements being inputs into the creation of (i). When you compare and contrast the services provided by Visa to the ones provided by Emergis, they are both highly analogous to one another in that they both provide services that facilitate payments between parties, with the principal difference between the two seeming to be scale, where the Visa platform is far more general in application and is correspondingly much larger and more technically sophisticated than the more specialized payment platform considered in *Great West Life*. At a superficial level then, the characterization of the supply used by Justice Owen in *Great West Life* should also be applicable in the present case, which is (to paraphrase) “to provide

real-time, electronic transactions, to go along with verification and adjudication in accordance with the applicable guidelines.”

[70] We know that CIBC, as a large financial institution, was looking for a payment platform which gives their customers the ability to immediately, at the point of purchase, use their CIBC issued credit cards to purchase goods and services anywhere in the world. This requires a system to be in place through which the funds totalling the purchases made by CIBC customers on credit can be transferred by CIBC to participating merchants in a safe, reliable and timely fashion. This includes having adjudication and verification elements in place so that the reliability of the platform can be assured and so that trust can be placed in the system by all of the major participants.

[71] The Visa platform provides this service by first granting CIBC the ability to instantly authorize a transaction attempted by a CIBC customer with a Visa card at any participating merchant. If CIBC authorizes the transaction, Visa then provides CIBC with the ability to pay the merchant in a timely fashion, by having in place a payment network where, through Visa, CIBC can transfer the necessary funds to the merchant’s acquirer, with the acquirer in turn then paying the merchant. In effect, the overriding goal of the Visa payment network according to Mr. Webster is to “provide trust so that the merchant knows, when that credit card is presented and they get an authorization, that they will get paid.” With limited exceptions, the risks associated with the payment fall on CIBC and the acquirer, not Visa.

[72] In *Canadian Medical Protective Assn. v The Queen*, 2009 FCA 115, (FCA), the Court was asked to answer whether investment managers used by the Canadian Medical Protective Association were the provision of a financial service. In ruling that it was a financial service, the Court found that although the research and analysis undertaken by the brokers was essential to the service that they provided, the supply being provided could not be characterized in this manner, as the research and analysis was all done in service of the end result, which was the purchase and sale of financial instruments:

56. The transfer of ownership of financial instruments is the end result of the exercise. “Arranging for” the transfer of ownership of a financial instrument, i.e., give instructions, cause to occur or issue buying and selling orders to the brokers is infinitesimal in terms of skill and time involved. The issuance of the order represents, however, an essential and vital part of the investment managers’ activity but it is not the dominant one. The skill shown in the pick, i.e., the research necessary for the preparation of the buying or selling order, is the core of

the investment managers' activity and the raison d'être of their being hired. The quality of the pick is the trademark of their profession.

...

62. On the one hand, there is the world of a difference between the services of the investment managers and those of a broker who generally accomplishes a more mechanical type of work. If I were to retain the dominant character of the investment managers' services, the research and analysis aspect of the trade would be the dominant character of the services they supply.

63. On the other hand, the research and analysis aspect of the trade will be purposeless if it does not end with a buy or sell order or a "hold" decision. The final order is an essential characteristic of the management of the funds by the investment manager. Otherwise, the investment manager does not manage at all.

64. I find that, considered as a whole, the services performed by investment managers cannot be divided. It is a mix. They do not provide advice, since there is no one to provide advice to except themselves. The end result of their services is to "cause to occur a transfer of ownership ... of a financial instrument". They fall within paragraph 123 (1) (d) and (1)9 of the Act.

[73] Similarly, it is the end result of the services which Visa provides, which is the facilitation of the transactions between CIBC, CIBC customers, merchant acquirers and participating merchants that constitutes the supply that is being provided by Visa to CIBC. The other elements of the supply that have been outlined by the Respondent, such as the Visa brand name, as well as administrative and data processing services used to maintain the Visa network, are peripheral elements that can more accurately be described as being inputs in the creation of the final end product, which is a payment platform which allows Visa to facilitate the transactions between issuers, acquirers and merchants.

[74] In the case of the brand name, although this is part of the bundle of rights of services that was offered by Visa to CIBC, the Visa brand does not have commercial value to CIBC independently of the payment system that is being provided by Visa. Instead, the Visa brand name and corresponding advertising expenses incurred by Visa with respect to that brand name can also be thought of as a kind of input of the end product in that the value of the Visa payment platform to CIBC is in large part a function of how widespread the acceptance of Visa as a payment method is. To achieve widespread acceptance requires Visa to have a high enough level of brand equity so that a merchant base of sufficient breadth can be attracted to the Visa platform; it is the by-product of the Visa brand and the

advertising expenses incurred by Visa (a payment platform with near universal acceptance by merchants), and not the Visa brand or advertising expenses in itself, which is what CIBC is paying for.

[75] After characterizing the service being provided by Visa as being the providing of a payment platform and facilitating payments on that platform, the next question is whether this service meets the definition of a financial service.

B. Is facilitating the payments between acquirers, issuers and merchants a financial service?

[76] The position of the Respondent is that the services provided by Visa do not meet any of the elements of the financial services definition. The Appellant, by contrast suggests that paragraph 123(1)(a) or paragraph 123(1)(i) or a combination of (a) and (i) capture the service being provided by Visa.

[77] In *Great West Life* itself, the service that Emergis provided of paying to the plan member the drug benefit claimed by the plan member under a group health benefits plan was found to have been captured by paragraph (f.1), which is not applicable in the present case. Justice Owen also rejected paragraph (i) as capturing the services provided by Emergis, as the actual provision of the services provided by Emergis, and not the agreement to provide the services, was what was regarded as being the substance of the supply:

84. The Appellant also argued that paragraph (i) describes the substance of the supply. Emergis did agree to provide a group of services that in substance effect the action described in paragraph (f.1). However, the agreement to provide the Services is not the substance of the supply. The actual provision of the Services is the substance of the supply. Accordingly, paragraph (i) does not apply to the supply in this particular case.

[78] In the UK VAT case *First Data Resources v Customs & Excise Commissioners*, VAT and Duties Tribunals, [1999] V & DR 67, affirmed [2000] STC 672 (Court of Appeal (Civil Division)), the tribunal dealt with whether the business of FDR Ltd., which involved acting as a clearing house for credit card transactions and effecting settlement of their net positions, was an exempt financial service. FDR Ltd.'s clients were members of the credit card payment network's operated by Visa and MasterCard International among others. Among the tasks that FDR Ltd. performed was to affect the clearing and settlement of credit card transactions for its clients without having to submit the transactions to the network operators.

[79] To perform this task, FDR Ltd.'s daily activities included:

1. receiving and reviewing authorization requests from merchants.
2. keeping track of every claim of each of its acquirer clients against the relevant issuer client arising out of the credit card transaction for every liability and chargeback so that the net position of each can be determined.
3. Determining this net position.
4. Paying out of the settlement account to each net claimant and collecting funds into the settlement account for each net debtor.

[80] The key provision dealt with by the Court under the VAT regime was under Schedule 9, group 5, which called for an exemption for services involving the “issue, transfer or receipt of, or any dealing with, money, any security for money or any note or order for the payment of money.”

[81] The tribunal characterized the core service being provided as being the processing of “credit transactions and settling their liabilities and settling their liabilities and claims under these transactions in accordance with the obligations of the Issuers and Acquirers.” Accordingly, they found that the service being provided by *FDR Ltd.* met the definition for the exemption. The Tribunal’s reasoning was affirmed by the English Court of Appeal, where with regards to characterizing the supply being provided by *FDR Ltd.*, the Court said:

...I would have categorized the essential commercial activity here in very simple terms. It consists in the movement of money between cardholder, merchant, issuer and acquirer, for the convenience of the cardholder and the profit of the other three parties.

[82] The relevant provisions under the VAT regime dealt with in FDR appear to have similar wording to paragraph (a) and (l) of the financial services definition. Furthermore, the services provided by Visa in the present case appear to be highly analogous to the services provided by FDR as, like FDR, an essential component of the service provided by Visa is facilitating the transfer of funds from CIBC to the acquirers, and then from the acquirers to the merchants, through affecting the settlement of each participant’s net position.

[83] In *Global Cash Access (Canada) Inc. v The Queen*, 2013 FCA 269, (FCA), a service provided by casinos to a company, Global, that was granted an exclusive

right for customers to place kiosks for customers to obtain cheques using their credit cards, was found to contain three distinct services:

1. allowing kiosks on the premises,
2. providing support services at the cashier cages such as transaction procedures and initiating transactions on behalf of patrons,
3. cashing the cheques issued by the company.

[84] Specifically, Global's business involved allowing patrons of the casinos to use their credit card to obtain cash through the issuance of a cheque from Global that would then be cashed by the casinos. To complete those transactions, the casinos were required to provide (1) access to the physical premises of the casino for Global's equipment (such as its dedicated computer terminals and kiosks), (2) the clerical services of the cashiers, and (3) the cash required to pay the patrons. The casinos would then earn a commission for providing these services. The casinos deposited each payment into its own bank account, while Global, as a "merchant" of the bank that issued the credit card, would collect from the issuer the amount of the cash plus the service fee charged by the bank, while the credit card issuer would bill that amount to the patron.

[85] The Federal Court of Appeal concluded that Global was in the business of providing cash, with the casinos entering in this arrangement with Global so that its patrons could be provided with cash, effectively providing an advance of money to a patron which is then repayable by Global. Accordingly, the Court found that the services provided by the casinos fell within paragraph (g) of the statutory definition of "financial service" ("the making of any advance, the granting of any credit or the lending of money"):

27. The Casinos earned commissions for completed Funds Access Service transactions. To complete those transactions, the Casinos were required to provide (1) access to the physical premises of the Casino for Global's equipment (such as its dedicated computer terminals and kiosks), (2) the clerical services of the cashiers, and (3) the cash required to pay the patrons.

28. On any reasonable view of the evidence, the commercial efficacy of the arrangement depends critically on access to the Casinos' cash. Global is in the business of providing the means by which holders of credit cards can be furnished with cash. Global entered into the contracts with the Casinos specifically to ensure that patrons of the Casinos could be furnished with cash on the Casinos'

premises. Unless the Casinos were willing and able to supply the cash, there would have been no point in Global setting up its equipment on the Casinos' premises or specifying the documentation required to complete the transactions.

29. In my view, based on that understanding of the contract between the Casinos and Global, each completed transaction falls within paragraph (g) of the statutory definition of “financial service” (“the making of any advance, the granting of any credit or the lending of money” or «l'octroi d'une avance ou de crédit ou le prêt d'argent»).

30. I reach that conclusion because the heart of each transaction is an advance of money by the Casinos, disbursed to casino patrons at Global's direction, and repayable by Global. The repayment obligation is performed when the Casino deposits the payment instruments into its bank account and the payments instruments are honoured by Global. The legal obligation of Global to repay the Casinos for the amount of cash advanced may arise because the payment instrument is, in law, a “cheque”, but it is also expressed in paragraph 5 of the contract:

1. [Global] agrees to guarantee payment on all [...] payment instruments where the transaction and the payment instrument have been properly completed in accordance with [Paragraph 3].

[86] This is distinguishable from the services provided by Visa as under normal circumstances, there is no point in the life cycle of the Visa payment process at which Visa would provide its own funds to pay the acquirer before receiving the necessary funds from the issuer. Although in rare circumstances this can happen, as Visa does provide an indemnity to merchants which can potentially involve the use of Visa's own funds to pay the merchant if an issuer or acquirer defaults on its settlement obligations, unlike with Global, this is not a regular part of the service that Visa provides.

[87] In “obiter”, the Court also considered whether the casino's services fell within paragraph (i) or (l) of the statutory definition. For (i), this paragraph was found to be applicable as the payment instrument issued by Global was regarded as being related to an amount for which a credit card voucher would be issued. With regards to (l), the Court concluded that it would not be applicable as the casino was being paid for the services that it actually performed and not for an agreement to perform services or for arranging for services to be performed:

36. Some argument was directed at paragraph (l) of the statutory definition of “financial service”, which refers to an agreement to provide, or the arranging for,

a service referred to in any of paragraphs (a) to (i). In my view, paragraph (l) has no application in this case. The Casinos are receiving consideration in this case for the services they actually perform, not for an agreement to perform services or for arranging for services to be performed.

[88] Visa satisfying paragraph (l), in conjunction with paragraph (a), is necessary in order for Visa to satisfy the financial services definition as the service provided by Visa does not involve Visa directly handling the funds that are in their possession. Instead, the transfer is done by having the issuers settle with Visa by paying the necessary funds into a designated bank account that Visa has with Scotiabank. Scotiabank, rather than Visa, then wires these funds to the acquirer's bank account (with Visa administering the process). The acquirer then pays the merchant.

[89] Although this is a more passive process than if Visa directly transferred the funds themselves, rather than requiring a direct transfer of funds, paragraph (l) instead uses the term "arranges for." In *Royal Bank v The Queen*, 2005 TCC 802, at paragraph 15, the dictionary definition of the verb "to arrange" was provided, which was defined as being to "plan or provide for; cause to occur." In *Royal Bank* itself, the bank subsidiaries' management of mutual funds was found to be the "arranging of" a financial service.

[90] In *Promotions D.N.D. Inc. v The Queen*, 2006 TCC 63, the term "arrange for" was regarded as referring to the usage of an intermediary in the provision of financial services. The Court determined that this included the promotion of credit cards by going to various public places (such as shopping centres) and distributing credit card applications.

[91] Accordingly, the Courts appear to have adopted a low threshold for establishing whether an activity constitutes the "arranging of" the supply, which the Court in *Promotions D.N.D* regarded as being satisfied when the service of the intermediary and the final provision of the financial service are linked in their purpose:

36 A person who agrees to provide a service described in one of paragraphs (a) to (i) may contract with the person acquiring the service without having to use intermediaries. In the field of financial services, however, there are often intermediaries. We need only think of brokers, insurance agents, etc. These intermediaries may act for the seeker of a financial service or for the service provider. They are, within the meaning of paragraph (l) of the definition of "financial service", the persons who arrange for a financial service.

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.

[92] Visa acts as a financial intermediary by facilitating the transfer of payments between issuers, acquirers and merchants. The services provided by Visa are linked to the financial services provided by CIBC in that they form an essential part of the ability for CIBC to offer credit card based services to their clients, as Visa helps to ensure that merchants are successfully paid after a CIBC client uses a Visa credit card to purchase goods and services. The services provided by CIBC and the services provided by Visa are linked in their purpose to a degree where it can be said that Visa is “arranging for” the credit services offered by CIBC, through acting as an intermediary in the transfer of money. As a result, the conditions in paragraphs (a) and (l) are satisfied.

[93] This conclusion is reinforced when looking at the case law concerning the relevant UK VAT legislation, which like its Canadian counterpart exempts services that involve “the arranging for” a financial service. In *Customs & Excise Commissioners v Civil Service Motoring Association*, 1998 BVC 21 (Eng C.A.), the English Court of Appeal concluded that developing and maintaining standard arrangements to govern the issuance of credit cards was the arranging of a financial service, which in that case was the issuance of credit.

[94] This case was later referenced as part of the Court’s reasoning in the Canadian case *President's Choice Bank v The Queen*, 2009 TCC 170. In that case, the activities of *PC Bank* involved collaborating with CIBC in developing and marketing certain financial products such as savings, chequing and loan accounts. In particular, *PC Bank* helped to determine the “launch times, geographic scope, marketing strategies and overall strategic direction of the President's Choice Financial Offer.” The Court held that the services provided by *PC Bank* to CIBC amounted to the arranging of these financial products, specifically by negotiating more favourable credit terms for its members:

34. for PC Bank, the advantage had to involve more than the association of its trademark with CIBC, since, as Mr. Lengyell testified, Loblaw was putting itself at risk through this association. The agreement with CIBC was in fact a necessary step for Loblaw in order to be able to increase its revenues by offering services other than those relating to its retail grocery business....

35. Further evidence of Loblaw's and then PC Bank's direct interaction in the sale of financial products is that Loblaws, in signing the FSA, insisted on the no-fee bank account and the lower, attractive rate of interest on mortgages and on lines of credit....

36.Loblaw/PC Bank has negotiated no-fee bank accounts, lower interest rates on mortgages and later on, an Interest Plus savings account for its members. That is equivalent to arranging for favourable special credit terms and benefits to be provided to its customers by CIBC.

[95] Like *PC Bank*, Visa gives CIBC the opportunity to offer new financial products to its customers. Specifically, it benefits CIBC and CIBC customers by arranging for a payment network to be in place which gives CIBC customers the ability to purchase goods and services anywhere in the world without CIBC having to individually contact each merchant to set up payment arrangements with them. If CIBC was forced to create such a payment network on its own, even if technically feasible, this network would invariably be much less widely accepted than the one offered by Visa.

[96] For paragraph (i), this paragraph uses the term “relating to.” The Supreme Court, in *Slattery (Trustee of) v Slattery*, [1993] 3 S.C.R. 430, referred to an earlier quote from Dickson J in *Nowegijick v. The Queen*, which indicated that the expression “in relation to” is comparable in meaning to the phrase “in respect of”, an expression which was described as denoting “words of the widest possible scope.” Referring to that quotation, Iacobucci J stated that “these comments are equally applicable to the phrase “relating to.” This comment from *Slattery* in turn was remarked upon in the GST case *Stantec Inc. v The Queen*, 2008 TCC 400, affirmed in 2009 FCA 285 (FCA), where it was suggested at paragraph 14 that the phrase “in relation to”, “implies a wide, rather than narrow, view in connecting two matters.”

[97] The interpretation of paragraph (i) was dealt with in *Costco Wholesale Canada Ltd. v The Queen*, 2009 TCC 134.¹ This case dealt with an exclusivity agreement between American Express and Costco, whereby in exchange for paying Costco an agreed upon percentage of the sales using American Express, only American Express was accepted at Costco. The agreement also required

¹ Reversed on other grounds in *Costco Wholesale Canada Ltd. v The Queen*, 2010 FCA 9 (FCA). Trial judge followed the original decision in *Costco Wholesale Canada Ltd. v The Queen (2010)*, 2010 TCC 609, which was affirmed in *Costco Wholesale Canada Ltd. v The Queen*, 2012 FCA 160 (FCA).

Costco to give American Express its membership list, as well as assist in the promotion and sale of the Co-Branded Amex/Costco card.

[98] The essence of the supply being provided by Costco to American Express was found by the Court to be the promotion of the co-branded card. Applying the *Promotions DND* decision, the Court concluded that this supply met the financial services definition:

41 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.

[99] With regards to paragraph (i) in particular, the Court adopted a very broad interpretation of the types of commercial activities that (i) is meant to encapsulate:

43 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.

[100] The Visa supply agreement carried with it a large number of services that Visa provided CIBC so that CIBC could issue Visa branded credit cards. This included promotion of the Visa brand, indemnification in the event of acquirers defaulting, rule making and adjudication of disputes such as in the case of chargebacks. This arrangement appears to be more comprehensive than the one featured in *Costco* which involved payments made in exchange for what amounts to promotion of a credit card at one particular retailer, with for example no requirement for Costco to adjudicate disputes or honour the financial transactions made with other merchants in the event of default. As a result, if paragraph (i) was found to be applicable for Costco, it should also be applicable in the present case.

C. The Exceptions

[101] The Respondent argues in the alternative, that even if Visa falls under the definition of a financial service, it is nonetheless excluded via (q.1), (r.3), (r.4), (r.5) and (t) of the financial services definition in s.123(1).

[102] The term asset management service is defined in s.123(1) as follows:

“asset management service” means a service (other than a prescribed service) rendered by a particular person in respect of the assets or liabilities of another person that is a service of

(a) managing or administering the assets or liabilities, irrespective of the level of discretionary authority the particular person has to manage some or all of the assets or liabilities,

(b) providing research, analysis, advice or reports in respect of the assets or liabilities,

(c) determining which assets or liabilities are to be acquired or disposed of, or

(d) acting to realize performance targets or other objectives in respect of the assets or liabilities;

[103] Paragraph (q.1) of the financial services definition was originally enacted as a response to the *CMPA* decision, which as previously established, considered whether the hiring of investment manager’s to actively manage the Appellant’s portfolio of investments was a financial service.

[104] In enacting these legislative changes, the provided technical notes stated:

The term “asset management service” [123(1)“asset management service”] includes the full range of investment portfolio management and administration activities. It means a service rendered by a particular person in respect of the assets or liabilities of another person that is the service of

- managing or administering the assets or liabilities, irrespective of the level of discretionary authority (if any) that the particular person has to manage some or all of the assets or liabilities;
- providing research, analysis, advice or reports in respect of the assets or liabilities;

- determining which assets or liabilities are to be acquired or disposed of; and
- acting to realize performance targets or other objectives in respect of the assets or liabilities.

[105] The *Oxford English Dictionary* defines “asset management” as being “the active management of assets in order to optimize return on investment.” This, combined with the technical notes, seems to suggest that asset management services are a fairly active process where the underlying portfolio of financial assets/liabilities, through the efforts of the asset manager, are created, optimized or otherwise changed in some way.

[106] In contrast, the liabilities incurred by CIBC are not created by Visa as Visa is not responsible for the issuing of the credit card. These liabilities are also not altered in anyway by the services provided by Visa, with Visa merely facilitating the transfer of funds between CIBC and the intended recipients of the funds for which the liabilities were incurred for. Section (q.1) does not appear to be applicable.

[107] For paragraph (r.3), the technical notes state:

New para. (r.3) is added to the definition to clarify that the definition “financial service” does not include a service of managing credit in respect of credit or charge cards, or in respect of credit accounts, charge accounts, loans accounts or accounts in respect of any advance, where the service is provided to a person granting, or prospectively granting, credit in respect of those cards or accounts. A service of managing credit includes a service provided to the person of

- checking, evaluating or authorizing credit;
- making decisions on behalf of the person relating to a grant, or an application for a grant, of credit;
- creating or maintaining records for the person relating to a grant, or an application for a grant, of credit or in relation to the cards or accounts; or
- monitoring another person's payment record, or dealing with payments made, or to be made, by the other person.

[108] The technical notes suggest that (r.3) is intended to apply to services centered around the giving and authorization of credit. In the present case however,

the responsibility for authorizing the credit lies purely with CIBC, with the granting of credit being entirely the decision of CIBC and no assistance being given by Visa in the credit authorization process. Paragraph (r.3) is not applicable.

[109] For paragraph (r.4), it was confirmed by the Federal Court of Appeal in *Global Cash* that for the purposes of this paragraph, the services listed are referring to the predominant elements of the supply:

[37] I turn now to the portion of the statutory definition of “financial service” that lists the exceptions. The Crown argues that paragraphs (r.4) and (r.5) of the statutory definition apply because under the agreement with Global, the Casinos are providing, respectively, clerical services that include the collection of identifying information about patrons, and access to the physical premises of the Casinos for Global's terminals and kiosks. Since the Crown is also arguing that there is a single supply, that argument assumes that those are the predominant elements of the supply.

[110] This was interpreted in *Great West Life* as implying that (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 elements of the supply. In *Great West Life* Justice Owen states:

89. As already stated, the taxability of a compound supply under the ETA is based on the essential character or substance of the supply and not the constituent elements of the supply. Accordingly, the fact that the constituent elements of the supply may include services described in paragraph (r.4) is not a basis for excluding the supply from the definition unless the essential character or substance of the supply is described by those services.

90 Here, the group of services that constitutes the compound supply does include some of the services described in paragraph (r.4). For example, Emergis does provide services to Great-West that involve collecting, collating or providing information. However, those services do not represent the essential character or substance of the supply, which is paying drug benefits to plan members. Accordingly, paragraph (r.4) does not apply to exclude the supply from the definition.

[111] Similarly, the supply provided by Visa also involves services such as information collection, market research and product design. However, as previously established, these services do not encapsulate the predominant elements of the supply. Accordingly, paragraph (r.4) is not applicable.

[112] Paragraph (r.5) was also rejected in *Great West Life*. Although *Great West Life* had the right to use the Emergis brand name, *Great West Life* did not acquire ownership of any of Emergis's intellectual property. Justice Owen states:

86. I will first address paragraph (r.5). The Respondent argued that Emergis delivered or made available property to Great-West. While it is true that Great-West had the right to acquire certain property if there was a Release Event, such an event did not occur during the reporting periods in issue. Apart from that right, section 13 of the 2007 Agreement acknowledges that Great-West had the right to use the Emergis trademarks and the Assure Card system, but only in the manner approved by Emergis. The section also makes clear that Great-West did not acquire any ownership of the intellectual or other property of Emergis.

87. Great-West is given limited rights to use the Emergis trademarks and the Assure Cards so that Great-West can link the use of the Assure Card services to its group health benefits plans. The use of the property of Emergis in this manner is not the essential character of the supply provided by Emergis to Great-West but an incidental aspect of retaining Emergis to provide the Services described in the Agreements. Accordingly, paragraph (r.5) does not describe the essential character of the supply.

[113] Visa, as part of its supply to CIBC, has provided them with a limited right to use the Visa logo, including putting in place strict standards for CIBC in how it uses the Visa logo (such as the requirement for every card issued to feature the Visa logo). Similar to *Great West Life*, this does not amount to a transfer of ownership of intellectual property from Visa to CIBC, as the intellectual property rights included as part of the supply are limited in scope and ancillary elements of the supply.

[114] Paragraph (t) was also dealt with in *Great West Life*, where although (a) was dismissed due to the “transfer, collection or processing of information” not being a predominant element of the supply, (b) was found to be applicable as although no one service deals purely with the taking or repaying of benefits, the cumulative effect of the services being provided by Emergis is to give effect to the payment of benefits to plan members. Justice Owen states:

104. Paragraph 4(2)(b) of the Regulation includes as prescribed services any administrative service, including the provision of an administrative service in relation to (i.e., concerning) the payment or receipt of benefits, but excluding a service that is solely the payment or receipt of benefits.

105 With respect to the exclusion in paragraph 4(2)(b), no one service provided by Emergis to Great-West can be described as being solely the effecting of the payment or the taking receipt of benefits. Rather, the payment to, and receipt by, plan members of drug benefits result from the overall effect of the group of services described in paragraph (i) of section II-A of Schedule A to the 2007 Agreement. In particular, the services of switching (i.e., the transmission of the claim by the pharmacy to Emergis), adjudication, communication of the result and payment to the pharmacies are all required in order to effect payment of the benefits to plan members. As a result of these services, Great-West is relieved of making individual drug benefit payments to plan members and instead need only make one daily payment to Emergis. Notwithstanding the multi-step procedure used to effect payment, from the point of view of the plan member the drug benefit is paid and received at the point of sale.

[115] In *Great West Life*, the Court went on to describe the services being provided by Emergis as administrative, as the payment process provided by Emergis did not involve any independent decision making and was quintessentially administrative in nature by principally providing an easier and more cost effective way for Great West Life to pay out its drug benefits:

106. With respect to the inclusionary language in paragraph 4(2)(b), the group of services provided by Emergis to Great-West can be accurately described as a group of administrative services in relation to the payment or receipt of benefits. Specifically, the essential character of the group of services constituting the single supply is the payment of benefits to plan members, and the services composing that same group of services are administrative services in relation to the payment of those benefits. There is no conflict between these two characterizations. The essential character of the supply and the objective of the administrative services are the same.

107. The group of services making up the single supply by Emergis can be described as administrative services for two principal reasons.

108. First, the services provided by Emergis to Great-West do not involve any independent decision making by Emergis. The basis for any decision regarding a claim is found in the plan communicated by Great-West to Emergis. In essence, Emergis provides a computer system that allows the decision regarding a drug benefit claim to be made in real time, but the decision itself stems from the terms of the group health benefits plan and not from Emergis.

109. Second, the services provided by Emergis are quintessentially administrative in nature. Specifically, each drug benefit claim is electronically submitted by the pharmacist to Emergis, the dedicated computer system of Emergis adjudicates the claim in real time by applying the terms of the plan provided by Great-West, and

that same system then communicates the result of the adjudication to the pharmacy, resulting in the constructive payment of any drug benefit available to the plan member. The Assure Card system employed by Emergis adds value for Great-West by simplifying and reducing the cost of the benefits payment procedure, but the system does not alter the substance of what is being done, which is established by the terms of the drug benefit plans provided by Great-West to Emergis. As stated by Mr. Roszak, Emergis is a pharmacy benefits manager and nothing more.

[116] Similarly, the value added service which Visa provides to CIBC is to relieve them of the need to keep track of and then individually pay merchants for the transactions paid for on credit by CIBC clients. Instead, Visa gives CIBC the ability to offer its clients the option of paying for goods and services on credit while only needing to make one lump sum payment to Visa at the end of every day to settle the transactions undertaken by these clients. At its most basic level then, the benefit that Visa offered CIBC was cost saving and logistical simplification. Both of which, like in *Great West Life*, are quintessentially administrative in nature.

[117] Like Emergis, the Visa network operates with minimal decision making involved. The Visa system was designed to handle in real time thousands of transactions per second. The sheer size and scale of the Visa platform is suggestive of a payment process from which human judgment has largely been removed from.

[118] Although opportunities for the application of human judgment do continue to exist on the payment platform, as Visa adjudicates disputes that arise (such as in the event of chargebacks) between network participants, and can stand in for an acquirer and authorize transactions in the event that verification systems are non-operational, these are both rather rare occurrences in practice, with Mr. Webster estimating that only 2 percent of disputes proceed to arbitration and that Visa stands in for CIBC only a handful of times per year.

[119] Even when these events do occur, in both scenarios, like in *Great West Life*, minimal discretion is involved as the decision of Visa is arrived at purely through the application of a detailed set of criteria (in the case of stand-ins) or bylaws (in the case of arbitration). Although, unlike in *Great West Life*, Visa is responsible for creating and updating all of the bylaws which govern its payment network, these rules appear to be largely static in practice, with Mr. Webster indicating that the Visa rules change very slowly over time.

[120] This does not do away with the fact that the payment network offered by Visa is much larger in scale than the one offered by Emergis, which results in the Visa network being more technically sophisticated by comparison. Ultimately though, the differences that exist between the two are purely a function of scale and not of substance. Accordingly, the tax treatment that is applicable for one should be applicable for the other.

[121] This result is different than the result in *Promotions D.N.D* and *Costco*. However, the result in these cases is distinguishable in that the services dealt with in these cases extended beyond merely acting as a financial intermediary. The services provided in *Promotions D.N.D* and *Costco* both involved the active solicitation and signing up of new clients for the credit cards as part of the supply being provided, a factor which was referenced in *Costco*:

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.

[122] In the present case it is CIBC, and not Visa, which solicits and assists with the signing up process and then finally provides a Visa card user with their credit card.

D. The Saving Provisions

[123] The Appellant argues in the alternative that subsection 4(3) of the Regulations is applicable, which reads:

(3) A service referred to in subsection (2) is not a prescribed service for the purposes of paragraph (t) of the definition financial service in subsection 123(1) of the Act where the service is supplied with respect to an instrument by

(a) a person at risk,

...

(c) an agent, salesperson or broker who arranges for the issuance, renewal or variation, or the transfer of ownership, of the instrument for a person at risk or a person that is a member of the same closely related group as the person at risk.

[124] A person at risk is defined as being:

“person at risk”, in respect of an instrument in relation to which a service referred to in subsection (2) is provided, means a person who is financially at risk by virtue of the acquisition, ownership or issuance by that person of the instrument or by virtue of a guarantee, an acceptance or an indemnity in respect of the instrument, but does not include a person who becomes so at risk in the course of, and only by virtue of, authorizing a transaction, or supplying a clearing or settlement service, in respect of the instrument.

[125] The Appellant argues that (a) and (c) of **4(3)** are applicable. For (c), they argue that Visa meets the definition of being a broker, specifically by suggesting that the word broker is synonymous with the word intermediary, a function which Visa serves in facilitating the transfer of funds between issuers, acquirers and merchants.

[126] In *Royal Securities Corp. v Montreal Trust Co.*, (1966), 59 DLR (2d) 666 (Ont. H.C.), at pages 686 and 687, a broker was described as follows:

It seems to me that Royal's capacity in this transaction may best be described as that of a broker. Story, in his work on Agency, 9th ed., p. 31, describes a broker as:

...an agent, employed to make bargains and contracts between other persons, in matters of trade, commerce or navigation, for a compensation, commonly called brokerage.

[127] In *The Law of Agency*, 7th Ed. Butterworths, Toronto, 1996, G.H.L. Fridman, Q.C. described a broker at page 42 as follows:

Brokers. Brokers, like factors, are mercantile agents. There is, however, a distinction between these classes of agents in that brokers are agents who are not given possession of goods or documents of title. A broker is:

an agent employed to make bargains and contracts between persons in matters of trade commerce and navigation. Properly speaking, a broker is a mere negotiator between other parties... He himself ... has no possession of the goods, no power actual or legal

of determining the destination of the goods, no power or authority to determine whether the goods belong to buyer or seller or either.

He is not entrusted with the possession of the goods he sells. Unlike a factor he may not sell in his own name. 'The principal therefore who trusts a broker has a right to expect that he will not sell in his own name'. Both brokers and factors negotiate sales. However, the difference between these two classes of agents in respect of the possession of goods may stem from the fact that brokers also negotiate other contracts, not involving the handling of goods by the broker himself. For example, stockbrokers deal with the sale of stock or shares (which are not goods within the meaning of the Sale of Goods Act 1979). Insurance brokers arrange policies of insurance. Other brokers deal in the hiring of ships on charter parties. A more recent growth is that of the credit-broker, whose function is to arrange credit for those who wish to purchase goods. Some of these different types of brokers have given rise to special legal problems, or may be governed by particular legislation.

[128] The definitions of a broker noted above give the impression of someone that actively engages in commercial activity, such as negotiating, buying and selling, on behalf of a principal. In contrast, the activities engaged in by Visa are generally more passive in nature with Visa not negotiating, buying or selling on behalf of CIBC, but rather coordinating the completion of financial transactions by effectively acting as a facilitator in helping to transmit funds from one party to another. I believe that Visa does not meet the intended definition of a broker.

[129] The Appellant also argues that **4(3)(a)** is satisfied, as Visa, in providing its supply to CIBC, was a person at risk due to the indemnification that it provided to the participants in the Visa payment network (and corresponding exposure to potential settlement losses), as well as its exposure to potential foreign exchange losses. This can be contrasted to *Great West Life*, where it was conceded by the Appellant in that case that they were not a person at risk.

[130] Respectfully though, I disagree with the Appellant's position, as the person at risk definition refers to a person providing a clearing or settlement service as not being a person at risk, which accurately describes the service that was provided by Visa.

[131] This view is reinforced by the fact that it does not appear as though Visa was actually put financially at risk as a result of the services it provided, at least not to the extent necessary to satisfy the person at risk definition. During his testimony, Mr. Vessey referred to four types of risk which Visa is potentially subject to: fraud risk, sovereign risk, merchant risk and foreign exchange risk. However, in the case

of fraud risk, according to the testimony of Ms. Brandes, this is a risk borne by the acquirer or the issuer, rather than by Visa.

[132] With regards to the other three types of risks, sovereign risk refers to the risk faced by Visa from countries where the solvency of their financial institutions is a major concern (such as Venezuela). For merchant risk, although it is the merchant acquirer's responsibility, under the Visa rules, for the merchants to get paid, Visa can be liable if for example a valid purchase was made by a Visa customer prior to that merchant going bankrupt and not delivering the good or service to the Visa customer. Finally, foreign exchange risk exists for Visa as Visa is continually settling globally in multiple currencies, which leads to them having a large foreign exchange position all over the world. One type of risk notably absent from this list is credit risk, which is acknowledged to be entirely borne by the issuer, with CIBC being the one responsible for collecting the amounts due from individual cardholders.

[133] In assessing Visa's potential risk exposure, a distinction needs to be made between the state of affairs that existed for Visa both before and after its IPO in 2007. Before the IPO, Visa Canada was a not for profit association owned by its member institutions which, as attested to by Ms. Brandes, only dealt with the settling of domestic transactions, thus eliminating its susceptibility to foreign exchange risk. In the event of settlement losses, after using any collateral that was collected, Ms. Brandes indicated that Visa Canada would first short settle with the other acquirers in the system in order to cover the loss. Visa Canada also had a risk stabilization fund that was funded by their members in case of a settlement loss. If this still didn't satisfy the loss, Visa Canada would then look to the global loss sharing arrangement that was in place with Visa International, where Visa Canada would be responsible for the first million dollars of the settlement loss, plus their pro rata share, with the other Visa regions being responsible for the remaining portion of the settlement loss.

[134] Before 2007 then it would appear that the risk borne by Visa Canada was almost entirely non-existent, with the risk instead largely being borne by Visa International and the issuing financial institutions. Post-2007, the principal change to Visa Canada's risk profile was that it no longer had the option of short settling with its members, with Visa Inc. being expected to make up any shortfall that arose as a result of settlement losses.

[135] In spite of this change, Visa Inc. itself seemed to value its own probability adjusted risk exposure as being extremely low, with its 2009 filing with the SEC

valuing its potential exposure at less than \$1 million dollars. Although Visa's theoretical exposure is extremely high at \$42 billion dollars and this extremely low valuation presumably takes into account the risk management techniques which are employed by Visa, this does not take away from the fact that Visa's risk exposure is based on events coming to fruition which have an extremely low probability of ever occurring. This was effectively admitted to by Ms. Brandes, who admitted during her testimony that Visa has never had to pay a settlement loss.

[136] In discussing the rational for the person at risk exception, the Department of Finance explained in its news release to the CIBC describing its legislative changes that the person at risk exception is not meant to apply to risks which have only a remote chance of occurring:

In accordance with the Department of Finance Press Release of November 5th, 1991, the proposed amendments will clarify that, as of January 1st 1991, the concept of a "person at risk" in relation to a financial instrument. Proposed subsection 4(1) of the Regulations stipulates that a "person at risk" does not include a person who becomes at risk solely through the provision of a clearing, settlement or authorization service. The effect of this change will be to ensure that otherwise taxable administrative services, such as those provided in respect of credit card transactions, do not fall within the definition of a "financial service" only because the service provider agrees to assume the remote risk of honouring the payment authorized under the credit transaction in the event of a failure by the relevant financial institution. (Emphasis added)

[137] It would appear that the purely hypothetical remote risks that Visa Canada is subject to are insufficient for them to be considered a person at risk.

[138] Upon review of all of the evidence and arguments presented, for the foregoing reasons, the appeal is dismissed. The Respondent shall have their costs. The Court shall schedule a hearing on the quantum of costs at the parties' convenience.

These Amended Reasons for Judgment are issued in substitution for the Reasons for Judgment issued June 22, 2018.

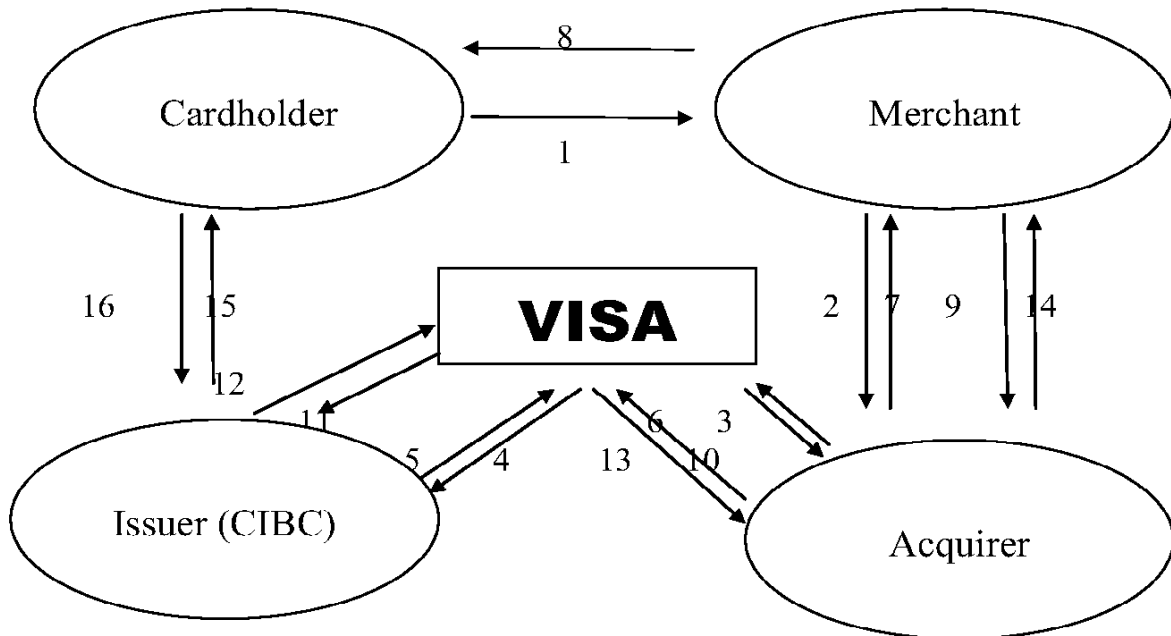
Signed at Ottawa, Canada, this **12th** day of **July**, 2018.

“E.P. Rossiter”

Rossiter C.J.

SCHEDULE "A"

Credit Card Payment Transaction



1. Cardholder presents CIBC Visa credit card to the Merchant to pay for goods/services.
2. The Merchant transmits to the Acquirer the cardholder's CIBC Visa credit card information and the amount of the transaction.
3. The Acquirer puts the cardholder account and transaction information into an authorization request and sends it to Visa.
4. Visa send the authorization request to CIBC, the issuer.
5. CIBC checks the status of the cardholder's account (including credit limit) and provides an approval or decline to Visa.
6. Visa send the approval or decline to the Acquirer.
7. The Acquirer send the approval or decline to the Merchant.
8. If approved, the Merchant provides the cardholder with the goods or services.
9. The Merchant sends to the Acquirer a record of the completed transaction.
10. The Acquirer combines all transaction records into a clearing record that is sent to Visa.
11. Visa sorts the clearing records from all Acquirers according to the responsible Issuer. Visa provides CIBC with the clearing records for the transaction that CIBC is responsible for and advises CIBC of the net settlement amount payable by CIBC to Visa.
12. CIBC sends an amount of the net settlement obligation to Visa's settlement bank.
13. Visa determines the settlement amount payable to each Acquirer. Visa transfers funds to the Acquirer's bank.
14. The Acquirer transfers funds to the Merchant's bank.
15. CIBC provides the cardholder a statement of account detailing the credit card loan transactions and the balance due.
16. The Cardholder pays CIBC the balance due.

Legend:

Information Flow 

Money Flow 

CITATION: 2018 TCC 109

COURT FILE NOs.: 2015-1845(GST)G and 2015-4539(GST)G

STYLE OF CAUSE: CANADIAN IMPERIAL BANK OF
COMMERCE V HER MAJESTY THE
QUEEN

PLACE OF HEARING: Toronto, Ontario

DATES OF HEARING: February 6, 8, 21 and 22, 2018

AMENDED REASONS FOR
JUDGMENT BY: The Honourable Eugene P. Rossiter, Chief
Justice

DATE OF JUDGMENT: July 12, 2018

APPEARANCES:

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