

Competition Tribunal



Tribunal de la Concurrence

Reference: *B-Filer Inc. et al. v. The Bank of Nova Scotia*, 2007 Comp. Trib. 29  
File No.: CT-2005-006  
Registry Document No.: 0196

IN THE MATTER OF the *Competition Act*, R.S.C. 1985, c. C-34, as amended;

AND IN THE MATTER OF an application by B-Filer Inc., B-Filer Inc. doing business as GPAY GuaranteedPayment and Npay Inc. for an order pursuant to section 75 of the *Competition Act*.

B E T W E E N :

**B-Filer Inc.,**  
**B-Filer Inc. doing business as**  
**GPAY GuaranteedPayment and**  
**Npay Inc.**  
(applicants)

and

**The Bank of Nova Scotia**  
(respondent)



Decided on the basis of the written record  
Before: Dawson J. (presiding), Mr. L. Bolton and Dr. L. Csorgo  
Date of Reasons and Order: November 14, 2007  
Reasons and Order signed by: Madam Justice E. Dawson, Mr. L. Bolton and Dr. L. Csorgo

**FINAL ORDER AS TO COSTS**

[1] **UPON** issuing “Preliminary Reasons for Order and Order Regarding Costs” (Reasons) on August 24, 2007;

[2] **AND UPON** receiving the further written submissions by the parties regarding costs filed on September 7, 2007, September 21, 2007 and October 1, 2007;

[3] **AND UPON** noting that, based upon the Tribunal’s Reasons, The Bank of Nova Scotia seeks costs in the amount of \$939,053.11 (all-inclusive) reduced from the sum of \$970,090.02 claimed in its submissions filed on September 7, 2007, while B-Filer Inc. and NPay Inc. (applicants) submit that an award of \$812,851.37 would be appropriate;

### **Endorsement**

[4] In their submissions filed on September 21, 2007, the applicants raise a number of issues in respect of the Bank’s calculation of its costs and in respect of the applicants’ claim to costs relating to their motion to amend their pleading. Each issue is dealt with below.

#### **Re: Repeated Claims under Tariff Item A2**

[5] The applicants note that Tariff B to the *Federal Courts Rules*, SOR/98-106, (Tariff) only allows a party to claim once in respect of “Preparation and filing of all defences, replies, counterclaims or respondents’ records and materials”. They further note that the Bank has made 14 claims in respect of item A2, once for the preparation of its response, seven times for the preparation of affidavits that were filed and used at the hearing, once for amending its response and five times for the preparation of reply affidavits.

[6] The Bank responds that it would not be adequately compensated if it is allowed only to claim once for the preparation of all of its affidavits. The Bank also submits that this would be contrary to paragraphs 40 and 46 at the Tribunal’s Reasons. The Bank does admit that Tariff item A3 deals with amendments and submits that it should be entitled to seven (as opposed to nine) units for the preparation of its amended response.

[7] The Tribunal agrees that the Bank should be compensated for the preparation of each affidavit filed and used at the hearing and notes that there is no tariff item that deals with the preparation of affidavits. Tariff item A5 applies to the preparation and filing of a contested motion, including materials and responses thereto (which would include the preparation of affidavits). At the top of Column IV nine hours are allotted for this service. In our view, a lump sum award based upon two hours for the preparation of each affidavit and one hour for the preparation of each reply affidavit would be appropriate and would be consistent with Tariff item A5. This would reduce the Bank’s original claim by 98 hours (7 X 7 hours X 2 counsel) in respect of its affidavits, four hours in respect of its amended response (2 hours X 2 counsel) as conceded by the Bank, and 80 hours (5 X 8 hours X 2 counsel) in respect of the reply affidavits. The amended response and the reply affidavits were all filed after the Bank’s offer to settle was served, and hence attract the 150% multiplier. This reduces the Bank’s original Bill of Costs by 224 hours or \$26,880.00.

**Re: Claim for Preparation**

[8] The Bank concedes that, contrary to its original Bill of Costs, after the first day of the hearing it was entitled to six and not nine units per day for hearing preparation. This results in a reduction of 144 hours (2 X 3 hours X 16 days X 150%) or \$17,280.00 from the Bank's original claim.

**Re: Motion to Amend Response**

[9] The parties have agreed that no costs should be awarded for the Bank's motion to amend its response or the applicants' motion to exclude Professor Sadinsky's affidavit. Thus, 27 hours (2 X 9 hours X 150%) or \$3,240.00 should be removed from the Bank's original Bill of Costs in respect of Tariff item B5.

**Re: Counsel fee at hearing**

[10] The applicants argue that Tariff item E14, Column IV, permits a claim of up to four units per hour in court for the first counsel, and 50% of that fee for second counsel where the court directs. Because the Tribunal allowed a claim for counsel fees for 2 1/2 counsel, the applicants agree that the full counsel fee should be charged for the first counsel, but say that the counsel fee for the remaining 1 1/2 counsel should be assessed at 50% of the amount assessed for the first counsel.

[11] The Bank relies upon paragraph 15 of the Tribunal's Reasons to argue that it is entitled to full fees for 2 1/2 counsel during the actual hearing, noting that the consequence of the applicants' submission is that the Bank would only be entitled to two full counsel fees at the hearing (one full counsel fee, plus two counsel fees of 50%).

[12] We agree that the position advocated by the applicants is contrary to the Tribunal's prior decision that the Bank is entitled to be reimbursed for the services of two and one half counsel at the hearing.

**Re: Travel to attend the hearing**

[13] The Bank claimed four return trips for its counsel to travel from Toronto to Ottawa for the hearing because its counsel did travel to and from Ottawa at the beginning and end of each week of the hearing. The Bank asserts that it is entitled to 14 units for each full return trip. Thus, it claimed 14 units X 2.5 counsel X 4 trips.

[14] In our view, 7 units properly compensate counsel for one full return trip between Toronto and Ottawa. This would reduce the claim to 7 units X 2.5 counsel X 4 trips.

[15] Further, while counsel chose to return home weekly, the opposing party need not be required to pay for such choice. The hearing proceeded in two blocks, each of a duration of two weeks. In our view, two return trips by counsel would be reasonable in that circumstance. This further reduces a reasonable award to a total of 35 hours, calculated as 7 units X 2.5 counsel X 2 trips. This is a reduction of 105 hours. This Tariff item would also attract the 150% multiplier. Thus, \$18,900.00 should be removed from the Bank's original claim in respect of Tariff item G24.

**Re: B-Filer's costs for the motion to amend**

[16] By order dated May 24, 2006, the Tribunal allowed the applicants to amend their pleading. The order awarded costs to the applicants, but was silent as to the basis upon which those costs should be assessed. Because the Bank was awarded costs for two counsel, the applicants say that their costs on the motion to amend should be assessed on the basis of two counsel, calculated at the top of Column III.

[17] As noted in the Tribunal's Reasons at paragraph 59, where an order for costs issues without any variation of Rule 407 of the *Federal Courts Rules*, the matter is *res judicata* with respect to the scale of costs. In our view, as a matter of law, the matter is also *res judicata* with respect to the number of counsel because Rule 407 and Column III of the Tariff contemplate costs to be calculated on the basis of a single counsel.

[18] The Tribunal fixes the applicants' costs in the lump sum amount of \$4,000.00 in respect of their motion to amend their pleading. This is based upon the Bill of Costs attached to the applicants' submission filed September 21, 2007, reducing the amount claimed so that the counsel fees and travel fees are based upon one counsel only.

**Conclusion**

[19] As previously noted in our Reasons, an award of party-party costs is not an exercise in exact science. The objective is to award an appropriate contribution towards solicitor-client costs. We have previously determined that in the present case a lump-sum should be awarded to the Bank, and that lump sum should be guided by the top end of Column IV of the Tariff.

[20] In considering the lump sum award, we note that the Bank's solicitor-client fees (as set out in the Bill of Costs attached as Exhibit B to the affidavit of Patti Ground) were \$1,664,660.55. This represented fees of \$760,803.15, and fees of \$903,857.40 post settlement offer.

[21] The Bank calculated in its revised Bill of Costs that, guided by the top of Column IV of the Tariff, it was entitled to fees of \$111,600.00 before the making of its settlement offer and \$206,460.00 after the making of the offer. These amounts total \$318,060.00. The Bank's revised Bill of Costs takes into account the concessions made in respect of the number of hours it can claim for the preparation of the hearing, the amended response, and its motion to amend the response.

[22] From that, we have deducted 98 hours before the making of the offer in respect of affidavits, and 185 hours after the making of the offer in respect of the reply affidavits and travel to attend the hearing. This results in fees of \$99,840.00 before the offer and \$184,260.00 after the offer, for a total of \$284,100.00.

[23] In our view, taking into account the result obtained by the Bank, the importance and complexity of the issues, the amount of work required, and the Bank's solicitor and client fees, an award of \$284,100.00 is reasonable. We repeat the principles set out in our Reasons that the objective of an award of costs is to award an appropriate contribution towards solicitor-client costs. The objective is not rigid adherence to the Tariff. Thus, in the present case, the objective was not to insure the appropriateness of every Tariff item. Rather, we are satisfied that our award, guided by the Tariff, provides an appropriate contribution towards the Bank's solicitor-client costs.

[24] To this must be added the 150% multiplier for services performed after the Bank's offer to settle. This increases the post-offer fees to \$276,390.00 for a total allowance of \$376,230.00. From that, the applicants are entitled to set-off their fees that we have fixed in the amount of \$4,000.00, thus reducing the total fees to \$372,230.00.

[25] The Bank's total entitlement is as follows:

Fees:	\$372,230.00
Taxable Disbursements:	\$441,847.16
Non-Taxable Disbursements:	\$ 21,616.72
GST on Fees (6%):	\$ 22,333.80
GST on Disbursements (6%):	\$ 26,510.83
Total:	\$884,538.51
Plus Ryan Woodrow's Expenses:	\$ 2,511.11
Grand Total:	\$887,049.62

[26] The Bank asks that the costs be payable forthwith. This is a final order of the Tribunal which is enforceable in the ordinary course. We see no need to provide that the costs be payable forthwith.

**FOR THESE REASONS, THE TRIBUNAL ORDERS that:**

[27] The applicants shall pay to the respondent costs fixed in the amount of \$887,049.62 all-inclusive.

DATED at Ottawa, this 14<sup>th</sup> day of November, 2007.

SIGNED on behalf of the Tribunal by the panel members

(s) Eleanor R. Dawson

(s) Lorne R. Bolton

(s) Lilla Csorgo

COUNSEL:

For the applicants:

B-Filer Inc., B-Filer Inc. doing business as GPAY GuaranteedPayment and  
Npay Inc.

Michael Osborne  
Sharon Dalton  
Jennifer Cantwell

For the respondent:

The Bank of Nova Scotia

Paul Morrison  
Lisa Constantine  
Ben Mills  
Tanya Pagliaroli