

COMPETITION TRIBUNAL

Reference: *B-Filer Inc. et al v. The Bank of Nova Scotia*, 2006 Comp. Trib. 42
File No. CT-2005-06
Registry Document No.: 0156

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

IN THE MATTER OF an application by B-Filer Inc, B. Filer Inc. doing business as GPAY Guaranteed Payment and NPAY Inc. for an order pursuant sections 75 of the *Competition Act*;

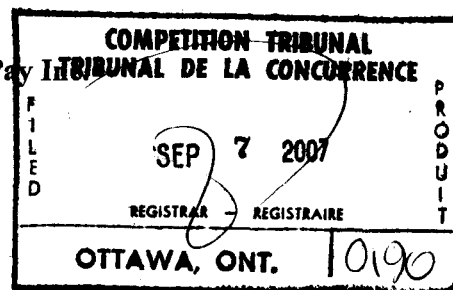
BETWEEN:

B-Filer Inc.

B-Filer Inc. doing business as GPAY Guaranteed Payment and NPAY Inc.
(Applicants)

- and -

The Bank of Nova Scotia
(Respondent)



FURTHER COSTS SUBMISSIONS OF THE RESPONDENT Pursuant to the Order of the Competition Tribunal Dated August 24, 2007

PART I—OVERVIEW

1. In accordance with the Competition Tribunal's Reasons and Order dated August 24, 2007 (the "Costs Order"), The Bank of Nova Scotia ("Scotiabank") makes the following brief submissions.
2. In accordance with the Tribunal's Costs Order, a Bill of Costs (**Tab 1**) has been prepared in accordance with the following principles articulated by the Tribunal:
 - (a) A lump sum should be awarded to Scotiabank by way of costs;¹
 - (b) The lump sum shall be guided by the top end of Column IV of Tariff B of the Federal Court Rules for two counsel throughout the preparatory phase of the hearing and for 2 ½ counsel during the actual hearing;² and

¹ Costs Order, para 3.

- (c) Given Scotiabank's Offer to Settle of July 31, 2006, a lump sum award shall be based upon 150% of the top end of the Column IV of Tariff B for services rendered after July 31, 2006.³

3. In addition to the foregoing general principles, the Tribunal made further specific findings which have been incorporated into the Bill of Costs attached hereto:

- (a) If an Affidavit was filed by Scotiabank in respect of the Leave Application and the Affidavit was subsequently used and filed at the main hearing, a claim for costs may be advanced;⁴
- (b) Fees and disbursements may be claimed with respect to the preparation of Affidavit material filed in response to the Applicant's Application for interim relief, if those Affidavits were used and filed at the main hearing;⁵
- (c) No fees and disbursements should be claimed for the preparation of Professor Sadinsky's Affidavit;⁶
- (d) Fees and disbursements in respect of Alex Todd may be claimed by Scotiabank;⁷ and
- (e) Fees and disbursements may be claimed in respect of Stan Wilson's expert advice.⁸

4. Scotiabank will make brief submissions on the following issues:

- (a) The inclusion of fees and disbursements in the Bill of Costs relating to Affidavits filed earlier in the proceeding, but marked as Exhibits and used at the Hearing;
- (b) The inclusion of fees associated with the attendance at two Case Conferences which occurred after the Plaintiffs' motion for interim relief and prior to the commencement of the hearing;
- (c) The inclusion of disbursements for Ryan Woodrow's attendance at the hearing at the request of the Applicants as the Applicants' witness, and pursuant to an agreement between the Applicants and the Respondent that the Applicants will be responsible for all such reasonable disbursements associated with Mr. Woodrow's attendance;

² Costs Order, paras 3 and 15.

³ Costs Order, paras 3 and 32.

⁴ Costs Order, para 40

⁵ Costs Order, para. 46.

⁶ Costs Order, para. 49.

⁷ Costs Order, para. 52

⁸ Costs Order, paras. 56-58.

- (d) Costs relating to Scotiabank's successful motion to amend its Response should be set off against the Applicants' successful motion to exclude the evidence of Professor Sadinsky, such that no costs should be awarded for either motion to either party; and
 - (e) The absence of any "costs thrown away" with respect to the Tribunal's Order of December 1, 2005 relating to the *nunc pro tunc* filing of the Scotiabank's evidence.
5. Pursuant to the Bill of Costs prepared in accordance with the Tribunal's Costs Order, Scotiabank requests that the Tribunal fix costs payable to Scotiabank by the Applicants in the amount of **\$970,090.02**, payable forthwith, in view of the Appeal which is now pending by the Applicants against the Respondent.

PART II—SUBMISSIONS

(a) Fees with respect to Robert Rosatelli's Affidavits

6. The Tribunal's Costs Order permits Scotiabank to claim fees and disbursements associated with the preparation of Affidavits used on the Leave Application or used in response to the Applicants' Motion for interim relief, provided that such Affidavits were also filed and used at the Hearing.

7. With respect to the Affidavits referenced on pages 1 and 2 of the Bill of Costs (**Tab 1**), all of those Affidavits were used at the Hearing. In particular, each Affidavit was marked as an Exhibit, and therefore qualifies for inclusion in Scotiabank's Bill of Costs.

(b) Costs Associated with Two Case Conferences

8. Two Case Conferences occurred after the Applicants' failed Motion for interim relief in December 2005 and before the Hearing of this matter beginning August 28, 2006.

9. As the Tribunal observed,⁹ the successful party is entitled to costs in respect of attendances during the Case Management process, unless by the successful party's own unreasonable conduct, the Case Management process was protracted.

10. Following the submissions on the Interim Motion of December 2005, Justice Simpson canvassed counsel with respect to appropriate hearing dates. It was agreed that the matter would proceed in July 2006.

11. The Applicants then sought to vary the Order so as to reschedule the hearing of this matter to commence at a later date.

12. It is submitted that Scotiabank opposed this request. Scotiabank, in taking this position, did not cause the Case Management process to be protracted.

13. As a result, it is respectfully submitted that the normal rule with respect to the Pre-trial proceedings should apply in this case, namely, that Scotiabank is entitled to its costs in relation to Case Management Conferences.

(c) Scotiabank's Claim for Disbursements in Respect of Ryan Woodrow

14. Ryan Woodrow's disbursements associated with his attendance at the Hearing as a witness called by the Applicants have been included as a separate line item at the end of the Bill of Costs (**Tab 1**).

15. The evidence with respect to Ryan Woodrow's disbursements is found at paragraph 28 of Patti Ground's Affidavit, sworn April 20, 2007:

28. The Applicants called Ryan Woodrow (an employee of Scotiabank) as part of its case. At the Applicants' request,

⁹ Costs Order, para 55.

Scotiabank paid for Mr. Woodrow's travel expenses, on the understanding that Scotiabank would be reimbursed, in any event of the cause, for these expenses. This was done as a courtesy to counsel for the Applicants. Despite numerous requests and despite having provided the Applicants with full back-up documentation for these expenses, the Applicants have refused to reimburse the Respondent for Mr. Woodrow's travel expenses. Mr. Woodrow's travel expenses total **\$2,511.11**.

16. It is respectfully submitted that the Applicants, having decided to call Mr. Woodrow as part of their case, are responsible for Mr. Woodrow's reasonable disbursements pursuant to the Agreement reached between counsel. Mr. Woodrow's disbursements were originally paid for by the Respondent as a courtesy, but the Respondent is entitled to be reimbursed for these. As a result, the inclusion of \$2,511.11 (for which backup documentation has been provided to the Applicants) is warranted and appropriate in the circumstances.

(d) No Costs Pursuant to the Tribunal's Order of December 1, 2005 Relating to the *nunc pro tunc* Filing of the Bank's Evidence on the Interim Motion

17. It is respectfully submitted that the Applicants have no "costs thrown away" in relation to the *nunc pro tunc* filing of Scotiabank's evidence on the interim Motion in December 2005.

18. In the event that the Applicants assert a claim for "costs thrown away" in their Responding Submission, Scotiabank will address this issue in Reply.

(d) Costs with Respect to Scotiabank's Motion to Amend its Response to B-filer's Motion

19. Scotiabank made a Motion in writing to amend its Response due to information received from the Applicants close to the commencement of the hearing. Scotiabank was successful on this Motion, and the amendment was allowed.

20. The Applicants made a Motion in writing after the commencement of the Hearing to exclude the evidence of Professor Sadinsky. The Applicants were successful on this Motion.

21. Scotiabank submits that costs which might be awarded in favour of Scotiabank for its successful Motion ought to be set off against costs which might be awarded to the Applicants for its successful Motion, with the result that neither party is entitled to costs of either Motion.

22. As a result, Scotiabank has not included anything in its Bill of Costs for its successful Motion to amend its pleading. However, should the Tribunal see fit to award costs to the Applicants for their successful Motion in excluding the evidence of Professor Sadinsky, Scotiabank claims the same amount in costs to be included in its Bill of Costs with respect to its successful Motion to amend its Response.

PART III—CONCLUSION

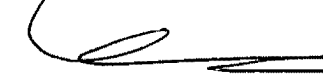
23. Scotiabank has prepared a Bill of Costs in accordance with the principles and findings articulated by the Competition Tribunal in its Costs Order. The Bill of Costs is attached hereto at **Tab 1.**

24. Scotiabank respectfully requests an Order fixing costs in favour of Scotiabank payable by the Applicants forthwith, in the amount of **\$970,090.02.**

ALL OF WHICH IS RESPECTFULLY SUBMITTED.



F. Paul Morrison



**Lisa M. Constantine
Of Counsel for the Respondent**

COMPETITION TRIBUNAL

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

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*.

BETWEEN:

**B FILER INC., B FILER INC. doing business as
GPAY GUARANTEEDPAYMENT and NPAY INC.**

Applicants

and

THE BANK OF NOVA SCOTIA

Respondent

BILL OF COSTS OF THE RESPONDENT

COUNSEL FEES – TARIFF B - COLUMN IV

PART 1 - UP TO THE DATE OF OFFER TO SETTLE – July 31, 2006

		No. of Counsel	Units	Hours/ Days	x \$120.00	
A2	Preparation and Filing of Expert Affidavit of Christopher Mathers, sworn November 23, 2005 EX. R-193	2	9		\$2,160.00	
2	Preparation and Filing of Affidavit of Alex Todd, sworn November 25, 2005 DOC 00521	2	9		\$2,160.00	
A2	Preparation and Filing of Affidavit of Colin Cook, sworn November 23, 2005 EX. R-139	2	9		\$2,160.00	
A2	Preparation and Filing of Affidavit of Douglas Monteath, sworn November 25, 2005 EX. R-141	2	9		\$2,160.00	

		No. of Counsel	Units	Hours/ Days	x \$120.00	
A2	Preparation and Filing of Affidavit of Ryan Woodrow, sworn November 24, 2005 EX. R-112	2	9		\$2,160.00	
A2	Preparation and Filing of Expert Affidavit of James F. Dingle, sworn July 27, 2006 EX. R-198	2	9		\$2,160.00	
A2	Preparation and Filing of Expert Affidavit of Frank Mathewson, sworn July 31, 2006 EX R-208	2	9		\$2,160.00	
A2	Preparation and Filing of Respondent's Response to amended Notice of Application (June 22, 2006) DOC 105	2	9		\$2,160.00	
C. Discovery and Examinations						
C7	Discovery of Documents, including listing, affidavit, and inspection	2	9		\$2,160.00	
C8	Preparation for cross-examination of Robert Rosatelli	2	8		\$1,920.00	
C9	September 7, 2005 - Attending at cross-examination of Robert Rosatelli (<i>per hour</i>) Ref-A-2	2	4	6.0 hrs	\$5,760.00	
C8	Preparation for cross-examination of Ryan Woodrow	2	8		\$1,920.00	
C9	September 8, 2005 - Attending at cross-examination of Ryan Woodrow (<i>per hour</i>) DOC 1511	2	4	6.0 hrs	\$5,760.00	
C8	Preparation for cross-examination of Raymond Grace	2	8		\$1,920.00	
C9	September 9, 2005 - Attending at cross-examination of Raymond Grace (<i>per hour</i>) DOC 2501	2	4	6.0 hrs	\$5,760.00	
C8	Preparation for cross-examination of Joseph Iuso	2	8		\$1,920.00	
C9	December 5, 2005 - Attending at cross-examination of Joseph Iuso (<i>per hour</i>) DOC 2510	2	4	6.0 hrs	\$5,760.00	
C8	Preparation for cross-examination of Raymond Grace	2	8		\$1,920.00	

		No. of Counsel	Units	Hours/ Days	× \$120.00	
C9	December 6 , 2005 - Attending at cross-examination of Raymond Grace (<i>per hour</i>) DOC 2502	2	4	6.0 hrs	\$5,760.00	
C8	Preparation for continued cross-examination of Raymond Grace	2	8		\$1,920.00	
C9	December 7, 2005 - Attending at continued cross-examination of Raymond Grace (<i>per hour</i>) DOC 2503	2	4	3.0 hrs	\$2,880.00	
C8	Preparation for examination for discovery of Robert Rosatelli	2	8		\$1,920.00	
C9	June 12, 2006 - Attending on examination for discovery of Robert Rosatelli (<i>per hour</i>) REF-A-30 and 31	2	4	6.0 hrs	\$5,760.00	
C8	Preparation for continued examination for discovery of Robert Rosatelli	2	8		\$1,920.00	
C9	June 13, 2006 - Attending on continued examination for discovery of Robert Rosatelli (<i>per hour</i>) REF-A-32 and 33	2	4	4.0 hrs	\$3,840.00	
C8	Preparation for examination for discovery of Raymond Grace	2	8		\$1,920.00	
C9	June 27, 2006 - Attending on examination for discovery of Raymond Grace (<i>per hour</i>) DOC 2504 and 2505	2	4	6.0 hrs	\$5,760.00	
C8	Preparation for continued examination for discovery of Raymond Grace	2	8		\$1,920.00	
C9	June 28, 2006 - Attending on continued examination for discovery of Raymond Grace (<i>per hour</i>) DOC 2506-2507	2	4	6.0 hrs	\$5,760.00	
C8	Preparation for continued examination for discovery of Robert Rosatelli	2	8		\$1,920.00	
C9	July 27, 2006 - Attending on continued examination for discovery of Robert Rosatelli (<i>per hour</i>) REF-A-34	2	4	6.0 hrs	\$5,760.00	
C8	Preparation for continued examination for discovery of Raymond Grace	2	8		\$1,920.00	

		No. of Counsel	Units	Hours/Days	x \$120.00	
C9	July 28, 2006 - Attending on continued examination for discovery of Raymond Grace <i>(per hour)</i> DOC 2508 and 2509	2	4	6.0 hrs	\$5,760.00	
D. Pre-Trial and Pre-Hearing Procedures						
D10	Preparation of Submissions for Case Conference to Amend the Hearing Order	2	8		\$1,920.00	
D11	February 13, 2006 - Attendance by Telephone on Case Conference <i>(per hour)</i>	2	4	0.5 hrs	\$480.00	
D10	Preparation of Submissions for Scheduling Case Conference	2	8		\$1,920.00	
D11	June 15, 2006 - Attendance by Telephone on Case Conference <i>(per hour)</i>	2	4	0.5 hrs	\$480.00	
G. Miscellaneous						
G27	Other Services - Confidentiality Agreement	2	4		\$960.00	
G27	Other Services - Consultation with Stanley Wilson, Net Evidence, expert re Internet Security	2	4		\$960.00	
			SUB-TOTAL		\$113,520.00	
SUB-TOTAL FEES PRE-OFFER:						\$113,520.00

PART 2 - AFTER THE DATE OF OFFER TO SETTLE – July 31, 2006

		No. of Counsel	Units	Hours/Days	x \$120.00	
A. Originating Documents and Other Pleadings						
A2	Preparation and Filing of Respondent's Amended Response	2	9		\$2,160.00	
A2	Preparation and Filing of Expert Affidavit of David O. Stewart sworn August 2, 2006 EX R-205	2	9		\$2,160.00	

		No. of Counsel	Units	Hours/ Days	x \$120.00	
A2	Preparation and Filing of Expert Rebuttal Affidavit of Frank Mathewson, sworn August 24, 2006 DOC 0136	2	9		\$2,160.00	
A2	Preparation and Filing of Reply Affidavit of Frank Mathewson, sworn October 2, 2006 EX. R-210	2	9		\$2,160.00	
A2	Preparation and Filing of Expert Reply Affidavit of James F. Dingle, sworn August 22, 2006 EX. R-203	2	9		\$2,160.00	
A2	Preparation and Filing of Expert Rebuttal Affidavit of Christopher Mathers, sworn August 24, 2006 EX. R-195	2	9		\$2,160.00	
B. Motions						
B5	Motion A - Preparation and filing of contested motion to file an Amended Response to the Amended Notice of Application	2	9		\$2,160.00	
B5	Motion B – Preparation and filing of Submissions on Applicant’s motion to exclude the expert evidence of David Stewart	2	9		\$2,160.00	
C. Discovery and Examinations						
C8	Preparing and Delivering Written Interrogatories of the Applicants	2	8		\$1,920.00	
C8	Preparing and Delivering Answers to Written Interrogatories of the Respondent	2	8		\$1,920.00	
D. Pre-Trial and Pre-Hearing Procedures						
D10	Preparation for Case Conference	2	8		\$1,920.00	
D11	August 18, 2006 - Attendance by Telephone on Case Conference (<i>per hour</i>)	2	4	0.5 hrs	\$480.00	
E. Trial or Hearing						
E13	Counsel fee: (a) preparation for hearing	2	9		\$2,160.00	
E13	Counsel fee: (b) preparation for hearing per day in Court after the first day (16 days)	2	9	16 days	\$34,560.00	

		No. of Counsel	Units	Hours/ Days	x \$120.00	
E14	Counsel Fee on Competition Tribunal Hearing held on August 28, 29, 30, 31, September 1, 5, 6, 7, 8, 25, 26, 27, 28, 29, October 3, 5, and 6, 2006 at Ottawa (<i>per hour in Court</i>)	2.5	4	119 hrs	\$142,800.00	
E15	Preparation and filing of Written Argument	2.5	9		\$2,700.00	
G. Miscellaneous						
G24	Travel by counsel on August 27, 2006 to Ottawa to attend Competition Tribunal Hearing	2.5	7		\$2,100.00	
G24	Travel by counsel on September 1, 2006 from Ottawa	2.5	7		\$2,100.00	
G24	Travel by counsel on September 4, 2006 to Ottawa to attend Competition Tribunal Hearing	2.5	7		\$2,100.00	
G24	Travel by counsel on September 8, 2006 from Ottawa	2.5	7		\$2,100.00	
G24	Travel by counsel on September 24, 2006 to Ottawa to attend Competition Tribunal Hearing	2.5	7		\$2,100.00	
G24	Travel by counsel on September 29, 2006 from Ottawa	2.5	7		\$2,100.00	
G24	Travel by counsel on October 2, 2006 to Ottawa to attend Competition Tribunal Hearing	2.5	7		\$2,100.00	
G24	Travel by counsel on October 6, 2006 from Ottawa	2.5	7		\$2,100.00	
G25	Preparing and Delivering Bill of Costs	2	1		\$240.00	
G27	Preparing Costs Submissions – April 2007	2	4		\$960.00	
G27	Preparing Costs Submissions – Sept. 2007	2	4		\$960.00	
				SUB-TOTAL	\$224,700.00	
					x 150%	
	SUBTOTAL FEES POST-OFFER:					\$337,050.00

PART 3 - Disbursements

DISBURSEMENTS:					
Long Distance Telephone Charges				\$31.91	
Facsimile Charges				\$30.40	
Courier Charges				\$1,721.92	
Photocopy Charges				\$9,089.81	
Print Room Binding				\$1,928.28	
Lexis-Nexis Computer Search				\$7.68	
Quick Law Computer Search				\$4,282.98	
Westlaw/Carswell Computer Search				\$104.60	
Travel – Air				\$17,434.45	
Travel – Hotel				\$24,719.20	
Travel – Meals				\$2,442.14	
Travel – Taxi				\$1,998.92	
Travel – Misc. (Mileage, Parking, etc.)				\$921.09	
Agent’s Fees (Document Management)				\$5,199.52	
Official Examiner Fees and Transcripts				\$29,799.70	
Expert Fees (taxable)				\$341,089.63	
Expert Fees (non-taxable)				\$21,616.72	
Witness Fees – Conduct Money				\$1,044.93	
	SUBTOTAL DISBURSEMENTS:				\$463, 463.88

	SUBTOTAL FEES PRE-OFFER:	\$113,520.00	
	SUBTOTAL FEES POST-OFFER:	\$337,050.00	
	SUBTOTAL FEES:		\$450,570.00
	SUBTOTAL TAXABLE DISBURSEMENTS:		\$441,847.16
	SUBTOTAL NON-TAXABLE DISBURSEMENTS:		\$21,616.72
	GST ON FEES:		\$27,034.20
	GST ON DISBURSEMENTS (6%):		\$26,510.83
	PLUS RYAN WOODROW'S EXPENSES		\$2,511.11
	TOTAL COSTS:		\$970,090.02

#4191329

Expert	Invoice Date	Amount
James Dingle	October 11, 2006	\$48,800.00
		\$48,800.00 (+GST)
SUB-TOTAL NON-TAXABLE EXPERT INVOICES:		\$21,616.72
SUB-TOTAL TAXABLE EXPERT INVOICES:		\$341,089.63
SUB-TOTAL EXPERT INVOICES:		\$362,706.35
TOTAL GST:		\$20,465.38
TOTAL:		\$383,171.73

#4192721

BETWEEN:

B-FILER INC. et al
Applicants

- and -

THE BANK OF NOVA SCOTIA
Respondent

Court File No. CT-2005-006

COMPETITION TRIBUNAL

**FURTHER COSTS SUBMISSIONS OF
THE RESPONDENT
Pursuant to the Order of the Competition
Tribunal Dated August 24, 2007**

McCarthy Tétrault LLP
Barristers & Solicitors
Box 48, Suite 4700
Toronto Dominion Bank Tower
Toronto, ON M5K 1E6

F. Paul Morrison: LSUC #17000P
Tel: (416) 601-7887

Lisa M. Constantine: LSUC #35064B
Tel: (416) 601-7652

Fax: (416) 868-0673

Solicitors for the Respondent
#4192269 v2