

Competition Tribunal



Tribunal de la Concurrence

Reference: *B-Filer Inc. et al. v. The Bank of Nova Scotia*, 2006 Comp. Trib. 26
File No.: CT-2005-006
Registry Document No.: 0098

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)



Date of oral hearing: 20060427
Place of Hearing: Ottawa
Counsel Present: For both parties
Presiding Judicial Member: Simpson J. (Chairperson)
Date of reasons and order: May 24, 2006
Reasons and order signed by: Madam Justice Sandra J. Simpson

**REASONS AND ORDER ALLOWING B-FILER'S MOTION TO AMEND ITS NOTICE
OF APPLICATION AND STATEMENT OF GROUNDS AND MATERIAL FACTS**

[1] These reasons follow a motion by B-Filer et al. (“B-Filer”) to amend its Notice of Application and Statement of Grounds and Material Facts (the “Notice and the Statement”). These are the documents which commenced B-Filer's application (the “Application”) to the Competition Tribunal (the “Tribunal”) under section 75 of the *Competition Act*, R.S.C. 1985, c. C-34 (the “Act”). The pertinent facts are as follows:

- (i) On November 4, 2005 B-Filer was granted leave to apply to the Tribunal as a private party (“Leave”).
- (ii) In broad terms, B-Filer’s Application alleges that The Bank of Nova Scotia (“Scotiabank”) has refused to provide B-Filer with banking services contrary to section 75 of the Act.
- (iii) Scotiabank has not filed its Response to B-Filer’s Application.
- (iv) B-Filer retained new lead counsel on or about January 30, 2006 and the material filed in support of this motion discloses that, in his view, the proposed amendments to the Notice and the Statement (the “Amendments”) are necessary to clarify the relevant legal and economic issues.
- (v) Schedule A hereto is a copy of the Notice and the Statement showing the Amendments. The parties have agreed that Schedule A is accurate and that the Amendments do not involve any changes to the underlying facts described in B-Filer’s Notice and Statement.

THE ISSUES

[2] Scotiabank opposes the Amendments because, in its view, they involve fundamental changes to the Application. Scotiabank says that fundamental changes cannot be made by amendment and that, instead, B-Filer must make a fresh application for leave to commence a private action.

[3] The first issue therefore is whether the Amendments make fundamental changes to the Application for which B-Filer was granted Leave. If the changes are fundamental, it will then be necessary to consider the second issue which is the applicability of the decisions in *Maxwell v. MLG Ventures Ltd.* (1995), 40 C.P.C. (3d) 304, *Endean v. Canadian Red Cross Society*, [1998] B.C.J. No. 1542 (QL) and *Ebco Industries Ltd. v. Eppich*, 2000 B.C.J. No. 1437 (QL) in which Courts have held that, in the context of the certification of class proceedings and leave to bring derivative actions, fundamental amendments to claims require a fresh consideration of the questions of certification and leave.

Issue I : Do the Amendments fundamentally change the Application?

[4] Subsections 103.1(1) and (7) and section 75 of the Act state that to be granted leave, a private party must show that the Tribunal “could” make an order remedying a situation in which there has been a refusal to supply. A leave applicant must address, among other things, the fact that (i) it is unable to obtain supply of a product anywhere in a market (ii) there is insufficient competition among suppliers of the product in the market, and (iii) the refusal to supply is having an adverse affect on competition in a market.

[5] For this reason, Scotiabank says that the definitions of the product and the market were fundamental aspects of the Application when Leave was granted and because the Amendments change both definitions, the changes are fundamental.

[6] Specifically, Scotiabank takes issue with the Amendments which appear on Schedule A in paragraphs 1(a)(i) and (ii) of the amended Notice and in paragraphs 8.1, 8.2, 8.14(a) and (b), 8.15, 15.8 and 19.1 of the amended Statement.

[7] These changes can be summarized as follows:

- (i) The Amendments plead that Bill Payee Services and Electronic Money Transfers (“EMTs”) are two separate products (the “Two Product Amendment”).
- (ii) The Amendments plead that Bill Payee Services at Scotiabank is a product which is separate from Bill Payee Services at other banks (the “Separate Product Amendment”).
- (iii) The Amendments plead that EMTs are a poor substitute for Bill Payee Services (the “Poor Substitute Amendment”).
- (iv) The Amendments plead that the market is “online bank card debit payment services” (the “Market Amendment”).

DISCUSSION

(i) The Two Product Amendment

[8] In its reasons for granting Leave, dated November 14, 2005 (the “Reasons”), the Tribunal described and discussed EMTs and Bill Payee Services at paragraphs 8, 10, 14, 16, 17, 19 and 20. (See *B-Filer Inc. v. The Bank of Nova Scotia*, 2005 Comp. Trib. 38.)

[9] The Reasons indicate that when Leave was granted, the Tribunal understood that EMTs are used when the purchaser does not have an account at Scotiabank. Bill Payee Services, on the other hand, are a different product which is used when the purchaser is a Scotiabank customer. Although the Reasons indicate that these services are interrelated in the sense that both are needed for B-Filer’s business, it is clear that the Tribunal was aware that the services are separate products which are used in different circumstances. For this reason, I have concluded that the Two Product Amendment does not involve a fundamental change to B-Filer’s Application.

(ii) The Separate Product Amendment

[10] The Reasons show at paragraph 19 that the Tribunal was aware that Scotiabank customers could only take advantage of Scotiabank’s Bill Payee Services to pay B-Filer if B-Filer was listed as a bill payee on Scotiabank’s online banking site. In the Amendments, B-Filer pleads that since Scotiabank is the only supplier of Bill Payee Services to customers of Scotiabank, those services constitute a separate product. In my view, since B-Filer had already said in its application for Leave that it needed the Scotiabank Bill Payee Services and that only Scotiabank

offered Scotiabank Bill Payee Services, the claim that they are a separate product from other banks' Bill Payee Services is not a fundamental change.

(iii) The Poor Substitute Amendment

[11] The Reasons do not indicate that EMTs are a poor substitute for Bill Payee Services. However, B-Filer says that fact was before the Tribunal in an affidavit affirmed by Mr. Grace on September 1, 2005 in support of the application for Leave.

[12] However, I have not found this submission persuasive. The Grace affidavit nowhere states that B-Filer considers EMTs to be inadequate substitutes for Bill Payee Services.

[13] Although this amendment introduces a new opinion, it does not, in my view, constitute a fundamental change. The two services, Bill Payee Services and EMTs, were clearly identified as distinct products at the time Leave was granted. The Amendment simply adds particulars comparing the desirability of the two services.

(iv) The Market Amendment

[14] The Reasons show in paragraph 20 that the parties agreed, at the time of the application for Leave, that the market was “online debit payment”. In other words, the use of bank debit cards to make payments for goods and services over the internet.

[15] At the Leave stage, there was an issue about whether, once Interac Online began to function, it would be in the market for online debit payments. The Tribunal considered the evidence and dealt with this topic at paragraphs 20 and 21 of the Reasons. There it said that Interac Online could be in the market because the differences between its services and those of B-Filer were not sufficient to support a finding that they would not operate in the same market.

[16] In this context, an amendment which pleads that the two services are nearly identical and in the market for “online bank card debit payment services” cannot be described as a fundamental change.

CONCLUSIONS AND ORDER

[17] The Amendments do not make fundamental changes. Accordingly, the second issue need not be considered. Further, the Amendments meet the test for approving amendments set out in *Canderel Ltd. v. Canada*, [1994] 1 F.C. 3 (F.C.A.) at paragraph 9 where the Court said:

...while it is impossible to enumerate all the factors that a judge must take into consideration in determining whether it is just, in a given case, to authorize an amendment, the general rule is that an amendment should be allowed at any stage of an action for the purpose of determining the real questions in controversy between the parties, provided, notably, that the allowance would not result in an injustice to the other party not capable of being compensated by an award of costs and that it would serve the interests of justice.

NOW THEREFORE, FOR THESE REASONS, THE TRIBUNAL ORDERS that:

- [18] (i) This motion is allowed, and the amended Notice and Statement which form Schedule A hereto are deemed served and filed this day.
- (ii) Scotiabank's response is to be served and filed on or before Wednesday, June 14, 2006.
- (iii) B-Filer's reply, if any, is to be served and filed on or before Wednesday, June 21, 2006.
- (iv) B-Filer is to have its costs of this motion.

DATED at Ottawa, this 24th day of May, 2006.

SIGNED on behalf of the Tribunal by the Chairperson of the Tribunal.

(s) Sandra J. Simpson

[19] SCHEDULE A –NOTICE OF APPLICATION AND STATEMENT OF GROUNDS AND MATERIAL FACTS SHOWING THE PROPOSED AMENDMENTS

APPEARANCES:

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

F. Paul Morrison
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