

**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 103.1 granting leave to make application under sections 75 and 77 of the *Competition Act*;

**AND IN THE MATTER OF** an application by B-Filer Inc., B-Filer Inc. doing business as GPAY GuaranteedPayment and Npay Inc. for an interim order pursuant to section 104 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

**B-Filer's Memorandum of Fact and Law**

*Motion to Amend Pleadings*

April 27, 2006

March 24, 2006

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## I Overview

1. The applicants (collectively, “B-Filer”) wish to amend their Notice of Application and Statement of Grounds and Material Facts to assist in determining the real questions in controversy in this case by:

- a) Pleading with greater precision the remedy sought in this application;
- b) Pleading more narrowly and precisely, and with more extensive particulars, the product markets in relation to the products that Scotiabank has refused to supply B-Filer;
- c) Pleading with greater particularity how B-Filer is substantially affected in its business by Scotiabank’s refusal to deal;
- d) Pleading explicitly and with more extensive particulars the product market in which the adverse effect on competition is (or is likely to be) felt and why an adverse effect on competition is likely;
- e) Organizing the pleading into the scheme of s. 75 and pleading additional particulars in relation to each element; and
- f) Deleting paragraphs that are repetitious and unnecessary.

2. Because the respondent the Bank of Nova Scotia (“Scotiabank”) has not filed its Response, B-Filer is entitled to amend as of right and needs neither consent nor leave, pursuant to Rule 200 of the *Federal Courts Rules*.

3. If leave is required, then leave should be granted, because the proposed amendments help to determine the real questions in controversy and do not cause any prejudice to Scotiabank at all, or in any event, any prejudice that cannot be compensated for by costs or an adjournment.

## II Facts

4. This case began when B-Filer received letters from Scotiabank giving thirty days notice of termination of all banking services provided by Scotiabank to B-Filer, on May 11, 2005.

*B-Filer v. Bank of Nova Scotia*, 2005 Comp. Trib. 38 at ¶12

5. B-Filer sued Scotiabank in the Alberta Court of Queen's Bench, and, on June 20, 2005, just over one month after receiving the notices of termination, applied to the Tribunal for leave to commence this application. As required by the Tribunal's practice direction, the application for leave was accompanied by the Notice of Application under s. 75 and 77 and associated Statement of Grounds and Material Facts.

*B-Filer v. Bank of Nova Scotia*, 2005 Comp. Trib. 38 at ¶4

*B-Filer v. Bank of Nova Scotia*, 2005 Comp. Trib. 31 at ¶4

6. B-Filer retained new lead counsel in mid January, 2006. Shortly thereafter, B-Filer's new counsel advised Scotiabank's counsel that B-Filer would be amending its Notice of Application and Statement of Grounds and Material Facts. B-Filer's counsel provided the proposed Amended Notice of Application and Statement of Grounds and Material Facts in draft to Scotiabank's counsel on or about March 7, 2006. Scotiabank's counsel has indicated that Scotiabank opposes these amendments.

7. Scotiabank has not filed its Response.

## III Argument

### **A. B-Filer can amend its pleading as of right**

8. The *Competition Tribunal Rules* do not contain any provisions for amendment of pleadings. The *Federal Courts Rules* thus govern amendments pursuant to the Tribunal's gap rule.

*Competition Tribunal Rules*, SOR/94-290, r. 72(1)

*Canada (Commissioner of Competition) v. Sears Canada Inc.* (2003), 28 C.P.R. (4<sup>th</sup>) 385 (Comp. Trib.) at ¶8

*Southam Inc. v. Canada (Director of Investigation and Research)* (1997), 78 C.P.R. (3d) 315 (Comp. Trib.)

9. Rule 200 of the *Federal Courts Rules* provides that a party can amend its pleading as of right at any time before another party has pleaded thereto:

#### Amendment of Pleadings

##### *Amendment as of right*

200. Notwithstanding rules 75 and 76, a party may, without leave, amend any of its pleadings at any time before another party has pleaded thereto or on the filing of the written consent of the other parties.

*Federal Courts Rules*, SOR/98-106, r. 200

10. As Scotiabank has not yet filed its Response, B-Filer is entitled to amend its Notice of Application and Statement of Grounds and Material Facts as of right, and requires neither consent nor leave.

#### **B. B-Filer should be given leave to amend its pleading**

11. If leave is required, then B-Filer should be given leave to amend its Notice of Application and Statement of Grounds and Material Facts, for the reasons set out below.

##### ***(1) The test for obtaining leave to amend pleadings***

12. Rule 75 of the *Federal Courts Rules* provides that the court may allow a party to amend a document at any time on such terms as will protect the rights of the parties.

*Federal Courts Rules*, r. 75

13. The general rule is that amendments ought to be allowed for the purposes of determining the real questions in controversy, unless non-compensable prejudice would result. The Federal Court of Appeal stated this test in *Canderel Ltd. v. Canada* as follows:

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.

*Canderel Ltd. v. Canada*, [1994] 1 F.C. 3 (C.A.) at ¶9

14. This test was adopted by the Tribunal in *Sears*, explicitly, and *Southam*, implicitly.

*Canada (Commissioner of Competition) v. Sears Canada Inc.* (2003), 28 C.P.R. (4<sup>th</sup>) 385 (Comp. Trib.)

*Southam Inc. v. Canada (Director of Investigation and Research)* (1997), 78 C.P.R. (3d) 315 (Comp. Trib.)

15. An amendment sought well before trial is more readily granted than one sought close to trial, or during the trial. For instance, in *Washington*, the Tribunal noted that to amend “at this stage of the proceedings” was not prejudicial. It appears from the Tribunal website that the Response had not yet been filed at that stage. (The Director needed leave to amend because he had lost a motion to strike the application as against one of the parties.) Similarly, in the *Southam* s. 106 application, the Tribunal noted that a request by the Director to amend his pleadings was made in a timely way. This ruling was made in September, 1997, at a time when the hearing was scheduled to begin two months later, in November, 1997. In both of those cases, the pleadings were subsequently amended a second time.

*Canderel Ltd. v. Canada*, [1994] 1 F.C. 3 (C.A.) at ¶12 (citing *Kettman v. Hansel Properties Ltd.*, [1988] 1 All ER 38 (H.L.))

*Canada (Director of Investigation and Research) v. Washington* (1996), 69 C.P.R. (3d) 284 (Comp. Trib.)

*Southam Inc. v. Canada (Director of Investigation and Research)* (1997), 78 C.P.R. (3d) 315 (Comp. Trib.)

***(2) The amendments do not cause prejudice***

16. Given that Scotiabank has not yet filed its Response, it is all but impossible that the proposed amendments should cause it any prejudice at all, much less prejudice that cannot be compensated by costs or an adjournment.

17. It should be noted that B-Filer is seeking to amend its pleading at an earlier stage in the proceeding than the amendments in the *Southam s. 106* application.

18. The proposed amendments actually benefit Scotiabank by pleading B-Filer's position more narrowly and with greater clarity. Moreover, as set out below, the proposed amendments make explicit what is implicit in the existing Statement of Grounds and Material Facts. Consequently, the proposed amendments allow Scotiabank to know with greater certainty the case it has to meet.

***(3) The proposed amendments clarify the questions in controversy***

19. The proposed amendments do not represent a change in B-Filer's position. They assist in determining the questions in controversy because they plead more narrowly and precisely, and provide more extensive particulars in respect of the elements of s. 75. Effectively, the proposed amendments make explicit what was implicit in the original Notice of Application. The key issues clarified by the amendments are:

- a) The relief sought by B-Filer.
- b) The two products that Scotiabank has refused to supply B-Filer (Scotiabank Biller Services and EMT Deposit Accounts), and why those products constitute separate product markets from services offered by other banks and from each other.
- c) More particulars on how B-Filer is substantially affected in its business by Scotiabank's refusal to deal.
- d) The adverse effect competition caused by Scotiabank's refusal to supply B-Filer including the product market in which the adverse effect on competition is likely to occur (the online bank card debit payment market), and why this is a separate



product market from other payment services; and why an adverse effect on competition is likely.

20. These three key clarifications are discussed further below.
21. The proposed amendments also assist in determining the questions in controversy because they re-organize the facts pleaded in the Notice of Application into the scheme of s. 75.
22. Finally, the proposed amendments accomplish a number of “housekeeping” matters:
  - a) Several paragraphs are deleted because they do not belong in the Statement of Grounds and Material Facts. In particular, paragraphs dealing exclusively with the proposed application under s. 77, for which leave was not granted (61-66); paragraphs that contain legal argument (35-39, 57-58); paragraphs that appear to plead causes of action that are not within the jurisdiction of the Tribunal and are thus not relevant to s. 75 (44-46, 48); and paragraphs that properly belong in a notice of motion for interim relief (50-54), should be deleted from the Statement of Grounds and Material Facts.
  - b) Many paragraphs became repetitious and thus redundant as a result of proposed additions earlier in the Statement of Grounds and Material Facts (20, 21, 24-26, 28, 30, 32-34, 41-43, 47-49, 58, 59).

*(i) Relief claimed by B-Filer*

23. As it stands, the Notice of Application seeks an order that Scotiabank supply B-Filer with “bank account services”. The proposed amendments make it clear that what B-Filer is seeking is “Scotiabank Biller Services”, that is, biller status at Scotiabank, including associated bank services and accounts, as well as “EMT Business Deposit Accounts”, that is, bank accounts into which email money transfers (“EMT”) can be deposited.
24. It should be noted that with the proposed amendments, the relief sought matches the products that Scotiabank has refused to supply B-Filer.

(ii) *Products that Scotiabank has refused to supply B-Filer*

25. Paragraph 75(1)(a) refers to inability to obtain adequate supplies of a *product* in a *market*. Paragraph 75(1)(b) requires a causal link between insufficient competition among suppliers of this same *product* and the inability to obtain adequate supplies. The use of the words “product” and “market” in these two paragraphs, and the requirement of insufficient competition, means that defining the *product market* in relation to the products that Scotiabank has refused to supply is a key question in controversy. The proposed amendments are designed to clarify B-Filer’s position on this question.

26. The proposed amendments expressly plead that Scotiabank Biller Services, that is, bill payee status at Scotiabank and associated accounts and services, constitute a product market separate from bill payee status at other banks. The facts pleaded in the unamended Statement of Grounds and Material Facts and the evidence filed in support of the application for leave show that B-Filer needs bill payee status at Scotiabank to process bill payments from Scotiabank customers, thus supporting this product market definition. The Tribunal, in granting leave, also recognized that B-Filer uses bill payments for banks at which it has bill payee status, but must use EMTs for banks at which it lacks bill payee status. The product market definition pleaded in the proposed amendments is thus implicit in the existing pleadings and consistent with the evidence on the leave application and the findings of the Tribunal.

Affidavit of R. Grace affirmed June 15, 2005, ¶4 pdf p. 2; Terms and Conditions of Use, ¶3, 4, pdf p. 15, Registry No. 1b.

Affidavit of R. Grace affirmed September 1, 2005, ¶209 pdf p. 38, Registry No. 15.

*B-Filer v. Bank of Nova Scotia*, 2005 Comp. Trib. 38 at ¶8, 10, 14, 16, 19

27. Similarly, the proposed amendments expressly plead that EMTs are a poor substitute for bill payments, and thus, EMT Business Deposit Accounts are a poor substitute for Scotiabank Biller Services. Some, but not all, of the facts that support this contention are pleaded in the unamended Statement of Grounds and Material Facts and are outlined in evidence on the leave application. These include the fact that B-Filer opened over 100 accounts to deal with processing difficulties it encountered with Scotiabank, and the fact that there are caps on the amount of

EMTs that can be deposited into accounts. The Tribunal referred to this evidence in granting leave.

Affidavit of R. Grace affirmed September 1, 2005, ¶214, 218, pdf p. 37-38, Registry No. 15.

*B-Filer v. Bank of Nova Scotia*, 2005 Comp. Trib. 38 at ¶11, 17, 19

28. By clearly identifying and distinguishing the product markets in relation to the two products that Scotiabank has refused to supply B-Filer, and pleading relevant particulars, the proposed amendments help determine the real questions in controversy.

*(iii) How B-Filer is substantially affected in its business*

29. B-Filer applied for leave and filed the existing Statement of Grounds and Material Facts before Scotiabank cut off its banking services. It goes almost without saying that B-Filer's ability to describe the harm it is suffering and will continue to suffer as a result of Scotiabank's refusal to deal is better today than it was when this proceeding was started.

30. The proposed amendments thus further particularize the ways in which B-Filer is substantially affected in its business by Scotiabank's refusal to deal.

*(iv) Product market relevant to the adverse effect on competition*

31. Paragraph 75(1)(e) requires that the refusal to deal have (or be likely to have) an adverse effect on competition in a *market*. The market in which the adverse impact on competition is felt need not be the same market as the market in which the refusal to deal is occurring. Indeed, the paradigm of an anticompetitive refusal to deal is where a supplier refuses to sell in an upstream market to someone who competes with it in a downstream market.

32. The *Xerox* case is an example of this. Xerox refused to sell Xerox parts (the upstream market) to independent service organizations that competed with it in the (downstream) market for repairs to Xerox photocopiers. Xerox's purpose was to curtail competition in the after-sale repair and service market.

*Canada (Director of Investigation and Research) v. Xerox Canada Inc.* (1990), 33 C.P.R. (3d) 83 (Comp. Trib.)

33. The proposed amendments plead explicitly that Scotiabank's refusal to supply B-Filer in two upstream markets (Scotiabank Biller Services and EMT Business Deposit Accounts) is likely to cause an adverse effect in a downstream market in which they compete with each other, that is, the market for online payment services using bank debit cards. The proposed amendments also delineate this market as *including* the online payment services offered by B-Filer and Interac Online and *excluding* other payment methods, whether online or offline. The existing Statement of Grounds and Material Facts and the evidence on the leave application implicitly indicate this, as they state that B-Filer and Interac Online offer the same service, and that the only suppliers of this service are B-Filer and Interac Online. The Tribunal, in granting leave, referred to this evidence, and noted that B-Filer and Scotiabank agreed that the market should be defined in this way.

*B-Filer v. Bank of Nova Scotia*, 2005 Comp. Trib. 38 at ¶20-21, 59.

34. By pleading explicitly the boundaries of the market in which the adverse effect on competition is felt, the proposed amendments help determine the questions in controversy.

### IV Order Requested

35. B-Filer respectfully requests:

- a) An order declaring that B-Filer may file its Amended Notice of Application and Statement of Material Grounds and Facts as of right;
- b) In the alternative, leave to file its Amended Notice of Application and Statement of Material Grounds and Facts; and
- c) Costs of this motion.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

March 24, 2006

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Michael Osborne

*“Sharon Dalton”*

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*“Jennifer Cantwell”*

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Jennifer Cantwell

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## v Authorities

### **A. Statutes**

*Competition Tribunal Rules*, SOR/94-290, r. 72(1)

*Federal Courts Rules*, SOR/98-106, r. 75, 200

### **B. Cases**

*B-Filer v. Bank of Nova Scotia*, 2005 Comp. Trib. 38

*B-Filer v. Bank of Nova Scotia*, 2005 Comp. Trib. 31

*Canada (Commissioner of Competition) v. Sears Canada Inc.* (2003), 28 C.P.R. (4<sup>th</sup>) 385 (Comp. Trib.)

*Southam Inc. v. Canada (Director of Investigation and Research)* (1997), 78 C.P.R. (3d) 315 (Comp. Trib.)

*Canderel Ltd. v. Canada*, [1994] 1 F.C. 3 (C.A.)

*Canada (Director of Investigation and Research) v. Washington* (1996), 69 C.P.R. (3d) 284 (Comp. Trib.)

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