

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 Motion Record

Motion to Amend Pleadings

April 27, 2006

March 24, 2006

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Applicants

– and –

THE BANK OF NOVA SCOTIA

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NOTICE OF MOTION
(returnable April 27, 2006)

The Applicants will make a motion to a judicial member of the Competition Tribunal, on April 27, 2006, at 10:00 a.m. at the Competition Tribunal hearing room, Thomas D'Arcy McGee Building, Suite 600, 90 Sparks Street, Ottawa, Ontario, K1P 5B4.

THE MOTION IS FOR

- a) An order declaring that B-Filer may file the Amended Notice of Application and Statement of Material Grounds and Facts attached hereto as Schedule "A" as of right;
- b) In the alternative, leave to file Amended Notice of Application and Statement of Material Grounds and Facts;
- c) Costs of this motion on a solicitor and client basis; and

- d) Such further and other relief as the Tribunal deems just.

THE GROUNDS FOR THE MOTION ARE:

- a) 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:
- i) Pleading with greater precision the remedy sought in this application;
 - ii) 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;
 - iii) Pleading with greater particularity how B-Filer is substantially affected in its business by Scotiabank’s refusal to deal;
 - iv) 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 is likely;
 - v) Organizing the pleading into the scheme of s. 75 and pleading additional particulars in relation to each element; and
 - vi) Deleting paragraphs that are repetitious and unnecessary.
- b) 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*.
- c) The proposed amendments help to determine the real questions in controversy and do not cause any prejudice to Scotiabank at all, or at least, any prejudice that cannot be compensated for by costs or an adjournment.
- d) Rule 72(1) of the *Competition Tribunal Rules*.

- e) Rules 75 and 200 of the *Federal Courts Rules*.
- f) Such further and other grounds as counsel may advise and the Tribunal may accept.

THE FOLLOWING DOCUMENTARY EVIDENCE will be used at the hearing of the motion:

- a) Affidavit of R. Grace affirmed June 15, 2005, previously filed;
- b) Affidavit of R. Grace affirmed September 1, 2005, previously filed; and
- c) Such further and other evidence as counsel may advise and the Tribunal may accept.

March 24, 2006

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COMPETITION TRIBUNAL

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

Applicants

-and-

THE BANK OF NOVA SCOTIA

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Notice of Motion

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Applicants

– and –

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Amended
NOTICE OF APPLICATION PURSUANT TO SECTION 75
OF THE COMPETITION ACT

TAKE NOTICE THAT:

1. The Applicants, B-Filer Inc., B-Filer Inc. doing business as GPAY GuaranteedPayment and Npay Inc (collectively, “**GPAY**”), will make an application to the Competition Tribunal (the “**Tribunal**”) pursuant to section 75 of the *Competition Act*, R.S.C. 1985, c. C-34, as amended (the “**Act**”) for:

- (a) an order under subsection 75(1) of the Act directing the Respondent, The Bank of Nova Scotia (hereinafter referred to as “**ScotiaBank**”), to accept the Applicants as customers and to provide bank account services to them on usual trade terms, in particular:

- (i) Scotia Bank Biller Services, that is, biller status at Scotiabank for purposes of Scotiabank's online banking, and associated bank services and accounts; and
- (ii) EMT Business Deposit Accounts, that is, bank accounts for deposit of E-mail Money Transfers; and

(b) costs on a solicitor and client basis.

AND TAKE NOTICE THAT:

2. The person against whom the orders are sought is the Respondent, ScotiaBank. The address of ScotiaBank is:

Scotia Plaza
44 King Street West
Toronto, Ontario
M5H 1H1

3. GPAY will rely on the Statement of Grounds and Material Facts attached hereto and on the Affidavit of Raymond F. Grace duly sworn before a lawyer of the Province of Alberta on June 15, 2005.

4. If leave is granted, GPAY will seek an interim order from the Competition Tribunal for the relief sought in this Application and directions from the Tribunal for an expedited hearing of this Application.

5. The Applicant requests that this application proceed in English.

6. The Applicant requests that documents be filed in electronic form.

DATED at Montreal, Quebec this 17th day of June, 2005.

AMENDED this ● day of March, 2006.

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STATEMENT OF GROUNDS AND MATERIAL FACTS

A. THE PARTIES

B-FILER INC. B-FILER doing business as GPAY GUARANTEEDPAYMENT and NPAY INC.

1. The Applicants B-Filer Inc. and NPAY Inc. are each corporations incorporated pursuant to the *Canada Business Corporations Act*, R.S.C. 1985, c. C-44. Each Applicant is registered extra-provincially in the Province of Alberta and each carries on business in the City of Sherwood Park in the Province of Alberta. GPAY GuaranteedPayment is a business name used by B-Filer Inc.

2. The business of the Applicants consists of providing an internet bank card debit payment service that allows Canadian consumers to make purchases from participating internet merchants by paying directly from their existing bank accounts (the “**GPAY Service**”). The GPAY Service is provided for the benefit of both Canadian consumers who wish to make internet debit payments and merchants that wish to receive internet debit payments. Individual consumer customers of the Applicants use the GPAY Service in order to facilitate in payments that they themselves make to merchants. The GPAY Service makes use of existing banking services, facilities, resources and information technology infrastructure offered by the major Canadian banks. Specifically, the GPAY Service relies upon two key inputs of the Respondent: (i) the E-mail Money Transfer system (“**EMT**”); and (ii) internet banking, including bill payment services, that is, the status of being listed as a biller for purposes of the Scotiabank’s online banking website, associated bank services, and a biller suspense account (“Scotiabank Biller Services”, also collectively, “**Internet Banking**”), for part of the payment, clearing and settlement process of the GPAY Service. The supply of EMT and Internet Banking are both necessary inputs for the production by the Applicants of the GPAY Service.

3. Some of the GPAY Services are provided indirectly through its joint venture partner, UseMyBank Services, Inc., a Canadian corporation with its principal place of

business in Toronto, Ontario (“UseMyBank”). UseMyBank provides computer services to GPAY through this joint venture.

4. GPAY Services are the principal business of the Applicants. GPAY Services generate substantially all of the revenue of the Applicants.

5. GPAY Services are distinct from all other electronic payment services available in Canada because they enable the merchant to receive confirmation within seconds of the availability of customer funds and of the settlement of those funds to the merchant. None of cheque payment, credit card payment or any other payment service in Canada offers this unique advantage for Canadian consumers wishing to make immediate payments to merchants.

SCOTIABANK

6. The Respondent, ScotiaBank, is a bank incorporated pursuant to the *Bank Act*, 1991 c. C-46 and carries on business throughout Canada.

7. The Respondent also carries on business under the name “Scotiabank”.

8. The Respondent is one of the five largest Schedule I banks in Canada.

A1. OVERVIEW

8.1 GPAY is unable to obtain adequate supplies of two products: (1) Scotiabank Biller Services and (2) EMT Business Deposit Accounts. As set out below, Scotiabank Biller Services and EMT Business Deposit Accounts constitute two distinct product markets.

8.2 GPAY’s inability to obtain adequate supplies of these two products is due to a lack of competition among suppliers of these products. Scotiabank is the only supplier of

Scotiabank Biller Services, and one of only two suppliers of EMT Business Deposit Accounts.

8.3 GPAY is substantially affected in its business because it needs Scotiabank Biller Services and EMT Business Deposit Accounts to operate as a viable online bank card debit payment processor.

8.4 Scotiabank's refusal to deal is having or is likely to have an adverse effect on competition in the market for online bank card debit payment processing, because it significantly reduces GPAY's ability to compete with the only other provider of this service, Interac Online (a service offered by Scotiabank and some other Interac Association members). The online bank card debit payment processing market is downstream from the Biller Services and EMT Business Deposit Account markets.

B. REFUSAL TO DEAL BY SCOTIABANK

1. How the GPAY Service works

8.5 As stated above, the GPAY service makes it possible for customers of internet merchants to pay for goods and services using their bank cards instead of (for instance) a credit card.

8.6 The GPAY Service works in the following way:

- (a) Online merchants that offer the GPAY Service display a "UseMyBank" button on their websites as a payment option.
- (b) The customer selects UseMyBank to pay the online merchant.
- (c) The customer selects his or her bank from a list of banks.

- (d) To continue, the customer must click to agree to UseMyBank's and GPAY's terms and conditions.
- (e) The customer enters his or her bank card number and online banking password. This information is encrypted and passed directly through UseMyBank's servers to the bank's computers in a secure environment. It never resides on the online merchant's server. The customer's bank card number and password are not stored on UseMyBank's server.
- (f) Using the bank card number and online banking password, GPAY, through its computer service provider, UseMyBank's server, opens a session with the customer's bank and processes either a bill payment to GPAY, or an EMT to GPAY, for the amount of the customer's purchase. The UseMyBank server also performs certain verification procedures to verify the identity of the customer and guard against fraud.
- (g) The money is taken immediately out of the customer's account by the bank and put into an internal bank suspense account.
- (h) GPAY notifies the internet merchant that the payment has been authorized.
- (i) The money is received by GPAY in its biller suspense account (in the case of bill payment transactions) or in its EMT deposit accounts (in the case of EMTs).
- (j) GPAY pays the money to the merchant.

- (k) GPAY reports transactions to Fintrac when and as required by the Proceeds of Crime (Money Laundering) and Terrorist Financing Act and associated regulations.

2. Scotiabank Biller Services is a relevant product market

8.7 Each of Canada's five major banks, including Scotiabank, offers online banking to its customers over the internet. As part of their online services, banks offer customers the ability to make bill payments from their bank accounts to utilities, governments, financial institutions, merchants, and some payment services providers (eg, Dexit). Each bank has its own list of available "billers", that is, firms to which that bank's customers can make online bill payments. In order to become a biller at a particular bank, a firm must obtain Biller Services from that bank, consisting chiefly of a contract enabling it to be listed as a biller, any associated services, and usually also an account for the deposit of bill payments, often called a biller suspense account.

8.8 The list of billers is specific to each bank. That is, Scotiabank deposit customers can only make online bill payments to firms that have obtained Biller Services from Scotiabank and are thus on Scotiabank's list of billers. Scotiabank customers cannot make bill payments to a firm that has obtained Biller Services from Royal Bank, but not from Scotiabank.

8.9 GPAY and UseMyBank make use of the banks' online bill payment services to effect payments for customers of online merchants. In order to process bill payments for customers of a particular bank as bill payments, GPAY needs Biller Services from that bank. In particular, in order for GPAY to process bill payments for Scotiabank customers, GPAY must have Biller Services from Scotiabank. The fact that GPAY has Biller Services from Royal Bank does not assist it in processing bill payments for customers of Scotiabank.

8.10 It follows that:

- (a) Scotiabank is the only possible supplier of Biller Services that would allow Scotiabank customers to pay bills to any particular would-be biller.
- (b) Biller Services from other banks are thus not substitutable for Biller Services from Scotiabank.
- (c) Banks do not compete with each other in offering Biller Services. Banks do compete for retail and business customers, but no bank is able to offer Biller Services to a merchant that would allow the merchant to be a “biller” at another bank.
- (d) Biller Services from Scotiabank – or, Scotiabank Biller Services – is a separate product market.

8.11 As noted above, every biller needs an account for depositing bill payments. It is more efficient for GPAY to have a biller suspense account at each bank at which it is listed as a biller. It would be possible for GPAY to use a central bank account at one bank to receive bill payments from other banks at which GPAY is listed as a biller. However, it would take longer for GPAY to receive the money into such an account.

3. EMT Business Deposit Accounts is a relevant product market

8.12 GPAY uses EMTs to process payments for customers of online merchants who bank with banks that have refused to supply GPAY with biller services, including Scotiabank.

8.13 In order to deposit EMTs, GPAY needs a business (as opposed to personal) bank account that allows EMTs to be deposited. Accounts having this feature are referred to herein as EMT Business Deposit Accounts. The accounts used by GPAY at Scotiabank for depositing EMTs were called “Money Manager for Business Accounts”. These accounts have the following essential characteristics:

- (a) No fee for deposit of electronic payment items; and

- (b) No fee for transfers to another Scotiabank account owned by the same customer.

8.14 The use of EMTs to effect payments is a work-around that is not an adequate substitute for using bill payments to effect payment. Disadvantages of EMTs, as compared with bill payments, include:

- (a) EMTs have a \$1000 limit per transaction (and also a limit of \$1000 per day). GPAY's reliance on EMTs thus makes the GPAY Service unattractive to many online merchants, such as retailers and airlines. Individual transactions frequently exceed \$1000 with these merchants.
- (b) A 30 minute hold on EMTs was introduced in 2005. During this 30 minute period, the bank customer can cancel the EMT. It is thus possible for a customer to pay for an item with an EMT, and then cancel the payment during the 30 minute hold. This increases the risk of GPAY and/or the online merchant being defrauded. GPAY experiences cancellations of EMTs from time to time.
- (c) Only two Canadian banks, Royal Bank of Canada ("Royal Bank") and Scotiabank, allow business customers to deposit EMTs. Both of these banks impose merchant deposit limits on EMTs of approximately \$10,000 per day per "profile". Scotiabank allowed GPAY three profiles, but Royal Bank has allowed GPAY only one. Because GPAY's volume significantly exceeds these limits, GPAY has had to use several bank accounts to receive EMTs, and develop software algorithms to direct EMTs to the appropriate account.
- (d) Large volumes of EMTs can cause processing problems. For example, Scotiabank encountered difficulty processing more than 100 EMTs per month for GPAY's account. The solution was for GPAY to open several accounts and limit each to 100 EMTs per month.

- (e) EMTs are not as reliable as bill payments. All EMTs go through a third party processor, Acxsys Corporation. When the Acxsys Corporation's computer system is down, EMTs are not available. Shutdowns of the EMT system occur frequently. By contrast, each bank processes its own bill payments. If bill payments processing is shutdown at one bank, it will still be available at other banks.
- (f) GPAY experiences frequent error messages when depositing EMTs. These errors must be investigated and resolved.
- (g) EMTs typically cost the online merchant's customer \$1.50 in bank fees, making them less attractive to consumers as a payment option.

8.15 Consequently, because of the disadvantages of using EMTs relative to bill payments, EMT Business Deposit Accounts are a separate product market from Scotiabank Biller Services.

4. Importance of Scotiabank Biller Services and EMT Business Deposit Accounts to GPAY

8.16 In order to be attractive to online merchants, GPAY needs to offer an online bank card debit payment service that can be used by almost any Canadian with a bank card. Since most Canadians bank with one of Canada's five major chartered banks, GPAY needs to be able to process payments from each of these banks.

8.17 Consequently, GPAY must obtain Biller Services from each of these banks. While it is possible for GPAY to use EMTs to process payments from customers of banks that refuse to supply it with Biller Services, the limitations inherent in EMTs constrain the GPAY Service, as discussed above.

8.18 Because of the structure of Canada's banking system, GPAY currently has no alternatives to Biller Services or EMTs as a payment processing method.

8.19 Biller Services, including Scotiabank Biller Services, are thus an essential facility required by GPAY in its business.

5. Refusal of ScotiaBank to Deal

8.20 In 1998 and 1999, GPAY obtained Biller Services from each of Canada's five major banks, including Scotiabank, as well as Alberta Treasury Branches and Fédération des caisses Desjardins du Québec. That is, GPAY was listed as a biller on each bank's online banking website and had a biller suspense account at each bank, including Scotiabank.

8.21 Thus, when GPAY began operation as an internet debit payment service in December 2002, GPAY had Biller Services with each of the five major banks, including Scotiabank. GPAY used these services to operate the GPAY Service as described above.

8.22 However, in December 2003, Canadian Imperial Bank of Commerce ("CIBC"), Toronto Dominion Bank ("TD"), and Alberta Treasury Branches stopped providing GPAY with Biller Services. They removed GPAY from the list of billers on their online banking websites and closed GPAY's biller suspense accounts. As a result, GPAY began relying on EMTs to process payments from CIBC and TD.

9. GPAY had four accounts at Scotiabank until November, 2004, when it began opening additional accounts to resolve difficulties Scotiabank had in processing GPAY's increasing volume of EMTs. Ultimately, GPAY had over 100 money manager accounts at Scotiabank's Sherwood Park, Alberta branch. GPAY entered into Financial Services Agreements (each an "Agreement") with Scotiabank on Scotiabank's standard form in respect of these accounts.[Remainder of paragraph deleted.]

10. The Applicants have built a substantial business during the six (6) years since the Applicants first began procuring banking services from the Respondent. Between June 1, 2004 and May 31, 2005, in the course of providing the GPAY Services, the Applicants deposited approximately \$9,929,881.17 into business bank accounts at the Respondent. Fees charged by the Applicants to merchants for the processing of such funds constitute nearly all of the revenue of the Applicants and now amount to more than \$100,000.00 per month.

11. The Applicants have never been in default under any of the Agreements. Respondent has never alleged any default by the Applicants under any of the Agreements.

12. Respondent delivered a letter to each of the Applicants dated May 11, 2005 (the “**Termination Letters**”), whereby the Respondent stated its intention to cancel its services to each of the Applicants under the Agreements and terminate the Agreements with each Applicant, effective June 15, 2005.

13. Paragraph 12.2 of each Agreement contains the following clause, where “We” refers to the Respondent and “you” refers to the Applicants:

We may cancel any service to you without a reason by giving you thirty days’ written notice.

14. The Termination Letters make express reference to Section 12.2 of the Agreement and state that ScotiaBank has decided to exercise that clause. ScotiaBank has therefore, in its own words, terminated the Agreement with each of the Applicants without cause.

15. Respondent reaffirmed its intent to terminate the Agreements without cause in its most recent letter to counsel to the Applicants, dated May 25, 2005.

15.1 Scotiabank subsequently terminated the Agreements, in September 2005. As a result, Scotiabank is refusing to supply GPAY with both Scotiabank Biller Services and EMT Business Deposit Accounts.

6. GPAY is unable to obtain adequate supplies of Scotiabank Biller Services and EMT Business Deposit Accounts.

15.2 Because of Scotiabank's refusal to supply Scotiabank biller services to GPAY, GPAY is unable to obtain Scotiabank Biller Services at all.

15.3 As set out above, GPAY needs EMT Business Deposit Accounts because it uses EMTs as a work-around to process payments for customers of online merchants who bank with banks that refuse to provide GPAY with Biller Services.

15.4 There are only two suppliers in Canada of EMT Business Deposit Accounts: Scotiabank and Royal Bank. Scotiabank has closed GPAY's EMT Business Deposit Account and Royal Bank has refused to allow GPAY to increase the volume of EMTs it processes.

15.5 Consequently, GPAY is unable to obtain adequate supplies of EMT Business Deposit Accounts.

7. GPAY is substantially affected in its business

15.6 GPAY is substantially affected in its business by Scotiabank's refusal to supply Scotiabank Biller Services in the following way:

- (a) GPAY wants to expand its business to provide online bank card debit payment services to major online merchants, such as online retailers and airlines. However, the GPAY Service is unattractive to these merchants

because GPAY is forced to rely on EMTs to process payments from customers who bank with Scotiabank (and other banks that have refused to provide Biller Services to GPAY). As set out above, the limitations inherent in EMTs make them a poor payment method for major online merchants. As a result of Scotiabank's refusal to supply Scotiabank Biller Services, GPAY has been largely unsuccessful in its efforts to attract major online merchants as customers. Consequently, GPAY has suffered a loss of growth in its business that would have otherwise occurred.

- (b) Moreover, as set out below, the Interac Association (of which Scotiabank is a member) now offers an online bank card debit payment service, Interac Online, that is functionally equivalent to that offered by GPAY. Because Scotiabank has made it impossible for GPAY to compete effectively with Interac Online, GPAY risks permanent loss of business and market share to Interac Online.
- (c) Further, the online bank card debit payment market is characterized by network effects. Consequently, GPAY's reduced growth, loss of business and market share, and competitive disadvantage relative to Interac Online could prevent it from achieving a sufficiently large network and thus threaten its viability as a participant in this market.
- (d) As a result, Scotiabank's refusal to deal deprives GPAY of its "first mover advantage", arising from GPAY being the first to market with an online bank card debit payment product.
- (e) The banking fees associated with EMTs makes them less attractive to customers than other payment methods (such as credit cards). This makes the GPAY Service less attractive to customers of online merchants, and thus, less attractive to online merchants, as compared with Interac Online.

GPAY's forced reliance on EMTs thus reduces GPAY's ability to expand its business.

- (f) Because of the limitations inherent in EMTs, GPAY is not able to expand its volume of transactions efficiently. GPAY is forced to rely on a short-term work-around, EMTs, and an array of bank accounts. GPAY needs biller services for the GPAY Service to continue to function as a viable online debit payment service.
- (g) The more banks GPAY can offer bill payments from, the more attractive is its service to potential customers. Scotiabank's refusal to deal makes GPAY less attractive to potential customers.
- (h) Scotiabank's refusal to deal undermines GPAY's business reputation and its ability to gain new customers.
- (i) In the result, GPAY's volume of business and profit is significantly lower than it would have been but for Scotiabank's refusal to deal. Between May 2004 and May 2005, GPAY's volume of business increased by 341%, from \$800,500.79 to more than \$2.7 million. But for Scotiabank's refusal to deal, GPAY's rapid growth would have intensified since then.
- (j) In the long run, GPAY's ability to continue in business at all is threatened by Scotiabank's refusal to deal.

15.7 GPAY is substantially affected in its business by Scotiabank's refusal to supply EMT business deposit accounts in the following way:

- (e) Scotiabank's refusal to supply GPAY forces GPAY to rely on just one bank, Royal Bank, for all of its EMT deposits.

- (f) Royal Bank has refused to increase GPAY's volume limits. Volume limits on EMT deposits will likely constrain GPAY's ability to continue expanding its volume of business.
- (g) Reliance on just one bank for EMT deposits increases the risk that the GPAY System will cease being a viable online payment system.

8. There is no competition for the supply of Scotiabank Biller Services

15.8 Scotiabank is the only supplier of Scotiabank Biller Services, since, as set out above, only Scotiabank can offer Biller Services allowing a biller to receive bill payments from Scotiabank customers. There is thus no competition for the supply of Scotiabank Biller Services.

9. There is insufficient competition for the supply of EMT Business Deposit Accounts

15.9 Only two banks allow EMTs to be deposited into business accounts: Scotiabank and Royal Bank. There is thus only limited competition for the supply of deposit accounts for EMTs. As stated above, Royal Bank has refused to allow GPAY to increase the volume of EMTs it processes.

10. GPAY is willing and able to meet Scotiabank's usual trade terms

15.10 GPAY is willing and able to meet Scotiabank's usual trade terms for the provision of Scotiabank Biller Services and deposit accounts for EMTs, and was doing so before Scotiabank refused to supply these services.

11. Scotiabank Biller Services and deposit accounts for EMTs are in ample supply

15.11 Scotiabank's ability to provide Scotiabank Biller Services and EMT Business Deposit Accounts is virtually unconstrained.

12. Adverse effect on competition in a market

15.12 Scotiabank's refusal to supply GPAY with Scotiabank Biller Services and deposit accounts for EMTs has had, or is likely to have, adverse effects on competition in a market or markets. It significantly reduces competition in the market for online bank card debit payment services (also referred to simply as "online debit payments"), as particularized below.

(a) Interac Online

16. On or about May 5, 2005, the five (5) principal Canadian banks, being the Respondent, The Bank of Montreal, The Royal Bank of Canada, The Canadian Imperial Bank of Commerce and The Toronto Dominion Bank (collectively, the "**Canadian Banks**"), announced that they were beginning to supply a service to Canadian consumers that would allow them to make debit-card payments via the internet, by enabling transfers of money directly out of bank accounts to merchants immediately during the course of an online transaction (the "**Competing Bank Service**" or "Interac Online"). The Competing Bank Services are provided through a single portal, Interac Online, which is a service of the Interac Association, an association controlled by banks in Canada, including the Respondent. Given the single portal through which it is provided, and the legal oligopoly of the Interac Association by which it is structured, it is difficult to distinguish between providers of Interac Online. Interac Online is a single service offered by members of the Interac Association collectively as a single supplier.

17. The Respondent has announced that it expects to offer the Competing Bank Service of the Interac Association, beginning in June or July of 2005. Scotiabank began offering Interac Online in 2005.

[paragraph 18 deleted]

19. The Competing Bank Service is virtually identical to the GPAY Service, from the perspective of both the consumer wishing to make payment and the merchant wishing to receive payment. Each of these services is used by a consumer entering their debit card information and personal identification number into a web site following which moneys are transferred immediately from the bank account of the consumer to the credit of the merchant.

(b) Online bank card debit payment services market

19.1 The GPAY Service and Interac Online are functionally nearly identical. They compete in the same product market, the market for online bank card debit payment services. This product market is distinct from other methods of paying for goods and services over the Internet, such as credit cards or third-party online wallets.

19.2 Characteristics of online bank card debit payment services include:

- (a) They allow customers of online merchants to pay for goods and services over the internet directly from their *bank accounts*, using their *bank cards*.
- (b) Conversely, they allow online merchants to receive payment from customer's bank accounts.
- (c) The transaction is a *debit* transaction as opposed to a *credit* transaction (unless the customer is overdrawing the bank account). The funds are removed immediately from the customer's bank account by the bank.
- (d) The money comes directly from the customer's *bank account*, rather than from a third party online account or "wallet" set up specially to effect

online payments, and the customer does not need to have an account with a third party payment processor.

- (e) The customer effects payment using his or her bank card number and online banking password.
- (f) Merchants obtain real-time confirmation that payment has been authorized by their customer's bank.
- (g) Payments are deposited directly into the merchant's bank account.
- (h) Payments are final and are not subject to chargeback (unlike credit card transactions).
- (i) The service provider is paid through fees from merchants. Typically these fees are a percentage of the value of payments processed for that merchant.

19.3 Online bank card debit payments respond to both consumer and merchant needs and preferences:

- (a) Many Canadians do not have credit cards. These people need a way to make payments to online merchants. Online merchants need a way to sell goods and services to people who do not have credit cards.
- (b) Many Canadians fear entering credit card numbers onto online merchant websites. With both Interac Online and the GPAY Service, the customer's bank card number and password are never seen by the merchant's computer system. This reduces the potential for fraud.

- (c) Many Canadians want the option of paying online for goods and merchandise using their bank cards, just as they do in a traditional brick-and-mortar store. Merchants want to be able to accommodate this desire.

19.4 The differences between the GPAY Service and Interac Online are technical in nature:

- (a) GPAY Service relies on bill payments, which are a service provided by banks to their biller customers. Payments made through GPAY do not go through the Interac network. Interac Online payments are processed through the Interac network. This difference is not readily apparent to the customer or the online merchant.
- (b) When using the GPAY Service, the customer enters information onto a webpage generated by UseMyBank's server, and UseMyBank's server uses this information to effect payment as agent for the customer. When using Interac Online, the customer is redirected to his or her bank website to finalize payment.
- (c) Both the GPAY Service and Interac Online rely on computer service providers. GPAY's computer service provider, UseMyBank, conducts verification and fraud prevention procedures. In the case of Interac Online, verification and fraud prevention are the responsibility of the individual banks.

(c) Adverse effect on competition in the online bank card debit payment services market

[paragraphs 20-21 deleted]

21.1. Scotiabank's refusal to supply GPAY with Scotiabank Biller Services and EMT Business Deposit Accounts is having or is likely to have an adverse effect on competition in the market for online bank card debit payment services because:

- (a) GPAY's only competitor is Interac Online.
- (b) GPAY charges fees to merchants that are lower than those charged by Interac Online.
- (c) As set out above, GPAY's inability to obtain Scotiabank Biller Services reduces its ability to expand its business generally, and particularly, to major online merchants such as retailers and airlines.
- (d) Consequently, Scotiabank's refusal to supply Scotiabank Biller Services and EMT Business Deposit Accounts to GPAY leaves Interac Online as the only viable supplier of online bank card debit payment services to many online merchants. This eliminates Interac Online's only competitor for many, if not most, potential customers of online bank card debit payment service providers. It also reduces or removes constraints on fees charged by Interac Online.

21.2. Further, even if other forms of online payments, such as credit cards and third-party online wallets, are included in the relevant market, Scotiabank's refusal to supply reduces choices of online payment options available both to online merchants and consumers, causing an adverse effect on competition.

21.3. In addition, Scotiabank's refusal to deal is having or is likely to have an adverse impact on competition in retail markets. Customers of traditionally brick and mortar stores and services are accustomed to many payment options, including cash, credit card, Interac (bank card), and, most recently, cards pre-loaded with value (Dexit, gift cards, etc). To the extent that Scotiabank's refusal to deal reduces payment choices for

customers of online merchants, it reduces the ability of those online merchants to compete with brick and mortar merchants.

[paragraph 22 deleted]

23. Applicants have no interest in preventing the entry of Respondent into the Online Debit Payment Market. Rather, this Application is to avoid the exclusion of the Applicants from that market upon the entry of the Respondent into it.

[paragraphs 24-26 deleted]

27. Canadian banks, including the Respondent, provide each other with unlimited EMT and Internet Banking deposit and transfer rights into each others accounts. The Respondent has never ceased providing EMT deposit services or Internet Banking to any bank.

[paragraph 28 deleted]

29. Before closing GPAY's accounts, and without prior notice or consultation with the Applicants, the Respondent has unilaterally amended the terms of the Agreements by which it provides money manager bank account services to the Applicants. As of a certain date in May or June of 2005, the precise date not being known to the Applicants, the number of deposits permitted in the bank accounts of the Applicants with the Respondent are no longer unlimited and there is no express reference to EMTs, nor is there any reference to there being no fee for deposits, as was previously the case under the Agreements (collectively, the "**Amendments**"). In brief, the Amendments provide for the exclusion of the Applicants from the EMT Deposit Market.

[paragraph 30 deleted]

31. Scotiabank's intention in refusing to supply GPAY with Scotiabank Biller Services and EMT Business Deposit Accounts was to eliminate GPAY as a competitor of Interac Online, at least for major online merchants. It is noteworthy that the date of the sending of the Termination Letters is coincident with the date on which the Competing Bank Service is being offered in Canada.

[Paragraphs 32-54 deleted]

55. Nothing in the Termination Letters or any other correspondence from the Respondent indicates that the Respondent would suffer any damage at all by continuing to perform under the Agreement it has with each Applicant. In fact, the Respondent stands to make material profits from providing a necessary element for the tremendously successful GPAY Service.

56. There is no impediment to the discretion of the Tribunal to grant an injunction to the Applicants in the present matter and accept the Application on the merits.

[paragraphs 57-60 deleted]

60.1 The Applicants therefore request the Tribunal to issue an order requiring Scotiabank to supply them with:

- (a) Scotiabank Biller Services; and
- (b) EMT Business Deposit Accounts,

on Scotiabank's usual trade terms.

[paragraphs 61 – 66 deleted]

DATED at Montreal, Quebec, this 17th day of June 2005.

AMENDED this ● day of March, 2006

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Counsel for the Applicants

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

COMPETITION TRIBUNAL TRIBUNAL DE LA CONCURRENCE	
FILED / PRODUIT CT 2005-006 June 20, 2005 Chantal Fortin for / pour REGISTRAR / REGISTRAIRE	
OTTAWA, ONT.	#0001b

THE BANK OF NOVA SCOTIA

Respondent

AFFIDAVIT OF RAYMOND F. GRACE
Affirmed June 15, 2005

I, RAYMOND F. GRACE, of the City of Sherwood Park in the Province of Alberta
AFFIRM AND SAY AS FOLLOWS:

1. I am the President of all the Applicants, B-Filer Inc., B-Filer Inc. doing business as GPAY GuaranteedPayment and Npay Inc. (collectively, "GPAY"), and as such have knowledge of the matters hereinafter deposed to, except where such matters are stated to be based on information and belief, and where so stated, I verily believe those matters to be true.

2. I make this Affidavit in support of: (i) an application by the Applicants, GPAY, for an order pursuant to section 103.1 of the *Competition Act*, R.S.C. 1985, c. C-34, as amended (the "Act") granting leave to the Applicants to make an application pursuant to sections 75 and 77 of the Act; (ii) an application for an interim order pursuant to section 104 of the Act and (iii) an

application pursuant to sections 75 and 77 of the Act all against the Respondent, The Bank of Nova Scotia ("**ScotiaBank**");

A. THE PARTIES

B-FILER INC. and NPAY INC.

3. The Applicants, are each corporations incorporated pursuant to the *Canada Business Corporations Act*, R.S.C. 1985, c. C-44. Each Applicant is registered extra-provincially in the Province of Alberta and each carries on business in the City of Sherwood Park in the Province of Alberta.

4. The business of the Applicants consists of providing an internet debit payment service that allows Canadian consumers to make purchases from participating internet merchants by paying directly from their existing bank accounts (the "**GPAY Service**"). The GPAY Service is provided for the benefit of both Canadian consumers who wish to make internet debit payments and merchants that wish to receive internet debit payments. Individual consumer customers of the Applicants use the GPAY Service in order to facilitate in payments that they themselves make to merchants. The GPAY Service makes use of existing banking services, facilities, resources and information technology infrastructure offered by the major Canadian banks. Specifically, the GPAY Service relies upon two key inputs of the Respondent: (i) the E-mail Money Transfer system ("**EMT**"); and (ii) internet banking, including bill payment services (collectively, "**Internet Banking**"), for part of the payment, clearing and settlement process of the GPAY Service. The supply of EMT and Internet Banking are both necessary inputs for the production by the Applicants of the GPAY Service.

5. Some of the GPAY Services are provided indirectly through its joint venture partner, UseMyBank Services, Inc., a Canadian corporation with its principal place of business in Toronto, Ontario ("**UseMyBank**").

Attached hereto and marked as Exhibit "A" to this my Affidavit are copies of the terms by which services are provided to merchant and consumer customers of GPAY via UseMyBank.

EXHIBIT A

Buyer

Top of Form

NPAY - Guaranteed Payment (NPAY)

Terms & conditions of the NPAY payment service agreement

1. NPAY Inc. is a federally incorporated Canadian company.
2. NPAY is a client of Guaranteed Payment (GPAY).
3. NPAY provides Buyers with a money refunded or satisfaction guarantee on goods purchased over the Internet.
4. Customers who have NPAY registered as a "Bill Payee" can buy from anyone.
5. If the Vendor refuses to deal with NPAY we will refund your payment.
6. Funds are held for 5 days giving the merchandise time to arrive.
7. The Buyer has the right to reject the merchandise.
8. The onus is on the Buyer to advise NPAY that the merchandise has been rejected and returned to the Vendor within 5 days.
9. In the absence of an authenticated communication from the Buyer rejecting the merchandise, the funds are paid to the Vendor on the morning of the 5th day.
10. Please note payments are always received on a Monday to Friday and always disbursed on a Monday to Friday. When there is a bank holiday, the funds are disbursed on the next banking day.
11. Funds are held for an additional 5 days until the Vendor confirms that the merchandise has been returned in good condition.
12. Restocking fees, reimbursement of shipping costs, and payment for damaged goods is between the Vendor and the Buyer.
13. Once an agreement has been reached on returned goods, the Buyer and the Vendor advise NPAY. The Buyer makes a second payment for the NPAY fees and any compensation amount agreed upon. The original payment is credited to the Buyer's bank account.
14. NPAY does not warrant any merchandise.
15. NPAY Guarantees that Buyer will get their money back if they notify NPAY that there is a problem within 5 days of paying.
16. NPAY Guarantees that the Vendor receives payment or their merchandise back.
17. Disputes that cannot be resolved are referred to the Alberta Adjudicator as pursuant to the laws of the province of Alberta Canada. Their decision is binding on both parties. The cost of the Adjudication comes out of the funds held by NPAY.
18. By agreeing, you also agree to the terms and condition of use for UseMyBank. The most recent version of these Terms can be found at <http://www.usemybank.com/legal.asp>.

Bottom of Form

Sellers and Affiliates

Top of Form

NPAY Inc. - A division of Guaranteed Payment (GPAY) Inc.

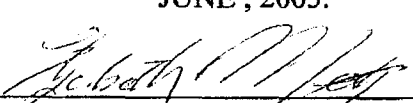
Terms & conditions of the NPAY payment service agreement

1. NPAY Inc. is a federally incorporated Canadian company.
2. NPAY is a client of Guaranteed Payment (GPAY).
3. The NPAY payment service allows individuals and corporations to send and receive cash payments.
4. The NPAY fee is deducted from the funds paid.
5. The Creditor and the Payer determine which party pays the NPAY fee.
6. The CustomerID is used to identify the payer and the payee.
7. The CustomerID is used as the NPAY account number.
8. A CustomerID can be issued by a corporate creditor.
9. Customers activate their CustomerID by making a \$1.00 payment to NPAY.
10. By making the payment the Customer ratifies the contract and accepts the terms and conditions of the NPAY Payment Service Agreement, as stated herein.
11. Customers with registered CustomerID's can send and receive funds from anyone.
12. Payments are made to NPAY using internet, Telephone banking, at ATMs and by Instant Pay.
13. Customers use the receipt number from their \$1.00 activation payment as a token to authenticate communication. This receipt number is known to the payee, the bank and NPAY.
14. All NPAY transactions are governed by the Laws of Alberta Canada.
15. All disputes are referred to the Alberta Arbitrator for resolution.
16. The Arbitrator's decision is final on all disputes.
17. The standard fee per transaction can be found by clicking [here](#).
18. By agreeing, you also agree to the terms and condition of use for UseMyBank. The most recent version of these Terms can be found at <http://www.usemybank.com/legal.asp>.

Bottom of Form

**This is the Exhibit "A" referred to
in the affidavit of
Raymond F Grace**

Sworn Before me this ^{E 15th} ~~13~~ day of
JUNE, 2005.



Elizabeth Meddings
Barrister & Solicitor

Terms and Conditions of Use

1. **Acceptance of terms**
Your use of UseMyBank is subject to the following Terms and Conditions of Use. UseMyBank reserves the right to update and change, from time to time, these Terms and all documents referenced. The most recent version of these Terms can be found at <http://www.UseMyBank.com/legal.asp>.
2. **Transaction providers**
You understand that the Transaction Provider may not have consented to and/or endorsed, and/or may not have knowledge of its inclusion as a designated Transaction Provider, and/or access by you to its Online Service, and that in the context of UseMyBank as an acting agent on your behalf, and not on the behalf of any Transaction Provider. You understand that UseMyBank provides a link to the Transaction Provider for your convenience, but that (i) if you activate such a link you will be using UseMyBank to access the Transaction Providers web site, and (ii) you are responsible for bill payments or email money transfer made by you using this service.
3. **Description of use**
UseMyBank is a service that facilitates account information and bill payment or email money transfer from your preferred online Transaction Provider. The providers and sources of your online accounts are referred to in these Terms as "Transaction Providers". The account information that is collected from these Transaction Providers is used on your behalf (ie. account information, Bill payee, etc). In order to access the account information from these Transaction Providers, UseMyBank will request your online Login Information. "Login Information" is your user ID, password, Personal Information Number (PIN), and other information that provides online access to the appropriate account information and billing facilities. The terms "Login Information" and "Account Information" are collectively referred to in these Terms as "Buyer Information." Please note account access from these Transaction providers will be used to process bill payment or email money transfer transactions from the selected account and at no time will the account information of login information be logged, and hence cannot be used in the facilitation of any transactions. UseMyBank is simply a facilitator, all rules and regulation governing the transferring of funds is provided by NPAY (NPAY Inc. which is the corporation that has Biller account with the Transaction Providers). Transaction Providers may prohibit the disclosure of Login Information or deny liability to the user if Login information is disclosed. It is the users responsibility to review their agreements with the Transaction Providers to determine whether disclosure is permitted, what the consequences of such disclosure are and what liability will be in connection with such disclosure.
 - i. For funds transfer, the Seller and Affiliate Terms and Conditions can be found by clicking [here](#)
 - ii. For funds transfer, the Buyer Terms and Conditions can be found by clicking [here](#).
4. **Your authorization of UseMyBank services**
Online accounts access is provided by you from the Transaction Providers. By providing Login Information, you authorize UseMyBank and its facilitation service to act as your agent to access, retrieve your Account Information, and make bill payments or email money transfer from the web sites of your Transaction Provider site on your behalf. You hereby grant UseMyBank and its facilitation service a limited power of attorney, and you hereby appoint UseMyBank and its facilitation service as your true and lawful attorney-in-fact and agent, with full power of substitution and resubstitution, for you and in your name, place and stead, in any and all capacities, to access Transaction Provider sites, retrieve information, and use your information, all as described above, with the full power and authority to do and perform each and every act and thing requisite and necessary to be done in connection with such activities, as fully to all intents and purposes as you might or could do in person. YOU ACKNOWLEDGE AND AGREE THAT WHEN USEMYBANK AND ITS FACILITATION SERVICE ACCESSES AND RETRIEVES INFORMATION FROM THE TRANSACTION PROVIDER, USEMYBANK AND ITS FACILITATION SERVICE ARE ACTING AS YOUR AGENT, AND NOT THE AGENT OR ON BEHALF OF SUCH TRANSACTION PROVIDER. You agree that the Transaction Providers will be entitled to rely on the foregoing authorization, agency and power of attorney granted by you to UseMyBank. You also authorize UseMyBank and its respective authorized agents and assignees to receive your information, to provide that information to its facilitation service in accordance with the terms of the UseMyBank Privacy Policy Statement. UseMyBank is not responsible for any fees that are associated with the facilitation of this services as it relates to Bill Payment or email money transfer through the Transaction Provider and/or third parties.
5. **Privacy**
Certain information, required by law, will be requested through your Transaction Provider. This information is solely used in the Facilitation Service of UseMyBank. All other information is subject to UseMyBank privacy policy statement (<http://www.UseMyBank.com/PrivacyBotSecurity.asp>). UseMyBank may contact you via your email address regarding your account status, provide information to you about enhancements of our services, and respond to your questions or comments about your transactions or other items.
6. **Method of communication**
To the fullest extent permitted by applicable law and usage, this Agreement and any other agreements, notices or other communications regarding your membership and/or your use of the UseMyBank Service, may be provided to you electronically and you agree to receive Communications in an electronic form. Electronic Communications may be posted on the pages within the UseMyBank website and/or delivered to your email address. You will print a copy of any Communications and retain it for your records. All Communications in either electronic or paper format will be considered to be in "writing," and to have been received no later than five (5) business days after posting or dissemination, whether or not you have received or retrieved the Communication. UseMyBank reserves the right but assumes no obligation to provide Communications in paper format. In Ontario, please refer to the Electronics Commerce Act. Your consent to receive Communications electronically is valid until you revoke your consent by notifying UseMyBank of your decision to do so, by sending an email message to support@UseMyBank.com. If you revoke your consent to receive Communications electronically, UseMyBank may terminate your right to use the UseMyBank Service.
7. **Anti-spam**
You agree not to use unsolicited email, usenet, message board postings, or similar methods of mass messaging (spam) to gather referral bonuses. The use of spam to promote the UseMyBank Service has strict negative consequences. UseMyBank will immediately and permanently terminate the account of any member who has used unsolicited email to gain referrals. In addition, you may be subject to Canadian provincial and federal penalties and US state and federal penalties and other legal consequences under applicable law if you send unsolicited email. Our Anti-Spam Policy is intended to protect our members, the Internet, and UseMyBank.
8. **Specific limitation of liability**
UseMyBank's facilitation service do not assume responsibility for malfunctions in communications facilities that may affect the accuracy or timeliness of transactions or information you send or that is provided to you via online access to the site. UseMyBank's service is also not responsible for any losses or delays in transmission of instructions arising out of the use of any Internet service provider providing connection to the Internet or caused by any third party software or systems. In the event that a court should hold that the limitations of liabilities or remedies available as set forth in these Terms, or any portions thereof, are unenforceable for any reason, or that any of your remedies in connection with the online access fail their essential purpose, you expressly agree that under no circumstances will UseMyBank and its facilitation service have any liability to you or any party claiming by, through or under you for any cause whatsoever, and regardless of the form of action, whether in contract or in tort, including negligence or strict liability. In the aggregate, exceed \$5,000 (Canadian.). Because some jurisdictions do not allow the exclusion or limitation of liability for consequential or incidental damages, in such cases liability is limited to the extent permitted by law.
9. **Exchange Rates**
Best efforts are made to obtain the most accurate and timely exchange rates from Bank of Canada. UseMyBank does not guarantee the accuracy, timeliness, reliability or completeness of this service from Bank of Canada. As a user, you acknowledge and agree that any reliance on or use by you of the exchange rates shall be entirely at your own risk. In no event shall UseMyBank nor any of its bill payment or email money transfer providers be liable for any direct, indirect, consequential or exemplary damages arising from the use or the performance of the exchange rates provided by Bank of Canada.
10. **Specific disclaimer of warranties**
YOU EXPRESSLY AGREE THAT USE OF ONLINE ACCESS IS AT YOUR SOLE RISK, NONE OF USEMYBANK'S, THIRD PARTIES, TRANSACTION PROVIDERS, OR THEIR RESPECTIVE LICENSORS, AFFILIATES, EMPLOYEES, DISTRIBUTORS OR AGENTS WILL HAVE ANY LIABILITY FOR ANY DIRECT, INCIDENTAL, CONSEQUENTIAL, INDIRECT, SPECIAL OR OTHER DAMAGES SUFFERED BY YOU OR ANY OTHER PARTY (REGARDLESS OF WHETHER OR NOT SUCH PARTIES HAVE BEEN ADVISED OF THE POSSIBILITY OF SUCH DAMAGES) RESULTING FROM: (I) THE USE OR THE INABILITY TO USE THE SERVICE; (II) THE COST OF OBTAINING SUBSTITUTE GOODS OR SERVICES RELATING IN ANY MANNER TO YOUR USE OR NON-USE OF THE SERVICE; (III) UNAUTHORIZED ACCESS TO OR ALTERATION OF YOUR TRANSMISSIONS OR DATA; (IV) STATEMENTS OR CONDUCT OF ANYONE ON THE SERVICE; OR (V) ANY OTHER MATTER RELATING IN ANY MANNER TO THE SERVICE.
11. **Termination**
Either you or UseMyBank may terminate your use of this service at any time without prior notice. You can cancel your transaction at any time during the use of this service at any time and have your information deleted from our records. The UseMyBank Terms of Service which apply to your use of your online account and transaction providers, provides that UseMyBank expressly reserves the right to immediately modify, suspend or terminate your transaction and refuse current or future use of any UseMyBank service, including online transaction processing, if UseMyBank in its sole discretion believes you or someone using your online access has: (i) violated or tried to violate the rights of others; or (ii) acted inconsistently with the spirit or letter of the UseMyBank's Terms.
12. **Invalidity of specific terms**
If any provision of these Terms or any document incorporated by reference is found by a court of competent jurisdiction to be invalid, the parties nevertheless agree that the court should endeavor to give effect to the parties' intentions as reflected in the provision, and the other provisions of the such documents remain in full force and effect.
13. **Age of use**
You agree and accept that payments that require age verification have been completed and accepted. UseMyBank services restrictions are not limited. All use is governed by the Transaction Providers and Third Party suppliers.
14. **Legal matters**
The UseMyBank Terms which apply to all use of the online access through the transaction providers, provides that both you and UseMyBank agree that any dispute or controversy arising out of or relating to any interpretation, construction, performance or breach of these Terms, shall be settled by arbitration to be held in Toronto, Ontario, before a single arbitrator and in accordance with the Commercial Arbitration Rules then in effect and/or pursuant to the statutes of Ontario, and in particular, the Arbitrations Act. Each party

irrevocably and unconditionally consents to the jurisdiction of any such proceeding and waives any objection that it may have to personal jurisdiction or the laying of venue of any such proceeding. The parties will cooperate with each other in causing the arbitration to be held in as efficient and expeditious a manner as practicable. If the parties are unable to appoint a mutually acceptable arbitrator within thirty (30) days after a party gives written notice to the other requesting resolution of a dispute, the a Ontario court shall appoint the arbitrator in accordance with such Commercial Arbitration rules and/or the Arbitration Act. The arbitrator may grant any and all relief permitted by the Arbitration Act. The decision of the arbitrator shall be final, conclusive and binding on the parties to the arbitration. Judgment may be entered on the arbitrator's decision in any court having jurisdiction. Nothing herein shall prevent the parties from settling any dispute by mutual agreement at any time.

15. **Indemnities**

EXCEPT WITH RESPECT TO CLAIMS, COSTS, AND LIABILITIES ARISING PRINCIPALLY BY REASON OF USEMYBANKS' NEGLIGENCE, YOU WILL INDEMNIFY USEMYBANK AGAINST ANY CLAIM, COST AND LIABILITY INCURRED BY YOU IN CONNECTION WITH USEMYBANK PROVIDING ITS FACILITATION SERVICE. IN ADDITION, YOU AGREE TO RELEASE USEMYBANK FROM ANY CLAIM, COST, AND/OR LIABILITY INCURRED BY YOU IN CONNECTION WITH THE USEMYBANK SERVICE, EXCEPT FOR THOSE ARISING PRINCIPALLY BY REASON OF USEMYBANKS' NEGLIGENCE.

16. **Language**

It is agreed that this Agreement and all related documents, including notices, be drawn up in the English language only.

17. **Code of Practice**

UseMyBank endorses the Canadian Code of Practice for Consumer Debit Card Services and is committed to maintaining and/or exceeding the level of customer protection for all its clients. Note: this is a voluntary code.

18. **Notices**

- i. The following legal agreement details the users responsibilities and obligations along with UseMyBank/NPAY with its facilitation of online bill payments or email money transfer from accounts of these Transaction Providers and by using this service you agree to be bound by same.
- ii. A copy of this agreement will not be mailed to the user. Please print or save this agreement by using the "Print" or "File/Save" options the appropriate Internet browser.

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

THE BANK OF NOVA SCOTIA

Respondent

COMPETITION TRIBUNAL TRIBUNAL DE LA CONCURRENCE FILED / PRODUIT Sept. 6, 2005 CT2005-006 <small>Chantal Fortin for / pour REGISTRAR / REGISTRAIRE</small>	
OTTAWA, ONT.	#0015

SECOND AFFIDAVIT OF RAYMOND F. GRACE
Affirmed September 1, 2005

I, RAYMOND F. GRACE, of the City of Sherwood Park in the Province of Alberta **AFFIRM AND SAY AS FOLLOWS:**

1. I ("**Grace**") am the President of all the Applicants, B-Filer Inc., B-Filer Inc. doing business as GPAY GuaranteedPayment and Npay Inc. (collectively, "**GPAY**"), and as such have knowledge of the matters hereinafter deposed to, except where such matters

the only entities permitted to participate in this hugely profitable and narrow market sector.

202. The Applicants submit that even if Interac Online were not launched, the termination by the Respondent of services to the Applicants alone would constitute a breach of the Act. That termination alone, in light of the reasons therefore provided in the Response, reveal that it was wholly unjustified, as discussed above.

203. Rosatelli suggests that all of the Applicant's problems would be solved if they just applied to join Interac.

204. The Applicants joining Interac is not an option.

205. At the present time, Interac only offers connection services by way of POS and ATM's. Efforts have been underway to work through a third party, CU Connection, to have an indirect connection through an existing member of Interac to use Interac Online.

206. At this time the Applicants have been told that this option is not available. Until Interac provides a service that the Applicants can actually use, joining Interac does not make business sense for the Applicants. Contrary to Rosatelli's allegations, joining Interac is not an option.

207. The termination of the Applicants by the Respondent, on the one hand, and the nearly simultaneous launch of Interac Online removes any doubt as to the true intent of Scotiabank. The true intent of Scotiabank is to extinguish the Applicants as competitors in the online debit payment services market and introduce their own Interac Online service as a substitute.

(b) Bill Payee

208. The Applicants were, indeed, listed as a "bill payee" with each of the TD, CIBC, Alberta Treasury Branch, Bank of Montreal and Royal Bank customers. In or about late 2003, TD, CIBC and ATB unilaterally cancelled the Applicants as a "bill payee" for their respective customers. The Applicants' business was just starting to expand and they had very little money to fund a lawsuit to challenge the de-listing by these 3 banks.

209. If Scotiabank is permitted to terminate the Applicants as a Bill Payee for Scotiabank customers, there will only be the Royal Bank and Bank of Montreal left which permit their customers to list the Applicants as a Bill Payee. This will have a devastating effect on the Applicants' business, again causing irreparable harm.

210. The Applicants are victims of a domino effect among the few Canadian banks. A few years ago, TD, CIBC and ATB removed the Applicants, now Scotiabank wants to do the same thing. Scotiabank is arguing that the Applicants can still keep operating with Royal Bank and Bank of Montreal.

211. The Applicants do not have to be down to the last bank before there is a finding of illegality and irreparable harm.

212. One of the Applicants maintains a business bank account with each of the five (5) banks listed above (not ATB). Only the Respondent bank has permitted each of the Applicants to open bank accounts. This has permitted the Applicants to treble their volume of business. All of the other four (4) banks treat the 3 Applicants as a single business.

(b) EMTs

213. On the subject of EMTs, the Royal Bank of Canada is the only bank, other than the Respondent bank, which permits EMT's to be deposited into a business savings account without a charge for each deposit.

214. However, because the Royal Bank will only allow the Applicants to collectively open only one business account, the other two (2) Applicants are not able to process such EMT's through any other business account except at the Scotiabank. Thus, the Applicants can only process \$300,000.00 per month and \$3.6 million per year at the Royal Bank but can process \$15 million per year at the Scotiabank as a small business customer.

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:

COMPETITION TRIBUNAL TRIBUNAL DE LA CONCURRENCE	
FILED / PRODUIT June 20, 2005 CT 2005-006	
Chantal Fortin for / pour REGISTRAR / REGISTRAIRE	
OTTAWA, ONT.	# 0002

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

Applicants

THE BANK OF NOVA SCOTIA

Respondent

**NOTICE OF APPLICATION PURSUANT TO SECTIONS 75 AND 77 OF THE
COMPETITION ACT**

TAKE NOTICE THAT:

1. The Applicants, B-Filer Inc., B-Filer Inc. doing business as GPAY GuaranteedPayment and Npay Inc (collectively, "**GPAY**"), will make an application to the Competition Tribunal (the "**Tribunal**") pursuant to sections 74 and 77 of the *Competition Act*, R.S.C. 1985, c. C-34, as amended (the "**Act**") for:

- (a) an order under subsection 75(1) of the Act directing the Respondent, The Bank of Nova Scotia (hereinafter referred to as "**ScotiaBank**"), to accept the Applicants as customers and to provide bank account services to them on usual trade terms; and

- (b) an order under subsection 77(2) of the Act prohibiting ScotiaBank from engaging in exclusive dealing whereby it is withholding its services to the Applicants thereby making banks the only participants in the internet debit payments market in Canada.

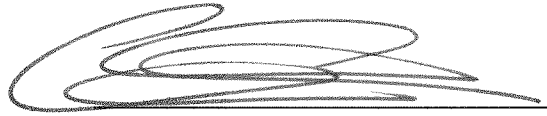
AND TAKE NOTICE THAT:

2. The person against whom the orders are sought is the Respondent, ScotiaBank. The address of ScotiaBank is:

Scotia Plaza
44 King Street West
Toronto, Ontario
M5H 1H1

3. GPAY will rely on the Statement of Grounds and Material Facts attached hereto and on the Affidavit of Raymond F. Grace duly sworn before a lawyer of the Province of Alberta on June 15, 2005.
4. If leave is granted, GPAY will seek an interim order from the Competition Tribunal for the relief sought in this Application and directions from the Tribunal for an expedited hearing of this Application.
5. The Applicant requests that this application proceed in English.
6. The Applicant requests that documents be filed in electronic form.

DATED at Montreal, Quebec this 17th day of June, 2005.



Adam N. Atlas

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Barreau du Québec No.: 201211-1

Counsel for the Applicants

TO:

**The Registrar
Competition Tribunal**
The Thomas D'Arcy McGee Building
90 Sparks Street, Suite 600
Ottawa, Ontario K1P 5B4
Tel: 613-957-7851
Fax: 613-952-1123

AND TO:

**Sheridan Scott
Commissioner of Competition**
50 Victoria Street
Gatineau, Quebec K1A 0C9
K1A 0C9
Tel: 819-997-3301
Fax: 819-997-0324

AND TO:

**The Bank of Nova Scotia
c/o Deborah M. Alexander, Executive Vice-President, General Counsel and
Secretary**
Scotia Plaza
44 King Street West
Toronto, Ontario
M5H 1H1
Tel: 416-866-6161
Fax: 416-866-3750

I. STATEMENT OF GROUNDS AND MATERIAL FACTS

A. THE PARTIES

B-FILER INC. B-FILER doing business as GPAY GUARANTEEDPAYMENT and NPAY INC.

1. The Applicants, are each corporations incorporated pursuant to the *Canada Business Corporations Act*, R.S.C. 1985, c. C-44. Each Applicant is registered extra-provincially in the Province of Alberta and each carries on business in the City of Sherwood Park in the Province of Alberta.

2. The business of the Applicants consists of providing an internet debit payment service that allows Canadian consumers to make purchases from participating internet merchants by paying directly from their existing bank accounts (the “**GPAY Service**”). The GPAY Service is provided for the benefit of both Canadian consumers who wish to make internet debit payments and merchants that wish to receive internet debit payments. Individual consumer customers of the Applicants use the GPAY Service in order to facilitate in payments that they themselves make to merchants. The GPAY Service makes use of existing banking services, facilities, resources and information technology infrastructure offered by the major Canadian banks. Specifically, the GPAY Service relies upon two key inputs of the Respondent: (i) the E-mail Money Transfer system (“**EMT**”); and (ii) internet banking, including bill payment services (collectively, “**Internet Banking**”), for part of the payment, clearing and settlement process of the GPAY Service. The supply of EMT and Internet Banking are both necessary inputs for the production by the Applicants of the GPAY Service.

3. Some of the GPAY Services are provided indirectly through its joint venture partner, UseMyBank Services, Inc., a Canadian corporation with its principal place of business in Toronto, Ontario (“**UseMyBank**”).

4. GPAY Services are the principal business of the Applicants. GPAY Services generate substantially all of the revenue of the Applicants.

5. GPAY Services are distinct from all other electronic payment services available in Canada because they enable the merchant to receive confirmation within seconds of the

availability of customer funds and of the settlement of those funds to the merchant. None of check payment, credit card payment or any other payment service in Canada offers this unique advantage for Canadian consumers wishing to make immediate payments to merchants.

SCOTIABANK

6. The Respondent, ScotiaBank, is a bank incorporated pursuant to the *Bank Act*, 1991 c. C-46 and carries on business throughout Canada.

7. The Respondent also carries on business under the name "Scotiabank".

8. The Respondent is the largest bank in Canada.

B. REFUSAL TO DEAL AND MARKET EXCLUSIVE DEALING BY SCOTIABANK

Refusal of ScotiaBank to Deal

9. Between August 6, 1999 and April 15, 2004, the Applicants entered into a total of approximately one hundred (100) standard-form Financial Services Agreements with the Respondent (each an "Agreement"). During the six (6) subsequent years, the relationship of the Applicants to the Respondent has grown to a point where the Applicants currently hold approximately five (5) current bank accounts and one hundred (100) money manager bank accounts operating at the branch of the Respondent situated in the City of Sherwood Park in the Province of Alberta.

10. The Applicants have built a substantial business during the six (6) years since the Applicants first began procuring banking services from the Respondent. Between June 1, 2004 and May 31, 2005, in the course of providing the GPAY Services, the Applicants deposited approximately \$9,929,881.17 in business bank accounts at Respondent. Fees charged by the Applicants to merchants for the processing of such funds constitute nearly all of the revenue of the Applicants and now amount to more than \$100,000.00 per month.

11. The Applicants have never been in default under any of the Agreements. Respondent has never alleged any default by the Applicants under any of the Agreements.

12. Respondent delivered a letter to each of the Applicants dated May 11, 2005 (the “**Termination Letters**”), whereby the Respondent stated its intention to cancel its services to each of the Applicants under the Agreements and terminate the Agreements with each Applicant, effective June 15, 2005.

13. Paragraph 12.2 of each Agreement contains the following clause, where “We” refers to the Respondent and “you” refers to the Applicants:

We may cancel any service to you without a reason by giving you thirty days’ written notice.

14. The Termination Letters make express reference to Section 12.2 of the Agreement and state that ScotiaBank has decided to exercise that clause. ScotiaBank has therefore, in its own words, terminated the Agreement with each of the Applicants without cause.

15. Respondent reaffirmed its intent to terminate the Agreements without cause in its most recent letter to counsel to the Applicants, dated May 25, 2005.

Exclusive Dealing by ScotiaBank

16. On or about May 5, 2005, the five (5) principal Canadian banks, being the Respondent, The Bank of Montreal, The Royal Bank of Canada, The Canadian Imperial Bank of Commerce and The Toronto Dominion Bank (collectively, the “**Canadian Banks**”), announced that they were beginning to supply a service to Canadian consumers that would allow them to make debit-card payments via the internet, by enabling transfers of money directly out of bank accounts to merchants immediately during the course of an online transaction (the “**Competing Bank Service**”). The Competing Bank Services are provided through a single portal, Interac Online, which is a service of the Interac Association, an association controlled by banks in Canada, including the Respondent. Given the single portal through which it is provided, and the legal oligopoly of the Interac Association by which it is structured, it is difficult to distinguish between providers of Interac Online. Interac Online is a single service offered by members of the Interac Association collectively as a single supplier.

17. The Respondent has announced that it expects to offer the Competing Bank Service of the Interac Association, beginning in June or July of 2005.

18. As of the date hereof, The Royal Bank of Canada is the only entity through which the Intereac Association is now offering the Competing Bank Service and it is doing so for only one merchant, DVDSSoon.com as a pilot project for the service.

19. The Competing Bank Service is virtually identical to the GPAY Service, from the perspective of both the consumer wishing to make payment and the merchant wishing to receive payment. Each of these services is used by a consumer entering their debit card information and personal identification number into a web site following which moneys are transferred immediately from the bank account of the consumer to the credit of the merchant.

20. In order for the Respondent to supply the Competing Bank Service, it must provide real time certifiable internet debit payment to other banks. The Competing Bank Service therefore depends on the input of this service of the Respondent. Similarly, the GPAY Service also depends on the input of the very same service from which it is to be excluded by the Respondent.

21. As of the date hereof, there are only two providers to in the market for the supply to consumers and merchants of real time internet debit payment services (the “**Online Debit Payment Market**”): (i) the Competing Bank Service, offered by the Interac Association; and (ii) the GPAY Service, offered by the Applicants.

22. Once the Competing Bank Service is deployed both Respondent, in its capacity as a member of the Interac Association, and Applicants will be major suppliers in the Online Debit Payment Market. However, it is the implied intention of the Respondent to terminate its supply of EMT deposit and Internet Banking services to the Applicants, and thereby exclude them from access this input that is necessary for their business.

23. Applicants have no interest in preventing the entry of Respondent into the Online Debit Payment Market. Rather, this Application is to avoid the exclusion of the Applicants from that market upon the entry of the Respondent into it.

24. The Online Debit Payment Market is an identifiable market in Canada for services procured by both consumers wishing to make payments and merchants wishing to receive payments by use of debit cards, rather than credit cards, cheques or other means. A considerable percentage of Canadians do not hold credit cards and therefore rely exclusively on debit cards as their sole means of electronic payment.

25. The Respondent is one of only two (2) banks in Canada that provide the service of EMTs into business bank accounts where the recipient of the deposit is not a bank. The two (2) providers of these services are the Respondent and The Royal Bank of Canada. Each of these two banks is not only a major supplier of such service, but, they are the only suppliers. The market for such services could be described as the market for EMT deposit services for the benefit of entities other than banks (the “**EMT Deposit Market**”).

26. The Royal Bank of Canada has refused to increase the processing volume of the Applicants in their accounts with that bank. There is therefore no substitute supplier for the EMT deposit services of the Respondent that the Respondent is refusing to supply to the Applicants.

27. Canadian banks, including the Respondent, provide each other with unlimited EMT and Internet Banking deposit and transfer rights into each others accounts. The Respondent has never ceased providing EMT deposit services or Internet Banking to any bank.

28. Access to the EMT Deposit Market and Internet Banking is necessary for the Applicants to provide the GPAY Service. EMT deposits are considered cash transactions by the Respondent and are therefore not subject to chargeback, unlike credit card or cheque payments. EMT deposits and Internet Banking transfers are immediate and final and are therefore both characterized as cash equivalents. Both merchant and consumer clients of the Applicants rely on the characterization of EMT deposits and Internet Banking transfers as cash equivalents as necessary inputs to and features of the GPAY Services.

29. Without prior notice or consultation with the Applicants, the Respondent has unilaterally amended the terms of the Agreements by which it provides money manager bank account services to the Applicants. As of a certain date in May or June of 2005, the precise date not being known to the Applicants, the number of deposits permitted in the bank accounts of the Applicants with the Respondent are no longer unlimited and there is no express reference to EMTs, nor is there

any reference to there being no fee for deposits, as was previously the case under the Agreements (collectively, the “**Amendments**”). In brief, the Amendments provide for the exclusion of the Applicants from the EMT Deposit Market.

30. The Amendments have the effect of preventing the Applicants from providing GPAY Services because access to the EMT Deposit Market is a necessary input for the production of GPAY Services. Without a supply of the EMT deposit services of the Respondent to the Applicants, the Competing Bank Service will be the only service available in the Canadian Online Debit Payment Market.

31. The date of the sending of the Termination Letters is coincident with the date on which the Competing Bank Service is being offered in Canada.

32. Interac Online is virtually identical to the GPAY Service. The Respondent will be providing it as part of the Interac Association by June or July of 2005. Moreover, Interac Online depends on access for all member banks to the EMT Deposit Market and Internet Banking. The Respondent is excluding the Applicants from both the EMT Deposit Market and access to Internet Banking.

33. If the Respondent were a bank, it would not be excluded from access to the EMT Deposit Market or Internet Banking and it would be able to continue providing GPAY Service as it has been doing for over five (5) years. Indeed, Interac Association members are announcing their intention to enter this very market. In so excluding the Applicants, the Respondent appears to make its supply of EMT deposit services and Internet Banking a function of the Applicants refraining from supplying their own GPAY Service.

34. In order to eliminate competition in the Online Debit Payment Market, Respondent has simultaneously launched its own product in that market and refused to supply the EMT deposit service and Internet Banking which are necessary inputs for the participation of the Applicants in that same market. What is more, by the Amendments, the Respondent has crystallized the exclusion of the Applicants from being able to procure the supplies necessary in the EMT Deposit Market to provide their GPAY Service in competition with the Competing Bank Service of the Respondent.

Interac Case

35. Reference is made to the Reasons for Consent Order in the case of *Director of Investigation and Research v. Bank of Montreal et al.*, CT-1995-002 (the “**Interac Case**”). In the Interac Case, the Competition Tribunal had opportunity to reflect on the rights and obligations, under the Act, of certain participants in the payment services markets in Canada.

36. In a discussion of New Services (at page 43 and following of the Interac Case), the Competition Tribunal opines that the charter members of the Interac Association, being the principal banks in Canada, including the Respondent, have had an incentive to discourage bilateral/multilateral services, such as deposits. A bilateral/multilateral service is, in general terms, one that is provided between or among financial institutions, such as EMT deposit services or Internet Banking.

37. The Competition Tribunal also speculated in the Interac Case that a reason why more shared services, such as bilateral/multilateral services, were not provided may have been the lack of demand for such services. The GPAY Service is dependent on the supply of two bilateral/multilateral services of the Respondent, namely, EMT deposits into a business banking accounts and Internet Banking.

38. Approximately 20,000 individuals in Canada make use of the GPAY Services. The Applicants are of the position that demand by this quantity of individuals constitutes significant demand for the bilateral/multilateral services of the Respondent necessary for the supply of the GPAY Services.

39. The termination of the supply of services by the Respondent to the Applicants, and the Amendments, each alone and together act to eliminate competition in both (i) the EMT Deposit Market and (ii) the Online Debit Payment Market, both of which are bilateral/multilateral services. An inclination for the lessening of competition in the broad bilateral/multilateral services market by the Respondent, through the Interac Association, of which it is a charter member, is evidenced in part by the Interac Case.

Substantial and Irreparable Detrimental Effect of ScotiaBank Action

40. The effect of the closure of bank accounts following termination of the Agreements between the Respondent and the Applicants will be catastrophic for the business of the Applicants and will result in the elimination of the only competitor to the Competing Bank Services in Canada.

41. The value of funds processed by the Applicants through their GPAY Service in May of 2004 were approximately \$800,500.79, which funds generated \$42,951.00 in revenue for the Applicants during such month. During May of 2005 approximately \$2,727,312.46 was processed through the GPAY Service generating \$161,000.00 of revenue for the Applicants. As such there was a three hundred and forty-one percent (341%) increase in processing during that twelve (12) month period. But for the refusal to deal and market restriction of the Respondent, the Applicants are projecting similar growth between May of 2005 and May of 2006. The effect of the refusal to deal and exclusive dealing of the Respondent will be to reduce the revenue of the Applicants by no less than fifty percent (50%).

42. If the Respondent is permitted to terminate the Agreements effective June 15, 2005 and close the accounts of the Applicants it will prevent the Applicants from carrying on and growing their businesses and each of the Applicants will suffer the irreparable harm of a permanent loss of market share that cannot be fully compensated for by damages.

43. The only other supplier of EMT deposit services in Canada, The Royal Bank of Canada, has imposed maximum transaction volumes on the Applicants thereby preventing the Applicants from moving any of the transaction now with the Respondent to that other supplier. There is no substitute for the Respondent in the market.

44. The Respondent knows of the contractual obligations of the Applicants to their 20,000 customers. Respondent is intentionally, directly or indirectly, causing Applicants to breach their contractual obligations to customers or prevent or hinder the Applicants from performing their contractual obligations, thereby causing irreparable harm by permanent loss of market share and potential for growth.

45. The Respondents intentionally intend to terminate its services to the Applicants effective June 15, 2005, intentionally interfering with the economic interests of the Applicants by illegal

means, intending to injure the Applicants, without justification or excuse, irreparably harming the Applicants by causing permanent loss of market share in the Internet Debit Payments Market.

46. The Respondents intend to terminate the Agreement with each Applicant, having knowingly allowed the Applicants to build their GPAY Services businesses, relying upon the banking, advice and other services provided by the Respondent for over five (5) years. During the course of such reliance, Respondent has secretly conspired with other Canadian banks to bring to market a business that competes directly with the GPAY Services.

47. The Respondent is not only a major supplier in the EMT Deposit Market; it is one of only two (2) suppliers in that market. The decision to no longer offer such service goes not to substantially lessen competition in the Canadian market for such service, rather, it goes to eliminate it completely.

48. Similarly, the Applicants are one of only entities now offering a service in the Online Debit Payment Market. Rather than simply introducing a competing service, Respondent has conspired to create a substitute service and cause the Applicants to cease providing its services in the market.

49. As the first provider of services in the Online Debit Payment Market, the Applicants stand to lose a lot more than were they some lower ranking provider.

50. The termination of the Agreements, if not enjoined, will cause irreparable harm to the Applicants which cannot be remedied fully by damages because the actions of the Respondents will cause harm, the nature of which cannot be quantified in monetary terms because the Applicants will either be put out of business, suffer permanent loss of market share, suffer irrevocable damage to their business reputations, and suffer a permanent loss of essential banking system resources and services.

51. Further, if the Agreements are terminated, the damage to the business of the Applicants, which would be a result of the termination of banking services by the Respondents, would be impossible to repair, and the underlying policy of access to essential services and infrastructure provided by an oligopolistic Respondent is so important that remedies other than an injunction are inadequate.

52. If the Respondents terminate the Applicants' accounts, the Applicants will suffer additional irreparable harm; specifically, and without limitation:

- a. the monthly losses to the Applicants would be impossible to calculate given the 300% per annum growth to date, but are now estimated at no less than \$100,000.00 per month, beginning on June 15, 2005;
- b. it would make the Applicants totally reliant on The Royal Bank of Canada, as the only bank that allows EMTs but the restrictions of that other bank make it impossible for the Applicants to increase their volume of business, leaving the Applicants with no substitute in the market for the services of the Respondent;
- c. if the Applicants were forced to rely solely on the Royal Bank, their business would be much more at risk for its investors, as well as consumers and merchants who rely on the GPAY Services;
- d. not being able to bank with the Respondents would lessen the Applicants' chances to establish a critical mass of customers, necessary for the "network effects", "first mover advantage" and increasing returns to scale required for a successful business;
- e. having one less bank supplier makes the business of the Applicants appear less legitimate;
- f. it removes the opportunity for the Applicants to leverage their business into a greater number of customers;
- g. it may allow a "second mover" to take the opportunity which the Applicants now have; and
- h. as buyers in the oligopolistic EMT Deposit Market, the Applicants need not prove that there are no alternative service providers, before demonstrating irreparable harm.

53. That, if the Respondents terminate the Applicants' accounts, there will be a substantial lessening of competition, if not complete elimination thereof in the Canadian Online Debit Payments Market; specifically, and without limitation:

- b. it would create a monopoly in Canada for the supply of EMT deposit accounts on the part of The Royal Bank of Canada;

- c. it would create a monopoly in the form of the Competitive Bank Services in the Canadian Online Debit Market for the supply of such payment services to individual consumers wishing to make immediate, direct payment to merchants; and
- d. it would create a monopoly in the form of the Competitive Bank Services in the Canadian Online Debit Market for the supply of such payment services merchants wishing to obtain immediate, certifiable direct payment.

54. The balance of convenience further favours the Applicants since the effects on the Respondents will be minimal at best, or the overall effects of enjoining the Respondent are better than not enjoining the Applicants.

55. Nothing in the Termination Letters or any other correspondence from the Respondent indicates that the Respondent would suffer any damage at all by continuing to perform under the Agreement it has with each Applicant. In fact, the Respondent stands to make material profits from providing a necessary element for the tremendously successful GPAY Service.

56. There is no impediment to the discretion of the Tribunal to grant an injunction to the Applicants in the present matter and accept the Application on the merits.

II. BASIS FOR APPLICATION PURSUANT TO SECTION 75

57. In this Application, the Applicants seek an order pursuant to subsection 75(1) of the Act which provides:

Where, on application by the Commissioner or a person granted leave under section 103.1, the Tribunal finds that

- (a) a person is substantially affected in his business or is precluded from carrying on business due to his inability to obtain adequate supplies of a product anywhere in a market on usual trade terms,
- (b) the person referred to in paragraph (a) is unable to obtain adequate supplies of the product because of insufficient competition among suppliers of the product in the market,
- (c) the person referred to in paragraph (a) is willing and able to meet the usual trade terms of the supplier or suppliers of the product,
- (d) the product is in ample supply, and
- (e) the refusal to deal is having or is likely to have an adverse effect on competition in a market,

the Tribunal may order that one or more suppliers of the product in the market accept the person as a customer within a specified time on usual trade terms unless, within the specified time, in the case of an article, any customs duties on the article are removed, reduced or remitted and the effect of the removal, reduction or remission is to place the person on an equal footing with other persons who are able to obtain adequate supplies of the article in Canada.

58. The elements required to satisfy an order pursuant to subsection 75(1) are clearly satisfied. The evidence now before the Competition Tribunal demonstrates that:

- (a) unlimited EMT deposit services are essential to the business of the Applicants; the Respondent is one of only two suppliers of unlimited EMT deposit services in Canada and has stated that it will cease supplying such services to the Applicants after June 15, 2005;
- (b) the Applicants will not be able to obtain equivalent EMT deposit services from the other supplier of such services in Canada and will therefore have inadequate supply of such services to meet its needs;
- (c) the business of the Applicants will be directly and substantially affected by the refusal to deal of the Respondent in that: (i) it will be limited in the quantity of transaction services that it will be able to supply; and (ii) it will likely lose no less than fifty percent (50%) of its revenue;
- (d) Respondent is fully capable of supplying its banking services to the Applicants, and would actually profit from doing so; indeed, Respondent has been supplying such services to the Applicants for no less than five (5) years;
- (e) Applicants are willing to pay any and all fees associated with the services of the Respondent; indeed Applicants have been doing so for no less than five (5) years;
- (f) procuring the services of the Respondent from the only other provider, in the EMT Deposit Market, would result in their being serviced by a supplier with a monopoly;
- (g) creating a monopoly in the EMT Deposit Market would have an adverse effect on competition in that market;
- (h) the inability of the Applicant to procure services from Respondent will result in its withdrawal from the Online Debit Payments Market; such

withdrawal will occur, at the very moment when the Respondent is launching a virtually identical service, the Competing Bank Service;

- (i) Respondent is restricting the Applicants from participating in the very market into which it seeks to enter, namely, the Online Debit Payments Market;
- (j) Without the participation of the Applicants in the Online Debit Payments Market, there will be a monopoly in that market held by the Interac Association and its members; and
- (k) a monopoly in the Online Debit Payments Market will constitute a substantial lessening of competition in that market.

59. The action of the Respondent in refusing to deal with the Applicants falls within the scope of activity prescribed by section 75 of the Act, and amounts to a practice which is subject to an order of that section in that the Competition Tribunal may order the Respondent to supply its unlimited EMT bank account deposit services and related banking services to the Applicants on the usual trade terms.

60. The refusal to deal by the Respondent requires the Competition Tribunal to make an order under section 75(1) of the Act.

III. BASIS FOR APPLICATION PURSUANT TO SECTION 77

61. The Applicants also seek an order pursuant to subsection 77(2) of the Act provides:

Where, on application by the Commissioner or a person granted leave under section 103.1, the Tribunal finds that exclusive dealing or tied selling, because it is engaged in by a major supplier of a product in a market or because it is widespread in a market, is likely to

- (a) impede entry into or expansion of a firm in a market,
- (b) impede introduction of a product into or expansion of sales of a product in a market, or
- (c) have any other exclusionary effect in a market,

with the result that competition is or is likely to be lessened substantially, the Tribunal may make an order directed to all or any of the suppliers against whom an order is sought prohibiting them from continuing to engage in that exclusive dealing or tied selling and

containing any other requirement that, in its opinion, is necessary to overcome the effects thereof in the market or to restore or stimulate competition in the market.

62. Under subsection 77(1) of the Act, “exclusive dealing” means:

(a) any practice whereby a supplier of a product, as a condition of supplying the product to a customer, requires that customer to

(i) deal only or primarily in products supplied by or designated by the supplier or the supplier's nominee, or

(ii) refrain from dealing in a specified class or kind of product except as supplied by the supplier or the nominee, and

(b) any practice whereby a supplier of a product induces a customer to meet a condition set out in subparagraph (a)(i) or (ii) by offering to supply the product to the customer on more favourable terms or conditions if the customer agrees to meet the condition set out in either of those subparagraphs;

63. The elements required to satisfy an order pursuant to subsection 77(2) are clearly satisfied. The evidence now before the Competition Tribunal demonstrates that:

(a) the Respondent is in the practice of supplying unlimited EMT deposit services to other banks, notably to facilitate the Competing Bank Service;

(b) the Respondent is a major supplier of unlimited EMT deposit services; it is one of only two (2) suppliers of such service in Canada;

(c) concurrently with excluding the Applicants from their ability to procure EMT deposit services, thereby excluding them from the Online Debit Payment Market, the Respondent has launched its own product in that precise market;

(d) but for the use of the services of the Respondent for its GPAY Services, the Applicants would not be excluded from procuring such services;

(e) given that the Respondent ceased providing services to the Applicants without cause, and that the Respondent is aware of the extent to which the Applicants are dependent on the services of the Respondent, the true intent of the Respondent can be none other than to exclude the Applicants from the Online Debit Payments Market;

(f) the Respondent has not ceased providing EMT deposit services to any bank;

- (g) the net effect of the actions of the Respondent are to remove, substantially diminish or severely limit the Applicants from participating as a supplier in the Online Debit Payments Market; and
- (h) the Amendments are such that there will be a monopoly in Canada for the supply of unlimited EMT deposit services to non-bank entities on the part of the Royal Bank of Canada and a monopoly for Interac Association members in the Online Debit Payments Market;
- (i) monopolies in these two markets will substantially lessen competition, impede introduction and have an exclusionary effect on the Applicants and all other potential participants in the market.

64. The action of the Respondent in excluding the Applicants from access to the EMT Deposits Market falls within the scope of activity prescribed by section 77 of the Act, and amounts to a practice which is subject to an order of that section in that the Competition Tribunal may order the Respondent to supply its unlimited EMT bank account deposit services and related banking services to the Applicants on the usual trade terms.

65. The exclusive dealing of the Respondent requires the Competition Tribunal to make an order under section 77(2) of the Act.

66. In support of the foregoing, Applicants rely on the Affidavit of Raymond F. Grace, sworn June 15, 2005.

DATED at Montreal, Quebec, this 17th day of June 2005.

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COMPETITION TRIBUNAL

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 Motion Record
Motion to Amend Pleadings**

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