Competition Tribunal Tribunal de la Concurrence

Reference: B-Filer Inc. v. The Bank of Nova Scotia, 2005 Comp. Trib. 52
File No.: CT-2005-006
Registry Document No.: 0083

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

AND IN THE MATTER OF an application by B-Filer Inc., B-Filer Inc. doing business as GPAY GuaranteedPayrnent and Npay Inc. for an interim order pursuant to section 104 of the Competition Act.

B E T W E E N :

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

and

The Bank of Nova Scotia
(respondent)

Date of hearing: 20051112
Judicial Member: Simpson J. (Chairperson)
Date of Reasons: January 6th, 2006
Reasons signed by: Madam Justice Sandra J. Simpson

REASONS FOR THE ORDER DATED DECEMBER 14, 2005 DISMISSING THE APPLICATION FOR INTERIM RELIEF

[1] B-Filer Inc., B-Filer Inc. doing business as GPAY GuaranteedPayment and Npay Inc. (the "Applicants") applied to the Tribunal for an interim order restoring the banking services which the Bank of Nova Scotia (the "Respondent") had provided to the Applicants in May 2005. The Applicants were advised on May 11, 2005 by way of notice of termination that their banking services would be terminated on June 15, 2005. However, the termination of bill payee services actually became effective on September 18, 2005 and the Applicants' business accounts were closed on September 26, 2005. On December 14, 2005, the Tribunal dismissed the application for the interim order and said that reasons would follow. These are the Reasons for that Order.

[2] A detailed description of the Applicants' business appears in the Tribunal's Reasons for Order granting leave to apply under section *75* (*B-Filer Inc. v. The Bank of Nova Scotia*, 2005 Comp. Trib.38) and will not be repeated here.

THE TEST FOR INTERIM RELIEF

[3] Section 104 of the *Competition Act*, R.S.C. 1985, c.C-34, as amended (the "Act") provides that a person who has made an application under section 75 may apply to the Tribunal for an interim order. Section 104 also provides that the Tribunal "may issue such interim order as it considers appropriate, having regard to the principles ordinarily considered by superior courts when granting interlocutory or injunctive relief".

[4] The authority which spells out the principles to be applied for injunctive relief is the decision of the Supreme Court of Canada in RJR - *MacDonald Inc. v. Canada (Attorney General)*, [I994] 1 S.C.R. 311. In that decision, the Supreme Court reiterates the test developed in *Manitoba (Attorney General) v. Metropolitan Stores (MTS) Ltd*., 119871 which was drawn from the English decision in *American Cyanamid Co. v. Ethicon Ltd*., [I975] A.C. 396. In short, to issue an order for injunctive relief, a court must be satisfied that there is a serious issue to be tried and that not granting interim relief will cause irreparable harm to the applicant and that the balance of convenience also favours the applicant. The decision in this case turned on the issue of irreparable harm.

[5] On the issue of irreparable harm, the Supreme Court states in *RJR-MacDonald* that the issue to be decided is "whether a refusal to grant relief could so adversely affect the applicants' own interests that the harm could not be remedied.. ." [at 341]. The Supreme Court then goes on to state:

> "Irreparable" refers to the nature of the harm suffered rather than its magnitude. It is harm which either cannot be quantified in monetary terms or which cannot be cured, usually because one party cannot collect damages from the other. Examples of the former include instances where one party will be put out of business by the court's decision (. . .); where one party will suffer permanent market loss or irrevocable damage to its business reputation (. . .); . . . [at 3411]

IRREPARABLE HARM

[6] However, the Applicants have failed to establish irreparable harm. The Tribunal has reached this conclusion based on the following findings with respect to each alleged harm.

Loss of Respondent's Bill Payee Services and Bank Accounts

[7] The Applicants allege that they cannot carry on business as before, because they have lost the ability to use the Respondent's electronic bill payment service which allowed the Respondent's customers to pay the Applicants directly using the "Bill Payee" procedure. In addition, they have lost the bank accounts at the Respondent which allowed them to deposit money received via Electronic Money Transfers ("EMTs") or through the Bill Payee service. However, it appears that the Applicants have made new banking arrangements with the Royal Bank of Canada (the "RBC") and the Bank of Montreal (the "BMO") which have replaced the Respondent's services and allow the applicants to continue in business.

[8] At this time, the Applicants still have bill payee status with the RBC, the BMO and the Caisses Populaires. In addition, for customers of the Toronto Dominion Bank ("TD"), the Canadian Imperial Bank of Canada ("CIBC"), the Alberta Treasury Branches ("ATB") and the Respondent, payments can be made by way of EMTs into the RBC and BMO accounts. The Applicants submit that the dollar value of payments has substantially decreased because of the loss of bill payee status at the Respondent. They say that because the Applicants no longer have bill payee status, Purchasers who are customers of the Respondent must pay new service fees of $1.50 and are limited to transactions worth $1000 when they use the Applicants' services. However, the Applicants presented no evidence that the additional charge or new $1000 limit have actually had a deterrent effect on Purchasers. While there has been a substantial decrease in the dollar value of transactions made by the Respondent's customers, the number of transactions did not significantly decline. Further, the Tribunal was not provided with evidence showing how the decline in the dollar value affected the Applicants' total revenue.

[9] In the past, the Applicants lost their bill payee status both at TD and CIBC. From the evidence adduced on cross-examination, the Tribunal is satisfied that customers of those banks switched from electronic bill payment to EMTs in order to continue their dealings with the Applicants, and the Applicants' business continued to expand. The Tribunal has seen no evidence that would lead it to conclude the situation will be different this time. Indeed, the evidence shows that the Respondent's customers have already begun to switch from electronic bill payments to EMTs. There was decrease from September 2005 to October 2005 (following the Termination), but an increase occurred (although not to the pre-Termination levels) in the period from October 2005 to November 2005.

Risk of Sudden Termination by BMO and RBC

[10] The Applicants fear that their replacement banking arrangements may be ended by RBC and BMO. For this reason they ask the Tribunal to reinstate their relationship with the Respondent by way of an order for interim relief, pending a decision on the merits of their section *75* application. However, from the evidence, there is no reason to believe that RBC and BMO will terminate their services. In particular, no evidence was presented as to the contractual relationship with RBC and BMO which would lead the Tribunal to conclude that services could be terminated before the section 75 hearing. On the contrary, from the testimony of both Mr. Grace and Mr. Iuso in cross-examination, it appears that the banks are aware of the situation and are willing to continue offering services. Finally, now that leave has been granted for the section 75 application, a remedial order would be available on short notice should circumstances change.

Growth Foreclosed

[11] Although the Applicants admit that they are presently able to process payments for Purchasers and Merchants, and have not had to refuse service to any potential clients, they submit that their present circumstances limit their growth potential. In particular, the fact that they can only offer EMTs to the Respondent's customers precludes payments of over $1000. However, no evidence was presented to show either that purchases by Respondent's customers in amounts over $1000 declined after the Termination or that the imposition of the $1000 limit had an impact on the Applicants' overall business. It is therefore impossible to say that the $1000 limit has caused or will cause irreparable harm.

[12] The Applicants also submit that the processing capacity of their current account arrangements is fast approaching its limit, so that further expansion is precluded. However, the Termination occurred two months ago, and the account limits have not yet been reached. Further, there is no evidence to suggest that if they are reached before the hearing on the merits of the section 75 application, the banks will not be willing to extend the limits.

[13] The Applicants also argue that they risk losing their first-mover advantage, should the BMO and the RBC decide to close their accounts and terminate the bill payee services, thus making Interac Online the only option for making debit card payments over the Internet. However, no evidence was presented to show that Interac Online is currently a viable alternative to the Applicants' business. As stated in *Aventis Pharma S.A. et al. v. Novopharm Ltd.* (2005), 40 C.P.R. (4^{th}) 210, paras. 85 and 113, speculative risk does not amount to irreparable harm.

Damage to Reputation

[14] The Applicants allege that losing the Respondent's services has had an impact on their reputation and legitimacy and negatively impacts current and prospective clients (Merchants). Moreover, the Respondent's repeated allegations concerning money laundering and the illegality of off-shore casinos also risk tarnishing the Applicants' reputation; reinstating banking services would serve to show that the allegations are ill-founded and would bolster the Applicants' reputation.

[15] Negative allegations are a fact of life in litigation, and in this instance have been somewhat mitigated by the Reasons of the Tribunal in granting leave. In addition, the Applicants presented no evidence that the loss of the Respondent's services had had any impact on their relationships with existing or prospective customers. As well, two Schedule I banks continue to service the Applicants, and Mr. Grace's affidavit contained a letter of reference from the BMO, stating that he has been "an outstanding client of the Bank of Montreal" since October 1998. In these circumstances, the tribunal has not been persuaded that the Applicants have suffered the alleged harm.

CONCLUSION

[16] In sum, the Applicants have not shown convincing evidence that they risk irreparable harm in the interim period before the hearing of the section 75 application. The existing banking services, pending a final determination, are adequate. This conclusion does not in any way prejudge the conclusion of the Tribunal on the section 75 application. The current arrangements suffice for now. They may prove inadequate for longer term growth. What is important for the purposes of the present application is that no evidence was presented that the Applicants were unable to meet the present expectations of Purchasers and Merchants.

[17] Given that the Applicants have not established irreparable harm, the Tribunal sees no need to address the serious issue or the balance of convenience.

[18] For these Reasons, this application was dismissed by Order of the Tribunal dated December 14, 2005.

DATED at Ottawa, this 6th day of January, 2006.

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

(s) Sandra J. Simpson

APPEARANCES :

For the Applicants B-Filer Inc., B-Filer lnc. doing business as GPAY GuaranteedPayrnent and Npay Inc.:

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