

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

COMPETITION TRIBUNAL
TRIBUNAL DE LA CONCURRENCE

FILED / PRODUIT
November 28, 2005
CT-2005-006

Chantal Fortin for / pour
REGISTRAR / REGISTRAIRE

OTTAWA, ONT.

0054

**AFFIDAVIT OF DAVID STAFFORD
(Sworn November 24, 2005)**

I, DAVID STAFFORD, of the City of Toronto, in the Province of Ontario, **MAKE**

OATH AND SAY:

1. I am the Vice President of Credit Cards and Retail Lending Services at The Bank of Nova Scotia (“Scotiabank”). I have been employed by Scotiabank for the last 20 years. In my present position, I am responsible for the card issuing business for retail and small business VISA cards. I am responsible for overseeing business strategy, product development, loyalty, and portfolio analysis and parameters including product terms and card marketing.

2. I have knowledge of the matters to which I hereinafter depose. Where such knowledge is based on information received from others, I have so stated.

Factual Overview with respect to the Applicants' Business

3. I have had an opportunity to review the Affidavit of Robert Rosatelli sworn July 15, 2005. I verily believe that this represents an accurate summary of the nature of the Applicants' business, based on my review of that Affidavit.

4. The Applicants, together with UseMyBank, operate a joint venture business enterprise which facilitates the transfer of money from banking customers' accounts to third parties.

5. If a banking customer wishes to transfer money to a third party through the services of the Applicants and UseMyBank, the banking customer would click on the UseMyBank icon. The banking customer would be prompted to provide the banking customer's bank card and internet password. The Applicants and UseMyBank would take the customer's bank card number and password and would enter into the customer's bank account and effect a transfer of money from the customer's bank accounts to the Applicants' account at The Bank of Nova Scotia ("Scotiabank") by way of e-mail money transfer. The Applicants could also effect transfers of money from banking customers' accounts by entering into the banking customers' accounts and transferring money to GPay as a Scotiabank bill payee and these funds would later be released from Scotiabank's suspension accounts to the Applicants' accounts at Scotiabank.

6. Based on my review of the materials, I verily believe that much of the Applicants' business involves transferring funds from Canadian banking customers' accounts to the Applicants' Scotiabank accounts, and apparently ultimately out to off-shore internet casinos.

The Applicants, in conjunction with UseMyBank, allow Canadian customers to place bets at off-shore internet casinos.

7. I have also had an opportunity to review the Affidavit of Raymond Grace affirmed September 1, 2005. In particular, in paragraphs 151 to 168, Mr. Grace argues that, because VISA Cards, including Scotiabank VISA Cards, can be used to make payments to off-shore internet casinos, Scotiabank is in no position to terminate the Applicants' bank accounts on the basis that the Applicants' business includes transferring money from banking customers' accounts to the Applicants' Scotiabank accounts, and ultimately to off-shore internet casinos.

The purpose of this Affidavit is to respond to this assertion.

The VISA System

8. In order to understand the way in which VISA payments work, it is necessary to have an understanding of the VISA system.

9. The VISA payment system is a four-party system made up of:

- (a) The Cardholder;
- (b) The Card Issuer;
- (c) The Acquirer; and
- (d) The Merchant.

10. The **Cardholder** is the end customer who holds the actual credit card and is responsible for charges on the account. The Cardholder initiates payment transactions over the VISA network by presenting the card to a Merchant.

11. The **Card Issuer** is a deposit taking financial institution member of Visa, including Scotiabank. The Card Issuer is responsible for the terms and conditions of the loan account, including underwriting credit, processing transactions, issuing statements to the Cardholder, collecting payments, and levying fees and interest charges to the Cardholder. The **Card Issuer** also settles payments with the VISA network for purchases, cash advances, and payments initiated by its Cardholders at Merchants, banks, automated bank machines (ABMs), etc.

12. The **Acquirer** is a deposit-taking financial institution member of Visa, receives from and provides value to the Merchant for transactions processed on VISA by Cardholders. In its simplest terms, the Acquirer may be responsible for putting the terminal on the Merchant's counter. The Acquirer is responsible for following a process of due diligence to confirm, among other things, the legality of the business in the country in which the business is being transacted. Acquirers acquire transactions from a number of channels, including Merchant terminals, ABMs and on-line, among others.

13. The **Merchant** sells goods and services, executes a Merchant Agreement with an Acquirer and is then authorized to accept VISA Cards as a form of payment. As a general rule, in a face-to-face transaction with a customer, the customer's VISA card is swiped in the terminal and the Merchant verifies the signature on the back of the card. Once the Merchant receives an authorization Member from the card Issuer, and properly performs a few other verification steps set out in its Merchant Agreement, the Merchant is guaranteed to receive payment. By using VISA, Merchants reduce the cost of handling cash, eliminate the risk of bad cheques, and eliminate the risks associated with providing credit to their customers directly benefit from incremental sales and for a number of other reasons, Merchants usually pay their Acquirers a fee, which typically ranges from 1.5- to 3% of the purchase price.

Relationship Between Scotiabank VISA, VISA Canada and VISA International

a) Scotiabank VISA

14. Scotiabank is a Visa Card Issuer. Scotiabank sells and sets up revolving credit loan accounts for customers. To provide customers with easy access to those loan accounts, Scotiabank issues Scotiabank branded VISA payment cards that can be used at any Merchant that accepts VISA Cards to pay for goods and services from the loan account.

15. In order to issue a Scotiabank branded VISA payment card, Scotiabank has to be a member of VISA Canada. Only deposit taking financial institutions can be members of VISA.

b) VISA Canada

16. VISA Canada is an incorporated membership association. It is licensed by Visa International to use the Visa-owned trademarks in Canada. It is funded by member institutions, including Scotiabank, through a series of fees that are charged to Members' various transactions. The amount that each member of VISA Canada contributes is based on their various card processing volumes.

17. VISA Canada has the responsibility for managing, controlling and building the VISA brand in Canada and ensuring its Members and all related systems operate seamlessly with all licencees around the world. Through a number of agreements, operating regulations, and by-laws, VISA Canada lays out the terms by which VISA will operate in Canada.

18. The terms imposed by VISA Canada include monitoring the Card Issuers, including Scotiabank, and the Acquirers. VISA Canada is also responsible for building card acceptance at Merchants and marketing the VISA brand to Canadians.

19. VISA Canada is not involved in the Card Issuer's business of loan rates, fees, rewards, credit underwriting, or collections. Instead, VISA Canada is responsible for maintaining the integrity of the Visa payment system that Cardholders and Merchants rely upon.

c) VISA International

20. VISA Canada is one of six regions that operate within the broader guidelines set out by VISA International. VISA Canada, VISA U.S. and VISA Europe are all incorporated entities. Latin America and the Caribbean, Asia/Pacific, Central Europe, the Middle East, and Africa are all divisions of VISA International.

21. VISA International is funded by the regions, which in turn are funded by the members. VISA International runs the VISA network, which is the pipeline through which all transactions are authorized and settled. Uniformity, or interoperability worldwide, is important so that the Cardholder with a VISA Card issued by any Card Issuer can use their card for payment at any of the 24 million Merchants in approximately 150 countries worldwide that accept VISA Cards.

22. VISA International controls the VISA brand. VISA International organizes international marketing (e.g. Olympic sponsorship). VISA International is also responsible for developing innovative technology, and procedures, platforms and services.

23. If one of the regions, such as VISA Canada, wants to do something different, VISA Canada would have to get a variance from VISA International in order to deviate from the rules which apply to each of the VISA regions.

24. VISA International's network is presently capable of handling up to 8,000 payment transactions per second. Approximately 8% of worldwide Personal Consumer Expenditures are

processed on a VISA card. VISA transactions totaled approximately \$3.3 U.S. Trillion worldwide in 2004.

Steps Involved in a VISA Transaction

25. The following are the usual steps that would occur in circumstances where a customer has purchased \$100 worth of goods from a Merchant in a face-to-face transaction:

- (a) Cardholder chooses \$100 worth of goods from XYZ Merchant.
- (b) Cardholder presents the card as payment to the Merchant.
- (c) Merchant swipes the card in their terminal often provided by the Acquirer, and enters the amount.
- (d) The terminal creates an authorization request transaction for the Acquirer that is a combination of Cardholder information from the magnetic stripe on the back of the card, and Merchant information from the terminal.
- (e) The Acquirer routes the transaction with the Cardholder and the Merchant information to the Card Issuer (e.g. Scotiabank) for authorization.
- (f) The Card Issuer usually checks the status of the account, limit, current balance, etc. and, assuming all of these issues are in satisfactory standing, sends an authorization number back to the Acquirer, who in turn sends it back to their terminal at the Merchant.
- (g) The Card Issuer reduces the available credit on the credit card account by the \$100 that has just been authorized. No funds are actually transferred at this time.
- (h) The Acquirer's terminal at the Merchant's place of business generates an authorization code and prints an authorized receipt.

- (i) The Merchant has the customer sign the receipt and checks the signature on the receipt against that on the back of the VISA card.
- (j) The Merchant keeps one copy of the receipt and the Cardholder leaves with the \$100 worth of goods they purchased, along with their copy of the receipt.
- (k) At some point the Merchant settles its terminal for the accumulated transactions (usually at the end of the business day) by submitting all of the purchases to the Acquirer for payment.
- (l) The Acquirer credits the Merchant's current account at the Merchant's bank, minus the Merchant's discount rate.
- (m) The Acquirer submits the transactions to VISA International for payment.
- (n) VISA International routes the transactions to the respective Card Issuers (all over the world), including Scotiabank VISA, for payment and credits the Acquirer.
- (o) Card Issuers receive the transactions for their cards, and debit the applicable card accounts for the amounts, in this case \$100.
- (p) The Card Issuers match the actual transaction to the authorization provided earlier, and adjust the credit remaining available to the Card Holder accordingly.
- (q) The Card Issuer sends a statement to the Cardholder for payment.

26. The Scotiabank VISA Card Issuing business is not analogous to the Applicant's business. The Applicant's business is one of acquiring and funding transactions, including off-shore gambling transactions. With 24 million Merchants and another 1 million ABMs, in an environment set up to handle 8,000 transactions per second, it is impossible to manage individual Merchants on an authorization by authorization basis. As a result, VISA International has

established a set of Merchant Category Codes (“MCCs”) to classify Merchants. Acquirers set these codes when they sign up Merchants. For example, airlines have a code, hotels have another code, restaurants have a code, and gaming also has a separate code.

27. The gaming code as determined by VISA International is 7995. This 7995 code is used all over the world. The 7995 code is put in place by the Acquirer when it arranges for a gaming Merchant to be able to accept VISA Cards. The 7995 code does not distinguish by territory or district. As a result, all “Merchants” that are engaged in gaming, regardless of jurisdiction, are given the 7995 code. For example, the Acquirer for the BC Lottery Corporation, a legal gaming institution, is coded pursuant to VISA International’s coding system as 7995. However, the same 7995 code has been applied to on-line casinos located in jurisdictions outside of Canada.

28. Acquirers operate in Canada to service Canadian businesses. Canadian Acquirers are not licensed by Visa Canada to sign up as Merchants non-resident or “off-shore” merchants including gambling casinos. They will, however, sign up resident legal gambling entities such as Lottery Corporations run by the provinces and gambling locations in Canada regulated by the province. Card Issuers, VISA Canada, and Acquirers work to ensure that illegal Canadian businesses are not supported by the VISA network.

29. In jurisdictions other than Canada, Acquirers in those jurisdictions would do the same thing, to ensure that businesses which are illegal in those jurisdictions are not signed up as VISA merchants and provided with a VISA code. As a result, every attempt is made by Acquirers and the VISA network in a given jurisdiction to ensure that the business signed up with VISA in that jurisdiction is legal.

30. VISA International and its regions have a number of data integrity programs that among other things work with Acquirers to ensure that Merchants are properly coded, and to ensure that illegal businesses are not admitted into the VISA International network. However, questionable businesses sometimes attempt to mask their true purpose. A few years ago, Card Issuers, including Scotiabank, and VISA Canada worked together with Acquirers to identify on-line gambling sites that were unknowingly being serviced by Canadian Acquirers. The Acquirers cancelled the services of “Merchants” who were shown to be off-shore gambling sites.

31. Thus, VISA International, VISA Canada, VISA Card Issuers, including Scotiabank, and Acquirers have worked together in the past to ensure that access is not provided to businesses such as off-shore gambling. In addition, wherever a merchant is discovered to be conducting any illegal operations, such Merchants are removed from the system. However, the system is certainly not fool-proof. For example, off-shore gambling is not illegal in many jurisdictions, including, for example, Spain. As a result, Acquirers in Spain are able to provide VISA services to these businesses, and they are coded with the international VISA gaming code 7995.

32. As mentioned elsewhere in this Affidavit, the system is set up to handle up to 8,000 VISA transactions per second worldwide. Scotiabank, as a Card Issuer, approves transactions for Merchants both inside and outside of Canada that have been given a Merchant code. Scotiabank is relying on the due diligence performed by the Acquirer, VISA International, and its Regions undertaken before the Merchant was issued a Merchant code.

33. Scotiabank, as the Card Issuer, settles its VISA transactions on the VISA network. Scotiabank, as the Card Issuer, would also debit the VISA customer’s card and match the actual transaction to the authorization provided earlier, and adjust the remaining credit available to the

Card Holder. As the Card Issuer, Scotiabank's primary role in the relationship is to provide funds to VISA International. VISA International transfers funds to the Acquirer. The Acquirer pays the Merchant.

34. The above-noted process occurs whether the Acquirer is a Canadian Acquirer dealing with businesses located in Canada, or an off-shore Acquirer dealing with business outside of Canada. In other words, for transactions taking place with Merchants outside of Canada, Scotiabank VISA submits funds to the VISA Network. The VISA Network distributes the funds worldwide to the Acquirers and the Acquirers credit the Merchants.

35. As a result of the foregoing, Scotiabank VISA never transfers funds directly to the Merchant.

How is the VISA System Distinct from the Business of the Applicants

36. VISA is primarily an electronic payment network. For Credit Cards it does not house deposits on behalf of either Cardholders or Merchants other than settlement transactions en route.

37. VISA Card Issuers, including Scotiabank, have Know-Your-Customer requirements. Scotiabank, as a VISA Card Holder, is required to verify customer identity when VISA accounts are opened. Moreover, the credit limit needs to be underwritten and approved.

38. When a VISA customer uses their VISA Card to fund their gambling account at an off-shore on-line casino, they are indicating to the Merchant (off-shore on-line casino) that they want funds to come from their VISA Card account. Scotiabank's role in this complex set of transactions is to ensure that it is the customer's intention to make the payment that has been presented for authorization by the Merchant. Scotiabank processes millions of transactions per month for Scotiabank VISA Card Holders.

39. For the reasons stated in other sections of this Affidavit, when an off-shore on-line casino that has been granted a Merchant number by a VISA accepted Acquirer in the country where the casino is located, following due diligence that the Merchant is operating a legal business in that country, the Merchant is assigned the same code (7995) as any other gaming establishment, whether inside or outside of Canada.

40. The VISA payment system is far different from what the Applicants seek to have put in place, namely, a sufficient number of accounts at Scotiabank, and an ability to undertake e-mail money transfers, so that the Applicants can move money from banking customers' accounts, both inside and outside of Scotiabank, into the Applicants' Scotiabank accounts, and ultimately out to off-shore casinos.


41. The Applicants run a business that would use accounts at Scotiabank to house deposits received from other banking customers, both at Scotiabank and other Financial Institutions.

42. The Know-Your-Customer requirements for commercial customers of Scotiabank are outside the area of my knowledge and expertise. However, in general terms, in order for the Applicants to be accepted as commercial customers with Scotiabank, they would have to meet all of the requirements in place at Scotiabank for the acceptance of commercial customers.

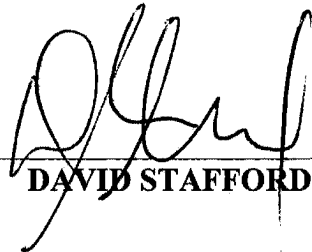
43. The Applicants assert that, because Scotiabank VISA has had a role in processing VISA charges made by banking customers to fund off-shore internet gambling, this somehow requires Scotiabank to take on the Applicants as banking customers. This misses the point. Scotiabank's role in the VISA system is as an issuer, and an operator of accounts that are the source of funds. The Applicant's role in the transaction is one of Acquirer, or receiver of funds en route to the end merchant, and the Applicant performs the added role of storing the funds until the customer calls

upon them to fund a wager at the Merchant. As previously stated, Canadian Acquirers connected to the VISA network will not from within Canada take on Merchants as customers whose business is illegal in Canada. Furthermore, the mutual decision for Scotiabank and any given Acquirer to form a Commercial Banking relationship is completely independent of the fact that the Acquirer is an accepted VISA transaction Acquirer in Canada. Scotiabank is bound by a myriad of regulations with respect to what business can be accepted as commercial customers which have nothing to do with VISA.

SWORN before me
at the City of Toronto, Ontario
this November 24, 2005.


A Commissioner for taking Affidavits

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DAVID STAFFORD

BETWEEN :

B-FILER INC.
Applicants

- and -

THE BANK OF NOVA SCOTIA
Respondent

Court File No. CT 2005-006

COMPETITION TRIBUNAL

AFFIDAVIT OF DAVID STAFFORD
(Sworn November 24, 2005)

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