



Reference: *B-Filer Inc. v. The Bank of Nova Scotia*, 2005 Comp. Trib. 38  
File No.: CT-2005-006  
Registry Document No.: 0041

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

AND IN THE MATTER OF an application by B-Filer Inc., B-Filer Inc. doing business as GPAY GuaranteedPayment and Npay Inc. for an order pursuant to section 103.1 for leave to make an 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*.

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)

Decided on the written record.  
Judicial Member: Simpson J. (Chairperson) sitting alone.  
Date of Reasons: November 14, 2005  
Reasons signed by: Madam Justice Sandra J. Simpson



**REASONS FOR PREVIOUS ORDER DATED NOVEMBER 4, 2005, GRANTING  
LEAVE TO APPLY ONLY UNDER SECTION 75 OF THE *COMPETITION ACT***

## **THE INTRODUCTION**

- [1] B-Filer Inc., B-Filer Inc. doing business as GPAY GuaranteedPayment and Npay Inc. (the "Applicants") have applied to the Competition Tribunal (the "Tribunal") pursuant to section 103.1 of the *Competition Act*, R.S.C. 1985, c. C-34, as amended (the "Act"), for leave to make an application under sections 75 and 77 of the Act (the "Leave" or the "Application"). The Applicants seek an order under section 75 directing the Bank of Nova Scotia (the "BNS") to accept the Applicants as customers on usual trade terms, and an order under section 77 prohibiting the BNS from engaging in exclusive dealing.
- [2] The Applicants' business involves offering purchasers who hold bank debit cards (the "Purchasers") the ability to use those cards to pay participating vendors (the "Merchants") for the purchase of goods and services over the internet (the "Applicants' Business" or "GPAY"). The Applicants started their business in 1999, but it "took off" in the spring of 2004 and now has approximately 20,000 customers, generates fees of \$100,000 per month, and sees enormous potential for further growth. The Applicants' Business is new and unregulated. When it began, no other entity in Canada (including the Chartered Banks) offered a service which allowed debit card holders to pay for their online purchases with their debit cards.
- [3] The Applicants began as small business customers of the BNS at its branch in Sherwood Park (the "Branch") near Edmonton, Alberta. As the Applicants' Business grew, it opened numerous accounts at the Branch. In May 2005, the BNS sent a notice terminating the accounts.

## **THE PROCEDURAL HISTORY**

- [4] This application has developed as follows:
- Notice of Application, filed on June 20, 2005
  - Statement of Grounds and Material Facts filed on June 20, 2005
    - 1<sup>st</sup> Affidavit of Mr. Raymond Grace, affirmed on June 15, 2005 (the "1<sup>st</sup> Grace Affidavit")
  - Certificate from the Commissioner of Competition dated June 23, 2005 indicating that the matter is not under inquiry and was not the subject of an inquiry which was discontinued because of a settlement
  - Representations on behalf of the BNS in Response, filed on July 13, 2005
    - 1<sup>st</sup> Affidavit of Mr. Robert Rosatelli, sworn on July 12, 2005 (the "1<sup>st</sup> Rosatelli Affidavit")
    - Affidavit of Mr. David Metcalfe, sworn on July 12, 2005 (the "Metcalfe Affidavit")
  - Applicants' Reply Submissions, filed on September 6, 2005
    - 2<sup>nd</sup> Affidavit of Mr. Raymond Grace, affirmed on September 1, 2005 (the "2<sup>nd</sup> Grace Affidavit")

- Affidavit of Mr. Joseph Iuso, affirmed on August 29, 2005 (the "Iuso Affidavit")
- Responding Affidavit from the BNS, filed with leave of the Tribunal
  - 2<sup>nd</sup> Affidavit of Mr. Robert Rosatelli, sworn on September 21, 2005 (the "2<sup>nd</sup> Rosatelli Affidavit")
- Motion by the BNS for Summary Disposition filed on September 30, 2005 and dismissed by Order of the Tribunal dated October 14, 2005
- Order of the Tribunal dated November 4, 2005 granting Leave under section 75 of the Act

## **THE FACTS**

- [5] The Applicants are 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 Alberta. Mr. Raymond Grace ("Mr. Grace") is the President of all the Applicants. Mr. Grace is the person who dealt with the Branch and opened the Applicants' BNS accounts.
- [6] The Respondent, the BNS, is a chartered bank incorporated pursuant to the *Bank Act*, S.C. 1991, c. 46. It carries on business throughout Canada.
- [7] In the spring of 2005, the Applicants' Business was operated using bank accounts at the BNS and at the Royal Bank of Canada (the "RBC").
- [8] The Applicants' Business uses three services offered by the BNS: (i) E-mail Money Transfers ("EMTs"), (ii) internet banking, which includes bill payee services and (iii) bank accounts (collectively, the "Banking Services"). These services are used to complete the payment, clearing and settlement procedures which allow money to be transferred from the Purchasers to the Merchants.
- [9] When Mr. Grace first opened an account for B-Filer Inc. at the Branch in August 1999, the Applicants' Business was the processing of payments through telephone and internet banking. Mr. Grace later opened the NPAY and GPAY accounts. Sometime in early 2004, the Applicants' Business started to expand rapidly because of a relationship it had developed with UseMyBank Services ("UMB").
- [10] Mr. Joseph Iuso is the President of UMB and Mr. Grace is its Chief Financial Officer. UMB and GPAY entered into a joint venture agreement in November 2002. It appears from the evidence now before the Tribunal that, as a result of that agreement, Purchasers can pay for a Merchant's goods and services by appointing GPAY as their agent. GPAY can then access Purchasers' bank accounts and effect payment either by direct debit of the funds from their bank accounts to GPAY as bill payee or by EMT of the funds from their bank accounts to GPAY's bank account.

- [11] Between the spring of 2004 and the spring of 2005, the Applicants opened over one hundred accounts at the Branch. Mr. Grace says that it was necessary to have a large number of accounts because of the limited number of transactions which could be made each month in each account. The amount of money deposited by the Applicants in their accounts at the BNS between June 1, 2004, and May 31, 2005, was approximately 10 million dollars.
- [12] In a letter dated May 11, 2005, the BNS advised the Applicants that, pursuant to the Financial Agreement which customers sign on opening an account, it was giving the Applicants thirty days notice of the termination of their Banking Services, without cause (the "Termination").
- [13] In the same month (May 2005), the Interac network announced that it would soon start providing bank customers with a new payment option whereby they could pay for purchases online with their debit cards ("Interac Online"). The Applicants submit that Interac Online is similar to GPAY. However, the BNS says that the businesses are entirely different for the reasons described below.
- [14] Every time a Purchaser wishes to make a purchase from a Merchant, it contacts UMB online. When that contact is made, UMB's terms and conditions for the transaction make UMB and GPAY the Purchaser's agents. In the online session with UMB, the Purchaser provides his debit card number and online banking password (the "Confidential Data"). Thereafter, those Data are used to access the Purchaser's bank account and withdraw the amount required to pay for the purchase. The money is then transferred from the Purchaser's bank account to a GPAY account, either by EMT (if the Purchaser's bank account is not with the BNS) or by having GPAY listed as a bill payee (if the Purchaser's bank account is with the BNS). Immediately after the funds are transferred, GPAY advises the Merchant that the funds are available and payment is made.
- [15] The evidence about how Interac Online will work is not comprehensive. However, it appears that it may differ from GPAY in the following respects:
- it will operate in real time whereas GPAY involves rapid successive transactions
  - it may not involve the appointment of an agent (it is not clear if Interac will be an agent for its members)
  - it may not involve disclosure of confidential information outside financial institutions' computers (it is not clear if disclosure to Interac will be outside financial institutions' computers)
  - it will not make payments to offshore online casinos
- These features will collectively be described as the "Differences".

## **THE PRELIMINARY ISSUES**

### **A. THE PRODUCT**

- [16] For the purposes of this Application, the "product" is the Banking Services defined above, i.e. EMTs, internet bank transfers (bill payee service) and bank accounts. These are interrelated services that are all needed for the Applicants' Business, since the Applicants must have a means to obtain payment from the Purchaser (through EMTs or bill payee services) and a location (bank accounts) to make a deposit before paying the Merchant.
- [17] Dealing first with EMTs, the Applicants allege that the BNS and the RBC are the only two banks which offer EMTs into business accounts without a charge per deposit in situations in which the recipient is not a bank. This evidence was not contradicted by the BNS. The Applicants further allege that the RBC has refused to increase the volume it processes in the accounts. This suggests that there may be no equivalent substitute suppliers for the BNS' EMT deposit services. The other EMT option for the Applicants would be to use a service called CertaPay, at much greater expense to the Applicants.
- [18] The BNS states that the Applicants can carry on their business without EMT, by joining Interac. In response, the Applicants submit that joining Interac is not a viable option at this time because connection services to Interac are not offered online. Today connection services are only available through an Automatic Teller Machine ("ATM") or a point-of-sale ("POS") connector. Neither of these facilities is compatible with the Applicants' services. Further, it appears that it is not possible to establish an indirect connection to Interac through an existing Interac member.
- [19] Internet bank transfers (also described as bill payee services) require payees to be listed with financial institutions. The Applicants' evidence shows that, until late 2003, GPAY was listed as a bill payee by six banks: Toronto-Dominion ("TD"), Canadian Imperial Bank of Commerce ("CIBC"), Alberta Treasury Board ("ATB"), Bank of Montreal ("BMO"), RBC and BNS. However, the first three banks terminated the Applicants as bill payees in late 2003 and they have now lost their privileges at the BNS. This constrains the Applicants' ability to do business, and has increased their dependence on EMTs as a means of facilitating debit card payments on the internet.

### **B. THE MARKET**

- [20] For present purposes, the parties appear to agree that online debit payment is the market. As noted above, until very recently, the Applicants were the only ones to offer this service, but in May 2005, the Interac Association announced that Interac Online would soon be a reality. Although the BNS submits that Interac Online is completely different from the Applicants' Business, the Tribunal has concluded that

the Differences are not sufficient to support a finding that they do not operate in the same market.

[21] The evidence shows that, at the present, there is no supplier in the market other than the Applicants' Business and that Interac Online will soon enter the market.

### **C. THE AGENCY RELATIONSHIP**

[22] The Applicants submit that they function as Purchasers' agents. The Tribunal accepts that GPAY could be characterized as the agent of the Purchaser because of the terms and conditions under which the Purchaser appoints GPAY as agent for each purchase. The terms and conditions, which appear when the Purchaser uses UseMyBank and GPAY, include the following:

Online accounts access is provided by you from the Transaction Providers [banks offering online banking services]. By providing Login Information, you authorize UseMyBank and its facilitation service [GPAY] to act as your agent to access, retrieve your Account Information, and make bill payments or email transfer from the web sites of your Transaction Provider 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 (...). 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.

[23] The Purchaser, by using the services of the Applicants, gives GPAY the authorization to access his account for the purpose of having GPAY withdraw the funds from the Purchaser's account and deposit these funds in a GPAY account. This is done with the understanding that such funds will be credited to the Merchant's account.

### **THE DISCRETION TO REFUSE LEAVE**

[24] In this case, the Tribunal has been asked to exercise its discretion to refuse Leave under subsection 103.1(7) of the Act. The BNS is saying that, even if the requirements of subsection 103.1(7) are met, Leave should be denied.

[25] The BNS bases its submission on the following allegations:

- (i) The Applicants' Business involves the disclosure of customers' Confidential Data and jeopardizes the integrity of the Canadian banking system.
- (ii) The Applicants' Business could be used to launder money to finance terrorist and other illegal activities.
- (iii) The Applicants' Business is being used to facilitate Purchasers' payments for criminal conduct in the form of offshore internet casino gambling.

- (iv) Providing Banking Services to the Applicants would place the BNS in breach of Rule E2 of the Rules of the Canadian Payments Association (the “CPA”).
- (v) The Applicants misrepresented the true nature of their business to the BNS and failed to disclose material information to the Tribunal.
- (vi) The BNS, as a matter of policy, does not carry on business with money services businesses such as the Applicants’ and the BNS has a contractual right to close the Applicants’ accounts and terminate Banking Services.

[26] I will discuss each allegation in turn but before doing so, some comments should be made about the context in which these allegations are presented.

[27] First, as described above, the BNS is about to become the Applicants’ competitor as a member of Interac Online. Second, the Applicants’ Business grew dramatically in the period from spring 2004 to spring 2005, and the BNS accommodated the Applicants’ expanding requirements for internet banking by providing an unusually large number of bank accounts. Third, there is no allegation that the Applicants have engaged in fraudulent conduct or money laundering.

**(i) The Disclosure of Confidential Data**

[28] There is no issue that, if they choose to use the Applicants’ Business, Purchasers must provide their Confidential Data to the Applicants. The BNS says that when its customers provide their Confidential Data to the Applicants, the customers “breach” the BNS cardholder agreement. However, a review of that agreement shows that it expressly contemplates that customers may share their Confidential Data on a confidential basis in a secure environment. In this regard, the agreement states:

Limitation for Authorized & Unauthorized Use of the Card  
You are liable for all debts, withdrawals and account activity resulting from:

- o Authorized use of the card by persons to whom you have made the card and/or electronic signature available.

[29] There is a debate in the evidence about whether a Purchaser’s Confidential Data is encrypted at every stage during the time it is in the Applicants’ computer and there is debate about whether and how it is stored. As well, there is a debate about the relative efficacy of the parties’ fraud detection systems. These are not issues which can be finally resolved at this early stage in the proceedings. I am, however, satisfied that the Applicants’ Business makes a sophisticated effort to protect the Purchasers’ Confidential Data. It has not been demonstrated that the Applicants’ computer and internet security does not create a secure environment and, accordingly, lack of security is not a reason to refuse Leave.

[30] There is evidence that fraud has occurred in connection with the Applicants’ Business. The parties agree that there have been twenty fraudulent transfers of funds

totalling \$7,000.00. This is a small amount given the scale of the Applicants' Business. As well, there is no evidence of the Applicants' involvement in any fraud and they have reimbursed all the fraud victims. In these circumstances, the evidence of fraud is not of sufficient consequence to justify refusing Leave.

[31] The BNS says that funds in Purchasers' accounts and related credit facilities are at risk of theft by computer hackers because of the disclosure of Purchasers' Confidential Data to the Applicants. Computer hackers are a fact of life. Purchasers who are making internet purchases of goods and services can reasonably be expected to understand the risk. The BNS acknowledges that even services related to banks have been victims of hackers. In these circumstances, although there is a risk, I am not satisfied that it justifies refusing Leave.

[32] The next question is whether to accept the BNS' submission that the Applicants' Business threatens the integrity of the Canadian banking system. The evidence does not support this submission and, were it otherwise, I would expect Parliament to regulate the Applicants' Business to eliminate any such threat.

**(ii) Money Laundering**

[33] In the absence of any evidence actually linking the Applicants' Business and money laundering, I am not persuaded that speculative concerns about money laundering justify refusing Leave. As the Applicants' Business is conducted entirely by the electronic transfer of funds, all the steps are recorded and presumably can be traced. The BNS refers to a report entitled "Summary of the 911 Commission Recommendation" dated February 25, 2005 and notes that, in response to the 911 attacks, the United States passed legislation which cracks down on illegal internet gambling by barring financial institutions from processing internet gambling transactions. However, in the absence of any evidence that similar legislation exists in Canada or that the Purchasers are gambling illegally, I am not prepared to refuse Leave.

**(iii) Criminal Conduct**

[34] There is no doubt that the vast majority of Purchasers who use the Applicants' Business are paying amounts owed to offshore internet casinos. I have reviewed sections 202 and 207 of the *Criminal Code*, R.S. 1985, c. C-46, and have concluded that paragraph 202(1)(e) could make it an offence for a person in Canada to make an agreement on the internet as a prelude to gambling at an offshore internet casino. However, there would be, among others, issues about the terms and meaning of any such agreement and about whether it was made in Canada.

[35] In the absence of any reference to cases about the criminality of Canadians using the internet to gamble at offshore internet casinos and, in the absence of any evidence about how or where the Applicants' Purchasers arrange their gambling privileges at offshore internet casinos, I am not prepared to conclude that the fact



that the Applicants' Purchasers are paying amounts due to offshore internet casinos is a reason to refuse Leave.

**(iv) The CPA's Rule E2**

[36] The CPA's Rule E2 became effective on February 3, 2005 (the "Rule"). It applies only to CPA members. It is noteworthy that the Applicants are not members and that the Rule does not govern their conduct. Accordingly, the only question is whether the Rule operates to prevent the BNS from supplying Banking Services to the Applicants.

[37] The relevant portion of the Rule is part 5(a). It reads:

In all matters relating to the Exchange, Clearing and Settlement of On-Line Payment Items for the purpose of Clearing and Settlement, each Member shall respect the privacy and confidentiality of the Payor and the Payee personal and financial information in accordance with applicable Canadian provincial and federal legislation. . . . In particular, only that information or data that is necessary to effect the processing of the On-line Payment Item is to be made available to the Acquirer and/or the Payee during the session. For greater clarity, the Payor's personal banking information, such as but not limited to the authentication information (e.g., user identification and password) and account balance, shall not be made available at any time to the Acquirer and/or Payee during the On-line Payment Transaction session.

[38] The BNS submits that the Applicants are the acquirer and/or the payee under the Rule and that the Rule prevents it from dealing with the Applicants because, during the Purchasers' online session with the Applicants, the Purchasers' Confidential Data are disclosed. I do not agree with this submission. In my view, given the Applicants' status as agents, it is the Merchants not the Applicants who should be considered Payees for the purposes of the Rule.

[39] In any event, the Rule does not address the Purchaser's decision to share its Confidential Data with the Applicants on a confidential agency basis. Nothing in the Rule justifies the BNS' refusal to supply Banking Services to the Applicants' Business and, for this reason, the Rule does not provide a basis for exercising discretion to refuse Leave.

[40] The BNS also refers to a statement on the CPA's website (the "Statement"). It reads:

**PAYMENT SERVICES** that require consumers to provide their on-line user banking ID and password to a party other than their financial institution are not eligible for clearing under this rule. [emphasis added]

[41] When it speaks of payment services, the Statement appears to say that a CPA member cannot clear transactions for non-members if those non-members, such as the Applicants, who are not bound by the Rule, offend its privacy provisions. However, on examination, the Rule itself says no such thing and the Statement is

therefore misleading. The Rule is simply a privacy provision. It does not refer to payment services and does not address eligibility for clearing or impose restrictions on clearing if the privacy requirements it imposes on its members are not met by non-members such as the Applicants.

(v) **Misrepresentation and Non-Disclosure**

[42] The BNS notes that in Leave applications there is no provision in the Tribunal's Rules for cross-examination on an applicant's affidavit. This fact, it submits, suggests that an applicant bears an onus of full and accurate disclosure which is akin to that imposed when injunctions are sought on an *ex parte* basis. I am not persuaded by this analogy. Leave applications are not made *ex parte*. The BNS has had a full opportunity to express its position.

[43] Although I am therefore not prepared to treat this Leave as if it were *ex parte*, I acknowledge that it would be appropriate to deny Leave if the Tribunal had clearly been misled on a significant and material issue. That said, I have reviewed the BNS' allegations of non-disclosure and have concluded that none can be described as either significant or material. The earlier investigation by the Competition Bureau and the Alberta litigation are not relevant, and the Applicants were entitled to defer the other matters for reply.

[44] The BNS alleges that Mr. Grace made serious misrepresentations in his dealings with the bank which were not disclosed to the Tribunal. The BNS is particularly vexed by the information Mr. Grace supplied when he opened the many bank accounts.

[45] In this regard, there is no dispute that many of the Applicants' accounts at the BNS were opened using the BNS telephone service which is linked to a computer. One of the questions posed by the computer during the call reads as follows:

And will this account be used to conduct business on behalf of someone other than the named account holder?

[46] The BNS informally describes this as the "money laundering question". In each case, Mr. Grace answered it in the negative and the BNS characterizes his answers as lies. However, in my view, the answers were appropriate. Given that the Applicants' Business is to facilitate the payment of internet debts using debit cards there is no question that the accounts were used for that business.

[47] Further, Mr. Grace's description of the Applicants' Business as "financial collection" in 1999 was accurate at that time. It is clear that, after a slow start in 2002, the Applicants' Business evolved and changed into an active internet debit payment facilitation business in 2004/2005.

[48] As well, the fact that Mr. Grace opened a great many more accounts at the Branch than normal for a small business customer is not a reason to deny Leave in the

circumstances of this case. The number of accounts was not a secret and is explained by the number of transactions required by the Applicants' Business. Further, although Mr. Grace offered to discuss opening commercial accounts, his offers were ignored.

[49] The BNS also alleges that the UMB website untruthfully states that the Applicants' Business complies with the Canadian Code of Practice for Consumer Debit Card Services (the "Code"). However, this allegation is not accurate. The UMB website actually says that UMB "endorses" the Code. Subsection 1(3) of the Code says that "Organizations endorsing the code will maintain or exceed the level of consumer protection it establishes". There is no evidence that the Applicants' Business fails to comply with this provision. This allegation therefore does not justify refusing Leave.

(vi) **BNS Policies and Contractual Rights**

[50] There is no policy document or other record in evidence to support the BNS' allegation that, as a matter of policy, it does not clear payments to offshore casinos and does not offer accounts and Banking Services to unregulated money services businesses. However, even if such policies were in place, their mere existence would not justify refusing Leave.

[51] Finally, the BNS emphasizes that, under its signed agreements with the Applicants, it has the right to close the Applicants' accounts without cause on thirty days notice. It says that its contractual rights should be respected and Leave denied. However, the Tribunal has jurisdiction to force parties to deal with one another if the requirements of the Act are met. Accordingly, the fact that a termination clause has been applied does not justify the exercise of discretion to deny Leave.

**SECTION 75 ANALYSIS**

[52] In an application for leave to make an application under section 75, the applicant must show that an order "could" issue under section 75. In *Symbol Technologies ULC v. Barcode Systems Inc.*, 2004 FCA 339, the Federal Court of Appeal held as follows:

17. The threshold for an applicant obtaining leave is not a difficult one to meet. It need only provide sufficient credible evidence of what is alleged to give rise to a *bona fide* belief by the Tribunal. This is a lower standard of proof than proof on a balance of probabilities which will be the standard applicable to the decision on the merits.

18. However, it is important not to conflate the low standard of proof on a leave application with what evidence must be before the Tribunal and what the Tribunal must consider on that application. For purposes of obtaining an order under subsection 75(1), a refusal to deal is not simply the refusal by a supplier to sell a product to a willing customer. The elements of the reviewable trade practice of refusal to deal that must be shown before the Tribunal may make an order are those set out in subsection 75(1).

These elements are conjunctive and must all be addressed by the Tribunal, not only when it considers the merits of the application, but also on an application for leave under subsection 103.1(7). That is because, unless the Tribunal considers all the elements of the practice set out in subsection 75(1) on the leave application, it could not conclude, as required by paragraph 103.1(7), that there was reason to believe that an alleged practice could be subject to an order under subsection 75(1).

19. The Tribunal may address each element summarily in keeping with the expeditious nature of the leave proceeding under section 103.1. As long as it is apparent that each element is considered, the Tribunal's discretionary decision to grant or refuse leave will be treated with deference by this Court. But the Tribunal's discretion to grant leave is not unfettered. The Tribunal must consider all the elements in subsection 75(1).

**[53]** The Tribunal must thus be satisfied that each of the elements set out in subsection 75(1) could be met when the application is heard on the merits. This means that there must be "sufficient credible evidence" to give rise to a *bona fide* belief. The elements of section 75 which the Tribunal must find before issuing an order are the following:

**75.** (1) ...*(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,

**75.** (1) ... *a)* qu'une personne est sensiblement gênée dans son entreprise ou ne peut exploiter une entreprise du fait qu'elle est incapable de se procurer un produit de façon suffisante, où que ce soit sur un marché, aux conditions de commerce normales;

*b)* que la personne mentionnée à l'alinéa *a)* est incapable de se procurer le produit de façon suffisante en raison de l'insuffisance de la concurrence entre les fournisseurs de ce produit sur ce marché;

*c)* que la personne mentionnée à l'alinéa *a)* accepte et est en mesure de respecter les conditions de commerce normales imposées par le ou les fournisseurs de ce produit;

*d)* que le produit est disponible en quantité amplement suffisante;

*e)* que le refus de vendre a ou aura vraisemblablement pour effet de nuire à la concurrence dans un marché,

- [54] The Tribunal has accepted the Applicants' evidence that they could be substantially affected in their business because 50% of their revenue is dependent on the Banking Services provided by the BNS.
- [55] The uncontradicted evidence of the Applicants shows that the RBC and the BNS are the only suppliers of Banking Services which allow EMTs into business accounts that are not bank operations. The evidence shows that EMTs are at the heart of the Banking Services and that the Applicants cannot carry on business without them. As a result of the Termination, the RBC is the only EMT supplier left in the market and it has refused to accept more business from the Applicants. Accordingly, the Tribunal could conclude that there is insufficient competition among suppliers.
- [56] The Applicants have met the BNS' usual trade terms, in the sense that there have been no allegations that they did not respect the terms of payment or honour their commitments to the BNS or the Purchasers. The BNS disputes that the Applicants met its usual trade terms, since they exceeded the account and monetary limits imposed on small business accounts. However, the Applicants allege that they tried to open a commercial account to accommodate the expansion of their business, to no avail.
- [57] The usual trade terms, insofar as this Leave application is concerned, must mean the trade terms which have thus far applied to the Applicants since the BNS allowed the Applicants to operate outside its normal small business account and monetary limits.
- [58] The Tribunal is satisfied that it could find that the Banking Services are in ample supply.
- [59] The Tribunal also concludes that it could find that the BNS' refusal to supply Banking Services to the Applicants' Business is likely to have an adverse effect on competition in the market for internet debit payments. The Applicants' uncontradicted evidence is that without the Banking Services supplied by the BNS, the revenue from the Applicants' Business is reduced by 50% and the business cannot grow because the RBC has refused to offer additional Banking Services. At the moment, the Applicants are the sole supplier of internet debit payment services so there is no competition to be adversely affected by these changes. However, the evidence shows that Interac Online will soon be operational. In that event, the Tribunal could find that there would likely be an adverse effect on competition because the Applicants' Business will not have the Banking Services it needs to function as a viable competitor.
- [60] The Tribunal concludes from this analysis that there is sufficient credible evidence to give rise to a *bona fide* belief that the elements of section 75 could be satisfied.

## **SECTION 77 ANALYSIS**

[61] The Applicants submit that the BNS is practising exclusive dealing in its refusal to continue to supply the Banking Services. From the Statement of Grounds and Material Facts filed by the Applicants, it appears that the Applicants understand "exclusive dealing" in this instance to mean that the BNS, and the other major banks that are part of the Interac network, intend by their actions (i.e. refusing to deal with the Applicants) to be the exclusive purveyors of bank debit payment services by internet.

[62] "Exclusive dealing" is a defined term in section 77 of the Act. It reads as follows:

77. (1) For the purposes of this section,

"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;

77. (1) Les définitions qui suivent s'appliquent au présent article.

«exclusivité»

a) Toute pratique par laquelle le fournisseur d'un produit exige d'un client, comme condition à ce qu'il lui fournisse ce produit, que ce client :

(i) soit fasse, seulement ou à titre principal, le commerce de produits fournis ou indiqués par le fournisseur ou la personne qu'il désigne,

(ii) soit s'abstienne de faire le commerce d'une catégorie ou sorte spécifiée de produits, sauf ceux qui sont fournis par le fournisseur ou la personne qu'il désigne;

b) toute pratique par laquelle le fournisseur d'un produit incite un client à se conformer à une condition énoncée au sous-alinéa a)(i) ou (ii) en offrant de lui fournir le produit selon des modalités et conditions plus favorables s'il convient de se conformer à une condition énoncée à l'un ou l'autre de ces sous-alinéas.

[63] There is no evidence of exclusive dealing as defined in the Act. For this reason, the Tribunal finds that an order could not issue under section 77. Leave will, therefore, not be granted for the section 77 application.

**THE CONCLUSION**

[64] For all these Reasons, an order was made on November 4, 2005 granting Leave to apply only under section 75 of the Act.

DATED at Ottawa, this 14<sup>th</sup> day of November, 2005.

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

(s) Sandra J. Simpson

COUNSEL:

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

Mr. Adam N. Atlas

For the Respondent Bank of Nova Scotia:

Mr. F. Paul Morrison

Mr. Glen G. MacArthur

Ms. Lisa M. Constantine