Reference: *B-Filer Inc. v. The Bank of Nova Scotia*, 2005 Comp. Trib. 31
File No. CT-2005-006
Registry Document No.: 0034

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 Guaranteed Payment 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 Guaranteed Payment and Npay Inc. for an interim order pursuant to section 104 of the *Competition Act*;

AND IN THE MATTER OF a motion for summary disposition filed by the Bank of Nova Scotia pursuant to subsection 9(4) of the *Competition Tribunal Act*, R.S. 1985, c. 19 (2nd Supp.) as amended.

B E T W E E N

B-Filer Inc., B-Filer Inc. doing business as GPAY Guaranteed Payment and Npay Inc.
(applicants, respondents in the motion)

and

The Bank of Nova Scotia
(respondent, moving party)

Decided on the basis of the written record.
Presiding Judicial Member: Simpson J. (Chairperson)
Date of Reasons and Order: October 14, 2005
Reasons and Order signed by: Madam Justice Sandra J. Simpson

REASONS AND ORDER DISMISSING THE BANK OF NOVA SCOTIA'S MOTION FOR SUMMARY DISPOSITION

I. BACKGROUND

A. INITIAL PROCEEDINGS BEFORE THE COMPETITION TRIBUNAL

[1] B-Filer Inc., B-Filer Inc. doing business as GPAY Guaranteed Payment and Npay Inc. (the "Applicants") have filed an application before 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 apply under sections 75 and 77 of the Act, as well as an application for interim relief pursuant to section 104 of the Act (the "Tribunal Proceedings"). The Applicants allege that the Bank of Nova Scotia (the "Respondent") is refusing to deal with them, and that they are entitled to a remedy under section 75 of the Act. The Applicants also allege that the Respondent practices exclusive dealing, and that they are entitled to a remedy under section 77 of the Act.

[2] The Applicants provide an on-line, internet-based payment service to customers wishing to pay electronically using debit cards for goods and services purchased from merchants who accept payment through the Applicants' services. To offer those services, the Applicants need banking services to be able to move the money through a series of on-line transactions. Until recently, the applicants were dealing with two banks that allowed the Applicants to make the transactions through accounts held in those banks: Royal Bank of Canada and the Respondent. In a letter dated May 11, 2005, the Respondent advised the Applicants that it intended to terminate the services it had been providing to them. The Applicants had by then opened over 100 accounts with the Respondent. To terminate services, the Respondent relied on a clause in the *Scotiabank Financial Services Agreement*, which had been signed for each account by Mr. Grace, the principal of the Applicants. The relevant clause reads as follows:

> 12.2 We may cancel any service to you without reason by giving thirty days' written notice.

[3] A decision on the leave application pursuant to section 103.1 is scheduled to be issued on or before Thursday, November 10, 2005. If leave is granted, the Tribunal will shortly thereafter consider the application under section 104 for an interim order to supply banking services, pending the resolution of the application under sections 75 or 77.

B. PROCEEDINGS BEFORE THE ALBERTA COURT OF QUEEN'S BENCH

[4] At the time of their initial applications to the Tribunal, the Applicants had also commenced proceedings before the Alberta Court of Queen's Bench. In that action, the Applicants are seeking relief from the Respondent’s decision to terminate banking services, and base their action on breach of contract and unlawful interference with economic interests. They also raise the issue of unfair competition.

[5] The Applicants brought an application for an interlocutory injunction to restrain the Respondent from closing the Applicant's bank accounts and terminating bank services pending trial. The application for injunctive relief was heard on September 16, 2005 and a decision was issued by Mr. Justice E.S. Lefsrud of the Alberta Court of Queen's Bench on September 22, 2005 (*B-FILER Inc. v. Bank of Nova Scotia*, 2005 ABQB 704, hereinafter the "Alberta Decision").

[6] Mr. Justice Lefsrud dismissed the application for injunctive relief. He concluded that the plaintiffs had failed to satisfy the three part test in *RJR -- MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311. This is especially so since the first part of the test, a serious issue to be tried, is more demanding in the case of a mandatory injunction, and requires a "strong prima facie case". Mr. Justice Lefsrud found no evidence of contractual breach on the part of the Respondent. In particular, he found that the terms of the agreement with the bank were clear, and that Mr. Grace, on behalf of the plaintiffs, had signed and had or should have understood their plain meaning. The evidence of unfair competition was not strong, and the plaintiffs had failed to establish a legal entitlement to the bank's services. Mr. Justice Lefsrud stated that this was sufficient to dispose of the application, but went on to say that the plaintiffs had not established irreparable harm, and that the balance of convenience favoured the bank.

II. THIS MOTION FOR SUMMARY DISPOSITION BEFORE THE TRIBUNAL

[7] Against this background, the Respondent now moves for a summary disposition of the Tribunal Proceedings under subsections 9(4) and 9(5) of the *Competition Tribunal Act*, R.S. 1985, c. 19 (2nd Supp.) as amended. These provisions were enacted with the 2002 amendments (S.C. 2002, c. 16, s. 18), and have never been interpreted or applied by the Tribunal. They read as follows:

9 (4) On a motion from a party to an application made under Part VII.1 or VIII of the *Competition Act*, a judicial member may hear and determine the application in a summary way, in accordance with any rules on summary dispositions. (5) The judicial member may dismiss the application in whole or in part if the member finds that there is no genuine basis for it. The member may allow the application in whole or in part if satisfied that there is no genuine basis for the response to it.	9 (4) Sur requête d'une partie à une demande présentée en vertu des parties VII.1 ou VIII de la *Loi sur la concurrence* et en conformité avec les règles sur la procédure sommaire, un juge peut entendre la demande et rendre une décision à son égard selon cette procédure. (5) Le juge saisi de la requête peut rejeter ou accueillir, en totalité ou en partie, la demande s'il est convaincu que, soit la demande, soit la réponse, n'est pas véritablement fondée.

[8] The Respondent submits that the Tribunal Proceedings have been decided by the Alberta Decision, and are now *res judicata*. The Respondent also argues that issue estoppel applies, and, in the alternative, says that to continue the proceedings before the Tribunal would be an abuse of process. The Tribunal should therefore, according to the Respondent, summarily dismiss the Tribunal Proceedings or, at a minimum, dismiss the application for the interim order, since there is no genuine basis for the Tribunal Proceedings or for injunctive relief, based on the decision of Mr. Justice Lefsrud. The Applicants have not responded directly to the motion, but by letter dated September 30, 2005, they have opposed its filing. The Applicants' position is that the Alberta proceedings and the Tribunal Proceedings are entirely different and that the Alberta Decision has no impact on the Tribunal Proceedings.

III. THE ISSUE

[9] Does the Alberta Decision foreclose the Tribunal Proceedings?

IV. DISCUSSION

[10] In his ruling, Mr. Justice Lefsrud does not determine whether the Act applies and draws a distinction between general contract law and competition law:

> The Plaintiffs have made reference to various authorities, several of which would involve services like public utilities and are issued by either the Competition Tribunal or the Canadian Radio-television and Telecommunications Committee. Such cases relate to areas of law that are closely regulated by specialized tribunals and cannot translate into general contract law. (par. 35)

[11] For the purposes of the Alberta Decision, the Act is irrelevant since the Competition Tribunal has exclusive jurisdiction to adjudicate matters under part VIII of the Act. This includes situations in which a requirement to supply may be forced on an unwilling party.

[12] In *Manos Foods International Inc. v. Coca-Cola Ltd.*, [1999] O.J. No. 3623, 125 O.A.C. 66, the Ontario Court of Appeal had to decide whether the Ontario Court – General Division had jurisdiction to grant a mandatory injunction to supply. The Court of Appeal ruled that it did not, since there was no jurisdiction in common law for such an order. The Court went on to say that such a remedy, if available, was within the exclusive jurisdiction of the Competition Tribunal:

> There is no common law obligation to contract with another party. Parties are free to contract as they see fit. The freedom to contract includes both the ability to enter into contracts and to refrain from entering into contracts. The effect of the remedy sought in paragraph 1(b) would be to compel the appellants to enter into contracts for sale of Coca-Cola products to the respondent on an ongoing basis. There is no jurisdiction in common law to make this order.
> […]

> Although the remedy sought in paragraph 1(b) does not exist in common law, there are statutory remedies in the *Competition Act* available in certain circumstances which may require a supplier of a product to sell that product to persons whose businesses would be substantially affected if the supplier did not do so and also which may prevent a supplier from limiting the sale of a product by its customer (See s. 75 and s. 77 of the *Competition Act,* R.S.C. 1985, c. C-34, as amended). These remedies are within the exclusive jurisdiction of the Competition Tribunal. (*Manos*, paras. 8 & 10)

[13] In my view, the Alberta Decision does not render the Tribunal Proceedings *res judicata*, because the issues before the Tribunal are not the same as the issues that were before the Alberta court. Mr. Justice Lefsrud found no contractual obligation to supply. This is not required under the Act. He did not rule on whether the Applicants had satisfied the requirements of section 103.1 of the Act, or on whether they could be entitled to an order under sections 75 or 77 of the Act. It is not an abuse of process for the Applicants to seek redress before the Tribunal, since the issues of refusal to deal and exclusive dealing must be decided under sections 75 and 77 of the Act, and since the Tribunal has exclusive jurisdiction to apply those provisions.

[14] Leave under section 103.1 of the Act may or may not be granted. If leave is granted, the application for interim relief under section 104 will be considered. Injunctive relief in the Alberta Decision was denied on the basis of contract law. It has not yet been decided in the context of competition law. It should be noted that the test for a mandatory injunction under the Act may not be as onerous as the common law test applied by Mr. Justice Lefsrud. In this regard, see *Quinlan's of Huntsville Inc. v. Fred Deeley Imports Ltd.,* 2004 Comp. Trib. 28.

ORDER

[15] For these reasons, the motion for summary disposition is dismissed.

DATED at Ottawa, this 14th day of October, 2005.

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

(s) Sandra J. Simpson

COUNSEL

For the Applicants (respondents in the motion):

Mr. Adam Atlas

For the Respondent (moving party):

Mr. F. Paul Morrison

Mr. Glen G. MacArthur

Ms. Lisa M. Constantine