

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.**

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

Applicants

THE BANK OF NOVA SCOTIA

Respondent

**NOTICE OF APPLICATION FOR LEAVE PURSUANT TO SECTION 103.1
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 103.1 of the *Competition Act*, R.S.C. 1985, c. C-34, as amended (the “Act”) seeking leave to bring an application 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, including, without limitation, unlimited E-mail Money Transfer deposit 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.



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TO:

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Competition Tribunal
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Tel: 613-957-7851
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AND TO:

Sheridan Scott
Commissioner of Competition
50 Victoria Street
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Tel: 819-997-3301
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AND TO:

The Bank of Nova Scotia
c/o Deborah M. Alexander, Executive Vice-President, General Counsel and
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Scotia Plaza
44 King Street West
Toronto, Ontario
M5H 1H1
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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 my 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 to 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 103.1

57. In this application, the Applicants seek leave, under section 103.1 of the Act to bring an application for an order pursuant to sections 75 and 77 of the Act.

58. The test for granting leave under section 103.1 of the Act is set out in subsection 103.1(7) of the Act as follows:

The Tribunal may grant leave to make an application under sections 75 and 77 if it has reason to believe that the applicant is directly and substantially affected in the applicants' business by any practice referred to in one of those sections that could be subject to an order under that section.

59. Section 103.1(7) of the Act was first analyzed by the Tribunal in *National Capital News Canada v. Canada* (Speaker, House of Commons), [2002] C.C.T.D. No. 38 (Competition Tribunal), affg [2004] F.C.J. No. 83 (C.A.) ("*National Capital News*") as follows at paragraph 14:

Accordingly on the basis of the plain meaning of the wording used in subsection 103.1(7) of the Act and jurisprudence referred to above ... the appropriate standard under subsection 103.1(7) is whether the leave application is supported by sufficient credible evidence to give rise to a *bona fide* belief that the applicant may have been directly and substantially affected in the applicant's business by a reviewable practice, and that the practice in question could be subject to an order.

60. In *Barcode Systems Inc. v. Symbol Technologies Canada ULC*, 2004 Comp. Trib. 1, the Competition Tribunal held:

What the Tribunal must have reason to believe is that Barcode is directly in substantially affected in its business by Symbol's refusal to sell. The Tribunal is not required to have reason to believe that Symbol's refusal to deal has or is likely to have an adverse effect on competition in a market at this stage.

61. The above propositions were cited with approval in *Allan Morgan and Sons Ltd. v. La-Z-Boy Canada Ltd.*, 2004 Comp. Trib. 4, where the Competition Tribunal stated that at the leave stage, the applicant is not required to meet any higher standard of proof threshold.

Section 75

62. Subsection 75(1) of the Act 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.

63. The Act and jurisprudence therefore provide that there are only two (2) conditions which must be satisfied for leave to be granted under section 103.1 for a section 75 application: (i) the business of the Applicants must be directly and substantially affected by the practice of the Respondent; and (ii) the practice of the Respondent could be subject to an order under section 75.

64. The evidence in this application demonstrates (collectively, the “**Key Assertions**”):

- (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 as much as 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; and

- (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.

65. 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.

Section 77

66. 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.

67. 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;

68. The Act and jurisprudence therefore provide that there are only two (2) conditions which must be satisfied for leave to be granted for an application under section 103.1 for a section 77 application: (i) the business of the Applicants must be directly and substantially affected by the practice of the Respondent; and (ii) the practice of the Respondent could be subject to an order under section 77.

69. The Key Assertions demonstrate that the Applicants are directly and substantially affected by the practice of the Respondent to the point of losing no less than half of their revenue and the exclusive dealing of the Respondent can be subject to an order pursuant to section 77 of the Act.

70. 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.

71. 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.

Adam N. Atlas

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