

File No. CT 2005-006

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:

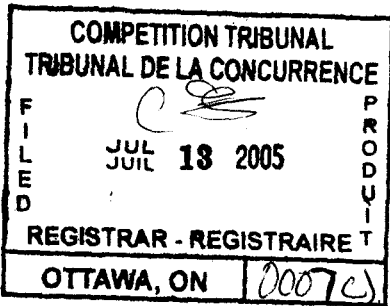
**B-FILER INC., B-FILER INC. doing business as
GPAY GUARANTEEDPAYMENT and NPAY INC.**

Applicants

- and -

THE BANK OF NOVA SCOTIA

Respondent



**REPRESENTATIONS OF THE BANK OF NOVA SCOTIA
IN RESPONSE TO APPLICATION FOR LEAVE
PURSUANT TO SECTION 103.1 OF THE COMPETITION ACT**

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I. OVERVIEW - SCOTIABANK OPPOSES THIS APPLICATION FOR LEAVE

(a) Summary

1. The Bank of Nova Scotia ("Scotiabank") vigorously opposes this application pursuant to Section 103.1 of the *Competition Act* for leave to apply for orders under Sections 75 and 77 of the *Competition Act*.

2. The Applicants have failed to satisfy the grounds upon which leave might be granted under s. 103.1(7) of the *Competition Act*. There is no reason for the Tribunal to believe that the Applicants are directly and substantially affected in their business by any practice referred to in s. 75 or s. 77 of the *Competition Act*.

3. The Applicants, B-Filer Inc. ("B-Filer"), B-Filer Inc. doing business as GPay Guaranteed Payment ("GPay") and NPay Inc. ("NPay") are operating in conjunction with UseMyBank Inc. ("UseMyBank") as a single business enterprise under the direction and control of the Affiant on behalf of the Applicants, Raymond Grace.

4. The business enterprise of the Applicants is one for which Scotiabank is not prepared to allow its accounts and services to be used. The Applicants seek accounts and services which Scotiabank does not provide. Further, the Applicants seek those accounts and services on terms which Scotiabank does not offer, and which are not offered by any Canadian chartered bank. The manner in which the Applicants have caused accounts to be opened at Scotiabank, and their use of those accounts, violates numerous Scotiabank policies and rules and regulations by which Scotiabank is governed.

5. The following is a brief summary. The points made in this summary are expanded upon in these Representations and supported in further detail in the Affidavits of Robert Rosatelli and David Metcalfe, filed on behalf of Scotiabank:

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- (a) prior to April, 2004, the Applicants had opened only a single account at Scotiabank for the conduct of their combined business;
- (b) between April, 2004 and March, 2005, the Applicants caused to be opened a further 108 accounts at Scotiabank. The manner in which these accounts were opened was in violation of numerous Bank policies. Further, Mr. Grace made material misrepresentations upon which Scotiabank relied in permitting the accounts to be opened;
- (c) Scotiabank was not aware of the true nature of the Applicants' business until it undertook an investigation of the Applicants' business and accounts by reason of a complaint of fraud in the transfer of monies from a customer's account at another Schedule I Chartered Bank to a GPay account at Scotiabank in or about March, 2005;
- (d) as a result of the subsequent investigation, Scotiabank became aware that the Applicants' business was not as Scotiabank had understood it, but instead was an unregulated Money Services Business, which Scotiabank, as a matter of policy, does not permit its accounts to be used for. Further, the Applicants' business breaches numerous Bank policies and rules and gives rise to serious security concerns;
- (e) the primary purpose of the Applicants' business appears to be to facilitate the transfer of monies from the accounts of Bank customers in order to make payment for off-shore internet gambling. Off-shore internet gambling businesses give rise to concerns with respect to Money Laundering and Terrorist Financing. As a result, Scotiabank, and other Canadian chartered banks, do not permit their accounts to be used for such purposes;

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(f) further, in order to effect money transfers from bank customer accounts, the Applicants require Bank customers to disclose to the Applicants the customer's confidential passwords and card numbers, so as to permit the Applicants to access the customer's account directly. This contravenes the Bank's agreement with its customers, and raises vital concerns of Bank security. It also violates numerous rules and regulations by which Scotiabank is governed, such as Canadian Payments Association Rule E2.

6. For these reasons, in summary, Scotiabank cannot and will not allow accounts to be used by the Applicants on the terms which the Applicants desire. Hence, with reference to s. 75 of the *Competition Act*, there is no refusal to supply a product to the Applicants on usual trade terms. Rather, the Applicants seek a "product" or "service" on terms which are not available anywhere in the market and which are incompatible with Bank system security.

(b) Applicants' Money Transfer Methods Breach Bank Security

7. The Applicants effect the transfer of money from customers' accounts in two ways. Through both methods, the customer is required to breach security by disclosing his or her confidential bank card number and Internet banking password.

Reference: Affidavit of Robert Rosatelli, paras. 61 and 62

8. Using the first method, Scotiabank customers provide their confidential Internet pass card number and password to UseMyBank. The Applicants then enter into the customer's Scotiabank account as if it were the customer and cause money to be transferred from the customer's Scotiabank account to GPay as a bill payee. As with all bill payees, money that is directed to the bill payee on a given day is held in a Scotiabank suspension account until 8:30 p.m. each evening. The money is then released from the Scotiabank suspension account and directed to the

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bill payees' bank accounts. In the case of GPay, the money is directed to one of the Applicants' numerous accounts at Scotiabank. In the meantime, the Applicants transfer money from their current accounts at Scotiabank to the intended recipient, most often an off-shore casino.

Reference: Affidavit of Robert Rosatelli, para. 61 and 62

9. The second method by which money is transferred involves customers who bank at Banks other than Scotiabank. Here too, the banking customer is required by the Applicants to divulge his/her confidential bank card number and Internet password. The Applicants then enter the customer's Internet banking site and cause money to be e-mailed to the Scotiabank MoneyManager accounts held by the Applicants. From the MoneyManager accounts, money is then transferred to the Applicants' current accounts. In the meantime, the Applicants transfer money from their current accounts to the intended recipient, most often off-shore Internet casinos.

Reference: Affidavit of Robert Rosatelli, paras 61 and 62

(c) Termination of Banking Relationship with Applicants

10. By letters dated May 11, 2005 Scotiabank exercised its contractual right to terminate its banking relationship with the Applicants on 30 days notice.

Reference: Affidavit of Robert Rosatelli, paras. 111 to 114

11. The decision to terminate the Applicants as customers of the Bank had nothing to do with an attempt to reduce competition in the on-line direct purchase market. Instead, as a result of the investigations undertaken in March 2005, Scotiabank's decision to terminate related solely to the manner in which the Applicants' are conducting their business, including:

- (a) The Applicants require that customers of Scotiabank (and other Schedule 1 Banks) disclose their bank card number and security internet banking card

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password, contrary to the agreement between Scotiabank and its customers. Maintaining confidentiality with respect to a customer's online banking password is central to the security of the online banking system. By revealing their password, Scotiabank customers are exposing themselves to fraud in relation to their Scotiabank accounts, for which they would be liable as a result of the terms of the Cardholder Agreement between Scotiabank and its customers.

- (b) By reason of the disclosure of the customer's bank card and the internet banking password, the Applicants have the ability to, and do in fact, access customers' bank accounts directly and effect transfers of money from customers' accounts. By conducting business in this way, it is the Applicants, and not the banking customer, who are "authenticating" the transaction. This is in breach of the Rules of the *Canadian Payments Association*, and in particular, Rule E2.
- (c) The Applicants are facilitating bank customers' funding gambling accounts at off-shore internet casinos. It is illegal for a Canadian resident to place a bet with an off-shore online internet casino.
- (d) The way in which the Applicants operate their business, by effecting transfers from other customers' accounts through the use of the customers' online banking password raises serious concerns with respect to Money Laundering and the Financing of Terrorist Activities.

Reference: Affidavit of Robert Rosatelli, paras 139 to 144

12. The service that is being operated by the Applicants is materially different from the service that will be offered through Interac, which will allow Scotiabank customers, themselves, to purchase merchandise using the customer's own secure internet banking website. In contrast, the Applicants conduct their business by requiring disclosure of the customer's internet banking passwords so that the Applicants, not the customer, can effect transfers of funds directly from the customer's accounts.

Reference: Affidavit of Robert Rosatelli, paras 122 to 133

13. Scotiabank's termination of the banking relationship with the Applicants arose, as well, from the manner in which the Applicants caused their Scotiabank accounts to be opened, in breach of bank policy. In particular:

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- (a) The description of the Applicants' business in the original account-opening form in 1999 did not reflect the true nature of the business.
- (b) In less than one year, between April 2004 and March 2005, Raymond Grace caused a further 108 accounts to be opened in the name of the Applicants, for purposes of their combined business enterprise. He did so by material misrepresentations made at the time of the account openings.
- (c) It is contrary to Scotiabank policy for a "small business" customer to have so many accounts opened for a single business enterprise.
- (d) Due to the size of the Applicants' business, and the volume and monetary amount of transactions as indicated in Mr. Grace's own Affidavit, the Applicants do not qualify under Scotiabank policy as a "small business" and, therefore, are not entitled to the accounts to which they assert entitlement, in any event.

Reference: Affidavit of Robert Rosatelli, para 16

(d) Material Non-Disclosure in Affidavit of Raymond Grace

14. Raymond Grace, in his Affidavit filed on behalf of the Applicants' Application for Leave, has failed to disclose many obviously material facts. In particular:

- At no time does Mr. Grace disclose the true central method of operation of his business, which involves requiring banking customers to divulge their confidential internet password, so that the Applicants can effect transactions in the banking customer's accounts, just as if they were the customer.
- Contrary to the assertions made by Raymond Grace in his affidavit as to the business of GPay and NPay, an internet search of "UseMyBank" discloses that the majority of the business transacted by UseMyBank involves the transfer of funds to internet offshore gambling sites. Gambling at internet offshore sites is illegal in Canada. The involvement of Scotiabank's accounts in these transactions gives rise to concerns about Money Laundering and Terrorist Financing and imposes disclosure obligations on Scotiabank.
- In 2003, CIBC terminated GPay as an authorized bill payee to which CIBC customers could direct electronic bill payments. GPay complained to the Competition Bureau. The matter was investigated. In January 2004, GPay's complaint was dismissed. It is noteworthy, therefore, that beginning in April 2004, Mr. Grace embarked on a course of action involving multiple Scotiabank accounts, presumably to replace the business facility that had been closed by CIBC when GPay was terminated as a bill payee.
- The Applicants opened only one account at Scotiabank between 1999 and 2004. Between April 2004 and March 2005, a mere 11 months, Raymond Grace caused

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to be opened over 100 Scotiabank accounts in the name of GPay, NPay and B-Filer and caused over 20 ScotiaCards to be issued to these companies.

- The Applicants failed to reveal that they have also commenced a civil action in Alberta, and that this was done approximately ten days prior to the commencement of their Competition Tribunal application. This gives rise to concerns the Applicants are using the Competition Tribunal as part of their litigation strategy.

15. Scotiabank therefore submits that this Application should be dismissed, with costs.

II. THE PARTIES

16. The Bank of Nova Scotia ("Scotiabank") is one of Canada's major Schedule I chartered banks. Scotiabank began serving customers in the Halifax area in 1832. Since that time, Scotiabank has grown to one of the largest Banks in Canada, with branches and offices in 50 countries and 48,000 employees worldwide.

Reference: Affidavit of Robert Rosatelli, paras. 4 and 5

17. As one of Canada's Schedule I Banks, Scotiabank is regulated by the *Bank Act*. Schedule I Banks, including Scotiabank, must meet strict regulatory requirements. Scotiabank's principal regulators in Canada are the Office of the Superintendent of Financial Institutions, the Financial Consumer Agency of Canada, and the Canadian Deposit Insurance Corporation. Scotiabank is also subject to laws of general application within Canada, including but not limited to the *Canadian Payments Act*, the *Competition Act*, the *Criminal Code*, the *Personal Information Protection and Electronic Document Act*, and the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act*.

Reference: Affidavit of Robert Rosatelli, paras. 6 to 9

18. One of Scotiabank's paramount responsibilities is to keep customers' financial and personal information secure. The confidentiality of each customer's electronic signature, which

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includes the customer's PIN and Internet banking password, is one of the cornerstones to protecting the electronic banking system from fraud and thereby maintaining customer confidence in the system.

Reference: Affidavit of Robert Rosatelli, para. 10

19. Raymond Grace is the President of NPay and B-Filer. B-Filer carries on business as GPay. NPay, GPay, and UseMyBank are operating as a single business enterprise, operating as a Money Services Business. By using customers' Internet banking passwords, the Applicants effect transactions from banking customers' accounts to the Applicants' accounts at Scotiabank. The Applicants then transfer money to the intended recipient, most often to off-shore internet casinos.

Reference: Affidavit of Robert Rosatelli, paras. 11 to 13; 35 to 40; 41 to 45

20. Between April 2004 and March 2005, Raymond Grace caused to be opened over 100 bank accounts and caused to be issued over 20 ScotiaCards to NPay, GPay, and B-Filer.

Reference: Affidavit of Robert Rosatelli, paras. 18 to 30

21. Scotiabank launched an investigation in March 2005, prompted by a customer from another Schedule I Bank complaining that monies from her account had been fraudulently transferred to the account of GPay at Scotiabank. Investigations by members of Scotiabank's fraud section and others revealed the true nature and extent of Raymond Grace's business enterprise.

Reference: Affidavit of Robert Rosatelli, para. 57 to 59

22. By letter dated May 11, 2004, Scotiabank exercised its contractual right to terminate the banking relationship with NPay, GPay, and B-Filer on 30 days' notice. Scotiabank has substantial business reasons for terminating its banking relationship with the Applicants.

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Contrary to the Applicants' allegations, Scotiabank was in no way motivated by a desire to restrict competition in the electronic online purchase business. Rather, it is the multiple breaches of Bank policy and serious concerns about security of customer accounts which form the basis of Scotiabank's decision to cease doing business with NPay, GPay, and B-Filer.

Reference: Affidavit of Robert Rosatelli, paras 111 to 116; 139 to 144

III. THE FACTS

(a) Opening of Accounts by Applicants in Breach of Scotiabank Policy

23. In August 1999, Raymond Grace approached the Scotiabank branch located in Sherwood Park, Alberta to establish a small business banking relationship with respect to his company B-Filer Inc., carrying on business as GPay. In the Application for Business Banking Services signed by Mr. Grace dated August 6, 1999, he described GPay as a "financial collection" business, with annual sales/revenue of \$240,000 per year. The company was identified as having three employees.

Reference: Affidavit of Robert Rosatelli, paras. 18 and 19

24. The statements made by Mr. Grace with respect to the business account opened on behalf of GPay in August 1999 were, and are, materially inaccurate. Based on its investigation, Scotiabank has discovered that GPay is not a "financial collection" business as asserted by Mr. Grace in his original Application for Business Banking Services. Rather, it is a Money Services Business.

Reference: Affidavit of Robert Rosatelli, paras. 19 and 40

25. As will be described in more detail, Scotiabank refuses to do business with Money Services Businesses. When one of its banking customers is found to be conducting an

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unregulated Money Services Business, Scotiabank takes steps to terminate the business banking relationship.

Reference: Affidavit of Robert Rosatelli, para. 40

26. Moreover, the suggested annual sales/revenue of \$240,000 is completely out of keeping with what Mr. Grace now asserts to be the volume of transactions he intends to flow through the 108 Scotiabank accounts he opened between April 2004 and March 2005. In his own Affidavit, he states that the Applicants flowed almost \$10 million through the Scotiabank accounts in the year beginning June 2004. Further, they intend to flow through almost \$35 million in the year beginning June 1, 2005.

Reference: Affidavit of Robert Rosatelli, paras. 18 and 19; 54
Affidavit of Raymond F. Grace, paras. 12 and 54

27. After opening the single account for GPay in August 1999, no further accounts were opened by Mr. Grace on behalf of any business enterprise until April 2004. Beginning in April 2004 and continuing until March, 2005, Mr. Grace caused over 100 accounts to be opened in the name of GPay, NPay, and B-Filer, and over 20 ScotiaCards to be issued to these entities.

Reference: Affidavit of Robert Rosatelli, paras 18 to 34

28. Most of the bank accounts were opened by Mr. Grace through utilization of Scotiabank's telephone banking system. Whenever someone opens an account through telephone banking, the customer is asked: "Will this account be used to conduct business by, or on behalf of, someone other than the named account holder(s)?" Mr. Grace answered these questions in the negative. Scotiabank now knows that these answers were untrue, as described more fully below.

Reference: Affidavit of Robert Rosatelli, paras. 19 to 32

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29. The opening of Scotiabank accounts by the Applicants, as summarized above and as more fully described in the Affidavit of Robert Rosatelli, violates Scotiabank policies in a number of respects. Although the accounts were opened in the names of three different entities, in fact Mr. Grace is running a single business enterprise. It is not permissible for customers to circumvent Scotiabank's small business guidelines by utilizing multiple corporations that in fact are engaged in a single business enterprise. In any event, even taking into account the three separate entities, Mr. Grace's number of accounts, transaction volumes, the monetary amounts of the transactions, and the number of ScotiaCards applied for and granted, far exceed what is permitted by Bank policy.

Reference: Affidavit of Robert Rosatelli, paras. 89-96

30. Pertinent Scotiabank policies that are transgressed by Mr. Grace's account openings are:

- (a) Any small business is permitted no more than three business accounts;
- (b) No more than 150 transactions per month are permitted in each account;
- (c) Only up to 50 cheques may be deposited per month in each of the permitted 3 accounts;
- (d) The total monthly deposit volume is \$400,000, or \$5 million per year;
- (e) Only one full function ScotiaCard can be issued per authorized officer of a company.

As is readily seen, all of the foregoing Scotiabank policies were violated by the opening of Mr. Grace's accounts.

Reference: Affidavit of Robert Rosatelli, paras. 90 to 94

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(b) **The Inter-Related Business of UseMyBank, NPay Inc., GPay and B-Filer**

31. According to NPay's website:

NPay in conjunction with GPay and UseMyBank provide an Internet on-line banking processing service.

A search of UseMyBank's website demonstrates that Raymond Grace is the CFO of UseMyBank. A Google search of UseMyBank revealed that the overwhelming business of UseMyBank and, therefore, GPay and NPay, relates to transferring funds from customers' accounts to GPay's and NPay's accounts at Scotiabank, which money is then remitted out to off-shore Internet casinos. This allows Canadian banking customers to maintain anonymity, while at the same time engaging in the illegal placing of bets at off-shore Internet casinos.

Reference: Affidavit of Robert Rosatelli, paras. 35 to 40

32. No where in his affidavit does Mr. Grace disclose that the true and dominant business of the Applicants is to facilitate on-line gambling transactions with off-shore Internet casinos. Had this been disclosed at any time, Scotiabank would have ceased doing business with the Applicants. As a matter of policy, Scotiabank does not permit its accounts to be used for such purposes.

Reference: Affidavit of Robert Rosatelli, paras. 50

33. Mr. Grace claims in his affidavit that the Applicants are engaged in "real-time" money transfers. Based on what Scotiabank has discovered about how these businesses operate, this is not an accurate statement. Instead, the Applicants are able to confirm that money has been taken out of a bank customer's account because the Applicants themselves effect the transaction in the customer's account, just as if they were the customer. Knowing that they have transferred the required funds from the customer's account, funds can then be transferred immediately from the

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Applicants' account at the Scotiabank to the intended recipient. As noted above, the recipients appear most often to be off-shore internet casinos.

Reference: Affidavit of Robert Rosatelli, para. 41 to 50; 65 to 66.

34. In reality, the Applicants' business is more akin to a traditional money transfer business, except that Mr. Grace has devised a way to shrink the usual time needed to receive confirmation that the money is available in the customer's account and that the transfer has been effected, because the Applicants are undertaking the transfer from the customer's account themselves.

Reference: Affidavit of Robert Rosatelli, para. 133

(c) **Applicants' Operation Violates Bank Security and Bank Policy**

35. Money Services Businesses, such as the Applicants, provide services of money transmission. Provision of financial services to such businesses poses a significant risk to the Banks that deal with them. Most Canadian Banks have discontinued servicing Money Services Businesses for this reason. Since 2003, as a matter of policy, Scotiabank has refused to do business with unregulated Money Services Businesses, such as the Applicants. When Scotiabank discovers that one of its existing customers is operating an unregulated Money Services Business, steps are taken to terminate the banking relationship.

Reference: Affidavit of Robert Rosatelli, paras. 51 to 56

36. Many of the activities of organized crime such as drug trafficking, money laundering, and enterprise crime offences are financed by illegal gaming profits. The 9/11 Commission noted the need to crack down on illegal Internet gambling. The 9/11 Commission strongly urged that financial institutions be barred from processing Internet gambling transactions.

Reference: Affidavit of Robert Rosatelli, para. 47 and 48

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37. The Applicants are facilitating transfers of money to off-shore Internet casinos. As a matter of policy, Scotiabank refuses to have its accounts used for such a purpose. An extensive Google search disclosed only a single legitimate merchant of services affiliated with UseMyBank. That is the Princess Margaret Hospital, which allows individuals to donate money using the UseMyBank service. All the other business associated with UseMyBank are Internet gambling casinos. This is not disclosed by Mr. Grace in his affidavit on this Application.

Reference: Affidavit of Robert Rosatelli, paras 56; 41 to 47

38. On its website, UseMyBank states that the use of its service to transfer money is "not much different" from paying bills on line. This is not accurate. There is one crucial and central difference, namely, that banking customers are required to disclose their bank card number and Internet password when they use UseMyBank, whose services are facilitated by GPay and NPay. UseMyBank acknowledges in its Terms and Conditions that banks may prohibit disclosure of Log-in Information or deny liability to the customer where Log-in Information is disclosed. UseMyBank asserts a complete waiver of liability for UseMyBank and anyone connected with it, with the result that UseMyBank, NPay and GPay purport to protect themselves from all manner of liability, including in the event that fraud occurred in the customer's account as a result of actions taken by these entities.

Reference: Affidavit of Robert Rosatelli, paras. 67 to 73

39. Representations made by UseMyBank on its website, on its behalf and on behalf of GPay and NPay, are materially misleading. In particular, despite its assertions to the contrary, UseMyBank does not comply with the *Canadian Code of Practice for Consumer Debit Card Services*. This Code is premised on banking customers keeping their electronic banking passwords confidential and not disclosing them to any third party.

Reference: Affidavit of Robert Rosatelli, paras. 74 to 76

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40. Moreover, UseMyBank makes bald assertions about "Security" in its website. However, the "Security Certificate" which UseMyBank asserts "keeps [banking customers'] information secure" expired on April 13, 2005.

Reference: Affidavit of Robert Rosatelli, paras. 77 to 79

41. Mr. Grace acknowledged in a taped conversation with a Scotiabank telephone banking representative that "there are no secure databases". Mr. Grace asserted during this tape recorded telephone conversation that his company takes "screen scrapes" of customers' Internet banking screens including their account information, and that these are later "scrubbed", so that his system is secure. This is not so. If "screen scrapes" are taken of a customers' banking information, they are saved somewhere. Screen scrapes never really "disappear". They remain on the hard drive of the NPay and GPay computer system. As a result, even if Mr. Grace cannot continue to see the confidential password information on the computer screen, the information remains available and accessible on the computer's hard drive.

Reference: Affidavit of Robert Rosatelli, paras. 79, Exhibit "M"

42. David Metcalfe, an employee of The Bank of Nova Scotia, entered into a transaction whereby he was requested to and did provide UseMyBank with a confidential bank card number and secret internet password to make a donation to Princess Margaret Hospital. He used a "dummy" account so as not to divulge his own banking information. Mr. Metcalfe printed out the computer screens from each step of the process. He was able to confirm that the Applicants are entering onto the customer's Internet banking site, using the customer's internet password, and effecting the transfer out of the customer's bank account to a Scotiabank account held by the Applicants.

Reference: Affidavit of David Metcalfe, paras. 4 to 13

43. The bank card and password information is stored, and could be used in order to effect a fraudulent transaction by either a rogue employee of the Applicants or a sophisticated computer hacker.

Reference: Affidavit of Robert Rosatelli, paras. 79
Affidavit of David Metcalfe, paras. 13 and 14

44. Breaches of computer security are a substantial problem and are undermining consumers' faith in the electronic commerce system. On July 6, 2005, the *Globe and Mail* reported:

In the past few weeks, several major breaches of consumer financial data have come to light. In one instance, 40 million credit card accounts were exposed to a breach and at least 200,000 records were stolen from Atlanta-based CardSystems Solutions Inc., which processes credit card and other payments for banks and merchants across North America. Further, Equifax Canada Inc., the credit reporting company, revealed that it had suffered a security breach that gave criminals access to personal financial information for hundreds of Canadians.

...

Getting a handle on the number of attacks is difficult because many businesses don't report them for fear of hurting their reputations ...

Reference: Affidavit of Robert Rosatelli, para. 81

(d) Applicants' Operation Causes Bank Customers to Breach their Agreement with the Bank and Exposes Customers to Fraud

45. One of Scotiabank's paramount priorities is the maintenance of a secure banking system that minimizes the risk of fraud and maintains confidentiality of customer information. High security standards are essential in order to maintain the integrity of the Canadian banking system. Any process which undermines security for Canada's banking customers undermines the integrity of the Canadian banking system.

Reference: Affidavit of Robert Rosatelli, para. 83

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46. To require Canadian banking customers to divulge their confidential Internet banking password to UseMyBank, and to allow NPay and GPay to enter into customers' secure Internet banking sites and undertake and perform account transactions as if they were the customer, undermines the security of the customer's account not only with respect to Scotiabank, but with respect to all Banks whose customers are using these services.

Reference: Affidavit of Robert Rosatelli, para. 83

47. The Cardholder Agreement between Scotiabank and its customers prohibits customers from disclosing their electronic signatures. By requiring bank customers to divulge their confidential access codes and passwords, the Applicants are inducing breach of contract between Scotiabank and its banking customers. They are exposing Scotiabank's customers to the possibility of fraud.

Reference: Affidavit of Robert Rosatelli, para. 84 to 86

48. In his Affidavit, Mr. Grace says that 20,000 Canadian banking customers have used UseMyBank's services. It follows from this that 20,000 Canadians have divulged their Internet banking password and pass card information to UseMyBank. This information is stored somewhere in UseMyBank's computer system. Mr. Grace asserts in his Affidavit that NPay and GPay flowed almost \$10 million through Scotiabank's accounts in the 12-month period beginning June 1, 2004, and will flow through almost \$35 million in the 12-month period beginning June 1, 2005.

Reference: Affidavit of Robert Rosatelli, para. 88

49. It is not an exaggeration to state that, by obtaining the Internet passwords from individuals using UseMyBank, it would be possible for a fraud on the Canadian banking public to occur. The system these entities have established provides unfettered access to these accounts

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giving the power to transfer all of the money out of customers' accounts who have divulged their passwords, and to access additional funds through lines of credit and by way of credit card cash advances which are connected to a customer's bank card.

Reference: Affidavit of Robert Rosatelli, para. 87

(e) **GPay Cannot meet Scotiabank's "Usual Trade Terms" with respect to Business Accounts**

50. Mr. Grace is operating his companies using Scotiabank small businesses accounts.

Scotiabank's small business accounts were never intended to be used in the manner or for the purpose for which they are being used by Mr. Grace and his business enterprise. In particular:

- (a) electronic banking for business is designed for small business customers with low transaction and deposit volumes, whose annual sales do not exceed \$5 million;
- (b) an individual small business is permitted no more than 3 business accounts;
- (c) no more than 150 transactions per month are permitted in each business account;
- (d) the total monthly deposit volume for small business accounts is \$400,000, or a maximum of \$5 million per year; and
- (e) only one full function ScotiaCard will be issued per authorized officer of a company.

Reference: Affidavit of Robert Rosatelli, paras. 89 to 92

51. These terms for Scotiabank small business accounts are to be contrasted with the situation that has developed in recent months with respect to GPay, NPay, and B-Filer.

Mr. Grace has opened well over 100 bank accounts with Scotiabank and caused over 20 ScotiaCards to be issued for the Applicants.

Reference: Affidavit of Robert Rosatelli, para. 21 and 34

52. Mr. Grace asserts that he deposited almost \$10 million in his Scotiabank accounts between June 1, 2004 and May 31, 2005. He also asserts in his Affidavit that there will be a

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341% increase in the volume of deposits in the next 12 month period, i.e., an anticipated flow through of funds totalling almost \$35 million using Scotiabank's accounts.

Reference: Affidavit of Robert Rosatelli, para. 94

53. Mr. Grace is running a single business enterprise under the names of GPay, B-Filer, and NPay. Scotiabank considers this to be one small business. Customers cannot circumvent the Small Business Banking Terms by using multiple corporations that undertake the same business, or as part one overall business enterprise. The Applicants' number of accounts, transaction volumes, and the number of ScotiaCards far exceed what is permitted by Bank policy for small business accounts.

Reference: Affidavit of Robert Rosatelli, para. 96

(D) **Applicants are in Breach of The Canadian Payments Association Rules for Clearing and Settlement**

54. By requiring disclosure of customers' Internet banking passwords, UseMyBank, GPay and NPay are also in direct contravention of the Rules of the Canadian Payments Association (the "CPA"). The CPA was created by the Parliament of Canada in 1980. The statutory objects of the CPA are to establish and operate a national system for clearing and settlement of payments and other arrangements for the making or exchange of payments. The *Canadian Payments Act* gives the CPA Board of Directors authority to make Rules respecting payment items acceptable for exchange, clearing or settlement. These Rules have the effect of law. All Canadian Schedule I Banks, including Scotiabank, are members of the CPA and are bound by the CPA Rules.

Reference: Affidavit of Robert Rosatelli, para. 97 to 100

55. The process through which Schedule I Banks and other CPA members exchange payment items, whether in paper or by electronic means, is referred to as "clearing". Flows of value in one direction are netted against flows of value in the opposite direction. The financial

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institutions involved, including Scotiabank “settle” the net amounts through their accounts at the Bank of Canada. The process of Clearing and Settlement are central to the operation of the national payments system. The Automated Clearing Settlement System (“ACSS”) is a system through which the vast majority of payment items in Canada – more than 17 million on an average day – are cleared.

Reference: Affidavit of Robert Rosatelli, para. 101

56. A new CPA Rule to support the clearing and settlement of on-line purchases came into effect on February 3, 2005 (“Rule E2”). The CPA’s website states that the new Rule E2 will facilitate the introduction of on-line payment services by service providers, working with CPA member financial institutions, and will allow customers to pay for purchases directly from their bank accounts via the Internet. The CPA states:

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.

Reference: Affidavit of Robert Rosatelli, para. 105

57. A fundamental requirement under Rule E2 is that the banking customer’s financial institution is responsible for directly authenticating the customer (through the customer’s on-line banking user ID and password) and obtaining the banking customer’s personal authorization for each on-line payment.

Reference: Affidavit of Robert Rosatelli, para. 106

58. Rule E2 sets out the requirements for the Exchange, Clearing and Settlement of on-line, real-time electronic payment items. Scotiabank is bound by the CPA Rules, including Rule E2, with respect to the clearing and settlement of on-line payments. Section 5(a) of Rule E2 states:

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In all matters relating to the Exchange, Clearing and Settlement of On-line Payment Items for the purpose of Clearing and Settlement each Member [which includes the Bank of Nova Scotia] shall respect the privacy and confidentiality of the payor [banking customer] and the payee [GPay, NPay Inc. and/or B-Filer Inc.] 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 Items is to be made available to the Acquirer and/or the Payee [NPay, GPay, NPay Inc. and/or B-Filer Inc.] during a session. For greater clarity, the Payor's [the banking customer'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. [emphasis added]

Reference: Affidavit of Robert Rosatelli, para. 108

59. The Applicants' manner of doing business, which is premised on the customer disclosing his or her on-line banking password, is in direct contravention of Rule E2. By requiring banking customers to divulge their password information, it is not the banking customer that is "authenticating" him or herself by entering the website and using his/her secret password. Instead, it is GPay and/or NPay that purports to be "authenticating" the transaction.

Reference: Affidavit of Robert Rosatelli, para. 109

60. For any banking transaction, Scotiabank's usual trade terms include compliance with the CPA Rules. The CPA Rules require that the customer authenticates him or herself during an on-line transaction, and not a third party such as GPay, NPay, or B-Filer. By reason of CPA Rule E2, transfers of money into the Applicants' Scotiabank accounts are not eligible for clearing where the customer's confidential on-line banking passwords have been used by the Applicants to effect the transaction.

Reference: Affidavit of Robert Rosatelli, paras. 108-110

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(g) Applicants' Business Raises Serious Money Laundering Issues

61. Off-shore Internet gambling is illegal in Canada. It is illegal for a Canadian resident to place a bet with an on-line off-shore Internet gambling provider.¹ Off-shore Internet gambling is known to be associated with other illegal activities including drug trafficking and money laundering.

Reference: Affidavit of Robert Rosatelli, para. 46 to 48

62. The bulk of UseMyBank's business involves money transfers to Internet off-shore casinos from the bank accounts of Canadian citizens. UseMyBank, and its affiliated entities NPay and GPay, are the entities that "authenticate" the e-mail money transfer by entering directly into the customer's Internet banking site, removing funds from the customer's account, and ultimately funding Internet gambling.

Reference: Affidavit of Robert Rosatelli, para. 49

63. As a matter of policy, Scotiabank will not participate in the transfer of funds between customers and Internet gambling sites, either directly or indirectly through an intermediary such as NPay or GPay.

Reference: Affidavit of Robert Rosatelli, para. 49 and 56

64. Mr. Grace's business enterprise gives rise to many concerns with respect to Money Laundering. For example, money is being transferred from customers' accounts at other Banks to the MoneyManager accounts held by NPay, GPay, and B-Filer at the Scotiabank. This money is transferred out to Internet casinos. According to Mr. Grace, almost \$10 million flowed

¹ The Federal Government regulates gaming in Canada through Sections 201 to 208 of the *Criminal Code*. Internet lotteries in Canada are illegal unless they are operated by a Provincial government exclusively within the province. Moreover, pursuant to Section 202(1)(c) of the *Criminal Code*, it is an offence for anyone to have "under his control any money or properties relating to a transaction that is an offence under [Section 202]". Offences under Section 202 include engaging in the business of betting.

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through Scotiabank accounts in this manner between June 1, 2004 and May 31, 2005. Mr. Grace states that almost \$35 million will flow through Scotiabank accounts in the above-described manner during the 12 month period beginning June 1, 2005.

Reference: Affidavit of Robert Rosatelli, paras. 52 to 55

65. While the following list is not meant to be exhaustive, the manner in which GPay, NPay and B-Filer conduct their business gives rise to the following concerns on the part of Scotiabank:

- (a) Money Services Businesses in Canada have not been subject to regulatory oversight and are not required to be licensed or registered with the government in any way. While they are required to comply with Canada's *Proceeds of Crime (Money Laundering) and Terrorist Financing Act*, and its regulations, it is very difficult for Scotiabank to be satisfied that Money Services Businesses are, in fact, compliant.
- (b) Money Services Businesses have become an attractive means for money launderers or terrorists to move money outside the traditional financial services industry. They represent a high risk for Banks and are difficult to monitor effectively.
- (c) Money Services Businesses, particularly those that concentrate on internet payments, are often used to maintain anonymity for individuals who are purchasing illegal goods or services over the internet.
- (d) Scotiabank would be exposed to significant regulatory and reputational risk if it were determined that it was facilitating money laundering or terrorist financing by enabling the movement of money for a Money Services Business, such as GPay, NPay, B-Filer, and UseMyBank.

Reference: Affidavit of Robert Rosatelli, para. 55

(h) **Scotiabank's Notice to Terminate its Banking Relationship with the Applicants**

66. As a result of Scotiabank's investigation undertaken in March 2005 due to the report of fraud from another Schedule I Bank, Scotiabank advised NPay, GPay, and B-Filer by letter dated May 11, 2005 that it would be terminating its banking relationship with them.

Reference: Affidavit of Robert Rosatelli, para. 411

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67. The Business Banking Services Agreement gives Scotiabank the right to terminate any banking service with its customer on 30 days' notice, for any reason. Scotiabank chose not to rely on the section of the Agreement permitting immediate termination, because to do so would have required Scotiabank to divulge the reasons for terminating the relationship "with cause". Scotiabank elected not to rely on the "with cause" section of the Agreement so as to maintain confidentiality over its fraud detection system and the specifics of the investigation.

Reference: Affidavit of Robert Rosatelli, para. 112 to 119

68. The Bill Payment Agreement with GPay also allows Scotiabank to terminate GPay's status as a bill payee on 30 days' notice, for any reason.

Reference: Affidavit of Robert Rosatelli, para. 115

69. Mr. Grace alleges in paragraph 48 of his Affidavit that Scotiabank knowingly allowed GPay to build its business. This could not be further from the truth. Mr. Grace misrepresented the nature of his business when filling out application forms to open his accounts. He was not forthright in answering questions posed to him by telephone banking personnel when opening accounts using telephone banking. He opened over a hundred accounts between April 2004 and March 2005. Prior to April 2004, Mr. Grace had only one business account at Scotiabank. Scotiabank did not know the true nature of Mr. Grace's business enterprise until it began investigating matters in March 2005. It was this investigation that culminated in the letter terminating the accounts on May 11, 2005.

Reference: Affidavit of Robert Rosatelli, para. 120

70. In addition to its contractual right to terminate its Agreements with the Applicants for any reason on 30 days' notice, Scotiabank acted on the basis of investigations commenced in March 2005, which revealed the true nature of Raymond Grace's business enterprise as a Money

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Service Business. Scotiabank's investigations revealed, *inter alia*, that cardholders are required by the Applicants to disclose their confidential internet banking passwords; that the Applicants have engendered multiple breaches of Bank policy with respect to the number of accounts and volume of transactions; that the Applicants' business causes serious Money Laundering issues; and that the Applicants' core money transfer operation causes breaches of CPA Rule E2.

Reference: Affidavit of Robert Rosatelli, para. 121

(i) **The Interac System is Materially Different than the Applicants' Business and is not in Competition with it**

71. Interac Association ("Interac") was founded in 1984 by five financial institutions, including Scotiabank.

Reference: Affidavit of Robert Rosatelli, para. 122

72. A review of Interac's website provides the following information:

- (a) Interac is a national organization linking enterprises that have proprietary networks. This allows the enterprises to communicate with each other for the purposes of exchanging electronic financial transactions.
- (b) Any company incorporated in Canada is eligible to join Interac.
- (c) Interac is an unincorporated, not-for-profit association.

Reference: Affidavit of Robert Rosatelli, para. 123

73. Security of the Interac system is fundamental to maintaining its integrity. Historically, Interac operated through the use of the customer's PIN. This is in contrast to the customer's Internet banking password which customers use when performing transactions via the internet using their Bank's website. The PIN and the Internet banking password are known as the customer's "electronic signature".

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Reference: Affidavit of Robert Rosatelli, para. 124

74. Whether a customer is accessing the Interac system at a bank machine operated by an entity other than the individual's own Bank, or at a point-of-sale terminal with a merchant, it is the customer that "authenticates" the transaction by using his or her own PIN. Consumers accessing Interac through bank machines or point-of-sale terminals are reminded to "protect your PIN".

Reference: Affidavit of Robert Rosatelli, para. 125

75. Scotiabank, along with Bank of Montreal, Royal Bank, CIBC, and TD Canada Trust have recently begun to offer banking customers the option of "e-mailing money" through the customer's own secure Internet banking site.

Reference: Affidavit of Robert Rosatelli, para. 126

76. In order to access the ability to "e-mail money" using the Interac network, the banking customer would log on to their usual online banking site. The customer chooses an icon on the banking site indicating "send Interac e-mail money transfer". An e-mail message is sent to the recipient. The receiver clicks on a link to accept the deposit. It is important to note that only e-mail notification travels over the internet. Money does not. Instead, it is transferred through the existing payment networks that Banks have used for years to settle cheques from bank machine deposits and withdrawals between the Banks. This is described elsewhere herein as the process of "clearing" and "settlement".

Reference: Affidavit of Robert Rosatelli, para. 127

77. E-mail money transfer using the customer's own Bank's website is secure. The customer is not required to divulge his/her "electronic signature" to a third party. It is the customer that is "authenticating" him or herself when they log on and use their internet password to transfer

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money. Personal authentication by the customer is essential in order for the banks to clear and settle the accounts between them as a result of transfers under CPA Rule E2. CPA Rule E2 does not allow third parties such as NPay, GPay, or UseMyBank to "authenticate" the transaction by having access to the customer's internet banking password. Where a third party has effected the transfer of funds using the customer's Internet banking password, Scotiabank would not be permitted to "clear" and "settle" the amounts under Rule E2 of the CPA Rules.

Reference: Affidavit of Robert Rosatelli, para. 128

78. Scotiabank, along with other chartered banks, is about to implement a means by which banking customers can purchase merchandise from on-line merchants using the Interac system. The fundamental difference between the Interac system and the business of GPay and NPay is that there is no disclosure of confidential customer information to third parties when using the Interac system.

Reference: Affidavit of Robert Rosatelli, para. 129

79. A further significant difference is that, whereas transfers to off-shore on-line casinos appears to be the majority of the Applicants' business, the Interac service will not be available on Internet gambling sites.

Reference: Affidavit of Robert Rosatelli, para. 129

80. A further significant difference between the service offered through Interac and the Applicants' business is that the Interac System allows Scotiabank customers to purchase products. The only information that is exchanged between the customer and the merchant is an e-mail notification that the transaction has been confirmed. There is no transfer of funds. Instead, funds are settled through the clearing and settlement system through the Bank of Canada that has been in place for years.

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Reference: Affidavit of Robert Rosatelli, para. 130

81. In contrast, NPay and GPay are acting as transferors of funds. The Applicants are not selling a product. Money is actually being transferred between the banking customer and Applicants, and then being transferred again between the Applicants and the entity receiving the money, which appears most often to be an Internet casino. Thus, GPay and NPay are acting as a settlement system but without the necessary regulation in place to monitor this activity and enforce security standards. This is in contrast to the heavily regulated clearing and settlement system used by the chartered banks through the Bank of Canada.

Reference: Affidavit of Robert Rosatelli, para. 131

82. As a result, Scotiabank, through the Interac on-line system, will not be in competition with the Applicants. The Applicants' business appears to be primarily connected with Internet gambling. Scotiabank will have no involvement in transferring money to Internet casinos.

Reference: Affidavit of Robert Rosatelli, para. 132

83. Moreover, Scotiabank will not be in competition with the Applicants because the Interac system actually allows customers to purchase merchandise, whereas customers interfacing with GPay and NPay are simply effecting a transfer of money between themselves and Raymond Grace's business enterprise. Customers are not purchasing any goods or services from the Applicants.

Reference: Affidavit of Robert Rosatelli, para. 133

84. Contrary to the assertions made by Raymond Grace, the Applicants' business is not "real-time" money transfers. Instead, the transactions are happening in quick succession. Banking customers' funds are being transferred to the Applicants' MoneyManager accounts at Scotiabank. Because the Applicants can confirm that this transaction has occurred, money is

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then being transferred out of the Applicants' operating accounts at Scotiabank to the intended recipients, most often Internet casinos.

Reference: Affidavit of Robert Rosatelli, para. 34

85. Interac's website invites any Canadian company to apply to be a member of Interac. Raymond Grace could make such an application on behalf the Applicants with the result that it could participate in the Interac network, without customers being required to divulge their Internet banking password. If the Applicants met Interac's terms of use, they would be permitted to "compete" through the regulated, secure system of Interac which does not require customers to breach their cardholder agreement and does not result in a third party acting as if it were the customer in "authenticating" a transaction.

Reference: Affidavit of Robert Rosatelli, para. 123

(j) **Conclusion**

86. Scotiabank's decision to terminate its banking relationship with GPay, NPay and B-Filer was in no way motivated by a desire to lessen competition. It was the result of legitimate and well-founded concerns about security of customer information and the fundamental nature of the Applicants' business. The way in which the Applicants conduct their business gives rise to serious concerns about Money Laundering, breaches of Rule E2 of the CPA Rules, and breaches of numerous bank policies, including a policy against facilitating Money Services Businesses, and the fact that the Applicants cannot meet Scotiabank's Small Business Banking Terms.

Reference: Affidavit of Robert Rosatelli, paras. 139-144

IV. SUBMISSIONS

(a) The Test for Leave to Commence a Private Application

87. The test for leave to commence a private application under section 103.1 was recently affirmed by the Federal Court of Appeal in *Symbol v. Barcode*.² The Tribunal must be satisfied that the leave application is:

- (a) 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
- (b) that the practice in question could be subject to an order.

88. Moreover, the Tribunal must also be satisfied that there is sufficient credible evidence with respect to each of the conjunctive statutory conditions under sections 75 or 77 of the *Competition Act*. According to the Federal Court of Appeal in *Barcode*:

...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 the purposes of obtaining an order under s. 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 practice of refusal to deal must be shown before the Tribunal may take an order are those set out in s. 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 s. 103.1(7). That is because, unless the Tribunal considers all the elements of the practice set out in s. 75(1) on the leave application, it could not conclude, as required by s. 103.1(7), that there was reason to believe that an alleged practice could be subject to an order under s. 75(1).³

89. The Applicants' submissions with respect to the test for leave are misleading and, in fact, inaccurate. At paragraphs 60 – 61 of their Notice of Application, the Applicants make the submission that it is only the first branch of the above-noted test that they must satisfy on a leave

² *Symbol Technologies Canada ULC v. Barcode Systems Inc.* (2004), 34 C.P.R. (4th) 481 at para. 16 (Fed. C.A.) per Rothstein J.A. ("*Barcode*")

³ *Barcode*, supra, para. 18

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application. In so doing, the Applicants cite the decision of the Competition Tribunal in *Barcode Systems Inc. v. Civil Technologies Canada ULC*. The Applicants fail to point out that the Tribunal's decision in *Barcode* was reversed on appeal to the Federal Court of Appeal.

(b) The Test for Leave Has Not Been Met

90. It is submitted that the Applicants have wholly failed to satisfy the test for leave to make an application, as above defined. There is no reason for the Tribunal to believe that the Applicants are directly and substantially affected in their business by any practice referred to in s. 75 or s. 77 of the *Act* that could be subject to an Order under either of those sections.

91. In particular:

- (a) the Applicants are not affected in their business due to an inability to obtain adequate supplies of a product in the market on usual trade terms. Rather:
 - (i) the Applicants seek to define and be granted a product that is not available in the market at all. The Applicants' "product" requires that they be given access to and allowed to use a bank customer's confidential password and code, in violation of numerous Bank policies and regulations;
 - (ii) the Applicants cannot and do not wish to meet the "usual trade terms" of products that are available from Scotiabank, and other Canadian Schedule I Chartered Banks;
- (b) the Applicants' inability to obtain the "product" they desire is not because of insufficient competition among suppliers in the market. Rather, the "product" which the Applicants seek is not available in the market at all. No Canadian Schedule I Chartered Bank will provide accounts and services to the Applicants on the terms that they seek. The Applicants seek "products" and "terms" that, for valid and important reasons, are not available in the market at all;

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- (c) the Applicants are not willing and able to meet the usual trade terms of suppliers of the product. Rather, as above-stated:
- (i) the Applicants seek a "product" that no Canadian chartered bank does, or can, make available to business customers;
 - (ii) the Applicants are not "willing and able to meet the usual trade terms" of products that are available from Canadian chartered banks; again, as above-stated, the Applicants seek a different product, on different terms neither of which is available in the market;
- (d) the "product" sought by the Applicants is not in ample supply in the Canadian financial services market. Rather, it is not available at all;
- (e) there is no "refusal to deal" by Scotiabank. The source and cause of the Applicants' complaint arise from their own illicit manner of doing business, which is in breach of numerous Bank policies and regulations which bind the Bank, which are not dissimilar to those binding other Canadian Chartered Banks.

92. Moreover to the extent that the Applicants rely on section 77 (2) of the *Competition Act*, there is no evidence before the Competition Tribunal of exclusive dealing or tied selling on the part of Scotiabank.

93. Each of the foregoing will now be dealt with, in turn.

(c) The Applicants Are Not Unable to Obtain Adequate Supplies of a Product "Unusual Trade Terms" (S. 75(1)(a))

94. As described herein, the Applicants operate their business in two ways:

- (a) The Applicants require disclosure of the confidential Internet banking passwords of Scotiabank customers. The Applicants enter the Scotiabank customer's internet banking website as if they, themselves, were the customer, choose GPay as a bill payee, and cause money to be transferred from the customer's account to GPay as a bill payee. When funds are released from Scotiabank's suspension account after 8:30 p.m. to all bill payees, monies that have been directed towards GPay as a bill payee are released to GPay's Scotiabank accounts.

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- (b) For customers who bank at banks other than Scotiabank, these customers are required to divulge their confidential internet banking password to the Applicants. The Applicants enter into the customer's internet on-line banking site, as if they, themselves, were the customer, and effect email money transfer from the customer's account to the Applicants' MoneyManager accounts at Scotiabank.

95. There is nothing particularly unique about the infrastructure that the Applicants require in order to effect money transfers on the above-noted basis. The Applicants need a financial institution that will open a sufficient number of bank accounts for the Applicants and will allow the Applicants to make many thousands of email transfers and bill payment transfers to the Applicants' accounts in any given month.

96. There is no evidence put forth by the Applicants that they have approached every or, indeed, any other Schedule I Canadian Chartered Bank, or alternative financial institutions, to open the necessary number of accounts for them to undertake their business. As a result, there is no evidence before the Tribunal that the Applicants are "unable to obtain adequate supplies of a product on usual trade terms" in the market place.

97. There is evidence before the Tribunal (in the Affidavit of Robert Rosatelli, sworn July 12, 2005) that CIBC terminated GPay as a bill payee, and that this was the subject-matter of a complaint to the Competition Bureau. GPay's complaint to the Competition Bureau was dismissed. The Applicants did not seek leave under section 103.1 to pursue an Application against CIBC with respect to this decision. None of this was disclosed to the Tribunal by the Applicants, in Mr. Grace's Affidavit or otherwise.

98. The Applicants also assert that they have been unable to put in place appropriate arrangements with Royal Bank of Canada ("RBC") because RBC will not let them open up enough accounts to undertake their business. Particulars of RBC's reasons for this are not in evidence. It is a fair inference, however, that RBC's policies are similar to those of Scotiabank

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detailed herein, which prohibit the use of bank accounts in the manner and for the purposes required by the Applicants for their business model.

99. There is no evidence of any other attempts by the Applicants to locate a financial institution that would be willing to deal with them and provide them with the number and types of accounts they require to pursue their business enterprise. To the contrary, there is evidence that CIBC terminated GPay as a bill payee, that GPay complained to the Competition Bureau, and that the Bureau dismissed GPay's complaint.

100. It is inaccurate for the Applicants to assert that Scotiabank's decision to terminate its banking relationship with the Applicants is "directly and substantially affecting the business conducted by the Applicants." Instead, it is the Applicants' manner of doing business by, *inter alia*,

- (a) requiring bank customers to disclose their confidential internet password information, contrary to and in breach of the customer's agreements with the Bank;
 - (b) conducting a Money Services Business through Scotiabank accounts, contrary to Scotiabank policy;
 - (c) engaging in money transfers to off-shore internet casinos, when gambling at an off-shore casino is illegal in Canada;
 - (d) acting in breach of Rule E2 of the CPA Rules to allow for clearing and settlement under that Rule; and
 - (e) conducting their business in such a way as to give rise to serious money laundering concerns,
- that is "directly and substantially" affecting the Applicants' ability to carry on business.

101. Because of the manner in which the Applicants conduct their business as described herein, the Applicants cannot meet the "usual trade terms" of products that are available from Scotiabank, and indeed any other Schedule I Canadian Chartered Bank.

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102. The reasonable inference from all of the available information indicates that the Applicants would not wish to meet the "usual trade terms" of Scotiabank or the other Schedule I Canadian Banks, because to do so would require that they, among other things, stop using banking customers' confidential internet banking passwords to effect money transfers to off-shore internet casinos.

(d) No Evidence of Insufficient Competition Among Suppliers in the Market (S. 75(1)(b))

103. To the extent that the Applicants would have difficulty obtaining the banking services they require to allow them to conduct their business as described herein from a provider other than Scotiabank (although they have not put such evidence before the Tribunal), this certainly is not due to insufficient competition among suppliers.

104. It is a mischaracterization to describe the service being offered by GPay as competing with the service offered by Interac. Scotiabank, through Interac, will permit customers to enter on to their own secure on-line banking site and to enter into a real-time transaction to purchase goods and services from merchants. The only thing that travels by email is confirmation that the transaction has occurred. The transfer of money between the customer and the merchant occurs through the well-established clearing and settlement procedure operated by the Bank of Canada.

105. In contrast, GPay is simply a Money Services Business engaged in the transfer of money. It is not selling a good or service. It is also not offering a "real-time" transfer of money between banking customers and sellers of goods or services. Instead, GPay is simply effecting transfer of money from Scotiabank customers' accounts to GPay as a bill payee. Because these funds are not released immediately to GPay but are held in a Scotiabank suspension account until after 8:30 p.m., GPay is actually transferring money on an interim basis out of its own current accounts, usually to off-shore internet casinos.

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106. With customers from other banks, the Applicants are e-mailing money to their Scotiabank Money Manager accounts, and sending the same amount out from their own current accounts at Scotiabank. The reconciliation between the Applicants' two accounts likely occurs later.

107. Although these transactions may be close in time, there is no "real-time" transfer of monies between the banking customer and the recipient of the money, usually offshore internet casinos.

108. The essence of the Applicants' grievance against Scotiabank is that Scotiabank will not let the Applicants operate their Scotiabank accounts in the manner they desire. There are good reasons for this, as already described. The Applicants' inability to obtain the "product" (i.e. a sufficient number of bank accounts to allow the Applicants to undertake thousands of money transfers a month), is not because of insufficient competition among suppliers in the market.

109. Instead, the "product" which the Applicants seek is not available in the market at all. No Canadian Schedule I Chartered Bank will provide accounts and services to the Applicants based on the Applicants' current manner of doing business, for all of the reasons described herein, including use by the Applicants of customers' confidential internet banking password; inability to comply with CPA Rule E2; the fact that the Applicants are engaged in transferring money to off-shore internet casinos; and serious money laundering concerns.

110. The Applicants seek "products" and "terms" that for valid and important reasons are not available in the market at all, from Scotiabank or from any other Schedule I Chartered Bank.

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(e) The Applicants are not willing and able to meet the Usual Trade Terms of Suppliers of the Products (S. 75(1)(c))

111. The Applicants cannot meet Scotiabank's "usual trade terms" for the reasons described herein. In particular:

- Compliance with CPA Rule E2 is one of Scotiabank's usual trade terms. Scotiabank cannot participate in the clearing of electronic transfers of funds between customers at Banks other than Scotiabank and the Applicants' Scotiabank MoneyManager accounts because the Applicants are using the customers' confidential on-line pass codes to effect these transactions in contravention of CPA Rule E2.
- The Applicants are causing Scotiabank customers to breach their Cardholder Agreement with Scotiabank by requiring disclosure of the on-line banking password, and are exposing the Scotiabank customers to fraud on their accounts.
- The bulk of the business transacted by the Applicants involves the transfer of funds to Internet off-shore casinos. Gambling at Internet off-shore gambling sites is illegal in Canada. The involvement of Scotiabank's accounts in these transactions gives rise to concerns about Money Laundering and Terrorist Financing, and imposes disclosure obligations on Scotiabank. Scotiabank refuses to be involved, directly or indirectly, in transferring funds to off-shore casinos.
- Raymond Grace made misrepresentations in opening Scotiabank accounts by use of telephone banking. In particular, when asked the "Money Laundering" question: "Will this account be used to conduct business by or on behalf of someone other than the named account(s)?", these questions were answered by Mr. Grace in the negative. Had Mr. Grace been truthful, Scotiabank would not have agreed to open the account.
- Raymond Grace made misrepresentations about the nature of his business to Scotiabank. He described it as a "bill payment business" in the banking applications on behalf of the Applicants. In fact, the Applicants are a Money Services Business. As a matter of policy, Scotiabank does not do business with unregulated Money Services Businesses.
- Scotiabank's usual trade terms allow small business customers to have only 3 accounts and one ScotiaCard per signing officer. The Applicants have opened over 100 accounts and have caused over 20 ScotiaCards to be issued to them since April 2004.
- Scotiabank's small business terms are available to small businesses with monthly deposit volumes of \$400,000 or less, and total annual volumes of \$500,000 or

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less. In the 12 month period beginning June 1, 2004, Mr. Grace claims to have flowed through the Applicants' Scotiabank accounts almost \$10 million and estimates that he will be flowing through almost \$35 million in the 12 months beginning June 1, 2005 if he is allowed to continue to operate his business with the Scotiabank accounts.

112. Scotiabank refuses to have its brand associated directly or indirectly with companies which engage in illegal activities, such as off-shore Internet gambling.

113. For all of the foregoing reasons, under their current business model, the Applicants cannot meet Scotiabank's usual trade terms.

114. Moreover, the Applicants have not filed any evidence of a willingness to comply with Scotiabank's usual trade terms. Indeed, the very essence of their business, as an unregulated Money Services Business that is using customers' confidential internet banking passwords and transferring money to off-shore Internet casinos, could not possibly comply with Scotiabank's usual trade terms.

115. As stated elsewhere, no other Schedule I Canadian Chartered Bank is going to offer the "product" on the "usual trade terms" that the Applicants seek to continue conducting their business in the manner described herein.

(f) The "Product" Sought by the Applicants is not in Ample Supply (S. 75(1)(d))

116. The "product" (i.e. a sufficient number of accounts and bank cards to allow the Applicants to conduct their business in the manner described herein) sought by the Applicants is not in ample supply in the Canadian financial services market. In fact, insofar as the service would be offered by a Schedule I Bank, the "product" that the Applicants seek is not available at all.

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117. For the reasons already described herein, it is the manner in which the Applicants conduct their business, by requiring banking customers to disclose their confidential on-line passwords so that the Applicants can effect transfers of money, most often to off-shore internet casinos, which makes it impossible for a Schedule 1 Bank such as Scotiabank to continue to offer banking services to the Applicants.

118. The Applicants are in no position to complain about the absence of available banking arrangements with Scotiabank, or any other Schedule 1 Bank for that matter, when the manner of conducting business chosen by the Applicants is in breach of so many Bank policies, regulations and codes which the Banks are bound to observe.

(g) Alleged Refusal to Deal is Not Having An "Adverse Effect on Competition in the Market" (S. 75(1)(e))

119. The Applicants have not filed any credible evidence that the alleged refusal to deal (which is denied) is having or is likely to have an "adverse effect on competition in the market", as required under s. 75(1)(e) of the *Competition Act*.

120. As stated elsewhere, the nature of the Applicants' business is not in competition with Interac. The Applicants are not selling a good or service. The Applicants are engaged in the transfer of money from banking customers' accounts to the Applicants' Scotiabank accounts, in a manner which breaches multiple bank policies, the CPA Rules, and Money Laundering legislation.

121. By contrast, Interac will allow customers to purchase goods and services from merchants on a real-time basis, with the money being cleared through well-established clearing and settlement infrastructure operated by the Bank of Canada. Customers accessing Interac to purchase goods and services will be using their own secure on-line banking site. No password

information will be disclosed to any third party. The Interac system does not give rise to any problems with respect to the CPA Rules, nor with respect to the Money Laundering legislation.

122. Any Canadian company is eligible to join Interac. If the Applicants wished to truly engage in real-time transfers, they could apply to become a member of Interac.

123. As a result of the foregoing, the decision by Scotiabank to terminate the Applicants' accounts and to terminate GPay's status as a bill payee will not have an "adverse effect on competition in the market." The Interac system is not in competition with the very different service offered by GPay. Scotiabank cannot and will not do business with the Applicants because of the Applicants' manner of doing business as described herein.

(h) There is No Evidence of Exclusive Dealing (S. 77)

124. The Applicants seek leave to bring an application pursuant to Section 77 and allege "exclusive dealing" within the meaning of that section. Section 77(1) defines "exclusive dealing" as:

- (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 favorable terms or conditions if the customer agrees to meet the conditions set out in either of those paragraphs.

125. Because of the manner in which the Applicants conduct their business as described herein, Scotiabank is not willing to supply any banking services to the Applicants. As a result,

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there is no condition pursuant to which Scotiabank would be willing to provide banking services to the Applicants, so as to invoke Section 77 of the *Competition Act*.

126. As a result, there is no evidence before the Tribunal of “exclusive dealing” by Scotiabank, as defined in Section 77(1) of the *Competition Act*.

127. As stated elsewhere, the Applicants are not in competition with Interac. The Applicants are not selling a product or service. The Applicants are transferring money to their Scotiabank accounts using the customers’ confidential internet banking password information, and then transferring money out to the recipients, most often internet casinos. The Interac system will have no involvement in transferring money to Internet casinos.

(i) The Bank Of Nova Scotia Has A Valid Business Justification For Terminating The Banking Relationship With The Applicants

128. As described in the preceding sections, Scotiabank has exercised its contractual rights to terminate the banking relationship with the Applicants, for serious and legitimate business reasons. These reasons, which have been developed in detail in the preceding sections, can be summarized as follows:

- Scotiabank, like all other banks, is bound by the rules of the Canadian Payments Association (the “CPA”). The CPA was created by statute. The CPA makes rules which have the force of law with respect to payment items that are acceptable for exchange, clearing, and settlement within the Canadian banking system. Compliance with the CPA Rules is one of Scotiabank’s “usual trade terms”. CPA Rule E2 expressly prohibits Banks, including Scotiabank, from clearing items under that Rule in circumstances where the banking customer’s authentication information such as user identification and password have been made available to the payee, in this case NPay and/or GPay, during the on-line payment transaction session.
- Requiring banking customers to disclose their on-line banking password is in breach of the contract between the Bank and the banking customer. Banking customers may be exposed to fraud by disclosing their password. Moreover, in accordance with the terms of the Cardholder Agreement between the Bank and

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their customer, customers who have divulged their PIN number or on-line banking card password are responsible for fraud that occurs in relation to the card.

- Raymond Grace has caused to be opened over 100 accounts in the name of GPay, NPay and B-Filer and has caused over 20 ScotiaCards to be issued in favour of these companies since April 1, 2004. This was done, in part, through Mr. Grace's circumvention of branch policy by opening accounts through Scotiabank's telephone banking system. Small businesses are allowed only three accounts. Small business customers are allowed only one ScotiaCard per signing officer.
- The type of accounts opened by Raymond Grace are only available to small businesses with annual revenues of less than \$5 million.
- Raymond Grace has made misrepresentations about the nature of the business he was conducting. He described the business of NPay Inc. and B-Filer Inc. as a "bill payment business" in the banking applications on behalf of his business enterprise. In fact, Raymond Grace is operating a Money Services Business. As a matter of policy, Scotiabank does not knowingly accept Money Services Businesses as banking customers. If Scotiabank discovers that such businesses are banking with Scotiabank, Scotiabank begins the process of terminating services to them.
- Raymond Grace also made misrepresentations when opening dozens accounts using Telephone Banking. In particular, Money Laundering legislation requires individuals wishing to open an account to answer the question "will this account be used to conduct business by or on behalf of someone other than the named account holder(s)?" A review of the audio tapes that exist of the calls made by Mr. Grace to the Telephone Banking Centre indicates that he answered this question in the negative. This answer is false, in that GPay and NPay are acting as if they were the customer and transferring money from customers' accounts either to GPay as a bill payee on Scotiabank's bill payment list or by e-mailing money from the customer's account at a bank other than Scotiabank to Scotiabank's accounts held by GPay, NPay and B-Filer. The Applicants then transfer money from the Scotiabank MoneyManager accounts into the Applicants' current accounts at Scotiabank, and then to the recipients, most often internet casinos.
- Contrary to the assertions made by Raymond Grace in his affidavit about the business of GPay and NPay, an internet search of "UseMyBank" discloses that the majority of the business transacted by UseMyBank involves the transfer of funds to internet offshore gambling sites. Gambling at internet offshore gambling sites is illegal in Canada. The involvement of Scotiabank's accounts in these transactions gives rise to concerns about Money Laundering and Terrorist Financing and imposes disclosure obligations on Scotiabank. In addition, Scotiabank does not want its brand associated directly or indirectly with companies which engage in illegal activities, such as off-shore internet gambling.

(j) The Tribunal Should Exercise Its Discretion In Favour Of The Bank Of Nova Scotia

129. Even if the Applicants have established the elements necessary to obtain leave of the Tribunal (which is denied), the Tribunal should exercise its discretion to refuse to grant leave.

130. Scotiabank has no right of cross-examination on the Affidavit filed in support of the Applicants' application for leave. The time limits for responding to a leave application are short. The Tribunal is asked to grant or refuse leave on the basis of the written record. In these circumstances, it is incumbent on the Applicants to make full disclosure of all relevant facts in their Application, which they have not done.⁴ However, the Applicants have materially misstated and omitted many material facts.

131. In several material respects, the Applicants do not disclose the true nature and manner of their business in the Affidavit of Raymond Grace. In particular:

- At no time does Mr. Grace disclose the true central method of operation of his business, which involves requiring banking customers to divulge their confidential internet password, so that the Applicants can effect transactions in the banking customer's accounts, just as if they were the customer.
- Contrary to the assertions made by Raymond Grace in his affidavit as to the business of GPay and NPay, an internet search of "UseMyBank" discloses that the majority of the business transacted by UseMyBank involves the transfer of funds to internet offshore gambling sites. Gambling at internet offshore sites is illegal in Canada. The involvement of Scotiabank's accounts in these

⁴ Because the decision whether to grant leave or be done on the basis of the written record, without the ability to cross-examine the Applicants with respect to the evidence put forth in the Affidavit of Raymond Grace, it is submitted that the principles of disclosure that arise in the context of an *ex parte* injunction are apposite. In the context of an *ex parte* injunction, an Applicant who has not made full disclosure in the supporting affidavit will be denied the injunctive relief or will have the injunction overturned if full disclosure is subsequently shown not to have been made. A party who seeks an *ex parte* injunction must make full and frank disclosure of the case. In both the injunction and leave under Section 103.1 of the *Competition Act*, the trier of fact does not have the benefit of a cross-examination to test the facts asserted by the Applicants' affidavit. It would be incumbent upon the moving party to make a balanced presentation of the facts and law. The moving party should be required to state its own case fairly and must inform the court of any points of fact or law which would favour the other side. The duty of full and frank disclosure is required to mitigate the obvious risk of injustice inherent in any situation where the responding party is deprived of the right of cross-examination. See *United States of America v. Friedland*, [1996] O.J. No. 4399 at paras. 26-28 (Gen. Div.) and *Watson v. Slavik*, [1996] B.C.J. No. 1885 at para. 10 (B.C.S.C.)

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transactions gives rise to concerns about Money Laundering and Terrorist Financing and imposes disclosure obligations on Scotiabank.

- In 2003, CIBC terminated GPay as an authorized bill payee to which CIBC customers could direct electronic bill payments. GPay complained to the Competition Bureau. The matter was investigated. In January 2004, GPay's complaint was dismissed. It is noteworthy, therefore, that beginning in April 2004, Mr. Grace embarked on a course of action involving multiple Scotiabank accounts, presumably to replace the business facility that had been closed by CIBC when GPay was terminated as a bill payee.
- The Applicants opened only one account at Scotiabank between 1999 and 2004. Between April 2004 and March 2005, a mere 11 months, Raymond Grace caused to be opened over 100 Scotiabank accounts in the name of GPay, NPay and B-Filer and caused over 20 ScotiaCards to be issued to these companies.
- The Applicants failed to reveal that they have also commenced a civil action in Alberta, and that this was done approximately ten days prior to the commencement of their Competition Tribunal application. This gives rise to concerns the Applicants are using the Competition Tribunal as part of their litigation strategy.

132. It is submitted that, having commenced litigation in Alberta in which the Applicants seek an Order restraining Scotiabank from terminating its relationship with the Applicants, this Application is not brought by the Applicants in good faith based upon valid allegations of anti-competitive conduct, but rather as part of the Applicants' litigation strategy. The possible use of the private right of action provisions of the *Competition Act* for strategic litigation purposes has been the subject of learned commentary advocating that the Tribunal exercise caution with respect to Leave applications for this reason. The following is an example:

"The volume of private section 75 applications is regarded by some as a realization of one of the key concerns about permitting private access; namely, the risk of strategic litigation. In this regard, former Commissioner Konrad Von Finckenstein acknowledged the possible misuse of private access or strategic purposes. In submissions made in support of the amendments allowing private access the Commissioner stated that these concerns had been addressed through the implementation of safeguards, such as the introduction of a competitive effects test to section 75, as well as procedural safeguards, such as the availability of costs and a one-year limitation period. In addition to these safeguards, Commissioner Von Finckenstein stated that the "Tribunal will act as gatekeeper", and that it would grant leave "only where satisfied that there is reason to believe

the Applicant is directly and substantially affected in its business by the alleged anti-competitive practices". ...

"The risk that private enforcement of the civil provisions of the Act will lead to litigation that has no real significance or competition needs to be acknowledged somehow by the Tribunal in its treatment of the evidence on leave applications."

Reference: Glenn F. Leslie & Chris Hersh, *Private Enforcement: Leave Applications and Granting Principles*, delivered for the 2005 Competition Litigation Invitational Forum at Toronto, Ontario, February 21, 2005, at pp. 1-2 and 8.

(k) Other Matters

133. Scotiabank admits the grounds and material facts in paragraphs 3, 6, 7, 8, 12 and 13 of the Applicants' Application for Leave.

134. Scotiabank has no knowledge of the grounds and material facts in paragraphs 1, 4, 24, 26 and 41 of the Applicants' Application for Leave.

135. Except as otherwise admitted, Scotiabank denies the grounds and material facts in the Applicants' Application for Leave.

136. Scotiabank requests that the proceedings be conducted in English.

137. Scotiabank does not oppose the Applicants' request that the documents be filed in electronic form.

138. Scotiabank requests the right to make oral submissions with respect to this Application for Leave.

Reference: *Judicial Review of Administrative Action in Canada*, Donald J.M. Brown, Q.C. and the Honourable John M. Evans, at pp. 10-7 to 10-10

B-FILER INC.
Applicants

and

THE BANK OF NOVA SCOTIA
Respondent

Court File No: CT 2005-006

COMPETITION TRIBUNAL

**REPRESENTATIONS OF BANK OF NOVA SCOTIA
IN RESPONSE TO APPLICATION FOR LEAVE
PURSUANT TO SECTION 103.1 OF THE COMPETITION ACT**

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