



Reference: *B-Filer Inc. et al. v. The Bank of Nova Scotia*, 2006 Comp. Trib. 29  
File No.: CT-2005-006  
Registry Document No.: 0115

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

AND IN THE MATTER OF an application by B-Filer Inc., B-Filer Inc. doing business as GPAY GuaranteedPayment and Npay Inc. for an order pursuant to section 75 of the *Competition Act*.

B E T W E E N :

**B-Filer Inc.,**  
**B-Filer Inc. doing business as GPAY GuaranteedPayment and**  
**Npay Inc.**  
(applicants)

and

**The Bank of Nova Scotia**  
(respondent)

Decided on the basis of the written record  
Presiding Judicial Member: Simpson J. (Chairperson)  
Date of Order: August 1, 2006  
Order signed by: Madam Justice S. Simpson

**CONFIDENTIALITY ORDER – ON CONSENT OF THE PARTIES**

- [1] FURTHER TO B-Filer's request for a confidentiality order;
- [2] AND FURTHER TO the confidentiality order filed on consent by the parties;

**THE TRIBUNAL ORDERS THAT:**

- [3] For purposes of this order,
  - (a) "Protected document" means any document produced in this application, including documents listed in an affidavit of documents, expert reports, pleadings, affidavits, or submissions, with respect to which:
    - i) A party claims confidentiality; or
    - ii) The Tribunal has determined is confidential.
  - (b) "Document" means any document whatsoever whether in physical or electronic form, including the things defined as "records" in s. 2(1) of the *Competition Act*.
- [4] Disclosure of documents containing any of the following types of information could cause specific and direct harm:
  - (a) Information relating to prices (to the extent that such prices have not been published or made generally known to customers) or negotiation with customers on prices, rates and incentives;
  - (b) Lists of existing, prospective, and former customers;
  - (c) Confidential contractual arrangements between the parties and their customers;
  - (d) Operational information;
  - (e) Security information, including security precautions and procedures, and investigative procedures, and any other procedures for combating fraud or money laundering;
  - (f) Financial data and reports;
  - (g) Business plans, strategic plans, budgets, forecasts, and other similar information;
  - (h) Internal market studies and analyses;
  - (i) Confidential banking or financial information relating to the parties, their customers, or any bank customer (including identity, address, bank card numbers, bank account numbers, passwords, and challenge questions and answers); and
  - (j) Other documents containing competitively sensitive and/or proprietary information of the parties.
- [5] There shall be two levels of confidentiality:
  - (a) Confidential Level A; and
  - (b) Confidential Level B.
- [6] The confidentiality level applicable to a document shall be determined in the following manner:
  - (a) At the time of production of a document, or as soon thereafter as possible, a party that claims confidentiality over a document shall provide counsel for the other parties with written notice identifying what confidentiality level, if any, the party claims applies to the document.

(b) All documents designated as protected documents shall, on a preliminary basis, be afforded the highest confidentiality level designation claimed by any of the parties pending further determination of the confidentiality level.

(c) Following the exchange of documents, the parties shall use their best efforts to agree on appropriate levels of confidentiality for the protected documents or portions thereof.

(d) If agreement cannot be reached, the parties may apply to the Tribunal to determine the confidentiality or level of confidentiality of any protected document or portion thereof.

[7] If information from a protected document is incorporated into any other document, that document shall be a protected document having the same level of confidentiality as the level applicable to the protected document from which the information came.

[8] This order shall apply to all persons, to the extent that they acquire access to protected documents through this application.

[9] No one who obtains a protected document through this application shall disclose it, except as required by law or as set out below:

(a) Protected documents designated as "Confidential - Level A" may be disclosed:

- (i) to counsel for the parties,
- (ii) counsel's staff directly involved in this application, and
- (iii) independent experts retained by the parties who have executed Confidentiality Undertakings in the form of Schedule A hereto;

(b) Protected documents designated as "Confidential - Level B" may be disclosed to:

- (i) counsel for the parties,
- (ii) counsel's staff directly involved in this application,
- (iii) independent experts retained by the parties who have executed Confidentiality Undertakings in the form of Schedule A hereto, and
- (iv) the representatives of the parties who have been designated pursuant to paragraph 10 of this order and have executed Confidentiality Undertakings in the form of Schedule A hereto.

[10] The parties may each designate two individuals as their representatives who will be permitted access to protected documents designated as Confidential - Level B. Such designation shall be made by written notice to the Tribunal, with copies sent to the other parties. Any party may make a motion to the Tribunal objecting to such a designation.

[11] Prior to gaining access to protected documents referred to in this order, independent experts and designated representatives shall execute a Confidentiality Undertaking in the form attached as Schedule A. Confidentiality Undertakings shall be filed promptly with the Registrar of the Tribunal, who shall retain them in confidence until completion or final disposition of this application and any related appeals, at which time they may be disclosed to the parties upon request.

[12] If a party is required by law to disclose a protected document, or if a party receives written notice from a person who has signed a Confidentiality Undertaking pursuant to this order that they are required by law to disclose a protected document, that party shall give prompt written notice to the party that claimed confidentiality over the protected document so that the party that claimed confidentiality may seek a protective order or other appropriate remedy.

[13] Counsel for a party may make such copies as they require in connection with these proceedings.

[14] Nothing in this order prevents a party from having full access to protected documents that originated from that party.

[15] For greater certainty, all persons who obtain access to documents through the discovery process in this application are subject to an implied undertaking to use the documents and information for the purposes of this application (including any application or proceedings to enforce any order made by the Tribunal in connection with this application, and any application under s. 106 of the *Competition Act*, to vary or rescind any order made by the Tribunal in connection with this application) and any related appeals only.

[16] Parties shall provide the Tribunal with redacted versions of all confidential expert affidavits, affidavits, pleadings, and memoranda of argument or similar documents, at the time of filing for the public record.

[17] At the hearing of this application,

(a) Protected documents tendered as evidence at the hearing of this application shall be identified as such and clearly marked as “Confidential - Level A” or “Confidential - Level B”, as the case may be.

(b) The Tribunal may determine whether the document should be treated as confidential and what level of confidentiality is appropriate.

(c) Protected documents shall not form part of the public record unless the party or parties claiming confidentiality waives the claim, or the Tribunal determines that the document is not confidential.

(d) At the time protected documents are tendered as evidence, or as soon as possible thereafter, parties shall provide the Tribunal with redacted versions for the public record unless otherwise directed by the Tribunal.

[18] Upon completion or final disposition of this application and any appeals, all protected documents and any copies of protected documents shall be destroyed or returned to the party that produced them, provided that counsel may keep one set of protected documents in their files.

[19] The termination of proceedings in this application shall not relieve any person to whom protected documents were disclosed pursuant to this order from the obligation of maintaining the confidentiality of such protected documents in accordance with the provisions of this order and any confidentiality agreement.

[20] This order shall be subject to further direction of the Tribunal.

DATED at Ottawa, this 1<sup>st</sup> day of August, 2006.

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

(s) Sandra J. Simpson

## SCHEDULE "A"

### Confidentiality Undertaking

IN CONSIDERATION of being provided with information or documentation in connection with the proceeding in the Competition Tribunal, File Number CT-2005-006, between B-Filer Inc., B-Filer Inc. Doing Business as Gpay GuaranteedPayment and Npay Inc. (collectively, "B-Filer") and the Bank of Nova Scotia (the "Application"), over which claims for confidentiality have been advanced ("Protected Documents"), I, \_\_\_\_\_, in the Province of \_\_\_\_\_, hereby undertake and agree to maintain the confidentiality of any Protected Document I obtain, and in particular:

1. I will not copy or disclose a Protected Document to any other person, except to a person permitted to receive it under the Confidentiality Order of the Competition Tribunal (the "Tribunal") dated [date], or such further order as the Tribunal may make.
2. I will not use the information or documentation so obtained for any purpose other than in connection with the Application (including any application or proceedings to enforce any order made by the Tribunal in connection with the Application, and any application under s. 106 of the *Competition Act*, to vary or rescind any order made by the Tribunal in connection with the Application), and any related appeals only.
3. Upon completion of this application and any related appeals, I agree that all Protected Documents in my possession, shall be dealt with in accordance with instructions from counsel for the party [I am retained by *or* that I represent] or as prescribed by order of the Tribunal. [Experts only:] I may retain in my confidential files, subject to the requirements of confidentiality imposed by this undertaking, materials prepared by me, such as my expert report, as well as study results and materials of a general nature which do not replicate any confidential information from a Protected Document.
4. I have read the Confidentiality Order, a copy of which is attached to this agreement, and agree to be bound by it. I acknowledge that any breach of this undertaking by me will be considered to be a breach of the said order of the Competition Tribunal.
5. I acknowledge and agree that B-Filer, the Bank of Nova Scotia, or any other owner of a Protected Document may have an adequate remedy at law and would be irreparably harmed in the event that any of the provisions of this undertaking are not performed in accordance with its specific terms or otherwise breached. Accordingly, I agree that any one or more of B-Filer, the Bank of Nova Scotia, or any other owner shall be entitled to injunctive relief to prevent breaches of this agreement and to specifically enforce the terms and provisions hereof, in addition to any other remedy to which they may be entitled at law or in equity.
6. In the event that I am required by law to disclose any Protected Document that is subject to this undertaking, I will provide (*insert name of retaining or employing party*) with prompt written notice so that the person that claimed confidentiality over such information or

documentation may seek a protective order or other appropriate remedy. In any event, I will furnish only that portion of the Protected Document that is legally required and I will exercise my best efforts to obtain reliable assurance that confidential treatment will be accorded it.

7. I will promptly, upon the request of the person providing a Protected Document, advise where it is kept by me.

8. I hereby attorn to the jurisdiction of the Federal Court of Canada and/or the Competition Tribunal to resolve any disputes arising under this agreement.

SIGNED, SEALED AND DELIVERED before a witness this \_\_\_\_\_ day of \_\_\_\_\_, 2006.

\_\_\_\_\_  
(Witness Signature)

\_\_\_\_\_  
(Signature)

\_\_\_\_\_  
(Print Name)

\_\_\_\_\_  
(Print Name)

COUNSEL:

For the applicants:

B-Filer Inc., B-Filer Inc. doing business as GPAY GuaranteedPayment  
and Npay Inc.

Michael Osborne  
Sharon Dalton  
Jennifer Cantwell

For the respondent:

The Bank of Nova Scotia

F. Paul Morrison  
Lisa M. Constantine