

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

COMPETITION TRIBUNAL
TRIBUNAL DE LA CONCURRENCE

FILED / PRODUIT

CT-2005-006
MAY 24, 2006

Jos LaRose for / pour
REGISTRAR / REGISTRAIRE

OTTAWA, ONT

0002a

Amended
NOTICE OF APPLICATION PURSUANT TO SECTION 75
OF THE COMPETITION ACT

TAKE NOTICE THAT:

1. The Applicants, B-Filer Inc., B-Filer Inc. doing business as GPAY GuaranteedPayment and Npay Inc (collectively, “**GPAY**”), will make an application to the Competition Tribunal (the “**Tribunal**”) pursuant to section 75 of the *Competition Act*, R.S.C. 1985, c. C-34, as amended (the “**Act**”) for:

- (a) an order under subsection 75(1) of the Act directing the Respondent, The Bank of Nova Scotia (hereinafter referred to as “**ScotiaBank**”), to accept the Applicants as customers and to provide bank account services to them on usual trade terms, in particular:

- (i) Scotia Bank Biller Services, that is, biller status at Scotiabank for purposes of Scotiabank's online banking, and associated bank services and accounts; and
- (ii) EMT Business Deposit Accounts, that is, bank accounts for deposit of E-mail Money Transfers; and

(b) costs on a solicitor and client basis.

AND TAKE NOTICE THAT:

2. The person against whom the orders are sought is the Respondent, ScotiaBank. The address of ScotiaBank is:

Scotia Plaza
44 King Street West
Toronto, Ontario
M5H 1H1

3. GPAY will rely on the Statement of Grounds and Material Facts attached hereto and on the Affidavit of Raymond F. Grace duly sworn before a lawyer of the Province of Alberta on June 15, 2005.

4. If leave is granted, GPAY will seek an interim order from the Competition Tribunal for the relief sought in this Application and directions from the Tribunal for an expedited hearing of this Application.

5. The Applicant requests that this application proceed in English.

6. The Applicant requests that documents be filed in electronic form.

DATED at Montreal, Quebec this 17th day of June, 2005.

AMENDED this ● day of March, 2006.

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STATEMENT OF GROUNDS AND MATERIAL FACTS

A. THE PARTIES

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

1. The Applicants B-Filer Inc. and NPAY Inc. are each corporations incorporated pursuant to the *Canada Business Corporations Act*, R.S.C. 1985, c. C-44. Each Applicant is registered extra-provincially in the Province of Alberta and each carries on business in the City of Sherwood Park in the Province of Alberta. GPAY GuaranteedPayment is a business name used by B-Filer Inc.

2. The business of the Applicants consists of providing an internet bank card debit payment service that allows Canadian consumers to make purchases from participating internet merchants by paying directly from their existing bank accounts (the “**GPAY Service**”). The GPAY Service is provided for the benefit of both Canadian consumers who wish to make internet debit payments and merchants that wish to receive internet debit payments. Individual consumer customers of the Applicants use the GPAY Service in order to facilitate in payments that they themselves make to merchants. The GPAY Service makes use of existing banking services, facilities, resources and information technology infrastructure offered by the major Canadian banks. Specifically, the GPAY Service relies upon two key inputs of the Respondent: (i) the E-mail Money Transfer system (“**EMT**”); and (ii) internet banking, including bill payment services, that is, the status of being listed as a biller for purposes of the Scotiabank’s online banking website, associated bank services, and a biller suspense account (“Scotiabank Biller Services”, also collectively, “**Internet Banking**”), for part of the payment, clearing and settlement process of the GPAY Service. The supply of EMT and Internet Banking are both necessary inputs for the production by the Applicants of the GPAY Service.

3. Some of the GPAY Services are provided indirectly through its joint venture partner, UseMyBank Services, Inc., a Canadian corporation with its principal place of

business in Toronto, Ontario (“UseMyBank”). UseMyBank provides computer services to GPAY through this joint venture.

4. GPAY Services are the principal business of the Applicants. GPAY Services generate substantially all of the revenue of the Applicants.

5. GPAY Services are distinct from all other electronic payment services available in Canada because they enable the merchant to receive confirmation within seconds of the availability of customer funds and of the settlement of those funds to the merchant. None of cheque payment, credit card payment or any other payment service in Canada offers this unique advantage for Canadian consumers wishing to make immediate payments to merchants.

SCOTIABANK

6. The Respondent, ScotiaBank, is a bank incorporated pursuant to the *Bank Act*, 1991 c. C-46 and carries on business throughout Canada.

7. The Respondent also carries on business under the name “Scotiabank”.

8. The Respondent is one of the five largest Schedule I banks in Canada.

A1. OVERVIEW

8.1 GPAY is unable to obtain adequate supplies of two products: (1) Scotiabank Biller Services and (2) EMT Business Deposit Accounts. As set out below, Scotiabank Biller Services and EMT Business Deposit Accounts constitute two distinct product markets.

8.2 GPAY’s inability to obtain adequate supplies of these two products is due to a lack of competition among suppliers of these products. Scotiabank is the only supplier of

Scotiabank Biller Services, and one of only two suppliers of EMT Business Deposit Accounts.

8.3 GPAY is substantially affected in its business because it needs Scotiabank Biller Services and EMT Business Deposit Accounts to operate as a viable online bank card debit payment processor.

8.4 Scotiabank's refusal to deal is having or is likely to have an adverse effect on competition in the market for online bank card debit payment processing, because it significantly reduces GPAY's ability to compete with the only other provider of this service, Interac Online (a service offered by Scotiabank and some other Interac Association members). The online bank card debit payment processing market is downstream from the Biller Services and EMT Business Deposit Account markets.

B. REFUSAL TO DEAL BY SCOTIABANK

1. How the GPAY Service works

8.5 As stated above, the GPAY service makes it possible for customers of internet merchants to pay for goods and services using their bank cards instead of (for instance) a credit card.

8.6 The GPAY Service works in the following way:

- (a) Online merchants that offer the GPAY Service display a "UseMyBank" button on their websites as a payment option.
- (b) The customer selects UseMyBank to pay the online merchant.
- (c) The customer selects his or her bank from a list of banks.

- (d) To continue, the customer must click to agree to UseMyBank's and GPAY's terms and conditions.
- (e) The customer enters his or her bank card number and online banking password. This information is encrypted and passed directly through UseMyBank's servers to the bank's computers in a secure environment. It never resides on the online merchant's server. The customer's bank card number and password are not stored on UseMyBank's server.
- (f) Using the bank card number and online banking password, GPAY, through its computer service provider, UseMyBank's server, opens a session with the customer's bank and processes either a bill payment to GPAY, or an EMT to GPAY, for the amount of the customer's purchase. The UseMyBank server also performs certain verification procedures to verify the identity of the customer and guard against fraud.
- (g) The money is taken immediately out of the customer's account by the bank and put into an internal bank suspense account.
- (h) GPAY notifies the internet merchant that the payment has been authorized.
- (i) The money is received by GPAY in its biller suspense account (in the case of bill payment transactions) or in its EMT deposit accounts (in the case of EMTs).
- (j) GPAY pays the money to the merchant.

- (k) GPAY reports transactions to Fintrac when and as required by the Proceeds of Crime (Money Laundering) and Terrorist Financing Act and associated regulations.

2. Scotiabank Biller Services is a relevant product market

8.7 Each of Canada's five major banks, including Scotiabank, offers online banking to its customers over the internet. As part of their online services, banks offer customers the ability to make bill payments from their bank accounts to utilities, governments, financial institutions, merchants, and some payment services providers (eg, Dexit). Each bank has its own list of available "billers", that is, firms to which that bank's customers can make online bill payments. In order to become a biller at a particular bank, a firm must obtain Biller Services from that bank, consisting chiefly of a contract enabling it to be listed as a biller, any associated services, and usually also an account for the deposit of bill payments, often called a biller suspense account.

8.8 The list of billers is specific to each bank. That is, Scotiabank deposit customers can only make online bill payments to firms that have obtained Biller Services from Scotiabank and are thus on Scotiabank's list of billers. Scotiabank customers cannot make bill payments to a firm that has obtained Biller Services from Royal Bank, but not from Scotiabank.

8.9 GPAY and UseMyBank make use of the banks' online bill payment services to effect payments for customers of online merchants. In order to process bill payments for customers of a particular bank as bill payments, GPAY needs Biller Services from that bank. In particular, in order for GPAY to process bill payments for Scotiabank customers, GPAY must have Biller Services from Scotiabank. The fact that GPAY has Biller Services from Royal Bank does not assist it in processing bill payments for customers of Scotiabank.

8.10 It follows that:

- (a) Scotiabank is the only possible supplier of Biller Services that would allow Scotiabank customers to pay bills to any particular would-be biller.
- (b) Biller Services from other banks are thus not substitutable for Biller Services from Scotiabank.
- (c) Banks do not compete with each other in offering Biller Services. Banks do compete for retail and business customers, but no bank is able to offer Biller Services to a merchant that would allow the merchant to be a “biller” at another bank.
- (d) Biller Services from Scotiabank – or, Scotiabank Biller Services – is a separate product market.

8.11 As noted above, every biller needs an account for depositing bill payments. It is more efficient for GPAY to have a biller suspense account at each bank at which it is listed as a biller. It would be possible for GPAY to use a central bank account at one bank to receive bill payments from other banks at which GPAY is listed as a biller. However, it would take longer for GPAY to receive the money into such an account.

3. EMT Business Deposit Accounts is a relevant product market

8.12 GPAY uses EMTs to process payments for customers of online merchants who bank with banks that have refused to supply GPAY with biller services, including Scotiabank.

8.13 In order to deposit EMTs, GPAY needs a business (as opposed to personal) bank account that allows EMTs to be deposited. Accounts having this feature are referred to herein as EMT Business Deposit Accounts. The accounts used by GPAY at Scotiabank for depositing EMTs were called “Money Manager for Business Accounts”. These accounts have the following essential characteristics:

- (a) No fee for deposit of electronic payment items; and

- (b) No fee for transfers to another Scotiabank account owned by the same customer.

8.14 The use of EMTs to effect payments is a work-around that is not an adequate substitute for using bill payments to effect payment. Disadvantages of EMTs, as compared with bill payments, include:

- (a) EMTs have a \$1000 limit per transaction (and also a limit of \$1000 per day). GPAY's reliance on EMTs thus makes the GPAY Service unattractive to many online merchants, such as retailers and airlines. Individual transactions frequently exceed \$1000 with these merchants.
- (b) A 30 minute hold on EMTs was introduced in 2005. During this 30 minute period, the bank customer can cancel the EMT. It is thus possible for a customer to pay for an item with an EMT, and then cancel the payment during the 30 minute hold. This increases the risk of GPAY and/or the online merchant being defrauded. GPAY experiences cancellations of EMTs from time to time.
- (c) Only two Canadian banks, Royal Bank of Canada ("Royal Bank") and Scotiabank, allow business customers to deposit EMTs. Both of these banks impose merchant deposit limits on EMTs of approximately \$10,000 per day per "profile". Scotiabank allowed GPAY three profiles, but Royal Bank has allowed GPAY only one. Because GPAY's volume significantly exceeds these limits, GPAY has had to use several bank accounts to receive EMTs, and develop software algorithms to direct EMTs to the appropriate account.
- (d) Large volumes of EMTs can cause processing problems. For example, Scotiabank encountered difficulty processing more than 100 EMTs per month for GPAY's account. The solution was for GPAY to open several accounts and limit each to 100 EMTs per month.

- (e) EMTs are not as reliable as bill payments. All EMTs go through a third party processor, Acxsys Corporation. When the Acxsys Corporation's computer system is down, EMTs are not available. Shutdowns of the EMT system occur frequently. By contrast, each bank processes its own bill payments. If bill payments processing is shutdown at one bank, it will still be available at other banks.
- (f) GPAY experiences frequent error messages when depositing EMTs. These errors must be investigated and resolved.
- (g) EMTs typically cost the online merchant's customer \$1.50 in bank fees, making them less attractive to consumers as a payment option.

8.15 Consequently, because of the disadvantages of using EMTs relative to bill payments, EMT Business Deposit Accounts are a separate product market from Scotiabank Biller Services.

4. Importance of Scotiabank Biller Services and EMT Business Deposit Accounts to GPAY

8.16 In order to be attractive to online merchants, GPAY needs to offer an online bank card debit payment service that can be used by almost any Canadian with a bank card. Since most Canadians bank with one of Canada's five major chartered banks, GPAY needs to be able to process payments from each of these banks.

8.17 Consequently, GPAY must obtain Biller Services from each of these banks. While it is possible for GPAY to use EMTs to process payments from customers of banks that refuse to supply it with Biller Services, the limitations inherent in EMTs constrain the GPAY Service, as discussed above.

8.18 Because of the structure of Canada's banking system, GPAY currently has no alternatives to Biller Services or EMTs as a payment processing method.

8.19 Biller Services, including Scotiabank Biller Services, are thus an essential facility required by GPAY in its business.

5. Refusal of ScotiaBank to Deal

8.20 In 1998 and 1999, GPAY obtained Biller Services from each of Canada's five major banks, including Scotiabank, as well as Alberta Treasury Branches and Fédération des caisses Desjardins du Québec. That is, GPAY was listed as a biller on each bank's online banking website and had a biller suspense account at each bank, including Scotiabank.

8.21 Thus, when GPAY began operation as an internet debit payment service in December 2002, GPAY had Biller Services with each of the five major banks, including Scotiabank. GPAY used these services to operate the GPAY Service as described above.

8.22 However, in December 2003, Canadian Imperial Bank of Commerce ("CIBC"), Toronto Dominion Bank ("TD"), and Alberta Treasury Branches stopped providing GPAY with Biller Services. They removed GPAY from the list of billers on their online banking websites and closed GPAY's biller suspense accounts. As a result, GPAY began relying on EMTs to process payments from CIBC and TD.

9. GPAY had four accounts at Scotiabank until November, 2004, when it began opening additional accounts to resolve difficulties Scotiabank had in processing GPAY's increasing volume of EMTs. Ultimately, GPAY had over 100 money manager accounts at Scotiabank's Sherwood Park, Alberta branch. GPAY entered into Financial Services Agreements (each an "Agreement") with Scotiabank on Scotiabank's standard form in respect of these accounts.[Remainder of paragraph deleted.]

10. The Applicants have built a substantial business during the six (6) years since the Applicants first began procuring banking services from the Respondent. Between June 1, 2004 and May 31, 2005, in the course of providing the GPAY Services, the Applicants deposited approximately \$9,929,881.17 into business bank accounts at the Respondent. Fees charged by the Applicants to merchants for the processing of such funds constitute nearly all of the revenue of the Applicants and now amount to more than \$100,000.00 per month.

11. The Applicants have never been in default under any of the Agreements. Respondent has never alleged any default by the Applicants under any of the Agreements.

12. Respondent delivered a letter to each of the Applicants dated May 11, 2005 (the "**Termination Letters**"), whereby the Respondent stated its intention to cancel its services to each of the Applicants under the Agreements and terminate the Agreements with each Applicant, effective June 15, 2005.

13. Paragraph 12.2 of each Agreement contains the following clause, where "We" refers to the Respondent and "you" refers to the Applicants:

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

14. The Termination Letters make express reference to Section 12.2 of the Agreement and state that ScotiaBank has decided to exercise that clause. ScotiaBank has therefore, in its own words, terminated the Agreement with each of the Applicants without cause.

15. Respondent reaffirmed its intent to terminate the Agreements without cause in its most recent letter to counsel to the Applicants, dated May 25, 2005.

15.1 Scotiabank subsequently terminated the Agreements, in September 2005. As a result, Scotiabank is refusing to supply GPAY with both Scotiabank Biller Services and EMT Business Deposit Accounts.

6. GPAY is unable to obtain adequate supplies of Scotiabank Biller Services and EMT Business Deposit Accounts.

15.2 Because of Scotiabank's refusal to supply Scotiabank biller services to GPAY, GPAY is unable to obtain Scotiabank Biller Services at all.

15.3 As set out above, GPAY needs EMT Business Deposit Accounts because it uses EMTs as a work-around to process payments for customers of online merchants who bank with banks that refuse to provide GPAY with Biller Services.

15.4 There are only two suppliers in Canada of EMT Business Deposit Accounts: Scotiabank and Royal Bank. Scotiabank has closed GPAY's EMT Business Deposit Account and Royal Bank has refused to allow GPAY to increase the volume of EMTs it processes.

15.5 Consequently, GPAY is unable to obtain adequate supplies of EMT Business Deposit Accounts.

7. GPAY is substantially affected in its business

15.6 GPAY is substantially affected in its business by Scotiabank's refusal to supply Scotiabank Biller Services in the following way:

- (a) GPAY wants to expand its business to provide online bank card debit payment services to major online merchants, such as online retailers and airlines. However, the GPAY Service is unattractive to these merchants

because GPAY is forced to rely on EMTs to process payments from customers who bank with Scotiabank (and other banks that have refused to provide Biller Services to GPAY). As set out above, the limitations inherent in EMTs make them a poor payment method for major online merchants. As a result of Scotiabank's refusal to supply Scotiabank Biller Services, GPAY has been largely unsuccessful in its efforts to attract major online merchants as customers. Consequently, GPAY has suffered a loss of growth in its business that would have otherwise occurred.

- (b) Moreover, as set out below, the Interac Association (of which Scotiabank is a member) now offers an online bank card debit payment service, Interac Online, that is functionally equivalent to that offered by GPAY. Because Scotiabank has made it impossible for GPAY to compete effectively with Interac Online, GPAY risks permanent loss of business and market share to Interac Online.
- (c) Further, the online bank card debit payment market is characterized by network effects. Consequently, GPAY's reduced growth, loss of business and market share, and competitive disadvantage relative to Interac Online could prevent it from achieving a sufficiently large network and thus threaten its viability as a participant in this market.
- (d) As a result, Scotiabank's refusal to deal deprives GPAY of its "first mover advantage", arising from GPAY being the first to market with an online bank card debit payment product.
- (e) The banking fees associated with EMTs makes them less attractive to customers than other payment methods (such as credit cards). This makes the GPAY Service less attractive to customers of online merchants, and thus, less attractive to online merchants, as compared with Interac Online.

GPAY's forced reliance on EMTs thus reduces GPAY's ability to expand its business.

- (f) Because of the limitations inherent in EMTs, GPAY is not able to expand its volume of transactions efficiently. GPAY is forced to rely on a short-term work-around, EMTs, and an array of bank accounts. GPAY needs biller services for the GPAY Service to continue to function as a viable online debit payment service.
- (g) The more banks GPAY can offer bill payments from, the more attractive is its service to potential customers. Scotiabank's refusal to deal makes GPAY less attractive to potential customers.
- (h) Scotiabank's refusal to deal undermines GPAY's business reputation and its ability to gain new customers.
- (i) In the result, GPAY's volume of business and profit is significantly lower than it would have been but for Scotiabank's refusal to deal. Between May 2004 and May 2005, GPAY's volume of business increased by 341%, from \$800,500.79 to more than \$2.7 million. But for Scotiabank's refusal to deal, GPAY's rapid growth would have intensified since then.
- (j) In the long run, GPAY's ability to continue in business at all is threatened by Scotiabank's refusal to deal.

15.7 GPAY is substantially affected in its business by Scotiabank's refusal to supply EMT business deposit accounts in the following way:

- (e) Scotiabank's refusal to supply GPAY forces GPAY to rely on just one bank, Royal Bank, for all of its EMT deposits.

- (f) Royal Bank has refused to increase GPAY's volume limits. Volume limits on EMT deposits will likely constrain GPAY's ability to continue expanding its volume of business.
- (g) Reliance on just one bank for EMT deposits increases the risk that the GPAY System will cease being a viable online payment system.

8. There is no competition for the supply of Scotiabank Biller Services

15.8 Scotiabank is the only supplier of Scotiabank Biller Services, since, as set out above, only Scotiabank can offer Biller Services allowing a biller to receive bill payments from Scotiabank customers. There is thus no competition for the supply of Scotiabank Biller Services.

9. There is insufficient competition for the supply of EMT Business Deposit Accounts

15.9 Only two banks allow EMTs to be deposited into business accounts: Scotiabank and Royal Bank. There is thus only limited competition for the supply of deposit accounts for EMTs. As stated above, Royal Bank has refused to allow GPAY to increase the volume of EMTs it processes.

10. GPAY is willing and able to meet Scotiabank's usual trade terms

15.10 GPAY is willing and able to meet Scotiabank's usual trade terms for the provision of Scotiabank Biller Services and deposit accounts for EMTs, and was doing so before Scotiabank refused to supply these services.

11. Scotiabank Biller Services and deposit accounts for EMTs are in ample supply

15.11 Scotiabank's ability to provide Scotiabank Biller Services and EMT Business Deposit Accounts is virtually unconstrained.

12. Adverse effect on competition in a market

15.12 Scotiabank's refusal to supply GPAY with Scotiabank Biller Services and deposit accounts for EMTs has had, or is likely to have, adverse effects on competition in a market or markets. It significantly reduces competition in the market for online bank card debit payment services (also referred to simply as "online debit payments"), as particularized below.

(a) Interac Online

16. On or about May 5, 2005, the five (5) principal Canadian banks, being the Respondent, The Bank of Montreal, The Royal Bank of Canada, The Canadian Imperial Bank of Commerce and The Toronto Dominion Bank (collectively, the "**Canadian Banks**"), announced that they were beginning to supply a service to Canadian consumers that would allow them to make debit-card payments via the internet, by enabling transfers of money directly out of bank accounts to merchants immediately during the course of an online transaction (the "**Competing Bank Service**" or "Interac Online"). The Competing Bank Services are provided through a single portal, Interac Online, which is a service of the Interac Association, an association controlled by banks in Canada, including the Respondent. Given the single portal through which it is provided, and the legal oligopoly of the Interac Association by which it is structured, it is difficult to distinguish between providers of Interac Online. Interac Online is a single service offered by members of the Interac Association collectively as a single supplier.

17. The Respondent has announced that it expects to offer the Competing Bank Service of the Interac Association, beginning in June or July of 2005. Scotiabank began offering Interac Online in 2005.

[paragraph 18 deleted]

19. The Competing Bank Service is virtually identical to the GPAY Service, from the perspective of both the consumer wishing to make payment and the merchant wishing to receive payment. Each of these services is used by a consumer entering their debit card information and personal identification number into a web site following which moneys are transferred immediately from the bank account of the consumer to the credit of the merchant.

(b) Online bank card debit payment services market

19.1 The GPAY Service and Interac Online are functionally nearly identical. They compete in the same product market, the market for online bank card debit payment services. This product market is distinct from other methods of paying for goods and services over the Internet, such as credit cards or third-party online wallets.

19.2 Characteristics of online bank card debit payment services include:

- (a) They allow customers of online merchants to pay for goods and services over the internet directly from their *bank accounts*, using their *bank cards*.
- (b) Conversely, they allow online merchants to receive payment from customer's bank accounts.
- (c) The transaction is a *debit* transaction as opposed to a *credit* transaction (unless the customer is overdrawing the bank account). The funds are removed immediately from the customer's bank account by the bank.
- (d) The money comes directly from the customer's *bank account*, rather than from a third party online account or "wallet" set up specially to effect

online payments, and the customer does not need to have an account with a third party payment processor.

- (e) The customer effects payment using his or her bank card number and online banking password.
- (f) Merchants obtain real-time confirmation that payment has been authorized by their customer's bank.
- (g) Payments are deposited directly into the merchant's bank account.
- (h) Payments are final and are not subject to chargeback (unlike credit card transactions).
- (i) The service provider is paid through fees from merchants. Typically these fees are a percentage of the value of payments processed for that merchant.

19.3 Online bank card debit payments respond to both consumer and merchant needs and preferences:

- (a) Many Canadians do not have credit cards. These people need a way to make payments to online merchants. Online merchants need a way to sell goods and services to people who do not have credit cards.
- (b) Many Canadians fear entering credit card numbers onto online merchant websites. With both Interac Online and the GPAY Service, the customer's bank card number and password are never seen by the merchant's computer system. This reduces the potential for fraud.

- (c) Many Canadians want the option of paying online for goods and merchandise using their bank cards, just as they do in a traditional brick-and-mortar store. Merchants want to be able to accommodate this desire.

19.4 The differences between the GPAY Service and Interac Online are technical in nature:

- (a) GPAY Service relies on bill payments, which are a service provided by banks to their biller customers. Payments made through GPAY do not go through the Interac network. Interac Online payments are processed through the Interac network. This difference is not readily apparent to the customer or the online merchant.
- (b) When using the GPAY Service, the customer enters information onto a webpage generated by UseMyBank's server, and UseMyBank's server uses this information to effect payment as agent for the customer. When using Interac Online, the customer is redirected to his or her bank website to finalize payment.
- (c) Both the GPAY Service and Interac Online rely on computer service providers. GPAY's computer service provider, UseMyBank, conducts verification and fraud prevention procedures. In the case of Interac Online, verification and fraud prevention are the responsibility of the individual banks.

(c) Adverse effect on competition in the online bank card debit payment services market

[paragraphs 20-21 deleted]

21.1. Scotiabank's refusal to supply GPAY with Scotiabank Biller Services and EMT Business Deposit Accounts is having or is likely to have an adverse effect on competition in the market for online bank card debit payment services because:

- (a) GPAY's only competitor is Interac Online.
- (b) GPAY charges fees to merchants that are lower than those charged by Interac Online.
- (c) As set out above, GPAY's inability to obtain Scotiabank Biller Services reduces its ability to expand its business generally, and particularly, to major online merchants such as retailers and airlines.
- (d) Consequently, Scotiabank's refusal to supply Scotiabank Biller Services and EMT Business Deposit Accounts to GPAY leaves Interac Online as the only viable supplier of online bank card debit payment services to many online merchants. This eliminates Interac Online's only competitor for many, if not most, potential customers of online bank card debit payment service providers. It also reduces or removes constraints on fees charged by Interac Online.

21.2. Further, even if other forms of online payments, such as credit cards and third-party online wallets, are included in the relevant market, Scotiabank's refusal to supply reduces choices of online payment options available both to online merchants and consumers, causing an adverse effect on competition.

21.3. In addition, Scotiabank's refusal to deal is having or is likely to have an adverse impact on competition in retail markets. Customers of traditionally brick and mortar stores and services are accustomed to many payment options, including cash, credit card, Interac (bank card), and, most recently, cards pre-loaded with value (Dexit, gift cards, etc). To the extent that Scotiabank's refusal to deal reduces payment choices for

customers of online merchants, it reduces the ability of those online merchants to compete with brick and mortar merchants.

[paragraph 22 deleted]

23. Applicants have no interest in preventing the entry of Respondent into the Online Debit Payment Market. Rather, this Application is to avoid the exclusion of the Applicants from that market upon the entry of the Respondent into it.

[paragraphs 24-26 deleted]

27. Canadian banks, including the Respondent, provide each other with unlimited EMT and Internet Banking deposit and transfer rights into each others accounts. The Respondent has never ceased providing EMT deposit services or Internet Banking to any bank.

[paragraph 28 deleted]

29. Before closing GPAY's accounts, and without prior notice or consultation with the Applicants, the Respondent has unilaterally amended the terms of the Agreements by which it provides money manager bank account services to the Applicants. As of a certain date in May or June of 2005, the precise date not being known to the Applicants, the number of deposits permitted in the bank accounts of the Applicants with the Respondent are no longer unlimited and there is no express reference to EMTs, nor is there any reference to there being no fee for deposits, as was previously the case under the Agreements (collectively, the "**Amendments**"). In brief, the Amendments provide for the exclusion of the Applicants from the EMT Deposit Market.

[paragraph 30 deleted]

31. Scotiabank's intention in refusing to supply GPAY with Scotiabank Biller Services and EMT Business Deposit Accounts was to eliminate GPAY as a competitor of Interac Online, at least for major online merchants. It is noteworthy that the date of the sending of the Termination Letters is coincident with the date on which the Competing Bank Service is being offered in Canada.

[Paragraphs 32-54 deleted]

55. Nothing in the Termination Letters or any other correspondence from the Respondent indicates that the Respondent would suffer any damage at all by continuing to perform under the Agreement it has with each Applicant. In fact, the Respondent stands to make material profits from providing a necessary element for the tremendously successful GPAY Service.

56. There is no impediment to the discretion of the Tribunal to grant an injunction to the Applicants in the present matter and accept the Application on the merits.

[paragraphs 57-60 deleted]

60.1 The Applicants therefore request the Tribunal to issue an order requiring Scotiabank to supply them with:

- (a) Scotiabank Biller Services; and
- (b) EMT Business Deposit Accounts,

on Scotiabank's usual trade terms.

[paragraphs 61 – 66 deleted]

DATED at Montreal, Quebec, this 17th day of June 2005.

AMENDED this ● day of March, 2006

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