

CRA CompetitioniNSIGHTS

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Tribunal Dismisses B-Filer's Refusal to Deal Application

On December 20, 2006, the Competition Tribunal released its decision in *B-Filer Inc. v. The Bank of Nova Scotia*, the first fully contested case under the amended Section 75 of the *Competition Act* and the first contested case brought as a private action. After a four-week hearing, the Tribunal ruled that the applicants failed to establish any of the required Section 75 elements.* The complaint centered on Scotiabank's termination of various banking services that it had previously supplied to GPay (B-Filer's operating name) that GPay had been using to provide its online debit payment service. The Tribunal agreed with Scotiabank's economic expert that the Chrysler test is the appropriate one for defining product markets relating to Section 75(1)(a), while rejecting the use of the hypothetical monopolist test as proposed by GPay's economics expert. The Tribunal also concluded that the termination would not adversely affect (downstream) competition (GPay claimed that Interac Online, in which Scotiabank participates, was a competing debit payment service), as required in the new Paragraph 75(1)(e); and, in fact, it concluded that the termination would not have any effect on competition.

The GPay Service and Scotiabank's Termination of GPay

GPay's service facilitates payments from its customers' bank accounts to internet merchants. The vast majority of GPay payments (about 98 percent) are made to online casinos (the service is provided

under the brand, UseMyBank). If GPay has online bill payee status at the payer's bank, it transfers funds from the payer's bank account to one of its own accounts at the same bank using online bill payment. Otherwise, it transfers funds from the payer's account to one of its own accounts (which may be at another bank) via e-mail money transfer (EMT). In either case, GPay initiates the transfer by entering the payer's account user ID and password—which the payer must provide to GPay—during an online banking session. It subsequently disburses the funds to merchants, after deducting its fee.

Prior to this action, GPay had online bill payee status at Scotiabank, Royal Bank, and Bank of Montreal. CIBC and TD Bank terminated GPay's online bill payee status in 2003, and GPay had been using EMTs to transfer funds from payers with accounts at these banks. In September 2005, Scotiabank terminated GPay's online bill payee status at Scotiabank and also closed GPay's small business accounts. As a result, GPay began to transfer funds from payers' Scotiabank accounts to its own accounts using EMTs, rather than by using online bill payment.

The Tribunal's Findings

The Tribunal found that GPay failed to establish any of the elements of Section 75. Here we discuss briefly the Tribunal's conclusions on relevant market definition for Paragraph 75(1)(a) and on the new competition test in Paragraph 75(1)(e).

* Professor Frank Mathewson of the University of Toronto was the expert economist for Scotiabank. Professor Mathewson is also a senior consultant with CRA International. Dr. Andy Baziliauskas of CRA International provided economic advice to Scotiabank. F. Paul Morrison and Lisa M. Constantine of McCarthy Tétrault were counsel for Scotiabank.

Markets for Paragraph 75(1)(a)

Paragraph 75(1)(a) requires that an applicant establish that it is substantially affected in its business because of its inability to obtain adequate supplies of a product anywhere in a market on usual trade terms. Economics experts had opposing views on the appropriate methodology for defining the product market. Scotiabank's expert economist, Professor Frank Mathewson of the University of Toronto, opined that the appropriate test is the Chrysler test, rather than the hypothetical monopolist test as proposed by GPay's economics expert. In Professor Mathewson's characterization of the Chrysler test, products are in the same market as the product that the respondent refused to supply if the purchaser's (i.e., the applicant's) business is not substantially affected by switching to these other services. The Tribunal agreed with Professor Mathewson that the Chrysler test is appropriate because it deals directly with the business at issue—consistent with the focus of Paragraph 75(1)(a)—while the hypothetical monopolist test is designed to identify a set of buyers that could be subject to an exercise of market power. Although the hypothetical monopolist test is capable of defining markets around a certain buyer by focusing on the characteristics of that buyer, the more direct and immediate approach of the Chrysler test was preferred by the Tribunal.

Furthermore, the Chrysler test focuses on the effects of a refusal on the terminated business rather than on the possible effects of a future increase in the price of the refused product, which is normally the concern that market definition in merger analysis seeks to address. Professor Mathewson applied the Chrysler test in this case by observing the effects on GPay's business when it switched to alternative products upon termination of its banking services by Scotiabank. By the time of the hearing, there was almost one year's worth of data on GPay's revenue performance after termination—one year in which GPay used alternatives to the products that Scotiabank refused to supply—which Professor Mathewson used to form his opinion about whether switching to these alternatives had a substantial negative

effect on GPay's business. GPay's expert argued that observing the products that GPay actually did switch to in response to the termination is not helpful for market definition, on the basis that a refusal is akin to an infinite price increase (rather than the 5 percent price increase as usually applied in a hypothetical monopolist test) and would therefore lead to an overbroad product market. The Tribunal disagreed, finding that under the Chrysler test products are in the market only if GPay would switch to them without suffering a substantial negative effect on its business; in other words, in contrast to the hypothetical monopolist test, the Chrysler test directly addresses the ultimate concerns of Paragraph 75(1)(a).

The Tribunal also largely accepted Professor Mathewson's opinion on the boundaries of the markets. With respect to the market focusing on bill payee status at Scotiabank, the primary issue was whether substituting towards EMTs for transferring payers' funds from Scotiabank accounts (after termination of GPay's bill payee status) would substantially affect GPay's business. GPay had argued that because EMTs attract transaction fees (\$1.50 per transaction) and have transfer limits, they are not a close substitute for bill payee status. However, the Tribunal adopted Professor Mathewson's methodology of assessing the effects of actual switching on GPay's business and found that GPay's switch to EMTs after Scotiabank's termination of GPay's bill payee status did not substantially affect GPay's business. GPay claimed that the switch reduced its revenue growth, but the Tribunal noted that even though GPay suffered an initial decrease in revenues generated from payments from Scotiabank accounts, its revenues recovered their initial levels by January 2006 and then continued to grow. There was insufficient evidence, according to the Tribunal, to conclude that GPay's revenue growth would have been even higher absent the termination.

Markets for Paragraph 75(1)(e)

Paragraph 75(1)(e) contains the new downstream competition test. The Tribunal found that this paragraph demands a comparison of the competitiveness or likely competitiveness of the market with and

without the refusal to deal, and that 'competitiveness' refers to the degree of market power that prevails in the market. The test is therefore similar to the test applied by the Tribunal under the abuse of dominance and merger provisions of the *Competition Act*.

The only difference is in the degree of the effect, which must be 'adverse' under Paragraph 75(1)(e) and 'substantial' under Sections 79 and 92. The Tribunal concluded that Scotiabank's refusal would not have any effect on competition and therefore the Tribunal did not have to define 'adverse' in this case. The Tribunal agreed with Professor Mathewson that the focus of the competition analysis should be on whether Interac Online, the online debit payment service in which Scotiabank participates, would increase its market power upon Scotiabank's termination of GPay. It also agreed with Professor Mathewson that in order for the termination to increase Interac Online's market power, Interac Online and GPay must be competitors to begin with, or there must be a likelihood that they would become competitors some time in the future. The Tribunal found, as did GPay's economics expert and Professor Mathewson, that Interac Online and the GPay service do not currently compete. It further found that there was no evidence that Scotiabank's termination affected GPay's ability to compete with Interac Online for high value payments and therefore the termination was not likely to have an effect on future competition for large value transactions.

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