

Competition Tribunal



Tribunal de la Concurrence

Reference: *The Commissioner of Competition v. Parkland Industries Ltd.*, 2015 Comp. Trib. 9
File No.: CT-2015-003
Registry Document No.: 062

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

AND IN THE MATTER OF an Application by the Commissioner of Competition for one or more orders pursuant to section 92 of the *Competition Act*;

B E T W E E N:

The Commissioner of Competition
(applicant)

and

**Parkland Industries Ltd., Parkland Fuel Corporation,
Pioneer Petroleums Holding Limited Partnership, Pioneer Energy LP,
Pioneer Petroleums Transport Inc., Pioneer Energy Inc., Pioneer Fuels Inc., Pioneer
Petroleums Holding Inc., Pioneer Energy Management Inc.,
668086 N.B. Limited, 3269344 Nova Scotia Limited
and 1796745 Ontario Ltd.**
(respondents)



Decided on the basis of the written record.
Before Judicial Member: Gascon J. (Chairperson)
Date of Order: July 23, 2015

CONFIDENTIALITY ORDER

[1] **FURTHER TO** the application filed by the Commissioner of Competition (the “Commissioner”) against the Respondents pursuant to section 92 of the *Competition Act*, R.S.C. 1985, c. C-34, as amended (the “Act”) for one or more orders pursuant to subsection 92(1) of the Act;

[2] **AND FURTHER** to the draft confidentiality order filed on consent by the Commissioner and the Respondents;

THE TRIBUNAL ORDERS THAT:

[3] For the purposes of this Order:

(a) **“Affiliate”** means, in respect of a Person, any other Person controlling, controlled by or under common control with such first Person, whether directly or indirectly, and “control” means directly or indirectly hold securities or other interests in a Person (i) to which are attached more than 50% of the votes that may be cast to elect directors or persons exercising similar functions or (ii) entitling the holder to receive more than 50% of the profits of the Person or more than 50% of its assets on dissolution;

(b) **“Commissioner”** means the Commissioner of Competition appointed pursuant to section 7 of the Act or any person designated by the Commissioner to act on his behalf;

(c) **“Designated Representatives”** means up to two in-house counsel and up to three additional individuals designated by each of Parkland and Pioneer as their respective representatives who will be permitted access to Documents designated as Level B Protected Documents in accordance with the terms of this Order, which designations shall be made by written notice to the Tribunal, with a copy sent concomitantly to the Commissioner. The Commissioner may make a motion to the Tribunal objecting to such designations;

(d) **“Document”** means any document whatsoever, whether in physical or electronic form, including “Records”;

(e) **“Document Review Vendor”** means a professional service provider retained by a Party with respect to the Proceeding to facilitate the review of documents, both digital and paper, by legal professionals and who has executed a confidentiality agreement in the form attached as Schedule A hereto;

(f) **“Independent Expert”** means an expert retained by a Party with respect to the Proceeding who (i) is not a current employee of a Respondent; (ii) has not been an

employee of a Respondent within 2 years prior to the date of this Order, (iii) is not a current employee of a competitor of a Respondent; (iv) has not been an employee of a competitor of a Respondent within 2 years prior to the date of this Order; and (v) has executed a confidentiality agreement in the form attached as Schedule A hereto;

(g) **“Parkland”** means Parkland Industries Ltd. and Parkland Fuel Corporation, their directors, officers, employees, agents, representatives, successors and assigns; and all joint ventures, subsidiaries, divisions, groups and Affiliates controlled by Parkland Fuel Corporation, and the respective directors, officers, employees, agents, representatives, successors and assigns of each;

(h) **“Parties”** means the Commissioner and Respondents collectively and **“Party”** means any one of them;

(i) **“Person”** means any individual or corporation or partnership, sole proprietorship, trust or other unincorporated organization capable of conducting business, and any Affiliates thereof;

(j) **“Pioneer”** means Pioneer Petroleums Holding Limited Partnership, Pioneer Energy LP, Pioneer Petroleums Transport Inc., Pioneer Energy Inc., Pioneer Fuels Inc., Pioneer Petroleums Holding Inc., Pioneer Energy Management Inc., 668086 N.B. Limited, 3269344 Nova Scotia Limited and 1796745 Ontario Ltd., their directors, officers, employees, agents, representatives, successors and assigns; and all joint ventures, subsidiaries, divisions, groups and Affiliates controlled by the foregoing entities, and the respective directors, officers, employees, agents, representatives, successors and assigns of each;

(k) **“Proceeding”** means the application filed by the Commissioner against the Respondents (File Number CT-2015-003) for one or more orders pursuant to subsection 92(1) of the Act;

(l) **“Protected Document”** means any Document (including the information such Document contains) that is produced in the Proceeding, including documents listed in affidavits of documents, excerpts from transcripts of examinations for discovery, answers to undertakings, documents produced with answers to undertakings, expert reports, lay witness statements, pleadings, affidavits or submissions that:

(i) the Party producing the Document claims is confidential pursuant to Section 4 of this Order;

(ii) the Tribunal has determined is confidential;

(m) “**Record**” has the same meaning as in subsection 2(1) of the Act and, for greater certainty, includes any email or other correspondence, memorandum, pictorial or graphic work, spreadsheet or other machine readable record and any other documentary material, regardless of physical form or characteristics;

(n) “**Respondents**” means Parkland and Pioneer collectively, and “Respondent” means any one of them; and

(o) “**Third Party**” means any Person other than the Commissioner or Respondents.

[4] Disclosure of Documents containing any of the following types of information could cause specific and direct harm, and such Documents may be designated as Protected Documents:

(a) Information relating to prices (to the extent that such prices have not been published or made generally known to competitors and customers), capacity, specific output or revenue data or market shares, or negotiations with customers or suppliers about prices, rates or incentives;

(b) Confidential contractual arrangements between a Respondent and its customers, agents, and/or suppliers;

(c) Financial data or reports, or financial information relating to a Respondent or its customers, suppliers or a Third Party;

(d) Business plans, marketing plans, strategic plans, budgets, forecasts and other similar information;

(e) Internal market studies and analyses; and

(f) Other Documents containing competitively sensitive and/or proprietary information of a Party or Third Party.

[5] If information from a Protected Document is incorporated into any other Document, that Document shall be a Protected Document. Any Protected Document shall cease to be a Protected Document if: (a) it or the protected information contained therein becomes publicly available (except if it becomes publicly available through a breach of this Order); or (b) if the Parties agree that the Document shall cease to be a Protected Document.

[6] Protected Documents will be identified in the following manner for the purpose of this Proceeding:

(a) A person who claims confidentiality over a Document shall, at the time of production of a Protected Document, mark it with the name of the entity producing the Document and with “Confidential – Level A” or “Confidential – Level B” on the face of each Document and/or on each page that is claimed as confidential;

(b) Subject to Section 5 of this Order, all Documents designated as Protected Documents shall be treated as a Protected Document, save for determination otherwise by the Tribunal or re-designation pursuant to Section 10 below;

(c) If a Document originates with or from more than one Party and is designated by at least one Party as a Protected Document, the highest level of confidentiality shall universally attach to that Document, subject to the resolution of any challenge to that claim of confidentiality;

(d) At any point in the Proceeding, a Party may challenge a claim of confidentiality or level of confidentiality made by another Party. The Parties shall use their best efforts to agree as to whether the Documents (or portions thereof) are to be treated as Protected Documents; and

(e) If agreement cannot be reached, the Parties may apply to the Tribunal to determine whether the Document or a portion thereof, is a Protected Document.

[7] Subject to a further order of the Tribunal, the consent of the Party or Parties that produced and claimed confidentiality over the Protected Document, or as required by law, Protected Documents marked “Confidential – Level A” (“Level A Protected Documents”) may be disclosed only to:

(a) the Commissioner, counsel to the Commissioner, and the Commissioner’s staff who are directly involved in the Proceeding;

(b) outside counsel to the Respondents and outside counsel’s staff who are directly involved in the Proceeding;

(c) Independent Experts and their staff who are directly involved in the Proceeding; and

(d) Document Review Vendors.

[8] Subject to a further Order of the Tribunal, the consent of the Parties that produced and claimed confidentiality over the Protected Document, or as required by law, Protected Documents marked “Confidential – Level B” (“Level B Protected Documents”) may be disclosed only to:

- (a) the individuals described in Section 7 above; and
- (b) Designated Representatives of the Respondent who have executed a confidentiality agreement in the form attached as Schedule A.

[9] Notwithstanding any provision of this Order, the Commissioner may disclose any Level A Protected Documents or Level B Protected Documents that he has so designated, and that have not been produced in this Proceeding by a Respondent or otherwise originated from a Respondent, to any Person for the purpose of preparing for the hearing of this Proceeding, subject to the limits prescribed by section 29 of the Act.

[10] A Party may at any time and with prior reasonable notice to the other Parties re-designate any of its own Level A Protected Documents as Level B Protected Documents or public documents, and/or may re-designate any of its own Level B Protected Documents as public documents. Where another Party disputes the re-designation, the Tribunal shall determine the proper designation. Documents re-designated as public shall cease to be Protected Documents and shall form part of the public record if introduced into evidence at the hearing of the Proceeding, unless the Parties agree otherwise or the Tribunal so orders. If a Party changes the designation of a Document to confidential, a prior disclosure of it shall not constitute a breach of this Order.

[11] 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 agreement 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 a protective order or other appropriate remedy may be sought.

[12] Outside counsel to a Party and his or her staff, counsel to the Commissioner, the Commissioner and his staff, and Independent Experts and their staff, may make copies of any Protected Document as they require in connection with the Proceeding.

[13] Nothing in this Order prevents a Party from having full access to Protected Documents that originated from that Party.

[14] For greater certainty, in accordance with section 62 of the *Competition Tribunal Rules*, SOR/2008-141, all Persons who obtain access to Documents and information through documentary, written and oral discovery through this Proceeding are subject to an implied undertaking to keep the Documents and information confidential and to use the Documents and information solely for the purposes of this Proceeding (including any application or proceedings

to enforce any order made by the Tribunal in connection with this Proceeding) and any related appeals.

[15] At the hearing of the Proceeding:

(a) Protected Documents tendered as evidence at the hearing of the Proceeding shall be identified and clearly marked as such, in accordance with paragraph 6(a), above;

(b) The Tribunal may determine whether the Document should be treated as a Protected Document;

(c) Protected Documents shall not form part of the public record unless the Party or Parties claiming confidentiality waive the claim, or the Tribunal determines that the Document is not a Protected Document; and

(d) Documents over which no privilege or confidentiality claim has been asserted shall, unless otherwise determined by the Tribunal at the hearing, form part of the public record in this Proceeding if introduced into evidence or otherwise placed on the record. Public Documents shall be marked "Public" on the face of the document.

[16] The Parties shall provide the Tribunal with redacted versions of Protected Documents at the time any such Documents are introduced into evidence or otherwise placed on the record, which redacted versions shall be marked "Public" on the face of the document and shall form part of the public record in this Proceeding. Each Protected Document shall identify the portions of the document which have been redacted from the "Public" version, by highlighting such portions in the Protected Document.

[17] The termination of the Proceeding 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, subject to any further order of the Tribunal.

[18] Upon completion or final disposition of the Proceeding and any related appeals, all Protected Documents and any copies of Protected Documents, with the exception of Protected Documents in the possession of the Commissioner and his staff, shall be destroyed or returned to the Party that produced them unless the Party that produced the Protected Documents states, in writing, that they may be disposed of in some other manner, provided that outside counsel to the Parties and counsel to the Commissioner may keep copies of Protected Documents in their files and that any copies of Protected Documents as may exist in the Parties' automatic electronic backup and archival systems may be kept provided that deletion is not reasonably practical and the copies are retained in confidence and not used for any purpose other than backup and archival purposes.

[19] The Parties shall bear their own costs associated with the request for and issuance of this Order.

[20] Nothing in this Order prevents or affects the ability of a Party from applying to the Tribunal for further order or directions with respect to the use or disclosure of Documents or information produced by another Party.

[21] The Tribunal shall retain jurisdiction to deal with any issues relating to this Order, including, without limitation, the enforcement of this Order and any undertakings executed pursuant to this Order. This Order shall be subject to further direction of the Tribunal and may be varied by order of the Tribunal.

DATED at Ottawa, this 23rd day of July, 2015.

SIGNED on behalf of the Tribunal by the Chairperson.

(s) Denis Gascon

[22] Schedule A - Confidentiality Agreement

IN CONSIDERATION of being provided with information or documentation in connection with this Proceeding which have been designated as confidential (the "Protected Documents"), I _____, of the City of _____, in the Province/State of _____, hereby agree to maintain the confidentiality of the Protected Documents so obtained.

I will not copy or disclose the Protected Documents so obtained to any other person, except (a) my staff who are directly involved in this matter; (b) counsel for the party on whose behalf I have been retained, members of his firm who are directly involved in this Proceeding and, in the case of the Commissioner, the Commissioner's staff involved in the Proceeding; (c) other experts retained by or on behalf of the Party on whose behalf I have been retained and who have signed a similar confidentiality agreement with the Parties to this Proceeding; and (d) persons permitted by order of the Competition Tribunal. Nor will I use the Protected Documents so obtained for any purpose other than in connection with this Proceeding and any related appeals.

Upon completion of this Proceeding and any related appeals, I agree that the Protected Documents, and any copies of same, shall be dealt with in accordance with instructions from counsel for the Party I am retained by or as prescribed by the Order of the Competition Tribunal.

I acknowledge that I am aware of the Order granted by the Competition Tribunal on _____, in this regard, a copy of which is attached to this agreement and agree to be bound by same. I acknowledge that any breach of this agreement by me will be considered to be a breach of the said Order of the Competition Tribunal. I further acknowledge and agree that any Party 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 in law or in equity.

In the event that I am required by law to disclose any of the Protected Documents, I will provide the Parties to this Proceeding with prompt written notice so that the Party that claimed confidentiality over such Protected Documents may seek a protective order or other appropriate remedy. In any event, I will furnish only that portion of the Protected Documents that is legally required and I will exercise my best efforts to obtain reliable assurances that confidential treatment will be accorded to the Protected Documents.

I will promptly, upon the request of the person providing the Protected Documents, advise where such material is kept. At the conclusion of my involvement, I will, upon the request and direction of the person providing the Protected Documents, destroy, return or otherwise dispose of all Protected Documents received or made by me having been duly authorized and directed to do so.

I hereby attorn to the jurisdiction of the Competition Tribunal to resolve any disputes arising under this agreement.

DATED this _____ day of _____, 2015.

SIGNED, SEALED & DELIVERED

in the presence of:

Witness

Name (seal)

COUNSEL

For the applicant:

The Commissioner of Competition

John Syme
Antonio Di Domenico
Tara DiBenedetto

For the respondents:

Parkland Industries Ltd.
Parkland Fuel Corporation

John F. Rook
Randal T. Hughes
Y. Beth Riley
Emrys Davis
Gannon G. Beaulne

Pioneer Petroleum Holding Limited Partnership
Pioneer Energy LP
Pioneer Petroleum Transport Inc.
Pioneer Energy Inc., Pioneer Fuels Inc.
Pioneer Petroleum Holding Inc.
Pioneer Energy Management Inc.
668086 N.B. Limited
3269344 Nova Scotia Limited
1796745 Ontario Ltd.

Christopher Hersh