Competition Tribunal | Tribunal de la Concurrence

PUBLIC VERSION

Reference: *The Commissioner of Competition v. Parkland Industries Ltd*, 2015 Comp. Trib. 4
File No.: CT-2015-003
Registry Document No.: 046

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

AND IN THE MATTER OF an Application for an Interim Order pursuant to section 104 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 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)

Date of hearing: 20150512
Before Judicial Member: Gascon J. (Chairperson)
Date of Reasons and Order: May 29, 2015

REASONS AND ORDER GRANTING IN PART AN APPLICATION FOR INTERIM RELIEF UNDER SECTION 104 OF THE COMPETITION ACT

I. INTRODUCTION

[1] This is an application filed by the Commissioner of Competition (the "Commissioner") pursuant to section 104 of the *Competition Act*, R.S.C. 1985, c. C-34 (the "Act") for an interim order in respect of a proposed transaction (the "Proposed Merger") in the retail gasoline industry between Parkland Industries Ltd. and Parkland Fuel Corporation (collectively "Parkland") and 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. (collectively, "Pioneer"). In this application, the Commissioner is seeking an order directing Parkland to hold separate the assets it proposes to acquire from Pioneer pursuant to the Proposed Merger in 14 local markets in the provinces of Ontario and Manitoba (the "14 Local Markets"), until such time as the Tribunal delivers its final decision in respect of the Commissioner's application under section 92 of the Act.

[2] In his underlying section 92 application, the Commissioner seeks an order prohibiting the Respondents from implementing the Proposed Merger in the 14 Local Markets and/or requiring Parkland to dispose of assets in these markets as well as such other assets, as are required for an effective remedy, on such terms as may appear just.

[3] The Commissioner provided a confidential version of his section 104 application to the Tribunal on May 7, 2015 and the hearing of the application took place in Ottawa on May 12.

[4] Upon reviewing the materials filed by the Commissioner and the Respondents and upon hearing counsel for all parties, and for the reasons detailed below, I am of the view that the Commissioner's application for interim relief under section 104 of the Act should be granted in part. The terms of my order are set out in Annex A.

II. BACKGROUND

A. The Parties

[5] The Commissioner is responsible for the administration and enforcement of the Act (see: section 7 of the Act).

[6] Parkland carries on business as an independent marketer of fuel and petroleum products. It supplies and supports 143 gas stations that it owns or leases (the "Corporate Stations"), as well as 539 gas stations that are owned or leased by third-party dealers (the "Independent Dealer Stations"). A Parkland Corporate Station is a gas station operated and managed on Parkland's behalf by an independent contractor. With respect to its Corporate Stations, Parkland owns the fuel inventory and controls the retail selling price of fuel at the pumps. A Parkland Independent Dealer Station is a gas station operated and managed by an independent third-party dealer to whom Parkland supplies fuel pursuant to exclusive long-term agreements. At these Independent Dealer Stations, the dealer owns the fuel inventory and sets the retail selling price at the pumps,

independently from Parkland. The Independent Dealer Stations supplied by Parkland operate under various brands; in particular, Parkland is a branded wholesaler for Esso and buys gasoline from Imperial Oil Ltd. to supply its Esso-branded Independent Dealer Stations.

[7] Pioneer is headquartered in Burlington, Ontario, and also carries on business as an independent marketer of fuel and petroleum products. It currently operates more than 180 Pioneer Corporate Stations and supplies fuel to approximately 210 Independent Dealer Stations located in Ontario and Manitoba.

B. The Proposed Merger

[8] On September 17, 2014, Parkland and Pioneer entered into an asset purchase agreement pursuant to which Parkland agreed to acquire substantially all of Pioneer's assets including 181 Pioneer Corporate Stations and 212 Pioneer supply agreements with Independent Dealer Stations in the provinces of Ontario and Manitoba. On October 3, 2014, an advance ruling certificate was requested by Parkland in respect of the Proposed Merger pursuant to section 102 of the Act. Three days later, pre-merger notification filings under Part IX of the Act were submitted by the Respondents to the Competition Bureau (the "Bureau").

[9] On November 5, 2014, the Commissioner issued a Supplementary Information Request ("SIR") pursuant to the applicable provisions of the Act. On December 12, 2014, the Bureau confirmed that the scope of the SIR was limited to 21 overlapping areas it had identified (the "Overlapping Areas"). The Respondents certified their responses to the SIR on January 23, 2015, after providing the Bureau with approximately 70,000 documents.

[10] On February 18, 2015, Parkland and Pioneer agreed to give the Commissioner a 15 days' written notice of the closing of the Proposed Merger. The outside closing date was extended a number of times to provide more time to the Commissioner to complete his review. On April 27, 2015, the parties notified the Commissioner of their intention to close the Proposed Merger on May 13, 2015. The following day, the Commissioner commenced an inquiry pursuant to section 10 of the Act.

[11] On April 29, 2015, Parkland sent a letter to the Commissioner advising him of Parkland's intention, following the closing of the Proposed Merger, to divest four Corporate Stations and six supply agreements in 10 of the 14 Local Markets (the "Parkland Divestitures"), notwithstanding Parkland's belief that the Proposed Merger was not likely to result in a substantial lessening of competition in any geographic area. The 10 local areas covered by the Parkland Divestitures are described as follows:

1) Neepawa, MB
2) Bancroft, ON
3) Lundar, MB
4) Kapuskasing, ON
5) Warren, MB
6) Welland, ON
7) Chelmsford/Azilda, ON
8) Gananoque, ON
9) Hanover, ON
10) Port Perry, ON

[12] The four other areas included in the 14 Local Markets are identified as Aberfoyle, Allanburg, Innisfil and Tillsonburg in Ontario. On April 30, 2015, the Commissioner filed with the Tribunal his application under section 92 of the Act in which he alleges that the Proposed Merger will likely lead to a substantial lessening of competition in the 14 Local Markets. Those 14 markets represent a subset of the Overlapping Areas which had been previously identified by the Bureau in December 2014.

[13] At the hearing of the Commissioner's section 104 application, counsel for Parkland informed the Tribunal and the Commissioner that the Respondents would not proceed to close the Proposed Merger until receipt of the Tribunal's decision on this application.

C. The Application for Interim Relief

[14] The Commissioner has applied pursuant to section 104 of the Act for an order directing Parkland to hold separate the assets it will acquire from Pioneer under the Proposed Merger in the 14 Local Markets "on such terms as are necessary to preserve the assets and business as a going concern and to maintain competition in the Relevant Markets [as defined in the application] until such time as the Tribunal's decision is finally disposed of in respect of the Commissioner's Application pursuant to section 92". No further details were given in the Commissioner's application with respect to the terms and conditions to be included in the interim order sought.

[15] At the hearing of the Commissioner's section 104 application, a detailed (22 pages long) draft Interim Hold Separate Order was submitted to the Tribunal by counsel for the Commissioner. This draft order also provides for the preservation of some of Parkland's assets.

[16] Although the passage quoted above from the Commissioner's application reflected a focus on preserving the assets and business of Pioneer as a going concern to maintain competition pending a final decision on his section 92 application, the Commissioner's submissions with respect to the irreparable harm that would ensue if an interim order were not issued had a different focus. Those submissions, found at paragraphs 33 to 59 of the Commissioner's Memorandum, focused on the harm to consumers and the broader economy that would result from increased prices and reduced non-price competition in the period between the closing of the transaction and a final determination being made on that application. This decision will therefore be directed towards those submissions.

[17] In support of his section 104 application, the Commissioner filed an affidavit of Mr. Mc Nabb, an acting Senior Competition Law Officer with the Bureau, dated April 30, 2015 (the "Mc Nabb Affidavit") as well as two reports prepared by Dr. Boyer, an Emeritus Professor of Economics at the Université de Montréal, respectively dated April 30, 2015 (the "Boyer Report") and May 5, 2015 (the "Reply Boyer Report"). In support of its response, Parkland filed an affidavit of Mr. Espey, the President and Chief Executive Officer of Parkland Fuel Corporation, (the "Espey Affidavit") as well as an affidavit of Ms. Sanderson, the Vice-President & Practice Leader of the Competition and Antitrust Economics practice for the consulting firm Charles

River Associates International Limited (the "Sanderson Affidavit"). Both affidavits were sworn on May 5, 2015.

[18] In his affidavit, Mr. Espey made the following commitments on behalf of Parkland (the "Parkland Commitments"):

a. Parkland intends to complete the Parkland Divestitures as soon as possible after closing;

b. Parkland will divest to a third-party purchaser or terminate the supply agreement with the Independent Dealer Station in Tillsonburg, Ontario (the "Tillsonburg Commitment"); and

c. with respect to all 14 Local Markets, Parkland will ensure that the rack forward margin Parkland charges to Independent Dealer Stations will be, at most, no greater than it has been under Pioneer's or Parkland's current supply agreements with Independent Dealer Stations and it will maintain Pioneer's pricing strategy at Pioneer Corporate Stations, until the assets are divested or supply arrangements terminated in the case of the Parkland Divestitures and the Tillsonburg Commitment or until the disposition of the section 92 application in the case of the local markets in Aberfoyle, Allanburg and Innisfil in Ontario.

[19] The "rack forward margin" to which Mr. Espey refers consists of the fee charged by Parkland to the Independent Dealer Stations and is based on the Parkland price zone in which the Independent Dealer Station is located. The rack forward margin, together with the "refiner pack price" (i.e., the rack price at the supply point from which Parkland picks up the fuel for delivery to an Independent Dealer Station), constitutes Parkland's "designated loading rack". The fuel price under Parkland's wholesale supply agreements is generally equal to Parkland's "designated loading rack" plus delivery costs and taxes.

[20] Pioneer, in its response, indicated that it would rely on the materials filed by Parkland and representations made by Parkland's counsel at the hearing.

[21] The Commissioner did not refer to the Parkland Divestitures or the Parkland Commitments in his section 104 application. The Reply Boyer Report contained a comment about them and, in his Reply Memorandum filed on May 12, 2015, the Commissioner stated that they did not constitute acceptable remedies in the context of this application nor did they provide the assurances needed to prevent irreparable harm during the interim period.

III. ISSUES

[22] The issue to be determined by the Tribunal is whether the Commissioner has, in light of the evidence filed in this application, met the requirements of section 104 and whether the Tribunal should, in the circumstances of this case, issue either the interim order sought or an interim order it considers appropriate to prevent irreparable harm from occurring in the 14 Local Markets in the period between the closing of the Proposed Merger and the final disposition of the Commissioner's section 92 application. For the reasons given at paragraph 16 above, the Tribunal will not address the harm that is typically at issue when considering and structuring hold separate agreements, namely preserving the competitive viability of the assets to be divested or potentially divested, as it is not the harm claimed by the Commissioner in this application.

IV. APPLICABLE LAW

[23] The Tribunal has not previously dealt with a contested application under section 104 of the Act in the context of a merger, and it is therefore useful to address the legislative framework for the analysis and interpretation of section 104.

A. Section 104

[24] Section 104 of the Act sets out the test to be applied on this application. It reads as follows:

104. (1) If an application has been made for an order under this Part, other than an interim order under section 100 or 103.3, the Tribunal, on application by the Commissioner or a person who has made an application under section 75, 76 or 77, may issue any interim order that it considers appropriate, having regard to the principles ordinarily considered by superior courts when granting interlocutory or injunctive relief.	**104.** (1) Lorsqu'une demande d'ordonnance a été faite en application de la présente partie, sauf en ce qui concerne les ordonnances provisoires en vertu des articles 100 ou 103.3, le Tribunal peut, à la demande du commissaire ou d'une personne qui a présenté une demande en vertu des articles 75, 76 ou 77, rendre toute ordonnance provisoire qu'il considère justifiée conformément aux principes normalement pris en considération par les cours supérieures en matières interlocutoires et d'injonction.
(2) An interim order issued under subsection (1) shall be on such terms, and shall have effect for such period of time, as the Tribunal considers necessary and sufficient to meet the circumstances of the case.	(2) Une ordonnance provisoire rendue aux termes du paragraphe (1) contient les conditions et a effet pour la durée que le Tribunal estime nécessaires et suffisantes pour parer aux circonstances de l'affaire.
(3) Where an interim order issued under	(3) Si une ordonnance provisoire est rendue

subsection (1) on application by the Commissioner is in effect, the Commissioner shall proceed as expeditiously as possible to complete proceedings under this Part arising out of the conduct in respect of which the order was issued.	en vertu du paragraphe (1) à la suite d'une demande du commissaire et est en vigueur, le commissaire est tenu d'agir dans les meilleurs délais possible pour terminer les procédures qui, sous le régime de la présente partie, découlent du comportement qui fait l'objet de l'ordonnance.
[emphasis added]	[mes soulignements]

[25] Section 104 is contained in the last group of provisions in Part VIII of the Act, under the heading "General", and thus applies to all matters reviewable by the Tribunal under Part VIII, including restrictive trade practices, agreements or arrangements that prevent or lessen competition substantially as well as mergers. Section 104 requires two elements. First, an application must have been made for an order under Part VIII, other than an interim order under section 100 or 103.3. Second, in exercising its discretion to issue an interim order under that provision, the Tribunal is directed to consider "the principles ordinarily considered by superior courts when granting interlocutory or injunctive relief".

[26] With respect to the principles ordinarily considered by superior courts when granting interlocutory or injunctive relief, the Tribunal has consistently applied the tripartite test set out by the Supreme Court of Canada in *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311 ("*RJR-MacDonald*"). In *RJR-MacDonald*, the Supreme Court held that, to issue an order for injunctive relief, a court must first be satisfied that there is a serious issue to be tried. Second, it must be determined whether the applicant would suffer irreparable harm if the injunction were refused. Third, an assessment must be made as to the "balance of convenience", which contemplates an assessment of which of the parties would suffer greater harm from the granting or refusal of the remedy pending a decision on the merits. The test is conjunctive, and all three elements have to be met in order for relief to be granted.

[27] The most recent decision issued by the Tribunal on a section 104 application is the decision by Justice Blanchard in *Nadeau Poultry Farm Limited v. Groupe Westco Inc. et al*, 2008 Comp. Trib. 16 ("*Nadeau*"), which was rendered in the context of a section 75 application involving a refusal to deal matter between private parties and in which the Tribunal applied, at para. 8, the tripartite test of *RJR-MacDonald* (see also: *B-Filer Inc. v. The Bank of Nova Scotia*, 2005 Comp. Trib. 52, at para. 4).

[28] In the context of mergers, the Tribunal has considered section 104 applications involving either an interim order filed on consent by the parties or the respondent providing satisfactory undertakings to the Commissioner (or the Director of Investigation and Research (the "Director"), as the Commissioner was previously known). In *Canada (Director of Investigation and Research) v. Southam Inc.* (1991), 36 C.P.R. (3d) 22 (Comp. Trib.) ("*Southam*"), the Director had applied for an interim order under section 104, and while the parties had agreed in principle on the issuance of a consent interim order, they did not agree on certain terms. In that

case, Justice Teitelbaum applied the *RJR-MacDonald* tripartite test, noting that the parties had only joined issue over the question of the balance of convenience.

[29] It is also useful to mention that in decisions dealing with requests for a stay of a decision or a consent agreement under the Act, the courts and the Tribunal also applied the three-part test set out in *RJR-MacDonald*. In that regard, the most recent Tribunal decision is Justice Rennie's decision in *Kobo Inc. v. The Commissioner of Competition*, 2014 Comp. Trib. 2 ("*Kobo*"), in which the Tribunal granted Kobo's motion for an order staying the implementation of a consent agreement (see also: *Tervita Corporation v. Commissioner of Competition*, 2012 FCA 223).

B. Other Merger Provisions

[30] In considering section 104 and in order to interpret the provision in the context of mergers, reference should also be made to the general legislative scheme applicable to proposed and completed mergers under the Act, and more specifically to the other remedies available to the Commissioner pursuant to sections 92 and 100.

[31] Under section 92, the Commissioner may file an application for dissolution, divestiture or other relief in the case of a completed merger or of a proposed merger. If the Tribunal finds that the merger or proposed merger will prevent or lessen, or is likely to prevent or lessen, competition substantially, it may grant a type of relief set forth in section 92.

[32] Under section 100, the Tribunal may issue an interim order forbidding the completion or implementation of a proposed merger where certain specific conditions are met. In contrast to section 104 of the Act, section 100 only applies where no application has yet been made by the Commissioner under section 92, and strictly relates to proposed mergers. Further to the most recent amendments enacted in 1999, the Tribunal needs to consider two criteria in section 100 applications: 1) whether an inquiry under paragraph 10(1)(b) of the Act is in progress in respect of the merger and the Commissioner needs more time to complete it, and 2) whether, in the absence of an interim order, the Tribunal's ability to remedy the effect of the merger on competition would be substantially impaired because an action by a party to the merger would be difficult to reverse (see: *The Commissioner of Competition v. Labatt Brewing Co. Ltd. et al*, 2007 Comp. Trib. 9 (aff'd 2008 FCA 22) ("*Labatt*")).

[33] Apart from *Labatt*, the only other decision of the Tribunal in a contested section 100 context (excluding consent orders) concerned an application heard in 1998 by Justice Rothstein (as he then was) in *Canada (Director of Investigation and Research) v. Superior Propane Inc.* (1998), 85 C.P.R. (3d) 194 (Comp. Trib.) ("*Superior Propane*"), under the prior version of section 100. The application was dismissed because the Tribunal did not find that the merger would "reasonably likely" lessen or prevent competition substantially, which was the test to be met by the Director at the time. This requirement linked to the anticipated anti-competitive effects of a proposed merger was removed from section 100 with the 1999 amendments to the Act.

[34] The three recourses available to the Commissioner in the merger context (i.e., sections 92, 100 and 104) have different tests, and distinct thresholds to be met by the Commissioner. In contrast to section 92, the test for an interim order under section 104 does not specifically refer to the substantial lessening or prevention of competition. And unlike section 100, it does not refer to the ability to remedy the effect of a merger. It simply refers to the principles of injunctive relief which require an assessment of the notions of serious issue, irreparable harm and balance of convenience.

[35] The Tribunal does not need to decide whether the threshold in section 104 is higher or lower than the other interim remedy available to the Commissioner under section 100 of the Act. Suffice it to say that the language used in the two provisions is now clearly different, reflecting the different objectives of the two provisions and the fact that they correspond to different stages of the merger investigation process undertaken by the Commissioner. At the stage of a section 100 application, no application has yet been made by the Commissioner, a Commissioner's inquiry is on-going and more time is needed to complete the inquiry. In a section 104 application, the Commissioner has reached a further stage in his merger investigation, he has made the decision to file a section 92 application challenging the merger in whole or in part, and he is evidently further along in his review of the transaction at stake. It should be noted that section 104 does not require the Commissioner to file an application for an interim order at the same time or shortly after his section 92 application; the Commissioner simply cannot do it before a section 92 application has been made.

[36] It is also important to bear in mind the recent legislative history of the merger provisions and how the merger review process has changed further to the most recent amendments to the Act. When the Tribunal rendered its decisions in *Southam* and in *Superior Propane*, the Act was then giving the Director a maximum initial period of 21 days to perform a merger review before the parties could close the transaction, barring a Tribunal order. At the time of the Tribunal's decision in *Labatt*, the Commissioner had a maximum of 42 days to complete his merger review before a possible closing. In 2009, the merger review process was substantially amended and the Commissioner now has an initial waiting period of 30 days to conduct his review before the parties can close the transaction, which can be extended, with the issuance of a SIR, to 30 days after receipt of the information requested by the Commissioner under the SIR. This has considerably extended the time available to the Commissioner to conduct his review in complex merger cases (where a section 92 application is more likely), before the merging parties can be in a position to close their transaction. In the current case, the Commissioner's review of the Proposed Merger has extended over a period of almost seven months before the Commissioner filed his applications under sections 92 and 104.

V. ANALYSIS

A. Serious Issue to be Tried

[37] I turn to the first part of the tripartite test: whether the evidence before the Tribunal is sufficient to satisfy it that there is a serious issue to be tried. The threshold is a low one. While a preliminary assessment of the merits of the case is required, a prolonged examination of the

merits is generally neither necessary nor desirable (*RJR-MacDonald*, at pp. 337-338). Once the Tribunal determines that the underlying section 92 application is neither vexatious nor frivolous, it should proceed to the second part of the test.

[38] The Commissioner asserts that his section 92 application raises serious issues regarding Parkland's ability to exercise market power to the detriment of consumers and the broader economy, either through coordinated behaviour or unilaterally, in the 14 Local Markets. He adds that, given the disagreement between the parties as to the proper delineation of the relevant geographic markets and on the likelihood of a substantial lessening of competition, it is obvious that the proceeding raises serious issues.

[39] Parkland asserts that there is no serious issue to be tried for 11 of the 14 Local Markets as Parkland will complete the Parkland Divestitures in 10 of those 11 markets and will divest or terminate the supply agreement in the market of Tillsonburg pursuant to the Tillsonburg Commitment. In that regard, Parkland refers to the Reply Boyer Report filed by the Commissioner, in which Dr. Boyer concludes that, although further analysis by the Bureau is required, the proposed divestitures "[meet] at first glance the necessary requirement to avoid an increase in the likelihood of coordinated conduct in those 11 markets [...]". Parkland admits in its Memorandum that there is a serious issue to be tried for the remaining three local markets (though it argues there would be no irreparable harm given the Parkland Commitments).

[40] The Commissioner, in his reply, asserts that Parkland has failed to establish that the Parkland Divestitures are a viable and effective remedy. In particular, he argues that they are very vague, lack a binding commitment and a time frame, fail to prevent irreparable harm, and may not remedy the substantial lessening of competition in the affected markets. He adds that the Parkland Commitments, and more particularly the commitments regarding the rack forward margin and pricing maintenance, would be difficult to implement and monitor, offer no assurances on the price levels to be charged and fail to provide for the Tribunal's involvement.

[41] By admitting there are serious issues to be tried with respect to the three markets for which there are no Parkland Divestitures or termination of a supply agreement (in the case of Tillsonburg), Parkland indirectly acknowledges that there would be a serious issue in all 14 Local Markets if the Tribunal concludes that the Parkland Divestitures and the Parkland Commitments are not acceptable remedial measures in the circumstances.

[42] I agree with the Commissioner that, as they currently stand before the Tribunal, the Parkland Divestitures and the Tillsonburg Commitment are not defined enough and sufficient to allow the Tribunal to conclude that they would remedy the competition concerns in the 11 local markets covered by them, to the point where no serious issue would remain in respect of these markets. The Parkland Divestitures were not accompanied with a draft detailed divestiture agreement like those typically found in consent agreements filed before this Tribunal to resolve competition concerns in merger matters. They provide no details as to when and how the proposed divestitures will take place; they do not specify who the potential or suitable purchasers of the Corporate Stations or suppliers to the Independent Dealer Stations will be, or whether they will need to be approved by the Commissioner; and they do not refer to what measures will be

put in place to keep the assets viable and competitive pending divestitures. In addition, there is no indication of the time period which will be required before the proposed divestitures and commitment actually take place. This absence of details cannot be justified by the fact that Parkland continues to contest the existence of a substantial lessening of competition in the 11 local markets covered by the Parkland Divestitures and the Tillsonburg Commitment.

[43] To accomplish their purpose, remedies in merger matters should be couched in clear terms and be sufficiently well defined to be effective and enforceable (see: *Canada (Director of Investigation and Research, Competition Act) v. Imperial Oil Limited*, [1989] C.C.T.D. No. 52 (QL) (Comp. Trib.) and *Canada (Director of Investigation and Research, Competition Act) v. Palm Dairies Ltd.* (1986), 12 C.P.R. (3d) 540 (Comp. Trib.)). There are numerous consent agreements registered with the Tribunal, which were referred to by the Commissioner in his submissions in this proceeding, outlining the various elements normally found in proposed remedies accepted by the Commissioner and the merging parties in merger matters. These precedents can serve as a guide to the parties and the Tribunal in respect of divestiture proposals and remedial measures being offered. I find that the Parkland Divestitures and the Tillsonburg Commitment, as they are currently proposed before the Tribunal, do not contain even the basic elements that would be required before the proposed remedies may be considered to be effective. I hasten to add that Dr. Boyer's comment to the effect that the Parkland Divestitures and the Tillsonburg Commitment could resolve competition concerns in those 11 of the 14 Local Markets is heavily qualified and subject to the proposed divestitures satisfying the usual criteria considered by the Bureau in assessing these types of remedies.

[44] To echo what Justice Phelan said in *Labatt*, at para. 55, the Tribunal can only address the facts as they are presented to it, not as a party might like them to be or how they may unfold in the future. I cannot, for the purpose of assessing the existence of a serious issue to be tried, take the measures proposed by Parkland at face value without any details about their terms and conditions. On the record before me, I do not have sufficient information to ascertain whether the Parkland Divestitures and the Tillsonburg Commitment would resolve the competition concerns in the 11 markets covered by them to the point where no serious issue remains.

[45] Having reviewed the evidence and the submissions of the parties relating to the factors to be met in order to obtain relief under section 92, I find that there are serious issues to be tried. Notwithstanding the Parkland Divestitures and the Tillsonburg Commitment, I am satisfied that the application of the Commissioner is not frivolous or vexatious. The Commissioner has led significant evidence with respect to the substantial lessening of competition that he alleges is likely to result from the Proposed Merger in the 14 Local Markets. The arguments raise complex questions of fact and law which will require assessing the credibility and sufficiency of evidence on a number of issues, including the unilateral and coordinated anti-competitive effects of the Proposed Merger in the 14 Local Markets. Such questions are ill-suited for determination in an application for interim relief where a prolonged examination of the merits is generally neither necessary nor desirable. Whether the Commissioner is correct or not in his conclusions and statements of facts in the section 92 application is not a question to be determined at this time. Only a low threshold has to be met.

[46] I therefore conclude, in view of the principles set out in *RJR-MacDonald* and based on the record before me, that the Commissioner has raised serious issues to be tried on the merits of its case under section 92 of the Act. The first element of the *RJR-MacDonald* test is accordingly met.

B. Irreparable Harm

[47] I now turn to the second part of the test, the question of irreparable harm. Under this part, the Commissioner must establish that irreparable harm would ensue if the interim relief sought is not granted. The test has two dimensions to it: the "harm" itself, and its "irreparable" nature.

(1) The legal test

[48] The Supreme Court held in *RJR-MacDonald*, at p. 341, that "irreparable" refers to the nature of the harm suffered rather than its magnitude; it is harm which either cannot be quantified in monetary terms or which cannot be cured. There is no dispute between the parties that, in this case, the harm that the Commissioner alleges would to be suffered in the interim period is harm which would not be curable, and would therefore be irreparable. The Commissioner states that it would be irreparable because the Tribunal has no authority to award damages under the merger provisions of the Act and lacks the jurisdiction to remedy the harm that may be suffered by consumers and the broader economy during the interim period in the event the Commissioner is successful in his underlying section 92 application. I agree. Under section 92 of the Act, in the case of a completed merger, the Tribunal may only order to dissolve the merger or to dispose of assets or shares; no other remedy is available except with the consent of the parties.

[49] The issue in dispute is whether there is sufficient evidence of the alleged "harm".

[50] Irreparable harm in the context of injunctive relief must be established on the basis of clear and not speculative evidence (see : *Syntex Inc. v. Novopharm Ltd.* (1991), 36 C.P.R. (3d) 129 (FCA); *AstraZeneca Canada Inc. v. Apotex Inc.*, 2011 FC 505, aff'd 2011 FCA 211; and *Amnesty International Canada v. Canadian Forces*, 2008 FC 162 ("*Amnesty*"), at paras. 68-69). In addition, not only must evidence establishing irreparable harm be clear and not speculative, but proof of irreparable harm cannot normally be inferred. However, as stated by the Tribunal in *Nadeau* (at para. 26), the situation is different where the alleged harm has not yet occurred, as is generally the case for interim orders sought under section 104. In such circumstances, the evidence relating to loss resulting in irreparable harm is prospective and must, of necessity, be inferred (see: *Ciba-Geigy Canada Ltd. v. Novopharm Ltd.* (1994), 83 F.T.R. 161, at paras. 117-120).

[51] The relief sought in section 104 applications is akin to a *quia timet* ("because he fears") injunction. Applications for such *quia timet* injunctions require the court to assess the propriety of injunctive relief without the advantage of actual evidence regarding the nature and extent of the alleged harm. Justice Sharpe notes that, in such cases, "the courts have adopted a cautious

approach when asked to award an injunction prior to actual harm being suffered and have said that there must be a high degree of probability that the harm will in fact occur" (see: Robert J. Sharpe, *Injunctions and Specific Performance* (Toronto: Canada Law Book, 1992) (loose-leaf updated 2014, release 23), at para. 1.690. See also: *Merck & Co. v. Apotex Inc.* (2000), 8 C.P.R. 4th 248 (FCA) ("*Merck*"), at para. 7 and *Amnesty,* at para. 70). The Tribunal observes that, in both *Merck* and *Amnesty,* the reference to the high degree of probability was made in relation to the requirement that apprehended harm occurs "imminently or in the near future", and was thus linked to the temporal dimension of the feared harm.

[52] While some cases have referred to the "high degree of probability", the Federal Court has frequently expressed the higher test applicable to apprehension of harm in terms of clear and non-speculative evidence that irreparable harm will ensue if the interim relief is not granted (see: *Amnesty*, at para. 123 and *Bayer HealthCare AG and Bayer Inc. v. Sandoz Canada Inc*., 2007 FC 352, at para. 35). In *Nadeau,* at para. 26, the Tribunal articulated as follows the cautious approach to be followed in assessing prospective and inferred harm in the context of section 104 applications:

> While the drawing of inferences that logically follow from the evidence is permitted in such circumstances, there must nevertheless be clear evidence showing how such harm will occur and why it will be irreparable. In the absence of such evidence, there is nothing on which inferences of irreparable harm can reasonably and logically be based.

[53] At the hearing, counsel for Parkland and the Commissioner agreed that the Tribunal must apply the higher test used in *quia timet* injunction cases because the interim relief sought under section 104 is akin to such injunctions.

[54] I pause to note that the origin of the "high degree of probability" test goes back to the Supreme Court decision in *Operation Dismantle Inc. v. The Queen*, [1985] 1 S.C.R. 441, where the Court stated that the burden of proof for prospective Charter breaches was a high degree of probability. However, in its more recent decision in *F.H. v. McDougall*, 2008 SCC 53 ("*McDougall*"), the Supreme Court considered whether the standard of proof to apply in a civil case in which certain criminal allegations (sexual assault against a minor) were made is a "shifting standard of probability". In that decision, Justice Rothstein, for a unanimous court, held that there is only one civil standard of proof in Canada, a balance of probabilities, and noted the practical problems of having an intermediate standard of proof (between the civil and criminal standards), such as the high degree of probability. In his reasons, Justice Rothstein said that "it is inappropriate to say that there are legally recognized different levels of scrutiny of the evidence depending upon the seriousness of the case" (at para. 45) and that the only legal rule in all cases is that "evidence must be scrutinized with care by the trial judge". After adding that "evidence must always be sufficiently clear, convincing and cogent to satisfy the balance of probabilities test" (at para. 46), he concluded as follows, at para. 49:

> I would reaffirm that in civil cases there is only one standard of proof and that is proof on a balance of probabilities. In all civil cases, the trial judge must

> scrutinize the relevant evidence with care to determine whether it is more likely than not that an alleged event occurred.

[55] Although the Tribunal understands that the Supreme Court's conclusion in *McDougall* applied to a situation where one seeks to establish the existence of past events, as opposed to future events as is the case here, its comments on the difficulties surrounding the usage of varying standards such as "high degree of probability" are nonetheless instructive.

[56] The standard of proof (or burden of proof as it is more commonly known) is not to be confused with the standard of evidence (or evidentiary burden), though the two are closely related and somewhat intertwined. The evidentiary burden refers to the nature and quality of the evidence needed to be brought forward by an applicant to obtain relief. "The term "evidential burden" means that a party has the responsibility to ensure that there is sufficient evidence of the existence or non-existence of a fact or of an issue on the record to pass the threshold test for that particular fact or issue" (see: Sidney N. Lederman, Alan W. Bryant & Michelle K. Fuerst, *The Law of Evidence in Canada*, 4th ed. (Markham: LexisNexis Canada Inc., 2014) ("Lederman"), at p. 90). The "high degree" or "clear and non-speculative" standard applicable in injunctive relief cases relates to this evidentiary burden.

[57] Conversely, the burden of proof means that a party has an obligation to prove or disprove a fact or issue to the criminal or civil standard. This legal burden "ordinarily arises after a party has first satisfied an evidential burden in relation to that fact or issue" (Lederman, at p. 91). So, even if a high "clear and non-speculative" standard governs the nature of the evidence required for injunctive relief, it is still the balance of probabilities standard of proof that applies if a civil case is involved.

[58] In light of the foregoing, I am of the view that the better approach to be followed by the Tribunal in assessing irreparable harm in section 104 applications and in applying the higher test established by the Federal Court for apprehended harm is to express the test in terms of whether there is clear and non-speculative evidence allowing the Tribunal to make inferences that irreparable harm will result if the relief is not granted, using the cautious approach called for in *quia timet* injunctions. In other words, to meet his burden in this section 104 application where the harm is apprehended, the Commissioner must establish, on a balance of probabilities, that there is clear and non-speculative evidence demonstrating how such harm will occur, so that the inferences can be found to reasonably and logically flow from the evidence. To determine whether, in a given case, there is indeed such a level of evidence that the apprehended harm will occur is a factual determination to be made by the Tribunal, based on the evidence on the record before it.

[59] The Tribunal needs to mention another element. In a merger case like this one, there is an important question of the public interest to be considered. The Commissioner has the responsibility to protect the public interest in respect of competition in Canada in the manner conferred upon him by the Act. He may bring cases before the Tribunal when he considers it necessary in order to carry out this responsibility, as he does in this application with his section 92 and section 104 applications filed under the merger provisions. He is presumed to act in the

public interest, and significant weight should be given to these public interest considerations (see: *Superior Propane*, at para. 19).

[60] This public interest dimension has often been looked at in the context of the third component of the *RJR-MacDonald* test, the balance of convenience. In *RJR-MacDonald*, the Supreme Court said the following regarding how the concept of inconvenience should be construed in Charter cases (at p. 346):

> In the case of a public authority, the onus of demonstrating irreparable harm to the public interest is less than that of a private applicant. This is partly a function of the nature of the public authority and partly a function of the action sought to be enjoined. The test will nearly always be satisfied simply upon proof that the authority is charged with the duty of promoting or protecting the public interest and upon some indication that the impugned legislation, regulation, or activity was undertaken pursuant to that responsibility. Once these minimal requirements have been met, the court should in most cases assume that irreparable harm to the public interest would result from the restraint of that action.

[61] Following *RJR-MacDonald*, these comments have been repeated or cited in many cases considering the grant of interlocutory injunctions suspending the operation of a validly enacted but challenged law, or in the assessment of balance of convenience in stay proceedings involving public authorities (see for example: *Harper v. Canada (Attorney General),* 2000 SCC 57, at para. 9 and *Vancouver (City) v. Zhang*, 2009 BCCA 210, at paras. 10-11). Furthermore, in *Canada (Attorney General) v. Sfetkopoulos*, 2008 FCA 106, the Federal Court of Appeal stated at para. 10 that the "issue of public interest, as an aspect of irreparable harm to the interest of the government, will be considered at the second stage as well as the third stage" of the *RJR-MacDonald* test. This was a constitutional case where the Attorney General of Canada sought a stay of a judgement which had declared a provision of the *Marihuana Medical Access Regulations* invalid (see also: *Northwest Territories v. Sirius Diamonds Ltd.* 2001 FCT 702, at paras. 58-59).

[62] It thus follows from the guidance in *RJR-MacDonald* and its progeny that, from an evidentiary standpoint, the Commissioner is assisted by the presumption that, as a public authority exercising his mandate, he is acting in the public interest. It does not change the Commissioner's burden of proof, which is still the balance of probabilities. But the Tribunal needs to factor in this presumption when scrutinizing the evidence of irreparable harm which, according to the Commissioner, will result from a proposed transaction, and in determining whether the alleged harm can be reasonably and logically drawn from the evidence.

[63] In some instances, depending on the type of harm alleged by the Commissioner, it may be more difficult to provide clear and non-speculative evidence in support of the expected anti-competitive effects or need to preserve the competitiveness or viability of assets to be divested. In all cases, the Tribunal must proceed with the understanding that the actions taken by the Commissioner pursuant to the provisions of the Act are directed to protect competition and serve

a valid public purpose. To echo what the Supreme Court said in *RJR-MacDonald*, indications that minimal requirements have been met showing that the activity is undertaken as part of the responsibilities conferred on the Commissioner by the Act may in some cases be sufficient for the Tribunal to determine that irreparable harm to the public interest will result and can be reasonably and logically inferred from the evidence.

(2) The parties' positions

[64] In this application, the Commissioner alleges that the irreparable harm consists of harm likely to be suffered by consumers and the broader economy in the 14 Local Markets if no interim order is issued. He submits that, without a hold separate order during the interim period, Parkland will have the market power to increase prices through coordination and unilaterally in the 14 Local Markets, as well as the incentive to use that power. In support of his position, the Commissioner refers extensively to a table showing the parties' combined market shares and the four-firm concentration ratios ("CR4") resulting in a merger to monopoly or in decreases in the number of competitors from 3 to 2, 4 to 3 or 5 to 4 in 12 of the 14 Local Markets following the Proposed Merger.

[65] More specifically, the Commissioner asserts that the Proposed Merger will lead to higher prices for consumers for retail gasoline and will cause consumers to limit their consumption of gas, creating a loss of allocative efficiency for the economy. The Commissioner's analysis starts with the affected markets, which are said to be "local in nature", and the statement that "it does not make economic sense for consumers to drive long distances to save a cent or two on gasoline". In his discussion of harm in his Memorandum, the Commissioner refers to significant barriers to entry in retail gasoline markets, to significant market shares, to increased concentration and coordination and to the loss of pre-merger rivalry between Parkland and Pioneer.

[66] Parkland submits that the Commissioner has failed this part of the tripartite test because his geographic market approach underlying his claims of harm is flawed. It submits that the Tribunal should conduct an analysis similar to the analysis adopted by Justice Rothstein in *Superior Propane* given the high standard that is required under the second part of the *RJR-MacDonald* test in this case. In *Superior Propane*, the Tribunal had to determine whether the merger was "reasonably likely" to prevent or lessen competition substantially under section 100. To make that determination, the Tribunal engaged in a review of the evidence supporting the product market definition used by the Director.

[67] Relying on the Tribunal's approach in that case, Parkland asserts that the Tribunal should examine, at least to some extent, the Commissioner's geographic market definition and be satisfied that there is enough evidence to support the Commissioner's market definition. Parkland, relying in particular on Ms. Sanderson's opinion, asserts that no such evidence exists and that Dr. Boyer's determination of the relevant geographic markets is, at the least, very suspect. In addition to the Sanderson Affidavit, Parkland refers to an analysis done on February 23, 2015 by Charles River Associates ("CRA") with respect to the Overlapping Areas, and which had been submitted to the Bureau by Parkland in the course of the Bureau's review (the "CRA

Report"). The CRA Report was attached to the Espey Affidavit and contains evidence questioning the Bureau's approach to the geographic market definition and its market concentration measures in the various Overlapping Areas.

[68] Parkland further submits that the Commissioner's evidence of irreparable harm is speculative as it fails to take into consideration the Parkland Commitments. Parkland also states that its economic incentive is to keep prices low in order to keep volumes high because of the high-volume discounts offered by refiners.

(3) The alleged harm

[69] The apprehended harm alleged by the Commissioner in this application would result from the ability of the merged entity to increase prices and otherwise limit competition through coordinated behaviour and unilaterally, further to increases in market power and market concentration. The prospective harm thus focuses on the apprehended impact, in terms of increased prices and loss of allocative efficiency in the 14 Local Markets in the interim period, resulting from increased unilateral and coordinated anti-competitive effects which themselves result from increased market power due to increased concentration and increased market share levels following the Proposed Merger. This increased market power and this increased concentration are heavily dependent on the definition of the geographic markets used by the Commissioner for the 14 Local Markets. The boundaries of the geographic markets and the measure of market concentration levels are therefore critical to support the apprehended anti-competitive effects and resulting harm in this case. According to the Commissioner, it is the increased concentration which will lead to Parkland's expanded ability to increase prices unilaterally or through coordinated behaviour, to the detriment of consumers and the general economy.

[70] The Tribunal notes that the definition of relevant markets has consistently been central to its decisions in merger cases. The same is true with respect to the merger review analysis conducted by the Commissioner and described in detail in the Bureau's Merger Enforcement Guidelines (the "MEGs") (Gatineau: Competition Bureau, 6 October 2011). The primary objective of the merger provisions is to prevent the creation, increase or maintenance of market power, and the standard methods for assessing whether a merger is likely to have such a result generally involve, as initial steps, defining the relevant markets in which to calculate the market shares of the merging parties and market concentration levels. This goes to the core of the Commissioner's mandate under the Act. It then allows consideration of whether the resulting shares are large enough, when considered with other factors, to support an inference that the merged entity has market power sufficient to give rise to anti-competitive effects. Without a market properly defined, market shares and market concentration levels become more or less meaningless.

[71] For the purpose of the Commissioner's section 104 application, the Tribunal must be satisfied that there is clear and non-speculative evidence from which it can be reasonably and logically inferred that the apprehended harm will be suffered by consumers and the Canadian economy. Since, in this case, the prospective harm asserted by the Commissioner is directly

based on and cannot be dissociated from his market concentration measures and geographic market approach, I must first consider and be satisfied that the evidence in this respect meets the clear and non-speculative evidentiary standard.

[72] Parkland invites the Tribunal to conduct an analysis similar to what Justice Rothstein did in *Superior Propane*, where the Tribunal had to apply the "reasonably likely" substantial lessening of competition test in the context of a section 100 application. I am reluctant to do so because the test in section 104 applications is not the same. However, there are some elements of the *Superior Propane* decision that can guide the Tribunal in the current case.

[73] More specifically, since a market had to be defined in order for the Commissioner to make his determination about concentration and market shares, the evidence on the record as to how the market was defined has to be considered. Furthermore, the Tribunal cannot merely assume that the Commissioner's market definition or market concentration measures are the correct ones for the purpose of a section 104 application, when they are relied on as the main indicator of market power and an important element of the Commissioner's allegations of harm, as is the case here. Just as in *Superior Propane* where the market definition had to be established by evidence to the standard required by section 100, I must be satisfied that there is clear and non-speculative evidence on the record on the scope of geographic markets, market concentration and other factors to make me able to reasonably infer, in this section 104 application, the prospective harm alleged by the Commissioner.

(4) The evidence on market concentration

[74] In this case, there is evidence on the record before me coming from both the Commissioner and Parkland regarding market concentration levels, market shares and geographic markets. While it is not the role of the Tribunal, at this stage, to delve too deeply into the merits of the case, I must however assess whether this evidence meets the test for irreparable harm. On the basis of the record before me in this application, I am not satisfied that there is clear and non-speculative evidence on the threshold issues of the geographic dimensions of the alleged markets and market concentration for eight of the 14 Local Markets.

[75] The evidence provided by the Commissioner on the geographic scope of, and market concentration levels in, the 14 Local Markets is contained in the Mc Nabb Affidavit and in the two reports from Dr. Boyer. The Mc Nabb Affidavit first refers to some of the generic factors the Bureau considered in defining the 14 Local Markets; in that respect, Mr. Mc Nabb lists the geographic proximity of competing gas stations, the geographic characteristics of the markets, the views, strategies and behaviour of market participants, pricing levels and dynamics, and census data. The Mc Nabb Affidavit then provides, at para. 18, some limited "illustrative" examples for five markets out of the 14 Local Markets. For these five examples, the Mc Nabb Affidavit describes the geographic proximity of some competing gas stations in all five markets. It also refers to a total of four documents relating to three of the markets, which contain lists or pictures of competitors considered to be reflective of the views of one gas retailer (for two documents) and of Parkland (for the other two). The documents from the third-party gas retailer are two one-page "fuels pricing philosophy" documents where the prices of competing stations

are listed; the documents from Parkland are two similar letters regarding the terms of a supply agreement to be concluded with prospective Independent Dealer Stations, to which pictures of "competitors" are attached in support as background information.

[76] Apart from a description of the towns and communities involved in each "illustrative" market and the four documents mentioned above, there is no specific or detailed reference in the Mc Nabb Affidavit to the "geographic characteristics" of the five markets, to "pricing levels and dynamics", or to "census data". In other words, the illustrative examples are virtually silent on some of the general criteria said to have been used by the Bureau in defining the 14 Local Markets. The Mc Nabb Affidavit contains, at para. 19, a table with market concentration figures for each of the 14 Local Markets further to the Proposed Merger but it provides no clear explanation as to how the various market concentration figures summarized in that table were arrived at. The Tribunal notes in passing that, in 10 of the 14 Local Markets, the CR4 levels do not appear to change with the Proposed Merger as the pre-transaction number of competitors is said to already be four or less.

[77] Turning to Dr. Boyer, throughout his initial report, he refers to the 14 Local Markets as the geographic markets that the Bureau "asked" him to study, to review, to look at or to analyse (at paras. 2, 8, 9, 67, 68, 71 and 74). He makes similar statements in the Reply Boyer Report, at paras. 14, 19 and 38. His initial report contains maps and descriptions of each of the 14 Local Markets; these descriptions provide the populations of the towns and communities involved, market share figures and the location and identity of the closest retail gas station identified as being outside of the market. The descriptions do not indicate how the specific markets or concentration measures were arrived at or which stations identified in the maps are considered to be part of each local market. At para. 19 of his reply report, Dr. Boyer refers to his "evaluation" of the geographic scope of the markets and to the fact that his definition of the markets relied on data provided to him by the Bureau.

[78] Dr. Boyer acknowledges that the geographic markets provided to him by the Bureau are not defined empirically, but states that his preliminary observations about the markets were sufficient for him to reach his conclusions about unilateral and coordinated anti-competitive effects, and that a precise delineation of the boundaries was not necessary. At para. 68 of the Boyer Report, he says that "the geographic scope of the relevant markets depends upon the extent of pricing constraint imposed by alternative supply", but he acknowledges he has not done empirical studies of that nature for the 14 Local Markets. Nor has he provided non-empirical evidence of alternative supply being able or unable to impose pricing constraints in the various markets.

[79] In the Boyer Report, at para. 10, Dr. Boyer refers to the CRA Report and indicates that he disagrees with its conclusions and that it does not provide an analysis of who is being constrained in the 14 Local Markets or support for the broader markets identified by CRA. However, Dr. Boyer does not provide an analysis of his own. He indicates that the distance consumers are willing to travel in response to a substantial price increase has a "natural limit", may vary for rural and non-rural areas and may be influenced by consumers' incomes,

commuting patterns and the geographic position of gas stations. There is however no detail or discussion on how these criteria are applied for each of the 14 Local Markets.

[80] Dr. Boyer adds in his initial report that, even if he was to accept the market definitions of Ms. Sanderson in the CRA Report, his opinion would not change, based on his "understanding of the dynamics of the retail gasoline markets" he previously studied. He further states that the "risk of coordinated conduct capable of mimicking and replicating actual collusion price increases would be significantly higher following the proposed transaction in the 14 markets". He also mentions that the market definitions he used were not precise, and that more precise boundaries would be unlikely to change his views regarding the increased likelihood of coordinated behaviour. He refers to using a range of potential markets as an option but no information on these potential markets is provided in his reports. He adds that further information required to determine a more precise market definition would be "unlikely to change concentration levels enough" to alleviate his concerns; the extent and scope of these concentration levels are not discussed in his reports.

[81] Based on my review of Dr. Boyer's two reports, I am not satisfied that they contain evidence of the evaluation, if any, done by Dr. Boyer to define the 14 Local Markets he describes in his initial and reply reports, or how such evaluation or definition may have been arrived at. Based on the evidence on the record, the only reasonable conclusion I can draw is that Dr. Boyer used the market share levels and geographic markets as provided by the Commissioner for the purpose of his analysis, without conducting a geographic assessment or making concentration measures of his own. Dr. Boyer referred, for the purpose of his analysis of the impact of the Proposed Merger in the 14 Local Markets, to the "highly or quite concentrated" markets, to significant market shares and to increased concentration above the MEGs safe harbour levels, but I find that no clear explanation on how these were reached is apparent from his reports. Indeed, most of the Boyer Report and the Reply Boyer Report is spent discussing unilateral and coordinated anti-competitive effects expected to result from the Proposed Merger, using the geographic markets and high concentration levels provided by the Bureau.

[82] There is also, on the issue of geographic markets, evidence on the record coming from the CRA Report and the Sanderson Affidavit that the Tribunal cannot ignore. The CRA Report contains an analysis of each Overlapping Area with estimates of market concentration levels which differ from those found in the table in the Mc Nabb Affidavit. In the various Overlapping Areas, the CRA Report contains references to elements such as the location of purchasers or driving and commuting patterns mostly derived from the Pioneer loyalty customer card data which suggest that additional retailers might compete with Pioneer and Parkland in the areas in question, thus resulting in more expanded and precise definitions of the geographic markets concerned. This leads CRA to conclude that the Bureau's post-merger market shares and concentration levels are overstated and that the market concentration levels of the merged entity would be below the 35% market share safe harbour levels in many areas. In addition, the Sanderson Affidavit looked more specifically at the geographic areas of Aberfoyle, Allanburg and Innisfil in Ontario, providing additional details on the calculation of market shares for these areas and on the commuting and purchase patterns from the Pioneer loyalty customer card data. By comparison with this detailed analysis, the Commissioner's evidence appears limited and speculative, particularly in the absence of explanations from the Bureau on its own methodology.

[83] Having reviewed the totality of the evidence provided by the Commissioner and the Respondents in this application, I am not satisfied that, on a balance of probabilities, there is clear and non-speculative evidence supporting the geographic markets and market concentration levels used by the Commissioner as the basis for his allegations of anti-competitive effects and anticipated harm resulting from the Proposed Merger. For example, I do not find clear and cogent evidence on the type of analysis that may have been made by the Bureau to obtain its market concentration figures, on how the Bureau's market share calculations were arrived at, on how some retail gas stations were chosen to be part of a given market and others not, or on the reasons why retail stations located as close as 4, 5 or 7 kilometers from one of the local markets were left out of it. Of some significance is also the absence of evidence from the Commissioner as to whether pricing in a local market is or is not observed to be constrained or disciplined by prices in neighbouring areas, or on whether pricing in one region is independent from prices in other regions. There is also no information (except in the CRA Report) on the extent to which consumers located within the local areas travel outside them in the course of their weekly travel patterns. Furthermore, the documentary evidence provided in the Mc Nabb Affidavit regarding the identification of competitors by Parkland and one other gas retailer is limited to two types of documents which, in my assessment, cannot be considered convincing evidence of the extent of competitors present in a given area, in the absence of corroborating evidence.

[84] However, with respect to five of the 14 Local Markets, namely Warren, MB, Lundar, MB, Neepawa, MB, Bancroft, ON and Tillsonburg, ON, the CRA Report concedes, further to its analysis, that the post-merger concentration levels in these geographic areas are high and at or close to the Commissioner's figures. This implies an acceptance of the Commissioner's definition of the geographic market in these areas, based on the analysis made by CRA of the particular characteristics of these towns, the location of the nearest potentially competing stations at significant distances (as far as 33 kilometers in the case of Neepawa, MB) and the purchase and travel patterns of these towns' residents.

[85] In the cross-examination on affidavit of Ms. Sanderson, there is a further recognition that there are competition concerns in those local markets of Warren, MB, Lundar, MB, Neepawa, MB, Bancroft, ON and Tillsonburg, ON, as well as in Kapuskasing, ON (the "Six Markets"). The Tribunal notes that Kapuskasing, ON was not addressed in the CRA Report given an existing proposal to divest a station in the area. Ms. Sanderson concedes that there are "very high concentration" levels in four of the Six Markets, which would give rise to "legitimate competition concerns", as well as "high concentration" levels and competition concerns in the two remaining markets. Ms. Sanderson did not admit that these concerns would necessarily lead to the level of harm alleged by the Commissioner. However, she agreed there would be a substantial lessening of competition without a proper remedy. These comments and the observations contained in the CRA Report in respect of these Six Markets must be taken seriously as they provide supporting evidence of increased market share and concentration in those geographic markets at levels raising *prima facie* competition concerns.

(5) Conclusion on market concentration and harm

[86] I am therefore satisfied that, in respect of the Six Markets, there is, on the record before me, evidence of increases in market shares and concentration following the Proposed Merger which I find to be clear and non-speculative and from which it is reasonable and logical to infer, along with other factors, that the anti-competitive effects and resulting harm apprehended by the Commissioner will occur. However, this is not the case for the remaining eight markets, namely Aberfoyle, Allanburg, Innisfil, Welland, Chelmsford/Azilda, Gananoque, Hanover and Port Perry in Ontario (the "Eight Markets"). In light of the totality of the evidence on the record, including the contrary evidence provided by the CRA Report and the Sanderson Affidavit, I am not satisfied that, on a balance of probabilities, there is clear and non-speculative evidence of the market share and market concentration figures used by the Commissioner in the Eight Markets from which I could proceed to assess irreparable harm.

[87] The Commissioner has put a lot of emphasis, in his submissions, on the alleged limits and shortcomings of Ms. Sanderson's analysis and the CRA Report. The Tribunal acknowledges that there could be questions about the interpretations and conclusions drawn by Ms. Sanderson from the Pioneer loyalty customer data or from the various traffic and commuting patterns observed by CRA. This is an issue which will be debated in the section 92 application. But the fact that the evidence provided by Parkland on the appropriate market definition of the Eight Markets may be challenged or questioned does not make the evidence put forward by the Commissioner in this application any more clear, more complete or less speculative.

[88] Parkland has provided evidence on the record challenging the soundness of the Commissioner's approach to defining the Overlapping Areas and of the Commissioner's market concentration figures, and contrary evidence provided in this application by the Commissioner is thin at best. I do not have the required level of evidence about the methodology used, the various locations and the various competitors in the Eight Markets to determine whether the market share and market concentration estimates used by the Commissioner can be supported.

[89] In merger cases, as stated by the Supreme Court in *Tervita*, the analysis is necessarily forward-looking, and the Tribunal is mindful of that in its assessment of the apprehended harm feared by the Commissioner. The Tribunal is also mindful of the Commissioner's responsibility to maintain and protect competition and of the presumption that, as a public authority exercising his mandate, he is acting in the public interest. Here however, according to the Commissioner, Parkland will be able to exercise enhanced market power, unilaterally or through coordinated behavior, due to the significant increases in concentration in the 14 Local Markets resulting in high market shares and high level of concentrations. While subsection 92(2) of the Act contemplates that the Tribunal should not find, solely on the basis of evidence of concentration or market share, that a merger or proposed merger is likely to have anti-competitive consequences, evidence supporting an element as fundamental as the Commissioner's market concentration calculations is a prerequisite for assessing his allegations of anti-competitive effects and resulting harm to consumers and the general economy in this case.

[90] The Tribunal acknowledges that defining markets or measuring market concentration can be difficult. The Bureau has multiple tools at its disposal, both empirical and non-empirical. It is not for the Tribunal to indicate which ones should or could be used. But when the threshold issues of market definition and market concentration are so central to the allegations of harm made by the Commissioner in a section 104 application, there needs to be evidence which is sufficiently clear and non-speculative to support the Commissioner's submissions on these issues. Without such minimal evidence, no reasonable or logical inferences can be made that the apprehended anti-competitive effects and harm will occur.

[91] Section 104 applications are not situations where an application is made at the embryonic stage of an investigation by the Bureau or with little time for preparation, as can be the case in a section 100 application or in applications for section 11 orders (see : *Commissioner of Competition v. Pearson Canada Inc.*, 2014 FC 376 ("*Pearson*"), at paras. 47-48). A section 104 application is filed after a decision to file an application for a substantive order under Part VIII of the Act has been made by the Commissioner. At this stage, the Commissioner should possess evidence supporting fundamental elements of his merger review beginning with market definition and market concentration, when those are pivotal to his case.

[92] In this matter, the Bureau's review of the Proposed Merger had been going on for nearly seven months before the Commissioner filed his section 92 application. In addition, the Bureau was able, when the SIR was issued in November 2014, to narrow down the number of local areas where there were potential issues to the Overlapping Areas. The Bureau also had the benefit of some discovery through the SIR process as part of its review of the transaction. Furthermore, it had a detailed analysis provided by Parkland in February 2015, in the form of the CRA Report, which provided evidence that raised questions about the Bureau's market definition and market concentration measures in the various Overlapping Areas. Notwithstanding all of the foregoing, the evidence on the record in support of the Commissioner's submissions on market definition and increased concentration levels in this application is not sufficient to meet the clear and non-speculative standard of evidence, save for the Six Markets.

[93] The Commissioner argues that he does not have to prove the relevant geographic market definition (as this term of art is known in the competition law field) on a balance of probabilities at this stage and that it is an issue to be determined in the section 92 application. I agree. However, when the Commissioner's allegations of apprehended harm in a section 104 application results from inferences of anti-competitive effects that are heavily dependent on market concentration levels which cannot be dissociated from market definition, there must be some evidence meeting the clear and non-speculative standard on those basic elements of his merger review before the Tribunal can proceed with its analysis and make reasonable inferences with respect to the alleged irreparable harm. It bears emphasising that in conducting such further analysis, and consistent with the spirit of subsection 92(2) of the Act, the Tribunal will expect to be presented with evidence of additional considerations, such as one or more of those set forth in section 93 of the Act.

[94] To grant, in the circumstances of this case, the interim order requested for the 14 Local Markets without such minimal evidence, empirical or otherwise, would make the test of section 104 meaningless. This cannot have been the intent of the provision.

[95] A significant portion of the Commissioner's submissions and evidence deal with the anticipated anti-competitive effects, both unilateral and coordinated, expected to result from the increased concentration levels brought about by the Proposed Merger in the 14 Local Markets, and I will briefly turn to them as far as they relate to the Six Markets. For those Six Markets where the evidence on market concentration levels meets the required clear and non-speculative threshold and where competition concerns are acknowledged by Parkland's expert, I am satisfied that the inference of likely anti-competitive effects and harm is a reasonable and logical outcome to be drawn from the evidence on the record in this case.

[96] The Tribunal notes that the Boyer Report and the Reply Boyer Report extensively discuss unilateral and coordinated anti-competitive effects expected to result from the Proposed Merger, using the geographic markets and high concentration levels provided by the Bureau. The initial Boyer Report refers to the profit-maximizing behaviour of firms and to unilateral effects, and concludes that the increased concentration resulting from the Proposed Merger will substantially raise the chance and likelihood of unilateral and coordinated behavior by Parkland in the 14 Local Markets. I do not accept Parkland's assertion that Dr. Boyer only raises "possible" concerns about that or that the Commissioner's evidence on coordination (assuming high concentration levels) is speculative.

[97] When the two reports of Dr. Boyer are read in their entirety, I am satisfied that his evidence is more definitive than that as far as the Six Markets are concerned. Dr. Boyer states that the concentration levels, combined with other factors such as barriers to entry and loss of pre-merger rivalry, raise the likelihood of unilateral effects and substantially raise the chances of coordinated price increases emerging. He states that the Proposed Merger poses serious risks to competition through unilateral effects and coordinated effects and that price overcharges would likely result from the transaction. I have considered the evidence adduced by Parkland with respect to its economic incentive to keep prices low in order to keep volumes high, but I conclude that, in this case, the more persuasive evidence for the Six Markets is the logical rational behaviour of profit-maximizing firms as described by Dr. Boyer.

[98] The Mc Nabb Affidavit also contains examples which, though they are limited and anecdotal and could be interpreted differently, provide evidence from which it is reasonable and logical, in the context of a section 104 application, to infer that increased coordinated behaviour will occur. While the Espey Affidavit responds to the examples of the Mc Nabb Affidavit on coordinated conduct and provides additional context for some of the events, I am satisfied that this is not sufficient to make the evidence provided by Mr. Mc Nabb speculative. In addition, though the analysis in the Boyer reports may be abstract and theoretical in some respects and relies on a generic set of factors which will need to be investigated further for the specific local markets, it contains an extensive review by Dr. Boyer of the various structural and behavioural factors that are conducive to increased coordination, which demonstrates that these can be considered present in the various local markets identified by the Bureau and how they apply to

them. Dr. Boyer talks about a "reasonable certainty" that coordinated price increases will emerge in the market conditions created by the Proposed Merger. I note that the Sanderson Affidavit refers to some issues such as costs linked to coordination that are not addressed in the evidence of Dr. Boyer on apprehended coordinated effects resulting from the Proposed Merger but, at the stage of this section 104 application and in light of the evidence on competition concerns in the Six Markets, I do not find it sufficient to overcome the rest of the evidence on the record.

[99] I am driven to conclude that, on the basis of all the evidence before me and on a balance of probabilities, there is clear and non-speculative evidence from which the inferences on the likely anti-competitive effects and apprehended harm on consumers and the general economy can be reasonably and logically drawn for the Six Markets.

(6) Parkland's Commitments

[100] Parkland submits that the Parkland Commitments, and in particular the price adjustment mechanism proposed through the maximum rack forward margins and the maintenance of Pioneer's pricing policies, would be sufficient to eliminate any risk of such harm. In light of what has been provided to the Tribunal in respect of the Parkland Commitments, I am not satisfied that this would be the case. On the contrary, I agree with the concerns expressed by the Commissioner in relation to those commitments.

[101] In particular, as it currently stands, the Parkland Commitments would only provide a ceiling for the rack forward margins. There would be no assurances as to what would happen if refinery prices in the industry started to decline. Harm to consumers and the economy can result not only from an ability to impose, amplify or accelerate price increases, but also from an ability to prevent, limit or slow down a price decrease that would otherwise take place in competitive market conditions. The Parkland Commitments do not deal with that. Keeping the *status quo* on Pioneer's pricing strategy and preventing prices from increasing could leave an important portion of the apprehended harm unprotected. In addition, Parkland would have the latitude to change other aspects of its supply arrangements with Independent Dealer Stations which can have an impact on retail prices, such as the terms and conditions of delivery. Furthermore, I agree that monitoring the proposed pricing mechanism would be significant and difficult to implement.

[102] In conclusion, I am satisfied that irreparable harm resulting from the Proposed Merger can be reasonably and logically inferred from clear and non-speculative evidence in six of the 14 Local Markets. The second element of the *RJR-MacDonald* test is accordingly met for the Six Markets. However, this is not the case with respect to the rest of the 14 Local Markets.

C. Balance of Convenience

[103] I now turn to the last part of the test, the balance of convenience (or inconvenience, as some prefer to state it). Under this third part of the test, the Tribunal must determine which of the parties will suffer the greater harm from the granting or refusal of the interim order, pending a decision on the merits (*RJR-MacDonald*, at p. 342). Having concluded that the Commissioner

has failed to satisfy the irreparable harm branch of the test for the markets other than the Six Markets, it is unnecessary for me to consider where the balance of convenience lies for those markets. The Commissioner's motion succeeds only if all three requirements are proved, and one of the elements has not been established. However, the balance of convenience must be considered for the Six Markets.

[104] The Commissioner notes that he is presumed to act in the public interest and that the public interest is to be considered and weighed together with the interests of private litigants. He asserts that the irreparable harm to consumers and the broader economy that will occur if the relief sought is not granted is greater than any harm that Parkland will suffer in the event the relief is accorded. The Commissioner has no private interest in the present proceedings before the Tribunal. It is the public interest in maintaining and encouraging competition in Canada that he argues will be irreparably harmed in the absence of an interim order. The Commissioner submits that such public interest weighs heavily in his favour because this is a situation where a public officer is carrying out his statutory duties, as in *RJR-MacDonald*. The Commissioner further argues that, since Parkland's financial harm is either unsupported (in the case of the alleged costs related to a separate legal entity needed for a hold separate order) or is speculative (in the case of the loss of Imperial Oil's consent or the possible termination of the Proposed Merger), there is no real prejudice to it should the interim order be granted. The Commissioner asserts that, under the interim order, Parkland would only need to engage hold separate managers resulting in costs of approximately $200,000, because Parkland does not need to create a separate legal entity to operate the hold separate assets.

[105] Parkland submits that the balance weighs against the issuance of a hold separate order. It submits that such an order would put the entire transaction at risk as each of Parkland and Pioneer may terminate the Proposed Merger if the Tribunal orders Parkland to hold separate all or part of the assets to be acquired. Parkland also asserts that an interim order will delay Parkland's anticipated efficiencies resulting from the Proposed Merger, estimated to be significant over a 12-month period. It argues that a hold separate order will increase Parkland's costs in terms of fuel supply, transportation costs and reduced volume discounts to serve the carved out assets in the 14 Local Markets and that prices are likely to increase at those retail gasoline stations to recoup those additional costs.

[106] Counsel for Parkland disagrees with the assertion made by counsel for the Commissioner that Parkland must establish, under this part of the *RJR-MacDonald* test, that there is a high degree of probability that Parkland's alleged harm will occur. Counsel for Parkland submits that there is no legal authority for such a proposition in the assessment of the balance of convenience. The Tribunal agrees with Parkland on this point, and the balance between each party's alleged harm has to be assessed on a balance of probabilities. But the evidence adduced must not be speculative.

[107] As indicated above in the discussion of the test on irreparable harm, in a merger case like this one, the question of the public interest needs to be considered. Here, the Commissioner's activity in bringing the section 92 and section 104 applications before the Tribunal was undertaken pursuant to his responsibility to protect competition in Canada under the merger

provisions. He is presumed to act in the public interest, and this is not a situation where, like in *Kobo*, there are competing public interests at stake.

[108] In *RJR-MacDonald*, at p. 346, the Supreme Court clearly stated that the role of public authorities in protecting the public interest was an important factor in assessing the balance of convenience. While the comments were made in the context of Charter cases, they should nonetheless guide the Tribunal in cases where the Commissioner is involved. As C.J. Crampton stated in *Pearson*, at para. 43, "[i]t is now well established that, as a statutory authority responsible for the administration and enforcement of the Act, the Commissioner benefits from a presumption that actions taken pursuant to the Act are *bona fide* and in the public interest". There is no question that, in the current case, the Commissioner's review of the Proposed Merger is a *bona fide* investigation. Significant weight should be given to these public interest considerations by the Tribunal.

[109] Turning to the harm alleged by Parkland, the Tribunal agrees with the Commissioner, based on the numerous consent agreements registered in merger cases before this Tribunal, that a separate legal entity is not required to put a hold separate order in place. Indeed, the Interim Hold Separate Order proposed by the Commissioner does not contemplate one but rather relies on the Parkland infrastructure to provide, with the appropriate hold separate and assets preservation mechanisms in place, the required support to Corporate Stations and Independent Dealer Stations in the various local markets. This suggests that the apprehended losses identified by Parkland in terms of fuel supply, increased transportation costs and reduced volume discounts resulting from a separate legal entity would not occur or are only an uncertain possibility. Mr. Espey further indicated in the cross-examination on his affidavit that, if there is no separate legal entity and Parkland was to supply the gas stations covered by a hold separate order, he does not know what these losses to Parkland would be.

[110] The Tribunal also notes that the evidence on the record only indicates that Imperial Oil may not consent to the transfer of supply agreements and that each of Parkland and Pioneer may exercise an option to terminate the Proposed Merger if there is a hold separate order imposed by the Tribunal further to the Commissioner's section 104 or 92 applications. In both cases, this is only a possibility. In order for harm to be considered by the Tribunal in its assessment of balance of convenience, it needs to be non-speculative. I agree with the Commissioner that the potential withholding of consent by Imperial Oil and the potential collapse of the whole transaction should a hold separate order be put in place are uncertain and speculative. I am therefore not satisfied that these possibilities have been sufficiently supported to enable me to conclude that they will likely occur and that the Proposed Merger would be cancelled or Imperial Oil's consent would not be given if an interim order is issued.

[111] What is left in terms of Parkland's alleged inconvenience is the cost of hold separate managers, estimated at $200,000, and the lost efficiencies estimated by Parkland for divestitures in the 14 Local Markets. These lost efficiencies will certainly be lower with divestitures affecting only the Six Markets; in addition, the Tribunal notes that an important part of the claimed lost efficiencies are "potential". In the circumstances of this case, when the losses expected to be suffered by Parkland in the Six Markets are compared to the harm expected to be caused to the

public interest in the absence of an interim order, I am of the view that the balance of inconvenience weighs in favour of the Commissioner and is not offset by the harm that the Respondents would suffer if the interim relief is granted. The third element of the *RJR-MacDonald* test is accordingly met for the Six Markets.

[112] Finally, I should point out that, whatever the inconvenience of the interim relief to Parkland for the Six Markets, the commitment of the Tribunal to expeditious proceedings will ensure that the arrangement contemplated by the order will only be in place for a relatively short period of time. It will be in the interest of all involved to work towards a quick resolution of the section 92 application. Subsection 104(3) of the Act indeed provides that it is the Commissioner's duty to proceed as expeditiously as possible to complete the proceedings where an interim order has been issued.

VI. TRIBUNAL'S DISCRETION TO ISSUE AN ORDER

[113] Subsection 104(1) of the Act provides that the Tribunal "may" issue such interim order as it considers appropriate. Such an order shall be on such terms, and shall have effect for such period of time, as the Tribunal considers necessary and sufficient to meet the circumstances of the case. The word "may" in subsection 104(1) indicates that the decision to be made by the Tribunal is discretionary.

[114] Section 104 is an extraordinary type of jurisdiction exercised by the Tribunal in that it may result in the Commissioner being granted a form of injunctive relief before a hearing on the merits and before complete pleadings have been filed under section 92. However, as indicated above, the Commissioner is presumed to act in the public interest, and significant weight should be given to those public interest considerations in the exercise of the Tribunal's discretion. I am not convinced that the Tribunal should refuse to exercise its discretion to grant an interim order in the current circumstances, when the requirements of the tripartite test in *RJR-MacDonald* have been met.

[115] Parkland asserts that the Tribunal should identify the remedy that protects the public interest in competition and, at the same time, minimally impairs the ability of a private market participant to carry on business without being restricted in the manner proposed by the Commissioner. In this case, Parkland argues that the Parkland Commitments make an interim order unnecessary and constitute a less invasive and less costly remedy than the Commissioner's proposed hold separate order.

[116] While the *RJR-MacDonald* test does not require the courts to consider and choose the least intrusive remedy possible, in *Southam* (at p. 26), the Tribunal said that it must balance the interests between the parties with a view to ensuring that the interim order is "adequate in its purpose but not any more intrusive or restrictive than is absolutely necessary". In the circumstances, for the reasons that I explained above, the Tribunal does not consider that the Parkland Commitments, as they are currently presented to the Tribunal, constitute adequate remedies that would be sufficient to serve the purpose of the interim order being sought. Not

being adequate remedies, the fact that they may be less invasive or less intrusive is not a factor meriting significant weight in the exercise of my discretion.

[117] Parkland also asserts that, given the offers made in the Parkland Divestitures and the Parkland Commitments, and the Commissioner's lack of response to those before he filed his Reply Memorandum the morning of the hearing, the Tribunal should refrain from issuing an interim order along the terms sought by the Commissioner. The Tribunal cannot force the parties to come to an agreement on what could be an acceptable divestiture agreement in a proposed transaction brought before it further to an application. The Commissioner has broad discretion to settle matters on terms that he considers advisable, provided that he does so within the bounds of the law, and it is not the Tribunal's role to interfere with that discretion.

[118] That said, there are certainly particular circumstances in this case that need to be mentioned, with the Parkland Divestitures and the Parkland Commitments put forward by Parkland, and to which the Commissioner has provided a late and limited response in these proceedings. While incomplete and not sufficiently detailed at this stage, the Parkland Divestitures and the Tillsonburg Commitment could potentially form a basis for resolving the competition concerns raised in the Six Markets for which I am issuing an order, as well as in some of the Eight Markets which are also the object of the section 92 application to be decided by the Tribunal.

[119] Achieving, through agreements between the parties, resolutions that address competition concerns with certainty and finality, and that provide market participants with clarity regarding the terms of settlement, are consistent with the broad purposes of the Act and are in the interest of the expeditious and effective administration of justice and determination of competition cases pursued by this Tribunal. The Tribunal will thus invite the parties, as part of the upcoming case management phase of the section 92 application in this case, to consult with each other to determine whether an agreement can be reached with respect to the Parkland Divestitures and the Tillsonburg Commitment in the geographic areas covered by these proposals, and more specifically for the Six Markets. If an agreement is reached, and reflected in a draft order that contains the types of terms set forth in consent agreements recently registered with the Tribunal in merger matters, the parties could then apply to the Tribunal to have the order that I am issuing today replaced with such order on consent.

VII. CONCLUSION

[120] The Commissioner has the obligation to satisfy the Tribunal that he has met all elements of the tripartite conjunctive test in *RJR-MacDonald*. On the basis of the record before me, and applying the clear and non-speculative evidence criteria for *quia timet* injunctions, I find that he has not done so with respect to the alleged irreparable harm in eight of the 14 Local Markets.

[121] However, the Commissioner has satisfied the tripartite conjunctive test for the granting of an interim order in respect of the harm that is alleged in relation to the Six Markets. Accordingly, the order detailed in Annex A, which largely reproduces the terms and conditions of the Interim Hold Separate Order submitted by the Commissioner, is being issued.

[122] Given the split result, there is no award of costs.

DATED at Ottawa, this 29th day of May, 2015.

SIGNED on behalf of the Tribunal by the Chairperson.

(s) Denis Gascon

ANNEX A – HOLD SEPARATE ORDER

I. DEFINITIONS

[1] Whenever used in this Order, the following words and terms have the meanings set out below:

(a) "**Act**" means the *Competition Act*, R.S.C. 1985, c. C-34, as amended.

(b) "**Affiliate**" means an affiliated corporation, partnership or sole proprietorship within the meaning of subsection 2(2) of the Act.

(c) "**Business Day**" means a day on which the Competition Bureau's Gatineau, Quebec office is open for business.

(d) "**Closing**" means the completion of the Transaction under the Transaction Agreement.

(e) "**Closing Date**" means the date on which Closing occurs.

(f) "**Commissioner**" means the Commissioner of Competition appointed under the Act.

(g) "**Confidential Information**" means competitively sensitive, proprietary and all other information that is not in the public domain, and that is owned by or pertains to a Person or a Person's business, and includes, but is not limited to, manufacturing, operations and financial information, customer lists, price lists, contracts, cost and revenue information, marketing methods, patents, technologies, processes, or other trade secrets.

(h) "**Designated Personnel**" means certain identified financial management employees of Parkland who have been approved by the Commissioner to receive aggregate financial information respecting the Hold Separate Assets pursuant to Paragraph 10 (c) and who shall have signed a confidentiality agreement in a form satisfactory to the Commissioner only. Within 5 Business Days after the issuance of this Order, Parkland shall submit a list of Designated Personnel to the Commissioner for approval.

(i) "**Hold Separate Assets**" means the Pioneer Stations and the Pioneer Supply Agreements.

(j) "**Hold Separate Employees**" means those employees of Respondents who are employed in connection with the Hold Separate Assets, and "Hold Separate Employee" means any one of them.

(k) "**Hold Separate Manager**" means the Person or Persons appointed pursuant to Part II of this Order (or any substitute appointed thereto) to manage the operation of the Hold Separate Assets, and any employees, agents or other Persons acting for or on behalf of the Hold Separate Manager.

(l) "**Intangible Property**" means intellectual property of any nature and kind used in connection with or relating to the Hold Separate Assets or Preservation Assets, including:

(i) patents;

(ii) copyrights;

(iii) software;

(iv) trademarks;

(v) trade secrets, know-how, techniques, data, inventions, practices, methods and other confidential or proprietary technical, business, research, development and other information, and all rights in any jurisdiction to limit the use or disclosure thereof;

(vi) rights to obtain and file for patents and registrations thereof; and

(vii) rights to sue and recover damages or obtain injunctive relief for infringement, dilution, misappropriation, violation or breach of any of the foregoing.

(m) "**Interpretation Act**" means the *Interpretation Act*, R.S.C. 1985, c. I-21, as amended.

(n) "**Management Agreement**" means the agreement described in Paragraph 4 of this Order.

(o) "**Monitor**" means the Person appointed pursuant to Part V of this Order (or any substitute appointed thereto), and any employees, agents or other Persons acting for or on behalf of the Monitor.

(p) "**Monitor Agreement**" means the agreement described in Paragraph 16 of this Order.

(q) "**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.

(r) "**Parkland Stations**" means all of the assets related to the business of marketing and supplying petroleum products and, where offered, ancillary products and services at each of the retail fuel stations listed in Schedule B hereto, including but not limited to:

(i) all applicable site-specific licenses, permits, contracts, agreements and authorizations, to which Parkland is a party or a beneficiary, used in the operation of each of the retail fuel stations listed in Schedule B;

(ii) the Intangible Property;

(iii) all tangible assets and equipment used at each of the retail fuel stations listed in Schedule B;

(iv) all petroleum products and other inventories at each of the retail fuel stations listed in Schedule B;

(v) all books, records and files specific to the retail fuel stations listed in Schedule B (for greater certainty, to the extent that there are any books, records or files which are common to the retail fuel stations listed in Schedule B and to Parkland's ongoing business, Parkland shall provide copies of such books, records and files to the Hold Separate Manager); and

(vi) any assets used in any ancillary businesses operated at the retail fuel stations listed in Schedule B, including, but not limited to, any automobile mechanical service, convenience store, restaurant or car wash, operated in connection with each retail fuel station listed in Schedule B, including, but not limited to, all permits, contracts, agreements and authorizations, to which Parkland is a party or a beneficiary, used in the operation of the ancillary business.

(s) "**Parkland Supply Agreements**" means all of the wholesale fuel supply agreements listed in Schedule B hereto and any ancillary agreements as between Parkland and the applicable non-corporate retail station.

(t) "**Parties**" means the Commissioner and Respondents collectively, and "**Party**" means any one of them.

(u) "**Person**" means any individual, sole proprietorship, partnership, joint venture, firm, corporation, unincorporated organization, trust, or other business or government entity, and any subsidiaries, divisions, groups or Affiliates thereof.

(v) "**Pioneer**" means Pioneer Petroleums Holding Limited Partnership, Pioneer Energy LP, Pioneer Petroleums Transport Inc., Pioneer Energy Inc., Pioneer Fuels Inc., Pioneer Petroleum 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.

(w) "**Pioneer Stations**" means all of the assets related to the business of marketing and supplying petroleum products and, where offered, ancillary products and services at each of the retail fuel stations listed in Schedule A hereto, including but not limited to:

(i) all applicable site-specific licenses, permits, contracts, agreements and authorizations, to which Respondents are a party or a beneficiary, used in the operation of each of the retail fuel stations listed in Schedule A;

(ii) the Intangible Property;

(iii) all tangible assets and equipment used at each of the retail fuel stations listed in Schedule A;

(iv) all petroleum products and other inventories at each of the retail fuel stations listed in Schedule A;

(v) all books, records and files specific to the retail fuel stations listed in Schedule A (for greater certainty, to the extent that there are any books, records or files which are common to the retail fuel stations listed in Schedule A and to Respondents' ongoing business, Respondents shall provide copies of such books, records and files to the Hold Separate Manager); and

(vi) any assets used in any ancillary businesses operated at the retail fuel stations listed in Schedule A, including, but not limited to, any automobile mechanical service, convenience store, restaurant or car wash, operated in connection with each retail fuel station listed in Schedule A, including, but not limited to, all permits, contracts, agreements and authorizations, to which Respondents are a party or a beneficiary, used in the operation of the ancillary business.

(x) "**Pioneer Supply Agreements**" means all of the wholesale fuel supply agreements listed in Schedule A hereto as between Pioneer and any ancillary agreements as between Pioneer and the applicable non-corporate retail station.

(y) "**Preservation Assets**" means the Parkland Stations and the Parkland Supply Agreements.

(z) "**Records**" means records within the meaning of subsection 2(1) of the Act.

(aa) "**Respondents**" means Parkland and Pioneer collectively, and "**Respondent**" means any one of them.

(bb) "**Respondents' Continuing Employees**" means those employees of Respondents who are not employed in connection with the Hold Separate Assets.

(cc) "**Third Party**" means any Person other than the Commissioner or Respondents.

(dd) "**Transaction**" means the transaction whereby Parkland Industries Ltd., a wholly-owned subsidiary of Parkland Fuel Corporation, proposes to acquire substantially all of the assets of 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.

(ee) "**Transaction Agreement**" means the asset purchase agreement dated September 17, 2014 between Parkland and Pioneer as amended January 22, 2015.

(ff) "**Tribunal**" means the Competition Tribunal established by the *Competition Tribunal Act*, R.S.C. 1985, c.l9 (2nd Supp.).

II. HOLD SEPARATE

[2] Respondents shall:

(a) Hold the Hold Separate Assets separate, apart and independent of Parkland and shall vest the Hold Separate Manager with all rights, powers and authority necessary to conduct the business of the Hold Separate Assets.

(b) Not exercise direction or control over, or influence directly or indirectly, the Hold Separate Assets or the Hold Separate Manager.

(c) Take no action that interferes with or impedes, directly or indirectly, the Hold Separate Manager's duties and responsibilities.

[3] Prior to Closing, the Commissioner shall appoint a Hold Separate Manager, responsible for managing and operating the Hold Separate Assets independently of Parkland.

[4] Within 5 Business Days after the appointment of the Hold Separate Manager, Respondents shall submit to the Commissioner for approval the terms of a proposed Management Agreement with the Hold Separate Manager and the Commissioner that transfers to the Hold Separate Manager all rights and powers necessary to permit the Hold Separate Manager

to manage and operate the Hold Separate Assets independently of Respondents in accordance with this Order.

[5] Within 5 Business Days after receipt of the proposed Management Agreement referred to in Paragraph 4, the Commissioner shall advise Respondents whether or not he approves the terms of the proposed Management Agreement. If the Commissioner does not approve the terms of the proposed Management Agreement, he shall prescribe alternative terms for the Management Agreement that Respondents shall incorporate into a final Management Agreement with the Hold Separate Manager and the Commissioner.

[6] Without limiting the Commissioner's discretion to require additional terms, Respondents consent to the following terms and conditions regarding the Hold Separate Manager's rights, powers, duties, authority and responsibilities, and shall include such terms in the Management Agreement:

(a) The Hold Separate Manager shall report solely and exclusively to the Monitor.

(b) The Hold Separate Manager shall not have any involvement with, or receive any Confidential Information respecting, the businesses or assets of Respondents other than in respect of the Hold Separate Assets.

(c) Subject to the oversight of the Monitor, the Hold Separate Manager shall manage and maintain the operation of the Hold Separate Assets independently and separately from Respondents, in the regular and ordinary course of business and in accordance with past practice, and shall use commercially reasonable efforts to ensure the ongoing economic viability, marketability and competitiveness of the Hold Separate Assets.

(d) Without limiting the generality of Paragraph 6(c) above, the Hold Separate Manager shall:

(i) maintain and hold the Hold Separate Assets in good condition and repair, normal wear and tear excepted, and to standards at least equal to those that existed prior to the date of this Order;

(ii) take all commercially reasonable steps to honour all customer contracts and to maintain quality and service standards for customers of the Hold Separate Assets at least equal to those that existed prior to the date of this Order;

(iii) not knowingly take or allow to be taken any action that materially and adversely affects the competitiveness, operations, financial status or value of the Hold Separate Assets;

(iv) not alter or cause to be altered, to any material extent, the management of the Hold Separate Assets as it existed prior to the date of this Order, except with the prior approval of the Monitor;

(v) not terminate or alter any employment, salary or benefit agreements, as they existed at the date of this Order, for Persons employed in connection with the Hold Separate Assets, except with the prior approval of the Monitor;

(vi) ensure that the Hold Separate Assets are staffed with sufficient employees to ensure their viability and competitiveness, including by replacing any departing employees with other qualified employees subject to the prior approval of the Monitor; and

(vii) maintain inventory levels and payment terms materially consistent with the practices of Pioneer that existed, with respect to the Hold Separate Assets, prior to the date of this Order.

(e) Parkland shall supply to the Pioneer Stations the volume of fuel and other goods and services requested by the Hold Separate Manager, at a price not to exceed the price that is charged to Parkland's retail gas stations in Ontario and Manitoba for similar sales on similar terms at equivalent locations on equivalent order dates and delivery dates.

(f) Parkland shall supply to the Hold Separate Manager the volume of fuel and other goods and services requested by Hold Separate Manager for the purpose of the Pioneer Supply Agreements at a price not to exceed the price that is charged to other dealers pursuant to wholesale fuel supply agreements or other ancillary agreements in Ontario and Manitoba for similar sales on similar terms at equivalent locations on equivalent order dates and delivery dates.

(g) Parkland shall provide sufficient financial resources, including general funds, capital funds, working capital and reimbursement for any operating, capital or other losses, to permit the Hold Separate Manager to comply with its obligations under this Section. The Hold Separate Manager, subject to the prior approval of the Monitor, may request funds at any time, and Parkland shall comply with any such request. If the Monitor believes that Parkland has not provided, is not providing or will not provide sufficient financial and other resources under this Paragraph, the Monitor shall forthwith refer the matter to the Commissioner, who shall make a final determination respecting the financial and other resources that Parkland must provide. Parkland shall comply with any determination made by the Commissioner on this issue.

(h) The Hold Separate Manager shall have no financial interests affected by Parkland's revenues, profits or profit margins, except that Parkland shall provide to the Hold Separate Manager reasonable incentives to undertake this position. The Monitor shall determine the type and value of such incentives, which shall include continuation of all

employee benefits, and such additional incentives as the Monitor determines may be necessary to assure the continuation and prevent any diminution of the viability, marketability and competitiveness of the Hold Separate Assets.

(i) In addition to those Persons employed in connection with the Hold Separate Assets on the Closing Date, the Hold Separate Manager may employ such other Persons as the Monitor believes are necessary to assist the Hold Separate Manager in managing and operating the Hold Separate Assets.

(j) Subject to any legally recognized privilege, the Hold Separate Manager shall provide to the Monitor full and complete access to all personnel, Records, information (including Confidential Information) and facilities relevant to monitoring Respondents' compliance with this Order.

(k) The Hold Separate Manager shall fully and promptly respond to all requests from the Monitor and shall provide all information the Monitor may request.

[7] Respondents shall be responsible for all reasonable fees and expenses properly charged or incurred by the Hold Separate Manager in the course of carrying out the Hold Separate Manager's duties under this Order. The Hold Separate Manager shall serve without bond or security, and shall account for all fees and expenses incurred. In the event of any dispute: (i) such account shall be subject to the approval of the Commissioner only; and (ii) Respondents shall promptly pay any account approved by the Commissioner.

[8] Respondents shall indemnify the Hold Separate Manager and hold the Hold Separate Manager harmless against any losses, claims, damages, liabilities or expenses arising out of, or in connection with, the performance of the Hold Separate Manager's duties, including all reasonable fees of counsel and other expenses incurred in connection with the preparation or defence of any claim, whether or not resulting in any liability, except to the extent that such losses, claims, damages, liabilities, or expenses result from malfeasance, gross negligence or bad faith by the Hold Separate Manager.

[9] If the Commissioner determines that the Hold Separate Manager has ceased to act or has failed to act diligently, the Commissioner may remove the Hold Separate Manager and appoint a substitute Hold Separate Manager. The provisions of this Order respecting the Hold Separate Manager shall apply in the same manner to any substitute Hold Separate Manager.

[10] Parkland and the Hold Separate Manager shall jointly implement and maintain in operation a system, as approved by the Monitor in consultation with the Commissioner, of access and data controls to prevent unauthorized access to or dissemination of Confidential Information. The system shall include the following protocols:

(a) The Monitor shall review all proposed communications between the Hold Separate Manager and Parkland before such communications occur.

(b) Respondents' Continuing Employees shall not receive, have access to or use any Confidential Information respecting the Hold Separate Assets. If any of Respondents' Continuing Employees possesses Confidential Information respecting the Hold Separate Assets as of the date of this Order, such Person shall, within 5 Business Days following appointment of the Hold Separate Manager, (i) deliver any Records containing such Confidential Information to the Hold Separate Manager, together with a signed statement confirming that he or she is no longer in possession of any Records containing Confidential Information respecting the Hold Separate Assets; and (ii) submit to the Monitor a signed statement confirming that he or she undertakes not to share any Confidential Information respecting the Hold Separate Assets with any of Respondents' Continuing Employees.

(c) Notwithstanding Paragraph 10(b), Designated Personnel of Parkland may receive aggregate financial and operational information relating to the Hold Separate Assets only to the extent necessary to comply with securities laws, prepare financial and regulatory reports, tax returns, administer employee benefits, defend litigation and comply with this Order. Any such information shall be: (i) reviewed by the Monitor prior to its receipt by any Designated Personnel; (ii) maintained in a separate confidential file that is accessible only to the Designated Personnel; and (iii) used only for the purposes set forth in this Section.

(d) Neither the Hold Separate Manager nor any Hold Separate Employee shall receive, have access to or use any Confidential Information relating to Respondents' businesses other than the Hold Separate Assets.

III. PRESERVATION OF PRESERVATION ASSETS

[11] In order to preserve the Preservation Assets, Parkland shall maintain the economic viability, marketability and competitiveness of the Preservation Assets, and shall comply with any decision of or direction given by the Monitor that relates to preservation of the Preservation Assets. Without limiting the generality of the foregoing, Parkland shall:

(a) Maintain and hold the Preservation Assets in good condition and repair, normal wear and tear excepted, and to standards that are, in the view of the Monitor, at least equal to those that existed at Closing.

(b) Ensure that the management and operation of the Preservation Assets continues in the ordinary course of business and in a manner that is, in the view of the Monitor, reasonably consistent in nature, scope and magnitude with past practices and generally accepted industry practices, and in material compliance with all applicable laws.

(c) Not knowingly take or allow to be taken any action that, in the view of the Monitor, materially or adversely affects the competitiveness, operations, financial status or value, viability and saleability of the Preservation Assets.

(d) Ensure that the Preservation Assets are not engaged in any type of business other than the type of business conducted as of the date of this Order, except with the prior approval of the Monitor.

(e) Maintain all approvals, registrations, consents, licences, permits, waivers, and other authorizations that are, in Monitor's view subject to consultation with Parkland, advisable for the operation of the Preservation Assets.

(f) Take commercially reasonable steps to honour all customer contracts and to maintain quality and service standards for customers of the Preservation Assets that are, in the view of the Monitor, at least equal to the standards that existed during the fiscal year prior to this Order.

(g) Not materially curtail marketing, sales, promotional or other activities of the Preservation Assets, except with the prior approval of the Monitor.

(h) Establish all prices, deductions, credit and allowances in accordance with policies which are consistent with Parkland's retail fuel businesses in Ontario and Manitoba that are not Preservation Assets.

(i) Not alter, or cause to be altered, to any material extent, the management of the Preservation Assets as it existed during the fiscal year prior to the date of this Order, except with the prior approval of the Monitor; not terminate or alter any employment, salary or benefit agreements, as they existed at the date of this Order, for Persons employed in connection with the Preservation Assets, without the prior approval of the Monitor.

(k) Ensure that the Preservation Assets are staffed with sufficient employees to ensure their viability and competitiveness, including by replacing any departing employees with other qualified employees provided that the Monitor has approved both the qualifications and the need for such replacement employees.

(1) Maintain inventory levels and payment terms materially consistent with the practices of Parkland that existed, with respect to the Preservation Assets, during the fiscal year prior to the date of this Order.

(m) Maintain in accordance with Canadian generally accepted accounting principles, adequate financial ledger books and records sufficient to show, on a separate basis, the material financial information with respect to the Preservation Assets.

[12] Parkland shall not, without the Commissioner's prior written approval:

(a) Create any new encumbrances on the Preservation Assets other than ordinary course obligations that are not due or delinquent.

(b) Enter into, withdraw from, amend or otherwise take steps to alter any obligations in material contracts relating to the Preservation Assets except as necessary to comply with this Order.

(c) Make any material changes to the Preservation Assets except as required to comply with this Order.

[13] Parkland shall provide sufficient financial resources, including general funds, capital funds, working capital and reimbursement for any operating, capital or other losses, to maintain the Preservation Assets in accordance with this Part. If the Monitor believes that Parkland has not provided, is not providing or will not provide sufficient financial and other resources under this Part, the Monitor shall forthwith refer the matter to the Commissioner, who shall make a final determination respecting the financial and other resources that Parkland must provide. Parkland shall comply with any determination made by the Commissioner on this issue.

IV. THIRD PARTY CONSENTS

[14] Respondents shall obtain any consents and waivers from Third Parties that are necessary to permit the Hold Separate Manager to fulfill its obligations under this Order and the Management Agreement.

V. MONITOR

[15] The Commissioner shall appoint a Monitor, responsible for monitoring compliance by Respondents with this Order. Such appointment may occur at any time following the date of this Order. A reference in this Order to specific monitoring functions or tasks that are to be undertaken by the Monitor shall in no way detract from the Monitor's general power and duty to monitor all aspects of Respondents' compliance with this Order.

[16] Within 5 Business Days after the appointment of the Monitor, Respondents shall submit to the Commissioner for approval the terms of a proposed Monitor Agreement with the Monitor and the Commissioner that transfers to the Monitor all rights and powers necessary to permit the Monitor to monitor compliance by Respondents with this Order.

[17] Within 5 Business Days after receipt of the proposed Monitor Agreement referred to in Paragraph 16, the Commissioner shall advise Respondents whether or not he approves the terms of the proposed Monitor Agreement. If the Commissioner does not approve the terms of the proposed Monitor Agreement, he shall prescribe alternative terms for the Monitor Agreement that Respondents shall incorporate into a final Monitor Agreement with the Monitor and the Commissioner.

[18] Respondents consent to the following terms and conditions regarding the Monitor's rights, powers, duties, authority and responsibilities, and shall include such terms in the Monitor Agreement:

(a) The Monitor shall have the power and authority to monitor Respondents' compliance with this Order, and shall exercise such power and authority and carry out the duties and responsibilities of the Monitor in a manner consistent with the purposes of this Order and in consultation with the Commissioner.

(b) The Monitor shall have the authority to employ, at the expense of Respondents, such consultants, accountants, legal counsel and other representatives and assistants as the Monitor believes are necessary to carry out the Monitor's duties and responsibilities.

(c) The Monitor shall have no obligation or authority to operate or maintain the Preservation Assets or Hold Separate Assets.

(d) The Monitor shall act for the sole benefit of the Commissioner, maintain all confidences and avoid any conflict of interest.

(e) The Monitor shall have no duties of good faith, of a fiduciary nature, or otherwise, to Respondents.

(f) The Monitor shall provide to the Commissioner every 30 days after the date of the Monitor's appointment, a written report concerning performance by Respondents of their obligations under this Order. The Monitor shall, within 3 Business Days, respond to any request by the Commissioner for additional information regarding Respondents' compliance.

[19] Subject to any legally recognized privilege, Respondents shall provide to the Monitor full and complete access to all personnel, Records, information (including Confidential Information) and facilities relevant to monitoring Respondents' compliance with this Order.

[20] Respondents shall take no action that interferes with or impedes, directly or indirectly, the Monitor's efforts to monitor Respondents' compliance with this Order.

[21] Respondents shall fully and promptly respond to all requests from the Monitor and shall provide all information the Monitor may request. Respondents shall each identify an individual who shall have primary responsibility for fully and promptly responding to such requests from the Monitor on behalf of the applicable Respondent.

[22] Respondents may require the Monitor and each of the Monitor's consultants, accountants, legal counsel and other representatives and assistants to sign an appropriate confidentiality agreement in a form satisfactory to the Commissioner only; provided, however, that such agreement shall not restrict the Monitor from providing any information to the Commissioner.

[23] The Commissioner may require the Monitor and each of the Monitor's consultants, accountants, legal counsel and other representatives and assistants to sign an appropriate

confidentiality agreement relating to materials and information the Monitor may receive from the Commissioner in connection with the performance of the Monitor's duties.

[24] Respondents shall be responsible for all reasonable fees and expenses properly charged or incurred by the Monitor in the course of carrying out the Monitor's duties under this Order. The Monitor shall serve without bond or security, and shall account for all fees and expenses incurred. In the event of any dispute: (i) such account shall be subject to the approval of the Commissioner only; and (ii) Respondents shall promptly pay any account approved by the Commissioner.

[25] Respondents shall pay all reasonable invoices submitted by the Monitor within 30 days after receipt.

[26] Respondents shall indemnify the Monitor and hold the Monitor harmless against any losses, claims, damages, liabilities or expenses arising out of, or in connection with, the performance of the Monitor's duties, including all reasonable fees of counsel and other expenses incurred in connection with the preparation or defence of any claim, whether or not resulting in any liability, except to the extent that such losses, claims, damages, liabilities, or expenses result from malfeasance, gross negligence or bad faith by the Monitor.

[27] If the Commissioner determines that the Monitor has ceased to act or has failed to act diligently, the Commissioner may remove the Monitor and appoint a substitute Monitor. The provisions of this Order respecting the Monitor shall apply in the same manner to any substitute Monitor.

VI. NOTICES

[28] For a notice, report, consent, approval, written confirmation or other communication required or permitted to be given under this Order to be valid,

> (a) It must be in writing and the sending party must use one of the following methods of delivery: (1) personal delivery; (2) registered mail; (3) courier service; (4) facsimile; or (5) electronic mail; and
>
> (b) It must be addressed to the receiving party at the address(es) listed below, or to any other address designated by the receiving party in accordance with this Section.
>
> <u>if to the Commissioner:</u>
>
> Competition Bureau Legal Services
> Department of Justice
> Place du Portage, 22nd Floor
> 50 Victoria Street, Phase I
> Gatineau, Quebec KIA OC9

Tel: (819) 997-2837
Fax: (819) 953-9267

Attention: John Syme
Antonio Di Domenico
Tara DiBenedetto

and

if to Parkland Industries Ltd. and Parkland Fuel Corporation:

Bennett Jones LLP
3400 One First Canadian Place
P.O. Box 130
Toronto, ON M5X1A4

Tel: (416) 863-1200
Fax: (416) 863-1716

Attention: John Rook
Randal Hughes
Beth Riley

if to Pioneer Petroleum 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.:

Cassels Brock LLP
Suite 2100 Scotia Plaza
40 King Street West
Toronto, ON M5H 3C2

Tel: (416) 869-5300
Fax: (416) 360-8877

Attention: Chris Hersh
Imran Ahmad

[29] A notice, consent or approval under this Order is effective on the day that it is received by the receiving Party. A notice, consent or approval is deemed to have been received as follows:

(a) If it is delivered in person, by registered mail or by courier, upon receipt as indicated by the date on the signed receipt.

(b) If it is delivered by facsimile, upon receipt as indicated by the time and date on the facsimile confirmation slip.

(c) If it is delivered by electronic mail, when the recipient, by an email sent to the email address for the sender stated in this Section or by a notice delivered by another method in accordance with this Section, acknowledges having received that email, with an automatic "read receipt" not constituting acknowledgment of an email for purposes of this Section.

If a notice is received after 5:00 p.m. local time, or on a day that is not a Business Day, then the notice shall be deemed to have been received on the next Business Day.

[30] Notwithstanding Paragraphs 28 and 29, a notice, report, consent, approval, written confirmation or other communication that is not communicated in accordance with Paragraphs 28 and 29 is valid if a representative of the Commissioner or Respondents that is the recipient of such communication confirms the receipt and sufficiency of such communication.

VII. GENERAL

[31] In this Order:

(a) **Number and Gender** - Unless the context otherwise requires, words importing the singular include the plural and vice versa and words importing gender include all genders.

(b) **Time Periods** - Computation of time periods shall be in accordance with the Interpretation Act, and the definition of "holiday" in the Interpretation Act shall include Saturday.

[32] If any of Respondents, the Hold Separate Manager or the Monitor becomes aware that there has been a breach or possible breach of any of the terms of this Order, such Person shall, within 2 Business Days after becoming aware of the breach or possible breach, notify the Commissioner thereof, and shall provide details sufficient to describe the nature, date and effect (actual and anticipated) of the breach or possible breach.

[33] For purposes of determining or securing compliance with this Order, and subject to any legally recognized privilege, Respondents shall, upon written request given at least 2 Business Days in advance to Respondents, permit any authorized representative(s) of the Commissioner, without restraint or interference:

(a) To access, during regular office hours of Respondents on any Business Day(s), all facilities and to inspect and copy all Records in the possession or control of Respondents

related to compliance with this Order, which copying services shall be provided by Respondents at its expense.

(b) To interview such officers, directors or employees of Respondents as the Commissioner requests regarding such matters.

[34] This Order shall remain in effect until the Tribunal's final determination on the merits of the Commissioner's application pursuant to section 92 of the Act with respect to the Transaction.

[35] In the event of a dispute regarding the interpretation, implementation or application of this Order, the Commissioner or Respondents may apply to the Tribunal for directions or an order.

SCHEDULE A : HOLD SEPARATE ASSETS

PIONEER STATIONS

Local Market	Station Number	Brand	Location
Tillsonburg	213	Pioneer	115- 123 Simcoe St. Tillsonburg, Ontario N4G 2J2
Tillsonburg	243	Pioneer	680 Broadway St. Tillsonburg, Ontario N4G 3S9
Kapuskasing	251	Esso	48 Government Rd. Kapuskasing, Ontario P5N 2W6
Bancroft	259	Esso	132 Hastings St. N. PO Box 247 Bancroft, Ontario K0L 1C0

PIONEER SUPPLY AGREEMENTS

Local Market	Station Number	Brand	Location
Lundar	776	Esso Dealer: S.S.T. Foods Ltd.	Main Street West at highway 6 Lundar, Manitoba R0C 1Y0
Warren	764	Esso Dealer: **[CONFIDENTIAL]**	HWY 6, PO Box 311 Warren, Manitoba R0C 3E0
Neepawa	779	Esso Dealer: 1059945 Alberta Inc.	10 Main Street Neepawa, Manitoba R0J 1H0

SCHEDULE B PRESERVATION ASSETS

PARKLAND STATIONS

Local Market	Station Number	Brand	Location
Lundar	50338	Fas Gas Dealer: Lundar Fas Gas	PT 30 Highway #6 Lundar, Manitoba R0C 1Y0
Kapuskasing	40229	Sunys	25 Brunetville Road Kapuskasing, Ontario P5N 2E9

PARKLAND SUPPLY AGREEMENTS

Local Market	Station Number	Brand	Location
Tillsonburg	51248	Esso Dealer: Hasty Market	90 Simcoe Street Tillsonburg, Ontario N4G 2H8
Warren	50567	Race Trac Dealer: Warren Hardware 2001	212 MacDonald Ave. Warren, Manitoba R0C 3E0
Bancroft	51021	Esso Dealer: Mountney's Gas and Country Store	16 Peever Road Bancroft, Ontario K0L 1C0
Bancroft	51025	Esso Dealer: M & M Esso	27523 Hwy 62 S Bancroft, Ontario
Neepawa	40209	Fas Gas Dealer: Fas Gas Neepawa Service	99 Main St. East Neepawa, Manitoba R0J 1H0

APPEARANCES

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 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
1796745 Ontario Ltd.

Christopher Hersh