

**THE COMPETITION TRIBUNAL**

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

**AND IN THE MATTER OF** the proposed acquisition by Parkland Industries Ltd., a wholly-owned subsidiary of Parkland Fuel Corporation, of substantially all of the assets of Pioneer Petroleum Holding Limited Partnership, Pioneer Energy LP, Pioneer Petroleum Transport Inc., Pioneer Energy Inc., Pioneer Fuels Inc., Pioneer Petroleum Holding Inc., Pioneer Energy Management Inc., 668086 N.B. Limited, 3269344 Nova Scotia Limited and 1796745 Ontario Ltd.;

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

**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:**

**COMMISSIONER OF COMPETITION**

**Applicant**

**- and -**

**PARKLAND INDUSTRIES LTD., PARKLAND FUEL CORPORATION, PIONEER PETROLEUMS HOLDING LIMITED PARTNERSHIP, PIONEER ENERGY LP, PIONEER PETROLEUMS TRANSPORT INC., PIONEER ENERGY INC., PIONEER FUELS INC., PIONEER PETROLEUMS HOLDING INC., PIONEER ENERGY MANAGEMENT INC., 668086 N.B. LIMITED, 3269344 NOVA SCOTIA LIMITED AND 1796745 ONTARIO LTD.**

**Respondents**

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**MEMORANDUM OF ARGUMENT OF THE COMMISSIONER OF COMPETITION  
(Application for an Interim Order)**

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Competition Bureau Legal Services  
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## **I. OVERVIEW**

1. Gasoline represents a significant cost for most Canadian households and businesses. Competition among gasoline retailers is important to Canadian consumers and the broader economy.

2. The Commissioner of Competition (“**Commissioner**”) has commenced an application pursuant to section 92 of the *Competition Act*, R.S.C. 1985, c. C-34 (the “**Act**”) (the “**92 Application**”). The purpose of the 92 Application is to ensure that consumers in 14 local markets in Ontario and Manitoba (the “**14 Markets**” or the “**Markets**”) do not face materially higher retail prices and have less choice for gasoline as a result of the Proposed Merger (defined below).

3. The Commissioner brings this application for an Interim Order pursuant to section 104 of the Act (the “**104 Application**”). The purpose of the 104 Application is to ensure that consumers and the broader economy in the affected 14 Markets do not suffer irreparable harm in the interim period between the closing of the Proposed Merger and the final disposition of the 92 Application. Irreparable harm will be prevented if Parkland is required to hold separate the assets relating to 17 of the total 393 gas stations it will acquire, so as to preserve those assets and maintain competition in the affected local markets.

4. The Commissioner meets the test for an interim order.

- a. *The Commissioner raises serious issues:* The 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.
- b. *Consumers and the broader economy will suffer irreparable harm:* Consumers and the broader economy will be harmed, irreparably, by the Proposed Merger. Parkland will have the market power to increase prices through coordination and unilaterally. This harm — harm that the Competition Tribunal (the “**Tribunal**”) has no ability in law to remedy — is irreparable harm.

## **PUBLIC VERSION**

- c. *Balance of convenience favours the interim order:* The Commissioner does not seek to prevent the Proposed Merger from closing, in whole or in part. The Commissioner seeks a hold separate order only in respect of 17 of the total 393 gas stations being acquired by Parkland. The public interest in protecting consumers and maintaining and encouraging competition outweighs the inconvenience that would be caused to Parkland by the issuance of an interim order.

## **II. FACTS**

### **A. THE PARTIES AND PROPOSED MERGER**

5. The Commissioner is appointed under section 7 of the *Competition Act*, R.S.C. 1985 c. C-34 (the “**Act**”) and is responsible for the administration and enforcement of the Act. The actions taken by the Commissioner pursuant to the Act are presumed to be *bona fide* and in the public interest.<sup>1</sup>

6. Parkland<sup>2</sup> and Pioneer<sup>3</sup> compete in the retail supply of gasoline to consumers at gas stations that they own (“**Corporate Stations**”).<sup>4</sup> They also compete in the retail supply of gasoline to gas stations owned and controlled by third parties pursuant to exclusive long-term contracts, having terms of up to 10 years (“**Non-Corporate Stations**”).<sup>5</sup> Pursuant to these contracts, Parkland and Pioneer can increase the wholesale price of gasoline charged to Non-Corporate Stations at any time without prior notice to the Non-Corporate Stations. Accordingly, Parkland and Pioneer have the ability to materially influence retail gasoline prices at the Non-Corporate Stations they supply.<sup>6</sup>

7. Pursuant to an asset purchase agreement dated September 17, 2014, as amended on January 22, 2015, Parkland agreed to acquire from Pioneer ownership of or control of supply to

<sup>1</sup> *Commissioner of Competition v. Pearson Canada Inc. and Penguin Canada Books Inc.* 2014 FC 376 at para. 43, Book of Authorities Tab 15; *Canada (Director of Investigation and Research) v. Bank of Montreal*, [1996] C.C.T.D. No. 12, at para. 32, Book of Authorities Tab 4; *Canada (Director of Investigation and Research) v. Superior Propane Inc.*, [1998] C.C.T.D. No. 20, at para. 19, Book of Authorities Tab 7; *Rona Inc. v. Commissioner of Competition*, 2005 CACT 26 (CanLII), at para. 17, Book of Authorities Tab 26.

<sup>2</sup> The defined term for “**Parkland**” in the Notice of Application pursuant to the section 104 of the Act (the “**104 Application**”) and the Affidavit of Alex McNabb sworn April 30, 2015 (“**McNabb Affidavit**”) has the same meaning herein. McNabb Affidavit, Commissioner of Competition’s Application Record (“**Commissioner’s Record**”), Tab 2, p. 10, para. 6; Exhibit “A” to McNabb Affidavit, Commissioner’s Record, Tab 2(a), pp. 27-34.

<sup>3</sup> The defined term for “**Pioneer**” in the 104 Application and the McNabb Affidavit have the same meaning herein. McNabb Affidavit, Commissioner’s Record, Tab 2, p. 10, para. 7; Exhibit “B” to McNabb Affidavit, Commissioner’s Record, Tab 2(b), pp. 36-82.

<sup>4</sup> McNabb Affidavit, Commissioner’s Record, Tab 2, p. 10, para. 8.

<sup>5</sup> McNabb Affidavit, Commissioner’s Record, Tab 2, p. 10, para. 9; Exhibit “C” to McNabb Affidavit, Commissioner’s Record, Tab 2(c), pp. 83-699.

<sup>6</sup> Exhibit “C” to McNabb Affidavit, Commissioner’s Record, Tab 2(c), pp. 83-699.

393 gas stations in Ontario and Manitoba (the “**Proposed Merger**”).<sup>7</sup> The Proposed Merger is a merger within the meaning of section 91 of the Act.<sup>8</sup>

**B. THE COMPETITION BUREAU’S REVIEW OF THE PROPOSED MERGER**

8. The timeline of the Competition Bureau (the “**Bureau**”) review to date is as follows:
- a. October 3, 2014: the Respondents submit a request for an advance ruling certificate to the Commissioner in respect of the Proposed Merger.
  - b. October 6, 2014: the Respondents submit pre-merger notification filing pursuant to Part IX of the Act in respect of the Proposed Merger.
  - c. November 5, 2014: the Commissioner issues a Supplementary Information Request (“**SIR**”).
  - d. January 22, 2015: the Respondents amend the Proposed Merger, removing the commercial fuel business of the Proposed Merger.
  - e. January 23, 2015: the Respondents certify responses to the SIR after providing the Bureau with approximately 70,000 documents.
  - f. February 18, 2015: the Respondents agree to provide the Commissioner with 15 days’ written notice of the closing of the Proposed Merger.
  - g. April 27, 2015: the Respondents provide the Bureau with 15 days’ written notice of closing and advise that the Proposed Merger is scheduled to close on May 13<sup>th</sup>, 2015.
  - h. April 28, 2015: the Commissioner commences an inquiry pursuant to section 10 of the Act.<sup>9</sup>
9. The Commissioner has not yet sought the issuance of section 11 orders against the Respondent or any other third parties in connection with the Proposed Merger.<sup>10</sup>

<sup>7</sup>McNabb Affidavit, Commissioner’s Record, Tab 2, p. 11, para. 10; Exhibit “D” to McNabb Affidavit, Commissioner’s Record, Tab 2(d), pp. 700-783.

<sup>8</sup>Section 91, the *Competition Act*, R.S.C. 1985, c. C-34, as amended (the “**Act**”), Schedule B; McNabb Affidavit, Commissioner’s Record, Tab 2, p. 11, para. 11.

<sup>9</sup> McNabb Affidavit, Commissioner’s Record, Tab 2, p. 11, para. 12.

<sup>10</sup> 92 Application, Commissioner’s Record, Tab 1, pp. 8-11, paras. 19-26; McNabb Affidavit, Commissioner’s Record, Tab 2, p. 13, para. 15.

10. Based on the Bureau's review, the Commissioner identified competition concerns with respect to 14 local markets in Ontario and Manitoba, as described in the 92 Application and below.<sup>11</sup>

**C. THE 92 APPLICATION**

11. The Commissioner filed the 92 Application on April 30, 2015.

12. The 92 Application pleads that if the Proposed Merger proceeds, Parkland will have the ability to exercise market power, either through coordinated behaviour or unilaterally, in the 14 Markets to the detriment of competition and ultimately consumers. In particular, the 92 Application pleads that the Proposed Merger is likely to substantially lessen competition by:

- a. significantly increasing the extent, likelihood, frequency and duration of coordination among some or all retail gasoline suppliers in the 14 Markets; or
- b. eliminating rivalry between Parkland and Pioneer, at times when coordination among retailers breaks down and the merged entity is able to exercise its market power unilaterally.

13. The 14 Markets<sup>12</sup> are identified below, together with the post-merger market share and Four Firm Concentration Ratio for each of them:

	<b>Market</b>	<b>Parties' Combined Market Shares (%)</b>	<b>Four Firm Concentration Ratio (post-Proposed Merger) (%)</b>
1	Warren, MB	100	100
2	Allanburg, ON	100	100
3	Lundar, MB	■	100
4	Tillsonburg, ON	74	100
5	Innisfil, ON	63	100
6	Kapuskasing, ON	■	100
7	Hanover, ON	50	100
8	Bancroft, ON	47	100
9	Gananoque, ON	47	100
10	Chelmsford/Azilda, ON	44	89

<sup>11</sup> McNabb Affidavit, Commissioner's Record, Tab 2, p. 13, para. 15.

<sup>12</sup> McNabb Affidavit, Commissioner's Record, Tab 2, p. 11, para. 10.

## PUBLIC VERSION

11	Aberfoyle, ON	43	100
12	Port Perry, ON	43	100
13	Neepawa, MB		100
14	Welland, ON	39	80

14. The 92 Application alleges that the Proposed Merger raises a number of competition concerns:

- a. The 14 Markets are already concentrated. The Proposed Merger will increase that concentration because Parkland, a pre-existing competitor in the Markets, will acquire Pioneer-owned or supplied gas stations.<sup>13</sup>
- b. Parkland's post-merger market share in the Markets would be significant (ranging from 39% to 100%).<sup>14</sup>
- c. The Four Firm Concentration Ratio (post-merger) would be 100% in all but two of the 14 Markets and, if completed, the Proposed Merger would result in:
  - i. a merger to monopoly in two of the Markets<sup>15</sup>;
  - ii. a decrease from three to two competitors in three of the Markets<sup>16</sup>;
  - iii. a decrease from four to three competitors in five of the Markets<sup>17</sup>; and
  - iv. a decrease from five to four competitors in two of the Markets.<sup>18</sup>

<sup>13</sup> McNabb Affidavit, Commissioner's Record, Tab 2, p. 16, para. 20.

<sup>14</sup> McNabb Affidavit, Commissioner's Record, Tab 2, p. 16, para. 21.

<sup>15</sup> McNabb Affidavit, Commissioner's Record, Tab 2, p. 16, para. 21(a).

<sup>16</sup> McNabb Affidavit, Commissioner's Record, Tab 2, p. 16, para. 21(b).

<sup>17</sup> McNabb Affidavit, Commissioner's Record, Tab 2, p. 16, para. 21(c).

<sup>18</sup> McNabb Affidavit, Commissioner's Record, Tab 2, p. 16, para. 21(d).

### **III. ISSUES**

15. The issue is whether the Tribunal should issue an interim order under section 104 of the Act directing Parkland to hold separate assets in respect of 17 of 393 gas stations or supply contracts it acquires from Pioneer pursuant to the Proposed Merger on such terms as are necessary to preserve the assets and business as a going concern and to maintain competition in the 14 markets in the period between the closing of the Proposed Merger and the final disposition of the 92 Application.

#### **IV. SUBMISSIONS**

16. In deciding whether to issue an interim order under section 104 of the Act, the Tribunal must have regard to the principles ordinarily considered by superior courts when granting interlocutory or injunctive relief.<sup>19</sup>

17. To obtain an interim order, the Commissioner must demonstrate, on a balance of probabilities, that:

- a. there is a serious issue to be tried;
- b. irreparable harm would ensue if an interim order is not granted; and
- c. the balance of convenience favours granting the interim order.<sup>20</sup>

18. The Commissioner meets all of the elements of this test.

19. The Commissioner's 92 Application is neither frivolous nor vexatious and there is accordingly a serious issue to be tried.

20. Consumers and the broader economy will be irreparably harmed by the Proposed Merger. Parkland will have the market power to increase prices through coordination and unilaterally, as well as the economic incentive to exercise that market power to the detriment of consumers and the Canadian economy. In addition, more generally, non-price aspects of competition in the 14 Markets will also be harmed. The Tribunal has no ability to remedy the harm incurred the interim period.

21. The balance of convenience favours the Commissioner. The Commissioner is not seeking to prevent the Proposed Merger from closing. The Commissioner seeks only a hold separate remedy involving 14 markets (a small portion of the Proposed Merger). The public interest in protecting consumers and maintaining and encouraging competition outweighs the

<sup>19</sup> Section 104(1), the Act, Schedule B to this memorandum.

<sup>20</sup> *RJR-MacDonald Inc. v. A.G. Canada*, [1994] 1 R.C.S. 311 at p. 334 ("*RJR*"), Book of Authorities Tab 25.

inconvenience to the Respondents, which is limited to \$200,000 in a transaction publicly announced to have a value of 378 million dollars.<sup>21</sup>

**A. THE COMMISSIONER'S APPLICATION RAISES A SERIOUS ISSUE**

22. The serious issue prong of the *RJR* test imposes a low threshold, requiring only a preliminary assessment of the merits to ensure that the underlying matter raises a serious issue, i.e., it is neither frivolous nor vexatious.<sup>22</sup>

23. The 92 Application alleges that if the Proposed Merger proceeds, Parkland will have the ability to exercise market power, either through coordinated behaviour or unilaterally, in 14 local markets in Ontario and Manitoba to the detriment of consumers and the Canadian economy. This will lessen, or is likely to lessen competition substantially in those markets.

24. Coordination refers to behaviour, by a group of firms that is profitable for each firm due to the accommodating reactions of the other firms in the group.<sup>23</sup> Coordination is more likely to occur in a market when firms are able to, *inter alia*:

- a. individually recognize mutually beneficial terms of coordination;
- b. monitor each other's behaviour in respect of key dimensions of competition, such as pricing, and detect deviations from the terms of coordination; and
- c. respond to, or punish, deviations from the terms of coordination by other firms in the market.<sup>24</sup>

25. All but two of the markets in issue<sup>25</sup> are susceptible to coordination by gas retailers.<sup>26</sup>

<sup>21</sup> Espey Affidavit, Respondent's Record, para. 57(b)(iii).

<sup>22</sup> *RJR*, pp. 335, 337-338, Book of Authorities Tab 25; *US Steel Corp. v. Canada*, 2010 FCA 200, para. 5, Book of Authorities Tab 3; *Nadeau Poultry Farm Ltd. v. Group Westco Inc.*, 2008 Comp. Trib. 16 at para. 17 ("*Nadeau*"), Book of Authorities Tab 23.

<sup>23</sup> Boyer Expert Report, Commissioner's Record, tab 3(b), p. 1077, para. 37.

<sup>24</sup> Boyer Expert Report, Commissioner's Record, tab 3(b), p. 1081, para. 53.

<sup>25</sup> Coordination cannot take place in markets where there is a monopoly. Two of the fourteen Relevant Markets are mergers-to-monopoly (Warren, Manitoba and Allanburg, Ontario). McNabb Affidavit, Commissioner's Record, Tab 2, p. 16, para. 21(a).

<sup>26</sup> Boyer Expert Report, Commissioner's Record, tab 3(b), p. 1085, para. 73. The opportunity for coordination in retail gas markets was recognized in the OECD, Directorate for Financial and Enterprise Affairs, Competition

26. Coordination can periodically break down, when cooperating retailers lower their prices below the coordinated level in an effort to gain additional sales. If the Proposed Merger proceeds, the pre-merger rivalry that existed between Parkland and Pioneer in the 14 Markets during periods of non-coordination will be lost. In those periods, the removal of Pioneer as a competitor coupled with, among other things, high barriers to entry and Parkland's increased market share, will allow Parkland to exercise enhanced market power to the detriment of consumers.<sup>27</sup>

27. The Commissioner's allegations are based on his review of the evidence gathered to date, supported by the McNabb and Boyer Affidavits. The post-merger market share of the parties is but one of the factors that must be weighed by the Tribunal in its consideration of the issues.

28. Moreover, Margaret Sanderson, Parkland's own expert witness for purposes of the section 104 Application, stated in cross-examination that absent a remedy, "high retail concentration" levels in four of the 14 Markets gives rise to "legitimate competition concerns".<sup>28</sup> Ms. Sanderson also agreed that there are competition concerns in two additional markets.<sup>29</sup> Accordingly, there are 6 markets where both experts agree there are competition concerns.<sup>30</sup>

29. The section 92 application raises a serious issue to be tried.

**B. IRREPARABLE HARM WILL ENSUE IF THE MERGER PROCEEDS**

30. If the Tribunal does not issue the interim order, consumers and the economy will be irreparably harmed by the Proposed Merger. Parkland will have the market power to increase prices through coordination and unilaterally, evidence of which is set out below, and the incentive to use that power.

31. The Commissioner must demonstrate irreparable harm on a balance of probabilities.<sup>31</sup> In other words, the Commissioner must satisfy the Tribunal that it is more likely than not that

Committee, *Competition in Road Fuel*, DAF/Comp (2013)18 Background Note, at §4.1, p.21, Book of Authorities, Tab 24.

<sup>27</sup> Boyer Expert Report, Commissioner's Record, tab 3(b), p. 1085, para. 71.

<sup>28</sup> Sanderson Cross-Examination Transcript, Qs 102-108, pp. 32-34, Commissioner's Supplemental Record, Tab 5.

<sup>29</sup> Sanderson Cross-Examination Transcript, Qs 107-108, pp. 32-34, Commissioner's Supplemental Record, Tab 5.

<sup>30</sup> Warren, Lundar, Neepawa, Kapuskasing, Bancroft, and Tilsonburg.

<sup>31</sup> *Millennium Charitable Foundation v. Canada (Minister of National Revenue - M.N.R.)*, 2008 FCA 414 (QL) at para. 18, Book of Authorities Tab 22.

irreparable harm will be suffered if the order sought is not issued and that harm would be irreparable.<sup>32</sup> The interim order sought by the Commissioner is akin to a *quia timet* injunction because the harm the Commissioner seeks to prevent will occur in the future through the pending merger.<sup>33</sup> Accordingly, harm must, of necessity, be inferred through reasonable inferences drawn from the evidence.<sup>34</sup>

32. This is the first case that squarely raises the issue of whether the harm that consumers and the economy will suffer before a section 92 application is disposed of can constitute irreparable harm.<sup>35</sup>

*(i) Harm Will Occur if an Interim Order is not Issued*

33. If an interim order is not issued, Parkland will have the market power to increase prices and harm competition more generally through coordination and unilaterally and the incentive to use that power.

a. Affected Markets

34. The 14 Markets are local in nature. There is a natural limit on the distance consumers will travel in response to a price increase in gasoline. It does not make economic sense for consumers to drive long distances to save a cent or two on gasoline.<sup>36</sup>

b. Barriers to Entry

35. There are significant barriers to entry into retail gasoline markets, particularly in rural and semi-urban markets. Generally, retail gasoline is dominated by two groups: integrated oil refiners/brand retailers and independent retailers. These two groups can operate within the high fixed costs environment that characterizes the retail gasoline industry by generating economies

<sup>32</sup> *Nadeau Poultry Farm Ltd. v. Group Westco Inc.*, 2008 Comp. Trib. 16 at para. 26 (“Nadeau”), Book of Authorities Tab 23.

<sup>33</sup> *Ibid.*

<sup>34</sup> *Ibid.*

<sup>35</sup> Though the Federal Court of Appeal in *Superior Propane* mentioned the issue of harm to consumers, that issue was not canvassed in any detail. *Canada (Commissioner of Competition) v. Superior Propane Inc.*, [2001] 3 F.C. 175 at para. 13, Book of Authorities Tab 9.

<sup>36</sup> McNabb Affidavit, Commissioner’s Record, Tab 2, p. 13, para. 16; Affidavit of Dr. Marcel Boyer sworn April 30, 2015 attaching his expert report as Exhibit B (“**Boyer Expert Report**”), Commissioner’s Record, tab 3(b), p. 1085, para. 70.

of scale. Supermarkets have become more visible competitors, but generally not in rural or semi-urban markets like the affected markets.<sup>37</sup>

36. The retail gasoline market is a mature. There has been a rationalization and a reduction of gas stations in Canada over the last fifteen years.<sup>38</sup> Entry is costly, time-consuming, and rare.<sup>39 40</sup>

c. Market Share

37. Parkland's post-merger market share in the 14 Markets would be significant (ranging from 39% to 100%).<sup>41</sup>

d. Concentration and Coordination

38. As set out in paragraph 14 above, the Proposed Merger will exacerbate the market concentration in 12 of the 14 Markets, where there is not merger to monopoly.

39. By increasing concentration in these Markets, the Proposed Merger will likely significantly increase the extent, likelihood, frequency and duration of coordination among some or all of the retailers who would remain in these markets post-merger.<sup>42</sup>

40. As noted in paragraph 24, coordination refers to behaviour by a group of firms that is profitable for each firm due to the accommodating reactions of the other firms.<sup>43</sup> Coordination is more likely to occur when firms individually recognize mutually beneficial terms of coordination; are able to monitor each other's behaviour in respect of key aspects of competition, such as pricing, and, can respond to, or punish, deviations from the terms of coordination by other firms.<sup>44</sup>

<sup>37</sup> Boyer Expert Report, paras. 29-31.

<sup>38</sup> Boyer Expert Report, para. 32.

<sup>39</sup> Boyer Expert Report, para. 29.

<sup>40</sup> Note that Parkland's expert Margaret Sanderson does not refute these points, providing only one example of entry in footnote 23, p. 11 of her report.

<sup>41</sup> McNabb Affidavit, Commissioner's Record, Tab 2, p. 16, para. 21.

<sup>42</sup> All but two Relevant Markets are susceptible to the coordinated exercise of market power. Coordination cannot take place in markets where there is a monopoly. Two of the fourteen Relevant Markets are mergers-to-monopoly (Warren, Manitoba and Allanburg, Ontario). McNabb Affidavit, Commissioner's Record, Tab 2, p. 16, para. 21(a).

<sup>43</sup> Boyer Expert Report, Commissioner's Record, tab 3(b), p. 1077, para. 37.

<sup>44</sup> Boyer Expert Report, Commissioner's Record, tab 3(b), p. 1081, para. 53.

41. The act of coordination and price-fixing is *not* the same.<sup>45</sup> However, the adverse *effect* of coordination and price-fixing on consumers and the economy is the same or substantially the same.<sup>46</sup> As noted by Chief Justice Crampton, price-fixing agreements have “a greater adverse economic impact on society than do theft and fraud” because it transfers wealth from consumers to the price-fixing participants and has a detrimental effect on the economy.<sup>47</sup>

42. The 14 Markets are highly susceptible to coordination.<sup>48</sup> There is no dispute between Dr. Boyer and Ms. Sanderson with respect to the characteristics that increase the likelihood, extent frequency and duration of coordination. Coordination is facilitated when:

- a. there are fewer competitors;
- b. entry barriers are important;
- c. firms interact frequently;
- d. the market is transparent (knowledge of prices and output);
- e. demand growth is important;
- f. demand is more predictable;
- g. innovation in markets is low;
- h. costs are similar between firms;
- i. production capacities are similar between firms.<sup>49</sup>

43. After applying these factors to the 14 Markets, Dr. Boyer concluded that all but two of the factors are present to different but significant degrees in those 12 of the 14 Markets (2 of the

<sup>45</sup> Subsection 45(1)(a) of the Act prohibits agreements between competitors in respect of a product to fix, maintain, increase or control the price for the supply of the product. An offence under subsection 45(1) is a *per se* criminal offence.

<sup>46</sup> Boyer Expert Report, Commissioner’s Record, tab 3(b), pp. 1070 (para. 6) and 1081 (para. 52).

<sup>47</sup> *Canada v. Maxzone Auto Parts (Canada) Corp.*, 2012 FC 1117 at para. 55, Book of Authorities Tab 2.

<sup>48</sup> Boyer Expert Report, Commissioner’s Record, tab 3(b), pp. 1070 (para. 8) and 1087, para. 75.

<sup>49</sup> Boyer Expert Report, Commissioner’s Record, tab 3(b), p. 1080 para. 48. Cross-examination transcript of Margaret Sanderson, May 8, 2015, Qs 144-145, pp. 43-44, Commissioner’s Supplemental Record, Tab 5.

Markets are merger to monopoly).<sup>50, 51</sup> Dr. Boyer also concluded that coordination among retail gasoline stations in the markets at issue will be *facilitated and rendered more likely* due to the Proposed Merger.<sup>52</sup> Ms. Sanderson's expert report neither sets out nor applies these factors, nor opines on the issue of coordination in the markets in issue.<sup>53</sup>

44. The history of collusion or coordination among retail gas providers in Canada, including among one of the merging parties, Pioneer Energy LP, demonstrates their ability to overcome hurdles to effective coordinated behaviour in retail gas markets.<sup>54</sup>

45. Moreover, there is evidence which the Commissioner submits suggests that Parkland has engaged in coordinated conduct in connection with the wholesale supply of gasoline to independent gas stations.<sup>55</sup>

46. There is also reason to believe that the coordinated conduct previously engaged in by Pioneer may occur post-merger. Parkland has offered "generous retention packages and increases in salary and benefits" to the Pioneer executives who were involved in coordination, in respect of retail gas, that is of concern to the Bureau.<sup>56</sup> These executive have been offered senior positions in Parkland's retail gasoline team.<sup>57</sup>

<sup>50</sup> Boyer Expert Report, Commissioner's Record, tab 3(b), pp. 1070 (para. 8), 1080-1081 (para. 48), 1085-1086 (paras. 71-73), 1087 (para. 75). Boyer Reply Affidavit, Commissioner's Supplemental Record, Tab 1, paras. 15, 21, 22, 24.

<sup>51</sup> These two factors are (e) when demand growth is important and (i) when production capacities are similar between firms. Boyer Reply Affidavit, para. 21, Commissioner's Supplemental Record, Tab 1.

<sup>52</sup> Boyer Expert Report, Commissioner's Record, tab 3(b), p. 1087, para. 75.

<sup>53</sup> Ms. Sanderson referred to the concept of coordination during her cross-examination and stated she had considered these factors in preparing her report. (Q146 p. 44 of Sanderson cross-examination transcript, Commissioner's Supplemental Record, Tab 5). However, Ms. Sanderson's expert report does not apply these factors to the affected markets.

<sup>54</sup> Competition Bureau, Merger Enforcement Guidelines (2011) Commissioner's Supplemental Record, Tab 6, para. 6.34; Boyer Expert Report, Commissioner's Record, tab 3(b), p. 1083, para. 60; McNabb Affidavit, Commissioner's Record, Tab 2, p. 17, paras. 23 – 24. Communication among Pioneer personnel further demonstrates that Pioneer can overcome the hurdles to effective coordinated behaviour. See McNabb Affidavit, Commissioner's Record, tabs 2(i) – (o), (u) – (w).

<sup>55</sup> McNabb Affidavit, Commissioner's Record, Tab 2, p. 19, paras. 25(f) – (k); McNabb Affidavit, Commissioner's Record, tabs 2(o) – 2(t).

<sup>56</sup> McNabb Affidavit, Commissioner's Record, Tab 2, p. 19, paras. 25(a), (c) – (d), (m); McNabb Affidavit, Commissioner's Record, tabs 2(j), (l) – (m), 2(v). All of the emails cited herein are authored or received by Haydn Northey and Brian Kitchen.

<sup>57</sup> Haydn Northey has been asked to lead Parkland's Eastern Retail Operations, and Brian Kitchen has been asked to join Parkland's Retail team. See Exhibit 8, Cross-Examination on Affidavit of Robert Espey, "Pioneer Acquisition Update", April 20, 2015, slide 15; Cross-Examination on Affidavit of Robert Espey, May 7, 2015, p. 76.

e. Unilateral Effects

47. Two of the Markets at issue are merger to monopoly. Consumers in these two markets, will, immediately upon closing, be at the mercy of Parkland's monopoly.

48. Coordination can periodically break down, as cooperating retailers deviate or "cheat" from coordinating their behaviour. There is evidence of such deviations or "cheating" by the Pioneer executives<sup>58</sup> offered senior positions with Parkland's retail gasoline team. For example:

In response to an email from Brian Kitchen at 4:11PM stating:

"Suggest we move on Shell now. We will miss the opportunity",

Haydn Northey wrote:

"Only concern is our volumes are down at most of our sites YTD. As a team player though, we will move now."

Brian Kitchen replied to Haydn Northey's email at 4:35PM and stated, among other things:

"Time for some robust price marketing games. ie back to cheating [REDACTED] in selected market areas?"<sup>59</sup>

49. If the Proposed Merger proceeds, the pre-merger rivalry that existed between Parkland and Pioneer in the 14 Markets during periods of non-coordination will be lost. In those periods, the removal of Pioneer as a competitor coupled with, among other things, high barriers to entry and Parkland's increased market share, will allow Parkland to exercise market power to the detriment of consumers in the 14 Markets.<sup>60</sup>

<sup>58</sup> Brian Kitchen and Hayden Northey.

<sup>59</sup> McNabb Affidavit, Commissioner's Record, Tab 2, p. 19, paras. 25(c); McNabb Affidavit, Commissioner's Record, tabs 2(l).

<sup>60</sup> Boyer Expert Report, Commissioner's Record, tab 3(b), p. 1085, para. 71.

f. Parkland is likely to exercise its market power

50. Dr. Boyer concluded that Parkland will be able to exert market power in the relevant markets and, as a profit maximizing firm, it is likely to raise prices.<sup>61</sup> Parkland can influence retail gasoline prices at Non-Corporate Stations through the rack forward margin fee and any other fee it charges to them.<sup>62</sup> As noted, Parkland can increase the wholesale price of gasoline charged to Non-Corporate Stations at any time without notice to and without recourse by the Non-Corporate Stations.<sup>63</sup>

g. Consumers and the Canadian Economy will be irreparably harmed

51. The total estimated annual volume of commerce arising from the sale of retail gasoline in the 14 Markets in 2013 is 357,929,264 litres, as described below:

	Relevant Markets	2013 Volume of Commerce
1	Warren, MB	
2	Allanburg, ON	12,421,983
3	Lundar, MB	
4	Tillsonburg, ON	26,780,735
5	Innisfil, ON	37,351,242
6	Kapuskasing, ON	
7	Hanover, ON	26,510,574
8	Bancroft, ON	19,836,819
9	Gananoque, ON	27,960,573
10	Chelmsford/Azilda, ON	28,513,449
11	Aberfoyle, ON	47,736,503
12	Port Perry, ON	40,318,182
13	Neepawa, MB	
14	Welland, ON	62,522,905
	<b>Total</b>	<b>357,929,264<sup>64</sup></b>

52. The purpose of the *Competition Act* is to maintain and encourage competition so that the benefits of competitive markets will accrue to the Canadian economy and consumers.<sup>65</sup> To

<sup>61</sup>Boyer Expert Report, Commissioner's Record, tab 3(b), pp. 1071-1072, para. 12. Dr. Boyer subsequently confirmed his position in a further affidavit. See Boyer Reply Affidavit, para. 15, Commissioner's Supplemental Record, Tab 1.

<sup>62</sup> Exhibit "C" to McNabb Affidavit, Commissioner's Record, Tab 2(c), pp. 83-699.

<sup>63</sup> Exhibit "C" to McNabb Affidavit, Commissioner's Record, Tab 2(c), pp. 83-699.

<sup>64</sup> McNabb Affidavit, Commissioner's Record, Tab 2, p. 22, para. 26.

illustrate the potential harm to consumers, if the prices increase by one cent per litre post-merger, this will result in additional costs to consumers in the 14 Markets of approximately \$3.5 million. This assumes that it takes only 12 months to finally dispose of the 92 Application and that consumers purchase the same volume of gasoline as previously in that time period.<sup>66</sup>

53. In addition, to the extent that consumers purchased less gasoline as a result of price increases brought about by the exercise of Parkland's market power post-merger, the broader economy would be harmed and the purpose of the Act undermined.

54. For example, if the price elasticity of demand for retail gasoline is -0.3, a 1% price increase would result in a 0.3% quantity reduction. If the pre-merger price of gas in the 14 Markets is \$1.00 per litre and if, post-merger, this price increased by 1%, then the quantity demanded would fall by approximately 1 million litres.<sup>67</sup> This loss in consumption would result in a decrease in allocative efficiency (the degree to which resources available to society are allocated to their most valuable use).<sup>68</sup> This loss of allocative efficiency is "contrary to promoting the efficiency and adaptability of the Canadian economy."<sup>69</sup>

55. For the foregoing reasons, Canadian consumers and the Canadian economy will be harmed if an interim order is not issued.

h. Tribunal lacks the Jurisdiction to Remedy the Harm

56. The Tribunal is a creature of statute and has only the powers conferred on it by Parliament.<sup>70</sup> In respect of a completed merger, the Tribunal may only order any party to the merger or any other person to dissolve the merger, or dispose of assets or shares in such a

<sup>65</sup> *Competition Act*, s. 1.1, Schedule B; *Commissioner of Competition v. Premier Career Management Group Corp.*, 2009 FCA 295 at para. 40, Book of Authorities Tab 16.

<sup>66</sup> McNabb Affidavit, Commissioner's Record, Tab 2, p. 23, para. 27.

<sup>67</sup> McNabb Affidavit, Commissioner's Record, Tab 2, p. 23, para. 28.

<sup>68</sup> Competition Bureau, Merger Enforcement Guidelines (2011), para. 12.4, Commissioner's Supplemental Record, Tab 7.

<sup>69</sup> *Ibid.* at 12.25. See also regarding allocative efficiency *Canada (Director of Investigation and Research) v. Hillsdown Holdings Ltd.*, 1992 C.C.T.D. No. 4 (QL) at p. 25, Book of Authorities Tab 5; and *Commissioner of Competition v. Superior Propane Inc.*, 2000 Comp. Trib. 15 (QL) at para. 423, Book of Authorities Tab 8.

<sup>70</sup> *Air Canada v. Canada (Commissioner of Competition)*, 2002 FCA 121 (QL) at para. 43, Book of Authorities, Tab 1.

manner as the Tribunal directs.<sup>71</sup> Accordingly, the Tribunal lacks the necessary authority to remedy the harm suffered by consumers and the economy during the interim period in the event the Commissioner is successful in the 92 Application.

57. The Federal Court of Appeal has found irreparable harm where full compensation for a loss is not available at law:

Subject to the submissions discussed below, I think it self-evident that the appellant will suffer irreparable harm if the injunction is refused. It is not the adequacy of the "damages" remedy which is in issue. Rather, it is the adequacy of the "compensation" which is available under the Regulations. Where, as in the present case, the amount of the recoverable loss is restricted by statute, and that amount is significantly less than the actual loss to be incurred if the injunction does not issue, irreparable harm is established. I take it to be accepted law that adequate compensation is to be measured in accordance with common law principles: See *American Cyanamid Co. v. Ethicon Ltd.*, [1975] A.C. 396 (H.L.), at page 408.<sup>72</sup>

58. Consumers and the Canadian economy will suffer *irreparable* harm if the Tribunal does not issue an interim order requiring Parkland to hold separate the assets in the 14 Markets.

59. If the Proposed Merger proceeds absent an interim order, consumers in these local markets will be subject to an increase in the cost of gasoline due to the increased likelihood of coordinated conduct and supra-competitive pricing by Parkland. As the Tribunal has no jurisdiction to remedy the harm suffered by consumers or the Canadian economy, such harm is irreparable.

### **C. THE BALANCE OF CONVENIENCE FAVOURS THE COMMISSIONER'S APPLICATION**

60. The Commissioner is presumed to act in the public interest. The public interest is to be taken into account and weighed together with the interests of private litigants.<sup>73</sup>

<sup>71</sup> In addition, with the consent of the person against whom the order is directed and the Commissioner, the Tribunal may order any party to the merger or any other person to take any other action (section 92(e)(iii)), Schedule B.

<sup>72</sup> *David Hunt Farms Ltd. v. Canada (Minister of Agriculture)*, [1994] 2 F.C. 625 (CA) at para. 13, Book of Authorities Tab 19.

<sup>73</sup> *Manitoba (Attorney General) v. Metropolitan Stores (MTS) Ltd.*, [1987] 1 S.C.R. 110, at 146, Book of Authorities Tab 21.

61. The balance of convenience favours granting the interim order. The irreparable harm to consumers and the broader economy that will occur if the relief sought herein is not granted, is greater than the harm that Parkland will suffer, if any, in the event the interim order is granted.

62. The harm to consumers and the broader economy is as set out above.

63. In applying the balance of convenience prong, the Tribunal may consider evidence of the effect on consumers of lessened competition in the market in the absence of the order and the impact of the delay on the respondents, including financial costs.<sup>74</sup>

64. In respect of harm to Parkland, it bears noting first that the Commissioner is not seeking to prevent the Proposed Merger from closing in whole or in part, as is permitted under subsection 92(1)(f) of the Act. The Commissioner seeks only a hold separate order. Further, the hold separate order the Commissioner seeks is only in respect of 17 of the total 393 gas stations being acquired by Parkland.<sup>75</sup>

65. Parkland submits that a hold separate order prejudices and jeopardizes the Proposed Merger, and would “orphan” the 17 gas stations at issue.<sup>76</sup> Parkland’s position is premised entirely on its understanding that a hold separate order would, of necessity, require Parkland to incorporate a separate legal entity to hold separate the 17 gas stations. The creation of a separate legal entity, in turn, necessitates (in Parkland’s view) the creation of separate infrastructure to operate the legal entity.<sup>77</sup>

66. Parkland’s position regarding the *inconvenience* it will suffer is based on a fundamentally flawed understanding of what the Commissioner seeks in this section 104 Application.

<sup>74</sup> *Kobo Inc. v. Canada (Commissioner of Competition)* 2014 Comp. Trib. 2 (QL) at paras. 48-49 (“*Kobo*”); Book of Authorities Tab 20. See also *Superior Propane*, [2001] 3 F.C. 175 (QL) at para. 17, Book of Authorities Tab 9.

<sup>75</sup> Notice of Application, Commissioner’s Record, Tab 1.

<sup>76</sup> Espey Affidavit, Respondent’s Record, para. 56.

<sup>77</sup> Espey Affidavit, Respondent’s Record, para. 55; Cross-Examination Transcript of Robert Espey, May 7, 2015, p. 58, Commissioner’s Supplemental Record, Tab 2. The infrastructure items listed by Parkland include: fuel supply arrangements, transportation and logistics arrangements, convenience store supplier arrangements, insurance, licenses (including for the sale of tobacco), bank accounts, point of sale systems, provincial and federal tax compliance considerations (especially fuel tax considerations which are a major component of fuel prices), regulatory compliance considerations and personnel to manage the various aspects of the business.

67. The Commissioner seeks an order directing Parkland to hold certain assets separate to maintain competition in the Relevant Markets pending the disposition of the Commissioner's 92 Application. *A separate legal entity to operate hold separate assets is unnecessary.* It is also unprecedented.

68. There are numerous examples of hold separate agreements arising in the context of completed mergers, including mergers by way of asset purchase, whereby post-closing, a portion of the acquired assets are managed by a hold separate manager until they are divested or otherwise in order to maintain competition in the affected markets.<sup>78</sup>

69. If the interim order sought by the Commissioner is issued, of the costs identified by Parkland, its inconvenience would be limited to the cost of two hold separate managers which Parkland says would be necessary to operate the hold separate assets (\$200,000 in respect of a publicly announced transaction worth \$378 million, assuming two managers are necessary).<sup>79</sup> The remaining hold separate costs alleged by Parkland would not be incurred because there is no need to create a separate legal entity and separate infrastructure to hold and operate the hold separate assets associated with the 17 stations in issue.<sup>80</sup>

70. In addition, whereas Parkland claims that the issuance of an interim order would jeopardize the Proposed Merger, the evidence on the record indicates that neither Parkland nor Pioneer has made a decision to terminate the transaction in the event a hold separate order is issued.<sup>81</sup>

<sup>78</sup> For example in the Book of Authorities: *Commissioner of Competition v. Holcim Ltd* (2015) (Tab 13), *Commissioner of Competition v. Agrium Inc.* (2013) (Tab 10), *Commissioner of Competition v. BCE Inc.* (2013) (Tab 11), *Commissioner of Competition and IESI-BFC Ltd., BFI Canada Inc., Waste Services Inc., and Waste Services (CA) Inc.* (2010) (Tab 14), *Commissioner of Competition and Ticket Master Entertainment Inc. and Live Nation Inc.* (2010) (Tab 17), *Commissioner of Competition and Clean Harbors, Inc.* (2009) (Tab 12), and *Commissioner of Competition v. Westway Holdings Canada Inc.* (2003) (Tab 18).

<sup>79</sup> Espey Affidavit, Respondent's Record, para. 57(b)(iii).

<sup>79</sup> Espey Affidavit, Respondent's Record, para. 57(b)(iii).

<sup>80</sup> Espey Affidavit, Respondent's Record, para. 57(b)(i) and 57(b)(ii). Further, the efficiencies that Parkland alleges would be lost under a hold separate (Espey Affidavit, Respondent's Record, para. 57(a)) are also unlikely to be lost due to the fact that a separate legal entity to operate the hold separate assets is unnecessary.

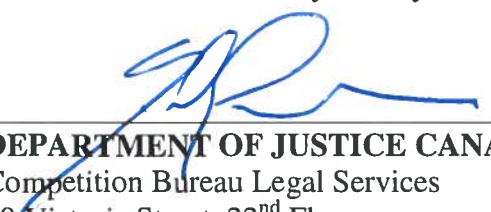
<sup>81</sup> Espey Cross-Examination Transcript, Q21 p. 56, Commissioner's Supplemental Record Tab 2; Answers to Undertakings, Q16, Commissioner's Supplemental Record Tab 4.

**IV. ORDER SOUGHT**

71. The Commissioner submits that he has met the test for injunctive relief and requests that the Tribunal issue:

- a. an order directing Parkland to hold separate the assets it acquires from Pioneer pursuant to the Proposed Merger in the Relevant Markets until such time as the Tribunal delivers its final decision in respect the Commissioner's Application pursuant to section 92 of the Act;
- b. costs; and
- c. such further and other relief as counsel may request and this Tribunal may grant.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED** this 10th day of May, 2015.



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**SCHEDULE A: LIST OF AUTHORITIES**

1. *Air Canada v. Canada (Commissioner of Competition)*, 2002 FCA 121 (QL)
2. *Canada v. Maxzone Auto Parts (Canada) Corp.*, 2012 F.C. 1117
3. *Canada (Attorney General) v. United States Steel Corp.*, 2010 F.C.A. 200.
4. *Canada (Director of Investigation and Research) v. Bank of Montreal*, [1996] C.C.T.D. No. 12 (QL)
5. *Canada (Director of Investigation and Research) v. Hillsdown Holdings Ltd.*, 1992 C.C.T.D. No. 4 (QL)
6. *Canada (Director of Investigation and Research) v. Superior Propane Inc.*, 1996 CanLII 8 (CT)
7. *Canada (Director of Investigation and Research) v. Superior Propane Inc.*, [1998] C.C.T.D. No. 20 (QL)
8. *Canada (Commissioner of Competition) v. Superior Propane Inc.*, 2000 Comp. Trib. 15 (QL)
9. *Canada (Commissioner of Competition) v. Superior Propane Inc.*, [2001] 3 F.C. 175 (QL)
10. *Commissioner of Competition v. Agrium Inc.* (2013) (consent agreement)
11. *Commissioner of Competition v. BCE Inc.* (2013) (consent agreement)
12. *Commissioner of Competition and Clean Harbors, Inc.* (2009) (consent agreement)
13. *Commissioner of Competition v. Holcim Ltd* (2015) (consent agreement)
14. *Commissioner of Competition and IESI-BFC Ltd., BFI Canada Inc., Waste Services Inc., and Waste Services (CA) Inc.* (2010) (consent agreement)
15. *Commissioner of Competition v. Pearson Canada Inc. and Penguin Canada Books Inc.*, 2014 FC 376
16. *Commissioner of Competition v. Premier Career Management Group Corp.*, 2009 FCA 295
17. *Commissioner of Competition and Ticket Master Entertainment Inc. and Live Nation Inc.* (2010) (consent agreement)
18. *Commissioner of Competition v. Westway Holdings Canada Inc.* (2003) (consent agreement)
19. *David Hunt Farms Ltd. v. Canada (Minister of Agriculture)*, [1994] 2 F.C. 625 (CA)
20. *Kobo Inc. v. Commissioner of Competition*, 2014 Comp. Trib. 2
21. *Manitoba (Attorney General) v. Metropolitan Stores (MTS) Ltd.*, 1987 CanLII 79 (SCC), [1987] 1 S.C.R. 110
22. *Millennium Charitable Foundation v. Canada (Minister of National Revenue - M.N.R.)*, 2008 FCA 414 (QL)
23. *Nadeau Poultry Farm Ltd. v. Group Westco Inc.*, 2008 Comp. Trib. 16
24. OECD, Directorate for Financial and Enterprise Affairs, Competition Committee, *Competition in Road Fuel*, DAF/Comp (2013)18
25. *RJR-MacDonald Inc. v. A.G. Canada*, [1994] 1 S.C.R. 311
26. *Rona Inc. v Commissioner of Competition*, 2005 C.A.C.T. 26 (CanLII)

**SCHEDULE B: LEGISLATION**

*Competition Act*, R.S.C., 1985, c. C-34, sections 1.1, 45, 91, 92, 104(1)



CANADA

CONSOLIDATION

CODIFICATION

# Competition Act

# Loi sur la concurrence

R.S.C., 1985, c. C-34

L.R.C. (1985), ch. C-34

Current to March 31, 2015

À jour au 31 mars 2015

Last amended on March 9, 2015

Dernière modification le 9 mars 2015



R.S.C., 1985, c. C-34

L.R.C., 1985, ch. C-34

An Act to provide for the general regulation of trade and commerce in respect of conspiracies, trade practices and mergers affecting competition

Loi portant réglementation générale du commerce en matière de complots, de pratiques commerciales et de fusions qui touchent à la concurrence

#### SHORT TITLE

#### TITRE ABRÉGÉ

Short title

**1.** This Act may be cited as the *Competition Act*.  
R.S., 1985, c. C-34, s. 1; R.S., 1985, c. 19 (2nd Supp.), s. 19.

**1.** *Loi sur la concurrence.*

Titre abrégé

L.R. (1985), ch. C-34, art. 1; L.R. (1985), ch. 19 (2<sup>e</sup> suppl.), art. 19.

#### PART I

#### PARTIE I

#### PURPOSE AND INTERPRETATION

#### OBJET ET DÉFINITIONS

##### PURPOSE

##### OBJET

Purpose of Act

**1.1** The purpose of this Act is to maintain and encourage competition in Canada in order to promote the efficiency and adaptability of the Canadian economy, in order to expand opportunities for Canadian participation in world markets while at the same time recognizing the role of foreign competition in Canada, in order to ensure that small and medium-sized enterprises have an equitable opportunity to participate in the Canadian economy and in order to provide consumers with competitive prices and product choices.

R.S., 1985, c. 19 (2nd Supp.), s. 19.

**1.1** La présente loi a pour objet de préserver et de favoriser la concurrence au Canada dans le but de stimuler l'adaptabilité et l'efficacité de l'économie canadienne, d'améliorer les chances de participation canadienne aux marchés mondiaux tout en tenant simultanément compte du rôle de la concurrence étrangère au Canada, d'assurer à la petite et à la moyenne entreprise une chance honnête de participer à l'économie canadienne, de même que dans le but d'assurer aux consommateurs des prix compétitifs et un choix dans les produits.

L.R. (1985), ch. 19 (2<sup>e</sup> suppl.), art. 19.

Objet

##### INTERPRETATION

##### DÉFINITIONS

Definitions

“article”  
«article»

**2.** (1) In this Act,  
“article” means real and personal property of every description including  
(a) money,  
(b) deeds and instruments relating to or evidencing the title or right to property or an interest, immediate, contingent or otherwise, in a corporation or in any assets of a corporation,

**2.** (1) Les définitions qui suivent s'appliquent à la présente loi.  
«article» Biens meubles et immeubles de toute nature, y compris :  
a) de l'argent;  
b) des titres et actes concernant ou constatant un droit de propriété ou autre droit relatif à des biens ou un intérêt, actuel, éventuel ou autre, dans une personne morale ou dans

Définitions

«article»  
“article”

## PART V

[Repealed, R.S., 1985, c. 19 (2nd Supp.), s.29]

## PART VI

OFFENCES IN RELATION TO  
COMPETITIONConspiracies,  
agreements or  
arrangements  
between  
competitors

**45. (1) Every person commits an offence who, with a competitor of that person with respect to a product, conspires, agrees or arranges**

**(a) to fix, maintain, increase or control the price for the supply of the product;**

**(b) to allocate sales, territories, customers or markets for the production or supply of the product; or**

**(c) to fix, maintain, control, prevent, lessen or eliminate the production or supply of the product.**

Penalty

(2) Every person who commits an offence under subsection (1) is guilty of an indictable offence and liable on conviction to imprisonment for a term not exceeding 14 years or to a fine not exceeding \$25 million, or to both.

Evidence of  
conspiracy,  
agreement or  
arrangement

(3) In a prosecution under subsection (1), the court may infer the existence of a conspiracy, agreement or arrangement from circumstantial evidence, with or without direct evidence of communication between or among the alleged parties to it, but, for greater certainty, the conspiracy, agreement or arrangement must be proved beyond a reasonable doubt.

Defence

(4) No person shall be convicted of an offence under subsection (1) in respect of a conspiracy, agreement or arrangement that would otherwise contravene that subsection if

**(a) that person establishes, on a balance of probabilities, that**

**(i) it is ancillary to a broader or separate agreement or arrangement that includes the same parties, and**

**(ii) it is directly related to, and reasonably necessary for giving effect to, the objective of that broader or separate agreement or arrangement; and**

## PARTIE V

[Abrogée, L.R. (1985), ch. 19 (2<sup>e</sup> suppl.), art. 29]

## PARTIE VI

INFRACTIONS RELATIVES À LA  
CONCURRENCEComplot, accord  
ou arrangement  
entre  
concurrents

**45. (1) Commet une infraction quiconque, avec une personne qui est son concurrent à l'égard d'un produit, complotte ou conclut un accord ou un arrangement :**

**a) soit pour fixer, maintenir, augmenter ou contrôler le prix de la fourniture du produit;**

**b) soit pour attribuer des ventes, des territoires, des clients ou des marchés pour la production ou la fourniture du produit;**

**c) soit pour fixer, maintenir, contrôler, empêcher, réduire ou éliminer la production ou la fourniture du produit.**

Peine

(2) Quiconque commet l'infraction prévue au paragraphe (1) est coupable d'un acte criminel et encourt un emprisonnement maximal de quatorze ans et une amende maximale de 25 000 000 \$, ou l'une de ces peines.

Preuve du  
complot, de  
l'accord ou de  
l'arrangement

(3) Dans les poursuites intentées en vertu du paragraphe (1), le tribunal peut déduire l'existence du complot, de l'accord ou de l'arrangement en se basant sur une preuve circonstancielle, avec ou sans preuve directe de communication entre les présumées parties au complot, à l'accord ou à l'arrangement, mais il demeure entendu que le complot, l'accord ou l'arrangement doit être prouvé hors de tout doute raisonnable.

Défense

(4) Nul ne peut être déclaré coupable d'une infraction prévue au paragraphe (1) à l'égard d'un complot, d'un accord ou d'un arrangement qui aurait par ailleurs contrevenu à ce paragraphe si, à la fois :

**a) il établit, selon la prépondérance des probabilités :**

**(i) que le complot, l'accord ou l'arrangement, selon le cas, est accessoire à un accord ou à un arrangement plus large ou distinct qui inclut les mêmes parties,**

**(ii) qu'il est directement lié à l'objectif de l'accord ou de l'arrangement plus large ou**

into account any terms and conditions that may be imposed under those Acts; or

(c) an agreement or arrangement that constitutes a merger or proposed merger approved under subsection 53.2(7) of the *Canada Transportation Act* in respect of which the Minister of Transport has certified to the Commissioner the names of the parties to the agreement or arrangement.

Where proceedings commenced under section 45, 49, 76, 79 or 92

(10) No application may be made under this section against a person on the basis of facts that are the same or substantially the same as the facts on the basis of which

(a) proceedings have been commenced against that person under section 45 or 49; or

(b) an order against that person is sought by the Commissioner under section 76, 79 or 92.

Definition of “competitor”

(11) In subsection (1), “competitor” includes a person who it is reasonable to believe would be likely to compete with respect to a product in the absence of the agreement or arrangement.

2009, c. 2, s. 429.

le ministre des Transports certifie au commissaire le nom des parties.

(10) Aucune demande à l’endroit d’une personne ne peut être présentée au titre du présent article si les faits au soutien de la demande sont les mêmes ou essentiellement les mêmes que ceux allégués au soutien :

a) d’une procédure engagée à l’endroit de cette personne en vertu des articles 45 ou 49;

b) d’une ordonnance demandée par le commissaire à l’endroit de cette personne en vertu des articles 76, 79 ou 92.

Procédures en vertu des articles 45, 49, 76, 79 et 92

(11) Au paragraphe (1), « concurrent » s’entend notamment de toute personne qui, en toute raison, ferait vraisemblablement concurrence à une autre personne à l’égard d’un produit en l’absence de l’accord ou de l’arrangement.

Définition de « concurrent »

2009, ch. 2, art. 429.

## MERGERS

Definition of “merger”

**91.** In sections 92 to 100, “merger” means the acquisition or establishment, direct or indirect, by one or more persons, whether by purchase or lease of shares or assets, by amalgamation or by combination or otherwise, of control over or significant interest in the whole or a part of a business of a competitor, supplier, customer or other person.

R.S., 1985, c. 19 (2nd Supp.), s. 45.

## FUSIONNEMENTS

Définition de « fusionnement »

**91.** Pour l’application des articles 92 à 100, « fusionnement » désigne l’acquisition ou l’établissement, par une ou plusieurs personnes, directement ou indirectement, soit par achat ou location d’actions ou d’éléments d’actif, soit par fusion, association d’intérêts ou autrement, du contrôle sur la totalité ou quelque partie d’une entreprise d’un concurrent, d’un fournisseur, d’un client, ou d’une autre personne, ou encore d’un intérêt relativement important dans la totalité ou quelque partie d’une telle entreprise.

L.R. (1985), ch. 19 (2<sup>e</sup> suppl.), art. 45.

Order

**92.** (1) Where, on application by the Commissioner, the Tribunal finds that a merger or proposed merger prevents or lessens, or is likely to prevent or lessen, competition substantially

(a) in a trade, industry or profession,

(b) among the sources from which a trade, industry or profession obtains a product,

**92.** (1) Dans les cas où, à la suite d’une demande du commissaire, le Tribunal conclut qu’un fusionnement réalisé ou proposé empêche ou diminue sensiblement la concurrence, ou aura vraisemblablement cet effet :

a) dans un commerce, une industrie ou une profession;

Ordonnance en cas de diminution de la concurrence

(c) among the outlets through which a trade, industry or profession disposes of a product, or

(d) otherwise than as described in paragraphs (a) to (c),

the Tribunal may, subject to sections 94 to 96,

(e) in the case of a completed merger, order any party to the merger or any other person

(i) to dissolve the merger in such manner as the Tribunal directs,

(ii) to dispose of assets or shares designated by the Tribunal in such manner as the Tribunal directs, or

(iii) in addition to or in lieu of the action referred to in subparagraph (i) or (ii), with the consent of the person against whom the order is directed and the Commissioner, to take any other action, or

(f) in the case of a proposed merger, make an order directed against any party to the proposed merger or any other person

(i) ordering the person against whom the order is directed not to proceed with the merger,

(ii) ordering the person against whom the order is directed not to proceed with a part of the merger, or

(iii) in addition to or in lieu of the order referred to in subparagraph (ii), either or both

(A) prohibiting the person against whom the order is directed, should the merger or part thereof be completed, from doing any act or thing the prohibition of which the Tribunal determines to be necessary to ensure that the merger or part thereof does not prevent or lessen competition substantially, or

(B) with the consent of the person against whom the order is directed and the Commissioner, ordering the person to take any other action.

b) entre les sources d'approvisionnement auprès desquelles un commerce, une industrie ou une profession se procure un produit;

c) entre les débouchés par l'intermédiaire desquels un commerce, une industrie ou une profession écoule un produit;

d) autrement que selon ce qui est prévu aux alinéas a) à c),

le Tribunal peut, sous réserve des articles 94 à 96 :

e) dans le cas d'un fusionnement réalisé, rendre une ordonnance enjoignant à toute personne, que celle-ci soit partie au fusionnement ou non :

(i) de le dissoudre, conformément à ses directives,

(ii) de se départir, selon les modalités qu'il indique, des éléments d'actif et des actions qu'il indique,

(iii) en sus ou au lieu des mesures prévues au sous-alinéa (i) ou (ii), de prendre toute autre mesure, à condition que la personne contre qui l'ordonnance est rendue et le commissaire souscrivent à cette mesure;

f) dans le cas d'un fusionnement proposé, rendre, contre toute personne, que celle-ci soit partie au fusionnement proposé ou non, une ordonnance enjoignant :

(i) à la personne contre laquelle l'ordonnance est rendue de ne pas procéder au fusionnement,

(ii) à la personne contre laquelle l'ordonnance est rendue de ne pas procéder à une partie du fusionnement,

(iii) en sus ou au lieu de l'ordonnance prévue au sous-alinéa (ii), cumulativement ou non :

(A) à la personne qui fait l'objet de l'ordonnance, de s'abstenir, si le fusionnement était éventuellement complété en tout ou en partie, de faire quoi que ce soit dont l'interdiction est, selon ce que conclut le Tribunal, nécessaire pour que le fusionnement, même partiel, n'empêche ni ne diminue sensiblement la concurrence,

Evidence

(2) For the purpose of this section, the Tribunal shall not find that a merger or proposed merger prevents or lessens, or is likely to prevent or lessen, competition substantially solely on the basis of evidence of concentration or market share.

R.S., 1985, c. 19 (2nd Supp.), s. 45; 1999, c. 2, s. 37.

Factors to be considered regarding prevention or lessening of competition

93. In determining, for the purpose of section 92, whether or not a merger or proposed merger prevents or lessens, or is likely to prevent or lessen, competition substantially, the Tribunal may have regard to the following factors:

(a) the extent to which foreign products or foreign competitors provide or are likely to provide effective competition to the businesses of the parties to the merger or proposed merger;

(b) whether the business, or a part of the business, of a party to the merger or proposed merger has failed or is likely to fail;

(c) the extent to which acceptable substitutes for products supplied by the parties to the merger or proposed merger are or are likely to be available;

(d) any barriers to entry into a market, including

(i) tariff and non-tariff barriers to international trade,

(ii) interprovincial barriers to trade, and

(iii) regulatory control over entry,

and any effect of the merger or proposed merger on such barriers;

(e) the extent to which effective competition remains or would remain in a market that is or would be affected by the merger or proposed merger;

(f) any likelihood that the merger or proposed merger will or would result in the removal of a vigorous and effective competitor;

(g) the nature and extent of change and innovation in a relevant market; and

(B) à la personne qui fait l'objet de l'ordonnance de prendre toute autre mesure à condition que le commissaire et cette personne y souscrivent.

Preuve

(2) Pour l'application du présent article, le Tribunal ne conclut pas qu'un fusionnement, réalisé ou proposé, empêche ou diminue sensiblement la concurrence, ou qu'il aura vraisemblablement cet effet, en raison seulement de la concentration ou de la part du marché.

L.R. (1985), ch. 19 (2<sup>e</sup> suppl.), art. 45; 1999, ch. 2, art. 37.

Éléments à considérer

93. Lorsqu'il détermine, pour l'application de l'article 92, si un fusionnement, réalisé ou proposé, empêche ou diminue sensiblement la concurrence, ou s'il aura vraisemblablement cet effet, le Tribunal peut tenir compte des facteurs suivants :

a) la mesure dans laquelle des produits ou des concurrents étrangers assurent ou assureront vraisemblablement une concurrence réelle aux entreprises des parties au fusionnement réalisé ou proposé;

b) la déconfiture, ou la déconfiture vraisemblable de l'entreprise ou d'une partie de l'entreprise d'une partie au fusionnement réalisé ou proposé;

c) la mesure dans laquelle sont ou seront vraisemblablement disponibles des produits pouvant servir de substituts acceptables à ceux fournis par les parties au fusionnement réalisé ou proposé;

d) les entraves à l'accès à un marché, notamment :

(i) les barrières tarifaires et non tarifaires au commerce international,

(ii) les barrières interprovinciales au commerce,

(iii) la réglementation de cet accès,

et tous les effets du fusionnement, réalisé ou proposé, sur ces entraves;

e) la mesure dans laquelle il y a ou il y aurait encore de la concurrence réelle dans un marché qui est ou serait touché par le fusionnement réalisé ou proposé;

f) la possibilité que le fusionnement réalisé ou proposé entraîne ou puisse entraîner la

Representations	(9) At the hearing of an application under subsection (7), the Tribunal shall provide the applicant, the Commissioner and any person directly affected by the interim order with a full opportunity to present evidence and make representations before the Tribunal makes an order under that subsection.	(9) Dans le cadre de l'audition de la demande visée au paragraphe (7), le Tribunal accorde au demandeur, au commissaire et aux personnes directement touchées toute possibilité de présenter des éléments de preuve et des observations sur l'ordonnance attaquée avant de rendre sa décision.	Possibilité de présenter des observations
Prohibition of extraordinary relief	(10) Notwithstanding section 13 of the <i>Competition Tribunal Act</i> , an interim order shall not be appealed or reviewed in any court except as provided for by subsection (7).	(10) Par dérogation à l'article 13 de la <i>Loi sur le Tribunal de la concurrence</i> mais sous réserve du paragraphe (7), l'ordonnance ne peut faire l'objet d'un appel ou d'une révision judiciaire.	Interdiction de recours extraordinaire
Duty of Commissioner	(11) When an interim order is in effect, the Commissioner shall proceed as expeditiously as possible to complete the inquiry arising out of the conduct in respect of which the order was made. 2002, c. 16, s. 12.	(11) Lorsqu'une ordonnance provisoire a force d'application, le commissaire doit, avec toute la diligence possible, mener à terme l'enquête à l'égard du comportement qui fait l'objet de l'ordonnance. 2002, ch. 16, art. 12.	Obligations du commissaire
Interim order	<b>104.</b> (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.	<b>104.</b> (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.	Ordonnance provisoire
Terms of interim order	(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.	Conditions des ordonnances provisoires
Duty of Commissioner	(3) Where an interim order issued under 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. R.S., 1985, c. 19 (2nd Supp.), s. 45; 1999, c. 2, s. 37; 2002, c. 16, s. 13; 2015, c. 3, s. 39.	(3) Si une ordonnance provisoire est rendue 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. L.R. (1985), ch. 19 (2 <sup>e</sup> suppl.), art. 45; 1999, ch. 2, art. 37; 2002, ch. 16, art. 13; 2015, ch. 3, art. 39.	Obligation du commissaire
Consent agreement	<b>104.1</b> [Repealed, 2009, c. 2, s. 433] <b>105.</b> (1) The Commissioner and a person in respect of whom the Commissioner has applied or may apply for an order under this Part, other than an interim order under section 103.3, may sign a consent agreement.	<b>104.1</b> [Abrogé, 2009, ch. 2, art. 433] <b>105.</b> (1) Le commissaire et la personne à l'égard de laquelle il a demandé ou peut demander une ordonnance en vertu de la présente partie — exception faite de l'ordonnance provi-	Consentement

**THE COMPETITION TRIBUNAL**

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

**IN THE MATTER OF** the proposed acquisition by Parkland Industries Ltd. of substantially all the assets of Pioneer Petroleum Holding Limited Partnership, Pioneer Energy LP, Pioneer Petroleum Transport Inc., Pioneer Energy Inc., Pioneer Fuels Inc., Pioneer Petroleum Holding Inc., Pioneer Energy Management Inc., 668086 N.B. Limited, 3269344 Nova Scotia Limited and 1796745 Ontario Ltd.;

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

**AND IN THE MATTER OF** an application for an Interim Order pursuant to section 104 of the *Competition Act*.

**BETWEEN:**

**COMMISSIONER OF COMPETITION**

**Applicant**

**- and -**

**PARKLAND INDUSTRIES LTD., PIONEER PETROLEUMS  
HOLDING LIMITED PARTNERSHIP, PIONEER ENERGY LP,  
PIONEER PETROLEUMS TRANSPORT INC., PIONEER  
ENERGY INC., PIONEER FUELS INC., PIONEER PETROLEUMS  
HOLDING INC., PIONEER ENERGY MANAGEMENT INC.,  
668086 N.B. LIMITED, 3269344 NOVA SCOTIA LIMITED AND  
1796745 ONTARIO LTD.**

**Respondents**

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**MEMORANDUM OF ARGUMENT ON APPLICATION FOR AN INTERIM  
ORDER**

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