PUBLIC

CT-2015-003

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 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.,

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*.

BETWEEN:

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

MEMORANDUM OF FACT AND LAW OF PARKLAND INDUSTRIES LTD. AND PARKLAND FUEL CORPORATION

COMPETITION TRIBUNAL
TRIBUNAL DE LA CONCURRENCE

FILED / PRODUIT

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PART I – OVERVIEW

1. Parkland's acquisition of 181 Pioneer-branded gas stations and 212 Pioneer wholesale fuel supply agreements is scheduled to close on May 13, 2015. After reviewing the merger for seven months, on April 30, 2015, the Commissioner filed a notice of application under section 92 of the *Competition Act* and sought an interim hold separate order under section 104. Of the almost 400 assets to be acquired by Parkland, the Commissioner takes issue only with 17 located in 14 rural municipalities scattered across Ontario and Manitoba.

2. But the real number of markets and assets in issue is actually even smaller. In his materials filed on April 30, 2015, the Commissioner did not inform the Tribunal that Parkland intended to divest assets in 10 of the 14 markets. As the Commissioner's own economist testified, these divestitures[1] seem to him to meet "at first glance the necessary requirement to avoid an increase in the likelihood of coordinated conduct" and will leave the "markets in a situation somewhat different but nevertheless similar to the pre-merger situation". The Commissioner has never explained why he did not inform the Tribunal of Parkland's intentions, which would eliminate all competition concerns in those markets.

3. In fact, despite his knowledge of Parkland's intended divestitures, the Commissioner alleged that the transaction would likely substantially lessen competition in 10 markets in which he knew Parkland intended to divest assets. He even went so far as to allege (and still alleges) a merger-to-monopoly in respect of one such market. Not only would there be no merger-to-monopoly, but the Commissioner knew that there would be *no change* in the market share or concentration levels at all in that market.

[1] As described below, Parkland's intended divestitures now extend to 11 markets to which the Commissioner's economist was referring.

4. The Commissioner's failure to draw the Tribunal's attention to this critical evidence was patently unreasonable, which alone disentitles him to the extraordinary equitable relief he seeks.[2]

5. An interim injunction is extraordinary relief. Had Parliament intended an application under section 92 to automatically prohibit the parties from closing all or part of a merger, it would have so provided. Instead, it required the Commissioner to satisfy the high test applied by courts when granting interlocutory injunctive relief. The Commissioner has not met that test.

6. There is no serious issue to be tried in 11 of the 14 local markets at issue. As the Commissioner's economist testified, Parkland's intended divestitures address the competition concerns in all but 3 markets.

7. With respect to all 14 markets, but in particular the 3 that remain in issue, the Commissioner's evidence of irreparable harm is speculative and his geographic markets unsupported by evidence. He has not demonstrated, as he must, that there is a "high degree of probability" that consumers will pay materially higher prices for retail fuel during the pendency of his section 92 application. In fact, his own economist has reached only preliminary conclusions, testifying that the merger "raised possible concern regarding unilateral effects and coordinated conduct in those markets and that a closer look was warranted." Presumably the closer look will occur at the hearing of the section 92 application. In the meantime, "possible concern" cannot justify extraordinary interim relief.

8. Finally, the balance of convenience does not favour a hold separate order, the terms of which remain unclear. Parkland has proposed a less invasive and likely more effective alternative

[2] *Canada (Commissioner of Competition) v Labatt Brewing Co*, 2008 FCA 22 at para 16, 2008 CarswellNat 134. See also *Canada (Commissioner of Competition) v Labatt Brewing Co*, 2008 FC 59, 163 ACWS (3d) 939; and *Canada (Commissioner of Competition) v Canada Pipe Co*, 29 CPR (4th) 530 at para 64, 2004 CarswellNat 1218.

which preserves the *status quo*. By capping its wholesale fuel supply prices to dealers, Parkland eliminates the risk of using its wholesale price to increase retail fuel prices. The Commissioner has led no evidence, nor even asserted in his written argument, that Parkland's proposal is inadequate. Where, as here, a party has agreed to an alternative remedy, the balance of convenience does not favour more intrusive relief just because the applicant prefers it.

PART II – FACTS

A. Parkland and the Proposed Transaction

9. Parkland is a made-in-Canada success story. Headquartered in Red Deer and Calgary, Alberta, Parkland is an independent wholesaler and retailer of fuel.[3] "Independent" means that it is not owned or operated by one of the large, vertically-integrated refiners like Imperial Oil, Shell, or Suncor/Petro-Canada.

10. Parkland's business includes energy-related businesses not at issue in this application, such as the sale of fuel to commercial customers. This application engages only Parkland's distribution and sale of fuel to customers in certain markets in Manitoba and Ontario. Although Parkland had a small presence in Eastern Canada (~2% market share in Ontario), it wished to expand its wholesale and retail fuel business, particularly in Ontario, in part, so that it could buy fuel from its suppliers in even greater quantities to take advantage of the volume discounts they offer.[4]

11. Pioneer's assets were attractive targets to Parkland. Pioneer's network of retail gasoline stations and its wholesale fuel supply business, focused primarily in Ontario, complemented Parkland's base in Western Canada. Pioneer sold a high volume of fuel which, combined with Parkland's existing volumes, would enable Parkland to take advantage of significant volume discounts available from the refiners.[5]

12. Parkland also saw an opportunity to leverage Parkland's expertise to improve the non-fuel side of Pioneer's business. Although Pioneer enjoyed strong fuel sales, it had not translated that

[3] Affidavit of Robert Espey sworn May 5, 2015, p 10, para 3, Responding Application Record of Parkland Industries Ltd. and Parkland Fuel Corporation, Tab 2 [**Espey Affidavit**].
[4] Espey Affidavit, pp 12-13, 17, 18-19, paras 11-12, 17, 32-33.
[5] Espey Affidavit, p 19, para 34.

success into strong convenience store sales at its retail stations. Parkland believed that applying its business plan to the Pioneer convenience store network, along with the stronger purchasing power that would come with larger scale, could significantly benefit the entire post-transaction convenience store network, as well as the customers it would serve, both in Ontario and elsewhere in Canada.[6]

13. For these and other reasons, Parkland agreed to acquire the assets of Pioneer's retail fuel business (the "**Proposed Transaction**").[7] The Proposed Transaction was scheduled to close no later than January 31, 2015. But approval under the *Competition Act* was a condition precedent to closing.[8] Although the parties to the Proposed Transaction (the "**Parties**") notified the Commissioner of Competition (the "**Commissioner**") of the Proposed Transaction on September 19, 2014, as required, such approval was not forthcoming from the Commissioner before the scheduled closing date.[9]

14. The Parties agreed to extend the closing date four times as they tried to resolve the Commissioner's concerns over several months.[10] In January 2015, they provided voluminous responses to the Commissioner's supplementary information request.[11] In February 2015, they entered into a timing agreement with the Commissioner in which they agreed to give the Commissioner 15 days notice of closing.[12]

[6] Espey Affidavit, p 18, para 32.
[7] The Proposed Transaction initially included the sale of Pioneer's commercial fuel business to Parkland, but this facet of the sale was abandoned in late 2014. See Espey Affidavit, p 17, para 27.
[8] Espey Affidavit, p 20, para 37. The Purchase Agreement defined Competition Act Approval as the Commissioner's delivery of an advance ruling certificate or a no-action letter.
[9] Espey Affidavit, p 20, para 38.
[10] Espey Affidavit, p 22, para 41.
[11] Espey Affidavit, pp 20-21, para 39.
[12] Espey Affidavit, p 22, para 42.

15. Months passed. No approval was forthcoming from the Commissioner and no resolution achieved. Unable to wait any longer without jeopardizing the Proposed Transaction, on April 27, 2015, the Parties gave the Commissioner notice of their intention to close on May 13, 2015.[13]

16. Two days later, on April 29, 2015, although Parkland did not believe that the Proposed Transaction substantially lessened competition but hoping to avoid litigation with the Commissioner, Parkland advised the Commissioner of its intention to divest Corporate Stations (defined below) and wholesale fuel supply agreements with Independent Dealer Stations (defined below) in 10 local markets in Ontario and Manitoba ("**Parkland Divestitures**").[14] The Commissioner did not respond to Parkland's letter dated April 29, 2015.[15]

17. Because of the Parkland Divestitures, even using the Commissioner's definition of the relevant markets, the Proposed Transaction will not change the market share or concentration levels in 8 markets.[16] For the 2 markets where there would be a change in market share, the post-transaction share would be at or below the 35 per cent safe harbour level established in the Bureau's *Merger Enforcement Guidelines*[17] and concentration levels would not change.

REGION	MARKET SHARE	CONCENTRATION
Warren, MB	Unchanged	Unchanged
Lundar, MB	Unchanged	Unchanged
Neepawa, MB	Unchanged	Unchanged
Kapuskasing, ON	Unchanged	Unchanged
Hanover, ON	Unchanged	Unchanged
Bancroft, ON	Unchanged	Unchanged
Gananoque, ON	Unchanged	Unchanged

[13] Espey Affidavit, p 22, paras 43-44.
[14] Espey Affidavit, p 23, para 46.
[15] Espey Affidavit, pp 24-25, para 49.
[16] Espey Affidavit, p 24, para 48.
[17] Competition Bureau Canada, *Merger Enforcement Guidelines* (October 6, 2011), online: <http://www.competition bureau.gc.ca/eic/site/cb-bc.nsf/eng/03420.html> [**MEGs**].

Chelmsford/Azilda, ON	Unchanged	Unchanged
Port Perry, ON	35 per cent	Unchanged
Welland, ON	27 per cent	Unchanged

18. Instead, on April 30, 2015, the Commissioner issued his Notice of Application.[18] Although the Parkland Divestitures meant that the Proposed Transaction would have no competitive impact in 10 local markets, the Commissioner's Notice of Application did not refer at all to the Parkland Divestitures. Instead, it alleged that the Proposed Transaction would increase market shares and concentration levels in those 10 markets, as well as 4 others (collectively, the "**Commissioner's Markets**"). The Commissioner went so far as to allege that the Proposed Transaction would result in a merger-to-monopoly in one market—Warren, MB—when Parkland had specifically advised on April 29, 2015, that it would divest its wholesale fuel supply agreement with the Independent Dealer Station in Warren so that the Proposed Transaction would not change either the pre-merger market shares or concentration levels at all.

19. In the evening of April 30, 2015, the Commissioner served his evidence in support of an interim hold separate order in respect of the 14 markets identified in his application. Just like his application, the Commissioner's injunction evidence made no reference to the Parkland Divestitures at all.

20. The Commissioner has not led any evidence to explain nor even explained in his Memorandum of Argument why his Notice of Application and injunction materials did not refer at all to the Parkland Divestitures.

[18] Espey Affidavit, p 25, para 51.

B. Corporate Stations and Independent Dealer Stations

21. While market shares and concentration levels figure prominently in the Commissioner's materials, there is almost no attention paid to the fact that Parkland does not participate in the retail fuel market in 12 of the 14 Commissioner's Markets. Rather, it supplies fuel on a wholesale basis to third-party dealers operating in those markets ("**Independent Dealer Stations**").[19] These independent, third-party dealers—not Parkland—set the price of retail fuel at the pumps.[20] Parkland supplies fuel to Independent Dealer Stations on a wholesale basis under long-term supply agreements.[21]

22. Parkland's wholesale fuel price to Independent Dealer Stations largely depends on factors beyond Parkland's control. The wholesale price consists of (i) Parkland's "designated loading rack" (that is, the daily rack price at a specified supply point) when the fuel is loaded for delivery to the Independent Dealer Station (which prices change daily), plus (ii) delivery costs and (iii) all applicable taxes. The vast majority of the "designated loading rack" consists of the price the refiner charges Parkland for the fuel. The small remainder is Parkland's margin on the sale, referred to as the "rack forward margin".[22]

23. Parkland's rack forward margin:

(a) is the only part of the wholesale price Parkland directly influences;

(b) is a tiny component of the total wholesale price;

[19] Espey Affidavit, pp 11-12, 13, paras 6, 8, 14.
[20] Espey Affidavit, pp 11-12, para 8.
[21] As a branded wholesaler for Imperial Oil's retail Esso brand, Parkland supplies Esso-branded Independent Dealer Stations with fuel it purchases from Imperial Oil. Parkland also supplies unbranded Independent Dealer Stations with fuel it purchases from a variety of refiners.
[22] Espey Affidavit, p 14, para 17.

(c) applies on a regional basis (i.e. all Independent Dealer Stations in a region, referred to as a "zone" pay the same "rack forward margin"); and

(d) Parkland's "rack forward margin" has not increased in Ontario in three years.[23]

24. In addition to its wholesale supply relationships with Independent Dealer Stations, Parkland also owns or leases gasoline stations ("**Corporate Stations**"). For Corporate Stations, Parkland owns the fuel and sets the retail price of fuel to consumers. It contracts operation of the convenience store to a third-party contractor, who pays Parkland rent and a percentage of the convenience store sales. Parkland pays the contractor a percentage of the retail fuel sales.[24]

25. Parkland owns approximately 143 Corporate Stations and supplies approximately 539 Independent Dealer Stations.[25] Parkland's base is primarily in Western Canada. The Proposed Transaction represents a significant opportunity to grow Parkland's business into the Ontario market, particularly through the acquisition of Pioneer's 181 Corporate Stations, through which Parkland can participate directly in the Ontario retail market.[26] Today, Parkland owns only two Corporate Stations in Ontario (in Kapuskasing and Bolton).[27]

C. Parkland's Incentives are to Maintain Pioneer's Low Prices to Sell Higher Volumes, not to Raise Prices

26. The Commissioner's materials allege a risk that Parkland will increase prices which will result in consumers buying less fuel. The uncontradicted evidence suggests exactly the opposite: a fundamental rationale of the Proposed Transaction is to sell more, not less, fuel to take advantage of volume discounts available from Parkland's suppliers.

[23] Espey Affidavit, pp 14-15, paras 17-18.
[24] Espey Affidavit, p 11, para 7.
[25] Espey Affidavit, p 11, para 6.
[26] Espey Affidavit, p 17, para 26.
[27] Espey Affidavit, p 30, para 60.

27. On average, Pioneer Corporate Stations sell [redacted] more fuel than their competitors owing to Pioneer's reputation for "everyday low prices".[28] Pioneer's high volume sales made it attractive to Parkland because of the significant benefit to Parkland in purchasing greater fuel volumes from refiners to take advantage of volume discounts. Applied over Parkland's entire purchases, volume discounts can have a significant impact on Parkland's profitability. Even a tenth of a cent discount on a litre of fuel would produce millions of dollars of savings for Parkland, which purchased [redacted] in 2014.[29]

28. Increasing wholesale or retail prices at Pioneer stations post-transaction would decrease—not increase—volumes. Parkland would thus lose the significant benefit of the potential volume discounts. Parkland has calculated that even a [redacted] cent per litre price increase to Pioneer's pre-transaction prices would cause volumes to fall [redacted], owing in part to the damage to Pioneer's "everyday low price" brand.[30] Applying [redacted] price increase just to the 17 Pioneer stations in the Commissioner's Markets would result in a reduction of at least [redacted] sales volume and [redacted] of lost earnings before interest, taxes, depreciation, and amortization ("**EBITDA**").[31]

29. Also, higher retail fuel prices reduce station traffic, thereby reducing convenience stores sales. Improving convenience stores sales throughout the Pioneer convenience store network was a critical factor in Parkland's valuation of the Pioneer assets.[32] Pioneer's strong fuel sales have not translated into strong convenience store performance. Parkland wants to change that to

[28] Espey Affidavit, p 19, para 34.
[29] Espey Affidavit, pp 12-13, para 11.
[30] Espey Affidavit, p 19, para 35.
[31] Espey Affidavit, pp 19-20, para 36.
[32] Espey Affidavit, p 18, para 32.

improve overall profitability. Increasing fuel prices with a corresponding reduction in convenience store traffic would damage that objective.

30. The Commissioner led no evidence to challenge Parkland's evidence that its incentives are to drive volume through low pricing rather than raise prices post-transaction.

D. The Geographic Scope of the Markets

31. The geographic scope of the relevant markets is a critical issue on this interim application. If the markets are larger than the Commissioner alleges, the market share and concentration levels he relies on are grossly overstated.

32. The Commissioner asserts 14 local markets but leads no evidence of their precise geographic scope. Mr. McNabb testifies only that the geographic market for retail gasoline is local. He then lists five point form factors which the Bureau considered in this regard.[33]

33. The Commissioner's economist, Prof. Boyer, provides no more useful evidence. He testifies that the "geographic scope of the relevant markets depends upon the extent of pricing constraint imposed by alternative supply"[34] but admits that he has not done such empirical analysis. In reply, he admitted that he "obtained" his market definition from the Bureau rather than conducting an analysis of the relevant geographic market himself and that these markets "are not defined empirically and may not reflect all the idiosyncrasies relevant to each."[35]

[33] Affidavit of Alexander N. McNabb affirmed April 30, 2015, p 13, paras 16-17, Application Record of the Commissioner of Competition, Volume I of II, Tab 2 [**McNabb Affidavit**].
[34] Affidavit of Marcel Boyer affirmed April 30, 2015, p 1084, para 68, Application Record of the Commissioner of Competition, Volume II of II, Tab 3, Exhibit B ("A Review of the Proposed Acquisition by Parkland Industries of Substantially all Retail Gazoline Assets of Pioneer Companies") [**Boyer Report**].
[35] Reply Affidavit of Marcel Boyer (unsworn), pp 6-7, para 19 [**Boyer Reply**].

34. In contrast, Parkland led evidence from Margaret Sanderson of Charles River Associates. She specifically analyzed the geographic scope of the 3 local markets for which divestitures had not already been proposed: Aberfoyle, Innisfil, and Allanburg, Ontario. She found that the geographic scope of each market was larger than the Commissioner alleged. Of particular importance, Aberfoyle, Innisfil, and Allanburg are each smaller municipalities which neighbour larger urban centres (Guelph, Barrie, and Niagara Falls/St. Catharines, respectively). The critical question is whether retail fuel prices in each of the larger centres constrain the prices charged in the smaller municipalities.

35. In each case, Ms. Sanderson testified that:

(a) historical pricing information showed that prices in the smaller centres closely tracked those in the neighbouring larger centres (this was the only pricing information filed by either side);

(b) customers in the smaller centres must travel to the larger centres to shop, at which point they could buy gas in those larger centres (for example, there are no grocery stores in Aberfoyle and Allanburg meaning that residents have to travel to the neighbouring larger centres to buy food); and

(c) Pioneer customer loyalty data indicated that [redacted] of purchasers who resided in the smaller centres were buying gas outside of their local market, and specifically in the larger centres.

36. These and other factors confirmed that the Commissioner's geographic markets were too narrow. Once expanded to include the gas stations in Guelph, Barrie, and Niagara Falls, the post-

merger market shares and concentration ratios did not indicate a likely substantial lessening of competition with combined shares far below the 35 per cent safe harbour level.

REGION	COMBINED MARKET SHARES	NUMBER OF COMPETING STATIONS
Aberfolye + Guelph[36]	30%	18
Innisfil + Barrie[37]	15%	29
Allanburg + Niagara Falls[38]	15%	17

37. Moreover, Ms. Sanderson demonstrated on cross-examination that she had provided a fair, balanced, and independent opinion. When asked for her opinion about whether the Proposed Transaction likely substantially lessened competition in any market, she candidly admitted that, in certain markets, but for the divestitures Parkland intended, a substantial lessening of competition was likely. However, she agreed with Prof. Boyer that the proposed divestitures addressed any such concerns.[39]

38. Prof. Boyer's reply to Ms. Sanderson's evidence confirmed that he had not conducted any analysis of the actual scope of the geographic market. He testified simply that his conclusions would not change even if the scope of each geographic market was larger than the Commissioner posited. That cannot be true.

39. Consider Allanburg which the Commissioner and Prof. Boyer allege is a merger-to-monopoly. If the geographic scope of the market is only 5-6 kilometres, in addition to the Parties' two stations, the market would include two Petro-Canada stations, a Shell station, a Canadian

[36] Affidavit of Margaret Sanderson sworn May 5, 2015, p 657, para 31, Responding Application Record of Parkland Industries Ltd. and Parkland Fuel Corporation, Tab C [**Sanderson Affidavit**].
[37] Sanderson Affidavit, p 665, para 57.
[38] Sanderson Affidavit, p 662, para 47; and Boyer Report, p 1091.
[39] Transcript of the Cross-Examination of Margaret Sanderson p 36, Q 121 [**Sanderson Transcript**].

Tire station, and an Esso station. Contrary to Prof. Boyer's testimony, even a relatively small increase in the geographic market has an obvious impact on shares and concentration levels.

E. The Commissioner's "evidence" of Coordinated Conduct is Overstated

40. The Commissioner relies heavily on a handful of emails and documents selected from the over 70,000 documents the Parties produced in response to the Commissioner's supplementary information request. The Commissioner's reliance on these documents as evidence of coordinated conduct is grossly overstated considering that:

(a) Mr. McNabb does not testify that the emails are evidence of coordinated conduct, only that they "raise concerns about coordination";[40]

(b) none of the documents relate to the 14 Commissioner's Markets;[41]

(c) Parkland has never been the subject of an investigation for coordinated conduct by the Competition Bureau;[42]

(d) every Parkland document concerns competition for Independent Dealer Stations within the Esso-branded network with other wholesale suppliers, not the retail gasoline market which is the only product market at issue;[43] and

(e) on cross-examination, Ms. Sanderson testified that documents put to her are also consistent with competition among retailers, and should be considered in the context of all other information before concluding that they reflect coordination.[44]

[40] McNabb Affidavit, p 17, para 25.
[41] Espey Affidavit, pp 30-31, para 61.
[42] Espey Affidavit, p 30, para 60.
[43] Espey Affidavit, pp 30-31, para 61.

41. The Commissioner's argument that improper conduct may occur after the Proposed Transaction because Parkland is retaining certain Pioneer executives is complete speculation and contrary to the evidence. The Commissioner put this risk to Mr. Espey on cross-examination. Mr. Espey was categorical that he would not tolerate such behaviour at Parkland, which has a "different set of discipline in place".[45] The Commissioner has no evidence to contradict Mr. Espey's statement.

F. A Hold Separate Order cannot be Implemented and Jeopardizes the entire Proposed Transaction

42. The Commissioner seeks an order directing Parkland to hold separate the Pioneer assets in the Commissioner's Markets. Nowhere does the Commissioner explain what such a hold separate would entail or what its terms would be. In this vacuum, Mr. Espey testified based on his first-hand experience of the business that a hold separate order cannot be implemented for the Commissioner's Markets and, even if it could, it would likely result in higher rather than lower prices.[46]

43. The Commissioner led no evidence in reply to challenge Mr. Espey's first-hand, industry-specific evidence. Instead, in his Memorandum of Argument, the Commissioner asserts only that Mr. Espey's evidence "is based on a fundamentally flawed understanding of what the Commissioner seeks." Yet even in his Memorandum of Argument, the Commissioner does not explain what the terms of the requested hold separate order will be. In those circumstances, the Tribunal has only Mr. Espey's uncontradicted evidence.

[44] Sanderson Transcript, pp 51-53, Q 164-166.
[45] Transcript of the Cross-Examination of Robert Espey, p 84 [**Espey Transcript**].
[46] Espey Affidavit, pp 25-30, paras 52-59.

44. Mr. Espey testified that these 17 stations require an underlying infrastructure to provide fuel, supply the convenience stores, insure the business, hold licences (such as for the sale of tobacco), hold bank accounts, provide point of sale systems, and remit taxes.[47] Absent this infrastructure, they cannot operate.

45. Today, Pioneer supplies the required infrastructure. On closing it will no longer do so. Parkland intended to provide the required infrastructure but a hold separate order may not allow it to do so.

46. Even if these infrastructure needs can be fulfilled in a timely manner, Mr. Espey testified that a hold separate order will effectively "orphan" the Pioneer assets in these 14 rural communities materially increasing their costs during the interim period:

(a) Because Pioneer's fuel supply agreement with Imperial will terminate on closing, many of the held separate assets will require new fuel supply arrangements. They will require such low volumes of fuel on their own that they will lose the benefit of the volume discounts refiners provide, increasing their cost of fuel during the interim period.

(b) Because they are not part of a network and they are spread across Manitoba and Ontario, the held separate assets will face materially higher transportation costs for fuel and other deliveries.

47. A hold separate order also delays significant synergies and efficiencies that Parkland expected to realize at and after closing. With respect just to the 17 Pioneer stations in the

[47] Espey Affidavit, pp 26-27, paras 55-56.

Commissioner's Markets, Parkland estimates [redacted] in lost efficiencies in the 12 months following closing and [redacted] of estimated incremental costs to operate the Pioneer assets in the Commissioner's Markets separate from Parkland.[48]

48. All of these considerations factor into Parkland's and Pioneer's decisions about whether to proceed with the Proposed Transaction if a hold separate order issues. While the Parties waived the requirement for *Competition Act* approval, the waiver permits each to terminate the Proposed Transaction if an order issues requiring Parkland to hold separate all or part of the Pioneer assets. In addition, Imperial Oil has informed Parkland that it may withhold its required consent to the Proposed Transaction if Parkland is ordered to hold separate some or all of the Pioneer assets.[49]

G. Parkland's Commitments

49. On April 29, 2015, Parkland had already advised the Commissioner of the Parkland Divestitures. In his affidavit, Mr. Espey reiterated Parkland's intended Parkland Divestitures and made further commitments (the "**Parkland Commitments**") designed to maintain the *status quo* more effectively and with less burden than the Commissioner's unspecified hold separate order. The Parkland Commitments are:

(a) With respect to 10 of the Commissioner's Markets, as Parkland advised the Commissioner on April 29, 2015, it intends to complete the Parkland Divestitures as soon as possible after closing.

(b) Having been advised of the Commissioner's ongoing concerns with respect to Tillsonburg, Ontario, Parkland will divest to a third party purchaser the wholesale

[48] Espey Affidavit, pp 27-29, para 57.
[49] Espey Transcript, pp 92-93.

supply agreement with the Tillsonburg dealer or will provide the requisite 30 days notice of termination to the Tillsonburg dealer in accordance with the terms of the supply agreement.

(c) With respect to all of the Commissioner's Markets, until they are divested or terminated under (a) or (b) or in the case of Aberfoyle, Allanburg and Innisfil, Ontario until the Commissioner's application is finally disposed of, Parkland will:

(i) ensure that the rack forward margin Parkland charges to Independent Dealer Stations would be, at most, no greater than it has been under Pioneer's or Parkland's current supply agreements with Independent Dealer Stations, as appropriate, and

(ii) maintain Pioneer's pricing strategy at Pioneer Corporate Stations.

50. The Commissioner has not explained why the Parkland Commitments are unsatisfactory. Unbelievably, he does not mention the Parkland Commitments at all in his Memorandum of Argument. Instead, the Commissioner's only evidence on this point is from Prof. Boyer who testified that Parkland Commitments (a) and (b) address his concerns. He writes, "…it seems to me that it meets at first glance the necessary requirement to avoid an increase in the likelihood of coordinated conduct in those 11 markets…"[50]

51. The Parkland Commitments recognize that the *status quo* can be maintained by locking in the economics for the Independent Dealer Stations because the dealers have complete control over their own retail pricing. So long as their wholesale prices (of which only the rack forward

[50] Boyer Reply, p 11, para 34.

margin is controlled by Parkland) do not increase in the interim period, whether Pioneer (as now) or Parkland (post-closing) sets the retail price at neighbouring Corporate Stations is irrelevant. Parkland is simply stepping into Pioneer's shoes. Parkland has no ability to influence the retail price charged by the Independent Dealer Station unless it increases its rack forward margin, which it has committed not to do. Nor do concentration levels rise because the number of independent decision makers setting the retail price remains the same.

52. If the Parkland Commitments were unacceptable to the Commissioner, one would expect some evidentiary explanation, or at least an explanation in the Commissioner's Memorandum of Argument. There is none.

PART III – ISSUES

53. The only issue is whether the Commissioner has met the test for an interim injunction under section 104 of the *Competition Act*.

PART IV – LAW AND ARGUMENT

54. This is the first merger case in which the Commissioner seeks an injunction on the basis that the merged entity will charge consumers materially higher prices pending the disposition of the Commissioner's s. 92 application. In his prior efforts to enjoin a merger, the Commissioner has focused on whether an effective remedy will remain at the end of the s. 92 application if the merger closes in the interim. The Commissioner has not met with success on any of those applications.[51]

[51] *Canada (Commissioner of Competition) v Superior Propane Inc*, 2001 FCA 104, [2001] 3 FC 185; *Canada (Commissioner of Competition) v Superior Propane Inc*, 85 CPR (3d) 194, 1998 CarswellNat 3013 (Comp Trib) [***Superior Propane CT***]; and *Canada (Commissioner of Competition) v Labatt Brewing Co*, 2007 Comp Trib 9, 2007 CarswellNat 1611.

55. A pre-trial hold separate order is extraordinary relief. Not only does it prohibit Parkland from integrating assets into its business to take advantage of the resulting synergies, it requires Parkland to hire employees and put systems in place to operate the assets at arms' length from itself. In practice, Parkland will have to operate (or at least pay for) two businesses: its own and a second consisting only of the assets ordered to be held separate.

56. The Commissioner may only obtain an interim hold separate order upon establishing that: (i) there is a serious issue to be tried, (ii) absent the hold separate order irreparable harm will occur, and (iii) the balance of convenience favours granting the hold separate order.

57. The Commissioner has failed to establish all three requirements. A hold separate order should not issue.

A. There is no Serious Issue to be Tried for 11 Markets

58. Under the serious issue to be tried standard, the Tribunal must make "a preliminary assessment of the merits of the case"[52] to determine whether the Commissioner's application is frivolous or vexatious. A frivolous claim is one lacking merit.[53] If the Commissioner's application is frivolous, there is no serious issue to be tried.

59. Parkland admits that there are serious issues to be tried with respect to Aberfoyle, Innisfil, and Allanburg where Pioneer and Parkland assets will overlap post-transaction.

60. However, there is no serious issue to be tried for the 11 remaining markets where there will be no overlap once Parkland completes the Parkland Divestitures and divests or terminates the supply agreement in Tillsonburg. The Commissioner's application with respect to these 11

[52] *RJR-MacDonald Inc v Canada*, [1994] 1 SCR 311 at para 54, 111 DLR (4th) 385 [***RJR-MacDonald***].
[53] *ICN Pharmaceuticals Inc v Canada (Patented Medicine Prices Review Board)* (1996), 119 FTR 114 at para 10, 65 ACWS (3d) 484 (FCTD).

markets is frivolous. A hold separate order for those 11 markets should not issue under any circumstances.

61. Change is the foundation of merger review under s. 92. In *Tervita*, the Supreme Court of Canada held that s. 92 requires the Tribunal to compare the merged entity's pre-merger and post-merger market power.[54] To substantially lessen competition, the merger must increase the merged entity's market power such that it is likely to be able to exercise materially greater market power than in the absence of the merger.[55] If the merger has not resulted in any material increase in market power, it will not substantially lessen competition under s. 92.

62. The Commissioner alleges that the Proposed Transaction materially increases Parkland's market power because it changes the market structure in two ways. First, the Proposed Transaction allegedly reduces the number of competitors in local markets making it more likely that a group of competitors will exercise materially greater market power together than they would have "but for" the merger (i.e., coordinated effects). Second, the Proposed Transaction allegedly combines Parkland's and Pioneer's local market shares, materially increasing Parkland's post-transaction market power were it to act alone (i.e., unilateral effects).

63. Neither allegation applies to the 11 markets subject to the Parkland Commitments. Upon completion of the intended divestitures, there will be no change to the market structure and thus no change in market power:

(a) For all 11 markets, the number of competitors will not fall, meaning that the Proposed Transaction will not increase the likelihood of coordinated effects.

[54] *Tervita Corp v Canada (Commissioner of Competition)*, 2015 SCC 3 at para 51, 380 DLR (4th) 381 [***Tervita SCC***]. See also *Canada (Director of Investigation and Research) v Southam Inc*, [1997] 1 SCR 748 at para 85, 144 DLR (4th) 1.
[55] *Tervita SCC*, *ibid* at para 54.

(b) For 9 markets, Parkland's market share will not rise above pre-transaction levels meaning that the Proposed Transaction will not increase the likelihood of unilateral effects.

(c) For Port Perry and Welland, although Parkland's market share will rise, it will be at or below the 35% market share safe harbour threshold in the MEGs; a level below which the Commissioner states that mergers "are unlikely to have anti-competitive consequences"[56] and which the Commissioner's economist characterizes as a "safe harbour".[57]

64. In his reply affidavit, the Commissioner's economist acknowledges that there will no longer be competition concerns with these 11 markets owing to Parkland's stated actions. He writes, "…it seems to me that it meets at first glance the necessary requirement to avoid an increase in the likelihood of coordinated conduct in those 11 markets…" and that the divestitures will leave the "markets in a situation somewhat different but nevertheless similar to the pre-merger situation."[58]

65. Despite Parkland pleading in its Response that there is no serious issue to be tried for 11 markets, the Commissioner's Memorandum of Argument is completely silent on this issue.

66. Because the Commissioner's allegations of Parkland's increased market power do not apply to the 11 markets, his application for relief under s. 92 with respect to those markets lacks legal merit. There is no serious issue to be tried for those 11 markets.

[56] On the basis that mergers which result in a combined market share of 35% "are unlikely to have anti-competitive consequences": See MEGs, *supra* note 17, p 18.
[57] Boyer Reply, pp 4-5, para 11.
[58] Boyer Reply, p 11, para 34.

B. The Commissioner has not established Irreparable Harm

67. Irreparable harm refers not to magnitude, but to the character of the harm: that it is unquantifiable or cannot be compensated in costs.[59]

68. Assertions of irreparable harm are insufficient to obtain an interim injunction. Evidence of irreparable harm must be clear and not speculative.[60] Where, as here, the harm feared has not yet begun, courts have acknowledged that prospective irreparable harm can be inferred from the evidence.[61] But in those circumstances, where the relief sought is akin to a *quia timet*[62] injunction, the applicant must demonstrate that there is a "high degree of probability" that the feared harm will occur.[63]

69. The Commissioner has not demonstrated that retail fuel prices will *likely* rise in any of the Commissioner's Markets let alone meeting the required standard of a "high degree of probability".

i. Harm is not "highly probable" because the Commissioner has failed to define the geographic scope of the relevant markets

70. The Tribunal has never before considered an injunction under s. 104 based entirely on feared price effects during the pendency of the Commissioner's application. It has not considered what evidence the Commissioner must lead to establish a "high degree of probability" that prices will rise materially absent an interim order.

[59] *RJR-MacDonald*, *supra* note 52.
[60] *Nadeau Ferme Avicole Ltée / Nadeau Poultry Farm Ltd v Groupe Westco Inc*, 48 BLR (4th) 303 at para 26, 2008 CarswellNat 2591 (Comp Trib) [***Nadeau Poultry***]; and *Amnesty International Canada v Canada (Minister of National Defence)*, 2008 FC 162 at paras 5, 68-70, 123, 133, 165 ACWS (3d) 156 [***Amnesty***].
[61] *Nadeau Poultry*, *ibid* at para 26.
[62] *Quia timet* is Latin for "because he fears": See Black's Law Dictionary, 10th ed (St Paul, Minnesota: Thomson Reuters, 2014), *sub verbo* "*Quia timet*", p 1443.
[63] *Merck & Co v Apotex Inc* (2000), 8 CPR (4th) 248 at paras 7-8, 98 ACWS (3d) 553 (FCA); and *Amnesty*, *supra* note 60 at para 70.

71. However, in *Superior Propane*, the Tribunal did consider the lesser but arguably similar standard contained in the former version of s. 100 of the *Competition Act*: whether the merger was "reasonably likely to prevent or lessen competition substantially". In other words, was the merger "reasonably likely" to result in material price increases during the pendency of the Director's section 92 application?[64]

72. In *Superior Propane*, the Director sought to enjoin Superior's merger with ICG. Section 100 was subsequently amended, but at the time of the Director's application it contained a two-part test. To enjoin the merger under s. 100, the Tribunal had to find that:

(a) "the proposed merger is reasonably likely to prevent or lessen competition substantially" and

(b) "in the absence of an interim order a party to the proposed merger or any other person is likely to take an action that would substantially impair the ability of the Tribunal to remedy the effect of the proposed merger on competition under section 92 because that action would be difficult to reverse".

73. The second criterion did not factor into the decision. Justice Rothstein dealt exclusively with whether the Director had demonstrated that the proposed merger was "reasonably likely" to prevent or lessen competition substantially.

74. Justice Rothstein held that the "reasonably likely" standard required "the Tribunal to embark upon a consideration, at least to some extent, of the merits of the Director's position."[65]

[64] A substantial lessening of competition is tied to market power, which is the ability to maintain prices above the competitive level for a significant period of time: MEGs, *supra* note 16, p 6, para 2.1-2.3.
[65] *Superior Propane CT*, *supra* note 51 at para 7.

75. The Director took the position that propane was the relevant product market. Justice Rothstein proceeded to evaluate the Director's evidence to support that market definition because "the Tribunal cannot merely assume that the Director's market definition is the correct one."[66] The question was whether propane was in a market by itself or whether it was part of a larger energy market.[67] If the former, the parties' combined markets shares were high. If the latter, they were not.

76. Justice Rothstein focused on what products were included in the relevant market, but his analysis is instructive for the Tribunal's current purposes because it applies equally to determining the geographic scope of the relevant market. Both are defined by evidence of price constraint.[68] In *Superior Propane*, Justice Rothstein concluded that:

> Of some significance is the fact that the Director has provided no evidence as to whether propane pricing is or is not observed to be disciplined by other fuel prices. One would expect that if the relevant market was limited to propane, that there would be some evidence that propane pricing was independent of the pricing of other fuel sources. There is no such evidence.[69]

77. So too here. One would expect that if the relevant markets were as narrow as the Commissioner alleges, there would be some evidence that prices in those areas are not constrained by prices in neighbouring areas. In particular, if the 3 relevant markets in issue were limited to Aberfoyle, Innisfil, and Allanburg, one would expect some evidence that prices at those stations were independent of prices at stations in the neighbouring urban centres of Guelph, Barrie, and Niagara Falls/St. Catharines respectively.

[66] *Ibid* at para 26.
[67] *Ibid* at para 28.
[68] Boyer Report, p 1084, para 68.
[69] *Superior Propane CT*, *supra* note 51 at para 35.

78. The Commissioner has led no such evidence *because it does not exist*. Prof. Boyer admits that he has not conducted such an analysis. He says in his reply affidavit that the Commissioner's Markets "are not defined empirically and may not reflect all the idiosyncrasies relevant to each."[70]

79. Nor is there any evidence of pricing analysis in Mr. McNabb's affidavit, which merely lists in point form five factors the Bureau considered when determining the geographic scope of its markets.[71]

80. The lack of evidence in this regard is fatal to the Commissioner's interim application with respect to all 14 local markets.

81. In fact, the only pricing analysis in the record was performed by Parkland's expert, Margaret Sanderson. It confirms that prices in each of Aberfoyle, Innisfil, and Allanburg are *not* independent of the prices charged at stations in their urban neighbours as would be expected if each was a separate geographic market. Ms. Sanderson analyzed and compared Pioneer's historical prices (i) in Aberfoyle to those in neighbouring Guelph, (ii) in Innisfil to those in neighbouring Barrie, and (iii) Allanburg to those in neighbouring Niagara Falls and St. Catharines. In all three cases, prices tracked each other closely.

82. The only exception occurred between May 2013 and June 2014 when prices were lower in Aberfoyle than in Guelph following entry of an Ultramar station in Aberfoyle. Entry of a Costco station in Guelph in June 2014 has resulted in Guelph and Aberfoyle prices closely tracking each other since June 2014. Prof. Boyer claims that this indicates that prices in Guelph

[70] Boyer Reply, pp 6-7, para 19.
[71] McNabb Affidavit, p 13, para 17.

were not constraining those in Aberfoyle, but that is not what the analysis reveals. Rather, it indicates that prices in Aberfoyle do not constrain prices in Guelph. This makes sense since it is far more likely that residents in Aberfoyle will travel to Guelph for their everyday needs, to commute to work and to buy gas. It is much less likely that residents of Guelph will leave the city to buy gas in Aberfoyle. Owing to these travel patterns, prices in Guelph are a ceiling for prices in Aberfoyle, yet prices in Aberfoyle may not affect prices in Guelph. In any event, for nearly a year since June 2014, prices in both Aberfoyle and Guelph have tracked each other closely meaning that, whatever competitive dynamic existed in 2013, it has changed with entry of additional stations and the geographic market is such that prices in Guelph constrain prices in Aberfoyle.

ii. Other factors indicate that harm is not "highly probable"

83. That the Commissioner has led no pricing analysis to support the geographic scope of his 14 local markets is itself sufficient for the Tribunal to refuse the Commissioner the extraordinary relief he seeks. Absent properly defined relevant markets, the Commissioner's market share and concentration calculations topple like a house of cards.

84. Additional evidence from Ms. Sanderson confirms that the geographic markets are larger than the Commissioner alleges and, in particular, that Parkland is unlikely to increase prices in Aberfoyle, Innisfil, or Allanburg after closing.

(a) Particularly for Aberfoyle and Allanburg which do not have grocery stores, residents must travel to neighbouring centres to work and/or shop. While there, they can easily buy gas, suggesting that, were Parkland to try to increase price in

those smaller centres, the price increase would be defeated by retail prices in the neighbouring larger centre.

(b) Pioneer's loyalty data confirms that [redacted] of residents of Aberfoyle, Innisfil, and Allanburg buy gas from stations outside of the Commissioner's narrow market.

(c) Pioneer’s loyalty data also indicates that its stations in Aberfoyle, Innisfil and Allanburg sell [redacted] to customers who are not local residents, but instead are residents of areas in which the Commissioner has raised no competition concerns in respect of the Proposed Transaction. Even if one accepts the Commissioner’s hypothesis that local residents are captive to the local stations in Aberfoyle, Innisfil and Allanburg, which they are clearly not in fact, if Parkland were to raise prices at these Pioneer stations, it risks losing material sales to customers who are not local residents.

(d) Parkland prices to Independent Dealer Stations on regional basis (referred to as "price zones"). This means that it cannot raise its wholesale price only to the Independent Dealer Stations in Aberfoyle, Innisfil, and Allanburg without risking an unprofitable volume loss at its other Independent Dealer Stations in the larger pricing region.

85. Finally, the Commissioner has not addressed in evidence at all Parkland's evidence that its economic incentive is to keep prices low in order to keep volumes high. Increasing prices in the interim risks volume falling off sharply and for the long-term as Pioneer's "everyday low

pricing" brand erodes. Lower volumes will result in reduced volume discounts over Parkland's entire fuel purchases and reduced convenience store revenue.

C. The Balance of Convenience Weighs Against a Hold Separate Order

86. The balance of convenience requires the Commissioner to demonstrate that the harm suffered without an interim order will be greater than that suffered if one issues.[72]

87. In this respect, although the Commissioner alleges that consumers will pay more for fuel without a hold separate order, he has not quantified these anticompetitive effects. Mr. McNabb's calculations in his affidavit are merely examples of what might occur, not what will or is even likely to occur but for the hold separate order.[73] In *Tervita*, the Supreme Court of Canada held that the Commissioner's failure to quantify anticompetitive effects means that the quantitative effects must be fixed at zero.[74]

88. More generally, the Commissioner asserts that maintaining and encouraging competition weigh in favour of a hold separate order. While these factors must be taken into account, the public interest in competition does not trump all other considerations.[75] In the circumstances of this case, four considerations weigh heavily against a hold separate order.

i. A Hold Separate Order Puts the Entire Proposed Transaction at Risk

89. Each of Parkland and Pioneer may terminate the Purchase Agreement if the Tribunal orders Parkland to hold separate all or part of the assets to be acquired from Pioneer. A hold separate order, which would apply to only four percent of Pioneer's 181 Corporate Stations and

[72] *RJR-MacDonald*, *supra* note 52 at para 67.
[73] McNabb Affidavit, p 23, paras 27-28.
[74] *Tervita SCC*, *supra* note 54 at para 128.
[75] *Tervita Corp v Commissioner of Competition*, 2012 FCA 223 at para 19, 221 ACWS (3d) 874.

212 supply agreements, threatens to derail the entire Proposed Transaction, along with the synergies, efficiencies, and procompetitive benefits it brings.

90. Whether either party will terminate the Proposed Transaction will depend in large part on the terms of the hold separate order, which remain unclear. As Mr. Espey testified, there are substantial practical impediments to operating/supplying 17 stations in 14 dispersed markets independent of Parkland's business. If it could even be done, the cost of doing so may undermine the Proposed Transaction's financial rationale and would certainly materially raise costs. If Imperial Oil withholds its required consent, the entire economics of the deal will fall apart. In the exercise of their fiduciary duties, Parkland's directors may have to terminate.

91. The Commissioner discounts this risk on the basis that Parkland's board has not said that it *will* terminate the Proposed Transaction if a hold separate order issues. The Commissioner ignores Mr. Espey's evidence that Parkland will not proceed if Imperial Oil does not consent.[76] But more generally, it would be irresponsible and contrary to their fiduciary duties for Parkland's directors to decide the future of a $400 million transaction on the basis of an order they have not seen. The Commissioner's suggestion that their decision should be made in an information vacuum that he has created by not filing a draft order is astonishing.

ii. It is impossible from a practical perspective to "hold separate" the Pioneer assets

92. Absent any consideration of how it could be implemented, the Commissioner's requested relief seems straightforward: direct Parkland to hold separate the assets it acquires. But as Mr. Espey testified, operating/supplying 17 stations in 14 rural communities as disparate as Warren, Manitoba (northwest of Winnipeg) and Allanburg, Ontario (near Niagara Falls) is fraught with

[76] Espey Transcript, p 93.

difficulty, primarily because the assets will lack the underlying infrastructure required to operate them.

93. Even if these infrastructure needs can be fulfilled in a timely manner, a hold separate order will effectively "orphan" the Pioneer assets in these 14 rural communities materially increasing their costs during the interim period. Facing higher costs, the held separate assets are likely to raise their prices to consumers – the very harm that the Commissioner states a hold separate order is designed to avoid.

94. The Commissioner has no evidence to overcome the issues Mr. Espey raises. He points only to past consent agreements without any evidence to explain why they would work in the circumstances of this industry. Absent such an explanation, the Tribunal cannot be confident that an order to hold the assets separate could even be implemented, and if implemented, would have the desired effect of keeping retail prices lower than if Parkland is permitted to operate these assets within its network.

95. The Commissioner is not even asking the Tribunal to "take his word for it" that a hold separate order can be implemented and would keep prices lower. He simply did not file any evidence whatsoever to support that position.

iii. ***A Hold Separate Order Delays Anticipated Efficiencies and Increases Parkland's Costs***

96. Anticipated costs savings and efficiencies were significant rationales for the Proposed Transaction. A hold separate order delays those anticipated efficiencies until the final disposition of the Commissioner's application. Conservatively estimating that disposition occurs within 12

months, Parkland estimates it will lose [redacted] in expected efficiency gains and pay [redacted] in higher costs.

97. The Commissioner speculates that these lost efficiencies and extra costs would not arise under his proposed hold separate order. The Commissioner's position is neither supported by evidence, as he filed no evidence replying to Mr. Espey's affidavit, nor by equity. Having not proposed terms for his hold separate order, the Commissioner is keeping everyone, including the Tribunal, guessing as to what terms he seeks.

iv. ***Parkland's Divestitures and Commitment to Current Pricing Levels make a Hold Separate Order Unnecessary***

98. The Commissioner alleges that without a hold separate order consumers will pay higher prices for retail fuel. A hold separate order is not required to keep prices from rising. Parkland has committed to the Tribunal that:

(a) For Pioneer's Corporate Stations at which Parkland will set the retail price post-closing, Parkland will maintain Pioneer's low pricing policy.

(b) Where Parkland supplies fuel to Independent Dealer Stations, it will not increase the rack forward margin charged by Parkland or Pioneer pre-closing.

99. Parkland's commitments mean that the Commissioner's fear will not come to pass. Parkland has committed to maintain the *status quo* through a more straightforward, less invasive, less costly, and more predictable manner than the Commissioner's requested hold separate order.

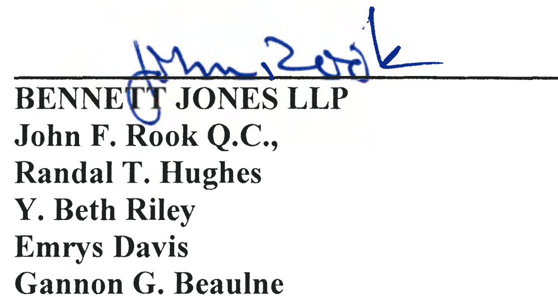
100. Where an alternative is likely to be both more effective and less burdensome, common sense suggests that the alternative should be adopted.

101. It is notable that a hold separate order was not required in advance of proposed gas station divestitures when Suncor acquired Petro-Canada in 2009.[77] The Commissioner has not explained why the Proposed Transaction is any different.

PART V – RELIEF REQUESTED

102. Parkland requests that the Tribunal dismiss the Commissioner's application for a hold separate order with costs to Parkland.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 11th day of May, 2015.



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[77] Consent Agreement in Relation to the Amalgamation of Suncor Energy Inc. and Petro-Canada to Continue as Suncor Energy Inc.

SCHEDULE "A" – AUTHORITIES CITED

1. *Canada (Commissioner of Competition) v Labatt Brewing Co*, 2008 FCA 22, 2008 CarswellNat 134.

2. *Canada (Commissioner of Competition) v Labatt Brewing Co*, 2008 FC 59, 163 ACWS (3d) 939.

3. *Canada (Commissioner of Competition) v Canada Pipe Co*, 2004 CarswellNat 1218, 29 CPR (4th) 530.

4. Competition Bureau Canada, *Merger Enforcement Guidelines* (6 October 2011).

5. *Canada (Commissioner of Competition) v Superior Propane Inc*, 2001 FCA 104, [2001] 3 FC 185.

6. *Canada (Commissioner of Competition) v Superior Propane Inc*, 85 CPR (3d) 194, 1998 CarswellNat 3013 (Comp Trib).

7. *Canada (Commissioner of Competition) v Labatt Brewing Co*, 2007 Comp Trib 9, 2007 CarswellNat 1611.

8. *RJR-MacDonald Inc v Canada*, [1994] 1 SCR 311, 111 DLR (4th) 385.

9. *ICN Pharmaceuticals Inc v Canada (Patented Medicine Prices Review Board)* (1996), 119 FTR 114, 65 ACWS (3d) 484 (FCTD).

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11. *Canada (Director of Investigation and Research) v Southam Inc*, [1997] 1 SCR 748, 144 DLR (4th) 1.

12. *Nadeau Ferme Avicole Ltée / Nadeau Poultry Farm Ltd v Groupe Westco Inc*, 48 BLR (4th) 303, 2008 CarswellNat 2591 (Comp Trib).

13. *Amnesty International Canada v Canada (Minister of National Defence)*, 2008 FC 162, 165 ACWS (3d) 156.

14. Black's Law Dictionary, 10th ed (St Paul, Minnesota: Thomson Reuters, 2014).

15. *Merck & Co v Apotex Inc* (2000), 8 CPR (4th) 248, 98 ACWS (3d) 553 (FCA).

16. *Tervita Corp v Commissioner of Competition*, 2012 FCA 223, 221 ACWS (3d) 874.

17. *Canada (Commissioner of Competition) v Suncor Energy Inc et al* (13 August 2009), Ottawa, Competition Tribunal, CT-2009-011 (Consent Agreement in Relation to the Amalgamation of Suncor Energy Inc and Petro-Canada to Continue as Suncor Energy Inc).

SCHEDULE "B" – STATUTORY REFERENCES

Combines Investigation Act, RSC 1985 (2nd Supp), c 19, s 100

Interim order where no application under section 92

100. (1) Where, on application by the Director, the Tribunal finds, in respect of a proposed merger in respect of which an application has not been made under section 92 or previously under this section, that

(*a*) the proposed merger is reasonably likely to prevent or lessen competition substantially and, in the opinion of the Tribunal, in the absence of an interim order a party to the proposed merger or any other person is likely to take an action that would substantially impair the ability of the Tribunal to remedy the effect of the proposed merger on competition under section 92 because that action would be difficult to reverse, or

(*b*) there has been a failure to comply with section 114 in respect of the proposed merger,

the Tribunal may issue an interim order forbidding any person named in the application from doing any act or thing that it appears to the Tribunal may constitute or be directed toward the completion or implementation of the proposed merger.

Notice of application

(2) Subject to subsection (3), at least forty-eight hours notice of an application for an interim order under subsection (1) shall be given by or on behalf of the Director to each person against whom the order is sought.

Ex parte application

(3) Where the Tribunal is satisfied, in respect of an application made under subsection (1), that

(*a*) subsection (2) cannot reasonably be complied with, or

(*b*) the urgency of the situation is such that service of notice in accordance with subsection (2) would not be in the public interest,

it may proceed with the application *ex parte*.

Ordonnance provisoire en l'absence d'une demande en vertu de l'article 92

100. (1) Dans les cas où, à la suite d'une demande du directeur, le Tribunal conclut, à l'égard d'un fusionnement proposé relativement auquel il n'y a pas eu de demande aux termes de l'article 92 ou antérieurement aux termes du présent article :

a) soit que le fusionnement proposé, en toute raison, aura vraisemblablement pour effet d'empêcher ou de diminuer sensiblement la concurrence et que, à son avis, en l'absence d'une ordonnance provisoire une personne, partie ou non au fusionnement proposé, posera vraisemblablement des gestes qui, parce qu'ils seraient alors difficiles à contrer, auraient pour effet de réduire sensiblement l'aptitude du Tribunal à remédier à l'influence du fusionnement proposé sur la concurrence si celui-ci devait éventuellement appliquer l'article 92 à l'égard du fusionnement proposé;

b) soit qu'il y a eu manquement à l'article 114 à l'égard du fusionnement proposé,

le Tribunal peut rendre une ordonnance provisoire interdisant à toute personne nommée dans la demande de poser tout geste qui, de l'avis du Tribunal, constituerait ou tendrait à la réalisation du fusionnement proposé ou à sa mise en œuvre.

Avis

(2) Sous réserve du paragraphe (3), le directeur, ou une personne agissant au nom de celui-ci, donne à chaque personne à l'égard de laquelle il entend demander une ordonnance provisoire aux termes du paragraphe (1) un avis d'au moins quarante-huit heures relativement à cette demande.

Audition *ex parte*

(3) Si, lors d'une demande présentée en vertu du paragraphe (1), le Tribunal est convaincu :

a) qu'en toute raison, le paragraphe (2) ne peut pas être observé;

b) que la situation est à ce point urgente que la signification de l'avis aux termes du paragraphe (2) ne servirait pas l'intérêt public,

il peut entendre la demande *ex parte*.

Terms of interim order

(4) An interim order issued under subsection (1)

(*a*) shall be on such terms as the Tribunal considers necessary and sufficient to meet the circumstances of the case; and

(*b*) subject to subsection (5), shall have effect for such period of time as is specified therein.

Conditions d'une ordonnance provisoire

(4) Une ordonnance provisoire rendue aux termes du paragraphe (1) :

a) prévoit ce qui, de l'avis du Tribunal, est nécessaire et suffisant pour parer aux circonstances de l'affaire;

b) sous réserve du paragraphe (5), a effet pour la période qui y est spécifiée.

Maximum duration of interim order

(5) An interim order issued under subsection (1) in respect of a proposed merger shall cease to have effect

(*a*) in the case of an interim order issued on *ex parte* application, not later than ten days, or

(*b*) in any other case, not later than twenty-one days,

after the interim order comes into effect or, in the circumstances referred to in paragraph (1)(*b*), after section 114 is complied with.

Durée maximale de l'ordonnance provisoire

(5) Une ordonnance provisoire rendue en application du paragraphe (1) à l'égard d'un fusionnement proposé cesse d'avoir effet :

a) dans le cas d'une ordonnance provisoire rendue dans le cadre d'une demande *ex parte*, au plus tard dix jours;

b) dans les autres cas, au plus tard vingt et un jours,

après la prise d'effet de l'ordonnance provisoire ou, dans les circonstances prévues à l'alinéa (1)*b*), à compter du moment où les exigences de l'article 114 ont été rencontrées.

Duty of Director

(6) Where an interim order is issued under paragraph (1)(*a*), the Director shall proceed as expeditiously as possible to commence and complete proceedings under section 92 in respect of the proposed merger.

Obligation du directeur

(6) Lorsqu'une ordonnance provisoire est rendue en vertu de l'alinéa (1)*a*), le directeur doit, avec toute la diligence possible, intenter et mener à terme les procédures visées à l'article 92 à l'égard du fusionnement proposé.

CT-2015-003

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 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.;

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*.

BETWEEN:

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

MEMORANDUM OF FACT AND LAW OF PARKLAND INDUSTRIES LTD. AND PARKLAND FUEL CORPORATION

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