PUBLIC VERSION

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*.

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

COMMISSIONER'S SUPPLEMENTAL RECORD

Department of Justice Canada
Competition Bureau Legal Services
50 Victoria Street, Gatineau QC K1A 0C9

John Syme (LSUC#: 29333H)
Antonio Di Domenico (LSUC#: 52508V)
Tara DiBenedetto (LSUC#: 56517R)
Tel: (819) 956-6891
Fax: (819) 953-9267

Counsel to the Commissioner of Competition

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TAB 1

This is the 2nd Affidavit
of Marcel Boyer in this case
and was made on _____

With respect to the proposed acquisition by Parkland Industries Ltd. ("Parkland") of substantially all of retail gasoline 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. ("Pioneer"),

I have been retained by the Competition Bureau ("Bureau") as an expert economist with significant expertise in the assessment and quantification of economic harm arising from anti-competitive practices, and in the economics of industrial organization more broadly.

I was originally asked by the Bureau to provide an analysis relating to the review of the proposed transaction, more specifically in assessing the competitive implications of the above-mentioned matter and any competition issues that may be raised by the proposed transaction.

I have now been asked by the Bureau to comment on the affidavit of Margaret Sanderson filed on May 5 2015 in reaction to my own affidavit filed with the Competition Tribunal sworn on April 30 2015 in relation with the proposed transaction.

AFFIDAVIT

I, Marcel Boyer of the City of Montréal in the Province of Québec AFFIRM THAT:

Professional Background

1. I am currently Emeritus Professor of Economics at the Université de Montréal; Associate Member, Toulouse School of Economics; Fellow of the C.D. Howe Institute, CIRANO and CIREQ; University Affiliate of The Analysis Group (Montréal, Boston) and of TERA Consultants (Paris); President of the international Society for Economic Research on Copyright Issues (SERCI); Director of the Competition Policy Group at CIRANO; Member of the Governance Committee of the "Sustainable Finance and Responsible Investment" AFG Chairs at École Polytechnique de Paris and Université de Toulouse; and Member of the C.D. Howe Institute Competition Policy Council.

2. My education includes a M. Sc. and Ph.D. in economics (Graduate School of Industrial Administration, Carnegie-Mellon University, Pittsburgh PA 1973); M.A. economics (Université de Montréal, 1968). I taught economics at York University (1971-1973), UQÀM (1973-1974) and at Université de Montréal (1974-2008), where I held the Bell Canada Chair in Industrial Economics in the Department of Economics (2003-2008) and the Jarislowsky-SSHRC-NSERC Chair in Technology and International Competition in the Department of Mathematics and Industrial Engineering (1993-2000), besides being invited as professor, researcher and speaker at different universities in Canada, the US, Europe, Africa, and Asia.

3. I was Member of the Expert Panel of the Council of Canadian Academies on the State of Industrial Research and Development in Canada; Member of the SHS1 (Society, spaces, organizations, markets) of the French National Research Agency; Vice-President and Chief Economist of the Montreal Economic Institute (2007-2010); President of the Canadian Economics Association (CEA 1990-91); President of the Société Canadienne de Science Économique (SCSE 1995-96); CEO of CIRANO (1998-2002, founding VP and Scientific Director 1993-98); Member of the Board of Directors of the National Bureau of Economic Research (NBER, USA 1992-2000); Member

of the National Statistics Council of Canada (1992-98); Member of the Management Committee of Bell-University Labs; Member of the Board of Directors of the Montreal Mathematical Finance Institute; Member of the Board of Directors of the Social Science and Humanities Research Council of Canada; Chairman of the Board of the Network for Computing and Mathematical Modelling; Visiting Senior Research Advisor for industrial economics at Industry Canada; Member of Industry Canada advisory committee on business strategies and innovation; Member of the Executive Committee of the Canadian Law and Economics Association; Member of the Board of the Agency for Public-Private Partnerships of Québec; Member of the Editorial Board of the Canadian Journal of Economics and the Journal of Economic Behavior and Organization; and Chairman of the Board of the Caisse Populaire de St-Jérôme.

4. I received the following prizes for excellence in research: Alexander-Henderson Award (Carnegie-Mellon University 1971), Prix Marcel-Dagenais (Société canadienne de science économique 1985), Endowment-for–the–future Distinguished Scholar Award (University of Alberta 1988), Distinguished Guest Professor Award (Wuhan University of Technology 1995), Fellow of The International Journal of Industrial Organization (1997), Fellow of the World Academy of Productivity Science (2001), Prix Marcel-Vincent (Association francophone pour le savoir ACFAS 2002), and Médaille Guillaume-Budé (Collège de France 2005).

5. My recent article “Alleviating Coordination Problems and Regulatory Constraints through Financial Risk Management” (with Martin Boyer and René Garcia), *Quarterly Journal of Finance* 3(2) has been selected by the Boards of the Midwest Finance Association and the QJF as the Best Paper published in the QJF in 2013. My recent book *Réinventer le Québec: douze chantiers à entreprendre* (with Nathalie Elgrably, Éditions Stanké, 2014) was among the four finalists (out of 75 candidates) to the Donner Book Prize for the best book on public policy by a Canadian published in 2014.

6. I was elected in 1992 Fellow of the Royal Society of Canada (Academies of Arts, Humanities and Sciences of Canada), elected in 2013 Honorary Fellow of the Canadian Economics Association, and elected in 2014 Honorary Member of the French Association of Environmental and Resource Economists.

7. I am the author or coauthor of over 275 scientific articles and papers and public and private reports. My current research is in the areas of investment valuation (risk, flexibility and real options); efficient organizations, innovation and competition (competitive social-democracy); public policy; and law and economics (cartels, anti-competitive practices, environmental issues, intellectual property rights).

8. I have acted as expert economist on behalf of several national and international organizations and corporations and government bodies, and have testified as expert witness before different committees, commissions, boards, and tribunals including arbitrage tribunals, the Copyright Board of Canada, as well as the Québec Superior Court, including its Criminal Chamber.

Scope and Context of Work

10. The conclusions I expressed in my affidavit of April 30 2015 were to the effect that there is reasonable certainty that coordinated price increases will emerge when a transaction, such as this one, enhances or causes more of the structural characteristics favourable to coordinated conduct to be present in the affected markets. The present transaction substantially raises the chances of coordinated price increases emerging. It also raises the likelihood of unilateral effects.

11. I did claim that the proposed transaction will bring the merged entity market share above the 35% market share safe harbour level and even a much

higher market share in many of the 14 markets and therefore that the proposed transaction raised possible concern regarding unilateral effects and coordinated conduct in those markets and that a closer look was warranted.

12. I insisted on the fact that the literature on coordinated conduct has established structural and behavioural factors that are conducive to a risk of coordinated conduct. I mentioned that the following non-exhaustive list of factors increase the likelihood of observing coordinated conduct: fewer competitors, important entry barriers, frequent interactions among firms, transparency (knowledge of prices and output) in the market, a relatively growing and predictable demand, a low rate of innovation, similar costs across firms, and similar production capacity between firms. I stressed that none of these factors is by itself necessary or sufficient, but the conjunction of factors plays an important role.

13. I indicated also that coordinated conduct or tacit collusion has the potential of having the same effects on markets as actual collusion or explicit cartel conduct. It is a central result of repeated game theory that tacit collusion can mimic actual collusion to a high degree.

14. Regarding the proposed Parkland-Pioneer transaction, my analysis indicated that the 14 geographic markets the Bureau asked me to study would be highly or quite concentrated following the proposed transaction.

15. I also expressly mentioned that virtually all of the structural and behavioral factors that are known to be conducive to coordinated conduct are present in those 14 markets. I concluded therefore that there will be incentives for the gas station parties in those markets to engage into coordinated conduct. Hence, given the characteristics of those markets, in particular the presence of virtually all the factors conducive to coordinated conduct, I concluded that one could expect that price overcharges would likely result from the proposed transaction, through its unilateral or coordinated effects on competition or both.

16. After evaluating different sources of potentially competitive supply in those markets, I reached the conclusion that these sources are unlikely to change my analysis and conclusion, based on my assessment that they would be unlikely to change concentration levels enough to alleviate the concerns I raise.

17. I find therefore surprising that Ms. Sanderson could claim that "the only facts presented in the Boyer Repot that specifically relate to the individual markets of concern are market shares and four-firm concentration ratios." (par. 8)

Relevant Geographic Markets and Increased Likelihood of Coordinated Conduct

18. In her Affidavit of May 5 2015, Ms. Sanderson critiques the definition of the relevant geographic markets in my Report. For example, in paragraph 13, she states that my Report "does not state the precise boundaries… for each market…" In paragraph 14, she also states that I have not consistently applied a 10km distance to define geographic markets, and seems to suggest this is a relevant fact that may undermine my conclusion. She illustrates her point by showing that the market shares would be different for Aberfoyle, Allanburg and Innisfil if a consistent radius of 10km had been applied to each market.

19. This comparison misses the essential point and is a mischaracterization of my evaluation of the geographic scope of these markets. First, I never intended or represented that I used the 10km radius to define the markets. Rather, I simply added a 10km radius to my maps to help the reader assess the scale of each map and quickly understand the distance to the closest competitor outside each market. My definition of the markets relies on data provided to me by the Bureau. While the markets I obtained in this manner are not defined empirically and may not reflect all the idiosyncrasies relevant to each, I note at paragraph 68 of my Report that based on the information available, my evaluation is sufficient to support the observations that I make in relation to these markets. My conclusion at paragraph 75 is that these observations

indicate serious risks to competition, and I clearly indicate that this conclusion is based in part on my consideration that further information to determine a more precise market definition is unlikely to alleviate these concerns.

20. In my view, Ms. Sanderson correctly identifies a number of criteria, based on the well-known article of Houde (2012), that are often relevant in defining the geographic markets. What she fails to realize is that Houde's characterization is data-intensive and is unnecessary in the present context. A more reasonable and productive approach in the current circumstances is to consider a range of potential markets and assess whether the conclusion about an increased likelihood of coordinated conduct would change if one definition is preferred to the other. As indicated above, it is my opinion that more information about the precise definition of these markets is unlikely to alleviate the concerns one can raise about an increased likelihood of coordinated conduct.

21. I considered nine factors that are generally considered in the economic literature as conducive to and facilitating coordinated behavior among sellers in a market. At paragraph 48, I claim in particular regarding the markets under consideration that all of the following characteristics may be considered as present to different but significant degrees, except possibly demand growth (#5) and similar production capacities (#9):

    1. when there are fewer competitors;
    2. when entry barriers are important;
    3. when firms interact frequently;
    4. when the market is transparent (knowledge of prices and output);
    5. when demand growth is important;
    6. when demand is more predictable;
    7. when innovation in markets is low;
    8. when costs are similar between firms;
    9. when production capacities are similar between firms.

22. At paragraph 9, Ms. Sanderson claims that I did not apply this framework to the factual circumstances in the individual markets. My analysis of concentration and CR4 measures clearly indicated that condition 1 is met in each of the markets I addressed in my first affidavit. In paragraphs 29 and 30, I evaluated barriers to entry applicable to each of the markets. I considered the frequency of interaction (#3) and price transparency (#4), because these are self-evident features of gasoline retailing across Canada and I have no reason to believe the markets under consideration are somehow precluded. Rapid innovation (#7) of the type likely to disrupt coordination is low in gasoline retailing, which is typically driven by margin on ancillary services (addressed at paragraph 27 of my first affidavit). For the purposes of assessing the likelihood of coordinated behavior, the similarity of costs among the relevant retailers (#8) is similarly self-evident in gasoline retailing.

23. It is worth noting here that despite the claim that I did not apply this framework to the factual circumstances, Ms. Sanderson herself makes no attempt to refute the validity of any of these factors in the current context.

24. As I have indicated above, the evidence and discussion of my Report pertain to more than simply providing market shares of the merged entities and CR4 indicators in the relevant markets. These market shares and CR4 indicators are provided within an analysis of the nine factors that are generally considered in the economic literature as conducive to and facilitating coordinated behavior.

Fallacy of the Broader Market Argument

25. In paragraphs 17, Ms. Sanderson uses data from Pioneer loyalty cards to show that “less than [redacted] of the total purchases made by all Pioneer loyalty card customers at Pioneer’s Aberfoyle station … are from consumers with residential postal codes within [redacted].” In paragraph 27 she adds that “[redacted] of this station’s loyalty customer revenues are from customers with addresses in [redacted].” She concludes that the relevant geographical market

for stations in Aberfoyle should include Guelph. I did not have data on the purchasing pattern of customers holding Pioneers loyalty card, but my conclusions would not have been affected by those data had they have been available.

26. In fact, Figure 2 of Ms. Sanderson provides clear evidence that the prices in Aberfoyle can diverge for sustained period of time from those in Guelph, making clear that competitive conditions in these markets are unresponsive to each other. Rather than an issue of market definition, this chart instead suggests an illustration of the real risks presented by the transaction. Although Figure 2 shows a convergence in price starting in March of 2014, the prices in Aberfoyle are significantly lower between June 2013 and February 2014. During this period of time, it appears that coordinated conduct between the stations in Aberfoyle could have allowed these stations to increase prices by 2 or 3 cents without any constraint from supply in Guelph. Although from February 2014 the arrival of Costco in Guelph may have reduced Guelph prices, there can be no guarantee of Guelph prices constraining a price rise in Aberfoyle due to coordinated conduct.

27. As explained in paragraph 10 of my Report, insofar as the data does not provide evidence of whether the prices in the larger market are constraining the prices in the smaller market, one cannot assume that the relevant market should include the larger one. I stated in my Report and remain of the same opinion today that unless such deeper analysis is performed, simply stating and referring to such data is of little significance.

28. In paragraph 20, Ms. Sanderson alleges that my report “lists a number of factors that may facilitate firms’ ability to engage in coordinated behavior” but “misses the fundamental consideration, which is whether the profits to be earned from coordination exceed the costs and risks…” This is incorrect and misleading.

29. Indeed, the body of research to which the paper by Ivaldi et al. (2003) belongs has established that all these factors are precisely those that determine the payoffs, costs and risks of coordinated conduct. For example, at paragraph 21, an estimate is provided of the possible losses associated with a price increase which is not followed by a competitor. However, one of the factors, pricing transparency, is precisely the condition that moderates this risk. It is transparency that allows such a price increase to be made with confidence that competitors will observe it and follow it.

30. This confidence allows such a price increase to be tested and withdrawn, if competitors do not follow, *without* risking the losses described at paragraph 21. This is an example of the ways in which the research I have cited in my first affidavit has established the validity of these factors.

31. I address in my Report the issue of price zone raised in Ms. Sanderson's paragraph 23.

Repeated Games and Coordinated Conduct

32. The analysis presented by Ms. Sanderson in paragraphs 20-62 sidesteps the key concern of coordinated conduct as raised in my report. Ms. Sanderson arguments based on price elasticity at the station level do not hold. A high elasticity at the station level is precisely what coordinated conduct circumvents.

33. If the reasoning of Ms. Sanderson is right, there would be little relevance for coordinated conduct concerns on any market, in any industry, even though competition authorities are increasingly concerned by an increase in the likelihood of coordinated conduct when ascertaining the possible effects of a merger.

The new set of markets

34. I understand that Parkland has announced it will divest 4 stations and 6 supply agreements as well as terminate one supply agreement in the markets of concerns. As set out in the following table, it appears that this would leave 11 markets in a situation somewhat different but nevertheless similar to the pre-merger situation. Although the specifics of this divestiture movement should be analysed by the Competition Bureau, 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, provided of course, that the divestitures would satisfy the criteria considered by the competition bureau in assessing whether a remedy resolves the competition concerns.

Market Shares in Relevant Markets
2013 Volume Data

Relevant Markets	Pre Transaction			Post Transaction with Divestitures		
	Parkland	Pioneer	CR4	Parkland+ Pioneer [A]	Non Party CR4 [B]	CR4 [C]
Warren, Manitoba	60%	40%	100%	60%	40%	100%
Allanburg, Ontario	54%	46%	100%	100%	0%	100%
Lundar, Manitoba	[redacted]	[redacted]	100%	[redacted]	[redacted]	100%
Tillsonburg, Ontario	4%	69%	100%	74%	26%	100%
Innisfil, Ontario	12%	51%	100%	63%	37%	100%
Kapuskasing, Ontario	[redacted]	[redacted]	100%	[redacted]	[redacted]	100%
Hanover, Ontario	15%	35%	94%	35%	59%	94%
Bancroft, Ontario	14%	34%	100%	14%	86%	100%
Gananoque, Ontario	4%	43%	100%	43%	57%	100%
Aberfoyle, Ontario	20%	22%	100%	43%	57%	100%
Neepawa, Manitoba	[redacted]	[redacted]	100%	[redacted]	[redacted]	100%
Port Perry, Ontario	11%	30%	90%	35%	59%	94%
Welland, Ontario	8%	31%	72%	27%	42%	69%
Chelmsford / Azilda (Sudbury, Ontario)	6%	31%	84%	31%	53%	84%

Note:

[1] [A]+[B]=[C]

Aberfoyle, Allanburg, and Innisfill

35. Based on the market dynamics presented in Figure 2 of Ms. Sanderson Affidavit where the price in Aberfoyle remained below the price in Guelph for a sustained period of time, I conclude that the price in Guelph does not constrain the price in Aberfoyle and that there is a significant risk of coordinated conduct in the Aberfolye market.

36. The stations in Allanburg, like Aberfoyle, are located within some distance to a larger collection of stations. The observed pricing pattern observed for Aberfoyle and Guelph indicates how similar distances can provide no indication of competitive interaction. Taken together this suggests that there is a substantial increase in the risk of coordination in Allanburg.

37. Innisfil is similarly located within some distance to a larger collection of stations, which Ms Sanderson argues would constrain the pricing of the Parkland Pioneer stations after the merger. The distances are very likely to be prohibitive for many consumers who fill up at these stations, who most likely live in the directly surrounding residential areas. Significant numbers of these consumers are unlikely to travel beyond this locality in response to price increases caused by coordination among stations in this area.

CONCLUSION

38. I maintain my main conclusion expressed in my Report to the effect that:

a) On the basis of the information I have reviewed in relation to the markets the Bureau asked me to analyse, it is my opinion that the concentration levels created by the transaction in these markets pose serious risks to competition through both unilateral effects and coordinated effects.

b) It is important to clarify the meaning of an increase in risk of coordinated conduct. At any time, across the economy, we observe coordinated conduct emerging in some markets, but not in others.

In markets where coordinated conduct occurs, we observe more often the structural characteristics favourable to coordinated conduct, but not always. In some cases, coordinated price increases are sometimes not observed in markets with the favourable characteristics, but less frequently in markets without the favourable characteristics. In some markets, the dynamics of competition give rise to episodes of coordinated conduct followed by a breakdown in coordination, followed again by a new episode of coordinated conduct. Those favourable characteristics that make coordinated conduct more likely would make coordinated conduct episodes more likely or frequent without ruling out the possibility at times of a breakdown in coordination.

c) The literature has also established that coordinated conduct or tacit collusion has the potential of having the same effects on markets as actual collusion or explicit cartel conduct. It is a central result of repeated game theory that tacit collusion can mimic actual collusion to a high degree.

d) Indeed, coordinated conduct has some or all of the following effects on markets, thereby hurting customers: higher prices, lower quality products or services, lower quantities available, less diversity in product or service offering, and lower product differentiation.

e) I studied previously the impacts of actual collusion in retail gasoline markets in Canada. Such collusion is capable of imposing significant costs on customers. Insofar as tacit collusion or coordinated conduct can generate impacts that are similar to actual collusion, there are reasons for concern when a merger is likely to increase the risk of such coordinated conduct.

f) Hence, there is reasonable certainty that coordinated price increases will emerge when a transaction, such as this one, enhances or causes more of the structural characteristics

favourable to coordinated conduct to be present in the affected markets. The present transaction substantially raises the chances of coordinated price increases emerging. It also raises the likelihood of unilateral effects.

TAB 2

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

Cross-Examination on Affidavit of ROBERT ESPEY, sworn the 5th day of May, 2015, taken at the offices of Bennett Jones LLP, Calgary, Alberta, on the 7th day of May, A.D. 2015.

For the Applicant

A. Di Domenico, Esq.
Department of Justice Canada
50 Victoria Street
Gatineau, Quebec K1A 0C9
819-997-2837

S. S. Lee, Mr.
Competition Bureau Canada
50 Victoria Street
Gatineau, Quebec K1A 0C9
819-934-3603

For the Respondent Parkland Entities

J. F. Rook, QC
Bennett Jones LLP
3400, 100 King Street West
Toronto, Ontario M5X 1B8
416-863-1200

Y. B. Riley, Ms.
Bennett Jones LLP
4500, 855-2nd Street SW
Calgary, Alberta T2P 4K7
403-298-3100

For the Respondent Pioneer Entities

C. Hersh, Esq.
Cassels Brock & Blackwell LLP
2100, 40 King Street West
Toronto, Ontario M5H 3C2
416-869-5300

Official Court Reporter

Michele M. Gibson, CSR(A)
Amicus Reporting Group
403-266-1744

(Proceedings commenced at 10 a.m.)

ROBERT ESPEY, sworn, cross-examined by Mr. Di Domenico:

Q. Good morning, Mr. Espey. You swore an affidavit dated

May 5th, 2015?
A. I did.
Q. And did you review your affidavit and the exhibits attached thereto in advance of this cross-examination?
A. I did.
Q. And are there any changes that you wish to make to your affidavit?
A. No.
Q. So the affidavit is currently accurate and complete --
A. That is correct.
Q. -- as of right now?
A. Yes.
Q. Okay. So, sir, Parkland Fuel Corporation is a public company?
A. That's correct.
Q. And Parkland's annual information form for the fiscal year ending December 31, 2014, I take it, is attached as Exhibit A to your affidavit?
A. That's correct.
Q. And that document itself is dated May 24th, 2015?
A. March 24th.
Q. Oh, pardon me, March 24th, 2015? So, sir, as a public company, I take it Parkland Fuel Corporation ensures that all information in this document is accurate and complete?

A. Yes.
Q. And as you've noted, you reviewed this document in advance of the cross-examination?
A. I did.
Q. And the document remains true and accurate as of now? Yes?
A. Yes. Certainly my understanding is that it is.
Q. Okay. If I can turn you to paragraph 27 of your affidavit, sir, and this may be an item where your counsel may be able to help you. Paragraph 27 makes reference to an [redacted], an [redacted] [redacted]. And it notes that it's attached as Exhibit E to your affidavit. Do you see that, sir?
A. So -- okay.
Q. Yes?
A. So I see paragraph 27, yes.
Q. And you make reference to it?
A. Yes.
Q. So I can't find the [redacted] in Exhibit E. Could you help me find it?
MR. ROOK: It's not there apparently.
MR. DI DOMENICO: Could you provide me with a copy, Mr. Rook?
MR. ROOK: Yes.
MR. DI DOMENICO: Thank you.

UNDERTAKING NO. 1 - To provide a copy of the [redacted]

Q. MR. DI DOMENICO: So, Mr. Espey, I would like to talk to you a bit about rack forward margins if I could.

A. Sure.

Q. As I understand it, a rack forward margin is the fee charged by Parkland to independent dealer stations based on the price zone where the independent dealer station is located?

A. That is correct.

Q. And so the rack forward margin, then, is Parkland's influence on the fuel price charged to independent dealers?

A. It's -- it's markup to the dealer for the services that we provide to them.

Q. If you could turn to paragraph 17, sir, of your affidavit.

A. Sure. Just review the last sentence. It reads: (As read)

> Parkland has not increased the rack forward margin to independent dealer stations in Ontario in the past three years.

A. That is correct.

Q. So I take it, then, that Parkland has increased rack forward margins to independent dealers in the province of Manitoba within the past three years?
A. That's a good question. I would need to confirm that.
MR. DI DOMENICO: Mr. Rook, will you advise me by way of an undertaking?
MR. ROOK: Yes.

UNDERTAKING NO. 2 - To advise whether Parkland has increased rack forward margins to independent dealers in the province of Manitoba within the past three years

Q. MR. DI DOMENICO: And, sir, assuming the prices have gone up in Manitoba, could you let me know the particulars of that?
A. I think that's an unfair assumption.
Q. Well, I'm looking at the e-mail and you've indicated Ontario, but you have excluded Manitoba. So that's why I'm asking --
A. Sorry, which e-mail?
Q. Pardon me, the paragraph 17.
A. Right.
Q. It makes reference to independent dealer stations in Ontario, but it omits Manitoba.
A. Right.

Q. So that's why I'm asking the question.
A. And, again, I would need to confirm that -- over that. I don't track -- personally don't track the pricing.
MR. DI DOMENICO: Mr. Rook, will you provide me with the particulars if the answer is yes?
MR. ROOK: Yes.
MR. DI DOMENICO: Will you provide me with the particulars of those price increases?
MR. ROOK: Yes, we will.
MR. DI DOMENICO: And that will include when the increases took place and by how much?
MR. ROOK: We will do our best given the time available.

UNDERTAKING NO. 3 - To advise the particulars of the price increases if Parkland increased rack forward margins to independent dealers in the province of Manitoba within the past three years, when the increases took place and by how much

Q. MR. DI DOMENICO: So if you could turn to paragraph 22, sir, of your affidavit, I just want to better understand this. So the paragraph 22 reads: (As read)

> Independent dealer stations with the same brand generally pay the same rack

price within a price zone.

So do I take it then, therefore, that different branded independent dealer stations within a price zone may be charged different rack forward margins?

A. Well, the -- so, again, that's understanding the proposition behind the brand, right? So the brand -- first of all, the cost to us is [redacted] For example, there is no [redacted] with the Imperial -- with the Parkland brand, but there is with the Imperial Oil brand. So you -- you would charge for that.

And the second thing is the offer is completely different in terms of -- of the [redacted] that's put into the proposition, the charges for [redacted] All of those are completely different in each situation, so -- so there will be different prices based [redacted] in the same market.

Q. Right. So the answer to my question is yes?

A. Yes.

Q. And, sir, in your affidavit, again, at paragraph 22, you use the word "generally." You say: (As read)

> Independent dealer stations with the same brand generally pay the same rack price within a price zone.

So you use the word "generally." So are there circumstances where independent dealer stations within a price zone, whether or not they are the same or a different brand, are charged different rack forward margins?

A. That's a good question. I would have to confirm that.

MR. DI DOMENICO: Mr. Rook, will you undertake --

MR. ROOK: Yes.

MR. DI DOMENICO: -- to let me know that?

A. So independent of brands, you're saying? You're asking independent of brand?

Q. Either or.

A. Okay.

Q. So whether it's a different brand --

A. So within the Esso brand, it would be all the same price, right, within that price zone.

MR. DI DOMENICO: All right, but, Mr. Rook, you're still going to provide me with those answers?

MR. ROOK: Let me just clarify the question or the request. So the witness has now said that in the IOL or the Esso branded stations, the rack forward margin is the same within price zones. So are you asking now with respect to non-Esso branded stations in Ontario?

MR. DI DOMENICO: Yes.

MR. ROOK: All right, thank you.

UNDERTAKING NO. 4 - To advise whether there are circumstances where independent dealer stations within a price zone in Ontario, whether or not they are the same or a different brand, are charged different rack forward margins

Q. MR. DI DOMENICO: So as I understand it, and just correct me if I'm wrong, Parkland has four brands within the 14 markets that is at issue in this litigation?

A. I'm not aware of the specific brands, but we can -- I can review --

Q. Let me know if you disagree with this --

A. Right, okay.

Q. So as I understand it --

A. Sure.

Q. -- there is the Suny's brand which is for corporate stores, the RaceTrac, Esso and Fas Gas. Those would be the four brands of Parkland within the 14 markets?

A. I would have to confirm that.

Q. Any reason for you to believe that that proposition is incorrect?

A. Those four brands could be present.

MR. DI DOMENICO: Okay. So, Mr. Rook, can you just confirm that for me by way of an undertaking?

MR. ROOK: Yes, we'll do that. What were the four? Suny's, RaceTrac --

MR. DI DOMENICO: Suny's, RaceTrac, Esso and Fas Gas.

MR. ROOK: Thank you.

UNDERTAKING NO. 5 - To confirm that Suny's, RaceTrac, Esso and Fas Gas are the four brands of Parkland within the 14 markets

Q. MR. DI DOMENICO: So, then, I'm just trying to unpack this --

A. Sure.

Q. -- Mr. Espey. So with respect to the 14 markets, then, that are at issue, there is examples where Parkland has more than one of its branded stations in a particular market?

A. In a particular market?

Q. Yes.

A. So dealer or corporate?

Q. Sorry?

A. Sorry, dealer or corporate?

Q. Dealer.

A. Again, I would have to confirm that.

MR. DI DOMENICO: Would you let me know that, Mr. Rook?
A. I don't have memorized the -- the brands by site.
MR. ROOK: Just bear with me for a moment. My understanding is that three of the four brands are present in one or other of the -- of ten markets. I cannot confirm, but we'll try to confirm the remaining four which are Kapuskasing, Aberfoyle, Allan --
MS. RILEY: Tillsonburg.
MR. ROOK: What is it, Allanburg?
MR. HERSH: Allanburg.
MS. RILEY: Allanburg, yes.
MR. ROOK: Allanburg and Tillsonburg.
MR. DI DOMENICO: All right. Thank you, Mr. Rook.
MR. ROOK: I can tell you about Kapuskasing. It's RaceTrac. There is a RaceTrac brand in Parkland station at Kapuskasing. I can't -- I don't know about the other three.
MR. DI DOMENICO: Yes. Just to be clear, what I'm talking about are two different -- are there more than one Parkland brand in a particular market.
MR. ROOK: Oh, that's a different question.
MR. DI DOMENICO: That's what I'm talking about.
MR. ROOK: Oh, all right. Can you restate your question so it's clear to me?

MR. DI DOMENICO: Sure.
Q. With respect to the 14 markets at issue --
MR. ROOK: Yes?
Q. MR. DI DOMENICO: -- are there examples where Parkland has more than one of its branded stations in a particular market?
A. Again, we would have to get a breakdown of the sites in the markets and the brands. I don't have those on the top of my head.
MR. ROOK: This is based on your definition of what the geographic market is?
MR. DI DOMENICO: Yes. The 14 at issue.
A. Right.
MR. ROOK: We'll look into that.
MR. DI DOMENICO: Thank you.

UNDERTAKING NO. 6 - With respect to the 14 markets at issue, to advise if there are examples where Parkland has more than one of its branded stations in a particular market

Q. MR. DI DOMENICO: Now, sir, I'm passing over a document. This is an e-mail that was produced by Parkland in response to a supplementary information request issued by the Competition Bureau. Take a moment to review it, and it's an e-mail from a Leon

Chabot to Rob Wilston dated April 10th, 2014. And the --

MR. ROOK: Is this in the application record?

MR. DI DOMENICO: No.

MR. ROOK: So this is a new document that you're producing for the first time?

MR. DI DOMENICO: This is your documents, actually, Mr. Rook.

MR. ROOK: No, but it's the first time it's been produced in this lawsuit?

MR. DI DOMENICO: No, it was produced in response to a supplementary information request.

MR. ROOK: But it hasn't been produced by you -- or it isn't included in Mr. McNabb's affidavit?

MR. DI DOMENICO: Correct.

MR. ROOK: That's all I'm trying to understand.

MR. DI DOMENICO: Correct.

MR. ROOK: Do you have a copy for me?

MR. DI DOMENICO: Yes.

Q. So while you go ahead and review that, the subject of the e-mail is "50936-Azilda-Renewal-DET."

A. Okay, I've read it.

Q. So I just want to understand, if you read the first sentence, it reads: (As read)

Based on our earlier discussion, Azilda renewal DET will move zone price from [redacted] cpl to [redacted] cpl, dealer payment from [redacted] to [redacted] cpl.

Do you see that, sir?

A. I do see that.

Q. So what I'm trying to understand is, is the zone price referred to in this e-mail the rack forward margin in the Parkland price zone that Azilda belongs to?

A. I would need to confirm that.

MR. DI DOMENICO: Could you let me know that then, Mr. Rook?

MR. ROOK: Yes.

UNDERTAKING NO. 7 - To advise if the zone price referred to in the e-mail, Exhibit 1, is the rack forward margin in the Parkland price zone that Azilda belongs to

Q. MR. DI DOMENICO: Can you also confirm that -- whether Azilda -- we're going to get to this momentarily, but Exhibit C to your affidavit encloses price zones, Parkland price zones. I just want to confirm whether or not Azilda is in the [redacted] Parkland price zone. And if you want to let me know that, that's fine.

MR. ROOK: Well, let's see if we can deal with it right now. If you look at page 130 of the application or the respondent's record towards the bottom, Mr. Espey, there seems to be a reference to somebody by the name of Mike's Gas Bar Azilda. Do you see that?

A. What page?

MR. ROOK: It's the bottom of page 130. Oh, your pages aren't numbered. Here, take a look at this, page 130, Sudbury. Do you know whether Azilda is in the vicinity of Sudbury or in what you call the [redacted] price zone?

A. I wouldn't know that. I don't know where Azilda is, so -- if you can pull out a map.

MR. ROOK: Thank you. All right. We will look into it.

UNDERTAKING NO. 8 - To confirm whether or not Azilda is in the [redacted] Parkland price zone

MR. DI DOMENICO: I would like to mark this e-mail, if I may, Exhibit 1 to the examination.

EXHIBIT 1 - E-mail from Leon Chabot to Rob Wilston dated April 10th, 2014

Q. MR. DI DOMENICO: Sir, I want to pass up another e-mail, if I may, and, again, this e-mail was produced

by Parkland in response to the supplementary information request issued by the Competition Bureau. And it's from, again, Leon Chabot or to Rob Wilston dated October 27th, 2014.

MR. ROOK: Do you have another copy?

MR. DI DOMENICO: I do.

MR. ROOK: Are there two pages or one?

MR. DI DOMENICO: Well, it's an e-mail chain, so there are two pages.

MR. ROOK: So what do you want the witness to read?

MR. DI DOMENICO: I want the witness to read the e-mail beginning at 8:44 a.m. beginning with "Hi Rob."

A. Yeah, I've read it.

Q. And the first paragraph of that.

A. The first paragraph? Sure. Okay.

Q. May I just ask who is Leon Chabot?

A. He's a territory manager.

Q. For?

A. For Parkland.

Q. And is he still employed by Parkland?

A. Good question.

Q. Would you let me know that? I assume he is, but --

A. Well, I don't know. I don't know. We have turnover in our business, so...

MR. DI DOMENICO: Mr. Rook, I will assume he is still employed, but, if he isn't, will you let me know?

MR. ROOK: Yes.

UNDERTAKING NO. 9 - To advise whether Leon Chabot is still employed with Parkland

Q. MR. DI DOMENICO: And who is Rob Wilston?

A. He's the regional manager.

Q. Of Parkland?

A. Of the retail business within Parkland.

Q. Right. And is he still employed by Parkland?

A. He is, yeah.

Q. In the same position?

A. He is.

Q. So in the first paragraph, it reads: (As read)

Per approved AFE for 50936-Azilda, effective November 1, 2014 [redacted] zone price to be adjusted upward with dealer receiving a dealer payment.

Do you see that, sir?

A. I do see that.

Q. So, to me, this indicates that the Parkland [redacted] price zone increased on November 1st, 2014; am I correct?

A. I would have to confirm that.

MR. DI DOMENICO: Would you let me know that, Mr. Rook?

MR. ROOK: We'll look into it.

UNDERTAKING NO. 10 - To confirm that the Parkland [redacted] price zone increased on November 1st, 2014

MR. DI DOMENICO: I would like to mark this document as Exhibit 2, if I may.

EXHIBIT 2 - E-mail chain from Leon Chabot to Rob Wilston dated October 27th, 2014

Q. MR. DI DOMENICO: If we could turn to Exhibit C, sir, of your affidavit.

A. The price zones? Yes.

Q. Now, are these the current price zone -- is this the current price zone list for Parkland in the provinces of Manitoba and Ontario?

A. My understanding is yes.

Q. So I would like you to help me, if you could. Could you just explain to me what a price zone is?

A. A price zone is a gathering of -- of dealer sites that basically have the same upcharge.

Q. And when you say a gathering of sites, are you saying that the gathering of sites within specific geographic boundaries?

A. Within a specific geographic zone.
Q. And who sets the price zones? I take it it's Parkland?
A. Our retail team, yes.
Q. So it's your retail team?
A. That's correct.
Q. And on what basis do they set these price zones?
A. I would have to confirm that.
Q. Is it the retail team that determines the price zone on its own or does the price zone need to be approved by senior management of Parkland?
A. Well, it would be approved by -- it is set within the retail team. The approval process, I'm not aware of. It certainly doesn't come to me.
Q. Okay. So the retail team, how large would the retail team of Parkland be?
A. I can't give you the exact number of employees.
Q. Just give me an approximate number.
A. Somewhere between 70 and 80.
Q. 70 and 80 people?
A. Yes.
Q. Okay. So am I correct that the 70 to 80 people would deliberate and determine --
A. Not -- not the whole group. There is a subset of that.
Q. A subset of the group that would determine what the price zones would be?

A. That's correct, right.
Q. And once that decision is made by them, that's the decision? It doesn't get approved by any form of management beyond the management of the retail team?
A. Again, I -- I don't know the exact process. It doesn't come to me, so -- and there is nobody between me and the retail team.
Q. I see. And just to confirm, sir, you don't know what the basis of criteria is for setting these price zones at Exhibit C to your affidavit?
A. Not -- not exactly.
Q. What do you know?
A. Well, just that they are within a geographic area where it makes sense from a concentration perspective.
Q. When you say "makes sense," what do you mean?
A. Again, we would have to clarify that with the pricing team in retail.
Q. Right, but I just want to understand your understanding.
A. Right.
Q. What is your understanding?
A. So, again, it's within a geographic area.
Q. Anything else?
A. That's it.
Q. Now, sir, are there corresponding maps for each of

these markets that set out the geographic boundaries for each?

A. I -- I couldn't tell you.

Q. Pardon me, I said "markets." Let me be clear for the transcript, are there corresponding maps for each of these stated price zones?

A. Not that I know. Again, I would have to confirm that.

Q. Well, I would imagine there would be. That's just my guess.

A. I don't know. I can't -- that would be conjecture on my part.

Q. But you agree that there are geographic boundaries for each of these price zones?

A. I would agree that there is geographic criteria put on that. What that exactly is, I'm not aware of.

Q. But you agree with me that geographic boundary would be memorialized somewhere on a document in the possession of Parkland?

A. I can't confirm that.

Q. Is it reasonable?

A. I would say it's reasonable, but I would need to confirm that.

MR. DI DOMENICO: So, Mr. Rook, could you please produce the -- and what I'm asking for is production of the corresponding maps for each of the price zones

contained at Exhibit C to Mr. Espey's affidavit.

MR. ROOK: We'll take that under advisement.

UNDERTAKING NO. 11 - To produce the corresponding maps for each of the price zones contained at Exhibit C to Mr. Espey's affidavit - TAKEN UNDER ADVISEMENT

Q. MR. DI DOMENICO: So, again, just to understand the zones a bit better, these zones are determined by the Parkland retail team --

A. That's correct, right.

Q. -- as you noted? And I guess they could be changed from time to time by the Parkland retail team?

A. They can.

Q. And they could change those boundaries without your direct approval?

A. Sure, certainly. I mean we run a large business that's decentralized. I can't -- if I start to approve everything, nothing would get done.

Q. And I take it that these geographic boundaries can change at any time?

A. Again, that's up to the discretion of the -- of the retail team.

Q. Right, but the retail team could change it at any time?

A. Yeah. Again, they review it on a -- I believe it's a

six month period.
Q. Let me put it this way. There is nothing precluding them from changing it at any point?
A. No, there isn't.
Q. That's correct?
A. That's correct.
Q. And are you aware of whether or not Parkland has changed any of the geographic boundaries for the markets listed in -- let me start that again. Are you aware of whether or not Parkland has changed the geographic boundaries of the price zones contained in Exhibit C to your affidavit within the past three years?
A. I can't confirm that.
Q. Would you let me know that, Mr. Rook?
MR. ROOK: How is that relevant?
MR. DI DOMENICO: Well, the relevancy is based on the -- you've put into evidence certain price zones and the fact that these are not subject to price increases within the past three years, and I think I'm entitled to know whether or not the geographic boundaries has also changed within the past three years.
MR. ROOK: We'll look into it.
MR. DI DOMENICO: At this point, are you undertaking or taking it under advisement?

MR. ROOK: I'm taking it under advisement.

UNDERTAKING NO. 12 - To advise whether or not Parkland has changed the geographic boundaries of the price zones contained in Exhibit C to Mr. Espey's affidavit within the past three years - TAKEN UNDER ADVISEMENT

Q. MR. DI DOMENICO: And, again, sir, just to understand the markets a bit -- these zones, pardon me, a bit better, so if you review them, it appears to me that the zones encompass many kilometres of territory; is that fair?

A. Yeah, again, depending on the market.

Q. Depending on the zone?

A. Sure, right, the zone.

Q. Just to be clear with terminology in this case.

MR. ROOK: That's right.

Q. MR. DI DOMENICO: So in looking at these, for example, a particular price zone could contain both urban and rural communities?

A. Again, I'm not familiar with the zoning here. I mean I'm familiar with the concept, but the specifics, I'm not familiar with.

Q. But, for example, let's just look at one of these. Niagara Falls -- or Niagara, I should say. So Niagara

presumably -- you will let know what the geographic boundaries are because I've asked for that, but that could contain, you know, an urban centre like Niagara Falls itself or more rural communities in the Greater Niagara Region?

A. It could. I mean, again, I don't know what -- these specific sites and where they are located.

Q. Right. I'm just trying to get a conceptual of it --

A. Sure.

Q. -- just so I can better understand these zones. That a Parkland price zone --

A. Right.

Q. -- could contain urban --

A. Urban --

Q. -- and rural communities?

A. Absolutely.

Q. Now, when Parkland changes a geographic boundary of a price zone, does it notify the independent dealers in that zone of the change?

A. I'm not aware of the current process, so we would have to confirm that.

MR. DI DOMENICO: Could you let me know that, Mr. Rook?

MR. ROOK: We'll look into it. Let me just clarify the question. You want us to make inquiries to

determine whether all dealers are told of a change in the geographic boundaries of price zones?

MR. DI DOMENICO: Not all dealers. What I want to know is whether Parkland -- if Parkland makes a change to the geographic boundary of a particular zone, let's say --

MR. ROOK: Yes.

MR. DI DOMENICO: -- does it advise the independent dealers within that zone, both -- maybe the older zone, for lack of a better word, and the new zone of a change?

MR. ROOK: So to use your example, in the hypothetical situation which the Niagara -- the boundaries of the Niagara pricing zone are changed, does Parkland tell all of the dealers that it supplies within that zone that the boundaries have changed?

MR. DI DOMENICO: Right.

MR. ROOK: Is that the question?

MR. DI DOMENICO: Yes.

MR. ROOK: All right. We'll make inquiries, and if there is information that we can unearth, we will provide it.

UNDERTAKING NO. 13 - If Parkland makes a change to the geographic boundary of a particular zone, to advise whether

Parkland informs the independent dealers within the older zone and the new zone of the change

Q. MR. DI DOMENICO: So, sir, I want to show you another document. This is, again, a document produced by Parkland in response to the supplementary information request issued by the Competition Bureau. And it's an e-mail from Rob W. Wilston to Brent Smith dated February 28th, 2013. And the subject is "Price Zone Process."

MR. ROOK: So is this another string of e-mails or is this --

MR. DI DOMENICO: Yes.

MR. ROOK: Is this one document or three?

MR. DI DOMENICO: One. It's an e-mail chain.

Q. I'm going to be asking a question about paragraph 2 of the e-mail when you're ready.

A. Okay.

Q. So, Mr. Espey, if you would just review the first sentence of the second paragraph, it reads: (As read)

> The whole point of having different zones is to reflect the differences in competitive factors, and the effect that have on brand value, et cetera.

Do you see that?

A. I do.
Q. So do you agree that Parkland's price zones reflect differences in competitive factors?
A. I would need to confirm that.
Q. But what's your view, sir?
A. You know, I really do need to -- to go back and talk to the team and find out how they do it.
Q. Well, that's fine, sir, but I'm here to get your evidence.
A. Right.
Q. I just want to know your view because you're the affiant of the affidavit --
A. Right, but I'm also under oath, so I'm not going to tell you anything that I'm not comfortable with, right?
Q. No, but you can tell me your view. And then if you want to confer with --
MR. ROOK: No, with respect, he doesn't have a basis for his view. He doesn't have to give his view. Ask your question.
MR. DI DOMENICO: I will ask the question.
MR. ROOK: If he can answer it, he will. And if he can't answer it, he will say whatever he has to say and you can deal with it elsewhere if you're not satisfied.
Q. MR. DI DOMENICO: So, Mr. Espey, do you agree that

Parkland's price zones reflect differences in competitive factors?

A. I will have to confirm that.

Q. So are you saying that you don't know?

A. I will have to confirm how we adjust our price zones.

Q. Right, because you don't know sitting here today?

A. Yeah, I don't know.

MR. DI DOMENICO: So I would like to mark this as the next exhibit, if I may, Exhibit 3.

EXHIBIT 3 - E-mail chain from Rob Wilston to Brent Smith dated February 28, 2013

Q. MR. DI DOMENICO: Can you turn to paragraph 23, sir, of your affidavit. And I would like to ask you about the second sentence, which reads: (As read)

> Charging different rack forward margins to different independent dealer stations within the same price zone would damage Parkland's brand and reputation. Parkland would risk losing independent dealer stations to competitors when contracts are up for renewal.

Do you see that, sir?

A. I do.

Q. So would you agree with me that that statement, that

those two sentences, assume that independent dealer stations are aware of what price zone they are in?

A. That is correct.

Q. And does that statement also assume that independent dealer stations are aware of what other stations are in their price zones?

A. They would be aware of that certainly.

Q. So you're saying it this way, the answer is yes, and then your follow-up point is, yes, they are aware of what other stations are in their price zone?

A. Well, they would be aware of who is supplied by Parkland within the price zone.

Q. Right. So your evidence is that the -- just so I understand it, the independent dealers within a Parkland price zone would be aware of what other independent dealers are in that price zone?

A. See, I'm not -- I'm not certain that that's the case. I would have to confirm it, but they would certainly be aware of who was supplied by Parkland. There is a difference.

Q. Right. So they would be aware of who was supplied by Parkland? What other --

A. Right.

Q. So your point is that if the others are aware of who is supplied by Parkland, they would effectively know what

other independent stations are in a given price zone?
A. I would have to confirm that.
MR. ROOK: Now, you've got me confused. Are you asking whether the non-Parkland dealers -- are you talking about non-Parkland --
MR. DI DOMENICO: No, Parkland dealers.
MR. ROOK: So let's assume that there is a -- let's take your Niagara example. So if there are 25 sites that are supplied by Parkland within Niagara --
MR. DI DOMENICO: Right.
MR. ROOK: -- zone is the question would the 25 know that the zone price was the same for all of them?
MR. DI DOMENICO: Yes.
MR. ROOK: That's the question?
MR. DI DOMENICO: Yes.
MR. ROOK: All right. And can you answer that question?
A. What's that? That -- would they know? Again, I am -- I'm most certain that they would know.
MR. ROOK: All right.
Q. MR. DI DOMENICO: Now, sir, I may have forgotten to ask you this and my apologies, but with -- stick to Exhibit C, there is -- one of the -- the e-mail, I believe, was -- involved a Brent Smith?

A. Right.
Q. Right. Is Brent -- can you just tell me who Brent Smith is?
A. I believe he was in an operations support role. Yeah, reporting to our Director of Retail Operations.
Q. And is he still employed by Parkland?
A. I believe he's on sick leave right now, but we would have to confirm that.
Q. Not to belabor this point, he may be on sick leave, but he's still employed by Parkland?
A. I believe -- again, I would have to confirm that. We've got 1,200 employees. I don't track them all.
Q. If not, just let me know, Mr. Rook.

UNDERTAKING NO. 14 - To advise whether Brent Smith is still employed by Parkland

A. In Canada and another 250 in the U.S.
Q. MR. DI DOMENICO: No, I appreciate that, sir. So I'm showing you an e-mail chain. And, again, this chain was being produced by Parkland in response to a supplementary information request issued by the Competition Bureau. And it's an e-mail chain between a Brent Smith and Scott McKelvie. And I would like to turn your attention to -- but feel free to read the chain. I'm going to ask you about the e-mail dated

December 12th, 2012 at 2:59 p.m. where the subject heading is "Ontario Price Zone Changes."

A. Sorry, where is that e-mail?

Q. So in the chain, it would be the second page, sir. The top is a little bit of white space, and there is, "From Brent Smith"; do you see that?

A. Mmm-hmm.

Q. Whenever you're ready.

MR. ROOK: Is there anything else in this e-mail other than this page or --

MR. DI DOMENICO: I'm going to be referring to the second bullet.

MR. ROOK: Specific -- starting with the word "specific"?

MR. DI DOMENICO: Yes.

MR. ROOK: Do you have any other copies of these e-mails that you're producing now so that the other counsel in the room can look at them?

MR. DI DOMENICO: Let me just confer.

(DISCUSSION OFF THE RECORD)

MR. DI DOMENICO: I don't think I have anymore e-mails to --

MR. ROOK: Is this the last one --

MR. DI DOMENICO: This should be the last one.

MR. ROOK: -- of the great surprise this

morning? But do you have an extra copy, at least, of the four that we are dealing with or have dealt with?

MR. DI DOMENICO: We can get them.

MR. HERSH: We can just get them in the rest spot.

A. Okay.

Q. MR. DI DOMENICO: So, sir, I want to ask you about the second bullet, and I will read it for you. This is, again, an e-mail from Brent Smith to Scott McKelvie --

A. Right.

Q. -- where the subject is "Ontario Price Zone Changes." And he writes, "Hi Guys," and then just to jump to the second bullet: (As read)

> Specifics of a dealer zone should absolutely not be discussed with them. We can work together on drafting up a communications piece if you guys deem warranted but some of the requests below lead me to believe that there might be some misunderstanding of the set up and its function and as well as what should or shouldn't be discussed revealed to dealers (like what specific zones they are in, what their upcharge is, who else

is in their zone, et cetera, et cetera, et cetera).

Do you see that, sir?

A. Sure, yeah.

Q. So I will ask you: Is it correct, then, that Parkland does not notify independent dealers of what price zones they are in?

A. I would have to confirm that.

Q. And am I correct that Parkland does not notify independent stations of what -- independent dealers of what other independent dealers are within their price zone?

A. Again, I would have to confirm that.

Q. But you would agree with me that this e-mail suggests that they don't?

A. It does suggest that.

Q. And there is nothing in your affidavit to suggest otherwise, correct?

A. Sorry?

Q. There is nothing in your affidavit --

A. To suggest?

Q. Otherwise.

A. Otherwise what?

Q. That -- the two propositions. That Parkland does not advise independent dealers of what price zones they are

in and that the other independent stations that are within that given zone?

MR. ROOK: Don't answer that question. That's not a proper question.

OBJECTION TAKEN to answering the question: That Parkland does not advise independent dealers of what price zones they are in and that the other independent stations that are within that given zone?

MR. ROOK: Are you asking for an undertaking on this issue or not?

MR. DI DOMENICO: I think I got the answer. I would like to, if I may, mark this as the next exhibit which I believe is Exhibit 4.

EXHIBIT 4 - E-mail chain from Brent Smith to Scott McKelvie dated 12/12/2012

Q. MR. DI DOMENICO: Sir, can you turn to paragraph 35 of your affidavit?

MR. ROOK: Are you finished with these exhibits?

MR. DI DOMENICO: Yes.

A. Okay.

Q. So the last sentence of this paragraph reads: (As read)

In particular Parkland estimates that a

0.3 cents per litre price increase at Pioneer branded stations would result in roughly a 25 percent decrease in volume.

A. That's correct.

Q. So is there a time period associated with this calculation?

A. A time period in what context?

Q. Well, how is this -- you've calculated a decrease of roughly 25 percent?

A. Right. So basically the thinking there -- and it relates back to two things. It relates back to consumer research that we did which showed that, in the eyes of the consumer, Pioneer is recognized as a low price leader. And then the second thing is that the average volume per site is significantly higher than the industry and then the majors. And what we're insinuating is that if we were to price -- if we were to change the pricing strategy, we would see a deterioration in volume. And conceivably it could go to the average of the majors. It could go less.

Q. My question is: You say, you swear under oath, that Parkland estimates that a 0.3 cents --

A. Sure.

Q. -- per litre price increase at Pioneer brand stations would result in roughly a 25 percent decrease?

A. That's correct.
Q. So you do provide numbers, and I want to know the basis for this calculation?
A. Well, again, I just explained it to you.
Q. Is there anything else that forms the basis of the calculation?
A. No.
Q. Does this calculation -- so when you say -- this calculation, I guess, assumes, therefore, that a 0.3 litre -- it assumes a 0.3 litre price increase by Parkland, right?
A. No, by -- in the Pioneer brand, right?
Q. Right, but it assumes a 0.3 litre price increase. Yes?
A. It -- it assumes that we start to match the market, right.
Q. Okay. Let's just take a step back. Am I right that this calculation assumes that a 0.3 litre price increase by Parkland and no price increase by competitors?
A. That's correct.
MR. ROOK: At Pioneer stations.
MR. DI DOMENICO: That's not what I asked.
A. No, at Pioneer stations. Sorry, I don't follow.
MR. ROOK: Look, it says that right in the document.

MR. LEE: You --
A. No, no, no, we're not going to do this to our dealers. I see where you're going down, right.
MR. LEE: No, no, that's not where --
MR. ROOK: Don't worry about where he's headed.
A. Right.
MR. ROOK: Just answer his questions.
A. So this is in relation to corporate Pioneer sites --
Q. MR. DI DOMENICO: I'm talking about -- when I say "competitors," maybe that's where the confusion is --
A. Right.
Q. -- I'm talking about competitors in the market.
A. Right.
Q. I'm not just talking about --
A. So I don't control my competitors pricing in the market. I have no influence on that. I don't care what their strategy is --
Q. I'm not suggesting -- that's not what I'm getting at.
A. Okay.
Q. I'm talking about your calculation, sir.
A. Right.
Q. You made a calculation at paragraph 35. I'm just trying to understand it?
A. Yeah, right.

Q. This calculation assumes a 0.3 litre price increase by Parkland and no --
A. Sorry of -- in the Pioneer channel with the Pioneer brand in corporate sites.
Q. Fine. Fine.
A. Does make sense?
Q. Yes, it makes sense.
A. Did you understand the difference between a corporate site and a dealer site?
Q. I do. I do, but the second part of that question is, it assumes no corresponding price increase by competitors in that market?
A. Again, I can't influence the market, so --
Q. I'm not having a debate with you. What I'm asking you is this calculation assumes no price increase by competitors in the market?
A. So, again, you know, I'm very careful here, but --
Q. Please.
A. -- the prices fluctuate everyday, right? So I can't control what my competitors' price at, what their pricing strategy is --
Q. Right, but the calculation at paragraph 35 doesn't factor in those fluctuations --
A. It assumes that we start to match others in the market at a -- at a posted price.

Q. Right, but, again, it assumes -- just the calculation, sir --
A. Right.
Q. -- that's all I'm asking about.
A. Right.
Q. This 0. --
A. So this goes back to where a consumer has told us through independent consumer research that they recognize the Pioneer brand as a price leader in the marketplace. If we were to change that pricing strategy, which is basically to take out the 30 point price differential, we would lose substantial volume.
Q. Sir, did you make this --
A. So why would the consumer come to us?
Q. Sir, did you make this calculation at paragraph 35 on your own?
A. Me personally?
Q. Yes.
A. Oh, our team made it.
Q. When you say "team," you mean internal to Parkland?
A. Yes.
Q. Did you retain an economist to help you up with this calculation?
A. No, we didn't.
Q. Okay. And just to get back to the point, and I don't

want to create confusion, what I'm asking you is for the purposes of the calculation only --

A. Sure, right.

Q. -- the calculation assumes a .3 litre price increase by Parkland and no corresponding price increase by competitors in the market?

A. Again, just -- just understanding the market changes everyday.

Q. Right?

A. Right.

Q. I know that.

A. So it's relative to --

Q. Right, but the calculation is not relative. The calculation is a snapshot, and it assumes no corresponding price increase by competitors?

A. Well, again, the prices change everyday, so I can't control what my competitors do on a daily basis.

Q. Right. So when you made the calculation --

A. Nor do I ever try and influence that, right?

Q. Of course, but the calculation, though --

A. Right.

Q. -- doesn't factor in those price fluctuations. It assumes that your competitors have not made a price increase?

A. Well, again, they will change their prices everyday.

Q. Right, but the calculation doesn't factor that in --
A. Is relative to their pricing.
Q. Right, but how is the 25 percent number relative to their pricing?
A. Because if I start to price or if Pioneer -- the Pioneer brand prices at what our competitors are in that market -- are to be competitors, why would the consumer seek out Pioneer to buy fuel because we would have destroyed the whole brand proposition which is low price fuel.
Q. Sir, you made a calculation at paragraph 35?
A. Right.
Q. And in the calculation, math was done?
A. Right.
Q. And the math was that 0.3 cents per litre price increase by Parkland, the Pioneer branded stations --
A. Right.
Q. And I take it that it assumes just for the purposes of the calculation --
A. Right.
Q. -- that -- no price increases by competitors?
A. Well, again, it's relative.
Q. Is that yes or no?
A. Well, I can't answer that question because my competitors' prices change on a daily basis or even an

hourly basis in some markets.

Q. When you made the calculation, would you know what the fluctuations would be?

A. Well, again, it's a relative price, right?

Q. Right, but would you know what the changes would have been at the time -- you wouldn't know what the fluctuations would have been post you making this calculation, correct?

A. I'm not -- I'm really not following your line of questioning. What we're saying is there is a differential of 30 points. If we were to collapse that, we would lose volume because the whole brand proposition is destroyed.

Q. So let me put it this way. The calculation assumes that all Pioneer sites are .3 cents per litre lower than the competitors in the market?

A. That would be correct.

Q. Can you turn to paragraph 36, sir, of your affidavit.

A. Okay.

Q. So the first sentence, in part, just going to the middle of the sentence beginning with "Parkland," it reads: (As read)

> Parkland estimates that a 1 cent per litre increase at the 17 Pioneer stations in the Commissioner's markets

defined below would result in a reduction of at least [redacted] million litres of sale volume and [redacted] million of EBITDA at these sites.

So, sir, when you say in your affidavit -- when you say "Pioneer stations," just to clarify, you mean Esso or Pioneer branded stations?

A. I would have to confirm that.

MR. DI DOMENICO: I think that's the case, but if it isn't, just let me know, Mr. Rook.

MR. ROOK: You mean the 17 Pioneer stations to which he is referring in his sentence --

MR. DI DOMENICO: Correct.

MR. ROOK: -- includes both Pioneer corporate stores and Pioneer supply wholesale Esso branded outlets?

MR. DI DOMENICO: Yes.

MR. ROOK: All right. We'll --

MR. DI DOMENICO: I think that's the case, but if it isn't, just let me know.

MR. ROOK: If that's not the case, we will let you know.

MR. DI DOMENICO: That's all I'm asking, thank you.

UNDERTAKING NO. 15 - To advise what is meant by "Pioneer stations" as

referenced in paragraph 36 of
Mr. Espey's affidavit

Q. MR. DI DOMENICO: Sir, again, was there a time period used to make this calculation?
A. Sorry, what's your question?
Q. Well, again, similar to the last set of questions, you were estimating a 1 percent price increase --
A. Right.
Q. And a consequential --
A. Sorry, not a 1 --
Q. 1 cent per litre increase --
A. Right, okay, yeah.
Q. -- at 17 stations would result in a reduction?
A. Mmm-hmm.
Q. So this was done with -- some calculation was done --
A. Sure.
Q. -- to come up with this?
A. Right.
Q. Right? Did you do the calculation?
A. Well, my team did the calculation.
Q. When you say your "team" --
A. Right.
Q. -- within Parkland?
A. Absolutely.
Q. Did you retain an economist to do this calculation for

you?

A. I would have to confirm on this one.

Q. When you do that, can you also find out -- did you calculate the elasticity of demand from Pioneer when this calculation was made?

MR. ROOK: We did not do that.

Q. MR. DI DOMENICO: Was an economist retained to come up with this calculation?

MR. ROOK: No.

Q. MR. DI DOMENICO: And, sir, does the -- and, again, I just want to be precise with this question. Does the calculation assume that all Pioneer sites are 1 cent per litre lower than competitors in the markets where the 17 stations are located?

A. I would have to confirm that.

Q. I would have thought it would because it did -- the answer was yes in the previous -- with respect to paragraph 35.

MR. DI DOMENICO: Can you let me know, Mr. Rook?

MR. ROOK: Yes.

UNDERTAKING NO. 16 - To advise whether the calculation in paragraph 36 of Mr. Espey's affidavit assumes that all Pioneer sites are 1 cent per litre lower than competitors in the markets

where the 17 stations are located

Q. MR. DI DOMENICO: Can you -- I want to ask you some questions about the remaining portion of paragraph 36, so let me know when you're ready.

A. Okay.

Q. So, sir, in your paragraph 36, you say -- you assume that volume will fall by 25 percent at the remaining 112 Pioneer branded stations?

A. Yeah, again, that's if we were to change the CVP to -- to the consumer.

Q. Right. I just want to confirm this, sir, in paragraph 36 --

A. Right.

Q. -- you assume volume would fall by 25 percent at the remaining 112 Pioneer branded stations?

A. That's correct.

Q. Sir, are you saying that a 1 percent increase at the 17 gas stations at issue --

MR. HERSH: 1 cent.

MR. DI DOMENICO: Oh, pardon me.

Q. Are you saying that a 1 cent litre increase at the 17 gas stations would, in your view, cause volume to fall by 25 percent at the 112 Pioneer branded stations across Ontario and Manitoba?

A. I believe -- so, again, that -- again, if we were to

change the customer value proposition, we would -- we would potentially deteriorate the network by 25 percent volume.

Q. That wasn't my question. So I'm going to ask it again.

A. Right.

Q. Are you saying that a 1 cent litre increase at the 17 gas stations would, in your view, cause volume to fall by 25 percent at the 112 Pioneer brand stations across Ontario and Manitoba?

A. It would impact the -- the customer value proposition which ultimately has the effect of a significant change in volume.

Q. So is the answer yes or no?

A. It's maybe.

Q. So you don't know, correct?

A. Well, again, I can't predict the future.

Q. So you don't know?

A. I think my intuition would say we would damage the brand.

Q. But that, again, wasn't my question.

A. Right.

Q. You know what my question was. My question is, yes or no, you said maybe. Now, my follow-up question to that is you don't know, do you?

A. Again, my intuition would say that it would.

Q. Right. And I'm not asking about your intuition, sir. I'm asking about what you know.
MR. ROOK: Well, he knows -- his intuition is part of what he knows.
MR. DI DOMENICO: Well, I don't agree with that.
Q. I'm going to ask one more time.
A. And I'm going to give you the same answer one more time.
Q. The answer is maybe -- that's your answer?
A. The answer is my intuition would tell me that we would lose market share and volume.
Q. Have you done a calculation to form the basis of the assumption?
A. Again, our team has.
Q. It has? And when you say your team has, you mean internally to Parkland?
A. It has, yeah.
Q. So can I have production of that, please.
MR. ROOK: I'll take that under advisement.

UNDERTAKING NO. 17 - To provide the calculation that supports the assumption that a 1 cent litre increase at the 17 gas stations would cause volume to fall by 25 percent at the 112 Pioneer brand stations across Ontario

and Manitoba - TAKEN UNDER ADVISEMENT

Q. MR. DI DOMENICO: Just so I understand your evidence, you're saying a 1 percent increase --

MR. ROOK: 1 cent.

Q. MR. DI DOMENICO: Pardon me, I misspoke, a 1 cent litre increase at the 17 gas stations would cause Pioneer branded stations to lose their entire brand equity?

A. It will impact their brand equity.

Q. To lose their brand equity was my question.

A. It would impact their brand equity.

Q. Not lose?

A. Hard for me to tell.

Q. Okay. So, for example -- let's play this out. If there was a 1 percent increase to a Pioneer branded station, and let's say, Chelmsford --

A. You keep talking 1 percent.

Q. That's -- pardon me --

A. It makes my answer easy, no.

Q. I actually deserve that.

MR. HERSH: We may give you a 1 percent jar to put money in.

MR. DI DOMENICO: I deserve it.

Q. So if you assume a 1 cent litre increase to a Pioneer branded station in, let's say, Chelmsford --

A. Sorry, where is Chelmsford.
Q. It's one of the issues at market.
A. Right. I'm not familiar with the geography, so it's not --
Q. I think it's in your Sudbury price zone.
A. Right.
Q. Okay? Do you believe that volume at the Pioneer branded station in Gananoque would fall by 25 percent?
A. Sorry, where is Chelmsford?
Q. Chelmsford is Sudbury, Northern Ontario.
A. Okay, right.
Q. And Gananoque which is also at issue in this litigation --
A. Right.
Q. -- is near Kingston, Ontario.
A. Right. Likely not.
Q. Could you turn to paragraph 43 of your affidavit, please.
A. Okay.
Q. So I don't wish to belabor this point, but in paragraph 43, you make reference to the time period --
A. Mmm-hmm.
Q. -- by which the Competition Bureau reviewed the transaction. Now, without getting into the contents of this, you agree that Parkland made a number of remedied

proposals to the Bureau during the seven month period?
A. There was a lot of dialogue for sure.
Q. Did that include remedy proposals?
A. There were a number of proposals made during that time.
Q. Now, sir, I'm showing you a document which is Parkland's press release dated May 1, 2015. Did you review this press release before it was issued?
A. I did.
Q. And do the contents of the press release remain true and accurate to your knowledge?
A. To my knowledge, they do.
MR. DI DOMENICO: I would like to mark that as the next exhibit, if I may, I believe that's Exhibit 5.

EXHIBIT 5 - Parkland press release dated May 1, 2015

Q. MR. DI DOMENICO: Turn to paragraph 43 -- you are already there at paragraph 43. It's the last sentence that I want to turn your mind to.
MR. ROOK: Sorry, what paragraph now?
MR. DI DOMENICO: Paragraph 43.
MR. ROOK: Yes?
Q. MR. DI DOMENICO: The last sentence -- or two sentences read: (As read)

> The waiver provides that Parkland and Pioneer may each terminate the purchase

agreement with the Competition Tribunal issuing a hold separate order in respect of all or part of the proposed transaction. Copy of the waiver is attached at Exhibit M.

Do you see that, sir?

A. I do.

Q. Could we turn to Exhibit M for a moment. So I just need a little bit of help here. As I read this document, in paragraph -- in particular, paragraph 1(a) and 6(a), it appears to contemplate that Parkland can terminate the purchase agreement. Can you please show me where Pioneer's right to terminate the purchase agreement lies?

A. I will have to defer to my legal counsel.

MR. DI DOMENICO: That's fine.

MS. RILEY: Would you look at paragraph 4?

MR. DI DOMENICO: Yes?

MS. RILEY: The vendors refers to Parkland having the dealer vendors which is, for our purpose, the Pioneer reference in the press release.

MR. DI DOMENICO: We don't have the time here to review it closely, but from what you're saying, it's paragraph 4 --

MS. RILEY: It makes sense.

MR. DI DOMENICO: That is where the Pioneer's right to terminate lies?

MS. RILEY: Yes.

MR. DI DOMENICO: Nothing else?

MS. RILEY: No, this one does -- it says they waived the condition -- it's basically they're waiving various conditions unless the Competition Tribunal has issued an order, 100 or 104 I believe joins the transactions contemplated by the purchase in whole or in part or holds its assets separate. So I'm referring you to paragraph 4.

MR. DI DOMENICO: Okay, thank you.

Q. MR. DI DOMENICO: So, Mr. Espey, if the Commissioner obtains a hold separate for one or more of the markets of Innisville, Aberfoyle, Allanburg or Tillsonburg, will Parkland terminate the purchase agreement?

MR. ROOK: Don't answer that. We have the right to terminate, and Parkland will make whatever decision it has in accordance with the agreement on receipt of the decision of the Tribunal.

OBJECTION TAKEN to answering the question: So, Mr. Espey, if the Commissioner obtains a hold separate for one or more of the markets of Innisville, Aberfoyle, Allanburg or Tillsonburg, will Parkland terminate the purchase agreement?

MR. DI DOMENICO: Has it made that decision yet?
MR. ROOK: No.
Q. MR. DI DOMENICO: And has Pioneer advised Parkland whether it will terminate the purchase agreement if the Commissioner obtains a hold separate order in one or more of Innisville, Aberfoyle, Allanburg or Tillsonburg?
A. I really haven't been dialoguing with Pioneer. It's been through counsel, so I --
Q. So you don't know?
A. I don't know.
Q. Can you just let me know as of the date, I guess, of this examination, whether or not Pioneer has done so by way of an undertaking, sir?
MR. ROOK: We're not going to undertake to do that.
MR. DI DOMENICO: Are you taking it under advisement or are you refusing to do so?
MR. ROOK: I'm refusing.
MR. DI DOMENICO: And the basis being?
MR. ROOK: The basis being that it's not something that is relevant.

UNDERTAKING NO. 18 - To advise whether Pioneer has advised Parkland whether it will terminate the purchase agreement

if the Commissioner obtains a hold separate order in one or more of Innisville, Aberfoyle, Allanburg or Tillsonburg - REFUSED

Q. MR. DI DOMENICO: Can you turn to paragraph 54, sir, of your affidavit.

A. Okay.

Q. So I just want to better understand what you're saying in paragraph 54. So are you saying that because the proposed transaction is an asset deal, that a separate legal entity needs to be established to hold the assets separate?

A. That is my understanding.

Q. So as a consequence, then, of that legal entity being created, separate infrastructure is required for the items that you list at paragraph 55 of your affidavit?

A. Yes.

Q. Is that right? So I'm going to show you a couple of documents. I show you -- this is a -- the first one is a consent agreement that has been filed with the Competition Tribunal between Commissioner of Competition and Agrium Inc. dated April 23rd, 2014.

A. Well, okay.

Q. And I'll pinpoint what I want you to look at. And the second is a consent agreement, again, filed with the

Competition Tribunal between the Commissioner of Competition and IESI-BFC Limited, BFI Canada Inc., Waste Services Inc., and Waste Services (CA) Inc. dated June 30th, 2010.

MR. ROOK: These are all consent agreements that you're now producing in various matters that have been registered with the Competition Tribunal?

Q. MR. DI DOMENICO: So with respect to the consent agreement for Agrium, I want you to turn to page 4.

A. Okay, page 4? Okay.

Q. And you will see subparagraph (x) and (z), (x) being hold separate assets and (z) --

A. Sorry, on page 4?

Q. Page 4. Agrium.

A. I have (jj), (ii) -- okay, (x) and (z), got it.

Q. You see (x) and (z)?

A. Yeah.

Q. So (x) is -- in bold it says "hold separate assets" and in (z), says "hold separate manager." Just have a read.

A. I'm not familiar with this case at all, so --

Q. That's fine. I just want you to read --

MR. ROOK: How is this proper cross-examination? What Agrium chose to enter into an agreement with the Commissioner is all very

interesting, but how it is relevant to what --

MR. DI DOMENICO: Well, I think you will see, but -- Mr. Rook, Mr. Espey spent a great deal of time in his affidavit particularizing hold separate arrangements and what can and cannot be done, so this is proper cross-examination.

MR. ROOK: And that may be true, but that doesn't mean that this document is relevant and proper cross-examination.

MR. DI DOMENICO: I will ask the questions, and you can state your position.

MR. ROOK: All right, thank you.

A. So (x) and (z)?

Q. MR. DI DOMENICO: You have reviewed that. And if you can turn to page 8, I just want to review clause 5 for now.

A. Okay.

Q. If you turn to the Waste consent agreement, turn to page 6.

A. 6? Okay.

Q. Clause 4.

A. Clause 4?

Q. Under the heading "Hold Separate Businesses."

A. Okay.

Q. And finally page 8, paragraph 13.

A. Sure, (a) through (m)?
Q. Just 13(a) through (m).
(DISCUSSION OFF THE RECORD)
(ADJOURNMENT)
Q. MR. DI DOMENICO: So before the break, sir, I had provided you with a copy of what we will call the Agrium and the Waste consent agreements. I referred you to some language in them. Now, before I ask my questions, I will just give you the preface for my question. My reading of this is that these are two examples where you have a closing of a transaction in its entirety where the acquiror owns the assets that are held separate, and then a hold separate manager manages the assets until they are divested or otherwise in order to maintain competition. So having regard to what I just said and what you have reviewed, are you still of the view that a separate legal entity with a separate infrastructure to operate it is needed to hold assets separate?
A. Yes.
Q. Would it surprise you that myself and the Competition Bureau legal team on this case is not aware of a single example of a hold separate arrangement whereby a separate legal entity with a separate infrastructure to operate it was established to hold assets separate?

Would that surprise you?
A. You know, I'm not an expert on hold separates, so I -- I couldn't give an opinion on that.
Q. So could you --
A. The first time I heard of hold separate was throughout this process.
Q. Well, you've provided several details about it in your affidavit.
A. Right.
Q. So my question, then, is can you provide me with an example, therefore, where a hold separate arrangement was made whereby there was a separate legal entity created with a separate infrastructure to operate it in order to hold the separate's assets?
MR. ROOK: Don't answer that question.
MR. DI DOMENICO: On what basis?
MR. ROOK: It's not a proper question.
MR. DI DOMENICO: Why?
MR. ROOK: It's not a proper question to ask. The witness has given his evidence as to why it is in his view that whatever it is your client is proposing, in this case, but generally characterized as a hold separate which requires -- a hold separate as is described in these paragraphs is not an appropriate remedy. And you can cross-examine about that, but to

ask him the question you're asking him, in my submission, is not appropriate.

OBJECTION TAKEN to answering the question: So my question, then, is can you provide me with an example, therefore, where a hold separate arrangement was made whereby there was a separate legal entity created with a separate infrastructure to operate it in order to hold the separate's assets?

MR. DI DOMENICO: I would like to mark these consent agreements, if I may, as the next exhibits. So it would be 6 and 7.

MR. ROOK: These consents agreements don't have to be marked. These are on the public record and the Competition Tribunal can refer to them, if they wish, in the course of their deliberations. They don't have to be marked as exhibits.

MR. DI DOMENICO: So my preference is they would be, so I would like to mark them if I may.

MR. ROOK: Let it be clear that this witness has not identified these documents. That's all I'm saying.

MR. DI DOMENICO: Well, he's reviewed the paragraphs I've asked him to review.

MR. ROOK: Fair enough. That doesn't mean they are properly admissible as exhibits.

MR. DI DOMENICO: I'm going to mark them, please. Can you please mark them. Is that 7 and 8.
MR. LEE: 6 and 7.
MR. DI DOMENICO: Pardon me, 6 and 7.
MR. ROOK: Which is which?
MR. DI DOMENICO: 6 would be Agrium.

EXHIBIT 6 - Consent agreement filed with the Competition Tribunal between Commissioner of Competition and Agrium Inc. dated April 23rd, 2014

MR. DI DOMENICO: And 7 would be Waste.

EXHIBIT 7 - Consent agreement filed with the Competition Tribunal between the Commissioner of Competition and IESI-BFC Limited, BFI Canada Inc., Waste Services Inc., and Waste Services (CA) Inc. dated June 30th, 2010

Q. MR. DI DOMENICO: Could you turn to paragraph 57 of your affidavit, sir?
A. Okay.
Q. Can you review it?
A. Yeah. Okay.
Q. All right, sir. So in your view, then, a hold separate order that continues for 12 months will increase costs to Parkland in the aggregate amount of approximately

[redacted] million?
A. That is correct.
Q. And of that [redacted] million, just to break this down, [redacted] represents the supply which you regard as supply efficiencies that would be lost?
A. That's incorrect.
Q. What is it then?
A. Well, it says right here. So the lost efficiencies would be supply, the benefits of the C store, convenience store integration, and the potential loss.
Q. What I was going to say -- I want to avoid confusion. I'm trying to breakdown the [redacted]. So, as I understand it, [redacted] represents the supply efficiencies and [redacted] million would represent the incremental costs. Is my math right?
A. What are you -- what's your definition of "supply"?
Q. So I guess if you look at paragraph (a) --
A. Right.
Q. -- 57 --
A. There is three components.
Q. Yes, but they total [redacted] million?
A. Right.
Q. That's where I'm getting the [redacted] million number from.
A. So, again, there is two aspects there that are fuel supply driven, and one aspect that's associated with

convenience store.
Q. Right. So what do they total?
A. They total [redacted] but they are not supply.
Q. Gotcha. So why don't we put it this way, forget the word "supply" then --
A. Sure.
Q. -- [redacted] represents efficiencies that you regard would be lost in the amount of [redacted] million?
A. That's correct.
Q. All right. And [redacted] million would represent the incremental costs?
A. That's correct.
Q. So let's just focus for a moment on the [redacted] number.
A. Sure.
Q. So if the hold separate business or legal entity, as you put it, purchases gasoline and convenience store items from Parkland, do you agree that the [redacted] million and potential supply efficiencies at paragraph 57 -- let me retract that, get rid of the word "supply." So if you hold separate business or legal entity, as you put it, purchase gasoline and convenience store items from Parkland, do you agree that the [redacted] million in potential efficiencies that you articulate at paragraph 57(a) could still be achieved?
A. Repeat your question.

Q. No problem. If a hold separate business or legal entity, as you put it in your affidavit, was created and if that entity purchased gasoline and convenience store items from Parkland, do you agree that the [redacted] million in potential efficiencies described at paragraph 57(a) could still be achieved?
A. Sorry, say that one more time.
Q. Not a problem. So the hold separate business --
A. Right.
Q. -- or entity, if I could put it, purchases gasoline and convenience store items from Parkland --
A. Mmm-hmm.
MR. ROOK: As opposed to Imperial; is that what you're suggesting?
MR. DI DOMENICO: Yes.
Q. Do you agree that the [redacted] million in potential efficiencies that you identified at paragraph 57(a) could still be achieved?
A. I can't confirm that.
Q. I'm going to ask you a similar question with the [redacted] million number. If Parkland delivers fuel to the hold separate business or legal entity, do you agree that the costs described at paragraph 57(b)(i) and (ii) would not be incurred?
MR. ROOK: Once, again, are you assuming in

the question that Imperial permits Parkland to buy the fuel from Imperial and then effectively resell it?

MR. DI DOMENICO: Yes.

A. Sorry, you're assuming that -- that Imperial Oil enables us to sell to this entity on a wholesale basis?

Q. Yes.

A. I'm sorry, so your question is?

Q. I will ask it again. If Parkland delivers fuel to the hold separate business or legal entity, do you agree that the costs described at paragraph 57(b)(i) and (ii) would not be incurred?

A. That's very difficult for me to predict at this point. I would need to seek clarity on what the arrangement is.

Q. So you don't know?

A. I don't know.

Q. Can you turn to paragraph 59(c).

A. Okay.

Q. So at (c)(i) --

MR. ROOK: Just a moment, what paragraph are you in again?

MR. DI DOMENICO: It's paragraph 59.

MR. ROOK: Yes?

MR. DI DOMENICO: (c) --

MR. ROOK: Thank you.

MR. DI DOMENICO: -- (i).
Q. Just for clarity, I will read it out. The portion of the paragraph I'm going to ask about reads, (i): (As read)

> 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 and Parkland's current supply agreements with independent dealer stations as appropriate.

I want to explore what "as appropriate" means. So when you use the phrase "as appropriate," are you saying that there are circumstances where the rack forward margin that Parkland will charge to independent dealers will be greater than it has been under Pioneer's or Parkland's current supply agreement with independent dealer stations?
A. We would not increase the price.
Q. So what does "as appropriate" mean?
A. I will ask my lawyers. I'm not an English major, so...
MS. RILEY: It's supposed to link Pioneer to Pioneer and Parkland to Parkland.
MR. ROOK: Perhaps. The word should have been "respectively."

MS. RILEY: "Respectively."
Q. MR. DI DOMENICO: Sir, could you turn to paragraph 61 of your affidavit.
A. Okay.
Q. So, sir, have you had a chance to review the affidavit of Alexander McNabb?
A. I have reviewed sections of it.
Q. Okay. What sections have you reviewed?
A. I can't recall off the top of my head.
Q. Maybe your counsel can help us.
MR. ROOK: I can't. I can't help you.
Q. MR. DI DOMENICO: When you say "sections," did you -- can you turn to -- have you read the body of the affidavit, in other words, the paragraphs where he describes things as opposed to the exhibits? Do you understand the difference between the exhibits and --
A. I do, yeah.
Q. So did you review the affidavit as a whole?
A. I skimmed it.
Q. Okay. So you reviewed it, that's fine. And did you review the exhibits to the affidavit?
A. Not all of them.
Q. You had an opportunity to review them?
A. Yeah.
MR. ROOK: For the record, he only saw a

redacted version --

A. That's true.

MR. ROOK: -- of both the affidavit and the exhibits.

MR. DI DOMENICO: And these are the redactions that were proposed by counsel for the Competition Bureau?

MR. ROOK: Correct.

MR. DI DOMENICO: That's the answer I was hoping that you would tell me so I would know.

Q. So, sir, the second sentence of paragraph 61 reads: (As read)

> Although I did not author or receive many of these e-mails, they relate to Parkland's competition for wholesale supply to independent dealer stations, not to the retail sale of gasoline.

So you use the word "many." So you note that you did not author or receive many of these e-mails which refer to the e-mails attached at Exhibits P to T to Mr. McNabb's affidavit. Do you see that?

A. I see the wording here.

Q. Right. So what e-mails did you author or receive?

MR. ROOK: Sorry, what e-mails did he what?

MR. DI DOMENICO: Author or receive.

A. I did not author or receive many.

MR. ROOK: Is there --
Q. MR. DI DOMENICO: Just so I can understand, at paragraph 61, right?
A. Right.
Q. I will read the whole paragraph for clarity. It says: (As read)
I have reviewed --
A. I -- I understand what you're asking.
Q. You write: (As read)
Although I did not receive many of these e-mails.
A. Right.
Q. Which means you did review some or author some. That's how I infer that sentence to read.
MR. ROOK: Well, I'm speaking from recollection here, but I believe there is one --
A. Yeah, there is one.
MR. ROOK: -- that Mr. Espey received.
MR. DI DOMENICO: Which one is it?
MR. ROOK: I would have to look at the --
MR. DI DOMENICO: Okay.
MR. ROOK: -- list. I can't remember off the top of my head. Are you asking us to figure out which it is here or --
MS. RILEY: There is one with his name on it

as a recipient and author. It's through a chain.

MR. ROOK: Do we know which one it is?

MS. RILEY: I don't have it with me, sorry.

MR. DI DOMENICO: Let's go off the record for a second.

(DISCUSSION OFF THE RECORD)

Q. MR. DI DOMENICO: So, sir, what I was asking before we went off the record is what among the e-mails attached at Exhibits P to T of Mr. McNabb's affidavit did you review or author? So there is an e-mail at Exhibit T of Mr. McNabb's affidavit from Peter Kilty to yourself and others dated September 27th, 2014. Do you see that?

A. I do see that, yes.

Q. So other than this e-mail, did you receive or author any of the e-mails at Exhibits P to T of Mr. McNabb's affidavit?

MR. ROOK: Based on our review while we were off the record, we can't see any others. So I don't believe there are any others.

MR. DI DOMENICO: If there are, just let me know.

MR. ROOK: Yes, fair enough.

UNDERTAKING NO. 19 - To advise if there are any other e-mails that were received or authored by Mr. Espey other

than Exhibit T of Mr. McNabb's affidavit

MR. ROOK: Are you finished now with that?

MR. DI DOMENICO: Yes, I am.

Q. So, sir, I am showing you a Power Point presentation dated April 20th, 2015 called "Pioneer Acquisition Update."

A. Okay.

Q. Do you recognize this document?

A. I do, and, in fact, sat across the table and reviewed it with you.

Q. Okay. So just to confirm, that you attended the offices Competition Bureau on April 20th, 2015 and presented this Power Point presentation to the case team?

A. I would have to check my diary to confirm the exact date.

Q. But otherwise yes?

A. Yes.

MR. DI DOMENICO: So if I may, I would like to mark this as the next exhibit.

EXHIBIT 8 - Power Point presentation dated April 20th, 2015 entitled "Pioneer Acquisition Update"

Q. MR. DI DOMENICO: Turn to slide 15 of the Power

Point presentation.

A. 15?

Q. Slide 15.

MR. ROOK: 1-5?

A. Okay.

Q. MR. DI DOMENICO: Sorry, it seems obvious, but I take it you reviewed the Power Point presentation before you presented it to the Competition Bureau on April 20th?

A. I did.

Q. And you confirm that the information was accurate and complete as far as you know?

A. To the best of my knowledge.

Q. Sir, at slide 15, it makes reference to the following, it says: (As read)

> Parkland has made significant effort to retain key Pioneer staff including a generous retention package and increases and salary to ensure and benefits to ensure that the brand is upheld in the Ontario market.

A. That's correct.

Q. And underneath that heading or sentence, is a list of four individuals. Do you see that?

A. I do see that.

Q. That is Tim Hogarth, Brian Kitchen, Haydn Northey and David McLachlan (sic)?
A. Dave MacFarlane.
Q. MacFarlane, pardon me. Brian Kitchen denotes that -- the vice president of dealer operations. Brian has been asked to join Parkland's retail team?
A. That's correct.
Q. Is that still true and accurate?
A. I believe so.
Q. And with respect to Haydn Northey, the Vice President of Retail Operation: (As read)

> Haydn has been asked to lead Parkland's Eastern Retail Operations.

Do you see that?
A. I do see that.
Q. Is that still the case?
A. I would -- I would have to confirm. I think he may be on sick leave right now. I think that offer is open.
Q. If it's not, just let me -- well, I will assume it is. Turn to slide 18, please.
A. Okay.
Q. At bullet number 2.
MR. ROOK: "Given" -- is that the paragraph you're looking at?
MR. DI DOMENICO: No, "Parkland conducted an

investigation..."

MR. ROOK: I'm sorry, I'm looking at the wrong page, sorry.

MR. DI DOMENICO: No, not at all.

Q. Now, sir, it reads: (As read)

Parkland conducted an investigation into the three documents provided by the Bureau the results of which were...

And then it outlines the explanation. Now, just to confirm, the three documents referred to here, as I understand it, are Exhibits P, R and S to Mr. McNabb's affidavit just so we're on the same page.

A. I can't confirm that.

Q. Well, let's just assume that's the case.

MR. ROOK: Sure.

MR. DI DOMENICO: But -- if I'm wrong, let me know, but that's my understanding.

MR. ROOK: Yes.

A. From -- see P, R and S?

Q. MR. DI DOMENICO: Yes.

MR. ROOK: Well, let's assume that's correct.

A. Okay.

MR. ROOK: We had not been supplied with the -- by the Bureau with T, what is now Exhibit T to Mr. McNabb's affidavit, as I understand it. In other

words, the e-mail that you asked -- or that we identified that Mr. Espey received a copy of, that was not one of the three documents that the Bureau had given to my client prior to this meeting on April the 20th.

MR. DI DOMENICO: Right. What I was referring to was Exhibit P, R and S.

MR. ROOK: Well, I believe, subject to correction, that your assumption is correct.

MR. DI DOMENICO: Thank you.

Q. So 59, bullet number 4, begins with: (As read)

For the most part --

MR. HERSH: Which page?

MR. DI DOMENICO: Same page.

A. Okay.

Q. Sir, it reads: (As read)

For the most part, discussions between Esso brand and wholesalers (SLBWs) was largely due to confusion with IOL's directions/expectations of its BWs especially in light of the [redacted]

I just want to ask you when you say "confusion" was for

the most part or largely -- well, the discussions were for the most part largely due to confusion --

A. That's correct, yeah.

Q. -- that's how I read this; but what is the other reason, though, for these discussions? Because you prefaced it with "for the most part" and "largely" which means there is another component. I would like to know what that component is?

A. My understanding was it was confusion with the way that IOL was administering these -- these -- the branded wholesaler zones or whatever you call it, territories.

Q. Sir, when these e-mails were provided to you --

A. Right.

Q. -- that you -- you say here that you investigated --

A. Sorry, I didn't say this. I reviewed this document.

Q. You presented this document yourself?

A. Yeah.

Q. To the Competition Bureau?

A. Right, but we didn't talk through this page.

Q. The second bullet reads: (As read)

> Parkland conducted an investigation into the three documents provided by the Bureau.

A. Right.

Q. So I take it that's true?

A. We did, yeah, absolutely.
Q. There was an investigation of three documents. And then as a result of the investigation, what I'm reading in your slides is that for the most part --
A. Right.
Q. And then it was discussions between Esso branded wholesalers was largely due to confusion with IOL's directions/expectations --
A. Right, there was.
Q. -- I'm just trying to understand. I understand that part.
A. Right.
Q. I don't know the other part.
MR. ROOK: Well, do you recall today whether there was anything else in these e-mails? That's the question I think he's asking.
A. So I don't recall.
Q. MR. DI DOMENICO: You don't recall. Is that information in the possession of Parkland?
A. Which information?
Q. The other component of what led to the -- you say the discussions were largely due to -- for the most part and largely due to confusion. So the discussions were also the result of something else. I asked you what that something else was, and you say you don't know.

Now, my question is, is that information in the possession of Parkland?

A. I'm not sure.

Q. Can you please look into that?

A. Sure.

MR. DI DOMENICO: Mr. Rook, and, if it is, I would like to know --

MR. ROOK: We will look into it, but I think you should assume, unless we advise you to the contrary, that whatever is in issue here is what is in the e-mails itself. And if I can just illustrate because there is a host of these undertakings, P is one of the documents to which you were referring. There is a reference at the bottom of page 988 to refusal to deal issues that the author of this document was concerned about which is not within the -- the four corners of the confusion relating to IOL and what IOL wanted or didn't want.

MR. DI DOMENICO: That's fine, but you can appreciate where I'm coming from, Mr. Rook --

MR. ROOK: No, I understand where you're coming from. If there is any other fruits of the investigation other than what we've said in this document, we'll advise you of that.

MR. DI DOMENICO: My point is, though, there is

clearly something else other than discussions between the Esso branded wholesalers.

MR. ROOK: Unless that's just a figure of speech that whoever authored this document put that in.

MR. DI DOMENICO: You are all very sophisticated people. And to write in "for the most part" and "largely due to," I would submit, is quite intentional. So I just want to know, that's all, what the other parties --

MR. ROOK: And you have my undertaking.

MR. DI DOMENICO: Okay.

UNDERTAKING NO. 20 - To advise if there are any other results of the investigation other than what's stated in bullet number 4 of paragraph 59 of the affidavit

(DISCUSSION OFF THE RECORD)

Q. MR. DI DOMENICO: Sir, you mention that you have skimmed or reviewed Mr. McNabb's affidavit?

A. That's correct.

Q. And as you know then or should know, the e-mails do show -- Mr. McNabb makes reference to a series of e-mails.

A. Yeah, sure.

Q. Both involving Parkland and Pioneer.

A. Right.
Q. And the e-mails show price communications between Pioneer and other retail gas stations about the prices charged in the market.
A. You know, I can't comment on Pioneer's pricing practices. I don't run that business. I have no insights into that. You know, we've -- we've -- at this point, I can't -- I can't comment on the behavior of that team. They are not my team.
Q. Based on your review of these e-mails alone, you agree that this shows price communication between Pioneer --
A. I found the e-mails, because it's a redacted version, very difficult to follow. So I was not able to draw conclusions out of them.
Q. Again, you used the redactions that the Competition Bureau provided to Mr. Rook.
A. I used -- I don't know who provided them.
Q. Mr. Rook has confirmed that.
A. I found them with a bunch of blackouts, and it was really very difficult to follow, so...
Q. With respect, sir, I have reviewed those, as well --
A. Right.
Q. -- and I think they are quite easy to follow.
A. Right.
Q. But we can agree to disagree on that, but I --

A. Again, I don't feel it's my position to comment on Pioneer and how they run their business. That is their business and not mine.
Q. Sir --
A. I can tell you that Parkland has a different set of discipline in place. We've got a really structured process around -- every employee goes through Competition Bureau training. It's also a market that we don't participate in. We don't participate in the Ontario market.
Q. So you don't want to answer the question then, that's what you're telling me?
A. No, what I'm saying is it's not clear to me from the e-mails.
MR. ROOK: This is argument. Why don't you move to your next question.
Q. I will ask one more time. I just want to make sure it's clear. And you can state your position and we will move on. I'm talking the series of e-mails attached to Mr. McNabb's -- referred to in Mr. McNabb's affidavit as well as attached as exhibits.
A. Right.
Q. In particular, paragraph 25 of Mr. McNabb's affidavit, correct?
A. Well --

MR. ROOK: Let him finish the question.
A. Sure.
Q. MR. DI DOMENICO: So the e-mails show price communications between Pioneer and other retail gas stations about the prices to be changed in the market. Do you agree with that?
MR. ROOK: Don't answer that question.
A. I would have to --
MR. ROOK: And I don't agree with the premise of the question I might add.
OBJECTION TAKEN to answering the question: So the e-mails show price communications between Pioneer and other retail gas stations about the prices to be changed in the market. Do you agree with that?
Q. MR. DI DOMENICO: And you don't, sir, given your experience in fuel and retail gasoline as a whole, don't disagree that in certain circumstances retail gas stations can and do coordinate regarding retail gas prices?
A. You would have to define --
MR. ROOK: What do you mean?
A. Yes, what do you mean by that?
Q. MR. DI DOMENICO: Exchange information about pricing.
MR. ROOK: So you're talking about collusion?

A. Not in our --
MR. DI DOMENICO: No, I'm talking about communications.
A. Not in our business.
Q. I'm not talking about Parkland's business, I'm not asking that.
A. Right.
Q. You don't disagree that in certain circumstances retail gas stations have coordinated regarding --
A. I'm not an expert on competition in the Canadian marketplace, and you probably have more insights into that than I do.
Q. So the answer is you don't know? You know my question, sir, I'd just appreciate your answer.
MR. ROOK: Well, I don't think it's a proper question. This witness is here to talk about his business, how he runs his business and any concerns that you have about it. What Pioneer or what others may have done is not really germane in my submission.
OBJECTION TAKEN to answering the question: You don't disagree that in certain circumstances retail gas stations have coordinated regarding --
MR. DI DOMENICO: I wasn't asking about Pioneer in my question, though --
MR. ROOK: Well, generally --

Q. MR. DI DOMENICO: What I was asking about is you don't disagree having regard to -- you have a vast amount of experience --
A. I am not experienced --
Q. Sir, let me finish my question.
MR. ROOK: Let him ask his question.
Q. MR. DI DOMENICO: You have a vast amount of experience in the retail gas space, correct?
A. Yeah.
Q. How many years do you --
A. I've been in this business for 6 1/2 years.
Q. Okay. So you don't disagree that in certain circumstances that retail gas stations have and can coordinate regarding retail gas prices?
A. So in my experience, I have not experienced that.
Q. In your own company, is that what you're saying?
A. In my company.
Q. But you don't disagree with that proposition that's gone on elsewhere?
A. I can't confirm that. I mean...
Q. What do you think?
MR. ROOK: How is that --
A. What do I think?
Q. MR. DI DOMENICO: Yes. Do you disagree with the proposition that in certain circumstances --

A. Right.
Q. -- retail gas stations have and can coordinate regarding retail gas prices?
A. This seems like a very hypothetical question to me.
Q. No, it's not.
A. So I'm not going to answer it.
Q. You're not going to answer it?
A. No.
OBJECTION TAKEN to answering the question: Do you disagree with the proposition that in certain circumstances retail gas stations have and can coordinate regarding retail gas prices?
MR. DI DOMENICO: Okay. Take a 5 minute break.
(ADJOURNMENT)
Q. MR. DI DOMENICO: So, Mr. Espey, I just want to briefly return to this issue of volume and hold separate assets that we were talking about earlier, just by way of clarification for me. So, as I understand it, Imperial Oil sells non-branded gasoline to distributors?
A. Well, they sell branded gasoline to distributors.
Q. What about non-branded gasoline?
A. Well, through our wholesale channel, we do move unbranded gasoline, right.
Q. So Parkland is a purchaser of that non-branded

gasoline?
A. Sure.
Q. And Parkland then, in turn, could sell that gasoline to anyone?
A. Well, we can't sell it into another branded channel, right?
Q. Right.
A. Because it has proprietary additives.
Q. But other than that, it can sell to anyone other than that exclusion?
A. That's -- that's true, yeah.
Q. So could, then, Parkland purport to deliver or supply such non-branded gas to any assets that may be held separate?
A. No.
Q. Why?
A. Because there is brand assets within those markets.
Q. But there are also non-branded assets?
A. There are non-branded assets.
Q. So could it do so for the non-branded assets?
A. I mean could it supply unbranded fuel to a hold separate entity or a separate entity?
Q. Or assets, yes.
A. Yeah, provided there is some sort of mechanism to invoice and account for it, sure. And that they have

the right credit.
Q. And why couldn't it do so for branded?
A. Because [redacted].
Q. Now, if Parkland were to purchase such non-branded fuel, would it still receive -- potentially receive volume discounts based on volume purchased from Imperial Oil?
A. Sorry, if it were to?
Q. So if it were to supply such -- in the manner we just described, if it were to purchase non-branded fuel --
A. Right.
Q. -- would it still be eligible to the volume discounts based on the amount of fuel it could purchase? Is it entitled to a volume discount?
A. Yeah, I don't follow though. So -- so what's the purpose of the separate entity.
Q. Well, let's say it was a hold separate in this case.
A. Right.
Q. And Parkland was supplying non-branded fuel to them --
A. Right.
Q. -- all I'm asking now is in your affidavit you make reference to volume discounts that Parkland is eligible for from a refiner like Imperial Oil. Based on the more -- I take it the more volume you purchase, you are eligible, therefore, for a potential discount?

A. Our -- our discounts require us to purchase a certain amount of fuel.
Q. Right.
A. Independent of the supplier.
Q. So if you were to supply this non-branded fuel to --
A. Right.
Q. -- to -- to a hold separate entity, Parkland would not be precluded from receiving volume discounts?
A. For how long?
Q. I'm just saying -- I know it would vary depending on the volume.
A. Right.
Q. But there is nothing precluding Parkland, assuming it obtains a requisite volume to obtaining those volume discounts from Imperial Oil --
A. Well, it depends for how long, right?
Q. I understand that, but there is nothing precluding, though --
A. Well, as long as the volume is maintained.
Q. Yes.
A. Maintained to Parkland.
Q. Right.
A. Right?
Q. The answer would be yes then?
A. The answer would be yes.

Q. And just so I understand, does Parkland receive volume discounts on gasoline from terminals other than Imperial Oil?

A. Absolutely.

MR. DI DOMENICO: So subject to the answers to undertakings, questions refused and ordered to be answered or any subsequent documentary publication, those are my questions.

MR. ROOK: Thank you. I have a few questions by way of reexamination, Mr. Espey.

Mr. Rook reexamines the witness:

Q. Am I correct or do you know whether Pioneer stations are currently supplied by Imperial with gasoline?

A. Well, I don't have -- so when you say "Pioneer stations," we're talking about Pioneer brand or Pioneer owned --

Q. Pioneer branded stations. Do Pioneer branded stations currently obtain gasoline from Imperial?

A. You know, I am aware that Pioneer does buy some unbranded volume from Imperial, but where they put that in their network, I don't have oversight. So it is possible, but I can't say definitely.

Q. Okay. What position, if any, has Imperial taken to this point about its willingness to supply fuel to Parkland should the Competition Tribunal issue a hold

separate order?

A. Well, they have taken a position that they [redacted].

Q. And when did you first become aware that Imperial might take --

A. Yesterday.

Q. -- that position? Pardon?

A. Yesterday evening.

Q. And what would be the impact on Parkland if Imperial refused to provide consent?

A. Oh, the economics of the deal wouldn't work.

Q. Why not?

A. Why? Because the -- the -- part of the transaction is the Pioneer sites and the Imperial Oil sites, right? So we're buying both and we're not just going to buy one.

MR. ROOK: Thank you, those are my questions.

(Proceedings ended at 12:28 p.m.)

Certificate of Transcript

I, the undersigned, hereby certify that the foregoing pages 1 to 94 are a complete and accurate transcript of the proceedings taken down by me in shorthand and transcribed from my shorthand notes to the best of my skill and ability.

Dated at the City of Calgary, Province of Alberta, this 7th day of May, 2015.

"Michele Gibson"

Michele Gibson, CSR(A)

Official Court Reporter

- I N D E X -

ROBERT ESPEY

May 7, 2015

The following is a listing of exhibits, undertakings and objections as interpreted by the Court Reporter.
The transcript is the official record, and the index is provided as a courtesy only. It is recommended that the reader refer to the appropriate transcript pages to ensure completeness and accuracy.

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UNDERTAKING NO. 3 - To advise the particulars of the price increases if Parkland increased rack forward margins to independent dealers in the province of Manitoba within the past three years, when the increases took place and by how much 7

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UNDERTAKING NO. 18 - To advise whether Pioneer has advised Parkland whether it will [redacted] if the Commissioner obtains a [redacted] - REFUSED		57

UNDERTAKING NO. 19 - To advise if there are any other e-mails that were received or authored by Mr. Espey other than Exhibit T of Mr. McNabb's affidavit		73
UNDERTAKING NO. 20 - To advise if there are any other results of the investigation other than what's stated in bullet number 4 of paragraph 59 of the affidavit		82
	OBJECTIONS	
OBJECTION TAKEN to answering the question: That Parkland does not advise independent dealers of what price zones they are in and that the other independent stations that are within that given zone?		37
OBJECTION TAKEN to answering the question: So, Mr. Espey, if the Commissioner obtains [redacted] will Parkland [redacted]		56

OBJECTION TAKEN to answering the question: So my question, then, is can you provide me with an example, therefore, where a hold separate arrangement was made whereby there was a separate legal entity created with a separate infrastructure to operate it in order to hold the separate's assets? 63

OBJECTION TAKEN to answering the question: So the e-mails show price communications between Pioneer and other retail gas stations about the prices to be changed in the market. Do you agree with that? 85

OBJECTION TAKEN to answering the question: You don't disagree that in certain circumstances retail gas stations have coordinated regarding -- 86

OBJECTION TAKEN to answering the question: Do you disagree with the proposition that in certain circumstances retail gas stations have and can coordinate regarding retail gas prices? 88

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TAB A

DATE MAY 7, 2015 EXHIBIT NO. 1
EXAM. OF ROBERT ESPEY
Michele Gibson, CSR(A)
Amicus Reporting Group

To: Rob M. Wilston [redacted]
From: Leon P. Chabot
Sent: Thur 10/04/2014 4:34:34 PM
Importance: Normal
Subject: 50936 - Azilda Renewal DET
MAIL_RECEIVED: Thur 10/04/2014 4:34:35 PM
50936 - Azilda - Renewal DET - March 28, 2014.xls
Azilda Esso.jpg

Hi Rob,

Based on earlier discussion, Azilda Renewal DET will move Zone price from [redacted] cpl to [redacted] cpl, dealer payment from [redacted] to [redacted] cpl. Includes $[redacted] f.l. toward dealer's plan to replace lines and possibly tanks this summer and $[redacted] towards minor image upgrades. Loan to be written off at a rate of [redacted].

Will go in with $[redacted] f.l. and $[redacted] toward site image improvements.

Thanks,

Leon Chabot | Territory Manager [redacted]

Parkland Fuel Corporation

Retail Operations East

#236, 4919-59th Street, Red Deer, AB T4N 6C9

[redacted]

TAB B

DATE MAY 7 2015 EXHIBIT NO. 2

EXAM. OF ROBERT ESPEY

Michele Gibson, CSR(A)
Amicus Reporting Group

To: Rob M. Wilston[redacted]
Cc: Leon P. Chabot[redacted]; Matthew P. Braymar[redacted]
From: Rhea A. Perepelkin
Sent: Thur 30/10/2014 1:29:26 PM
Importance: High
Subject: FW: 50936 - Azilda, 50991 - Capreol, 50936 - Warren Form 120s Effective Nov 1 - [redacted] Price Zone Adjustment / New price zone for[redacted]
MAIL_RECEIVED: Thur 30/10/2014 1:29:32 PM
Approved AFE- Mikes Gas Bar Azilda, ON Oct 8,14.pdf
50936 Mike's Gas Bar & Auto Sales Form 120 - Contract Renewal Oct 20-14.xls
50991 Tom's Esso Form 120 - Fixed pro-fee - Oct 27-14.xls
50996 Warren Esso Form 120 - new price zone Oct 27-14.xls

Hey Rob,

I just want to clarify if 50615 - Jeremy's Truck Stop, is also moving with the [redacted] Price Zone? They are currently sitting at RGL[redacted] and PRM[redacted].

Let me know, thanks!

Rhea Perepelkin | Fuel Program Coordinator

Parkland Fuel Corporation

#100 4919 59 Street, Red Deer, AB, T4N 6C9 [redacted]

From: Randi M. Dale x6717
Sent: Tuesday, October 28, 2014 10:03 AM
To: Rhea A. Perepelkin

Subject: FW: 50936 - Azilda, 50991 - Capreol, 50936 - Warren Form 120s Effective Nov 1 - [redacted]
Price Zone Adjustment / New price zone for [redacted]
Importance: High

You okay making these changes? Looks like adding a zone, just let me know if you need a hand…

For 50991 the [redacted] profee, just make sure that it's noted on the workbook like the others with [redacted] profees so we don't adjust them by accident. Makes for a cranky dealer…

Randi Dale | Fuel Program Specialist

Parkland Fuel Corporation

#100 4919 59 Street, Red Deer, AB T4N 6C9

[redacted]

From: Rob M. Wilston
Sent: October 27, 2014 8:59 AM
To: Randi M. Dale x6717; Rachelle C. Arcinas
Cc: Leon P. Chabot; Matthew P. Brayman
Subject: Fw: 50936 - Azilda, 50991 - Capreol, 50936 - Warren Form 120s Effective Nov 1 - [redacted]
Price Zone Adjustment / New price zone for [redacted]
Importance: High

Please enact these changes for these three sites effective Nov 1st. This is in accordance with market pricing in that area, the Azilda resign and better positions [redacted] for resign at a future date.
[redacted] is quite a distance from Sudbury and should be in its own zone of [redacted] or probably more accurately, [redacted]

R.M. (Rob) Wilston
Dealer Operations Manager-East
Manitoba, Ontario + Maritimes
Parkland Fuel Corporation
[redacted]

From: Leon P. Chabot
Sent: Monday, October 27, 2014 08:44 AM
To: Rob M. Wilston
Cc: Matthew P. Brayman
Subject: 50936 - Azilda, 50991 - Capreol, 50936 - Warren Form 120s Effective Nov 1 - [redacted] Price Zone Adjustment / New price zone for [redacted]

Hi Rob,

Per approved AFE for 50936 – Azilda, effective Nov 1, 2014 [redacted] Zone price to be adjusted upward with dealer receiving a dealer payment. [redacted] **Zone processing fees for EREG & DIESEL moving to** [redacted] **and PREM to** [redacted] **on Nov 1.** New Supply Agreement Expiry Date / Contract end date: October 31, 2024; New Dealer payment at [redacted]

The other dealer in the [redacted] price zone, 50991 – [redacted] Esso, was unwilling to amend or renew his contract to accommodate a zone price increase. Therefore please **move 50991 –** [redacted] **out of the** [redacted] **price zone to a** [redacted] **processing fee**. Processing fees for EREG & DIESEL to remain at [redacted] and PREM at [redacted].

Require a new price zone for 50996 – Warren to maintain current processing fees (EREG/DSL at [redacted] and PREM at $[redacted]). Form 120 is attached suggesting **creation of** [redacted] **price zone for** [redacted] and use current [redacted] processing fees for the new zone. Move [redacted] to new price Zone November 1, 2014.

Regards,

Leon Chabot | Territory Manager (North Central Ontario)

Parkland Fuel Corporation

Retail Operations East

#236, 4919-59th Street, Red Deer, AB T4N 6C9

[redacted]

.CC Matt Brayman

TAB C

DATE MAY 7, 2015 EXHIBIT NO. 3
EXAM. OF ROBERT ESAEV
Michele Gibson, CSR(A)
Amicus Reporting Group

To: Rob M. Wilston[redacted]
From: Brent Smith
Sent: Thur 28/02/2013 12:00:02 PM
Importance: Normal
Subject: RE: Price zone process
MAIL_RECEIVED: Thur 28/02/2013 11:59:00 AM

I will ask Randi to set the spread at [redacted] cpl, so this site will be at rack plus [redacted] cpl…a full [redacted] per liter lower than they were before the zone implementation. Any further changes to zone pricing will have to wait until I do the [redacted] review [redacted]

The whole point of having different zones is to reflect the differences in [redacted] factors, and the effect the have on [redacted] etc. The [redacted] between [redacted] differs from zone to zone, and the view is that the Esso brand in [redacted] is [redacted], and therefore the spread between Esso and [redacted] is [redacted]. Because there is a spread of X in one area, doesn't mean there must be the same spread in another, as long as it is [redacted] within the zone.

This site would have seen a price drop of [redacted] cpl from previous by getting put into this zone the way I had initially set it up. If things would have been left the way I set them up to begin with, this would not be an issue, the 2 Esso's that were upset wouldn't have been, and this site would have been very happy to see their price drop by [redacted] per liter. These things were all factored in when I set these zone up initially. Now, instead of being happy with a [redacted] decrease they would have gotten originally, they may be upset, in spite of the decrease and it will cost us an extra [redacted] per liter.

Sincerely,

Brent Smith| Manager Optimization, Retail Operations

Parkland Retail Fuels

A division of Parkland Fuel Corporation

#236, 4919-59th Street, Red Deer, AB T4N 6C9

[redacted]

[redacted]

NOTICE OF CONFIDENTIALITY

From: Rob M. Wilston
Sent: Thursday, February 28, 2013 8:00 AM
To: Randi M. Dale x6717; Brent Smith
Cc: Matthew P. Brayman
Subject: RE: Price zone process

Thanks, works, except for 50319-Derry Rd RT. As an unbranded vs the Esso sites it needs to be [redacted] cpl [redacted] on the processing fee as in the [redacted] zone. That would set the fee at [redacted]. or you can use the [redacted] price he had before when he was in the [redacted] zone.

R.M. (Rob) Wilston | Dealer Operations Manager-East

Manitoba, Ontario + Maritimes

Parkland Fuel Corporation

[redacted]

From: Randi M. Dale x6717
Sent: February 27, 2013 6:17 PM
To: Rob M. Wilston
Cc: Matthew P. Brayman; Brent Smith; Melissa I. Ballantyne x6645
Subject: RE: Price zone process

Hi Guys,

Changes have been made in the system for effective tomorrow. Please include changes on a Form 120 to send to Melissa as well.

Zone name	BU	Address Book #	TM	profee gas	profee premium	Profee Dsl
Brampton-Oakville	50319	[redacted]45877	**Matt Brayman**	[redacted]	[redacted]	[redacted]
Brampton-Oakville	50877	**224192**	**Matt Brayman**			
Brampton-Oakville	50883	**224066**	**John Beson**			
Brampton-Oakville	50896	**224086**	**Matt Brayman**			

Thank you,

Randi Dale | Fuel Program Coordinator

Parkland Fuel Corporation

#236 4919 59 Street, Red Deer, AB T4N 6C9

[redacted]

From: Rob M. Wilston
Sent: February 27, 2013 10:40 AM
To: Randi M. Dale x6717
Cc: Matthew P. Brayman
Subject: FW: Price zone process

Hi Randi, can you let Matt and I know when done. Thanks

R.M. (Rob) Wilston | Dealer Operations Manager-East

Manitoba, Ontario + Maritimes

Parkland Fuel Corporation

[redacted]

From: Brent Smith
Sent: February 21, 2013 7:27 PM
To: Rob M. Wilston
Subject: RE: Price zone process

Will do. Will let you know asap when done.

Sincerely,

Brent Smith| Manager Optimization, Retail Operations

Parkland Retail Fuels

A division of Parkland Fuel Corporation

#236, 4919-59th Street, Red Deer, AB T4N 6C9

[redacted]

From: Rob M. Wilston
Sent: Thursday, February 21, 2013 11:13 AM
To: Brent Smith
Subject: Price zone process

The price zones so far seem to have been carried out with not too much problems or the dealers have not figured it out. I made a mistake in rolling the two Mississauga-Oakville sites into the [redacted] zone and those two large accounts (50896 and 50877) are now complaining that they are [redacted] points [redacted] than Pioneer Esso rather than the usual [redacted] points. We should recreate your original zone that you suggested here.

R.M. (Rob) Wilston | Dealer Operations Manager-East

Manitoba, Ontario + Maritimes

Parkland Fuel Corporation

[redacted]

TAB D

To: Brent Smith[redacted]
Cc: Rob M. Wilston[redacted]
From: Scott McKelvie x6502
Sent: Wed 12/12/2012 5:37:15 PM
Importance: Normal
Subject: RE: [redacted] Price Zone changes
MAIL_RECEIVED: Wed 12/12/2012 5:37:00 PM

DATE MAY 7, 2015 EXHIBIT NO. 4
EXAM. OF ROBERT ESPEY
Michele Gibson, CSR(A)
Amicus Reporting Group

Great work here. Couple of points of clarification for me.

1) I can't fathom a reason why we are [redacted] the Premium by [redacted]. Let's get this back up to a [redacted] differential.

2) Not sure why exception list has grown. This isn't a balance exercise, it's a legality exercise.

3) Initial $'s for adjustment and presented/agreed to with the board was [redacted] not [redacted]. let's get this back in line before executing

4) Let's leave zone structure you initially created in place and adjust mid-year where absolutely necessary.

Again good stuff. February 1 date for completion/update?

Thanks

Scott McKelvie | Director of Retail Operations, Canada

Parkland Fuel Corporation

#236, 4919-59th Street, Red Deer, AB T4N 6C9

[redacted]

From: Brent Smith
Sent: December 12, 2012 2:59 PM
To: Scott McKelvie x6502
Subject: RE: [redacted] Price Zone changes

For review prior to sending back to RW.

Hi guys,

Update attached. Most recommendations/requests applied, but some were not. Please see comments below re: specific requests (in red). A few general comments however to help understanding of process:

- Names of zones are really kind of irrelevant. Can just as easily go with [redacted] etc… they were set up to aid myself (and Randi) in locating them and guiding us during set up. Can look at changing these later if really needed.

- Specifics of a dealer's zone should absolutely not be discussed with them. We can work together on drafting up a communication piece if you guys deem warranted, but some of the requests below lead me to believe that there might be some misunderstanding of this set up, and it's function, as well as what should or shouldn't be discussed/revealed to dealers. (like what specific zone they are in, what their upcharge is, who else is in their zone etc etc etc)

- There were a few requests to split zones up into more zones. Unless we were going to change what the upcharge (processing fee) was, there was no real purpose in doing this at this time. **We will review zones [redacted] and make any needed adjustments then**. I saw asks to split a zone because they price differently, but unless [redacted], there is no reason to do this. I saw no requested changes to profees in these zones to be split, so did not make these changes. (fewer zones is better, especially out of the gate)

- There may be a few new sites that have yet to be added to a zone. These can be dropped in

easily. For now, I have not added them. Will ask TM to work with Randi and myself on adding these as needed as she inputs the zones

- The names of TM's that are attached to sites are simply pulled from the current rbd pricing sheet. Not an urgent issue to get this corrected at this stage. Changed many/most as outlined, but can work with Randi as needed after all implemented to correct as needed (my sheet wont necessarily change how things on her end show up on this front) Have the 120's been updated to reflect these new tm's? This should trigger the change.

- Have added all sites to "exception" list. (now [redacted] sites, up from [redacted]) We should be reviewing contracts for wording. Some of the sites requested are seeing very small changes (as little as [redacted] annualized). Unless wording re: price specifies how they will be priced exactly, not worth chasing amending agreements…just make the changes. If the wording on these little ones does specify, them just let them run out?

- Overall cost to make this move, (assuming dealer payments are added, or sites with net pricing left alone) has gone up from $[redacted] to $[redacted].

- Question about LSD/Prem differentials was raised. Believe we should be leaving diesel with [redacted]….a[redacted] differential for Esso Premium, and [redacted] for unbranded. Rob, your email was a bit confusing in terms of what you have done with Esso premium…looked as though you had adjusted it so all sites only pay [redacted] over RUL price, even though we are charged [redacted] over RUl priced by IOL? Need some clarity on this front.

Sincerely,

Brent Smith| Manager Optimization, Retail Operations

Parkland Retail Fuels

A division of Parkland Fuel Corporation

#236, 4919-59th Street, Red Deer, AB T4N 6C9

[redacted]

From: Rob M. Wilston
Sent: Wednesday, November 07, 2012 9:33 AM
To: Brent Smith
Cc: Scott McKelvie x6502
Subject: [redacted] Price Zone changes

That was a great start for the [redacted] Price Zone and we were all quite impressed with how close you got it. Spent over a day with our guys and wanted to fine tune to a minor extent to the most part, but still significant in some ways. As we flowed from one area into another, some of the groupings you had did not quite work as the some towns priced with a market to the left rather than the one to the right so we had to split off some towns and move them to the adjoining price zone because that is the way the historic patterns and street patterns actually work. The other involved some straight adjusting of a few of the names as in Ontario, certain areas are well known by different names. For example, the [redacted] zone takes in all of [redacted] and that would be the best description. [redacted] and [redacted] are all known as [redacted] region and move together. I will give the specific recommendations below. I would like to get back the chart and maps with the revisions so we can use that as a base to implement, if you are in agreement. Some sites were accidentally put into zones quite a distance away in error such as [redacted] into [redacted].

ZONE CHANGES AND NAMES:

- [redacted] zone changed to [redacted] as that is what the [redacted] area is known as.
- [redacted] should be changed to [redacted] as those two areas do not price together. [redacted] zone should be renamed [redacted] and would be its own zone.
- [redacted] zone would be eliminated and rolled into [redacted] as they price with [redacted]
- [redacted] zone should be [redacted] as that is more accurate to this zone.
- [redacted] would just be [redacted] as [redacted] is insignificant.
- [redacted] really encompasses [redacted] and that entire region is known as [redacted] and should be called such.

- [redacted] is just [redacted] as that entire area is known as that.

- [redacted] should be [redacted]

- [redacted] zone for pricing reasons of the accounts in it needs to be split into two zones- [redacted] and [redacted] zone.

- [redacted] zone has a lot of sites and some areas price differently. Needs to be split into a [redacted] zone and a [redacted] zone.

[redacted] and [redacted] are 12 hours apart and should be there own zones.

SITE AND TM CHANGES-CORRECTIONS:

Greg Coyle:

-51023 Wasaga Beach is John's, not Greg's and would be in the [redacted] zone.-As per above. Can correct once implemented.

-50612 Belleville site missing and goes into [redacted] zone. –Will add during implementation stage.

-50218 Bobcaygeon should be added under Greg and put into [redacted]. –Will add during implementation stage.

-50282 Pontypool added under Greg and put into [redacted]. –Will add during implementation stage.

-51021 and 51025 Bancroft sites should be taken out of [redacted] zone and put in Belleville zone and they are straight up Hwy 62 out of [redacted] for reality. –These sites are both quite north of rest of [redacted] and both zones have same pricing. No benefit to make the change.

Matt Brayman:

-50319 Derry Rd, 50877 Glen Erin and 50896-Rainbow should be moved out of [redacted] Zone and it all rolled into [redacted] zone. -DONE

-51330-Dundas Cango-Sunset Minimart must be added to [redacted] list. - Will add during implementation stage.

Mark Barnartt:

-combine [redacted] zone with [redacted] zone as [redacted] zone -DONE and move 51249-Happy One Stop-Grimsby into that zone and out of [redacted] zone as that is the way the pricing breaks –UPCHARGE SAME IN BOTH. LEFT AS IS. Price [redacted] zone at [redacted] zone rate. -DONE

-51247 Wainfleet should not be in [redacted] zone but in [redacted] zone as that is where the town is. -DONE

-rename [redacted] zone to [redacted]. -DONE

Kevin Berkes:

-rename [redacted] zone [redacted] and put 51306-Brucedale Esso into this zone.-Site in Guelph? Same upcharge, no reason to move. Left as is.

-50990-Hillsburgh is under Kevin Berkes and not Richard Lavoie. -DONE

-Rename [redacted] zone to [redacted] and put 51108 Flesherton in it Already in zone and 51241 Dundalk(OTR-TM for this site is now Richard) -DONE also in it as this is the geographically correct area and correct pricing area.

John Beson:

-Move 50883 Mayfield to [redacted] zone-DONE

-Move 51023 Wasaga Beach and 51012 Wasaga Beach to new [redacted] zone, both under John Beson. It is a distinct price and geographic area. –No change in profee so no need to create the extra zone. They would be priced the same either way. Can adjust during next review if deemed warranted.

-Move 51251 Shelburne into [redacted] price zone as it is close and that is the right pricing area. -DONE

-Put 50603 Oshawa and 50887 Whitby into a new [redacted] zone as that is really distinct from [redacted] and further [redacted] pricing. –No change in profee so no need to create the extra zone. They would be priced the same either way. Can adjust during next review if deemed warranted.

-Leave the others just in the [redacted] zone–DONE

-The Lindsay target should be [redacted] cents and that zone is known as [redacted]. –DONE- But fairly large impact on ebitda. All sites had profee lowered significantly.

Richard Lavoie:

-Move 51011 Shanty Bay into [redacted] zone-it is in another zone by error. –Not in error. Put in this zone intentionally.

-Move 51081 Oro-Medonte into [redacted] zone, it is in [redacted] by mistake.- –DONE

-Rename [redacted] zone to [redacted] (off Lake Huron as the area is called.)

-Take out 51270 Port Elgin-gone –DONE

Leon Chabot:

-Move 51309 Thorton into [redacted] zone –DONE and rename zone just [redacted].

-Rename [redacted] zone just [redacted]

-Take 51026-11S Orillia site out of [redacted] it should be in [redacted] zone. –DONE

-Price [redacted] and [redacted] zones same. Sites in zone had net pricing so you have adjusted by leaving zone price down though it is a higher price area. That works so we do not hammer the dealers but if the zone target was raised, would have to offer these Esso dealers a dealer payment as in place in the rest of Ontario otherwise they would be severely penalized. -Eliminated [redacted] entirely. One remaining site moved to [redacted] zone

-Split [redacted] zone into two separate zones-[redacted] and [redacted] –No change in profee so no need to create the extra zone. They would be priced the same either way. Can adjust during next review if deemed warranted.

-Add to the [redacted] zone: 50258-Midland; 51027-Craighurst; 50900-Waubaushene; 51050-Wyebridge or Waverly as it is often called; and 50604-Penetanguishene.

-Rename [redacted] zone to [redacted].

IF YOU ARE IN AGREEMENT, PLEASE MODIFY CHART TO MATCH AS WELL AS

MAPS AND WE COULD GO AS EARLY AS DECEMBER 1ST AS IN MOST CASES WE FEEL THE CHANGES ARE MINIMAL. I WOULD LIKE TO GET THE COMPLETE CHART BACK FOR FUTURE PLANNING PURPOSES, BUT IN THE SHORT TERM THERE ARE A FEW EXCEPTIONS I COULD NOT START OFF RIGHT AWAY DUE TO AMMENDMENTS NEEDED AROUND NET PRICING OR OTHER IMPACTS. SOME SITES WOULD NOT BE TOO DIFFICULT TO AMMEND QUICKLY, SOME MIGHT HAVE TO BE LEFT OUT FOR SOMETIME AS IT EFFECTS THE CASHFLOW THEY GET AND THE TIMING OF THAT CASHFLOW.

SITES THAT WOULD NEED TO BE SET ASIDE IN THE FIRST GO AROUND DUE TO RENEWALS UNDERWAY OR NET PRICING PROBLEMS, ETC:

-50607-Roseneath-Greg-had [redacted] and would have to add a dealer payment [redacted]

-51336-North York-Dulai Pet-Matt-Cango site who picks up his own product and set up with [redacted] -would be very [redacted]

-50990-Hillsburgh-Kevin-on [redacted] and would [redacted]

-51059-Campbellville-Kevin-same as previous but might be a bit [redacted] to get to [redacted]

-51323 and 51324-Cambridge-Kevin-dlr has two Cango sites with us and three on his own and a 6 month cancellation clause-Kevin trying to [redacted] with [redacted] and [redacted] -if tough negotiations now and [redacted] and keep if negotiations [redacted].

-50992-Stone Motors-John- [redacted] and some [redacted] -would have to [redacted] and [redacted].

-51318-Cango Esso-John- that we just resigned-had and still has [redacted]

-51322-Port Perry Cango-John-had very low [redacted] price from Cango ([redacted]) and is [redacted] to Parkland brand-negotiations under way and [redacted] as would be [redacted]

-50989-Port Carling-Leon-ex Sunoco account that went to Esso with [redacted] -would need to [redacted]

-50996-Warren-Leon-would need a [redacted] dealer payment adjustment depending upon zone

setup.

-50615-Nairn Centre-Leon-[redacted]-would be[redacted] by zone and would need [redacted]-contract expiring in May anyway.

-51060-Baysville-Leon-converted from Sunoco[redacted] over to Esso and would need[redacted]

-51286-Kincardine-Richard-[redacted]-contract under negotiation now-would leave out for now until resign and adjustment complete.

-51287-Hanover-Richard-[redacted]-Richard just resigned successfully and dealer was on [redacted] with Cango-zone[redacted] which I think Richard could accomplish.

R.M. (Rob) Wilston | Dealer Operations Manager-East

Manitoba, Ontario + Maritimes

Parkland Fuel Corporation

[redacted]

TAB E

Competition Bureau Opposes Parkland Fuel Corporation's Acquisition of Pioneer Energy in 14 Communities

RED DEER, AB--(Marketwired - May 01, 2015) - Parkland Fuel Corporation ("**Parkland**" or the "**Corporation**") (TSX: PKI), one of North America's fastest growing distributors and marketers of fuels and lubricants, acknowledges the announcement on April 30, 2015 by the Competition Bureau of Canada (the "**Bureau**") of its application (the "**Application**") to challenge Parkland's acquisition of a limited number of the assets of Pioneer Energy ("**Pioneer**") which form a part of Parkland's previously announced proposed acquisition (the "**Acquisition**") of all of the assets of Pioneer Energy ("**Pioneer**").

Since announcement on September 17, 2014, the Acquisition has been the subject of Bureau review for close to seven months. During this period, Parkland has productively engaged with the Bureau and prior to being served with the Application, advised the Bureau of its intention to dispose of assets in most of the affected markets. However, Parkland and the Bureau differ on a significant matter of principle regarding the assets referred to in the Application, which are a mix of company and independent dealer-operated assets.

"We are surprised by this Application since Parkland had previously proposed to the Bureau that it would sell certain of the assets that are the subject of the Application in order to mitigate anti-competitive impacts perceived by the Bureau. Parkland believes that the Acquisition will be beneficial to consumers and result in additional efficiencies in the marketplace being realized," said Bob Espey, President and Chief Executive Officer of Parkland.

Parkland intends to vigorously contest the Application before the Competition Tribunal. Notwithstanding Parkland's views and intentions, as a result of the Application or otherwise, Parkland may be subject to a remedy (including a behavioral remedy) in respect of the Acquisition, which, in any case, may impact the aggregate anticipated benefits of the Acquisition and financial projections related thereto, and/or the timing of closing of the Acquisition.

About Parkland Fuel Corporation

Parkland Fuel Corporation is one of North America's fastest growing distributors and marketers of fuels and lubricants. We deliver gasoline, diesel, propane, lubricants, heating oil and other high quality petroleum products to motorists, businesses, households and wholesale customers in Canada and the United States. Our mission is to be the partner of choice for our customers and suppliers, and we do this by building lasting relationships through outstanding service, reliability, safety, and professionalism.

We are unique in our ability to provide customers with dependable access to fuel and petroleum products, utilizing a portfolio of supply relationships, storage infrastructure and third-party rail and highway carriers to rapidly respond to supply disruptions in order to protect our customers.

To sign up for Parkland news alerts please go to **http://bit.ly/PKI-Alert (http://ctt.marketwire.com/?release=11G040224-001&id=6014680&type=0&url=http%3a%2f%2fbit.ly%2fPKI-Alert)** or visit **www.parkland.ca (http://ctt.marketwire.com/?release=11G040224-001&id=6014683&type=0&url=http%3a%2f%2fwww.parkland.ca)**.

Forward Looking Information

Certain information and statements contained in this press release constitute forward-looking information within the meaning of applicable Canadian securities laws. Forward-looking information included in this press release includes, without limitation, information with respect to the final outcome of the Application, the assets impacted by the Application or any order or remedy in respect thereof, Parkland's intention to defend the Application, the impact on Parkland of any order issued or remedy imposed by the Competition Tribunal, the nature of any order issued or remedy imposed by the Competition Tribunal, the expected benefits, including benefits to consumers and marketplace efficiencies, and financial projections of the Acquisition and the timing of closing of the Acquisition. Many of these statements can be identified by words such as "believe", "expects", "expected", "will", "intends", "projects", "projected", "anticipates", "estimates", "continues" or similar words or expressions. Parkland believes the expectations reflected in such forward-looking information are reasonable but no assurance can be given that these expectations will prove to be correct and such forward-looking information should not be unduly relied upon. Use of forward-looking information is not a guarantee of future performance and involves a number of risks and uncertainties some of which are described in Parkland's annual information form and other continuous disclosure documents. Such forward-looking information necessarily involve known and unknown risks and uncertainties and other factors, which may cause Parkland's actual performance and financial results in future periods to differ materially from any projections of future performance or results expressed or implied by such forward-looking statements. Such factors include, but are not limited to: the impacts or nature of any order or remedy imposed by the Competition Bureau, failure to successfully defend, in whole or in part, the Application; failure to complete the Acquisition in accordance with Parkland's present expectations or at all; failure to achieve the anticipated benefits (including benefits to consumers and marketplace efficiencies) of the Acquisition; general economic, market and business conditions; actions by governmental authorities, including the Bureau, and other regulators; and other factors, many of which are beyond the control of Parkland. Any forward-looking information is made as of the date hereof and, unless otherwise required by law, Parkland does not intend, or assume any obligation, to publicly revise any forward-looking information to reflect subsequent events or circumstances.

For investor inquiries, please contact:
Scott Stickland
Investor Relations
403-567-2590

Email contact (https://go.marketwire.com/Public/InformationRequestForm.aspx?id%3dlMpMqJED9UzK0xsB7YpW0w%3d%3d%26contact%3d0ipx5hlwRCeWqlYkfPBYoqKa7c7rq8BPnlKuAAbzMVq%3d)

For media inquiries, please contact:
Elizabeth Wilcox
Communications
403-567-2578
Email contact (https://go.marketwire.com/Public/InformationRequestForm.aspx?id%3dlMpMqJED9UzK0xsB7YpW0w%3d%3d%26contact%3dxnfLP1dPpjcxWGmBwrjLHXKDqzzX8CR6WwzkV6A2hMI%3d)

TAB F

PUBLIC VERSION

CT-2013-006

COMPETITION TRIBUNAL

IN THE MATTER OF the *Competition Act*, R.S.C. 1985, c. C-34, and the *Competition Tribunal Rules*, SOR/2008-141;

AND IN THE MATTER OF the proposed acquisition by Agrium Inc. and/or its affiliates of certain agri-products assets from Glencore International plc and/or its affiliates;

AND IN THE MATTER OF the filing and registration of a consent agreement pursuant to section 105 of the *Competition Act*.

B E T W E E N :

THE COMMISSIONER OF COMPETITION

Applicant

– and –

AGRIUM INC.

Agrium

CONSENT AGREEMENT

RECITALS:

A. Agrium Inc. and/or its affiliates ("Agrium") proposes to directly or indirectly acquire 217 agri-products retail outlets, related anhydrous ammonia bullet tank stations and three related dry storage facilities from Glencore International plc and/or its affiliates (the "Transaction");

B. The Commissioner has concluded that the Transaction is likely to result in a substantial lessening and/or prevention of competition in the retail supply of certain agri-products in certain areas in Alberta and Saskatchewan, and that the implementation of this Agreement is necessary to ensure that any substantial lessening and/or prevention of competition will not result from the Transaction;

C. Agrium does not admit but will not for the purposes of this Agreement, including execution, registration, enforcement, variation or rescission, contest the Commissioner's conclusions that (i) the Transaction is likely to result in a substantial lessening and/or

prevention of competition in the retail supply of certain agri-products in certain areas of Alberta and Saskatchewan; and (ii) the implementation of this Agreement is necessary to ensure that any substantial lessening and/or prevention of competition will not result from the Transaction.

THEREFORE Agrium and the Commissioner agree as follows:

I. DEFINITIONS

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

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

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

(c) **"Agreement"** means this Consent Agreement, including the schedules hereto, and references to a "Part", "Section", "Paragraph" or "Schedule" are, unless otherwise indicated, references to a part, section, paragraph or schedule of or to this Agreement;

(d) **"Agrium"** means Agrium Inc., its directors, officers, employees, agents, representatives, successors and assigns; and all joint ventures, subsidiaries, divisions, groups and Affiliates controlled by Agrium Inc., and the respective directors, officers, employees, agents, representatives, successors and assigns of each;

(e) **"Agrium Divested AA Businesses"** means the Agrium retail anhydrous ammonia businesses identified in Schedule A;

(f) **"Agrium Divested Agri-Products Businesses"** means the Agrium agri-products retail businesses identified in Schedule A;

(g) **"Agrium's Continuing Employees"** means those employees of Agrium who are not employed in connection with the Hold Separate Assets;

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

(i) **"Closing"** means the completion of the Transaction under the Support and Purchase Agreement dated March 19, 2012, between Glencore International plc, 8001979 Canada Inc., 8115222 Canada Inc. and Agrium, as amended;

(j) **"Closing Date"** means the date on which Closing occurs;

(k) **"Commissioner"** means the Commissioner of Competition appointed under the *Competition Act*;

(l) **"Commitment Dates"** shall have the meaning set out in Section 41 of this Agreement;

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

(n) **"Designated Personnel"** means the employees of Agrium (and their successors in the same capacity) listed in Confidential Schedule F, who shall have signed a confidentiality agreement in a form satisfactory to the Commissioner only;

(o) **"Divested Business"** means the Agrium Divested AA Businesses, the Viterra Divested AA Businesses, the Agrium Divested Agri-Products Businesses and the Viterra Divested Agri-Products Businesses;

(p) **"Divestiture"** means the sale, conveyance, transfer, assignment or other disposal of the Divestiture Assets to a Purchaser or Purchasers pursuant to this Agreement and with the prior approval of the Commissioner, such that Agrium will have no direct or indirect interest in the Divestiture Assets;

(q) **"Divestiture Agreement"** means a binding and definitive agreement between Agrium and a Purchaser to effect the Divestiture or part of the Divestiture pursuant to this Agreement and subject to the prior approval of the Commissioner;

(r) **"Divestiture Assets"** means all of the right, title and interest in, to and under, or relating to, the assets, property and undertaking owned or used or held by Agrium for use in, or relating to, the Divested Business;

(s) **"Divestiture Process Agreement"** means the agreement described in Section 23 of this Agreement;

(t) **"Divestiture Trustee"** means the Person appointed pursuant to Part VI of this Agreement (or any substitute appointed thereto) and any employees, agents or other Persons acting for or on behalf of the Divestiture Trustee;

(u) **"Divestiture Trustee Sale"** means the Divestiture to be conducted by the Divestiture Trustee pursuant to Part VI of this Agreement;

(v) **"Divestiture Trustee Sale Period"** means the period that commences upon expiry of the Initial Sale Period and ends at the time provided for in Confidential Schedule B to this Agreement;

(w) **"First Reference Date"** shall have the meaning set out in Paragraph 3(c) of this Agreement;

(x) **"Hold Separate Assets"** means the Viterra Divested Agri-Products Businesses and Viterra's retail agri-products businesses at Camrose, Craddock, Cudworth and Medicine Hat;

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

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

(aa) **"Hold Separate Period"** means the period that commences at Closing and ends, in respect of any Hold Separate Assets, upon the completion of the Divestiture of the corresponding Divestiture Assets;

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

(cc) **"Initial Sale Period"** means the period that commences at Closing and ends at the time set out in Confidential Schedule B to this Agreement;

(dd) **"Management Agreement"** means the agreement described in Section 7 of this Agreement;

(ee) **"Monitor"** means the Person appointed pursuant to Part XI of this Agreement (or any substitute appointed thereto), and any employees, agents or other Persons acting for or on behalf of the Monitor;

(ff) **"Monitor Agreement"** means the agreement described in Section 47 of this Agreement;

(gg) **"Option"** shall have the meaning set out in Section 39 of this Agreement;

(hh) **"Parties"** means the Commissioner and Agrium collectively, and "**Party**" means any one of them;

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

(jj) **"Prescribed Volumes"** shall have the meaning set out in Section 39 of this Agreement;

(kk) **"Preservation Assets"** means the Agrium Divested AA Businesses and the Agrium Divested Agri-Products Businesses;

(ll) **"Purchaser"** means a Person that acquires Divestiture Assets pursuant to this Agreement and a Divestiture Agreement;

(mm) **"Records"** means records within the meaning of subsection 2(1) of the Act;

(nn) **"Relevant Local Areas"** means the areas that are within 35 kilometres of the sites listed in Schedule A;

(oo) **"Second Reference Date"** shall have the meaning set out in Paragraph 3(d) of this Agreement;

(pp) **"Third Party"** means any Person other than the Commissioner, Agrium or a Purchaser;

(qq) **"Transaction"** means the transaction described in the first recital to this Agreement;

(rr) **"Tribunal"** means the Competition Tribunal established by the *Competition Tribunal Act,* R.S.C. 1985, c.19 (2nd Supp.);

(ss) **"Viterra"** means Viterra Inc., its directors, officers, employees, agents, representatives, successors and assigns; and all joint ventures, subsidiaries, divisions, groups and Affiliates controlled by Viterra Inc., and the respective directors, officers, employees, agents, representatives, successors and assigns of each;

(tt) **"Viterra Divested AA Businesses"** means the Viterra retail anhydrous ammonia businesses identified in Schedule A;

(uu) **"Viterra Divested Agri-Products Businesses"** means the Viterra agri-products retail businesses identified in Schedule A; and

(vv) **"Viterra Divested Assets"** means the Viterra Divested AA Businesses and the Viterra Divested Agri-Products Businesses.

II. COMMISSIONER APPROVAL OF DIVESTITURE

[2] The Divestiture may proceed only with the prior approval of the Commissioner in accordance with this Part.

[3] Agrium (during the Initial Sale Period) or the Divestiture Trustee (during the Divestiture Trustee Sale Period), as the case may be, shall comply with the following process for seeking and obtaining a decision of the Commissioner regarding his approval of a proposed Divestiture:

(a) Agrium or the Divestiture Trustee, as the case may be, shall promptly:

(i) inform the Commissioner of any negotiations with a prospective Purchaser that may lead to a Divestiture; and

(ii) forward to the Commissioner copies of any agreements that are signed with a prospective Purchaser, including non-binding expressions of interest.

(b) Agrium or the Divestiture Trustee, as the case may be, shall immediately notify the Commissioner that it intends to enter a Divestiture Agreement with a prospective Purchaser, or has entered into an agreement that, if approved by the Commissioner, will be a Divestiture Agreement within the meaning of this Agreement. Such notice shall be in writing and shall include: the identity of the proposed Purchaser; the details of the proposed Divestiture Agreement and any related agreements; and information concerning whether and how the proposed Purchaser would, in the view of Agrium or the Divestiture Trustee, likely satisfy the terms of this Agreement.

(c) Within 7 days following receipt of the notice described in Paragraph 3(b), the Commissioner may request additional information concerning the proposed Divestiture from any or all of Agrium, the Divestiture Trustee, the Monitor, the Hold Separate Manager and the prospective Purchaser. These Persons shall each provide any additional information requested from them. When they have provided a complete response to the Commissioner's request, these Persons shall comply with the following procedures:

(i) the Divestiture Trustee shall provide written confirmation to the Commissioner that the Divestiture Trustee has provided to the Commissioner all additional information requested from the Divestiture Trustee;

(ii) the Monitor shall provide written confirmation to the Commissioner that the Monitor has provided to the Commissioner all additional information requested from the Monitor;

(iii) an officer or other duly authorized representative of Agrium shall certify that he or she has examined any additional information provided by Agrium to the Commissioner and that such information is, to the best of his or her knowledge and belief, correct and complete in all material respects;

(iv) an officer or other duly authorized representative of the Hold Separate Manager shall certify that he or she has examined any additional information provided by the Hold Separate Manager to the Commissioner and that such information is, to the best of his or

her knowledge and belief, correct and complete in all material respects; and

(v) an officer or other duly authorized representative of the prospective Purchaser shall certify that he or she has examined any additional information provided by the prospective Purchaser to the Commissioner and that such information is, to the best of his or her knowledge and belief, correct and complete in all material respects.

The date on which the last of the Divestiture Trustee, Agrium, Monitor, Hold Separate Manager and the prospective Purchaser provides to the Commissioner a confirmation or certification required under this Paragraph is the **"First Reference Date"**.

(d) Within 5 Business Days after the First Reference Date, the Commissioner may request further additional information concerning the proposed Divestiture from any or all of Agrium, the Divestiture Trustee, the Monitor, the Hold Separate Manager and the prospective Purchaser. These Persons shall each provide any further additional information requested from them. When they have provided a complete response to the Commissioner's request, if any, these Persons shall comply with the procedures outlined in Paragraph 3(c)(i)-(v) in regard to the further additional information provided. The date on which the last of the Divestiture Trustee, Agrium, Monitor, Hold Separate Manager and the prospective Purchaser provides to the Commissioner a confirmation or certification required under this Paragraph is the **"Second Reference Date"**.

(e) The Commissioner shall notify Agrium or the Divestiture Trustee, as the case may be, of the approval of, or the objection to, the proposed Divestiture as soon as possible, and in any event within 7 days after the date on which the Commissioner receives the notice described in Paragraph 3(b) or, if he requests any additional information under Paragraph 3(c) or further additional information under Paragraph 3(d), within 7 days after the later of:

(i) the First Reference Date; and

(ii) the Second Reference Date, if any.

(f) The Commissioner's determination as to whether to approve a proposed Divestiture shall be in writing.

[4] The Commissioner has sole discretion to determine whether to approve a proposed Divestiture. In exercising such discretion, the Commissioner shall take into account the likely impact of the Divestiture on competition, and may consider

any other factor he considers relevant. Prior to granting his approval, the Commissioner must also be satisfied that:

(a) the proposed Purchaser is fully independent of and operates at arm's length from Agrium;

(b) Agrium will have no direct or indirect interest in the Divestiture Assets following the Divestiture, subject to Section 62 below;

(c) the proposed Purchaser is committed to carrying on the Divested Business;

(d) the proposed Purchaser has the managerial, operational and financial capability to compete effectively in the retail supply of anhydrous ammonia or agri-products, as the case may be; and

(e) the proposed Purchaser will (i) if the Commissioner grants his approval during the Initial Sale Period, complete the Divestiture prior to the expiry of the Initial Sale Period; or (ii) if the Commissioner grants his approval during the Divestiture Trustee Sale Period, complete the Divestiture during the Divestiture Trustee Sale Period.

III. HOLD SEPARATE

[5] During the Hold Separate Period, Agrium shall:

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

(b) not exercise direction or control over, or influence directly or indirectly, the Hold Separate Assets or the Hold Separate Manager; and

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

[6] Prior to or at Closing, the Commissioner shall appoint a Hold Separate Manager, responsible for managing and operating the Hold Separate Assets independently of Agrium during the Hold Separate Period.

[7] Within 5 Business Days after the appointment of the Hold Separate Manager, Agrium shall submit to the Commissioner for approval the terms of a proposed Management Agreement with the Hold Separate Manager and the Commissioner that transfers to the Hold Separate Manager all rights, powers and authority necessary to permit the Hold Separate Manager to conduct the business of the Hold Separate Assets independently of Agrium during the Hold Separate Period in accordance with this Agreement.

[8] Within 5 Business Days after receipt of the proposed Management Agreement referred to in Section 7, the Commissioner shall advise Agrium whether or not he approves the terms of the proposed Management Agreement. If the Commissioner does not approve the terms of the proposed Management Agreement, he shall prescribe alternative terms for the Management Agreement that Agrium shall incorporate into a final Management Agreement with the Hold Separate Manager and the Commissioner.

[9] Agrium consents to the following terms and conditions regarding the Hold Separate Manager's rights, powers, authority, duties and responsibilities, and shall include such terms in the Management Agreement:

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

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

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

(d) Without limiting the generality of Paragraph 9(c) above, the Hold Separate Manager shall:

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

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

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

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

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

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

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

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

(f) The Hold Separate Manager shall have no financial interests affected by Agrium's revenues, profits or profit margins, except that Agrium shall provide to the Hold Separate Manager reasonable incentives to undertake this position. The Monitor shall determine the type and value of such incentives, which shall include continuation of all employee benefits, and such additional incentives as the Monitor determines may be necessary to assure the continuation and prevent any diminution of the viability, marketability and competitiveness of the Hold Separate Assets.

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

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

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

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

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

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

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

(a) The Monitor shall be entitled to review all proposed communications between the Hold Separate Manager and Agrium before such communications occur, and shall be copied on all such communications.

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

statement confirming that he or she undertakes not to share any Confidential Information respecting the Viterra Divested Assets with any of Agrium's Continuing Employees.

(c) Notwithstanding Paragraph 13(b), Designated Personnel of Agrium may receive aggregate financial and operational information relating to the Viterra Divested Assets only to the extent necessary to comply with securities laws, prepare financial and regulatory reports, prepare tax returns, prepare, administer and process insurance coverage and any related claims, administer employee benefits, defend litigation, operate information technology systems and comply with this Agreement. Designated Personnel identified as having responsibility for information technology systems or finance may receive detailed financial and operational information relating to the Viterra Divested Assets to the extent necessary to operate such information technology systems, comply with securities laws, prepare financial and regulatory reports, prepare tax returns, prepare, administer and process insurance coverage and any related claims, administer employee benefits, defend litigation, or comply with this Agreement. Any such information shall be: (i) reviewed by the Monitor prior to its receipt by any Designated Personnel; (ii) maintained in a separate confidential file that is accessible only to the Designated Personnel; and (iii) used only for the purposes set forth in this Section. If required by the Monitor, Designated Personnel shall sign a confidentiality agreement in a form satisfactory to the Commissioner.

(d) Neither the Hold Separate Manager nor any Hold Separate Employee shall receive, have access to or use any Confidential Information relating to Agrium's businesses other than the Hold Separate Assets. Agrium shall provide the list of Designated Personnel set out in Confidential Schedule F, as updated from time to time, to the Hold Separate Manager and Hold Separate Employees.

(e) Agrium shall be entitled to and the Hold Separate Manager shall, on request, provide to Agrium any information (including Confidential Information) in respect of Hold Separate Assets that are not Viterra Divested Assets.

[14] For the purpose of this Part, if there is no Monitor, the Hold Separate Manager shall report to and be subject to the oversight of the Commissioner, who shall have the rights, powers and authorities of the Monitor under this Part. Where the prior approval of the Monitor is required and there is no Monitor, such prior approval may be obtained from the Commissioner and the Commissioner may make any determination that could have otherwise been made by the Monitor under this Part.

IV. PRESERVATION OBLIGATION

[15] In order to preserve the Preservation Assets, prior to the Divestiture Agrium shall, subject to the oversight of the Monitor, manage and maintain the operation of the Preservation Assets in the regular and ordinary course of business and in accordance with past practice, and shall use commercially reasonable efforts to ensure the ongoing economic viability, marketability and competitiveness of the Preservation Assets.

[16] Without limiting the generality of Section 15 above, Agrium shall:

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

(b) take all commercially reasonable steps to honour all customer contracts and to maintain quality and service standards for customers of the Preservation Assets that are, in the view of the Monitor, at least equal to those that existed prior to the date of this Agreement;

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

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

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

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

(g) maintain inventory levels and payment terms materially consistent with the practices of Agrium that existed, with respect to the Hold Separate Assets, prior to the date of this Agreement; and

(h) not enter into, withdraw from, amend or otherwise take steps to alter any obligations in material contracts relating to the Preservation Assets, except as necessary to comply with this Agreement.

[17] Agrium shall provide sufficient financial resources, including general funds, capital funds, working capital and reimbursement for any operating, capital or

other losses, to comply with its obligations under this Part. If the Monitor believes that Agrium has not provided, is not providing or will not provide sufficient financial and other resources under this Section, the Monitor shall forthwith refer the matter to the Commissioner, who shall make a final determination respecting the financial and other resources that Agrium must provide. Agrium shall comply with any determination made by the Commissioner on this issue.

[18] In addition to those Persons employed in connection with the Preservation Assets on the Closing Date, Agrium shall employ such other Persons as the Monitor determines are necessary to manage and operate the Preservation Assets.

[19] For the purpose of this Part, if there is no Monitor, Agrium shall report to and be subject to the oversight of the Commissioner, who shall have the rights, powers and authorities of the Monitor under this Part. Where the prior approval of the Monitor is required and there is no Monitor, such prior approval may be obtained from the Commissioner and the Commissioner may make any determination that could have otherwise been made by the Monitor under this Part.

V. INITIAL SALE PERIOD

[20] Agrium shall use commercially reasonable efforts to complete the Divestiture during the Initial Sale Period in accordance with the provisions of this Part and Confidential Schedule B.

[21] Agrium shall provide to the Commissioner and to the Monitor every 21 days a written report describing the progress of its efforts to effect the Divestiture. The report shall include a description of contacts, negotiations, due diligence and offers regarding the Divestiture Assets, the name, address and phone number of all parties contacted and of prospective Purchasers who have come forward. Agrium shall, within 3 Business Days, respond to any request by the Commissioner for additional information regarding the status of Agrium's efforts to complete the Divestiture. An officer or other duly authorized representative of Agrium shall certify that he or she has examined the information provided in any such response and that such information is, to the best of his or his knowledge and belief, correct and complete in all material respects.

VI. DIVESTITURE TRUSTEE SALE PROCESS

[22] In the event that Agrium fails to complete the Divestiture during the Initial Sale Period, the Commissioner shall appoint a Divestiture Trustee, to complete the Divestiture in accordance with this Agreement. Such appointment may be made at any time prior to the expiry of the Initial Sale Period or on such later date as the Commissioner determines.

[23] Within 5 Business Days after the appointment of the Divestiture Trustee, Agrium shall submit to the Commissioner for approval the terms of a proposed Divestiture Process Agreement with the Divestiture Trustee and the Commissioner that

transfers to the Divestiture Trustee all rights, powers and authority necessary to permit the Divestiture Trustee to effect the Divestiture.

[24] Within 5 Business Days after receipt of the proposed Divestiture Process Agreement referred to in Section 23, the Commissioner shall advise Agrium whether or not he approves the terms of the proposed Divestiture Process Agreement. If the Commissioner does not approve the terms of the proposed Divestiture Process Agreement, he shall prescribe alternative terms that Agrium shall incorporate into a final Divestiture Process Agreement with the Divestiture Trustee and the Commissioner.

[25] Agrium consents to the following terms and conditions regarding the Divestiture Trustee's rights, powers, authority, duties and responsibilities, and shall include such terms in the Divestiture Process Agreement:

(a) The Divestiture Trustee shall complete the Divestiture as expeditiously as possible, and in any event prior to expiry of the Divestiture Trustee Sale Period.

(b) The Divestiture Trustee shall use reasonable efforts to negotiate terms and conditions for the Divestiture that are as favourable to Agrium as are reasonably available at that time; however, the Divestiture shall not be subject to any minimum price. The Divestiture Trustee's opinion of what constitutes favourable terms and conditions and what constitutes reasonably available terms and conditions, is subject to review and approval by the Commissioner only.

(c) Subject to oversight and approval by the Commissioner, the Divestiture Trustee shall have full and exclusive authority during the Divestiture Trustee Sale Period:

(i) to complete the Divestiture in accordance with the provisions of this Part;

(ii) to solicit interest in a possible Divestiture by whatever process or procedure the Divestiture Trustee believes is suitable to allow a fair opportunity for one or more prospective good faith Purchasers to offer to acquire the Divestiture Assets;

(iii) to enter into a Divestiture Agreement with a Purchaser that will be legally binding on Agrium;

(iv) to negotiate reasonable commercial covenants, representations, warranties and indemnities to be included in a Divestiture Agreement; and

(v) to employ, at the expense of Agrium, such consultants, accountants, legal counsel, investment bankers, business brokers,

appraisers, and other representatives and assistants as the Divestiture Trustee believes are necessary to carry out the Divestiture Trustee's duties and responsibilities.

(d) Where any Person makes a good faith inquiry respecting a possible purchase of Divestiture Assets, the Divestiture Trustee shall notify such Person that the Divestiture is being made and shall provide to such Person a copy of this Agreement, with the exception of the provisions hereof that are confidential pursuant to Sections 74, 75 and 76 of this Agreement.

(e) Where, in the opinion of the Divestiture Trustee, a Person has a good faith interest in purchasing Divestiture Assets and has executed a confidentiality agreement, in a form satisfactory to the Commissioner only, with the Divestiture Trustee protecting any Confidential Information that such Person may receive in the course of its due diligence review of the Divestiture Assets, the Divestiture Trustee shall:

(i) promptly provide to such Person all information respecting the Divestiture Assets that is determined by the Divestiture Trustee to be relevant and appropriate;

(ii) permit such Person to make reasonable inspection of the Divestiture Assets and of all financial, operational or other non-privileged Records and information, including Confidential Information, that may be relevant to the Divestiture; and

(iii) give such Person as full and complete access as is reasonable in the circumstances to the personnel involved in managing the Divestiture Assets.

(f) The Divestiture Trustee shall have no obligation or authority to operate or maintain the Divestiture Assets.

(g) The Divestiture Trustee shall provide to the Commissioner and to the Monitor, within 14 days after the Divestiture Trustee's appointment and thereafter every 21 days, a written report describing the progress of the Divestiture Trustee's efforts to complete the Divestiture. The report shall include a description of contacts, negotiations, due diligence and offers regarding the Divestiture Assets, the name, address and phone number of all parties contacted and of prospective Purchasers who have come forward. The Divestiture Trustee shall, within 3 Business Days, respond to any request by the Commissioner for additional information regarding the status of the Divestiture Trustee's efforts to complete the Divestiture.

(h) The Divestiture Trustee shall notify Agrium and the Commissioner immediately upon the signing of any letter of intent or agreement in principle relating to the Divestiture Assets, and shall provide to Agrium a copy of any executed Divestiture Agreement upon receipt of

Commissioner approval of the Divestiture contemplated in such Divestiture Agreement.

[26] Agrium shall not be involved in the Divestiture process during the Divestiture Trustee Sale Period or in any negotiations with prospective Purchasers undertaken by the Divestiture Trustee, nor will Agrium have contact with prospective Purchasers during the Divestiture Trustee Sale Period.

[27] Subject to any legally recognized privilege, Agrium and the Hold Separate Manager shall provide to the Divestiture Trustee full and complete access to all personnel, Records, information (including Confidential Information) and facilities relating to the Divestiture Assets, to enable the Divestiture Trustee to conduct its own investigation of the Divestiture Assets and to provide access and information to prospective Purchasers.

[28] Agrium shall take no action that interferes with or impedes, directly or indirectly, the Divestiture Trustee's efforts to complete the Divestiture.

[29] Agrium and the Hold Separate Manager shall fully and promptly respond to all requests from the Divestiture Trustee and shall provide all information the Divestiture Trustee may request. Agrium shall identify an individual who shall have primary responsibility for fully and promptly responding to such requests from the Divestiture Trustee on behalf of Agrium.

[30] Agrium will do all such acts and execute all such documents, and will cause the doing of all such acts and the execution of all such documents as are within its power to cause the doing or execution of, as may be reasonably necessary to ensure that the Divestiture Assets are divested in the Divestiture Trustee Sale Period and that agreements entered into by the Divestiture Trustee are binding upon and enforceable against Agrium.

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

[32] Agrium shall pay all reasonable invoices submitted by the Divestiture Trustee within 30 days after receipt. Any outstanding monies owed to the Divestiture Trustee by Agrium shall be paid out of the proceeds of the Divestiture.

[33] Agrium shall indemnify the Divestiture Trustee and hold the Divestiture Trustee harmless against any losses, claims, damages, liabilities or expenses arising out of, or in connection with, the performance of the Divestiture Trustee's duties, including all reasonable fees of counsel and other expenses incurred in connection with the preparation or defence of any claim, whether or not resulting in any

liability, except to the extent that such losses, claims, damages, liabilities, or expenses result from malfeasance, gross negligence or bad faith by the Divestiture Trustee.

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

[35] Agrium may require the Divestiture Trustee and each of the Divestiture Trustee's consultants, accountants, legal counsel, investment bankers, business brokers, appraisers, and other representatives and assistants to sign an appropriate confidentiality agreement in a form satisfactory to the Commissioner only; provided, however, that such agreement shall not restrict the Divestiture Trustee from providing any information to the Commissioner.

[36] The Commissioner may require the Divestiture Trustee and each of the Divestiture Trustee's consultants, accountants, legal counsel, investment bankers, business brokers, appraisers, and other representatives and assistants to sign an appropriate confidentiality agreement relating to materials and information the Divestiture Trustee may receive from the Commissioner in connection with the performance of the Divestiture Trustee's duties.

[37] Notwithstanding any term of this Agreement, the obligations and powers of the Divestiture Trustee under this Agreement shall not expire until the Divestiture is completed.

VII. THIRD PARTY CONSENTS

[38] It shall be a condition in any Divestiture Agreement (whether negotiated by Agrium or by the Divestiture Trustee) that Agrium shall, as a condition of closing, obtain any consents and waivers from Third Parties that are necessary to permit the assignment to, and assumption by, a Purchaser of all material contracts, approvals and authorizations relating to the Divestiture Assets; provided, however, that Agrium may satisfy this requirement by certifying that the Purchaser has executed agreements directly with one or more Third Parties which make such assignment and assumption unnecessary.

VIII. TRANSITIONAL SUPPLY ARRANGEMENTS

[39] Subject to Section 42, at the option of the Purchaser(s) (the "**Option**"), for up to 4 years following the Divestiture, Agrium shall sell to the Purchaser the amount of anhydrous ammonia requested by the Purchaser, up to a total annual amount of 19,348 tonnes, subject to the maximum annual amounts per location listed in Confidential Schedule E (the "**Prescribed Volumes**"), at a price based on Agrium's published price list and that is, in any event, not to exceed the price that

is charged to Agrium's retail outlets in Alberta and Saskatchewan for similar sales on similar terms at equivalent locations on equivalent order dates and delivery dates.

[40] Each Purchaser shall provide Agrium a volume forecast by month and delivery point by June 30th for the upcoming fall season and by December 31st for the upcoming spring season.

[41] Each Purchaser shall notify Agrium of the volumes, delivery points, and delivery dates to which it will also commit contractually by submitting a completed and binding Agrium purchase order by the last day of February for the upcoming spring season and August 31st for the upcoming fall season (collectively the "**Commitment Dates**"). For greater certainty, if the Purchaser does not make such a contractual commitment by a Commitment Date, Purchaser will no longer have its Option referred to in Section 39 for the applicable season. Agrium shall deliver from any of its supply points the committed volumes in the monthly amounts in accordance with the dates and the delivery point(s) specified by the Purchaser(s) in its purchase order.

[42] Agrium may proportionately reduce the Prescribed Volumes for each Purchaser in the event of supply disruptions experienced by Agrium, including plant shutdowns, plant turnarounds for maintenance, production volume reductions and force majeure events. Agrium shall promptly notify the Commissioner, the Monitor and the Purchaser(s) if a supply disruption will require a curtailment of Prescribed Volumes.

IX. EMPLOYEES

[43] Agrium (during the Initial Sale Period), the Divestiture Trustee (during the Divestiture Trustee Sale Period) and the Hold Separate Manager (for the Hold Separate Employees) shall provide to any prospective Purchaser and to the Commissioner information relating to the employees whose responsibilities involve the operation of the Divestiture Assets, to enable such Purchaser to make decisions regarding offers of employment to such employees. The Monitor shall review the information provided to ensure that it is sufficient to enable the Purchaser to make such decisions. Agrium shall:

(a) not interfere, directly or indirectly, with any negotiations by a Purchaser to employ any such employees;

(b) not offer any incentive to such employees to decline employment with the Purchaser or to accept other employment with Agrium;

(c) remove any impediment that may deter such employees from accepting employment with the Purchaser;

(d) waive any non-compete or confidentiality provisions of employment or other contracts that could impair the ability of such employees to be employed by the Purchaser; and

(e) pay or transfer to or maintain for the employees subsequently employed by Purchaser all current and accrued bonuses, pensions and other current and accrued benefits to which such employees would otherwise have been entitled had they remained in the employment of Agrium.

[44] For a period of 1 year following completion of the Divestiture, Agrium shall not, without the prior written consent of the Commissioner, directly or indirectly solicit or employ any Persons employed in connection with the Divestiture Assets who has accepted an offer of employment with the Purchaser unless such Person's employment has been terminated by the Purchaser.

X. FAILURE OF DIVESTITURE TRUSTEE SALE

[45] If, by the end of the Divestiture Trustee Sale Period, the Divestiture has not been completed, or if the Commissioner is of the opinion that the Divestiture likely will not be completed prior to the end of the Divestiture Trustee Sale Period, the Commissioner may apply to the Tribunal, at his election, for either (i) such order as is necessary to complete the Divestiture; or (ii) such order as is necessary to ensure that the Transaction is not likely to prevent or lessen competition substantially.

XI. MONITOR

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

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

[48] Within 5 Business Days after receipt of the proposed Monitor Agreement referred to in Section 47, the Commissioner shall advise Agrium whether or not he approves the terms of the proposed Monitor Agreement. If the Commissioner does not approve the terms of the proposed Monitor Agreement, he shall prescribe alternative terms for the Monitor Agreement that Agrium shall incorporate into a final Monitor Agreement with the Monitor and the Commissioner.

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

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

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

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

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

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

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

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

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

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

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

[54] The Commissioner may require the Monitor and each of the Monitor's consultants, accountants, legal counsel and other representatives and assistants to sign an appropriate confidentiality agreement relating to materials and information the Monitor may receive from the Commissioner in connection with the performance of the Monitor's duties.

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

[56] Agrium shall pay all reasonable invoices submitted by the Monitor within 30 days after receipt. Any outstanding monies owed to the Monitor by Agrium shall be paid out of the proceeds of the Divestiture.

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

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

[59] The Monitor shall serve for such time as is necessary to monitor Respondent's compliance with this Agreement.

XII. COMPLIANCE

[60] Within 5 Business Days after the Closing Date, Agrium shall provide written confirmation to the Commissioner of the date on which the Transaction was completed.

[61] Agrium shall provide a copy of this Agreement to each of its own and its Affiliates' directors, officers and employees having managerial responsibility for any obligations under this Agreement, within 3 Business Days after the date of registration of this Agreement. Agrium shall ensure that its directors, officers, employees and agents with responsibility for any obligations under this Agreement receive sufficient training respecting Agrium's responsibilities and duties under this Agreement, and the steps that such individuals must take in order to comply with this Agreement.

[62] Agrium shall not, for a period of 10 years after the date when the Divestiture is completed, directly or indirectly acquire any interest in the Divestiture Assets, without the prior written approval of the Commissioner.

[63] For a period of 3 years after the date when the Divestiture is completed, Agrium shall not, without providing advance written notification to the Commissioner in the manner described in this Section, directly or indirectly:

(a) acquire any assets or shares of, or any other interest in, any agri-products retail outlet in a Relevant Local Area where urea and anhydrous ammonia fertilizer sales make up more than 10% of gross revenues; or

(b) consummate any merger or other combination relating to the agri-products business in a Relevant Local Area where urea and anhydrous ammonia fertilizer sales make up more than 10% of gross revenues.

If a transaction described in (a) or (b) is one for which notice is not required under section 114 of the Act, Agrium shall supply to the Commissioner the information described in section 16 of the *Notifiable Transactions Regulations* at least 30 days before completing such transaction. Agrium shall certify its own information in the same manner as would be required if section 118 of the Act applied. The Commissioner may, within 30 days after receiving the information described in section 16 of the *Notifiable Transactions Regulations*, request that Agrium supply additional information that is relevant to the Commissioner's assessment of the transaction. In the event that the Commissioner issues such a request for additional information, Agrium shall supply information to the Commissioner in the form specified by the Commissioner and shall not complete such transaction until at least 30 days after Agrium has supplied all such requested information in the form specified by the Commissioner.

[64] 6 months after the date of registration of this Agreement and annually for the duration of this Agreement, and at such other times as the Commissioner may require, Agrium shall file an affidavit or certificate, substantially in the form of Schedule D to this Agreement, certifying its compliance with Parts IX (for so long as Part IX applies) and XII of this Agreement and setting out the following information in detail:

(a) the steps taken to ensure compliance;

(b) the controls in place to verify compliance; and

(c) the names and titles of employees who have oversight of compliance.

[65] If any of Agrium, the Hold Separate Manager, the Divestiture Trustee or the Monitor becomes aware that there has been a breach or possible breach of any of the terms of this Agreement, such Person shall, within 2 Business Days after becoming aware of the breach or possible breach, notify the Commissioner thereof, and shall provide details sufficient to describe the nature, date and effect

(actual and anticipated) of the breach or possible breach. Agrium shall provide confirmation of its compliance with this provision in all affidavits and certificates of compliance filed with the Commissioner pursuant to Section 64 of this Agreement.

[66] Agrium shall notify the Commissioner at least 30 days prior to:

(a) any proposed dissolution of Agrium Inc.;

(b) any other material change in Agrium including, but not limited to, a reorganization, material acquisition, disposition or transfer of assets, or any fundamental change for purposes of Agrium's incorporating statute, if such change may affect compliance obligations arising out of this Agreement.

[67] For the period commencing when this Agreement is registered and ending when the Divestiture is completed, for purposes of determining or securing compliance with this Agreement, and subject to any legally recognized privilege, Agrium shall, upon written request given at least 2 Business Days in advance to Agrium, permit any authorized representative(s) of the Commissioner, without restraint or interference:

(a) to access, during regular office hours of Agrium on any Business Day(s), all facilities and to inspect and copy all Records in the possession or control of Agrium related to compliance with this Agreement, which copying services shall be provided by Agrium at its expense; and

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

XIII. DURATION

[68] This Agreement shall become effective on the date when it is registered, and shall remain in effect for 10 years following the Divestiture, except that Parts II, III, IV, V, VI and VII of this Agreement shall be effective only until the Divestiture is complete.

XIV. NOTICES

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

(a) it must be in writing and the sending party must use one of the following methods of delivery: (1) personal delivery; (2) registered mail; (3) courier service; (4) facsimile; or (5) electronic mail; and

(b) it must be addressed to the receiving party at the address(es) listed below, or to any other address designated by the receiving party in accordance with this Section.

if to the Commissioner:

Commissioner of Competition
Competition Bureau Canada
Place du Portage, 21st Floor
50 Victoria Street, Phase I
Gatineau, Quebec K1A 0C9

Attention: Commissioner of Competition
Fax: (819) 953-5013
Email address: MergerNotification@cb-bc.gc.ca

with a copy to:

Steve Sansom
Competition Bureau Legal Services
Department of Justice
Place du Portage, 22nd Floor
50 Victoria Street, Phase I
Gatineau, Quebec K1A 0C9
Fax: (819) 953-9267
Email address: steve.sansom@cb-bc.gc.ca

if to Agrium:

Tom Mix
Chief Counsel, Corporate
13131 Lake Fraser Drive S.E.
Calgary, Alberta T2J 7E8
Fax: (403) 225-7610
Email address: tom.mix@agrium.com

with a copy to:

Donald B. Houston
McCarthy Tétrault LLP
Box 48, Suite 5300
Toronto Dominion Bank Tower
Toronto, Ontario M5K 1E6
Fax: (416) 868-0673
Email address: dhouston@mccarthy.ca

and

Oliver J. Borgers
McCarthy Tétrault LLP
Box 48, Suite 5300
Toronto Dominion Bank Tower
Toronto, Ontario M5K 1E6
Fax: (416) 868-0673
Email address: oborgers@mccarthy.ca

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

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

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

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

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

[71] Notwithstanding Sections 69 and 70, a notice, report, consent, approval, written confirmation or other communication that is not communicated in accordance with Sections 69 and 70 is valid if a representative of the Party to this Agreement that is the recipient of such communication confirms the receipt and sufficiency of such communication.

XV. GENERAL

[72] In this Agreement:

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

(b) **Time Periods** – Computation of time periods shall be in accordance with the *Interpretation Act*, R.S.C. 1985, c. I-21, and the definition of "holiday" in the *Interpretation Act* shall include Saturday.

[73] The Commissioner shall file this Agreement with the Tribunal for registration in accordance with section 105 of the Act. Agrium hereby consents to such registration.

[74] Information in Confidential Schedule B shall be made public upon the expiry of the Initial Sale Period.

[75] Information in Confidential Schedule C shall be made public as provided for in Confidential Schedule C.

[76] Information in Confidential Schedules E and F shall be made public after the expiry of this Agreement.

[77] The Commissioner may, after informing Agrium, extend any of the time periods contemplated by this Agreement, other than the time periods in Part VIII, Part IX, Sections 62 and 63, and Part XIII. If any time period is extended, the Commissioner shall promptly notify Agrium of the revised time period.

[78] Nothing in this Agreement precludes Agrium or the Commissioner from bringing an application under section 106 of the Act. Agrium will not, for the purposes of this Agreement, including execution, registration, enforcement, variation or rescission, contest the Commissioner's conclusions that: (i) the Transaction is likely to result in a substantial lessening and/or prevention of competition in the retail supply of agri-products; and (ii) the implementation of this Agreement is necessary to ensure that any substantial lessening and/or prevention of competition will not result from the Transaction.

[79] Agrium attorns to the jurisdiction of the Tribunal for the purposes of this Agreement and any proceeding initiated by the Commissioner relating to this Agreement.

[80] This Agreement constitutes the entire agreement between the Commissioner and Agrium, and supersedes all prior agreements, understandings, negotiations and discussions, whether written or oral, with respect to the subject matter hereof.

[81] This Agreement shall be governed by and interpreted in accordance with the laws of Ontario and the laws of Canada applicable therein, without applying any otherwise applicable conflict of law rules.

[82] In the event of a dispute regarding the interpretation, implementation or application of this Agreement, the Commissioner or Agrium may apply to the Tribunal for directions or an order. In the event of any discrepancy between the English language version of this Agreement and the French language version of this Agreement, the English language version of this Agreement shall prevail. In no event shall any dispute suspend the Initial Sale Period or the Divestiture Trustee Sale Period.

[83] This Agreement may be executed in two or more counterparts, each of which shall be an original instrument, but all of which shall constitute one and the same Agreement.

The undersigned hereby agree to the filing of this Agreement with the Tribunal for registration.

DATED this 5th day of September, 2013

COMMISSIONER OF COMPETITION

[Original signed by John Pecman]

Name: John Pecman

Title: Commissioner of Competition

AGRIUM INC.

[Original signed by Patrick Freeman]

I/We have authority to bind the corporation

Name: Patrick Freeman

Title: Vice President, Corporate Development & Strategy

SCHEDULE A

DIVESTED AA BUSINESSES AND DIVESTED AGRI-PRODUCTS BUSINESSES

The following are the Agrium Divested AA Businesses:

- Agrium Canora
- Agrium Kinistino
- Agrium North Battleford
- Agrium Prince Albert
- Agrium Yorkton

The following are the Agrium Divested Agri-Products Businesses:

- Agrium Bow Island
- Agrium Eaglesham
- Agrium Lacombe

The following are the Viterra Divested AA Businesses:

- Viterra Camrose
- Viterra Craddock
- Viterra Cudworth
- Viterra Medicine Hat

The following are the Viterra Divested Agri-Products Businesses:

- Viterra Alix
- Viterra Alliance
- Viterra Edenwold
- Viterra Vauxhall

SCHEDULE B

INITIAL SALE PERIOD AND DIVESTITURE TRUSTEE SALE PERIOD

The Initial Sale Period shall commence at Closing and shall expire 5 months and 15 days after the Closing Date.

The Divestiture Trustee Sale Period shall commence at the expiry of the Initial Sale Period, and shall expire 3 months thereafter, subject to Confidential Schedule C.

PUBLIC VERSION

CONFIDENTIAL SCHEDULE C

[CONFIDENTIAL]

SCHEDULE D

FORM OF COMPLIANCE CERTIFICATION/AFFIDAVIT

I, **[name]**, of **[place]**, hereby certify[1] in accordance with the terms of the Registered Consent Agreement dated • between **[Agrium]** and the Commissioner of Competition, that:

1. I am the **[title]** of **[Agrium]**, and have personal knowledge of the matters deposed to herein, unless they are stated to be on information and belief, in which cases I state the source of such information and believe it to be true.

2. On **[date]**, **[Agrium]** entered into a Consent Agreement (the "Consent Agreement") with the Commissioner of Competition (the "Commissioner") in connection with **[describe Transaction]** (the "Transaction").

3. The Transaction closed on **[date]** (the "Closing Date").

4. The Divestiture (as defined in the Consent Agreement) to **[Purchaser]** was completed on **[date]**.

5. Pursuant to Section 64 of the Consent Agreement, Agrium is required to file annual reports certifying its compliance with Parts IX and XII of the Consent Agreement.

Oversight of Compliance

6. **[Names/titles]** have primary responsibility for overseeing compliance with this Agreement.

Closing Date

7. Pursuant to Section 60 of the Consent Agreement, Agrium is required to provide written confirmation to the Commissioner of the date on which the Transaction was completed. Such notice was provided on **[date]**.

Circulation of Consent Agreement

8. Pursuant to Section 61 of the Consent Agreement, Agrium is required to provide a copy of the Consent Agreement to each of its own and its Affiliates' directors, officers, employees and agents having managerial responsibility for any obligations under the Consent Agreement, within 3 Business Days after the date

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[1] If this is drafted as an affidavit, the words "hereby certify" should be removed and should be replaced with "make oath and say". An affidavit should be sworn under oath. A certificate should be certified by a Commissioner for taking affidavits.

of registration of the Consent Agreement. The Consent Agreement was circulated by **[whom]** to **[provide list]** on **[dates]**.

9. Pursuant to Section 61 of the Consent Agreement, Agrium is required to ensure that its directors, officers, employees and agents with responsibility for any obligations under the Consent Agreement receive sufficient training respecting Agrium's responsibilities and duties under the Consent Agreement. The following training has been provided: **[provide list of who was trained and by whom as well as a general statement of the content of the training]**

Employees

10. Sections 43 and 44 of the Consent Agreement require Agrium to take various steps in regard to its employees whose responsibilities involved the operation of the Divestiture Assets. Agrium has fully complied with the terms of these Sections and, more particularly:

[Note: Describe steps taken to facilitate employee transfer to Purchaser(s), having regard to the terms of Section 43; provide data on the # of employees who have transferred to the Purchaser.]

Notification of Breach

11. Based on my personal knowledge and my inquiries of **[provide names],** I am not aware of any breach or possible breach of any of the terms of the Consent Agreement within the meaning of Section 65 of the Consent Agreement.

DATED ●.

Commissioner of Oaths **Name and Title of Certifying Officer**

CONFIDENTIAL SCHEDULE E

[CONFIDENTIAL]

CONFIDENTIAL SCHEDULE F

[CONFIDENTIAL]

TAB G

CT-2010-005

COMPETITION TRIBUNAL

IN THE MATTER OF the *Competition Act*, R.S.C. 1985, c. C-34, and the *Competition Tribunal Rules*, SOR/94-290;

AND IN THE MATTER OF the acquisition by IESI-BFC Ltd. of Waste Services, Inc.;

AND IN THE MATTER OF the filing and registration of a consent agreement pursuant to section 105 of the *Competition Act*.

B E T W E E N :

THE COMMISSIONER OF COMPETITION

Applicant

– and –

IESI-BFC LTD., BFI CANADA INC., WASTE SERVICES INC., and WASTE SERVICES (CA) INC.

Respondents

CONSENT AGREEMENT

WHEREAS pursuant to an agreement and plan of merger dated November 11, 2009 between IESI-BFC Ltd. ("BFI"), IESI-BFC Merger Sub, Inc. ("Merger Sub") and Waste Services, Inc. ("WSI"), Merger Sub will be merged with and into WSI, with WSI continuing as a wholly-owned subsidiary of BFI (the "Transaction");

AND WHEREAS the Commissioner of Competition (the "Commissioner") has concluded that the Transaction is likely to result in a substantial lessening and/or prevention of competition in the supply of front-end commercial waste collection services in each of Calgary and Edmonton in the Province of Alberta, and each of Hamilton, Ottawa and Simcoe County in the Province of Ontario (collectively, the "Relevant Markets");

AND WHEREAS the Commissioner has concluded that the implementation of this Consent Agreement (the "Agreement") is necessary and sufficient to ensure that any substantial lessening and/or prevention of competition will not result from the Transaction;

AND WHEREAS the Respondents do not admit but will not for the purposes of the enforcement of any provision of this Agreement, or in any subsequent proceeding relating to the Transaction, including in any proceedings under section 106 of the *Competition Act* (the "Act"), contest: (i) the Commissioner's conclusion that the Transaction is likely to result in a substantial lessening and/or prevention of competition in the supply of front-end commercial waste collection services in each of the Relevant Markets; and (ii) the Commissioner's conclusion that the implementation of this Agreement is necessary to ensure that any substantial lessening and/or prevention of competition will not result from the Transaction;

AND WHEREAS the Respondents attorn to the jurisdiction of the Competition Tribunal (the "Tribunal") for the purposes of this Agreement and any proceeding initiated by the Commissioner relating to this Agreement;

AND WHEREAS the Respondents agree to the immediate registration of this Agreement with the Tribunal;

NOW THEREFORE the Respondents and the Commissioner agree as follows:

I. DEFINITIONS

[1] For the purposes of this Agreement, unless something in the subject matter or context is inconsistent therewith, the following capitalized terms have the following meanings:

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

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

(c) "**Agreement**" means this Consent Agreement entered into between the Respondents and the Commissioner pursuant to section 105 of the Act, including the appendices hereto;

(d) "**BFI**" means IESI-BFC Ltd., its directors, officers, employees, agents, representatives, successors, and assigns; and its joint ventures, subsidiaries, divisions, groups and Affiliates, including, Merger Sub, BFI Canada Inc., and the respective directors, officers, employees, agents, representatives, predecessors, successors and assigns of each. Following the Transaction, BFI shall include WSI, and the entity formed upon the merger of Merger Sub with WSI;

(e) "**Business Day**" means a day other than a Saturday, Sunday or statutory holiday in the Province of Ontario;

(f) "**Closing Date**" means the date upon which the Transaction is completed;

(g) "**Commercial Waste Collection**" means the collection of solid, non-hazardous waste (which includes recycling and organic material) from commercial, institutional and industrial customers by front-end loading trucks for disposal at a disposal facility;

(h) "**Commissioner**" means the Commissioner of Competition appointed pursuant to section 7 of the Act and any person designated by the Commissioner to act on her behalf;

(i) "**Confidential Information**" means competitively sensitive or proprietary information not independently known to a Person from sources other than the entity to which the information pertains or a Person who is under confidentiality obligations to that other Person, including, without limiting the generality of the foregoing, manufacturing, operations and financial information, operating costs and revenues, customer lists, price lists, marketing methods, patents, technologies, processes or other trade secrets;

(j) "**Divest**" or "**Divesting**" means to implement and complete the Divestiture;

(k) "**Divestiture**" means the sale, conveyance, transfer, auction, public tender, public offering, assignment, or other disposal of the Divestiture Assets to a Purchaser, such that BFI will have no direct or indirect interest in the Divestiture Assets, except as permitted herein;

(l) "**Divestiture Agreement**" means a binding and definitive agreement between BFI and a Purchaser or Purchasers or, if necessary, between the Divestiture Trustee and a Purchaser or Purchasers, in each case to effect the Divestiture contemplated by this Agreement;

(m) "**Divestiture Assets**" means (i) the contracts with customers, trucks, bins, and other related equipment used by WSI for the supply of Commercial Waste Collection and ancillary services with customers in each of the Relevant Markets, as more fully described in Schedule "A" and Confidential Schedule "A.1"; and (ii) all of WSI's interest in the Hamilton Transfer Station and related equipment, as more fully described in Schedule "A";

(n) "**Divestiture Trustee**" means the Person appointed pursuant to **Part VII** of this Agreement (or any substitute appointed thereto) and any employees, agents or other Persons acting for or on behalf of the Divestiture Trustee;

(o) "**Divestiture Trustee Sale**" means the Divestiture to be conducted by the Divestiture Trustee pursuant to **Part VII** of this Agreement;

(p) "**Divestiture Trustee Sale Period**" means the period set out in Confidential Schedule "B";

(q) "**Hamilton Transfer Station**" means the Transfer Station operated by WSI and located at 306 Lake Avenue North in Hamilton, Ontario and related equipment and assets, as more fully described in Schedule "A";

(r) "**Hold Separate Businesses**" means WSI's Commercial Waste Collection businesses in each of the Relevant Markets and the Hamilton Transfer Station, and includes the Divestiture Assets;

(s) "**Hold Separate Manager**" means the Person appointed pursuant to **Part III** of this Agreement (or any substitute appointed thereto) to manage the Hold Separate Businesses;

(t) "**Hold Separate Period**" means the period immediately following the Closing Date until the Divestiture has been completed in accordance with this Agreement;

(u) "**Initial Sale Period**" means the period set out in Confidential Schedule "B";

(v) "**Monitor**" means the Person appointed pursuant to **Part IV** of this Agreement (or any substitute appointed thereto), and any employees, agents or other Persons acting for or on behalf of the Monitor;

(w) "**Person**" means any individual, partnership, limited partnership, firm, corporation, association, trust, unincorporated organization or other entity, whether acting alone or in concert with another Person;

(x) "**Purchaser**" means a Person that acquires Divestiture Assets pursuant to this Agreement;

(y) "**Relevant Market**" means each of Calgary and Edmonton in the Province of Alberta, and each of Hamilton, Ottawa and Simcoe County in the Province of Ontario;

(z) "**Respondents**" means the parties to this Agreement, excluding the Commissioner;

(aa) "**Substitute Contract**" means a contract with a customer of BFI or WSI that is substituted for any contract in accordance with paragraphs 53, 54, 55, 65 or 76 of this Agreement;

(bb) "**Third Party**" means any Person other than the Respondents or the Purchaser;

(cc) "**Transaction**" has the meaning given to it in the recitals;

(dd) "**Transfer Station**" means a disposal facility where commercial, institutional and industrial waste is collected and stored for disposal at a landfill or other facility;

(ee) "**Tribunal**" means the Competition Tribunal established by the *Competition Tribunal Act,* R.S.C. 1985, c.19 (2nd Supp.), as amended;

(ff) "**Unassigned Contract**" has the meaning given to it in paragraph 52 of this Agreement; and

(gg) "**WSI**" means Waste Services, Inc., its directors, officers, employees, agents, representatives, successors, and assigns; and its joint ventures, subsidiaries, divisions, groups and Affiliates, including, Waste Services (CA) Inc., and the respective directors, officers, employees, agents, representatives, predecessors, successors and assigns of each.

All other terms defined in this Agreement have the meanings established elsewhere in this Agreement.

II. APPLICATION

[2] The provisions of this Agreement shall apply to:

(a) BFI, and BFI shall cause each of its Affiliates to carry out their respective obligations under this Agreement;

(b) WSI, and WSI shall cause each of its Affiliates to carry out their respective obligations under this Agreement;

(c) each officer, director, employee, agent or other Person acting for or on behalf of the Respondents with respect to any of the matters referred to in this Agreement;

(d) all other Persons acting in concert or participating with one or more of those listed in (a) or (b) above, with respect to the matters referred to in this Agreement, who shall have received actual notice of this Agreement;

(e) the Commissioner;

(f) the Hold Separate Manager;

(g) the Monitor;

(h) the Divestiture Trustee; and

(i) each Purchaser and its heirs, successors, legal representatives and assigns.

III. HOLD SEPARATE BUSINESSES

[3] The Commissioner shall appoint a Hold Separate Manager. The Hold Separate Manager shall execute an agreement, in a form determined by the Commissioner, agreeing to be bound by the terms and conditions of this Agreement and to perform the duties and responsibilities required of the Hold Separate Manager under this Agreement. BFI shall transfer to the Hold Separate Manager all of the rights and powers necessary to permit the Hold Separate Manager to perform his duties and responsibilities under this Agreement.

[4] Effective immediately upon the Closing Date, the Hold Separate Businesses shall be operated independently and separately from the other businesses of BFI, under the supervision of the Hold Separate Manager, during the Hold Separate Period, provided that the Hold Separate Businesses may operate from the same locations as WSI businesses, and that BFI shall, at the request of the Hold Separate Manager, provide managerial, administrative and operational (including maintenance) resources of BFI as required by the Hold Separate Businesses, including:

(a) human resources and payroll;

(b) accounts payable systems;

(c) occupational health and safety;

(d) services related to environmental permitting and liability;

(e) insurance, including notification of claims for which coverage is sought; and

(f) financial services, including banking.

In using such resources, the Hold Separate Manager shall not disclose any Confidential Information and shall ensure that any Confidential Information is only disclosed to personnel employed solely in connection with the Hold Separate Businesses, other than as permitted herein.

[5] BFI shall be responsible for all fees and expenses properly charged or incurred by the Hold Separate Manager in the course of carrying out his duties and responsibilities under this Agreement, provided that the Hold Separate Manager shall not be authorized to make capital expenditures that are outside of the ordinary course of the Hold Separate Businesses, except for those capital expenditures which, in the opinion of the Hold Separate Manager, acting reasonably and after consultation with the Monitor, are necessary to maintain the viability and competitiveness of the Hold Separate Businesses. The Hold Separate Manager may, in consultation with the Monitor, utilize available equipment of BFI in the operation of the Hold

Separate Businesses as an alternative to purchasing additional equipment for use in the Hold Separate Businesses.

[6] BFI shall:

(a) not exert or attempt to exert any influence, direction or control over the Hold Separate Manager;

(b) take all commercially reasonable steps to ensure that, from and after the Closing Date, the Hold Separate Businesses are operated independently and separately from BFI, including transferring to the Hold Separate Manager all rights, powers and authority necessary to perform his duties and responsibilities under this Agreement; and

(c) not exercise direction or control, direct or indirect, over the management and operations of the Hold Separate Businesses, except to the extent that BFI must exercise such direction and control to ensure compliance with this Agreement and except as otherwise provided in this Agreement.

[7] The Hold Separate Manager shall report directly to the Monitor. The Hold Separate Manager shall not have any access to any Confidential Information of BFI other than that relating to the Hold Separate Businesses. During the term of the Hold Separate Period, the Hold Separate Manager shall not be involved or participate in any way in the operations of the other businesses or activities of BFI.

[8] The Hold Separate Manager shall have the responsibility to manage the Hold Separate Businesses, although the Hold Separate Manager may employ such Persons as are reasonably necessary to locally manage the Hold Separate Businesses in each of the Relevant Markets or otherwise assist him in the management and operation of the Hold Separate Businesses. Such Persons shall be under the direct supervision of the Hold Separate Manager and shall be employed solely in connection with the Hold Separate Businesses, and not employed in connection with the operation of other businesses of BFI following the Closing Date.

[9] In addition to those Persons employed in connection with the Hold Separate Businesses on the Closing Date, the Hold Separate Manager may employ such Persons as are reasonably necessary to assist him in the management and operation of the Hold Separate Businesses, including, without limitation, those providing administrative services, such as finance, information technology, employee relations, regulatory and legal, public relations, and customer relations services; provided that the Hold Separate Manager may not employ additional Persons if such services are reasonably capable of being provided by Persons employed solely in connection with the Hold Separate Businesses, and not employed in connection with the operation of other businesses of BFI following the Closing Date, or through the use of the managerial, administrative and operational (including maintenance) resources of BFI in accordance with paragraph 4 above and the other terms and conditions of this Agreement. All costs associated therewith shall be borne by BFI.

[10] The Hold Separate Manager shall have the responsibility to, and be given by BFI the resources reasonably necessary to, implement existing sales and marketing plans relating to the Hold Separate Businesses and to modify existing plans with the approval of the Monitor. The Hold Separate Manager shall not have access to BFI's confidential marketing materials unrelated to the Hold Separate Businesses.

[11] The Hold Separate Manager shall deliver to the Monitor a copy of any written communications between the Hold Separate Manager and BFI within five (5) Business Days of the date such communication was made. Verbal communications shall be summarized and reduced to writing by the Hold Separate Manager for provision to the Monitor in accordance with the foregoing.

[12] If the Hold Separate Manager ceases to act or fails to act diligently or otherwise in accordance with this Agreement or any agreement between the Commissioner and the Hold Separate Manager, the Commissioner, or the Monitor with the approval of the Commissioner, may remove the Hold Separate Manager. In the event the Hold Separate Manager ceases to act in his role, the Commissioner shall, in her sole discretion, select a substitute Hold Separate Manager after consultation with BFI and the Monitor, and transfer to the substitute Hold Separate Manager all rights, powers and authority necessary to fulfill the duties and responsibilities of the Hold Separate Manager pursuant to this Agreement.

[13] Pending the completion of the Divestiture, the Hold Separate Manager shall take all commercially reasonable steps to preserve the independence and competitive viability of the Hold Separate Businesses in the ordinary course and in a manner that is reasonably consistent in nature, scope and magnitude with past practices, including, but not limited to, instructing Persons employed in connection with the Hold Separate Businesses to:

(a) operate the Hold Separate Businesses independently and separately from BFI;

(b) operate the Hold Separate Businesses in compliance with all applicable laws, including labour and employment laws;

(c) maintain all approvals, registrations, consents, licences, permits, waivers, and other authorizations necessary for the operation of the Hold Separate Businesses;

(d) use commercially reasonable efforts to maintain the competitiveness of the Hold Separate Businesses in the ordinary course and in a manner that is reasonably consistent in nature, scope and magnitude with past practices;

(e) maintain and hold the trucks and equipment which are included in the Hold Separate Businesses in an operating condition and state of repair at least equal to the current level for such assets, normal wear and tear excepted, and to standards at least equal to those that existed prior to the date of this Agreement;

(f) establish all fees, deductions, discounts, credits or allowances with respect to the services provided by the Hold Separate Businesses;

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

(h) ensure that the Hold Separate Businesses are not engaged in any type of business other than the type of business conducted as of the date of this Agreement, except with the prior approval of the Monitor and the Commissioner;

(i) not communicate any Confidential Information related to the Hold Separate Businesses to anyone other than the Monitor, the Commissioner, or as otherwise permitted herein;

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

(k) not materially curtail marketing, sales, promotional or other activities of the Hold Separate Businesses in connection with the solicitation of existing or prospective customers, except with the prior approval of the Monitor;

(l) not alter to any material extent, or cause to be altered, the management of the Hold Separate Businesses as it existed prior to the date of this Agreement, except: (i) as may be necessary to comply with the terms of this Agreement; (ii) to replace employees that may resign; or (iii) with the prior approval of the Monitor; and

(m) not terminate or alter any employment, salary or benefit agreements, as they existed at the date of this Agreement, for Persons employed in connection with the Hold Separate Businesses, without the prior approval of the Monitor.

[14] At the request of the Hold Separate Manager, BFI shall provide sufficient resources, as appropriate in the judgment of the Hold Separate Manager, with the concurrence of the Monitor, to accomplish the foregoing.

[15] BFI shall use commercially reasonable efforts to ensure that all Persons employed in connection with the Hold Separate Businesses continue to conduct sales and marketing activities independently of BFI and that such Persons refrain from sharing with BFI any Confidential Information related to sales and marketing, except, with the prior approval and consent of the Commissioner, summaries in aggregate form to the extent required by a public company to complete adequate financial reporting.

[16] The Hold Separate Manager shall not (and shall cause any Persons employed in connection with the Hold Separate Businesses to not) communicate any Confidential Information acquired in the performance of their duties to any Person, except to the extent required or permitted by this Agreement. The Hold Separate Manager and any officers of BFI employed in connection with the Hold Separate Businesses shall execute a confidentiality agreement in a form determined by the Commissioner.

[17] BFI and the Hold Separate Manager shall hold and maintain all customer contracts of the Hold Separate Businesses and associated files and customer databases separate from BFI's databases and records. Employees of BFI that are not employed solely in connection with the Hold Separate Businesses shall not have access to information regarding contracts included in the Hold Separate Businesses or associated customer information, except to the extent that access to or use of such Confidential Information is necessary in order to complete the Transaction, defend or prosecute litigation, obtain legal advice, negotiate and meet obligations under agreements to effect the Divestiture or to the extent otherwise required by law.

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

[19] The Hold Separate Businesses shall be staffed with sufficient employees, on a level consistent with past custom and practice, to maintain their viability, competitiveness and value. Persons employed in connection with the Hold Separate Businesses shall include: (a) all personnel performing responsibilities primarily in connection with any of the Hold Separate Businesses, as determined by the Hold Separate Manager, as of the Closing Date; and (b) any Persons subsequently hired in connection with the Hold Separate Businesses. The Hold Separate Manager, with the approval of the Monitor, may replace departing or departed employees with Persons who, in the opinion of the Hold Separate Manager, have appropriate experience and expertise, or determine not to replace such departing or departed employees.

[20] BFI shall not, during the Hold Separate Period, offer Persons employed in connection with the Hold Separate Businesses positions with BFI. BFI shall not enter into any agreement with an employee or otherwise offer any incentive to such employees to decline employment with the Purchaser, and shall remove any impediments that may deter such employees from accepting employment with the Purchaser. Without limiting the generality of the foregoing, BFI shall waive any non-compete provisions of employment or other contracts that could impede such employees from being employed by the Purchaser; provided that BFI shall be entitled to seek to enforce any provision in an agreement that precludes such employees from using Confidential Information of WSI, or from using Confidential Information of WSI to solicit business from customers of WSI whose contracts are not included in the Divestiture Assets for a period of one (1) year from the termination of their employment with BFI.

[21] For a period of two (2) years following completion of the Divestiture, BFI shall not employ or make offers of employment to Persons employed in connection with the Hold Separate Businesses who have accepted offers of employment with the Purchaser unless the individual employee has been terminated by the Purchaser.

[22] BFI shall ensure that Persons employed in connection with the Hold Separate Businesses receive, during the Hold Separate Period, their salaries, all current and accrued bonuses, pensions

and other current and accrued benefits and such other payments to which those employees would otherwise have been entitled.

IV. MONITOR

[23] The Commissioner may appoint a Monitor as selected in her sole discretion, responsible for monitoring the compliance of the Respondents and the Hold Separate Manager with this Agreement.

[24] The Monitor's obligations and powers shall not expire under this Agreement until the Divestiture has been completed in accordance with this Agreement or further order of the Tribunal.

[25] BFI shall be responsible for all reasonable fees and expenses properly charged or incurred by the Monitor in the course of carrying out his duties under this Agreement. The Monitor shall account for all fees and expenses incurred and such account shall be subject to the approval of the Commissioner only.

[26] Within five (5) Business Days of the appointment of the Monitor, the Respondents and the Monitor shall execute an agreement, subject to the approval of the Commissioner, agreeing to be bound by the terms and conditions of this Agreement and that confers on the Monitor all of the rights and powers necessary to permit the Monitor to monitor the Respondents' compliance with this Agreement.

[27] If the Monitor ceases to act or fails to act diligently or otherwise in accordance with this Agreement, the Commissioner shall appoint a substitute Monitor as selected in her sole discretion.

[28] The Monitor shall have, subject to a legally recognized privilege, full and complete access to all personnel, books, records, documents and facilities related to the Hold Separate Businesses and the Divestiture Assets or to any other information relevant to the performance of his responsibilities as Monitor, including Confidential Information, as the Monitor may request from the Respondents. The Respondents shall cooperate with any request of the Monitor. The Respondents shall not interfere with or impede the Monitor's compliance with this Agreement or the Monitor's ability to oversee the performance of this Agreement by the Respondents and the Hold Separate Manager.

[29] The Monitor shall serve without bond or security, at the expense of BFI, on such reasonable and customary terms as are agreed with the approval of the Commissioner. If the Monitor and the Respondents fail to agree on terms within five (5) Business Days from the date of the Monitor's appointment, the Commissioner shall establish the terms of the Monitor's service. The Monitor shall have the authority to engage, at the cost and expense of BFI, such consultants, accountants, attorneys, and other representatives and assistants as are reasonably necessary to carry out the Monitor's duties and responsibilities under this Agreement.

[30] The Respondents shall indemnify the Monitor and hold him harmless against any losses, claims, damages, liabilities or expenses arising out of, or in connection with, the performance of

his duties under this Agreement. This includes all reasonable fees of counsel and other expenses incurred in connection with the preparation or defence of any claim, whether or not such claim results in any liability, except to the extent that such liabilities, losses, damages, claims or expenses result from malfeasance, gross negligence or bad faith by the Monitor.

[31] The Monitor shall report in writing to the Commissioner concerning compliance with this Agreement by the Respondents and the Hold Separate Manager: (i) no later than thirty (30) days after the Closing Date and every thirty (30) days thereafter until the completion of the Divestiture; (ii) no later than thirty (30) days from the date upon which the Divestiture is completed in accordance with this Agreement; and (iii) within five (5) days following a request by the Commissioner or her staff for supplemental information.

[32] Neither the Respondents nor the Hold Separate Manager shall exert or attempt to exert any influence, direction or control over the Monitor.

[33] The Monitor is not the agent of the Respondents and this Agreement shall not be construed as providing the Monitor with ownership, management, possession, charge or control of the Hold Separate Businesses or the Divestiture Assets.

[34] The Monitor shall execute a confidentiality agreement in the form attached hereto at Schedule "E", pursuant to which the Monitor will undertake to the Respondents not to disclose any Confidential Information acquired in the performance of the Monitor's duties to any Person, except as permitted by such confidentiality agreement or by this Agreement.

[35] If the Monitor believes that any of the Respondents or the Hold Separate Manager is in breach of any of the terms of this Agreement, the Monitor shall immediately notify the Commissioner, the Respondents and the Hold Separate Manager of the breach, setting out particulars of such breach.

V. PRESERVATION OF THE DIVESTITURE ASSETS

[36] In order to preserve the Divestiture Assets pending completion of the Divestiture, and except to the extent that such powers, duties and responsibilities are vested with the Hold Separate Manager, the Respondents shall:

(a) ensure that the management and operation of the Hold Separate Businesses continues in the ordinary course of business and in a manner that is reasonably consistent in nature, scope and magnitude with past practices;

(b) provide resources necessary for the operational support of the Hold Separate Businesses in a manner that is reasonably consistent in nature, scope and magnitude with the past practices of WSI;

(c) use commercially reasonable efforts to maintain the viability and saleability of the Divestiture Assets;

(d) maintain all approvals, registrations, consents, licences, permits, waivers, and other authorizations necessary for the operation of the Hold Separate Businesses;

(e) maintain and hold the Hamilton Transfer Station and trucks, bins and other equipment included in the Divestiture Assets in an operating condition and state of repair at least equal to the current level for such assets, normal wear and tear excepted, and to standards at least equal to those that existed at the date of this Agreement;

(f) operate the Hold Separate Businesses in the ordinary course of business and in accordance with past practices, generally accepted industry practices and in material compliance with all applicable laws;

(g) ensure that the Divestiture Assets are not engaged in any type of business other than the type of business conducted as of the date of this Agreement, except with the prior approval of the Monitor and the Commissioner;

(h) not knowingly take or allow to be taken any action that materially and adversely affects the viability and saleability of the Divestiture Assets;

(i) not materially curtail marketing, sales, promotional or other activities in respect of the Hold Separate Businesses in connection with the solicitation of existing or prospective customers, except with the prior approval of the Monitor;

(j) not alter to any material extent, or cause to be altered, the management of the Hold Separate Businesses as it existed immediately prior to the date of this Agreement, except: (i) as may be necessary to comply with the terms of this Agreement; (ii) to replace employees that may resign; or (iii) with the prior approval of the Monitor; and

(k) maintain, adequate financial ledger books and records of material financial information with respect to the Hold Separate Businesses in accordance with Canadian generally accepted accounting principles consistently applied and sufficient to show the accounts receivable, fixed assets, revenues, direct expenses and earnings of the Hold Separate Businesses on a separate or stand-alone basis.

[37] Pending completion of the Divestiture, the Respondents shall not, without the Commissioner's prior written approval:

(a) create any new encumbrances on the Divestiture Assets, other than ordinary course obligations that are not due or delinquent;

(b) enter into, withdraw from, amend or otherwise take steps to alter any obligations in material contracts relating to the Divestiture Assets, except as necessary to comply with this Agreement; or

(c) make any material changes to the Divestiture Assets, except as required to comply with this Agreement.

VI. DIVESTITURE PROCESS (INITIAL SALE PERIOD)

[38] BFI shall conduct the Divestiture in accordance with the provisions of this Part VI and Confidential Schedules "B", "C" and "D".

[39] The Initial Sale Period commences on the Closing Date and ends at the time prescribed in Confidential Schedule "B" to this Agreement.

[40] During the Initial Sale Period, BFI shall promptly use all commercially reasonable efforts to:

(a) complete the Divestiture in accordance with this Agreement, such that BFI will have no direct or indirect interest in the Divestiture Assets, except as expressly provided for in paragraph 52 for Unassigned Contracts that are subcontracted to a Purchaser;

(b) complete the Divestiture to a Purchaser or Purchasers, each of which is:

(i) approved in writing by the Commissioner and on terms approved in writing by the Commissioner, each as determined in her sole discretion;

(ii) at arm's length from the Respondents; and

(iii) able to satisfy the Commissioner, in her sole discretion, that such Purchaser:

a. is committed to carrying on a Commercial Waste Collection business using the Divestiture Assets in the Relevant Market in which such Divestiture Assets are located or, in the case of the Hamilton Transfer Station, operating a Transfer Station in Hamilton, Ontario;

b. has the managerial, operational and financial capability to compete effectively in the Commercial Waste Collection business in the Relevant Market in which the Divestiture Assets are located, including the ability to operate from a facility located in such Relevant Market or, in the case of the Hamilton Transfer Station, it has the managerial, operational and financial capability to operate a Transfer Station in Hamilton, Ontario; and

c. will complete the Divestiture prior to the expiry of the Initial Sale Period.

The determination of whether the above conditions are satisfied is at the sole discretion of the Commissioner. In exercising her discretion to approve a proposed Divestiture to a Purchaser, the Commissioner may take into account, *inter alia*, the likely impact of the Divestiture on competition.

[41] BFI shall notify the Commissioner as soon as possible of any negotiations with a prospective Purchaser that may lead to a Divestiture and shall forward to the Commissioner copies of any agreement that is signed with a prospective Purchaser, including non-binding expressions of interest.

[42] BFI shall promptly notify the Commissioner of its intention to enter into a Divestiture Agreement with respect to any proposed Divestiture.

[43] Within five (5) Business Days of receipt of the notice described in paragraph 42, the Commissioner may request additional information concerning the proposed Divestiture. The Commissioner may request further additional information within three (3) Business Days of all of the information received from the prior request.

[44] The Commissioner shall notify BFI of the approval of, or the objection to, the proposed Divestiture as soon as possible, and in any event within five (5) Business Days of receipt of all information requested pursuant to paragraph 43 or if no additional information was requested, within ten (10) Business Days of the receipt of the notice described in paragraph 42.

[45] BFI shall provide reasonable and customary commercial covenants, representations, warranties and indemnities to the Purchaser(s), consistent with those typically included in sales of assets similar to the Divestiture Assets.

[46] Any Person making a *bona fide* inquiry of BFI shall be notified by BFI that the Divestiture is being made pursuant to this Agreement and shall be provided with a copy of this Agreement, with the exception of the provisions hereof that are confidential pursuant to paragraph 82.

[47] Subject to paragraphs 48 and 49 below, prospective Purchasers who have demonstrated a *bona fide* interest and who have the financial capability to complete a purchase of the Divestiture Assets shall:

(a) be furnished with all pertinent information regarding the Divestiture Assets within fourteen (14) days of a request therefor, excluding customer names and addresses;

(b) be permitted to make reasonable inspection of the Divestiture Assets and of all financial, operational or other non-privileged documents and information, including Confidential Information, which may be relevant to the Divestiture, except for any documents which, at the time of the request for inspection of such documents the Commissioner has agreed need not be disclosed; and

(c) be given such full and complete access as is reasonable in the circumstances to the personnel involved in managing the Divestiture Assets.

[48] If the Monitor is concerned as to the *bona fides* or the financial capability of any Person making an inquiry, the Monitor shall advise the Commissioner of such concern and the final determination of *bona fides* or financial capability shall be made by the Commissioner alone.

[49] Access by a potential Purchaser to the information identified in paragraph 47 above shall be conditional on the potential Purchaser demonstrating its financial capability to complete a purchase of Divestiture Assets and executing a standard confidentiality agreement in a form determined by the Commissioner and subject to approval by BFI.

[50] Subject to Confidential Schedule "C", BFI shall Divest of all of the Commercial Waste Collection assets included in the Divestiture Assets in a Relevant Market to the same Purchaser, unless otherwise agreed to in writing by the Commissioner. For example, the Purchaser of a Divestiture Asset in Calgary, Alberta, must be the Purchaser for the remaining Divestiture Assets located in Calgary, Alberta. However, as an example, the Purchaser of all of the Divestiture Assets located in Calgary, Alberta is not required to also be the Purchaser for the Divestiture Assets located in Edmonton, Alberta or any other Relevant Market.

[51] BFI shall use all commercially reasonable efforts to obtain any Third Party consents or waivers necessary to permit the assignment to, and assumption by, the Purchaser, of all contracts, licences, permits, agreements and authorizations included in the Divesture Assets.

[52] In the event that BFI fails to secure the Third Party consents or waivers necessary to permit the assignment to, and assumption by, the Purchaser of a Divestiture Asset, other than the lease of the Hamilton Transfer Station ("Unassigned Contract") BFI may subcontract to the Purchaser an Unassigned Contract, with the approval of the Commissioner, in her sole discretion, and in accordance with the following procedure:

(a) BFI shall promptly notify the Commissioner in writing of any failure to secure the Third Party consents or waivers necessary to permit the assignment of an Unassigned Contract, and the terms of any proposed subcontract;

(b) Within five (5) Business Days of receipt of the notice described in subparagraph (a) above, the Commissioner may request additional information concerning the attempt to assign the Unassigned Contract, including any documents or other information relating to negotiations or discussions with respect to the attempt to assign the Unassigned Contract, the particulars of the Unassigned Contract and the particulars of the proposed subcontracting arrangement;

(c) The Commissioner shall notify BFI of her approval of, or objection to, the proposed subcontract of the Unassigned Contract as soon as possible, and in any event within five (5) Business Days of receipt of the information described in subparagraph (b) above;

(d) In the event of, and upon receipt of, the approval described in (c) above, BFI may subcontract the Unassigned Contract to the Purchaser on the terms described in

Schedule "F" or such other terms as approved by the Commissioner, in her sole discretion; and

(e) BFI shall use all commercially reasonable efforts to obtain any Third Party consents or waivers necessary to permit the subcontract of the Divestiture Asset to the Purchaser.

[53] In the event that:

(a) BFI does not secure the Third Party consents or waivers necessary to permit a subcontract of an Unassigned Contract to the Purchaser, or the Commissioner does not approve of a subcontract of an Unassigned Contract or such Divestiture Asset is not otherwise subcontracted in accordance with paragraphs 51 and 52 above; or

(b) a contract included in the Divestiture Assets has been terminated or expires prior to the Divestiture of such contract;

BFI shall substitute a contract or contracts of at least equal value (based on contract or customer type, revenues, remaining term and location) in the same Relevant Market (the "Substitute Contract"), with the approval of the Commissioner in her sole discretion and in accordance with the procedure set out in paragraph 55 below, and such Substitute Contract shall form part of the Divestiture Assets.

[54] In the event that more than three percent (3%) of the Commercial Waste Collection annual revenues associated with the Divestiture Assets in a Relevant Market are attributable to contracts to provide services in more than one province, then BFI shall substitute contracts of a sufficient value so that no more than three percent (3%) of the Commercial Waste Collection annual revenues associated with Divestiture Assets in a Relevant Market are attributable to contracts to provide services in more than one province, in accordance with the procedure set out in paragraph 55 below, and such Substitute Contract shall form part of the Divestiture Assets.

[55] Where BFI is required to substitute a contract or contracts in the Divestiture Assets with a Substitute Contract:

(a) BFI shall promptly notify the Commissioner that a Substitute Contract is required under the terms of this Agreement;

(b) BFI shall, within five (5) Business Days of any request by the Commissioner, provide any additional information requested by the Commissioner to evaluate a Substitute Contract, including copies of other contracts with customers in the same geographic region as an Unassigned Contract;

(c) The Commissioner shall notify BFI of the approval of, or the objection to, a Substitute Contract as soon as possible, and in any event within five (5) Business Days of receipt of the information described in subparagraph (b) above; and

(d) Where the Commissioner objects to a Substitute Contract:

(i) BFI shall propose an alternate contract or contracts of at least equal value (based on contract or customer type, revenues, remaining term and location) in the same Relevant Market to be a Substitute Contract; and

(ii) The process established by these subparagraphs (b) to (d) shall be repeated until such time as a Substitute Contract is approved by the Commissioner.

[56] With respect to the Divestiture of all of WSI's interests in the Hamilton Transfer Station to a Purchaser, BFI shall take the steps set out in Confidential Schedule "D" during the Initial Sale Period.

[57] BFI, or the Divestiture Trustee on behalf of BFI, shall enter into the following agreements to supply transitional services, at the option of the relevant Purchaser:

(a) For the Purchaser of the Divestiture Assets that are located in Calgary, Alberta, an agreement to permit such Purchaser to dispose of waste at BFI's landfill located at 201-194th Avenue SE, Calgary, Alberta at volumes of up to 18,000 tonnes per year at rates (exclusive of all applicable taxes and government levies imposed following the Closing Date), and on terms which are the same as those agreed to between BFI and WSI for disposal of solid, non-hazardous waste from commercial, institutional and industrial customers at BFI's landfill in Calgary, Alberta and set out in the Solid Waste Disposal Agreement dated August 1, 2009, for the earlier of two (2) years or such time as BFI no longer has the capacity to accept such waste at its Calgary landfill from any person, including BFI. The rate for disposal of waste during the second year of such agreement shall be adjusted to reflect any change in the all-items consumer price index for Alberta as published by Statistics Canada in the Consumer Price Index Catalogue No. 62-001-X Table 9-9 (Alberta) (or a publication replacing same);

(b) For the Purchaser of the Divestiture Assets that are located in Simcoe County, Ontario, an agreement to permit such Purchaser to dispose of up to 9,000 tonnes of solid, non-hazardous waste from commercial, institutional and industrial customers for the first year and up to 10,000 tonnes of such waste for the second year, at the option of the Purchaser, at either the WSI Transfer Station located at 320 Saunders Road, Barrie, Ontario or the BFI Transfer Station located at 21 Bertram Industrial Parkway, Midhurst, Ontario, at rates exclusive of all applicable taxes and government levies imposed following the Closing Date, in accordance with Confidential Schedule "D" and on commercially reasonable terms, provided that the waste complies with the permits issued to these Transfer Stations; and

(c) For each Purchaser of the Divestiture Assets, a transitional services agreement for a period of up to 90 days to allow for access and use of BFI's yard and related facilities for the parking or storage of vehicles, bins and other equipment forming part of the Divestiture Assets in the Relevant Market in which the Divestiture

Assets are located at no cost, and the supply of maintenance and repair services for such equipment on commercially reasonable terms.

VII. DIVESTITURE TRUSTEE PROCESS

[58] In the event that BFI fails to complete the Divestiture during the Initial Sale Period, the Commissioner may appoint a Divestiture Trustee to, within the Divestiture Trustee Sale Period, complete the Divestiture to a Purchaser approved by the Commissioner and on terms approved by the Commissioner (including those terms set out at Confidential Schedules "C" and "D"), in her sole discretion. The Divestiture Trustee shall use whatever procedure it believes is suitable, as determined by the Divestiture Trustee in its sole discretion, subject to oversight and approval by the Commissioner only.

[59] The Commissioner may appoint the Divestiture Trustee ten (10) days before the expiry of the Initial Sale Period or on such later date as determined by the Commissioner. Immediately following the appointment of the Divestiture Trustee, and prior to the expiry of the Initial Sale Period, BFI shall provide the Divestiture Trustee with complete access to all information relating to the Divestiture Assets, including Confidential Information, to facilitate the Divestiture by the Divestiture Trustee.

[60] The Divestiture Trustee shall have full and exclusive authority during the Divestiture Trustee Sale Period to complete the Divestiture and enter into a legally binding agreement with a Purchaser that will be binding on BFI. BFI shall be bound by any agreement entered into by the Divestiture Trustee on behalf of BFI to complete the Divestiture in accordance with this Part. BFI agrees that it will do all such acts and execute all such further documents, and will cause the doing of all such acts and the execution of all such further documents as are within its power to cause the doing or execution of, as may be reasonably necessary to ensure that the Divestiture Assets are Divested in the Divestiture Trustee Sale Period and that agreements entered into by the Divestiture Trustee are binding upon and enforceable against BFI.

[61] Any Person making a *bona fide* inquiry of the Divestiture Trustee shall be notified that the Divestiture is being made pursuant to this Agreement and shall be provided with a copy of this Agreement, with the exception of the provisions hereof that are confidential pursuant to paragraph 82.

[62] BFI consents to the following terms and conditions regarding the Divestiture Trustee's powers, duties, authority and responsibilities:

(a) Subject to oversight and approval by the Commissioner only, the Divestiture Trustee shall have the exclusive authority to control the Divestiture, subject to this Agreement, to accomplish the Divestiture by whatever procedure the Divestiture Trustee believes in its discretion is suitable, as soon as practicable within the Divestiture Trustee Sale Period or such longer period as directed by the Commissioner.

(b) BFI will not be included in the Divestiture process, including negotiations, nor will BFI have contact with prospective Purchasers, except with the prior approval of the Commissioner; provided, however, that the Divestiture Trustee may consult with BFI in the presence of a representative of the Commissioner when the Divestiture Trustee considers such consultation to be appropriate and the Commissioner consents.

(c) Notwithstanding any term of this Agreement, the Divestiture Trustee's obligations and powers under this Agreement shall not expire until the Divestiture is completed.

(d) The Divestiture Trustee shall execute a standard confidentiality agreement in a form determined by the Commissioner, and may communicate Confidential Information to a prospective Purchaser to the extent reasonably required to complete the Divestiture, provided that such Person shall have agreed in writing with the Divestiture Trustee to keep such information confidential in a form of agreement determined by the Divestiture Trustee in its sole discretion, subject to oversight and approval by the Commissioner only.

(e) The Commissioner may extend the Divestiture Trustee Sale Period as the Commissioner considers necessary, in her sole discretion, to complete the Divestiture.

(f) BFI shall grant the Divestiture Trustee full and complete access to all personnel, books, records and facilities related to the Divestiture Assets, and to any other information relevant to the performance of its responsibilities as Divestiture Trustee, including Confidential Information, deemed relevant by the Divestiture Trustee to complete the Divestiture. BFI shall take no action to interfere with or impede the Divestiture Trustee's efforts to complete the Divestiture.

(g) BFI shall fully and promptly respond to all requests from the Divestiture Trustee and shall provide all information the Divestiture Trustee may request. BFI shall identify an individual who shall have primary responsibility for responding to such requests from the Divestiture Trustee on behalf of BFI.

(h) The Divestiture Trustee shall use commercially reasonable efforts to negotiate terms and conditions that are favourable to BFI as are reasonably available at that time for the Divestiture, having regard to the terms attached hereto as Confidential Schedules "C" and "D".

(i) The Divestiture Trustee shall have the sole authority to determine, and BFI shall provide, all reasonable and customary commercial covenants, representations, warranties and indemnities for the purpose of completing the Divestiture to a Purchaser.

(j) The Divestiture Trustee shall serve, without bond or other security, at the cost and expense of BFI, and on such reasonable and customary terms and conditions as the Commissioner may set.

(k) BFI shall pay all reasonable invoices submitted by the Divestiture Trustee within thirty (30) days of receipt. Any outstanding monies owed to the Divestiture Trustee by BFI shall be paid out of the proceeds of the Divestiture.

(l) The Divestiture Trustee shall have the authority to employ, at the expense of BFI, such consultants, accountants, attorneys, investment bankers, business brokers, appraisers, and other representatives and assistants as are necessary to carry out the Divestiture Trustee's duties and responsibilities.

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

(n) If the Divestiture Trustee ceases to act or fails to act diligently or otherwise in accordance with this Agreement or any agreement between the Commissioner and the Divestiture Trustee, the Commissioner may appoint a substitute Divestiture Trustee in the same manner as provided in this Part for the initial Divestiture Trustee.

(o) The Divestiture Trustee shall have no obligation or authority to operate or maintain the Divestiture Assets.

(p) The Divestiture Trustee shall report in writing to the Commissioner every thirty (30) days following the date of the Divestiture Trustee's appointment, and upon the Commissioner's request within three (3) days, concerning the Divestiture Trustee's efforts to complete the Divestiture. Such reports shall contain reasonable detail on the steps being taken by the Divestiture Trustee to complete the Divestiture, including but not limited to: the identity of prospective Purchasers; the status of negotiations with such prospective Purchasers; and any additional information requested by the Commissioner.

(q) The Divestiture Trustee shall promptly notify the Commissioner of any proposed agreement to Divest the Divestiture Assets. Such notice shall include: the identity of the proposed Purchaser; the details of the proposed agreements; information concerning whether, in the view of the Divestiture Trustee, the proposed Purchaser would likely satisfy the terms of this Agreement; and any additional information requested by the Commissioner.

(r) The Divestiture Trustee shall complete the Divestiture to a Purchaser or Purchasers, each of which is:

(i) approved in writing by the Commissioner and on terms approved in writing by the Commissioner, each as determined in her sole discretion;

(ii) at arm's length from the Respondents; and

(iii) who is able to satisfy the Commissioner, in her sole discretion, that such Purchaser:

a. is committed to carrying on a Commercial Waste Collection business using the Divestiture Assets in the Relevant Market in which such Divestiture Assets are located or, in the case of the Hamilton Transfer Station, operating a Transfer Station in Hamilton, Ontario;

b. has the managerial, operational and financial capability to compete effectively in the Commercial Waste Collection business in the Relevant Market in which the Divestiture Assets are located, including the ability to operate from a facility located in such Relevant Market or, in the case of the Hamilton Transfer Station, that it has the managerial, operational and financial capability to operate a transfer Station in Hamilton, Ontario; and

c. will complete the Divestiture prior to the expiry of the Divestiture Trustee Sale Period.

The determination of whether the above conditions are satisfied is at the sole discretion of the Commissioner. In exercising her discretion to approve a proposed Divestiture to a Purchaser, the Commissioner may take into account, *inter alia*, the likely impact of the Divestiture on competition. The decision of the Commissioner as to whether to approve the proposed Divestiture shall be in writing.

[63] Subject to Confidential Schedule "C", the Divestiture Trustee shall Divest of all of the Commercial Waste Collection assets included in the Divestiture Assets in a Relevant Market to the same Purchaser, unless otherwise agreed to in writing by the Commissioner.

[64] The Divestiture Trustee shall use all commercially reasonable efforts to obtain any Third Party consents or waivers necessary to permit the assignment to, and assumption by, the Purchaser of all contracts, licences, permits, agreements and authorizations included in the Divesture Assets. In the event that, despite commercially reasonable efforts, the Divestiture Trustee fails to secure the Third Party consents or waivers necessary to permit the assignment to, and assumption by, the Purchaser of an agreement or contract included in the Divestiture Assets, other than the lease for the Hamilton Transfer Station, the Divestiture Trustee, on behalf of BFI,

may, with the approval of the Commissioner in her sole discretion, subcontract the Unassigned Contract to the Purchaser on the terms described in Schedule "F" or such other terms as approved by the Commissioner in her sole discretion. Where the Unassigned Contract will be subcontracted to the Purchaser, the Divestiture Trustee shall use all commercially reasonable efforts to obtain any Third Party consents or waivers necessary to permit the subcontract to the Purchaser.

[65] In the event the Divestiture Trustee does not secure the Third Party consents or waivers necessary to permit a subcontract of an Unassigned Contract or the Commissioner does not approve of a subcontract of an Unassigned Contract in accordance with paragraph 64 above, the Divestiture Trustee shall substitute another contract or contracts of at least equal value (based on contract or customer type, revenues, remaining term and location) in the same Relevant Market, and such Substitute Contract shall form part of the Divestiture Assets. The Divestiture Trustee shall choose a BFI contract as a Substitute Contract only if, in the opinion of the Divestiture Trustee, there are no WSI contracts of at least equal value (based on contract or customer type, revenues, remaining term and location) to an Unassigned Contract in the same Relevant Market available to be Divested. The Divestiture Trustee's choice of Substitute Contracts shall be subject to the prior approval of the Commissioner in her sole discretion.

[66] BFI may not object to or challenge the performance of the Divestiture Trustee's duties under this Agreement or any Divestiture Trustee Sale on any grounds other than the Divestiture Trustee's malfeasance, gross negligence or bad faith in executing its obligations hereunder. If BFI objects to the terms and conditions of a Divestiture that has been proposed by the Divestiture Trustee on grounds of malfeasance, gross negligence or bad faith by the Divestiture Trustee, BFI or the Commissioner may apply to the Tribunal for directions, but in no event shall any such dispute serve to suspend the Divestiture Trustee Sale Period.

VIII. FAILURE OF DIVESTITURE TRUSTEE SALE

[67] If, by the end of the Divestiture Trustee Sale Period, the Divestiture has not been completed, or if the Commissioner is of the opinion that the Divestiture likely will not be completed prior to the end of the Divestiture Trustee Sale Period, the Commissioner may apply to the Tribunal for such order as is necessary to complete the Divestiture, or for such order as is necessary to ensure that the Transaction is not likely to prevent or lessen competition substantially.

[68] BFI agrees that the Tribunal has jurisdiction to grant such relief as is required to give effect to this Agreement and complete the Divestiture to a Purchaser.

IX. COMPLIANCE

[69] Subject to paragraph 71 below, for a period of ten (10) years from the Closing Date, BFI shall not manage or operate any Divestiture Assets or directly or indirectly acquire any interest in the Divestiture Assets, without the prior written consent of the Commissioner.

[70] In respect of each Relevant Market, pending the completion of the Divestiture of all the Commercial Waste Collection assets included in the Divestiture Assets in such Relevant Market and for a period of one (1) year following such Divestiture, BFI shall not, directly or indirectly, solicit or offer to provide Commercial Waste Collection services in that Relevant Market to a customer subject to a contract included in the Divestiture Assets. For greater clarity, nothing in this paragraph shall preclude the Hold Separate Manager or Hold Separate Businesses from, directly or indirectly, soliciting, acquiring, offering or providing Commercial Waste Collection services in a Relevant Market pending the completion of the Divestiture of the Commercial Waste Collection assets included in the Divestiture Assets in that Relevant Market.

[71] Following the expiry of the one-year period in paragraph 70, BFI shall not be restricted by this Agreement from competing for the business of any customers, including customers who have contracts included in the Divestiture Assets.

[72] For a period of three (3) years from the Closing Date, without the prior written consent of the Commissioner, BFI shall not:

(a) acquire any Commercial Waste Collection assets in any Relevant Market from a Purchaser or Third Party offering Commercial Waste Collection in any of the Relevant Markets;

(b) consummate any merger or other combination relating to Commercial Waste Collection in any Relevant Market with a Purchaser or Third Party offering Commercial Waste Collection in any of the Relevant Markets;

(c) enter into, perform or consummate any agreement with a Purchaser or Third Party offering Commercial Waste Collection in any of the Relevant Markets that would restrict or impair the Purchaser's or Third Party's ability to operate its Commercial Waste Collection business in any Relevant Market in a manner that is competitive and fully independent of BFI; or

(d) acquire any voting or non-voting stock, share capital, equity, notes convertible into any voting or non-voting stock or otherwise acquire any direct or indirect interest in any Purchaser or Third Party offering Commercial Waste Collection in any of the Relevant Markets.

[73] For any transaction described in paragraph 72 above that is proposed within a two (2) year period following the expiry of the period in paragraph 72 and for which notice is not required under section 114 of the Act, BFI shall, unless otherwise agreed by the Commissioner, supply the information described in section 16 of the *Notifiable Transaction Regulations* to the Commissioner at least thirty (30) days before completing such transaction. The Commissioner may, within thirty (30) days of receiving the information described in section 16 of the *Notifiable Transaction Regulations*, request that BFI supply additional information that is relevant to the Commissioner's assessment of the transaction. In the event that the Commissioner issues such a request for additional information, BFI agrees that it will supply such information to the Commissioner in the form specified by the Commissioner and shall not complete such

transaction until at least thirty (30) days after BFI has supplied all such requested information in the form specified by the Commissioner.

[74] BFI shall: (i) six (6) months from the Closing Date, and every six (6) months thereafter for a period of five (5) years, provide to the Commissioner a declaration of compliance with this Agreement; and (ii) provide to the Commissioner information requested by the Commissioner to confirm compliance with this Agreement no later than ten (10) Business Days after receiving a request for such information from the Commissioner.

[75] In the event of a material breach of any of the terms of this Agreement, the Respondents shall, upon becoming aware of such breach, promptly notify the Commissioner thereof, and shall provide details sufficient to describe the nature, date and effect (actual or anticipated) of the breach.

[76] In the event that a subcontracting agreement entered into with a Purchaser in accordance with paragraphs 51 and 52 or 64 of this Agreement has been terminated prior to the expiry of the term of the Unassigned Contract, BFI shall substitute a contract or contracts of at least equal value (based on contract or customer type, revenues, remaining term and location) in the same Relevant Market with the approval of the Commissioner in her sole discretion and in accordance with the procedure set out in paragraph 55 above.

[77] For a period of five (5) years from the Closing Date, for purposes of determining or securing compliance with this Agreement, and subject to any legally recognized privilege, and upon written request and upon two (2) Business Days notice to the Respondents, the Respondents shall, without restraint or interference, permit any duly authorized representative(s) of the Commissioner:

(a) access, during regular office hours of the Respondents on Business Days, to all facilities and access to inspect and copy all books, ledgers, accounts, correspondence, memoranda and all other records and documents in the possession or under the control of the Respondents related to compliance with this Agreement, which copying services shall be provided by the Respondents at their expense; and

(b) to interview officers, directors, or employees of the Respondents regarding such matters,

it being understood that this paragraph 77 shall not be construed so as to derogate from any protections afforded by section 29 of the Act.

[78] The Respondents shall not be deemed to be in default under this Agreement if such default is caused by or is attributable to any occurrence which is beyond the reasonable control of the Respondents and which by the exercise of reasonable foresight and due diligence the Respondents are unable to prevent or overcome (a "Force Majeure Event"); provided that: (a) notice of the Force Majeure Event is promptly provided; (b) a work-around strategy is promptly

developed; and (c) all commercially reasonable efforts are used to implement the work-around strategy and to otherwise resume performance of this Agreement given the circumstances.

X. NOTIFICATION

[79] The Respondents shall provide a copy of this Agreement to each of their own and their Affiliates' officers, employees and agents having managerial responsibility for any obligations under this Agreement, no later than ten (10) Business Days from the date this Agreement is registered with the Tribunal.

[80] Notices, reports and other communications required or permitted pursuant to any of the terms of this Agreement or in any proceedings arising herefrom before the Tribunal shall be in writing and shall be considered to be given if dispatched by personal delivery, registered mail or facsimile transmission to the parties as follows:

(a) If to the Commissioner:

Commissioner of Competition
Competition Bureau Canada
Place du Portage, 21st Floor
50 Victoria Street, Phase I
Gatineau, Quebec K1A 0C9

Attention: Melanie Aitken, Commissioner of Competition
Fax: (819) 953-5013

With copies to:

Executive Director and Senior General Counsel
Competition Law Division
Department of Justice
Place du Portage, 22nd Floor
50 Victoria Street, Phase I
Gatineau, Quebec K1A 0C9

and

Adam Fanaki
Davies Ward Phillips & Vineberg LLP
44th Floor, 1 First Canadian Place
Toronto, Ontario
M5X 1B1

(b) If to BFI:

IESI-BFC Ltd.
BFI Canada Inc.
135 Queens Plate Drive Suite 300
Toronto, Ontario, M9W 6V1

Attention: William Chyfetz, General Counsel
Fax: (416) 741-4565

With copies to:

Donald B. Houston
McCarthy Tétrault LLP
Suite 5300
Toronto-Dominion Bank Tower
Toronto, Ontario, M5K 1E6

or to such other street address, individual or electronic communication number or address as may be designated by notice given by any party to the other parties. Any demand, notice or other communication given by personal delivery will be conclusively deemed to have been given on the day of actual delivery and, if given by registered mail, on the fifth (5^{th}) Business Day following the deposit thereof in the mail and, if given by electronic communication, on the day of transmittal thereof if given during the normal business hours of the recipient and on the Business Day during which such normal business hours next occur if not given during such hours on any day. If the party giving any demand, notice or other communication knows or ought reasonably to know of any difficulties with the postal system that might affect the delivery of mail, any such demand, notice or other communication may not be mailed but must be given by personal delivery or by electronic communication.

XI. GENERAL

[81] The Respondents agree to the immediate registration of this Agreement with the Tribunal.

[82] Information in Confidential Schedules "A.1" and "D" shall remain confidential at all times during and following the duration of this Agreement, provided that BFI or the Divestiture Trustee may disclose the contents of Confidential Schedule "A.1" to any prospective Purchaser. Information in Confidential Schedule "B" shall be made public upon expiration of the Initial Sale Period. Information in Confidential Schedule "C" shall be made public upon the completion of the Divestiture of all Divestiture Assets.

[83] The Commissioner may, in her sole discretion, extend any of the time periods contemplated by this Agreement. The Respondents and the Commissioner may mutually agree to amend this Agreement in any manner pursuant to subsection 106(1) of the Act.

[84] Nothing in this Agreement (including the recitals hereto) precludes the Respondents from bringing an application under section 106 of the Act (or a successor or equivalent provision under the Act) to vary or rescind this Agreement. The Respondents agree that they shall not, in any such application, contest the Commissioner's present conclusions that: (i) the Transaction is likely to result in a substantial lessening and/or prevention of competition in supply of Commercial Waste Collection in each of the Relevant Markets; and (ii) that the implementation of this Agreement is necessary and sufficient to ensure that any substantial lessening and/or prevention of competition would not result from the Transaction.

[85] Computation of time periods contemplated by this Agreement shall be in accordance with the *Interpretation Act*, R.S.C. 1985, c. I-21. For the purpose of this Agreement, the definition of "holiday" in the *Interpretation Act* shall be deemed to include Saturday.

[86] This Agreement constitutes the entire agreement between the Commissioner and the Respondents and supersedes all prior agreements, understandings, negotiations and discussions, whether written or oral, with respect to the subject matter hereof.

[87] Nothing in this Agreement precludes the Commissioner from taking enforcement action against the Respondents under any provision of the Act, including sections 77 and 79 of the Act, except for an application under section 92 of the Act (or a successor or equivalent provision under the Act) with respect to the Transaction, or precludes the Respondents from raising any available defences to such action.

[88] Nothing in this Agreement abrogates the notification obligations set out in Part IX of the Act.

[89] In the event of a dispute regarding the interpretation, application or implementation of this Agreement, including any decision by the Commissioner pursuant to this Agreement or any breach of this Agreement by the Respondents, any of the Commissioner, the Monitor or BFI may apply to the Tribunal for directions or a further order. In no event shall any dispute serve to suspend the Initial Sale Period or the Divestiture Trustee Sale Period.

[90] This Agreement may be executed in counterparts, each of which shall constitute an original and all of which taken together shall constitute one and the same instrument. In the event of any discrepancy between the English language and French language versions of this Agreement, the English language version shall prevail.

The undersigned hereby agree to the immediate registration of this Agreement.

DATED this 29th day of June, 2010.

"Melanie L. Aitken"

Melanie L. Aitken
Commissioner of Competition

IESI-BFC LTD.

By: "Keith Carrigan"

Name: Keith Carrigan
Title: Vice-Chairman and
Chief Executive Officer

BFI CANADA INC.

By: "Keith Carrigan"

Name: Keith Carrigan
Title: President and
Chief Executive Officer

WASTE SERVICES INC.

By: "Ivan R. Cairns"

Name: Ivan R. Cairns
Title: Executive Vice-President

WASTE SERVICES (CA) INC.

By: "Ivan R. Cairns"

Name: Ivan R. Cairns
Title: Vice-President

SCHEDULE "A"

DIVESTITURE ASSETS

Calgary

Approximate Number of Customer Contracts (detailed information in Confidential Schedule "A.1"):	795
Annual Revenue	$4,051,449
Approximate Number of Containers	1,212
List of Trucks (5 in total)	2009, Autocar/labrie, 5VCDC6JF39H208163 2007, Autocar/labrie, 5VCDC6MF47H204583 2005, Autocar/labrie, 5VCDC6MF85H201411 2005, Autocar/labrie, 5VCDC6MFX5H201412 2005, Autocar/labrie, 5VCDC6ME25H200898

Edmonton

Approximate Number of Customer Contracts (detailed information in Confidential Schedule "A.1"):	1,592
Annual Revenue	$5,851,605
Approximate Number of Containers	2,116
List of Trucks (4 in total)	2007, Autocar/labrie, 5VCDC6MF67J204584 2007, Autocar/labrie, 5VCDC6MF08H205442 2004, Autocar/labrie, 5VCDC6LF65H200534 2002, Autocar/labrie, 4V2DC6UE93N339815

Barrie

Approximate Number of Customer Contracts (detailed information in Confidential Schedule "A.1"):	428
Annual Revenue	$1,806,236
Approximate Number of Containers	822
List of Trucks (2 in total)	2005, Mack/UHE, 1M2K195CX6M028544 2000, Volvo/UHE, 4V2DCHEYN796758

Ottawa

Approximate Number of Customer Contracts (detailed information in Confidential Schedule "A.1"):	859
Annual Revenue	$4,933,382
Approximate Number of Containers	2,231
List of Trucks (5 in total)	2007, Mack, 1M2K189C57M034905 2007, Mack, 1M2K189C77M034906 2001, Volvo/UHE, 4V2DC6UE21N321198 2000, Volvo/UHE, 4V2DCHE7YN780238 2000, Volvo/UHE, 4V2DC2HE2YN780261

Hamilton

Approximate Number of Customer Contracts (detailed information in Confidential Schedule "A.1"):	460
Annual Revenue	$1,700,293
Approximate Number of Containers	938
List of Trucks (2 in total)	2007, Mack/UHE, 1M2K189C87M039712 2001, Mack/Labrie, 1M2K185C41M008079

Hamilton Transfer Station

- Assignment of all of WSI's interests in the Hamilton Transfer Station, including assignment of the lease for the Hamilton Transfer Station.

- Transfer Station equipment:

    - 06 John Deere 200CLC Hydraulic Excavator with grapple and scale
    - Transfer Station Compactor
    - 99 John Deere 624H Wheel Loader
    - Facility Scale
    - Radiation Detector

CONFIDENTIAL SCHEDULE "A.1"

[CONFIDENTIAL]

CONFIDENTIAL SCHEDULE "B"

[CONFIDENTIAL]

CONFIDENTIAL SCHEDULE "C"

[CONFIDENTIAL]

CONFIDENTIAL SCHEDULE "D"

[CONFIDENTIAL]

SCHEDULE "E"

CONFIDENTIALITY AGREEMENT

THIS AGREEMENT is dated as of ■

BETWEEN:

[Full name of Monitor]

(hereinafter referred to as the "**Receiving Party**")

- and -

[IESI-BFC LTD., BFI CANADA INC., WASTE SERVICES INC., and WASTE SERVICES (CA) INC.]

(hereinafter referred to as the "**Disclosing Parties**")

WHEREAS:

A. Pursuant to an agreement and plan of merger dated November 11, 2009 between IESI-BFC Ltd. ("**BFI**"), IESI-BFC Merger Sub, Inc. ("**Merger Sub**") and Waste Services, Inc. ("**WSI**"), Merger Sub will be merged with and into WSI, with WSI continuing as a wholly-owned subsidiary of BFI (the "**Transaction**");

B. The Commissioner of Competition (the "Commissioner") and the Disclosing Parties have entered into a Consent Agreement dated the June 29, 2010 and registered with the Competition Tribunal pursuant to section 105 of the *Competition Act*, R.S.C. 1985, c.C-34;

D. The Receiving Party has been appointed by the Commissioner to act as Monitor (as such term is defined in the Consent Agreement) pursuant to Part IV of the Consent Agreement

E. The Consent Agreement sets forth the role and obligations of the Receiving Party (the "**Purpose**").

F. In fulfilling the Purpose, the Receiving Party may be furnished with certain confidential and/or proprietary business information regarding the Disclosing Parties' businesses.

NOW THEREFORE for good and valuable consideration, the receipt and sufficiency of which each party acknowledges, the parties agree as follows:

1. **Definitions**

(a) "**Agreement**" means this Agreement entered into between the Receiving Party and the Disclosing Parties;

(b) "**Commissioner**" means the Commissioner of Competition appointed pursuant to section 7 of the Act and any person designated by the Commissioner to act on her behalf;

(c) "**Confidential Information**" means all or any part of the information regarding financial affairs, operations, engineering and technical matters, accounting matters, suppliers, customer information, customer lists, computer programs, trade secrets, trademarks, patents, know-how, ideas, financial information, data, models, specifications, patent or trademark applications, methodologies, designs, processes, technology, techniques, drawings, inventions, diagrams, business requirements, technical requirements and exploration, including, without limitation all information marked as "Confidential", "Proprietary" or "Restricted" or that reasonably should be considered as such from its nature or from the circumstances surrounding its collection, use or disclosure and all other relevant information pertaining thereto in any form whatsoever, as well as this Agreement and the Purpose; except that Confidential Information will exclude information that:

(i) was already in the public domain;

(ii) was already lawfully in the Receiving Party's possession, or previously known to or developed by the Receiving Party without obligation of confidentiality, at the time of disclosure by the Disclosing Parties;

(iii) becomes part of the public domain through no act or omission of the Receiving Party;

(iv) is disclosed to the Receiving Party without obligation of confidentiality by a third party having the legal right to do so;

(v) is independently developed by the Receiving Party without reference to the Confidential Information of the Disclosing Parties; or

(vi) is approved in writing for disclosure by the Disclosing Parties.

(d) "**Disclosing Parties**" has the meaning ascribed thereto in the recitals and, for greater certainty, includes any of that party's Affiliates and their respective successors or assigns;

(e) "**Monitor**" has the meaning ascribed thereto in the Consent Agreement;

(f) "**Receiving Party**" has the meaning ascribed thereto in the recitals and, for greater certainty, includes any of their Affiliates and any of their respective successors or assigns;

(g) "**Representatives**" means the Receiving Party's officers, directors, partners, personnel or professional advisors;

All other capitalized terms used, but not defined, herein shall have the meanings ascribed to them in the Consent Agreement.

2. **Receiving Party's Duty of Confidentiality.** With respect to any Confidential Information the Receiving Party receives from the Disclosing Parties, the Receiving Party shall: (i) use commercially reasonable measures to keep such information confidential; (ii) use the same degree of care to protect the Disclosing Parties' Confidential Information as it uses for its own Confidential Information, but in no event less than reasonable care; (iii) not use the Confidential Information other than in connection with the performance of this Agreement; and (iv) not divulge the Confidential Information to the Representatives, unless the Receiving Party has informed such Representatives of the confidential nature of the Confidential Information and the Representatives are subject to similar confidentiality obligations.

3. **Return of Confidential Information.** Following termination of this Agreement and upon written notice from any of the Disclosing Parties requesting return of any or all Confidential Information, the Receiving Party shall forthwith return all such Confidential Information to the Disclosing Party requesting return of the Confidential Information and shall keep no copies. Where deletion of information is necessary to fulfill this requirement, it shall be performed within the confines afforded by existing technology limitations. Upon request, an officer's certificate confirming that such actions have been completed and that there are no tangible and/or electronic versions of the Confidential Information in the Receiving Party's possession or control, shall be provided to the Disclosing Parties by the Receiving Party. Notwithstanding the foregoing, the Receiving Party shall be entitled to retain such Confidential Information as is necessary in order to comply with its professional obligations which require the retention of such working papers, records and other documentation which reasonably evidence the nature and extent of the work done in respect of any professional engagement.

4. **Disclosure of Confidential Information.** In the event that the Receiving Party or any of the Representatives is required to disclose any Confidential Information by law or by any regulatory authority or due to the Receiving Party's professional obligations or the Rules of Professional Conduct, if permitted by law the Receiving Party shall provide the Disclosing Party with prompt notice thereof so that the Disclosing Parties may seek a protective order or other appropriate remedy or waive compliance with the provisions of this Agreement prior to such disclosure. The Receiving Party shall cooperate with the Disclosing Parties in its efforts to obtain a protective order or other remedy. In the event that such protective order or other remedy is not obtained or the Disclosing Parties waives compliance with the provisions of this Agreement, either the Receiving Party or

its representatives will furnish only that portion of the Confidential Information which is legally required to be disclosed to such parties, based on advice from the Receiving Party's internal counsel, and the Receiving Party shall exercise all reasonable efforts to obtain assurances that confidential treatment will be accorded the Confidential Information.

5. **Interim Relief.** The Receiving Party agrees that it shall be responsible for any breach of this Agreement by the Representatives and that the Disclosing Parties shall be entitled to seek all remedies available at law or in equity to enforce, or seek relief in connection with, any breach of the obligations set forth in this Agreement, provided that the Disclosing Parties shall provide the Commissioner with notice in writing in advance of any proceedings it commences in this regard.

6. **Choice of Law.** This Agreement shall be interpreted and construed in accordance with the laws of the Province of Ontario and the federal laws of Canada applicable therein (other than any conflict of laws rules that would result in the choice of laws of another jurisdiction).

7. **Severability.** If any provision contained in this Agreement is found by a court of competent jurisdiction to be invalid, illegal or unenforceable in any respect, the validity, legality or enforceability of the remaining provisions herein shall not in any way be affected or impaired thereby.

8. **Term**. This Agreement will continue in force until three years after the Receiving Party ceases to act as Monitor.

9. **Headings**. The headings in this Agreement are for convenience of reference only and shall not affect the construction or interpretation thereof.

10. **No Assignment**. Neither party may assign this Agreement or any of its rights or obligations thereunder, in whole or in part.

11. **Relationship of Parties**. Nothing in this Agreement shall be construed to establish an agency, employment, partnership, joint venture or other relationship between the parties.

12. **Notice**. All notices required or contemplated by this Agreement shall be in writing and shall be deemed received:

    (a) when delivered in person; or

    (b) on the day sent by facsimile (fax) transmission or, if that day is not a business day on the date of receipt, then on the next following business day,

    addressed to the Disclosing Party as follows:

■
Attention: ■
Telecopy: ■

and addressed to the Receiving Party as follows:

■
Attention: ■
Telecopy: ■

With copies to:

Commissioner of Competition
Competition Bureau Canada
Place du Portage, 21st Floor
50 Victoria Street, Phase I
Gatineau, Quebec K1A 0C9

Attention: Melanie Aitken, Commissioner of Competition

Fax: (819) 953 5013

And:

Executive Director and Senior General Counsel
Competition Law Division
Department of Justice
Place du Portage, 22nd Floor
50 Victoria Street, Phase I
Gatineau, Quebec K1A 0C9

Each party may change the address to which notices shall be sent from time to time by giving the other party notice of change in accordance with this Section 12. For the purposes of this Section, the term "business day" means a day, other than a Saturday or Sunday, on which banks are open for regular business in Toronto, Ontario.

13. **Amendment; Waiver; and Entire Agreement**. No amendment, modification or change in this Agreement shall be binding unless in writing, executed by all parties, and with the prior written approval of the Commissioner, acting in her sole discretion. No waiver of any provision of this Agreement shall be binding unless in writing, executed by the party making the waiver, and with the prior written approval of the Commissioner, acting in her sole discretion. No amendment, modification or change in this Agreement, nor any waiver of any provision by a party, shall be binding upon such party unless and until executed in writing by an authorized officer of such party. No delay or omission to exercise any right, power or remedy accruing to either party under this Agreement shall impair any such right, power or remedy, nor will it be construed to be a waiver of any

breach, default or non-compliance by the other party, or any acquiescence therein. Subject to the terms of the Consent Agreement, this Agreement reflects the complete understanding of the parties and constitutes the parties' entire agreement with respect to the subject matter contained herein, superseding all prior negotiations, representations, agreements, understandings, and statements.

14. **Execution.** This Agreement may be executed in counterparts, each of which shall be an original instrument, but all of which shall constitute one and the same Agreement.

IN WITNESS WHEREOF, the parties hereto have caused this Agreement to be duly executed as of the date first above written.

By: _____
Authorized Signing Officer

[NTD: Full name of Disclosing Parties]

By: _____
[Name]
Authorized Signing Officer

SCHEDULE "F"

SUBCONTRACT TERMS

1. Subcontractor as Independent Contractor

BFI is required under the terms of the Consent Agreement with the Commissioner of Competition (the "Commissioner") dated June 29, 2010 to subcontract to the Subcontractor any Unassigned Contracts (as defined in paragraph 52 of the Consent Agreement) to the Subcontractor to perform, as an independent contractor, all of the services required to be subcontracted and as more fully described in Appendix A. It is expressly understood and agreed that the Subcontractor is an independent contractor carrying on its own business independent of BFI and neither the Subcontractor nor any of its employees are employees or partners of BFI. It is understood and agreed that BFI does not have the right to, and will not control or endeavour to control the manner or prescribed method of performing the services covered by this Subcontracting Agreement provided the service provided by the Subcontractor complies with the terms of the various agreements pursuant to which the waste collection service is being provided.

2. Term

This Subcontracting Agreement shall be effective as of the date first above written and shall continue until the expiry of the terms, including any renewal options, as set out in the Unassigned Contract that BFI is subcontracting to the Subcontractor, as described in Appendix A.

3. Services and Payment

The Subcontractor shall provide the services and equipment necessary to perform all of the services required to be subcontracted and as more fully described in Appendix A.

The Subcontractor shall be paid the amounts shown on Appendix A, which amounts shall provide for the Subcontractor to receive all of the revenues payable or attributable to all of the services required to be subcontracted. The Subcontractor shall invoice BFI within ten (10) days of the end of each calendar month. BFI shall pay the amount owing to the Subcontractor within ten (10) days of receipt of invoice by BFI.

BFI will provide the Subcontractor with copies of the Unassigned Contracts with its customer and the Subcontractor shall perform all of the subcontracted services required under those agreements in accordance with the agreements.

4. Accident Reporting

The Subcontractor shall report immediately to BFI any and all accidents involving property damage or bodily injuries.

5. General Liability Insurance

The Subcontractor shall, at all times during the term of this Subcontracting Agreement, carry at its own expense, adequate comprehensive general liability insurance covering personal injury and property damage with a minimum $2,000,000 per occurrence combined single limit for bodily injury and property damage liability.

6. Automobile Liability

The Subcontractor shall, at all times during the term of this Subcontracting Agreement, carry at its own expense adequate automobile liability insurance with a minimum $2,000,000 per occurrence combined single limit for bodily injury and property damage liability.

BFI shall be provided with certificates of insurance with respect to this and general liability coverage.

7. Indemnity

The Subcontractor agrees to indemnify and hold harmless BFI from and against any and all claims, damages, losses and expenses (including reasonable legal fees), arising out of the performance of any work to be performed hereunder by the Subcontractor, including, without limitation, all damages for bodily injury, illness, death, and property damage caused in whole or in part by the Subcontractor's negligent act or omission, or that of anyone employed by the Subcontractor or for whose acts the Subcontractor may be liable.

8. Inability to Perform Services

In the event that the Subcontractor is unable to complete the services contracted for herein for any reason whatsoever, BFI may terminate this Subcontracting Agreement and shall provide prompt written notice to the Commissioner of such termination.

9. Driver's Safety Regulations

Any driver utilized by the Subcontractor shall be an individual who meets all the requirements to drive and operate the equipment used by the Subcontractor under this Subcontracting Agreement. The Subcontractor shall be liable for fines or any other expenses incurred by reason of any violation by such driver(s) of any rule, order or regulation of regulatory bodies.

10. Permits, Equipment and Maintenance

The Subcontractor warrants that it has, and that it shall maintain and keep in good standing during the term of this Subcontracting Agreement, all federal, provincial and municipal permits and licenses required to perform the services contracted for herein.

The Subcontractor shall comply with all federal, provincial and municipal rules and regulations, including, without limitation, rules in respect of health and safety.

All equipment used by the Subcontractor shall be maintained in a safe and road-worthy condition in compliance with all federal, provincial and municipal laws, rules, regulations, permits and licenses.

11. Entire Agreement, Amendments and Waivers

This Subcontracting Agreement, the Consent Agreement and the Appendix hereto, constitute the entire agreement between the parties pertaining to the subject matter hereof and supersedes all prior agreements, statements, representations and warranties, understandings, negotiations, and discussions of the parties, whether oral or written. No supplement, modification or waiver of this Subcontracting Agreement shall be binding unless approved by the Commissioner and executed in writing by the party to be bound thereby. No waiver of any of the provisions of this Subcontracting Agreement shall be deemed or shall constitute a waiver of any other provision hereof, and the waiver of any default shall not be deemed to be a waiver of any other or subsequent default.

12. Assignment

Neither this Subcontracting Agreement nor any of the rights and obligations provided by this Agreement may be assigned by the Subcontractor without the prior written consent of BFI, which consent shall not be unreasonably withheld.

13. Validity

In the event that any provision of this Subcontracting Agreement is held to be invalid or unenforceable by a court of competent jurisdiction, such invalidity or unenforceability shall not effect the remainder of the provisions hereof and such part shall be fully severable and this Agreement shall be construed and enforced as if such invalid or unenforceable part had not been a part of this Subcontracting Agreement.

14. Binding on Successors and Assigns

This Agreement shall enure to the benefit of the parties and their permitted successors and assigns.

15. Confidential Information

The Subcontractor recognizes and acknowledges that it will have access to confidential information of BFI which the Subcontractor agrees it will not disclose to any third parties.

16. Governing Law

This Agreement shall be governed by and construed in accordance with the laws of the Province of XX and the laws of Canada, applicable therein.

TAB H

DATE May 7, 2015 EXHIBIT NO. 8
EXAM. OF ROBERT ESPEY
Michele Gibson, CSR(A)
Amicus Reporting Group

Parkland
FUEL CORPORATION

PIONEER ACQUISITION UPDATE

April 20th, 2015

PARKLAND IS A GROWING INDEPENDENT SUPPLIER OF RETAIL, COMMERCIAL AND WHOLESALE FUELS

Parkland FUEL CORPORATION

Executive Summary

Parkland is an independent fuel company that generates earnings by selling refined fuel products at retail gas stations, to commercial fuel customers, or through wholesale bulk purchases. Parkland's cost of supply, its most important cost, is driven by negotiating contracts with the major Canadian integrated refiners (e.g., Esso, Shell, Suncor). Unlike the integrated refiners, Parkland does not earn any margin on the refining of crude oil, only on the margin between its purchase cost from the refiners and its selling price to customers of refined products.

Over the last ten years, Parkland has grown into Canada's largest independent fuel companies, but remains significantly smaller than the integrated refiners in terms of volume of fuel sold, revenue, and profit. Over time, and driven by its growth in fuel volume, Parkland has been able to improve the discount it receives from the integrated refiners, driving efficiencies to the business.

In September 2014, Parkland announced its intention to acquire the assets of Pioneer Energy, representing the marriage of two of Canada's independent fuel marketers. What makes these companies independent is that they are not tied to the integrated refiners, and as such are able to freely negotiate more aggressive pricing discounts on the fuel that they purchase, resulting in a cheaper supply price, and thus stronger competition for retail, commercial and wholesale fuel sales.

Parkland is particularly excited to acquire Pioneer Energy due to the extensive brand recognition that Pioneer has achieved in the retail gasoline market in Ontario, and the above average volume that it typically sells at its retail gas stations, driven by its aggressive pricing strategy, attracting value customers. While Parkland is also excited by the volume that Pioneer sells at its Esso branded independent dealers, the corporately owned Pioneer branded stations with their market leading throughput per site, are considered the jewel of the acquisition. Lastly, Parkland sees a strong fit between the two companies given their limited geographic overlap; pre acquisition, Parkland's market share in Ontario (Pioneer's core region of operations) is less than 2%.

Parkland has no incentive to deviate from Pioneer's established "low-price" strategy as their customers shop with them because of that same "low-price" brand position. If Pioneer sites were to raise prices to match the market, the result would be a destruction of its brand equity as the "low-price" retailer. This would result in a significant loss of volume and thereby EBITDA to Parkland, destroying the economics which made the transaction attractive in the first place.

Lastly, a further reason that Parkland is so interested in the acquisition of Pioneer is due to the efficiencies that are estimated as a result of the transaction. By Parkland increasing their share of volume purchased from Canadian refiners (from approximately ~8% to ~10%) Parkland's ability to negotiate a further rack discount from the integrated refiners increases.

AGENDA

Parkland
FUEL CORPORATION

Background on Parkland

The Pioneer Energy Transaction

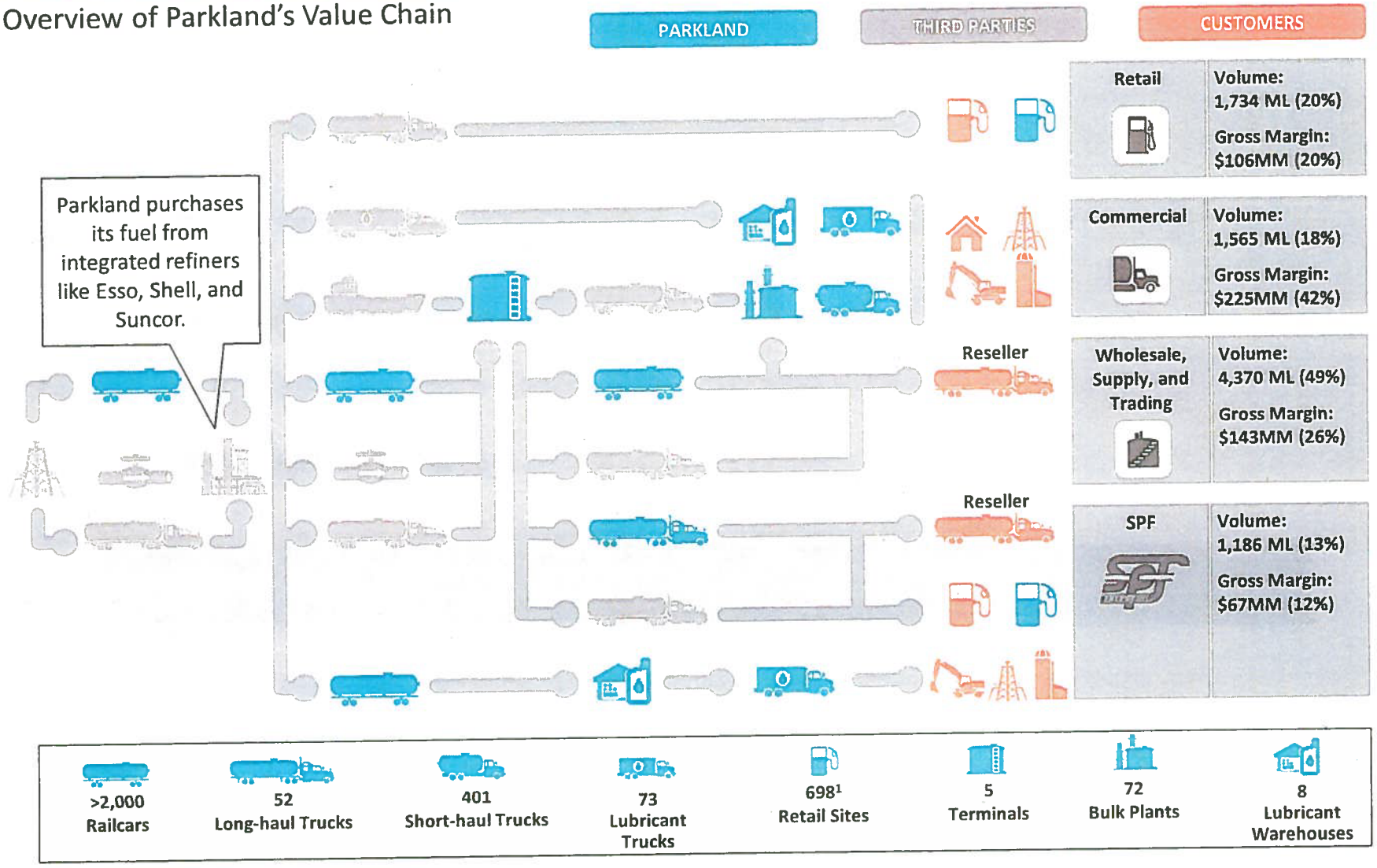
Considerations Raised by the Bureau

Appendix

PARKLAND GOES TO MARKET VIA WHOLESALE, COMMERCIAL, AND RETAIL SALES CHANNELS IN CANADA AND THE U.S.

Parkland FUEL CORPORATION

Overview of Parkland's Value Chain

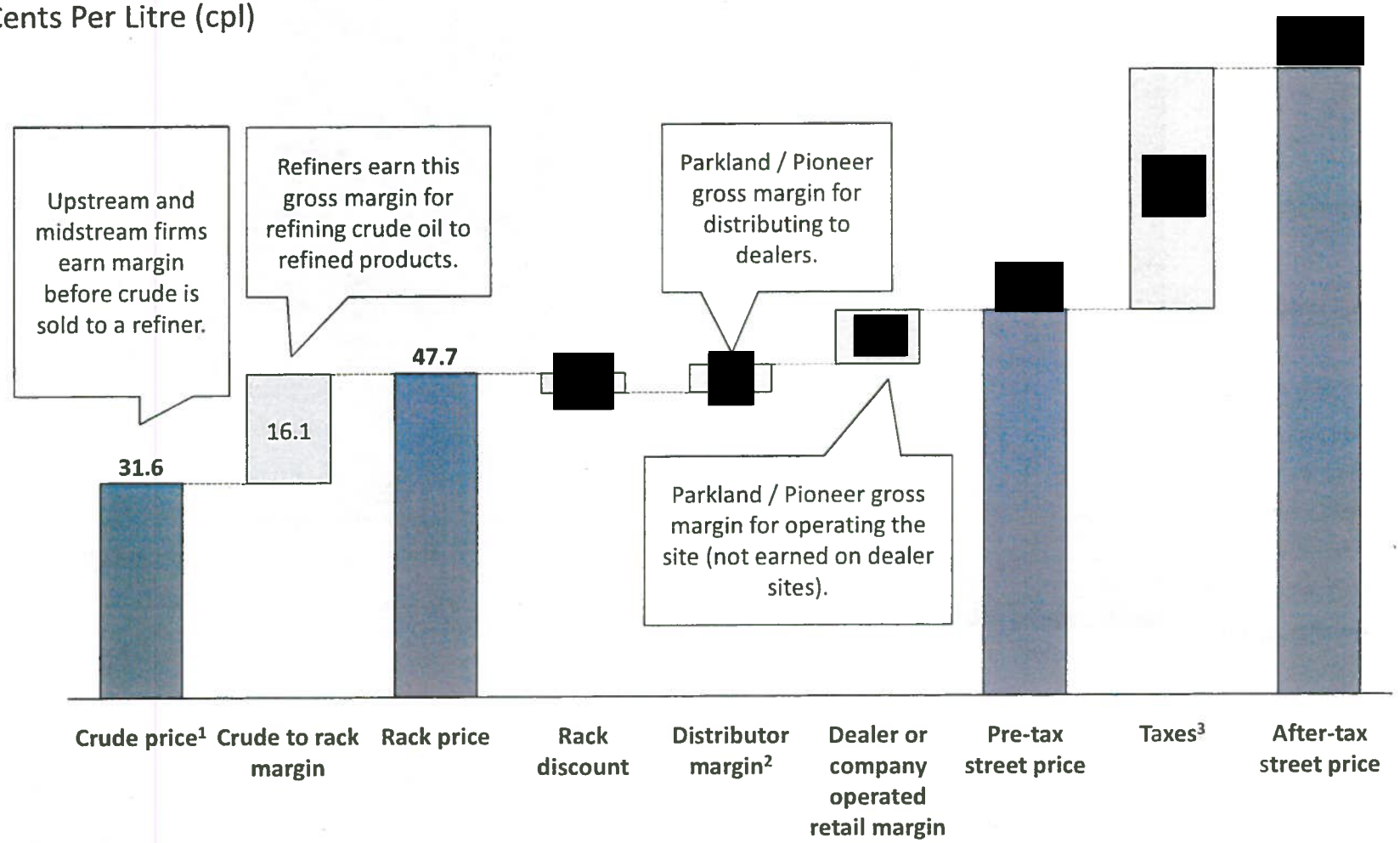


1. Does not include Pioneer retail sites.

DOWNSTREAM FUEL ECONOMICS ARE SHARED BY MULTIPLE PARTIES; GREATEST SHARE EARNED BY REFINERS…

Parkland FUEL CORPORATION

Indicative Crude to Retail Fuel Price for Ontario – January 2015
Cents Per Litre (cpl)

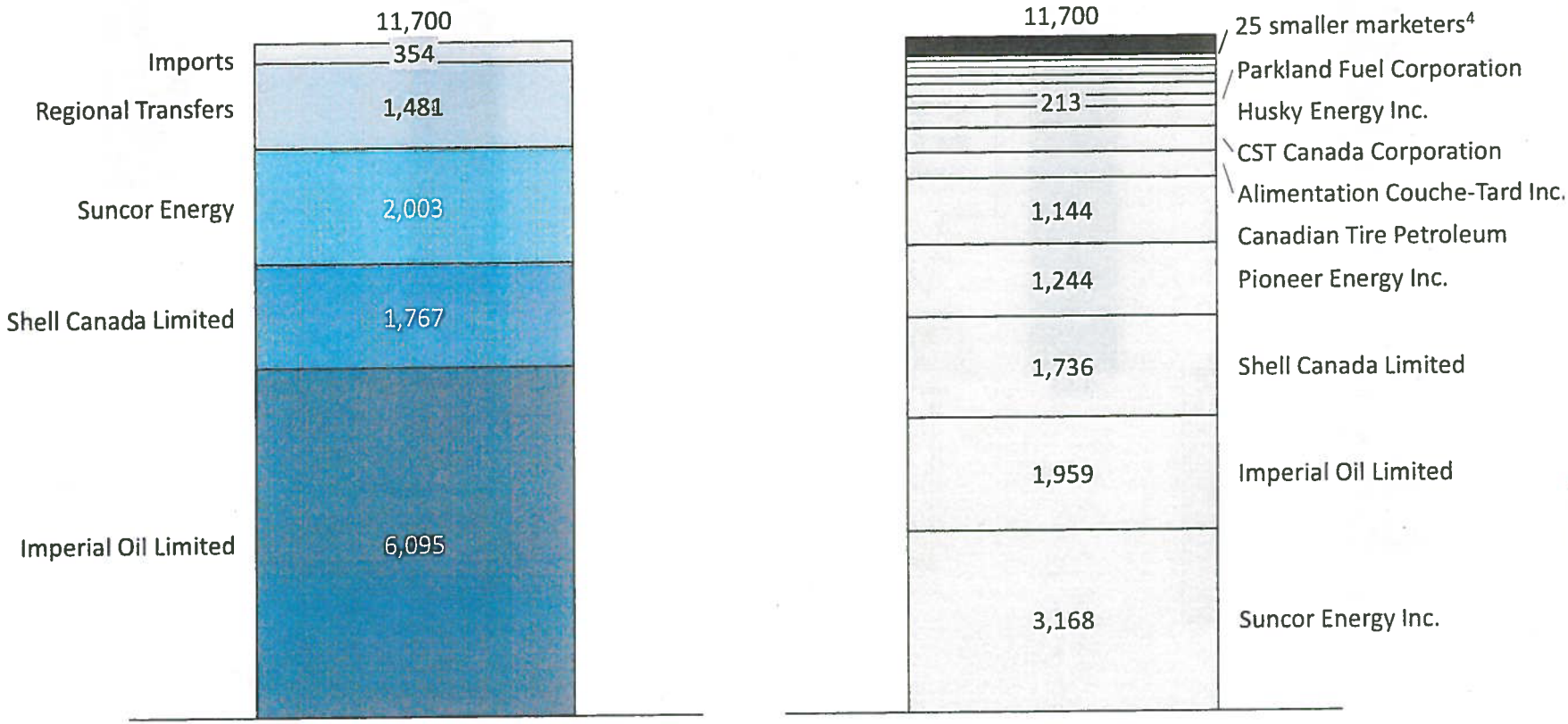


1. Crude price is a blend of light (WTI) and heavy (WCS) crude.
2. Distributor margin is comprised of processing fees charged to dealer. The figure listed is an average for Parkland's Ontario dealer sites in 2013.
3. Fixed taxes are comprised of a 10.0 cpl Federal Excise Tax, and a 14.7 cpl Ontario Provincial Fuel Tax. On top of these taxes, a 13% Ontario Harmonized Sales Tax is added ([redacted] cpl in this example).
Source: Kent Marketing Group data from January 2015 was used for all figures, excluding Rack discount and distributor margin; Parkland internal data was used for rack discount and distributor margin.

...POTENTIALLY DRIVEN BY SUPPLIER POWER THAT ENABLES INCREASED PRICING DUE TO A FRAGMENTED BUYER BASE

Parkland FUEL CORPORATION

Ontario Gasoline Supply and Demand
ML Per Year

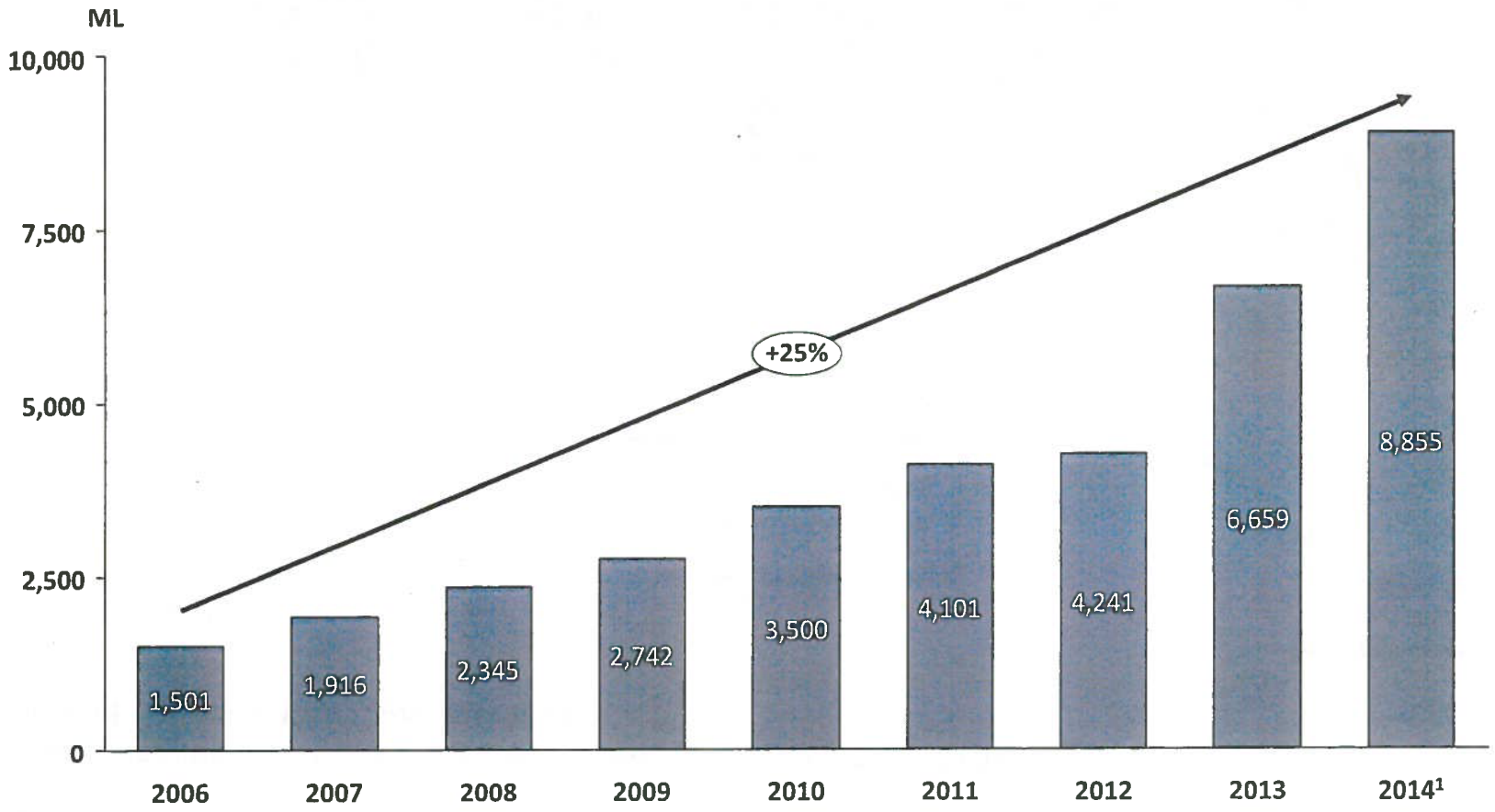


1. Refinery production data from Statistics Canada CANSIM Table 134-0004. Parkland has assumed December 2013 data to be an average of the previous 11 disclosed months of production data.
2. Refiner-specific production data is not provided by Statistics Canada. Parkland has estimated the production by refiner using publically disclosed refinery capacity.
3. Sourced from 2014 Kent Marketing Services data.
4. Includes 7-Eleven, MacEwen, Loblaw, Global, Gales, Amco, Mr. Gas, UPI Energy, McDougall, W.O. Stinson, XTR Energy, Econo, Flying J, Drummond, Federated Co-Op, Fifth Wheel, Gra Ham Energy, Mackenzie Oil, Sobeys, Maple Leaf Gas, Petro V, Irving Oil, Crevier, Francis Fuels, Gas King, and Therrien Inc.

PARKLAND HAS GROWN ITS VOLUME AND EBITDA SIGNIFICANTLY IN THE LAST DECADE LARGELY THROUGH ACQUISITION

Parkland CORPORATION

Parkland Volume History
ML; C$ MM

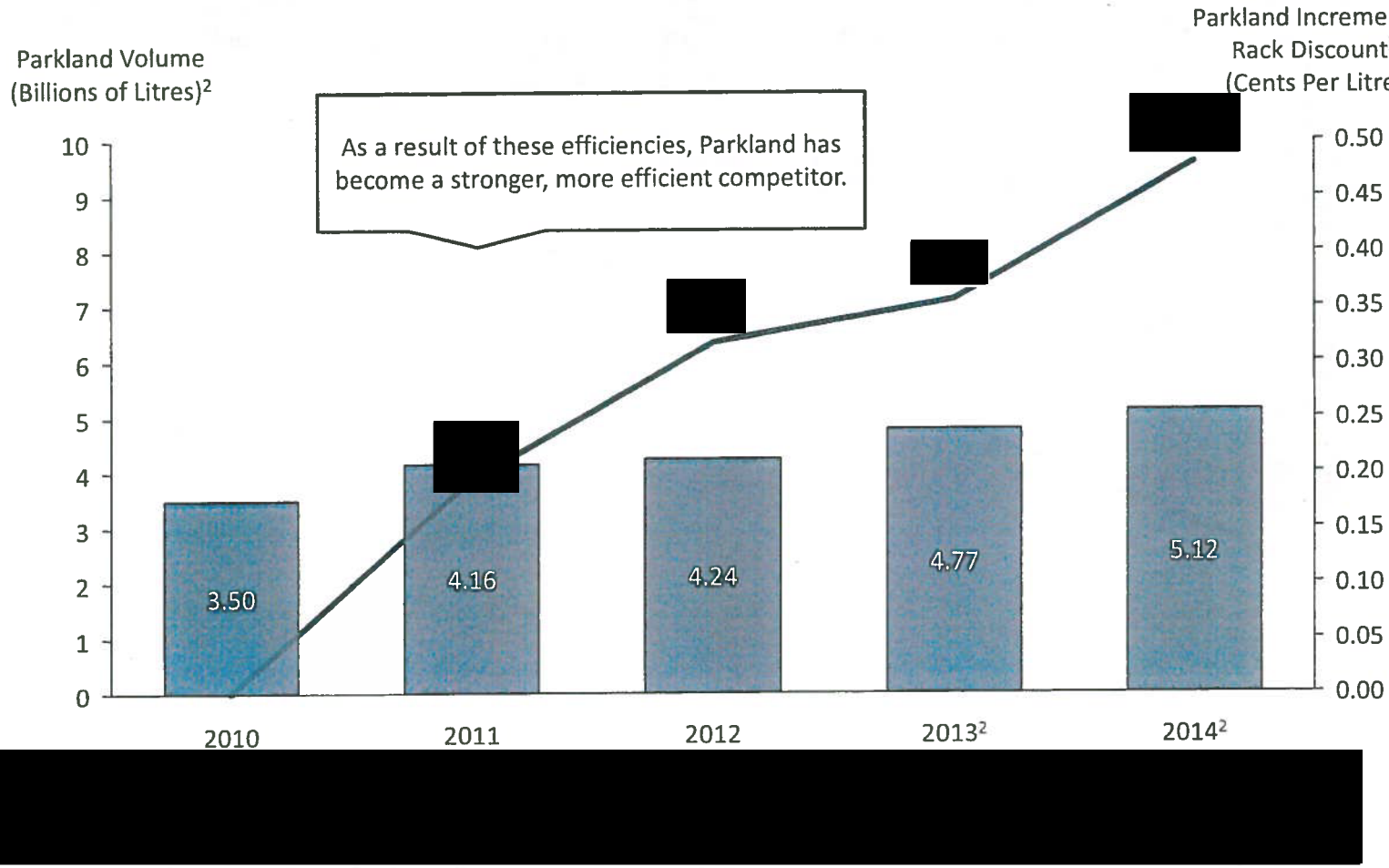


1. The Pioneer acquisition is not reflected in the 2014 volume and EBITDA numbers presented, but is included in the acquisition data.
Source: Parkland public disclosures and internal reports.

THIS GROWTH HAS ENABLED PARKLAND TO IMPROVE RACK PRICE DISCOUNTS FROM REFINERS, DRIVING EFFICIENCIES

Parkland FUEL CORPORATION

Parkland Volume and Incremental Rack Discount[1] Relative to a 2010 Baseline
Billions of Litres Per Year; Cents Per Litre



1. Incremental rack discount is a given year's discount minus the base discount of [redacted] cents per litre in 2010. This discount is the weighted average of all purchases ex-Suncor.
2. Parkland volume excludes volume of SPF Energy and Elbow River Marketing, as the rack discount is not applicable to the volume from these business units.
3. Calculated as the incremental rack discount multiplied by volume. For example, 2011 was [redacted] 4.16BL.

Source: Volume is sourced from Parkland annual MD&A reports. Rack discount is from Parkland's internal data.

AGENDA

Parkland
FUEL CORPORATION

Background on Parkland

The Pioneer Energy Transaction

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Appendix

PIONEER IS AN ATTRACTIVE OPPORTUNITY TO EXPAND PARKLAND'S PRESENCE IN CANADA'S LARGEST RETAIL MARKET

Parkland FUEL CORPORATION

Investment Thesis

Note: Slide is unedited from the "Project Red Horse" Investment Recommendation dated September 12th, 2014 and provided in the initial data request to the Bureau.

- **Significant Growth.** The acquisition of Pioneer provides Parkland an opportunity to substantially grow its total marketing volume (by 2.2 billion litres, or 33%), unbranded volume (by 1.2 billion litres or 63%), and EBITDA (by $53.4MM, or 29%)[1]. Additionally, with this acquisition, Parkland will achieve it's Penny Plan target EBITDA of $250MM one year ahead of schedule.

- **Supply Opportunities.** Increased production in PADD II, driven by advantaged crude and lengthening crack spreads provides Parkland with new supply opportunities. Pioneer's 1.2 billion litres of unbranded volume enables Parkland to benefit from these potential arbitrage opportunities in addition to capturing supply synergies in the first year from existing contracts.

- **Differentiated Marketer.** Pioneer is the strongest independent marketer in the largest retail gasoline market in Canada. With a differentiated "low cost" position well established in the market, Pioneer drives an impressive average site volume of 7.4 ML (+12% greater than the average of Shell, Esso, and Petro Canada in Ontario).

- **Increased RBD Presence.** Pioneer has 213 Esso RBD sites. Combined with Parkland's 346 sites, the combined entity will represent 43% of the RBD network and 31% of all Esso sites from coast to coast.

- **Risks are Mitigated.** [redacted]

- **Strong Financial Returns.** At $380MM [redacted]x[2] TEV/LTM normalized EBITDA) the acquisition of Pioneer will: (i) return a [redacted] after-tax IRR in the base case; (ii) drive an increase in cash flow per share of 27% (from $0.95 to $1.21); (iii) reduce Parkland's payout ratio from 111% to 87% (or from [redacted] to [redacted] assuming only [redacted] is considered); and iv) deliver [redacted] of TEV [redacted] ([redacted] of TEV [redacted]).

1. All figures are for FY 2013.

[redacted]

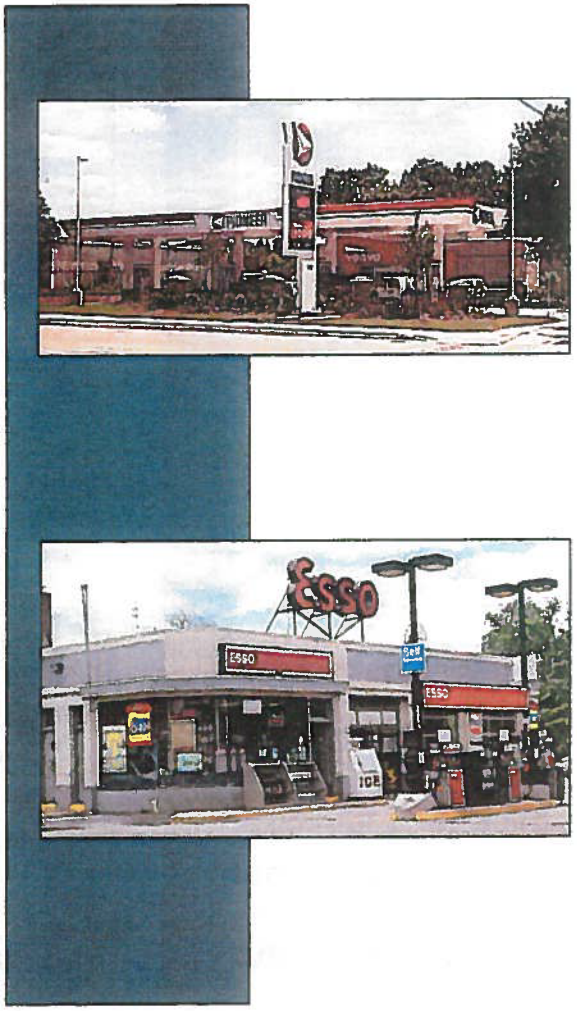
Source: Pioneer Data; Kent Market Report 2013.

PIONEER EMPLOYS TWO RETAIL STRATEGIES WHICH GENERATED [redacted] IN CONTRIBUTION IN FY2013

Parkland FUEL CORPORATION

Pioneer Go-To-Market Strategies

Note: Slide is unedited from the "Project Red Horse" Investment Recommendation dated September 12th, 2014 and provided in the initial data request to the Bureau.



Description	Contribution
Retail Division • Pioneer's retail division operates 180 corporate owned locations, 145 under their proprietary brands, and 35 under Esso or other brands. • Under each, Pioneer owns the fuel and controls the pricing of fuel at the site. • In this division, Pioneer uses three operating models: (i) owned locations; (ii) leased locations; and (iii) consignment dealer locations.	[redacted]
Dealer Division • Pioneer has 213 dealer locations, 198 of which operate under the Esso brand. • The majority of these locations were acquired through a Retail Branded Distributor agreement with Esso. • Pioneer does not control price, or own the fuel at any of these locations; fuel is sold on a wholesale basis.	[redacted]
	[redacted]

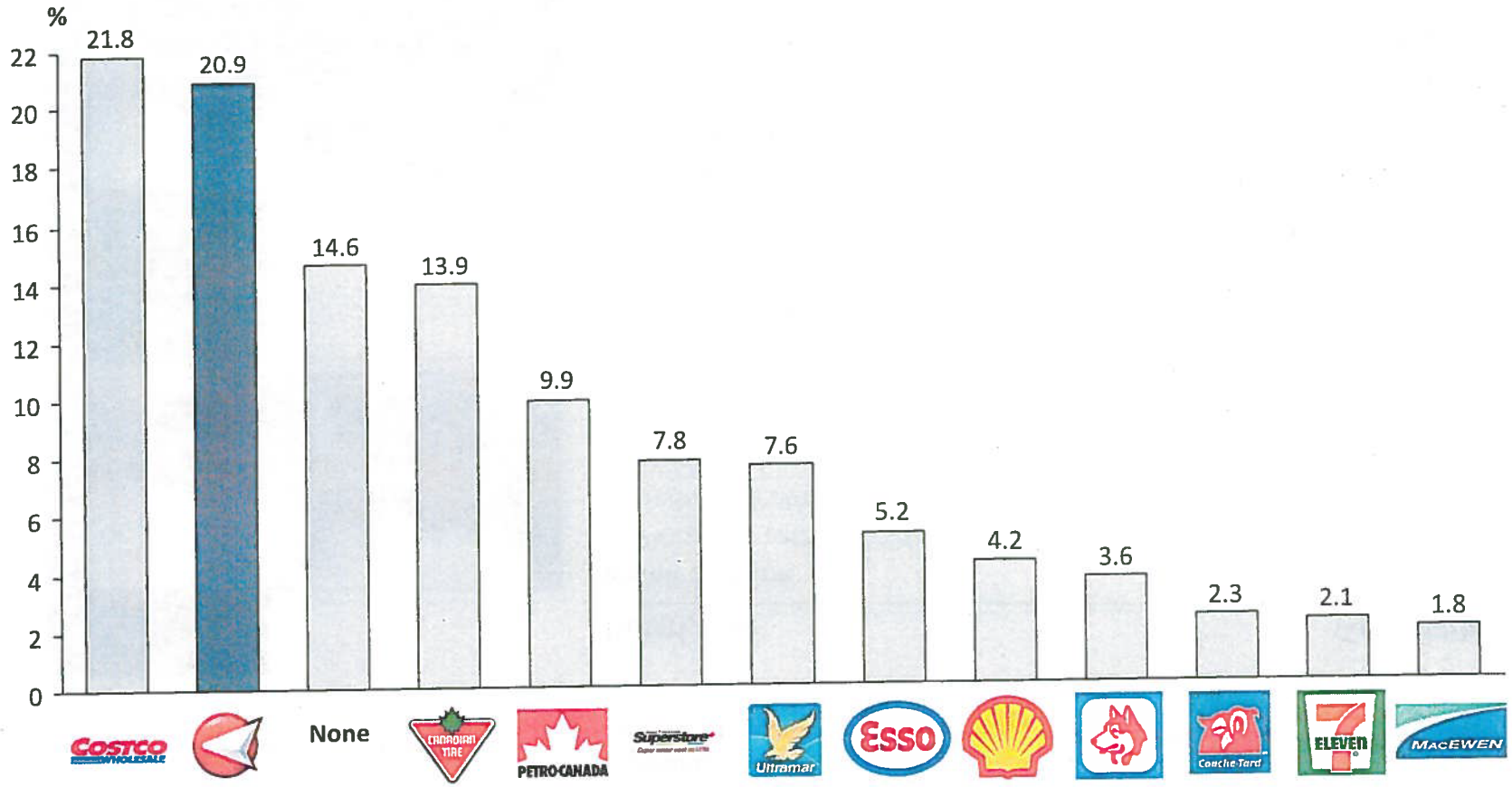
Note: Site counts do not include vacant sites.
Source: Pioneer data.

CONSUMERS VIEW PIONEER AS LOW COST, SECOND ONLY TO COSTCO AMONG BRANDS SURVEYED...

Parkland FUEL CORPORATION

Note: Slide is unedited from the "Project Red Horse" Investment Recommendation dated September 12th, 2014 and provided in the initial data request to the Bureau.

Which of These Brands Offers the Lowest Fuel Price?
% of Respondents Selecting That Answer



Source: Market research survey (n=1,000) conducted on behalf of Parkland in February 2014.

...DRIVEN IN PART BY AN AGGRESSIVE PRICING STRATEGY: TYPICALLY DISCOUNTED, USUALLY BY 0.3CPL VS. MAJORS...

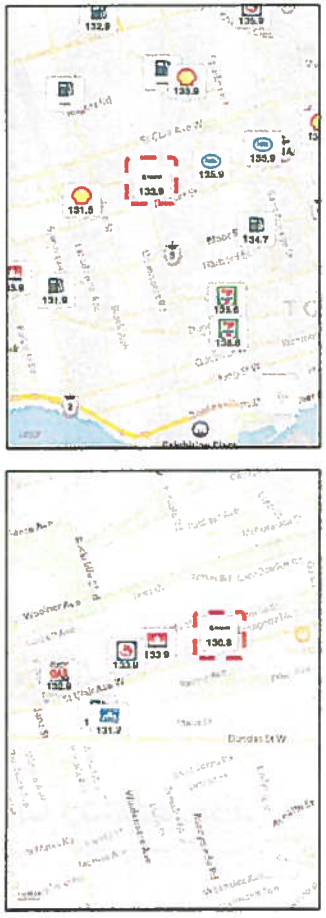
Parkland FUEL CORPORATION

Pioneer Pricing Relative to Competitors

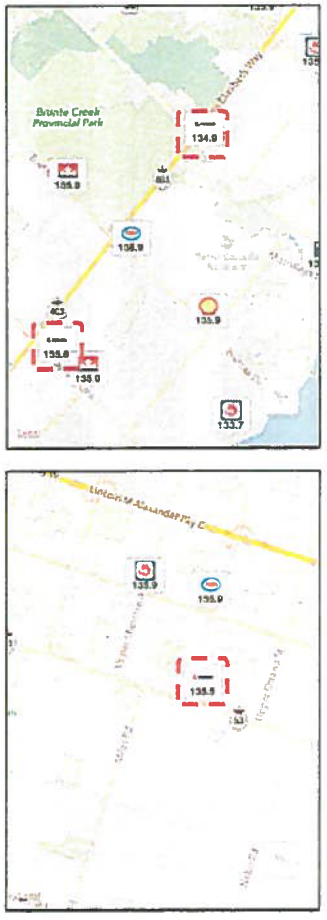
Note: Slide is unedited from the "Project Red Horse" Investment Recommendation dated September 12th, 2014 and provided in the initial data request to the Bureau.

Burlington

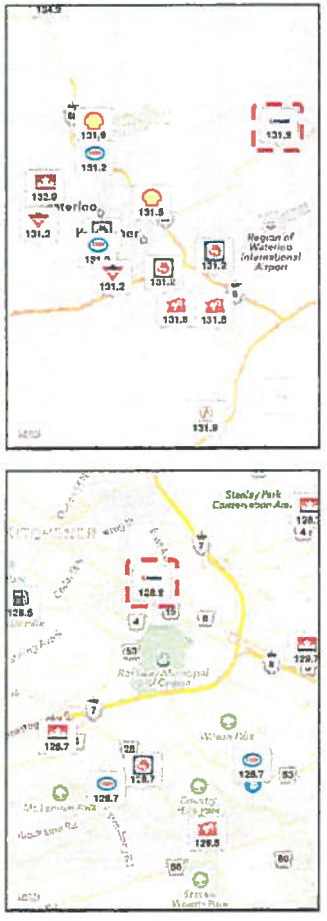
Greater Toronto



Greater Hamilton



Kitchener / Waterloo



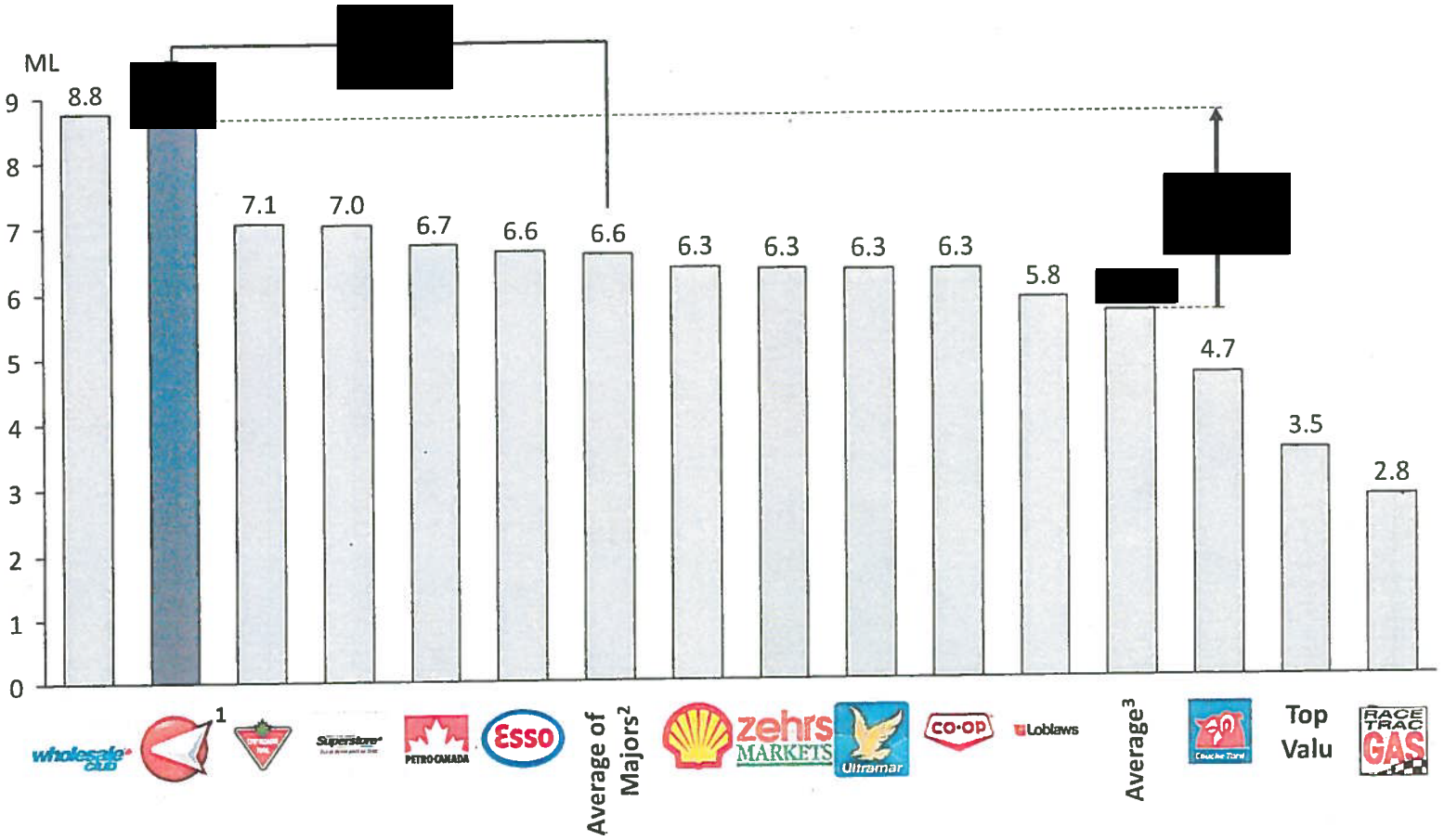
Note: Prices are reported by consumers, and are indicative only.
Source: Select markets captured on GasBuddy.com on the week of July 21, 2014.

...WHICH DRIVES SUBSTANTIALLY HIGHER THROUGHPUTS, SIMILAR TO [redacted]

Parkland FUEL CORPORATION

Note: Slide has had one edit for clarity. A similar slide was included in the "Project Red Horse" Investment Recommendation dated September 12th, 2014 and provided in the initial data request to the Bureau.

Pioneer Throughput Relative to Competitors
ML Per Site, Per Year

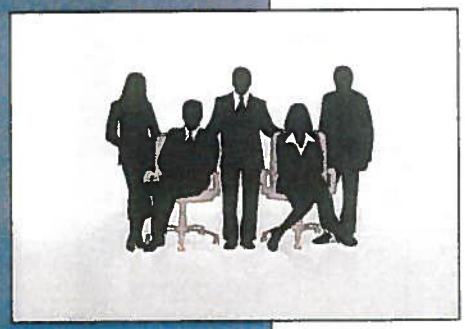


1. Internal Pioneer retail data for 2013.
2. Average of Majors consists of Petro Canada, Esso, and Shell taken from all Kent-reported markets in Ontario.
3. Average of all Kent-reported markets and marketers in Ontario.

Source: 2013 Kent market data; Pioneer internal retail data.

FOR THIS REASON, PARKLAND PLANS TO PRESERVE PIONEER'S LOW PRICE POSITION AND HAS ARTICULATED THE SAME

Parkland FUEL CORPORATION



Retention of Key Pioneer Staff

Parkland has made a significant effort to retain key Pioneer staff, including a generous retention package and increases in salary and benefits to ensure that the brand is upheld in the Ontario market:

- **Tim Hogarth** – the CEO of Pioneer Energy. Tim has been asked to join Parkland's Board of Directors upon the transaction's closing.
- **Brian Kitchen** – the Vice President of Dealer Operations. Brian has been asked to join Parkland's Retail team.
- **Hayden Northey** – the Vice President of Retail Operations. Hayden has been asked to lead Parkland's Eastern Retail Operations.
- **Dave MacFarlane** – the Vice President of Real Estate. Dave has been asked to lead Parkland's Eastern Real Estate Development team.

Messaging to Investors

On September 17th, 2014, Parkland's management team announced the Pioneer transaction to its investors reinforcing its discount pricing:

- Immediately following the announcement of the transaction, Parkland management stated publically to its investors that "Pioneer's offer is a very attractive offer to consumers. They tend to be priced $0.003 below the others on the street.... That following drives greater than 50% more volume throughput per site than you'd see on average in Ontario. ...[due to] their resonance with consumers, it's more than made up for, so the gross profit per site is strong."

Source: Parkland integration planning; Parkland investor call transcript, September 17th, 2014.

BY THE END OF YEAR [redacted] RUN RATE EFFICIENCIES ARE PROJECTED TO BE $[redacted] MM DRIVEN BY [redacted] AND [redacted]

Parkland FUEL CORPORATION

Note: Slide is unedited from the "Project Red Horse" Investment Recommendation dated September 12th, 2014 and provided in the initial data request to the Bureau.

Overall Projected Efficiencies

C$ MM

Note: Numbers may not foot due to rounding.
Source: Deal team assumptions.

AGENDA

Parkland
FUEL CORPORATION

Background on Parkland

The Pioneer Energy Transaction

Considerations Raised by the Bureau

Appendix

PARKLAND IS COMMITTED TO COMPLYING WITH THE COMPETITION ACT OF CANADA

Parkland FUEL CORPORATION

Coordinated Conduct

Parkland is committed to complying with the Competition Act and has developed a Competition Act Compliance Policy, including comprehensive education programs for all staff.

With respect to the three documents provided by the Bureau:

- These documents do not relate to retail gas markets, and do not support the Bureau's stated concerns of coordinated conduct in respect of the merger.
- Parkland conducted an investigation into the three documents provided by the Bureau, the results of which were:
  - The chart summarizing distributors' supply agreements is based on information gathered from dealers as part of negotiations with dealers for supply agreements.
  - For the most part, discussions between Esso Branded Wholesalers ("Esso BWs") was largely due to confusion with IOL's directions / expectations of its BWs (especially in light of the transition from limited geographic competition to more open competition as governed by IOL):
    - IOL has developed a Code of Conduct that applies to all Esso BWs and established the IOL BW Council to govern the conduct of Esso BWs (modeled after its US structure).
    - IOL requested Parkland be an initial member of this council.
- The provision of these documents has helped increase Parkland's sensitivity to conduct that may raise concerns under the Competition Act.
- Parkland is reviewing additional corrective measures, including assessing whether to terminate membership in the IOL BW Council and other associations and, if it remains a member, establishing protocols to ensure it does not engage in conduct that could inadvertently raise competition concerns.

THE BUREAU HAS IDENTIFIED [redacted] MARKETS THAT RAISE COMPETITION CONCERNS

Parkland FUEL CORPORATION

Discussion of the [redacted] Markets Identified by the Bureau

[redacted]

THE BUREAU HAS IDENTIFIED [redacted] MARKETS THAT RAISE COMPETITION CONCERNS

Parkland FUEL CORPORATION

Discussion of the [redacted] Markets Identified by the Bureau

[redacted]

THE BUREAU'S PROPOSAL IS OF SIGNIFICANT COST TO PARKLAND IN ANNUAL VOLUME AND EBITDA

Parkland FUEL CORPORATION

Summary of the Financial Impact of Remedies in the Identified Markets
# of Sites; L 000s; C$ 000s

[redacted]

1. Proforma site count excluding the impact of any potential remedies.
2. 6.9x is the purchase price expressed as a multiple of EBITDA that was paid for the proposed Pioneer acquisition.
3. Additional costs will arise from significant lost synergies including supply side efficiencies.

Source: Parkland and Pioneer retail data from FY 2013.

AGENDA

Parkland
FUEL CORPORATION

Background on Parkland

The Pioneer Energy Transaction

Considerations Raised by the Bureau

Appendix

[redacted]

Parkland
FUEL CORPORATION

[redacted]

[redacted]

Parkland
FUEL CORPORATION

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Parkland
FUEL CORPORATION

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FUEL CORPORATION

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Parkland
FUEL CORPORATION

TAB 4

ANSWERS TO UNDERTAKINGS OF ROBERT ESPEY

The following are the answers to undertakings given at the Cross-Examination of Robert Espey held on May 7, 2015 in respect to his Affidavit sworn May 5, 2015.

UNDERTAKING NO. 1

Undertaking: Provide the [redacted] between Parkland and Pioneer whereby it was agreed that Parkland [redacted]

Answer: [redacted]

UNDERTAKING NO. 2

Undertaking: Parkland to confirm whether or not there has been a increase to the Rate Forward Margin ("**RFM**") in Manitoba in the past three years, if so, provide details of such increase (when/how much of an increase)

Answer: See below the changes made to Parkland's RFM to independent dealers in Manitoba in the past three years:

- On June 14, 2014, Parkland reduced the RFM in two zones (five stations in [redacted] zone and four stations in [redacted] zone) as follows:
  - Station 50342 $[redacted]
  - Station 50084 $[redacted]
  - Station 50205 $[redacted]
  - Station 50417 $[redacted]
  - Station 50370 $[redacted]
  - Station 50316 $[redacted]
  - Station 50430 $[redacted]
  - Station 50567 $[redacted]
  - Station 50269 $[redacted]
- On April 1, 2014, Parkland reduced the RFM by [redacted] points on all products to compensate for the freight/overhead decrease that occurred at the same time (net effect to dealer was [redacted] or close to that)
- On May 19, 2012, Parkland increased the RFM at six sites up [redacted] or [redacted] on all products, as follows:

- Station 50342 $
- Station 50417 $
- Station 50269 $
- Station 50316 $
- Station 50430 $
- Station 50567 $

NOTE: There were only two price zone changes in Ontario in the past three years, being (noted below in answer to Undertaking 6) and . In June 2014, Parkland reduced the RFM in the zone was reduced from to cpl.

UNDERTAKING NO. 3

Undertaking: Explain the circumstances where Parkland would pay a branded dealer (i.e., ESSO) a different price than a dealer with the same brand (i.e, ESSO) in the same Parkland price zone.

Answer: All with the branding within a single price zone are generally charged RFM by Parkland.

There are limited circumstances where a branded dealer may pay a For example, a dealer may request and negotiate a specific RFM as part of entering into a new supply agreement with Parkland as part of the totality of the offer to the independent dealer.

UNDERTAKING NO. 4

Undertaking: Confirm whether Parkland has dealer or company stations with the Suny's Race Trac, Fas Gas and ESSO brands in Ontario.

Answer: Parkland has corporate stations and supply agreements with independent dealers that operate under each of the Race Trac, Fas Gas and ESSO brands in Ontario.

Parkland's corporate station in Kapuskasing historically operated under the Suny's brand .

UNDERTAKING NO. 5

Undertaking: Advise whether Parkland has more than one brand (a dealer or company station) in any of the Commissioner's 14 markets.

Answer: Within the Commissioner's 14 markets Pioneer has multiple stations (each of whom is an independent dealer) in each of the following markets:

Bancroft: Station 51029 (ESSO)
Station 50121 (ESSO)

Welland: Station 51317 (ESSO)
Station 50181 (Race Trac)
Station 51326 (Race Trac)

Port Perry and Uxbridge (depending upon the geographic market):
Station 51322 (Race Trac)
Station 51279 (ESSO)

UNDERTAKING NO. 6

Undertaking: Confirm whether the RFM charged to the independent dealer in Azilda has changed in the past 3 years. If so, provide details:

Answer: With regard to station 50936 (Mike's Gas Bar) in Azilda, Mike's Gas Bar was formerly a NOCO site, which was rebranded as an Esso site on or about November 2014. In connection with such rebranding (and the entering into new supply agreement with Parkland), fuel pricing for Mike's Gas Bar was moved from the historical NOCO model based off of the rack price to Parkland's price zone model, which resulted in Mike's Gas Bar being provided with [redacted] to be more consistent with Parkland's pricing approach. Mike's Gas Bar was renegotiated in September 2014 with an associated pro fee of [redacted] cpl.

The supply agreement with Jeremy's Truck Shop (station 50615) (located in Nairn Centre in the Sudbury price zone) terminated on April 1, 2015, and Jeremy's Truck Shop did NOT renew its supply agreement with Parkland at this time. Jeremy's Truck Shop is no longer a Parkland independent dealer.

UNDERTAKING NO. 7

Undertaking: Confirm whether Leon Chabot is employed by Parkland.

Answer: Leon Chabot is an employee of Parkland.

UNDERTAKING NO. 8

Undertaking: Confirm whether there was an increase to the RFM to station 50936 in Azilda further to the Parkland email dated November 1, 2014.

Answer: See response to Undertaking 6.

UNDERTAKING NO. 9

Undertaking: Produce any Parkland maps that demonstrate Parkland's price zones in Ontario and Manitoba *[Note: This undertaking was taken under advisement]*

Answer: Parkland has not prepared any maps that delineate prize zones in Ontario, although employees may have prepared maps for their own purposes.

UNDERTAKING NO. 10

Undertaking: Confirm whether there have been any change in the geographic boundaries of any price zones (in Ontario and Manitoba) in the past three years.

Answer: There have been very few changes to price zones (a handful of stations) in the past three years, which changes Parkland believes resulted in [redacted] and/or [redacted] to the dealers subject to the changes.

UNDERTAKING NO. 11

Undertaking: Describe the method of communication by Parkland to dealers of changes to an RFM in a price zone. Does Parkland advise all dealers in a price zone of a change within a price zone.

Answer: [redacted]

UNDERTAKING NO. 12

Undertaking: Confirm whether Brent Smith is still employed by Parkland.

Answer: Brent Smith continues to be an employee of Parkland, but is on long term disability.

UNDERTAKING NO. 13

Undertaking: Confirm whether or not Parkland notifies dealers of the price zone that they (and other dealers) are in.

Answer: [redacted].

UNDERTAKING NO. 14

Undertaking: Confirm that there are 17 Pioneer stations in the Commissioner's 14 markets.

Answer: Parkland believes there are, in aggregate, 17 corporate stations and independent dealer stations supplied by Pioneer in the Commissioner's 14 markets. These stations operate primarily under the Pioneer and Esso brands.

UNDERTAKING NO. 14

Undertaking: Confirm whether all Pioneer sites in the Commissioner's 14 markets price 1 cent per litre ("**cpl**") below their competitors.

Answer: We do not have access to all of Pioneer's pricing at its corporate stations in the Commissioner's 14 markets and Pioneer does not control pricing at its dealer's stations. We understand that many of the Pioneer corporate stations generally follow a pricing strategy to price below the 'majors' by $0.003 cpl.

UNDERTAKING NO. 15

Undertaking: Provide analysis of the impact of a 1 cpl retail price increase (see Para 36 of Robert Espey's Affidavit)

Answer: In connection with its assessment of Pioneer, Parkland had determined that any change in the pricing strategy of Pioneer branded stations would result in significant volume and EBITDA losses as consumers ceased to view Pioneer as a low price competitor and switched to competitor stations, causing volumes at Pioneer stores to fall towards the market average cited above. Pioneer's throughput per site [redacted] is [redacted] higher than the market average of the 'majors' in Ontario (6.60ML), as measured by Pioneer internal data and Kent data. In particular, Parkland had estimated that a [redacted] cpl price increase at Pioneer branded stations would result in roughly a [redacted] decrease in volume (which would result in the average throughput at such Pioneer branded stations approximating the market average of majors such as Shell, Esso and Petro Canada in Ontario).

Relying on the same assumption as to the impact on volume as a result of a [redacted] cpl price increase, Parkland estimates that a [redacted] cpl price increase at the 17 Pioneer stations (recognizing that not all such stations are Pioneer branded stations) in the Commissioner's 14 markets would result in a reduction of at least [redacted] million litres of sales volume (which is approximately [redacted] of current volume sales at such stations). While not all the sites were branded Pioneer, Parkland understands that those that are Pioneer branded represent [redacted] of the [redacted] sale volume by the total 17 stations in the Commissioner's markets (or approximately 82%). Assuming everything else constant, a reduction of [redacted] million litres of sale volume would result roughly in a reduction of [redacted] million of EBITDA at these sites.

Parkland further assumes that a 1.0 cpl price increase at the Pioneer branded stations in the Commissioner's markets would damage Pioneer's overall brand recognition as an "everyday low pricer". Assuming volume fell by [redacted] at the

remaining 112 Pioneer branded stations in response to such price increase, volume could fall by an additional approximately [redacted] million litres and EBITDA could fall by approximately [redacted] million.

See attached at Schedule "B" a copy of the working papers that demonstrates the EBITDA calculation resulting from a 1 cpl price increase for each Pioneer station.

The forgoing analysis simply reinforces Parkland's belief that any such price increase at Pioneer branded stations would be inconsistent with Parkland's business objectives.

UNDERTAKING NO. 16

Undertaking: Query whether Parkland has advised Pioneer of its decision under [redacted] of the [redacted] dated [redacted] between Parkland and the Pioneer vendors. *[Note: Mr. Rook advised Mr. Espey to not respond to the question]*

Answer: [redacted].

TAB A

TAB B

Site Number	Current Owner	Brand	Region	Location	Province
147	Pioneer	Pioneer	Aberfoyle	Aberfoyle, ON	ON
177	Pioneer	Pioneer	Azilda	Azilda, ON	ON
259	Pioneer	Esso	Bancroft	Bancroft, ON	ON
186	Pioneer	Pioneer	Port Perry	Port Perry, ON	ON
553	Pioneer	Esso	Font Hill	Font Hill, ON	ON
654	Pioneer	Target	Font Hill	Font Hill, ON	ON
257	Pioneer	Pioneer	Gananoque	Gananoque, O	ON
241	Pioneer	Pioneer	Hanover	Hanover, ON	ON
127	Pioneer	Pioneer	Innisfil	Innisfil, ON	ON
251	Pioneer	Esso	Kapuskasing	Kapuskasing, C	ON
776	Pioneer	Esso	Lundar	Lundar, MB	MB
779	Pioneer	Esso	Neepawa	Neepawa, MB	MB
213	Pioneer	Pioneer	Tillsonburg	Tillsonburg, OI	ON
243	Pioneer	Pioneer	Tillsonburg	Tillsonburg, OI	ON
764	Pioneer	Esso	Warren	Warren, MB	MB
256	Pioneer	Pioneer	Welland	Welland, ON	ON
238	Pioneer	Pioneer	Welland	Welland, ON	ON
N/A	Pioneer	N/A	Hanover	Hanover, ON	ON

Address	2013 Volume	2013 Contribution	Company / Dealer
256 BROCK S - NICHOLAS BEAVER	[redacted]	[redacted]	Company
3775 Hwy. #144	[redacted]	[redacted]	Company
132 Hastings St. N., Po Box 247	[redacted]	[redacted]	Company
1805 Scugog St.	[redacted]	[redacted]	Company
Rr #1, 2432 Hwy #20	[redacted]	[redacted]	Dealer
151 Highway 20	[redacted]	[redacted]	Dealer
560 KING ST E E OF HERBERT	[redacted]	[redacted]	Company
857 10 ST	[redacted]	[redacted]	Company
7364 Yonge St., Unit 3	[redacted]	[redacted]	Company
48 Government Rd.	[redacted]	[redacted]	Company
Hwy 6	[redacted]	[redacted]	Dealer
10 Main St. W.	[redacted]	[redacted]	Dealer
115 Simcoe St.	[redacted]	[redacted]	Company
680 Broadway St.	[redacted]	[redacted]	Company
Hwy 6	[redacted]	[redacted]	Dealer
90 Lincoln Street West	[redacted]	[redacted]	Company
681 South Pelham Rd.	[redacted]	[redacted]	Company
134 Hastings St. N	N/A	N/A	Company

Site Number	147	177	259	186	257
Location	Aberfoyle	Azilda	Bancroft	Port Perry	Gananoque
Brand	Pioneer	Pioneer	Esso	Pioneer	Pioneer
Corp / Dea	Company	Company	Company	Company	Company

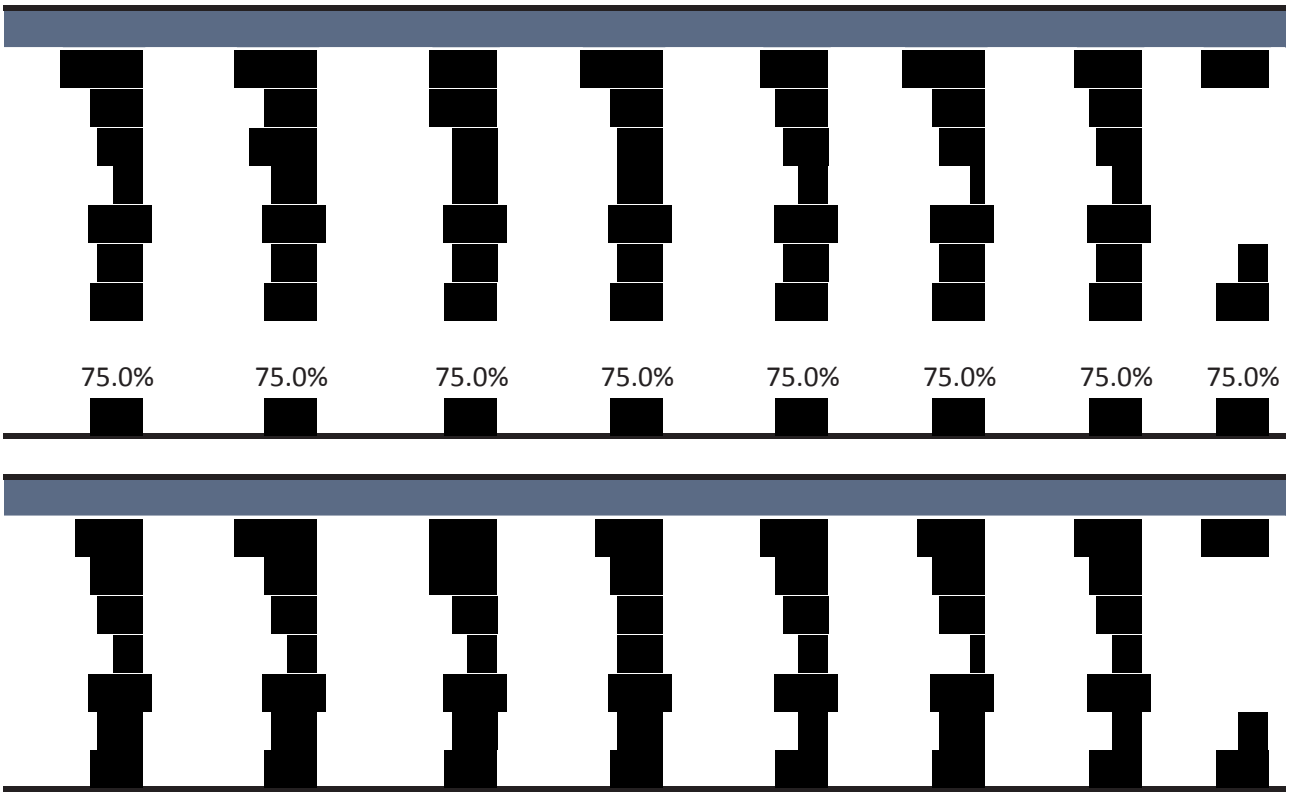
Status Quo					
Volume	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]
Fuel Margin cpl	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]
Fuel Margin	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]
Non-Fuel Margin	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]
OpEx	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]
EBITDA	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]
EBITDA cpl	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]
Volume	75.0%	75.0%	75.0%	75.0%	75.0%
Fuel Margin cpl	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]

Pro-forma					
Volume	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]
Fuel Margin cpl	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]
Fuel Margin	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]
Non-Fuel Margin	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]
OpEx	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]
EBITDA	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]
EBITDA cpl	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]

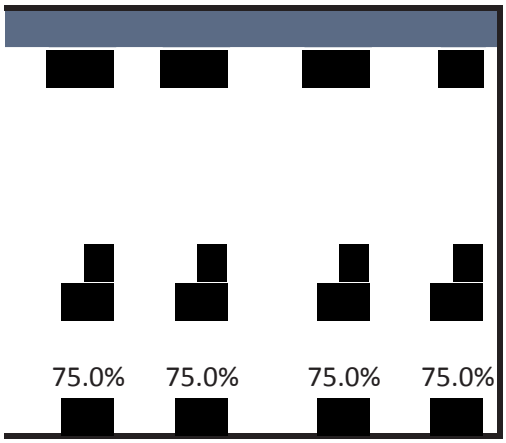
Volume Lost	34,594
Supply Margin	[redacted]
Supply Margin Lost	[redacted]

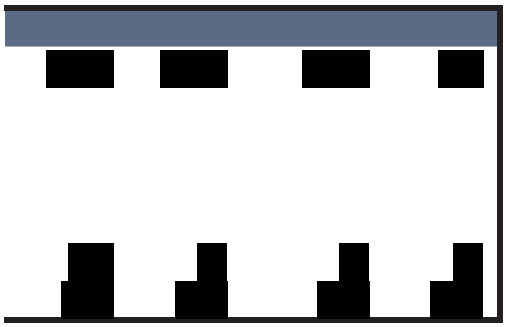
	Status Quo	Test Case	Abs. Differe	% Difference
Volume	[redacted]	[redacted]	[redacted]	[redacted]
EBITDA	[redacted]	[redacted]	[redacted]	[redacted]

241	127	251	213	243	256	238	553
Hanover Pioneer Company	Innisfil Pioneer Company	Kapuskasing Esso Company	Tillsonburg Pioneer Company	Tillsonburg Pioneer Company	Welland Pioneer Company	Welland Pioneer Company	Font Hill Esso Dealer



654	776	779	764
Font Hill	Lundar	Neepawa	Warren
Target	Esso	Esso	Esso
Dealer	Dealer	Dealer	Dealer





	Total	17 Sites	
Volume	[redacted]	[redacted]	[redacted]
Non-Fuel Margin	[redacted]	[redacted]	[redacted]
Supply Efficiency	[redacted]	[redacted]	
C-Store Efficiency	[redacted]	[redacted]	

cpl impact of lost volume	[redacted]
Litres lost	[redacted]
Impact of Volume Lost	[redacted]

TAB 5

PUBLIC VERSION

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:

COMMISSION 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., PIONER PETROLEUMS HOLDING INC., PIONEER ENERGY MANAGEMENT INC., 668086 N.B. LIMITED, 3269344 NOVA SCOTIA LIMITED and 1796745 ONTARIO LTD.

Respondents

--- This is the Cross-Examination of MARGARET SANDERSON on her affidavit dated May 5, 2015, taken at the offices of Bennett Jones LLP, One First Canadian Place, Suite 3400, , Toronto, Ontario, on the 8th day of May, 2015.

A P P E A R A N C E S:

John Syme, Esq. & Antonio Di Domenico, Esq.	for the Applicant.
Randal T. Hughes, Esq. & John Rook, Esq. & Emrys Davis, Esq.	for the Respondents, Parkland Fuel Corporation and Parkland Industries Ltd.
Chris Hersh, Esq.	for Pioneer.

Also present: Ryan Jakubowski, Stuart Sangwan Lee, Dennis Lu, from the Competition Bureau

Kendall W. Waiting, Parkland

REPORTED BY: Terry Wood, RPR, CSR

I N D E X

WITNESS: MARGARET SANDERSON

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MARGARET SANDERSON	
Cross-Examination by Mr. Syme	6

The following list of undertakings, advisements and refusals is meant as a guide only for the assistance of counsel and no other purpose

INDEX OF REFUSALS

The questions/requests refused are noted by R/F and appear on the following pages/lines: None.

INDEX OF UNDERTAKINGS

The questions/requests undertaken are noted by U/T and appear on the following pages/lines: None.

INDEX OF UNDER ADVISEMENTS

The questions/requests taken under advisement are noted by U/A and appear on the following pages/lines: None.

LIST OF EXHIBITS

EXHIBIT NO./DESCRIPTION		Page
1	The geographic market definition by Neil Campbell, Lila Csorgo, and Margaret Sanderson	23
2	An assessment of market power in the provision of wireless telecommunication service in Canada	29

--- Upon commencing at 10:14 a.m.

MARGARET SANDERSON, AFFIRMED;

CROSS-EXAMINATION BY MR. SYME:

Q. Good morning.

A. Good morning.

Q. You have in front of you there your affidavit of May 5th, 2015?

A. I do.

Q. Do you have anything else there with you that you want to refer to during the examination?

A. No. Just a pad of paper.

Q. All right. Okay. I may refer you to the MEGs at some point during this examination.

A. Okay.

Q. I don't know if you can get a copy, but it may or may not be necessary, so let's take it as we go.

I take it that you reviewed the Commissioner's section 92 and 104 applications in preparing for this?

A. Yes, I have.

Q. And you've reviewed the rest of the materials on the file, in other words, the Commissioner's application record?

A. Yes.

Q. Okay. As well as the response application record?

A. Yes.

Q. All right. And just for purposes so we can get some sort of nomenclature out of the way, you are aware there are 14 locations or areas that are of particular concern to the Commissioner in this matter; is that correct?

A. Yes.

Q. And three of them are Aberfoyle, Allanburg, and Innisfil?

A. Yes.

Q. Now, if I can get you to turn your affidavit to paragraph 11.

A. Yes.

Q. And there, you refer to the things that you considered in preparing the opinion; is that correct?

A. Yes.

Q. Okay. So the first thing you indicate is that you refer to the information cited herein. Do you see that?

A. Yes.

Q. And by that, I understand you were

referring to things like -- if you were to flip over to the next page, page 7 or page 6, in fact -- the Houde paper?

A. Yes.

Q. And if you flip over again, you will see reference to a paper by Mr. Noel?

A. Yes, Michael Noel.

Q. Right. As well as the Espey affidavit?

A. Yes.

Q. So I take it that there aren't any materials that you refer to that aren't cited or listed here in the affidavit?

A. So the only other materials would be -- there are citations to other academic articles in respect to retail gasoline that would have been cited in prior work that I had submitted, like the memorandum of February 23rd, for example, and those materials would be things that I would have -- would have reviewed or contemplated in preparing this.

Q. So I want to make sure I understand. So there were materials that you looked at or contemplated in preparing your opinion that aren't referenced in this opinion?

A. No, they are referenced, because

they -- because they are included in the Commissioner's materials or in the Espey materials. So in the Espey material, there is an attachment -- there are two attachments, which would be my memorandum that I had prepared in the course of looking at the transaction.

18 Q. Okay.

A. So all that I'm suggesting is that there are academic articles referred to in those -- in that -- those memos that would be part of the general knowledge I have about retail gasoline markets and would be also I think included in paragraph 11.

19 Q. All right. But whereas, for example, with the Houde paper, you provide a footnote to indicate where you are referring to it, footnote 10, for example?

A. Yes.

20 Q. You haven't done likewise with respect to those other materials in the February 23rd report; is that correct?

A. I don't specifically cite anything else, like, from a page reference perspective, yes.

21 Q. Okay. Fair enough.

And I take it you are not able to indicate to me now where the materials that are referred to in the February 23rd report might be

referred to here or cited here or drawn on in this report?

A. Well, they are not cited at all, because if they were cited, there would be a footnote for them.

22 Q. Right. Yes.

A. And they would be -- I guess they would just be part of the general -- my general knowledge of how gasoline -- retail gasoline pricing works.

23 Q. Okay. But you are not putting yourself forward as an expert in retail gasoline pricing, are you?

A. No, I'm putting -- no. No, I'm -- I would -- that's why I'm referring to what other people have written about it.

24 Q. Okay. Just going back to paragraph 11, you then refer to, after information -- information -- pardon me -- cited therein, you refer to your knowledge of general economic principles and analytical techniques. Do you see that?

A. Yes.

25 Q. And I take it that those principles and techniques include analysis under the Competition Act of the competitive effects of a merger; is that

right?

A. Yes, yes.

26 Q. Okay. And this includes the principles and techniques you'd use to form an opinion on whether a proposed merger is likely to bring about a substantial lessening of competition, or SLC; is that right?

A. Yes.

27 Q. All right. Now, I can read this to you. What I'm looking at is the Merger Enforcement Guidelines, which I'm going to call the MEGs, going forward, and if you want me to stop and let you get a -- do you have the MEGs?

MR. HUGHES: No.

BY MR. SYME:

28 Q. -- get a copy, I'm happy to do that. Do you want to pause?

MR. HUGHES: Why don't we stop and I'll have a copy --

MR. SYME: I apologize.

-- OFF THE RECORD --

BY MR. SYME:

29 Q. So you have got there in front of you a copy the MEGs; is that right?

A. I do.

30 Q. So if I could get you to turn to page 6. And I'm looking -- there, you will see a section, Part 2, "The Anticompetitive Threshold". Do you see that?

A. Yes.

31 Q. And there's a heading "Overview", and then under that, the first paragraph 2.1?

A. Yes.

32 Q. And I just want to understand if you agree with the propositions that are set out here. So the first sentence is:

"As set out in section 92 of the Act, the tribunal may make an order when it finds that a merger prevents or lessens or is likely to prevent or lessen competition substantially."

I think that is uncontroversial.

A. Right.

33 Q. That's what the provision says. And then:

"A substantial prevention or lessening of competition results only from mergers that are likely to create, maintain, or enhance the ability of the merged entity unilaterally or in coordination with other firms to exercise market power."

Do you see that?

13

A. Yes, I do.
34 Q. Do you agree with that?
A. Yes, I do.
35 Q. All right. And would you agree with me that, to come to a view regarding market power -- or is it -- pardon me, let me rephrase.
Is it your view that, to come to an opinion about market power, that it is important to correctly define both the relevant product and geographic markets?
A. Yes.
36 Q. All right. And I found -- I wish I had found it earlier in my career, but I found on the Internet a presentation -- I have more copies here -- that you did. Just take a moment and look at it and see if you recognize it.
A. Yes.
37 Q. So what you are looking at is, just for the record, a presentation that you, Neil Campbell, Lilla Csorgo did on November 19th, 2009, to the Young Lawyers Committee of the CBA's Competition Section; is that correct?
A. Yes.
38 Q. And the presentation related to geographic market definition?

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A. Yes.
39 Q. Right. And if I understand this correctly, it's sort of a primer on geographic market definition; is that fair?
MR. HUGHES: Do you want a minute to flip through?
THE WITNESS: Yes. It covers a number of topics in the -- for geographic market definition.
BY MR. SYME:
40 Q. Right. So it's sort of a -- is it fair to say sort of an ABC in terms of geographic markets?
A. Yes.
41 Q. All right. So if I get you to turn over to page 4, that presentation, and I have done, you see, a sort of a scrawl there at the top of the page. That's my hand-numbering.
A. Uhm-hmm.
42 Q. So it gets worse as we go along.
You will see a heading "Merger Analytical Framework". Do you see that?
A. Yes.
43 Q. And what I took from this is that -- and basically there's a series of three columns with boxes at the top. Do you see that?

15

A. Yes.
44 Q. Okay. And in the first box, it says "Product and Geographic Market Definition". And then there is a description of market definition, and so forth and so on, three bullets after that. Do you see that?
A. Yes.
45 Q. And then in the next box, "Market Share/Concentration". Do you see that?
A. Yes.
46 Q. And I gather they are sort of -- this is sequential: What you are doing is you define product and geographic market, and then the next step is you go and look at market shares and concentration; is that fair?
A. That's based on the prior Merger Enforcement Guidelines, which certainly took a very sequential approach.
47 Q. Okay.
A. And the current Merger Enforcement Guidelines emphasize market definition less and point out that you can turn to addressing competitive effects directly in some instances or simultaneously with also determining market definition. So it's -- the current Merger Enforcement Guidelines are less rigid in

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following this sequence of events.
48 Q. I see. Okay. But you'd agree with me, nonetheless, that market definition, for purposes of an SLC analysis, is something that you have got to do at some point in time; is that correct?
A. Sometimes you can do competitive effects directly.
49 Q. Without defining a market?
A. Economists believe, yes, that's the case, but usually, we -- usually, that exercise informs both the competitive effects aspect and market definition, to some extent.
50 Q. Right. Okay. Now, if I get you to turn over to page 6, you'll see reference there to the hypothetical monopolist test. Do you see that?
A. Yes.
51 Q. And can you -- rather than having me labour through it, can you sort of give us a thumbnail of what that is?
A. The hypothetical monopolist test is an iterative process that is undertaken to determine a relevant product or relevant geographic market. You -- we typically start by looking at overlap between the merging firms and postulating that as a potential candidate market to which one then asks if -- if

17

those -- if the two parties together plus everybody else in the candidate market, whoever the other suppliers are in that candidate market, if they were all to act as a single seller, as a quote/unquote hypothetical monopolist, and they acted as a single seller, and they all raised price together, would that -- would it be profitable for them to do that or would they lose sufficient volume to competitors outside of this candidate area that it would be unprofitable, and if it's unprofitable to do because they lose sufficient sales to suppliers outside the candidate market, then you expand the relevant market to include the additional suppliers and then postulate the test again.

52 Q. All right. And you keep doing that until you have defined the market, in other words, where that market -- where you can sustain what we call a SNIP; is that correct?

A. Yes. And the SNIP is a small yet significant non-transitory pricing -- increase in price. The only thing I would pause on is that -- and the current merger guidelines state this explicitly, which follows what economists also believe, is that you have to -- you have to be a bit careful when you are thinking about relevant product market to not -- to

18

think about -- the extent of competition can vary from players within the market and from players that are outside of that market. So just because one draws a boundary at a particular point doesn't mean that a supplier that is outside of that area does not exert competitive -- some competitive influence, and the current merger guidelines have very clear statements about that.

53 Q. All right. So you are saying that somebody outside a market can influence or interact with somebody in the market. Is that what I understand you to be saying?

A. Yes, that it varies case to case, and the guidelines make it clear that you have to take that into account on a case-by-case basis.

54 Q. Okay. And I think you were going there as part of this exercise. At least I will refer you to it. I'll just get the page numbers. Page 14. There is a reference to critical loss analysis, and I think you touched on that in your answer a moment ago. Page 14.

A. Yes. The critical loss analysis is a technique that is -- in essence, it's an application of what the hypothetical monopolist test is.

55 Q. Right. All right. And just

19

explain to us what you mean by that.

A. So what -- what critical loss analysis is used for is it's used to determine what's the critical value of the quantity lost that would be required to make a small yet significant non-transitory increase in price unprofitable. So essentially, what we do is we calculate the amount that -- the amount of volume that has to be lost to make a price increase of whatever amount. Usually people assume 5 percent or 10 percent based on some assumptions about demand; then how much loss in volume would make that price increase unprofitable.

56 Q. Okay.

A. And that becomes the critical value. And then you step away from that critical value to then say do I expect in the current market that if prices increased by this amount that the actual losses, how would they compare to the critical value? And when the actual losses are greater than the critical value, you know that the -- that you wouldn't be able to raise price by that amount.

57 Q. Okay. And can you tell me what role, if any, third-party information plays in that analysis? In other words, information about third-party, for example, costs and things of that

20

nature as opposed to information of the merging parties?

A. I'm not sure I understand the question.

58 Q. Well, in order to do the critical loss analysis --

A. Yes.

59 Q. -- and maybe I have got this wrong --

A. Yes.

60 Q. -- do you require third-party information? In other words, information about the costs and things to do with third parties who are in that candidate market?

A. So to do a critical loss analysis, you actually use very few inputs. You use the assumed price increase and the merging firms' variable margin.

61 Q. Right.

A. And then you make an assumption about what demand elasticity looks like, and that can be sufficient. So you can do that without -- so to get the critical value, you do not necessarily need third-party information. You would -- yeah, you really don't -- most of the time, you don't have it.

62 Q. Okay. Most of the time, you don't

have it, or most of the time, you don't need it?

A. Well, the Competition Bureau is always in a different position than other parties, but the -- most of the time, when people do a critical loss -- when they are calculating critical loss value, when economists are doing it, they typically just have the -- they have the merging parties' margins, they have assumptions about demand elasticity, and then they have a postulated pricing increase, so it's a fairly simple formula.

63 Q. All right.

A. At 16, you essentially can see the -- how it just plays out with the different contribution margin assumptions and your different assumptions about price increases.

64 Q. Right. Right, right, right. I noticed, and I have to ask.

A. Yes.

65 Q. And you'll hear about this from Mr. Rook later, perhaps, but if you turn to page 7.

A. Yes.

66 Q. You will see there's a -- curiously or coincidentally, there is an example you are giving to illustrate points there; and there, the example is sort of set out on pages 7, 8, and 9. Do you see that?

A. Yes.

67 Q. And the example relates to gas stations in Southwestern Ontario.

A. Yes.

68 Q. And I noticed, just looking at page 8, that the service areas you have identified are 2 kilometres in -- I guess in diameter; is that right?

A. Yes.

69 Q. All right. And I'm just wondering, because we happen to be here on retail gas and some of the stations are in Southwestern Ontario, where that number came from.

A. That was used as an example to show that -- the real point is on the next page at 9, which was to show that even -- if you took a very narrow radius, 2 kilometres being a very narrow radius, and you drew that around each single gas station, that you get these intersections, and because a gas station cannot price discrim -- it can't charge a consumer a different price based on their location but charges everybody the same price that comes in, that because of this overlap between all of these intersecting circles, even using a very narrow radius of 2 kilometres, that you can get -- you can have stations that are actually fairly distant from each other influence the prices of other stations through these -- through these interconnections.

70 Q. All right. You are explaining to me -- I think you explained to me why you used that number -- you used it to illustrate a certain phenomenon -- but I don't think you answered the question where the number came from.

A. Oh, 2 kilometres was just chosen as an example of a very narrow -- even if you choose a very narrow radius --

71 Q. Okay.

A. -- you still get these very large intersections across broader geographies, so it was just used as an example.

MR. SYME: All right. Fair enough. I will just pass that, if I may. There's one for your counsel. Actually, two for your counsel. We should mark that as an exhibit.

EXHIBIT NO. 1: The geographic market definition by Neil Campbell, Lila Csorgo, and Margaret Sanderson

BY MR. SYME:

72 Q. So I passed across to you a paper that -- or a report you did with Andrew Tepperman, May 25th, 2007.

A. Yes.

73 Q. Entitled "An Assessment of Market Power in the Provision of Wireless Telecommunications Services in Canada". Do you recognize that report?

A. Yes, I do.

74 Q. And are you able to indicate sort of the context within which this report was provided?

A. Just give me a second, because it was eight years ago.

75 Q. Sure.

A. Seven years ago.

So we prepared this report for Bell Canada as part of a -- part of a regulatory proceeding that Bell was in before the CRTC.

76 Q. All right. And if I get you to turn to page -- I guess it's page IV, Roman numeral IV. So it's really the third page in. Do you see that? There's an executive summary?

A. Yes.

77 Q. Okay. And you indicate at the top there that:

"This report provides the authors' examination of whether any existing provider of wireless services in Canada is able to exercise significant market power either on its own or in

coordination with other providers of wireless services."

Then you say:

"We have employed the analytical tools that are standard in competition policy for this purpose."

A. Yes.

78 Q. All right. And I appreciate that it's in 2007. But if you were to turn to page 6.

MR. HUGHES: Page numbered 6 or six pages in?

BY MR. SYME:

79 Q. Yes, page numbered 6. So there, you'll see a heading, heading 2, "Market Definitions", 2.1, "Focus of the Inquiry".

A. Yes.

80 Q. And you say:

"Any inquiry into market power must begin with a definition of the markets at issue. Only after defining markets can the existence or extent of market power be evaluated, since, without defining the market accurately, it's impossible to know whether a firm operating in that market will be able to exercise market power or whether competition by other products or firms will prevent an exercise of market power."

Do you see that?

A. I do.

81 Q. And do you think that accurately reflects the process you have to go through in order to determinate whether or not there is market power?

A. So in 2007, this certainly would have been the way people thought about the process. It's very sequential.

82 Q. Right.

A. And, as I mentioned, the new Merger Enforcement Guidelines in Canada, which follow the U.S. merger -- Horizontal Merger Guidelines, have taken an approach which has said -- which economists support, that often with differentiated products you don't need to define a market first; you can think about competitive effects at the -- coincident with market definition. So I would say it's -- you know, this certainly was the view that would have existed in 2007, and since then, I think people are a little less rigid about the requirement to define markets first. It's often the case people still do, of course, define markets and then think about market power within that area.

83 Q. Would you agree with me that it's typically the case that they define markets first?

A. Yes, it's fairly common.

84 Q. All right. Are you aware of any -- and I don't want to -- I know you are not here as a legal expert, but are you aware of any case that the tribunal has decided or considered where they haven't considered geographic and product market first? I'm thinking, of course, of matters under Part 8 of the Act.

A. The tribunal has always spoken about market definition, typically, first. I think the -- and lawyers always do too, and economists -- depends on the case. Economists will do that as well sometimes, and then in other cases, economists will speak directly to competitive effects without -- without -- and so in a number of cases certainly that I have been involved with recently, we have come in and spoken directly to competitive effects first without defining a market.

85 Q. These are cases before the Competition tribunal?

A. These are cases in front of the Competition Bureau, and the Bureau has not challenged those cases, so they haven't gone to the tribunal.

86 Q. Just looking, then, at page 6 again, and leaving aside this notion of sequencing, do you agree or is it your view that it's impossible to know whether a firm operating in a market is able to exercise market power without defining a market?

A. I would not -- I don't think that statement -- depends on the market or the type of product that you are dealing with, but if you have a differentiated product, you can proceed by testing, as I said, directly for competitive effects. You can determine if -- you can do econometric analysis with scanner data, for example, to determine whether a particular brand of one product competes closely with another brand of product. You can also do analyses where you look at whether prices are lower in geographic markets where the -- where the parties would appear to be -- one party appears to be a monopolist and compare that to pricing in another location where there appears to be more competition to also test whether, you know, the effects of the -- what the effect of the merger would be. So there are a number of things that are more commonly done today that wouldn't have been done that commonly in 2007.

87 Q. All right. So if I can get you to look at paragraph 9 of your affidavit.

A. Yes.

88 Q. And there, you --

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MR. HUGHES: Did you want to mark this?
MR. SYME: I'm sorry. Thank you. Yes, Exhibit 2, please.
EXHIBIT NO. 2: An assessment of market power in the provision of wireless telecommunication service in Canada
BY MR. SYME:
89 Q. Page 4, paragraph 9.
And there, you will see you are referring to Professor Boyer's report in paragraph 9. I'm not going to read it. You make an observation about it, and you -- you level a criticism at the report in terms of the analysis, and that's neither here nor there for purposes of what we are here for today, necessarily.
MR. HUGHES: We think it is.
BY MR. SYME:
90 Q. Okay. What I wanted to direct you to -- yes, I phrased that badly. What I wanted to direct you to, in any event, was paragraph 10.
A. Yes.
91 Q. And you say:
"A more comprehensive analysis of the facts relevant to the purchase of retail gasoline by consumers in Aberfoyle, Allanburg, and Innisfil

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indicates that the proposed transaction will not substantially lessen competition in these locations through either unilateral conduct of the merged firm or coordinated conduct with rival gasoline retailers post-merger."
So what you are saying is no SLC as a result of the proposed transaction, correct?
A. Yes.
92 Q. Okay. And in reaching that conclusion, did you apply a hypothetical monopolist test?
A. So in reaching that conclusion, I did define the market, the relevant market.
93 Q. Okay. But that's not the question I asked you.
MR. HUGHES: I don't think she'd finished.
BY MR. SYME:
94 Q. I'm sorry. Pardon me.
A. So I think it's -- so are you --
95 Q. I'm asking if you applied the hypothetical monopolist test in reaching the conclusion there was no SLC.
A. And you are thinking of applying it -- well, I define the relevant market to be broader

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than each of these locations on the same principles as would be applied in the context of a hypothetical monopolist test. I did not undertake a critical loss analysis.
96 Q. Sorry, you said you did on the same basis as you would the hypothetical?
A. Well, I looked at the -- yes, in the following sense. I looked -- the report addresses the profitability of raising prices to retail customers that live in Aberfoyle and whether that would be profitable to do or not, and they -- or raising retail prices in Allanburg or raising retail prices in Innisfil, whether gasoline stations in Innisfil could raise retail prices there to customers based in Innisfil, which is what the hypothetical monopolist test would be doing, and I conclude that it would not be profitable to do that because they would lose too much volume to stations that are in -- sort of along Mapleview Drive, for instance, in Southern Barrie, so the market would have to be broader.
97 Q. Right. So what is it that you didn't do? What is it that is missing from your analysis such that it isn't a hypothetical monopolist test?
A. Well, I -- the only thing that

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would be -- the only thing would be whether there was a calculation of a critical loss.
98 Q. That's the only thing that's missing?
A. You may point out more to me, but at this point, that's what comes to mind.
99 Q. Now, you've addressed there in paragraph 10 the four -- or the three areas that we have been talking about, Aberfoyle, Allanburg, and Innisfil. What's your view with respect to the balance of the areas, in other words, the other 11 areas that are at issue? In terms of SLC?
MR. HUGHES: What do you mean by --
BY MR. SYME:
100 Q. Is there an SLC in those areas or not?
A. Well, with the proposed remedy, there's -- I wasn't asked to deal with those, and Professor Boyer also indicated that there was no competition problem with the proposed remedy in place.
101 Q. Okay. Absent the proposed remedy, is there an SLC in those areas?
A. In some of them, yes.
102 Q. Okay. Which ones?
A. So it would be -- do you have my

February 23rd?

MR. HUGHES: Yes.

THE WITNESS: Just a second. I will ...

So in Lundar, Manitoba, Neepawa, Manitoba, Warren, Manitoba, Kapuskasing, Ontario, there would be very high concentration post-merger, and they would be part of a small price zone. And then there were two locations, Bancroft and Tillsonburg, both in Ontario, where there would be quite high retail concentration post-merger.

BY MR. SYME:

103 Q. Sorry, can you slow down.

A. Sorry.

104 Q. I've got Lundar, Neepawa, Warren, and Kapuskasing, and then you went to --

A. There were two other markets, Bancroft and Tillsonburg.

105 Q. Yes.

A. Where there was high retail concentration post-merger, but they were part of a larger price zone, which I think additional -- I mean, I -- I'm not saying there's necessarily an SLC there, but there are certainly some risks there that would need to be addressed.

106 Q. Okay. And in the first, you said very high concentration, Lundar and the Neepawa --

MR. HUGHES: I think she said "high".

BY MR. SYME:

107 Q. I heard "very high", but --

A. High concentration in -- at a retail level, and they were part of a small price zone for Parkland.

108 Q. Okay. So are you saying there is an SLC there?

A. In those, I think there's legitimate competition concerns in those markets, yes. And I believe a remedy has been proposed to address them.

109 Q. Okay. So we have talked about Bancroft and Tillsonburg and the other four that you referred to initially, and I think in respect of Bancroft and Tillsonburg, I think you said there's not necessarily an SLC; is that what you said?

A. Yes. There would be competition concerns, and one would have to do sort of further analysis there. I think part of the complication with Tillsonburg, for example, is that, pre-merger -- pre-merger, Pioneer has quite a large share to begin with, and then the Parkland dealer is quite small and ineffect -- and not very effective.

110 Q. Right.

A. And so the question there would be does the merger make much difference? So it's not obvious, even though you have high share, that the merger is creating a substantial lessening of competition relative to what existed pre-merger.

111 Q. Okay. So we have done 6 there.

A. Yes.

112 Q. Keep going.

A. So then with the remaining markets that -- a number of which the Competition Bureau -- the Commissioner no longer has concerns, our initial analysis, my initial analysis, was that there was unlikely to be a substantial lessening of competition in those other markets. And the Commissioner has agreed, because, for instance, Hamilton and Grimsby are no longer markets of concern.

113 Q. Okay. I think we are talking about a universe of 14, right?

A. Yes.

114 Q. So I don't think we are talking about Hamilton or Grimsby anymore.

A. Right.

115 Q. I think we are talking about a different subset of that.

A. Okay.

116 Q. I think you are referring to the original 21?

A. Yeah, 22, I think there were.

117 Q. Or 22, perhaps?

A. Yes.

118 Q. Okay. So I'm just trying to drill down on those 14 --

A. 14.

119 Q. -- and we've talked about 6.

A. Yes.

120 Q. I have asked you about an SLC, and I'm wondering if there is an SLC in those markets, in your view.

A. In the remainder?

121 Q. Yes.

A. Well, certainly not with the remedy, because the remedy will remove any overlap.

122 Q. Right. But I've asked you without the remedy.

A. In some of those markets, I wouldn't have thought there was an SLC without the remedy.

123 Q. Okay. Which ones?

A. The list of -- sorry, I just have

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to go back to the 14.

124 Q. Right.

MR. HUGHES: Here's the application.

BY MR. SYME:

125 Q. I'm wondering if the easiest place to find it is in -- at page -- yes.

A. Oh, here. Okay. So ...

126 Q. We've talked about Warren.

A. We talked about Warren. I don't think there is substantial lessening of competition in Allanburg. Lundar, we talked about. Tillsonburg, we talked about. Innisfil, I don't think there is a substantial lessening of competition in. Kapuskasing, we talked about. Hanover, I think -- I don't agree with -- I think in Hanover, that Hanover's part of a broader -- broader market so that it's -- there isn't -- I didn't believe there was a substantial lessening of competition in Hanover. Bancroft, we talked about. Gananoque is a market where there's a proposed remedy, but even without that remedy, it's likely influenced by competition from some other locations.

Chelmsford/Azilda is a market with a proposed remedy, but it's probably influenced by pricing in Sudbury so that I didn't think there was a

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problem there. Aberfoyle is one that I discussed, and I don't think there is a substantial lessening of competition in Aberfoyle. In Port Perry, that's a location also with a proposed remedy which, when I looked at it initially, looked like it was part of a broader -- had influences beyond Port Perry, and there wasn't a substantial lessening. Neepawa, we have talked about. And Welland is another market with a proposed remedy where it's also -- like, I didn't find that there was necessarily a substantial lessening of competition.

127 Q. Even without the remedy?

A. Even without the remedy.

128 Q. Okay. So why don't we turn to page A-4 of your -- it's an appendix to your February 23rd report. Actually, why don't we go to A-66.

A. Okay.

129 Q. Do you see that there?

A. Yes.

130 Q. That's a map of Warren, Manitoba; is that correct?

A. Yes.

131 Q. And, of course, I have read this, but I just want to understand what it is that this is

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telling me.

When I look at this, what I'm understanding is that it's your view that that's the relevant market for purposes of analysis of Warren. Manitoba, is that correct, that 25-kilometre circle?

A. Sorry. Just have to go back.

MR. HUGHES: Yes. It's on the last page.

THE WITNESS: Yes. Sorry, just give me a moment.

BY MR. SYME:

132 Q. Yes. Take your time.

A. So I think the 25K was presented -- I did not reach a conclusion that 25 kilometres was necessarily the relevant market. The discussion basically speaks to the fact that there's -- that the town -- that the town is quite -- is quite a bit further away from Winnipeg and is fairly isolated from other towns. The next closest town is Stonewall, which is almost 20 kilometres to the east. And the parties are very -- the discussion talks about the fact that the parties likely compete directly in Warren and are constrained by two competitors that are quite a bit further away, either 12 or 19 kilometres away. So I -- the 25K is essentially just an illustration.

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133 Q. What's it an illustration of?

A. Distance. Just to show how far away the distances are.

134 Q. How is it relevant to what you are portraying here? Why is it there?

A. Oh, just so that you could see how far the distances are. I mean, the circle could have been drawn with -- at 20K.

135 Q. Right. So if I understand this, your analysis in respect of Warren, you are saying that folks in Warren, in your view, would drive 20 -- or 19 kilometres down the road to Stonewall to fill up their tank with gas. Is that what you are saying?

A. No, no. In fact, I said that -- in the description, I said that the two stations in Warren very likely compete directly in the Warren area and that the next closest competitors that they might be constrained by are 12 to 19 kilometres away, and given these facts, there's likely to be competition concerns in Warren, and that's why Warren was one of the markets that was identified as having high share in a concentration problem and potentially an SLC.

136 Q. Okay. And what are the -- what's the bound of the geographic market here in this Warren area?

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A. Well, I think if you just look at the scale, it would probably be -- I mean, they are -- you know, you could draw different -- sort of hard to know as to the extent to which you'd -- they compete with the station up at Woodlands. That's on the same main road. So you would want to know what the traffic patterns are, the commuting pattern.

137 Q. All right. And do you know anything about the traffic patterns in that area of Manitoba?

A. No. I didn't spend -- I didn't look further at the traffic patterns there. For my current report, I just focussed on the three markets, because there is a remedy offered in Warren.

138 Q. All right. So perhaps let's have a look at Lundar. A-59.

A. Sure.

139 Q. And as I understand it, the parties Pioneer and Parkland own two of the three gas stations in Lundar; is that right?

A. Yes.

140 Q. All right. And the parties would control a significant majority of the supply of gas in Lundar, retail gas in Lundar, post --

MR. HERSH: Those, I believe, are both

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dealer stations in Lundar, not owned stations. At least one of them is likely to be a dealer station.

MR. HUGHES: They are both independent dealer stations.

BY MR. SYME:

141 Q. All right. What's the geographic market for this Lundar area? I don't see a circle here. I'm just trying to grasp that.

A. I think the -- so the discussion of Lundar is on page 21 of that earlier document, which I guess is 00556, and it basically indicates that the -- the competition that would exist would be primarily with those local stations in Lundar, and that you have to go -- you have to go 20 kilometres away from Lundar before you hit another competitor up at Eriksdale, and so you are going to have a problem in Lundar. I mean, you know, it probably wouldn't matter how -- because you are so far away before you get to another town and you don't have any obvious commuting patterns that would connect Lundar to Eriksdale.

142 Q. So if I can get you to turn up paragraph 20 of your report.

A. Yes.

143 Q. And I'll let you get there. You make reference to -- you are referring to the Boyer

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report, and, of course, you are referring to the -- his initial report, correct?

A. Yes.

144 Q. All right. And you indicate there that:

"That report lists a number of factors which may facilitate the firms' ability to engage in coordinated behaviour."

Do you see that?

A. Yes, I do.

145 Q. And we can turn it up if we need to, but I don't understand you to be taking issue in this report with the factors that he lists in his report in terms of that those factors are relevant considerations in thinking about coordinated behaviour; is that fair?

A. That's right. We agree that the factors are relevant. I think one of the things that makes the factors not very informative here is that, if we look at the list of factors that are relevant and accept Professor Boyer's view that entry is difficult, and -- for example, then basically every one of the factors except the number of competitors applies to every retail gasoline market in Canada. So that becomes -- so the factors become not very helpful for

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purposes of distinguishing whether you'll have a risk of coordinated conduct or you won't. You have to dive sort of past those factors into the very details of the individual market.

146 Q. I see. All right. You haven't applied any of those factors in the context of your report, looked at those factors and considered them in the context of these markets, have you?

A. Yes, I have, I think. So where I -- what I have done, which I agree with -- Professor Boyer points out that those factors all go into really a single question, which is whether the profits to be earned from coordination exceed the costs and the risks associated with that, so that's at my paragraph 20, and Professor Boyer refers to that -- this profit calculation at his paragraph 44. So the factors all filter into that as the ultimate question, and I sought to address that ultimate question for each market in each section.

So there's -- when I talk about Aberfoyle, Allanburg, and Innisfil, I have a section which talks about the profit and risks of increasing prices for each of those. So that's how I have addressed those factors.

147 Q. Okay. So in paragraph 21, you

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refer to paragraph 27 of the Boyer report and you quote it there. And you talk about single firm price elasticity or own firm price elasticity. Do you see that?

A. I do.

148 Q. Okay. And I'm wondering if you agree with me that, in the context of coordinated effects, the relevant concept in terms of the ability to raise prices is not own price elasticity of an individual station but the extent to which a group of firms acting in concert or in a coordinated fashion can internalize division.

A. I would not agree fully, because the own price elasticity for an individual station plays into coordinated effects in the following way. The own price elasticity at the individual station level tells us something about an individual firm's willingness to -- what's the gain or the loss that it gets from coordinating with rivals, and that exists for each station. So when the own price elasticity is very high, as it is here, that means that, for an individual station, it has a lot to gain if it doesn't coordinate. If it prices a little bit less or it holds back on a restoration, it can gain a lot of volume, and that's quite profitable to it. So that -- the fact that that

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exists will affect the likelihood that you see coordination. It will make it more difficult to achieve a coordinated outcome.

149 Q. Because you are going to end up with -- if you get coordination, you are going to end up with perhaps some coordinating behaviour, and then there is going to be the temptation to cheat to gain extra volume --

A. There's all -- that's right --

150 Q. -- the terms; is that right?

A. -- that's exactly right, and that -- in some markets -- in some markets, the gains from cheating are small.

151 Q. Right.

A. And this is a market where, because this own price elasticity at the station level is so large, the gains are large from not coordinating fully. So from being the last one who raises prices or from being -- or from starting to under -- being the first to undercut, that's, in fact, in essence, why, in gasoline markets, we see these asymmetric price cycles, because that is an indication of sort of that continual fight to get share in the undercutting phase.

152 Q. Right. So you will see, in other words, perhaps a shorter period of coordination and

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then you will see undercutting and cheating as the price comes down?

A. Well, it's -- it's not actual coordin -- I think you have to be careful there. It's not the -- when a restoration occurs in a cycle, that is not the result of -- that's not the result of coordination that would be contrary to the Act in any capacity. It's a sort of -- in fact, these cycles have been heavily studied in the economic literature, and the literature has very clearly stated that the cycles are associated with competition.

153 Q. Right.

A. What happens is -- why do you get a restoration? You get a restoration because basically margins get very, very low, and margin has to come back up, and so that's where the price -- and they are not always followed, so, you know, somebody will try to raise price and others -- sometimes it sticks and sometimes it doesn't.

154 Q. Right. But you have reviewed Mr. McNabb's affidavit, I take it, in preparing for your testimony here today?

A. I have.

155 Q. Okay. And you have seen the e-mails that are referred to beginning at about

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paragraph -- at paragraph 25, have you?

A. Yes, I have.

156 Q. Okay. And you'll agree with me that what's going on there is coordination, would you?

MR. ROOK: I'm not sure Margaret is in a position to comment on those e-mails or what those e-mails mean.

MR. HUGHES: She has read the e-mails. She is not an author or a recipient of any of the e-mails.

BY MR. SYME:

157 Q. Right. Do you have a view as to what is going on there?

A. I have some comments about the e-mails. Do you have them, by any chance? So there is a few things I noted reading them.

So more than half of them, six of the -- or maybe half, six of the twelve -- my recollection is six of the twelve. So, first thing, they are not all e-mails. There are two documents that are sort of just pricing strategy documents.

158 Q. Right.

A. But for -- so for the ten e-mails, six of the ten are describing competition between Parkland and Global Fuels for dealers and are related

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to the terms that a dealer would have between -- is the dealer better off with Global Fuels or with Parkland or what's the rack price that the dealer gets through Parkland with Imperial Oil versus Petro Canada, for example.

159 Q. Okay. And can you direct me to where those are, those six?

A. Yes. Those are the latter ones. So if I -- so I tried to get these to my memory.

So the exhibits are -- his e-mails start at J -- sorry. W, they end at.

And so the Global Fuels ones are certainly at the -- at the back, so Exhibits -- let me just get you the exact references.

So -- yes. So I think when I read O, that's -- that was about a competing offer for Global -- between Global and Parkland for the dealer.

Exhibit P ...

MR. ROOK: Sorry, O is related to Pioneer in my copy.

THE WITNESS: Oh, Pioneer, sorry. Pioneer and -- but then they were talking about alternatives with Global. That's the way I had read this. And -- because it's about sort of the different options that the dealer arrangement would have. You

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know, sort of the upfront payments and so on.

So P was also about sort of competition among the dealers and when different dealer arrangements expire. Q was basically also in the context of, you know, how many dealers do we have at risk that could turn over to Global, what's their volume, what's our revenues from them, how do we try to ensure that we keep them or talk to them? R was not actually an e-mail, and, actually, I confess I couldn't really read R. But it's also forgivable loans and repayable loans and different card rates or loyalty programs. It looks like it's dealer-related competition.

S was kind of fun to read. And that was -- that was also about dealer competition with, you know, Global. T appeared to be -- T was sort of follow-up off this Imperial meeting, so it wasn't about retail gasoline prices, per se. And then U. So U was about pricing at a particular station and whether that station was at the right price. So that wasn't about dealer competition, but I think -- I think V was -- V was about, you know, whether the dealer -- the dealer was complaining about the rack price at Petro-Canada versus Imperial. So that was sort of more about the dealer contracts is the way I read that e-mail.

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160 Q. All right.

A. So there's four e-mails at the beginning.

161 Q. Yes. I don't think you spoke to J.

A. No. J is --

162 Q. So let me just cut to the chase here.

A. Yes.

163 Q. So with J, we have an e-mail from Troy Richer?

A. Yes.

164 Q. Richter, pardon me, Pioneer Director of Retail Operations West, to Haydn Northey, Pioneer Vice-President Retail Operations, with the subject heading "Timmins - Mac's Shell Pricing". It's dated July 16, 2014, and it says, in part:

"I'm not sure what message they are trying to send other than they are trying to position a Shell brand at one cent per litre below other majors in the market."

And then down below:

"It should be noted that our Esso site in North Bay missed a message to negotiate a restoration in North Bay on Tuesday, and although we went up at 9 a.m., no one reacted, so we moved back

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down at noon."

You are not going to tell me that this isn't coordination.

MR. HUGHES: Well, first of all, this isn't an e-mail that Ms. Henderson either authored or received, and she is not really in a position to be commenting on factual matters in the record.

MR. SYME: She has just given a view with respect to six e-mails and she's given her interpretation of what went on there. She can do it there, she can do it here.

BY MR. SYME:

165 Q. What's your answer?

A. So this -- I guess this is in Timmins. This doesn't affect any of the three markets that I'm addressing.

166 Q. I didn't ask you that.

A. I know, and I'm -- and what -- but it talks about more -- a couple of things. There are a few things in it.

So it talks about the fact that he -- that they didn't -- so they did a restoration at nine o'clock. No one reacted, so no one else restored.

167 Q. Right.

A. And so they had to move back down

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at noon, because nobody else moved up. So that meant that they were unsuccessful in getting that restoration is the latter part. And then the earlier part of the e-mail talks about the fact that they are in this battle back and forth with Shell where they keep going back and forth and each dropping a penny each time.

So, I mean, the totality of the e-mail -- the totality of the e-mail is such that it's not obvious to me that it's -- it can only be read to believe or to be interp -- it can only be read to be consistent with coordination; it could also be read to be completely consistent with the type of price cycles that we see in retail gasoline markets: They tried to -- somebody initiated a restoration, nobody followed, they came back down.

Why did they come back down? They came back down because this own price elasticity of demand is so high. They basically couldn't be sitting out there at a high price for a long time because they weren't selling any gasoline, so they were only out there for three hours and then moved their price back down, because nobody else followed them, is the latter part, and then the early part is about the kind of ratcheting down where, in Timmins, this Pioneer station is going head-to-head with the Shell station, and they

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just keep dropping, trying to overcome each other by a penny each time.

168 Q. Let's look at Exhibit L. This is an e-mail chain between Kelly Nelson, Pioneer Director of Sales Operations, Brian Kitchen, Pioneer VP Dealer and Reseller Sales, Haydn Northey, Pioneer VP Retail Operations, and John Evans, Pioneer Director of Retail Operations East. It's dated August 12th, 2014, and they are discussing the pump pricing of Esso-branded fuel at certain stations in Winnipeg.

A. Yes.

169 Q. Do you see that?

A. I do.

170 Q. And in response to an e-mail from Brian Kitchen at 4:11 p.m., it states:

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

And then Haydn Northey wrote -- sorry, do you see that?

A. I see it. I do.

171 Q. Okay:

"My only concern is our volumes are down at most of our sites year-to-date. As a team player, though, we will move now."

And then down below, Brian Kitchen

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replies to Haydn Northey's e-mail at 4:35 and states, among other things:

"Time for some robust price marketing games, i.e., back to cheating [redacted] in selected markets."

Do you see that?

A. I do.

172 Q. So what I'm going to suggest to you that is going on here is there is coordination going on during the week, and then, as you describe it, there's cheating [redacted] to grab a little bit of that extra volume. Isn't that a logical explanation for what is going on here?

A. So I think that you could interpret the e-mail that way. I think you would want to look at the totality of the evidence and not look at one e-mail out of context, so I guess it would depend on what else was going on and what else you had information about in Winnipeg in terms of the -- you know, the rest of what was -- the rest of what was happening.

You have to -- if you think about how many markets there are and how many price changes these stations are making in the course of a year, there's -- I just would be cautious about reading one e-mail without thinking about everything else that's going on

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in that market.

I didn't look at Winnipeg, and so I -- but, you know, I fully understand why the Bureau would see an e-mail like this and want to know more information.

173 Q. But I'm not asking you what else is going on in that market at another time or another place, I'm asking you whether or not this reflects price coordination. I'm suggesting to you that it does.

MR. HUGHES: Well, I don't think she can reach a conclusion as to whether this does or doesn't involve price coordination. She just told you that.

MR. SYME: I didn't ask her whether -- to reach a conclusion, I said it suggests price coordination.

MR. HUGHES: Well, I think she has given you her answer.

MR. SYME: Can we take a short break.

-- RECESS AT 11:26 --

BY MR. SYME:

174 Q. So maybe I can get you to turn to page 10 of your report.

A. Yes.

175 Q. Where you address Aberfoyle there.

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And I just have a few questions for you about that. And perhaps we can start by looking at paragraph 26. And you say, at 26:

"There are no supermarkets, hardware stores, or other major retailers in Aberfoyle."

How do you know that?

A. Google searching.

176 Q. All right. And then you say:

"As a result, residents of Aberfoyle will regularly travel to Guelph for grocery and other shopping."

Is that right?

A. Yes.

177 Q. How do you know that?

A. That's the proximity that Aberfoyle is, and it also comes from the fact that the loyalty data for the Pioneer Guelph stations show that a large fraction of their volume comes from customers in Aberfoyle.

178 Q. So you are extrapolating from that that people are going into Guelph to go shopping; is that right?

A. Yes. It's a logical -- it's the most logical place to travel from Aberfoyle.

179 Q. Okay. So that's -- you are drawing

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an inference, but you don't have any evidence, so there's no evidence on the record that you can point to that that's what actually happens; is that fair?

MR. HUGHES: Well, she's just referred to the loyalty data.

BY MR. SYME:

180 Q. Other than that?

A. There's two: The loyalty data, the -- and just looking at the maps to see where it is, and that's where people would go to -- that's where you would need to go to get to the nearest grocery store.

181 Q. All right. And did you look at other locations in proximity to Aberfoyle that you could go to to get to a grocery store?

A. Yes, and Guelph was the largest, closest centre.

182 Q. Okay. Now, when we look at paragraph 27, I just want to understand these loyalty card numbers, and I think this analysis applies in respect of all of Aberfoyle -- or Aberfoyle, Allanburg, and Innisfil, and perhaps what we can do is look first at footnote 12.

A. Yes.

183 Q. And you'll remember footnote 12.

A. Yes.

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184 Q. So there, you set out the percentage of revenues from loyalty cardholders, right?

A. Yes.

185 Q. So in respect of Aberfoyle, that's [redacted] percent of the Pioneer station's revenues come from loyalty cardholders; is that right?

A. Yes.

186 Q. Okay. And then so [redacted] percent come from other people?

A. Yes.

187 Q. Who don't hold loyalty cards?

A. Correct.

188 Q. All right. So if we look at that [redacted] percent, you then say, in 27:

"Pioneer's loyalty card data indicates that only [redacted] percent of its Aberfoyle station loyalty customers' revenues are sold to customers with addresses in Aberfoyle."

So if I -- so the math we did was we took [redacted] percent of [redacted] and that gave us [redacted] of total sales. Will you accept that number, subject to check? In other words, [redacted] of total sales at that station come from that [redacted] percent. Do you follow the math?

A. Yes, I do, yeah. [redacted] percent of [redacted] would be that volume.

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189 Q. 54. Okay. And if I take the [redacted] percent from Guelph and I do the same exercise, I get [redacted] percent?

A. Uhm-hmm.

190 Q. Right. So, basically, putting those two numbers together, you get [redacted] percent of total sales are from those two groups; is that right? In other words, you've got some people from Aberfoyle and some people from Guelph, and that makes up 30 percent of total revenues, right?

A. Yes.

191 Q. Okay. So you would agree with me that you don't know anything about the other [redacted] percent of people buying gas there in terms of where they come from; is that fair?

A. We -- we would know where they come from for the loyalty card customers, because we could find the loyalty -- the postal code, so we would know, for the given station. For this -- for this particular station, we actually know the postal code of the loyalty cardholder.

192 Q. Okay.

A. So we would know where they came from --

193 Q. Okay.

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A. -- for the 59 percent, and for the 41 percent that we don't -- that buy gasoline there that don't have a loyalty card, we are -- there's an assumption made here that the travel patterns are similar whether you hold a loyalty card or you don't.

194 Q. What's the basis of that assumption?

A. That I would just expect that people's travel patterns are basically influenced by the geography and not by whether or not they hold a loyalty card.

195 Q. You are not an expert on travel patterns or commuting, are you?

A. Only to the extent of looking at maps and seeing where people travel when they buy gasoline and looking at the data from the loyalty -- the data that's available here.

196 Q. So I just want to make sure I understand your answer. Are you saying that you are an expert in travel patterns?

A. I'm not -- I've not said I'm an expert in travel patterns, but I -- but the information -- the assumptions that I'm drawing come from the data that is -- gives me information about travel patterns. In this market. I mean, I'm not

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suggesting I know anything about Winnipeg or any other market.

197 Q. Now, if I can get you to look at paragraph 30.

A. Yes.

198 Q. Talking about relevant geographic market there. And you say -- you refer to I think three things. You talk about commuter patterns. I think you have just agreed with me that you are not an expert in commuter patterns, right?

MR. HUGHES: With the qualification that she gave.

BY MR. SYME:

199 Q. Right. So you refer to that. Then you say:

"The extensive volume of Aberfoyle station volume sold to customers located in Guelph evidence of Guelph's station volume sold to customers living in Aberfoyle."

So that's sort of what I will call the second factor.

A. Yes.

200 Q. And then the similarity in Aberfoyle and Guelph retail pricing. That's the third factor.

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A. Yes.

201 Q. Right?

A. Yes.

202 Q. And what I'm going to put to you is that the similarity in pricing by itself is not indicative of anything. Is that fair? If you were to look at that by itself and there was a correlation or that the prices lined up, it wouldn't necessarily indicate anything in terms of geographic market; is that fair?

A. Yes. You'd need more information.

203 Q. Right. Just looking at Allanburg, paragraph 41.

A. Yes.

204 Q. You say there there's no major supermarkets in Allanburg. So I understand from your earlier evidence that you determined that by looking at Google Maps?

A. I searched through Google for all local businesses in Allanburg.

205 Q. All right.

A. That's how we found that -- I found that Avondale Food Stores.

206 Q. And if I look at paragraph 46, you say -- and, you know, you can take me back to it, if

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you wish:

"The above demonstrates that, as a result of commuting and travelling for shopping and other purposes, residents of Allanburg have a large number of competitive options to the Parkland and Pioneer stations in Allanburg."

What studies did you do in respect of commuting to express that view?

A. So people have to leave Allanburg to buy food, and they -- there's a variety of places that they go. It's also the case that -- and the closest -- these are the closest places that they go. So -- and then on top of that, I know that -- from the loyalty card data, I know that [redacted] percent, possibly [redacted] percent -- I'd have to -- or [redacted] or so percent of loyalty cardholders that live in Allanburg buy gasoline outside of Allanburg. So I know that they are travelling outside of Allanburg to shop and to -- and when they are outside of Allanburg shopping, they are also buying gasoline.

I mean, the reason commuting patterns really matter is -- which Professor Boyer and I agree with -- is related to this -- because you buy gasoline not just where you live and you buy it also where you travel, and the best economic study on that front and

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why that matters is by Jean-Francois Houde, and I quote him at paragraph 16, which is why commuting patterns are a focus, because he talks -- he studies this for Quebec City and finds that you can have -- if you have good connections along a road network and particular traffic flows, you can have fairly distant stations, as the crow flies, actually, be fairly important competitors to each other.

207 Q. All right. So when you use the word -- so I saw the word "commuting", and then I saw "and travelling for shopping". You referred to travelling for shopping in your answer there, but I didn't hear you referring to commuting. When you say "commuting", what are you talking about?

A. I was thinking of that for work.

208 Q. Okay. Do you have any evidence about where people in Allanburg work?

A. Well, I know there's -- there's no stores -- I know there are no stores in Allanburg or nothing major. There's no -- there's no retail locations of any type in Allanburg. It's a very tiny place. And so, basically, people -- and there's not a lot of people there. There's a few hundred, I suppose, but those people are leaving Allanburg to go somewhere to work. I don't --

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209 Q. That's what you are assuming?

A. Yes. I'm assuming they are not all retired.

210 Q. Okay. Are you also assuming that there is no substantial source of employment in Allanburg; is that right?

A. Actually, I have at least checked that there's no -- there's no -- through Google, I have looked for retailer's locations there, and there's nothing that I can find, other than this Avondale Food Stores. There's nothing major.

211 Q. All right. And if you go over to paragraph 49. Right down the last sentence there, you're commenting on Allanburg residents, and you say:

"They likely purchase a substantial portion of their gasoline volumes in Niagara Falls, St. Catharines, Thorold, and other communities where they shop and travel."

A. Yes.

212 Q. Do you have any evidence to support that?

A. Yes. I know that -- from the loyalty data, I know that -- so I looked at the loyalty card data, who had a card that lived in Allandale (sic) and where did they buy -- where did they make a

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gasoline purchase, and I know that [redacted] -- it's somewhere between [redacted] and [redacted] percent of the loyalty cardholders in Allandale (sic) make gasoline purchases at stations -- Pioneer stations outside of Allanburg. So I know that they are buying -- I know that a large number of them are buying gasoline outside of Allanburg.

213 Q. Okay. They are buying it outside of Allanburg, but you're saying they're buying it in Niagara Falls, St. Catharines, Thorold, and other communities where they shop or travel. Do you have any evidence that supports that?

A. So in the loyalty card data, there are -- the stations in Niagara Falls, St. Catharines, and Thorold include sales that would be made to people that have Allanburg addresses.

214 Q. So that's what you are relying on for that statement?

A. That plus the fact that I know that -- that these are the logical places for them to go because they are so close, Niagara Falls and St. Catharines. Well, Niagara Falls is particularly close, and Thorold. St. Catharines is a little further away.

215 Q. So looking at paragraph 53.

A. Yes.

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216 Q. You are talking about Innisfil there. And in the first sentence of that paragraph, you are saying:

"Innisfil is part of the census metropolitan area of Barrie, which is a major urban centre to which residents of Innisfil regularly travel."

Do you see that?

A. Yes.

217 Q. What's your evidence to support that statement?

A. So the Barrie -- so Innisfil -- there's a major road called Mapleview Drive, which is in South Barrie, which has a whole series of power centres on it, and people -- that is a major draw for people in the region, and it's within 10 kilometres of Innisfil. And the -- so there are a couple of things that come out of that that are evidence here.

So first off, we know from the loyalty card data that a large fraction -- again, the same sort of evidence as before, that I looked at loyalty card data holders that lived in Innisfil, and [redacted] percent of them purchase gas outside of Innisfil. And then I know that the Innisfil stations track prices on Mapleview Drive in Barrie, and that also people -- the Barrie

stations include purchases by people that have residential addresses in Innisfil. So all of those things plus the proximity. Our office manager lives in the area and tells me, you know, people travel regularly to that area. So it's sort of a totality of things.

218 Q. So all of that and the office manager's evidence?

A. Yeah. The office manager isn't footnoted. It's far more than her view.

219 Q. Looking at paragraph 56, you refer there, again, to commuter patterns, and I understand from your earlier answer, when you say "commuter patterns", you are talking about people going to and from work; is that correct?

A. Yes. I probably should have added the -- added about travelling to shop, too, because I didn't mean to limit it here to only people who would work in Barrie but people that would also travel to Barrie to shop.

220 Q. But you don't have any evidence with respect to people and numbers of people or traffic flows or commuter patterns with respect to people in Innisfil?

A. I looked for traffic patterns, and

in terms of commuting, the data is -- you can get data on sort of at a road level as to the amount of traffic that is travelling sort of in different distances. There's no -- there's no data that actually identifies, you know, this person is -- you know, these are the fraction of people that work in this location from these different cities. There's no public data on that.

I think it's very logical that, given the size of this town and its location and the nature of where they would shop, and I guess having grown up in a smaller town myself, that you travel to shop somewhere. It strikes me as quite logical that this is where they are going. In addition to the fact that we know that they -- [redacted] percent of them buy gasoline outside of Innisfil because of the loyalty card data, and we know that the Innisfil stations track the Barrie pricing, so it's the combination of things.

221 Q. All right. So you think that, in thinking about these issues or thinking about commuter patterns and driving, you should be applying, among other things, logic and common sense; is that fair?

A. Yes.

MR. SYME: Give me a moment.

-- OFF THE RECORD --

MR. SYME: Thank you very much. Those are all my questions.

MR. HUGHES: I don't have any re-examination.

-- Whereupon the cross-examination concluded at 12:15 p.m.

REPORTER'S CERTIFICATE

I, TERRY WOOD, RPR, CSR, Certified Shorthand Reporter, certify;

That the foregoing proceedings were taken before me at the time and place therein set forth, at which time the witness was put under oath by me;

That the testimony of the witness and all objections made at the time of the examination were recorded stenographically by me and were thereafter transcribed;

That the foregoing is a true and correct transcript of my shorthand notes so taken.

Dated this 9th day of May, 2015.

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NEESONS

PER: TERRY WOOD, RPR, CSR

CERTIFIED COURT REPORTER

MR. HUGHES: [20] 11/13 11/17 14/4 25/9 28/25 29/15 30/15 32/12 33/1 34/1 37/2 39/6 42/2 48/7 52/3 56/10 56/16 58/3 62/10 71/2
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TAB 6

TAB A

Geographic Market Definition

Presentation to the CBA Competition Section's Young Lawyers Committee

Neil Campbell, McMillan LLP
Lilla Csorgo, Competition Bureau
Margaret Sanderson, Charles River Associates

November 19, 2009

Disclaimer

- Discussions of particular policies and cases are for teaching purposes only.
- These slides are part of a presentation and cannot be fully understood separately from that presentation. Ideas presented here are preliminary and their intent is to promote further discussion and analysis.
- These slides do not necessarily reflect the views of the authors' organizations.

Topics for Discussion

- Identifying geographic market definition issues
- Merger analytical framework
- Practical indicators
- Hypothetical monopolist test
- Testing for regional price discrimination
- Critical loss analysis
- Conduct cases and the “cellophane trap”
- Canada Pipe
- Making use of market definition evidence

Identifying Geographic Market Definition Issues

- Where do the merging parties have overlaps?
  - Sales offices / production facilities
  - Customers
- Does geographic market matter?
  - Market share similarities / differences
  - Differences in competitors' presence / position
  - Price differences
- Note: need to consider product market definition in parallel
  - Similar questions

Merger Analytical Framework

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- "Market definition is based on substitutability and focuses on demand responses to changes in relative prices" (MEGs, 3.3)
- May not correspond to standard company or industry segmentations
- May not follow political boundaries

- 35% unilateral effects safe harbour
- 65% CR_4 coordinated effects safe harbour

- Effectiveness of remaining competition
- Removal of vigorous competitor
- Entry
- Change / innovation
- Countervailing power
- Failing firm
- Efficiencies (possible defence)
- Other

345

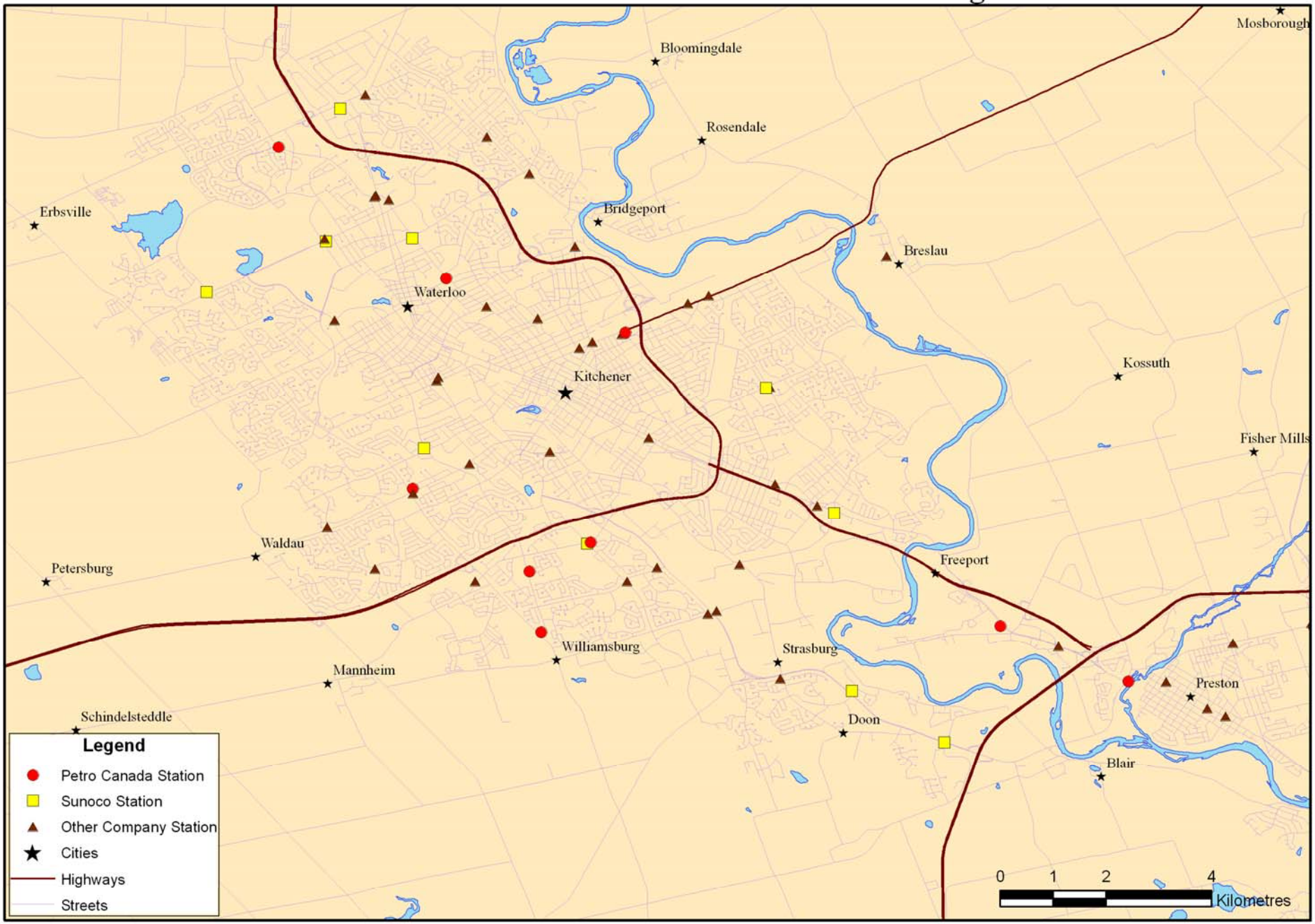
Practical Indicators for Defining Geographic Market

- Closeness of substitution possibilities
  - Demand side: extent to which buyers would switch suppliers
  - Supply side: scope for expansion or repositioning
- Potentially relevant factors (MEGs, 3.21-3.26)
  - Buyers' and trade views
  - End use and product attributes
  - Price relationships and levels
  - Switching costs
  - Transportation costs
  - Shipment patterns
  - Foreign competition

Hypothetical Monopolist Test

- Product dimension:
  - Smallest group of products over which it would be profitable for a single firm acting as a monopolist to implement and sustain a small yet significant non-transitory increase in price ("SSNIP")
- Geographic dimension:
  - Smallest geographic area over which it would be profitable for a single firm acting as a monopolist to implement and sustain a SSNIP
- Conceptual, iterative process

Gas Stations in Kitchener-Waterloo and Surrounding Areas



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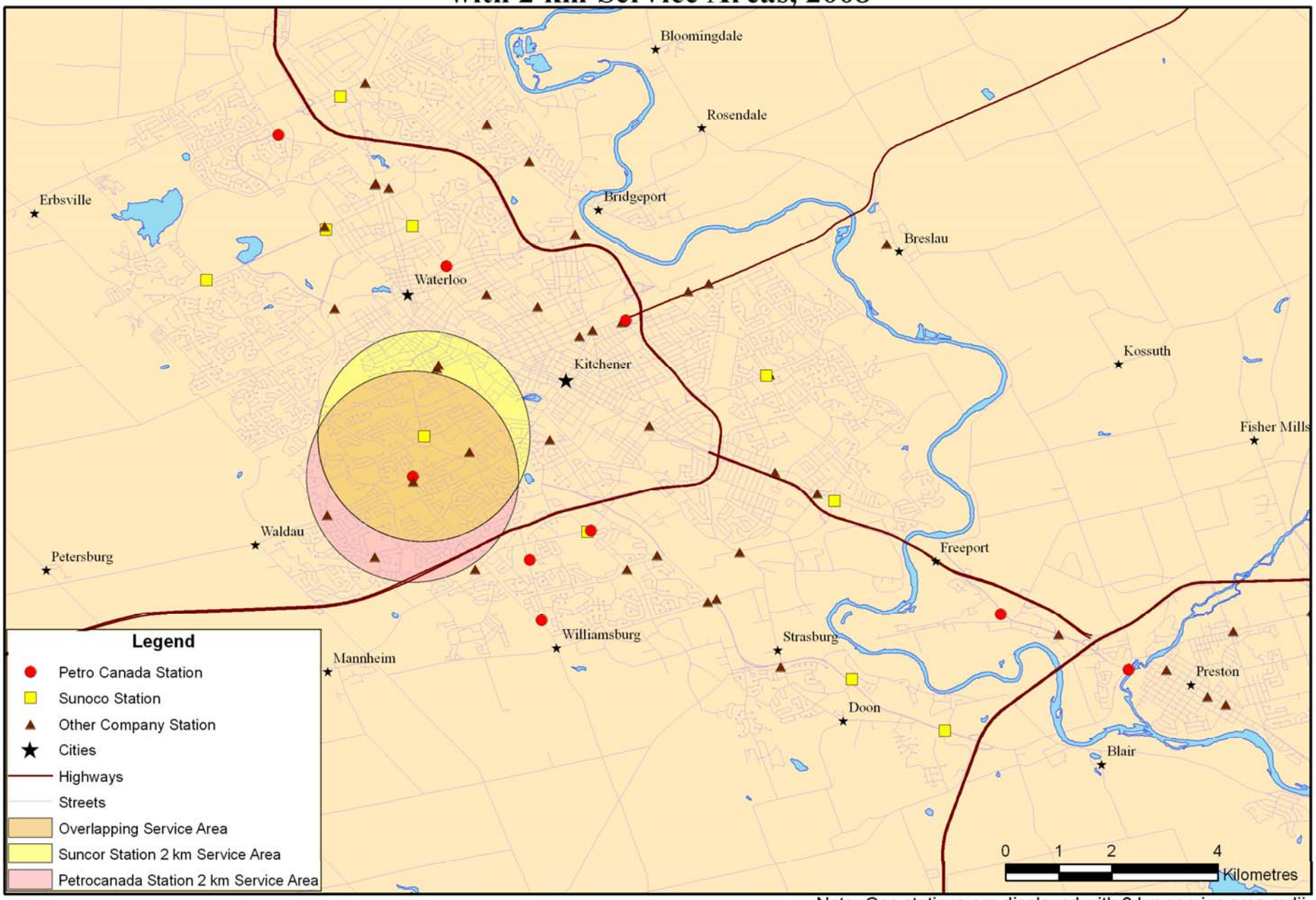
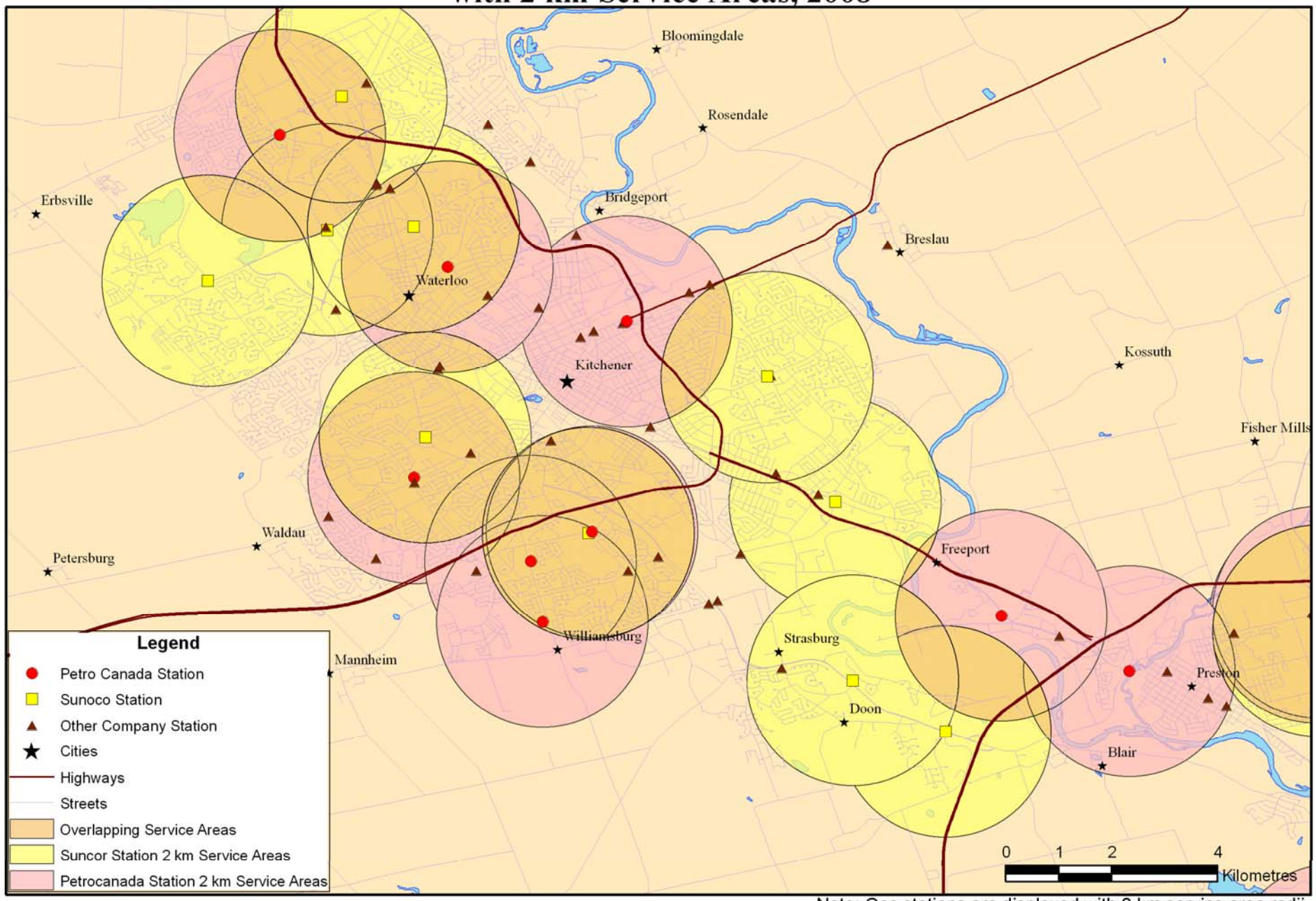
Selected Merging Party Gas Stations in Kitchener-Waterloo and Surrounding Areas with 2 km Service Areas, 2008



Note: Gas stations are displayed with 2 km service area radii.

PUBLIC VERSION

Merging Party Gas Stations in Kitchener-Waterloo and Surrounding Areas with 2 km Service Areas, 2008



Note: Gas stations are displayed with 2 km service area radii.

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Hypothetical Monopolist Test (cont')

- What is a SSNIP?
  - Usual test is 5% price increases over 1 year (MEGs, 3.4)
  - May vary depending upon the product
- What base is used?
  - Prevailing prices for mergers (even if not competitive)
  - Demand responses depend upon price faced by customer (*e.g.*, transportation plus tipping fees in waste disposal)
  - Supply responses depend upon margin faced by entrant (*e.g.*, FOB mill price in case of delivered pricing where supplier pays for freight cost)
- Is price discrimination relevant?
  - If different buyers pay different prices for the same relevant product, subsets of buyers may comprise separate markets over which hypothetical monopolist profitably can impose a SSNIP

Testing for Regional Price Discrimination

- Merger involving two firms based in Western Canada
- Merging parties consider the relevant geographic market to be North America given their extensive exports to U.S. customers
- There are no imports into Canada
- Regression analysis employed to test whether geographic price discrimination exists
  - Test whether the "netback" (per unit sales revenues less freight costs) from the merging firms' sales to customers in the U.S. is similar to the netback earned from customers in Western Canada
  - If netbacks (as a measure of margin) are materially higher for sales to customers in Western Canada than to U.S. customers, the threat of entry from the U.S. does not appear to discipline prices in Western Canada
  - Common netbacks are a necessary but not a sufficient condition for finding that Western Canada is part of a wider geographic market

Merger Case – Practical Example (cont')

- Transaction level data is obtained from merging firms
  - Prices, quantities, discounts, freight costs, customer location, product type for all shipments to U.S. and Canadian customers
- Regression specification used:

$$\text{Log(netback per tonne)} = \alpha + \beta * \log(\text{volume}) + \gamma * (\text{region dummy}) + \delta * (\text{month dummy}) + \zeta * (\text{product type dummy}) + \text{error}$$

- Log-linear regression means the coefficient "γ" measures the % difference in netback per tonne for sales to customers in other regions relative to netbacks earned from customers located in B.C.
  - If no regional price discrimination exists, the netbacks for sales to customers in B.C. should not be significantly (either economically or statistically) different from the netbacks for sales to customers in other regions

Merger Case – Practical Example (cont')

- Netbacks are 10-11% lower for sales to customers in the U.S. compared to netbacks on sales to customers in B.C. and Prairies
- Suggest B.C. + Prairies are in one geographic market, but U.S. Pacific Northwest and U.S. Southwest are in a separate geographic market

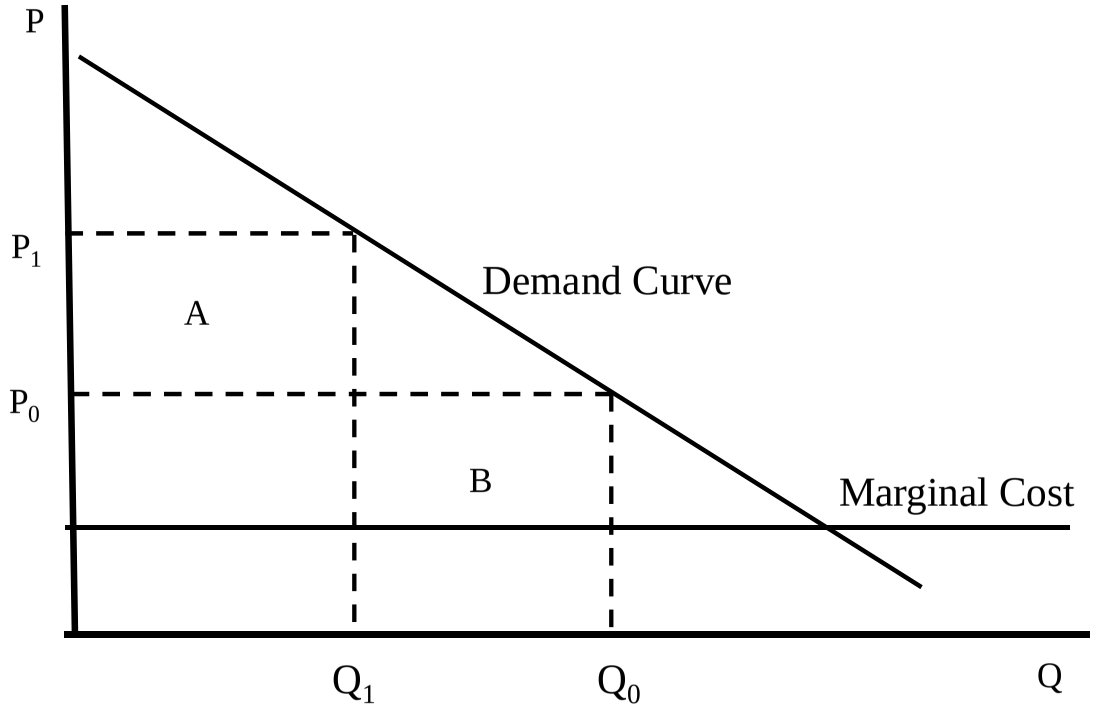
Variable	**Parameter Estimate**	**T-statistic**
Intercept	5.970*	10.83
Volume	-0.005	-1.47
Prairies	-0.030	-1.13
U.S. Pacific Northwest	-0.104**	-2.07
U.S. Southwest	-0.113**	-2.11
	Observations	*1,194*
	R^2	*0.481*

* Statistically significant at 1% level

** Statistically significant at 5% level

Critical Loss Analysis in Market Definition

- No regional price discrimination is a necessary but not a sufficient condition for finding a single, common geographic market
- Sufficient test is the hypothetical monopolist test (critical loss analysis)
  - If hypothetical monopolist imposes a SSNIP, are the gains in revenue from customers who still purchase (area A) greater than the losses from customers who are no longer buying (area B)?



Market Definition Tool: Critical Loss Analysis

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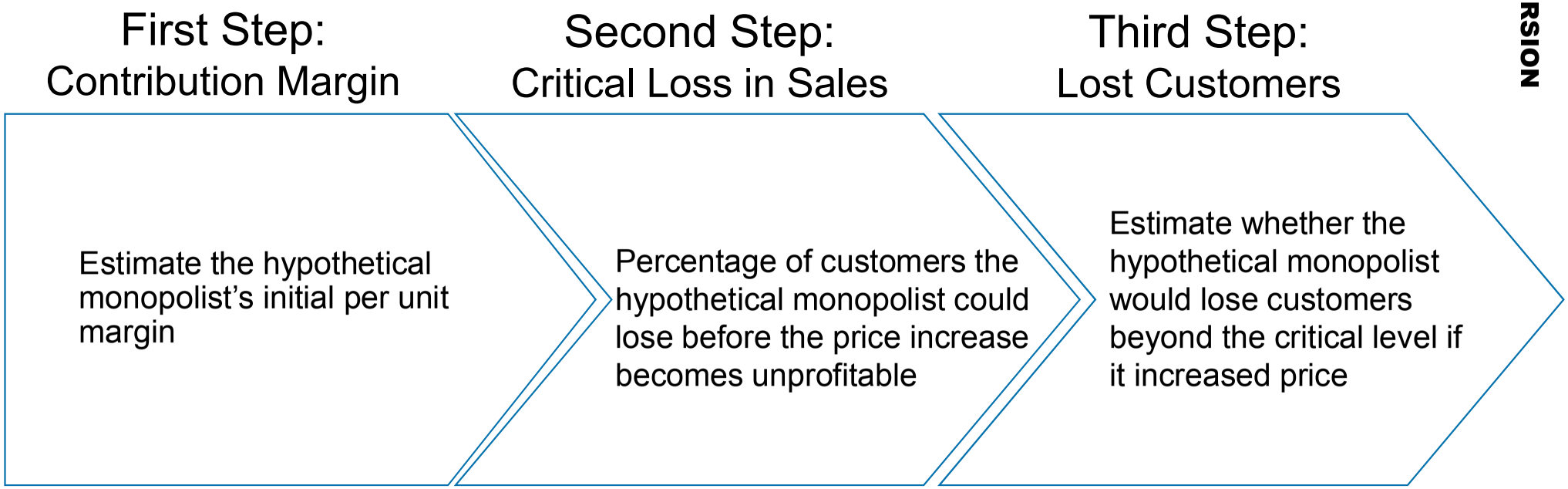

Contribution margin = (initial price – marginal cost) ÷ initial price

Critical loss in sales = SSNIP ÷ (SSNIP + contribution margin)

Involves quantifying how many customers would be lost either to rival firms or by not purchasing when faced with the SSNIP

Critical Loss Analysis - Implications

- As the critical loss formula indicates:
  - The greater the contribution margin, the smaller the critical loss for a given postulated price increase
  - The greater the postulated price increase, the larger the critical loss for a given contribution margin

Percentage Contribution Margin	*Percentage Price Increase*		
	5	10	15
0	**100.0**	**100.0**	**100.0**
10	**33.3**	**50.0**	**60.0**
20	**20.0**	**33.3**	**42.9**
30	**14.3**	**25.0**	**33.3**
40	**11.1**	**20.0**	**27.3**
50	**9.1**	**16.7**	**23.1**

Critical Loss Analysis - Adjustments and Caveats

- Important adjustments and considerations
  - Alternative production facility use may attenuate the effects of lost sales
  - Joint product production
  - Margins may be high for a reason (*e.g.*, inelastic demand); therefore do not assume high margins always mean broad geographic markets because the critical loss is small

- Assumptions
  - No price discrimination
  - Marginal cost is constant over the range of output relevant to the postulated price increase
  - Average variable cost is often used as a proxy for marginal cost
  - Accounting data is typically used to calculate the average variable cost, but this introduces measurement problems

Critical Loss Analysis – Practical Example

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- Geographic market analysis for a possible ChemCo / TargetCo merger – separate East and West markets vs. all Canada?
  - Available data only for ChemCo plants throughout North America
- Assume hypothetical monopolist of all Western Canada plants
- Hypothesize 5% price increase in Western Canada only
  - Price increase is realized by shutting down enough Western Canada capacity to increase price by 5% given elasticity of demand
  - Calculate the contribution margin associated with the shut down capacity by assuming production is shut down at the highest cost plants – find 2 plants need to be shut down to remove enough volume in Western Canada to raise price by 5%
  - Contribution margin associated with the 2 shut-down plants is roughly 20%
- Forgone margin = 20%, price increase = 5% → critical loss = 20%

Critical Loss – Practical Example (cont')

- Will actual loss > 20% if hypothetical monopolist in West raises price by 5%?
  - Assume prices in East remain the same and assume netbacks earned by rival firms are similar to ChemCo netbacks in East
  - Calculate existing ChemCo netbacks (Transaction Price - Freight Cost) for each eastern plant for sales to current customers
  - Assume prices in Western Canada rise by 5% and calculate potential netbacks from each eastern plant to ship to customers in the West
  - Compare post-price-increase netbacks in West with netbacks for current customers in East; if netback to shift an Eastern sale to a Western customer is improved assume East volume is diverted to West
  - Calculate total volumes that would be diverted to West, assuming diversion begins with the highest netback opportunity
  - Is the total volume diverted from East to West > 20% of total Western volume?

Critical Loss – Practical Example (cont')

- Findings
  - Price increases up to 5.2% in Western Canada induce cumulative potential divertible volume from ChemCo plants of 41,414 tonnes
  - Scaling ChemCo divertible volumes by ratio of total plant capacity to ChemCo plant capacity in Eastern Canada (5.64) yields potential industry divertible volume from Eastern Canada to Western Canada of 233,706 tonnes
  - This represents 37% of total Western Canada sales, which exceeds the critical loss of 20%
    - Assumes competitors have freight costs, netbacks and diversion opportunities similar to those of ChemCo's Eastern plants
    - Assumes no contract constraints would restrict diversion of sales from Eastern customers to West

Conduct Cases and the "Cellophane Trap"

- The wrong base price can lead to overly large markets (cellophane trap) or overly small ones (reverse cellophane trap)
- Cellophane trap: If the prevailing price is one that already exhibits substantial market power as result of anticompetitive conduct, a further (hypothetical) price increase in relation to that price may cause buyers to switch to products they would not normally consider as substitutes
  - *U.S. v. Dupont:* the alleged monopolist Dupont had priced its cellophane wrap product so high that substitution of less desirable wrapping materials finally occurred
- Reverse Cellophane Trap: Some suggest that the competitive price be used as the base price instead to avoid the trap, but using the competitive price when market power has already been exercised can lead to overly narrow markets

Reverse Cellophane Trap Example: Canada Pipe

- In Canada Pipe, prevailing prices were used
  - No switching to imports in face of a price increase was found, but the absence of switching was possibly due to the anti-competitive act (the stocking distribution program) and the related penalties associated with switching

- It is expensive to transport cast iron product
  - As a consequence, if price is at the competitive level (i.e., at marginal cost or even average cost), applying the hypothetical monopolist test would likely find that imports are not in the relevant geographic markets

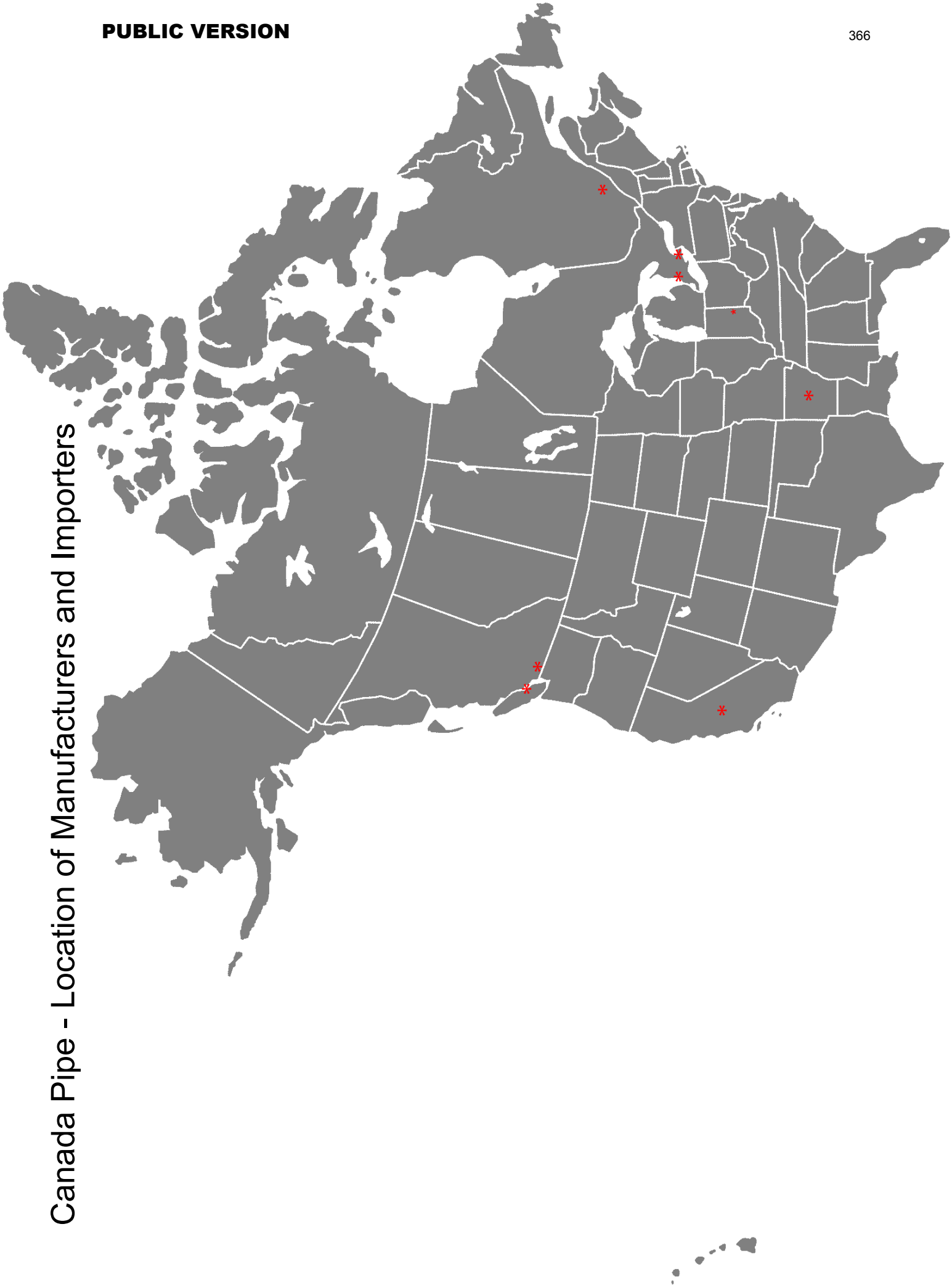
- The price that would prevail absent the anti-competitive act (the "but-for" price) did not appear to be the competitive price
  - At the "but-for" price, imports would be in the market

Abuse Case Example – Canada Pipe

- Six regions of Canada were defined as separate markets
  - B.C., Alberta, the Prairies, Quebec, Ontario and the Maritimes
  - Commissioner submitted that Canada Pipe had at least 82% market share in each geographic market
- Canada Pipe has production facilities in only one of the geographic markets, Quebec
  - Finding on geographic market would imply that buyers located in B.C. would not find sellers located in Quebec to be adequate substitutes
  - How can the location of Canada Pipe be reconciled with its participation in all six geographic markets?
- In considering the potential effects of the alleged anti-competitive acts, the Tribunal considered the effects on imports from the U.S.
  - How can this be reconciled with a geographic market that consists of regions of Canada?

Conundrum 1: Correlations and Price Discrimination

- Tribunal decided in favour of six markets based on evidence that prices across those six regions were not correlated (para. 112).
- MEGs: “When price discrimination is feasible, it may be appropriate to define relevant markets with reference to the characteristics of the classes of buyers or to the particular locations of the targeted buyers.” (para. 3.9)
- Telecom Abuse Bulletin: “The Bureau generally aggregates locations that have the same competitive alternatives (within the product market) for the relevant telecommunications services into a single geographic market.” (section 2.6)



Canada Pipe - Location of Manufacturers and Importers

Sellers of Relevant Product in North America

Seller	Location	Area of Distribution
Canada Pipe	Ste Croix, QC	Canada
Vandem	Hamilton, ON	Ontario
Fernco	Sarnia, ON	Canada
New Centurion	Nanaimo, BC	British Columbia (?)
Sierra	Abbotsford, BC	British Columbia and Alberta (?)
Mission Rubber	California	?
Ideal	Indiana and Arkansas	?

Conundrum 2: Hypothetical Monopolist Test in Abuse Cases

- Base Price
  - The Tribunal noted that markets are based on sufficiently close substitutes. Substitutes are considered close if buyers are willing to switch from one product to another in response to a relative price change (para. 68)
  - Nowhere does it consider the relevant base price
  - Based its conclusions on the Commissioner's submissions on price correlations
    - Those correlations were based on prices that prevailed during the stocking distribution program (the alleged anticompetitive conduct)
  - The prevailing price is not typically the right base price when defining markets in abuse cases

Market Definition in Conduct Cases

- Test: hypothetical monopolist
- Base price: an “appropriate benchmark”
  - Likely the price level that would prevail absent the alleged anti-competitive act(s)
  - Allows for a determination of the products and geographic areas that an allegedly abusive firm would have to control, or otherwise adversely affect, in order to be able to raise price above the price that would prevail absent the anticompetitive act

Abuse Case Example

- Sections of relevant geographic markets can overlap
- The alternative supply locations buyers have available to them need not be uniform
- For example, a product is imported into both Eastern and Western Canada from Central America
- Within Canada, the product imported into or produced in the East is not shipped past Manitoba, and product imported into or produced in the West is not shipped past Saskatchewan
- Buyers throughout Canada have the option of buying product from Central America
- The relevant geographic markets are Eastern Canada plus Central America, and Western Canada plus Central America

Making Use of Market Definition Evidence

- Who is proving (or disproving) what?
- Use visuals (maps, graphs, tables)
- Disclose methodology
  - Assumptions
  - Data sets
- Reality check
  - Is the economic analysis compatible with key business documents and the client's market behaviour?

TAB B

PUBLIC VERSION

INTERNATIONAL

FINAL REPORT

Prepared For:

Bell Canada

An Assessment of Market Power in the Provision of Wireless Telecommunications Services in Canada

Prepared By:

Margaret Sanderson and Andrew Tepperman

CRA International

Date: May 25, 2007

CRA Project No. D11353-00

DISCLAIMER

This report provides the views of the authors. It does not necessarily reflect the views or opinions of other staff or consultants with CRA International. Any errors or omissions are the responsibility of the authors alone.

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EXECUTIVE SUMMARY

This report provides the authors' examination of whether any existing provider of wireless services in Canada is able to exercise significant market power, either on its own or in coordination with other providers of wireless services. We have employed the analytical tools that are standard in competition policy for this purpose.

A Canadian wireless provider would have "significant market power" if it is able profitably to set the price of its services substantially above the competitive level for a sustained period of time. When addressing this question, it is important to look not only at prices but also other dimensions of competitive rivalry. Wireless companies (like firms in many industries) attempt to obtain a competitive advantage in the marketplace by enhancing the quality and functionality of their products and services through a costly process of investment in product development and implementation. High fixed costs and complex pricing are the norm in the industry, so the competitive model is one that departs from "perfect competition" and instead involves firms selling (or expecting to sell) at prices above marginal cost in order to cover their fixed costs. To capture the dynamic aspect of the industry when evaluating the extent of competition, we look not only at prices but also at other direct indicators of investment and new product introductions in the sector.

We begin our analysis by identifying the set of services and the geographic area within which Canadian wireless providers compete, based on considering the alternatives that consumers would view as reasonably good substitutes. Given the manner in which wireless services are available and marketed to Canadian consumers, we define the relevant market for assessing the vigor of competition to be that of wireless services, including voice and data capability, in Canada.

Next we examine indicia of competitive rivalry within the defined market that are commonly used in competition assessments. One such indicator is market share. A high market share is a necessary but not sufficient condition for a finding of market power. Yet, there is no simple rule to identify when a firm's market share is in fact "high". The cost structure of the wireless industry is such that we would not expect to have very large numbers of competing firms. Thus, in Canada we have three national providers of wireless services—Bell Canada, Telus Communications, and Rogers Wireless—and a few regional providers. None of the national providers has a share that significantly exceeds the Competition Bureau's safe harbour threshold of 35%, which is used as an initial screen to determine the existence of market power in merger and other antitrust matters.

Once firms have invested in facilities to provide wireless services they have strong incentives to compete intensely to gain additional subscribers, as the cost of serving one additional customer is very low relative to the significant fixed and sunk investments required to offer service at all. We see this in the evidence that shares of new subscribers among the three national wireless providers have fluctuated considerably over time.

Competitive rivalry is further evidenced in declining average revenue per minute over time, substantial increases in the average minutes of use and high levels of customer satisfaction. The national providers have responded to the entry of mobile virtual network operators with introductions of their own lower-priced or specialty brands to target the particular customer segments. As well, providers have launched a number of plan options with large buckets of available minutes of use. Both the Canadian Radio-television and Telecommunications Commission and the Competition Bureau have characterized the wireless industry in Canada as highly competitive. Finally, there is evidence of considerable investments in network capability and new service offerings by Canadian wireless providers.

We also consider whether the three national wireless providers would have the incentive and ability to exercise significant market power by acting cooperatively. While there are few companies among which such hypothetical coordination might take place, there are considerable hurdles that would need to be overcome to make any attempt at coordination be successful. First, the continuing changes in technology that have made new services available to consumers, and the rapid growth in the number of consumers subscribing for wireless services, would give each firm a strong incentive to "cheat" on any cooperative agreement. Second, it is particularly difficult to sustain a cooperative arrangement in the face of rapid actual and potential growth in demand when this growth is coupled with technological changes that are implemented by different firms at different points in time. Third, pricing conditions are not transparent, and competition is substantially based on non-price characteristics such as service quality, making monitoring and disciplining of any hypothetical attempt at a collusive arrangement unwieldy, if not impossible. As a result, such coordination is highly unlikely.

In summary, using the well-established analytical framework embodied in Canadian competition law, we find that no single wireless firm in Canada has significant market power. As well, we find that cooperative arrangements among the existing wireless providers to exercise significant market power jointly are highly unlikely. Thus, given the issues being examined in Industry Canada's consultation process, we find no clear evidence for concerns regarding the state of competition in the Canadian wireless market.

1. INTRODUCTION

1.1. TASK AND QUALIFICATIONS

As experts in the economics of competition policy, we have been retained by Bell Canada to determine whether any single provider of wireless telecommunications services in Canada has significant market power. We understand that a finding that significant market power exists may influence Industry Canada's policy in its upcoming auction of the rights to certain frequencies for the eventual provision of advanced wireless services (AWS), including data applications. In particular, Industry Canada may determine it appropriate to implement policies that would assist entrants in obtaining access to AWS spectrum while correspondingly constraining any existing provider's access to spectrum for the provision of AWS if that provider has significant market power.[1]

We make use of the standard analytical tools used in competition policy to determine whether any current provider of wireless services in Canada has significant market power. We have studied and evaluated competitive conditions using these same methods in numerous industries, including the communications sector, on behalf of the Canadian Competition Bureau and private parties. Details on our credentials to undertake a competitive analysis of this nature are provided in the Appendix together with our curricula vitae. The analytical approach used in this report is the standard one adopted by competition authorities not only in Canada, but also in Europe, the United States, and Asia-Pacific countries. Fundamentally, it involves a process of specifying precisely the market that is to be analyzed, discussing pertinent features of that market, and evaluating indicators of the degree of competition in the market. When we carry this procedure out in this case, using standard tools of economic analysis, we find that no single wireless provider in Canada today has significant market power, and that providers would not have the ability to jointly exercise significant market power in a coordinated fashion.

1.2. MARKET POWER

A firm will possess market power when it has the ability to profitably sell its services (or products) at a price above the competitive level.[2] The extent to which a firm has market

[1] Policies that might be implemented to assist entrants include setting aside frequencies so that only new entrants can bid on these, using spectrum aggregation limits to prevent any entity from holding more than a certain amount of spectrum, and mandating roaming to require major carriers to offer roaming to new entrants. See Industry Canada, *Consultation on a Framework to Auction Spectrum in the 2 GHz Range including Advanced Wireless Services*, February 2007, pp. 21-25.

[2] Michael Trebilcock, Ralph A. Winter, Paul Collins, and Edward M. Iacobucci, *The Law and Economics of Canadian Competition Policy*, University of Toronto Press, 2002, p. 78.

power can be directly measured if the own-price demand elasticity facing that firm is known. The own-price demand elasticity facing the firm measures the responsiveness of the firm's customers' purchases to increases in the firm's own price. If customers can easily switch to other products or services in the face of a small increase in price, and if other firms are able to supply these customers readily, the firm will face "elastic" demand. Where a firm's own-price demand elasticity is high—customers have many alternatives available to them, either from competing firms supplying the same service or from firms offering alternative services that customers consider nearly as attractive—market power will necessarily be small and the firm under question will be unable to profitably charge a price above the competitive level. Economists sometimes speak of "perfectly competitive" markets, in which the resulting price is equal to the marginal cost of producing the last unit of output.[3]

A firm will have "significant market power" if it is able to set the price of its products or services substantially above the competitive level for a sustained period of time. The focus on significant market power is important because the ability to set prices above the marginal cost of providing them is present to some degree in most competitive markets. That is, most markets are not "perfectly competitive" in the sense used by economists. The basic assumptions of the perfectly competitive model include homogeneous products, infinitesimally small firms, perfect information, and small fixed costs per firm. Because these assumptions do not apply in the majority of real markets, we do not consider the fact that prices may be above marginal cost to be evidence of significant market power.

In many industries, firms have large fixed costs which are incurred to provide products and services to consumers. If prices in these industries were constrained to equal marginal cost—as they would be in a world of perfect competition—no firm would be able to remain in business, and no new firms would ever choose to provide the subject products and services. Sources of high fixed costs are numerous, and include deployment and maintenance of costly infrastructure in network industries, as well as the costs of developing and implementing new products and services discussed further below. Prices may also exceed marginal cost because consumers regard products as differentiated, and the existence of preferences for specific attributes tends to reduce the intensity of price competition. In such circumstances, when some customers have strong preferences for specific product (or service) attributes, this will allow the firms providing those products to price above marginal cost. As a result, there are numerous reasons why it is inappropriate to expect prices to equal marginal cost in many industries.

[3] An index of market power that is often used measures the amount by which a firm is able to set price above marginal cost. This mark-up is inversely related to the firm's own-price elasticity of demand, and therefore the higher the firm own-price elasticity of demand the lower the mark-up the firm can charge over its marginal cost.

1.3. INSTRUMENTS OF COMPETITION

Although price is the traditional focus of competition analysis, it is not the only dimension along which firms compete. For example, firms in many industries attempt to obtain a competitive advantage relative to their rivals by enhancing the quality and functionality of their products and services, typically through a costly process of investment in product research and development. Consider for example a wireless handset, which may have sold for a nominal retail price of $200 in both 2000 and 2007, but as the more recent model embodies vastly greater power and functionality the price cannot accurately be regarded as unchanging. To take account of these changes, it is important, particularly in telecommunications industries, to focus on "quality-adjusted" prices that seek to compare products of similar quality. A static competition analysis focusing on nominal prices would tend to overlook the critical dynamic nature of investment-based competition that has unfolded over time, and that has resulted in tremendous gains for consumers.

Because we often lack the detailed information needed to quality-adjust prices in a rigorous and systematic way, it is common practice to consider the extent to which technological progress and quality changes have occurred by looking at direct indicators of investment activity and the extent to which new product introductions are an important determinant of competitive rivalry among firms.[4] Doing so in connection with an examination of competition in the pricing dimension allows us to give due consideration to the range of determinants of market success. For example, if we observe that firms are competing on price while also undertaking investments in product enhancements, we can reasonably conclude that quality-adjusted prices are falling and, correspondingly, consumers are reaping substantial benefits.

A corollary of the above discussion is that in an industry in which technological progress is rapid, it would be incorrect to infer that a firm has significant market power simply because it appears to be earning large "profits" at a point in time. When considering competition through innovation, it is important not to confuse the improvement in earnings by the innovating firm with the profits associated with significant market power. Instead, the firm is earning a return on its investments, which economists refer to as a "quasi-rent".[5] The existence of quasi-rents is not analogous to market power, yet the two are often confused, particularly if analysts look to firm profits at a single point in time as a means of measuring the extent of market power. Professor Franklin Fisher has summarized the issue in the following way:

> Looking at the industry during the period just after the innovation is made, one sees the world beating a path to the door of the mousetrap

[4] Economists have estimated what are referred to as "hedonic" pricing models in an effort to measure the effect of individual product characteristics on value. These empirical models allow for the measurement of quality-adjusted prices and changes in these prices over time. Considerable data is needed in order to accurately estimate these prices, however, and this data will not be available in all cases.

[5] See Trebilcock et al. (2002), pp. 54-57, for a discussion of rents, including quasi-rents.

> inventor. One sees the mousetrap inventor making profits. One sees the mousetrap inventor alone in the field. One ought not, however, to conclude therefore that he has a monopoly of mousetraps. Indeed, what really matters, in some sense, is whether he has a monopoly of technical progress in the industry. Similarly, when prices come down after the imitators enter, it would be wrong to conclude that the monopolist is engaging in "predatory pricing" in order to maintain his market share. Rather, what one would be seeing would be competition seriously at work.[6]

The implication of this from a practical perspective is that in an innovative industry we should not attempt to infer significant market power on the basis of "high" prices or profits at a given point in time.

1.4. REPORT SUMMARY

With these qualifications to the characterization of "significant market power" in mind, in the remainder of this report we evaluate whether any current wireless provider has significant market power. As noted above, if we could measure the own-price elasticity of demand facing each wireless provider, it would help us directly determine the extent to which that provider has any market power, significant or otherwise. As it is often not possible to directly measure the own-price elasticity of demand, we typically seek the answer to this query through an alternative set of analytical steps.

The first step is to determine the relevant market in both the product and geographic dimensions within which the firm competes. We consider that the relevant product market for use in our analysis is comprised of mass market wireless services, including voice and data functionality, provided over a handheld device. The relevant geographic market is all of Canada, although our analysis would be largely unchanged if a narrower geographic market is used. This analysis is described in Section 2.

Section 3 offers more detail on the three national providers of wireless services, as well as other market participants, to set the stage for the rest of the report. In Section 4 we consider market share, which is the standard indicator of current (and past) competitive success. We find that the three major national providers of wireless service, Bell Canada (Bell), Telus Communications (Telus), and Rogers Wireless (Rogers), have largely symmetric market share holdings. Further, market shares as measured on a subscriber addition basis have not been stable over time, but instead have changed frequently. These findings suggest customers have readily switched providers and that each provider faces competitive discipline from the other major firms.

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[6] Franklin M. Fisher, "Diagnosing Monopoly," *Quarterly Review of Economics and Business*, Vol. 19, 1979, 7-33, p. 12.

In Section 5 we discuss specific aspects of the market structure of the wireless industry that factor into our subsequent analysis. In particular, high fixed costs and complex pricing are the norm in the industry, so the competitive model is one that departs from perfect competition and instead involves firms selling (or expecting to sell) at prices above marginal cost in order to cover their fixed costs. Accordingly, we look for direct indicators of competition that would be consistent with this type of competitive market structure.

Price and non-price competition are considered in Sections 6 and 7, respectively. We find ample evidence of both forms of competition, arguing against the existence of significant market power: price trends are such that substantial gains have been transferred to consumers over time, while firms have also engaged in a great deal of investment in order to enhance their services to make them more attractive in relation to those offered by other providers.

In Section 8 we discuss whether the existing wireless providers might be able to coordinate their actions in a manner that would allow them to jointly exercise significant market power. We believe market conditions are such that this outcome is not likely. This is apart from the fact that if undertaken explicitly such conduct would be illegal, and that there are regulatory safeguards already in place to prevent such activity. Finally, Section 9 concludes.

2. MARKET DEFINITION

2.1. FOCUS OF INQUIRY

Any inquiry into market power must begin with a definition of the markets at issue. Only after defining markets can the existence or extent of market power be evaluated, since without defining the market accurately it is impossible to know whether a firm operating in that market will be able to exercise market power or whether competition by other products or firms will prevent an exercise of market power.

Market definition is implemented by examining both product and geographic dimensions. Competition authorities typically define relevant product markets to include the set of products and services that are considered to be sufficiently close substitutes to each other from the buyer's perspective, such that if the price of the product or service was raised, buyers would turn to substitute products in large enough numbers to make any exercise of market power unprofitable. Relevant geographic markets enclose the locations from which suppliers of the identified products can serve customers such that buyers view these as close substitutes to each other. Analogous to the conceptual exercise undertaken when delineating relevant product markets, we ask what would happen if the price of the relevant product at a particular location were raised. If buyers would turn to more distant suppliers for the relevant product in large enough numbers to make any exercise of market power unprofitable, these more distant suppliers are included in the relevant geographic market.

Market definition should be driven by the question of interest. Here, that question is whether any provider of wireless services in Canada has the ability to exercise significant market power, acting either unilaterally or coordinating with rivals. We will then consider wireless service (including data capability) as a possible product market, and all of Canada as a potential relevant geographic market.

Delineating markets can be complicated when products are differentiated and have a variety of attributes that different consumers may value in different ways. As a result, it may not be possible (or helpful) to distinguish between those products that are "in" and those that are "out" of the relevant market, particularly if products outside the relevant market are thought of as not competing with those that are within the market. In such circumstances, it is more helpful to treat market delineation as a question of degree, so that within the market as properly defined, products compete relatively intensely against each other. Products outside the defined market may offer some competitive constraint as well, but not enough to prevent an increase in price if all the producers of the products within the market were to act collectively (hypothetically) to raise price.[7] The difficulty of defining the market in the case of differentiated products is one of the reasons why competition law in some jurisdictions calls

[7] This is known as the "hypothetical monopolist test" in the economics of competition policy.

for the adoption of market boundaries that are consistent with "commercial common sense" in addition to those that can easily be demonstrated with the quantitative tools of economists.[8]

2.2. PRODUCT MARKET DEFINITION

The potential product market that is proposed is wireless service, including voice and data capability. This is a sensible candidate market to begin with as it would be a market in which the winners of the spectrum auctions for AWS frequencies would operate, and in light of the fact that such frequencies are well suited to data uses such as wireless broadband Internet or streaming audio and video.

Voice and data services are often bundled by providers and demanded by consumers of wireless services. Wireless technology has converged in such a way that wireless infrastructure (including base stations and switching capabilities) are constructed to be able to handle data as well as voice traffic, and modern handsets have voice as well as at least some data functionality.[9] With the continuing rollout of third generation (3G) technology as a result of investments in network infrastructure, consumers are obtaining ever-increasing access to wireless data functionality. From a technological perspective, these services are typically provided jointly. Voice and data services also provide complementary benefits from the perspective of the consumer. Recent studies have found that a significant proportion of wireless phone customers use their phones for data purposes, including text messaging, downloading, video calling, and like services.[10]

Today, most basic wireless subscription plans provide voice access by default, with data access available in addition. And while there is no meaningful sense in which the availability of wireless data services by competitive sellers could discipline the pricing of wireless voice offered by a hypothetical sole seller, because data services are ubiquitously available as an add-on, it is appropriate to consider the joint voice-data bundle as a single product for convenience. To put it slightly differently, since voice and data services are invariably sold together, the price of each component would affect consumers' choice of whether to

[8] For example, Section 3(1A) of the New Zealand Commerce Act defines a market as "a market in New Zealand for goods or services as well as for other goods or services that, as a matter of fact and commercial common sense, are substitutable for them."

[9] Not all handsets provide all data capabilities, but consumers are able to select a handset that provides the capabilities they expect to use during the course of a service contract.

[10] Decima Research, "Usage of Wireless Communications in Canada", April 2006, Prepared for the Canadian Wireless Telecommunications Association.

purchase a subscription to the combination product; therefore, the market is effectively for the combination product.[11]

Although there are other services that provide similar functionality, such as fixed (wireline) voice and Internet access, these are not sufficiently close substitutes to be included in a definition of the relevant market from the perspective of a wireless phone user. An important and perhaps critical feature for consumers of wireless services is mobility. Consumers that value mobility are willing to pay more for a device and a subscription that enables them to communicate from different locations than for a stationary service that is otherwise similar. This is demonstrably true in Canada, where prices for wireline service have historically been low compared to wireless services. Thus, although there are certain customers or situations for which low-priced wireline access could be seen as substitutable, for the most part wireline would not offer a significant constraint on the pricing of wireless services.

Competition regulators have reached the same conclusion after considering this issue: the Competition Bureau considered whether wireline telephony was an effective substitute for wireless service when it examined the potential competitive effects of the acquisition of Microcell Telecommunications Inc. by Rogers Wireless Inc., and rejected the inclusion of wireline service in the relevant market.[12] We note, however, that this discussion does not imply the converse, i.e., that wireless service is not considered a substitute by users of wireline telephone services. Examining whether wireless would be included in a wireline product market would entail a separate analysis that is not required for current purposes.

The relevant product market can therefore be defined as mass market wireless service, including data capability.

2.3. GEOGRAPHIC MARKET DEFINITION

Turning to the geographic market, we ask whether a sole provider serving only a region of the country would be able to impose a price increase in that location only or whether the availability of supply from outside of the region would discipline the provider's pricing. One possibility is to start by considering markets at the provincial level. This is the geographic market arrived at by the Competition Bureau in a previous analysis of this issue. As the Bureau indicated in its review of the 2004 Rogers-Microcell merger, pricing tends to differ by

[11] See Fisher (1979), p. 14, who writes (in connection with ski boots and bindings as an example): "To the extent that certain boots are associated with certain bindings …, the real competition takes place between binding-boot combinations. It would be wrong to consider the market for boots alone, even if boots are sold without bindings, if there is a substantial business in binding-boot combinations and the price of the boot affects the choice of the combination."

[12] Competition Bureau, *Technical Backgrounder – Acquisition of Microcell Telecommunications Inc. by Rogers Wireless Communications Inc.*, April 12, 2005, available at http://www.competitionbureau.gc.ca/internet/index.cfm?itemID=257&lg=e (viewed May 21, 2007).

province or locality, and the identity of available providers may also differ by location.[13] The Bureau also observed that "there is no persuasive explanation that explains why a provincial hypothetical monopolist could not raise price profitably."[14] The Bureau reasoned in reviewing that transaction that these factors tended to support markets defined at the provincial level.

As we discuss in the next section, there are three providers with national networks, Bell, Rogers, and Telus, as well as several regional providers, some of which are quite large. In addition, several mobile virtual network operators (MVNOs) offer wireless plans that involve resale of access under a network owner's infrastructure. Thus, in most parts of the country a customer will normally have access to subscriptions offered by one or more of the national providers, as well as any regional provider and MVNO that may exist; notable exceptions to this general rule are Saskatchewan and Manitoba, where Bell does not have a facilities-based presence. If the customer chooses to purchase wireless service from a national provider, he or she will be able to make calls anywhere in Canada that the provider has a network without incurring roaming charges.[15] The availability of service from a national provider would then tend to discipline the pricing of any regional providers, and would support the proposed national market definition. For example, a customer located in Vancouver could purchase wireless service as though he or she lived in Toronto. That customer would be assigned a Toronto number, and might be exposed to long distance charges for certain calls but depending on the customer's calling needs and the structure of the long distance plans available from the Toronto provider, it might pay to do this.[16]

There are additional reasons why a national geographic market is appropriate. Competitive conditions in most provinces are very similar, with the three national carriers having some sort of presence along with regional providers and MVNOs. Even if a particular national carrier does not have a large current presence in a province (as is the case for Bell in parts of Western Canada), the carrier has the capability to expand its customer base given the infrastructure that is in place and it would undoubtedly do so if prices exceeded competitive levels in a given province on a sustained basis. There is, therefore, a case to be made for aggregating provincial markets for convenience, which is helpful also because much of the data we use in our analysis is presented at the national level.[17] The Bureau likewise

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[13] Competition Bureau (2005).

[14] Competition Bureau (2005).

[15] We understand that Bell and Telus currently have a mutual roaming arrangement that allows the customers of each to roam on the other's network where necessary without incurring any additional charges (see http://www.bce.ca/en/news/releases/bc/2001/10/17/6459.html, viewed May 22, 2007).

[16] We accept that depending on the structure of long-distance charges it may be the case in some instances that national providers would be unable to discipline the pricing of a purely regional hypothetical monopolist.

[17] See Gregory J. Werden, "Assigning Market Shares," *Antitrust Law Journal*, Vol. 70, 2002, pp. 67-104.

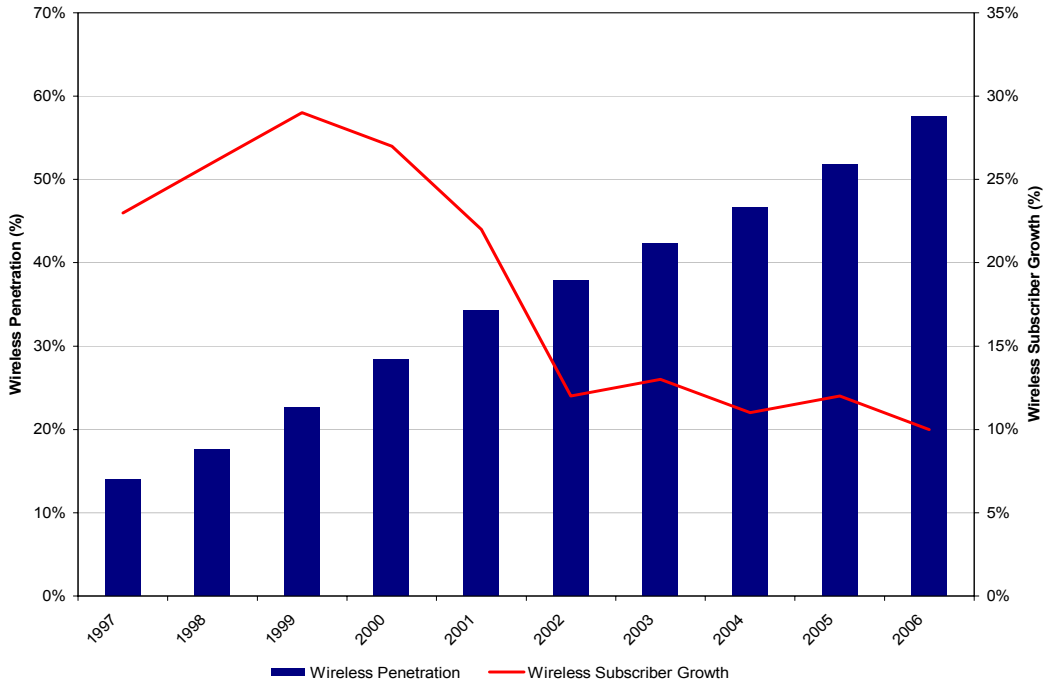
observed that the distinction between provincial and national markets is of little practical importance in evaluating the competitive circumstances in the industry.[18] It is true that by proceeding on a national basis we may overstate the current competitive significance of the national providers in certain provinces where they have a limited presence (such as Saskatchewan and Manitoba) and understate it in other provinces, but we believe this compromise is acceptable as our concern is ultimately with the overall presence or absence of significant market power on the part of the large carriers. In the following discussion, we therefore adopt a Canada-wide geographic market.

[18] Competition Bureau (2005).

3. PARTICIPANTS IN THE RELEVANT MARKET

A variety of national and regional licensed wireless carriers provide wireless voice and data services to Canadian consumers, along with numerous resale partners. The digital networks of these providers reach 97% of the Canadian population, with coverage reaching nearly 100% in urban areas.[19] According to Wall Communications, by the end of 2005 approximately 90% of Canadians could select wireless service from among three service providers.[20] At the end of 2006, Canadian wireless phone subscribers numbered 18.6 million, representing a national wireless penetration rate of approximately 58%.[21] Subscriber growth and the penetration rate have increased rapidly since the introduction of digital wireless services in the late 1990s, as shown in Figure 1 below.

Figure 1: *Wireless Penetration and Subscriber Growth in Canada, 1997-2006*



Source: Wall Communications (2006), Merrill Lynch (2007).

[19] Wall Communications Inc., A Study on the Wireless Environment in Canada, September 29, 2006, Prepared for the Canadian Wireless Telecommunications Association, p. 17.

[20] Wall Communications (2006), p. 36.

[21] Merrill Lynch, "Global Wireless Matrix 4Q06, Shaky Markets, Solid Fundamentals," March 28, 2007.

There are three major national providers of wireless services: Bell, Rogers, and Telus. Each of these is a division of a larger company that is diversified into other telecommunications and broadcasting activities. Bell and Telus are affiliated with the incumbent providers of wireline services in Eastern and Western Canada, respectively, while Rogers is an affiliate of a cable television provider. According to each of their annual reports, Rogers' network serves 94% of Canadians;[22] Telus' network covers 92% of the Canadian population;[23] and Bell's network serves 95% of the population in Ontario and Quebec and approximately 90% of the population in Atlantic Canada and the major cities in the provinces of Alberta and British Columbia.[24] Bell's network coverage does not extend to Saskatchewan and Manitoba. These provinces have wireless networks provided by their own incumbent wireline service providers (SaskTel and MTS Allstream). SaskTel and MTS Allstream have roaming arrangements with the national providers, so that (for example) a SaskTel customer would be able to use his or her phone in Ontario over the Bell network.

The national providers do not all use the same wireless technology to deliver services to consumers. Bell and Telus (as well as SaskTel and MTS Allstream) use a technological standard based on code division multiple access (CDMA) called CDMA2000, while Rogers uses the GSM standard (including GPRS, EDGE, and HSDPA). CDMA technology is used in North America and parts of Asia, while GSM is the main standard that is used in Europe. These technologies are not compatible with each other, so a Bell subscriber cannot generally use his or her phone when traveling in Europe. Similarly, a Rogers subscriber cannot switch to Bell or Telus with the same device.

MVNOs include companies such as Virgin Mobile, Vidéotron, President's Choice, and 7-Eleven. No standard industry definition for an MVNO exists, but there are a couple of key characteristics shared by all MVNO players.[25] The first is that the MVNO does not directly own spectrum, but instead enters into an agreement with a licensed wireless carrier (also known as the Host Network Operator) to use its facilities. MVNOs are consequently limited in their offerings and fee structure by the underlying network and the need to obtain access to that network. Second, the MVNO operates under a brand name through which it sustains client relationships and therefore it is not a pure reseller. The MVNO business model is a low-cost means of entering markets with developed wireless infrastructure as it allows the MVNO to enter without having to incur the expenses associated with entry as a facilities-based provider. Apart from marketing and promotional expenses, the costs incurred by the MVNO are restricted to those needed to maintain daily operations.

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[22] Rogers Communications Inc., *2006 Annual Report*.

[23] Telus, *2006 Annual Report*.

[24] Bell Canada Enterprises, *2006 Annual Report*.

[25] See "MVNOs (Mobile Virtual Network Operators): Everybody's Business," White Paper Series – Volume 1, Next Gen Networking Services & Infrastructure, ThinkEquity Partners LLC, September 21, 2005, pp. 5-6.

4. MARKET SHARES

The standard metric that is typically used to summarize firms' competitive position in analyses of market power is market share. There is no simple rule that identifies the market share at which a firm has market power, let alone significant market power. That being the case, there can be shares below which market power is highly unlikely. For example, the Competition Bureau uses a share of 35% as a "safe harbour" in merger transactions, noting: "the Commissioner generally will not challenge a merger on the basis of a concern related to unilateral exercise of market power when the post-merger market share of the merged entity would be less than 35 percent."[26]

Ultimately, while market power requires a high market share, a high market share alone need not indicate market power. A wide range of market characteristics must be considered as part of any assessment of the likely competitive response to any attempt by a single firm to substantially raise price. Even a market with only two symmetrically positioned sellers can be highly competitive if certain market conditions are met. Similarly, if barriers to entry are absent then any attempt by a firm to raise its price above the competitive level will be unsuccessful even if that firm has a very substantial market share.

Market share evidence may, however, help us to assess the capacity of competitors to discipline any attempt to exercise market power. In calculating market shares there are often a number of options that can be used to compare firms, including output, sales revenue, production capacity, or control over critical assets or reserves (as in cases involving natural resources) of existing firms; any or all of these may be relevant depending on the situation. In cases where rivals can quickly and easily expand production in response to a small increase in price, market shares based on current sales may not be a useful indicator of the power any particular firm has within the market on a long-run or sustainable basis. In such cases, it is better to measure market share based on either control over productive assets or capacity if there is a well-established capacity common denominator across firms.[27] However, shares based on current sales may still be informative. Current sales shares help us understand competitive trends in the market and comparing these shares over time we obtain a sense of the nature of competitive rivalry. If a single firm consistently has a high share of current sales, this fact may suggest a more mature market in which firms may not be engaged in aggressive competition to win over each other's customers.[28] If we see current

[26] Merger Enforcement Guidelines, September 2004, ¶ 4.12.

[27] Werden (2002).

[28] The observation that a single firm consistently holds a high share does not always suggest a mature market and less aggressive competition, however. Instead, it may simply indicate superior performance on the part of the firm with the high share in meeting the demands of customers. Active and aggressive competition may still exist within such a market, with one firm succeeding more frequently than its rivals.

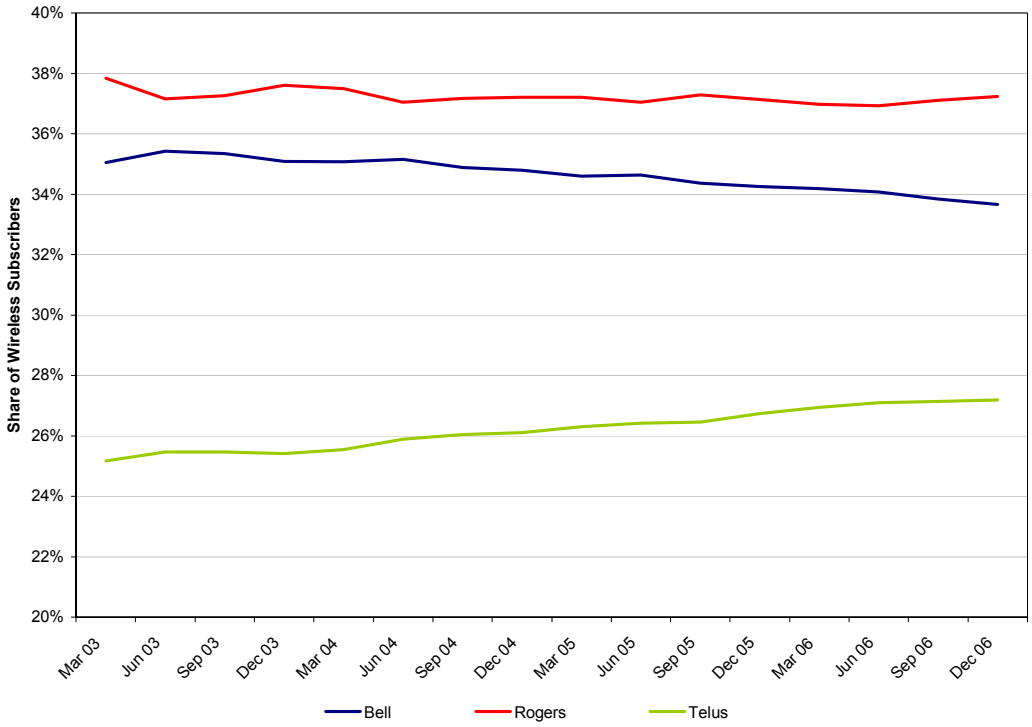
sales shares fluctuating from period to period, this is indicative of active competition among producers.

As we discuss in further detail below, the wireless industry is an example of a case where "output" (in the sense of subscribers) can be added quickly provided the network infrastructure is in place to serve such customers. Thus, in areas where all providers can serve new customers using their own facilities, each carrier will be equally interested in winning the customer's business and it may be appropriate to assign symmetric shares based on the capacity to serve that incremental customer of 1/n each, where "n" is the number of firms with network infrastructure in place. With respect to Canada's three national providers, we expect that this symmetric situation holds for the vast majority of the Canadian population.[29]

Another measure of capacity that can be used in order to construct average shares on a national basis is the existing subscriber base. Capacity in the wireless industry is scalable over the medium term, and providers make investments in network capacity depending on their actual and expected subscriber base. Service providers with a large subscriber base tend to have a correspondingly large capacity (but not a great deal in excess of what would be required during peak periods of usage). Figure 2 presents shares based on existing subscribers in Canada over the March 2003 to December 2006 period.

[29] Wall Communications (2006, p. 36) notes that as of the end of 2005 "close to 90% of the population had three digital providers" to choose from.

Figure 2: ***Share of Existing Wireless Subscribers, March 2003-December 2006***



Source: Merrill Lynch (2007)

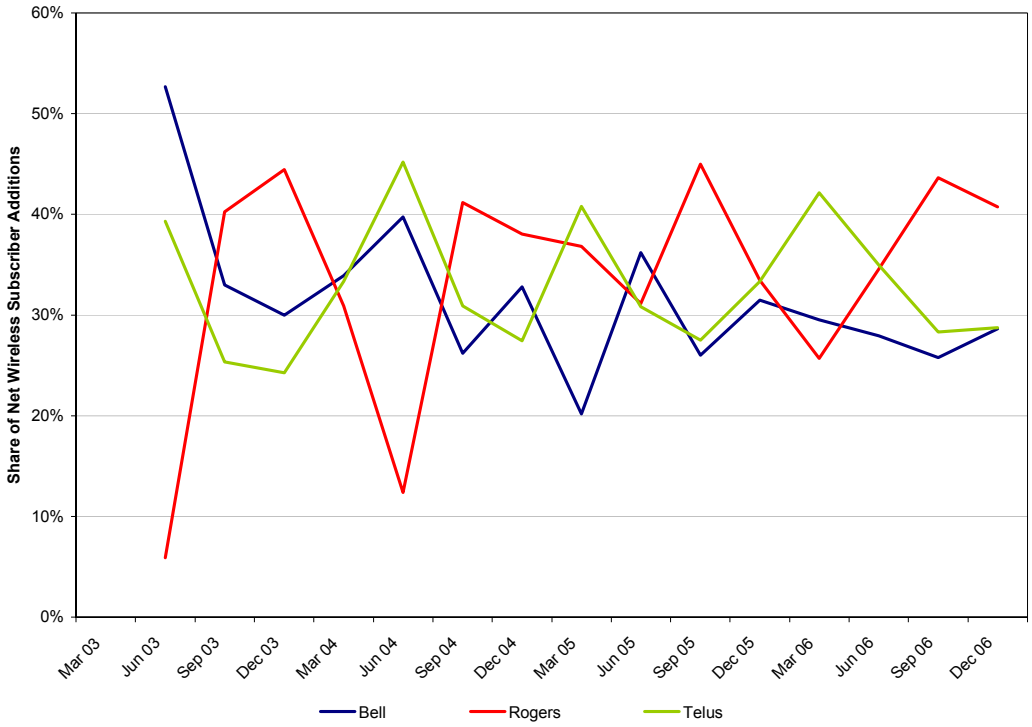
Figure 2 shows a relatively stable pattern of national market shares for the three national providers, all of which are similar in share from a national perspective. Rogers has been in the lead during the entire time period and had a share of 37% at the end of 2006. In second place was Bell, with a Canadian share of 34%, while Telus had a share of 27%. These shares have fluctuated little since 2004.

The individual national wireless providers' shares in Canada are not high by international standards; there are many examples of countries in which there are three or fewer providers of substantial size.[30]

In contrast to the relative stability of shares of total subscribers, Figure 3 reports the share of new subscribers over the same time period. This has been extremely volatile.

[30] See e.g., Merrill Lynch (2007).

Figure 3: ***Share of New Wireless Subscribers, March 2003-December 2006***



Source: Merrill Lynch (2007)

Looking at 2006, Rogers has gone from a new subscriber share of 26% in the first quarter to a share of 41% at the end of the year, while Telus has gone in the other direction. More recent data shows that Bell has also faced challenges attracting new subscribers. In the first quarter of 2007, Bell's net subscriber additions were essentially negative, as it lost subscribers to other providers.[31]

Summarizing the market share evidence from both an existing and new subscriber perspective, only Rogers has a share that is greater than one-third of the market. As market share alone is insufficient to determine the existence of market power, in the following sections, we explore in more detail the structure of the market and further indicators that can be used to refine the assessment of market power.

[31] "BCE Inc.: A Challenging Start to 2007," UBS Investment Research, May 3, 2007, p. 3.

5. MARKET STRUCTURE

The Canadian market for wireless service has many of the typical characteristics of markets in information and computing industries. These characteristics have an impact on the structure of the market and are essential to consider in any analysis of market power. We consider first the cost structure of the industry, especially as this has a bearing on barriers to entry and competitive behaviour among incumbent providers. We then turn to a discussion of specific aspects of competition in the wireless market in both the "static" dimension (where we discuss price discrimination and switching costs) as well as the "dynamic" dimension (involving ongoing investment and new service introduction among providers). We find that the Canadian market for wireless service is one in which substantial fixed and sunk costs are required for operation, and therefore competitive prices must (on average) exceed marginal cost. Common to such markets, pricing tends to be complex and customer-specific and providers are continually making investments in order to offer new services in competition with the other providers.

5.1. COST STRUCTURE AND BARRIERS TO ENTRY

Barriers to entry and expansion are often defined as costs that must be incurred by an entrant that will place it at a competitive disadvantage against an incumbent provider. Where entrants and incumbents must make similar investments in fixed and sunk assets, this may affect the cost of entry and expansion, but these costs are not true barriers to entry.[32] Furthermore, the only barriers to entry that are of interest in competition analysis are those that prevent socially desirable entry. If an entrant would have to incur a large cost to enter a market but the social benefit of that entry (for example through reduced prices in the market) does not outweigh the cost of entry, then the so-called barrier to entry is only of interest to the thwarted competitor but not for the process of competition itself. Similarly, if entry would result in incumbents failing to earn an adequate return on their investments in equipment or innovation, the lack of entry is of no concern from a competition perspective.

Where there are significant fixed and sunk investments required to offer service, such as in the deployment of network assets for telecommunications and other network markets, the cost of serving one additional customer—the marginal cost—is typically very low. In such cases, output can be easily expanded given the existence of the underlying network infrastructure. As a result, the mere fact that significant fixed and sunk costs exist does not translate into market power for any given incumbent if rival firms have already made investments required to offer service or can interconnect to another provider's facilities.

[32] Costs are sunk if they cannot be recovered in the face of unsuccessful (i.e. unprofitable) entry. Not all fixed costs are sunk. Fixed costs are costs that do not vary with output. An example of a fixed but not sunk cost is a warehouse. Should entry prove to be unprofitable and the firm is forced to exit the warehouse may be leased for alternative purposes and hence it does not represent a sunk investment.

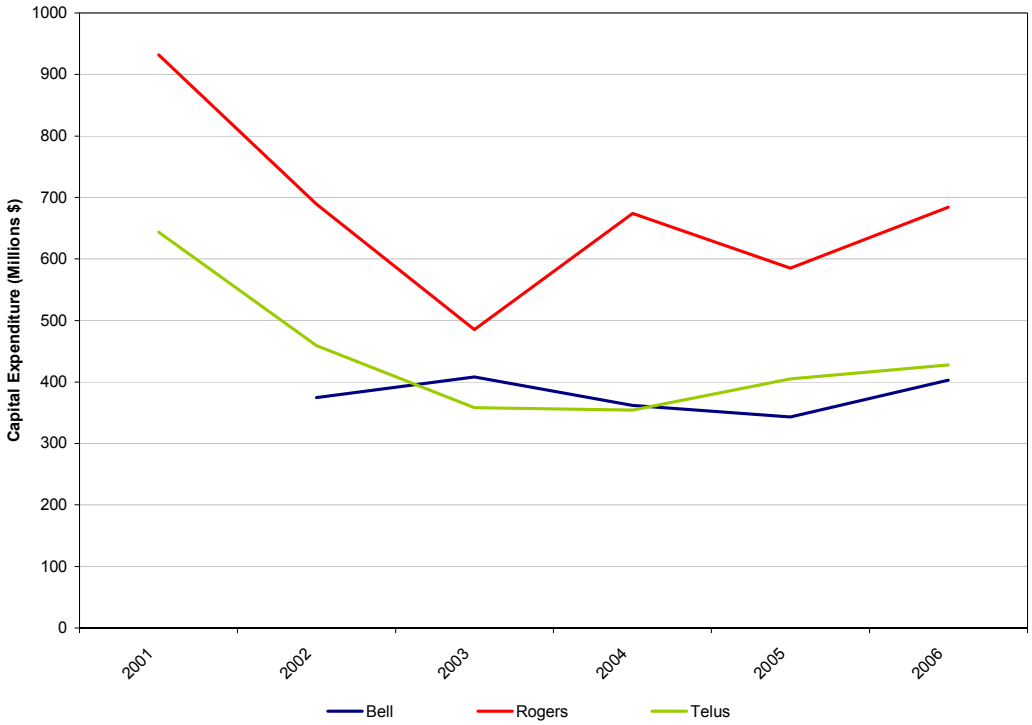
As in many telecommunications markets, the fixed and sunk costs necessary to enter as a facilities-based provider of wireless services are high. A provider must obtain access to wireless spectrum in order to offer services, which involves bidding in auctions such as the auction for AWS currently under consideration, and then negotiating the terms of the licence to the spectrum. Once a spectrum licence is secured, a facilities-based provider would face numerous other costs, which can usefully be divided into two categories: necessary network-related capital expenditures and costs of non-network assets.[33] Network-related expenses include expenditures on core network infrastructure (including radio towers, base stations, and mobile switching systems) as well as interconnection fees with other providers. Non-network costs include costs of implementing billing systems, operational systems and support structures, software, and real estate. These expenditures are necessary to build a national footprint, and their sum can easily amount to several billion dollars per carrier.[34] After these initial outlays, there are further expenses associated with the day-to-day operation of the company. These include general and administrative expenses (credit checks, collections and executive staff), sales and marketing costs (advertising, promotions and acquisition costs) and technical support (customer care and staff).

Investments in infrastructure are not a one-time event. Service providers are continually upgrading their networks to add new functionality that is compatible with the technological standard that is in place. This is a further source of fixed cost (although it is not a barrier to entry as incumbents and entrants would all face these ongoing infrastructure upgrade costs). Recently, carriers have made very large expenditures in order to enhance the data capacity of their digital networks as well as to extend their networks to areas that had previously not received coverage. While we describe the nature of these investments and the results from the perspective of consumers in greater detail below, their aggregate annual dollar value is presented for each national provider in Figure 4.

[33] ThinkEquity Partners (2005), p. 22.

[34] ThinkEquity Partners (2005), p. 22.

Figure 4: ***Capital Expenditures by National Wireless Providers, 2001-2006***



Source: Merrill Lynch (2007)

While fixed and sunk costs of initial network deployment are important to note because of their effects on entry, it is also significant to consider the effects of the industry cost structure on market conduct for those facilities-based carriers that have already made these initial investments. Firms choose to participate in a market with high fixed costs only if they expect to be able to earn an adequate return above variable costs on each sale—otherwise, firms will exit the market. Accordingly, prices must exceed variable costs by an amount sufficient to make ongoing operations worthwhile. These prices will not attract additional facilities-based entry when a potential entrant considers that in light of the nature of post-entry competition it is not likely to be able to recoup its initial sunk investment. By international standards, the Canadian market for wireless services is relatively small and subscribers relatively spread out.[35] With a relatively small market, the number of providers that arise in an economic equilibrium in Canada may differ from the number of providers arising in other countries.

[35] The Wall Communications study points out that there is a greater concentration of urban areas in the U.S. and population density in U.S. cities tends to be higher than Canadian cities. Wall Communications (2006), p. 15.

5.2. COMPETITION AT A POINT IN TIME

There are important characteristics of the wireless market that have an effect on how we understand competition at a point in time, and that differ from the characteristics of markets for simpler products. These include complex differential systems of service pricing, and sales under contracts. Such pricing structures frequently arise when firms compete in markets characterized by substantial fixed costs of operation.

5.2.1. Complex Pricing

A number of different components collectively impact the price that each consumer pays for wireless service, and in general it is difficult to arrive at an accurate summary of the prices faced by consumers. Factors affecting the complexity of pricing include the bundling and customization of plans and options, switching and recruiting incentives, and the wide variety of promotional offers that are available at different times. These pricing strategies can generally be regarded as examples of differential retail pricing or "price discrimination". Price discrimination practices are commonly used by firms competing in industries characterized by high recurring fixed costs of operation, of which telecommunications is a classic example.[36]

Two major types of price discrimination through bundling exist in the wireless market: (a) bundling across telecommunications services, including wireless services; and (b) bundling of various wireless services to form a wireless service package. Both types of bundling are prevalent in the wireless market, especially among the national players.

Bundling across telecommunications services exists when a company provides a variety of services such as television, Internet access, wireless and landline at a single price, if purchased together. According to a recent IDC Canada consumer survey, 62% of Canadian consumers tend to prefer bundles when purchasing telecommunications services.[37] In Canada, bundles are offered by major carriers such as Bell and Rogers along with some MVNOs such as Primus Canada. The discount offered for purchasing in a bundle varies with the number of products selected and, depending on the provider, may be expressed as a percentage discount or a fixed dollar amount off the total cost of the separately purchased components. Bundling enables providers to reduce customer switching, attract new subscribers, and reduce operating expenses.[38] The bundling of numerous products complicates the wireless pricing structure by making pricing dependant on the number of products chosen by an individual subscriber. It is then difficult to determine the wireless price

[36] See William J. Baumol and Daniel G. Swanson, "The New Economy and Ubiquitous *Competitive* Price Discrimination: Identifying Defensible Criteria of Market Power," *Antitrust Law Journal*, Vol. 70, 2003.

[37] See http://www.comparecellular.com/newsstory_details.asp?id=2019&l (viewed May 22, 2007).

[38] http://www.wirtel.co.uk/article_eu_2005q2_002_convergys.htm (viewed May 22, 2007).

component of the bundle, as the proportion of the bundling discount to be allocated to each specific service may be unknown.

Wireless service plans are themselves typically bundles of services offered for a single aggregated price. Many providers offer basic add-ons such as voice mail, call display, call waiting, conference calling, call forwarding and other features at either a specified cost per option or as a bundled package price. MVNOs tend to offer these options as part of their basic package while the national providers tend to offer these services as a bundle purchased in addition to their basic plans. As preferences differ across wireless subscribers, providers are also offering more complex add-ons such as inter-carrier calling, unlimited evenings and weekends starting at varying times with different associated prices, free incoming calls, various family, couple and business specific plans, as well as plans exclusively catering towards specific handsets such as Blackberrys and PDAs.

The recent rollout of 3G technology in Canada adds yet another layer of complexity to the wireless pricing structure. 3G options such as wireless TV, MP3, graphic downloads, video conferencing, Internet access, and chat options are provided to customers with various cost structures. Companies provide these services in the form of specific bundles on a fixed price per month basis as well as a pay-per-item basis. For example, Rogers and Telus both currently have a $20 plan allowing customers to download an unlimited number of songs per month; however they also provide the option of downloading a single song for a cost of $2.99 and $2.00 per song, respectively.

The following table provides some further examples of bundled wireless service plans.

Table 1: *Examples of Service Bundles*

Company	Offer Type	Details	Price
Telus	Plan	Flexible Share Plan (combo of Share 20 Plan + Share 15 plan), 150 minutes, unlimited nights and weekends, sharing of unused minutes, unlimited calls between share plan members, call waiting, call forwarding and conference calling	$35/month
Telus	Add-on	Caller ID, Voice Mail 10, Unlimited text, picture or video messages, Unlimited browsing at over 100 selected sites, Unlimited email via Web browser, Unlimited My Email sent and received messages and Unlimited Instant Messenger	$15/month
Rogers	Add-on	Communicate Value Packs (includes various combinations of Voicemail, Enhanced Voicemail, Name Display, WhoCalled™, 125 Sent Text Messages, 2,500 Sent Text Messages, 1,000 Sent Picture/Video Messages, $5 mobile Internet Plan)	$10-$20/month
Rogers	Plan	Mega Time: 1000 evenings & weekends (9pm-7am), 150 weekday minutes, unlimited network calling	$25/month
Virgin	Plan	L: 200 minutes, voice mail, call display, call forwarding and call conferencing	$20/month

Each company aims to differentiate its services and typically provides numerous incentives and promotions to encourage customers to join. Promotions are provided in many forms and

vary across companies. Basic promotions, which are common among the national providers, include features such as free intra-carrier calling, a select number of free monthly bonus minutes, unlimited local or evening and weekend calling, free extended hours for evening and weekend plans, a certain amount of free long distance minutes, select number of text messages, graphic and ring tone downloads. In addition to these promotions, companies also have a number of unique offers exclusive to the company. Telus has a rewards program called "PERKS" which provides customers which perks such as discounts, free goods and other options with a number of their partners. For example, for the month of May 2007 Telus PCS clients on a monthly rate plan were entitled to free ice cream or frozen yogurt.[39] Likewise, Primus Canada, in collaboration with Air Miles, provides customers with 1 bonus reward mile for every $5 of monthly Primus spending.[40]

Most companies also provide added incentives to purchase products or services online. For example, Virgin provides all customers with a $25 dollar credit as well as free shipping if products or services are purchased online. Similarly, Rogers provides customers with $50 gift certificates to Future Shop, American Express or a selection of restaurants for certain online purchases. Promotions are not only applicable to rate plans but also apply to wireless peripherals such as handsets and other phone components.

Many of these promotions and benefits are available only if the customer is under a specific contractual agreement. Sometimes the rate plan itself is available only under a contract. These agreements vary from one year to a maximum of three years. Generally, the longer the agreement the greater are the benefits available to the subscriber. Such benefits are not usually applicable for the whole period of the contract but rather for a limited time. Bell, Telus and Rogers tend to provide benefits on the rate plan as well as the handset if the consumer enters into a contract, whereas MVNOs may provide only a discount on the handset (e.g., Primus) or may not have contracts at all and provide no discount on the phone or plan (e.g., Virgin).

Finally, there are other benefits which are available on a per-customer basis. For instance, new customers switching from one provider to another can often get additional promotions in the form of credit, discounts and/or free phones. Bell provides up to $200 in credits for customers switching their wireless, Internet and television services over from another provider. These types of benefits are not standard or documented and therefore it is hard to incorporate these discounts when determining the net price paid for wireless service. Similarly, when service or billing errors occur, companies often provide additional benefits (such as free service for a month) to compensate for the mistake in order to retain a customer's business, which further complicates the pricing structure.

[39] See http://www.telusmobility.com/on/perks/thismonth_perk.shtml (viewed May 22, 2007).

[40] http://www.primus.ca/en/residential/rewards/RewardPrograms.htm (viewed May 22, 2007).

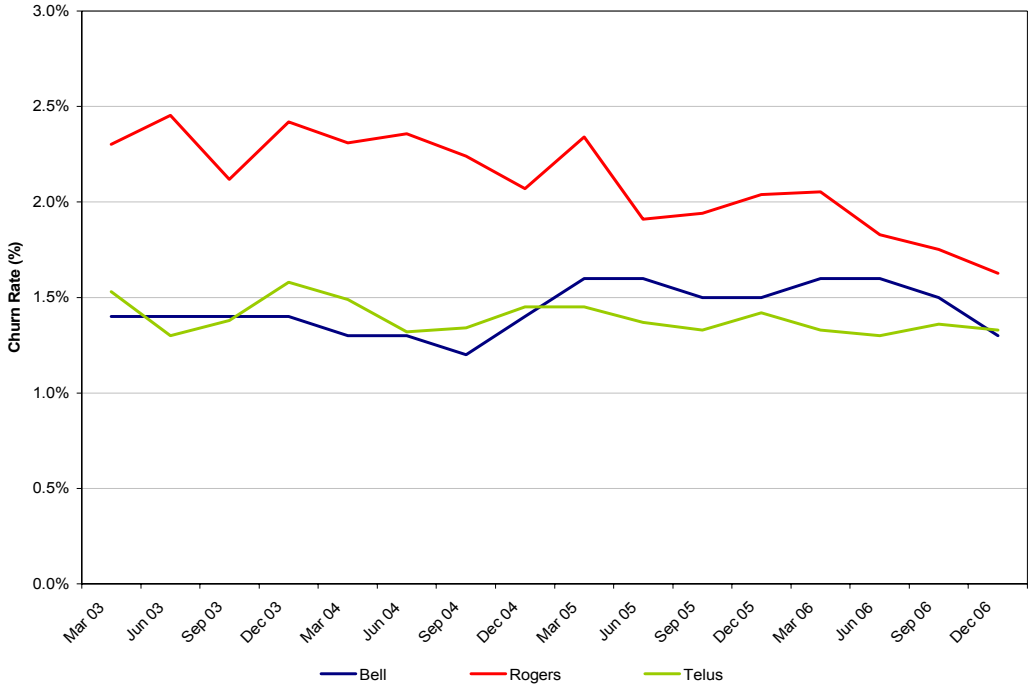
5.2.2. Customer Switching

Consumers of wireless services normally sign up with a provider for a period of one year or more. Entering into a contract reduces the out-of-pocket cost of the handset to the consumer, sometimes by 100%, and serves to guarantee a certain level of revenue to the provider during the period of the contract. In this sense customers under a contract are not free to switch providers unless they are willing to incur the cost of terminating the contract.[41] Yet this does not mean that providers are accorded market power during the term of the contract. Service providers remain bound to the contract terms agreed to by the customer. If a service provider attempted to exploit customers under contract, existing customers may switch providers and new customers or those between contracts are likely to choose an alternative provider. In this way, competition would discipline any temptation to take advantage of customers under contract.

In any event, customers do switch providers, and providers have a great interest in understanding and measuring the scope of this phenomenon. "Churn" rates represent the proportion of contractual customers or subscribers who leave a provider during a given time period. Data from various sources indicate that for the three national wireless companies, monthly churn rates have been lower in recent years. Figure 5 shows churn rates based on data from Merrill Lynch for Bell, Rogers and Telus from March 2003 to December 2006.

[41] To break a contract, contact with sales representatives at Bell, Rogers and Telus revealed that each company has similar policies. Each requires a termination fee of $20 per month for the remaining months on the contract. Bell has a $100 minimum fee and a $400 maximum fee, Rogers has a maximum fee of $400, and Telus has a minimum fee of $100, with no maximum fee.

Figure 5: ***Monthly Subscriber Churn, March 2003-December 2006***



Source: Merrill Lynch (2007)

Wireless number portability came into effect in Canada as of March 14, 2007. This allowed mobile phone users to keep their existing phone number when moving between providers, allowing subscribers to take advantage of the best offers on the market without fearing missed calls or having to distribute new contact information. Number portability reduces customer switching costs. There has been some speculation that wireless churn rates would increase drastically with number portability in place as customers will start switching between companies on a whim. This is the not the view of market analysts, however.[42] As noted above, there are fees involved in ending an existing contact if the customer is subject to one, and customers (except those that are extremely dissatisfied) are not expected to begin switching in drastically greater numbers just because it is now easier.

As number portability is relatively new in Canada, the effects on wireless carriers are hard to predict at this time. While some industry analysts believe that wireless provides will have to compete intensely to gain and retain their customers,[43] recent survey evidence also reveals that although number portability may provide customers with a sense that switching is an

[42] See www.teleclick.ca/2007/03/wireless-number-portability-comes-into-effect/ (viewed May 22, 2007).

[43] See www.teleclick.ca/2007/03/wireless-number-portability-comes-into-effect/ (viewed May 22, 2007).

option which they may take advantage of at some point, most respondents do not have any immediate expectation that they will switch providers.[44]

5.3. COMPETITION OVER TIME

Price competition is only one of the methods used by wireless carriers to compete. As noted in the introduction, firms compete using a variety of instruments, some of which (such as prices) are short-term in nature, and some of which affect longer-term competitive trends. A focus only on competition at a point in time does not reveal the competitive rivalry that unfolds between firms over time. This process of rivalry—in which firms develop and introduce new products and services in an effort to attain a position of market leadership and win customers away from other firms—has been called "dynamic competition".[45] Dynamic competition involves the creation of new products and potentially also new markets, along with the replacement or obsolescence of older products. It also implicitly or explicitly involves entry and exit by firms—there is no guarantee that today's successful firms will be able to offer the product attributes demanded by tomorrow's consumers.

Competition in the wireless service market, like most telecommunications markets, is dynamic and is based on costly investments in network technologies. This has been amply evident since the introduction of digital (second generation or "2G") service in Canada in the 1990s, when four firms made very significant investments to build their digital networks. At that time, the Canadian providers made a choice between two competing platforms: a TDMA-based standard that included GSM (with later enhancements such as GPRS and EDGE); and a CDMA-based standard known as IS-95 (which has been upgraded to CDMA2000 in many locations).[46] These technology choices determined the options that were available for providers in terms of later network enhancements. Because GSM has become the *de facto* standard of choice in Europe, providers such as Rogers that have deployed GSM technology have benefited from a steady stream of infrastructure and device enhancements developed for the large fraction of carriers around the world that operate GSM networks. The CDMA-based carriers (Bell and Telus) have thus far had access to technology upgrades that have provided similar functionality, although the path to the next generation of technology for CDMA-based carriers is less clear.

Subsequent to the rollout of basic 2G digital service, all providers have made incremental investments in their networks to improve data download speeds for customers in order to provide full 3G services. 3G provides download speeds ranging from 144 Kbps to 2 Mbps

[44] TNS Canadian Facts (2007), p. 11.

[45] See further discussion in Andrew Tepperman and Margaret Sanderson, "Innovation and Dynamic Efficiencies in Merger Review," paper commissioned by the Competition Bureau, 2007.

[46] Wall Communications (2006), pp. 31-32.

and above, thus approaching data delivery speeds comparable to home or office broadband connections. It is expected that mobile data-related services will be the key drivers of 3G adoption. Consumer applications currently in existence and making use of improved rates of mobile data delivery include video calling, music downloads, and full Internet access. Around 30% of the population, mostly in urban areas, had access to some form of 3G service in 2006.[47] Currently, about two-thirds of the Canadian population has 3G service available to them, with carriers continuing further roll-out and planning for future generations of service technology.

[47] Wall Communications (2006), p. 18.

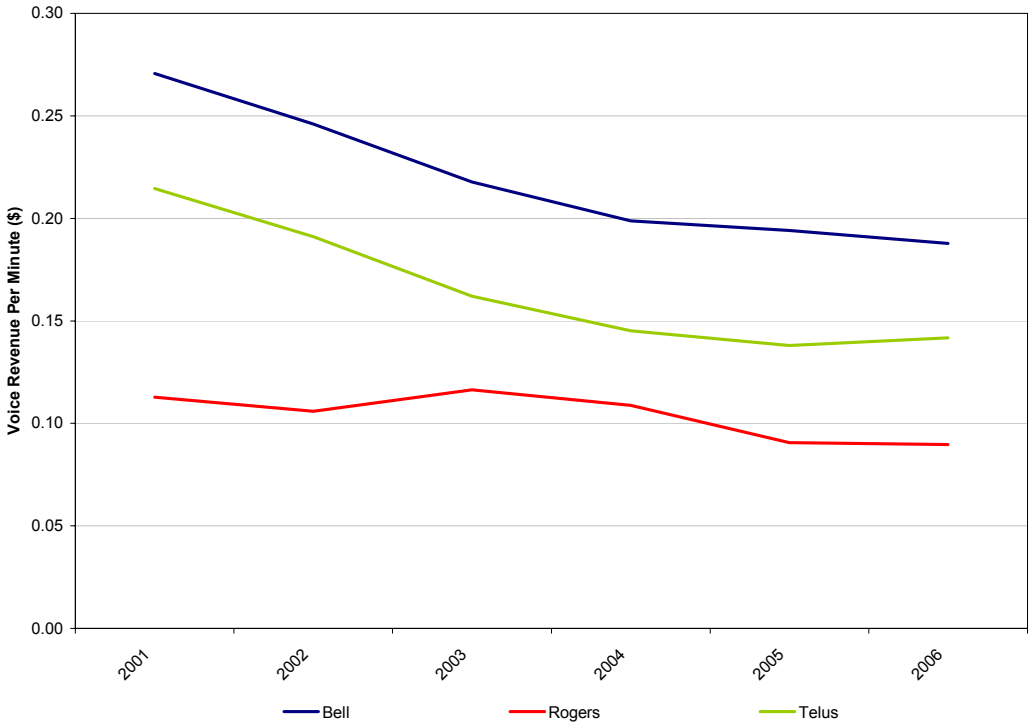
6. EVIDENCE OF PRICE COMPETITION

In this section, we look to various sources of data on pricing in order to explore the nature of competition among the major service providers. We find evidence that all providers are engaged in similar practices that are indicative of static or short-run competition (i.e., competition using short-run instruments such as pricing).

6.1. PRICE COMPETITION

Average revenue per minute (ARPM) in Canada has declined by a substantial degree over the last five years. Figure 6 shows ARPM for voice service by provider over 2001 to 2006. The figure shows a clear decline during this time period for all providers, consistent with competition among providers.

Figure 6: ***Average Revenue per Minute of Voice Usage, 2001-2006***

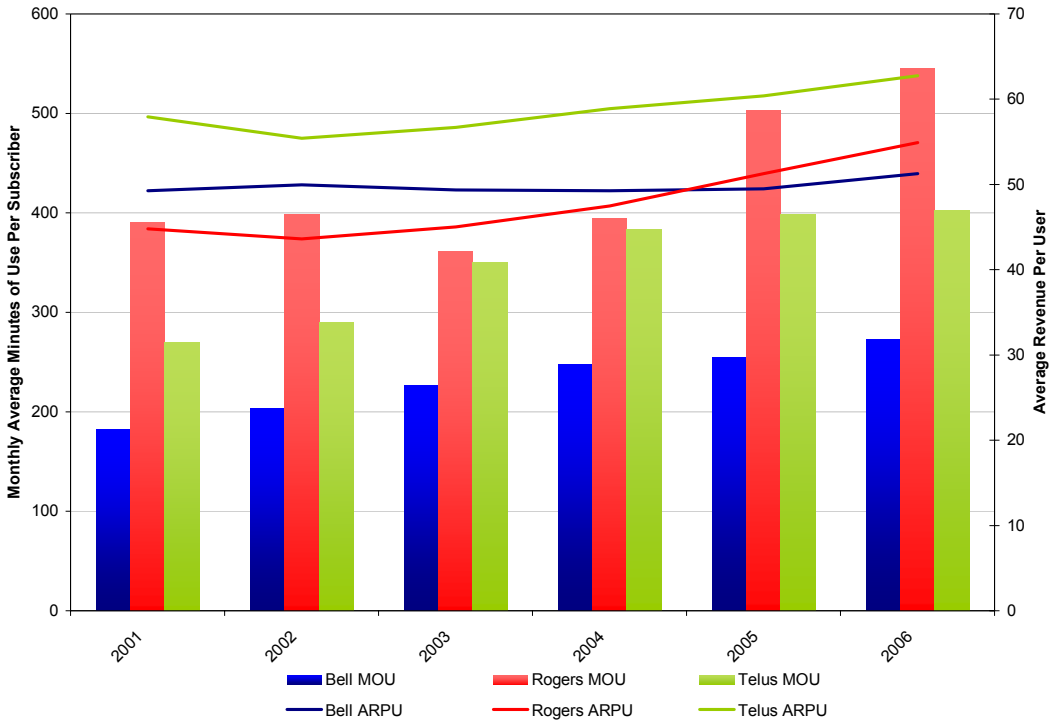


Source: Merrill Lynch (2007)

Apart from the declining trend in ARPM, another apparent finding from Figure 6 is what appears to be a difference in pricing among providers. For example, Rogers would appear to have a relatively low ARPM in comparison to the other carriers. This is due to the fact that providers tend to have similar average monthly costs for their service plans, but Rogers subscribers tend to consume more minutes of use relative to subscribers to the other

companies, and therefore the ARPM is lower for Rogers' subscribers. Figure 7 shows average minutes of use per month for subscribers as well as average revenue per user (ARPU) for each of the national providers' plans over 2001-2006.[48]

Figure 7: *Average Minutes of Use and ARPU, 2001-2006*



Source: Merrill Lynch (2007)

As shown in Figure 7, there is a general trend toward greater minutes of use per user for each provider. Indeed, Canada has experienced an increase in the average number of minutes used by each subscriber of almost 50% from 2001 to 2006.[49] Rogers and Telus customers use 475 minutes per month on average, as compared to 273 minutes by Bell customers. The ARPU associated with Bell and Rogers tend, however, to be quite similar, which accounts for the divergence in ARPM among providers shown previously in Figure 6.

Figure 7 also shows an increase in ARPU over 2001-2006. This increase is not the result of rising prices (as Figure 6 showed, ARPM has declined over time), but instead reflects increased usage over time, as represented in Figure 7. As another example of increased

[48] ARPU is equal to the amount of revenue received for subscription services over a period of time (such as a month) divided by the number of users.

[49] Merrill Lynch (2007).

wireless usage, approximately 8% of households that currently have access to a wireless phone have in fact replaced their traditional telephone line with a wireless phone and a study commissioned by the Canadian Wireless Telecommunications Association (CWTA) reports that 17% of Canadian households that either currently have a wireless phone or plan to have one in the next 12 months are likely to replace an existing wireline service with a wireless service.[50]

ARPU has also risen over time as a result of the explosion of new options and the rollout of new features. We have seen the introduction of a variety of new service offerings by all three national wireless companies. Companies are now offering more than just voice services, and are introducing technologies previously not available to Canadian customers, as described in greater detail below. The additions of these features have increased options for customers, and consumers are willing to pay more for them. There are also other concrete examples of an increased take-up of new functionality:

(a) According to the CRTC 2006 Monitoring Report, the "Data and Others" component of wireless and paging revenues experienced a 37% increase from 2004 to 2005. This was the highest growth of any of the components.[51]

(b) Merrill Lynch reports that the percentage of ARPU arising from data sources increased tenfold from 2001 to 2006.[52] In 2001, data services made up only a tiny fraction of ARPU while in 2006 data use accounted for 10% of ARPU.

(c) Increased data usage can be observed by the jump in the number of mobile-originated text messages in Canada. Mobile phone customers sent more than 4.3 billion person-to-person text messages in 2006, almost triple the 1.5 billion messages sent in 2005. Text message volumes peaked in December 2006 at more than 560 million in that month alone, which represents more than 18 million per day for Canadian subscribers.[53]

Our focus thus far on measures of average revenue may miss other sources of price competition. One of these is in the form of handset subsidies provided by carriers to customers. Wireless providers buy an enormous number of wireless devices from handset manufacturers such as Nokia, Motorola, and RIM. The prices paid by the carriers for these devices are often far higher than the prices customers actually pay. In many cases a customer signing a service contract is able to receive a large discount on the cost of a

[50] See http://www.cwta.ca/CWTASite/english/whatsnew_download/may16_06.html (viewed May 22, 2007).

[51] *CRTC Telecommunications Monitoring Report*, July 2006, p. 81.

[52] Merrill Lynch (2007).

[53] See http://cwta.ca/CWTASite/english/whatsnew_download/mar05_07.html (viewed May 22, 2007).

handset (up to 100%), and even in the middle of a contract a customer may be able to acquire a new handset for a reduced price.[54] With the addition of new service offerings such as MP3 downloads and video conferencing, there are a greater number of discounts and promotional offers related to phones supporting these features. According to Wall Communications, handset subsidies are a major component of the cost of customer acquisition, and these costs totaled between $375 and $400 per subscriber in 2005.[55]

Handset subsidy rates in Canada are high relative to those in other countries. The average cost of acquisition per customer was greater than USD$350 for the three national wireless carriers in Canada in 2006, whereas an analysis of a subset of non-Canadian companies including KPN E-Plus, T-Mobile and O2 in Germany, KPN Mobile in the Netherlands, T-Mobile in the United States and T-Mobile and O2 in the UK yielded an average cost of less than USD$200.[56] One would have to take into account these differences in handset subsidies in making international comparisons of the net costs of wireless service to subscribers, for example by subtracting the handset subsidy from the discounted sum of other service-related expenditures.

6.2. INDIRECT INDICATORS OF PRICE COMPETITION

6.2.1. Share Volatility

There are a number of additional indicators that are consistent with active price competition. One is the dramatic and volatile behaviour of market share measured on a new subscriber basis, as shown in Figure 3. If a single provider had significant market power we might expect that provider to capture a relatively constant fraction of consumers of all types, including new subscribers. Instead, we see customer additions spread across providers in an apparently nonsystematic fashion, with certain providers doing well in certain periods and poorly in others.

6.2.2. Targeted Brands

As mentioned above, recent years have seen the entry of MVNOs into what had been a space traditionally dominated by facilities-based providers. While these providers have not deployed their own network facilities, and as a result they can only discipline pricing to the extent possible given the variable cost that each incurs to secure network access, it is clear

[54] For example, as of the date of this report, Rogers offered the BlackBerry 7290 for $49.99 with a 3 year contract as compared to $499.99 with no contract. See www.rogers.ca (viewed May 21st 2007).

[55] Wall Communications (2006), p. 52, based on data from NBI/Michael Sone Associates.

[56] "Challenging the Myths about Canadian Wireless", CWTA Public Forum on Advanced Wireless Services Spectrum Auction, Genuity Capital Markets, April 23, 2007.

that the facilities-based providers have perceived a threat to the price-sensitive segment of their customer bases. These national providers have responded to entry by MVNOs such as Virgin by developing their own brands targeted to specific segments of the consumer population. The national carriers may perceive MVNOs to be a competitive threat to certain segments of their customer base as MVNOs are able to offer a large number of branded service lines that are tailored to specific customer groups which the national carriers may not have focused on in the past. For example:

(a) In 2005, Bell re-launched its Solo Mobile brand. This initiative was geared towards the key youth market segment. Solo featured custom-built services and unique applications including nationwide pay-per-use push-to-talk (PTT) in either prepaid or post-paid forms. This made Bell the first Canadian wireless operator to actively market PTT to the youth segment.[57] More recently, Solo Mobile was repositioned in 2006 in the wireless market as a value brand that broadly appeals to mass-market consumers rather than being primarily geared towards the youth segment.[58]

(b) When it acquired Microcell in November 2004, Rogers also acquired the Fido brand. Rogers has maintained the Fido brand and retail distribution network separate from Rogers, believing this strategy would provide it with improved market position in the youth segment and many regions of Canada, particularly in Quebec.[59]

(c) In August 2006, Telus announced it had entered into an exclusive relationship with Amp'd Mobile for the sale and distribution of its branded services in Canada. Amp'd offers highly interactive and customized mobile entertainment, information and messaging services. The partnership enables Telus to more effectively reach the high-value young adult (18-35) market through Amp'd's differentiated, premium data and content-centric services.[60]

6.2.3. Increased Use of Post-Paid Plans

As mentioned above, Canada has experienced an increase in the average number of minutes used by each subscriber. Canada currently ranks fourth behind the United States, India and Hong Kong with subscribers averaging 420 minutes per month. With the larger number of minutes used by Canadian subscribers, the proportion of post-paid plans to prepaid plans has been growing substantially, with a relatively greater number of net additions to post-paid plans. This is significant because a shift toward post-paid plans is indicative of a general

[57] Bell Canada Enterprises, *2005 Annual Report.*

[58] Bell Canada Enterprises, *2006 Annual Report*.

[59] Rogers Communications Inc., *2004 Annual Report.*

[60] TELUS, *2006 Annual Report*.

trend toward plans in which subscribers select a relatively large number of base minutes, often with unlimited usage during certain times, and for which the incremental price of usage below the cap is low (or zero). This trend is itself indicative of competition among providers serving to return benefits to consumers, as occurred in the U.S. after some carriers introduced the first "big-bucket" plans.[61]

Prepaid plans tend to be optimal for people who use a relatively low number of minutes per month. As subscribers use more minutes, it becomes preferable to use post-paid plans which already include a base number of minutes and which provide additional minutes at discounted rates. For instance, as described below, Rogers has the following prepaid and post-paid options:

Table 2: *Wireless Service Plan Options from Rogers*

Option	Plan	Minimum Cost	Cost/Min	Eve. & Wknd.	Anytime Minutes
Pre-paid Options					
Option 1	Anytime Plan (Minimum $10)	10	0.33	0	30
Option 2	1¢ Eve. & Wknd. Plan (Minimum $20)	20	0.39	unlimited	52
Post-paid Options					
Option 1	Mega Time: (9PM-7AM) 1000 Eve. & Wknd. & 50+50 Wkday Minutes	20	0.30	1000	100
Option 2	Mega Time: (9PM-7AM) Unltd. Eve. & Wknd. & 150+50 Wkday Minutes + Unlimited Network Calling	30	0.30	unlimited	200
Option 3	Business - 350 Wkday Minutes	40	0.25	unlimited	350
Option 4	Business - 500 Wkday Minutes	40	0.25	unlimited	500

Source: Rogers Communications Inc. (www.rogers.ca)

For a person using 50 minutes per month, it is most cost-effective to use a prepaid plan. However, as soon as the customer uses 100 or more minutes per month, one, if not all, of the four post-paid plans are better options. This is presented in summary form in Table 3.

[61] See e.g., Jerry Hausman, "Mobile Telephone," Chapter 13 in Martin E. Cave, Sumit K. Majumdar, and Ingo Vogelsang, eds., *Handbook of Telecommunications Economics*, Vol. 1, North-Holland, 2002, p. 579.

Table 3: *Summary of Monthly Costs by Plan*

Daytime Minutes Used	500	420	100	50
Pre-paid cost				
Option 1	$165	$139	$33	$17
Option 2	$195	$164	$39	$20
Post-paid cost				
Option 1	$140	$116	$20	$20
Option 2	$120	$96	$30	$30
Option 3	$78	$58	$40	$40
Option 4	$40	$40	$40	$40

From this, we conclude that Canada, like the U.S., is moving towards "big-bucket" plans, where users are provided with a large number of minutes. Given that the incremental cost of using these minutes is low, we expect to see greater usage, and this is what we seem to observe from the data.

6.2.4. Survey Evidence

We expect to find customer dissatisfaction if customers are faced with the exercise of significant market power. To this end, survey evidence on customer satisfaction levels provides additional evidence of the lack of significant market power. A recent national survey of 1500 wireless users conducted by the Strategic Counsel has shown that consumers are generally satisfied with Canadian wireless offerings. Over 60% expressed satisfaction with the features and technologies that are available; 68% of participants expressed satisfaction with the available choices in service providers; and 73% were satisfied with the choices available in terms of service plans and phone models.[62] In addition, almost 60% of wireless users reported that they felt they were receiving good value for their money from their wireless providers.[63]

Another recent survey conducted by TNS Canadian Facts found that the vast majority of wireless subscribers (87%) are either "fairly satisfied" or "very satisfied" with their provider, and of those subscribers under contract only about 19% are planning to switch providers once their contract expires.[64] As noted above, if a provider was exercising significant market power, we would expect consumers to express dissatisfaction with the quality or pricing of their services, which is not evident from these recent surveys.

[62] The Strategic Counsel, *Wireless Users Survey*, February 2007, pp. 2-4.

[63] Strategic Counsel (2007), p. 3.

[64] TNS Canadian Facts, "Number Portability Public Release 2007," pp. 6-7.

6.2.5. Regulatory Agency Comments on the State of Competition

The regulatory agencies, including the CRTC and the Competition Bureau, have each remarked on the competitive behaviour shown by wireless providers in Canada. For example, the CRTC in a recent decision characterized the Canadian wireless market as "robustly competitive".[65] In another decision the CRTC noted:

> The Commission considers that the wireless market is not the same as the wireline market, in that there is not a single dominant service provider in each operating territory. The Commission notes that in Decision 94-15, the Commission forebore from regulating the wireless market as it was found to be competitive, and has remained so. The Commission further notes that the wireless carriers have similar market share, are well established with large customer bases and are not in need of protection in order to establish a sustainable customer base.[66]

Similarly, in its assessment of the Rogers-Microcell merger the Competition Bureau stated:

> [P]ost-merger, there will be three mobile wireless operators who are vigorous and effective competitors. Rogers does not possess sufficient market power to impose and sustain a significant and non-transitory price increase above levels that would otherwise exist in absence of the merger because rivals would likely respond in an effort to enhance their customer bases. The Bureau concluded that innovative product and service offerings will continue to be available to consumers at competitive prices. As already noted, both Bell and Telus have recently engaged in aggressive marketing promotions targeted at current Rogers and Microcell subscribers.[67]

Based on these statements, it would seem that the key regulatory bodies consider the wireless market to be relatively competitive, and certainly one in which there is not a provider with significant market power.

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[65] Telecom Decision CRTC 2006-33, ¶ 30.

[66] Telecom Decision CRTC 2006-28, ¶ 100.

[67] Competition Bureau (2005).

7. EVIDENCE OF INVESTMENT-BASED COMPETITION

We turn in this section to evidence of firms engaging in rivalry by investing in and deploying new wireless technologies. This investment-based competition has been ongoing since the early days of the wireless market in Canada, and has provided consumers with benefits in the form of valued services and reduced quality-adjusted prices.

7.1. INVESTMENTS IN NETWORK INFRASTRUCTURE

The wireless market is a capital-intensive one, as we have shown above, and in order to support the rapid growth in subscriptions considerable capital investments need to be made. In the first five years after wireless was introduced in Canada, total capital expenditures for the industry ranged between $160 million to $627 million annually.[68] In the late 1990s, total infrastructure-related investments to support the transition to digital service accelerated to greater than $1 billion per year, reaching $2 billion by 2000.[69] The continual upgrading of infrastructure in line with technologies introduced in other countries such as the U.S. has been essential to Canadian carriers in attracting and keeping subscribers. Examples of recent investments in the expansion of 3G network capabilities include the following:

(a) Rogers has launched UMTS/HSDPA (Universal Mobile Telephone System/High Speed Downlink Packet Access) next-generation wireless data technology in the Golden Horseshoe markets in Ontario and is in the process of deploying this technology in other centres.[70] Rogers HSPDA network is estimated to cover 60% of the Canadian population by year end 2007.

(b) Telus expanded the availability of its wireless high-speed service to two-thirds of the Canadian population in 2006. Based on the CDMA2000 1x Evolution, Data Optimized (EVDO) standard, the newest 3G wireless data technology available, its wireless high-speed services have typical download speeds of 400-700 Kbps with peaks of up to 2.4 Mbps..[71] Telus' EVDO network covered 65% of the Canadian population as of Q2, 2007.

(c) Bell launched Canada's first CDMA2000 1xEVDO wireless data network in Toronto and Montreal in 2005. There are plans to continue EVDO deployment in other major

[68] Wall Communications (2006), p. 9.

[69] Wall Communications (2006), p. 9.

[70] Rogers Communications Inc,. *2006 Annual Report*.

[71] Telus, *2006 Annual Report*.

Canadian urban centres.[72] Bell's EVDO network is estimated to cover 67% of the Canadian population by the end of Q2, 2007.

It has been observed that Canadian carriers did not begin to deploy 3G network facilities in a concentrated way until after U.S. carriers had done so.[73] To a certain extent this likely reflects a prudent desire to wait until the case for large-scale deployment could be demonstrated more concretely by increased demand for data applications. It does not suggest that investment-based competition is weak due to significant market power on the part of any one Canadian carrier. As shown above, all of the providers are now making investments in 3G network upgrades at around the same time. One obvious reason is that the technology is now mature and robust enough that it can be implemented with little fear of failure. But also, and more importantly, each carrier perceives that if it fails to deploy the necessary technology it is at risk of losing customers to carriers that offer the latest technology or that are seen as more concerned with the newest functionality. Eventually, carriers that forgo investing may be labeled non-competitive, and all customers but those with the most rudimentary demands will leave for other providers. This is the essence of dynamic competition.

7.2. DELIVERY OF NEW SERVICES TO CONSUMERS

The investments in infrastructure referred to above are of value to the extent that they are able to deliver services that consumers demand. Examples of such services include the following:

(a) Bell experienced a $3 year-over-year increase in postpaid ARPU. This has been attributed to higher penetration of BlackBerry customers and other heavy users subscribing to higher-priced rate plans.[74] Bell also launched Groove Client (a music download service), a music video ringtones service (which allows customers to listen to and/or watch digital music on their wireless phones) as well as a variety of video clip services (including NHL and MTV highlights, news and reports from CTV News and ROBTv).[75]

(b) Data revenues for Rogers represented 10.6% of total revenue in 2006, compared to 8.2% in 2005, representing a 54.5% year-over-year growth. This has been attributed to the rapid growth of BlackBerry use, wireless messaging, mobile Internet access,

[72] Bell Canada Enterprises, 2*006 Annual Report.*

[73] Wall Communications (2006), p. 37.

[74] Bell Canada Enterprises, *2006 Annual Report.*

[75] Bell Canada Enterprises, *2006 Annual Report.*

downloadable ring tones, music, games, and other wireless data services and applications.[76]

(c) Telus rebranded its portfolio of mobile entertainment, information and messaging services for consumers as SPARK, which includes the newly-launched Mobile Music, Mobile Radio, Mobile TV, multimedia messaging, etc.[77] These services are expected to run over Telus's enhanced wireless network.

The fact that all of the national providers are focusing on making available next-generation data services for consumers suggests strongly that all have a similar competitive interest and no carrier has been able to dominate such that it is the sole provider offering certain services.

[76] Rogers Communications Inc,. *2006 Annual Report*.

[77] Telus, *2006 Annual Report*.

8. COORDINATED EFFECTS

The previous discussion has focused entirely on providers acting unilaterally, and based on that discussion we provided our opinion that no single provider has significant market power. In this section we turn to the related question of whether these providers would have the incentive and ability to exercise market power by acting cooperatively. We find that any hypothetical coordinated exercise of significant market power would not be feasible in this market, for a number of reasons.

We note at the outset that a cooperative exercise of market power would of course be illegal if the arrangement is an explicit one. According to one authority, "[t]he prohibition against price fixing and other forms of anticompetitive horizontal arrangements lies at the core of competition policy in virtually all sophisticated competition law jurisdictions."[78] Yet not all cartel arrangements are explicit; in some cases it is possible for firms to act in cooperative fashion without communicating with each other. It is generally agreed that although such behaviour is contrary to social welfare, it falls outside the purview of competition law governing horizontal arrangements.[79] The ensuing discussion is general enough to cover both explicit and tacit cases of coordination.

Any individual firm faces a trade-off between cooperating in order to share the profits of a larger pie owing to the exercise of market power, and earning greater profits in the short run if its rivals attempt to raise prices cooperatively while the individual firm "cheats", thereby gaining customers from its rivals at the higher "coordinated" price. In the face of this trade-off, a (tacit or explicit) cooperative arrangement will only exist if enough firms participate, if each participating firm finds it privately profitable to cooperate, if monitoring compliance with the arrangement is not overly difficult and if deviations from the arrangement can be credibly punished. There are market conditions which are more favourable to firms reaching agreement (explicitly or tacitly) on the terms of such coordination. These include the existence of a small number of firms; similarity of cost structures; similarity of levels of capacity; and similarity of products. Certain market conditions also may assist firms in exercising market power cooperatively by making it easier to monitor and enforce a collusive arrangement, assuming that they have been able to explicitly or tacitly arrive at one. These include the following: (i) the pricing, demand and cost conditions within the industry are readily observable for participants ("market transparency" exists); (ii) the products over which coordination takes place are relatively similar and competition based on non-price characteristics (such as product quality) is limited; (iii) transactions are not highly idiosyncratic; (iv) demand is stable; and (v) the coordinating firms are relatively symmetric in their size and cost structure.

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[78] Trebilcock et al. (2002), p. 86.

[79] Trebilcock et al. (2002), p. 89. Note that consideration of cooperative effects is an important part of merger analyses done by competition authorities.

In the Canadian wireless market, it is unlikely that significant market power could be exercised through coordinated conduct by the wireless providers. It is true that there are few providers at the national (or even the regional) level, and that in a certain sense these firms are "similar" in terms of their capacities. Yet the difficulties that would be involved in enforcing any collusive arrangement to sufficiently limit the possibility of cheating are very large in this industry. First, the continuing changes in technology that have made new services available to consumers, and the rapid growth in the number of consumers subscribing for wireless services, would make the gains from "cheating" more attractive relative to cooperation. As we have seen above, although subscriber growth has leveled off to a certain extent in recent years it is still proceeding at a rate of over 10% per year. Providers have an incentive to compete intensely in order to capture these new subscribers. Canada's wireless penetration is not at the upper end when international comparisons are made, so there remains scope for a large number of new subscribers to sign up for service.[80] Further, now that wireless number portability has been implemented, consumers can switch providers to take advantage of new offers and services, subject to any contractual obligations they may have entered into.

Second, it is particularly difficult to sustain a collusive arrangement in the face of rapid actual and potential growth in demand when this growth is coupled with technological changes that are implemented by different firms at different points in time. On this issue, we concur with comments made by the Competition Bureau: "Markets with rapid and frequent product or service innovations are less conducive to coordinated behaviour. It is much harder to act in a coordinated fashion when competitors worry that their rivals might be ready to launch the next new 'killer application'."[81] The Canadian wireless market is undoubtedly one in which "rapid and frequent product or service innovations" exist.

Third, pricing conditions are not transparent, and competition is substantially based on non-price characteristics such as quality, making monitoring and disciplining of any attempted collusive arrangement unwieldy if not impossible. As described above, pricing differs across consumers depending on the items from the menu of possible options that are chosen by individual subscribers. When consumers purchase service plans with varying quantities of minutes, some of which are associated with per-minute charges and others which are free, it would be very complex for providers to conduct the monitoring of prices that would be necessary to ensure that any collusive arrangement held up. Associated with this, products are highly differentiated. Some consumers will be interested in purchasing service bundles with various data services included (such as music downloads and video calling) while others may be interested just in the ability to make voice calls. The former type of customer is also

[80] See e.g., Wall Communications Inc., "An Examination of Issues Raised in the Telecommunications Policy Review Panel's March 2006 Report Regarding the Canadian Mobile Wireless Services Industry," prepared for the Canadian Wireless Telecommunications Association, September 29, 2006, p. 36.

[81] Competition Bureau (2005).

likely to have a preference for the newest handsets, which would be an additional source of variation in pricing and product characteristics.

In sum, we expect that the conditions for successful cartelization do not hold in this market. We believe the Bureau's analysis of coordinated behaviour in the context of the Rogers-Microcell transaction in 2004 remains true today: "In summary, significant factors existed pre-merger that constrained coordination (in particular, growing demand, innovation, competitive history). None of these constraining factors are in any way affected or diminished by the merger."[82]

[82] Competition Bureau (2005).

9. CONCLUSION

We have considered whether any provider of wireless service in Canada has significant market power, and in addition whether providers jointly have the incentive and the ability to exercise significant market power on a coordinated basis. Given our review of industry structure and the competitive dynamics of the wireless industry, there is no evidence of market failure resulting in significant market power being exercised.

The major wireless service providers compete in the Canadian market for mass market wireless service, which includes voice and data services. The national providers that compete in this market have a similar level of market presence, and there is evidence of a great deal of rivalry for new subscribers. While entry as a facilities-based provider of wireless service is costly, economics tells us that existing providers that have already incurred the substantial costs of entry will compete intensely for new customers, as well as to win the customers of rivals. We see evidence of this when we look at pricing trends within the wireless market. Providers also compete by offering new services to consumers over costly network facilities that are continually being upgraded. Finally, we find that wireless service providers would not have the ability to exercise significant market power on a coordinated basis given the numerous impediments that would tend to defeat any attempt at cooperative behaviour.

In summary, using the well-established analytical framework embodied in Canadian competition law, we find that no single wireless firm in Canada has significant market power. As well, we find that cooperative arrangements among the existing wireless providers to exercise significant market power jointly are highly unlikely. Thus, given the issues being examined in Industry Canada's consultation process, we find no clear evidence for concerns regarding the state of competition in the Canadian wireless market.

APPENDIX

CRA INTERNATIONAL

Founded in 1965, CRA International is a leading provider of economic and financial expertise and management consulting services. Working with businesses, law firms, accounting firms, and governments, CRA is the preferred consulting firm for complex assignments with pivotal and high-stakes outcomes. The firm is distinguished by a unique combination of credentials: deep vertical experience in a variety of industries; broad horizontal expertise in a range of functional disciplines; and rigorous economic, financial, and market analysis. CRA offers a proven track record of thousands of successful engagements in regulatory and litigation support, business strategy and planning, market and demand forecasting, policy analysis, and engineering and technology management. Headquartered in Boston, the firm has more than a dozen offices within the United States and nine offices in Canada, Europe, the Middle East, and the Asia Pacific region.

CRA's Competition practice has been at the company's core since its inception. CRA International offers one of the world's largest competition economics practices. CRA consultants have been involved in landmark cases before major regulatory agencies around the globe. Many CRA staff have served as high-level officials at government competition agencies around the world. CRA brings deep knowledge of local laws and regulations together with experience testifying before a wide range of courts and regulatory agencies, including Canadian courts, Canada's Competition Bureau, Competition Tribunal, Canadian Radio-television and Telecommunications Commission and Copyright Board.

MARGARET SANDERSON

Margaret Sanderson is a Vice President and head of CRA International's Global Competition practice. She has experience analyzing the competitive effects of a wide range of business conduct (mergers, horizontal restraints, predatory pricing, and abuse of dominance and vertical restraints) and government regulatory policy. In the communications sector, Ms. Sanderson has authored (and co-authored) expert reports on competitive issues in the areas of broadcasting, Internet, telecom, satellite, and wireless, many of which have been filed with the Canadian Radio-television and Telecommunications Commission and the Competition Bureau. Ms. Sanderson is a recognized Canadian expert in competition matters. Her work in this area has covered numerous sectors including media, transportation, consumer products, finance, industrial products, natural resources and health care. Ms. Sanderson has testified before Canadian courts and regulatory authorities and has appeared before the US Federal Trade Commission. Prior to joining CRA, Ms. Sanderson directed the economic expertise applied within the Competition Bureau to enforcement cases, enforcement policy and regulatory interventions. She has published various articles on competition policy, and has presented and taught on selected topics of antitrust economics. Ms. Sanderson received her M.A. in Economics from the University of Toronto.

ANDREW TEPPERMAN

Andrew Tepperman is an Associate Principal at CRA International where he specializes in competition, regulatory, intellectual property, and damages issues. His expertise in the telecommunications industry includes submitting a report (co-authored with Michael Trebilcock) on behalf of SaskTel which commented on the Canadian Radio-television and Telecommunication Commission's 2005 decision regarding regulation of voice over Internet Protocol services. Dr. Tepperman has also contributed to numerous other regulatory filings in proceedings concerning high-speed digital services, local forbearance, voice over Internet Protocol services, and wholesale access, as well as to submissions by CRA International experts for consideration by the Telecommunications Policy Review Panel. In the competition area, he has advised clients in numerous mergers as well as other competition matters. He holds a PhD in economics from the University of Toronto, where his doctoral dissertation focused on issues relating to intellectual property and research and development.

TAB 7

Competition Bureau Canada | Bureau de la concurrence Canada

Enforcement Guidelines

Merger Enforcement Guidelines

Canada

This publication is not a legal document. It contains general information and is provided for convenience and guidance in applying the *Competition Act*.

This publication replaces the following Competition Bureau publications:
Enforcement Guidelines — *Merger Enforcement Guidelines*, September 01, 2004
Bulletin — *Efficiencies in Merger Review*, March 2, 2009

For information on the Competition Bureau's activities, please contact:

Information Centre
Competition Bureau
50 Victoria Street
Gatineau QC K1A 0C9

Tel.: 819-997-4282
Toll free: 1-800-348-5358
TTY (for hearing impaired): 1-800-642-3844
Fax: 819-997-0324
Website: www.competitionbureau.gc.ca

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FOREWORD

The Competition Bureau ("the Bureau") has issued these guidelines to provide general direction on its analytical approach to merger review. The guidelines describe, to the extent possible, how the Bureau analyzes merger transactions. Given that merger law applies to a wide variety of factual circumstances, these guidelines are not applied rigidly. As such, this document sets out the Bureau's general approach to merger review and is not a binding statement of how the analysis is carried out in any particular case. The specific facts of a case, as well as the nature of the information and data available, determine how the Bureau assesses a proposed transaction and may sometimes require methodologies other than those noted here.

Merging parties are encouraged to contact the Bureau at an early stage to discuss proposed transactions, and should obtain appropriate legal advice when contemplating a merger.[1] The final interpretation of the *Competition Act* (the "Act") rests with the Competition Tribunal ("the Tribunal") and the courts.[2]

These guidelines supersede previous merger enforcement guidelines and statements made by the Commissioner of Competition ("the Commissioner") or other Bureau officials. These guidelines also supersede the Bureau's *Bulletin on Efficiencies in Merger Review*. The Bureau may revisit certain aspects of these guidelines in the future based on amendments to the Act, decisions of the Tribunal and the courts, developments in the economic literature and the Bureau's case experience.

PART 1: DEFINITION OF MERGER

1.1 Section 91 of the Act defines a "merger" as "...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, buyer or other person."

1.21 This definition covers any manner in which control over, or a significant interest in, the whole or a part of a business of another person is acquired or established.[3] While these guidelines focus primarily on mergers of firms that supply competing products (horizontal mergers), section 91 also captures mergers of firms that do not compete (non-horizontal mergers, addressed in Part 11, below).

1 See also the Bureau's *Merger Review Process Guidelines*, *Procedures Guide for Notifiable Transactions and Advance Ruling Certificates under the* Competition Act and *Fee and Service Standards Handbook for Mergers and Merger-Related Matters*.

2 *Competition Act*, R.S.C. 1985, c. C-34.

3 As outlined in the Bureau's Competitor Collaboration Guidelines, paragraph 1.2(*a*), a transaction that does not fall within the definition of "merger" may in some instances be subject to review under the civil provision in section 90.1 of the Act. Parties who are uncertain as to whether an agreement will be assessed as a merger or a competitor collaboration are encouraged to consult the *Competitor Collaboration Guidelines* and to contact the Bureau at the earliest opportunity to discuss how the Bureau is likely to assess such an agreement if pursued.

Control

1.3 Acquisition of control constitutes a merger under section 91. With respect to corporations, section 2(4) of the Act defines "control" to mean *de jure* (legal) control—that is, a direct or indirect holding of more than 50 percent of the votes that may be cast to elect directors of the corporation, and which are sufficient to elect a majority of such directors. With respect to partnerships, section 2(4) provides that a partnership is controlled by a person when the person holds an interest in the partnership that entitles the person to receive more than 50 percent of the profits of the partnership or more than 50 percent of its assets on dissolution.

Significant Interest

1.4 The Act does not define what constitutes a "significant interest," as referenced in section 91, leaving this concept to be construed within the broader context of the Act as a whole.

1.5 When determining whether an interest is significant, the Bureau considers both the quantitative nature and qualitative impact of the acquisition or establishment of the interest. Given that the Act is concerned with firms' competitive market behaviour, a "significant interest" in the whole or a part of a business is held qualitatively when the person acquiring or establishing the interest (the "acquirer") obtains the ability to materially influence the economic behaviour of the target business, including but not limited to decisions relating to pricing, purchasing, distribution, marketing, investment, financing and the licensing of intellectual property rights.

1.6 The factors that may be relevant to the Bureau's analysis of whether a particular minority shareholding, an interest in a combination, agreement or other relationship or interest confers material influence (as per paragraph 1.5) include the following:

- voting rights attached to the acquirer's shareholdings or interest in a combination;
- the status of the acquirer of partnership interests (e.g., general or limited partner) and the nature of the rights and powers attached to the partnership interest;
- the holders and distribution of the remaining shares or interests (whether the target business is widely or closely held, and whether the acquirer will be the largest shareholder);
- board composition[4] and board meeting quorum, attendance and historical voting patterns (whether the acquirer will be able to carry or block votes in a typical meeting);
- the existence of any special voting or veto rights attached to the acquirer's shares or interests (e.g., the extent of shareholder approval rights for non-ordinary-course transactions);
- the terms of any shareholder or voting agreements;

4 This includes both the total number of directors and the number of directors who are the acquirer's nominees.

- the dividend or profit share of the minority interest as compared to the acquirer's equity ownership share;
- the extent, if any, of the acquirer's influence over the selection of management or of members of key board committees;
- the status and expertise of the acquirer relative to that of other shareholders;
- the services (management, advisory or other) the acquirer is providing to the business, if any;
- the put, call or other liquidity rights, if any, that the acquirer has and may use to influence other shareholders or management;
- the access the acquirer has, if any, to confidential information about the business; and
- the practical extent to which the acquirer can otherwise impose pressure on the business's decision-making processes.

It is generally the combination of factors – not the presence or absence of a single factor – that is determinative in the Bureau's assessment of material influence.

Notifiable Transactions

1.7 In the absence of any evidence to the contrary, the Bureau presumes that notifiable transactions described in Part IX of the Act constitute the acquisition or establishment of a significant interest in the whole or a part of a business. A transaction is notifiable where the relevant transaction-size and party-size thresholds are exceeded and, in the case of a share acquisition[5], where the shareholding threshold (voting interest of more than 35% for a private corporation or more than 20% for a public corporation) is also exceeded.

Share Acquisitions

1.8 Share acquisitions (whether or not they are notifiable) fall within the scope of section 91 when the acquirer obtains the ability to materially influence the economic behaviour of a business by purchasing shares or other securities. When assessing whether a particular minority shareholding confers material influence, the Bureau conducts a case-by-case analysis of the relationship between the acquirer and the target business, and of the various mechanisms through which the acquirer might exercise influence.

1.9 In the case of *voting shares*, the Bureau considers that a significant interest in a corporation exists when one or more persons directly or indirectly hold enough voting shares

5 Where the transaction involves the acquisition of an interest in a combination, a further threshold also applies. Such a transaction will be notifiable only if the person or persons acquiring the interest, together with their affiliates, would be entitled to receive more than 35% of the profits of the combination (more than 50% if they are already entitled to more than 35%), or 35% of its assets on dissolution (more than 50% if they are already entitled to more than 35%).

- to obtain a sufficient level of representation on the board of directors to materially influence that board, with reference to the factors outlined in paragraph 1.6 and any other relevant factors; or
- to block special or ordinary resolutions of the corporation.

1.10 The Bureau will also consider whether voting shares give the person or persons who hold them the ability to exercise material influence through other mechanisms, with reference to the factors outlined in paragraph 1.6 and any other relevant factors. In the absence of other relationships, direct or indirect ownership of less than 10 percent of the voting interests in a business does not generally constitute ownership of a significant interest.[6] While inferences about situations that result in a direct or indirect holding of between 10 percent and 50 percent of voting interests are more difficult to draw, a larger voting interest is ordinarily required to materially influence a private company than a widely held public company. The merger notification requirements in Part IX of the Act, referred to in paragraph 1.7 above, are triggered at a voting interest of more than 35 percent for private corporations and of more than 20 percent for public corporations.[7]

1.11 When a transaction involves the purchase of *non-voting* shares,[8] the Bureau examines whether the holder of the minority interest can materially influence the economic behaviour of the business despite its inability to vote its shares, with reference to the factors outlined in paragraph 1.6 and any other relevant factors.

1.12 In the case of *convertible securities* or *options*, a significant interest may be acquired or established when these securities are first purchased or created, or at the time they are converted or exercised.[9] To determine whether a purchase constitutes a significant interest, the Bureau examines the nature of and circumstances in which the rights (or potential rights) attached to these securities may be exercised, and the influence that the acquirer may possess through their exercise, or threat of exercise, with reference to the factors outlined in paragraph 1.6 and any other relevant factors.

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6 This position is consistent with other Canadian statutes. See, for example, *Bank Act*, S.C. 1991, c. 46, s. 8. (See also *Cooperative Credit Associations Act*, S.C. 1991, c. 48, s. 9; *Insurance Companies Act*, S.C. 1991, c. 47, s. 8; and *Trust and Loan Companies Act*, S.C. 1991, c. 45, s. 8.) The Bureau typically requires disclosure of all holdings that account for 10 percent or more of the voting interests in a business, and may seek information respecting other minority holdings in the course of a merger review.

7 The pre-merger notification provisions are discussed in the Bureau's *Procedures Guide for Notifiable Transactions and Advance Ruling Certificates under the* Competition Act and the *Interpretation Guidelines for Notifiable Transactions under Part IX of the* Competition Act.

8 When *non-voting* shares are convertible (for example, into voting shares), they will also be assessed under paragraph 1.12.

9 A convertible security is a bond, debenture, preferred share or other security that may be exchanged by the owner, usually for common shares of the same company, in accordance with specified conversion terms. An option is a right to buy or sell specific securities or properties at a specified price within a specified time.

Asset Acquisitions

1.13 Asset transactions (whether or not they are notifiable) that generally fall within the scope of section 91 include the purchase or lease of an unincorporated division, plant, distribution facilities, retail outlet, brand name or intellectual property rights from the target company. The Bureau treats the acquisition of any of these essential assets, in whole or in part, as the acquisition or establishment of a significant interest in that business. Further, acquiring a subset of the assets of a business that is capable of being used to carry on a separate business is also considered to be the acquisition or establishment of a significant interest in the business.

Increasing an Existing Interest in a Business

1.14 Persons already holding a significant interest in the whole or a part of a business may trigger the merger provisions of the Act by acquiring or establishing a materially greater ability to influence the economic behaviour of the business.

Interlocking Directorates

1.15 An interlocking directorate may arise where a director of one firm is an employee, executive, partner, owner or member of the board of directors of a second firm, or has another interest in the business of the second firm. An interlocking directorate is generally of interest under section 92 of the Act only when the interlocked firms are competitors, are vertically related, or produce complementary or related products.

1.16 Interlocking directorates may be features of transactions that otherwise qualify as mergers. For example, an interlock results from the merger of firms A and B when an executive of A sits on the board of firm C, and C competes with B. Interlocking directorates may be features of minority interest transactions; for example, a firm that acquires a minority interest in its competitor may also obtain rights to nominate one or more directors to its competitor's board. An interlocking directorate would rarely qualify, in and of itself, as the establishment of a significant interest.

1.17 When assessing whether an interlocked director has the ability to materially influence the economic behaviour of the interlocked firm(s), the Bureau's focus is typically on the access that an interlocked director has to confidential information, and on the director's voting and veto rights in the context of the board composition, quorum and voting rules, including attendance and historical voting patterns.

Other Considerations

1.18 A significant interest can be acquired or established under shareholder agreements, management contracts, franchise agreements and other contractual arrangements involving corporations, partnerships, joint ventures, combinations and other entities, depending on the terms of the arrangements. In addition, loan, supply and distribution arrangements that are not ordinary-course transactions and that confer the ability to materially influence the economic behaviour of the target business (for example, financing arrangements and terms of default relating to such arrangements; long-

term contractual arrangements or pre-existing long-term business relationships) may constitute a merger within the meaning of section 91.

1.19 When determining whether an acquisition or establishment of a significant interest constitutes a merger, the Bureau examines the relationship between the parties prior to the transaction or event establishing the interest, the likely subsequent relationship between the parties, the access that an acquirer has and obtains to confidential business information of the target business, and evidence of the acquirer's intentions to affect the behaviour of that business.

PART 2: THE ANTI-COMPETITIVE THRESHOLD

Overview

2.1 As set out in section 92(1) of the Act, the Tribunal may make an order when it finds that a merger "prevents or lessens, or is likely to prevent or lessen, competition substantially." A substantial prevention or lessening of competition results only from mergers that are likely to create, maintain or enhance the ability of the merged entity, unilaterally or in coordination with other firms, to exercise market power.

2.2 In general, when evaluating the competitive effects of a merger, the Bureau's primary concerns are price and output. The Bureau also assesses the effects of the merger on other dimensions of competition, such as quality, product choice, service, innovation and advertising—especially in markets in which there is significant non-price competition. To simplify the discussion, unless otherwise indicated, the term "price" in these guidelines refers to all aspects of firms' actions that affect the interests of buyers. References to an increase in price encompass an increase in the nominal price, but may also refer to a reduction in quality, product choice, service, innovation or other dimensions of competition that buyers value.

2.3 These guidelines describe the analytical framework for assessing market power from the perspective of a seller of a product or service ("product," as defined in section 2(1) of the Act). Market power of sellers is the ability of a firm or group of firms to profitably maintain prices above the competitive level for a significant period of time. The jurisprudence establishes that it is the *ability* to raise prices, not whether a price increase is likely, that is determinative.

2.4 The Bureau also applies this analytical framework to its assessment of the market power of the buyers of a product. Market power of buyers is the ability of a single firm (monopsony power) or a group of firms (oligopsony power)[10] to profitably depress prices paid to sellers (by reducing the purchase of inputs, for example) to a level that is below the competitive price for a significant period of time. Part 9, below, sets out the Bureau's approach to situations of monopsony power.

10 Oligopsony power occurs where market power in the relevant purchasing market is exercised by a coordinated group of buyers. Except where otherwise indicated in these guidelines, the term "monopsony" includes situations of oligopsony.

2.5 The Bureau analyzes competitive effects under two broad headings: unilateral exercise of market power and coordinated exercise of market power. The same merger may involve both a unilateral and a coordinated exercise of market power.

2.6 A unilateral exercise of market power can occur when a merger enables the merged firm to profitably sustain higher prices than those that would exist in the absence of the merger, without relying on competitors' accommodating responses.

2.7 A coordinated exercise of market power can occur when a merger reduces the competitive vigour in a market by, for example, removing a particularly aggressive competitor or otherwise enabling or enhancing the ability of the merged firm to coordinate its behaviour with that of its competitors. In these situations, higher post-merger prices are profitable and sustainable because other competitors in the market have accommodating responses.

2.8 When a merger is not likely to have market power effects, it is generally not possible to demonstrate that the transaction will likely prevent or lessen competition substantially, even though the merger might have implications for other industrial policy objectives that are beyond the scope of the Act.

Lessening of Competition

2.9 A merger may substantially lessen competition when it enables the merged firm, unilaterally or in coordination with other firms, to sustain materially higher prices than would exist in the absence of the merger by diminishing existing competition. This typically occurs with horizontal mergers when there is direct or existing overlap between the operations of the merging firms. This can also occur with non-horizontal mergers, such as those that foreclose rivals from accessing inputs to production.

Prevention of Competition

2.10 Competition may be substantially prevented when a merger enables the merged firm, unilaterally or in coordination with other firms, to sustain materially higher prices than would exist in the absence of the merger by hindering the development of anticipated future competition. This typically occurs when there is no or limited direct overlap between the merging firms' existing businesses, but direct competition between those businesses was expected to develop or increase in the absence of the merger. It may also occur when there is direct overlap between the merging parties' existing business(es) and the competitive effectiveness of one of the merging firms was expected to increase absent the merger, for example, because of the introduction of an improved product.

2.11 In these circumstances, the Bureau examines whether, absent the merger, timely entry or expansion[11] by either of the merging firms would likely occur on a sufficient scale and with sufficient scope to prevent incumbents from exercising market power.[12] "Timely"

11 Throughout these guidelines, the term "entry" also refers to expansion by existing firms.

12 The terms "timely," "likely" and "sufficient" are discussed in further detail in Part 7, below.

means that such entry would have occurred within a reasonable period of time, given the characteristics and dynamics of the market in question.[13] "Likely" refers to the expectation that entry by one of the merging firms would occur. The Bureau also considers whether effective entry by rival firms is likely, and the impact of such rival entry or expansion on prices. "Sufficient" means that, in the absence of the merger, entry by one of the merging firms would have caused prices to materially decrease. It also encompasses a scenario in which the threat of such entry has prevented a material price increase from occurring. The Bureau may examine a merger in terms of prevention of competition when the merger forestalls the entry plans of the acquirer, the target or a potential competitor, or when the merger removes independent control of capacity or an asset that provides or was likely to provide an important source of competitive discipline.

2.12 The following are examples of mergers that may result in a substantial prevention of competition:

- the acquisition of a potential entrant or of a recent entrant that was likely to expand or become a more vigorous competitor;
- an acquisition by the market leader that pre-empts a likely acquisition of the same target by a competitor;
- the acquisition of an existing business that would likely have entered the market in the absence of the merger;
- an acquisition that prevents expansion into new geographic markets;
- an acquisition that prevents the pro-competitive effects associated with new capacity; and
- an acquisition that prevents or limits the introduction of new products.

Substantiality

2.13 When the Bureau assesses whether a merger is likely to prevent or lessen competition substantially, it evaluates whether the merger is likely to provide the merged firm, unilaterally or in coordination with other firms, with the ability to materially influence price. The Bureau considers the likely magnitude and duration of any price increase that is anticipated to follow from the merger. Generally speaking, the prevention or lessening of competition is considered to be "substantial" in two circumstances:

- the price of the relevant product(s) would likely be materially higher in the relevant market than it would be in the absence of the merger ("material price increase"); and
- sufficient new entry would not occur rapidly enough to prevent the material price increase, or to counteract the effects of any such price increase.

13 Since the harm occasioned by a merger that substantially prevents competition may be sustained over the long term, the Bureau may consider longer time frames when assessing the effects of a prevention of competition than it does when assessing post-merger entry (see Part 7, below).

2.14 The Bureau does not consider a numerical threshold for the material price increase.[14] Instead, it bases its conclusions about whether the prevention or lessening of competition is substantial on an assessment of market-specific factors that could have a constraining influence on price following the merger. Additionally, where the merging firms, individually or collectively, have pre-existing market power, smaller impacts on competition resulting from the merger will meet the test of being substantial.

PART 3: ANALYTICAL FRAMEWORK

3.1 In determining whether a merger is likely to create, maintain or enhance market power, the Bureau must examine the competitive effects of the merger. This exercise generally involves defining the relevant markets and assessing the competitive effects of the merger in those markets. Market definition is not necessarily the initial step, or a required step, but generally is undertaken. The same evidence may be relevant and contribute to both the definition of relevant markets and the assessment of competitive effects. Merger review is often an iterative process in which evidence respecting the relevant market and market shares is considered alongside other evidence of competitive effects, with the analysis of each informing and complementing the other.

3.2 The overall objective of market definition in merger analysis is to identify the set of products that customers consider to be substitutes for those produced by the merging firms and the set or sets of buyers that could potentially face increased market power owing to the merger. Market definition, and the measurement of market share and concentration in the relevant market, is not an end in itself. Consistent with this, section 92(2) of the Act precludes the Tribunal from concluding that a merger is likely to prevent or lessen competition substantially solely on the basis of evidence of concentration or market share. The ultimate inquiry is not about market definition, which is merely an analytical tool – one that defies precision and can thus vary in its usefulness – to assist in evaluating effects. Rather, the ultimate inquiry is about whether a merger prevents or lessens competition substantially. That said, when reviewing a merger, market definition generally sets the context for the Bureau's assessment of the likely competitive effects of a merger.

3.3 In some cases, it may be clear that a merger will not create, preserve or enhance market power under any plausible market definition. Alternatively, it may be clear that anti-competitive effects would result under all plausible market definitions. In both such circumstances, the Bureau need not reach a firm conclusion on the precise metes and bounds of the relevant market(s). Additionally, when a completed merger has resulted in a material price increase, the Bureau may rely on evidence of that increase, taking into account other relevant factors. Cases may also arise in which the choice among several plausible market definitions may have a significant impact on

14 A material price increase is distinct from (and will generally be less than) the "significant and non-transitory price increase" that is used to define relevant markets, as described in Part 4, below. What constitutes a "materially greater" price varies with the industry and the context. For purposes of the statement above, materiality includes not only the magnitude and scope but also the sustainability of the price increase.

market share. In such cases, there may be a greater need for evidence regarding likely competitive effects that is not based on market share and concentration. While the Bureau may elect not to define markets in cases in which other reliable evidence of competitive effects is available, the Bureau will normally identify one or more relevant markets in which competition is prevented or lessened, in any merger enforcement action.

3.4 Section 93 of the Act sets out a non-exhaustive list of discretionary factors that the Tribunal may consider when determining whether a merger prevents or lessens competition substantially, or is likely to do so.[15] These factors, which are largely qualitative, may be relevant to the Bureau's assessment of market definition or of the competitive effects of a merger, or both. These factors are discussed in detail in Parts 4 and 6, below.[16]

3.5 The Bureau may also assess competitive effects from a quantitative perspective using various economic tools. The Bureau has discretion in determining which economic and other analytical tools it uses in particular cases. As the economic tools evolve, so will the Bureau's analytical approach.

3.6 The tools the Bureau uses to assess competitive effects also depend heavily on the facts of each case as well as on the availability of qualitative and quantitative evidence. Qualitative evidence may come from documents created by the merging parties in the ordinary course of business or from first-hand observations of the industry by customers or other market participants. Quantitative evidence may be derived from statistical analyses of price, quantity, costs or other data maintained by the merging parties and/or third parties. In all cases, the Bureau assesses the reliability, robustness and probative value of the evidence gathered.

15 Section 93 provides that the Tribunal "may" have regard to the listed factors, while section 93(*h*) permits the Tribunal to consider any other relevant factor. The Bureau does not consider the section 93 factors in a linear fashion. Rather, these factors form part of the analysis of competitive effects, to the extent they are relevant in a particular case. The Bureau encourages parties in their submissions to focus only on the factors and evidence that are relevant to the assessment of the impact of their merger on competition, rather than to treat the section 93 factors as a "checklist" to address in every case.

16 See also Part 7 on barriers to entry (section 93(*d*)) and Part 13 on "failing firm" (section 93(*b*)).

PART 4: MARKET DEFINITION

Overview

4.1 When the Bureau assesses relevant markets, it does so from two perspectives: the product dimension and the geographic dimension. As a general principle, the Bureau does not assume that the merging parties operate in the same relevant market(s), even when there appears to be some overlap between their products and the geographic areas in which they conduct business. In addition, the relevant market(s) being analyzed for competitive effects may not necessarily correspond to the product categories or service areas established by the merging firms or their rivals for operational purposes.

4.2 Market definition is based on substitutability, and focuses on demand responses to changes in relative prices after the merger. The ability of a firm or group of firms to raise prices without losing sufficient sales to make the price increase unprofitable ultimately depends on buyers' willingness to pay the higher price.[17] The ability of competitive suppliers to respond to a price increase is also important when assessing the potential for the exercise of market power, but the Bureau examines such responses later in the analysis—either when identifying the participants in the relevant market or when examining entry into the relevant market.

4.3 Conceptually, a relevant market is defined as the smallest group of products, including at least one product of the merging parties, and the smallest geographic area, in which a sole profit-maximizing seller (a "hypothetical monopolist") would impose and sustain a small but significant and non-transitory increase in price ("SSNIP") above levels that would likely exist in the absence of the merger.[18] In most cases, the Bureau considers a five percent price increase to be significant and a one-year period to be non-transitory. Market characteristics may support using a different price increase or time period.

4.4 The market definition analysis begins by postulating a candidate market for each product of the merging parties. For each candidate market, the analysis proceeds by determining whether a hypothetical monopolist controlling the group of products in that candidate market would profitably impose a SSNIP, assuming the terms of sale of all other products remained constant.[19] If the price increase would likely cause buyers to switch their purchases to other products in sufficient quantity to render the price increase unprofitable, the postulated candidate market is not the relevant market, and the next-best substitute is added to the candidate market.[20] The analysis

17 The Bureau typically considers product and geographic substitutes that are included in a single relevant market to be "acceptable" within the meaning of section 93(*c*) of the Act. When products within a relevant market are differentiated, some may be closer substitutes than others.

18 A market may consist of a single homogeneous product or a group of differentiated products.

19 Changes in terms of sale of other products in response to the merger are accounted for in the analysis of competitive effects and entry.

20 The next-best substitute is the product that would account for the greatest diversion in demand by buyers

then repeats by determining whether a hypothetical monopolist controlling the set of products in the expanded candidate market would profitably impose a SSNIP. This process continues until the point at which the hypothetical monopolist would impose and sustain the price increase for at least one product of the merging parties in the candidate market. In general, the smallest set of products in which the price increase can be sustained is defined as the relevant product market.

4.5 The same general approach applies to assessing the geographic scope of the market. In this case, an initial candidate market is proposed for each location where a merging party produces or sells the relevant products. As above, if buyers are likely to switch their purchases to sellers in more distant locations in sufficient quantities to render a SSNIP by a hypothetical monopolist unprofitable, the location that is the next-best substitute is added to the candidate market. This process continues until the smallest set of areas over which a hypothetical monopolist would impose and sustain the price increase is identified.

4.6 The base price used to postulate a price increase is typically the prevailing price in the relevant market. The Bureau may elect not to use the prevailing price when market conditions (absent the merger) would likely result in a lower or higher price in the future.[21]

4.7 In general, the base price used to postulate a price increase is whatever is ordinarily considered to be the price of the product in the sector of the industry (e.g., manufacturing, wholesale, retail) being examined.

4.8 In some circumstances, sellers may identify and charge different prices to various targeted sets of buyers ("price discrimination"). Sellers are able to price discriminate when targeted buyers cannot effectively switch to other products or geographic locations, and cannot engage in arbitrage with other buyers by taking advantage of price differences. When price discrimination is feasible, it may be appropriate to define relevant markets with reference to the characteristics of the buyers who purchase the product (assuming they can be delineated) or to the particular locations of the targeted buyers.

4.9 The factors the Bureau considers when analyzing the product and geographic dimensions of market definition are set out below.

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in response to the postulated price increase, assuming that the product is available in unlimited quantities at constant prices.

21 When the evidence suggests a change in the future price (absent the merger) can be predicted with confidence, the Bureau may delineate markets based on the likely future price, even when that future price cannot be predicted precisely.

Product Market Definition

4.10 For the purpose of product market definition, what matters is not the identity of sellers, but the characteristics of the products and buyers' ability or willingness to switch from one product to another in response to changes in relative prices.[22] A relevant product market consists of a given product of the merging parties and all substitutes required for a SSNIP to be profitable.

4.11 When detailed data on the prices and quantities of the relevant products and their substitutes are available, statistical measures may be used to define relevant product markets. Demand elasticities indicate how buyers change their consumption of a product in response to changes in the product's price (own-price elasticity) or in response to changes in the price of another identified product (cross-price elasticity). While cross-price elasticities do not in themselves directly measure the ability of a firm to profitably raise prices, they are particularly useful when determining whether differentiated products are substitutes for one another and whether such products are part of the same relevant market.

4.12 Whether or not reliable statistical evidence on demand elasticities is available, the Bureau considers factors that provide evidence of substitutability, including evidence from market participants and the functional indicators highlighted below.

4.13 The views, strategies and behaviour of buyers are often reliable indicators of whether buyers would likely switch to other products in response to a SSNIP. For example, the Bureau examines what buyers have done in the past and what they are likely to do in the future as options become available, for instance, through advances in technology. Information from industry surveys and industry participants, such as competitors and manufacturers of the relevant product, is also taken into account. This information advances the analysis by providing details on historical developments (including the past behaviour of the merging parties and their rivals) and likely future developments in the industry. Pre-existing documents prepared by the merging parties in the ordinary course of business can also be very useful in this regard.

4.14 Various functional indicators help to determine what products are considered substitutes, including end use, physical and technical characteristics, price relationships and relative price levels, as well as buyer switching costs, as discussed below. Buyers may not view products purchased for similar end uses as substitutes. Therefore, functional interchangeability is not sufficient to warrant inclusion of two products in the same relevant market. In general, when buyers place a high value on the actual or perceived unique physical or technical characteristics of a product (including warranties, post-sales service and order turnaround time), it may be necessary to define distinct relevant markets based on these characteristics.

22 In this context, switching refers to "economic substitutability," defined as a change in consumption patterns in response to a price change, holding all other factors constant.

4.15 Switching costs may discourage a sufficient number of buyers from purchasing products that are functionally interchangeable, thereby allowing a hypothetical monopolist to impose a SSNIP. Products are not included in the same relevant market when costs that must be incurred by buyers are sufficient to render switching unlikely in response to a SSNIP. Examples include costs for buyers to retool, re-package, undertake product testing, adapt marketing materials and strategies, terminate a supply contract, learn new procedures or convert essential equipment. Other costs include the expense (and risk) buyers must incur when a product fails to satisfy expectations, which may damage a buyer's reputation as a reseller, or require the shutdown of a production line.

4.16 A relevant market may consist of a group of diverse products that are not themselves substitutes for each other. This occurs when a sole profit-maximizing seller would increase the price of the group of products because a sufficient number of buyers would not respond to the price increase by purchasing the various components separately from different sellers. This reaction may occur when there are significant transaction costs associated with using a number of sellers, including transportation costs and the time required to negotiate with multiple sellers. In these circumstances, the Bureau's examination includes an assessment of these transaction costs, as well as buyers' propensity to purchase a number of products from a single seller and the extent to which they have in the past broken up their purchases of a group of products in response to relative price changes.

Geographic Market Definition

4.17 For the purpose of geographic market definition, what matters is not the identity of the sellers, but buyers' ability or willingness to switch their purchases in sufficient quantity from suppliers in one location to suppliers in another, in response to changes in relative prices. A relevant geographic market consists of all supply points that would have to be included for a SSNIP to be profitable, assuming that there is no price discrimination (as described in paragraph 4.8 above). When price discrimination is present (and buyers and third parties are unable to arbitrage between low and high price areas), geographic markets are defined according to the location of each targeted group of buyers.

4.18 When defining the boundaries of geographic markets, the Bureau generally relies on evidence of substitutability, including evidence from market participants and the functional indicators described below and, when available, empirical analysis.

4.19 The views, strategies and behaviour of buyers in a given geographic area are often reliable indicators of whether buyers would likely switch their purchases to sellers located in other geographic areas in the event of a SSNIP. For example, the Bureau examines what buyers have done in the past and what they are likely to do in the future as options become available through, for instance, advances in technology. Industry surveys and the views, strategies and behaviour of industry participants also inform the analysis by providing information on how buyers of a relevant product in

one geographic area respond or have responded to changes in the price, packaging or servicing of the relevant product in another geographic area. The extent to which merging parties and other sellers take distant sellers into account in their business plans, marketing strategies and other documentation can also be a useful indicator for geographic market definition.

4.20 Various functional indicators can assist in determining whether geographic areas are considered to be substitutes, including particular characteristics of the product, switching costs, transportation costs, price relationships and relative price levels, shipment patterns and foreign competition.

4.21 Several price and non-price factors could affect buyers' ability or willingness to consider distant options. Non-price factors include the fragility or perishability of the relevant product, convenience, frequency of delivery, and the reliability of service or delivery.

4.22 As with product market definition, high switching costs may discourage buyers from substituting between geographic areas. In addition, transportation costs play a central role in defining the geographic scope of relevant markets because they directly affect price. For example, when the price of the relevant product in a distant area plus the cost of transporting it to a candidate geographic market exceeds the price in the candidate market including a SSNIP, the relevant market does not generally include the products of sellers located in the distant area.[23]

4.23 Evidence that prices in a distant area have historically either exceeded or been lower than prices in the candidate geographic market by more than the transportation costs may indicate that the two areas are in separate relevant markets, for reasons that go beyond transportation costs.[24] However, before reaching this conclusion, the Bureau determines whether a SSNIP in the candidate geographic market may change the pricing differential to the point that distant sellers may be able to constrain a SSNIP.

4.24 Significant shipments of the relevant product from a distant area into an area in which a price increase is being postulated may suggest that the distant area is in the relevant geographic market. However, pre-merger shipment patterns do not, by themselves, establish the constraining effect of distant sellers and may be insufficient to justify broadening the geographic market. The Bureau undertakes further analysis to determine whether shipments from the distant area would make the SSNIP unprofitable.

23 However, distant firms that have excess capacity may in certain circumstances be willing to ship to another market, even when the net price received is less than the price in their own market.

24 For example, the existence of tariffs or other trade-related factors may create price differentials.

Foreign Competition

4.25 Buyers' willingness or ability to turn to foreign sellers may be affected by buyers' tastes and preferences, and by border-related considerations. Buyers may be less willing or able to switch to foreign substitutes when faced with factors such as exchange rate risk, local licensing and product approval regulations, industry-imposed standards, or initiatives to "buy local" owing to difficulties or uncertainties when crossing the border. Conversely, buyers may be more willing to turn to foreign substitutes when they have ample information about foreign products and how to source them, when foreign sellers or their products have already been placed on approved sourcing lists, or when technology licensing agreements, strategic alliances or other affiliations exist between domestic buyers and foreign firms.

4.26 When it is clear that the sales area of the merging parties and that of foreign sellers both belong in the relevant market (because sufficient buyers would be willing to respond to a SSNIP by turning to these sellers), the boundaries of the market are expanded beyond Canada to include the locations of foreign sellers.[25]

Delineating Geographic Boundaries

4.27 The geographic locations of buyers and sellers are relevant to delineating boundaries, particularly when markets are local or regional in nature. The underlying assumption is that profit-maximizing firms make decisions about where to locate based on the density of their buyer base and try to avoid cannibalizing their own sales when they have two or more locations in close proximity. In this way, demand responses are still key determinants of market boundaries. The Bureau may use spatial competition analysis to help delineate the boundaries of localized geographic markets.[26] The methodology for applying spatial competition analysis depends on the characteristics of the industry and the market under consideration.

4.28 It is important to emphasize that market boundaries in respect of either product or geographic markets are not precise in many instances. In addition, constraints on a merged firm's pricing behaviour can come from both inside and outside the relevant market as defined. These issues are discussed further below.

25 See section 93(*a*) of the Act. In addition to its relevance to market definition, the extent to which foreign products or foreign competitors provide or are likely to provide effective competition is evaluated in the context of the analysis described in Parts 5, 6 and 7, below.

26 When using spatial competition analysis, the Bureau identifies all locations (such as stores, branches, hubs and outlets) of both the merging parties and their product market competitors, to determine how firms' physical locations are situated relative to one another.

PART 5: MARKET SHARES AND CONCENTRATION

5.1 When engaged in a market definition exercise, the Bureau identifies participants in a relevant market to determine market shares and concentration levels. Such participants include (1) current sellers of the relevant products in the relevant geographic markets and (2) sellers that would begin selling the relevant products in the relevant geographic markets if the price were to rise by a SSNIP. In the latter case, the Bureau considers a firm to be a participant in a relevant market when it does not require significant sunk investments to enter or exit the market and would be able to rapidly and profitably divert existing sales or capacity to begin supplying the market in response to a SSNIP (a "supply response").[27] The Bureau considers situations in which competitive sellers would need to incur significant sunk investments, or would not be able to respond rapidly, in the analysis of entry (see Part 7, below).

Calculating Market Shares

5.2 The Bureau calculates market shares for all sellers who have been identified as participants in the relevant market.

5.3 Market shares can be measured in various ways, for example in terms of dollar sales, unit sales, capacity or, in certain natural resource industries, reserves.[28] When calculating market shares, the Bureau uses the best indicators of sellers' future competitive significance. In cases in which products are undifferentiated or homogeneous (i.e., have no unique physical characteristics or perceived attributes), and firms are all operating at full capacity, market shares based on dollar sales, unit sales and capacity should yield similar results. In such situations, the basis of measurement depends largely on the availability of data.

5.4 When firms producing homogeneous products have excess capacity, market shares based on capacity may best reflect a firm's relative market position and competitive influence in the market. Excess capacity may be less relevant to calculating market shares when it is clear that some of a firm's unused capacity does not have a constraining influence in the relevant market (e.g., because the capacity is high-cost capacity or the firm is not effective in marketing its product). When a regulated or historical incumbent firm is facing deregulation or enhanced competition, shares based on new customer acquisitions may be a better indicator of competitive vigor than are shares based on existing customers.

5.5 As the level of product differentiation in a relevant market increases, market shares calculated on the basis of dollar sales, unit sales and capacity increasingly differ. For

27 When merging firms compete across several markets and face the same competitors in each, the Bureau may use an aggregate description of these markets simply as a matter of convenience.

28 Throughout these guidelines, the term "capacity" means the ability to *produce* or *sell* a product. Capacity to sell refers to marketing and distribution capabilities, such as a sales force, distribution networks and other related infrastructure.

example, if most of the excess capacity in the relevant market were held by discount sellers in a highly differentiated market, the market shares of these sellers calculated on the basis of total capacity would be greater than if they were calculated on the basis of actual unit or dollar sales. In this case, market shares based on total capacity would be a misleading indicator of the relative market position of the discount sellers.[29] In such circumstances, dollar sales may be the better indicator of the size of the total market and of the relative positions of individual firms. Because unit sales may also provide important information about relative market positions, the Bureau often requests both dollar sales and unit sales data from the merging parties and other sellers.[30]

5.6 The Bureau generally includes the total output or total capacity of current sellers located within the relevant market in the calculation of the total size of the market and the shares of individual competitors. However, when a significant proportion of output or capacity is committed to business outside the relevant market and is not likely to be available to the relevant market in response to a SSNIP, the Bureau generally does not include this output or capacity in its calculations.

5.7 For firms that participate in the market through a supply response, the Bureau only includes in the market share calculations the output or capacity that would likely become available to the relevant market without incurring significant sunk investments.

Market Share and Concentration Thresholds

5.8 Consistent with section 92(2) of the Act, information that demonstrates that market share or concentration is likely to be high is not, in and of itself, sufficient to justify a conclusion that a merger is likely to prevent or lessen competition substantially. However, information about market share and concentration can inform the analysis of competitive effects when it reflects the market position of the merged firm relative to that of its rivals. In the absence of high post-merger market share and concentration, effective competition in the relevant market is generally likely to constrain the creation, maintenance or enhancement of market power by reason of the merger.

5.9 The Bureau has established the following thresholds to identify and distinguish mergers that are unlikely to have anti-competitive consequences from those that require a more detailed analysis:

29 Similar results occur as the level of differentiation between sellers increases. For instance, two firms may operate with the same capacity (e.g., number of trucks) but have significantly different revenue streams (because one firm may have many buyers along a truck route, i.e., route density). In such cases, market shares based on capacity and revenues provide different information about relative market positions.

30 While publicly available or readily observable information may be useful for estimating market shares, when credible and possible, the Bureau relies on transaction-level data from individual market participants as the most accurate measure of market shares.

- The Commissioner generally will not challenge a merger on the basis of a concern related to the unilateral exercise of market power when the post-merger market share of the merged firm would be less than 35 percent.
- The Commissioner generally will not challenge a merger on the basis of a concern related to a coordinated exercise of market power when
  - the post-merger market share accounted for by the four largest firms in the market (known as the four-firm concentration ratio or CR4) would be less than 65 percent; or
  - the post-merger market share of the merged firm would be less than 10 percent.

5.10 Mergers that give rise to market shares or concentration that exceed these thresholds are not necessarily anti-competitive. Under these circumstances, the Bureau examines various factors to determine whether such mergers would likely create, maintain or enhance market power, and thereby prevent or lessen competition substantially.

5.11 When other information suggests that current market shares do not reflect the competitive role of one of the merging parties relative to its rivals, the Bureau considers this information when determining whether a merger is likely to prevent or lessen competition substantially. In all cases, examining market shares and concentration is only one part of the Bureau's analysis of competitive effects.

5.12 In addition to the level of market shares or concentration in the relevant market, the Bureau examines the distribution of market shares across competitors and the extent to which market shares have changed or remained the same over a significant period of time.

5.13 All else being equal, the likelihood that a number of firms may be able to bring about a price increase through coordinated behaviour increases as the level of concentration in a market rises and as the number of firms declines.[31] In contrast, coordinated behaviour becomes increasingly difficult as the number or size of firms that have the ability to increase output increases.

5.14 When evaluating market share information, the Bureau considers the nature of the market and the impact of forthcoming change and innovation on the stability of existing market shares.[32] While a small incremental increase in concentration following a merger may suggest that the merger is not likely to have a significant impact on the

31 In addition to the CR4, the Bureau may examine changes in the Herfindahl-Hirschman Index ("HHI") (calculated by summing the squares of the individual market shares of all market participants) to observe the relative change in concentration before and after a merger. While the change in HHIs may provide useful information about changes in the market structure, the Bureau does not use HHI levels to delineate any safe harbour threshold.

32 For example, historical or existing market shares may be less relevant in bidding markets in which rapid fluctuations in market shares are more common. In such cases, the analysis focuses on the likely future effectiveness of independent sources of competition, regardless of their current shares. Bidding and bargaining markets are discussed in additional detail under "Unilateral Effects" in Part 6.

market, the Bureau assesses the growth expectations for one or both of the merging parties to determine whether the merger may eliminate an important competitive force.

PART 6: ANTI-COMPETITIVE EFFECTS

6.1 As noted in Part 3, above, the Bureau may consider market definition and competitive effects concurrently in a dynamic and iterative analytical process. When the market share and concentration thresholds listed in paragraph 5.9, above, are exceeded or when other information suggests that a merger may prevent or lessen competition substantially, the Bureau's assessment of competitive effects based on quantitative analysis and the application of relevant factors, including the factors listed in section 93 of the Act, takes on greater importance. Such an assessment falls under the broad categories of unilateral effects and coordinated effects, as described below.

6.2 When it is clear that the level of effective competition that is to remain in the relevant market is not likely to be reduced as a result of the merger, this alone generally justifies a conclusion not to challenge the merger.

6.3 To determine the ability and effectiveness of remaining competitors to constrain an exercise of market power by the merged firm, the Bureau examines existing forms of rivalry, such as discounting and other pricing strategies, distribution and marketing methods, product and package positioning, and service offerings. Whether the market shares of firms are stable or fluctuate over time is also relevant, as is the extent to which product differentiation affects the degree of direct competition among firms. Further, the Bureau assesses whether competitors are likely to remain as vigorous and effective as they were prior to the merger.

6.4 The extent and quality of excess capacity held by merging and non-merging firms provides useful information about whether the merger could result in the exercise of market power. Excess capacity held by rivals to the merged firm improves their ability to expand output should the merged firm attempt to exercise market power. On the other hand, when the merged firm holds a significant share of excess capacity in the relevant market, this may discourage rivals from expanding.

6.5 The Bureau assesses the competitive attributes of the target business to determine whether the merger will likely result in the removal of a vigorous and effective competitor.[33] In addition to the forms of rivalry discussed above, the Bureau's assessment includes consideration of whether one of the merging parties:

33 See section 93(*f*) of the Act. A firm that is a vigorous and effective competitor often plays an important role in pressuring other firms to compete more intensely with respect to existing products or in the development of new products. A firm does not have to be among the larger competitors in a market in order to be a vigorous and effective competitor. Small firms can exercise an influence on competition that is disproportionate to their size. Mavericks (described in "Coordinated Effects," in Part 6, below) are one type of vigorous and effective competitor.

- has a history of not following price increases or market stabilizing initiatives by competitors, or of leading price reductions;
- provides unique service, warranty or other terms to the market;
- has recently expanded capacity or has plans to do so;
- has recently made gains in market share or is in a position to do so; or
- has recently acquired intellectual property rights or other inputs, or has developed product features that enhance its ability to compete in the market, or will soon do so.

6.6 While the removal of a vigorous and effective competitor through a merger is likely to prevent or lessen competition to some degree, it may not, in itself, provide a sufficient basis for a decision to challenge the merger. Additionally, when a firm removed through a merger is not a vigorous or effective competitor (e.g., owing to financial distress, or declining technologies or markets), this fact is relevant to, but not determinative of, a decision not to challenge a merger.

6.7 The Bureau evaluates the general nature and extent of change and innovation in a market.[34] In addition to assessing the competitive impact of technological developments in products and processes, the Bureau examines change and innovation in relation to distribution, service, sales, marketing, packaging, buyer tastes, purchase patterns, firm structure, the regulatory environment and the economy as a whole.

6.8 The pressures exerted by change and innovation on competitors in a market (including the merging parties) may be such that a material price increase is unlikely to be sustainable, especially when technology or a merger reduces barriers to entry or stimulates or accelerates the change or innovation in question. Such pressures may have important implications for efficient markets in the medium to long term.

6.9 A merger may facilitate the exercise of market power by impeding the process of change and innovation. For example, when a merger eliminates an innovative firm that presents a serious threat to incumbents, the merger may hinder or delay the introduction of new products, processes, marketing approaches, and aggressive research and development initiatives or business methods.

Unilateral Effects

6.10 By placing pricing and supply decisions under common control, a merger can create an incentive to increase price and restrict supply or limit other dimensions of competition. A unilateral exercise of market power occurs when the merged firm can profitably sustain a material price increase without effective discipline from competitive responses by rivals.

6.11 When buyers can choose from among many sellers offering comparable products, a firm's ability to profitably increase its price is limited by buyers diverting their

34 See section 93(*g*) of the Act.

purchases to substitute products in response to the price increase. When two firms in a market merge and the price of one firm's product(s) rises, some demand may be diverted to product(s) of the firm's merger partner, thereby increasing the overall profitability of the price increase and providing the impetus to raise the price. As such, the elimination of competition between firms as a result of a merger may lessen competition substantially.

6.12 Unilateral effects can occur in various market environments, defined by the primary characteristics that distinguish the firms within those markets and determine the nature of their competition. Three types of market environment are described below.

Firms in Differentiated Product Industries

6.13 In markets in which products are differentiated, a merger may create, enhance or maintain the ability of the merged firm to exercise market power unilaterally when the product offerings of the merging parties are close substitutes for one another. In such circumstances, the Bureau assesses how the merger may change the pricing incentives of the individual firms.

6.14 Any firm considering increasing the prices for its products faces a trade-off between higher profits on the sales that it continues to make following the price increase and the profits that it loses on sales that it no longer makes following the price increase, as buyers switch to other firms and/or other products. Any sales that were previously lost to the firm's merging partner will be captured by the merged firm ("diverted sales"). Thus, the incentives to raise prices after the merger are greater the more closely the products of the merging firms compete with each other, and the larger the profit margins on these diverted sales.

6.15 The closeness of competition between the merging firms' products may be measured by the diversion ratio between them.[35] The value of the diverted sales from one merging firm depends on the volume of diverted sales and the profit margin on the diverted sales. The greater the value of the diverted sales, the greater the incentive the merged firm has to raise prices.

6.16 The incentive to raise prices following the merger will typically be greater when the products of the merging firms are close substitutes for a significant number[36] of buyers, when the merger removes a vigorous and effective competitor from the market, or when buyers are not very sensitive to price increases.[37] These are not the only circumstances, however, when the Bureau may be concerned with potential unilateral effects post-merger.

35 The diversion ratio between firm A's product and firm B's product is equal to the fraction of sales lost by firm A to firm B when firm A raises the price of its product. Similarly, the diversion ratio between firm B's product and firm A's product is equal to the fraction of sales lost by firm B to firm A when firm B raises the price of its product. The diversion ratios between firms A and B need not be symmetric.

36 A significant number" in this context need not approach a majority.

37 Buyer sensitivity to price increases may but need not be measured by the own-price elasticity of demand.

6.17 Even when the merging firms are found to have an incentive to increase price after the merger, the likelihood of the merger preventing or lessening competition substantially also depends on the responses of buyers and rival firms. In addition to considering the value of sales currently diverted to rivals, the Bureau evaluates the likely competitive responses of rivals, including whether rivals in the market are likely to expand production, reposition their products or extend their product line to discipline unilateral market power that would otherwise occur as a result of the merger.[38] The Bureau also considers existing sellers that may only occupy a particular niche within the relevant market and whether they provide an alternative for a sufficient number of buyers. In addition, the likelihood and likely impact of entry is considered.

6.18 When assessing the extent of competition between the products of the merging firms, the Bureau examines, among other possible factors, past buyer-switching behaviour in response to changes in relative prices, information based on buyer preference surveys, win-loss records, and estimates of own-price and cross-price elasticities.[39]

Firms in Homogeneous Product Industries

6.19 A post-merger price increase may be profitable if the merger were to remove a seller to whom buyers would otherwise turn in response to a price increase. In markets in which products are relatively undifferentiated (that is, they are homogeneous), such a price increase is more likely to be profitable

- the greater the share of the relevant market the merged firm accounts for;
- the lower the margin on the output that the merged firm withholds from the market to raise price;
- the less sensitive buyers are to price increases; and
- the smaller the response of other sellers offering close substitutes.

6.20 The response of other sellers will be smaller when they have insufficient capacity to increase sales to replace the output withheld by the merged firm post-merger, or substantial amounts of capacity are committed to other buyers under long-term contracts, and capacity cannot be expanded quickly and at relatively low cost. Therefore, the Bureau examines, among other factors, whether capacity constraints limit the effectiveness of remaining sellers by impeding their ability to make their products available in sufficient quantities to counter an exercise of market power by the merged firm.

Bidding and Bargaining Markets

6.21 In some markets, sellers may interact with buyers through bidding or bargaining for the right to supply. Buyers may negotiate with multiple sellers as a means of using one seller to obtain a better price from another seller. Such interactions may take the form of a pure auction or involve repeated rounds of negotiation with a select group

38 This requires a determination of whether expansion, repositioning or product line extension will likely be deterred by risk, sunk costs or other entry barriers.

39 Refer to definitions of own-price and cross-price elasticity in paragraph 4.11, above.

of sellers. A merger between two sellers will prevent buyers from playing these two sellers off against each other to obtain a better price.

6.22 The extent to which this loss of competition will affect the price paid by the buyer depends on how close the merging firms are to each other relative to other bidders and potential suppliers in meeting the buyer's requirements. When there are many bidders or potential suppliers that are equally or similarly situated as the merging parties, a merger involving two sellers is unlikely to prevent or lessen competition substantially.[40]

Coordinated Effects

6.23 A merger may prevent or lessen competition substantially when it facilitates or encourages coordinated behaviour among firms after the merger. The Bureau's analysis of these coordinated effects entails determining how the merger is likely to change the competitive dynamic in the market such that coordination is substantially more likely or effective. A lessening or prevention of competition may result from coordinated behaviour even when the coordination does not involve all the firms in the market.

6.24 Coordination involves interaction by a group of firms (including the merged firm) that is profitable for each firm because of each firm's accommodating reactions to the conduct of the others. Coordinated behaviour may relate to price, service levels, allocation of customers or territories, or any other dimension of competition.

6.25 Coordinated behaviour may involve tacit understandings that are not explicitly negotiated or communicated among firms. Tacit understandings arise from mutual yet independent recognition that firms can, under certain market conditions, benefit from competing less aggressively with one another. Coordinated behaviour may also involve express agreements among firms to compete less vigorously or to refrain from competing. Such agreements may raise concerns under the conspiracy and bid-rigging provisions of the Act.

6.26 Coordinated behaviour is likely to be sustainable only in the following circumstances:

- when firms are able to
  - individually recognize mutually beneficial terms of coordination;
  - monitor one another's conduct and detect deviations from the terms of coordination; and
  - respond to any deviations from the terms of coordination through credible deterrent mechanisms;[41] and

40 As noted in footnote 32 above, historical or existing market shares may be less relevant in bidding markets.

41 These responses, typically known as punishments, may take the form of lowering prices in the relevant market or in other markets.

- when coordination will not be threatened by external factors, such as the reactions of existing and potential competitors not part of the coordinating group of firms or the reactions of buyers.

6.27 Competition is likely to be prevented or lessened substantially when a merger materially increases the likelihood of coordinated behaviour when none existed before, or materially increases the extent or effectiveness of coordination beyond that which already exists. When making this assessment, the Bureau considers a number of factors, including the presence of factors necessary for successful coordination and those that are conducive to coordination. The mere presence of such factors, however, is not sufficient to conclude that there are competition concerns. Rather, at issue is whether the merger impacts these factors in such a way that makes coordination or more effective coordination more likely.

Market Concentration and Entry Barriers

6.28 Market power typically arises in markets characterized by concentration and high barriers to entry. Market concentration is generally a necessary but not sufficient condition for a merger to prevent or lessen competition substantially through coordinated effects. Firms in a concentrated market typically find it easier and less costly to engage in coordinated behaviour because it is easier for members of a small group of firms to recognize terms of coordination, and to monitor one another's conduct and detect and respond to deviations. Barriers to entry are also relevant, since coordinated behaviour among competitors in a concentrated market would unlikely be sustainable if raising prices were to lead to significant effective entry.

Indicia Suggesting that Market Conditions are Conducive to Coordination

6.29 In its analysis of competitive effects, the Bureau examines whether market conditions would likely allow coordinated behaviour to be sustainable after the merger, with reference to the criteria outlined in paragraph 6.26, above. While the presence of certain market conditions (often referred to as facilitating factors) may suggest the ability of firms to overcome impediments to coordinated behaviour, neither the absence nor the presence of any single factor or group of factors determines whether competition is likely to be prevented or lessened substantially.

6.30 When examining whether firms are likely able to independently recognize mutually beneficial terms of coordination, the Bureau considers, among other factors, the degree of product differentiation and cost symmetries among firms. Recognizing terms of coordination that all firms find profitable is easier when products are less differentiated and when firms have similar cost structures. Complex products and differences in product offerings and cost structure tend to make it more difficult for firms to reach profitable terms of coordination. Similarly, markets with rapid and frequent product innovations, or that are in a period of rapid growth, are less conducive to coordinated behaviour.

6.31 Profit-maximizing firms have an incentive to deviate from coordinated behaviour when the expected profits from deviating are greater than the expected profits from

engaging in coordination. Therefore, when evaluating whether coordination is likely, the Bureau considers whether certain firms have stronger incentives to deviate as well as factors that could affect incentives to deviate, such as the size and frequency of transactions. When individual transactions are large and infrequent relative to total market demand, deviations from coordinated behaviour are more profitable, making effective coordinated behaviour less likely. Additionally, when individual transactions are large relative to a single firm's total output, this will increase that firm's incentive to deviate from coordinated behaviour.[42]

6.32 The Bureau also considers whether firms can monitor and detect deviations from coordinated behaviour. When so doing, the Bureau evaluates the degree of market transparency that exists. When information about prices, rival firms and market conditions is readily available to market participants, it is easier for rivals to monitor one another's behaviour, which in turn makes effective coordination more likely. The existence of industry organizations that facilitate communication and dissemination of information among market participants may also make it easier for firms to coordinate their behaviour. A complex, multi-stage procurement process may affect the ability of firms to detect deviations from coordinated agreements. Also relevant to the analysis is the stability of firms' underlying costs, as well as the predictability of demand. When costs fluctuate, it may be difficult to detect whether a price change represents a deviation from coordinated behaviour or whether it is a response to a change in cost conditions, which, in turn, makes effective coordination less likely. It may similarly be difficult to detect whether a price change represents a deviation from coordinated behaviour when demand fluctuates unexpectedly.

6.33 The Bureau's evaluation of whether firms can impose credible punishments includes assessing the degree of multi-market exposure among firms and of excess capacity.[43] When firms participate in multiple geographic or product markets, there are greater opportunities for them to discourage deviation from coordinated behaviour because there is broader scope for punishing deviations. Similarly, excess capacity held by firms within the coordinating group can allow such firms to oversupply the market when they detect deviations from the coordinated price, thereby discouraging deviations and making coordination more likely. However, excess capacity may also provide firms with an incentive and an ability to deviate from coordinated behaviour by selling products at lower prices. This could, in turn, make coordinated behaviour less likely. It is therefore important to consider which firms, if any, hold excess capacity as well as their individual economic incentives. A firm may also adopt pricing policies, such

42 These examples assume that coordination does not involve a customer allocation scheme.

43 This includes information about levels of service, innovation initiatives, product quality, product choice and levels of advertising. Market transparency is typically increased by posted pricing, circulation of price books, product, service or packaging standardization, exchanges of information regarding matters such as pricing, output, innovation, bids won and lost, and advertising levels, through a trade association, trade publication or otherwise, public disclosure of this information by buyers or through government sources, and "meet the competition" or "most favoured customer" clauses in contracts.

as most-favoured customer clauses, that commit it to following a low-pricing strategy when other firms reduce their prices.

6.34 A history of collusion or coordination in the market is also relevant to the Bureau's analysis, because previous and sustained collusive or coordinated behaviour indicates that firms have successfully overcome the hurdles to effective coordinated behaviour in the past.

Impact of the Merger on Coordinated Behaviour

6.35 When assessing whether a merger increases the likelihood of coordination, the Bureau considers whether the merger changes the competitive dynamic in a market so as to make coordinated behaviour among firms more likely or effective. A merger that changes the competitive dynamic among firms may lead to coordinated behaviour when none existed prior to the merger, or may materially increase the extent or effectiveness of coordination beyond that which already exists in a market. The Bureau determines whether market conditions are conducive to coordination before the merger and whether the merger is likely to increase the likelihood of coordination. The Bureau also identifies the constraints on coordinated behaviour that existed before the merger to determine whether the merger reduces or eliminates those constraints.

6.36 In highly concentrated markets, effective coordination may be constrained by the number of firms that exist before the merger. A merger could remove this constraint by reducing the number of rivals to the point that the profitability of coordination makes coordination a more achievable strategy than it was prior to the merger.

6.37 When firms differ greatly from one another, effective coordination may be constrained by their inability to behave in a way that each finds profitable. When the effect of the merger is to reduce or eliminate asymmetries between the merged firm and its key rivals, firms may find it easier to coordinate their behaviour in a way that is profitable for each coordinating firm after the merger. Conversely, a merger may increase asymmetries between the merged firm and its rivals, thereby making coordinated behaviour less profitable and therefore less likely.

6.38 Effective coordination may be constrained before the merger by the activities of a particularly vigorous and effective competitor (a "maverick"). A maverick is a firm that plays a disruptive role and provides a stimulus to competition in the market. An acquisition of a maverick may remove this constraint on coordination and, as such, increase the likelihood that coordinated behaviour will be effective.

6.39 Alternatively, a merger may not remove a maverick but may instead inhibit a maverick's ability to expand or enter, or otherwise marginalize its competitive significance, thereby increasing the likelihood of effective coordination.

PART 7: ENTRY

7.1 A key component of the Bureau's analysis of competitive effects is whether timely entry[44] by potential competitors would likely occur on a sufficient scale and with sufficient scope to constrain a material price increase in the relevant market. In the absence of impediments to entry, a merged firm's attempt to exercise market power, either unilaterally or through coordinated behaviour with its rivals, is likely to be thwarted by entry of firms that

- are already in the relevant market and can profitably expand production or sales;
- are not in the relevant market but operate in other product or geographic markets and can profitably switch production or sales into the relevant market; or
- can profitably begin production or sales into the relevant market de novo.

Conditions of Entry

7.2 Entry is only effective in constraining the exercise of market power when it is viable. When entry is likely, timely and sufficient in scale and scope, an attempt to increase prices is not likely to be sustainable as buyers of the product in question are able to turn to the new entrant as an alternative source of supply.

Timeliness

7.3 The Bureau's assessment of the conditions of entry involves determining the time that it would take for a potential entrant to become an effective competitor in response to a material price increase that is anticipated to arise as a result of the merger. In general, the longer it takes for potential entrants to become effective competitors, the less likely it is that incumbent firms will be deterred from exercising market power. For that deterrent effect to occur, entrants must react and have an impact on price in a reasonable period of time. In the Bureau's analysis, the beneficial effects of entry on prices in this market must occur quickly enough to deter or counteract any material price increase owing to the merger, such that competition is not likely to be substantially harmed.

Likelihood

7.4 When determining whether future entry is likely to occur, the Bureau generally starts by assessing firms that appear to have an entry advantage. While other potential sources of competition may also be relevant, typically the most important sources of potential competition are the following:

- fringe firms already in the market;
- firms that sell the relevant product in adjacent geographic areas;

44 As noted previously, throughout these guidelines, the term "entry" also refers to expansion by existing firms. The same factors that constrain new entrants also often constrain significant expansion by fringe firms, even though in many cases expansion costs for existing firms may be lower than entry costs for a new entrant.

- firms that produce products with machinery or technology that is similar to that used to produce the relevant product;
- firms that sell in related upstream or downstream markets;
- firms that sell through similar distribution channels; and
- firms that employ similar marketing and promotional methods.

7.5 A history of entry into and exit from a particular market provides insight into the likelihood of entry occurring in a timely manner and on a sufficient scale to counteract an exercise of market power by a merged firm. It is, however, not the sole determinant of whether this would likely occur.

7.6 The Bureau seeks to determine the extent that entry is likely, given the commitments that potential entrants must make, the time required to become effective competitors, the risks involved and the likely rewards. The Bureau considers any delay or loss that potential entrants expect to encounter before becoming effective competitors, and the resulting sunk costs and risk associated with such entry that reduce the likelihood that entry will occur or be successful. The Bureau also considers the expectations that potential entrants may have of incumbent responses to entry, as well as the likelihood that customers will support an entrant's investments or guarantee it a needed volume of sales. When assessing the likelihood of entry, the Bureau evaluates profitability at post-entry prices, taking into account the effect that new supply would have on market prices. These prices are often the pre-merger price levels. For instance, if a competitor was able to enter a market only on a scale that is below the minimum viable scale, the Bureau would not consider such entry to be likely, since the entrant would be unable to achieve the annual level of sales necessary to achieve profitability at post-entry prices.

Sufficiency

7.7 When considering whether entry is likely to be on a scale and scope that would be sufficient to deter or counteract a material price increase, the Bureau examines what would be required from potential competitors who choose to enter. The Bureau will also consider any constraints or limitations on new entrants' capacities or competitive effectiveness. Entry by firms that seek to differentiate themselves by establishing a niche to avoid direct competition with the merged firm may also not be sufficient to constrain an exercise of market power.

Types of Barriers to Entry

7.8 Barriers to entry affect the timeliness, likelihood and sufficiency of entry. They can take many forms, ranging from absolute restrictions that preclude entry, to sunk costs and other factors that raise the costs and risks associated with entry and thereby deter it.[45] While, in some cases, each individual "barrier" may be insufficient alone to impede entry, the Bureau considers the collective influence of all barriers which, when taken together, can effectively deter entry.

45 While commencing a business may in some cases be easy, new entrants may find it difficult to survive for a variety of reasons, including the strategic behaviour of incumbents.

Regulatory Barriers

7.9 The types of barriers identified in section 93(*d*) of the Act—namely tariff and non-tariff barriers to international trade, interprovincial barriers to trade and regulatory control over entry—can provide incumbents with absolute cost advantages over potential entrants, presenting considerable and, in some cases, insurmountable impediments to entry.

Sunk Costs

7.10 Substantial sunk costs directly affect the likelihood of entry and constitute a significant barrier to entry. Costs are sunk when they are not recoverable if the firm exits the market. In general, since entry decisions are typically made in an environment in which success is uncertain, the likelihood of significant future entry decreases as the absolute amount of sunk entry costs relative to the estimated rewards of entry increases. The Bureau's assessment of sunk costs also focuses on the time required to become an effective competitor and the probability of success, and whether these factors justify making the required investments.

7.11 New entrants must often incur various start-up sunk costs, such as acquiring market information, developing and testing product designs, installing equipment, engaging personnel and setting up distribution systems. New entrants may also face significant sunk costs owing to the need to

- make investments in market-specific assets and in learning how to optimize the use of these assets;
- overcome product differentiation-related advantages enjoyed by incumbents; or
- overcome disadvantages presented by the strategic behaviour of incumbents.

7.12 These potential sources of sunk costs can create significant impediments to entry when they require that potential entrants factor greater costs into their decision-making relative to incumbents who can ignore such costs in their pricing decisions because they have already made their sunk cost commitment.

7.13 The investment required to establish a reputation as a reliable or quality seller is also a sunk cost, constituting a barrier to entry when it is an important element in attracting buyers, particularly in industries in which services are an important element of the product. Under these circumstances, the time to establish a good reputation may make profitable entry more difficult, and therefore delay the competitive impact that an entrant may have in the marketplace.

7.14 Long-term exclusive contracts with automatic renewals, rights of first refusal, most favoured customer or "meet or release" clauses or termination fees may constitute barriers to entry. Contracts with attributes that limit buyer switching may make it difficult for firms to gain a sufficient buyer base to be profitable in one or more markets (even when barriers to entry in the industry are otherwise relatively low) and can thus make entry unattractive. The deterring effects of such contracts are

more pronounced when, for example, economies of density or scale are important and make it difficult for new or smaller firms to achieve a minimum efficient scale of operations.

Other Factors That Deter Entry

7.15 In markets in which economies of scale are significant, entry on a small scale may be difficult unless the entrant can successfully exploit a niche. Conversely, entry in such markets on a large scale may expand available capacity to supply beyond market demand, thereby depressing market prices and making entry less attractive.

7.16 Market maturity can also impede entry. Entry may be less difficult and time-consuming in the start-up and growth stages of a market, when the dynamics of competition generally change more rapidly. Mature markets exhibit flat or declining demand, making it more difficult for potential entrants to profitably enter the business because the entrants' sales have to come from existing rivals.

7.17 Other cost advantages for incumbents that may deter entry include those related to transportation costs, control over access to scarce or non-duplicable resources such as technology, land, natural resources and distribution channels, network effects, and capital costs.[46]

PART 8: COUNTERVAILING POWER

8.1 When determining whether a merger is likely to result in a material price increase, the Bureau assesses whether buyers are able to constrain the ability of a seller to exercise market power. This may occur when, for example,

- they can self-supply through vertical integration into the upstream market;
- the promise of substantial orders can induce expansion of an existing smaller supplier and/or can sponsor entry by a potential supplier not currently in the market;
- they can refuse to buy other products produced by the seller;
- they can refuse to purchase the seller's products in other geographic markets where the competitive conditions are different; or
- they can impose costs on the seller (for example, by giving less favourable retail placement to the merged entity's products).

8.2 The Bureau does not presume that a buyer has the ability to exercise countervailing power merely by virtue of its size. There must be evidence that a buyer, regardless of size, will have the ability and incentive to constrain an exercise of market power by the merged firm. Evidence of prior dealings between the buyer and one or more of the merging parties that tends to demonstrate the buyer's relative bargaining strength is of particular relevance. The Bureau also considers the extent to which

46 The need to raise capital may have a significant impact on the likelihood and timeliness of entry.

the merger affects the buyer's ability and incentive to exercise countervailing power. When a merger eliminates a supplier whose presence contributed significantly to a buyer's historical bargaining strength, the buyer may no longer be able to exercise countervailing power after the merger.

8.3 When price discrimination is a feature of the relevant market, it may be possible for some but not all buyers to counter the effects of an exercise of market power. For example, a merged firm may be able to increase prices to buyers that do not have the option to vertically integrate their operations, while other buyers with this option may be able to resist such a price increase. Where only a subset of buyers is able to counter a price increase or other exercise of market power, the Bureau will generally find that countervailing power is insufficient to prevent the merged firm from exercising market power in the relevant market.

PART 9: MONOPSONY POWER

9.1 A merger of competing buyers may create or enhance the ability of the merged firm, unilaterally or in coordination with other firms, to exercise monopsony power. The Bureau is generally concerned with monopsony power when a buyer holds market power in the relevant purchasing market, such that it has the ability to decrease the price of a relevant product below competitive levels with a corresponding reduction in the overall quantity of the input produced or supplied in a relevant market, or a corresponding reduction in any other dimension of competition.[47]

9.2 Consistent with its general analytical framework for merger review, the Bureau considers both market definition-based and other evidence of competitive effects in monopsony cases. The conceptual basis used for defining relevant markets is, mirroring the selling side, the hypothetical monopsonist test. A relevant market is defined as the smallest group of products and the smallest geographic area in which a sole profit-maximizing buyer (a "hypothetical monopsonist") would impose and sustain a significant and non-transitory price decrease below levels that would likely exist in the absence of the merger. The relevant product market definition question is thus whether suppliers, in response to a decrease in the price of an input, would switch to alternative buyers or reposition or modify the product they sell in sufficient quantity to render the hypothetical monopsonist's price decrease unprofitable.

9.3 In order to determine market shares and concentration levels, the Bureau compares the size of the purchases of the relevant product by the merging parties with the total sales of the relevant product. When the merging parties represent only a small percentage of the total purchases of the relevant product, the Bureau generally considers the suppliers to be well-placed to forego sales to the merging parties in

47 Cases where the supply curve is perfectly inelastic, such that a price decrease below competitive levels does not result in a decrease in output but only a wealth transfer, may also give rise to concerns. This scenario should be understood to be generally included in the category of monopsony. Similarly, an output effect is not required in monopoly cases.

favour of other buyers when faced with an attempt to lower prices. As a general rule, the Bureau will not challenge a merger based on monopsony (or oligopsony) power concerns where shares of the relevant upstream market held by the merging parties (and their competitors, in an oligopsony case) fall below the market share safe harbours set out in Part 5 of these guidelines. When the merging parties account for a significant portion of purchases of the relevant product and exceed these market share safe harbours, then it is more likely that the merging parties could exercise monopsony power. In this case, the Bureau considers barriers to entry that may limit or negate the ability of a new buyer to purchase the product, or of an existing buyer to expand its purchases (see Part 7 for a detailed discussion of the Bureau's approach to assessing entry).

9.4 When the merged firm accounts for a significant portion of purchases of the relevant product, and barriers to buying the input are high, the factors that the Bureau considers when attempting to determine whether the merged firm is likely to have the ability to exercise monopsony power include the following:

- whether the merged firm can restrict its purchases by an amount that is large enough to reduce the relevant product's price in the market;
- whether upstream supply of the relevant product is characterized by a large number of sellers and low barriers to entry into buying such that the normal selling price of a supplier is likely competitive;
- whether it seems likely that certain suppliers will exit the market or otherwise reduce production, or will reduce investments in new products and processes in response to the anticipated price decrease;
- whether a reduction in the merged firm's purchases of the relevant (input) product is likely to reduce the profits earned by the merged firm in downstream output markets, and, if so, whether the downstream output profit reduction is large enough to reduce the merged firm's incentive to restrict its purchases; and
- whether a reduction in the merged firm's purchases of the relevant product is likely to reduce its access to adequate supply of the relevant product in the long run.

9.5 When available, the Bureau considers empirical evidence to analyze the effect of historical changes in supply on price and quantity as part of the assessment of whether the merging parties would have the ability to exercise monopsony power.

PART 10: MINORITY INTEREST TRANSACTIONS AND INTERLOCKING DIRECTORATES

10.1 Part 1, above, outlines the factors the Bureau considers when determining whether a minority interest transaction or interlocking directorate confers the requisite level of influence to constitute a merger. Additionally, a minority interest or interlocking directorate may be ancillary to a merger that the Bureau is otherwise reviewing (e.g., when one of the merging parties holds a minority interest in a third competitor prior to the merger).[48] This Part outlines the Bureau's approach to minority interest transactions where the Bureau has jurisdiction under the merger provisions of the Act.

10.2 The Bureau's analysis of minority interests and interlocks that are determined to be mergers under Part 1 of these guidelines involves two distinct steps:

- First, the Bureau conducts a preliminary examination of the transaction as a full merger between the acquirer and the target firm. This exercise is used to screen out benign cases. When the Bureau concludes that a full merger would not likely prevent or lessen competition substantially[49], then a more detailed analysis of the minority interest or interlocking directorate is not generally required.
- When, based on its preliminary examination, the Bureau determines that a full merger would raise possible competition concerns, it then moves to the second step in its analysis, in which it (1) examines the specific nature and impact of the minority shareholding and/or interlocking directorate; and (2) conducts a detailed examination of the likely competitive effects arising from the minority shareholding and/or interlocking directorate.

10.3 A minority interest or interlocking directorate may impact competition by affecting the pricing or other competitive incentives of the target, the acquirer or both. Note that, with respect to interlocking directorates, the Bureau is not generally concerned when board representation in these circumstances occurs solely through "independent" directors when the businesses do not compete.

48 As noted in paragraph 1.16, above, an interlocking directorate alone would rarely constitute a merger although it could; however, interlocks are often features of partial interest transactions that otherwise qualify as a merger. The Bureau considers features of any interlock in its assessment of the competitive effects of a merger. Of particular relevance are the following factors: relationship between the interlocked firms, the role and duty of the interlocked director toward the interlocked firms, board composition and the position of the interlocked director on the boards, information to which the interlocked director has access, any special powers of the interlocked director, including voting or veto rights, and any contractual or practical mechanisms that the interlocked director might use to influence firm policies or decision-making.

49 As noted below in paragraph 12.3, in reviewing a full merger the Bureau may make an assessment of whether the efficiency gains that are likely to be brought about by the merger will be greater than and will offset the anti-competitive effects of that merger. By contrast, minority interest transactions typically do not involve the integration of firms and therefore efficiency gains are not typically considered by the Bureau in reviewing minority interests.

10.4 When assessing the target's pricing or other competitive incentives, the Bureau first considers whether, by virtue of its ability to materially influence the economic behaviour of the target business, the acquirer or interlocked director may induce the target business to compete less aggressively. The Bureau also considers the extent of such influence and the likelihood that competition will be prevented or lessened as a result of its exercise.

10.5 Second, the Bureau considers whether the transaction provides the acquirer or the firm with the interlocked director access to confidential information about the target business. In particular, the Bureau examines the likelihood that such access may facilitate coordination between the two firms, may affect the unilateral competitive conduct of the firm that receives the information, or both.

10.6 With respect to the acquirer, the Bureau considers whether a minority interest or interlock may result in a change to the acquirer's pricing or other competitive incentives. A firm that holds a minority position in a target business that is a competitor might have a reduced incentive to compete with the target business because if the acquirer raises its price and consequently loses sales, it will benefit, through its minority interest, from sales that flow to the target business. In effect, the acquirer will recapture some of the sales diverted to the target business and may thus have a greater incentive to raise its own price than it would absent the minority interest. In its assessment, the Bureau considers the extent of diversion between the acquiring and target firms' products and the profits earned on these diverted sales. The Bureau also examines the likelihood, significance and impact of any such change to the incentives of the acquirer.

PART 11: NON-HORIZONTAL MERGERS

11.1 A horizontal merger is a merger between firms that supply competing products. By contrast, non-horizontal mergers involve firms that do not supply competing products. The two main types of non-horizontal mergers are vertical mergers and conglomerate mergers. A vertical merger is a merger between firms that produce products at different levels of a supply chain (e.g., a merger between a supplier and a customer). A conglomerate merger is a merger between parties whose products do not compete, actually or potentially[50], and are not vertically related. Conglomerate mergers may involve products that are related because they are complementary (e.g., printers and ink cartridges),[51] or because customers buy them together owing to purchasing economies of scale or scope.

50 Mergers between potential competitors are dealt with as prevention of competition cases. See paragraphs 2.10-2.12 above.

51 That is, the goods are economic complements, such that the quantity demanded of one product decreases as the price of the other increases.

11.2 Non-horizontal mergers are generally less likely to prevent or lessen competition substantially than are horizontal mergers. This is because non-horizontal mergers may not entail the loss of competition between the merging firms in a relevant market. Non-horizontal mergers also frequently create significant efficiencies.[52] However, non-horizontal mergers may reduce competition in some circumstances, as outlined below.

11.3 The civil provisions of the Act may be available to address conduct by the merged firm that constitutes a refusal to deal, an abuse of dominance or other reviewable conduct. However, where the Bureau is able to remedy or enjoin a merger that is likely to substantially prevent or lessen competition, it will generally do so in preference to pursuing post-merger remedies under other provisions of the Act.

Unilateral Effects of Non-Horizontal Mergers

11.4 A non-horizontal merger may harm competition if the merged firm is able to limit or eliminate rival firms' access to inputs or markets, thereby reducing or eliminating rival firms' ability or incentive to compete. The ability to affect rivals (and, by extension, competition) in this manner is referred to in these guidelines as "foreclosure."

11.5 Foreclosure may be partial when the merged firm, for example, raises its price to a downstream competitor, thereby raising its rival's costs. Foreclosure may be complete when the merged firm, for example, refuses to supply a downstream competitor.

11.6 When examining the likely foreclosure effects of a non-horizontal merger transaction, the Bureau considers three inter-related questions: (1) whether the merged firm has the ability to harm rivals; (2) whether the merged firm has the incentive (i.e., whether it is profitable) to do so; and (3) whether the merged firm's actions would be sufficient to prevent or lessen competition substantially.

11.7 In the case of vertical mergers, the Bureau looks at four main categories of foreclosure:

- total input foreclosure, which occurs when the merged firm refuses to supply an input to rival manufacturers that compete with it in the downstream market;
- partial input foreclosure, which occurs when the merged firm increases the price it charges to supply an input to rival manufacturers that compete with it in the downstream market;[53]

52 For example, a vertical merger may allow the merged firm to remove or "internalize" existing double marginalization, since there is no longer any need for a mark-up on goods from the upstream firm to its downstream merger partner. With conglomerate mergers, the merged firm may be able to internalize the positive effect of a decrease in the price of one complementary product on the sales of another complementary product. This in turn may increase the output of both products, which is, all other things being equal, pro-competitive.

53 Foreclosure may also be accomplished through non-price means. For example, a merged firm may adopt product standards that are incompatible with those used by rivals, thus requiring rivals to invest in new standards in order to continue to purchase the merged firm's product or making it impossible for rivals to use

- total customer foreclosure, which occurs when the merged firm refuses to purchase inputs from an upstream rival; and
- partial customer foreclosure, which occurs when the merged firm is a distributor and can disadvantage upstream rivals in the distribution/resale of their products.

11.8 In the case of a conglomerate merger, the Bureau considers whether the combination of products in related markets will confer upon the merged firm the ability and incentive to leverage a strong market position from one market to another by means of tying products together. For example, the merged firm may harm its rivals by refusing to sell one product to customers unless customers also buy a second product from it. Assuming that rivals do not sell the same range of products as the merged firm, such tying may foreclose rivals by reducing their ability to compete, thereby preventing or lessening competition substantially.

Coordinated Effects of Non-Horizontal Mergers

11.9 The Bureau also considers whether a non-horizontal merger increases the likelihood of coordinated interaction among firms:

- A merger that leads to a high degree of vertical integration between an upstream market and a downstream retail market, or increases the degree of existing vertical integration, can facilitate coordinated behaviour by firms in the upstream market by making it easier to monitor the prices rivals charge upstream. Vertical mergers could also facilitate coordinated behaviour by firms in a downstream market by increasing transparency (by enabling firms to observe increased purchases of inputs) or by providing additional ways to discourage or punish deviations (by limiting the supply of inputs).
- A conglomerate merger may facilitate coordination by increasing the degree of multi-market exposure among firms (see paragraph 6.33, above).

PART 12: THE EFFICIENCY EXCEPTION

Overview

12.1 Section 96 of the Act provides an efficiency exception to the provisions of section 92. When a merger creates, maintains or enhances market power, section 96(1) creates a trade-off framework in which efficiency gains that are likely to be brought about by a merger are evaluated against the anti-competitive effects that are likely to result. It should be noted that the Bureau's approach is to expeditiously identify those few transactions that may raise material competition concerns and provide quick clearance for remaining transactions to provide commercial certainty and allow parties to achieve any efficiencies as quickly as possible. Consistent with that approach, a thorough assessment of efficiency claims is unnecessary in the vast majority of the Bureau's merger reviews.

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the merged firm's product altogether.

12.2 As the starting point, when determining the relevant anti-competitive effects for the purpose of performing the trade-off, the Bureau recognizes the significance of all of the objectives set out in the statutory purpose clause contained in section 1.1 of the Act.

12.3 The Bureau, in appropriate cases and when provided in a timely manner with the parties' evidence substantiating their case, makes an assessment of whether the efficiency gains that are likely to be brought about by a merger will be greater than and will offset the anti-competitive effects arising from that merger, and will not necessarily resort to the Tribunal for adjudication of the issue. However, the parties must be able to validate efficiency claims to allow the Bureau to ascertain the nature, magnitude, likelihood and timeliness of the asserted gains, and to credit (or not) the basis on which the claims are being made.

12.4 In general, categories of efficiencies that are relevant to the trade-off analysis in merger review include the following:

- allocative efficiency: the degree to which resources available to society are allocated to their most valuable use;
- technical (productive) efficiency: the creation of a given volume of output at the lowest possible resource cost; and
- dynamic efficiency: the optimal introduction of new products and production processes over time.

12.5 These categories are examined in reference to both gains in efficiency and anti-competitive effects (which include losses in efficiency).

12.6 For the purpose of the trade-off analysis in litigated proceedings before the Tribunal, the Bureau must show the anti-competitive effects of a merger. As outlined in more detail in paragraph 12.13 below, the merging parties must show all other aspects of the trade-off, including the nature, magnitude, likelihood and timeliness of efficiency gains, and whether such gains are greater than and offset the anti-competitive effects. Whether or not a case proceeds to litigation, the Bureau seeks information from the merging parties and other sources to evaluate gains in efficiencies and anti-competitive effects.

12.7 By incorporating an explicit exception for efficiency gains, Parliament has indicated that the assessment of the competitive effects of the merger under section 92 of the Act is to be segregated from the evaluation of efficiency gains under section 96. That said, cost savings from substantiated efficiency gains may be relevant to the analysis under section 92 of whether the merger is likely to prevent or lessen competition substantially in the following limited sense: the Bureau considers whether, as a result of true cost savings (discussed below under "Types of Efficiencies Generally Included

in the Trade-Off"), the parties to the merger are better positioned to compete in a competitive market or are less likely to engage in coordinated behaviour.[54]

12.8 Where efficiencies may be material, merging parties are encouraged to make their efficiency submissions to the Bureau as early as possible in the merger review process. This facilitates an expeditious assessment of the nature, magnitude, likelihood and timeliness of the efficiency gains and of the trade-off between relevant efficiency gains and anti-competitive effects. Having detailed information regarding efficiency claims at an early stage of the process will facilitate the preparation of focused follow-up information requests and/or the targeted use of other information-gathering mechanisms and, subject to confidentiality restrictions, enable the Bureau to test the claims during its market contacts regarding the merger. Submissions regarding anticipated efficiency gains may also assist the Bureau in understanding the rationale underlying the proposed transaction.

Gains in Efficiency

12.9 To be considered under section 96(1), it must be demonstrated that the efficiency gains "would not likely be attained if the order (before the Tribunal) were made." This involves considering the nature of potential orders that may be made, including those that may apply to the merger in its entirety or are limited to parts of the merger. Each of the anticipated efficiency gains is then assessed to determine whether these gains would likely be attained by alternative means if the potential orders are made. Where the order sought is limited to parts of a merger, efficiency gains that are not affected by the order are not included in the trade-off analysis.

12.10 To facilitate the Bureau's review of efficiency claims, parties should provide detailed and comprehensive information that substantiates the precise nature, magnitude, likelihood and timeliness of their alleged efficiency gains, as well as information relating to deductions from gains in efficiency, such as the costs associated with implementing the merger. The information should specifically address the likelihood that such gains would be achieved and why those gains would not likely be achieved if the potential Tribunal orders were made.

12.11 Typically, the Bureau uses industry experts to assist in its evaluation of efficiency claims. To assess efficiency claims, Bureau officers and economists, as well as experts retained by the Bureau, require access to detailed financial and other information.[55] To enable the objective verification of anticipated efficiency gains, efficiency claims should be substantiated by documentation prepared in the ordinary course of business, wherever possible. This includes plant and firm-level accounting statements, internal

54 The impact of efficiencies on a firm's cost structure may render coordination more difficult by enhancing its incentive to compete more vigorously.

55 This includes all pre-existing merger planning documents. Additional information that may be relevant includes (1) information on efficiencies realized from previous mergers involving similar assets; (2) pre-merger documents relating to product and process innovation; and (3) information related to economies of scale, including minimum efficient scale, and economies of scope in production.

studies, strategic plans, integration plans, management consultant studies and other available data. The Bureau may also require physical access to certain facilities and will likely require documents and information from operations-level personnel who can address, among other matters, how their business is currently run and areas where efficiencies would likely be realized.

12.12 Section 96(2) requires the Tribunal to consider whether the merger is likely to bring about gains in efficiency described in section 96(1) that will result in (1) a significant increase in the real value of exports; or (2) a significant substitution of domestic products for imported products. To assist this analysis, firms operating in markets that involve international trade should provide the Bureau with information that establishes that the merger will lead them to increase output owing to greater exports or import substitution.[56]

Burden on the Parties

12.13 The parties' burden includes proving that the gains in efficiency

- are likely to occur. In other words, the parties must provide a detailed explanation of how the merger or proposed merger would allow the merged firm to achieve the gains in efficiency. In doing so, the parties must specify the steps they anticipate taking to achieve the gains in efficiency, the risks involved in achieving these gains and the time and costs required to achieve them.
- are brought about by the merger or proposed merger (i.e., that they are merger-specific). The test under section 96(1) is whether the efficiency gains would likely be realized in the absence of the merger. Thus, if certain gains in efficiency would likely be achieved absent the merger, those gains are not counted for the purposes of the trade-off.
- are greater than and offset the anti-competitive effects. The parties must provide a quantification of the gains in efficiency and a detailed and robust explanation of how the quantification was calculated. They should also, to the extent relevant, provide any information on qualitative efficiencies. While the burden is ultimately on the parties to establish that the gains in efficiency are greater than and offset the anti-competitive effects, in appropriate cases and when provided in a timely manner with the parties' evidence substantiating their case, the Bureau undertakes its own internal assessment of the trade-off before deciding whether to challenge a merger at the Tribunal.
- would not likely be attained if an order under section 92 were made. Gains in efficiency that would likely be achieved, even if an order prohibiting all or part of the merger were made, are not counted for the purposes of section 96.[57]

56 Increased output in this context is generally only possible with an associated decrease in price.

57 For example, if remedying a substantial prevention or lessening of competition required divestitures only in certain markets, cost savings resulting from the rationalization of head office facilities would not be included in the trade-off, assuming that such savings would be achievable despite the divestitures. A portion of head office cost savings may be relevant in this example only if the parties can clearly demonstrate that those cost savings

Types of Efficiencies Generally Included in the Trade-Off: Gains in Productive Efficiency

12.14 Productive efficiencies result from real cost savings in resources, which permit firms to produce more output or better quality output from the same amount of input. In many cases, such efficiencies can be quantifiably measured, objectively ascertained, and supported by engineering, accounting or other data, subject to a discount, as appropriate, for likelihood in practice. Timing differences in the realization of these savings are accounted for by discounting to the present value.

12.15 Productive efficiencies include the following:

- cost savings at the product, plant and multi-plant levels;
- savings associated with integrating new activities within the firm;[58] and
- savings arising from transferring superior production techniques and know-how from one of the merging parties to the other.[59]

12.16 Information respecting gains in efficiency that relate to cost savings should be broken down according to whether they are one-time savings or a recurring savings. When considering cost savings, the Bureau examines claims related to the following:

- economies of scale: savings that arise from product- and plant-level reductions in the average unit cost of a product through increased production;
- economies of scope: savings that arise when the cost of producing more than one product at a given level of output is reduced by producing the products together rather than separately;
- economies of density: savings that arise from more intensive use of a given network infrastructure;
- savings that flow from specialization, the elimination of duplication, reduced downtime, a smaller base of spare parts, smaller inventory requirements and the avoidance of capital expenditures that would otherwise have been required;
- savings that arise from plant specialization, the rationalization of various administrative and management functions (e.g., sales, marketing, accounting, purchasing, finance, production), and the rationalization of research and development activities; and
- savings that relate to distribution, advertising and raising capital.

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would not be achievable if the proposed remedy is granted. Only those gains in efficiency that will be forgone as a result of the remedy will be counted.

58 These include reduced transaction costs associated with contracting for inputs, distribution and services that were previously performed by third parties, but exclude pecuniary savings such as those related to bringing idle equipment into use if such idle capacity will be transferred from the merged firm to third parties.

59 While such legitimate production-related savings may exist, it will generally be difficult to demonstrate that efficiencies will arise owing to "superior management," that savings are specifically attributable to management performance or that they would not likely be sought and attained through alternative means.

Types of Efficiencies Generally Included in the Trade-Off: Gains in Dynamic Efficiency

12.17 The Bureau also examines claims that the merger has or is likely to result in gains in dynamic efficiency, including those attained through the optimal introduction of new products, the development of more efficient productive processes, and the improvement of product quality and service. When possible, the assessment of dynamic efficiencies is conducted on a quantitative basis. This is generally the case if there is information presented by the parties to suggest that a decrease in production costs as a result of an innovation in production technology or an increase in demand for the parties' products as a result of product innovation (leading to a new or improved product) is likely. To supplement quantitative information or where quantitative information is absent, the Bureau conducts a qualitative assessment.

12.18 The specific environment of the industry in question is important in the Bureau's analysis of the competitive effects of a merger on innovation. In light of the complexities and uncertainties associated with the assessment of dynamic efficiency claims, irrespective of the industry, certain types of industry information (in addition to that considered in paragraphs 12.10 and 12.11, above) can be particularly beneficial to the Bureau's assessment of a merger's impact on innovation as they relate to, for example, verifiability, likelihood of success and timeliness. Historical information on the effect of previous mergers in the industry on innovation may be insightful.[60] Such information may relate to a merger's impact on the nature and scope of research and development activities, innovation successes relating to new or existing products or production processes, and the enhancement of dynamic competition.[61] In addition, and only when applicable, the Bureau encourages parties to provide detailed explanations regarding plans to utilize substitute or complementary technologies so as to increase innovation.

Types of Efficiencies Generally Included in the Trade-Off: Deductions to Gains

12.19 Once all efficiency claims have been valued, the costs of retooling and other costs that must be incurred to achieve efficiency gains are deducted from the total value of the efficiency gains that are considered pursuant to section 96(1). Integrating two complex, ongoing operations with different organizational cultures can be a costly undertaking and ultimately may be unsuccessful. Integration costs are deducted from the efficiency gains.[62]

Types of Efficiencies Generally Excluded from the Trade-Off

12.20 Not all efficiency claims qualify for the trade-off analysis. The Bureau excludes the following:

60 Such information may be useful even when previous mergers did not necessarily involve any of the merging parties, since Bureau staff will examine the effect of past industry mergers on innovation through various sources of information, including industry experts and interviews with competitors.

61 In this context, dynamic competition refers to competition based on the successive introduction of new or better products over time.

62 Losses in dynamic efficiency described in paragraph 12.31, below, may also be deducted from gains in efficiency at this stage of the analysis, provided they are not double-counted.

- gains that would likely be attained in any event through alternative means if the potential orders were made (examples include internal growth, a merger with a third party,[63] a joint venture, a specialization agreement, and a licensing, lease or other contractual arrangement);[64]
- gains that would not be affected by an order, when the order sought is limited to part of a merger;
- gains that are redistributive in nature, as provided in section 96(3) of the Act (examples include gains anticipated to arise from increased bargaining leverage that enables the merging parties to extract wage concessions or discounts from suppliers that are not cost-justified, and tax-related gains);[65]
- gains that are achieved outside Canada (examples include productive efficiency gains arising from the rationalization of the parties' facilities located outside Canada that do not benefit the Canadian economy);[66] and
- savings resulting from a reduction in output, service, quality or product choice.

Anti-Competitive Effects

12.21 Section 96(1) requires efficiency gains to be evaluated against "the effects of any prevention or lessening of competition that will result or is likely to result from the merger or proposed merger." The effects to be considered are not limited to resource allocation effects and include all the anti-competitive effects that are likely to arise from a merger, having regard to all of the objectives of the Act. Determination of the relevant anti-competitive effects depends upon the particular circumstances of the merger in question and the markets affected by the merger.

12.22 The Bureau examines all relevant price and non-price effects, including negative effects on allocative, productive and dynamic efficiency; redistributive effects; and effects on service, quality and product choice.

12.23 In addition to direct effects in the relevant market, the Bureau also considers price and non-price effects in interrelated markets. For example, mergers that are likely to

63 Consideration will only be given to alternative merger proposals that could reasonably be considered practical given the business realities faced by the merging firms.

64 The market realities of the industry in question will be considered in determining whether particular efficiencies could reasonably be expected to be achieved through non-merger alternatives. This includes growth prospects for the market in question, the extent of excess capacity in the market, and the extent to which the expansion can be carried out in increments.

65 Discounts from a supplier resulting from larger orders that would enable the supplier to achieve economies of scale, reduced transaction costs or other savings may qualify, to the extent that the savings by the supplier can be substantiated. Mere redistribution of income from the supplier to the merged firm in the form of volume or other discounts is not an efficiency.

66 A rationalization of the parties' facilities located outside of Canada where it could be established that these efficiencies would likely result in lower prices in Canada is an example of how such gains in efficiency from non-Canadian sources could accrue to the Canadian economy. The issue is whether the efficiency gains will benefit the Canadian economy rather than the nationality of ownership of the company.

result in increased prices and lower output can impair industries that use the merged firm's products as inputs.

12.24 Some examples of potential anti-competitive effects that can result from a merger are described below. This list is not intended to be exhaustive. While, in some cases, the negative impacts of a merger may be difficult to measure, all of the relevant anti-competitive effects of a merger are considered for the purposes of the trade-off. When anti-competitive effects (such as redistributive effects and non-price effects) cannot be quantified, they are considered from a qualitative perspective.

Price Effects: Loss of Allocative Efficiency (Deadweight Loss)

12.25 A merger that results in a price increase generally brings about a negative resource allocation effect (referred to as "deadweight loss"), which is a reduction in total consumer and producer surplus within Canada. This reflects a loss of allocative efficiency that is contrary to promoting the efficiency and adaptability of the Canadian economy.

12.26 In view of the difficulties associated with estimating the magnitude of a material price increase that is likely to be brought about by a merger and other variables, various estimates of the deadweight loss are usually prepared over a range of price increases and market demand elasticities.

12.27 The estimate of deadweight loss generally includes the following:

- losses to consumer surplus resulting from reductions in output owing to the merger;
- losses in producer surplus that arise when market power is being exercised in the relevant market prior to the merger[67]; and
- losses to consumer and producer surplus anticipated to result in interrelated markets.[68]

Price Effects: Redistributive Effects

12.28 Price increases resulting from an anti-competitive merger cause a redistributive effect ("wealth transfer") from buyers to sellers. Providing buyers with competitive prices and product choices is an objective of the Act.

Non-Price Effects: Reduction in Service, Quality, Choice

12.29 A substantial prevention or lessening of competition resulting from a merger can have a negative impact on service, quality, product choice and other dimensions of

67 When pre-merger conditions are not competitive, the deadweight loss arising from a merger may be significantly understated if this loss to producer surplus is not taken into account.

68 For example, when the products produced by the merged firm include intermediate goods that are used as inputs in other products, price increases in the intermediate goods can contribute to allocative inefficiency in interrelated markets.

competition that buyers value. Considering these effects is consistent with ensuring that buyers are provided with competitive prices and product choices.

Non-Price Effects: Loss of Productive Efficiency

12.30 Mergers that prevent or lessen competition substantially can also reduce productive efficiency, as resources are dissipated through x-inefficiency[69] and other distortions.[70] For instance, x-inefficiency may arise when firms, particularly in monopoly or near monopoly markets, are insulated from competitive market pressure to exert maximum efforts to be efficient.

Non-Price Effects: Loss of Dynamic Efficiency

12.31 Mergers that result in a highly concentrated market may reduce the rate of innovation, technological change and the dissemination of new technologies with a resulting opportunity loss of economic surplus.[71]

The Trade-Off

12.32 To satisfy the section 96 trade-off, the efficiency gains must both "be greater than and offset" the relevant anti-competitive effects.

12.33 The "greater than" aspect of the test requires that the efficiency gains be more extensive or of a larger magnitude than the anti-competitive effects. The "offset" aspect requires that efficiency gains compensate for the anti-competitive effects. The additional requirement to "offset" makes it clear that it is not sufficient for parties to show that efficiency gains merely, marginally or numerically exceed the anti-competitive effects to satisfy the section 96 trade-off. How significant this additional requirement may be has yet to be tested by the Tribunal and the courts.

12.34 Both the efficiency gains and the anti-competitive effects can have quantitative (measured) and qualitative aspects to them, and both the "greater than" and "offset" standards apply to all anti-competitive effects. To enable appropriate comparisons to be made, timing differences between measured future anticipated efficiency gains and measured anti-competitive effects are addressed by discounting to the present value.

12.35 Merging parties intending to invoke the efficiencies exception are encouraged to address how they propose that qualitative and quantitative gains and effects be evaluated for the purpose of performing the "greater than and offset" aspect of the

69 "X-inefficiency" typically refers to the difference between the maximum (or theoretical) productive efficiency achievable by a firm and actual productive efficiency attained.

70 For example, increased market power can lead to rent-seeking behaviour (such as lobbying) which can cause real economic resources to be consumed in activities directed towards redistributing income, rather than used in producing real output.

71 Losses in dynamic efficiency may be considered under anti-competitive effects or may be deducted from gains in efficiency at the outset, as indicated in paragraph 12.20.

trade-off; and to explain how and why the gains "compensate for" the anti-competitive effects.[72]

PART 13: FAILING FIRMS AND EXITING ASSETS

Business Failure and Exiting Assets

13.1 Among the factors that are relevant to an analysis of a merger and its effects on competition, section 93(*b*) lists "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." The opening clause of section 93 makes it clear that this information is to be considered "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 impact that a firm's exit can have in terms of matters other than competition is generally beyond the scope of the assessment contemplated by section 93(*b*).

13.2 Probable business failure does not provide a defence for a merger that is likely to prevent or lessen competition substantially. Rather, the loss of the actual or future competitive influence of a failing firm is not attributed to the merger if imminent failure is probable and, in the absence of a merger, the assets of the firm are likely to exit the relevant market. Merging parties intending to invoke the failing firm rationale are encouraged to make their submissions in this regard as early as possible.

13.3 A firm is considered to be failing if:

- it is insolvent or is likely to become insolvent;[73]
- it has initiated or is likely to initiate voluntary bankruptcy proceedings; or
- it has been, or is likely to be, petitioned into bankruptcy or receivership.

13.4 In assessing the extent to which a firm is likely to fail, the Bureau typically seeks the following information:

- the most recent, audited, financial statements, including notes and qualifications in the auditor's report;
- projected cash flows;
- whether any of the firm's loans have been called, or further loans/line of credit advances at viable rates have been denied and are unobtainable elsewhere;
- whether suppliers have curtailed or eliminated trade credit;

72 The burden is ultimately on the parties to undertake the entire trade-off analysis and establish that the gains in efficiency are greater than and offset the anti-competitive effects.

73 Technical insolvency occurs when liabilities exceed the realizable value of assets, or when a firm is unable to pay its liabilities as they come due.

- whether there have been persistent operating losses or a serious decline in net worth or in the firm's assets;[74]
- whether such losses have been accompanied by an erosion of the firm's relative position in the market;
- the extent to which the firm engages in "off-balance-sheet" financing (such as leasing);
- whether the value of publicly-traded debt of the firm has significantly dropped;
- whether the firm is unlikely to be able to successfully reorganize pursuant to Canadian or foreign bankruptcy legislation, the Companies' Creditors Arrangement Act, or through a voluntary arrangement with its creditors.

13.5 These considerations are equally applicable to failure-related claims concerning a division or a wholly-owned subsidiary of a larger enterprise. However, in assessing submissions relating to the failure of a division or subsidiary, particular attention is paid to transfer pricing within the larger enterprise, intra-corporate cost allocations, management fees, royalty fees, and other matters that may be relevant in this context. The value of such payments or charges is generally assessed in relation to the value of equivalent arm's-length transactions.

13.6 Matters addressed in financial statements are ordinarily considered to be objectively verified when these statements have been audited or prepared by a person who is independent of the firm that is alleging failure. The Bureau's assessment of financial information includes a review of historic, current and projected income statements and balance sheets. The reasonableness of the assumptions underlying financial projections is also reviewed in light of historic results, current business conditions and the performance of other businesses in the industry.

Alternatives to the Merger

13.7 Before concluding that a merger involving a failing firm or division is not likely to result in a substantial lessening or prevention of competition, the Bureau assesses whether any of the following alternatives to the merger exist and are likely to result in a materially greater level of competition than if the proposed merger proceeds.

Acquisition by a Competitively Preferable Purchaser

13.8 The Bureau assesses whether there exists a third party whose purchase of the failing firm, division or productive assets is likely to result in a materially higher level of competition in the market.[75] In addition, such a third party ("competitively preferable purchaser") must be willing to pay a price which, net of the costs associated with

74 Persistent operating losses may not be indicative of failure, particularly in a "start-up" situation, in which such losses may be normal and indeed anticipated.

75 The Bureau considers whether the third party is capable of exercising a meaningful influence in the market. When an alternative buyer does not intend to keep the failing firm's assets in the relevant market, the Bureau assesses the extent to which the market power arising from the original merger proposal is likely to be less than if the alternative merger proceeds.

making the sale,[76] would be greater than the proceeds that would flow from liquidation, less the costs associated with such liquidation (referred to as the "net price above liquidation value").[77] Where it is determined that a competitively preferable purchaser exists, it can generally be expected that, if the proposed merger under review cannot be completed, the target will either seek to merge with that competitively preferable purchaser, or remain in the market. If the Bureau is not satisfied that a thorough search for a competitively preferable purchaser has been conducted, the Bureau will require the involvement of an independent third party (such as an investment dealer, trustee or broker who has no material interest in either of the merging parties or the proposal in question) to conduct such a search before the failing firm rationale is accepted.

Retrenchment/Restructuring

13.9 Where it appears that the firm is likely to remain in the market rather than sell to a competitively preferable purchaser or liquidate, it is necessary to determine whether this alternative to the proposed merger is likely to result in a materially greater level of competition than if the proposed merger proceeds. The retrenchment or restructuring of a failing firm may prevent failure and enable it to survive as a meaningful competitor by narrowing the scope of its operations, for instance, by downsizing or withdrawing from the sale of certain products or from certain geographic areas.

Liquidation

13.10 Where the Bureau is able to confirm that there are no competitively preferable purchasers for the failing firm and that there are no feasible and likely retrenchment scenarios, it assesses whether liquidation of the firm is likely to result in a materially higher level of competition in the market than if the merger in question proceeds. In some cases, liquidation can facilitate entry into a market by enabling actual or potential competitors to compete for the failing firm's customers or assets to a greater degree than if the failing firm merged with the proposed acquirer.

76 These costs include matters such as ongoing environmental liabilities, tax liabilities, commissions relating to the sale and severance and other labour-related costs.

77 Liquidation value is defined as the sale price of assets as a result of bankruptcy or foreclosure proceedings.

HOW TO CONTACT THE COMPETITION BUREAU

Anyone wishing to obtain additional information about the *Competition Act*, the *Consumer Packaging and Labelling Act* (except as it relates to food), the *Textile Labelling Act*, the *Precious Metals Marking Act* or the program of written opinions, or to file a complaint under any of these acts should contact the Competition Bureau's Information Centre:

Web site

www.competitionbureau.gc.ca

Address

Information Centre
Competition Bureau
50 Victoria Street
Gatineau, Quebec K1A 0C9

Telephone

Toll-free: 1-800-348-5358
National Capital Region: 819-997-4282
TTY (for hearing impaired) 1-800-642-3844

Facsimile

819-997-0324

PUBLIC VERSION

CT-2015-003

THE COMPETITON 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 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 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

COMMISSIONER'S SUPPLEMENTAL RECORD

DEPARTMENT OF JUSTICE CANADA
COMPETITION BUREAU LEGAL SERVICES
Place du Portage, Phase I
50 Victoria Street, 22nd Floor
Gatineau QC K1A 0C9

John Syme (LSUC#: 29333H)
Antonio Di Domenico (LSUC#: 52508V)
Tara DiBenedetto (LSUC#: 56517R)

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

Counsel to the Commissioner of Competition