PUBLIC

CT-2015-003

THE COMPETITION TRIBUNAL

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

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

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

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

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

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

COMPETITION TRIBUNAL
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TABLE OF CONTENTS

I. OVERVIEW ....- 2 -

II. REPLY SUBMISSIONS ....- 2 -

A. There is a Serious Issue even if the Parkland Divestitures Occur ....- 2 -

B. There Will Be Irreparable Harm in the Interim Period ....- 6 -

(i) Harm Will Occur in the Interim Period Regardless of Parkland's Divestitures ....- 6 -

(ii) The Commissioner's Expert provided a fulsome analysis of the relevant geographic markets ....- 8 -

(iii) Parkland Assumes Away the Coordination in the Markets ....- 10 -

(iv) The Impact of the Divestitures in the 11 Markets is Unknown Without a Confirmed Purchaser ....- 11 -

(v) Parkland is Unable to Prevent Irreparable Harm through Margin and Pricing Maintenance ....- 12 -

C. The Balance of Convenience Favours the Commissioner ....- 15 -

(i) A Hold Separate Arrangement is Possible ....- 15 -

(ii) The Tribunal Should Favour a Straightforward Remedy over one that is Vague, Complex and Unenforceable ....- 16 -

III. ORDER SOUGHT ....- 19 -

SCHEDULE A: AUTHORITIES CITED ....- 20 -

I. OVERVIEW

1. The Commissioner files the following in reply to Parkland's responding factum. Defined terms in the Commissioner's moving factum are adopted herein.

2. At issue in the 104 application is not whether a remedy proposed by one of the Parties will resolve a *substantial lessening* of competition in the relevant markets. Rather, the issue is whether an interim order is required to prevent irreparable harm from occurring in the period between the closing of the Proposed Merger and the final disposition of the section 92 Application. Parkland seeks to circumvent the Tribunal's jurisdiction in this respect by unilaterally imposing an unenforceable remedy offered at the last minute, without specifics, that favours Parkland, and that ignores the public and consumer interests.

II. REPLY SUBMISSIONS

1. Parkland's remedy proposal is squarely before the Tribunal. It is contained in Parkland's Response to the 104 Application dated May 5, 2015,[1] contained in Parkland's Responding Application Record dated May 5, 2015,[2] addressed by Dr. Boyer in his reply affidavit dated May 7, 2015, [3] and addressed by Ms. Sanderson in her affidavit dated May 5, 2015.[4] Accordingly, any suggestion that the remedy proposal was not before the Tribunal or that the Commissioner was somehow remiss in not alerting the Tribunal of the existence to the proposed remedy is completely unfounded.

A. THERE IS A SERIOUS ISSUE EVEN IF THE PARKLAND DIVESTITURES OCCUR

2. The serious issue test considers whether or not there are serious issues raised in the underlying matter, here, the section 92 Application. That application alleges that Parkland's market power will be enhanced, both on a coordinated and/or unilateral basis, in 14 Markets in Ontario and Manitoba.

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[1] Application Response for an Interim Order, para. 6, p. 3, Respondent's Record, Tab 1.
[2] Espey Affidavit, para. 59, Respondent's Record, Tab 2, pp. 29-30.
[3] Reply Affidavit of Dr. Marcel Boyer, May 7, 2015, Commissioner's Supplemental Record, Tab 1, para. 34, p. 11.
[4] Sanderson Affidavit, Respondent's Record, Tab 3, para. 6, p. 649.

3. Parkland argues that its proposed divestitures remedy the competitive concerns in 11 of the 14 Markets, and that therefore no serious issue exists in respect of these markets. Parkland's remedy proposal was made on the eve of filing of the Commissioner's section 92 application. Parkland's proposal consists of a letter from Parkland's counsel, and a paragraph in Mr. Espey's Affidavit.[5] Parkland did not provide any evidence whatsoever of why their proposal is a viable and effective remedy. Parkland's own expert does not comment on the adequacy of Parkland's proposal in addressing the competition issues in the markets concerned.[6]

4. Ironically, the only person to offer any comment on the proposed remedy is the Commissioner's expert, Dr. Boyer. In one paragraph of his report, he indicated that, *subject to the Bureau analyzing the divestiture movements*, it "seem[ed]" to him that "at first glance" the proposed divestitures could meet "the necessary requirement to avoid an increase in the likelihood of coordinated conduct in those 11 markets, *provided of course* the divestitures would satisfy the criteria considered by the competition bureau in assessing whether a remedy resolves the competition concerns."[7] (emphasis added)

5. Several things are noteworthy about Dr. Boyer's comment above. First, his comment is limited to coordinated conduct and the referenced markets. He offers no view with respect to unilateral conduct. Moreover, as noted by Dr. Boyer, it will be important for the Competition Bureau to have specifics of the proposed divestitures before any final conclusion can be reached with respect to coordinated conduct in those markets (specifics that Parkland has not provided).[8] Lastly, as Dr. Boyer notes, it will be important to consider whether the proposed divestitures would satisfy the criteria used by the Commissioner to determine whether the proposed remedy resolves the competition concerns.[9]

6. Parkland's suggestion that its proposed divestitures resolve competition concerns and eliminate the serious issue before the court is problematic. In particular:

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[5] Espey Affidavit, para. 59, Respondent's Record, Tab 2, pp. 29-30.
[6] Sanderson Affidavit, para. 6, Respondent's Record, Tab 3, p. 649.
[7] Reply Affidavit of Dr. Marcel Boyer, May 7, 2015, Commissioner's Supplemental Record, Tab 1, para. 34, p. 11.
[8] *Ibid*.
[9] *Ibid*.

a. Parkland states that it “intends” to do something following closing of the transaction – no guarantee is offered. Parkland makes no binding commitment and its proposal creates no enforceable obligation.

b. Parkland’s proposal would allow Parkland to pick its competitors in markets where competition concerns have been identified, in some instances by both Parkland’s and the Commissioner’s experts.[10]

c. Parkland arguably has every incentive to delay implementation of the proposed divestitures.

d. Parkland provides no details of when and how these proposed divestitures will be implemented. Nor does Parkland provide any information on the critical issue of who would be a potential or suitable purchaser.

e. With respect to third party dealers, Parkland has provided no evidence with respect to how these dealers would be affected by the supply contract divestitures. The divestiture of an independent dealer’s supply contract would necessarily be on the dealer that owns the station, who is not a party to the transaction.

f. Parkland is putting “the cart before the horse”. A viable and effective remedy cannot be determined unless and until the Parties agree or do not contest the existence of a substantial lessening of competition in the affected markets. Here, Parkland disputes the existence of a substantial lessening of competition but wishes to unilaterally impose a remedy. This is not the way viable and effective remedies are determined.[11] Parkland’s proposal assumes that a remedy can be arrived at without context and with no understanding of the underlying market, such as would be gained in the context of a Tribunal proceeding.

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[10] Cross-Examination transcript on Sanderson Affidavit, May 8, 2015, Commissioner’s Supplemental Record, Tab 5, pp. 33-34. Affidavit of Dr. Marcel Boyer, April 30, 2015, Exhibit B, Commissioner’s Record, Tab 3(b), para. 10, p. 1070.

[11] *Commissioner of Competition and United Grain Growers and Canadian Wheat Board*, [2002] C.C.T.D. No. 30 at para. 10, Reply Book of Authorities, Tab X.

g. Importantly, there is no suggestion of any involvement by the Competition Tribunal to assess these proposed divestitures and whether or not they are viable and effective remedies for the markets in question. In other words, *Parkland wants to usurp the Tribunal's jurisdiction over matters that properly form part of the section 92 proceeding*. Parkland cannot substitute its own unilateral remedy to address a substantial lessening of competition. That is the purview of the Tribunal, acting in the public interest, not Parkland's interests.

7. For there to be no serious issue, the Commissioner's position must be obviously without merit.[12] Here, there are significant disputes as to the underlying facts of the 92 Application. By way of example:

a. The Commissioner alleges a substantial lessening of competition. The Commissioner has led evidence showing that there is the possibility for coordination and a unilateral exercise of market power in the 14 Markets, which is likely to lead to a substantial lessening of competition. Parkland says there is no substantial lessening of competition.

b. Parkland seeks to divest the assets contemplated by its proposal. The Commissioner seeks a remedy in the section 92 application, an order requiring Parkland to dispose of assets in the 14 Markets, as well as other assets required, if any, to ensure an effective remedy in all of the circumstances. In other words, the Commissioner's Application contemplates the possibility that assets beyond those in the 14 Markets will be required to craft an effective remedy. For example, it may be necessary to add additional stations to the divestiture package to create a viable network of stations and attract a suitable purchaser. At this juncture in the process, it is impossible to know whether that would be necessary, and the competition interests of those affected markets should not be left to chance.

c. Parkland states that all Non-Corporate Stations in a price zone pay the [redacted] rack forward margin.[13] Following questioning on this issue by the Commissioner,

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[12] *ICN Pharmaceuticals Inc v Canada (Patented Medicine Prices Review Board)* (1996), 119 FTR 114, 65 ACWS (3d) 484 (FCTD) at para. 10, Respondent's Book of Authorities, Tab 9.

Parkland admitted that there are in fact [redacted] rack forward margins depending on the [redacted] of each Non-Corporate Station in a given price zone.[14]

d. Mr. Espey's Affidavit stated that Parkland has not increased rack forward margins in Ontario in the past three years.[15] However, Parkland later acknowledged that it had changed the rack forward margin charged to an Non-Corporate Station in Azilda in November 2014.[16] Furthermore, this does not mention changes to the rack forward margin in Manitoba, one of the two provinces with relevant markets. In Manitoba, multiple changes have been made to rack forward margins in the last three years.[17]

e. Parkland states that it will lose "at least [redacted] million litres of sales volume" if, post-transaction, it raises prices by [redacted] cents per litre at the 17 Pioneer stations in the Markets.[18] Parkland admitted in cross-examination that the estimate had not been calculated by an economist. Further, Parkland has provided no evidence showing that it considered any potential response to such a price increase by its competitors in the Relevant Markets. Further, it did not provide any evidence showing that it had factored into its estimate such fundamental economic principles as the price elasticity of demand.

8. In light of the evidence led by the Commissioner in this Application, the Commissioner position has merit and raises a serious issue.

B. THERE WILL BE IRREPARABLE HARM IN THE INTERIM PERIOD

(i) Harm Will Occur in the Interim Period Regardless of Parkland's Divestitures

9. Assuming the Parkland Divestitures could remedy the competitive problem (which is not admitted) the Parkland Divestitures will only remedy the competitive problem once they are implemented. The Divestitures cannot be implemented simultaneously with closing. The only

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[13] Parkland Memorandum of Fact and Law, para. 23(c); Espey Affidavit, para. 17, Respondent's Record, Tab 2, p. 14.
[14] Undertaking 3, Espey Answer to Undertakings, Commissioner's Supplemental Record, Tab 4, p. 270.
[15] Espey Affidavit, para. 17, Respondent's Record, Tab 2, p. 17.
[16] Undertaking 6, Espey Answer to Undertakings, Commissioner's Supplemental Record, Tab 4, p. 271.
[17] Undertaking 2, Espey Answer to Undertakings, Commissioner's Supplemental Record, Tab 4, p. 269.
[18] Espey Affidavit, para. 36, Respondent's Record Tab 2 p. 19; Parkland Memorandum, para. 28.

evidence Parkland has provided regarding the timing of such divestitures is that they will be completed "as soon as possible after closing."[19]

10. On the facts as they stand today, without an interim order, Parkland will take over the assets effective May 13, 2015, and consumers in all of the 14 Markets will be at the mercy of Parkland's market power that may result from that Proposed Merger. Absent an effective and enforceable interim remedy, this will continue, at a minimum, until Parkland follows through on its proposal. Further if Parkland's divestitures do not remedy the competitive concerns, which is a very real concern in the absence of a fulsome consideration of the 14 affected markets through the normal Tribunal proceeding, such harm will continue until the Tribunal disposes of the Commissioner's application. Accordingly, there is a need for an interim order to protect consumers during the interim period.

11. The harm caused by the merger will extend beyond consumers paying higher prices for gasoline to the Canadian economy more broadly. As discussed in the Commissioner's Memorandum of Argument,[20] the merger of Parkland-Pioneer will increase the merged entity's market power, and increase coordination which in turn will lead to a higher cost to the consumer for retail gasoline. The additional costs to the consumer for gasoline will cause consumers to limit their consumption.[21] This will cause a loss of allocative efficiency[22] which is a more general harm to the economy.[23] A loss of allocative efficiency "is contrary to promoting the efficiency and adaptability of the Canadian economy".[24]

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[19] Espey Affidavit, para. 59(a), Respondent's Record, Tab 2, pp. 29-30.

[20] *See paras.* 12, 20 and 23 of the Commissioner's Memorandum of Argument filed May 10, 2015.

[21] *See* August 2005, Report of the Advisory Panel on Efficiencies, available at http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/01954.html noting that allocative inefficiencies are introduced where higher prices are introduced post-merger. ("Advisory Panel Report")

[22] Allocative efficiency measures whether resources available to the economy are allocated to their most valuable uses. Industry Canada, "Merger Enforcement Guidelines", 2011 at § 12.4, Commissioner's Supplemental Record, Tab 7, p. 462. See also Advisory Panel Report, at p. 10.

[23] Advisory Panel Report, *ibid.*

[24] Industry Canada, "Merger Enforcement Guidelines", 2011 at paragraph 12.25, Commissioner's Supplemental Record, Tab 7, p. 468.

(ii) The Commissioner's Expert provided a fulsome analysis of the relevant geographic markets

12. The relevant geographic markets are local in nature and the geographic definition of retail gasoline markets is difficult.[25] Parkland's expert Ms. Sanderson criticises the Commissioner's expert Dr. Boyer for not defining the precise boundaries of the relevant geographic markets.[26] But this criticism is unwarranted. Neither Dr. Boyer nor Ms. Sanderson precisely defined the boundaries of the relevant geographic markets.

13. Dr. Boyer did conduct a geographic market analysis with the information available. His report recognizes the importance of the hypothetical monopolist test but, lacking data to empirically identify customer substitution patterns, relies on preliminary observations and notes that additional information which would be required to more precisely define the relevant geographic markets is unlikely to address the competition concerns.[27] The Boyer Reply Affidavit further notes that:

> … based on the information available, my evaluation is sufficient to support the observations that I make in relation to these markets … 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.[28]

14. The Sanderson Affidavit does not provide an empirical estimate of the results of the hypothetical monopolist test to define the relevant geographic markets.[29] Further, it does not precisely define the areas it considers to be the relevant geographic market for Aberfoyle, Allanburg, and Innisfil.[30]

15. The Sanderson Affidavit considers data from Pioneer loyalty cards to allege that geographic markets are broader than considered by the Boyer Report. The loyalty card data reports the home address associated with Pioneer loyalty card holders. When these cards are used

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[25] *Canada (Director of Investigation and Research, Competition Act) v. Imperial Oil Limited,* [1989] C.C.T.D. No. 52 (QL) p. 5 ("*Imperial Oil 1*").
[26] Sanderson Affidavit, Respondents' Record, Tab 3, para. 13.
[27] Boyer Affidavit, Applicant's Record, para. 68 and 75.
[28] Boyer Reply Affidavit, para. 19, Commissioner's Supplemental Record, Tab 1 p. 6.
[29] Cross-Examination transcript on Sanderson Affidavit, May 8, 2015, Response to 97, pp. 31-32, Commissioner's Supplemental Record, Tab 5 pp. 321.
[30] Sanderson Affidavit, Respondents' Record, para. 30 – 33; 46 – 47; and 56 – 59, Commissioner's Supplemental Record, Tab 5 pp. 657-658, 661-662, 664-665.

in a transaction the Pioneer station where gasoline was purchased can be linked to the cardholders' home address and the distance can be calculated.[31] Based on the loyalty card data, Ms. Sanderson reported consumers living in one area but purchasing gasoline in another area to support her view of the relevant geographic market.[32] However, this is not consistent with the concept of the hypothetical monopolist test because it does not demonstrate substitutability between stations; that is, it does not demonstrate consumers substituting between stations in each area in response to price changes.

16. The Sanderson Affidavit also reports the similarity in prices between two areas.[33] However, as she acknowledged in the cross-examination, this does not necessarily indicate anything in terms of geographic market.[34]

17. The Sanderson Affidavit also purports to rely on traffic patterns for commuting and shopping to inform the geographic market.[35] However, as acknowledged in the cross-examination, Ms. Sanderson did not study traffic patterns, does not know where residents work or shop (besides from the loyalty data which is addressed above), and is not an expert on the matter.[36]

18. In summary, Ms. Sanderson and Dr. Boyer did not precisely define the relevant geographic markets. Dr. Boyer, however, did conduct an analysis to determine the affected geographic markets and concluded that such markets were local in nature, and that there were serious risks to competition in these markets due to the increased likelihood of unilateral and coordinated conduct and therefore of price increases.[37]

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[31] See Sanderson Affidavit, Respondents' Record, para. 17 for a description of the loyalty card data.
[32] Sanderson Affidavit, Respondents' Record, para. 17, 27, 43, and 54.
[33] Sanderson Affidavit, Respondents' Record, para. 28, 45, and 55.
[34] Cross-Examination transcript on Sanderson Affidavit, May 8, 2015, Q 202 p. 63 Commissioner's Supplemental Record, Tab 5 p. 329.
[35] Sanderson Affidavit, Respondents' Record, para. 26, 41, and 53, Tab 3 pp. 656, 660, 663.
[36] Cross-examination transcript on Sanderson Affidavit, May 8, 2015, pp. 64 – 70, Commissioner's Supplemental Record, Tab 5 pp. 329-331.
[37] Boyer Report, paras. 71-75, Commissioner's Application Record, pp. 1086-1087.

(iii) Parkland Assumes Away the Coordination in the Markets

19. In paragraphs 26-30 of its Memorandum, Parkland makes a number of assumptions about monetary and brand losses if it were to increase the rack forward margins. All of the calculations were made without attempting to determine the elasticity of demand from Pioneer.[38]

20. The calculation assumes that Parkland would increase its prices substantially above the market and leave them at that level for an extensive period of time. Moreover, it also assumes that the potential price increases by Parkland would elicit no corresponding price increase (and in fact no market fluctuations) from competitors.[39] The premise underlying Parkland's assumption is that there is no, and could never be, coordination in retail gas markets.

21. The evidence in the record is plainly to the contrary.[40]

22. At paragraph 40 of its Memorandum, Parkland regards the Commissioner's conclusion on coordination as overstated, yet despite requests from the Commissioner, has never clarified the evidence on coordination at issue. In the course of his review, the Commissioner discovered evidence suggesting that individuals at Parkland may have engaged in coordinated conduct.[41] The Bureau alerted Parkland to this evidence, which led to an "investigation" by Parkland.[42] The precise outcome of that investigation is unclear.[43]

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[38] Cross-examination transcript on Espey Affidavit, May 7, 2015 at p. 48, Commissioner's Supplemental Record, Tab 2, p. 63.

[39] Commissioner of Competition Memorandum of Argument, para. 45

[40] OECD, Directorate for Financial and Enterprise Affairs, Competition Committee, Competition in Road Fuel, DAF/Comp (2013)18 Background Note, at §4.1, p.21, Book of Authorities, Tab 24, McNabb Affidavit, Commissioner's Record, Tab 2, p. 17, para. 24.

[41] *See* Commissioner of Competition Memorandum of Argument, para. 55.

[42] Espey Affidavit, Respondent's Record, para. 62, p. 31. According to Parkland, "[t]he provision of these documents has helped increase Parkland's sensitivity to conduct that may raise concerns under the Competition Act." Exhibit 8, Cross-Examination on Affidavit of Robert Espey, "Pioneer Acquisition Update", April 20, 2015, slide 18, Commissioner's Supplemental Record, Tab 3, p. 248.

[43] Mr. Espey states in his affidavit that "[t]he internal emails *mainly* relate to Parkland's confusion about conduct Imperial permits or does not permit its Esso-branded wholesalers to engage in, *largely* as a result of the removal of geographic limitations on wholesalers." (emphasis added) See Espey Affidavit, Respondent's Record, para. 62(b). Parkland's power point presentation to the Commissioner on April 20, 2015, notes that "*[f]or the most part*, discussions between Esso Branded Wholesalers ("Esso BWs") was *largely* due to confusion with IOL's directions / expectations of its BWs" (emphasis added). See Exhibit 8, Cross-Examination on Affidavit of Robert Espey, "Pioneer Acquisition Update", April 20, 2015, slide 18, Commissioner's Supplemental Record, Tab 3, p. 248. Pursuant to an undertaking provided during the cross-examination of Robert Espey on May 7, 2015, Parkland

(iv) The Impact of the Divestitures in the 11 Markets is Unknown Without a Confirmed Purchaser

23. The Commissioner seeks as a remedy in the section 92 application, an order requiring Parkland to dispose of assets in the 14 Markets, as well as other assets required, if any, to ensure an effective remedy in all of the circumstances. Whether a remedy is effective will depend, among other things, on the purchaser, and additional assets may be required depending on the identity of the purchaser.

24. Beyond the problem with the delay described above, Parkland has not identified who the purchaser of the divested assets would be, and the Tribunal cannot properly assess whether this acquisition of the assets by this unknown purchaser would remedy the competitive problem to the extent that an interim order is not necessary to prevent irreparable harm to consumers. Until a purchaser has been identified and approved, there is a need to preserve all assets in a manner that would allow them to be divested to an appropriate purchaser.

25. As noted by the Tribunal when discussing the terms of a proposed Consent Order:

> *At the very least, the Tribunal considers that the proposed purchaser should be identified before the Tribunal relinquishes jurisdiction.* It is our view that the Tribunal should be given concrete assurance that the purchaser is someone who will maintain the viability of the divested assets before approval is given to the Atlantic divestitures. In this way, if an appropriate purchaser is not forthcoming, then there is still the opportunity to require a second package of assets to be offered (i.e., one comprising all of the assets of Texaco), if necessary, to attract an appropriate purchaser.[44] (emphasis added)

26. Without knowledge of the ultimate purchaser of the proposed divestiture, the Tribunal is not able to fully assess the impact of the divestitures on the affected markets and therefore cannot determine whether the Parkland Divestitures will remove the interim harm incurred as a result of the merger.

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undertook to share other fruits of Parkland's investigation (other than what is noted in its power point presentation), if any. Parkland has not provided any answer to this undertaking. See Cross-Examination transcript on Affidavit of Robert Espey, May 7, 2015, pp. 81 – 82, Commissioner's Supplemental Record, Tab 2, and Answers to Undertakings sent to the Commissioner on May 9, 2015, Commissioner's Supplemental Record, Tab 4.

[44] *Canada (Director of Investigation and Research, Competition Act) v. Imperial Oil Limited,* [1989] C.C.T.D. No. 52 (QL) p. 8 ("*Imperial Oil 1*")

(v) Parkland is Unable to Prevent Irreparable Harm through Margin and Pricing Maintenance

a. The "Rack Forward Margin"

27. The "rack forward margin" is a fee charged by Parkland to Non-Corporate Stations based on the price zone where the Non-Corporate Stations are located.[45] Accordingly, Parkland can influence retail gasoline prices at Non-Corporate Stations through the "rack forward margin" fee it charges to Non-Corporate Stations.[46] As noted, Parkland can change its "rack forward margin" at any time without notice and without recourse by the Non-Corporate Station.[47]

28. In Parkland's proposed alternative to the Commissioner's requested Hold Separate Order, Parkland proposes to ensure that the rack forward margins it charges its Non-Corporate Stations would be, at most, no greater than it has been under Pioneer's or Parkland's current supply agreement with Non-Corporate Stations.[48] Parkland's assurance is no assurance at all for at least four reasons: (1) the assurances are not effective if prices would be lower than they are currently but for the Proposed Merger; (2) Parkland will still have the incentive to raise retail prices but only its rack forward margin would be capped - Parkland could change other aspects of its supply arrangement such as fuel deliveries to affect retail pricing; (3) institutionally, Parkland does not have adequate processes and procedures in place to fulfill its assurance; and (4) even if Parkland could fulfill its assurance (and there is doubt it can), monitoring Parkland's assurance would be significant, impractical and unreliable.

b. Parkland's Assurance Does Not Protect Competition in a Declining Margin Environment

29. Parkland's assurance does not protect competition in the event that prices would have been lower but for the Proposed Merger. Parkland has decreased its rack forward margin in a number of zones and if further decreases were to occur but for the Proposed Merger, then Parkland's assurance would not provide a cap on rack forward margins.[49] Additionally,

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[45] Espey Affidavit, Respondent's Record, para. 17, p. 14.
[46] Espey Affidavit, Respondent's Record, paras. 17-18, pp. 14-15.
[47] Espey Affidavit, Respondent's Record, Exhibit B.
[48] Espey Affidavit, Respondent's Record, para 59(c), pp. 30.
[49] Parkland has decreased its rack forward margin in the following zones: On June 14, 2014, Parkland reduced its rack forward margin in its "[redacted]" and "[redacted]" zones. The reduction was $[redacted] and $[redacted] respectively. In June 2014, Parkland reduced its rack forward margin in its [redacted] zone from [redacted] to

Parkland's assurance would permit it to increase rack forward margins in areas where it has decreased the rack forward margin during the term of the current supply agreement.

c. Parkland's Assurance Does Not Protect Other Aspects of Supply to Non-Corporate Stations

30. Parkland's assurance does not protect other aspects of supply to its Non-Corporate Stations. Parkland will still have the incentive to raise retail prices where it has at least one Corporate Station following the Proposed Merger. Following the Proposed Merger, Parkland would have at least one Corporate Station in each relevant geographic market except Warren and Lundar, MB. However, Parkland has only committed to capping its rack forward margin; it could change other aspects of its supply arrangement to increase retail prices. For example, Parkland could change other non-price aspects of competition such as the frequency, timing, and volume of fuel deliveries to its Non-Corporate Stations to affect retail pricing.

31. It is difficult to provide for all the manners in which Parkland could affect its Non-Corporate Stations. Further, it is difficult to monitor and enforce such other terms of supply. For example, it would be difficult for the Commissioner or even a Non-Corporate Station to know whether a particular Non-Corporate Station is being supplied on terms no less favourable than other Non-Corporate Stations. A Hold Separate Manager on the other hand would be well situated to oversee supply to its held separate Non-Corporate Stations.

32. For the reasons set out in the Commissioner's section 92 Application, Parkland is incentivized to exert its market power by manipulating its price zones to yield higher average "per litre margins" in the Markets, all of which are rural or semi-urban. As Parkland has stated, its business objective is to operate in rural markets with less competition and higher margins.[50] As noted in Parkland Fuel Corporations' Annual Information Form dated March 24, 2015:

> …[Parkland] prefers operations outside urban markets where the competition generally has a lesser presence. Sales volumes per site in these markets are typically lower than in the larger centres, however, sites outside urban markets

[redacted] cpl. Answers to Undertakings of Robert Espey, Commissioner's Supplemental Record, Record, Tab 4, Response to Undertaking No. 2, pp. 269 – 270.

[50] Espey Affidavit, Respondent's Record, Exhibit A, p. 50.

typically yield higher average "per litre" margins and can be profitable with lower sales volumes than are required for urban markets."[51]

d. Parkland Lacks Adequate Institutional Processes and Procedures in Place to fulfill its Assurance

33. According to Parkland, Non-Corporate Stations with the same brand generally pay the same rack price within a price zone.[52] Accordingly, Parkland's rack forward margin is based on the price zone in which the Non-Corporate Station is located.[53] Parkland's price zones are not aligned with relevant antitrust markets, and can encompass both urban and rural areas.[54] The exact boundaries of Parkland's price zones are unknown to the Commissioner, and appear to be unknown to Parkland.[55] For example, Parkland has not prepared any maps that delineate its prize zones.[56] Parkland has not told the Commissioner the geographic boundaries of its price zones (assuming Parkland has delineated boundaries for its price zones).[57]

34. Parkland's business is decentralized.[58] It lacks the institutional processes and procedures to fulfill its assurances regarding prices. For example, Parkland's retail team determines Parkland's price zone on its own without approval from Parkland's senior management.[59] Parkland's President and Chief Executive Officer – who provided Parkland's aforesaid assurances on Parkland's behalf[60] – is unaware of Parkland's criteria for setting price zones and would not be aware of any changes to price zones made by the retail team.[61] In fact, Parkland's

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[51] *Ibid*.
[52] Espey Affidavit, Respondent's Record, para. 22, p. 16.
[53] Espey Affidavit, Respondent's Record, para. 17, p. 14.
[54] Cross-Examination transcript on Affidavit of Robert Espey, May 7, 2015, p. 26, Commissioner's Supplemental Record, Tab 2, p. 41.
[55] Cross-Examination transcript on Affidavit of Robert Espey, May 7, 2015, pp. 20-23, Commissioner's Supplemental Record, Tab 2, pp. 35-38.
[56] Answers to Undertakings of Robert Espey, Commissioner's Supplemental Record, Tab 4, Response to Undertaking No. 9, p. 272.
[57] Cross-Examination transcript on Affidavit of Robert Espey, May 7, 2015, pp. 22-23, Commissioner's Supplemental Record, Tab 2 and Answers to Undertakings of Robert Espey, Commissioner's Supplemental Record, Tab 4, Response to Undertaking No. 9, p. 272.
[58] Cross-Examination transcript on Affidavit of Robert Espey, May 7, 2015, p. 23, Commissioner's Supplemental Record, Tab 2, p. 38.
[59] Cross-Examination transcript on Affidavit of Robert Espey, May 7, 2015, pp. 23-24, Commissioner's Supplemental Record, Tab 32, pp. 37-38.
[60] Espey Affidavit, Respondent's Record, para. 59(c) p. 30.
[61] Cross-Examination transcript on Affidavit of Robert Espey, May 7, 2015, pp. 21-24, Commissioner's Supplemental Record, Tab 2, pp. 36-39.

sworn evidence in this application about price increases in one of the markets at issue is inaccurate.[62]

e. Monitoring Parkland's Assurance would be Significant, Impractical and Unreliable in any Event

35. Additionally, changes to price zones are not detectable by the Non-Corporate Stations and even changes to rack forward margins may not be detectable by Non-Corporate Stations. Parkland does not tell – and will not tell – its Non-Corporate Stations of the price zones in which they are located, the other Non-Corporate Stations in their price zone and of changes to the price zones or upcharge.[63] As Parkland's Director of Retail Operations notes:

> "*Specifics of a dealer's zones 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 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)"[64] (emphasis added)

36. In addition, there is no detailed evidence before the Tribunal of what Pioneer's pricing strategy is. Without further information, the Tribunal cannot assess whether maintenance of this strategy is an appropriate way to address competition concerns in the affected Markets during the interim period, nor what would be required to monitor this pricing strategy.

C. THE BALANCE OF CONVENIENCE FAVOURS THE COMMISSIONER

(i) A Hold Separate Arrangement is Possible

37. Parkland raises the spectre of Imperial Oil's consent as a reason for why the Hold Separate Arrangement is burdensome or difficult.[65] However, it appears that the closing of the

[62] Espey Affidavit, Respondent's Record, para. 17, p. 14 states that "Parkland has not increased the rack forward margin to Independent Dealer Stations in Ontario in the past three years." However, this is contradicted in Answers to Undertakings of Robert Espey, Commissioner's Supplemental Record, Tab 4, Response to Undertaking No. 6, p. 271.

[63] Answers to Undertakings of Robert Espey, Commissioner's Supplemental Record, Tab 4, Responses to Undertakings No. 11 and 13, p. 272.

[64] Exhibit 4, Cross-Examination on Affidavit of Robert Espey, p. 2, Commissioner's Supplemental Record, Tab 3(d), p. 138.

[65] Parkland Memorandum of Argument, paras. 46, 91; Espey Transcript p.93, Commissioner's Supplemental Record, Tab 2, p. 108.

transaction would require the Pioneer supply contracts to be terminate with Imperial and be re-negotiated for all of the stations acquired in the transaction, not just the ones in the 14 Markets. Parkland has provided no evidence as to why it will be able to continue to supply all acquired stations post-transaction except the ones in the 14 Markets. Moreover, Parkland has advised only that Imperial has taken the position that it [redacted].[66] Without evidence, such speculation does not sway the balance of convenience.

38. Parkland alleges it is impossible from a practical perspective to hold separate the Pioneer assets.[67] It claims that a hold separate in respect of the 17 stations is fraught with difficulty, primarily because the assets will lack the underlying infrastructure required to operate them. There is no evidence before the Tribunal that indicates that the hold separate assets will not be able to utilize Parkland's existing infrastructure. Parkland's submission on this point is rooted in its misconception regarding the need to transfer the hold separate assets to a separate legal entity. Parkland's submission that the hold separate assets would be "orphaned" is fundamentally flawed for the same reasons.[68] Finally, Parkland offers no explanation for why, in this instance, a hold separate arrangement would not work.

(ii) The Tribunal Should Favour a Straightforward Remedy over one that is Vague, Complex and Unenforceable

39. The Commissioner has proposed a hold separate agreement to ensure that the assets in the Relevant Market be held separate until such time as the Tribunal delivers its final decision in respect of the Commissioner's section 92 application. Such an agreement is common to allow for divestitures following a merger, and as shown in the record, proceeds using a similar model across industries.[69]

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[66] Transcript to Espey Cross-Examination, p. 93, Commissioner's Supplemental Record, Tab 2, p. 108.
[67] Parkland Memorandum of Argument, para. 92.
[68] Espey Affidavit, Respondent's Record, para. 56, p. 27.
[69] See the Consent Agreement listed in the Commissioner's Book of Authorities at Tabs *Commissioner of Competition v. Holcim Ltd* (2015) (Tab 13), *Commissioner of Competition v. Agrium Inc.* (2013) (Tab 10), *Commissioner of Competition v. BCE Inc.* (2013) (Tab 11), *Commissioner of Competition and IESI-BFC Ltd.*, *BFI Canada Inc., Waste Services Inc., and Waste Services (CA) Inc.* (2010) (Tab 14), *Commissioner of Competition and Ticket Master Entertainment Inc. and Live Nation Inc.* (2010) (Tab 17), *Commissioner of Competition and Clean Harbors, Inc.* (2009) (Tab 12), and *Commissioner of Competition v. Westway Holdings Canada Inc.* (2003) (Tab 18).

40. Prior Tribunal reviews of proposed consent orders have established the following principles for the issuance of a remedy from the Tribunal:

a. the proposed measures "are sufficiently well defined to be effective and to be enforceable"[70]; and

b. the proposed remedy meets the objectives of the Act;[71]

c. the Tribunal will not issue orders couched in vague terms;[72] and

d. the remedy should be straightforward instead of complex.[73]

41. In addition, a straightforward remedy is to be preferred over one that is complex. As noted by the Tribunal in reviewing a proposed consent order:

> There is no evidence before the Tribunal that this complex arrangement, as opposed to a more simple, straightforward remedy such as allowing another (completely independent) purchaser to acquire Palm Dairies, is necessary to meet the objectives of the Act. Also, there is reason to doubt the effectiveness of the arrangement which it is sought to impose and consequently issuing the order could possibly lead to a substantial reduction in competition.[74]

42. Parkland's proposed remedy fails to meet all of these principles, notably because:

a. Parkland did not provide sufficient details on the proposed divestitures. The Respondents' vague and ambiguous assertions about the Parkland Divestitures do not address when this will occur, who will purchase the assets, who will monitor the pricing and who will enforce the proposal. As a result, there is no certainty regarding the effectiveness of the proposed remedy as the Tribunal cannot properly assess whether the divestitures will effectively remedy the substantial lessening of competition in the affected Markets;

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[70] *Director of Investigation and Research v. Asea Brown Boveri Inc*. [1989] C.C.T.D. No. 35 (QL), Reasons for Consent Order Dated June 15, 1989 at p. 1122, ("*Asea Brown*")
[71] *Ibid.*
[72] *Canada (Director of Investigation and Research, Competition Act) v. Palm Dairies Ltd.* [1986] C.C.T.D. No. 10 (QL) p.10. ("*Palm*"). *See also Imperial Oil 1*, p.10 ("…an order of the Tribunal is as enforceable as a court order. The terms of that order then must be sufficiently precise.")
[73] *Palm*, p.14.
[74] *Palm*, at p. 14.

b. Parkland is unable to ensure that maintenance of the rack forward margin and Pioneer's pricing strategy could be monitored and enforced;[75]

c. The Commissioner's hold separate proposal is simple – a hold separate agreement will maintain the assets and preserve their competitiveness, and would include a hold separate manager vested with the authority necessary to conduct business in respect of the assets held separate without being influenced, controlled or directed by Parkland. This will ensure the assets remain viable following the closing of the transaction and eliminate the risk of irreparable harm in the interim period. Hold separate agreements are used routinely in resolving matters under the Act. Moreover, hold separate agreements are akin to an interim structural remedy, as opposed to what Parkland has proposed, which is an interim behavioural remedy.

43. Imposing a hold separate agreement would allow for an enforceable order which would prevent irreparable harm to consumers and the Canadian economy during the interim period. The burden on Parkland would be limited to the $200,000 required to engage the hold separate Manager.[76] Accepting Parkland's Divestitures would allow for an unenforceable "intention" that would be difficult to implement and monitor, would not prevent irreparable harm, and most importantly may not remedy the substantial lessening of competition in the affected markets.

44. For all these reasons, the balance of convenience favours the Commissioner.

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[75] See paragraphs 33 to 34 *supra*.

[76] Espey Affidavit, Respondent's Record, para. 57(b)(iii), Tab 2, p. 29.

III. ORDER SOUGHT

45. The Commissioner maintains his request that the Tribunal issue:

a. an order directing Parkland to hold separate the assets it acquires from Pioneer pursuant to the Proposed Merger in the Markets on such terms as are necessary to preserve the assets and business as a going concern and to maintain competition in the Markets until such time as the Tribunal delivers its final decision in respect the Commissioner's Application pursuant to section 92 of the Act;

a. costs; and

b. such further and other relief as counsel may request and this Tribunal may grant.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 12th day of May, 2015.

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SCHEDULE A: AUTHORITIES CITED

1. Advisory Panel on Efficiencies, Report of the Advisory Panel on Efficiencies, August 2005, http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/01954.html
2. *Canada (Director of Investigation and Research, Competition Act) v. Imperial Oil Limited,* [1989] C.C.T.D. No. 52 (QL) p. 5, 8, 10
3. *Canada (Director of Investigation and Research, Competition Act) v. Palm Dairies Ltd.* [1986] C.C.T.D. No. 10 (QL) p.10. ("*Palm*")
4. *Commissioner of Competition and United Grain Growers and Canadian Wheat Board*, [2002] C.C.T.D. No. 30 at para. 8
5. *Director of Investigation and Research v. Asea Brown Boveri Inc*. [1989] C.C.T.D. No. 35 (QL), Reasons for Consent Order Dated June 15, 1989 at p. 1122
6. *ICN Pharmaceuticals Inc. v Canada (Patented Medicine Prices Review Board)* (1996), 119 FTR 114, 65 ACWS (3d) 484 (FCTD) (DO NOT INCLUDE IN BOA)

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

REPLY MEMORANDUM OF ARGUMENT ON APPLICATION FOR AN INTERIM ORDER

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