COMMENTS / COMMENTAIRES

MERGERS AND INTERIM ORDERS UNDER THE COMPETITION ACT: THE COMPETITION TRIBUNAL'S DECISION IN PARKLAND

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The Competition Tribunal's decision in Commissioner of Competition v. Parkland Industries Ltd. *("Parkland") is the first and, to date, only contested application under section 104 of the* Competition Act *(the "Act") in the context of a merger. The decision determined the legal test for an interim order in the context of a merger and the relationship between traditional principles of injunctive relief ordinarily applied by the Superior Courts and an interim order under section 104 of the Act. The Tribunal's decision also – quite helpfully – explained the legal and contextual framework for each of the Tribunal's remedial powers for mergers under the Act. This comment discusses these developments.*

La décision du Tribunal de la concurrence dans l'arrêt Commissaire de la concurrence c. Parkland Industries Ltd. *(« Parkland ») constitue le premier et – jusqu'à présent – seul cas d'une demande contestée en vertu de l'article 104 de la Loi sur la concurrence (la « Loi ») dans le contexte d'un fusionnement. Cette décision a instauré le critère juridique suivant lequel une ordonnance provisoire peut être délivrée dans le contexte d'un fusionnement, et a établi la relation entre les principes traditionnels des mesures injonctives généralement accordées par les cours supérieures et une ordonnance provisoire accordée en vertu de l'article 104 de la Loi. La décision du Tribunal fournit également une explication – qui s'avère particulièrement utile – de l'encadrement juridique et contextuel de chacun des pouvoirs de redressement du Tribunal en ce qui concerne les fusionnements opérés en vertu de la Loi. Le présent commentaire d'arrêt examine ces différentes innovations.*

The Competition Tribunal's decision in *Commissioner of Competition v. Parkland Industries Ltd.*[1] ("*Parkland*") is the first and, to date, only contested application under section 104 of the *Competition Act*[2] (the "Act") in the context of a merger. The Competition Tribunal's decision determined the legal test for interim orders under section 104 of the Act for mergers. It also discussed the legal and contextual framework for each of the Tribunal's remedial powers for mergers under the Act.

This comment discusses these developments, focusing on the legal test for an interim order under section 104 of the Act and its intersection with the principles of injunctive relief ordinarily applied by the Superior Courts.

I. Factual Basis for the Contested Application under Section 104 of the *Competition Act*[3]

Parkland and Pioneer each carried on business as an independent marketer of fuel and petroleum products.[4] Parkland and Pioneer had entered into an asset purchase agreement pursuant to which Parkland agreed to acquire substantially all of Pioneer's assets.[5] The acquired assets included 181 of Pioneer's corporate stations and 212 of Pioneer's supply agreements with independent dealer stations in the provinces of Ontario and Manitoba.[6] Corporate stations (which are owned or leased by Parkland) are supplied and supported by Parkland.[7] Independent dealer stations (which are operated and managed by independent third-party dealers) are supplied fuel by Parkland pursuant to exclusive long-term agreements between the independent dealer and Parkland.[8]

The Commissioner of Competition (the "Commissioner") filed an application pursuant to section 92 of the Act seeking, among other things, an order prohibiting Parkland and Pioneer from implementing the proposed merger in 14 local markets in Ontario and Manitoba[9] and/or requiring Parkland to dispose of assets in these markets as would be required for an effective remedy.[10] The next day, the Commissioner filed an application for an interim order in respect of the proposed merger pursuant to section 104 of the Act.[11] The Commissioner sought an order directing Parkland to hold separate the assets it proposed to acquire from Pioneer pursuant to the proposed merger in the 14 local markets until the Tribunal's final disposition of the Commissioner's application pursuant to section 92 of the Act.[12] The Tribunal's application for interim relief under section 104 of the Act was granted in respect of 6 of the 14 local markets at issue, as discussed further below.

II. The Commissioner's Remedial Powers for Mergers

Before *Parkland*, the Tribunal had not heard a contested application under section 104 of the Act in the context of a merger. Accordingly, when setting out and applying the test for an interim order under section 104 of the Act, the Tribunal discussed the legal framework for

its remedial powers for mergers and the context in which each remedy is generally sought by the Commissioner in a merger investigation.

Section 92 of the Act represents the ultimate relief that the Commissioner may seek to remedy a merger or proposed merger that will prevent or lessen, or is likely to prevent or lessen, competition substantially. Through an application before the Tribunal under section 92 of the Act, the Commissioner may seek dissolution, divestiture or other relief in the case of a proposed or completed merger (a "92 Application").[13] Procedurally, a 92 Application is in many ways akin to the procedure for an action in the civil courts, encompassing pleadings, documentary and oral discovery and a trial.

The Commissioner has two available forms of interim relief in the context of a merger: an interim order under section 100 of the Act (a "100 Interim Order") and an interim order under section 104 of the Act (a "104 Interim Order"). In *Parkland*, the Tribunal regarded these interim orders as inherently different from each other, not only with respect to the legal test that must be satisfied to obtain the interim order, but also in respect of the purpose and context in which each is generally sought by the Commissioner during a merger investigation and granted by the Tribunal.[14]

A 100 Interim Order, if granted, forbids the completion or implementation of a proposed merger for 30 days subject to an extension of up to an additional 30 days.[15] The Tribunal commented that a 100 Interim Order is generally sought during the "embryonic stage" of a merger investigation when the Commissioner's inquiry is ongoing and more time is needed to complete the inquiry.[16] Unlike a 104 Interim Order, a 100 Interim Order only applies to proposed mergers (it has no application to completed mergers). Further, and also unlike a 104 Interim Order, a 100 Interim Order cannot (and would not) be sought by the Commissioner after he has commenced a 92 Application.[17] There are two criteria that the Tribunal must consider in order to issue a 100 Interim Order: 1) whether an inquiry under paragraph 10(1)(b) of the Act is in progress in respect of the merger and the Commissioner needs more time to complete the inquiry; and 2) whether, in the absence of the interim order, the Tribunal's ability to remedy the effect of the merger on competition would be substantially impaired because an action by a party to the merger would be difficult to reverse.[18] There have only been two contested section 100 applications, both of which predate the 2009 amendments to the Act,

that created an initial waiting period that may be extended through the issuance of a Supplementary Information Request under the Act.[19]

Unlike a 100 Interim Order, a 104 Interim Order is available for all reviewable conduct under Part VIII of the Act. The Commissioner can only seek a 104 Interim Order after the Commissioner has filed an application for a substantive order under Part VIII of the Act, and in the case of a merger, a 92 Application.[20] Accordingly, the Commissioner's merger investigation is generally more advanced when seeking a 104 Interim Order as compared to when he would generally seek a 100 Interim Order.[21] Further, the Tribunal's determination of whether to grant a 104 Interim Order does not refer to the ability to remedy the effect of a merger. It only refers to the principles of injunctive relief that must be satisfied in order for a 104 Interim Order to be granted.[22] Accordingly, the conduct of an application under section 104 of the Act is in many ways akin to the conduct of an interim or interlocutory injunction in the civil courts.

III. Framework for an Interim Order under Section 104 of the Competition Act

With respect to mergers, an interim order under section 104 requires two main elements. First, and as noted, the Commissioner must have commenced a 92 Application.[23] This element is unsurprising as the purpose of this interim order (as with injunctive relief generally) is to prevent irreparable harm during the interim period pending the disposition of the main application. Second, the Tribunal, when exercising its discretion to make an interim order, must consider the principles ordinarily considered by superior courts when granting interlocutory or injunctive relief.[24] In this regard, the Tribunal has consistently applied – as it did in *Parkland* – the tripartite test for injunctive relief set out by the Supreme Court of Canada in *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311.[25] Accordingly, the Tribunal may issue the interim order if the Commissioner proves the following elements on a balance of probabilities:

- there is a serious issue to be tried;
- irreparable harm would ensue if an interim order is not granted; and
- the balance of convenience favours granting the interim order.[26]

The Tribunal's treatment of each of these elements in *Parkland* is described below.

(a) Serious Issue to be Tried

The serious issue to be tried element imposes a low threshold, requiring only a preliminary assessment of the merits to ensure that the underlying application commenced before the Tribunal raises a serious issue.[27] The Commissioner must demonstrate that the application before the Tribunal is neither frivolous nor vexatious.[28] Once the Tribunal determines that the underlying application before it is neither vexatious nor frivolous, it should proceed to the second part of the test.

In *Parkland*, the Tribunal concluded that the Commissioner had raised serious issues to be tried regarding the 14 local markets at issue, and in particular, significant evidence with respect to his allegation of a substantial lessening of competition.[29] The Tribunal concluded that the matters at issue raised complex questions of fact and law requiring an assessment of the credibility and sufficiency of evidence on a number of issues, including the alleged unilateral and coordinated anti-competitive effects of the proposed merger in the 14 local markets.[30] The merging parties argued that there was no serious issue to be tried regarding 12 of the 14 local markets because Parkland had intended to complete certain divestitures in those markets in any event.[31] The Tribunal concluded that the proposed divestitures were not sufficiently defined and detailed to allow the Tribunal to conclude that they would remedy competition concerns in those markets.[32]

(b) Irreparable Harm

Under the irreparable harm element, the Commissioner must demonstrate that irreparable harm would ensue if the interim relief sought is not granted.[33] In outlining this element, the Tribunal distinguished between "harm" and its "irreparable" nature, and expanded upon the nature of each.[34]

The Tribunal clarified that "harm" in the context of a 104 Interim Order must be established on the basis of clear and non-speculative evidence.[35] Generally, irreparable harm must be proven – and cannot be inferred – when injunctive relief is sought. However, harm in the context of a proposed merger is prospective by its nature and must, of necessity, be inferred.[36] Accordingly, the relief sought in a 104 Interim Order is akin

to a *quia timet* ("because he fears") injunction, requiring an assessment of the propriety of the injunctive relief sought without the advantage of actual evidence regarding the nature and extent of the alleged harm.[37] Having regard to the *quia timet* nature of a 104 Interim Order, the Tribunal adopted a "cautious approach", requiring a "high degree of probability" that the alleged harm will in fact occur in order to award injunctive relief.[38] Accordingly, when requesting a 104 Interim Order, the Commissioner has the burden of showing clear and non-speculative evidence demonstrating how such harm will occur so inferences can reasonably and logically flow from the evidence.[39] In this regard, and from an evidentiary standpoint, the Tribunal noted that the Commissioner is assisted by the presumption that his actions pursuant to the Act are in the public interest.[40] However, this presumption does not change the Commissioner's burden of proof, which is on a balance of probabilities.[41]

"Irreparable" in the context of a 104 Interim Order refers to the *nature* of the harm suffered rather than the harm's magnitude.[42] It is harm that cannot be quantified in monetary terms (whether through damages or costs) or harm that cannot be cured.[43] Importantly, in the context of a contested merger before the Tribunal, the irreparability arises from the Tribunal's lack of jurisdiction to remedy interim harm that may be suffered by consumers and the broader economy during the interim period in the event the Commissioner is ultimately successful in his section 92 application.[44]

The Tribunal is a creature of statute and only has the powers conferred on it by Parliament. In this regard, the Tribunal lacks the necessary authority to remedy harm that may be suffered before the final disposition of an application before the Tribunal, such as through an award of damages.[45] In the context of the merger between Parkland and Pioneer, the Tribunal did not, for example, have the jurisdiction to remedy any harm suffered by consumers that may have paid higher retail gasoline prices in the 14 local markets in the event the Commissioner was successful in his section 92 application. In respect of a completed merger, the Tribunal may only order any party to the merger or any other person to dissolve the merger, or dispose of assets or shares in such a manner as the Tribunal directs.[46]

With respect to 6 of the 14 markets at issue in the section 104 proceeding, the Tribunal concluded that irreparable harm resulting from the proposed merger could be reasonably and logically inferred from clear and non-speculative evidence.[47] With respect to the remaining 8 markets,

the Tribunal concluded that clear and non-speculative evidence of the market share and market concentration figures from which to assess irreparable harm was lacking.[48] In balancing the evidentiary burden of the Commissioner in a section 104 proceeding, the Tribunal noted that the Commissioner does not have to prove the relevant geographic market definition on a balance of probabilities (as that is an issue for the section 92 application).[49] However, the Tribunal noted that the Commissioner's allegations of apprehended harm resulted from inferences of anti-competitive effects heavily dependent on market concentration levels that could not be dissociated from market definition.[50] As a result, the Tribunal concluded that there must be some evidence meeting the clear and non-speculative standard regarding market concentration and market definition before the Tribunal could proceed with its analysis and make reasonable inferences with respect to the alleged irreparable harm.[51]

(c) Balance of Convenience

Under the balance of convenience element, the Tribunal must determine which of the parties will suffer the greater harm from the granting or refusal of the 104 Interim Order, pending a decision on the merits in the 92 application.[52] The role of public authorities in protecting the public interest is an important factor when assessing the balance of convenience in injunctive relief generally.[53] The Commissioner's actions pursuant to the Act are presumed to be in the public interest.[54] Accordingly, the Tribunal concluded that significant weight should be applied to these public interest considerations in the context of a 104 Interim Order when weighing the balance of convenience.[55]

After balancing Parkland's expected losses in the 6 markets with the harm expected to be caused to the public interest in the absence of the 104 Interim Order, the Tribunal concluded that the balance of convenience weighed in favour of the Commissioner.[56] A significant factor in the balance of convenience analysis was Parkland's cost to implement the relief sought by the Commissioner in the section 104 proceeding, i.e., a hold separate order.[57] The cost was examined through affidavit evidence, cross-examination and submissions, leading to an approximate figure from which the Tribunal could balance against the public interest.[58]

(d) Tribunal's Discretion to Issue An Order

Subsection 104(1) of the Act provides that the Tribunal "may issue" an interim order as it considers appropriate. The word "may" indicates that

the Tribunal's decision to impose an interim order is discretionary (even if the three elements for an interim order are satisfied).[59] The Tribunal acknowledged and weighed this discretion before deciding to exercise it and make the interim order.[60]

IV. Conclusion

The Tribunal's decision in *Parkland* has made a significant contribution to competition jurisprudence in Canada. It determined the legal test for a 104 Interim Order in the context of a merger. In particular, it clarified the burden the Commissioner must meet to obtain interim relief, the considerations the Tribunal will consider before deciding a contested application for interim relief and the relationship between traditional principles of injunctive relief and the nuances of a 104 Interim Order in the context of a merger. The Tribunal's decision also – quite helpfully – explained the legal and contextual framework for each of the Tribunal's remedial powers for mergers under the Act.

Endnotes

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[1] Canada (*Commissioner of Competition) v Parkland Industries Ltd*, 2015 Comp Trib 4 [*Parkland*].

[2] RSC, 1985, c C-34 [*Competition Act*].

[3] What follows is a brief synopsis of salient facts underpinning the contested application under section 104 of the *Competition Act*. Please see *Parkland, supra* note 1 at paras 5-21 for further factual information regarding this matter.

[4] *Parkland, supra* note 1 at paras 6-7. In the decision, "Parkland" was defined to include Parkland Industries Ltd. and Parkland Fuel Corporation. "Pioneer" was defined to include 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.

[5] *Ibid* at para. 8.

[6] *Ibid.*

[7] *Ibid* at para. 6.

[8] *Ibid.*

[9] The 14 markets at issue were: (1) Neepawa, MB; (2) Bancroft, ON; (3) Lundar, MB; (4) Kapuskasing, ON; (5) Warren, MB; (6) Welland, ON; (7)

Chelmsford/Azilda, ON; (8) Gananoque, ON; (9) Hanover, ON; (10) Port Perry, ON; (11) Aberfoyle, ON; (12) Allanburg, ON; (13) Innisfil, ON; and (14) Tillsonburg, ON.

[10] *Ibid* at para. 12.

[11] *Ibid* at para. 14.

[12] *Ibid.*

[13] Without the consent of the merging parties and the Commissioner, the Tribunal's remedial powers are limited to dissolution or the divestiture of assets or shares for completed mergers and a prohibition against the completion of all or part of a proposed merger. With the consent of the merging parties and the Commissioner, the Tribunal may order a wider range of remedies for both completed and proposed mergers. See section 92(1) of the *Competition Act.*

[14] *Parkland, supra* note 1 at para 35.

[15] *Competition Act, supra* note 2, ss100 (1)(a), 100(5), 100(7).

[16] *Parkland, supra* note 1 at paras 35, 91.

[17] *Ibid* at para 35.

[18] *Competition Act, supra* note 2, s 100(1)(a); *Parkland, supra* note 1 at para 32; *Canada (Commissioner of Competition) v Labatt Brewing Co*, 2007 Comp Trib 9; aff'd 2008 FCA 22 [*Labatt*].

[19] *Labatt, supra* note 18; *Canada (Competition Act, Director of Investigation and Research) v Superior Propane Inc*, [1998] CCTD No 20, 85 CPR (3d) 194 [*Superior Propane*]. As noted by the Tribunal in Parkland, when the Tribunal issued its decision in *Superior Propane*, the Act then gave the Director (now referred to as the Commissioner) a maximum initial period of 21 days to perform a merger review before the parties could close the transaction, barring a Tribunal order. When the Tribunal issued its decision in *Labatt*, the Commissioner had a maximum of 42 days to complete his merger review before a possible closing. In 2009, the merger review process under the Act was substantially amended. The Commissioner now has an initial waiting period of 30 days to conduct his review before the parties can close the transaction. This can be extended, with the issuance of a Supplementary Information Request ("SIR"), to 30 days after receipt of the information requested by the Commissioner under the SIR. *Parkland, supra* note 1 at para 36.

[20] *Parkland, supra* note 1 at para 91.

[21] *Ibid* at para 35.

[22] *Ibid* at para 25.

[23] *Competition Act, supra* note 2, s104(1); *Parkland, supra* note 1 at para 25.

[24] *Parkland, supra* note 1 at para 25.

[25] *Nadeau Poultry Farm Limited v Groupe Westco Inc et al*, 2008 Comp Trib 16 at para. 8 [*Nadeau*]; *B-Filer Inc v The Bank of Nova Scotia*, 2005 Comp Trib 52 at paras 3-5; *Parkland, supra* note 1 at para 25.

[26] *Ibid.*

[27] *Parkland, supra* note 1 at para 37; *RJR-MacDonald Inc v Canada (Attorney General)*, [1994] 1 SCR 311 at 337-338 [*RJR-MacDonald*]; *Nadeau, supra* note 25 at para 15.

[28] *Ibid.*
[29] *Parkland, supra* note 1 at para 42.
[30] *Ibid* at para 45.
[31] On April 29, 2015, Parkland sent a letter to the Commissioner advising him of Parkland's intention, following the closing of the merger, to divest four Corporate Stations and six supply agreements in 10 of the 14 Local Markets. In addition, in its affidavit evidence, Parkland also committed to divesting to a third-party purchaser or terminate the supply agreement with the Independent Dealer Station in Tillsonburg, Ontario. *Parkland, supra* note 1 at paras 11, 18 and 39.
[32] *Parkland, supra* note 1 at para 42.
[33] *Ibid* at para 47.
[34] *Ibid.*
[35] *Parkland, supra* note 1 at para 50; *Syntex Inc v Novopharm Ltd* (1991), 36 CPR (3d) 129 (FCA); *AstraZeneca Canada Inc v Apotex Inc*, 2011 FC 505, aff'd 2011 FCA 211; *Amnesty International Canada v Canadian Forces*, 2008 FC 162 at paras 68-69 [*Amnesty*].
[36] *Ciba-Geigy Canada Ltd v Novopharm Ltd* (1994), 83 FTR 161 at paras 118-121; *Parkland, supra* note 1 at para 50; *Nadeau, supra* note 25 at para 26.
[37] *Parkland, supra* note 1 at para 51; *Nadeau, supra* note 25 at para 26.
[38] Robert J Sharpe, *Injunctions and Specific Performance* (Toronto: Canada Law Book, 1992) (loose-leaf updated 2014, release 23), at para 1.690 [*Sharp*]; *Merck & Co v Apotex Inc* (2000), 8 CPR 4th 248 (FCA) at para 7; *Amnesty, supra* note 35 at paras 70, 123; *Parkland, supra* note 1 at paras 51-58.
[39] *Parkland, supra* note 1 at para 58.
[40] *Canada (Commissioner of Competition) v Pearson Canada Inc*, 2014 FC 376 at para 43; *Canada (Competition Act, Director of Investigation and Research) v. Bank of Montreal*, [1996] CCTD No 12 at para 32; *Superior Propane Inc, supra* note 19 at para 19; *Rona Inc v Commissioner of Competition*, 2005 Comp Trib 26 at para 17; *Milk Producers Assn v British Columbia (Milk Board)*, [1989] 1 FC 463 at para 28 (TD); *North of Smokey Fishermen's Assn v Canada (Attorney General)*, 2003 FCT 33, [2003] FCJ No 40 at para 24 (TD); *Entreprises Sibeca Inc c Frelighsburg (Municipalité)*, [2002] JQ No 5093 at paras 59-61 (CA); *Parkland, supra* note 1 at para 62.
[41] *Parkland, supra* note 1 at para 62.
[42] *RJR-MacDonald, supra* note 27 at 341; *Parkland, supra* note 1 at para 48.
[43] *Ibid.*
[44] *Parkland, supra* note 1 at para 48.
[45] This is unlike the superior courts of the provinces that have "inherent jurisdiction", in that they do not derive their existence from legislation.
[46] In addition, with the consent of the person against whom the order is directed and the Commissioner, the Tribunal may order any party to the merger or any other person to take any other action: *Competition Act, supra* note 2, se 92(e)(iii).
[47] *Parkland, supra* note 1 at para 99. These six markets were Warren, MB,

Lundar, MB, Neepawa, MB, Bancroft, ON, Tillsonburg, ON and Kapuskasing, ON.

[48] *Ibid* at para 86. These eight markets were Aberfoyle, ON, Allanburg, ON, Innisfil, ON, Welland, ON, Chelmsford/Azilda, ON, Gananoque, ON, Hanover, ON and Port Perry, ON.

[49] *Ibid* at para 93.

[50] *Ibid* at para 48.

[51] *Ibid.*

[52] *RJR-MacDonald, supra* note 27 at 342; *Parkland, supra* note 1 at para 103.

[53] *RJR-MacDonald, supra* note 27 at 108; *Parkland, supra* note 1 at para 108.

[54] *Sharp, supra* note 38.

[55] *Parkland, supra* note 1 at para 108. See also: *RJR-MacDonald, supra* note 27 at 346.

[56] *Parkland, supra* note 1 at para 111.

[57] *Parkland, supra* note 1 at paras 109-112.

[58] *Ibid.*

[59] *Competition Act, supra* note 2, s 104(1); Parkland, supra note 1 at paras 113-114.

[60] *Parkland, supra* note 1 at paras 113-117.