MEDIATING BEFORE THE COMPETITION TRIBUNAL: LESSONS FROM THE *PARKLAND* MEDIATION

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As litigation counsel to Parkland, the authors mediated the first ever case before a judicial member of the Competition Tribunal. They explore why mediation resolved this hard-fought case and discuss lessons for the Competition Bureau and future respondents. With mediation here to stay, future litigants must think carefully about whether to focus the mediation on the case's merits, whether and when to mediate, and who should participate (spoiler alert: bring your economist).

Les avocats plaidants qui ont représenté la société Parkland et qui sont les auteurs de l'article résumé ici ont entrepris la médiation de la toute première cause devant un juge du Tribunal de la concurrence. Ils examinent les raisons pour lesquelles la médiation a mené à la résolution d'une cause qui avait été si âprement débattue et décrivent les enseignements dont devraient tenir compte le Bureau de la concurrence et les futurs défendeurs. Alors que la médiation n'est pas une approche appelée à disparaître, les futurs plaideurs devront bien se demander si elle devrait être axée sur le bien-fondé de la cause, s'il faut même engager un processus de médiation et, si oui, à quel moment il faudrait le faire, et qui devrait y participer (avis à ceux qui ne le sauraient pas déjà : invitez-y votre économiste).

Introduction

In March 2016, the Commissioner of Competition and Parkland settled the Commissioner's application against Parkland during the first ever mediation involving a judicial member of the Competition Tribunal.[2] There have been two mediations involving the Tribunal since that time; one resulted in a settlement and a second mediation occurred in July 2017.[3] Mediation appears to be here to stay.

Although settlement discussions are commonplace in matters brought under Part VIII of the Competition Act, such as mergers and abuse of dominance cases ("Part VIII Matters"), formal mediation before a judicial member of the Tribunal is new. Unlike provincial rules of civil procedure, the *Competition Tribunal Rules*[4] do not provide for mediation. The Tribunal's June 2016 Practice Direction,[5] released after the successful Parkland mediation, provides guidance but rightly leaves many important decisions about the mediation to the parties, including whether to

participate in one at all. How individual mediations proceed and how the mediation process before the Tribunal develops more generally will be influenced by decisions of the Commissioner and future respondents.

This paper summarizes the *Parkland* mediation and provides our views, as litigation counsel to Parkland, about the mediation process in that case, why it worked, and what the Commissioner, the Competition Bureau, counsel, and their clients can learn from it for future mediations.

The Merger and The Commissioner's Review

We begin with a brief review of the merger and the litigation leading to the mediation.

The merging parties, Parkland and Pioneer Energy, were fuel wholesalers and retailers. Parkland and Pioneer Energy directly or indirectly operated retail gasoline stations for which they supplied the gasoline and set the retail price ("Corporate Stations"). They also supplied gasoline to independent dealers who operated retail gas stations and who resold the gasoline to the public ("Independent Dealers"). Those Independent Dealers set the retail price of gasoline at their stations. The majority of Parkland's assets were in Western Canada. The majority of Pioneer Energy's assets were in Ontario, with some in Manitoba.

On September 17, 2014, Parkland agreed to acquire 181 Corporate Stations and 212 Independent Dealer supply agreements from Pioneer Energy. Parkland and Pioneer Energy submitted their pre-merger notification filings on October 6, 2014. On November 5, 2014, the Commissioner issued a supplementary information request ("SIR"). On January 23, 2015, the parties certified their responses to the SIR, which included the provision of approximately 70,000 documents.

Although the statutory waiting period was set to expire on February 23, 2015, the parties agreed to give the Commissioner 15 days' written notice before closing. Parkland worked to try and resolve the Commissioner's concerns in certain local areas but the parties disagreed about key issues. As the subsequent litigation revealed, among other things, the parties disagreed about the scope of the geographic markets and Parkland's ability to profitably increase retail gasoline prices. On the one hand, the Commissioner argued that Parkland controlled the Independent Dealers so that the gasoline they sold should be attributed to Parkland for the purpose of measuring market shares and concentration in the analysis

of unilateral and coordinated competitive effects. The Commissioner argued that Parkland could and would increase its wholesale price of gasoline to the Independent Dealers, thereby facilitating an increase in the retail price in those geographic markets where Parkland would also have a Corporate Station post-merger.

For its part, Parkland argued that this approach ignored the role of Independent Dealers that set their own retail prices and incorrectly analyzed the combination of Corporate Stations and Independent Dealers as horizontal when in fact it was vertical (*i.e.*, a now vertically-integrated Parkland supplying a retail competitor). In addition, Parkland argued that the Commissioner had narrowly defined the geographic markets in order to increase his estimate of concentration and market shares in the affected markets.

On April 27, 2015, the parties advised the Commissioner of their intention to close the transaction on May 13, 2015. On April 28, 2015, the Commissioner commenced an inquiry under section 10 of the Competition Act. Although it disagreed that the merger had any anti-competitive effects in any of the disputed geographic markets, on April 29, 2015, Parkland sent a with prejudice letter to the Commissioner listing the divestitures it would make in ten local areas.[6] This involved divesting Corporate Stations in four areas and Independent Dealer supply agreements in six areas.

Despite Parkland's offered divestitures, on April 30, 2015, the Commissioner brought an application under section 92 concerning all ten local areas in which Parkland had offered divestitures as well as four additional areas (the "14 Local Markets"). At the same time, he sought an interim hold separate order that would require Parkland to hold separate the Pioneer Energy assets in those 14 Local Markets pending the Tribunal's determination of the Commissioner's application.

Parkland opposed the requested hold separate order. Among other reasons, a hold separate order threatened the merger. Parkland's acquisition of the Independent Dealer supply agreements required Imperial Oil's consent and its consent was uncertain in the face of a hold separate order. Parkland also feared the significant cost associated with a hold separate order. Not only would Parkland have to pay for a hold separate manager and a monitor, it would have to take onerous steps to ensure confidential information was kept separate. In his affidavit filed with the Tribunal, Parkland's chief executive officer reaffirmed Parkland's

intention to divest in ten of the 14 Local Markets, stated that Parkland would let its Independent Dealer supply agreement in Tillsonburg expire to permit the Independent Dealer to obtain supply from another source, and, in all 14 Local Markets, Parkland would commit not to raise prices to Independent Dealers during the application.

Despite these commitments, the Commissioner proceeded with his application. The Tribunal heard the application on May 12, 2015, and released its reasons and order on May 29, 2015.[7] The Tribunal held that the Commissioner's evidence failed to establish that irreparable harm was likely in any of the 14 Local Markets, owing in particular to his failure to offer anything more than speculation as to the relevant geographic markets. The Tribunal nevertheless granted the requested hold separate order with respect to six of the 14 Local Markets on the basis that Parkland's expert had admitted the potential for anti-competitive effects in those 6 Local Markets (although she said more analysis would be required to confirm that potential). As a result, the hold separate order issued by the Tribunal applied to only those 6 Local Markets, did not set in place any divestitures, and left 8 Local Markets to be dealt with by Parkland as it saw fit. The discrepancy between what Parkland offered and the Commissioner rejected (11 divestitures and interim relief for all 14 Local Markets), and what the Commissioner eventually obtained (interim relief for only 6 Local Markets) would be repeated following the parties' March 2016 mediation.

Agreeing to Mediate

In its reasons, the Tribunal noted that the Commissioner and Parkland did not appear to be far apart on remedy. The Commissioner sought divestitures; Parkland had offered divestitures. Thus, the Tribunal "invite[d] the parties, as part of the upcoming case management phase of the section 92 application in this case, to consult with each other to determine whether an agreement can be reached…"[8]

The Commissioner accepted the Tribunal's invitation by proposing a mediation before a member of the Tribunal. The Commissioner proposed that the mediation occur soon after the exchange of pleadings and before documentary and oral discovery. At that point the Commissioner likely thought that, in as much as Parkland had proposed a remedy in eleven of the 14 Local Markets and there was a hold separate order in effect in six of those markets with the attendant disruption and cost for Parkland, a mediation was in his interest. Parkland had a different view. In view of the

Commissioner's evidence and the Tribunal's reasons, Parkland required more time to fully analyze the Commissioner's theory of harm, including the contention that there was a horizontal merger at retail in the affected markets. Moreover, as the Tribunal's reasons make clear, the Commissioner's evidence was for the most part underwhelming. Accordingly, an early mediation appeared to favour the Commissioner. Parkland asserted that a mediation in those circumstances was premature. At best, the mediation would deteriorate into a horse-trading exercise rather than the application of competition law principles to the evidence.

The Tribunal agreed with Parkland's position. The preamble to its Scheduling Order noted that "the Tribunal is of the view that additional information on the parties' respective positions, to be provided through the discovery process and the service of the parties' expert reports, will be of assistance in any mediation process."[9] Mediation was scheduled for two days in March 2016, after discovery and after the Commissioner was to deliver his evidence in chief, including his expert reports.

The Mediation and the Parties' Theories of the Case

The months leading up to the March 2016 mediation did not bode well for settlement. The litigation was hard fought. The Commissioner moved for the production of thousands of additional documents from Parkland. Parkland resisted, arguing that the Commissioner's production requests were unending, disproportionate, and a fishing expedition.

In early November 2015, Parkland advised the Commissioner that it no longer intended to divest assets in any of the 14 Local Markets. Seemingly in response, the Commissioner sought and obtained section 11 orders against 17 third parties seeking production of enormous amounts of allegedly relevant information to supplement his case. Parkland argued that it could not examine the Commissioner's representative before the Commissioner produced the fruits of the section 11 orders. The Tribunal disagreed and ordered Parkland to proceed.

Having looked like they were close to settlement in May 2015, by early 2016 the parties looked a long way from resolving their differences. It was in that context that the parties attended a mediation in Ottawa before Crampton CJ on March 16 and 17, 2016. Those who know Ottawa in March know that the weather was as bleak as the prospects for settlement.

However, by March 2016, both sides had refined their theories of the case, a development that proved critical to the mediation's success. More time, and the fruits of his section 11 orders, enabled the Commissioner to drop one of the 14 Local Markets, Chelmsford-Azilda, from his application. He had also developed economic evidence to predict the upward pricing pressure expected to result from the merger, along with estimates of the likely deadweight loss, both of which were heavily sensitive to scope the geographic markets. To support his narrow geographic market definitions, the Commissioner also relied on additional expert evidence from non-economists. On the other side, Parkland had developed econometric evidence showing that the Commissioner's predicted anti-competitive effects had not in fact occurred in other similar local markets where Parkland had acquired overlapping assets (i.e., an Independent Dealer supply agreement and a Corporate Station), nor did there appear to be any support in the historical data for the Commissioner's theory of coordinated effects. Thus, while the Commissioner's economic analysis predicted price increases, it was manifestly flawed because those predicted price increases had not occurred in other comparable situations.

We do not know everything that brought the parties to settlement. But in our view, the opportunity to present their respective positions to a judicial member of the Tribunal was a significant factor in resolving the litigation. Why is that? There are at least three reasons. First, mediation can be a reality-check for both sides. Preparing the case for a mediation requires the parties to focus on their evidence and evaluate its persuasiveness. The reaction of the judicial member to that evidence may cause further evaluation of the persuasiveness of some or all of that evidence. Second, presenting a case to a judge, even at a mediation, can have a cathartic effect that can be a necessary precondition to settlement. The Commissioner, Competition Bureau officers, counsel, and client representatives have invested huge amounts of time and effort developing a case. Presenting that case at trial is the goal, but mediation is an opportunity to present that case to a judge as if it were a mini-trial. Third, in presenting their respective positions, the parties focused settlement discussions on the evidence for each of the 13 Local Markets that remained in issue. This enabled the mediator to work with both sides to bridge the gaps between them based in part on the evidence for each of these Markets.

The mediation produced an agreement in principle. The parties formalized that agreement in a Consent Agreement that was registered

with the Tribunal on March 29, 2016. Parkland agreed to six divestitures,[10] five fewer than it had been prepared to make in May 2015. Except in one market, it did not have to divest any of the valuable Corporate Stations, whereas it had previously offered to divest four Corporate Stations. In two markets in which it had previously offered to divest Independent Dealer supply agreements, Parkland agreed to a behavioural remedy concerning pricing. Just over two months later, the Consent Agreement was amended on consent to end the behavioural remedy in one of those two markets – Warren, Manitoba.[11] On the other side, while the Commissioner obtained many fewer divestitures than had been offered in April and May 2015, he avoided further litigation and the possibility of obtaining no remedies at all, given that Parkland had advised that it no longer intended to complete any divestitures and had developed evidence of no anti-competitive effects.

Lessons Learned

Although we have mediated cases before, mediating before the Tribunal was entirely new. Below are some of the lessons we learned from this experience that others might benefit from hearing.

Decide early whether the mediation will focus on the merits. Before scheduling the mediation, the parties need to consider what they hope to achieve. This will influence a foundational question: will the mediation consider the merits of each party's position or will it focus exclusively on negotiating a resolution? The answer to this question will influence almost every other decision about the mediation.

Sometimes mediation of civil suits completely ignores the merits. The focus is instead on extricating the parties from contentious and costly litigation and brokering a settlement, usually based on the exchange of money, that benefits both sides by avoiding further litigation. Although they follow procedural rules similar to civil matters, Part VIII Matters are very different than civil claims. First and foremost, one of the litigants is a public official. Discharging the Commissioner's mandate under the *Competition Act* will always require some analysis of the merits of his position and the likely anti-competitive effects. Second, Part VIII Matters are not just about money. While a remedy may have a monetary impact on a respondent, it can also have broader implications for the respondent's business or growth plans. Remedies may also require long-lasting changes to conduct or the creation of compliance programs. The Commissioner's application may cast the respondent or its employees

in an unfavourable light motivating the respondent to litigate to "clear its name". Third, mediation of Part VIII Matters occurs before a judicial member of the Tribunal. The mediator is not just a dealmaker, but a subject-matter expert whose reactions to merits-based arguments may assist the parties in evaluating the strength of their position. In our view, these factors will result in mediations of Part VIII Matters focusing on the merits more than might occur in ordinary civil matters.

How much each mediation will focus on the merits will vary, but recognizing that the merits will play some role influences most of the other decisions about the mediation.

Do not agree to mediate just because everyone else is. The first decision the parties face is whether to mediate before the Tribunal at all. In our view, both the Commissioner and respondents will usually welcome mediation. The benefits of settlement greatly outweigh the additional cost and burden associated with preparing for and attending a mediation. Both parties (but perhaps especially respondents) may also see mediation as an early check on the other side's intransigence or unreasonableness. Knowing that a Tribunal member will scrutinize the parties during a mediation may discourage unreasonable or arbitrary positions, particularly when the Commissioner is a serial litigant at the Tribunal.

However, just because the Tribunal welcomes mediation and others have agreed to mediate does not mean that the Commissioner or respondents should agree to mediate every case. Not every case can be settled through mediation and the parties are wasting their time and judicial resources by trying. One example of this type of intractable case is a merger that the Commissioner seeks to block entirely. If nothing short of enjoining the merger or requiring complete divestiture will satisfy the Commissioner, then the parties will have to litigate. There can be no settlement in those circumstances, only capitulation by one side. Another example where mediation may not be useful is where the parties require the Tribunal to interpret (or set aside) a prior Consent Agreement. Like the merger example, this could be an all-or-nothing proposition, or it could be that the parties can resolve their differences without mediation once the Consent Agreement is clarified.

Do not mediate too early. Litigating a case that could have been settled wastes enormous amounts of time and money. That concern sometimes pushes parties to mediate before they are ready to, meaning before settlement is a realistic outcome of the mediation. Some cases

may be ready for mediation immediately after the close of pleadings. The Commissioner and the respondent may have very developed theories of the case, some evidence in hand, and be close on potential remedies. In those circumstances, an early mediation may be useful. But the practical reality of most Part VIII Matters is that pre-litigation settlement discussions between the parties have failed very recently. The parties may need time to distance themselves from those discussions and to refine their evidence and theories of the case. An early mediation is likely to fail for the same reason that pre-litigation settlement discussions failed.

Parkland is an example of how scheduling mediation later in the litigation assisted settlement. By March 2016, both parties had refined their theories of the case and developed their evidence. That had not happened in the summer of 2015. Scheduling a mediation then would have been a waste of time, and could have negatively affected prospects for settlement going forward. In addition, had the litigation settled in the summer of 2015, it likely would have produced an unnecessary remedy in Chelmsford-Azilda. More time and information permitted the Commissioner to conclude that the merger would not substantially lessen competition in that area.

Schedule more time rather than less. The amount of time the parties need will vary. More complex matters may require more time. But as a general rule, parties should schedule more than one day and more time than they think they need. Most Tribunal matters are complex and may involve significant amounts of economic and other evidence. The parties need time to present that to the mediator. Memorializing a settlement also takes time. A Consent Agreement can be long and complex. Like any complex settlement agreement, the parties may need time after the mediation to review and revise the particular language of the Consent Agreement. But leaving a mediation without a signed document can cause a loss of settlement momentum and jeopardize the settlement. One solution is to schedule time for the parties to negotiate the language of the Consent Agreement at the mediation. The mediator may not been needed for this process but could be available as necessary. Another option is to memorialize the settlement in brief minutes of settlement to be implemented in a Consent Agreement that is subsequently negotiated and agreed to. One problem with this approach is that the parties may deal with the "big" issues at the mediation (*e.g.*, what the divestitures will be) but ignore "small" related issues (*e.g.*, how much time the respondent has to divest before a trustee is appointed). How the "small" issues

appear in the Consent Agreement could mean the difference between a settlement or continued litigation, yet the parties may not even realize there is an issue until after the mediation is over. In those circumstances, parties could consider agreeing that the mediator will be the final arbiter of disputes related to the implementation of the minutes of settlement in a Consent Agreement. This may enable the parties to quickly deal with any outstanding issues that arise after the mediation.

Bring experts to the mediation if necessary. One issue that arose in the *Parkland* mediation was the presence of experts at the mediation to present their analysis to the mediator. There was a concern that the mediator's reaction to the evidence might permit the expert to tailor any future evidence with the benefit of that reaction. In our view, this concern is overblown. As the Tribunal's Practice Direction regarding mediation confirms, the mediator will not hear the application. The mediator's reaction to either party's position or evidence may align with the panel's reaction or it may not. Whether experts participate in the mediation or not, counsel participate, and so long as the mediation deals with the merits in some fashion, it is an opportunity for the parties to improve their cases in reaction to what they have learned about their own case or their opponent's. Whether it is useful for experts to attend the mediation to explain their analysis or to assist counsel will depend on the case. But in our view, there should be no presumptive rule against experts attending. At least in *Parkland*, the attendance some of the expert witnesses facilitated the eventual settlement.

Conclusion

The mediation genie is out of the bottle and has conjured settlements in the first two mediated cases. That perfect record will be impossible to maintain but is a promising start. The *Parkland* case demonstrates that, if done well, mediation can settle even very contentious cases.

Endnotes

[1] Lawyers at Bennett Jones LLP in Toronto. The authors represented Parkland in defence of the Commissioner's application.

[2] *Canada (Commissioner of Competition) v Parkland Industries Ltd*, CT-20-15-003 [*Parkland*].

[3] *Canada (Commissioner of Competition) v Moose International Inc*, CT-2016-004 (settled December, 2016); *Canada (Commissioner of Competition v Vancouver Airport Authority)*, CT-2016-015 (mediation scheduled for July 2017 following discovery). As of the date of writing, no schedule had been

ordered in *Canada (Commissioner of Competition) v HarperCollins Publishers LLC., and Harpercollins Canada Limited*, T-2017-002.

[4] *Competition Tribunal Rules*, SOR/2008-141.

[5] Canada, Competition Tribunal, "Practice Direction regarding Mediation", by Denis Gascon, Chairperson (6 June 2016), online: <http://www.ct-tc.gc.ca/Procedures/PracticeDirection-Mediation-eng.asp>.

[6] Parkland proposed to divest Corporate Stations in Neepawa, MB, Bancroft, ON, Kapuskasing, ON, and Welland, ON. It proposed to divest Independent Dealer supply agreements in Lundar MB, Warren, MB, Azilda-Chelmsford ON, Gananoque, ON, Hanover, ON, and Port Perry, ON.

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

[8] *Ibid* at para 119.

[9] *Canada (Commissioner of Competition) v Parkland Industries Ltd*, 2015 Comp Trib 11.

[10] Neepawa MB, Bancroft, ON, Hanover, ON, Innisfil, ON, Kapuskasing ON, and Tillsonburg ON.

[11] Order allowing an application under paragraph 106(1)(b) of the *Competition Act*, RSC 1985, c C-34 to vary a consent agreement dated June 8, 2016.