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CANADIAN COMPETITION TRIBUNAL ISSUES FIRST CONTESTED HOLD SEPARATE ORDER IN A MERGER CASE

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On June 3, 2015, the Canadian Competition Tribunal ordered Parkland and Pioneer to preserve and hold separate retail gas stations and supply agreements in six local markets, pending the resolution of the Commissioner of Competition's challenge to their proposed merger. The Commissioner is challenging the merger in relation to 14 local markets (less than 10% of the overall transaction) in which he alleges that the proposed transaction will likely lead to a substantial lessening of competition. The Commissioner had asked the Tribunal for an interim injunction prohibiting Parkland and Pioneer from implementing the proposed merger in the 14 markets in issue but the Tribunal concluded that he had satisfied the test for injunctive relief in respect of only six of those markets.

This is the first time that the Tribunal has considered a contested application for an interim injunction prohibiting the closing of a proposed merger transaction in circumstances where the Commissioner has already filed an application challenging that merger. The decision clarifies the applicable test for the issuance of hold separate orders and the evidentiary burden the Commissioner will need to satisfy in order to meet that test. The decision also offers some helpful guidance to parties to proposed mergers seeking to rely on unilateral preservation commitments to defeat a challenge by the Commissioner.

Background

In September 2014, Parkland agreed to buy substantially all of Pioneer's assets, including 181 retail gas stations and 212 exclusive long-term supply contracts. Parkland and Pioneer are competitors in the retail gas sector through the sale of gas at their respective corporate-owned stations and through the supply of gas to stations owned and independently operated by third parties. The parties pre-notified the transaction to the Competition Bureau in early October 2014. The Bureau conducted a thorough review, including a Supplementary Information Request (the Canadian equivalent of a Second

Request under the Hart-Scott-Rodino Act). Following its review of the proposed merger, the Bureau had concerns related to unilateral and coordinated anticompetitive effects in 14 local markets in Ontario and Manitoba. On April 30, 2015, after negotiations aimed at resolving the Bureau's concerns failed, the Commissioner applied to the Tribunal under section 92 of the Canadian Competition Act for, among other things, an order prohibiting the parties from implementing the proposed transaction with respect to the gas stations and supply agreements in the 14 markets of concern. Separately, the Commissioner also applied under section 104 for an order directing the parties to preserve and hold separate their gas assets in those 14 local markets, pending a final decision on the main application.

The Tribunal's Decision

Under section 104 of the Act, once the Commissioner has filed an application under section 92 challenging a proposed merger, either in whole or in part, he may also apply to the Tribunal for an interim order directing the parties to perverse and hold separate the assets proposed to be acquired pending the determination of the Commissioner's challenge. The test under section 104 had never before been litigated in the context of a contested merger. In its decision, the Tribunal confirmed that the elements of the test under section 104, which the Commissioner has the burden of satisfying, are as follows:

1. There must be a serious issue to be tried;
2. There must be "clear and non-speculative evidence" from which it can be reasonably and logically inferred that irreparable harm will result if the interim injunction is not granted; and
3. The balance of convenience must favour granting the interim injunction.

Serious Issue to be Tried: The decision confirms that the threshold for showing a serious issue to be tried is a low one; namely, "[o]nce the Tribunal determines that the underlying section 92 application is neither vexatious nor frivolous, it should proceed to the second part of the test". The Tribunal concluded that the Commissioner had raised serious issues to be tried in respect of whether the proposed merger would likely result in a substantial lessening of competition in the 14 local markets in issue. Although Parkland had offered certain commitments in relation to 11 of the contested markets, including the divestiture of stations and the divestiture or termination of a long-term supply contract, the Tribunal found that these commitments were "not defined enough and sufficient to allow the Tribunal to conclude that they would remedy the competition concerns in the 11 local markets covered by them, to the point where no serious issue would remain in respect of

these markets." In this regard, the Tribunal commended to merging parties the "numerous consent agreements registered with the Tribunal … outlining the various elements normally found in proposed remedies accepted by the Commissioner and the merging parties in merger matters" which it suggested should serve as a guide for merging parties as to the elements that would be required before proposed remedies and commitments may be considered to be effective.

Clear and Non-Speculative Evidence of Irreparable Harm: The decision establishes that the test under the second prong of the three-part test for an interim order under section 104 is whether there is "clear and non-speculative evidence allowing the Tribunal to make inferences that irreparable harm will result if the relief is not granted". On this prong of the test, the Commissioner took the position that the irreparable harm consisted of the harm (including higher prices for retail gasoline and a resulting loss of allocative efficiency) likely to be suffered by consumers and the Canadian economy in the 14 markets in issue if the interim order was not granted. In the Tribunal's view, this meant that the Commissioner was required to adduce "clear and non-speculative evidence … on the scope of the geographic markets, market concentration, and other factors to make [the Tribunal] able to reasonably infer … the prospective harm alleged by the Commissioner". Except for six markets in respect of which Parkland's expert had effectively conceded that there would be a substantial lessening of competition without a proper remedy, the Tribunal concluded that the Commissioner had failed to adduce sufficient evidence from which inferences as to the likely anti-competitive effects and apprehended harm to consumers and the economy could properly be drawn.

Balance of Convenience: In the six local markets where it found that irreparable harm would occur in the absence of an interim injunction, the Tribunal found that the balance of convenience favoured granting the injunction. On the evidence before it, the Tribunal found that the alleged costs to Parkland associated with the requested hold separate order were speculative or minimal and that the harm to the public interest in the absence of an interim injunction would likely be significant.

Finally, it is worth noting that while the Tribunal's decision is significant in the context of the relatively few transactions that raise substantive competition concerns, it is important not to overstate its significance in the context of the vast majority of transactions that do not raise such concerns. Contested mergers are extremely rare in Canada. The vast majority of mergers reviewed by the Bureau are cleared without qualification. The Bureau typically has concerns with less than 5% of the mergers it reviews, and those concerns are almost always resolved by remedies negotiated with the parties, the most common being a hold separate and divestiture agreement that requires the buyer to hold the problematic portion

of the acquired business separate and sell it to a third party within a specified time. Less than 10 mergers have been litigated in the almost 30 years since Canada's merger review regime was introduced, and only two have been litigated in the last ten years (including Parkland/Pioneer and the recent Tervita case. For more on Tervita please click here).

Set out below are statistics from the Bureau's last three fiscal years, ending March 31, that provide some additional details.

	2014/15	2013/14	2012/13
Number of Mergers Reviewed by Bureau	214	217	240
Number of Reviews that Concluded with Substantive Concerns (includes consent agreements, foreign remedies that resolved Canadian competition concerns, transactions abandoned due to competition concerns, alternative resolutions such as undertakings and fix-it-first solutions, and litigated mergers)	8	7	3

Source: Competition Bureau, Mergers Directorate, Merger Review Performance Report, Update on Key Performance Statistics, May 29, 2015

Related Capital Markets, Competition Law & Antitrust, Mergers & Acquisitions, Commercial Litigation

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