**CITATION:** Parkland Corporation v. 2615669 Ontario Inc., 2024 ONSC 3724
**COURT FILE NO.:** CV-24-00720470-0000
**DATE:** 20240627

**ONTARIO SUPERIOR COURT OF JUSTICE**

**RE:** Parkland Corporation, Applicant

-and-

2615669 Ontario Inc., Himadri Bhardwaj, Gagan Dadiala, Surinderpal Cheema and Rajinder Kalsi, Respondents

**BEFORE:** Robert Centa J.

**COUNSEL:** Brendan Jones, for the applicant

William Leslie, for the respondents

**HEARD:** June 26, 2024



## ENDORSEMENT

[1] Parkland Corporation is an independent supplier and marketer of fuel products to gas stations, including Pioneer gas stations. In 2018, Parkland Corporation and 2615669 Ontario Inc. (the "Dealer") entered into an agreement. The agreement is a long-term exclusive contract under which the Dealer agreed to sell only Parkland-supplied motor fuel from a gas station it would operate as a Pioneer gas station.

[2] On or about May 7, 2024, the Dealer removed the branding from the gas station and began selling motor fuel supplied by another company. On May 15, 2024, Parkland commenced this application. On May 31, 2024, Parkland served a notice of motion seeking an interlocutory injunction to prevent the Dealer from selling motor fuel supplied by any entity other than Parkland pending the determination of its application.

[3] On June 7, 2024, the Dealer commenced an application against Parkland in St. Catharines.

[4] For the reasons that follow, I grant the injunction sought by Parkland. First, Parkland has demonstrated a strong likelihood on the law and the evidence that it will prove that the Dealer has breached its covenant to only sell motor fuel supplied by Parkland. Second, the breach of a negative covenant, such as the Dealer's covenant not to sell motor fuel supplied by anyone other than Parkland, gives rise to a presumption of irreparable harm. In addition, I find that Parkland would suffer irreparable harm from a Dealer changing the brand of its gas station and selling non-Parkland fuel. Third, the balance of convenience strongly favours Parkland. The Dealer need only comply with the contract it signed whereas Parkland will suffer irreparable harm.

**The test to obtain an injunction**

[5] Parkland seeks an interlocutory injunction pursuant to s. 101 of the *Courts of Justice Act*, R.S.O. 1990, c C.43, and rule 40.01 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg 194.

[6] Courts have previously granted interlocutory and permanent injunctions to protect long term and exclusive supply contracts tied to gas station lands: *Stephens v. Gulf Oil Canada Ltd.* (1976), 11 O.R. (2d) 129 (C.A.); *Parkland Corporation v. SRAA Inc.* 2021 ONSC 2874; *Northland Petroleum v. Brokenhead Ojibiway Nation*, 2019 MBQB 31, at para. 67; *Parkland Corporation v. Caledon Fuels Inc.* 2024 ONSC 2361. As the Hon. Robert J. Sharpe observed in *Injunctions and Specific Performance* (Toronto: Thomson Reuters Canada) (November 2021), §9:3:

> Despite the disinclination to order specific performance of agreements for the purchase of ordinary commodities, agreements not to purchase fungible goods over extended periods from anyone but the plaintiff are regularly enforced by injunction. The courts have distinguished these cases from those where the plaintiff seeks specific performance of a positive obligation to supply such goods, or even those where the defendant has promised not to sell goods to anyone but the plaintiff, on the grounds that injunctive relief should be awarded on the *Doherty v. Allman* principle - where the obligation is negative in substance.
>
> The case-law provides many examples. Service station operators often enter exclusive supply contracts with petroleum companies and, in cases where the operator attempts to purchase products covered by the agreement from someone other than the plaintiff, injunctions have been granted.

[7] Parkland must meet the usual test for an interlocutory injunction set out in *RJR — MacDonald Inc*. [1994] 1 S.C.R. 311:

a. Parkland must demonstrate that there is a serious issue to be determined, which is a low threshold and means only that its case is not frivolous or vexatious;

b. Parkland must demonstrate that it will suffer irreparable harm if the injunction is not granted; and

c. Parkland must prove that the balance of convenience favours granting the injunction.

[8] The Dealer submits that Parkland must meet a higher standard on the first branch and demonstrate that it has a strong *prima facie* case. To meet this higher test, Parkland must demonstrate a strong likelihood on the law and the evidence presented that, at the hearing of the application, Parkland will be ultimately successful in proving the allegations set out

in its notice of application: *R. v. Canadian Broadcasting Corp*., 2018 SCC 5, [2018] 1 S.C.R. 196, at paras. 17 and 18.

[9] Assuming without deciding that the Dealer is correct, I have no doubt Parkland has made out a strong *prima facie* case.

**Parkland has demonstrated a strong *prima facie* case**

[10] Parkland has made out a strong *prima facie* case that the Dealer has breached the agreement by selling fuel supplied by an entity other than Parkland.

[11] The agreement between the parties has a slightly complicated origin story, but nothing turns on that.[1] For present purposes, the 10-year agreement runs from August 27, 2015, to August 26, 2025, with Parkland having the option to renew the agreement for a further five years. The Dealer assumed this agreement on March 8, 2018. In the agreement, the Dealer agreed to sell only Parkland supplied fuel from the gas station that the Dealer would sell on consignment to the public:

> 3. Duties and Covenants of the Dealer
>
> (a) Dealer covenants an agrees with [Parkland] that so long as this Agreement is in effect, it will:
>
> > xi. sell only those grades or qualities of Motor Fuels as supplied under the terms of this agreement by [Parkland];

[12] In addition, the Dealer agreed that it would only sell motor fuel to the public under the Pioneer trade name. Under the agreement, the Dealer holds motor fuel delivered to it by Parkland in trust and was to hold the proceeds from the sale of the motor fuel in trust for Parkland. The Dealer would then receive a commission on the sale of the fuel at an amount specified in the agreement.

[13] Parkland alleges that starting in 2023, the Dealer held insufficient funds to cover the funds it was supposed to be holding in trust for Parkland from the sales of the motor fuel. This breached section 6 of the agreement. By February 2024, the Dealer owed Parkland over $40,000, which has now climbed to over $48,000, despite the Dealer obtaining an influx of over $160,000 after remortgaging the premises. Parkland exercised its rights under the

[1] Parkland's factum describes the relationship this way: "Pursuant to a dealer commission plan and equipment loan agreement dated September 25th, 2014, between Pioneer Energy LP by its general partner Pioneer Energy Management Inc. and 2255100 Ontario Inc. ("Original Dealer"), as assigned to 2482435 Ontario Ltd. ("Second Dealer") by assignment and assumption agreement and consent dated October 14th, 2015, and as assigned to the Dealer by assignment and assumption agreement dated March 8th, 2018 (collectively "Agreement"), the Dealer contracted with Parkland to operate a Pioneer gas station and to sell exclusively Parkland Motor Fuels from the Dealer Premises."

contract to suspend the delivery of motor fuel until the Dealer cured its default. Parkland communicated that it was not terminating the agreement, which remained in force.

[14] The evidence filed by Parkland demonstrates a strong *prima facie* case that on or about May 7, 2024, the Dealer breached the agreement by and selling motor fuel from an entity other than Parkland.[2] There is no serious dispute that the agreement is in force and that the Dealer has breached it. I am satisfied that that there is a strong likelihood on the law and the evidence presented that, at the hearing of the application, Parkland will be ultimately successful in proving the allegations set out in its notice of application.

[15] The respondent raises a number of defences to try and undermine Parkland's strong *prima facie* case. In my view, based on the evidence tendered on this motion, the Dealer's proposed defences do not cause me to doubt that Parkland will be successful on the application.

***The alleged oral agreement does not undermine significantly the strength of Parkland's case***

[16] The Dealer makes a series of vague allegations that there was some type of oral agreement between the Dealer and Parkland before the assignment and assumption agreement was signed on March 8, 2018. The Dealer's evidence is internally inconsistent, unpersuasive, and self-serving. There are no contemporaneous documents that reflect this supposed agreement. The Dealer did not take any steps over six years to obtain a judicial determination of whether or not the alleged oral agreement existed. While it is conceivable that the Dealer could prove this agreement at trial, this evidence does not displace Parkland's strong *prima facie* case.

[17] On May 29, 2018, a representative of the Dealer wrote to Parkland as follows:

> We just wanted to follow up regarding the commission adjustment on gas sales. Were you able to revisit and able to make changes for us? Presently it's very tight as mentioned during our one on one meeting and puts us in very tough spot to manage the bottom line. Let's us know.

[18] This email does not suggest that there was any binding agreement in agreement in place between Parkland and the Dealer to increase the commission rate. On June 1, 2018, Parkland responded offering to move the commission rate in exchange for a series of concessions with the Dealer, including those affecting other stations. Parkland's response does not suggest that there was a binding agreement.

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[2] There is equally little doubt that the Dealer has also breached the agreement by failing to hold the proceeds of sale of motor fuel supplied by Parkland in trust for it and by removing the Pioneer branding from the gas station. Because Parkland only seeks an interlocutory order with respect to the covenant compelling the Dealer to only sell motor fuel obtained from Parkland, I will be focusing on that alleged breach.

[19] On October 22, 2018, one of the Dealer's shareholders wrote to Parkland to say that "we have been trying to reach you to renegotiate the commissions split for gas being supplied by [Parkland] as previously assured by you before the transaction was closed." This email alleges that there was an oral agreement to negotiate rates after the agreement was signed. At most, this would be an agreement to agree and would probably not be enforceable. It certainly does not suggest that Parkland promised to change the rates set out in the agreement to specific higher level. Parkland responded that the commission discussion was now closed as the concessions it sought back in June had not been met. Again, Parkland's response does not suggest that there was an oral agreement to raise the rates prior to March 8, 2018.

[20] On October 23, 2018, the Dealer's shareholder responded with another email. This email is internally inconsistent suggesting, in one place, that Parkland agreed to "look at increasing the rates" and, in another place, that Parkland agreed to increase the commission by 100%. The contrast to the Dealer's earlier position on May 29, 2018, could not be sharper. The message read as follows:

> I am surprised to note the contents of your email dated October 23'd, more specifically the last sentence in which you advised that "Commission Discussion is now closed".
>
> I want to point out that you made a clear representation before this deal was closed, that you will look at increasing the base commission from 2.5 cents per litre soon after. The deal closed on or about March 30, 2018. However, the base minimum commission remains the same as before despite a request to increase it as promised. It appears that you are now reneging from your promise/assurance made earlier on which we closed the transaction.
>
> We do not agree with you that store sale numbers are down and believe they are better than last year and improving.
>
> As advised to you in my previous email, we are going into loss and are being compelled to put in monies every month to keep this business running. I do not think we can continue on current commission rate for too long.
>
> Before taking the final call on future possibilities, I once again request you to increase the base/minimum commission to at least 5 cpl as promised. As you must be aware, if we go private, we can increase our margin over 10 cpl in the current scenario, we cannot make the ends meet at the minimum wage has gone up, rate of interest and other input costs have gone up.

> Please advise at your earliest convenience if you are prepared to deliver on your promise as stated above for us to decide our future course.

[21] In my view, the Dealer is extremely unlikely to prove the existence of the supposed oral agreement. There is no contemporaneous written documentation to reflect the agreement. The Dealer has taken significantly different positions on the terms of this alleged agreement. It seems highly unlikely that the Dealer would not insist on the agreement being amended to reflect a change as material as a 100% increase in the commission rate, if Parkland agreed to such a change. This is particularly the case where one of the Dealer's representatives was a lawyer and the agreement contains an entire agreement clause and states that all changes to the agreement must be in writing:

> 30. Entire Agreement
>
> This agreement and the schedules and any concurrently dated agreements between Pioneer and the Dealer contain the entire agreement between Pioneer and the Dealer and it is expressly understood and agreed that there are no representations, inducements, promises or agreements, oral or otherwise, not embodied herein. Any change to this Agreement can only be in writing and signed by both Pioneer and the Dealer.

[22] The March 18, 2018, assignment and assumption agreement stated that the Dealer "assumed all obligations under the Agreement."

[23] Entire agreement clauses are "generally intended to lift and distill the parties' bargain from the muck of negotiations": *10443204 Canada Inc. v. 2701835 Ontario Inc*., 2022 ONCA 745, at para 24, *Soboczynski v. Beauchamp*, 2015 ONCA 282, 125 O.R. (3d) 241, at para. 43, leave to appeal to S.C.C. refused, [2015] S.C.C.A. No. 243. They are generally read to apply to what was said or done before the agreement was made, so as to exclude such dealings from affecting the interpretation of the agreement. They are essentially a codification of the parol evidence rule: *Soboczynski*, at paras. 45-47.

[24] There is no doubt that an entire agreement clause will not insulate a party who makes a fraudulent misrepresentation from liability: *Royal Bank of Canada v. 1643937 Ontario Inc.*, 2021 ONCA 98; *10443204 Canada Inc. v. 2701835 Ontario Inc.* 2022 ONCA 745. Here, however, the Dealer is asserting that a fundamental term of the agreement is something other than what the agreement says. This is not a case where, for example, Parkland made a misrepresentation about the gas station's historical annual sales to the public to induce the Dealer to sign the agreement.

[25] For all of these reasons, I think it is highly unlikely that the Dealer will be able to prove that there was an oral agreement with Parkland about the commission rate. While the Dealer will be able to advance this argument at trial, I am still satisfied that Parkland has demonstrated a strong *prima facie* case.

***The lack of independent legal advice is irrelevant***

[26] The Dealer submits that "Canadian courts have historically been hesitant to uphold binding agreement in which one or both parties did not receive Independent Legal Advice." I disagree.

[27] The Dealer relies on cases involving spousal guarantee transactions where one spouse receives no consideration for guaranteeing the debt of the other spouse, cases where one party to the contract owes fiduciary duties to the other, and domestic contracts. None of these cases bear any resemblance to this case where the shareholders of the Dealer, one of whom was a lawyer, invested $3 million to purchase and outfit a gas station in an arm's length transaction.

[28] There is no evidence that Parkland prevented the Dealer or its representatives from obtaining legal advice.

[29] I am still satisfied that Parkland has demonstrated a strong *prima facie* case.

***Parkland's conduct does not appear to be oppressive***

[30] The dealer intends to seek a remedy against Parkland pursuant to s. 245 of the Ontario *Business Corporations Act*, R.S.O. 1990, c. B.16.

[31] In my view, the Dealer is unlikely to demonstrate that it is a "complainant" within the meaning of the OBCA. The Dealer asserts that it is a creditor of Parkland because Parkland owed it certain obligations under the agreement, for example to delivery fuel.

[32] Based on the evidence filed on this motion, I do not think it is likely that the Dealer will be able to demonstrate that it is a proper complainant within the meaning of the OBCA. I am still satisfied that Parkland has demonstrated a strong *prima facie* case.

***The Dealer's operational problems are irrelevant***

[33] The Dealer alleges that it is facing bankruptcy unless Parkland amends the agreement. While Parkland's insistence on strictly enforcing its contractual rights may prove short sighted, it is not required to compromise its position simply because of the Dealer's financial situation. The financial situation of the Dealer does not affect the interpretation of the agreement or the preliminary assessment of whether the Dealer's conduct has breached that agreement.

***Conclusion***

[34] In my view, Parkland has demonstrated a strong *prima facie* case that the Dealer has breached the agreement.

**Parkland has demonstrated that it would suffer irreparable harm absent the injunction**

[35] The deliberate breach of a negative covenant gives rise to a presumption of irreparable harm: *Parkland Corporation v SRAA Inc*., 2021 ONSC 2874; *Parkland Corporation v. Caledon Fuels Inc*., 2024 ONSC 2361; *Canpark Services Ltd. v. Imperial Parking Canada Corp.* (2001), 56 O.R. (3d) 102 (S.C.J.).

[36] This is particularly true where, as here, the party seeking the injunction has demonstrated a strong *prima facie* case: *MD Management Limited v. Campbell*, 2010 ONSC 4217, at para 11.

[37] I see no reason to depart from earlier decisions of this court that concluded that Parkland would suffer irreparable harm from dealers de-branding the gas stations and publicly selling motor fuel supplied by an entity other than Parkland: *Parkland Corporation v SRAA Inc*., 2021 ONSC 2874; *Parkland Corporation v. Caledon Fuels Inc*., 2024 ONSC 2361.

[38] Parkland's harm includes loss of commercial control over the site that is difficult to quantify in damages. This, in turn, allows one of Parkland's competitors ready and inexpensive access to its market. Parkland will likely suffer reputational damage, damage to its intellectual property, and harm to its entire business model . I adopt the reasoning of Myers J. in *Parkland Corporation v SRAA Inc*., 2021 ONSC 2874, at para. 93:

> I do not agree with Mr. Gerson that the harm to Parkland is too speculative to qualify as irreparable. The issue is whether it is just to confine the applicant to its remedy in damages. It is noteworthy that two operators have chosen to act unilaterally to sign up with a competitor and take down Ultramar's signs. The effect on the intellectual property, the brand, of the applicant if that is seen as an available process will fundamentally undermine its contractual and property rights and its long term business model. Given that the SRAA's financial position, the lack of evidence of 1064410's ability to pay damages, and the recognized centrality of the issue of control of the sites that undergirds the structure of the fuel supply business in Ontario, I am satisfied that the injury to Parkland is virtually incalculable and it is not fair, just, or appropriate to limit Parkland to its remedy in damages.

[39] I am satisfied that Parkland has demonstrated that it will suffer irreparable harm if the injunction is not granted.

**The balance of convenience favours Parkland**

[40] In my view the balance of convenience strongly favours Parkland. It has established a strong *prima facie* case that the Dealer has violated negative covenants.

[41] The Dealer took deliberate and unilateral steps to breach the agreement. In such circumstances the Dealer cannot suggest that the status quo should remain in place pending

the disposition of the application. The Dealer's actions look pre-meditated and appear to have been taken in bad faith. While the injunction may inconvenience the Dealer, I see no reason to exercise a discretion in its favour.

**Relief sought by the Dealer**

[42] I do not grant any of the relief sought by the Dealer.

[43] First, I cannot consolidate two proceedings that have been commenced in different regions. The Dealer chose to commence its application in St. Catharines despite knowing that Parkland's application and its motion were in Toronto. If the Dealer wishes to transfer one application or the other to a different region, it must follow the appropriate process to do so.

[44] Second, I decline the Dealer's request that I set aside the contract because of fraudulent misrepresentation, bad faith, "lack of an authentic voice," lack of independent legal advice, or as a remedy for corporate oppression. There is no basis upon which I could set aside the contract at this time. The Dealer has not issued an application in the Toronto Region. The Dealer did not even serve a notice of cross-motion seeking this relief, it simply made that request in its factum. In addition, it is not clear to me that such relief is available on an interlocutory basis before the return of the main application.

**Conclusion**

[45] I grant an interlocutory injunction enjoining the Dealer from selling non-Parkland motor fuel from the gas station located at 120 Hartzel Road, St. Catharines, Onatrio, pending the final determination of this application.

**Costs**

[46] A successful party is normally entitled to an award of costs on a successful motion. The cost consequences of a motion for an interlocutory injunction, however, are often treated differently than other motions. In *Injunctions and Specific Performance* (Toronto: Thomson Reuters Canada) (November 2021), at §2:42, the Hon. Robert J. Sharpe explained the unique aspects of a motion for an interlocutory injunction:

> Where the defendant successfully resists the plaintiff's motion for an interlocutory injunction, costs may be awarded forthwith. It has been held that where the motion was groundless and based upon unfounded allegations of fraud, deceit and conspiracy, it may be appropriate for the court to fix the costs on a solicitor and client scale and require that they be paid forthwith. On the other hand, it would be unusual to award costs of an interlocutory injunction motion to the successful plaintiff prior to trial. As there has been no final determination of the rights of the parties, but rather an order to protect the plaintiff's position pending trial, the preferable course is to reserve the question of costs to the trial judge.

[47] In *Quizno's Canada Restaurant Corporation v. 1450987 Ontario Corp*., 2009 CanLII 31599 (ONSC), Perell J. exercised his discretion and declined to make an order for costs in favour of a plaintiff who had succeeded in obtaining an interlocutory order stating:

> Where a plaintiff succeeds in obtaining an interlocutory injunction it is the preferable (although not inevitable) course to reserve costs to the trial judge, which is to say to make costs in the cause. This is the preferable course because it allows the court to have the benefit of hindsight and to avoid the possible injustice of awarding costs to a plaintiff for having succeeded in obtaining an order to protect his or her position pending trial when the outcome of the trial reveals that that plaintiff's position was not worthy of having been protected.

[48] In *Capital SCL v. Spotless Consultancy*, 2022 ONSC 4192, Morgan J. granted and then extended a world-wide *Mareva* injunction against the defendants based on allegations that the defendant participated in a $2.8 million fraud of the plaintiff. Justice Morgan found that the Mareva had not put an end to the proceedings or that the interlocutory injunction the issues in the action with finality. Justice Morgan observed that the defendant's assets were now subject to the *Mareva* injunction until trial, which protected the plaintiffs if they were ultimately successful at trial. In those circumstances, Morgan J. ordered that the costs of the motion be in the cause.

[49] I agree with the approaches taken by Perell and Morgan JJ: *Sanders v. Canada's Choice Investments Inc*., 2023 ONSC 666; *CDW Canada Inc. v. Ali*, 2022 ONSC 4907; see also: *Tillsonburg Foamtec Inc. v. Free*, [2005] O.J. No. 2255 (Sup. Ct. J.); *Penn-Co Construction Canada (2003) v. Constance Lake First Nation*, [2008] O.J. No. 3733 (Sup. Ct. J.); *Erinwood Ford Sales Ltd. v. Ford Motor Co. of Canada Ltd*., 2005 CanLII 23333, [2005] O.J. No. 2791 (Sup. Ct. J.); *Rogers Cable TV Ltd. v. 373041 Ontario Ltd*., [1994] O.J. No. 844 (Gen. Div.).

[50] Much of the material used on this motion may be used in subsequent steps in this litigation. The judge hearing this application will be able to consider how to fix the costs of this motion considering the determination of the application on its merits. I order that the costs of this motion be in the cause.

Robert Centa J.

Date: June 27, 2024