Competition Tribunal Tribunal de la concurrence

Citation: *Canada (Commissioner of Competition) v Secure Energy Services Inc. and Tervita Corporation*, 2021 Comp Trib 4
File No.: CT-2021-002
Registry Document No.: 9

IN THE MATTER OF an application by the Commissioner of Competition for an interim order pending the hearing of an application made pursuant to section 104 of the *Competition Act*, RSC 1985, c C-34 as amended;

BETWEEN:

Commissioner of Competition
(applicant)

and

Secure Energy Services Inc.

Tervita Corporation
(respondents)

Date of hearing: June 30, 2021
Before: Chief Justice Paul Crampton
Date of reasons and order: July 1, 2021

REASONS FOR ORDER AND ORDER REGARDING THE COMMISSIONER'S REQUEST FOR AN INTERIM ORDER

I. INTRODUCTION

[1] On the afternoon of June 29, 2021, the Commissioner of Competition (the **"Commissioner"**) filed a 2,795 page application record pursuant to section 104 of the *Competition Act*, RSC 1985, c C-34 (the **"Act"**) with respect to a proposed transaction between the Respondents (the "**Proposed Transaction**").

[2] In that Application (the **"Section 104 Application"**), the Commissioner seeks an interim Order directing the Respondent Secure Energy Services Inc. (**"Secure"**) not to proceed with its proposed acquisition of the Respondent Tervita Corporation (**"Tervita"**) until the final disposition of a second application filed that same day by the Commissioner, pursuant to section 92 of the Act (the **"Section 92 Application"**).

[3] The Respondents intend to close the Proposed Transaction shortly after midnight this evening.

[4] Having regard to the urgency of the situation, the Commissioner requested, in an e-mail sent shortly after filing the Section 104 Application, "an emergency case conference tomorrow where we will seek an interim order preventing the respondents from closing the transaction until the section 104 application is heard." Apart from that sentence, the Commissioner did not place anything else before the Tribunal with respect to the interim relief that he is seeking pending the hearing of the Section 104 Application.

[5] The case conference hearing took place yesterday afternoon.

[6] At that hearing, the Commissioner recognized that the relief available under section 104 is itself interim relief. Therefore, he characterized the relief he is currently seeking pending the hearing of the Section 104 Application as being "interim, interim" relief.

[7] The Tribunal fully appreciates the difficult situation in which the Commissioner and the Competition Bureau's case team find themselves. The Tribunal also fully appreciates the serious nature of the harm to competition and to certain of the Respondents' customers that the Commissioner alleges is likely to occur if the Proposed Transaction closes.

[8] However, as explained more fully below, the Tribunal does not have the jurisdiction to issue the specific interim and unprecedented relief sought by the Commissioner. Accordingly, the requested relief will be denied.

II. THE PARTIES

[9] The Commissioner is the public official appointed by the Governor in Council under section 7 of the Act to be responsible for the enforcement and administration of the Act.

[10] Secure is a publicly traded company headquartered in Calgary, Alberta and listed on the Toronto Stock Exchange. According to the Commissioner, Secure owns and operates 18 treatment, recovery and disposal facilities ("**TRDs**"), 6 industrial landfills, and 15 standalone water disposal wells in the Western Canadian Sedimentary Basin (**"WCSB"**) that provide certain waste services.

Secure also offers a wide range of environmental services associated with oil and gas drilling, including: the sale of drilling fluids, production chemicals and water services; and the demolition, decommissioning, remediation, and reclamation of oil and gas wells.

[11] Tervita is a publicly traded company based in Calgary, Alberta. Its common shares are listed on the Toronto Stock Exchange. According to the Commissioner, Tervita owns and operates 44 TRDs, 22 industrial landfills, 3 cavern disposal facilities, and 8 standalone water disposal wells in the WCSB. As with Secure, Tervita offers a range of environmental services including the demolition, decommissioning, remediation and reclamation of oil and gas wells.

III. THE PROPOSED TRANSACTION

[12] In the Section 104 Application, the Commissioner described the Proposed Transaction as an Arrangement Agreement, dated March 8, 2021, pursuant to which:

> Secure and Tervita will carry out an all-share transaction. Under the Plan of Arrangement, Secure will acquire all of the issued and outstanding shares of Tervita. Upon completion of the Proposed Transaction, Secure and Tervita shareholders will own approximately 52% and 48%, respectively, of the combined entity.

IV. BACKGROUND

[13] On March 12, 2021, the Respondents submitted a pre-merger notification filing pursuant to subsection 114(1) of the Act, together with a request for an advance ruling certificate pursuant to section 102 of the Act, in respect of the Proposed Transaction.

[14] On April 9, 2021, the Commissioner issued a Supplementary Information Request (**"SIR"**) to each Respondent pursuant to subsection 114(2) of the Act.

[15] Further to paragraph 123(1)(b) of the Act, a proposed transaction shall not be completed before the end of 30 days after the day on which information required under subsection 114(2) has been received by the Commissioner.

[16] On May 28, 2021, the Commissioner commenced an inquiry pursuant to section 10 of the Act.

[17] On May 31, 2021, the Respondents certified the responses to their respective SIRs after providing the Bureau with approximately 396,000 documents.

[18] As a consequence, they would have been in a position to legally close their transaction earlier today, absent the issuance of an interim order by the Tribunal or an undertaking to postpone their transaction.

[19] However, on June 25, 2021, counsel confirmed in writing to the Commissioner that, before closing the Proposed Transaction, the parties would provide 72 hours' notice of their intention to do so.

[20] At 11:15 p.m. on June 28, 2021, the Respondents provided such notice. Accordingly, absent an order from the Tribunal, they will be entitled to close the Proposed Transaction at 11:15 p.m. this evening.

[21] On June 29, 2021, and as noted in the introduction above, the Commissioner filed the Section 104 Application and the Section 92 Application. Among other things, the latter application seeks an Order permanently enjoining the Respondents from proceeding with the Proposed Transaction.

[22] In support of that requested relief, the Commissioner describes the Respondents as vigorous competitors in the provision of oil and gas waste services **("Waste Services")** in the WCSB. He alleges that, if the Proposed Transaction is permitted to proceed:

> … the merged entity will have significantly enhanced market power that is unlikely to be constrained. Oil and gas producers will likely pay materially higher prices and experience a deterioration in the quality of service to dispose of waste at a time when the oil and gas industry, an important sector of the Canadian economy, is struggling.

[23] The Commissioner also asserts that the Proposed Transaction is likely to lead to higher prices and degraded services for certain additional services, described as "environmental services," as a result of the elimination of competition between the Respondents. In addition, he maintains that the Proposed Transaction is likely to substantially prevent competition in North Eastern British Columbia (**"NEBC"**), where he alleges Secure had planned to open an industrial landfill in Wonowon, British Columbia. The Commissioner states that, but for the Proposed Transaction, Secure's landfill in Wonowon would have competed with two of Tervita's landfills for Waste Services, and that customers in NEBC likely would have benefited from decreased prices and increased quality of service.

[24] Earlier today, counsel to Secure confirmed in an e-mail sent to the Tribunal's Registry that the Respondents' "intention is to close [their proposed] transaction effective 2:01 am ET (12:01 MT) on Friday July 2."

V. RELEVANT LEGISLATION

[25] Section 104 of the Act states as follows:

Interim Order

104 (1) If an application has been made for an order under this Part, other than an interim order under section 100 or 103.3, the Tribunal, on application by the Commissioner …., may issue any interim order that it considers appropriate, having regard to the principles ordinarily considered by superior courts when granting interlocutory or injunctive relief.

Terms of Interim Order

(2) An interim order issued under subsection (1) shall be on such terms, and shall have effect for such period of time, as the Tribunal considers necessary and sufficient to meet the circumstances of the case.

Duty of Commissioner

(3) Where an interim order issued under subsection (1) on application by the Commissioner is in effect, the Commissioner shall proceed as expeditiously as possible to complete proceedings under this Part arising out of the conduct in respect of which the order was issued.

[26] A second type of interim order that may be issued in respect of a proposed transaction is provided for in section 100.

[27] The nature of the order that may be made under section 100, and the test that must be satisfied, are set forth in subsection 100(1), which states as follows:

100 (1) The Tribunal may issue an interim order forbidding any person named in the application from doing any act or thing that it appears to the Tribunal may constitute or be directed toward the completion or implementation of a proposed merger in respect of which an application has not been made under section 92 or previously under this section, where

(a) on application by the Commissioner, certifying that an inquiry is being made under paragraph 10(1)(b) and that, in the Commissioner's opinion, more time is required to complete the inquiry, the Tribunal finds that in the absence of an interim order a party to the proposed merger or any other person is likely to take an action that would substantially impair the ability of the Tribunal to remedy the effect of the proposed merger on competition under that section because that action would be difficult to reverse; or

b) the Tribunal finds, on application by the Commissioner, that there has been a contravention of section 114 in respect of the proposed merger.

[28] Pursuant to section 92 of the Act, the Tribunal can grant a range of specific remedies in respect of proposed and completed mergers.

VI. ISSUES

[29] For the present purposes, there are two issues. They are as follows:

1. Does the Tribunal have the jurisdiction to issue the interim relief sought by the Commissioner, pending the hearing of the Section 104 Application?
2. If so, should such relief be granted?

VII. ANALYSIS

A. Does the Tribunal have the jurisdiction to issue the interim relief sought by the Commissioner, pending the hearing of the Section 104 Application?

(1) The Commissioner's position

[30] The Commissioner submits that the Tribunal has the jurisdiction to grant the interim relief he is seeking, pending the hearing of the Section 104 Application. In this regard, he relies on the Tribunal's decision in *Canadian Standard Travel Agent Registry v International Air Transport Association*, 2008 Comp Trib 12, at paras 12-13 ("**CSTAR**"). The issue there was whether the Tribunal had the jurisdiction to issue an interim order under section 104 to a private party before leave had been granted to bring an application under section 75. Justice Simpson interpreted section 104 as not being applicable prior to the granting of such leave. Accordingly, she relied on Rule 34(1) of the *Competition Tribunal Rules*, SOR/2008-141 (the **"Rules"**), which is sometimes referred to as the "gap rule." That provision states:

> **34 (1)** If, in the course of proceedings, a question arises as to the practice or procedure to be followed in cases not provided for by these Rules, the practice and procedure set out in the *Federal Courts Rules* may be followed.

[31] The specific Rule in the *Federal Courts Rules* upon which she relied was Rule 372(1), which states as follows:

> **372 (1)** A motion under this Part may not be brought before the commencement of a proceeding except in a case of urgency.

[32] After characterizing the relief being requested as "a motion in a pending proceeding" under section 75, Justice Simpson determined that the combination of the foregoing Rules permitted a party to apply for interim relief pending the granting of leave.

[33] In further support of his position, the Commissioner relies upon Rule 2 of the Rules, which states as follows:

> **Variation**

2 (1) The Tribunal may dispense with, vary or supplement the application of any of these Rules in a particular case in order to deal with all matters as informally and expeditiously as the circumstances and considerations of fairness permit.

Urgent Matters

(2) If a party considers that the circumstances require that an application be heard urgently or within a specified period, the party may request that the Tribunal give directions about how to proceed.

[34] The Commissioner relies on a similar provision in subsection 9(2) of the *Competition Tribunal Act*, R.S.C., 1985, c. 19 ("**CTA**"), which states that all proceedings before the Tribunal shall be dealt with as informally and expeditiously as the circumstances and considerations of fairness permit.

[35] The Commissioner further maintains that, if the interim relief that he seeks pending the hearing of the Section 104 Application is not granted, irreparable harm will ensue because competition in the relevant markets will be substantially prevented or lessened and a large number of the Respondents' customers will suffer serious adverse price and non-price effects.

(2) The Respondents' position

[36] The Respondents begin by stating that the Act and the Rules contain specific and detailed provisions for interim relief in respect of proposed transactions. These include the provisions in sections 100 and 104 of the Act, described above, as well as the provisions of the Rules, including those in Part 4, which pertain to "interim or temporary orders." Accordingly, there is no "gap" to be filled by resort to the *Federal Courts Rules*. In their view, the existing legislative scheme provides a "complete code," and it can be inferred that Parliament did not intend to provide the Tribunal with the jurisdiction to issue the type of interim relief being sought by the Commissioner, pending the hearing of the Section 104 Application.

[37] The Respondents distinguish *CSTAR*, above, on the basis that it concerned a situation that had not been contemplated in the Act – namely, whether interim relief is available to a party prior to having been granted leave to bring an application under section 75 of the Act. By contrast, they underscore that the Act specifically addresses, in sections 100 and 104, the interim relief that is available to the Commissioner in connection with proposed transactions. They add that CSTAR did not involve a request for an "interim interim" order, which the Commissioner is now requesting the Tribunal to issue.

[38] The Respondents further submit that if the Commissioner needed additional time to complete his review, he could have sought interim relief under section 100. By failing to do so, he created the "urgency" that he now maintains exists. In addition, if he preferred to obtain relief under section 104, he could have filed the Section 104 Application sufficiently in advance of the scheduled closing to enable that application to be heard and determined prior to the closing, as he has done on at least one prior occasion.

[39] However, by proceeding in the manner that he did in the present case, the Respondents state that the Commissioner is in essence attempting to "do an end run around section 100." In the process, they were deprived of their right to a fair hearing. In this regard, they make two main points. First, given that the Commissioner did not file anything in support of his request for the "interim interim" relief, there was nothing to which they could respond. Second, they had no opportunity, prior to the hearing yesterday, to review the 2,795 page application record that was filed in connection with the Section 104 Application. As a consequence, they had no opportunity to prepare for and obtain instructions in respect of the substantive issues that the Commissioner addressed during the hearing.

[40] Finally, the Respondents maintain that, having waited the initial period applicable under subsection 114(1) of the Act, and then provided extensive information in response to the SIR and waited the additional 30 day period set forth in subsection 114(2) of the Act, they have the legal right to close the Proposed Transaction.

(3) Analysis

[41] I agree with the essence of the Respondents' submissions. Given the urgency of the situation, my reasons for doing so will necessarily be brief.

[42] As a statutory court of record, the Tribunal only has the jurisdiction accorded to it by Parliament, together with the plenary powers "necessary or proper for the due exercise of its jurisdiction": CTA, subsection 8(2). Those plenary powers are informed and indeed bounded by the statutory scheme set forth in the Act and the CTA.

[43] That statutory scheme provides the Tribunal with the ability to provide urgent relief, including certain types of relief that find their source of jurisdiction in the Tribunal's plenary powers: *CSTAR*, above, at paras 12-13. However, insofar as interim relief in relation to proposed transactions is concerned, the statutory scheme is sufficiently detailed and specific that it must be viewed as providing "a complete code."

[44] At its core, that code consists of the two types of interim orders provided for in sections 100 and 104 of the Act.

[45] The relief contemplated by section 100 is available where, among other things, the Commissioner is still in the process of conducting an inquiry and no application has been made under section 92 or previously under section 100.

[46] In subsections 100(2) – (8), the Act sets out detailed provisions regarding the period of notice to be provided by the Commissioner to each person against whom the order is sought, the circumstances in which an *ex parte* application may be made, the terms that can be included in the order, its duration, extensions of time, and the Commissioner's obligation to complete the inquiry as expeditiously as possible.

[47] Insofar as the relief contemplated by section 104 is concerned, it is available anytime after the filing of an application under section 92.

[48] Having regard to the foregoing, it is readily apparent that Parliament turned its mind to the circumstances in which interim relief might be required in respect of a proposed merger. It enacted section 100 to address the circumstances in which an application has not yet been made under section 92 or previously section 100. It also enacted section 104 to address the circumstances in which an application under Part VIII, including section 92 but excluding sections 100 and 103.3, has already been made.

[49] These provisions in relation to interim relief are part of a broader, very detailed, scheme pertaining to (i) the review of proposed transactions by the Commissioner, (ii) the time within which such reviews must take place, (iii) the final orders that may be issued by the Tribunal in connection with such transactions and completed transactions, and (iv) the rules that govern the Tribunal's proceedings, including in respect of interim and temporary orders: Rules, at Part 4.

[50] Given the detailed nature of the merger review scheme set forth in the Act and the Rules, Parliament can be taken to have addressed its mind to the specific types of relief it wished to make available to the Commissioner and the different points in time at which such relief is available pursuant to sections 100, 104 and 92, respectively. In not providing for the type of relief that the Commissioner is now seeking, it can be inferred that Parliament decided not to grant the Tribunal the jurisdiction to provide such relief.

[51] That relief would constitute a new, third type of interim relief that would seriously curtail respondents' rights to procedural fairness. Indeed, this was demonstrated during the hearing yesterday, when the Respondents stated that they were unable to address the three-prong test applicable to injunctive relief because they had only received the Commissioner's very lengthy application record late the prior day.

[52] Although Parliament is free to curtail the procedural fairness rights of parties who appear before the Tribunal, it cannot be understood to have done so in the absence of express language or by necessary implication: *Kane v Board of Governors of the University of British Columbia*, [1980] 1 SCR 1105, at 1113; *P. & S. Holdings Ltd. v Canada*, 2017 FCA 41, at para 39. No such express language is present in the Act, nor can it be said that the "interim interim" relief being sought by the Commissioner is contemplated by necessary implication.

[53] That relief would also undermine the predictability, certainty and transparency that is achieved by the existing scheme of the Act. Among other things, that scheme clearly informs merging parties of what their obligations are in the merger review process, how long they must wait before they can close their merger, and the potential remedies that are available to the Commissioner to prevent them from doing so.

[54] Although Rule 2 and section 9(2) of the CTA provides the Tribunal with considerable flexibility to deal with matters, including urgent matters, as informally and expeditiously as the circumstances *and considerations of fairness permit*, they do not assist the Commissioner to the extent that he would like in the present circumstances. This is because they do not contemplate the type of substantial curtailment of procedural fairness rights that resulted from the manner in which he proceeded. In any event, Rule 2 and subsection 9(2) are procedural provisions. They cannot be relied upon as a source for substantive remedies that are not contemplated by the Act.

[55] Based on the foregoing, I conclude that the Tribunal does not have the jurisdiction to grant the interim relief pending the hearing of the Section 104 Application that is being sought by the Commissioner.

[56] Given this conclusion, it is not necessary for me to address the second issue identified in Part VI above, concerning the merits of the Commissioner's request for injunctive relief. Considering that the Respondents did not have an opportunity to prepare to address those merits, I would have found myself in an untenable position had it been necessary to address this issue. This is particularly so given that I also did not have the time to review that record in more than a cursory fashion prior to the hearing.

VIII. CONCLUSION

[57] For the reasons set forth in Part VII above, the Commissioner's request for an interim order pending the hearing of the Section 104 Application is denied.

[58] I recognize that it can be extremely difficult in some cases for the Commissioner to properly prepare applications under sections 92 and 104 in the 30-day period set forth in subsection 114(2) of the Act. However, the solution to this problem is not to seek an unprecedented remedy that finds no support in the statutory scheme, and in so doing deprive the merging parties of any ability to meaningfully respond.

[59] Rather, the solution, at least in part, is to bring an application under section 100. At a minimum, that would provide some additional time to review the extensive information that is typically provided in response to a SIR, and to prepare applications under sections 92 and 104. Another part of the solution could be to reduce the amount of information that is sought in a SIR and that then needs to be assessed within a very short period of time.

[60] I further recognize that even if the Commissioner seeks recourse under section 100, he may ultimately encounter challenges similar to those encountered in this case, in terms of preventing merging parties from closing their proposed merger upon the expiry of the section 100 order and the filing of applications under sections 92 and 104. However, it would be open to the Commissioner to argue that the scheme of those provisions permits an order that is issued under section 100 to extend to the point in time at which an application under section 104 can be heard and determined, assuming that this is within the 30 day period contemplated by subsection 100(5).

[61] Of course, greater certainty in this regard, and indeed a more robust framework for preventing the type of harm described in paragraph 100(1)(a) of the Act, can be sought from Parliament.

[62] In closing, I will simply add that, during the hearing yesterday, the Respondents stated that they will cooperate with the Commissioner in ensuring that the Section 104 Application is heard in a timely fashion. They also stated that, if asked by the Commissioner, they would maintain the *status quo* in their operations for 30 days. This includes not terminating any employees.

DATED at Ottawa, this 1st day of July, 2021.

SIGNED on behalf of the Tribunal by:

”Paul Crampton”

(s) Paul Crampton C.J.

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ORDER

1. For the reasons set forth in the Reasons for Order attached hereto, the Commissioner's request for interim relief pending the hearing of the Application filed under section 104 of the *Competition Act*, RSC 1985, c C-34 is dismissed.

2. Given that the Respondents did not request costs on this motion, none will be ordered.

SIGNED on behalf of the Tribunal by:

"Paul Crampton"
(s) Paul Crampton C.J.

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