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CT-2021-002

THE COMPETITION TRIBUNAL

IN THE MATTER OF the *Competition Act*, R.S.C. 1985, c.C-34, as amended;

AND IN THE MATTER OF the acquisition of Tervita Corporation by Secure Energy Services Inc.;

AND IN THE MATTER OF an Application by the Commissioner of Competition for an order pursuant to 92 of the *Competition Act*;

AND IN THE MATTER OF an Application by the Commissioner of Competition for an interim order pursuant to section 104 of the *Competition Act*;

B E T W E E N:

COMMISSIONER OF COMPETITION

Applicant

- and -

SECURE ENERGY SERVICES INC.

Respondent

**MEMORANDUM OF ARGUMENT OF THE COMMISSIONER OF COMPETITION
(Application for an Interim Order)**

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I. OVERVIEW

1. Until July 2, 2021, Secure competed vigorously with Tervita to provide Waste Services in the WCSB. Oil and gas producers, including a number of small to medium sized enterprises, benefitted from this competition through discounted prices and higher quality of service.
2. That competition and those benefits ended when Secure acquired Tervita on July 2, 2021. The Transaction is eliminating the competitive rivalry between Secure and Tervita and providing Secure the ability to materially increase the prices oil and gas producers pay for Waste Services and/or decrease the quality of service provided. This is harming oil and gas producers, hundreds of which now face a merger to monopoly, at a time when this important sector to the Canadian economy is struggling.
3. Three days earlier, on June 29, 2021, the Commissioner filed two applications with the Tribunal. The first was an application pursuant to section 92 of the Act to block or dismantle the then pending Transaction in order to remedy the likely substantial lessening and prevention of competition it would cause. The second was this application, pursuant to section 104 of the Act, for an injunction to prevent the parties from closing the Transaction until the 92 Application was resolved.
4. Secure completed the Transaction in the face of the applications. In doing so Secure knowingly accepted the risk that the Tribunal might grant either of the Commissioner's applications and require Secure to unwind the Transaction (or otherwise recreate the competitive landscape) on either an interim or permanent basis.
5. The completion of the Transaction does not change the objective of the 104 Application - to ensure that customers of Waste Services in the WCSB do not suffer irreparable harm in the interim period prior to the final disposition of the 92 Application. Only the relief changes: it is too late to prevent closing, and so what is now required is an order to unwind the Transaction or (if, as Secure argues,

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that is not feasible) to otherwise reinstate the competitive tension that the Transaction eliminated.

6. The completion of the Transaction means that the irreparable harm is now actually occurring, as Secure has the ability to raise prices and decrease service and other non-price competition. While harm arising from the Transaction can be prevented *prospectively* by an appropriate interim order, harm *already* inflicted before the order cannot be remedied by the Tribunal.
7. The Commissioner meets the three part test for an injunction under section 104 of the Act.
8. *The 92 Application meets the merits part of the injunction test.* The 92 Application, supported by the ample evidence filed in support of the 104 Application, makes a strong prima facie case regarding Secure's ability to exercise new or increased market power to the detriment of customers of Waste Services in many markets in the WCSB.
9. *The Transaction has caused and will continue to cause irreparable harm to competition.* The Transaction has provided Secure with new or increased market power, giving it the ability to increase prices and/or decrease service for Waste Services. This harm is irreparable since the Tribunal has no ability in law to remedy it.
10. *Balance of convenience favours the injunction.* The irreparable harm to competition from the Transaction outweighs any inconvenience to Secure in unwinding or counteracting it. The public interest in protecting, maintaining and encouraging competition outweighs the inconvenience, if any, that would be caused to Secure by the issuance of an injunction. And Secure deliberately tied its own hands by closing in the face of the 104 Application – no cost or inconvenience to Secure arising from that decision can be considered when weighing the balance of convenience.

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11. Moreover, the efficiencies Secure claims would be lost should be given little weight. Secure's efficiencies expert simply summed and discounted estimates provided by Secure without substantive documentary evidence to justify these claims. The "expert report" in this case is little more than company assertions wrapped in the veneer of expert respectability. Even if documented, which they are not, the claimed efficiencies have conceptual and methodological issues making their achievement unlikely. In any event, efficiencies delayed (if any) are not efficiencies denied where as the loss of competition during the interim period cannot be regained.

II. FACTS

A. THE PARTIES AND THE TRANSACTION

12. The Commissioner of Competition (the "**Commissioner**") is appointed under section 7 of the Act and is responsible for the administration and enforcement of the Competition Act, R.S.C. 1985, c.C-34, as amended (the "**Act**"). The actions taken by the Commissioner pursuant to the Act are presumed to be *bona fide* and in the public interest.¹
13. Secure Energy Services Inc. ("**Secure**") is a publicly traded company headquartered in Calgary, Alberta and listed on the Toronto Stock Exchange. Prior to the Transaction, Secure owned and operated 18 Full Service Terminals ("**FSTs**", also called Treatment Recovery and Disposal facilities or ("**TRDs**")), 6 industrial landfills (as well as one it does not own but operates under contract), and 15 standalone water disposal wells in the Western Canadian Sedimentary Basin ("**WCSB**") that provide oil and gas waste disposal services ("**Waste Services**").²

¹ Commissioner of Competition v. Parkland Industries Ltd, 2015 CACT 4 ("**Parkland**") at para 37, Book of Authorities, Tab 7; Commissioner of Competition v. Pearson Canada Inc. and Penguin Canada Books Inc., 2014 FC 376 at para 43, Book of Authorities Tab 8.

² Affidavit of Andrew Kelly affirmed June 29, 2021, ("**Kelly Affidavit**"), Commissioner's 104 Application Record ("**Commissioner's Record**") Exhibit 1, p 79 and p 81.

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14. 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 demolition, decommissioning, remediation, and reclamation of oil and gas wells ("**Environmental Services**").³
15. Secure stores and markets oil it recovers from its FST operations on behalf of its customers, and also receives clean oil directly from producers. Twelve of Secure's FSTs provide oil and gas producers with an access point or terminal to transport their clean oil to market by pipeline. Secure also has four rail transloading terminals that can accept clean oil as well.⁴ Secure does not earn a gross margin on its revenues associated with oil purchase and resale.⁵
16. Tervita Corporation ("**Tervita**") was a publicly traded company based in Calgary, Alberta. Its common shares were listed on the Toronto Stock Exchange. Among other assets, Tervita owned and operated 44 TRDs, 22 industrial landfills (18 of which were owned by Tervita, one of which it operated under a contract, and three sites that Tervita marketed under contract for other landfill operators), 3 cavern disposal facilities, and 8 standalone water disposal wells in the WCSB. Tervita offered a range of Environmental Services including the demolition, decommissioning, remediation, and reclamation of oil and gas wells.⁶ Tervita's energy marketing business represents activities related to the purchase and resale of oil volumes produced at their TRDs, and Tervita also does not earn a margin on these revenues.⁷
17. Secure acquired all the issued and outstanding shares of Tervita on July 2, 2021 (the "**Transaction**"). Secure then amalgamated with Tervita and the amalgamated entity continues as Secure.⁸

³ Kelly Affidavit, Commissioner's Record, Exhibit 1, p 63.

⁴ Kelly Affidavit, Commissioner's Record, Exhibit 1, p 79.

⁵ Kelly Affidavit, Commissioner's Record, Exhibit 5, p 395.

⁶ Kelly Affidavit, Commissioner's Record, p 15, para 9.

⁷ Kelly Affidavit, Commissioner's Record, Exhibit 7, p 465-466.

⁸ Secure Responding Record ("**Secure Response**"), Secure Responding Application Record ("**Secure's Record**") p 11-12, paras 3 & 8.

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B. THE COMMISSIONER'S INVESTIGATION

18. The Commissioner's review of the Transaction began on March 12, 2021 when Secure and Tervita submitted a request for an advance ruling certificate and pre-merger notification filings pursuant to Part IX of the Act in respect of the Transaction.⁹
19. On April 9, 2021, the Commissioner issued Supplementary Information Requests ("SIR") to Secure and Tervita.¹⁰
20. On May 28, 2021, the Commissioner commenced an inquiry pursuant to section 10 of the Act.¹¹
21. On May 31, 2021, Secure and Tervita certified responses to the SIRs after providing the Bureau with over 396,000 documents as well as data.¹² Pursuant to paragraph 123(1)(a) of the Act, the parties could not complete the Transaction until 30 days thereafter.
22. After an investigation of the local markets where Secure and Tervita overlapped, during which the Commissioner made over 65 market contacts, and after reviewing the records and data from Secure and Tervita provided in response to the SIRs, the Commissioner concluded that the Transaction was likely to substantially lessen and prevent competition in a number of local markets across the WCSB as described in the 92 Application.
23. The Commissioner's conclusions along with a detailed overview of the case teams analysis were communicated to the Secure and Tervita on June 23, 2021.¹³ Secure and Tervita requested a meeting with the Commissioner which occurred on June 28, 2021.¹⁴

⁹ Kelly Affidavit, Commissioner's Record, Exhibit 5, p 393; Exhibit 6, p 417; and Exhibit 7, p 447.

¹⁰ Kelly Affidavit, Commissioner's Record, p 16, para 14.

¹¹ Kelly Affidavit, Commissioner's Record, p 17, para 15.

¹² Kelly Affidavit, Commissioner's Record, p 17, para 16.

¹³ Kelly Affidavit, Commissioner's Record, p 18, para 23.

¹⁴ Kelly Affidavit, Commissioner's Record, p 18, para 23 and p 19 para 26.

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24. On June 29, 2021, the Commissioner filed an application pursuant to section 92 of the Act (the “**92 Application**”) to block the Transaction and an application pursuant to section 104 of the Act (the “**104 Application**”) for an injunction to prevent irreparable harm to competition until the 92 Application is disposed of. Secure and Tervita closed the Transaction on July 2, 2021 in the face of the 104 Application.

C. INDUSTRY BACKGROUND

(i) *The Affected Area*

25. The WCSB is a vast sedimentary basin in Western Canada that includes southwestern Manitoba, southern Saskatchewan, Alberta, northeastern British Columbia and the southwest corner of the Northwest Territories. The WCSB contains one of the world's largest reserves of petroleum and natural gas.

(ii) *Waste Facilities*

26. Upstream oil exploration and production companies produce crude oil, natural gas and natural gas liquids. Canadian oil and gas producers range from small and medium sized companies to large multinationals.¹⁵ Various forms of waste are generated in connection with the development, operation, remediation and reclamation of oil and gas wells including produced water, waste water, sludge, drill cuttings, contaminated soil and other chemicals.¹⁶ Producers generally pay third parties to take this waste, depending on its composition, at one of four types of facilities: TRDs, industrial landfills, standalone water disposal wells and caverns (collectively, “**Waste Facilities**”).¹⁷ As Secure did not own any caverns pre-Transaction, they will not be discussed in this section.

a. *TRDs/FSTs*

27. TRDs process contaminated fluids that contain mixtures of solids, oil and water. They perform three types of services: custom treatment of oil/water emulsions,

¹⁵ Kelly Affidavit, Commissioner's Record, Exhibit 9, p 520-528.

¹⁶ Kelly Affidavit, Commissioner's Record, Exhibit 5, p 402-406.

¹⁷ Ibid.

waste processing, and disposal of produced water and waste water. When a waste stream is treated or processed, the solid, water, and oil components are separated. If the TRD contains a terminal with a pipeline connection, the oil recovered from the waste will be delivered via pipeline to an oil and gas plant. If the TRD is not connected via terminal to a pipeline, the oil will be trucked to a facility with a terminal. The water is disposed of at a disposal well, often co-located at the TRD, and the solids are separately disposed of at an industrial landfill.¹⁸

b. Landfills

28. Industrial landfills are engineered sites that dispose of solid waste.¹⁹ Industrial landfills receive solid waste directly from oil and gas customers, particularly contaminated soil and drill cuttings, as well as solid waste separated at TRDs.²⁰ In Alberta and Saskatchewan, industrial landfills that receive oilfield waste streams fall into two categories: Class I (hazardous oilfield waste) and Class II (nonhazardous oilfield waste) industrial landfills.²¹ The majority of solid oil and gas waste in Alberta and Saskatchewan is nonhazardous and is disposed of in Class II landfills.²² In British Columbia, both hazardous and nonhazardous solid oilfield waste is disposed of in secure landfills.²³
29. Solid waste that has been contaminated with naturally occurring radioactive materials (“**NORM Waste**”) can only be disposed of in a landfill licensed to accept NORM Waste.²⁴ In the WCSB, the only two landfills that can accept solid waste contaminated with NORMs are the former Tervita’s Silverberry landfill in Northeastern British Columbia and Secure’s Pembina landfill in Alberta.²⁵

¹⁸ Kelly Affidavit, Commissioner’s Record, Exhibit 1, p 73-74.

¹⁹ Kelly Affidavit, Commissioner’s Record, Exhibit 1, p 77.

²⁰ Ibid.

²¹ Kelly Affidavit, Commissioner’s Record, Exhibit 76, p 2411.

²² Ibid.

²³ Kelly Affidavit, Commissioner’s Record, Exhibit 74, p 1897-1898, para 4.

²⁴ Kelly Affidavit, Commissioner’s Record, Exhibit 21, p 1221 and Exhibit 22, p 1224.

²⁵ Kelly Affidavit, Commissioner’s Record, p 20-21, para 32.

c. Disposal Wells

30. Disposal wells, also referred to as water disposal facilities, dispose of produced or waste water.²⁶ They can be co-located with a TRD or can be operated on a standalone basis. Most of the standalone disposal wells in the WCSB are owned by oil and gas producers to dispose of produced water generated in their day-to-day operations. Disposal wells owned by third party vendors, such as Secure and Tervita, are often used to dispose of overflow water volumes from producers.²⁷
31. As described in greater detail below, the Transaction results in Secure owning and controlling the vast majority of TRDs, industrial landfills, and third-party standalone disposal wells in the WCSB.²⁸ No other company that provides Waste Services comes close to having the geographic range and breadth of facilities that Secure now has after acquiring Tervita.²⁹

(iii) Transportation costs determine competitive options for disposal

32. Waste is most often trucked to Waste Facilities. Typically, trucking costs constitute a high percentage of disposal costs and are paid by the oil and gas producer.³⁰ These transportation costs can comprise upwards of 70% of the total disposal costs,³¹ with Tervita's internal documents estimating a range of ██████% of total disposal costs.³² Therefore, distance from the waste generation site to the Waste

²⁶ Kelly Affidavit, Commissioner's Record, Exhibit 76, p 2410.

²⁷ Kelly Affidavit, Commissioner's Record, Exhibit 86, p 2552.

²⁸ Expert Report of Dr. Nathan H. Miller, Ph.D. dated June 29, 2021 ("**Miller Report**") Commissioner's Record, p 2723, para 8.

²⁹ From the CIBC Institutional Equity Research report dated August 15, 2018: "Concentrated and favourable competitive environment in Canada. We estimate that the two largest competitors in the WCSB oilfield waste management market (i.e. Tervita and Secure) control upwards of 75% of the third-party oilfield waste management facilities in Canada and process over 80% of the third-party waste." Kelly Affidavit, Commissioner's Record, Exhibit 81, p 2468.

³⁰ "These are important considerations as transportation is a significant cost incurred by the customer, therefore a service provider may have an advantage to its nearest competitor based on the location [...] to the customer." Kelly Affidavit, Commissioner's Record, Exhibit 76, p 2412.

³¹ Kelly Affidavit, Commissioner's Record, Exhibit 81, p 2493.

³² Miller Report, Commissioner's Record, p 2732, para 19, footnote 50: "In particular, the trucking differential analysis attached to the email quoted per hour trucking costs of between ██████ and ██████ CAD per tonne and hour, while the disposal fees ranged from ██████ per tonne. Email from tnickel@tervita.com to cmacmullin@tervita.com and lgailey@tervita.com, "RE: ██████ Volumes," October 15, 2020, TEV00223412, attachment "Trucking Differential –

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Facility is a key factor in a customer's decision as to which facility to send waste. Customers can avoid trucking produced water if they are connected by pipeline to a facility with a disposal well.³³

33. Secure and Tervita consider its customers' locations when setting prices and negotiating with customers, as is described at length in paragraphs 38 – 50 of the Kelly Affidavit.

(iv) Environmental Services

34. In addition to Waste Services, both Secure and Tervita competed to offer a comprehensive portfolio of Environmental Services associated with drilling for oil and gas, including environmental consulting services, solids control, demolition & decommissioning, and equipment rentals.³⁴ Companies that offer these Environmental Services may also procure Waste Services on behalf of their customers.³⁵ These companies may now rely on Secure, their competitor for these Environmental Services, as a dominant provider of Waste Services in certain markets where they operate.

D. RELEVANT PRODUCT MARKETS ARE NOT IN DISPUTE

35. The relevant product markets for assessing the effects of the Transaction are:
- a. the supply of waste processing and treatment services by TRDs;
 - b. the disposal of solid oil and gas waste into industrial landfills;
 - c. the disposal of produced and waste water into disposal wells owned by third party vendors (including both TRDs and water disposal facilities);
 - d. the disposal of NORM Waste into landfills permitted to accept this type of solid waste; and
 - e. the provision of Environmental Services.³⁶

Sharp V2.xlsx," TEV00223413". The record referenced by Dr. Miller can be found in the Kelly Affidavit, Commissioner's Record, Exhibit 26, p 1237 – 1243.

³³ Kelly Affidavit, Commissioner's Record, Exhibit 1, p 62.

³⁴ Kelly Affidavit, Commissioner's Record, Exhibit 1, p 63; and Exhibit 2, p 140.

³⁵ Kelly Affidavit, Commissioner's Record, p 47-49, paras 118-122.

³⁶ Kelly Affidavit, Commissioner's Record, p 20, para 30.

- 36. Customer switching between different types of Waste Services is generally not possible due to federal and provincial regulations that restrict disposal of certain waste streams to certain types of Waste Facilities, as well due to the technical capabilities of Waste Facilities.³⁷
- 37. Secure and Tervita documents and transaction data confirm that each type of Waste Facility handles different and largely non-overlapping types of waste. Dr. Miller analyzed the type of waste accepted at each of facility. As can be seen from Exhibit 7 of his report, excerpted below, landfills, TRDs, and disposal wells accept different and largely distinct types of waste.³⁸

EXHIBIT 7

Wastes accepted by different types of facilities from Tervita’s transaction data

Service Type Group ^[1]	Service Share of Total Revenue	Share of Volume going to a...		
		Landfill	TRD ^[2]	Water Disposal Facility
1. Waste - Contaminated Soil				
2. Waste - Drill Cuttings				
3. Waste - Lime Sludge				
4. Treating - Emulsion				
5. Waste - Drill Fluids				
6. Waste - EBD Water < 12.5 PH				
7. Waste - Hydrovac Waste				
8. Waste - Processing				
9. Waste - Solid Component				
10. Waste - Water Component				
11. Waste HO Processing				
12. Waste - Sludge				
13. Water - Waste Water				
14. Water - Produced Water				
15. Other Services				
Total / Average				

- 38. Caverns can take certain types of waste streams that can be disposed of at TRDs and disposal wells.³⁹ As such, caverns can be considered a functional substitute for TRDs and disposal wells. There are five operating caverns in the WCSB that accept third-party waste – three were owned by Tervita, one is

³⁷ Kelly Affidavit, Commissioner’s Record, p 20, para 31; and Exhibit 76, p 2410-2411.

³⁸ Miller Report, Commissioner’s Record, Exhibit 7, p 2745.

³⁹ Miller Report, Commissioner’s Record, p 2744, Exhibit 6 and para 42.

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owned by White Swan Environmental Ltd. (“**White Swan**”) and one is owned by Plains Environmental.⁴⁰

39. Solid waste contaminated with NORMs can only be disposed of in landfills permitted to accept this type of waste. There are no functional substitutes for the disposal of solid waste contaminated with NORMs.⁴¹
40. Other waste disposal options such as on-site storage or bioremediation are not close substitutes for the services provided by landfills and TRDs. On-site storage for long periods is neither practical nor economically feasible.⁴² Bioremediation may only be practical for a narrow range of contaminated soil not impacted by salts, heavy metal, or heavy end hydrocarbons.⁴³
41. Environmental Services are not a functional substitute for the provision of Waste Services. Environmental Management Companies may need to purchase Waste Services to offer certain Environmental Services.⁴⁴ For example, an Environmental Services Company remediating a well site may need to dispose of contaminated soil in an industrial landfill.⁴⁵

E. GEOGRAPHIC MARKETS ARE LOCAL

42. Dr. Miller’s analysis, records from Secure and Tervita, and submissions to the Commissioner made by Secure and Tervita demonstrate that relevant geographic markets are local.
43. There are two components to a producer’s cost of waste disposal: the fee charged by the Waste Facility and the cost to transport the waste to the Waste Facility.

⁴⁰ Tervita owns the Unity, Hughenden, and Lindbergh caverns; White Swan owns the Atmore cavern; Plains Environmental owns the Melville cavern. Kelly Affidavit, Commissioner’s Record, Exhibit 3, p 180. Pure Environmental’s cavern in Hangingstone is not yet operational.

⁴¹ Kelly Affidavit, Commissioner’s Record, p 20-21, para 32; Exhibit 21, p 1221; and Exhibit 22, p 1224.

⁴² The Tribunal considered these issues in *The Commissioner of Competition v. CCS Corporation et al.*, 2012 Comp. Trib. 14, paras 63-88, Book of Authorities Tab 24. Secure has not raised this.

⁴³ Kelly Affidavit, Commissioner’s Record, p 21, para 33.

⁴⁴ Kelly Affidavit, Commissioner’s Record, p 21, para 36; and p 47-49, paras 118-122.

⁴⁵ Kelly Affidavit, Commissioner’s Record, p 21, para 36.

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44. Dr. Miller has analyzed geographic markets using both a customer-based approach and a Waste Facility-based approach. While the evidence suggests that Secure and the former Tervita price discriminate, and therefore the customer-based approach is appropriate, Dr. Miller also considers the alternative facility-based approach to confirm that his findings are robust.⁴⁶

i) Customer-based approach

45. Suppliers of Waste Services price discriminate among their customers, i.e., they identify and charge different prices to customers, based on, among other factors presence and proximity of other competitors, distance between customers and the facility, and volume commitments.⁴⁷ For example, Tervita's internal documents show that it considered "market rate and strategy" at each facility separately, meaning that their pricing varied across facilities.⁴⁸

46. Dr. Miller also notes that Tervita's transaction level data confirms that the pricing for the same service varies across different facilities.⁴⁹ For example, Tervita's prices after discount at the East Peace landfill varied between \$■ and \$■ per m³, and at the Judy Creek landfill varied between \$■ and \$■ per m³.⁵⁰

47. Dr. Miller's analysis demonstrates that Waste Services are local in nature. He analyzed the Tervita and Secure transaction data to determine the average driving distance between a customer site and the waste service facility. The results of that analysis are contained in Exhibit 4 of his report which is excerpted below. It shows for example, that the average driving distance between Waste Services customers and Secure and Tervita landfills are 88 km and 84 km respectively.

⁴⁶ Miller Report, Commissioner's Record, p 2748-2450, paras 51-53.

⁴⁷ Miller Report, Commissioner's Record, p 2735, para 23.

⁴⁸ Miller Report, Commissioner's Record, p 2735, para 24 and footnote 61.

⁴⁹ Miller Report, Commissioner's Record, p 2736, para 25.

⁵⁰ Ibid.

EXHIBIT 4***Distribution of travel distance between customers and Secure and Tervita facilities***

Company	Facility Type ^[1]	Number of Associated Customer Wells ^[2]	Average Travel Distance (km)	Median Travel Distance (km)	75th Percentile Travel Distance (km)	90th Percentile Travel Distance (km)
1. Tervita	Landfill	2,625				
2. Tervita	TRD ^[3]	35,770				
3. Tervita	Water Disposal Facility	1,388				
4. Secure	Landfill	1,333				
5. Secure	Full-Service Terminal	15,628				
6. Secure	Water Disposal Facilities ^[4]	3,412				

48. The customer based approach defines the geographic market around a set of customers most likely to be impacted by the Transaction. This approach is appropriate because there is price discrimination in the market and therefore competitive effects can vary across different sets of customers.⁵¹
49. Because Secure has the ability to price discriminate, when defining geographic markets it is appropriate to aggregate the oil and gas customers based on their location and the number of competitive options available to them.⁵²
50. Two sets of oil and gas customers that will experience the largest impact from the Transaction are: (1) those oil and gas customers whose location means that the Transaction effectively results in a merger to monopoly because there is no other reasonably accessible alternative; and (2) those oil and gas customers whose location means that the Transaction will reduce their competitive options from 3 to 2. Even those oil and gas customers that will have more than two competitive options will still be affected by the Transaction.⁵³

ii) Facility-based approach

51. Dr. Miller also considered an alternative facility-based approach to market definition to confirm that his findings on the effects of the Transaction are robust to the geographic market definition approach. Dr. Miller defined facility-based markets as areas within a 110 km radius of Secure facilities.⁵⁴ He focuses his

⁵¹ Miller Report, Commissioner's Record, p 2748-2749, paras 50-51.

⁵² Miller Report, Commissioner's Record, p 2748-2749, para 51, footnote 112.

⁵³ Miller Report, Commissioner's Record, p 2749, para 52.

⁵⁴ Miller Report, Commissioner's Record, p 2749-2750, para 53.

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analysis on geographies where the Secure facility competes with one or more Tervita facilities and any other competing facilities within the 110 km radius of the Secure facility.⁵⁵ Dr. Miller's analysis of the anticompetitive effects are robust regardless of approach to market definition one takes.⁵⁶

iii) Qualitative Evidence

52. Secure and Tervita's internal records support Dr. Miller's findings and demonstrate that Waste Facilities consider the next closest competitive facility when quoting prices to customers.⁵⁷ Numerous examples of both Secure and Tervita considering the next closest competitive facility in setting prices are attached to the Kelly Affidavit.⁵⁸ In one example, Secure considers the location of waste from ██████████ and the different routes that ██████████ could take to Secure's Willesden Green landfill and Tervita's competing landfill with the same name. Secure decides to offer ██████████ the lowest rate that it offers at Willesden Green "which should be very competitive with Tervita's landfill (perhaps better)."⁵⁹
53. Secure and Tervita's past submissions to the Bureau support Dr. Miller's conclusions. When Tervita acquired Newalta Corporation ("**Newalta**") in 2018, both Secure and Tervita provided submissions on local overlap markets for Waste Facilities. Secure submitted that "Based on our operating experience 40km-60km can be used as an initial rule of thumb to define the competitive area around a facility."⁶⁰ Tervita submitted that "typically, the majority of customers will be located within 75-110 km of a treatment facility."⁶¹
54. Finally, before the Transaction closed, Secure and Tervita had been engaged in litigation against one another since 2007 as described in paragraphs 78 – 93 of the Kelly Affidavit. On September 4, 2020, Tervita's (which commenced the lawsuit under its previous name, CCS) counsel provided "a revised chart

⁵⁵ Miller Report, Commissioner's Record, p 2753-2754, para 62.

⁵⁶ Miller Report, Commissioner's Record, p 2763, para 75.

⁵⁷ Miller Report, Commissioner's Record, p 2736-2737, para 26, footnote 71.

⁵⁸ Kelly Affidavit, Commissioner's Record, p 22-25, paras 39–50.

⁵⁹ Kelly Affidavit, Commissioner's Record, p 25, para 50 and Exhibit 35, p 1284-1289.

⁶⁰ Kelly Affidavit, Commissioner's Record, Exhibit 76, p 2413.

⁶¹ Kelly Affidavit, Commissioner's Record, Exhibit 75, p 2263.

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indicating the CCS facilities impacted by Secure and identifying the corresponding competing Secure facilities.”⁶² This chart identifies local Tervita sales areas, the Tervita facility or facilities, as well as the competing Secure facilities.

F. SECURE’S HIGH MARKET SHARES POST TRANSACTION

55. Market shares estimated by Dr. Miller as well as business records prepared by Secure and Tervita indicate that Secure will have substantially more than half the market in several local markets, including many where Secure will have a monopoly.

i) Dr. Miller’s market share estimates

56. Dr. Miller has determined that Secure’s market shares in many markets across the WCSB increased post-Transaction regardless of whether geographic markets are defined using a customer based approach or a facility based approach. Dr. Miller’s analysis was not contested during his cross-examination.
57. Using the customer based approach to geographic markets, Dr. Miller has identified for each Tervita and Secure customer the impact of the Transaction on the number of competitive alternatives remaining for that customer. The maps below show the expected changes in competition for TRDs, landfills, and water disposal customers respectively.⁶³
58. Green dots indicate customer locations for which the merger reduces the number of competitors from 2 to 1 (i.e., merger-to-monopoly). Blue dots represent customer locations that were benefiting from competition between Secure, Tervita, and another competitor but now only have two competing Waste Services provider options after the merger (i.e., 3-to-2 merger). Purple dots represent customer locations that experience a reduction in competition, but have more than one viable competitor facility nearby (for example, 4-to-3 merger). The gray dots represent customers’ locations that will not experience a

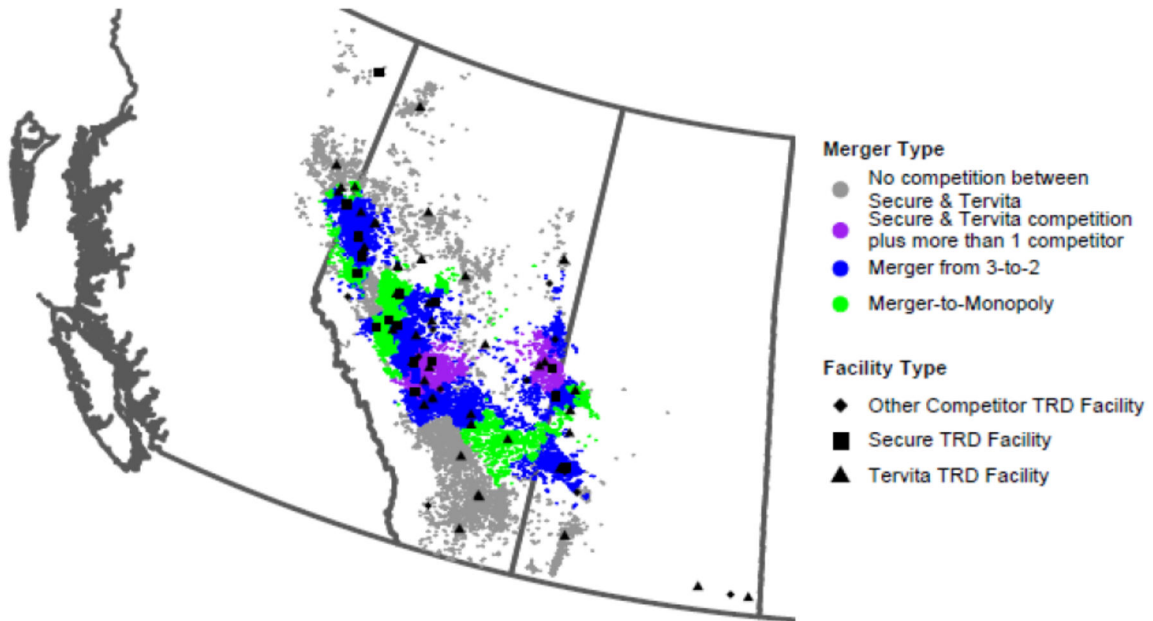
⁶² Kelly Affidavit, Commissioner’s Record, Exhibit 71, p 1874-1878.

⁶³ Miller Report, Commissioner’s Record, Exhibits 10–12, p 2758-2760.

reduction in competition, or that are already located in a monopoly market, where a Secure or Tervita facility is the only viable option.⁶⁴

EXHIBIT 10

TRD customers in the WCSB facing a potential reduction in competition from the Tervita-Secure merger



⁶⁴ Miller Report, Commissioner's Record, p 2757-2758, para 70.

EXHIBIT 11

Landfill customers in the WCSB facing a potential reduction in competition from the Tervita-Secure merger

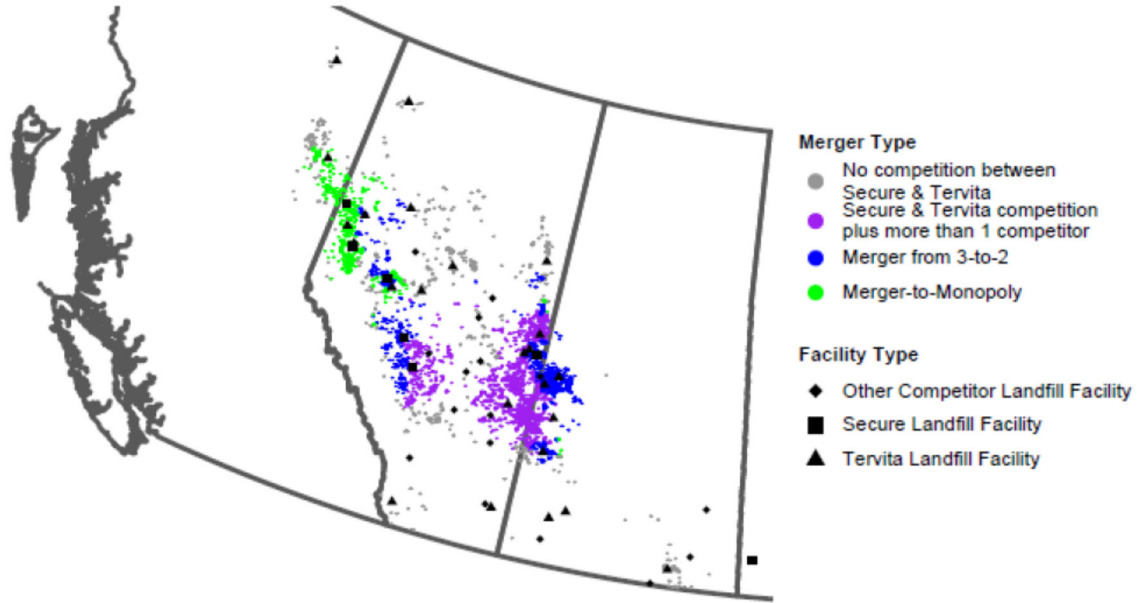
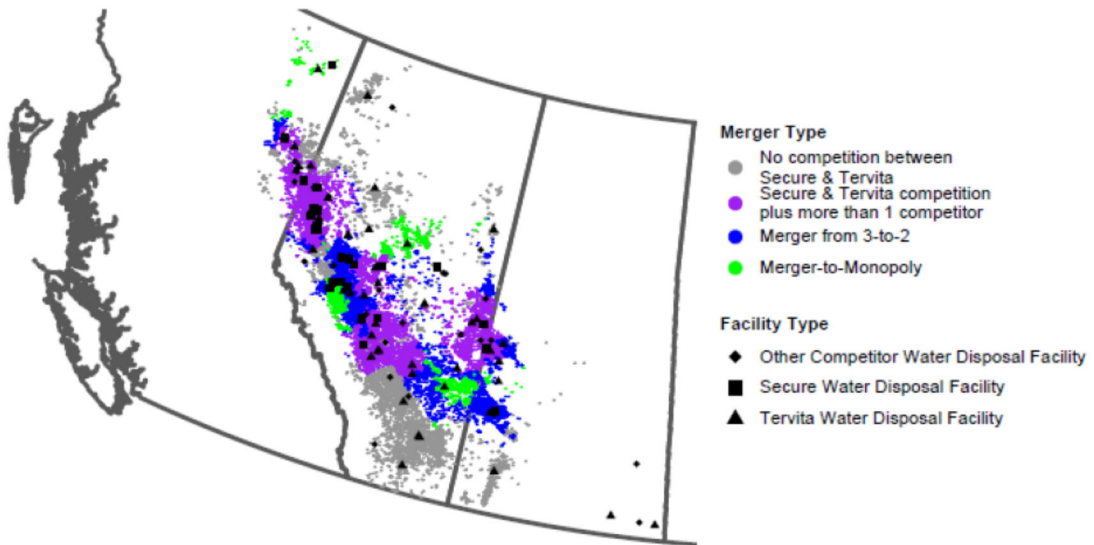


EXHIBIT 12

Water disposal customers in the WCSB facing a potential reduction in competition from the Tervita-Secure merger



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59. For each Secure and Tervita facility, in Exhibit 13, Dr. Miller has calculated the number of customers that will face a merger to monopoly and the total revenues from these customers for Secure and Tervita. For example, prior to the Transaction, there were customers with 245 well sites who relied on competition between Secure's Saddle Hills and Tervita's Silverberry landfill but now have no viable alternatives.⁶⁵

EXHIBIT 13**Market shares in select customer-based markets identified as merger-to-monopoly**

Secure Facility	Tervita Facility	Total Revenue for Secure and Tervita (CAD)	Total Count of Secure and Tervita Customers	Estimated Market Share of Merged Entity
TRDs				
1. Fox Creek	Fox Creek East		551	100.0%
2. Kakwa	South Wapiti		220	100.0%
3. Edson	West Edson		760	100.0%
4. Nosehill	West Edson		1133	100.0%
5. Tulliby Lake	Coronation		776	100.0%
6. Tulliby Lake	Turtleford		310	100.0%
7. Obed	West Edson		270	100.0%
8. Dawson Creek	Boundary Lake		104	100.0%
9. Judy Creek	Judy Creek		152	100.0%
10. Rocky Mountain House	Willesden Green		75	100.0%
Landfills				
1. Saddle Hills	Silverberry		245	100.0%
2. South Grande Prairie	South Wapiti		212	100.0%
3. Saddle Hills	Spirit River		147	100.0%
4. Fox Creek	Fox Creek		70	100.0%
5. Tulliby Lake	Bonnyville		14	100.0%
Water disposal (+TRDs)				
1. Edson	West Edson		843	100.0%
2. Athabasca	Mitsue		280	100.0%
3. Tulliby Lake	Coronation		524	100.0%
4. Obed	West Edson		215	100.0%
5. Judy Creek	Judy Creek		152	100.0%
6. Wonowon	Mile 103		23	100.0%
7. Kindersley	Coronation		75	100.0%
8. Kotcho	Sierra		52	100.0%
9. Rocky Mountain House	Willesden Green		54	100.0%
10. Nosehill	West Edson		64	100.0%

60. For customers whose competitive options have been reduced from 3-2 after the Transaction, Secure's post-merger market share of these customers range from

⁶⁵ Miller Report, Commissioner's Record, Exhibit 13, p 2761.

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52% to 82%.⁶⁶ These market share calculations are based on the very conservative assumption that the remaining competitor obtains the same revenue as the average revenue of Secure and Tervita.⁶⁷

EXHIBIT 14

Market shares in select customer-based markets where the merger reduces competitors from 3-to-2 firms

Secure Facility	Tervita Facility	Nearby Competitor	Total Revenue for Secure and Tervita (CAD)	Total Count of Secure and Tervita Customers	Estimated Market Share of Merged Entity
TRDs					
1. Kakwa	South Wapiti	Rycroft (Wolverine)		304	82.6%
2. Tulliby Lake	Lindbergh Caverns	Fort Kent (Pure Environmental)		447	79.5%
3. South Grande Prairie	South Wapiti	Rycroft (Wolverine)		1053	76.5%
4. Fox Creek	Fox Creek	Mayerthorpe (Wolverine)		273	73.5%
5. Obed	West Edson	Grande Cache (Wolverine)		360	70.3%
6. La Glace	Grande Prairie Industrial	Rycroft (Wolverine)		303	68.0%
7. Dawson Creek	South Taylor	Rycroft (Wolverine)		732	66.6%
8. Brazeau	Brazeau	Cynthia (Wolverine)		1007	66.1%
9. Silverdale	Turtleford	Hardisty CIT (Gibson)		474	64.6%
10. Kindersley	Gull Lake	Plato South (Gibson)		51	55.3%
Landfills					
1. Tulliby Lake	Lindbergh Caverns	Lloydminster (Ridgeline)		149	74.9%
2. Tulliby Lake	Mervin	Lloydminster (Ridgeline)		468	74.6%
3. Willy Green	Willesden Green	Breton Waste Management (RemedX)		76	59.3%
4. Fox Creek	Fox Creek	High Prairie (Ridgeline)		117	54.0%
5. Pembina	Judy Creek	Breton Waste Management (RemedX)		127	50.5%
Water disposal (+TRDs)					
1. Tony Creek	Fox Creek	Fox (Catapult)		423	75.2%
2. Wonowon	Mile 103	Fort St. John (Aquaterra)		132	74.5%
3. Eccles	West Edson	Grande Cache (Wolverine)		179	73.9%
4. Obed	West Edson	Grande Cache (Wolverine)		262	73.4%
5. Tulliby Lake	Lindbergh Caverns	Fort Kent (Pure Environmental)		247	72.4%
6. Kaybob	Fox Creek East	Fox (Catapult)		352	70.7%
7. Edson	West Edson	Cynthia (Wolverine)		676	67.7%
8. Brazeau	Brazeau	Cynthia (Wolverine)		826	67.1%
9. Nosehill	West Edson	Berland (Catapult)		122	66.9%
10. Kindersley	Gull Lake	Plato North (Gibson)		54	55.7%

ii) Secure and Tervita's internal market share estimates

61. In addition to the work done by Dr. Miller, records created in the ordinary course by Secure and Tervita show market share estimates well above levels the Tribunal has found to be presumptively indicative of market power.⁶⁸
62. In January 2017, Tervita created a document that, among other things, analyzes market shares for its TRD and water disposal in various waste sheds for Tervita TRD and disposal well facilities. This document was created prior to Tervita's

⁶⁶ See *The Commissioner of Competition v The Toronto Real Estate Board*, 2016 Comp. Trib. 7, at para 194, Book of Authorities Tab 23; *Commissioner of Competition v Canada Pipe*, 2005 Comp Trib 3, at paras 138 and 140 Book of Authorities Tab 6; *Canada (Director of Investigation and Research) v Laidlaw Waste Systems Ltd* (1992), 40 CPR (3d) 289 (Comp Trib) at paras 68 and 98, Book of Authorities Tab 5.

⁶⁷ Miller Report, Commissioner's Record, Exhibits 14 and 15, p 2762-2763.

⁶⁸ Supra 66.

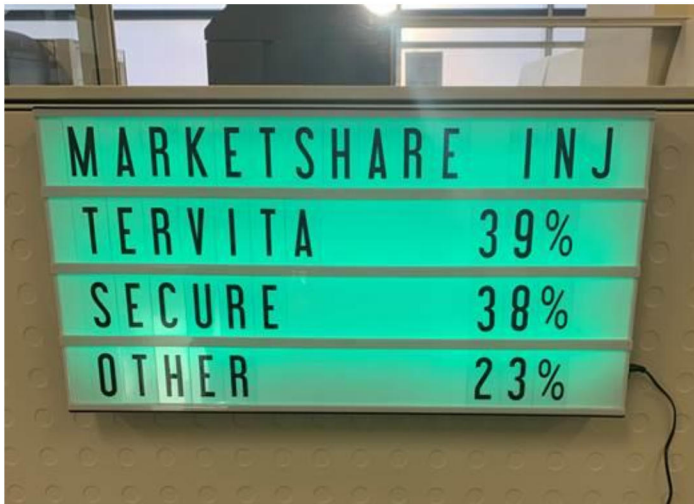
acquisition of Newalta. Below is a table summarizing the market share calculations for the waste sheds by quarter for 2016 where a Secure facility is present.⁶⁹

Waste shed	Market share estimate of combined Secure/Tervita/Newalta facilities			
	16-Q1	16-Q2	16-Q3	16-Q4
Kindersley	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
Lindbergh	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
Unity	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
Fox Creek	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
Judy Creek	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
West Edson	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
Moose Creek	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
Brazeau	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
Buck Creek	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
Spirit River	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
LaGlace	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
South Wapati	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
Sierra	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
Silverberry	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]

⁶⁹ Kelly Affidavit, Commissioner's Record, p 26-27, para 54.

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63. In March 2020, Taryn Roy, Commercial Manager at Tervita, reported to a number of senior Tervita executives, including former CEO John Cooper, Tervita's market share in water disposal which, for the month of January 2020 "████████████████████". In response to Ms. Roy's e-mail, Jay McNeil, Director of Sales and Commercial at Tervita, responds with this picture:⁷⁰



64. Secure also tracks water injection volumes by third party water disposal. In March 2021, it reported a market share of █% for Tervita, █% for Secure, █% for Medicine River Oil Recyclers, █% for Aqt Water Management Inc., █% for Wolverine Energy and Infrastructure, █% for Catapult Environmental, and █% for Envolve Energy Services Corp.⁷¹
65. The evidence from Dr. Miller as well as Secure and Tervita's own documents demonstrate that regardless of how geographic markets are defined, the Transaction has provided Secure with market shares that are above levels the Tribunal has found are presumptively indicative of market power.⁷²

⁷⁰ Kelly Affidavit, Commissioner's Record, p 27, para 55; and Exhibit 41, p 1391-1392.

⁷¹ Kelly Affidavit, Commissioner's Record, p 28, para 56; and Exhibit 42, p 1399-1401.

⁷² Supra 66. The market shares are also well above the 35% safe harbour threshold found in the Merger Enforcement Guidelines, para. 5.9, Book of Authorities, Tab 30.

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G. REMOVAL OF A VIGOROUS AND EFFECTIVE COMPETITOR

66. The Transaction eliminates the head-to-head rivalry between Secure and Tervita, who were, pre-merger, the two largest providers of Waste Services in WCSB and for a significant number of customers were the two closest options for Waste Services.⁷³ Secure and Tervita competed by offering discounts to customers trying to win volume from one another.

i) Secure and Tervita are close and bitter rivals

67. Secure was started by former employees and contractors of Tervita. After Secure entered the market, there were multiple lawsuits between Secure and Tervita. Tervita alleged that a number of its former employees conspired to take Tervita's confidential information and formed Secure for the purpose of taking certain business opportunities from it. Secure alleged that Tervita engaged in various forms of anticompetitive conduct.⁷⁴

68. Secure has filed multiple complaints with the Competition Bureau regarding alleged anticompetitive conduct by Tervita including targeted discounts and below cost pricing; payments to trucking companies to drive by but not use Secure facilities; attempts to prevent customers from using Secure; and commencing frivolous litigation against Secure.⁷⁵

69. Secure and Tervita each identified the other as their biggest rival for the provision of Waste Services in their respective Annual Information Forms ("**AIFs**") from 2020:

70. Secure's 2020 AIF:

SECURE is one of the leading providers in the third-party oilfield treatment and disposal market with 42 locations in the WCSB and five in the U.S. Tervita Corporation ("Tervita") has approximately 50 treating, recovery and disposal facilities located primarily in western Canada. Several smaller

⁷³ Kelly Affidavit, Commissioner's Record, Exhibit 1, p 84.

⁷⁴ Kelly Affidavit, Commissioner's Record, p 35-36, paras 78-80.

⁷⁵ Kelly Affidavit, Commissioner's Record, p 35, para 78; and Exhibit 62, p 1727-1728.

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competitors also exist, operating independent facilities, most of which offer limited services.⁷⁶

71. Tervita's 2020 AIF:

Treating, Recovery and Disposal and Landfills – Tervita's large competitors include Secure Energy Services Inc., plus a number of smaller, predominantly privately owned, regional operators, as well as producers that handle their own waste processing.⁷⁷

ii) Secure and Tervita's Waste Facilities are in close proximity to each other

72. Tervita built facilities close to new Secure facilities including its South Grande Prairie landfill close to Secure's Grande Prairie landfill, and Tervita's Fox Creek TRD close to Secure's Fox Creek TRD.⁷⁸ Customers benefited from decreased tipping fees and better service where Secure and Tervita operated facilities in close proximity to each other.⁷⁹

73. Dr. Miller has analyzed how many Secure facilities had Tervita as the next nearest competitor and the average distance to those facilities at Exhibit 16 and 17 of his report.⁸⁰ As Dr. Miller's analysis demonstrates, for most Secure and Tervita customers the next closest option was a facility owned by the other party.

EXHIBIT 16

Secure customers' next nearest facility is often operated by Tervita

Facility type ^[a]	Count of customer wells ^[a]	Customer wells for whom the nearest non-Secure facility is Tervita...		If the nearest non-Secure facility is Tervita, mean distance to...	
		Count	Percentage	Tervita facility (km)	Nearest third party facility (km)
1. Landfill	1,309	1,077	82.3%	87.26	236.65
2. TRD	13,371	11,095	83.0%	55.15	127.87
3. Water Treatment	14,070	9,506	67.6%	48.21	92.40

⁷⁶ Kelly Affidavit, Commissioner's Record, Exhibit 1, p 84.

⁷⁷ Miller Report, Commissioner's Record, p 2764, para 78, footnote 137.

⁷⁸ Kelly Affidavit, Commissioner's Record, p 37, para 88.

⁷⁹ Kelly Affidavit, Commissioner's Record, Exhibit 54, p 1475-1477.

⁸⁰ Miller Report, Commissioner's Record, Exhibit 16-17, p 2767-2768.

EXHIBIT 17***Tervita customers' next nearest facilities are often operated by Secure***

Facility type ^[1]	Count of customer wells ^[2]	Customer wells for whom the nearest non-Tervita facility is Secure...		If the nearest non-Tervita facility is Secure, mean distance to...	
		Count	Percentage	Secure facility (km)	Nearest third party facility (km)
1. Landfill	4,880	1,608	33.0%	112.79	226.50
2. TRD	26,029	12,930	49.7%	70.65	142.38
3. Water Treatment	26,915	10,102	37.5%	59.23	95.30

ii) Vigorous competition through pricing discounts

74. Secure and Tervita's internal documents highlight the vigorous competition manifested through aggressive pricing discounts and close monitoring of the other's activities.
75. For example, an e-mail from Ryley Pierson, Area Manager – Sales at Secure, confirms that Secure obtained prices that clients were receiving from Tervita's South Wapiti facility in order to calibrate the discount at Secure's South Grande Prairie facility.⁸¹ A further example, Senior Corporate Accounts Representative, Dave Desjardins, viewed Tervita's Fox Creek landfill as Secure's competitor and wrote to Ed Guenther, General Manager, that "Tervita has been throwing around some low-ball numbers (██████) which has won them some market share".⁸² The Kelly Affidavit includes several examples of Secure and Tervita competing closely in paragraphs 65-73.
76. Internal records indicate that Secure and Tervita are in close competition with one another more than any other provider of Waste Services. Tervita creates a category of records that are called DOAs (Discounted Offer Authorizations) which appear to be automated approval requests for discounts for customers. The fields for the DOA requests include 'Customer Name', 'Quote Revenue', 'Discount %', 'New or Existing Business', 'Recommendation & Rationale', 'Competitor Rate', 'Next Best Alternative Analysis', 'Competitive Dynamics', 'Market Share', 'Contract Summary' and 'Account/Market Strategy'. The DOAs

⁸¹ Kelly Affidavit, Commissioner's Record, p 31, para 67.

⁸² Kelly Affidavit, Commissioner's Record, p 31, para 69.

may include an explanation of the purpose for the discount in the field 'Recommendation & Rationale'. These records appear to stop being produced after 2018. For the DOA's requested in 2018, the chart below lists the number of unique 'Quote Numbers' where Secure is mentioned along with various entities identified in the review as potential competitors and the basis for reducing prices.⁸³ The DOAs demonstrate that Secure is by far Tervita's largest and most vigorous competitor.

Various Entities	References in DOA docs
Secure	63
[REDACTED]	4
[REDACTED]	4
[REDACTED]	5
[REDACTED]	2
[REDACTED]	1 / 1 / 0
[REDACTED]	1
[REDACTED]	0
[REDACTED]	0 / 0 / 0
[REDACTED]	3
[REDACTED]	1
[REDACTED]	2
[REDACTED]	3
[REDACTED]	0
[REDACTED]	0
[REDACTED]	1
[REDACTED]	1
[REDACTED]	1
[REDACTED]	0
[REDACTED]	1
[REDACTED]	0
[REDACTED]	0
[REDACTED]	0
[REDACTED]	0
[REDACTED]	2
[REDACTED]	0 / 0
[REDACTED]	0 / 0
[REDACTED]	0 / 0
[REDACTED]	0
[REDACTED]	0
[REDACTED]	0

⁸³ Kelly Affidavit, Commissioner's Record, p 33-34, para 74.

H. INEFFECTIVE REMAINING COMPETITION

77. There is insufficient remaining competition to constrain an exercise of market power by Secure.
78. No other company comes close to having the facilities to match the geographic scope and product depth of Secure and Tervita. Combining the assets of Secure and Tervita results in one entity owning 62 TRDs, 28 industrial landfills, 3 cavern disposal facilities and 23 water disposal wells in the WCSB. Post transaction, remaining competitors may include:
- a. Wolverine Energy and Infrastructure, which operates five TRDs in Alberta and one industrial landfill in Saskatchewan;⁸⁴
 - b. Aqua Terra Water Management (“**Aqua Terra**”), which operates eight standalone disposal wells – two in British Columbia, five in Alberta, and one in Saskatchewan;⁸⁵
 - c. Ridgeline Canada Inc., which accepts certain types of solid waste at municipal landfills in Alberta and Saskatchewan;⁸⁶
 - d. RemedX, which operates one industrial landfill in Breton, Alberta;⁸⁷
 - e. Catapult Water Midstream (“**Catapult**”), which operates three standalone disposal wells in Alberta and one in British Columbia;⁸⁸
 - f. Medicine River Oil Recyclers (“**MROR**”), which operates one TRD in Drayton Valley, Alberta;⁸⁹ and
 - g. White Swan, which operates one cavern and one TRD in Alberta.⁹⁰
79. Some municipal landfills may accept volumes of contaminated soil and drill cuttings. However, the volume of this type of waste accepted by municipal landfills is insignificant relative to the volumes of contaminated soil and drill

⁸⁴ Kelly Affidavit, Commissioner’s Record, Exhibit 39, p 1320.

⁸⁵ Ibid.

⁸⁶ Ibid.

⁸⁷ Ibid.

⁸⁸ Ibid.

⁸⁹ Ibid.

⁹⁰ Ibid.

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cuttings produced in the WCSB and collected by Secure and Tervita at their landfills.⁹¹

80. Mr. David Engel, Senior Vice President, Landfill Solutions at Secure, claims in his affidavit (the “**Engel Affidavit**”) that Secure prices will be constrained by competitors.⁹² The effectiveness of the competitors identified by Mr. Engel (and additional competitors) were considered by the Bureau. As the chart in paragraph 76 demonstrates, these competitors rarely influence Secure’s pricing decisions. In addition, Mr. Engel has done no analysis to substantiate the claims he makes about competitors.⁹³

I. SELF SUPPLY AND COUNTERVAILING POWER ARE UNLIKELY TO CONSTRAIN AN EXERCISE OF MARKET POWER BY SECURE

81. Some oil and gas producers own waste disposal facilities, called first-party facilities. Due to regulatory and capital constraints, typically only larger producers have first-party facilities.
82. A submission received from Secure in 2018 supports this, as Secure claimed that “in some instances, oil and gas producers manage their own water disposal and treating internally, however this option is only available to large Producers (balance sheet and production) as they have operational expertise and the volume required to invest internally on the infrastructure. Producer owned facilities are almost never open to third parties”.⁹⁴
83. While Secure now argues that the ability of oil and gas producers to self-supply is a competitive constraint, internal records indicate that Secure sells Waste Services on the basis that first party facilities are not an efficient use of an oil and gas producers’ capital.⁹⁵

⁹¹ Kelly Affidavit, Commissioner’s Record, Exhibit 44, p 1414. Municipal landfills noted as potential competitors include [REDACTED]

⁹² Affidavit of David Engel, sworn July 14, 2021 (“**Engel Affidavit**”), Secure’s Record, p 41-42, paras 55-56.

⁹³ Reply Expert Report of Nathan H. Miller, Ph.D., dated July 19, 2021 (“**Miller Reply**”), p 9-10, para 13.

⁹⁴ Kelly Affidavit, Commissioner’s Record, Exhibit 76, p 2412.

⁹⁵ Kelly Affidavit, Commissioner’s Record, p 45, para 110.

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84. Further, oil and gas producers that have self-disposal capacity still rely on third-party water disposal wells, TRDs and landfills to dispose of their waste.⁹⁶ ██████ an oil and gas producer with first party landfills and disposal wells, remains a major customer of both Secure and Tervita. ██████ appears as a top 20 customer of Secure for landfills (#█ at \$█████ sales for 2020) and FSTs (#█ at \$█████ sales for 2020).⁹⁷ ██████ appears as a top 20 customer of Tervita for TRDs, Caverns and Disposal Wells (#█ at \$█████ sales in 2020) and Landfills (#█ at \$█████ sales in 2020).⁹⁸
85. The Alberta Energy Regulator (“AER”) approves and regulates first party oilfield landfills and third party oilfield waste disposal facilities in Alberta. As the AER website notes, “First-party receivers can only accept upstream oilfield waste generated by one oil and gas company, but can come from various sites. Third-party receivers can accept upstream oilfield waste from various sites and various generators.”⁹⁹ Secure has provided no examples of first party landfills being approved in Alberta within the last three years.
86. In British Columbia, no secure landfills or TRDs (whether owned by oil and gas companies or competitors) have been approved since the Babkirk facility in 2008. Secure is the only company with an application to build a secure landfill (at Wonowon in Northeastern British Columbia).¹⁰⁰
87. Oil and gas companies own and operate water disposal wells that they use to dispose of their produced water and waste water. Generally oil and gas companies with their own wells do not accept water from other oil and gas companies.¹⁰¹ However, even oil and gas companies that own water disposal wells use third party water disposal wells due to overflow volumes and/or geography. When wells are completed they create a large surge in overflow volumes that typically exceed their internal disposal capacity. An internal Secure

⁹⁶ Kelly Affidavit, Commissioner’s Record, Exhibit 86, p 2552.

⁹⁷ Kelly Affidavit, Commissioner’s Record, Exhibit 6, p 425-426.

⁹⁸ Kelly Affidavit, Commissioner’s Record, Exhibit 7, p 467-468.

⁹⁹ Kelly Affidavit, Commissioner’s Record, p 46, para 111.

¹⁰⁰ Kelly Affidavit, Commissioner’s Record, Exhibit 85, p 2544-2545.

¹⁰¹ Kelly Affidavit, Commissioner’s Record, Exhibit 76, p 2412.

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presentation titled [REDACTED] notes that "[REDACTED]
[REDACTED]
[REDACTED]"¹⁰²

As well, producers may have producing wells across multiple locations and it may not be feasible to drill disposal wells at each of their locations.

88. In the Secure and Tervita business records referenced in paragraphs 62- 65, neither company includes first party facility volumes in its market share estimates.
89. Secure's claims about self-supply and countervailing power are based on statements made by Mr. Engel.¹⁰³ The vague statements by Mr. Engel about volumes lost to self-supply were unsupported and lacked context.¹⁰⁴ Moreover, Secure has not filed a report from an economist that provides any analysis to substantiate these claims while Dr. Miller has considered this information about self-supply and countervailing power and it does not change his conclusions.¹⁰⁵
90. Finally, as described below in paragraphs 91 - 99, a producer would face high barriers to entry to build a first party facility.

J. BARRIERS TO ENTRY ARE HIGH

91. Secure's dominant position will not be constrained by entry or expansion as barriers to entry are high; accordingly, entry is not likely, timely, or sufficient.
92. Barriers to entry include regulatory and permitting requirements for establishing a waste disposal site; high capital costs; high sunk costs; market maturity; and limits on the number of available geologically suitable sites for waste disposal.¹⁰⁶
93. The timeline required for the necessary approvals can take several years. Recent examples of the time required for entry include:

¹⁰² Kelly Affidavit, Commissioner's Record, Exhibit 86, p 2552.

¹⁰³ Engel Affidavit, Secure's Record, p 41-46, paras 55-67.

¹⁰⁴ Cross Examination Transcript of David Engel, dated July 22, 2021 ("**Engel Cross**"), Supplementary Record, p 497, line 11 to p 499, line 1.

¹⁰⁵ Miller Reply, p 9-12, paras 13-16.

¹⁰⁶ Kelly Affidavit, Commissioner's Record, p 28-30, paras 59-62.

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- a. Waste Management's successful entry of the Thorhild landfill, which took nearly a decade;¹⁰⁷
 - b. Secure's unsuccessful attempt to build a landfill in Conklin, which took nearly seven years;¹⁰⁸ and
 - c. Secure's ongoing attempt to build an industrial landfill at Wonowon which Secure has been pursuing since 2013.¹⁰⁹
94. There are significant capital and regulatory requirements to build an industrial landfill. In Alberta, it would require geological mapping, public consultations, and a formal application from the AER in the case of a first-party landfill or Alberta Environment and Parks for a landfill that accepts third party solid waste. In a presentation [REDACTED] Tervita describes the initial investment requirement to be [REDACTED] to build a landfill with additional investments of [REDACTED] investment every two years (depending on volumes). It also notes that it requires 12 months to construct (not including siting and regulatory time), up to 4 years until operation, and a medium level of regulatory complexity.¹¹⁰
95. There are also significant capital and regulatory requirements to build a TRD or FST. In Alberta, it would require a local development permit, geological mapping, public consultations, and a formal application from the AER. Tervita in its own documents describes the initial investment requirement to be [REDACTED] [REDACTED] It also notes that it requires 12 months to construct, 2-3 years to operation and a high level of regulatory complexity.¹¹¹
96. There are also significant capital costs to drill a disposal well. From Secure's submission to the Bureau during the Tervita/Newalta investigation – which Mr.

¹⁰⁷ Kelly Affidavit, Commissioner's Record, Exhibit 45, p 1416-1420.

¹⁰⁸ Kelly Affidavit, Commissioner's Record, Exhibit 46, p 1424-1428.

¹⁰⁹ Kelly Affidavit, Commissioner's Record, Exhibit 47b, Tab AFE Signoff.

¹¹⁰ Kelly Affidavit, Commissioner's Record, Exhibit 48, p 1453.

¹¹¹ Kelly Affidavit, Commissioner's Record, Exhibit 48, p 1451.

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Engel testified it would have been important to provide “correct and complete” information:¹¹²

- “There are limited areas within Alberta with the appropriate geology to construct disposal wells.
- Application timelines from drilling approval, drilling, completions, injection application, injection approval, and construction to operations will typically take from approximately 12 to 18 months.
- Disposal wells and associated surface facilities can range in cost from approximately [REDACTED] depending mainly on well depth and drilling and completion complexity.
- Associated surface facilities can be difficult to site in developed areas.”¹¹³

97. In addition, there are geological areas in the WCSB that have limited disposal geology for wells. A Secure internal request for approval to build a single well disposal facility west of Grande Prairie notes in the Project Overview that “the geology for disposal wells in the area is very limited.”¹¹⁴

98. The market for Waste Facilities is a mature market. By Secure’s CEO’s own admission in his letter to the Commissioner, the market for Waste Facilities is overcapitalized.¹¹⁵

99. Secure intends to fully or partially suspend 26 Waste Facilities in the WCSB. All fully and partially suspended sites remain fully permitted and can resume operations with modest capital expenditure and within six weeks.¹¹⁶ Secure could preempt any entry by a competitor in a market proximate to a suspended facility by reopening.

¹¹² Engel Cross, Supplementary Record, p 505, line 16 to p 507, line 10.

¹¹³ Kelly Affidavit, Commissioner’s Record, Exhibit 76, p 2431.

¹¹⁴ Kelly Affidavit, Commissioner’s Record, Exhibit 87, p 2559.

¹¹⁵ Engel Affidavit, Secure’s Record, Exhibit 84, p 2184: “As to landfills, TRDs and FSTs, those represent an area of overcapacity and opportunity for significant efficiencies.”

¹¹⁶ Engel Affidavit, Secure’s Record, p 69, para 131.

K. FORECLOSURE AND BUNDLING OF WASTE SERVICES WITH ENVIRONMENTAL SERVICES

100. Secure tries to bundle the provision of Waste Services with Environmental Services.

101. In an e-mail on January 15, 2021 from Vince Lisch, Vice President of Energy Services at Tervita, to John Cooper, CEO of Tervita, Lisch notes that: [REDACTED]

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]¹¹⁷

The acronym ES is likely a reference to Tervita’s Energy Services business unit (in which Tervita’s landfill, TRD and water disposal businesses operate), and IS is likely a reference to Tervita’s Industrial Services business (in which many of Tervita’s Environmental Services businesses operate).¹¹⁸

102. In an e-mail from Shawn Olson, Business Development, to Richard Bodnaryk, Area Manager at Tervita, on October 21, 2019, a business opportunity analysis is attached with the title “Consolidation v.6”. The heading “[REDACTED]

[REDACTED]” is on page 13. The opportunity is described as “[REDACTED]
[REDACTED]

[REDACTED]” It then says “[REDACTED]

[REDACTED]” Later on the page, it reads “[REDACTED]

[REDACTED]
[REDACTED]¹¹⁹

103. Adam Lunseth, Field Services Manager for Edmonton Industrial Waste Services, writes on May 1, 2018 in an e-mail to the Sales Rep Shane Nelson, “[REDACTED]

[REDACTED]

¹¹⁷ Kelly Affidavit, Commissioner’s Record, Exhibit 90, p 2613.

¹¹⁸ Kelly Affidavit, Commissioner’s Record, Exhibit 5, p 396-397.

¹¹⁹ Kelly Affidavit, Commissioner’s Record, Exhibit 91, p 2629.

[REDACTED]

[REDACTED]

[REDACTED] 120

104. In a Secure document, Ryan Richardson writes to a number of Secure employees on January 10, 2017, that [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] 121

L. SECURE HAS THE ABILITY TO RAISE PRICES

105. Dr. Miller’s opinion is that the Transaction will likely have anticompetitive effects giving Secure the ability to increase the price of Waste Services in many local markets across the WCSB.¹²² Secure and Tervita were each other’s closest competitor in the product and geographic markets related to Waste Services described above. The Transaction eliminated this competition. The Transaction significantly increases Secure’s market share in many local markets. In fact, the Transaction has created monopolies and reduced competition from three firms to two in many local markets.¹²³

106. Dr. Miller’s analysis confirms that Secure and Tervita competed locally in many relevant markets, with other competitors typically being farther away. His analysis is that in many local markets diversion between Secure and Tervita facilities was high and that the merged entity would be able to recapture a large share of customers who would switch as a response to a price increase. Therefore, a

¹²⁰ Kelly Affidavit, Commissioner’s Record, Exhibit 92, p 2702-2706.

¹²¹ Kelly Affidavit, Commissioner’s Record, Exhibit 93, p 2712.

¹²² Miller Report, Commissioner’s Record, p 2721, para 2.

¹²³ Ibid.

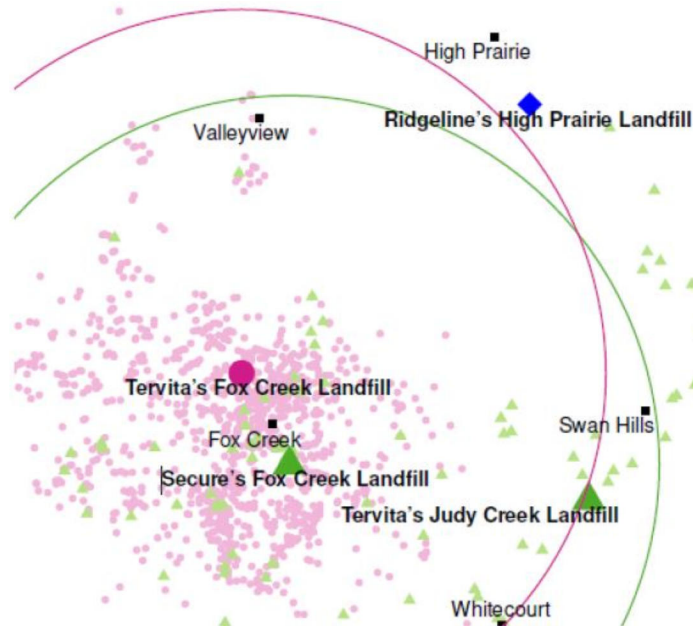
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price increase will be profitable for Secure and it now has the ability to increase prices after to the Transaction.¹²⁴

107. Secure will have the ability to raise its price because many customers will face much higher transportation costs to reach the next closest competitive option. As an illustrative example, Secure and Tervita's Fox Creek landfills were located within about 31 kilometers of each other. In the figure below, the pink and green dots show the locations of customers, who have used Secure's and Tervita's facilities, respectively. The closest competing facility owned by a third-party is the High Prairie facility operated by Ridgeline, which is located 185 kilometers to northeast of the Secure's Fox Creek facility. If the Secure facility increases its price, most of its customers' next closest competitive alternative would be Tervita. Without competition from Tervita, the next closest competitive alternative is now Ridgeline, which would impose a much higher cost of transportation on the customer to switch. As a result, the merged entity would be able to recapture a high share of switching customers if it increased its price or refused to lower its price. In fact, for many customers (e.g., customers to the southwest of Fox Creek) the merger would decrease their viable landfill options from 2 competitors to 1 due to the distance of Ridgeline. The map illustrating this situation is below:¹²⁵

¹²⁴ Miller Report, Commissioner's Record, p 2768-2769, paras 88-89.

¹²⁵ Miller Report, Commissioner's Record, Exhibit 5, p 2740-2741.

EXHIBIT 5**Example of competitive pricing pressure, Fox Creek landfill facilities**

108. Secure's counsel suggested to Dr. Miller during his cross-examination that Secure has no incentive to raise prices while the 92 Application is ongoing, relying on a statement from Dr. Miller's reply report in the matter of the Commissioner vs. P&H ("**P&H**").¹²⁶ Of course, as described in more detail below, the test for the 104 Application is whether there is irreparable harm to competition, not whether Secure has made any behavioural commitments which would be vague and unenforceable. The irreparable harm to competition comes from Secure obtaining the ability to raise prices. Dr. Miller's testimony from P&H and, of course, his uncontested detailed economic analysis, demonstrates this.
109. In the P&H application, Dr. Miller replied to P&H's expert Margaret Sanderson's opinion that P&H had not raised prices after it completed its acquisition of the Virden elevator from Louis Dreyfus. Dr. Miller's evidence was that there were

¹²⁶ Cross Examination Transcript of Nathan H. Miller, Ph.D. ("**Miller Cross**"), Supplementary Record, p 316, line 13 – p 318, line 19.

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both “conceptual and methodological reasons why this piece of Ms. Sanderson’s analysis should be ignored.”¹²⁷

110. Dr. Miller testified that he saw no reason to expect that P&H would have been acting on its incentives immediately after P&H had acquired the Virden elevator from Louis Dreyfus. He said “it would be surprising to learn that P&H has moved ahead to implement price increases while this proceeding is underway and while it is soliciting farmers in the area for witnesses statements. The *Guidelines* are clear that it is the incentive to profitably raise prices that is dispositive for good reason”.¹²⁸ Dr. Miller was clear that his testimony in P&H does not change his evaluation of the harm to competition that has occurred when Secure acquired Tervita.¹²⁹

M. SECURE’S ALLEGED EFFICIENCIES SHOULD BE GIVEN LITTLE WEIGHT

111. Secure has claimed that, depending on the order granted by the Tribunal, it may lose the benefit of various efficiencies as described in the affidavit from their efficiencies expert, Mr. Andrew Harington (the “**Harington Affidavit**”).¹³⁰ Mr. Harington’s opinion should be given little weight. It is based on Secure’s self-interested analysis with little detail or documentary support provided. Secure’s efficiencies claims are a house of cards without foundation. In addition, Secure’s efficiencies claims contain several conceptual and methodological issues which demonstrate they are not likely to be obtained.

(i) *Secure’s efficiencies claims do not have the proper evidentiary foundation*

112. Secure relies on the Harington Affidavit to support its lost efficiencies claims.¹³¹ The Harington Affidavit’s evidence about the lost efficiencies is based on Mr. Harington’s efficiencies report dated June 3, 2021.¹³² In turn, Mr. Harington’s report is based on undocumented conversations he had with Secure and Tervita

¹²⁷ Miller cross, Supplementary Record, Exhibit 3, p 464, para 86.

¹²⁸ Miller cross, Supplementary Record, Exhibit 3, p 464, para 87.

¹²⁹ Miller Cross, Supplementary Record, p 320, line 9 to p 321, line 18.

¹³⁰ Affidavit of Andrew Harington, affirmed July 14, 2021 (“**Harington Affidavit**”), Secure’s Record, p 2499, para 96.

¹³¹ Engel Affidavit, Secure’s Record, p 26, para 19.

¹³² Harington Affidavit, Secure’s Record, p 2453, para 15.

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management, 19 documents provided to him by Secure, 2 Tervita documents, and some publicly available documents.¹³³

113. Mr. Harington agreed that, as an independent expert, it is important that his work be thoroughly cited.¹³⁴ Mr. Harington testified that any facts he relies on should now be found in the Engel Affidavit.¹³⁵ Mr. Engel in turn makes a blanket claim that all of the information provided to Mr. Harington was true.¹³⁶ In the blanket claim, Mr. Engel provides no source on whom he relies to support a blanket claim that information provided to Mr. Harington at conversations where Mr. Engel was not in attendance are true.¹³⁷
114. There are no separate notes or records of those conversations Mr. Harington had with Secure and Tervita executives.¹³⁸ Neither Mr. Harington nor Mr. Engel provide any information about how many conversations were had with each executive, how long each conversation was, the dates when the conversations took place, or even who else attended the calls besides the named executive.¹³⁹
115. Mr. Engel does describe some of the efficiencies Secure expects to achieve in a general manner, often in language identical to Mr. Harington, then states that the “details” can be found in the schedules of Mr. Harington’s report.¹⁴⁰ Of course, the cross-examination demonstrates that these schedules were made for Mr. Harington by Secure.¹⁴¹ While Mr. Harington may have spent some time to understand what was provided to him in the schedules, he certainly has not “audited” the schedules.¹⁴² In fact, the cross-examination demonstrated that the

¹³³ Harington Affidavit, Secure’s Record, p 2652-2654; Cross Examination Transcript of Andrew Harington dated July 20, 2021 (“**Harington Cross**”), Supplementary Record, p 15, line 4 to p 17, line 6.

¹³⁴ Harington Cross, Supplementary Record, p 8, lines 13-18.

¹³⁵ Harington Cross, Supplementary Record, p 13, lines 3-17.

¹³⁶ Engel Affidavit, Secure’s Record, p 19, para 4.

¹³⁷ Ibid.

¹³⁸ Harington Cross, Supplementary Record, p 71, lines 4-8.

¹³⁹ Harington Cross, Supplementary Record, p 10, line 13 to p 13, line 2.

¹⁴⁰ Engel Affidavit, Secure’s Record, p 52 paras 80-81 and p 53 paras 84-85; Harington Cross, Supplementary Record, p 21, line 12 to p 31, line 11.

¹⁴¹ Harington Cross, Supplementary Record, p 15, lines 4-8.

¹⁴² Harington Cross, Supplementary Record, p 23, lines 4-8; p 33, line 21 to p 34, line 25; p 38, lines 12-16.

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“details” provided are often numbers hardcoded into spreadsheets without any references to the documents that would support the claims.¹⁴³

116. By way of an example, over █████ of Secure’s \$██████████ annual run rate efficiencies come from corporate (\$██████████) field and environmental (\$██████████) headcount reductions.¹⁴⁴ Mr. Harington’s report contains no independent analysis of these figures.
117. The rickety evidentiary foundation on which Mr. Harington’s opinion is built is illustrated by following the ‘sources’ Mr. Harington relies on to support these headcount reduction efficiencies. There is no detail or evidence at the end of the trail to support the claimed reductions. Mr. Harington states the basis for his opinion that the elimination of redundant corporate employees will result in efficiencies in paragraphs 196 and 197 of his report:

Using the same approach as with field office headcount savings, SECURE conducted a detailed analysis of all corporate employees for itself and Tervita, on a level-by-level basis for each corporate department. For each position, SECURE first identified the number of current SECURE and Tervita employees in each position, along with their total salaries. SECURE then analyzed the number of employees in each position that SECURE would require after the Proposed Transaction. SECURE also estimated the one-time severance costs associated with termination of these employees.

Based on the combined salaries of the redundant employees in this analysis total annual labour costs savings are estimated to be \$██████████. See Schedules 5.1 and 5.1.1 for more detail.¹⁴⁵

118. Any facts Mr. Harington relied on to support this statement are to be found in Mr. Engel’s affidavit and any further support for these opinions would be in Schedules 5.1 and 5.1.1.¹⁴⁶

¹⁴³ Harington Cross, Supplementary Record, p 22, lines 2-20; p 52, line 20 to p 53, line 13; p 53, lines 14-19.

¹⁴⁴ Harington Affidavit, Secure’s Record. The \$██████████ run rate figure comes from p 2454-2455, para 16(c). The Corporate Headcount Reduction figure comes from Exhibit C, p 2619, Table 10. The Field and Environmental Services headcount savings comes from Exhibit C, p 2606, Table 9.

¹⁴⁵ Harington Affidavit, Secure’s Record, p. 2619-2620, paras 196-197.

¹⁴⁶ Harington Cross, Supplementary Record, p 44, lines 13-22.

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get by with fewer finance and accounting employees than Tervita had prior to the transaction. The only source referenced in Schedule 5.1 is Schedule 5.1.1.¹⁵¹

122. Schedule 5.1.1 is a chart titled “Headcount Details”. Each row number identifies a category of employee, the number of Secure employees in that category, the number of Tervita employees in that category, and the “post merger requirement”. For example, row 226 identifies a category of admin employee in the Environmental Services business. We see in this row that Secure has identified that it can cut 20 of these employees. No additional detail is provided. The only source for these items is the spreadsheet “HC Reduction V05-06-2021.xlsx”.¹⁵² This was a spreadsheet created by Secure for Mr. Harington.¹⁵³ In fact, Schedule 5.1.1 simply duplicates the information in this spreadsheet.¹⁵⁴ Schedule 5.1.1 provides no detail or explanation as to why Secure could cut half of this category of employee post transaction. There is simply no means of understanding or duplicating Mr. Harington’s analysis beyond Mr. Engel’s blanket claim that Mr. Harington got it right.
123. Mr. Harington’s opinion with respect to efficiencies related to IT savings cost is another example of this problem. Mr. Harington and Mr. Engel describe the IT efficiencies using language that is substantially identical.¹⁵⁵ The only support referenced by either of them is Mr. Harington’s Schedule 5.4.1.¹⁵⁶ Schedule 5.4.1 is simply a reproduction of a document that Secure provided to Mr. Harington.¹⁵⁷ None of the source documents that would allow these efficiencies to be verified have been provided.¹⁵⁸ The record does not include for example the contract that would support the claimed reductions from the elimination of the ██████████¹⁵⁹ As a

¹⁵¹ Harington Cross, Supplementary Record, p 49, line 1-8.

¹⁵² Harington Cross, Supplementary Record, p 50, line 2 to p 51, line 22.

¹⁵³ Harington Cross, Supplementary Record, p 51, lines 23-24.

¹⁵⁴ Harington Cross, Supplementary Record, p 52, lines 6-7; Harington Affidavit, Secure’s Record, Exhibit C, p 2695-2699.

¹⁵⁵ Harington Affidavit, Secure’s Record, Exhibit C, p 2625, para 226; Engel Affidavit, Secure’s Record, p 61, para 107(c).

¹⁵⁶ Ibid.

¹⁵⁷ Harington Cross, Supplementary Record, p 62, lines 19-25; Harington Affidavit, Secure’s Record, Exhibit C, p 2707.

¹⁵⁸ Harington Cross, Supplementary Record, p 63, lines 1-6.

¹⁵⁹ Harington Cross, Supplementary Record, p 63, lines 7-19.

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result, it is impossible to assess, for example, whether the contract has termination costs or the prices reported are right.

(ii) Secure's efficiencies are undermined by several conceptual and methodological errors

124. Secure's efficiencies claims also contain significant substantive flaws which undermine the likelihood of these efficiencies being realized. In particular, Secure's facility rationalization rely on improper assumptions about capacity utilization, and Mr. Harington's allocation of fixed and variable costs is a departure from his past practice in mergers in this industry.
125. Over ██████████ of Secure's \$█████████ annual run rate efficiencies come from facility rationalization, which relates to efficiencies realized by shutting down various Waste Facilities.¹⁶⁰ Mr. Harington's opinion on these efficiencies is based on the integration groupings provided to him by Secure along with an analysis demonstrating that there will be sufficient capacity to integrate the Waste Facilities (the "**Capacity Analysis**"). The Capacity Analysis was provided to him by Secure.¹⁶¹
126. Secure claims that Secure's Capacity Analysis demonstrates that the absorbing facility in each integration grouping has the capacity to absorb the demand from the closing facility. However, Secure's Capacity Analysis is based on Secure's 2020 annual capacity numbers and annualized from Tervita's Q1 2021 numbers.¹⁶² In addition to this being a comparison of two different time periods without any explanation as to why, there are two flaws with this approach.
127. The first flaw is that demand is seasonal and fluctuates on a monthly basis. Secure and Tervita's own documents demonstrate this. In Secure's Annual Information Form, Secure describes that "[i]n Canada, the level of activity in the oilfield services industry is influenced by seasonal weather patterns."¹⁶³ A Tervita

¹⁶⁰ Harington Affidavit, Secure's Record, Exhibit C, p 2575, Table 1.

¹⁶¹ Harington Cross, Supplementary Record, p 63, line 25 to p 68, line 14.

¹⁶² Harington Cross, Supplementary Record, p 70, line 4-15; Harington Affidavit, Secure's Record p 2663 at "Note 1".

¹⁶³ Kelly Affidavit, Commissioner's Record, Exhibit 1, p 84.

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spreadsheet tracking capacity utilization also shows capacity utilization fluctuating on a monthly basis at TRDs, landfills and disposal wells.¹⁶⁴ Mr. Harington claimed during cross-examination, that this is not an issue for TRDs because they have storage capacity – at least with respect to waste liquid – and demand can be smoothed out.¹⁶⁵ However, Mr. Harington has done no analysis in his report to demonstrate this is the case. His report does not note the ability of each TRD to store liquid, has not analyzed demand on a monthly basis to see if it is even possible based on the capacity to store at each TRD.¹⁶⁶ Mr. Engel's affidavit is silent on this issue as well.

128. The second flaw is that Secure's Capacity Analysis is based on demand during 2020 for Secure and Q1 2021 for Tervita. The periods 2020 and Q1 2021 were not representative years for the oil and gas industry as oil and gas demand was at historically low levels because of COVID.¹⁶⁷ However, Secure has stated in its public disclosures that it expects "increased utilization at our Midstream Infrastructure facilities and landfills as higher drilling, completion and production volumes from increased levels require processing and disposal".¹⁶⁸
129. Secure's Capacity Analysis does not consider if the absorbing facility will have enough capacity if demand goes up from 2020 volumes. If an absorbing facility cannot accommodate demand with its capacity, then Secure would need to reopen the closed facility and the fixed costs would not be saved.¹⁶⁹
130. When an analysis of available capacity considers the periods 2017-2019 average annual volume data, many of the absorbing facilities in the integration groupings will not be able to absorb the demand from the closing facilities. The

¹⁶⁴ Harington Cross, Supplementary Record, p 73, line 2 to p 77, line 18; and for example, tab LaGlace in Exhibit 7 (ID) to Harington Cross, Supplementary Record, p 127 and attached; Engel Affidavit, Secure's Record at p 19, para 5 ("all information provided by SECURE to the Commissioner of Competition... in connection with his review of the Transaction, and by Tervita prior to its acquisition by SECURE is correct and complete to the best of my information and belief. This includes information provided in response to detailed information requests issued by the Commissioner on March 18 and April 9, 2021"). The April 9, 2021 "information request" is the SIR referred to in the Kelly Affidavit, Commissioner's Record, p 16, para 14.

¹⁶⁵ Harington Cross, Supplementary Record, p 75, line 8 - p 76, line 1.

¹⁶⁶ Harington Cross, Supplementary Record, p 90, line 3 to line 22.

¹⁶⁷ Harington Cross, Supplementary Record, p 85, line 10 – p 86, line 5; and Exhibit 8, p 134.

¹⁶⁸ Harington Cross, Supplementary Record, Exhibit 8, p 134.

¹⁶⁹ Harington Cross, Supplementary Record, p 87, line 11 to p 88, line 11.

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Commissioner's efficiencies expert Dr. Eastman re-ran Secure's Capacity Analysis using the 2017-2019 data which demonstrates that seven integration groupings would not have capacity to absorb the demand from the closing facility.¹⁷⁰ Dr. Eastman's evidence is uncontradicted.¹⁷¹

131. The other conceptual issue with Secure's claimed efficiencies relates to Mr. Harington overestimating the fixed cost savings from facility closures compared to previous work he has done on mergers in this industry. Secure has claimed efficiencies of \$ [REDACTED] annual run rate arising from avoided utilities expenses.¹⁷² Mr. Harington's opinion is that utilities are properly considered a "fixed cost."¹⁷³ In 2018, Mr. Harington was retained to provide an efficiencies opinion related to Tervita's acquisition of Newalta. Mr. Harington's opinion in Newalta was that utilities were a variable cost and consequently were not an efficiency arising from the closure of facilities.¹⁷⁴ Mr. Harington took the opposite approach to utilities in this case because Secure told him to. Mr. Harington could not explain why he treated utilities differently in the two mergers.¹⁷⁵ This again illustrates that Mr. Harington is simply acting as a conduit for Secure.
132. Secure has provided no evidence that a delay in achieving any of the alleged efficiencies will deny Secure the ability to obtain these efficiencies if it is successful in the 92 Application. Furthermore, Dr. Miller's uncontradicted opinion is that the alleged efficiencies will not be passed onto the hundreds of customers who now face a merger to monopoly or significant reduction in competition.¹⁷⁶

¹⁷⁰ Affidavit of J. Gregory Eastman, Ph.D., affirmed July 19, 2021, p 9-11, paras 18-19 and Table 2.

¹⁷¹ Secure choose not to cross-examine Dr. Eastman on his reply on the ground that Dr. Eastman's evidence was not "proper reply". Secure provided no basis for its claim. Efficiencies is a defence to an anticompetitive transaction. The Commissioner is under no obligation to anticipate and provide affirmative evidence with respect to efficiencies until the evidence is filed by the respondents. Secure may point to the fact that the Commissioner attached Mr. Harington's June 3rd report to the Kelly Affidavit. Mr. Harington's report was attached to the Kelly Affidavit because it was received during the course of the investigation. Secure's responding efficiencies evidence, including an affidavit from Mr. Harington that attaches his report, was not provided until the Secure Response to the Commissioner's 104 Application.

¹⁷² Harington Affidavit, Respondent Record, Exhibit C, Schedule 3.2.1A, row 3 and Schedule 3.2.1B row 5. The sum of these rows is \$ [REDACTED]

¹⁷³ Harington Affidavit, Secure Record, Exhibit C, p 2668.

¹⁷⁴ Harington Cross, Supplementary Record, Exhibit 9, p 248.

¹⁷⁵ Harington Cross, Supplementary Record, p 96, line 3 - p 99, line 9.

¹⁷⁶ Miller Reply, p 7-8, paras 5-9.

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- █████ Tonne. He recommended matching or going to █ Tonne to make sure we receive the soil".¹⁷⁹
137. The discounted rate offered by Tervita lowered the quoted revenue from \$█████ at PBR to \$█████¹⁸⁰ This is a discount of \$█████ offered by Tervita as a result of competition from Secure.
138. If Husky had this project now it would have to approach Secure and would not be able to rely on Tervita's next door landfill as leverage. Assuming for the moment that Secure's "plan" not to increase price refers to the posted rate at the facility – Secure now has no incentive to discount because it knows it will not be losing the job to Tervita.
139. Dr. Miller has analyzed the prices charged by Secure and Tervita at each facility and found that prices vary across customers who deliver their waste to the same facility. As noted in paragraph 46, 2019 ticket rates (i.e. process after discounts to the plant based rate) at the East Peace landfill varied between \$████ and \$████ and, at the Judy Creek landfill, varied between \$████ and \$████.¹⁸¹
140. Secure's "plan" not to raise prices also focuses on only one aspect of competition. The Commissioner is seeking to prevent irreparable harm to all aspects of competition. Price is typically referred to as a proxy for the benefits of competition but there are other qualitative aspects to competition harmed because Secure has removed competition from its largest and vigorous competitor. For example, the wait times to dispose of waste are an important part of the service a customer receives when they dispose of waste at a Secure facility.¹⁸² Secure and Tervita would compete vigorously on these non-price

¹⁷⁹ Kelly Affidavit, Commissioner's Record, Exhibit 60, p 1518.

¹⁸⁰ Ibid.

¹⁸¹ Miller Report, Commissioner's Record, Exhibit A, p 2736, para 25, footnote 68.

¹⁸² "Have been holding a higher "all-in" mud disposal rate in the area (\$████ m3), while winning work. This success has come from us providing a high level of service and promising no-waits." Kelly Affidavit, Commissioner's Record, Exhibit 54, p 1476. "We initially lost the SR TRD bid at \$████ due to newAlta being 90km closer and also proceed at \$████ However we are having the opportunity to rebid due to NewAlta wait times and operation/contractor personality conflict." Kelly Affidavit, Commissioner's Record, Exhibit 60, p 1590-1591.

aspects of the services they provide. No “plan” can replace the vigorous and effective competition that Tervita provided for customers prior to the Transaction.

III. ISSUES

141. Should an interim injunction be issued under section 104 of the Act to restore competition between Secure and Tervita until the 92 Application is disposed of?

IV. SUBMISSIONS

A. THE TEST

142. In deciding whether to issue an injunction under section 104 of the Act, the Tribunal has regard to the principles ordinarily considered by superior courts when granting interlocutory or injunctive relief.¹⁸³
143. To obtain an injunction, the Commissioner must demonstrate, on a balance of probabilities, that:
- a. the 92 Application is a strong prima facie case and accordingly there is a serious issue to be tried;
 - b. irreparable harm would ensue if an injunction is not granted; and
 - c. the balance of convenience favours granting the injunction.¹⁸⁴

B. THE COMMISSIONER’S POSITION

144. The Commissioner seeks to remedy the irreparable harm to competition Secure caused by removing Tervita as a competitor until the 92 Application is disposed of. The irreparable harm to competition is caused by the loss of competitive discipline from Tervita and so the remedy required must restore that competitive discipline.

¹⁸³ Section 104(1) of the Act.

¹⁸⁴ *RJR-MacDonald Inc. v. A.G. Canada*, [1994] 1 SCR. 311 at paras 83-85 (“*RJR-MacDonald*”), Book of Authorities Tab 21.

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145. Secure attempts to distract from the irreparable harm that it has caused to competition by devoting much of its evidence to demonstrating that remedies like divestitures will remain available on the 92 Application. That misses the point. The Commissioner does not dispute that, assuming Secure preserves the facilities it now controls, these facilities are available for a divestiture in the event the Tribunal makes such an order. In fact, the Commissioner's position is that irreparable harm to competition arises from the Transaction and will be suffered by market participants absent an interim order. The fact that assets might be available later for divestiture simply does not address that issue or the irreparable harm to competition.
146. The Commissioner meets all of the elements of this test required for the Tribunal to make an order that restores competition from Tervita until the 92 Application is decided.
147. The Commissioner's 92 Application is a strong prima facie case and there is accordingly a serious issue to be tried.
148. Competition for Waste Services has been and will continue to be irreparably harmed by the Transaction. The Transaction has provided Secure with the ability to unilaterally increase prices materially to the detriment of Waste Services customers.¹⁸⁵ In addition, more generally, non-price aspects of competition for Waste Services will also be harmed. The Tribunal cannot remedy harm *already* incurred during the interim period – it can only forestall *additional* harm by issuing an injunction.
149. The balance of convenience favours the Commissioner. The public interest in protecting consumers and maintaining and encouraging competition outweighs any cost or inconvenience to Secure.
150. Accordingly, to address the lost competition, the Tribunal should order Secure to unwind the Transaction until the 92 Application is disposed of. In the alternative,

¹⁸⁵ Miller Report, Commissioner's Record, p 2768-2769, paras 88-89.

the Tribunal should order Secure to hold separate and independently operate the former Tervita business.

C. THE MERITS COMPONENT IS MET

151. The serious issue prong of the *RJR* test imposes a low threshold, requiring only a preliminary assessment of the merits to ensure that the underlying matter raises a serious issue. Once the Tribunal determines that the 92 Application is neither vexatious nor frivolous, it should proceed to the remaining parts of the test.¹⁸⁶
152. Secure appears to argue in its response that the Tribunal should impose a higher threshold than the usual “serious issue to be tried” standard and assess whether the Commissioner has a “realistic prospect” of success.¹⁸⁷ Courts have imposed a higher standard where the injunction can be characterized as mandatory. In this case, Secure has changed the nature of the relief sought from prohibitory to mandatory because it closed in the face of the 104 application.
153. Secure cannot “steal a march” in the face of the Commissioner’s injunction, and then complain that compliance will be too burdensome.¹⁸⁸ In the same way, Secure cannot benefit from a higher strength of the case test simply by arguing it has changed the *status quo* in the dead of the night.¹⁸⁹
154. The 92 Application meets the strength of the case test regardless of the threshold. The 92 Application alleges that the Transaction eliminated the competitive rivalry between Secure and Tervita, which were the two largest suppliers of Waste Services in the WCSB and by far each other’s closest competitor. The Transaction allows Secure to unilaterally exercise new or enhanced market power resulting in a likely substantial lessening of competition. Secure’s new or increased market power is likely to take the form of an increase

¹⁸⁶ *RJR-MacDonald*, paras 55 and 83, Book of Authorities Tab 21; *Commissioner of Competition v. Parkland Industries Ltd*, 2015 Comp. Trib. 4 (“**Parkland**”) at para 37, Book of Authorities Tab 7.

¹⁸⁷ *R. v. Canadian Broadcasting Corporation*, [2018] 1 S.C.R. 196 at para 13, Book of Authorities Tab 20.

¹⁸⁸ Sharpe, *Injunctions and Specific Performance* at paras 1.590 and 1.600, Book of Authorities Tab 31.

¹⁸⁹ *Kinnear v. Hanley*, 2017 ONSC 1165, para 4, Book of Authorities Tab 13.

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in prices for Waste Services and/or a decrease in the quality of the Waste Services provided.¹⁹⁰

155. The Commissioner's strong prima facie case is supported by the uncontested evidence attached to the Kelly Affidavit, primarily from the parties' own documents, showing the close and vigorous competition that has been lost because of the Transaction. All of this information is supported by the evidence from Dr. Miller who has provided clear non-speculative analysis of the relevant markets and Secure's market high market shares in those markets as a result of the Transaction.
156. The 92 Application raises serious and complex questions of law and fact that will require assessing the credibility and sufficiency of evidence.¹⁹¹ A prolonged examination of those issues at this stage is neither necessary nor desirable.¹⁹² Accordingly, the 92 Application meets the merits component of the RJR test.

D. IRREPARABLE HARM IS ONGOING AND WILL CONTINUE IF ORDER IS NOT ISSUED

157. Competition for Waste Services has been and will continue to be irreparably harmed in many geographic markets in the WCSB if the Tribunal does not issue the injunction. The irreparable harm to competition arises from the Transaction providing Secure with the ability to charge customers materially higher prices and to provide decreased service levels for Waste Services.

(i) Legal test for irreparable harm

158. The Supreme Court of Canada held in *RJR* that "irreparable" refers to the nature of the harm suffered rather than its magnitude.¹⁹³
159. The Commissioner must demonstrate irreparable harm on a balance of probabilities.¹⁹⁴ As with any civil case, the Commissioner must put forward

¹⁹⁰ 92 Application CT-2021-002, Proceeding Number 2, para 32.

¹⁹¹ See *RJR-MacDonald* at para 49-50, Book of Authorities Tab 21; *Parkland* at para 45, Book of Authorities Tab 7.

¹⁹² *RJR-MacDonald* at para 55, Book of Authorities Tab 21; *Parkland* at para 45, Book of Authorities Tab 7.

¹⁹³ *RJR-MacDonald* at para 64, Book of Authorities Tab 21; *Parkland* at para 48, Book of Authorities Tab 7.

¹⁹⁴ *Millennium Charitable Foundation v. Canada (Minister of National Revenue - M.N.R.)*, 2008 FCA 414 (QL) at para 16; Book of Authorities Tab 17; *Parkland* at para 57, Book of Authorities Tab 7.

evidence that is “sufficiently clear, convincing and cogent” to satisfy that test.¹⁹⁵ The Tribunal must scrutinize the evidence with care to determine whether irreparable harm is more likely than not to occur.¹⁹⁶ In other words, the Commissioner must satisfy the Tribunal that it is more likely than not that harm will be suffered if the order sought is not issued and that such harm would be irreparable.¹⁹⁷

160. In this case, as with all merger cases, the analysis is necessarily forward-looking.¹⁹⁸ In these circumstances, evidence relating to loss resulting in irreparable harm is prospective and must, of necessity, be inferred.¹⁹⁹
161. The Tribunal has held, following the jurisprudence of the Federal Court and Federal Court of Appeal, that meeting the balance of probabilities in injunction cases requires putting forward “clear and non-speculative” evidence that allows the Tribunal to make inferences that irreparable harm will result if the relief is not granted.²⁰⁰ The determination of whether the evidence is sufficient is a factual determination to be made based on the evidence on the record.²⁰¹
162. As described in the Facts section above, the Commissioner has put forward ample “clear and non-speculative” evidence that establishes the irreparable harm on a balance of probabilities and therefore meets this element of the test.
163. The Commissioner notes, however, that the phrase “clear and non-speculative” evidence does not appear in the jurisprudence of the Supreme Court. Many courts have preferred to describe the evidentiary threshold in language such as “meaningful risk of irreparable harm”²⁰² or a “sound evidentiary foundation”²⁰³ or

¹⁹⁵ *FH v. McDougall*, 2008 SCC 53 (“*FH v. McDougall*”) at para 46, Book of Authorities Tab 10.

¹⁹⁶ *FH v. McDougall*, at para 49, Book of Authorities Tab 10.

¹⁹⁷ *Nadeau Poultry Farm Ltd. v. Group Westco Inc.*, 2008 Comp. Trib. 16 (“*Nadeau*”) at para 26, Book of Authorities Tab 17; *Parkland* at para. 54, Book of Authorities Tab 7.

¹⁹⁸ *Parkland* at para 89, Book of Authorities Tab 7; *Tervita Corp. v. Canada (Commissioner of Competition)*, 2015 SCC 3 (“*Tervita*”) at para 52, Book of Authorities Tab 22.

¹⁹⁹ *Parkland* at para 50, Book of Authorities Tab 7.

²⁰⁰ *Parkland* at paras 54-58, Book of Authorities Tab 7.

²⁰¹ *Parkland* at para 58, Book of Authorities Tab 7.

²⁰² *Potash Corp of Saskatchewan Inc. v. Mosaic Potash Esterhazy Ltd Partnership*, 2011 SKCA 120 at paras 51-66, Book of Authorities Tab 19; *Turtle v. Valvoline Canadian Franchising Corp.*, 2021 SKCA 46 a para 27, Book of

a risk that is “more than speculative”.²⁰⁴ Commentators have also cautioned against applying too high of a threshold for irreparable harm.²⁰⁵ The Supreme Court in *RJR* held that the very uncertainty in the state of the law constituted “irreparable harm” on the facts of that case. In the context of merger review which is inherently forward looking it would be incorrect to require a high level of certainty.

(iii) Harm to Customers Will Occur if an Interim Order is not Issued

164. In *Parkland*, the Tribunal recognized that harm to competition in the interim period before an application under section 92 of the Act is disposed of can constitute irreparable harm.²⁰⁶ This is because the Tribunal has no authority to award damages under the merger provisions of the Act and therefore lacks jurisdiction to remedy the harm to competition during the interim period in the event the 92 Application is successful.²⁰⁷
165. If an injunction is not issued, Secure will have ability to increase prices and decrease the quality of Waste Services in various local markets across the WCBS. The Commissioner has provided clear and non-speculative evidence of the scope of the relevant product and geographic markets and market concentration that demonstrates the prospective harm to competition that will result if the injunction is not granted. This evidence has not been contradicted by Secure.
166. The Commissioner’s economic expert, Dr. Miller, has delineated the set of relevant markets where the harm is occurring, as outlined in section II.E and II.F above. Dr. Miller has also concluded that the Transaction will likely have

Authorities Tab 25; *Hudson Bay Mining & Smelting Co. v. Dumas*, 2014 MBCA 6 at para 85, Book of Authorities Tab 12.

²⁰³ *Vancouver Aquarium Marine Science Centre v. Charbonneau*, 2017 BCCA 395 at paras 57-60, Book of Authorities Tab 26.

²⁰⁴ *Ontario v. Shehrzad Non Profit Housing Inc.*, 2007 ONCA 267 at para 26, Book of Authorities Tab 18.

²⁰⁵ For example, Sharpe, Injunctions and Specific Performance at paras 2.417 and 2.418, Book of Authorities Tab 31.

²⁰⁶ *Parkland* at para 48, Book of Authorities Tab 7.

²⁰⁷ Section 92 of the Act, *Book of Authorities Tab 27; Parkland* at para 48, Book of Authorities Tab 7.

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anticompetitive effects and increase the prices of Waste Services in these markets.²⁰⁸

167. The magnitude and scope of the harm is significant. Considering just one product market as an example, Dr. Miller has concluded that customers with 688 well sites face a merger to monopoly for disposal of solid oil and gas waste into industrial landfills representing approximately \$[REDACTED] in revenue to Secure.²⁰⁹ All else equal, a 5% increase in the price to dispose of waste for just these customers would result in an increase in \$[REDACTED] for Secure. Of course, as Dr. Miller opines, Secure may also have the ability to raise prices for those customers who still have one or more competitive alternatives remaining post-Transaction.²¹⁰
168. Dr. Miller's opinion is supported from the evidence of Secure and Tervita's own documents that demonstrate they were vigorous competitors, and in many local markets were each other's only competitors.²¹¹ Customers benefited from the rivalry between these two firms. However, post-Transaction, that rivalry has been eliminated.
169. Dr. Miller's report confirms that in many local markets diversion between Secure and Tervita facilities was high and that the merged entity would be able to recapture a large share of customers who would switch as a response to a price increase. Therefore, a price increase will be profitable for Secure and Secure has the ability to increase prices after to the Transaction.²¹²
170. In terms of market shares, Dr. Miller finds that the Transaction brings the Respondent's market share well above the safe harbour level (i.e., 35 percent) in many local markets as the merger creates monopolies and reduces competition from 3 competitors to 2 in many local markets.²¹³ The Tribunal has previously

²⁰⁸ Miller Report, Commissioner's Record, p 2721, para 2.

²⁰⁹ Miller Report, Commissioner's Record, p 2760-2761, para 71 with Exhibit 13.

²¹⁰ Miller Report, Commissioner's Record, p 2758, para 70, footnote 130.

²¹¹ Miller Report, Commissioner's Record, p 2721, para 2.

²¹² Miller Report, Commissioner's Record, p 2768-2769, paras 88-89.

²¹³ Miller Report, Commissioner's Record, p 2721, para 2.

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found that market shares less than those found by Dr. Miller are indicative of market power.²¹⁴

171. The abundant clear and non-speculative evidence allows the Tribunal to reasonably and logically infer that there will be irreparable harm to competition if an injunction is not granted.

(iv) *Tribunal lacks the Jurisdiction to Remedy the Harm*

172. The Tribunal is a creature of statute and has only the powers conferred on it by Parliament.²¹⁵ 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.²¹⁶ Accordingly, the Tribunal lacks the necessary authority to remedy the harm being suffered by consumers and the economy during the interim period in the event the Commissioner is successful in the 92 Application.
173. The Federal Court of Appeal has found irreparable harm where full compensation for a loss is not available at law:

Subject to the submissions discussed below, I think it self-evident that the appellant will suffer irreparable harm if the injunction is refused. It is not the adequacy of the "damages" remedy which is in issue. Rather, it is the adequacy of the "compensation" which is available under the Regulations. Where, as in the present case, the amount of the recoverable loss is restricted by statute, and that amount is significantly less than the actual loss to be incurred if the injunction does not issue, irreparable harm is established. I take it to be accepted law that adequate compensation is to be measured in accordance with common law principles: See *American Cyanamid Co. v. Ethicon Ltd.*, [1975] A.C. 396 (H.L.), at page 408.²¹⁷

²¹⁴ Supra 66.

²¹⁵ *Air Canada v. Canada (Commissioner of Competition)*, 2002 FCA 121 (QL) at para 43, Book of Authorities Tab 1.

²¹⁶ 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 (Section 92(e)(iii)) of the Act).

²¹⁷ *David Hunt Farms Ltd. v. Canada (Minister of Agriculture)*, [1994] 2 F.C. 625 (CA) at para 13, Book of Authorities Tab 9.

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174. Waste Services customers in the WCSB will suffer irreparable harm if the Tribunal does not issue an interim order requiring Secure to unwind its acquisition of Tervita, or in the alternative, hold separate the former business of Tervita.
175. If the Tribunal does not issue an interim order, hundreds of customers of Waste Services in the WCSB who relied on competition between Secure and Tervita will be harmed. As the Tribunal has no jurisdiction to remedy the harm suffered by consumers or the Canadian economy, such harm is irreparable.
- (v) *Secure has caused irreparable harm to competition even if it “plans” not to raise prices***
176. Secure argues that no irreparable harm can occur until the 92 Application has been disposed of because it has publicly stated it has “no plans” to raise prices. This remedy, even if it was available and enforceable, still means that Secure is causing irreparable harm to competition.
177. Irreparable harm is the harm to competition arising from removal of Tervita as a competitor. While price is the most common proxy for considering the harm resulting from a loss of competition, there are many non-price aspects to competition between Secure and Tervita that benefited consumers such as decreased wait times at the facilities. A behavioral order with respect to price does not replace the benefits from the competition that has been lost.
178. The Commissioner is not seeking a behavioural order to regulate Secure’s pricing practices until the 92 Application is disposed of. Assuming for argument that a behavioural order was even possible, an order that Secure not ‘increase’ price still leaves customers harmed because Secure no longer has to compete with Tervita to offer discounts on prices that Secure has been ordered not to increase.
179. The Commissioner rarely accepts behavioral remedies in merger consent agreements for the reasons above but also because they are difficult to construct

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and almost impossible to enforce.²¹⁸ As described in the fact section above, there is no real one “price” that Secure could be ordered not to raise. Even if a detailed behavioural order could be developed, it would be impossible to monitor or enforce because the pricing in the relevant markets is dynamic involving thousands of prices for hundreds of customers across hundreds of facilities. The Competition Bureau has never accepted a pricing behavioural remedy nor has the Tribunal ever ordered one. A pricing behavioural remedy does not allow the competitive process to do its job.

E. THE BALANCE OF CONVENIENCE FAVOURS THE COMMISSIONER’S APPLICATION

180. Under this part of the test, the Tribunal must determine which of the parties will suffer the greater harm from the granting or refusal of the injunction.²¹⁹ The balance between each party’s alleged harm has to be assessed on a balance of probabilities on the basis of clear and non-speculative evidence.²²⁰
181. The Commissioner is presumed to act in the public interest. The public interest is to be taken into account and weighed together with the interests of private litigants.²²¹ The Tribunal held in *Parkland* that significant weight should be given to these public interest considerations.²²²
182. The balance of convenience favours granting the interim order. The irreparable harm to consumers and the broader economy that has occurred and will occur if the relief sought herein is not granted, is greater than the harm that Secure will suffer, if any, in the event the interim order is granted.
183. The harm to consumers and the broader economy is as set out above.
184. In applying the balance of convenience prong, the Tribunal may consider evidence of the effect on consumers of lessened competition in the market in the

²¹⁸ Competition Bureau, “Information Bulletin on Merger Remedies in Canada” (September 22, 2006), at paras 47-50, Book of Authorities Tab 28.

²¹⁹ *RJR-MacDonald* at para 67, Book of Authorities, Tab 21; *Parkland* at para 103, Book of Authorities Tab 7.

²²⁰ *Parkland* at para 106, Book of Authorities, Tab 7.

²²¹ *Manitoba (Attorney General) v. Metropolitan Stores (MTS) Ltd.*, [1987] 1 S.C.R. 110 at p 146, Book of Authorities Tab 15.

²²² *Parkland* at para 108, Book of Authorities, Tab 7.

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absence of the order and the impact of the delay on the respondent, including financial costs.²²³

185. Any inconvenience to Secure arising from the difference between unwinding a completed merger (or otherwise recreating competition) must not be taken into account. The parties closed in the face of a pending injunction application, and cannot now complain about difficulties that they knowingly brought upon themselves.
186. Secure alleges that it will be harmed because it will be delayed in obtaining the alleged efficiencies it hopes to achieve now that the Transaction is closed. Section M provides in detail the reasons why the Tribunal should give little weight to Secure's efficiencies claims. The efficiencies claims lack a proper evidentiary foundation. They also rely on several conceptual and methodological issues which undermine their validity.
187. The Commissioner meets the balance of convenience test. As described above, he has filed clear non-speculative evidence of the harm to Waste Services customers. It outweighs the alleged financial harm to Secure which is based on unreliable and speculative evidence.
188. The Commissioner takes note of his duty to proceed as expeditiously as possible to complete the inquiry once the injunction is issued.²²⁴

(i) *No undertaking for damages in appropriate*

189. The Commissioner appropriately has not given an undertaking as to damages because this is an injunction to enforce the "law of the land". As such the absence of an undertaking has no place in the weighing of balance of convenience.

²²³*Kobo Inc. v. Canada (Commissioner of Competition)*, 2014 Comp. Trib. 2 (QL) at paras 48-49, Book of Authorities Tab 14; See also *Canada (Commissioner of Competition) v. Superior Propane*, [2001] 3 F.C. 175 (QL) at para 17, Book of Authorities Tab 4.

²²⁴ Subsection 104(3) of the Act, *Book of Authorities Tab 27; Parkland* at para 112, Book of Authorities Tab 7.

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190. The Act entrusts the Commissioner with the responsibility of challenging anticompetitive mergers through sections 92 and 104 of the Act. The Commissioner in the 92 Application seeks to enforce the law of the land in the manner conferred upon him by the Act. The Commissioner is presumed to act in the public interest. Where, as here, a public authority is seeking to enforce the law in the interests of the public generally, the Crown is not required to give an undertaking.²²⁵
191. Secure is inappropriately trying to weigh down the balance of convenience with the lack of undertaking to avoid having to deal with the consequence of closing the Transaction at its own risk in the face of the 104 Application. The risk Secure bears, contemplated by Parliament, is an interlocutory injunction pending the disposition of the substantive challenge to the Transaction.

F. THE TRIBUNAL'S DISCRETION TO ISSUE AN ORDER

192. The Tribunal ought to exercise its discretion to issue an order.
193. The Commissioner seeks an order to address the lost competitive discipline from Tervita. The irreparable harm stems from the loss of competition that Tervita provided across all of its waste facilities. Secure attempts to minimize the importance of the markets where the Commissioner has concerns by noting that these lines of business represent just 23% of the former Tervita business and that the majority of both Secure and Tervita's revenues come from Energy Marketing.²²⁶ However, Secure often excludes Energy Marketing revenues when it is reporting its business revenues because Secure does not earn a profit on these revenues. As Secure said to the Commissioner, when describing its own revenues in 2020, revenue figures that include revenues from oil purchase and

²²⁵ Hogg, Peter, Liability of the Crown, pg. 50, fn 60, Book of Authorities Tab 29; Financial Services Authority v Sinaloa Gold plc, [2013] UKSC 11 at paras. 1 and 31, Book of Authorities Tab 11; British Columbia (Attorney General) v. Wale (1986), [1987] 2 W.W.R. 331 (B.C. C.A.); affirmed (1991), [1991] 2 W.W.R. 568 (S.C.C.) per McLachlin JA (as she then was) at para 62, Book of Authorities Tab 2. The comment regarding an undertaking as to damages in the decision in Canada (Commissioner of Competition) v Superior Propane Inc. [2000] F.C.J. No. 1518, 2000 CarswellNat 2172 at para 17, Book of Authorities, Tab 3 is obiter and therefore is not binding on this Tribunal. It was also made without apparent consideration of the above-noted body of case law.

²²⁶ Engel Affidavit, Secure's Record, p 23, para 12.

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resale are overstated as these revenues are returned to the producer.²²⁷ Further, earlier in Mr. Engel's affidavit in paragraphs 7 and 10, he excludes Energy Marketing revenues when providing Secure's Midstream Infrastructure revenues.²²⁸ Tervita and Secure generate profits through the services they provide to producers when recovering this oil through its TRD operations, which include the business lines identified in the Commissioner's 92 Application.

194. Given the harm to competition in relevant markets across the WCSB, an order requiring Secure to hold separate and independently operate the former business of Tervita is required to reinstate that competition.
195. The Commissioner has met the elements of the test in *RJR-MacDonald*. The interim order need not be in place for a long time, such that if the 92 Application fails the parties will be in a position to realize any efficiencies that can be attained from the Transaction. Conversely, if the 92 Application succeeds, a hold separate and preservation order will ensure that irreparable harm does not occur from the date of the 104 order until the 92 Application is decided.

V. ORDER SOUGHT

196. The Commissioner submits that he has met the test for injunctive relief and requests that the Tribunal issue an order:
 - a. unwinding Secure's acquisition of Tervita until such time as the Tribunal's decision in respect of the Commissioner's Application pursuant to section 92 of the Act is finally disposed of;
 - b. in the alternative, holding the business of Tervita separate, apart, and independent until such time as the Tribunal's decision in respect of the Commissioner's Application pursuant to section 92 of the Act is finally disposed of;

²²⁷ Engel Cross, Supplementary Record, p 495, line 19 to p 497, line 10.

²²⁸ Engel Affidavit, Secure's Record, p 19-20, para 7 and p 22, para 10.

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- c. requiring the Respondent pay the costs of this proceeding; and
- d. such further and other relief as the Commissioner may request and this Tribunal may consider appropriate.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 26th day of July, 2021.

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SCHEDULE A: LIST OF AUTHORITIES

1. *Air Canada v. Canada (Commissioner of Competition)*, 2002 FCA 121 (QL)
2. *British Columbia (Attorney General) v. Wale* (1986), [1987] 2 W.W.R. 331 (B.C. C.A.); affirmed (1991), [1991] 2 W.W.R. 568 (S.C.C.)
3. *Canada (Commissioner of Competition) v Superior Propane Inc.* [2000] F.C.J. No. 1518, 2000 CarswellNat 2172
4. *Canada (Commissioner of Competition) v. Superior Propane*, [2001] 3 F.C. 175 (QL)
5. *Canada (Director of Investigation and Research) v Laidlaw Waste Systems Ltd* (1992), 40 CPR (3d) 289 (Comp Trib)
6. *Commissioner of Competition v Canada Pipe*, 2005 Comp Trib 3
7. *Commissioner of Competition v. Parkland Industries Ltd*, 2015 CACT 4
8. *Commissioner of Competition v. Pearson Canada Inc. and Penguin Canada Books Inc.*, 2014 FC 376
9. *David Hunt Farms Ltd. v. Canada (Minister of Agriculture)*, [1994] 2 F.C. 625 (CA)
10. *FH v. McDougall*, 2008 SCC 53
11. *Financial Services Authority v Sinaloa Gold plc*, [2013] UKSC 11 at paras. 1 and 31
12. *Hudson Bay Mining & Smelting Co. v. Dumas*, 2014 MBCA 6
13. *Kinnear v. Hanley*, 2017 ONSC 1165
14. *Kobo Inc. v. Canada (Commissioner of Competition)*, 2014 Comp. Trib. 2 (QL)
15. *Manitoba (Attorney General) v. Metropolitan Stores (MTS) Ltd.*, [1987] 1 S.C.R. 110
16. *Millennium Charitable Foundation v. Canada (Minister of National Revenue - M.N.R.)*, 2008 FCA 414 (QL)
17. *Nadeau Poultry Farm Ltd. v. Group Westco Inc.*, 2008 Comp. Trib. 16

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18. *Ontario v. Shehrzad Non Profit Housing Inc.*, 2007 ONCA 267
19. *Potash Corp of Saskatchewan Inc. v. Mosaic Potash Esterhazy Ltd Partnership*, 2011 SKCA 120
20. *R. v. Canadian Broadcasting Corporation*, [2018] 1 S.C.R. 196
21. *RJR-MacDonald Inc. v. A.G. Canada*, [1994] 1 SCR. 311
22. *Tervita Corp. v. Canada (Commissioner of Competition)*, 2015 SCC 3
23. *The Commissioner of Competition v The Toronto Real Estate Board*, 2016 Comp. Trib. 7
24. *The Commissioner of Competition v. CCS Corporation et al.*, 2012 Comp. Trib. 14
25. *Turtle v. Valvoline Canadian Franchising Corp.*, 2021 SKCA 46
26. *Vancouver Aquarium Marine Science Centre v. Charbonneau*, 2017 BCCA 395

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SCHEDULE B: LEGISLATION

1. *Competition Act*, R.S.C., 1985, c. C-34, sections 1.1, 45, 91, 92, 104

SCHEDULE C: SECONDARY SOURCES

1. Competition Bureau, "Information Bulletin on Merger Remedies in Canada" (September 22, 2006)
2. Hogg, Peter, Liability of the Crown, 4th ed.
3. Competition Bureau, "Merger Enforcement Guidelines" (October 6, 2011)
4. Sharpe, Justice Robert J, Injunctions and Specific Performance.

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CT-2021-002

THE COMPETITION TRIBUNAL

IN THE MATTER OF the *Competition Act*, R.S.C. 1985, c. C-34, as amended;

IN THE MATTER OF the proposed acquisition of Tervita Corporation by Secure Energy Services Inc.;

AND IN THE MATTER OF an Application by the Commissioner of Competition for one or more orders pursuant to 92 of the *Competition Act*.

AND IN THE MATTER OF an application for an Interim Order pursuant to section 104 of the *Competition Act*.

BETWEEN:

COMMISSIONER OF COMPETITION

Applicant

- and -

**SECURE ENERGY SERVICES INC
TERVITA CORPORATION**

Respondents

**MEMORANDUM OF ARGUMENT ON APPLICATION FOR AN
INTERIM ORDER**

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