CONFIDENTIAL - LEVEL B

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 section 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.*

BETWEEN

THE COMMISSIONER OF COMPETITION

Applicant

- and -

SECURE ENERGY SERVICES INC.

Respondent

MEMORANDUM OF ARGUMENT OF THE RESPONDENT SECURE ENERGY SERVICES INC.
(Application for an interim order, section 104 of the *Competition Act*)

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TABLE OF CONTENTS

Page

PART I: OVERVIEW

1. Having twice failed to block SECURE Energy Services Inc.'s ("**SECURE**") acquisition of Tervita Corporation ("**Tervita**") in "emergency" proceedings, the Commissioner of Competition seeks the drastic and unprecedented relief of an interim order "unwinding" the merger pending determination of an application under section 92 of the *Competition Act* (the "**Act**"). The orders the Commissioner seeks are ill-conceived, without precedent, and unnecessary to preserve the Tribunal's ability to make a remedial order under section 92 if one is required—which SECURE will vigorously argue it is not.

2. This merger is already increasing efficiency to the benefit of the economy, SECURE, and its customers. Completing this merger was essential to SECURE's ability to adapt to changing dynamics in the oil and gas industry, which has been in decline for more than five years. Aside from being wildly impractical, "unwinding" the merger on an interim basis—a notion the Commissioner has left entirely undefined—would cause significant irreparable harm to SECURE and to the Canadian economy.

3. Quite apart from the fact that the Commissioner's prayer for relief has been twice considered and twice denied, the Commissioner has not met any aspect of the legal test for injunctive relief. Having sought mandatory orders, he must show a strong *prima facie* case that the underlying section 92 application will succeed. Faced with this burden, the Commissioner has not even attempted to satisfy the evidentiary requirements set by the Supreme Court of Canada in the *Tervita* case. In a case like this one that raises the efficiencies exception in section 96 of the Act, these requirements include quantifying alleged anti-competitive effects.

4. There is no evidence of irreparable harm. The only harm the Commissioner alleges is the supposed "ability" for SECURE to raise prices for waste disposal services—and with no evidence on critical issues such as incentives, extent, or timing. In any event, that bare "ability" is not irreparable harm as a matter of law. More fundamentally, the Commissioner's own economic expert gave evidence that any price effects are unlikely to occur while a section 92 application is pending.

5. As the Commissioner concedes in his memorandum of fact and law, it is common ground that the merger will not result in the loss or destruction of any of SECURE's assets (or those of the former Tervita business). There is no evidence that SECURE will undertake any actions in the interim period that will deprive the Commissioner of any final remedy available under section 92 of the Act if his underlying application succeeds.[1]

6. Considering the absence of irreparable harm, and conversely the significant harms that will accrue to SECURE and the Canadian economy if an interim order is made, the balance of convenience overwhelmingly favours SECURE. The efficiencies and other benefits of the merger already being realized include synergies, financial stabilization of the businesses, and greater access to capital in the face of substantial losses. The merger has also enhanced SECURE's ability to achieve its environmental, social and governance ("**ESG**") goals. The Commissioner has not given any undertaking to compensate SECURE for any of these harms, which would ordinarily be a condition for granting an injunction.

7. As the Federal Court of Appeal found in the early hours of July 2, 2021, the way the Commissioner has proceeded suggests that any alleged harm arising from the merger is not significant enough to warrant interim relief.[2] He is not acting to promote the public interest objectives of the merger provisions of the Act—paramount of which is enhancing the efficiency and adaptability of the Canadian economy.[3] Rather, he is acting tactically to win this litigation and to punish SECURE for exercising its legal right to complete the merger, as both this Tribunal and the Federal Court of Appeal held it had a right to do.

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[1] Affidavit of Andrew Kelly affirmed June 29, 2021, Exhibit 79, Application Record of the Commissioner of Competition, p 2460 [**Kelly Affidavit**].

[2] *Anderson v Evans*, 2005 NSSC 50 at para 6, Respondent's Book of Authorities [**Respondent's BOA**], Tab 2; see also Mr. Justice Robert J. Sharpe, *Injunctions and Specific Performance*, Looseleaf Edition (Toronto: Thompson Reuters, 2020) [*Sharpe*] Respondent's BOA, Tab 44, at para 1.990 "The very fact of delay by the plaintiff, quite apart from any question of prejudice to the defendant, may often serve as evidence that the risk is not significant enough to warrant interlocutory relief.", cited with approval by Ontario Superior Court of Justice in *Cardinal v. Cleveland Indians Baseball Company Limited Partnership*, ONSC 6929 [*Cleveland*], Respondent's BOA, Tab 18, at para 73.

[3] *Tervita Corp v. Canada (Commissioner of Competition)*, 2015 SCC 3, at paras 110-111 [*Tervita*], Respondent's BOA, Tab 31; *Canada (Commissioner of Competition) v Superior Propane Inc*., 2000 Comp Trib 15 at paras 412-413 [*Superior Propane I*], Respondent's BOA, Tab 10; *Canada (Commissioner of Competition) v Superior Propane Inc.*, 2002 Comp Trib 16 at paras 80 and 215 [*Superior Propane III*], aff'd 2003 FCA 53, Respondent's BOA, Tab 13.

8. The Commissioner has not met the legal test for injunctive relief, and the Tribunal should not countenance these tactics by granting an equitable remedy.

PART II: STATEMENT OF FACTS

The Transaction and rationale

9. SECURE is a publicly traded company headquartered in Calgary, Alberta and listed on the Toronto Stock Exchange ("**TSX**"). SECURE provides solutions to upstream oil and natural gas companies operating in Western Canada and certain regions in the U.S. Many of SECURE's customers are large, sophisticated oil and gas producers, such as Canadian National Resources Limited ("**CNRL**"), Cenovus, Suncor, Imperial Oil, and ConocoPhillips.[4]

10. Pursuant to an Arrangement Agreement in accordance with the *Business Corporations Act (Alberta)* dated March 8, 2021, SECURE acquired Tervita effective July 2, 2021 (the "**Transaction**"). Under the Plan of Arrangement, SECURE acquired all the issued and outstanding shares of Tervita upon completion of the Transaction. Following the Transaction, former SECURE and former Tervita shareholders own approximately 52% and 48%, respectively, of SECURE post-merger. The Plan of Arrangement was approved by the Alberta Court of Queen's Bench on June 18, 2021.[5]

11. Through the Transaction, SECURE is becoming more efficient to survive seismic changes in the oil and gas industry and to invest in the industry's transition to net-zero. Since 2014, Western Canada's entire oil and gas sector has been marked by significant volatility and consolidation. This wave was caused first by a global slump in prices and, more recently, by commitments from governments, investors, and operators to lower carbon emissions, focus on renewable energy and, ultimately, achieve a net-zero future.[6]

12. Limited pipeline infrastructure restricting the delivery of oil and gas from Canada to other markets, combined with a less favourable tax and regulatory environment, resulted in Canadian

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[4] Affidavit of David Engel sworn July 14, 2021, paras 6, 57, Responding Application Record of SECURE Energy Services Inc., pp 19, 42 [**Engel Affidavit**].
[5] Engel Affidavit, para 13, p 23.
[6] Engel Affidavit, paras 17, 27, 29, pp 25, 29-30.

producers being more severely impacted by the 2014 price collapse than their U.S. counterparts. This produced a corresponding flight of capital from the Canadian oil and gas sector, which spurred a wave of consolidations as Canadian companies sought scale and efficiencies.[7]

13. The capital challenges already facing Western Canada's oil and gas sector were exacerbated in 2020 when Saudi Arabia launched a price war against Russia and, days later, the World Health Organization declared COVID-19 as a pandemic. These events led to an all-time low for Alberta oil prices in April 2020. In response, Canadian producers cut capital expenditures and production.[8]

14. Although both SECURE and Tervita slashed costs in 2020, both reported substantially lower revenues (decreases of 8% and 39%, respectively) and overall net losses (C$87.2 million and C$43 million, respectively). In total, since 2016, SECURE and Tervita reported net losses of C$481 million. [9]

15. At the same time as economic conditions reduced oil and gas investment, access to capital became even more strained. Investors began demanding firm commitments to ESG and reduced carbon emissions in return for their capital. As a midstream operator, SECURE must adapt to the changing economic environment and the growing cost, service, and ESG requirements of their ever-consolidating customers. Customers increasingly demand higher service quality at lower prices as economic conditions continue to change. They are looking for strong, well-capitalized partners as the industry makes the necessary investments in ESG to secure its long-term future. [10]

16. The Transaction is critical to SECURE's efforts to support customers through this period of rapid industry change. It will generate run rate efficiencies of at least [redacted] every year, or [redacted] on a discounted basis over 10 years.[11]

17. More importantly, the Transaction results in an improved and cost-effective infrastructure to support a growing and consolidating customer base and shared commitments to ESG initiatives,

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[7] Engel Affidavit, para 27, pp 29-30.
[8] Engel Affidavit, para 28, p 30.
[9] Engel Affidavit, paras 7-8, 22, pp 19-20, 27-28.
[10] Engel Affidavit, paras 17, 18, 20, 30, pp 25-27, 30-31, Exhibit 75, pp 1931-1934, Exhibit 16, pp 872-879, 881-882, 884-898, 900.
[11] Engel Affidavit, para 19, p 26; Affidavit of Andrew C. Harington sworn July 14, 2021, para 16, Responding Application Record of SECURE Energy Services Inc., Tab 3, pp 2454-2455 [**Harington Affidavit**].

safety, performance, and customer service. That is why, since the Transaction was announced on March 8, 2021, [redacted] of SECURE's customers—both small and large and spanning different geographic regions—have written to pledge their support for the Transaction. Their letters speak to, among other things, the importance of cost savings, efficiency, ESG commitments, and partnering with midstream suppliers capable of investing in shared ESG goals. [12]

18. SECURE knows that if it is not a capable partner through this industry transition, its customers will look for alternatives. These alternatives include further expanding their capacity to self-supply midstream services that SECURE provides today. [13]

Operations of SECURE and the former Tervita business

19. The Transaction generates significant synergies and efficiencies because the asset bases and operations of SECURE and the former Tervita business were underutilized. SECURE and formerly Tervita both provided waste treatment and disposal services, environmental remediation services, and oil terminalling and marketing services to upstream oil and gas producers. [14]

20. Waste treatment and disposal services include operations at four types of facilities operated across Western Canada.

(a) **Water Disposal Wells**: Wells permit the underground disposal of water generated by drilling, and especially by fracking. SECURE is one of many businesses that operate disposal wells in Western Canada, but oil and gas producers (i.e., SECURE's customers) own and operate the vast majority of disposal wells.[15] There are over 3800 produced water and wastewater disposal wells that are currently active in Alberta alone. Many of these are operated by oil producers including

[12] Engel Affidavit, paras 18, 20, pp 26-27.
[13] Engel Affidavit, para 25, p 29.
[14] Engel Affidavit, paras 18, 59, pp 26, 42; Harington Affidavit, Exhibit C, paras 32, 34, 40, 45, pp 2579-2580, 2582-2583.
[15] Engel Affidavit, Exhibit 1, p 106; Affidavit of Nathan H. Miller affirmed June 29, 2021, Exhibit A, para 14, Application Record of Commissioner of Competition, p 2727 [**Miller Affidavit**].

CNRL, Cenovus and Ovinitiv. Only 80 wells (2%) are owned and operated by SECURE.[16]

(b) **FSTs/TRDs**: Referred to by SECURE as "full-service terminals" (FSTs) and formerly by Tervita as "treatment, remediation and disposal facilities" (TRDs), FSTs both treat and dispose of some waste. Treatment includes the separation of solid and liquid waste so that each can be disposed of separately, as well as the recovery of useable oil from waste streams (e.g., residual oil mixed into wastewater). Solid waste must be sent to a landfill for final disposal but FSTs often include a water disposal well so that liquid waste can be disposed of on site. FSTs also include storage terminals and are sometimes connected to pipeline networks enabling them to collect oil volumes in competition with other midstream terminal and pipeline operators.[17]

(c) **Landfills**: Landfills permit the disposal of solid waste. Producers and non-producers, such as Remedex, Clean Harbors, and municipalities, operate landfills that accept solid oilfield waste.[18]

(d) **Caverns**: Caverns permit disposal of solid and liquid waste. [19]

21. SECURE's customers can and do operate these same facilities. As noted above, oil and gas producers dispose of far more water at their owned wells than does SECURE. Some producers, such as CNRL and Cenovus, also own and operate landfills. In fact, since 2016, SECURE and formerly Tervita lost approximately [redacted] in revenues as their customers insourced services previously provided by SECURE or Tervita. For example, between 2016 and 2019, [redacted][20]

[16] Engel Affidavit, para 33, p 31-32.
[17] Engel Affidavit, para 41, pp 34-35, Exhibit 1, pp 103-104; Miller Affidavit, Exhibit A, para 12, p 2726.
[18] Engel Affidavit, paras 45, 47-48, pp 36-37.
[19] Kelly Affidavit, Exhibit 76, p 2411.
[20] Engel Affidavit, paras 34, 49, pp 32, 37.

22. Due to customer insourcing and reduced drilling activity, many of SECURE's assets (including those of the former Tervita business) are and will remain underutilized, a source of significant inefficiency and loss to the Canadian economy. SECURE anticipates that the combination of these underutilized assets will enable SECURE to suspend facilities without reducing output. These suspensions are a major component of the anticipated [redacted] of annual efficiencies. [21]

The Commissioner's review of the Transaction

23. The Commissioner's review of the Transaction began on March 12, 2021. Prior to closing, SECURE and Tervita met numerous times with and provided several submissions and expert reports to the Commissioner, including an advanced ruling certificate request and the parties' Part IX notification filings (both dated March 12, 2021).[22]

24. Among other submissions, on June 3, 2021, SECURE provided the Commissioner with an expert report from Andrew C. Harington of The Brattle Group documenting the efficiencies that would be generated by the Transaction. Mr. Harington found that the Transaction will generate a minimum of [redacted] in efficiencies annually (run rate), representing [redacted] in efficiencies over 10 years ([redacted] on a 10-year discounted basis). This is consistent with SECURE's initial analysis of its expected synergies from the Transaction, which estimated that the combined entity will achieve annual integration cost savings of [redacted]. [23]

25. SECURE and Tervita also provided voluminous records and data to the Commissioner to facilitate his review of the Transaction, pursuant to two information requests issued by him on March 18 and April 9, 2021 (the "**Information Requests**"). Notwithstanding the exceptional breadth of the Information Requests, SECURE and Tervita provided complete responses to the Bureau on May 31, 2021. These responses comprised approximately 396,000 documents and a significant volume of transaction-specific economic data.[24]

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[21] Engel Affidavit, paras 59, 130, 138, pp 42, 68, 70; Harington Affidavit, Exhibit C, paras 19-20, 48, 57-58, pp 2575-2576, 2584, 2586-2587.
[22] Engel Affidavit, Exhibits 69-70.
[23] Engel Affidavit, para 19, p 26, Exhibit 75; Harington Affidavit, para 16, pp 2454-2455, Exhibit C.
[24] Engel Affidavit, para 115, p 64, Exhibit 74; Kelly Affidavit, para 16, p 17.

26. Having responded to the Information Requests on May 31, 2021, the parties were legally entitled to close the Transaction on July 1, 2021, when the waiting period under section 123 of the Act expired. Throughout the Commissioner's review, the Parties repeatedly stressed the urgent need to close to begin realizing the synergies and efficiencies discussed above. Despite SECURE's strong position that the Transaction would not prevent or lessen competition substantially in any relevant market, the parties engaged in without prejudice discussions with the Commissioner in an effort to address his concerns before the closing date.[25]

Closing of the Transaction

27. The Transaction closed effective 12:01 am MT (2:01 am ET) on July 2, 2021, two days following the expiry of the statutory waiting period on June 30, 2021.[26] While the Commissioner insists on characterizing the closing as proceeding "in the dead of night," and takes repeated issue with SECURE closing "in the face of" his objection, closing was neither a surprise to the Commissioner nor in any way improper.

28. The Commissioner requested and, although there is no requirement in the Act to do so, SECURE and Tervita agreed to give him 72 hours' notice of closing. On June 28, 2021, the parties gave the Commissioner notice of their intention to close at 12:01 am MT on July 2, 2021, or as soon as possible thereafter. [27]

29. The next day, June 29, 2021, the Commissioner commenced an application under section 92 of the Act seeking an order that SECURE and Tervita be directed not to proceed with the Transaction in whole or, in the alternative, directing SECURE not to proceed with the acquisition of certain assets of Tervita (the "**Section 92 Application**"). The Commissioner also commenced an application under section 104 of the Act seeking an interim order prohibiting the closing of the Transaction (the "**Section 104 Application**"). [28]

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[25] Engel Affidavit, paras 116, 118, p 65, Exhibits 70-73, 76, 78.
[26] Engel Affidavit, para 13, p 23; *Canada (Commissioner of Competition) v Secure Energy Services Inc. and Tervita Corporation*, 2021 Comp Trib 4 at para 18 [*Interim Interim Decision*], Respondent's BOA, Tab 8.
[27] Engel Affidavit, paras 119-120, pp 65-66; *Interim Interim Decision* at paras 20, 24; Kelly Affidavit, Exhibits 17-18.
[28] Engel Affidavit, paras 120, p 66; Notice of Application for Interim Order dated June 29, 2021, Application Record of the Commissioner of Competition; Notice of Application dated June 29, 2021.

30. Also on June 29, 2021, the Commissioner made an eleventh-hour request to the Competition Tribunal (the "**Tribunal**") to issue an unprecedented "interim interim" order prohibiting closing until the determination of the Section 104 Application. At the Commissioner's insistence, the Tribunal held a case conference to address the Commissioner's request on June 30, 2021. At that hearing, SECURE advised the Tribunal that, if asked by the Commissioner, it would undertake to maintain the *status quo* with respect to pricing, facilities, customer service, and employees for at least 30 days post-closing, to allow this Section 104 Application to be determined in an orderly fashion. Despite the Tribunal's urging, the Commissioner declined to engage with this offer.[29]

31. The following evening, on July 1, 2021, the Commissioner filed a notice of application for judicial review seeking an order compelling the Tribunal to issue its decision in respect of the Commissioner's request. The Tribunal issued its decision dismissing the Commissioner's request for "interim interim" relief at 10:49 pm ET on July 1, 2021. This decision confirmed that the Commissioner's choice to wait until the eleventh hour to seek relief was at his own peril. The Commissioner then "converted" his application for judicial review to an appeal [30]

32. An "emergency" motion to the Federal Court of Appeal for an injunction prohibiting closing was heard beginning at 12:15 am ET on July 2, 2021, and ultimately dismissed minutes before 2:00 am ET. [31] Justice Stratas found, among other things, that the Commissioner had not demonstrated that closing would cause irreparable harm or that the balance of convenience favoured delaying closing.[32]

33. Immediately upon the closing of the Transaction on July 2, 2021, SECURE and its wholly owned subsidiary Tervita were amalgamated pursuant to a short form amalgamation and a Certificate of Amalgamation was issued in accordance with the Alberta *Business Corporations*

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[29] *Interim Interim Decision* at para 62.
[30] Engel Affidavit, para 122, p 66.
[31] Engel Affidavit, para 123, p 67.
[32] *Canada (Commissioner of Competition) v Secure Energy Services Inc. and Tervita Corporation*, Docket A-185-21, Order (Federal Court of Appeal), Respondent's BOA, Tab 9.

Act. SECURE and Tervita continued as one corporate entity. Tervita no longer exists as a separate entity, and has no directors, officers, employees, or property. [33]

34. As a result of the transactions undertaken pursuant to the Plan of Arrangement, all the Tervita shares were transferred to SECURE in consideration for shares of SECURE. When SECURE acquired 100% of Tervita, Tervita's shares were de-listed from the TSX and all of Tervita's shares were cancelled. [34]

35. The Transaction also facilitated the refinancing of certain indebtedness of the combined company. SECURE undertook a significant bond offering and irrevocably committed to use a portion of the proceeds of such offering to, on July 16, 2021, redeem the USD$100 million of indebtedness previously issued by the former Tervita that SECURE became the obligor of as a result of the amalgamation. In connection with closing of the Transaction, SECURE paid off outstanding credit facilities of SECURE and the former Tervita, discharged old security, and implemented a new C$800 million credit facility with new lenders and security registrations. All material subsidiaries of SECURE and the former Tervita provided security and guarantees of the new credit facilities. [35]

36. In addition, certain of the former SECURE subsidiaries have now guaranteed the obligations of SECURE under the former Tervita bonds. The ability for SECURE to undertake these transactions was, in part, based on the creditworthiness and structure of the merged entity and conditional upon completion of the Transaction. [36]

Integration planning

37. Operationally, SECURE expects a [redacted] integration period for the SECURE and Tervita businesses, with most integration being completed by [redacted] post-closing. Following closing,

[33] Engel Affidavit, para 14, p 24.
[34] *Ibid*.
[35] Engel Affidavit, para 15, pp 24-25.
[36] *Ibid*.

SECURE circulated to its management team an internal communication regarding integration planning (the "**Integration Guidance**"). [37]

38. A key aspect of SECURE's plan to realize efficiencies from the Transaction is integrating underutilized waste disposal facilities. [redacted] [38]

39. It is undisputed that SECURE has no plans to divest, demolish, or otherwise render permanently unusable any waste disposal assets or facilities (including those formerly belonging to Tervita) as a result of the Transaction. Rather, any facilities that will not be actively used will be placed in a suspended state and preserved for future use, with all required permits and capital assets in place. This type of suspension permits any suspended facility to resume operations within a short time frame if required to meet customer needs. [39]

40. The nature of the midstream waste disposal industry is that the capability of facilities is used up over time, such that SECURE will eventually need to expand or open new facilities. As the existing SECURE and former Tervita facilities are already constructed and properly licensed, it makes business sense to preserve these sites in a suspended state for future use. The costs of keeping these facilities in a suspended state is minimal compared to the expense of permanently closing or decommissioning them.[40]

41. SECURE's Integration Guidance states that there are to be no price increases to customers. SECURE does not believe the merged company has the ability to raise prices considering the challenges facing the industry and the countervailing buying power of its customers. [redacted] The Integration Guidance also stresses the importance of finding ways for SECURE to reduce its customers' total cost of service

[37] Engel Affidavit, paras 138-139, pp 70-71.
[38] Engel Affidavit, para 138, p 70.
[39] Engel Affidavit, para 142, p 72.
[40] Engel Affidavit, paras 143-144, 154, pp 72, 76.

to remain competitive in the evolving oil and gas business.[41] The Commissioner has not challenged this evidence in any way.

The Commissioner's applications

42. In his now-amended Section 104 Application, the Commissioner seeks an order "unwinding [SECURE's] acquisition of [Tervita] until such time as the Tribunal's decision in respect of the [Section 92 Application] is finally disposed of". In the alternative, the Commissioner seeks an order that SECURE hold the business of Tervita "separate, apart, and independent" pending determination of the Section 92 Application. And in the further alternative, the Commissioner seeks an order "directing SECURE not to proceed with any further integration of Tervita's operations and to preserve all assets."[42]

43. While on its face, the application seeks the most intrusive interlocutory relief conceivable, the Commissioner's materials do nothing to illuminate what these orders would entail in practice. Neither his notice of application nor his memorandum of fact and law provides any specificity around what "unwinding" the Transaction, "holding separate" assets that have already been acquired, or "not proceeding with further integration" would require from a corporate, operational, or timing perspective. He has not described exactly what actions he wants the Tribunal to order SECURE to take, how the order would be implemented, or the timeframe for implementation.

44. The crux of the Commissioner's allegations is that the Transaction has enhanced SECURE's market power by eliminating the competitive rivalry between it and Tervita. As a result, the Commissioner alleges, there is a likely substantial lessening of competition that will "likely lead" to some unspecified level of higher prices and lower quality of service for customers at some point in the future.[43] The notice of application is silent on any loss of allocative efficiency or the trade-off between such effects and the efficiencies generated by the Transaction.

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[41] Engel Affidavit, para 153, p 75.
[42] Amended Notice of Application for Interim Order dated July 3, 2021, Application Record of the Commissioner of Competition [**Section 104 Application**].
[43] Section 104 Application, paras 10-11, pp 4-5; Notice of Application dated June 29, 2021, paras 32-34.

45. Further, the Commissioner's pleadings identify only a portion of SECURE's business as being of concern, specifically: (a) landfills; (b) FST/TRD waste disposal; (c) produced water disposal; and (d) environmental services. Notably, these service lines together represent only [redacted] (by revenue) of the business that SECURE acquired from Tervita. The majority of SECURE's (and formerly Tervita's) revenues are generated by energy marketing, which has never been identified as an area of concern during the Commissioner's review or on this application. [44]

Evidence filed on the Section 104 Application

SECURE's evidence

David Engel

46. SECURE relies on the affidavit of David Engel, its Senior Vice President, Landfill Solutions. Mr. Engel has been with SECURE since its founding in 2007 and worked for Tervita (then known as CCS Corp) from 2000 to 2007.[45] Among other things, Mr. Engel's unchallenged evidence confirms that SECURE has no plans to raise prices or to divest or otherwise render inoperable any of its waste disposal facilities as part of its integration plans. [46]

47. As Mr. Engel explains, the Transaction was driven by the need for SECURE to obtain costs savings and greater access to capital to create a stronger midstream infrastructure and environmental solutions business. SECURE has neither the ability nor the incentive to raise prices considering the competition it faces from other third-party suppliers, the countervailing buying power of customers, and customers' ability to insource the services SECURE currently provides.[47]

48. As noted above, SECURE's customers are primarily large and sophisticated oil and gas producers, who have considerable ability to "punish" SECURE for any pricing they consider to be unfair. They can do this by reducing their purchases across other service lines and geographies, or

[44] Engel Affidavit, para 12, p 23.
[45] Engel Affidavit, para 2, p 18; Transcript of the Cross Examination of David Engel dated July 22, 2021, Supplementary Record, p 490, Qs 16-17.
[46] Engel Affidavit, paras 142, 153, pp 72, 75.
[47] Engel Affidavit, paras 18, 55-56, 61, 67, pp 26, 41, 43, 46, Exhibit 70, p 1883.

self-supplying services that they currently purchase from SECURE. [48] In these circumstances, SECURE has no ability or incentive to impose price increases or service reductions.

Andrew Harington

49. SECURE also relies on the expert opinion of Mr. Harington. Mr. Harington has been qualified numerous times as an expert witness in contested merger proceedings before the Tribunal, including as an expert witness for the Commissioner. His uncontroverted evidence is that the Transaction will generate substantial synergies and efficiencies—specifically, a minimum of [redacted] in efficiencies annually (run rate), representing [redacted] in efficiencies over 10 years ([redacted] on a 10-year discounted basis), and synergies of [redacted] annually (run rate). [49]

50. The factual foundation for Mr Harington's opinion regarding efficiencies is found in Mr. Engel's affidavit. Contrary to the Commissioner's submissions, it is well-established that it is not an expert's burden to prove the facts underlying his own opinion. Further, an expert can rely on and refer to facts that are not included in evidence as the foundation for his opinions.[50] That is to be expected with many kinds of expert evidence, considering that an independent expert will generally have no first-hand knowledge of the underlying facts.[51] Indeed, neither of the Commissioner's experts did any independent audit or investigation to confirm the facts they relied on in their reports.

51. It is true that the underlying facts must be proven for the expert's opinion to be given any weight,[52] which SECURE has done through Mr. Engel's affidavit. The Commissioner cross-examined Mr. Engel, who was not impeached in any way. Indeed, the Commissioner did not put to Mr. Engel that any of the information or data that SECURE provided to Mr. Harington was untrue. [53]

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[48] Engel Affidavit, para 57, p 42.
[49] Harington Affidavit, para 16, p 2454-2455, Exhibit C, para 19, p 2575.
[50] *R v Lavallee*, [1990] 1 SCR 852 at paras 66-67, Respondent's BOA, Tab 27; *R v D(D)*, 2000 SCC 43 at para 55, Respondent's BOA, Tab 26.
[51] *Lavallee* at para 83.
[52] *Lavallee* at paras 66-67.
[53] *R v Lyttle*, 2004 SCC 5 at para 64, Respondent's BOA, Tab 28.

52. Mr. Harington has also opined that, if necessary, it would be feasible for SECURE to create two viable, independent, and effective competitors that could operate separately, if so ordered by the Tribunal following the hearing of the Section 92 Application. He further opined that it would be possible to sell one of those businesses to a buyer or buyers that would operate it as an independent, viable, and effective competitor following divesture. [54] The Commissioner has not challenged this evidence and acknowledges that he has no concerns about the ability of the Tribunal to order divestiture in the event the Section 92 Application succeeds.[55]

53. On the other hand, Mr. Harington has opined that SECURE and the Canadian economy as a whole will permanently lose significant efficiencies and synergies if the Tribunal issues any of the interim orders that the Commissioner seeks on this Section 104 Application. The dollar value of the lost efficiencies, synergies, and out of pocket costs would be [redacted] to [redacted] depending on the order made and the length of the interim period before the Section 92 Application is disposed of.[56]

The Commissioner's evidence

Andrew Kelly

54. Andrew Kelly, a Competition Bureau officer, has sworn an affidavit appending numerous documents produced by SECURE and the former Tervita in response to the Information Requests and other evidence obtained by the Commissioner through his review of the Transaction.[57]

Nathan Miller

55. The affidavit of Nathan Miller, an economist, speaks to SECURE's post-merger market shares in several posited product and geographic markets. Dr. Miller opined that SECURE will

[54] Harington Affidavit, paras 22, 38, pp 2459, 2466.
[55] Memorandum of Argument of the Commissioner of Competition, para 145, p 50 [**Commissioner Memo of Argument**].
[56] Harington Affidavit, para 100, p 2500.
[57] Kelly Affidavit.

have the ability to charge increased prices to customers as a result of higher market shares. Dr. Miller also affirmed a reply affidavit.[58]

56. Notably, Dr. Miller did not attempt to quantify these alleged price effects or any deadweight loss arising from the Transaction. Moreover, Dr. Miller did not conduct any economic analysis of the countervailing buyer power of customers, nor did he delineate specific product markets or boundaries for geographic markets.

57. On cross-examination, Dr. Miller testified that it was unlikely that SECURE would raise prices while the Section 92 Application is pending. As he had opined in an earlier case before the Tribunal, a company facing a section 92 proceeding is incentivized not to raise prices, to avoid damaging its case in the proceeding.[59]

58. Much of Dr. Miller's evidence goes to matters that will be in issue at the hearing of the Section 92 Application but are not material to the Section 104 Application. To be clear, SECURE disputes the conclusions of Dr. Miller's report and the soundness of his methodology. While SECURE will lead evidence on the Section 92 Application speaking to the conceptual and methodological errors in Dr. Miller's evidence, those errors are not addressed further in this memorandum.

J. Gregory Eastman

59. In reply, the Commissioner submitted the affidavit of a second economist, Gregory Eastman. Significantly, Dr. Eastman's report expressly stated that he was not challenging the reasonableness of the efficiencies found by Mr. Harington.[60] Dr. Eastman's critique focused on Mr. Harington's use of volume data "occurring during COVID 19" in his efficiencies analysis.[61]

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[58] Affidavit of Nathan H. Miller affirmed July 19, 2021, Exhibit A [**Miller Reply Affidavit**]. At para 6 of his reply report, Miller himself noted that a key section of his reply evidence was of limited relevance.
[59] Transcript of the Cross Examination of Nathan Miller dated July 21, 2021, Supplementary Record, p 314-318, Qs 80-94 and Exhibit 3 [**Miller Cross**].
[60] Affidavit of J. Gregory Eastman affirmed July 19, 2021, para 8, p 5 **[Eastman Affidavit**].
[61] Eastman Affidavit, paras 9, 16, pp 5, 7.

Dr. Eastman simply asserted, without any evidentiary foundation, that the use of data from 2017 to 2019 would be more appropriate.[62]

60. When this issue was put to Mr. Harington on cross-examination, he explained that he had been satisfied by discussions with and a memorandum from SECURE that 2020 data was the most representative of the future industry outlook. He further concluded that "2017 to 2019 are not representative because of a continuing decline in the investments and the number of active wells" in that period.[63] The Commissioner did not so much as raise this factual point with Mr. Engel on cross-examination. The Commissioner also did not request any of the foundational information for Mr. Harington's opinion regarding the use of 2020 data.

61. Dr. Eastman also claimed that Mr. Harington's analysis of throughput capacity should have taken into account the seasonality of the business. Notably, however, Dr. Eastman does himself not perform any analysis of the potential impact of seasonality.[64] In fact, Mr. Harington explained on cross-examination that FSTs/TRDs have storage on-site that allows the facility to store waste in a busy month for processing in a subsequent month with lower volumes, making an analysis of seasonality unnecessary.[65] The Commissioner did not raise this point with Mr. Engel during his cross-examination.

PART III: POINTS IN ISSUE

62. The issue on the Section 104 Application is whether the Commissioner has established all three prongs of the test for the granting of injunctive relief, namely: that he has shown a strong *prima facie* case that he will succeed on the Section 92 Application, that irreparable harm would result if an interim order were refused, and that the balance of convenience favours granting the order.

63. Even if this threshold is met, the Tribunal must also consider whether it should exercise its discretion to grant injunctive relief in the circumstances.

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[62] Eastman Affidavit, para 17, p 7.
[63] Transcript of the Cross Examination of Andrew Harington dated July 20, 2021, Supplementary Record, p 83, Q 274 [**Harington Cross**].
[64] Eastman Affidavit, paras 20-21, p 11.
[65] Harrington Cross, p 75-76, Q 244.

PART IV: SUBMISSIONS

Extraordinary nature of injunctive relief

64. As the Tribunal has noted, "[s]ection 104 is an extraordinary type of jurisdiction exercised by the Tribunal in that it may result in the Commissioner being granted a form of injunctive relief before a hearing on the merits and before complete pleadings have been filed under section 92."[66] This is reflected in Parliament's direction that the Tribunal apply "the principles ordinarily considered by superior courts when granting interlocutory or injunctive relief"[67]—including the tripartite test from *RJR-MacDonald Inc. v Canada (Attorney General).*[68] In this case, because the Commissioner seeks mandatory injunctive relief, that test is modified as set out in *R. v. Canadian Broadcasting Corp.* ("**CBC**").

65. Under the modified *RJR-MacDonald* test, the Commissioner bears the onus to demonstrate that:

> (a) he has a strong *prima facie* case that he is likely to succeed on the Section 92 Application;
>
> (b) there will be irreparable harm if the order were refused; and
>
> (c) the balance of convenience favours granting the order.[69]

66. Even if the balance of convenience favours the applicant, the "Tribunal must look to balancing the equities between the parties by canvassing the alternative forms of interim relief. If an interim order is to issue, it should be adequate to its purpose but not any more intrusive or restrictive than is absolutely necessary."[70]

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[66] *Canada (Commissioner of Competition) v Parkland Industries Ltd.*, 2015 Comp Trib 4 at para 114 [*Parkland*], Respondent's BOA, Tab 7.
[67] *Parkland* at para 25.
[68] *RJR-MacDonald Inc. v Canada (Attorney General)*, [1994] 1 SCR 311 [*RJR-MacDonald*], Respondent's BOA, Tab 29; *Parkland* at para 26.
[69] *R v Canadian Broadcasting Corp.*, 2018 SCC 5 at para 18 [*CBC*], Respondent's BOA, Tab 25.
[70] *Parkland* at para 116. See also *TCT Canada Logistics Inc. v Nordeen*, 1999 BCCA 597 at para 27, Respondent's BOA, Tab 30.

Evidentiary burden on an injunction application

67. It is the Commissioner's burden to establish each requirement of the modified *RJR-MacDonald* test on a balance of probabilities. That burden is not altered or shifted by SECURE's decision to close the Transaction, as the Commissioner seems to suggest in his memorandum of fact and law. Mergers are presumptively lawful commercial transactions. SECURE is not obligated to justify closing the Transaction when it was legally entitled to do so, as confirmed by this Tribunal and the Federal Court of Appeal.

68. In this case, SECURE submits that the Commissioner is not entitled to rely on a presumption that he is acting in the public interest. It is well established that the paramount objective of the merger provisions of the Act is to "maintain and encourage the efficiency and adaptability of the Canadian economy."[71] Moreover, this Tribunal has recognized that consumer protection is not the main goal of the merger provisions of the Act (although this particular Transaction will have no impact on individual Canadian consumers in any event).[72] Despite this, the Commissioner has steadfastly refused to consider the efficiencies arising from the Transaction, maintaining his myopic focus on alleged price effects that he has not even attempted to quantify (and which his own expert economist testified are unlikely to occur during the interim period).[73]

69. Where, as here, the Commissioner refuses to engage with a significant aspect of his statutory mandate, it should not be presumed that he is acting in the public interest. Certainly, the Commissioner's evidence on this application should not be assessed on any more favourable or lenient standard because of his supposed pursuit of the public interest.

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[71] *Competition Act*, RSC 1985, c C-34, s. 1.1 [*Competition Act*], Respondent's BOA, Tab 35; *Tervita* at paras 85, 110-111; *Superior Propane I*, at paras 412-413; *Superior Propane III* at paras 80 and 215.
[72] *Superior Propane III* at paras 62 and 64. Here, SECURE's customers are sophisticated oil and gas companies, not individual consumers.
[73] Miller Cross, p 314-318, Qs 80-94.

Strong *prima facie* case

Commissioner's burden to show a strong prima facie case

70. On an application for a mandatory interlocutory injunction, the first stage of the *RJR-MacDonald* test is not whether there is a "serious issue to be tried," but rather the heightened threshold of whether the applicant has shown a "strong *prima facie* case."[74] The Commissioner bears the burden "to show a case of such merit that [he] is very likely to succeed at trial" (emphasis added).[75]

71. A mandatory injunction requires the respondent to undertake a positive course of action, which is often costly and burdensome—as it would undoubtedly be in this case. As such, a mandatory order is generally "difficult to justify at the interlocutory stage, since restorative relief can usually be obtained at trial."[76] The purpose of an interlocutory injunction is to "maintain a reasonable state of affairs so that the trial court may do justice at the end of the case," not to grant judgment pending a merits hearing. [77]

72. The orders sought by the Commissioner on this application are all plainly mandatory in nature. As the Supreme Court explained in *CBC*, the distinguishing feature of a mandatory injunction is that it requires the respondent to do something, rather than to refrain from doing something.[78]

73. Whereas an order prohibiting completion of a merger is a prohibitive injunction, here the Commissioner asks the Tribunal to require SECURE to separate itself from a business it has acquired and has already begun to integrate. While his materials offer no detail on what actions specifically would be required, any such order would necessitate SECURE taking positive actions to unscramble the proverbial eggs—whether somehow "unwinding" the amalgamation of two publicly-traded companies, putting the former Tervita business into a hold separate vehicle, or

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[74] *CBC* at para 15.
[75] *CBC* at paras 17-18.
[76] *CBC* at para 15.
[77] *Pusateri's Yorkville Limited v City of Toronto*, 2013 ONSC 6860 at para 6 [*Pusateri's*], Respondent's BOA, Tab 24; see also *Sharpe*, at para 2.550.
[78] *CBC* at para 16.

implementing segregated back-office and operational services to halt integration of a business that it now owns.

74. The Commissioner's submission that the strong *prima facie* case standard should not apply because SECURE chose to close the Transaction is meritless. He has cited no authority standing for that proposition. The one Ontario case and the passage from *Injunctions and Specific Performance* he relies on stand only for the proposition that equitable considerations may militate in favour of granting mandatory relief where the respondent has acted "wrongfully" or "without regard to his neighbour's rights" or for tactical reasons to gain a litigation advantage or avoid the jurisdiction of the courts.[79] None of those circumstances exists here.

75. SECURE made no secret of its intention to close the Transaction and gave the Commissioner the 72 hours' notice of closing he requested. It was the Commissioner who tried to "steal a march" by bringing his demand for "interim interim" relief in a manner that left SECURE no time to meaningfully respond. This Tribunal and the Federal Court of Appeal both confirmed SECURE's right to close the Transaction as planned. There is no merit to the suggestion that SECURE acted "without regard to the rights" of the Commissioner in the face of judicial findings that he had no such rights.

76. The strong *prima facie* case standard also applies here because the order the Commissioner seeks would amount to pre-judgment execution. An interim order that SECURE "unwind" the Transaction—a remedy that is not available at law in any event—would grant the Commissioner the most intrusive final relief he could possibly seek on the Section 92 Application, by way of an interim order.[80] And even if the Transaction could somehow be unwound, the evidence is that there is no feasible way to recreate it. [81] In other words, an interim order to "unwind" the Transaction would effectively end the litigation, despite the strength of SECURE's case.

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[79] Commissioner's Memo of Argument, para. 15, citing *Kinnear v Hanley*, 2017 ONSC 1165, Commissioner's Book of Authorities, Tab 13, and Sharpe, *Injunctions and Specific Performance* at paras 1.590 and 1.600, Commissioner's Book of Authorities, Tab 31.
[80] *CBC* at para 15.
[81] Engel Affidavit, paras 109-110, pp 62-63.

Commissioner's failure to discharge his burden

77. Contrary to the Commissioner's submissions, his burden is not to demonstrate that he has a strong *prima facie* case that SECURE has "new or increased market power" or evidence of "relevant markets and SECURE's high market share as a result of the Transaction."[82] As *CBC* makes clear, he must demonstrate that he has a strong likelihood of winning the Section 92 Application. As Justice Brown wrote for the unanimous Supreme Court of Canada, the moving party's burden is not to "show a case…that 'leans' one way or another, but rather a case, based on the law and evidence presented, that has a strong likelihood of success at trial."[83] Here, given the evidence adduced by SECURE, that analysis must include consideration of both section 92 and the efficiency exception in section 96 of the Act.

78. The Commissioner has fallen woefully short of that threshold. To prevail on the Section 92 Application, he must ultimately demonstrate that: a) the transaction prevents or lessens competition substantially; and b) that the anti-competitive effects of any such prevention or lessening of competition outweigh the efficiencies gained as contemplated by section 96 of the Act. The Commissioner's record on this application is entirely silent on the second requirement.

79. The Supreme Court of Canada instructed in *Tervita Corp. v. Canada (Commissioner of Competition)* that in cases raising efficiencies like this one, the Commissioner must quantify any alleged anti-competitive effects of a merger that are quantifiable.[84] Where such effects have not been quantified, including any loss of allocative efficiency (also referred to as the "deadweight loss"), they are to be fixed at zero.[85] The respondent then has the onus to demonstrate the extent of the efficiencies generated by the merger and that they are greater than and offset the anti-competitive effects.[86]

80. Here, the Commissioner has not adduced any evidence that even attempts to quantify the price effects he alleges, the elasticity of demand, or any deadweight loss. The crux of Dr. Miller's

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[82] Commissioner Memo of Argument, paras 8, 155.
[83] *CBC* at para 31.
[84] *Tervita* at paras 125, 128, and 136.
[85] *Tervita* at paras 128-140.
[86] *Tervita*, at para 122.

economic evidence is that the merging parties compete with one another and the Transaction results in increased market concentration in certain geographies, which could lead to incentives to increase prices.[87] This falls well short of the evidentiary standard set out in *Tervita*—particularly as subsection 92(2) of the Act provides that the Tribunal cannot find that competition has been prevented or lessened substantially purely based on evidence of concentration or market shares.[88]

81. Considering the Commissioner's failure to quantify the alleged anti-competitive effects of the Transaction, zero weight can be assigned to them. As such, the Commissioner has not advanced any case—let alone a strong *prima facie* case—that he will be able to prove that the efficiencies quantified by Mr. Harington are not greater than and offset any alleged anti-competitive effects.

82. Moreover, despite having had Mr. Harington's efficiencies report since June 3, 2021, and including it in his own application record, the Commissioner has not substantively responded to SECURE's evidence regarding the efficiencies arising from the Transaction. In particular, the Commissioner has not challenged the core proposition that the Transaction generates significant quantifiable efficiencies that are cognizable under section 96 of the Act.

83. The Commissioner has failed to show that he has a strong *prima facie* case of succeeding on the Section 92 Application. He has not adduced evidence that can meet his burden to prove anti-competitive effects. Based on the record before this Tribunal, even if the Commissioner were able to prove a likely substantial prevention or lessening of competition, the quantifiable anti-competitive effects would be assigned a weight of zero.[89] He has not alleged any cognizable qualitative anti-competitive effects. Conversely, SECURE has put forward cogent evidence of quantifiable efficiencies arising from the Transaction, which the Commissioner has not meaningfully challenged.

84. In short, even a superficial examination of the record on this application demonstrates that the Commissioner has not made out a strong *prima facie* case that would justify the extraordinary relief he seeks. That is sufficient for the Tribunal to dismiss the Section 104 Application.

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[87] Miller Affidavit, para 88, p 2768.
[88] *Competition Act*, s 92(2).
[89] *Tervita* at paras 128-140.

Irreparable harm

85. The Commissioner has also not shown that any irreparable harm to competition will occur if an interim order is refused. The irreparable harm criterion has two dimensions: the existence of harm itself and its irreparable nature.[90] Irreparable "refers to the nature of the harm suffered rather than its magnitude; it is harm which either cannot be quantified in monetary terms or which cannot be cured."[91]

86. To establish irreparable harm, the Commissioner may not rely on bare assertions. Rather, he must "adduce clear and non-speculative evidence" at a convincing level of particularity that demonstrates a real probability that unavoidable irreparable harm will result unless an injunction is granted.[92] A party seeking an injunction must "demonstrate in a detailed and concrete way that it will suffer real, definite, unavoidable harm—not hypothetical and speculative harm—that cannot be repaired later."[93]

87. Here, the Commissioner has failed to show that irreparable harm would result if an interim order were refused, for at least three reasons:

(a) anti-competitive effects resulting from a merger, even if established, are not irreparable unless the Commissioner can show that competition cannot be restored;

(b) interim price effects could not constitute irreparable harm in this context because there would be no socially adverse wealth transfers in this industry (meaning that the only anticompetitive effect in this case would be any deadweight loss, which the Commissioner has made no attempt to establish or quantify);

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[90] *Parkland* at para 48; *RJR-MacDonald* at para 64, 84.
[91] *Parkland* at para 48. In *Tervita Corp. v Canada (Commissioner of Competition)*, 2012 FCA 223 at para 9 [*Tervita II*], Respondent's BOA, Tab 32, the Tribunal noted that irreparable harm is "harm which cannot be quantified in monetary terms or which cannot be cured, usually because one party cannot collect damages from the other."
[92] *Glaxosmithkline Biologicals SA v Canada (Minister of Health)*, 2020 FCA 135 at paras 15-16, Respondent's BOA, Tab 19. See also *Arctic Cat, Inc. v. Bombardier Recreational Products Inc.*, 2020 FCA 116, Respondent's BOA, Tab 3.
[93] *Canada (Attorney General) v Oshkosh Defense Canada Inc.*, 2018 FCA 102 at para 25, Respondent's BOA, Tab 4.

(c) even if interim price effects could constitute irreparable harm as a matter of law, the Commissioner's own expert testified that such effects are unlikely while the Section 92 Application is pending; and

(d) the unchallenged evidence on this application establishes that all the assets of Tervita (and SECURE) will be preserved such that if the Commissioner is successful in the Section 92 Application, a viable competitor can be created through divestiture to restore competition in the relevant market(s).

Anti-competitive effects are not irreparable harm

88. The controlling authority on what constitutes irreparable harm in the merger context is the *ICG* case.[94] In that case, the Commissioner applied to the Federal Court of Appeal for an injunction preventing the merging parties from integrating their businesses pending the hearing of an appeal of the dismissal of a section 92 application. The Court of Appeal applied the same test that applies in this Section 104 Application—the *RJR-MacDonald* test.

89. The Commissioner argued that irreparable harm would result if a stay were not ordered because anti-competitive effects would occur in the interim period, including harm to consumers in the form of higher prices.[95] Justice Linden did not interfere with the Tribunal's findings that competition was likely to be prevented or lessened substantially and that integration would cause anti-competitive effects (including price effects). However, he held that such harm was not irreparable:

> [The Commissioner's expert witness] concluded that the "integration of Superior Propane Inc. and ICG operations would at best impede, and at worst jeopardize an effective divestiture", that is, the "relatively rapid restoration of vigorous competition in the industry". This is hardly proof that the harm "could not be remedied". It is argued that, since interim integration will "diminish or practically destroy ICG as a divestible entity", the "public interest" will be "irreparably harmed" if a stay is refused. <u>In other</u>

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[94] *Canada (Commissioner of Competition) v Superior Propane Inc.*, [2001] 3 FC 175 (CA) [*ICG*], Respondent's BOA, Tab 11. The Competition Tribunal is bound by decisions of the Federal Court of Appeal, including a decision of a single judge acting as the court when properly exercising jurisdiction over a motion. See *Federal Courts Act*, RSC, 1985, c F-7, s 16.1, Respondent's BOA, Tab 36, and *Federal Courts Rules*, SOR 98-106, s 2, "Court", Respondent's BOA, Tab 37; *Canada (Commissioner of Competition) v Superior Propane Inc.*, 2003 FCA 53 at para 54 [*Superior Propane IV*], Respondent's BOA, Tab 14**.**

[95] *ICG* at paras 11-12.

> words, it is said that consumers would be subjected to the anti-competitive effect of this merger during the period awaiting the decision on the appeal. There is no doubt that divestiture would be difficult and costly if the merger proceeded, but the Respondents are aware of that fact and willing, if necessary, to bear the cost of it. These costs have been expertly estimated, and it is clear that the money saved will more than offset the cost.
>
> In my view, the metaphor of scrambled eggs is dramatic, but not entirely apt. When one scrambles eggs it is impossible to unscramble them, but a merged company is not exactly like scrambled eggs. It can be broken up, though it is maybe difficult to do so. Competition can be restored. It is not enough for it to be hard or inconvenient to do so. To obtain a stay, the damage must be truly irreparable and proved to be so.[96] [Emphasis added, citations omitted]

90. Justice Linden correctly concluded that the alleged anti-competitive effects were not irreparable harm for the purposes of section 104 of the Act, unless the Commissioner could establish that it would be impossible to restore competition later.[97] The expert evidence before him demonstrated that it would be feasible to divide the merged businesses within a reasonable period of time to create two viable competitors, if the Commissioner's appeal was successful and that were necessary to restore competition. In this case, the unchallenged evidence of Mr. Harington is to the same effect. The Commissioner also acknowledges that no order is required to ensure that the necessary facilities would be available for divestiture if required.[98]

91. Justice Linden's approach to the issue of irreparable harm is binding on the Tribunal. It is also consistent with the scheme of the Act and the principles applied by courts in granting interlocutory injunctions. The purpose of an interlocutory injunction is to preserve the court's ability to grant a remedy in the underlying proceeding. As Justice Abella wrote in *Google v Equustek Solutions Inc.*, "interlocutory injunctions seek to ensure that the subject matter of the

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[96] *ICG* at paras 12-13.

[97] As Justice Linden noted in *ICG*, there are many instances in which U.S. courts have ordered a divestiture after a merger was completed. More recent examples include *United States of America v Bazaarvoice Inc.*, Case No. 3:2013cv00133, Respondent's BOA, Tab 33*; Polypore International Inc. v Federal Trade Commission*, 686 F.3d 1208, Respondent's BOA, Tab 23; and *United States of America v Election Systems and Software, Inc.*, 722 F. Supp 2d 117, Respondent's BOA, Tab 34.

[98] Commissioner Memo of Argument, para 145, p 50.

litigation will be 'preserved' so that effective relief will be available when the case is ultimately heard on the merits."[99]

92. That principle is incorporated by reference in section 104 of the Act. In the merger review context, section 104 must be read together with sections 100, 92, and 96.[100] The statutory scheme is discussed further below.

93. Here, the underlying proceeding is the Section 92 Application. Section 92 of the Act requires the Commissioner to prove that a merger "will or is likely to prevent or lessen competition substantially."[101] The question is not whether the Tribunal can award damages to compensate customers for some alleged price increase, but rather whether competition can be restored to a point that it is no longer "prevented or lessened substantially."[102]

94. Section 92 of the Act provides for dissolution and divestiture post-closing as possible remedies, and all mergers can be challenged for up to one year after the completion of a transaction.[103] For example, when Tervita acquired Newalta in 2018, the Commissioner did not seek any interim relief notwithstanding that it had "concerns" about the merger and continued its review for months after closing.[104] The Act does not evince any intention by Parliament to absolutely eliminate alleged anti-competitive effects between closing and disposition of a section 92 application. If that were so, the Commissioner would always be required to seek injunctive relief before closing in merger review cases.

95. More generally, only mergers that pass a certain threshold are notifiable under the Act. If Parliament were concerned that the Tribunal could not remedy anti-competitive effects resulting

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[99] *Google Inc. v Equustek Solutions Inc.*, 2017 SCC 34 at para 24 [*Google*], Respondent's BOA, Tab 20; *Pusateri's* at paras 6-10. See also *Tervita* at para 117; Competition Bureau, Information Bulletin on Merger Remedies in Canada (September 22, 2006), at paras 22-23 and 51, Respondent's BOA, Tab 39; see also *Sharpe*, at para 2.550.
[100] *Parkland* at para 30.
[101] *Canada (Director of Investigation & Research) v Southam Inc.*, 36 CPR (3d) 22 (Competition Tribunal) at para 12, Respondent's BOA, Tab 16; see also *The Commissioner of Competition v. Labatt Brewing Co. Ltd. et al*., 2007 Comp. Trib. 9 at paras 43 and 51, Respondent's BOA, Tab 6.
[102] *Canada (Director of Investigation & Research) v Southam Inc.*, [1997] 1 SCR 748 at paras 83-85, Respondent's BOA, Tab 15.
[103] *Competition Act*, s 97. Prior to 2009, section 97 permitted the Commissioner to bring a section 92 application within three years of closing.
[104] Engel Affidavit, paras 127-129, p 68, and Exhibit 83, p 2178.

from a transaction post-closing, it would have required pre-closing notification for all mergers meeting certain concentration levels (as opposed to financial thresholds only) as is required in certain jurisdictions.[105] Parliament did neither.

96. Similarly, section 96 of the Act prohibits the Tribunal from ordering a remedy under section 92 if the merger is likely to bring about gains in efficiency that will be greater than, and will offset, the effects of any prevention or lessening of competition.[106] In other words, the Act directs that any anti-competitive effects of a merger are tolerated if they are outweighed by efficiencies. This also militates against the Commissioner's interpretation of section 104 as focusing solely on anti-competitive effects during the interim period.

97. Finally, section 100, which provides for interim relief before an application under section 92 has been made, also makes no reference to anti-competitive effects. While section 100 imposes a less onerous burden on the Commissioner than section 104, it is also squarely focused on preserving the Tribunal's ability to issue a remedy. Interim relief under section 100 may be issued only where absent an order, a person may take an action "that would substantially impair the ability of the Tribunal to remedy the effect of the proposed merger on competition under [section 92] because that action would be difficult to reverse".[107]

Parkland does not assist the Commissioner

98. The Commissioner's reliance on *Parkland* is misplaced. *ICG* is clear that interim price effects do not constitute irreparable harm. While it appears that this aspect of *ICG* was not considered by the Tribunal in *Parkland*, it remains binding authority. As explained above, Justice Linden's analysis in *ICG* is harmonious with the scheme of the Act and the law of injunctions more generally. It should therefore be preferred to the interpretation of section 104 the Commissioner urges on the Tribunal.

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[105] See for example, Israel (*Restrictive Trade Practices Law, 5748-1988, Chapter III, s.17*), Respondent's BOA, Tab 38.
[106] *Competition Act*, s 96
[107] *Competition Act*, s 100

99. In the alternative, *Parkland* is distinguishable for two reasons. First, interim period price effects do not constitute harm in this context because there would be no socially adverse wealth transfers in this industry. In *Parkland*, the alleged irreparable harm was framed as constituting both (i) higher prices for consumers of retail gasoline and (ii) the loss of allocative efficiency to the Canadian economy as a whole[108] (also referred to as the deadweight loss").[109] Here, any hypothetical price increases would result only in a wealth transfer from oil and gas producers to SECURE (with no wealth transfers from consumers). Therefore, as the Tribunal noted in the *CCS* case involving this same industry, any wealth transfers should be treated as neutral.[110]

100. As a result, the only potential type of irreparable harm in this case is the deadweight loss to the Canadian economy. The Commissioner has not led any evidence quantifying any deadweight loss. He also has not attempted to quantify any alleged price increases or the elasticity of demand (both of which would be necessary to calculate any deadweight loss). As the Supreme Court of Canada held in *Tervita*, the absence of any such quantification "admits far too much subjectivity" and "invites speculation into the analysis."[111]

101. Second, even if price effects could notionally be considered as irreparable harm, the Commissioner has failed to adduce clear and non-speculative evidence that there will be any price effects before the Section 92 Application is determined. It is true that Dr. Miller has opined that the Transaction gives SECURE the incentive to raise prices (a conclusion that SECURE will vigorously contest on the Section 92 Application). However, his evidence is also that there is no reason to expect SECURE to act on those incentives in the interim period pending the Section 92 Application.

102. Dr. Miller testified as an expert witness on behalf of the Commissioner in the *Parrish & Heimbecker* case before this Tribunal that:[112]

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[108] *Parkland* at paras 65 and 69.
[109] See e.g., Competition Bureau, *Merger Enforcement Guidelines*, at para 12.25, Commissioner's Book of Authorities, Tab 30.
[110] *Canada (Commissioner of Competition) v. CCS Corp.*, 2012 Comp. Trib. 14 at paras. 283-284 [*CCS*], Respondent's BOA, Tab 5.
[111] *Tervita* at para. 139.
[112] *Parrish & Heimbecker*, CT-2019-005.

> Conceptually, there is no reason to expect that P&H would have been acting on its incentives immediately after the Transaction. Indeed, it would be surprising to learn that P&H has moved ahead to implement price increases while this [section 92] proceeding is underway and while it is soliciting farmers in the affected area for witness statements. The Guidelines are clear that it is the incentive to profitably raise prices that is dispositive for good reason.[113] [Emphasis added.]

103. Dr. Miller acknowledged that an incentive to maintain or lower prices would be dispositive as much as an incentive to raise them and agreed that his analysis in *Parrish & Heimbecker* would also apply to this case:

> You know, my analysis suggests that there is a loss of competition that would arise due to the transaction. You know, here is where maybe there is less certainty, is that if there is some sort of administrative or legal hearing over, you know, overlaying all of this, the timing of my analysis is more difficult for me to project, for the same reasons that I laid out in P&H.[114] [Emphasis added]

104. The Commissioner's characterization of Dr. Miller's testimony (at paragraph 110 of his memorandum of fact and law) is wholly misleading. While Dr. Miller may not have resiled from his opinion that the Transaction might ultimately result in a lessening of competition, his evidence was that price increases would be unlikely pending the disposition of the Section 92 Application.

105. In contrast to the lack of evidence about likely price effects, the Commissioner has not challenged Mr. Harington's evidence regarding the feasibility of implementing a remedy if the Commissioner succeeds on the Section 92 Application. Specifically, Mr. Harington's uncontradicted evidence is that:

(a) it is feasible for SECURE to continue with the implementation of its planned integration and subsequently separate some or all of the acquired Tervita business into an independent, viable, and effective competitor if so ordered by the Tribunal on the Section 92 Application;

(b) that separation could occur within 90 days of an order;

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[113] Miller Cross, Exhibit 3, para 87, p 464.
[114] Miller Cross, p 317-318, Q 91-93 and p 321, Q 97.

(c) each of the successor businesses referred to in (a) above would have an established customer base and strong corporate systems and would be financially strong—neither would be a "start-up" operation; and

(d) if required by the Tribunal, SECURE would be able to sell one of the successor businesses, either by itself or through a divestiture trustee, to a buyer or buyers that would operate the acquired business as a viable and effective competitor.[115]

Conclusion on irreparable harm

106. In short, the Commissioner has not established that any irreparable harm will occur if an interim order is not made. Conversely, SECURE has led cogent and uncontroverted expert evidence that the Tribunal's ability to order an effective remedy (including divestiture) if the Commissioner succeeds on the Section 92 Application will be entirely preserved. Even if the Commissioner had satisfied the strong *prima facie* case requirement (which he has not, as explained above), the absence of irreparable harm is sufficient for this Tribunal to dismiss the Section 104 Application.

Balance of convenience strongly favours SECURE

Approach to the balance of convenience

107. Given that the Commissioner has not established a strong *prima facie* case or that he will suffer any irreparable harm if an injunction is not granted, it follows that the balance of convenience favours refusing a mandatory injunction. For completeness, however, the balance of convenience factor is discussed below.

108. Under the final prong of the *RJR-MacDonald* test, the Tribunal must determine on a balance of probabilities which of the parties "will suffer the greater harm from the granting or refusal of the interim order, pending a decision on the merits". Again, the evidence adduced must not be speculative.[116]

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[115] Harington Affidavit, para 38, p 2466.
[116] *Parkland* at para 26, 106; *RJR-MacDonald* at para 67.

109. The relevant factors in this analysis vary in each case.[117] They include the impact of the order sought on the responding parties, including financial costs,[118] and public interest considerations.[119] Regarding the latter, the "role of public authorities in protecting the public interest [is] an important factor"[120] but a private party may advance an argument relating to the public interest.[121] Among other things, lost efficiencies are a matter of public interest and are relevant to determining the balance of convenience.[122]

110. Here, the balance of convenience overwhelmingly favours SECURE. With respect, the notion of "unwinding" the merger and amalgamation of two publicly traded companies on an interim basis is absurd on its face. The Commissioner has also not adduced any evidence or submissions on how an order to "hold separate" the former Tervita business or to "stop integrating" it would operate. In short, he has made no effort to explain what the orders he seeks would entail from a corporate, operational, or timing perspective. The Tribunal can easily infer, however, that any of these orders would be very burdensome for SECURE (if even possible to implement).

111. Moreover, as noted above, the business lines and geographies the Commissioner is focused on are a small proportion of the total business SECURE acquired from Tervita. The orders requested by the Commissioner, which are directed at the entire business, are therefore plainly overboard.

112. The Commissioner's argument that these burdens should not be considered as part of the balance of convenience because SECURE "tied its own hands" was rejected by the Tribunal in the *CCS* case. There, the Tribunal wrote:

> The Commissioner asserts that, in the particular circumstances of this case, hardship is irrelevant, because she warned the Vendors that she would seek dissolution before they sold Complete to CCS. However, in the Tribunal's view it is the right of private parties to disagree with the Commissioner and make their case

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[117] *Tervita II* at para 9; *Parkland* at paras 107-8.
[118] *Kobo Inc. v Commissioner of Competition*, 2014 Comp Trib 2 at paras 48-49 [*Kobo*], Respondent's BOA, Tab 21.
[119] *Kobo* at para 47.
[120] *Parkland* at para 108; *RJR-MacDonald* at para 90.
[121] *Kobo* at para 49.
[122] *Parkland* at para 111.

> before the Tribunal. Accordingly, they are not estopped from raising issues of hardship.[123]

Here, SECURE's position on the "disagreement" between it and the Commissioner was validated by the Tribunal and the Federal Court of Appeal, both of whom confirmed that SECURE had the right to close.

Irreparable harm to SECURE if an interim order is made

113. As explained above, the Commissioner has not demonstrated that any irreparable harm will result if an interim order is refused. Conversely, SECURE will suffer significant losses, including:

(a) lost synergies (principally represented by the lost efficiencies);

(b) the costs associated with needing segregated operational and back-office services;

(c) transaction costs associated with divestiture of the former Tervita business, to the extent that is what is meant by "unwinding" the Transaction;

(d) alternatively, the costs of appointing a hold separate manager, and other costs associated with a hold separate; and

(e) the costs of dedicating employees and resources to any held separate assets and being unable to reallocate those employees and resources to other areas.

114. SECURE has voluntarily undertaken to preserve all assets that would be required to implement a remedy if the Commissioner succeeds on the Section 92 Application. The uncontroverted evidence of Mr. Harington is that an interim order requiring SECURE to do anything more than that would visit substantial losses on SECURE in the form of lost synergies and efficiencies, and other transaction costs.

115. More specifically, Mr. Harrington has opined that the following harm will occur if the Tribunal issues any of the interim orders sought by the Commissioner:

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[123] *CCS* at para 337.

(a) **An order to "unwind" the Transaction:** lost efficiencies, lost operating cost synergies, and out of pocket costs to facilitate the order, valued at [redacted], [redacted], or [redacted], for interim periods of 6, 12, and 18 months, respectively.

(b) **An order to "hold separate" the former Tervita business:** lost efficiencies, lost operating cost synergies, and out of pocket costs to facilitate the order, valued at [redacted], [redacted], or [redacted], for interim periods of 6, 12, and 18 months, respectively.

(c) **An order to "stop integrating" the former Tervita business:** lost efficiencies and operating cost synergies valued at [redacted], [redacted], or [redacted], for interim periods of 6, 12, and 18 months, respectively.

116. SECURE's losses would be irreparable—once lost, they are lost forever, and there would be no practical way of "wind[ing] back the clock".[124] As Mr. Harington explains, the orders sought by the Commissioner would lead to delayed integration, resulting in lost efficiencies that "will never be recovered by SECURE or the Canadian economy and represent a permanent loss in the efficiencies that would have otherwise accrued to the benefit of the Canadian economy."[125] In particular: (i) there would be a permanent loss to the Canadian economy equivalent to the run-rate value of the efficiencies over the length of the interim period during which integration is delayed, and (ii) the net present value of any efficiencies to the Canadian economy would be lower the longer they are delayed.[126]

117. Notably, Dr. Eastman stated expressly in his affidavit that he does not challenge the reasonableness of the efficiencies found by Mr. Harington.[127] Instead of addressing this issue head-

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[124] *Kobo* at para 48; *Tervita II* at para 15.
[125] Harington affidavit, para 55, p 2474-2476.
[126] To use a simple analogy, suppose that a person had the right to receive $100 every year for the rest of their life and was then subsequently told that they would not receive $100 in the first year. The inability to obtain $100 in the first year would represent a loss both because (i) the $100 in the first year is never received, and (ii) the net present value of $100 that first year is worth more than the net present value of $100 in all subsequent years.
[127] Eastman Affidavit, para 8, p 5.

on, the Commissioner unfairly disparages the credibility and competence of Mr. Harington,[128] who is a leading expert on the quantification of efficiencies.[129]

118. The substance of Mr. Harington's analysis in his report belies the suggestion that he is acting as a mere "conduit" for SECURE, as the Commissioner suggests. Mr. Harington also effectively addressed Dr. Eastman's critiques of his methodology in cross-examination and made clear why he was comfortable using the information and data he did in his analysis.[130] The veracity of that information and data was unchallenged during Mr. Engel's cross-examination.

119. SECURE has no ability to recover these losses in damages from the Commissioner if the Section 92 Application is dismissed (as SECURE contends it should be). Both the Tribunal and the Federal Court of Appeal have recognized that a party's inability to claim damages from the Commissioner, in the event the party is successful, contributes to the irreparable nature of financial harm.[131]

120. Notably, the Commissioner has not given an undertaking to compensate SECURE for these losses if the Section 92 Application is dismissed. Such a damages undertaking is usually a pre-condition for a party seeking injunctive relief.[132] Even assuming without conceding that the Commissioner cannot be required to give such an undertaking, the absence of an undertaking renders irreparable the harm SECURE will suffer if an injunction is granted. In *ICG*, Justice Linden described the absence of an undertaking as "significant" and militating in favour of the merging parties on the balance of convenience.[133]

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[128] Commissioner Memo of Argument, paras 11, 111-132, pp 6, 39-46.
[129] Mr. Harington's expertise on the quantification of efficiencies was accepted by the Tribunal in *CCS* at paras 260, 273, and 275, and by the Commissioner in proffering the Bureau's evidence in *CCS* and *Commissioner of Competition v. Parrish & Heimbecker, Limited*, CT-2019-005.
[130] Transcript of the Cross Examination of Andrew Harington dated July 20, 2021, Supplementary Record, p 9, Q13; p 29-30, Q 82; p 32, Q 87; p 33-34, Q 94; p 35-36, Q 98; p 37-38, Q 104; p 39-40, Q113; p 42-44, Q 121; p 47-48, Q 128; p 48, Q 129; p 63, Q 195; p 66-67, Q 206; p 70-71, Q 223; p 75-76, Q 244; p 80-81, Q 264; p 83-84, Q 274; p 87-88, Q 285; p 90, Q 294; and p 93-94, Q 316.
[131] *Tervita II* at para 15; *Canadian Waste Services Holdings Inc. v Canada (Commissioner of Competition)*, 2004 FCA 273 at para 18, Respondent's BOA, Tab 17; *Nadeau Poultry Farm Limited v Groupe Westco Inc. et al.*, 2008 Comp Trib 16 at para 29, Respondent's BOA, Tab 22; Kobo at para 40.
[132] *Airport Limousine Drivers Assn. v Greater Toronto Airports Authority*, [2005] OJ No. 3509 at para 85, Respondent's BOA, Tab 1.
[133] *ICG* at para 17.

121. The Commissioner has acknowledged the important role of efficiencies and has allowed transactions to close even where he has concluded that they would result in anti-competitive effects, because such effects would be outweighed and offset by the efficiencies.[134] The primacy of efficiencies under the Act has been repeatedly affirmed by the Tribunal, the Federal Court of Appeal, and the Supreme Court of Canada.[135] Despite this, the Commissioner has refused in this case to engage with SECURE's efficiencies evidence. Ultimately, that refusal to address efficiencies is fatal on the balance of convenience test.

The public interest favours realization of efficiencies

122. Finally, the Commissioner argues that the balance of convenience favours the granting of an order because he is carrying out his responsibility to protect the public interest, specifically with respect to preventing harm to consumers. This submission ignores that this public interest must be balanced against the public interest in realizing the efficiencies, cognizable under section 96 of the Act, that will result from the Transaction. This is clear from section 1.1 of the Act and the authorities noted above.

123. The Tribunal must consider and balance all aspects of the public interest, not merely those the Commissioner chooses to focus on. As noted by the Federal Court of Appeal:

> …Like other regulatory administrative tribunals, the Tribunal is charged with the responsibility of protecting the public interest, which it does by striking a balance among conflicting interests and objectives in a manner that respects the text and purposes of the legislation, is informed both by technical expertise and by the

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[134] The Competition Bureau has cleared multiple transactions on the basis of the efficiencies defence: See Competition Bureau of Canada, *Competition Bureau statement regarding Superior's proposed acquisition of Canexus*, June 28, 2016, online: <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04111.html>, Respondent's BOA, Tab 43; Competition Bureau of Canada, *Acquisition of Canexus by Chemtrade will not be challenged*, 2017, online: <https://www.canada.ca/en/competition-bureau/news/2017/03/acquisition_of_canexusbychemtradewillnotbechallenged.html>, Respondent's BOA, Tab 40; Competition Bureau of Canada, *Competition Bureau statement regarding Superior Plus LP's proposed acquisition of Canwest Propane from Gibson Energy ULC*, 2017, online: <https://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04307.html>, Respondent's BOA, Tab 42; Competition Bureau of Canada, *Competition Bureau statement regarding Canadian National Railways Company's proposed acquisition of H&R Transport Limited*, online: < https://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04527.html>, Respondent's BOA, Tab 41.

[135] *Superior Propane I* at paras 412-413; *Superior Propane III* at para 80; *Canada (Commissioner of Competition) v Superior Propane Inc.*, 2001 FCA 104 at para 90 [*Superior Propane II*], Respondent's BOA, Tab 12; *Tervita* at paras 85, 110-111.

> judgment that comes from its members' varied experiences, and is responsive to the particularities of the case. [136]

124. The balance of convenience does not inexorably favour the Commissioner simply because he is carrying out his mandate under the Act. If this were so, the third stage of the *RJR-MacDonald* test would be gutted of any meaning. Rather, all aspects of public interest must be taken into consideration, and paramount under the merger provisions of the Act is the promotion of the efficiency of the Canadian economy.[137] Here, the efficiencies that will be lost if an interim order is granted represent harm not only to SECURE, but to the Canadian economy as a whole. When those efficiencies are properly considered, the public interest clearly militates against granting a mandatory injunction.

Conclusion on the balance of convenience

125. In summary, the uncontradicted evidence on this application is that SECURE will suffer significant irreparable harm [redacted] if an interim order is issued. Conversely, the Commissioner has not made out any irreparable harm to the Canadian economy and has ignored the efficiencies that will be generated by continued integration of the former Tervita business. The balance of convenience therefore favours SECURE.

The Tribunal should not grant interim relief

126. As set out above, the Commissioner has not satisfied any of the elements of the *RJR-MacDonald* test. The Section 104 Application therefore must fail. Contrary to the Commissioner's submissions, there is no reason for the Tribunal to exercise any residual discretion to grant an interim order.

127. In this case, it would not be just and equitable for the Tribunal to award interim relief, having regard to the way the Commissioner has conducted this litigation. If the Commissioner had a *bona fide* belief that the Transaction would cause irreparable harm to competition, it was incumbent on him to take timely steps to prevent closing. Instead, he waited until the last minute

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[136] *Superior Propane II* at para 98.
[137] *Superior Propane I* at paras 412-413; *Superior Propane II* at para 90; *Superior Propane III* at para 68, 80 and 215; *Tervita* at para 85.

to seek "interim interim" relief that this Tribunal correctly concluded it had no jurisdiction to grant.[138]

128. Following an "emergency" hearing the Commissioner forced on the parties in the middle of the night on Canada Day, the Federal Court of Appeal found that this delay suggested that the harm alleged was not significant enough to prevail under the balance of convenience. In the circumstances, this application is effectively a collateral attack on Justice Stratas's order that should not be countenanced by this Tribunal.

129. The Commissioner is not acting here as the even hand of the guardian of the public interest. His approach has been nothing short of an emotional, tactical, and unmeasured exercise of the powers of the Crown to interfere with the legitimate actions of private parties. At every turn, the Commissioner has acted with an eye to catching SECURE off guard, to pressure it not to exercise its legal rights and protect its economic interests, and to punish it for doing so despite that pressure.

130. To grant equitable relief in these circumstances would reward the Commissioner for pursuing a litigation strategy that is incompatible with his public interest mandate to protect the efficiency and adaptability of the Canadian economy, and which undermines the principles of predictability and fairness in merger reviews. SECURE respectfully urges the Tribunal not to set this precedent.

PART V: ORDER SOUGHT

131. Considering the above, the Commissioner has failed to meet his burden under section 104 of the Act and therefore no interim order should be made. SECURE asks that the Tribunal dismiss the Commissioner's Section 104 Application, with costs.

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[138] As recognized by the Ontario Superior Court of Justice in *Cleveland*, "delay alone can disentitle an applicant from an injunction", para 69 (footnote 4). See also *Sharpe*, at paras 1.820-1.830 "A plaintiff, once entitled to an injunction or specific performance may lose that right on account of delay in asserting the claim…Consideration of delay is an aspect of the more general principle which takes into account the injustice of awarding relief against a party who will be prejudiced on account of a change of position related to acts or omissions of the party seeking relief."

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 28th day of July, 2021.

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SCHEDULE A: JURISPRUDENCE

1. *Airport Limousine Drivers Assn. v Greater Toronto Airports Authority,* [2005] OJ No. 3509
2. *Anderson v Evans,* 2005 NSSC 50
3. *Arctic Cat, Inc. v Bombardier Recreational Products Inc.,* 2020 FCA 116
4. *Canada (Attorney General) v Oshkosh Defense Canada Inc.,* 2018 FCA 102
5. *Canada (Commissioner of Competition) v CCS Corp.,* 2012 Comp. Trib. 14
6. *Canada (Commissioner of Competition) v Labatt Brewing Co.,* 2007 Comp Trib 9
7. *Canada (Commissioner of Competition) v Parkland Industries Ltd.,* 2015 Comp. Trib. 4
8. *Canada (Commissioner of Competition) v Secure Energy Services Inc. and Tervita Corporation,* 2021 Comp. Trib. 4
9. *Canada (Commissioner of Competition) v Secure Energy Services Inc. and Tervita Corporation,* Docket A-185-21, Order (Federal Court of Appeal)
10. *Canada (Competition Act, Director of Investigation & Research) v Superior Propane Inc.,* 2000 Comp. Trib. 15
11. *Canada (Commissioner of Competition) v Superior Propane Inc,* [2001] 3 FC 175
12. *Canada (Commissioner of Competition) v Superior Propane Inc.,* 2001 FCA 104
13. *Canada (Commissioner of Competition) v Superior Propane Inc.,* 2002 Comp. Trib. 16
14. *Canada (Commissioner of Competition) v Superior Propane Inc.,* 2003 FCA 53
15. *Canada (Director of Investigation & Research) v Southam Inc.,* [1997] 1 SCR 748
16. *Canada (Director of Investigation & Research) v Southam Inc.,* 36 CPR (3d) 22 (Comp Trib)
17. *Canadian Waste Services Holdings Inc. v Canada (Commissioner of Competition),* 2004 FCA 273
18. *Cardinal v Cleveland Indians Baseball Company Limited Partnership,* 2016 ONSC 6929
19. *Glaxosmithkline Biologicals SA v Canada (Minister of Health),* 2020 FCA 135
20. *Google Inc. v Equustek Solutions Inc.,* 2017 SCC 34
21. *Kobo Inc. v The Commissioner of Competition,* 2014 Comp Trib 2

22. *Nadeau Poultry Farm Limited v Groupe Westco Inc. et al.*, 2008 Comp Trib 16
23. *Polypore Int'l, Inc. v Federal Trade Commission*, 686 F.3d 1208
24. *Pusateri's Yorkville Limited v City of Toronto*, 2013 ONSC 6860
25. *R v Canadian Broadcasting Corp.*, 2018 SCC 5
26. *R. v D(D)*, 2000 SCC 43
27. *R v Lavallee*, [1990] 1 SCR 852
28. *R v Lyttle*, 2004 SCC 5
29. *RJR-MacDonald Inc. v Canada (Attorney General)*, [1994] 1 SCR 311
30. *TCT Canada Logistics Inc. v Nordeen*, 1999 BCCA 597
31. *Tervita Corp. v Canada (Commissioner of Competition)*, 2015 SCC 3
32. *Tervita Corp. v Canada (Commissioner of Competition)*, 2012 FCA 223
33. *United States v Bazaarvoice, Inc.*, Case No 13-cv-00133-WHO (N D, Cal, 2014)
34. *United States v. Election Sys. & Software*, 722 F. Supp. 2d 117

SCHEDULE B: DOMESTIC AND FOREIGN LEGISLATION

35. *Competition Act*, RSC 1985, c C-34, ss 1.1, 92(2), 97

36. *Federal Courts Act*, RSC 1985, c F-7

37. *Federal Courts Rules*, SOR 98-106

38. *Restrictive Trade Practices Law*, 5748-1988, Chapter III, s.17 (Israel)

SCHEDULE C: SECONDARY SOURCES

39. Competition Bureau, Information Bulletin on Merger Remedies in Canada (September 22, 2006)
40. Competition Bureau, “Acquisition of Canexus by Chemtrade will not be challenged” (March 8, 2017)
41. Competition Bureau, “Competition Bureau statement regarding Canadian National Railways Company’s proposed acquisition of H&R Transport Limited” (September 18, 2017)
42. Competition Bureau, “Competition Bureau statement regarding Superior Plus LP’s proposed acquisition of Canwest Propane from Gibson Energy ULC” (September 28, 2017)
43. Competition Bureau, “Competition Bureau statement regarding Superior's proposed acquisition of Canexus” (June 28, 2016)
44. Robert J. Sharpe, *Injunctions and Specific Performance* (Thompson Reuters, 2020)