Competition Tribunal | Tribunal de la concurrence

PUBLIC VERSION

Citation: *Canada (Commissioner of Competition) v Secure Energy Services Inc*, 2021 Comp Trib 7
File No.: CT-2021-002
Registry Document No.:53

IN THE MATTER OF an application by the Commissioner of Competition under section 104 of the *Competition Act*, RSC 1985, c C-34 for an interim order pending the hearing of an application for permanent relief under section 92 of the *Competition Act* ;

BETWEEN:

Commissioner of Competition
(applicant)

and

SECURE Energy Services Inc.
(respondent)

Date of hearing: August 4, 2021
Before: Chief Justice Paul Crampton
Date of reasons and order: August 16, 2021

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

I. INTRODUCTION

[1] This application concerns a request by the Commissioner of Competition (the **"Commissioner"**) for interim relief pursuant to section 104 of the *Competition Act*, RSC 1985, c C-34 (the **"Act"**). Given that it is only the second fully contested proceeding concerning a merger under that provision,[1] it raises important issues with respect to each of the three parts of the tripartite test for an injunction that have not previously been addressed in this context.

[2] When this application (the "**Section 104 Application**") was initially filed, the Commissioner sought an interim Order directing the Respondents at that time, SECURE Energy Services Inc. (**"Secure"**) and Tervita Corporation (**"Tervita"**) not to proceed with their proposed merger transaction until the final disposition of a second application, filed contemporaneously by the Commissioner. That second application, made under section 92 of the Act (the **"Section 92 Application"**), sought an Order to permanently prohibit the completion of the transaction, as well as certain ancillary relief. In the alternative, the Commissioner sought an Order requiring Secure not to proceed with the acquisition of such assets as would be required for an effective remedy.

[3] However, for reasons explained below, Secure and Tervita (the **"Merging Parties"**) completed their transaction (the "**Merger**") shortly after 12:00 a.m. MT on July 2, 2021. As a result, the Commissioner verbally amended the relief sought in the Section 104 Application during the hearing of that application. The relief now being sought is an Order requiring certain identified facilities formerly owned by Tervita to be "held separately and operated independently" from Secure: Transcript of the hearing of *Canada (Commissioner of Competition) v Secure Energy Services Inc and Tervita Corporation* dated August 4, 2021, p 25.

[4] For the reasons that follow, this application will be dismissed.

II. THE PARTIES

[5] The Commissioner is appointed under section 7 of the Act and is responsible for the enforcement and administration of the Act.

[6] Secure is a publicly traded company headquartered in Calgary, Alberta and listed on the Toronto Stock Exchange. According to the Commissioner, Secure owns and operates 18 treatment recovery and disposal facilities ("**TRDs**"), 6 industrial landfills, and 15 standalone water disposal wells in the Western Canadian Sedimentary Basin (**"WCSB"**) that provide certain waste services. Secure also offers a wide range of environmental services associated with oil and gas drilling, including the sale of drilling fluids, production chemicals, and water services. Additional services it provides include the demolition, decommissioning, remediation and reclamation of oil and gas wells.

[7] Tervita, which no longer exists, was a publicly traded company based in Calgary, Alberta. Its common shares were listed on the Toronto Stock Exchange. According to the

[1] The first was *The Commissioner of Competition v Parkland Industries Ltd*, 2015 Comp Trib 4 ("**Parkland**").

Commissioner, Tervita owned and operated 44 TRDs, 22 industrial landfills, 3 cavern disposal facilities, and 8 standalone water disposal wells in the WCSB. As with Secure, Tervita offered a range of environmental services including the demolition, decommissioning, remediation, and reclamation of oil and gas wells.

III. THE MERGER

[8] In the Section 104 Application, the Commissioner described the Merger as an Arrangement Agreement, dated March 8, 2021, pursuant to which, among other things:

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

IV. BACKGROUND

A. Procedural History

[9] On March 12, 2021, the Merging Parties submitted a pre-merger notification filing pursuant to subsection 114(1) of the Act, together with a request for an advance ruling certificate under section 102 of the Act.

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

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

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

[13] On May 31, 2021, the Merging Parties certified the responses to their respective SIRs, after providing the Bureau with approximately 396,000 documents. Consequently, they would have been in a position to legally close the Merger 30 days later, absent the issuance of an interim order by the Tribunal or an undertaking to postpone that transaction.

[14] On June 25, 2021, counsel confirmed in writing to the Commissioner that, before closing their proposed transaction, the Merging Parties would provide 72 hours notice of their intention to do so.

[15] At 11:15 p.m. on June 28, 2021, such notice was provided. This meant that the Merging Parties were free to close their transaction at 11:15 p.m. on July 1, 2021, absent an order from the Tribunal.

[16] On June 29, 2021, the Commissioner filed the Section 104 Application as well as the Section 92 Application.

[17] Later that day, and after failing to obtain an agreement from the Merging Parties not to close their proposed transaction "before the Tribunal reaches a decision on the section 104 application", the Commissioner requested an "emergency case conference." The purpose of that case conference was to obtain an order to prevent the Merger from closing before the Section 104 Application could be heard and determined.

[18] After hearing the Merging Parties' representations on the afternoon of June 30, 2021, I issued a decision the following evening. In brief, I rejected the "interim interim" relief sought by the Commissioner on the ground that the Tribunal does not have the jurisdiction to issue such relief: *Canada (Commissioner of Competition) v Secure Energy Services Inc and Tervita Corporation*, 2021 Comp Trib 4 ("***Secure Energy 1***").

[19] A few hours later, and minutes before the time at which the parties planned to close the Merger (12:01 a.m. MT on July 2, 2021), the Federal Court of Appeal dismissed an application by the Commissioner for an "interim interim" order preventing the completion of the Merger until an appeal of the decision I issued earlier that evening could be heard: *Canada (Commissioner of Competition) v Secure Energy Services Inc and Tervita Corporation* (July 2, 2021), *Federal Court of Appeal Docket A-185-21*.

[20] The Merger then effectively closed within minutes, at the previously scheduled time of 12:01 a.m. MT, July 2, 2021. Secure has since started to implement a [redacted] integration plan, "with most integration being completed by [redacted] post-closing."

B. Summary of the Commissioner's Allegations

[21] The Commissioner describes the Merging Parties as having been vigorous competitors in the provision of oil and gas waste services (**"Waste Services"**) in the WCSB. In the Section 92 Application, he alleges that:

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

[22] More specifically, the Commissioner alleges that competition is likely to be substantially lessened in a large number of local geographic markets for (i) the supply of waste processing and treatment services by TRDs; (ii) the disposal of solid oil and gas waste into industrial landfills;

and (iii) the disposal of produced water and wastewater into water disposal wells owned by third-party waste service providers.

[23] In this regard, the Commissioner places particular emphasis on two sets of oil and gas customers that he alleges are most affected by the Merger, namely: (1) oil and gas customers whose location is such that the Merger effectively results in a merger to monopoly; and (2) oil and gas customers whose location is such that the Merger will reduce their competitive options from 3 to 2.

[24] The Commissioner identifies approximately 7,700 customers who allegedly fall into the former category and over 30,000 who fall into the latter category.[2]

[25] The Commissioner also asserts that the Merger is likely to lead to higher prices and degraded services for certain additional services, described as "environmental services." He states that this is likely to result from the elimination of competition between Secure and Tervita and their ability to foreclose rivals by bundling Waste Services with environmental services. In addition, he maintains that the Merger is likely to substantially prevent competition in North Eastern British Columbia (**"NEBC"**), where Secure has been planning to open an industrial landfill in Wonowon, British Columbia. The Commissioner states that, but for the Merger, Secure's landfill in Wonowon would have competed with two of Tervita's landfills for Waste Services. As a result of such new competition, customers in NEBC would likely have benefited from decreased prices and increased quality of service.

[26] Now that the Merger has been completed, and Tervita no longer exists as a separate entity, the Commissioner maintains that irreparable harm to the competitive process and to purchasers of the services described above has begun to occur.

C. Summary of Secure's Response

[27] Secure maintains that the Merger will allow it to achieve greater financial stability and scale in order to remain viable and meet increasingly demanding customer needs in the struggling oil and gas industry.

[28] Contrary to the Commissioner's allegations, Secure asserts that it continues to face significant effective competition from remaining third-party waste disposal companies. It adds that the majority of its customers are large, sophisticated oil and gas companies that have significant countervailing buyer power and the ability to self-supply the relevant services. Furthermore, it states that there are no meaningful barriers to expansion in the relevant markets and that the Merger raises no particular foreclosure concerns with respect to environmental services.

---

[2] These figures represent the sum of Secure and Tervita customers identified in Exhibit 25 (merger to monopoly), Exhibit 29 (reduction of three to two competitors for TRD facilities), and Exhibit 30 (reduction from three to two for landfill and water disposal facilities) of Dr. Nathan Miller's Report dated June 29, 2021. These numbers represent the sum of the total number of customers who bring waste to each of the parties' allegedly overlapping facilities. Given that some customers may have multiple oil-well locations, and therefore may bring waste to different facilities of Secure and/or Tervita, they may be counted multiple times in these summed figures.

[29] Secure also maintains that the Merger will generate "run rate" efficiencies of at least [tens of millions of dollars] annually, or [hundreds of millions of dollars] on a discounted basis over 10 years.

V. RELEVANT LEGISLATION

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

Interim Order	**Ordonnance provisoire**
104 (1) If an application has been made for an order under this Part, other than an interim order under section 100 or 103.3, the Tribunal, on application by the Commissioner …, may issue any interim order that it considers appropriate, having regard to the principles ordinarily considered by superior courts when granting interlocutory or injunctive relief.	**104 (1)** Lorsqu'une demande d'ordonnance a été faite en application de la présente partie, sauf en ce qui concerne les ordonnances provisoires en vertu des articles 100 ou 103.3, le Tribunal peut, à la demande du commissaire …, rendre toute ordonnance provisoire qu'il considère justifiée conformément aux principes normalement pris en considération par les cours supérieures en matières interlocutoires et d'injonction.
Terms of Interim Order	**Conditions des ordonnances provisoires**
(2) An interim order issued under subsection (1) shall be on such terms, and shall have effect for such period of time, as the Tribunal considers necessary and sufficient to meet the circumstances of the case.	(2) Une ordonnance provisoire rendue aux termes du paragraphe (1) contient les conditions et a effet pour la durée que le Tribunal estime nécessaires et suffisantes pour parer aux circonstances de l'affaire.
Duty of Commissioner	**Obligation du commissaire**
(3) Where an interim order issued under subsection (1) on application by the Commissioner is in effect, the Commissioner shall proceed as expeditiously as possible to complete proceedings under	(3) Si une ordonnance provisoire est rendue en vertu du paragraphe (1) à la suite d'une demande du commissaire et est en vigueur, le commissaire est tenu d'agir dans les meilleurs délais

this Part arising out of the conduct in respect of which the order was issued.	possible pour terminer les procédures qui, sous le régime de la présente partie, découlent du comportement qui fait l'objet de l'ordonnance.

[31] A second type of interim order that may be issued in respect of a proposed transaction is provided for in section 100 of the Act. The nature of the order that may be made under this section, and the test that must be satisfied, are set forth in subsection 100(1), which states:

Interim order where no application under section 92	**Ordonnance provisoire en l'absence d'une demande en vertu de l'article 92**
100 (1) The Tribunal may issue an interim order forbidding any person named in the application from doing any act or thing that it appears to the Tribunal may constitute or be directed toward the completion or implementation of a proposed merger in respect of which an application has not been made under section 92 or previously under this section, where	100 (1) Le Tribunal peut rendre une ordonnance provisoire interdisant à toute personne nommée dans la demande de poser tout geste qui, de l'avis du Tribunal, pourrait constituer la réalisation ou la mise en œuvre du fusionnement proposé, ou y tendre, relativement auquel il n'y a pas eu de demande aux termes de l'article 92 ou antérieurement aux termes du présent article, si :
(a) on application by the Commissioner, certifying that an inquiry is being made under paragraph 10(1)(b) and that, in the Commissioner's opinion, more time is required to complete the inquiry, the Tribunal finds that in the absence of an interim order a party to the proposed merger or any other person is likely to take an action that would substantially impair the ability of the Tribunal to remedy the effect of the proposed merger	a) à la demande du commissaire comportant une attestation de la tenue de l'enquête prévue à l'alinéa 10(1)b) et de la nécessité, selon celui-ci, d'un délai supplémentaire pour l'achever, il conclut qu'une personne, partie ou non au fusionnement proposé, posera vraisemblablement, en l'absence d'une ordonnance provisoire, des gestes qui, parce qu'ils seraient alors difficiles à contrer, auraient

on competition under that section because that action would be difficult to reverse; or	pour effet de réduire sensiblement l'aptitude du Tribunal à remédier à l'influence du fusionnement proposé sur la concurrence, si celui-ci devait éventuellement appliquer cet article à l'égard de ce fusionnement;
(b) the Tribunal finds, on application by the Commissioner, that there has been a contravention of section 114 in respect of the proposed merger.	b) à la demande du commissaire, il conclut qu'il y a eu contravention de l'article 114 à l'égard du fusionnement proposé

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

[33] Section 1.1 describes the purpose of the Act as follows:

Purpose of Act	**Objet**
1.1 The purpose of this Act is to maintain and encourage competition in Canada in order to promote the efficiency and adaptability of the Canadian economy, in order to expand opportunities for Canadian participation in world markets while at the same time recognizing the role of foreign competition in Canada, in order to ensure that small and medium-sized enterprises have an equitable opportunity to participate in the Canadian economy and in order to provide consumers with competitive prices and product choices.	1.1 La présente loi a pour objet de préserver et de favoriser la concurrence au Canada dans le but de stimuler l'adaptabilité et l'efficience de l'économie canadienne, d'améliorer les chances de participation canadienne aux marchés mondiaux tout en tenant simultanément compte du rôle de la concurrence étrangère au Canada, d'assurer à la petite et à la moyenne entreprise une chance honnête de participer à l'économie canadienne, de même que dans le but d'assurer aux consommateurs des prix compétitifs et un choix dans les produits.

VI. ISSUES

[34] For the present purposes, there are two broad issues raised in this application. They are as follows:

1. Has the Commissioner satisfied the test to obtain the requested injunctive relief?

2. If so, should such relief be granted?

VII. ANALYSIS

A. Has the Commissioner satisfied the test to obtain the requested injunctive relief?

(1) The applicable test

[35] The Commissioner maintains that the test to be applied by the Tribunal in this proceeding is the classic three-part test applicable to requests for injunctive relief. That test requires the Tribunal to be satisfied that (i) there is a serious issue to be tried; (ii) the applicant would suffer irreparable harm if the application were refused; and (iii) the balance of convenience favours the applicant: *RJR-MacDonald Inc v AG Canada*, [1994] 1 SCR 311 at 334 ("***RJR***"); *Parkland* at para 26.

[36] Even if the Tribunal finds all three parts of the test to be satisfied, it is not compelled to issue an order. Subsection 104(1) of the Act states that the Tribunal "may" issue any interim order that it considers appropriate, having regard to the principles ordinarily considered by superior courts when granting interlocutory or injunctive relief. Accordingly, even where the tripartite test is satisfied, the Tribunal will typically proceed to consider whether to exercise its discretion to grant the relief sought: see e.g. *Parkland* at 113 *et seq*.

[37] Secure submits that the appropriate test to be applied in this proceeding is the more stringent one applicable to applications for mandatory relief. Specifically, Secure states that now that the Merger has closed and certain steps have been taken to integrate its business with the former business of Tervita, the relief sought by the Commissioner would require various positive steps that are mandatory in nature. As a consequence, it maintains that the Commissioner must demonstrate a "strong *prima facie* case," rather than simply a "serious issue to be tried": *R v Canadian Broadcasting Corp*, 2018 SCC 5 at para 15 ("***CBC***").

[38] I agree that this test would ordinarily apply to situations where the Commissioner seeks relief under s. 104 that is largely mandatory in nature. However, in the very particular circumstances of this case, I do not consider that this test is the appropriate one to apply.

[39] To demonstrate a strong *prima facie* case, the Commissioner must demonstrate a strong likelihood of success at trial: *CBC* at para 17. In this case, this means a strong likelihood of prevailing with respect to the two overarching issues in the underlying proceeding, namely: (i) his allegation that the Merger is likely to prevent or lessen competition substantially, and (ii) Secure's defence under section 96 of the Act.

[40] The Commissioner's failure to address the section 96 defence in his Section 104 Application would make it impossible for the Tribunal to conclude, based on the evidentiary record as it stands, that he has a strong likelihood of prevailing with respect to that defence. Among other things, overcoming that defence will require the Commissioner to prove the extent of the anti-competitive effects that he alleges are likely to result from the Merger: *Tervita Corp v Canada (Commissioner of Competition)*, 2015 SCC 3 at paras 122-126, 128, and 136 ("***Tervita***"). In turn, this will require the Commissioner to provide evidence regarding price-elasticities of demand and estimates of the deadweight loss that will likely result from the Merger: *Tervita* at paras 132, 134 and 139. Since no such evidence was provided in the Section 104 Application, I am unable to conclude that the Commissioner "is very likely to succeed at trial": *CBC* at para 17.

[41] The Commissioner maintains that he should not have been expected to provide this type of evidence on the Section 104 Application because Secure has not yet provided its Response to the Section 92 Application. Therefore, Secure has not yet invoked the efficiencies defence contemplated by section 96 and he has no obligation to provide evidence regarding the extent of the anti-competitive effects he alleges are likely to result from the Merger: *Tervita* at para 166. I disagree.

[42] The Commissioner has been on notice since March 12, 2021, when Secure made its request for an advance ruling certificate, that Secure intends to take the position that the Merger will generate substantial efficiencies. At the very latest, the Commissioner was made aware of Secure's intention to rely on section 96 on June 3, 2021, when it informed the Commissioner in writing that the efficiencies generated by the merger would be significant, likely and cognizable under Section 96. In Mr. Harington's Report of that same date, which was enclosed with Secure's letter, numerous references to section 96 were made. Secure also explicitly invoked section 96 in a letter to the Commissioner dated June 25, 2021.

[43] Notwithstanding the foregoing, I consider that it would not be in the interests of justice to permit Secure to benefit from the more stringent "strong *prima facie* case" test in the particular circumstances of this case.

[44] I recognize that the Commissioner could have ensured that he would obtain the benefit of the less stringent "serious issue to be tried" test by filing the Section 104 Application sooner. As an alternative, he could also have filed an application under section 100 to obtain additional time to complete his inquiry and simultaneously prepare an application under section 104. Among other things, this would have given him time to prepare at least a rough estimate of a plausible range of anti-competitive effects. Although the Commissioner was still in ongoing discussions with the parties in the week leading up to the filing of the Section 104 Application, it would have been prudent for him to have better protected his position before he ultimately filed that application on June 29, 2021.

[45] I also acknowledge that Secure had a legal right to close its transaction after defeating the Commissioner's attempts to obtain an "interim interim" application from the Tribunal and then from the Federal Court of Appeal. In addition, I recognize that Secure appears to have underscored to the Commissioner, on multiple occasions over the course of his review of the Merger, that time is of the essence to close the Merger.

[46] However, by racing ahead to close "in the face of" the Section 104 Application and within minutes of defeating the Commissioner's request for an "interim interim" injunction before the Federal Court of Appeal, Secure deliberately acted in a high-handed manner, without regard to the Commissioner's interests or indeed the public interest. In so doing, it effectively "stole a march" on the Commissioner: *Redland Bricks Ltd v Morris*, [1970] AC 652 at 666 (HL); *Burnside Industrial Packaging Ltd, Re*, 1994 CarswellNS 376 at para 31 (NSSC); *International Steel Services Inc v Dynatec Madagasgar SA*, 2016 ONSC 2810 at paras 58 and 65; *Ruskin v Canada All-News Radio Ltd*, 1979 CarswellOnt 158 at para 5 (Ont HCJ); *Clerke v Fougère*, 2002 CarswellNB 488 at para 21 (QB); *Kraft Jacobs Suchard (Schweiz) AG v Hagemeyer Canada Inc*, 1998 CanLII 147804 at para 62 (OCJ); Robert Sharpe, *Injunctions and Specific Performance*, Looseleaf Edition (Toronto: Carswell, 2018), at 1.600 ("***Sharpe***"). See also *1338121 Ontario Inc v FDV Inc*, 2011 ONSC 3816 at para 49.

[47] Although Secure's conduct cannot be characterized as having been wrongful, it would not in these circumstances be in the interests of justice to permit Secure to avail itself of the more stringent "strong *prima facie* case" test. Doing so would completely frustrate the Commissioner's efforts to preserve the *status quo* and prevent harm to the public pending a full hearing on his Section 92 Application.

[48] I recognize that such conduct is often taken into account as an equitable consideration at a later stage of the three-part test applicable to applications for an injunction. However, I consider that it can also be considered at the first stage where a failure to do so will effectively determine the application before a consideration of irreparable harm and the balance of convenience can be undertaken.

[49] In my view, this is entirely consistent with (i) the need to apply a flexible approach in considering such applications; (ii) the principle that the ultimate focus of the assessment must be upon whether granting the injunction would be "just and equitable in all of the circumstances of the case"; and (iii) the general recognition that the three parts of the RJR test are not watertight compartments: *Google Inc v Equustek Solutions Inc*, 2017 SCC 34 at paras 1, 23, and 25 ("***Google***"); *Vancouver Aquarium Marine Science Centre v Charbonneau*, 2017 BCCA 395 at para 38; *Sharpe* at 2.600.

[50] Just as persons in other contexts are prevented from claiming damages that could have been avoided by taking reasonable steps after a cause of action has arisen (see e.g., *Red Dear College v Michaels*, [1976] 2 SCR 324), Secure should not be able to rely on its deliberate and high-handed conduct to gain the benefit of the "strong *prima facie* case" test.

[51] The principal foundations for that test are (i) requiring the situation to be "put … back to what it should be", is often costly or burdensome for a defendant or respondent; (ii) such relief can usually be obtained at trial; and (iii) such relief can constitute the effective final determination of the action in favour of the plaintiff or applicant: *CBC* at para 15.

[52] In the current context, only the first of these foundations applies. This is because the relief being sought by the Commissioner (preventing interim irreparable harm to the competitive process and Secure's customers) cannot be obtained at trial and this relief would not constitute the effective final determination of the action in favour of the Commissioner.

[53] Where the costs required to be incurred to "put the situation back to what it should be" could have been avoided by maintaining the *status quo* until the application that had already been served and filed could be heard, it would not be appropriate or in the interests of justice to permit a respondent to effectively rely on those same costs to avail itself of a much more favourable legal test. This is especially so in the particular circumstances of this case, described above.

[54] Secure suggests that it should not face any adverse consequences as a result of exercising its legal right to close. In this regard, it relies on *The Commissioner of Competition v CCS Corporation et al*, 2012 Comp Trib 14 (**"CCS"**), which did not involve an application under section 104 of the Act. In considering the Commissioner's request for an order of dissolution under section 92 of the Act, the Tribunal held that vendors who had sold their shares after being warned by the Commissioner that she would seek dissolution were not estopped from raising issues of hardship in respect of that remedy. However, that type of situation, as well as situations in which parties close a proposed transaction before the completion of the Commissioner's review, and after having been cautioned that doing so would be "at their own risk," are distinguishable. This is because the filing of an application under section 104 of the Act serves to crystallize a legal dispute brought by a public authority to protect the public interest.

[55] In addition to the foregoing, I cannot ignore that, after assuring the Tribunal on June 30, 2021 that it would cooperate with the Commissioner in ensuring the Section 104 Application would be heard in a timely fashion (*Secure Energy 1* at para 62), Secure fought hard to have the hearing take place "on or after August 30th" or in any event "the last week of August": Transcript of the Case Management Conference of *Canada (Commissioner of Competition) v Secure Energy Services Inc and Tervita Corporation* dated July 6, 2021, at pp 6 – 11, 16 and 23**.** In the meantime, Secure was proceeding with integrating Tervita's business into its own, and increasing the costs that would be associated with restoring the situation that the Section 104 Application was intended to maintain.

[56] In my view, applications under section 104 should be heard within approximately one week of their filing in circumstances where merging parties appear to be intending to close a merger transaction immediately upon the expiry of the 30 waiting period set forth in paragraph 123(1)(b), or have not confirmed that they will wait until after the application is determined before doing so. Although this may seem somewhat short, any longer period may very well prevent the Commissioner from being able to assess responses provided to a supplementary information request issued pursuant to subsection 114(2), and then prepare the application under section 104, as he would have less than three weeks in which to do so.

[57] In summary, for the reasons set forth above, I consider that the test to be applied in assessing the present application is the classic test as set forth in *RJR* and articulated at paragraph 35 above. It is not the modified test articulated in *CBC*, which requires the applicant to establish a "strong *prima facie* case" at the first stage of the tripartite analysis.

[58] I agree with the Commissioner that to give Secure the benefit of the "strong *prima facie* case" test in circumstances such as those before the Tribunal in this application would incentivize others to do the same in the future and thereby make it much more difficult for the Commissioner to fulfill his statutory mandate.

[59] I will add in passing that I recognize that Secure was motivated, at least in part, by a desire to begin attaining certain efficiencies associated with integrating its operations with those of Tervita. However, this is something that is more appropriately considered at the third stage of the assessment of injunctive relief.

(2) Serious issue to be tried

[60] The threshold to determine whether there is a serious issue to be tried is a low one. In brief, the Tribunal must simply be satisfied that the issues raised are neither vexatious nor frivolous: *RJR* at 335.

[61] The evidence before the Tribunal amply demonstrates that this test is met for the overarching issue of whether the Merger is likely to prevent or lessen competition. This evidence is substantial and relates to many of the quantitative and qualitative considerations that are relevant in adjudicating this overarching issue.

[62] Among other things, the quantitative evidence indicates that there is a large number of locations at which the competitive choices available to Secure's customers may have been reduced from two to one, or from three to two, as a result of the Merger. Additionally, the merging parties' internal documents indicate that Secure and Tervita had very high market shares before the Merger and provide support for the Commissioner's position that they were each other's closest rivals in the relevant markets. With respect to qualitative factors, the parties have adduced considerable evidence that will require the Tribunal to make determinations concerning important and complex matters such as:

i. the product and geographic dimensions of the relevant markets;

ii. the effectiveness of remaining competition;

iii. the nature and extent of any barriers to entry into the relevant markets;

iv. the extent to which acceptable substitutes for the relevant products are likely to be available;

v. the extent to which the option of self supply is likely to constrain the exercise of market power by Secure; and

vi. the extent to which Secure's customers have countervailing power.

[63] Moreover, if Secure invokes the efficiencies defence under section 96 of the Act, as it has stated it intends to do, that will be a further serious issue to be tried. Among other things, this will require the Tribunal to assess the parties' respective positions concerning important matters such as:

i. the merged entity's own-price elasticity of demand;

ii. the deadweight loss that will likely result from the Merger;

iii. whether the various efficiencies identified by Secure are cognizable; and

iv. whether those efficiencies are likely to be greater than, and offset, any anti-competitive effects that the Tribunal finds are likely to result from the Merger.

[64] Having regard to the foregoing, there can be little doubt that the Commissioner has demonstrated that there is a serious issue to be tried.

(3) Irreparable harm

(a) General legal principles

[65] The term irreparable connotes the nature of the harm suffered, rather than the magnitude of that harm. "It is harm which either cannot be quantified in monetary terms or which cannot be cured, usually because one party cannot collect damages from the other": *RJR* at 341.

[66] Given that an application under section 104 of the Act is akin to a *quia timet* injunction, irreparable harm typically will not yet have occurred and may therefore be inferred on the basis of "clear and not speculative" evidence: *Parkland* at paras 50-53.

[67] This evidentiary requirement must meet the balance of probabilities standard that generally applies in civil cases. In brief:

> "… [T]o meet his burden in this section 104 application where the harm is apprehended, the Commissioner must establish, on a balance of probabilities, that there is clear and non-speculative evidence demonstrating how such harm will occur, so that the inferences can be found to reasonably and logically flow from the evidence."
>
> (*Parkland* at para 58)

[68] Although harm to third parties is typically assessed at the third stage of the tripartite test for an injunction, harm to the public interest is considered at both the second and third stages where a government authority is the applicant in a motion for injunctive relief: *RJR* at 349.

[69] Moreover, where the applicant is a public authority:

> "… [t]he test will nearly always be satisfied simply upon proof that the authority is charged with the duty of promoting or protecting the public interest and upon some indication that the impugned legislation, regulation, or activity was undertaken pursuant to that responsibility. Once these minimal requirements have been met, the court should in most cases assume that irreparable harm to the public interest would result from the restraint of that action."

(*RJR* at para 346)

(b) The Commissioner's position

[70] The Commissioner's submissions with respect to irreparable harm focus solely on the harm that he alleges is currently occurring and will continue to occur to competition and customers in the relevant markets pending the determination of the Section 92 Application, unless the relief that he has requested in the present application is granted. As in *Parkland*, the Commissioner explicitly has not alleged that, in the absence of injunctive relief, there will not be an effective remedy available to restore competition to the requisite level: *Parkland* at paras 16 and 22. Accordingly, he did not adduce any of the usual types of evidence that might be relevant in that regard, such as evidence concerning Secure's access to Tervita's pricing strategies or other competitively sensitive information, the loss of key employees, or the likelihood that any buyer of assets that may be ordered to be divested will not be able to restore competition to the requisite level.

[71] The Commissioner maintains that the Merger is currently causing irreparable harm to competition primarily because it has eliminated all rivalry in a large number of local areas and it has eliminated competition between the two principal rivals in many other areas where Secure and Tervita were each other's closest competitors, and only one other competitor now remains. As a result, the Commissioner alleges that it can be reasonably and logically inferred that customers now facing a "monopoly situation" will no longer be able to negotiate price discounts that were a common aspect of competition prior to the Merger. He adds that customers in many other geographic markets will obtain smaller discounts than they would have received in the absence of the Merger. In addition, he states that the benefits of non-price competition, including reduced wait times, service, innovation, and competition for new landfill sites have been eliminated or substantially lessened.

[72] Relying on *Parkland*, the Commissioner alleges that this harm to competition is irreparable because the Tribunal has no authority to award damages under the merger provisions of the Act if the Section 92 Application is successful: *Parkland* at para 48.

[73] In one example provided by the Commissioner, Tervita offered a customer a discount of [tens of thousands of dollars in relation to the disposal of many thousand MT of waste], to meet or slightly beat a rival offer from Secure.

[74] The Commissioner underscores that because the Merger has eliminated or substantially lessened competition between Secure and Tervita, the merged entity has the *ability* to charge prices that are higher than they would have been in the absence of the Merger. Likewise, he alleges that Secure now has the *ability* to reduce the non-price benefits of competition. The Commissioner adds that Secure's commitment not to raise prices ignores the fact that there is no one "price" at which transactions occur and it would be impossible to monitor or enforce this commitment across hundreds of customers and facilities. This is because of the prevalence of discounting in the relevant markets before the Merger. More fundamentally, the Commissioner underscores that a behavioural pricing "remedy" does not allow the competitive process to do its job.

(c) Secure's position

[75] Secure maintains that the interim effects on competition that are the focus of the Commissioner's submissions are not relevant as a matter of law in an application under section 104. This is for two reasons. First, section 104 requires the Tribunal to have regard to "the principles ordinarily considered by superior courts when granting interlocutory or injunctive relief." Secure insists that, at the second stage of the tripartite test for granting such relief, those principles require the Tribunal's assessment to focus exclusively on whether its ability to grant effective relief in the underlying Section 92 Application will be preserved. On this issue, Secure states that the unchallenged evidence on this application establishes that an Order under section 104 is not necessary to preserve the assets of Tervita (and indeed Secure) as an effective remedy. Consequently, 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). Second, Secure states that the scheme of the Act does not contemplate a concern with preventing interim price effects.

[76] In any event, Secure submits that even if the Tribunal is able to consider interim effects on competition at this stage of its analysis, no such effects will occur. This is because it has issued internal "Integration Guidance" to its management team stating that there are to be no price increases to customers. [redacted]

[77] Secure also states that it will have no incentive to increase prices and that this was acknowledged by Dr. Miller during cross-examination.

[78] Moreover, Secure asserts that interim price effects cannot constitute irreparable harm in the present context because the Commissioner conceded in another case involving this same industry that the alleged wealth transfer should be treated as neutral: *CCS* at para 284. As a result, the only potential type of irreparable harm, in this case, would be the deadweight loss to the Canadian economy, in respect of which the Commissioner failed to lead any evidence.

[79] Finally, Secure states that the Commissioner is not entitled to the benefit of the usual assumption that irreparable harm to the public interest will result if the relief he seeks, in his capacity as a public authority charged with the duty of promoting or protecting the public interest, is not granted: *RJR* at 346. This position is based on the fact that the Commissioner did not engage the aspect of his mandate that requires him to consider the efficiencies that Secure claims are likely to result from the Merger.

(d) Assessment

[80] I agree with the Commissioner that adverse interim price and non-price effects on customers can constitute irreparable harm for the purposes of an application under section 104. I also agree that the evidence he has adduced is clear and non-speculative evidence from which it can be reasonably and logically inferred, on a balance of probabilities, that such irreparable harm will occur. In reaching this conclusion, I have been mindful that the onus of demonstrating

irreparable harm to the public interest is less for a public authority such as the Commissioner than it is for a private applicant: *RJR* at 346. I do not accept Secure's position that the Commissioner is not entitled to the assumption described in the immediately preceding paragraph above simply because he did not engage with Secure's efficiency claims in the Section 104 Application. In my view, this is something that is more appropriately considered in the assessment of balance of convenience.

[81] In support of its position that interim effects on competition are not relevant as a matter of law in an application under section 104 of the Act, Secure relies on authorities stating that the purpose of injunctive relief is to ensure that the subject matter of litigation will be preserved so that effective relief will be available when the case is ultimately heard on the merits: see e.g., *Google* at para 24; and *Sharpe* at 2.550. However, this argument begs the question of what constitutes "effective relief".

[82] In the present application, the relief the Commissioner seeks is a remedy that would restore the competitive discipline on Secure that was provided by Tervita prior to the Merger, pending a determination of the Section 92 Application on its merits. The Commissioner maintains that this remedy is necessary to avoid the irreparable harm to competition that has already occurred and will continue to occur until that point in time. The Commissioner adds that this remedy is also necessary to avoid the consequent irreparable harm to customers in the relevant markets, in the form of net prices that are higher than they otherwise have been in the absence of the Merger, and non-price benefits of competition that will be less than what they otherwise have been.

[83] I agree with Justice Gascon that these harms are cognizable in an application under section 104 of the Act and constitute irreparable harm because the Tribunal has no authority to award damages under the merger provisions of the Act or to otherwise remedy any adverse interim price or non-price effects of a merger: *Parkland* at para 48.

[84] Secure's position that the scheme of the Act precludes a recognition of the alleged interim harms to competition and customers in the present application is based on its reading of sections 74.101, 92, 96 and 100 of the Act.

[85] Subsection 74.101(2) provides a court with the ability to order the payment of restitution up to a specified limit in certain circumstances, in connection with representations to the public that are false or misleading in a material respect. Secure suggests that it can be inferred from the absence of a similar remedial power in the merger provisions of the Act that Parliament decided that restitution should not be available in the merger context. However, with respect, this misses the point. It is readily apparent that Parliament decided not to make restitution available in the merger context. Yet, it cannot be inferred from this that Parliament did not intend the authority provided in section 104 to include an order to preserve competition and the associated price and non-price benefits that it generally produces.

[86] Turning to section 92, Secure notes that the post-closing remedies that it makes available are directed towards the restoration of competition to the point at which it can no longer be said to be lessened or prevented "substantially." It infers from this that the Act does not evince any

intention by Parliament to absolutely eliminate alleged anti-competitive effects that may occur between closing and disposition of a section 92 application.

[87] This is not the right question to ask. Rather, the question is whether the Act evinces an intention to prevent any material adverse price or non-price effects on customers of the merging parties. This question has been answered in the affirmative: see e.g. *Tervita* at paras 80-83.

[88] With respect to section 96, Secure submits that it reflects a view that any anti-competitive effects of a merger are tolerated if they are outweighed by efficiencies. Secure asserts that this militates against the Commissioner's position that section 104 confers upon the Tribunal the authority to address any temporary anti-competitive effects that may occur prior to a determination of an application under section 92.

[89] I disagree. The fact that section 96 may provide a defence where the respondent(s) in a section 92 application may be able to establish the requirements of that defence does not infer anything about what Parliament's intention may have been with respect to any interim anti-competitive effects that result, or are likely to result, from a merger prior to a determination of the respondent's defence on its merits.

[90] In my view, the better view of the scheme of the Act is rooted in a reading of section 104 together with sections 1.1, 92, 100 and 123.

[91] Section 1.1 sets forth the purposes of the Act. As reflected in the full text reproduced at paragraph 33 above, one of those purposes is "to maintain and encourage competition in Canada *in order to* … provide consumers with competitive prices and product choices" (emphasis added). The words "in order to" make it clear that competition is not an end in itself, but is desired to achieve other objectives, including providing consumers with competitive prices and product choices.

[92] In furtherance of that objective (and the other objectives set forth in section 1.1), section 92 provides the Tribunal with the ability to issue remedial orders in respect of both proposed and completed mergers. With respect to proposed mergers, sub-clause 92(1)(f)(iii)(A) provides the Tribunal with the authority to prohibit any person "from doing any act or thing the prohibition of which the Tribunal determines to be necessary to ensure that the merger or part thereof does not prevent or lessen competition substantially." As noted above, this contemplates prohibiting any merger that is likely to result in prices that are materially higher, or in non-price benefits of competition being materially lower, than they would likely be in the absence of the merger: *Tervita* at paras 80-83.

[93] To ensure that potentially anti-competitive mergers are reviewed *before* they are completed, section 123 imposes two waiting periods. The first is an initial 30 day waiting period after a pre-merger notification filing has been made. The second is as a further 30 day waiting period that begins to run the day after the Commissioner has received the responses to any SIR that has been issued pursuant to subsection 114(2).

[94] To further reinforce the objectives of the Act, including the objective of providing consumers with competitive prices and product choices, sections 100 and 104 provide the

Tribunal with the authority to issue injunctive relief before the completion of the Commissioner's inquiry and after the filing of an application under section 92, respectively.

[95] Secure asserts that section 100 is squarely focused on preserving the Tribunal's ability to issue a remedy. It states that this is clear from the requirement that the Tribunal find:

> "… that in the absence of an interim order a party to the proposed merger or any other person is likely to take an action that would substantially impair the ability of the Tribunal to remedy the effect of the proposed merger on competition under [section 92] because that action would be difficult to reverse."

[96] I am inclined to agree with Secure that section 100 does not appear to reflect a concern with the types of interim effects that are the focus of the present application. This is because the focus of that provision is upon *actions* that are taken that would be difficult to reverse. Examples of actions that can potentially fall into this category include completing a transaction, accessing strategic plans or other competitively sensitive information pertaining to the other merging party, terminating key employees and integrating the merging parties' businesses in a way that would be difficult to reverse. But increasing prices or reducing the level of service, quality, or other non-price benefits of competition do not appear to be contemplated by section 100. Instead, the section appears to focus on preserving the Tribunal's ability to remedy the effects of proposed mergers on competition by reversing *actions* that have such effects, rather than by preventing such effects from occurring at all.

[97] However, the fact that section 100 does not reflect a concern with the types of interim effects that are the focus of the present application is far from determinative. This is especially so in light of the language of section 1.1 (discussed above) and the fact that Parliament did not include language similar to that provision in section 104: *Parkland* at paras 34-35. Instead, Parliament gave the Tribunal a broader authority to "issue any interim order that it considers to be appropriate, having regard to the principles ordinarily considered by superior courts when granting interlocutory or injunctive relief." These principles include preventing irreparable harm as defined at paragraph 65 above, where the other two components of the tripartite test are satisfied.

[98] Interpreting section 104 in a manner that permits the Tribunal to prevent interim anti-competitive effects is consistent with the comprehensive scheme set forth in sections 1.1, 92, 100 and 123 of the Act. This interpretation is also consistent with giving the Act "such fair, large and liberal construction and interpretation as best ensures the attainment of its objects": *Interpretation Act*, RSC 1985, c I-21, s 12.

[99] Secure maintains that such an interpretation of section 104 is contrary to the interpretation adopted in *Canada (Commissioner of Competition) v Superior Propane Inc*, [2001] 3 FC 175 (FCA) ("***Superior Propane"***). I disagree.

[100] The passage of that decision relied upon by Secure is the following:

> [12] In his report [the Commissioner's expert] … 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". (See *RJR-MacDonald* at 341). 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. *In other 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.
>
> [13] 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. (Emphasis added.)

[101] This passage followed the Court's reference to the Commissioner's position regarding irreparable harm, which was that "once the eggs are scrambled, they cannot be unscrambled": *Superior Propane* at para 11. This passage, together with all but one of the italicized segments in the passage quoted immediately above, make it apparent that the Court was focused on the effectiveness of the ultimate remedy, and not on the types of interim effects being alleged by the Commissioner in the present application. Although the fully italicized sentence in paragraph 12 appears to address such interim effects, the Court never returned to them in the remainder of its decision. Instead, the focus of that decision remained on the effectiveness of a divestiture as a remedy after the Court's determination of the Commissioner's appeal on its merits. After focusing solely on the effectiveness of such a remedy in paragraphs 14 and 15, the Court concluded with the following sentence: "*Consequently*, the evidence, in my view, is overwhelming that the applicant has not been able to establish, as it must, that there will be irreparable harm suffered if the stay is not granted" (emphasis added): *Superior Propane* at para 16.

[102] I will now briefly turn to Secure's submission that there will be no irreparable harm because of the internal "Integration Guidance" that it has given to its management team to refrain from initiating any price increases [redacted]. In my view, this can hardly be relied upon as a reason to conclude that the irreparable harm to competition and to customers alleged by the Commissioner is unlikely to occur. To begin, the Commissioner has provided clear and non-speculative evidence that most transactions in the relevant markets prior to the Merger were conducted at discounts off the list or "gate" price. That evidence also demonstrates that such discounts were provided because customers were able to play Secure and Tervita off against one another. Accordingly, even if the list price is not increased, and even if

[redacted], there is clear and non-speculative evidence that further discounting activity will likely be eliminated in a large number of areas where it appears that Secure will face no remaining competition. The same is true in areas where Secure and Tervita were each other's closest competitors and the number of rivals has been reduced from three to two. This is because the degree of competitive discipline on Secure has been reduced or eliminated.

[103] More fundamentally, the Tribunal cannot rely on a merged entity to benevolently refrain from exercising any increased market power that results from a Merger. It is the *ability* to exercise increased market power that must be addressed in applications under section 104 (and indeed 92): *Tervita* at paras 44, 51 and 80-83. With respect to prices, that ability can be manifested either by increasing or maintaining prices above levels that would otherwise prevail in the absence of a merger: *Tervita* at paras 44, 154, 55 and 80; *Parkland* at para 101.

[104] The foregoing discussion applies equally to Secure's position that it will not have any incentive to increase prices or to reduce service levels or other non-price benefits of competition prior to the hearing of the Section 92 Application, because doing so would create evidence that would be used against it in that application. I recognize that the Commissioner's expert, Dr. Miller, acknowledged during cross-examination that he stated in a prior case that a merged entity would not have any incentive to raise prices in such circumstances. Dr. Miller was also led to concede that incentives can in some cases be dispositive, although he expressed discomfort with the word "dispositive." This was in part because a merged entity's incentives could also be to increase prices, based on the facts of a particular case.

[105] I acknowledge that evidence with respect to a merged entity's incentives may, in some cases, be relevant to an assessment of whether irreparable harm will occur in the absence of injunctive relief. However, such evidence would not typically be determinative. Among other things, it would have to be considered with all of the other evidence. In addition, the Tribunal will always remain mindful that there are many ways in which market power can be exercised in a manner that does not give rise to "bad evidence." It will also be mindful that customers may not have an incentive to bring exercises of market power to the Commissioner's attention. Also, monitoring a firm's behaviour can be exceptionally difficult. These are all reasons why the Tribunal and the courts have generally focused on the *ability* to exercise increased market power: see e.g. *Tervita*, above, at paras 44, 51 and 80-83.

[106] Finally, I do not accept Secure's argument that there will be no irreparable harm in this case because any transfer of wealth from customers to Secure will be "neutral" from the perspective of the economy as a whole, and because the Commissioner has failed to lead any evidence with respect to any deadweight loss to the economy that may result from the Merger. There is currently no evidence before the Tribunal that any wealth transfer between Secure and its very large number of customers should be treated as neutral. The Tribunal cannot rely on a concession made by one of the Commissioner's predecessors in another case, involving a single geographic market, even if that case involved the same industry. Moreover, for the purposes of assessing the irreparable harm component of the tripartite test for injunctive relief, harm to the public cannot be confined to the issue of whether there is harm to the economy as a whole. Irreparable harm is a much broader concept that extends to any "harm which either cannot be

quantified in monetary terms or which cannot be cured, usually because one party cannot collect damages from the other": *RJR* at 341.

[107] For all of the above reasons, I conclude that adverse interim price and non-price effects on customers can constitute irreparable harm for the purposes of an application under section 104. I also find that the evidence the Commissioner has adduced is clear and non-speculative evidence from which it can be reasonably and logically inferred, on a balance of probabilities, that such irreparable harm will occur.

(4) The balance of convenience

[108] This stage of the assessment requires the Tribunal to consider "… which of the two parties will suffer the greater harm from the granting or refusal of an interlocutory injunction, pending a decision on the merits": *RJR* at 342. In the course of its consideration, "the interest of the public must be taken into account" and can be invoked by either party: *RJR* at 348. In assessing this interest, "… the public interest in enforcing the law weighs heavily in the balance": *Harper v Canada (Attorney General)*, 2000 SCC 57 at para 9; *Parkland* at paras 59 and 108.

[109] The Commissioner maintains that the irreparable harm he has alleged outweighs the alleged financial harm to Secure, which he asserts is based on unreliable and speculative evidence.

[110] Secure makes numerous submissions in support of is position that it will suffer the greater harm if the relief sought by the Commissioner is granted. For the present purposes, it will suffice to address one of those submissions.

[111] Secure asserts that the Commissioner has not provided the Tribunal with any sense whatsoever of the extent of harm that the public will suffer if the relief he seeks is not granted. It states that when a party to a merger has adduced evidence of substantial and likely efficiency gains resulting from its merger, the Commissioner has an onus to provide at least some initial indication or estimate of the extent of the irreparable harm he claims. Without such a preliminary indication or estimate, the Tribunal cannot conduct the balancing analysis required at the third stage of the tripartite test for injunctive relief.

[112] I agree.

[113] The Commissioner has provided the Tribunal with extensive evidence. Among other things, that evidence includes hundreds of pages of records of exchanges with a large number of customers in the relevant markets and other third parties. It also includes other industry documentation, internal documents of Tervita and Secure, evidence from ongoing litigation that they had between them prior to the Merger, and materials they and others provided to the Competition Bureau in connection with previous merger transactions in this industry. In addition, the Commissioner filed expert reports by Dr. Miller and Dr. Eastman, and provided the Tribunal with evidence adduced in a prior proceeding before the Tribunal.

[114] However, the Commissioner has made no effort to provide the Tribunal with even a very preliminary or rough sense of how all of that evidence comes together, so that the Tribunal can have at least some appreciation of how the interim harm he alleges compares with the harm Secure has identified on its side of the ledger.

[115] The latter harm is based largely on estimates of the operating efficiencies that will be permanently lost by Secure in various scenarios, including those in which the broad type of relief currently being sought by the Commissioner is obtained and kept in place for periods of 6, 12 and 18 months. Mr. Harington estimated those lost efficiencies [to range from tens of millions of dollars to a multiple of that figure], respectively. For greater certainty, those estimates do not include the other financial and non-financial harm Secure claims it will suffer if the relief sought by the Commissioner is granted.

[116] Even if I accept some of the Commissioner's submissions regarding the shortcomings of Secure's estimates, I will still have a good general sense of the extent of harm to be considered on Secure's side of the ledger, for the purposes of the balance of convenience assessment. That is to say, Secure has provided clear and non-speculative evidence regarding the general extent of the harm that it will suffer if the relief requested by the Commissioner is granted.

[117] I have not, however, been given any such general sense of the extent of harm to be considered on the Commissioner's side of the ledger.

[118] I recognize that "[w]ithout the benefit of pleadings and full discovery, the factual and legal issues may well be only roughly defined and, perhaps, not even fully investigated by the parties themselves": *Sharpe* at 2.70. This will particularly be the case in circumstances such as those presently before the Tribunal, where a merging party proceeds to closing immediately following the applicable 30 day waiting period. In such circumstances, the Commissioner cannot reasonably be expected to have fully synthesized, within the very short period of time available, the extensive information that is typically provided by merging parties in their response to a SIR. Such a task would be further complicated by the need to integrate that information with information obtained from market contacts and other third parties during the course of the Bureau's review of the merger, as well as with other information the Bureau may already have in its records. The Commissioner's challenge is accentuated by the need to file his application in time for it to be heard prior to the expiry of the 30 day waiting period, or such other tight timeline as may be applicable.

[119] Nevertheless, in a merger case where the respondent provides clear and non-speculative evidence of the extent of harm that it would suffer if the relief sought by the Commissioner is granted, the Commissioner must provide at least some "rough" or initial sense of the irreparable harm he alleges would result if that relief is not granted.

[120] I do not accept the Commissioner's submission that requiring such evidence would essentially transform a section 104 application into a full-blown contested application under sections 92 and 96 of the Act, or make it otherwise inordinately difficult for him to prevail in a proceeding under section 104.

[121] With the assistance of staff in the Competition Bureau and outside experts, the Commissioner should be able to provide at least rough estimates, supported by evidence, of (i) the range of price effects that are likely to result from the merger; (ii) a range of plausible elasticities; (iii) a "ballpark" estimate of the deadweight loss; and (iv), where applicable, a basic sense of the extent to which non-price effects are likely to result from the merger. This is particularly so where, as here, the Bureau has extensive information from previous cases upon which he can build. Where the Commissioner requires more time to prepare such rough estimates, resort can be had to the interim relief contemplated by section 100 of the Act.

[122] With respect to prices, a preliminary estimate of the range of adverse price effects (usually expressed as a percentage of the prevailing price) is not sufficient because this "is not enough to determine the extent of any anti-competitive effect": *Tervita* at para 132. Accordingly, rough estimates of price elasticities and deadweight loss are also required to permit the Tribunal to assess the balance of convenience, where the respondent in a merger case provides clear and non-speculative evidence of harm for the purposes of the balancing exercise.

[123] In my view, the Supreme Court of Canada's teaching that "[e]ffects that can be quantified should be quantified, even as estimates" is equally applicable to applications under both section 104 and section 92 of the Act, when the defence contemplated by section 96 has been raised: *Tervita* at para 100. Such an approach "minimizes the degree of subjective judgment necessary in the analysis and enables the Tribunal to make the most objective assessment possible in the circumstances": *Tervita* at para 124. Moreover:

> [a]n approach that would permit the Commissioner to meet her burden without at least establishing estimates of the quantifiable anti-competitive effects fails to provide the merging parties with the information they need to know the case they have to meet.
>
> (*Tervita* at para 124)

[124] During the hearing, the Commissioner maintained that the volume of commerce estimates that Dr. Miller provided in Exhibits 25-27 of his report dated June 29, 2021 are sufficient to provide the Tribunal with what it requires for the purposes of assessing the balance of convenience. The Commissioner characterized those estimates as totalling in the "hundreds of millions of dollars." However, without a rough sense of the extent of adverse price effects, price elasticities and deadweight loss, estimates of the volume of affected commerce are of little utility: *Tervita* at para 132. Moreover, Secure had no advance notice of this position prior to the hearing.

[125] In summary, for the reasons provided above, the Commissioner has not established that the balance of convenience is in his favour.

[126] Before concluding the discussion regarding the third prong of the tripartite test, I will make two additional observations.

[127] First, Secure initially appeared to suggest that the Commissioner should be required to provide an undertaking to compensate Secure for any damages suffered as a result of the granting of the relief sought in this application. I disagree. Given that the Commissioner is a public authority acting in furtherance of his statutory mandate, he is not required to provide such an undertaking: *Financial Services Authority v Sinaloa Gold plc*, [2013] UKSC 11 at paras 1 and 31; *British Columbia (Attorney General) v Wale*, 1986 CarswellBC 413 at para 62 (CA). Although Justice Linden in *Superior Propane* attached significance to the fact that no such undertaking had been given by the Commissioner, he did so in *obiter dictum* remarks in which he appeared to be simply suggesting that this meant that the harm identified by the respondent would be irreparable: *Superior Propane* at para 17.

[128] Second, the Commissioner further complicated the Tribunal's task by failing to provide the Tribunal with any sense of the terms of the order being sought. Although counsel for the Commissioner requested during the hearing that the order be made "on terms similar to" what was sought in *Parkland*, that did not provide fair notice to Secure and left many questions unanswered.

VIII. CONCLUSION

[129] For the reasons provided above, the Commissioner has met the first and second parts of the tripartite test applicable to applications for injunctions. However, he has not met the third part of that test.

[130] Given that the tripartite test requires an applicant for injunctive relief to prevail with respect to each of the three prongs of the test, this application will be denied and it is unnecessary to consider the second general issue raised on the application.

IX. COSTS

[131] Having regard to the public interest nature of this application, as well as the novel nature of the issues raised by Secure and the mixed results that it achieved in respect of those issues, I consider it appropriate to deny Secure's request for costs.

DATED at Ottawa, this 16th day of August, 2021.

SIGNED on behalf of the Tribunal by:

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

ORDER

For the reasons set forth in the Reasons for Order attached hereto, the Commissioner's request for interim relief under section 104 of the *Competition Act*, RSC 1985, c C-34 is dismissed without costs.

SIGNED on behalf of the Tribunal by:

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

COUNSEL OF RECORD:

For the applicant:

The Commissioner of Competition

Jonathan Hood
Paul Klippenstein
Ellé Nekiar

For the respondent:

SECURE Energy Services Inc.

Brian Facey
Robert Kwinter
Nicole Henderson
Joe McGrade