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Annie Ruhlmann for / pour
REGISTRAR / REGISTRAIRE

THE COMPETITION TRIBUNAL

OTTAWA, ONT.

Doc. # 77

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*.

BETWEEN:

COMMISSIONER OF COMPETITION

Applicant

— and —

SECURE ENERGY SERVICES INC.

Respondent

THE COMMISSIONER OF COMPETITION'S MEMORANDUM OF FACT AND LAW

(For Answers to Questions from the Examination for
Discovery of Secure Energy Services Inc.)

PART I THE MOTION

1. The Applicant, the Commissioner of Competition (“**Commissioner**”), moves for an order requiring the Respondent, Secure Energy Services Inc. (“**Secure**”), to answer questions that were improperly refused during the examination of Secure’s representative David Engel. The Commissioner also seeks the costs of this motion, payable forthwith.

PART II THE FACTS

A. The Application¹

2. On June 29, 2021, the Commissioner applied to the Competition Tribunal (“**Tribunal**”), to remedy the likely substantial lessening and prevention of competition caused by Secure’s merger with Tervita Corporation (“**Tervita**”) (the “**Merger**”) which was completed on July 2, 2021. By merging with Tervita, Secure has removed its largest and closest competitor in the provision of Waste Services in the WCSB.²
3. Secure now controls the vast majority of the supply of Waste Services in the WCSB and is the only reasonable option for many customers in an industry with high barriers to entry for competitors and high transportation costs for customers.
4. The merger eliminates the fierce competition between Secure and Tervita. Prior to the merger, Secure and Tervita developed competing Waste Services facilities in close proximity to each other – sometimes opening facilities right across the road from one another, leading to decreased prices and service improvements. For a significant number of customers, Secure and Tervita are the only or the two closest geographic options for Waste Services.
5. The Waste Services business is characterized by higher barriers to entry, including regulatory, financial and reputational barriers as well as a mature market. In addition, given the significant size of Secure post-merger, new entry or expansion

¹ The paragraphs that follow provide a high-level summary for context. For full particulars, see the pleadings in the Motion Record, Affidavit of Mallory Kelly affirmed January 21, 2022 (the “Kelly Affidavit”), Tab 2.

² Where capitalized terms are not defined in this Memorandum of Fact and Law, the Commissioner relies on those terms as they are defined in the pleadings.

would not be timely, is unlikely, and would be insufficient to constrain an exercise of market power.

6. To remedy the anticompetitive merger, the Commissioner seeks dissolution. In the alternative, the Commissioner seeks an order requiring Secure to dispose of such assets as are required for an effective remedy in all the circumstances.³
7. In response, Secure relies on the efficiencies defence. Secure pleads that the transaction has already generated and will continue to generate significant efficiencies to the Canadian economy.⁴ The efficiencies claimed by Secure include savings from a reduction in employees. Secure alleges that the efficiencies it claims will be lost if the order sought by the Commissioner is granted.⁵
8. The Commissioner denies that the cognizable efficiencies generated by the Merger will be greater than or outweigh the anticompetitive effects.⁶ In assessing Secure's efficiencies claims, a live issue for the Tribunal at the hearing will be assessing whether those efficiencies will be lost but for the order.⁷

B. Questions improperly refused during the examination of Mr. Engel

9. The examination of Secure's representative, David Engel, took place from December 20, 2021 to December 22, 2021 (the "**Engel Examination**"). During the Engel Examination, 39 questions were refused or taken under advisement.⁸
10. The parties have narrowed⁹ the questions in dispute to two categories: (1) questions that seek the contact information of former Secure and Tervita employees that were terminated allegedly to achieve efficiencies,¹⁰ and (2)

³ Motion Record, Kelly Affidavit, Tab 2, Exhibit A, Amended Notice of Application, p.13.

⁴ Motion Record, Kelly Affidavit, Tab 2, Exhibit B, Secure Response, para 31, p. 43.

⁵ Motion Record, Kelly Affidavit, Tab 2, Exhibit B, Secure Response, para 8, p. 37.

⁶ Motion Record, Kelly Affidavit, Tab 2, Exhibit C, Commissioner's Reply, para 2, p. 50, paras 11-12, p. 52.

⁷ *The Commissioner of Competition v. CCS Corporation et al.*, 2012 Comp. Trib. 14, para 264.

⁸ Motion Record, Kelly Affidavit, Tab 2, Exhibits D, E and F, Transcripts from the Examination for Discovery of David Engel December 20, 21 and 22, 2021 ("Engel Examination").

⁹ Motion Record, Kelly Affidavit, Tab 2, Exhibit G, Correspondence between Jonathan Hood and Nicole Henderson dated January 18, 2022, p. 663.

¹⁰ Motion Record, Notice of Motion, Tab 1, Appendix A, p. 6.

questions that seek facts related to efficiencies that Secure would still obtain if the Tribunal ordered it to divest the former Tervita facilities.¹¹

PART III ISSUES AND LAW

11. The issue to be decided by the Tribunal is whether the questions listed in Appendix A to the Commissioner's Notice of Motion are proper questions.

A. THE QUESTIONS IN APPENDICES A AND B ARE RELEVANT TO ISSUES IN DISPUTE

12. As described above, the Commissioner has identified two categories of questions where Secure has failed to provide adequate discovery because it has refused to answer relevant questions. The headings below correspond to the two categories set out in the chart appended to the Notice of Motion (see Appendix A). Below, each category is described, and its relevance to the pleadings is discussed.

Category I: Persons with knowledge relating to a matter in question

13. **Relevance:** Secure has pled the efficiencies defence. The Commissioner sought facts that underlie these categories of claimed efficiencies. Specifically, the Commissioner asked for the contact information of persons who might reasonably be expected to have knowledge relating to the question of the corporate labour savings claimed as efficiencies by Secure.¹²

14. **Relevant Question 1177 (p 6 of Appendix A):**¹³ The 13 individuals for whom contact information is sought are those whose positions were eliminated allegedly as a result of the Merger. Mr. Engel was unable to provide this information during his examination and Secure's counsel refused to answer this question for three reasons: (1) relevance; (2) privacy concerns; and (3) proportionality.¹⁴

¹¹ Motion Record, Notice of Motion, Appendix A, p 6.

¹² Motion Record, Kelly Affidavit, Tab 2, Exhibit E, Transcript from Engel Examination dated December 21, 2021, Question 842, p. 351; and Kelly Affidavit, Tab 2, Exhibit F, Transcript from Engel Examination dated December 22, 2021, Question 1177, p. 473.

¹³ Motion Record, Notice of Motion, Appendix A, p. 6.

¹⁴ Motion Record, Kelly Affidavit, Tab 2, Exhibit E, Transcript from Engel Examination dated December 21, 2021, Question 842, p. 351; and Kelly Affidavit, Tab 2, Exhibit F, Transcript from Engel Examination dated December 22, 2021, Question 1177, p. 473.

15. Rule 240(b) of the *Federal Court Rules* requires that Secure shall answer any question that “concerns the name or address of any person, other than an expert witness, who might reasonably be expected to have knowledge relating to a matter in question in the action”.¹⁵ The 13 individuals in question are reasonably expected to have knowledge relating to Secure’s claimed efficiencies. They would reasonably be expected to have knowledge related to the corporate labour savings Secure claims as merger efficiencies, their nature of the duties they performed prior to the merger, as well as circumstances surrounding their termination and its relation to the merger. Therefore this question is relevant.
16. Secure also refused this question ostensibly because it is concerned for the privacy of the individuals that it terminated.¹⁶ Nothing in the *Federal Court Rules* permits questions to be refused on privacy grounds. In any event, as the Commissioner has told Secure, the names can be protected pursuant to the Confidentiality Order that is in place as Confidential Level B.¹⁷ The information would only be used to contact these individuals regarding their knowledge of the matters in question in this litigation.¹⁸
17. Finally, this is not a disproportionate request given that the Commissioner is only asking for the names and contact information of 13 readily identifiable individuals out of approximately 100 that Secure indicates have been terminated to date.¹⁹

Category II: Facts relating to cost savings lost in the event of a divestiture order

18. **Relevance:** As noted above, Secure has pled the efficiencies defence. Pursuant to section 96(1) of the Act, the Commissioner is entitled to the facts in Secure’s knowledge relating to any “gains in efficiency [that] would not likely be attained if the order were made”.²⁰ During the Engel Examination, the Commissioner sought the factual basis for any claimed efficiencies that would be lost if a divestiture order

¹⁵ *Federal Courts Rules*, SOR/98-106, Rule 240(b).

¹⁶ Motion Record, Kelly Affidavit, Tab 2, Exhibit F, Transcript from Engel Examination dated December 22, 2021, Question 1177, p. 473.

¹⁷ Confidentiality Order, 2021 Comp Trib 6.

¹⁸ Motion Record, Kelly Affidavit, Tab 2, Exhibit G, Correspondence between Jonathan Hood and Nicole Henderson dated January 18, 2022, p. 633.

¹⁹ Motion Record, Kelly Affidavit, Tab 2, Exhibit F, Transcript from Engel Examination dated December 22, 2021, Question 842, p. 351.

²⁰ *Competition Act*, R.S.C. 1985, c. C-34, as amended, Section 96(1).

is made regarding certain facilities. The question do not ask for expert analysis; the Commissioner seeks only the facts underpinning Secure's claimed efficiencies.

19. **Relevant Questions 1230 to 1254 (pages 6-8 of Appendix A):**²¹ The Commissioner asked a series of questions which sought factual information related to the following categories of alleged efficiencies: corporate labour savings; corporate-level employee terminations; head-office lease savings; public company costs savings; other corporate cost savings; pipeline access savings; field lease and operating cost savings; field and environmental services head-count savings; and intercompany transport savings. The Commissioner also sought facts related to any savings that may be lost if another buyer were to purchase one or more of the facilities subject to a divestiture order.
20. Secure alleges the Commissioner's questions seek information that will be the subject of expert analysis. It also alleges the questions are overly broad.²²
21. The questions ask for facts related to efficiencies that Secure has claimed and whether those efficiencies would be lost in the event of a divestiture order.
22. Questions seeking facts about savings that would be lost to Secure are clearly within Secure's knowledge. For example, whether a Secure executive would make a business decision to seek to lease additional head-office space if required to divest Tervita facilities is a factual question. Efficiencies experts cannot give opinions without a basis in fact. As Secure's efficiencies expert has demonstrated in the report he provided in response to the Commissioner's injunction application, Secure's efficiencies expert relies on interviews he had with Secure and Tervita's executives.²³ However, Secure did not provide notes or records from these interviews or conversations. During the cross examination for the injunction application, Secure's efficiencies expert revealed facts that he learned during

²¹ Motion Record, Notice of Motion, Appendix A, p. 6.

²² Motion Record, Kelly Affidavit, Tab 2, Exhibit F, Transcript from Engel Examination dated December 22, 2021, Questions 1230 to 1254, p. 501-512.

²³ Motion Record, Kelly Affidavit, Tab 2, Exhibit H, Affidavit of Andrew C. Harington dated July 14, 2021, para 18, p. 653.

these interviews that were not provided in his report.²⁴ By refusing the questions asked on discovery, Secure is depriving the Commissioner of the ability to explore with a Secure executives the factual basis for this aspect of its efficiencies defence. The Commissioner will be prejudiced if he is forced to wait until the hearing to find out about these relevant facts.

23. The questions are not overly broad; they are relevant and proportionate in the context of the efficiencies Secure has claimed – hundreds of millions of dollars in the context of a merger that created a company valued at over two billion dollars.

PART IV ORDER REQUESTED

24. The Commissioner seeks an order that Secure be required to answer the questions listed in Appendix A.

DATED AT TORONTO, ONTARIO, this 21st day of January, 2022.

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²⁴ Motion Record, Kelly Affidavit, Tab 2, Exhibit I, Transcript from the Examination of Andrew C. Harington on July 20, 2021, Questions 85-88, p.82-84, Questions 223-224, 122-123, Question 244, p. 148-149, Question 274, p. 160 and Questions 294-295. p. 168.

Authorities

1. *Federal Courts Rules*, SOR/98-106, Rule 240(b).

Scope of examination

240 A person being examined for discovery shall answer, to the best of the person's knowledge, information and belief, any question that

(a) is relevant to any unadmitted allegation of fact in a pleading filed by the party being examined or by the examining party; or

(b) concerns the name or address of any person, other than an expert witness, who might reasonably be expected to have knowledge relating to a matter in question in the action.

2. *Competition Act*, R.S.C. 1985, c. C-34, as amended, Section 96(1).

Exception where gains in efficiency

96 (1) The Tribunal shall not make an order under section 92 if it finds that the merger or proposed merger in respect of which the application is made has brought about or 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 that will result or is likely to result from the merger or proposed merger and that the gains in efficiency would not likely be attained if the order were made.

3. *The Commissioner of Competition v. CCS Corporation et al.*, 2012 Comp. Trib. 14, para 264.

[264] The fifth screen filters out claimed efficiencies that either (a) would likely be attained through alternative means if the Tribunal were to make the order that it determines would be necessary to ensure that the merger in question does not prevent or lessen competition substantially, or (b) would likely be attained through the Merger even if that order were made. This screen has a critical role to play in the case at bar.

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

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

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

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

B E T W E E N:**COMMISSIONER OF COMPETITION****Applicant****- and -****SECURE ENERGY SERVICES INC.****Respondent**

**THE COMMISSIONER OF COMPETITION'S
MEMORANDUM OF FACT AND LAW**

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