

Competition Tribunal



Tribunal de la concurrence

Citation: *Canada (Commissioner of Competition) v Secure Energy Services Inc.*, 2022 Comp Trib 1

File No.: CT-2021-002

Registry Document No.: 96

**IN THE MATTER OF** an application by the Commissioner of Competition for one or more orders pursuant to section 92 of the *Competition Act*, RSC 1985, c C-34 as amended.

BETWEEN:

**The Commissioner of Competition**  
(applicant)

and

**Secure Energy Services Inc.**  
(respondent)



Date of hearing by video-conference: January 28, 2022

Before Judicial Member: Phelan, J.

Date of order: February 9, 2022

**REASONS FOR ORDER AND ORDER REGARDING THE COMMISSIONER'S  
MOTION TO COMPEL ANSWERS ON DISCOVERY**

## **I. NATURE OF MATTER**

[1] This is the Commissioner of Competition's [Commissioner] motion to compel the Respondent, Secure Energy Services Inc [Secure], to answer certain questions refused on discovery. This motion was heard along with Secure's motion to compel answers from the Commissioner.

[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]. This merger [Merger] was completed on July 2, 2021.

[3] This is not the first merger the Commissioner has reviewed in the waste services business in the Western Canadian Sedimentary Basin [WCSB]. The Commissioner had reviewed a transaction where Tervita acquired Newalta Corporation [Tervita/Newalta].

[4] The Commissioner seeks dissolution or the disposal of certain assets. Secure relies on, amongst other defences, on the "efficacy defence".

[5] While 39 questions put to Secure's witness Engel were refused or taken under advisement, there are two categories of questions in dispute on this motion: (1) the contact information of certain Secure and Tervita employees who were terminated to achieve the claimed efficiencies; and (2) questions said to relate to efficiencies that Secure would still obtain if the Tribunal ordered it to divest the former Tervita facilities.

[6] Secure objected to the first category on the grounds of relevance, privacy and proportionality. It objected to the second category for being vague, overbroad and unfair to the corporate witness Engel.

[7] Aside from the general principles of discovery, which are not really in dispute, the resolution of the issues often comes down to the specific question or questions – the devil being in the detail.

## **II. CATEGORY 1 – WITNESS DETAILS**

[8] The Commissioner limited the request for witness details to 13 persons whose positions were eliminated allegedly as a result of the Merger. In that respect, the matter is relevant to the matter of efficiencies.

[9] By limiting the request to 13 persons, out of potentially many more, the Commissioner has addressed the matter of proportionality.

[10] In terms of privacy concerns, R 240(b) of the *Federal Courts Rules*, SOR/98-106, requires disclosure of the names and addresses of persons who may reasonably be expected to have relevant knowledge. There is no objection permitted on privacy grounds. In this case, any such concerns are addressed by having the information covered by Level B of the confidentiality regime.

[11] Question 1177 will be answered and such information will be treated as Level B information.

**III. CATEGORY 2 – EFFICIENCIES – COST SAVINGS LOST IF DIVESTITURE ORDERED**

[12] While the subject matter of efficiencies and what efficiencies might not be realized is a relevant subject matter, it is an inherently speculative matter. Any answer is heavily dependent on the assumptions in the speculated event of a divestiture of assets order.

[13] The Commissioner has not established that Secure looked at the issue and if it did, whether there is any record of consideration.

[14] The series of questions Q 1230-1254 asked for facts related to savings under various cost categories (i.e. labour, head office lease) if a hypothetical divestiture order was issued.

[15] Secure objected on grounds that the information would be the subject of expert opinion and that the question was overly broad.

[16] In my view, the questions seek opinions about what the company might do under various unspecified scenarios. The Commissioner has objected to somewhat similar questions being posed to him. Whatever the merits of that objection may be, the specific questions posed to Secure are unfair, vague and overbroad.

[17] The questions do not provide specifics as to the assets to be divested, to whom and under what conditions. This is too speculative an inquiry to put to a witness and any answer is unlikely to assist the hearing panel. Secure is not required to conduct this type of analysis. Therefore, if Secure had not performed such an analysis, it need not create one.

[18] As phrased, the questions will not be ordered to be answered. If Secure had actually performed some such analysis based upon its own assumptions, such material should be produced subject to any issues of privilege.

**ORDER**

- A. Secure shall answer Question 1177, the answers to which shall be treated as Level B information.
- B. Questions 1230-1254 are not ordered to be answered subject to the comments in paragraph 18.

DATED at Ottawa, this 9th day of February, 2022.

SIGNED on behalf of the Tribunal by the presiding judicial member  
Michael Phelan.

(s) Michael Phelan

**COUNSEL OF RECORD:**

For the applicant:

The Commissioner of Competition

Jonathan Hood  
Paul Klippenstein  
Ellé Nekiar

For the respondent:

Secure Energy Services Inc.

Robert Kwinter  
Nicole Henderson  
Brian Facey