Competition Tribunal Tribunal de la concurrence

Citation: *Canada (Commissioner of Competition) v Secure Energy Services Inc.*, 2022 Comp Trib 3
File No.: CT-2021-002
Registry Document No.: 100

**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 15, 2022

**REASONS FOR ORDER AND ORDER REGARDING THE RESPONDENT'S MOTION TO COMPEL THE COMMISSIONER TO PROVIDE PROPER AND COMPLETE ANSWERS TO REFUSALS ON DISCOVERY**

## I. NATURE OF MATTER

**[1]** This is Secure Energy Services Inc.'s [Secure/Respondent] motion [Secure's Motion] following the discovery of the Commissioner's representative. It was heard along with the Commissioner's motion to compel Secure to answer certain questions. The Tribunal has ruled on the Commissioner's motion. Ultimately Secure's Motion comes down to whether some or all of the questions identified in Schedule A to Secure's Motion should be answered. This Order will address the specific questions to be answered as well as the applicable principles regarding the types of questions. Many of the disputed questions related to information arising from the Commissioner's investigation of the Tervita/Newalta merger previously described in the Tribunal's decision related to the Commissioner's discovery motion.

**[2]** The Commissioner has taken the position that it is only required to answer questions about facts learned related to the Tervita-Newalta merger whereas Secure takes the position that the Commissioner has a broader obligation to answer questions based on the Commissioner's "information, knowledge and belief" – the usual discovery standard.

**[3]** Secure recognizes, properly I add, that certain types of questions are improper to ask of the Commissioner including those seeking expert opinion and analysis – sometimes a difficult distinction. Secure does not ask for new analyses to be performed but says that the Commissioner's refusals relate to the Commissioner's existing knowledge, information and belief about a completed transaction involving one of the merging parties in (arguably) the same product and geographic market.

**[4]** The Tervita/Newalta merger's relevance or potential relevance to the Secure/Tervita Merger [Merger] is obvious from the facts in issue and from the pleadings in the litigation. The Commissioner does not seriously dispute the relevance of the Tervita/Newalta merger to the issues in this case. It just seeks to shield itself from disclosing some of what it learned from its review of that merger.

## II. CONSIDERATIONS

**[5]** Generally Secure's position better reflects the discovery obligations of a party in a Tribunal matter – including the Commissioner's. The Tribunal has taken a broad approach to the discovery obligation and has provided guidance, which I adopt, in *The Commissioner of Competition v Live Nation Entertainment, Inc et al*, 2019 Comp Trib 3 [*Live Nation*], and *The Commissioner of Competition v Vancouver Airport Authority*, 2017 Comp Trib 16 [*VAA*].

**[6]** The following quotes from *Live Nation* reflect the Tribunal's approach to the discovery obligation:

> [6] … It is now well-recognized that a liberal approach to the scope of questioning on discovery should prevail (*Lehigh* at para 30). What the parties and the Tribunal are both trying to achieve with examinations for discovery is a level of disclosure sufficient to allow each side to proceed fairly, efficiently, effectively and expeditiously towards a hearing, with sufficient knowledge of the case each

party has to meet (*The Commissioner of Competition v Vancouver Airport Authority*, 2017 Comp Trib 16 ("VAA") at para 46). If a party does not disclose relevant facts or information known to it until trial, the other side will be unfairly disadvantaged.

[7] … FC Rule 240 provides that a person being examined for discovery must answer, to the best of the person's knowledge, information and belief, any question that is relevant to the unadmitted facts in the pleadings.

[8] … At the discovery stage, relevance is a generous and flexible standard (*Apotex Inc v Sanofi-Aventis*, 2011 FC 52 at para 19). Doubts on the issue of relevance are to be resolved in favour of disclosure, and questions will typically need to be answered unless they are clearly improper.

…

[10] That being said, even when questions do meet the standard of relevance, courts have nonetheless delineated some boundaries to the type of questions that may be asked on examinations for discovery. A party can properly ask for the factual basis of the allegations made by the opposing party and for the facts known by such party, but it cannot ask for the facts or evidence relied on by the party to support an allegation (*VAA* at paras 20, 27; *Montana Band v Canada*, 1999 CanLII 9366 (FC), [2000] 1 FC 267 (FCTD) ("*Montana Band*") at para 27; *Can-Air Services Ltd v British Aviation Insurance Company Limited*, 1988 ABCA 341 at para 19). In *Apotex Inc v Pharmascience Inc*, 2004 FC 1198, aff'd 2005 FCA 144 ("*Apotex*"), the Federal Court further established that witnesses are not to testify on pure questions of law: a fundamental rule is that an examination for discovery may seek only facts, not law. Accordingly, the following types of questions have generally been found not to be proper subject matters for discovery: (i) questions seeking expert opinion, (ii) questions seeking the witness to testify as to questions of law, (iii) questions seeking law or argument, as opposed to facts, and (iv) questions where the witness is being asked "upon what facts do you rely for paragraph x of your pleading" (*Bard Peripheral Vascular, Inc v W.L. Gore & Associates, Inc*, 2015 FC 1176 at para 19).

[11] … The scope of permissible discovery will ultimately depend "upon the factual and procedural context of the case, informed by an appreciation of the applicable legal principles" (*Lehigh* at paras 24-25; see also *VAA* at paras 41 46).

**[7]** In outlining the broad scope of discovery applicable to parties, it is important to recognize the somewhat unique status of the Commissioner. This was touched upon at *VAA*, paras 43-44:

[43] **Other factors colour the examination for discovery process in Tribunal matters. First, the Commissioner is a unique litigant in proceedings before the Tribunal. The Commissioner is a non-market participant and his representatives have no independent knowledge of facts regarding the market**

> **and behaviour at issue. Rather, all of the facts or information in the Commissioner's possession, power or control arise from what he has gathered from market participants in the course of his investigation of the matter at stake. The Commissioner and his representatives do not have the direct and primary knowledge of the facts supporting the Application. This means that it may typically be more difficult and challenging for a representative of the Commissioner to exhaustively describe "all facts known" to the Commissioner.**
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> [44] **Second, expeditiousness and considerations of fairness are two fundamental elements of the Tribunal's approach and proceedings.** Subsection 9(2) of the *Competition Tribunal Act*, RSC 1985, c 19 (2nd Supp) directs the Tribunal to conduct its proceedings "as informally and expeditiously as the circumstances and considerations of fairness permit". Ensuring both expeditious litigation and adequate protection of procedural fairness is thus a statutory exigency central to the Tribunal's functions. The Tribunal endeavours to make its processes quick and efficient and, at the same time, never takes lightly concerns raised with respect to the procedural fairness of its proceedings. Furthermore, as I have indicated in the *VAA Privilege Decision*, since proceedings before the Tribunal are highly "judicialized", they attract a high level of procedural fairness (*VAA Privilege Decision* at para 159). It is well-established that the nature and extent of the duty of procedural fairness will vary with the specific context and the different factual situations dealt with by the Tribunal, as well as the nature of the disputes it must resolve (*Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 at paras 25-26; *VAA Privilege Decision* at paras 165-170).
>
> [Tribunal's emphasis]

**[8]** The guiding principles for this discovery obligation are relevance and fairness as reflected in para 46 of *VAA*.

**[9]** While the Tribunal has recognized the limits on the source of the Commissioner's knowledge, information and belief, the Commissioner has the obligation to meet the discovery disclosure standard subject to usual issues of relevance, privilege and proportionality to name a few.

**[10]** In respect of relevance, discovery cannot be used as a tool to review the Commissioner's conduct of another merger investigation. The issue before the Tribunal is not the "reasonableness" of the Commissioner's decision to challenge this merger – it is not judicial review nor is it a review of the Commissioner's decision not to challenge the other related merger or any other merger. It is not about how the Commissioner conducted its investigations or the techniques used in those investigations. Whether they were proper and well conducted or botched is of no relevance to the Tribunal's consideration of the alleged substantial lessening of competition of this Merger.

**[11]** That being said, recognition that the Commissioner is not a typical litigant does not support the proposition that the Commissioner can be insulated from the basic tenets of discovery or of the

examination for discovery process (See *Canada (Director of Investigation and Research) v NutraSweet*, [1989] CCTD No 54 at para 35 [*NutraSweet*]).

**[12]** An important aspect of oral discovery is that of obtaining admissions from the opposing party. This process can involve probing inquiry of matters and issues (*VAA*, para 41).

**[13]** As explained in *NutraSweet* and in *The Commissioner of Competition v Direct Energy Marketing Limited*, 2014 Comp Trib 17, Secure is entitled to be provided with the relevant factual information underlying the Commissioner's application and the allegations therein, to know the case it has to meet, to obtain sufficient information respecting specific facts in issue.

**[14]** As with all motions regarding refusals, one must examine the questions at issue, the context, and their true nature. The Tribunal must determine the true nature of the question posed and ensure that questions are not a disguised manner of trying to obtain that which is not permitted. As acknowledged at para 63 of *VAA*, requiring the Commissioner to outline the facts and sources cannot be a disguised way to requiring disclosure of the "fact relied upon" by the Commissioner.

**[15]** There is no magic formula for determining whether a question should be answered. It requires a review of the question as posed, the subject matter and the context.

**[16]** In keeping with the underlying principles of discovery including that ultimate relevance and weight will be determined by the hearing tribunal, this stage of the litigation favours disclosure.

**[17]** It is not a realistic premise that if there is true surprise by matters which should have been disclosed, an adjournment can be granted to allow the surprised party time to consider their position. While such remedy does exist, in these scheduled and time managed proceedings, the process of stopping the hearing and restarting is inefficient, disruptive and difficult for the parties and the Tribunal itself. Adjournment is a last resort, not a "going in" proposition.

## III. QUESTIONS IN ISSUE

### A. Customer based approach

**[18]** Q 156 asks whether the Commissioner used "the customer based" approach and more directly phrased, Secure is seeking an admission as to the Commissioner's knowledge which is a proper line of questions.

**[19]** Q 157, on the other hand, seeks to question the Commissioner's decisions during the inquiry process which is not pertinent and need not be answered.

### B. Product/Geographic Markets

**[20]** Q 332 seeks an admission that the Tervita/Newalta merger involves the same products and market as the Secure/Tervita Merger. The question could have been approached in stages of

identifying the products of each and then comparing the answers. The question posed is a more efficient way to secure an admission on a relevant issue.

**[21]** Q 332 includes a follow-up question seeking any differences. Both aspects should be answered within the context of the Commissioner's knowledge, information and belief.

**[22]** Q 332 asks questions directed at how the Commissioner dealt with product markets internally. As such, it seeks information about how the Commissioner conducted the Tervita/Newalta merger review. The Commissioner's manner of conduct is not the issue in this litigation and the question need not be answered.

**[23]** Q 333: for the same reasons as Q 332, it need not be answered.

**[24]** Q 334: as this relates to geographic markets in the same way Q 332 related to product markets, it must be answered.

**[25]** Q 335 is directed at the internal workings of the Commissioner's office and is irrelevant.

## C. Tervita/Newalta Merger

**[26]** Q 339 asks about the Commissioner's post Tervita/Newalta closing conduct and is irrelevant.

**[27]** Q 350 to 354 asks about how the Commissioner conducted his analysis of aspects of the Tervita/Newalta merger. It is not relevant. The current litigation is not a process of comparing investigative activities as between merger reviews.

## D. Dead Weight Loss

**[28]** Q 355-358: the series of questions focuses on dead weight loss analysis. Dead weight loss is a key defence in this litigation. Apparently the Commissioner has knowledge, information or belief of aspects of dead weight loss in what is arguably the same product and geographic markets. To the extent that the questions do not require the production of expert opinion or engage privileged communication, the information is producible.

## E. Other

**[29]** Q 359 – 361 raises similar questions in respect to demand elasticity and for the same reasons and subject to the same caveats as above, they are to be answered.

**[30]** Q 362 inquires into how the Commissioner conducted the Tervita/Newalta merger review and is irrelevant.

**[31]** Q 363 inquires into efficiencies considered in the Tervita/Newalta merger and to the extent that the Commissioner has knowledge, information and belief on this subject and Secure is seeking

an admission, the Commissioner is to answer. The fact that there may be expert opinion on a topic does not, in and of itself, form a valid grounds of refusal.

## ORDER

**FOR THE REASONS GIVEN,** the Tribunal orders the following questions to be answered:

Q 156, 332, 334, 355 to 358, 359 to 361 and 363

DATED at Ottawa, this 15th day of February, 2022

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

(s) Michael Phelan

**COUNSEL OF RECORD:**

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