PUBLIC

CT-2021-002

THE COMPETITION TRIBUNAL

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

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

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

BETWEEN

THE COMMISSIONER OF COMPETITION

Applicant

- and -

SECURE ENERGY SERVICES INC.

Respondent

MEMORANDUM OF ARGUMENT OF THE RESPONDENT SECURE ENERGY SERVICES INC.

BLAKE, CASSELS & GRAYDON LLP
199 Bay Street
Suite 4000, Commerce Court West
Toronto, ON M5L 1A9

Robert E. Kwinter
Phone: (416) 863-3283
Email: rob.kwinter@blakes.com

Nicole Henderson
Phone: (416) 863-2399
Email: nicole.henderson@blakes.com

Brian A. Facey
Phone: (416) 863-4262
Email: brian.facey@blakes.com

Joe McGrade
Phone: (416) 863-4182
Fax: (416) 863-2653
Email: joe.mcgrade@blakes.com

Counsel for the respondent
SECURE Energy Services Inc.

TABLE OF CONTENTS

Page

PART I: OVERVIEW

1. The Commissioner's application against SECURE Energy Services Inc. ("**SECURE**") in respect of its acquisition of Tervita Corporation ("**Tervita**") is "stuck in the model versus in reality."[1] This Transaction (as defined below) makes the Canadian economy more efficient. It involves a transaction in the Western Canadian oil and gas industry, which has been marked by significant volatility, investor uncertainty, and endemic overcapacity.

2. The purpose of the Competition Act's (the "***Act***") merger provisions and the efficiencies exception is first and foremost to promote the efficiency and adaptability of the Canadian economy.[2] The role of the efficiencies exception is to allow competitors to merge in order to produce the same products and services using fewer inputs and facilities. That is what is happening here. Fewer facilities will now provide the same services to SECURE's customers, but at a lower cost and using fewer resources.

3. The efficiencies exception requires balancing efficiencies against deadweight loss. Faced with inelastic demand for waste disposal services and an inability to quantify deadweight loss beyond "illustrative calculations,"[3] the Commissioner seeks to advance a novel (and unsustainable) theory asserting that the very efficiencies the *Act* seeks to encourage, the closure of redundant facilities, creates a new kind of lost surplus.

4. The Commissioner has acknowledged that his application must fail unless the Tribunal accepts the so-called "facility closure theory," which represents a significant departure from Canadian competition law's consistent and unequivocal understanding of what constitutes an anticompetitive effect of a merger, and how that effect is quantified. The Commissioner's novel theory is stranded on a peninsula—contrary to law, accepted competition law economics, and the facts of this case.

---

[1] Oral Testimony of Nathan Miller, Combined Transcript [**Transcript**], vol 6, p 824:21-23 [**Miller Testimony**].
[2] *Tervita Corp. v Canada (Commissioner of Competition)*, 2015 SCC 3, para 2, Respondent's Book of Authorities **[Respondent's BOA]**, Tab 18 [*Tervita*].
[3] Expert Report of Nathan H Miller, Exhibit CA-A-057, paras 133, 163 [**Miller Report**].

5. The facility closure theory ultimately fails because it is not a competitive effect. The facility closure theory results solely from facility suspensions, regardless of why, how, or when such suspensions occur. The theory is also based on the false premise that the facilities are the relevant products in this matter. They are not. The facilities are inputs to provide the relevant services (i.e., the various oilfield waste disposal services that the parties agree are the relevant product markets).

6. Post-merger, SECURE will continue to provide all the same services the parties provided prior to the merger in the same relevant geographic markets but through a more efficient expanded network of facilities. Contrary to the Commissioner's assertions, the closure of facilities is not the elimination of a product or product choice. Rather, the carefully contemplated decisions by SECURE to suspend certain facilities represents a sensible integration of resources in an industry whose survival is dependent on being cost-effective.

7. Having expended his efforts on advancing his baseless facility closure theory, the Commissioner either fails to meet or ignores his burdens under ss. 92 and 96 of the *Act*: namely, to establish a substantial lessening of competition in each of the product and geographic markets at issue and to properly quantify the anticompetitive effects from the merger. The Commissioner buried his case in a spreadsheet, failing to lead evidence sufficient to prove a substantial lessening of competition in the markets in which he seeks a divestiture order. He also made no attempt to justify why his proposed remedy, itself made known only days before the hearing was to begin, is necessary or will effectively ameliorate any substantial lessening of competition.

8. Once the failed facility closure theory is discarded, the deadweight loss arising from the Transaction is minimal. On the other hand, the efficiencies the Canadian economy is realizing as a result of the Transaction have been and will continue to be significant. These efficiencies outweigh any anticompetitive effects by a significant order of magnitude across a wide range of scenarios. The merger efficiencies will also enhance SECURE's ability to meet its customers' needs in this challenging industry, including through innovation or dynamic efficiencies that would not be possible but for the Transaction. This application should be dismissed.

PART II: STATEMENT OF FACTS

A. The Transaction

9. SECURE is a publicly traded Canadian company headquartered in Calgary, Alberta and listed on the Toronto Stock Exchange ("**TSX**").[4] SECURE provides solutions to upstream oil and natural gas companies operating in Western Canada.[5] SECURE's customers are oil and gas producers, many of whom are part of large multinational organizations such as Canadian National Resources Limited ("**CNRL**"), Cenovus, Petronas, Imperial Oil, and ConocoPhillips.[6] SECURE does not sell any services to household consumers.

10. Pursuant to an Arrangement Agreement in accordance with the *Business Corporations Act (Alberta)* dated March 8, 2021, SECURE acquired Tervita effective July 2, 2021 (the "**Transaction**").[7] The Transaction was driven by the need to obtain cost savings and greater access to capital to create a stronger midstream infrastructure and environmental solutions business that could thrive long-term in a challenging industry environment.[8]

11. SECURE and formerly Tervita both provided waste treatment and disposal services, environmental remediation services, and oil terminalling and marketing services to upstream oil and gas producers in the Western Canadian Sedimentary Basin (the "**WCSB**").[9] This application focuses on waste disposal and treatment services as the relevant product markets. SECURE uses four types of facilities to provide these services:

(a) **Standalone Water Disposal Wells ("SWDs"),** which are used to dispose of water generated by drilling, fracking, and producing oil and gas wells. While other third-party competitors (e.g., Catapult) operate SWDs in the WCSB, the vast majority of

[4] Agreed Statement of Facts, Tribunal Record Number 000279, para 1 **[Agreed Statement of Facts]**.
[5] SECURE also has a limited number of operations in the United States, which are not relevant to this application.
[6] Witness Statement of David Engel, Exhibit CB-R-153, paras 5, 70 **[Engel Affidavit]**.
[7] Agreed Statement of Facts, paras 27-28, 30.
[8] Engel Affidavit, para 20.
[9] Engel Affidavit, paras 4, 8-9.

SWDs are operated by oil and gas producers (i.e., SECURE's customers).[10] SECURE owns only [redacted] of the more than 3800 SWDs in the WCSB.[11]

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

While no producers currently operate FSTs, there are more than 7,000 producer-owned oil battery sites that perform oil handling services (emulsion treating and/or terminalling). SECURE owns only [redacted] of the facilities that provide oil handling services to producers.[12]

(c) **Landfills**: Landfills are used to provide solid waste disposal services. Producers and non-producers (e.g., such as RemedX, Clean Harbors, and municipalities), operate landfills that accept solid oilfield waste.[13]

(d) **Caverns**: Caverns are used to provide solid and liquid waste disposal services. [14]

12. [redacted]

[10] Engel Affidavit, para 37.
[11] Engel Affidavit, para 37.
[12] Engel Affidavit, paras 37, 42-43, 45.
[13] Engel Affidavit, paras 49, 52.
[14] Engel Affidavit, para 4.
[15] [redacted]

Consolidating these complementary assets will allow SECURE to fully or partially suspend [redacted] facilities (which include [redacted]) without reducing its ability to handle the volumes that flow into these facilities now and into the future. These suspensions are a major component of the efficiencies that are created by the Transaction.[16]

B. The Canadian oil and gas industry and rationale for the Transaction

13. Through the Transaction, SECURE is becoming more efficient and thereby better able to survive the seismic changes in the oil and gas industry. Since 2014, Western Canada's oil and gas sector has been marked by significant volatility, consolidation and reduced investment. This wave was caused first by a global slump in prices and, more recently, by uncertainty over pipeline access and commitments from governments, investors, and operators to lower carbon emissions, focusing instead on renewable energy and, ultimately, achieving a net-zero future.[17]

14. Canadian producers were more severely impacted by the 2014 price collapse than their U.S. counterparts. This produced a corresponding flight of capital from the Canadian oil and gas sector, which spurred a wave of consolidations as Canadian companies sought scale and efficiencies.[18] At the same time, investors began demanding firm commitments to environmental, social and governance initiatives ("**ESG**") and reduced carbon emissions in return for their capital.[19] The capital challenges facing Western Canada's oil and gas sector were exacerbated in 2020 by a Saudi/Russian price war and the COVID-19 pandemic.[20]

15. Although both SECURE and Tervita—like most of their customers—slashed costs in 2020, both reported substantially lower revenues (decreases of 25% (excluding pass-through revenue from oil resale) and 39%, respectively)[21] and overall net losses (C$87.2 million and C$43 million,

---

[16] [redacted]: Witness Statement of Keith Blundell, Exhibit CB-R-871, para 10 **[Blundell Affidavit]**; [redacted]

[17] Engel Affidavit, paras 29-31.

[18] Engel Affidavit, paras 29-31.

[19] Engel Affidavit, para 19; Oral Testimony of Rory Johnston, Transcript, vol 1, p 187:5-12 [**Johnston Testimony**].

[20] Engel Affidavit, para 30.

[21] Consolidated Financial Statement for the years ended December 31, 2020 and 2019, Exhibit CB-A-666, p 41 [**2020 -2019 Financial Statement**]; Engel Affidavit, para 7, Exhibit 9, p 772.

respectively).[22] In total, since 2016, SECURE and Tervita reported net losses of C$481 million.[23] [redacted] This was of concern to customers, who were and still are looking for strong, well-capitalized partners to manage their long-term waste liability as the industry makes the necessary investments in ESG to secure its long-term future.[25]

16. While global oil prices have rebounded recently due to global unrest, the long-term future of the industry remains uncertain.[26] Both SECURE's fact witnesses and the Commissioner's industry expert agreed that investors in the industry continue to be much more focused on short-term returns than they were before the global downturn; they are less interested in long-term growth strategies that leave them exposed to the uncertain long-term future of oil.[27]

17. Accordingly, high commodity prices no longer translate directly to increased development and production activity in the WCSB. [redacted] Rather, they are responding to investors who "are looking for producers to maintain production and provide a return of cashflow from existing projects through things like debt repayment, share buy-backs or dividends."[29]

18. The Transaction, and the significant efficiencies it has and will continue to generate, are critical to SECURE's efforts to support customers through this period of rapid industry change. SECURE cannot survive unless its customers continue to thrive and to invest in the production

[22] 2020-2019 Financial Statement, p 2; Engel Affidavit, Exhibit 9, p 772.
[23] Engel Affidavit, paras 6-7, Exhibits 4, 7, 9, pp 341, 591, 772; Consolidated Financial Statement for the years ended December 31, 2020 and 2019, p 2. Tervita's 2016 net loss of $16 million was offset by the recognition of a one-time gain of $670 million on debt restructuring, resulting in a reported net profit of $654 million: see Engel Affidavit, Exhibit 11, pp 858, 864.
[redacted]
[25] Engel Affidavit, para 20; Johnston Testimony, Transcript, vol 1, p 187:5-22; Witness Statement of Chris Hogue (IPC Canada), Exhibit CB-R-312, paras 10-11 **[Hogue Witness Statement]**; Witness Statement of Robert Broen (Athabasca), Exhibit CB-R-321, paras 29-31 **[Broen Witness Statement]**; Witness Statement of Rod Gray (Baytex), Exhibit CB-R-319, para 13 **[Gray Witness Statement]**; Expert Report of Adonis Yatchew, Exhibit CA-R-325, para 12 **[Yatchew Report]**; [redacted]
[26] Johnston Testimony, Transcript, vol 1, pp 171:14-172:23; Engel Affidavit, para 29.
[27] Johnston Testimony, Transcript, vol 1, pp 175:11-176:23; [redacted]
[29] Broen Witness Statement, para 16.

activities that create the demand for its services.[30] More importantly, the Transaction results in an improved and cost-effective infrastructure to support a growing and consolidating customer base and shared commitments to ESG initiatives, safety, performance, and customer service. It is therefore unsurprising that the Transaction has been supported by dozens of SECURE's customers.[31]

19. SECURE knows that if it is not a capable partner to its customers, they will look for alternatives. As demonstrated by the customers who testified at trial, SECURE's customers are sophisticated and focused on containing costs to obtain the best net-back on each barrel of oil they produce.[32] They are savvy purchasers who are well-informed about the market and their alternatives to using SECURE's services. As one customer stated, "capitalism is alive and well in our industry: if someone wanted to start a waste disposal company and there is enough demand to make it profitable, my expectation is that they could raise the money to do so."[33] These alternatives include further expanding their existing capacity to self-supply midstream services that SECURE provides today.[34]

C. Operations of SECURE and the former Tervita business

i) Pricing dynamics

20. The pricing of SECURE's services is heavily influenced by the symbiotic relationship it has with its customers. Much of the fact evidence regarding the pricing dynamics that affect SECURE's business was given by David Engel, a senior executive with over 23 years in the midstream infrastructure industry, including previous roles with Tervita and Newalta Corporation

---

[30] Witness Statement of Darren Gee (Peyto), Exhibit CB-R-314, para 8 **[Gee Witness Statement]**.

[redacted] Broen Witness Statement, paras 29-31; Gray Witness Statement, paras 11-12.

[redacted] Oral Testimony of David Hart (CNRL), Transcript, vol 5, p 616:3-7 **[Hart Testimony]**; Hogue Witness Statement, para 7; Gee Witness Statement, para 10.

[33] Gee Witness Statement, para 14.

[redacted] Gray Witness Statement, paras 15-18; Gee Witness Statement, paras 12-13; [redacted]; Oral Testimony of Darren Gee (Peyto), Transcript, vol 10, pp 1579:6-14, 1581:2-17, 1582:23-1583:3 **[Gee Testimony]**; [redacted].

("**Newalta**"). Mr. Engel was a highly knowledgeable and credible witness, and his evidence was unchallenged on cross-examination.[35]

21. As Mr. Engel testified, [redacted]

22. Regardless of pricing philosophy, both prior to and following the Transaction, oil and gas producers have various levers they can and do use to limit SECURE's prices. [redacted][39]

23. Among other things, [redacted]

[35] In cross-examination, various documents were read to Mr. Engel demonstrating that pricing strategies are multi-faceted, which SECURE does not deny. Mr. Engel was not, however, contradicted on any of his key evidence in the manner required by the rule in *Browne v Dunn*, [1893] 6 R 67 (HL), at 70-71 (HL), Respondent's BOA, Tab 1. See also J. Kenneth McEwan, *Sopinka on the Trial of an Action*, 4th ed. (Toronto: LexisNexis, 2020), §5.75, Respondent's BOA, Tab 30.

[redacted]

[redacted]

24. [redacted][43] These customers have considerable bargaining power when it comes to waste disposal. This bargaining power includes the ability to discipline pricing they perceive as unreasonable by reducing the volumes brought to SECURE facilities, either across geographies, or across product lines (including by self-supplying services or using a competitor).[44]

ii) Customer facility choices driven by focus on overall costs

25. Ultimately, the overwhelming weight of the evidence is that customers base their choice of waste disposal facility (whether third party or self-supplied) primarily on overall cost. For third party facilities like SECURE's, the primary drivers are the price charged by the facility for disposal (referred to as the "tipping fee" for landfills and solid waste disposal) and the cost to transport the waste from the customer's site to the facility (which is generally paid to a third party). These transportation costs are a significant component of the overall cost, and in many cases are the largest component.[45] All the customers who testified at trial spoke to the importance of transportation costs in making decisions about waste disposal services, and this was amply supported by the documentary evidence.

26. Because most trucking companies charge by the hour, transportation costs can include the time a driver spends waiting at a waste disposal facility that is at capacity when the truck arrives,

---

[redacted]

[43] Gee Witness Statement, para 10; Broen Witness Statement, paras 14-15; Gray Witness Statement, paras 5, 17; [redacted]

[44] Engel Affidavit, paras 64, 66; Hogue Witness Statement, para 15; Gee Witness Statement, paras 11-12.

[45] Oral Testimony of Joshua Ryan McSween (Del Canada), Transcript, vol 2, p 245:8-23 [**McSween Testimony**]; [redacted] McRae Testimony, Transcript, vol 4, p 530:9-12; Oral Testimony of Carl Lammens (Petronas), Transcript, vol 4, pp 565:12-15 **[Lammens Testimony**].

as well as time spent driving.[46] Wait times are often driven by extrinsic factors like the regular spike in demand caused during "spring breakup" in the WCSB.[47]

27. Wait times are a reality of the industry that existed prior to the Transaction, but both SECURE and its customers agree that they are episodic rather than chronic. As Mr. Engel explained, wait times "sometimes get an oversized amount of the discussion. I think it's a minor piece of the transaction cost for customers…the reason I would say it's fairly minor is they're episodic, they happen, but they're usually addressed fairly quickly, and they don't happen all that often."[48] Post-Transaction, SECURE will be able to use its expanded network of facilities to more efficiently route customers' waste and will have an enhanced ability to anticipate and manage its customers' wait times.[49] If anything, the Transaction is likely to reduce wait times.

28. With the flight of capital from the WCSB, SECURE's customers have become laser-focused on controlling costs as the key to their profitability.[50] That includes robust negotiations for the prices they pay SECURE for waste disposal and insisting on detailed justification for pricing increases. A unique feature of this industry is that SECURE's customers have meaningful insight into its operating costs and profit margins and can and do effectively push back against any attempt by SECURE to expand those margins.[51]

29. [redacted]

[46] Oral Testimony of Paul Dziuba (Chevron), Transcript, vol 2, pp 280:7-281:1 [**Dziuba Testimony**]; [redacted] McRae Testimony, Transcript, vol 4, pp 529:25-530:8; Hart Testimony, Transcript, vol 5, pp 592:11-16.

[47] Supplementary Witness Statement of Keith Blundell, Exhibit CB-R-871, para 19 **[Blundell Supplementary Affidavit]**; [redacted]

[48] Engel Testimony, Transcript, vol 7, p 1097:3-10.

[49] [redacted]

[50] Johnston Testimony, Transcript, vol 1, pp 174:4-175:1; Broen Witness Statement, paras 7-12; Hogue Witness Statement, para 7; Gee Witness Statement, para 7; Engel Affidavit, paras 28-30.

[redacted]

[redacted]

iii) Self-supply as a competitive constraint

30. One of the most significant negotiating levers producers have at their disposal – both before and after the Transaction – is the threat of self-supply. There is no regulatory or other requirement that producers use a third party like SECURE for waste disposal – they can and do perform their own waste disposal services. This constant threat of self-supply is part of the underlying matrix of SECURE's negotiations with its customers and serves as a constraint on SECURE's ability to increase prices or otherwise exercise market power.[53]

31. Customers continuously assess their options to minimize their total cost of waste disposal. A significant aspect of this is that customers consider whether it would be more economical for them to build facilities to dispose of their own waste rather than paying the disposal fees and transportation costs associated with third party disposal.[54] For instance, in many cases, it is more economical for customers to dispose of their own water by repurposing spent wells they have drilled for production, to be used for disposal[55] – which helps explain why the vast majority of water disposal wells in the WCSB are operated by producers.[56] While it is less frequently done, customers also have the ability to build their own landfills or treatment facilities. They will do so (either alone or in concert with other producers) if the economics favour it, [57] which becomes more

[redacted]

[53] Hogue Witness Statement, para 15; Gee Witness Statement, para 12; Broen Witness Statement, para 25; [redacted] Hart Testimony, Transcript, vol 5, pp 618:19-619:16.

[redacted]

[56] Agreed Statement of Facts, paras 99-101; Engel Affidavit, para 37.

[redacted] Hart Testimony, Transcript, vol 5, pp 614:22-615:11; Agreed Statement of Facts, para 102; [redacted] Gee Testimony, Transcript, vol 10, pp 1583:13-1584:1; [redacted]

likely if prices increase. Customers further have the ability to leverage their ability to self-supply water disposal to negotiate lower prices for all waste services.[58]

32. [redacted]

33. SECURE and Tervita have historically lost waste volumes to producer self-supply. For example, between [redacted] Tervita lost significant volumes at its [redacted] when [redacted] diverted those volumes to its own landfill.[61] Similarly, [redacted]

34. Respecting the threat of self-supply is also crucial to SECURE's long-term profitability. Self-supply not only threatens volumes coming into SECURE's existing facilities but can eliminate opportunities for SECURE to partner with its customers in the construction of new facilities. [redacted]

[58] Engel Affidavit, para 69.
[59] [redacted]
[60] [redacted]
[63] [redacted]
[64] [redacted]

iv) Sponsored entry as a competitive constraint

35. Producers are also capable of sponsoring the entry of a new competitor or expanding the capabilities of an existing competitor in response to a price increase from SECURE, amplifying the competitive constraint that even smaller competitors provide.[66] Even competitors with relatively small footprints act as a competitive constraint given their ability to build additional waste disposal facilities in partnership with oil and gas producers. Those facilities can then be used not only by the customer that sponsored entry but other producers as well.[67] The prospect of sponsored entry is an important constraint on SECURE's ability to exercise market power.

36. Witnesses gave evidence of at least three examples of sponsored entry or expansion at trial, which illustrate the point:

(a) Talisman Energy sponsored SECURE's initial entry into the Grande Prairie region by providing SECURE with equipment to create a more cost-effective option in the region in response to unfair pricing and poor service from the existing options at the time, CCS and Newalta.[68]

(b) [redacted].[69]

(c) [redacted].[70]

37. SECURE itself is a powerful example of the significance of sponsored entry. The uncontroverted evidence of Mr. Engel is that SECURE's entry and expansion to nine facilities between 2007 and 2010, and to 24 facilities by 2014 was made possible through the sponsorship

[redacted]; [redacted].

[68] Broen Witness Statement, paras 27-28.

[redacted]

[70] [redacted]

of SECURE's customers.[71] The growth of SECURE's business demonstrates the industry's ability to respond to a marketplace that is not sufficiently competitive.[72] Just as SECURE has benefitted from the sponsorship of its customers in the past, it knows that if it does not continue to meet its customers' needs, someone else will likely be the beneficiary of that sponsorship in the future.[73]

D. SECURE'S integration plans

38. SECURE has crafted a detailed integration plan designed to improve the efficiency of SECURE's operations and reduce costs and best serve its customers. SECURE plans to achieve these efficiencies while providing the same services in the same relevant geographic markets at a higher level of quality, with no reduction in output.[74]

39. A significant component of the integration plan is the elimination of excess capacity by suspending facilities or service lines. SECURE is carrying out these suspensions only where other facilities could absorb the volumes expected at those facilities or realize cost savings by operating certain facilities unmanned, with no impact on service to customers.[75] The efficiencies also include significant corporate-level cost savings.

40. SECURE's facility rationalization process is based on "integration clusters," overlapping facilities between SECURE and Tervita that provide the same service lines and same geographic area. As Keith Blundell explained in detail in his written and oral evidence, SECURE analyzed each integration cluster to confirm that it would be able to suspend underutilized facilities without compromising on the quality of service offered to customers.[76] [redacted]

[71] Engel Affidavit, para 76.
[72] Gee Witness Statement, paras 14-15 ("Capitalism is alive and well in our industry: if someone wanted to start a waste disposal company and there is enough demand to make it profitable, my expectation is that they could raise the money to do so").
[73] [redacted]
[74] Blundell Affidavit, para 5; Supplementary Blundell Affidavit, para 3; [redacted]
[75] Blundell Affidavit, para 7.
[76] Blundell Affidavit, paras 8-10.
[77] [redacted]

41. For each of the [redacted] integration clusters and [redacted] clusters, SECURE analyzed a wealth of information from both internal and external sources to create production forecasts and capacity analyses for each region.[78] Mr. Blundell's testimony, both in direct and cross-examination, demonstrated the depth of SECURE's knowledge about the capabilities of its assets and local production activity. While the Commissioner has relied on high-level forecasts for oil production in the WCSB as a whole to challenge SECURE's integration plans, SECURE relied on detailed, region-specific analysis, data, and business intelligence. None of the Commissioner's witnesses made any effort to audit that analysis,[79] and Mr. Blundell's evidence in this regard was not meaningfully challenged in cross-examination.

42. Witnesses called by both parties agreed that growth in Western Canadian oil production is concentrated in heavy oil production in the Alberta oil sands rather than conventional production. Over two-thirds of production in the WCSB has come from the oil sands over the last 10 years and that trend is expected to continue.[80] Any growth in conventional production is expected to be much more modest.

43. This is significant for SECURE because it has a very limited presence for third party waste disposal services in the oil sands region (and no presence before the Transaction) due to the prevalence of self supply resulting from the scale of operations in the region.[81] None of SECURE's oil sands assets are being suspended. [redacted]

44. [redacted]

[78] Blundell Affidavit, para 8. [redacted]
[79] Johnston Testimony, Transcript, vol 1, p 168:3-23; Oral Testimony of J. Gregory Eastman, Transcript, vol 16, pp 2746:24-2747:15, 2753:6-2754:14 **[Eastman Testimony]**.
[80] Johnston Testimony, Transcript, vol 1, pp 168:24-169:17; Engel Testimony, Transcript, vol 7, pp 1095:21-1096:20; [redacted]
[81] Engel Affidavit, paras 11-12; [redacted]

[redacted]

45. The synergies from the Transaction have or will enable SECURE to take steps to improve its level of enabled service to its customers at its facilities that would not have been possible absent the Transaction. [redacted]

46. [redacted]

47. SECURE's efficiencies expert, Andrew Harington, is Canada's leading expert in the quantification of merger efficiencies, having analyzed over 60 transactions for both merging parties and the Commissioner.[86] Mr. Harington opines that the execution of SECURE's integration plan will generate run rate efficiencies of at least [redacted] every year, or [redacted] million on a discounted basis over 10 years.[87] (That analysis is explained in further detail below.) These efficiencies dwarf any cognizable anticompetitive effects alleged by the Commissioner.

---

[83] [redacted].

[86] Harington Updated Report, pp 212-215.

[87] [redacted]

E. The Commissioner's application

48. In his pleadings, the Commissioner seeks an order under s. 92 of the *Act* requiring SECURE to dispose of assets "required for an effective remedy in all circumstances" from SECURE's merger with Tervita. On the eve of trial, well after all expert reports had been submitted, the Commissioner identified for the first time 41 facilities sought as part of this remedy (the "**Commissioner's Proposed Remedy**").[88]

49. Using a customer-location approach based on driving distances to SECURE's facilities, the Commissioner has posited 271 different geographic markets, many of which overlap to a significant extent.

50. The Commissioner's Proposed Remedy includes facilities in so-called "2-to-1" and "3-to-2" markets but also includes other facilities that include a variety of other market structures, including "4-to-3" markets and beyond.[89] The Commissioner has not led any evidence going to the question of why these specific facilities are required to be divested for an effective remedy, nor does the Commissioner assess whether a divestiture of significantly fewer facilities might also serve as an effective remedy.

51. The Commissioner's pleading identifies the relevant product markets as the supply of waste disposal services at (i) TRDs; (ii) industrial landfills; (iii) water disposal wells; and (iv) the disposal of NORM waste[90] into permitted landfills. The Commissioner did not lead any specific evidence regarding the alleged effects of the Transaction on NORM waste disposal.[91]

---

[88] Opening Demonstrative of the Commissioner, Tribunal Record 000283, pp 47-53 **[Commissioner's Opening Demonstrative]**. The only other specific relief sought by the Commissioner is an order "requiring the Respondent to provide the Commissioner with at least 30 days advance written notice of any future proposed merger, as such term is defined by section 91 of the Act, involving the Respondent for a period of five years, where the proposed merger would not otherwise be subject to notification pursuant to Part IX of the Act"; the Tribunal has no jurisdiction to make such an order.

[89] See [redacted]. Row 257 is an "11-to-10" market and the remaining rows are "10-to-9" markets. In total, 72 markets that meet the criteria for inclusion in the Commissioner's Proposed Remedy are 5-4 or greater.

[90] "NORM waste" refers to waste contaminated by naturally occurring radioactive materials.

[91] Miller Report, para 26.

52. For the purposes of this application, SECURE's economic experts have not disputed the geographic or product markets defined by the Commissioner.

PART III: POINTS IN ISSUE

53. There are three issues on this application:

(a) First, whether the Commissioner has met his burden to establish that the merger has or is likely to prevent or lessen competition substantially under s. 92 of the *Act*;

(b) Second, what remedy would remove any "substantial" lessening of competition from the merger; and

(c) Third, whether the efficiencies from the Transaction are greater than and offset the anticompetitive effects, if any, of the merger under s. 96 of the *Act*.

PART IV: LAW AND SUBMISSIONS

A. Overview of the legal framework

54. Section 92 of the *Act* permits the Tribunal to order the divestiture of assets where it finds that a merger has or is likely to prevent or lessen competition substantially ("**SLC**"). The Commissioner bears the onus of establishing an SLC on a balance of probabilities for each relevant and properly defined product and geographic market and product line where such SLC is alleged to result from the merger. If the Tribunal finds that an SLC is likely, the appropriate remedy for the merger is one that restores competition to the point where it is not substantially less than the pre-merger level.[92]

55. Section 96 of the *Act* provides that the Tribunal shall not make an order under s. 92 where it finds that the 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 offset the anticompetitive effects

[92] *Canada (Director of Investigation and Research) v Southam Inc.*, [1997] 1 SCR 748, at para 85 [*Southam*], Respondent's BOA, Tab 8.

that result from the merger. Section 96 also requires that the gains in efficiency would not likely be attained if the order were made.

56. Under s. 96, it is the Commissioner's burden to prove the alleged anticompetitive effects. The merging parties bear the onus of establishing the extent of the efficiency gains and that such gains are greater than and offset the anti-competitive effects.[93] Anticompetitive effects are limited to those effects that result from a lessening or prevention of competition.[94] Effects that are not restricted to anti-competitive mergers, such as layoffs and plant closures, are not anticompetitive effects and should not be considered.[95]

57. The Supreme Court of Canada has confirmed that the Commissioner's burden is to quantify all quantifiable anti-competitive effects. These estimates must be grounded in evidence that can be challenged and weighed. Where the Commissioner fails to quantify a quantifiable anticompetitive effect, such effect is fixed at zero.[96]

58. The requirement that the Commissioner quantify all quantifiable effects is rooted in the need for fairness to the merging parties. As Justice Rothstein held in *Tervita,* allowing indeterminate weight to be applied to unquantified effects "would be to leave the merging parties in an untenable position where they are expected to prove that the efficiencies are greater than and offset the anti-competitive effects, despite not knowing what those effects are."[97]

B. The Commissioner has not met his burden to prove an SLC

i) The Commissioner's failure to prove an SLC on a market-by-market basis

59. The Commissioner seeks divestitures relating to 271 distinct geographic markets identified by his economic expert Dr. Nathan Miller, across three product lines (SWDs, landfills, and

[93] *Tervita*, at para 122, citing *The Commissioner of Competition v Superior Propane Inc.*, 2000 Comp Trib 15, at paras 399 and 403, Respondent's BOA, Tab 21 [*Superior Propane I*]; *Canada (Commissioner of Competition) v Superior Propane Inc. (C.A),* 2001 FCA 104, at para 154, Respondent's BOA, Tab 3 [*Superior Propane II*]; *Canada (Commissioner of Competition) v Superior Propane Inc. (C.A.),* 2003 FCA 53 at para 64, Respondent's BOA, Tab 4 [*Superior Propane IV*].
[94] *Superior Propane I*, at paras 442-445.
[95] *Superior Propane I*, at paras 443-444.
[96] *Tervita,* at para 128.
[97] *Tervita,* at para 136.

FSTs).[98] The Commissioner's Proposed Remedy is apparently structured to include over 100 geographic markets in which SECURE allegedly has market shares over 35% and where Dr. Miller predicts price effects greater than 5%.

60. The Commissioner relies on Dr. Miller's evidence to discharge this burden to prove an SLC in each of these markets, despite Dr. Miller's opinions being largely focused on the Transaction as a whole. The Commissioner has provided no meaningful evidence or analysis relating to the competitive dynamics at the geographic market level, or across product lines. Instead, he relies solely on scatterings of anecdotal evidence, and the high-level descriptions of the markets contained in a spreadsheet prepared by Dr. Miller. For this purpose, the information in Dr. Miller's spreadsheet is limited to: (i) the structural change in the market (e.g., four competitors to three, three to two, or two to one), (ii) the combined market share of the parties post-Transaction; and (iii) his estimated price effects for the market.

61. The evidence shows that factors such as self-supply, countervailing buyer power, and the ability of producers to sponsor the entry or expansion of additional third-party competitors act as competitive constraints on SECURE across the WCSB. Dr. Miller's analysis does not properly consider these factors, and they play no role in his description of the relevant geographic markets. In short, the Commissioner has not established that mere consolidation will give rise to an SLC in 271 separate geographic markets.

ii) The evidence regarding deadweight loss

62. The Commissioner has not met his burden under s. 96 of the *Act* for two key reasons. Each of these is tied to one of the two wholly distinct theories of deadweight loss Dr. Miller relies on in his reports.

63. First, the lion's share of the "deadweight loss" asserted by Dr. Miller is associated with his failed facility closure theory. Dr. Miller was unable to commit to a specific number but quantified this category of deadweight loss at somewhere between $37 million and $72 million.[99] The facility

[98] Given that the Commissioner's expert Dr. Miller did not provide evidence relating to NORM waste, there is no basis on the record to conclude that there is an SLC relating to NORMs.
[99] Miller Testimony, Transcript, vol 6, pp 1019:14-1022:7.

closure theory has no basis in law, economics, or fact. In short, it is not an anti-competitive effect arising from the Transaction. Facility suspensions are efficiencies, not anticompetitive effects.[100]

64. Second, Dr. Miller conducts a more traditional deadweight loss analysis based on output reductions arising from predicted price effects. This traditional deadweight loss analysis is entirely distinct from the deadweight loss he claims arises from the facility closure theory. However, this analysis significantly overestimates deadweight loss, in large part because the model Dr. Miller uses for his analysis is completely disconnected from the realities of the industry.

65. Dr. Miller provided an illustrative calculation setting these potential effects at $1 million to $4.4 million annually.[101] Applying an actual empirical model, SECURE's economic expert Dr. Renee Duplantis quantified this same category of effects at $1.6 million annually. As explained further below, Dr. Duplantis's evidence should be preferred to Dr. Miller's. However, either Dr. Miller or Dr. Duplantis's calculations of deadweight loss arising from the Transaction is significantly outweighed by the efficiencies generated.

66. Each of these categories of deadweight loss are discussed in turn below.

C. Dr. Miller's facility closure theory is not a cognizable anticompetitive effect

67. The Commissioner has conceded that his application must fail unless the Tribunal accepts Dr. Miller's facility closure theory.[102] This case will be the first where the Tribunal considers this novel theory,[103] which has not been accepted or even commented upon by any other court in the world.

68. Dr. Miller's facility closure theory postulates that when SECURE closes a waste disposal facility following the Transaction, there is an incremental social value that customers attribute to that facility that is lost. Dr. Miller quantifies this alleged loss with reference to the variable profits realized by the suspended facility before the Transaction.

---

[100] *Superior Propane I*, paras 443-445.
[101] Miller Report, para 133.
[102] Commissioner Opening, Transcript, vol 1, p 22:4-8.
[103] Commissioner Opening, Transcript, vol 1, p 20:14-16.

69. The fatal flaw of Dr. Miller's facility closure theory is that it is not tied to any exercise of market power or any output reduction, the traditional hallmarks of a cognizable anti-competitive effect. In his opening, the Commissioner characterized this as "the first case where the deadweight loss is measured other than primarily with respect to output effects."[104]

70. The facility closure theory is based on an internally inconsistent economic theory and a flawed understanding about the industry in which SECURE operates. Notably, it fails to account for the fact that customers will continue to receive the same waste disposal services at other facilities post-Transaction. There is no loss of product choice as Dr. Miller alleges because waste disposal facilities are not products—they are the inputs used by SECURE to provide the relevant products.[105] SECURE's integration plan enables it to provide those services through a more efficient network by eliminating excess capacity.

ii) The facility closure theory fails as a matter of law

71. The s. 92 analysis focuses on the creation, maintenance, and enhancement of market power, which is defined as the ability to profitably maintain prices (or other dimensions of competition) beyond the competitive level for a considerable period of time.[106] Section 96 of the *Act* is concerned with the effects of that market power, as reflected in the reference in that provision to "effect of any prevention or lessening of competition." If an effect does not result from the merged firm's enhanced competitive position post-merger, it is not an anticompetitive effect that needs to be considered for the s. 96 analysis.[107]

72. As the majority of the Supreme Court of Canada held in *Tervita*, the relevant "effect" for the s. 96 analysis is the deadweight loss from the Transaction, which involves a reduction of output flowing from an increase in price (or related exercise of market power). Deadweight loss is understood as "the amount by which total surplus is reduced under certain market conditions that reduce the quantity of a good that is supplied"[108] and "results from the fall in demand for the

[104] Commissioner Opening, Transcript, vol 1, p 77:1-13.
[105] *Competition Act*, RSC 1985, c C-34, s 2, "product," Respondent's BOA, Tab 25 [*Competition Act*].
[106] *Tervita*, at para 44.
[107] *Superior Propane I*, at paras 443-444.
[108] *Tervita*, at para 94, citing Brian A. Facey and Cassandra Brown, *Competition and Antitrust Laws in Canada: Mergers, Joint Ventures and Competitor Collaborations* (Markham, Ont: LexisNexis, 2013), at pp 256-257.

merged entities' products following a post-merger increase in price, and the inefficient allocation of resources that occurs when, as prices rise, consumers purchase a less suitable substitute" [all emphasis added].[109]

73. In *Tervita,* the majority recognized that an elasticity of demand calculation is required for calculating deadweight loss because the s. 96 anticompetitive effects analysis is concerned with a reduction in output resulting from an exercise of market power through a price increase.[110] Elasticity of demand measures "the degree to which demand for a product varies with its price."[111] As a result, the need to calculate elasticity of demand simply reflects the fact that the elasticity is a measure of how an exercise in market power through an increase in prices affects output (and thereby social welfare).

74. The meaning of "effect" in s. 96 is restricted to those that arise solely from anticompetitive mergers and the attendant exercise of market power.[112] The Tribunal specifically noted in *Superior Propane I* that the closure of facilities would not qualify as an anticompetitive effect under s. 96:

> The Tribunal observes that an anti-competitive merger may well have other important economic and social effects. Job terminations and plant closures are often emphasized in the press, presumably because of their immediacy and significance to the people and communities involved.
>
> While not seeking to minimize the importance of these effects on those affected, the Tribunal wishes to point out that they are not restricted to anti-competitive mergers. Layoffs and closures often result from mergers and business restructurings that are not offensive and the Commissioner may take no notice thereof under the Act. Accordingly, the Tribunal is of the view that these effects are not to be considered when they result from anti-competitive mergers.

[109] *Tervita*, at para 94, citing *Superior Propane IV*, at para 13.
[110] *Tervita*, at para 94. See also *Tervita,* at paras 132, 134-136.
[111] *Tervita*, at para 94; see also *Canada (Commissioner of Competition) v Secure Energy Services Inc*, 2021 Comp Trib 7, at para 40, Respondent's BOA, Tab 2 [*SECURE 104*]. In his reasons dismissing the Commissioner's application under s. 104 of the *Act* in this case, Chief Justice Crampton stated that overcoming the s. 96 exception requires the Commissioner "to provide evidence regarding price-elasticities of demand and estimates of deadweight loss that will likely result from the Merger."
[112] Competition Bureau, *Merger Enforcement Guidelines*, at para 2.1 [*MEGs*], Respondent's BOA, Tab 28.

> As a result, the Tribunal cannot accept the Commissioner's submission that section 96 does not place any other limitations upon the scope or range of "effects" to be considered.[113] [emphasis added]

75. Later, in *Superior Propane III,* the Tribunal reiterated that that these other supposed "effects" of a merger that are "not connected to any of the objectives of Canadian competition policy" are not an effect because they "also result from mergers that are not anti-competitive and in that case the Commissioner can take no notice thereof under the Act."[114]

76. In his seminal text, *Mergers and the Competition Act*, Chief Justice Crampton explained that the "effects" for purposes of s. 96 must be tied to an exercise of market power. He states that s. 96 effects "should be taken to be *economic* consequences that can be quantitatively or qualitatively measured. Insofar as purely structural effects of mergers do not, in and of themselves, have economic (i.e., market power) consequences on the process of competition that can be measured, a merger cannot 'substantially' prevent or lessen competition"[115] [emphasis in original].

77. Indeed, Chief Justice Crampton cautioned about the consequences of including effects that are not tied to a specific exercise of market power in the s. 96 analysis:

> A conclusion that the "substantial prevention or lessening" threshold could be found to be contravened in the absence of market power implications that can be assessed by reference to concrete benchmarks such as a price increase, an output restriction, or other exercise of market power would not only create significant scope for arbitrary decisions but would also impose significant costs on the economy by blocking transactions that business persons implicitly consider to be efficient, without any corresponding tangible or intangible gain to society. Such a view would imply that the Government has a legitimate role to play in the marketplace even where there are no likely negative resource allocation consequences associated with the mergers being blocked. It is difficult to see what the policy justification for such a position could be, and there is nothing to suggest that this is what Parliament had in mind when it enacted the current merger provisions. In fact, in none of the jurisdictions that have been reviewed in this work

[113] *Superior Propane I*, at paras 443-445.
[114] *The Commissioner of Competition v Superior Propane Inc.*, 2002 Comp Trib 16, at para 284, Respondent's BOA, Tab 22 [*Superior Propane III*].
[115] Paul S Crampton, *Mergers and the Competition Act* (Toronto: Carswell, 1990), p 383, Respondent's BOA, Tab 31 [Crampton*, Mergers and the Competition Act*].

> are mergers that are not believed to be likely to have market power consequences challenged for competition reasons.[116] [emphasis added]

78. Dr. Duplantis explained that the facility closure theory has no connection to the competitive harm Dr. Miller predicts from higher post-merger prices and is independent of whether a transaction would result in a substantial lessening of competition.[117] Dr. Miller readily conceded that his facility closure theory is in no way connected with a merged firm's exercise of market power. In particular, during cross-examination he admitted that:

(a) The facility closure theory does not depend on an exercise of market power.[118]

(b) A customer loses value from a facility closure whether or not they were in a market where SECURE and Tervita were competitors.[119]

(c) The facility closure theory is unaffected and distinct from any of the price effects that allegedly give rise to a substantial lessening of competition.[120] Indeed, including customer buyer power in Dr. Miller's model would result in *lower* price effects (and potentially no price effects at all) but a *higher* facility closure effect.[121]

[116] Crampton, *Mergers and the Competition Act*, p 385.
[117] Updated Expert Report of Renee Duplantis, Exhibit CA-R-335, para 133 **[Duplantis Updated Report]**; Oral Testimony of Renee Duplantis, Transcript, vol 11, pp 1804:15-1805:25 **[Duplantis Testimony]**.
[118] Miller Testimony, Transcript, vol 6, pp 833:24-834:9. In response to a question on redirect, Dr. Miller said that as a matter of "theory" it may be more profitable to close a facility if due to high diversion one is able to recapture customers from the closed facility (Miller Testimony, Transcript, vol 6, pp 951:2-954:1). However, Dr. Miller made no reference to this supposed theory in either of his reports or direct testimony and the Commissioner put no questions to any Secure witness in relation to it. Moreover, there is no evidence in this case that market power is in any way connected to the facilities being suspended under SECURE's integration plan. In fact, facility suspensions are taking place for facilities in a wide variety of market structures (as just one example, [redacted] indicates that the Emerson SWD being suspended is only a closest or a relevant facility in three "8 to 7" markets, nine "9 to 8" markets, ten "10 to 9" markets", and two "11 to 10" markets), and Mr. Blundell's testimony indicated that a wide range of factors went into the decision to suspend facilities, including a facility's age, capacity utilization, location, profitability, and any required capital expenditures (See Blundell Testimony, Transcript, Vol, pp 2153:9-2154:11).
[119] Miller Testimony, Transcript, vol 6, pp 810:4-20, 828:15-829:12.
[120] Miller Testimony, Transcript, vol 6, p 818:18-23.
[121] Miller Testimony, Transcript, vol 6, pp 864:24-866:11.

(d) A customer's supposed lost value from a facility closure is based on a facility's variable profits from more than a year prior to the Transaction (i.e., in 2019), rather than any post-Transaction impact from the merger.[122]

(e) Neither the profit-based or share-based approach to the facility closure theory depends on any concentration resulting from the merger.[123] Whether the share of the remaining facility in the market was 10 percent or 99 percent, or there was no accretion in concentration at all, the facility closure effect would be the same.[124]

79. Dr. Miller also acknowledged that the facility closure theory does not depend on or contemplate a reduction in output.[125] For this reason, despite the clear legal requirement under s. 96 for an elasticity of demand calculation, the facility closure theory does not require one.[126] Adoption of this novel theory would fly in the face of the Supreme Court of Canada's clear guidance in *Tervita* that an elasticity estimate is needed to calculate deadweight loss.

80. Dr. Miller's facility closure theory should be rejected as a matter of law. It is not tied to any exercise of market power by a merged firm, does not depend on a reduction in output, and is precisely the type of "effect" that may arise regardless of whether a merger is anticompetitive. Adopting the facility closure theory would give scope for a significant degree of arbitrary decision making and would allow efficient mergers to be blocked, contrary to the purpose of the *Act.*

iii) The facility closure theory fails as a matter of economics

81. Dr. Miller principally relies on the second-score auction model, both for calculating his price effects and the various disparate figures associated with his facility closure theory (which ranged anywhere from $51 million to $72 million). Dr. Miller uses his specific second-score auction model because: (i) he considers price discrimination to be a salient feature of the waste

[122] Miller Testimony, Transcript, vol 6, pp 817:5-818:10.
[123] Miller Testimony, Transcript, vol 6, pp 830:8-12, 833:19-23.
[124] Miller Testimony, Transcript, vol 6, pp 832:2-14, 834-9.
[125] Miller Testimony, Transcript, vol 6, pp 823:11-824:17.
[126] Miller Testimony, Transcript, vol 6, pp 818:24-819:2.

disposal services industry; and (ii) he does not view customer buyer power as likely to be a significant contributor to price determinations in this industry.[127]

82. As highlighted by Dr. Duplantis, Dr. Miller's theory of this case has already been debunked by an independent economist. A critique by Dr. Keith Waehrer of Dr. Miller's second score auction model disproves that total surplus will decrease due to facility suspensions following the Transaction. In his paper, Dr. Waehrer explains that under Dr. Miller's model, a profit maximizing firm would never close an economically profitable facility:

> [T]he situation where the merger does make it profitable to eliminate a product is unlikely to occur at least as modeled in Miller (2014, 2017). This is not to say that we would never observe a merged firm eliminating a premerger product, only that if such a move was planned, additional factors are likely at play. One example of such a factor is a merger efficiency in the production capability for the retrained products post-merger leading to smaller anticompetitive effects than arise from the model proposed in Miller (2014, 2017) even with the discontinuation of a product. However, the approach taken in Miller (2014, 2017) assumes an anticompetitive incentive to discontinue a product line that is generally alone not a profitable response to a merger.[128] [emphasis added]

83. Although Dr. Miller was well aware of Dr. Waehrer's critique (indeed, he commented on a draft of Dr. Waehrer's paper), he did not address it before providing his reply report. He conceded during cross-examination that Dr. Waehrer's observation is correct:

> You know, first of all, [Dr. Waehrer] is right. You can prove that result. In the context of second-score, you don't close a facility that is economically profitable before the merger. So I don't think there's any disagreement from me about that point….[129] [emphasis added]

84. One of Dr. Waehrer's explanations for why a merged firm would still close a profitable facility is that the lost surplus at a suspended facility will be offset by the recaptured and heightened surplus at the absorbing facility.[130] This explanation aligns with the circumstances here, where

[127] Miller Report, paras 33, 206-207; [redacted] Miller Testimony, Transcript, vol 6, pp 840:13 – 841:16, 843:12-25.
[128] 2021, Paper by Dr. Keith Waehrer - Modeling the effects of mergers in procurement, Exhibit P-R-069, p 3 **[2021 Waehrer Paper]**.
[129] Miller Testimony, Transcript, vol 5, pp 795:2-6.
[130] 2021 Waehrer Paper, p 5.

SECURE is investing in and making improvements to the remaining facilities in its network and operating these facilities more efficiently.[131]

85. When forced to address Dr. Waehrer's critique, Dr. Miller effectively abandons the second-score auction model that he claimed best suited the industry. Dr. Miller claims that Dr. Waehrer's observation does not extend to potential variants of the second-score auction that account for buyer power.[132] This shift flies in the face of:

(a) Dr. Miller's previous opinion that both factually and theoretically, "buyer power is [not] a consideration that is going to be important in most situations in this market";[133]

(b) the fact that Dr. Miller did not use any models incorporating buyer power in his analysis; and

(c) Dr. Miller's admission that buyer power could prevent any price effects from a merger altogether.[134]

86. Then, Dr. Miller argues that Dr. Waehrer's observation does not extend to yet another alternative model, the Bertrand model. Using the Bertrand model, Dr. Miller claims he can establish a deadweight loss of $37 million arising from his facility closure theory. However, this model is also inapt to this industry. Bertrand competition is based on a single posted price with no negotiation[135] and does not involve any of the price discrimination that Dr. Miller claims is widespread in the waste disposal services industry (and upon which his second-score auction model is based).[136]

87. The Bertrand model is inconsistent with Dr. Miller's own belief that there are no posted prices within markets or between markets in the waste disposal industry, [redacted]

[131] [redacted]
[132] Miller Reply Report, para 93.
[133] Miller Testimony, Transcript, vol 5, pp 747:15-748:9.
[134] Miller Testimony, Transcript, vol 6, pp 865:18-866:5.
[135] Miller Testimony, Transcript, vol 6, pp 855:22-856:1; Miller Reply Report, para 90.
[136] Miller Report, paras 33, 71, 117; [redacted] Miller Testimony, Transcript, vol 6, pp 855:11-856:14.

[redacted].[137] The inapplicability of the Bertrand model to this industry is evident in that Dr. Miller did not calculate the price effects from the Transaction using his Bertrand model,[138] which Dr. Duplantis explained could have rendered vastly different price effects than those estimated by his second-score auction model.[139]

88. The Waehrer critique also explains why the use of the Bertrand model in this context is inappropriate. As Dr. Duplantis cogently explained, Dr. Waehrer's observation that shifting production (or other analogous improvements of value to customers) to an absorbing product (or in this case, facility) can increase total surplus applies more broadly to models like Bertrand. This is particularly true as Dr. Miller himself has described Bertrand as mathematically equivalent to a first-price auction.[140] Under the Bertrand model, SECURE's facility suspensions would enhance total surplus through its improvements in customer service and shifting of production to its remaining facilities. Dr. Duplantis did not resile from this point despite protracted cross-examination by the Commissioner.[141]

89. In short, Dr. Miller's attempts to explain away the Waehrer critique by hopping from model to model are unsuccessful. The $72 million and $51 million deadweight loss figures he derived from the second score auction model are negated by the Waehrer critique. SECURE suspending these facilities and improving customer service and shifting productive capacity to other facilities will in fact increase total surplus rather than reduce it. Further, the Bertrand model that is used to calculate the $37 million in deadweight loss due to facility suspensions does not fit the industry even as Dr. Miller understands it. In any event, SECURE's shifting volumes to remaining facilities and facility improvements more than negates the alleged deadweight loss Dr. Miller calculates from the Bertrand model.

90. Dr. Miller's facility closure theory also depends crucially on an assumption that SECURE and Tervita's variable margins entirely reflect product differentiation, resulting in an assumed loss

[137] Miller Testimony, Transcript, vol 6, p 856:15-18; [redacted]
[138] Miller Testimony, Transcript, vol 6, pp 938:1-20.
[139] Duplantis Testimony, Transcript, vol 11, pp 1777:3-22.
[140] Duplantis Testimony, Transcript, vol 12, p 1953:2-11; 2014, Paper by Dr. Nathan H. Miller - Modeling the effects of mergers in procurement, Exhibit P-R-067, p 207.
[141] Duplantis Testimony, Transcript, vol 12, pp 1945:13-1955:15.

of unique incremental value when a facility closes. Leaving aside that facilities are not themselves "products," there are numerous reasons for positive variable margins that are unrelated to differentiation, including:

(a) high industry fixed costs for which a supplier needs to earn a rate of return on their cost of capital;[142]

(b) a premium reflecting long-term storage requirements and the importance of a supplier's reputation to manage liabilities that ultimately belong to the customer (which is only being enhanced by the Transaction);[143]

(c) pre-existing market power from oligopolistic pricing; and

(d) pre-existing market power from barriers to entry.[144]

91. Dr. Miller acknowledged that oligopolistic pricing and barriers to entry could result in high margins.[145] Dr. Miller then claimed that these two factors are incorporated into the assumptions in his model[146] but, at the same time, also claims his results do not depend on any particular model.[147] As Dr. Duplantis explained, positive profit margins alone are not sufficient to assess the degree of product differentiation (or lack thereof) outside of the theoretical world of Dr. Miller's models.[148]

92. Further, the variable margins of SECURE's facilities are unrelated to a customer's valuation of that facility. Variable margins of facilities can vary from year to year, or month to month, while the services provided at the facilities remain unchanged, in response to external factors such as weather events (e.g., high rainfall resulting in greater leachate disposal costs at a landfill) or other one-time expenses.[149] Further, the facility-based P&L statements on which Dr.

[142] Mr. Engel discussed the importance of SECURE earning a rate of return on its initial investment in waste disposal facilities in his testimony. [redacted]
[143] Updated Duplantis Report, paras 148-150.
[144] Duplantis Testimony, Transcript, vol 11, pp 1798:5-1800:13; Engel Affidavit, paras 93-96.
[145] Miller Testimony, Transcript, vol 6, pp 932:1-4, 935:1-11.
[146] Miller Testimony, Transcript, vol 6, pp 931:14-932:16.
[147] Miller Testimony, Transcript, vol 5, pp 795:8-796:5.
[148] Duplantis Testimony, Transcript, vol 11, pp 1799:19-1800:13.
[149] Engel Affidavit, para 93.

Miller based his margin calculations do not accurately reflect a facility's profitability, as they do not reflect the true cost of owning and operating a facility.[150]

iv) The facility closure theory fails as a matter of fact

93. As noted immediately above, the facility closure theory relies on treating individual waste disposal locations as individual "products" that customers value relative to other options, to establish a welfare loss from their closure. The quantity of the effect for a given facility represents the "value [oil and gas producers] derived from delivering waste to that facility over other alternatives."[151] Dr. Miller's supposed deadweight loss then represents the incremental value of all the suspended facilities to oil and gas producers, with a value anywhere between $37 and $72 million.

94. When pressed by the Tribunal whether he was confident in his $72 million figure, Dr. Miller said only that there will be a loss "within some range":

> No, within a range. You know, within some range and you know, a range that I can't – you know, I don't know if – I don't know what to tell you, is it 65 to 75, you know, or 60 to 80? I don't want to – I don't think it would be appropriate to me to narrow it down for you and I don't want to overstate what I can accomplish there.
>
> But it's going to be a big number, and that's what economic theory tells us. And you know, again, it just flows from what we see from the shares and the margins. [emphasis added][152]

95. Dr. Miller went on to say that "I feel comfortable with the range of 37 to 51 and I also feel comfortable with 72 being my best estimate of the full effect."[153] In his testimony, it was clear that Dr. Miller did not have a quantity for his facility closure theory, calling his $72 million figure "reasonably accurate" and saying he is comfortable with $37 million to $51 million "if you go for the loss within the markets."[154] Simply put, even assuming the facility closure theory has any merit

[150] Engel Affidavit, para 94.
[151] Miller Report, para 148.
[152] Miller Testimony, Transcript, vol 6, pp 1019:22-1020:7.
[153] Miller Testimony, Transcript, vol 6, p 1020:23-25.
[154] Miller Testimony, Transcript, vol 6, p 1021:16-22.

(which it does not), Dr. Miller has not estimated the supposed loss resulting therefrom with the level of precision or rigour required by *Tervita*.[155]

96. Beyond Dr. Miller's lack of precision, the facility closure theory has no factual foundation for four reasons. First, his calculations are based on an erroneous list of planned facility suspensions, based on an earlier version of SECURE's integration plan which has since been superceded.[156]

97. Second, Dr. Miller is wrong in fact to characterize SECURE's facilities as differentiated products that will be discontinued following the Transaction. While Dr. Miller may consider the facilities products in a theoretical economic sense,[157] this view does not reflect the reality of the industry: facilities are not the product. The product is waste disposal services, which is how the relevant product markets have been defined by both the Commissioner and SECURE. [158] None of the relevant products are being discontinued.[159]

98. The overwhelming weight of the evidence is that SECURE's service offerings are not differentiated from those of the former Tervita in any meaningful way. Indeed, the Commissioner's entire case and Dr. Miller's competitive effects analysis asserts and rests on an assumption that SECURE and Tervita were each other's closest substitutes.[160] While substitute products can still be differentiated as a matter of economic theory, Dr. Miller's claim of significant differentiation conflicts with a mountain of testimony from customers who testified that they viewed the waste disposal services provided by SECURE and Tervita as interchangeable subject to overall cost.[161]

---

[155] *Tervita*, at para 125; see also Miller Testimony; Transcript, vol 6, p. 1017:24 – 1022:7.
[156] These facilities are Tervita Willesden Green Landfill, Tervita South Taylor TRD, SECURE Edson TRD, SECURE Tulliby Lake TRD, Tervita Brazeau TRD, and Tervita Eckville WD. See Miller Report, Exhibit 33, rows 2, 5, 7, 17, 19 and 28.
[157] Miller Testimony, Transcript, vol 6, pp 918:19-919:24.
[158] Miller Report, para 46; Miller Testimony, Transcript, vol 6, 879:11-22; Opening Submissions by Mr. R. Kwinter, Transcript, vol 1, pp 95:22-96:3, 96:10-12; Duplantis Testimony, Transcript, vol 11, pp 1771:23-1772:5.
[159] Blundell Supplementary Affidavit, para 3.
[160] Miller Report, para 91-100.
[161] McSween Testimony, Transcript, vol 2, pp 246:4-247:6; Hart Testimony, Transcript, vol 5, pp 593:20-594:6; Cain Testimony, Transcript, vol 2, pp 357:21-358:18; [redacted]; Oral Testimony of Lars DePauw (OWA), Transcript, vol 4, p 502:9-21 **[DePauw Testimony]:** [redacted] Lammens Testimony, Transcript, vol 4, pp 565:19-566:10; [redacted]

99. Third, Dr. Miller is unable to account for the components of the supposed value that customers derive from the suspended facilities. Dr. Miller openly admitted that he does not know and cannot quantify the value that customers ascribe to the various differentiating factors that Dr. Miller is only even vaguely able to identify in any event—he is thus forced to claim that the customers ascribe an indeterminate yet substantial value to distinguishing factors that he regards as "unobservable".[162]

100. The only aspect of this alleged loss that Dr. Miller (or any witness in this proceeding) is able to quantify is the incremental transportation cost from facility suspensions – in other words, the incremental driving distance a customer might incur to travel to another waste disposal facility if the facility they used prior to the Transaction is suspended by SECURE. Based on Dr. Miller and Dr. Duplantis' calculations, the incremental transportation cost is at most one-tenth (and properly calculated only [redacted] of the $72 million in alleged welfare loss from facility suspensions.[163]

101. This result is astonishing considering that nearly all customers that testified at trial agreed that transportation costs were a central component in their calculus when choosing a waste disposal facility, and often the determining factor.[164] What follows from this is that in order to fully account for the lost "value" from suspending facilities according to Dr. Miller's theory, oil and gas producers must value the other, unnamed, unidentified distinguishing factors between facilities nine to [redacted] times higher than they value transportation costs.

102. To put it simply, there is no evidence that would permit the Tribunal to draw the inference that customers value things like driver amenities at a facility ten times more than they value minimizing their trucking costs (which as noted above, includes wait times). In fact, many of the things the Commissioner has tried to insinuate were differentiators between SECURE and former

[162] Miller Testimony, Transcript, vol 6, pp 832:21-23, 874:7-875:13, 877:6-879:10.
[163] Dr. Duplantis estimates the incremental transportation cost at approximately [redacted] See Duplantis Updated Report, Figure 29, p 128. See also Miller Report, para 139.
[164] McSween Testimony, Transcript, vol 2, pp 245:8-246:12; [redacted] Cain Testimony, Transcript, vol 2, pp 351:6-352:21, 358:3-7; [redacted] DePauw Testimony, Transcript, vol 4, pp 498:19-499:5, 502:5-8; McRae Testimony, Transcript, vol 4, p 529:8-20; Lammens Testimony, Transcript, vol 4, pp 564:20-566:11; Hart Testimony, Transcript, vol 5, pp 591:12-25, 593:16-19.

Tervita facilities simply go to transportation costs (e.g., guaranteed turnaround times or offering dedicated risers to reduce wait times).

103. In his reply report, Dr. Miller provided a revised value for the incremental transportation cost and an entirely new figure for incremental wait times following facility suspensions. However, even he characterized these revised figures as "thought experiments" and "illustrative calculations" that were "not intended to be specific estimates".[165] The purpose of these exercises, according to Dr. Miller, was simply to see "how big could the number be."[166]

104. Indeed, both Dr. Miller and Dr. Duplantis agreed that there were no data available that would allow either of them to calculate the incremental lost value from wait times.[167] There is likewise no evidence in the record establishing that wait times at SECURE facilities have systematically increased following the Transaction. They continue to be an occasional issue for customers, as they were before the Transaction. The alleged value of the incremental travel costs and wait time "thought experiment" in Dr. Miller's rebuttal report should be given zero weight.

105. Fourth and finally, the uncontroverted evidence is that customers will benefit from the Transaction and derive increased value from the remaining facilities in SECURE's networks. [redacted] To suggest that the Transaction will reduce consumer surplus in a theoretical sense is contrary to all this evidence.

[165] Miller Testimony, Transcript, vol 5, p 796:18-21, vol 6, p 945:20-23.
[166] Miller Testimony, Transcript, vol 5, p 797:8-11.
[167] [redacted] Duplantis Testimony, Transcript, vol 11, pp 1803:20-1804:3.
[168] [redacted]
[169] [redacted]
[170] [redacted]

v) Conclusion on the facility closure theory

106. In short, the facility closure theory is not an anticompetitive effect properly considered under s. 96 of the *Act*. It is based on flawed and inconsistent economic theory and has no factual foundation in the record before the Tribunal. For these reasons, it should be excluded from the Tribunal's assessment of the alleged anticompetitive effects under s. 96. The s. 96 analysis should be restricted to the deadweight loss from reduced output resulting from potential price increases, which the Commissioner acknowledges is entirely distinct from the facility closure theory. This is the analysis required by *Tervita*, as discussed immediately below.

D. The Commissioner failed to properly quantify the alleged anticompetitive effects

107. As noted above, it is the Commissioner's burden under s. 96 to quantify all anticompetitive effects that can be quantified.[171] While the Tribunal has discretion to accept estimates in this regard, "due to the uncertainty inherent in economic prediction, the analysis must be as analytically rigorous as possible in order to enable the Tribunal to rely on a forward-looking approach to make a finding on a balance of probabilities" [emphasis added]. [172]

i) The Commissioner did not put forward an estimate of price elasticity

108. As *Tervita* teaches, quantifying the quantifiable anticompetitive effects in the form of deadweight loss requires an elasticity of demand calculation.[173] Chief Justice Crampton also emphasized this in dismissing the Commissioner's application under s. 104 of the *Act* in this case.[174]

109. Despite this, the Commissioner did not lead any "analytically rigorous" expert analysis of the deadweight loss from the Transaction. Rather, Dr. Miller asserted an elasticity range without any supporting evidence based on an implied analysis done on a single landfill over a decade ago,[175] which the Supreme Court of Canada found was based on unsupported assumptions.[176] His

[171] *Tervita,* para 123.
[172] *Tervita*, para 125.
[173] *Tervita*, paras 132-134.
[174] *SECURE 104*, paras 40, 121-122.
[175] Miller Report, para 163; Miller Testimony, Transcript, vol 6, pp 942:10-946:4; Yatchew Report, para 20.
[176] *Tervita*, para 133.

reasons for selecting the lower and upper bounds of his range, and for not even attempting an elasticity calculation himself, were vague and unsatisfying.[177]

110. Instead, SECURE's expert, Dr. Adonis Yatchew, calculated the price elasticity of demand. Dr. Yatchew's evidence is that demand for waste disposal services is highly inelastic, which the Commissioner does not dispute. This was also echoed by SECURE's customers who testified that their disposal costs are [redacted][178] Dr. Yatchew opines that a reasonable point estimate for the price elasticity of demand is -0.15 and a reasonable range is from close to zero to -0.25, with the actual price elasticity of demand to be more likely at the lower end of the range.[179]

111. The Commissioner chose not to cross-examine Dr. Yatchew. Dr. Miller also did not seriously challenge the elasticity calculation performed by Dr. Yatchew. He agreed that Dr. Yatchew used a reasonable methodology and that Dr. Yacthew's point estimate was consistent with how he viewed the market.[180] Dr. Miller ultimately adopted Dr. Yatchew's point estimate in his reply report.[181]

112. Dr. Miller also admitted that he did not estimate the deadweight loss from a reduction in output. He claimed that he was "not able to estimate fully" the deadweight loss from oil and gas producers choosing a less efficient option due to price increase and instead proffered an "illustrative calculation" of $1 million to $4.4 million.[182] As a result, Dr. Miller performed the deadweight loss calculation in his reply report based on the elasticity calculation of SECURE's

[177] Miller Testimony, Transcript, vol 6, pp 1013:5-17, 1015:19-23.
[178] [redacted] See also Gee Testimony, Transcript, vol 10, p 1587:12-25.
[179] A price elasticity of demand estimate of -0.15 means that a 10% increase in the price of waste disposal services would lead to a 1.5% decline in demand for these services.
[180] Miller Testimony, Transcript, vol 6, p 1017:7-9.
[181] [redacted] Miller Testimony, Transcript, vol 5, pp 798:23-799:4.
[182] Miller Report, para 133.

expert, having arbitrarily chosen price increases at the mid-point between his and Dr. Duplantis's price effects without any justification for doing so.[183]

ii) Dr. Miller has overestimated deadweight loss arising from output reduction

113. In contrast to Dr. Miller's entirely theoretical approach based on his second score auction model, Dr. Duplantis provides a calculation of the potential deadweight loss that follows the Supreme Court of Canada's guidance in *Tervita*. To do so, she has calculated potential price effects arising from the Transaction using a natural experiment analysis, which is a data-driven empirical approach.[184]

114. Her natural experiment is based on Tervita's acquisition of Newalta in 2018, an apt point of comparison considering that the Newalta transaction involved substantially the same industry, product markets, geography, and customer base. She was able to control for the presence of SECURE as a remaining competitor following the Newalta transaction.[185] Dr. Duplantis's natural experiment also captures the constraining influence that effective remaining competition, threat of self-supply, countervailing buyer power and sponsored entry will have on SECURE's prices post-Transaction. By contrast, Dr. Miller's analysis simply ignores these factors without grappling with the extensive evidence demonstrating that they are relevant features of the market.

115. As Dr. Duplantis explained, a key distinction between the two experts' approaches is that her analysis was retrospective, whereas Dr. Miller's second score auction model is entirely prospective. Dr. Miller's own theoretical second-score merger simulation model would have predicted vastly higher price effects than occurred following the Newalta transaction. This is yet another example of Dr. Miller's opinions being "stuck in the model versus reality":[186]

[183] [redacted] Miller Testimony, Transcript, vol 5, pp 798:24-799:1, vol 6, pp 1012:21-1013:17, 1014:6-1015:13. Notably, this is similar to the approach the Commissioner took in *Tervita,* which was rejected: *Tervita*, paras 135-137.
[184] Duplantis Testimony, Transcript, vol 11, pp 1772:14-1773:6.
[185] Duplantis Report, paras 90, 100, 108; Duplantis Testimony, Transcript, vol 11, pp 1778:21-1779:9, vol 12, pp 1957:6-15; 1979:9-13, vol 13, pp 2024:4-2025:3.
[186] Miller Testimony, vol 6, p 824:21-23.

FIGURE 19: COMPARISON OF PRICE EFFECTS FROM DR. MILLER'S MERGER SIMULATION MODEL TO TERVITA/NEWALTA NATURAL EXPERIMENTS ANALYSIS

		Dr. Miller Analysis	Brattle Analysis	
Change in Market Structure		Dr. Miller Simulation for Secure/Tervita Average Price Effect [A]	Dr. Miller Simulation Applied to Tervita/Newalta Average Price Effect [B]	Natural Experiment of Tervita/Newalta Average Price Effect [C]
2-to-1	[1]	49.9%	45.5%	11.0%
3-to-2	[2]	23.2%	14.8%	9.8%
4-to-3 (or more)	[3]	12.3%	7.5%	0.9%

Sources: Figure 17, Figure 18, and Miller Report, Exhibit 21.

116. The significant difference between Dr. Miller's theory and reality is not surprising, given that he gave self-supply, sponsored entry, and countervailing buyer power—all significant features of the industry—very little to no weight in his analysis. Dr. Miller arbitrarily set the "outside good" (to collectively represent the proportion of customers travelling to more distant facilities, bioremediation, self-supply[187] and other alternate options) at 10%. This figure is not supported by any extrinsic evidence. As Dr. Duplantis demonstrated, the output of his model varies widely depending on the outside good value, despite Dr. Miller's claims to the contrary.[188]

117. Dr. Duplantis then applied Dr. Yatchew's price elasticity of demand estimate to calculate the deadweight loss arising under a range of scenarios: [189]

[187] Dr. Miller's initial report does not even explicitly refer to the "outside good" as including potential self-supply. See Miller Report, paras 186-189.
[188] Duplantis Testimony, Transcript, vol 11, pp 1775:12-1776:11, vol 13, pp 2093:8-2094:12;
[189] Duplantis Updated Report, paras 164-169, Figure 20, p 81.

FIGURE 20: DEADWEIGHT LOSS BY HYPOTHETICAL DIVESTITURE OPTION AND THE COMMISSIONER'S PROPOSED REMEDY (BASED ON 2019)

Remedy Option		Remedy Description [A]	Annual [B]	10-Year NPV [C]
Transaction		Full Transaction	$1,615,645	$11,266,415
Divestiture Option 1(a)	[1]	40 Tervita Facilities (Relevant Facilities)	$1,588,289	$11,075,648
Divestiture Option 1(b)	[2]	40 Tervita Facilities (Closest Facility)	$1,239,033	$8,640,175
Divestiture Option 2(a)	[3]	25 Tervita Facilities (Relevant Facilities)	$1,586,058	$11,060,095
Divestiture Option 2(b)	[4]	25 Tervita Facilities (Closest Facility)	$1,306,894	$9,113,395
Commissioner's Proposed Remedy (a)	[5]	Commissioner's 41 Tervita Facilities (Relevant Facilities)	$1,615,645	$11,266,415
Commissioner's Proposed Remedy (b)	[6]	Commissioner's 41 Tervita Facilities (Closest Facility)	$1,613,870	$11,254,031

118. Dr. Miller's criticisms of Dr. Duplantis's natural experiment analysis are unpersuasive, and she decisively responded to all of them in her testimony. For the most part, Dr. Miller's critiques of Dr. Duplantis's work largely amounted to theoretical points. Notably, he did not do any empirical analysis himself to assess whether any of his critiques would have any impact on Dr. Duplantis's results.[190]

119. Even if the Tribunal were inclined to accept Dr. Miller's estimated price effects despite the myriad frailties in his analysis discussed above, his estimate of deadweight loss based on price effects is at most $6.1 million annually and $42.8 million on a 10-year discounted basis. Even that figure is vastly outweighed by the efficiencies generated by the Transaction. In short, unless the Tribunal accepts Dr. Miller's novel and unsupported facility closure theory (*and* values it at more than $42.8 million), SECURE inescapably wins the s. 96 trade-off analysis.

iii) The Tribunal cannot conduct its own analysis of elasticity or price effects

120. At the conclusion of the evidentiary portion of the hearing, the Tribunal requested submissions on whether the Tribunal could conduct its own analysis to make determinations of elasticity of demand or price effects between the figures presented by the parties' experts. As a

[190] Duplantis Testimony, Transcript, vol 11, pp 1782:23-1785:19. In at least one case, Dr. Miller acknowledged that the additional analysis presented in Dr. Duplantis's demonstrative slides would "alleviate some of [his] concerns" but that he had not vetted it: Miller Testimony, Transcript, vol 5, p. 752:4-9.

matter of law, the Tribunal cannot do so, both due to the special function of expert opinion evidence and to avoid procedural unfairness to the parties.

121. While the Tribunal is a specialized decision-making body, it does not have the necessary evidentiary foundation to impose a value for the elasticity of demand or likely price effects outside of the analysis provided by the parties' experts. Dr. Duplantis and Dr. Yatchew conducted detailed econometric analysis and spent hundreds of hours developing their expert opinions on the range of elasticities and price effects. Respectfully, the Tribunal does not have the ability to conduct its own econometric analysis with the required rigor to establish the likely elasticity or price effects to the standard required by *Tervita*.

122. The question of the quantum of the likely anticompetitive effects and the elasticity of demand is one requiring expert evidence. Each involves highly technical econometric analyses that the Tribunal is unable, as a matter of law, to conduct on its own. This is precisely the reason why expert evidence is permitted on these questions in the first place. As the Supreme Court of Canada explained in *R v. Abbey*:

> With respect to matters calling for special knowledge, an expert in the field may draw inferences and state his opinion. An expert's function is precisely this: to provide the judge and jury with a ready-made inference which the judge and jury, due to the technical nature of the facts, are unable to formulate. An expert's opinion is admissible to furnish the Court with scientific information which is likely to be outside the experience and knowledge of a judge or jury. If on the proven facts a judge or jury can form their own conclusions without help, then the opinion of the expert is unnecessary"[191] [Emphasis added, citations omitted].

123. The Tribunal has previously recognized that it is unable to select a value for price effects that has not been proven by expert evidence. In *Canada (Commissioner of Competition) v Canadian Waste Services Holdings Inc.,*[192] the Tribunal was presented with two competing remedy proposals by the parties. The respondent's expert conducted an economic analysis and provided a range of possible price declines that could be preserved with the divestiture of certain disposal

[191] *R v Abbey*, [1982] 2 SCR 24 at p 42, Respondent's BOA, Tab 13.
[192] *The Commissioner of Competition v Canadian Waste Services Holdings Inc.*, 2001 Comp Trib 34, Respondent's BOA, Tab 19 [*CWS*].

rights to third parties. The Tribunal found that it could not choose from those proposed price decline scenarios.

124. In particular, the Tribunal held that "without expert opinion evidence and rebuttal evidence thereon, the Tribunal has no basis for adopting a particular price decline and consequential remedy that Dr. Vellutro has advanced".[193] Similarly, in this case, no elasticity or price effect figures have been advocated for or contested in the hearing aside from those put forward by the parties' experts, and the Tribunal is not in a position to impose its own.

125. Further, the prospect of the Tribunal conducting its own expert economic analysis would be unfair to the parties, who will have had no opportunity to challenge or test the Tribunal's analysis. Simply put, SECURE would not have the opportunity to know the case to be met if the case to be met is only revealed by the Tribunal in its final judgment.[194]

126. SECURE's position is that the Tribunal should prefer the evidence of Dr. Duplantis and Dr. Yatchew to that of Dr. Miller where there is a conflict. If the Tribunal finds that no expert has sufficiently quantified the likely anticompetitive effects of the merger, then the Commissioner's burden has not been met, and his alleged effects should be assigned a weight of zero as required by *Tervita*.[195]

E. No proof that the Commissioner's Proposed Remedy would resolve any SLC

127. The Commissioner must prove that his proposed divestiture order would remove any "substantial" lessening of competition in the markets at issue.[196] The Commissioner has provided no evidence directly addressing how the Commissioner's Proposed Remedy would "restore competition to the point at which it can no longer be said to be substantially less than it was before the merger."[197] Rather, the Commissioner's Proposed Remedy was selected based on arbitrary

[193] *CWS*, at para 84.
[194] See *Marathon Realty Co. v Regional Assessment Commissioner, Region 7*, 1979 CarswellOnt 3377, at para 33 (Div. Ct.), Respondent's BOA, Tab 11; see also *Nova Scotia (Director of Assessment) v Knickle*, 2007 NSCA 104, at paras 43-46, Respondent's BOA, Tab 12.
[195] *Tervita*, at para 128.
[196] *Southam*, at para 89; *Canada (Director of Investigation and Research) v Southam Inc.*, [1995] FCJ No 1092 (C.A.), at para 18, Respondent's BOA, Tab 7.
[197] *Southam*, at para 85.

thresholds of alleged market shares (35%) and price effects predicted by Dr. Miller (5%). The result is that, even when restricting to markets that meet or exceed these arbitrary thresholds of market shares and price effects, the Commissioner now seeks a divestiture in 72 markets with a market structure his own expert calculates as "5-to-4" or greater.[198]

128. While the remedy aims to resolve the alleged SLC, the Commissioner presented no volume-based deadweight loss calculation for the markets in issue. The only "deadweight loss" calculation provided for the markets in issue relates to the facility closure theory. As the facility closure theory is not tied to an SLC or any exercise of market power, the Commissioner is unsurprisingly seeking divestitures for markets where there are alleged price effects but no facility closure,[199] and for markets with no price effects but a positive facility closure effect.[200]

129. If valid, the facility closure theory would only potentially be remedied where either a closing facility or an absorbing facility is divested, but the Commissioner's calculations are for each market as a whole with no attempt to distinguish between such facilities and any other facilities in a market. Moreover, no evidence or analysis has been provided for the facility closure theory attributed to a particular closing or absorbing facility in each market in issue. Because most markets have multiple integrating facilities, the Tribunal is therefore left with no information that would enable it to discern what portion of the alleged facility closure theory a particular divestiture would resolve (assuming it can be relied upon at all).

130. Using the facility closure theory to justify the Commissioner's Proposed Remedy is also misleading. The Commissioner has known since he received Mr. Harington's report on March 25, 2022, that Dr. Miller's calculations of the deadweight loss attributable to the facility closure theory are incorrect, based on the wrong set of facilities in an outdated integration plan. Rather than

[198] See [redacted].
[199] See [redacted]. In these markets, the alleged price effects are greater than 5%, ranging from 17% to 65%, but have no facility closure effect. See also [redacted] rows 14, 60, 62, 79, 81, 128, 232 and 241. In these markets, the alleged price effects are greater than 5% but Dr. Miller's facility closure effect is zero because the "relevant facilities" set to close in these markets earn no revenues in that market and were included based on distance alone.
[200] See [redacted]. There are 59 markets where Dr. Miller has calculated zero or negative price effects but a positive facility closure effect, totaling $12.54 million out of his $51 million second-score auction model (column X) and $8.3 million out of his $37.1 million out of his Bertrand model (column Y).

updating his figures in reply, Dr. Miller's calculations include six facilities[201] that are no longer being suspended but appear as closures in 125 markets, comprising a significant proportion of the facility closure theory.[202]

131. In short, the Commissioner's apparent justification for his proposed remedy is both indecipherable and lacking a proper factual foundation. Moreover, the Commissioner has to date provided no basis upon which this Tribunal could find that his proposed remedy would meet the *Southam* test.

F. The trade-off analysis under section 96

132. The Transaction has already brought about and will continue to bring about significant efficiencies as integration progresses. All these efficiencies represent real resources savings to the benefit of the Canadian economy. This demonstrates that far from being anticompetitive, the Transaction is consistent with the overarching objectives of the *Act*, namely to promote the adaptability and efficiency of the Canadian economy. The efficiencies likely to be generated by the merger will be greater than and offset the effects of any SLC from the Transaction on a range of approaches and hypothetical orders.

i) The proper approach to the section 96 analysis is the "plain reading" of the Act

133. There are two interpretive approaches to s. 96(1): (i) the "plain reading" approach; and (ii) the "order-specific" approach. Although the former is the correct approach, it ultimately does not matter which interpretation is adopted here because the efficiencies exceed the potential anticompetitive effects in all cases, as explained below.

134. A plain reading of s. 96(1) of the *Act* does not permit the Tribunal to issue an order if the efficiencies likely generated by the Transaction exceed the anticompetitive effects that are likely to result from the Transaction. This approach is different from the "order-specific" approach

[201] These facilities are Tervita Willesden Green Landfill, Tervita South Taylor TRD, SECURE Edson TRD, SECURE Tulliby Lake TRD, Tervita Brazeau TRD, and Tervita Eckville WD. See Miller Report, Exhibit 33, rows 2, 5, 7, 17, 19 and 28.

[202] To illustrate the point, the total facility closure effect for these 125 markets is $25.4 million out of the $51 million under the second-score auction model and $18.4 million out of his $37.1 million under the Bertrand model. See [redacted], columns X and Y.

advocated by the Commissioner in the Competition Bureau's *Merger Enforcement Guidelines* (the "***MEGs***"), which asks whether the efficiencies lost as a result of an *order* from the Tribunal under s. 92 would be greater than the anticompetitive effects.[203]

135. The modern approach to statutory interpretation gives primacy to the grammatical and ordinary reading of the words of the enactment, read in context of the scheme and object of the statute as a whole and the intention of Parliament.[204] In its grammatical and ordinary sense, s. 96(1) requires the Tribunal to (i) assess whether the gains in efficiency from the merger exceed the anticompetitive effects from the merger, and (ii) then to assess whether an order would cause any of those gains in efficiency to be lost.[205]

136. In other words, the second part of s. 96(1) exists to ensure that the efficiencies generated by an efficiency-enhancing transaction will not be reduced. The Supreme Court of Canada in *Tervita* provided further support for this interpretation of s. 96(1) when it held that s. 96 precludes *any* remedial order from being issued under s. 92 "if it is found that the merger is likely to bring about efficiencies" which exceed the anticompetitive effects [emphasis added].[206]

137. This interpretation is also consistent with the object and scheme of the *Act* as a whole. The language of s. 96 and the legislative history of its enactment both evince Parliament's intent that the efficiencies analysis should focus on a merger as a whole.[207] As recognized in *Tervita* (and

---

[203] *MEGs*, at para 12.9.

[204] *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 SCR 27, at para 21, Respondent's BOA, Tab 16.

[205] While the meaning of a statute is not found in its words alone, the chosen meaning must generally be consistent with a plausible grammatical reading of the words chosen. See also *Re: Sound v Motion Picture Theater Associations of Canada*, 2012 SCC 38, at para 33, Respondent's BOA, Tab 15; *Canada (Information Commissioner) v Canada (Minister of National Defence)*, 2011 SCC 25, at para 40, Respondent's BOA, Tab 5.

[206] *Tervita*, at paras 17, 48. Chief Justice Crampton (writing extra-curially) has also characterized this interpretation as most consistent with a literal reading of s. 96(1): Crampton, *Mergers and the Competition Act*, pp 533-534. This interpretation is further supported by the use of the words "ces gains," in the French language version of s. 96(1), which confirms that the "gains" referred to in the second clause of s. 96(1) are the same gains in efficiency as brought about by the merger. See *Estabrooks Pontiac Buick Ltd.*, *Re*, 1982 CarswellNB 236, at paras 11, 29 (CA), per LaForest J.A., Respondent's BOA, Tab 10.

[207] *Tervita*, para 85; *Superior Propane III*, at para 43, citing the Economic Council of Canada, *Interim Report on Competition Policy* (July 1969) at 9; *Superior Propane III* at para 68, citing Minutes of Proceedings and Evidence of the Legislative Committee on Bill C-91, Issue No. 7, Monday, May 12, 1986, at 7:27-7:28; Daniel J Shaw, Parliamentary Research Branch, Economics Division, *Bill C-249: An Act to Amend the Competition Act* (November 15, 2002) at 7 ("In effect, section 96 provides an exemption to section 92; that is, it introduced the notion of a trade-off between the social losses attributed to the prevention or lessening of competition and the social benefits related to

previously in the *Superior Propane* cases), the *Act* gives primacy to economic efficiency as a statutory objective for merger review,[208] and any interpretation of s. 96 that would allow the Tribunal to issue an order reducing the efficiencies from an efficiency-enhancing transaction would be inconsistent with this objective.

138. In contrast to the plain reading of s. 96, the so-called "order-specific approach: (1) first considers what efficiencies would be lost from a hypothetical order and (ii) then compares those efficiencies gains lost from the hypothetical order to the anticompetitive effects. This effectively involves balancing of the "cost" to the Canadian economy associated with making the order the Tribunal has determined should otherwise be made against the "cost" to the economy of not making the proposed order.[209]

139. A key problem with the order-specific approach is the lack of fairness and certainty afforded to the merging parties. The majority of the Supreme Court of Canada in *Tervita* reiterated the importance of providing merging parties with "the information they need to know the case they have to meet" as a key aspect of basic procedural fairness.[210] Under the order-specific approach, merging parties need to know the order being considered so that they can lead evidence relevant to the efficiencies trade-off for that specific remedy. However, instead of being able to assess this when planning and negotiating a transaction, they have to wait until the Commissioner indicates the hypothetical order being sought to begin properly assessing this (and may never get the opportunity to provide any analysis regarding the specific order ultimately chosen by the Tribunal).[211]

140. The circumstances in this case demonstrate the difficulties and unfairness in applying the order-specific approach. The Commissioner disclosed his proposed remedy on the eve of trial and has made no meaningful effort to date, through expert evidence or otherwise, to justify to the

---

the cost savings *from the merger*. When the latter exceed the former, society benefits and this merger should be allowed" [emphasis added]) Respondent's BOA, Tab 29.

[208] *Tervita*, at paras 110-111; *Superior Propane I*, at para 413; *Superior Propane II*, at para 110; and *Superior Propane III*, at paras 80, 215 aff'd *Superior Propane IV*. See also *Competition Act*, s 1.1.

[209] *The Commissioner of Competition v CCS Corporation et al.*, 2012 Comp Trib 14, at para 391 [*CCS*], Respondent's BOA, Tab 20.

[210] *Tervita*, at para 124. See also *Tervita*, at paras 131, 135.

[211] Harington Updated Report, para 10.

Tribunal why the remedy he seeks is necessary to remedy the SLC that he alleges. Rather, the Commissioner has buried his case in a massive Excel spreadsheet, expecting SECURE (and the Tribunal) to do the work itself and chart its own path.[212]

ii) Properly applying the efficiencies trade-off analysis

141. The comparison of the efficiencies to the anti-competitive effects of a merger exercise under s. 96 is a two-step inquiry (these principles apply whether the plain reading or order specific approach is adopted):[213]

(a) first, the quantitative efficiencies of the merger at issue should be compared against the quantitative anti-competitive effects;

(b) second, qualitative efficiencies should be balanced against qualitative anti-competitive effects, and a final determination must be made as to whether the total efficiencies offset the total anti-competitive effects of the merger. For the Tribunal to give qualitative elements weight in the analysis, they must be supported by the evidence, and the reasoning for the reliance on the qualitative aspects must be clearly articulated.

142. The s. 96 trade off analysis must be as objective as is reasonably possible. As a result, quantitative considerations will, in most cases, be of greater importance than qualitative considerations.[214] There is no "significance" threshold by which the efficiencies must outweigh the anticompetitive effects. Even efficiencies which marginally offset the proven anticompetitive effects can satisfy the requirements of s. 96.[215] The efficiencies must be "likely" to be attained from the merger to be cognizable, but whether the efficiencies could theoretically have been achieved some other way should not be considered.[216]

---

[212] [redacted]

[213] *Tervita*, at para 147.

[214] *Tervita*, at para 150.

[215] *Tervita,* at paras 154-155.

[216] *Superior Propane III*, paras 147-148; *Canada (Director of Investigation and Research) v Hillsdown Holdings (Canada) Ltd.,* [1992] CCTD No. 4, at p 26, Respondent's BOA, Tab 6 [*Hillsdown*]; *CCS*, para 395.

iii) Properly applying the "order-specific" approach

143. SECURE acknowledges that the Tribunal has previously interpreted the second component of s. 96(1) to require the "order-specific" approach to the trade-off.[217] Therefore, without prejudice to SECURE's position that the "order-specific" approach is not supported by a proper interpretation of s. 96(1) of the *Act*, the remainder of this section describes how the "order specific" approach should be applied if it is adopted.

Inappropriate to apply a "market-by-market" approach

144. It would be inappropriate to apply the efficiencies trade-off on a "market-by-market" basis by only issuing a s. 92 order in any individual markets where the efficiencies may not exceed the competitive effects.[218] When applying the efficiencies trade-off, the efficiencies cannot influence the choice of the order under s. 92 of the *Act*.[219]

145. In other words, it is only after the hypothetical s. 92 order is determined (pursuant to the *Southam* test above)[220] that s. 96 is considered as a potential exception. As the Supreme Court of Canada held in *Tervita*, "After a finding that a merger engages s. 92(1), s. 96 may be invoked by the parties to the merger to preclude a s. 92 remedial order."[221] Moreover, the efficiencies need not exceed the effects in every single market for s. 96 to prevent the issuance of any order by the Tribunal.[222]

The costs to achieve efficiencies are irrelevant where they have already been incurred

146. Efficiencies that have already been achieved (assuming they are non-recurring) are not to be considered because they are not affected by a hypothetical divestiture order.[223] In other words,

[217] See e.g., *CCS*, at paras 264-265.
[218] A market-by-market approach also does not make sense from a public policy perspective. Efficiencies are not gained or lost in relation to a particular antitrust market; they are gained or lost depending upon whether certain integration activities take place. There are often significant linkages and interdependencies between assets located in multiple different markets that give rise to efficiencies, and a "market-by-market" approach would lead to double-counting of such efficiencies when considered separately for each individual market.
[219] *Superior Propane III*, paras 137, 149.
[220] *Southam*, at para 85.
[221] *Tervita*, at para 48.
[222] *Superior Propane III*, at para 140.
[223] *CCS*, at para 274.

they do not represent a "cost" of making the order contemplated by s. 96.[224] By the same token, negative efficiencies (or costs to achieve the efficiencies) that have already been incurred are not to be considered under s. 96. Efficiencies should therefore be assessed as of the date of the order, which accounts for both positive and negative efficiencies that would be impacted by a hypothetical divestiture order.[225]

The treatment of efficiencies and anticompetitive effects should be symmetrical

147. Consistent with the cost-benefit framework for the efficiencies trade-off explained by Chief Justice Crampton in *CCS*,[226] the efficiencies lost from a hypothetical order should be compared to the anticompetitive effects remedied by that order, not to the anticompetitive effects from the entire merger. To do otherwise would result in an "apples-to-oranges" comparison of the efficiencies trade-off that would be inconsistent with the cost-benefit framework of s. 96. However, to the extent the literal wording of s. 96 may suggest otherwise, this further confirms that Parliament intended the "plain reading" approach to the efficiencies trade-off, as discussed above.

iv) The Transaction has generated significant efficiencies accruing to the benefit of the Canadian economy

148. SECURE's efficiencies expert, Mr. Harington, has determined that the Transaction will generate [redacted] in annual run rate efficiencies and [redacted] in efficiencies on a discounted basis over 10 years, which accounts for the approximately [redacted] in inefficiencies from customers' increased incremental transportation cost from facility suspensions.

149. On an order-specific basis, Mr. Harington calculated the efficiencies that would be lost if a divestiture order were issued. Broadly, these efficiencies represent the costs that would be incurred by another operator to operate any facilities it acquires through the divestiture, including both facility-specific costs and the additional back-office support that would be required for those facilities. Mr. Harington calculates the efficiencies that would be lost from the Commissioner's

[224] *CCS*, at para 391.
[225] [redacted]
[226] *CCS*, at para 391.

Proposed Remedy as [redacted] in annual run rate efficiencies and [redacted] on a discounted basis over 10 years, under his Tribunal Order Date Approach.

150. As demonstrated both by his report and his testimony at trial, Mr. Harington's analysis was extremely rigorous and well-documented. By contrast, the Commissioner's expert, Dr. Eastman, has not attempted to perform his own efficiencies analysis based on SECURE's integration plan. While Dr. Eastman does not deny that there will be at least some cognizable efficiencies arising from the Transaction, he vaguely asserts that these have been overestimated by Mr. Harington, without putting forward different figures. More importantly, Dr. Eastman's criticisms of Mr. Harington's work reflect a lack of understanding of both the facts and the nature of Mr. Harington's analysis. They are all convincingly rebutted in Mr. Harington's reply report.

151. Dr. Eastman puts numbers to his criticisms in only two instances. First, Dr. Eastman suggests that [redacted] in run-rate savings from FST, SWD and landfill facility suspensions should be excluded from qualifying as cognizable efficiencies to the extent these arise from a reduction in product choice.[227] However, he expressly refrains from opining on whether the services provided by SECURE and Tervita prior to the Transaction were indeed differentiated products.[228] In making this point, Dr. Eastman relies solely on a misinterpretation of the *MEGs*, specifically paragraph 12.20:

> Not all efficiencies claims qualify for the trade-off analysis. The Bureau excludes the following: …
>
> savings resulting from a reduction in output, service, quality or product choice.[229] [emphasis added]

152. The purpose of paragraph 12.20 is to avoid merging parties' claiming efficiency gains from a merger solely due to cost savings from reducing output, service levels or quality, or no longer offering products to customers.[230] Productive efficiencies arise from "real cost savings in resources, which permit firms to product more output or better quality output from the same

[227] [redacted]
[228] Eastman Report, para 31.
[229] *MEGs*, para 12.20.
[230] Expert Reply Report of Andrew Harington, Exhibit CA-R-892, para 19 **[Harington Reply Report]**.

amount of input."[231] Cost savings from, for example, reducing output or no longer offering certain products to customers are not productive efficiencies because they are not the result of producing more or better quality output from fewer inputs.[232]

153. Mr. Harington's analysis is not based on any cost savings from a reduction in product choice, as SECURE will continue to offer the same products, which are waste disposal services, to customers going forward, with no reduction with output. [233] More importantly, Mr. Harington's assumption is a conservatism that ensures that he does not overestimate efficiencies by including any efficiencies arising from a reduction in output, which would be contrary to the *MEG*s. Dr. Eastman did not opine to the contrary.

154. Dr Eastman's theory is also inconsistent with the Tribunal's historical approach to efficiencies. The rationalization of duplicate facilities was accepted by the Tribunal as an efficiency in the seminal *Superior Propane* cases, despite clear evidence of differentiation between Superior, ICG, and other propane suppliers involved in that case.[234]

155. Second, Dr. Eastman suggests that Mr. Harington's claimed corporate efficiencies lost under his hypothetical divestiture order are overstated by "[redacted]," without providing a specific figure.[235] This criticism assumes that there are potential divestiture buyers who could integrate up to 40 divestment facilities into their existing operations while hiring minimal back-office staff.

156. In this regard, Dr. Eastman relies principally on the reply witness statements from Clean Harbours and [redacted], two competitors who testified they might have an interest in acquiring some or all of any facilities SECURE might be ordered to divest. As was made abundantly clear in the testimony of Mr. McLean (for Clean Harbours) and [redacted], neither company has performed the requisite due diligence to know what corporate support they would

[231] *MEGs*, para 12.14.
[232] *MEGs*, para 12.20.
[233] Blundell Supplementary Affidavit, para 3; Harington Reply Report, para 19.
[234] *Superior Propane I*, paras 21, 321. See also *Tervita*, para 88, describing the *Superior Propane* cases as the "leading case law on the interpretations of the efficiencies defence."
[235] [redacted]

need to maintain and operate the divested assets. In fairness, as both witnesses conceded, it would be extremely difficult to do so without knowing exactly what assets are being acquired.[236]

157. Further, Mr. McLean appropriately acknowledged that oilfield waste disposal was not the "core" of Clean Harbors business.[237] [redacted] similarly acknowledged that [redacted] did not have any experience operating FSTs or dedicated oilfield waste landfills in Canada.[238] [redacted].[239]

158. In contrast to Dr. Eastman, Mr. Harington performed a detailed analysis of SECURE's integration plan, bringing his extensive knowledge and experience to bear on the question of the likely efficiencies to be achieved from the Transaction. Given the number of conservatisms acknowledged in his report, his calculation of the efficiencies to be gained from the Transaction and those to be lost from an order are reasonable and are unaffected by the superficial and misguided critiques of Dr. Eastman.

v) SECURE's efficiencies are cognizable under section 96

159. Mr. Harington's evidence establishes that the claimed efficiencies will accrue to the Canadian economy as resource savings amounting to [redacted] in efficiencies on a discounted basis over 10 years. The efficiencies identified and calculated by Mr. Harington are clearly cognizable under s. 96. All identified efficiencies

(a) are productive efficiencies;

(b) are likely to be brought about by the merger;

(c) are real resource gains to the Canadian economy;

[236] McLean Testimony, Transcript, vol 3, pp 454:20-23, 455:2-458:12; [redacted]

[237] McLean Testimony, vol 3, pp 438:20-439:10.

[redacted]

(d) will accrue to the Canada economy; and

(e) would be attained if an order implementing the Commissioner's Proposed Remedy were made.[240]

160. The Tribunal questioned Mr. Harington with respect to the nationality of SECURE's shareholders. Mr. Harington testified that, while he did not have information regarding the nationality of SECURE's shareholders, all SECURE's claimed efficiencies will occur in Canada and benefit the Canadian economy by freeing up resources for redeployment in Canada, and why the nationality of SECURE's shareholders was irrelevant to his analysis.[241]

161. Further, although not strictly relevant to the question of whether the efficiencies will accrue in Canada, SECURE is a Canadian company. It is headquartered in Calgary, publicly traded only on the TSX, and the vast majority of its operations take place in the WCSB.[242]

162. Whether SECURE has any foreign shareholders is also irrelevant from a legal, policy and practical standpoint. No decision by the Tribunal or a higher Court has ever discounted a merging parties' efficiencies based on the nationality of its shareholders, nor has any decision assessed the nationality of shareholders for this purpose. In fact, despite *obiter dicta* in *CCS*, [243] the Tribunal has recognized that the residency of a company's shareholders should play no role in the analysis of efficiencies under s. 96, as discussed below.

163. The Tribunal in *Superior Propane I* held that the focus when considering efficiencies from a merger is the real resource savings to the Canadian *economy* – not the transfer of wealth to shareholders. [244] This is consistent with the purposes of the *Act*, which include the promotion of

[240] Harington Updated Report, paras 56-59; Oral Testimony of Andrew Harington, Transcript, vol 16, pp 2689:4-2690:5 **[Harington Testimony]**.
[241] Harington Testimony, Transcript, vol 16, p 2665:14-25; Harington Updated Report, para 57.
[242] Engel Affidavit, para 5. Secure operates a *de minimis* number of facilities in North Dakota, which were not the subject of any material evidence on this application.
[243] *CCS*, para 262.
[244] *Superior Propane I*, para 430. The *MEGs* also expressly state that the nationality of shareholders is irrelevant to the efficiencies analysis: *MEGs*, footnote 66.

"the efficiency and adaptability of the Canadian economy," with no mention of promoting the wealth of Canadian nationals.[245]

164. The policy rationale for this is clear. When a merger results in productive efficiencies, the resources that are freed up in Canada from the merger are available for redeployment in Canada.[246] This makes the Canadian economy more productive. Conversely, resources that are freed up in another jurisdiction do not make the Canadian economy more productive and are not cognizable under s. 96. This holds whether the owners of a company claiming that any such efficiencies are cognizable under s. 96 of the Act are Canadian nationals or merely resident in Canada. As a result, regardless of the legal standard, the actual benefit of efficiencies to the Canadian economy do not flow through to shareholders (whether domestic or foreign) as a factual matter.

165. Further, as the Tribunal in *Superior Propane III* recognized, considering the nationality of shareholders under s. 96 would violate Canada's treaty and other international trade obligations by discriminating against foreign investors.[247] As a matter of statutory interpretation, s. 96 must be construed in a manner consistent with Canada's international obligations in the absence of any evidence of Parliamentary intention to the contrary.[248] Accordingly, only the location of the efficiencies should be considered.

166. Canada's trade agreements contain provisions that require Canada to treat its foreign investors the same as domestic ones, including on the application of Canada's competition laws.[249]

---

[245] *Competition Act*, s. 1.1. *Tervita* also emphasized that the total surplus standard "does not consider the effect of the wealth likely to be transferred from consumers to the shareholders of the merged entity": *Tervita*, para 95.
[246] *MEGs*, para 12.14.
[247] *Superior Propane III*, paras 195-197. Similar considerations were also briefly highlighted by the Tribunal in *Hillsdown*, pp 33-34.
[248] *R v Hape*, 2007 SCC 26, para 54, Respondent's BOA, Tab 14.
[249] See e.g., *Canada-United States-Mexico Agreement*, 10 December 2019, arts 14.4, 14.5, 21.1 (entered into force 1 July 2020), Respondent's BOA, Tab 24 [*CUSMA*]. *CUSMA*'s national treatment provision at Article 14.4 states: "Each Party shall accord to investors of another Party treatment no less favorable than that it accords, in like circumstances, to its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments in its territory." See also *Comprehensive Economic and Trade Agreement*, Canada and the European Union, 30 October 2016, arts 8.6, 8.7, 17.2 (provisionally entered into force 21 September 2017), Respondent's BOA, Tab 27; *Comprehensive and Progressive Agreement for Trans-Pacific Partnership*, 8 March 2018, arts 9.4, 9.5, 16.1 (entered into force 30 December 2018), Respondent's BOA, Tab 26; *Canada–European Free Trade Association Free Trade Agreement*, 26 January 2008, arts 4, 12, 14 (entered into force 1 July 2009), Respondent's BOA, Tab 23.

Discounting the efficiencies generated in Canada by a transaction on the basis of foreign ownership of the merged entity would clearly constitute discrimination against foreign investors.

167. Assessing whether efficiencies claimed under s. 96 are cognizable based on the nationality of a merging party's shareholders is unworkable from a practical perspective and would create significant uncertainty in merger analysis. That is particularly so for publicly-traded companies like SECURE. Share ownership in public companies can change daily, and the company cannot necessarily know the nationality of the ultimate beneficial owners of each of its shares. As a result, the efficiencies analysis of a merger could vary from day to day.[250]

168. In short, the focus of the s. 96 analysis must be on the location where the efficiencies occur by freeing up resources for redeployment. The nationality of the ownership of a company that frees up such resources in Canada is irrelevant. Any other approach would be contrary to the purpose of the *Act*, the jurisprudence, and international law. It would also set an unworkable standard for mounting an efficiencies case under s. 96.

169. In the alternative, it would be prejudicial to require SECURE to respond to an issue that the Commissioner himself has not raised. While SECURE bears the ultimate legal burden to establish that the efficiencies exceed and outweigh any proven anti-competitive effects,[251] the parties have never joined issue on the nationality of SECURE's shareholders. The Commissioner did not raise this issue in his pleadings or evidence adduced at trial. Notably, while Dr. Eastman in his report referenced the so-called "five screens" from the Tribunal's decision in Tervita, he raised an issue only with respect to the fifth screen (i.e., whether the efficiencies would still be realized despite an order).[252] The issue is therefore immaterial.

---

[250] It is also unclear how and as of what date the benefit to shareholders would be assessed. Shareholders may derive value from their ownership through capital gains and dividends, and it is unclear whether the benefit would need to be assessed at the time of transaction announcement, at the time of closing of the transaction, at the time of the Tribunal hearing, or some other date entirely. It is also unclear whether the shareholders of the acquiring firm, the target firm, or both could be relevant.

[251] *Cop v Saskatchewan Government Insurance*, 2019 SKCA 75, at para 53, Respondent's BOA, Tab 9, citing *Robins v National Trust Co. Ltd.*, [1927] 2 DLR 97, at p 100-101, Respondent's BOA, Tab 17.

[252] Eastman Report, at para 79.

G. The efficiencies outweigh any anticompetitive effects across a range of scenarios

170. Regardless of the Tribunal's approach, or the order the Tribunal makes, the efficiencies will outweigh the anticompetitive effects (properly calculated as the deadweight loss from a reduction in output). The Commissioner knows that this is the case and acknowledges that his application will fail unless the Tribunal adopts Dr. Miller's legally unprecedented, economically flawed, and factually unsupported facility closure theory.

171. Applying the plain-reading approach, the efficiencies will outweigh the anticompetitive effects by a factor of [redacted] (the Transaction will generate [redacted] on a discounted basis over 10 years compared to [redacted]. Even using Dr. Miller's "illustrative calculation" for the whole Transaction, the $42.8 million in deadweight loss from that illustration is significantly outweighed by a factor of more than [redacted].

172. Using the order-specific approach, the efficiencies will outweigh the anticompetitive effects for the Commissioner's proposed remedy:

(a) the high end of the anticompetitive effects calculation by Dr. Duplantis for the Commissioner's proposed remedy is $11.3 million on a discounted basis over 10 years and is the same as for the full Transaction;

(b) while the Commissioner has not put forward a proper deadweight loss calculation for his own remedy, given the similarity between the order-specific and full transaction analysis by Dr. Duplantis, it would be reasonable to assume that the deadweight loss for the Commissioner's remedy in Dr. Miller's illustrative example is close to the full transaction total of $42.8 million on a discounted basis over 10 years; and

(c) the efficiencies lost were the Tribunal to issue this order would vastly exceed either of these numbers, as the Canadian economy would lose [redacted], based on the Tribunal Order Date Approach.

173. Before the Commissioner disclosed his proposed remedy, SECURE's experts calculated the anticompetitive effects and efficiencies of two hypothetical scenarios involving the divestiture of either 40 or 25 former Tervita facilities, the latter of which represented a divestiture of a facility in all "3-to-2" and "2-to-1" markets. Dr. Miller's illustrative calculation responded to these scenarios as well. The s. 96 trade-off for these scenarios is instructive in showing that SECURE wins the trade-off on a range of scenarios, including the divestiture of all Tervita facilities in all "2-to-1" and "3-to-2" markets identified by Dr. Miller as contained in the 25 Tervita facility order:

FIGURE 21: COMPARISON OF DEADWEIGHT LOSS TO EFFICIENCIES FOR EACH HYPOTHETICAL DIVESTITURE OPTION AND THE COMMISSIONER'S PROPOSED REMEDY, 10-YEAR NPV

Remedy Option		Deadweight Loss 10-Year NPV ($M) [A]	Efficiencies 10-Year NPV ($M) [B]
Transaction		$11.3	[redacted]
Divestiture Option 1	[1]	$8.6 to $11.1	
Divestiture Option 2	[2]	$9.1 to $11.1	
Commissioner's Proposed Remedy	[3]	$11.3	

174. Even taking Dr. Miller's deadweight loss estimates relating to output reduction at face value, the efficiencies are more than [redacted] and in some cases [redacted] times, as large across a range of potential remedies, and over [redacted] times as large on a full-transaction basis:

Remedy Option	Deadweight Loss 10-Year NPV ($M)[253]	Efficiencies 10-year NPV ($M)
Transaction	$42.8	[redacted]
Divestiture Option 1	$32.3 to $42.8	
Divestiture Option 2	$27.7 to $41.4	

[253] [redacted]

PART V: ORDER SOUGHT

175. Considering the above, the Commissioner has failed to meet his burden under ss. 92 and 96 of the *Act* to establish and quantify the anti-competitive effects he alleges arise from the Transaction. In any event, the efficiencies would outweigh the anticompetitive effects from the Transaction under s. 96. Therefore, no order under s. 92 can be made. SECURE asks that the Tribunal dismiss the Commissioner's application, with costs.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 10th day of June, 2022.

Nicole Henderson

BLAKE, CASSELS & GRAYDON LLP
Per: Nicole Henderson

Counsel for the respondent
SECURE Energy Services Inc.

SCHEDULE A: JURISPRUDENCE

1. *Browne v Dunn* (1893), 6 R 67 at 70-71 (HL)
2. *Canada (Commissioner of Competition) v Secure Energy Services Inc*, 2021 Comp Trib 7
3. *Canada (Commissioner of Competition) v. Superior Propane Inc. (C.A.)*, 2001 FCA 104
4. *Canada (Commissioner of Competition) v. Superior Propane Inc. (C.A.)*, 2003 FCA 53
5. *Canada (Information Commissioner) v. Canada (Minister of National Defence)*, 2011 SCC 25
6. *Canada (Director of Investigation and Research) v Hillsdown Holdings (Canada) Ltd.*, [1992] CCTD No 4
7. *Canada (Director of Investigation and Research) v Southam Inc.*, [1995] FCJ No 1092 (C.A.)
8. *Canada (Director of Investigation & Research) v. Southam Inc.*, [1997] 1 SCR 748
9. *Cop v Saskatchewan Government Insurance*, 2019 SKCA 75
10. *Estabrooks Pontiac Buick Ltd., Re*, 1982 CarswellNB 236 (C.A.)
11. *Marathon Realty Co. v Ontario (Regional Assessment Commissioner No. 7)*, 1979 CarswellOnt 3377 (Div. Ct.)
12. *Nova Scotia (Director of Assessment) v Knickle,* 2007 NSCA 104
13. *R v Abbey,* [1982] 2 SCR 24
14. *R v Hape*, 2007 SCC 26
15. *Re: Sound v. Motion Picture Theater Associations of Canada*, 2012 SCC 38
16. *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 SCR 27
17. *Robins v National Trust Co. Ltd.*, [1927] 2 DLR 97
18. *Tervita Corp. v. Canada (Commissioner of Competition)*, 2015 SCC 3
19. *The Commissioner of Competition v. Canadian Waste Services Holdings Inc.*, 2001 Comp. Trib. 34
20. *The Commissioner of Competition v. CCS Corporation et al.*, 2012 Comp. Trib. 14
21. *The Commissioner of Competition v. Superior Propane Inc.*, 2000 Comp. Trib. 15

22. *The Commissioner of Competition v. Superior Propane Inc.*, 2002 Comp. Trib. 16

SCHEDULE B: DOMESTIC LEGISLATION AND INTERNATIONAL TREATIES

23. *Canada–European Free Trade Association Free Trade Agreement*, 26 January 2008

24. *Canada-United States-Mexico Agreement*, 10 December 2019

25. *Competition Act*, RSC 1985, c C-34

26. *Comprehensive and Progressive Agreement for Trans-Pacific Partnership*, 8 March 2018

27. *Comprehensive Economic and Trade Agreement*, Canada and the European Union, 30 October 2016