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**

---

# COST SUBMISSIONS OF THE RESPONDENT, SECURE ENERGY SERVICES INC.

---

**BLAKE, CASSELS & GRAYDON LLP**
Barristers & Solicitors
199 Bay Street, Suite 4000
Commerce Court West
Toronto, Ontario 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

Lawyers for the Respondent,
SECURE Energy Services Inc.

**TO:** **DEPARTMENT OF JUSTICE CANADA**
Competition Bureau Legal Services
Place du Portage, Phase I
50 Victoria Street, 22nd Floor
Gatineau, Quebec K1A 09C

**Jonathan Hood**
Tel: (416) 954-5925
Fax: (416) 973-5131
Email: jonathan.hood@cb-bc.gc.ca

**Paul Klippenstein**
Tel: (819) 934-2672
Email: paul.klippenstein@cb-bc.gc.ca

**Ellé Nekiar**
Tel: (819) 360-8760
Email: elle.nekiar@cb-bc.gc.ca

Lawyers for the Applicant,
the Commissioner of Competition

## Introduction

1. SECURE Energy Services Inc. ("**SECURE**") and the Commissioner of Competition ("**Commissioner**") have partially resolved the issue of the costs of this application, agreeing to settle counsel fees at an amount of $150,000 all-inclusive to the successful party. The issue of disbursements remains unresolved.

2. If SECURE is successful, it seeks to recover its disbursements in the amount of $5,665,512.79, inclusive of taxes, as set out below. SECURE's bill of costs is attached to these submissions as Schedule "A."

| Item | Amount |
|---|---|
| Expert witnesses – Brattle (CAD) | $2,880,945.89 |
| Expert witnesses – CRA (CAD) | $799,162.36 |
| Document processing, management, and review – KLDiscovery (CAD) | $1,814,710.10 |
| Court reporters and transcripts (CAD) | $52,120.12 |
| **TOTAL DISBURSEMENTS** | **$5,665,512.79** |

3. The amount sought is fair and reasonable considering, among other things, the length and complexity of the hearing, the scope of the Commissioner's initial application, and the multiple shifts in the Commissioner's case, all of which SECURE had to respond to on highly expedited timelines.

## General principles in fixing costs

4. Under section 8.1 of the *Competition Tribunal Act*[1] and Rule 400(1) of the *Federal Courts Rules*[2] (the "**Rules**"), the Tribunal has full discretionary power over the amount and allocation of costs in a proceeding.[3] Such discretion should be guided by recognized principles, including the non-exhaustive list of factors set out in Rule 400(3) that the Tribunal may consider in awarding costs.[4]

5. As a general rule, the successful party in a proceeding before the Tribunal is entitled to recover its costs, as contemplated by Rule 400(3). The Tribunal has followed this approach in its

[1] R.S.C. 1985, C. 19 (2nd Supp.), s.8.1.
[2] *Federal Courts Rules*, SOR/98-106, r s. 400(1).
[3] *The Commissioner of Competition v Vancouver Airport Authority*, 2019 Comp Trib 6 [**VAA CT**].
[4] See, e.g., *Bauer Hockey Ltd v Sport Maska Inc*, 2020 FC 862 at para 7 [**Maska CT**].

most recent cases, including, *P&H*, and *VAA CT*, awarding costs and disbursements to the respondents following their success. [5]

6. The successful party is not required to prevail on all issues before the Tribunal to be entitled to costs. For example, in *Nadeau Ferme Avicole Ltee v Group Westco Inc,* the Tribunal rejected the argument that no costs should be awarded or awarded at a reduced rate on account of "mixed success", stating that "absent an abuse of process, a successful party should not be penalized simply because not all points advanced by that party have found favour with the Court". [6]

7. As the counsel fees component of the costs in this case have been resolved, all that remains for the Tribunal to fix is the quantum of disbursements the successful party should recover. Disbursements must be reasonable, necessary, and justified to be recoverable.[7] In assessing the reasonableness of costs, a party's conduct of the litigation should not be easily second-guessed with the benefit of hindsight. [8] In other words, "it should not be for the losing party 'to tell the winning party how they could have succeeded by doing or spending less'"[9]. Further, a difference in the quantum of costs between parties should not be viewed as evidence of unreasonableness. [10]

8. Awards of increased costs have been justified in cases involving numerous, complex issues, on compressed schedules. For example, in *B-Flier Inc. et al. v The Bank of Nova Scotia*, the Tribunal held that an increased cost award was warranted as the "work required was substantial, both with respect to the preparation for the hearing and the hearing itself. The case was actively case managed with a compressed schedule for all discoveries, the provision of expert reports, and the like, and the fact that B-Flier failed to make a timely admission "impacted significantly upon the Bank's preparation for hearing".[11]

---

[5] See, *Canada (Commissioner of Competition) v Parrish & Heimbecker, Limited,* 2022 Comp Trib 18 [***P&H***] at paras 775 and 768, citing *Heiltsuk Horizon Maritime Services Ltd v Atlantic Towing Limited*, 2021 FCA 26 at para 182; *MacFarlane v Day & Ross Inc*, 2014 FCA 199 at para 6; *VAA CT* at para 816; FC Rule 400(3)(a).
[6] *Nadeau Ferme Avicole Ltee v Group Westco Inc*, 2010 Comp Trib 1, at para 13.
[7] *NOVA Chemicals Corporation v Dow Chemical Company*, 2017 FCA 25, at para 26; *VAA CT* at para 821.
[8] *Maska*, para 13.
[9] *Seedlings Life Science Ventures, LLC v Pfizer Canada ULC*, 2020 FC 505 [***Seedlings***].
[10] *Seedlings*, at para 15.
[11] *B-Flier Inc. et al v The Bank of Nova Scotia*, 2007 Comp Trib 26 at para 12.

**Disbursements in SECURE's bill of costs**

9. All the disbursements SECURE incurred were reasonable and necessary in the context of this proceeding, particularly considering the importance and complexity of the issues, the expedited timetable for discovery and hearing, and the litigation tactics of the Commissioner, including his various changes in the theory of the case from the date of filing up until closing arguments.

10. There was no palpable novelty or public interest in this application. While business-to-business transactions are within the Competition Bureau's mandate, it was common ground at trial that any alleged anticompetitive effects of the transaction would not be visited upon Canadian consumers (i.e., the prices charged by SECURE for waste disposal services have no effect on the price paid for fuel "at the pump"). While some of the factual and economic issues in this proceeding were complex, it involved the straightforward application of principles set out in previous cases, including in particular the Supreme Court of Canada's decision in *Tervita Corp v Canada (Commissioner of Competition)*.

11. The submissions below briefly address each of the disbursements claimed in SECURE's bill of costs. As an overarching general comment, SECURE notes that all disbursements claimed in its bill of costs were incurred after the Tribunal dismissed the Commissioner's application under s. 104 of the *Competition Act* on August 16, 2021. SECURE has excluded all disbursements associated with its response to the Supplementary Information Requests issued by the Commissioner in respect of the transaction and the interlocutory proceedings before the Tribunal. Fees associated with consulting experts who did not testify at trial have also been excluded.

*Expert witness fees – Brattle Group*

12. These disbursements include all work done in connection with the testimony and expert report of Dr. Renée Duplantis, and the expert report, reply report, and testimony of Andrew Harrington. Their evidence was critical to SECURE's case. As SECURE relied on the efficiencies exception under s. 96 of the *Competition Act*, it was required to lead evidence on the quantification of any anticompetitive effects from the transaction (Dr. Duplantis), and the demonstration that the efficiencies likely to be realized as a result of the transaction were greater

than and offset such effects (Mr. Harrington). All this evidence was necessary for SECURE to meet its onus, regardless of whether or not the Tribunal finds that the transaction caused a substantial lessening of competition before considering the efficiencies exception.

13. SECURE's expert fees also reflect the challenges of responding to the ever-changing case brought by the Commissioner. The Commissioner initially sought a full block, and then full unwinding of the Transaction, or alternatively, a divestiture of unspecified waste disposal facilities. This required SECURE and its experts to prepare responses and consider all facilities and geographies, significantly expanding the scope of expert evidence required for the hearing. Only on the eve of trial in his opening demonstrative did the Commissioner provide his proposed remedy, comprised of 41 facilities and 271 proposed geographic markets. This prompted further last-minute analysis by SECURE's experts to present responses to the Commissioner's changed position at trial.

14. The Commissioner also abandoned some of his theories of harm at trial, including alleged effects of the transaction on NORM waste disposal as a distinct product market and the supposed prevention of competition with respect to a potential landfill in Wonowon, BC. SECURE, however, had already incurred the expense of having its experts consider and respond to these meritless aspects of the Commissioner's case.

15. SECURE notes that its disbursements for the quantification of anticompetitive effects and efficiencies is comparable to the amounts claimed by the Commissioner (approximately $2.5 million); it should not therefore lie in the Commissioner's mouth to criticize these disbursements as unreasonable or excessive.

*Expert witness fees – Charles River Associates (CRA)*

16. Dr. Adonis Yatchew provided evidence regarding the elasticity of demand for waste disposal services. As established by the Supreme Court in *Tervita*, estimates of the elasticity of demand are "necessary to calculate deadweight loss",[12] and were a necessary input to SECURE's case with respect to the quantification of any anticompetitive effects of the Transaction as required under s. 96.

[12] *Tervita Corp v. Canada (Commissioner of Competition)*, 2015 SCC 3, at para 94.

17. Despite bearing the burden of quantifying the alleged deadweight loss associated with the transaction, the Commissioner did not proffer any expert analysis of the elasticity of demand. Indeed, the Commissioner's expert Dr. Miller ultimately adopted and relied upon Dr. Yatchew's estimate in his reply report, which demonstrates the value of Dr. Yatchew's work.

*Document Management Fees – KLDiscovery*

18. KLDiscovery is a third-party document management vendor. Considering the breadth of the application and the Commissioner's discovery demands, SECURE was required to collect, review, and produce a tremendous volume of documents on a highly expedited timeline (over 55,000 documents)**.** Despite using the resources of the trial team and inSource (Blakes' in-house e-discovery service), use of a third party vendor to manage and review documents was essential to the discovery process in this case. The reasonableness of such disbursements have been approved in previous cases, including in *VAA CT*.[13] They are properly recoverable in this case as well.

*Data processing Fees – Analysis Group*

19. Analysis Group provided necessary support for the collection and processing of transaction data from SECURE to support SECURE's economic experts, particularly considering the expedited litigation schedule. Had Analysis Group not performed these services, they would have been provided by Brattle and/or CRA, whose fees would have increased accordingly.

*Court reporters and transcripts*

20. These disbursements all relate to examinations for discovery. These expenses were necessary and proportional in this proceeding, and SECURE notes that the Commissioner has claimed similar amounts for court reporters in his bill of costs.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED** this 10th day of February, 2023

**BLAKE, CASSELS & GRAYDON LLP**
Lawyers for the Respondent,
SECURE Energy Services, Inc.

[13] *VAA CT*, para 823.