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CT-2024-012

THE COMPETITION TRIBUNAL

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

AND IN THE MATTER OF an application by the Commissioner of Competition for an order pursuant to section 74.1 of the *Competition Act* regarding conduct reviewable pursuant to paragraph 74.01(1)(a) and subsections 74.011(1) and 74.011(2) of the *Competition Act*;

B E T W E E N:

COMMISSIONER OF COMPETITION

Applicant

- and -

ROGERS COMMUNICATIONS INC.

Respondent

**Compendium of the Commissioner of Competition
(Rogers' Motion to Strike the Witness Statements of Dr. Strathearn
and Motion for Leave to File Sur-Reply from Dr. Nick Feamster)**

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CT-2024-012

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TAB 1

CT-2024-012

THE COMPETITION TRIBUNAL

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

AND IN THE MATTER OF an application by the Commissioner of Competition for an order pursuant to section 74.1 of the *Competition Act* regarding conduct reviewable pursuant to paragraph 74.01(1)(a) and subsections 74.011(1) and 74.011(2) of the *Competition Act*;

BETWEEN:

COMMISSIONER OF COMPETITION

Applicant

– and –

ROGERS COMMUNICATION INC.

Respondents

WITNESS STATEMENT OF MATTHEW STRATHEARN

I, MATTHEW STRATHEARN, a Senior Economist with the Economic Analysis Directorate (“**EAD**”) of the Competition Bureau (the “**Bureau**”), of the City of Ottawa in the Province of Ontario, make this witness statement in support of the Commissioner of Competition’s (the “**Commissioner**”) application for an order under section 74.1 of the *Competition Act*, R.S.C., C-34 (the “**Act**”) and AFFIRM AS FOLLOWS:

I. INTRODUCTION

1. I have been a Senior Economist with EAD within the Bureau since June 2022. Previously, I was a Competition Law Officer with the Bureau's Advocacy unit. I began that role in November 2021.
2. My current responsibilities include providing economic support and advice to Bureau case teams dealing with enforcement and advocacy matters. My day-to-day duties include: designing economic models that can be used to test theories of harm, preparing data specifications for various information-gathering requests (Supplementary Information Requests (SIRs), applications under section 11 of the Act, voluntary requests, and discovery proceedings), ingesting and preparing data for analyses, using data to estimate economic models, and providing advice and recommendations to case teams based on the results of these estimations. In addition to these core roles and responsibilities, I have also be called upon by case teams to draft theoretical economic models that can provide insight into methods for calculating the benefit derived from a firm's conduct.
3. Prior to joining the Bureau, I was a Senior Analyst with the Currency Research Unit at the Bank of Canada. My responsibilities included collaborating on various academic research projects across the following research portfolios: consumer access to cash, consumer cash sentiment, and merchant method of payment acceptance. My specific duties included; formulating hypotheses for research projects, designing methodologies for testing hypotheses, and collecting and analyzing data to implement these methodologies. I held this role from February 2021 to November 2021. Upon ending my official duties at the Bank of Canada, I held the title of External Academic Consultant with the Bank of Canada Financial System Research Centre between November 2021 and November 2022.
4. I hold a Doctor of Philosophy (PhD) in Economics from Carleton University. My dissertation was "Three Chapters Exploring Themes in Competition and Collusion". In my dissertation I explore: the effect of business cycle fluctuations on incentives for firms to collude; the interaction between early-stage leniency and late-stage

settlements and how they impact incentives to collude; and how spatial competition impacts bank branching decisions.

II. FINANCIAL CALCULATIONS

5. I was asked by counsel to the Commissioner to calculate certain financial information, as set out below.

A. Total revenues from Rogers' 'unlimited' data plans

6. I was asked by counsel for the Commissioner to calculate the revenues Rogers obtained from 'unlimited' wireless plans between June 2019 and September 2025. To calculate these revenues, I relied only on the spreadsheet titled "Speedpass & Topup vs Price Plan.xlsx" bearing document ID ROG00346941, which is attached as Exhibit "A". My understanding is that this document provides revenue information for various wireless plans and was in response to an undertaking where the Bureau asked for "... *the revenues from Infinite plan subscriptions Rogers has earned from consumers by year from its Infinite plans, from launch in June of 2019 to the end of July 2025, excluding Speed Pass revenue?*" I have limited information about the document itself, apart from its name, identifier, and the answers about the document given by Rogers at the examination of Phil Hartling and to associated undertakings. Therefore, I cannot speak to its broader context or how this document was created. The annual revenues for 'unlimited' wireless plans between June 2019 and September 2025 broken down by base plan charge and topup/speedpass charge can be found in Table 1. During the period June 2019 to September 21, 2025, Rogers earned \$15,379 million CAD (\$15.4 billion CAD) on 'unlimited' wireless plan base charges and an additional \$118.99 million CAD on additional topup/speedpass charges.

Table 1 - Annual revenues for ‘unlimited’ wireless plans (\$CAD – millions)

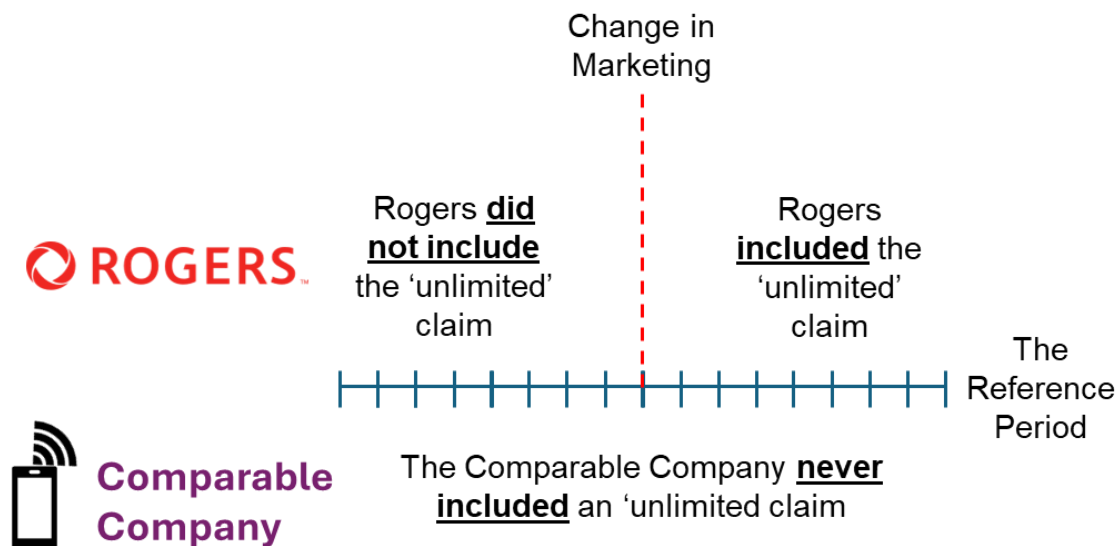
Year	Base Plan	Topup/Speedpass
2019 (from June 2019)	\$500.10	\$3.84
2020	\$1,893.82	\$12.71
2021	\$2,356.88	\$24.63
2022	\$2,522.29	\$26.26
2023	\$2,761.46	\$26.71
2024	\$3,023.07	\$15.97
2025 (up to Sept. 2025)	\$2,321.25	\$8.87
Total	\$15,378.88	\$118.99

B. Difference in revenues attributable to the impugned representations about Rogers’ ‘unlimited’ plans

7. I was also asked by counsel for the Commissioner to calculate the difference between the revenues made by Rogers from its ‘unlimited’ wireless plans and what it would have made if the marketing representations did not claim that the plans offered ‘unlimited’ data. To answer this question, I considered whether I could use a difference-in-differences (“**DiD**”) methodology.
8. DiD is a method that researchers use to figure out whether a specific change or action caused a change in outcomes. It works by comparing how things changed over time for a group that experienced the change to a similar group that did not. In this case, I would use DiD to estimate the impact of including the ‘unlimited’ claim on Rogers’ revenues.

9. To successfully implement DiD, I would need the following:
 - a. a period of time that includes two sub-periods, one where Rogers *did not* market these plans as being 'unlimited' and one where Rogers *did* market these plans as being 'unlimited' (the 'Reference Period'); and
 - b. data from a control group that is very similar to Rogers (for example, including but not limited to, similar size and advertising budgets) and offered a comparable plan (the 'Comparable Company') to the Rogers 'unlimited' plan and *did not* market their plan as being 'unlimited' during the Reference Period and with sufficient data points and variation both before and after Rogers changed their marketing representations to include an 'unlimited' claim.
10. Figure 1, which I prepared, shows the main requirements for doing the analysis. My understanding is that Rogers has always marketed these plans as being 'unlimited', so there is no period when the plans were marketed without that claim. Because of this, I did not have the information needed to construct a reliable "what-if" scenario. In other words, I did not have the information needed to construct what revenues would have looked like without the 'unlimited' claims and so, I could not estimate the extra revenue generated by the claim.

Figure 1 – Marketing campaign requirements in the Reference Period for Rogers and the Comparable Company for a DiD application



11. As an alternative, I considered whether I could use what is called a difference-in-differences in reverse (“**DiDR**”) analysis. In this method, the group that did not experience a change is the company that was always using ‘unlimited’ to market their plans. In this case, Rogers. The group that did experience a change is a comparable company that starts making ‘unlimited’ representations to market their plans during the Reference Period.
12. The DiDR methodology is more nuanced and should be interpreted carefully. DiDR measures a ‘pre-treatment effect’. In this case, DiDR would measure: the effect that the ‘unlimited’ marketing claim had on the Comparable Company if they had made this claim earlier. I would then need to consider whether this estimate is a good stand-in for the effect that Rogers would have seen. DiDR would require the following information:
 - a. data from a Comparable Company that changed their marketing campaign to include an ‘unlimited’ claim during the Reference Period; and
 - b. sufficient data points and variation for both Rogers and the Comparable Company both before and after the Comparable Company changed their marketing.

13. I understand that no Comparable Company had a similar data plan and changed its marketing in the way required. As a result, I do not have the necessary before and after data from another competitor. I therefore could not use the DiDR method to calculate the effect of Roger's 'unlimited' representations.

C. Other potential benefits to Rogers

14. Counsel for the Commissioner asked me to calculate the revenues obtained by Rogers from the sale of Speed Passes purchased by Rogers' 'Infinite Plan' customers from June 2019 to September 21, 2025, I have calculated this amount to be \$118.99 million CAD (See Table 1).
15. Counsel for the Commissioner asked me to calculate the dollar value of Rogers' gain in wireless market share that are attributable to the marketing of 'unlimited' data plans from June 2019 to the present. To do this, I would need access to revenue and unit sales, preferably on a product and monthly basis, for both Rogers and other competitors.¹ I do not have access to this information. Furthermore, I would need to apply a similar DiD or DiDR methodology to identify the change incremental to the 'unlimited' representation. The same challenges mentioned in paragraph 10 and 13 also apply. Due to these limitations, I was unable to calculate this.
16. Counsel for the Commissioner asked me to calculate the dollar value of Rogers' gains in 'likelihood to recommend' that are attributable to the marketing of 'unlimited' data plans from June 2019 to the present. To do this, I would need access to 'likelihood to recommend' survey data for both Rogers and other Comparable Companies offering 'unlimited' plans. I do not have access to this information. Furthermore, I would need to apply a similar DiD or DiDR methodology to identify the change incremental to the 'unlimited' representation. The same challenges mentioned in paragraph 10 and 13 also apply. Due to these limitations, I was unable to calculate this.

¹ The information requirements are high since shares are a function of total market sales. To identify total market sales I would need access to revenues and unit sales for all competitors.

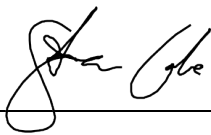
17. Counsel for the Commissioner asked me to calculate the dollar value of Rogers' improvements in terms of brand equity from June 2019 to the present. To calculate the dollar value of a positive statement to the brand, I would need access to brand equity data for both Rogers and other Comparable Companies offering comparable 'unlimited' plans. I do not have access to this information. Furthermore, I would need to apply a similar DiD or DiDR methodology to identify the change incremental to marketing the products as 'unlimited'. The same challenges identified in paragraph 10 and 13 apply. Due to these limitations, I was unable to calculate this.
18. Counsel for the Commissioner asked me to calculate the dollar value of Rogers' existing customers staying with Rogers due to the representations (lower customer churn) from June 2019 to the present. To calculate the dollar value, I would need access to a measure of customer churn for both Rogers and other Comparable Companies offering comparable 'unlimited' plans. I do not have access to this information. Furthermore, I would need to apply a similar DiD or DiDR methodology to identify the change incremental to marketing the products as 'unlimited'. The same challenges identified in paragraph 10 and 13 apply. Due to these limitations, I was unable to calculate this.
19. Counsel for the Commissioner asked me to calculate 3% of Rogers' global sales, I have the data required to do so. I relied on Rogers' public Quarterly Earnings and Reports. Between Q1 2019 and Q3 2025, Rogers' global revenue totalled \$114.49 billion CAD. Based on 3% of \$114.49 billion CAD, this amounts to \$3.43 billion CAD. The calculation can be found in Table 2. I have attached the following to my witness statement:
 - a. Rogers' Supplemental Financial Information for Q4 2019, attached as Exhibit **"B"**;
 - b. Rogers' Supplemental Financial Information for Q4 2020, attached as Exhibit **"C"**;

- c. Rogers' Supplemental Financial Information for Q4 2021, attached as Exhibit "D";
- d. Rogers' Supplemental Financial Information for Q4 2022, attached as Exhibit "E";
- e. Rogers' Supplemental Financial Information for Q4 2023, attached as Exhibit "F";
- f. Rogers' Supplemental Financial Information for Q4 2024, attached as Exhibit "G"; and
- g. Rogers' Supplemental Financial Information for Q3 2025, attached as Exhibit "H".

Table 2 – Global Revenues (\$CAD – billions)

Year	Global Revenues	3% of Global Revenues	Document Cell Reference
2019	15.07	0.45	Exhibit "B", sheet 'Consolidated Financial Results', cell C12
2020	13.92	0.42	Exhibit "C", sheet 'Consolidated Financial Results', cell C12
2021	14.66	0.44	Exhibit "D", sheet 'Consolidated Financial Results', cell C12
2022	15.40	0.46	Exhibit "E", sheet 'Consolidated Financial Results', cell C12
2023	19.31	0.58	Exhibit "F", sheet 'Consolidated Financial Results', cell C12
2024	20.60	0.62	Exhibit "G", sheet 'Consolidated Financial Results', cell C12
2025 (up to and incl. Q3)	15.54	0.47	Exhibit "H", sheet 'Consolidated Financial Results', cell C12, sum of cells C12 to E12
Total	114.49	3.43	

Affirmed remotely by MATTHEW)
STRATHEARN stated as being located)
in the City of Ottawa in the province of)
Ontario, on January 7, 2026 in)
accordance with O. Reg. 431/20,)
Administering Oath or Declaration)
Remotely.)
)
)



P13862



MATTHEW STRATHEARN

Court File No. CT-2024-012

THE COMPETITION TRIBUNAL

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B E T W E E N:**COMMISSIONER OF COMPETITION****Applicant****- and -****ROGERS COMMUNICATIONS INC.****Respondent**

WITNESS STATEMENT OF MATTHEW STRATHEARN

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Counsel to the Commissioner of Competition

TAB 2

Federal Court of Appeal**Cour d'appel fédérale****Date: 20221209****Docket: A-25-22****Citation: 2022 FCA 216**

**CORAM: GLEASON J.A.
MACTAVISH J.A.
MONAGHAN J.A.**

BETWEEN:

THE ATTORNEY GENERAL OF CANADA

Appellant

and

**MOSAIC FOREST MANAGEMENT
CORPORATION, TIMBERWEST FOREST
COMPANY and
ISLAND TIMBERLANDS LIMITED COMPANY**

Respondents

Heard at Toronto, Ontario, on October 4, 2022.

Judgment delivered at Ottawa, Ontario, on December 9, 2022.

REASONS FOR JUDGMENT BY:

GLEASON J.A.

CONCURRED IN BY:

MACTAVISH J.A.
MONAGHAN J.A.

Federal Court of Appeal



Cour d'appel fédérale

Date: 20221209

Docket: A-25-22

Citation: 2022 FCA 216

**CORAM: GLEASON J.A.
MACTAVISH J.A.
MONAGHAN J.A.**

BETWEEN:**THE ATTORNEY GENERAL OF CANADA****Appellant****and**

**MOSAIC FOREST MANAGEMENT
CORPORATION, TIMBERWEST FOREST
COMPANY and
ISLAND TIMBERLANDS LIMITED PARTNERSHIP**

Respondents**REASONS FOR JUDGMENT****GLEASON J.A.**

[1] The appellant, the Attorney General of Canada (the AGC), appeals and the respondents, collectively termed Mosaic, cross-appeal from the Order of the Federal Court in *Mosaic Forest Management Corporation v. Canada (Attorney General)*, 2021 FC 1488, 342 A.C.W.S. (3d) 348. In that Order, Fuhrer J. (the Federal Court Judge) dismissed an appeal from an unreported

speaking Order issued on August 20, 2021, in Federal Court File T-773-20 by Associate Judge Aalto, who was acting as a case management judge (the Case Management Judge). In his speaking Order, the Case Management Judge granted in part the AGC's motion to strike certain affidavits filed by Mosaic in support of its application to review a decision of the Minister of Foreign Affairs that denied Mosaic's applications for permits to export logs to China and Japan.

[2] The Case Management Judge found that the portions of the affidavits in respect of which Mosaic has cross-appealed before this Court constituted opinion evidence but were not proffered by an expert in conformity with the requirements governing expert evidence contained in the *Federal Courts Rules*, S.O.R./98-106 (the Rules). The Case Management Judge therefore concluded that these portions of the affidavits should be struck out.

[3] While the reasons of the Case Management Judge are not as clear as they might have been, I am satisfied that he declined to strike the remaining portions of the affidavits impugned by the AGC because their admissibility was best left to the judge hearing the judicial review application on the merits. Thus, the Case Management Judge's comments on the admissibility of these portions of the affidavits should be read as non-binding *obiter dicta*.

[4] The Federal Court Judge found no basis to interfere with the Case Management Judge's speaking Order, which she characterized as being discretionary in nature. She accordingly applied the review standard of palpable and overriding error, found that the Case Management Judge made no such error, and dismissed the appeal.

[5] Before this Court, the normal appellate standard of review applies. As such, we must determine whether the Federal Court Judge erred in law or otherwise made a palpable and overriding error in refusing to interfere with the Case Management Judge's speaking Order: *Hospira Healthcare Corp. v. Kennedy Institute of Rheumatology*, 2016 FCA 215 at paras. 83–84, 402 D.L.R. (4th) 497.

[6] Insofar as concerns the AGC's appeal, I am of the view that the Federal Court made no such error. The Federal Court correctly characterized as discretionary the Case Management Judge's decision to defer the admissibility of portions of the impugned affidavits to the application judge hearing the merits of the judicial review application (*Bernard v. Canada (Revenue Agency)*, 2015 FCA 263 at para. 10, 261 A.C.W.S. (3d) 441). The Federal Court Judge thus selected the correct standard of review to be applied to this part of the Case Management Judge's speaking Order.

[7] Nor do I see any palpable and overriding error in the Case Management Judge's declining to strike portions of the affidavits that the AGC says ought to have been struck out or any error in the Federal Court Judge's declining to interfere with this part of the Case Management Judge's speaking Order.

[8] The issues in the underlying application in this matter involve not only a review of the ministerial decision but also an allegation that the listing of all species of logs on the Export Control List, established pursuant to the *Export and Import Permits Act*, R.S.C. 1985, c. E-19, is *ultra vires* the provision pursuant to which the listing is authorized. Much of the impugned

evidence relates to Mosaic's *vires* argument. The AGC's position is that the *vires* of the listing is to be assessed as of the time it was made. For this reason, among others, he contests the admissibility of the impugned evidence, which post-dates the listing. Mosaic disagrees. The merits of the *vires* argument are thus closely intertwined with the admissibility of the evidence the AGC impugns.

[9] Given the deferential nature of the standard of review applicable to this portion of the Case Management Judge's decision, how closely the admissibility issue is tied to the merits of Mosaic's judicial review application, and the frequent preference for leaving these sorts of issues to an application judge (as noted, for example, in *Gravel v. Telus Communications Inc.*, 2011 FCA 14, 218 A.C.W.S. (3d) 478), I see no palpable and overriding error in declining to strike the portions of the affidavits that the AGC impugns. The AGC will be able to make admissibility arguments related to the proper scope of evidence relevant to the *vires* issue or otherwise admissible on a judicial review application before the application judge, charged with hearing the merits of Mosaic's application.

[10] Since the admissibility of evidence relevant to the *vires* issue was left to be decided by the application judge, contrary to what the AGC asserts, the Case Management Judge was not required to analyze whether the impugned affidavits are admissible in respect of Mosaic's *vires* argument.

[11] I would therefore dismiss the AGC's appeal because he has failed to demonstrate a palpable and overriding error in the Orders below.

[12] As concerns Mosaic’s cross-appeal, the issue is different and, contrary to what the Federal Court Judge found, raises, at least in part, a question of law because Mosaic submits that the Case Management Judge erred in striking portions of the affidavits as being inadmissible opinion evidence when they are not.

[13] I agree with the parties that the issue of whether evidence is inadmissible opinion evidence raises a question of law, reviewable for correctness, where what is at issue is the legal test for delineating inadmissible opinion evidence. As recently noted by my colleague de Montigny J.A. in *Sweet Productions Inc. v. Licensing LP International S.À.R.L.*, 2022 FCA 111 at para. 22, [2022] F.C.J. No. 862 (QL), “[...] the standard of review for admissibility of evidence is generally correctness, to the extent that the alleged error relates to the applicable legal test and principles.”

[14] I turn now to consideration of the applicable legal principles and their application to the case at hand.

[15] Opinion evidence may be characterized as evidence where a witness offers an inference from observed facts as opposed to evidence of the witness’ own first-hand factual observations. The following excerpt from Paciocco, Paciocco & Stuesser, *The Law of Evidence*, 8th ed. (Toronto: Irwin Law, 2020) at 233–34, provides a useful discussion of the difference between factual and opinion evidence:

An inference from observed fact is different than the observed fact itself. A witness who says a wound was life-threatening, for example, is drawing an

inference from an observed fact and is therefore offering an opinion. If that same witness merely describes the wound by saying either “the victim had a wound in his neck” or “the carotid artery was severed,” that witness is simply reporting an observed fact.

[16] There are two exceptions to the general rule that opinion evidence is inadmissible.

[17] First, non-expert witnesses may offer their observations in the form of opinion where:

(1) they are in a better position than the trier of fact to form a conclusion; (2) the conclusion is one that a lay person can make; (3) the witness has the necessary experience to draw the conclusion; and (4) the opinion is a “compendious mode of stating facts that are too subtle or complicated to be narrated as effectively without resort to conclusions” (*The Law of Evidence* at 239; *Graat v. The Queen*, [1982] 2 S.C.R. 819 at 837, 840, 144 D.L.R. (3d) 267 [*Graat*]; *Toronto Real Estate Board v. Commissioner of Competition*, 2017 FCA 236 at para. 79, 286 A.C.W.S. (3d) 369; *Hunt (Litigation guardian of) v. Sutton Group Incentive Realty Inc.* (2002), 162 O.A.C. 186 at para. 17, 215 D.L.R. (4th) 193 (ONCA)).

[18] Second, properly qualified experts may offer opinions as to certain matters where they possess the specialized training or expertise required to provide inferences beyond the ability of the trier of fact to draw. In the Federal Court, as noted by the Case Management Judge, rule 52.2 of the Rules requires, among other things, that an affidavit of an expert witness set out the expert’s qualifications and be accompanied by a certificate confirming the expert’s agreement to conform to the Code of Conduct for Expert Witnesses set out in the Schedule to the Rules.

[19] Turning to the paragraphs struck out from the affidavit of Mr. Lee, these paragraphs are not opinion evidence at all but rather merely attach and provide a summary of data drawn from a report from Statistics Canada that is attached to Mr. Lee's affidavit as an exhibit. No opinion whatsoever is proffered in the impugned paragraphs. As in *The Owners, Strata Plan NES 97 v. Timberline Developments Ltd.*, 2011 BCCA 421 at paras. 45–46, 24 B.C.L.R. (5th) 234, and in *R. v. Ajise*, 2018 ONCA 494 at para. 23, 428 D.L.R. (4th) 586, aff'd on other grounds, 2018 SCC 51, [2018] 3 S.C.R. 301, upon which Mosaic relies, compilations or explanations of data drawn from exhibits—like those contained in the impugned paragraphs of Mr. Lee's affidavit—do not constitute opinion evidence.

[20] The AGC made the suggestion before us that the Statistics Canada report appended to the Lee affidavit that Mr. Lee summarizes is inadmissible on the additional ground of being inadmissible hearsay evidence. It is unclear whether the hearsay objection was pursued before the Case Management Judge. That said, it is clear that the hearsay issue was not pursued before the Federal Court Judge, since there is no mention of any error in respect of hearsay in the AGC's Notice of Motion to the Federal Court Judge seeking to set aside the Case Management Judge's speaking Order. Nor is it dealt with by the Federal Court Judge in her reasons. In light of the AGC's failure to raise the hearsay issue before the Federal Court Judge, the issue cannot be revived on appeal before this Court.

[21] I therefore conclude that the Case Management Judge erred in striking paragraphs from Mr. Lee's affidavit.

[22] As concerns the paragraphs struck out from the affidavit of Mr. Gough, in paragraphs 25 to 29 of his affidavit, Mr. Gough provides evidence of Mosaic's own sales data that he offers as Mosaic's Chief Commercial Officer. As Mosaic rightly notes, this is not opinion at all but rather first-hand factual evidence with which the affiant presumably is familiar. The Case Management Judge thus erred in holding that these paragraphs constituted opinion evidence.

[23] The remaining paragraphs struck out from the affidavits of Mr. Gough and from the first affidavit of Mr. Kaps contain two sorts of statements.

[24] On one hand, some of these paragraphs are similar to the impugned paragraphs in Mr. Lee's affidavit. They attach and summarize data drawn from reports or industry subscriptions: the *Madison's BC Coastal Log Prices* report and the subscription from RSI Inc. known as Fastmarkets RSI, in the case of Mr. Gough, and a series of reports generated from the B.C. Ministry of Forests, Lands, Natural Resource Operations and Rural Development and WoodX.com, in the case of Mr. Kaps' first affidavit.

[25] On the other hand, other paragraphs or portions of paragraphs express opinions. For example, in paragraph 17 of his affidavit, Mr. Gough offers the view that the prices for both the domestic and export markets for logs harvested in the Pacific Northwest region of the United States are comparable. Similarly, in paragraph 81 of his first affidavit, Mr. Kaps provides an estimate of the cost another company would incur in cutting and engaging in certain processing operations for the logs it cuts in British Columbia. Mr. Kaps provides the estimate based on his 29 years' experience in the forestry industry. Other expressions of opinion are interspersed

through paragraphs 70 to 81 of the first Kaps affidavit and paragraphs 9 to 24 and 30 to 35 of the Gough affidavit.

[26] Arguably, these sorts of opinions are the sort of evidence witnesses with many years experience in the forestry industry, like Messrs. Gough and Kaps, may be entitled to offer as lay opinion evidence. They are perhaps similar to the views, for example, of a police officer about matters within police training and expertise, such as opining on the practices of drug couriers, which were found to be admissible as non-expert lay opinion evidence in *R. v. MacKenzie*, 2013 SCC 50 at paras. 55–65, 363 D.L.R. (4th) 381; and *R. v. Nolet*, 2010 SCC 24 at para.48, 320 D.L.R. (4th) 1.

[27] In *Graat*, the Supreme Court of Canada noted at pages 839 to 840 that it is for the trier of fact to decide whether to admit lay opinion evidence and to determine what weight to give it.

[28] Many of the paragraphs struck out from the affidavits of Mr. Gough and the first affidavit of Mr. Kaps are similar in kind to other evidence that the Case Management judge declined to strike. In this regard, there is no meaningful difference between paragraphs 40 to 69 of the first Kaps affidavit (that the Case Management Judge declined to strike) and paragraphs 70 to 81 of the same affidavit and paragraphs 9 to 24 and 30 to 35 of the Gough affidavit (that the Case Management Judge struck out).

[29] Given the disparate treatment afforded to evidence of similar ilk, as well as the nature of the lay opinion evidence at issue, it is my view that the Case Management judge erred in ruling

on the admissibility of paragraphs 70 to 81 in the first Kaps affidavit and of paragraphs 9 to 24 and 30 to 35 of the Gough affidavit. The issue of their admissibility should have been left to the application judge, who will be better placed to draw the line between admissible and inadmissible lay opinion evidence, as, by then, the affiants presumably will have been cross-examined and responding materials will have been filed.

[30] I accordingly conclude that the Case Management Judge made a reviewable error in striking out paragraphs from the affidavits of Messrs. Lee and Gough and from the first affidavit of Mr. Kaps. Thus, these portions of the Case Management Judge's Order must be set aside.

[31] For sake of clarity, however, I note that it remains open to the AGC to contest the admissibility of these paragraphs before the application judge on the basis that they are inadmissible opinion evidence. In addition, as already noted, it remains open to the AGC to renew before the application judge his motion to set aside all the evidence the AGC impugns on the broader grounds that it is inadmissible on an application for judicial review, because it was not before the Minister, or irrelevant to the *vires* argument.

[32] Consequently, I would dismiss the appeal and grant the cross-appeal, set aside the Order of the Federal Court and vary the speaking Order of the Case Management Judge to dismiss the AGC's motion, without prejudice to him to renew it before the application judge in accordance with these Reasons.

[33] On the issue of costs, the costs award of the Case Management Judge stipulated that costs were in the cause, and I see no reason to vary that part of the Case Management Judge's speaking Order, which is highly discretionary. As Mosaic did not seek its costs before the Federal Court and none were awarded by the Federal Court, I would award none in respect of the appeal to the Federal Court Judge. Before this Court, I would rule that costs in respect of the AGC's appeal and Mosaic's cross-appeal are in the cause as most issues remain to be decided by the application judge.

"Mary J.L. Gleason"

J.A.

"I agree.

MACTAVISH J.A."

"I agree.

MONAGHAN J.A."

FEDERAL COURT OF APPEAL**NAMES OF COUNSEL AND SOLICITORS OF RECORD**

DOCKET:	A-25-22
STYLE OF CAUSE:	THE ATTORNEY GENERAL OF CANADA v. MOSAIC FOREST MANAGEMENT CORPORATION, TIMBERWEST FOREST COMPANY AND, ISLAND TIMBERLANDS LIMITED COMPANY
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	OCTOBER 4, 2022
REASONS FOR JUDGMENT BY:	GLEASON J.A.
CONCURRED IN BY:	MACTAVISH J.A. MONAGHAN J.A.
DATED:	DECEMBER 9, 2022

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	FOR THE RESPONDENTS

TAB 3

Competition Tribunal



Tribunal de la concurrence

PUBLIC VERSION

Citation: *Canada (Commissioner of Competition) v Parrish & Heimbecker, Limited*, 2022 Comp Trib 18

File No.: CT-2019-005

Registry Document No.: 296

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

BETWEEN:

Commissioner of Competition
(applicant)

and

Parrish & Heimbecker, Limited
(respondent)



Dates of hearing: January 6-7, 11-15, 19-21, and 25 and February 3-4, 2021

Before: D. Gascon J. (Chairperson), A.D. Little J. and Ms. R. Samrout

Date of Reasons for Order and Order: October 31, 2022

REASONS FOR ORDER AND ORDER

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I. EXECUTIVE SUMMARY

[1] On December 19, 2019, the Commissioner of Competition (“**Commissioner**”) filed a Notice of Application (“**Application**”) against the Respondent Parrish & Heimbecker, Limited (“**P&H**”), pursuant to section 92 of the *Competition Act*, RSC 1985, c C-34 (“**Act**”), following the acquisition by P&H of 10 primary grain elevators (“**Elevators**”) located in Western Canada (“**Transaction**”). Prior to the Transaction, these 10 Elevators were owned and operated by Louis Dreyfus Company Canada ULC (“**LDC**”), one of P&H’s competitors in the grain business. In his Application, the Commissioner challenges the acquisition by P&H of one of these Elevators, namely, the LDC Elevator located on the Trans-Canada Highway in Virden, Manitoba (“**Virden Elevator**”), near the Manitoba-Saskatchewan border.

[2] The Commissioner claims that by acquiring the Virden Elevator (“**Virden Acquisition**” or “**Acquisition**”), P&H causes or is likely to cause a substantial reduction of competition in the supply of grain handling services (“**GHS**”) for wheat and canola for those farms that benefited from competition between the Virden Elevator and the nearby elevator owned by P&H and located in Moosomin, Saskatchewan, also on the Trans-Canada Highway (“**Moosomin Elevator**”). The Virden Acquisition is the only portion of the Transaction challenged by the Commissioner in this Application.

[3] The Commissioner’s Application alleges that the anti-competitive effects caused by the Virden Acquisition require a remedy under section 92 of the Act. The Commissioner submits that farms in the area which had previously benefited from the competition between P&H and LDC are likely to pay materially more to obtain GHS from the Moosomin and Virden Elevators, and will thus receive less money for their wheat and canola. The Commissioner maintains that canola crushing plants (“**Crushers**”) and more distant Elevators are not sufficient to constrain an exercise of market power by P&H, due to higher transportation costs for farms to deliver their grain to these competitors.

[4] P&H disputes the Commissioner’s position. P&H submits that the Commissioner’s Application improperly defines both the relevant product market and the relevant geographic market affected by the Virden Acquisition. According to P&H, the relevant product market is the purchase of wheat or canola from the farms, as P&H does not supply GHS. As to the relevant geographic market, P&H submits that it is much broader than the Commissioner alleges since the purchase prices set by the Moosomin and Virden Elevators are influenced by rival Elevators and Crushers located far beyond the respective individual draw areas of these two Elevators. P&H contends that in the face of vigorous and effective competition from competing Elevators, as well as from canola Crushers and other direct purchasers of wheat and canola, P&H’s control of the Virden Elevator gives it neither the ability nor the incentive to exercise monopsony power in any properly defined market. Hence, says P&H, the Virden Acquisition does not lessen competition substantially in any relevant market, and is not likely to do so. Moreover, P&H argues that in any event, the efficiencies that the Virden Acquisition is likely to bring about will be greater than, and will offset, the effects of any alleged lessening or prevention of competition.

[5] For the reasons that follow, the Tribunal will dismiss the Application brought by the Commissioner. The Commissioner has failed to establish, on a balance of probabilities, that the elements of section 92 have been satisfied.

[6] The Tribunal¹ first concludes that in the circumstances of this case, the relevant product is not the sale of GHS to farms, as alleged by the Commissioner, but the purchase of wheat and canola by P&H. The definition of the relevant product market was a fundamental point of disagreement between the parties, and was highly influential in the Tribunal's overall analysis. The Tribunal finds that the Commissioner's proposed product market is not grounded in commercial reality and in the evidence. Moreover, in this case, the "value-added" approach to product market definition advanced by the Commissioner fails on the facts, from a precedential and legal standpoint, and from a conceptual and economic perspective. Turning to the geographic market, the Tribunal is of the view that the relevant geographic market for the purchase of wheat is more likely than not to be comprised of at least the Virden, Moosomin, Fairlight, Whitewood, Oakner, Elva, and Shoal Lake Elevators. As to the relevant geographic market for the purchase of canola, it includes at least the Moosomin, Virden, Fairlight, Oakner, Whitewood, Brandon (Richardson), Melville, Souris East, Shoal Lake, and Elva Elevators, as well as the Crushers at Harrowby, Yorkton (LDC), Velva, and Yorkton (Richardson). These relevant markets are somewhat closer to the geographic markets proposed by the Commissioner but are larger than the narrow "corridor of concern" between the Moosomin and Virden Elevators that he originally identified (discussed below).

[7] The Tribunal also finds that the Commissioner has not established that the Acquisition lessens competition substantially in any relevant market, or is likely to do so. The Tribunal reaches that conclusion after finding that the Virden Acquisition does not materially reduce, and is not likely to reduce materially, the degree of price or non-price competition in the purchase of wheat and canola in the relevant geographic markets, relative to the degree that would likely have existed in the absence of the merger. In particular, the evidence shows that the price effects of the Acquisition are immaterial for the purchase of both wheat and canola, that several effective remaining competitors will remain to constrain P&H's ability to exercise market power, and that the post-merger market shares are below the 35% safe harbour threshold. The Tribunal finds that the Virden Acquisition causes some lessening of competition for the purchase of wheat, but the evidence does not allow it to conclude that such lessening reaches the substantiality level required by section 92.

[8] In light of those conclusions, the Tribunal does not need to determine the issue of efficiencies claimed by P&H. However, considering the extensive submissions made by the parties on efficiencies and the nature of the issues raised, the Tribunal addresses the matter. The Tribunal concludes that P&H has not proven, with clear and convincing evidence, that the Virden Acquisition is likely to bring about cognizable gains in efficiency. As a result, P&H would not have met its burden of demonstrating, on a balance of probabilities, that its claimed gains in efficiency would be greater than, and would offset, the anti-competitive effects of any lessening of competition resulting from the Acquisition.

¹ Where the words "Tribunal" or "panel" are used and the decision relates to a matter of law alone, that decision has been made solely by the judicial members of the Tribunal.

II. INTRODUCTION AND OVERVIEW

A. The parties

[9] The Commissioner is the public official appointed by the Governor in Council under section 7 of the Act and is responsible for the enforcement and administration of the Act.

[10] P&H is a private, family-owned Canadian agribusiness headquartered in Winnipeg, Manitoba. P&H buys many varieties of grain, including wheat and canola, from farms and sells them to customers located in Canada, Europe, Asia, and South America. P&H has vertically integrated operations spanning across Canada in grain trading, handling, and merchandising, as well as in crop inputs retail, flour milling, and feed mills. It employs over 1,500 people with customers in 24 countries. Prior to the Transaction, P&H owned 19 Elevators in Western Canada. It also has ownership interests in a number of export terminals at Canadian ports located near Vancouver, British Columbia and in Thunder Bay, Ontario.

B. The Transaction

[11] Pursuant to an asset purchase agreement dated September 3, 2019, P&H agreed to purchase from LDC 10 Elevators and related assets in Western Canada, including the Virden Elevator. On December 10, 2019, P&H and LDC closed the Transaction, bringing the total number of Elevators owned by P&H to 29. The grain volumes purchased through the former LDC Elevators in the last full crop year when they were owned and operated by LDC was 1.6 million metric tonnes (“MT”).

[12] The Transaction is part of P&H’s growth strategy. P&H claims that it will improve its efficiency and effectiveness in competing with other grain companies in Western Canada.

C. The merger provisions of the Act

[13] A merger is defined by section 91 of the Act as referring to the acquisition or establishment, by one or more persons, of “control over or significant interest in the whole or a part of a business of a competitor, supplier, customer, or other person.” It is not disputed that the Transaction is a merger covered by the Act.

[14] Mergers, along with matters such as restrictive trade practices, are reviewable by the Tribunal under Part VIII of the Act if they have anti-competitive effects (*Tervita Corp v Canada (Commissioner of Competition)*, 2015 SCC 3 (“**Tervita SCC**”) at para 43). With respect to mergers, section 92 identifies these anti-competitive effects as either substantially lessening competition or substantially preventing competition. More specifically, subsection 92(1) allows the Tribunal to intervene with respect to a merger or proposed merger if it finds that the merger prevents or lessens, or is likely to prevent or lessen, competition substantially “(a) in a trade, industry or profession; (b) among the sources from which a trade, industry or profession obtains a product; (c) among the outlets through which a trade, industry or profession disposes of a product; or (d) otherwise than as described in paragraphs (a) to (c).” The Tribunal is empowered to make a remedial order when a merger is found to either lessen or prevent competition substantially.

[15] Subsection 92(2) provides that the Tribunal shall not find that a merger or proposed merger prevents or lessens, or is likely to prevent or lessen, competition substantially “solely on the basis of evidence of concentration or market share.” However, the Tribunal has found that these two factors nonetheless may help in assessing whether or not a merger or proposed merger could result in a substantial lessening or prevention of competition (*The Commissioner of Competition v CCS Corporation et al*, 2012 Comp Trib 14 (“**Tervita CT**”) at para 360, rev’d 2013 FCA 28, rev’d 2015 SCC 3; *The Commissioner of Competition v Superior Propane Inc*, 2000 Comp Trib 15 (“**Superior Propane I**”) at paras 126, 304–313; *Director of Investigation and Research v Hillsdown Holdings (Canada) Ltd* (1992), 41 CPR (3d) 289 (Comp Trib) (“**Hillsdown**”) at pp 315–316, 318).

[16] Section 93 sets out a non-exhaustive list of market-specific factors that the Tribunal may consider in determining whether a merger prevents or lessens, or is likely to prevent or lessen, competition substantially. These factors include the following: foreign products as effective competition; failing firm considerations; availability of acceptable substitutes; removal of a vigorous and effective competitor; barriers to entry; remaining effective competitors; and change and innovation. The list is open-ended, as it includes at paragraph (h) “any other factor that is relevant to competition in a market that is or would be affected by the merger or proposed merger.”

[17] The Act also carves out certain exceptions to the application of the Tribunal’s section 92 remedial powers. One such exception, which is relevant in this case, is what is commonly named the “efficiencies defence,” in section 96 of the Act. This exception provides that the Tribunal shall not make an order under section 92 if it finds that the merger in respect of which the application is made is likely to bring about efficiency gains which are greater than and likely to offset the anti-competitive effects resulting from the merger.

[18] The Commissioner bears the burden of satisfying the elements of section 92, and the Tribunal must make a positive determination in respect of those elements before it may issue a remedial order. However, as will be discussed in more detail below, P&H bears most of the burden of proof under the efficiencies defence in section 96.

[19] The burden of proof is the civil standard, that is, the balance of probabilities. In that respect, the Tribunal remains guided by the principles established in *FH v McDougall*, 2008 SCC 53 (“**McDougall**”), where the Supreme Court of Canada (“**SCC**”) held that there is only one civil standard of proof in Canada, the balance of probabilities (see also *Tervita SCC* at para 66). Speaking for a unanimous court, Justice Rothstein stated in his reasons that the only legal rule in all cases is that “evidence must be scrutinized with care by the trial judge” and that “evidence must always be sufficiently clear, convincing and cogent to satisfy the balance of probabilities test” (*McDougall* at paras 45–46). In all civil cases, the trier of fact “must scrutinize the relevant evidence with care to determine whether it is more likely than not that an alleged event occurred” (*McDougall* at para 49).

[20] The full text of the relevant provisions of the Act is reproduced in Schedule “A” to these Reasons.

D. The parties' pleadings

[21] In his Application, the Commissioner seeks an order requiring P&H to divest either the Virden Elevator or the Moosomin Elevator, as well as an order prohibiting P&H from acquiring any Elevator in the relevant markets for a certain period of time.

[22] The Commissioner submits that the relevant product is the supply of GHS. According to the Commissioner, GHS includes the following services: the elevation, grading, and segregation of the grain performed by the Elevators, as well as the cleaning, drying, blending, and storage that may be offered. The Commissioner pleads that the relevant markets should be defined as “the supply of [GHS] for wheat and the supply of [GHS] for canola for the aggregated locations of farmers that benefited from competition between the Virden Elevator and Moosomin Elevator.” The Commissioner says that there are no functional substitutes for these GHS.

[23] Turning to the geographic dimension of the relevant markets, the Commissioner pleads that the wheat and canola purchased by an Elevator usually originate from nearby farms, and that the relevant geographic market is therefore local due to transportation costs, with the most affected farms being located in a narrow corridor between the Virden and Moosomin Elevators, within a one-hour drive of each Elevator.

[24] The Commissioner contends that the Virden Acquisition causes, or is likely to cause, a substantial lessening of competition in the relevant markets, due to the elimination of an important competitor². The Commissioner alleges that, with the acquisition of the Virden Elevator, P&H can unilaterally exercise enhanced market power in the relevant markets, at the expense of farms located in certain parts of Saskatchewan and Manitoba. According to the Commissioner, P&H will be able to materially raise the implicit price that farms pay for GHS for wheat and canola in the Virden-Moosomin corridor, and farmers will be paid less for their wheat and canola.

[25] The Commissioner maintains that canola Crushers and more distant Elevators are not sufficient to constrain an exercise of market power by P&H owing to higher transportation costs for farms to deliver their grain.

[26] The Commissioner further claims that several section 93 factors support these conclusions, in that: 1) Elevators and direct purchasers in other countries cannot compete directly for the purchase of wheat and canola from farms in the relevant markets because of transportation costs; 2) for the vast majority of farms in the relevant markets, there are no viable substitutes; 3) barriers to entry and expansion are high, owing to significant capital costs and difficulty finding a suitable location to build an Elevator and accompanying access to rail transportation; 4) P&H no longer intends to expand the rail car capacity at the Moosomin Elevator, which would have increased this Elevator's ability to handle more wheat and canola and the level of competition in the relevant markets; 5) the closest remaining Elevator to the Virden and Moosomin Elevators is an Elevator owned by Viterra Inc. (“**Viterra**”) in Fairlight, Saskatchewan (“**Fairlight Elevator**”), but it is insufficient to constrain an exercise of market power by P&H due to its location on a secondary

² The Tribunal pauses to note that the Commissioner is not claiming that the Acquisition substantially prevents competition. Hence, in these Reasons, the Tribunal's analysis will be limited to the Commissioner's alleged substantial lessening of competition.

road, 35 kilometers south of the Trans-Canada Highway; 6) the Virden Elevator, which has now been removed as a competitor, was previously a vigorous and effective competitor to P&H; and 7) the market for the delivery of GHS is not subject to material change through innovation.

[27] The Commissioner adds that, even if the relevant product markets were more broadly defined to be the purchase by Elevators of wheat and canola from farms, the Acquisition still causes, or is likely to cause, a substantial lessening of competition in these product markets due to P&H's ability to materially decrease the price of wheat and canola paid to farms.

[28] P&H opposes the Commissioner's Application and asks the Tribunal to dismiss it with costs. In P&H's view, the Commissioner improperly defines both the relevant product market and the relevant geographic market. Furthermore, P&H submits that the Acquisition does not enable it to materially lower the prices it pays to farms for their wheat or canola, nor does it lead to a substantial lessening of competition in any relevant and properly defined market.

[29] P&H submits that the relevant product market is the purchase of wheat or canola. It states that, contrary to what the Commissioner advances, it does not supply GHS to farms.

[30] P&H argues that the prices it pays for grain at the Virden or Moosomin Elevators are largely dependent on global prices, which are independent of changes to the local competitive landscape around the Virden and Moosomin Elevators. According to P&H, the prices that it offers to pay farms for grain are centrally set: they are derived from the demand and prices it receives from its sales to customers in international and domestic markets, as well as by the costs to transport grain from its network of Elevators to export terminals or to domestic buyers.

[31] P&H also disagrees with the relevant geographic market as defined by the Commissioner. P&H maintains that Elevators purchase grain from farms located farther away than what the Commissioner alleges. P&H contends that the Virden and Moosomin Elevators each purchase grain from hundreds of farms mostly located outside the geographic area between these two Elevators along the Trans-Canada Highway, well beyond a one-hour drive. According to P&H, the Virden and Moosomin Elevators must purchase grain at competitive prices against many other rival Elevators whose draw areas extend farther than the narrow "corridor of concern" and the proposed geographic markets identified by the Commissioner. Therefore, in P&H's view, the relevant geographic market is much broader than the Commissioner alleges since the purchase prices set by the Moosomin and Virden Elevators are influenced by rival Elevators located far beyond the respective individual draw areas of the two Elevators at issue. P&H claims that it does not hold or exercise monopsony power in a relevant geographic market as alleged by the Commissioner, or even in the broader area of Southeastern Saskatchewan and Southwestern Manitoba.

[32] P&H contends that in the face of vigorous and effective competition from competing Elevators, as well as from canola Crushers and other direct purchasers of wheat and canola, P&H's control of the Virden Elevator gives it neither the ability nor the incentive to exercise monopsony power in any properly defined market. Rival Elevators and other purchasers within and beyond the draw areas of the Virden and Moosomin Elevators already purchase grain from farms that also sell to the Virden and Moosomin Elevators, have significant excess capacity to purchase additional

grain, and can increase their purchases from those farms at low cost. In other words, says P&H, the Virden Acquisition will not substantially lessen competition.

[33] P&H further argues that barriers to entry and expansion are low, with the result that P&H's ability to exercise any monopsony power would be constrained by the expansion of existing Elevators' purchases and/or by new entry.

[34] Moreover, even if the Virden Acquisition were found to substantially lessen competition, P&H argues that the gains in efficiency that the Acquisition is likely to bring about will be greater than, and will offset, the effects of any alleged lessening of competition. According to P&H, it will not likely attain such gains in efficiency if the Tribunal makes the orders sought by the Commissioner. The efficiencies claimed by P&H from the Acquisition include the following: improved scale economies and cost savings at the Fraser Grain Terminal ("FGT") located in British Columbia; elimination of the margin that LDC formerly paid to use the Vancouver export terminal owned by Kinder Morgan; output expansion and improved scale economies at the Virden Elevator; and administrative synergies.

[35] In his reply, the Commissioner opposes P&H on this last point and submits that the Virden Acquisition will not generate cognizable gains in efficiencies to the extent alleged by P&H. The Commissioner further maintains that, if the Tribunal makes the orders sought, P&H's ability to achieve the alleged efficiencies being claimed would not be impacted. In any event, the Commissioner holds that any cognizable efficiencies that P&H may obtain through the Virden Acquisition and that would be lost if the orders sought were made will not be greater than or offset the anti-competitive effects of the Acquisition.

E. Procedural history

[36] Around the time the Commissioner filed the Application in December 2019, he stated that he would request an expedited scheduling order in accordance with the Tribunal's *Practice Direction regarding an Expedited Proceeding Process before the Tribunal*, dated January 2019. Under an expedited scheduling order, an application will typically be heard by the Tribunal within five to six months after the filing of the notice of application.

[37] P&H opposed the Commissioner's request and asserted that procedural fairness concerns would arise under an expedited process. P&H proposed an alternative schedule pursuant to which the hearing would take place approximately three to four months later than the hearing dates contemplated under the expedited process.

[38] On January 13, 2020, the Tribunal denied the Commissioner's request for an expedited process (*Canada (Commissioner of Competition) v Parrish & Heimbecker, Limited*, 2020 Comp Trib 1). The Tribunal was not persuaded that in the absence of P&H's consent, the expedited process was a reasonable option given the circumstances and fairness considerations arising in this case. Moreover, the period of three to four months that could be gained with the expedited process did not justify the imposition of the process over P&H's strong objections. The Tribunal adopted the alternative schedule proposed by P&H and issued a scheduling order in early March 2020, pursuant to which the hearing of the Commissioner's Application would start in November 2020 (*Canada (Commissioner of Competition) v Parrish & Heimbecker, Limited*, 2020 Comp Trib 2).

(“**Scheduling Order**”). Adjustments were subsequently made to various steps of the Scheduling Order as a result of the COVID-19 pandemic. The parties nonetheless continued to work towards the November 2020 hearing dates.

[39] In October 2020, P&H advised the Tribunal that its expert was no longer available in November because of unforeseen personal circumstances. The Tribunal agreed to adjourn the hearing with the consent of both parties. Eventually, the Tribunal issued an amended Scheduling Order, pursuant to which the hearing would now proceed in early January 2021 (*Canada (Commissioner of Competition) v Parrish & Heimbecker, Limited*, 2020 Comp Trib 13).

[40] In the course of the proceedings leading up to the hearing, counsel for P&H insisted on various occasions on an in-person hearing notwithstanding the COVID-19 pandemic and the implementation of various lockdowns. While counsel for the Commissioner initially accommodated P&H’s request and agreed to a hybrid hearing, the Commissioner eventually opposed the request as the pandemic worsened. In December 2020 and early January 2021, the Tribunal ordered that the hearing would take place remotely by way of videoconference using the Zoom platform (*Canada (Commissioner of Competition) v Parrish & Heimbecker, Limited*, 2020 Comp Trib 14; *Canada (Commissioner of Competition) v Parrish & Heimbecker, Limited*, 2021 Comp Trib 1).

[41] In anticipation of the hearing, the parties exchanged witness statements in accordance with the schedule fixed by the Tribunal. These witness statements included statements from farmers in Western Canada, as well as initial and reply witness statements by John Heimbecker, the Chief Executive Officer (“**CEO**”) of P&H.

[42] On November 27, 2020, the Commissioner moved to strike some paragraphs of the initial witness statement of Mr. Heimbecker on the basis that it contained inadmissible hearsay and inadmissible lay opinion evidence. In December 2020, the Tribunal granted this motion in part and ordered P&H to prepare a revised witness statement from Mr. Heimbecker (*Canada (Commissioner of Competition) v Parrish & Heimbecker, Limited*, 2020 Comp Trib 15 (“**Parrish & Heimbecker**”)).

[43] Initially, both parties agreed to designate the identity of their respective farmer witnesses as Confidential Level B in accordance with the Confidentiality Order issued by the Tribunal (*Canada (Commissioner of Competition) v Parrish & Heimbecker, Limited*, 2020 Comp Trib 3). As the hearing approached, however, P&H revised its position. By way of letter, P&H advised the Tribunal at the end of November 2020 that witness statements prepared by three farmers on behalf of P&H would no longer be designated confidential. Moreover, P&H expressed doubts about the merits of the Commissioner’s confidentiality designations and eventually asserted that the Commissioner should file a formal motion to designate as confidential the identities of his farmer witnesses. On December 7, 2020, the Commissioner moved for an order designating the identities of five farmers as confidential.

[44] On December 29, 2020, the Tribunal dismissed the Commissioner’s motion and reasons for this decision were issued in early January 2021 (*Canada (Commissioner of Competition) v Parrish & Heimbecker, Limited*, 2021 Comp Trib 2). The Tribunal found that the Commissioner had failed to present clear and convincing evidence sufficient to satisfy the Tribunal that the

requirements for the confidentiality designations were met. Further to that decision, only three of the five farmer witnesses originally identified by the Commissioner appeared at the hearing in a public setting.

[45] The hearing was held virtually between January 6 and February 4, 2021, and the witnesses testified by videoconference in accordance with a witness protocol that was developed by the Tribunal with the parties' input.

[46] Not only was this the first virtual hearing for the Tribunal, but this was also the first time that experts testified together as part of a panel of expert witnesses formed in accordance with Rules 75 and 76 of the *Competition Tribunal Rules*, SOR/2008-141 ("**CT Rules**"). CT Rule 76 provides that the Tribunal "shall direct the manner in which the panel [of witnesses] shall testify" and that counsel can cross-examine and re-examine the witnesses. The protocol for this concurrent expert evidence session (also known as "hot-tubbing") was set out in a specific Direction issued by the Tribunal with the parties' consent.

[47] The purpose of this "hot-tubbing" process is to streamline the testimonies of expert witnesses, and to allow experts to ask questions from each other and highlight their areas of agreement and disagreement. Pursuant to the Tribunal's Direction, the experts and counsel for the parties agreed on a list of five main issues to be addressed by the experts at the concurrent evidence session, and the experts identified their areas of agreement and disagreement on each issue. The parties also exchanged short statements of each expert's proposed expertise. Each expert was granted a full and fair opportunity to present and explain their respective position on each issue, and opposing counsel were able to cross-examine the experts. A significant benefit that flowed from this concurrent evidence session was that experts were able to rapidly focus on the key areas of disagreement between them. In the view of all members of the Tribunal, the process worked well and helped the Tribunal to have a solid understanding of each expert's position, while allowing the Tribunal and the parties to narrow the disputed issues between the experts.

III. FACTUAL BACKGROUND

A. The Canadian grain industry

[48] The grain supply chain in Canada involves an interconnected network of businesses and infrastructure that moves grain from individual farms to end customers, such as companies that manufacture food or feeds. The main participants include farmers who produce grain, grain companies that purchase grain from farmers, railways that transport grain from Elevators to export terminals or to domestic customers, and export terminals where the grain is delivered for storage and shipping.

[49] Canadian farmers grow a variety of grains such as wheat, barley, soybeans, peas, and canola. The Commissioner's Application in this case focuses solely on two types of grain, namely, wheat and canola. Wheat and canola are both commodity products.

[50] Farmers can sell their wheat to Elevators, and their canola to Elevators or Crushers. For many years before 2012, when the Canadian Wheat Board ("**CWB**") was in existence, grain

companies bought wheat and barley on behalf of the CWB on a toll basis. At the time, the CWB was, by law, the sole marketer of wheat and barley for export and domestic human consumption. Grain companies then acted as the agents of and service providers to the CWB. Grain companies purchased other grains such as canola directly from farmers, without the intervention of the CWB. However, in August 2012, the CWB's role ended and grain companies ceased being service providers to the CWB. The grain companies now purchase and sell wheat and barley from farmers on their own account for sale to their own customers, as they do for other types of grain. With the end of the CWB's role as a sole purchaser of certain grain, the historical tariffs and fees that had been in place for the service provided by grain companies ended. But, as will be discussed below, the heritage from the CWB days has an impact on certain purchasing and selling practices in the grain business.

[51] Canadian grain companies sell grain domestically or to overseas customers by transporting it by rail to export terminals located at Canadian ports. At the export terminals (and at some local Elevators), grain is segregated by type and quality attributes, stored, blended, and loaded onto vessels.

[52] In addition to P&H, there are several major grain companies that purchase wheat and canola in competition with P&H in Western Canada. The two largest are Viterra and Richardson International Limited ("**Richardson**"). Viterra is a privately-held subsidiary of Glencore, a British-Swiss multinational corporation; it has 79 Elevators and six port facilities across Canada and parts of the United States ("**U.S.**"). Richardson is a privately-held Canadian subsidiary of James Richardson & Sons, Limited which owns 73 grain Elevators and has ownership or partnership interests in the largest three grain terminals in Canada.

[53] Other major grain companies operating in Western Canada include Cargill Limited ("**Cargill**"), Paterson Grain Limited ("**Paterson**"), Ceres Global Ag Corp. ("**Ceres**"), Bunge Ltd ("**Bunge**"), Archer-Daniels-Midland Limited ("**ADM**"), and G3 Canada Limited ("**G3**"). Cargill is a vertically-integrated company with 31 Elevators and port terminals across Canada. Paterson operates more than 40 Elevators whereas G3 has 17 Elevators and four export terminals.

[54] In addition to these major players, other local grain companies such as GrainsConnect Canada also compete in Western Canada.

B. Elevators and Crushers

[55] Elevators are designed to stockpile and store the grain they purchase from spatially dispersed farms. The Elevators, upon receiving the grain from a farm, will grade it, elevate it, and segregate it; they may also clean, blend, dry, and store the grain at the Elevator until a railcar or a truck comes to take the grain to its next destination. This is what the Commissioner refers to as GHS. Elevators' staff will typically examine grain samples from the farms' trucks, assess for dockage as needed, grade the grain, unload the trucks delivering the grain, elevate the grain to the appropriate storage bins, store the grain and keep it in condition, blend the grain as appropriate, assist with weighover (i.e., inventory counts), dry the grain as needed, prepare cash settlements for farms, and load the grain into railcars for shipment to a port terminal or to a further processing mill such as flour mills. Grain companies incur costs for those activities, such as costs related to any

cleaning or drying, transportation from Elevators to export terminals or domestic locations, developing export and domestic customers, and managing risk with respect to fluctuations in exchange rates and commodity prices.

[56] Grain is graded in accordance with the Official Grain Grading Guide published by the Canadian Grain Commission (“CGC”). A grading factor is a physical condition of grain that indicates a certain quality level. For wheat, the highest quality grade under the CGC’s classification system is grade 1 Canadian Western Red Spring Wheat (“1CWRS”). Turning to canola, the most common grade for harvested canola is 1CAN CANOLA. In the case of wheat, the protein content also affects the price. The base protein content commonly used by grain companies is 13.5%, and a higher protein wheat commands a higher price relative to 1CWRS 13.5. Protein spreads reflect the cash price adjustments (either up or down from the cash price for 1CWRS 13.5) based on the protein content of the wheat.

[57] Elevators have varying grain storage capacities. The storage capacity of P&H’s Elevators ranges from 22,000 MT at the Glossop Elevator (located in Glossop, Manitoba) to 106,000 MT at the Weyburn Elevator (located in Weyburn, Saskatchewan).

[58] Elevators are often located close to railways, as the grain is typically loaded onto railcars and transported by rail. The term “rail car spots” is commonly used within the industry and refers to the number of railcars at an Elevator that can be accommodated for loading on a sidetrack (or spur line) off the main track line.

C. Farms

[59] Even though some farms will have storage and elevating capacity, farms typically rely on Elevators as they could not achieve the same efficiencies in moving their grain from the farm to the domestic customers or to export terminals for delivery to international end customers. Farms can sell their wheat and canola to multiple grain companies and are offered prices by Elevators and Crushers for their grain.

[60] In most instances, farms are responsible for hauling their grain to the Elevators. Some farms have their own trucks to transport their grain, while others employ commercial trucking companies to load, ship, and unload their grain. In certain circumstances, some Elevators or Crushers might offer pick-up service, which is charged to farms through a trucking allowance.

[61] The transportation costs incurred by farms to bring their grain to an Elevator will vary with distance but also with travel time, road conditions, and seasonal road weight restrictions that may affect certain secondary roads. All else being equal, most farms prefer to sell their grain to closer Elevators.

D. Pricing and contracts

[62] Grain companies such as P&H buy wheat or canola at their Elevators by paying farms a “net” or “cash” price for their grain (“Cash Price” or “CP”). The Cash Price is also sometimes referred to as the “flat” or “bid” price for the grain. No matter how it is worded or expressed, the

Cash Price represents the actual amount of money (per MT or per bushel) received by a farm for the net quantity of grain delivered and sold at an Elevator. P&H posts its Cash Price for grain for each of its Elevators. Farms can also use P&H's mobile application, named "P&H Direct," to see the Cash Prices at each of P&H's Elevators across Western Canada.

[63] The price of grain can be expressed in terms of dollars per MT or dollars per bushel. There are 36.744 bushels of wheat to the MT and 44.092 bushels of canola to the MT.

[64] The Cash Price that a farmer receives for grain is comprised of two components: the futures price ("**Futures Price**" or "**FP**") and what is commonly known in the grain industry as the "basis." The term "basis" refers to the difference between the Futures Price and the Cash Price ("**Basis**" or "**B**")³.

[65] The Futures Price reflects the global commodity market price for the grain, set by global supply and demand forces. Neither the farms nor the Elevators have control over the Futures Prices, as these are global commodity prices. The world Futures Prices for wheat and canola are determinative of P&H's prices for those commodities. For wheat, P&H uses the Minneapolis Hard Red Spring wheat futures contract price for CWRS. This price trades in U.S. dollars ("**USD**") per MT. For canola, P&H uses the Intercontinental Exchange futures price for canola in Saskatchewan. This price trades in Canadian dollars ("**CAD**") per MT. Grain companies (including P&H) typically use 1CWRS as their base grade for wheat pricing and 1CAN CANOLA as their base grade for canola pricing.

[66] While both the Commissioner and P&H agree that the Cash Price, the Futures Price and the Basis are the three components of the pricing process for grain, they fundamentally disagree on the interrelation between these three components. The Commissioner claims that P&H has no control over the Futures Price and sets the Basis, and that the Cash Price paid to farms is the resulting amount. In other words, the Commissioner argues that $FP - B = CP$. P&H instead argues that the Basis numerically results from the difference between the Cash Price it sets and the Futures Price over which it has no control. In sum, P&H submits that $FP - CP = B$. The Commissioner claims that the relevant price for the purposes of a competition analysis is the price for GHS — which, he says, equates to the Basis —, whereas P&H is of the view that the relevant price is the Cash Price effectively paid to the farms.

[67] Farms can sell and deliver their grain at different times throughout the year and they can sell a portion of their crop before it is harvested. Some farms can store some or all of their grain on their farm if they have the proper elevating capacity, which allows them to sell their grain at a time of their choosing.

[68] The Cash Price ultimately received by the farms can sometimes be adjusted upwards when Elevators offer limited-tonne or limited-time pricing "specials" to fill remaining space in a train or a vessel or to obtain additional grain supplies to meet sales commitments. From time to time, the Cash Price or the Basis can also be adjusted to reflect individual negotiations between farms and the Elevators. P&H estimates that this occurs in approximately [REDACTED] of its grain purchase transactions.

³ In his oral and written submissions, the Commissioner often refers to the Basis as the "basis price."

[69] In terms of contracts with Elevators and Crushers, farms can enter into different types of agreements to sell their grain. They can enter into fixed price contracts, grain pricing order agreements (“GPOs”) — also known as grain purchase orders or target contracts —, and basis contracts.

[70] Under a fixed price contract, the Cash Price, Futures Price and Basis are fixed. Similarly, the quantity and quality of grain to be delivered, as well as the delivery period, are determined in the fixed price contract. Fixed price contracts are used for forward or deferred delivery purchase transactions as well as for spot purchase transactions. Forward or deferred delivery refers to a delivery of grain at some point in the future. Farms can enter into forward or deferred delivery contracts to deliver a specific quantity and quality of grain to an Elevator for an agreed Cash Price within a prescribed delivery window in the future. In P&H’s fixed price contracts, the Cash Price appears as the “net” price.

[71] Under a GPO, a farm sets a targeted Cash Price above an Elevator’s posted Cash Price (“**Target Cash Price**”) at which the farm agrees to sell and deliver to that Elevator a specific type of grain in a specified delivery month. If the Elevator’s posted Cash Price reaches a farm’s Target Cash Price, the GPO is triggered and the Elevator must purchase the farm’s grain at the Target Cash Price. If a GPO is triggered, it becomes a fixed price contract. Farms always keep the option to amend or cancel a GPO at any time before it is triggered. A farm chooses the expiry date for the GPO, which may be in effect for days, weeks, or months.

[72] The third type of agreement that farms can enter into is a basis contract. Under such a contract, the Basis is agreed upon and fixed in the contract, but the Futures Price for contracting purposes is taken from the international markets and fixed by the farms’ actions at a later date. Such agreements allow farms to lock in what they consider to be a favorable Basis. Under a basis contract, the quantity and quality of grain to be delivered, as well as the delivery period, are set, but the Cash Price is determined once the farm triggers the basis contract, which sets the Futures Price.

[73] When P&H buys wheat or canola from a farm, it takes title to the grain at the time the farm delivers the grain to the Elevator. At that point in time, the farm receives the contracted Cash Price for its grain and ownership of the grain then passes to P&H. The Cash Price may be adjusted at the time of delivery of the grain to the Elevator if the quality of the wheat or canola delivered is different from the quality the parties had agreed upon in the contract.

E. P&H’s business

[74] P&H operates within the grain business by buying and selling grain for its own account throughout the crop year, which spans from August 1 to July 31 of the following year.

[75] P&H buys wheat and canola from farmers via a network of 29 Elevators located throughout Western Canada, including the Moosomin Elevator and the 10 Elevators purchased from LDC in December 2019. P&H’s 29 Elevators are the entry points to its grain network in Western Canada.

[76] P&H sells the varieties of grain it purchases, such as wheat and canola, to customers located in Canada, Europe, Asia, and South America. Just over half of P&H's total wheat and canola sales are for export. P&H's export customers pay for wheat and canola at the Canadian port.

[77] In order to move the wheat and canola it sells to its customers located overseas, P&H utilizes the rail network to ship grain from its Elevators in Western Canada to its export terminals located on the West Coast and in Thunder Bay, Ontario.

[78] P&H has an interest in three export terminals located near Vancouver in British Columbia, namely, the Alliance Grain Terminal ("AGT"), the Fraser Surrey Docks ("FSD"), and the FGT, where P&H has recently invested [REDACTED]. P&H also has an interest in the Superior terminal located in the port of Thunder Bay in Ontario ("Superior"). The vast majority of grain exported by P&H moves through its export terminals. The storage capacities are 102,000 MT at AGT, 18,000 MT at FSD, 176,000 MT at Superior, and 92,000 MT at FGT, where P&H has a partial entitlement to storage and throughput capacity.

[79] Export terminals are used to receive grain from rail, segregate and store grain by type and quality attributes, clean grain when required, blend grain, and load grain onto vessels. As with other commodities, wheat and canola of the same grade received from different P&H Elevators are commingled at the terminals. The cleaning and blending of grain occur principally at P&H's export terminals, rather than at its Elevators, given the greater economies of scale available at these terminals.

[80] P&H also operates a milling group that sources Canadian wheat to produce flour and cereal products. P&H moves the wheat supplied to its milling group by rail or truck from its Elevators to its mills in Western and Eastern Canada.

[81] Additionally, P&H operates a Crop Inputs and Services business, which supplies fertilizer, seed, and pesticides as well as agronomic services to farms through dual crop inputs and grain facilities at its Elevators across Canada. P&H has a "one-stop-shop" crop inputs retail and grain purchase business model. The former LDC Elevators purchased by P&H did not offer crop inputs services.

[82] P&H's audited consolidated financial statements for the 2018 fiscal year indicate that, across all of its lines of businesses, it generated consolidated revenues of approximately [REDACTED] and gross profit of [REDACTED]. By comparison, P&H reported consolidated revenues of approximately [REDACTED] and gross profit of [REDACTED] for the 2017 fiscal year.

[83] In March of every year, P&H sets its annual grain-purchasing budget for Western Canada for the upcoming fiscal year, which begins on May 1 of each year. Its grain purchase targets aim to increase P&H's total grain volumes and share over time.

F. The Moosomin and Virden Elevators

[84] Prior to the Transaction, P&H and LDC respectively owned and operated the Moosomin Elevator and the Virden Elevator, located in proximity to one another near the Manitoba-

Saskatchewan border. Then, LDC would send grain from the Virden Elevator westward by rail to its export terminals on the West Coast. Following the Transaction, these two Elevators were re-assigned to P&H's Thunder Bay catchment area, meaning that the grain purchased by these Elevators is shipped to the Superior terminal in Thunder Bay. However, the Moosomin Elevator, which is located west of the Virden Elevator, is also in a position to ship grain to P&H's West Coast terminals.

[85] For rail transportation, the Moosomin Elevator has 56-car spots while the Virden Elevator has 112-car spots. In terms of storage capacity, the Moosomin Elevator has a capacity of 26,000 MT and an annual throughput capacity in the range of [REDACTED] MT. For its part, the Virden Elevator has a storage capacity of 46,000 MT and an annual throughput capacity in the same range of [REDACTED] MT.

IV. EVIDENCE – OVERVIEW

[86] Over the course of the hearing, the Tribunal heard from 16 lay witnesses and three expert witnesses. Over 250 exhibits were filed.

A. Fact witnesses

(1) The Commissioner

[87] The Commissioner led evidence from three farmer witnesses located in Manitoba or Saskatchewan, namely:

- Alistair Pethick: Mr. Pethick and his brother operate a farm located in McAuley, Manitoba. They mainly grow wheat and canola, but also soybeans, oats, and hay as well as other speciality crops in some years. Mr. Pethick sold his wheat to the Moosomin, Virden, and Fairlight Elevators, as well as to the Ceres Elevator located in Northgate, Manitoba;
- Chris Lincoln: Mr. Lincoln and his family own and operate two farms located in Maryfield and Wawota, Saskatchewan. They grow wheat and canola. Mr. Lincoln's farms have the capacity to store 80-85% of his grain. The Fairlight Elevator operated by Viterro is the closest Elevator to Mr. Lincoln's farms. Since harvesting his crops in November 2019, Mr. Lincoln has sold all his crop to the Fairlight Elevator. In 2018, he sold 20% of his commodity crop to the Virden Elevator and the balance to the Fairlight Elevator; and
- Ian Wagstaff: Mr. Wagstaff owns a 6,000-acre farm approximately two miles south of Manson, Manitoba. He is a wheat and canola farmer. He harvests approximately 100,000 bushels of wheat and canola per year. Mr. Wagstaff can store 60,000 to 70,000 bushels of wheat at his farm, meaning that he must sell approximately 25-30% of his crop at harvest time. In the past two years, he has sold most of his crop to the Virden Elevator.

[88] The Commissioner had two other farmer witnesses, [REDACTED] and [REDACTED], who decided not to testify in public at the hearing. However, the parties filed an agreed statement of facts regarding the testimonies of these two farmer witnesses.

[89] The Commissioner also led evidence from Harvey Brooks, who is the General Manager of the Saskatchewan Wheat Development Commission (“**Sask Wheat**”). Sask Wheat is a producer-led organization established to grow Saskatchewan’s wheat industry through research, market development, and advocacy. Mr. Brooks has been General Manager of Sask Wheat since 2014. Prior to joining Sask Wheat, Mr. Brooks served as Deputy Minister of Agriculture for the Government of Saskatchewan, Director of Policy and Economic research with the Saskatchewan Wheat Pool, and Head of Corporate Policy at the CWB. He holds a Ph.D. in Economics from Iowa State University and a Masters degree in Agricultural Economics from the University of Saskatchewan.

[90] Eight representatives of grain companies other than P&H also testified before the Tribunal for the Commissioner. These companies had provided data to the Commissioner during his investigation of the Transaction. These witnesses were:

- Dean McQueen: Mr. McQueen is the Vice President, Grain Merchandising and Transportation (North America) at Viterra. Viterra markets and handles grain, oilseeds, and pulses. It operates grain elevators and special crop facilities, port terminals, and processing facilities. Mr. McQueen is responsible for overseeing the merchandising and transportation of grain, oilseeds, and pulses, including procurement, through the Viterra country grain Elevator network;
- Ray Elliot: Mr. Elliot is a Manager for Seed Procurement at Bunge’s Harrowby Crusher facility located in Russell, Manitoba. Bunge is an agribusiness and food company that buys oilseeds and softseeds from producers and sells finished products to customers. Mr. Elliot is responsible for managing all the seed purchases for Bunge’s crushing plants in Western Canada;
- Brett Malkoske: Mr. Malkoske is the Chief Financial Officer of G3. He previously was the Vice President of Business Development and Communications at G3, where he was responsible for external communications and facilitating the development and execution of G3’s strategic plans in Canada;
- Darcy Jordan: Ms. Jordan has been a Management Accounting and Reporting Senior Analyst at Cargill since 2019. Cargill is a merchandiser and processor involved in crop inputs product retailing, grain handling, milling, salt distribution, and merchandising. In her role, Ms. Jordan is responsible for Cargill’s management reporting, supporting the Manitoba region for margins, and implementing the controls framework and profit and loss statements;
- Kara Hawryluk: Ms. Hawryluk is the Canada Operational Controller at LDC. Along with its parent company Louis Dreyfus Company B.V., LDC is a global merchant and processor of agricultural goods. Ms. Hawryluk is responsible for working with LDC’s commercial

and operational teams to ensure timely and accurate reporting of Elevator and trading information;

- Jeff Wildeman: Mr. Wildeman is the Origination and Supply Chain Solutions Manager at Ceres. Ceres is involved in the procurement and provision of North American agricultural commodities, industrial products, fertilizers, energy products, and supply chain logistics services. Mr. Wildeman is responsible for the origination of Canadian agricultural commodities for Ceres's grain merchandising operations;
- Mark Irons: Mr. Irons is the Vice-President, Softseed Crush for ADM, an American global food processing and commodities trading corporation. Mr. Irons oversees the management of commercial activities related to ADM's softseed crush assets in North America; and
- Bryce Geddes: Mr. Geddes is a Marketing Specialist at Richardson, a worldwide handler and merchandiser of major grains and oilseeds, and a vertically integrated processor and manufacturer of oats and canola-based products. Mr. Geddes is responsible for collecting and analyzing transactional data for Western Canadian markets in which Richardson conducts its grain and crop inputs businesses.

[91] The Tribunal notes that the Commissioner obtained data from nine grain handling companies including 15 Elevators and five Crushers. This data was used in the preparation of the expert evidence filed by the Commissioner.

[92] The Tribunal generally found the Commissioner's farmer witnesses and Mr. Brooks to be credible, forthright, helpful, and impartial. They were knowledgeable about their respective businesses and farm operations. With respect to the representatives of competing grain companies and Crushers, the Tribunal found that these witnesses were reliable and gave no reasons to doubt the accuracy of the transaction data they provided.

(2) P&H

[93] Turning to P&H, it led evidence from the following three farmer witnesses, who are all based within the Commissioner's proposed geographic market and his narrower "corridor of concern" in Manitoba and Saskatchewan:

- Kristjan Hebert: Mr. Hebert owns a 22,000-acre farm located in Fairlight, Saskatchewan, which is operated through Hebert Grain Ventures. Mr. Hebert grows wheat and canola as well as malt barley, hybrid rye, and yellow peas;
- Tim Duncan: Mr. Duncan owns and operates an approximately 3,000-acre farm located west of Cromer, Manitoba. He grows wheat, canola, and oats. From year-to-year, he will also grow barley, peas, and/or soybeans; and
- Edward Paull: Mr. Paull owns and operates an approximately 3,400-acre farm located 4.5 miles outside of Elkhorn, Manitoba, a town located between the Moosomin and Virden Elevators. He grows wheat and canola every year.

[94] Mr. Heimbecker, the CEO of P&H, also testified at the hearing and was the only witness representing P&H itself. In addition to being CEO, Mr. Heimbecker is the President of P&H's Grain Division Canada. Mr. Heimbecker has been at P&H and in the grain business for his entire professional career, which started in May 1987. He was named CEO of P&H in September 2019. As President of Grain Division Canada, he is in charge of P&H's grain business for all of Canada. Mr. Heimbecker also acted as P&H's main witness on the issue of efficiencies.

[95] As was the case for the Commissioner's former witnesses, the Tribunal generally found P&H's former witnesses to be credible, forthcoming, helpful, and impartial. As to Mr. Heimbecker, the Tribunal also found him forthcoming and knowledgeable about P&H's business. The Tribunal, however, observes that Mr. Heimbecker was not close to the day-to-day operations of P&H's Elevators, and was of more limited assistance to the panel in this respect. In addition, some of his evidence was distinctly oriented towards a successful outcome for P&H in this proceeding and was therefore less helpful to the Tribunal in such instances.

B. Expert witnesses

[96] Three expert witnesses provided expert reports and testified at the hearing.

(1) The Commissioner

[97] Dr. Nathan Miller and Mr. Andrew Harington testified on behalf of the Commissioner.

(a) Dr. Miller

[98] Dr. Miller is the Saleh Romeih Associate Professor at the McDonough School of Business at Georgetown University in Washington, DC. He holds a B.A. in Economics and History from the University of Virginia and a Ph.D. in Economics from the University of California at Berkeley. He served as a Visiting Professor at Toulouse School of Economics in 2019-2020. Prior to joining Georgetown University in 2013, he served as a Staff Economist in the U.S. Department of Justice from 2008 to 2013. Dr. Miller's area of expertise is in industrial organization, with a specialization in antitrust economics and a focus on collusion and the competitive effects of mergers.

[99] The Commissioner asked Dr. Miller to prepare a report examining the competitive effects and the deadweight loss ("DWL"), if any, with respect to the acquisition of grain Elevators and related assets from LDC by P&H (namely, the Transaction). His report focused specifically on the Virden Acquisition. Dr. Miller was also asked to reply to the report filed by P&H's expert, Ms. Margaret Sanderson, in response to his initial expert report.

[100] With the parties' agreement, Dr. Miller was accepted as an expert qualified to give opinion evidence in industrial organization and competition law economics. The Tribunal generally found Dr. Miller to be credible, forthright, objective, and impartial. Dr. Miller was a cooperative witness and explained his models and analyses with clarity.

(b) Mr. Harington

[101] Mr. Harington is a Chartered Professional Accountant, a Chartered Financial Analyst charterholder, and a Chartered Business Valuator. He is a Principal in the Toronto office of The Brattle Group, an economic consulting firm with offices around the world. Mr. Harington has provided business and intellectual property valuation and merger and acquisition advisory services for over 25 years.

[102] Mr. Harington's mandate was to comment on the witness statements of Mr. Heimbecker as they relate to an assessment of efficiencies under section 96 of the Act. Mr. Harington was asked in particular to comment on whether, and if so the extent to which, the efficiencies that Mr. Heimbecker identified are cognizable under section 96 of the Act and would likely be lost if the Tribunal made the orders sought by the Commissioner.

[103] At the hearing, Mr. Harington was qualified as an expert in the quantification of efficiencies. The Tribunal found Mr. Harington to be credible, forthright, objective, and impartial, as well as willing to acknowledge the weaknesses/shortcomings in his own evidence or in the Commissioner's case. He was a reliable and knowledgeable expert.

(2) P&H

[104] Ms. Margaret Sanderson appeared on behalf of P&H as an expert witness.

[105] Ms. Sanderson is the Vice President and the global practice leader of the Competition and Antitrust Economics practice for the consulting firm Charles River Associates International Limited, a multinational firm that provides economic, financial, and business strategy consulting. She holds a M.A. in Economics and a B.Sc. in Economics and Quantitative Methods from the University of Toronto. Prior to joining Charles River Associates, Ms. Sanderson was Assistant Deputy Director of Investigation and Research within the Economics and International Affairs Branch of the Competition Bureau. She has 30 years of experience addressing the competitive effects of mergers and other firm conduct.

[106] Ms. Sanderson's mandate was to provide her opinion on the likely anti-competitive effects of P&H's Acquisition of the Virden Elevator and to respond to the initial expert report of Dr. Miller.

[107] With the parties' agreement, Ms. Sanderson was accepted as an expert qualified to give opinion evidence in industrial organization and competition law economics. The Tribunal generally found Ms. Sanderson to be credible, forthright, objective, and impartial. Ms. Sanderson was helpful to the panel in her explanations.

C. Documentary evidence

[108] The list of exhibits that were admitted in this proceeding is attached as Schedule "B" to these Reasons.

V. PRELIMINARY ISSUES

[109] At the hearing, counsel for P&H raised issues regarding the Commissioner's evidence and obligations in these proceedings. These preliminary matters must be addressed before dealing with the main issues in dispute in the Commissioner's Application. They are as follows: 1) challenges to the evidence provided by the Commissioner's experts; 2) adverse inferences and the Commissioner's duty of fairness and obligations regarding the gathering of evidence; and 3) the legal burden of proof in this Application. Each will be dealt with in turn.

A. Challenges to the Commissioner's experts

(1) Mr. Harington's evidence

[110] At the hearing, P&H challenged a number of paragraphs found in Mr. Harington's expert report on the issue of efficiencies. In particular, P&H asked the Tribunal to strike or give no weight to approximately 49 paragraphs of Mr. Harington's report, on the basis that they express opinions of law related to statutory construction or the interpretation of cases. P&H further asserted that a number of other paragraphs of Mr. Harington's expert report constitute inappropriate legal opinion evidence or inappropriate hearsay evidence related to the grain industry.

[111] The Commissioner responds that none of the challenged paragraphs should be struck. He submits that Mr. Harington set out his understanding of the legal framework as it informed his opinion on efficiencies. With respect to P&H's claim that some paragraphs of Mr. Harington's report should be struck because they constitute opinion evidence related to the grain industry, the Commissioner explains that efficiencies and economic experts need to set out their factual understanding of the industry before they can give their opinion. The Commissioner further notes that in this case, Mr. Harington cited all sources in support of the factual statements contained in his report.

[112] For the reasons that follow, the Tribunal agrees in part with P&H and will give limited weight to the legal opinions expressed by Mr. Harington as part of his expert report.

[113] As the Tribunal noted in *The Commissioner of Competition v Vancouver Airport Authority*, 2019 Comp Trib 6 ("**VAA CT**"), it has consistently applied the principles articulated by the SCC in *R v Mohan*, [1994] 2 SCR 9 ("**Mohan**") and its progeny when it is tasked with determining the admissibility of expert evidence (*VAA CT* at para 107). In *White Burgess Langille Inman v Abbott and Haliburton Co*, 2015 SCC 23 ("**White Burgess**"), the SCC set out a two-step test for determining the admissibility of expert evidence. It held that in order to be admissible, expert opinion evidence must first meet the four threshold requirements established in *Mohan*, namely, relevance, necessity in assisting the trier of fact, absence of any exclusionary rule, and a properly qualified expert. At the second step, the decision maker engages in a balancing exercise and weighs the potential benefits of admitting the proposed evidence against the risks.

[114] It is well recognized that, under the principle of "necessity," expert evidence must provide the courts with information that is considered as being "outside the experience and knowledge of a judge" (*Mohan* at p 23). The proposed expert opinion evidence must be necessary to assist the

trier of fact, bearing in mind that necessity should not be judged strictly. This is notably the case where the expert evidence is needed to assist a court or a tribunal due to the technical nature of the issues at stake, or where the expertise is required to enable the decision maker to appreciate a matter at issue and to help it form a judgment on a matter where ordinary persons are unlikely to do so without the help of those with special knowledge.

[115] Experts, however, must not substitute themselves for the trier of fact (*Mohan* at p 24). As the Tribunal stated in *VAA CT*, “evidence that provides legal conclusions or opinions on issues and questions of fact to be decided by the court is inadmissible because it is unnecessary and usurps the role and functions of the trier of fact” (*VAA CT* at para 109, referring to *Quebec (Attorney General) v Canada*, 2008 FC 713 at para 161, aff’d 2009 FCA 361, 2011 SCC 11 and to *Mohan* at p 24). In sum, expert witnesses are not entitled to opine on legal matters, which fall within the scope of the court or Tribunal’s experience and knowledge. An expert opinion that is analogous to a memorandum of fact and law can become inadmissible as it “merely summarizes legal decisions, offers legal submissions on those decisions, and then expresses the author’s personal views on the ultimate issue that is for this Court to decide” (*Es-Sayyid v Canada (Public Safety and Emergency Preparedness)*, 2012 FCA 59 at para 41). The closer the expert evidence approaches an opinion on the ultimate issue to be decided, the stricter the application of the principle will be.

[116] In many paragraphs of his expert report, Mr. Harington examines in detail the framework for quantifying cognizable efficiencies under section 96 of the Act. He does an extensive review of the provisions of the Act, of the case law, and of the Competition Bureau’s 2011 *Merger Enforcement Guidelines*, Competition Bureau Canada, October 6, 2011 (“**2011 MEGs**”)⁴. Relying on these legal sources, he provides his interpretation of section 96 of the Act dealing with efficiencies.

[117] It is not disputed that Mr. Harington is not a legal expert. The Tribunal agrees with P&H that the impugned paragraphs of his report constitute legal conclusions and opinion on an important issue that is up to the Tribunal to decide upon, namely, efficiencies. There is no doubt that the interpretation of section 96 and the determination of the proper legal framework to assess the efficiencies defence advanced by P&H falls within the Tribunal’s experience, expertise, and knowledge. The legal opinion expressed by Mr. Harington on this issue, strictly speaking, intrudes on the role and functions of the Tribunal.

[118] At the same time, the Tribunal acknowledges the extensive and well-recognized experience and expertise of Mr. Harington regarding the complex issue of efficiencies in merger reviews. Section 96 of the Act is a very technical provision and the Tribunal appreciates that Mr. Harington’s comments on how the jurisprudence has been thought through were made to provide the background of his analysis and to help the panel understand his reasoning. The Tribunal accepts that it would have been difficult for Mr. Harington to prepare his expert report and offer his opinion on P&H’s claimed efficiencies without providing some legal assumptions or basis to anchor his assessment of the particular facts in this case. In these circumstances, the Tribunal will not declare the impugned paragraphs of Mr. Harington’s report inadmissible as they are necessary to understand his opinion on efficiencies, but it will give them limited weight in the determination

⁴ In these Reasons, the word “**MEGs**” will also be used to refer to the Competition Bureau’s merger guidelines more generally.

that the Tribunal is called upon to make on the appropriate legal framework under section 96 of the Act.

[119] Turning to P&H's complaint about Mr. Harington's comments on the Canadian grain industry, the Tribunal accepts that Mr. Harington is not a grain industry expert. The Commissioner was indeed not offering Mr. Harington's evidence as such. However, the Tribunal is satisfied that, in making comments on the grain industry in his expert report, Mr. Harington was simply providing his factual understanding of the grain industry based on the documents contained in the evidence. P&H also had an opportunity to cross-examine him to expose the limits of his knowledge on this front. The factual references to the grain industry made by Mr. Harington are grounded on various portions of the evidence, and the Tribunal is not convinced that they should be declared inadmissible or given no weight. The Tribunal is not accepting what Mr. Harington says on the grain industry as a fact. It is simply taking note of the factual sources Mr. Harington relied on for his opinions.

(2) Objectivity of the Commissioner's experts

[120] P&H also asserted in its closing submissions that Dr. Miller failed to provide his expert opinion in an objective manner because he advanced a product market based on GHS, without examining the possibility of alternative product markets. P&H further submitted that neither Dr. Miller nor Mr. Harington opined objectively in their expert reports because of what it termed "their speculative approach" to what has occurred since the Transaction was completed. Echoing an observation made by Justice Moldaver (then at the Ontario Court (General Division)) in *R v Clarke Transport Canada Inc*, 1995 CanLII 7327, P&H claimed that the Commissioner's experts were "hired guns."

[121] The Tribunal does not agree.

[122] Nothing in Dr. Miller's and Mr. Harington's expert reports and testimonies, including in their respective cross-examinations, allows the Tribunal to conclude that these two experts did not provide their evidence objectively and in an impartial manner. Experts have a duty to provide independent assistance to a court at common law (*White Burgess* at para 26). Like many courts at the federal level and in provinces and territories, the Tribunal has also provided explicit guidance on the duty of experts by issuing its *Notice on Acknowledgement of Expert Witnesses* in December 2010. Pursuant to that Notice, experts appearing before the Tribunal have the obligation to sign a form acknowledging that they will comply with the Tribunal's code of conduct for expert witnesses.

[123] The Tribunal's code of conduct provides that experts must assist the Tribunal impartially, that they must be independent and objective, and that their role should not be conflated with that of an advocate for a party. In the Tribunal's opinion, this is exactly what both Dr. Miller and Mr. Harington have done in this case. P&H's claim that they were "hired guns" is entirely without merit and finds no support in the evidence heard by the Tribunal in this case.

B. The Commissioner's duty of fairness and adverse inferences

[124] A second area of preliminary issues relates to the Commissioner's duty of fairness and his obligations regarding the gathering of evidence in the context of this Application. More specifically, P&H asked the Tribunal to draw adverse inferences against the Commissioner. P&H's position is two-fold. First, P&H submitted that the Tribunal should draw an adverse inference against the Commissioner "generally" in this proceeding. Second, P&H argued that an adverse inference should be drawn against the Commissioner because he failed to obtain and produce evidence that was "peculiarly" within his power with respect to subsection 96(3) of the Act on efficiencies and the counterfactual test established in subsection 96(1).

[125] In its written submissions, P&H submitted that there are some circumstances in which a party who bears a burden of proof is not the party best situated to adduce the evidence related to the issue at stake, because the relevant facts lie particularly within the knowledge of the other party. The failure of a party to adduce evidence within its power may be considered as a matter of evidentiary weight and can lead to an adverse inference against it. In support of its position, P&H relied on the SCC's decision in *R v Jolivet*, 2000 SCC 29 ("**Jolivet**").

[126] P&H argued that in weighing the evidence in the record in this Application generally, and more specifically under section 96, the Tribunal must be "alive to what evidence is not in the record." P&H maintained that, if there are gaps in the evidence, and the missing evidence was uniquely within the ability of the Commissioner to obtain, the Tribunal should weigh this consideration and be prepared to draw an adverse inference that such evidence, had it been produced, would not support the Commissioner's position with respect to the Application generally and to efficiencies under section 96.

[127] In addition to the legal principles set out in *Jolivet*, P&H also referred to Tribunal decisions which, according to P&H, established a general duty of fairness owed by the Commissioner during proceedings under the Act (*Commissioner of Competition v Canada Pipe Company*, 2004 Comp Trib 2 ("**Canada Pipe 2004**") at paras 60–64, aff'd 2004 FCA 76; see also *Commissioner of Competition v Canada Pipe Company*, 2003 Comp Trib 15 ("**Canada Pipe 2003**") at para 53).

[128] During cross-examination of the Commissioner's witnesses, counsel for P&H posed questions designed to show that the witnesses had additional documents, or information, or both, that the Commissioner had not elected to obtain and disclose, or had not included in the individual's witness statement.

[129] During oral argument at the hearing, P&H further submitted that while the Commissioner had collected documents from the merging parties, made market contacts, and collected data from grain companies and Crushers prior to commencing this proceeding, the more important question was what the Commissioner did not obtain and file before the Tribunal. P&H contended that the Commissioner did not request nor obtain, from the grain companies or Crushers, any contemporary business documents related to market shares, markets, rail capacity and expansions, excess capacity, barriers to entry, or competition generally. According to P&H, it was incumbent on the Commissioner, acting in the public interest, to investigate the matter fully before commencing this proceeding and to put a full and proper evidentiary record before the Tribunal. The Commissioner

having failed to ask for and obtain the evidence, P&H claims that an adverse inference should be drawn by the Tribunal against him.

[130] Not surprisingly, the Commissioner disagrees with P&H's submissions. During the hearing, the Commissioner submitted that he had complied with his obligations. The Commissioner disagreed with P&H's characterization of Justice Blanchard's reasons in *Canada Pipe 2004* because in that case, the Tribunal considered the 1994 *Competition Tribunal Rules*, SOR/94-290, which are no longer in effect. Relying on *McIlvenna v Viebig*, 2012 BCSC 218, aff'd 2013 BCCA 411, the Commissioner argued that the decision to draw an adverse inference is discretionary and should not occur unless it is warranted in all the circumstances.

[131] At the hearing, the Commissioner further argued that *Jolivet* was a criminal case about whether the Crown's failure to call a witness at a criminal trial could be the subject of comment in the address to a jury by defence counsel. In the Commissioner's submission, the decision in *Jolivet* confirmed that the Crown was under no obligation to call a witness it considered unnecessary to its case.

[132] The Commissioner also countered P&H's arguments about best evidence with his own submission, stating that the best evidence of how P&H competes on a day-to-day basis at an Elevator through pricing should have come from grain merchants such as P&H's employees, rather than relying solely on the evidence of Mr. Heimbecker, a senior executive of P&H. The Commissioner noted that two specific P&H employees were exclusively within the control of P&H and that there was no legitimate explanation for not calling them as witnesses.

(1) Legal principles

(a) Adverse inferences

[133] The drawing of an adverse inference from the absence of evidence relies on the reasoning that the failure by a party to call certain evidence may, depending on the circumstances, amount to an implied admission that the evidence would be contrary to the party's case, or at least would not support it (*Jolivet* at para 28).

[134] In *Jolivet*, the SCC considered whether a jury was entitled to draw an adverse inference from the Crown's failure to call a witness. During the trial, the Crown had indicated to the jury, twice, that it would be calling the witness to corroborate important admissions allegedly made by the accused. Just prior to the close of the prosecution's case, the Crown advised the court that it no longer intended to call that witness and provided an explanation for this decision. Speaking for the SCC, Justice Binnie referred to the general rule developed in civil cases about adverse inferences from the failure to tender a witness, noting that a party may provide a satisfactory explanation for not doing so. A party may have no special access to the potential witness, or the missing proof may lie in the peculiar power of the party against whom the adverse inference is proposed — in which case the argument for an adverse inference is stronger (*Jolivet* at paras 25–27). The SCC also held that one “must be precise about the exact nature” of the adverse inference to be drawn. The SCC concluded that, because Crown counsel had announced to the jury its intention to call the allegedly corroborative witness, an adverse inference of “unhelpfulness”

would have been a fair result owing to the Crown's failure to substantiate its assertion of the existence of corroborative evidence (*Jolivet* at paras 29–30).

[135] The authors of Sopinka, Lederman & Bryant, *The Law of Evidence in Canada*, 5th ed (LexisNexis Canada Inc, 2018) describe the situations in which an adverse inference may be drawn as follows:

§6.471 In civil cases, an unfavourable inference can be drawn when, in the absence of an explanation, a party litigant does not testify, or fails to provide affidavit evidence on an application, or fails to call a witness who would have knowledge of the facts and would be assumed to be willing to assist that party. In the same vein, an adverse inference may be drawn against a party who does not call a material witness over whom he or she has exclusive control and does not explain it away. The inference should only be drawn in circumstances where the evidence of the person who was not called would have been superior to other similar evidence. The failure to call a material witness amounts to an implied admission that the evidence of the absent witness would be contrary to the party's case, or at least would not support it.

§6.472 An adverse inference should be drawn only after a *prima facie* case has been established by the party bearing the burden of proof.

[136] The Federal Court of Appeal (“FCA”) has applied this passage in *Deyab v Canada*, 2020 FCA 222 at para 46 and *Caron Transport Ltd v Williams*, 2020 FCA 106 at para 10.

[137] The FCA also considered adverse inferences in *Toronto Real Estate Board v Commissioner of Competition*, 2017 FCA 236 (“**TREB FCA**”) and *Apotex Inc v Canada (Health)*, 2018 FCA 147 (“**Apotex**”). In *TREB FCA*, the court concluded that the Tribunal made no error in declining to draw an adverse inference against the Commissioner in the circumstances. The FCA held that the requested inference was tantamount to finding that the Commissioner had a legal obligation to quantify anti-competitive effects under section 92, which he had not because of the binding precedent issued by the SCC in *Tervita SCC*. In addition, the FCA stated as follows with respect to the Commissioner's and the Tribunal's roles in the proceeding:

[104] Considering that the Commissioner had no such legal obligation, he, like any other plaintiff, had to decide what evidence he had to put forward to prove his case. As we know, he chose to do so by way of qualitative evidence and in so doing, he took the risk of failing to persuade the Tribunal that the anti-competitive effects of TREB's practice resulted in a substantial prevention of competition. As it turned out, the Tribunal was persuaded by the qualitative evidence adduced by the Commissioner.

[105] We have carefully considered the case law and cannot see any basis to accept TREB's and CREA's proposition that the Tribunal ought to have drawn an adverse inference against the Commissioner for failing to conduct an empirical assessment of markets in the United States and in Nova Scotia, or for that matter in the GTA. That, in our respectful view, would be akin to giving the Tribunal the power to

dictate to the Commissioner how he should present his case. There is no authority for such a proposition.

[Emphasis added.]

[138] In *Apotex*, the FCA confirmed that recent decisions have treated the drawing of an adverse inference as a matter of discretion, to be exercised only where warranted in all of the circumstances. The court identified two reasons for this evolution. First, court rules now go a long way towards rendering witnesses and documents available to both sides, through discovery and other procedural mechanisms. Second, courts have recognized that whether or not an adverse inference is warranted on particular facts is bound up inextricably with the adjudication of the facts (*Apotex* at para 68, citing *TREB FCA* at para 107).

(b) Discovery under the current CT Rules

[139] Pursuant to Rule 60 of the CT Rules, a party to a proceeding has to serve an affidavit of documents on each other party, identifying the documents that are “relevant” to any matter in issue and that are or were in the possession, power, or control of the party. CT Rule 60 does not distinguish between the Commissioner and the other parties for the purposes of discovery, and parties are all subject to the requirement of disclosing what is “relevant.” CT Rule 65 adds that access to what is disclosed must be provided.

[140] Relevance is determined by the way the issues are framed in the pleadings. A document of a party is considered relevant if the party intends to rely on it, if the document tends to adversely affect or support another party’s case, or if the document might fairly lead a party to a “train of inquiry” that could have either of these consequences (Antonio Di Domenico, *Competition Enforcement and Litigation in Canada*, (Toronto: Emond Montgomery Publications Limited, 2019) (“*Di Domenico*”) at p 736, referring to subsection 222(2) of the *Federal Courts Rules*, SOR/98-106 (“*FC Rules*”)). The definition of relevance is therefore quite broad and applies to all parties.

[141] FC Rule 226 further provides that the disclosure obligation is continuous. This requirement has been imported by the Tribunal in its proceedings (*Tervita v Canada (Commissioner of Competition)*, 2013 FCA 28 (“*Tervita FCA*”) at para 74; *The Commissioner of Competition v Air Canada*, 2012 Comp Trib 20 at para 22). The continuous disclosure obligation entails that the initial disclosure affidavit must be updated any time a party becomes aware that it is deficient.

[142] The most recent court decision to have considered the Commissioner’s disclosure obligations is *Vancouver Airport Authority v Commissioner of Competition*, 2018 FCA 24 (“*VAA FCA*”), in which the FCA said the following:

[30] The procedural fairness obligations require the Commissioner of Competition to disclose to the Airport Authority evidence that is relevant to issues in the proceedings. This is necessary for the Airport Authority to know the case it has to meet and to fairly defend itself against the allegations. Often — as the Commissioner has recognized in this case by releasing roughly 8,300 documents

from his investigatory file — this includes exculpatory material or other material resting in the investigatory file that could assist the party whose conduct is impugned in testing the evidence called by the Commissioner or in building its own case. [...] In some cases, there may be limits on the obligation to disclose based on materiality, proportionality, applicable legislative standards and the nature of the proceedings. [...]

[Citations omitted.]

[143] The FCA further noted that the Tribunal proceedings are adjudicative in nature, which typically commanded high procedural fairness requirements (*VAA FCA* at para 29).

(c) Disclosure and the Commissioner’s duty of fairness

[144] In light of P&H’s submissions, it is also important to consider the issue of adverse inferences in the context of the more general legal principles governing the Commissioner’s disclosure obligations and duty of fairness. These go back to the Tribunal’s decision in *Canada Pipe 2004*.

[145] In *Canada Pipe 2004*, the respondent had requested additional disclosure from the Commissioner and to examine witnesses before the hearing. The procedural rules governing Tribunal proceedings back then were different from today’s; they applied a standard of reliance for the Commissioner’s general disclosure obligations, as opposed to the standard of relevance currently in place. In that case, the Tribunal dismissed the motion for additional discovery of documents and persons.

[146] In the Tribunal’s reasons, Justice Blanchard addressed the “duty of fairness” of the Commissioner (*Canada Pipe 2004* at paras 60–64). He found that, although the Commissioner’s disclosure obligation was dictated by a standard of reliance under the then-rules, the Commissioner was “nonetheless required to act fairly in the exercise of her duties.” He noted that the Commissioner is a public officer with significant statutory powers to gather information and exercise public interest privilege, and there was a presumption that the Commissioner was acting in good faith. He further found that in those proceedings, the Commissioner was not a normal adversary, but rather a public officer with a statutory obligation to act fairly (*Canada Pipe 2004* at para 62; see also *Canada Pipe 2003* at para 53). Justice Blanchard likened the Commissioner’s obligations to that of a prosecutor who must act fairly, referring to the criminal law decisions in *Boucher v The Queen*, [1955] SCR 16 (“**Boucher**”) at pp 23–24 and *R v O’Connor*, [1995] 4 SCR 411 (“**O’Connor**”) at pp 477–478. He then stated:

[64] It naturally follows that just as the Crown prosecutor must be motivated by fairness and not the notion of winning or losing, so too the Commissioner must be motivated by goals of fundamental fairness and not by achieving strategic advantage on the proceeding. This is not to say that the duties articulated in such landmark criminal cases as *Boucher, supra*, or *O’Connor, supra*, should be directly imported into an administrative law setting. The Tribunal is an administrative Tribunal with an administrative process and procedural fairness must be customized

to accommodate the expedited process required by the legislation and rules which govern its proceedings. Though the standard of disclosure may justifiably be different in proceedings before the Tribunal than in criminal proceedings, the underlying notion of fairness must remain constant for both. It is in this context that the reliance standard is to be applied.

[147] The Tribunal pauses to note that Justice Rand’s opinion in *Boucher* made comments about all available proof of facts being presented in a criminal matter. The passage from Justice L’Heureux-Dubé’s reasons for the SCC in *O’Connor* further referred to “full and fair disclosure as a fundamental aspect of the Crown’s duty to serve the Court as a faithful public agent, entrusted not with winning or losing trials but rather with seeing that justice is served” (*O’Connor* at para 101).

[148] P&H’s arguments in this proceeding do not concern disclosure obligations of the Commissioner so much as whether the Commissioner has an obligation to collect evidence (*i.e.*, information, documents, and data) from third parties during an investigation or inquiry, and then to present that evidence fully to the Tribunal during proceedings commenced under section 92. The Tribunal observes that P&H cited no case dealing specifically with the Commissioner’s obligation to gather evidence during an investigation or inquiry, nor about whether the Commissioner may have an obligation to obtain an order under section 11 of the Act before a hearing, in order to assist a respondent with its case. P&H also did not refer to any cases involving other statutory officers’ or law enforcement officials’ obligations to carry out full and fair investigations or to obtain court orders to gather information for a party whose transaction or conduct is under review.

[149] Neither party referred to any prior determination of the Tribunal or appellate courts about the scope of the Commissioner’s obligation to present a full evidentiary record to the Tribunal, nor the obligations of any comparable statutory or law enforcement official (other than *Boucher*). Indeed, neither party referred to the remarks made by the FCA in *TREB FCA* at paragraphs 104–105, about the Commissioner’s decisions in presenting a case to the Tribunal.

[150] In addition, since Justice Blanchard’s decision, the procedural landscape during Tribunal proceedings, including disclosure rules, has changed. The Tribunal’s procedural rules passed in 2002 have been replaced by the CT Rules issued in 2008, which now contemplate a relevance-based approach to documentary discovery of the Commissioner. Since *Canada Pipe 2004*, the FCA has also revised the characteristics of the public interest privilege that existed in 2004 and examined procedural fairness obligations during Tribunal proceedings (*VAA FCA* at paras 28–35).

[151] In this context, it is fair to consider whether, and how, the Commissioner’s duty of fairness may have changed since *Canada Pipe 2004*, owing to a respondent’s right to disclosure and production of all non-privileged records in the possession or control of the Commissioner under the current CT Rules and the respondent’s ability to make its own comprehensive submissions and call its own evidence based on that same body of evidence. The Tribunal did not receive meaningful legal submissions on that question, nor does it have submissions on how the absence of the third party evidence in the present case adversely affected P&H’s already-vigorous defence against the Commissioner’s case — apart from general submissions criticizing the Commissioner’s efforts to collect the evidence and examples of what else could have been requested.

(2) Tribunal's assessment

[152] With these considerations in mind, the Tribunal will now consider the adverse inferences requested by P&H.

(a) The “general” adverse inference

[153] For the following reasons, the Tribunal declines P&H's request to draw an adverse inference against the Commissioner “generally” in this proceeding.

[154] First, P&H provided no specifics as to the exact nature of the adverse inference to be drawn. During the hearing, it made submissions that criticized the Commissioner's investigation and lack of document production and data gathering, and it added generalized submissions of the same nature in oral argument. However, it did not specify that, because a particular piece of evidence was not tendered to the Tribunal or because a certain witness did not testify, the Tribunal should infer that some particular fact did occur, or that the Tribunal should draw an adverse inference of a specific nature against the Commissioner.

[155] The Tribunal finds it preferable to be asked much more precisely what inference to draw and on what basis, before deciding whether to draw an adverse inference (*Jolivet* at para 28). In the Tribunal's view, such specificity is particularly important when a party asks the Tribunal to draw an inference against a party based on the absence of evidence or the absence of a witness. In the case at bar, the generalized adverse inference requested by P&H is too amorphous for meaningful adjudication.

[156] Second, the Tribunal is unaware of anything that prevented P&H from attempting to obtain documents or information itself (setting aside additional data, discussed separately below). P&H could have interviewed the farmer witnesses and could have attempted to interview or send written questions to the grain companies' witnesses in advance of the hearing (or even while the merger review was occurring), and could have asked them for documents. There was no suggestion that P&H attempted to do so and was rebuffed, or that the Commissioner tried to interfere with any such attempts.

[157] Third, the Commissioner does not bear the exclusive or entire burden of adducing evidence for the Tribunal. In litigation in respect of a merger under section 92, the Commissioner is not required to present every bit of evidence at the hearing. Contested proceedings under section 92 are adversarial by nature. The Commissioner called some farmer witnesses to support his case under section 92 in relation to issues for which he had the evidentiary and legal burden of proof. It was the Commissioner's risk not to obtain and present specific evidence from them (*TREB FCA* at paras 104–105).

[158] This is also not a situation where the witnesses were not called to testify at all. P&H had the opportunity to cross-examine each of the Commissioner's farmer witnesses to expose missing or incomplete information, and it did so in several respects. The cross-examination revealed that there were additional inquiries that could have been made to the farmer witnesses and there were documents that could have been requested from them.

[159] In these circumstances, the Tribunal prefers a more surgical alternative instead of a general adverse inference against the party that called the witness to testify. Incomplete evidence gathered from or presented by a witness during examination-in-chief may adversely affect the credibility or reliability of the witness's testimony. Exposed during cross-examination at a hearing, it can sometimes be damaging to a party's case. Given that P&H could also have easily sought the same information and documents, apparently did not do so, but exposed the issues at the hearing, the Tribunal concludes that the Commissioner took on the risk of failing to discharge his burden under section 92 and of having adverse reliability or credibility findings made by the Tribunal against the witnesses.

[160] Fourth, the absence of data from rival Elevators is addressed separately, below. That analysis supports the Tribunal's conclusions on the requested general adverse inference.

[161] Finally, having considered the parties' submissions, the Tribunal is disinclined in this case to make a legal ruling with potentially far-reaching consequences concerning the Commissioner's general duty of fairness as it concerns either gathering evidence for a proceeding under section 92 or presenting that evidence. The Tribunal notes that P&H's pleading in response to the Application ("**Response**") did not express any concerns about the Commissioner's investigation or inquiry into the proposed merger. P&H did not later seek to amend its pleading after it received the Commissioner's Affidavit of Documents or after its oral discovery of the Commissioner. Nor did P&H raise any concerns to the Tribunal on receipt of the witness statements, or else seek any further order before the hearing. Considering how and when P&H raised the issue and the scope of the parties' submissions, the Tribunal considers it unnecessary and inappropriate to make more detailed comments.

[162] In light of the foregoing, the Tribunal exercises its discretion not to make a generalized adverse inference against the Commissioner. In stating this conclusion, the Tribunal should not be understood to express a view on the scope of the Commissioner's fairness duties as submitted by P&H and denied by the Commissioner in this case. Resolving issues related to the Commissioner's general fairness obligations in the disclosure process will be for another day.

(b) The adverse inferences related to efficiencies under section 96

[163] P&H also argued that the Tribunal should draw a more specific adverse inference against the Commissioner for his failure to obtain certain data from third-party grain companies that compete with it at the Virden Elevator, and which had an impact on the evidence relating to the efficiencies defence.

[164] P&H took the position that the Transaction would increase throughput at the Virden Elevator, resulting in cognizable efficiencies for the purposes of section 96. During the cross-examination of Mr. Harington, the Commissioner's expert on efficiencies, P&H drew attention to paragraph 130 of Mr. Harington's expert report. In that paragraph, Mr. Harington stated that the only way a redistribution of throughput between competing Elevators would result in an efficiency to the Canadian economy is if "the entity from which the increased throughput is being taken operates at a higher per unit variable operating cost" than P&H (Exhibits P-A-195, CA-A-196 and CB-A-197, Expert Report of Mr. Andrew Harington ("**Mr. Harington Report**"), at para 130). Mr.

Harington testified under cross-examination that he did not have the variable operating costs of the rival Elevators to the Virden Elevator. Without that, he said, he could not do the comparison contemplated by his paragraph 130. Because his mandate was to respond to the alleged efficiencies claimed by P&H in Mr. Heimbecker's initial witness statement on efficiencies, rather than to determine the efficiencies himself, Mr. Harington did not request or obtain the variable operating cost data of the rival Elevators.

[165] Mr. Harington testified that in fact, he would have required a lot more than the variable operating costs data: he would have needed all of the data on locations of farms that shifted volumes of grain from one Elevator to another, and what the transportation costs were for those farms. He would have looked at the efficiencies implications for all of Canada. Mr. Harington further noted that he would not reasonably expect P&H to have its competitors' variable cost data. However, Mr. Harington testified that he had all of the evidence he needed to do the job he was asked to do (*i.e.*, to respond to P&H's position on increased throughput at the Virden Elevator as an efficiency under section 96).

[166] P&H submitted that the Tribunal should draw an adverse inference against the Commissioner owing to the Commissioner's failure to request and obtain the variable operating costs data from rival Elevators because, without the data, a precise assessment could not be completed for the purposes of the counterfactual test contemplated in subsection 96(1) of the Act and the redistribution analysis under subsection 96(3). According to P&H, the Commissioner could have obtained the required data either by request or by obtaining an order under section 11 of the Act.

[167] The Commissioner responded that he had no such burden under section 96. Referring to paragraph 122 of the SCC's decision in *Tervita SCC*, the Commissioner observed that the merging parties bear the onus of establishing all elements of the efficiencies defence after the Commissioner has discharged his initial burden to prove the anti-competitive effects and the DWL for the purposes of section 96. A respondent's burden includes proof of the extent of the efficiency gains and whether the gains are greater than and offset the anti-competitive effects. The Commissioner noted that P&H's position, according to which the Commissioner did not collect evidence enabling it to prove an efficiency claim, was not raised in its own initial Response pleading. The Commissioner noted that P&H could have sought, but did not seek, discovery from third parties to obtain the information it now requires. P&H decided to discharge its burden to quantify cognizable efficiencies through a witness statement from Mr. Heimbecker, rather than from an expert witness. According to the Commissioner, P&H cannot shift the burden onto the Commissioner for its own failure to discharge its burden.

[168] The Tribunal agrees with the Commissioner and will not draw the specific adverse inferences requested by P&H against the Commissioner in relation to efficiencies. There are three reasons for this determination.

[169] First, it is not clear what exactly P&H seeks from the Tribunal by way of adverse inference. Again, P&H did not specify which rival Elevators' data were at issue, who owed them, what the variable costs data would necessarily or could reveal (by itself or in combination with other unidentified data), or what the outcome would be under subsections 96(1) or (3) following analysis and quantification.

[170] For example, P&H did not explain how the absence of variable operating costs data at one or more unnamed Elevators constitutes an implied admission against the Commissioner that the data will lead to a cognizable and quantifiable efficiency under section 96. It would be speculative to find that such an implied admission follows from the sole absence of unknown data. To do so would require making several assumptions about the contents of the data and the outcome of calculations using those data. As Mr. Harington's testimony confirmed, significant additional data would be required to do the analysis he envisioned. Accordingly, no inference is warranted based on an absence of the variable operating costs data.

[171] Second, P&H has not demonstrated that the Commissioner had an obligation to obtain the data. It has cited no case nor pointed to a principled basis for such an obligation. Apart from the initial burden on the Commissioner under section 96 to show and quantify anti-competitive effects as established in *Tervita SCC*, the legal burden under section 96 is on the respondent. While P&H sought to argue that *Tervita SCC* did not settle the evidentiary burden under section 96, it provided no compelling legal or factual reason to shift a further burden onto the Commissioner on the facts of this case.

[172] Third and relatedly, P&H has not shown that the Commissioner knew or should have known that P&H needed the data in the present case. There is no evidence that P&H made any efforts itself to request or obtain the variable operating costs data. While P&H may well be correct that its competitors would not voluntarily provide that data to a rival, it did not try to obtain the data by way of request to them or by filing a motion with the Tribunal.

[173] On the evidence, the Tribunal does not accept that the Commissioner should (or even could) have known that P&H required the data. P&H acknowledged during argument that it did not ask the Commissioner to obtain it. When asked by the Tribunal how the Commissioner would have known that P&H needed it, or whether the Commissioner should have filed an application for an order under section 11 of the Act to obtain it, P&H did not provide a clear answer.

[174] Moreover, based on the events leading up to the hearing, the Tribunal sees no realistic basis on which the Commissioner could have known that he should obtain the impugned data:

- At the pleadings stage in this proceeding, P&H did not raise possible efficiencies arising from increased throughput at the Virden Elevator, nor anything specific about subsection 96(3) of the Act. Its Response pleaded that the efficiencies from the Transaction "include: improved [FGT] scale economies and cost savings, elimination of the margin that [LDC] formerly paid to use the Vancouver export terminal owned by Kinder Morgan, outlay expansion and improved scale economies at the former [LDC] elevator and administrative synergies;"
- There was no suggestion that P&H noted the absence of the data and raised it after receiving the Commissioner's Affidavit of Documents;
- At the oral examinations for discovery, P&H declined to provide the Commissioner with any specific insight about its efficiencies defence. Counsel for the Commissioner asked several questions requesting information about efficiencies to Mr. Heimbecker. The answers provided by P&H's counsel were essentially that it was a matter for an expert

report to be filed later and that otherwise, no substantive answers would be provided at discovery;

- Mr. Heimbecker repeated that position in his subsequent responses to undertakings and questions taken under advisement;
- However, P&H did not file an expert report concerning efficiencies;
- Mr. Heimbecker's reply witness statement, delivered over two months before the hearing started, set out evidence to advance P&H's position on efficiencies. However, it made no reference to any need for variable operating costs data from rival Elevators;
- P&H also did not raise any need for data after it received a copy of Mr. Harington Report, also more than two months before the hearing commenced. As noted above, this expert report referred directly to variable operating costs of other entities;
- P&H did not file a motion to the Tribunal seeking an order to compel the Commissioner to obtain the data; and
- The issue did not come to light until Mr. Harington's cross-examination, near the end of the hearing.

[175] In these circumstances, the Tribunal finds it unrealistic to expect that the Commissioner would be or could have been aware that P&H required variable operating costs data of rival Elevators for its efficiencies defence. It was equally unrealistic to expect the Commissioner to be aware that P&H expected him to attempt to obtain that data either by request or under section 11 of the Act. Rather, the Tribunal finds P&H's position on the need for this data to be late-blooming and tactical, rather than based on a substantive need to support its position on efficiencies arising at the Virden Elevator.

[176] Exercising its discretion based on the evidence and arguments made, the Tribunal therefore declines to make any specific adverse inferences on issues related to efficiencies. To draw an adverse inference against the Commissioner in the present circumstances would be demonstrably unfair.

C. Legal and evidentiary burden applicable to sections 92 and 96 of the Act

[177] The last preliminary issue that needs to be briefly addressed is the legal burden of proof in this Application. In its submissions, P&H suggested that the allocation of the burden of proof established by the SCC in *Tervita SCC* has left some questions unanswered regarding the Commissioner's burden under section 96 of the Act.

[178] With respect, the Tribunal disagrees.

[179] It is not disputed that, under section 92, the Commissioner bears the burden of proving that the merger will create, maintain, or enhance market power through the merged entity's ability to profitably influence price, quality, service, or other dimensions of competition. However, there is

no requirement for the Commissioner to prove that the merged entity will, in fact, exercise these powers (*The Commissioner of Competition v Canadian Waste Services Holdings Inc*, 2001 Comp Trib 3 (“*Canadian Waste*”) at para 108, aff’d 2003 FCA 131, leave to appeal refused, [2004] 1 SCR vii; *Superior Propane I* at para 258). In determining whether the Commissioner has met his burden on this point, a forward-looking analysis of whether the merger will give the merged entity the ability to prevent or lessen competition substantially compared to the pre-merger benchmark — or “but for” world — must be conducted (*Tervita SCC* at para 51).

[180] With respect to section 96, Justice Rothstein in *Tervita SCC* clearly stated that “the [*Superior Propane* cases] established that the Commissioner has the burden under s. 96 to prove the anti-competitive effects” of a merger (*Tervita SCC* at para 122). Conversely, the merging parties bear the onus of establishing all the other elements of the efficiencies defence, including the extent of the efficiency gains and whether the gains are greater than and offset the merger’s anti-competitive effects (*Tervita SCC* at para 122). To meet his burden, the Commissioner must quantify the quantifiable anti-competitive effects he relies upon. Where these effects are measurable, they must be calculated or at least estimated, and a failure to quantify quantifiable effects will not result in such effects being considered qualitatively or remaining undetermined (*Tervita SCC* at paras 125–133). Justice Rothstein explained that an approach that would permit the Commissioner to meet his burden without at least establishing estimates of the quantifiable anti-competitive effects would fail to provide the merging parties with the information they need to know the case they have to meet (*Tervita SCC* at para 124). Qualitative anti-competitive effects which are not quantifiable can also be taken into account, provided they are supported by the evidence and the reasoning for the reliance on the qualitative aspects is clearly articulated by the Tribunal (*Tervita SCC* at para 147).

[181] In the Tribunal’s view, there is at present no legal precedent for the Commissioner to have any additional burden under section 96 beyond that established by the SCC in *Tervita SCC*. P&H has not provided any argument or sufficient supporting evidence that could allow the Tribunal to revisit, revise or enlarge the clear standard set out in *Tervita SCC* on the legal and evidentiary burden of the Commissioner under the merger provisions of the Act.

VI. ISSUES

[182] The following broad issues are raised in this proceeding:

- What is or are the relevant product market(s) for the purposes of this proceeding?;
- What is or are the relevant geographic market(s) for the purposes of this proceeding?;
- Has the Commissioner established, on a balance of probabilities, that the Virden Acquisition lessens, or is likely to lessen, competition substantially?;
- If the Commissioner has established that the Virden Acquisition lessens, or is likely to lessen, competition substantially, what is the remedy to be ordered?;

- Has P&H established, on a balance of probabilities, that the gains in efficiency will be greater than, and will likely offset, the effects of any lessening of competition pursuant to section 96 of the Act?;
- What costs should be awarded?

[183] Each of these issues will be discussed in turn.

VII. ANALYSIS

A. What is or are the relevant product market(s) for the purposes of this proceeding?

[184] In order to determine whether the Virden Acquisition lessens competition substantially, or is likely to do so, the Tribunal must first identify the product and geographic dimensions of the relevant market(s) for the purposes of this proceeding. In this case, the fundamental dispute between the parties is how to properly characterize the product market — and more specifically, the relevant product and the relevant price — in a situation where the merging firms’ alleged specific contribution of value is only a component of the final price of the product. The Commissioner claims that P&H supplies GHS for wheat and canola to farmers, whereas P&H submits that it purchases wheat and canola from farmers. The Commissioner submits that the relevant price is the “imputed” price for GHS — which, he says, approximates the Basis —, while P&H argues that it is the Cash Price charged to farmers for their grain.

[185] As acknowledged by both Dr. Miller and Ms. Sanderson during their respective testimony, the definition of the relevant product market is a key element that has an impact on the rest of the Tribunal’s analysis in this case (*i.e.*, the geographic market, the competitive effects analysis, the market shares, the surplus calculations, etc.).

(1) Analytical framework

(a) The purpose of market definition

[186] In assessing whether, under section 92 of the Act, a merger lessens competition substantially or is likely to do so, the focus is on whether the merger is likely to create, maintain or enhance the ability of the merged entity to exercise market power, unilaterally or in coordination with other firms (*Tervita SCC* at para 44).

[187] Market power is not defined in the Act. Market power has been described by the Tribunal as the ability to “profitably influence price, quality, variety, service, advertising, innovation or other dimensions of competition” (*Canadian Waste* at para 7) or as “the ability to maintain prices above the competitive level for a considerable period of time without such action being unprofitable” (*Hillsdown* at p 314). Both of these descriptions were cited with approval in *Tervita SCC*, at paragraph 44.

[188] The first step in measuring market power is to define the relevant market. Put differently, the purpose of identifying the relevant product (or geographic) market is to identify the possibility for the exercise of market power (*Canadian Waste* at para 39; *Superior Propane I* at para 47; *Director of Investigation and Research v Southam* (1992), 43 CPR (3d) 161 (Comp Trib) at pp 177–178). Market definition is often considered a critical component in assessing market power because it frames the context within which competitive effects can be analyzed (*Di Domenico* at p 408).

[189] The Tribunal and the courts have traditionally considered it necessary to define a relevant market before proceeding to assess the competitive effects of mergers under the Act (*Canada (Director of Investigation and Research) v Southam Inc.*, [1997] 1 SCR 748 at para 79; *Tervita CT* at paras 92, 360–364; *Superior Propane I* at para 56; *Hillsdown* at p 297). The relevant market is typically a predicate to a finding of substantial lessening or prevention of competition in merger cases because the merger must be one that will substantially lessen or prevent competition, or is likely to do so, within an area of actual or potential competition.

[190] However, the Tribunal has cautioned against losing sight of the ultimate inquiry and task of the Tribunal, which is to determine whether the merger being assessed prevents or lessens, or is likely to prevent or lessen, competition substantially (*Superior Propane I* at para 48). Market definition is not an end in itself: it is merely an analytical tool to assist in evaluating anti-competitive effects (*Superior Propane I* at para 48; 2011 MEGs at para 3.2).

[191] It is further important to note that a competition market is an analytical construct, and neither the product market nor the geographic market needs to coincide with the market as it is considered by a business or industry (*Superior Propane I* at paras 67, 85, 101, 106). Relevant markets for the purpose of a merger analysis are not always intuitive and may not align with how industry participants use the term “market” or view their “market.”

[192] Market definition is typically the subject of contested submissions and can often be outcome-determinative in merger matters under section 92.

(b) Rationale and tools for market definition

[193] When defining relevant markets in proceedings brought under section 92 of the Act, the Tribunal considers whether there are close substitutes for the product at issue. Market definition is based in part on substitutability, and it focuses primarily on demand responses to changes in relative prices after the merger. The ability of a firm to raise prices without losing sufficient sales to make the price increase unprofitable ultimately depends on the purchasers’ willingness to pay the higher price. This is determined by analyzing evidence of the ability of purchasers to switch their purchases to substitute products and locations in response to a price increase (*Tervita CT* at paras 58–60). Close substitutes have been defined in terms of whether “buyers are willing to switch from one product to another in response to a relative change in price, *i.e.*, if there is buyer price sensitivity” (*Canada (Commissioner of Competition) v Tele-Direct Publications Inc* (1997), 73 CPR (3d) 1 (Comp Trib) (“**Tele-Direct**”) at p 35, citing the test adopted by the FCA in *Canada (Director of Investigation and Research) v Southam Inc.*, [1995] 3 FC 557, 63 CPR (3d) 1 (FCA) (“**Southam FCA**”), *rev’d* on other grounds [1997] 1 SCR 748).

[194] In assessing the extent of the product (and geographic) dimensions of relevant markets in the context of proceedings under the Act, the Tribunal has generally followed the well-established hypothetical monopolist analytical framework, or hypothetical monopolist test (“HMT”) (*VAA CT* at para 300; *The Commissioner of Competition v The Toronto Real Estate Board*, 2016 Comp Trib 7 (“*TREB CT*”) at paras 121–124; *The Commissioner of Competition v Visa Canada Corporation and MasterCard International Incorporated*, 2013 Comp Trib 10 (“*Visa Canada*”) at para 173; *Tervita CT* at para 58; *Superior Propane I* at para 57).

[195] In *Tervita CT* and *Superior Propane I*, two merger cases, the Tribunal embraced the description of that framework set forth in the Competition Bureau’s MEGs (see, for example, 2011 MEGs at para 4.3). Under this approach, a relevant product market is defined as the smallest group of products (including at least one product of the merging parties) in respect of which a sole profit-maximizing seller — the hypothetical monopolist — controlling all suppliers in the proposed market would find it profitable to impose and sustain a small but significant and non-transitory increase in price (“SSNIP”) above levels that would likely exist in the absence of the merger. The purpose of the HMT is to determine the extent to which customers in the candidate market will switch to other products in response to a SSNIP (*Visa Canada* at para 198). In the determination of whether a SSNIP would be profitable, the HMT makes use of demand elasticity and cross-elasticity evidence as well as what are known as practical indicia. If a small price increase would drive purchasers to an alternative product, then that product must be reasonably substitutable for those in the proposed market and must therefore be part of the market, properly defined. The conceptual exercise is repeated to include a broader array of products until it defines a product set over which a hypothetical monopolist could profitably impose a SSNIP (Brian A. Facey and Cassandra Brown, *Competition and Antitrust Laws in Canada: Mergers, Joint Ventures and Competitor Collaborations*, 3rd ed (Toronto: LexisNexis Canada Inc, 2020) (“*Facey and Brown*”) at p 205).

[196] Pursuant to the HMT framework, the product dimension of a relevant market is defined in terms of the smallest group of products in respect of which a hypothetical monopolist would have the ability to impose and sustain a SSNIP above levels that would likely exist in the absence of the merger. The “smallest group” principle is an important component of the test because, without it, there would be no objective basis upon which to draw a distinction between a smaller group of products in respect of which a hypothetical monopolist would have the ability to profitably impose a SSNIP and a larger group of products in respect of which that monopolist may also have such an ability (*VAA CT* at para 326; *TREB CT* at para 124).

[197] The SSNIP will be applied to the price that is being paid by the purchasers of the candidate product (*Visa Canada* at para 198), often referred to as the “base price” (see, for example, 2011 MEGs at para 4.6).

[198] Generally, for the purposes of determining the SSNIP, the objective benchmarks are as follows (and are reflected as such in the 2011 MEGs): an “increase in price” is typically one of 5% or more, and a “non-transitory” price increase is typically one that is maintained for at least one year. This 5%/one-year approach is generally treated as a “threshold” used to identify market power at the market definition stage, where the objective is to define the smallest market in which a substantial lessening of competition would be possible. If sellers of a product or of a group of products in a provisionally defined market, acting as a hypothetical monopolist, would not have

the ability to profitably impose and sustain a 5% price increase lasting one year, the product bounds of the relevant market will be progressively expanded until the point at which a hypothetical monopolist would have that ability and degree of market power. Essentially the same approach is applied to identify both the product and geographic dimensions of relevant markets.

[199] Indeed, the Commissioner and P&H both acknowledged that a 5% increase and a one-year time frame are the standard thresholds for a SSNIP, here in Canada and in many other jurisdictions. However, these benchmarks can be adjusted to reflect the specific realities of a given industry or business.

[200] The Tribunal agrees that the HMT approach adopted in previous Tribunal cases, consistent with the 2011 MEGs, should continue to be used in this case.

[201] Given the practical challenges associated with determining the base price in respect of which the SSNIP assessment must be conducted in a proceeding brought under section 92 of the Act, market definition will often include not only the analysis of prices through the HMT framework but also other evidence of substitutability or customer switching. Market definition may therefore involve assessing indirect evidence of substitutability, including factors such as: functional interchangeability in end-use of the products; switching costs; the views, strategies, behaviour and identity of buyers; trade views, strategies and behaviours of other market participants; physical and technical characteristics; and price relationships and relative price levels.

(c) The language of section 92

[202] During final argument, the Tribunal raised an issue related to the interpretation of section 92. The Tribunal observed that, contrary to other provisions of the Act such as civil agreements between competitors (section 90.1), section 92 on mergers does not expressly refer to a substantial lessening or prevention of competition “in a market.” Subsection 92(1) rather uses broader language incorporating the phrase “trade, industry or profession” in four paragraphs referring to the effect of the merger on competition: “(a) in a trade, industry or profession; (b) among the sources from which a trade, industry or profession obtains a product; (c) among the outlets through which a trade, industry or profession disposes of a product; or (d) otherwise than as described in paragraphs (a) to (c).”

[203] Both parties expressed the view that the absence of the word “market” in subsection 92(1) makes no difference, that the merger provision clearly relates to a substantial lessening or prevention of competition “in a market,” and that determining the relevant “market” forms part of the analysis to be conducted by the Tribunal.

[204] The Tribunal agrees and finds that the absence of the word “market” in the opening part of section 92 should not be interpreted as implying that a relevant competition market does not need to be defined or utilized in merger analysis.

[205] The principled approach to statutory interpretation requires that section 92 be read in its entire context, in its grammatical and ordinary sense, harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament (see, for example, *Bell ExpressVu Limited Partnership v Rex*, 2002 SCC 42 (“*Bell ExpressVu*”) at para 26).

[206] Looking first at the wording of section 92, the Tribunal agrees with P&H that a merger as defined in section 92 clearly encompasses the concept of market or markets. A merger is defined in section 91 as the taking of control of a “business.” The word “business” is in turn defined broadly in section 2 of the Act as “the business of (a) manufacturing, producing, transporting, acquiring, supplying, storing and otherwise dealing in articles, and (b) acquiring, supplying and otherwise dealing in services” [emphasis added]. The French version of the Act uses the words “tout autre commerce” to translate the expression “otherwise dealing.” The use of the word “business” in the definition of “merger” therefore makes it clear that a merger for the purposes of a section 92 assessment is with respect to the market or commercial activity of the “business.” Moreover, since a “business” is defined in terms of activities dealing in articles or services, the definition must concern one or more articles or services (as each are defined in subsection 2(1)) that are bought or sold as part of a commercial activity.

[207] Importantly, there are also express references to the notion of “market” in subsection 92(2) and section 93 of the Act, which provide direction on how to assess whether a merger lessens or prevents competition substantially. Subsection 92(2) prohibits the Tribunal from making a finding and exercising its discretionary power to impose a remedy under subsection 92(1) solely on the basis of evidence of “concentration or market share.” The assessment under section 92 is further informed and limited by section 93, which sets out factors that may be considered in determining whether a merger affects competition in a significant way for the purposes of section 92. Section 93 contains sustained references to the concept of “market” in paragraphs 93(d), (e), (g), (g.1), (g.2), and (h), and implies that such a market has been defined to make the competitive assessment. For example, paragraph (h) refers to “any [...] factor that is relevant to competition in a market that is or would be affected by the merger or proposed merger.”

[208] Turning to the object and purpose of section 92, there is no doubt that the Tribunal’s focus is on assessing the degree to which market power is created, maintained or enhanced by the merger at issue. The concept of a competition or antitrust market is implicit in many provisions of the Act for the identification of anti-competitive conduct and for the substantiality threshold that must be applied to the assessment of anti-competitive effects.

[209] The Tribunal further observes that since the Tribunal’s first decision in a contested merger proceeding (i.e., *Hillsdown*), subsection 92(1) has consistently been interpreted as synonymous with “market” by the Tribunal and the courts (*Tervita SCC* at para 44; *Hillsdown* at pp 297–314), and by the Commissioner. In *Tervita SCC*, the SCC made it clear that the assessment of the substantial effect on competition was an effect on the “market”: it “involves assessing the degree and duration of any effect it would have on the market” [emphasis added] (*Tervita SCC* at para 78).

[210] In sum, section 92 does not have a different scope in its relationship to the substantial lessening of competition even if it refers to the effect of competition in a “trade, industry or profession,” as opposed to a “market.” Given the definition of “merger” and the fact that several factors listed in subsection 92(2) and section 93 expressly contemplate an evaluation made in relation to a “market,” the Tribunal is satisfied that, even though section 92 does not expressly refer to a substantial lessening or prevention of competition in a market, “Parliament intended that competition must be shown to be likely to be prevented or lessened substantially in a competition

law or antitrust market” (Paul S. Crampton, *Mergers and the Competition Act*, (Carswell, 1990) (“*Crampton 1990*”) at p 261).

(d) HMT and monopsony

[211] Finally, the Tribunal observes that the approach to market power and to market definition, which has mostly developed in matters involving the sale of a product, is similar in the context of the purchase of a product: the market power of buyers is the “ability of a single firm (monopsony power) [...] to profitably depress prices paid to sellers [...] to a level that is below the competitive price for a significant period of time” (2011 MEGs at para 2.4).

[212] The HMT framework therefore applies to define relevant markets for both the sale and the purchase of a product. For monopsony power, the 2011 MEGs describe the analytical process as follows, at paragraph 9.2:

[...] The conceptual basis used for defining relevant markets is, mirroring the selling side, the hypothetical monopsonist test. A relevant market is defined as the smallest group of products and the smallest geographic area in which a sole profit-maximizing buyer (a “hypothetical monopsonist”) would impose and sustain a significant and non-transitory price decrease below levels that would likely exist in the absence of the merger. The relevant product market definition question is thus whether suppliers, in response to a decrease in the price of an input, would switch to alternative buyers or reposition or modify the product they sell in sufficient quantity to render the hypothetical monopsonist’s price decrease unprofitable.

[213] In such cases, the SSNIP becomes “a small but significant and non-transitory decrease in price” (“SSNDP”) below levels that would likely exist in the absence of the merger⁵.

(2) Parties’ positions

(a) The Commissioner

[214] The Commissioner submits that the proper way to characterize the relevant product market is to define it as the provision of GHS for wheat and canola to farmers who, prior to the Acquisition, benefited from competition between the Virden and Moosomin Elevators. He argues that the supply of GHS for wheat is a relevant product market and that the supply of GHS for canola is a separate one. According to the Commissioner, a hypothetical monopolist of GHS for each of wheat and canola could profitably impose a 5% SSNIP. Moreover, says the Commissioner, there are no functional substitutes for GHS for wheat or canola.

[215] The Commissioner maintains that local competition between Elevators for wheat or canola manifests itself through the Basis, and not through the final Cash Price that an Elevator pays to the

⁵ Throughout these Reasons, all references to a SSNIP are meant to include a SSNDP when the context requires it.

farmer. He submits that, because P&H has no control over the Futures Price, the only component of the Cash Price it can control is the Basis, and that only the Basis component of the Cash Price is affected by local competition between the Elevators. The Basis, or the “imputed” price for GHS calculated by Dr. Miller, adds the Commissioner, represents the Elevators’ specific contribution of value in the final Cash Price paid to farmers. The Commissioner argues that the relevant product market should therefore reflect an economic framework that analyzes the competition actually impacted by the Virden Acquisition.

[216] The Commissioner contends that P&H’s approach to the product market allows it to mask and obscure the anti-competitive effects of its Acquisition by focusing on the grain itself and on the Cash Price it pays to the farmers, whereas the services effectively provided by P&H are only a small part of the overall value of the grain they purchase from the farmers and resell to their end customers.

[217] By the end of the hearing, both the Commissioner and Dr. Miller agreed that their proposed approach to the product market definition could be qualified or described as a “value-added” approach, even though the Commissioner did not use these specific terms in his pleadings or even in his opening submissions at the hearing, and even though Dr. Miller did not describe his analytical approach as such in his initial expert report.

[218] The Commissioner maintains that economics, the facts, and the law support his “value-added” approach to product market definition.

[219] With respect to economics, the Commissioner submits that defining the product market as the sale of GHS by P&H “facilitates” an economic analysis focused on the competition affected by the Virden Acquisition and the Elevators’ contribution of value. On this point, the Commissioner mostly relies on Dr. Miller’s initial and reply expert reports and on his testimony. Using common features of the market definition exercise, such as the HMT, diversion ratios, and upward pricing pressure (“UPP”) calculations, Dr. Miller testified that he relied on the “imputed” price of GHS because, in his view, this aligns with the service that the Elevators effectively give to farmers. Dr. Miller opined that receiving GHS from Elevators is what is enabling the farmers to access the worldwide market. According to Dr. Miller, the price for GHS is an important factor in a farm’s choice of Elevators, and price competition between Elevators is reflected in the Basis and the “imputed” price he calculated for GHS.

[220] With respect to facts, the Commissioner relies on four main elements to support his proposed product market: 1) P&H recognizes the role of the Basis in competition between Elevators, and as one of the two components of the Cash Price, along with the Futures Price; 2) the only component of the price of grain that P&H can set is the Basis. P&H claims that it uses its “**Workback Algorithm**” to determine its Cash Prices but, according to the Commissioner, this algorithm sets the Basis and not the Cash Price, which can fluctuate during the day with the variations of the Futures Price. Moreover, P&H sends mass communications about the Basis on a daily basis, through emails and on its P&H Direct application; 3) the Basis is also carried over to the contracts concluded between Elevators and farmers, and this is done by all grain companies with the exception of LDC; and 4) farmers are affected by local competition and they use the Basis to make comparisons between Elevators. In sum, argues the Commissioner, the provision of GHS is how the industry operates, and the Basis is an important industry-wide practice.

[221] Turning to the law, the Commissioner submits that characterizing the product market as GHS is consistent with the purpose clause of the Act, with previous merger cases, and with the 2011 MEGs. With respect to the so-called “value-added” approach, he claims that the U.S. Horizontal Merger Guidelines issued in 2010 (U.S. Department of Justice and the Federal Trade Commission, *Horizontal Merger Guidelines*, August 19, 2010 (“US HMEGs”)) actually recognize that in situations where the price of a merging firm’s contribution to value can be identified with “reasonable clarity,” the price used to assess the merger can be a component of the final price of the product that the firms effectively compete on.

(b) P&H

[222] P&H responds that GHS is not a product supplied by P&H and the other grain companies. The relevant products, says P&H, are the wheat and canola purchased from farmers by P&H, for which the farmers receive the Cash Price. According to P&H, the so-called GHS are only internal processes that the grain companies may apply to the grain after the title to the grain has passed from the farmer to the grain company: in other words, the GHS claimed by the Commissioner are merely costs to the grain companies. Furthermore, it is export terminals that are used to do the following: to receive grain from rail; to grade, segregate, and store grains by type and quality attributes; to clean when required and blend; and to load grain onto vessels. Therefore, many of the GHS claimed by the Commissioner are not services that are performed at the Elevator level.

[223] P&H argues that the documentary and *viva voce* evidence shows that GHS are not actually transacted, contracted, or discussed between farms and P&H or other grain companies. P&H adds that Mr. Heimbecker’s testimony and evidence clearly establishes that P&H does not supply any GHS, and this evidence was unchallenged on cross-examination.

[224] P&H further submits that there are no precedents in Canadian law for utilizing an imputed price for the merging firms’ specific contribution to the value of a product and for determining the relevant market and the applicable SSNIP on the basis of the so-called “value-added” approach. In fact, adds P&H, the Commissioner has never publicly endorsed the “value-added” approach he is suddenly advancing in this case. Moreover, the Commissioner’s approach would suffer from numerous flaws identified by economists with respect to the “value-added” approach advocated in the US HMEGs.

[225] While Dr. Miller asserts that the price for GHS drives the farmers’ decisions, P&H points to the fact that the testimonies of farmer witnesses on both sides make it clear that farmers base their sale decisions on the posted Cash Price, which is what the grain companies actually compete on.

(3) Tribunal’s assessment

[226] As the Commissioner rightly indicated, the fundamental disagreement in this case is how to define the product market, and more specifically the relevant product that is being exchanged when the farmers sell their grain to an Elevator. Ms. Sanderson indeed acknowledged that the main issue to be determined by the Tribunal is the choice between the Cash Price for grain and the “imputed” price for GHS.

[227] For the reasons set below, the Tribunal agrees with P&H on this issue and concludes that there are two relevant product markets in the present case, namely, the purchase of wheat and the purchase of canola by P&H.

[228] The Tribunal finds that the Commissioner's proposed product market (*i.e.*, the sale of GHS) is not grounded in commercial reality and in the evidence, and that in this case, the "value-added" approach advanced by the Commissioner fails on three fronts: on the facts, from a precedential and legal standpoint, and from a conceptual and economic perspective. It fails factually, because there is no clear and convincing evidence to conclude, on a balance of probabilities, that GHS effectively exist as a relevant "value-add" product or "add on feature" that is transacted and to which a price can be attached. The Commissioner created an analytical price for operational activities associated with the purchase of grain by Elevators. It further fails as a legal argument, because the Commissioner's position finds no support in the authorities he cites, including the US HMEGs, cases in Canada and elsewhere, and his own MEGs. Finally, it fails conceptually, because the Commissioner did not address the issue of the appropriate SSNIP threshold, as described by the current MEGs, despite the fact that adopting a "value-added" approach would profoundly change the HMT framework and the effective SSNIP level used for market definition purposes.

(a) The product and the price at issue

[229] At its core, four critical elements determine the characteristics and boundaries of a relevant competition market: 1) a product for which there is a source of demand and a source of supply; 2) a price at which the product is transacted; 3) a geography within which the product is transacted; and 4) the extent of available substitution between different sources of demand or supply for the product if there is a sufficient price incentive.

[230] Since products can be said to be in the same market if they are close substitutes (*Tele-Direct* at p 36), the debate around the product market definition has typically revolved around the issue of substitutability. However, this is not the case here, as the parties are not debating the extent to which there are functional substitutes to selling GHS to the farmers or to purchasing grain by the Elevators. The parties instead agree that there are no substitute products for either GHS or for grain (namely, each of wheat and canola).

[231] The debate around the product market definition in this case is about how to characterize what occurs when a farmer sells grain to an Elevator. The debate does not center on the definition of the product market, but rather on the definition of the relevant product itself, and of the relevant price attached to it.

[232] Before dealing with the product market — or the geographic market —, the Tribunal must first determine what the product at issue is and what its price is. It is important to distinguish the "product" and the "price" from the product "market." The Tribunal does not dispute that the product market is an analytical framework and an artificial construct, where the Tribunal needs to determine the presence and extent of substitutes (*Superior Propane I* at para 101). However, the underlying product or the underlying price for it are not analytical or theoretical constructs themselves. The product and the price attached to a product need to be anchored in the evidence

and, indeed, tied to commercial reality. Determining the relevant product and the relevant price is an inquiry that must be based on the evidence of each case.

[233] On the facts of this case, the relevant product is not the sale of GHS, but the purchase of grain.

(i) *The notions of product and price*

[234] In the legal and economic context relevant to merger analysis, the term “product” refers to the output that a producer (seller) provides to a purchasing customer, or the input that a producer (purchaser) acquires from a supplying customer.

[235] To identify the relevant product for the purpose of defining a relevant competition market, the starting point is to determine what the customer actually buys or sells, and at what price. In the context of a merger, it starts with the product(s) in respect of which, prior to the merger, the merging entities were competitors. In other words, what is the product that P&H and LDC sold or purchased in the marketplace, in competition with one another, prior to the Transaction?

[236] For a product to exist in the economic sense and in the context of the relevant market definition for the purpose of an application under section 92 of the Act, there must be a separate and identifiable supply and demand for it. It must be transacted and it must have a price attached to it. Product market definition is based on substitutability and focuses on demand responses to changes in prices. The SSNIP must therefore be applied to the price that is being received by the sellers or paid by the purchasers of the candidate product (*Visa Canada* at para 198). In fact, in order to apply the HMT, a relevant price for the relevant product must be identified. The focus is on the price of the good or service effectively being sold or bought. There can be no product, and no price for such product, if the product has no independent existence and market presence. The Tribunal further accepts P&H’s view that an article or a service which would be neither bought nor sold cannot fall within the definition of a “business” under the Act (and hence, the definition of a merger in section 91), because it would not be a product that is acquired, supplied, or otherwise dealt in.

[237] According to the MEGs, the “base price” to be used for market definition purposes and to postulate a price increase in the HMT framework “is typically the prevailing price in the relevant market” (2011 MEGS at para 4.6). This, once again, refers to a price observed in a market. The base price is the price used in the normal course of business, namely, whatever price “is ordinarily considered to be the price of the product in the sector of the industry (e.g., manufacturing, wholesale, retail) being examined” (2011 MEGs at para 4.7). The MEGs therefore make it clear that the relevant price must echo what is effectively occurring in the industry being considered.

[238] The price that has been typically employed in the standard approach to market definition and in the HMT analysis is the “cumulative price,” namely, “the total value of the product when it leaves the stage of the industry in question. This simply represents the sum of input costs plus value added” (*Crompton 1990* at p 265, fn 11). The author Crompton (now a judicial member of the Tribunal) also referred to alternative “prices” such as the “value added price” representing the difference between the cost of all inputs and the cumulative price, and he specified that this price “has been employed in situations where the value added is billed as a separate fee, with no mark-

up being applied to the product in relation to when the service is performed” (*Crampton 1990* at p 265).

[239] However, the Tribunal underlines that price and cost are two different notions. A price is the amount that a customer buying a product or a person supplying one is willing to pay or receive for it. The price is ascertained from the perspective of the customer or the purchaser. On the other hand, a cost is the expense incurred for making a product or offering a service that is sold. It is ascertained from the perspective of the producer. A cost cannot simply be equated with a price, though there is evidently a relationship between the two, since costs have a direct impact on the price of a product.

[240] The Tribunal has found no precedent, and the Commissioner has not referred to any, where it was recognized by the courts or by the economic literature that there can be a “market” for a product that is not sold and purchased as such, but is only a cost component of a final product. The Tribunal accepts that a specific part can be categorized as a separate product and can constitute the basis for a separate product market (see, for example, *Canada (Director of Investigation and Research) v Xerox Canada Inc* (1990), 33 CPR (3d) 83 (Comp Trib) (“*Xerox*”). But a product must have a price attached to it. In other words, the notion of product for market definition purposes and the calculation of a SSNIP implies a transacted price, not solely a theoretical price derived from allocating revenue to the cost of selected activities associated with the purchase or sale of a product.

(ii) *GHS is not a transacted product*

[241] The evidence indicates that GHS, as defined by the Commissioner, is not a product that actually exists in the grain industry or that is being supplied by the Elevators and purchased by the farmers: GHS are not transacted or contracted between the farms and the grain companies.

[242] The Tribunal has found no reference to GHS in P&H’s materials nor a description of any service provided by P&H or other grain companies under the label of GHS. Neither the Elevators, the Crushers, nor even the farmers themselves recognize GHS as a separate, identifiable product. It is not even a term of art used in the grain industry. There is no evidence that farmers and grain companies transact on the basis of the sale and purchase of GHS.

[243] More specifically, none of the six farmer witnesses who testified at the hearing on behalf of either the Commissioner or P&H referred to GHS as an actual service they receive from the Elevators and pay for. Farmers do not talk in terms of GHS.

[244] Similarly, the Elevators do not refer to the notion of GHS. Mr. Heimbecker, for P&H, and the witness from Cargill, Ms. Jordan, both confirmed that in the industry, grain companies do not charge farmers for GHS and rather consider the services covered by the Commissioner’s definition of GHS as costs. At one point in his submissions, the Commissioner mentioned the fact that P&H refers to its grain handling and trading business in its own financial reporting documents. However, the Commissioner has pointed to no evidence, whether from P&H or from any other grain company, containing a reference to grain handling services. The “grain handling business and trading” is not to be confused with “grain handling services” (as a product). P&H purchases grain

for the purpose of trading it in national and international markets and grain handling is an operational process in the purchase and resale of the grain.

[245] While the Tribunal agrees with Dr. Miller that the participants and competitive constraints at each stage of an industry are distinct, the Tribunal finds that GHS is not a product that is transacted as such between farmers and Elevators, at any stage of the grain handling and trading business. It is an artificial bundle of services that the Commissioner and Dr. Miller have constructed for the purposes of this proceeding.

[246] Mr. Heimbecker testified that P&H does not supply GHS in the post-CWB era (Exhibits CA-R-115 and P-R-116, Witness Statement of Mr. John Heimbecker (“**Heimbecker Statement**”), at para 115). This evidence was not contradicted and the Tribunal accepts the evidence of Mr. Heimbecker on this point.

[247] In sum, GHS, or the “value-added” product identified by the Commissioner in this case, is not a product that farms and grain companies recognize and effectively buy and sell. Moreover, GHS is not a separate value-added product that farms transact separately from the grain, and for which they could find substitute sources of supply (*i.e.*, sellers offering just the GHS value-added service).

[248] The Tribunal pauses to observe that, from an industry perspective, the notion of GHS advanced by the Commissioner corresponds to a historical nomenclature that disappeared when the CWB was dismantled on July 31, 2012 (Heimbecker Statement at paras 113–117). Before its dismantling, the CWB purchased certain types of grain — including wheat — from farms and grain companies handled that grain on behalf of the CWB on a “toll basis,” effectively providing the type of services included by the Commissioner in his definition of GHS. However, with the end of the CWB, grain companies are no longer intermediaries between the CWB and farmers, and the market interrelation between the farmers and the grain companies has changed. As a result, grain companies have assumed part of the role of the CWB in the supply chain, namely, as purchaser of grain with the risks attached to the marketing and sale of the product. With the end of the CWB, the historical tariffs and fees that used to be charged for a service also came to an end. In the post-CWB world, P&H (like other grain companies) buys wheat and canola from farms, taking title to the grain at the time the farm delivers it to the Elevator. At that point in time, the farm receives the contracted Cash Price for its grain and ownership of the grain passes to P&H or the other Elevators. From that point on, the farm has no right or interest in the grain and bears no risk in relation to the purchase transaction. Instead, P&H is fully responsible for the costs, risks, and rewards of aggregating, transporting, and selling the grain to a customer.

[249] True, as will be discussed below, the farmers and Elevators sometimes negotiate on one component of the Cash Price (namely, the Basis) because information on the Basis is provided by the Elevators. The Tribunal is satisfied that this reflects a historical heritage from the CWB days (or, as argued by P&H, a linguistic vestige of the CWB era). But what were services at the time of the CWB are now costs to the Elevators, not GHS to which a price can be attached.

[250] For the purpose of this Application, the only products that are exchanged and transacted between the farms and the Elevators are wheat and canola.

(iii) *There is no price for GHS*

[251] Furthermore, the Tribunal concludes that there is no “price” associated with GHS.

[252] As was the case for GHS as a product, the Tribunal finds no evidence of a “price” for GHS. The evidence from the farmer witnesses indicates that they do not talk about receiving GHS and are not charged any fees or price for GHS. All farmer witnesses testified that there are no separate charges for GHS. In addition, no price exists for GHS in the contracts or agreements concluded by P&H and other grain companies with the farmers.

[253] Nor is a price for GHS recorded or kept in the transaction data reported by the grain companies in the usual course of business. The transaction data obtained from the grain companies provides address information for farms delivering canola or wheat to the Elevators and Crushers, with some exceptions. The farm address information allowed Dr. Miller and Ms. Sanderson to identify deliveries to the Elevators from farms with addresses in the various regions used in their respective analyses, as well as any other location. The transaction data report Cash Prices and deliveries to each grain company but they do not include any information on GHS or on a price for such alleged bundle of services.

[254] It is of note that, just as they do not consider GHS to be a separate product offered for purchase and sale, the grain companies do not keep an amount representing the price of GHS — or even the Basis, as will be discussed below — in their transaction data set. If GHS were meaningful for the Elevators or the farmers from a transactional perspective, the grain companies would likely keep track of its price in their transaction data.

[255] Indeed, the Commissioner recognized at the hearing and in his written submissions that the farmers are not charged for GHS as a separate, added service to the purchase of grain. Moreover, a witness for the Commissioner in the discovery process and Dr. Miller in his testimony each confirmed that the price for GHS had to be “imputed” and that it is a constructed price.

[256] As GHS is neither observed as an added service feature nor transacted as such, Dr. Miller had to create a measure for the price of it. In his expert report, Dr. Miller imputed the price of GHS for each transaction as the difference between the Cash Price and the Futures Price from the financial market, as of the transaction date, adjusting for exchange rates in the case of wheat. Dr. Miller sometimes referred to the price of GHS as the Basis, although he admitted that his constructed price of GHS is not equal to the Basis used by Elevators for wheat or canola for each transaction. Dr. Miller’s transaction-level prices of GHS were estimated with error, in part because the contract date (which often determines the relevant Futures Price) is unobserved in the transaction data.

[257] In sum, there is no observed or observable added feature for GHS, no price is attached to it, and none appears in the transaction data or can be otherwise identified. The evidence from the Commissioner reveals that the “imputed” price for GHS is a constructed price, and not an explicit or implicit price transacted between buyer and seller. Here, there is no doubt that it is not a situation where a farmer pays a price for an actual specific service, such as delivery, transportation or processing fees.

[258] The farmer witnesses (*i.e.*, Mr. Lincoln, Mr. Wagstaff, Mr. Pethick, Mr. Paull, Mr. Duncan, and Mr. Hebert) all testified that the Cash Price they ultimately receive for their grain drives their decisions to sell their grain to an Elevator. As admitted by the Commissioner, farmers care about the money they receive from the sale of their grain, and they never talk about GHS as separately transacted.

[259] In his witness statement, Mr. Pethick stated that he considers the “basis price” but also the overall price (*i.e.*, the Cash Price) communicated by the Elevators when deciding where to deliver his grain (Exhibit P-A-001, Witness Statement of Mr. Alistair Pethick (“**Pethick Statement**”), at paras 19–20). Similarly, Mr. Lincoln also referred to the importance of “competitive prices” and to being offered a “higher price,” generally, without suggesting that this was limited to the Basis (Exhibits CB-A-025 and P-A-026, Witness Statement of Mr. Chris Lincoln (“**Lincoln Statement**”), at paras 13, 15). The Agreed Statement of Facts for the two farmer witnesses who did not testify at the hearing indicates that [REDACTED] “regularly checks the prices” at various Elevators, without limiting his comment to the Basis (Exhibits CA-R-242 and P-R-243, Compilation of Additional Documents Added to Agreed Book, Agreed Statement of Facts re [REDACTED] and [REDACTED]). For their part, each of Mr. Hebert, Mr. Paull, and Mr. Duncan said in their respective witness statements that the Cash Price is what drives their decisions to sell to Elevators or Crushers.

[260] The evidence from Mr. Heimbecker also reveals that most pricing-related communications made by P&H to farmers refer to the Cash Price, with no mention of the Basis (Heimbecker Statement at para 61; Exhibits CB-A-134 and P-A-135, Read-in Brief of the Commissioner (“**Commissioner Read-In**”). Industry participants also use the Basis and the Cash Price interchangeably, to refer to the net final price that farmers effectively receive for their grain. Mr. Hebert, for example, testified that when he is using the Basis, he is “calculating it back to the cash price that [he is] going to deposit” (Consolidated Transcript, Confidential B, at p 870). In short, he is using the Basis to compare the Elevators’ net prices for the grain.

[261] In the Tribunal’s view, on the facts of this case, the only “base price” for market definition purposes is the Cash Price paid to farmers to purchase their wheat or canola, not the “imputed” price of GHS that is never separately or identifiably charged to farmers by Elevators to handle their grain. Farms sell grain to Elevators and Crushers for a single Cash Price. Elevators and Crushers purchase grain from farms for a single Cash Price. The Cash Price paid to farms to purchase grain is the ordinary and prevailing price in the relevant markets.

(iv) *The Basis differs from GHS and is not the price of GHS*

[262] In his submissions on the product market and on GHS, the Commissioner relied heavily on the Basis and on the evidence related to it.

[263] The Commissioner argues that the Basis is a component of the Cash Price, along with the Futures Price. Both combine to form the Cash Price paid to the farms. According to the Commissioner, the Basis component of the Cash Price is the mechanism that P&H uses to ensure that the price at which it buys the grain from the farmers is a price that allows it to cover the expenses of operating the Elevator where the farmers deliver their grain. The Commissioner

maintains that the Basis “is an amount subtracted from the Futures Price in the case of canola (and added to the Futures Price in the case of wheat to account for exchange rate differences) that covers the grain company’s costs to operate the Elevator while also providing the grain company with a margin.” He claims that it is not a simple mathematical construct, as alleged by P&H and Mr. Heimbecker. According to Dr. Miller, the Basis covers the costs of the Elevators and allows for a profit. Dr. Miller claims that it is the relevant price “in terms of how competition plays out” in the grain industry, “in terms of the value added” by the Elevators, and “in terms of just the profitability of the [grain handling] business” (Consolidated Transcript, Public, at p 1430).

[264] The Commissioner further submits that all contracts entered into by the Elevators and the farms refer to the Basis, or even to the “basis price,” and that farmers use the Basis in their dealings with the Elevators. The Commissioner adds that the problem with GHS and the Basis is an “implementation issue” as neither the Basis nor the price of GHS appear in the transaction data of the grain companies. In sum, throughout his submissions, the Commissioner effectively equates GHS to the Basis to justify his approach to the product market definition.

[265] The Tribunal is not persuaded by the Commissioner’s arguments and finds that the existence of the Basis is not sufficient to transform GHS into a relevant product to which a relevant and reliable base price can be attached. The evidence does not support that the Basis can be equated with the notion of GHS advanced by the Commissioner and Dr. Miller. There is a distinction and a difference between the use of the Basis by farmers and grain companies in the sale and purchase of grain on the one hand, and GHS as an operational cost to the grain companies on the other.

[266] The Tribunal acknowledges that the Basis is an industry benchmark, recognized and used by the participants in the grain handling business. But the Basis is not a product that is transacted as such. The Basis is not a price either. Despite the repeated references made by the Commissioner to a “basis price” in his oral and written submissions, the Tribunal is not persuaded that, on a balance of probabilities, the evidence supports a conclusion that the Basis represents a price attached to a product. Mr. Heimbecker testified that the Basis is not a price expressed in dollar terms, even though there is often a dollar sign apposed to its numerical figure in some of P&H’s own documents. In the Tribunal’s view, the Basis is best described as the numerical difference between the Cash Price and the Futures Price, as determined by P&H’s Workback Algorithm. The Workback Algorithm is only run once a day by P&H, but the Cash Price that a farmer sees in P&H Direct will adjust instantaneously to reflect any changes in the Futures Price. This evidence has not been contradicted, and was confirmed by farmers such as Mr. Duncan and Mr. Hebert in their respective testimony (see, for example, Consolidated Transcript, Confidential B, at p 929). Yes, the Basis is a metric used in the grain business, but it is not a price for a product.

[267] One of the farmer witnesses, Mr. Paull, testified that the Basis is just a tool used to track or monitor the Cash Price that he will receive when he delivers his grain to the Elevators. One of P&H’s customer service representatives, since promoted to managing an Elevator, explained the Basis in emails sent to hundreds of customers as follows: “[t]his premium or discount to the futures value is commonly referred to as a basis. The basis reflects each grain company’s own particular handling, transportation and marketing costs, combined with the bid values from their own-end use customers” (Exhibit CB-A-149, P&H Email Subject: Gain From You Grain, dated February 16, 2017).

[268] The Tribunal observes that the Basis is not identified by the farms or the grain companies as a price associated with GHS or with any specific service. The grain industry participants instead refer to the Basis, without more. It is never the “Basis for GHS” or for any other specific product. Nowhere in the evidence is there a reference to a Basis for something. It is a concept and a notion used in the grain industry, but there is no evidence that the Basis refers to or is attached to a particular product. As is the case for GHS, and even though it is an information communicated by the Elevators in their dealings with the farms, the Basis is not recorded in the transaction data by the grain companies.

[269] Moreover, when the farmers refer to the effect of changes in the Basis, they always refer to changes expressed in terms of cents per bushel or per MT. The bushel or the MT is a unit of measurement for the grain, not for GHS. In other words, the farms always refer to the impact that a change in the Basis will have on the price for the grain itself, expressed in terms of a dollar value per bushel or MT. The changes to the Basis are never expressed in terms of cents for GHS or for any type of service provided by an Elevator.

[270] Even if a change to the Basis offered is the subject of negotiations between grain companies and farmers, what ultimately changes is the Cash Price from which the Basis is derived. What changes is the price expressed in dollars and cents per bushel or MT, for the grain being purchased by the Elevator and sold by the farmer.

[271] Further to its review of the evidence, the Tribunal therefore concludes that the Basis is best described as a component of the price of grain, not as a price attached to a specific product or a separate value added. In fact, the Tribunal finds that the evidence from P&H and the grain companies establishes that the Basis is not a price of a product by itself but a cost element for the Elevators.

[272] The Tribunal adds that merely displaying the components of a price, itemizing the price of a product, or providing the breakdown of the components of a product being sold or purchased, does not have the effect of creating a separate product if such an itemized component does not have an economic life of its own, and is not transacted in a market for a price. This is exactly the case for the Basis and the GHS.

[273] In his final argument, the Commissioner submitted that this is not even a case where the price for GHS is implicit. He claims that there is nothing implicit about GHS and that its price or value appears in the contracts that P&H and other grain companies enter into with farmers. The Commissioner claims that the price for GHS is in fact explicit and only appears to be implicit because the Basis is not subsequently recorded in the transaction data of the grain companies. The Commissioner argues that the explicit price underlying his product market is the Basis being charged to the farmers by the Elevators. And that the problem is strictly one of implementation because the Basis sets the price for GHS.

[274] The Tribunal does not agree. This is not a situation where there is an explicit price for GHS that is part of the contract price between the farmers and the Elevators.

[275] First, the Commissioner confuses the price of GHS and the Basis. The evidence clearly establishes that the Elevators do not post a price for GHS; they post a Basis. The Basis sometimes

shows up in the information posted by P&H and other grain companies, as well as on some invoices and in some contracts. But not GHS. The Basis and GHS are not the same thing, and Dr. Miller clearly acknowledged that he had to “impute” the price of GHS from the Basis information (Exhibits P-A-169, CA-A-170 and CB-A-171, Expert Report of Dr. Nathan Miller (“**Dr. Miller Report**”), at para 173). Dr. Miller used a computed price as a proxy for the Basis, because neither the Basis, nor a price for GHS, appears in the transaction data. Dr. Miller and a representative of the Commissioner indeed acknowledged, in their testimony and on discovery, that the imputed price for GHS is a “subset of the Basis” (Exhibits CA-R-242 and P-R-243, Compilation of Additional Documents Added to the Agreed Book, P&H Read-in Brief (“**P&H Read-In**”), at pp 21–22). Dr. Miller further admitted that the imputed price for GHS does not always correspond to what the Basis component of the Cash Price actually is.

[276] Second, a calculated or imputed price is not a price that can be correctly described as being observed or observable. Here, Dr. Miller has not used the observed Basis; he has estimated a price for GHS (which he sometimes refers to as a Basis) for each transaction from the difference between the Cash Price and an assumed Futures Price at a given date. Dr. Miller testified that at a transaction level, the estimation leads to variance between the observed Basis of which a corresponding Cash Price was transacted and the constructed price for GHS for that transaction.

[277] The Commissioner submits that the price of GHS imputed by Dr. Miller is a good approximation of the Basis. For the Virden and Moosomin Elevators, Dr. Miller takes the median of the transaction-level prices of GHS and he uses the Virden Elevator median price to calculate his mark-up. The median prices calculated by Dr. Miller are the benchmark prices he uses in his HMT analysis.

[278] Dr. Miller and Ms. Sanderson agree that taking a median over thousands of observations measured with error reduces the measurement error. However, they disagree about whether the median prices for GHS obtained by Dr. Miller for the Virden and Moosomin Elevators are reliable estimates for the Basis.

[279] Referring to the contracts of [REDACTED], a farmer, Dr. Miller said that the difference between his computed median price of CAD \$31.02 per MT for GHS for wheat and the corresponding value of the Basis in [REDACTED] contracts of CAD \$34.83 per MT was “reasonably close,” using 37 deliveries made by [REDACTED]. The Tribunal observes that it is still a significant difference of 12% — namely, CAD \$3.76 per MT or 10.23 cents per bushel of wheat. And that difference is a variance of only a few transactions out of thousands. However, when Dr. Miller compares the median for all wheat transactions at the Moosomin Elevator, calculated by his own model as being CAD \$34.78 per MT, to the actual Basis in the contracts of [REDACTED] (*i.e.*, CAD \$ 34.83), the two values are very similar. In light of that, the Commissioner claims that the price for GHS imputed by Dr. Miller represents a good approximation of the actual Basis found in the contracts.

[280] Ms. Sanderson testified that the large difference in the median between the Moosomin and Virden Elevators for both wheat and canola is likely due to a larger error between Dr. Miller’s predicted median and the median of the actual Basis. Ms. Sanderson points to the fact that for wheat, the GHS median value is 20% lower at the Virden Elevator than at the Moosomin Elevator, whereas in the case of canola, the Virden Elevator median value is 60% higher than the Moosomin

Elevator value, in a situation where the Virden Elevator had larger sales than Moosomin. Ms. Sanderson attributed these differences to the uncertainties in the methodology used by Dr. Miller.

[281] Like Ms. Sanderson, the Tribunal does not share the Commissioner's confidence in Dr. Miller's calculations. The Tribunal is not persuaded that using a median to correct for the error terms between the estimated and the actual values is sufficient, in this case, to correct for the high uncertainty in the estimated values. The median calculated by Dr. Miller includes several sources of uncertainty stemming from the fluctuation of the Futures Price and exchange rates within a day that may not be correlated with the actual transactions, the choice for delivery dates, and negotiations on delivery. The Tribunal agrees that in theory, using the median of a very large data set (in this case, thousands of transaction data) provides a much smaller error than the error of each observation. However, in his attempt to correlate a Futures Price for an estimated delivery date for each transaction, Dr. Miller did not provide convincing evidence to give the Tribunal the level of confidence or precision needed to conclude that the median predicts the actual Basis. The Tribunal adds that if the measurement errors are systematically skewed from actual delivery periods or Futures Price and exchange rates spot price reflected in the application at the time of sale, the results will also be skewed. Dr. Miller did not provide the Tribunal with evidence that this did not occur.

[282] In any event, whether Dr. Miller's "imputed" price of GHS is a good or not so good approximation of the Basis is not a determinative issue in this case. The Tribunal finds that neither the "imputed" price of GHS nor the Basis can be used as the foundation of a product market definition since neither is a transacted price attached to an identifiable product.

[283] The Tribunal pauses to note that, if in a given case, the evidence enabled it to isolate or identify a value-added component or feature of a product with sufficient precision, and to find a value-added price from business records, the Tribunal may conclude that the computed price is the price of that value-added component. In this case, the evidence does not permit to make such a conclusion.

(v) *The Basis plays a role in competition*

[284] That being said, the Tribunal appreciates that the Basis is a touchstone of competition between the Elevators, and that it is an important factor to understand the rivalry between Elevators as well as the competitive dynamics in the grain industry. One cannot ignore what is going on at the Elevator's level (including competition on the Basis) when determining whether there is an increase in market power and a substantial lessening of competition.

[285] The evidence supports a conclusion that the Basis component of the price of grain is affected by local competition. Farmers such as Mr. Pethick, Mr. Paull, and Mr. Hebert testified that they can play Elevators against each other based, among other things, on the Basis. Mr. Paull and Mr. Hebert admitted on cross-examination that they use not only the Cash Price to compare Elevators, but also the Basis. Even Mr. Heimbecker admitted that farmers use the Basis to compare grain prices between Elevators. There was also evidence that P&H sends email blasts to customers containing references to the Basis. The vast majority of grain companies also incorporate references to the Basis as well as the Futures Price and the Cash Price in their contracts with

farmers. Farmers can also enter into Basis contracts, though Mr. Heimbecker testified that these were rare in the grain industry. Furthermore, P&H can and does adjust the Basis to account for local competition from Elevators: P&H and other grain companies will offer limited-time or limited-tonnage specials to farms to attract their grain, and such premiums above the posted Cash Price are sometimes expressed through changes in the Basis.

[286] The Tribunal accepts that the Basis captures an aspect of competition between the Elevators. The Basis is one part of competition between the Elevators and, as will be discussed below, it is an element to consider in the substantial lessening of competition analysis. However, this does not mean that the Basis, or Dr. Miller’s “imputed” price for GHS, can constitute the base price for market definition purposes, or that the existence of the Basis is sufficient to transform GHS into a relevant product.

[287] The Commissioner is urging the Tribunal to adopt, for its product market definition, an economic framework that allows for and facilitates an analysis focused on the local competition allegedly impacted by the Acquisition. This is what led the Commissioner and Dr. Miller to identify GHS as a product and to “impute” a price for it, derived from the Basis. Dr. Miller opined that, economically, constructing an imputed price to approximate the Basis was the right way to analyze the “effects” of the Virden Acquisition. However, in an effort to define a relevant product market, the Commissioner developed a theoretical framework that does not reflect the commercial reality of the grain industry, where GHS does not exist as a product, does not have a “price,” and is not transacted. In short, the Commissioner’s position ignored the fundamental premise of product market definition, which requires the existence of a transacted product whose price is the ordinary price in the sector of the industry being examined.

[288] In sum, the Tribunal finds that the evidence does not support the existence of a separate relevant “market” for the sale of GHS. GHS is an artificial product, with an artificial price, that cannot form the foundation of an acceptable relevant product market for the purpose of the Tribunal’s analysis. On the facts of this case, the relevant products are the purchase of wheat and canola and the relevant price is the Cash Price.

(b) The “value-added” approach

[289] The Commissioner submits that the law acknowledges it can be appropriate to define the relevant product market around a component of the price of the final product which represents the specific value provided at an intermediary level by the merging firms. In this case, the Commissioner maintains that an Elevator’s specific contribution of value, namely, providing GHS as part of the Cash Price farmers receive for their grain, can be identified with reasonable clarity. According to the Commissioner, a product market definition focused on the competition affected by the merger and on the merging firms’ contribution to value is an approach supported by the jurisprudence from Canada, the U.S., and the European Union.

[290] The Tribunal disagrees. Further to its analysis, the Tribunal instead concludes that there are no precedents, in Canada or in any other jurisdiction, where the “value-added” approach referred to in the US HMEGs has actually been used and applied by an adjudicating court or tribunal to define a relevant product market in a merger case. Moreover, the “value-added”

approach advocated by the Commissioner cannot be reconciled with the history of the MEGs and the current 2011 MEGs issued by the Commissioner himself.

(i) *The US HMEGs*

[291] In support of his “valued-added” approach to the product market definition, the Commissioner relies heavily on the US HMEGs. These guidelines describe the approach to merger review by the U.S. antitrust agencies and were adopted in 2010. In his reply expert report, Dr. Miller referred specifically to them, drawing an analogy between the present case and the examples used in the US HMEGs (Exhibits P-A-172, CA-A-173 and CB-A-174, Reply Expert Report of Dr. Nathan Miller (“**Dr. Miller Reply Report**”), at paras 34–36 and fn 33).

[292] In its section 4 on “Market Definition”, the US HMEGs contemplate that in certain situations, the benchmark price used for analyzing a product market — *i.e.*, the base price — can be different from the price effectively charged for a final product. The US HMEGs indicate that, in a situation where explicit or implicit prices for the merging firms’ contribution to the value of the final product can be identified with reasonable clarity, the price used to assess the merger and define the relevant market can be the component of the price that the firms compete on. Similarly, the SSNIP threshold can also be adjusted. In paragraph 4.1.2 on “Benchmark Prices and SSNIP Size,” the US HMEGs state as follows:

The Agencies most often use a SSNIP of five percent of the price paid by customers for the products or services to which the merging firms contribute value. However, what constitutes a “small but significant” increase in price, commensurate with a significant loss of competition caused by the merger, depends upon the nature of the industry and the merging firms’ positions in it, and the Agencies may accordingly use a price increase that is larger or smaller than five percent. Where explicit or implicit prices for the firms’ specific contribution to value can be identified with reasonable clarity, the Agencies may base the SSNIP on those prices.

[Emphasis added.]

[293] The US HMEGs then refer to three specific examples, illustrating situations where implicit prices for the firms’ specific contribution to value can be identified. These examples read as follows:

Example 8: In a merger between two oil pipelines, the SSNIP would be based on the price charged for transporting the oil, not on the price of the oil itself. If pipelines buy the oil at one end and sell it at the other, the price charged for transporting the oil is implicit, equal to the difference between the price paid for oil at the input end and the price charged for oil at the output end. The relevant product sold by the pipelines is better described as “pipeline transportation of oil from point A to point B” than as “oil at point B.”

Example 9: In a merger between two firms that install computers purchased from third parties, the SSNIP would be based on their fees, not on the price of installed

computers. If these firms purchase the computers and charge their customers one package price, the implicit installation fee is equal to the package charge to customers less the price of the computers.

Example 10: In Example 9, suppose that the prices paid by the merging firms to purchase computers are opaque, but account for at least ninety-five percent of the prices they charge for installed computers, with profits or implicit fees making up five percent of those prices at most. A five percent SSNIP on the total price paid by customers would at least double those fees or profits. Even if that would be unprofitable for a hypothetical monopolist, a significant increase in fees might well be profitable. If the SSNIP is based on the total price paid by customers, a lower percentage will be used.

[294] The US HMEGs therefore contemplate two situations where the usual base price and/or SSNIP threshold could be modified. The first one looks at the explicit or implicit price of the value added by the merging firms and, in cases where the value-added component can be identified with reasonable certainty, a base price other than the usual total price of the product may be used. The second refers to situations where the SSNIP remains based on the total price paid for the product, but the usual 5% SSNIP threshold is adjusted to deal with the realities of an industry.

[295] However, the US HMEGs provide no guidance as to when the contribution to value, as opposed to the total price of a product, would be appropriate for the purposes of the relevant market definition. Nor do they contain any guidance on how and when the usual 5% SSNIP threshold should be adjusted. The Tribunal finally notes that the US HMEGs simply mention that the U.S. antitrust agencies “may base” the SSNIP and the HMT analysis on the price for the value added by the merging firms.

(ii) *No court or tribunal has ever applied the “value-added” approach*

[296] As correctly pointed out by P&H in its submissions, a review of the existing jurisprudence reveals that, contrary to the Commissioner’s submissions, there are no legal precedents, in Canada, in the U.S., or in any other jurisdiction, where a court or a tribunal has effectively applied or recognized the “value-added” approach set out in the US HMEGs. While the concept advanced by the Commissioner has been argued in a few cases in the U.S., the European Union and Australia, it has either been rejected by the courts or applied by competition agencies to facts which are distinguishable from the facts of this case. The Tribunal further observes that the “value-added” approach has never been considered or applied in respect of an “imputed” price. In other words, the Tribunal has not found any situation where a court or tribunal has accepted and retained an implicit price for the merging firms’ specific contribution to the value of a product to determine the relevant product, the relevant price, the SSNIP, and the relevant market in a merger case.

[297] In essence, on this issue of the “value-added” approach, the Commissioner is asking the Tribunal to go where no other court or tribunal has yet agreed to go.

- Canada

[298] As far as Canadian cases are concerned, the Commissioner relies on *Hillsdown* and *Xerox*. He claims that these cases both demonstrate that the value added by the merging firms can form the basis of a product market definition and that, to define the relevant product market, the Tribunal can focus on the portion of the final price that is impacted by the merger.

[299] The Tribunal is not persuaded by the Commissioner's arguments.

[300] In *Hillsdown*, the first contested merger review proceeding under section 92, the Tribunal analyzed the merger of two companies that operated rendering businesses for the by-products from slaughterhouses and other entities. On the product market definition, the Tribunal had to decide whether to characterize the relevant market as the supply of "renderable material" from slaughterhouses to the renderers, or as the provision of the specific services that contribute to the end product's value, namely, "rendering services" offered by the renderer to the slaughterhouses, meat processing plants, grocery stores, etc. Since the Tribunal decided to characterize the market as the provision of rendering services, claims the Commissioner, it recognized that the product market can be limited to the services capturing the value provided by an intermediary.

[301] The Tribunal considers that *Hillsdown* is of no assistance to the Commissioner on the "value-added" approach since in that case, the Tribunal expressly said that there was no difference between the two contemplated approaches to the product market, even though it decided to characterize the market as the provision of rendering services. If the first characterization was used, then the analysis for competition purposes would have focused on the possible monopsony power of the renderers as buyers of the raw materials. If the second characterization was used, then the analysis would have focused on the possible market power of the renderers as sellers of the rendering services. But, said the Tribunal, no significant difference resulted from the two characterizations. Moreover, there was clearly a price paid for the renderable materials or for the services provided (*Hillsdown* at pp 293 d-h, 299). In light of the foregoing, the panel finds that the *Hillsdown* decision is at best inconclusive on the issue of the "value-added" approach.

[302] In *Xerox*, a non-merger case, the Tribunal found that the relevant product market was the provision of intermediary services, namely, servicing copier parts that were not constrained by the sale of copiers to end customers. It is true that the Tribunal then recognized that a subset of a final product (*i.e.*, the servicing of parts for copiers) can constitute a relevant product. However, in that case, there was a specific price charged for the specific service offered by the parties. Again, this precedent therefore offers at best weak support to the "value-added" approach contemplated by the Commissioner in this case, as no specific price is charged for GHS.

- U.S.

[303] Turning to the U.S., even though the US HMEGs were adopted more than 12 years ago in August 2010, the Commissioner has not referred the Tribunal to any decision of a U.S. court where the "value-added" approach set out in the US HMEGs was accepted and actually applied.

[304] In his submissions to the Tribunal, the Commissioner referred to a matter involving Conagra Foods (*United States of America v Conagra Foods, Inc, et al*, 14-CV-000823 “*Conagra*”)) and to *FTC v Whole Foods Market, Inc*, 502 F.Supp. 2d 1 (2007) (“*Whole Foods*”). The Tribunal concludes that neither of these matters constitutes a convincing precedent to assist the Commissioner on the “valued-added” approach.

[305] The *Conagra* example was a case in the flour business, where a fee was charged by the millers for converting wheat into flour. The Commissioner claims that this was a situation where the U.S. Department of Justice applied the SSNIP to a component of the final price for the flour, namely, the converting fee, because this component was the subject of the effective competition at issue between the merging flour mills. However, this precedent is of no value to the Tribunal as the Commissioner was strictly relying on the argument presented to the court by the U.S. antitrust agency itself, and not on a decision issued by a U.S. court. This case is therefore not a legal authority but instead solely reflects the position taken by another competition authority on the “value-added” approach.

[306] With respect to *Whole Foods*, it was not a case where a “value-added” approach was applied or even considered by the U.S. court. It was instead a matter where the court mentioned that in the context of the HMT framework, lower SSNIP levels may be more appropriate for mergers in markets or industries characterized by high-volume sales but low-profit margins (*Whole Foods* at pp 9–11). This case therefore did not involve the application of a “value-added” approach to a component of a product but turned instead on the possible use of a smaller SSNIP threshold on the final product sold by the grocers. The Tribunal points out that in *Whole Foods*, the U.S. court did not analyze nor provide any guidance on the factors to take into account or the evidence required in order to determine the appropriate level of such a lower SSNIP level.

- European Union

[307] The Commissioner also referred to two cases issued by the European Commission (“EC”) in the European Union, where the US HMEGs were approved and followed by the EC. These decisions dealt with extruded metals and, according to the Commissioner, recognized the value-added by an intermediary as a relevant and separate product market.

[308] In *Norsk Hydro/Orkla/JV* (Case No COMP/M.6756), 13 May 2013 (“*Norsk Hydro*”), two companies had operations in the aluminum sector where extrusion premia were charged. The extrusion premia represent the price paid by customers for the value added by companies that extrude the aluminum. In *Norsk Hydro*, the EC noted that there was a significant and persistent difference in the extrusion premia charged by soft-alloy extrusion suppliers in two different geographic markets. Therefore, in analyzing the merger between extruders, the EC considered that the relevant benchmark price was the actual price for the premium charged for the extruding process, and not the full price of the aluminum eventually sold to customers. The EC concluded that “in the presence of a similar price structure, it seems appropriate to take as a relevant benchmark price the extrusion premia rather than the full price” — citing with approval the US HMEGs (*Norsk Hydro* at paras 66–67). The EC found that the price negotiations were only on the extrusion premium, as other factors such as the price of aluminum or the billet conversion costs were typically fixed.

[309] The second European Union case relied on by the Commissioner is *Inco/Falconbridge*, (Case No COMP/M.4000), 4 July 2006 (“*Inco*”). In that case, the EC considered the market for high-purity nickel, stating that “the price increase must be seen in relation to the added value provided by the firms in the relevant market” (*Inco* at para 379). The EC observed that a price increase of an input good may have only a minor effect on the price of the final product (depending on the share of total input cost represented by the input good), but can nonetheless be considered significant from a competition perspective. Since the premium charged was directly negotiated with the customers, the EC determined that it was a separate product, with a separate price.

[310] The Tribunal pauses to note that P&H also referred to a third similar EC matter, also dealing with extruded metals, namely, *Glencore/Xstrata* (Case No COMP/M.6541), 22 November 2012. In that case, a premium applicable to the extruded metal differentiated the extruded product from the raw metal price, and was also the main element of the price negotiated between buyers and sellers.

[311] The Tribunal finds that these European Union cases are of no real precedential value. In any event, they are clearly distinguishable from the present case.

[312] Regarding their precedential value, the Tribunal underlines that these three matters are decisions issued by the EC, which is the European competition agency and the equivalent of the Commissioner in the European Union. These EC decisions are not decisions issued by an independent adjudicative court or tribunal. Under the European Union competition law regime, and in merger matters in particular, the EC is not strictly an investigator and law enforcer as is the Commissioner under the Act. The EC has the dual role of being not only the investigative authority but also the first-instance decision-maker. The EC decisions relied on by the Commissioner thus represent the position of the competition authority itself, as opposed to a decision by an independent judicial body like the courts or the Tribunal. The Tribunal is thus of the view that such decisions of the EC, while informative, carry less persuasive weight. They can certainly not be qualified as legal precedents on the issue of the “value-added” approach.

[313] The Tribunal further concludes that the *Norsk Hydro* and *Inco* precedents are of limited assistance to the Commissioner as they are distinguishable from the present case: according to the evidence in those cases, the premia were a separate price charged for a separate product, and were openly negotiated between the suppliers and the customers. These were situations where there was a specific price for the premia at issue. In other words, the price of the value-added product was not constructed or implicit. It was explicit and transacted.

- Australia

[314] In its final submissions, P&H referred to an Australian case, *Australian Competition and Consumer Commission v Metcash Trading Limited*, [2011] FCA 967 (“*Metcash*”), aff’d [2011] FCAFC 151. This was in response to a Direction the Tribunal had issued prior to final oral argument, where it notably invited counsel for both parties to identify legal precedents in which a court or tribunal considered situations where it was proposed that an implicit price for the merging firms’ specific contribution to the value of a product should be used to determine the SSNIP and the relevant market, as well as legal precedents which considered situations where in applying the

HMT and in defining the relevant market, a SSNIP smaller or larger than 5% should be used, and/or reviewed the factors to take into account in determining the appropriate level of the SSNIP.

[315] In the *Metcash* case, the Australian Competition and Consumer Commission (“ACCC”) challenged a merger of wholesale grocery suppliers. The ACCC sought to use an imputed price purporting to represent the value added by grocery wholesalers at their stage in the supply chain as the basis for considering the impact of a SSNIP in defining markets. The ACCC’s approach, which echoed the US HMEGs, was soundly rejected by the Federal Court of Australia (and affirmed on appeal). The Australian court found that the purported value-added services for which the ACCC sought to use an imputed price were not the extent of what the wholesaler actually provided, and that an imputed price solely for these services could therefore not be used as the basis for defining the relevant market. The court noted that “the associated services provided by [the wholesaler] are not available in the absence of the acquisition by a retailer of packaged groceries from [the wholesaler]” (*Metcash* at para 196).

[316] The Commissioner argues that this case is distinguishable as it involves a considerably more complex market structure, in an industry characterized by a mixture of self-supplying retailers and independent retailers, and involving different categories and types of products across multiple levels of the supply chain.

[317] The Tribunal does not share the Commissioner’s view. As admitted by counsel for the Commissioner at the hearing, *Metcash* is the sole judicial precedent identified by the parties that actually dealt directly with the so-called “value-added” approach exposed in the US HMEGs and advocated by the Commissioner in the present case. In *Metcash*, the Australian courts clearly rejected the “value-added” approach to product market definition and the use of an imputed price covering only a subset of the product effectively sold by the merging parties, as it did not reflect the commercial activity of the merging firms. Moreover, the alleged value added by the grocery wholesalers was not independently transacted.

[318] In the Tribunal’s view, this Australian case bears a number of striking similarities with the present case: like the situation in *Metcash*, the so-called value-added for GHS does not have a commercial life of its own, and the “imputed” price for GHS — or the Basis — is not the price ordinarily used in the grain industry for the product being transacted between the farmers and the Elevators. The Tribunal considers that the reasoning in this Australian decision, while not binding, is persuasive and is generally consistent with the Tribunal’s analysis in the present case.

(iii) *The “value-added” approach is not supported by the Commissioner’s own MEGs*

[319] The Commissioner finally submits that the “value-added” approach he is proposing finds support in his own MEGs.

[320] With respect, the Tribunal again does not agree. The Tribunal instead finds that the Commissioner’s proposed approach to the application of the HMT and the choice of the price of GHS for market definition purposes cannot be reconciled with the removal, in 2004, of the “value-added” language that existed before then and the continued absence of such language in the current 2011 MEGs.

[321] It is worth reminding that the MEGs articulate the analytical framework that the Competition Bureau and the Commissioner apply in determining whether a merger is likely to substantially lessen or prevent competition. The MEGs were first introduced in 1991 to provide guidance to the Competition Bureau's enforcement approach to the new merger provisions enacted in 1986 ("1991 MEGs"). The Competition Bureau's 1991 MEGs were superseded in September 2004 with the release of the 2004 MEGs, which were themselves replaced by new, revised guidelines in October 2011, when the 2011 MEGs were issued. The Tribunal pauses to note that the 2011 MEGs followed the issuance of the revised US HMEGs in August 2010.

[322] Since the first adoption of the MEGs in 1991, several important changes have been made to the product market approach presented by the Commissioner. More specifically, the "value-added" approach, which the Commissioner is apparently attempting to resuscitate in this case, was expressly abandoned in the most recent iterations of the MEGs.

[323] In the 1991 MEGs, the Commissioner discussed the conceptual framework for market definition. With respect to the base price, the 1991 MEGs stated the following (1991 MEGs at p 9):

In general, the base price that is employed in postulating a significant and non-transitory price increase is whatever is ordinarily considered to be the price of the product at the stage of the industry (e.g., manufacturing, wholesale, retail) being examined. This is typically the cumulative value of the product, inclusive of the value added (mark-up) at the industry level in question. However, in certain industries, the value added is billed as a separate fee, and no mark-up is applied to the product in relation to which the service (or other value added) is performed. In such cases, the price increase will usually be postulated in relation to the fee.

[Emphasis added.]

[324] The 1991 MEGs therefore made an express distinction between the "cumulative price" and the "value added" price. They specifically identified a "value added" approach as an exception to the typical approach of using the cumulative price, and specified that this exception would apply if two conditions were met: "the value added is billed as a separate fee, and no mark-up is applied to the product in relation to which the service (or other value added) is performed." The 1991 MEGs thus established that the value-added price could "be employed where it is billed as a separate fee and no mark-up is applied to the product in relation to which the value-added is applied" (Paul S. Crampton, *Canada's New Enforcement Guidelines: a "Nuts and Bolts" Review*, 36 *Antitrust Bulletin* 883, 1991) ("**Crampton 1991**") at p 914). The author, who was the drafter of the 1991 MEGs, used a pipeline example — similar to what the US HMEGs would use some 20 years later — to illustrate a situation where the value-added price could be used as the base price for market definition purposes: when two pipeline operators simply charge a tariff for transporting the oil, such billed fee can be used as the base price for the HMT analysis (*Crampton 1991* at p 914).

[325] However, it is clear from the 1991 MEGs that the mainstream approach was to use the "cumulative value of the product" as the base price to postulate a SSNIP: the 1991 MEGs adopted the "common sense approach of using cumulative prices except where it is industry practice to bill

the value added as a separate fee” (A. Neil Campbell, *Merger Law and Practice: The Regulation of Mergers under the Competition Act*, (Scarborough, Ontario: Carswell, 1997) (“**Campbell**”) at p 61).

[326] In the 2004 and 2011 MEGs, this reference to the alternative value-added price approach was taken out of the MEGs, and the sole reference to the base price remained the price “ordinarily considered to be the price of the product at the stage of the industry (e.g., manufacturing, wholesale, retail) being examined.” The Tribunal underlines that, even though the 2011 MEGs were adopted 14 months after the US HMEGs, they did not revive the value-added price abandoned in 2004 or echo the “implicit or explicit price” exceptions described in the US HMEGs.

[327] The Tribunal further understands that, before the present case, not a single merger was judicially contested by the Commissioner on the basis of a value-added price or the “value-added” approach.

[328] On March 10, 2021, the Tribunal sent a Direction to counsel inviting the parties to provide submissions regarding the specific reference that was contained in the 1991 MEGs to a “value-added” price and its absence from the subsequent iterations of the MEGs published by the Competition Bureau in 2004 and 2011.

[329] In his submissions to the Tribunal, the Commissioner did not identify a particular reason why the paragraph discussing the value-added approach was not explicitly retained in subsequent iterations of the MEGs. He noted that most commentators remained silent on the issue when the new version of the 2004 MEGs was discussed in draft form. The Commissioner submitted that even though the explicit reference to the value-added price was removed, the concept remains embedded in the subsequent versions of the MEGs. He added that a significant change in the 2004 MEGs was to explain that market definition is based on substitutability and focuses on demand responses to changes in relative prices, and that the focus of the market definition exercise is on those dimensions of competition that purchasers of the product value.

[330] The Commissioner further argued that, despite their silence on the “value-added” approach, the 2011 MEGs define the notion of price in a way that encompasses such a “value-added” approach, and that the language of the MEGs provides “latitude on what price is analyzed in a merger.” According to the Commissioner, the 2011 MEGs contemplate flexibility on the SSNIP test to be applied and on the 5% threshold. He added that in paragraph 4.2 of the 2011 MEGs, the reference to price is intended to capture any market that may be anti-competitive, and that the guidelines are agnostic as to how the price to supply the product is defined. The Commissioner also relied on the fact that the MEGs are also clear that in terms of the SSNIP, 5% is generally appropriate but “market characteristics may support using a different price increase” (2011 MEGs at para 4.3).

[331] The Tribunal is not convinced by the Commissioner’s arguments.

[332] The Tribunal first observes that the Commissioner’s references to the apparent flexibility in the 2011 MEGs language strictly relate to the level of the SSNIP threshold, not to the definition of the base price. In the 2011 MEGs, the Competition Bureau refers to the notion of “base price” at paragraphs 4.6 and 4.7. It expressly states that the base price used to postulate a price increase

is “typically the prevailing price in the relevant market” (2011 MEGs at para 4.6). The Competition Bureau may elect not to use the prevailing price when market conditions (absent the merger) would likely result in a lower or higher price in the future. It then states that “[i]n general, the base price used to postulate a price increase is whatever is ordinarily considered to be the price of the product in the sector of the industry (e.g., manufacturing, wholesale, retail) being examined” (2011 MEGs at para 4.7). The Tribunal is unable to read in those provisions any direct, oblique, or implied reference to a value-added price or to the situations alluded to in the US HMEGs.

[333] Furthermore, the Tribunal does not accept the Commissioner’s disconcerting contention that the 2011 MEGs could or should somehow continue to be read as implicitly containing the express language of the 1991 MEGs that the Commissioner explicitly removed and abandoned in 2004, and did not re-insert when he issued his revised MEGs in 2011.

[334] In fact, as the panel indicated at the hearing, the Tribunal is left with the distinct impression that the Commissioner is urging the Tribunal to follow the US HMEGs and to prefer them to his own 2011 MEGs. This is not a path that the Tribunal will follow.

[335] The Tribunal instead agrees with P&H that the evolution of the MEGs since 1991 reinforces its position that the base price to be used for purposes of market definition is “whatever is ordinarily considered to be the price of the product at the stage of the industry [...] being examined,” which is “typically the cumulative value of the product, inclusive of the value added (mark-up) at the industry level in question” (1991 MEGs at p 9; see also 2004 MEGs at para 3.8 and 2011 MEGs at para 4.7). In the present case, what is ordinarily considered to be the price of the product in the sector of the industry being examined, and what is the cumulative value of the product, is the Cash Price received by the farmers for their grain, be it wheat or canola.

[336] What is more, the conditions of the “value added” price once recognized by the Commissioner in the 1991 MEGs — namely, that the value added be “billed as a separate fee” with “no mark-up [...] applied to the product in relation to which the [...] value added is performed” — would not be met in this case. These conditions speak of a separate price attached to the value-added product and imply that the value-added element must be more than a simple cost component and must be transacted. Here, the Commissioner’s proposed price for GHS is founded on an imputed price equal to only a fraction of the total value-added provided by grain companies, there is no separate fee (either explicit or implicit) for the alleged value-added provided by grain companies for GHS, and P&H does not charge and bill a separate fee for GHS, or even for the Basis.

[337] The Tribunal is mindful of the fact that the MEGs are neither sacrosanct nor legally binding (*Southam FCA* at p 41). The MEGs do not restate or revise the law, nor do they substitute for professional advice (*Canada (Commissioner of Competition) v Superior Propane Inc*, 2001 FCA 104 (“*Superior Propane II*”) at paras 144–146). However, published guidelines such as the MEGs do provide guidance and notice to the public of how the Commissioner interprets the Act (*Canada (Commissioner of Competition) v Canada Pipe Co*, 2006 FCA 233, at paras 33, 39; *JD Irving Ltd v General Longshore Workers, Checkers and Shipliners of the Port of Saint John*, 2003 FCA 266 (“*JD Irving*”) at para 37). The Tribunal agrees with P&H that the MEGs serve as an important tool for the public and the business community to understand the application of the Act. While not legally binding, they serve as a meaningful element to delineate legal and economic principles that

are not fully reflected in the Act itself, and they may be considered as an aid to the Act's interpretation (*Eli Lilly and Co v Apotex Inc*, 2005 FCA 361 at para 33). The Tribunal has indeed often noted that the MEGs provide "important enforcement guidelines reflecting the Commissioner's view on how the Act should be interpreted" (*Superior Propane I* at para 393).

[338] It is worth repeating the comments made by the Tribunal at paragraph 397 of *Superior Propane I*:

It must not be forgotten that the point of view put forward in the MEGs represents the considered opinion of the Commissioner, the official appointed by the Governor in Council to administer and enforce the Act. That view, it goes without saying, is the view arrived at by the Commissioner following careful advice given to him by his legal and economic advisers regarding the meaning of the various provisions of the Act. Although the Commissioner is not bound by the MEGs nor are they binding upon this Tribunal, the MEGs should be given very serious consideration by this Tribunal. Needless to say, the Tribunal can disagree and in fact should disagree if it is of the opinion that the interpretation proposed in the MEGs is wrong. However, when referring and considering the MEGs, one should bear in mind the comments in the preface to the MEGs made by Howard Wetston, then Director of Investigation and Research. He stated that the MEGs were published to promote a better understanding of the Director's merger enforcement policy and to facilitate business planning. He also noted the extensive consultation process which was followed in their preparation.

[339] It cannot be said that the Commissioner was unaware of the fact that the "value-added" approach was expressly removed from the 2004 MEGs and is absent from 2011 MEGs, even if this most recent iteration was issued after the US HMEGs had been adopted in the U.S.

[340] The Commissioner provided no satisfactory explanation or compelling argument to convince the Tribunal that it should now depart from the 2011 MEGs, revive a "value-added" approach the Commissioner abandoned and removed from the MEGs in 2004, and embrace a new standard for product market definition that no longer forms part of the MEGs and the Commissioner has not publicly endorsed since at least 2004.

[341] The Tribunal is of the view that parties to transactions in Canada should be able to rely reasonably on statements of principle made by the Commissioner in published enforcement guidelines, including the MEGs, in order to know the rules applicable to their future activities and planned transactions. As the official responsible for the administration and enforcement of the Act, the Commissioner has a particular responsibility to provide guidance to parties through the publication and consistent application of relevant principles and approaches. Although the MEGs are not legally binding on the Tribunal or the Commissioner, if the Commissioner proposes to depart materially from them in litigated proceedings, the departure should be recognized, explained and justified (for example, by noting an amendment to the Act, or a recent Tribunal or court decision on point, or an advance in economic thinking or methodology) (see also *JD Irving* at para 37). The Commissioner did not do so with respect to the proposed new "value-added" approach to product market definition that he is inviting the Tribunal to adopt.

[342] In sum, from a legal standpoint, the Tribunal finds no support in adjudicated precedents or in the MEGs for the “value-added” approach to product market definition advocated by the Commissioner in this case. If anything, both the existing precedents and the MEGs instead reinforce the conclusion that, in this case, the relevant products are the purchase of wheat and canola and the relevant price is the Cash Price.

(iv) *The US HMEGs do not apply to this case*

[343] The Tribunal makes one last observation on the US HMEGs. In his submissions, the Commissioner tries to draw a parallel between the present case and the hypothetical situations described in those guidelines. He argues that, just as in the US HMEGs, the Elevators’ specific contribution to value can be “identified with reasonable clarity,” through the Basis.

[344] The Tribunal is not persuaded that, even if they were retained, the US HMEGs’ requirements would be met in this case.

[345] The US HMEGs expressly require that in order to base a SSNIP on the value added by the merging firms, the firms’ specific contribution to value must be identifiable with reasonable clarity. In the Tribunal’s view, this is not a situation where an Elevator’s specific contribution of value (by providing GHS) to the Cash Price farmers receive for their wheat or canola can be identified with reasonable clarity. As discussed above, the evidence indicates that the price of GHS, as “imputed” by Dr. Miller, cannot be identified explicitly by the grain companies or the farmers, nor is it implicitly observable by industry participants, as it is not the actual Basis. And if the price for GHS is neither observed nor observable, the “value-added” approach must fail.

[346] The Commissioner’s price for GHS is neither implicit nor explicit; it is a constructed price. In the present case, the two observed or observable prices are the Futures Price and the Cash Price. Not the price for GHS. Moreover, the US HMEGs’ “value-added” approach requires a transacted price, not only a cost component.

(c) *The HMT framework and the SSNIP test*

[347] The “value-added” approach proposed by the Commissioner also raises concerns from a conceptual perspective. As proposed, applying a 5% price increase as part of the SSNIP test only to the value-added portion of the price of a product would effectively alter the price change that a hypothetical monopolist must be able to sustain. That alteration to the HMT, without more, would have the effect of seriously modifying the current well-accepted economic analysis underlying market definition and the HMT framework. Since no consideration was given by the Commissioner to whether or how the applicable SSNIP threshold would have to be modified in a value-added scenario, adopting his proposed approach to the product market definition would imprint a profound change to the review of mergers and would significantly recalibrate the current HMT framework governing the market definition exercise.

[348] The Tribunal points out that such impact can be significant. Where the value-added component of a product accounts for 10% of the final price, applying a 5% SSNIP threshold to the value-added component is equivalent to applying a *de minimis* 0.5% SSNIP to the final price of

the product. Conversely, in order to keep the usual well-accepted 5% SSNIP benchmark applied to the final transacted product, it would require applying a 50% SSNIP threshold when considering a component representing a 10% value-added to the final transacted product.

[349] As demonstrated by Ms. Sanderson in her testimony and by P&H in its final argument, the 5% SSNIP threshold used by Dr. Miller in his HMT analysis based on the “imputed” price of GHS (as a proxy for the Basis) translates into an unprecedentedly low SSNIP level when transposed to the total price of grain: the “value-added” approach of the Commissioner would mean that the equivalent SSNIP percentage calculated by Dr. Miller would vary between 0.6% and 0.8% for the purchase of wheat when expressed in terms of the Cash Price, and between 0.1% and 0.2% for the purchase of canola.

[350] The Tribunal is not convinced that in the circumstances of this case, the Commissioner has provided clear and convincing evidence, or arguments, supporting such a fundamental change to the market definition exercise. The Commissioner provided no submissions nor evidence on what the appropriate SSNIP threshold should be in the context of his “value-added” approach, or why it should nonetheless be kept at 5% when a smaller component of the final price is used as the base price. The Commissioner’s position simply assumed that the usual 5% SSNIP threshold should remain, and he applied it in the HMT analysis. These gaps in the conceptual framework undermine the approach he is proposing in this case.

[351] Antitrust economists in the U.S. have voiced concerns about the revised US HMEGs, pointing out that the “value-added” approach would lead to fewer potential substitutes and to lower effective SSNIP thresholds. In response to the draft version of the US HMEGs, some economists identified a fundamental flaw in the “value-added” approach to product market definition proposed in the guidelines, indicating that in many cases, “the value-added service is not actually purchased by customers on a standalone basis” and “customers are not able to substitute to sellers of just the value-added service” (E.M. Bailey, G.K. Leonard and L. Wu, “Comments on the 2010 Proposed Horizontal Merger Guidelines”, *HMG Revision Project – Comment, Project No. P092900*, June 3, 2010 at p 5). This is precisely the case here with GHS or the Basis. Other economists observed that “one implication of applying the [HMT] using a value-added approach is that it will tend to produce more narrowly defined markets whenever the threshold used for the value added test is not sufficiently increased to account for the ratio of value added to prices” [emphasis added] (P Davis and U Haegler, “Should competition agencies focus on ‘value added’ instead of final prices?”, March 1, 2016 <http://ssrn.com/abstract=2740706> at p 16). Again, in the present case, neither the Commissioner nor Dr. Miller turned their mind to the impact of their proposed “value-added” approach on the effective SSNIP threshold.

[352] In *Metcash*, the Federal Court of Australia noted that on the facts of that case, applying a 5% SSNIP to the imputed value-added price (*i.e.*, the wholesaler profit margin) would reflect approximately a 0.26% increase in the final retail price. The Australian court did not accept that such a small price increase could be used to define a product market, and refused the proposed “value-added” approach.

[353] The Tribunal is unaware of any precedent — and the Commissioner has not mentioned any — where a price increase of less than 5% has been utilized as the SSNIP threshold in applying the HMT analysis. The Tribunal finds that the “value-added” approach as proposed would profoundly

change the current HMT framework, and it is not ready to accept that minimal price increases of less than 1% can become the yardstick to justify an intervention in the market. Lower effective SSNIP thresholds lead to narrower product markets, and to a higher likelihood of intervention in mergers.

[354] The Tribunal notes that in response to a question from the panel, Dr. Miller acknowledged that the “value-added” approach, whereby a component of the final price of a product is used as the base or benchmark price for a HMT analysis, is not really addressed in the broader empirical industrial organization literature (Consolidated Transcript, Public, at pp 1431–1432).

[355] In the Tribunal’s view, espousing the “value-added” approach cannot simply be a question of modifying the base price that will be used for the product market definition. Given its impact on the effective price increase it entails for the final product, it also implies, at a minimum, a consideration of the appropriate SSNIP threshold that should be used and an explanation or justification for the selected SSNIP threshold. One cannot dissociate the issue of the “value-added” approach from the issue of the SSNIP threshold. Here, the Commissioner has not presented any evidence nor any economic analysis or authority that would support keeping the 5% SSNIP threshold in the context of his “value-added” approach. Even though the scientific or economic foundation for adopting and using a 5% level remains unclear, the Tribunal underlines that this 5% SSNIP threshold was developed in a context where the base or benchmark price was the cumulative price for the final product sold or purchased. In this case, Dr. Miller and the Commissioner simply transposed this 5% threshold to a value-added price and to their HMT analysis, without explaining or justifying why such threshold could be imported as is in this different context.

[356] In light of this shortcoming in the Commissioner’s economic analysis and evidence, the Tribunal is not persuaded that the Commissioner’s proposed “value-added” approach can be sustained in the circumstances.

[357] The Tribunal makes one other observation.

[358] As acknowledged by Dr. Miller at the hearing, the US HMEGs refer to two possibilities for dealing with market definition in situations where the value added by the supplier of a product allegedly relates to a small portion of the total price of the product. The first option is resorting to a smaller component of the final price corresponding to the value-added to determine the base price, when the explicit or implicit price of the value-added can be identified with reasonable clarity, with an appropriate SSNIP threshold. The second option, when the merging firms’ specific contribution to value is not an implicit or explicit price, is to keep the overall final price of the product as the base price, but use a lower SSNIP threshold in the HMT analysis, adapted to the realities of the industry being examined.

[359] Since the constructed price for GHS, or the Basis, is a small component of the total price of grain that is not transacted in itself, the Commissioner could therefore have argued — as was alluded to in *Whole Foods* — that a lower SSNIP should be used in a HMT analysis based on the final price of the grain. However, this second option was not considered by the Commissioner nor by Dr. Miller in this case. At the hearing, the Tribunal asked Dr. Miller and Ms. Sanderson about

the issue of using a smaller SSNIP threshold on the Cash Price, but did not receive clear answers from either expert.

[360] Resorting to this second option would have required evidence and some economic analysis supporting the different SSNIP threshold to be used. The Tribunal notes that no legal precedent has been identified where, in applying the HMT and in defining the relevant market, a court or a tribunal has discussed the factors or the evidence to be taken into account in order to adjust the appropriate level of the SSNIP threshold in light of the realities of a particular industry. Similarly, the Commissioner has not provided economic or antitrust literature pointing to analyses that could have been done to determine the appropriate SSNIP threshold to be used in the context of a small value added by the supplier or purchaser of a product.

[361] Given the profound change that adopting the “value-added” approach would entail for the current well-accepted HMT analysis underlying market definition, the Tribunal is of the view that no change can be adopted without addressing the SSNIP threshold, in one form or another. The failure to address the SSNIP threshold leaves the Tribunal with no clear and convincing evidence to assess whether either of the two options mentioned in the US HMEGs (*i.e.*, the “value-added price component” or the “reduced SSNIP”) should or could be retained and applied in this case.

(4) Conclusion on relevant product market(s)

[362] For all the reasons detailed above, the Tribunal concludes that the relevant product markets for the purpose of these proceedings are the purchase of wheat and the purchase of canola. Considering the evidence on the record in this proceeding, the Commissioner has not established, on a balance of probabilities, that there is a distinct relevant market for the supply of GHS for each of wheat and canola. When it comes to the value added by P&H and other Elevators further to their purchase of grain from farmers, there is no separate relevant “market” associated with it in which to conduct the necessary quantitative analysis.

[363] The main considerations weighing in favour of a conclusion that there are distinct relevant markets for the purchase of wheat and canola include the factual evidence as well as the absence of legal foundation or SSNIP threshold analysis supporting the “value-added” approach argued by the Commissioner.

[364] For greater clarity, the Tribunal is not saying that a “value-added” approach to product market definition could never be contemplated or applied. But if the Commissioner intends to resort to such an approach in future cases, he should first clarify the MEGs in that respect. Furthermore, for the Tribunal to be in a position to assess the merits of a “value-added” approach in any given case, the Commissioner would need to present clear and convincing evidence and submissions showing that the contemplated component of a final product is transacted, that it has a price attached to it or a measurable one, and that consideration is given to the SSNIP threshold to be used.

[365] As will be discussed below, this product market issue significantly influences many elements in the remainder of the Tribunal’s analysis.

B. What is or are the relevant geographic market(s) for the purposes of this proceeding?

[366] The parties took different approaches to the geographic scope of their respective proposed competition markets. The Commissioner initially proposed a local geographic market in which the Virden, Moosomin, and Fairlight Elevators provided GHS to farmers for their wheat and canola. In its pleadings, P&H submitted that in the competition markets for the purchase of wheat and/or canola, the proper geographic area was at least Southeastern Saskatchewan and Southwestern Manitoba, comprising more than 20 Elevators and Crushers.

(1) Analytical framework

[367] When identifying the geographic dimension of a competition market, the Tribunal typically applies the HMT, as it does for the product dimension. The HMT is designed to assist the Tribunal in identifying the smallest geographic area in which the merged entity, acting as a hypothetical monopolist or monopsonist, may profitably impose a SSNIP or SSNDP respectively — that is, the smallest geographic area over which it could exercise market power (*Tervita CT* at para 94; *Canadian Waste* at paras 61, 68, 69, 73; *Superior Propane I* at paras 84–85; see also *VAA CT* at paras 300–301; *TREB CT* at paras 121–124; *Facey and Brown* at pp 226–230; John S. Tyhurst, *Canadian Competition Law and Policy*, (Toronto: Irwin Law Inc., 2021) at pp 172–180).

[368] Given the practical challenges associated with determining the base price in respect of which the SSNIP or SSNDP assessment must be conducted, the market definition exercise will sometimes need to go beyond the analysis of prices through the HMT framework and to consider other evidence of substitutability or customer switching. Geographic market definition may therefore involve assessing indirect evidence of substitutability, including factors such as: switching costs; transportation costs; the views, strategies, behaviour and identity of buyers; trade views, strategies, and behaviours of other market participants; price relationships and relative price levels; and shipment patterns (2011 MEGs at paras 4.17–4.24).

[369] In defining the geographic scope of the relevant competition market, the Tribunal has previously concluded that it may be neither possible nor necessary to establish geographic boundaries with precision. The boundaries may well overlap with adjacent markets and be indistinct from those adjacent markets at many geographic points (*VAA CT* at para 305; *Hillsdown* at pp 301–302, 310; *Canada (Director of Investigation and Research) v Laidlaw Waste Systems Ltd* (1992), 40 CPR (3d) 289 (Comp Trib) at p 324). The Tribunal has also held, in particular, that there may be restraints on a merged firm’s market power that come from both inside and outside the defined geographic market (*VAA CT* at para 305; *Hillsdown* at p 310).

[370] It should once again be emphasized that business markets, service or trade areas, or operational areas used by company management, are not necessarily the same as a geographic market for the purposes of a competition analysis (*Canadian Waste* at para 72; *Superior Propane I* at paras 85, 101, 106).

(2) Parties' positions

(a) The Commissioner

[371] Supported by expert testimony from Dr. Miller, the Commissioner submitted that the relevant geographic market is local in nature. The Commissioner's principal position was that the Moosomin, Virden, and Fairlight Elevators constituted a relevant market. More precisely, the Commissioner proposed a geographic market around these three Elevators in which a hypothetical monopolist could impose a SSNIP for GHS. Dr. Miller's expert evidence included a HMT analysis (for the purposes of the Commissioner's proposed product market for the delivery of GHS) and concluded that the Moosomin, Virden, and Fairlight Elevators, acting as a hypothetical monopolist, would have the ability and incentive to impose a SSNIP for GHS in the geographic area served by these three Elevators. Dr. Miller used a 5% SSNIP threshold in his analysis.

[372] In addition, at the hearing and in response to Ms. Sanderson's critique on the product market definition, Dr. Miller testified that the geographic area around the Virden, Moosomin, Fairlight, and Whitewood Elevators could serve as the relevant geographic dimension of a competition market for the cash sale of wheat, again based on his HMT analysis (Exhibits CA-A-192 and P-A-193, Relevant Results from Ms. Sanderson's HMT Calculations ("**Dr. Miller Revised HMT**").

[373] To support the argument for a local market, the Commissioner emphasized the importance to farmers of the distance between their farm and the point of delivery, and the associated transportation costs, when deciding on an Elevator or Crusher for the sale of their grain. The Commissioner submitted that most farms analysed by Dr. Miller deliver their grain to Elevators located less than 100 kilometers away. The Commissioner submitted that the size of the service areas from which the Moosomin and Virden Elevators draw at least 90% of the wheat or canola they handle demonstrated that most of the volumes are drawn from farms located near each of those Elevators.

[374] Dr. Miller developed a model of demand to understand how farms make decisions as between Elevators and Crushers to sell their grain. In his expert report, Dr. Miller relied on four qualitative elements, namely, a review of case documents, the distances that farms tend to send their grain, the distances between the Elevators, and the profit margins. He also relied on his HMT analysis (Dr. Miller Report at para 4).

[375] Dr. Miller testified that in his opinion, proximity is an important factor in a farm's choice of a "primary" Elevator for the sale of its grain. Dr. Miller considered the driving distance between the Moosomin and Virden Elevators, and calculated the drive time and drive distance from farms to Elevators using various data, including data from the Elevator operators.

[376] During his analysis, Dr. Miller identified farms that were customers of the three Elevators (*i.e.*, Moosomin, Virden, and Fairlight) in his proposed geographic market for the delivery of GHS. In developing a model for demand, Dr. Miller considered the "draw areas" for the Elevators and used available data to determine each Elevator's "service area" — described as the set of closest Census Consolidated Subdivisions from which each Elevator draws at least 90% of its total wheat or canola intake. Dr. Miller used the service areas for these three Elevators to define a "Farmer

Region,”namely, a collection of farms useful for understanding the pricing incentives at the three Elevators and how their current and prospective customers would respond to price changes (“**Farmer Region**”)⁶.

[377] In Dr. Miller’s analysis, the respective service areas for the Moosomin and Virden Elevators were contiguous with each Elevator. In addition, the service areas for the two Elevators substantially overlapped, suggesting that both Elevators expect to purchase grain from similar or geographically clustered farms. After determining the service areas for other Elevators and for more distant Crushers, Dr. Miller’s analysis of service areas also found that the median farm selling canola may be more willing to travel longer distances to sell to Crushers.

[378] Dr. Miller also quantified the role of distance in his demand model and considered internal documents from the merging parties to support a conclusion that the Moosomin, Virden, and Fairlight Elevators were close competitors. He also observed the margin (or mark-up) earned by the Virden Elevator, both for wheat and for canola, which supported a conclusion that the Virden Elevator faced a relatively small set of competitors.

[379] Turning to his HMT analysis, Dr. Miller determined that a HMT using a merger simulation model showed that the Moosomin, Virden, and Fairlight Elevators comprised a relevant geographic competition market where a hypothetical monopolist would find it profitable to impose a SSNIP on the price of GHS. For GHS for wheat, Dr. Miller’s predicted price increase of a hypothetical monopolist was CAD \$9.03 per MT at the Moosomin Elevator and CAD \$5.88 per MT at the Virden Elevator, representing changes in price (compared to his constructed pre-Acquisition price for GHS at each Elevator) of 26.0% at Moosomin and 21.6% at Virden. With respect to GHS for canola including Crushers, his predicted price increase of a hypothetical monopolist was CAD \$2.76 per MT at the Moosomin Elevator and CAD \$1.51 per MT at the Virden Elevator, representing changes in price (compared to his constructed pre-Acquisition price for GHS) of 22.2% at Moosomin and 7.6% at Virden (Dr. Miller Report at paras 74–79 and Exhibit 9). According to Dr. Miller, his simulation and the resulting projected price changes demonstrated that a hypothetical monopolist of the Moosomin, Virden and Fairlight Elevators would “increase price by far more than a typical SSNIP” (*i.e.*, 5%) (Dr. Miller Report at para 79).

(b) P&H

[380] P&H submitted that the relevant geographic area for competition market purposes was much larger. P&H submitted that all farmer witnesses can and do haul their wheat and canola significant distances to Elevators and (for canola) to Crushers because it is financially worthwhile to do so. P&H submitted that farms closer to a particular Elevator receive a premium for their products, because they do not have high costs associated with hauling their grain to that Elevator. In P&H’s submission, transportation costs do not provide any kind of constraint on competition in the relevant geographic market that shields the Virden and Moosomin Elevators from competition.

⁶ To assist the reader of these Reasons, the Tribunal reproduces at Schedule “C” a map representing the location of farms and the location and identity of the Elevators and Crushers operating in Dr. Miller’s geography (Exhibit P-R-250, Map with Farm Locations in Dr. Miller’s Geography).

[381] P&H first relied on Mr. Heimbecker's evidence. Mr. Heimbecker testified that in the area surrounding the Virden and Moosomin Elevators, P&H competes with numerous Elevators and Crushers to purchase wheat and canola from farms. For wheat in that area, Mr. Heimbecker identified over 20 rival Elevators owned by six competing grain companies. For canola in that area, he identified at least 27 rival purchasing locations owned by nine grain companies. Mr. Heimbecker also referred to P&H's internal documents, including business plans, internal emails, and the competitors identified in "Draw Analysis Reports" prepared by third party consultants for P&H.

[382] P&H also relied on the expert evidence provided by Ms. Sanderson. Ms. Sanderson initially proposed a geographic market of "(at least) southeastern Saskatchewan and southwestern Manitoba" (Exhibits P-R-180 and CA-R-181, Expert report of Ms. Margaret Sanderson ("**Ms. Sanderson Report**"), at para 14). She adopted a monopsony framework, analysing the market for the purchase of wheat or canola by Elevators and Crushers. Ms. Sanderson's view was that the Virden and Moosomin Elevators were small buyers in an unconcentrated market or industry and, specifically, that the geographic market is wider than merely the area around the Moosomin, Virden, and Fairlight Elevators. She did not conduct a formal HMT analysis to support her broad proposed geographic market but relied on other quantitative and qualitative evidence and draw areas.

[383] However, Ms. Sanderson did comment on hypothetical monopolist issues in responding to Dr. Miller's HMT analysis in her hearing slides and during her testimony (Exhibits P-R-182, CA-R-183 and CB-R-184, Slides of Ms. Sanderson ("**Ms. Sanderson Slides**"), at pp 72, 74-75). While she did not do her own HMT analysis, Ms. Sanderson did a recalculation of Dr. Miller's model to generate new values based on a different denominator — namely, the Cash Price instead of the constructed price for GHS —, using Dr. Miller's diversion ratios and his Virden margin. Ms. Sanderson's revised HMT analysis resulted in the same absolute price changes calculated by Dr. Miller, but with different relative price variations in light of the different denominator she used.

[384] Ms. Sanderson's recalculation of Dr. Miller's HMT analysis suggested that when the Cash Price is used as the denominator, a market made up of the Moosomin, Virden, Fairlight, Oakner, Whitewood, Elva, Shoal Lake, and Carnduff Elevators would be a relevant geographic competition market for wheat. The relevant geographic market for canola would be larger and would include other Elevators as well as several Crushers such as Bunge Harrowby and LDC Yorkton (Ms. Sanderson Slides at pp 74-75). Ms. Sanderson based her HMT results on the same diversion ratios as Dr. Miller and on the weighted average price changes for the Moosomin and Virden Elevators (as calculated by Dr. Miller), but she used the wheat prices prevailing at the Virden Elevator as the reference price to calculate her relative price decreases. Ms. Sanderson indicated in her testimony that she used the Virden prices because Virden was the Elevator from which Dr. Miller had calculated the margin he used in his economic model (Consolidated Transcript, Confidential A, at p 1782).

[385] In addition to her HMT recalculations, Ms. Sanderson studied the evidence in the transaction data and witness testimonies to provide an opinion on the relevant geographic market based on the number of competing buyers (Elevators and Crushers) P&H faced in purchasing wheat or canola, farms' switching alternatives amongst the Elevators and Crushers, and the distance farms were prepared to travel to sell their products.

[386] Ms. Sanderson prepared “draw area” maps for the Elevators in Southeastern Saskatchewan and Southwestern Manitoba, and so-called “heat maps” derived from the overlapping draw areas. The draw areas for the Moosomin and Virden Elevators substantially overlapped.

[387] Ms. Sanderson also studied the Farmer Region identified by Dr. Miller as well as the “corridor of concern” identified by the Commissioner prior to the commencement of this proceeding. As described by Ms. Sanderson, the corridor of concern was a geographic polygon focused on approximately 80 farms located between the Virden and Moosomin Elevators on either side of the Trans-Canada Highway. (By definition, the “corridor of concern” included farms within a one-hour driving distance from both Elevators using commercial trucking roads. It included two small non-contiguous areas south of the main polygon.) The Moosomin and Virden Elevators’ draw areas both covered this “corridor of concern.”

[388] Ms. Sanderson observed that given the range of options available to farms for the sale of their crops, the Cash Prices set by P&H to purchase wheat and canola must be competitive with the Cash Prices set by numerous Elevators operated by many competitors, because they are all buying from the same farms.

[389] Ms. Sanderson also referred to internal documents of P&H and LDC. Ms. Sanderson’s report noted that P&H and its customer service representatives at the Moosomin Elevator referred to and tracked prices of more than a dozen other Elevators and Crushers, in addition to the Virden Elevator. LDC’s documents also showed that the Virden Elevator competed with almost a dozen other competitor purchase locations in addition to the Moosomin and Fairlight Elevators. Ms. Sanderson made specific reference to Elevators and Crushers identified by P&H before the Virden Acquisition in its fiscal 2019 and fiscal 2020 business plans for the Moosomin Elevator.

[390] Ms. Sanderson concluded that the transaction data, testimonies and documentary evidence demonstrated that there was a large set of relevant competing Elevators buying as much or more volume than the Moosomin or Virden Elevators from farms within Dr. Miller’s Farmer Region, that the geographic market had many participants, and that P&H had a small share of that market.

[391] In his reply expert report, Dr. Miller addressed the geographic market analysis of Ms. Sanderson. He testified that farms in the towns close to the Moosomin, Virden, and Fairlight Elevators were particularly likely to rely on those Elevators for the sale of their grain. Dr. Miller concluded that the desirability of travelling to a particular Elevator differs for farms located at different points within each Elevator’s draw area. Looking at the percentage of MT sold and the quantity sold on a town-by-town basis, Dr. Miller found that farms close to the centre of the geographic area served by the three Elevators had a “distinct preference” for working with the Moosomin, Virden, and Fairlight Elevators. He also found that while it was rare for a farm located directly between the Moosomin and Virden Elevators to choose a more distant Elevator, the frequency increases for farms farther from this centralized location — both for wheat and for canola, including Crushers.

[392] During the experts’ concurrent evidence session at the hearing, Ms. Sanderson agreed that distance matters to an individual farm and that farms preferred to sell closer and to travel a shorter distance to sell their wheat and canola. She also agreed that the transaction data, supported by the testimony of the farmer witnesses, were helpful in understanding what makes an Elevator attractive

to a farm for the sale of wheat or canola. Dr. Miller and Ms. Sanderson agreed that the diversion ratios summarized the information about farmers' sale behaviour in relation to the Elevators available and the relative distance to be travelled for delivery.

[393] As mentioned above, at the hearing and in response to Ms. Sanderson's recalculation of his HMT analysis using the Cash Price, Dr. Miller also testified that the geographic area around the Virden, Moosomin, Fairlight, and Whitewood Elevators could serve as the geographic dimension of a competition market for the "cash sale of wheat." In response, Ms. Sanderson observed that her analysis of the purchases from farms within Dr. Miller's Farmer Region concluded that several other Elevators had higher wheat purchases than the Whitewood Elevator from the farms in that Farmer Region, and that two other Elevators (in addition to Whitewood) were located within it. Ms. Sanderson testified that an application of the HMT in Dr. Miller's alternative geographic market would engage a larger set of Elevators than just the Moosomin, Virden, and Fairlight Elevators, but that the question was how many more.

[394] Both experts agreed that neither the Moosomin nor the Virden Elevator have any special or unusual competitive significance in the marketplace.

(3) Tribunal's assessment

[395] After considering all the evidence in this case, the Tribunal is able to describe the geographic dimension of the relevant competition markets based on the factual and expert evidence.

[396] Although Dr. Miller's proposed product market (i.e., the delivery of GHS to farms by Elevators and Crushers) has not been accepted by the Tribunal, the panel nonetheless found his geographic market analysis to be helpful and persuasive in understanding certain aspects of the behaviour of farms in selecting an Elevator or Crusher to sell their grain. The panel also found Ms. Sanderson's evidence useful, including her recalculation of Dr. Miller's HMT analysis on the basis of the Cash Price, and incorporated it into its assessment.

[397] In addition to the evidence on the HMT analyses conducted by the two experts, the Tribunal also assessed a number of factors in determining the geographic scope of the relevant competition markets. The salient evidence concerned the purchases of wheat and canola by the Moosomin and Virden Elevators and other Elevators and Crushers in the area, and the corresponding selling behaviour of farms. It included the following: the experts' analysis of transaction data in relation to the purchase and sale of wheat and canola to those Elevators and Crushers, and the oral testimony of the farmer witnesses; the evidence related to the distance that must be travelled to deliver grain to an Elevator or Crusher (and relatedly, the transportation costs and time it takes to travel that distance) and the volume and frequency of those purchases by Elevators from farms; expert evidence as to draw areas, heat maps, and diversion ratios; evidence as to prices paid to farms at the Elevators, including price-setting and prices that are negotiated and therefore depart from the Cash Price or Basis offered for each Elevator; and internal documents from the merging parties suggesting the perceived scope of the geographic market, including communications with farms about the purchase of their crops.

[398] In the result, the Tribunal's analysis of the geographic dimension of the competition markets is not restricted to the geographic area identified in Dr. Miller's analysis. However, the Tribunal does not agree with the much wider region initially advocated by P&H and described in Ms. Sanderson's testimony (*i.e.*, Southeastern Saskatchewan and Southwestern Manitoba). Like certain aspects of both Dr. Miller's and Ms. Sanderson's analyses, the Tribunal finds that the geographic area relevant to a competition analysis for wheat is different from the relevant geographic area for canola.

[399] The Tribunal concludes that, in general, Elevators that are closer to a farmer's crop are more attractive to farms for the purchase of their wheat. Considering in particular the farmers' testimonies concerning their selection of purchaser Elevators and the role of transportation costs, the setting and negotiation of prices, and the expert evidence, the Tribunal finds that the key competitors to the Moosomin and Virden Elevators are rival Elevators nearby to them, particularly the Fairlight Elevator. By contrast, Elevators that are farther away are not part of the relevant geographic market for competition purposes. Although more distant Elevators may purchase some quantity of grain and may provide some degree of competitive discipline on the Cash Price (including specifically, on the Basis) offered to farms by the Moosomin and Virden Elevators, that does not necessarily lead to the conclusion that those Elevators are all within the relevant competition market.

(a) HMT analyses

[400] Three different HMT analyses have been presented to the Tribunal by Dr. Miller and Ms. Sanderson.

[401] Dr. Miller's initial HMT analysis, summarized at Exhibit 9 of his expert report, concluded that the Moosomin, Virden, and Fairlight Elevators formed a relevant geographic competition market where a hypothetical monopolist would find it profitable to impose a SSNIP on the price of GHS. For GHS for wheat, Dr. Miller's model predicted that a hypothetical monopolist could impose an increase of 26.0% on the constructed pre-Acquisition price for GHS for wheat at the Moosomin Elevator, and of 21.6% on the price for GHS for wheat at Virden. With respect to GHS for canola including Crushers, Dr. Miller's predicted price increase of a hypothetical monopolist was 22.2% at the Moosomin Elevator and 7.6% at the Virden Elevator. In each case, Dr. Miller compared his projected price increase to his computed price for GHS prevailing at each of the Moosomin and Virden Elevators. Since all of his projected price increases clearly exceeded the typical 5% SSNIP threshold — they ranged from 7.6% to 26.0% —, Dr. Miller arguably did not have to calculate weighted average reference prices for GHS for wheat or canola, or weighted average price increases representing the combined average price increase for the Moosomin and Virden Elevators (which, in the Tribunal's view, would be a more accurate basis for price change analysis under the HMT framework).

[402] Given the Tribunal's finding on the relevant product market, and its conclusion that the relevant products are the purchase of wheat and canola and that the relevant base prices are the Cash Prices of wheat and canola paid to the farms by P&H, the Tribunal cannot entirely retain Dr. Miller's initial HMT analysis: his projected price increases, expressed in terms of percentages, are based on the wrong base price, namely, the computed prices for GHS for wheat and canola.

[403] The second HMT analysis is the recalculation of Dr. Miller's model done by Ms. Sanderson as part of her presentation at the hearing (Ms. Sanderson Slides at pp 72–75). This recalculation replicated Dr. Miller's model, including the diversion ratios and the Virden Elevator margin calculated by Dr. Miller, but determined the relative values of the projected price changes based on a different denominator, namely, the Cash Prices instead of the constructed prices for GHS. The Tribunal observes that both experts agree on the absolute figures of the predicted price variations for each of wheat and canola (expressed in dollars per MT) coming from Dr. Miller's HMT analysis (Consolidated Transcript, Confidential A, at p 1795).

[404] Ms. Sanderson's revised HMT analysis used the same absolute price changes as those calculated by Dr. Miller but resulted in different relative price variations in light of the different denominator she used. Ms. Sanderson's recalculation concluded that a hypothetical monopsonist controlling each of the Moosomin, Virden, and Fairlight Elevators could impose a price change of only 3.9% on the pre-Acquisition Cash Price for wheat at the Moosomin Elevator (*i.e.*, CAD \$9.03 on CAD \$229.73 per MT), and of 2.5% on the Cash Price for wheat at the Virden Elevator (*i.e.*, CAD \$5.88 on CAD \$239.11 per MT) (Ms. Sanderson Slides at p 72; Ms. Sanderson Report at Figure 49). As the price variations would be in the purchase of grain, these would be price decreases. With respect to canola including Crushers, Ms. Sanderson's predicted price decrease was 0.6% on the pre-Acquisition Cash Price at the Moosomin Elevator (*i.e.*, CAD \$2.76 on CAD \$461.46 per MT), and 0.3% to the Cash Price at the Virden Elevator (*i.e.*, CAD \$1.51 on CAD \$452.80 per MT). None of the resulting price decreases exceeded the usual 5% SSNIP or SSNDP threshold, which led Ms. Sanderson to conclude that, based on her revised HMT analysis using Cash Prices, the relevant geographic market had to be larger than the Moosomin, Virden, and Fairlight Elevators.

[405] In her presentation at the hearing, Ms. Sanderson provided results for more Elevators than in Dr. Miller's HMT analysis, using the Cash Prices (Ms. Sanderson Slides at pp 74–75). She concluded that, when the Cash Price is used as the denominator, a market made up of the Moosomin, Virden, Fairlight, Oakner, Whitewood, Elva, Shoal Lake, and Carnduff Elevators would be a relevant geographic competition market for the purchase of wheat. The relevant geographic market for the purchase of canola would be larger and would include the Moosomin, Virden, Fairlight, Oakner, Whitewood, Brandon (Richardson), Melville, Souris East, Shoal Lake, and Elva Elevators as well as the Crushers at Harrowby (Bunge), Yorkton (LDC), Velva (ADM), and Yorkton (Richardson). Ms. Sanderson based her HMT results on the same diversion ratios as Dr. Miller and on the weighted average absolute price changes for each of wheat and canola. In terms of average relative price changes, she expressed the price variations as a percentage of the weighted average wheat and canola prices calculated for the Virden Elevator (*i.e.*, CAD \$239.11 per MT and CAD \$452.80 per MT, respectively).

[406] The third iteration of the HMT analyses prepared by the experts is Dr. Miller's response to Ms. Sanderson's recalculation, presented at the concurrent evidence session and summarized in Dr. Miller Revised HMT. This Revised HMT analysis only looked at the geographic market for the purchase of wheat, and did not consider canola. Since the HMT framework dictates that additional candidates for market definition purposes must be ordered by their diversion ratios, Dr. Miller determined that, for wheat, the next closest competitor Elevator to the Moosomin and Virden Elevators (other than the Fairlight Elevator) was the Whitewood Elevator. Dr. Miller testified that, based on his analysis, the diversion ratios for wheat were higher at the Whitewood

Elevator than at the Oakner Elevator, when these ratios are weighted by sales from the Virden and Moosomin Elevators, or weighted by sales from the Virden, Moosomin, and Fairlight Elevators. Dr. Miller concluded that, even using the Cash Price as a denominator in his Revised HMT analysis, the relevant geographic market for wheat would be a smaller market comprising only the Moosomin, Virden, Fairlight, and Whitewood Elevators, as such relevant market would reach the 5% SSNIP threshold.

[407] The Tribunal pauses to note that Dr. Miller did not discard the recalculated HMT analysis made by Ms. Sanderson based on his data, model, and framework but using the Cash Prices — as opposed to his constructed price for GHS — as a denominator. On the contrary, in his Revised HMT analysis, Dr. Miller simply redid Ms. Sanderson’s recalculation by looking at additional Elevators using their respective weighted averaged diversion ratios (Consolidated Transcript, Confidential A, at pp 1787 ff). He also used a different “reference price” as the basis to calculate the relative price changes he observed: instead of solely using the prevailing pre-Acquisition price for wheat at the Virden Elevator as Ms. Sanderson did, he developed the weighted average HMT price change relative to the pre-Acquisition price for each of the Moosomin Elevator (CAD \$229.73 per MT) and the Virden Elevator (CAD \$239.11 per MT). He then selected the Moosomin Elevator price change and this led him to conclude that a geographic market comprised of the Moosomin, Virden, Fairlight, and Whitewood Elevators would meet the 5% SSNIP threshold, since his relative price change based on the lower Moosomin Elevator price was 5.06%. Dr. Miller’s table reproduced in his Revised HMT analysis indicates that, had he used the higher prevailing wheat price at the Virden Elevator, the relative price change would have been 4.86% and would thus have been below the 5% SSNIP threshold.

[408] It thus appears that the two experts disagree on the “reference price” to use for the calculation of the relative HMT price variations: Dr. Miller relied on the lower Moosomin Elevator price in his Revised HMT analysis, whereas Ms. Sanderson used the higher Virden Elevator price in her recalculation. Neither Dr. Miller nor Ms. Sanderson apparently considered using a weighted average of the Moosomin and Virden Elevators prices, which would be a more accurate base for price change analysis under the HMT framework. This is especially true in a case like the present one, where the results of adding candidate markets in the HMT analysis are each very close to the 5% benchmark. The purpose of the HMT analytical framework is to assess how a “hypothetical monopolist” (or “hypothetical monopsonist”) controlling a hypothetical group of entities would behave; as such, the proper relevant “reference price” of a product has to be the weighted average price of all entities controlled by such hypothetical monopolist or monopsonist that are supplying or purchasing the product. The Tribunal notes that in this particular case, changing the “reference price” has a direct impact on the conclusions to be drawn from the HMT analyses based on the Cash Price, as it significantly modifies the group of Elevators needed to meet the 5% SSNIP/SSNDP threshold. The Tribunal further observes that, even though Dr. Miller opted to calculate a weighted average of the Moosomin and Virden Elevators to determine the appropriate diversion ratios to the rival Elevators and used weighted average dollar price changes in his Revised HMT analysis, he relied solely on the lower Moosomin price for wheat as a denominator to determine his estimated price variations. During the concurrent evidence session, Dr. Miller provided no explanation for not also using a weighted average reference price in his calculations.

[409] At the hearing, Dr. Miller relied on his reading of paragraph 4.4 of the 2011 MEGs to state that the HMT is satisfied “if any price of the merging firms goes up by five per cent” (Consolidated

Transcript, Confidential A, at p 1784). With respect, the Tribunal does not agree with Dr. Miller's interpretation of the MEGs. What the 2011 MEGs say is that the HMT is met when "the price increase of at least one product of the merging parties" [emphasis added] exceeds the SSNIP threshold (2011 MEGs at para 4.4). It does not say the price of a product of one of the merging firms. Here, all the Elevators purchase the same product, namely, wheat or canola. And what the Tribunal needs to assess is the predicted price variation for wheat or canola for the selected Elevators acting as a hypothetical monopolist. In the Tribunal's view, this has to be measured in relation to the weighted average price variation of wheat and canola for all Elevators involved — not to the price of just one of the merging firms.

[410] The Tribunal has not found in the evidence what the weighted pre-Acquisition average price for wheat would be for the Moosomin and Virden Elevators taken together, or for any larger group of Elevators. However, the Tribunal underlines that the simple arithmetical average between the weighted average base price for wheat at the Moosomin and Virden Elevators would be CAD \$234.42 per MT (*i.e.*, $(\$229.73 + \$239.11) \div 2$). Moreover, since the evidence indicates that, pre-Acquisition, the Virden Elevator handled relatively more wheat than the Moosomin Elevator (see, for example, Ms. Sanderson Report at Figure 62 and Consolidated Transcript, Confidential A, at p 1789), it is a mathematical certainty that the weighed average price for wheat for the Moosomin and Virden Elevators would be higher than the straight arithmetical average mentioned above, since the Virden Elevator has both the higher weighted average price and the higher volume quantity. Had Dr. Miller used a weighted pre-Acquisition average price for wheat, or even the more conservative arithmetical average of CAD \$234.42 per MT, in his Revised HMT analysis, it is clear from his evidence that the results of his Revised HMT analysis for wheat using the Cash Prices would have concluded that even a geographic market made up of the Moosomin, Virden, Fairlight, Whitewood, and Oakner Elevators would not be large enough to satisfy the 5% SSNIP/SSNDP threshold: using the more conservative arithmetical average, the predicted price changes would not have exceeded 4.96% in a geographic market including the Whitewood Elevator, and 4.90% in a market including both the Whitewood and Oakner Elevators.

[411] Turning to Ms. Sanderson's HMT analysis, had she used a weighted pre-Acquisition average price for wheat as a "reference price," instead of the higher Virden Elevator price, the results of her recalculated HMT analysis for wheat using the Cash Prices would have yielded slightly higher relative changes. For example, for the group of seven Elevators ending with the Shoal Lake Elevator, her estimated price change of 4.86% would have been 4.96% (*i.e.* CAD \$11.63 / CAD \$234.42) and suggest that the 5% SSNIP/SSNDP threshold would have been close to be met with one less Elevator (*i.e.*, without the need of adding the Carnduff Elevator).

[412] The Tribunal is mindful of the fact that Dr. Miller's (and Ms. Sanderson's) calculations twirl around the 5% threshold as soon as four or five Elevators are included in the geographic competition market for wheat, and that there are margins of error in these calculations.

[413] In light of the foregoing, based on the evidence before it regarding the HMT analyses using the Cash Prices, and considering possible margins of error regarding the median of the Basis, the Tribunal concludes that a geographic market for wheat including only the Moosomin, Virden, Fairlight, and Whitewood Elevators, or even those four Elevators plus the Oakner Elevator, has not been established on the evidence. In sum, in his HMT analyses, the Commissioner has not adduced clear and convincing evidence that the relevant geographic market for wheat could be

limited to those four or five Elevators. Thus, further to its review of the HMT analyses, the Tribunal is of the view that, on a balance of probabilities, the relevant geographic market for wheat is more likely than not to include at least the following Elevators listed in Ms. Sanderson's recalculated HMT analysis: the Moosomin, Virden, Fairlight, Oakner, Whitewood, Elva, and Shoal Lake Elevators. The Tribunal says "at least" because determining whether the Carnduff Elevator identified by Ms. Sanderson should also be included in the relevant geographic market is too close to call in light of the above discussion on the weighted pre-Acquisition average price for wheat.

[414] In the competition market for the purchase of canola, the Tribunal accepts that Crushers play a more significant role in the competitive process and reduce the likelihood that the Moosomin and Virden Elevators, acting as a hypothetical monopsonist, could impose a SSNDP in the purchase of canola. The evidence suggests that Crushers are able to attract some canola purchases from a longer distance than Elevators and that some canola deliveries to Crushers by-pass Elevators that are closer in distance to a farm. A Crusher may therefore have greater competitive impact on the merged entity's prices and limit its ability to impose a SSNDP than would have an Elevator that buys canola. Furthermore, the Tribunal notes that in the concurrent evidence session, Dr. Miller did not respond to Ms. Sanderson's recalculation HMT analysis for canola using the Cash Prices, found at page 75 of Ms. Sanderson Slides. In her analysis, Ms. Sanderson concluded that the relevant geographic market for the purchase of canola would include at least the Moosomin, Virden, Fairlight, Oakner, Whitewood, Brandon (Richardson), Melville, Souris East, Shoal Lake, and Elva Elevators as well as the Crushers at Harrowby (Bunge), Yorkton (LDC), Verva (ADM), and Yorkton (Richardson). Even for this larger group of Elevators and Crushers, Ms. Sanderson's predicted price decrease of a hypothetical monopsonist would only be 3.08% (*i.e.*, a weighted average price change of CAD \$13.94 per MT on the pre-Acquisition price of CAD \$452.80 at the Virden Elevator), significantly below the usual 5% threshold for market definition purposes. Here, the pre-Acquisition price for canola at the Moosomin Elevator (*i.e.*, CAD \$461.46) is higher than at Virden, and Virden's purchases of canola are much higher than Moosomin's (Ms. Sanderson Report at Figure 62). In light of the foregoing, and based on the evidence before it regarding the HMT analyses using the Cash Prices, the Tribunal concludes that, on a balance of probabilities, the relevant geographic market for canola is more likely than not to include at least all the Elevators and Crushers listed in Ms. Sanderson's recalculated HMT analysis. Again, the Tribunal says "at least" because Ms. Sanderson's HMT analysis stopped at a 3.08% SSNIP level, and it is uncertain how many other Elevators and/or Crushers would need to be added to reach the typical 5% SSNIP threshold.

(b) Distance, transportation costs, and farms' preferences

[415] Turning to other factors, the Tribunal accepts that most farms deliver grain to Elevators located less than 100 kilometers from the location of their crops. Like both Dr. Miller and Ms. Sanderson, the Tribunal finds that farms prefer to travel shorter distances to sell their grain. Most of the volume of grain purchased by the Moosomin and Virden Elevators comes from farms located in proximity to them. The Tribunal also finds, based on Ms. Sanderson's data, that in the "corridor of concern," a significant number of farms sell their wheat exclusively or substantially to the Moosomin, Virden, and Fairlight Elevators.

[416] At the hearing, several farmers testified about the sales of their grain to Elevators and Crushers. In general, they expressed a preference to sell to Elevators closer to their farms unless a more distant Elevator or Crusher made it worthwhile financially to travel the extra distance. The three farmers called to testify by the Commissioner generally stated their preference to sell most of their grain to the Virden and Moosomin Elevators, and sometimes to the Fairlight Elevator, rather than to more distant Elevators and Crushers. In several cases, the witnesses acknowledged in cross-examination that they have also delivered some proportion of their wheat and canola crops to purchasers more distant than the Moosomin, Virden, and Fairlight Elevators. When selling canola to Crushers, their canola crops would also travel past a number of possible Elevators to which they could have sold while en route to a Crusher location.

[417] When selecting an Elevator or Crusher for a shipment of their grain, the farmers' principal considerations were price, timing (*i.e.*, when grain could be accepted by the Elevator), the grade of the grain to be sold, and the travel distance to the purchase point. Additional factors included the farmers' business relationship with each Elevator, each farmer's ability to store grain at their own farm, road conditions including restrictions on the use of some highways in the springtime, and whether an Elevator was located on a main or a secondary highway (which affects the number of trips, speed of the truck en route, and the wear and tear on the vehicle).

[418] The testifying farmers called by the Commissioner and P&H generally indicated that a higher price is necessary to cause them to sell to a more distant location — to make it worthwhile to travel the extra distance to deliver the crop. Mr. Lincoln advised that his transportation cost was approximately CAD \$8 per MT, with each additional 15 minutes drive costing CAD \$1 per MT. Mr. Paull testified that he would not leave a local Elevator for a few pennies per bushel, but would do so for CAD \$0.10, \$0.15 or \$0.20 per bushel. Sometimes, he could even get CAD \$0.30 or \$0.40 more per bushel to go a longer distance. He would sell to a more distant Elevator if there was “enough profit” in it. Mr. Wagstaff testified that his decision to do so also depended on his own time and the efficiency of deliveries. From his farm, he could deliver four loads per day with his own trailer to the Virden Elevator, but could only make one trip per day to the Crusher located in Bloom, Manitoba, which is much farther away from his farm. Mr. Duncan, Mr. Paull, and Mr. Hebert all testified that Crushers made it financially worthwhile to sell canola at a longer distance away from their respective farms.

[419] The Tribunal found Dr. Miller's evidence concerning farms' behaviour in selecting a purchaser to be helpful in assessing the geographic dimension of the markets for the purchase of wheat and canola by Elevators and Crushers. Dr. Miller's analysis found that farms select an Elevator for the sale of their grain based on proximity to the farm, because it decreases delivery costs and because they may have a relationship with personnel responsible for the Elevator. The farms' travel time and cost to deliver the grain to the purchase point were important factors in the choice, together with price. Farms incur delivery costs by crop weight and by kilometre, whether they deliver themselves or hire commercial trucks to do so.

[420] Dr. Miller's analysis considered travel distance and time between Elevators and from farms to the Moosomin and Virden Elevators, to identify close competitors to the merged entity. He used data collected from the merging parties and several other grain companies comprising over 20 Elevators, as well as census data and other source data. Dr. Miller found that the Fairlight Elevator was the most proximate competitor to the Moosomin and Virden Elevators.

[421] Dr. Miller also calculated the range of travel time for the delivery of each of wheat and canola, representing a percentage of deliveries. In general, the range of travel time for 50% of deliveries was longer for canola than for wheat. Based on travel distance and time, and weighted by quantity of grain sold, Dr. Miller analysed the range of time taken by 90% of farms to travel to each of the Moosomin, Virden, and Fairlight Elevators, all other Elevators, and Crushers. Dr. Miller's analysis showed that the median, representing 50% of farms, was approximately half an hour drive time for both wheat and canola. Dr. Miller's analysis also showed that 90% of farms travelled from four to 79 minutes to deliver wheat to all chosen Elevators in the model and from four to 75 minutes to deliver canola to Elevators. The time range to canola Crushers increased to 44 minutes up to a maximum of 147 minutes. Recognizing that this analysis occurred over one crop year, the Tribunal accepts Dr. Miller's evidence to show that close proximity of a delivery point is important to farms when selling wheat and canola.

(c) Draw areas and heat maps

[422] As noted, both Dr. Miller and Ms. Sanderson used draw areas (or service areas) for Elevators in their analyses. Both indicated that Elevators and Crushers draw the grain they purchase from areas surrounding them, creating a geographic cluster of supplier farms.

[423] Dr. Miller's review found that proximity was an important factor in the farms' choice of an Elevator for the sale of their grain. He also noted that some Crushers attract supply from greater distances than Elevators. He found, for example, that the median farm selling to the Moosomin Elevator is just five kilometers from its location and the median farm selling to the Virden Elevator is about 20 kilometers from it, whereas the median farm selling to the Yorkton Crusher is over 100 kilometers away from it. To Dr. Miller, this suggested that farms might be more willing to travel farther distances to sell to Crushers.

[424] Ms. Sanderson's draw area maps displayed the geographic area for 95% of an Elevator's purchases from farms, using the address of each farm. In these maps, the draw areas for the Moosomin and Virden Elevators could be compared to the draw areas for other Elevators and for Crushers that could be competitors for a farm's sales. In this way, Ms. Sanderson's analysis could indicate the number of farms that switch between buyers and the distance travelled to deliver their crops.

[425] Ms. Sanderson's expert report found that for the crop year 2018-2019, the Moosomin Elevator purchased canola from [REDACTED] farms and the Virden Elevator purchased from [REDACTED] farms. The Moosomin Elevator drew [REDACTED] of its canola from a distance as far as [REDACTED] kilometers while the Virden Elevator drew [REDACTED] of its canola from farms located as far as [REDACTED] kilometers. Both were based on commercial trucking travelling those distances. As for wheat, the draw area for the Moosomin Elevator included [REDACTED] farms, while the draw area for the Virden Elevator comprised [REDACTED] farms. The Moosomin Elevator drew [REDACTED] of its wheat from a distance as far as [REDACTED] kilometers while the Virden Elevator drew [REDACTED] of its wheat from farms located as far as [REDACTED] kilometers.

[426] Ms. Sanderson found that approximately two-thirds of the farms closest to the Moosomin and Virden Elevators (*i.e.*, in the "corridor of concern") sold crops to other rival Elevators and Crushers. Only four farms sold exclusively to the Moosomin and Virden Elevators in the last three crop years combined. Seven farms sold only to the Moosomin Elevator, while 17 farms sold only

to the Virden Elevator. In addition, farms in the corridor of concern sold to more distant Elevators and Crushers. Ms. Sanderson's written testimony included details for each of the 82 farms within the corridor of concern for both canola and wheat. Ms. Sanderson noted significant deliveries from those farms to Elevators and Crushers outside of Dr. Miller's proposed geographic market.

[427] Ms. Sanderson prepared heat maps by overlapping all of the draw area maps cumulatively. The heat maps showed areas in darker colours where a higher number of Elevators and Crushers buy grain. Ms. Sanderson concluded that all farm locations within the draw areas for the Moosomin and Virden Elevators had more than six Elevators/Crushers bidding for their wheat and for their canola.

[428] Dr. Miller observed in his reply expert report that Ms. Sanderson's use of overlapping draw areas did not present any evident consideration of what factors affect a farm's choice of Elevator or, most importantly, how the farms would likely respond to a price change. Dr. Miller agreed with Ms. Sanderson that some farms scattered throughout the geographic region may elect to work with a more distant Elevator. Dr. Miller observed, however, that the overlap analysis masked that the desirability of travelling to a particular Elevator will differ for farms located at different points. In Dr. Miller's view, Ms. Sanderson's draw area maps assumed that every farm customer inside the boundary of the Elevator's draw area is equally willing to choose that Elevator, which does not address the question posed by geographic market definition, *i.e.*, where those farms would likely turn in reaction to a price increase.

[429] Specifically, Ms. Sanderson submits that what she referred to as "heat maps" provide a count of farms and their locations supplying canola and wheat to Elevators within the overlapping draw areas. However, the Tribunal observes that the overlapping draw areas do not incorporate the volume density supplied, frequency, and the respective geographic locations of those volumes. Such presentation does not assist the Tribunal in visually understanding the concentration of grain supply and corresponding distance to each Elevator as provided by the transaction data.

[430] The Tribunal recognizes that overlapping draw area maps may be useful in initially identifying the possible range of geographic scope of one or more candidate competition markets. They also may identify suppliers or customers who could be affected by a proposed transaction. However, they may be of less help in more precisely defining the scope of the relevant geographic competition market, unless they are coupled with evidence about the reaction of affected suppliers or customers to a change in price or another dimension of competition.

[431] In this case, the panel agrees with Dr. Miller's concerns that the draw area maps and heat maps have less value on their own, insofar as they treat farms at different distances from an Elevator as likely to react the same way to a change in price. Draw area maps and heat maps may, together, suggest that farms have more ability to switch in the overlapping areas but must be taken as a non-definitive factor in the assessment of a geographic area for competition purposes. In this case, Ms. Sanderson's draw area maps, on their face, give equal weight to each farm having sold grain to an Elevator regardless of frequency of sales and volumes sold. In sum, the heat maps provided additional information but, on their own, they are of limited assistance because they do not account for volume and the location of the farms from which those volumes are drawn. Both must be weighed with the evidence concerning farms' behaviour, including from the farmers'

testimonies, the diversion ratio evidence, and other data and information as to preferences and switching.

[432] On this issue, the Tribunal finds Dr. Miller’s observations in his reply expert report to be compelling. Dr. Miller analyzed the percentage of MT of wheat and canola sold to the Moosomin, Virden, and Fairlight Elevators by town. The analysis showed that a farm close to an Elevator is more likely to rely on that Elevator and that more distant farms are less likely to do so. He found that farms close to the centre of the area around the Moosomin, Virden, and Fairlight Elevators had a distinct preference to work with those Elevators. This analysis is consistent with the testimonies of farmers. It also provides some more nuanced insight to assist in understanding the likely behaviour of customers in response to a price change — specifically, whether they are likely to switch Elevators.

[433] The Tribunal further finds that farms, as sellers of grain to Elevators, are less likely to switch to more distant rivals if the farm is near the centre of the geographic market, and more likely to switch as the location moves away from the centre and, the Tribunal infers, away from each of the Moosomin, Virden, and Fairlight Elevators. Consistent with this conclusion and with Dr. Miller’s report, the Tribunal finds that the closer farms are to the Moosomin and Virden Elevators, the more volumes they sell to those Elevators. Conversely, farms located farther away are delivering less to these two Elevators and more to other Elevators.

[434] The Tribunal has considered the “corridor of concern.” Ms. Sanderson’s analysis of the deliveries of wheat and canola from those farms to the Moosomin and Virden Elevators over three crop years showed that many farms sell all, or a very substantial proportion, of those crops to the Moosomin and Virden Elevators. In her report, Ms. Sanderson noted that 54 of the 82 farms in the “corridor of concern” (*i.e.*, about two-thirds) sold wheat or canola to Elevators or Crushers that compete with the Moosomin and Virden Elevators at different points in the three successive crop years used in her analysis (Ms. Sanderson Report at Figures 19–21). She also noted that farms located in proximity adopted different approaches during that period (*i.e.*, decide to sell at least once to a rival, or not). The Tribunal finds this analysis to be highly sensitive to change — a single sale (above the minimum volume Ms. Sanderson used) of either wheat or grain to a rival over the three crop years would change the classification of a farm. Ms. Sanderson’s observation also implies that a substantial number of the farms in the corridor of concern (*i.e.*, 28 of 82, or a third) did not sell to a rival and therefore sold their wheat and canola only to the Moosomin or Virden Elevators (or to both) over three successive crop years. Ms. Sanderson also noted that the Fairlight Elevator is frequently listed as a purchaser from the corridor farms.

[435] As the Commissioner observed during final argument, Ms. Sanderson’s data effectively showed that 75% of the farms in the corridor of concern (*i.e.*, 60 farms out of 80⁷) sold all of their wheat exclusively to the Moosomin, Virden, and Fairlight Elevators in any given year. For canola, the corresponding percentage was 55% of the farms selling canola only to those Elevators. The Tribunal notes that for the vast majority of the farms in the corridor, the Whitewood Elevator was not a purchaser over that time period. Finally, for canola, the corridor farms taken as a group sometimes sold to Crushers (*e.g.*, to Bunge at Harrowby).

⁷ In the corridor of concern, a total of 80 farms sold wheat, 77 farms sold canola, and 82 farms sold either wheat or canola.

[436] There are some examples of switching behaviour by farms in the corridor of concern, through the sale of wheat or canola to Elevators or Crushers other than the Moosomin, Virden, and Fairlight Elevators. However, the weight of the evidence is that these farms rely acutely on the Moosomin and Virden Elevators, as well as the Fairlight Elevator, for the sale of their grain, particularly wheat.

(d) Diversion ratios

[437] Both Dr. Miller and Ms. Sanderson provided diversion ratio calculations. Diversion ratios are calculated to estimate the proportion of a competitor's customers lost to one or more rivals if that competitor raises its price. Higher diversion ratios imply more substitution between two competitors. That is, in a HMT analysis, if competitor A raises its price for the supply of a product, the diversion ratios calculation shows the resulting switching (*i.e.*, diversion) of customers to the product offered by competitors B, C, and D. Diversion ratios are expressed as a percentage, namely, the proportion of customers diverted to the products of each of competitors B, C, and D, as a percentage of the overall number of diverted customers. The same type of calculation may be done for diversions caused by a monopsonist that lowers its price.

[438] Diversion ratios assist in the assessment of how close two or more competitors may be. As part of a larger model, diversion and information about profit margins may be used to understand the dollar value of diverted sales and specifically, the dollar value of customer purchases that may be recaptured by a merged entity (for example, after the merger of competitors A and B in the example above). The results assist to understand the incentive of a merged entity to raise prices and the predicted price effects of a proposed merger (2011 MEGs at para 6.15).

[439] Dr. Miller's estimated diversion ratios indicated that many farms viewed the Moosomin and Virden Elevators as substitutes. For wheat, Dr. Miller calculated the diversion ratios from the Moosomin Elevator to the Virden Elevator to be 23.8%, and 16.8% from Virden to Moosomin. In Dr. Miller's view, the diversion ratios for wheat between the Moosomin and Virden Elevators indicated that they were "relatively close competitors" (Dr. Miller Report at para 114 and Exhibit 11). For canola, the diversion ratios between the Moosomin and Virden Elevators were smaller, at 13.1% and 5.3% respectively. However, the Fairlight Elevator had large diversion ratios with both Elevators, suggesting to Dr. Miller that there was likely indirect competition between the Moosomin and Virden Elevators, through the Fairlight Elevator, for both wheat and canola.

[440] Ms. Sanderson also presented diversion ratios. Methodologically, Ms. Sanderson reran diversion ratios using the formulas in Dr. Miller's expert report based on farm data within the union of the 90% service areas for the Moosomin, Virden, and Fairlight Elevators.

[441] In that context, Ms. Sanderson did not dispute Dr. Miller's estimates of the diversion from the Moosomin Elevator to the Virden Elevator for each of wheat, canola including Crushers, and canola excluding Crushers, and the diversion from Virden to Moosomin in the same categories. Ms. Sanderson also presented diversion ratios from each of the Moosomin, Virden, and Fairlight Elevators to many other Elevators and Crushers, in several figures attached to her expert report (Ms. Sanderson Report at Figures 47, 48, 50).

[442] The Tribunal finds that Ms. Sanderson's diversion ratios indicated, generally, that the Moosomin, Virden, and Fairlight Elevators were relatively close competitors, more so for wheat than for canola. As Ms. Sanderson observed in her expert report, there were smaller diversion ratios for canola from the Virden Elevator to the Moosomin Elevator than from Virden to several other Elevators and Crushers. The same was true for the canola diversion ratios from the Moosomin Elevator to the Virden Elevator. Ms. Sanderson's diversion ratios to rival Elevators beyond the Moosomin, Virden, and Fairlight Elevators also showed, as she testified, that estimated diversions from both the Moosomin Elevator and the Virden Elevator to all other rivals (in the aggregate) were high for both wheat and canola. For wheat, the diversion ratios found by Dr. Miller were 23.8% from the Moosomin Elevator to the Virden Elevator, and 36.3% to the Fairlight Elevator, for a total of 60.1%. This means that 40% of the sales of wheat diverted from the Moosomin Elevator would go to rival Elevators other than Virden or Fairlight. Conversely, for the Virden Elevator, the diversion ratios for wheat were 16.8% to the Moosomin Elevator and 20.3% to the Fairlight Elevator, for a total of 37.1% of the sales to these two Elevators. This, observed Ms. Sanderson, means that 63% of the diverted sales of wheat from the Virden Elevator would go to Elevators other than Moosomin or Fairlight. In the case of canola, 65% of the sales diverted from the Moosomin Elevator would go to rival Elevators other than Virden or Fairlight, and 77% of the sales diverted from the Virden Elevator would be absorbed by Elevators other than Moosomin or Fairlight. In light of these figures, Ms. Sanderson opined that the diversion ratios to rival Elevators other than Moosomin, Virden, or Fairlight are significant, with many other Elevators and Crushers having diversion ratios similar or higher than those calculated for the Moosomin and Virden Elevators.

[443] In his reply to Ms. Sanderson's opinion that the geographic market should include more Elevators given their large diversion ratios, Dr Miller referred to the extract from the 2011 MEGs stating that a relevant market is defined as the "smallest group of products" including at least one product of the merging parties, and the "smallest geographic area," in which a sole profit-maximizing seller would impose and sustain a SSNIP above levels that would likely exist in the absence of the merger. Dr. Miller further explained that defining a relevant market is important because it is impractical to consider all sources of competition. Indeed, doing so would significantly increase the burden of antitrust inquiry, while shedding very little light on the competitive effects of the Transaction.

[444] The Tribunal observes that, in aggregate, 60.1% of switched volumes of wheat are diverted from Moosomin to Virden and Fairlight, and 37.1% are diverted from Virden to Moosomin and Fairlight. The Tribunal finds that the magnitude of these diversions signals a meaningful potential impact of the Acquisition on reducing alternatives for local wheat farms residing in the corridor of concern. But the diversion ratios also reflect the fact that Elevators other than Moosomin, Virden, and Fairlight represent alternatives for the purchase of wheat.

[445] The Tribunal takes less certain direction concerning the purchase of canola, as the diversion ratio data are much less convincing. The Tribunal does not agree with the position, advanced by Ms. Sanderson in her expert report, that higher comparative diversion ratios necessarily leads to the inclusion of all additional Elevators or Crushers on the periphery of the service areas for the Moosomin and Virden Elevators. However, the diversion ratios for canola suggest that it is less likely that the Moosomin and Virden Elevators, acting as a hypothetical monopsonist, would be able to exercise market power in a market defined geographically around the Moosomin, Virden,

and Fairlight Elevators. The panel notes that the diversion data suggest that the Whitewood Elevator and the Harrowby Crusher are the next closest competitors to the Moosomin, Virden, and Fairlight Elevators for the purchase of canola, and that other Crushers and Elevators offer alternatives to the farmers for their canola.

(e) Evidence related to prices and price negotiations

[446] P&H emphasized that its posted prices were set on a centralized basis, and that the vast majority of its sales were at the Cash Price offered each day based on the Basis set each morning and the fluctuating Futures Price.

[447] Dr. Miller testified that he found evidence that farms may sometimes individually negotiate prices with Elevators. Such negotiations may depend on long-standing relationships and revenue dependence, as well as subjective assessments of whether a farm could credibly purchase GHS from another, competing Elevator. Dr. Miller also found documentary evidence that farms negotiate prices that deviate from posted prices in a number of ways, including price matching by Elevators of their competitors' prices, not charging for certain services, and purchasing grain on the basis of a higher grade price with the intent to blend the grain for later sale. Dr. Miller also noted that a farm's commitment to purchase crop input products from the Elevator could also affect price.

[448] While the Tribunal agrees that uniformity of prices may be indicative of a geographic competition market, the evidence disclosed that there was a material proportion of transactions that involved a negotiated price. Specifically, P&H confirmed that approximately [REDACTED] of its transactions occurred at a price set as a result of a successful negotiation of a Cash Price between a farm and the company through its representatives at a particular Elevator. (There was no percentage provided in respect of unsuccessful or attempted price negotiations.)

[449] There was also some evidence that, while negotiating a price to be offered to a farm, P&H representatives were aware of the specific distance from specific farms to the company's Elevators and to competitor Elevators, and that this information affected the assessment of whether a rival Elevator's offered price would be matched or not. In determining a potential purchase price for grain, representatives of the Elevator were able to closely analyze circumstances affecting price that were material to an individual farm. Knowledge of the location of the farm, and thus the distance from the farm to each Elevator bidding for the crop, was a key factor in deciding whether to raise the price to be offered for the crop. The internal correspondence recognized that a farm located closer to a rival Elevator would find the rival more attractive as a purchaser at the same price; a higher price would be required to attract volumes of grain away from the rival in order to make up for the time and cost of transportation.

[450] This evidence is indicative of an ability by P&H to discriminate on price when departing from the Basis determined by using its Workback Algorithm. It also further demonstrates the salience of distance (and associated transportation costs) and shows the sophistication of the buy-side analysis of price.

- (f) Mr. Heimbecker's testimony and P&H business records identifying competitors

[451] The Tribunal appreciates that Mr. Heimbecker identified many competitors to the Moosomin and Virden Elevators during his testimony, and that there are documents to support the view that those Elevators and Crushers are competitors in a business sense. Those competitors were principally those within the draw areas of the Elevators. Like Mr. Heimbecker's testimony, the parties' submissions both referred to documents from the files of the merging parties that identified various competitors. Those documents included reports for planning purposes, emails that identified a rival Elevator to which a farm's sale was lost, and emails for bidding or individual price negotiation purposes (*i.e.*, to obtain supply from a farm).

[452] The Tribunal has considered this documentary evidence and Mr. Heimbecker's testimony. For the purposes of a competition analysis and geographic market definition, not all business competitors are equal: different competitors may have different abilities to affect the competitive process. Some may have considerable ability to constrain a price increase by the merged entity (or otherwise discipline key dimensions of competition in a market), while others have little or no ability to do so. In this case, applying an HMT approach, the panel finds that the competitive rivals that can constrain a SSNDP by the merged entity do not correspond with competitors from a business perspective. The evidence of internal documents and from Mr. Heimbecker identifying business rivals is relevant but, overall, is a less weighty factor in the Tribunal's assessment of the geographic scope of the competition markets.

(4) Conclusion on relevant geographic market(s)

[453] Having considered all the quantitative and qualitative factors described above, the Tribunal concludes that the relevant geographic markets for the purchase of each of wheat and canola are not likely to be smaller or larger than those resulting from the HMT analyses. The Tribunal acknowledges that factors such as the price negotiations on a non-negligible proportion of grain purchases, the diversion ratios between the Moosomin, Virden, and Fairlight Elevators on wheat, the purchases of farmers in the "corridor of concern," and the evidence on distance travelled by farmers suggest a geographic market definition that would be more localized. Conversely, the Tribunal is not persuaded that the evidence flowing from heat maps or business records identifying numerous competitors is sufficient to justify an expansion of the relevant geographic markets resulting from the HMT analyses. In the end, the Tribunal finds that the evidence related to the geographic markets does not amount to clear and convincing evidence allowing the Tribunal to move away from the results coming from the HMT analyses.

[454] Therefore, on a balance of probabilities, the Tribunal is of the view that the relevant geographic market for the purchase of wheat is more likely than not to include at least the Moosomin, Virden, Fairlight, Oakner (Cargill), Whitewood (Richardson), Elva (Cargill), and Shoal Lake (Richardson) Elevators. With respect to the relevant geographic market for the purchase of canola, it includes at least the Moosomin, Virden, Fairlight, Oakner (Cargill), Whitewood (Richardson), Brandon (Richardson), Melville (G3), Souris East (Viterra), Shoal Lake (Richardson), and Elva (Cargill) Elevators, as well as the Crushers at Harrowby (Bunge), Yorkton (LDC), Velva (ADM), and Yorkton (Richardson).

C. Has the Commissioner established, on a balance of probabilities, that the Virden Acquisition lessens, or is likely to lessen, competition substantially?

[455] The Tribunal now turns to the main element of the merger provisions, namely, whether the Virden Acquisition lessens competition substantially, or is likely to have that effect.

(1) Analytical framework

(a) The statutory language

[456] Subsection 92(1) of the Act provides that the Tribunal may make a remedial order if it finds that a merger or proposed merger prevents or lessens, or is likely to prevent or lessen, competition substantially.

[457] The anti-competitive threshold is directly linked to the concept of market power. As discussed above, market power is the ability to profitably influence the price or non-price dimensions of competition in the market for the supply or purchase of a product. The price and non-price dimensions of competition show the intensity of rivalry between or among competitors in a market (*Tervita SCC* at para 44; *Tervita CT* at paras 371–373). A merger will only be found to lessen or prevent competition substantially if it is likely to create, maintain, or enhance the ability of the merged entity to exercise market power, whether unilaterally or in coordination with other firms. The market power analysis in respect of a merger centres on the question of whether the merged entity is able, or is likely to be able, to exercise more market power than it could have exercised in the absence of the merger. When a merger is not likely to have market power effects, “it is generally not possible to demonstrate that the transaction will likely prevent or lessen competition substantially” (2011 MEGs at para 2.8). Without market power effects, section 92 will not generally be engaged (*Tervita SCC* at para 44).

[458] If there are no market power implications of a merger, there can be no anti-competitive implications. If there are market power implications of a merger, competition can be taken to be lessened or prevented to some extent (see *Facey and Brown* at p 181; *Campbell* at p 100). However, it is only where the prevention or lessening of competition is substantial that the Tribunal can intervene under section 92. There can therefore be situations where market power is created, maintained or increased without necessarily resulting in a substantial lessening or prevention of competition.

[459] Subsection 92(2) expressly provides that the Tribunal “shall not find” that a merger or proposed merger prevents or lessens, or is likely to prevent or lessen, competition substantially “solely on the basis of evidence of concentration or market share.” However, depending on the circumstances, post-merger market share may be a useful or reliable indicator of market power (*Hillsdown* at p 318). In sum, evidence of changes in market shares and concentration levels are relevant and often influential, but not determinative (*The Commissioner of Competition v Parkland Industries Ltd*, 2015 Comp Trib 4 at para 89; *Tervita CT* at para 360; *Canadian Waste* at para 108, 193–195, 204–205, 224; *Superior Propane I* at paras 126, 304–313).

[460] Section 93 of the Act provides a non-exhaustive list of factors that the Tribunal may consider when assessing whether a merger substantially lessens or prevents competition or is likely to do so. These factors include whether a party is a failing business, the availability of acceptable substitutes, barriers to entry into the relevant market, the extent to which effective competition remains or would remain after a merger, whether the merger would result in the removal of a vigorous and effective competitor, and the nature and extent of change and innovation in a relevant market.

[461] The Tribunal points out that none of the section 93 factors specifically refers to exports or to the pro-competitive dimension or business rationale of a merger. The Tribunal further reaffirms that the intent of the parties is irrelevant in determining whether a merger will likely reduce competition (*Canadian Waste* at para 118).

(b) The “substantial lessening” analysis

[462] As the present case solely concerns an alleged substantial lessening of competition, the Tribunal’s analysis will focus on that branch of the assessment of anti-competitive effects. In *Tervita SCC*, the SCC confirmed that the language in section 92 concerning anti-competitive effects is very close to the corresponding words in paragraph 79(1)(c) of the Act dealing with abuse of dominance (*Tervita SCC* at para 50). The legal framework applicable to analysis of effects under the two provisions has common features, so court and Tribunal decisions under both provisions provide guidance in relation to the assessment of a substantial lessening of competition.

[463] As the Tribunal discussed in *VAA CT* at paragraphs 632–644 and in *TREB CT* at paragraphs 456–483, there are two dimensions in the Tribunal’s substantial lessening of competition analysis. The first considers a forward-looking, counterfactual comparison. The second considers whether the alleged anti-competitive effects are substantial.

[464] First, the Tribunal’s review under section 92 examines whether the merger will give the merged entity the ability to lessen competition, compared with the pre-merger benchmark or “but for” world. The analysis involves a forward-looking counterfactual scenario where the Tribunal compares the state of competition that exists or would likely exist in the presence of the merger with the state of competition that would have likely existed in the absence of the merger (*Tervita SCC* at paras 51, 54; *Tervita FCA* at para 108). The focus is on whether the merged entity is likely to be able to exercise materially greater market power than in the absence of the merger, through either materially higher prices or materially lower non-price aspects of competition in the market (*Tervita SCC* at paras 15, 50–51, 54, 80–81; *Tervita FCA* at para 108; *VAA CT* at paras 636, 642; *Tervita CT* at paras 123, 229(iv), 377)⁸. The Tribunal’s approach thus contemplates an assessment that emphasizes the comparative and relative state of competition before and after the merger, as

⁸ In a situation involving the purchase of a product and potential monopsony power, the determination to be made is whether prices are or likely would be materially lower than in the absence of the merger. In this discussion on the analytical framework, all references to “price increases” or “material price increases” are meant to relate to mergers involving the sale of a product and potential monopoly power. For mergers involving the purchase of a product and potential monopsony power, all references would be to “price decreases” or “material price decreases.”

opposed to the absolute state of competition at those two points in time. In a case involving an alleged likely substantial lessening of competition, the Tribunal will assess whether the merger is likely to enable the merged entity to exercise new or enhanced market power (*Tervita SCC* at para 55, citing *Tervita CT* at para 368). That is, the Tribunal will consider whether the merger has likely created a new ability to exercise market power, or enhanced the merged entity's existing ability to exercise market power.

[465] In the second part of its analysis, the Tribunal determines whether the difference between the level of competition in the presence of the merger, and the level that would have existed “but for” the merger, is substantial. The extent of a merger's likely effect on market power is what determines whether its effect on competition is likely to be “substantial” (*Tervita SCC* at para 45; *TREB FCA* at paras 82, 86–92). The issue is whether competition would likely be substantially greater, “but for” the implementation of the merger or proposed merger, through the merged entity's ability to profitably influence price, quality, service, advertising, innovation, or other dimensions of competition (*Canadian Waste* at paras 7, 108; *Di Domenico* at p 554). For a merger to be subject to a remedial order by the Tribunal, it is not enough to demonstrate that an actual or likely lessening of competition will result, or the mere creation or enhancement of market power. In a merger review, the Tribunal's assessment focuses on “whether the merged entity is likely to be able to exercise materially greater market power than in the absence of the merger” [emphasis added] (*Tervita SCC* at para 54, citing *Tervita CT* at para 367).

[466] Again, the test is relative and requires an assessment of the difference between the level of competition in the actual world and in the “but for” world (*TREB FCA* at para 90). What is substantial is not defined in the Act. The Tribunal may consider evidence of market shares and concentration levels, together with the factors listed in paragraphs 93(a) to (g.3) of the Act and, under paragraph 93(h), “any other factor” relevant to competition in a market that is or would be affected by the merger or proposed merger. In each given case, all relevant indicators of market power need to be considered, but the relevance and weight to be assigned to each indicator will vary with the factual context. There is no precise scale by which to measure what is substantial, and this determination will be “highly contextual” (*Facey and Brown* at p 184).

[467] In conducting its assessment of substantiality, the Tribunal will look at three key components, namely, the degree, scope, and duration of the lessening of competition (*Tervita SCC* at para 45; *VAA CT* at para 640).

[468] With respect to degree, or magnitude, the Tribunal assesses whether the impugned merger is enabling or is likely to enable the merged entity respondent to exercise materially greater market power than in the absence of the merger (*Tervita SCC* at paras 50–51, 54). When assessing whether competition with respect to prices is or is likely to be lessened substantially, the test applied by the Tribunal is to determine whether prices are or likely would be materially higher than in the absence of the merger. With respect to non-price dimensions of competition, such as quality, variety, service, or innovation, the test applied is to determine whether the level of one or more of those dimensions of competition is or likely would be materially lower than in the absence of the merger (*Tervita SCC* at para 80; *TREB FCA* at paras 89–92; *Tervita CT* at paras 123–125, 376–377; *VAA CT* at para 642).

[469] In assessing whether the degree, or magnitude, of lessening of competition is sufficient to be considered “substantial,” the Tribunal will consider the overall economic impact of a merger in the relevant market. Proof of a likely post-merger price increase must be assessed in relation to its materiality in the specific market at issue, the nature and extent of pre- and post-merger competition, and the rest of all the quantitative and qualitative evidence related to the affected dimensions of competition.

[470] On the price dimension of competition, the Tribunal has not found it useful to apply rigid numerical criteria in conducting this assessment. In short, there is no specific quantum of price variation implying that a merger lessens competition substantially. The Tribunal agrees with the 2011 MEGs that there is no rigid “numerical threshold” for a material price increase (2011 MEGs at para 2.14; see also *Hillsdown* at p 329). The Tribunal pauses to underline that the use of a 5% increase in price for the purposes of the HMT analysis must not be confused with the materiality of a price increase under the substantial lessening of competition analysis. The conceptual SSNIP threshold of 5% in the HMT analysis for market definition purposes is distinct from the assessment of substantiality of anti-competitive effects. It is therefore incorrect to state that the Commissioner must adduce quantitative evidence showing a 5% variation in post-merger prices in order to establish a lessening of competition that is “substantial.” The required magnitude of a “substantial” price increase will instead vary from case to case and will depend on the facts of each case (*Tervita SCC* at para 46; *TREB FCA* at para 88; *Hillsdown* at pp 328–329). A substantial price variation can be less than 5%.

[471] In fact, as Chief Justice Crampton explained in his concurring opinion in *Tervita CT*, the degree of market power used in assessing whether competition is likely to be prevented or lessened substantially must be recalibrated downward when a 5% price increase is used to assess the degree of market power held by a hypothetical monopolist for the purposes of the HMT analysis and the SSNIP threshold. At paragraphs 376–377 of *Tervita CT*, he said:

[376] [...] However, given that the Tribunal has now embraced the hypothetical monopolist framework and the SSNIP test for market definition, it is necessary to revisit this definition of substantiality. This is because if the degree of market power used to define relevant markets is the same as the degree of market power used to assess competitive effects, a merger would not be found to be likely to prevent or lessen competition substantially unless the degree of new, enhanced or maintained market power of the merged entity is the same degree of market power held by as [*sic*] the hypothetical monopolist that was conceptualized for the purposes of market definition.

[377] Accordingly, the degree of market power used in assessing whether competition is likely to be prevented or lessened substantially must be recalibrated downwards. That recalibrated degree of market power is a level of market power required to maintain prices *materially* higher, or to depress one or more forms of non-price competition to a level that is *materially* lower, than they likely would be in the absence of the merger. [...]

[Emphasis in original.]

[472] In sum, the substantiality level contemplated by the “substantial lessening of competition” analysis can be lower than the level under the HMT analysis and the SSNIP threshold.

[473] It must also be emphasized that there is no requirement for the Tribunal to find a likely increase in price; it is sufficient for the Tribunal to conclude that the merged entity has the ability to increase price or to reduce quality, service, or product choice.

[474] Turning to scope, the assessment involves determining whether the lessening of competition affects the entire relevant market or a material part of it. If the alleged anti-competitive effects do not extend throughout the totality of the relevant market, the Tribunal will assess their scope and whether they extend throughout a “material” part of the market, or in respect to a material volume of sales / business (*Tervita FCA* at para 108; *Tervita CT* at paras 375, 378).

[475] With respect to duration, the test applied by the Tribunal is whether a material increase in price or material reduction in non-price dimensions of competition resulting from a merger is likely to be maintained for approximately two years (*Tervita SCC* at para 80; *Tervita CT* at para 123).

[476] In assessing substantiality and its various components, the Tribunal considers quantitative evidence, qualitative evidence, or both, related to the price and non-price dimensions of competition (*TREB FCA* at para 16; *VAA CT* at paras 124, 639; *TREB CT* at paras 469–471). In *Tervita SCC*, the SCC held that the Commissioner was not, in law, required to quantify any anti-competitive effects under section 92 (*Tervita SCC* at paras 121–122, 166; *TREB FCA* at paras 99–100; *TREB CT* at para 469). That said, in all situations, the Commissioner must always adduce sufficiently clear and convincing evidence, and he bears the burden to demonstrate, on a balance of probabilities, that the merger lessens or is likely to lessen competition substantially, as well as the basic facts of the “but for” scenario that are required to make that demonstration (*Tervita SCC* at paras 65–66; *TREB FCA* at paras 87; *Tervita FCA* at paras 107–108; *VAA CT* at para 644).

(2) Parties’ positions

(a) The Commissioner

[477] The Commissioner submits that the Virden Acquisition is likely to cause a substantial lessening of competition in the relevant markets owing to the elimination of a vigorous and effective competitor, namely, the Virden Elevator. The Commissioner claims that both the quantitative and qualitative evidence demonstrates that farmers in the relevant markets will pay materially more for GHS for wheat and canola over the next two years and will lose other impactful aspects of competition. With the control of the Virden Elevator, says the Commissioner, P&H has the ability and incentive to unilaterally exercise market power in the relevant markets. The Commissioner contends that the lessening of competition is substantial in terms of magnitude, duration, and scope: it adversely impacts competition to a degree that is material, the duration of the anti-competitive effects is substantial, and the anti-competitive effects extend to a substantial part of the relevant markets.

[478] In his final submissions, the Commissioner argued that the substantial lessening of competition is demonstrated by the following elements, which echo many of the factors listed in

section 93 of the Act: 1) the high margins at the Virden Elevator, which provide direct evidence of P&H's existing market power; 2) P&H's ability to engage in price discrimination; 3) P&H's high market shares in the relevant markets; 4) the removal of the vigorous and effective competition to the Moosomin Elevator that the Virden Elevator provided prior to the Acquisition; 5) the material impact of the Virden Acquisition on the price for GHS for wheat and canola; 6) the postponement of the planned expansion of the Moosomin Elevator that would have made P&H a more effective competitor to the Virden Elevator in the absence of the Acquisition; 7) the inability of Viterra's Fairlight Elevator to constrain an increased exercise of market power by P&H; and 8) the existence of high barriers to entry and expansion.

[479] The Commissioner further submitted that other more distant Elevators, canola Crushers, and direct purchasers of wheat or canola are unable to constrain an exercise of market power by P&H as they do not have sufficient capacity and farmers would have to incur higher transportation costs to deliver their wheat and canola to these locations. While the Commissioner's submissions mostly focused on the anti-competitive price effects of the Virden Acquisition, the Commissioner maintains that quantified price effects are only one element of the substantial lessening of competition caused by the Acquisition. According to the Commissioner, there is also significant other evidence demonstrating that the contemplated price effects are material to the farmers.

[480] The Commissioner submits that the Tribunal should adopt a framework that allows for an economic analysis that can credibly assess the impact of local competition between Elevators that was lost when P&H acquired the Virden Elevator from LDC. The Commissioner considers that such local competition is expressed through the Basis. He states that the main issue to be determined by the Tribunal can be summarized as follows: when competition effectively takes place on, and affects one component of, the overall final price of a product, as he suggests is the case here, how should the Tribunal assess and measure the magnitude of harm and the materiality required for the lessening of competition to be substantial?

[481] In support of his arguments on the substantial lessening of competition, the Commissioner relies on three pillars of evidence: the expert evidence of Dr. Miller (including his merger simulation model), the fact witnesses (notably, the farmers who testified at the hearing), and the documentary evidence.

[482] The Commissioner does not dispute that he has the burden to adduce sufficiently clear and convincing evidence to demonstrate, on a balance of probabilities, that competition is or is likely to be lessened substantially as a result of the Virden Acquisition.

(b) P&H

[483] P&H responds that the Virden Acquisition does not, and is not likely to, lessen competition substantially in any relevant market. More specifically, P&H submits that the Commissioner has failed to meet his burden to prove, on a balance of probabilities, his alleged substantial lessening of competition. According to P&H, the evidence on the record does not establish that the markets at issue would be substantially more competitive, "but for" the Virden Acquisition.

[484] In its Response, P&H denied that the Virden Acquisition creates, enhances, or maintains monopsony power in any properly defined market for the purchase of wheat or canola. P&H argued

that it will continue to face vigorous and effective competition from numerous competing Elevators and Crushers located in Manitoba and Saskatchewan. P&H further claimed that barriers to entry and expansion are low and that rival Elevators have excess capacity, allowing them to expand their purchases of wheat and canola and to constrain any attempt by P&H to exercise monopsony power. P&H also submitted that the predicted price variations determined by Dr. Miller are immaterial and unlikely.

[485] In its closing submissions, P&H elaborated by focusing on the fact that: 1) barriers to entry and expansion are low; 2) the Virden Elevator has become and will remain a vigorous and effective competitor further to the Transaction; and 3) the Transaction enhances non-price competition.

[486] In support of its arguments on the absence of any substantial lessening of competition, P&H relies on Ms. Sanderson's expert evidence, more particularly her critique of the price effects alleged by Dr. Miller and her post-Acquisition price analysis, and on the evidence provided by the farmer witnesses.

(3) Tribunal's assessment

[487] The Tribunal notes at the outset that the evidence adduced by the Commissioner on the substantial lessening of competition primarily focused on the quantification of the alleged price effects of the Virden Acquisition. As the Commissioner said in his oral submissions, his demonstration that the lessening of competition is substantial was mostly done through Dr. Miller's quantification work including evidence such as market shares and margins. As part of its assessment, the Tribunal has therefore considered whether the Cash Prices paid by P&H to the farmers for their wheat or canola are or would likely be materially lower, "but for" the Virden Acquisition. The Tribunal also assessed other evaluative factors raised by the Commissioner and covered by section 93 of the Act. These factors notably included likely entry and expansion, excess capacity, and the extent of any remaining vigorous and effective competitors.

[488] For the reasons discussed below, the Tribunal concludes that the Commissioner has not demonstrated, on a balance of probabilities, that the Virden Acquisition lessens, or is likely to lessen, competition substantially in the relevant markets. The Tribunal accepts that the joint control of the Virden and Moosomin Elevators by P&H has and will continue to have some limited adverse effects on competition in the purchase of wheat. However, on the evidence before it, the Tribunal is not persuaded that such lessening of competition reaches or is likely to reach the substantiality required by section 92 of the Act.

[489] The Tribunal also acknowledges that the materiality level to assess the substantial lessening of competition varies from case to case, and that a lower materiality level could apply in cases, such as this one, where competition between rivals takes place, at least in part, on one more specific component of the overall final price of a product. However, the Tribunal observes that, even though the Commissioner insisted that competition between Elevators and Crushers revolved around the Basis, he has not provided any compelling submissions, nor any clear and convincing evidence, supporting a particular materiality level that the Tribunal should apply in the current circumstances. Moreover, even considering that some competition between Elevators effectively takes place on one component of the overall price of grain, namely, the Basis, the Tribunal finds

that the low magnitude of harm revealed by the evidence is not enough to meet the materiality required for the lessening of competition to be substantial, whether in relation to the Basis or the Cash Price.

(a) P&H's alleged pre-existing market power

[490] The Commissioner argues that P&H already had existing market power prior to the Acquisition and now has the ability to increase this market power by virtue of its ownership of the Moosomin and Virden Elevators. He claims that two pieces of evidence demonstrate P&H's pre-existing market power: the high margins prevailing at the Virden Elevator and P&H's ability to price discriminate.

[491] In his expert report, Dr. Miller calculated that the Virden Elevator earned a 55.2% margin on GHS for wheat and a 39.3% margin on GHS for canola. In Dr. Miller's opinion and experience, those are relatively high margins "consistent with localized competition rather than significant competition from many distant competitors" (Dr. Miller Report at para 72). Dr. Miller's margins are economic margins. Ms. Sanderson did not provide any specific margin estimates of her own. Apart from Dr. Miller's estimates, no other evidence was provided to the Tribunal with respect to Elevators' margins on the purchase of grain.

[492] To calculate his margins for the Virden Elevator, Dr. Miller identified those Virden Elevator costs which are marginal or incremental, and he excluded fixed costs. Ms. Sanderson did not dispute Dr. Miller's categorization of the fixed and marginal costs, but she criticized his estimated margins on the ground that they were overstated and failed to include certain freight costs and other costs relating to export terminal operations.

[493] The Tribunal accepts Dr. Miller's estimated margins for the Virden Elevator, based on his allocation of both revenue and costs to Elevators for the purposes of estimating marginal costs. The Tribunal agrees that the marginal costs related to GHS are a satisfactory proxy for the marginal costs associated with the purchase of grain. Although Dr. Miller's allocations were based on variable costs associated with the delivery of GHS, the same operating activities are also closely associated with the purchase of grain. The Tribunal finds that the variable costs allocated by Dr. Miller are properly allocable to the purchase of grain (and respective revenue generated) at an Elevator, in contrast with freight and other costs that are properly attributable to the marginal cost for (and revenue generated by) the sale and distribution of grain downstream at export terminals and other destinations.

[494] Turning to price discrimination, the evidence from discovery is clear that P&H knows the location of its customers and has the ability to use that information to engage in price discrimination. To the extent that Elevators sometimes negotiate individual prices with farmers, a price-discrimination framework may thus be more descriptive of the grain industry. However, the evidence on the record indicates that price negotiations between farms and P&H only occur for about [REDACTED] of P&H's transactions with farmers, with the vast majority (*i.e.*, the remaining [REDACTED]) of transactions between farmers and the Elevator being done on the basis of posted prices. This [REDACTED] percentage is arguably conservative, as it does not include those transactions where farms attempted price negotiations but were unsuccessful. The Tribunal also points out that, while there

is some evidence of price discrimination, Dr. Miller stated that a posted price model was the appropriate framework to study how prices are set in the grain industry (Dr. Miller Report at paras 140–142). The Tribunal considers that the evidentiary record in this case demonstrates that P&H has some ability to price discriminate based on its customers' locations, and that it can exercise that ability when it is in its interest to do so. However, the evidence shows that P&H's actual use of this ability is limited.

[495] The Tribunal agrees that high margins and the ability to price discriminate can constitute direct evidence that P&H has some pre-existing market power. This was recognized by the Tribunal in *Tele-Direct* at paragraphs 286 and 297. In that case, the Tribunal looked at Tele-Direct's behaviour towards consultants and whether it had abused its dominant position. The Tribunal found that “[w]here a firm with a high degree of market power is found to have engaged in anti-competitive conduct, smaller impacts on competition resulting from that conduct will meet the test of being “substantial” than where the market situation was less uncompetitive to begin with” (*Tele-Direct* at para 758). The Tribunal points out that in that case, Tele-Direct was found to have “overwhelming” market power.

[496] Based on the evidence before it, the Tribunal is satisfied that the high margins calculated by Dr. Miller at the Virden Elevator constitute clear and convincing evidence of P&H's pre-existing market power. Similarly, while the evidence with respect to P&H's ability to price discriminate is not as compelling given that the evidence showed a practice affecting only a limited portion of P&H's purchases of wheat and canola, the Tribunal is satisfied that, on a balance of probabilities, this evidence also supports a finding of some pre-existing market power for P&H.

(b) Price effects

[497] With respect to the price effects, the Commissioner relied on the expert evidence of Dr. Miller to support his position that prices for GHS are or will likely be materially higher than they would have been in the absence of the Virden Acquisition.

[498] In his analysis, Dr. Miller found that the diversion ratios between the Moosomin and Virden Elevators ranged between 15% and 25% for wheat and between 5% and 15% for canola. More detail about these diversion ratios were provided above in the Tribunal's discussion of the geographic market definition. Dr. Miller used these diversion ratios to quantify the UPP created by the Acquisition. The UPP is a tool that is often used in merger review to approximate the incentive for the merging parties to unilaterally increase prices following a merger, and to measure such price effects. Dr. Miller computed several measures of UPP, all of which showed that prices for GHS would likely rise as a result of the Acquisition, for both wheat and canola. His results suggested that the Transaction generates impetus for price increases, with UPPs of over CAD \$2.50 per MT for wheat and over CAD \$0.30 per MT for canola. He estimated the gross UPP indices (“GUPPI”) at over 9% for wheat and over 1% for canola.

[499] As explained by both Dr. Miller and Ms. Sanderson in the concurrent evidence session, the magnitudes of UPP, GUPPI, and price effects from merger simulations depend on the amount of diversion between the merging firms and on the mark-up (or margin). Holding all else equal,

greater diversion ratios between the merging firms and higher margins will increase UPP, GUPPI, and the simulated price effects.

[500] Using his diversion ratios and his estimate of the Virden Elevator's margin, Dr. Miller constructed a merger simulation model to quantify the price impact of the Virden Acquisition on farmers. A merger simulation model is a widely accepted econometric method for calculating the predicted price effects from a merger, and to quantify changes to consumer surplus, profit, and the DWL. It is not disputed that the models constructed by Dr. Miller for his farm choice and his merger simulation are standard economic models, and that Dr. Miller's analysis reflects the principles established in the economic literature. The Tribunal pauses to mention that Dr. Miller's merger simulation model was used both for market definition purposes and for measuring the anti-competitive effects of the Acquisition.

[501] The Tribunal notes that there was no disagreement between Dr. Miller and Ms. Sanderson on the calculation of the diversion ratios that went into the merger simulation model; those diversion ratios came out of the transaction-level data.

[502] For his substantial lessening of competition analysis, Dr. Miller considered a large number of competing entities, namely, 15 Elevators in the case of wheat and, for canola, 15 Elevators and five Crushers. These were Elevators and Crushers to which there are positive deliveries of canola or wheat made by farms located within Dr. Miller's Farmer Region. In sum, Dr. Miller's merger simulation model included Elevators and Crushers that come from both inside and outside the defined geographic markets resulting from his HMT analysis.

[503] There was agreement by both experts that they were able to interpret the data provided and that Dr. Miller relied on a rich and robust data set for his merger simulation model. P&H had voiced concerns about the fact that the Commissioner did not collect data from two Paterson Elevators located at Carnduff and Binscarth, nor from the Cargill Elevator at Nesbitt. All six farmers who testified at the hearing said they do not sell to any of these three Elevators and did not produce receipts showing sales to these Elevators. In addition, no reference was made by Ms. Sanderson to these Elevators as a competitor in any of the Moosomin business documents. The Tribunal is therefore satisfied that, in the end, there were no real issues with alleged missing data in Dr. Miller's model.

[504] Dr. Miller's merger simulation model provided both relative and absolute values for his predicted price effects. Dr. Miller and Ms. Sanderson agreed on the magnitude, in absolute dollar terms, of the price effects predicted by Dr. Miller's merger simulation model. They however disagreed on the percentage of the price variations, as the relative price changes varied significantly depending on the denominator being used (*i.e.*, the price of GHS or the Cash Price).

[505] In light of the foregoing, the Tribunal is satisfied that it can accept Dr. Miller's merger simulation model and its absolute results.

[506] Both Dr. Miller and Ms. Sanderson further acknowledged that, if the diversion ratios and the mark-ups are positive, a merger simulation model will always predict price increases whenever efficiencies are not directly modeled (Ms. Sanderson Report at para 78; Consolidated Transcript, Public, at pp 1525–1526, 1529; Consolidated Transcript, Confidential A, at pp 1711, 1718–1719,

1784–1785, 1871–1872). This is a reflection of economic theory, which says that, when there is competition, there will be lower prices. In other words, a merger that reduces competition in the sale of a product will raise prices to some degree. The Tribunal must, however, determine whether the predicted price increases — or, in the case of a monopsony, price decreases — are meaningful and substantial.

[507] Further to its review of the evidence, the Tribunal is not persuaded that the Virden Acquisition is decreasing or will likely decrease the Cash Prices for wheat or canola to a material degree in the relevant markets, relative to the prices that likely would have existed “but for” the Acquisition. Stated differently, the Commissioner has not demonstrated that, “but for” the Virden Acquisition, the prices received by farmers for their wheat and canola are or would likely be materially lower. This is the case for both the relative and absolute measures coming out of Dr. Miller’s evidence.

(i) *Relative measures*

[508] The Tribunal first considers the relative price changes predicted by Dr. Miller’s model, as this is typically how expected price effects are measured and assessed by the Tribunal. The relativity of predicted price changes is an important benchmark, as price effects are not measured in a vacuum, but against a certain reference or base price. Price variations will be material when they represent a meaningful proportion of the reference price.

[509] Dr. Miller’s merger simulation model based on the farmers’ choices of Elevator predicts that the price of GHS for wheat will increase by CAD \$2.49 per MT for the Moosomin Elevator, and by CAD \$2.07 per MT for the Virden Elevator (Dr. Miller Report at Exhibit 14). This corresponds to 7.1% and 7.6% price increases, respectively, relative to the reference pre-Acquisition price of GHS for wheat at each Elevator. Turning to the price of GHS for canola, Dr. Miller’s projected price increases will be between CAD \$0.91 per MT and CAD \$1.21 per MT at the Moosomin Elevator, and between CAD \$0.25 per MT and CAD \$0.35 per MT at the Virden Elevator. The range reflects the different values for canola including or excluding Crushers. These observed variations amount to a 7.3%–9.7% and 1.3%–1.7% increase in the price of GHS for canola at the Moosomin and Virden Elevators, respectively.

[510] Dr. Miller’s expert opinion is that the Virden Acquisition allows P&H to charge farmers 7% to 8% more to handle their wheat, and between 1% to 7% more to handle their canola (using the data for canola including Crushers) (Dr. Miller Report at para 6). According to Dr. Miller and the Commissioner, these results from Dr. Miller’s merger simulation show a material increase in the price of GHS per MT, for both wheat and canola, when considered against the price farmers pay for GHS.

[511] The Tribunal notes that the highest predicted price increase of CAD \$2.49 per MT for wheat represents a variation of 6.8 cents per bushel (*i.e.*, CAD \$2.49 / 36.7444 bushels). The corresponding highest predicted price increase of CAD \$0.91 per MT for canola (including Crushers) equates to 2.1 cents per bushel (*i.e.*, CAD \$0.91 / 44.092 bushels). Both of these highest price variations were measured for the Moosomin Elevator.

[512] Ms. Sanderson further calculated that, for wheat, the average price increase predicted by Dr. Miller for the Moosomin, Virden, and Fairlight Elevators would be CAD \$1.39 per MT (or 4 cents per bushel). The average price increase for canola would be CAD \$0.23 per MT (or 1 cent per bushel). When expressed as a percentage of the weighted average imputed prices for GHS at the Moosomin, Virden, and Fairlight Elevators, the price effects calculated by Dr. Miller are, on average, 1.51% for canola and 4.62% for wheat (Ms. Sanderson Slides at pp 93–94).

[513] However, as Ms. Sanderson points out in her evidence, when the predicted price changes found by Dr. Miller are expressed in relation to the Cash Prices, the picture of the relative price variations is quite different.

[514] In the period of reference used by Dr. Miller, the weighted average price for wheat was CAD \$229.73 per MT at the Moosomin Elevator, and CAD \$239.11 per MT at the Virden Elevator. For its part, the weighted average price for canola was CAD \$461.46 per MT at the Moosomin Elevator, and CAD \$452.80 per MT at the Virden Elevator. Therefore, for wheat, Dr. Miller’s predicted price variations of CAD \$2.49 per MT for the Moosomin Elevator and CAD \$2.07 per MT for the Virden Elevator represented changes of only 1.1% and 0.9%, respectively, compared to the pre-Acquisition Cash Price for wheat at each Elevator. With respect to canola including Crushers, Dr. Miller’s projected price variations of CAD \$0.91 per MT for the Moosomin Elevator, and CAD \$0.25 per MT for the Virden Elevator amounted to relative changes of 0.2% and 0.05%, respectively, compared to the pre-Acquisition Cash Price for canola at each Elevator. When expressed as a percentage of the average Cash Prices at the Moosomin, Virden, and Fairlight Elevators, the average relative price effects calculated by Dr. Miller are 0.05% for canola and 0.60% for wheat (Ms. Sanderson Slides at p 94).

[515] The Commissioner therefore asks the Tribunal to find a substantial lessening of competition in a situation where his expert’s average predicted price increases represent 1.51% of his imputed price for GHS for canola, expressed as a percentage of the average price for GHS at the Moosomin, Virden, and Fairlight Elevators, and 4.62% of his imputed price for GHS for wheat at those same Elevators. When they are expressed in relation to the product market and the appropriate reference price identified by the Tribunal — namely, the Cash Price —, Dr. Miller’s predicted price changes represent between 0.05% and 0.2% of the Cash Price for canola, and between 0.60% and 1.1% of the Cash Price for wheat. The Commissioner claims that, even if the purchase of grain and Cash Prices should be the denominator, these price effects are still material when viewed against the qualitative evidence.

[516] With respect, the Tribunal disagrees. The Tribunal is of the view that price changes of this magnitude (*i.e.*, at most 1.1% of the Cash Price for wheat and at most 0.2% of the Cash Price for canola) cannot be qualified as “material.” On the contrary, the Tribunal finds that predicted price variations representing such a small fraction of the pre-Acquisition price for wheat or canola at the Moosomin or Virden Elevators are immaterial, especially in light of the fact that a merger simulation model will always predict a price increase. For the purchase of canola, price variations of 0.2% or less (or between one and two cents a bushel) are *de minimis*. For the purchase of wheat, price variations reaching at most 1.1% (or a maximum of seven cents a bushel) are very minor and far from substantial in this market. Indeed, the Tribunal observes that, in his submissions at the hearing, the Commissioner admitted that such relative price changes were “small” when expressed

in terms of percentage. Hence, the Commissioner's focus on the absolute values of the predicted price changes, to which the Tribunal will turn below.

[517] The Tribunal accepts that the Basis plays a certain role in the competition between Elevators at the local level. The evidence indicates that there can be adjustments to the Basis or to the Cash Price after or in addition to changes in the Futures Price. In some cases, the Basis fluctuates for reasons other than a change in the Futures Price, such as negotiations between farms and Elevators or limited-tonne and limited-time specials offered by the Elevators. The Tribunal also accepts that the price variation threshold can certainly be lower than 5% (contrary to P&H's argument) in order to meet the substantiality level. The Tribunal is further mindful of the fact that, when a firm has high pre-existing market power, smaller impacts on competition can be enough to meet the test of substantiality (*Tele-Direct* at para 758). The Tribunal pauses to note that, while it finds that P&H had "some pre-existing market power" in this case, the facts do not support a conclusion that P&H had "high" market power and certainly not "overwhelming" market power as in *Tele-Direct*.

[518] However, the Commissioner has not presented any compelling argument nor any clear and convincing evidence regarding the materiality level (in terms of percentage) that should apply to the substantial lessening of competition analysis in this case. More specifically, the Commissioner has not made submissions regarding the relative materiality level that should apply in a case where competition allegedly takes place on one component of the final price for wheat or canola, namely, the Basis. Similarly, the Commissioner has submitted no analysis nor any evidence to demonstrate that, in the particular circumstances of this case, the acceptable materiality level for a price decrease could be as low as around 1% or less.

[519] In fact, the Tribunal is not aware of any merger cases, in Canada or in any other jurisdiction, where a court or tribunal has recognized that a predicted price effect revolving around 1% could be enough to meet the test of substantiality. Indeed, since merger simulation models predict price increases (as discussed above), the Tribunal is of the view that, absent expert evidence allowing it to conclude differently, relative price variations predicted by a merger simulation model have to be more than 1% in order to have any significance or materiality.

[520] For all the above reasons, the Tribunal agrees with P&H and Ms. Sanderson that the relative effect of the Virden Acquisition on the Cash Prices paid by P&H for wheat or canola is not material.

(ii) *Absolute measures*

[521] The Commissioner also takes the position that the absolute price variations observed by Dr. Miller are material. In his submissions, the Commissioner relied on the absolute magnitude of Dr. Miller's predicted price increases and what he claimed was their resulting materiality. The Commissioner argued that, in this case, the Tribunal should prefer and adopt an absolute notion of materiality with respect to the price effects and consider the impact that the Acquisition will have on farmers, in terms of changes in "cents per bushel" they will pay for GHS or receive for their grain. The Commissioner submits that the absolute amount of the effects measured by Dr. Miller is evidence of a substantial lessening of competition. The price increases projected by Dr. Miller,

says the Commissioner, are also well above 2 cents per bushel (or, equivalently, CAD \$0.73 per MT for wheat and CAD \$0.88 per MT for canola), and this is sufficient to demonstrate materiality.

[522] As mentioned above, Dr. Miller's highest predicted price variations are 6.8 cents per bushel for wheat and 2.1 cents per bushel for canola. Dr. Miller and Ms. Sanderson agree that these absolute effects are the same regardless of whether the product market is GHS or the purchase of grain. In sum, these price effects are not dependent upon the definition of the relevant market or on the selection of the SSNIP. The relevant market only impacts the computation of the price effects in relative terms, and the experts indeed disagree on the percentage of the price variations (in terms of the imputed price of GHS or the Cash Price).

[523] The Commissioner further claims that price increases of 2 cents to 7 cents per bushel are material when viewed against the qualitative evidence and the pre-existing market power of P&H. The Commissioner submits that the materiality of the price effects is enhanced when all of the other evidence of a substantial lessening of competition is considered, namely, P&H's pre-existing high margins, high market shares, and ability to price discriminate, the removal of the Virden Elevator as a vigorous and effective competitor, and the loss of competition between the Virden and Moosomin Elevators as a result of the Moosomin Elevator's delayed expansion.

[524] The Tribunal is not persuaded by the Commissioner's submissions and evidence. More specifically, the Tribunal is not convinced that there is evidence showing, on a balance of probabilities, that 2 cents a bushel "matter" to farmers. The evidence is only in respect of amounts much higher than that, and higher than Dr. Miller's predicted price increases. The Tribunal agrees with P&H that arguing that a 2 cents per bushel price increase, or even a 7 cents price increase, is material is inconsistent with the farmers' evidence and with the high volatility of prices in the grain industry, often vacillating by plus or minus 10 cents a bushel in a day.

[525] The Commissioner first relies heavily on the so-called "2 cents challenge." The "2 cents challenge" refers to an email sent by [REDACTED] to [REDACTED] and [REDACTED] in the regular course of business (Commissioner Read-In at p 643). In that email, [REDACTED] said that 2 cents per bushel translated into CAD \$3.2 million in profitability for P&H. The Commissioner claims that this evidence is very important to assessing materiality because [REDACTED] posted that if P&H bought each bushel 2 cents cheaper, it would add more than CAD \$3 million in profitability to P&H. Moreover, when Mr. Heimbecker was asked on discovery what CAD \$3.2 million in profit meant to him, he said that such a sum of money was "not insignificant" (Commissioner Read-In at p 178).

[526] The Commissioner adds that 2 cents per bushel is a reasonable threshold for materiality as it represents 2.1% of GHS for wheat and 7.1% of canola handling prices for the Moosomin Elevator, and 2.7% of GHS for wheat and 4.4% of canola handling prices for the Virden Elevator.

[527] The Commissioner also refers to another email where [REDACTED] from P&H said that he does not need to be [REDACTED] per bushel higher than his competitors on wheat, and that the damage of such a discount to P&H's buying program would be [REDACTED] (Commissioner Read-In at p 800). On the basis of this evidence, the Commissioner maintains that P&H cares about pennies on the bushel.

[528] The Tribunal does not find this evidence convincing on the issue of materiality of price effects in the context of its substantial lessening of competition analysis. For the purpose of section 92 of the Act and the Tribunal's assessment of anti-competitive effects, materiality is analyzed in relation to a market situation, to the competitive behaviour of market participants as a result of a merger, and to competition in the relevant market. It is not analyzed in relation to a firm's overall profitability or bottom line. In this case, it is analyzed in relation to the situation in the relevant geographic markets for wheat and canola as a result of the Virden Acquisition. The Tribunal appreciates that 2 cents a bushel, when projected on the overall profitability of P&H, may have some significance for P&H. But the fact that 2 cents a bushel may be important to P&H's overall bottom line does not constitute clear and convincing evidence that such an amount is or would likely be "material" with respect to a lessening of competition in the purchase of wheat or canola in the relevant markets defined above.

[529] The materiality of predicted price changes, whether relative or absolute, is not to be measured in relation to the general profitability of one specific producer or supplier, or one specific customer. This is even more so when the Commissioner's Application only challenges one specific portion P&H's business, namely, the acquisition of only one Elevator out of an overall network of 29. The issue to be determined by the Tribunal is whether the adverse price effects on competition are material in relation to the market and industry at stake. The "2 cents challenge" email offers no clear and convincing evidence to support the Commissioner's position on the alleged price effects attributable to the Virden Acquisition.

[530] The Tribunal further observes that virtually any business person would say that any additional cent of profit per unit of product sold does matter and has some significance for his or her business. In the Tribunal's view, the assessment of materiality was not meant to be reduced, and cannot be reduced, to a single comment such as those made by [REDACTED].

[531] With respect to the email from [REDACTED] the Tribunal notes that the [REDACTED] comment was not made in reference to a specific benchmark, let alone to a 2 cents per bushel benchmark. It was generally made in reaction to sales representatives saying that "farmers are getting better prices somewhere" with no information to support such claims. Moreover, when [REDACTED] referred to a particular amount P&H should not contemplate, he said that P&H did not need to be [REDACTED] per bushel higher than its competitors. [REDACTED] per bushel is far higher than the 2 cents or even 7 cents a bushel measured by Dr. Miller.

[532] The Commissioner further submits that cents per bushel matter not only to P&H, but also to farmers. In that regard, the Commissioner relies on several extracts and comments made by the farmer witnesses regarding the price changes they face in their business.

[533] Again, the Tribunal is not persuaded by the Commissioner's submissions. The Tribunal has not found clear and convincing evidence allowing it to conclude, on a balance of probabilities, that a few cents a bushel matter to farmers and to their behaviour in the market. On the contrary, the evidence from farmers is in respect of amounts much higher than 2 cents a bushel and higher than the predicted price increases of Dr. Miller.

[534] It is true, as the Commissioner argues, that Mr. Lincoln (a farmer called by the Commissioner) testified in his witness statement that that he needs "every penny to be able to hit

the profitability levels” required to operate his farm (Lincoln Statement at para 16). However, immediately before he made that statement, Mr. Lincoln referred three times to an example of what a material amount meant to him: it was 10 cents a bushel. He indicated that the Moosomin Elevator would have to offer him 10 cents a bushel above the Fairlight Elevator for it to be worthwhile driving past this Elevator (Lincoln Statement at para 15). When he went on to quantify the adverse impact of a price decrease on his business, he again used the value of 10 cents per bushel (Lincoln Statement at para 16). Nothing in the Lincoln Statement supports the contention that an amount as low as 2 cents a bushel or in the range predicted by Dr. Miller would be material to him and to his competitive behaviour in the sale of his grain.

[535] The Commissioner also referred to the testimony of Mr. Hebert, one of P&H’s farmer witnesses, singling out his comments and podcasts about the farmers’ margins being squeezed. Further to its review of Mr. Hebert’s evidence, the Tribunal finds no support in that evidence for the proposition that 2 cents or a few cents a bushel matter to Mr. Hebert. The documents mentioned by Mr. Hebert in his testimony contained comments he made about his “5% rule” in the context of the farmers’ business: for Mr. Hebert, farmers should concentrate on trying to improve certain metrics of their business by 5%. The only references to cents per bushel were to an amount of 50 cents per bushel. Again, this is far above 2 cents or 7 cents per bushel.

[536] Mr. Paull, another farmer witness called by P&H, testified that he will only switch to a more distant Elevator if it means receiving more cents a bushel. Regarding the magnitude of the price differential, Mr. Paull testified that he would not leave a local Elevator for “a few pennies a bushel or a few cents a bushel,” but if he could make “10 or 15, 20 cents, sometimes 30 or 40 cents by going further,” he would (Consolidated Transcript, Confidential B, at p 1020). Mr. Paull added that he would not switch from a local Elevator if the difference in net price is 5 cents a bushel or lower (Consolidated Transcript, Confidential B, at p 1022). He also mentioned that he would not haul his grain 50 or 100 miles away for a few cents a bushel. More distant Elevators would need to offer higher prices than that for him to consider sending his grain farther. In fact, Mr. Paull sold all of his canola in the last four years to Bunge Altona, a Crusher located some 350 kilometers and three and a half hours away from his farm. He did it because it was profitable to do so.

[537] In sum, Mr. Paull testified that a few pennies are not material enough for him to change his selling behaviour and to switch Elevators. It starts to matter for him at 10 cents per bushel.

[538] As Mr. Duncan, Mr. Paull, and Mr. Hebert all said in their witness statements, the net price or Cash Price they receive from the Elevators is what matters to them as farmers.

[539] In his submissions, the Commissioner indicated that farmer witnesses were not meant to be a statistically representative sample and were not the way the Commissioner intended to demonstrate that the lessening of competition is substantial. He said that substantiality flows from Dr. Miller’s quantification work and other evidence on market shares and margins. However, even the farmers’ examples used by the Commissioner do not support his argument that 2 cents per bushel is a material price impact on the facts of this case.

[540] Dr. Miller also testified that the price effects he calculated would represent a loss of about CAD \$2,000 per farm in the Elkhorn area, located between the Moosomin and Virden Elevators. However, the Commissioner did not point to any clear evidence allowing the Tribunal to determine

how such an amount could be material or not to the farmers, or whether this would change their selling or competitive behaviour in the relevant markets for wheat or canola.

[541] The Tribunal makes one other observation in relation to the “2 cents per bushel” issue. P&H pointed out that volatility in the grain industry is often in excess of 10 cents a bushel on any given day. In her expert report, Ms. Sanderson calculated the average of the within-day price variations (Ms. Sanderson Report at para 104 and Figure 30). The average within-day variation is CAD \$4.32 per MT for canola and CAD \$3.82 per MT for wheat. When expressed in dollars per bushel, these values translate into approximately 10 cents a bushel for each of wheat and canola. Should a farm be successful in timing its grain sale within any given day, it can therefore achieve a purchase price that is 10 cents a bushel higher by selling grain at the right hour of the day. This evidence was not contradicted.

[542] In light of this evidence, said Ms. Sanderson, a 2 cents variation that is significantly lower than the typical within-day daily fluctuations in the purchase price of wheat or canola cannot be a material price variation in the grain industry. Furthermore, Ms. Sanderson stated that, during 2018-2019, the average cash purchase price paid at the Moosomin Elevator for canola was CAD \$10.47 a bushel (or CAD \$461.46 per MT), making 2 cents equal to 0.19% of the Cash Price of canola. During the same period, the average cash purchase price paid at the Moosomin Elevator for wheat was CAD \$6.25 a bushel (or CAD \$229.73 per MT), making 2 cents equal to 0.32% of the Cash Price of wheat (7 cents would be equal to 1.12%).

[543] According to Ms. Sanderson, this evidence suggests that a material change in price cannot be less than 10 cents a bushel. The Tribunal agrees. The weighted average price increases predicted by Dr. Miller’s merger simulation model are only 1 cent per bushel in canola and 4 cents per bushel for wheat (in relation to the average price at the Moosomin, Virden, and Fairlight Elevators), which are both well below 10 cents per bushel.

[544] In sum, even looking at the absolute price effects measured by Dr. Miller, the Tribunal does not find evidence supporting the Commissioner’s position that the projected price variations are material. They are rather of a small magnitude and immaterial, consistent with the fact that P&H faces considerable competition from several rival Elevators and Crushers to constrain material price decreases after the Transaction.

[545] The Tribunal pauses to note the following. On this whole issue of P&H’s prices, the Tribunal agrees with the Commissioner that little weight should be given to Mr. Heimbecker’s evidence on this front, as he was obviously not very familiar with P&H’s day-to-day operations in relation to these pricing issues. However, even without taking into account Mr. Heimbecker’s evidence, there is no clear and convincing evidence of a material decrease in the price for wheat or canola, in absolute or relative terms.

[546] The Tribunal concludes that the evidence of absolute pricing variations does not constitute clear and convincing evidence supporting a conclusion that, “but for” the Virden Acquisition, the prices of wheat or canola paid to farmers by P&H are or would likely be “materially” lower.

(iii) *Difference-in-differences analysis*

[547] As part of her expert report, Ms. Sanderson did a difference-in-differences regression analysis to verify whether, since the closing of the Transaction, P&H has effectively lowered the Cash Prices “it pays farms at Virden or Moosomin post-Acquisition in an economically significant way” (Ms. Sanderson Report at para 110). Ms. Sanderson’s difference-in-differences is a retrospective merger analysis based on what actually happened to P&H’s post-Acquisition posted prices since the merger.

[548] Difference-in-differences regressions can be informative to study the effect of events such as mergers if the facts are consistent with the empirical framework. These analyses are called difference-in-differences because they aim at determining whether the merger has created a difference going above and beyond the other changes that would have occurred in any event, and whether the relative difference will be the same through the review period.

[549] In this case, Ms. Sanderson used a difference-in-differences regression analysis of posted prices at the Moosomin and Virden Elevators to test if the Acquisition has effectively reduced P&H’s Cash Prices at Moosomin and Virden, relative to the prices prevailing at a benchmark P&H Elevator (namely, the Dutton Elevator) that is unaffected by the Acquisition. Ms. Sanderson considered that the Dutton Elevator was an appropriate comparator Elevator as it was unaffected by the Acquisition and was outside of any acquired LDC Elevator’s draw areas, it was subject to the same network dynamics as the Moosomin Elevator, and it had posted prices. The graphs provided in Ms. Sanderson’s expert report show that the Dutton Elevator had closely similar behaviour and common trends compared to the Virden and Moosomin Elevators, with no evidence of materially lower purchase prices than the Virden and Moosomin Elevators.

[550] Ms. Sanderson calculated a difference-in-differences regression comparing net price changes for the Moosomin and Virden Elevators using the post-Acquisition months from December 10, 2019 to June 30, 2020 and the same months for 2016 to 2019 in the pre-Acquisition period. By using similar months every year, Ms. Sanderson removed added seasonal variations that increase modeling noise, and she chose the Dutton Elevator outside the Transaction’s competitive markets to control for impact of market conditions external to the impact of the Transaction.

[551] Ms. Sanderson concluded to a minimal decline in the Cash Price of canola and to a posted Cash Price increase of 1.5% for wheat since the Acquisition (Ms. Sanderson Report at para 112 and Figure 33; Ms. Sanderson Slides at p 86). More specifically, for the Moosomin Elevator, her difference-in-differences analysis found that canola prices were 0.5% higher and that wheat prices were 0.6% lower. For the Virden Elevator, she found that canola prices were 0.6% lower and wheat prices 1.5% higher. On that basis, she concluded that her regression analysis constituted further evidence that, as far as price effects are concerned, the Virden Acquisition does not, and is not likely to, lessen competition substantially.

[552] Dr. Miller acknowledged that Ms. Sanderson’s difference-in-differences methodology was “about as good as you can do” and “as good as the economic literature can get you here” (Consolidated Transcript, Confidential A, at p 1889). However, Dr. Miller considered that Ms.

Sanderson's regression framework does not fit the facts of this case, and is not a good predictor of P&H's pricing in the future.

[553] Three concerns were expressed by Dr. Miller about Ms. Sanderson's difference-in-differences analysis. First, Dr. Miller's main issue was about the usefulness of doing such an analysis while a merger review process is still on-going. In other words, he questioned the probative value of a retrospective merger analysis while the merger itself is still under review before the Tribunal, and had serious reservations about it. Second, he questioned the use of posted prices as opposed to realized transactions which could include results of negotiations (bearing in mind that, according to the evidence, █████ of P&H's prices for wheat and canola are negotiated). These negotiations often impact the Basis, and not only the Cash Price. Third, he was concerned about the reliability of the data in the period surrounding the Transaction, which is influenced by an international trade war and the effects of the COVID-19 pandemic. Dr. Miller also submitted that Ms. Sanderson does not have enough data post-merger to do a robust analysis, nor does she have a sufficient control set against which to reliably interpret her results, as she only had one benchmark Elevator, the Dutton Elevator, in her control group.

[554] In her presentation at the hearing, Ms. Sanderson took into account the concerns raised by Dr. Miller (Ms. Sanderson Slides at p 87). She responded that she used the Dutton Elevator to counter the impact of factors such as an international trade war or COVID-19. She is comparing the changes at the Moosomin and Virden Elevators to the changes at the Dutton Elevator. All three Elevators were impacted by these exogenous factors, and the assumption was that the broader market effects would be similar on the three Elevators.

[555] With respect to the quality of her price data, Ms. Sanderson emphasized that her regression is a difference-in-differences analysis, and that using the posted price data would be suitable for picking up whether there is a difference due to the Acquisition. Approximately █████ of P&H's transactions are at posted prices, and there was no evidence that the situation about negotiated prices is different at the Moosomin and Virden Elevators from what it is at other Elevators, including the Dutton Elevator. More generally, Ms. Sanderson advised that there is no indication that the Dutton Elevator was an outlier or had delivered results different from other Elevators in the P&H network. Ms. Sanderson's model results also indicate that the R-squared variable, which is an indicator measuring how well the variables in the regression predict the dependent variable, is fairly high, thus showing a good fit for her model.

[556] The Tribunal notes that Dr. Miller identified a few reasons as to why Ms. Sanderson's methodology could provide inadequate results, but no evidence was provided to show that this occurred with Ms. Sanderson's model in this case.

[557] However, the Tribunal agrees with some of Dr. Miller's concerns about Ms. Sanderson's difference-in-differences regression, in that it did not account for autocorrelation in the modeling, which leads to overstating the precision of her results. The Tribunal also notes that the post-Acquisition time period for the data used by Ms. Sanderson, being less than a year, is fairly short and that there were inventory issues at the Virden Elevator towards the end of 2019.

[558] One member of the Tribunal, Ms. Samrout, has additional methodological concerns with Ms. Sanderson's analysis. Ms. Samrout is of the view that Ms. Sanderson's regression treated the

Futures Price as a control variable that explains a portion of the variation in the observed Cash Price. Although this variable provides the average change in the Cash Price pre- and post-Transaction as the Futures Price changes, while holding all other variables constant, it is unclear whether the model fully or partially explains the magnitude of the variation in the Cash Price since the interaction between the timing of the transaction (pre- and post-Transaction) and the Futures Price was not tested. In other words, a variable should have been included to capture the difference in the magnitude of how well the Cash Price is affected by the Futures Price pre- and post-Transaction.

[559] As part of her difference-in-differences analysis, Ms. Sanderson also presented in her testimony (Ms. Sanderson Slides at pp 82–85) the line trends tracking the difference in Cash Price before and after the Acquisition in comparison with the Dutton Elevator's Cash Price, showing that there is little difference between the Moosomin and Virden pricing behaviour in Cash Price in comparison to Dutton. Ms. Samrout notes that Ms. Sanderson compared the Cash Price before and after the Acquisition without any visual linkage to the fluctuation and trending of Futures Prices and their corresponding posted Basis to arrive at the Cash Prices.

[560] In the end, the Tribunal is satisfied that Dr. Miller's critiques do not significantly alter Ms. Sanderson's conclusions and agrees that, on a balance of probabilities, it is more likely than not that P&H has not lowered its purchase prices for wheat and canola since the Acquisition. In sum, the Tribunal is of the view that Ms. Sanderson's difference-in-differences analysis is more consistent with P&H's position than the Commissioner's, and that it provides some support for the non-material nature of the price effects resulting or likely to result from the Virden Acquisition. However, the Tribunal finds the analysis to be of more limited assistance given the concerns raised by the limitation of the data and by the fact that it is looking at the behaviour of P&H while the Virden Acquisition was under review. The Tribunal thus concludes that it should be given little weight in its price effects analysis.

(iv) *Conclusion on price effects*

[561] In light of the foregoing, the Tribunal is left with unpersuasive and insufficient evidence regarding the alleged substantiality of the price effects of the Virden Acquisition. The measured price effects are *de minimis* for the purchase of canola. For wheat, the Tribunal finds that the Acquisition is having or is likely to have some very minor price effects on the purchase of wheat but they are far from substantial. In sum, having regard to the evidence presented, the Tribunal finds that the likely price variations due to the Virden Acquisition, whether in absolute terms or in relative terms, are immaterial and are likely to remain immaterial for both the purchase of wheat and the purchase of canola.

[562] The Tribunal underlines that, even though farmers located in the “corridor of concern” are arguably the most affected by the Virden Acquisition as a vast majority of them sell their wheat and canola exclusively to the Virden, Moosomin, and Fairlight Elevators, the Commissioner presented no quantitative evidence regarding the predicted price changes in that specific part of the relevant geographic markets for wheat and canola. There is therefore insufficient evidence allowing the Tribunal to determine the relative or absolute magnitude of the predicted price variations for the farmers located in the corridor of concern.

(c) Market concentration and market shares

[563] The Tribunal now turns to the effect of the Virden Acquisition on P&H's post-merger market shares. As discussed above, Dr. Miller and Ms. Sanderson disagree as to the number of participants in the relevant geographic markets; hence, they disagree on whether or not the merged firm will have a market share that exceeds 35%, which is considered a "safe harbour" in the Commissioner's 2011 MEGs.

[564] Relying on *Tele-Direct* at paragraph 226, the Commissioner submits that high market shares are an indirect indicator that the Virden Acquisition allows P&H to exercise increased market power: in this case, Dr. Miller's calculations indicate that P&H's post-Acquisition market shares are 59.6% for wheat and 53.9% for canola (Dr. Miller Report at Exhibit 10). These calculations are for Dr. Miller's original relevant geographic market based on the "imputed" price for GHS, which was defined by Dr. Miller as including solely the Virden, Moosomin, and Fairlight Elevators.

[565] According to Ms. Sanderson, using the geographic markets based on the Cash Prices with a 5% SSNIP threshold, P&H's post-Acquisition market shares would be much lower (Ms. Sanderson Slides at pp 74–75). It would be 31.6% in the relevant geographic market for the purchase of wheat, defined by Ms. Sanderson as including the Moosomin, Virden, Fairlight, Oakner, Whitewood, Elva, Shoal Lake, and Carnduff Elevators, using the average price at the Virden Elevator as the reference price. Based on Ms. Sanderson's figures, this percentage would increase to 34.6% if the Carnduff Elevator is left out of the market. Post-Acquisition market shares would amount to only 16.1% in the relevant geographic market for the purchase of canola, defined by Ms. Sanderson as including the Moosomin, Virden, Fairlight, Oakner, Whitewood, Brandon (Richardson), Melville, Souris East, Shoal Lake, and Elva Elevators as well as the Crushers at Harrowby (Bunge), Yorkton (LDC), Velva (ADM), and Yorkton (Richardson).

[566] Ms. Sanderson further opined that what matters for the competitive effects analysis is P&H's post-merger share of purchases, because this determines the competitive alternatives available to farms if P&H were to seek to reduce its purchase prices for wheat and canola post-Acquisition. Ms. Sanderson testified that, post-Acquisition, the Moosomin and Virden Elevators account for only 15% of total canola purchases and only 26% of total wheat purchases from farms within Dr. Miller's Farmer Region.

[567] While subsection 92(2) of the Act expressly precludes the Tribunal from making a finding of substantial lessening of competition "solely on the basis of evidence of concentration or market share," it is not disputed that evidence of changes in market shares and concentration levels are relevant and often influential in the Tribunal's assessment. The Tribunal further agrees with the Commissioner that, in its market share and concentration calculations, it should not take into account the purchases of all Elevators located both inside and outside the relevant markets; the market shares should instead be computed based on the purchases made by those participants that are part of the relevant markets, as these markets are defined by the Tribunal.

[568] In this case, based on the evidence before it and considering the geographic market definition discussed above, the Tribunal finds that the post-Acquisition market share of P&H would be at most 16.1% in the relevant geographic market for the purchase of canola. This is a

conservative measure, as the relevant geographic market for canola identified by Ms. Sanderson was based on SSNIP level well below 5% — it was 3.08% — and on the lower Virden Elevator price for canola as a reference price. This concentration level is significantly below the 35% safe harbour threshold identified in the MEGs, and cannot be considered indicative of a lessening of competition in the purchase of canola, let alone a substantial one.

[569] Turning to wheat, the Tribunal concludes that the post-Acquisition market share of P&H would likely fall within a range corresponding to the potential relevant geographic markets discussed above: these market shares would vary between 31.6% for a relevant geographic market including all Elevators retained by Ms. Sanderson in her analysis and approximately 34.6% if the market is limited to the Moosomin, Virden, Fairlight, Oakner, Whitewood, Elva, and Shoal Lake Elevators (and excludes the Carnduff Elevator). These market share figures approaching 35% provide, in the Tribunal's view, no more than weak evidence of enhanced market power in the purchase of wheat.

(d) Removal of a vigorous and effective competitor

[570] The Commissioner submits that the Virden Acquisition eliminates intense rivalry between the two main suppliers of GHS for wheat and canola in the corridor of concern. He asserts that the Moosomin and Virden Elevators competed head-to-head on price and service, and were each other's closest competitors. The removal of a vigorous and effective competitor is one of the factors specifically contemplated by section 93, at paragraph (f).

[571] The Tribunal agrees with the Commissioner on this point.

[572] Three sources of evidence support the Commissioner's arguments: the diversion ratios, the documentary evidence, and the farmers' testimonies.

[573] One of the factors that can be relevant when considering the likely competitive effects of a merger is the diversion ratios between the products of the merging parties. This is because such ratios can provide information regarding the closeness of competition between those products. In this case, the diversion ratios calculated by Dr. Miller demonstrate that the Virden and Moosomin Elevators are close competitors. For wheat, the diversion ratios found by Dr. Miller were 23.8% from the Moosomin Elevator to the Virden Elevator, and 36.3% to the Fairlight Elevator. Conversely, for the Virden Elevator, the diversion ratios for wheat were 16.8% to the Moosomin Elevator and 20.3% to the Fairlight Elevator. True, the highest diversion ratios from each of the two Elevators were to the Fairlight Elevator. But the diversion ratios between the Moosomin and Virden Elevators were second, reflecting the fact that the Moosomin and Virden Elevators are relatively close competitors. As will be discussed below, the Tribunal is mindful of the fact that these diversion ratios — being around 20% and far below 50% — are not objectively high, and that there is significant diversion to rival Elevators other than Moosomin, Virden, or Fairlight. However, this does not diminish the fact that, in light of these observed diversion ratios, the Acquisition removes a vigorous and effective competitor.

[574] There is also ample documentary evidence of direct, head-to-head competition between the Moosomin and Virden Elevators.

[575] Finally, the farmer witnesses who testified on behalf of the Commissioner — Mr. Lincoln, Mr. Pethick, and Mr. Wagstaff — all referred to the fact that they were using the two Elevators and complained about the loss of one competitive option further to the Virden Acquisition.

[576] Based on all this evidence, the Tribunal finds that the Acquisition eliminates a vigorous competitor —the Virden Elevator — which was a close rival to the Moosomin Elevator. The Tribunal is satisfied that, in the absence of the Acquisition, the Virden and Moosomin Elevators would have continued to vigorously compete in the relevant markets for the foreseeable future. There is no evidence to indicate that the Virden Elevator would have ceased being a vigorous and effective competitor, but for the Acquisition.

(e) Effective remaining competitors

[577] While the removal of a vigorous and effective competitor is a factor that the Tribunal may have regard to, paragraph 93(e) of the Act also directs the Tribunal to consider the “extent to which effective remaining competition remains or would remain” in a market affected by the merger. P&H maintains that there are several remaining Elevators and Crushers which will continue to discipline the Virden and Moosomin Elevators after the Acquisition, in the purchase of both wheat and canola, and that these rivals will be capable of constraining P&H’s ability to exercise increased market power after the Acquisition.

[578] The Tribunal agrees in part with P&H. The fact that the Moosomin and Virden Elevators went toe-to-toe on several occasions does not mean that they did not also have to go toe-to-toe with other rival Elevators located farther away. At the stage of the substantial lessening of competition, the Tribunal considers whether rivals’ purchase locations (including those close to the border of the relevant geographic market) provide competition and constrain the supply/purchase locations that are within the geographic market (*VAA CT* at para 305; *Hillsdown* at p 330).

[579] Dr. Miller and Ms. Sanderson agree that, for the purpose of analyzing anti-competitive effects and the substantial lessening of competition, the Tribunal needs to consider competitors located both inside and outside the defined relevant geographic markets in order to assess their constraining impact on the price and non-price dimensions of competition. In other words, the competitive constraints on a merged firm can come from rivals within and outside the relevant geographic markets (Consolidated Transcript, Public, at p 1831). Indeed, the number of competitors considered by Dr. Miller for his substantial lessening of competition analysis were not limited to those Elevators he had included in his narrow geographic market definition; they instead extended to 15 Elevators for wheat and, for canola, to these same 15 Elevators as well as five Crushers. In sum, Dr. Miller’s merger simulation model included Elevators and Crushers that come from outside the defined geographic markets.

[580] In her testimony before the Tribunal, Ms. Sanderson stated that, however the geographic market is defined, what matters for anti-competitive effects is P&H’s post-merger share of purchases because this determines the competitive alternatives available to farms if P&H were to seek to reduce its purchase prices post-Acquisition. Dr. Miller and Ms. Sanderson did not dispute P&H’s share of purchases. As mentioned above, post-Acquisition, the Moosomin and Virden

Elevators account only for 15% of canola purchases and 26% of wheat purchases from farms within Dr. Miller's Farmer Region.

[581] P&H's evidence indicates that it competes with numerous Elevators and Crushers in the purchase of wheat and canola in Dr. Miller's Farmer Region. According to P&H, its competitors for wheat include the following Elevators and grain companies: Viterra at Fairlight, Brandon, Souris East, Grenfell, Waldron, Binscarth, and Carnduff; Paterson at Binscarth and Carnduff; Richardson at Shoal Lake, Kemnay, Langenburg, Melville, Minnedosa, Estevan, and Whitewood; Ceres at Northgate; Cargill at Oakner, Nesbitt, and Elva; and G3 at Bloom and Melville (Heimbecker Statement at paras 119, 121–124). P&H adds that its competitors for canola include the following Elevators and Crushers, and grain companies: Viterra at Fairlight, Brandon, Souris East, Grenfell, Waldron, Binscarth, and Carnduff; Paterson at Binscarth and Carnduff; Richardson at Shoal Lake, Kemnay, Langenburg, Yorkton, Melville, Minnedosa, Estevan, and Whitewood; Ceres at Northgate; Cargill at Oakner, Nesbitt, and Elva; G3 at Bloom and Melville; LDC at Yorkton; ADM at Velva; and Bunge at Harrowby and Altona (Heimbecker Statement at paras 120–125).

[582] According to Ms. Sanderson, there are many other Elevators and Crushers buying canola and wheat from farms in Dr. Miller's Farmer Region. As indicated in Ms. Sanderson's expert report, 11 rival Elevators and Crushers are buying more canola than does the Moosomin Elevator (Ms. Sanderson Report at Figure 24; Ms. Sanderson Slides at pp 77–78). And Viterra's Fairlight Elevator and Bunge's Harrowby Crusher also purchase more canola than the Virden Elevator. For wheat, while the Virden, Moosomin, and Fairlight Elevators are the largest purchasers of wheat, six rival Elevators each have at least a 5% share of total wheat purchases (Ms. Sanderson Report at Figure 25; Ms. Sanderson Slides at pp 79–80).

[583] P&H further submits that internal business documents from both its records and LDC's records further show that each of the Moosomin and Virden Elevators compete with and track prices of many other Elevators beyond Moosomin, Virden, and Fairlight (Ms. Sanderson Report at paras 81–82). In her evidence, Ms. Sanderson referred to numerous contemporaneous business documents from P&H and LDC where they referred to competitor pricing, such as Viterra at Carnduff, or Richardson at Whitewood.

[584] Ms. Sanderson's analysis of P&H's documents and LDC's Producer Reports showed that individual price negotiations are relatively infrequent, echoing the evidence demonstrating that about [REDACTED] of P&H's transactions are at posted prices. In her analysis of those instances where price negotiations actually occurred, Ms. Sanderson found that 72 of the 213 reports referring to negotiations at the Virden Elevator identified farms using rival Elevator prices in a negotiation: only six of those 72 mentioned the Moosomin Elevator, and 27 mentioned Viterra's Fairlight Elevator. Other rival grain companies identified in the reports included G3 (13 times), Cargill (11 times), and Richardson (eight times). Conversely, 17 reports referring to negotiations at the Moosomin Elevator identified farms using rival Elevator prices in a negotiation: five of those mentioned Virden, and the Fairlight Elevator appeared 12 times (Ms. Sanderson Report at paras 116–117, Figures 35a–35b; Ms. Sanderson Slides at p 88). This evidence, says P&H, reflects the presence of other remaining Elevators and Crushers constraining P&H's pricing behaviour.

[585] Turning to the diversion ratios found by Dr. Miller, Ms. Sanderson advises that, for wheat, they show that 40% of the sales diverted from the Moosomin Elevator would go to rival Elevators other than Virden or Fairlight. For the Virden Elevator, 63% of the diverted sales of wheat from the Virden Elevator would go to Elevators other than Moosomin or Fairlight. In the case of canola, these percentages are higher: 65% of the sales diverted from the Moosomin Elevator would go to rival Elevators and Crushers other than the Virden or Fairlight Elevators, and 77% of the sales diverted from the Virden Elevator would be absorbed by Elevators and Crushers other than the Moosomin or Fairlight Elevators (Dr. Miller Report at Exhibit 11; Ms. Sanderson Report at Figure 50). The Tribunal agrees with Ms. Sanderson that these diversion ratios to rival Elevators other than Moosomin, Virden, or Fairlight are not insignificant, with several other Elevators and Crushers having diversion ratios for canola that are similar or higher than those calculated between the Moosomin and Virden Elevators (Ms. Sanderson Report at Figure 47). For wheat, diversion ratios from one of the Moosomin or Virden Elevators exceed 10% to the Fairlight (Viterra), Whitewood (Richardson), Souris East (Viterra), and Oakner (Cargill) Elevators (Ms. Sanderson Report at Figure 48).

[586] Distance (and hence trucking costs) between individual farms and Elevators was included in Dr. Miller's farm choice model, which found that the Virden and Moosomin Elevators would lose a significant portion of their wheat or canola sales to rival Elevators other than Moosomin, Virden, and Fairlight.

[587] According to Ms. Sanderson, the relatively small price variations predicted by Dr. Miller's merger simulation model reflect the relatively low diversion ratios between the Moosomin and Virden Elevators, compared to the diversion ratios to rival Elevators and Crushers (Ms. Sanderson Slides at p 5). P&H submits that the diversion ratios support a finding that P&H also faces competition from several rival Elevators and Crushers.

[588] The evidence from the farmer witnesses also suggests that farmers have numerous alternatives to which they sell their grain, and to which they could sell more, should P&H attempt to reduce its purchase prices for wheat or canola (Ms. Sanderson Report at paras 12–13). Any farm located within the draw areas of the Moosomin and Virden Elevators has at least six other Elevators or Crushers available to it, should it not want to sell its grain to P&H, if the price offered price at those other locations was attractive. According to P&H, the evidence establishes that all farmers in the Commissioner's relevant geographic market and in the Commissioner's corridor of concern within that geographic market, including each of the farmer witnesses, consistently sell to numerous Elevators and Crushers beyond the Virden, Moosomin, and Fairlight Elevators. P&H also argued that the evidence also establishes that the farmers could easily switch to other Elevators and Crushers without negative financial impact on them in the event that P&H were to attempt to pay them less for their wheat or canola (P&H Read-In at pp 26–27, 52–54, 61–67, 77, 551, 553–556, 558).

[589] The three farmer witnesses called by the Commissioner (*i.e.*, Mr. Lincoln, Mr. Wagstaff, and Mr. Pethick) have sold their grain to Elevators located farther away when offered an acceptable price from more distant Elevators. Farmer witnesses further confirmed in their testimony that while transportation costs are important to farmers in deciding between competing Elevators and/or Crushers, they do not preclude sales of grain to competing alternatives available to farmers at a greater distance. This is so because rival Elevators and Crushers offer posted Cash Prices that are

high enough to cover farmers' hauling costs and make it worthwhile for them to sell to those Elevators and Crushers (Exhibit P-R-14, Witness Statement of Mr. Edward Paull, at para 25; Exhibit P-R-077, Witness Statement of Mr. Kristjan Hebert, at para 26; Exhibit P-R-095, Witness Statement of Mr. Timothy Duncan, at para 21).

[590] In light of the foregoing, the Tribunal agrees that there are some effective remaining competitors able to constrain P&H's attempt to increase its market power further by the Virden Acquisition. The more difficult question is to identify how many there is and who they are. The Tribunal is not persuaded that all rival Elevators and Crushers singled out by P&H remain, and are likely to remain, effective competitors post-Acquisition. All competitors are not equal, even if they purchase some grain from the farms located in Dr. Miller's Farmer Region.

[591] In the Tribunal's view, the effective remaining competitors certainly include those Elevators and Crushers forming part of the relevant geographic markets accepted by the Tribunal. For wheat, these competitors are the following Elevators (and grain companies): Fairlight (Viterra), Oakner (Cargill), Whitewood (Richardson), Elva (Cargill), and Shoal Lake (Richardson). For canola, this effective remaining competition includes several Elevators — namely, Fairlight (Viterra), Oakner (Cargill), Whitewood (Richardson), Brandon (Richardson), Melville (G3), Souris East (Viterra), Shoal Lake (Richardson), and Elva (Cargill) — as well as four Crushers — namely, Harrowby (Bunge), Yorkton (LDC), Velva (ADM), and Yorkton (Richardson). The Tribunal observes that these competing Elevators and Crushers are all operated by major grain companies that purchase wheat and canola in competition with P&H throughout Western Canada, including Viterra and Richardson, the two largest. They also include most of the Elevators and Crushers having the higher diversion ratios discussed above, as well as all the rivals which buy more canola than the Virden or Moosomin Elevators and four out of the six Elevators having at least a 5% share of total purchases of wheat.

[592] One notable exception is the Viterra Elevator in Souris East, which is not part of the relevant geographic market for wheat despite its high diversion ratio from the Virden Elevator (*i.e.*, 12.9%) and its 5.3% share of total wheat purchases. The Tribunal is of the view that, in light of this evidence, this rival Elevator can be considered as an effective remaining competitor in wheat even though it is not part of the relevant geographic market.

[593] With respect to other competing Elevators and Crushers located outside the relevant geographic markets identified in these Reasons, the Tribunal accepts that, from time to time, they are purchasing grain from farms located in Dr. Miller's Farmer Region. However, the Tribunal does not find that, on a balance of probabilities, they can be qualified as "effective" remaining competitors able to constrain P&H post-Acquisition.

[594] In sum, the Tribunal agrees with P&H that there is and will be several remaining effective competitors in the relevant markets for the purchase of wheat and canola. On a balance of probabilities, there are competitors remaining that are able to discipline P&H's attempts to exercise market power.

(f) Fairlight Elevator

[595] The Commissioner claims that, while the Fairlight Elevator will remain as an effective competitor, it is not sufficient to constrain the exercise of market power by P&H post-Acquisition.

[596] According to the Commissioner, the simple way to demonstrate this is through Dr. Miller's quantitative evidence. There is also qualitative evidence to support this quantitative evidence: the Virden and Moosomin Elevators are both on the Trans-Canada Highway, while the Fairlight Elevator is located approximately 35 kilometers away down a secondary road. This secondary road is subject to weight restrictions in the spring. Mr. Wagstaff testified that, contrary to the Trans-Canada Highway where one can drive at an average speed, going up highway 41 or down road no. 8 to get to the Fairlight Elevator is more difficult, as the road conditions are worse, and it takes longer to haul the grain.

[597] The Tribunal accepts that, in and of itself, the presence of the Fairlight Elevator may not be enough to constrain the exercise of increased market power by P&H post-Acquisition. However, the Tribunal nonetheless observes that the Fairlight Elevator is a very important competitive constraint that will remain after the merger given its market shares and the evidence of diversion ratios. In the geographic market for wheat, the Fairlight Elevator would have the highest market share after the Moosomin-Virden combination. In the geographic market for canola, it would have the second highest market share after the Crusher in Harrowby and Moosomin-Virden. Moreover, the Fairlight Elevator's diversion ratios (at 20.3% and 36.3%) are respectively higher than the Moosomin Elevator (16.8%) and Virden Elevator (23.8%) for diversion of wheat from the Virden Elevator and the Moosomin Elevator. It is also true for canola: the Fairlight Elevator's diversion ratios (at 17.2% and 22.2%) are respectively higher than those of the Moosomin Elevator (5.3%) and the Virden Elevator (13.1%) for diversion of wheat from the Virden Elevator and the Moosomin Elevator.

[598] For those reasons, the Tribunal is of the view that the Fairlight Elevator is a significant competitor that, on the evidence, cannot be qualified as being less effective than other remaining Elevators and Crushers.

(g) Moosomin expansion

[599] The Commissioner contends that P&H's decision not to expand the Moosomin Elevator's rail capacity is another reflection of the anti-competitive effects caused by the Virden Acquisition. Prior to the Acquisition, P&H had planned to expand railcar access at the Moosomin Elevator, allowing it to load up 112 railcars at once, instead of its current limit of 56. This expansion would have allowed the Moosomin Elevator to access lower bulk rates on its freight, and to be more competitive.

[600] Considering the evidence provided by Mr. Heimbecker on the reasons for the delayed expansion at the Moosomin Elevator, the Tribunal is not persuaded by the Commissioner's arguments. In sum, there is no clear and convincing evidence supporting the Commissioner's assertion that the delay in expansion is or could likely be the result of the Virden Acquisition.

[601] The evidence before the Tribunal shows that in July 2019, P&H made the decision not to expand rail capacity at the Moosomin Elevator as initially planned before LDC solicited P&H to buy its 10 Elevators, including the Virden Elevator. Mr. Heimbecker further testified that later in 2019, P&H decided to postpone all capital expenditures, including the Moosomin Elevator expansion, for a period of one year, as a matter of prudent financial management, in light of the fact that P&H would be spending more than [REDACTED] to purchase the LDC Elevators (Heimbecker Statement at para 138, Exhibit 34). Mr. Heimbecker further confirmed in his testimony that, subject to the outcome of this Application (as a result of which P&H could potentially be ordered to divest the Moosomin Elevator), the P&H Board is expected to approve the 112-car spot expansion at the Moosomin Elevator.

[602] The Tribunal accepts Mr. Heimbecker's evidence on that point, which has not been contradicted. The Tribunal does not dispute that if the Moosomin Elevator's rail capacity had been expanded, the Moosomin Elevator would have been a more vigorous competitor. But the evidence before the Tribunal does not allow it to conclude that the delayed Moosomin expansion can be attributed to the Virden Acquisition.

[603] This is therefore not a factor supporting the Commissioner's claim of a substantial lessening of competition caused by the Virden Acquisition.

(h) Barriers to entry and expansion

[604] In assessing whether competition is or is likely to be substantially lessened by a merger, an important factor to consider is whether entry or expansion into the relevant market likely is or likely would be substantially faster, more frequent, or more significant "but for" the merger (*TREB CT* at para 505). This factor is specifically mentioned at paragraph 93(d) of the Act. As previously noted by the Tribunal, "[t]he conditions of entry into a relevant market can be a decisive factor in the Tribunal's assessment of whether a merger is likely to prevent or lessen competition substantially" (*Tervita CT* at para 216).

[605] In assessing whether new entry into, or expansion within, a relevant market can be relied upon to conclude that a substantial lessening of competition is likely to occur, the Tribunal will consider whether such entry or expansion will be timely, likely, and sufficient (*Tervita CT* at para 217). For a new entry to be timely, the assessment is not limited to the actual construction time. The period starts when firms begin considering sites and go through the regulatory approval process.

[606] According to the Commissioner, entry or expansion by competitors into the relevant markets is unlikely to occur in a timely and sufficient way because barriers to entry and expansion are high in the grain industry. They include capital costs of CAD \$40-50 million to construct an Elevator, as well as having to find a location where there is sufficient demand and a suitable site permitting adequate rail and road access. A potential entrant would further take more than two years to build an Elevator, says the Commissioner.

[607] P&H responds that, in terms of entry, there is evidence that at least 20 new high throughput Elevators have been built in Western Canada since 2015, including 10 Elevators by G3, two

Elevators by P&H, one by Ceres, and four by GrainsConnect. P&H adds that G3 also has three additional Elevators currently under construction.

[608] For the reasons detailed below, the Tribunal finds that the Commissioner has provided credible and persuasive evidence confirming that barriers to entry and expansion are high. This evidence came from G3 and from P&H itself.

[609] Mr. Malkoske of G3 testified that, based on his experience with G3's Vermillion site, the total costs to build a new Elevator are approximately [REDACTED] (Exhibits P-A-047 and CB-A-048, Witness Statement of Mr. Brett Malkoske, at para 8). He also stated that it typically takes between [REDACTED] months from deciding to construct an Elevator to commencing operations.

[610] The evidence of G3 was corroborated by P&H's own evidence.

[611] When building a new Elevator in Dugald, Manitoba, P&H considered sites in June 2018 and, going through the permit process, regulatory approvals, and construction, it expected the Elevator to be completed in [REDACTED], approximately [REDACTED] months after its initial consideration. P&H further estimated the cost of building a new Elevator to be in the range of [REDACTED] to [REDACTED].

[612] The Tribunal notes P&H's evidence on its experience that a motivated competitor wishing to construct greenfield Elevators could build a new Elevator in the Virden/Moosomin area in approximately 18 months. However, the Tribunal is not convinced by the general statement of Mr. Heimbecker on this point, in light of the other specific evidence on the record, referring to actual experiences by both G3 and P&H itself in building new Elevators over a much longer timeframe.

[613] As a result, the Tribunal is satisfied that there is clear and convincing evidence to support the conclusion that entry or expansion is not likely to occur on a sufficient scale or scope within the next two years and that new entrants are not sufficient to have a material impact on the price and non-price dimensions of competition in the purchase of wheat and canola. Having regard to the foregoing evidence, the Tribunal finds that there are significant barriers to entry into the purchase of wheat and canola. Entry and expansion within the relevant markets is not likely to be sufficient to ensure that the Virden Acquisition does not and will not likely lessen competition substantially, and to prevent P&H from imposing and sustaining decreased prices for its purchase of wheat and canola.

(i) Excess capacity

[614] At the Elevator level, the general issue of entry and expansion entails considering the potential of adding capacity through new entry, the possibility of expanding existing capacity, and the existence of excess capacity that already lies dormant in the industry.

[615] In his submissions, the Commissioner addresses the first two elements — namely, entry and expansion — but not the last one, excess capacity.

[616] P&H claims that the presence of significant excess capacity is and will remain a constraining factor on P&H after the Virden Acquisition. In paragraphs 141 to 147 and 152 of his witness statement, Mr. Heimbecker discussed the maximum observed throughput and actual throughput at P&H and other Elevators in the grain industry. Using publicly available CGC data (Heimbecker Statement at Exhibit 35), Mr. Heimbecker prepared a table setting out the average amount of grain purchased and shipped annually by each of P&H's rival Elevators over a five-year period between the 2014-2015 and 2018-2019 crop years. The table also provided information on each of the Elevators' maximum annual throughput in that five-year period and their average and best turn rates (Heimbecker Statement at paras 143–145).

[617] Summing their individual maximum annual throughputs, Mr. Heimbecker testified that the aggregate maximum “capacity” of competing Elevators (*i.e.*, Elevators other than Moosomin and Virden) is at least 4,562,400 MT. In comparison, the five-year average of total throughput of these Elevators was 3,570,700 MT (Heimbecker Statement at para 146). A comparison of these two figures led Mr. Heimbecker to conclude that these rival Elevators are capable of handling at least 991,700 MT more than their average throughput over the five-year period. In his witness statement, Mr. Heimbecker also addressed the rail shipping capacity, at paragraphs 148 to 151, and concluded that the unused car spot capacity added up to 4,765,200 MT.

[618] In a preliminary motion objecting to some paragraphs of the Heimbecker Statement, the Commissioner submitted that Mr. Heimbecker cannot opine as to what rival Elevators can do and took exception with Mr. Heimbecker's statements that rival Elevators “could easily increase their purchases of wheat and canola from farms in the Virden/Moosomin area” or “add significant grain purchasing capacity,” made at paragraphs 141 and 152 of the Heimbecker Statement.

[619] In a decision issued in December 2020, the Tribunal agreed with P&H that those paragraphs on average throughput and capacity generally described Mr. Heimbecker's observations and perceptions from data published by the CGC showing the volume of grain that P&H and rival Elevators purchased and shipped (*i.e.*, their effective and maximum throughput) in the five-year period between the 2014-2015 and 2018-2019 crop years (*Parrish & Heimbecker* at paras 25–30). The Tribunal was satisfied that the statements on the actual measures of capacity and throughput generally reflected Mr. Heimbecker's own observation of data and amounted to simple arithmetical calculations required to establish averages, totals, and differences regarding maximum throughput at Elevators within a five year span. Given his long experience in the grain industry, the Tribunal noted that Mr. Heimbecker was well positioned to assist the Tribunal in this regard. However, the Tribunal held that Mr. Heimbecker was not qualified to form conclusions as to what the rival Elevators would do with their alleged excess capacity. Extrapolating from the throughput data to what rival Elevators could do in their businesses and to their future conduct in terms of purchases of wheat and canola are inferences or conclusions that could be done by experts or argued by counsel, and which will ultimately be for the Tribunal to determine. The Tribunal therefore struck certain passages of the Heimbecker Statement as inadmissible lay opinion evidence.

[620] Mr. Heimbecker's evidence on throughput and excess capacity calculations was not contradicted. The Tribunal, however, observes that no evidence has been provided regarding what other Elevators not owned by P&H could or would do with their excess throughput capacity or

railcar capacity, and how it could or would translate in terms of their purchases of wheat and canola.

[621] In their testimonies, Mr. McQueen from Viterra and Mr. Wildeman from Ceres confirmed the nature of the data and information reported to the CGC regarding Elevators' throughput, which was used by Mr. Heimbecker for his calculations.

[622] The Commissioner did not adduce (or obtain) any evidence as to excess capacity nor did he challenge the evidence put forward by P&H in this regard.

[623] The Tribunal is not satisfied that the arithmetic calculation presented by Mr. Heimbecker can qualify as a true measurement of excess capacity. Mr. Heimbecker's calculations provide no reference to grain volumes produced during each crop year corresponding to the grain purchased and shipped for that year, as well as to the grain companies' ability to ship and sell those volumes. Nor do they provide a clear understanding of the supply chain capacity and fluidity impacting Elevators' throughput with respect to ships availability, and the capacities of export terminals, Elevators, ports, and rail networks.

[624] In previous decisions, the Tribunal has considered excess capacity in its substantial lessening of competition analysis and when considering market power at the market definition stage (see, for example, *Hillsdown*, at pp 318–321). In *Hillsdown*, the Tribunal noted that if rival firms in a market have excess capacity, they “can respond to a supra-competitive price rise by flooding the market at a lower price level” (*Hillsdown* at p 318). As a result, “the best question to ask when assessing market power, in some circumstances, is whether the respondents' [merging parties'] current competitors have capacity available to service what otherwise would be the merged firm's customers” (*Hillsdown* at p 318).

[625] The Tribunal in *Hillsdown* considered evidence about the excess capacity of several specific rivals and the merged firm's own excess capacity. At page 320, the Tribunal concluded that in the industry, it was fairly easy for renderers to increase their capacity or, in the case of multi-plant firms, to shift renderable material among different plants to open up capacity at a given plant when it was needed. The Tribunal also found that there appeared to be significant excess capacity in the industry generally, and that the merged firm was not capacity-constrained. The excess capacity of firms both inside and outside the relevant market would provide a degree of competitive pressure on the merged firm and restrain to a considerable degree its ability to raise prices (*Hillsdown* at p 321).

[626] In the present case, the Tribunal accepts that, at an industry level, the Elevators are likely able to move more grain as suggested by Mr. Heimbecker's evidence and to transport it by rail to ports. However, the Tribunal cannot place much weight on this general finding in its substantial lessening of competition assessment. An assessment of excess capacity in the grain industry would have had to consider many additional factors and evidence that is not before the Tribunal. For instance, in the Tribunal's view, there is insufficient evidence about the excess capacity of specific rival Elevators close to the Moosomin and Virden Elevators — namely, how the owners of those rival Elevators could adjust their local grain inventories and rail capacities at different points in the crop year to respond to lower grain purchase prices offered to farmers at those two P&H Elevators. In the absence of additional factual evidence (*e.g.*, from rival Elevator owners) or expert

evidence about the industry that assessed capacity issues in more detail, the Tribunal can reach no firm conclusion on the impact of any excess throughput capacity on the intensity of rivalry after the Transaction, or on the ability of P&H to decrease prices for wheat and canola.

(j) Other factors

[627] Paragraph 93(h) of the Act also allows the Tribunal to take any other relevant factor in consideration in its assessment of the substantial lessening of competition. The Tribunal is aware that, following the most recent amendments to the Act entered into force after the hearing of this Application, the Act specifically recognizes, at paragraph 93(g.3), that the Tribunal may have regard to any effect of a merger on “price and non-price competition, including quality, choice or consumer privacy.”

[628] In this case, the non-price effects alleged by the Commissioner are very limited. More specifically, there is no issue of change and innovation being affected by the Virden Acquisition (see paragraph 93(g)).

[629] In his final submissions, the Commissioner argued that the evidence also supports the existence of non-price competition. He referred to evidence from Mr. Pethick stating that the ability of an Elevator to accept grain during harvest is important to him (Pethick Statement at para 13). He also mentioned that the ability of an Elevator to quickly and efficiently receive grain, and its capacity to do so, is an aspect of non-price competition that the Tribunal should consider. The Commissioner however added that, while these aspects of competition are not necessarily reflected in the Elevator’s posted price, they “ultimately all are reflected in the price paid to the farmers by the Elevator” (Commissioner’s Closing Submissions at para 44).

[630] The non-price effects alleged by the Commissioner thus appear to be reflected in the transaction data and in the Cash Prices ultimately charged to the farmers by P&H and other Elevators for their wheat and canola. They are part of the price effects on which the Commissioner has focused in his submissions and in the evidence he presented.

[631] The Tribunal therefore determines that there is no clear and convincing evidence of separate non-price factors demonstrating, in and of themselves, a lessening of competition, let alone a substantial one.

(k) Magnitude, duration, and scope of the anti-competitive effects

[632] Having regard to all of the foregoing, the Tribunal concludes that, “but for” the Virden Acquisition, there are and will likely be some fairly limited adverse effects on competition in the purchase of wheat in the relevant markets, and virtually no proven effects in the purchase of canola. More specifically, there is not, and would likely not be, any new entry or expansion; there is, or likely would be, some very minor price decreases in the amount paid to farmers for their wheat; the Acquisition removes a close competitor to P&H’s Moosomin Elevator, as the Virden Elevator provided vigorous and effective competition; and there is also evidence of some pre-existing market power held by P&H. However, those anti-competitive effects are far less than what the Commissioner alleged.

[633] The Tribunal finds that the price effects, whether they are measured in relative or absolute terms, are minimal and immaterial in the circumstances, for both wheat and canola. Moreover, there will be several remaining effective rival Elevators and Crushers to compete with the Virden and Moosomin Elevators, and this situation is unlikely to change for the foreseeable future. In addition, the post-merger market shares of P&H would be far below the safe harbour threshold in the 2011 MEGs for purchases of canola; for wheat, the market shares are more likely than not to be slightly lower than the 35% safe harbour. Finally, the postponement of the Moosomin expansion cannot be attributed to the Virden Acquisition, and there appears to be some varying capacity at rival Elevators though the evidence does not allow the Tribunal to assess its constraining impact on P&H.

[634] The Tribunal must now determine whether the limited anti-competitive effects attributable to the Virden Acquisition and identified above, taken together, rise to the level of substantiality required by section 92. Further to its assessment of all the evidence before it, and notably the immaterial price effects resulting from the Virden Acquisition, the Tribunal finds that this is not the case. In particular, the Tribunal puts significant weight on the evidence showing an absence of any material price effects resulting from the Virden Acquisition, in the purchase of both wheat and canola, and the continuing presence of several effective remaining competitors in the markets. In brief, the aggregate impact of the limited anti-competitive effects that have been demonstrated to result from the Virden Acquisition does not constitute an actual or likely substantial lessening of competition in the relevant markets.

[635] Stated differently, the Tribunal is not persuaded that the evidence regarding the absence of likelihood of additional entry and expansion, the minimal predicted price variations, and the loss of the Virden Elevator as a competitor are sufficient, cumulatively, to enable the Commissioner to discharge his burden under section 92, even in a context where P&H has some pre-existing market power. Without a link between, on the one hand, such evidence and, on the other hand, some material impact on the price or non-price dimensions of competition in a material part of the relevant markets (*Tervita FCA* at para 108), the Commissioner's evidence falls short of the mark. In this regard, when measured against factors such as the immaterial price variations, the effective competitors remaining, and the post-merger market shares below the 35% safe harbour threshold, the Tribunal agrees with P&H that the Commissioner's evidence does not provide clear and compelling evidence that there is, or would likely be, materially lower price or non-price competition "but for" the Acquisition.

[636] Regarding scope, the Tribunal typically considers whether the merged entity would likely have the ability to impose the anti-competitive effects in a material part of the relevant market, or in respect of a material volume of sales. The evidence relied on by the Commissioner does not establish that it does.

[637] The Tribunal looked more specifically at the evidence regarding farmers located in the corridor of concern, arguably the most affected by the Virden Acquisition as a vast majority of them sell their wheat and canola exclusively to the Virden, Moosomin, and Fairlight Elevators. However, as mentioned above, there was an absence of quantitative and qualitative evidence regarding the predicted price changes in that specific part of the relevant geographic markets for the purchase of wheat and canola. Similarly, the Commissioner has not presented compelling evidence regarding the particular effects that the removal of the Virden Elevator as a vigorous and

effective competitor would have in the corridor of concern. There is therefore insufficient quantitative and qualitative evidence to allow the Tribunal to determine the degree to which the price and non-price effects resulting from the Virden Acquisition would be different for the farmers located in the corridor of concern.

(4) Conclusion on substantial lessening of competition

[638] In light of all of the foregoing, the Tribunal is not satisfied that the anti-competitive effects that could be attributable to the Virden Acquisition are, individually or in the aggregate, “substantial” as required by section 92 of the Act. The evidence does not allow the Tribunal to conclude that the Virden Acquisition has adversely affected or is adversely affecting price or non-price competition in the relevant markets, to a degree that is material, or that it is likely to do so in the future. True, the Virden Acquisition allows and is likely to allow P&H to increase its market power in the purchase of wheat; but the evidence does not support a finding that, on a balance of probabilities, it allows P&H to be able to exercise materially greater market power than in the absence of the merger. The Tribunal therefore concludes that the Commissioner has not demonstrated, on a balance of probabilities and with clear and convincing evidence, that the requirements of section 92 are met and that “but for” the Virden Acquisition, purchase prices paid by P&H for wheat and canola are or would likely be materially lower in the relevant markets, or that there are or would likely be materially greater non-price competition in those markets.

D. If the Commissioner has established that the Virden Acquisition lessens, or is likely to lessen, competition substantially, what is the remedy to be ordered?

[639] Given the Tribunal’s conclusion that the Virden Acquisition does not lessen, and is not likely to lessen, competition substantially in any relevant market, there is no remedy to be ordered.

E. Has P&H established, on a balance of probabilities, that the gains in efficiency will be greater than, and will likely offset, the effects of any lessening of competition pursuant to section 96 of the Act?

[640] In light of the Tribunal’s findings on the substantial lessening of competition, and since there will be no remedial order under section 92 of the Act, the Tribunal does not need to determine the issue of efficiencies claimed by P&H under section 96. However, considering the extensive submissions made by the parties on the issue of efficiencies and the nature of the issues raised, the Tribunal will address the matter.

(1) Analytical framework

[641] The section 96 efficiencies defence is an exception to the application of section 92. It “prohibits the Tribunal from making an order precluding a merger when it finds that the merger is likely to bring about gains in efficiency that would be greater than and would offset the anti-competitive effects of the merger” (*Tervita SCC* at para 17).

(a) The statutory language

[642] In the current case, P&H relies on both the general language of section 96 and the more specific provisions of subsection 96(2) to support its efficiency claims. Each will be discussed in turn.

(i) *Section 96*

[643] Section 96 of the Act is reproduced in Schedule “A” to these Reasons. Subsection 96(1) provides in relevant part that the Tribunal shall not make an order under section 92 if 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 will offset, the effects of any [...] lessening of competition that will result or is likely to result from the merger [...] and that the gains in efficiency would not likely be attained if the order were made.” Subsection 96(3) further instructs the Tribunal not to find that a merger or proposed merger has brought about or is likely to bring about gains in efficiency “by reason only of a redistribution of income between two or more persons.”

[644] The analysis mandated by subsection 96(1) has three components: 1) an assessment of the anti-competitive effects of any lessening or prevention of competition resulting or likely to result from the merger; 2) an assessment of the gains in efficiency brought about or likely to be brought about by the merger, and that would not likely be attained if the contemplated remedial order is made by the Tribunal; and 3) a trade-off analysis (or balancing test) to determine whether the assessed gains in efficiency will be greater than, and will offset, the assessed anti-competitive effects. The analyses of anti-competitive effects and efficiencies analyses are both forward-looking estimations and are therefore associated with varying degrees of uncertainty.

[645] In *Tervita SCC* and *Tervita CT*, the SCC and the Tribunal provided important guidance on the three elements of section 96.

- Anti-competitive effects

[646] For the purpose of the efficiencies defence and section 96, the anti-competitive effects include all effects of “any” lessening of competition, as long they result or are likely to result from the merger in respect of which the application is made.

[647] Anti-competitive effects include the likelihood of price increases, but they are not confined to such resource allocation effects, as the exercise of market power can manifest itself in ways other than an increase in price. Under both sections 92 and 96 of the Act, the anti-competitive effects encompass all relevant price and non-price effects that are likely to arise from a merger, including the following: negative effects on allocative, productive, and dynamic efficiency; redistributive effects; and effects on service, quality, and product choice (2011 MEGs at paras 12.21–12.22).

[648] The main anti-competitive effect considered under section 96 is the DWL associated with a likely increase in price. The DWL represents the loss of allocative efficiency and reflects the reduction in total consumer and producer surplus within Canada resulting from a merger. As the SCC stated in *Tervita SCC*, the “total surplus standard involves quantifying the DWL which will result from a merger — ‘the amount by which total surplus is reduced under certain market conditions that reduce the quantity of a good that is supplied’ (*Facey and Brown* at pp 256–57)” (*Tervita SCC* at para 94). The DWL “results from the fall in demand for the 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” (*Canada (Commissioner of Competition) v Superior Propane Inc*, 2003 FCA 53 (“**Superior Propane IV**”) at para 13). Estimates of the elasticity of demand (*i.e.*, the degree to which demand for a product varies with its price) are necessary to calculate the DWL (*Tervita CT* at para 244). Put differently, a price increase or decrease is not enough to determine the extent of the DWL, if there is no evidence on the price elasticity of demand (*Tervita SCC* at paras 132–133; *Tervita FCA* at para 124).

[649] The focus of this DWL approach is on the magnitude of the total surplus. The degree to which total surplus is allocated between producers and consumers is not considered. In other words, the total surplus standard measures the total benefit flowing to the economy and is not concerned with whom the benefits flow to (*Tervita SCC* at para 95; *Superior Propane IV* at para 16).

[650] A lessening or prevention of competition resulting from a merger can also lead to non-price effects in the form of a reduction in service, quality, product choice, incentives to innovate, or other dimensions of competition that customers value. While some indicators of quality may be translatable into dollar terms by making use of available statistical or survey data, others may not be expressible in that way. As such, it is not always possible to translate anti-competitive effects related to non-price factors into consumer or producer welfare terms, as can be more easily done with price effects.

[651] Anti-competitive effects covered by both sections 92 and 96 are therefore not strictly limited to reductions in price and to the quantified or quantifiable DWL. They may also include unquantifiable non-price effects such as: reduction in service, quality, and product choice; loss of productive efficiency; and loss of dynamic efficiency (2011 MEGs at paras 12.29–12.31). If a non-price anti-competitive effect is not reasonably measurable, it may be assessed using qualitative evidence. The SCC recognized it in *Tervita SCC*, when it noted that “qualitative elements of a merger, including in some cases such things as better or worse service or lower or higher quality, may not be measurable as they are dependent on individual preferences in the market” (*Tervita SCC* at para 100, citing *Superior Propane I* at paras 459–460).

[652] This qualitative assessment of anti-competitive effects may only be resorted to where such effects are not quantifiable: “[q]ualitative anti-competitive effects, including lessening of service or quality reduction, are only assessed on a subjective basis because this analysis involves a weighing of considerations that cannot be quantified because they have no common unit of measure (that is, they are “incommensurable”)” (*Tervita SCC* at para 125). However, quantifiable effects which the Commissioner failed to quantify cannot be resurrected as qualitative effects (*Tervita SCC* at para 100). Anti-competitive effects should be quantified wherever reasonably

possible, and the weight given to unquantifiable qualitative effects must be reasonable (*Tervita FCA* at para 148).

[653] In some circumstances, the anti-competitive effects to be assessed under section 96 may further include redistributive effects, namely, wealth transfers from buyers to sellers which amount to a social loss. These are commonly referred to as a “socially adverse wealth transfer.”

[654] It may happen that the Tribunal finds a substantial lessening of competition under section 92, but no anti-competitive effects under section 96, as was the case in the *Tervita* matter, a situation characterized by Justice Rothstein as a “paradoxical” result (*Tervita SCC* at para 166). Depending on the evidence available, the statutory scheme under sections 92 and 96 does not bar a finding of likely substantial lessening or prevention of competition where there has been a failure to quantify the DWL. But the test under section 96 does require that quantifiable anti-competitive effects be quantified in order to be considered under the efficiencies defence. In *Tervita SCC*, the SCC determined that the failure to quantify the DWL barred consideration, under section 96, of the quantifiable effects that supported a finding of likely substantial prevention of competition under section 92.

- Cognizable efficiencies

[655] With respect to efficiencies, section 96 provides that, to be recognized and be qualified as “cognizable,” efficiencies must meet three different requirements. First, the gains in efficiency must be brought, or be likely to be brought, by “the merger or proposed merger in respect of which the application is made” (subsection 96(1)). Second, the gains in efficiency would not likely be attained if the order contemplated by the Tribunal to remedy the substantial lessening or prevention of competition were made. Third, the gains in efficiency must not result “by reason only of a redistribution of income between two or more persons” (subsection 96(3)).

[656] As is the case for anti-competitive effects, cognizable efficiencies include both efficiencies that can reasonably be quantified as well as those that cannot reasonably be quantified and are therefore qualitative. Since it must be “likely” that the claimed gains in efficiency are achieved because of the merger, there must be evidence of the claimed savings and of the implementation process leading to the materialization of the claimed efficiencies (*Superior Propane I* at paras 347–348). As stated in the 2011 MEGs, “the parties must be able to validate efficiency claims to allow the Bureau to ascertain the nature, magnitude, likelihood and timeliness of the asserted gains, and to credit (or not) the basis on which the claims are being made” (2011 MEGs at para 12.3).

[657] In *Tervita CT*, the Tribunal adopted five screens to standardize the methodology used to eliminate efficiencies that are not cognizable under subsections 96(1) and 96(3) (*Tervita CT* at paras 261–264). Those screens may be summarized as follows:

1. The claimed gains in efficiency must involve a type of productive or dynamic efficiency or be likely to result in an increase in allocative efficiency (*Tervita SCC* at para 102; *Tervita CT* at para 262).

2. The claimed gains in efficiency must likely be brought about by the merger (*Tervita SCC* at para 113; *Tervita CT* at para 262).
3. The claimed gains in efficiency must not be brought about by reason only of a redistribution of income, or amount to a simple wealth transfer between organizations in Canada. This screen serves to discard savings that result solely from a reduction in output, service, quality or product choice, reductions in taxes, and savings from increased bargaining leverage (*Tervita CT* at para 262).
4. The claimed gains in efficiency must not be achieved outside Canada and must instead flow back to Canadian shareholders. Under this fourth screen, savings from operations in Canada that would flow through to foreign shareholders are eliminated (*Tervita CT* at para 262).
5. The claimed gains in efficiency must not (a) be attainable through alternative means even if the Tribunal were to make an order to eliminate the substantial prevention or lessening of competition, or (b) be achievable through the merger even if the remedial order were made (*Tervita CT* at para 264). In sum, the gains in efficiency are evaluated in light of the order contemplated by the Tribunal (*Commissioner of Competition v Superior Propane Inc*, 2002 Comp Trib 16 (“*Superior Propane III*”) at para 149), and gains that would have occurred irrespective of the merger are not cognizable (*Hillsdown* at p 83).

[658] Implicit in these five screens is that, in order to be cognizable under section 96, the claimed gains in efficiency must accrue to the benefit of society — that is, to the Canadian economy (*Tervita SCC* at para 102; *Tervita CT* at para 262; *Superior Propane III* at para 196; *Superior Propane I* at paras 412–413, 429–430).

- Trade-off analysis or balancing test

[659] Turning to the trade-off analysis, the SCC held that the requirement in section 96 according to which the efficiency gains must be “greater than” and “offset” the anti-competitive effects imports a weighing and balancing of both quantitative and qualitative aspects of the merger. The term “greater than” suggests a numerical comparison of the magnitude of the efficiencies versus the extent of the anti-competitive effects. The term “offset” implies a more subjective analysis related to qualitative considerations — i.e., things that cannot be quantitatively compared because they have no common measure (*Tervita SCC* at paras 144–145; *Superior Propane II* at para 95).

[660] In *Tervita SCC*, the SCC also directed the Tribunal to use an analysis that is as objective as possible. As such, the SCC held that in most cases, the qualitative effects of a merger will be of “lesser importance.” In addition, the SCC stated that “the statutory requirement that efficiencies be greater than *and* offset the anti-competitive effects would in most cases require a showing that the quantitative efficiencies exceed the quantitative anti-competitive effects as a necessary element of the defence” [emphasis in original] (*Tervita SCC* at para 146).

[661] *Tervita SCC* adopted a two-step inquiry for the balancing test in subsection 96(1). First, the quantitative efficiencies of the merger at issue are compared against the quantitative anti-

competitive effects to determine whether the quantitative efficiencies are “greater than” the quantitative anti-competitive effects. If the quantitative anti-competitive effects outweigh the quantitative efficiencies, this step will be dispositive in most cases, and the section 96 defence will not apply. Second, the qualitative efficiencies are balanced against the qualitative anti-competitive effects. The Tribunal then makes a final determination as to whether the total efficiencies “offset” the total anti-competitive effects of the merger at issue (*Tervita SCC* at para 147).

[662] The SCC further held that the Tribunal should consider “all available quantitative and qualitative evidence” (*Tervita SCC* at para 100, citing *Superior Propane I* at para 461; *Superior Propane III* at para 335). For the Tribunal to give weight to qualitative elements in its analysis, they must be supported by the evidence, and the reasoning for the reliance on the qualitative aspects must be clearly articulated (*Tervita SCC* at para 147).

(ii) *Interpretation of subsection 96(2)*

[663] In this matter, P&H also made specific submissions on the interpretation of subsection 96(2) and relied heavily on this provision in its consideration of the efficiency gains allegedly brought about by the Transaction. This subsection provides in part that in considering whether a merger or proposed merger is likely to bring about gains in efficiency described in subsection 96(1), the Tribunal shall consider whether such gains will result in “(a) a significant increase in the real value of exports.”

[664] P&H argued that the purpose and effect of the Transaction were to increase export sales by P&H and that increased throughput at export terminals was the “uncontroverted objective” of the Transaction. P&H further submitted that increased throughput at an export facility is a “more efficient utilization of an asset in the purest sense,” and that the Transaction as a whole clearly leads to a significant increase in the real value of exports of grain under subsection 96(2).

[665] P&H maintained that there were three possible interpretations of subsection 96(2):

- The consideration of efficiencies related to exports is subsumed under the subsection 96(1) analysis, so that all of the tests applied under subsection 96(1) would be applied to exports;
- The consideration of exports under subsection 96(2) is a separate consideration that is not confined to the efficiencies arising in the local or domestic markets. Any efficiencies arising either domestically or in an export market that lead to a significant increase in exports must be separately considered. In this interpretation, the efficiency gains that lead to significant increases in the real value of exports would not be subsumed in the subsection 96(1) analysis including the offset test and the counterfactual but-for test; and
- Subsection 96(2) only deals with efficiency gains that lead to increases in the real value of exports, and exports *per se* should be considered under the broader analysis under sections 92 and 93 of the Act.

[666] P&H took the position that the second and third interpretations described above are the correct ones to follow.

[667] P&H submitted that the interpretation of subsection 96(2) must accord with Parliamentary intent, as seen in comments made in 1986 by the Parliamentary Secretary to the Minister of Agriculture, the Honourable Pierre Blais, during the House of Commons debates on Bill C-91 (which enacted the *Competition Tribunal Act*, RSC 1985, c 19 (2nd Supp) (“CTA”) and the Act). P&H argued that mergers should be assessed, in Mr. Blais’ words, “in such a way as to encourage competition between Canadian businesses at home in Canada, without putting them at a disadvantage when carrying out business dealings in international markets.” P&H also referred to the objectives in section 1.1 of the Act, including its references to the expansion of opportunities for Canadian participation in world markets and the promotion of the efficiency of the Canadian economy. In addition, P&H submitted (again citing Mr. Blais) that “when a merger would greatly improve efficiency, thereby increasing exports or substitutions to imports, the Tribunal will have to authorize it.” P&H argued that this reflected a focus on efficiencies that lead to increased exports.

[668] The Commissioner made no written submissions on subsection 96(2). The Commissioner noted in oral argument that P&H made no reference to any reliance on that provision in its Response filed on February 3, 2020. The Commissioner submitted that P&H had acquired the grain volume at the Virden Elevator which LDC would have exported. In other words, these grain volumes were headed to the port at Vancouver for export, regardless of the Transaction. Therefore, P&H had not demonstrated any substantial increase in the real value of exports under paragraph 96(2)(a). The Commissioner also submitted that P&H had not analyzed why keeping the Virden Elevator in its possession (*i.e.*, if the Tribunal makes no order) would lead to a substantial increase in the real value of exports.

[669] This is the first time that the Tribunal has been directly asked to interpret or apply paragraph 96(2)(a) of the Act.

[670] Under modern principles of statutory interpretation, the words of paragraph 96(2)(a) must be read in their entire context and in their grammatical and ordinary sense, harmoniously with the scheme and the object of the Act, and the intention of Parliament (*Pioneer Corp v Godfrey*, 2019 SCC 42 at para 42; *Canada Trustco Mortgage Co v Canada*, 2005 SCC 54 (“*Canada Trustco*”) at para 10; *Bell ExpressVu* at para 26; *Rizzo & Rizzo Shoes Ltd (Re)*, [1998] 1 SCR 27 at para 21; *VAA CT* at para 257; *The Commissioner of Competition v HarperCollins Publishers LLC and HarperCollins Canada Limited*, 2017 Comp Trib 10 at paras 101, 118; *Rakuten Kobo Inc v The Commissioner of Competition*, 2016 Comp Trib 11 at para 108). In *Canada Trustco*, the SCC also held that if the words of a provision are precise and unequivocal, their ordinary meaning plays a dominant role in the interpretive process. If the words can support more than one reasonable meaning, the ordinary meaning of the words plays a lesser role. However, in all cases, the Tribunal must seek to read the provisions of the Act as a harmonious whole (*Canada Trustco* at para 10; 9354-9186 *Québec inc v Callidus Capital Corp*, 2020 SCC 10 at para 60).

[671] When the legislation that would become the Act was introduced in December 1985, the accompanying guide made the following observations:

The existing merger provision is considered to be unsuitable for the Canadian economy, which is small and open. Canadian firms often have to compete with larger foreign rivals both at home and abroad. In these circumstances, they should

not be prevented from obtaining economies of scale which improve their competitive position. An effective merger law for Canada must weight [*sic*] the advantages of economic efficiency against the disadvantages of a lessening of competition.

[...]

The new merger law will also provide a defence in situations where the gains in efficiency that would result from the merger would more than offset the costs due to the lessening of competition. It is important for the performance of the economy that significant cost savings brought about by mergers, for example, through scale economies or other efficiencies, be allowed. Moreover, the Tribunal will be invited to consider whether the gains in efficiency resulted in increased exports or increased import substitution.

Minister of Consumer and Corporate Affairs, *Competition Law Amendments: A Guide*, (1985) at pp 16–17.

[672] In *Tervita SCC*, Justice Rothstein, speaking for a majority of the court, observed the following at paras 87 and 167:

[87] A stand-alone statutory efficiencies defence was considered “particularly appropriate for Canada because a small domestic market often precludes more than a few firms from operating at efficient levels of production and because Canadian firms need to be able to exploit scale economies to remain competitive internationally” (Campbell, [citation below] at p. 152; see also *House of Commons Debates*, vol. VIII, 1st Sess., 33rd Parl., April 7, 1986, at p. 11962; Minister of Consumer and Corporate Affairs, *Competition Law Amendments: A Guide* (1985), at p. 4). In the context of the relatively small Canadian economy, to which international trade is important, the efficiencies defence is Parliamentary recognition that, in some cases, consolidation is more beneficial than competition (*ibid.*, at pp. 15-17).

[...]

[167] While the efficiencies defence applies in this case under the terms of s. 96 as written, this case does not appear to me to reflect the policy considerations that Parliament likely had in mind in creating an exception to the general ban on anti-competitive mergers. As discussed above at para. 84 [*sic*: 87] in the historical examination of s. 96, the evidence suggests that the efficiencies defence was created in recognition of the size of Canada’s domestic market and with an eye toward supporting operation at efficient levels of production and the realization of economies of scale, particularly with reference to international competition. [...]

[Emphasis added.]

[673] In section 1.1 of the Act, Parliament set out the overall purpose of the statute: “to maintain and encourage competition in Canada.” Section 1.1 contains four objectives or benefits of maintaining and encouraging competition in Canada (*Superior Propane I* at paras 407–408, 410), which are listed in the provision:

Purpose of Act

1.1 The purpose of this Act is to maintain and encourage competition in Canada in order to promote the efficiency and adaptability of the Canadian economy, in order to expand opportunities for Canadian participation in world markets while at the same time recognizing the role of foreign competition in Canada, in order to ensure that small and medium-sized enterprises have an equitable opportunity to participate in the Canadian economy and in order to provide consumers with competitive prices and product choices.

Objet

1.1 La présente loi a pour objet de préserver et de favoriser la concurrence au Canada dans le but de stimuler l’adaptabilité et l’efficacité de l’économie canadienne, d’améliorer les chances de participation canadienne aux marchés mondiaux tout en tenant simultanément compte du rôle de la concurrence étrangère au Canada, d’assurer à la petite et à la moyenne entreprise une chance honnête de participer à l’économie canadienne, de même que dans le but d’assurer aux consommateurs des prix compétitifs et un choix dans les produits.

[674] The FCA has held that section 96 as a whole gives primacy to the statutory objective of economic efficiency, because it provides that if efficiency gains exceed and offset the effects of an anti-competitive merger, the merger must be permitted to proceed even though it would otherwise be prohibited by section 92 (*Superior Propane II* at para 90).

[675] The commentary on the proper interpretation of the language in subsection 96(2) has not been extensive, despite its presence in the Act since 1986.

[676] The Competition Bureau’s 1991 MEGs stated that the words “described in subsection (1)”:

make it clear that section 96(2) does not operate to expand the class of efficiency gains that may be considered in the trade-off analysis. Accordingly, this provision is simply considered to draw attention to the fact that, in calculating the merged entity’s total output for the purpose of arriving at the sum of unit and other savings brought about by the merger, the output that will likely displace imports, and any increased output that is sold abroad, must be taken into account.

[677] The principal drafter of the 1991 MEGs, now a judicial member of the Tribunal, set out the same point in a 1991 article, adding that, “[a]pparently, there was never any intention on the part of the drafters of subsection 96(2) that this section has any significant role in the trade-off assessment” (*Crompton 1991* at pp 967–968).

[678] A book by the same author further explained:

If an increase in the real value of exports [...] cannot be shown to lead to one or more of the types of “gains in efficiency” [in subsection (1)], there is nothing that can be found in subsection 96(2) that will change this fact. In short, this provision simply requires the Tribunal to assess whether any significant increase in the real value of exports [...] *that is attributable to the attainment of efficiencies, will give rise to further efficiency gains.*

Crompton 1990 at p 548 [Emphasis in original.]

[679] On this view, the increased exports are a source of efficiencies that must be taken into account under subsection 96(1) and Parliament enacted subsection 96(2) to fulfil a “guidance function” (*Crompton 1990* at p 549).

[680] While this approach would not give efficiencies that meet the requirements of subsection 96(2) an independent role, the *Crompton 1990* text offered additional analysis. It noted that there is a reasonable argument that Parliament intended subsection 96(2) to provide more than a guidance function, and that export-related efficiencies merit, and were intended to receive, additional qualitative weighting, that should be decisive only if the trade-off analysis under subsection 96(1) “yields an inclusive result.” The text listed four possible reasons. The significant increase in the real value of exports may: 1) give rise to other important but unquantifiable benefits to the economy; 2) promote the adaptability of the Canadian economy; 3) expand the opportunities for Canadian participation in world markets; and 4) have been considered to be of such particular importance as to merit specific mention in the legislation. In a footnote, the author referred to remarks by the then-Director of Investigation and Research (“**Director**”), who noted in a speech that information provided by merging parties about efficiency gains that allow the firm to significantly increase the real value of exports would be given “additional weight” in favour of the merging parties under subsection 96(1) (*Crompton 1990* at pp 549–550).

[681] At least one commentary has taken a more robust view of subsection 96(2). While recognizing the positions taken in the 1991 MEGs and by the Director, Dr. Neil Campbell remarked that in enacting the provision, Parliament appeared to be creating an “independent category of efficiencies” (*Campbell* at pp 155–156, citing a discussion of “national champions” in A.N. Campbell and J.W. Rowley, *Industrial Policy, Efficiencies and the Public Interest – the Prospects for International Merger Rules*, (Center for Trade Policy and Law, 8th Annual Conference on Trade, Investment and Competition, Ottawa, May 1993)).

[682] The Competition Bureau’s 2004 MEGs and 2011 MEGs both advised merging parties to provide the Bureau with information that “establishes that the merger will lead them to increase output owing to greater exports,” noting in a footnote that “increased output in this context is

generally only possible with an associated decrease in price” (see 2011 MEGs at para 12.12; 2004 MEGs at para 8.10).

[683] The text of subsection 96(2) is situated within section 96. The chapeau language of subsection 96(2) provides that in considering whether a merger or proposed merger is likely to bring about gains in efficiency described in subsection (1), the Tribunal “shall” consider whether “such” gains “will result in” a significant increase in the real value of exports and a significant substitution of domestic products for imported products.

[684] With respect to the language in subsections 96(1) and (2), the Tribunal notes that:

- In *Tervita SCC*, Justice Rothstein observed that subsection 96(2) is “logically subservient to” subsection 96(1) (*Tervita SCC* at para 152);
- The analysis of any claimed efficiencies that meet the requirements of paragraphs 96(2)(a) and (b) occurs during the Tribunal’s consideration of whether the merger is likely to bring about the gains in efficiency described in subsection 96(1);
- The word “shall” is mandatory or directory, not permissive. The Tribunal is required to consider subsection 96(2) if the evidence supports its relevance in a proceeding;
- The words “such gains” [emphasis added] in subsection 96(2) refer to the gains in efficiency in subsection (1); and
- The words “will result in” suggest that the Tribunal consider the causal relationship between the gains in efficiency in subsection (1) and the existence of the two factors in paragraphs 96(2)(a) and (b). Parliament also chose to use “will result in” [emphasis added], which implies proof with greater certainty than, for example, “may result in.”

[685] Paragraph 96(2)(a) contemplates that the Tribunal consider the gains in efficiency in subsection (1) that will result in a significant increase in the “real value” of exports, which suggests that evidence must be adduced as to the quantum, in dollars, of the increase. To engage the provision, the increase must be shown to be “significant,” not small, trivial or inconsequential.

[686] In light of the foregoing, the Tribunal considers that the proper interpretation of subsection 96(2) should:

- Adhere to the language of subsection 96(2), read in tandem with subsection 96(1);
- Seek to implement the overall purpose and the objectives of the Act, as set out in section 1.1;
- Be compatible with the approach to the trade-off analysis established in *Tervita SCC*, including the two-step quantitative and qualitative assessments described by Justice Rothstein at paragraph 147; and

- Be compatible with the five screens established by the Tribunal in *Tervita CT* to implement the trade-off analysis in subsections 96(1) and (3).

[687] The Tribunal further observes that, by creating the efficiency exception enabling parties to avoid the application of section 92 when the elements of section 96 are satisfied, Parliament has in fact “withdrawn efficiency consideration, or at the very least, consideration relating to efficiency *enhancement*, from eligibility in the determination of whether competition has been prevented or substantially lessened” [emphasis in original] (*Crampton 1990* at p 257). Gains in efficiency are thus excluded from the assessment of anti-competitive effects under section 92.

[688] In view of the language in subsection 96(2) and the discussion in the various legal sources above, the Tribunal adopts the following framework for the interpretation and application of subsection 96(2):

1. The Tribunal recognizes that a merger may make a firm more competitive in international markets through proven efficiencies realized in Canada (*i.e.*, efficiencies that accrue to the Canadian economy).
2. Such proven efficiencies may be claimed and included in the Tribunal’s trade-off analysis, as established in *Tervita SCC* and *Tervita CT*.
3. Efficiencies that are claimed to result in a significant increase in the real value of exports should be analyzed within the established trade-off analysis under subsection 96(1).
4. The language of subsection 96(2) does not alter or expand the types of gains in efficiency under subsection 96(1) that may be considered in the trade-off analysis.
5. If a respondent raises a claim that efficiencies will result in a significant increase in the real value of exports, that respondent has the same burden to prove such efficiencies as with any other claimed efficiencies.
6. Specifically, if such claimed efficiencies are quantifiable, they must be quantified or, at a minimum, estimated, as contemplated by *Tervita SCC*.
7. If proven and quantified, such efficiencies will then be assessed along with other proven quantitative efficiencies in the first step of the trade-off analysis.
8. If such efficiencies are proven but cannot be quantified or estimated, they may be considered and given weight by the Tribunal at step two of the trade-off analysis, as qualitative efficiencies.

[689] Not resolved in this framework are the questions of whether and how the Tribunal should provide any additional recognition to efficiencies that result in a significant increase in the real value of exports under paragraph 96(2)(a).

[690] The Tribunal does not have the benefit of recent legal, economic, or business commentary on the role that subsection 96(2) should play in the efficiencies trade-off analysis established by *Tervita SCC*. The Tribunal also believes that, since the Act came into force in June 1986, there

have been material developments affecting the Canadian industrial policy and international trade policies, as well as significant changes in some sectors of the Canadian economy, that could affect the proper approach to paragraphs 96(2)(a) and (b).

[691] Given the Tribunal's conclusions elsewhere in these Reasons under section 92 and subsection 96(1), it is not necessary to resolve all questions related to paragraph 96(2)(a) in this proceeding. The Tribunal nonetheless considers that, without limiting other possible options, the following approach to paragraphs 96(2)(a) and (b) could be contemplated.

[692] As noted above, the Tribunal is of the view that the language of subsection 96(2) does not alter or expand the types of gains in efficiency under subsection 96(1) that may be considered in the trade-off analysis. However, in order to implement the objectives set out in section 1.1 of the Act and other indications of Parliamentary intent and objectives, the Tribunal could provide additional qualitative recognition to some claimed efficiencies in the trade-off analysis if a firm is able to demonstrate, with clear and cogent evidence, that the specified efficiencies achieved in Canada also meet the requirements of paragraphs 96(2)(a) or (b). Such proven efficiencies could achieve one or more of the objectives listed in section 1.1, in addition to the promotion of the efficiency of the Canadian economy inherent in any proven efficiencies under subsection 96(1).

[693] For example, a merger could be proven to result in efficiencies that accrue to the Canadian economy which will also result in a significant increase in the real value of exports and expand the opportunities for Canadian participation in world markets. A merger might, for example, enable a firm to enter a new overseas market due to the lower costs of production in Canada that result from the merger. In that type of scenario, the Tribunal could give the proven efficiencies that achieve the requirements of paragraph 96(2)(a) some additional, qualitative weight at stage two of the trade-off analysis under subsection 96(1). Specifically, at stage two, the Tribunal could give some qualitative weight to proven and quantified efficiencies that will result in a significant increase in the real value of exports; or the Tribunal could give additional qualitative weight at stage two to proven qualitative efficiencies. The weight could vary, for example, with the strength of the efficiencies' proven ability to achieve at least one of the objectives of the Act as set out in section 1.1 (other than promoting the efficiency of the Canadian economy). Regardless of how the Tribunal decides to proceed in a future case, the Tribunal will determine how such efficiencies may be weighed at stage two based on the evidence and the applicable law, including *Tervita SCC* and *Tervita CT*.

(b) Evidentiary burden on efficiencies

[694] As discussed above, the Commissioner has an initial burden under section 96 to prove the anti-competitive effects, including both quantitative and qualitative effects (*Tervita SCC* at para 122, citing *Superior Propane I* at paras 399, 403, *Superior Propane II* at para 154 and *Superior Propane IV* at para 64; *Tervita CT* at para 232).

[695] The SCC in *Tervita SCC* instructed that, to discharge his burden, the Commissioner must quantify any quantifiable anti-competitive effects, at least by estimate (*Tervita SCC* at paras 125, 126, 137, 165; *Tervita FCA* at para 127; *Tervita CT* at para 243). To meet that burden, the Commissioner must ground the calculations or estimates in evidence that can be challenged and

weighed (*Tervita SCC* at para 125). If effects are realistically measurable, failure to at least estimate the quantification of those effects will not result in the effects being assessed on a qualitative basis (*Tervita SCC* at para 100, citing *Superior Propane III* at para 233 and *Superior Propane IV* at para 35). Instead, quantifiable effects that are not quantified are considered to be equal to zero and have no weight (*Tervita SCC* at paras 128–129, 137, 140, 142, 151, 157, 159, 165).

[696] While the Commissioner has the burden to prove the anti-competitive effects, the merging parties bear the onus of proving the remaining elements of the defence under section 96 (*Tervita SCC* at paras 136, 165; *Superior Propane II* at paras 154, 157; *Tervita CT* at para 233). The merging parties' onus is to prove the extent of the efficiency gains and that those efficiency gains from the merger will be greater than and will offset the effects of any prevention or lessening of competition resulting from the merger (*Tervita SCC* at paras 89, 122; *Superior Propane I* at para 403).

[697] In the Tribunal's view, the same requirements imposed on the Commissioner for proof of anti-competitive effects under section 96 should also be imposed on the merging parties (in this case, P&H) to discharge their onus to prove the remaining elements under section 96. Thus, if a claimed efficiency is quantifiable, it must be quantified or at least estimated. That quantification or estimate must be grounded in evidence that can be challenged and weighed. If the claimed efficiency is quantifiable but is not quantified or estimated, then it will be treated as a zero and given no weight. An unquantified claimed efficiency that could have been quantified, but was not, will not be considered as a qualitative efficiency (*Tervita SCC* at para 124; *Superior Propane IV* at para 35). Claimed qualitative efficiencies, if any, must also be supported by evidence that can be challenged and weighed.

(2) Tribunal's assessment

[698] In the Tribunal's view, and for the following reasons, P&H has not met its burden of demonstrating, on a balance of probabilities, that the Virden Acquisition is likely to bring about cognizable gains in efficiency. As a result, such gains would not be greater than, and would not offset, the anti-competitive effects of any lessening of competition resulting from the Virden Acquisition.

(a) The anti-competitive effects of any lessening of competition

[699] In light of the Tribunal's conclusions on efficiencies, there is no need to deal extensively with the anti-competitive effects of any lessening of competition resulting from the Virden Acquisition.

[700] Suffice it to say that there is no fundamental dispute between Dr. Miller and Ms. Sanderson on the magnitude of the consumer surplus loss, suggested to be CAD \$540,000 per crop year in wheat and less in canola according to Dr. Miller's model. This estimate is conditional on accepting the diversion ratios and mark-up used by Dr. Miller.

[701] Ms. Sanderson only takes issue with Dr. Miller's producer surplus calculations. She claims that it should include profits captured by Elevators and Crushers falling outside the relevant geographic markets. Even accepting Ms. Sanderson's critique, when profits associated with all transfers to rival Elevators and Crushers are included, there is still some DWL in wheat, but not in canola. Taking into account the producer surplus transferred to rival Elevators and Crushers which do not belong to Dr. Miller's geographic market, Dr. Miller's DWL for wheat decreases to some CAD \$30,000, while the DWL in respect of canola is eliminated.

[702] In sum, no matter how it is defined or calculated, the DWL is certainly greater than zero for wheat.

(b) The gains in efficiencies

(i) *P&H's claimed efficiencies*

[703] At the outset of this proceeding, P&H's Response claimed the following efficiencies from the Acquisition: improved FGT scale efficiencies and cost savings; elimination of the margin that LDC formerly paid to use the Vancouver export terminal owned by Kinder Morgan; output expansion and improved scale economies at the former LDC Elevators; and administrative efficiencies.

[704] P&H did not elaborate on its claimed efficiencies during the discovery process.

[705] Mr. Heimbecker's initial witness statement identified four areas of claimed efficiencies that became the focus of the parties' submissions at the hearing. They were as follows: 1) increased throughput at the Virden Elevator; 2) network logistics efficiencies arising from optimizing the shipment of grain to "freight-logical" terminals; 3) efficiencies at the Vancouver terminals, particularly the FGT; and 4) efficiencies related to the conversion of local Elevators to include the retail sale of crop inputs.

[706] At the hearing, the Commissioner did not cross-examine Mr. Heimbecker on his evidence about these proposed efficiencies. Mr. Heimbecker was not qualified to provide expert evidence on efficiencies and acknowledged that he is not such an expert. He provided P&H's factual foundation for its efficiency claims. As discussed above, on a pre-hearing motion, some of his evidence was struck out (*Parrish & Heimbecker* at paras 72–73). Ultimately, P&H did not file an expert report to support or quantify its position on efficiencies, either initially or in reply to Mr. Harington's expert report. P&H solely relied on the initial and reply witness statements of Mr. Heimbecker.

- Increased throughput at the Virden Elevator

[707] Regarding the increased throughput at the Virden Elevator, P&H offered Mr. Heimbecker's evidence comparing the throughput at the Virden Elevator in 2019 when it was operated by LDC with Virden's 2020 throughput when operated by P&H. Mr. Heimbecker also explained that P&H's Elevators had a higher "turn rate" than LDC's former Elevators. An Elevator's "turn rate" is calculated as the purchases of grain by an Elevator in a given period

divided by the storage capacity. According to Mr. Heimbecker, P&H also forecast a higher turn rate for each of the former LDC Elevators during 2020. He attributed the higher turn rate to four factors: P&H's superior port access (particularly its access to the Superior terminal in Thunder Bay, Ontario, which LDC did not use); port storage and ship loading speed in Vancouver; its larger network of Elevators from which it could source grain; and the fact that P&H purchased a larger variety of grain than LDC did.

[708] In his initial witness statement, to which Mr. Harington responded, Mr. Heimbecker compared the Virden Elevator's 2019 results with its actual results from January to July 2020 and P&H's forecast for the balance of 2020. He then applied P&H's grain margins for wheat and canola to the increased volumes to find an annual "efficiency," in dollars, for each of wheat and canola.

[709] In his reply witness statement, Mr. Heimbecker reiterated his evidence about P&H's Elevator turn rates, its better port access at both Vancouver and Thunder Bay terminals, and its larger network of Elevators, all compared with LDC. He also updated his initial Virden throughput evidence with actual 2020 results up to October 31, 2020.

[710] Mr. Heimbecker also addressed the overall increase in grain production from 2019 to 2020 raised by Mr. Harington in his expert report. He concluded that, even adjusting for the increased production, the Virden Elevator showed increased throughput for wheat and canola when comparing the period from January 1 to October 31, 2019 with the period from January 1 to October 31, 2020. Using the same wheat and canola margins from his initial evidence, Mr. Heimbecker then re-determined the "additional value" created, in dollars, from the increased Virden throughput through to October 31, 2020, adjusting LDC's 2019 numbers for grain industry developments.

- Network logistics efficiencies

[711] Turning to network logistics efficiencies, Mr. Heimbecker explained in his initial witness statement that Elevators have a natural, "freight logical" terminal. Elevators operated by P&H fall into catchment areas depending on their physical location. Those catchment areas are for terminals in either Vancouver or Thunder Bay. The catchment area determines rail freight costs from an Elevator to a terminal. The Virden Elevator is in the Thunder Bay catchment area. As a result, the wheat and canola purchased from farms and delivered to the Virden Elevator will generally be shipped to P&H's Superior terminal in Thunder Bay for sale to its eastern grain customers.

[712] Mr. Heimbecker testified that P&H decided that four of the Elevators it purchased in the Transaction could shift their grain from delivery to West Coast terminals in favour of delivery to the Superior terminal in the east. At the same time, some grain movement from Elevators already owned by P&H could be switched to delivery westward to Vancouver at P&H's two most efficient terminals, namely, AGT and FGT. According to Mr. Heimbecker, the additional eastbound throughput from the addition of the four new Elevators "will now allow P&H to increase the efficiency of its network." In particular, Mr. Heimbecker stated that P&H acquired the Virden and Rathwell Elevators in the Transaction and would shift their grain eastward, enabling additional tonnage to be shipped westward to Vancouver from other Elevators in the P&H network.

[713] Mr. Heimbecker advised in his reply witness statement that the addition of the Virden Elevator and its additional volume was a “necessary addition to P&H’s elevator network to achieve these logistics benefits” (Exhibits CA-R-121 and P-A-122, Reply Witness Statement of Mr. John Heimbecker (“**Heimbecker Reply Statement**”), at para 43).

- Efficiencies at West Coast terminals

[714] Mr. Heimbecker also identified efficiencies at the West Coast terminals. He testified that the amount of grain that would be processed through P&H’s terminals in Vancouver would increase as a result of the Transaction. In his reply witness statement, Mr. Heimbecker further noted that the FGT’s location on Vancouver’s South Shore bypasses the congested rail corridors to the West Coast, which move grain from the Prairies to the West Coast terminals. As a result of its location, FGT would provide significant rail cycle time of 50% which many other grain purchasers would not enjoy. Mr. Heimbecker did not provide any evidence supporting his claim in improved rail car cycle time, nor did he provide any explanation or operating plans from the railways that attest to those savings.

- Crop inputs efficiencies

[715] With respect to crop inputs efficiencies, Mr. Heimbecker testified that the Transaction allows P&H to compete more effectively with rival grain companies by converting the Elevators acquired in the Transaction into dual-purpose facilities. Previously, they were purely grain facilities, whereas P&H would now create a “one-stop shop” location that would include both the delivery of grain for sale and also enable farmers to purchase crop inputs. The sales of crop inputs at the newly acquired Elevators would provide P&H with increased margins. Mr. Heimbecker provided evidence of the cost per Elevator to convert a location into a combined grain/crop inputs facility and, based on his past business experience, he estimated the increased margins at [REDACTED]. Mr. Heimbecker acknowledged that some of the crop inputs sales to be made at the Virden Elevator would come from sales made by other grain companies and crop input retailers. Mr. Heimbecker also advised that the expansion of crop inputs would not only benefit P&H through increased sales and margin but would also increase overall grain production.

(ii) *The Commissioner’s response*

[716] The Commissioner’s Reply filed on February 17, 2020 stated that the Transaction would not generate cognizable gains in efficiencies to the extent claimed by P&H. The Commissioner reminded that his Application to the Tribunal sought the divestiture of just one Elevator, leaving nine others acquired by P&H as part of the Transaction. The contemplated orders requested would therefore not impact P&H’s ability to achieve the alleged efficiencies. The Commissioner further denied that any cognizable efficiencies would be greater than or offset the anti-competitive effects of the Virden Acquisition.

[717] As already noted, the Commissioner filed Mr. Harington’s expert report, which addressed each of the efficiencies claimed in Mr. Heimbecker’s initial witness statement. Mr. Harington’s

report provided his analysis of how the five screens identified in *Tervita CT* applied to each of P&H's claimed efficiencies.

- Increased throughput at the Virden Elevator

[718] The Commissioner submitted that this claimed efficiency was caught by four of the five *Tervita CT* screens, namely, screens 1, 2, 3, and 5, summarized above in these Reasons. On *Tervita CT* screens 1 and 2, the Commissioner submitted that the increased volumes at the Virden Elevator would have occurred irrespective of the Acquisition, given the overall upward trend in grain production (measured by delivery volumes to Elevators) from 2019 to 2020. The Commissioner also noted that at the end of 2019, inventory levels at the Virden Elevator were low and had to be replenished by P&H after it acquired that Elevator. According to the Commissioner, those additional purchase volumes could partially explain the increase in delivered volume to Virden.

[719] The Commissioner further submitted that P&H had failed to demonstrate that the increased volumes at the Virden Elevator were not a redistribution of income between two persons under subsection 96(3) (*Tervita CT* screen 3). He argued that any increases in volume not attributable to the overall industry increase in grain production were merely a wealth transfer from other Elevators and did not represent a cognizable efficiency under section 96. According to the Commissioner, P&H also had not shown that its per unit variable operating costs of the Virden Elevator for the 10 months of 2020 were lower than LDC's operating costs at this Elevator the previous year.

[720] The Commissioner further submitted that P&H had not shown that any increase in volume at the Virden Elevator could not have been achieved by an alternative purchaser of that Elevator (*Tervita CT* screen 5).

[721] Mr. Harington's expert report concluded that increased throughput at the Virden Elevator was not a cognizable efficiency. In his view, any increase in throughput in P&H's Virden Elevator and terminal network would have to arise from increased Canadian grain production and not be a pecuniary redistribution of throughput between P&H's facilities and other facilities. To be a cognizable efficiency, any increased throughput would have to result from an increase in grain production brought about by the Virden Acquisition that was not "cannibalized" volume from other entities, and would not likely occur in the event of an order under section 92. Mr. Harington concluded that the claimed efficiencies based on an increase in throughput at the Virden Elevator did not qualify as a cognizable efficiency under these criteria.

- Network logistics efficiencies

[722] Regarding the claimed logistics efficiencies, Mr. Harington noted in his report that P&H did not quantify the cost savings arising from shipping volumes to a more "freight logical" terminal and did not demonstrate that any of the savings would be lost in the event of a remedial order by the Tribunal. In addition, P&H did not show what proportion of any cost savings was attributable to the purchase of the Virden Elevator as opposed to the Rathwell facility.

- Efficiencies at West Coast terminals

[723] Turning to the claimed efficiencies at the West Coast terminals, Mr. Harington's expert report found that increased volumes at more efficient Vancouver area terminals were not a cognizable efficiency that would be lost in the event of an order of the Tribunal, because the same volume was still going through the less efficient Superior terminal in Thunder Bay; that is, the "only difference is the Elevators from which these volumes to Thunder Bay are coming." Mr. Harington also noted that P&H did not offer any proof of increased volume of grain production due to the Acquisition and did not provide a comparison of operating costs at the Vancouver terminals with similar costs at another terminal through which the grain previously travelled.

- Crop inputs efficiencies

[724] On crop input efficiencies, Mr. Harington's expert report opined that the benefit of increased crop inputs sales would be a redistribution of income rather than a real resource saving. Any margin on crop inputs sales earned by P&H by the conversion of facilities was, in his view, a "pecuniary redistribution of income between P&H and farmers," even if some portion of those sales were new sales rather than sales that would otherwise be made by rival retail suppliers.

[725] Mr. Harington noted the absence of any evidence (apart from Mr. Heimbecker's opinion) that an additional crop inputs retail location would increase crop inputs sales in the area of the Virden Elevator rather than redistribute sales within the area, or would lead to more use of crop inputs by farmers and increase grain production as a result.

(iii) *The gains in efficiency under subsection 96(1)*

[726] For the following reasons, the Tribunal concludes that P&H has not proven cognizable efficiencies under section 96.

- Increased throughput at the Virden Elevator

[727] P&H advanced the position that the Acquisition had caused an increase in throughput at the Virden Elevator, by an increase in volume of grain delivered to and processed by that Elevator between 2019 and 2020.

[728] Mr. Heimbecker's evidence about Elevators' turn rates was not contradicted, nor did the Commissioner cross-examine him on it. Mr. Heimbecker testified that P&H had access to port terminals both in the Vancouver area and in Thunder Bay, compared with LDC which had no access to Thunder Bay and did not export from the Superior terminal. He also testified that the Virden Elevator is in P&H's catchment area for Thunder Bay and that grain from Virden will generally be shipped east by P&H to its Superior terminal for sale to its eastern grain export customers. He testified that P&H's most efficient port terminals are the AGT and the FGT.

[729] The Tribunal accepts that there are likely some time and transportation (*i.e.*, rail) cost savings to move the Virden Elevator grain to the Superior terminal in Thunder Bay rather than to

a Vancouver port terminal, which would presumably contribute to a higher turn rate at Virden for P&H than what existed when LDC sent its grain to Vancouver. However, P&H did not adduce evidence of any transportation cost savings. Having said that, Mr. Heimbecker's evidence was also that P&H's Superior terminal is not as efficient as the AGT or FGT in Vancouver. In light of that evidence, the Tribunal is unable to measure any benefits to the Canadian economy that would allegedly result from the change of the Virden Elevator grain being shipped west to the Vancouver port by LDC before the Transaction, to it being shipped east to the Superior terminal in Thunder Bay by P&H afterwards.

[730] Mr. Heimbecker provided a forecast that P&H would increase the Virden Elevator's turn rate from historical rates of [REDACTED] in 2017 and [REDACTED] in 2018 while LDC operated Virden, to a turn rate of [REDACTED] in P&H's fiscal year 2021. Mr. Heimbecker did not present turn rates (actual or forecast) for the years 2019 or 2020, as the Virden Elevator was emptied by LDC following the agreement on the Transaction, and P&H needed to replenish it. The Virden Elevator's forecast increase of [REDACTED] from 2018 to 2021 ranks just [REDACTED] of the 10 former LDC Elevators' forecast increases, and is relatively small compared with some increases at other Elevators (which went up by as much as [REDACTED]). The Tribunal further observes that the Virden Elevator's turn rate of [REDACTED] in fiscal year 2021 will be the lowest of any of the former LDC Elevators. The Tribunal does not find this evidence about increased turn rates at the Virden Elevator to be particularly compelling or persuasive.

[731] The evidence about the relative inventory numbers between 2019 and 2020 must be assessed carefully. Mr. Harington testified that the abnormally lower inventory due to lower purchases by LDC in 2019, as well as the abnormally higher purchases by P&H in 2020 to make up the needed volume for inventory, would essentially have a "two-times" effect on the Tribunal's ability to compare the two years. To compare them, each year would have to be adjusted (2019 upward and 2020 downward).

[732] In the Tribunal's view, there are several additional uncertainties and anomalies associated with P&H's evidence that undermine the reliability of any comparison of the change in throughput over these two years. These concerns prevent a sufficiently accurate quantification of any change in throughput following the Transaction and raise considerable doubt about the existence of any increase in throughput brought about by the Virden Acquisition.

[733] First, there is uncertainty about the baseline volumes in 2019. Mr. Heimbecker testified that LDC diminished the inventory levels at its Elevators, including at the Virden Elevator, prior to the closing of the Transaction on December 10, 2019. P&H did not provide the Tribunal with the Virden Elevator's inventory level information as of that date. There was no evidence from LDC as to when it began to lessen its grain purchases (or if it simply stopped sometime before the closing), or about how much less grain it acquired at the Virden Elevator or decided not to store. The evidence also does not contain inventory levels or grain delivery volumes to the Virden Elevator in any prior years (*e.g.*, 2018, 2017, or 2016) for historical comparison to 2019.

[734] Second, there is uncertainty about which product's inventory decreased in 2019. In his initial witness statement, Mr. Heimbecker testified that there was little or no canola inventory at most of the LDC locations, including at the Virden Elevator. He testified that, by summer of 2020, P&H had "significantly increased canola purchases at Virden over the levels purchased there previously by LDC." In his reply witness statement, Mr. Heimbecker explained that one reason

why P&H missed its three-month throughput forecast for May to July 2020 was “low level of inventory left by LDC. LDC did not have grain in the pipeline when P&H purchased the assets which prevented P&H from selling grain in the beginning of the year” [emphases added] (Heimbecker Statement at para 51; Heimbecker Reply Statement at para 24).

[735] At the hearing, Ms. Sanderson testified, having looked at the Virden Elevator’s purchase data, that she did not see any sort of change on the canola side in December 2019 or January 2020 compared to the year prior. She attributed the running down of inventories just to wheat.

[736] Third, there were anomalous monthly deliveries of both canola and wheat that make 2019 and 2020 harder to compare. Mr. Heimbecker provided monthly MT deliveries of canola to the Virden Elevator from January 1 to October 31, 2020. Of the approximately [REDACTED] in those ten months, [REDACTED] was delivered in September 2020. That month saw deliveries of [REDACTED] in 2019, implying an increase of over [REDACTED] comparing September 2019 with September 2020.

[737] There was also an anomalous month in the data for wheat. Ms. Sanderson testified that November 2019 wheat purchases by LDC were more than twice larger than October 2019 and were “by far and away the largest” quantity purchased in any month from January 2019 to July 2020 (the period of available actual data when she prepared her report) (Consolidated Transcript, Confidential A, at p 1895). Ms. Sanderson’s review of volumes from September to December 2019 allowed her to conclude that LDC increased purchases in November and may have run down inventories in December. As noted, the Transaction closed on December 10, 2019, and the parties did not provide the Tribunal with inventory level information at the Virden Elevator as of that date.

[738] Fourth, in order to compare the 2019 and 2020 deliveries to the Virden Elevator, both parties agreed that the 2020 deliveries had to be adjusted for an overall industry increase in grain production over 2019. Mr. Heimbecker used the overall grain production increase in Canada of 13.1% for the crop years ending July 31, 2019 compared with July 31, 2020 to make adjustments. However, Mr. Harington’s presentation of the industry evidence on increased deliveries indicated that the increases in both all-wheat production and all-grain production in Saskatchewan and Manitoba were each different from the 13.1% used in the calculations: higher for Saskatchewan (+15.8% and +17.9%, respectively) and noticeably lower for Manitoba (+6.8% and +7.0%, respectively). The Virden Elevator’s purchases come from those two provinces.

[739] Mr. Heimbecker’s revised calculations in his reply witness statement continued to use the 13.1% Canada all-grain increase, referring to the Manitoba increases in all-wheat production and all-grain production and tendering his calculations as a “conservative” approach. However, Mr. Heimbecker acknowledged in cross-examination that overall canola deliveries in Manitoba increased by 18%, comparing January to October 2019 with January to October 2020. At the same time, Mr. Heimbecker was also careful to distinguish between grain or canola production and delivery.

[740] The Tribunal finds that an adjustment of 13.1% to account for increased grain production in Canada does not account accurately for grain delivery increases to the Virden Elevator from farms in Saskatchewan and Manitoba from 2019 to 2020, and negatively affects the Tribunal’s ability to quantify any increase in throughput at the Virden Elevator over the period.

[741] In light of all this evidence, the Tribunal finds that there is considerable uncertainty about the existence and quantum of any actual increase in throughput at the Virden Elevator following the Acquisition. The Tribunal cannot conclude that any specific amount of increased throughput volume of wheat, or canola, or grain, has been demonstrated or satisfactorily quantified for 2020 after the Transaction.

[742] The Tribunal is also unable to conclude that any increase or any quantifiable increase in throughput was brought about by the Virden Acquisition for the purposes of *Tervita CT* screen 2. P&H offered no expert assistance to assist the Tribunal in identifying and quantifying throughput increases brought about by the Virden Acquisition (if any) and to distinguish it from higher throughput caused by rising overall grain deliveries to replenish inventory (the quantum of which was itself debated, as discussed above).

[743] In addition, while the monthly trend comparing 2019 to 2020 for canola was generally rising from March to September 2020, the spike in canola deliveries in September 2020 (comprising nearly half of the delivered volume for the calendar year) is inconsistent with P&H's position that there are sustainable, ongoing efficiencies in throughput at the Virden Elevator. As Mr. Harington testified, one month does not make a trend.

[744] The Tribunal concludes that P&H has not demonstrated, with clear and convincing evidence, any section 96 efficiencies with respect to increased throughput at the Virden Elevator.

- Network logistics efficiencies

[745] With respect to network logistic efficiencies, the Tribunal agrees with the Commissioner that P&H has not quantified its alleged efficiencies arising from the optimization of shipments to "freight logical" terminals in Vancouver. The evidence does not establish how much additional or incremental grain has been or will be diverted to the grain terminals in Vancouver (from other western terminals or from Thunder Bay), nor any of the cost savings that resulted from processing grain at the Vancouver terminals compared with the Superior terminal, nor any cost savings associated with processing and transporting grain a shorter distance from an Elevator to a terminal. While the possibility of a synergy or an efficiency arising from better network logistics has some intuitive attraction, the evidence does not support the existence or any quantification of such an efficiency for the purposes of section 96.

[746] Applying the principles articulated in *Tervita SCC*, this proposed efficiency must be considered a zero.

- Efficiencies at West Coast terminals

[747] The Tribunal also concludes that the evidence does not support any proven efficiencies arising from any additional grain flowing through the terminals in Vancouver used by P&H. Again, P&H did not offer any quantification of the incremental volumes of grain from the Virden Acquisition, or any cost savings as a result of processing such grain, in the Vancouver terminals or by a shift in volumes from other grain terminals to its terminals. Moreover, Mr. Heimbecker did not provide any evidence supporting his claim of improved rail car cycle time nor did he provide

any explanation or operating plans from the railways that attest to those savings. Applying the principles set out in *Tervita SCC*, this proposed efficiency must also be considered a zero.

- Crop inputs efficiencies

[748] Turning finally to the claimed crop inputs efficiencies, the Tribunal concludes that P&H has not proven any section 96 efficiencies related to crop inputs. An increase in margins accruing to P&H is not a benefit to the Canadian economy for the purposes of an efficiency under section 96. In addition, P&H has not measured, quantified, or even estimated any increase in output as alleged (*i.e.*, any increase in the sale of crop inputs in the area around the Virden Elevator, nor any increase in local grain production). Needless to say, such claims in efficiencies were, by their nature, clearly quantifiable.

[749] The Tribunal therefore concludes that P&H has not demonstrated any cognizable efficiencies, whether quantitative or qualitative, under subsection 96(1) of the Act. Since P&H failed to meet its burden, the efficiencies are assigned a weight of zero.

(iv) *The impact of subsection 96(2)*

[750] P&H submitted that the Tribunal should also apply subsection 96(2), since its objective in entering the Transaction was to increase its competitiveness in domestic and international export markets and to maximize the profitability of its export business. P&H emphasized that the Transaction served to enhance the return on its investment in the FGT through the expansion of its network, by acquiring access to increased throughput of grain sourced from the acquired LDC Elevators. P&H emphasized that it had no anti-competitive intention. Its intention was not to exercise monopsony power in local input markets, but rather to increase output in export markets.

[751] P&H pointed to its focus — and the focus of the industry as a whole — on exporting canola and wheat. It noted that its pricing mechanism (*i.e.*, the Workback Algorithm) tied local prices in the input market to prices in the export market. The acquisition of the grain volumes represented by the LDC Elevators, including the Virden Elevator, enabled large increases in the volume processed by the FGT without displacing any planned volumes from pre-Transaction P&H Elevators. Those increased throughput volumes would be achieved quickly, rather than waiting for ■■■ years as P&H originally anticipated and planned for the FGT.

[752] P&H referred to Mr. Brooks' evidence and to a report from the Saskatchewan Wheat Development Commissioner (found in Exhibits CA-R-240 and P-R-241, Compilation of Miscellaneous Documents) to support a submission that grain producers' (*i.e.*, farmers') interests in increased production were aligned with grain companies' interests in increasing export capacity.

[753] P&H submitted that the Elevators acquired in the Transaction:

[...] will be capable at full utilization to fill the ■■■ metric tonnes of capacity at the FGT. This capacity utilization represents a 9% increase in export sales capacity at the West Coast and approximately 6.5% of total Canadian export capacity. The contribution of the LDC Elevators to export sales pre-acquisition was

██████ MT. At full capacity, within the P&H network, these elevators will add MT of export throughput to FGT for a net increase of █████. Hence the transaction as a whole clearly leads to a significant increase in the real [value] exports of grain within the meaning of section 96(2).

[Emphasis added.]

[754] The Commissioner responded that there was no evidence to indicate that the Transaction had actually led to a real increase in the value of exports under subsection 96(2). The Commissioner contended that P&H had acquired the grain volume that LDC was exporting through Vancouver terminals, so that P&H could export the same grain volume through its terminals in Vancouver. The grain was all headed for export, regardless of the Transaction. In addition, no analysis had been done to demonstrate that allowing P&H to keep one Elevator (*i.e.*, the Virden Elevator) would lead to a significant increase in the real value of exports.

[755] The Tribunal disagrees with P&H's submission that the increase in the real value of exports from the Transaction "as a whole" may be considered under subsection 96(2). That provision refers to the gains in efficiency mentioned in subsection 96(1), which in turn refers to the efficiencies brought about by the merger or proposed merger "in respect of which the application is made." Consideration of a substantial increase in the real value of exports under paragraph 96(2)(a) must therefore focus on the specific merger being challenged by the Commissioner in the proceeding. In this case, the Commissioner's Application is solely made in respect of P&H's Acquisition of the Virden Elevator, not in respect of the Transaction as a whole.

[756] During oral argument, the Tribunal asked whether there was anything in the evidence that parsed out the impact of the Virden Elevator on exports. P&H's answer was no. It advised that it would need access to third party information and data about grain volumes from other grain companies at the port and their efficiencies there, as well as those companies' variable operating costs to reach the port facilities, in order to measure such impact.

[757] During argument, the Tribunal requested that P&H specifically refer to the evidence on the additional (incremental) volume attributable to the Virden Elevator that would be exported through the FGT. P&H did not provide a satisfactory answer in substance, pointing to its evidence of increased throughput at the Virden Elevator. However, as noted above, this evidence does not support the quantification of any volume of increased throughput at the Virden Elevator. The Tribunal also notes that volumes of grain from the Virden Elevator were delivered to Thunder Bay (not Vancouver) and that the Superior terminal in Thunder Bay closed during the winter. Because P&H redirected the Virden Elevator grain eastward to Thunder Bay, any increased volume to the FGT that could (in theory) be attributable to the Virden Elevator would have to be sourced from another Elevator(s). P&H did not provide an analysis to support such an attribution.

[758] Reduced to its essence, P&H's submission was that more of the FGT's capacity would be used, and sooner, as a result of the Transaction as a whole. The evidence of how much additional capacity would be used (or the value of that grain in dollars), and when, is insufficient to show a significant increase in the real value of exports resulting from the Virden Acquisition. The Tribunal agrees with the Commissioner that it is likely that most of the additional volumes anticipated to be processed at the FGT post-Transaction are volumes that would otherwise have been processed at

other terminals but will now be diverted to the FGT because P&H now owns all of the source Elevators. Further, P&H confirmed during argument that the additional volumes are for all types of grains, not just wheat and canola. Lastly, the Tribunal appreciates the logic of Mr. Heimbecker's evidence concerning congested rail lines. Even accounting for that evidence and the general claim that the FGT would be a more efficient terminal (it was scheduled to become fully operational shortly after the hearing), the Tribunal is not satisfied that the evidence demonstrates a significant increase in the real value of exports for the purposes of paragraph 96(2)(a).

[759] The Tribunal pauses to again note that P&H's intention or objectives in entering the Transaction are not relevant, or material, to the Tribunal's analysis.

[760] Given the analysis above with respect to subsection 96(1), the Tribunal finds that P&H has not shown a causal connection between any proven efficiencies under subsection 96(1) and an increase in the real value of any exports. The Tribunal therefore concludes that the requirements of subsection 96(2) have not been met.

(c) The trade-off analysis

[761] In light of the Tribunal's conclusions on efficiencies, there is no need to deal with the trade-off analysis in this case.

(3) Conclusion on efficiencies and section 96

[762] For the reasons detailed above, the Tribunal concludes that P&H has not demonstrated, with clear and convincing evidence, its claimed efficiencies and that it would not have met its burden of demonstrating, on a balance of probabilities, that its claimed gains in efficiency would be greater than, and would offset, the anti-competitive effects of any lessening of competition resulting from the Acquisition.

VIII. CONCLUSION

[763] For the above detailed reasons, the Commissioner's Application is dismissed. In light of this conclusion, no remedial action will be ordered.

IX. COSTS

[764] The parties were unable to come to an agreement as to costs.

[765] The Commissioner submits that he should be awarded a lump sum amount of CAD \$2 million inclusive of counsel fees and disbursements if he is successful. If the Application is dismissed, then the Commissioner argues that P&H should be awarded CAD \$2 million inclusive of counsel fees and disbursements. However, if the Application is dismissed and the Tribunal finds that P&H's section 96 efficiencies defence would not have been successful, then the Tribunal should, in the Commissioner's view, deduct CAD \$500,000 from the lump sum cost award, in recognition of the costs the Commissioner incurred in order to respond to that defence. While the

Commissioner recognizes that P&H was entitled to rely on the efficiencies defence, he argues that if a respondent pleads the defence but does not adduce sufficient evidence to make it out, then the Tribunal should use a costs award to recognize the significant costs incurred by the Commissioner (and ultimately, Canadian taxpayers) to respond. If there is no financial deterrent associated with an unsuccessful efficiencies defence, the Commissioner submits that in the future, respondents will claim efficiencies as a matter of course, causing significant financial burden on the Commissioner regardless of whether raising the efficiencies defence was justified.

[766] P&H, in turn, seeks costs payable as a lump sum in the amount of CAD \$2,206,958.18, inclusive of fees, disbursements and taxes, if the Commissioner's Application is dismissed. This sum represents approximately CAD \$209,000 for legal fees and approximately CAD \$1,998,000 for disbursements (both inclusive of taxes). Should the Application be allowed, P&H indicates that it takes no position with respect to the Bill of Costs submitted by the Commissioner, save for one item — *i.e.*, the preparation and filing of the Commissioner's motion materials dealing with confidentiality designations — which P&H maintains is an ineligible cost in view of the Tribunal's order dismissing the Commissioner's confidentiality motion without costs. As for the matter of costs relating to the efficiencies defence, P&H submits that the merits of the efficiencies defence becomes moot if a substantial lessening of competition is not found under section 92, and that the result of the case must drive costs, not *obiter dicta*. According to P&H, this is not a case of divided success (citing *Allergan Inc v Sandoz Canada Inc*, 2021 FC 186 at paras 31, 43).

[767] Both parties submitted bills of costs and affidavits in support.

A. Legal principles applicable to costs

[768] In *VAA CT*, the Tribunal noted that section 8.1 of the CTA grants jurisdiction to the Tribunal to award costs of proceedings before it in accordance with the provisions governing costs in the FC Rules (*VAA CT* at para 817). Under subsection 400(1) of the FC Rules, the Tribunal has “full discretionary power over the amount and allocation of costs and the determination of by whom they are to be paid.” A non-exhaustive list of factors that the Tribunal may consider when exercising its discretion is set out in subsection 400(3).

[769] Costs ordinarily follow the outcome of the proceeding, in that the successful party is usually awarded costs (see, for example, *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)).

[770] The costs regime does not indemnify the successful party for all of its legal fees and disbursements, absent very unusual circumstances. Costs are only partial compensation for the actual costs incurred in litigation. As noted in *VAA CT*, an award of costs represents a compromise between compensating a successful party and not unduly burdening an unsuccessful party (*VAA CT* at para 817, citing *Apotex Inc v Wellcome Foundation Ltd* (1998), 159 FTR 233 (FCTD), 84 CPR (3d) 303, *aff'd* (2001), 199 FTR 320 (FCA)).

[771] The objectives of a costs award include having the unsuccessful party make a “reasonable contribution” to the successful party's costs of litigation, having regard to the Tariff in the FC Rules (*NOVA Chemicals Corporation v Dow Chemical Company*, 2017 FCA 25 (“*NOVA*

Chemicals”) at paras 13, 21). Although the Tariff amounts may be inadequate in complex litigation, nevertheless, an increased costs award cannot be justified solely on the basis that a successful party’s actual fees are significantly higher than the Tariff amounts. The burden is on the party seeking increased costs to demonstrate why their particular circumstances warrant an increased award (*NOVA Chemicals* at para 13, citing *Wihksne v Canada (Attorney General)*, 2002 FCA 356 at para 11).

[772] The approximation of lump sum costs is a matter of judgment rather than an accounting exercise (*Conorzio del Prosciutto di Parma v Maple Leaf Meats Inc*, 2002 FCA 417 at para 8). While the costs awarded should have a fair relationship to the actual costs of litigation, the question for the Tribunal is what, in the circumstances, are necessary and reasonable legal costs and disbursements (*Nadeau Ferme Avicole Ltée v Groupe Westco Inc*, 2010 Comp Trib 1 at para 49).

[773] Disbursements must be reasonable, necessary, and justified (*NOVA Chemicals* at para 26; *VAA CT* at para 821). Expert-related costs are not automatically recovered in their entirety and can be adjusted by the Tribunal if they do not appear reasonable (*VAA CT* at para 822).

[774] In *VAA CT*, the Tribunal took into account that success on the issues in dispute, particularly the legal issues in dispute, was divided; although the respondent was successful overall, the Commissioner prevailed on certain issues (*VAA CT* at paras 819, 827). The Tribunal reduced the costs award to the respondent to reflect the time spent on issues on which the Commissioner prevailed but the respondent persisted in spending time, and based on the reasonableness and necessity of the disbursements.

[775] As paragraph 400(3)(a) of the FC Rules contemplates, success overall in the proceeding remains a principal factor, subject to additional considerations relevant to the circumstances and claims made. The Tribunal may consider the factors in paragraphs 400(3)(b) to (n.1) of the FC Rules and any other matter it considers relevant under subsection 400(3)(o).

[776] The Tribunal favours lump sum costs awards (*VAA CT* at para 825).

B. Tribunal’s assessment

[777] As the successful party, P&H is entitled to an award of costs. The Tribunal will fix the costs payable by the Commissioner in this proceeding.

(1) Legal fees

[778] With respect to legal fees, P&H claimed approximately CAD \$209,000 in respect of legal fees, calculated based on Tariff B, Column IV. Its claims included time spent for preparation of pleadings, affidavits of documents, preparing for and attending oral examinations for discovery, preparing for and attending case management conferences, preparation of witness statements, and the attendance of two counsel at the hearing. The Commissioner submitted that, if P&H is successful, its quantum of costs should be determined on the usual basis of the middle of column III, and should also be less than the amount fixed by the Tribunal in *VAA CT* (which was CAD \$70,000) because the matter occupied fewer hearing days.

[779] As noted, both parties took positions to increase or decrease an award of costs by large amounts beyond the Tariff. P&H increased its requested award based on its actual legal fees and the complexity of this proceeding. P&H advised that it believed that an award for legal fees in the amount of CAD \$900,000 would be appropriate (its actual legal fees were approximately CAD \$3.6 million), but only claimed CAD \$209,000 under Tariff B, Column IV. For his part, the Commissioner sought to decrease an award to P&H if it did not succeed on section 96 issues. The Commissioner submitted that P&H's costs award should be reduced by CAD \$500,000, which the Commissioner argued represented the amount he paid to respond to P&H's position under section 96 by having to quantify the anti-competitive effects (through Dr. Miller) and file Mr. Harington's expert report on efficiencies under section 96.

[780] The parties also argued several novel points — i.e., issues that had not been argued to the Tribunal in previous litigated proceedings. The Commissioner's position on product market raised new issues for the Tribunal's consideration, while P&H raised issues under section 96 that had not been considered previously.

[781] The most important overall factor in arriving at a costs award is which party succeeded. Here, the Tribunal dismissed the Commissioner's Application. In addition to the overall result, the Tribunal recognizes that this proceeding involves a public official with a statutory mandate to administer and enforce the Act; both parties are highly sophisticated with very experienced counsel; and the legislative setting contemplates significant pre-litigation disclosure through the merger review process and pre-hearing disclosure, as well as well known elements and burdens of proof under sections 92 and 96 of the Act. The Tribunal also finds that proceedings under section 92 involve complex legal and factual matters that support higher costs awards under the Tariff B, Column IV in the FC Rules (as claimed by P&H).

[782] Although the Commissioner succeeded on several preliminary issues, the Tribunal does not find that those arguments diminish P&H's entitlement to an award of costs in this case.

[783] The Tribunal does not agree with the Commissioner's position that the costs award to P&H should be reduced by an overall lump sum amount of CAD \$500,000 because P&H would not have succeeded on its section 96 defence. Although the cost of Mr. Harington's services are known (*i.e.*, CAD \$259,000), the balance to arrive at the claimed amount of CAD \$500,000 is merely an assumption or guess without a sufficient evidentiary basis.

[784] That said, however, the Tribunal finds it appropriate under FC Rule 400(3)(o) (and by analogy to other paragraphs in FC Rule 400(3)) to take into account the specific circumstances of this proceeding related to the section 96 evidence and arguments in its overall assessment of legal fees, as follows:

- The overall burden of proof under section 96 was on P&H;
- P&H raised efficiencies in its pleading. The Tribunal notes that P&H did not provide details of its position on efficiencies at examinations for discovery and did not file an expert report for the hearing — even though it advised it would do so during the discovery process. It only filed Mr. Heimbecker's fact evidence (which included some efficiencies arguments that P&H did not initially plead);

- The Commissioner did not waste time on section 96 issues during the fact portion of the hearing; he did not cross-examine Mr. Heimbecker on his evidence related to alleged efficiencies;
- The Commissioner prevailed on section 96 issues. Even if the Tribunal's conclusions on section 96 were, strictly speaking, unnecessary for the Tribunal to decide given the outcome of its analysis under section 92, the Commissioner had no practical alternative but to respond to the section 96 efficiencies defence raised by P&H and to do so with an expert report;
- The Commissioner had to prepare for and conduct discovery on section 96 issues, quantify the anti-competitive effects in accordance with the principles established in *Tervita SCC*, file an expert report, address section 96 issues at the hearing, and respond to issues related to the proper interpretation of subsection 96(2), all of which affected the time spent by legal counsel;
- The Tribunal considers that P&H's approach to the section 96 issues in this proceeding tended to unnecessarily increase the Commissioner's costs and increase the time spent on the proceeding. A considerable part of the Commissioner's legal costs in relation to section 96 and its disbursement for Mr. Harington's report could have been avoided.

[785] Exercising its discretion, the Tribunal concludes that the appropriate costs award to P&H for legal fees in this matter should be fixed at CAD \$157,000, which represents approximately 75% of P&H's legal fees as claimed under Tariff B, Column IV.

(2) Disbursements

[786] The Tribunal has considered the positions of both parties with respect to each of the claims made by P&H for the disbursements it incurred in this litigation.

[787] P&H claims expert fees in the amount of approximately CAD \$1.61 million. Having regard to the Tribunal's positive treatment of Ms. Sanderson's evidence, but also to the overall reasonableness of the quantum claimed by P&H to be reimbursed by the Commissioner, the Tribunal finds CAD \$1.2 million to be a reasonable sum in respect of expert fees.

[788] The Tribunal recognizes that this hearing was conducted not only electronically (as is standard at the Tribunal) but entirely virtually, and in very unusual circumstances owing to the COVID-19 pandemic. P&H decided that its counsel would travel to Winnipeg, at or close to its witnesses (particularly Mr. Heimbecker), and presumably close to P&H's offices. For the hearing, P&H set up an operations centre at a hotel, necessitating the rental of a large room (to maintain physical distancing and set up the appropriate equipment for a virtual hearing with all the required computers and technical support).

[789] P&H claims a disbursement of approximately CAD \$126,000 for hotel conference rooms and audio visual display equipment used during examinations for discovery and, later, during the facts portion of the hearing. The Commissioner submitted that these amounts were excessive,

noting his own claim for just CAD \$2,200. The Tribunal does not accept the Commissioner's comparison of P&H's costs for four witnesses to testify in Manitoba, versus the 10 witnesses called by the Commissioner. Having decided that counsel would travel to Winnipeg (which the Tribunal does not find appropriate to question in this case), the Tribunal finds that the rental of space and equipment was reasonable given the COVID-19 restrictions in Manitoba at the time. Although some charges on the invoices related to food and package deliveries and the amounts charged for space and equipment appear quite high on a daily basis, the Tribunal finds it appropriate that the Commissioner make a reasonable contribution to this expense in the amount of CAD \$50,000.

[790] P&H claimed payments made for case law searches in third party legal databases in the amount of approximately CAD \$32,000. The evidence reveals more than 300 searches, done mostly in the two months leading up to the hearing. It is unclear whether those searches related to two motions argued and decided during the same period, or to the legal issues arising in the hearing itself. (On one motion, costs were awarded in the cause whereas no costs were awarded in the other.) The Tribunal recognizes that most legal research is done online and at the time, the law firm personnel were likely working from home and without a law library. It is also clear that some of the legal issues raised by the Commissioner's position and by P&H (for example, preliminary issues and the interpretation of subsection 92(2)) required legal research. Although the Commissioner did not object in his submissions, the Tribunal finds that the high number of searches and absence of details as to what the searches concerned (motions as opposed to hearing; issues raised by each party) support a reasonable claim for CAD \$8,000.

[791] P&H sought reimbursement for air travel to and from Winnipeg in the amount of CAD \$31,500. Its claim was based on 50% of the actual cost of a private jet for two counsel to travel to Winnipeg and back for discovery, and later for the fact portion of the hearing. Reviewing the invoices, it appears that at both the discovery and hearing stages, the aircraft flew from Winnipeg to Toronto (without passengers on board other than flight crew) to pick up P&H's counsel and returned the same day. The aircraft made a trip to return counsel to Toronto upon completion of both the discoveries or portion of the hearing, and then flew back to Winnipeg without passengers on board other than flight crew. The invoices reflect charges for round-trips even though counsel were on board one way only. The Tribunal will allow a claim for CAD \$4,500, which (on the evidence) approximates a full fare economy air ticket for two counsel to fly between Toronto and Winnipeg for discovery and for the fact portion of the hearing.

[792] P&H claims approximately CAD \$31,600 for transcripts of the examinations for discovery and the hearing and approximately CAD \$10,600 for data hosting, which was necessary for the virtual hearing at the Tribunal. The Tribunal allows these claims in their entirety.

[793] The Tribunal allows claims for photocopies and printing in the amount of CAD \$800 and for hotels and meals during examinations for discovery and at the hearing in the aggregate of the amount of CAD \$8,000 (based on a contribution to the cost of hotel rooms for two counsel and a reasonable *per diem* for meals).

[794] P&H claimed approximately CAD \$6,000 in courier costs attributable, for example, to counsel working from home during the pandemic and materials sent by counsel to the panel members and the Tribunal Registry during the hearing. The Tribunal notes that most (approximately CAD \$4,200) of P&H's claim in that regard relates to a single package sent from

Winnipeg to Toronto to return materials and equipment after the fact portion of the hearing ended. The Tribunal considers CAD \$2,000 as a reasonable contribution towards courier costs.

[795] P&H claimed meals in the amount of approximately CAD \$1,350 in addition to those claimed by hearing counsel, which the Tribunal notes was not an appropriate claim for costs purposes.

[796] A claim for conference calls in the amount of CAD \$127 is *de minimis* in this context. The Tribunal notes that certain calls occurred before the litigation began.

C. Conclusion on costs

[797] In light of the foregoing, the Tribunal awards costs for legal fees in the lump sum amount of CAD \$157,000, inclusive of applicable taxes. The total of all disbursements allowed is CAD \$1,315,500, inclusive of applicable taxes.

[798] The Tribunal therefore concludes that the Commissioner shall pay an all-inclusive aggregate lump sum amount of CAD \$1,472,500 to P&H in respect of costs of this proceeding.

X. ORDER

[799] The Application brought by the Commissioner is dismissed.

[800] Within 30 days from the date of this Order, the Commissioner shall pay to P&H an amount of CAD \$1,472,500.

[801] These Reasons are confidential. In order to enable the Tribunal to issue a public version of the Reasons, the Tribunal directs the parties to attempt to reach an agreement regarding the redactions to be made to these Reasons in order to protect confidential evidence and information. The parties are to jointly correspond with the Tribunal Registry by no later than the close of business on November 14, 2022, setting out their agreement and any areas of disagreement concerning the redaction of the confidential version of the Reasons. If there is any disagreement, the parties shall separately correspond with the Tribunal setting out their respective submissions with respect to any proposed, but contested, redactions from these confidential Reasons. Such submissions are to be served and filed with the Tribunal Registry by the close of business on November 14, 2022.

DATED at Ottawa, this 31st day of October, 2022

SIGNED on behalf of the Tribunal by the Panel Members.

(s) Denis Gascon J. (Presiding Member)
(s) Andrew D. Little J.
(s) Ramaz Samrout

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Commissioner of Competition

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Schedule “A” – Relevant provisions of the Act

Mergers	Fusionnements
[...]	[...]
Order	Ordonnance en cas de diminution de la concurrence
92 (1) Where, on application by the Commissioner, the Tribunal finds that a merger or proposed merger prevents or lessens, or is likely to prevent or lessen, competition substantially	92 (1) Dans les cas où, à la suite d’une demande du commissaire, le Tribunal conclut qu’un fusionnement réalisé ou proposé empêche ou diminue sensiblement la concurrence, ou aura vraisemblablement cet effet :
(a) in a trade, industry or profession,	a) dans un commerce, une industrie ou une profession;
(b) among the sources from which a trade, industry or profession obtains a product,	b) entre les sources d’approvisionnement auprès desquelles un commerce, une industrie ou une profession se procure un produit;
(c) among the outlets through which a trade, industry or profession disposes of a product, or	c) entre les débouchés par l’intermédiaire desquels un commerce, une industrie ou une profession écoule un produit;
(d) otherwise than as described in paragraphs (a) to (c),	d) autrement que selon ce qui est prévu aux alinéas a) à c),
the Tribunal may, subject to sections 94 to 96,	le Tribunal peut, sous réserve des articles 94 à 96 :
(e) in the case of a completed merger, order any party to the merger or any other person	e) dans le cas d’un fusionnement réalisé, rendre une ordonnance enjoignant à toute personne, que celle-ci

	soit partie au fusionnement ou non :
(i) to dissolve the merger in such manner as the Tribunal directs,	(i) de le dissoudre, conformément à ses directives,
(ii) to dispose of assets or shares designated by the Tribunal in such manner as the Tribunal directs, or	(ii) de se départir, selon les modalités qu'il indique, des éléments d'actif et des actions qu'il indique,
(iii) in addition to or in lieu of the action referred to in subparagraph (i) or (ii), with the consent of the person against whom the order is directed and the Commissioner, to take any other action, or	(iii) en sus ou au lieu des mesures prévues au sous-alinéa (i) ou (ii), de prendre toute autre mesure, à condition que la personne contre qui l'ordonnance est rendue et le commissaire souscrivent à cette mesure;
(f) in the case of a proposed merger, make an order directed against any party to the proposed merger or any other person	f) dans le cas d'un fusionnement proposé, rendre, contre toute personne, que celle-ci soit partie au fusionnement proposé ou non, une ordonnance enjoignant :
(i) ordering the person against whom the order is directed not to proceed with the merger,	(i) à la personne contre laquelle l'ordonnance est rendue de ne pas procéder au fusionnement,
(ii) ordering the person against whom the order is directed not to proceed with a part of the merger, or	(ii) à la personne contre laquelle l'ordonnance est rendue de ne pas procéder à une partie du fusionnement,
(iii) in addition to or in lieu of the order referred to in subparagraph (ii), either or both	(iii) en sus ou au lieu de l'ordonnance prévue au sous-alinéa (ii), cumulativement ou non :
(A) prohibiting the person against whom the order is directed, should the merger or part thereof be completed, from doing any act or thing the	(A) à la personne qui fait l'objet de l'ordonnance, de s'abstenir, si le fusionnement était éventuellement complété en tout ou en partie, de faire

prohibition of which the Tribunal determines to be necessary to ensure that the merger or part thereof does not prevent or lessen competition substantially, or

(B) with the consent of the person against whom the order is directed and the Commissioner, ordering the person to take any other action.

Evidence

(2) For the purpose of this section, the Tribunal shall not find that a merger or proposed merger prevents or lessens, or is likely to prevent or lessen, competition substantially solely on the basis of evidence of concentration or market share.

Factors to be considered regarding prevention or lessening of competition

93 In determining, for the purpose of section 92, whether or not a merger or proposed merger prevents or lessens, or is likely to prevent or lessen, competition substantially, the Tribunal may have regard to the following factors:

(a) the extent to which foreign products or foreign competitors provide or are likely to provide effective competition to the businesses

quoi que ce soit dont l'interdiction est, selon ce que conclut le Tribunal, nécessaire pour que le fusionnement, même partiel, n'empêche ni ne diminue sensiblement la concurrence,

(B) à la personne qui fait l'objet de l'ordonnance de prendre toute autre mesure à condition que le commissaire et cette personne y souscrivent.

Preuve

(2) Pour l'application du présent article, le Tribunal ne conclut pas qu'un fusionnement, réalisé ou proposé, empêche ou diminue sensiblement la concurrence, ou qu'il aura vraisemblablement cet effet, en raison seulement de la concentration ou de la part du marché.

Éléments à considérer

93 Lorsqu'il détermine, pour l'application de l'article 92, si un fusionnement, réalisé ou proposé, empêche ou diminue sensiblement la concurrence, ou s'il aura vraisemblablement cet effet, le Tribunal peut tenir compte des facteurs suivants :

a) la mesure dans laquelle des produits ou des concurrents étrangers assurent ou assureront vraisemblablement une concurrence réelle aux

of the parties to the merger or proposed merger;	entreprises des parties au fusionnement réalisé ou proposé;
(b) whether the business, or a part of the business, of a party to the merger or proposed merger has failed or is likely to fail;	b) la déconfiture, ou la déconfiture vraisemblable de l'entreprise ou d'une partie de l'entreprise d'une partie au fusionnement réalisé ou proposé;
(c) the extent to which acceptable substitutes for products supplied by the parties to the merger or proposed merger are or are likely to be available;	c) la mesure dans laquelle sont ou seront vraisemblablement disponibles des produits pouvant servir de substituts acceptables à ceux fournis par les parties au fusionnement réalisé ou proposé;
(d) any barriers to entry into a market, including	d) les entraves à l'accès à un marché, notamment :
(i) tariff and non-tariff barriers to international trade,	(i) les barrières tarifaires et non tarifaires au commerce international,
(ii) interprovincial barriers to trade, and	(ii) les barrières interprovinciales au commerce,
(iii) regulatory control over entry,	(iii) la réglementation de cet accès,
and any effect of the merger or proposed merger on such barriers;	et tous les effets du fusionnement, réalisé ou proposé, sur ces entraves;
(e) the extent to which effective competition remains or would remain in a market that is or would be affected by the merger or proposed merger;	e) la mesure dans laquelle il y a ou il y aurait encore de la concurrence réelle dans un marché qui est ou serait touché par le fusionnement réalisé ou proposé;
(f) any likelihood that the merger or proposed merger will or would result in the	f) la possibilité que le fusionnement réalisé ou proposé entraîne ou puisse entraîner la disparition d'un

removal of a vigorous and effective competitor;	concurrent dynamique et efficace;
(g) the nature and extent of change and innovation in a relevant market;	g) la nature et la portée des changements et des innovations sur un marché pertinent;
(g.1) network effects within the market;	g.1) les effets de réseau dans le marché;
(g.2) whether the merger or proposed merger would contribute to the entrenchment of the market position of leading incumbents;	g.2) le fait que le fusionnement réalisé ou propose contribuerait au renforcement de la position sur le marché des principales entreprises en place;
(g.3) any effect of the merger or proposed merger on price or non-price competition, including quality, choice or consumer privacy; and	g.3) tout effet du fusionnement réalisé ou proposé sur la concurrence hors prix ou par les prix, notamment la qualité, le choix ou la vie privée des consommateurs;
(h) any other factor that is relevant to competition in a market that is or would be affected by the merger or proposed merger.	h) tout autre facteur pertinent à la concurrence dans un marché qui est ou serait touché par le fusionnement réalisé ou proposé.
[...]	[...]
Exception where gains in efficiency	Exception dans les cas de gains en efficience
96 (1) The Tribunal shall not make an order under section 92 if it finds that the merger or proposed merger in respect of which the application is made has brought about or is likely to bring about gains in efficiency that will be greater than, and will offset, the effects of any prevention or lessening of competition that will result or is likely to result	96 (1) Le Tribunal ne rend pas l'ordonnance prévue à l'article 92 dans les cas où il conclut que le fusionnement, réalisé ou proposé, qui fait l'objet de la demande a eu pour effet ou aura vraisemblablement pour effet d'entraîner des gains en efficience, que ces gains surpasseront et neutraliseront les effets de l'empêchement ou de la diminution de la

from the merger or proposed merger and that the gains in efficiency would not likely be attained if the order were made.

concurrence qui résulteront ou résulteront vraisemblablement du fusionnement réalisé ou proposé et que ces gains ne seraient vraisemblablement pas réalisés si l'ordonnance était rendue.

Factors to be considered

Facteurs pris en considération

(2) In considering whether a merger or proposed merger is likely to bring about gains in efficiency described in subsection (1), the Tribunal shall consider whether such gains will result in

(2) Dans l'étude de la question de savoir si un fusionnement, réalisé ou proposé, entraînera vraisemblablement les gains en efficacité visés au paragraphe (1), le Tribunal évalue si ces gains se traduiront :

(a) a significant increase in the real value of exports; or

a) soit en une augmentation relativement importante de la valeur réelle des exportations;

(b) a significant substitution of domestic products for imported products.

b) soit en une substitution relativement importante de produits nationaux à des produits étrangers.

Restriction

Restriction

(3) For the purposes of this section, the Tribunal shall not find that a merger or proposed merger has brought about or is likely to bring about gains in efficiency by reason only of a redistribution of income between two or more persons.

(3) Pour l'application du présent article, le Tribunal ne conclut pas, en raison seulement d'une redistribution de revenu entre plusieurs personnes, qu'un fusionnement réalisé ou proposé a entraîné ou entraînera vraisemblablement des gains en efficacité.

Schedule “B” – List of Exhibits

<u>Exhibit No.</u>	<u>Description</u>
P-A-001	Witness Statement of Mr. Alistair Pethick
CA-R-002	Purchase Receipts from Pethick Farms (Confidential – Level A)
P-R-003	Purchase Receipts from Pethick Farms
CA-R-004	2018 Purchase Receipts from Pethick Farms (Confidential – Level A)
P-R-005	2018 Purchase Receipts from Pethick Farms
CA-R-006	Excel Table Summarizing Purchases of Grain by Pethick Farms (Confidential – Level A)
P-R-007	Excel Table Summarizing Purchases of Grain by Pethick Farms
CA-R-008	2019 Purchase Receipts from Pethick Farms (Confidential – Level A)
P-R-009	2019 Purchase Receipts from Pethick Farms
CA-R-010	Purchase Contracts from Pethick Farms (Confidential – Level A)
P-R-011	Purchase Contracts from Pethick Farms
CA-R-012	Grain Purchase Order Agreement of Mr. Pethick (Confidential – Level A)
P-R-013	Grain Purchase Order Agreement of Mr. Pethick
P-A-014	Witness Statement of Mr. Harvey Brooks
P-R-015	PDQ Update Notice from Alberta Wheat Commission
P-R-016	“Where’s My Region?” Map from PDQ
P-R-017	Rosetown “Where’s My Region?” Map from PDQ
P-R-018	Virden “Where’s My Region?” Map from PDQ
P-R-019	Moosomin “Where’s My Region?” Map from PDQ
P-R-020	Fairlight “Where’s My Region?” Map from PDQ
P-R-021	Wheat Market Outlook and Price Webpages from Sask Wheat

P-R-022	FOB Wheat Prices and Export Basis Prices Calculation pdf from Sask Wheat
P-R-023	Sask Wheat Strategic Plan 2018-2020
P-R-024	Sask Wheat Port Capacity Article
CB-A-025	Witness Statement of Mr. Chris Lincoln (Confidential – Level B)
P-A-026	Witness Statement of Mr. Chris Lincoln
CA-R-027	Chris Lincoln Deliveries 2016-2019 (Confidential – Level A)
P-R-028	Chris Lincoln Deliveries 2016-2019
CA-R-029	Chris Lincoln Grain Purchase Agreements (Confidential – Level A)
P-R-030	Chris Lincoln Grain Purchase Agreements
CA-R-031	Balance Sheet for CKB Lincoln Farms for Wawota and Maryfield (Confidential – Level A)
P-R-032	Balance Sheet for CKB Lincoln Farms for Wawota and Maryfield
P-A-033	Witness Statement of Mr. Ian Wagstaff
CA-R-034	Ian Wagstaff Deliveries 2016-2019 (Confidential – Level A)
P-R-035	Ian Wagstaff Deliveries 2016-2019
P-A-036	Witness Statement of Mr. Dean McQueen
CA-A-037	Witness Statement of Mr. Dean McQueen (Confidential – Level A)
CB-A-038	Witness Statement of Mr. Dean McQueen (Confidential – Level B)
CB-R-039	Competition Bureau RFIs (Confidential – Level B)
P-R-040	Competition Bureau RFIs
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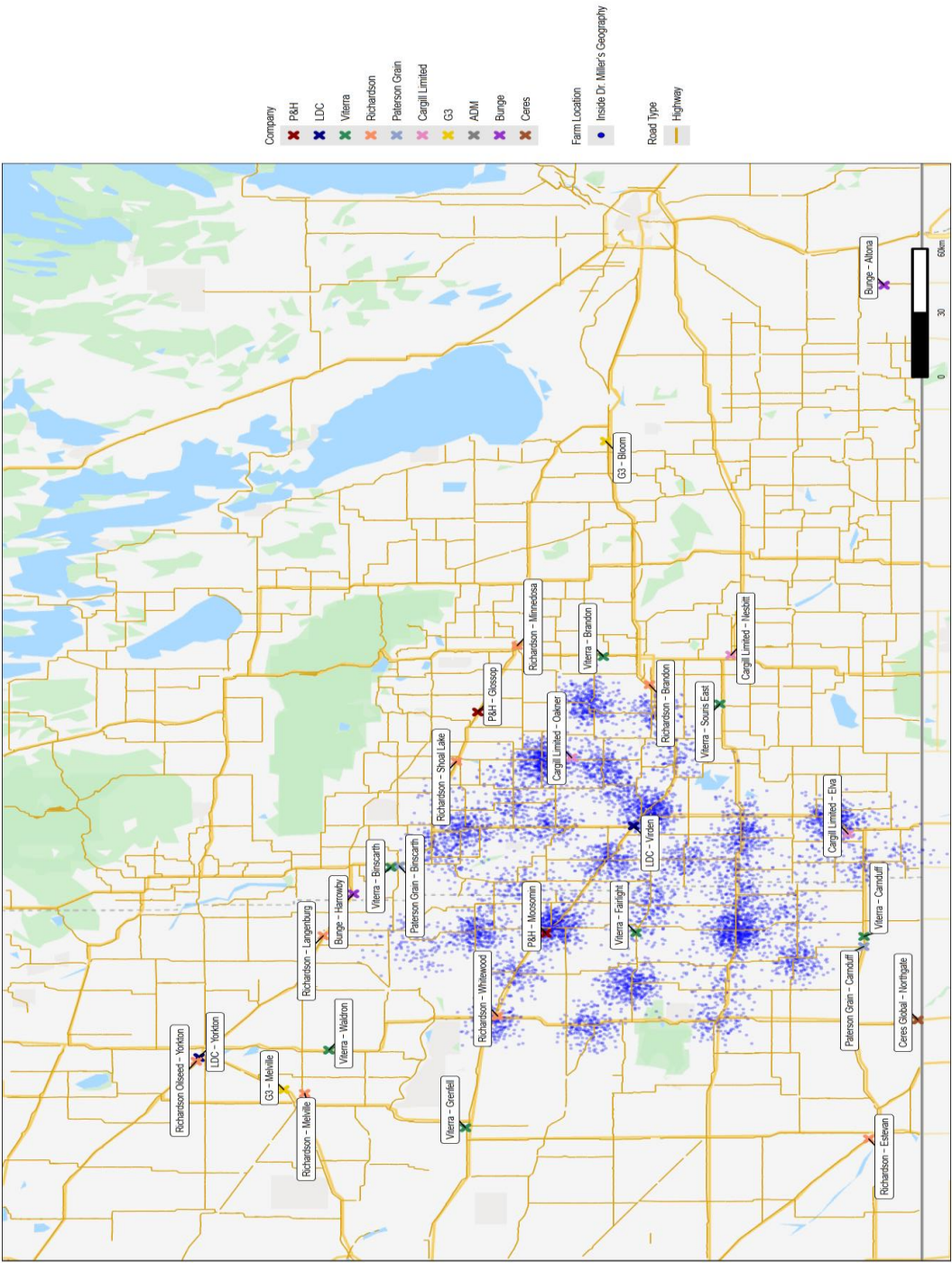
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CONFIDENTIAL LEVEL A
Farm Locations in Dr. Miller's Geography
Canola and CWRS

100198



The farm locations are taken from the transactions related to CWRS and Canola in crop year 2018-2019 in all of the transaction data collected (the Parties' data and rivals data) by the Commissioner and used in Dr. Miller's merger simulation.

All roads pictured are highways as defined by StatsCanada. In Manitoba and Saskatchewan, 70% and 82% of highways (respectively) are paved roads (National Road Network Data).

TAB 4

Competition Tribunal



Tribunal de la concurrence

PUBLIC VERSION

Citation: *Canada (Commissioner of Competition) v Secure Energy Services Inc*, 2023 Comp Trib 02

File No.: CT-2021-002

Registry Document No.: 349

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

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

BETWEEN:

Commissioner of Competition
(applicant)

and

SECURE Energy Services Inc.
(respondent)



Dates of hearing: May 9-12, 16-19, 24-27, and 30-31 and June 1-2 and 15-17, 2022

Before: P. Crampton C.J., D. Gascon J. and Dr. T. Horbulyk

Date of order: March 3, 2023

REASONS FOR ORDER AND ORDER

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I. INTRODUCTION

[1] In this application, the Commissioner of Competition (the “**Commissioner**”) alleges that the July 2021 acquisition of Tervita Corporation (“**Tervita**”) by SECURE Energy Services Inc. (“**Secure**”) substantially lessened competition in approximately 143 distinct markets in Western Canada. To remedy that ongoing situation, the Commissioner seeks the divestiture of 41 facilities previously owned by Tervita.

[2] Ultimately, the application turns on two questions raised by Secure in connection with the efficiencies defence in section 96 of the *Competition Act*, RSC 1985, c C-34 (the “**Act**”). The first is whether certain types of alleged non-price anti-competitive effects (the “**Non-Price Effects**”) can be considered in assessing the deadweight loss (“**DWL**”) to the Canadian economy likely to result from the acquisition. The second is whether those effects have been demonstrated by the Commissioner, at least to the degree required to prevail on this application.

[3] The Non-Price Effects relate to 25 facilities (the “**Closing Facilities**”) that have been or will be fully or partially closed by Secure.¹ Those facilities handle various types of waste generated by oil and gas producers at their production sites. Approximately two-thirds of the Closing Facilities were previously owned by Tervita.

[4] The Commissioner alleges that the Non-Price Effects include the increased transportation costs that customers of the Closing Facilities will have to incur to travel to more distant facilities owned by Secure (the “**Absorbing Facilities**”). The Commissioner also asserts that the Non-Price Effects include increased waiting times for customers to deliver their waste to the Absorbing Facilities. Additional Non-Price Effects are alleged to include capacity constraints; a reduction of the quality of service and relationships; and a reduction in the value placed on the reputation of the operator of the Absorbing Facilities, relative to that of the operator of the Closing Facilities. For greater certainty, these alleged Non-Price Effects are in addition to alleged anti-competitive effects related to price increases and reductions in output (the “**Price/Output Effects**”).

[5] The Tribunal² agrees with the Commissioner that Secure’s acquisition of Tervita (the “**Merger**”) has substantially lessened competition in 136 of the 143 markets in which this effect has been alleged. To the extent that these markets represent close to half of the 271 areas of competitive overlap between Secure and Tervita (collectively, the “**Merging Parties**”) identified by the Commissioner, it is difficult to conceive of a more anti-competitive merger.

[6] The Tribunal finds that 29 of the 41 divestitures sought by the Commissioner would be sufficient to restore competition to the requisite degree, subject to its determination of the efficiencies defence invoked by Secure.

¹ This includes one facility designated for temporary closure.

² Where the words “Tribunal” or “panel” are used and the finding relates to a matter of law alone, that finding has been made solely by the judicial members of the Tribunal.

[7] In assessing the DWL likely to result from the Merger, the Tribunal agrees with the Commissioner's position that the Non-Price Effects can be taken into consideration in measuring the DWL likely to be brought about by the Merger, provided that those effects otherwise meet the requirements of section 96 and are demonstrated on a balance of probabilities. In reaching this conclusion, the Tribunal rejects Secure's position that the Non-Price Effects are not cognizable under section 96.

[8] The Tribunal also agrees with the Commissioner that it may consider the Non-Price Effects in all areas of prior competitive overlap between Secure and Tervita, comprising 271 distinct customer location-based geographic areas. Stated differently, the Tribunal agrees with the Commissioner that the cognizable anti-competitive effects contemplated by section 96 are not limited to the smaller number of markets in which the Tribunal determined that the Merger has brought about, or is likely to bring about, a substantial lessening of competition ("SLC"). This is because section 96 contemplates an assessment of "the effects of any prevention or lessening of competition" [emphasis added].

[9] However, given that Non-Price Effects occurring beyond the 271 areas of competitive overlap do not result from any prevention or lessening of competition, they are not within the purview of section 96. For greater certainty, the Commissioner did not allege any "prevention" of competition in respect of the areas beyond the 271 areas of prior competitive overlap between Secure and Tervita.

[10] The Commissioner initially asserted that the Non-Price Effects would likely amount to approximately \$78 million in annual DWL. When the analysis is confined to customers in the 271 overlapping draw areas of the Merging Parties, that estimate fell to between \$40 million and \$55 million, depending on which of two approaches was adopted.³ As a result of further adjustments, the Commissioner reduced these estimates to approximately \$50 million for all customers of Secure and Tervita, and to between \$15.9 million and \$32.6 million for customers located in areas of competitive overlap.

[11] As for the Price/Output Effects, the Commissioner first alleged that they would likely amount to between \$1 million and \$4.4 million in annual DWL, depending on which of his estimates of market elasticity of demand was accepted. The Commissioner subsequently increased the upper limit of those estimates to "around \$6 million."

[12] After reviewing all of the evidence, the Tribunal finds that the Commissioner has only been able to demonstrate annual Non-Price Effects of approximately \$2,808,132,⁴ and annual Price/Output Effects of between \$500,000 and at least \$1,500,000, in DWL for the period 2023-

³ The alternative approaches and the various adjustments that were made are discussed in Part XV.B (2) below.

⁴ Given that the Commissioner attempted to quantify the Non-Price Effects, he did not separately maintain that they should be given any qualitative weight in the balancing assessment contemplated by section 96 (*Tervita Corp v Canada (Commissioner of Competition)*, 2015 SCC 3 ("*Tervita SCC*"), at paras 100, 125–126, 137–140).

2033.⁵ The sum of these two annual amounts is approximately \$3,308,132 to at least \$4,308,132. Adjusting this range to include the DWL that has occurred since the date of the Merger yields values of approximately \$4,333,591 to at least \$5,643,572 in annual DWL for the ten-year period 2023-2033. The net present value (“NPV”) of this range is approximately \$30,219,522 to at least \$39,354,443.

[13] The Tribunal observes that part of the reason why the amount of demonstrated Non-Price Effects is much less than what the Commissioner alleged is due to the difficulty associated with quantifying such effects on a balance of probabilities. In the end, a majority of the panel concludes that the “top down” estimates produced by the economic models used by the Commissioner did not resonate with the preponderance of the evidence in the record. Consequently, the Commissioner was left with his “bottom up” estimate of Non-Price Effects, which consisted of his estimate of increased transportation costs that will likely result from the Merger. The panel majority finds that the Commissioner did not meet his burden of quantifying any other Non-Price Effects on a balance of probabilities, and with clear and convincing evidence. One member of the panel is of the view that the Commissioner’s economic models were sufficient to demonstrate, on a balance of probabilities, a higher amount of demonstrated Non-Price Effects.

[14] In invoking the efficiencies defence, Secure alleged that the Merger is likely to bring about cognizable gains in efficiency that will be greater than, and will offset, the effects of any lessening of competition alleged by the Commissioner.

[15] After reviewing all of the evidence, the Tribunal disagrees. In brief, Secure was only able to demonstrate total cognizable gains in efficiency of approximately \$32,205,813, in NPV terms, for the period 2023-2033. The annualized equivalent amount is approximately \$4,618,433. These are the efficiencies that would not likely be attained if the Tribunal’s order were made (the “Foregone Efficiencies”), as contemplated by section 96.

[16] These gains in efficiency are much less than the total efficiency gains claimed by Secure for two principal reasons. First, Secure did not meet its burden with respect to its claimed cost savings pertaining to facility rationalizations. Second, Secure failed to demonstrate that some of its claimed “corporate cost savings” meet the requirements of the efficiencies defence, as set forth in section 96 of the Act.

[17] Given that the total cognizable Foregone Efficiencies likely to be brought about by the Merger (i.e., \$4,618,433 annually and \$32,205,813 in NPV terms) are not greater than, and do not offset, the full range of DWL likely to result from the Merger (i.e., \$4,333,591 to at least \$5,643,572 annually, and \$30,219,522 to at least \$39,354,443 in NPV terms), Secure’s efficiency defence fails.

II. THE PARTIES

[18] The Commissioner is appointed under section 7 of the Act and is responsible for the enforcement and administration of the Act.

⁵ This range is a function of the range of the price elasticity of demand determined by the Tribunal.

[19] Secure is a publicly traded company headquartered in Calgary, Alberta, and is listed on the Toronto Stock Exchange. At the time of the Merger, Secure owned and operated a network of facilities in the Western Canadian Sedimentary Basin (“WCSB”) that provided various waste disposal services. These included 18 treatment, recovery, and disposal facilities (“TRDs”), also known as full service terminals (“FSTs”); seven industrial landfills (“Landfills”); and 15 stand-alone water disposal wells (“SWDs”).

[20] Secure also offered, and continues to offer, a wide range of other services that are not at issue in this proceeding. These include various environmental services associated with oil and gas drilling, such as the sale of drilling fluids, production chemicals, and water services, and the demolition, decommissioning, remediation, and reclamation of oil and gas wells.

[21] Immediately prior to the Merger, Tervita was a publicly traded waste services company based in Calgary, Alberta. Its owned and operated network in the WCSB included 44 TRDs, 22 Landfills, eight SWDs, and three cavern disposal sites (“Caverns”). It also offered a range of additional services that are not at issue in this proceeding, including the demolition, decommissioning, remediation, and reclamation of oil and gas wells.

III. THE MERGER

[22] Pursuant to an Arrangement Agreement dated March 8, 2021, Secure acquired all of the issued and outstanding shares of Tervita, and then amalgamated with Tervita on July 2, 2021. Through the amalgamation, former Secure and Tervita shareholders acquired approximately 52% and 48%, respectively, of the merged entity.

[23] Since completing the Merger, Secure has been implementing a six-year integration plan.

IV. TRDS, LANDFILLS AND SWDS

[24] The production of oil and gas generally results in large quantities of various forms of solid and water waste, including what is known as “produced water,” wastewater, sludge, drill cuttings, contaminated soil, and other chemicals. For producers who prefer to dispose of their waste through a third party, that waste is typically taken to a TRD, a Landfill or a SWD.⁶

[25] TRDs process contaminated sludge and emulsions that contain mixtures of oil, water, gas, and other substances. At a TRD, each of those principal components of the mixtures is separated using centrifuges or other thermal processes. If the TRD facility contains a terminal with a pipeline connection, the oil recovered from the waste will be delivered via pipeline to an oil and gas plant. If the TRD is not connected via terminal to a pipeline, the oil will be trucked to a facility which has a terminal. Insofar as the water waste is concerned, it is disposed of at a disposal well, often co-located at the TRD. The solids are separately disposed of at a Landfill.

⁶ As further discussed in Part XIII.C (4)(c) below, some producers dispose of certain types of waste at their own sites. Based on the evidence before the Tribunal, this appears to be primarily for produced water. Some types of waste, including drill mud, drill cuttings, sludge, wastewater, produced water, and certain naturally occurring radioactive materials, can be disposed of at a Cavern.

[26] Landfills are engineered sites into which solid waste is disposed. In addition to receiving solid waste from TRDs, Landfill operators also receive solid waste, such as contaminated soil and drill cuttings, directly from oil and gas customers. In Alberta and Saskatchewan, Landfills that receive oilfield waste streams fall into two categories: Class I landfills (hazardous oilfield waste) and Class II landfills (non-hazardous oilfield waste). The majority of solid oil and gas waste in Alberta and Saskatchewan is non-hazardous, and therefore is disposed of in Class II landfills. In British Columbia, both hazardous and non-hazardous solid oilfield waste is disposed of in what are called “secure” landfills.

[27] SWDs are used to dispose of produced water, or wastewater.⁷

V. BACKGROUND AND SUMMARY OF THE COMMISSIONER’S ALLEGATIONS

[28] The present application was filed by the Commissioner on June 29, 2021, shortly after being informed that Secure and Tervita intended to complete the Merger at 12:01 a.m. on July 2, 2021.

[29] Contemporaneously with the filing of this application, the Commissioner filed a second application under section 104 of the Act (the “**Section 104 Application**”) in which he sought an interim order directing the Merging Parties not to proceed with the Merger until the final disposition of this application.

[30] The following day, the Commissioner sought an “interim interim” order to prevent the Merger from closing, pending the disposition of the Section 104 Application. The Tribunal ultimately dismissed both of those applications (*Canada (Commissioner of Competition) v Secure Energy Services Inc and Tervita Corporation*, 2021 Comp Trib 4 (the “**Interim Interim Decision**”); *Canada (Commissioner of Competition) v Secure Energy Services Inc*, 2021 Comp Trib 7).

[31] The Commissioner appealed the Interim Interim Decision. Although the Commissioner’s appeal of one aspect of this decision was successful, the Federal Court of Appeal (“FCA”) decision does not have any bearing on the present application (*Canada (Commissioner of Competition) v Secure Energy Services Inc and Tervita Corporation*, 2022 FCA 25).

[32] Given that the Merger has now been completed, the relief sought in the present application was amended. For the present purposes, it will suffice to note that in his Amended Notice of Application (the “**Amended Application**”), the Commissioner sought an order requiring Secure to dispose of such assets “as are required for an effective remedy,” with no further details.

[33] The Tribunal pauses to observe that, in the future, applications submitted by the Commissioner may not be accepted for filing if they do not meet the requirements set forth in Rule

⁷ Produced water is water that comes out of the ground along with oil and gas. The term “produced water” is also sometimes used to refer to water that contains remnants of the drilling and fracking process. A SWD is a facility that is not co-located with a TRD.

36 of the *Competition Tribunal Rules*, SOR/2008-141 (the “**Rules**”). This includes the requirement to provide “the particulars of the order sought” (Rule 36(2)(e)).

[34] In the Amended Application, the Commissioner describes Secure and Tervita as having been fierce competitors who had developed competing facilities in close proximity to each other. He adds that Secure and Tervita were either the only waste services options, or were the two closest geographic options, for a significant number of customers. The Commissioner characterizes such geographic proximity as being critical to oil and gas customers, due to the high costs associated with transporting oilfield waste.

[35] As a result of the elimination of the competition previously provided by Tervita, the Commissioner alleges that Secure has gained significantly enhanced market power that is unlikely to be constrained. Consequently, the Commissioner maintains that “[o]il and gas producers will likely pay materially higher prices and experience a deterioration in the quality of service to dispose of waste at a time when the oil and gas industry, an important sector of the Canadian economy, is struggling.”

[36] More specifically, through expert evidence and in closing submissions, the Commissioner maintains that Secure and Tervita were each other’s closest competitors. He asserts that as a result of the elimination of competition between them, competition has been substantially lessened in 143 local geographic markets in Saskatchewan, Alberta, and Northeastern British Columbia for (i) the supply of waste processing and treatment services by TRDs, (ii) the disposal of solid oil and gas waste into Landfills, and (iii) the disposal of produced water and wastewater into SWDs owned by third party waste service providers. Those markets (the “**Relevant Markets**”) were distinguished from the broader group of 271 “markets” in respect of which the Commissioner identified competitive overlap between the Merging Parties. That distinction was based on the following two screens: (i) a market share screen of at least 35% post-Merger, and (ii) a 5% price increase screen.

[37] In approximately 17 of the 143 Relevant Markets, the Commissioner alleges that the Merger has reduced the number of competitors from two to one — resulting in a monopoly. In a further 30 of those Relevant Markets, the Commissioner maintains that the number of competitors has been reduced from three to two, and that the sole remaining competitor is much smaller and unable to provide effective competition. He also asserts the latter position in respect of the competitors in the remaining 96 Relevant Markets, where the number of competitors has been reduced to three or more. More broadly, he states that the Merger has resulted in Secure owning the vast majority of TRDs, Landfills, and third party SWDs in the WCSB. He adds that no other competitor comes close to having the geographic range and breadth of facilities that Secure now has as a result of the Merger. Table 1 summarizes the change in the structure of the 143 Relevant Markets.

Table 1 – Change in the structure of the Relevant Markets⁸

2-to-1 (monopoly)	17
3-to-2 (weak remaining competitor)	30
4-to-3+ (weak remaining competitors)	96
Total	143

[38] The Commissioner also maintains that the Merger has substantially lessened competition in respect of the disposal of naturally occurring radioactive materials (“**NORM Waste**”). However, the Commissioner did not address that particular allegation during this proceeding. When questioned about this during closing submissions, counsel explained that nothing turns on this because the Commissioner’s concerns in relation to NORM Waste would be addressed by one of the Landfill divestitures being sought.⁹ Accordingly, the Commissioner’s allegations in respect of NORM Waste will not be further addressed in these reasons.

[39] Shortly before the hearing of this application commenced on May 9, 2022, the Commissioner provided the particulars of the divestitures being sought. He did so in a slide presentation filed for the purposes of his opening submissions. In that presentation, as amended, the Commissioner stated that he sought an order for Secure to divest 41 facilities that were specifically identified — namely, 26 TRDs, five SWDs, eight Landfills, and two Caverns.

[40] Subsequently, one of those TRD facilities (i.e., Willesden Green) was omitted from the list of Divestiture Facilities, attached at Schedule A to the Draft Order which was included at Appendix C to the Commissioner’s closing submissions. It was also omitted from an identical list included at Appendix A to those submissions. However, given that one of the Relevant Markets (i.e., market #10) served by that Willesden Green facility is a “2-to-1” market, and given that this TRD is addressed in Appendix B to the Commissioner’s closing submissions, the Tribunal has inferred that the omission of this facility from the above-mentioned Draft Order and from Appendix A was an oversight.

[41] For greater certainty, the Commissioner confirmed during a pre-hearing case management conference on May 2, 2022, that he was not alleging any SLC in respect of the other services mentioned at paragraphs 20–21 above, and at paragraph 5 of the Amended Application.

[42] For the purposes of the efficiencies defence raised by Secure and discussed below, the Commissioner maintains that the annual DWL associated with the Non-Price Effects is approximately \$50 million for all customers of the Merging Parties, and approximately \$15.9

⁸ Given that the Relevant Markets are those in respect of which the Commissioner has alleged a likely substantial lessening of competition, they do not include markets that might otherwise appear to be relevant, including two “2-to-1” areas of competitive overlap and one “3-to-2” area of overlap. As further discussed at paragraphs 249–251 below, these areas of overlap did not meet the Commissioner’s “5% price increase” screen.

⁹ The Landfill in question is located at Silverberry, British Columbia and is discussed at paragraph 410 below. In Alberta, there is only one Landfill permitted to accept NORM Waste — namely, Secure’s Pembina Hazardous Waste Landfill.

million to \$36.2 million for customers located in areas of competitive overlap. These estimates are in addition to alleged annual Price/Output Effects of approximately \$1 million to \$6 million.

VI. SUMMARY OF SECURE'S RESPONSE

[43] Secure maintains that the Merger is critical to its efforts to support customers through a time of fundamental industry change. Among other things, that change includes significant volatility, investor uncertainty, and endemic overcapacity — all of which were initially caused by a global slump in oil and gas prices. That price collapse led to a flight of capital from the WCSB. More recently, the situation has been exacerbated by the 2020 Saudi/Russian price war, the COVID-19 pandemic, uncertainty over pipeline access, and commitments from governments, investors, and operators to reduce carbon emissions.

[44] Secure notes that, in this context, the Merging Parties reported combined net losses of \$481 million since 2016. It adds that Tervita was in financial distress and was left scrambling for short-term cash flow. However, Secure did not submit that Tervita was likely to fail in the absence of the Merger, or that there were no competitively preferable purchasers. Nevertheless, customers were apparently concerned by this situation. This is because they ostensibly require strong, well-capitalized partners to manage their long-term waste liability, in a context in which the industry is required to adapt to address environmental, social, and governance issues that have been raised by various stakeholders. Secure maintains that this explains why the Merger is supported by many of its customers.

[45] With respect to the Commissioner's allegations, Secure asserts that the Merger has not resulted in an SLC, and is not likely to do so in the future.

[46] Contrary to the Commissioner's claims, Secure asserts that it continues to face significant effective competition from remaining third party waste disposal companies. It also submits that there are no meaningful barriers to entry or expansion in the Relevant Markets. It adds that the majority of its customers are large, sophisticated oil and gas companies that have significant countervailing buyer power and the ability to self-supply the relevant services.

[47] Regarding countervailing power, Secure states that its customers operate across multiple geographies and/or avail themselves of multiple services offered by Secure. Consequently, Secure contends that its customers can credibly threaten to punish Secure for any price increases it may attempt to impose in a particular geography or line of service, by moving their business in other geographies or product lines to competing service providers. Such countervailing power is alleged to be enhanced by the fact that those customers are counterparties to contracts with Secure for the purchase and resale of crude oil.

[48] Regarding self-supply, Secure maintains that oil and gas producers already internally dispose of the vast majority of their wastewater volumes, and that it has lost significant water disposal volumes to customer in-sourcing over the past several years. Secure adds that several producers operate Landfills that accept solid oilfield waste from third parties and that there are more than 7,000 producer-owned oil battery sites that perform the emulsion-treating and/or terminalling functions provided by TRDs.

[49] Beyond all of the foregoing, Secure submits that the Merger is likely to bring about gains in efficiency that will be greater than, and will offset, the effects of any SLC that may be likely to result from the Merger, as contemplated by the efficiencies defence in section 96 of the Act. In connection with this, Secure asserts that the Merger will generate \$52.8 million in annual run rate efficiencies, or \$328.4 million in efficiencies on a discounted basis over 10 years, after accounting for approximately \$4 million in inefficiencies from customers' increased incremental transportation costs due to facility closures. Secure adds that the requirements of section 96 would still be met even if the cognizable efficiencies are limited to those that would not likely be attained if an order requiring the divestitures sought by the Commissioner were made by the Tribunal. In that case, Secure states that the efficiencies likely to be lost would be \$19.9 million annually, or \$138.5 million on a discounted basis over 10 years.

[50] Secure maintains that those efficiencies would meet the requirements of section 96, in part because the Non-Price Effects alleged by the Commissioner do not constitute effects of any lessening of competition for the purposes of the trade-off assessment contemplated by that provision. Secure further asserts that the Commissioner has not met his evidentiary burden with respect to those effects, or indeed, the alleged Price/Output Effects.

VII. RELEVANT LEGISLATION

[51] Section 92 of the Act provides the Tribunal with the authority to issue various types of orders in respect of mergers that, upon application by the Commissioner, it finds prevent or lessen competition substantially, or are likely to have that effect.¹⁰ In the case of completed mergers, this includes, under subparagraph 92(1)(e)(ii) of the Act, the authority to dispose of assets or shares designated by the Tribunal in such manner as the Tribunal directs.

[52] Pursuant to section 96, also known as the efficiencies defence, the Tribunal is precluded from issuing an order under section 92 if it finds that the merger in question “has brought about or is likely to bring about gains in efficiency that will be greater than, and will offset, the effects of any prevention or lessening of competition that will result or is likely to result from the merger [...] and that the gains in efficiency would not likely be attained if the order were made.” Consequently, where this defence is raised, the Tribunal must first determine whether competition is or is likely to be substantially prevented or lessened. If the Tribunal makes a positive finding in this regard, it must then determine, in the second stage of its analysis, the remedy that would be required to restore competition to the point at which the lessening or prevention of competition would no longer be substantial. The Tribunal would then assess, at the third stage of its analysis, the efficiencies defence.

[53] The full text of paragraphs 92(1)(a) – (e) and section 96 of the Act is set forth in Appendix 1 to these reasons.

¹⁰ In the present proceeding, the Commissioner has not claimed that the Merger is likely to substantially prevent competition. Hence, the Tribunal's analysis below will be limited to the SLC alleged by the Commissioner.

VIII. ISSUES

[54] This application raises the following three principal issues:

1. Has the Merger lessened competition substantially, or is it likely to do so?
2. If so, what would be the appropriate remedy?
3. Are the requirements of the efficiencies defence satisfied?

[55] Within each of these principal issues lie multiple sub-issues to be addressed. These will be discussed in Parts XIII – XV below.

IX. WITNESSES

[56] Below is a summary of the issues addressed by the witnesses who testified in this proceeding, as well as the Tribunal's impression of their testimony.

[57] In addition to the testifying witnesses, the Commissioner filed witness statements from approximately 40 additional witnesses. Those witnesses included oil and gas producers, actual and alleged competitors of the Merging Parties, and other industry participants. Most of these participants simply provided a very short witness statement referencing information provided in response to an order issued by the Federal Court pursuant to section 11 of the Act. They will not be further discussed in this Part of these reasons.

A. The Expert Witnesses

[58] There were six expert witnesses in this proceeding, three of whom testified on behalf of the Commissioner, and three of whom testified on behalf of Secure. To assist the Tribunal, most of those expert witnesses prepared a helpful demonstrative slide presentation that summarized their opinion evidence.

[59] The Commissioner's principal expert was Dr. Nathan Miller. He is the Provost's Distinguished Associate Professor at Georgetown University, where he teaches in various programs, including to PhD students in the Economics Department. He was qualified as an expert in industrial organization and competition law economics.

[60] Dr. Miller testified with respect to his Expert Report dated February 25, 2022 (the "**Initial Miller Report**") as well as his Expert Rebuttal Report dated April 11, 2022 (the "**Miller Rebuttal Report**"). In those reports, he defined the relevant product and geographic markets in this proceeding, calculated market shares in each of the 271 areas of geographic overlap between the Merging Parties, estimated the price effects of the Merger in those markets, estimated the corresponding DWL in those markets, and estimated the DWL associated with the closure of the

Closing Facilities.¹¹ In the Miller Rebuttal Report, he also addressed criticisms of the Initial Miller Report that were advanced by Dr. Renée Duplantis, one of Secure's expert witnesses. In the course of doing so, he revised some of his previous estimates.

[61] In general, Dr. Miller was knowledgeable, helpful, candid, and forthcoming with the panel, although he was sometimes defensive on cross-examination. He readily acknowledged some of the limitations of his models and estimates. He appeared to be genuinely interested in assisting the Tribunal to make the right determinations.

[62] The Commissioner's second expert witness was Dr. James Gregory Eastman. He is Senior Vice President at Cornerstone Research, Inc., where he specializes in applying economic analysis and accounting in various areas, including antitrust and competition law. He was qualified as an expert in the area of merger efficiencies.

[63] Dr. Eastman testified with respect to his report dated April 11, 2022 (the "**Eastman Report**"), in which he reviewed an assessment of the efficiencies likely to be brought about by the Merger that was prepared by Mr. Andrew Harington, one of Secure's expert witnesses. Dr. Eastman also testified with respect to Mr. Harington's reply to the Eastman Report.

[64] The Tribunal considered Dr. Eastman to have been less helpful, succinct, and spontaneous than the other expert witnesses in this proceeding. His evidence was often directed toward possibilities, rather than probabilities. At times, he came across as being somewhat evasive and not as knowledgeable about the waste industry as the other expert witnesses who testified.

[65] The Commissioner's third expert witness was Mr. Rory Johnston. He is the author of the Commodity Context newsletter and is currently employed by Melancthon Capital, which operates under the business name Price Street. He provided evidence regarding estimated levels of oil production in the WCSB at various points in the future. The Tribunal found his testimony to be knowledgeable, forthcoming, clear, succinct, helpful, and candid.

[66] Secure's first expert witness was Dr. Adonis Yatchew. He is a Professor of Economics at the University of Toronto, where he teaches PhD level courses in econometrics. He is also Editor-in-Chief of *The Energy Journal*, a journal that publishes theoretical, empirical, and policy-related papers in energy economics. He was qualified as an expert in energy economics and econometrics.

[67] Dr. Yatchew testified with respect to his expert report dated March 24, 2022 (the "**Yatchew Report**"). In that report, he estimated the price elasticity of demand for TRD, Landfill, and SWD services, respectively, as well as for waste services as a whole. He was not cross-examined by the Commissioner.

[68] The Tribunal considered Dr. Yatchew to have been generally knowledgeable, helpful, and spontaneous, although he did not provide clear answers to some of the panel's questions. On other

¹¹ As discussed at paragraph 109 in Part XV.B (2) below, Dr. Miller included in his estimates DWL in relation to several facilities that Secure is not planning to close. These are not included among the 25 Closing Facilities mentioned elsewhere in these reasons.

occasions, he readily acknowledged certain shortcomings associated with the analysis supporting his opinions.

[69] Secure's second expert witness was Dr. Renée Duplantis. She is a Principal in the Toronto office of The Brattle Group ("**Brattle**"), a multinational firm that provides economic, regulatory, and financial consulting services. She is currently the leader of that firm's Canadian Antitrust and Competition practice.

[70] Dr. Duplantis holds a PhD in Economics from Northeastern University in Industrial Organization and Applied Economics. She was qualified as an expert in that field.

[71] Dr. Duplantis testified with respect to her expert report dated March 25, 2022 (the "**Initial Duplantis Report**") and a subsequent version of that report dated May 20, 2022 (the "**Updated Duplantis Report**"), where she updated her analysis to address the specific divestitures identified by the Commissioner in the slide presentation prepared for his opening submissions. These reports generally reviewed and critiqued Dr. Miller's opinions, and provided competing opinions with respect to the likely effects of the Merger on competition. Those likely effects included DWL calculations. In the course of testifying with respect to those opinions, Dr. Duplantis also testified with respect to the Miller Rebuttal Report.

[72] When responding to questions from the panel, Dr. Duplantis was succinct and left the impression that she was trying to be helpful. Her concessions with respect to the definition of the Relevant Markets, market shares, margins, and diversion ratios greatly assisted the Tribunal to focus on the paramount issues in dispute. Nevertheless, she was more defensive and less candid in cross-examination. Moreover, some aspects of the analysis in her reports and testimony were selective, particularly with respect to evidence that did not support her opinions. The Tribunal considered Dr. Miller to be more forthcoming, impartial, and candid than her, and therefore preferred his evidence on several (but not all) points, where it differed from Dr. Duplantis' evidence.¹²

[73] Secure's third expert witness was Mr. Andrew Harington. He is a Chartered Professional Accountant, Chartered Financial Analyst Charterholder, and Chartered Business Valuator. As with Dr. Duplantis, he is a Principal in the Toronto office of Brattle. He was qualified as an expert in the quantification of efficiencies under the Act.

[74] Mr. Harington testified with respect to his report dated March 25, 2022, an updated version of that report dated May 20, 2022 (the "**Updated Harington Report**"), reports of Dr. Miller and Dr. Eastman, and his reply report dated April 26, 2022 (the "**Harington Reply Report**").

[75] The Tribunal found Mr. Harington to have been knowledgeable and generally clear, candid, spontaneous, and forthcoming. Where his evidence was inconsistent with evidence provided by

¹² A particularly important example of where some aspects of Dr. Duplantis' testimony was preferred by a majority of the panel concerned Dr. Miller's quantification of the Non-Price Effects. This is discussed at paragraphs 682–685 below.

Dr. Eastman, the Tribunal tended to prefer his evidence over Dr. Eastman's.¹³ However, the Tribunal considered some aspects of Mr. Harington's analysis to have been insufficiently supported by the evidence. This led to the need to make adjustments to some of his calculations regarding the efficiencies claimed by Secure.¹⁴

B. The Lay Witnesses

[76] A total of 16 lay witnesses testified in this proceeding — ten on behalf of the Commissioner, and six on behalf of Secure.

(1) The Commissioner

[77] The first lay witness for the Commissioner was Mr. Cory Hall, President and CEO of Aqua Terra Water Management Inc. ("**Aqua Terra**"), which is a provider of water management, water disposal, and related services in Canada and the U.S. In Canada, Aqua Terra owns seven disposal wells. The focus of Mr. Hall's evidence was on [REDACTED]. The Tribunal considered Mr. Hall's testimony to be straightforward, candid, and responsive, although he appeared to be cautious on cross-examination at times.

[78] The Commissioner's second lay witness was Mr. Joshua Ryan McSween. He holds the position of Manager, Production & Operations, for DEL Canada GP Ltd. ("**DEL Canada**"), an oil and gas producer in Alberta. He testified with respect to the factors considered by DEL Canada in choosing a waste disposal services provider, DEL Canada's experience with the Merging Parties, its options for waste disposal services, and substantive issues such as self-supply and countervailing power. The Tribunal considered him to be somewhat evasive and difficult to pin down.

[79] The Commissioner's third lay witness was Mr. Paul Dziuba. He holds the position of Environmental Specialist at Chevron Canada Resources ("**Chevron**"), a large oil and gas producer. He testified with respect to Chevron's experience with the Merging Parties, as well as substantive issues, including barriers to entry, Chevron's options for waste disposal services, self-supply, and countervailing power. The Tribunal found Mr. Dziuba to be forthright, responsive, and candid in responding to questions from the panel. However, he was somewhat less so on cross-examination. He appeared to be less well-prepared and more guarded than other witnesses.

[80] The Commissioner's fourth lay witness was Mr. Geoffrey Cain, President and CEO of Halo Exploration Ltd. ("**Halo**"), a junior oil and gas producer. His testimony focused on many of the same issues as Messrs. McSween and Dziuba. He was not quite as spontaneous, candid, or helpful as other witnesses.

[81] The Commissioner's fifth lay witness was Mr. James Taylor, Chief Operating Officer of Crew Energy Inc. ("**Crew Energy**"), an oil and gas producer. His testimony focused on many of

¹³ An important example of where Dr. Eastman's evidence was preferred over Mr. Harington's concerns the latter's claims in respect of [REDACTED] employees. This is discussed at paragraphs 604–610 below.

¹⁴ See discussion at paragraphs 569–570 and 574–583 below.

the same issues as the other representatives of oil and gas producers discussed above. The Tribunal found him to be slow in his responses, hesitant, and careful, although he became more forthcoming as his testimony unfolded and transitioned into questions from the panel.

[82] The Commissioner's sixth lay witness was Mr. Cameron McLean, Vice President of Clean Harbors Canada ("**Clean Harbors**"), which provides a range of environmental and industrial services across North America, including Landfill disposal, wastewater treatment, and waste transportation. [REDACTED], the focus of Mr. McLean's testimony was on Clean Harbors' potential interest in acquiring assets on divestiture. In exchanges with the panel, Mr. McLean also testified with respect to some of the substantive issues in dispute in this proceeding. During his testimony, he was candid, responsive, articulate, and knowledgeable. He also appeared to be endeavouring to assist the panel as best he could and readily acknowledged when he did not know the answer to certain questions.

[83] The Commissioner's seventh lay witness was Mr. Lars DePauw, Executive Director of the Orphan Well Association ("**OWA**"). That entity has a mandate from the Alberta Energy Regulator to decommission and reclaim oil and gas wells, facilities, and pipelines that do not have a solvent and responsible owner. The focus of Mr. DePauw's testimony was essentially on the same issues as those addressed by the representatives of oil and gas producers. Throughout his testimony, Mr. DePauw was knowledgeable, clear, responsive, and forthright, although he came across as cautious on occasion.

[84] The Commissioner's eighth witness was Mr. Carl Lammens, who is Team Lead, Asset Retirement and Remediation, at PETRONAS Energy Canada Ltd. ("**PECL**"). PECL is an oil and gas producer. His testimony focused on many of the same issues as the other representatives of oil and gas producers, as discussed above. The Tribunal found him to be knowledgeable, forthright, candid, and responsive. His unprompted elaborations on various issues were also very helpful.

[85] The Commissioner's ninth witness was Ms. Melanie McRae. She is the General Manager, Supply Chain Canada, at ConocoPhillips Canada ("**ConocoPhillips**"), an oil and gas producer. Once again, her testimony focused on essentially the same issues that were addressed by the other representatives of oil and gas producers, discussed above. Her testimony was succinct, to the point, candid, and generally helpful. She readily acknowledged when she did not know the answer to certain questions. However, she limited her answers to the questions asked and was not as helpful as some of the other witnesses in this proceeding.

[86] The Commissioner's final lay witness was Mr. David Hart, who is Lead, Environmental Operations, Field Operations, for Canadian Natural Resources Limited ("**CNRL**"). CNRL is an oil and gas producer that also has extensive mid-stream assets. His testimony focused on many of the same issues as the other oil and gas producers, discussed above. The Tribunal found him to be cautious, guarded, and less comfortable providing information, although he was not evasive and was generally clear.

(2) Secure

[87] Six lay witnesses testified on behalf of Secure, two of whom hold executive positions at Secure.

[88] The first such executive was Mr. David Engel. He is the Senior Vice President, Landfill Solutions. In that capacity, he was a member of the senior executive team that evaluated and planned the Merger. He has also been involved in overseeing the integration of the Merging Parties' respective operations. Prior to joining Secure in 2007, he held various roles at Tervita.

[89] Mr. Engel provided evidence with respect to Secure's operations, the Merger and its underlying rationale, aspects of the mid-stream oil and gas industry, Secure's pricing philosophy, the service improvements resulting from the Merger, the 2018 merger between Tervita and Newalta Corporation ("**Newalta**"), and the potential strategic buyers of divestiture assets from Secure. He included five large volumes of information with his witness statement.

[90] The panel found Mr. Engel to be knowledgeable and cooperative in his disposition. However, his written and oral testimony contained inaccuracies on important issues. For example, he downplayed the significance of wait times and overplayed the role and potential for customers to self-supply their waste disposal needs. Consequently, his evidence was not always considered reliable by the panel.

[91] The second executive who testified on behalf of Secure was Mr. Keith Blundell, who is a Corporate Development Manager. He is currently responsible for overseeing the execution of Secure's integration plan following the Merger, which was the focus of his testimony. The Tribunal found him to be very knowledgeable, yet reluctant to elaborate and sometimes not entirely forthcoming.

[92] In addition to Messrs. Engel and Blundell, representatives of four oil and gas producers testified on behalf of Secure. Each of them were supportive of the Merger. Generally, they testified with respect to the importance of having a financially stable provider of waste services, the relative insignificance of waste disposal costs on the production decisions of oil and gas producers, and their lack of concern regarding the possibility of price increases by Secure.

[93] The first of those individuals was Mr. Chris Hogue, Senior Vice President at International Petroleum Corp. ("**IPC**"). Among other things, he stated that the IPC is more than capable of disposing of its own waste internally, and that it is able to leverage its operations in other geographic areas when negotiating with Secure. He stated that Secure's knowledge of this acts as a deterrent for Secure. The Tribunal found his evidence to be inordinately cautious, less convincing, and unreliable, in part due to his lack of knowledge of the waste disposal operations.

[94] The next producer witness for Secure was Mr. Darren Gee. He is the Chief Executive Officer of Peyto Exploration and Development ("**Peyto**"). He explained that Peyto's reasons for its lack of concern regarding post-Merger price increases by Secure are essentially the same as those put forward by Mr. Hogue. He added that as a result of consolidation at the upstream level of the oil and gas industry, the remaining players are sufficiently large to in-source their waste disposal requirements. He further explained that producers typically permit other producers to dispose of waste at their internal facilities, and that producers are capable of sponsoring the entry of a new competitor into the industry. Finally, he suggested that recent price increases have resulted from inflation, rather than any exercise of market power by Secure. While the panel found Mr. Gee to be candid and straightforward, his testimony was fairly general in nature. In addition, it was not well supported by the evidence and he was sometimes evasive, for example, in respect

of the issues of self-supply and geographic leverage. An important contradiction with Peyto's own public documentation on this issue undermined Mr. Gee's credibility.

[95] The third producer witness for Secure was Mr. Rodney Gray. He is the Executive Vice President and Chief Financial Officer of Baytex Energy Corporation ("**Baytex**"). His testimony was similar to that of Mr. Gee, and was similarly very general in nature, unsupported, and unpersuasive on the issues of geographic leverage, self-supply, and new entry. He was also terse and uncooperative on cross-examination. He did not appear to have the same level of knowledge about his company's operations as other witnesses. He attributed Baytex's lack of concern regarding the Merger to the fact that Baytex only used one of Secure or Tervita, whichever was located closest to Baytex's relevant facility, prior to the Merger. He also maintained that Baytex has other disposal options, although the evidentiary record suggests that they are all very minor industry participants.

[96] The final lay witness was Mr. Robert Broen, President and CEO of Athabasca Oil Corporation ("**Athabasca**"). The panel found him to be increasingly comfortable, forthright, clear, and helpful as his testimony unfolded. However, as with some of the other witnesses for Secure, he was more knowledgeable about the high-level issues than the details. To his credit, he readily acknowledged when he did not know the answer to certain questions.

X. EVIDENTIARY OBJECTIONS

[97] During the hearing of this application, Secure raised two objections: one that the Tribunal took under reserve, and one that the Tribunal determined at the time it was raised and undertook to address in these reasons. The first objection related to the Commissioner's reliance on section 69 of the Act. The second related to the Commissioner's attempt to amend some of his evidence after his case was closed.

A. The Commissioner's Reliance on Section 69

[98] During cross-examination, counsel to the Commissioner attempted to ask Mr. Blundell of Secure about an e-mail that had been included in the Agreed Book of Documents. Secure objected on the basis that Mr. Blundell stated that he did not know the identity of the sender of the e-mail, and that therefore there was no adequate foundation for the document to be put to him. Secure maintained that the Commissioner was inappropriately attempting to adduce hearsay evidence for the truth of its contents that was neither necessary nor reliable.

[99] In response, the Commissioner relied on paragraph 69(2)(c) of the Act. That provision states as follows:

Evidence against a participant

69 (2) In any proceedings before the Tribunal or in any prosecution or proceedings before a court under or pursuant to this Act,

Preuve contre un participant

69 (2) Dans toute procédure engagée devant le Tribunal ou dans toute poursuite ou procédure engagée devant un tribunal en vertu ou en application de la présente loi :

[...]

(c) a record proved to have been in the possession of a participant or on premises used or occupied by a participant or in the possession of an agent of a participant shall be admitted in evidence without further proof thereof and is prima facie proof

(i) that the participant had knowledge of the record and its contents,

(ii) that anything recorded in or by the record as having been done, said or agreed on by any participant or by an agent of a participant was done, said or agreed on as recorded and, where anything is recorded in or by the record as having been done, said or agreed on by an agent of a participant, that it was done, said or agreed on with the authority of that participant, and

(iii) that the record, where it appears to have been written by any participant or by an agent of a participant, was so written and, where it appears to have been written by an agent of a participant, that it was written with the authority of that participant.

[...]

c) s'il est prouvé qu'un document a été en la possession d'un participant, ou dans un lieu utilisé ou occupé par un participant, ou en la possession d'un agent d'un participant, il fait foi sans autre preuve et atteste :

(i) que le participant connaissait le document et son contenu,

(ii) que toute chose inscrite dans le document ou par celui-ci enregistrée comme ayant été accomplie, dite ou convenue par un participant ou par l'agent d'un participant, l'a été ainsi que le document le mentionne, et, si une chose est inscrite dans le document ou par celui-ci enregistrée comme ayant été accomplie, dite ou convenue par l'agent d'un participant, qu'elle l'a été avec l'autorisation de ce participant,

(iii) que le document, s'il paraît avoir été écrit par un participant ou par l'agent d'un participant, l'a ainsi été, et, s'il paraît avoir été écrit par l'agent d'un participant, qu'il a été écrit avec l'autorisation de ce participant.

[100] In support of this position, the Commissioner noted that on February 25, 2022, Secure was sent a notice pursuant to Rule 72. That notice was entitled “Records to be admitted without further proof — Section 69 of the Competition Act” and stated:

The Commissioner of Competition (“Commissioner”), hereby relies on section 69 of the Competition Act with respect to the following records:

.....

[A]ll records produced by the respondent in its Affidavit of Documents on sworn [sic] October 29, 2021 and January 31, 2022, and any other records that may be produced by the Respondent after the date of this notice.

[101] The Commissioner maintained that this notice satisfied his obligations under both the Tribunal’s Scheduling Order and Rule 72, which states as follows:

Records to be admitted in evidence

72 The Commissioner shall provide a list of the documents to be admitted in evidence without further proof in accordance with section 69 of the Act at least 45 days before the commencement of the hearing.

Documents qui font foi

72 Au moins quarante-cinq jours avant le début de l’audience, le commissaire fournit la liste des documents qui font foi de leur contenu sans autre preuve en vertu de l’article 69 de la Loi.

[102] In reply, Secure stated that the notice effectively applied to every piece of paper or electronic record it had produced during the proceeding, and that there were hundreds of thousands of such documents. As such, the notice did not serve the purpose contemplated by Rule 72. Moreover, Secure asserted that the Commissioner had already produced a list of hundreds of documents that he was seeking to rely upon under section 69, before closing his case. Given the Commissioner’s confirmation that his case had closed, Secure maintained that the Commissioner was precluded from putting this additional document to Mr. Blundell.

[103] In this latter regard, Secure relied on *Eli Lilly v Apotex Inc*, 2009 FC 991 (“*Apotex*”), at paragraph 703, where the Court held that section 69 “only applies to evidence tendered in the course of a party’s case in chief.” After noting that Apotex had declined an opportunity to reopen its case to introduce the documents in question into evidence, the Court concluded that they were not admissible, having regard to “the totality of these circumstances” (*Apotex*, at para 705).

[104] Ultimately, nothing turns on the disputed e-mail, which was marked for identification. The same is true of a second e-mail that was also marked for identification. Even if those documents had been marked as exhibits, they would not have had any impact on the Tribunal’s determination of the main issues in dispute in this application. However, the Tribunal considers it important to comment briefly on the Parties’ positions.

[105] The Tribunal does not agree that section 69 applies only to the Commissioner’s case in chief. With respect, there is nothing in the plain language of that provision or the statutory context which would support this interpretation. Moreover, the circumstances at hand are distinguishable

from those in *Apotex* — most notably, because the Commissioner was not given the same opportunity as *Apotex* was given to reopen his case.

[106] Nevertheless, the Tribunal agrees with Secure's position that the manner in which the Commissioner proceeded deprived it of the meaningful notice contemplated by Rule 72. This is despite the fact that the documents in dispute had been included in the Agreed Book of Documents.

[107] Given that the Rule 72 notice is not required until 45 days before the commencement of the hearing, the Tribunal considers that the Commissioner will ordinarily have had sufficient time to ascertain which documents, among the hundreds of thousands that may have been produced by a respondent, may realistically be adduced as an exhibit during the hearing. The Rule 72 notice should be confined to those documents, particularly given that section 69 documents are adduced for the truth of their contents (*Commissioner of Competition v Toronto Real Estate Board*, CT-2011-003, Transcript of hearing dated September 10, 2012, at pp 122–123).

[108] The Tribunal observes in passing that, in light of its finding at paragraph 104 above, it is not necessary to discuss the issue of the necessity and reliability of the disputed e-mails for the purposes of the common law exception to the hearsay rule. Nor is it necessary to decide whether they would constitute business records under the *Canada Evidence Act*, RSC 1985, c C-5 and benefit from this statutory path to admissibility. Of course, it bears underscoring that, whenever the Commissioner wishes to rely on the business records exemption to hearsay, he must comply with the requirements set out in subsection 30(7) of the *Canada Evidence Act*.

B. The Commissioner's Attempt to Reopen his Case

[109] On the evening of June 14, 2022, before closing submissions were scheduled to be made the following morning, and almost two weeks following the close of the evidentiary phase of the hearing, the Commissioner requested an opportunity to reopen his case. The Commissioner's counsel explained that it had come to the case team's attention that Dr. Miller's DWL calculations were inaccurate because he did not account for Secure's updated integration plans. In those plans, Secure removed the names of six of the facilities that it had identified for closure.¹⁵ The Commissioner's team realized this change only when they read Secure's closing submissions, which had been submitted on Friday, June 10, 2022. Counsel recognized that (i) those updated integration plans had been identified in Mr. Harington's initial report dated March 25, 2022, (ii) Dr. Duplantis had updated Dr. Miller's data to account for the relevant updates in her report, and (iii) both of those reports were filed before the Miller Rebuttal Report. Counsel further recognized that Mr. Harington also addressed one aspect of Dr. Miller's inaccurate calculations in his Reply Report.

[110] Despite the foregoing, the Commissioner's counsel requested an opportunity to recall Dr. Miller to testify to the narrow issue of the impact of the updated integration plans on his DWL estimates. Counsel noted that this issue had not been raised during Dr. Miller's cross-examination, and that if Dr. Miller were not permitted to update his calculations, the Tribunal would be deprived

¹⁵ These were referred to as the [REDACTED]

facilities (Transcript, Confidential B, at p 3138).

of evidence that might be critical to the proper application of the balancing test in section 96 to the facts in this proceeding. Counsel emphasized that this would result in unfairness and prejudice to the public interest, and that there would be no prejudice to Secure that could not be subsequently compensated by costs.

[111] The Commissioner's counsel further stated that Dr. Miller would not be adducing new evidence, but rather rerunning his model based on facts that are already in evidence. He added that Dr. Miller's revised calculations had been shared with Secure, and that those calculations were in Secure's favour as they show that the DWL would be lower than Dr. Miller had previously calculated (yet still sufficient to permit the Commissioner to prevail in relation to Secure's efficiencies defence).

[112] Having regard to all of the foregoing, counsel maintained that it would be in the best interests of justice to permit Dr. Miller to be cross-examined later that week, or the following week. Counsel added that this would not necessarily require closing submissions to be postponed.

[113] The Tribunal refused the Commissioner's request to reopen his case and undertook to explain why in these reasons. In essence, the Tribunal agreed with Secure's position, as conveyed at the outset of the hearing on June 15, 2022.

[114] It is common ground among the Parties that the test applicable to a request to reopen one's case is that which was affirmed in *671122 Ontario Ltd v Sagaz Industries Canada Inc*, 2001 SCC 59 ("**Sagaz**"), at paragraphs 59–65. There, the Supreme Court of Canada ("**SCC**") upheld the trial judge's application of the conjunctive two-part test, which requires determinations that (i) the evidence sought to be introduced would probably change the result, and (ii) the evidence could not have reasonably been obtained before trial by the exercise of reasonable diligence. The Court added that the discretion to reopen a trial must be exercised "sparingly and with the greatest care" (*Sagaz*, at para 61).

[115] The SCC revisited these issues recently in *Barendregt v Grebliunas*, 2022 SCC 22 ("**Barendregt**"), where it was called upon to consider the four-part test applicable to admitting additional evidence on appeal. One of those parts requires the exercise of due diligence. In discussing this factor, the Court observed that the "due diligence inquiry should focus on the *conduct* of the party seeking to adduce such evidence rather than on the evidence itself" [emphasis in original] (*Barendregt*, at para 59). The Court added: "Parties cannot benefit from their own inaction when the existence of those facts was partially or entirely within their control" (*Barendregt*, at para 60). The Court then proceeded to note that the absence of due diligence may in rare instances be superseded by the interests of justice (*Barendregt*, at para 70).

[116] In the Tribunal's view, the SCC's comments regarding the exercise of due diligence are particularly apposite in the present proceeding. The Commissioner had every opportunity to address the inaccuracies in Dr. Miller's calculations, after Mr. Harington's report dealing with Secure's updated integration plans was filed on March 25, 2022. Yet the Commissioner somehow failed to do so, even after those updated plans were subsequently addressed in the Initial Duplantis Report, and then again in the Harington Reply Report. As a result, the due diligence branch of the two-part test was not satisfied.

[117] Given the Tribunal’s finding on this issue, it is unnecessary to dwell on the other branch of the test to reopen one’s case after the close of evidence. The Tribunal simply observes that the Commissioner’s counsel represented that the revised calculations sought to be adduced would still yield an amount of DWL that would be higher than the overall amount of efficiencies claimed by Secure (Transcript, Public, at p 2846). In response to concerns expressed by Secure, counsel assured the Tribunal that the Commissioner would not take advantage of the increased price effects in a number of markets, and would not seek to change the remedy he was seeking (Transcript, Public, at p 2878). In the face of these representations, it would be difficult for the Tribunal to conclude that the revised calculations “would probably” change the result in the case. At the time the Tribunal conveyed its decision regarding the Commissioner’s request, it was not in any position to make a determination in the Commissioner’s favour on this branch of the test.

[118] Despite the foregoing, the Commissioner maintained that the Tribunal should nevertheless exercise its discretion to permit him to reopen his case. The Tribunal disagrees. The Commissioner had several opportunities to become aware of Dr. Miller’s error and to take the steps necessary to correct it. He also had a very significant period of time in which to do so — essentially from March 25, 2022 until Dr. Miller’s evidence-in-chief on May 16, 2022. In the Tribunal’s view, this is not one of those cases that warrant the exercise of discretion that is to be used “sparingly and with the greatest of care” (*Sagaz*, at para 61). Having reached this conclusion, it is unnecessary to determine whether the stricter test applicable to introducing new evidence on appeal — namely, a demonstration of the existence of “rare” or exceptional circumstances — applies to a party seeking to reopen its case at trial. The Tribunal makes this latter observation simply because Secure and the Commissioner each made representations regarding whether this was one of those “rare” cases in which the Tribunal’s discretion should be exercised to permit the case to be reopened.

[119] The Tribunal also disagrees with the Commissioner that considerations of fairness, the interests of justice, or the public interest weigh in favour of exercising its discretion to permit him to reopen his case. Indeed, the Tribunal considers that it would be unfair to Secure and contrary to the interests of justice to permit the Commissioner to reopen his case in these circumstances.

[120] In this regard, the Tribunal observes that in *Tervita SCC*, the SCC commented upon the unfairness to Tervita that resulted from the Tribunal permitting the Commissioner to address deficiencies in her case through a reply expert report, filed approximately two weeks before the hearing. After adding that the “procedural deficiencies meant that Tervita could not prepare a proper response to the Commissioner,” the SCC imposed harsh consequences: the anti-competitive effects were fixed at zero for the purposes of Tervita’s efficiencies defence (*Tervita SCC*, at paras 135–137). In brief, the public interest in competition was not permitted to prevail over considerations of procedural fairness and the interests of justice. This was despite the fact that the merger in question preserved a monopoly structure, and was therefore highly anti-competitive.

[121] In the present proceeding, the unfairness to Secure was exacerbated by the fact that the Commissioner waited until the evening before closing submissions were scheduled to begin before alerting Secure of its request to reopen his case. At the same time, counsel to the Commissioner clarified that the Commissioner was not seeking an adjournment. The Commissioner simply wanted to have Dr. Miller’s revised calculations admitted into evidence, so that the Tribunal could have the benefit of them (Transcript, Public, at p 2877). Secure’s position was further compromised because its experts were unable to access the backup files that were sent to them the

prior evening, as they were password protected. Among other things, those backup files apparently contained updated DWL calculations pertaining to all 271 areas of competitive overlap identified by Dr. Miller (Transcript, Public, at p 2864).¹⁶

[122] In support of his request to reopen his case, the Commissioner relied on *Rovi Guides, Inc. v Videotron Ltd*, 2021 FC 19 (“*Rovi*”), where the Federal Court granted a request by the defendant to reopen the evidentiary portion of its patent infringement proceeding to permit the parties to adduce additional expert evidence relating to the accounting of profits remedy sought by the plaintiff. However, that case is distinguishable from the present proceeding, as it was based on a change in the law brought about by a decision of the FCA that was issued after the defendant closed its case, but before closing submissions. In addition, the Court accepted the defendant’s position that it could not reasonably have been expected to have filed the evidence it was proposing to adduce on the motion to reopen its case, in light of the law prevailing at the time it filed its evidence (*Rovi*, at para 26). Moreover, the Court concluded that the first branch of the test for reopening one’s case had been satisfied (*Rovi*, at para 23). The Tribunal recognizes that the Federal Court proceeded to note that it considered it to be in the interests of justice to grant the motion in any event. However, its decision in this regard was clearly driven by the intervening decision of the FCA.

[123] The Commissioner also relied on *Apotex Inc v Takeda Canada Inc*, 2013 FC 1237 (“*Takeda*”), at paragraph 118. There, the Federal Court permitted the defendant’s expert to redo his analysis to correct some errors, so that the Court and the parties could have the benefit of his revised calculations. However, once again, this case is distinguishable from the present case because it was the plaintiff who suggested that the defendant’s expert be permitted to revise his calculations. Moreover, there does not appear to have been any dispute over whether the errors in those calculations ought to have been identified with reasonable due diligence. In addition, the Federal Court was not, at that particular time, being asked to reach a final conclusion regarding the principal issue at hand (damages), but rather to “determine certain issues” so that the parties could then make their respective calculations and submissions (*Takeda*, at para 3).

[124] In summary, for the reasons set forth above, the Tribunal rejected the Commissioner’s request to reopen his case to adduce Dr. Miller’s revised calculations into evidence. However, the consequences of this decision were not as harsh as may otherwise have been the case. This is because the Commissioner was able to draw upon the factual record to make submissions regarding the adjustments that should be made to Dr. Miller’s DWL calculations, to reflect Secure’s updated integration plans. Those submissions did not give rise to any objections from Secure. In addition, the Commissioner satisfied the Tribunal that his estimates of the DWL had already been discounted to reflect the partial closure of one of the six facilities that were no longer on the list of closures (██████████). He also satisfied the Tribunal that his failure to account for the temporary closure of Tervita’s ██████████ Landfill was of little consequence because ██████████

¹⁶ The panel did not see those backup files. Although the Commissioner alleged a likely SLC in relation to only 143 markets, Dr. Miller produced DWL calculations for virtually all of the 271 geographic areas of overlap between the Parties.

[REDACTED] (Transcript, Confidential B, at pp 3137–3138).

XI. THE RELEVANT MARKETS

A. Product Markets

[125] As noted at paragraph 36 above, the Commissioner alleges that there are three distinct product markets, namely: (i) the supply of waste processing and treatment services by TRDs; (ii) the disposal of solid oil and gas waste into Landfills; and (iii) the disposal of produced water and wastewater into SWDs owned by third party waste service providers.

[126] In its response to the Commissioner’s Amended Application (the “**Amended Response**”), Secure maintained that these definitions were deficient for two principal reasons. First, Secure submitted that produced water and wastewater disposal sites and other waste service sites owned by its customers (the “**First Party Supplier Sites**”) should be included in the relevant product markets. Second, Secure asserted that the market for Landfills should be expanded to include municipal solid waste landfills and bioremediation sites.

[127] However, during the cross-examination of Dr. Miller, Secure’s lead counsel acknowledged that there was little disagreement among the Parties regarding the definition of the relevant product markets (Transcript, Public, at p 879). By the end of the hearing, counsel to both Parties confirmed that there was no dispute between their respective experts (i.e., Dr. Miller and Dr. Duplantis) on this issue (Transcript, Public, at pp 2900, 3215).

[128] For greater certainty, Secure continued to maintain that the First Party Supplier Sites should be taken into account in assessing the potential for Secure to exercise any market power post-Merger. However, the Tribunal understood that Secure recognized and accepted that this ought to occur in the post-market definition stage of the analysis.

[129] Insofar as municipal landfills are concerned, Secure acknowledged that they do not always accept the same types of waste as Landfills (Transcript, Public, at p 884). The Tribunal considers that the evidence in this proceeding demonstrates this to be an understatement. In brief, the evidence demonstrates that municipal landfills ordinarily do not accept some of the principal types of solid waste that producers need to dispose of, except perhaps for the purposes of covering the landfill at the end of its life. In these circumstances, the Tribunal considers that any potential constraining influence of municipal landfills on Secure’s alleged ability to exercise market power is best considered at the post-market definition stage of the analysis.

[130] For greater certainty, the Tribunal is satisfied that the presence of one or more municipal landfills in any given area would not likely prevent a hypothetical monopolist of Landfills in that area from being able to impose and sustain a small but significant and non-transitory increase in the price of Landfill services above levels that would likely exist in the absence of the Merger. This is consistent with the Tribunal’s prior finding in relation to this issue (*The Commissioner of Competition v CCS Corporation et al*, 2012 Comp Trib 14 (“**Tervita CT**”), at para 58).

[131] Insofar as bioremediation is concerned, Secure did not adduce any material evidence in support of its position. However, several witnesses stated that bioremediation is not a good substitute for Landfill services.¹⁷ This is because of its inability to break down salt contamination from produced waters and soils contaminated with metals, as well as the high cost associated with remediating certain types of hydrocarbons, including heavier ones. In pre-hearing examination for discovery, Mr. Engel of Secure acknowledged that bioremediation “cannot normally” be used to effectively treat solid waste contaminated with heavy metals, cannot “in most cases” be used to effectively treat solids contaminated with salts, and cannot “normally” be used to effectively treat solids contaminated with heavy hydrocarbons. This is also consistent with the evidentiary record in *Tervita CT*, at paragraphs 89–91. On appeal in that matter, the FCA observed that “there was abundant evidence submitted to the Tribunal showing that bioremediation was not a feasible alternative to a secure landfill [...]” (*Tervita Corporation v Commissioner of Competition*, 2013 FCA 28 (“*Tervita FCA*”), at para 110). Having regard to all of the foregoing, the Tribunal is satisfied that the relevant market for Landfill services does not include bioremediation.

[132] In summary, the relevant product markets in this proceeding are: (i) the supply of waste processing and treatment services by TRDs; (ii) the disposal of solid oil and gas waste into Landfills; and (iii) the disposal of produced water and wastewater into SWDs owned by third party waste service providers.

B. Geographic Markets

[133] In the Commissioner’s Amended Application, he appeared to define a single relevant market for the aggregated locations of customers of broadly defined oil and gas waste services in the WCSB that previously benefitted from competition between Secure and Tervita. He added that “customers most affected are located generally in NE BC, Northwestern Alberta, Western Alberta, the conventional heavy oil region, Lloydminster and Kindersley.”

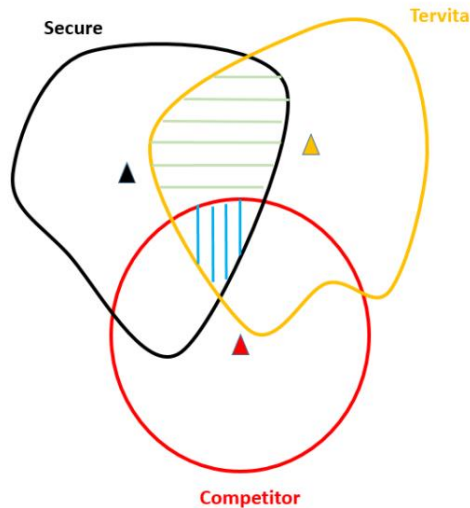
[134] Secure understandably stated in its Amended Response that this definition was unclear. The Tribunal agrees and observes that the Commissioner must do better in the future.

[135] The Commissioner’s position was eventually clarified in the Initial Miller Report. There, Dr. Miller explained that a large number of geographic markets had been defined based on the location of customers for each of the three relevant product markets. Specifically, the geographic contours of those markets were established based on (i) the well sites from which a local facility receives 90% of its waste service revenue, and (ii) groups of customers who “roughly share the same competitive conditions.” Using this approach, Dr. Miller defined 271 distinct geographic areas in which facilities of both Secure and Tervita obtained waste service revenues. Stated differently, those were areas in which there was direct competitive overlap between the Merging Parties’ facilities. Those overlapping areas accounted for approximately 63% of the Merging Parties’ combined revenues. In other words, approximately 37% of the Merging Parties’ combined revenues was in areas in which they did not overlap. Those areas are not included in the 271 overlapping geographic “markets” that Dr. Miller defined.

¹⁷ Those witnesses included Messrs. Lars DePauw of OWA, Cliff Swadling of Obsidian Energy Ltd., Jeffrey Biegel of SHARP Environmental (2000) Ltd., Barrie Flood of RemedX Remediation Services Inc. (“**RemedX**”), and Carl Lammens of PECL.

[136] Dr. Miller provided the following illustration in his Initial Report:

EXHIBIT 8
Illustration of customer-based geographic market definition



[137] The area shaded in green horizontal lines depicts a distinct geographic “market” in which customers had only two competitive options prior to the Merger — namely, Secure and Tervita. The contours of that market were established by sorting customers who had used the Secure facility, according to their distance from that facility. The revenues from the facility’s customers were added until they captured 90% of the facility’s overall revenues. The farthest travel distance among customers that comprise 90% of the facility’s revenues is the distance from the Secure facility to the edge of the draw area. This exercise was repeated for the Tervita facility.

[138] The area shaded in blue vertical lines represents a separate “market” in which customers had three options prior to the Merger. The geographic limit for the competing facility was a fixed distance, based on the longest of the distances used for the Secure and Tervita facilities, respectively.

[139] Dr. Miller explained that his geographic “markets” were defined based on customer locations because that approach better captures the competitive effects of a merger when sellers can effectively price discriminate among buyers. This is because, in such circumstances, the competitive effects of the merger may vary for different groups of customers. That is to say, the merged entity may have the ability to raise prices for certain targeted customers based on what it knows about their location and transportation costs to competing facilities. In the absence of any ability to engage in arbitrage between competitors, customers may have no alternative but to accept an attempted price increase.

[140] Dr. Miller added that this approach yielded “conservatively large” geographic markets, because it is likely that the draw areas of the third party facilities he included in the markets are much smaller than what he used. In addition, he included many third parties whose facilities are not, in fact, competitive options.

[141] Dr. Miller's position on this point is supported by responses that Secure provided in 2018 in relation to a request for information from the Competition Bureau (the "**Bureau**") concerning Tervita's acquisition of Newalta. Those responses were provided in letters dated May 17, 2018, and June 19, 2018, which were entered as Exhibits CB-A-341/P-A-342 ("**Secure's 2018 RFI Response**") and CB-A-347/P-A-348, respectively.¹⁸ At page two of the latter document, Secure stated as follows:

We are also unable to provide customer heat map/draw area however, we echo our original submission and our comments on the May 31st phone call that we use a [REDACTED] to define a "Market Area"; however, factors such as specific roads and terrain conditions (e.g., mountains and valleys), customer facilities and preferences, and facility capacities can all greatly impact this. It's worth noting that this is generally applied to our Alberta operations and can change depending on the specific province and regulatory environment our original response. You can assume that the smaller draw area relates to smaller facilities (i.e., SWD's) and that a larger draw ([REDACTED]) relates to larger facilities providing more services (i.e., FST and Landfills), but again there are a several factors that influence this.

[142] Dr. Miller's responses to questions from the panel further supported his position regarding the conservative nature of his approach. In this regard, he indicated that the geographic scope of the markets he defined around third party competitors was in excess of 100 kilometres (Transcript, Confidential B, at p 1050). Based on the totality of the evidence adduced in this proceeding, the Tribunal considers that most customers would not likely be prepared to travel 100 kilometres in response to a small but significant and non-transitory price increase.

[143] Moreover, Secure recognized that its data analyzed by Dr. Miller "demonstrates that on average most waste is travelling less than 100 kilometres from the well site, and Secure does not dispute that analysis" (Transcript, Public, at p 30).

[144] Having regard to all of the foregoing, the Tribunal is satisfied that Dr. Miller's approach is in fact conservative.

[145] The customer location-based approach to defining geographic markets was also adopted at paragraph 161 of both the Initial Duplantis Report and the Updated Duplantis Report. In her slide presentation, Dr. Duplantis described the approaches to product and geographic markets as being "key areas of agreement" between her and Dr. Miller. In closing submissions, counsel to both Parties confirmed that there was no dispute between them on this issue (Transcript, Public, at pp 2900, 3215).

[146] The Tribunal notes that the customer location-based approach to defining geographic markets when price discrimination is widespread is consistent with the Bureau's 2011 *Merger*

¹⁸ The Exhibits in this proceeding are first identified by the letters "P" (Public), "CA" (Confidential Level A) or "CB" (Confidential Level B). Then, the letters "A" or "R" indicate whether the Exhibit was entered by the Applicant (i.e., the Commissioner) or by the Respondent (i.e., Secure).

Enforcement Guidelines, Competition Bureau Canada, October 6, 2011 (“MEGs”), at paragraph 4.17.

[147] Considering all of the foregoing, the Tribunal is prepared to accept that the potential relevant geographic markets are the 271 areas of local overlap that were addressed by both Dr. Miller and Dr. Duplantis. They may be summarized as follows:

Table 2 – Change in the structure of overlapping draw areas

Market Structure	Landfills	TRDs	SWDs	Total
2-to-1	0	16	3	19
3-to-2	3	23	14	40
4-to-3+	25	56	131	212
Total	28	95	148	271

C. Markets that are “Relevant” for the Purposes of the SLC and Divestiture Analyses

[148] Within the universe of the 271 areas of geographic overlap described above, the Commissioner is alleging that competition is likely to be substantially lessened in 143 of them. The latter markets were identified using two screens, namely: (i) a post-Merger market share screen of 35%; and (ii) an estimated price increase screen of 5%.¹⁹ These are the markets that are “relevant” for the present application.²⁰ Those markets (defined at paragraph 36 above as the “Relevant Markets”) are identified at Appendix 2 to these reasons and may be summarized as follows:

Table 3 – Summary of Structure of Relevant Markets

Market Structure	Landfills	TRDs	SWDs (& TRDs)	Total
2-to-1	0	14	3	17
3-to-2	2	16	12	30
4-to-3+	5	34	57	96
Total	7	64	72	143

¹⁹ In addition to filtering out areas of competitive overlap in which Dr. Miller’s model predicted no price increases or price increases of less than 5%, this screen filtered out 56 areas of competitive overlap in which the model predicted a negative price increase. See discussion at paragraphs 250–251 below.

²⁰ A small adjustment has been made to account for the fact that the Commissioner appears to have mixed up markets #161 and 162. Since the 5% price increase criterion was met for market #162, but not for market #161, only the former market was included among the Relevant Markets.

XII. MARKET SHARES

[149] Dr. Miller calculated market shares in each of the above-mentioned 143 Relevant Markets based on the Merging Parties' internal transaction data and information obtained from over 30 competitors and alleged competitors.

[150] By way of overview, in his Initial Report, Dr. Miller provided the following chart in relation to the larger universe of 271 markets in which there is competitive overlap between the Merging Parties:

EXHIBIT 9

Weighted average of Parties' market shares for the TRD, landfill, and water disposal markets

Market Type	Total Secure and Tervita Market Revenue	No. of Secure and Tervita Well Sites in the Market	Estimated Market Share of Merged Entity		
TRDs					
1. 2-to-1			90.0%		
2. 3-to-2			88.5%		
3. 4-to-3 (or higher)			73.3%		
5. Total			80.5%		
Landfills					
1. 2-to-1			-		
2. 3-to-2			87.7%		
3. 4-to-3 (or higher)			66.8%		
5. Total			74.8%		
Water disposal (+TRDs)					
1. 2-to-1			90.0%		
2. 3-to-2			78.3%		
3. 4-to-3 (or higher)			63.2%		
5. Total			64.4%		

Source: Tervita Transaction Data; Secure Transaction data; Secure Facilities Data (4 210422 - Revenues and Volumes.xlsx): RBEJ00002_000000306; Tervita Facilities Data (PROTECTED & CONFIDENTIAL Facility List - FINAL - 05282021.xlsx): RBEK00004_000000068; Appendix (Section 7.7)

[151] Regarding the 143 Relevant Markets, Dr. Miller's estimates indicate the following minimum market shares for each of the "2-to-1", "3-to-2", and "4-to-3+" categories:

Table 4 – Estimated market shares for the Relevant Markets

Market structure	Number of markets	Minimum market share
2-to-1	17	90%
3-to-2	30	73%*
4-to-3+	96	46%

* There is one outlier (market #60), in which the merged entity's estimated share is [REDACTED].

[152] It bears underscoring that the foregoing market share estimates are conservative.

[153] Dr. Miller characterized his market share calculations as being conservative because they include municipal landfills and facilities at First Party Supplier Sites that take in waste from other producers, even though they may not be considered to be viable competitive alternatives to Secure. Moreover, Dr. Miller assumed that, in aggregate, customers in each relevant market spend 10% of the total revenue generated from within that market, at facilities that do not have a draw area that overlaps with any of the markets he defined.²¹ Thus, even in “2-to-1” markets, Dr. Miller assumed that Secure’s post-Merger share was only 90%. Having regard to the evidentiary record as a whole, the Tribunal considers that this likely understated Secure’s market share in most of the 143 Relevant Markets.

[154] Dr. Duplantis and Secure did not dispute Dr. Miller’s market share estimates. Indeed, Dr. Duplantis stated that she used Dr. Miller’s estimates of total party revenue and market shares to derive an implied total market size estimate. She added that she also used them in preparing her DWL estimates (Updated Duplantis Report, at para 167, Figure 20). In closing submissions, counsel to Secure acknowledged that there was no dispute between the Parties with respect to Dr. Miller’s market share estimates (Transcript, Public, at p 3215).

[155] The Tribunal pauses to observe that those estimates are broadly consistent with Secure and Tervita documentation on the Tribunal record, which discusses their high market shares. For example, an internal Tervita market share update for water disposal in January 2020 indicated market shares of 39% for Tervita, 38% for Secure, and 23% for all other competitors. That report did not include Tervita’s “four new operating areas.” A similar internal Secure document dated March 5, 2021 indicated water disposal market shares of 49% for Tervita and 34% for Secure, for all of Alberta.

[156] Given the foregoing, the Tribunal accepts that the structure of the Relevant Markets is as alleged by Dr. Miller, and that the market shares within those markets are essentially as he estimated them to be.

XIII. ISSUE #1 – IS THE MERGER LIKELY TO SUBSTANTIALLY LESSEN COMPETITION?

A. Applicable Legal Principles

[157] In assessing whether competition is likely to be lessened, the focus of the Tribunal’s assessment is upon whether the merger in question is likely to facilitate the exercise of new or increased market power by the merged entity, acting alone or interdependently with one or more rivals (*Tervita SCC*, at para 55).

[158] Market power is the ability to profitably influence price or non-price dimensions of competition for an economically meaningful period of time (*Tervita SCC*, at para 44; *Canada*

²¹ Based on the Parties’ transaction data, this resulted in outside-market revenue that is, on average, between 50% and 80% higher (depending on the product market) than the amount of actual expenditure at Secure and Tervita facilities outside the market.

(*Commissioner of Competition v Rogers Communications Inc and Shaw Communications Inc*, 2023 Comp Trib 1 (“**Rogers-Shaw**”), at para 128; *Canada (Commissioner of Competition) v Parrish & Heimbecker, Limited*, 2022 Comp Trib 18 (“**P&H**”), at paras 457–458; *Tervita CT*, at para 371).

[159] Accordingly, the assessment of whether competition is likely to be lessened generally involves an evaluation of whether the merged entity will likely have the ability to increase prices, or to reduce meaningful dimensions of non-price competition, relative to levels that would likely have prevailed in the absence of the merger. Stated differently, the Tribunal’s evaluation of levels of price and non-price competition is made relative to what would likely have existed “but for” the merger (*Tervita SCC*, at para 51; *Rogers-Shaw*, at para 129; *P&H*, at para 464; *Tervita CT*, at para 373).

[160] The non-price dimensions typically assessed include service, quality, variety, and innovation (*Tervita SCC*, at para 44).

[161] When the Tribunal determines that a merger is not likely to enable the merged entity to exercise greater market power than in the absence of the merger, the Tribunal will generally conclude that the merger is not likely to lessen competition at all, let alone substantially (*Tervita CT*, at para 370).

[162] In assessing whether a merger is likely to lessen competition substantially, the Tribunal’s focus is upon whether the merged entity, acting alone or interdependently with one or more other firms, is likely to be able to exercise materially greater market power than in the absence of the merger (*Tervita SCC*, at para 54; *Rogers-Shaw*, at para 134; *P&H*, at para 465).

[163] This involves an evaluation of the likely magnitude, scope, and duration of any adverse effects on prices or on non-price forms of competition that may be likely to result from the merger (*Tervita SCC*, at para 45; *Rogers-Shaw*, at para 135; *P&H*, at para 467; *Tervita CT*, at para 375).

[164] With respect to the magnitude or degree, the Tribunal generally focuses on whether the merged entity will have the ability to increase prices materially, or to materially reduce one or more important benefits of non-price competition, relative to what would have existed in the absence of the merger (*Rogers-Shaw*, at para 136; *P&H*, at para 468; *Tervita CT*, at para 377).

[165] Regarding scope, the Tribunal typically considers whether the merged entity would likely have the ability to impose such effects in a material part of the relevant market or in respect of a material volume of sales (*Rogers-Shaw*, at para 137; *P&H*, at para 474).

[166] Turning to duration, the Tribunal ordinarily will evaluate whether the merged entity would likely have the ability to sustain a material price increase or a material reduction in non-price benefits of competition, for approximately two years or more, relative to the “but for” scenario (*Tervita SCC*, at para 80; *Tervita CT*, at paras 123, 379).

[167] The burden of establishing that a merger is likely to prevent or lessen competition substantially falls on the Commissioner (*Tervita FCA*, at paras 107–108; *Rogers-Shaw*, at para 141; *P&H*, at para 476).

[168] Pursuant to subsection 92(2) of the Act, the Tribunal is not permitted to find that a merger lessens, or is likely to lessen, competition substantially solely on the basis of evidence of concentration or market share. Nevertheless, evidence of changes in market shares and concentration levels is relevant and often influential in the Tribunal's assessment (*P&H*, at paras 459, 567).

[169] Consequently, it is necessary to consider both quantitative and qualitative assessment factors, individually and cumulatively. In this latter regard, it bears underscoring that all relevant factors need to be considered, and that the relevance and weight to be assigned to each factor will vary with the factual context. Moreover, there is no precise numeric benchmark (such as a 5% price increase) by which to measure what is material or substantial. This determination is "highly contextual" (*P&H*, at para 466).

[170] A non-exhaustive list of factors that the Tribunal may consider is set forth in section 93 of the Act. For the present purposes, the relevant section 93 factors are discussed in Part XIII.C below.

B. The Parties' Positions

(1) The Commissioner

[171] In support of his position that the Merger is likely to substantially lessen competition, the Commissioner submits that Secure has already significantly enhanced its market power as a result of its acquisition of Tervita. He maintains that this will likely result in increased prices and/or a decrease in non-price dimensions of competition.

[172] More specifically, the Commissioner relies on Dr. Miller's estimates of: (i) the structural change in the market (e.g., reduction from two competitors to one, three competitors to two, etc.); (ii) high market shares (discussed above); (iii) high diversion ratios between Secure and Tervita; and (iv) price increases in each of the 143 Relevant Markets, ranging from 5% to 72.30%.

[173] In addition, the Commissioner relies on general evidence with respect to various qualitative assessment factors that he states are broadly applicable to each of those Relevant Markets. Those factors include his allegations that:

- the Merger removed a vigorous and effective competitor that was Secure's closest rival;
- remaining competition consists of much smaller competitors, if any, who will not be able to prevent Secure from significantly raising prices or from reducing forms of non-price competition that are valued by customers;
- municipal landfills and bioremediation are not acceptable substitutes for the relevant products;
- barriers to entry into the Relevant Markets are high; and

- customers are not likely to be able to exercise sufficient countervailing power to constrain the alleged price increases and reduction in non-price competition, whether by threatening to in-source their waste service requirements (i.e., self-supply) or by threatening to move business away from Secure in other markets, where there are more competitive alternatives.

[174] The foregoing factors will be further discussed below.

(2) Secure

[175] In its Amended Response, Secure maintained that the Merger “has not and will not prevent or lessen competition, because it does not and will not provide SECURE the ability to exercise market power.”

[176] In support of this position, Secure asserted that there are no material barriers to entry or expansion in any relevant product or geographic market. Secure added that it continues to face effective remaining competition from oil and gas producers who dispose of waste on-site (the “**First Party Suppliers**”) and third party waste disposal services providers, who are capable of expanding their capacity in response to any alleged price increase. Moreover, Secure stated that oil and gas producers can and do sponsor the entry of new competitors and the expansion of existing service providers.

[177] In addition, Secure maintained that its customers have the ability to constrain prices by credibly threatening to switch business in other markets where they have more competitive alternatives, or by self-supplying the disposal of their waste.

[178] In its closing submissions, Secure added that the Commissioner has not met his burden to prove an SLC on a market-by-market basis. In this regard, Secure asserted that the Commissioner had not provided any meaningful evidence or analysis relating to the competitive dynamics at the level of individual local geographic markets, or across relevant product lines.

[179] Finally, Secure continued to assert that “factors such as self-supply, 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.”

C. The Tribunal’s Assessment

[180] As discussed in Part XII above, there is no dispute between the Parties regarding the structural change brought about by the Merger in each of the Relevant Markets or regarding Dr. Miller’s estimates of post-Merger market shares in those markets. Accordingly, the assessment below will focus on the quantitative indicia estimated by Dr. Miller, the qualitative assessment factors listed in section 93 of the Act that are relevant in the context of this proceeding, as well as additional factors that have been raised by the Parties.

(1) **Diversion Ratios, Margins and Predicted Price Impacts**

[181] The Commissioner maintains that several quantitative indicia support an SLC finding. These are the high diversion ratios, high margins and material price increases estimated by Dr. Miller.

(a) **High Diversion Ratios**

[182] One of the factors that can be relevant when considering the likely competitive effects of a merger is the diversion ratios between the products of the merging parties. This is because such ratios can provide information regarding the closeness of competition between those products. In brief, diversion ratios are calculated to estimate the proportion of one merging party's sales that would be lost to the other merging party, if the first party raises its price. Higher diversion ratios imply a high degree of substitution from the first merging party to the other merging party. The same would be indicated by high diversion ratios from the products of a merging party to the products of other competitors in the market (*P&H*, at para 437).

[183] As explained in the Bureau's MEGs:

The diversion ratio between firm A's product and firm B's product is equal to the fraction of sales lost by firm A to firm B when firm A raises the price of its product. Similarly, the diversion ratio between firm B's product and firm A's product is equal to the fraction of sales lost by firm B to firm A when firm B raises the price of its product. The diversion ratios between firms A and B need not be symmetric.

MEGs, at para 6.15, footnote 35.

[184] At Exhibits 12–17 of the Initial Miller Report, Dr. Miller presented graphic estimates of diversion ratios for Secure and Tervita in most of the Relevant Markets, excluding markets where either firm had a monopoly. At paragraph 110, he reported average estimated diversion ratios between Secure and Tervita (expressed as percentages) for TRDs, SWDs, and Landfills, as being 75%, 37%, and 55%, respectively. His corresponding estimated diversion ratios between Tervita and Secure for TRDs, SWDs, and Landfills, were 69%, 57%, and 58%, respectively (Initial Miller Report, at para 110).

[185] In his detailed spreadsheets, Dr. Miller also estimated the diversion ratios between Secure and Tervita in each of the 143 Relevant Markets (the “**Relevant Diversion Ratios**”).

[186] Secure did not provide estimates of any diversion ratios and did not dispute Dr. Miller's methodology or estimates for his market-based diversion ratios (Transcript, Public, at pp 3215–3216).

[187] In addition to the very high Relevant Diversion Ratios that one would expect in the 17 identified “2-to-1” Relevant Markets, the corresponding ratios for the 30 “3-to-2” Relevant Markets were quite high. Specifically, with the exception of one outlier,²² the lowest value of the

²² In one market, the higher of the two estimated diversion ratios was 0.558 (or 55.8%).

higher of the two Relevant Diversion Ratios was 0.669 (or 66.9%). With three exceptions,²³ the lowest value of the other ratio was 0.405. In the vast majority of those markets, the latter value exceeded 0.500.

[188] Turning to the “4-to-3+” Relevant Markets, the higher of the two Relevant Diversion Ratios was above 0.500 in 68 of the 96 markets and was above 0.400 in 81 of those markets. It was above 0.300 in the remaining 15 markets.²⁴ The lower of the two ratios was above 0.300 in 53 of those markets.²⁵

[189] Having regard to the foregoing, the Tribunal accepts Dr. Miller’s estimates and considers the high Relevant Diversion Ratios he calculated to be suggestive of a potential ability for Secure to exercise enhanced market power, post-Merger. The Tribunal finds that the high level of the Relevant Diversion Ratios generally signals a meaningful potential adverse impact of the Merger on prices for the supply of Landfill, TRD, and SWD services in the Relevant Markets. The estimates produced by Dr. Miller also suggest that there are limited alternatives other than Secure or Tervita.

(b) High Margins

[190] The Tribunal has recognized that evidence of economic rents / high margins is a form of direct evidence of market power (*P&H*, at para 495; *Canada (Competition Act, Director of Investigation and Research) v Tele-Direct (Publications) Inc.*, [1997] CCTD No 8 297 (“*Tele-Direct*”), at para 286).

[191] The Commissioner maintains that there is such evidence in the present proceeding. In this regard, the Commissioner relies primarily on Dr. Miller’s reporting of high variable profit margins at Secure’s facilities as well as the ones formerly owned by Tervita. Those margins were derived from the Merging Parties’ financial statements, in particular their facility-level profit & loss (“P&L”) statements. In brief, Dr. Miller deducted the reported variable costs from the reported revenues, to obtain estimates of each relevant facility’s variable profits, also referred to as “variable cost margins” (Initial Miller Report, at para 179 and Exhibits 43–45). Dr. Miller also reported that the majority of those facilities were profitable (Initial Miller Report, at para 152 and footnote 246).

[192] In addition to relying on these high variable cost margins as evidence of market power, the Commissioner relied on them in one of the two approaches he took to estimating the DWL associated with the closure of facilities by Secure. As more fully discussed in Part XV.B below, that approach was the “profit-based” approach described in the Initial Miller Report, which was also referred to by Dr. Miller and the Commissioner as a “revenue-based” approach.²⁶ Pursuant to

²³ The estimated diversion ratios for those exceptions were 0.318, 0.125, and 0.170.

²⁴ The number of “4-to-3+” markets in which the higher of the two diversion ratios was below 0.400 remains at 15 when adjusted to remove the markets in which the Tribunal ultimately found no likely SLC.

²⁵ The number of “4-to-3+” markets in which the lower of the two diversion ratios was below 0.300 remains at 43 when adjusted to remove the markets in which the Tribunal ultimately found no likely SLC.

²⁶ Transcript, Public, at pp 80, 963, 1010. The second approach taken in this regard was the “market share-based” approach.

that approach, the Commissioner and Dr. Miller maintain that the variable profit margins associated with those facilities represent the incremental value they generate for consumers, and that such value is lost when those facilities are closed (Initial Miller Report, at para 137; Miller Rebuttal Report, at footnote 137).

[193] Dr. Miller initially calculated the weighted average variable profit margins of the facilities serving the full universe of 271 areas of geographic overlap between the Merging Parties to be as follows:

Table 5 – Initially reported weighted average margins of Secure and Tervita facilities in the 271 areas of geographic overlap (2019)²⁷

	Landfills	TRDs/Caverns	SWDs
Secure	69.6%	82.4%	87.9%
Tervita	73.9%	77.9%	83.9%

[194] In response to points raised by Mr. Harington, Dr. Miller adjusted the foregoing numbers to account for certain costs that Mr. Harington maintained are variable in nature — specifically, asset depletion costs and incremental asset retirement obligations. The revised margin figures reported by Dr. Miller are as follows:

Table 6 – Revised weighted average margins of Secure and Tervita facilities (2019)²⁸

	Landfills	TRDs/Caverns	SWDs
Secure	41.3%	80.6%	86.0%
Tervita	49.9%	75.5%	76.1%

[195] Dr. Miller also updated his estimates of facility-level variable profits in the Miller Rebuttal Report, at Exhibits 4–6. Almost all of those estimates had positive values.

[196] During closing submissions, Secure confirmed that it did not dispute the variable cost margins reported by Dr. Miller (Transcript, Public, at p 3216). Indeed, during the hearing (Transcript, Confidential B, at p 2101), Dr. Duplantis confirmed that she adopted those margins in one of the spreadsheets she prepared for the Tribunal (Exhibit CB-R-417, Spreadsheet Prepared by Dr. Renée Duplantis re: Deadweight Loss by Hypothetical Divestiture Option (“**Duplantis Spreadsheet**”)). However, Secure disputed the inferences drawn by the Commissioner from this evidence.

²⁷ Initial Miller Report, at Exhibits 43–45.

²⁸ Miller Rebuttal Report, at Exhibits 4–6.

[197] Despite the foregoing, Mr. Engel maintained that Secure’s facility-level P&L data does not accurately reflect a facility’s profitability. Among other things, he noted that many of the costs associated with a given facility are tracked centrally by Secure, and therefore are not reflected in individual facility-level financial statements. He added that other costs, such as depreciation, depletion, upfront capital costs, periodic capital costs, and end-of-life capital costs, may not be reflected in those P&L statements (Exhibit P-R-152/CB-R-153, Witness Statement of Mr. David Engel on behalf of Secure (“**Engel Witness Statement**”), at paras 94–95). However, Mr. Engel did not provide any persuasive evidence to suggest that Dr. Miller’s facility level estimates of variable profit, as accepted by Dr. Duplantis, were not generally accurate.

[198] In its closing submissions, Secure added that there could be many reasons for high variable margins. These included the following:

- a) the need for a facility’s variable margin to contribute to its fixed costs;
- b) the need to account for potential long-term environmental liabilities;
- c) pre-existing market power from oligopolistic pricing; and
- d) pre-existing market power from barriers to entry.

[199] During cross-examination, Dr. Miller maintained that his models took into account the oligopolistic structure of the industry, and that they indirectly considered barriers to entry (Transcript, Public, at pp 933, 936). Moreover, in the Miller Rebuttal Report, he added that “sunk” fixed costs do not play a role in profit-maximizing pricing decisions once a facility is operational (Miller Rebuttal Report, at paras 32, 46). Nevertheless, as noted above, he revised his estimates of the Merging Parties’ profit margins to account for certain types of costs that Dr. Duplantis and Mr. Harington characterized as variable costs.

[200] In light of Dr. Miller’s revised estimates, which are not disputed by Secure and continue to reflect high margins, the Tribunal considers that this evidence weighs in favour of finding that Secure and Tervita both had market power, pre-Merger. Given that Secure has now consolidated that market power into itself, this factor suggests a potential ability for Secure to exercise enhanced market power, post-Merger.

(c) Material Predicted Price Increases

[201] As discussed at paragraph 172 above, Dr. Miller estimated price increases for each of the 143 Relevant Markets. Those price increases range from 5% to 72.30%.

[202] Dr. Miller’s initial estimates were produced from an accepted type of merger simulation analysis, the key inputs of which were his estimated market shares, variable profit margins, and diversion ratios (Initial Miller Report, at paras 124–130 and footnote 242; Miller Rebuttal Report, at paras 7–11, including footnotes). After revising his estimates of variable profit margins as discussed at paragraph 194 above, Dr. Miller reported updated revenue-weighted average price increases of 8.9% for Landfills, 24.3% for TRDs, and 11.1% for SWDs (Miller Rebuttal Report, at Exhibit 1). In response to questioning from the Tribunal, Dr. Miller confirmed that his estimated

price increases are independent of any consideration of general price inflation (Transcript, Public, at p 988).

[203] Dr. Duplantis critiqued Dr. Miller's estimates on several grounds. To begin, she maintained that those estimates significantly exceed the price increases she estimated based on a "natural experiment" analysis involving Tervita's 2018 acquisition of Newalta. In conducting that analysis, Dr. Duplantis performed a "difference-in-differences" ("DiD") approach. As she explained, the DiD approach can help to isolate the effect of a merger by permitting a comparison of the change in prices paid by customers affected by the merger (the "treatment group") to the change in prices paid by customers who were not affected by the merger (the "control group") (see also *Tervita CT*, at para 110). To control for the fact that Secure was a remaining competitor after the Newalta acquisition, Dr. Duplantis separately analyzed areas where Secure was present and where it was not present. This permitted her to confine her control group to areas she considered did not experience a change in market structure as a result of that acquisition.

[204] Based on her analysis, Dr. Duplantis identified the following average price increases resulting from the Newalta acquisition: 11% for customers in "2-to-1" markets; 9.8% for customers in "3-to-2" markets; and 0.9% for customers in "4-to-3+" markets (Initial Duplantis Report, at para 168).²⁹ The results for the "2-to-1" category were statistically significant at the 10% level, whereas the results in the other two categories were not statistically significant. Nevertheless, Dr. Duplantis maintained that these results provided strong confirmation that the model used by Dr. Miller to predict the price effects of the Merger did not fit the pricing dynamics at play in this case.

[205] In response, Dr. Miller maintained that Dr. Duplantis did not properly control for Secure's presence following the Newalta acquisition, and that her "natural experiment" suffered from several methodological flaws. He stated that those flaws included the following: (i) a reliance on a limited eight-month data set for a period that commenced immediately following the termination of the Bureau's investigation and ended at the start of the major response to the COVID-19 pandemic, in March 2020; (ii) a failure to provide evidence that prices in her treatment and control groups exhibited comparable pricing trends leading up to when the Newalta acquisition was announced; (iii) a reliance on a very small sample of customers for Landfill services; and (iv) the aggregation of transaction data at the customer level, rather than at the well location level. Among other things, Dr. Miller maintained that the latter error resulted in a failure to capture important "2-to-1" market changes.

[206] With respect to the allegation that Dr. Duplantis had not properly controlled for Secure's presence following the Newalta acquisition, the Commissioner resiled from that position during his closing arguments (Transcript, Confidential B, at pp 2941–2942). Consequently, while the Tribunal was sympathetic to Dr. Miller's criticism of this aspect of Dr. Duplantis' analysis, it will not further address it.

²⁹ These estimates were for the full universe of 271 markets in which there is a geographic overlap between the Parties, rather than only for the 143 Relevant Markets. The Tribunal considers it reasonable to infer that Dr. Duplantis' estimated price effects would have been higher if calculated solely for the latter group of markets.

[207] The Tribunal also agrees with Dr. Miller’s position that the eight-month data set used by Dr. Duplantis was too short to produce reliable results. Among other things, the evidence demonstrates that customers often take many months to negotiate their rates, even following a merger that increases the waste services provider’s leverage, such as in the present case. In addition, customers often have contracts in place that would not be impacted during a short, eight-month period. The Tribunal understands that Dr. Duplantis did not ensure that her data set excluded prices that were protected by such contracts. Moreover, Tervita may well have been reluctant to increase prices in the months immediately following the close of the Bureau’s investigation, particularly having regard to the fact that the Commissioner may challenge a merger for up to one year after it has been substantially completed (Act, section 97). In addition, the outbreak of the COVID-19 pandemic can reasonably be expected to have had an impact on Tervita’s pricing behaviour.

[208] Furthermore, the Tribunal accepts Dr. Miller’s view that Dr. Duplantis did not demonstrate, by either statistical methods or other evidence, that her treatment and control groups exhibited common pricing trends. The Tribunal also accepts that the data set relied upon by Dr. Duplantis to assess prices for Landfill services was too small to produce reliable results, and that the aggregation of transaction data at the customer level produced the shortcomings identified by Dr. Miller. Furthermore, the Tribunal considers that Dr. Duplantis’ analysis was not based on a true “natural experiment,” in which some exogenous force or action (unrelated to the event under study) separates a treatment group from a control group, thereby reducing or eliminating potential bias due to self selection. In Dr. Duplantis’ analysis, there appears to have been an absence of explicit controls for such potential selection bias.

[209] Beyond all of the foregoing, the Tribunal considers that evidence relating to industry pricing following Tervita’s acquisition of Newalta in 2018 does not provide a reliable predictor of pricing behaviour in 2023, because general industry conditions have changed significantly. In particular, Mr. Engel stated that, beginning in 2014, Secure struggled for many years to navigate a global decline in oil prices, reduced drilling and completion activity, and excess capacity. He added that these challenges were exacerbated by the COVID-19 pandemic and the Russia/Saudi price war (Engel Witness Statement, at para 17). However, Mr. Johnston’s expert opinion, which the Tribunal accepts, is that it is reasonable to expect steady incremental growth in the WCSB through to the end of 2030 (Exhibit P-A-001, Expert Report of Mr. Rory Johnston, at paras 25, 35; Transcript, Public, at pp 152, 157–160). There is no evidence that the post-Merger price-setting behaviour of Secure in 2022, operating in an industry experiencing sustained production growth, could be meaningfully predicted by copying the price-setting behaviour of another firm (Tervita) in 2019-2020, struggling through a global downturn.

[210] Dr. Duplantis also criticized Dr. Miller’s price estimates on the basis that, when she applied his merger simulation model to Tervita’s acquisition of Newalta, the model predicted much larger price increases than what actually occurred. However, given the concerns identified above with respect to the limited data used by Dr. Duplantis and the other methodological shortcomings in her analysis, the Tribunal does not accept this criticism.

[211] A third criticism levied by Dr. Duplantis in relation to Dr. Miller’s analysis is that his analysis is highly sensitive to his assumptions, particularly his assumption of a 10% market share

(the “**Outside Share**”) by waste services suppliers³⁰ situated outside the outer geographic limit of the Relevant Markets. In this regard she estimated that if the assumed Outside Share were infinitesimally small in a “2-to-1” market, Dr. Miller’s model would predict a price increase of over 2,000%, whereas if it were 25% in that market, the price effects would be in the order of 21% (Transcript, Public, at p 1776). However, while Dr. Duplantis maintained that the Outside Shares could be different from 10%, she did not review any data regarding Outside Shares (Transcript, Public, at pp 2038–2039). In addition, she was not able to provide her own estimate of the Outside Share (Transcript, Public, at pp 2039–2040). Based on all of the evidence in this proceeding, the Tribunal considers that Dr. Miller’s Outside Share estimate of 10% is likely very conservative.³¹

[212] Considering all of the foregoing, the Tribunal finds Dr. Miller’s estimates of the likely price effects of the Merger to be more reliable than the estimates produced by Dr. Duplantis. In the absence of any persuasive evidence impugning Dr. Miller’s estimates, the Tribunal broadly accepts those estimates.

[213] In any event, there is no dispute between Dr. Miller and Dr. Duplantis, or indeed between the Parties, that the estimated price effects of the Merger are likely to exceed 5% for the 17 “2-to-1” Relevant Markets as well as for the 30 “3-to-2” Relevant Markets. The Tribunal is satisfied that, in the waste services industry, predicted price increases of this magnitude are material.

[214] Regarding the remaining 96 “4-to-3+” Relevant Markets, the Tribunal will proceed to consider the qualitative factors discussed below.

[215] The Tribunal pauses to observe that Dr. Miller’s predicted price increases are likely conservative. This is because they were based on pre-Merger market shares. This resulted in approximately 56 negative values for predicted price changes when the higher price facility in a market was planned to be closed by Secure. Given that Dr. Miller also used a 5% price increase screen to identify markets in which an SLC was alleged, it is likely that some instances of such a lessening of competition were missed. Moreover, the inclusion of negative values in determining average price increases likely reduced the level of those predicted average price increases.

(2) Removal of a Vigorous and Effective Competitor (subsection 93(f))

[216] The Commissioner submits that the Merger eliminated intense rivalry between the two largest suppliers of waste services in the WCSB. He asserts that Secure and Tervita competed closely on price and service, and were each other’s closest competitors.

³⁰ Such suppliers include Secure, third party waste services suppliers, First Party Suppliers and self-supply (Miller Rebuttal Report, at para 45).

³¹ This estimate is conservative in the sense that it gives a higher share to sales outside the market than is likely actually the case. The effect of this is to lower Secure’s post-Merger market share. Among other things, the evidence suggesting that the Outside Share is lower than 10% includes Dr. Miller’s testimony that “on average, six or seven percent [of sales within a Relevant Market] go to some more distant facility” outside the Relevant market (Transcript, Public, at p 694), and that “most of the shipments that go out of the market are captured by Tervita and Secure anyway” (Transcript, Public, at p 728).

[217] In support of this position, the Commissioner referred to Exhibits CB-A-864/P-A-865 and CB-A-866/P-A-865, which contain hundreds of internal Tervita Discounted Offer Authorizations and Opportunity Approval Requests, respectively, pertaining to discounts to compete with Secure in a large number of different markets. He also referred to Exhibit CB-A-206/P-A-207, which contains thousands of customer visit reports. Those reports are in spreadsheet format and, among other things, contain a column entitled “Competitive Insights.” Secure is referenced in that column over 800 times in the approximately 1,800 rows that have content in that column. Once again, this information pertains to a large number of different markets.

[218] Similar internal Tervita and Secure documents were referenced in the Initial Miller Report, at paragraphs 91–99.

[219] In another document referenced by Dr. Miller, Secure is identified as having the highest market share among Tervita’s competitors (after adjusting for the fact that Newalta was subsequently acquired by Tervita) at 16 of its 27 facilities (Exhibit CB-A-762/P-A-763, TRD and Disposal Well Facility Review dated February 1, 2017). The Tribunal notes that Secure did not have a competing facility for most of Tervita’s other facilities.

[220] Dr. Miller also estimated that between 63% and 84% of Secure’s customers (pre-Merger) were located in regions where Tervita operates the next nearest facility to them. This breaks down to 63.9% for Landfills, 84.4% for TRDs, and 66.4% for SWDs. The corresponding estimates for Tervita’s customers were 17.2% for Landfills, 30.0% for TRDs, and 48.4% for SWDs (Initial Miller Report, at paras 101–102). He added that, on average, Secure’s customers were located within 76 kilometres of the Tervita facility, while their average distance to a competitor facility was 140 kilometres. The corresponding figures for Tervita’s customers were 61 kilometres from the Secure facility and 105 kilometres from the third party facility (Initial Miller Report, at paras 100–102). This evidence was not challenged by Secure.

[221] In addition to the foregoing, the Commissioner referred to Exhibit CB-A-568/P-A-569, Action No. 0701-13328 – Defendant’s Written Interrogatories (Damages) dated July 31, 2020, which contains responses to written interrogatories provided by Tervita to Secure in the context of a litigation in the Court of Queen’s Bench of Alberta between Secure and Tervita’s predecessor entity, CCS. In response to Request 7, Tervita stated the following:

[REDACTED]

[222] In the course of responding to Request 9 in the above-mentioned litigation, Tervita added the following:

[223]

[224]

[225] Beyond all of the information discussed above, the Commissioner provided evidence that establishes that Secure and Tervita also competed with respect to the location of their facilities (see, for example, Exhibit CB-A-512/P-A-513, Email dated December 12, 2018 between Mr. Alastair Graham, Mr. Robert Clarke and Others re: RMWB and Economic Development Meetings, at pp 2–3; Exhibit CB-A-820/P-A-821, Landfill Strategy Meeting Summary dated February 5, 2020, at p 1; Exhibit CB-A-472/P-A-473, Spreadsheet titled “AFE Estimate Template” (“**AFE Estimate**”); Exhibit CB-A-403/P-A-404, Email dated September 18, 2019 between Mr. Rene Besler and Mr. Corey Higham re: CNRL 07-17, at p 2; Transcript, Confidential B, at p 1075).

[226] In addition, public reporting by Secure and Tervita also gave special mention to each other. In this regard, Secure’s 2020 Annual Information Form stated the following (Exhibit P-A-363, Secure Annual Information Form for the Year Ended December 31, 2020, dated February 25, 2021 (“**Secure’s 2020 AIF**”), at p 30):

Other competitors in the third-party oilfield treatment and disposal market include small regional service providers as well as larger companies with operations throughout the WCSB. SECURE is one of the leading providers in the third-party oilfield treatment and disposal market with 42 locations in the WCSB and five in the U.S. Tervita Corporation (“Tervita”) has approximately 50 treating, recovery and disposal facilities located primarily in western Canada. Several smaller competitors also exist, operating independent facilities, most of which offer limited services.

[227] Likewise, Tervita’s 2020 Annual Information Form stated the following (Exhibit P-A-364, Tervita Annual Information Form for the Year Ended December 31, 2020, dated March 4, 2021 (“**Tervita’s 2020 AIF**”), at p 21):

Tervita’s primary competitors for each service line are as follows:

- Treating, Recovery and Disposal and Landfills — Tervita’s largest competitors include Secure Energy Services Inc., plus a number of

smaller, predominantly privately owned, regional operators, as well as producers that handle their own waste processing.

...

[228] The foregoing is consistent with representations that Tervita made to the Commissioner in connection with its 2018 acquisition of Newalta. In particular, Tervita stated the following with respect to itself and Newalta:

Both parties identify Secure as their principal third party competitor, suggesting that they lose business more often to Secure than to each other. From Tervita's perspective, Secure is viewed as the stronger competitor because of its stronger financial position, in that Newalta's recent financial strains have limited its ability to compete on price, whereas Secure tends to be more aggressive on pricing.

Exhibit CB-A-337/P-A-338, ARC Request from Tervita dated March 1, 2018 re: Newalta, at p 22.

[229] Despite all of the above, Secure maintains that Tervita was "in some real distress" prior to the Merger (Transcript, Public, at p 3453). However, Tervita's public documentation indicates that its Energy Services Division, which included its TRDs, SWDs and Landfills, had annual earnings before interest, taxes, depreciation, and amortization ("EBITDA") of between \$179 million and \$240 million during the three years prior to the Merger (Transcript, Public, at pp 1123–1124).

[230] The Tribunal pauses to observe that, in cross-examination, Mr. Engel of Secure acknowledged that Secure's Midstream Infrastructure ("MI") business segment, which includes its TRDs and SWDs, was profitable for the 12-month periods ending December 31, 2020 and December 31, 2021, and that the same was true for its Environmental and Fluid Management Segment, which houses its Landfill operations (Transcript, Public, at pp 1121–1122). He also acknowledged that Secure's MI segment had positive EBITDA in 2017, 2018, and 2019, and that its Landfill business was part of that segment in those years (Transcript, Public, at p 1119).

[231] Based on all of the evidence discussed above, the Tribunal finds that the Merger eliminated a vigorous competitor, namely, Tervita, which was Secure's closest rival in virtually all of the 143 Relevant Markets. The Tribunal is satisfied that, in the absence of the Merger, Secure and Tervita would have continued to vigorously compete in the Relevant Markets for the foreseeable future. There is no evidence to indicate that Tervita would have ceased being a vigorous and effective competitor, but for the Merger.

(3) Effectiveness of Remaining Competition (subsection 93(e))

(a) Introduction and Identification of the "Competitors" in the Relevant Markets

[232] The Commissioner maintains that there is insufficient remaining competition to constrain the exercise of market power by Secure.

[233] In support of this position, the Commissioner states that no other company comes close to having the facilities to match the geographic scope and product depth of Secure. As a result, remaining competitors are at a significant disadvantage, relative to Secure.

[234] The Commissioner notes that, post-Merger, Secure owns 62 TRDs, 24 Landfills, eight SWDs, and three Caverns in the WCSB. This compares with the following holdings of the next largest competitors for the relevant waste services in that region:

- Wolverine Energy and Infrastructure Inc. (“**Wolverine**”), which operates five TRDs in Alberta and one industrial landfill in Saskatchewan;
- Aqua Terra, which operates eight SWDs, of which two are located in British Columbia, five in Alberta, and one in Saskatchewan;
- Ridgeline Canada Inc. (“**Ridgeline**”), which accepts certain types of solid waste at municipal landfills in Alberta and Saskatchewan;
- Catapult Water Midstream (“**Catapult**”), which operates three SWDs in Alberta and one in British Columbia;
- Medicine River Oil Recyclers (“**MROR**”), which operates one TRD and one SWD in Alberta; and
- White Swan Environmental Ltd. (“**White Swan**”), which operates one TRD and one Cavern in Alberta.

[235] Regarding water disposal, the Commissioner adds that in February 2021, Secure and Tervita combined to inject over 20,000 cubic metres of wastewater, compared to a total of 6,000 for the next three largest competitors combined (i.e., Aqua Terra, MROR, and Catapult).

[236] In response, Secure maintains that it will continue to face effective remaining competition from First Party Suppliers and third party waste disposal services providers. It asserts that they are generally capable of expanding their capacity in response to any alleged price increase.

[237] However, as discussed at paragraph 204 above, Dr. Duplantis acknowledged that the average price effects in the “2-to-1” markets would be at least 11.0%, and that the average price effects in the “3-to-2” markets would be at least 9.8%. These compare with Dr. Miller’s estimated price increases of between 6.54% and 64.57% for the “2-to-1” markets and between 6.95% and 72.30% for the “3-to-2” markets.

[238] The main competitors identified in the Relevant Markets are as follows.

[239] Wolverine. Wolverine describes its waste business as “water midstream, including water management, wastewater disposal and recycling and full-service waste management” (Exhibit CA-A-149/P-A-150, Witness Statement of Mr. John Paul Herbert Smith on behalf of Wolverine (“**Wolverine Witness Statement**”), at para 5). In its witness statement, it describes the types of

waste accepted at its various facilities, including the following four that the Parties have included in one or more Relevant Markets:

- Grande Cache, Alberta — This facility is said to accept a broad range of hazardous and non-hazardous waste. It also treats emulsions/production fluids and has a Class 1B fluid disposal well;
- Mayerthorpe, Alberta — Essentially the same as above;
- Rycroft, Alberta — Essentially the same as above; and
- Cynthia, Alberta — This facility also treats emulsions/production fluids and has a Class 1B fluid disposal well. However, it accepts a much more restricted range of hazardous and non-hazardous waste.

[240] NA. In their filed materials, the Parties identify NA as being associated with the following waste services providers:

- MROR — The Commissioner identifies this entity as having one TRD in Drayton Valley, Alberta. It also has a nearby Class 1B disposal well;
- Rush Energy Services Inc. (“Rush”) — Rush is identified on the Commissioner’s list of facilities as having two facilities: (i) a TRD facility near Breton, Alberta, and (ii) a Class II SWD facility near Rimbey, Alberta;
- White Owl Energy Services Inc. (“White Owl”) — In Mr. Owen Pinnell’s witness statement on behalf of White Owl (“**White Owl Witness Statement**”), he describes a facility owned by White Owl in the Grande Prairie region of Alberta as being an “oil pipeline connected processing and disposal facility” (White Owl Witness Statement, at para 6). The revenues of that facility are identified as being less than \$2 million in 2019 and less than \$150,000 in 2020. The Commissioner describes this facility as being a TRD; and
- Albright Flush Systems Ltd. (“Albright”) — The Commissioner identifies Albright as having one TRD, located in Fort St. John, British Columbia

[241] Aqua Terra. According to Mr. Hall’s witness statement on behalf of Aqua Terra (“**Aqua Terra Witness Statement**”), Aqua Terra is active in providing water management, water disposal logistics, recycling, and pipeline services at facilities in Fort St. John, British Columbia; Dawson Creek, British Columbia; Gordondale, Alberta; Gold Creek, Alberta; Hillmond, Saskatchewan; Drumheller, Alberta; and Torrington, Alberta.

[242] Pure Environmental. In Mr. Ramin Bogzaran’s witness statement on behalf of Pure Environmental, he indicates that Pure Environmental provides cavern waste disposal as well as TRD services at its facility in Fort Kent, Alberta.

[243] Envolve Energy Services Corp. (“**Envolve**”). On an internal Tervita map of competing waste services facilities in the WCSB, Envolve is identified as having an SWD facility near South Grande Prairie, Alberta.

[244] Catapult. In Mr. Ryan Kaminski’s witness statement on behalf of Catapult (“**Catapult Witness Statement**”), he describes Catapult’s services as relating to the recycling and disposition of fluids. Its facilities in Fox Creek and Berland, Alberta are licenced to accept Class II and Class 1B fluids, whereas its facility in Pipestone, Alberta is only approved to receive Class II fluids (brine and brine-equivalent fluids). Its fourth facility, located in South Taylor, British Columbia, is approved to accept produced water and flowback fluids. According to the witness statement of Mr. Dziuba on behalf of Chevron (“**Chevron Witness Statement**”), Catapult’s facility in Fox Creek is used for the disposal of saline water, but it is not an option for other waste streams. Mr. Broen of Athabasca added during the hearing that he would only use Catapult on an emergency basis (Transcript, Confidential B, at p 1675). In a chart included at Tab 2 of the Catapult Witness Statement, the volume of wastewater treated by Secure post-Merger in the main oil and gas producing regions of Alberta and British Columbia was more than [REDACTED] times the volume of wastewater treated by Catapult in March 2021 ([REDACTED]), and more than [REDACTED] times the volume treated by the next largest competitor, namely, Aqua Terra. Other identified competitors (Voda Inc., MROR, and Envolve) each processed less than [REDACTED].

[245] CNRL. CNRL is an oil and gas producer that has several waste disposal facilities of its own. At some of those facilities, it accepts third party waste. In this capacity, it is a First Party Supplier. The facilities at which it accepts third party waste include the Peejay Landfill in Northeastern British Columbia, and the Wabasca Landfill in Alberta. A third Landfill in Manatokan, Alberta was recently approved to accept third party waste. In addition, CNRL has 13 Class 1B or Class II wells in Alberta and Saskatchewan that accept third party waste.

[246] White Swan. White Swan has a facility in Conklin, Alberta that is identified as being a TRD on the above-mentioned internal Tervita map. [REDACTED]

[REDACTED]. According to Mr. Phil Porter’s witness statement on behalf of White Swan (“**White Swan Witness Statement**”), the Conklin facility has a daily capacity of [REDACTED]. In Ms. McRae’s witness statement on behalf of ConocoPhillips (“**ConocoPhillips Witness Statement**”), it is noted that White Swan’s facility primarily provides liquid waste disposal services and has a solid waste capacity of only 200 m³/day (ConocoPhillips Witness Statement, at para 17). [REDACTED]

[REDACTED] (Transcript, Confidential B, at p 1650).

[247] Sprocket Energy Corporation (“**Sprocket**”). Sprocket appears to be an oil and gas producer that is also a First Party Supplier in a small number of Relevant Markets.

[248] In addition to the foregoing, certain other entities were identified as a “competitor” in spreadsheets supplied by the Parties. However, the evidence does not support this description, at least with respect to the Relevant Markets. Consequently, they cannot be considered to be competitors to Secure. For example:

- Mr. Nigel Wiebe stated in a witness statement filed on behalf of TAQA North Ltd. (“**TAQA**”) (“**TAQA Witness Statement**”) that TAQA does not accept third party waste;
- an e-mail attached to a witness statement filed by Mr. Travis Tweit on behalf of White Cap Resources Inc. (“**White Cap**”) (“**White Cap Witness Statement**”) states that White Cap did not receive any third party waste during the period covered by an order issued by the Federal Court pursuant to section 11 of the Act (i.e., January 1, 2019 to October 14, 2021, the date of the e-mail);
- a representative of Tidewater Midstream Ltd. (“**Tidewater**”) stated in an e-mail attached to the witness statement filed of behalf of Tidewater that although it provides some emulsion treating and water disposal services from time to time, those services are not material to its business and it does not see itself as a competitor to Secure;
- Mr. Scott Lauinger, President and Chief Executive Officer of Dragos Water Management (“**Dragos**”) stated in a witness statement that Dragos effectively shut down its facility in the fall of 2021;
- Mr. Frank Vanden Elsen of Gibson Energy Inc. (“**Gibson**”), another industry participant, stated in a witness statement that Gibson sold its waste disposal facilities in the WCSB to Wolverine in 2019; and
- a witness statement filed by Ms. Lora Brenan of Aquatera Utilities Inc. (“**AUI**”) (“**AUI Witness Statement**”) states that AUI does not consider its Landfill in Grande Prairie to be a competitor to the Landfills operated by companies like Secure and Tervita, because its Landfill predominantly accepts household and industrial waste, and recycles materials like cardboard and metals.

(b) The “2-to-1” Markets

[249] By definition, there is no remaining competition in the 19 “2-to-1” markets identified in Table 2 above. However, as reflected in Table 3 above, the Commissioner only alleged a likely SLC in respect of 17 of those markets. This is because his 5% price increase screen was not exceeded in two markets. Specifically, the predicted price change in market #9 is [REDACTED], and in market #11 is [REDACTED].

[250] In the Miller Rebuttal Report, Dr. Miller explained how his analysis produced predictions of negative price changes. In brief, such predictions resulted from the removal from the analysis of certain facilities with high revenues and high market shares that Secure has scheduled to close. When he apportioned those revenues to remaining facilities in the market, the merged entity’s post-Merger market share wound up being lower than that of the closed facility. Given that markups and prices are determined by market shares, the post-Merger markup/price of the merged entity was predicted to be lower than the pre-Merger markup/price of the closing facility. In reporting his predicted price changes, Dr. Miller used a weighted average of these two changes. In some cases, this resulted in a negative predicted price change, and “mask[ed] the actual price increase” (Miller Rebuttal Report, at paras 70–71).

[251] Notwithstanding the foregoing, the Commissioner did not allege a likely SLC in respect of any of the 56 markets in the universe of 271 geographic areas where there is competitive overlap between the Merging Parties, and where his analysis resulted in negative predicted price increases. This included the two “2-to-1” markets in this category. Nor did the Commissioner even suggest that any of those 56 markets should be included in the SLC category. Consequently, and in the absence of any concession or other representations from Secure on this issue, the Tribunal will not further address these markets. The Tribunal will observe in passing that little turns on this, as the closest Tervita facility to customers in the substantial majority of those markets is on the list of divestitures that the Tribunal has determined ought to be made to remedy the SLC.

[252] Considering that the structure of the 17 “2-to-1” markets in which the Commissioner has alleged a likely SLC has not been disputed, and given Dr. Duplantis’ acknowledgement that the Merger will likely result in a significant price increase of 11% in those markets, the Tribunal will not discuss these markets further. The Tribunal is satisfied that the Merger has substantially lessened competition in these markets, and is likely to continue to have that effect for the foreseeable future. Given that the Tribunal broadly accepts Dr. Miller’s estimates of the likely price effects of the Merger, the Tribunal finds that that prices in virtually all these Relevant Markets are likely to increase by more than the average of 11% estimated by Dr. Duplantis.

(c) The “3-to-2” Markets

[253] The Tribunal has concluded that remaining competition in the 30 “3-to-2” markets in which the Commissioner has alleged a likely SLC is not likely to be sufficiently effective to ensure that this does not occur.

[254] As noted above, Dr. Duplantis acknowledged that the average price effects in these 30 Relevant Markets would be at least 9.8%. The Tribunal considers that prices in each of these Relevant Markets are likely to increase by at least the 5% that Dr. Miller has estimated. This is because almost all of those Relevant Markets can be fairly described as “2-to-1” markets for at least some of the customers in those markets. This is due to the fact that the identified remaining “competitor” either (i) is not a competitor at all;³² (ii) only accepts some types of waste;³³ (iii) is not considered to be an acceptable alternative by customers;³⁴ or (iv) is located substantially farther

³² This is the case for TAQA in markets #47, 49, 50, 51, and 57. As noted at paragraph 248 above, TAQA does not accept third party waste. Similarly, White Cap is identified as the remaining competitor in markets #52, 53, and 58. However, White Cap confirmed to the Bureau that it did not accept any third party waste during the period covered by the Bureau’s question (January 1 to October 2021) (see paragraph 248 above). This is also the case for White Swan in market #60 (see paragraph 246 above).

³³ This is the case for Grande Prairie Clairmont Landfill (“GPCL”) in markets #22 and 23. That entity is a municipal landfill. Likewise, Catapult’s Berland facility in market #55 only deals with Class II and 1(b) wastewater fluids. Wolverine’s Cynthia facility in markets #36, 37, and 42 also treats a more limited range of waste streams than its Grande Cache and Mayerthorpe facilities (see paragraph 239 above). In the quote from Secure’s 2020 AIF that is reproduced at paragraph 226 above, Secure characterizes most of its competitors other than Tervita as offering “limited services.”

³⁴ At paragraph 19 of the Chevron Witness Statement, Mr. Dziuba stated: “However, besides Secure, no other provider meets Chevron’s internal vetting process nor is a viable competitor in the market for solid waste or emulsion waste.”

away from the customer locations than the facilities owned by Secure (including those formerly owned by Tervita).³⁵

(d) The “4-to-3+” Markets

(i) *Introduction*

[255] The Commissioner has identified 96 “4-to-3+” markets in respect of which he alleges the Merger is likely to result in an SLC.

[256] As with some of the “3-to-2” markets discussed above, some of the “competitors” identified in the “4-to-3+” markets are unlikely to provide effective competition to Secure. These include the following:

- municipal landfills, which are not permitted to accept certain types of solid waste, and/or are located much farther away from customers than the relevant Secure and former Tervita facilities; and
- TAQA, White Cap, Dragos, and Gibson, which, in fact, are not competitors (see paragraph 248 above).

[257] As a general observation, despite the inclusion of these and other so-called “competitors” in the Relevant Markets, Dr. Miller still estimated likely price increases of at least 5% in each of those markets. In over 50% of the “4-to-3+” markets, the estimated price increase is greater than 10%. Where the Tribunal has concluded below that remaining competition is unlikely to be sufficiently effective to prevent an SLC, the Tribunal accepts Dr. Miller’s price estimates.

[258] A second general observation that the Tribunal wishes to make is that the Commissioner did not provide the Tribunal with a conventional market-by-market assessment. The information he provided regarding the specific Relevant Markets was largely confined to information provided in spreadsheets prepared by Dr. Miller, who provided estimates of market revenues, market shares, diversion ratios, price increases, and Non-Price Effects-related DWL for each market (Exhibit CA-A-065/P-A-066, Exhibits 8-10, Predicted Price Effect and Deadweight Loss in Customer Defined Markets (“**Miller Spreadsheet**”); Exhibit CA-A-919, Response to Tribunal Communication dated May 20, 2022 re: Exhibit CA-A-065 (“**Miller/Duplantis Combined Spreadsheet**”)). In his closing submissions, the Commissioner supplemented this information with a small amount of information and maps specific to each of the facilities in respect of which he is seeking divestiture.

³⁵ This is the case for the following identified competitors:

- Pure Environmental in markets #25 and 27, and for most customers in market #26;
- TAQA in markets #47, 49, 50, 51, and 57;
- GPCL for most of the customers in markets #22 and 23;
- Catapult in market #55;
- MROR in markets #45 and 46;
- Wolverine (Rycroft) in markets #28, 29, and 41;
- Wolverine (Mayerthorpe) in markets #30, 31, and 33; and
- Wolverine (Cynthia) in markets #36, 37, and 42.

However, this information was not presented on a market-by-market basis, but in terms of facilities to be divested. Given that most of those facilities serve a large number of Relevant Markets, the Tribunal had difficulty in gleaning any helpful market-specific information from that documentation. Of course, some of the other documentation provided in the course of this proceeding contained some information pertaining to certain specific Relevant Markets. However, that documentation was not presented in a manner that enabled the Tribunal to readily correlate it with specific Relevant Markets.

[259] Ultimately, after the Tribunal made repeated requests to the Parties to provide maps that would assist it to conduct the required market-by-market assessments, Secure provided maps that it constructed from the evidence on the record. While these maps were not entered as an Exhibit in the Tribunal record, they were helpful for this purpose.³⁶ Among other things, those maps and the underlying evidence permitted the Tribunal to better understand the locations of customers, relative to the competing facilities that Secure claims will continue to provide effective competition. References to customer locations in the discussion below are to the locations depicted on those maps provided by Secure.

[260] The Tribunal pauses to observe that respondents in future proceedings who may be inclined to refrain from providing information that would assist the Tribunal in its assessment will do so at their own peril. This is because the Commissioner typically provides information with respect to market shares/concentration and the qualitative assessment factors listed in section 93 of the Act, from which inferences that are favourable to the Commissioner may be made. To avoid such inferences, respondents are well advised to provide relevant information for that purpose. This is what has generally been done in the past. In this proceeding, a principal benefit to Secure of having provided the maps is that they assisted the Tribunal to conclude that the Merger is not likely to substantially lessen competition in some of the 143 Relevant Markets. They also assisted the Tribunal to conclude that some of the divestitures requested by the Commissioner would not be necessary to restore competition to the point at which the lessening resulting from the Merger would no longer be substantial.

(ii) *Landfills*

[261] The Commissioner alleges that the Merger is likely to result in an SLC in five of the so-called “4-to-3+” Landfill markets, namely, markets #62, 63, 78, 79, and 80 (see Table 3 above and Appendix 2 to these reasons).

[262] The Tribunal agrees that the competition remaining in each of these markets is not sufficiently effective to prevent the Merger from resulting in an SLC. Stated differently, the remaining competition is not sufficiently effective to prevent Secure from exercising a materially greater degree of market power than what it was able to exercise prior to the Merger. There is no persuasive evidence in the record to suggest that this is likely to change.

[263] In brief, in each of those markets, the identified remaining competitors either are a municipal landfill or are located much farther away from customers than the Secure and former

³⁶ The Tribunal underlines that counsel for the Commissioner had no objections to the maps prepared by Secure, which he observed “are simply based on Dr. Miller’s work” (Transcript, Confidential B, at p 2929).

Tervita Landfills that are closest to those customers. As discussed at paragraph 129–130 above and 293–294 below, municipal landfills ordinarily do not accept some of the principal types of solid waste that producers need to dispose of. Moreover, in markets #62 and 63, the municipal landfill is located quite far away from most or all customers.³⁷ In addition, in market #79, the nearest competitor is Ridgeline, which is not only located much farther away, but is also not viewed as being competitive with Secure (Exhibit CA-A-040/CB-A-041/P-A-042, Mr. Hart’s Witness Statement on behalf of CNRL (“**CNRL Witness Statement**”), at para 19; Exhibit CA-A-109/P-A-110, TAQA Witness Statement, at para 16). Ridgeline is also the only non-municipal landfill “competitor” on the map for market #78, but is located a very long distance away. The same is true for Peejay (CNRL) Landfill in markets #62 and 63, and for RemedX in market #80.

(iii) *TRDs*

[264] The Commissioner alleges that the Merger is likely to substantially lessen competition in 34 “4-to-3+” TRD markets. With two exceptions (i.e., markets #123 and 126), the Tribunal agrees that the competition remaining in those markets is not sufficiently effective to prevent the Merger from resulting in an SLC. There is no persuasive evidence in the record to suggest that this is likely to change.

[265] The basic characteristics of the 34 markets in question are such that they can be separated into groups and summarized together.

[266] Nine of those markets are located in the vicinity of Grande Prairie, Alberta, including just south and west thereof. They are markets #86, 88, 90, 91, 92, 94, 95, 96, and 98. With the exception of market #98 where the estimated share is [REDACTED], the estimated market shares in these markets are all above or close to 85%. In addition, in each case, the higher of the two Relevant Diversion Ratios is above 0.69. Moreover, with the exception of market #95, many or all customers in those markets are located much closer to both the relevant Secure and former Tervita facilities than they are to the identified competing facilities of third parties. Accordingly, they are exposed to having to pay significantly increased prices or transportation costs as a result of the Merger. In market #95, many customers will continue to have one non-Secure facility (i.e., Envolve or White Owl) that is situated more closely to them than the relevant Secure facility. However, given the high Relevant Diversion Ratios ([REDACTED]), they too are exposed to significantly increased prices by Secure. This is particularly so during “surge” periods, because the remaining competitors (Envolve and White Owl) process very small volumes of wastewater. Considering all of the foregoing, the Tribunal has no difficulty finding that the competition remaining in these markets is not sufficiently “effective” to prevent Secure from exercising a materially greater degree of market power than it was able to exercise prior to the Merger.

[267] An additional six markets are located in Alberta near the Brazeau and Niton Junction facilities formerly owned by Tervita. In markets #99, 101, 111, 117, and 136, between two and five competing TRDs are identified. However, apart from Wolverine’s Cynthia facility, the competing facilities are located much farther away from many customers, than the relevant Secure and former Tervita facilities. Moreover, the Cynthia facility accepts only limited waste streams (see paragraph 239 above). Accordingly, customers in these markets will be exposed to having to

³⁷ The same is true for two of the alleged “3-to-2” Landfill markets — namely, markets #22 and 23.

pay significant additional prices or transportation costs as a result of the Merger. In the sixth market in that region, namely, market #102, Wolverine's Mayerthorpe facility appears to be closer than the relevant Secure facility for most customers. However, the Relevant Diversion Ratios in that market are [REDACTED]. In addition to the foregoing, the estimated market shares in markets #99, 101, 102, and 136 are all above 75%.³⁸ Considering all of the above, the Tribunal finds that the competition remaining in these six markets is not sufficiently "effective" to prevent Secure from exercising a materially greater degree of market power than it was able to exercise prior to the Merger.

[268] A further five markets are located close to Dawson Creek, British Columbia. These are markets #104, 105, 106, 107, and 108. In each case, most or all customers are located farther from the identified competing third party facilities than they are from the closest Secure and Tervita facilities. For those customers, the effect of the Merger was to create a "2-to-1" market structure, because Secure now has the ability to increase prices significantly, given its knowledge of the locations of the customers, the competing facilities, and transportation costs. That ability is unlikely to change in the foreseeable future. Consequently, the Tribunal finds that the competition remaining in these markets is not sufficiently "effective" to prevent the Merger from having that anti-competitive effect.

[269] Similarly, in markets #119, 121, 124, and 127, many or all customers are located farther away from the identified competing third party TRDs than they are to the closest Secure and Tervita facilities. Accordingly, the observations and finding made in the immediately preceding paragraph above apply with equal force to these markets.

[270] The same is true in three additional markets (#128, 129, and 130) near Beaverlodge, Alberta, west of Grande Prairie, as well as in two markets (#116 and 138) near Rocky Mountain House, Alberta.

[271] In three other markets near Spirit River, Alberta (i.e., markets #93, 132, and 134), customers have at least one proximate alternative to Secure. In particular, in markets #93 and 132, Wolverine's Rycroft facility is located close to the relevant Secure and former Tervita facilities. In market #134, customers also have a second alternative, namely, White Owl. However, Secure's market share in each of these three markets is estimated to be above 85%, and the higher of the two Relevant Diversion Ratios is [REDACTED] in each market, respectively. Consequently, the Tribunal finds that the competition remaining in these three markets is not likely to be sufficiently "effective" to prevent the Merger from substantially lessening competition.

[272] In the final two TRD markets (#123 and 126), the Tribunal is not able to conclude, on the basis of the evidence in the record, that the remaining competition is not effective. There do not appear to be any customers for whom the relevant Secure and Tervita facilities are closer than the nearest competing TRD. In market #123, customers have two nearby alternatives to Secure (i.e., MROR and the facility at Rimbey, Alberta, formerly owned by Gibson). The same is true in market #126, where customers can access the nearby facilities owned by Rush and Wolverine (Mayerthorpe). The Tribunal observes in passing that this may explain why Secure has lower

³⁸ In markets #111 and 117, the estimated market shares are above 50%.

estimated market shares in those markets (both below 50%), as well as the relatively low Relevant Diversion Ratios in those markets of [REDACTED], respectively.

[273] In summary, based on the foregoing, the Tribunal finds that the remaining competition is not sufficiently effective, and is not likely to be sufficiently effective, to prevent Secure from exercising a materially greater degree of market power than what it was able to exercise prior to the Merger in 32 of the 34 “4-to-3+” Relevant Markets for the supply of TRD services. There is no persuasive evidence in the record to suggest that this is likely to change. However, in the remaining two of those markets (i.e., markets #123 and 126), the Tribunal concludes that the competition remaining is, and is likely to remain, sufficiently effective for this purpose.

(iv) *SWDs*

[274] The Commissioner alleges that the Merger is likely to substantially lessen competition in 57 of the “4-to-3+” Relevant Markets for the supply of SWD services. These Relevant Markets can conveniently be grouped into markets that have similar structures, at least for a meaningful number of customers in each Relevant Market.

[275] In 17 of these Relevant Markets, the number of reasonably proximate competitive alternatives for customers, or at least for a meaningful number of customers, has been reduced from two to one as a result of the Merger. These are markets #143, 144, 145, 146, 147, 148, 150, 154, 155, 157, 160, 163, 166, 177, 232, 233, and 246.

[276] By “reasonably proximate alternatives,” the Tribunal means third party alternatives that can be accessed without having to drive much farther away, and thereby incur significant additional transportation costs, relative to prior to the Merger (“**Reasonably Proximate Alternatives**”).³⁹ Had the geographic scope of the Relevant Markets been defined on the basis of the hypothetical monopolist test, it is highly unlikely that any of the other alternatives depicted on the maps that were provided to the Tribunal or mentioned in the Miller Spreadsheet would have been included in those Relevant Markets.⁴⁰

[277] In the absence of having any Reasonably Proximate Alternative, customers will be exposed to significantly increased prices and/or significantly increased transportation costs as a result of the Merger. In other words, Secure will have the ability to increase the prices charged to those customers. Consequently, the Tribunal finds that the remaining “competitors” identified in these 17 Relevant Markets do not provide, and are unlikely to provide, effective competition. They are not likely to prevent the Merger from resulting in an SLC.

[278] In another 10 Relevant Markets, the Merger has reduced the number of Reasonably Proximate Alternatives from three to two, at least for a meaningful number of customers. Those are markets #142, 152, 159, 168, 193, 196, 206, 235, 252, and 257. In each of these markets, Secure’s estimated market share is approximately 50% or more. Indeed, in several cases, it is much

³⁹ If a single competitor has two facilities that are each a Reasonably Proximate Alternative, they are counted together as a single Reasonably Proximate Alternative.

⁴⁰ Where the Tribunal had any doubts in this regard, it erred on the side of identifying a facility as being a Reasonably Proximate Alternative.

higher. Secure's true market share in a market defined on the basis of the hypothetical monopolist test would likely be even higher. Moreover, the higher of the two Relevant Diversion Ratios is above 0.43 in all but two of these markets, and is [REDACTED] in the remaining two. Finally, the remaining competitor in each of these markets does not have anywhere near the scale of operations as Secure. Considering all of the foregoing, the Tribunal finds that the competition remaining in these 10 Relevant Markets is not likely to be sufficiently effective to prevent the Merger from lessening competition substantially.

[279] In a further 22 Relevant Markets, the Merger has reduced the number of Reasonably Proximate Alternatives from four to three, at least for a meaningful number of customers. Those are markets #156, 162, 164, 165, 169, 171, 172, 173, 174, 176, 183, 186, 188, 200, 202, 241, 242, 245, 247, 251, 255, and 259.

[280] Of these 22 markets, 12 are located in the Fox Creek area in Alberta. These are markets #156, 169, 171, 172, 173, 174, 176, 183, 186, 188, 245, and 247. With the exit of Dragos, the only remaining competitors in that area are Catapult (Berland and Fox Creek) and Sprocket. Given the evidence on the record regarding competition in that area, the Tribunal is satisfied that it is not sufficiently effective to ensure that the Merger does not result in an SLC. In this regard, Mr. Dziuba stated that Chevron "has limited options to dispose of many waste types in the Fox Creek area outside of the facilities owned by Secure (and former Tervita) in Kaybob and Fox Creek" (Chevron Witness Statement, at para 19.) He explained that, while Chevron has used Catapult's facility in Fox Creek for the disposal of saline water, that facility is not an option for other waste streams.⁴¹ Mr. Broen of Athabasca added that he would only use Catapult on an emergency basis (Transcript, Confidential B, at p 1675). Mr. Cain of Halo also characterized Catapult and other remaining competitors in the Fox Creek area as "small, independent disposal facilities for produced water" that "pale in comparison relative to the Secure and Tervita footprint in that greater Fox Creek area" (Transcript, Confidential A, at pp 370–371).

[281] In an additional five markets that are located to the south of Grande Prairie, Alberta, the Merger has left many customers in a position in which their only Reasonably Proximate Alternatives to Secure are Envolve and Aqua Terra. These are markets #162, 164, 165, 241, and 242.⁴² However, given the evidence regarding the very small volumes of waste processed by those two competitors, the Tribunal finds that they cannot be relied upon to provide effective competition to Secure (see paragraph 244 above).

[282] This leaves five other markets in which the number of Reasonably Proximate Alternatives has been reduced from four to three — namely, markets #200, 202, 251, 255, and 259. In the Tribunal's view, competitive conditions in market #202 resemble those discussed in the immediately preceding paragraph. In brief, customers in this market, who are located just to the north of Grande Prairie, Alberta have been left with only very small Reasonably Proximate

⁴¹ Mr. Dziuba added that "besides Secure, no other provider meets Chevron's internal vetting process nor is a viable competitor in the market for solid waste or emulsion waste" (Chevron Witness Statement, at para 19).

⁴² As previously noted, even these options are not Reasonably Proximate Alternatives for many customers in markets #163 and 166.

Alternatives — namely, Envolve, Aqua Terra, and White Owl. The Tribunal finds that, collectively, these competitors do not provide effective competition to Secure in market #202.

[283] Markets #200, 251, 255, and 259 are located near Dawson Creek, British Columbia. In the latter two markets, the Tribunal finds that effective competition is likely to be provided by Catapult's Tower TD and by Aqua Terra, which has two facilities in that region. In reaching this conclusion, the Tribunal also considered that Dr. Miller's predicted price increases were barely above 5% (5.3% and 6.0%, respectively). The Tribunal draws further comfort from the fact that market #259 is very small, with less than [REDACTED] in annual revenues. However, in markets #200 and 251, two of the panel members have concluded that the competition remaining is not likely to be sufficiently effective to prevent Secure from exercising materially greater power than it was able to exercise prior to the Merger, having regard to other factors. Those factors include that (i) Dr. Miller's predicted price increases are 7.7% and 7.2%, respectively, (ii) at least one of the Relevant Diversion Ratios for each of those two markets is close to 0.50, and (iii) the margins in those markets are high ([REDACTED]).

[284] In the remaining eight markets (in the broader category of "4-to-3+" markets), where the Commissioner alleges a likely SLC, there are either four or five Reasonably Proximate Alternatives remaining. However, in three of those markets (#179, 184 and 208), Dr. Miller has estimated price increases in excess of 10% — namely, 14.5%, 11.6%, and 12.8%, respectively. Based on those estimates, as well as the high market shares, Relevant Diversion Ratios and margins,⁴³ the Tribunal finds that the competition remaining in these markets is not likely to be sufficiently effective to ensure that the Merger does not lessen competition substantially. In two additional markets (#200 and 249), two of the panel members find that the remaining competition is not likely to be sufficiently effective for this purpose, when all relevant factors are looked at cumulatively. In reaching that finding, they considered Dr. Miller's predicted price increases of 7.7% and 7.0%, respectively, as well as the high market share ([REDACTED]), margins ([REDACTED]) and Relevant Diversion Ratios ([REDACTED] for market #200, and [REDACTED] for market #249). This evidence is sufficient to conclude that, on a balance of probabilities, the Merger is causing or is likely to cause an SLC in those markets. In the final three markets (#203, 204, and 205), the Tribunal considers that there is not sufficient evidence in the record to establish that the remaining competition is not effective. In brief, four good Reasonably Proximate Alternatives will remain (i.e., Catapult, Aqua Terra, Rycroft, and CNRL Wembly). This will ensure that Secure will not likely be able to exercise a materially greater degree of market power than before the Merger. The Tribunal observes that Dr. Miller's predicted price increases were just slightly above 5%, namely, 5.9%, 5.3%, and 6.9%, respectively.

[285] In summary, for the reasons set forth above, the Tribunal finds that, in 52 of the 57 "4-to-3+" SWD markets in which the Commissioner is alleging an SLC, there is not sufficient effective remaining competition to ensure that the alleged SLC does not result from the Merger. However, in the remaining five of those markets — namely, markets #203, 204, 205, 255, and 259 — the Tribunal has not been persuaded that the remaining competition is not effective. Stated differently, the Commissioner has not demonstrated that remaining competition is insufficient to prevent

⁴³ The market shares in these three markets are [REDACTED], respectively. The Relevant Diversion Ratios are [REDACTED], respectively. The margins are [REDACTED], respectively.

Secure from exercising materially greater market power than it was able to exercise prior to the Merger.

(v) *Conclusion on the effectiveness of remaining competition*

[286] In summary, for the reasons set forth at paragraphs 249–252 above, the Tribunal finds that the competition remaining is not sufficiently effective in any of the 17 “2-to-1” markets in which the Commissioner has alleged that the Merger is likely to result in an SLC. There is no persuasive evidence to suggest that this is likely to change in the foreseeable future.

[287] For the reasons provided at paragraphs 253–254 above, the Tribunal reaches the same finding in respect of the 30 “3-to-2” markets regarding which the Commissioner has alleged a likely SLC.

[288] For the reasons given at paragraphs 255–285 above, the Tribunal also reaches this finding in respect of 89 of the 96 “4-to-3+” markets in which he made the same allegation. These 89 markets consist of: (i) all five Landfill markets that the Commissioner identified in this category; (ii) 32 of the 34 TRD markets so identified; and (iii) 52 of the 57 SWD markets so identified.

[289] It follows that the Tribunal finds that, overall, remaining competition is not sufficiently effective in 136 of the 143 Relevant Markets to ensure that Secure will not be able to exercise a materially greater degree of market power as a result of the Merger.

(4) **Availability of Acceptable Substitutes (subsection 93(c))**

[290] Secure maintains that municipal landfills and bioremediation are acceptable substitutes for the services provided at Landfill sites. It adds that some producers (also known as “**First Parties**”) make certain types of waste treatment services available to third party producers, at their on-site “oil batteries.” In addition, Secure states that some First Parties provide other producers with access to their on-site water disposal wells.

[291] Secure’s submissions in this regard are pertinent to seven of the Relevant Markets — namely, markets #22, 23, 62, 63, 78, 79, and 80.

[292] The evidence on the record does not support Secure’s position. On the contrary, it supports the Commissioner’s position that these alleged substitutes for the Landfill, TRD, and SWD services provided by Secure and Tervita are not capable of constraining Secure’s ability to exercise increased market power post-Merger.

(a) **Municipal Landfills**

[293] With respect to municipal landfills, Mr. Barrie Flood for RemedX, which operates a Class II Landfill in Breton, Alberta, stated the following: “While municipal landfills sometimes have lower waste disposal costs, in general these municipal landfills cannot accept all of the waste types that can be disposed of at a Class II landfill and there may be greater environmental risk in disposal at a municipal landfill” (Exhibit CA-A-122/P-A-123, Mr. Flood’s Witness Statement on behalf of RemedX (“**RemedX Witness Statement**”), at para 13). This was corroborated by Mr. Lammens

of PECL, who stated: “Municipal landfills are not an option for PECL, as they are neither licensed for nor designed to accept the type of solid oilfield waste which PECL generates” (Exhibit P-A-036/CA-A-037/CB-A-038, Mr. Lammens’ Witness Statement on behalf of PECL (“**PECL Witness Statement**”), at para 36). Ms. Brenan for AUI added that while AUI has a Class II Landfill in Grande Prairie, Alberta, that Landfill “predominantly accepts household and industrial waste, and recycles various materials like cardboard and metal” (AUI Witness Statement, at para 5). Therefore, she does not consider that Landfill to be a competitor to the Landfills operated by Secure and Tervita. Consequently, in the Relevant Markets in which AUI’s Landfill is located — namely, markets #22, 23, and 78 — the Tribunal did not attribute much significance to its presence there.

[294] In five of the seven markets mentioned above — namely, markets #22, 23, 62, 63, and 79 — there is a second reason why the Tribunal did not accord much competitive significance to the identified municipal landfills. It is that those municipal landfills are located much farther away from all or many customers than the Secure and former Tervita facilities.

(b) Bioremediation

[295] As previously noted, several witnesses stated that bioremediation is not a good substitute for Landfill services (see paragraph 131 above). This is because of its inability to break down salt contamination from produced waters as well as soils contaminated with metals, in addition to the high cost associated with remediating certain types of hydrocarbons, including heavier ones.

(c) First Party Suppliers

[296] As also previously discussed, Dr. Miller included First Party Suppliers who accept third party waste in his market definitions and market share estimates (see paragraph 153 and footnote 30 above). He did so to be “conservative”. This, together with the maps which depicted the locations of such First Party Suppliers, assisted the Tribunal to consider the extent to which those suppliers of waste services would likely contribute to ensuring that effective competition would likely remain in the Relevant Markets, post-Merger.⁴⁴

[297] For greater certainty, with the exception of CNRL in a small number of markets and the Tourmaline Oil Battery in one market, no noteworthy First Party Suppliers were identified in any of the Relevant Markets for Landfill or TRD services. Insofar as SWDs are concerned, First Party Suppliers who accept third party wastewater were identified and considered in relation to a large number of Relevant Markets. However, the Tribunal concluded that their competitive significance was not such as to warrant a conclusion that effective competition remains or is likely to remain, post-Merger. The noteworthy exceptions were markets #203, 204, 205, and 259, where CNRL’s Wembly facility is among the remaining competitors, and market #255, where the Tourmaline Oil Battery is present with several other remaining competitors.

[298] The Tribunal observes that the absence of a significant competitive role for First Party Suppliers in the vast majority of the Relevant Markets is consistent with an observation made by Secure in 2018 in response to a request for information from the Bureau relating to Tervita’s

⁴⁴ See the discussion in Part XIII.C (3) above.

proposed acquisition of Newalta. At that time, Secure stated that [REDACTED]
[REDACTED].” It added that [REDACTED]

(Secure’s 2018 RFI Response, at p 5).

(5) Barriers to Entry (subsection 93(d))

(a) Introduction

[299] As previously noted by the Tribunal, “[t]he conditions of entry into a relevant market can be a decisive factor in the Tribunal’s assessment of whether a merger is likely to prevent or lessen competition substantially” (*Tervita CT*, at para 216).

[300] In assessing whether new entry into, or expansion within, a relevant market can be relied upon to conclude that an SLC is not likely to occur, the Tribunal will consider whether such entry or expansion will be timely, likely, and sufficient (*P&H*, at paras 604–605; *Tervita CT*, at para 217).

[301] To be timely, the Tribunal typically uses a benchmark of approximately two years (see paragraph 166 above).

[302] To be likely, the entry or expansion must be “more likely than not” (*Tervita SCC*, at paras 65–66).

[303] To be sufficient, the scale of the entry or expansion must be such as to ensure that any lessening of competition is not substantial. That is to say, the extent of new entry or expansion must be enough to either (i) reverse any “material” price increase, or “material” reduction of non-price dimensions that has or will likely occur prior to the entry, or (ii) deter such material anti-competitive effects from happening in the first place (*Tervita CT*, at para 217).

[304] Secure maintains that producers are capable of sponsoring the entry of a new competitor or expanding the capabilities of an existing competitor in response to any price increase that might possibly be imposed by Secure. In support of this position, it noted that several of its witnesses supported this position, and that its own entry and expansion in the WCSB was made possible through the sponsorship of its customers. It further noted that [REDACTED]
[REDACTED].

[305] The Tribunal acknowledges that a number of Secure’s witnesses did indeed support Secure’s position on this point (Exhibit P-R-311/CB-R-312, Witness Statement of Mr. Hogue on behalf of IPC (“**IPC Witness Statement**”), at para 16; Exhibit P-R-313/CB-R-314, Witness Statement of Mr. Gee on behalf of Peyto (“**Peyto Witness Statement**”), at para 15; Exhibit P-R-318/CB-R-319, Witness Statement of Mr. Gray on behalf of Baytex (“**Baytex Witness Statement**”), at para 17; Exhibit P-R-320/CB-R-321, Witness Statement of Mr. Broen on behalf of Athabasca (“**Athabasca Witness Statement**”), at para 27).

[306] However, in the case of Messrs. Hogue and Gee, this was simply expressed as a possibility or an option. In the case of Mr. Broen, he merely stated that Athabasca has the ability to sponsor the entry of other competitors into waste disposal services. Mr. Broen did not state that Athabasca

would likely sponsor new entry in response to a 5%, 10% or any other particular level of price increase. In the case of Mr. Gray, he just expressed confidence that “[i]f the margins in the business rise high enough ... either a new entrant (sponsored by producers or not) will compete with SECURE, or existing competitors will expand their operations” (Baytex Witness Statement, at para 17). Mr. Gray did not explain what level of margins would be sufficient to attract the required level of investment.

[307] The Tribunal pauses to observe that Secure’s expert, Dr. Duplantis, specifically did not provide an opinion regarding barriers to entry in this proceeding (Transcript, Confidential B, at p 1938). However, she did list “pre-existing market power from barriers to entry” as one of the possible explanations for the margins in this industry (Transcript, Public, at pp 1799–1800).

[308] Secure’s position on the issue of entry and/or expansion is very different from the position it previously conveyed to the Bureau. Specifically, in a letter dated May 1, 2008, it stated:

[REDACTED]

As discussed below, Secure provided additional information in this regard in a response to a request for information made by the Bureau in connection with Tervita’s 2018 acquisition of Newalta (Secure’s 2018 RFI Response, at p 24).

[309] The positions taken by Secure in 2008 and 2018 are more consistent with the evidence in this proceeding than the position it is now taking.

(b) Landfills

[310] In 2018, Secure stated the following regarding the barriers to entry into the provision of Landfill services:

[REDACTED]

Secure’s 2018 RFI Response, at p 24.

[311] During discovery in this proceeding, Mr. Engel of Secure acknowledged that the foregoing remains true today (Exhibit P-A-680/CB-A-681, Commissioner's Read-Ins from Examination for Discovery ("**Commissioner Read-Ins**"), at pp 223–226).

[312] Various witnesses in this proceeding provided similar information.

[313] For example, Mr. Dziuba of Chevron characterized barriers to entry into the waste disposal business as being "high" and as imposing "significant financial and regulatory requirements [on] new entrants" (Chevron Witness Statement, at para 18). In this regard, he noted that "receiving the necessary permits to begin creation of a landfill can take between 24–36 months, even just finding a geologically suitable location can be very difficult, and initial estimates of the capital expenditures required to build a TRD/FST or landfill indicate that it would not be economically feasible" (Chevron Witness Statement, at para 25).

[314] Ms. McRae of ConocoPhillips added that the licensing process for its proposed Landfill at Surmont, Alberta cost approximately [REDACTED] and took approximately three years from inception to approval. ConocoPhillips estimates that initial construction will be a further [REDACTED], that the time required to complete the facility would be "at least two years," and that each subsequent landfill cell would require an additional [REDACTED] in capital investment. It added that if the proposed Landfill is built, it does not plan to offer waste disposal services to other producers (ConocoPhillips Witness Statement, at paras 21–22).

[315] Mr. Hart, who is responsible for landfill construction and operations at CNRL, stated that the timeline to build a landfill "can typically range from eighteen months (best case scenario) to four years from the initial decision to build ... [and] that the cost can exceed [REDACTED]" (CNRL Witness Statement, at para 25).

[316] Mr. DePauw of the OWA stated:

The OWA does not own any of its own landfills or TRDs, nor does it have plans to build any. The regulatory process to license and construct new landfills is difficult, expensive and time consuming. In my previous role at Penn West, we did consider the option of building our own landfill and TRD but made a similar decision not to pursue this option due to the capital requirements and lengthy regulatory requirements.

Exhibit P-A-030/CA-A-031/CB-A-032, Witness Statement of Mr. DePauw on behalf of OWA, at para 39.

[317] Ms. Carol Nelson, who is a Waste Management Specialist for the Ministry of Alberta Environment and Parks ("**AEP**"), generally corroborated much of the foregoing. In her witness statement, she observed the following:

- the geological requirements for a landfill application process "represent a significant limitation on where a landfill may be constructed";
- delays are "often" associated with landfill development applications;

- to the best of her knowledge, there is only one, not yet constructed, third party landfill that would accept oil and gas waste currently being contemplated in Alberta. That application was by RemedX (see the next paragraph below);
- the AEP expects to receive approximately one new proposed site every one to two years for a Class II Landfill and that even though the AEP is notified of a proposed site an application may not subsequently be filed; and
- closure of a typical Landfill will usually cost between \$3 million and \$8 million.

Exhibit CA-A-084/P-A-085, Witness Statement of Ms. Nelson on behalf of AEP, at paras 21–29.

[318] In addition, Mr. Flood for RemedX stated that RemedX “spent approximately \$6 million building the Breton Landfill, and the landfill construction process took approximately two years.” He added that this “development was quicker than the typical landfill development process because RemedX already owned its soil treatment facility at the same site [...] and there were few issues with surrounding landowners” (RemedX Witness Statement, at para 14).

[REDACTED] (RemedX Witness Statement, at para 17).

[319] In an internal presentation, Tervita estimated the initial investment to build a Landfill to be approximately [REDACTED]. It added that it can take up to [REDACTED] years before a new Landfill facility is operational, assuming a median level of regulatory complexity (Exhibit CB-A-798/P-A-799, Fort McMurray Slide Presentation dated February 19, 2019 (“**Fort McMurray Presentation**”), at p 20).

[320] Moreover, the Tribunal considers it appropriate to note that Secure has been trying to build a Landfill facility in Wonowon, British Columbia, since 2013. Secure also abandoned a proposed facility in Conklin, Alberta after spending several years attempting to move it forward (AFE Estimate, at rows 10–15; Commissioner Read-Ins, at pp 162–164 (Q 659), 179–181 (Q716–Q720)).

[321] Regarding the time and cost to build a Cavern, Secure told the Bureau the following in 2018, and confirmed during discoveries that it remains true today:

[REDACTED]

[REDACTED]

[REDACTED]

Secure's 2018 RFI Response, at p 24; Commissioner Read-Ins, at pp 237–239, 242–244.

[322] In summary, having regard to all of the evidence discussed above, the Tribunal finds that barriers to entry into the provision of Landfill services are high and that it would likely require well in excess of two years before a new facility becomes operational. This is consistent with what the Tribunal found in *Tervita CT*, where it concluded that “even in a remote location and even with concurrent permitting, it would take a new entrant at least 30 months to complete the process of selecting a new site, obtaining the required Authorizations and constructing a new Secure Landfill” (*Tervita CT*, at para 222).

(c) TRDs

[323] The evidence provided by Messrs. Dziuba and DePauw, discussed at paragraphs 313 and 316 above, was corroborated by Secure's internal documentation. In that documentation, Secure described the initial investment required to build a TRD to be in the range of [REDACTED], plus approximately [REDACTED] every year. During discoveries, Mr. Engel described this range as being “a bit high,” and added that “[i]n general ... [REDACTED] is probably a better estimate” (Commissioner Read-Ins, at pp 182–183 (Q726–Q730)).

[324] This is consistent with Tervita's internal estimate of the total cost to build a new TRD in Kakwa, Alberta, namely, [REDACTED] (Exhibit CB-A-250/P-A-251, Attachment to Exhibit CB-A-248 (“**Kakwa Overview**”), at p 2). Regarding the time required to get a new TRD approved and operational, Secure's evidence indicates that it can take 12 months to construct a facility and two to three years to bring it to full operation, in light of the high level of regulatory complexities (Fort McMurray Presentation, at p 18; Kakwa Overview, at p 2).

[325] Given the foregoing, the Tribunal concludes that barriers to entry into the TRD business in the WCSB are high, and that it would likely require well in excess of two years before a new facility becomes operational.

(d) SWDs

[326] In 2018, Secure provided the following information to the Bureau, which was confirmed by Mr. Engel during the discoveries pertaining to this proceeding:

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

Secure's 2018 RFI Response, at p 24; Commissioner Read-Ins, at p 221.

[327] The foregoing was generally corroborated by Mr. Kaminski, Executive Vice President at Catapult, who stated that the construction of water disposal facilities requires significant investment, public consultations, and market and sustainability assessments, and involves significant geological risks (Catapult Witness Statement, at paras 10–12). He added:

Production activities (such as the completion of a well) can create a significant surge in the amount of water produced, and during these times the water disposal requirements of producers peak, typically necessitating the use of third party disposal services.

Catapult Witness Statement, at para 14.

[328] The Tribunal acknowledges Mr. Gee's evidence that converting an existing well bore, which the Tribunal understood to mean a spent oil well, can significantly lower the costs associated with starting a new oil disposal well (Transcript, Public, at pp 1581–1583). However, there was little to no evidence of the existence of such existing spent or decommissioned wells in the Relevant Markets.

[329] In summary, the preponderance of the evidence in this proceeding establishes that there are meaningful impediments to entry into the Relevant Markets for the supply of SWD services. The Tribunal is not persuaded that new entry into, or expansion within those markets would likely be sufficient to ensure that the Merger will not likely lessen competition substantially.

(e) Conclusion on Barriers to Entry

[330] Given all of the foregoing, the Tribunal finds that there are significant barriers to entry into the Relevant Markets for supply of Landfill, TRD, and SWD services. The Tribunal also finds that new entry into, and expansion within, those markets is not likely to be sufficient to ensure that the Merger will not likely lessen competition substantially.

[331] In addition to the considerations discussed above, several witnesses testified that reputation is an important factor when considering where to bring their waste since producers retain the liability for their waste. As a result, they would not likely bring their waste to a new entrant that had not yet established a reputation, even if that new supplier of waste services were offering a lower cost for its services (see, for example, Transcript, Public, at pp 446–447 (Mr. McLean of Clean Harbors); Transcript, Confidential A, at pp 1535–1536 (Mr. Hogue of IPC); Transcript, Public, at p 1587 (Mr. Gee of Peyto); [REDACTED]; Transcript, Confidential A, at p 1678 (Mr. Broen of Athabasca); Chevron Witness Statement, at para 19; Witness Statement of Mr. McSween on behalf of DEL Canada, at para 8).

[332] Moreover, in areas where Secure would have a closed facility, the prospect of such new entry or expansion would be deterred by the recognition that such facility could be restarted relatively quickly, i.e., [REDACTED] (Transcript, Confidential B, at p 2155).

(6) Other Relevant Considerations (subsection 93(h))

(a) Countervailing Power

[333] Secure maintains that the Merger is not likely to result in an SLC because its customers are in a position to exercise countervailing power. In this regard, Secure identifies two separate sources of such power: geographic/product leverage, and self-supply.

(i) Geographic and product leverage

[334] In its Amended Response, Secure stated that nearly all of its revenues come from servicing producers who operate across multiple geographies and/or purchase multiple different types of waste services from Secure. Secure maintained that these customers have the ability to credibly threaten to punish Secure for any attempted price increases in a particular geographic area or in relation to a specific type of waste service, in one of two ways. The first is by switching their business to competitors in other geographic areas, where Secure faces greater competition. The second is by switching to competitors where Secure faces greater product competition. During the hearing of this application, Secure focused on the former of these two alleged sources of countervailing power.

[335] In support of its position on this issue, Secure underscored evidence provided by its witnesses. Specifically, Mr. Gee stated that if Secure attempted to raise prices in an area where Peyto had fewer choices for waste disposal, Peyto would threaten to punish Secure in other areas where it has more options (Peyto Witness Statement, at para 11). Mr. Hogue stated that IPC could do the same thing, although it typically does not resort to direct threats or actual punishment (IPC Witness Statement, at para 15). Mr. Broen, of Athabasca, made a similar statement in his witness statement (Athabasca Witness Statement, at para 26). However, none of those witnesses provided any examples of where this leverage had in fact been exercised to constrain the pricing behaviour of Secure or any other supplier of waste services.

[336] In response to questioning from the panel, Mr. Dziuba stated that Chevron is not able to exercise that leverage, essentially because it does not have alternatives in the areas where it operates (Transcript, Public, at p 341). Likewise, Mr. DePauw, on behalf of the OWA, which operates over an extended area of Alberta, categorically stated that “[t]here’s no way that we’d be able to leverage” OWA’s business in other areas (Transcript, Public, at p 518). He explained that “if there’s no competition and we need to landfill it, it’s only trucking and the tipping that comes into it” (Transcript, Public, at pp 517–518). He added that “if there’s no competition, you can’t negotiate” (Transcript, Public, at p 511). Mr. Lammens of PECL made essentially the same observation, albeit not specifically in relation to the issue of geographic leverage. He simply observed that “there isn’t a lot of competition, so there’s not many places for us to go with our waste” (Transcript, Confidential A, at p 577).

[337] Having regard to the foregoing, the Tribunal finds that customers are not likely to be able to rely on geographic leverage to prevent Secure from exercising materially greater market power than it was able to exercise prior to the Merger. That is to say, customers are not likely to be able to credibly threaten to switch sufficient volumes away from Secure in areas outside the Relevant

Markets, where they have more competitive alternatives, to prevent Secure from increasing prices for waste services or reducing service levels in the Relevant Markets.

(ii) *Self-supply*

[338] As a second source of countervailing power, Secure asserts that the majority of its customers are capable of internally self-supplying nearly all of the waste disposal services they require. In this regard, it notes that producers already internally dispose of the vast majority of their wastewater volumes, by repurposing spent oil wells. Secure maintains that producers' ability to resort to self-supply creates significant bargaining power and constrains Secure's pricing, not only for the disposal of produced water, but also for TRD and Landfill services.

[339] In support of Secure's position, Dr. Duplantis stated that [REDACTED] (Updated Duplantis Report, at para 75). However, Dr. Duplantis was unable to point to any specific instance where the threat of self-supply impacted Secure's actual pricing behaviour. [REDACTED]

[REDACTED]. She clarified that the threat of self-supply simply "could" lead to lower pricing (Transcript, Confidential B, at pp 1921, 1919–1931).

[340] Secure also pointed to three examples of where it lost business to self-supply. However, the preponderance of the evidence suggests that producers would not ordinarily consider insourcing their waste disposal service requirements in response to an increase in tipping fees in the range of only 5-10%. Among other things, this would be inconsistent with the trend toward greater outsourcing of waste disposal requirements in the oil and gas industry, which Secure expressly discusses in some of its public documentation (see, for example, Engel Witness Statement, Exhibit 5 (Secure's Annual Information Form for the Year Ended December 31, 2019, dated February 24, 2020, at p. 31) and Exhibit 6 (Secure's 2020 AIF, at p. 20)). Moreover, Secure's own evidence indicates that competition from self-supply is marginal. In this regard, Mr. Engel testified that Secure and Tervita lost "at least [REDACTED] million" in wastewater revenues to self-supply over the period 2016 to 2022 (Engel Witness Statement, at paras 38, 53). This amounts to less than [REDACTED] of the Merging Parties' combined revenues in this six-year period (Transcript, Confidential B, at pp 1901–1904).

[341] In 2018, in connection with Tervita's proposed acquisition of Newalta, Secure told the Bureau in response to a Request for Information that the option of self-supply [REDACTED]

[REDACTED] (Secure's 2018 RFI Response, at p 5).

[342] Other evidence supports that this is indeed the case for each of Landfill, TRD, and SWD services, essentially for the same reasons discussed in connection with barriers to entry, at Part XIII.C (5) above. In brief, these relate to financial cost and risk, time, and expertise.

[343] With respect to Landfill services, Mr. Taylor of Crew Energy stated as follows:

One of the other critical items when operating a landfill is the knowledge. So one of the key important things with landfill is understanding the rules, the regulations, and having the field operating experience and expertise as well as, I'll call it, office or above field experience and expertise. The capital cost itself is likely high, but I would be -- I would be hesitant to operate one as a small company like Crew Energy.

Transcript, Confidential A, at p 413.

[344] Mr. Taylor further stated that Crew Energy had not considered building a Landfill or Cavern because it is cost prohibitive to do so and outside Crew Energy's normal scope of work (Exhibit CA-A-022/CB-A-023/P-A-024, Mr. Taylor's Witness Statement on behalf of Crew Energy ("**Crew Energy Witness Statement**"), at para 18). Another witness, Mr. Lammens of PECL, stated that PECL does not produce sufficient volumes of solid oilfield waste to justify establishing its own licenced Landfill facility (PECL Witness Statement, at para 58).

[345] Turning to TRDs, Secure did not provide any examples of a producer in-sourcing TRD services in response to price increases imposed by a supplier of such services. Although Mr. Engel identified two producers (i.e., Baytex and Cenovus/Husky) who have approved "waste processing facilities in Alberta," it is not apparent that those facilities operate as full TRDs.⁴⁵ Moreover, Baytex is only identified on one of the maps of the Relevant Markets that were provided by Secure (market #53 – water disposal), and Cenovus/Husky is not mentioned at all.

[346] Even CNRL, a First Party Supplier, does not have the capability to in-source the full range of services provided by Secure and others who offer TRD services (Transcript, Confidential B, at p 659).

[347] Regarding water disposal services, the evidence demonstrates that even producers who have their own internal disposal facilities generally need to resort to third party waste service providers at certain periods when they have "surges" of produced water (Catapult Witness Statement, at paras 13–15; Chevron Witness Statement, at para 26; ConocoPhillips Witness Statement, at para 25; CNRL Witness Statement, at paras 36–37; Transcript, Public, at pp 1581–1583).

[348] In this regard, Mr. Lammens of PECL stated that it would not be practical to create internal storage for such periodic surges (Transcript, Confidential A, at p 573).

[349] Ms. McRae added that ConocoPhillips is only able to internally dispose of at most "a week or two" worth of volume (Transcript, Confidential A, at pp 553–554).

[350] Based on all of the foregoing, the Tribunal finds that the threat of self-supply is very limited and is not likely to prevent Secure from exercising the increased market power that it will have to materially raise the price of waste services, as a result of the Merger. The evidence is that even for a large customer such as CNRL, the threat of self-supply has not actually led Secure to modify its pricing behaviour.

⁴⁵ It appears that these facilities are only licensed for internal use, and therefore are not made available to third parties.

[351]

(b) Price Discrimination

[352] The “ability to price discriminate is evidence of market power” (*Tele-Direct*, at para 297; *P&H*, at para 495).

[353] As discussed at paragraph 135 above, Dr. Miller defined the geographic markets in this case based on customer locations. This was because that approach better captures the competitive effects of a merger when sellers can effectively price discriminate among buyers.

[354] As noted at paragraph 145 above, Dr. Duplantis described the approaches to product and geographic markets as being “key areas of agreement” between her and Dr. Miller. During the hearing, Dr. Duplantis acknowledged the evidence of price discrimination based on distance, [REDACTED] (Transcript, Confidential B, at pp 2125, 2129).

[REDACTED] (Transcript, Confidential B, at pp 1856, 1870–1876).

[REDACTED] (Transcript, Confidential B, at p 1873). Dr. Duplantis’ principal disagreement with Dr. Miller was with respect to Dr. Miller’s assumption that Secure is able to price discriminate on every dimension that a customer may be concerned about. Based on her review, the price discrimination was “mostly distance” and she had not seen evidence of price discrimination on other dimensions (Transcript, Confidential B, at p 1876).

[355]

[356] During closing submissions, Secure agreed that “there is certainly some evidence of price discrimination,” yet hesitated to qualify it as being “widespread” on the basis that it is a relative term (Transcript, Public, at p 3215). However, it was quite prepared to agree that prices in the waste services industry tend to be negotiated (Transcript, Public, at p 3216).

[357] The Tribunal considers that the evidentiary record in this case demonstrates that Secure has the ability to price discriminate based on the distance between its facilities and its customers’ locations, and that it exercises that ability when it is in its interest to do so.

(7) Conclusion Regarding SLC

[358] Based on its review of the foregoing considerations, individually and cumulatively, the Tribunal concludes that the Merger has substantially lessened competition, and is likely to continue to substantially lessen competition for the foreseeable future, in 136 of the 143 Relevant Markets. Those 136 markets (“**SLC Markets**”) are identified in Appendix 3 to these reasons.

[359] In summary, post-Merger market shares in the Relevant Markets are very high — by definition, at least 90% in the “2-to-1” markets, and an average of 73% in the “3-to-2” markets and 46% in the “4-to-3+” markets.

[360] In addition, Dr. Miller has demonstrated, with clear and convincing evidence, that the Merger is likely to result in price increases of at least 5% for the waste disposal services offered in the SLC Markets. Indeed, the Tribunal accepts Dr. Miller’s evidence that the price increases resulting from the Merger are likely to be substantially higher than 5% in a large number of the SLC Markets.

[361] The Tribunal also finds that the Merger eliminated Secure’s closest competitor in each of the 143 Relevant Markets. That competitor, Tervita, provided vigorous price and non-price competition to Secure prior to the Merger. The Tribunal is satisfied that, in the absence of the Merger, Tervita and Secure would have continued to vigorously compete in the Relevant Markets for the foreseeable future. Although Tervita reported small losses at a corporate level during the period 2018–2020, its TRD, SWD, and Landfill operations were consistently profitable during the years leading up to the Merger (Transcript, Public, at pp 1124–1125). There is no evidence to indicate that Tervita would have ceased being a vigorous and effective competitor, but for the Merger. Secure did not suggest otherwise.

[362] In addition, the Tribunal finds that no acceptable substitutes are available in the Relevant Markets, and that there are significant barriers to entry and expansion into the Relevant Markets for the supply of Landfill, TRD, and SWD services. For greater certainty, the Tribunal is satisfied that expansion and/or new entry is not likely to occur on a sufficient scale within at least two years to eliminate the material price increases that it finds are likely to result from the Merger. The same is true with respect to the reduction of service and other non-price dimensions of competition that the Tribunal is satisfied will occur as a result of the Merger. Once again, that reduction is unlikely to be reversed by the expansion of existing competitors or the entry of new competitors.

[363] Moreover, the Tribunal concludes that effective competition does not remain in the 136 SLC Markets, and that this situation is unlikely to change for the foreseeable future.

[364] Secure’s ability to impose material price increases in the SLC Markets will be facilitated by its ability to engage in price discrimination, and to set prices based on its knowledge of customers’ locations and their nearest alternative sources of supply of TRD, SWD, and Landfill services. Contrary to Secure’s position, that ability, together with its ability to reduce service levels and other non-price dimensions of competition, will not be materially constrained by any countervailing customer power.

[365] The foregoing conclusion is reinforced by Dr. Miller’s uncontested evidence of high Relevant Diversion Ratios and profit margins in the SLC Markets.

[366] In sum, the Tribunal finds that, in the 136 SLC Markets, the anti-competitive effects resulting or likely to result from the Merger have the required magnitude in terms of price increases and reduction of non-price competition for waste disposal services. The Tribunal also finds that Secure will have the ability to impose such effects in a material part of the Relevant Markets and in respect of a material volume of sales, and that it will have the ability to sustain material price increases and material reductions in non-price benefits of competition for a duration of approximately two years or more.

[367] With respect to the seven Relevant Markets that are not SLC Markets, the Tribunal concludes that the Merger has not resulted in an SLC, and is unlikely to do so in the foreseeable future. For those markets — namely, markets #123, 126, 203, 204, 205, 255, and 259 — the Tribunal is not persuaded that the Commissioner has discharged his burden under section 92. Among other things, the Tribunal finds that the competition remaining is likely to be sufficiently effective in those Markets to ensure that Secure will not be able to exercise materially greater market power than it was able to exercise prior to the Merger. The Tribunal further notes that, in those markets, the Relevant Diversion Ratios are generally lower (revolving around 30%), the predicted price increases are more modest (with one exception, they are below 7%) and the market shares are lower (varying between 46% and 52%), than they are in relation to the SLC Markets.

XIV. ISSUE #2 – WHAT IS THE APPROPRIATE REMEDY?

A. Introduction

[368] Having concluded that the Merger is likely to substantially lessen competition in the 136 SLC Markets, the next issue to be determined is the appropriate remedy.

[369] In the Amended Application, the Commissioner requested that Secure be required to “dispose of such assets of [Secure] as are required for an effective remedy in all of the circumstances as a result of [the Merger].” As explained at paragraph 39 above, the Commissioner eventually identified 41 facilities that he requested be divested. That list consists of 26 TRDs, five SWDs, eight Landfills, and two Caverns.

[370] The Commissioner bears the burden of demonstrating that those 41 requested divestitures are necessary “to restore competition to the point at which it can no longer be said to be substantially less than it was before the merger,” as he maintains (*Canada (Director of Investigation and Research) v Southam Inc.*, [1997] 1 SCR 748 (“**Southam SCC**”), at paras 85, 89). In this regard, the Commissioner relies on the following well-established principle: “If the choice is between a remedy that goes farther than is strictly necessary to restore competition to an acceptable level and a remedy that does not go far enough even to reach the acceptable level, then surely the former must be preferred. At the very least, a remedy must be effective” (*Southam SCC*, at para 89).

[371] Pursuant to subparagraph 92(1)(e)(ii) of the Act, the Tribunal may, subject to sections 94 to 96, order any party to a completed merger or any other person to dispose of assets or shares designated by the Tribunal in such a manner as the Tribunal directs.

B. Secure's Request for a Separate Hearing on Remedies

[372] Before addressing Secure's substantive position regarding the requested divestitures, the Tribunal will discuss Secure's request for a separate hearing on remedies. Specifically, Secure requested that it be permitted to make submissions regarding the requested divestitures, if and when the Tribunal concludes that the Merger is likely to result in an SLC. Secure maintained that this is, at least in part, an issue of procedural fairness. In this regard, Secure asserted that because the Commissioner did not identify the specific divestitures he was seeking until the eve of the hearing, Secure did not have the opportunity to lead expert evidence as to whether those divestitures meet the legal test described above.

[373] The Tribunal does not accept that Secure was prejudiced in the manner it has described. The Tribunal also disagrees with Secure's position that its procedural fairness rights would be attenuated if it was not provided with an opportunity to make submissions regarding the Commissioner's requested remedy – if and when the Tribunal decides that the Merger is likely to result in an SLC.

[374] On May 5, 2022, shortly after the Commissioner identified the specific divestitures he is seeking and before the commencement of the hearing, the Tribunal asked the Parties whether they would prefer an adjournment, so that they could have more time to consider and address the divestitures that the Commissioner identified. They both declined (Transcript, Public, at pp 3445–3446). Secure then had until June 10, 2022, the day its written closing submissions were due, to make whatever points it wished to make regarding the requested divestitures. Indeed, it had until June 16, 2022, when its oral submissions commenced, to do so. However, it failed to avail itself of those opportunities. The Tribunal further notes that, much earlier in this proceeding, Secure could have sought particulars regarding the disposition of assets that the Commissioner asked as a remedy in his Amended Application.

[375] Consequently, the Tribunal does not accept Secure's arguments that it will be prejudiced, and will be deprived of its procedural fairness rights, if it is not provided with an opportunity to make submissions regarding the proposed divestitures now that the Tribunal has concluded that the Merger will likely result in an SLC in 136 markets.

[376] The Tribunal pauses to observe that Dr. Duplantis acknowledged that the average price effects in the "2-to-1" markets would be approximately 11%, and that the average price effects in the "3-to-2" markets would be approximately 9.8%. In making that acknowledgement, Dr. Duplantis effectively acknowledged that the Merger would likely result in an SLC in respect of 47 of the 143 Relevant Markets. Secure did not distance itself from that acknowledgement. As to the remaining 96 Relevant Markets, Secure has known that Dr. Miller was alleging a likely price increase of 5% or more in those markets since it obtained Agreed Book Document 8966, which became the Miller Spreadsheet.

[377] In support of its position, Secure noted that the respondents in two past proceedings were given an opportunity to make submissions regarding remedies (*Canada (Director of Investigation and Research) v Southam Inc*, 1992 CarswellNat 637 ("**Southam FC**"), at para 482; *Canada (Commissioner of Competition) v Canadian Waste Services Holdings Inc*, 2001 Comp Trib 3 ("**Canadian Waste**"), at para 236). However, in the former of those cases, both parties requested

a separate hearing on remedies. In addition, the Tribunal noted that it would be a challenge to identify an effective remedy given that it found in favour of the applicant (the Director of Investigation and Research — the former title of the Commissioner) in respect of only a very small part of the case. Regarding *Canadian Waste*, it is not clear why the Tribunal ordered a separate hearing on remedies.

[378] In any event, the public interest in a timely remedy, and considerations of judicial economy, will often mitigate in favour of dealing with substantive issues and the question of remedy in a single hearing. In the absence of persuasive grounds relating to matters such as a *bona fide* procedural fairness issue, hardship or the excessive or disproportionate nature of an alleged remedy, the Tribunal may not be receptive to a request to bifurcate the hearing in the manner that Secure has suggested.

[379] This is particularly so in cases where the efficiencies defence has been raised. In such cases, the position being advanced by Secure would result in the proceeding being trifurcated, at least under the order driven approach to section 96 that has been taken in the past (*Tervita CT*, at para 264; *The Commissioner of Competition v Superior Propane Inc*, 2002 Comp Trib 16 (“*Superior Propane III*”), at paras 147–149). This is because the trade-off assessment can only be undertaken once it is known which efficiencies “would not likely be attained if the order were made,” as contemplated by subsection 96(1). To make that determination, it is necessary to know the specifics of the remedial order in question.

[380] Notwithstanding the foregoing, the Tribunal is sympathetic to the situation in which Secure found itself in this proceeding. That is why the Tribunal suggested the possibility of adjourning the hearing, to provide Secure additional time to consider and address the divestitures that the Commissioner identified for the first time on the eve of the hearing. The Tribunal understands that Secure may have considered this possibility to be more problematic than having less time than it would have liked for this purpose. In the Tribunal’s view, the better way in which to avoid this problem in the future is for the Commissioner to provide “the particulars of the order sought” in his notice of application, as expressly required by Rule 36(2)(e). In the future, failure to do so may lead to harsh consequences.

C. Secure’s Substantive Arguments and the Tribunal’s Assessment

[381] Secure states that the Commissioner bears an onus to show that the requested divestitures are “minimally impairing,” in the sense that they would go no further than restoring competition to the point at which it can no longer be said to be substantially less than it was before the Merger (Transcript, Confidential B, at pp 3433–3434). Secure maintains that this flows from the SCC’s teaching that “[...] the appropriate remedy for a substantial lessening of competition is to restore competition to the point at which it can no longer be said to be substantially less than it was before the merger” (*Southam SCC*, at para 85).

[382] The Tribunal does not interpret *Southam* as imposing any such onus on the Commissioner. Rather, the passage quoted immediately above formed part of the SCC’s response to the respondent’s position that “the test of a remedy is whether it restores the parties to the pre-merger competitive situation” (*Southam SCC*, at para 84). That suggested test was rejected in favour of the one quoted in the immediately preceding paragraph above.

[383] Although Parliament considered it appropriate to include a “minimal impairment” limitation in the abuse of dominance provisions of the Act,⁴⁶ no such wording appears in the merger provisions of the Act. This implies that Parliament did not wish to impose this type of limitation on the Tribunal’s order-making powers in respect of mergers (*Canada v Loblaw Financial Holdings Inc*, 2021 SCC 51, at para 59; *Mohr v National Hockey League*, 2022 FCA 145 (“*Mohr*”), at para 22).

[384] Instead, Parliament gave the Tribunal the unfettered discretion to order that assets or shares it may designate be disposed of in such a manner as it may direct. In exercising that discretion, when considering one or more divestitures requested by the Commissioner, the Tribunal will follow the SCC’s above-mentioned teaching as well as its corollary teachings that the remedy must be effective, and that if there is a choice between a remedy that “goes farther than is strictly necessary to restore competition to an acceptable level and a remedy that does not go far enough even to reach the acceptable level, then surely the former must be preferred” (*Southam SCC*, at para 89).

[385] The Tribunal acknowledges that where it is presented with two or more alternative effective remedies, one of which goes further than “restor[ing] competition to the point at which it can no longer be said to be substantially less than it was before the merger,” *Southam SCC* requires that the Tribunal select the remedy that does not overshoot the mark in this manner. The Tribunal implicitly embraced this principle in *Tervita CT*, at paragraphs 333, 338, and 341.

[386] Secure also maintains that, in seeking 41 divestitures, the Commissioner is looking to restore competition to what it was before the Merger, rather than simply ensuring that any lessening of competition is not “substantial.” In other words, Secure asserted that the Commissioner was trying to “recreate Tervita.”

[387] The Tribunal finds that there is some merit in this position, despite the fact that the Commissioner is not seeking the divestiture of approximately 30 other facilities formerly owned by Tervita. This is because, during the hearing, counsel to the Commissioner explained that for each of the SLC Markets, the Commissioner is seeking the divestiture of all of the Tervita facilities that had sales into that market (Transcript, Confidential B, at pp 3125–3126). Counsel further explained that this approach was adopted because “[t]here’s such an intense concentration of Secure and Tervita facilities with overlapping markets all over the place that you can’t easily extract and figure out that list because of the nature of overlaps of those facilities” (Transcript, Confidential B, at p 3127).

[388] The Tribunal agrees with Secure’s position that this aspect of the Commissioner’s approach to the divestitures is flawed. The difficulty that may be associated with identifying an effective remedy that will simply restore competition to the point at which the alleged lessening will no longer be “substantial” does not justify a simpler approach that would fully restore competition to what it was before. If it is reasonably possible to identify a remedy that achieves the former objective without having to resort to the latter approach, this is what should be done.

⁴⁶ See subsection 79(3) of the Act (“[...] only to the extent necessary to achieve the purpose of the order.”).

[389] With the assistance of the maps provided by Secure and the evidence upon which they were based, the Tribunal was able to identify a package of divestitures that will meet the applicable test, without including additional facilities that are not necessary for that purpose. That is to say, the Tribunal was able to identify a package of divestitures that, in its view, would restore competition to the point at which the SLC that it has found will no longer likely be “substantial.” Where a facility was not required for this purpose, it was not included in the package.

[390] In the course of performing this exercise, the Tribunal recognized that, for several SLC Markets, the Commissioner was seeking two or more divestitures even where Secure only had one facility in the market in question prior to the Merger. For some of those SLC Markets, the Tribunal considered the number of facilities as well as their relative size in terms of capacity and revenues (to the extent this evidence was available), to determine whether a single divestiture would suffice to restore competition to the point described immediately above. The Tribunal also considered whether the divestiture of any additional facilities would likely place the divestiture buyer in a stronger position than Secure was in, within the Relevant Market, pre-Merger. The Tribunal generally seeks to avoid this outcome, provided that an effective remedy could otherwise be achieved.

[391] The Tribunal pauses to underscore that its task in this respect was rendered much more difficult because, for each Relevant Market, information on the extent of revenues generated by each Secure and Tervita facility was generally not available. The Commissioner only provided the total revenues generated by all Secure and Tervita facilities offering waste services to customers located in each market, without a breakdown detailing the revenues by facility. Such information would have been helpful to assist the Tribunal in conducting its assessment.

[392] Secure also submits that there is a “disconnect” between the anti-competitive effects alleged by the Commissioner and the divestitures that he is seeking (Transcript, Public, at p 3454). In this regard, Secure observes that the Non-Price Effects relating to the Closing Facilities account for the vast majority of the DWL that has been identified by the Commissioner. Yet, the requested divestitures are all directed toward markets in which he is alleging Price/Output Effects. Secure adds that the list of requested divestitures did not change even after the Commissioner recognized that fewer facilities were closing than Dr. Miller thought.

[393] The Tribunal recognizes that the Commissioner has not sought relief to address the DWL that he has alleged in relation to the Non-Price Effects, and that those effects account for the majority of the overall DWL he has estimated. However, that does not preclude the Commissioner from seeking divestitures to address the Price/Output Effects he has alleged. As it turns out, many of those divestitures are of facilities that have been fully or partially closed, or are planned to be fully or partially closed. To the extent that the Tribunal has determined that any of those facilities should be divested, the facility closure effects (or Non-Price Effects) associated with those facilities would be indirectly addressed.

[394] Moreover, the purpose of the remedies contemplated by section 92 of the Act is to address the SLC that has been alleged, and not to address the alleged DWL. Often, this will be a distinction without any practical difference, but it is an important principle to keep in mind.

[395] Secure further maintains that the Commissioner’s requested divestitures were selected on the basis of the arbitrary market share and price increase thresholds (35% market share / 5% price increase).⁴⁷ Secure insists that the Commissioner has not done any further analysis for each of the Relevant Markets to permit the Tribunal to satisfy itself that the requested divestitures address the SLC that has been alleged in those markets.⁴⁸

[396] This shortcoming in the Commissioner’s approach is not fatal. Ultimately, the Tribunal was able to satisfy itself, after reviewing all of the factors and evidence described in Part XIII.C above, that the Merger has resulted in an SLC in 136 of the Relevant Markets. In the course of reaching that conclusion, the Tribunal further determined that the Merger has not had this result — and is not likely to have that result — in the remaining seven Relevant Markets.

[397] Finally, Secure submits that the Tribunal has no jurisdiction to grant some of the relief sought by the Commissioner. Specifically, Secure submits that the Tribunal has no jurisdiction to require Secure to provide the Commissioner with at least 30 days advance written notice of any future proposed merger involving Secure, for a period of five years, where the proposed merger would not otherwise be subject to notification pursuant to Part IX of the Act.

[398] The Tribunal agrees. It is now well established that, in the absence of consent, the Tribunal is limited to two types of orders in respect of a completed merger: (i) dissolution of the merger in such manner as the Tribunal directs, and (ii) divestiture of assets or shares in such manner as the Tribunal directs (paragraph 92(1)(e) of the Act; *Canada (Director of Investigation and Research) v Air Canada* (1993), 49 CPR (3d) 417 (FCA), at 430; *Canadian Waste*, at paras 50, 101).

D. The Required Divestitures

(1) Introduction

[399] A list and brief description of each of the 143 Relevant Markets is provided in Appendix 2 to these reasons. The seven highlighted and italicized markets on the list are those in respect of which the Tribunal has concluded that the Merger is not likely to lessen competition. The divestitures discussed below are in relation to the remaining 136 markets on the list, namely, the SLC Markets.

[400] The following table provides an overview of the SLC Markets:

⁴⁷ See paragraphs 36 and 148 above.

⁴⁸ During the hearing, the Tribunal repeatedly mentioned the importance of being provided with the evidence required to conduct its assessment at the level of each Relevant Market (see, for example, Transcript, Confidential B, at pp 1257, 1396–1398, 1401–1402, 1408–1409, 1490, 1498–1501; Transcript, Public, at pp 1622, 1629, 1632). Secure acknowledged that it too had to make its case with respect to the issues that it was advancing, such as self-supply and countervailing power (Transcript, Confidential B, at p 1495). After noting that the Commissioner had made a “fair point” when he noted that any given facility might affect a large number of markets, counsel to Secure expressed confidence that “we’ll figure it out” (Transcript, Confidential B, at pp 1493–1494, 1496). That is what the Tribunal has done.

Table 7 – SLC Markets by structure

Market structure	Landfills	TRDs	SWDs (& TRDs)	Total
2-to-1	0	14	3	17
3-to-2	2	16	12	30
4-to-3+	5	32	52	89
Total	7	62	67	136

(2) Landfills**(a) Introduction**

[401] Seven of the SLC Markets are Landfill markets. They can be summarized as follows:

Table 8 – Landfill SLC Markets

Market structure	Markets	Total
2-to-1		0
3-to-2	22, 23	2
4-to-3+	62, 63, 78, 79, and 80	5
Total		7

[402] The Commissioner seeks the divestiture of a total of eight Landfills formerly owned by Tervita, namely, Elk Point, Fox Creek, La Glace, Marshall, Silverberry, South Wapiti, Spirit River, and Willesden Green.

[403] The Tribunal has concluded that the divestiture of only six of those Landfills would be required to restore competition in the above-noted SLC Markets to the point at which it will no longer be lessened substantially. The Landfills that the Tribunal considers need not be divested are Fox Creek and Marshall.

(b) Elk Point and Marshall Landfills

[404] The divestiture of the Elk Point Landfill would be required to address the SLC in market #79. The Commissioner also seeks the divestiture of the Marshall Landfill, apparently to address that same market.⁴⁹ However, the Tribunal considers that the divestiture of the former of those two facilities would be sufficient to restore competition in market #79 to the point at which it would no longer be lessened substantially.⁵⁰ The Tribunal observes that this single divestiture would also

⁴⁹ Although the Commissioner is also seeking the divestiture of the nearby Lindbergh Caverns, which is discussed further below, there is no evidence that this facility had any revenues in market #79.

⁵⁰ Note that the Commissioner is not seeking the divestiture of the Bonnyville Landfill that is also in the region. [REDACTED]

re-establish the competitive environment that existed prior to the Merger, in the sense that there would be (i) one firm (now Secure) with multiple facilities, (ii) one firm (now a divestiture buyer) with a facility that provided the principal competition to Secure's Tulliby Lake facility, (iii) the Ridgeline Landfill, and (iv) CNRL's Manatokan Landfill.

(c) Fox Creek Landfill

[405] The Tribunal disagrees with the Commissioner's position that the Fox Creek Landfill ought to be divested. In brief, the markets he identified as being served by that facility do not include any of the 143 Relevant Markets. Stated differently, the only two markets that the Commissioner identified as being served by that facility are markets #21 and 64, in respect of which Dr. Miller estimated negative price increases. For the reasons previously discussed, the Tribunal does not consider it appropriate to grant remedies in respect of such markets.⁵¹

(d) La Glace, South Wapiti and Spirit River Landfills

[406] The divestiture of these Landfills would be sufficient to restore competition to the point described above in markets #22, 23, and 78. Prior to the Merger, customers in these three markets were serviced primarily by one or more of three Tervita Landfills (La Glace, South Wapiti, and Spirit River) and two Secure Landfills (Saddle Hills and South Grande Prairie). [REDACTED] (Updated Harington Report, at para 157).

[407] The Commissioner requested that all three of these Tervita Landfills be divested. However, the Tribunal considers that the divestiture of the Spirit River Landfill, which has the smallest revenues of the three, would not be necessary to ensure that the lessening brought about by the Merger in markets #22, 23, and 78 would no longer be substantial. The La Glace and South Wapiti Landfills are closer to the substantial majority of the customers in these markets than is the Spirit River facility. They are also better positioned than the latter facility for the longer term, [REDACTED] (Updated Harington Report, at para 157). In addition, it does not appear that the divestiture of only the La Glace and South Wapiti Landfills would result in any customers having to travel farther to reach those facilities than they had to travel to reach the closest Secure Landfill, prior to the Merger. In other words, the divestiture of only the La Glace and South Wapiti facilities would effectively restore the competitive environment that existed prior to the Merger. One firm would have three facilities, and there would be two other facilities situated no farther away than were the two facilities that provided competition to the entity with three Landfills.

[408] Little turns on the foregoing analysis as it relates to the Spirit River Landfill, because that facility would need to be divested to address the likely SLC that the Tribunal has found in market #62. This is because that facility appears to be the main, if not the only, Tervita facility that was servicing customers in market #62 prior to the Merger. Those customers are located to the west and northwest of Secure's Saddle Hills facility, and east/northeast of Dawson Creek. The evidence summarized at pages 146–148 of Appendix B to the Commissioner's closing submissions makes it readily apparent that competition in this market was essentially between the Spirit River and the Saddle Hills facilities. The Tribunal recognizes that the Spirit River Landfill is projected to become

⁵¹ See paragraphs 215 and 250–251 above.

full in approximately 2025. However, it considers that a divestiture of that Landfill is required to ensure that competition is not substantially lessened in the intervening period.

[409] The Tribunal pauses to observe that the maps provided by Secure suggest that Tervita's Silverberry Landfill is within the draw area of this market. The Tribunal disagrees. Based on the evidence on the record, that facility is situated much farther away from customers than is the Spirit River facility. Accordingly, the Spirit River Landfill is the appropriate Landfill to be divested in this market. For greater certainty, the Spirit River Landfill is also much closer to most customers in this market than is the La Glace Landfill. This may explain why the latter facility does not appear to have received any revenues from market #62.

(e) Silverberry Landfill

[410] Notwithstanding the foregoing, the Tribunal agrees with the Commissioner that the Silverberry Landfill should be divested to address the SLC in market #63. That facility appears to have been the only Tervita Landfill that had material revenues in this market prior to the Merger. It also was the principal competitor to Secure's Saddle Hills facility. Customers in this market are located close to the highway between those two facilities, and very far from the Peejay (CNRL) Landfill and the Grande Prairie Clairemont (municipal) landfill.

(f) Willesden Green Landfill

[411] The Tribunal also agrees with the Commissioner that the Willesden Green Landfill would be the appropriate facility to divest to address the SLC in market #80. That Landfill is located virtually beside Secure's Willy Green Landfill, and appears to have been the only Tervita facility to have had material revenues from in this market. There are no other nearby facilities that were formerly owned by Tervita.

(g) Conclusion on Landfill Divestitures

[412] In summary, the Tribunal concludes that the divestitures of the Elk Point, La Glace, Silverberry, South Wapiti, Spirit River, and Willesden Green Landfill facilities that were formerly owned by Tervita would be sufficient to address the likely SLC that it has found in the Relevant Markets that pertain to Landfill services. In reaching this conclusion, the Tribunal has determined that it would not be appropriate to order the divestiture of the two additional Landfills sought by the Commissioner – namely, the Fox Creek and Marshall Landfill facilities, formerly owned by Tervita. The Tribunal's conclusions regarding Landfill divestitures are summarized in the following table:

Table 9 – Summary of the Tribunal’s conclusions regarding Landfill divestitures⁵²

Landfill	Main SLC Markets addressed	Finding
Elk Point	79	Divestiture required
La Glace	22, 23, 78	Divestiture required
Silverberry	63	Divestiture required
South Wapiti	22, 23, 78	Divestiture required
Spirit River	62	Divestiture required
Willesden Green	80	Divestiture required
~~Fox Creek~~		No divestiture required
~~Marshall~~		No divestiture required

(3) TRDs**(a) Introduction**

[413] 62 of the SLC Markets are TRD markets. They can be summarized as follows:

Table 10 – TRD SLC Markets

Market structure	Markets	Total
2-to-1	2, 3, 4, 5, 6, 7, 8, 10, 12, 13, 14, 15, 16, and 17	14
3-to-2	25, 26, 27, 28, 29, 30, 31, 32, 35, 36, 37, 38, 41, 42, 45, and 46	16
4-to-3+	86, 88, 90, 91, 92, 93, 94, 95, 96, 98, 99, 101, 102, 104, 105, 106, 107, 108, 111, 116, 117, 119, 121, 124, 127, 128, 129, 130, 132, 134, 136, and 138	32
Total		62

⁵² A summary of divestitures by market is provided in Appendix 3 to these reasons.

[414] The Commissioner seeks the divestiture of a total of 26 TRDs and two Caverns in relation to these 62 markets.⁵³ These were all formerly owned by Tervita and will be discussed below. A summary is provided at Table 11 below.

[415] In brief, the Tribunal has concluded that the divestiture of only 17 of these 26 TRDs (plus the Lindbergh and Unity Caverns) would be required to restore competition in the above-noted SLC Markets to the point at which it will no longer be lessened substantially.

(b) Boundary Lake, South Taylor, and Gordondale TRDs

[416] The Tribunal considers that it would be appropriate to require the divestiture of the South Taylor and Gordondale TRDs, but not the Boundary Lake TRD.

[417] The TRD SLC markets serviced by these three facilities are markets #28, 41, 104, 105, 106, 107, 108, and 132.

[418] Of those, the Boundary Lake facility services markets #41, 104, 105, 106, 107, and 108. However, customers in those markets are also served by one or both of the South Taylor and Gordondale TRDs. The Tribunal has concluded that the divestiture of the latter two TRDs would suffice to restore competition in the above-noted SLC Markets to the point at which the lessening that it has identified would no longer be substantial. This is so despite the fact that the Commissioner has identified the Boundary Lake TRD as being the closest former Tervita TRD to the customers in markets #41 and 105. For customers in each of those markets, the additional distance to the South Taylor or Gordondale TRD is not particularly significant. In markets #104, 106, 107, and 108, customers are situated closer to one or both of the latter TRDs than they are to the Boundary Lake facility.

[419] A further relevant consideration in relation to the Boundary Lake TRD is that, prior to the Merger, the six above-mentioned markets served by this facility appear to have been served by only one Secure TRD. The Tribunal considers that for customers in those markets, the competitive environment that existed prior to the Merger will be restored to the requisite standard through the divestitures of the South Taylor and Gordondale TRDs. Accordingly, a third divestiture would not be appropriate. For greater certainty, the divestiture of two, rather than one, TRDs in this region is required because of the particular geographic distribution of customers in the six markets mentioned above, as well as in other nearby SLC Markets. In the absence of one of those two divestitures, Secure would be in a position to significantly increase prices to some customers.

[420] The divestiture of the South Taylor TRD is necessary to eliminate this increased market power that Secure obtained through the Merger, for all or most customers in market #107, as well as for some customers in markets #108 and 105. The same is true for the Gordondale TRD in respect of markets #28, 41, 104, 105, 106, 108, and 132.

⁵³ As previously indicated, the Tribunal is confining its analysis to the 143 Relevant Markets in which an SLC has been alleged. As discussed further below, the divestiture of some of these TRD facilities would also address the SLC that the Tribunal has found in certain markets for the supply of SWD services.

(c) Brazeau TRD

[421] The Tribunal considers that the divestiture of this facility would be required to restore competition to the requisite standard in the principal TRD SLC Markets served by this facility, namely, markets #36, 99, 101, 111, 117, and 136. For many or all customers in each of those markets, this facility is the closest TRD formerly owned by Tervita, and by a considerable margin. If this facility were not divested, Secure would be in a position to significantly raise prices to those customers.

(d) Buck Creek TRD

[422] The principal TRD SLC Market served by this facility is market #124. This TRD is in the heart of that large market, where it is situated in very close proximity to Secure's Drayton Valley TRD. The Tribunal finds that the divestiture of the Buck Creek TRD would be necessary to address the SLC that it has found in this market. Such divestiture would also address the SLC in part of market #102.

(e) Kindersley TRD,⁵⁴ Coronation TRD, Gull Lake TRD, and Unity Caverns

[423] There is much overlap in the TRD SLC Markets serviced by these facilities, namely, markets #2, 14, and 17.

[424] The Tribunal finds that the divestiture of the Kindersley TRD and Unity Caverns would be sufficient to address the SLC brought about by the Merger in those markets. It would not be necessary or appropriate to require the additional divestitures of the Coronation or Gull Lake TRDs for that purpose.

[425] Prior to the Merger, Tervita was the only competitor to Secure in markets #2, 14, and 17. One of either the Kindersley TRD or Unity Caverns is the closest former Tervita facility to customers in market #2, as well as to most, if not all customers in market #17. The same is true for many customers in market #14.

[426] In each of these three markets, Secure competed with Tervita from a single facility that is also located at Kindersley. Accordingly, the divestiture of the former Tervita Kindersley facility would fully restore the competitive environment that existed prior to the Merger for most or many customers. Going forward, Secure and the divestiture buyer would be competing for those customers from essentially the same general location in Kindersley. The same would be true for most of the remaining customers, for whom Unity Caverns was their closest Tervita facility. With this in mind, the Tribunal considers that it would neither be necessary nor appropriate to order the divestiture of the Gull Lake TRD (which has sales into market #17) or the Coronation TRD (which has sales into markets #2 and 14).

⁵⁴ The Kindersley TRD formerly owned by Tervita consists of two facilities — namely, Kindersley East and Kindersley West, which are located in close proximity to each other.

[427] The Tribunal notes for the record that the divestiture of Unity Caverns would also restore competition to the point at which the lessening of competition resulting from the Merger would no longer be substantial for some customers in markets #15 and 27.⁵⁵

(f) Eckville, Willesden Green and Stauffer TRDs

[428] Once again, some of the TRD SLC Markets serviced by these facilities are serviced by two or more of them.

[429] The Tribunal finds that the divestiture of the Willesden Green TRD is necessary to address the SLC brought about in market #10, where Secure and Tervita were the only competitors prior to the Merger. The divestiture of that facility is also required in markets #127 and 138, where it is located close to customers and to Secure's Rocky Mountain House TRD.

[430] Likewise, the divestiture of the Stauffer TRD is necessary to address the SLC resulting from the Merger in market #46, as that facility is by far the closest of the three facilities in question to customers in that market.

[431] The divestiture of the Willesden Green and Stauffer TRDs would also sufficiently address the SLC resulting from the Merger in markets #116, 119, and 121. Although the Eckville TRD also had sales into those three markets, the Stauffer facility is closer to most if not all customers in market #119. The same is true for Willesden Green in market #121. In market #116, the Willesden Green and Stauffer TRDs appear to be closer than the Eckville TRD to all customers.

[432] The divestiture of the Willesden Green and Stauffer TRDs is also likely to sufficiently address the SLC brought about by the Merger in market #45. Although the maps provided by the Parties do not identify the location of customers in that market, the relative locations of the various facilities in this market suggest that the divestiture of the Eckville TRD is not necessary in this market. In any event, the Commissioner has not met his burden of demonstrating that the divestiture of the latter facility ought to be ordered to ensure that the lessening of competition the Tribunal has found will be restored to the requisite standard.

[433] The Tribunal pauses to observe that to the extent that one or both of the Willesden Green or Stauffer TRDs is the closest former Tervita facility to some customers in markets #99 and 117, the divestiture of those TRDs would assist to ensure that Secure is not able to materially increase prices to those customers in those markets.

(g) Elk Point TRD and Lindbergh Caverns

[434] These two facilities are located quite close to each other. The Tribunal finds that the divestiture of the Elk Point TRD would suffice to address the SLC brought about by the Merger in market #4, where Secure and Tervita were the only competitors prior to the Merger. The same is true in market #25, where an alleged third "competitor" is located very far away from customers.

⁵⁵ For other customers in markets #15 and 27, Lindbergh Caverns is the closest former Tervita facility. As discussed below, the divestiture of that facility would be required to ensure that Secure is not able to increase prices materially to those customers.

[435] Likewise, the Tribunal finds that Lindbergh Caverns would also be the better facility to divest in order to address the SLC brought about by the Merger in market #26. This is because it is geographically closer to most customers than the Elk Point TRD. Accordingly, its divestiture would more effectively prevent Secure from increasing prices to those customers.

[436] The Tribunal observes in passing that the divestiture of Lindbergh Caverns and the Elk Point TRD would assist to address the SLC that it has found in two additional markets, namely, markets #15 and 27. Those markets were discussed above in relation to Unity Caverns. To the extent that some customers in those markets appear to be located more closely to the Elk Point TRD and Lindbergh Caverns than they are to Unity Caverns, the divestiture of the former two facilities would significantly assist in preventing Secure from increasing prices materially to those customers.

[437] The Tribunal recognizes that the Elk Point TRD facility was destroyed in a fire in late 2021. However, it understands that, absent the Merger, Tervita would have constructed a replacement facility. According to Mr. Harington, a divestiture purchaser likely would do the same (Updated Harington Report, at para 236).

(h) Fort McMurray TRD

[438] This facility services only one SLC Market — namely, market #60, which is a “3-to-2” SWD market. The Tribunal agrees with the Commissioner that the divestiture of this facility is necessary to restore competition in that market to the point at which the lessening of competition brought about by the Merger will no longer be substantial.

(i) Fox Creek (Bigstone) TRD, Fox Creek East TRD, and Fox Creek Highway Terminal (“HT”)

[439] These facilities are located in close proximity to each other. Given their inter-relationship and the strength of Secure’s overall position in this region (in the TRD and SWD markets combined), the Tribunal considers that each of these facilities would have to be divested.

[440] These divestitures would be necessary to restore competition to the requisite standard in markets #5, 12, 13, 29, 30, 31, and 32.

[441] In the first three of those markets, Secure and Tervita were the only competitors prior to the Merger. The Tribunal considers that markets #29 and 31 also resemble “2-to-1” markets. The Bigstone facility is the closer of the three facilities to most or all customers in markets #5 and 29, whereas the Fox Creek East facility is the closest to customers in markets #12 and 31. In market #13, some customers are closer to the Bigstone facility, while others are closer to Fox Creek East.

[442] As noted below in connection with the Judy Creek (Tervita) facility, the divestiture of these three former Tervita facilities in Fox Creek would assist in addressing the SLC in markets #30 and 32.

[443] The Fox Creek (Bigstone) TRD is located approximately 8 kilometres from the nearby highway, and is connected to the Fox Creek HT by a pipeline. [REDACTED]

[REDACTED] (Transcript, Confidential B, at p 2190; Exhibit P-R-868/CB-R-869, Witness Statement of Mr. Blundell on behalf of Secure (“**Blundell Witness Statement**”), at para 92).

[REDACTED] (Transcript, Confidential B, at pp 2168, 2185)

[REDACTED] (Exhibit CB-A-860/P-A-861, Tervita Facility Sales Plan Q3 2020 dated July 15, 2020 (“**Tervita Sales Plan**”), at p 30).

[444]

[445] Given that Secure serviced these markets from a single TRD (known as the Fox Creek FST), the Tribunal considered whether the divestiture of only one of the three former Tervita TRDs would be appropriate. However, beyond the important differences between those three facilities, the Tribunal proceeded to determine that the divestiture of only one of them would not suffice to address the SLC that it has found in certain SWD markets.⁵⁶ Stated differently, having regard to the differences between the two facilities as well as the impact of the Merger in TRD markets and SWD markets, the Tribunal is satisfied that the divestiture of both the Fox Creek (Bigstone) TRD (including the Fox Creek HT) and the Fox Creek East TRD would be required to restore competition in the relevant TRD and SWD markets to the requisite level.

(j) La Glace, South Wapiti, Spirit River and Grande Prairie Industrial TRDs

[446] There is much overlap in the SLC Markets serviced by these four former Tervita facilities — namely, markets #86, 88, 90, 91, 92, 93, 94, 95, 96, 98, 128, 129, 130, and 134.

[447] The Tribunal finds that the divestiture of the La Glace, South Wapiti, and Spirit River TRDs formerly owned by Tervita would be sufficient to address the SLC brought about by the Merger in these markets.⁵⁷ It would not be necessary or appropriate to require the additional divestiture of Grande Prairie Industrial TRD for that purpose.

[448] The La Glace facility is more geographically proximate to the vast majority or all of the customers in markets #90, 91, 128, and 130, than is the Grande Prairie Industrial TRD.⁵⁸ The same is true for the South Wapiti facility, with respect to markets #86, 88, 92, 96, 98, and 129. The same

⁵⁶ Secure has three water disposal facilities in that area, in addition to its TRD, namely, Kaybob, Kaybob South, and Tony Creek.

⁵⁷ To the extent that some customers in markets #90, 91, and 93 may be geographically closer to the Gordondale TRD, discussed above, than to any of these TRDs, the divestiture of that facility would also assist to ensure that competition is restored to the requisite standard in those markets.

⁵⁸ Some customers in market #91 appear to be situated more closely to either the Gordondale TRD or the Spirit River TRD, than they are to the La Glace TRD.

is also true for the Spirit River TRD, with respect to markets #93 and 134, and some customers in market #91.

[449] The South Wapiti TRD is also located closer to customers in market #35 than is the Grande Prairie Industrial TRD.

[450] The Tribunal acknowledges that the Grande Prairie Industrial facility is the closest of these four facilities to the majority of customers in markets #94 and 95, and to a small number of customers in market #91. However, considering that the White Owl and Envolve facilities in those markets are located very close to the Grande Prairie Industrial TRD, the Tribunal finds that the divestiture of the latter facility would not be necessary to ensure that Secure is unable to increase prices to those customers. The Tribunal would add for the record that some customers in those two markets (i.e., markets #94 and 95) are situated more closely to the La Glace or the South Wapiti facility, than they are to the Grande Prairie Industrial TRD.

(k) Judy Creek, Mitsue, and Green Court TRDs

[451] Once again, there is much overlap in the SLC Markets serviced by these three TRDs formerly owned by Tervita. The Tribunal finds that the divestiture of the Judy Creek TRD would be sufficient to address the SLC brought about by the Merger in markets #8 and 16, where Tervita and Secure were the only competitors prior to that transaction. Together with the previously discussed divestitures in Fox Creek, the divestiture of Judy Creek would achieve this same result in markets #30 and 32.

[452] Consequently, the Tribunal has concluded that the divestitures of the Mitsue and Green Court TRDs would not be necessary or appropriate.

[453] The Tribunal acknowledges that the Mitsue TRD is closer to all or most customers in market #16 than is the Judy Creek TRD. However, the evidence establishes that, prior to the Merger, Tervita would have priced its services to those customers based on the location of Secure's facility in Judy Creek. Accordingly, the Tribunal is satisfied that the divestiture of the Judy Creek TRD formerly owned by Tervita will re-establish the competitive dynamic that existed prior to the Merger. All that would change is that Secure will have assumed Tervita's former position, and the divestiture purchaser will have assumed Secure's former position, with a single facility at Judy Creek.

[454] The Tribunal also acknowledges that the Green Court TRD had some revenues from a significant number of TRD SLC markets, namely, markets #8, 12, 16, 29, 30, 31, 36, 37, 38, 42, 47, 49, 50, 51, 101, 102, 111, and 117. However, the Tribunal is satisfied that other divestitures discussed above and below would be more than sufficient to restore competition in those markets to the point at which the lessening of competition would no longer be substantial.

[455] With the possible exceptions of markets #101 and 102, those other facilities that would be divested are situated closer to all or the substantial majority of customers than is the Green Court facility. Insofar as markets #101 and 102 are concerned, the evidence establishes that, prior to the Merger, Tervita would have priced its services to customers in those markets based on the locations of the closest competing facilities. Those facilities are Wolverine's Mayerthorpe and Cynthia

TRDs, as well as Secure's Edson and Drayton Valley TRDs. Given the presence of the Wolverine facilities, and the fact that the two Secure facilities are located virtually beside two TRDs that would be divested (namely the Buck Creek and West Edson facilities),⁵⁹ the Tribunal is satisfied that the divestiture of the Green Court facility is not required. This is despite the fact that the Cynthia TRD accepts only a limited range of waste. In brief, the Tribunal considers that the divestitures of the Buck Creek and West Edson TRDs would be sufficient to restore competition in markets #101 and 102 to the requisite degree.

(l) West Edson and Niton Junction TRDs

[456] As with some of the other facilities discussed below, there is some overlap in the SLC Markets serviced by these two former Tervita TRDs, namely, markets #3, 6, 7, 36, 37, 38, and 42.

[457] The Tribunal finds that the divestiture of the West Edson TRD alone would be sufficient to address the SLC brought about by the Merger in all but one of those markets, namely, market #36. This facility is much closer than the Niton Junction TRD is to customers in those markets, with the possible exception of a few customers in market #38, who may be marginally closer to the latter facility. The Tribunal observes that customers in markets #3, 6, 7, 37, and 42 are all located to the west of the West Edson TRD, whereas the Niton Junction TRD is located a significant distance to the east of Edson.

[458] Together with the divestiture of the Willesden Green and Brazeau TRDs, the divestiture of the West Edson TRD would also assist in addressing the SLC brought about in market #36, from which it receives some revenues. Although the Niton Junction facility also has sales into this market, the Tribunal considers that the divestiture of that fourth TRD would not be required to address the SLC in this market. For greater certainty, it does not appear that a material number of customers, if any, are closer to the Niton Junction TRD than they are to the other three TRDs mentioned immediately above.

[459] The Tribunal acknowledges that the Niton Junction TRD had some revenues from a significant number of other TRD SLC markets, namely, markets #29, 30, 31, 32, 101, 102, 111, 117, 121, 124, 136, and 138. However, the Tribunal is satisfied that other divestitures discussed above and below would be more than sufficient to restore competition in those markets to the point at which the lessening of competition would no longer be substantial. With the exception of markets #101 and 102, which are discussed above in connection with the Green Court TRD, other facilities to be divested are located much closer to the customers in those markets.

(m) Valleyview and Silverberry TRDs

[460] The Tribunal considers that the divestiture of the Valleyview TRD would not be required to restore competition to the point at which it can no longer be said to be substantial, in any TRD SLC Market.

[461] The Tribunal acknowledges that the Valleyview TRD had some revenues from a significant number of other TRD SLC markets, namely, markets #3, 5, 6, 7, 12, 13, 16, 29, 30, 31, 32, 35, 37,

⁵⁹ See discussion above with respect to Buck Creek, and below with respect to West Edson.

42, 47, 49, 90, 93, 94, 95, 96, 98, 99, 101, 102, 104, 105, 106, 107, 108, 111, 117, 121, 124, 127, 128, 129, 130, and 132. However, the Tribunal is satisfied that other divestitures discussed above and below would be more than sufficient to restore competition in those markets to the point at which the lessening of competition would no longer be substantial. In each of those markets, other facilities identified for divestiture are located closer to customers than is the Valleyview TRD.

[462] With respect to the Silverberry TRD, the Tribunal notes that it had revenues from several TRD SLC Markets, namely, markets #104, 106, 107, and 108. However, once again, the Tribunal is satisfied that other divestitures discussed above and below would be more than sufficient to restore competition in those markets to the point at which the lessening of competition would no longer be substantial. In each of those markets, other facilities identified for divestiture (namely, the South Taylor and the Gordondale TRDs) are located closer to customers than the Silverberry TRD is. Nevertheless, as discussed at paragraph 471 below, the divestiture of the Silverberry TRD would be required to address the substantial lessening of competition that the Tribunal has found in SWD markets #148 and 168.

(n) Conclusion on TRD Divestitures

[463] In summary, the Tribunal considers that only 17 of the 26 TRDs, and both of the Caverns, in respect of which the Commissioner seeks a divestiture, would be required to be divested to restore competition in the affected TRD SLC Markets to the point at which the lessening of competition would no longer be substantial. The Tribunal's findings in this regard are summarized in the following table:

Table 11 – Summary of the Tribunal's conclusions regarding TRD divestitures⁶⁰

TRD	TRD SLC Markets addressed	Additional SWD markets addressed?	Finding
Brazeau	36, 99, 111, 117, and 136	Yes – see below	Divestiture required
Buck Creek	124		Divestiture required
Elk Point	4, 15, 25, and 27	Yes – see below	Divestiture required
Fort McMurray	60		Divestiture required
Fox Creek (Bigstone) and Fox Creek HT	5 and 29	Yes – see below	Divestiture required
Fox Creek East	12, 13, 31, and parts of 30 and 32	Yes – see below	Divestiture required
Gordondale	28, 104, 106, 108, and 132, and parts of 41, 105, and 107	Yes – see below	Divestiture required
Judy Creek	8, 16, 30, and 32	Yes – see below	Divestiture required
Kindersley	2, 14, and 17	Yes – see below	Divestiture required
La Glace	90, 91, 94, 95, 128, and 130, and parts of 93	Yes – see below	Divestiture required
Silverberry	148 and 168 (SWDs)	Yes – see below	Divestiture required

⁶⁰ A summary of divestitures by market is provided in Appendix 3 to these reasons.

TRD	TRD SLC Markets addressed	Additional SWD markets addressed?	Finding
South Taylor	Parts of 41, 104, 105, 106, 107, and 108	Yes, see below	Divestiture required
South Wapiti	35, 86, 88, 92, 94, 95, 96, 98, and 129	Yes – see below	Divestiture required
Spirit River	91, 93, and 134	Yes – see below	Divestiture required
Stauffer	45, 46, 116, 119, 121, and 127	No	Divestiture required
West Edson	3, 6, 7, 18, 19, 36, 37, 42, 47, 50, 51, and 55, and parts of 99	Yes – see below	Divestiture required
Willesden Green	10, and parts of 45, 99, 127, 138, 116, 117, 119, and 121	No	Divestiture required
Lindbergh Caverns	15, 25, 26, and 27	Yes – see below	Divestiture required
Unity Caverns	14 and 58, and parts of 2, and 15	No	Divestiture required
~~Boundary Lake~~		N/A	No divestiture required
~~Coronation~~		N/A	No divestiture required
~~Eckville~~		N/A	No divestiture required
~~Grande Prairie Industrial~~		N/A	No divestiture required
~~Green Court~~		N/A	No divestiture required
~~Gull Lake~~		N/A	No divestiture required
~~Mitsue~~		N/A	No divestiture required
~~Niton Junction~~		N/A	No divestiture required
~~Valleyview~~		N/A	No divestiture required

(4) SWDs

[464] 67 of the SLC Markets are SWD markets. They can be summarized as follows:

Table 12 – SWD SLC Markets

Market structure	Markets	Total
2-to-1	18, 19, and 20	3
3-to-2	47, 49, 50, 51, 52, 53, 54, 55, 57, 58, 59, and 60	12
4-to-3+	142, 143, 144, 145, 146, 147, 148, 150, 152, 154, 155, 156, 157, 159, 160, 162, 163, 164, 165, 166, 168, 169, 171, 172, 173, 174, 176, 177, 179, 183, 184, 186, 188, 193, 196, 200, 201, 202, 206, 208, 232, 233, 235, 241, 242, 245, 246, 247, 249, 251, 252, and 257	46
Total		67

(a) Markets Sufficiently Addressed by TRD Divestitures

[465] The Tribunal considers that the likely SLC that it has found in 43 of these SLC Markets above will be addressed by the TRD divestitures discussed in the immediately preceding section of these reasons and summarized in Table 11 at paragraph 463 above. Those markets are as follows:

Table 13 – SWD SLC Markets sufficiently addressed by TRD divestitures

Market structure	Market and TRD divestiture	Total
2-to-1	20, 55 – West Edson ⁶¹	2
3-to-2	49, 57 – Judy Creek 50, 51 – West Edson 52, 53 – Kindersley 58 – Kindersley / Unity Caverns 60 – Fort McMurray	8
4-to-3+	142 – Kindersley 143, 147, 246 – West Edson 144, 146, 206 – Brazeau 145, 193 – Brazeau 156, 157, 169, 171, 172, 173, 174, 176, 188, 245, 247 – Fox Creek / Fox Creek East 160 – Judy Creek 162, 241 – South Wapiti ⁶² 183, 186 – Judy Creek / Fox Creek / Fox Creek East 184, 208, 251 – La Glace / Spirit River / Gordondale 200 – South Taylor / Gordondale 235 – Elk Point / Lindbergh Caverns 196, 252, 257 – Gordondale	33
Total		43

(b) Remaining SWD SLC Markets

[466] The Tribunal will now turn to the remaining 24 SWD SLC Markets.

[467] In four of those markets (i.e., markets #18, 19, 47, and 150), the divestiture of the West Edson TRD would not be sufficient to restore the markets to the point at which the lessening of competition the Tribunal has found would no longer be substantial. This is because some customers in those markets are located closer to the Moose Creek SWD than they are to the West Edson TRD. In the absence of the divestiture of the Moose Creek SWD, Secure would be in a position to materially increase prices to those customers, whose alternative would be the more distant divested West Edson TRD.

⁶¹ As discussed below, a combination of this divestiture and that of the Moose Creek SWD is required to address the SLC in markets #18, 19, 47, and 150.

⁶² As discussed below, a combination of this divestiture and that of the Kakwa SWD is required to address the SLC in markets #154, 155, 159, 163, 164, 165, 177, 232, and 242.

[468] The same appears to be true with respect to market #152. Although the divestiture of the Brazeau TRD would suffice for most customers in that market, the divestiture of the Moose Creek SWD would assist to prevent Secure from materially increasing prices to those customers which are located closer to the Moose Creek SWD than they are to the Brazeau TRD.

[469] In any event, in another four markets (i.e., markets #54, 59, 166, and 233), customers are located more closely to the Kakwa SWD than they are to any other facility formerly owned by Tervita. Accordingly, the divestiture of the Kakwa SWD would be required to prevent Secure from materially increasing prices in those markets.

[470] In a further nine markets (i.e., markets #154, 155, 159, 163, 164, 165, 177, 232, and 242), the divestiture of the South Wapiti TRD would eliminate the SLC that the Tribunal has identified, but only for a subset of customers. To the extent that other customers in each of those markets are located closer to the Kakwa SWD than to the South Wapiti TRD, the divestiture of the Kakwa SWD would be required to ensure that Secure is not able to materially raise prices to those customers.

[471] In an additional two markets (i.e., markets #148 and 168), the divestiture of the Mile 103 SWD would be required to assist in achieving this result. The Tribunal observes that, if that facility were able to operate at full capacity, its divestiture would essentially restore the competitive environment that existed prior to the Merger, when Secure's only facility in the region was its Wonowon SWD. [REDACTED]

[REDACTED]. Consequently, the Tribunal considers that the divestiture of the Silverberry TRD would also be necessary to restore the lessening of competition in markets #148 and 168 to the point at which it would no longer be substantial. The Tribunal's view in this regard would remain the same [REDACTED].

[472] Finally, the Tribunal considers that the divestiture of the 08-09 SWD would be required to ensure that Secure is not able to materially raise prices to customers in markets #179, 201, 202, and #249.

[473] Given that the SLC identified by the Tribunal in the 67 SWD SLC Markets would be sufficiently addressed by the divestitures discussed above, it would not be necessary for Secure to divest the Swan Hills SWD. Based on the information provided by the Commissioner,⁶³ it appears that this facility only received revenues from markets #160 and 237. However, market #160 would be sufficiently addressed by the divestiture of the Judy Creek TRD, and market #237 is not included in the SLC Markets. Moreover, it appears that prior to the Merger, Tervita had planned to close the Swan Hills facility because it was dependent on wastewater related to the Judy Creek Landfill, which is almost full and will be capped in the near future (Blundell Witness Statement, at para 70).

⁶³ See p 153 of Appendix B to the Commissioner's closing submissions.

(c) Conclusion on SWD Divestitures

[474] In summary, some of the TRD divestitures that the Tribunal determined would be necessary to address the SLC it identified in TRD SLC Markets would also suffice to address the SLC in 43 of the 67 SWD SLC Markets. Those divestitures, together with the affected markets, are summarized in Table 13 above.

[475] With respect to the remaining 24 SWD SLC Markets, the Tribunal concluded that it would be necessary for Secure to divest an additional five facilities — namely, the Moose Creek SWD, the Kakwa SWD, the Mile 103 SWD, the 08-09 SWD, and the Silverberry TRD. The divestiture of those additional facilities would be necessary to restore competition in those SWD SLC Markets to the point at which the lessening of competition the Tribunal has found would no longer be substantial.

[476] Given the foregoing, the Tribunal concludes that it would not be necessary for Secure to divest the Swan Hills SWD, despite the Commissioner's position to the contrary.

[477] The Tribunal's findings regarding the divestiture of SWD facilities are summarized in the following table:

Table 14 – Summary of the Tribunal's conclusions regarding SWD divestitures

SWD	Main SLC Markets addressed	Finding
08-09	179, 201, 202, and 249	Divestiture required
Kakwa	54, 59, 166, and 233, and parts of 154, 155, 159, 163, 164, 165, 177, 232, and 242	Divestiture required
Mile 103	148, 168	Divestiture required
Moose Creek	Parts of 18, 19, 47, 150, and 152	Divestiture required
Swan Hills		No divestiture required

(5) Conclusion Regarding Divestitures

[478] In conclusion, the Tribunal determines that it would be appropriate to order the divestiture of six of the eight Landfills in respect of which the Commissioner has sought that remedy.

[479] The Tribunal also concludes that the divestiture of 17 of the 26 TRD divestitures, as well as the two Cavern divestitures sought by the Commissioner, would suffice to restore competition to the point at which the lessening of competition that it has identified would no longer be substantial.

[480] Finally, the Tribunal concludes that the divestiture of four of the five SWD divestitures sought by the Commissioner would suffice for that purpose.

[481] It follows that the Tribunal has concluded that 29 of the 41 divestitures sought by the Commissioner would suffice to address the substantial lessening of competition that it has found resulted from the Merger.

[482] The foregoing conclusions are summarized in Table 15 below:

Table 15 – Summary of Tribunal’s divestiture findings by facility

Divestiture Required ⁶⁴			Divestiture Not Required		
#	Facility	Type	#	Facility	Type
1	Brazeau	TRD	1	Boundary Lake	TRD
2	Buck Creek	TRD	2	Coronation	TRD
3	Elk Point	TRD	3	Eckville	TRD
4	Fort McMurray	TRD	4	Grande Prairie Industrial	TRD
5	Fox Creek East	TRD	5	Green Court	TRD
6	Fox Creek (Bigstone and HT)	TRD	6	Gull Lake	TRD
7	Gordondale	TRD	7	Mitsue	TRD
8	Judy Creek	TRD	8	Niton Junction	TRD
9	Kindersley	TRD	9	Valleyview	TRD
10	La Glace	TRD			
11	Silverberry	TRD	10	Swan Hills	SWD
12	South Taylor	TRD			
13	South Wapiti	TRD	11	Fox Creek	Landfill
14	Spirit River	TRD	12	Marshall	Landfill
15	Stauffer	TRD			
16	West Edson	TRD			
17	Willesden Green	TRD			
18	08-09	SWD			
19	Kakwa	SWD			
20	Mile 103	SWD			
21	Moose Creek	SWD			
22	Elk Point	Landfill			
23	La Glace	Landfill			
24	Silverberry	Landfill			
25	South Wapiti	Landfill			
26	Spirit River	Landfill			

⁶⁴ These facilities were all formerly owned by Tervita.

27	Willesden Green	Landfill
28	Lindbergh	Cavern
29	Unity	Cavern

[483] The Tribunal observes for the record that, if it ultimately determines that Secure has not met the requirements of the efficiencies defence in section 96 of the Act, the terms requested in the Commissioner’s Draft Order are essentially those that should be imposed, subject to its observations at paragraphs 397–398 above and certain other adjustments.

XV. ISSUE #3 – ARE THE REQUIREMENTS OF THE EFFICIENCIES DEFENCE SATISFIED?

A. Legal Principles

(1) Introduction

[484] Subsection 96(1) of the Act provides as follows:

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

96 (1) Le Tribunal ne rend pas l’ordonnance prévue à l’article 92 dans les cas où il conclut que le fusionnement, réalisé ou proposé, qui fait l’objet de la demande a eu pour effet ou aura vraisemblablement pour effet d’entraîner des gains en efficience, que ces gains surpasseront et neutraliseront les effets de l’empêchement ou de la diminution de la concurrence qui résulteront ou résulteront vraisemblablement du fusionnement réalisé ou proposé et que ces gains ne seraient vraisemblablement pas réalisés si l’ordonnance était rendue.

[485] Despite the fact that the margin note beside subsection 96(1) refers to this provision as an exception, it has been treated in the jurisprudence as a defence (*Tervita SCC*, at para 89). This is because an analysis of the anti-competitive effects alleged by the Commissioner must be undertaken before the trade-off assessment contemplated by the provision can be made.

[486] In approaching its task under subsection 96(1), the Tribunal has the flexibility to select the basic methodology that it considers to be most appropriate in the circumstances. In this regard, the jurisprudence has recognized two main standards: the “total surplus” standard and the “balancing weights” standard (*Tervita SCC*, at para 91). The latter standard has also been referred to as the

“socially adverse effects” approach (*The Commissioner of Competition v Superior Propane Inc*, 2003 FCA 53 (“*Superior Propane IV*”). at paras 20–23, 58). A more appropriate name for that standard would be the “weighted surplus” standard (*Tervita CT*, at para 399).

[487] Pursuant to the total surplus standard, the focus is upon the change in the aggregate sum of economic surplus (e.g., consumers’ surplus and producers’ surplus) that would likely result from the merger in question. Therefore, pure transfers of surplus between “consumers” (in this case, Secure’s customers) and “producers” (in this case, Secure) are considered to be neutral (*Tervita SCC*, at para 95; *P&H*, at para 649).

[488] However, under the weighted surplus standard, wealth transfers from customers to the merged entity are not necessarily considered to be neutral. Instead, the Tribunal must make value judgments regarding the redistributive effects of the merger on customers and shareholders of the merged entity (see, generally, *Tervita SCC*, at paras 96–98; *Tervita CT*, at paras 400–406).

[489] It is not necessary to say more about the weighted surplus standard because the total surplus standard remains the starting point, and Secure and the Commissioner each maintained that this standard should be adopted in this case (*Tervita CT*, at paras 281–283; Transcript, Public, at p 80; Transcript, Confidential B, at p 3267).

[490] Given that subsection 96(1) in essence functions as a defence, the merging parties (in this case, Secure) bear the onus of proving the extent of the cognizable efficiency gains that will likely result from the merger (*Tervita SCC*, at paras 89, 136). However, the Commissioner bears the burden of proving the extent of the “effects of any prevention or lessening of competition that will result or is likely to result from the merger or proposed merger” (*Tervita SCC*, at para 122; *P&H*, at paras 694–697). This will be further discussed below.

(2) Cognizable Efficiencies

[491] Section 96 gives primacy to economic efficiency. However, the Act and the jurisprudence impose several limits on the efficiencies that may be considered under that provision (*Tervita SCC*, at para 111). These may also conveniently be considered to be screens through which claimed efficiencies must pass, to be cognizable under section 96.

[492] To begin, the Tribunal has identified five initial screens for filtering claimed efficiencies (*P&H*, at paras 655–658; *Tervita CT*, at paras 262–264, 270. See also *Tervita SCC*, at paras 102, 107–110).

[493] The first screen concerns the types of efficiencies that may be considered. In brief, efficiencies that fall into one of the following three broad categories are eligible for consideration in this context: (i) productive efficiencies that enable a given level of output to be produced with fewer resources, or that permit an increased level of output to be produced with the same resources; (ii) dynamic efficiencies, which are achieved through the invention, development and diffusion of new products and production processes; and (iii) other efficiencies that may increase overall allocative efficiency, namely, the allocation of resources to their most valuable use (*Tervita SCC*, at para 102). All of the claims advanced by Secure fall into one of these three categories.

[494] The second screen concerns the probability that claimed efficiencies will be achieved. In brief, only efficiencies that are likely to be realized, or that have actually been brought about, may be considered in this context (subsection 96(1) of the Act). Once again, subject to the application of the fifth screen discussed below, the efficiencies identified by Secure satisfy this condition.

[495] The third screen excludes from eligibility claimed efficiencies that would be, or have already been, brought about by reason only of a redistribution of income between two or more persons (subsection 96(3)). The Commissioner has not suggested that any of the efficiencies claimed by Secure fall into this category.

[496] The fourth screen excludes (i) claimed efficiency gains that would be achieved outside Canada and would not flow back to shareholders in Canada, as well as (ii) gains that would be achieved within Canada but then ultimately flow through to shareholders located outside Canada. In response to questioning from the panel, the Commissioner explicitly refrained from maintaining that any of the efficiencies claimed by Secure should be reduced on this basis (Transcript, Public, at pp 2775–2777). Given that the evidentiary record and argument were not developed by either the Commissioner or Secure on this point, the Tribunal indicated during the hearing that it would not pursue this point (Transcript, Public, at pp 2776–2777, 3222). In adopting that position, the Tribunal was mindful that Secure is a Canadian company and there was little evidence to suggest that any of its shareholders were located outside Canada.⁶⁵ In the future, the party invoking the efficiencies defence will be expected to establish, on a balance of probabilities and with clear and convincing evidence, the location of its shareholders.

[497] The fifth screen excludes from eligibility two broad categories of efficiencies. The first category consists of efficiencies that would likely be attained through alternative means if the Tribunal were to make the order that it determines would be necessary to ensure that the merger in question does not prevent or lessen competition substantially. The second category consists of efficiencies that would likely be attained through the merger in question even if that order were made. This typically includes efficiencies achieved in markets that are not targeted by the order in question. However, efficiencies that are so inextricably linked to the relevant markets that they would not likely be attained if the order were made are cognizable (*Tervita CT*, at para 394).

[498] The fifth screen described above has a significant role to play in this proceeding.

[499] Secure objects to this screen on the basis of its view of the plain reading of section 96. Secure maintains that such a reading precludes the Tribunal from making an order in respect of a merger if the efficiencies likely to be generated by the merger exceed the anti-competitive effects that are likely to result therefrom. In other words, Secure asserts that all efficiencies likely to be brought about by the merger are cognizable under section 96. In support of this interpretation, it relies upon passages in *Tervita* in which the SCC observed that section 96 precludes the Tribunal

⁶⁵ The panel asked the parties' experts during the evidentiary phase of the hearing whether they had assessed whether any of Secure's shareholders were located outside Canada. They each replied in the negative (Transcript, Public, at pp 2655, 2797). At footnote 291 of the Commissioner's closing submissions, the Commissioner referred to two shareholders mentioned in Exhibit P-A-156 – Secure's Notice of the Annual and Special Shareholder Meeting of April 29, 2022, at p 72. However, the only source of the location of those shareholders were website references which were not tendered into evidence.

from making an order where it finds that the merger is likely to bring about gains in efficiency that would be greater than and would offset the anti-competitive effects resulting from the merger (*Tervita SCC*, at paras 17, 48). Secure adds that the final clause in subsection 96(1) (“and that the gains in efficiency would not likely be attained if the order were made”) simply exists to ensure that the efficiencies generated by the merger will not be reduced.

[500] The Tribunal disagrees with Secure’s position regarding the fifth screen. In brief, the “order driven” interpretation of section 96 that underlies this screen was explicitly endorsed in both *Tervita CT*, at paragraph 262 and in *Superior Propane III*, at paragraphs 148–149 (aff’d *Superior Propane IV* (see also *P&H*, at para 657)). This interpretation was also implicitly endorsed in *Tervita FCA*, at paragraph 172. Insofar as the SCC’s decision in *Tervita* is concerned, the abovementioned paragraphs (17 and 48) relied upon by Secure did not address the final clause in subsection 96(1). Those passages appear to have been simply intended to summarize the efficiencies defence in a general way. When the SCC subsequently discussed the limitations on efficiencies that may be considered under section 96, it explicitly recognized that the Tribunal must find that “the gains in efficiency [likely to be brought about by a merger or proposed merger] would not likely be attained if a s. 92 order were made” (*Tervita SCC*, at para 113). Secure’s interpretation of this language fails to recognize that section 96 creates an element of the efficiency defence that must be established by those who invoke that defence (*Tervita SCC*, at para 136).

[501] Moreover, to the extent that the position advanced by Secure would require the last clause in subsection 96(1) to be interpreted as referring to the total gains brought about by the merger, it would require the Tribunal to depart from the ordinary meaning of that provision, particularly the last clause, quoted immediately above. However, in circumstances where, as here, the words of a provision “are precise and unequivocal, the ordinary meaning of the words plays a dominant role in the interpretive process” (*Orphan Well Association v Grant Thornton Ltd*, 2019 SCC 5, at para 88, citing *Canada Trustco Mortgage Co v Canada*, 2005 SCC 54, at para 10. See also *Mohr*, at paras 13, 23).

[502] For greater certainty, there is nothing in the context of the merger provisions — or, indeed, the Act as a whole — that would support the interpretation that Secure advances. Had Parliament intended subsection 96(1) to operate in the manner advocated by Secure, it could easily have inserted the word total, to make it clear that the relevant comparison is between the total efficiency gains likely to be brought about by a merger and the effects of any prevention or lessening of competition likely to result from the merger. The fact that Parliament did not include the word total in the provision suggests that this is not the test it intended to create.

[503] Moreover, Secure’s interpretation would permit the efficiencies defence to be satisfied even where most of the efficiencies claimed would likely be attained in other ways, if the order were made. This would be problematic because it would not permit the two objectives of maintaining competition and enhancing efficiency to be maximized. Instead, the former objective would be completely subordinated to the latter, even where most of the efficiencies in question would likely be attained in alternative ways. To the extent that the “order driven” interpretation achieves a better balancing of these two objectives, it is to be preferred to the interpretation advanced by Secure.

[504] A further benefit of the “order driven” interpretation is that it puts the focus on the true cost of making the order in question — namely, the loss of the various efficiencies that would not likely be attained if the order in question were made. In so doing, it permits a balancing of that cost against the DWL that would result from any prevention or lessening of competition brought about by the Merger.⁶⁶

[505] Secure notes that a shortcoming associated with the order driven interpretation is that it requires merging parties to wait until they know the specifics of the order sought by the Commissioner, before being able to advance their case under section 96. Secure underscores that the unfairness of this approach was demonstrated in the present proceeding, because the Commissioner did not disclose his proposed remedy until the eve of the hearing.

[506] The Tribunal considers that this shortcoming is more theoretical than practical in nature. Pursuant to Rule 36(2)(e), the Commissioner is required to provide the particulars of the order sought. Where those particulars are not provided, they may be sought by the respondent(s). During the hearing, this was recognized by Secure (Transcript, Public, at p 3448). Moreover, as noted at paragraphs 33 and 380 above, future applications submitted by the Commissioner may not be accepted for filing if they do not meet the requirements of Rule 36. Furthermore, to the extent that parties who may seriously consider invoking the efficiencies defence are likely to retain knowledgeable counsel, such counsel will presumably make them aware of the nature of the order likely to be made by the Tribunal. In this regard, the Tribunal observes that the appropriate remedy identified by the Tribunal in Part XIV above was determined by applying well-established principles that ought to be well known to counsel practising in the competition law field. Although the same may not be said of the order requested by the Commissioner, it is the order that would likely be made by the Tribunal under section 92 that is relevant for the purposes of section 96.

[507] The Tribunal pauses to observe that, in anticipation of the possibility that the Tribunal would maintain its past approach to the fifth screen, and apply the “order driven” interpretation of subsection 96(1), Mr. Harington provided an alternate set of efficiency claims based on that approach. The Commissioner accepted that those claims were confined to efficiencies that would not likely be attained if the order being sought were made (Transcript, Public, at p 2774).

[508] In addition to the five screens discussed above, two additional limitations on the efficiencies that may be recognized under section 96 have been identified. The first of those limitations excludes efficiencies that a merging party would realize sooner than an alternate buyer only because that other purchaser would be delayed in implementing those efficiencies because of legal proceedings associated with a divestiture order. Put differently, efficiencies that are the result

⁶⁶ As discussed in Part XV. (3)(c) below, effects of any prevention or lessening of competition that may occur outside the SLC Markets are cognizable for the purposes of section 96. To the extent that the Tribunal’s orders are focused on restoring competition to the point at which any prevention or lessening of competition is no longer substantial, such orders would not eliminate all effects of a prevention or lessening of competition. In addition, to the extent that the merger may result in DWL in areas where there was no actual or likely future competition between the parties, such DWL would not be cognizable for the purposes of section 96, because it would not concern “the effects of any prevention or lessening of competition that will result or is likely to result from the merger,” as contemplated by subsection 96(1) of the Act. See paragraphs 520–524 below.

of the regulatory processes of the Act are not cognizable under section 96 (*Tervita SCC*, at paras 107, 114–115).

[509] Finally, an additional limitation excludes efficiencies that have already been attained. These efficiencies are not cognizable because it cannot be said that they “would not likely be attained if the order were made,” as contemplated by subsection 96(1) (*Tervita CT*, at para 274).

[510] In addition to the above-mentioned seven limits on efficiencies that may be considered under section 96, any efficiencies that are cognizable in this context must be adjusted to reflect the cost associated with achieving those efficiencies (*Commissioner of Competition v Superior Propane*, 2000 Comp Trib 15 (“*Superior Propane I*”), at paras 333, 340). This is because those costs reduce the overall savings to the economy associated with the attainment of the efficiencies in question. For greater certainty, to the extent that efficiencies that have already been attained are not cognizable, the costs associated with achieving those efficiencies are not deducted in the assessment process. This ensures that those efficiencies and the costs associated with them are treated symmetrically.

(3) Cognizable Anti-Competitive Effects

(a) Introduction

[511] The effects that are cognizable under section 96 are a function of the basic standard adopted by the Tribunal in any particular case. As discussed at paragraph 489 above, the applicable standard in this proceeding is the total surplus standard.

[512] Consequently, the cognizable and reasonably quantifiable effects are those that would reduce consumer surplus (in this case, the surplus of Secure’s customers) and producer surplus (in this case, the surplus of Secure’s shareholders),⁶⁷ and not be recaptured by Secure. This reduction in overall surplus would represent a DWL to the Canadian economy.

[513] It follows that any surplus that is likely to be simply redistributed between consumers and producers is considered to be neutral under the total surplus standard. Therefore, such redistributions or transfers of wealth are not taken into account in determining the extent of the anti-competitive effects of a merger (*Tervita SCC*, at para 95; *P&H*, at para 649).

[514] As noted at paragraph 490 above, the Commissioner bears the burden of proving the extent of “the effects of any prevention or lessening of competition that will result or is likely to result from the merger,” as contemplated by subsection 96(1) of the Act. As part of that burden, the Commissioner is required to quantify such effects, to the extent that they are measurable. In this regard, precision is not required where it is not reasonably attainable. In such circumstances, an estimate will suffice, even if only in terms of a reasonable range (*Tervita SCC*, at paras 124–125; *P&H*, at paras 180, 651). However, such estimates must be grounded in evidence that can be challenged and weighed (*Tervita SCC*, at para 125).

⁶⁷ Where there is pre-existing market power, the DWL associated with a merger will include a component of lost producer surplus (see generally *Tervita CT*, at para 287).

[515] Where anti-competitive effects are not reasonably measurable, they may be considered in qualitative terms in the trade-off assessment contemplated by section 96 (*Tervita SCC*, at paras 100, 124, 144–147; *P&H*, at paras 651–652). In the present proceeding, the Commissioner confirmed that he is not alleging any such qualitative effects (Transcript, Public, at p 2894). This is because his expert, Dr. Miller, provided quantitative estimates of both the Price/Output Effects and the Non-Price Effects being alleged. Accordingly, the discussion below will be confined to quantifiable anti-competitive effects.

[516] The Tribunal pauses to underscore that the requirement to quantify the quantifiable anti-competitive effects equally applies to the cognizable efficiencies (*P&H*, at para 656). Given the requirement that the claimed gains in efficiency be “likely” to be achieved because of the merger, there must be persuasive evidence of the claimed savings and of the implementation process leading to the realization of the claimed efficiencies (*Superior Propane I*, at paras 347–348).

[517] Stated differently, as the Tribunal noted in *P&H* at paragraphs 697 and 726–749, the same requirements imposed on the Commissioner for proof of anti-competitive effects under section 96 extend to the merging parties (in this case, Secure) to discharge their onus to prove the cognizable efficiencies under section 96. Thus, if a claimed efficiency is quantifiable, it must be quantified or at least estimated. That quantification or estimate must be grounded in evidence that can be challenged and weighed. Failure to provide such evidence will result in the claim being given no weight. Moreover, an unquantified claimed efficiency that could have been quantified, but was not, will not be considered as a qualitative efficiency (*Tervita SCC*, at para 124; *Superior Propane IV*, at para 35). Claimed qualitative efficiencies, if any, must also be supported by evidence that can be challenged and weighed.

(b) Cognizable “Effects” are Limited to those Resulting from the Exercise of Market Power

[518] For the purposes of subsection 96(1), “effects” are not cognizable unless they result from the exercise of market power. This is consistent with the principles discussed at paragraphs 161–166 above (*Tervita SCC*, at para 44; *The Commissioner of Competition v Superior Propane Inc*, 2001 FCA 104 (“*Superior Propane II*”), at para 160, leave to appeal to SCC refused, 28593 (September 13, 2001); *Tervita CT*, at paras 232, 370; *Superior Propane I*, at paras 412, 466).

[519] The Parties do not take issue with this fundamental premise. However, they disagree on its implications for the scope of the “effects” that are cognizable in this proceeding.

[520] Secure maintains that the portion of the alleged Non-Price Effects which relates to geographic areas in which Secure and Tervita did not compete (the “**Non-Competing Areas**”) prior to the Merger is not cognizable.⁶⁸ Stated differently, Secure asserts that the portion of the Non-Price Effects which relates to areas beyond the 271 areas of geographic overlap between

⁶⁸ It will be recalled that the Non-Price Effects relate to the 25 Closing Facilities (see paragraphs 3, 7–10 above). These include effects alleged to arise both within the 271 geographic areas of competitive overlap between Secure and Tervita, as well as beyond those areas. This is because some of the Closing Facilities receive waste from customers who are not located within any of those 271 areas, and therefore did not benefit from any direct competition between Secure and Tervita prior to the Merger.

Secure and Tervita is not attributable to the exercise of any market power, and is therefore not within the scope of “effects of any prevention or lessening of competition,” as contemplated by subsection 96(1).

[521] The Commissioner disagrees. He submits that those Non-Price Effects are cognizable even if the DWL does not occur in one or more of the 271 geographic areas in which the Merging Parties previously competed directly. In support of this position, he advances two arguments.

[522] First, he notes that facility closures that have occurred or are likely to occur in Non-Competing Areas are a direct result of the Merger, as contemplated by section 96. The Tribunal considers that this is not sufficient to bring the alleged Non-Price Effects in Non-Competing Areas within the scope of section 96. The relevant anti-competitive effects for the purposes of that provision are “the effects of any prevention or lessening of competition that will result or is likely to result from the merger or proposed merger.” This language makes it very clear that the only effects of a merger or proposed merger which are cognizable are those associated with any prevention or lessening of competition resulting therefrom. Other effects of the merger in question are not cognizable. The Tribunal recognizes that it may have suggested otherwise in *Superior Propane III*, at paragraph 230. However, it did so in a single sentence, without reconciling its observation with the language quoted immediately above from subsection 96(1).

[523] Second, the Commissioner maintains that the facility closures in the Non-Competing Areas have the requisite link to an exercise of market power by Secure (Transcript, Public, at p 3169). In this regard, the Commissioner contends that the facilities to be closed were in fact closely competing with facilities operated by the other Party, that they were economically profitable, and that their closure would not make economic sense in the absence of close competition between the Merging Parties (Transcript, Public, at pp 2889–2893). He adds that the extent of the Non-Price Effects he is alleging is directly related to the extent of competition with each closing facility’s next closest competing facility.

[524] The Tribunal considers that, in the Non-Competing Areas, the alleged Non-Price Effects do not have the requisite link to market power. For greater certainty, those are effects alleged to arise beyond the 271 areas of geographic overlap between Secure and Tervita. The Tribunal recognizes that the Closing Facilities all had some sales into one or more of those 271 areas. However, many of those facilities also had sales of waste services to producers located in other areas where the Merging Parties did not compete prior to the Merger. For greater certainty, the Commissioner has not established, with clear and convincing evidence, that the Merging Parties previously competed or would likely have competed in the future in any of those latter areas, i.e., areas beyond the 271 areas of competitive overlap. Consequently, there is no scope for the Merger to prevent or lessen competition in those areas, within the meaning of the Act. Stated differently, the “effects” contemplated by section 96 are limited to those that have occurred, are occurring or are likely to occur in a market in which the Merging Parties competed or were likely to compete prior to the merger (*Tervita SCC*, at para 90; *Tervita CT*, at paras 375, 378). In this proceeding, it is common ground between the Parties that such markets are the 271 areas of geographic overlap identified by the Commissioner. In the absence of any evidence of actual or likely future competition between Secure and Tervita outside those 271 areas, any “effects” that may arise beyond those 271 areas are not “effects of any prevention or lessening of competition that will result or is likely to result” from the Merger, as contemplated by subsection 96(1).

[525] Secure further asserts that the Non-Price Effects are not cognizable, even if they relate to those 271 overlapping areas, because those effects do not depend on the exercise of market power. In this regard, Secure makes two principal arguments.

[526] First, Secure notes that Dr. Miller acknowledged on cross-examination that those effects would be the same even if the merged entity had no market power, and even if there were no increase in market share or concentration as a result of the Merger (Transcript, Public, at pp 833–834). Secure adds that Dr. Miller also conceded that his estimate of the Non-Price Effects was based on financial statements that predated the Merger and that are a matter of indifference to Secure’s customers (Transcript, Public, at pp 817–818).

[527] Second, Secure states more generally that effects associated with the closure of facilities do not qualify as anti-competitive effects for the purposes of the Act. In this regard, it relies on the following passage from *Superior Propane I*:

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.

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.

Superior Propane I, at paras 443–445 [emphasis added].

[528] In the passage quoted immediately above, the Tribunal was careful to confine its comments to the effects of “mergers and business restructurings that are not offensive” [emphasis added].

[529] More generally, arguments advanced by Secure essentially boil down to the proposition that if alleged anti-competitive effects would be the same as between a scenario in which the requisite link to market power has been established and a scenario in which that link has not been established, such effects are not cognizable.

[530] The Tribunal rejects that proposition. In this case, the requisite link to the alleged Non-Price Effects that are likely to occur in the 271 areas of geographic overlap has been established by the evidence that Secure and Tervita competed in those areas. That evidence was not contested by Secure.

- (c) Anti-competitive Effects in Overlapping Markets in which the Lessening of Competition is Not Substantial

[531] Secure contends that the anti-competitive effects that are cognizable under subsection 96(1) are limited to those that would likely result in markets in which the Tribunal has concluded that there is likely to be a substantial lessening of competition, namely, the 136 SLC Markets. In support of this position, Secure maintains that the inclusion of anti-competitive effects arising in the other markets in which Secure and Tervita competed prior to the Merger would result in an “apples-to-oranges” assessment. This is because the efficiencies considered in the section 96 trade-off analysis are limited to those arising in markets in which competition is likely to be prevented or lessened substantially.⁶⁹

[532] The Tribunal disagrees. Given that subsection 96(1) contemplates a balancing of “the effects of any prevention or lessening of competition that will result or is likely to result from the merger” [emphasis added], all such effects are cognizable. That is to say, the assessment is not limited to markets in which the Tribunal has determined that the prevention or lessening of competition is or is likely to be substantial (see, for example, *Superior Propane III*, at para 230).

[533] Had Parliament wished to avoid the asymmetry identified by Secure, it could easily have included the word “substantially” in subsection 96(1). As stated above, it can be inferred from the absence of that word, which is used throughout the merger provisions of the Act,⁷⁰ that Parliament did not intend to limit the balancing assessment in subsection 96(1) to effects arising in markets in which a substantial prevention or lessening of competition has been found (see, generally, *P&H*, at para 646; *Superior Propane II*, at para 83).

[534] Consequently, the cognizable efficiency gains established by Secure must be greater than, and offset, the effects of “any” prevention or lessening of competition resulting from the Merger in the 271 areas of geographic overlap identified by Dr. Miller. It is not sufficient that they simply be greater than, and offset, the effects that are likely to result from a “substantial” prevention or lessening of competition in the 136 SLC Markets. In brief, whereas the cognizable efficiencies are limited to those efficiencies that would not likely be attained if the Tribunal makes a particular order, the extent of the cognizable anti-competitive effects to be assessed is entirely independent of the order to be made by the Tribunal. Moreover, whereas the cognizable efficiencies are limited to those efficiencies that will likely be lost when the order is made (i.e., the efficiencies are “order driven” and arise as of the date of the order), the anti-competitive effects are those resulting from the merger in respect of which the application is made, and arise as soon as the merger is completed.

(d) Anti-competitive Effects that are not Directly Linked to a Reduction in Output

[535] Secure asserts that the cognizable anti-competitive effects are limited to those that are associated with exercises of market power which result in a reduction in output. In support of this position, it relies on the SCC’s endorsement of the statement that DWL “results from the fall in

⁶⁹ As previously noted, efficiencies in other markets that would not likely be attained if the order in question were made, because they are inextricably linked to the market(s) in which a likely substantial prevention or lessening of competition has been found, are also cognizable.

⁷⁰ See, for example, sections 92, 93, 94, 97, 98, 99, 100, and 103 of the Act.

demand for the 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" (*Tervita SCC*, at para 94, quoting *Superior Propane IV*, at para 13). After quoting that statement, the SCC proceeded to observe in the same paragraph: "Estimates of the elasticity of demand – or the degree to which demand for a product varies with its price – are necessary to calculate the deadweight loss" (*Tervita SCC*, at para 94, citing *Tervita CT*, at para 244).

[536] The Tribunal disagrees with Secure's interpretation of these passages from *Tervita SCC*. In brief, at the time *Tervita* was decided, discussions in the jurisprudence relating to DWL had generally been confined to DWL associated with exercises of market power that were related to a reduction in output. This includes the passage at paragraph 244 of *Tervita CT*, to which the majority decision in *Tervita SCC* referred in the above-quoted passage from paragraph 94 of its reasons. Nevertheless, it was generally recognized that the Act is concerned with anti-competitive price and non-price effects, and that the former were often treated as shorthand for all aspects of a firm's actions that have an impact on its customers (*Tervita SCC*, at para 44). The Tribunal recognizes that the anti-competitive effects considered under section 96 have usually been the DWL associated with a likely increase in price and the related reduction in output. However, anti-competitive effects are not confined to those effects. Under both sections 92 and 96 of the Act, the anti-competitive effects encompass "all relevant price and non-price effects that are likely to arise from a merger ..." (*P&H*, at para 647), subject to the discussion at paragraphs 520–524 above. These include non-price effects, such as a reduction in service, quality, product choice, innovation, or other dimensions of competition that customers value. Indeed, in *Superior Propane I*, the Tribunal acknowledged that a reduction in product choice can be part of the anti-competitive effects covered by section 96 even though it may not be captured by the quantified DWL (*Superior Propane I*, at paras 460, 464). In that matter, the Tribunal awarded a value of \$3 million to the qualitative effects resulting from a reduction in product choice and "changes in the product line by the merged firm" (*Superior Propane III*, at para 229). These effects had not been quantified by the Commissioner but were included in the total \$6 million DWL calculated by the Tribunal.

[537] To the extent that non-price effects of a prevention or lessening of competition are measurable and are likely to reduce total surplus, they are cognizable under subsection 96(1) (see, for example, *Superior Propane III*, at paras 229, 240–241; *Superior Propane I*, at paras 466–467).⁷¹ In this regard, the Tribunal accepts Dr. Miller's evidence that the notion that total surplus can be reduced due to a lessening of consumer choice is well-established in economics (Transcript, Confidential B, at pp 780–781; Miller Rebuttal Report, at para 93; see also Transcript, Public, at pp 759, 920; Transcript, Confidential B, at p 786). This was confirmed by Dr. Duplantis, who acknowledged on cross-examination that the loss of product choice resulting from the closure of a facility can result in a DWL even if there is no reduction in output. In this connection, she agreed that if there were only two grocery stores at either end of a town, and one of them was closed as a result of a merger, that could in theory result in a loss of consumer surplus, even if the volume of groceries purchased remained the same. Nevertheless, she maintained that in this particular

⁷¹ This remains so even if they are not quantifiable and not directly linked to a reduction in DWL (see paragraph 515 above and *Superior Propane I*, at para 460).

instance, the alleged anti-competitive effects associated with facility closures were not “representative of deadweight loss” (Transcript, Public, at pp 1850–1851).

[538] Considering the foregoing, the Tribunal disagrees with Secure’s position that the theory being advanced by the Commissioner with respect to Non-Price Effects is novel and should in any event be rejected. The fact that it has not yet been addressed in the jurisprudence does not make it novel.

[539] Prior to *Tervita SCC*, the Commissioner appears to have considered that it was unnecessary to quantify these or other types of anti-competitive effects, and that such effects could be given qualitative weighting in the overall assessment contemplated by section 96. However, in *Tervita SCC*, a majority of the Court explicitly rejected the Commissioner’s position in this regard, in circumstances when the alleged anti-competitive effects can be quantified. The majority decision clarified that the Commissioner has a legal burden to quantify all alleged anti-competitive effects that are quantifiable, even if only as estimates, provided that where estimates are provided, they must be grounded in evidence (*Tervita SCC*, at paras 124–125; *P&H*, at paras 651–652). Where that burden is not met, such anti-competitive effects will receive a zero weighting (*Tervita SCC*, at paras 128, 137, 139, 159, 165). The Commissioner’s attempt to estimate the reduction in DWL flowing from the closure of facilities is simply a response to these teachings of the SCC.

[540] The Tribunal pauses to underscore that it may not always be possible to measure non-price anti-competitive effects in DWL terms. If a non-price anti-competitive effect is not reasonably measurable, it may be assessed on a qualitative basis. However, it bears underscoring that this can only be done where such effects are not quantifiable: “[q]ualitative anti-competitive effects, including lessening of service or quality reduction, are only assessed on a subjective basis because this analysis involves a weighing of considerations that cannot be quantified because they have no common unit of measure (that is, they are ‘incommensurable’)” (*Tervita SCC*, at para 125). Where qualitative effects are reasonably quantifiable, and the Commissioner fails to quantify them, even as estimates, they cannot be resurrected as qualitative effects (*Tervita SCC*, at para 100).

(4) The Trade-Off Contemplated by Section 96

[541] Subsection 96(1) of the Act requires an assessment of whether the merger in question has brought about or is likely to bring about cognizable gains in efficiency that will be greater than, and will offset, the cognizable anti-competitive effects that are likely to result from the merger. In this regard, the term “greater than” suggests a numerical comparison of the magnitude of the efficiencies, relative to the extent of the anti-competitive effects; whereas the term “offset” implies a subjective balancing of incommensurables, i.e., considerations that are not amenable to quantitative comparison (*Tervita SCC*, at para 144).

[542] Accordingly, the assessment contemplated by subsection 96(1) involves a two-stage process. At the first stage, the quantitative efficiencies are compared against the quantitative anti-competitive effects of the merger. At the second stage, the qualitative efficiencies are balanced against the qualitative anti-competitive effects (*Tervita SCC*, at para 147; *P&H*, at para 661). As previously mentioned, the Commissioner has explicitly refrained from asserting qualitative anti-competitive effects, because his expert has provided a quantitative estimate of the Non-Price Effects that are at issue in this proceeding.

[543] This trade-off, or balancing, assessment is flexible in nature and requires the Tribunal to be cognizant of the uncertainty that may be inherent in economic models that are employed by the parties (*Tervita SCC*, at paras 146, 154). However, it bears underscoring that the extent of the claimed efficiencies and anti-competitive effects must be grounded in the evidence and objectively reasonable (*Tervita SCC*, at paras 125, 146; *P&H*, at paras 660, 662).

B. The Tribunal's Assessment

(1) Secure's Efficiency Claims

(a) Summary of Secure's Position

[544] Secure submits that the Merger satisfies the requirements of the efficiencies defence as set forth in section 96 of the Act. In this regard, Secure maintains that it has demonstrated that the Merger is likely to bring about Foregone Efficiencies that will be greater than, and will offset, the effects of any SLC that is likely to result from the Merger.

[545] More specifically, Secure asserts that the Merger will generate \$52.8 million in annual run rate efficiencies and \$328.4 million in efficiencies on a discounted basis over 10 years,⁷² after accounting for approximately \$4 million in inefficiencies from customers' increased incremental transportation costs due to facility closures.⁷³ It claims that these annual and discounted 10 year amounts are fully cognizable pursuant to a "plain reading" of section 96.

[546] Recognizing that the jurisprudence has previously adopted an "order driven" approach to the interpretation of section 96, Secure has provided alternative estimates calculated in accordance with that approach. In that respect, Secure maintains that the cognizable Foregone Efficiencies would be \$20.2 million annually, and \$138.5 million on a discounted basis over 10 years. These are the efficiencies that would not likely be attained if an order requiring the 41 divestitures sought by the Commissioner were made.

[547] For the reasons discussed at paragraphs 499–507 above, the relevant claimed efficiencies for the purposes of the Tribunal's assessment are those that Mr. Harington calculated pursuant to the "order driven" approach, namely, \$20.2 million annually, and \$138.5 million on a discounted

⁷² Mr. Harington used a real, annual discount rate of 8% in arriving at his 10-year NPV estimates.

⁷³ The Tribunal understands that Secure's estimates of efficiencies were based on 2020 dollars, whereas all estimates of DWL provided by the Commissioner were based on 2019 dollars. In the absence of any evidence regarding the appropriate adjustment factor to apply to adjust the DWL estimates to 2020 dollars, or to adjust all estimates to 2021 dollars, the Tribunal has no basis upon which to make such adjustments. Given the pandemic conditions that prevailed in those years, the Tribunal does not consider that anything turns on this issue. Nevertheless, the Tribunal observes that it is often asked to make comparisons or trade-offs involving monetary sums from different time periods. To be accurate, the dollar values on each side of the comparison should be expressed in the same units of measure, such as in dollars (or other units of currency) with the same purchasing power. In future proceedings, parties could assist the Tribunal by providing evidence of relevant economic data, such as the quarterly GDP price indices published by Statistics Canada and, in some cases, market exchange rates.

basis over 10 years. These will be discussed below. To facilitate the discussion, the Tribunal will focus on the 10-year discounted NPV estimate, unless otherwise indicated.

(b) Adjustments to Account for the Tribunal's List of Divestitures

[548] Mr. Harington's \$138.5 million estimate was rounded up from \$138,456,865 and is reported at line 195 of Schedule 4.1 of the Updated Harington Report. This estimate was based on (i) the list of 41 divestitures discussed at paragraphs 39–40 and 369–370 and Table 15 above; and (ii) the list of facility integrations provided at Tables 4 and 5 of the Updated Harington Report. Given the Tribunal's conclusion at paragraph 481 above that only 29 divestitures would be required, Mr. Harington's \$138,456,865 estimate needs to be adjusted. The following table summarizes the required adjustments.

Table 16 – Adjustments to Secure's efficiency claims to reflect the Tribunal's revised list of divestitures

Required Adjustments	NPV (2023-2033)	Comments ⁷⁴
	\$138,456,865	Starting point.
-\$2,165,457	\$136,291,408	Reversal of all claimed savings related to the [REDACTED], which is no longer on the Tribunal's list of divestitures. The Tribunal's order would not affect Secure's plans to consolidate the waste processed at this facility into [REDACTED].
+\$2,744,911	\$139,036,320	Inclusion of savings relating to the [REDACTED], which were not included in Mr. Harington's Schedule 4.1, but were included at Tab 3.1 of his supporting spreadsheet. The numbers in the latter spreadsheet were adjusted to account for the Order Date Approach, as defined below. This facility was added by the Tribunal to its list of divestitures for greater clarity, as it properly forms part of the [REDACTED] facility. It is not apparent why it was not included in Mr. Harington's analysis.
-\$2,354,682	\$136,681,637	Reversal of all claimed savings related to the [REDACTED], which is no longer on the Tribunal's list of divestitures. The Tribunal's order would not affect Secure's plans to consolidate the waste processed at this facility into its other nearby facilities.

⁷⁴ In this table, the term "will no longer be closed" should be understood to mean "will no longer be closed or will have to be reopened."

-\$1,380,615	\$135,301,023	Reversal of all claimed savings related to the [REDACTED], which is no longer on the Tribunal's list of divestitures. The Tribunal's order would not affect Secure's plans to consolidate the waste processed at this facility into its other nearby facilities.
-\$1,883,304	\$133,417,719	Reversal of all claimed efficiencies related to the [REDACTED]. Absent the transaction, this [REDACTED] would have required a new well. Secure claimed that this cost would be avoided with closure of this facility, and the absorption of the waste it processed, at a combination of the [REDACTED], the [REDACTED], the [REDACTED], and the [REDACTED], among others. Secure added that the divestiture of those facilities would result in this saving being lost. Since the [REDACTED] and [REDACTED] will not be divested, the Tribunal considers it likely that the [REDACTED] will remain closed.
-\$2,962,539	\$130,455,180	Reversal of all claimed savings related to the [REDACTED], which is no longer on the Tribunal's list of divestitures. The Tribunal's order would not affect Secure's plans to consolidate the waste processed at this facility into its other nearby facilities, e.g., the [REDACTED] and [REDACTED].
+\$767,688	\$131,222,867	The [REDACTED] is no longer on the Tribunal's list of divestitures. The Tribunal's order would not affect Secure's plans to close its nearby [REDACTED] and consolidate waste volumes into the [REDACTED]. Therefore, the "negative efficiencies" included by Mr. Harington for this facility's [REDACTED] integration no longer need to be deducted from Secure's overall efficiency claims.
-\$4,287,311	\$126,935,556	The [REDACTED] is no longer on the Tribunal's list of divestitures. The Tribunal's order would not affect Secure's plans to close its nearby [REDACTED], consolidate waste volumes into the [REDACTED], and construct a pipeline to move leachate from this [REDACTED]. These efficiencies are categorized

		by Secure as Geographical Operating Cost Savings and are in addition to the [REDACTED] Integration values adjusted immediately above.
-\$1,204,990	\$125,730,566	Reversal of all claimed savings related to the [REDACTED], which is no longer on the Tribunal's list of divestitures. The Tribunal's order would not affect Secure's plans to consolidate the waste processed at this facility into its other nearby facilities.
+\$12,345,994	\$138,076,560	Removal of the remaining "negative efficiencies" that Mr. Harington deducted from Secure's claimed efficiencies, due to the fact that some customers would have to incur incremental transportation costs associated with facility consolidations. In the adjustments that appear in the rows above, such as the one that removes all entries for the [REDACTED], labour and non-labour costs, as well as incremental transportation cost savings, were included. For all the remaining facilities listed in Mr. Harington's Schedule 4.1 and not specifically addressed in the above rows, this adjustment sums and reverses the negative transportation cost entries. These negative transportation effects are implicitly included in the DWL associated with facility closures — which DWL was not addressed by Mr. Harington.
+\$4,113,800	\$142,190,360	This adjustment acknowledges forgone efficiencies in connection with the [REDACTED], in the event that [REDACTED], as suggested by Mr. Harington. These were not included in Mr. Harington's Schedule 4.1, but were included in Schedule 7. The inclusion of the [REDACTED] on the Tribunal's list of divestitures means there will be [REDACTED], etc. The Tribunal adjusted these entries to reflect the date intended to approximate the implementation of its order (the " Order Date Approach ") and to remove incremental transportation costs.
-\$1,551,687	\$140,638,674	This adjustment relates to the removal of the [REDACTED] from Secure's claims,

		because Secure reopened this facility after revising its integration plan. ⁷⁵
\$140,638,674		This is the adjusted value of cognizable efficiencies. It represents the NPV of Secure's efficiency claims over the 2023-2033 period. The annualized equivalent is \$20,168,105 per year.

[549] The Tribunal pauses to observe that Secure did not claim any facility integration efficiencies in relation to seven other facilities that the Tribunal excluded from the Commissioner's proposed list of divestitures.⁷⁶

[550] In summary, after making the adjustments described above, the starting point for the Tribunal's consideration of Secure's claimed efficiencies is \$140,638,674. Those adjustments account for (i) six facilities in respect of which Secure claimed efficiencies, but which were removed from the Commissioner's proposed list of divestitures, (ii) the removal of pipeline access savings associated with [REDACTED], (iii) the addition of costs associated with the [REDACTED] and [REDACTED], (iv) the Tribunal's conclusion that Secure's plan to close the [REDACTED] is unlikely to be affected by the divestitures, and (v) the reversal of certain "negative efficiencies" that were deducted based on the Commissioner's (longer) proposed list of divestitures. These adjustments follow the presentation of Schedule 4.1 of the Updated Harington Report by employing June 30, 2023 as the assumed order date (para 14), to follow the Order Date Approach.

[551] This adjusted, ten-year discounted \$140,638,674 figure is broken down as follows, using the four main categories of efficiencies identified by Mr. Harington (Updated Harington Report, at Table 6):

⁷⁵ Transcript, Confidential B, at pp 2913, 3032, 3509. Secure claims that this reopening is temporary. However, the Tribunal accepts the Commissioner's position that this facility will likely be kept in operation having regard to the other planned closures and the divestitures required by the Tribunal.

⁷⁶ [REDACTED]

Table 17 – Secure’s claimed efficiency gains (NPV), adjusted by category⁷⁷

Initial Values Based on Schedule 4.1 (Updated Harington Report)		Adjusted Values
TRD / SWD FACILITY RATIONALIZATION COST SAVINGS ⁷⁸		
Labour cost savings		
Non-labour cost savings		
Incremental customer transportation costs ⁷⁹		
TOTAL TRD / SWD INTEGRATION	\$55,359,949	\$60,449,729
<i>Annualized Equivalent</i>		<i>\$8,668,714</i>
LANDFILL FACILITY RATIONALIZATION COST SAVINGS ⁸⁰		
Labour cost savings		
Labour termination costs (4.7 months per Schedule 6.2)		
Non-labour cost savings		
Incremental customer transportation costs		
TOTAL LANDFILL INTEGRATION	\$11,686,564	\$14,270,895
<i>Annualized Equivalent</i>		<i>\$2,046,499</i>
TOTAL GEOGRAPHIC BASED OPERATING COST SAVINGS⁸¹	\$11,778,284	\$6,285,983
<i>Annualized Equivalent</i>		<i>\$901,433</i>
TOTAL CORPORATE COST SAVINGS	\$59,632,068	\$59,632,068
<i>Annualized Equivalent</i>		<i>\$8,551,459</i>
Total	\$138,456,865	\$140,638,674
<i>Annualized Equivalent</i>	<i>\$19,855,226</i>	<i>\$20,168,105</i>

⁷⁷ Ten-year discounted and annualized equivalent values employ 8% per year for the period July 2023 – June 2033, treating annual data from each July-June interval as a single value on each December 31st.

⁷⁸ Added values for [REDACTED]. Removed values for the [REDACTED].

At Schedule 4.1 of the Updated Harington Report, Mr. Harington refers to “FST / SWD” instead of “TRD / SWD.” The terms FST and TRD refer to the same facilities.

⁷⁹ Incremental transportation costs are not a gain in efficiency but an anti-competitive effect to be considered on the other side of the trade-off analysis. Consequently, they have been removed from this listing.

⁸⁰ Removed values for the [REDACTED].

⁸¹ Removed values for the [REDACTED].

[552] The figures above were calculated based on the Order Date Approach, which the Commissioner and Secure both maintained is the appropriate starting point for calculating efficiency gains for the purposes of section 96 of the Act.⁸² The Tribunal agrees that is a more appropriate starting point than the “date of closing” approach, because the last clause of subsection 96 confines the scope of efficiencies that are cognizable to those that would not likely be attained if the order were made. Consequently, gains in efficiency that have already been achieved, for example as a result of plant rationalizations that have been completed, may not be considered because they would not likely be impacted by any order issued by the Tribunal. In the interests of fairness and consistency, any costs associated with attaining those already achieved efficiency gains are also not considered in the analysis.

(c) The Claimed Efficiency Gains Associated with Facility Rationalizations

[553] As reflected in Table 17 above, \$60,449,729 of the total efficiencies claimed by Secure is associated with TRD and SWD rationalizations and an additional \$14,270,895 pertains to Landfill integrations. For the following reasons, the Tribunal finds that these gains are cognizable, but they have not been demonstrated on a balance of probabilities. Consequently, the \$140,638,674 in overall efficiencies claimed by Secure must be reduced by these two amounts. This will leave \$65,918,050 in remaining efficiency claims to be addressed in Parts XV.B. (1)(d) and (e) below.⁸³ The annualized equivalent of these remaining efficiencies is \$9,452,892.

(i) *The Commissioner’s assertion that these claimed efficiencies are not cognizable*

[554] The Commissioner asserts that the cost savings Secure has claimed in relation to the rationalization of Landfill/TRD/SWD facilities are not cognizable, because they will result from a loss of product choice. In this regard, Dr. Eastman explained that if, as he understood, Dr. Miller was maintaining that the Closing Facilities represent differentiated products, then the savings resulting from removing such product choices do not represent productive efficiencies. In support of this position, Dr. Eastman relied on the general proposition that savings resulting from a reduction in product choice are not cognizable (MEGs, at para 12.20). Dr. Eastman added that he had not assessed, and was not opining on, whether the Closing Facilities should be considered to be differentiated products.

[555] Ultimately, the Commissioner clarified that he was not in fact maintaining that the Closing Facilities should be considered to be differentiated products, in and of themselves. Rather, the Commissioner’s position is that those facilities each offer a differentiated service, in the sense that the bundle of services acquired by customers differs from one facility to another (Transcript, Confidential B, at p 3168). Nevertheless, the Commissioner maintained that the efficiencies

⁸² Memorandum of Argument of Secure, at para 146; Closing Argument of the Commissioner, at para 154. However, the Tribunal notes that, during the hearing, the Commissioner took the position that Secure’s claimed efficiency gains, as well as the costs incurred to achieve those gains, should be assessed from the time of closing (Transcript, Public, at pp 3095–3097).

⁸³ $\$140,638,674 - (\$60,449,729 + \$14,270,895) = \$65,918,050$.

claimed by Secure in relation to facility rationalization/consolidation are not cognizable on the ground that they arise from a reduction in product choice.

[556] The Tribunal disagrees. There is a distinction between the bundle of services offered at a facility, and the facility itself. So long as the bundle of services that are offered at the Absorbing Facilities remains essentially the same as the bundle that was offered at the Closing Facilities, any true resource savings to the Canadian economy that will likely result from the rationalization of those facilities are cognizable under section 96. This remains true even if customers derive some value — which will be lost — from the geographic location of the facilities that will be closed (see, for example, *Superior Propane I*, at paras 21, 321–323, 380–383).

[557] Subject to the Tribunal's findings below with respect to the Price/Output Effects, the Tribunal accepts Mr. Harington's evidence that, after looking at all of the services provided by Secure and Tervita prior to the Merger, he was satisfied that there would be no reduction in output, service, quality or choice, in the conventional sense of those words (Transcript, Confidential B, at p 2478). Consequently, to the extent that the gains in efficiency associated with the rationalization of the Closing Facilities are demonstrated on a balance of probabilities, they are cognizable as true productive savings in resources. This is because they will permit a similar bundle of services to be provided to customers at a lower cost than before the Merger.

[558] Notwithstanding the foregoing, as discussed in Part XV.B (2)(c) below, the loss of the value associated with the location of a Closing Facility is something that can be considered on the other side of the trade-off analysis, when balancing established gains in efficiencies against the likely anti-competitive effects of a merger.

(ii) *Alleged shortcoming in Secure's correlation analysis*

[559] The Commissioner submits that Secure's calculation of fixed cost savings associated with the rationalization of its Landfill/TRD/SWD facilities is flawed because it is based in part on an analysis of the correlation between output and some important individual cost categories, at a narrow selection of facilities. Secure relied on that analysis, conducted by Mr. Harington, to identify and then remove variable costs from its overall facility costs, in order to estimate its fixed cost savings.

[560] As part of his analysis, Mr. Harington relied on averages of certain significant individual cost items at the facilities he selected, despite the significant variation in those items across those facilities.

[561] The Commissioner maintains that the flaws in this approach are, in part, reflected in the fact that many negative correlations reported by Mr. Harington have no sensible economic interpretation.

[562] Mr. Harington conducted separate correlation assessments for SWDs, TRDs, and Landfills, respectively, based on information obtained from monthly income statements for the period January 2019 to October 2021 for Tervita, and for the period of January 2020 to October 2021 for Secure. Those income statements included all costs by category for each facility. Mr. Harington's assessments were confined to the facilities that were included in Secure's integration plan. Stated

differently, those assessments excluded all facilities that were not part of that integration plan. For TRDs, his assessment was further confined to facilities that only handle two product lines, namely, waste treating and water disposal. This enabled him to back out water disposal in order to isolate waste treatment costs (Transcript, Confidential B, at pp 2606-2607).

[563] To identify the variable costs of the SWD facilities, Mr. Harington correlated monthly processed water volumes in cubic meters against monthly expenses for each cost line item. He then identified the line items which indicated a significant correlation with volumes. After taking account of the nature of each line item, and obtaining the input of Secure's management,⁸⁴ Mr. Harington selected a fixed percentage for each line item, based on the average of the observed variable percentage for that line item across the facilities that were assessed.

[564] As it turned out, four line items accounted for [REDACTED] of the total costs of the Secure SWD facilities that were included in the assessment. Those four line items were wages and salary ([REDACTED]), facility/field R&M ([REDACTED]), utilities ([REDACTED]) and trucking ([REDACTED]). Of those line items, only utilities appeared to be correlated with volumes processed at the Closing Facilities. Likewise, of the remaining line items assessed, only two other line items were identified as being correlated with volumes processed. Those were chemicals and equipment rentals, which together accounted for only approximately [REDACTED] of the total costs of the facilities that were assessed. Consequently, the only significant line item in respect of which Mr. Harington relied on a correlation analysis in relation to Secure's SWDs was "utilities." The same was true for the Tervita SWD facilities.⁸⁵

[565] For the utilities line item, Mr. Harington calculated that the average correlation was [REDACTED]

[REDACTED]

(Transcript, Confidential B, at pp 2509–2510).

[566] Mr. Harington adopted a broadly similar approach for TRDs and Landfills (Updated Harington Report, at paras 116–117, 150). For TRDs, utilities were once again the sole line item in respect of which Mr. Harington's correlation analysis materially impacted his overall estimates of fixed cost savings. Specifically, utilities accounted for approximately [REDACTED] of overall facility fixed costs, and were estimated to have a fixed cost component of [REDACTED] (Updated Harington Report, at Tables 14, 15).⁸⁶ For Landfills, the line item that accounted for the largest percentage of facility

⁸⁴ In this regard, Mr. Harington stated that he considered Secure's assessment of whether a cost is fixed or variable, but he did not rely on that assessment, other than in respect of repairs and maintenance (Updated Harington Report, at footnote 66).

⁸⁵ For those facilities, utilities accounted for approximately [REDACTED] of total non-labour costs. Once again, Mr. Harington relied on a correlation analysis for only two other cost categories, namely, chemicals ([REDACTED]) and subcontracting expenses ([REDACTED]).

⁸⁶ [REDACTED]

[REDACTED]

costs and that was the subject of a correlation analysis was “wages and salary,” which represented approximately [REDACTED] of the overall fixed cost and was estimated to have a fixed cost component of [REDACTED] (Updated Harington Report, at Tables 21, 22).⁸⁷ Utilities only accounted for approximately [REDACTED] of overall facility cost.

[567] In cross-examination, the Commissioner demonstrated that the correlated utility costs of the Secure and Tervita facilities that were included in the analysis vary substantially (Transcript, Confidential B, at pp 2511–2516). For example, for the Secure SWD facilities in respect of which the [REDACTED] average discussed at paragraph 565 above was reported, the percentage of utility costs that varied with volume were as follows: Nosehill TRD ([REDACTED]), Kaybob SWD ([REDACTED]), Eccles SWD ([REDACTED]), Rycroft TRD ([REDACTED]), Kaybob South SWD ([REDACTED]), Emerson SWD ([REDACTED]), Silverdale TRD ([REDACTED]), and Wild River SWD ([REDACTED]) (Updated Harington Report, at para 417).

[568] Mr. Harington acknowledged that the reported negative correlation numbers for the [REDACTED] did not make sense, because they would imply that as volumes increased, the utility expenses declined (Transcript, Confidential B, at p 2514). He made a similar acknowledgement in relation to reported negative correlations for salaries and wages, relative to volumes (Transcript, Confidential B, at pp 2516–2517). In addition, he acknowledged that he had applied averages across facilities that are located in different regions, despite his recognition that there are distinctions across regions (Transcript, Confidential B, at pp 2525–2526). Furthermore, he acknowledged that none of the facilities in certain integration groupings were included in his analysis and that, for six other integration groupings, the Absorbing Facility was excluded from his analysis (Transcript, Confidential B, at pp 2529–2531). However, he maintained that the exclusion of those facilities did not have a meaningful impact on his analysis (Transcript, Confidential B, at p 2531).

[569] The Tribunal disagrees with the latter statement. The Tribunal considers that the shortcomings in Mr. Harington’s analysis of utility costs of SWDs and TRDs render his estimates of the fixed cost savings associated with utility costs unreliable. The Tribunal is unable to adjust for this shortcoming, because the record does not enable the panel to determine the weight that utility costs comprised of the overall fixed cost savings claimed by Secure in respect of the rationalization of SWD and TRD facilities. Consequently, the Tribunal agrees with the Commissioner that Secure has neither properly demonstrated or quantified the fixed cost savings pertaining to SWDs and TRDs, nor provided a reliable estimate.

[570] The Tribunal reaches the same conclusion in respect of the claimed fixed cost savings pertaining to Landfills. In brief, those claimed cost savings are fatally tainted by the correlation analysis that Mr. Harington conducted in respect of “wages and salary.”⁸⁸

⁸⁷ [REDACTED]

⁸⁸ This line item was reported in Schedules 1 and 2 of Appendix I to the Updated Harington Report. As with the data relating to the utility costs discussed above, the data reported in those schedules reflects a large degree of variation in the “wage and salary” costs of the facilities identified in those schedules. As

[571] Given the conclusion reached in the next section immediately below, it is unnecessary to address here the impact of the shortcomings in the correlation analysis conducted by Mr. Harington in relation to Secure's claimed fixed cost savings from facility rationalizations.

(iii) Alleged shortcomings in Secure's assessment of the full impact of increasing volume throughput at Absorbing Facilities

[572] The Commissioner further submits that Secure's analysis of cost savings in relation to facility rationalizations rests on a series of unproven assumptions that: (i) variable costs per unit at Absorbing Facilities are equal to or less than those at Closing Facilities; (ii) Absorbing Facilities will process additional volume without any increase in variable cost per unit; and (iii) Absorbing Facilities will process additional volume without any increase in fixed costs. Given these shortcomings, the Commissioner once again maintains that Secure has not properly demonstrated or quantified the fixed cost savings associated with facility rationalizations. The Tribunal agrees.

[573] For each of the facilities for which facility integration savings are claimed, Secure provided annual figures for the total labour and non-labour savings that it is claiming. Unless otherwise indicated in these reasons,⁸⁹ the Tribunal is prepared to accept those figures as the starting point for its analysis. They represent only the starting point, because it is necessary to proceed from there to assess the impact of shifting to Absorbing Facilities the volumes of waste treated at Closing Facilities.

[574] Several of the schedules to the Updated Harington Report demonstrate that the variable cost structures of the facilities that are the subject of Secure's claimed efficiency gains differ considerably.⁹⁰ However, Secure has made no attempt to quantify the variable cost per unit across those facilities, even for the paired Closing and Absorbing Facilities (Transcript, Confidential B, at p 2558). It has also made no attempt to calculate the differences in variable costs across facilities (Transcript, Confidential B, at p 2559). Instead, Secure relied on Mr. Harington's assumptions that variable costs were, and would remain, the same at the paired Closing Facilities and Absorbing Facilities.⁹¹

[575] The Tribunal does not accept these assumptions. Based on his past work for Tervita, Mr. Harington was well aware of the relevance of assessing (i) any difference between the variable operating costs at a Closing Facility and the related Absorbing Facility, and (ii) the potential impact that a significant increase in waste volume treated can have on the variable costs of an Absorbing Facility. He was also aware of the possibility that those increased variable costs can be so substantial as to exceed the fixed cost savings associated with shutting down a facility for the purposes of transferring its volumes to the Absorbing Facility.

noted at paragraph 566 above, the "wages and salary" line item accounted for approximately [REDACTED] of the overall Landfill facility costs assessed by Mr. Harington.

⁸⁹ See, for example, the discussion in the immediately preceding section above.

⁹⁰ For TRDs and SWDs, see Schedules G1.1, G1.2, G4.1.1, G4.1.2, G4.2 and G4.3 to the Updated Harington Report. For Landfills, see Appendix I – Schedules 1 and 2.

⁹¹ The Tribunal acknowledges that Secure included some capital expenditures in its integration plan, primarily in relation to expenditures that were or would be incurred prior to 2023.

[576] In particular, in connection with Tervita's 2018 acquisition of Newalta, Mr. Harington prepared an expert report on the efficiencies likely to result from the merger (Exhibit CB-A-897/P-A-898, Tervita Newalta – The Brattle Group Initial Report dated June 11, 2018 Assessing Productive Efficiencies Arising from the Transaction (the “**Harington Newalta Report**”)). In that report, he assessed both (i) the reduction in fixed operating costs (as he did in the present proceeding) and (ii) the difference between the variable costs of a facility being closed and the facility into which its volume would be absorbed (Harington Newalta Report, at para 51). Later in that report, he observed that he had accounted for “certain positive or negative efficiencies arising from difference in per unit variable costs across facilities” (Harington Newalta Report, at para 62).

[577] The Tribunal pauses to observe that, in the Harington Newalta Report, Mr. Harington and Tervita also took the time to assess the variable costs of each facility, rather than relying on an average across facilities that was based on the type of correlation analysis discussed in the immediately preceding section above.

[578] During cross-examination in the present proceeding, Mr. Harington acknowledged that one would normally subtract the incremental variable costs at the Absorbing Facility from the savings claimed in relation to the Closing Facility (Transcript, Confidential B, at p 2554). [REDACTED]

(Transcript, Confidential B, at pp 2555–2558; Harington Newalta Report, at p 77, Schedule 2.5.7(B)). [REDACTED]

[REDACTED] (Harington Newalta Report, at Schedule 2.5, footnote A).

[579] For each of the seven facilities that were assessed in Mr. Harington's Newalta Report, negative efficiencies associated with incremental variable costs at Absorbing Facilities were identified (Harington Newalta Report, at Schedule 2.5). Despite his awareness of that very significant fact, Mr. Harington did not adjust for variable costs in his assessment of the cost savings related to facility rationalizations in the present proceeding.

[580] Considering this failure to adjust for variable costs at the Absorbing Facilities, as well as the shortcomings in Secure's approach to fixed cost savings that were discussed in the immediately preceding section above, the Tribunal finds that Secure has failed to demonstrate, on a balance of probabilities, the overall efficiency gains that it has claimed in respect of facility rationalizations. Secure's expert, Mr. Harington, was not only well aware of the relevance of assessing the impact of consolidated volumes on Absorbing Facilities, he appears to have had the data he required to conduct that analysis, at least for some facilities.⁹² Moreover, he could have requested the data he required for other facilities.

⁹² For example, it appears that Mr. Harington had the data he required for this purpose in connection with the integration of several Landfill Closing/Absorbing Facilities, including [REDACTED]

[581] The Tribunal acknowledges that some aspects of the analysis may have presented challenges for assessing variable costs at some of the Closing/Absorbing facility integrations. However, neither Mr. Harington nor Secure attempted to explain such challenges or why there was no reasonable way in which incremental variable costs at Absorbing Facilities could not be estimated.⁹³

[582] By failing to conduct that assessment, and by failing to conduct a more robust assessment of fixed cost savings, Secure has fallen short in the very same way that it insists the Commissioner has done so in estimating the anti-competitive effects of the Merger. That is to say, it has failed to quantify claimed savings that were and are reasonably quantifiable, as Mr. Harington did in connection with Tervita's 2018 acquisition of Newalta. As a result of those two failures, the support Secure has provided for the efficiencies it claims in relation to facility rationalizations is incomplete and doubly confounding. Stated differently, Secure has not met its legal burden to properly quantify those efficiencies (*Tervita SCC*, at paras 124, 128).⁹⁴

[583] Consequently, the Tribunal is not in a position to verify those claims. Moreover, the Commissioner was not in a position to challenge those claims, other than by way of the more general argument being addressed in this section. Therefore, those claims must be given a zero value for the purposes of section 96 (*Tervita SCC*, at paras 128, 137, 139, 151, 159, 165).

[584] Given this conclusion, it is unnecessary to address in detail the other submissions made by the Commissioner in respect of the efficiencies Secure has claimed in relation to facility rationalizations. However, to provide guidance for the future, the Tribunal will briefly comment on those submissions immediately below.

(iv) *Alleged failure to account for industry growth and increased demand*

[585] The Commissioner submits that to the extent Secure's forecasts of future demand turn out to be incorrect, the Absorbing Facilities will not have sufficient capacity to absorb volumes from the Closing Facilities. In turn, the Commissioner states that this may result in Secure having to either reopen Closed Facilities or keep them open if they have not yet closed. In the alternative, the Commissioner maintains that Secure may be required to make additional capacity investments.

[586] Dr. Eastman similarly opined that the current and planned capacity at Absorbing Facilities may not be sufficient to deal with volumes commensurate with pre-COVID production, future growth in demand or potential bottlenecks. He added that Secure has not addressed other potential diseconomies of scale (Eastman Report, at paras 45–47).

⁹³ The Tribunal acknowledges that at paragraph 75 of the Harington Reply Report, Mr. Harington presents Table 2 that compares ratios of total expenses to waste volumes for Landfills across matched sets of Closing Facilities and Absorbing Facilities. However, reporting and comparing the total cost per unit is not the same as reporting the variable cost per unit, which could be more important in establishing a claim for efficiencies.

⁹⁴ Although these passages dealt with the Commissioner's burden, the rationale applies equally to a respondent's burden under section 96 (see paragraphs 516–517 above). The Tribunal is unable to ascertain any principled basis upon which the burden to quantify something that is quantifiable should apply to the Commissioner, but not to a respondent.

[587] The Tribunal has carefully assessed the evidentiary record and accepts Mr. Harington's opinion that there will likely be sufficient capacity at the Absorbing Facilities to accommodate likely growth in demand in the foreseeable future. In reaching this conclusion, the Tribunal has considered that the number of facilities on its list of divestitures (29) is almost 30% less than what the Commissioner requested (41). Moreover, as discussed in Table 16 above, the Tribunal has determined that, as a result of the divestitures, certain additional facilities that Secure had planned to close will need to be reopened.

[588] The Tribunal has also considered Mr. Harington's uncontested evidence [REDACTED] (Exhibit P-R-884/CB-R-885, Updated Slide Presentation of Mr. Andrew Harington ("Harington Slide Presentation"), at p 30), [REDACTED] (Transcript, Confidential B, at pp 2434–2435). In addition, the Tribunal has considered the detailed analysis of Closing and Absorbing Facilities in Appendix F to the Updated Harington Report. Furthermore, the Tribunal notes that [REDACTED]; Transcript, Confidential B, at p 2478), whereas Mr. Harington's analysis was based on the average of the highest 12-month period of output at each facility, between January 2018 and October 2021 (Transcript, Confidential B, at pp 2425–2431, 2478–2479; Harington Slide Presentation, at p 67).

[589] Having regard to the foregoing and the other evidence in the record, the Tribunal finds that Secure's assumptions regarding future demand and the capacities at the Absorbing Facilities were reasonable. Stated differently, the Tribunal does not accept the Commissioner's submission that Secure has failed to demonstrate that it will have sufficient capacity to service growing demand. The Tribunal also rejects the Commissioner's assertion that capacity restraints will lead to the need to increase capacity, either through (i) additional capacity investments, (ii) the reopening of facilities that have closed,⁹⁵ or (iii) the continued operation facilities that are planned to be closed.⁹⁶

(v) *The claimed efficiency gains associated with facility labour costs*

[590] The Commissioner asserts that Secure has not sufficiently substantiated its claimed productive efficiencies from labour reductions, because it has not provided evidence about the output of the terminated and retained employees. The Commissioner adds that Mr. Harington simply relied on Secure's estimation of which employees are redundant, and that he did not undertake any independent workflow analysis.

[591] In support of its claimed labour cost savings, Secure put forward a spreadsheet with the names of terminated employees. The Tribunal considers that this would normally provide a sufficient basis upon which to substantiate claimed efficiencies related to labour savings. It is not necessary to go further and provide evidence regarding the output of terminated and retained employees, or to undertake an independent workflow analysis. Such steps would not be in keeping

⁹⁵ [REDACTED]
[REDACTED] The Tribunal accepts the Commissioner's position that this facility will likely remain reopened.

⁹⁶ This is subject to the discussion in Part XV.B (1)(c)(vii) below.

with the Tribunal's understanding of how decisions are typically made regarding labour reductions in connection with a merger.

[592] Beyond the foregoing, the Commissioner adduced evidence indicating that Secure sought to fill positions that correspond to positions that were terminated and counted as merger efficiencies. [REDACTED]

The Tribunal agrees that this evidence suggests that Secure did indeed fail to adjust its claimed labour cost savings to account for these subsequent developments. To the extent that Secure has hired or is likely to hire employees to fill positions that were the subject of claimed cost reductions, those claimed reductions must be reduced.

[593] Given the Tribunal's decision to reject all of the cost savings associated with facility rationalizations, and to reject certain of the "corporate cost savings" that are discussed below, it is unnecessary to calculate the effect of this particular failure on Secure's part.

(vi) *Alleged failure to account for diversion of production*

[594] The Commissioner further submits that Secure's efficiency claims do not take into account the likely diversion away from Absorbing Facilities, including to competitors. In support of this submission, the Commissioner notes that both Dr. Miller and Dr. Duplantis estimated that there would be some reduction in output as a result of price increases following the Merger.

[595] In principle, this is a valid point. Given that demand is not completely inelastic, and given that there are one or more competitors in many of the Relevant Markets, it is reasonable to expect that there will be at least some diversion of output away from Secure to those competitors. There is also likely to be some overall reduction of output. These points are further discussed in Part XV.B. (2)(c) below.

[596] For the present purposes, it will suffice to observe that if the Tribunal had not already decided to reject Secure's claimed facility rationalization cost savings for the reasons provided at paragraphs 569–570 and 574–583 above, those savings would have required a downward adjustment to account for reduced output over the disputed range of adverse price effects and demand elasticities. The Tribunal recognizes the awkward position in which Secure found itself in this regard, as it has maintained that the Merger is not likely to prevent or lessen competition substantially. However, section 96 operates as a defence to a positive finding regarding the likelihood of a substantial prevention or lessening of competition. That provision does not get triggered unless and until such a finding has been made. In that context, it is not acceptable to prepare estimates of efficiency gains on the basis of an assumption that output will remain constant, as Mr. Harington did in his report. Rather, those invoking the defence have an onus to adjust their estimates of likely efficiency gains, having regard to the disputed range of adverse price effects and demand elasticities. Nevertheless, for the reasons given at paragraph 584 above, it is unnecessary to make any adjustment for Secure's shortcoming in this regard.

(vii) *Alleged failure to account for more rapid depletion of SWD and Landfill facilities*

[597] Lastly, the Commissioner submits that Secure failed to account for the fact that the consolidation of wastewater and solid waste into Absorbing SWD and Landfill Facilities, respectively, would accelerate the depletion of the absorbing disposal wells and Landfill cells. This was acknowledged by Mr. Harington on cross-examination (Transcript, Confidential B, at pp 2577–2581). He also acknowledged that certain capital avoidance expenditures that he claimed were more appropriately considered to be savings related to the time value of money, rather than capital cost savings (Transcript, Confidential B, at pp 2579–2580).

.⁹⁷ However, for the reasons given at paragraph 584 above, it is unnecessary to make any adjustment for Secure’s shortcoming in this regard.

(viii) *Summary – fixed cost savings claimed in relation to facility rationalizations*

[598] In summary, for the reasons provided at paragraphs 569–570 and 574–583 above, the Tribunal finds that Secure has not properly substantiated (i) the \$60,449,729 in fixed cost savings it has claimed in relation to TRD and SWD rationalizations, and (ii) the \$14,270,895 in fixed cost savings it has claimed in relation to Landfill consolidations. These amounts must therefore be deducted from the overall cost savings of \$140,638,674 that Secure has claimed (see paragraphs 548–550 above). After applying those deductions, the remaining efficiencies claimed by Secure amount to \$65,918,050. The annualized equivalent of this is \$9,452,892. Given this finding, it is unnecessary to adjust for the shortcomings in Secure’s analysis that are discussed in Parts XV.B (1)(c)(v)-(vii) above.

(d) Claimed “Corporate Cost Savings”

[599] Secure claimed \$59,632,068 in “corporate cost savings. The Commissioner submitted that this amount ought to be reduced for several reasons.

[600] To begin, the Commissioner maintains that Secure failed to quantify and deduct at least two categories of costs incurred to realize some of the efficiencies that it claims. These relate to (i) bonuses paid to executives to “hit certain targets or performance indicators,” and thereby achieve efficiencies; and (ii) labour spent on achieving efficiencies.

[601] The Tribunal accepts that bonuses paid in return for additional effort can constitute “a true economic cost of achieving the efficiencies claimed” (*Superior Propane I*, at para 340). The same

⁹⁷

(Transcript, Confidential B, at pp 2575–2578), (Transcript, Confidential B, at pp 2578–2579). For completeness, the Tribunal observes that these claims are not cognizable under the Order Date Approach.

is true for other types of incremental management/labour costs and opportunity costs incurred to achieve such efficiencies (*Superior Propane I*, at para 333). Indeed, this was recognized by Mr. Harington in the previously mentioned report that he prepared in connection with Tervita's 2018 acquisition of Newalta (Harington Newalta Report, at Table 8, p 49, and para 153; Transcript, Confidential B, at pp 2603–2605).

[602] However, the evidence adduced in this proceeding relates to (i) bonuses paid in 2021, including in connection with helping to achieve the closing of the Merger, and (ii) costs incurred in 2021 and 2022 to compensate the members of the integration team that Secure assembled to identify, plan for and ultimately achieve the claimed efficiencies.

[603] To the extent that these or other costs were incurred to attain efficiencies prior to the time at which any order may be issued under section 92 in this proceeding, they need not be deducted from the claimed efficiencies. This is because those efficiencies are not cognizable (see paragraph 552 above). So, it would be anomalous to exclude the efficiencies from consideration, while at the same time taking into account the costs incurred to achieve them.

[604] The Commissioner also submits that efficiencies that would likely be realized by any acceptable alternative purchaser should not be included in the assessment under section 96. The Tribunal agrees. In brief, those efficiencies would not meet the criteria of efficiencies that “would not likely be attained if the order were made”, as set forth in subsection 96(1). For greater certainty, it is not necessary that a particular likely purchaser be identified before the Tribunal can conclude that such efficiencies would likely be attained by an alternative purchaser (*Tervita CT*, at para 267).

[605] The efficiencies that the Commissioner submits would likely be realized by any acceptable purchaser pertain to cost savings claimed by Secure in respect of [REDACTED] positions. The Commissioner asserts that those positions are not likely to be required by potential divestiture purchasers. As a consequence, he states that Secure's claimed savings in relation to those positions, which have an NPV of [REDACTED],⁹⁸ are not gains in efficiency that are cognizable under section 96. In support of this, the Commissioner notes that Dr. Eastman opined that it is reasonable to assume that a potential acquirer or set of acquirers would not likely need to rehire [REDACTED], as assumed by Mr. Harington. Dr. Eastman provided the same opinion with respect to [REDACTED]. He stated that these [REDACTED] positions commonly exist in many organizations (Eastman Report, at para 93; Transcript, Confidential B, at p 2725).

[606] In cross-examination, Dr. Eastman conceded that, to his knowledge, none of the potential purchasers he had identified had prepared an integration plan setting out how any purchased facilities would be integrated into their existing operations (Transcript, Public, at pp 2775–2776). He also acknowledged that some degree of due diligence would be required before preparing a proper integration plan (Transcript, Public, at p 2777).

⁹⁸ This figure is the sum of the specific positions and labour costs in Mr. Harington's Schedules 6.2 and 6.4 in the Updated Harington Report.

[607] Regardless of whether any of the tentatively identified potential purchasers may have to conduct additional due diligence and then prepare a detailed integration plan, the fact remains that Dr. Eastman's evidence is that (i) it is reasonable to assume that a potential acquirer or set of acquirers would not likely need to rehire persons to fill the positions described immediately above, and (ii) such positions commonly exist in many organizations. The Tribunal considers this evidence to be corroborated, in general terms, by several witnesses who represented potential purchasers of divested assets. These include Mr. McLean of Clean Harbors (Exhibit P-A-029, Reply Witness Statement of Mr. Cameron McLean of Clean Harbors Canada Inc., at para 12);⁹⁹ Mr. John Smith of Green Impact Partners Inc., which acquired the clean energy assets of Wolverine around May 2021 (Exhibit P-A-095, Witness Statement of Mr. John Paul Smith of Green Impact Partners Inc., at paras 8–9); Mr. Kaminski of Catapult (Catapult Witness Statement, at paras 33–34); and, at least to some extent, Mr. Pinnell of White Owl (White Owl Witness Statement, at para 11).

[608] Mr. Harington testified that [REDACTED] (Transcript, Confidential B, at p 2470). He added that [REDACTED] (Transcript, Confidential B, at p 2473). This falls somewhat short of clear and convincing evidence.

[609] In turn, during questioning from the panel, Mr. Blundell stated that he thought that “a lot of what is listed in [his] Affidavit would still hold true” even if a potential purchaser was located in Western Canada” (Transcript, Confidential B, at p 2384). This leaves open the question of which part of the estimates he provided in his witness statement would not hold true (Blundell Witness Statement, at para 124).¹⁰⁰

[610] Considering all of the foregoing, the Tribunal finds that Secure has not demonstrated on a balance of probabilities that the cost savings associated with the [REDACTED] positions identified by Dr. Eastman, and described at paragraph 605 above, would likely be foregone in the event of an order requiring the divestiture of the 29 facilities listed in Table 15 above. Consequently, Secure's corporate cost savings must be reduced by \$22,986,790, the annualized equivalent of which is \$3,296,391.

[611] The Tribunal pauses to note in passing that it accepts Mr. Harington's position that, if a divestiture purchaser ultimately does not need to fill any of the disputed positions because it already has people who fulfill the functions in question, and who are located outside Canada, the savings claimed by Secure in respect of those positions would represent true resource savings to Canada. Stated differently, the Tribunal accepts that, in such circumstances, the claimed efficiencies would meet the requirements of section 96, because they would not likely be attained in Canada if the order in question were made. However, given that the identity of the likely purchaser(s) of the facilities listed in Table 15 above is not yet known, this is something that is

⁹⁹ The Tribunal considers it noteworthy that Mr. McLean formerly worked for Tervita and has significant experience assessing these types of matters (Transcript, Public, at pp 462–463, 470).

¹⁰⁰ Many of the positions challenged by Dr. Eastman and described at paragraph 605 above were addressed by Mr. Blundell at paragraph 124 of his witness statement.

speculative at the present time. Of the currently identified potential purchasers, this issue would be partially relevant for Clean Harbors, as Mr. McLean testified that some of the functions fulfilled by the holders of the positions are currently carried out by Clean Harbour employees located in the U.S. while other functions are carried out by persons located in Canada. (Transcript, Public, at pp 461, 466–467, 472–474, 476).

[612] Beyond the foregoing, Mr. Harington explained during the hearing that the amount Secure has claimed for “corporate cost savings” was based on the full list of “approximately 40” divestitures the Commissioner sought in this proceeding (Transcript, Confidential B, at p 2498). He further explained that, without knowing the actual list of divestitures, he could not adjust the estimated “corporate cost savings” to reflect that list. Therefore, he opined that the most reasonable manner in which to proceed would be to scale down the total amount of claimed “corporate cost savings” by the same proportion that the Tribunal scaled down the Commissioner’s proposed list of divestitures.

[613] The Tribunal’s list of divestitures contains only 29 facilities. Given that the Commissioner sought 41 divestitures, the appropriate scale down fraction is 12/41. The latter figure must be multiplied by \$36,645,278, which is the figure that results when the adjustment discussed at paragraph 610 above (i.e., \$22,986,790) is subtracted from the total “corporate cost savings” provisionally claimed by Secure (i.e., \$59,632,068). Performing that multiplication yields a sum of \$10,725,447 to be deducted from \$36,645,278. Applying that deduction leaves a remaining amount of “corporate cost savings” of \$25,919,831.¹⁰¹ This is the amount of “corporate cost savings” that is cognizable for the purposes of section 96 of the Act.

[614] In summary, the Tribunal finds that the total ten-year discounted “corporate cost savings” claimed by Secure in respect of “corporate cost savings” (i.e., \$59,632,068) must be reduced to reflect the Tribunal’s decision to disallow Secure’s claims in respect of the [REDACTED] positions discussed at paragraphs 605–610 above. Those claims amount to \$22,986,790. Deducting them from \$59,632,068 results in an adjusted amount of \$36,645,278.

[615] The latter figure then needs to be scaled down by 12/41, that is to say by approximately 29% (i.e., \$10,725,447), to reflect the fact that the Tribunal’s list of divestitures is somewhat shorter than the list of divestitures sought by the Commissioner (see paragraphs 612–613 above). This leaves an amount of \$25,919,831 in “corporate cost savings” that is cognizable for the purposes of section 96 of the Act. The annualized equivalent of this is \$3,716,999.

[616] The Tribunal pauses to observe that the two deductions described in the two immediately preceding paragraphs amount to \$33,712,237.¹⁰² When the latter amount is deducted from the overall amount of claimed efficiency gains left (\$65,918,050) after the elimination of Secure’s claims in relation to facility rationalizations (see paragraph 598 above), the remaining amount is \$32,205,813. The annualized equivalent of this is \$4,618,433.

¹⁰¹ $\$36,645,278 - \$10,725,447 = \$25,919,831$.

¹⁰² $\$22,986,790 + \$10,725,447 = \$33,712,237$.

(e) Efficiencies Likely to Arise during the Period Required to Implement the Tribunal's Order

[617] The Commissioner submits that certain costs Secure has included in its claims are not cognizable because they would be incurred solely to implement the Tribunal's order. These are costs that would be incurred by Secure to make the facilities to be divested operational "well before the divestiture date." They include expenses associated with "all of the hiring, training, restart and operating costs in that period." Mr. Harington included "run rates costs for the 6-month period commencing the date of the Tribunal ruling" as a "proxy" for those costs (Updated Harington Report, at paras 228.b, 230).

[618] The Tribunal agrees with the Commissioner that these costs are not cognizable under section 96. They may well represent a "cost" to the Canadian economy associated with implementing the Tribunal's order. However, they would be incurred solely as a "result of the regulatory processes under the Act" (*Tervita SCC*, at para 115). Moreover, they are not "gains in efficiency" brought about by the Merger, as contemplated by subsection 96(1). They are instead costs that will be incurred as a result of divestitures ordered by the Tribunal.

[619] However, given that the Tribunal has rejected all of the cost savings claimed by Secure in relation to facility rationalizations (see paragraph 598 above), no further adjustment is required in relation to the specific claims made by Secure in relation to costs it will incur to implement the Tribunal's order.

(f) Claimed Qualitative Efficiencies

[620] In the Updated Harington Report, several claims are advanced under the heading "Other Qualitative Benefits" (Updated Harington Report, at para 202). A number of those claims concern efficiencies that, on their face, ought to have been quantifiable. These include claims with respect to a reduction in the amount of spare parts that the merged entity would need to maintain, the attainment of economies of scale from increased volumes at absorbing facilities, and the optimization of Secure's capital spending plan. In the absence of a persuasive explanation as to why no attempt was made to quantify these claims or to estimate them, they do not merit any weighting in the assessment under section 96 (*Tervita SCC*, at paras 128, 137, 139, 151, 159, 165. See also paragraphs 582–583 above).

[621] Mr. Harington also claimed that Secure will benefit from some of Tervita's internal best practices. However, in the absence of any description of those best practices, the Tribunal is unable to evaluate them.

[622] Another qualitative efficiency identified by Mr. Harington concerns [REDACTED]

(Transcript, Confidential B, at p 2565). However, there is no evidence that it will be adversely impacted by the Tribunal's order. Accordingly, it is not cognizable for the purposes of the assessment contemplated by section 96 of the Act

[623] Finally, Mr. Harington claims that, in the shorter term, Secure will be able to more efficiently manage what it refers to as “swing volumes,” even without the technology mentioned immediately above. However, once again, there is no evidence that this will be adversely impacted by the Tribunal’s order. Therefore, it will not be further considered by the Tribunal.

(g) Conclusion Regarding Secure’s Efficiency Claims

[624] In summary, for the reasons discussed at paragraphs 499–509 above, the relevant claimed efficiencies for the purposes of the Tribunal’s assessment are those that Mr. Harington calculated pursuant to the “order driven” approach, namely, \$138.5 million on a present value basis discounted over 10 years. The annualized equivalent amount is \$19.9 million.

[625] These estimates were based on the Commissioner’s list of 41 divestitures discussed at paragraphs 39–40 and 369–370 above, and the list of facility integrations provided at Tables 4 and 5 of the Updated Harington Report. Given the Tribunal’s conclusion at paragraph 481 above that only 29 divestitures would be required to remedy the SLC resulting from the Merger, Mr. Harington’s \$138,456,865 estimate was adjusted to \$140,638,674 (see Table 16 above). In the course of making that adjustment, certain other adjustments related to specific facilities that either are on the Tribunal’s list of divestitures, or that will need to be reopened, have been made.

[626] For the reasons discussed at paragraphs 569–570 and 574–583 above, the above-mentioned \$140,638,674 figure was reduced by \$74,720,624, to reflect the Tribunal’s disallowance of the full amounts that Secure claimed in relation to TRD and SWD rationalizations (\$60,449,729) and Landfill integrations (\$14,270,895). This left \$65,918,050 in remaining efficiency claims to be assessed.¹⁰³

[627] For the reasons summarized at paragraphs 614–616 above, this provisional amount of \$65,918,050 was further reduced by $\$22,986,790 + \$10,725,447 = \$33,712,237$, to reflect rejected claims made by Secure in respect of “corporate cost savings.”

[628] Thus, the final amount of efficiency gains that Secure has established on a balance of probabilities, and with clear and convincing evidence, is $\$65,918,050 - \$33,712,237 = \$32,205,813$. The annualized equivalent of this is \$4,618,433.

[629] The foregoing conclusions are summarized in Table 18 below:

¹⁰³ $\$140,638,674 - (\$60,449,729 + \$14,270,895) = \$65,918,050$.

Table 18 – Summary of further adjustments to Secure’s claimed efficiency gains

Initial Values Based on Schedule 4.1 (Updated Harington Report)		Adjusted Values	
	Ten-Year Discounted Values		Annualized Equivalent of Ten-Year Discounted Value
Initial total claim	\$138,456,865	\$140,638,674	\$20,168,105
Less claim in relation to TRD / SWD facility rationalizations	(\$55,359,949)	(\$60,449,729)	(\$8,668,714)
Less claim in relation to Landfill facility rationalizations	(\$11,686,564)	(\$14,270,895)	(\$2,046,499)
Less part of claim in relation to corporate cost savings		(\$22,986,790 + \$10,725,447 = \$33,712,237)	(\$3,296,391 + \$1,538,069 = \$4,834,460)
Total remaining claims for the section 96 trade-off		\$32,205,813	\$4,618,433

[630] Beyond the foregoing quantitative gains that will be considered in the trade-off analysis contemplated by section 96, there are no additional cognizable qualitative efficiencies that will be considered in the trade-off assessment under section 96 of the Act (see paragraphs 620–623 above).

[631] The Tribunal acknowledges that the divestitures that will be ordered may not take place until a short period of time after the June 30, 2023 date assumed by Mr. Harington. The Tribunal agrees with Mr. Harington that this would not materially impact upon the foregoing estimates (Transcript, Confidential B, at p 2673).

(2) The Anti-competitive Effects Alleged by the Commissioner

(a) The Commissioner’s Position

(i) Introduction

[632] The Commissioner maintains that the cognizable efficiencies asserted by Secure are not likely to be greater than, and to offset, the effects of any lessening of competition that are likely to result from the Merger, i.e., the DWL contemplated by section 96. This is so despite a substantial reduction in the alternative estimates of DWL provided by the Commissioner in respect of Non-Price Effects. As noted at paragraph 3 above, those Non-Price Effects relate to Closing Facilities.¹⁰⁴

¹⁰⁴ Secure and the Commissioner agree that the most updated lists of Closing Facilities are provided at Tables 4 and 5 of the Updated Harington Report (Transcript, Confidential B, at pp 3134–3136, 3157–3158).

[633] Given that the Commissioner provided quantitative estimates of the Non-Price Effects, he explicitly refrained from asserting that those or any other anti-competitive effects should be given any qualitative weighting under section 96 (Transcript, Public, at pp 2894, 3198).

[634] The quantitative estimates provided by the Commissioner were all annual figures. Unlike Secure, the Commissioner did not provide 10-year discounted estimates. Instead, he invited the Tribunal to apply the same discount rate used by Secure, namely, 8% (Transcript, Confidential B, at pp 1830, 3050–3151; Transcript, Public, at p 2624; Updated Harington Report, at para 15).¹⁰⁵

(ii) *Price/Output Effects*

[635] In the Initial Miller Report, Dr. Miller stated that he was not able to fully quantify or estimate the DWL associated with Price/Output Effects. However, based on “illustrative calculations,” he stated that “the loss could range between \$0.5 million and \$2.4 million for solid waste and between \$0.5 million and \$2.0 million for water waste” on an annual basis (Initial Miller Report, at para 133). He later explained that these estimates were based on market elasticities of -0.2 and -0.87 (Initial Miller Report, at para 163).¹⁰⁶

[636] In the Miller Rebuttal Report, Dr. Miller revised his estimate of the annual DWL associated with Price/Output Effects to \$6 million. This represented an increase from the upper end of the estimates described above, which sum to \$4.4 million.¹⁰⁷ He described this revised estimate of \$6 million as being based on the mid-point between the price impact that Dr. Duplantis calculated from her natural experiment analysis and his own estimates of price effects (Initial Miller Report, at para 105; Transcript, Public, at p 1014). It appears that this revised estimate was based on a price elasticity of demand of -0.2 and included Landfill, SWD, and TRD services, as opposed to just the first two (Transcript, Public, at pp 1013–1014).

The total number of closing facilities in those tables is 35. However, the Commissioner relied on Dr. Miller’s estimates of the facility closure effects (i.e., the Non-Price Effects), as set forth in Exhibit 7 of the Miller Rebuttal Report, and then adjusted to remove four facilities that are not included in Mr. Harington’s above-mentioned Tables 4 and 5. There were 29 facilities listed in Exhibit 7. Deducting the four facilities in question brings to 25 the total number of Closing Facilities in respect of which Non-Price Effects are being asserted. The Tribunal understands that Dr. Miller did not include in his calculations some partial facility closures that were identified on Mr. Harington’s Tables 4 and 5 (Transcript, Confidential B, at pp 3135–3136). For greater certainty, in assessing the Non-Price Effects, the Tribunal has focused on the final estimates of those effects that were provided by the Commissioner during final oral submissions (Transcript, Confidential B, at pp 3132–3148).

¹⁰⁵ The (fiscal) annual periods in the calculations run from July 1 to June 30. The discounting is calculated as if the annual amounts were received at mid-year, i.e., December 31.

¹⁰⁶ As further discussed below, the latter figure was “implied” from a calculation made by Dr. Kahwaty in *Tervita CT*, at paragraphs 298–303, whereas Dr. Miller described the 0.2 figure as being “a round number that was close to zero” (Transcript, Public, at p 1013).

¹⁰⁷ \$2.4 million (for solid waste) + \$2.0 million (for water waste) = \$4.4 million.

[637] The Commissioner relied on Dr. Miller's revised estimate of \$6 million in DWL associated with Price/Output Effects in both his written closing arguments (at paragraph 181) and in his final oral submissions (Transcript, Confidential B, at p 3187).

(iii) *Non-Price Effects: Profit Based Approach*

[638] The Commissioner initially estimated the Non-Price Effects to be approximately \$78.12 million per year for the entire customer base of the Merging Parties, including customers located in areas where the Merging Parties did not directly compete prior to the Merger (Initial Miller Report, at Exhibit 24). This estimate was based on the Merging Parties' combined variable profits (the "**Profit Based Approach**") and a second-score auction ("**SSA**") model, which the Commissioner maintains is a reasonable model to use in markets in which there is widespread price discrimination. The \$78.12 million estimate represented an approximation of the loss in surplus borne by waste producers when they are forced to select another waste disposal facility that has less value for them.

[639] That \$78.12 million estimate was reduced to \$71.81 million after Dr. Miller revised his margin estimates to account for additional variable costs identified by Mr. Harington (Miller Rebuttal Report, at Exhibit 2). It was then further revised to \$62.25 million after Dr. Duplantis noted that Dr. Miller had included the full facility margins for four facilities that Secure intended to only partially close (Transcript, Confidential B, at p 3133). Upon closer examination, the Tribunal discovered that this latter adjustment (i.e., a reduction of \$9.56 million) ought to have been slightly smaller (i.e., only \$9.26 million), such that the appropriate revised figure is \$62.55 million.¹⁰⁸

[640] During closing oral submissions, the Commissioner provided further revised estimates after realizing that the estimates described above did not account for Secure's updated integration plans (see paragraphs 109–124 above). For the Profit Based Approach, he reduced his \$62.25 million estimate by \$11.69 million, to adjust for the DWL attributable to four facilities that Dr. Miller thought were closing but that are not, in fact, closing (Transcript, Confidential B, at pp 3134–3136). This produced a final estimate of approximately \$50.56 million, which the Tribunal adjusted to \$50.86 million.

[641] Together, the adjustments described in the two immediately preceding paragraphs represented a reduction of \$21.25 million from the \$71.81 million figure mentioned at paragraph 639 above, and \$20.95 million after further adjustment by the Tribunal.

[642] The foregoing adjustments are summarized in Table 19 below:

¹⁰⁸ The \$9.56 million adjustment was calculated by reference to Dr. Miller's initial estimate of \$78.12 million. The Tribunal's revised adjustment of \$9.26 million is calculated by reference to Dr. Miller's revised estimate of \$71.81 million.

Table 19 – Adjustments to the Commissioner’s estimates of Non-Price Effects (Profit Based Approach)

Adjustments	Annual Amount	Comments
	\$78,115,753	Revenue-based DWL due to facility closures, in 2019 dollars (Initial Miller Report, at Exhibit 24). ¹⁰⁹
(\$6,304,154)	\$71,811,599	Adjustment to reflect the additional variable costs asserted by Mr. Harington (Miller Rebuttal Report, at Exhibit 2).
~~(\$9,563,651)~~ (\$9,262,603)	\$62,247,948 \$62,548,996	Initial adjustment for partial closures identified by Dr. Duplantis (Updated Duplantis Report, at footnote 10; Exhibit CA-R-900, Back Up for Dr. Duplantis’ Expert Report, Workpaper 2, at cells G40, H40). Revised adjustment by the Tribunal to apply Dr. Duplantis’ approach to the \$71,811,599 figure, rather than to the \$78,115,753 figure.
(\$11,687,255)	~~\$50,560,693~~ \$50,861,741	Initial adjustment to remove four facilities that were no longer included in Secure’s final list of closures. This was adjusted by the Tribunal to reflect a starting point of \$71,811,599 figure, rather than to the \$78,115,753.

(iv) *Non-Price Effects: Market Share Based Approach*

[643] In the event that the Tribunal concluded that the cognizable anti-competitive effects under section 96 are limited to those that will likely arise in areas where the Merging Parties competed prior to the Merger (i.e., the 271 overlapping areas), the Commissioner provided alternative DWL estimates based on the Merging Parties’ market shares (the “**Market Share Based Approach**”). Initially, those estimates were approximately \$55 million, using the SSA model, and \$40 million, using a different model known as the “Bertrand” model (Initial Miller Report, at Exhibit 24). Those figures were revised downward to \$50.99 million and \$37.13 million, respectively, in the Miller Rebuttal Report (at Exhibit 2) and in the Commissioner’s closing written submissions (at paragraphs 175–176).

[644] During closing submissions, the Commissioner provided two alternative sets of adjusted estimates.

[645] In the first set, the Commissioner applied the same \$21.25 million reduction as he had applied under the Profit Based Approach (see paragraph 641 above). Applying that adjustment to the \$50.99 million and \$37.13 million figures mentioned immediately above resulted in revised estimates of \$29.8 million (SSA model) and \$15.9 million (Bertrand model) (Transcript,

¹⁰⁹ The Tribunal understands that Dr. Miller’s estimates assume that the Closing Facilities close on the date of the Merger. Given the conclusions that the Tribunal has reached further below, it is unnecessary to adjust for this assumption.

Confidential B, at pp 3139–3142). The Commissioner maintained that these revised estimates are conservative for at least two reasons. First, the Commissioner asserted that they do not include the DWL associated with Secure's plans to partially close several facilities. Second, they reflect an application of the full \$21.25 million reduction that was applied to the \$71.81 million estimate under the Profit Based Approach. The Commissioner stated that deducting this entire \$21.25 million would be conservative because the Market Share Based Approach concerns sales only in the 271 areas of competitive overlap between Secure and Tervita, whereas the Profit Based Approach concerns sales across their entire pre-Merger operations, including sales in areas in which the Merging Parties did not compete (Transcript, Confidential B, at pp 3139–3140).

[646] In his second set of further revised estimates under the Market Share Based Approach, the Commissioner applied the same 29%¹¹⁰ proportionate reduction to the abovementioned \$50.99 million and \$37.13 million estimates as was applied to the \$71.81 million under the Profit Based Approach. Applying that 29% reduction to the \$50.99 million and \$37.13 million estimates produced new estimates of \$36.2 million and \$26.3 million, respectively, for the Non-Price Effects under the Market Share Based Approach. The Commissioner maintained that this second set of further revised estimates was more appropriate than the first set, because it did not have the same shortcomings described in the immediately preceding paragraph above (Transcript, Confidential B, at pp 3140, 3176). As discussed further below, the Tribunal agrees with the Commissioner that the application of this second set of reductions is superior to the first set of reductions discussed further above.

[647] The foregoing adjustments, as slightly refined by the Tribunal and having regard to the above-mentioned finding in favour of the second set of final adjustments, are summarized in Table 20 below:

¹¹⁰ \$21.25 million represents 29% of \$78.81 million.

Table 20 – Adjustments to the Commissioner’s estimates of Non-Price Effects¹¹¹ (Market Share Based Approach)

Annual Amount (SSA Model)	Annual Amount (Bertrand Model)	Adjustments to SSA Model	Comments
\$55,140,000	\$40,050,000		Starting estimates under the Bertrand and SSA models (Initial Miller Report, at Exhibit 24).
\$50,990,000	\$37,130,000	(\$4,150,000)	Adjustment to reflect the additional variable costs asserted by Mr. Harington (Miller Rebuttal Report, at Exhibit 2).
~~\$36.2M~~ \$36,007,707	~~\$26.3M~~ \$26,288,040	~~(\$14.79M)~~ (\$14,889,080)	Application of the same 29% adjustment as was made under the Profit Based Approach. Further adjustment by the Tribunal to apply a 29.2% adjustment, based on the fact that the average ratio of Dr. Miller’s estimates under the Market Share Based Approach to his estimates under the Profit Based Approach is 70.8%.

[648] Ultimately, the Commissioner asserted that the sum of the DWL associated with these alleged Price/Output Effects (\$6 million) and his final estimate of Non-Price Effects (i.e., \$50.56 million under the Profit Based Approach and \$36.2 million under the SSA Market Based Approach) is greater than the cognizable portion of the annual efficiencies claimed by Secure (i.e., \$20.2 million).¹¹²

(b) Secure’s Position

[649] Secure makes four principal arguments regarding the anti-competitive effects alleged by the Commissioner. First, Secure maintains that the Commissioner failed to properly quantify the Price/Output Effects, and in any event overestimated those effects. Dr. Duplantis estimated those

¹¹¹ Adjustments are only made to the SSA model because the Tribunal considered that this model had fewer shortcomings than the Bertrand model, in terms of application to the particular facts of this case. In particular, the Bertrand model is based on prices being set without negotiation, and assumes that a facility sets a single price for a particular market. These assumptions are not consistent with the evidence in this case. The Tribunal observes that this was recognized by Secure (Transcript, Confidential B, at pp 3364, 3375–3377).

¹¹² These amounts are all prior to any adjustment by the Tribunal. With the Tribunal’s adjustments, these amounts would be \$50,861,741 under the Profit Based Approach and \$36,007,707 under the SSA model / Market Share Based Approach. For greater certainty, the Commissioner’s position remained the same if his final estimate of DWL under the Bertrand model/Market Share Based Approach (i.e., \$26.3 million) was adopted for the purposes of the Non-Price Effects.

effects to be between \$1.2 million and \$1.6 million, depending on certain assumptions.¹¹³ Second, Secure asserts that the Non-Price Effects have no basis in law, economics, or fact. Third, Secure states that the Commissioner has not met his evidentiary burden with respect to either the Non-Price Effects or the alleged Price/Output Effects. Fourth, Secure submits that, in any event, the efficiency gains that are likely to be brought about by the Merger will be greater than, and will offset, the sum of the Non-Price Effects and the Price/Output Effects.

(c) Analysis of the Alleged Price/Output Effects

(i) *Price elasticity of demand*

[650] Secure submits that the Commissioner failed to meet his burden to provide an estimate of price elasticity of demand. In this regard, Secure states that the Commissioner’s expert asserted a range of elasticity without any supporting evidence. That range was -0.2 to -0.87. The latter figure was “implied” from a calculation made by Dr. Kahwaty in *Tervita CT*, at paragraphs 298–303, whereas Dr. Miller described the -0.2 figure as being “a round number that was close to zero” (Transcript, Public, at p 1013).

[651] The Tribunal rejects Secure’s submission that the Commissioner failed to meet his burden with respect to the provision of an estimate of price elasticity of demand.

[652] As part of the Commissioner’s burden with respect to the alleged Price/Output Effects, the Commissioner was required to establish the price elasticity of demand (*Tervita SCC*, at para 132). In this regard, it was sufficient to provide a range of estimates that could be challenged by Secure (*Tervita SCC*, at paras 100, 124–125, 134–136). This is what Dr. Miller did in the Initial Miller Report, at paragraph 163. The extent to which that asserted range was supported by clear and convincing evidence goes to the weight to be accorded by the Tribunal to that range of estimates, after considering the evidentiary record as a whole.

[653] Secure therefore knew the case it had to meet and had a full opportunity to respond to and challenge Dr. Miller’s range of estimates. Indeed, that is precisely what Dr. Yatchew did, in his expert report (Yatchew Report, at para 8). This contrasts with the situation that was before the Court in *Tervita SCC*, where the Commissioner had not provided any price elasticities whatsoever in the initial report of her expert, but then put forward an estimate of price elasticity through a reply expert report filed shortly before the hearing (*Tervita SCC*, at paras 135–136).

[654] Dr. Yatchew fairly characterized Dr. Miller’s evidence as being entirely unsupported and “at best anecdotal.” This was implicitly acknowledged by Dr. Miller, who stated that he was unaware of any data or elasticity estimates that would allow him to fully quantify the DWL and that it would be “econometrically ... quite a difficult exercise to have a reliable estimate” (Initial Miller Report, at para 163; Transcript, Public, at p 1015). In response to questioning from the panel, Dr. Miller added that “getting the elasticity in this exercise is actually incredibly difficult and challenging” (Transcript, Public, at p 1019).

¹¹³ See footnote 139 below.

[655] Despite the foregoing, Dr. Miller testified that he felt that his upper range estimate of -0.87 “felt larger than it should be just based on [his] understanding of the market and the ability of – you know, what the likely substitution away [from third party waste services] would be” (Transcript, Public, at p 1013). However, he expressed confidence in the lower end of his range (Transcript, Public, at pp 1014, 1017).

[656] In his report, Dr. Yatchew provided estimates of firm-based price elasticity of demand based on a comprehensive dataset from Tervita dating back many years and what he characterized as being “gold standard techniques” (Transcript, Confidential B, at pp 1726, 1729). Specifically, Dr. Yatchew provided point-estimates of -0.24, -0.13, and -0.49, for Landfill services, TRD services, and SWD services, respectively (Yatchew Report, at para 60). He also provided a weighted average estimate of -0.22, for these services combined (Yatchew Report, at para 61). Based on the various analyses that he conducted, he opined that demand is “highly inelastic” and that “[a] reasonable range for the market elasticity is from close to zero to -0.25, and more likely to be at the lower end of this range” (Yatchew Report, at para 64).

[657] The supporting exhibits to the Yatchew Report reveal that Dr. Yatchew’s estimates were not statistically significant (Yatchew Report, at pp 57–63).

[658] Dr. Yatchew was not cross-examined by the Commissioner. However, during questioning from the panel, Dr. Yatchew acknowledged various shortcomings in his analysis. These included a failure to incorporate variables such as transportation costs, the prices of firms other than Tervita, and the length of contracts (Transcript, Confidential B, at pp 1735–1739). Dr. Yatchew also acknowledged that his analysis was best interpreted as providing bounds on the range of elasticities, rather than as providing specific estimates of the price elasticity of demand for each of Landfill, TRD, and SWD services (Transcript, Confidential B, at p 1749). He further acknowledged that those bounds were based on his personal judgment, rather than precise econometric results (Transcript, Confidential B, at p 1751). They were more in the nature of “magnitudes” than specific values (Transcript, Confidential B, at p 1752).

[659] Given the shortcomings in the analyses of Dr. Miller and Dr. Yatchew, the Tribunal was unable to reach a definitive conclusion, based on their evidence alone, and on a balance of probabilities, with respect to the price elasticity of demand for the markets for Landfill, TRD, and SWD services.

[660] However, having regard to the evidentiary record as a whole, the Tribunal finds, on a balance of probabilities, that the price elasticity of demand for each of those services is likely in the range of -0.1 to -0.3. This is not only consistent with where Dr. Yatchew and Dr. Miller ultimately landed (see above and Transcript, Confidential B, at p 3401), but is also consistent with (i) the evidence regarding the practical unavailability of alternatives to obtaining third party Landfill, TRD, and SWD services, (ii) the high costs that would be associated with self-supply, (iii) the need to use third party services during periods of high production, and (iv) the relative absence of countervailing power.

(ii) *Price increases*

[661] For the reasons provided at paragraphs 207–215 above, the Tribunal concluded that Dr. Miller’s estimates of the likely price effects of the Merger are more reliable than those provided by Dr. Duplantis. In the absence of any persuasive evidence impugning Dr. Miller’s estimates, the Tribunal broadly accepted those estimates, which ranged from 5% to 72.3% across the 143 Relevant Markets (see paragraphs 172 and 201 above). On a revenue-weighted basis, Dr. Miller estimated the average price increases to be 8.9% for Landfills, 24.3% for TRDs, and 11.1% for SWDs for the larger universe of the 271 overlapping markets (Miller Rebuttal Report, at Exhibit 1).

(iii) *Estimated DWL*

[662] As noted at paragraph 635 above, Dr. Miller initially estimated the annual DWL associated with the Price/Output Effects to be between \$0.5 million to \$2.4 million for solid waste services, and between \$0.5 million and \$2 million for water waste services. He characterized those estimates as being “illustrative” (Initial Miller Report, at para 163). He did not provide separate estimates in terms of Landfill, TRD, and SWD services.

[663] In the Miller Rebuttal Report, Dr. Miller addressed the DWL associated with the Price/Output Effects in one paragraph that focused on responding to Dr. Duplantis’ estimate that the Merger will result in \$1.2 million to \$1.6 million in such DWL, on an annual basis.¹¹⁴ After noting that Dr. Duplantis’ estimates were based on the price impacts she calculated from her natural experiment analysis (which the Tribunal ultimately rejected),¹¹⁵ Dr. Miller stated that Dr. Duplantis’ estimates of the DWL from a reduction in volume would increase if the price impact of the Merger was larger. He then stated: “For example, even if the price impact is between my estimates and her estimates, the DWL from the full transaction is around \$6 million annually (see Exhibit 3)” (Miller Rebuttal Report, at para 105). This single sentence, which was essentially repeated during Dr. Miller’s testimony (Transcript, Public, at pp 798–799, 1014), constituted his revised attempt to quantify the extent of the DWL associated with the Price/Output Effects.

[664] In calculating his revised estimate of \$6 million, Dr. Miller did not use his revised and lower predicted price increases (see Miller Rebuttal Report, at Exhibits 1 and 3).¹¹⁶ Had he done

¹¹⁴ The lower end of this range was premised on an assumption of hypothetical divestiture options using the “closest facility” approach, whereas the higher end of this range was based either on the DWL associated with the entire transaction, or hypothetical divestiture options based on the “relevant facility” approach (Updated Duplantis Report, at Figure 20). Dr. Duplantis confirmed (Transcript, Confidential B, at p 2101) that, to arrive at her output-reduction DWL estimates, she had replicated Dr. Miller’s work, used his market shares, margins, and market revenues data, and only substituted her own elasticities and price increases in the calculations. Dr. Duplantis’ breakdown of her Price/Output Effects DWL for each of the 271 overlapping areas was provided in the Duplantis Spreadsheet and in the Miller/Duplantis Combined Spreadsheet.

¹¹⁵ See discussion at paragraphs 203–208 above.

¹¹⁶ Dr. Miller revised his average estimated price increases as follows: TRD services, from 25% to 24.3%; Landfill services, from 13.6% to 8.9%; and SWD services, from 11.4% to 11.1% (Initial Miller Report, at para 129; Miller Rebuttal Report, at Exhibit 1).

so, that estimate would have been somewhat lower. Unfortunately, the Tribunal is not able to determine how much lower that estimate would have been.

[665] Dr. Miller also made no attempt to calculate the DWL associated with Price/Output Effects, using his revised price increase estimates. The Tribunal understands from the Duplantis Spreadsheet and the Miller/Duplantis Combined Spreadsheet that this could have been easily quantified by Dr. Miller. Indeed, the Tribunal has calculated that if the DWL had been quantified based on Dr. Yatchew's point-estimate elasticities of -0.24, -0.13, and -0.49, for Landfill, TRD, and SWD services, respectively, and Dr. Miller's predicted price increases – which the Tribunal broadly accepted,¹¹⁷ the Price/Output Effects DWL would be approximately \$10.5 million on an annual basis. To the extent that these calculations are based on the evidentiary record, the Tribunal may have been inclined to embrace them, especially since the Parties appear to have agreed that the price elasticity of demand is close to -0.2,¹¹⁸ and Secure has been aware of Dr. Miller's predicted price increases since the Initial Miller Report was filed.

[666] However, the panel considers that the controlling jurisprudence does not permit the Tribunal to resort to its own calculations of the DWL in the particular circumstances of this case. This is for two principal reasons. First, *Tervita SCC* teaches that the Commissioner has a legal burden to quantify or at least estimate anti-competitive effects where they are measurable (*Tervita SCC*, at paras 124–125, 128). This is because a failure to do so would deprive “merging parties with the information they need to know the case they have to meet” (*Tervita SCC*, at para 124). Second, the Commissioner explicitly relied on Dr. Miller's revised \$6 million “estimate” of annual DWL in relation to Price/Output Effects, in both his final written submissions and in his final oral submissions, without ever suggesting any specific higher estimate. Consequently, the adoption of a higher estimate of DWL would exacerbate the unfairness contemplated by the passage quoted immediately above (see also *Tervita SCC*, at paras 131, 136).

[667] Considering all of the foregoing, the Tribunal is left with (i) Dr. Miller's initial estimates of “between \$0.5 million and \$2.4 million for solid waste and between \$0.5 million and \$2.0 million for water waste” annually (Initial Miller Report, at para 133), and (ii) Dr. Miller's revised estimate of \$6 million, which is too high because he used his initial estimates of price increases, before they were revised downward. Unfortunately, the Tribunal is unable to make its own downward adjustment of Dr. Miller's \$6 million figure. Consequently, it is unable to work with that figure.

[668] This leaves Dr. Miller's initial estimates. The panel understands that the low end of each of those initial estimates is based on a price elasticity of demand of -0.2 and that the high end is based on a price elasticity of demand of -0.87. Adjusting these initial estimates to reflect the Tribunal's finding that the price elasticity of demand is in the range of approximately -0.1 and -0.3 yields revised annual estimates of between \$500,000 and \$1,500,000, for solid waste and water waste, combined.¹¹⁹

¹¹⁷ See paragraph 661 above.

¹¹⁸ See discussion at paragraphs 655–656 above and Transcript, Confidential B, at p 3401.

¹¹⁹ An elasticity of -0.1 would yield lower bounds of approximately \$250,000 in DWL for solid waste and approximately \$250,000 for water waste. These two amounts sum to \$500,000. An elasticity of -0.3 would

[669] The Tribunal finds that this range of \$500,000 to \$1,500,000 annually is the appropriate estimate to adopt for the purposes of the trade-off assessment contemplated by section 96 of the Act. However, the Tribunal considers that the upper end of this estimate is likely much higher, given the Tribunal's observations at paragraph 715 below. This is why, further in these reasons, the Tribunal will refer to a range of \$500,000 to "at least" \$1,500,000. This is something that the Tribunal will take into account if the trade-off assessment contemplated by section 96 of the Act produces a "close" result (*Tervita SCC*, at para 154).

(d) Analysis of the Alleged Non-Price Effects

[670] As discussed at paragraphs 638–648 above, the Commissioner estimated the Non-Price Effects pursuant to two principal approaches: (i) the Profit Based Approach, which applied to the entire customer base of Secure and Tervita combined; and (ii) the Market Share Based Approach, which applied solely to transactions generated from customer locations situated within the 271 areas of competitive overlap between Secure and Tervita. The Commissioner then provided two separate estimates for the Market Share Based Approach, based on the SSA model and the Bertrand model, respectively.

[671] Secure did not provide any estimates in relation to the alleged Non-Price Effects, because it maintained that such effects have no basis in law, economics, or fact.

[672] For the reasons discussed at paragraphs 518–524 above, any effects that occur beyond the 271 areas of competitive overlap between Secure and Tervita are not cognizable for the purposes of section 96 of the Act. Consequently, the Tribunal rejects the Commissioner's estimate of Non-Price Effects that is based on the Profit Based Approach, namely, the estimate of \$50.56 million discussed at paragraph 640 above, which the Tribunal then adjusted to \$50,861,741 at the bottom of Table 19.

[673] Turning to the effects contemplated by the Market Share Based Approach, these are cognizable for the purposes of section 96 because they concern effects of a lessening of competition between Secure and Tervita (see paragraphs 525–540 above).

[674] As previously discussed, the Commissioner's final estimates of Non-Price Effects calculated pursuant to the Market Share Based Approach were \$36.2 million using the SSA model and \$26.3 million using the Bertrand model. The Tribunal slightly adjusted the SSA model estimate to \$36,007,707 (see footnote 112 and Table 20 above).

[675] The Tribunal finds that the Bertrand model is not well-suited to the particular facts of this case because it assumes that prices are set without negotiation, and that a facility sets a single price, similar to a posted price, for a particular market (Miller Rebuttal Report, at para 89; Transcript, Public, at pp 743, 791–792, 855–856, 862, 871, 1001–1002, 1795). These assumptions are not consistent with the evidence in this case. In particular, there is considerable evidence of negotiation between waste service providers (including Secure and Tervita), and their customers. There is also

yield upper bounds of approximately \$828,000 for solid waste and \$690,000 for water waste. These two amounts sum to approximately \$1,518,000.

substantial evidence of bespoke pricing, including price discrimination, at the level of individual customers.

[676] To the extent that the SSA model does not have these shortcomings, it is potentially somewhat better suited to the particular facts of this case.

[677] However, one implication of determining prices pursuant to the SSA approach is that a Closing Facility's variable profits represent the incremental value it generates for its customers, and that the entirety of this value represents the DWL that occurs when the facility is closed (Initial Miller Report, at paras 137, 138, 145, 152, 153; Miller Rebuttal Report, at paras 97, 101; Transcript, Confidential B, at p 785). This incremental value is rooted in observable and non-observable forms of differentiation (Miller Rebuttal Report, at paras 78, 100–101; Transcript, Public, at pp 832–833).

[678] In addition, the SSA model assumes perfect price discrimination within each market at the customer level (Transcript, Public, at pp 726, 791–792, 823, 842, 855, 862; Miller Rebuttal Report, at footnote 137; Updated Duplantis Report, at para 57). Although Dr. Miller acknowledged that price discrimination is not perfect in the Relevant Markets, he maintained that the SSA model “felt like a reasonable match given what [he had] seen in the data” (Transcript, Public, at pp 726, 840, 842–843).

[679] Under the Market Share Based Approach, Dr. Miller adapted the SSA model to remove revenues from waste generated outside the 271 areas of geographic overlap.¹²⁰ This was done by combining each Closing Facility's market share with its margins, to generate the variable profit associated with waste generated from within the 271 areas of geographic overlap.¹²¹

[680] Formally, Dr. Miller calculated the change in consumer surplus resulting from the closure of a facility as follows:

$$\text{Change in Total Surplus} = \sigma \ln (1 - \text{Share of the Closed Facility})$$

[681] Dr. Miller explained that “[t]he parameter σ converts the unit-less lost value into dollars – i.e., lost profits to oil and gas producers due to the closure” (Initial Miller Report, at para 155).

[682] According to Dr. Miller, the observable and non-observable aspects of differentiation that are valued by customers and captured in a facility's variable profits include the reduced transportation costs and wait times that may be associated with taking waste to that facility. They also include fewer capacity constraints relative to other nearby facilities, better relationships with customer representatives, access to specialized services or infrastructure, and the reputation of the waste services provider (Initial Miller Report, at paras 148, 153; Transcript, Public, at pp 768–772, 999–1001).

[683] Dr. Duplantis criticized Dr. Miller's use of the SSA model in the context of the factual matrix of this case on several grounds, some of which are not germane for the present purposes.

¹²⁰ Transcript, Public, at pp 815, 827–829.

¹²¹ Transcript, Public, at pp 815, 825.

Among other things, Dr. Duplantis maintained that the variable profits of the Closing Facilities are not an accurate representation of the value lost to customers when those facilities close (Updated Duplantis Report, at paras 20, 135). In this regard, she noted that transportation costs account for only a small proportion of Dr. Miller's overall DWL estimate, despite the fact that evidence from many different sources underscores the primary importance of transportation costs in customers' decisions as to where to bring their waste. Dr. Duplantis questioned how transportation costs could be the only observable component of the value that Dr. Miller claims is reflected in a Closing Facility's variable profits, and yet account for such a small portion of his estimate of DWL associated with the closure of facilities (Updated Duplantis Report, at paras 136–142). Dr. Duplantis underscored this latter criticism by noting that Dr. Miller devoted substantial attention to transportation costs in his reports, and seldom referred to, or provided any evidence of, the importance of other factors customers might value in choosing a waste facility (Updated Duplantis Report, at paras 137–138).

[684] Dr. Duplantis added that any “reputational” value that a facility may have is not tied to a specific facility, but to a specific company. On the latter point, she observed that customers of Closing Facilities will continue to have the combined “reputational value” of Secure and Tervita post-Merger (Updated Duplantis Report, at paras 22–23, 148–150).

[685] A majority of the panel agrees with the foregoing criticisms identified by Dr. Duplantis.

[686] In brief, the panel majority considers that the substantial magnitude of DWL estimated by Dr. Miller using the SSA model, as modified under the Market Share Based Approach, does not resonate with the rest of the evidentiary record in this proceeding. Stated differently, the \$36.2 million estimate of DWL ultimately put forward by the Commissioner during closing submissions is not tethered to the rest of the evidentiary record before the Tribunal.¹²²

[687] That record demonstrates that transportation costs are the most important factor in customers' decisions as to where to bring their waste (see, for example, Updated Duplantis Report, at footnote 170; Transcript, Confidential B, at pp 29, 55, 118, 122, 245, 342–343, 351–353, 392–393, 444–445, 498–499, 529–530, 564–565, 591, 593, 686, 890, 1097, 1261, 1585–1586; Transcript, Confidential A, at pp 324, 365–366, 483–484). Dr. Miller estimated that the annual DWL attributable to increased transportation costs will range from \$6.4 million (based on distance travelled) to \$7.2 million (based on time travelled) (Initial Miller Report, at paras 139, 157, 159, and Exhibit 25). Given the importance of hourly trucking fees, the Tribunal considers the latter estimate to be more appropriate than the former. The Tribunal also considers that estimate to be more accurate than the lower estimate of \$2,658,500 provided by Mr. Harington, essentially because of the shortcomings associated with Mr. Harington's estimates (Initial Miller Report, at para 158).¹²³

[688] In the Miller Rebuttal Report, Dr. Miller stated that he used a conservative assumption, namely, \$155 per hour for trucking costs, in calculating his above-mentioned estimates. After

¹²² See footnote 112 above. As indicated at Table 20, the Tribunal adjusted the \$36.2 million figure slightly, to \$36,007,707.

¹²³ The one exception is that Mr. Harington clarified that his reference to his use of 2020 data was an error, and that he in fact used 2019 data, as did Dr. Miller.

noting that trucking costs “can be as high as \$220” per hour, he estimated that using the latter figure would increase his estimate of increased transportation costs to between \$9.2 million and \$10.2 million (Miller Rebuttal Report, at para 102). However, Dr. Miller did not provide any evidence to demonstrate the extent to which an hourly rate of \$220 is actually paid to transport waste in the Relevant Markets. In fact, Dr. Miller’s evidence regarding this \$220 rate was limited to a single reference to a “range from \$150-220 per hour” made in the CNRL Witness Statement (Initial Miller Report, at footnote 321; Miller Rebuttal Report, at footnote 146).

[689] Having regard to the foregoing, the Tribunal considers the appropriate starting point for its estimation of increased transportation costs to be \$7,200,000 annually.

[690] For many customers, transportation costs include wait times. However, with the exception of some very limited anecdotal evidence regarding an increase in wait times as a result of the Merger, there is virtually no evidence of the extent to which wait times are likely to increase at any given Absorbing Facility, or across all such facilities as a group, as a result of the Merger. The only quantitative estimate that Dr. Miller provided was based on an unsupported assumption of an additional 30 minutes of wait time per trip for all 178,000 trips that he reported as having been made from customer well sites to the Closing Facilities in 2019. Using trucking rates of \$155 per hour, he estimated that customers would have to pay \$13.8 million in additional wait time-related costs as a result of the Merger. That figure rose to \$19.6 million when Dr. Miller assumed a trucking rate of \$220 per hour (Miller Rebuttal Report, at para 104). Given the unsupported nature of Dr. Miller’s assumptions, these estimates fall far short of persuading the panel, on a balance of probabilities, that customers are likely to have to pay anything approximating even the lower of these two estimates, \$13.8 million, in additional costs as a result of increased wait times. In the absence of any other estimate of the additional costs that may be incurred as a result of increased wait times, the panel is unable to have any sense of the likely increased costs in this regard, if any.¹²⁴ The panel underlines that both Dr. Miller and Mr. Harington acknowledged that there was no evidence allowing them to compute and quantify the importance of wait times (Transcript, Confidential B, at p 2914).

[691] Apart from the evidence regarding the importance of transportation costs and wait times, the evidence is very sparse regarding the value placed by customers on other aspects of the bundle of differentiated services that may be offered at a particular facility. The sparsity of that evidence is such that the panel majority is far from being persuaded that it accounts for even a substantial portion of the gap between the Commissioner’s final estimate of \$36.2 million in annual Non-Price Effects pursuant to the Market Share Based Approach,¹²⁵ and the \$7,200,000 in increased transportation costs estimated by Dr. Miller.

[692] The panel observes that the latter figure represents only approximately 20% of the overall \$36.2 million in DWL estimated by the Commissioner. Given the importance accorded to transportation costs, relative to other factors, the absence of any reliable quantification or estimate

¹²⁴ The panel notes that there is some evidence that customers may not incur charges related to increased wait times until such wait times exceed a particular threshold, such as 30 minutes (Transcript, Public, at p 1803).

¹²⁵ As noted at footnote 112 above, this estimate was slightly adjusted to \$36,007,707 by the Tribunal.

of the likely value of increased costs associated with wait times, and the paucity of evidence regarding other aspects of the bundle of differentiated services that may be offered at the Closing Facilities, the panel majority is not persuaded that the Commissioner's \$36.2 million estimate is well-founded. This is because it is not tethered to the balance of the evidentiary record. Stated differently, Dr. Miller's "top down" theoretical estimate of DWL is not sufficiently supported by "bottom up" evidence pertaining to the constituents of the "observable and unobservable" aspects of alleged differentiation to be persuasive.

[693] The panel therefore rejects the \$36.2 million estimate based on the SSA model and the Market Share Based Approach, which it revised to \$36,007,707 (at Table 20).¹²⁶

[694] Consequently, the only persuasive estimate with which the Tribunal is left in relation to the Non-Price Effects is Dr. Miller's estimate of \$7,200,000 in increased transportation costs.

[695] However, that estimate is only a starting point. This is because it was made at a time when Dr. Miller envisioned the full closure of 29 facilities (Initial Miller Report, at Exhibit 33). In addition, the estimate included increased transportation costs for customers located both within and beyond the 271 areas of prior competitive overlap between Secure and Tervita.

[696] As discussed at paragraphs 109 and 639-640 above, the estimates provided in the Initial Miller Report contemplated the full closure of four facilities that will only partially close as well as four additional facilities that will not close at all. The Tribunal finds it likely that four other facilities identified for closure by Dr. Miller ultimately will not close.¹²⁷

[697] In the absence of a facility-by-facility and market-by-market breakdown of Dr. Miller's \$7,200,000 estimate, the relative importance of increased transportation costs associated with the facilities that will not fully close can be reasonably approximated using the information in Exhibit 7 of the Miller Rebuttal Report. This can be done by applying to Dr. Miller's estimate of increased transportation costs the same percentage reduction that the Tribunal considers appropriate to apply to his estimate of DWL associated with the closure of facilities. In this latter regard, Table 21 below reproduces and then expands upon the adjustments identified in Table 19 above. Working from the \$71.8 million annual DWL total for the 29 facilities named in Exhibit 7 of the Miller Rebuttal Report, and deducting the DWL associated with each of the eight facilities that will not fully close, would lower the total DWL value for the 21 closing facilities to approximately \$28.0

¹²⁶ See footnote 112 above. The Tribunal observes that this estimate would have needed to be further lowered to mirror some of the adjustments that were made to the claimed efficiencies identified in Table 16, namely, in connection with facilities that are not likely to close, or that are likely to close well after the date of the order. For the reasons discussed at paragraph 686 above, it is unnecessary to further examine these adjustments here, but they are addressed in Table 21 below.

¹²⁷

. So, the total number of facilities involved is .

Table 21 – Additional adjustments to the Commissioner’s estimates of Non-Price Effects¹²⁸

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¹²⁹ The Updated Harington Report explains that [REDACTED]

		every facility in Exhibit 7 of the Miller Rebuttal Report, except for those noted in the two rows above in this table that will not close. The resulting overall reduction in the NPV for the period 2021-2033 is presented here as an equivalent annual amount (\$5,534,616).
(\$11,551,256)	\$28,007,839	As in Table 20, a further reduction of 29.2% is applied, based on the average ratio of Dr. Miller's estimates under the Market Share Based Approach to his estimates under the Profit Based Approach. The effect is to narrow the analysis to include only those transactions within the 271 areas of prior competitive overlap.

[698] The resulting \$28,007,839 in Table 21 represents a relative reduction of 60.9% to the figure of \$71,811,599. The Tribunal is of the view that it is reasonable to apply the same percentage reduction to Dr. Miller's estimate of \$7,200,000 in annual increased transportation costs, in order to limit those increased costs to those facilities that Secure will actually close and to the 271 overlapping areas. Accordingly, applying this same 60.9% reduction to Dr. Miller's \$7,200,000 per year figure yields a value of approximately \$2,808,132 per year as the adjusted estimate of increased transportation costs within the 271 areas of prior competitive overlap due to 21 (full or partial) facility closures.¹³⁰

[699] This \$2,808,132 estimate will be the estimate used for Non-Price Effects, and will be added to the Tribunal's estimate of approximately \$500,000 to at least \$1,500,000 in Price/Output Effects, for the purposes of the trade-off assessment contemplated by section 96 of the Act.

[700] The Tribunal pauses to note that the Commissioner's efforts to quantify Non-Price Effects through the parallel application of three distinct models and empirical approaches is a welcome development for the Tribunal's consideration of the anti-competitive effects of mergers. Whereas non-price effects traditionally have been considered on a qualitative basis, the availability of relevant market data can serve to identify and quantify those effects that, previously, often only boiled down to conjectures. The panel's decision not to accept the \$36.2 million estimate does not imply that bottom-up estimates are necessary or sufficient. However, in the absence of sufficient links between a "top down" valuation and the rest of the evidentiary record, "bottom up" estimates can assist to provide support for such valuations. Where such "bottom up" estimates are put forth, they should be adequately supported.

¹³⁰ As explained in paragraphs 686 and 693, the Tribunal does not accept the estimated levels of DWL reported in Exhibit 7 of the Miller Rebuttal Report. However, since these DWL values are likely to be highly correlated with the volume of shipments at the 29 facilities listed therein, these DWL values are instructive in approximating and adjusting for the relative shares of the increased transportation costs of the facilities that will not close or that will only partially close. An alternate adjustment could have reduced the \$7,200,000/year transportation cost figure in proportion to the number of facilities that will not close, whereby use of that fraction (8/29) would result in a reduction of 27.6%. The Tribunal's 60.9% reduction here is significantly more comprehensive and conservative, consistent with the central importance of these increased transportation cost estimates within the overall determination of anti-competitive effects.

[701] One member of the panel accepts that the Market Share Based Approach to estimating the DWL from facility closures is methodologically sound and provides a valid approach to exploring the issues in dispute. Where the Tribunal has heard diverse evidence about price determination in the Relevant Markets, estimates developed under both the SSA and Bertrand models have shed light on aggregate market outcomes that may lie somewhere between the two. The Tribunal underlines that, had the view of the panel minority been retained, it would have resulted in a higher amount of demonstrated Non-Price Effects.

(e) Summary regarding Price/Output Effects and Non-Price Effects

[702] For the reasons provided at paragraph 669 above, the Tribunal finds that the annual value of the Price/Output Effects likely to result from the Merger is between \$500,000 and at least \$1,500,000.

[703] For the reasons provided at paragraphs 694–699 above, the Tribunal finds that the annual value of the Non-Price Effects likely to result from the Merger is \$2,808,132.

[704] The sum of these two estimates is a range of \$3,308,132 to at least \$4,308,132.

[705] The Tribunal considers that these estimates must be adjusted to reflect the fact that the Price/Output Effects and the Non-Price Effects have been occurring since the Merger was completed on July 2, 2021. The Tribunal finds that such effects are within the purview of the “effects of any prevention or lessening of competition that will result or is likely to result from the merger,” as contemplated by section 96 of the Act. In other words, the comparison or trade-off to be done will be between 10 years of cognizable Foregone Efficiencies and 12 years of anti-competitive effects, with both to be expressed as present values or annual equivalents.

[706] The Tribunal recognizes that this gives rise to another asymmetry in the treatment of gains in efficiency and anti-competitive effects, because gains in efficiency achieved prior to the issuance of the Tribunal’s order generally are not cognizable, due to the fact that they will not meet the statutory requirement of being gains that “would not likely be attained if the order were made,” as set forth by subsection 96(1). However, that asymmetry is a product of the language of subsection 96(1). To the extent that there is a sound basis for including in the trade-off assessment any anti-competitive effects that have materialized prior to the issuance of the Tribunal’s order, and for excluding efficiencies that are unlikely to be affected by such order, the panel does not consider such an outcome to result in the type of absurdity that might otherwise warrant a search for a different interpretation of subsection 96(1).

[707] Adjusting the estimate of \$3,308,132 to at least \$4,308,132 to account for the Price/Output Effects and the Non-Price Effects that have occurred since the Merger was completed on July 2, 2021 produces a revised amount of \$4,333,591 to at least \$5,643,572 per year for the purposes of comparing the ten-year discounted streams of Foregone Efficiencies and anti-competitive effects

over the period July 2023 – June 2033.¹³¹ The NPV of this range is \$30,219,522 to at least \$39,354,443.

(3) Trade-Off Assessment

[708] For the reasons summarized at paragraph 628 above, the final amount of Foregone Efficiencies that Secure has established on a balance of probabilities, and with clear and convincing evidence, is \$32,205,813 on an NPV basis. The annualized equivalent of this is \$4,618,433.

[709] For the reasons summarized at paragraphs 701–707 above, the final amount of anti-competitive effects that the Commissioner has established on a balance of probabilities, and with clear and convincing evidence, is between \$30,219,522 and at least \$39,354,443, on an NPV basis. The annual equivalent of this is \$4,333,591 to at least \$5,643,572 for the years 2023-2033.

[710] It follows that Secure has failed to meet its burden of establishing that the Foregone Efficiencies likely to be brought about by the Merger will be greater than, and will offset, the effects of any prevention or lessening of competition likely to result from the Merger, as required by subsection 96(1) of the Act.

[711] The Tribunal pauses to observe that the bottom end of the final range of likely anti-competitive effects discussed at paragraph 707 above is close to the sum of what Dr. Duplantis estimated for Price/Output Effects (i.e., \$1.2 million to \$1.6 million)¹³² and what Mr. Harington estimated for increased transportation costs due to facility closures (i.e., \$2,658,500).¹³³

[712] For greater certainty, there are no cognizable qualitative gains in efficiency or anti-competitive effects for the purposes of subsection 96(1) (see paragraphs 630 and 633 above).

[713] The Tribunal recognizes that the trade-off assessment produces an outcome that some may consider to be “close,” at least at the lower end of the range of estimated anti-competitive effects (\$4,333,591). However, it bears underscoring that Secure’s burden is to demonstrate that the Foregone Efficiencies likely to be brought about by the Merger will be greater than, and will offset, the full range of the Tribunal’s estimate of anti-competitive effects that will likely result from the Merger. This is a necessary implication of the reality that it may not be practically feasible to calculate a precise value for the price elasticity of demand. In such circumstances, which include those in the present proceeding, it will be necessary for the Tribunal to make a finding regarding

¹³¹ A series of annual payments of \$3,308,132 over the interval from July 2, 2021, through June 30, 2033, would have a present value of \$30,219,522, if that present value were calculated as at July 2023. Using that date for the present value (discounting at 8% per year) allows direct comparison with the present values of Foregone Efficiencies under the Order Date Approach. (All of these calculations assume a single payment at the midpoint of each fiscal year.) This present value of \$30,219,522 at July 2023 is equivalent in present value to a 10-year (July 2023 through June 2033) series of annual payments of \$4,333,591 each year. Similarly, \$4,308,132 per year over those same 12 years has a present value of \$39,354,443, or \$5,643,572 annually over the years 2023-2033.

¹³² Updated Duplantis Report, at Figure 20.

¹³³ Updated Harington Report, at para 136.

a range of reasonable and likely elasticities, based on the evidentiary record as a whole (*Tervita SCC*, at paras 94, 132; *Tervita FCA*, at para 124; *Tervita CT*, at paras 244–245). As the SCC has recognized: “[e]stimates are acceptable ... because calculations of anti-competitive effects for the purposes of s. 96 do not have the precision of history” (*Tervita SCC*, at para 125). It follows that in order for a respondent relying upon the efficiencies defence to meet the “likely” element of section 96, it must demonstrate, on a balance of probabilities, that the cognizable Foregone Efficiencies will be greater than, and will offset, the entire range of likely anti-competitive effects that the Tribunal has determined, based on the range of elasticities that it has found.

[714] Moreover, even if the trade-off assessment contemplated by section 96 might be said to be result in a “close” outcome in the present proceeding, the Tribunal would consider it appropriate to find in favour of the Commissioner. This is because of the conservative nature of the Commissioner’s estimate of the only Non-Price Effects that he was able to establish on a balance of probabilities, namely, the increased transportation costs that have resulted, and will continue to result, from the Merger. That estimate was very conservative for two reasons. First, it was based on an assumed hourly trucking rate of \$155 per hour, despite evidence of trucking rates that exceed that rate, and despite evidence of widespread inflation since the onset of the COVID-19 pandemic. Second, it did not account for any increased trucking fees due to longer wait times at Absorbing Facilities.

[715] Indeed, the Tribunal’s estimate of the Price/Output Effects is also conservative. As noted at paragraph 669 above, the Tribunal considers that the upper range of the Commissioner’s estimate of Price/Output Effects is likely significantly greater than the \$1,500,000 annual value that the Tribunal adopted after adjusting Dr. Miller’s initial estimate of Price-Output Effects to reflect a narrower range of price elasticity of demand (-0.1 to -0.3) than what Dr. Miller assumed (-0.2 to -0.87). This is because the Tribunal was forced to resort to Dr. Miller’s initial estimates of Price/Output Effects only because Dr. Miller’s subsequent \$6 million estimate was based on the midpoint between his original (and higher) estimates of price increases, and Dr. Duplantis’ estimated price effects. The Tribunal considers that, had Dr. Miller used his revised (lower) estimates of price increases in performing that exercise, the estimate of DWL associated with Price/Output Effects likely would have been closer to his \$6 million estimate than to the \$1,500,000 mentioned above.

[716] Collectively, the three considerations discussed above, which are based in the evidentiary record, weigh in favour of the exercise of the Tribunal’s discretion to reject Secure’s efficiencies defence (*Tervita SCC*, at para 154).

XVI. CONCLUSION

[717] For the reasons summarized in Part XIII.C. (7) above, the Tribunal finds that the Merger has substantially lessened competition, and is likely to continue to substantially lessen competition for the foreseeable future, in 136 of the 143 Relevant Markets. Those 136 SLC Markets are identified in Appendix 3 to these reasons.

[718] For the reasons summarized in Part XIV.D. (5) above, the Tribunal concludes that 29 of the 41 divestitures sought by the Commissioner would suffice to address the SLC that it has found resulted from the Merger. The Tribunal’s conclusions are summarized at paragraph 482 above, in

Table 15. The Tribunal will order the divestiture of the 29 facilities identified in that table, under the heading “Divestiture Required.”

[719] For the reasons summarized in Part XV.B. (3) above, the Tribunal finds that Secure has failed to meet its burden of establishing that the gains in efficiency likely to be brought about by the Merger, and that would not likely be attained if the Tribunal’s order were made, will be greater than, and will offset, the effects of any prevention or lessening of competition likely to result from the Merger, as required by subsection 96(1) of the Act.

XVII. COSTS

[720] By way of a direction issued on January 25, 2023, the Tribunal asked the Parties to attempt to come to an agreement on costs related to this application and, if unable, to provide submissions. On February 10, 2023, the Parties informed the Tribunal that they had agreed that the successful party shall receive \$150,000 (inclusive of taxes) for legal fees. However, they were unable to come to an agreement for disbursement costs. They each provided submissions as well as detailed bills of costs with some supportive evidence to explain the disbursements and the basis for their respective claims.

[721] The Commissioner submits that he should be awarded a “lump sum cost award” of \$2.5 million if he is successful. The Commissioner’s bill of costs for disbursements adds up to \$2,591,343.14. The vast majority of these disbursements relate to expert fees, mostly for the work of Dr. Miller. If the application is dismissed, the Commissioner argues that the Tribunal should not order him to pay disbursement costs to Secure because there was a broad public interest in bringing this case and because Secure allegedly provided overstated efficiencies estimates during the Section 104 Application that did not bear out in the evidence in the section 92 hearing. Furthermore, and in the alternative, the Commissioner maintains that, if the application is dismissed, the Tribunal should reduce any cost award to recognize any split success. The Commissioner added that, in the further alternative, a lump sum cost award of \$2 million to Secure would be fair.

[722] For its part, Secure filed a bill of costs claiming \$5,665,512.79 in total disbursements, inclusive of taxes, if the Commissioner’s application is dismissed. These disbursements notably include a total sum of \$3,680,108.25 for its expert witnesses (Dr. Duplantis, Mr. Harington, and Dr. Yatchew) and \$1,814,710.10 in document processing, management and review provided by KLDDiscovery. Secure submits that its disbursements are reasonable, necessary, and justified. In its submissions on costs, Secure takes no position with respect to the bill of costs submitted by the Commissioner or regarding the disbursements to be granted if the application is allowed.

[723] The legal principles applicable to costs have been recently summarized by the Tribunal in *P&H*, at paragraphs 768–776. They need not be repeated here. In essence, the Tribunal has full discretionary power over the amount and allocation of costs and the determination of by whom they are to be paid. The most important overall factor in arriving at a costs award is which party succeeded. The Tribunal will also have regard to the public interest in bringing the case.

[724] The fixing of costs typically involves a compromise between compensating a successful party and not unduly burdening an unsuccessful party. The costs ordered should not be excessive

or punitive, but rather reflect a fair relationship to the actual costs of litigation. Moreover, disbursements must be reasonable, necessary, and justified, and expert-related costs are not automatically recovered in their entirety and can be adjusted by the Tribunal if they do not appear reasonable. Finally, as was reiterated in all its recent proceedings and at the hearing of this application, the Tribunal favours lump sum cost awards over formal taxation of bills of costs.

[725] As the successful party, the Commissioner is entitled to an award of costs.

[726] With respect to legal fees, in light of the agreement between the Parties, the Tribunal is satisfied that a lump sum amount of \$150,000 (inclusive of taxes) should be awarded to the Commissioner.

[727] Turning to disbursements, the Tribunal has considered the positions of both Parties with respect to the claims made by the Commissioner for the disbursements he incurred in this litigation. The Commissioner's claim essentially relates to expert fees: these fees amount to \$2,525,897.84, including \$10,000 for Mr. Johnston, \$1,704,964.37 for Dr. Miller, and \$810,933.47 for Dr. Eastman. Other disbursements incurred by the Commissioner include travel fees in an amount of \$17,778.57, transcription fees of \$46,359.98, and printing fees of \$1,306.75.

[728] The Tribunal is satisfied that the Commissioner has provided, in his bill of costs, detailed information and sufficient support to explain the disbursements incurred and the basis of his various claims. The bills of costs were prepared in accordance with the applicable rules, and evidence has been provided regarding the billing, payment, and justifications of the services provided and expenses incurred. The question is not whether the disbursements at issue were incurred but whether they are reasonable, necessary, and justified in the circumstances. Having regard to the Tribunal's generally positive treatment of the Commissioner's expert evidence, as well as to the overall reasonableness of the quantum claimed by the Commissioner, the Tribunal generally finds the claimed amounts of disbursements to be a reasonable sum. The Tribunal pauses to note that the expert fees claimed by Secure are substantially higher than the fees of the Commissioner's expert witnesses. The Tribunal further notes that, in its costs submissions, Secure has not raised any specific objections to the disbursement amounts claimed by the Commissioner.

[729] As stated above, the Tribunal favors lump sum awards as it simplifies the costs assessment process. In fact, there is now "a judicial trend to grant costs on a lump sum basis whenever possible" (*Philip Morris Products SA v Marlboro Canada Ltd*, 2015 FCA 9, at para 4). A lump sum award saves time and trouble for the parties by avoiding precise and unnecessarily complicated calculations. Lump sum awards also align with the objective of promoting the just, most expeditious and least expensive determination of proceedings. In this proceeding, the Commissioner submitted that a "lump sum cost award" of \$2.5 million would be fair if he is successful.

[730] In light of the foregoing, the Tribunal awards costs for legal fees in the lump sum amount of \$150,000, inclusive of applicable taxes. The total allowed for disbursements is fixed at \$2,350,000, inclusive of applicable taxes. The Tribunal therefore concludes that Secure shall pay an all-inclusive aggregate lump sum amount of \$2.5 million to the Commissioner in respect of costs of this proceeding.

XVIII. ORDER

[731] For the reasons set forth above, the application brought by the Commissioner is partially granted. The Tribunal orders the divestitures identified at Table 15 above and in Schedule A to the Order attached at Appendix 6 to these reasons. The terms of the Tribunal's Order are detailed in Appendix 6.

[732] Within 30 days from the date of this order, Secure shall pay to the Commissioner an all-inclusive amount of \$2.5 million.

[733] These reasons are confidential. To enable the Tribunal to issue a public version of the reasons, the Tribunal directs the Parties to attempt to reach an agreement regarding the redactions to be made to these reasons in order to protect confidential evidence and information. The parties are to correspond, preferably jointly, with the Tribunal Registry by no later than the close of business on March 17, 2023, setting out their agreement and any areas of disagreement concerning the redaction of the confidential version of the reasons.

DATED at Ottawa, this 3rd day of March, 2023

SIGNED on behalf of the Tribunal by the Panel Members.

(s) Paul Crampton C.J. (Presiding Member)
(s) Denis Gascon J.
(s) Ted Horbulyk

APPENDIX 1 – RELEVANT STATUTORY PROVISIONS*Competition Act, RSC 1985, c C-34***Mergers
Order**

92 (1) Where, on application by the Commissioner, the Tribunal finds that a merger or proposed merger prevents or lessens, or is likely to prevent or lessen, competition substantially

- (a) in a trade, industry or profession,
- (b) among the sources from which a trade, industry or profession obtains a product,
- (c) among the outlets through which a trade, industry or profession disposes of a product, or
- (d) otherwise than as described in paragraphs (a) to (c),

the Tribunal may, subject to sections 94 to 96,

(e) in the case of a completed merger, order any party to the merger or any other person

- (i) to dissolve the merger in such manner as the Tribunal directs,
- (ii) to dispose of assets or shares designated by the Tribunal in such manner as the Tribunal directs, or
- (iii) in addition to or in lieu of the action referred to in subparagraph (i) or (ii), with the consent of the person against whom the order is directed and the Commissioner, to take any other action, or

**Fusionnements
Ordonnance en cas de diminution
de la concurrence**

92 (1) Dans les cas où, à la suite d'une demande du commissaire, le Tribunal conclut qu'un fusionnement réalisé ou proposé empêche ou diminue sensiblement la concurrence, ou aura vraisemblablement cet effet :

- a) dans un commerce, une industrie ou une profession;
- b) entre les sources d'approvisionnement auprès desquelles un commerce, une industrie ou une profession se procure un produit;
- c) entre les débouchés par l'intermédiaire desquels un commerce, une industrie ou une profession écoule un produit;
- d) autrement que selon ce qui est prévu aux alinéas a) à c),

le Tribunal peut, sous réserve des articles 94 à 96 :

- e) dans le cas d'un fusionnement réalisé, rendre une ordonnance enjoignant à toute personne, que celle-ci soit partie au fusionnement ou non :
 - (i) de le dissoudre, conformément à ses directives,
 - (ii) de se départir, selon les modalités qu'il indique, des éléments d'actif et des actions qu'il indique,

(iii) en sus ou au lieu des mesures prévues au sous-alinéa (i) ou (ii), de prendre toute autre mesure, à condition que la personne contre qui l'ordonnance est rendue et le commissaire souscrivent à cette mesure;

[...]

Factors to be considered regarding prevention or lessening of competition

93 In determining, for the purpose of section 92, whether or not a merger or proposed merger prevents or lessens, or is likely to prevent or lessen, competition substantially, the Tribunal may have regard to the following factors:

- (a) the extent to which foreign products or foreign competitors provide or are likely to provide effective competition to the businesses of the parties to the merger or proposed merger;
- (b) whether the business, or a part of the business, of a party to the merger or proposed merger has failed or is likely to fail;
- (c) the extent to which acceptable substitutes for products supplied by the parties to the merger or proposed merger are or are likely to be available;
- (d) any barriers to entry into a market, including
 - (i) tariff and non-tariff barriers to international trade,
 - (ii) interprovincial barriers to trade, and

[...]

Éléments à considérer

93 Lorsqu'il détermine, pour l'application de l'article 92, si un fusionnement, réalisé ou proposé, empêche ou diminue sensiblement la concurrence, ou s'il aura vraisemblablement cet effet, le Tribunal peut tenir compte des facteurs suivants :

- a) la mesure dans laquelle des produits ou des concurrents étrangers assurent ou assureront vraisemblablement une concurrence réelle aux entreprises des parties au fusionnement réalisé ou proposé;
- b) la déconfiture, ou la déconfiture vraisemblable de l'entreprise ou d'une partie de l'entreprise d'une partie au fusionnement réalisé ou proposé;
- c) la mesure dans laquelle sont ou seront vraisemblablement disponibles des produits pouvant servir de substituts acceptables à ceux fournis par les parties au fusionnement réalisé ou proposé;
- d) les entraves à l'accès à un marché, notamment :
 - (i) les barrières tarifaires et non tarifaires au commerce international,

(iii) regulatory control over entry,
and any effect of the merger or proposed merger on such barriers;
(e) the extent to which effective competition remains or would remain in a market that is or would be affected by the merger or proposed merger;
(f) any likelihood that the merger or proposed merger will or would result in the removal of a vigorous and effective competitor;
(g) the nature and extent of change and innovation in a relevant market;
(g.1) network effects within the market;
(g.2) whether the merger or proposed merger would contribute to the entrenchment of the market position of leading incumbents;
(g.3) any effect of the merger or proposed merger on price or non-price competition, including quality, choice or consumer privacy; and
(h) any other factor that is relevant to competition in a market that is or would be affected by the merger or proposed merger.

[...]

Exception where gains in efficiency

96 (1) The Tribunal shall not make an order under section 92 if it finds that

(ii) les barrières interprovinciales au commerce,
(iii) la réglementation de cet accès,
et tous les effets du fusionnement, réalisé ou proposé, sur ces entraves;
e) la mesure dans laquelle il y a ou il y aurait encore de la concurrence réelle dans un marché qui est ou serait touché par le fusionnement réalisé ou proposé;
f) la possibilité que le fusionnement réalisé ou proposé entraîne ou puisse entraîner la disparition d'un concurrent dynamique et efficace;
g) la nature et la portée des changements et des innovations sur un marché pertinent;
g.1) les effets de réseau dans le marché;
g.2) le fait que le fusionnement réalisé ou proposé contribuerait au renforcement de la position sur le marché des principales entreprises en place;
g.3) tout effet du fusionnement réalisé ou proposé sur la concurrence hors prix ou par les prix, notamment la qualité, le choix ou la vie privée des consommateurs;
h) tout autre facteur pertinent à la concurrence dans un marché qui est ou serait touché par le fusionnement réalisé ou proposé.

[...]

Exception dans les cas de gains en efficience

96 (1) Le Tribunal ne rend pas l'ordonnance prévue à l'article 92

the merger or proposed merger in respect of which the application is made has brought about or is likely to bring about gains in efficiency that will be greater than, and will offset, the effects of any prevention or lessening of competition that will result or is likely to result from the merger or proposed merger and that the gains in efficiency would not likely be attained if the order were made.

Factors to be considered

(2) In considering whether a merger or proposed merger is likely to bring about gains in efficiency described in subsection (1), the Tribunal shall consider whether such gains will result in

(a) a significant increase in the real value of exports; or

(b) a significant substitution of domestic products for imported products.

Restriction

(3) For the purposes of this section, the Tribunal shall not find that a merger or proposed merger has brought about or is likely to bring about gains in efficiency by reason only of a redistribution of income between two or more persons.

dans les cas où il conclut que le fusionnement, réalisé ou proposé, qui fait l'objet de la demande a eu pour effet ou aura vraisemblablement pour effet d'entraîner des gains en efficience, que ces gains surpasseront et neutraliseront les effets de l'empêchement ou de la diminution de la concurrence qui résulteront ou résulteront vraisemblablement du fusionnement réalisé ou proposé et que ces gains ne seraient vraisemblablement pas réalisés si l'ordonnance était rendue.

Facteurs pris en considération

(2) Dans l'étude de la question de savoir si un fusionnement, réalisé ou proposé, entraînera vraisemblablement les gains en efficience visés au paragraphe (1), le Tribunal évalue si ces gains se traduiront :

a) soit en une augmentation relativement importante de la valeur réelle des exportations;

b) soit en une substitution relativement importante de produits nationaux à des produits étrangers.

Restriction

(3) Pour l'application du présent article, le Tribunal ne conclut pas, en raison seulement d'une redistribution de revenu entre plusieurs personnes, qu'un fusionnement réalisé ou proposé a entraîné ou entraînera vraisemblablement des gains en efficience.

APPENDIX 2 – LIST OF RELEVANT MARKETS**List of the 143 Relevant Markets in which the Commissioner alleges a likely substantial lessening of competition¹³⁴**

Market	Structure	Product	Closest Tervita Facility	Closest Secure Facility	Description
2	2 to 1	TRDs	Kindersley	Kindersley	SW of Saskatoon
3	2 to 1	TRDs	West Edson	Obed	W & SW of Edson
4	2 to 1	TRDs	Elk Point	Silverdale	S of Vermilion
5	2 to 1	TRDs	Fox Creek	Fox Creek	W of Fox Creek
6	2 to 1	TRDs	West Edson	Edson	N & SW of Edson
7	2 to 1	TRDs	West Edson	Nosehill	NW of Edson
8	2 to 1	TRDs	Judy Creek	Judy Creek	W & N of Swan Hills
10	2 to 1	TRDs	Willesden Green	Rocky Mountain House	Customer Location Not Visible on Map
12	2 to 1	TRDs	Fox Creek East	Edson	SE of Grande Prairie
13	2 to 1	TRDs	Valleyview	Fox Creek	SSW of Valleyview
14	2 to 1	TRDs	Coronation	Kindersley	Between Lloydminster and Medicine Hat
15	2 to 1	TRDs	Lindbergh Caverns	Silverdale	S of Lloydminster
16	2 to 1	TRDs	Mitsue	Judy Creek	S of Slave Lake
17	2 to 1	TRDs	Gull Lake	Kindersley	S of Elrose
18	2 to 1	SWDs (& TRDs)	West Edson	Edson	SW of Edson
19	2 to 1	SWDs (& TRDs)	West Edson	Obed	SE of Hinton
20	2 to 1	SWDs (& TRDs)	West Edson	Nosehill	WNW of Edson
22	3 to 2	Landfills	South Wapiti Landfill	South Grande Prairie	S of Grande Prairie
23	3 to 2	Landfills	La Glace Landfill	South Grande Prairie	W of Grande Prairie
25	3 to 2	TRDs	Elk Point	Silverdale	E of Vermilion
26	3 to 2	TRDs	Lindbergh Caverns	Tulliby Lake	N of Cold Lake to N of Lloydminster

¹³⁴ Shaded markets are those seven markets in which the Tribunal has not accepted the Commissioner's SLC allegation.

Market	Structure	Product	Closest Tervita Facility	Closest Secure Facility	Description
27	3 to 2	TRDs	Lindbergh Caverns	Silverdale	NW of Lloydminster
28	3 to 2	TRDs	Gordondale	Dawson Creek	NE of Dawson Creek
29	3 to 2	TRDs	Fox Creek	Fox Creek	Fox Creek Area
30	3 to 2	TRDs	Judy Creek	Fox Creek	Midway between Edmonton & Grande Prairie
31	3 to 2	TRDs	Fox Creek East	Fox Creek	W & S of Fox Creek
32	3 to 2	TRDs	Judy Creek	Judy Creek	N & WNW of Whitecourt
35	3 to 2	TRDs	Grande Prairie Industrial	Kakwa	WNW & ENE of Grande Cache
36	3 to 2	TRDs	Brazeau	Brazeau	SW of Edmonton
37	3 to 2	TRDs	West Edson	Obed	W of Edmonton
38	3 to 2	TRDs	West Edson	Edson	Edson Area
41	3 to 2	TRDs	Boundary Lake	Dawson Creek	NE of Dawson Creek
42	3 to 2	TRDs	West Edson	Nosehill	NW of Edson
45	3 to 2	TRDs	Willesden Green	Rocky Mountain House	Customer Location Not Visible on Map
46	3 to 2	TRDs	Stauffer	Rocky Mountain House	WSW of Ricinus
47	3 to 2	SWDs (& TRDs)	West Edson	Edson	SW of Edson
49	3 to 2	SWDs (& TRDs)	Judy Creek	Judy Creek	N & W of Swan Hills
50	3 to 2	SWDs (& TRDs)	West Edson	Eccles	W of Edson
51	3 to 2	SWDs (& TRDs)	West Edson	Nosehill	WNW of Edson
52	3 to 2	SWDs (& TRDs)	Kindersley	Kindersley	Between Oyen & Rosetown
53	3 to 2	SWDs (& TRDs)	Gull Lake	Kindersley	N & NW of Swift Current
54	3 to 2	SWDs (& TRDs)	Obed	Kakwa	Between Grande Cache, Fox Creek & Hinton
55	3 to 2	SWDs (& TRDs)	West Edson	Nosehill	NW of Edson
57	3 to 2	SWDs (& TRDs)	Mitsue	Judy Creek	SW of Slave West

Market	Structure	Product	Closest Tervita Facility	Closest Secure Facility	Description
58	3 to 2	SWDs (& TRDs)	Unity Caverns	Kindersley	N of Fiske
59	3 to 2	SWDs (& TRDs)	Grande Prairie Industrial	Obed	NE & SE of Grande Cache
60	3 to 2	SWDs (& TRDs)	Fort McMurray	Athabasca	Between Fort McMurray & Cold Lake
62	4 to 3 or more	Landfills	Spirit River Landfill	Saddle Hills	NE of Dawson Creek
63	4 to 3 or more	Landfills	Silverberry Landfill	Saddle Hills	Between Dawson Creek & Fort St. John
78	4 to 3 or more	Landfills	La Glace Landfill	South Grande Prairie	N of Grande Prairie
79	4 to 3 or more	Landfills	Lindbergh Caverns	Tulliby Lake	N of Lloydminster
80	4 to 3 or more	Landfills	Willesden Green Landfill	Willy Green	WNW of Red Deer
86	4 to 3 or more	TRDs	South Wapiti	South Grande Prairie	SW & SE of Grande Prairie
88	4 to 3 or more	TRDs	South Wapiti	Kakwa	S of Grande Prairie
90	4 to 3 or more	TRDs	La Glace	Dawson Creek	SE of Dawson Creek
91	4 to 3 or more	TRDs	La Glace	La Glace	Between Dawson Creek & Grande Prairie
92	4 to 3 or more	TRDs	South Wapiti	South Grande Prairie	S of Grande Prairie
93	4 to 3 or more	TRDs	Spirit River	Rycroft	Spirit River Area
94	4 to 3 or more	TRDs	Grande Prairie Industrial	La Glace	N & SE of Grande Prairie
95	4 to 3 or more	TRDs	Grande Prairie Industrial	South Grande Prairie	Grande Prairie Area
96	4 to 3 or more	TRDs	South Wapiti	Kakwa	S of Grande Prairie
98	4 to 3 or more	TRDs	South Wapiti	Kakwa	Between Grande Prairie & Grande Cache
99	4 to 3 or more	TRDs	Brazeau	Brazeau	SW of Edmonton

Market	Structure	Product	Closest Tervita Facility	Closest Secure Facility	Description
101	4 to 3 or more	TRDs	Niton Junction	Brazeau	WSW of Edmonton
102	4 to 3 or more	TRDs	Niton Junction	Drayton Valley	W of Edmonton
104	4 to 3 or more	TRDs	Gordondale	Dawson Creek	SW of Dawson Creek
105	4 to 3 or more	TRDs	Boundary Lake	Dawson Creek	N & NE of Dawson Creek
106	4 to 3 or more	TRDs	Gordondale	Dawson Creek	W of Dawson Creek
107	4 to 3 or more	TRDs	South Taylor	Dawson Creek	Dawson Creek Area
108	4 to 3 or more	TRDs	Gordondale	Dawson Creek	SE of Dawson Creek
111	4 to 3 or more	TRDs	Brazeau	Brazeau	SW of Edmonton
116	4 to 3 or more	TRDs	Willesden Green	Rocky Mountain House	SW of Rocky Mountain House
117	4 to 3 or more	TRDs	Brazeau	Brazeau	SW of Edmonton
119	4 to 3 or more	TRDs	Stauffer	Rocky Mountain House	Between Rocky Mountain House and Alhambra
121	4 to 3 or more	TRDs	Willesden Green	Rocky Mountain House	NW of Red Deer
123	4 to 3 or more	TRDs	Eckville	Rocky Mountain House	NW of Red Deer
124	4 to 3 or more	TRDs	Buck Creek	Drayton Valley	SW of Edmonton
126	4 to 3 or more	TRDs	Buck Creek	Drayton Valley	WSW of Edmonton
127	4 to 3 or more	TRDs	Willesden Green	Rocky Mountain House	W of Red Deer
128	4 to 3 or more	TRDs	Grande Prairie Industrial	Dawson Creek	W of Beaverlodge
129	4 to 3 or more	TRDs	Grande Prairie Industrial	South Grande Prairie	SW of Grande Prairie
130	4 to 3 or more	TRDs	La Glace	Dawson Creek	W of Grande Prairie

Market	Structure	Product	Closest Tervita Facility	Closest Secure Facility	Description
132	4 to 3 or more	TRDs	Gordondale	La Glace	WSW of Spirit River
134	4 to 3 or more	TRDs	Spirit River	La Glace	Between Spirit River & Grande Prairie
136	4 to 3 or more	TRDs	Brazeau	Drayton Valley	SW of Edmonton
138	4 to 3 or more	TRDs	Brazeau	Rocky Mountain House	NW of Rocky Mountain House
142	4 to 3 or more	SWDs (& TRDs)	Kindersley	Kindersley	SW of Saskatoon
143	4 to 3 or more	SWDs (& TRDs)	West Edson	Nosehill	NW of Edson
144	4 to 3 or more	SWDs (& TRDs)	Brazeau	Brazeau	SW of Edmonton
145	4 to 3 or more	SWDs (& TRDs)	Brazeau	Brazeau	NW of Red Deer
146	4 to 3 or more	SWDs (& TRDs)	Brazeau	Brazeau	SW of Edmonton
147	4 to 3 or more	SWDs (& TRDs)	West Edson	Obed	W of Edson
148	4 to 3 or more	SWDs (& TRDs)	Mile 103	Wonowon	W of Wonowon
150	4 to 3 or more	SWDs (& TRDs)	West Edson	Edson	W & S of Edson
152	4 to 3 or more	SWDs (& TRDs)	Niton Junction	Brazeau	WSW of Edmonton
154	4 to 3 or more	SWDs (& TRDs)	South Wapiti	Big Mountain Creek	SSE of Grande Prairie
155	4 to 3 or more	SWDs (& TRDs)	South Wapiti	Gold Creek	SSW of Grande Prairie
156	4 to 3 or more	SWDs (& TRDs)	Valleyview	Tony Creek	WNW of Fox Creek
157	4 to 3 or more	SWDs (& TRDs)	Fox Creek	Tony Creek	W of Fox Creek
159	4 to 3 or more	SWDs (& TRDs)	Grande Prairie Industrial	Rycroft	SSE of Grande Prairie
160	4 to 3 or more	SWDs (& TRDs)	Swan Hills	Judy Creek	Between Swan Hills & Whitecourt
162	4 to 3 or more	SWDs (& TRDs)	Grande Prairie Industrial	Emerson	SW of Grande Prairie
163	4 to 3 or more	SWDs (& TRDs)	South Wapiti	Gold Creek	S of Grande Prairie

Market	Structure	Product	Closest Tervita Facility	Closest Secure Facility	Description
164	4 to 3 or more	SWDs (& TRDs)	South Wapiti	Big Mountain Creek	S of Grande Prairie
165	4 to 3 or more	SWDs (& TRDs)	Grande Prairie Industrial	Rycroft	SE of Grande Prairie
166	4 to 3 or more	SWDs (& TRDs)	Kakwa	Big Mountain Creek	Between Grande Prairie & Grande Cache
168	4 to 3 or more	SWDs (& TRDs)	Silverberry	Wonowon	NW of Fort St. John
169	4 to 3 or more	SWDs (& TRDs)	Valleyview	Kaybob	SW of Fox Creek
171	4 to 3 or more	SWDs (& TRDs)	Fox Creek East	Kaybob	S of Fox Creek
172	4 to 3 or more	SWDs (& TRDs)	Fox Creek East	Kaybob	SW of Fox Creek
173	4 to 3 or more	SWDs (& TRDs)	Fox Creek East	Tony Creek	SW of Fox Creek
174	4 to 3 or more	SWDs (& TRDs)	Fox Creek East	Fox Creek	SE of Grande Prairie
176	4 to 3 or more	SWDs (& TRDs)	Fox Creek	Fox Creek	WSW of Fox Creek
177	4 to 3 or more	SWDs (& TRDs)	South Wapiti	Big Mountain Creek	Between Grande Prairie & Grande Cache
179	4 to 3 or more	SWDs (& TRDs)	08-09	La Glace	SW of Grande Prairie
183	4 to 3 or more	SWDs (& TRDs)	Judy Creek	Kaybob	Between Fox Creek & Whitecourt
184	4 to 3 or more	SWDs (& TRDs)	La Glace	La Glace	SW of Spirit River
186	4 to 3 or more	SWDs (& TRDs)	Fox Creek East	Kaybob	S & W of Fox Creek
188	4 to 3 or more	SWDs (& TRDs)	Fox Creek East	Fox Creek	Fox Creek Area
193	4 to 3 or more	SWDs (& TRDs)	Brazeau	Brazeau	NW of Red Deer
196	4 to 3 or more	SWDs (& TRDs)	Gordondale	Gordondale	SE of Dawson Creek
200	4 to 3 or more	SWDs (& TRDs)	South Taylor	Dawson Creek	NW of Dawson Creek
201	4 to 3 or more	SWDs (& TRDs)	08-09	Pipestone	SW of Grande Prairie

Market	Structure	Product	Closest Tervita Facility	Closest Secure Facility	Description
202	4 to 3 or more	SWDs (& TRDs)	La Glace	Emerson	N of Grande Prairie
203	4 to 3 or more	SWDs (& TRDs)	La Glace	La Glace	W & NW of Grande Prairie
204	4 to 3 or more	SWDs (& TRDs)	La Glace	La Glace	SE of Dawson Creek
205	4 to 3 or more	SWDs (& TRDs)	La Glace	La Glace	NW of Grande Prairie
206	4 to 3 or more	SWDs (& TRDs)	Brazeau	Brazeau	SW of Edmonton
208	4 to 3 or more	Water Disposal (& TRDs)	La Glace	Dawson Creek	S & SE of Dawson Creek
232	4 to 3 or more	SWDs (& TRDs)	South Wapiti	Big Mountain Creek	SSE of Grande Prairie
233	4 to 3 or more	SWDs (& TRDs)	Kakwa	Gold Creek	N of Grande Cache
235	4 to 3 or more	SWDs (& TRDs)	Marshall	Silverdale	Lloydminster Area
241	4 to 3 or more	SWDs (& TRDs)	Grande Prairie Industrial	Rycroft	SE of Grande Prairie
242	4 to 3 or more	SWDs (& TRDs)	Grande Prairie Industrial	Rycroft	SW of Valleyview
245	4 to 3 or more	SWDs (& TRDs)	Fox Creek	Nosehill	NW of Edson
246	4 to 3 or more	SWDs (& TRDs)	West Edson	Nosehill	NW of Edson
247	4 to 3 or more	SWDs (& TRDs)	Fox Creek East	Fox Creek	Fox Creek Area
249	4 to 3 or more	SWDs (& TRDs)	South Wapiti	South Grande Prairie	Customer Location Not Visible on Map
251	4 to 3 or more	SWDs (& TRDs)	Gordondale	Gordondale	NE of Dawson Creek
252	4 to 3 or more	SWDs (& TRDs)	Gordondale	Gordondale	WSW of Spirit River
255	4 to 3 or more	SWDs (& TRDs)	Gordondale	Dawson Creek	SW of Dawson Creek
257	4 to 3 or more	SWDs (& TRDs)	Gordondale	Dawson Creek	W of Dawson Creek
259	4 to 3 or more	SWDs (& TRDs)	Gordondale	Dawson Creek	SE of Dawson Creek

APPENDIX 3 – TABLE OF MARKET-BY-MARKET SLC FINDINGS**SLC Markets****No-SLC Markets**

Market	Finding	Divestiture(s)		Market	Finding
2	SLC	Kindersley TRD / Unity Caverns		1	N/A
3	SLC	West Edson TRD		9	No SLC
4	SLC	Elk Point TRD / Lindbergh Caverns		11	No SLC
5	SLC	Fox Creek (Bigstone and HT) TRD / Fox Creek East TRD		21	No SLC
6	SLC	West Edson TRD		24	No SLC
7	SLC	West Edson TRD		33	No SLC
8	SLC	Judy Creek TRD		34	No SLC
10	SLC	Willesden Green TRD		39	No SLC
12	SLC	Fox Creek (Bigstone & HT) TRD / Fox Creek East TRD		40	No SLC
13	SLC	Fox Creek (Bigstone & HT) TRD / Fox Creek East TRD		43	No SLC
14	SLC	Kindersley TRD / Unity Caverns		44	No SLC
15	SLC	Elk Point TRD / Lindbergh Caverns / Unity Caverns		48	No SLC
16	SLC	Judy Creek TRD		56	No SLC
17	SLC	Kindersley TRD		61	No SLC
18	SLC	West Edson TRD / Moose Creek SWD		64	No SLC
19	SLC	West Edson TRD / Moose Creek SWD		65	No SLC
20	SLC	West Edson TRD		66	No SLC
22	SLC	La Glace Landfill / Spirit River Landfill		67	No SLC
23	SLC	La Glace Landfill / Spirit River Landfill		68	No SLC
25	SLC	Elk Point TRD / Lindbergh Caverns		69	No SLC
26	SLC	Elk Point TRD / Lindbergh Caverns		70	No SLC
27	SLC	Elk Point TRD / Lindbergh Caverns / Unity Caverns		71	No SLC
28	SLC	Gordondale TRD		72	No SLC
29	SLC	Fox Creek (Bigstone & HT) TRD / Fox Creek East TRD		73	No SLC

Market	Finding	Divestiture(s)		Market	Finding
30	SLC	Fox Creek (Bigstone & HT) TRD / Fox Creek East TRD / Kindersley TRD		74	No SLC
31	SLC	Fox Creek (Bigstone & HT) TRD / Fox Creek East TRD / Kindersley TRD		75	No SLC
32	SLC	Fox Creek (Bigstone & HT) TRD / Fox Creek East TRD		76	No SLC
35	SLC	South Wapiti TRD		77	No SLC
36	SLC	West Edson TRD / Willesden Green TRD		81	No SLC
37	SLC	West Edson TRD		82	No SLC
38	SLC	West Edson TRD		83	No SLC
41	SLC	Gordondale TRD		84	No SLC
42	SLC	West Edson TRD		85	No SLC
45	SLC	Stauffer TRD / Willesden Green TRD		87	No SLC
46	SLC	Stauffer TRD		89	No SLC
47	SLC	West Edson TRD / Moose Creek SWD		97	No SLC
49	SLC	Judy Creek TRD		100	No SLC
50	SLC	West Edson TRD		103	No SLC
51	SLC	West Edson TRD		109	No SLC
52	SLC	Kindersley TRD		110	No SLC
53	SLC	Kindersley TRD		112	No SLC
54	SLC	Kakwa SWD		113	No SLC
55	SLC	West Edson TRD		114	No SLC
57	SLC	Judy Creek TRD		115	No SLC
58	SLC	Kindersley TRD		118	No SLC
59	SLC	Kakwa SWD		120	No SLC
60	SLC	Fort McMurray TRD		122	No SLC
62	SLC	Spirit River Landfill		123	No SLC
63	SLC	Silverberry Landfill		125	No SLC
78	SLC	La Glace Landfill / South Wapiti Landfill		126	No SLC
79	SLC	Elk Point Landfill		131	No SLC
80	SLC	Willesden Green Landfill		133	No SLC
86	SLC	South Wapiti TRD		135	No SLC
88	SLC	South Wapiti TRD		137	No SLC
90	SLC	La Glace TRD		139	No SLC
91	SLC	La Glace TRD		140	No SLC
92	SLC	South Wapiti TRD		141	No SLC
93	SLC	Spirit River TRD		149	No SLC

Market	Finding	Divestiture(s)		Market	Finding
94	SLC	La Glace TRD / South Wapiti TRD / Spirit River TRD		151	No SLC
95	SLC	La Glace TRD / South Wapiti TRD / Spirit River TRD		153	No SLC
96	SLC	South Wapiti TRD		158	No SLC
98	SLC	South Wapiti TRD		161	No SLC
99	SLC	Stauffer TRD / Willesden Green TRD		167	No SLC
101	SLC	Brazeau TRD		170	No SLC
102	SLC	Buck Creek TRD / West Edson TRD		175	No SLC
104	SLC	Gordondale TRD		178	No SLC
105	SLC	Gordondale TRD		180	No SLC
106	SLC	Gordondale TRD		181	No SLC
107	SLC	Gordondale TRD / South Taylor TRD		182	No SLC
108	SLC	Gordondale TRD / South Taylor TRD		185	No SLC
111	SLC	Brazeau TRD		187	No SLC
116	SLC	Stauffer TRD / Willesden Green TRD		189	No SLC
117	SLC	Brazeau TRD / Willesden Green TRD		190	No SLC
119	SLC	Stauffer TRD / Willesden Green TRD		191	No SLC
121	SLC	Stauffer TRD / Willesden Green TRD		192	No SLC
124	SLC	Buck Creek TRD		194	No SLC
127	SLC	Stauffer TRD / Willesden Green TRD		195	No SLC
128	SLC	La Glace TRD		197	No SLC
129	SLC	South Wapiti TRD		198	No SLC
130	SLC	La Glace TRD		199	No SLC
132	SLC	Gordondale TRD		203	No SLC
134	SLC	Spirit River TRD		204	No SLC
136	SLC	Brazeau TRD		205	No SLC
138	SLC	Willesden Green TRD		207	No SLC
142	SLC	Kindersley TRD		209	No SLC
143	SLC	West Edson TRD		210	No SLC
144	SLC	Brazeau TRD		211	No SLC
145	SLC	Brazeau TRD / Willesden Green TRD		212	No SLC
146	SLC	Brazeau TRD		213	No SLC
147	SLC	West Edson TRD		214	No SLC

Market	Finding	Divestiture(s)		Market	Finding
148	SLC	Silverberry TRD / Mile 103 SWD		215	No SLC
150	SLC	West Edson TRD		216	No SLC
152	SLC	Brazeau TRD / Moose Creek SWD		217	No SLC
154	SLC	South Wapiti TRD / Kakwa SWD		218	No SLC
155	SLC	South Wapiti TRD / Kakwa SWD		219	No SLC
156	SLC	Fox Creek (Bigstone & HT) TRD / Fox Creek East TRD		220	No SLC
157	SLC	Fox Creek (Bigstone & HT) TRD / Fox Creek East TRD		221	No SLC
159	SLC	South Wapiti TRD / Kakwa SWD		222	No SLC
160	SLC	Judy Creek TRD		223	No SLC
162	SLC	South Wapiti TRD		224	No SLC
163	SLC	South Wapiti TRD / Kakwa SWD		225	No SLC
164	SLC	South Wapiti TRD / Kakwa SWD		226	No SLC
165	SLC	South Wapiti TRD / Kakwa SWD		227	No SLC
166	SLC	Kakwa SWD		228	No SLC
168	SLC	Silverberry TRD / Mile 103 SWD		229	No SLC
169	SLC	Fox Creek (Bigstone & HT) TRD / Fox Creek East TRD		230	No SLC
171	SLC	Fox Creek (Bigstone & HT) TRD / Fox Creek East TRD		231	No SLC
172	SLC	Fox Creek (Bigstone & HT) TRD / Fox Creek East TRD		234	No SLC
173	SLC	Fox Creek (Bigstone & HT) TRD / Fox Creek East TRD		236	No SLC
174	SLC	Fox Creek (Bigstone & HT) TRD / Fox Creek East TRD		237	No SLC
176	SLC	Fox Creek (Bigstone & HT) TRD / Fox Creek East TRD		238	No SLC
177	SLC	South Wapiti TRD / Kakwa SWD		239	No SLC
179	SLC	La Glace TRD / Spirit River TRD / 08-09 SWD		240	No SLC
183	SLC	Fox Creek (Bigstone & HT) TRD / Fox Creek East TRD / Judy Creek TRD		243	No SLC
184	SLC	La Glace TRD / Spirit River TRD		244	No SLC
186	SLC	Fox Creek (Bigstone & HT) TRD / Fox Creek East TRD / Judy Creek TRD		248	No SLC
188	SLC	Fox Creek (Bigstone & HT) TRD / Fox Creek East TRD		250	No SLC
193	SLC	Brazeau TRD / Willesden Green TRD		253	No SLC

Market	Finding	Divestiture(s)		Market	Finding
196	SLC	Gordondale TRD		254	No SLC
200	SLC	South Taylor TRD		255	No SLC
201	SLC	La Glace TRD / Spirit River TRD / 08-09 SWD		256	No SLC
202	SLC	La Glace TRD		258	No SLC
206	SLC	Brazeau TRD		259	No SLC
208	SLC	Gordondale TRD / La Glace TRD / Spirit River TRD		260	No SLC
232	SLC	South Wapiti TRD / Kakwa SWD		261	No SLC
233	SLC	Kakwa SWD		262	No SLC
235	SLC	Elk Point TRD / Lindbergh Caverns		263	No SLC
241	SLC	South Wapiti TRD		264	No SLC
242	SLC	South Wapiti TRD / Kakwa SWD		265	No SLC
245	SLC	Fox Creek (Bigstone & HT) TRD / Fox Creek East TRD		266	No SLC
246	SLC	West Edson TRD		267	No SLC
247	SLC	Fox Creek (Bigstone & HT) TRD / Fox Creek East TRD		268	No SLC
249	SLC	La Glace TRD / South Wapiti TRD / Spirit River TRD / Kakwa SWD		269	No SLC
251	SLC	Gordondale TRD		270	No SLC
252	SLC	Gordondale TRD		271	No SLC
257	SLC	Gordondale TRD		272	No SLC

**APPENDIX 4 – TABLE SUMMARIZING FINDINGS
REGARDING DIVESTITURES**

List of Commissioner’s requested divestitures and Tribunal’s findings on divestitures

Facility	Product	Main SLC Markets affected	Tribunal’s finding
~~Boundary Lake~~	TRD	41, 105	No divestiture required Addressed by Gordondale TRD and Spirit River TRD divestitures
Brazeau	TRD	36, 99, 111, 117, 136, 144, 145, 146, 193, 206	Divestiture required
Buck Creek	TRD	124	Divestiture required
~~Coronation~~	TRD	2, 14	No divestiture required Addressed by Kindersley TRD and Unity Caverns divestitures
~~Eckville~~	TRD	119, 121	No divestiture required Addressed by Buck Creek TRD and Stauffer TRD divestitures
Elk Point	TRD	4, 25, 26, 27, 15, 235	Divestiture required
Fort McMurray	TRD	60	Divestiture required
Fox Creek East	TRD	12, 31, 171, 173, 169, 171, 173, 174, 176, 183, 186, 188, 245, 247	Divestiture required
Fox Creek (Bigstone & HT)	TRD	5, 29, 157, 176, 245	Divestiture required
Gordondale	TRD	28, 104, 106, 108, 132, 196, 251, 252, 255, 257	Divestiture required
~~Grande Prairie Industrial~~	TRD	94, 95	No divestiture required Addressed by La Glace TRD, South Wapiti TRD, and Spirit River TRD divestitures
~~Green Court~~	TRD	30, 102, 183	No divestiture required Addressed by Brazeau TRD, Buck Creek TRD, Fox Creek

Facility	Product	Main SLC Markets affected	Tribunal's finding
			(Bigstone & HT) TRD, Judy Creek TRD, and West Edson TRD divestitures
~~Gull Lake~~	TRD	17, 53	No divestiture required Addressed by Kindersley TRD divestiture
Judy Creek	TRD	8, 16, 30, 32, 49, 57, 160 (SWD), 183 (SWD), 186 (SWD)	Divestiture required
Kindersley	TRD	2, 14, 17, 52, 53, 142 (WD)	Divestiture required
La Glace	TRD	90, 91, 93 (in part), 94, 95, 128, 130, 202 (SWD)	Divestiture required
~~Mitsue~~	TRD	16, 57, 49	No divestiture required Addressed by Judy Creek TRD divestiture
~~Niton Junction~~	TRD	101, 102, 152 (SWD) (and maybe 38, 99, 111 for some customers)	No divestiture required Addressed by Brazeau TRD, Buck Creek TRD, and West Edson TRD divestitures
Silverberry	TRD	168 (SWD)	Divestiture required
South Taylor	TRD	107, 108, 168 (SWD)	Divestiture required
South Wapiti	TRD	86, 88, 92, 93, 94, 95, 96, 98, 129 and the following SWD markets: 154, 155, 159, 163, 164, 165, 166, 232, 233	Divestiture required
Spirit River	TRD	91, 93, 134, and perhaps part of 202 (SWD)	Divestiture required
Stauffer	TRD	45, 46, 117, 119, 121, 127, 138	Divestiture required
~~Valleyview~~	TRD	11, 12, 13	No divestiture required Addressed by Fox Creek (Bigstone & HT) TRD and Judy Creek TRD divestitures
West Edson	TRD	3, 6, 7, 18, 19, 36, 37, 42, 47, 50, 51, 55, 99	Divestiture required

Facility	Product	Main SLC Markets affected	Tribunal's finding
		(in part), and SWD markets 143, 147, 150, 246	
Willesden Green	TRD	10	Divestiture required
08-09	SWD	234	Divestiture required
Kakwa	SWD	54, 154, 155, 163, 164, 165, 166, 177, 232, 233	Divestiture required
Mile 103	SWD	148, 168	Divestiture required
Moose Creek	SWD	18, 19, and parts of 47 144, 146, 150	Divestiture required
Swan Hills	SWD		No divestiture required Addressed by Judy Creek TRD divestiture
Elk Point	Landfill	79	Divestiture required
~~Fox Creek~~	Landfill		No divestiture required
La Glace	Landfill	22, 23, 78	Divestiture required
~~Marshall~~	Landfill	79	No divestiture required Addressed by Elk Point Landfill and Lindbergh Caverns divestitures
Silverberry	Landfill	63	Divestiture required
South Wapiti	Landfill	22, 23, 78	Divestiture required
Spirit River	Landfill	62	Divestiture required
Willesden Green	Landfill	80	Divestiture required
Lindbergh	Cavern	15, 25, 26, 27, 235	Divestiture required
Unity	Cavern	58, 14 and parts of 2, 15, 142	Divestiture required

APPENDIX 5 – FACILITY CLOSING DATES

Facility Name	Expected Date of Closure	Source
[REDACTED]		
[REDACTED]	August 31, 2027	Updated Harington Report, at Table 5 and Appendix 3.2A
[REDACTED]	July 31, 2022	Updated Harington Report, at Table 5 and Appendix 3.2A
[REDACTED]	Temporary closure (until [REDACTED] runs out of capacity)	Updated Harington Report, at Table 5 and Appendix 3.2A, Note 2 Transcript, Confidential B, at p 3138
[REDACTED]	N/A – “Capping in process”	Updated Harington Report, at Table 5 and Appendix 3.2A
[REDACTED]		
[REDACTED]	April 30, 2022	Updated Harington Report, at Table 4 and Appendix F
[REDACTED]	Temporary closure November 1, 2021 (waste stream closure) February 28, 2022 (partial closure, to be reopened upon the closure of [REDACTED]) May 1, 2022 (reopening, upon closure of [REDACTED])	Updated Harington Report, at Table 4 and Appendix F, Line 18 Updated Harington Report, at Table 4 and Appendix F, Note 3
[REDACTED]	April 30, 2022	Updated Harington Report, at Table 4 and Appendix F Transcript, Confidential B, at p 2345
[REDACTED]	April 30, 2023	Updated Harington Report, at Table 4 and Appendix F Transcript, Confidential B, at pp 2671–2673
[REDACTED]	October 28, 2021	Updated Harington Report, at Table 4 and Appendix F

Facility Name	Expected Date of Closure	Source
[REDACTED]	October 31, 2021	Updated Harington Report, at Table 4 and Appendix F
[REDACTED]	April 30, 2023	Updated Harington Report, at Table 4 and Appendix F Transcript, Confidential B, at p 2345
[REDACTED]	November 1, 2021	Updated Harington Report, at Table 4 and Appendix F
[REDACTED]	November 30, 2021	Updated Harington Report, at Table 4 and Appendix F Transcript, Confidential B, at pp 2452–2453
[REDACTED]	October 31, 2022	Updated Harington Report, at Table 4 and Appendix F
[REDACTED]	October 1, 2021 [REDACTED] April 30, 2022 [REDACTED]	Updated Harington Report, at Table 4 and Appendix F
[REDACTED]	April 30, 2022	Updated Harington Report, at Table 4 and Appendix F Transcript, Confidential B, at pp 2671–2673
[REDACTED]	November 5, 2021	Updated Harington Report, at Table 4 and Appendix F Transcript, Confidential B, at p 2342
[REDACTED]	October 24, 2021	Updated Harington Report, at Table 4 and Appendix F Transcript, Confidential B, at p 2355
[REDACTED]	November 5, 2021	Updated Harington Report, at Table 4 and Appendix F Transcript, Confidential B, at p 2342
[REDACTED]	April 30, 2022	Updated Harington Report, at Table 4 and Appendix F Transcript, Confidential B, at pp 2671–2673

Facility Name	Expected Date of Closure	Source
[REDACTED]	October 3, 2021	Updated Harington Report, at Table 4 and Appendix F
[REDACTED]		
[REDACTED]	April 30, 2023	Updated Harington Report, at Table 4 and Appendix F
[REDACTED]	November 30, 2021	Updated Harington Report, at Table 4 and Appendix F

APPENDIX 6 – ORDER**File No. CT-2021-002****COMPETITION TRIBUNAL****IN THE MATTER OF** the *Competition Act*, RSC 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

ORDER

WHEREAS SECURE Energy Services Inc. (“**Secure**”) acquired all the issued and outstanding shares of Tervita Corporation (“**Tervita**”) on July 2, 2021 (the “**Merger**”);

WHEREAS the Commissioner of Competition (the “**Commissioner**”) commenced an application pursuant to section 92 of the *Competition Act*, RSC 1985, c C-34 (the “**Act**”);

AND UPON hearing counsel for the Commissioner and counsel for Secure, the Tribunal orders that:

I. DEFINITIONS

[1] Whenever used in this Order, the following words and terms have the meanings set out below:

- a) “**Act**” means the *Competition Act*, RSC 1985, c C-34, as amended;
- b) “**Affiliate**” has the meaning given to it in subsection 2(2) of the Act;
- c) “**Business Day**” means a day on which the Competition Bureau’s Gatineau, Quebec office is open for business;
- d) “**Commissioner**” means the Commissioner of Competition appointed under the Act and includes the Commissioner’s authorized representatives;
- e) “**Confidential Information**” means competitively sensitive, proprietary and all other information that is not in the public domain, and that is owned by or pertains to a Person or a Person’s business, and includes, but is not limited to, manufacturing, operations and financial information, customer lists, price lists, contracts, cost and revenue information, marketing methods, patents, technologies, processes, or other trade secrets;
- f) “**Divested Business**” means the business carried on at the facilities listed in Schedule A;
- g) “**Divestiture**” means the sale, conveyance, transfer, assignment or other disposal of the Divestiture Assets to a Purchaser or Purchasers pursuant to this Order and with the prior approval of the Commissioner, such that Secure will have no direct or indirect interest in the Divestiture Assets;
- h) “**Divestiture Agreement**” means a binding and definitive agreement between Secure and one or more Purchasers to effect the Divestitures pursuant to this Order and subject to the prior approval of the Commissioner;
- i) “**Divestiture Applicant**” means Secure during the Initial Sale Period or the Divestiture Trustee during the Divestiture Trustee Sale Period;
- j) “**Divestiture Assets**” means all of the right, title and interest in, to and under, or relating to, the tangible assets, Intangible Assets, property and undertaking owned or used by Secure or held by Secure for use in, or relating to, the Divested Business;

- k) **“Order”** means this order, including the schedules hereto, and references to a “Part”, “Section”, “Paragraph”, or “Schedule” are, unless otherwise indicated, references to a part, section, paragraph or schedule of or to this Order;
- l) **“Divestiture Process Agreement”** means the agreement described in Section 6 of this Order;
- m) **“Divestiture Trustee”** means the Person appointed pursuant to Part III of this Order (or any substitute appointed thereto) and any employees, agents or other Persons acting for or on behalf of the Divestiture Trustee;
- n) **“Divestiture Trustee Sale”** means the Divestiture to be conducted by the Divestiture Trustee pursuant to Part III of this Order;
- o) **“Divestiture Trustee Sale Period”** means the 6 month period commencing upon expiry of the Initial Sale Period
- p) **“Effective Date”** means the date of this Order;
- q) **“First Reference Date”** shall have the meaning set out in Paragraph 22(d) of this Order;
- r) **“Initial Sale Period”** means the period that commences on [REDACTED] and ends [REDACTED];
- s) **“Intangible Assets”** means intellectual property of any nature and kind, including:
 - i. patents, copyrights, trademarks and software;
 - ii. trade dress, industrial designs, distinguishing guises, trade secrets, know-how, techniques, data, inventions, practices, methods and other confidential or proprietary technical, business, research, development and other information, and all rights in any jurisdiction to limit the use or disclosure thereof;
 - iii. rights to obtain and file for patents and registrations thereof; and
 - iv. rights to sue and recover damages or obtain injunctive relief for infringement, dilution, misappropriation, violation or breach of any of the foregoing;
- t) **“Merger”** means the transaction described in the first recital to this Order;
- u) **“Monitor”** means the Person appointed pursuant to Part X of this Order (or any substitute appointed thereto), and any employees, agents or other Persons acting for or on behalf of the Monitor, provided that if no Monitor is appointed, other than in Part X of this Order Monitor means the Commissioner;

- v) **“Monitor Agreement”** means the agreement described in Section 34 of this Order;
- w) **“Person”** means any individual, corporation or partnership, sole proprietorship, trust or other unincorporated organization capable of conducting business, and any Affiliates thereof;
- x) **“Purchaser”** means a Person that acquires Divestiture Assets pursuant to this Order and a Divestiture Agreement;
- y) **“Records”** means records within the meaning of subsection 2(1) of the Act;
- z) **“Second Reference Date”** shall have the meaning set out in Paragraph 22(e) of this Order;
- aa) **“Secure”** means SECURE Energy Services Inc. and its Affiliates and their directors, officers, employees, agents, representatives, successors and assigns;
- bb) **“Third Party”** means any Person other than the Commissioner, Secure or a Purchaser; and
- cc) **“Tribunal”** means the Competition Tribunal established by the *Competition Tribunal Act*, RSC 1985, c19 (2nd Supp).

II. OBLIGATION TO COMPLETE DIVESTITURE

- [2] Secure shall use commercially reasonable efforts to complete the Divestitures.
- [3] During the Initial Sale Period, Secure shall use commercially reasonable efforts to complete the Divestitures in accordance with the provisions of this Order.
- [4] During the Initial Sale Period, Secure shall provide to the Commissioner and to the Monitor, every 30 days, a written report describing the progress of its efforts to effect the Divestitures. The report shall include a description of contacts, negotiations, due diligence, and offers regarding the Divestiture Assets, the name, address, and phone number of all parties contacted and of prospective Purchasers who have come forward. Secure shall, within 3 Business Days, respond to any request by the Commissioner for additional information regarding the status of Secure’s efforts to complete the Divestitures. An officer or other duly authorized representative of Secure shall certify that the information provided in any such response has been examined and is, to the best of that individual’s knowledge and belief, correct and complete in all material respects.

III. DIVESTITURE TRUSTEE SALE PROCESS

- [5] In the event that Secure fails to complete the Divestitures during the Initial Sale Period, the Commissioner shall appoint a Divestiture Trustee to complete the Divestitures in accordance with this Order. Such appointment may be made at any time prior to the expiry of the Initial Sale Period or on such later date as the Commissioner determines.

- [6] Within 5 Business Days after the appointment of the Divestiture Trustee, Secure shall submit to the Commissioner for approval the terms of a proposed Divestiture Process Agreement between the Divestiture Trustee and the Commissioner that confers on the Divestiture Trustee all rights and powers necessary to permit the Divestiture Trustee to effect the Divestitures.
- [7] Within 5 Business Days after receipt of the proposed Divestiture Process Agreement referred to in Section 6, the Commissioner shall advise Secure whether or not the Commissioner approves the terms of the proposed Divestiture Process Agreement. If the Commissioner does not approve the terms of the proposed Divestiture Process Agreement, the Commissioner shall prescribe alternative terms that Secure shall incorporate into a final Divestiture Process Agreement with the Divestiture Trustee and the Commissioner.
- [8] Without limiting the Commissioner's discretion to require additional terms, Secure consents to the following terms and conditions regarding the Divestiture Trustee's rights, powers and duties, and shall include such terms in the Divestiture Process Agreement:
- a) The Divestiture Trustee shall complete the Divestitures as expeditiously as possible, and in any event prior to the expiry of the Divestiture Trustee Sale Period.
 - b) The Divestiture Trustee shall use reasonable efforts to negotiate terms and conditions for the Divestitures that are as favourable to Secure as are reasonably available at that time; however, the Divestitures shall not be subject to any minimum price. The Divestiture Trustee's opinion of what constitutes favourable terms and conditions and what constitutes reasonably available terms and conditions is subject to review and approval by the Commissioner.
 - c) Subject to oversight and approval by the Commissioner, the Divestiture Trustee shall have full and exclusive authority during the Divestiture Trustee Sale Period:
 - i. to complete the Divestitures in accordance with the provisions of this Part;
 - ii. to solicit interest in a possible Divestiture by whatever process or procedure the Divestiture Trustee believes is suitable to allow a fair opportunity for one or more prospective good faith Purchasers to offer to acquire the Divestiture Assets, and for greater certainty, in determining whether to pursue negotiations with a prospective Purchaser, may have regard to the approval criteria in Section 23;
 - iii. to enter into a Divestiture Agreement with one or more Purchasers that will be legally binding on Secure;
 - iv. to negotiate reasonable commercial covenants, representations, warranties and indemnities to be included in a Divestiture Agreement; and

- v. to employ, at the expense of Secure, such consultants, accountants, legal counsel, investment bankers, business brokers, appraisers, and other representatives and assistants as the Divestiture Trustee believes are necessary to carry out the Divestiture Trustee's duties and responsibilities.
- d) Where any Person makes a good faith inquiry respecting a possible purchase of Divestiture Assets, the Divestiture Trustee shall notify such Person that the Divestitures are being made and shall provide to such Person a copy of this Order.
- e) Where, in the opinion of the Divestiture Trustee, a Person has a good faith interest in purchasing Divestiture Assets and has executed a confidentiality agreement, in a form satisfactory to the Commissioner, with the Divestiture Trustee protecting any Confidential Information that such Person may receive in the course of its due diligence review of the Divestiture Assets, the Divestiture Trustee shall:
 - i. promptly provide to such Person all information respecting the Divestiture Assets that is determined by the Divestiture Trustee to be relevant and appropriate;
 - ii. permit such Person to make reasonable inspection of the Divestiture Assets and of all financial, operational or other non- privileged Records and information, including Confidential Information, that may be relevant to the Divestitures; and
 - iii. give such Person as full and complete access as is reasonable in the circumstances to the personnel involved in managing the Divestiture Assets.
- f) The Divestiture Trustee shall have no obligation or authority to operate or maintain the Divestiture Assets.
- g) The Divestiture Trustee shall provide to the Commissioner and to the Monitor, within 14 days after the later of the Divestiture Trustee's appointment and the commencement of the Divestiture Trustee Sale Period and thereafter every 30 days, a written report describing the progress of the Divestiture Trustee's efforts to complete the Divestitures. The report shall include a description of contacts, negotiations, due diligence, and offers regarding the Divestiture Assets, the name, address, and phone number of all parties contacted and of prospective Purchasers who have come forward. The Divestiture Trustee shall, within 3 Business Days, respond to any request by the Commissioner for additional information regarding the status of the Divestiture Trustee's efforts to complete the Divestitures.
- h) The Divestiture Trustee shall notify Secure and the Commissioner immediately upon the signing of any letter of intent or agreement in principle relating to the Divestiture Assets, and shall provide to Secure a copy of any executed

Divestiture Agreement upon receipt of the Commissioner's approval of the Divestiture contemplated in such Divestiture Agreement.

- [9] Secure shall not be involved in the Divestiture process during the Divestiture Trustee Sale Period or in any negotiations with prospective Purchasers undertaken by the Divestiture Trustee, nor will Secure have contact with prospective Purchasers during the Divestiture Trustee Sale Period, without the express written approval of the Divestiture Trustee.
- [10] Subject to any legally recognized privilege, Secure shall provide to the Divestiture Trustee full and complete access to all personnel, Records, information (including Confidential Information), and facilities relating to the Divestiture Assets, to enable the Divestiture Trustee to conduct its own investigation of the Divestiture Assets and to provide access and information to prospective Purchasers.
- [11] Secure shall take no action that interferes with or impedes, directly or indirectly, the Divestiture Trustee's efforts to complete the Divestitures.
- [12] Secure shall fully and promptly respond to all requests from the Divestiture Trustee and shall provide all information the Divestiture Trustee may request. Secure shall identify an individual who shall have primary responsibility for fully and promptly responding to such requests from the Divestiture Trustee on behalf of Secure.
- [13] Secure will do all such acts and execute all such documents, and will cause the doing of all such acts and the execution of all such documents as are within its power to cause the doing or execution of, as may be reasonably necessary to ensure that the Divestiture Assets are divested in the Divestiture Trustee Sale Period and that agreements entered into by the Divestiture Trustee are binding upon and enforceable against Secure.
- [14] Secure shall be responsible for all reasonable fees and expenses properly charged or incurred by the Divestiture Trustee in the course of carrying out the Divestiture Trustee's duties and responsibilities under this Order. The Divestiture Trustee shall serve without bond or security, and shall account for all fees and expenses incurred. Secure shall pay all reasonable invoices submitted by the Divestiture Trustee within 30 days after receipt and, without limiting this obligation, Secure shall comply with any agreement it reaches with the Divestiture Trustee regarding interest on late payments. In the event of any dispute: (i) such invoice shall be subject to the approval of the Commissioner; and (ii) Secure shall promptly pay any invoice approved by the Commissioner. Any outstanding monies owed to the Divestiture Trustee by Secure shall be paid out of the proceeds of the Divestitures.
- [15] Secure shall indemnify the Divestiture Trustee and hold the Divestiture Trustee harmless against any losses, claims, damages, liabilities, or expenses arising out of, or in connection with, the performance of the Divestiture Trustee's duties, including all reasonable fees of counsel and other expenses incurred in connection with the preparation or defence of any claim, whether or not resulting in any liability, except to the extent that such losses, claims, damages, liabilities, or expenses result from malfeasance, gross negligence, or bad faith by the Divestiture Trustee.

- [16] Secure shall indemnify the Commissioner and hold the Commissioner harmless against any losses, claims, damages, liabilities, or expenses arising out of, or in connection with, the performance of the Divestiture Trustee's duties, including all reasonable fees of counsel and other expenses incurred in connection with the preparation or defence of any claim, whether or not resulting in any liability.
- [17] If the Commissioner determines that the Divestiture Trustee has ceased to act or has failed to act diligently, the Commissioner may remove the Divestiture Trustee and appoint a substitute Divestiture Trustee. The provisions of this Order respecting the Divestiture Trustee shall apply in the same manner to any substitute Divestiture Trustee.
- [18] Secure may require the Divestiture Trustee and each of the Divestiture Trustee's consultants, accountants, legal counsel, investment bankers, business brokers, appraisers, and other representatives and assistants to sign an appropriate confidentiality agreement in a form satisfactory to the Commissioner; provided, however, that such agreement shall not restrict the Divestiture Trustee from providing any information to the Commissioner.
- [19] The Commissioner may require the Divestiture Trustee and each of the Divestiture Trustee's consultants, accountants, legal counsel, investment bankers, business brokers, appraisers, and other representatives and assistants to sign an appropriate confidentiality agreement relating to materials and information the Divestiture Trustee may receive from the Commissioner in connection with the performance of the Divestiture Trustee's duties.
- [20] Notwithstanding any term of this Order, the rights, powers, and duties of the Divestiture Trustee under this Order shall not expire until the Divestiture is completed.

IV. COMMISSIONER APPROVAL OF DIVESTITURE

- [21] The Divestitures may proceed only with the prior approval of the Commissioner in accordance with this Part. For greater certainty, the provisions set forth in this Part IV of this Order apply during the Initial Sale Period, the Divestiture Trustee Sale period, and any subsequent periods that are contemplated by this Order. If a Divestiture is a notifiable transaction nothing in this Order affects the operation of Part IX of the Act.
- [22] The Divestiture Applicant shall comply with the following process for seeking and obtaining a decision of the Commissioner regarding approval of one or more proposed Divestitures:
 - a) The Divestiture Applicant shall promptly:
 - i. inform the Commissioner of any negotiations with any prospective Purchaser that may lead to one or more Divestitures; and
 - ii. forward to the Commissioner copies of any agreement that is signed with a prospective Purchaser, including non-binding expressions of interest.
 - b) The Divestiture Applicant shall immediately notify the Commissioner when it intends to enter a Divestiture Agreement with a prospective Purchaser, or when

it has entered into an agreement that, if approved by the Commissioner, will be a Divestiture Agreement within the meaning of this Order.

- c) The notice described in Paragraph 22(b) shall be in writing and shall include: the identity of the proposed Purchaser(s); the details of the proposed Divestiture Agreement and any related agreements; and information concerning whether and how the proposed Purchaser(s) would, in the view of the Divestiture Applicant, likely satisfy the terms of this Order.
- d) Within 14 days following receipt of the notice described in Paragraph 22(b), the Commissioner may request additional information concerning the proposed Divestiture(s) from any or all of Secure, the Monitor, the prospective Purchaser(s), and, in the Divestiture Trustee Sale Period, the Divestiture Trustee. These Persons shall each provide any additional information requested from them. When they have provided a complete response to the Commissioner's request, these Persons shall comply with the following procedures:
 - i. the Divestiture Trustee shall provide written confirmation to the Commissioner that the Divestiture Trustee has provided to the Commissioner all additional information requested from the Divestiture Trustee;
 - ii. the Monitor shall provide written confirmation to the Commissioner that the Monitor has provided to the Commissioner all additional information requested from the Monitor;
 - iii. an officer or other duly authorized representative of Secure shall certify that the additional information provided by Secure in response to the Commissioner's request has been examined and is, to the best of that individual's knowledge and belief, correct and complete in all material respects; and
 - iv. an officer or other duly authorized representative of the prospective Purchaser(s) shall certify that the additional information provided by the prospective Purchaser(s) in response to the Commissioner's request has been examined and is, to the best of that individual's knowledge and belief, correct and complete in all material respects.

The date on which the last of the Divestiture Trustee, Secure, the Monitor and the prospective Purchaser(s) provide(s) to the Commissioner a confirmation or certification required under this Paragraph is the **"First Reference Date"**.

- e) Within 7 days after the First Reference Date, the Commissioner may request further additional information concerning the proposed Divestitures from any or all of the Persons identified in Paragraph 22(d). These Persons shall each provide any further additional information requested from them. When they have provided a complete response to the Commissioner's request, if any, these

Persons shall comply with the procedures outlined in Paragraph 22(d) in regard to the further additional information provided. The date on which the last of the Divestiture Trustee, Secure, the Monitor, and the prospective Purchaser provides to the Commissioner a confirmation or certification required under this Paragraph is the “**Second Reference Date**”.

- f) The Commissioner shall notify the Divestiture Applicant of the approval of, or the objection to, the proposed Divestitures as soon as possible, and in any event within 14 days after the date on which the Commissioner receives the notice described in Paragraph 22(b) or, if the Commissioner requests any additional information under Paragraph 22(d) or further additional information under Paragraph 22(e), within 14 days after the later of:
 - i. the First Reference Date; and
 - ii. the Second Reference Date, if any.
- g) The Commissioner’s determination as to whether to approve one or more proposed Divestitures shall be in writing.

[23] In exercising discretion to determine whether to approve one or more proposed Divestitures, the Commissioner shall take into account the likely impact of the Divestiture(s) on competition, and may consider any other factor the Commissioner considers relevant, including (i) any potential adverse impact that the proposed Divestiture(s) may have on the prospects for effecting any remaining Divestiture(s); and (ii) whether it would be necessary to expand the proposed Divestiture(s) to include additional Divestitures, in order to ensure that one or more other Divestitures contemplated by this Order are effected Prior to granting approval, the Commissioner must also be satisfied that:

- a) the proposed Purchaser is fully independent of and operates at arm’s length from Secure;
- b) Secure will have no direct or indirect interest in the Divestiture Assets following the Divestiture;
- c) the proposed Purchaser is committed to carrying on the Divested Business;
- d) the proposed Purchaser has the managerial, operational, and financial capability to compete effectively in the supply of oil and gas waste services in the Western Canadian Sedimentary Basin; and
- e) the proposed Purchaser will (i) if the Commissioner grants approval during the Initial Sale Period, complete the Divestiture prior to the expiry of the Initial Sale Period; or (ii) if the Commissioner grants approval during the Divestiture Trustee Sale Period, complete the Divestiture during the Divestiture Trustee Sale Period.

V. PRESERVATION OF DIVESTITURE ASSETS

- [24] In order to preserve the Divestiture Assets pending completion of the Divestiture, Secure shall maintain the economic viability, marketability, and competitiveness of the Divestiture Assets and Divested Business, and shall comply with any decision of or direction given by the Monitor that relates to preservation of the Divestiture Assets. Without limiting the generality of the foregoing, Secure shall:
- a) maintain and hold the Divestiture Assets in good condition and repair, normal wear and tear excepted, and to standards that are, in the view of the Monitor, at least equal to those that existed at the Effective Date;
 - b) ensure that the management and operation of the Divestiture Assets continues in the ordinary course of business and in a manner that is, in the view of the Monitor, reasonably consistent in nature, scope, and magnitude with past practices and generally accepted industry practices, and in compliance with all applicable laws;
 - c) not knowingly take or allow to be taken any action that, in the view of the Monitor, adversely affects the competitiveness, operations, financial status or value, viability, and saleability of the Divestiture Assets;
 - d) ensure that the Divestiture Assets are not engaged in any type of business other than the type of business conducted as of the date of this Order, except with the prior approval of the Monitor and the Commissioner;
 - e) maintain all approvals, registrations, consents, licences, permits, waivers, and other authorizations that are, in Monitor's view and subject to consultation with Secure, advisable for the operation of the Divestiture Assets and Divested Business;
 - f) take all commercially reasonable steps to honour all customer contracts and to maintain quality and service standards for customers of the Divestiture Assets that are, in the view of the Monitor, at least equal to the standards that existed during the fiscal year prior to this Order;
 - g) not curtail marketing, sales, promotional, or other activities of the Divestiture Assets or Divested Business, except with the prior approval of the Monitor;
 - h) not alter, or cause to be altered, the management of the Divestiture Assets as it existed during the fiscal year prior to the date of this Order, except with the prior approval of the Monitor;
 - i) not terminate or alter any employment, salary, or benefit agreements, as they existed at the date of this Order, for Persons employed in connection with the Divestiture Assets, without the prior approval of the Monitor;

- j) ensure that the Divestiture Assets are staffed with sufficient employees to ensure their viability and competitiveness, including by replacing any departing employees with other qualified employees provided that the Monitor has approved both the qualifications and the need for such replacement employees;
- k) maintain inventory levels and payment terms consistent with the practices of Secure that existed, with respect to the Divestiture Assets, during the fiscal year prior to the date of this Order; and
- l) maintain in accordance with Canadian generally accepted accounting principles, separate and adequate financial ledger books and records of material financial information with respect to the Divestiture Assets and the Divested Business.

[25] Pending completion of the Divestitures, Secure shall not, without the Commissioner's prior written approval:

- a) create any new encumbrances on the Divestiture Assets or Divested Business, other than ordinary course obligations that are not due or delinquent;
- b) enter into, withdraw from, amend or otherwise take steps to alter any obligations in material contracts relating to the Divestiture Assets or Divested Business, except as necessary to comply with this Order; or
- c) make any material changes to the Divestiture Assets or Divested Business, except as required to comply with this Order.

[26] Secure shall provide sufficient financial resources, including general funds, capital funds, working capital, and reimbursement for any operating, capital, or other losses, to maintain the Divestiture Assets in accordance with this Part. If the Monitor believes that Secure has not provided, is not providing or will not provide sufficient financial and other resources under this Part, the Monitor shall forthwith refer the matter to the Commissioner, who shall make a final determination respecting the financial and other resources that Secure must provide. Secure shall comply with any determination made by the Commissioner on this issue.

VI. THIRD PARTY CONSENTS

[27] It shall be a condition in any Divestiture Agreement (whether negotiated by Secure or by the Divestiture Trustee) that Secure shall, as a condition of closing, obtain any consents and waivers from Third Parties that are necessary to permit the assignment to, and assumption by, a Purchaser of all material contracts, approvals, and authorizations relating to the Divestiture Assets; provided, however, that Secure may satisfy this requirement by certifying that the Purchaser has executed agreements directly with one or more Third Parties which make such assignment and assumption unnecessary.

VII. TRANSITIONAL SUPPORT ARRANGEMENTS

- [28] Secure, or the Divestiture Trustee on behalf of Secure, shall enter into the agreements to supply, at the option of the Purchaser, transitional services for up to 12 months following the completion of the Divestiture, such that the Purchaser will be able to operate the Divested Business in a manner consistent with the manner in which the Divested Business was conducted during the 12-month period prior to the Effective Date.

VIII. EMPLOYEES

- [29] Secure (during the Initial Sale Period) and the Divestiture Trustee (during the Divestiture Trustee Sale Period) shall provide to any prospective Purchaser, the Commissioner and the Monitor information relating to the employees whose responsibilities involve the operation of the Divestiture Assets, to enable such Purchaser to make decisions regarding offers of employment to such employees. The Monitor shall review the information provided to ensure that it is sufficient to enable the Purchaser to make such decisions.
- [30] Secure shall:
- a) not interfere, directly or indirectly, with any negotiations by a Purchaser to employ any employees whose responsibilities involve the operation of the Divestiture Assets;
 - b) not offer any incentive to such employees to decline employment with the Purchaser or to accept other employment with Secure;
 - c) remove any impediment that may deter such employees from accepting employment with the Purchaser;
 - d) waive any non-compete or confidentiality provisions of employment or other contracts that could impair the ability of such employees to be employed by the Purchaser; and
 - e) pay or transfer to the employees subsequently employed by the Purchaser all current and accrued bonuses, pensions, and other current and accrued benefits to which such employees would otherwise have been entitled had they remained in the employment of Secure.
- [31] For a period of one year following completion of the Divestiture, Secure shall not, without the prior written consent of the Commissioner, directly or indirectly solicit or employ any Persons employed in connection with the Divestiture Assets who has accepted an offer of employment with the Purchaser, unless such Person's employment has been terminated by the Purchaser. Nothing in this Order shall restrict the solicitation or employment by Secure of any Person who is solicited by advertising placed in a newspaper, trade journal, through a web site, or via other media of general circulation which is not directed at or focused on Persons employed in connection with the Divestiture Assets.

IX. FAILURE OF DIVESTITURE TRUSTEE SALE

- [32] If, by the end of the Divestiture Trustee Sale Period, the Divestitures have not been completed, or if the Commissioner is of the opinion that the Divestiture likely will not be completed prior to the end of the Divestiture Trustee Sale Period, the Commissioner may apply to the Tribunal, at the Commissioner's election, for either (i) such order as is necessary to complete the Divestitures; or (ii) such order as is necessary to ensure that the Merger is not likely to prevent or lessen competition substantially.

X. MONITOR

- [33] The Commissioner shall appoint a Monitor, responsible for monitoring compliance by Secure with this Order. Such appointment may occur at any time following the Effective Date. A reference in this Order to specific monitoring functions or tasks that are to be undertaken by the Monitor shall in no way detract from the Monitor's general right, power and duty to monitor all aspects of Secure's compliance with this Order.
- [34] Within 5 Business Days after the appointment of the Monitor, Secure shall submit to the Commissioner for approval the terms of a proposed Monitor Agreement with the Monitor and the Commissioner that confers on the Monitor all rights and powers necessary to permit the Monitor to monitor compliance by Secure with this Order.
- [35] Within 5 Business Days after receipt of the proposed Monitor Agreement referred to in Section 34, the Commissioner shall advise Secure whether or not the Commissioner approves the terms of the proposed Monitor Agreement. If the Commissioner does not approve the terms of the proposed Monitor Agreement, the Commissioner shall prescribe alternative terms for the Monitor Agreement that Secure shall incorporate into a final Monitor Agreement with the Monitor and the Commissioner.
- [36] Notwithstanding the foregoing, Secure consents to the following terms and conditions regarding the Monitor's rights, powers and duties, and shall include such terms in the Monitor Agreement:
- a) The Monitor shall have the power and authority to monitor Secure's compliance with this Order, and shall exercise such power and authority and carry out the duties and responsibilities of the Monitor in a manner consistent with the purposes of this Order and in consultation with the Commissioner.
 - b) The Monitor shall have the authority to employ, at the expense of Secure, such consultants, accountants, legal counsel, and other representatives and assistants as the Monitor believes are necessary to carry out the Monitor's duties and responsibilities.
 - c) The Monitor shall have no obligation or authority to operate or maintain the Divestiture Assets.

- d) The Monitor shall act for the sole benefit of the Commissioner, maintain all confidences, and avoid any conflict of interest.
 - e) The Monitor shall have no duties of good faith (except as required by law), of a fiduciary nature, or otherwise, to Secure.
 - f) The Monitor shall provide to the Commissioner every 30 days after the date of the Monitor's appointment until the Divestitures are complete and thereafter annually on or before the anniversary of the Divestitures, a written report concerning performance by Secure of its obligations under this Order. The Monitor shall, within 3 Business Days, respond to any request by the Commissioner for additional information regarding Secure's compliance.
- [37] Subject to any legally recognized privilege, Secure shall provide to the Monitor full and complete access to all personnel, Records, information (including Confidential Information), and facilities relevant to monitoring Secure's compliance with this Order.
- [38] Secure shall take no action that interferes with or impedes, directly or indirectly, the Monitor's efforts to monitor Secure's compliance with this Order.
- [39] Secure shall fully and promptly respond to all requests from the Monitor and, subject to any legally recognized privilege, shall provide all information the Monitor may request. Secure shall identify an individual who shall have primary responsibility for fully and promptly responding to such requests from the Monitor on behalf of Secure.
- [40] Secure may require the Monitor and each of the Monitor's consultants, accountants, legal counsel, and other representatives and assistants to sign an appropriate confidentiality agreement in a form satisfactory to the Commissioner; provided, however, that such agreement shall not restrict the Monitor from providing any information to the Commissioner.
- [41] The Commissioner may require the Monitor and each of the Monitor's consultants, accountants, legal counsel, and other representatives and assistants to sign an appropriate confidentiality agreement relating to materials and information the Monitor may receive from the Commissioner in connection with the performance of the Monitor's duties.
- [42] Secure shall be responsible for all reasonable fees and expenses properly charged or incurred by the Monitor in the course of carrying out the Monitor's duties under this Order. The Monitor shall serve without bond or security, and shall account for all fees and expenses incurred. Secure shall pay all reasonable invoices submitted by the Monitor within 30 days after receipt and, without limiting this obligation, Secure shall comply with any agreement it reaches with the Monitor regarding interest on late payments. In the event of any dispute: (i) such invoice shall be subject to the approval of the Commissioner; and (ii) Secure shall promptly pay any invoice approved by the Commissioner. Any outstanding monies owed to the Monitor by Secure shall be paid out of the proceeds of the Divestitures.
- [43] Secure shall indemnify the Monitor and hold the Monitor harmless against any losses, claims, damages, liabilities, or expenses arising out of, or in connection with, the

performance of the Monitor's duties, including all reasonable fees of counsel and other expenses incurred in connection with the preparation or defence of any claim, whether or not resulting in any liability, except to the extent that such losses, claims, damages, liabilities, or expenses result from malfeasance, gross negligence, or bad faith by the Monitor.

- [44] If the Commissioner determines that the Monitor has ceased to act or has failed to act diligently, the Commissioner may remove the Monitor and appoint a substitute Monitor. The provisions of this Order respecting the Monitor shall apply in the same manner to any substitute Monitor.
- [45] The Monitor shall serve for such time as is necessary to monitor Secure's compliance with this Order.

XI. COMPLIANCE

- [46] Secure shall provide a copy of this Order to each of its own and its Affiliates' directors, officers, employees, and agents having managerial responsibility for any obligations under this Order, within 3 Business Days after the Effective Date. Secure shall ensure that its directors, officers, employees, and agents with responsibility for any obligations under this Order receive sufficient training respecting Secure's responsibilities and duties under this Order, and the steps that such individuals must take in order to comply with this Order.
- [47] Secure shall not, for a period of 10 years after the date when the Divestiture is completed, directly or indirectly acquire any interest in the Divestiture Assets, without the prior written approval of the Commissioner.
- [48] One year after the Effective Date and annually thereafter on the anniversary of the Effective Date, and at such other times as the Commissioner may require, Secure shall file an affidavit or certificate, substantially in the form of Schedule B to this Order, certifying its compliance with Parts VII, VIII and XI of this Order and setting out the following information in detail:
 - a) the steps taken to ensure compliance;
 - b) the controls in place to verify compliance; and
 - c) the names and titles of employees who have oversight of compliance.
- [49] If any of Secure, the Divestiture Trustee or the Monitor becomes aware that there has been a breach or possible breach of any of the terms of this Order, such Person shall, within 5 Business Days after becoming aware of the breach or possible breach, notify the Commissioner thereof, and shall provide details sufficient to describe the nature, date, and effect (actual and anticipated) of the breach or possible breach, provided that notification of a possible breach is not required if such Person determines within those 5 Business Days that it could not reasonably be considered a breach of any of the terms of this Order. Secure shall provide confirmation of its compliance with this provision in all affidavits and certificates of compliance filed with the Commissioner pursuant to Section 48 of this Order.

[50] Secure shall notify the Commissioner at least 30 days prior to:

- a) any proposed dissolution of Secure; or
- b) any other change in Secure, if such change may affect compliance obligations arising out of this Order including, but not limited to, a reorganization, material acquisition, disposition or transfer of assets, or any fundamental change for purposes of Secure's incorporating statute.

[51] For purposes of determining or securing compliance with this Order, and subject to any legally recognized privilege, Secure shall, upon written request given at least 5 Business Days in advance to Secure, permit any authorized representative(s) of the Commissioner, without restraint or interference:

- a) to access, during regular office hours of Secure on any Business Day(s), all facilities and to inspect and copy all Records in the possession or control of Secure related to compliance with this Order, which copying services shall be provided by Secure at its expense; and
- b) to interview such officers, directors, or employees of Secure as the Commissioner requests regarding such matters.

XII. NOTICES

[52] A notice or other communication required or permitted to be given under this Order is valid if it is:

- a) in writing and delivered by personal delivery, registered mail, courier service, facsimile or electronic mail; and
- b) addressed to the receiving party at the address(es) listed below, or to any other address designated by the receiving party in accordance with this Section.

if to the Commissioner:

Commissioner of Competition
 Competition Bureau Canada
 Place du Portage, 21st Floor
 50 Victoria Street, Phase I
 Gatineau, Quebec K1A 0C9

Attention: Commissioner of Competition
 Fax: (819) 953-5013
 Email address: ic.avisdefusionmergernotification.ic@canada.ca and
avisdefusionmergernotification@cb-bc.gc.ca

with a copy to:

Executive Director and Senior General Counsel
 Competition Bureau Legal Services
 Department of Justice
 Place du Portage, 22nd Floor
 50 Victoria Street, Phase I
 Gatineau, Quebec K1A 0C9
 Fax: (819) 953-9267
 Email address: ic.cb_lsu_senior_general_counsel-avocat_general_principal_usj_bc.ic@canada.ca and
cb_lsu_senior_general_counsel-avocat_general_principal_usj_bc@ised-isde.gc.ca

if to Secure:

SECURE Energy Corporate Head Office
 Brookfield Place
 2300, 225 6 Avenue SW
 Calgary, Alberta T2P 1N2

Attention: Rene Amirault – Chief Executive Officer

with a copy to:

Blake, Cassels & Graydon LLP
 Robert E. Kwinter; Nicole Henderson; Brian Facey, and Joe McGrade
 199 Bay Street, Suite 4000, Commerce Court West
 Toronto, Ontario M5L 1A9
 Email addresses: rob.kwinter@blakes.com
nicole.henderson@blakes.com
brian.facey@blakes.com
joe.mcgrade@blakes.com

[53] A notice or other communication under this Order is effective on the day that it is received by the receiving party and is deemed to have been received as follows:

- a) if it is delivered in person, by registered mail, or by courier, upon receipt as indicated by the date on the signed receipt;
- b) if it is delivered by facsimile, upon receipt as indicated by the time and date on the facsimile confirmation slip; or

- c) if it is delivered by electronic mail, when the recipient, by an email sent to the email address for the sender stated in this Section or by a notice delivered by another method in accordance with this Section, acknowledges having received that email, with an automatic “read receipt” not constituting acknowledgment of an email for purposes of this Section.

If a notice or other communication is received after 5:00 p.m. local time, or on a day that is not a Business Day, it shall be deemed to have been received on the next Business Day.

- [54] Notwithstanding Sections 52 and 53, a notice or other communication that is not communicated in accordance with Sections 52 and 53 is valid if a representative of the party to this Order that is the recipient of such communication confirms the receipt of such communication and does not, at the time of such confirmation, request that it be delivered differently.

XIII. GENERAL

- [55] In this Order:

- a) **Number and Gender** – Unless the context otherwise requires, words importing the singular include the plural and vice versa, and words importing gender include all genders.
- b) **Time Periods** – Computation of time periods shall be in accordance with the *Interpretation Act*, RSC 1985, c I-21, and the definition of “holiday” in the *Interpretation Act* shall include Saturday.

- [56] The Commissioner may, after informing Secure, extend any of the time periods contemplated by this Order other than Section 47. If any time period is extended, the Commissioner shall promptly notify Secure of the revised time period.
- [57] In the event of a dispute regarding compliance with or the interpretation, implementation, or application of this Order, the Commissioner or Secure may apply to the Tribunal for directions or a further order.

DATED at Ottawa this 3rd day of March, 2023

SIGNED on behalf of the Tribunal by the Panel Members.

(s) Paul Crampton C.J. (Presiding Member)
 (s) Denis Gascon J.
 (s) Ted Horbulyk

SCHEDULE A**DIVESTITURE FACILITIES**

Treatment, Recovery and Disposal	Stand-Alone Water Disposal
Brazeau	08-09
Buck Creek	Kakwa
Elk Point	Mile 103
Fort McMurray	Moose Creek
Fox Creek East	
Fox Creek (Bigstone and Highway Terminal)	
Gordondale	Landfill
Judy Creek	Elk Point
Kindersley	La Glace
La Glace	Silverberry
Silverberry	South Wapiti
South Taylor	Spirit River
South Wapiti	Willesden Green
Spirit River	
Stauffer	
West Edson	Caverns
Willesden Green	Lindbergh
	Unity

SCHEDULE B

FORM OF COMPLIANCE CERTIFICATION/AFFIDAVIT

I, **[name]**, of **[place]**, hereby certify¹³⁵ in accordance with the terms of the Competition Tribunal's Order dated March 3, 2023, that:

1. I am the **[title]** of **[Secure]**, and have personal knowledge of the matters deposed to herein, unless they are stated to be on information and belief, in which cases I state the source of such information and believe it to be true.
2. The Divestiture (as defined in the Order) to **[Purchaser]** was completed on **[date]**.
3. Pursuant to Section 48 of the Order, Secure is required to file **[annual reports/reports when requested by the Commissioner]** certifying its compliance with Parts VII, VIII and XI of the Order.

Oversight of Compliance

4. **[Names/titles]** have primary responsibility for overseeing compliance with this Order.

Circulation of Order

5. Pursuant to Section 46 of the Order, Secure is required to provide a copy of the Order to each of its own and its Affiliates' directors, officers, employees, and agents having managerial responsibility for any obligations under the Order, within 3 Business Days after the date of registration of the Order. The Order was circulated by **[whom]** to **[provide list]** on **[dates]**.
6. Pursuant to Section 46 of the Order, Secure is required to ensure that its directors, officers, employees, and agents with responsibility for any obligations under the Order receive sufficient training respecting Secure's responsibilities and duties under the Order. The following training has been provided: **[provide list of who was trained and by whom as well as a general statement of the content of the training]**

Transitional Support Arrangements

7. Section 28 of the Order requires Secure to provide transitional support arrangements. **[Describe compliance with this obligation.]**

Employees

8. Sections 30 and 31 of the Order require Secure to take various steps in regard to its employees whose responsibilities involved the operation of the Divestiture Assets. Secure has fully complied with the terms of those Sections and, more particularly: **[Describe steps taken to facilitate employee transfer to Purchaser, having regard to the terms of Sections 30 and 31; provide data on the # of employees who have transferred to the Purchaser.]**

¹³⁵ If this is drafted as an affidavit, the words "hereby certify" should be removed and should be replaced with "make oath and say". An affidavit should be sworn under oath. A certification should be certified by a Commissioner for taking affidavits.

Acquisition, Reacquisition and Corporate Change

9. Section 47 of the Order prohibits reacquisition of Divestiture Assets for a period of 10 years after the Divestiture is completed without prior written approval of the Commissioner. Secure has fully complied with the terms of those Sections
10. Section 50 of the Order requires notice to the Commissioner of certain corporate changes or other changes to Secure that may affect compliance with the Order. Secure has complied with this provision and, more particularly: **[Describe steps taken to ensure this commitment has been complied with.]**

Notification of Breach

11. Based on my personal knowledge and my inquiries of **[provide names]**, I am not aware of any breach or possible breach of any of the terms of the Order within the meaning of Section 49 of the Order.

DATED []

Commissioner of Oaths

Name and Title of Certifying Officer

COUNSEL OF RECORD:

For the applicant:

Commissioner of Competition

Jonathan Hood
Paul Klippenstein
Ellé Nekiar

For the respondent:

SECURE Energy Services Inc.

Robert Kwinter
Nicole Henderson
Brian Facey
Joe McGrade

TAB 5

Anthony Graat Appellant;

and

Her Majesty The Queen Respondent.

File No.: 16189.

1982: October 12; 1982: December 21.

Present: Ritchie, Dickson, Beetz, Estey, McIntyre,
Chouinard and Wilson JJ.ON APPEAL FROM THE COURT OF APPEAL FOR
ONTARIO

Criminal law — Evidence — Opinion evidence — Non-expert witnesses — Impaired driving — Degree of intoxication — Whether police officers and other witnesses opinions as to impairment of accused admissible — Criminal Code, R.S.C. 1970, c. C-34 as amended, s. 234.

The trial judge accepted the opinion evidence of two police officers that the appellant's ability to drive had been impaired by alcohol and convicted him under s. 234 of the *Criminal Code*. Appellant's appeals to the County Court and the Court of Appeal were dismissed. This appeal is to determine whether a court may admit opinion evidence on the question to be decided—here, whether the appellant's ability to drive had been impaired by alcohol.

Held: The appeal should be dismissed.

The question whether a person's ability to drive was impaired by alcohol is one of fact, not of law, and non-expert witnesses may give evidence as to the degree of a person's impairment. The guidance of an expert is unnecessary. The value of opinion will depend on the view the court takes in all the circumstances. The judges, however, should not consider the opinion of police officers in a preferential way merely because they may have extensive experience with impaired drivers. Here, the non-expert evidence was correctly admitted. The witnesses all had an opportunity for personal observations. They were not deciding a matter for the court to decide as the weight of the evidence is entirely a matter for the judge who could accept all or part or none of their evidence.

Wright v. Tatham (1838), 4 Bing. N.C. 489; *R. v. German* (1947), 89 C.C.C. 90; *R. v. Marks*, [1952] O.W.N. 608; *R. v. Zarins* (1959), 125 C.C.C. 375; *R. v. Beauvais*, [1965] 3 C.C.C. 281; *R. v. Pollock* (1947), 90

Anthony Graat Appellant;

et

Sa Majesté La Reine Intimée.

N° du greffe: 16189.

1982: 12 octobre; 1982: 21 décembre.

Présents: Les juges Ritchie, Dickson, Beetz, Estey,
McIntyre, Chouinard et Wilson.

EN APPEL DE LA COUR D'APPEL DE L'ONTARIO

Droit criminel — Preuve — Témoignage d'opinion — Témoins ordinaires — Conduite avec facultés affaiblies — Degré d'ébriété — L'opinion des témoins policiers et des autres témoins sur l'affaiblissement des facultés de l'accusé est-elle recevable? — Code criminel, S.R.C. 1970, chap. C-34 et modifications, art. 234.

Le juge du procès a cru le témoignage d'opinion de deux agents de police selon lequel la capacité de conduire de l'appelant était affaiblie par l'alcool et l'a déclaré coupable aux termes de l'art. 234 du *Code criminel*. Les appels de l'appelant à la Cour de comté et à la Cour d'appel ont été rejetés. Le présent pourvoi soulève la question de savoir si la Cour peut recevoir un témoignage d'opinion sur la question à trancher—en l'espèce, savoir si la capacité de conduite de l'appelant était affaiblie par l'effet de l'alcool.

Arrêt: Le pourvoi est rejeté.

La question de savoir si la capacité de conduire d'une personne est affaiblie par l'effet de l'alcool est une question de fait et non une question de droit et un témoin ordinaire peut témoigner quant au degré d'incapacité d'une personne. L'aide d'un expert est superflue. La valeur probante de l'opinion donnée dépend de la façon dont la cour juge l'ensemble des circonstances. Les juges ne doivent cependant pas accorder un traitement spécial à l'opinion des agents de police parce qu'ils peuvent avoir une grande expérience des conducteurs aux facultés affaiblies. En l'espèce, les dépositions de non-experts ont été reçues à bon droit. Les témoins avaient tous eu l'occasion d'observer les faits par eux-mêmes. Ils ne décidaient pas une question relevant de la cour puisque la valeur probante des témoignages relève complètement du juge qui peut ajouter foi à la totalité ou à une partie des témoignages ou les rejeter.

Jurisprudence: *Wright v. Tatham* (1838), 4 Bing. N.C. 489; *R. v. German* (1947), 89 C.C.C. 90; *R. v. Marks*, [1952] O.W.N. 608; *R. v. Zarins* (1959), 125 C.C.C. 375; *R. v. Beauvais*, [1965] 3 C.C.C. 281; *R. v.*

C.C.C. 171; *R. v. Cox* (1948), 93 C.C.C. 32; *Giddings v. The King* (1947), 89 C.C.C. 346; *R. v. Smith* (1948), 17 Fortnightly L.J. 241; *Grimsteit v. McDonald* (1950), 96 C.C.C. 272; *R. v. MacDonald* (1966), 9 Crim. L.Q. 239; *R. v. Davies*, [1962] 1 W.L.R. 1111 (U.K.); *R. v. Neil*, [1962] Crim. L.R. 698; *A.G. (Ruddy) v. Kenny* (1959), 94 I.T.L.R. 185; *Sherrard v. Jacob*, [1965] N.I.L.R. 151; *Burrows v. Hanlin*, [1930] S.A.S.R. 54; *R. v. Spooner*, [1957] V.R. 540; *R. v. Kelly*, [1958] V.R. 412; *Blackie v. Police*, [1966] N.Z.L.R. 910, referred to.

APPEAL from a judgment of the Ontario Court of Appeal (1980), 116 D.L.R. (3d) 143, 55 C.C.C. (2d) 429, 30 O.R. (2d) 247, 45 N.R. 474, 17 C.R. (3d) 55, 7 M.V.R. 163, dismissing appellant's appeal from a conviction for impaired driving. Appeal dismissed.

Edward L. Greenspan, Q.C., for the appellant.

Douglas C. Hunt, for the respondent.

The judgment of the Court was delivered by

DICKSON J.—This appeal raises the issue whether on a charge of driving while impaired the Court may admit opinion evidence on the very question to be decided, namely, was the accused's ability to drive impaired by alcohol at the time and place stated in the charge.

I

The Procedural History

The appellant, Anthony Graat, was charged on August 10, 1978 at the City of London, County of Middlesex, while his ability to drive a motor vehicle was impaired by alcohol, he did drive a motor vehicle, contrary to s. 234 of the *Criminal Code*. He was tried, convicted, and sentenced to a fine of \$300 or, in default, imprisonment for 30 days. An appeal to the County Court was dismissed. Leave to appeal to the Court of Appeal of Ontario was granted but the appeal was dismissed. The matter is now, by leave, before this Court.

Pollock (1947), 90 C.C.C. 171; *R. v. Cox* (1948), 93 C.C.C. 32; *Giddings v. The King* (1947), 89 C.C.C. 346; *R. v. Smith* (1948), 17 Fortnightly L.J. 241; *Grimsteit v. McDonald* (1950), 96 C.C.C. 272; *R. v. MacDonald* (1966), 9 Crim. L.Q. 239; *R. v. Davies*, [1962] 1 W.L.R. 1111 (R.-U.); *R. v. Neil*, [1962] Crim. L.R. 698; *A.G. (Ruddy) v. Kenny* (1959), 94 I.T.L.R. 185; *Sherrard v. Jacob*, [1965] N.I.L.R. 151; *Burrows v. Hanlin*, [1930] S.A.S.R. 54; *R. v. Spooner*, [1957] V.R. 540; *R. v. Kelly*, [1958] V.R. 412; *Blackie v. Police*, [1966] N.Z.L.R. 910.

POURVOI contre un arrêt de la Cour d'appel de l'Ontario (1980), 116 D.L.R. (3d) 143, 55 C.C.C. (2d) 429, 30 O.R. (2d) 247, 45 N.R. 474, 17 C.R. (3d) 55, 7 M.V.R. 163, qui a rejeté l'appel de l'appellant à l'encontre d'une déclaration de culpabilité d'avoir conduit avec des facultés affaiblies. Pourvoi rejeté.

Edward L. Greenspan, c.r., pour l'appellant.

Douglas C. Hunt, pour l'intimée.

Version française du jugement de la Cour rendu
e par

LE JUGE DICKSON—Le présent pourvoi soulève la question de savoir si, relativement à une accusation d'avoir conduit avec des facultés affaiblies, la Cour peut recevoir un témoignage d'opinion sur la question même à trancher, c.-à-d. la capacité de l'accusé de conduire était-elle affaiblie par l'effet de l'alcool au moment et à l'endroit mentionnés dans l'acte d'accusation?

g

I

La procédure

L'appellant, Anthony Graat, a été accusé, le 10 août 1978, à London, comté de Middlesex, d'avoir conduit un véhicule à moteur, en contravention de l'art. 234 du *Code criminel*, alors que sa capacité de conduire un véhicule à moteur était affaiblie par l'alcool. Il a subi son procès, a été déclaré coupable et condamné à une amende de \$300 ou, faute de payer l'amende, à un emprisonnement de 30 jours. Un appel interjeté à la Cour de comté a été rejeté. La Cour d'appel de l'Ontario a accordé l'autorisation d'interjeter appel, mais a rejeté l'appel. L'affaire est maintenant soumise à cette Cour avec son autorisation.

II

The Facts

At approximately 2:15 a.m. on the date in question, Constables Case and McMullen of the London City Police observed Mr. Graat's vehicle travelling at a high rate of speed. The constables followed for several blocks. They observed Mr. Graat's car weaving in the southbound lane, crossing the centre line on two occasions and driving onto the shoulder of the road on another occasion. When the vehicle turned left it straddled the centre line.

Both constables testified they noticed the smell of alcohol on the appellant's breath; both said Mr. Graat was unsteady on his feet, he staggered as he walked, and had bloodshot eyes.

At the police station Mr. Graat was observed by a Sergeant Spoelstra. The sergeant testified he smelled alcohol on the appellant's breath, the top part of his body was swaying, and his walk was "kind of wavy".

Mr. Graat complained of chest pains. He told the police he suffered from a heart condition and asked to be taken to a hospital. The police complied. By the time Mr. Graat returned to the police station it was too late to take two breath samples because the two-hour time limit for the taking of such samples had expired or was about to expire.

Mr. Graat testified he had had two drinks of gin between the hours of 3:00 p.m. and 7:00 p.m., and two glasses of wine with his dinner about 11:00 p.m. He said he and two friends, George Wilson and Vincent O'Donovan, were returning from a sailing party; he became tired. Wilson drove the car while he dozed in the back seat. The appellant resumed driving after Wilson had driven O'Donovan and himself home. Wilson testified that if he had thought Mr. Graat was not in a fit condition to drive he would have asked him to stay at his, Wilson's, house.

At trial Constable Case was asked the following questions and gave the following answers:

II

Les faits

Vers 2 h 15 du matin, le jour en cause, les agents Case et McMullen, de la police de la ville de London, ont remarqué la voiture de M. Graat qui circulait à grande vitesse. Les agents l'ont suivie sur une bonne distance. Ils ont constaté que la voiture de M. Graat zigzaguait dans la voie de circulation sud, qu'elle a traversé la ligne médiane à deux reprises et qu'à un moment donné elle circulait sur l'accotement. Au moment de tourner à gauche, le véhicule enjambait la ligne médiane.

Les deux agents ont déposé qu'ils avaient constaté que l'haleine de l'appellant sentait l'alcool, ils ont tous deux affirmé que M. Graat chancelait et marchait en titubant et qu'il avait les yeux injectés de sang.

Au poste de police, le sergent Spoelstra a observé M. Graat. Le sergent a témoigné que l'haleine de l'appellant sentait l'alcool, que le haut de son corps vacillait et que sa démarche était en quelque sorte instable.

M. Graat s'est plaint de douleurs à la poitrine. Il a informé les policiers qu'il souffrait de troubles cardiaques et a demandé à être conduit à l'hôpital. Les policiers ont accédé à sa demande. Quand M. Graat est revenu au poste de police, il était trop tard pour prélever deux échantillons d'haleine parce que le délai de deux heures pendant lequel il faut prélever ces échantillons était écoulé ou sur le point de l'être.

M. Graat a témoigné qu'il avait consommé deux gins entre 15 h et 19 h et deux verres de vin au souper, vers 23 h. Il a raconté qu'avec deux amis, George Wilson et Vincent O'Donovan, ils revenaient d'une excursion de voile; il était fatigué. Wilson a conduit la voiture pendant que lui somnolait sur le siège arrière. L'appellant a repris le volant après que Wilson est rentré chez lui, ayant reconduit O'Donovan. Wilson a déposé que s'il avait pensé que M. Graat n'était pas en état de conduire, il l'aurait invité à passer la nuit chez lui.

Au procès, l'agent Case a donné les réponses qui suivent aux questions suivantes:

Q. All right, now what, if any, opinion having made those observations, what if any opinion did you form regarding the accused man's ability to drive a motor vehicle?

A. I formed the opinion that the accused's ability was impaired.

Q. By?

A. By alcohol.

Q. You said the accused man's ability to what?

A. To drive a motor vehicle was impaired by alcohol.

Constable McMullen was asked the following question:

Q. Now officer when you were at the scene and having made the observations of the driving of the accused man, having observed him, having smelled the alcoholic beverage on his breath and observed him walk and observed him standing, observed him speaking to you what, if any, conclusion did you come to regarding his ability to drive a motor vehicle?

A. It was in my opinion that the accused's ability to operate a motor vehicle was impaired by alcohol beverage.

Sergeant Spoelstra, the desk sergeant, gave similar evidence:

Q. ... You saw him standing and you saw him walking. What, if any opinion, did you form regarding his ability to drive a motor vehicle?

A. In my opinion the accused's ability was impaired by the use of alcohol to drive a motor vehicle.

No objection was taken at trial to the admission of any of this evidence. Indeed, at the conclusion of the examination in chief of Sergeant Spoelstra, the following exchange took place:

MR. ALLAN: [Crown Counsel]

Your witness.

Q. Oh, wait a minute, what if any opinion, did you form regarding his ability to drive a motor vehicle from what you saw?

A. From what I saw.

THE COURT:

Just one moment, please. This man's a desk sergeant, he's not the man in the field, so to speak. Do you say I should permit him to give his opinion?

[TRANSDUCTION] Q. Très bien, si vous aviez une opinion, après avoir fait ces observations, à quelle opinion étiez-vous arrivé quant à la capacité de l'accusé de conduire un véhicule à moteur?

R. J'étais d'opinion que la capacité de l'accusé était affaiblie.

Q. Par?

R. Par l'alcool.

Q. Vous avez dit la capacité de l'accusé de quoi?

R. De conduire un véhicule à moteur était affaiblie par l'alcool.

L'agent McMullen a répondu à la question suivante:

[TRANSDUCTION] Q. Maintenant, constable, alors que vous étiez sur les lieux et après avoir observé la façon de conduire de l'accusé, l'avoir observé, avoir constaté que son haleine sentait l'alcool et l'avoir vu marcher et se tenir debout, après l'avoir vu parler, à quelle conclusion en êtes-vous venu quant à sa capacité de conduire un véhicule à moteur?

R. A mon avis la capacité de l'accusé de conduire un véhicule à moteur était affaiblie par l'alcool.

Le sergent Spoelstra, qui était de service, a témoigné dans le même sens:

[TRANSDUCTION] Q. ... vous l'avez vu debout et l'avez vu marcher. A quelle conclusion en êtes-vous venu quant à sa capacité de conduire un véhicule à moteur?

R. A mon avis, la capacité de l'accusé de conduire un véhicule à moteur était affaiblie par l'usage d'alcool.

Il n'y a pas eu d'opposition, au moment du procès, à la réception d'aucun de ces témoignages. En réalité, l'interrogatoire principal du sergent Spoelstra s'est terminé de la façon suivante:

[TRANSDUCTION] M^e ALLAN: [substitut du procureur]
Votre témoin.

Q. Oh, un instant, à quelle conclusion en êtes-vous venu quant à sa capacité de conduire un véhicule à moteur d'après ce que vous avez vu?

R. D'après ce que j'ai vu?

LE TRIBUNAL:

Juste un instant s'il vous plaît. C'est le sergent de service, il n'est pas celui qui se trouve sur les lieux, pour ainsi dire. Prétendez-vous que je devrais lui permettre d'énoncer son opinion?

MR. ALLAN:

Your Honour, with respect, even if he didn't see the accused man driving, if the sergeant . . .

MR. SILVER: [then counsel for the defence]

I can save time, Your Honour, I'm quite content with it.

THE COURT:

Thank you. Proceed.

I do not think failure on the part of defence counsel to object to the admission of inadmissible evidence should, in the circumstances of this case, stand in the way of directing a new trial if such evidence is held to be inadmissible.

The trial judge preferred the evidence of the police witnesses to the evidence of Mr. Graat and Mr. Wilson. In particular, the judge relied on the evidence of Constable McMullen and Sergeant Spoelstra, policemen for 8 and 17 years respectively. Constable Case had only been a police officer for a few months, and had only charged two or three persons with impaired driving. The judge said he accepted the opinions of officers McMullen and Spoelstra in reaching his conclusion that the accused's ability to drive was impaired:

I'm of the view that I'm entitled to accept and I do accept the opinions of those two police officers on the issue of impairment as part of the totality of the evidence.

On the appeal to the County Court, Judge McNab concluded there was direct evidence upon which the trial judge was justified in making a finding that the ability of the appellant to drive was impaired.

III

The Ontario Court of Appeal

The appellant sought leave to appeal to the Court of Appeal of Ontario and at that time the question was raised as to whether the trial judge had erred in law in relying on the opinion evidence of the two police officers that the appellant's ability to drive a motor vehicle had been impaired by alcohol.

M^e ALLAN:

Votre Honneur, avec égards, même s'il n'a pas vu l'accusé conduire, si le sergent . . .

M^e SILVER: [alors avocat de la défense]

Je puis vous faire gagner du temps, Votre Honneur, je n'ai aucune objection.

LE TRIBUNAL:

Merci. Continuez.

A mon avis, ce n'est pas parce que l'avocat de la défense a omis de s'opposer à la réception de témoignages irrecevables que, dans les circonstances de l'espèce, cela devrait empêcher d'ordonner un nouveau procès si ces témoignages sont jugés irrecevables.

Le juge du procès a plutôt ajouté foi au témoignage des policiers qu'à ceux de MM. Graat et Wilson. Plus particulièrement, le juge a accepté les témoignages de l'agent McMullen et du sergent Spoelstra, qui sont policiers depuis 8 et 17 ans respectivement. L'agent Case n'était policier que depuis quelques mois et n'avait inculqué que deux ou trois personnes de conduite avec facultés affaiblies. Le juge déclare qu'il a accepté l'opinion des agents McMullen et Spoelstra pour conclure que la capacité de conduire de l'accusé était affaiblie:

[TRADUCTION] J'estime que j'ai le droit d'accepter et j'accepte effectivement l'opinion de ces deux agents de police sur la question des facultés affaiblies en tant que partie de l'ensemble de la preuve.

En appel à la Cour de comté, le juge McNab a conclu qu'il y avait des éléments de preuve directs qui permettaient au juge du procès de conclure que la capacité de conduire de l'appellant était affaiblie.

III

En Cour d'appel de l'Ontario

L'appellant a demandé l'autorisation d'interjeter appel à la Cour d'appel de l'Ontario et a alors soulevé la question de savoir si le juge du procès avait commis une erreur de droit en acceptant le témoignage d'opinion des agents de police selon lequel la capacité de l'appellant de conduire un véhicule à moteur était affaiblie par l'alcool.

The Court dismissed the appeal, saying that the evidence was admissible under the exception to the rule excluding opinion evidence:

... that permits non-expert opinion evidence where the primary facts and the inferences to be drawn from them are so closely associated that the opinion is really a compendious way of giving evidence as to certain facts—in this case the condition of the appellant.

This echoes the words of Parke B. in *Wright v. Tatham* (1838), 4 Bing. N.C. 489 (at pp. 543-44):

... and though the opinion of a witness upon oath, as to that fact [testamentary capacity], might be asked, it would only be a compendious mode of ascertaining the result of the actual observation of the witness, from acts done, as to the habits and demeanour of the deceased.

On behalf of the Court of Appeal Chief Justice Howland delivered a lengthy, scholarly, judgment exhaustively reviewing academic opinion and case law relating to the exclusion of opinion evidence. He began with a passage from *Cross on Evidence*, 5th ed., 1979, at p. 442:

In the law of evidence 'opinion' means any inference from observed facts, and the law on the subject derives from the general rule that witnesses must speak only to that which was directly observed by them. The treatment of evidence of opinion by English law is based on the assumption that it is possible to draw a sharp distinction between inferences and the facts on which they are based. The drawing of inferences is said to be the function of the judge or jury, while it is the business of a witness to state facts.

The Chief Justice then spoke of two categories of opinion evidence that has traditionally been admissible: (i) cases calling for expert testimony in matters requiring specialized skill and knowledge, the only questions being whether the subject matter called for expertise and whether the witness was a qualified expert; (ii) non-expert opinion on matters requiring no special knowledge, where it is virtually impossible to separate the witness' inference from the facts on which the inference is based. In the opinion of the Chief Justice, the admission of opinion evidence in the latter circum-

La Cour a rejeté l'appel, statuant que les témoignages étaient recevables en vertu de l'exception à la règle qui exclut les témoignages d'opinion:

[TRADUCTION] ... qui autorise le témoignage d'opinion d'un témoin non expert si les faits fondamentaux et la conclusion qu'il faut en tirer sont si intimement liés qu'en réalité l'opinion n'est qu'une façon concise de témoigner de certains faits—soit, en l'espèce, l'état de l'appellant.

Cela rappelle l'observation du baron Parke dans *Wright v. Tatham* (1838), 4 Bing. N.C. 489 (aux pp. 543 et 544):

[TRADUCTION] ... et bien qu'on puisse demander à un témoin sous serment son opinion sur ce fait [de la capacité de tester], ce ne serait qu'une manière concise de vérifier le résultat de l'observation, faite personnellement par le témoin, des habitudes et de la conduite du défunt d'après ses actes.

En Cour d'appel, le juge en chef Howland a rédigé les motifs élaborés et fouillés qui étudient de façon exhaustive la doctrine et la jurisprudence relatives à l'exclusion du témoignage d'opinion. Il commence par un extrait de *Cross on Evidence*, 5^e éd., 1979, à la p. 442:

[TRADUCTION] Dans le droit de la preuve, «opinion» signifie une inférence tirée de faits observés et le droit à ce sujet découle de la règle générale selon laquelle les témoins ne doivent parler que de ce qu'ils ont eux-mêmes directement observé. La façon dont le droit anglais aborde le témoignage d'opinion se fonde sur l'hypothèse qu'il est possible d'établir une distinction précise entre les inférences et les faits sur lesquels elles s'appuient. Il appartient, dit-on, au juge ou au jury de tirer des inférences, tandis qu'il appartient au témoin d'énoncer les faits.

Le Juge en chef traite ensuite de deux catégories de témoignages d'opinion qui ont été traditionnellement considérées comme recevables: (i) les affaires qui exigent le témoignage d'experts sur des questions relevant de compétence et de connaissances spécialisées; la seule question pertinente étant alors de savoir si l'objet de la cause exige une expertise et si le témoin est un expert compétent; (ii) l'opinion de personnes non expertes sur des questions qui n'exigent pas de connaissances spéciales, où il est à peu près impossible de séparer les inférences du témoin des faits sur lesquels elles se

stance is merely a compendious way of ascertaining the result of the witness' observations.

After canvassing the case law in this country and a number of other countries, Chief Justice Howland summed up in the following passage:

In my opinion, impairment is a degree of drunkenness. It is a compendious way of describing a condition based on observed facts. It does not require the evidence of a doctor or other expert, nor should it be limited to persons who themselves drive cars. It is a subject about which most people should be able to express an opinion from their ordinary day-to-day experience of life. To testify that a person is impaired is really tantamount to saying "I don't think that he should have been driving". In each case the opinion must be based on the observed facts: the car was weaving back and forth across the road, there was a strong odour of alcohol on the driver's breath, his powers of perception and coordination were poor, he was drowsy and was not reacting quickly to other cars or pedestrians in the path of his car, and so on. To exclude such non-expert evidence of witnesses who were passengers in the car of the accused or of other cars in the vicinity or who were pedestrians may result in an injustice to the accused and may at the same time impede the police in the prosecution of impaired drivers. Such evidence should be admissible. The weight to be given to such inferential testimony will vary from witness to witness, depending on the observed facts on which it is based.

The learned Chief Justice rejected the "ultimate issue" doctrine, *i.e.* that an opinion can never be received when it touches the very issue before the jury. He also noted that opinion evidence is properly rejected when it involves a legal component, such as the question of whether a person had acted negligently.

The judgment concludes:

In my opinion the trial judge did not err in admitting as non-expert testimony the opinion evidence of the police officers as to impairment, and in relying on it as part of the totality of the evidence. Having reached this conclusion, it is not necessary to consider whether the police officers could have qualified as experts and what evidence would have been necessary for this purpose.

fondent. De l'avis du Juge en chef, la réception de témoignages d'opinion dans ce dernier cas n'est qu'une façon concise de vérifier le résultat des observations du témoin.

Après avoir examiné la jurisprudence d'ici et de plusieurs autres pays, le juge en chef Howland conclut en ces termes:

[TRADUCTION] A mon avis, l'affaiblissement des facultés est une phase de l'ivresse. C'est une façon concise de décrire un état, d'après l'observation de certains faits. Il n'exige pas le témoignage d'un médecin ou de quelque autre expert, ni n'est restreint aux personnes qui elles-mêmes conduisent. C'est un sujet à propos duquel presque tout le monde peut exprimer une opinion d'après son expérience personnelle du quotidien. Témoigner que les facultés d'une personne sont affaiblies équivaut en réalité à dire: «Je ne crois pas qu'il aurait dû conduire.» Dans tous les cas, l'opinion doit se fonder sur les faits observés: la voiture zigzaguait, l'haleine du chauffeur avait une forte odeur d'alcool, ses facultés de perception et de coordination étaient réduites, il était somnolent et réagissait lentement à la présence d'autres voitures ou de piétons sur la trajectoire de sa voiture, et ainsi de suite. Exclure la déposition de témoins non experts qu'ils soient passagers de la voiture de l'accusé, passagers d'autres voitures proches ou qu'ils soient piétons peut conduire à une injustice envers l'accusé et, en même temps, entraver la police dans la poursuite des conducteurs dont les facultés sont affaiblies. De telles dépositions doivent être recevables. Le poids à accorder à de tels témoignages d'opinion variera selon le témoin et selon les faits observés sur lesquels le témoignage se fonde.

Le savant Juge en chef a rejeté la doctrine de la «question essentielle», *c.-à-d.* que le témoignage d'opinion n'est jamais recevable s'il porte sur la question même à soumettre au jury. Il a aussi fait remarquer que le témoignage d'opinion est refusé à bon droit s'il comporte une question de droit, telle la question de savoir si une personne a agi avec négligence.

Les motifs se terminent comme ceci:

[TRADUCTION] A mon avis, le juge du procès n'a pas commis d'erreur en recevant, comme déposition d'un non-expert, le témoignage d'opinion des agents de police au sujet de la capacité affaiblie de l'accusé et en y ajoutant foi comme partie de l'ensemble de la preuve. Vu cette conclusion, il n'est pas nécessaire de déterminer si les agents de police auraient pu se qualifier comme

Accordingly, leave to appeal is granted, but the appeal is dismissed.

IV

The Case Law

The question in issue is a vexed one. The authorities in this country and elsewhere are by no means congruous. One of the earliest, and most frequently quoted cases is *R. v. German* (1947), 89 C.C.C. 90, a decision of the Ontario Court of Appeal involving charges of dangerous driving and driving while intoxicated. Counsel for the appellant submitted that the Crown was improperly permitted to introduce opinion evidence of persons who had no special qualifications. This evidence related to whether the accused was intoxicated, and was in a fit condition to drive. The Court observed that there were several matters on which a person of ordinary intelligence may be permitted to give opinion evidence based on his personal knowledge, such as the identity of individuals, the apparent age of a person, the speed of a vehicle and whether a person was sober or not.

Robertson C.J.O. said (at p. 99):

I am sure there have been many cases where a witness has been asked whether a person was sober or not, and has been allowed to state what is after all, a matter of opinion, but the answer is given as if nothing but a mere question of fact was involved.

In the present case the evidence objected to is that of witnesses who saw the appellant and had opportunity of observing him. While some of the questions allowed to be answered were, I think, improperly framed, it was quite plain to the jury that these witnesses were ordinary observers applying their unskilled knowledge to what they actually saw, and, taken as a whole, I do not think any injustice was done by the occasional putting of a question that was unfortunately framed.

The case is of limited help as the degree of impairment was not really in issue.

German's case was discussed in *R. v. Marks*, [1952] O.W.N. 608, in which it was held that it was for the judge to decide whether in the light of the facts the police officer was "competent" to

témoins experts et quelle preuve aurait été exigée pour y arriver. En conséquence, l'autorisation d'interjeter appel est accordée, mais l'appel est rejeté.

IV

La jurisprudence

La question en cause est controversée. La jurisprudence d'ici et d'ailleurs est loin d'être uniforme. Un des arrêts les plus anciens et le plus fréquemment cité est *R. v. German* (1947), 89 C.C.C. 90, de la Cour d'appel de l'Ontario à propos d'accusations de conduite dangereuse et de conduite en état d'ébriété. L'avocat de l'accusé avait soutenu qu'on avait permis, à tort, à la poursuite de présenter des témoignages d'opinion de personnes qui n'avaient pas de titres de compétence spéciaux. Ces témoignages avaient trait à l'état d'ébriété de l'accusé et à sa capacité de conduire. La Cour avait signalé qu'il y avait plusieurs sujets sur lesquels une personne d'intelligence normale peut être admise à donner un témoignage d'opinion fondé sur ses connaissances personnelles, comme l'identité des gens, l'âge apparent d'une personne, la vitesse d'un véhicule et si une personne est sobre ou non.

Le juge en chef Robertson dit ceci (à la p. 99):

[TRADUCTION] Je suis certain que dans de nombreuses affaires on a demandé à un témoin si une personne était ivre ou non et on lui a permis de se prononcer sur ce qui est en définitive une question d'opinion, mais la réponse est alors donnée comme s'il ne s'agissait que d'une pure question de fait.

En l'espèce, la déposition à laquelle on s'oppose est celle de témoins qui ont vu l'appellant et ont eu la possibilité de l'observer. Même si certaines des questions permises étaient, à mon avis, mal formulées, il était évident pour le jury que ces témoins étaient des observateurs ordinaires qui appliquaient leurs connaissances générales à ce qu'ils avaient effectivement vu et, dans l'ensemble, je ne crois pas qu'il y ait eu une injustice du fait d'avoir posé, à l'occasion, une question mal formulée.

Cette affaire n'est pas très utile puisque le degré d'affaiblissement des facultés n'était pas vraiment en cause.

L'arrêt *German* a été étudié dans l'arrêt *R. v. Marks*, [1952] O.W.N. 608; il y est décidé qu'il appartient au juge de déterminer si, étant donné les faits, l'agent de police a «compétence» pour

give an opinion as to any condition of impairment by consumption of alcohol. On the evidence in that case the judge held that the officers were not competent because they did not actually observe the accused driving his car and because they disagreed both about the state of intoxication and about the accused's ability to drive.

The next case is *R. v. Zarins* (1959), 125 C.C.C. 375, another impaired driving case, the judgment of the Ontario Court of Appeal being delivered by Porter C.J.O. Two short passages might be quoted (at pp. 380 and 382):

I would adopt certain language of Harvey C.J.A. in *R. v. Cox* 93 Can.C.C. 32 at p. 36, [1949] 1 D.L.R. 524 at p. 528, and say that the fact of intoxication under s. 222, and impairment under s. 223 "may well be determined by observance of the conduct of the person charged as to which anyone can speak."

and

Following this decision [the decision in *R. v. German*, *supra*], I think that the evidence of the police officers as to intoxication and impairment was clearly admissible.

From the Ontario authorities one would conclude that opinion evidence as to drunkenness, and as to impairment, are currently both admissible.

In British Columbia (*R. v. Beauvais*, [1965] 3 C.C.C. 281 (B.C.S.C.)) McFarlane J. adopted the reasoning of the Court of Appeal in Ontario in *R. v. German* and held that the opinions of the constables was lawfully admissible evidence on which the magistrate could find impairment.

In Alberta, it has been held that the constables could describe the accused's actions, appearance, language and general conduct and, in answer to a question framed as a question of fact, state the accused was drunk: *R. v. Pollock* (1947), 90 C.C.C. 171. In *R. v. Cox* (1948), 93 C.C.C., 32 (Alta. C.A.), Harvey C.J.A., delivering the judgment of the Court, said (at pp. 35-36):

donner une opinion quant à l'affaiblissement des facultés dû à l'usage d'alcool. Selon la preuve soumise dans cette affaire-là, le juge a conclu que les agents n'avaient pas compétence parce qu'ils n'avaient pas réellement vu l'accusé conduire et parce qu'ils n'étaient pas d'accord sur l'état d'ébriété de l'accusé ni sur sa capacité de conduire.

L'arrêt suivant est *R. v. Zarins* (1959), 125 C.C.C. 375, une autre affaire de conduite avec facultés affaiblies. C'est le juge en chef Porter qui a rédigé les motifs de jugement de la Cour d'appel de l'Ontario. On peut en citer les deux courts passages suivants [aux pp. 380 et 382]:

[TRADUCTION] Je fais mienne l'expression employée par le juge en chef Harvey en Cour d'appel dans *R. v. Cox* 93 Can.C.C. 32, à la p. 36, [1949] 1 D.L.R. 524, à la p. 528, et dirais que l'ébriété au sens de l'art. 222 et les facultés affaiblies au sens de l'art. 223 «peuvent bien être établies par l'observation du comportement de l'accusé dont n'importe qui peut faire état».

et

[TRADUCTION] Conformément à cette décision [*R. v. German*, précitée], je crois que le témoignage des agents de police quant à l'ébriété et à l'affaiblissement des facultés était manifestement recevable.

Selon la jurisprudence ontarienne, on pourrait conclure que le témoignage d'opinion sur l'ébriété et sur l'affaiblissement des facultés sont aujourd'hui l'un et l'autre recevables.

En Colombie-Britannique (*R. v. Beauvais*, [1965] 3 C.C.C. 281 (C.S.B.-C.)), le juge McFarlane a suivi le raisonnement de la Cour d'appel de l'Ontario dans l'arrêt *R. v. German* et a conclu que l'opinion des agents était une preuve légalement recevable d'après laquelle le magistrat pouvait conclure à l'affaiblissement des facultés.

En Alberta, on a décidé que les agents pouvaient rapporter les gestes de l'accusé, ses paroles, décrire son apparence et son comportement général et, en réponse à une question formulée comme s'il s'agissait d'un fait, dire que l'accusé était en état d'ivresse: *R. v. Pollock* (1947), 90 C.C.C. 171. Dans *R. v. Cox* (1948), 93 C.C.C. 32 (C.A. Alta.) le juge en chef Harvey dit ceci au nom de la cour (aux pp. 35 et 36):

It seems clear, however, that the purpose of the prohibition of s. 285 is for the protection of people on the highway, and that when a person is in such a state of intoxication that his driving is a menace to the public safety, he must be intoxicated within the intention, and therefore the meaning, of the term as used in the section.

That fact may well be determined by observance of the conduct of the person charged as to which anyone can speak, and that too perhaps with greater certainty than by any conclusions from the percentage of alcohol in the blood.

In some of the other provinces the position is more narrowly circumscribed. For example, in Prince Edward Island, Campbell C.J. held in *Giddings v. The King* (1947), 89 C.C.C. 346 that, in cases where intoxication is the very issue, it is neither helpful nor permissible for witnesses to state their own opinions or conclusions as to the fact or degree of intoxication, at least unless they relate the detailed symptoms on which their conclusions are based. In *R. v. Smith* (1948), 17 Fortnightly L.J. 241, the same judge held that only evidence of actual symptoms could be regarded, and evidence that the accused was intoxicated should be eliminated. An equally restrictive view was taken by Hogarth D.C.J. in *Grimsteit v. McDonald* (1950), 96 C.C.C. 272: "My opinion has always been that it is for a witness to state the facts and for the Court to draw conclusions from those facts" (at p. 286).

A midway position was voiced by O'Hearn C.C.J. in *R. v. MacDonald* (1966), 9 Crim. L.Q. 239 (at p. 241):

I ruled that it would probably be improper for the witness to give as his opinion that the defendant's ability to drive a motor vehicle was impaired by alcohol or a drug, as this might involve a conclusion of law, but that any adult person with sufficient experience of the world may be asked his opinion of a person's condition with respect to intoxication.

England

Lord Parker, speaking on behalf of the Court-Martial Appeal Court in *R. v. Davies*, [1962] 1 W.L.R. 1111 was of opinion that a witness could

[TRANUDCTION] Il me semble clair cependant que l'interdiction portée à l'art. 285 vise à protéger le public sur les routes et que, lorsqu'une personne est dans un état d'ébriété tel qu'elle constituerait une menace pour la sécurité publique si elle conduisait, elle doit être dans un état d'ébriété visé par le législateur et en conséquence selon le sens de cette expression dans l'article.

Ce fait peut bien être établi par l'observation du comportement de l'accusé dont n'importe qui peut rendre compte et aussi, peut-être avec plus de certitude que n'importe quelle constatation du taux d'alcoolémie.

Dans certaines autres provinces la position adoptée est réglée de façon plus stricte. Par exemple, à l'Île-du-Prince-Édouard, le juge en chef Campbell a conclu dans l'arrêt *Giddings v. The King* (1947), 89 C.C.C. 346, que, dans les cas où l'ébriété est la question essentielle, il n'est ni permis, ni utile que les témoins donnent leur propre opinion ou leur conclusion sur le degré d'ébriété ou sur l'ébriété elle-même à moins qu'ils ne décrivent les signes détaillés sur lesquels ils fondent leur conclusion. Dans l'arrêt *R. v. Smith* (1948), 17 Fortnightly L.J. 241, le même juge conclut que seule la déposition relative aux signes réels pouvait être retenue et que celle selon laquelle l'accusé était en état d'ébriété devait être rayée. Le juge Hogarth de la Cour de district a exprimé un avis aussi sévère dans *Grimsteit v. McDonald* (1950), 96 C.C.C. 272: [TRANUDCTION] «J'ai toujours été d'avis qu'il appartient aux témoins d'énoncer les faits et au tribunal de tirer des conclusions à partir de ces faits» (à la p. 286).

Le juge O'Hearn de la Cour de comté a opté pour une position intermédiaire dans *R. v. MacDonald* (1966), 9 Crim. L.Q. 239 (à la p. 241):

[TRANUDCTION] J'ai décidé qu'il serait probablement répréhensible que le témoin dise, à titre d'opinion, que la capacité du défendeur de conduire un véhicule à moteur était affaiblie par l'usage d'alcool ou d'une drogue puisque ce pourrait être une conclusion de droit, mais on peut demander à tout adulte, qui a une expérience suffisante de la vie, son opinion sur l'état d'une personne pour ce qui a trait à l'ébriété.

En Angleterre

Au nom du Tribunal d'appel des cours martiales, lord Parker a exprimé l'avis dans *R. v. Davies*, [1962] 1 W.L.R. 1111 qu'un témoin pouvait fort

properly give his impression as to whether another had "taken drink", but could not testify as to fitness or unfitness to drive. He reached his conclusion on two grounds (i) he is not in the expert witness category; (ii) that was the very matter the court had to determine on a charge of driving a vehicle on a road while unfit to drive through drink or drugs. The passage reads (at p. 1113):

The court has come clearly to the conclusion that a witness can quite properly give his general impression as to whether a driver had taken [a] drink. He must describe of course the facts upon which he relies, but it seems to this court that he is perfectly entitled to give his impression as to whether drink had been taken or not. On the other hand, as regards the second matter, it cannot be said, as it seems to this court, that a witness, merely because he is a driver himself, is in the expert witness category so that it is proper to ask him his opinion as to fitness or unfitness to drive. That is the very matter which the court itself has to determine. Accordingly, in so far as this witness and two subsequent witnesses, the lance-corporal and the regimental sergeant-major gave their opinion as to the appellant's ability or fitness to drive, the court was wrong in admitting that evidence.

In *R. v. Neil*, [1962] Crim. L.R. 698 a Courts-Martial Appeal Court (Winn, Widgery and Brabin JJ.) indicated that the scope of *Davies* "might call for consideration in future in relation to particular circumstances". The Court in *Neil* upheld the conviction on the somewhat tenuous ground that the members of the Court Martial "were not invited or directed by the Judge-Advocate to pay attention to opinion as distinct from observation".

Eire

An informative discussion of the point under review comes from Eire, *A.G. (Ruddy) v. Kenny* (1959), 94 I.T.L.R. 185. Kenny was charged with driving a motor lorry while drunk. The prosecution proposed to ask a police witness whether "in his opinion the defendant was drunk and incapable of driving the vehicle". The solicitor for the defend-

bien dire qu'il a l'impression qu'une autre personne «a bu», mais il ne peut pas déposer quant à sa capacité ou son incapacité de conduire. Le juge en est arrivé à cette conclusion pour deux motifs (i) le témoin n'est pas un témoin expert; (ii) c'est la question même que la cour est appelée à trancher relativement à une accusation de conduite d'un véhicule avec facultés affaiblies par l'usage d'alcool ou de drogue. Voici l'extrait de cette décision (à la p. 1113):

[TRADUCTION] La cour a conclu sans hésitation qu'un témoin peut fort bien donner son impression générale quant à savoir si un conducteur a bu. Il doit évidemment énoncer les faits sur lesquels il s'appuie, mais cette cour estime qu'il a parfaitement le droit de donner son impression à savoir s'il y a eu consommation d'alcool. D'autre part, pour ce qui a trait à la seconde question, on ne peut dire selon nous que, simplement parce qu'un témoin conduit lui-même une automobile, il entre dans la catégorie des témoins experts et qu'il convient de lui demander son avis sur la capacité ou l'incapacité de l'accusé de conduire. C'est la question même que la cour est appelée à trancher. En conséquence, pour autant que ce témoin et les deux autres témoins suivants, le caporal et le sergent major du régiment, ont exprimé leur opinion quant à la capacité ou aptitude de l'appelant de conduire, la cour a eu tort de recevoir leur témoignage.

Dans l'arrêt *R. v. Neil*, [1962] Crim. L.R. 698, le Tribunal d'appel des cours martiales (les juges Winn, Widgery et Brabin) a signalé que la portée de l'affaire *Davies* [TRADUCTION] «pourrait devoir être réexaminée plus tard, à cause de circonstances particulières». Dans l'arrêt *Neil*, la Cour a confirmé la déclaration de culpabilité en fonction d'un motif plutôt ténu selon lequel les membres de la Cour martiale [TRADUCTION] «n'avaient été ni invités, ni incités par le juge-avocat à tenir compte de l'opinion des témoins par opposition à leurs observations».

En Irlande

L'arrêt irlandais *A.G. (Ruddy) v. Kenny* (1959), 94 I.T.L.R. 185 comporte une étude utile du point en cause. Kenny était accusé d'avoir conduit un camion en état d'ivresse. La poursuite voulait demander à un témoin policier si [TRADUCTION] «à son avis, le défendeur était ivre et incapable de conduire le véhicule». L'avocat de la défense s'est

ant objected to the question and submitted that the witness "not being a doctor or like expert was not qualified or competent to give evidence of his opinion of the defendant's condition". The prosecution replied that evidence as to drunkenness or sobriety need not necessarily be that of a medical practitioner or similar witness but that any ordinary witness would be qualified to give evidence on such matters. The District Justice thereupon agreed to state a case for the opinion of the High Court. The question for decision was whether evidence by a member of the Garda Siochana was admissible of his opinion that the defendant driver by reason of his being drunk, was unfit to drive a mechanically propelled vehicle? It was held by Davitt P. and on appeal by the Supreme Court of Eire (Lavery and O'Daly JJ., Kingsmill Moore J., dissenting) that the question asked should be answered "Yes". The evidence was admissible.

Northern Ireland

The same point arose in Northern Ireland in *Sherrard v. Jacob*, [1965] N.I.L.R. 151 on a stated case. The Court of Appeal held that opinion evidence of the police officers as to drunkenness was admissible but (Lord MacDermott L.C.J., dissenting) opinion evidence of the police officers as to capability to drive was not admissible. The majority of the Court followed *R. v. Davies*.

Australia

The Australian case of *Burrows v. Hanlin*, [1930] S.A.S.R. 54 held that mere opinion as to whether a man is drunk or whether he is capable of driving a motorcar, unsupported by facts, is not entitled to any weight. Murray C.J. said (at p. 55):

Evidence of opinion can be given by experts on questions of science, but as to whether a man is drunk or whether he is capable of exercising effective control over a motorcar, mere opinion, unsupported by facts (I think I may go so far as to say), is not admissible evidence.

opposé à la question et a soutenu que, vu que le témoin [TRADUCTION] «n'était ni médecin, ni expert de ce genre, il n'était ni qualifié, ni compétent pour donner en preuve son opinion quant à l'état du défendeur». La poursuite a répliqué que le témoignage quant à l'ivresse ou à la sobriété de quelqu'un n'était pas nécessairement celui d'un médecin ou d'un témoin de cette catégorie, mais que tout témoin ordinaire avait compétence pour déposer sur ces questions. Le juge de district a, dès lors, accepté de référer l'affaire, sous forme d'énoncé de cause, à la Haute Cour. Il s'agissait de décider de la recevabilité du témoignage d'un membre de la Garda Siochana, selon lequel l'accusé était incapable de conduire un véhicule motorisé parce qu'il était ivre. Le président Davitt et, en appel, la Cour suprême d'Irlande (les juges Lavery, O'Daly et le juge Kingsmill Moore étant dissident) ont conclu qu'il faut répondre à la question par l'affirmative. Le témoignage était recevable.

En Irlande du Nord

La même question s'est posée en Irlande du Nord, sous forme d'énoncé de cause dans l'affaire *Sherrard v. Jacob*, [1965] N.I.L.R. 151. La Cour d'appel a conclu que le témoignage d'opinion des agents de police sur l'état d'ébriété était recevable mais (le lord juge en chef MacDermott étant dissident) que leur témoignage d'opinion sur la capacité de conduire n'était pas recevable. La Cour à la majorité a suivi l'arrêt *R. v. Davies*.

En Australie

Selon l'affaire australienne *Burrows v. Hanlin*, [1930] S.A.S.R. 54, la simple opinion quant à l'ébriété d'une personne et à sa capacité de conduire un véhicule à moteur, non fondée sur des faits, n'a aucune valeur probante. Le juge en chef Murray a dit (à la p. 55):

[TRADUCTION] Des experts peuvent rendre des témoignages d'opinion sur des questions de science, mais un témoignage d'opinion sur la question de savoir si un homme est ivre et s'il est capable d'exercer un contrôle efficace sur une automobile, une simple opinion, non appuyée sur des faits est (j'oserais dire) non recevable.

The later case of *R. v. Spooner*, [1957] V.R. 540 expressed a less strict view, with which I find myself much in accord. Sholl J. said (at p. 541):

I think I ought to say that my own view would be that it is not only a police officer who may be capable of expressing an opinion whether a man is so intoxicated as to be unable properly to drive a car. Many other persons have had experience in driving a motor-car, and have observed persons under the influence of intoxicating liquor, and must, one would suppose, be in a position to form a view as to the capacity to drive. I see no magic myself in the fact that the witness is a police officer, or anything else. It depends largely, I suppose, on his actual knowledge of what is required in driving a motor car.

In *R. v. Kelly*, [1958] V.R. 412, Smith J. expressed the opinion that if the Crown is merely seeking from a witness a compendious description of what he actually observed, evidence in such form is not properly to be regarded as opinion evidence and the law of evidence does not forbid the giving of evidence in such form. Moreover, the law of evidence does not require that a witness should be qualified as an expert before he testifies.

New Zealand

In *Blackie v. Police*, [1966] N.Z.L.R. 910 the New Zealand Court of Appeal divided on whether an experienced traffic officer could give evidence as to whether a driver was so far intoxicated as to be incapable of having control of a vehicle. A majority of the Court held that a traffic officer or policeman who can show that he is sufficiently qualified by training or experience may be allowed to express his opinion in evidence as to a person's capacity to drive. The Court held also that the fact that a witness is either a traffic officer or a policeman does not, however, automatically qualify him to give opinion evidence on this topic.

L'affaire plus récente *R. v. Spooner*, [1957] V.R. 540 exprime une opinion moins rigide, avec laquelle je suis beaucoup plus en accord. Le juge Sholl y dit (à la p. 541):

[TRADUCTION] Je crois devoir dire qu'à mon avis, un agent de police n'est pas le seul qui peut être capable de dire si, selon lui, un homme est à ce point ivre qu'il en est incapable de conduire normalement une voiture. Bien d'autres personnes ont eu l'expérience de conduire une voiture et d'observer des personnes en état d'ébriété et doivent, on peut le supposer, être en mesure de se former une opinion sur la capacité du chauffeur de conduire. Quant à moi je ne vois rien de magique à ce que le témoin soit un agent de police ou autre chose. Cela dépend en grande partie, je suppose, de la connaissance qu'a le témoin de ce qui est nécessaire pour conduire une voiture.

Dans *R. v. Kelly*, [1958] V.R. 412, le juge Smith a exprimé l'avis que si la poursuite cherche simplement à faire décrire de façon concise par un témoin ce qu'il a effectivement observé, cette forme de témoignage ne peut valablement être considérée comme un témoignage d'opinion et le droit de la preuve n'interdit pas la présentation de cette forme de preuve. De plus, le droit de la preuve n'exige pas qu'un témoin se qualifie comme expert avant de déposer.

En Nouvelle-Zélande

Dans l'affaire *Blackie v. Police*, [1966] N.Z.L.R. 910, la Cour d'appel de Nouvelle-Zélande a rendu une décision partagée sur le point de savoir si un agent de la circulation expérimenté pouvait déposer qu'un chauffeur était ivre au point d'être incapable de contrôler un véhicule. La majorité de la Cour a conclu qu'on peut permettre à un policier ou à un agent de la circulation qui peut démontrer qu'il a l'expérience ou la formation voulue, d'exprimer son opinion, comme témoin, sur la question de savoir si une personne est capable de conduire. La Cour a aussi conclu que même si le témoin est agent de la circulation ou policier, cela ne l'habilite pas automatiquement à rendre un témoignage d'opinion sur ce sujet.

V

The Text Writers

Sir Rupert Cross in his work on *Evidence* (5th ed., 1979, p. 451) states that the existence of a particular issue may necessitate the reception of evidence which is not that of an expert and yet is nothing short of a witness' opinion concerning an ultimate issue in the case. The author adds, (at p. 452), that, subject to the exceptional type of situation, it would seem that, if non-expert opinion is in reality evidence of fact given *ex necessitate* in the form of evidence of opinion, there should be no question of its inadmissibility because it deals with ultimate issues.

Professor Cross continues (at p. 452):

This is borne out by the form of s. 3(2) of the Civil Evidence Act 1972, which suggests that no change in the law was intended:

It is hereby declared that where a person is called as a witness in any civil proceedings, a statement of opinion by him on a relevant matter on which he is not qualified to give expert evidence, if made as a way of conveying relevant facts personally perceived by him, is admissible as evidence of what he perceived.

So far as criminal cases are concerned, the decisions on drunken driving indicate a difference of approach between the English and Northern Irish courts on the one hand, and the courts of Eire on the other.

Professor Cross suggests (at p. 453) two main and two subsidiary reasons for the exclusion of non-expert opinion: In the first place it is said that opinion evidence is irrelevant and that this is largely true of non-expert opinion on a subject requiring expertise as well as opinion evidence concerning matters which do not call for expertise. Secondly, it is said that the reception of opinion evidence would "usurp the functions of the jury" in the sense that the jury would be tempted blindly to accept a witness' opinion. The two subsidiary reasons mentioned are the fact that a witness who merely speaks his opinion cannot be prosecuted for perjury, and the danger that the reception of such evidence might indirectly evade other exclusionary rules. Cross speaks of the first subsidiary reason as

V

La doctrine

Sir Rupert Cross dans son ouvrage intitulé *Evidence* (5^e éd., 1979, p. 451) déclare qu'il peut se présenter une question qui exige qu'on reçoive un témoignage qui n'est pas celui d'un expert, mais qui n'en est pas moins l'opinion d'un témoin sur une question fondamentale dans l'affaire. L'auteur ajoute (à la p. 452) que sauf dans une situation exceptionnelle, il semblerait que, si l'opinion d'un non-expert constitue en réalité la preuve de faits apportée *ex necessitate* sous forme de témoignage d'opinion, sa recevabilité ne devrait pas être mise en doute parce qu'elle porte sur des questions fondamentales.

Le professeur Cross poursuit (à la p. 452):

[TRADUCTION] Cela ressort du texte du par. 3(2) de la Civil Evidence Act 1972, qui donne à penser qu'on n'a pas voulu modifier le droit:

Il est par les présentes déclaré que lorsqu'une personne, citée comme témoin dans une procédure civile, énonce une opinion sur un sujet pertinent sur lequel elle n'est pas un témoin expert, si elle le fait dans le but de relater les faits pertinents dont elle a eu personnellement connaissance, sa déclaration est recevable comme preuve de ce dont elle a eu connaissance.

Pour ce qui est des affaires criminelles, les décisions relatives à la conduite en état d'ébriété indiquent une différence de point de vue entre les cours d'Angleterre et celles d'Irlande du Nord d'une part et les cours de la République d'Irlande d'autre part.

Le professeur Cross fait état (à la p. 453) de deux raisons principales et deux raisons accessoires qui justifient l'exclusion de l'opinion de témoins ordinaires. D'abord, on affirme que le témoignage d'opinion n'a pas de pertinence et que c'est largement aussi vrai du témoignage d'opinion d'une personne ordinaire sur un sujet qui exige des connaissances spéciales que du témoignage d'opinion sur des questions qui n'en nécessitent pas. En deuxième lieu, on soutient que la réception de témoignages d'opinion empiéterait sur le rôle du jury en ce que le jury pourrait être tenté d'accepter aveuglément l'opinion du témoin. Les deux motifs secondaires indiqués tiennent à ce que le témoin qui ne fait qu'émettre une opinion n'est pas susceptible de poursuite pour parjure, et aux dangers que

one of "some antiquity" and suggests that there is more force in the second reason, but that "it has not been stressed by the judges".

Professor Wigmore takes a diametrically opposed position. He states, (vol. 7, para. 1917, Chadbourn ed., 1978) that the disparagement of "opinion" always had reference to the testimony of a person who had no "facts" of his own observation to speak from, and the skilled witness was the person who had to be received by way of exception to that notion. Thus, when an ordinary or lay witness took the stand, equipped with a personal acquaintance with the affair and therefore competent in his sources of knowledge, the circumstances that incidentally he drew inferences from his observed data and expressed conclusions from them did not present itself as in any way improper. It would not occur to any judge that this witness was doing a wrong thing.

Wigmore refers to the theory that wherever inferences and conclusions can be drawn by the jury as well as by the witness, the witness is superfluous, the theory being that of the exclusion of supererogatory evidence.

Wigmore uses strong language in discussing the "usurp the functions of the jury" theory (para. 1920). The phrase, he says, is made to imply a moral impropriety or a radical unfairness in the witness' expression of opinion. He says that "In this aspect the phrase is so misleading, as well as so unsound, that it should be entirely repudiated. It is a mere bit of empty rhetoric". The author continues "There is no such reason for the rule, because the witness, in expressing his opinion, is not attempting to 'usurp' the jury's function; nor could if he desired".

Turning then to an attack of the other theory, which would deny opinions of the "very issue before the jury" Wigmore has this to say:

The fallacy of this doctrine is, of course, that, measured by the principle, it is both too narrow and too

la réception d'un tel témoignage puisse permettre de contourner d'autres règles d'exclusion. Cross qualifie la première raison accessoire de [TRADUCTION] «désuète dans une certaine mesure» et opine
a que la seconde raison est plus convaincante, mais [TRADUCTION] «que les juges n'en ont pas beaucoup fait état».

Le professeur Wigmore adopte un point de vue diamétralement opposé. Il affirme (vol. 7, par. 1917, éd. Chadbourn, 1978) que le dénigrement du témoignage d'opinion a toujours fait référence au témoignage d'une personne qui n'a pas personnellement observé de «faits» qu'elle pourrait rapporter et que le témoin expert est celui qu'il faut entendre par exception à cette notion. Donc lorsqu'un témoin ordinaire dépose, avec une connaissance personnelle de l'affaire et, en conséquence, bien assuré de ses sources de connaissances, le fait qu'il tire des conclusions incidentes et exprime une opinion à partir de faits qu'il a observés n'a en soi rien de répréhensible. Il ne viendrait jamais à l'idée d'un juge que ce témoin se conduit mal.

Wigmore parle de la théorie selon laquelle chaque fois que le jury aussi bien que le témoin peut tirer des inférences et des conclusions, le témoin est de trop; c'est la théorie de l'exclusion de la preuve surérogatoire.

Wigmore emploie des termes forts pour parler de la théorie de «l'empiétement sur le rôle du jury» (par. 1920). On a fait dire à cette expression, dit-il, que l'énoncé d'opinion du témoin est moralement incorrect ou fondamentalement inéquitable. Il affirme que [TRADUCTION] «Sous ce rapport, l'expression est si trompeuse et mal fondée qu'il y a lieu de la désavouer complètement. Ce n'est qu'un exercice de rhétorique creuse». L'auteur poursuit «Aucune raison de la sorte ne fonde la règle, puisqu'en exprimant son opinion, le témoin n'essaie pas de s'approprier le rôle du jury et il ne pourrait pas le faire même s'il le voulait».

Abordant la critique de l'autre théorie, qui interdirait le témoignage d'opinion sur «la question même soumise au jury», Wigmore dit ceci:

[TRADUCTION] La fausseté de cette théorie tient à ce que, de toute évidence, en fonction du principe, elle est à

broad. It is too broad, because, even when the very point in issue is to be spoken to, the jury should have help if it is needed. It is too narrow, because opinion may be inadmissible even when it deals with something other than the point in issue. Furthermore, the rule if carried out strictly and invariably would exclude the most necessary testimony. When all is said, it remains simply one of those impracticable and misconceived utterances which lack any justification in principle [para. 1921].

VI

Law Reform Commission Reports

The Law Reform Commission of Canada has proposed an opinion rule based on facts perceived by the witness and on "helpfulness":

Section 67. A witness other than one testifying as an expert may not give an opinion or draw an inference unless it is based on facts perceived by him and is helpful to the witness in giving a clear statement or to the trier of fact in determining an issue [*Report on Evidence* (1975), Evidence Code, s. 67].

The Ontario Law Reform Commission proposed the enactment of the following section (Draft Act, Section 14):

Where a witness in a proceeding is testifying in a capacity other than as a person qualified to give opinion evidence and a question is put to him to elicit a fact that he personally perceived, his answer is admissible as evidence of the fact even though given in the form of an expression of his opinion upon a matter in issue in the proceeding [*Report on the Law of Evidence* (1976), pp. 150-53].

A majority of the Federal/Provincial Task Force on Uniform Rules of Evidence favoured the adoption of the proposal of the Law Reform Commission of Canada, embodied in s. 67 of the Commission's Evidence Code, rather than that of the Ontario Law Reform Commission. The majority opposed the proposal of the Ontario Law Reform Commission as being an enactment of the "collective facts rule" which allows non-expert opinion to be admitted on the basis that it is "a compendious mode of ascertaining the result of the actual observation of the witness". The majority felt that such

la fois trop particulière et trop générale. Elle est trop générale, parce que même s'il faut viser le point essentiel de l'affaire, le jury doit avoir l'aide dont il peut avoir besoin. Elle est trop particulière parce qu'une opinion peut être irrecevable même si elle porte sur autre chose que le point essentiel de l'affaire. De plus, si on applique la règle de façon stricte et inconditionnelle, on éliminerait les témoignages les plus nécessaires. Tout compte fait, elle n'est qu'une proposition, parmi d'autres, inapplicable et mal conçue qui n'a absolument pas de fondement dans les principes [par. 1921].

VI

Les rapports des commissions de réforme du droit

La Commission de réforme du droit du Canada a proposé une règle sur le témoignage d'opinion fondée sur des faits perçus par le témoin lui-même et sur l'«utilité»:

67. Hormis l'expert, aucun témoin ne peut faire part de ses opinions ou de ses conclusions à moins qu'elles ne soient fondées sur des faits perçus par lui-même et qu'elles ne soient utiles soit à une narration claire des faits, soit à la solution par l'arbitre des faits d'un problème soulevé au cours du litige. [*Rapport sur la preuve* (1975), Code de la preuve, art. 67].

La Commission de réforme du droit de l'Ontario a proposé l'adoption de l'article suivant (projet de loi, article 14):

[TRADUCTION] Lorsque dans une procédure où il dépose à un titre autre que celui de témoin expert, un témoin rapporte un fait dont il a eu personnellement connaissance, sa déposition est recevable à titre de preuve de ce fait, même si elle prend la forme d'une expression de son opinion à l'égard d'une question soulevée dans la procédure [*Report on the Law of Evidence* (1976), aux pp. 150 à 153].

Le groupe d'étude fédéral-provincial sur les règles uniformes de preuve a opté à la majorité pour l'adoption de la proposition formulée par la Commission de réforme du droit du Canada à l'art. 67 de son Code de la preuve, plutôt que pour la proposition de la Commission de réforme du droit de l'Ontario. Le groupe s'est majoritairement opposé à la proposition de la Commission de réforme du droit de l'Ontario parce qu'elle équivaut à adopter la «règle des faits en bloc» qui permet de recevoir le témoignage d'opinion d'un témoin ordinaire parce que c'est là [TRADUCTION]

an approach purported to draw an impossible and illogical distinction between "fact" and "opinion". The Task Force observed:

Section 67 would allow a lay witness to testify in the form of opinion if it is relevant, within the realm of common experience and a shorthand expression of the witness's personal observation.

VII

Conclusion

I have attempted in the foregoing to highlight the opposing points of view as reflected in some of the cases, texts, and reports of the law reform commissions.

We start with the reality that the law of evidence is burdened with a large number of cumbersome rules, with exclusions, and exceptions to the exclusions, and exceptions to the exceptions. The subjects upon which the non-expert witness is allowed to give opinion evidence is a lengthy one. The list mentioned in *Sherrard v. Jacob*, *supra*, is by no means exhaustive: (i) the identification of handwriting, persons and things; (ii) apparent age; (iii) the bodily plight or condition of a person, including death and illness; (iv) the emotional state of a person—e.g. whether distressed, angry, aggressive, affectionate or depressed; (v) the condition of things—e.g. worn, shabby, used or new; (vi) certain questions of value; and (vii) estimates of speed and distance.

Except for the sake of convenience there is little, if any, virtue, in any distinction resting on the tenuous, and frequently false, antithesis between fact and opinion. The line between "fact" and "opinion" is not clear.

To resolve the question before the Court, I would like to return to broad principles. Admissibility is determined, first, by asking whether the evidence sought to be admitted is relevant. This is a matter of applying logic and experience to the circumstances of the particular case. The question which must then be asked is whether, though

«une façon concise d'obtenir le résultat des observations réelles du témoin». Le groupe a majoritairement estimé que cette attitude tend à établir une distinction illogique et inapplicable entre les «faits» et les «opinions». Le groupe d'étude a fait remarquer que:

[TRADUCTION] L'article 67 permettrait à un témoin ordinaire de rendre un témoignage d'opinion si celui-ci est pertinent, s'il appartient au domaine d'expérience courante et constitue un énoncé concis des observations personnelles du témoin.

VII

Conclusion

Jusqu'ici, j'ai essayé de souligner les points de vue opposés qu'on retrouve dans la jurisprudence, dans la doctrine et dans les rapports des commissions de réforme du droit.

Disons au départ que, dans le concret, le droit de la preuve est embarrassé d'un grand nombre de règles encombrantes, assorties d'exclusions, d'exceptions à ces exclusions et d'exceptions aux exceptions. La liste des sujets sur lesquels un témoin ordinaire peut rendre un témoignage d'opinion est longue. Celle qui est mentionnée dans l'arrêt *Sherrard v. Jacob*, précité, n'est nullement exhaustive: (i) l'identification d'écriture, de personnes ou de choses; (ii) l'âge apparent; (iii) l'état physique d'une personne, notamment si elle est malade ou morte; (iv) l'état émotif d'une personne—c.-à-d. si elle est affligée, en colère, agressive, tendre ou découragée; (v) l'état des choses—c.-à-d. si elles sont usées, détériorées, neuves ou usagées; (vi) certaines questions d'évaluation; et (vii) des estimations de vitesse ou de distance.

Si ce n'est par commodité, la distinction fondée sur l'opposition précaire, et même souvent fausse, entre un fait et une opinion a peu ou pas d'avantages. La distinction entre un «fait» et une «opinion» n'est pas nette.

Pour résoudre la question soumise à la Cour, je veux revenir aux principes généraux. Le premier critère de recevabilité d'une preuve est sa pertinence. Il s'agit d'appliquer la logique et l'expérience aux circonstances du cas particulier. Il faut alors se demander si, même si la preuve a une

probative, the evidence must be excluded by a clear ground of policy or of law.

There is a direct and logical relevance between (i) the evidence offered here, namely, the opinion of a police officer (based on perceived facts as to the manner of driving, and *indicia* of intoxication of the driver) that the person's ability to drive was impaired by alcohol, and (ii) the ultimate *probandum* in the case. The probative value of the evidence is not outweighed by such policy considerations as danger of confusing the issues or misleading the jury. It does not unfairly surprise a party who had not had reasonable ground to anticipate that such evidence will be offered, and the adducing of the evidence does not necessitate undue consumption of time. As for other considerations such as "usurping the functions of the jury" and, to the extent that it may be regarded as a separate consideration, "opinion on the very issue before the jury", Wigmore has gone a long way toward establishing that rejection of opinion evidence on either of these grounds is unsound historically and in principle. If the court is being told that which it is in itself entirely equipped to determine without the aid of the witness on the point then of course the evidence is supererogatory and unnecessary. It would be a waste of time listening to superfluous testimony.

The judge in the instant case was not in as good a position as the police officers or Mr. Wilson to determine the degree of Mr. Graat's impairment or his ability to drive a motor vehicle. The witnesses had an opportunity for personal observation. They were in a position to give the Court real help. They were not settling the dispute. They were not deciding the matter the Court had to decide, the ultimate issue. The judge could accept all or part or none of their evidence. In the end he accepted the evidence of two of the police officers and paid little heed to the evidence of the third officer or of Mr. Wilson.

I agree with Professor Cross (at p. 443) that "The exclusion of opinion evidence on the ultimate

valeur probante, il y a lieu de l'exclure pour un motif manifeste de principe ou de droit.

Il y a une relation directe et logique entre (i) le témoignage présenté en l'espèce, savoir l'opinion d'un agent de police (fondée sur des observations quant à la manière de conduire du chauffeur et sur des indices d'ébriété de celui-ci) d'après laquelle la capacité de conduire de la personne était affaiblie par l'alcool et (ii) la preuve même à faire en l'espèce. La force probante du témoignage n'est pas supplantée par des considérations de principe comme le danger d'embrouiller les questions ou d'induire le jury en erreur. Le témoignage ne prend pas injustement par surprise une partie qui n'aurait pu raisonnablement prévoir qu'un tel témoignage serait présenté et sa présentation ne prend pas un temps excessivement long. Pour ce qui est des autres considérations, comme «l'empiètement sur le rôle du jury» et, dans la mesure où on peut la considérer comme une préoccupation distincte, celle que «le témoignage d'opinion porte sur la question même soumise au jury», Wigmore a bien établi qu'il est illogique de rejeter le témoignage d'opinion pour l'un ou l'autre de ces motifs tant du point de vue historique que de celui des principes. Si l'on dit au tribunal ce qu'il pourrait entièrement décider par lui-même, sans le secours du témoin sur la question, alors il va de soi que le témoignage est surérogatoire et inutile. Ce serait perdre son temps que d'entendre des dépositions superflues.

En l'espèce, le juge n'était pas aussi bien placé que les agents de police ou M. Wilson pour juger du degré de capacité ou d'incapacité de M. Graat de conduire un véhicule à moteur. Les témoins ont eu la possibilité de l'observer personnellement. Ils étaient en mesure d'apporter une aide réelle au tribunal. Ils ne tranchaient pas le litige. Ils ne décidaient pas ce que la cour était appelée à décider, le point crucial de l'affaire. Le juge avait la liberté d'accepter leurs dépositions en entier, en partie ou de les rejeter entièrement. En définitive il a cru les témoignages de deux agents de police et accordé peu d'attention à celui d'un troisième agent ou à celui de M. Wilson.

Je suis d'accord avec le professeur Cross pour dire (à la p. 443) que [TRADUCTION] «L'exclusion

issue can easily become something of a fetish". I can see no reason in principle or in common sense why a lay witness should not be permitted to testify in the form of an opinion if, by doing so, he is able more accurately to express the facts he perceived.

I accept the following passage from Cross as a good statement of the law as to the cases in which non-expert opinion is admissible.

When, in the words of an American judge, "the facts from which a witness received an impression were too evanescent in their nature to be recollected, or too complicated to be separately and distinctly narrated", a witness may state his opinion or impression. He was better equipped than the jury to form it, and it is impossible for him to convey an adequate idea of the premises on which he acted to the jury:

"Unless opinions, estimates and inferences which men in their daily lives reach without conscious ratiocination as a result of what they have perceived with their physical senses were treated in the law of evidence as if they were mere statements of fact, witnesses would find themselves unable to communicate to the judge an accurate impression of the events they were seeking to describe."

There is nothing in the nature of a closed list of cases in which non-expert opinion evidence is admissible. Typical instances are provided by questions concerning age, speed, weather, handwriting and identity in general [at p. 448].

Before this Court counsel for the appellant took the position that although opinion evidence by non-experts may be admissible where it is "necessary" the opinions of the police officers in this case were superfluous, irrelevant and inadmissible. I disagree. It is well established that a non-expert witness may give evidence that someone was intoxicated, just as he may give evidence of age, speed, identity or emotional state. This is because it may be difficult for the witness to narrate his factual observations individually. Drinking alcohol to the extent that one's ability to drive is impaired is a degree of intoxication, and it is yet more difficult for a witness to narrate separately the individual facts that justify the inference, in either the witness or the trier of fact, that someone was intoxicated to some particular extent. If a witness is to

du témoignage d'opinion sur le point crucial de l'affaire peut, en quelque sorte, devenir un fétiche». Je ne puis voir pourquoi en principe ou selon le bon sens, on ne pourrait pas permettre à un témoin ordinaire de déposer en exprimant son opinion si, en le faisant, il peut énoncer plus précisément les faits qu'il a observés.

Je considère l'extrait suivant de Cross comme l'énoncé exact du droit relatif aux affaires où le témoignage d'opinion d'un non-expert est recevable.

[TRADUCTION] Lorsque, selon l'expression d'un juge américain, les faits qui ont produit une impression sur le témoin sont trop fugaces pour qu'il s'en rappelle ou trop compliqués pour qu'il les énonce un par un, le témoin peut faire état de son opinion ou de son impression. Il était dans une situation plus favorable que le jury pour y arriver et il lui est impossible de faire saisir au jury les prémisses sur lesquelles il s'appuie:

«A moins que les opinions, les estimations et les conclusions auxquelles on arrive inconsciemment, dans la vie de tous les jours, par suite de ce qu'on perçoit par nos sens soient considérées, en droit de la preuve, comme de simples énoncés de faits, les témoins seront incapables de communiquer au juge une impression exacte des circonstances qu'ils veulent relater.»

Il n'y a pas d'énumération exhaustive des affaires pour lesquelles un témoignage d'opinion de non-expert est recevable. Les exemples caractéristiques sont ceux qui concernent l'âge, la vitesse, la température, l'écriture et de façon générale l'identité [à la p. 448].

Devant cette Cour, l'avocat de l'appellant a soutenu que même si le témoignage d'opinion de certains non-experts peut être recevable lorsqu'il est nécessaire, l'opinion des agents de police en l'espèce était superflue, non pertinente et irrecevable. Je ne suis pas d'accord. Il est bien établi qu'un témoin qui n'est pas un expert peut déposer que quelqu'un est ivre tout comme il peut témoigner au sujet de l'âge, de la vitesse, de l'identité ou d'un état émotif. Il en est ainsi parce qu'il peut être difficile au témoin d'énoncer une à une ses observations des faits. Consommer de l'alcool au point où la capacité de conduire est affaiblie constitue un degré d'ivresse et il est encore plus difficile pour un témoin de relater les faits distincts qui justifient l'inférence pour le témoin ou pour le juge des faits, que quelqu'un est ivre à un degré donné. Si l'on

be allowed to sum up concisely his observations by saying that someone was intoxicated, it is all the more necessary that he be permitted to aid the court further by saying that someone was intoxicated to a particular degree. I agree with the comment of Lord MacDermott L.C.J. in his dissent in *Sherrard v. Jacob*, *supra*:

I can find no good reason for allowing the non-expert to give his opinion of the driver's observable condition and then denying him the right to state an opinion on the consequences of that observed condition so far as driving is concerned [at p. 162].

Nor is this a case for the exclusion of non-expert testimony because the matter calls for a specialist. It has long been accepted in our law that intoxication is not such an exceptional condition as would require a medical expert to diagnose it. An ordinary witness may give evidence of his opinion as to whether a person is drunk. This is not a matter where scientific, technical, or specialized testimony is necessary in order that the tribunal properly understands the relevant facts. Intoxication and impairment of driving ability are matters which the modern jury can intelligently resolve on the basis of common ordinary knowledge and experience. The guidance of an expert is unnecessary.

If that be so it seems illogical to deny the court the help it could get from a witness' opinion as to the degree of intoxication, that is to say whether the person's ability to drive was impaired by alcohol. If non-expert evidence is excluded the defence may be seriously hampered. If an accused is to be denied the right to call persons who were in his company at the time to testify that in their opinion his ability to drive was by no means impaired, the cause of justice would suffer.

Whether or not the evidence given by police or other non-expert witnesses is accepted is another matter. The weight of the evidence is entirely a matter for the judge or judge and jury. The value of opinion will depend on the view the court takes in all the circumstances.

doit permettre au témoin de résumer ses observations de façon concise en affirmant que quelqu'un est ivre, il est encore plus nécessaire de lui permettre de mieux éclairer la cour en disant que quelqu'un est ivre à un degré donné. Je souscris au commentaire du lord juge en chef MacDermott, dissident, dans l'arrêt *Sherrard v. Jacob*, précité:

[TRADUCTION] Je ne puis trouver de motif valable de permettre au témoin ordinaire de donner son avis sur l'état apparent du conducteur et de lui refuser ensuite le droit de dire son avis sur les conséquences de l'état qu'il a observé pour autant que la capacité de conduire est en cause [à la p. 162].

Il ne s'agit pas ici d'une affaire d'exclusion du témoignage d'un non-expert parce qu'on aurait dû faire appel à un spécialiste. Il est depuis longtemps admis dans notre droit que l'ébriété n'est pas un état si exceptionnel qu'il faille avoir recours à un expert en médecine pour la diagnostiquer. Un témoin ordinaire peut donner son avis sur la question de savoir si une personne est ivre. Ce n'est pas un sujet où il est nécessaire d'obtenir un témoignage scientifique, technique ou spécialisé pour que le tribunal apprécie les faits pertinents à leur juste valeur. L'ébriété et l'affaiblissement de la capacité de conduire sont des questions que, de nos jours, un jury peut résoudre intelligemment en fonction des connaissances et de l'expérience communes. L'aide d'un expert est superflue.

Dans ces conditions, il paraît illogique de priver la cour de l'aide que l'opinion du témoin peut lui apporter sur le degré d'ébriété, c.-à-d. sur la question de savoir si la capacité de conduire d'une personne était affaiblie par l'usage de l'alcool. S'il fallait exclure les dépositions de témoins ordinaires, la défense en serait gravement gênée. Si l'on doit priver l'accusé du droit de citer des personnes qui l'accompagnaient lors de l'incident et de les faire témoigner qu'à leur avis sa capacité de conduire n'était nullement affaiblie, l'intérêt de la justice en serait atteint.

C'est une autre question de savoir s'il faut ajouter foi au témoignage des policiers ou d'autres témoins ordinaires. Le poids à accorder au témoignage relève complètement du juge ou du juge et du jury. La valeur probante de l'opinion dépend de la façon dont la cour juge toutes les circonstances.

I would adopt the following passage from the reasons of Lord MacDermott in *Sherrard v. Jacob*, *supra*:

The next stage is to enquire if the opinion of the same witnesses was also admissible on the question whether the respondent, if he was under the influence of drink, was so to an extent which made him incapable of having proper control of the car he was driving. On this it seems to me that the reasoning which has led me to the conclusion just stated applies as well to this branch of the matter. The driving of motor vehicles is now so much a matter of everyday experience for ordinary people that I find it difficult to see how inferential or opinion evidence as to being (a) under the influence of drink and (b) thereby unfit to drive a car can be placed in different categories for the purpose of determining admissibility. The one as much as the other seems to be within the capacity of the non-expert to form a reasonable conclusion [at p. 162].

A non-expert witness cannot, of course, give opinion evidence on a legal issue as, for example, whether or not a person was negligent. That is because such an opinion would not qualify as an abbreviated version of the witnesses factual observations. An opinion that someone was negligent is partly factual, but it also involves the application of legal standards. On the other hand, whether a person's ability to drive is impaired by alcohol is a question of fact, not of law. It does not involve the application of any legal standard. It is akin to an opinion that someone is too drunk to climb a ladder or to go swimming, and the fact that a witness' opinion, as here, may be expressed in the exact words of the *Criminal Code* does not change a factual matter into a question of law. It only reflects the fact that the draftsmen of the *Code* employed the ordinary English phrase: "his ability to drive . . . is impaired by alcohol" (s. 234).

In short, I know of no clear ground of policy or of law which would require the exclusion of opinion evidence tendered by the Crown or the defence as to Mr. Graat's impairment.

I conclude with two caveats. First, in every case, in determining whether an opinion is admissible,

Je suis d'avis d'adopter le passage suivant des motifs de lord MacDermott dans l'arrêt *Sherrard v. Jacob*, précité:

[TRADUCTION] L'étape suivante consiste à se demander si l'opinion de ce témoin est aussi recevable quand il s'agit de déterminer si l'intimé, étant sous l'influence de l'alcool, l'était au point d'être incapable de bien contrôler la voiture qu'il conduisait. Sur ce point, il me semble que le raisonnement qui m'a amené à la conclusion que je viens d'énoncer s'applique aussi bien à cet aspect de la question. Conduire un véhicule automobile est devenu une expérience tellement quotidienne pour la moyenne des gens que je vois difficilement comment une inférence ou un témoignage d'opinion quant a) au fait d'être sous l'influence de l'alcool et b) d'être, en conséquence, incapable de conduire une automobile peuvent être placés dans des catégories différentes pour en déterminer la recevabilité. L'une et l'autre me semblent relever de la capacité du témoin ordinaire de se former une opinion raisonnable [à la p. 162].

Un témoin ordinaire ne peut évidemment pas rendre un témoignage d'opinion sur une question de droit, par exemple, déterminer si une personne a été négligente ou non. Il en est ainsi parce qu'une telle opinion n'équivaut pas à une expression abrégée des observations des témoins. L'opinion qu'une personne a été négligente repose en partie sur des faits, mais elle comprend aussi l'application de critères juridiques. D'autre part déterminer si la capacité de conduire d'une personne est affaiblie par l'alcool est une question de fait et non une question de droit. Elle ne comporte l'application d'aucun critère juridique. Elle est semblable à l'opinion selon laquelle quelqu'un est trop ivre pour grimper à une échelle ou pour se baigner et le fait que l'opinion du témoin soit exprimée, comme en l'espèce, selon les termes mêmes du *Code criminel*, ne transforme pas une question de fait en une question de droit. Cela signifie simplement que les rédacteurs du *Code* ont utilisé une expression courante: «sa capacité de conduire . . . est affaiblie par l'effet de l'alcool» (art. 234).

En bref, je ne vois pas de motif évident, ni en principe, ni en droit, d'exclure le témoignage d'opinion offert par la poursuite ou par la défense quant à l'incapacité de conduire de M. Graat.

Je conclus par deux mises en garde. D'abord dans tous les cas, pour déterminer si un témoi-

the trial judge must necessarily exercise a large measure of discretion. Second, there may be a tendency for judges and juries to let the opinion of police witnesses overwhelm the opinion evidence of other witnesses. Since the opinion is admitted under the "compendious statement of facts" exception, rather than under the "expert witness" exception, there is no special reason for preferring the police evidence over the "opinion" of other witnesses. As always, the trier of fact must decide in each case what weight to give what evidence. The "opinion" of the police officer is entitled to no special regard. Ordinary people with ordinary experience are able to know as a matter of fact that someone is too drunk to perform certain tasks, such as driving a car. If the witness lacks the relevant experience, or is otherwise limited in his testimonial capacity, or if the witness is not sure whether the person was intoxicated to the point of impairment, that can be brought out in cross-examination. But the fact that a police witness has seen more impaired drivers than a non-police witness is not a reason in itself to prefer the evidence of the police officer. Constable McMullen and Sergeant Spoelstra were not testifying as experts based on their extensive experience as police officers.

There was some confusion about this matter in this case as appears from the following cross-examination of Mr. Wilson:

Q. ... And of course you've not and never have been a Police Officer. Do you agree or disagree with me?

A. No. No.

Q. You have never been a Police Officer?

A. No.

Q. And you're not in the habit of checking people as to the amount of alcohol that is consumed in order to make him impaired. Do you agree or disagree with me?

A. I have to agree with you.

Q. Yes. So you're really not in a position to tell us whether or not he was impaired or not impaired by alcohol. Do you agree or disagree with me?

A. I was only ...

gnage d'opinion est recevable, le juge du procès doit nécessairement exercer une grande mesure de discrétion. Deuxièmement, il se peut que les juges et les jurys aient tendance à laisser l'opinion des policiers prévaloir sur les témoignages d'opinion d'autres témoins. Puisque le témoignage d'opinion est reçu en vertu de l'exception dite «de l'énoncé concis des faits» plutôt qu'en vertu de l'exception visant le témoignage d'experts, il n'y a pas de raison particulière de préférer la déposition des policiers à «l'opinion» d'autres témoins. Comme dans tous les cas, l'arbitre des faits doit juger quel poids accorder à ce témoignage. L'opinion d'un agent de police ne mérite pas un traitement spécial. Des gens ordinaires avec une expérience courante peuvent savoir qu'en réalité quelqu'un est trop ivre pour faire certaines choses comme conduire une automobile. Si le témoin n'a pas l'expérience pertinente, si sa capacité de témoigner est autrement limitée, ou si le témoin n'est pas certain que la personne était ivre au point d'être incapable de conduire, on peut le faire ressortir par le contre-interrogatoire. Mais le fait qu'un agent de police ait vu plus de conducteurs incapables de conduire qu'un témoin qui n'est pas policier n'est pas un motif en soi d'accorder plus de poids à la déposition d'un agent de police. L'agent McMullen et le sergent Spoelstra n'ont pas déposé à titre d'experts en fonction de leur grande expérience comme agents de police.

Il y a eu en l'espèce un certain flottement à ce sujet, comme on peut le constater de l'extrait suivant du contre-interrogatoire de M. Wilson:

[TRADUCTION] Q. ... Et bien sûr vous n'êtes pas agent de police et ne l'avez jamais été. Êtes-vous d'accord avec moi ou non?

R. Non, non.

Q. Vous n'avez jamais été agent de police?

R. Non.

Q. Et vous n'avez pas l'habitude de surveiller les gens pour voir quelle quantité d'alcool il leur faut absorber avant d'être incapables de conduire. Êtes-vous d'accord avec moi?

R. Je suis obligé d'être d'accord.

Q. Oui. Donc vous n'êtes pas en mesure de nous dire s'il était capable ou incapable à cause de l'alcool. Êtes-vous d'accord avec moi ou non?

R. Je n'ai que ...

Q. ... But of course you were in no position to judge as to whether or not he was impaired. Do you agree or disagree with me?

A. I don't have any qualifications in that regard I guess. a

Mr. Wilson does not need any special qualifications. Nor were the police officers relying on any special qualifications when they gave their opinions. Both police and non-police witnesses are merely giving a compendious statement of facts that are too subtle and too complicated to be narrated separately and distinctly. Trial judges should bear in mind that this is non-expert opinion evidence, and that the opinion of police officers is not entitled to preference just because they may have extensive experience with impaired drivers. The credit and accuracy of the police must be viewed in the same manner as that of other witnesses and in the light of all the evidence in the case. If the police and traffic officers have been closely associated with the prosecution, such association may affect the weight to be given to such evidence. b c d e

The trial judge was correct in admitting the opinions of the three police officers and Mr. Wilson. f

For the foregoing reasons, as well as for the reasons given by Chief Justice Howland, I would dismiss the appeal. g

Appeal dismissed.

Solicitors for the appellant: Greenspan, Moldaver, Toronto.

Solicitor for the respondent: The Attorney General for the Province of Ontario.

Q. ... Mais bien sûr vous n'étiez pas en mesure de juger s'il était incapable ou non. Êtes-vous d'accord avec moi ou non?

R. Je n'ai aucun titre particulier sous ce rapport, je suppose.

M. Wilson n'a besoin d'aucun titre spécial. Les agents de police n'ont pas non plus besoin d'avoir de titre spécial lorsqu'ils donnent leur opinion. Les témoins qui sont agents de police et ceux qui ne le sont pas ne font que donner un énoncé concis des faits qui sont trop subtils et trop compliqués pour être énoncés un par un. Les juges de première instance ne devraient pas oublier qu'il s'agit là de témoignages d'opinion de non-experts et que l'opinion des agents de police n'a pas droit à un traitement de faveur simplement parce que ceux-ci peuvent avoir une grande expérience des conducteurs dont les facultés sont affaiblies. La fiabilité et l'exactitude des policiers doivent être appréciées de la même façon que celles des autres témoins, en fonction de l'ensemble de la preuve dans la cause. Si les agents de police et les agents de circulation ont été intimement associés à la poursuite de ces infractions, cette expérience peut modifier la force probante de leur témoignage.

Le juge du procès a eu raison de recevoir l'opinion des trois agents de police et celle de M. Wilson.

Pour les motifs ci-dessus, et pour les motifs exprimés par le juge en chef Howland, je suis d'avis de rejeter le pourvoi. g

Pourvoi rejeté.

Procureurs de l'appellant: Greenspan, Moldaver, Toronto. h

Procureur de l'intimée: Le procureur général de la province de l'Ontario.

TAB 6

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Luis v. Marchiori*,
2018 BCCA 317

Date: 20180807
Dockets: CA44339, CA44340

Docket: CA44339

Between:

Leni Lim Luis

Appellant
(Plaintiff)

And

Lori Marchiori and Ram Mechanical Ltd.

Respondents
(Defendants)

- and -

Docket: CA44340

Between:

Leni Lim Luis

Appellant
(Plaintiff)

And

**Robert J. Christian, Cheryl Lynn Christian
and Geoffrey Lim Luis**

Respondents
(Defendants)

Corrected Judgment: The text of the judgment was corrected at paragraph 14 on
August 9, 2018.

Before: The Honourable Mr. Justice Frankel
The Honourable Mr. Justice Groberman
The Honourable Madam Justice Fenlon

On appeal from: An order of the Supreme Court of British Columbia, dated
March 2, 2017 (*Luis v. Christian*, Vancouver Dockets M120460; M094252).

Counsel for the Appellant: G. Collette

Counsel for the Respondents: S. Hoyer
J. Archibald
R.W. Parsons

Place and Date of Hearing: Vancouver, British Columbia
April 19, 2018

Place and Date of Judgment: Vancouver, British Columbia
August 7, 2018

Written Reasons by:

The Honourable Madam Justice Fenlon

Concurred in by:

The Honourable Mr. Justice Frankel

The Honourable Mr. Justice Groberman

Summary:

The appellant seeks to overturn the order of a Supreme Court judge dismissing her appeal of the decision of a master sitting as a Registrar. The Registrar determined that the appellant, who was successful at trial, could not recover as a disbursement an expert fact witness' charge for his time testifying at trial beyond the \$20 fee prescribed by the Supreme Court Civil Rules. The appellant says the Registrar erred in principle, or was clearly wrong, by not assessing whether the charge was a necessary or proper disbursement under Rule 14-1(5). Held: Appeal dismissed. The Registrar did not err in principle, nor was she clearly wrong. The legislative history supports the Registrar's conclusion that a charge an expert fact witness levies for testifying is not recoverable as a disbursement under Rule 14-1(5).

Reasons for Judgment of the Honourable Madam Justice Fenlon:

[1] These appeals concern the practice of expert witnesses charging for their time to testify at trial when they have given fact evidence and have not been qualified to give opinion evidence. The particular question before us is whether the party paying such charges is entitled to recover them from the other side as a disbursement.

Background

[2] The appellant Leni Lim Luis was injured in two motor vehicle accidents. The respondents admitted liability. The issue of damages proceeded to a seven-day trial, with the two actions heard together. Ms. Luis' treating family physician, Dr. Shu, was one of the witnesses who testified at trial. He gave evidence as a fact witness and was not qualified at trial to provide a medical opinion. He invoiced Ms. Luis \$2,651 for attending the trial in keeping with the British Columbia Medical Association Guidelines.

[3] Ms. Luis was awarded damages of \$1.187M and one set of costs for the two actions. She included Dr. Shu's fees as a disbursement in the bill of costs presented to the respondents. They challenged the attendance fee, arguing that Ms. Luis was entitled to recover only the \$20 fee provided for in Schedule 3 of Appendix C to the *Supreme Court Civil Rules*.

[4] At the costs hearing, Master Scarth, sitting as a Registrar, applied what she held to be the accepted rule in such cases and denied Ms. Luis recovery of Dr. Shu's attendance fee. An appeal from that order was dismissed: *Luis v. Marchiori* (2 March 2017), Vancouver M120460 (B.C.S.C.). The appeal judge noted that the standard of review is a deferential one, and concluded Master Scarth had neither erred in principle, nor been clearly wrong in her decision. The appeal judge, however, went on to note that the \$20 fee paid to Dr. Shu was "very low", and did not reflect the reality that doctors are often called as non-opinion fact witnesses at trial. She observed that the issue was one of interest to the legal profession and that a ruling from a senior court might be helpful. Leave to appeal her order was granted by a justice of this Court on June 30, 2017.

Terminology

[5] It is useful to begin by distinguishing between expert fact evidence and expert opinion evidence. Witnesses who become involved in litigation due to their profession—such as a treating doctor or an engineer overseeing a construction project—may be called to testify about their observations. Although the observations may be beyond the knowledge of a layperson, that testimony is not opinion evidence. Examples include a witness describing radiological images, identifying a microbe seen under a microscope, or identifying the pathological process seen on surgery or autopsy. Such evidence is sometimes described as "non-opinion expert evidence": Robert B. White, *The Art of Using Expert Evidence* (Toronto: Canada Law Book, 1997), ch. 2 at 16–21.

[6] Justice Schultes addressed this distinction in *Anderson v. Dwyer*, 2009 BCSC 1872 at para. 14 in the context of the Rule requiring notice of opinion evidence:

... However, the witness's factual narrative of the actions he took and the observations he made, including describing without interpretation, the anatomical features he observed in the x-rays does not amount to offering an opinion and does not offend the Rule. The fact that he brings special training or experience to bear in having taken those actions and made those observations is not determinative. It is whether he draws inferences or offers opinion beyond what the actual evidence itself is capable of revealing.

[Emphasis added.]

Issues on appeal

[7] There are two main issues raised on appeal:

1. Does Schedule 3 of Appendix C of the *Supreme Court Civil Rules* establish \$20/day as the fee payable to expert fact witnesses for their attendance at trial?
2. Does Rule 14-1(5) of the *Supreme Court Civil Rules* give the Registrar discretion to award additional attendance fees to expert fact witnesses?

[8] For the reasons that follow, I am of the view that expert fact witnesses are limited to the \$20 fee set out in Schedule 3, and that Rule 14-1(5) does not authorize recovery of attendance fees beyond that. I would accordingly dismiss the appeals.

Analysis

[9] The fees prescribed to compel a witness' attendance at trial are set out in Schedule 3 to Appendix C of the Rules:

Fees Payable to Witnesses

In all cases in which a witness is required to attend an examination, hearing or trial, the following **daily witness fees** and fees for travel, meals and preparation are payable, and must, unless otherwise ordered, be tendered in advance by the party requiring the attendance of the witness:

Daily witness fee

- 1 (1) For any witness, other than a party or a present officer, director or partner of a party to a proceeding, for each day or part of a day, a daily witness fee of \$20.
- (2) A witness who is a party or a present officer, director or partner of a party to the proceeding is not entitled to a daily witness fee.

Travel

- 2 (1) For any witness, if the examination, hearing or trial is held at a place
 - (a) within 200 km by road (including any ferry route within the Provincial road system) of where the witness resides, 30¢ per km each way by road between his or her residence and the place of examination, hearing or trial; but no travel allowance will be made if the distance by road between that residence and the place of examination, hearing or trial is less than 8 km., or

(b) more than 200 km from where the witness resides, the minimum return air fare by scheduled airline plus 30¢ per km each way from his or her residence to the departure airport and from the arrival airport to the place of examination, hearing or trial.

(2) The allowance described in subsection (1) (a) includes ferry fares and road tolls.

Allowances

3 For any witness, a reasonable allowance for meal expenses made necessary by the witness' attendance, and if the witness resides elsewhere than the place of examination, hearing or trial and is required to remain overnight, a reasonable allowance for overnight accommodation.

Preparation

4 For any witness other than a party or a present officer, director or partner of a party to a proceeding, a reasonable sum must be allowed for the time employed and expenses incurred by the witness in preparing to give evidence, when that preparation is necessary.

[Emphasis added.]

[10] Recovery of disbursements on an assessment of costs is governed by Rule 14-1(5):

When assessing costs under subrule (2) or (3) of this rule, a registrar must

(a) determine which disbursements have been necessarily or properly incurred in the conduct of the proceeding, and

(b) allow a reasonable amount for those disbursements.

[11] Ms. Luis contends the lower court erred in refusing to allow recovery for the attendance fee charged by Dr. Shu. She submits the \$20 attendance fee provided for in Schedule 3 is a minimum to be paid to a witness in advance of his or her attendance at trial, not a maximum, and in any event that the words "unless otherwise ordered" permit the court to depart from that fee. She further submits Rule 14-1(5) requires a Registrar to award a reasonable amount to a witness in excess of the \$20 if it was either a necessary or proper disbursement at the time it was incurred.

[12] Ms. Luis argues this interpretation is consistent with the practice of the Registrar to allow as disbursements significant attendance fees for expert opinion

witnesses—even though Schedule 3 applies to “any witness, other than a party or a present officer, director or partner of a party” and should therefore include those giving opinion evidence. In short, she submits that if Rule 14-1(5) gives the Registrar discretion to award as disbursements additional fees paid to expert opinion witnesses, that discretion should also extend to additional fees paid to expert fact witnesses.

[13] Finally, Ms. Luis submits limiting expert fact witnesses to \$20 per day of attendance will only lead to counsel requesting opinion reports from treating doctors in order to avoid the limit. She says that if she had obtained a report from Dr. Shu, the cost of that report and his attendance fees at trial would not be in dispute and would have to be paid by the respondents. Why, she asks, should she be penalized for avoiding unnecessary expense?

[14] I begin by considering this last *in terrorem* submission, which I do not find to be persuasive. Disbursements are only recoverable if they are “necessarily or properly incurred in the conduct of the proceeding”. Ms. Luis chose to rely on the opinions of specialist physicians to prove her case, rather than on the opinion of her family doctor. If an additional report from Dr. Shu would have added nothing to her claim, it is unlikely that it would have been recoverable as a necessary or proper disbursement under Rule 14-1(5) in any event.

[15] I turn next to the submission that Schedule 3 vests a broad discretion in the court to set a fee greater than \$20. Ms. Luis relies on the words underlined below in the opening paragraph of Schedule 3:

In all cases in which a witness is required to attend an examination, hearing or trial, the following daily witness fees and fees for travel, meals and preparation are payable, and must, unless otherwise ordered, be tendered in advance by the party requiring the attendance of the witness:

[Emphasis added.]

[16] I would not accede to this submission. The interpretation contended for by Ms. Luis was thoroughly considered by Justice Fraser in *Northland Properties Ltd. v. Equitable Trust Co.* (1992), 71 B.C.L.R. (2d) 124 (S.C.). At 131, Fraser J.

acknowledged that the words of Schedule 3 present some difficulty and could be interpreted in the following ways:

1. That attendance fees are payable, unless otherwise ordered.
2. That these fees must be tendered in advance, unless otherwise ordered.
3. That the amount of the attendance fee to be paid is \$20.00, unless otherwise ordered.
4. All of the above.

[17] Justice Fraser then said at 132–33:

The involuntary participation of non-involved persons in litigation is a longstanding tradition of the legal system. The rationale underlying the fact that persons can be compelled to be witnesses (and jurors) without being fully compensated for their loss of time is that the right of litigants to have justice done requires sacrifices on the part of others who have no interest in the outcome.

[...]

The arbitrary character of the \$20.00 witness fee provides an important clue to the proper interpretation of this issue. The sum of \$20.00 has no relation to the service rendered by a witness. A person on a fixed income, whether high or low, will suffer no financial loss as a result of testifying. Other witnesses may. The witness fee may represent a small profit for someone whose employer pays him or her full wages during the attendance days. If the meaning of Schedule 3 is that a witness who will suffer financial loss as a result of attending to testify is entitled to compensation for that loss, why is the figure of \$20.00 mentioned at all? It would have been simpler (although administratively not simpler) to provide that a witness shall be compensated in full for lost income. The \$20.00 witness fee is simply a continuation of the long tradition.

The words “unless otherwise ordered” mean that a litigant, on proper grounds, may compel the attendance of a witness without tendering witness fees in advance. An example in which the discretion conferred might be exercised is where a litigant cannot afford to tender fees in advance but has a reasonable prospect of being able to pay them at some later time, perhaps as a result of success at trial. Another example might be where it is too difficult to calculate in advance what proper fees for preparation should be.

[Emphasis added.]

[18] I agree with Fraser J. that the plain meaning of the words read in context leads to the conclusion that the phrase “unless otherwise ordered” applies only to the tendering of fees in advance.

[19] I turn next to Ms. Luis' submission that an amendment made to Schedule 3 after *Northland* supports greater flexibility in setting attendance fees. She observes that the earlier version provided that witness fees "shall be payable", whereas the amended version provides that witness fees "are payable". In my view, this amendment is a stylistic one, reflecting the move away from the use of "shall" in common parlance and in statutory drafting, not a substantive one.

[20] I come now to the submission that additional attendance fees may be recovered as a disbursement under Rule 14-1(5). The cases are not entirely consistent on this point.

[21] Ms. Luis relies on *Laramie v. Olson* (1992), 82 B.C.L.R. (2d) 228 (S.C.), a case decided only a few months after *Northland*. In *Laramie*, Master Patterson, sitting as Registrar, distinguished *Northland* and found Schedule 3 does not fetter the Registrar's discretion to allow as a disbursement more than a \$20 fee paid to an expert witness for attendance at trial. He reasoned that the principal objective of Schedule 3 was to enable a party to easily determine the amount to be tendered to a witness with a subpoena. He concluded Schedule 3 did not preclude paying more to the witness if it became necessary to do so, saying at 231:

Nowhere is it stated in Sched. 3 that only the amount which is payable and tendered in advance can be recovered as disbursements on an assessment. It would be ridiculous if that were so, as it would eliminate any flexibility in dealing with additional costs incurred after the initial tender. It is worth noting also that nowhere in Sched. 3 is R. 57 [now Rule 14-1(5)] mentioned.

Because the *Northland* case did not deal with an assessment of costs after the fact, Fraser J., quite properly, did not have to consider either R. 57(4) or (8). Nor was it necessary for him to consider the *Van Daele* decision or any of those decisions of the courts subsequent to that which have adopted that rule. It is my view that *Northland* decided only one point and that was the amount which had to be tendered in advance to secure the attendance of a witness at examination for discovery.

Rule 57(4) and (8) gives to the registrar the discretion to allow reasonable, necessary and proper expenses and disbursements to the successful litigant. *Northland* does not change that. The purpose of R. 57(4) and (8) is to provide the successful litigant with a method of collecting from the unsuccessful litigant all reasonable, necessary and proper disbursements, and not just those fees which might have to be tendered in advance to secure the attendance of a witness, either at examination for

discover or at trial. If it were otherwise, it would mean that litigants would be placed in the invidious position of having to expend their own funds to pursue a legitimate claim without hope of reimbursement.

In my view, App. C, Sched. 3 does not fetter the discretion of the registrar to allow more than \$20 as a witness fee payable to an expert witness for attendance at trial.

[Emphasis added.]

[22] Master Patterson did not specify in *Laramée* whether the witness whose fees were in issue was a fact witness or an expert opinion witness. Two years later, in *United Contractors Ltd. v. The Queen* (14 January 1994), New Westminster C891753 (B.C.S.C), Master Joyce (as he then was), sitting as Registrar, assumed *Laramée* dealt with a doctor who had been engaged to provide opinion evidence.

[23] The majority of decisions dealing with expert witnesses who provide fact evidence take the view that only the \$20 fee provided for in Schedule 3 is recoverable as a disbursement: *United Contractors Ltd.*; *Easton v. Easton*, 2002 BCSC 1031; *Summers v. McGinnis*, 2005 BCSC 523; *Van de Mortel v. Flagg et al*, 2006 BCSC 689; *Miley v. Abulaban*, 2015 BCSC 720; and *Patterson v. McDaniel*, 2015 BCSC 1693. In those cases in which attendance fees charged by expert witnesses were found to be recoverable as disbursements, the issue was either not squarely addressed or it is not clear whether the expert witness had given fact or opinion evidence: *Hall v. Coad*, 2002 BCSC 720; *Charlebois v. Vandas*, 2003 BCSC 888.

[24] Ms. Luis asks this Court to depart from the prevailing practice and to interpret Rule 14-1(5) expansively so as to grant the Registrar discretion to recognize additional attendance fees for expert fact witnesses as disbursements. Why, asks Ms. Luis, should expert fact witnesses be treated differently from expert opinion witnesses when both lose significant income from their professional work while attending court, and both are before the court because of their expertise and profession?

[25] In my view, the different treatment afforded the two types of expert testimony is explained and justified by the unique characteristics of opinion evidence. The law

has long recognized the fundamental difference between a witness called upon to provide opinion evidence and one called upon to testify to what he or she has observed. In *Webb v. Page* (1843), 174 E.R. 695 at 695, Justice Maule explained:

There is a distinction between the case of a man who sees a fact and is called to prove it in a Court of justice, and that of a man who is selected by a party to give his opinion on a matter with which he is peculiarly conversant from the nature of his employment in life. The former is bound, as a matter of public duty, to speak to a fact which happens to have fallen within his knowledge, without such testimony, the course of justice must be stopped. The latter is under no such obligation. There is no such necessity for his evidence, and the party who selects him must pay him.

[26] Simply put, when a witness has observed relevant events, what he has seen or heard is within his capacity to relay without doing anything further, other than perhaps refreshing his memory. A party to a civil proceeding can normally compel the attendance of such a witness by issuing a subpoena. Unless the attendance would work a particular hardship on the recipient of the subpoena, a court is unlikely to set it aside. It follows that, in order to secure his testimony, it is not necessary to pay him anything more than the fees the Rules stipulate must be provided with the subpoena.

[27] An expert opinion witness, on the other hand, must take steps to acquire the opinion evidence that will assist the court in resolving a dispute. The party wishing to obtain that evidence must contract with the expert and pay him or her to engage in the work necessary to produce the opinion, prepare a report and, if required by the opposing party for cross-examination, to testify to that opinion at trial. Payment is thus a necessity.

[28] The use of a subpoena to secure opinion evidence from a person with expertise, but with no connection to the litigation, is little more than a theoretical possibility in a civil case. The requirements for advance notice of expert opinion evidence makes it entirely impractical for a party to rely on opinion evidence of an expert who is unwilling to attend. Further, a civil court is likely to exercise its discretion to strike a subpoena issued to an expert who has no connection to the

facts of the litigation: see *R. v. Blais*, 2008 BCCA 389 and the cases discussed therein; *Briscoe v. SSQ, Life Insurance Company, Inc.*, 2013 BCSC 2036.

[29] The need to pay expert opinion witnesses is recognized by Rule 11-5(9) which expressly provides for the remuneration of an expert opinion witness appointed by the court, including “an appropriate sum for each day that the expert’s attendance in court is required”.

[30] Ms. Luis asserts that even if the sum she paid Dr. Shu was not “necessary”, it should be recoverable nonetheless as a “proper” disbursement. She emphasizes the disjunctive language of the Rule which says that a disbursement may be “necessary or proper”.

[31] A “necessary” disbursement relates to an essential or inevitable expenditure, an outlay a party is bound or required to incur in order to prove the case: *MacKenzie v. Rogalasky*, 2014 BCCA 446 at para. 59. A “proper” disbursement is one that, although not necessary, was right for the party to incur in the sense that it was a reasonable outlay having regard to the circumstances of the case: *Fairchild v. British Columbia (Vancouver Coastal Health Authority)*, 2012 BCSC 1207 at para. 43; *McKenzie v. Darke*, 2003 BCSC 138 at para. 18.

[32] The question of whether a sum paid to an expert witness to compensate him or her for time spent giving fact evidence amounts to a proper disbursement was considered by Master Joyce in *United Contractors Ltd.* That case involved a dispute over a contract for the supply of fuel for a construction project. A Mr. Ahola was employed by the defendant during the contract as an engineer on site and was also responsible for overseeing deliveries. He was called as a witness for the defence, and also acted as a resource person throughout the litigation, providing advice on tactical issues. By the time of trial, Mr. Ahola was no longer working for the defendant, having moved to a private engineering firm. In order to secure his presence at trial, the defendant agreed to compensate him for his time at his regular rate. The defendant argued that the reality and practicality of the situation was such that it would be unreasonable for the defendant to rely on its subpoena power and

refuse to compensate the witness reasonably for his time and trouble in giving material evidence: *United Contractors Ltd.* at 5.

[33] After noting the fundamental difference between a compellable fact witness and a non-compellable opinion witness, Master Joyce said at 9–10:

Notwithstanding that it was open to the defendant in this case to rely upon its ability to compel the attendance of the witnesses, through subpoena if necessary, and thereby limit its obligation for attendance fees to \$20 per day, should the successful party be permitted to recover a greater sum from the unsuccessful party because the successful party has made an arrangement with the witness for some compensation greater than that provided for by Appendix C? In my opinion there are good reasons why that question should be answered in the negative.

In the first place, to do would be to detract from the long standing principle, reaffirmed in the *Northland Properties Ltd.* decision, that the cost of the judicial process is to be borne, in part, by the citizenry at large in requiring persons with material evidence to give of their time as witnesses. To permit the party to recover the attendance fee on an assessment of party/party costs would be to sanction, in effect, an amendment to Appendix C, Schedule 3 to permit the witness, in effect, to extract an attendance fee of more than \$20 in the particular case. It could tend to lead witnesses to refuse to cooperate unless paid what they might believe their time is worth and might encourage a system of paid witnesses. That, in my respectful opinion, is to be avoided.

If the submission of the defendant is accepted in this case then in future cases registrars will have to inquire into the particular circumstances surrounding the securing of the witness' evidence and determine whether counsel acted reasonably in making a private arrangement with the witness rather than compelling that witness' attendance. This will create additional difficulty and uncertainty in the assessment process which is not desirable. Will it be necessary to have evidence from the witness as to his or her degree of cooperation? Will the reasonableness of the arrangement depend upon the factors referred to in *Northland Properties Ltd. v. Equitable Trust Co.* as appropriate for consideration when determining the quantum of preparation fees or some other factors?

I therefore conclude that the defendant is not entitled to recover an amount in respect of the witnesses' attendances greater than \$20 per day plus reasonable travel, meal and lodging expense.

[Emphasis added.]

[34] The Nova Scotia Court of Appeal reached a similar conclusion in *D.W. Matheson & Sons Contracting Ltd. v. Canada (Attorney General)*, 2000 NSCA 44, though the language of the statutory provisions was somewhat different from that of the British Columbia Rules.

[35] I would adopt this reasoning. In my view, a payment made to a fact witness that exceeds the amount set out in Schedule 3 is not a disbursement “properly incurred in the conduct of the proceeding” as that phrase is used in Rule 14-1(5)(a). That is not to say that a party may not reasonably agree to make an additional payment to a witness to cover loss of income or other expenses. A payment of that kind is not prohibited by Schedule 3. Subject to legal and ethical limits, a party is free to enter into such arrangements—the payment, however, is not recoverable from the opposing party as a disbursement.

[36] In my view, the history of the costs regime supports this interpretation. At common law, witnesses were not entitled to any compensation for the sacrifices expected of them in discharging their civic duty to testify, even if that sacrifice involved travel expenses, loss of time, income or profits: J. H. Wigmore, *Wigmore on Evidence* (McNaughton Revision), vol. 8 (Toronto: Little, Brown and Company, 1961), at 72–73, 136; *Northland* at 132–33. It was not until the mid-sixteenth century that the United Kingdom modified the common law to permit a witness to claim reasonable sums for travel and accommodation expenses: *Statute of Elizabeth*, 1562–63, 5 Eliz. I, c. 9, s. 12; *Wigmore on Evidence* at §2202, pp. 135–36.

[37] Although the legislation did not provide for payment of fees for attending trial, a practice developed of allowing professional witnesses a *per diem* for their attendance: *Collins v. Godefroy* (1831), 109 E.R. 1040, 1 B. & A.D. 951 (K.B.), at 956–57; *Pell v. Daubeny* (1850), 155 E.R. 416, 5 Ex. 954 (Exch.), at 958–59; *The Ibis VI* (1921), 90 L.J.P. 289 (C.A.), at 297–98.

[38] In the mid-nineteenth century the United Kingdom enacted the first scale of witness fees giving all witnesses, not just professional men, a small measure of recompense for performance of their civic duty, although the fee payable was still determined by the witnesses’ station in life: *Common-Law Procedure Act* 1852, 15 and 16 VIC., CAP. 76. The courts did not apply the fixed attendance fees to expert opinion witnesses, however, recognizing that a witness testifying in that capacity had

no civic duty to bestow his skill and professional experience gratuitously: *Webb v. Page*.

[39] In British Columbia, the 1890 Rules allowed fact witnesses a fee of \$2 to attend to give evidence, although some witnesses were entitled to less and some more based on race or profession: *Supreme Court Rules, 1890*, Appendix M.

[40] In 1906 the Rules expanded the compensation claimable by a witness to include “a reasonable sum” for the time employed and the expense incurred by a “professional or scientific” witness in preparing “to give the testimony expected”: *Supreme Court Rules, 1906*, Appendix M. A taxing officer was also given discretion to allow recovery of higher fees, though not special charges or expenses to witnesses or disbursements not specifically provided for under the fee tariff unless by analogy to an existing tariff fee: *Supreme Court Rules, 1912*, Rule 27(30). In *Dassiuk v. Waugh* (1962), 39 W.W.R. 677 (B.C.S.C.), the court determined that a daily witness fee greater than the fixed tariff could not be recovered from the opposing party.

[41] Between 1906 and 1993, the legislature amended Schedule 3 a number of times, eventually providing that any witness other than the parties or their affiliates was entitled to the same daily witness fee of \$20, along with reasonable preparation fees, thus moving away from making distinctions in the attendance fee based on race or profession. As Fraser J. observed in *Northland* at 132,

...[t]he result is the status of a witness and the reason he or she may possess relevant knowledge is no longer legislatively recognized as a factor in the amount of attendance fees to which he or she is entitled.

[42] In 1993, the legislature added introductory language to Schedule 3 mandating payment of the prescribed witness fees in advance of attendance, unless the court ordered otherwise.

[43] In my view, the witness fees contained in Schedule 3 demonstrate the legislature’s continued intention to provide a fixed amount to compel a witness’

attendance at trial regardless of occupation, and a flexible “reasonable allowance” or sum for the witnesses’ meals, accommodation, and preparation.

[44] I note in this regard that the legislature used more expansive language in addressing attendance fees payable to out-of-province witnesses under the *Subpoena (Interprovincial) Act*, R.S.B.C. 1996, c. 442, which provides:

- 7 (1) A person who is required to attend before a court in British Columbia by a subpoena adopted by a court outside British Columbia, may request the court in British Columbia to order additional fees and expenses to be paid for the person’s attendance as a witness.
- (2) If satisfied that the fees and expenses previously paid to the person for the person’s attendance are insufficient, the court may order the party who obtained the subpoena to pay the person at once such additional fees and expenses as the court considers sufficient.
- (3) Fees and expenses paid under an order made under this section are disbursements in the cause.

[Emphasis added.]

[45] Ms. Luis submits this interpretation of Schedule 3 and Rule 14-1(5) works an unfairness. While recognizing that everyone has a civic duty to testify in judicial proceedings, she argues that professionals who are frequently involved in litigation as fact witnesses due to the nature of their field bear an “unfair burden” in discharging that duty.

[46] Although I agree that some professions are more regularly called upon to testify in court than others, it is not readily apparent that a particular individual will be called upon more often. Further, these appeals have focused on the potential financial hardship to professionals such as physicians, engineers and lawyers called to testify as fact witnesses, but as Justice Park observed in *Loneragan v. The Royal Exchange Assurance*, (1831), 131 E.R. 280 at 283, “time to a poor man is of as much importance as to an attorney.” Indeed, the loss of a day’s work at minimum wage may be a greater relative hardship to a lay witness than the loss of a professional person’s earnings. In addition, to focus on monetary losses alone may be too narrow. Although some witnesses make a sacrifice of time and labour and

thus of profits and wages, others sacrifice privacy, and experience the “disagreeable consequence of disclosure”: *Wigmore on Evidence*, vol. 8 at 72.

[47] In my view, the interpretation Ms. Luis advances is of no small significance, departing as it would from the longstanding tradition that attendance at trial is “an inherent burden of citizenship”. As John Henry Wigmore put it so eloquently:

That the ordinary witness should be paid more than the nominal dollar — i.e., should be fully indemnified for sacrificing his day’s livelihood in order to perform his testimonial duty — is a plausible assertion. The argument against it, that the total cost of reimbursing highly paid citizens would be prohibitive, gives no real answer, for the state is bound to supply the necessities of justice however expensive. The best answer is that the testimonial duty, like other civic duties, is to be performed without pay, the sacrifice being an inherent burden of citizenship. Neither for military service nor for public office can the citizen claim that he shall be paid on a scale which will bear any equable proportion to the loss of his livelihood’s income. Any other principle would be worthy only of a purely mercenary community. If the sacrifice made is a real one, the dignity of the service rendered should ennoble it. The sense of civic duty done must be the consolation.

Wigmore on Evidence, vol. 8 at 136. [Emphasis added.]

[48] If there are sound policy reasons for departing from that tradition and the present regime, it is in my view for the legislature and not the judiciary to effect that change.

Disposition

[49] In summary, I am of the view that the payment of an attendance fee to expert fact witnesses beyond the fee prescribed in Schedule 3 is not a disbursement recoverable from the opposing party. I would therefore dismiss the appeals, with thanks to all counsel for their able and thorough submissions.

“The Honourable Madam Justice Fenlon”

I AGREE:

“The Honourable Mr. Justice Frankel”

I AGREE:

“The Honourable Mr. Justice Groberman”

TAB 7

COURT OF APPEAL FOR ONTARIO

CITATION: R. v. Ajise, 2018 ONCA 494

DATE: 20180530

DOCKET: C57589

Sharpe, Pardu and Fairburn JJ.A.

BETWEEN

Her Majesty the Queen

Respondent

and

David Ajise

Appellant

R. Craig Bottomley, for the appellant

Xenia Proestos, for the respondent

Heard: March 21, 2018

On appeal from the conviction entered on June 14, 2013 and the sentence imposed on January 10, 2014 by Justice Thomas A. Bielby of the Superior Court of Justice, sitting with a jury.

Sharpe J.A.:

[1] The appellant, a tax return preparer, was charged on a one count indictment with fraud over \$5,000 for filing false claims of charitable donations on behalf of his clients. The appellant did not dispute that he had filed hundreds of claims for charitable deductions for donations of used goods to a registered

charity called Tractors for Daily Bread (“Tractors”) and that he had been paid by his clients a percentage of the amounts claimed, usually between 10 and 15%. He testified, however, that he believed that the claims were valid and that they had been verified by Tractors.

[2] After a twelve day jury trial, the appellant was convicted and sentenced to 30 months in custody.

[3] The appellant submits that the trial judge erred in admitting the non-expert opinion evidence of a Canada Customs and Revenue Agency (“C.C.R.A.”) investigator, and further erred in his instruction to the jury on the *mens rea* component of fraud and the use that could be made of prior inconsistent statements. The appellant also seeks leave to appeal his sentence.

FACTS

[4] In 2002, the appellant, at the time a recent immigrant from Nigeria, took an eight week tax preparation course and started his own tax preparation business. He met Mr. Eto Eto, the executive director of Tractors. Tractors’ stated purpose was to collect donations in cash and in used goods to alleviate poverty in Africa.

[5] Eto referred tax clients to the appellant and allowed the appellant to carry on his tax preparation business at Tractors’ office. The appellant also met clients at coffee shops and in his car to prepare their tax returns.

[6] The appellant carried on his tax preparation business for the taxation years 2003, 2004 and 2005 in the name of Datronix Solutions, an unincorporated entity. In 2006, he involved Ayodeji Salami in his tax preparation business. Salami obtained his own Efiler number but acted under the appellant's instructions.

[7] The Crown called eleven of the appellant's clients, and one client of Salami's, as witnesses. They testified that the appellant suggested that they could reduce their income tax by making donations in cash and in kind to Tractors. The appellant asked them to pay him 10 to 15% of the amount of the donation to be claimed and also charged them a fee for preparing their return. Over the three year period between 2003 and 2005, the appellant submitted 27 tax returns on behalf of those clients claiming a total of \$223,793 in charitable donations resulting in tax refunds of \$58,138. The 10 to 15% fee charged by the appellant was typically paid from the proceeds of the clients' tax refund as the appellant would hold their cheques until they received their refunds. The clients testified that they did not think that they were doing anything illegal, but eleven of them admitted that they had made no donations in kind to Tractors. The evidence of the twelfth client was very vague about what he had donated. All of these witnesses testified that they had been reassessed and had to re-pay the C.C.R.A.

[8] The Crown also called Seeta Maraj, a C.C.R.A. investigator. Maraj prepared a number of detailed spread-sheets summarizing information obtained from documents filed with the C.C.R.A., bank documents obtained pursuant to a production order and documents seized pursuant to search warrants executed at the Tractors premises and the residences of the appellant, Eto and Salami. The appellant's clients' tax returns were found on his computer. The charitable receipts issued by Tractors were found on Eto's computer. The appellant made no objection when the spreadsheets and other documents were introduced in evidence.

[9] While Maraj's evidence was lengthy and the supporting documents were voluminous, the totality of that evidence may be summarized as follows. The spreadsheets itemized, name by name, the claims for charitable donations made in income tax returns filed by the appellant on behalf of clients for the taxation years 2003, 2004 and 2005, and by Salami for the taxation year 2005. A significant number of returns claim large amounts for charitable donations, averaging 20 to 30% of each client's reported income. C.C.R.A. records indicated that the total amount of charitable donations claimed by the appellant's clients was \$842,593 in 2003, \$1,801,123 in 2004, and \$1,830,712 in 2005. Salami's clients claimed \$549,028 in 2005. The refunds paid on account of those claims were for approximately \$1,400,000.

[10] A spreadsheet found in Eto's residence listed \$766,030 in charitable donations for the appellant's clients in 2003. Spreadsheets for the years 2004 and 2005 linked the claimed donations by each client with the cancelled cheques the appellant had received for making charitable claims. The total amount of charitable receipts claimed was \$1,137,255 for 2004, and \$1,226,766 for the appellant and \$421,436 for Salami for 2005. The spreadsheets showed donation receipts for the appellant's clients found on the Tractors computer, indicating claims for donations of \$951,050 in 2004 and \$998,910 in 2005. One of the documents seized was an email from the appellant to Eto providing a four page list giving the names of clients and the amounts they had claimed for charitable donations to Tractors for the year 2005.

[11] By contrast, Tractors reported receiving gifts in the amounts of \$700 for 2003, zero in 2004 and \$200 in 2005.

[12] The Crown also called Salami who testified that he assisted the appellant in his tax preparation business for the 2005 taxation year.

[13] The appellant testified in his own defence. He swore that he did not know that the charitable claims he filed on behalf of his clients were false. He relied on Eto to verify the claims, to have the donated goods appraised and to ensure that proper charitable receipts were filed. He testified that he was shocked when the C.C.R.A. investigated his clients and only realized that the charitable donation

claims were false when he saw that Tractors had reported little or no charitable donations.

[14] The appellant conceded that he had received payments for 10 to 15% of the charitable donations claimed and that he had not reported those payments on his tax returns. The appellant testified that he had often held his clients' cheques and only cashed them after the refund was paid. He denied that the payments he received from clients were for fraudulent charitable receipts and asserted that they were by way of commission for soliciting charitable donations.

ISSUES

[15] The appellant appeals his conviction on three grounds:

1. That the trial judge erred by admitting non-expert opinion evidence from a C.C.R.A. investigator and in his jury instruction relating to that evidence;
2. That the trial erred in his instruction on *mens rea*; and
3. That the trial judge erred in his instruction relating to prior inconsistent statements.

The appellant also seeks leave to appeal his sentence.

ANALYSIS

1. Opinion evidence

[16] The appellant argues that the trial judge erred by admitting what amounted to opinion evidence from Seeta Maraj, the C.C.R.A. investigator, who was not

qualified as an expert. This argument focusses on the evidence relating to Exhibit 12, a spreadsheet headed “Tax Evaded Calculation – Ajise (Efiler D6458& E0300 & Salami (Efiler D5913)” that gives totals for “false donation claims” in returns filed by the appellant for 2003, 2004 and 2005, and Salami for 2005. Exhibit 12 was filed towards the end of Maraj’s evidence in chief. The appellant’s trial counsel did not object to its admissibility. Exhibit 12 identified “false donation” claims totalling \$842, 593 in 2003, \$1,801,123 in 2004 and \$2,379,740 (\$1,830,712 by the appellant and \$549,028 by Salami) in 2005. Exhibit 12 also stated that \$241,678 in tax was “evaded” in 2003, \$493,445 in 2004 and \$678,043 (\$521,335 for the appellant and \$156,708 for Salami) in 2005. These figures were derived from what the C.C.R.A. files showed had been claimed by way of charitable donations on the returns filed by the appellant and Salami

[17] Maraj was asked to explain “how you know those donations were false”. She explained she had compared the amounts shown by the C.C.R.A. records with the amounts shown on the spreadsheets she had prepared based on what was found on Eto’s computer and based on the cancelled cheques the appellant had received. These spreadsheets set out, client by client, the charitable claims the clients had made for donations to Tractors. The total amounts from those lists were somewhat less than shown on Exhibit 12: for 2003, \$766,030 rather than \$842,593; for 2004, \$1,137,255 rather than \$1,801,123; and for 2005, \$1,226,766 rather than \$1,830,712. She explained that while she had tracked

cancelled cheques, some of the payments to the appellant could have been in cash. She testified that the amounts were close enough to lead her “to believe that all of the donation claims were false”. The appellant submits that this amounted to opinion evidence that should not have been admitted as Maraj was not qualified as an expert.

[18] The appellant also takes issue with Maraj’s evidence that she believed that one of the lists found on Eto’s computer had been prepared by the appellant. When asked why she thought that, Maraj explained that the list had personal information about the clients as well as filing information that would not have been available to Eto.

[19] No objection was made to any of this evidence and the appellant’s trial counsel began her cross-examination of Maraj by asking: “You indicated to us today that your belief that the receipts were false were, in effect, based on a couple of different things. Is that right?” Maraj replied that her belief was based on two facts. First, that Tractors’ charity returns reported little or no charitable donations. Second, that while there were discrepancies between the amounts shown on Exhibit 12 and the amounts derived from the spreadsheets she prepared, the differences were not sufficiently large to give rise to concern. The appellant’s trial counsel probed Maraj on the significance of the discrepancies but Maraj maintained her position that all the claims for charitable donations filed by the appellant were false.

[20] The appellant also submits that Crown counsel repeatedly invited the jury in her closing address to rely on Maraj's "*findings* of false charitable donation claims" (emphasis added). The prejudice to the appellant was compounded when the trial judge in his instructions to the jury referenced Maraj's testimony that the returns filed by the appellant "contained false donation claims in her *opinion*" (emphasis added). Further exception is taken to the instruction reminding the jury of Maraj's "belief" that [the appellant] prepared one of the lists of the donations found on Eto's computer, and that "[the] minimal or nil donations reported by Tractors confirmed for Ms. Maraj her *conclusions* that claims were false."

[21] The Crown argues that Maraj's evidence was factual in nature and that there was no need to qualify her as an expert. The Crown also submits that as the appellant's trial counsel did not object to the evidence impugned on appeal, the argument that it should be ruled inadmissible on appeal should not be entertained.

[22] I am not persuaded that the admission or treatment of Maraj's evidence at trial amounts to a reversible error for the following reasons.

[23] First, Maraj is properly characterized by the Crown as a fact witness, called to explain how she had assembled and summarized a large volume of documentary evidence relating to the income tax returns filed by the appellant. It was only at the end of her evidence in chief, when Exhibit 12 was introduced,

that she was asked to explain why she believed all the charitable claims filed by the appellant's clients were false. When asked that question, she simply explained what the records showed. Maraj was doing nothing more than explaining her sources and her methodology in a way that would allow the jury to understand and to assess the numbers on Exhibit 12. The lists from Eto's computer, the list on the appellant's computer, and the compilation derived from the cancelled cheques demonstrated that a very large number of the appellant's clients had submitted substantial claims for charitable donations to Tractors representing a disproportionate part of their income. The records showed that the appellant had been directly paid 10 to 15% of the amounts claimed by way of donation and that Tractors had reported receipt of virtually no charitable donations. While the total of the itemized, client by client lists of Tractors donations was less than the total showed by C.C.R.A. records for all returns filed by the appellant, Maraj testified that they were close enough to lead her to believe that all the charitable claims the appellant filed were false, which is why she included them in the "false donation" column on Exhibit 12. While it might have been preferable had Maraj not been asked to formulate her summary of the evidence she found in terms of her belief, and had the trial judge not referred to her opinion in his instructions, it remains that Maraj's evidence was essentially factual in nature. It was entirely proper for her to explain to the jury the nature of the calculations she had made and the source data she used to compile Exhibit

12, which was an admissible demonstrative aid designed to summarize the properly admitted evidence and “to assist the jury in understanding the entire picture presented by voluminous documentary evidence”: *R v. Scheel* (1979), 42 C.C.C. (2d) 31, at p. 34 (Ont. C.A.); *Kon Construction Ltd. v. Terranova Developments Ltd.*, 2015 ABCA 249, 20 Alta L.R. (6th) 85, at para. 46. As with the summaries in *Scheel*, the usefulness of Exhibit 12 “depended entirely...upon the acceptance by the jury of the proof of the facts upon which [it was] based”: *Scheel*, at p. 34 . The jury was in a position to assess for itself the worth of Maraj’s explanation for her calculations as they did not rest on or draw its force from any specialized or technical skill or knowledge: see *R. v. Hamilton*, 2011 ONCA 399, 271 C.C.C. (3d) 208, at para. 277.

[24] Maraj explained how she had compiled the spreadsheets and what her background sources were. Maraj’s calculations were explained and her reasons for labelling the donations “false” were fully explored by defence counsel and exposed in a way that could be assessed by the jury as a matter of logic and common sense. Even if not every dollar of the \$5,023,456 shown on Exhibit 12 was nailed down as being a Tractors’ donation, it was open to a trier of fact to infer that false claims comprised a significant portion of that total. The background sources were available for the jury’s consideration. In her closing address, Crown counsel encouraged the jury to consider those sources. The trial judge also referred to the background sources in reviewing the evidence during

his charge to the jury. The jury was also instructed that they could accept all, some or none of the evidence.

[25] Maraj's statement that she believed that the appellant was the source of one of the lists found on Eto's computer has to be read in context. The evidence showed that the appellant had sent lists to Eto and, as Maraj explained, the list at issue contained information to which the appellant was privy and Eto was not. The question was one of fact upon which a non-expert witness could properly express a view: see *R. v. Graat*, [1982] 2 S.C.R. 819, at pp. 835-839.

[26] Second, the appellant did not object to this evidence at trial. The Crown suggests that this could have been a tactical decision as the alternative might have been to face the direct evidence of more of the appellant's clients. Related to the failure to object is the manner in which the appellant's trial counsel cross-examined Maraj, effectively accepting and joining issue with the manner in which Maraj's evidence had been led. The appellant's trial counsel was content to allow Maraj to testify as to her belief and then to challenge that belief on cross-examination.

[27] The lack of objection, the way Maraj was cross-examined and the use of Maraj's evidence during closing submissions suggests that Maraj's evidence was not impermissible opinion evidence prejudicial to the position of the appellant: *R.*

v. Daley, 2007 SCC 53, [2007] 3 S.C.R. 53, at para. 58; *R. v. Potts*, 2018 ONCA 294, at paras. 17, 55.

[28] The third and related reason that leads me to reject this argument is how Maraj's evidence relates to the substance of the defence advanced by the appellant. The appellant did not seriously challenge the contention that his clients had made false charitable donations. His defence was that he believed that the donations were valid and that he had relied on Eto to verify the donations before authorizing charitable receipts. Maraj's evidence went to the *actus reus* of the fraud – whether false claims were made and in what amount. The appellant's defence was that he did not know that the claims were false and that he lacked the *mens rea* to commit fraud.

[29] Indeed, defence counsel's closing address demonstrates that the appellant may well have wanted Maraj's evidence admitted. He relied upon this evidence to advance the proposition that he was an unwitting dupe in a fraudulent scheme. As defence counsel submitted in her closing submissions, if he had known about the fraud, he would have taken some steps to cover his tracks. According to counsel, the "obvious" nature of the fraud demonstrated that the appellant did not know he was unwittingly involved in a fraudulent scheme:

And David Ajise, this really smart guy, this mastermind behind this scheme risks all of the things I've just mentioned to you, to engage in a fraudulent scheme and then he makes sure to make it as obvious as possible. Let's

just make it as obvious as possible and leave a clear paper trail leading to me.

You've heard the evidence ... when he's submitting these – these tax returns on behalf of clients, he's using his own Efile in each of the years, to ensure that the Canada Revenue Agency can trace back each of these returns to him. Let – let's just engage in a fraudulent scheme, let's plan it, let's intend it, but then make it as obvious as possible, so the CRA can trace it all back to me.

...

If this was not a legitimate scheme, I put to you again that Mr. Ajise would have warned people or signaled to people that this was not legitimate ... there's other ways of filing. ... Why make it so obvious? It just doesn't make any sense.

...

Why send these spreadsheets to Mr. Eto Eto ...? Well the point of the spreadsheets is because Mr. David Ajise genuinely believed that Mr. Eto was following on the donations.

[30] The nature of the appellant's defence distinguishes this case from the cases relied upon by the appellant; *R. v. Sekhon*, 2014 SCC 15, [2014] 1 S.C.R. 272 and *R. v. Lewis*, 2012 ONCA 388, 284 C.C.C. (3d) 423. *Sekhon* was a drug importation case. The accused denied knowledge that the truck he was driving had a concealed compartment containing cocaine. The Supreme Court held that the trial judge erred by admitting the evidence of a police officer, who had been qualified as an expert, that he had never encountered a blind courier. The Court held that this was purely anecdotal evidence that lacked relevance and probative value and that did not qualify as expert evidence. *Lewis* was also a drug importation case where the accused denied knowledge of the drugs. A Border Services Inspector who had not been qualified as an expert testified that short

notice ticketing and cash payment were strong indicators of a drug courier. This court held that there was danger that the jury would clothe the Inspector's evidence with an aura of authority that it did not deserve. In both cases, the impugned evidence went to the heart of the accused's defence.

[31] *Sekhon* and *Lewis* both involved challenges to the evidence of inspectors and police officers testifying, in effect, that the accused is guilty and clothing that opinion with an aura of expertise. In both cases, the key issue was whether the accused knew that he was carrying drugs and in both cases, the impugned evidence denied the validity of that defence. Maraj's evidence does not fall into that forbidden category. Her evidence was limited to the issue of whether false donation claims had been filed and, as I have found, she was entitled to give that evidence. She said nothing about the appellant's defence of lack of knowledge that the claims were false and the risk posed by the improper evidence in *Sekhon* and *Lewis* was not present in this case.

[32] Finally, I note that in her dissenting reasons, my colleague Pardu J.A. places considerable emphasis on the suggestion that to succeed on this ground, the respondent must rely on the curative proviso but is precluded from doing so as that argument was not explicitly made in either oral or written submissions. I agree that no explicit reference was made to s. 686(1)(b)(iii) of the *Criminal Code*. However, even assuming that resort to the proviso is required in this case, it is my view that the substance of the proviso point was raised. In her

submissions before this court, Crown counsel placed considerable reliance upon the argument that the defence effectively conceded at trial that the donation claims were fraudulent and instead relied entirely on the appellant's claim that he lacked knowledge of the fraud. On this basis, the Crown argued that even if the impugned evidence amounted to opinion evidence, it did not go to the only live issue at trial. The Crown also noted that Maraj's impugned statements comprised a small portion of the evidence advanced during a multi-day trial, and were admitted without objection by defence counsel. In my view, these lines of argument amounted in substance to a submission that even if there was an error in admitting the evidence or in failing to conduct a *voir dire*, no substantial wrong or miscarriage of justice had occurred and the appeal should be dismissed on that account. As the substance of that point was addressed and fully argued before this court, the failure to specifically reference s. 686(1)(b)(iii) should not be fatal.

[33] Accordingly, I would not give effect to this ground of appeal.

2. Instruction on *mens rea*

[34] The appellant takes issue with the trial judge's jury instruction on the *mens rea* required for fraud. The trial judge instructed the jury that if they were satisfied beyond a reasonable doubt that the government had suffered a deprivation

caused by deceit, falsehood or other fraudulent means, they were to go to the next question:

[D]id [the appellant] intend to defraud the Government of Canada. This element relates to [the appellant's] state of mind at the time he deprived the Government of Canada or allegedly deprived the Government of Canada of tax revenue by deceit, falsehood or other fraudulent means.

To prove this essential element Crown counsel must satisfy you beyond a reasonable doubt that [the appellant] meant to say and/or to do those things that amount to deceit, falsehood or other fraudulent means and that he knew that saying and/or doing them to put at risk the economic (financial) interests of the Government of Canada. *It does not matter whether [the appellant] thought that what they were saying and or doing was not dishonest or thought that neither the government nor or anyone else would suffer harm in the end as a result.* [Emphasis Added.]

[35] The appellant takes issue with the italicized passage and argues that it effectively took away his defence of lack of knowledge that the charitable claims were false.

[36] After the charge was delivered, the jury asked a question stating that as the appellant “put so much trust in Mr. Eto” they would like to have the last fifteen minutes of the appellant’s cross-examination played back. That request was granted. The portion of the cross-examination focused on how the fees were collected, recorded and divided with Eto and another individual, the due diligence required of a tax filer, and how the appellant had relied upon Eto to have donated

goods appraised and proper receipts issued. The jury's question, according to the appellant, proved that they had been misled by the jury instructions as to the *mens rea* required for fraud.

[37] The Crown points out that the judge's instruction on state of mind tracks *Watt's Manual of Criminal Jury Instructions*, 2d ed. (Toronto: Thomson Reuters Canada Limited, 2015), and that the impugned passage is derived from the Supreme Court of Canada's decision in *R. v. Théroux*, [1993] 2 S.C.R. 5. The Crown further submits that when the instruction is read as a whole, it would have been clear to the jury that in order to convict the appellant, they had to be satisfied that he knew that the tax returns were false.

[38] *Théroux*, the source for the impugned passage, involved a developer who assured purchasers that their deposits were insured. This claim was false, the developer's company went bankrupt, residences were not built, and there was no insurance to protect the purchasers who lost their deposits. The appellant was charged with fraud. McLachlin J. posed the issue to be resolved as follows, at p. 14:

There is no doubt that the appellant deliberately practised a deceitful act, constituting the *actus reus* of the offence of fraud. The issue is whether the fact that he honestly believed that the projects would be completed negates the guilty mind or *mens rea* of the offence. This requires this Court to examine the question of what constitutes the *mens rea* for the offence of fraud.

[39] At p. 19, McLachlin J. applied to fraud the “traditional criminal law principle that the mental state necessary to the offence must be determined by reference to the external acts which constitute the *actus* of the offence...” This means that “the fact that the accused may have hoped the deprivation would not take place, or may have felt that there was nothing wrong with what he or she was doing, provides no defence”. Once the *actus reus* is made out, *Théroux* holds that “it need only be determined that an accused knowingly undertook the acts in question, aware that deprivation, or risk of deprivation, could follow as a likely consequence”: see pp. 19-20.

[40] The fact that the developer honestly believed at the time he made the representation that the houses would be built provided no defence. He had knowingly made a false statement to induce the buyers to enter contracts and provide their deposits and he therefore had the *mens rea* for fraud.

[41] I agree with the appellant to this extent: on the facts of this case, it was not strictly necessary to include the impugned passage. Neither the Crown nor the defence suggested that the appellant hoped for an outcome that would not result in loss to the government. The instruction would have been adequate without the impugned passage.

[42] However, for the following reasons, I do not agree that including this sentence deprived the appellant of his defence of mistaken belief.

[43] I am satisfied that when the instruction is read as a whole, it was made apparent to the jury that they had to be satisfied beyond a reasonable doubt that the appellant knew that he was submitting false charitable donation claims. The jury were instructed that the Crown had to prove beyond a reasonable doubt “that [the appellant] intended to defraud the government of Canada” and to acquit if the Crown failed to prove beyond a reasonable doubt that he “intended to deprive the Government of Canada of tax revenue”. The judge fairly outlined the appellant’s evidence that he believed that the donations were valid and the jury would have understood that any doubt on the point of the appellant’s knowledge of the falsity of the donations had to result in acquittal. A *R. v. W.(D.)* caution was given and the jury were instructed:

[I]f you believe [the appellant’s] evidence and accept it as true, that he did not intentionally defraud the Government of Canada, you must find him not guilty of the offence. Even if you do not believe his evidence, if it leaves you with a reasonable doubt about the crime as I’ve defined it, you must find him not guilty of the offence.

[44] I am not persuaded that the arguably unnecessary inclusion of the one sentence mandated by *Thérault* distorted or detracted from the essential point made clear by the balance of the instruction, namely, that the Crown had to prove beyond a reasonable doubt that the appellant knew that the charitable donation claims were false.

[45] Second, the draft charge was vetted with counsel. Mid-way through the instruction and during a break, the appellant's trial counsel expressed concern about the *mens rea* instruction, but did not object to the passage challenged on appeal. The trial judge considered her objection and agreed to add the following:

[T]he real issue to be determined is whether [the appellant] knowingly participated in the scheme, claiming for his clients' donations he knew were not made and profiting from the scheme by taking a share of ten to 15 percent of the monies collected.

[46] Counsel indicated that the addition satisfied her concerns on *mens rea* and made no further objection.

[47] Accordingly, I would not give effect to this ground of appeal.

3. Instruction on prior inconsistent statements

[48] The appellant submits that the trial judge erred by failing to instruct the jury that if a witness adopted a prior inconsistent statement as true, the jury could use those prior inconsistent statements for their truth.

[49] In my view, there is no merit to this ground of appeal for the simple reason that neither of the two Crown witnesses identified by the appellant adopted their prior inconsistent statements as true. Monique Robinson, one of the appellant's former clients, had told investigators that goods were donated to Tractors, but

testified at trial that she was mistaken as her husband had explained that the goods were given to a friend. Clive Williams, another former client of the appellant's, told the investigator that he had donated old furniture to Tractors and while attempt was made to have him adopt that statement on cross examination, he did not do so.

4. Sentence appeal

[50] The trial judge gave detailed reasons for sentencing the appellant to 30 months in custody. He noted that the appellant has a family of three children, many positive references from his friends, church and community and that the appellant would face deportation without a right of appeal if sentenced to six months imprisonment or more. The appellant had a prior and dated conviction for fraud but had received a pardon for that offence. The trial judge reviewed the case law and determined that a sentence of 30 months custody was appropriate.

[51] The sole ground for the sentence appeal is that even if the conviction is upheld on the basis of the evidence of the appellant's clients, it is still open to this Court to find that the trial judge erred in relying on Maraj's evidence to conclude that the amount involved in the fraud was in the \$1 million range. The sentence should therefore be reduced to 6 months less a day.

[52] It was only at the sentencing stage that the appellant raised any issue as to the fact that Maraj had not been qualified as an expert. The trial judge

dismissed that objection, holding that it was not necessary to qualify her as an expert as she had simply “[re]ported on her findings and her evidence as to the total amounts in issue was not seriously challenged.” The trial judge added that there was no need to call all of the appellant’s clients who had claimed false donations, since “[a] sampling was sufficient to prove the fraud” and he was satisfied that it had a value of over \$1 million.

[53] It is not necessary to repeat here what has already been said in relation to the conviction appeal as to the magnitude of this fraud. Simply put, I am satisfied that the trial judge did not err in finding that when the *viva voce* evidence of the appellant’s clients is considered together with the documentary evidence, the Crown did prove fraud in the range of \$1 million. Even if one were to reject the Crown’s contention that *all* of the charitable donations claimed in returns filed by the appellant were false donations, the Crown established that the appellant submitted a very large volume of claims for charitable donations to Tractors on behalf of his clients and that the appellant had been paid 10 to 15% for each of those claimed donations.

[54] Further, the trial judge took into account the immigration consequences of the sentence he imposed and a term of imprisonment of more than 6 months was very much in line with the principles enunciated by this Court in *R. v. Leo-Mensah*, 2010 ONCA 139, 101 O.R. (3d) 366.

[55] I would grant leave to appeal the sentence but dismiss the sentence appeal.

DISPOSITION

[56] For these reasons, I would dismiss the appeal from conviction, grant leave to appeal sentence but dismiss the sentence appeal.

“Robert J. Sharpe J.A.”

“I agree Fairburn J.A.”

Pardu J.A. (Dissenting):

[57] The appellant or his agent prepared and filed hundreds of tax returns in 2003, 2004 and 2005. The taxpayers claimed they had made charitable donations of \$5,023,456 to Tractors for Daily Bread (“Tractors”). A Canada Customs and Revenue Agency (“C.C.R.A.”) investigator, Seeta Maraj, who was trained as a general accountant, testified that in her opinion all of the donation claims were false, resulting in tax evaded of \$1,413,166. There was no ruling,

however, allowing her to give opinion evidence. She based her opinion that the charitable donations were false on two essential bases:

1. The Tractors charitable returns reported only nominal amounts of tax receipted gifts.
2. The donations claimed by the taxpayers were disproportionately large compared to their incomes.

[58] The differences between the returns filed by the appellant and those filed by Tractors do not in and of themselves lead to the inference that the appellant filed false returns. Either the appellant or Tractors or both could have filed false returns.

[59] The appellant's defence was that to his knowledge, the donation claims were valid, and that he did not know that charitable donations were not in fact made to Tractors, and did not know that the donation receipts issued by Tractors were false. There were some appraisals establishing the value of goods donated to Tractors.

[60] Maraj had no personal knowledge as to whether the taxpayers had really donated money or goods to Tractors. She began her evidence by explaining charts that organized data she had retrieved from the tax returns prepared by the appellant, Tractors donation records, bank records of the appellant, and computer records. I agree that this was factual information not requiring a *voir*

dire. Partway through her examination in chief, however, rather than eliciting the factual information collected, the Crown began to ask leading questions as to the nature of the donations:

First of all I just want to be clear, the – the amounts of – in total false donations claimed, as well as the total tax evaded due to false donations that you just mentioned....those amounts can be found at Tab 7 and 8 of the trial book.

[61] This theme was repeated in many questions and answers that followed. In her examination in chief, Maraj went on to testify how she came to her opinion that the donations were false. She had interviewed several taxpayers who told her that they had not dealt with Tractors themselves. In cross examination, she explained that although there were some discrepancies between the donation amounts claimed and the amounts indicated on the spreadsheets she prepared as part of her investigation, the differences were not sufficiently large to give rise to concern. Maraj's estimation of the total donation amounts claimed was off by roughly \$600,000 but Maraj testified she could still conclude that the charitable donation claims were false, particularly given that the donations claimed were large in relation to the taxpayers reported net income for 2004, for example.

[62] Crown counsel repeatedly invited the jury in her closing address to rely on Maraj's "*findings*" of false charitable donation claims (emphasis added). In his instructions to the jury, the trial judge referenced Maraj's "*opinion*" and "*belief*"

(emphasis added) and reminded the jury that the evidence confirmed Maraj's "*conclusions*" (emphasis added) that the claims were false.

[63] The opinion evidence of non-expert witnesses, or lay opinion evidence, is generally inadmissible. In *R. v. D. (D.)*, 2000 SCC 43, [2000] 2 S.C.R. 275, at para. 49, the Supreme Court of Canada summarized this long-standing exclusionary rule:

A basic tenet of our law is that the usual witness may not give opinion evidence, but testify only to facts within his knowledge, observation and experience. This is a commendable principle since it is the task of the fact finder, whether a jury or judge alone, to decide what secondary inferences are to be drawn from the facts proved.

[64] While the history of the lay opinion evidence rule has been fraught with ambiguities, in Alan W. Bryant, Sidney N. Lederman & Michelle K. Fuerst's, *The Law of Evidence in Canada*, 5th ed. (Toronto: LexisNexis, 2018), at p. 820, its receivability is described in these terms:

Courts now have greater freedom to receive lay witnesses' opinions if: (1) the witness has personal knowledge of the observed facts; (2) the witness is in a better position than the trier of fact to draw the inference; (3) the witness has the necessary experiential capacity to draw the inference, that is, form the opinion; and (4) the opinion is a compendious mode of speaking and the witness could not as accurately, adequately and with reasonable facility describe the facts she or he is testifying about. But as such evidence

approaches the central issues that the courts must decide, one can still expect an insistence that the witnesses stick to the primary facts and refrain from giving their inferences. It is always a matter of degree. As the testimony shades towards a legal conclusion, resistance to admissibility develops. [Emphasis added.]

[65] Although the distinction between fact and opinion evidence may be tenuous, in *R. v. Graat*, [1982] 2 S.C.R. 819, at paras. 51-52, the Supreme Court suggests that non-expert opinion evidence is inadmissible unless: (1) by permitting the lay witness to testify in the form of an opinion, the witness is able more accurately to express the facts he or she perceived or (2) the facts from which a witness received an impression were too evanescent in their nature to be recollected or too complicated to be separately and distinctly narrated.

[66] The court stated, at para. 47, that “[e]xcept for the sake of convenience there is little, if any, virtue in any distinction resting on the tenuous, and frequently false, antithesis between fact and opinion. The line between ‘fact’ and ‘opinion’ is not clear.”

[67] Academics have made the same observation, for example, as described by S. Casey Hill, David M. Tanovich and Louis P. Strezos in *McWilliams’ Canadian Criminal Evidence*, 5th ed. (Toronto: Thomson Reuters, 2017), at p. 12-9:

Whatever the distinctions in justification for the admission of a compendious statement of fact and opinion where the facts are too subtle or complicated to

be narrated separately and distinctly, the lay witness exception to the opinion evidence exclusionary rule requires the witness's personal or direct acquaintance with the particular subject-matter and therefore some assurance of competence in source of knowledge. As well, the witness must have incidentally drawn inferences from observed data necessarily expressible in only abbreviated or conclusory form as opposed to a narration of individual factual observations or perceptions.

[68] In *Ganges Kangro Properties Ltd. v. Shepard*, 2015 BCCA 522, 51 C.L.R. (4th) 1, at para. 76 the court makes clear that “the compendious statement of facts exception is limited to inferences drawn by non-expert witnesses who have personally observed the facts from which their inferences are drawn.”

[69] In this case, Maraj (1) did not have personal knowledge of the observed facts – rather, she was asked to formulate her summary of the evidence in terms of her belief; (2) was in no better position than the jury to draw inferences from the evidence of the 12 taxpayers who testified combined with the raw data she collected; (3) had the experiential capacity to draw the inference – however, this is precisely what made the statement increasingly prejudicial; and (4) could have described the facts without testifying to the central question at issue. I am not persuaded that the jurors would inevitably have come to a conclusion of guilt absent her evidence.

[70] As pointed out by Strathy C.J.O. in *Meady v. Greyhound Canada Transportation Corp.*, 2015 ONCA 6, 329 O.A.C. 173, at para. 37:

There has been growing recognition of the responsibility of the trial judge to exercise a more robust gatekeeper role in the admission of expert evidence – see: Lisa Dufraimont, “New Challenges for the Gatekeeper: The Evolving Law on Expert Evidence in Criminal Cases” (2012) 58 C.L.Q. 531; and *Report of the Inquiry into Pediatric Forensic Pathology in Ontario* (Toronto: Queen’s Printer for Ontario, 2008), vol. 3, c. 18: “Role of the Court”. This observation holds true for both civil and criminal contexts. Although much of the discussion has focused on increasing scrutiny of threshold reliability at the gatekeeper stage, it is equally important to ensure the evidence is genuinely necessary.

[71] Here, it is difficult to see how the opinion evidence was necessary, but for the Crown’s failure to call anyone from Tractors. The appellant testified he did not know that charitable donations were not made, and the Crown did not call the director of Tractors with whom the appellant dealt. Proof that the charitable donations were not made was essential to the Crown’s case.

[72] Maraj’s opinion that the charitable donations claimed were false was expert evidence that required a *voir dire* to determine its admissibility.

[73] The trial judge erred in failing to conduct a *voir dire* to make this determination or else, in failing to exclude the evidence absent a ruling.

[74] I acknowledge that defence counsel failed to object to the admission of the evidence. On this record, however, I cannot conclude that defence counsel’s failure to object amounted to recognition that the evidence would likely be admitted following a *voir dire*, was inadvertent, or tactical. If there was

agreement, that should have been noted for the record. I also agree that by the end of the trial, defence counsel focused on the mental element of the offence, knowledge.

[75] As indicated earlier, I agree that the jury could have drawn inferences about fraud, in respect of the returns filed by the appellant on behalf of the taxpayers who testified, from the summarized raw data submitted, together with the evidence of those taxpayers, without Maraj's opinion evidence. However, I am not certain that they would have done so without the weight of the opinion evidence and the resulting affirmation that all 442 tax returns contained false charitable donation receipts.

[76] Had the trial judge admitted Maraj's evidence as opinion evidence, he would have instructed the jury as to the significance of factual assumptions underlying her opinion, notably, the assumption that Tractors' returns were correct. The jury was concerned about this issue, and asked a question about the trust the appellant placed in Tractors.

[77] The majority relies upon the absence of any substantial wrong or miscarriage of justice to dismiss the appeal, in the event the judge erred in admitting this evidence.

[78] I would not apply the proviso for two reasons.

[79] The Crown did not invoke the proviso in either its factum or in oral argument. The proviso is embodied in s. 686 (1) (a) (ii) and s. 686 (1) (b) (iii) of the *Criminal Code*, R.S.C., 1985, c. C-46 for errors of law. Even if a trial judge has made a wrong decision on a question of law, the court may dismiss an appeal if “it is of the opinion that no substantial wrong or miscarriage of justice has occurred.”

[80] This court has held that it should not invoke the proviso on its own motion: *R. v. P.G.*, 2017 ONCA 351, 138 O.R. (3d) 343, at paras. 13-15. The Crown’s oral and written argument on appeal was that Maraj’s opinions amounted to factual evidence for which a *voir dire* was not required, and that no error was committed by the trial judge in admitting this evidence without a *voir dire*. I would not infer from this argument that the Crown’s position was also that even if there was an error, no substantial wrong or miscarriage of justice resulted, particularly since the Crown did not address an essential element of the test for application of the proviso, whether the jury verdict would have necessarily been the same, absent the legal error: *R. v. Mahoney*, [1982] 1 S.C.R. 834, at para. 17.

[81] Secondly, I am not satisfied that the verdict would have necessarily been the same, but for the error in admitting the opinion evidence. This test is applied strictly, as noted in *Mahoney*, at para. 18: “[i]t is abundantly clear, in my view, that the discretion involved in its application is narrowly limited by statute to cases where the court of appeal has found an error or errors of law at trial, and

its exercise depends upon the application of the strict legal test affirmed in the authorities and firmly imbedded in the law.”

[82] The rigor of the test for application of the proviso was highlighted by Epstein J.A. in *R. v. Brown*, 2018 ONCA 481, at paras. 75-76 as follows:

First, use of the curative proviso is appropriate where the error at first instance is “harmless or trivial”: *Sekhon*, at para. 53. The overriding question guiding this inquiry is whether the error “on its face or in its effect was so minor, so irrelevant to the ultimate issue in the trial, or so clearly non-prejudicial, that any reasonable judge or jury could not possibly have rendered a different verdict if the error had not been made”: *R. v. Van*, 2009 SCC 22, [2009] S.C.R. 22, at para. 35. When a case involves multiple errors at first instance, the cumulative impact of those errors can be relevant to determining whether the “harmless or trivial” test is satisfied: *R. v. Bomberry*, 2010 ONCA 542, 258 C.C.C. (3d) 117, at para. 79; *R. v. Hill*, 2015 ONCA 616, 23 C.R. (7th) 224, at para. 102.

The curative proviso may also be applied in cases involving more serious errors, where the evidence is “so overwhelming” that a reasonable and properly instructed jury would inevitably convict: *Sekhon*, at para. 53; *Van*, at para. 36. This inquiry does not turn on the gravity of the trial judge’s errors, but on the strength of the Crown’s case. “Overwhelming evidence” has been described as a high standard, and “substantially higher than the requirement that the Crown prove its case ‘beyond a reasonable doubt’ at trial”: *R. v. Trochym*, 2007 SCC 6, [2007] 1 S.C.R. 239, at para. 82. These onerous thresholds flow from the difficulties appellate courts inevitably face in “evaluating the strength of the Crown’s case retroactively, without the benefit of hearing the witnesses’ testimony and experiencing the trial as it unfolded”: *Van*, at para. 36. Accordingly, any measure of doubt concerning the strength of the

Crown's case should enure to the benefit of the appellant.

[83] The consequences of a criminal conviction may be catastrophic. Where there is legal error, unless the court is satisfied that the verdict would necessarily have been the same, the proviso cannot be applied to uphold the conviction.

[84] Here, I am not convinced that the jury would have rendered the same verdict, absent the opinion evidence of Maraj. The appellant's credibility in the eyes of the jury may have suffered when weighed against that of an apparent expert. It is arguable that the evidence was not necessary and would not have met the test for admissibility of expert opinion evidence.

[85] I would accordingly allow the appeal and direct a new trial. I need not address the other arguments advanced on appeal.

Released: May 30, 2018

"G. Pardu J.A."

TAB 8

In the Court of Appeal of Alberta**Citation: R v Beausoleil, 2025 ABCA 371****Date:** 20251110
Docket: 2403-0028A
Registry: Edmonton**Between:****His Majesty the King**

Respondent

- and -

John Edward Beausoleil

Appellant

Restriction on Publication**Identification Ban** – See the *Criminal Code*, section 486.4.

By Court Order, information that could identify the victim or the witness must not be published, broadcast, or transmitted in any way.

NOTE: Identifying information has been removed from this judgment to comply with the ban so that it may be published.**The Court:****The Honourable Justice Jack Watson**
The Honourable Justice Frans Slatter
The Honourable Justice Michelle Crighton**Memorandum of Judgment**Appeal from the Conviction by
The Honourable Justice R.P. Belzil
Convicted on the 29th day of September, 2023
(Docket: 200089191Q1)

Memorandum of Judgment

The Court:**I. Introduction**

[1] In the modern vernacular, this is a “cold case”, meaning that the case was moribund for many years before the opportunity to follow up the investigation with modern science arose. Evidence does not often age well, but some forms of human traces may persist for a long time and may reliably carry with them markers of specific identity.

[2] That happened here with DNA residues of both victim and assailant found on the same segment of cloth. By expert analysis, the appellant was implicated as the assailant donor, and a victim of rape and robbery as the other donor. The trial judge considered the Crown evidence including that of the victim, which was unanswered by cross-examined testimony given by the appellant. (An exculpatory police interview of the appellant given decades after the fact was before the trial judge and considered by him, but no grounds of appeal specifically emerged from the trial judge’s treatment of that interview.)

[3] The appellant did not dispute the occurrence of the crimes. Rather, he argued the evidence was insufficient to implicate *him* in those crimes. The trial judge was satisfied beyond a reasonable doubt that the appellant was guilty of the crimes described by the victim and convicted the appellant on September 29, 2023. Challenging his conviction, the appellant advances several arguments essentially linked to the proposition that the evidence did not disprove that someone else could have been the assailant.

[4] We are not persuaded that there is palpable and overriding error in the fact finding of the trial judge and we are not persuaded that he erred in law either in his admission or assessment of the circumstantial evidence, notably the expert evidence. The existence of alternatives that an expert does not consider reasonable is not a universal solvent for the expert’s conclusion about a DNA match. It is for the trial judge to decide what to make of the expert’s evidence. Here the trial judge’s ultimate verdict was reasonable and was supported by the evidence within the terms of section 686(1)(a) of the *Criminal Code*. For the following reasons, the appeal is dismissed.

II. Background

a. The assault & investigation

[5] On September 18, 1981, the complainant returned to her condominium in north-central Edmonton after an evening out with friends. She came home at about 2:30am and parked in a shared underground parking garage. She was 36 years old at the time.

[6] After locking her car, a man came from the right side and grabbed her arms and told her not to move. He told her to remove her clothing, and when she questioned this, he ripped her dress open in the front and began fondling her and telling her to kiss him. He then told her to get on the ground. She tried to encourage him to come upstairs with her in the hopes she could make a run for it; he refused and pushed her to the ground. Once she was there, he removed her pantyhose and raped her.

[7] The assailant obtained compliance from the complainant by telling her he had a knife and threatened that if she moved, he would kill her. The complainant could not recall if the assailant ejaculated or had an erection. When he was finished, he took her purse and ran. The purse was recovered the next day. The money inside it had been removed.

[8] After the attack, the complainant went to a neighbour's place and called the police. Once the police arrived, they took the complainant to a hospital where she underwent a vaginal exam. The complainant also sustained a broken pinky.

[9] The complainant went to the police station the next day to give a statement to Detective Peter Demers. She gave Detective Demers the pantyhose she was wearing during the attack. The dress the complainant was wearing at the time of the attack was not seized until several days later.

[10] Testing on the internal samples taken from the complainant's vaginal exam was completed at an RCMP serology lab by Dorothy Dawson. The complainant's dress and pantyhose were also tested. Dawson's report dated November 19, 1981, confirmed that indications of human seminal fluid had been identified on the dress and pantyhose, and that human spermatozoa was identified by microscope on the internal vaginal samples. However, since the technology for testing DNA did not exist in 1981, the samples, dress, and pantyhose were unable to provide any insight into the identity of the assailant.

[11] At the time of the attack, no charges were laid, and the assailant remained unidentified. The file was concluded sometime between November 1981 and January 1982. The police did investigate an alternative suspect, but nothing came from that investigation. The complainant and her assailant were strangers to one another.

[12] The file seemingly lay dormant until 2016 or 2017, when the complainant was approached by Detective Levesque and asked if she knew J.B., the appellant in this matter. She did not. In 2018, the case was re-opened. The advancements in technology meant that cuttings from the complainant's dress could be tested for DNA.

[13] The cuttings were retested by Lindsey March, a search technologist, using a fast blue test. This yielded a positive result on the larger of the two cuttings. Ms. March then divided that cutting into two separated areas, designated AA and AB. She performed a second presumptive screening test for semen on area AA, which also yielded a positive result. Then, using a microscope, she visually examined part of the cutting which she had rubbed on a microscope slide. No sperm cells were found. Area AB also yielded a negative result. The cuttings were sent for DNA analysis and subjected to an extraction process to determine if there was sufficient DNA to build a profile.

[14] Vashni Skipper, who was the Crown's DNA expert at trial, was assigned in January 2019 to interpret the data. She prepared two reports. Her first report found that the DNA typing profile obtained from Area AA suggested two individuals, one male and the other female. The female components matched the complainant. The first report also noted there was insufficient human DNA on area AB to proceed with further testing. The second report found the male components from Area AA matched a known sample derived from the appellant [AT 1035/25-1037/34]. The possibility of an unrelated individual with the same profile was estimated at about 1 in 21 quintillion.

[15] Expert witness Skipper agreed in cross that she could not say that the two sources were deposited at the same time [AT 1039/1-14]. She also agreed that there were various ways transfers could occur [AT 1040-1042]. She, however, offered explanations for why what the results obtained by March with the 'fast blue' test might not be revealing of sperm cells. Skipper rejected the position offered to her in cross-examination about presence of spermatozoa in the male source and stood by her position that "[t]he only reasonable scientific explanation, that I'm aware of, for these results in this case -- I can think of no other explanation -- would be that this result, this male profile, came from spermatozoa" [AT 1070/17-19]. The unfolding of Skipper's evidence goes to the appellant's argument below.

b. Historical storage of the evidence

[16] The evidence was stored in Detective Demers' desk, rather than with the Property Control Unit, until it was sent to the RCMP lab, where it was analyzed by Dawson. Detective Demers testified that each of the vials obtained from the internal examination of the complainant would have been sealed, and that the individual exhibits were also sealed separately.

[17] The dress, pantyhose, and vials were returned to Detective Demers and held by him in his desk drawer until he was placed on administrative leave in 1984. At that point, the exhibits that were in his possession were removed by Detective Benotto and transferred to the EPS Property

Control Unit until they were ultimately destroyed. By comparison, the cuttings from the dress and a blood sample from the complainant were stored with the RCMP until 2007/2008, when there was a mass transfer of exhibits from the RCMP lab back to the EPS. At this point, the cuttings and blood sample were placed with the Property Control Unit.

c. Procedural history

[18] From June to November of 2021, there were pre-trial motions which do not form part of the issues on appeal.

[19] The first motion related to the admissibility of the November 19, 1981, report of the by-then retired serologist Dorothy Dawson: trial judge reasons dated November 10, 2021. Dawson was called as a witness at trial by the Crown to confirm her methodology and to authenticate her report *inter alia*.

[20] On the motion, the trial judge was satisfied that her report was observational and experiential evidence as compared to post-facto expert opinion evidence (such as later in the work of Skipper and Blackmore). In his view, the report was also comparable to ordinary course analytical records at common law under *R v Monkhouse* (1987), 83 AR 62, [1988] 1 WWR 725 at p 732. The appellant had objected to admissibility on the basis the report contained expert opinion evidence. The trial judge was not persuaded that there was an inadmissibility issue on that basis.

[21] We observe that even if a form of experiential opinion were involved in the Dawson report, it was admissible. Where a witness who has participated in the events at issue provides fact evidence concerning her own observations, even where those observations are informed by skill, knowledge, training, or experience that goes beyond that of the trier of fact, they are not screened for admissibility on the same strictures for admission of ‘expert evidence’: *R v Ajise*, 2018 ONCA 494 at para 23, affirmed on other grounds, 2018 SCC 51, [2018] 3 SCR 301; *R v Hamilton*, 2011 ONCA 399 at paras 277-279, 271 CCC (3d) 208; *R v Potter*, 2020 NSCA 9 at paras 411-423, 385 CCC (3d) 1; see also *R v Awer*, 2016 ABCA 128 at paras 52-55, 405 DLR (4th) 463, appeal allowed, outcome reversed, on a different ground (trial fairness); *R v Awer*, 2017 SCC 2, [2017] 1 SCR 83 for a discussion of the treatment of opinion evidence arising from experience.

[22] Such experiential and observational evidence can emanate from a witness who also offers opinion evidence subject to the presumption of inadmissibility and to the legal standards for admission of *that form* of opinion evidence: see *Kon Construction Ltd v Terranova Developments Ltd*, 2015 ABCA 249 at para 35, 387 DLR (4th) 623; see also David Paciocco et al in *The Law of Evidence*, 8th ed (Toronto: Irwin Law, 2020) at pp 248-249. *Awer* figures in discussions further down in these reasons.

[23] The second motion concerned whether the loss of the bench notes of Dawson and the loss of vaginal samples and other aspects of clothing was the result of unacceptable negligence by the Crown, resulting in a violation of the *Charter* rights of the appellant: trial judge reasons dated November 24, 2021. The trial judge was satisfied that the eventual police destruction was not unacceptable negligence and refused the defence motion for a stay of proceedings of the case. That approach was consistent with the view of Doherty JA in *R v Hersi*, 2019 ONCA 94 at para 26, 373 CCC (3d) 229, leave denied [2021] SCCA No 406 (QL) (SCC No. 39914) where he said a breach of section 7 requires a finding of disclosable evidence lost by unacceptable negligence.

[24] We discern no error in the trial judge's ruling. Practicality should figure in the analysis of cases as to alleged 'lost' evidence as it does generally in motions for judicial stays: compare *R v Babos*, 2014 SCC 16 at paras 32-35, 41, [2014] 1 SCR 309. The discretion of a trial judge to refuse to stay proceedings is entitled to deference: *R v Carosella*, [1997] 1 SCR 80 at para 48; see also *R v Bjelland*, 2009 SCC 38 at para 15, 2009 SCC 38, [2009] 2 SCR 651; *Babos* at para 48; *R v Kociuk*, 2011 MBCA 85 at paras 23-39, 278 CCC (3d) 1, affirmed for reasons of MBCA majority, 2012 SCC 15, [2012] 1 SCR 529.

[25] The extent of any prejudice to the defence may be a factor; speculation is not a proxy for prejudice: compare *R v Peets*, 2024 ABCA 48 at para 103, 437 CCC (3d) 415, leave denied [2025] SCCA No 85 (QL) (SCC No. 41708). *Inter alia*, *Peets* cited *R v Abreha*, 2019 ONCA 392 at paras 10-14, [2019] OJ No 2424 (QL), holding that prejudice from failure to retain a video could be remedied by weighing its absence. Here, the appellant was able to argue at trial (and continues to argue in this Court) about 'gaps' in the Crown's case -- albeit the alleged gaps are essentially speculative.

[26] At trial, the issue was the identity of the assailant. The Crown's case was based on circumstantial DNA evidence. The case turned on the relevance and reliability of the DNA sample obtained from the cuttings from the complainant's dress. Defence submissions at trial focused on the handling and testing of the dress with related submissions concerning the complainant's descriptions of her attacker and his identity. Both parties called DNA expert witnesses at trial.

i. The assailant's physical appearance

[27] On direct examination, the complainant described her assailant as Caucasian, about 5'6 in height, and roughly 140 pounds. She described his hair as brownish-blond. She could not recall the colour of his eyes. The complainant disagreed with the initial investigator's report and how her evidence had been recorded. The report claimed the attacker was 5'9, with curly hair over the ears, and that he was wearing glasses. She had no memory of saying the assailant was wearing glasses.

[28] No evidence was presented by counsel as to the appellant's appearance at the time of the attack, and the trial judge determined he could not make a finding based on the record before him

as to how accurate or inaccurate the complainant's description of the assailant was at the time of the attack.

ii. Dealings with the dress

[29] The defence disputed whether the dress which ended up with Detective Demers and which thereafter was the source of observations by Dawson and of samples subjected to examination by Crown expert Skipper was the dress of the victim in this case during the attack on her.

[30] At the time of the offence, the first responding police officer described the dress as a "cotton light blue dress" with buttons in the front. The complainant did not agree this was an accurate assessment of the dress. In June 2019, when the complainant spoke again to police, she thought the dress had been a green cotton-type dress, with a boat neck and no sleeves or buttons. She maintained this recollection during examination, even when confronted with the report of the initial investigator. Conversely, Detective Demers gave evidence that the dress, rather than being blue or green, was purple.

[31] The complainant had no memory of what she did with the dress at the time. She guessed she would have put it in the laundry, but she did not know. She denied washing the dress. She was sure she had not had any sexual activity for five days prior to the incident. She did not remember giving the dress to the police.

[32] There were also questions raised about how the cuttings from the dress were handled between the time of the attack and when the DNA evidence was obtained, and whether there was a risk of contamination of the exhibits. Although standards are now quite stringent for preventing contamination, there was some agreement between the parties that procedures back in the 1980s were less rigorous.

[33] The trial judge ultimately found that the DNA on the complainant's dress was derived from semen, and that it belonged to the appellant. The trial judge found the dress had either always been in the complainant's possession or that of the EPS, and that the dispute about the colour of the dress could be explained by differences in perception. The judge held that light blue, green, and purple were all at the same end of the colour spectrum. Beyond the dispute over colour, the trial judge found the cuttings that were used for the DNA sampling came from the dress the complainant was wearing during the attack.

III. Grounds of Appeal

[34] There are three primary issues raised on appeal:

- 1) Did the trial judge err by misapprehending material evidence at trial?

- 2) Did the trial judge err in law in permitting the prosecution's DNA expert to opine beyond her area of expertise?
- 3) Did the trial judge err in law in his interpretation and application of the prosecution's expert evidence in the area of DNA?

IV. Standard of Review

[35] The standard of review is different for the three issues on appeal. The parties generally agreed on the relevant standards to be applied.

a. Misapprehension of the evidence

[36] The bar to demonstrating a misapprehension of material evidence is a high one of palpable and overriding error. Misapprehension will be found where there is a mistake regarding a key point of the evidence, a failure to consider evidence relevant to a material issue, or a failure to give proper effect to evidence: *R v Rakka*, 2024 ABCA 1 at para 18, [2024] AJ No 11 (QL). An error must be ‘overriding’ in its influence on the reasoning process: *R v Lohrer*, 2004 SCC 80, [2004] 3 SCR 732.

[37] As stated in *Lohrer*, any misapprehension “must go to the substance rather than to the detail. It must be material rather than peripheral to the reasoning of the trial judge. Once those hurdles are surmounted, there is the further hurdle (the test is expressed as conjunctive rather than disjunctive) that the errors thus identified must play an essential part, not just in the narrative of the judgment, but “in the reasoning process resulting in a conviction””: at para 2 quoting *R v Morrissey* (1995), 97 CCC (3d) 193; see also *R v Whiteway (BDT) et al*, 2015 MBCA 24 at paras 31-32; *R v H(JB)*, 2025 MBCA 88 at para 5.

[38] This form of error can also be positioned under section 686(1)(a) of the *Criminal Code*: a verdict would not be reasonable if, (a) the evidence as a whole is such that a reasonable jury, properly instructed and acting judicially, could not have reached the verdict, or (b) fact findings on material matters of a decisive character are clearly wrong, or (c) whether the reasoning process used by the judge to get from the evidence to the verdict is not logical or is “reversibly incoherent”: see *R v Morrissey* (1995), 22 OR (3d) 514 (ONCA), cited in *Lohrer*; *R v Fleig*, 2014 ABCA 97 at paras 19-21, 7 Alta LR (6th) 204; *Rakka* at para 16.

[39] A misapprehension error should be readily obvious on its face; an appellate court should not have to go ferreting through the record to find clues about such error: *R v Garford*, 2021 ABCA 338 at para 12, 33 Alta LR (7th) 1. The error must be “palpable” as well as overriding: see *Benhaim v St-Germain*, 2016 SCC 48 at para 38, [2016] 2 SCR 352; *Salomon v Matte-Thompson*, 2019 SCC 14 at para 116, [2019] 1 SCR 729; *British Columbia v Council of Canadians with Disabilities*, 2022 SCC 27 at para 96, 470 DLR (4th) 289; *Nelson (City) v Mowatt*, 2017 SCC 8 at

para 38, [2017] 1 SCR 138. For a discussion of the century and a half provenance of the concept of ‘palpable and overriding error’ see *Dr Ignacio Tan III v Alberta Veterinary Medical Association*, 2025 ABCA 119 at paras 36-45, 82 Alta LR (7th) 20.

[40] Accordingly, where an appellant is alleging a misapprehension of evidence, the appellate court also should consider the reasonableness of the verdict overall. If the verdict is reasonable on the other fact findings, then the appellate court should consider whether the alleged misapprehension seen in the overall context of the trial nevertheless resulted in a miscarriage of justice or a reversible error of law: *R v Kruk*, 2024 SCC 7 at para 90, 489 DLR (4th) 385.

b. Experts opining beyond their expertise

[41] The standard of review of admissibility of opinion evidence is correctness having regard to a trial judge’s conclusion that the expert has special skill or knowledge acquired through study or experience, or both, in the subject matter of the opinion that is beyond that of the decision maker and meets necessity, reliability and impartiality criteria: *White Burgess Langille Inman v Abbott and Haliburton Co*, 2015 SCC 23, [2015] 2 SCR 182; *R v Mohan*, [1994] 2 SCR 9; *R v Marquard*, [1993] 4 SCR 223; *R v Bingley*, 2017 SCC 12 at paras 13-17, [2017] 1 SCR 170.

[42] Consistent with that, the standard of review as to whether an expert gave evidence that is clearly outside of their qualifications *might* raise a question of law if acceptance of the excess opinion effectively restructured in a significant way the base finding of qualification: *R v Den Ouden*, 2024 ABCA 256 at para 14, [2024] AJ No 928 (QL).

[43] That said, the alleged ‘excess’ of the expert’s qualifications may well be simply a matter of using ordinary logic or the witness’ own proven experience to reveal more about the accepted zone of qualifications. Either way, the ‘excess’ is arguably a matter of weight, not admissibility of that evidence. In *Marquard*, at para 35, McLachlin J observed that “[d]eficiencies in the expertise go to weight, not admissibility.” In *Marquard*, “the witnesses were qualified more narrowly than their areas of expertise”, and one witness was “not formally qualified at all”.

[44] In *Marquard*, at para 37, McLachlin J said that:

Important as the initial qualification of an expert witness may be, it would be overly technical to reject expert evidence simply because the witness ventures an opinion beyond the area of expertise in which he or she has been qualified. ... In the absence of objection, a technical failure to qualify a witness who clearly has expertise in the area will not mean that the witness's evidence should be struck. However, if the witness is not shown to have possessed expertise to testify in the area, his or her evidence must be disregarded and the jury so instructed.

[45] Similarly, this Court in *Awer*, at para 25, said:

[t]he qualification of an expert and the assessment of the probative value of his or her testimony or opinion are evidentiary issues that require deference” and that it is not open to a reviewing court to carry out its own assessment of the probative value of an expert’s testimony or opinions simply because it disagrees with the assessment below: *Mouvement Laïque Québécois v Saguenay (City)*, 2015 SCC 16 at para 105, [2015] 2 SCR 3.

c. Interpretation and application of expert evidence

[46] How a trial judge has interpreted and applied expert evidence will be reviewed on a deferential standard, as will the conclusions they have reached based on that evidence. Unless an appellant can show there was a legal error about the scope or admissibility of that evidence, the applicable standard is one of palpable and overriding error: *R v Clifford*, 2024 ABCA 421 at para 18, [2024] AJ 1512 (QL).

[47] As noted above, the probative value of expert evidence is assessed in the same manner as that of any other witness: see *Awer* (ABCA), at para 25, citing *Mouvement Laïque Québécois v Saguenay (City)*, 2015 SCC 16 at para 105.

d. General principles of appellate review of circumstantial evidence cases

[48] Overall, the assessment by a trial judge as to the weight of evidence, whether direct or circumstantial, is palpable and overriding error. As pointed out in *Rakka*, at para 32, citing *R v Profeit*, 2021 ABCA 379 at para 73, 407 CCC (3d) 494, the “role of the trier of fact in a circumstantial evidence case is entitled to be respected in the same way as the role of triers of fact in cases which have direct evidence”.

[49] As said over a half century ago in *McGreevy v DPP*, [1973] 1 All ER 503, [1973] 57 CRA 424 (UKHL), circumstantial evidence does not fall into any special category that requires a special direction to the jury always be given to reinforce the jury’s understanding of the Crown’s burden and the standard of proof. The ultimate question for the jury is the same whether the evidence is direct or indirect: Has the prosecution proved upon all the evidence so that the jury is sure that the defendant is guilty?

[50] Lord Morris in *McGreevy* also added that it is not “to be assumed that members of a jury will abandon their reasoning powers and, having decided that they accept as true some particular piece of evidence, will not proceed further to consider whether the effect of that piece of evidence is to point to guilt or is neutral or is to point to innocence”. Similarly, in *Daniels v R*, [2006] EWCA 628 at para 14:

We do not read the speech of Lord Morris or the judgment of Steyn LJ as meaning that the mere fact that the version of facts contended for by the defence is a logical

possibility means that a submission of no case to answer must succeed. Sometimes the proffered version is logical but so implausible that a reasonable jury, properly directed about circumstantial evidence, would be justified in rejecting it.

[51] As discussed below, the appellant presses arguments which, in his submission, raise concerns effectively about continuity, comparison and expert opinion. In his submission, these concerns raise the possibility of another perpetrator or at least a doubt that the appellant was the attacker. In effect, those arguments come down to a theme that on the evidence there was “any other rational conclusion than that the prisoner was the guilty person” within the meaning of the jury direction in *Hodge’s Case* (1838), 2 Lew 227, 168 ER 1136 (Eng).

[52] Noting the Supreme Court of Canada’s decision in *R v Villaroman*, 2016 SCC 33, [2016] 1 SCR 1000, the appellant asserts that there is an “evidentiary gap that remains between the collection of the dress itself and the receipt of the DNA analysis results” and also that “failure to resolve concerns as to how the missing notes relate to the lost evidence, and how there is some evidence as to how the evidence was handled that could give rise to an exculpatory conclusion”: AF paras 69-74. *Villaroman* does not instruct that acquittal must follow if there is “some evidence” that “could” give rise to an exculpatory inference.

[53] How Canadian law got to *Villaroman* is worthy of some additional comment here.

[54] Human knowledge, and particularly technology, have moved a long way since *Hodge’s Case* where juries needed to be educated in simple terms about the law since, as Alexis de Tocqueville, a visiting French aristocrat observed in 1835, they needed to “pay attention to things other than their own affairs”. They also were still a politically vulnerable group of people.

[55] In that era, it is therefore no surprise that the Court in *Hodge’s Case* should have found it appropriate that a jury be given a bright line language direction about how reasonable doubt can arise in circumstantial evidence cases when telling the jury to decide whether “the facts were such as to be inconsistent with any other rational conclusion than that the prisoner was the guilty person”.

[56] *Villaroman*, at paras 13, 17-22 and 32-34, Cromwell J explains that the more appropriate word for modern usage is “reasonable” rather than “rational” because the latter word seems to distinguish itself from “reasonable” as in “reasonable doubt” with the further effect of suggesting, perhaps, a higher standard for circumstantial evidence than other evidence or combinations of evidence. While the words are used interchangeably in cases, the more appropriate word is “reasonable”.

[57] In *Villaroman*, at para 19, Cromwell J referred to the case note of Prof. Dufrainmont in “*R. v. Griffin and the Legacy of Hodge’s Case*” (2009), 67 CR (6th) 74 where she pointed out that in

the aftermath on *McGreevy*, English Courts treated *Hodge's Case* as essentially just an explanation of how reasonable doubt *may* arise from evidence or its absence.

[58] By comparison, said Prof Dufrainmont, Canadian cases since *R v Comba*, [1938] SCR 396, had become rather channelled towards a “no case to answer” position arising from the conceivable existence of another “rational” conclusion. Canadian courts from *Comba* tended to express the legal position in those sorts of terms. In *R v Mezzo*, [1986] 1 SCR 802 at paras 12-14, this juridical phenomenon was explained by Wilson J and it was in particular noted in *R v Paul*, [1977] 1 SCR 181, *Lavoie v The Queen*, [1977] 1 SCR 193, and *R v John*, [1971] SCR 781, that contrary to *Comba*, *Hodge's Case* was simply an elaboration of the reasonable doubt standard and therefore “the question of reasonable doubt does not arise on a motion for a directed verdict”: *Mezzo* at para 13.

[59] The majority in *Mezzo*, per McIntyre J, at paras 56-60, went even more deeply into *Comba* and affirmed that, with *R v Cooper*, [1978] 1 SCR 860, the Court “placed the rule in *Hodge's Case* into the general consideration of reasonable doubt”. The aftermath to *Comba* included cases such as *R v McLean*, [1933] SCR 688 at page 690 which effectively elevated the Canadian interpretation of *Hodge's Case* to a rule.

[60] In *John*, the dissent of Branca JA below was the jury should have been told “that if the jury found the evidence consistent with guilt but like wise consistent with a rational hypothesis of innocence the jury should acquit the appellant, not on the basis of giving the appellant the benefit of a reasonable doubt, *but because the evidence did not satisfy the test laid down in the Hodge's case*”. In other words, Branca JA suggested that *Hodge's Case* set a distinct legal test for the Crown to meet. But *R v Mitchell*, [1964] SCR 471, suggested that to apply such a distinct test to the ‘planning and deliberation element’ would be proof to “a demonstration” which “could never be so proved”. *John* therefore said *Hodge's Case* should be treated as merely “a graphic illustration” of the principle of reasonable doubt. *Cooper* repeated the effort to fold *Hodge's Case* into the reasonable doubt standard and no longer use *Hodge's Case* as an additional and distinct (essentially higher) standard than proof beyond a reasonable doubt, properly understood.

[61] By *R v Griffin*, 2009 SCC 28 at para 28, [2009] 2 SCR 42 the Supreme Court of Canada noted the trial judge had told the jury they should acquit “if there is an equally reasonable inference” or “if there is a second inference that's as reasonable”. Those instructions were faulted by the defence as inviting the jury to merely compare competing reasonable inferences. Facing a defence objection, and in answering a jury question, the trial judge in *Griffin* told the jury that if they had “any other rational inference that *you* can draw from the evidence”[emphasis added], that reflected reasonable doubt.

[62] Charron J, for the majority in *Griffin*, opined that the jury was given the message that in “order to convict, they must be satisfied beyond a reasonable doubt that the only rational inference that can be drawn from the circumstantial evidence is that the accused is guilty”. While language

like “equally rational inference” clouded the analysis, taking the language back to “reasonable doubt” was sufficient.

[63] Charron J added, at para 35, that “[i]ndeed, no one argues that the jury should be entitled to base its decision on irrational or unreasonable inferences. When the instructions on circumstantial evidence are read as a whole, it is more likely than not that they would have been understood by the jury in the manner intended by the trial judge.” *Griffin* drew comments by Prof Dufraimont as above.

[64] *Villaroman* settled the law’s ambiguity, first by easing the word “rational” to the sidelines in favor of “reasonable”, and second by saying no special instruction was required and third by picking up the thread that a jury was not required to give effect to what the jury considered to be an “unreasonable inference”. The concern of the law was with the jury filling in the blanks or jumping to conclusions. But the trier of fact was to consider “other plausible theor[ies]” and “other reasonable possibilities” which are inconsistent with guilt: at para 37. Cromwell J explained, para 38:

Of course, the line between a "plausible theory" and "speculation" is not always easy to draw. But the basic question is whether the circumstantial evidence, viewed logically and in light of human experience, *is reasonably capable of supporting an inference other than that the accused is guilty*. [Emphasis added]

Cromwell J then noted *R v Dipnarine*, 2014 ABCA 328 at paras 22-25, which said that “[c]ircumstantial evidence does not have to totally exclude other conceivable inferences”; that the trier of fact should not act on alternative interpretations of the circumstances that it considers to be unreasonable; and that “[a]lternative inferences must be reasonable ... not just possible.”

[65] Accordingly, the law of Canada now is no longer (if it ever was) inclusive of the view that the mere existence of an alternative hypothesis entitles the accused to acquittal. The alternative hypothesis must be one that *the trier of fact* considers reasonable. An example of this as to DNA evidence appears in *R v O(NN)*, 2025 MBCA 76 at paras 40-42, [2025] MJ No 212 (QL).

[66] As repeated in *Villaroman*, at para 56:

The governing principle was nicely summarized by the Alberta Court of Appeal in *Dipnarine*, at para. 22. The court noted that “[c]ircumstantial evidence does not have to totally exclude other conceivable inferences” and that a verdict is not unreasonable simply because “the alternatives do not raise a doubt” in the jury’s mind. Most importantly, “[i]t is still fundamentally for the trier [of] fact to decide if any proposed alternative way of looking at the case is reasonable enough to raise a doubt.”

[67] **Villaroman**, at para 71, then reaffirmed that the role of an appellate court in deciding whether a trial verdict on circumstantial evidence is reasonable is not any more interventionist than on other totalities of evidence and it reversed the decision of this Court in **Villaroman** saying:

The Court of Appeal's analysis *overlooks the important point made in Dipnarine that it is fundamentally for the trier of fact to draw the line in each case that separates reasonable doubt from speculation*. The trier of fact's assessment can be set aside only where it is unreasonable. While the Crown's case was not overwhelming, my view is that it was reasonable for the judge to conclude that the evidence as a whole excluded all reasonable alternatives to guilt. [Emphasis added].

This is the legal approach to be applied here by the trial judge. And it was.

V. Positions of the Parties

a. The appellant

[68] On the first ground of appeal, the appellant makes two primary arguments:

- 1) That the trial judge failed to take into account an admission made by Detective Demers that he had seized the wrong dress from the complainant; and
- 2) That the trial judge did not adequately consider whether the way Dawson stored the dress cuttings gave rise to serious contamination concerns.

[69] The appellant argued that these misapprehensions go to the substance of the case against him – namely, his identity as the assailant. The appellant argued the trial judge accepted that the dress seized by Detective Demers was the dress worn at the time of the attack but did not provide reasons for how it reached that decision. Given the disagreement over the colour of the dress, and the fact that Detective Demers adopted the defence's position that he seized the wrong dress, this was a misapprehension of the evidence.

[70] In the same vein, the appellant argued the Court was required to address the question of contamination in its reasons, particularly as it related to: 1) how Dawson stored her exhibit cards; and 2) to Detective Demer's habit of storing his exhibits in his desk drawer rather than handing them over to the Property Control Unit. While the trial judge considered the relevant case law, the appellant argued the trial judge did not attach the legal principles from that jurisprudence to the evidence before him. The evidentiary gap between the collection of the dress and the DNA results remained an open issue not adequately dealt with.

[71] The appellant also argued the trial judge failed to consider evidence that was lost, including the dress and some relevant notes, and the impact of that loss on the appellant's ability to cross-examine Detective Demers and Dawson about the reliability of their evidence. Much of their

evidence fell back on their standard practices, as to which the appellant argued the trial judge was wrong to give substantial weight.

[72] The appellant went on to argue the trial judge gave unequal scrutiny to the evidence of the parties. For instance, the appellant suggested the court did not accept Detective Demers' adoption of the defence's argument during cross-examination. Similarly, on several occasions, both Detective Demers and Dawson suggested their evidence could be different if they had had access to their notes. The appellant seemed to suggest, as well, that the trial judge relied too heavily on testimony related to standard practice, rather than on evidence from the actual incident.

[73] On the second ground of appeal, the appellant argued the trial judge was wrong to allow the Crown DNA expert to testify beyond her expertise. While she was an expert in a specific form of DNA analysis, the Crown expert recognized there were other forms of DNA analysis that were beyond her competency. In particular, the appellant objected to the Crown's expert being allowed to state that inferring the presence of human spermatozoa was the only explanation for the DNA results that were obtained from the dress cuttings. The appellant argued on appeal that, given the limits of her expertise, the Crown's expert was not equipped with the necessary knowledge to be able to validly provide that opinion. This was based on the argument that other forms of DNA analysis exist that could maybe have explained the results obtained in a different way.

[74] On the third ground of appeal, the appellant argued the Defence's DNA expert did not agree with the opinion of the Crown's expert. To suggest the two experts were consistent with each other was an error.

b. The respondent

[75] The respondent Crown argued the appeal should be dismissed. The respondent suggested the trial judge did not misapprehend the evidence, and did not err by admitting the evidence of the prosecution's DNA expert.

[76] The respondent's perspective was that the trial judge correctly and carefully reviewed the evidence as a whole, and his findings of fact and inferences are owed deference. The respondent argued the appellant's position is not supported by the record, and there were no legal errors in the trial judge's decision. Ultimately, the evidence was entirely circumstantial, and the trial judge appropriately considered all other logical possibilities before concluding it was the appellant's semen on the complainant's dress, and that that semen was present because the appellant attacked her.

[77] On the first ground of appeal, the respondent argued the trial judge did not misapprehend the evidence and did not misapply the law of circumstantial evidence. The respondent argued the trial judge addressed defence concerns regarding continuity and contamination, and that it was open to the judge to make findings of fact on those issues contrary to the appellant's position.

[78] On the question of whether Detective Demers accepted the appellant's evidence that Detective Demers was given the wrong dress, the respondent noted the Detective was re-examined. Upon re-examination, he testified the only dress he dealt with was the purple dress the complainant gave him, and that he understood that dress to be the one the complainant was wearing when she was attacked. He did not recall any other dress or that she was wearing anything different on the day of the attack. The respondent argued the trial judge's reasons for his decision showed an awareness of the discrepancy over the colour of the dress, and that he made a reasonable finding of fact based on the evidence.

[79] As to the question of how Dawson stored the cuttings and the relative risk of contamination, the respondent noted there was no dispute at trial about whether investigative standards or practices regarding contamination changed between 1981 and when the DNA testing was performed. There was no evidence presented of either actual or confirmed contamination, but there was evidence presented showing the steps that were taken to ensure continuity and lack of contamination throughout the life cycle of the file. As with the question of the colour of the dress, the respondent argued the trial judge addressed the question of continuity within his reasons and made reasonable findings of fact based on the evidence.

[80] The respondent argued that the trial judge correctly considered and applied the law of circumstantial evidence. He considered alternative explanations, and accepted inferences where they were logical and reasonable. The respondent argued the trial judge reasonably considered the record as a whole and that a finding of guilt was the only reasonable conclusion based on the DNA evidence.

[81] Finally, the Crown said the appellant did not meet the test for establishing uneven scrutiny, and the appellant's complaints regarding the loss of notes are an attempt to re-litigate an issue that was resolved in pre-trial motions. The respondent further argued the trial judge was allowed to rely on evidence of standard practice in reaching a verdict.

[82] On the second ground of appeal, regarding whether the Crown's DNA expert opined beyond her expertise, the respondent argued that she did not. The respondent noted the appellant did not take issue with any of the Crown expert's opinion except her final statement that she could find no other reasonable explanation for explaining the results of the DNA test except that the sample consisted of semen from the appellant. The respondent argued that assertion was supported by a detailed, scientific explanation. This was an opinion rooted within the Crown expert's field of expertise. The respondent argued the opinion was both relevant and necessary, as well as being scientifically sound. The trial judge was right to rely on it.

[83] Finally, on the third ground of appeal, the respondent argued the trial judge is owed deference on his finding that the evidence of the defence expert was consistent with that of the Crown. It seems as though, in making this argument, the appellant may not have had access to an accurate transcript, since the corrected version of the transcript demonstrates that the defence

expert did, in fact, seem to agree with the Crown expert's assessment. Ultimately, the respondent argued the trial judge's findings related to the agreement between the experts was a finding worthy of deference.

VI. Law & Analysis

a. Did the trial judge err by misapprehending material evidence at trial?

i. Legal principles

[84] As noted in detail above, the role of this Court is not to reweigh the evidence in this case, or to substitute its own opinion for that of the trial judge. Additional authorities to those already mentioned on this topic above include *R v Gonzales*, 2018 ABCA 105 at para 3 per Slatter JA, [2018] AJ No 318 (QL). In *R v Leeming*, 2024 ABCA 255 at para 11, [2024] AJ No 921 (QL), this Court said:

A "stringent" standard of review is applied to a claim of misapprehension of evidence. The misapprehension must be an error, must go to the substance of the evidence, must be material, not peripheral, to the trial judge's reasoning, and must play an essential role in the reasoning resulting in a conviction. Differences of opinion with respect to interpretation of the evidence, inferences to be drawn from the evidence, or the weight of the evidence, do not amount to a misapprehension of the evidence.

(footnotes omitted citing *R v Lohrer*, 2004 SCC 80 at para 2; *R v Garford*, 2021 ABCA 338 at para 12, and *Rakka* at paras 18-19, *Lohrer* at paras 6, 8.)

[85] Notably, where the case is based on circumstantial evidence, the court must consider "whether the trier of fact, acting judicially, could reasonably be satisfied that the accused's guilt was the only reasonable conclusion available on the totality of the evidence. A verdict on circumstantial evidence is not reviewable merely because the appeal court concludes that the evidence, including gaps, gives rise to competing inferences": *Rakka*, at para 17; *Villaroman* at para 55. As noted in *R v Mela*, 2021 ABCA 38 at para 30, [2021] AJ No 163 (QL):

Unreasonableness is not 'lurking doubt' at the appellate level ... Nor is it reasoning that could have been more detailed. Nor is it reasoning involving a conclusion that the trier of fact does not have a doubt on an element of the offence charged or overall, even if a doubt might arise in the minds of the appeal court judges on direct or circumstantial evidence

ii. *Analysis*

[86] The appellant mainly argues that the trial judge failed to take into consideration the absence of contemporaneous notes prepared by some of the investigators at the time of the assault, and their reliance on “standard practices” followed by them.

[87] Before turning to that, we can rapidly dispose of the appellant’s submission within this part of his argument that there was ‘uneven scrutiny’ in the trial judge’s assessment of the evidence. Although as mentioned there was a statement of the appellant in evidence – and the trial judge instructed himself to bear in mind the principles in *R v W(D)*, [1991] 1 SCR 742 -- the significant evidence of the defence was that of their expert Blackmore. That said, there was a substantial level of agreement between the defence expert Blackmore and the Crown expert Skipper.

[88] The appellant also contends that there was a conflict about the color of the dress and the physical appearance of the assailant decades ago as compared to the appellant. In our view, those discrepancies are eminently explicable for the reasons of the trial judge. His conclusions on those matters does not reflect uneven scrutiny.

[89] The decision of a trial judge to choose the conclusion of one expert over another does not usually, and did not in this case, turn on the respective credibility of the experts. He found them both “highly qualified in the field of forensic DNA and [found] both of them to be equally credible” [AT 1453/13-14].

[90] Similarly, there is no reason to think he was oblivious to the presentation of other witnesses. Nor is there any indication of a binary coin-flip sort of assessment of the expert evidence. In the end, the trial judge found the conclusions that the DNA of the victim and the appellant were on the cuttings were compelling here. He said, *inter alia*:

I also find as a fact that the DNA profiles developed by Ms. Skipper were developed using differential extraction, which is a validated methodology for this purpose, and that the RCMP lab in Edmonton is a validated facility, which complies with international standards for DNA testing. Ms. Skipper opined that she could not offer any scientific explanation for the match between the known sample from the accused and the single source male profile she developed, other than that there was a match. I accept her expert opinion. Ms. Blackmore did not disagree with the opinion of Ms. Skipper. I find that the testimony of the two DNA experts was strikingly similar. [AT 1453/16-23]

[91] The deferential review standard of palpable and overriding error is applicable to choices as to expert evidence: *Mouvement Laïque Québécois*; *Alberta v ENMAX Energy Corporation*, 2018 ABCA 147 at para 67, 68 Alta LR (6th) 217; *Grafkom Speedfast Limited v Heidelberg Canada*, 2013 ABCA 104 at para 19, 544 AR 167; *Stewart Estate v TAQA North Ltd*, 2015 ABCA 357 at

para 112, 25 Alta LR (6th) 1, leave denied, [2016] SCCA 17 (QL) (SCC No 36810); *Benhaim* at para 72; *International Air Transport Association v Canada (Transportation Agency)*, 2024 SCC 30 at para 26, 496 DLR (4th) 385; *Canadian Natural Resources Ltd v Signalta Resources Ltd*, 2025 ABCA 306 at para 30, [2025] AJ No 976 (QL). It is certainly sufficient for deference if the trial judge makes a “reasoned choice” between experts. *A fortiori*, deference applies to choices about aspects of their evidence.

[92] Returning then to the topic of alleged error in misconceiving the evidence as to how the exhibits were handled over time, it should not be too surprising that the “bench notes” prepared forty years earlier by Dawson were no longer available at this trial. There was, however, other recorded information such as pages from her Case Record Book and, importantly, her formal report.

[93] There was also a record by a different member of the Crime Detection Laboratory, K E Sanders, recording the *personal* receipt by Sanders of items, described as from the relevant investigation here, from Detective Demers on October 9, 1981 and his transfer of the “panty hose” and “dress” to Dawson on October 29, 1981 [EKE(R) p 8]. Dawson’s report confirmed the receipt from Sanders as well as further receipt from Demers of the other vaginal samples and a blood sample [EKE(R) p 4]. So did Dawson’s evidence.

[94] The appellant contends that Dawson conceded that the contents of the bench notes “could have” affected her evidence. As he did at trial, the appellant argues that their absence renders her assessments and conclusions unreliable and must generate a reasonable doubt. He cites *R v Tweedly*, 2013 BCSC 910 at para 160, [2013] BCJ No 1062 (QL):

In reaching that conclusion, based on the evidence I have heard on the voir dire, it is important to recall it has been held innumerable times in our courts that police testimony, without the advantage of contemporaneous notes, is unreliable and often not admitted into evidence for that purpose.

Whether or not this might be an accurate comment on the evidence in that case, it is certainly not a correct statement of the law.

[95] Notetaking by investigators is obviously a good practice, which is why it is commonly done. Contemporaneous notes are often the most reliable evidence of what happened. The context, however, is important, as in *Wood v Schaeffer*, 2013 SCC 71 at paras 63-68, [2013] 3 SCR 1053 emphasized by the appellant.

[96] In *Schaeffer*, the investigation concerned people who were shot by the police, and the issue was whether the officers had a right to consult counsel before preparing their notes about the incident. The Court confirmed that notetaking is part of a police officer’s “duty” and is important

to the administration of justice and considered the potential for note making by police officers based on subjective future forensic concerns. There is nothing like that here.

[97] The present case involves an unremarkable event of bench notes being missing. Dawson was not sure where they would have gone. As noted above in the discussion of the second ruling of the trial judge as to loss of evidence, there is nothing about the lack of the notes that presumably fed into Dawson's report which creates any fear about her actions or conclusions. There is no basis to assume unacceptable negligence on her part, and, more important, that in between the notes and the report Dawson somehow mis-constructed her assessments and conclusions.

[98] In *Kon Construction*, at para 44, the appellant Terranova complained that:

... raw data were collected in part by individual surveyors, none of whom testified. The computer programs were operated by unknown persons. The computer manipulated the data in ways and for reasons that are not entirely transparent. None of the witnesses who testified had any personal knowledge of any of this, which the appellant argues makes the evidence hearsay and inadmissible.

Kon Construction pointed to the reality of how records are acquired and kept in most contexts. Evidence of the "methodology" used to explain the acquisition and interpretation of such records itself provides some assurance for the output evidence. The difference between "methodology" and "standard practice" and, for that matter, "system" and "habit" is, essentially, a matter of semantics.

[99] Here, the appellant impugns the reliance by some witnesses as to "standard practice" as part of the alleged weakness of the Crown's case respecting continuity and lack of contamination of the exhibits seized by Demers and turned over to the Crime Lab and Dawson and ultimately to witnesses March and Skipper. In particular, Dawson, Demers and Skipper referred to usual or general practice of different eras. Those references were covered in direct and cross-examination.

[100] There is no evidence of any contamination in this. Nor is standard practice evidence a form of forbidden reasoning. It is up to the trier of fact to give weight to explanations in the absence of records which once existed: see eg *Crosslink Bridge Corp v Canadian National Railway Company*, 2014 ONCA 247 at para 14, 82 CELR (3d) 190; *Dickie v Minett*, 2014 ONCA 265 at para 4, [2014] OJ No 1607 (QL); *Kon Construction* at paras 46-51.

[101] A witness' description of her standard practice as an explanation of her methodology including by resort to devices is an acceptable form of evidence: see eg *R v Kee*, 2015 ONCA 730 at paras 10-11, 89 MVR (6th) 177; *R v Shams*, 2017 MBCA 116 at para 5, [2017] MJ No 336 (QL); *R v Cunningham*, 2006 ABCA 345 at paras 4-5, 69 Alta LR (4th) 20; *R v Watson* (1996), 108 CCC (3d) 310 at paras 36-38, referring to "habit" in the context of a defence case ("Where a person's conduct in given circumstances is in issue, evidence that the person repeatedly acted in a

certain way when those circumstances arose in the past has been received as circumstantial evidence that the person acted in conformity with past practice on the occasion in question”); *R v Murray*, 2013 ONCA 173, 42 MVR (6th) 175 (referring to reliance on instruments); *R v Lundle*, 2023 ABCA 11 at paras 35-37, [2023] AJ No 24 (QL).

[102] The appellant proposes that *R v Gubbins*, 2018 SCC 44 at paras 15, 46-51, [2018] 3 SCR 35 stands for the proposition “that evidence of a standard practice, without objectively reliable evidence that the standard was being practiced at the specific time under consideration, cannot supplant actual evidence of the incident”: AF para 75. With respect, this does not sweep aside as inadmissible the rather typical references to standard practice as occurred in this case.

[103] The trial judge was well aware that some of the witnesses relied on their “standard practice” in support of their analysis and conclusions. That he nonetheless accepted that analysis and the conclusions does not disclose any reviewable error. In the end, the trial judge said this about the handling of the key exhibits:

Defence counsel argues that the investigation conducted by Detective Demers was of poor quality. Detective Demers testified that exhibits for this file were locked in his desk at police headquarters. Detective Demers left EPS shortly thereafter, and ultimately other officers removed exhibits from his desk and placed them into central storage. The dress cuttings were originally sent to the RCMP lab in 1981 and remained at the lab until there was a mass transfer of exhibits back to EPS in 2007. In 2007, the dress cuttings were placed into storage with EPS. The dress cuttings were returned to the lab in 2018 for DNA analysis.

Investigative standards in 1981 were not as rigorous as they are today. The critical issue, however, is whether continuity of the dress cuttings was maintained. As noted above, continuity of the dress and dress cuttings was maintained. [AT 1454/28-39]

[104] We are not persuaded that there is any error in this.

b. Did the trial judge err in law in permitting the prosecution’s DNA expert to opine beyond her area of expertise?

i. Legal principles

[105] The appellant invokes *Awer*, 2016 ABCA 128, emphasizing the opinion of Berger JA in dissent in this Court at paras 122-126 about the assessment of expert evidence for alleged departures from areas where the witness would be qualified, with an effect that the expert’s conclusion was of no value.

[106] As it happens, Berger JA had, years earlier, expressed analogous dissenting conclusions in *R v B(SA)*, 2001 ABCA 235 (appeal dismissed at 2003 SCC 60, [2003] 2 SCR 678. In *B(SA)*, Berger JA opined that since there was not much evidence about international guidance which the expert witness had evidently considered, Berger JA seemingly concluded the evidence of the expert relied upon ‘unproven’ evidence which then devalued the expert’s opinion because it was, then, in effect, ‘outside’ the frame of expert qualifications. Abella J for the unanimous Supreme Court rejected that line of reasoning, and at para 63 said:

In my view, it is clear that the expert's reliance on the international guidelines was reliance on information obtained and acted upon within the scope of her expertise. It was entirely open to the appellant to challenge the expert on that issue. Absent such a challenge, the expert was entitled to refer to the sources within her field of expertise to explain and support her conclusions. Berger J.A., dissenting at the Court of Appeal, is correct that the record offers little information about the international guidelines referred to by the DNA expert (para. 131). *However, her expert evidence was tested according to the normal processes of the adversarial system.* Dr. Szakacs was cross-examined by the defence, and the trial judge was satisfied that the current standards in technology and competence had been met. *It was open to the trial judge to give the opinion of the expert the weight that he considered appropriate and there is no basis upon which this Court could interfere with his assessment of that evidence. The trial judge was alive to his [page706] obligation to weigh carefully and appropriately the evidence tendered by the DNA expert.* His verdict was not based solely on the DNA results, but also to a large degree on the circumstantial evidence and on his finding that the complainant's testimony was credible. [Emphasis added]

[107] Returning to the views of Berger JA in *Awer* as invoked by counsel for the appellant here, those views were, with respect, essentially a matter of his own conclusion on the evidentiary record in *Awer*. The conclusion he reached arose in the individual case of *Awer* where the subject was a mixture of experiential evidence and common sense. But, once again, in ordering a new trial, the Supreme Court of Canada did not suggest the evidentiary record had destroyed the opinion evidence.

[108] Rather, the Supreme Court of Canada accepted that the type of evidence which was advanced by the Crown in *Awer* should be evaluated afresh by a new screening procedure. The Court even proposed topics for such a *voir dire*. In our view, the observations of the Supreme Court of Canada in ordering a new trial in *Awer* did not purport to change the law as to admission or assessment of expert evidence, nor the principle of the deferential standard of review.

ii. *Analysis*

[109] The appellant contends, in effect, that it was outside of the qualifications of Skipper to provide the opinions that she did. That said, as the argument unfolds in the appellant's factum, it reads also like the concern is that Skipper was unable to say that a different form of DNA analysis for which she was not qualified might have led to a different conclusion on the subject of whether the source was a sperm source.

[110] The admissibility of Skipper's testimony is not in issue. The appellant's complaint that she strayed from the scope of her expertise was in her saying that she could see, against the backdrop of a list of circumstances including the perceptions of witness March, no scientific basis to conclude that the source of the appellant's DNA as found on the cutting was other than semen. Blackmore did offer evidence as to the possibility the source was not something with spermatozoa, she said in cross:

A If it's -- if it is not sperm then it has to be some other body fluid that ends up in the sperm fraction. So, if -- if I can make an assumption that the RCMP process is validated for enriching, much like our own, then it does provide support for the presence of sperm cells. [AT 1373/35-38]

[111] Before re-examination of Blackmore, the trial judge found that "we have evidence" that the RCMP process was validated [1376/8-9]. After that Blackmore was asked more questions in re-examination about validation and said there could be various purposes of validation. She opined again also that from the passage of time or some sort of chemical insult the shape or morphological properties of the source might change. She also repeated her evidence that a different source location may have viewed by witness March. None of that rendered wrong the findings of the trial judge about Skipper's conclusion.

[112] In the end, there was a substantial basis for saying that Skipper's reasoning as to why the source was a sperm source as opposed to saliva or some other source was not really outside the scope of her expertise. Her view was grounded in much more than "impression" as was faulted by Berger JA in *Awer*. It was, as Abella J said in *B(SA)*, "information obtained and acted upon within the scope of her expertise". It was not groundless.

[113] The process of differential extraction and the results obtained thereby were within her expertise and she provided a detailed explanation of the scientific basis for that conclusion about a sperm source. Blackmore did not differ on the process and purposes off differential extraction. Her evidence, ultimately, did not make wrong reliance by the trial judge on Skipper's evidence.

c. Did the trial judge err in law in his interpretation and application of the prosecution's expert evidence in the area of DNA?

i. Legal principles

[114] The third ground of appeal relates to the foregoing aspect of the evidence. There is no law involved here because the appellant's counsel, relying on an incorrect version of the transcript of the answer of Blackmore in re-examination at AT 1373/35-38, was arguing that the trial judge had Blackmore's evidence wrong. The erroneous transcript had the words "doesn't provide" where in fact the accurate transcript, as quoted above, was "does provide".

ii. Analysis

[115] The trial judge did specifically refer to the essence of Blackmore's direct evidence said to undermine Skipper's evidence about a sperm source. The trial judge also referred, more generally, to the evidence of both experts provided in their direct, cross-, and re-examinations. It is evident that he grasped the evidence and the arguments made about it specifically on the matter still pressed on appeal. His conclusion was not unreasonable.

VII. Conclusion

[116] Despite the able efforts of counsel for the appellant to suggest error, we do not find any in the reasons on any legal test or any finding of fact. Nor is the verdict unreasonable in any of the dimensions of that term that the law recognizes.

[117] The appeal is dismissed.

Appeal heard on September 5, 2025

Memorandum filed at Edmonton, Alberta
this 10th day of November, 2025

Watson J.A.

Slatter J.A.

Crighton J.A.

Appearances:

D.E. Green
for the Respondent

D.J. Anderson
for the Appellant

TAB 9

CITATION: R. v. Hamilton, 2011 ONCA 399

DATE: 20110524

DOCKETS: C43113, C44056, C44089, C44375

COURT OF APPEAL FOR ONTARIO

Laskin, Moldaver and LaForme JJ.A.

BETWEEN

Her Majesty the Queen

Respondent

and

Anthony Hamilton, Lennox Schloss, Michael Reid and Everaldd Davis

Appellants

James Lockyer, Brian Snell and Zachary Kerbel, for the appellant Anthony Hamilton

Gregory Lafontaine and Vincenzo Rondinelli, for the appellant Lennox Schloss

Timothy E. Breen and Diana M. Lumba, for the appellant Michael Reid

Joseph Di Luca, for the appellant Everaldd Davis

Michal Fairburn and Deborah Calderwood, for the respondent

Heard: April 12, 13, 14 and October 21 and 22, 2010

On appeal from the convictions entered by Justice Eugene G. Ewaschuk of the Superior Court of Justice, sitting with a jury, dated January 26, 2005.

By the Court:**Introduction**

[1] On July 24, 2001 at approximately 9:17 p.m., a call was placed to 911 reporting a shooting at 7 Flemington Road, a residential building in the City of Toronto. According to eyewitnesses, three gunmen leapt over the railing to the east of the entrance to the building and opened fire on a crowd of people standing outside the building. Paul Watson and Michael Lewis were shot multiple times and pronounced dead at the scene. Wayne Medder was shot in the leg as he ran trying to escape the gunfire. The killers fled in a van that was never recovered by police.

[2] In the spring of 2002, the four appellants, Anthony Hamilton, Lennox Schloss, Michael Reid and Everaldo Davis, were each charged with attempted murder and two counts of first degree murder.

[3] The trial of all four appellants began on September 13, 2004 before Ewaschuk J. and a jury, following several months of pre-trial rulings by the trial judge. The sole issue at trial was the identity of the killers and the driver of the getaway vehicle. On January 26, 2005, after nine days of deliberation, the appellants were convicted on all counts. On January 28, 2005, they were sentenced to life imprisonment with 25 years of parole ineligibility.

[4] Each appellant appeals his convictions, raising multiple grounds of appeal. In addition, some six months after the appeals were argued, the court reconvened to hear an application by the appellant Hamilton to introduce fresh evidence.

[5] We decline to give effect to any of the grounds of appeal and we dismiss the application to introduce fresh evidence. The trial judge, in our view, conducted this very difficult trial fairly, firmly and even-handedly. Before explaining the result, we briefly describe the evidence adduced at trial as it relates to the Crown's theory of the case and the defence of the four appellants.

Summary of the Evidence at Trial

1. Theory of the Crown

[6] The Crown's theory of the case was that the fatal shootings of Paul Watson and Michael Lewis and the wounding of Wayne Medder marked the third incidence of related violence over a 48-hour period between July 22 and 24, 2001. According to the Crown, the victim Paul Watson was targeted in revenge for the shooting death of Omar Christian (a.k.a. "Face"), which occurred less than 24 hours before Watson was killed. Christian was fatally shot on July 24, 2001 at approximately 2 a.m. outside the Base nightclub in Toronto. A day before his death, Christian had shot at and grazed Sydney McKoy (a.k.a. "Plum") following a boat cruise in the Toronto Harbour. McKoy was a member of a gang called the Eglinton Boys.

[7] At about the time Christian was shot outside the Base nightclub, witnesses observed a Silver PT Cruiser in the parking lot. Watson drove a Silver PT Cruiser. The

Crown's theory was that the appellants believed that members of the Eglinton Boys had killed Christian in retaliation for the shot he fired at McKoy after the boat cruise, and that Watson was the getaway driver in Christian's shooting. The appellants, who were criminal associates and friends of Christian, allegedly shot Watson in retribution for Christian's death. According to the Crown, the other shooting victims, Lewis and Medder, were simply in the wrong place at the wrong time.

[8] The Crown's theory of liability was that the appellant Hamilton was the getaway driver of the green van that was observed leaving the scene of the killings and the remaining appellants were the gunmen.

[9] Central to the Crown's case against the four appellants was evidence obtained through cell phone records that was said to reveal the appellants' movements on the day of the shootings. The Crown relied on the cell phone evidence as a compelling item of circumstantial evidence demonstrating that the appellants Hamilton, Schloss and Davis were near 7 Flemington Road, the scene of the murders, minutes before and after the shootings.¹

[10] Also integral to the Crown's case were intercepted telephone conversations involving the appellants that occurred after the shootings. The wiretap evidence included a conversation in which the appellant Hamilton (a.k.a. "Kaddhaffi") took credit for the killing of Watson and Lewis. There was also an intercept of Hamilton berating his

¹ Reid's phone did not register anywhere between 8:47 p.m. and 9:29 p.m. on the evening of the murders.

spouse for failing to give him an alibi when she was questioned by homicide police about his whereabouts on the day of the shooting. Other intercepted calls indicated that the appellants, Schloss (a.k.a. “Buckers”), Everal Davis (a.k.a “Ninja”), and Hamilton were conspiring to murder the appellant, Michael Reid (a.k.a. “Dawg” or “Richie Rich”) because he was telling others about his role in “serious things”, which the Crown posited must have been the murders of Watson and Lewis. In relation to Schloss, the Crown also relied on an intercept of a song he sung to a female acquaintance in December 2001, which contained the lyric: “From the day I see my friend die, That’s the day I let my gun cry.”

[11] The Crown’s case against two of the appellants, Reid and Davis, was also based in part on the evidence of their associate, Clarence Coward. Coward, while in police custody on unrelated charges, gave two statements to the police indicating that on the afternoon of July 24, 2001 (the day Watson and Lewis were killed), he helped Reid and Davis look for McKoy in an attempt to avenge Christian’s death. These statements were made under oath and videotaped in accordance with the requirements established by the Supreme Court of Canada in *R. v. K.G.B.* (1993), 79 C.C.C. (3d) 257 (“the *K.G.B.* statements”). In a third statement Coward gave to police, which was audiotaped, and in his testimony at the preliminary inquiry, he recanted the information given in his *K.G.B.* statements.

[12] By the time of trial, Coward had absconded and was not available to testify. The trial judge admitted his two *K.G.B.* statements as well as the recantation evidence in the

form of the police statement and Coward's testimony at the preliminary inquiry. The trial judge's ruling on Coward's statements and his evidence gives rise to three grounds of appeal by the appellants Reid and Davis. The details of Coward's evidence as well as the grounds of appeal in relation to it are discussed below.

[13] The Crown's case against Reid and Davis also included forensic evidence, which when taken in conjunction with Coward's *K.G.B.* statements, linked Reid and Davis to two of the guns used in the murders.

2. Defence Positions at Trial

[14] None of the appellants testified. Each took the position that he had nothing to do with the shooting of Watson, Lewis and Medder.

(i) Hamilton's Position

[15] Hamilton pointed to his lack of motive to kill Watson and Lewis. He also raised the defence of alibi.

[16] His counsel relied on a videotaped statement that Hamilton gave to the police following his arrest for the murders on May 2, 2002, in which Hamilton denied being involved in the killing of Watson and Lewis and claimed he had no motive to kill either one of them because he knew that McKoy was responsible for the killing of his friend Christian. In this statement, Hamilton told the police that at the time of the murders, he was riding in a van on Eglinton Avenue West, near Oakwood Avenue, with Patrick Webb

(a.k.a. “Ginga”), and urged investigators to check his cell phone records to confirm this alibi. Webb did not testify at the trial.

[17] Counsel for Hamilton also pointed to his client’s cell phone records with Telus Mobility, which indicated that at 9:18:45 p.m., Hamilton’s cell phone registered at a cell phone tower near the intersection of Eglinton Avenue West and Marlee Avenue, several blocks from where he told police he had been at the time of the murders. Counsel claimed that this evidence confirmed Hamilton’s story to the police about his whereabouts and also proved he was not near the murder scene shortly after the shootings, which were first reported in a phone call placed to 911 by the deceased Lewis’ brother at 9:17:55 p.m. The cell tower where Hamilton’s phone registered 50 seconds after the 911 call was approximately 3.6 kilometres from the murder scene and there were four other Telus cell towers closer to the crime scene. The evidence at trial was that a phone call generally registers at the closest cell tower, with exceptions that will be discussed below.

[18] In addition, counsel contended that Hamilton’s cell phone records indicated that he and Schloss were not together at the time of the shootings because Hamilton received incoming calls from Schloss several minutes before and several minutes after the 911 call that was made at 9:17:55 p.m.²

² The Crown’s explanation for the calls between Schloss and Hamilton before and after the shootings was based on the evidence of a witness who testified that after hearing shots, he saw a red car speeding past his house, just behind a green van. The Crown urged the jury to conclude that the killers drove separately to a spot near the crime scene, then got into a single vehicle and drove to the murder scene. After committing the murders, they drove away in the van and travelled to where they left the car, whereupon Schloss (and Reid and Davis) drove away separately from Hamilton.

(ii) Schloss' Position

[19] Counsel for Schloss emphasized the absence of any forensic or eyewitness evidence connecting Schloss to the murder scene. He also relied on the cell phone evidence indicating that Schloss and Hamilton spoke by telephone both immediately before and after the murders, which suggested, contrary to the Crown's theory, that they were not together at the time of the murders. Counsel contended that the cell phone location evidence indicating that Schloss' phone registered at a cell tower close to the murder scene both minutes before and minutes after the shooting could not provide accurate and reliable evidence of location and, even if accurate, it did not prove his involvement in the murders.

(iii) Reid's Position

[20] Reid pointed out that there was no evidence in the form of cell phone records linking him to the scene of the murder at the times in question. Counsel also pointed out that Reid was significantly shorter and had a different complexion than the persons described by eyewitnesses as the shooters, and submitted that this identification evidence exonerated him.

[21] Reid took the position that Coward was an unsavoury witness who falsely implicated him in order to extract immunity in relation to Coward's involvement with a Glock pistol that was used as one of the murder weapons. Counsel argued that Coward implicated Reid because he knew Reid had been arrested in connection with the Watson and Lewis murders and that Coward would therefore stand to benefit by providing

information against Reid. Counsel further argued that Reid's alleged involvement on July 24, 2001 with an incident at a jewellery store on Eglinton Avenue, as described by Coward, was inconsistent with Reid's cell phone records.

(iv) Davis' Position

[22] The trial judge permitted Davis to raise Patrick Webb as an alternate suspect. Webb was a criminal associate and friend of both Hamilton and Schloss. As noted, Hamilton claimed to have been with Webb at the time of the shootings.

[23] In support of his alternate suspect theory, counsel for Davis pointed out to the jury that Webb's cell phone records indicated that his phone registered at a cell phone tower located several minutes from the murder scene at 7 Flemington at around the time of the murders. In addition, in Coward's recantation statement and in his preliminary inquiry testimony, he claimed to have supplied Webb with the gun that was forensically linked to the murders. Davis took the position that the police confused him with Webb by virtue of the similarity of his nickname "Ninja" with Webb's nickname "Ginga".

[24] Davis also advanced an alibi defence based on evidence that his cell phone registered at a cell tower located near Yorkdale Mall at approximately 9:20:09 p.m. on the night in question, and the evidence of an eyewitness who suggested that the gunmen remained at the crime scene for five to eight minutes after the shooting.

Grounds of Appeal and the Fresh Evidence Application

[25] In total, the appellants raise ten grounds of appeal, both in common and individually.³ All four appellants raise the following two grounds of appeal:

- The trial judge's numerous interventions during the trial compromised trial fairness.
- The trial judge's comments while summarizing the evidence in his charge to the jury were unfair and prejudicial.

The appellants Davis and Reid raise three grounds of appeal in relation to the evidence of Clarence Coward:

- The trial judge erred in admitting the *K.G.B.* statements of Clarence Coward.
- The trial judge erred in ruling that Coward's preliminary inquiry evidence was admissible at the instance of the prosecution.
- The trial judge failed to provide the jury with a *Vetrovec* caution in assessing Coward's *K.G.B.* statements.

The appellant Reid raises the following ground of appeal:

- The trial judge erred in refusing Reid's application for severance.

The appellant Schloss raises the following grounds of appeal:

- The trial judge erred in admitting the intercept of a song Schloss sung over the phone to a woman.
- The trial judge failed to leave a critical factual issue with the jury – whether three or four men were involved in the crimes.

³ Two grounds of appeal were abandoned in oral argument: whether the trial judge erred in admitting the evidence relating to the conspiracy to kill Reid and; whether the trial judge erred in failing to give a *Parrington* charge in relation to the appellant Hamilton's alibi.

The appellants Schloss, Davis and Reid raise the following ground of appeal in relation to the cell phone evidence:

- The trial judge erred in admitting the evidence of three Crown witnesses related to the location of cell phones associated with the appellants without first conducting a *voir dire* on its admissibility.

The appellant Hamilton raises the following two grounds of appeal in relation to the cell phone evidence:

- The trial judge misdirected the jury in his instructions relating to exceptions to the general rule that a cell phone ordinarily registers at the nearest cell phone tower.
- The trial judge misdirected the jury on the lack of synchronization between the Telus clock and the 911 clock.

[26] In addition to these ten grounds of appeal, after the appeal was argued, Hamilton pursued an application to adduce fresh evidence, which he contends proves that the time recorded on the first 911 call at 9:17:55 p.m. and the time of the incoming call on his phone received at the Telus cell tower at Eglinton Avenue West and Marlee Avenue at 9:18:45 p.m. were both accurate times. According to Hamilton, this evidence clearly establishes that he was not at the scene of the crime when the shootings occurred and refutes evidence the Crown relied on at trial to the effect that there may be time discrepancies between the clocks used by the 911 system and the cell phone carriers of as much as or more than three minutes.

[27] We now explain why we dismiss each of the grounds of appeal and the application to introduce fresh evidence.

I. Interventions by the Trial Judge

[28] The appellants collectively assert that interventions by the trial judge compromised the fairness of their trial. They claim that these interventions occurred during the cross-examination of various Crown witnesses, as well as at other times throughout the trial. They argue that, together, the interventions by the trial judge created an appearance of unfairness or bias.

The Applicable Principles

[29] Appellate courts are reluctant to interfere on the basis that a trial judge improperly intervened during a trial. There is a strong presumption that a trial judge has not unduly intervened in a trial, and that “there are many proper reasons why a trial judge may intervene by making comments, giving directions or asking questions during the course of a trial”: *Chippewas of Mnjikaning First Nation v. Chiefs of Ontario*, 2010 ONCA 47, at para. 231.

[30] When evaluating interventions by a trial judge, the fundamental question is whether the interventions led to an unfair trial: *R v. Valley* (1986), 26 C.C.C. (3d) 207 (Ont. C.A.), at p. 232, application for leave to appeal dismissed, [1986] S.C.C.A. No. 62. This assessment is made from the perspective of a reasonable observer present throughout the trial: *R v. Stucky* (2009), 240 C.C.C. (3d) 141 (Ont. C.A.), at para. 72.

Isolated expressions of impatience or annoyance by a trial judge as a result of frustrations, particularly with counsel, do not in themselves create unfairness.

[31] In *Stucky*, at para. 71, this court repeated three situations, referred to in *Valley* at pp. 231-32, where interventions by the trial judge have been found to lead to an unfair trial and have resulted in quashing criminal convictions. These situations are:

1. Questioning an accused or a defence witness to such an extent or in a manner which conveys the impression that the trial judge has placed the authority of his or her office on the side of the prosecution and conveys the impression that the trial judge disbelieves the accused or the witness;
2. Interventions that have effectively made it impossible for defence counsel to perform his or her duty in advancing the defence; and
3. Interventions that effectively preclude the accused from telling his or her story in his or her own way.

[32] While these three situations appear to go some way toward categorizing different types of interventions, the analysis is nonetheless a contextual one. That is, interventions should not be judged in isolation but in the broader context of the entire trial: “[T]he record must be assessed in its totality and the interventions complained of in a given case must be evaluated cumulatively, not as isolated occurrences”: *Stucky*, at para. 72.

[33] Simply put, the rules limiting the ways in which a trial judge can intervene in proceedings are based on the oft-repeated adage that “justice should not only be done, but should manifestly and undoubtedly be seen to be done” (internal citations omitted): *Stucky*, at para. 61.

[34] Particularized occurrences of the trial judge's interventions were set out in the materials and referred to in the arguments of the appellants Reid and Hamilton. The appellant Davis relies on those occurrences and adopts the arguments made by Reid and Hamilton, while the appellant Schloss adopts those of Reid.

Reid's Objections

[35] Reid points to numerous interventions that he contends interfered with his ability to challenge the prosecution's case and compromised the necessary appearance of judicial impartiality. The first of these challenged interventions is in connection with Clarence Coward being shown a photo array that included a picture of Reid. According to Reid, the trial judge interfered with his counsel's cross-examination of one of the investigating officers by suggesting answers to the officer in anticipation of counsel's attempt to establish that another officer had shown Coward the photo array off-camera in order to get him to implicate Reid.

[36] Reid also argues that the trial judge intervened at several points in a way that reinforced the credibility of Coward's *K.G.B.* statements. In particular, the trial judge commented during the examination-in-chief of one of the investigating officers that Coward had made these statements because he was doing his "civic duty".

[37] Next, Reid argues that the trial judge erred in censuring defence counsel with the jury present when his counsel attempted to lead evidence that the Crown witness, Deetha (Angie) Simms, had failed to identify Reid from an incident at a jewellery store where

she worked.⁴ Reid also complains that the trial judge minimized Andrew Simms' inability to describe Sydney McKoy (a.k.a. "Plum") and the three men involved in the jewellery store incident.

[38] Finally, and briefly, Reid points to several other interventions by the trial judge during the testimony of various witnesses that he alleges were problematic:

- During the testimony of Satinder Dhillan, owner of a rental car company, the trial judge pointed out that having a non-renter drive a rental van would create issues with insurance;
- During the cross-examination of Garfield Braham, a witness at the appellants' hang-out at 1620-22 Lawrence Avenue West, the trial judge intervened to say that the witness did not need to be 100% sure of certain facts, allegedly displayed impatience with defence counsel's cross-examination of the witness on his criminal record, and also undermined counsel's suggestion that Reid spoke with a thick Jamaican accent;
- During the testimony of Janelle King, a friend of Reid, the trial judge allegedly minimized her evidence about his accent;
- During the cross-examination of Locksley Blades, a security guard at East Detention Centre, the trial judge allegedly minimized his comment that inmates will fight over dessert; and,
- During the cross-examination of Michael Rickard, a Bell Canada employee, the trial judge allegedly minimized cell phone evidence by noting that "[w]e can't be sure where he was in between those two calls."

⁴ Angie Simms testified at trial that three black men entered the jewellery store and asked for "the black one."

Hamilton's Objections

[39] Hamilton, in a single paragraph in his factum, joins in the submissions made by Reid for this ground of appeal, and also refers to several portions of the trial record that he claims demonstrate other objectionable interventions by the trial judge.

[40] Hamilton refers to three interventions related to the Crown witness, Nicole Flemming, the girlfriend of Paul Watson and acquaintance of Omar Christian. The first two interventions occurred during a *voir dire* into the admissibility of a statement made by Christian to Ms. Flemming. The *voir dire* was held just prior to the end of Ms. Flemming's examination-in-chief. In the first example, the trial judge ruled it was unnecessary to have Ms. Flemming take the time to read two preceding pages of the statement for purposes of illustrating that she did not refer to a fact in issue, given that she did refer to this fact later in the statement. In the second example, the trial judge insisted that counsel not misstate Ms. Flemming's previous evidence. Similarly, in the third intervention, which occurred during the cross-examination of Ms. Flemming while the jury was present, the trial judge again insisted that counsel not misstate her previous evidence.

[41] Hamilton next refers to interjections by the trial judge while the Crown witness, Paul Dylan, was being cross-examined on his observations regarding the alleged getaway van. The trial judge intervened to ensure that counsel did not misstate in his questions evidence that the witness had given in chief.

[42] Hamilton also refers to two interjections during Bharat Punwassie's evidence related to the timing of the departure of the alleged getaway van and his physical description of the occupants of the van. In the first example, the trial judge was seeking clarification of the timing related to the departure of the vehicle after the witness gave contradictory evidence on the point. In the second example, the trial judge commented on what Mr. Punwassie had meant when he said the men he saw get into the getaway van were of what he believed to be Somalian or Ethiopian descent. The trial judge did so by repeating the witness' earlier answers on this point.

Analysis

[43] It should be emphasized that interventions by trial judges are not about numbers, but rather about their effect and impact on the trial. As we stated at the outset, the ultimate question is whether the appellants received a fair trial from the perspective of a reasonable observer present throughout the trial. This assessment is, by necessity, a contextual one.

[44] This was a complex and difficult homicide case. The Crown's case was strong, but far from simple. The jury was compelled to examine a culture of violence that fosters fear.

[45] Leading up to and throughout the proceedings before the jury, the trial judge was required to make numerous evidentiary rulings and manage a complicated set of players. The following list helps to illustrate the demanding nature of the trial by showing the sheer magnitude of players, steps and decisions involved:

- Between March and August 2004, the four accused brought many pre-trial motions which required the trial judge to make numerous rulings.
- The accused were placed in the charge of the jury in mid-September. The jury began its deliberations on January 18, 2005 and verdicts were returned on January 26, 2005, a little over four months from the time the jury was empanelled.
- During the trial about 100 witnesses testified before the jury, over 60 mid-trial rulings were made, and over 20 mid-trial instructions given.

[46] Indeed, managing this trial was a very difficult task and a trial judge with expertise in criminal matters was essential to running a smooth trial.

[47] An examination of whether a trial judge has unduly intervened in a trial begins with the recognition that there are many proper reasons why a trial judge may intervene through comments, giving directions or asking questions during the course of a trial. A trial judge has an inherent authority to control the court's process and, in exercising that authority, a trial judge will often be required to intervene in the proceedings: *R. v. Felderhof* (2003), 68 O.R. (3d) 481 (C.A.), at para. 40.

[48] A trial judge may properly intervene to focus the evidence on the matters in issue, to clarify evidence, to avoid irrelevant or repetitive evidence, to dispense with proof of obvious or agreed matters, and to ensure that the way a witness is answering or not answering questions does not unduly hamper the progress of the trial.

[49] At a time when we are concerned about the increasing cost and length of criminal trials as well as their drain on resources and the pressures they bring to bear on the

administration of justice, appropriate trial management is to be encouraged, not muted. In a case of this complexity and size, a good deal of deference is owed to an experienced trial judge who lived those dynamics for many months; dynamics that must have impacted on his decision to intervene from time to time. A microscopic analysis of interventions by a trial judge in large cases such as this should be avoided.

[50] Aside from the trial judge's comment about "civic duty" in relation to Clarence Coward, the appellants have not rebutted the strong presumption that the trial judge conducted himself fairly and impartially. The interventions by the trial judge, when evaluated cumulatively and after an assessment of the entire record, cannot be said to have resulted in an unfair trial for any of the appellants.

[51] Although it is true that the trial judge intervened on multiple occasions, he did so in the context of a case that was very large, long, and complex. On the whole, when he intervened – and he did in both the case for the Crown and defence – he did so for good reasons. On our review, his interventions were for proper purposes such as clarification, avoiding irrelevant and repetitive evidence, and generally to move the trial expeditiously to a conclusion. We do not accept the argument that his interventions impeded counsel's ability to probe the Crown's case, or reflect the trial judge's attempts to provide the witnesses with answers favourable to the Crown's case. Rather, the trial judge had a noteworthy grasp of the evidence and demanded accuracy and fairness on the part of all counsel.

[52] After examining the appellants' complaints, any concern for unfairness or perceived unfairness is misplaced. The trial judge determined when it was appropriate to interject to move along the process. His discretion should be given deference. Indeed, this case required an experienced judge with a firm hand.

[53] The "civic duty" comment, nevertheless, is problematic. It arose during the examination-in-chief of Det. Carter in a discussion of the police efforts to protect Coward's identity as a witness in this investigation. The trial judge suggested to Det. Carter that what he meant by the phrase, "the cat was out of the bag", was "that Mr. Coward had done his civic duty and cooperated with you".

[54] It is of some significance that this comment was not made in the context of a discussion of Coward's credibility. The trial judge was giving his own interpretation of the meaning of the witness' comment that "the cat was out of the bag." Even so, the comment appears to somewhat facetiously attribute certain civic virtues to Coward. The comment is not, however, fatal.

[55] Importantly, shortly after the comment was made, the jury was excused and counsel brought a mistrial application based on the prejudicial effect of this comment. The trial judge dismissed the application. When the jury returned, the trial judge gave them a clear instruction to disregard the opinion of counsel or himself in assessing a witness' credibility. He emphasized:

[P]lease keep in mind that it is your sworn duty as jurors to determine the credibility and reliability of a particular witness

when assessed in the context of all the evidence. The opinion of Crown counsel, defence counsel, a witness, or even myself, as to a witness's veracity are irrelevant to your determinations. You determine the truth of the case as judged in the context of all the evidence tendered at this trial. It is your responsibility, not that of other witnesses, counsel or even myself, to determine whether a witness is telling the truth on a particular matter.

[56] We are satisfied that this instruction would have eliminated any prejudice that may have been caused by the trial judge's comment.

[57] Again, in a difficult case, where trial management skills needed to be at their most acute level, the trial judge did extremely well. Witnesses were treated fairly, as were all counsel and all accused, and the administration of justice was well-served. We therefore dismiss this ground of appeal.

II. The Trial Judge's Summary of the Evidence

[58] In addition to their complaints about the trial judge's interventions, the appellants also complain that in his charge to the jury, the trial judge used inflammatory and prejudicial language, which compromised their right to a fair trial.

[59] For example, the appellant Hamilton complains that the trial judge made a number of comments emphasizing the speed with which the killers left the crime scene, even though there was conflicting evidence on this point, some of which suggested that the shooters walked calmly away from the scene and drove away at a normal pace. The trial judge's commentary on the speed of the killers is said by Hamilton to have detracted

from his alibi defence. In advancing this objection, Hamilton cites this passage from the trial judge's charge to the jury:

Please also keep in mind that the killers acted quickly and with military precision in executing their ... well-formulated plan, to kill Paul Watson.

[60] Hamilton also points to several passages from the trial judge's summary of the Crown's case, including:

Common sense tells you that the brazen criminals had to make a rapid getaway or risk being arrested by the police.

...

It defies common sense that the gunmen would wait for three to five to eight minutes before they fled the murder scene. No, theirs was a rapid escape, a rapid flight. It was lightning quick, not done in slow motion.

[61] We do not accept that these passages were unfair or prejudicial. The first impugned comment by the trial judge in his charge simply refers to the speed with which the shootings occurred, something that was not in dispute. As for the trial judge's recitation of the Crown's position that the shooters would have left the scene quickly, three observations are in order. First, the trial judge was merely stating the Crown's overall position on this point. Second, trial counsel for Hamilton in his closing argument accepted that common sense indicated that the shooters would have moved with speed after the shooting, noting that "it's hard to believe that it would have taken over three minutes for these gunmen to get into the van and drive away." And finally, the trial judge reminded the jury of the conflicting evidence related to the speed with which the shooters

left the scene. Simply put, there was no unfairness in how this issue was left with the jury.

[62] The appellants also submit that the trial judge advanced a theory of association between the four of them that was not advanced by the Crown, namely, that Schloss seemed to be the lynch pin between the older and younger members of the group. Again, a review of the charge and the Crown's closing does not bear out this complaint. In the Crown's closing address, Schloss was described as the leader. The trial judge's suggestion merely reflected this position.

[63] In addition, the appellants complain that the trial judge made comments to the jury conveying his personal opinion of the evidence. However, as pointed out by the Crown, each of the examples given by the appellants is taken from the portions of the trial judge's charge called "The Crown's Position" and "Crown's Overview". The trial judge was simply providing an accurate summary of the Crown's position. Moreover, the trial judge had explained to the jury on several occasions during the trial and in his charge that they were not bound to follow his opinions on questions of fact or on the weight of the evidence.

[64] Finally, the appellants complain that the trial judge described the Crown's case as though it were a statement of fact, while in contrast, he described the defence position as a matter of counsel's opinion by repeatedly prefacing his comments with the phrase "according to defence counsel".

[65] This objection is not borne out by a review of the charge. The trial judge interspersed his summary of the Crown's case with phrases such as "the Crown submits", "according to the Crown", and "the Crown points out". Although some elements of the Crown's case were not attributed to Crown counsel's position, the trial judge used the same approach in describing the defence position. For example, in his summary of the positions of the various accused, he made comments such as:

Anthony Hamilton has a valid alibi.

...

At those times the two accused [Schloss and Hamilton] could not have been together and the Crown's theory must necessarily fail.

...

Once you reject [Coward's] unreliable evidence, which is not corroborated with respect to the identity of the shooter of Colin Allen's van, nothing is left of the Crown's case against Michael Reid.

...

Thus, Everal Davis has a valid alibi for the charges.

[66] In short, the trial judge's summary of the evidence relating to the theories of the Crown and the accused was balanced and fair. We therefore do not give effect to this ground of appeal.

III. Three Grounds of Appeal Related to the Evidence of Clarence Coward

Introduction

[67] At the time of the murders of Watson and Lewis, Clarence Coward was a friend of Reid and Davis and an acquaintance of Hamilton and Schloss.

[68] On August 7, 2002, a little more than a year after the murders, Coward provided the police with a *K.G.B.* statement in which he placed Reid and Davis in possession of two of the handguns used in the murders just hours before the murders occurred. On December 12, 2002, Coward provided the police with a second *K.G.B.* statement in which he provided further information and also discussed his understanding of what police had said to him off-camera during the August 7 statement.

[69] Five weeks later, on January 16, 2003, Coward provided the police with a third audio-recorded statement in which he recanted his earlier two *K.G.B.* statements. This statement was not taken in accordance with the *K.G.B.* format as it was not made under oath or videotaped.

[70] In mid-March 2003, Coward testified as a Crown witness at the appellants' preliminary inquiry and continued to disavow his two *K.G.B.* statements. The preliminary inquiry judge admitted the *K.G.B.* statements for their truth over the objection of defence counsel. At the conclusion of the preliminary inquiry, Reid and Davis were committed to stand trial along with their co-accused, Hamilton and Schloss.

[71] At trial, the Crown sought to call Coward as a witness at the trial of the four accused, but by the time of trial, he was no longer in Canada. Evidence adduced by the Crown established that he had absconded and was probably living somewhere in Jamaica.

[72] In the light of Coward's absence, the Crown sought to introduce his two *K.G.B.* statements for their truth. In argument, Crown counsel advised the trial judge that if Coward's two *K.G.B.* statements were admitted for their truth, he would agree that Coward's third statement (the audio-recorded recantation) and his evidence from the preliminary inquiry should also be admitted for the jury's consideration. That way, the jury would have a full picture of everything Coward had said when assessing the worth of his *K.G.B.* statements.

[73] Defence counsel objected to the admissibility of Coward's *K.G.B.* statements for their truth. However, if those statements were to be admitted for their truth, defence counsel wanted the jury to have Coward's audio-recorded recantation and his evidence from the preliminary inquiry.

[74] The trial judge ruled that Coward's two *K.G.B.* statements, along with his third recantation statement and his testimony from the preliminary inquiry, were admissible for the truth of their contents for the jury to consider.

[75] Following the trial judge's ruling, the parties began vetting Coward's statements and his evidence from the preliminary inquiry for use by the jury. In the course of that exercise, defence counsel had a change of heart about Coward's testimony from the

preliminary inquiry, and now claimed that it should be withheld from the jury and that the jury should only receive his two *K.G.B.* statements and his audio-recorded recantation.

[76] Crown counsel objected to that proposal. In his view, the jury should have Coward's audio-recorded recantation and his evidence from the preliminary inquiry, or neither. The defence could not have it both ways.

[77] The trial judge agreed with the Crown and offered defence counsel a choice – both or neither. Defence counsel chose both and Coward's audio-recorded recantation and his evidence from the preliminary inquiry were admitted as evidence the jury could consider for the truth of their contents.

[78] In pre-charge discussions, defence counsel urged the trial judge to provide the jury with a *Vetrovec* caution in relation to Coward. The trial judge felt that such a warning was unnecessary. He did advise the jury of the need to carefully assess Coward's evidence given that he was an admitted perjurer. He did not, however, fully identify why Coward's evidence should be approached with caution.

Grounds of Appeal Relating to Coward's Evidence

[79] Reid and Davis raise the following three grounds of appeal in relation to Coward's evidence:

- The trial judge erred in admitting Coward's two *K.G.B.* statements for their truth.
- The trial judge erred in including Coward's preliminary inquiry evidence in the package of evidence presented to the jury.

- The trial judge erred in failing to give the jury a *Vetrovec* warning in relation to Coward's evidence.

1. Did the trial judge err in admitting Coward's two *K.G.B.* statements for their truth?

Background

[80] On September 10, 2001, Coward was arrested by the York Regional Police on charges arising out of a home invasion that occurred in May 2001. On October 19, 2001, Davis was arrested in respect of the same occurrence. Davis was released on bail; Coward was detained in custody.

[81] On February 14, 2002, wiretap surveillance conducted by the Toronto Police in connection with the Watson and Lewis murders revealed an arrangement whereby Davis was to pick up a handgun. The police believed that Davis was targeting Reid to kill him. Reid had just been released from custody on unrelated matters. While in custody, Reid had been speaking indiscreetly about matters related to the Watson and Lewis murders and it appeared from the wiretaps that Davis, Hamilton and Schloss had come to view him as a liability.

[82] The police followed Davis to a location where he had arranged to pick up the handgun. Davis was stopped and a loaded 9 mm Glock handgun was found concealed in the dashboard of his car. He was arrested for various gun-related offences and detained in custody.

[83] On February 18, 2002, forensic examination of the gun found in Davis' car revealed that it was one of the guns used in the Watson and Lewis murders. The Toronto Police charged Davis in connection with the murders on April 25, 2002 while Reid was charged on May 8, 2002.

[84] On June 10, 2002, the Toronto Police learned that the gun seized from Davis' car was purchased by Coward several weeks before the murders. On June 11, 2002, the Toronto Police forwarded certain intercepted calls involving Coward and Davis to the York Regional Police. Those calls were disclosed to the two counsel who were representing Coward and Davis on the York Region home invasion charges. Davis was overheard in some of the calls making derogatory remarks about Coward. He expressed concern that Coward was planning to arrange a guilty plea and identify Davis as the lone gunman in the home invasion charges. Davis was also overheard to say that he did not care about Coward and that so far as he was concerned, Coward could spend the rest of his life in jail.

[85] On June 18, 2002, D.C. Nicol of the Toronto Police contacted Catherine Rhineland, Coward's counsel on the York Region charges. D.C. Nicol told Ms. Rhineland that the Toronto Police had information linking Coward to one of the guns used in the Watson and Lewis murders. Although he was not a suspect in those murders, the Toronto Police wanted to speak to Coward on a "no promises/no deals" basis.

[86] On June 21, 2002, Ms. Rhinelanders spoke to D.C. Nicol and told him that Coward would speak to the police in her presence. She advised D.C. Nicol that Coward had concerns about his safety and the safety of his family. She also made it known that Coward wanted consideration on the York Region charges for speaking to the Toronto Police. D.C. Nicol stood firm and told her that there would be no promises or deals.

[87] In the ensuing weeks, efforts were made to arrange a meeting with Coward. On June 27, 2002, Crown counsel from York Region advised Ms. Rhinelanders that Coward would be offered immunity from the use of any statement he might provide to the Toronto Police concerning the gun located in Davis' car but he would receive no consideration on the York Region charges. Ms. Rhinelanders indicated that she would seek instructions from Coward.

[88] On July 26, 2002, having received no response from Ms. Rhinelanders, D.C. Nicol left a message for her indicating that the police would be attempting to speak with Coward in the next several weeks. Once again, Ms. Rhinelanders did not respond.

[89] On August 7, 2002, D/Sgt. Martin and D.C. Nicol travelled to the Newmarket Provincial Court knowing that Coward would be attending there for a bail hearing. At 4:35 p.m., they met Ms. Rhinelanders in the corridor outside of the court and told her that they would be attempting to obtain a statement from Coward. Coward would be told that he faced prosecution for his involvement with the handgun found in Davis' car and he would be asked to account for his whereabouts at the time of the Watson and Lewis

murders. Ms. Rhinelanders indicated that she wanted to speak to Coward and arrangements were made to have Coward taken to a York Regional police station.

[90] Coward was transferred to a nearby detachment and at 5:00 p.m., he was placed in an interview room. D/Sgt. Martin then spoke to Ms. Rhinelanders, who was in the detachment lobby. Ms. Rhinelanders stated that she would not be sitting in on the interview with her client. She was then escorted into the interview room where she met with Coward in private.

The August 7, 2002 Statement

[91] At 5:51 p.m., D/Sgt. Martin and D.C. Nicol commenced a videotaped interview with Coward. The interview lasted for almost five hours. It was interrupted by two breaks.

[92] At the outset of the interview, Coward made it known that he was willing to talk about his involvement with the gun used in the Watson and Lewis murders but he preferred to wait until he was out of jail. D/Sgt. Martin advised him of the witness protection program and she outlined some of the benefits and burdens associated with it. Coward described his present situation as a “predicament ... [i]t’s like I am signing my death wish”. Asked whether he had already been threatened, Coward referred to the intercepted communications that the Toronto Police had turned over to York Region in which Davis had been speaking about him in very negative terms.

[93] Before going further with the interview, Coward was told by D/Sgt. Martin that one of the guns used in the murders had been traced back to Coward in Florida and that the American authorities might be pursuing charges against him. As for charges in Canada arising from Coward's involvement with the gun, D/Sgt. Martin explained that Coward would receive use immunity for any statement he might provide and he would also be given transactional immunity, such that he would be protected from prosecution in Canada for any offences related to the gun. She further told Coward that while he was not a suspect in the Watson and Lewis murders, he was "a person of interest".

[94] Coward then indicated that he wanted to call his wife and a break was taken to enable him to do so. During the break, Coward spoke briefly with D.C. Sepkowski off-camera. D.C. Sepkowski was the officer in charge of the York Region investigation and Coward wanted to know what was going to happen on those charges. D.C. Sepkowski told Coward that that was between Coward and the Toronto police and the Toronto police could approach him [Sepkowski] at any time.

[95] After the break, Coward was advised that the interview was being videotaped and audiotaped. D/Sgt. Martin further informed him that he did not "have to be here". It was his choice to remain or leave and if he chose to leave, arrangements would be made to have him returned at once to the detention centre. Coward stated that he wanted to stay. He was then placed under oath and cautioned and the formal interview commenced at 6:42 p.m.

[96] Because of the importance of Coward's statement of August 7, 2002, particularly as regards Reid, we describe in detail the content of the statement. We also describe the many items of independent evidence that support the statement's overall veracity and those aspects of it that implicate Reid and Davis in the Watson and Lewis murders.

[97] In his statement, Coward told the police that about a month before the murders, he was in Miami. He said he travelled there under the name of Clarence Rogers and that his cell phone was registered to that name. Coward's wife, Caron, confirmed that Coward used the name Clarence Rogers and cell phone records under the name of Clarence Rogers were produced at trial and filed as exhibits.

[98] While in Florida, Coward received a call from Davis. Davis wanted Coward to buy a gun for him. Cell phone records and car rental agreements confirm Coward's account of being in Florida and speaking to Davis. Coward was in Florida between June 29 and July 14, 2001. During that timeframe, Coward had repeated phone contact with Davis and Reid. He had no phone contact with Patrick "Ginga" Webb, the man whom Davis would later cast as a third party suspect and for whom Coward in his subsequent recantations claimed he had purchased the gun.

[99] Coward purchased two 9 mm hand guns in Florida and had them smuggled into Canada. He purchased the 9 mm Glock, which was found by the police in the dashboard of Davis' car, from a man named "Dean". Coward's cousin had introduced him to Dean and Dean rented cars for Coward when he was in Florida. Records from Dollar Rent-A-

Car in Fort Lauderdale, Florida, show “Clarence Rogers” named as an additional driver in a car rental agreement dated July 13 between Dollar and Dean Thomas. Danae Dalling, a woman from Florida who was called by the Crown as a witness, testified that she purchased two guns from A.A. Lock & Gun in Fort Lauderdale, Florida, on April 16, 2001. According to Dalling, she gave the guns to her boyfriend, Dean Thomas, to sell to a “friend of a friend” who wanted to purchase them. The serial number of the 9 mm Glock found in Davis’ car matched the serial number of the Glock sold by A.A. Lock & Gun to Dalling.

[100] Upon Coward’s return to Canada on July 18, he called Davis and told him to come by and pick up the gun. Davis was shown the two guns that Coward purchased while in Florida and he selected the Glock. Telephone records confirm that Coward called Davis on July 18. Telephone records also show that between July 14 and July 18, on his return trip from Florida, Coward had four contacts with Davis, three with Reid and none with Webb.

[101] In his statement, Coward told the police where Davis secreted the gun in his car. When Davis was arrested on February 14, 2002, the Glock was found in the precise location indicated by Coward. Intercepted calls from Davis established that the Glock found in the dashboard belonged to Davis.

[102] Before taking a second break in the interview, D/Sgt. Martin asked Coward if he knew anything about a man named Colin Allen (a.k.a. “Roach”). Roach had been shot at

on the day of the Watson and Lewis murders. Coward paused and then stated that he had heard about it.

[103] During the break, after Coward made a phone call to his wife, he was escorted by D.C. Nicol to an investigation room. As D.C. Nicol was about to shut the door, Coward told him that in the photographs that D/Sgt. Martin had shown him, he now believed that he recognized one of the guys as “Richie Rich” (Reid’s nickname), a friend of “Ninja’s” (Davis’ nickname). D.C. Nicol told Coward that they would discuss it on tape when the interview resumed. He then advised D/Sgt. Martin of the conversation.

[104] D/Sgt. Martin proceeded to the room where Coward was waiting. Coward was crying when she entered the room. He told her he was afraid of Davis. He stated that she “wasn’t asking him the right questions.” He said he knew everything and that he was with Reid and Davis in a van on Falstaff Avenue when Reid shot at Roach.

[105] Shortly after 9:00 p.m., Coward was returned to the interview room. He told D/Sgt. Martin that he knew Reid as “Richie Rich”. He stated that on the day of the Watson and Lewis murders, Reid and Davis picked him up shortly after noon hour. Reid was driving a light blue Dodge Caravan that he had rented. They spoke about Face’s (Christian’s) death and the rumours going around that the Eglinton Boys were responsible.

[106] Coward stated that he, Davis and Reid drove to Eglinton and parked in a back alley. Davis had the Glock and he provided Coward with another gun. The three men

then entered a small jewellery store, drew their guns, and Reid asked for someone whose name Coward could not recall. Coward said he knew the person in the store and told Davis not to “trouble them.”

[107] Angie Simms and her brother Andrew Simms testified at trial. Angie worked at the jewellery store and she and Andrew were present when three men entered some time after noon on July 24. Angie and Andrew did not specifically identify anyone and denied seeing handguns. Nonetheless, following the event, Angie called her employer in a “fright” and did not work at the store again. (Reid points out that the general descriptions of the assailants and the timing of the event serve to exclude him as one of the assailants).

[108] After initially denying it, Coward remembered that after leaving the jewellery store on Eglinton, he, Davis and Reid drove to the parking lot behind 1620 Lawrence Avenue West. There were approximately 25 to 35 men and women in the lot who were drinking and mourning Face’s death. People were angry and they were holding the Eglinton Boys responsible. Several people said that somebody had to go down for it. Coward recalled seeing Hamilton and someone he believed to be Patrick Webb in the crowd. A witness, Garfield Braham, testified that he recalled seeing Hamilton, Webb, Reid and Schloss at the parking lot on the afternoon of the 24th or the day after. Some of their cell phones registered in the area of the lot at the time Coward said he saw them there.

[109] After leaving the lot, Coward stated that he, Davis and Reid proceeded north on Jane Street. Reid was driving, Davis was seated in the front passenger seat and Coward was in the seat behind them. Reid pulled into a building on Falstaff Avenue to look for Roach (Colin Allen, one of the Eglinton Boys). As they drove in, Roach was driving towards them from the opposite direction. Either Davis or Reid said “isn’t that Colin Roach?” Coward responded “yes”, at which point Reid pulled out a gun, extended it out of the driver’s window and fired at Roach as he passed. It was “driver door to driver door”. Reid then drove to the other side of the building and proceeded north on Jane Street, where he dropped Coward off at his apartment.

[110] At the appellants’ preliminary inquiry, Colin Allen provided information for the first time about the shooting. His description of it was strikingly similar to Coward’s account. Allen described the van that fired on him as a “Chrysler Dodge Chevrolet van, something like that.” He thought it was grey or silverish in colour. On July 23, 2001, Reid rented a silver Dodge Caravan under the name Anthony White, one of his aliases. The van was returned on July 27, 2001. It largely matched the description provided by Coward.

[111] Bullets extracted from Allen’s car were tested forensically. Sometime after the August 7 interview, the police learned that the bullets from Allen’s car matched up with bullets found at the scene of the Watson and Lewis murders. No bullets from Davis’ Glock were found in Allen’s car. According to Coward, it was only Reid who fired at Roach. At the time of the August 7 interview, although the police were aware of the

linkage between the bullets in the car driven by Allen and those extracted from Mr. Watson and Mr. Lewis, this information had not been released to the public. Finally, Davis' cell phone registered in the vicinity of 30 Falstaff Avenue shortly after a resident heard gun shots and called 911.

The December 12, 2002 Statement

[112] On December 12, 2002, while Coward was still in custody awaiting trial on the York Region charges, he provided a second *K.G.B.* statement to D/Sgt. Martin and her partner, Det. Carter. After being cautioned and sworn, D/Sgt. Martin reminded Coward of the “promises” or “inducements” she had held out to him on the last occasion. In particular, she repeated the promise that his statement would not be used against him on any charges relating to the gun found in Davis' car and that the police would make efforts to have him and his family placed in the witness protection program. Coward expressed a desire to be placed in the witness protection program and stated that he and his wife would want to be relocated before his statements were disclosed to the defence.

[113] At the outset of the December 12 statement, Coward confirmed that while he was off-camera during the August 7 interview, he was not offered any further inducements by the police, nor did any police officers threaten him in any manner. He agreed that when he spoke with officers off-camera, including D/Sgt. Martin, he did so at his own request and of his own volition. He further acknowledged that in the several off-camera discussions, he was the one who prompted the police to question him about Reid and the shooting incident on Falstaff Avenue involving Colin Allen. The police then provided

Coward with his cell phone records and the remainder of the interview was mainly taken up with a review of those records, particularly his calls on July 24, 2001.

The January 16, 2003 Statement

[114] On December 22, 2002, Coward resolved the York Region charges by way of a plea of guilty. Over the Christmas weekend – December 27 to December 31 – Coward left voice messages for D/Sgt. Martin and Det. Carter, indicating that he wanted to see them to set something straight.

[115] On January 10, 2003, Det. Sepkowski testified at Davis' trial on the York Region charges and in the course of his evidence, he referred to Coward's December 12, 2002 meeting with the Toronto homicide officers. Det. Sepkowski relayed this information to Det. Carter after he finished testifying.

[116] On January 16, 2003, Detectives Carter and Horner attended at the Toronto West Detention Centre to speak with Coward. The meeting with Coward was audiotaped. Det. Carter anticipated that Coward might recant his earlier statements and Coward did just that.

[117] Coward maintained that he had not been honest with the police in his earlier statements. He said that, in truth, he had obtained the 9 mm Glock for Patrick Webb, not Everald Davis. He had misled the police earlier because Webb had threatened his family. He falsely implicated Davis because of the disparaging remarks Davis had made about

him on the wiretaps. Coward denied witnessing the shooting of Colin Allen on Falstaff Avenue and claimed that he had made that up when speaking to D/Sgt. Martin.

[118] On February 7, 2003, Coward received a 10-month sentence on the York Region charges, in addition to a credit of 38 months for the 18 months he had spent in pre-trial custody.

The Preliminary Inquiry – March 2003

[119] Coward was called by the Crown as a witness at the preliminary inquiry. He testified over the course of 7 days.

[120] In examination-in-chief, Coward maintained that he purchased the gun in Florida for Patrick Webb. He admitted knowing Reid and Davis but claimed that he was not with them on July 24, 2001.

[121] Crown counsel then sought leave to cross-examine Coward on his August 7 and December 12 statements. Those statements were played in Coward's presence. Coward maintained his position that he purchased the gun for Webb and that he was not with Reid and Davis on the day of the Watson and Lewis murders.

[122] The Crown then sought to have Coward's August 7 and December 12 statements admitted for their truth. With the concurrence of defence counsel, the preliminary inquiry judge ruled that the Crown could cross-examine Coward on his prior statements and the defence counsel could do so as well, in addition to cross-examining him at large.

[123] In cross-examination by Crown counsel, Coward testified that the police coerced him into naming Davis as the person for whom he had purchased the gun in Florida. He was told that if he did not name Davis, he would be charged with offences relating to the gun and he would also face murder charges in relation to Watson and Lewis. As for the shooting incident on Falstaff Avenue involving Colin Allen, Coward stated that he told the police that he had heard rumours about it but that he did not know who was involved. According to Coward, the police told him to implicate Davis and Reid. He later changed his explanation and said that the police did not tell him what to say. Coward made the same claim in relation to the incident at the boutique on Eglinton. He had heard rumours about it but the police made him say that he, Reid and Davis were involved. He later changed that explanation and said that the police did not tell him what to say. Coward refused to accept that he recanted his *K.G.B.* statements because he was afraid of Reid and Davis, knowing what they might do to him.

[124] In cross-examination by Reid's counsel, Coward provided a new explanation for his earlier statements. He agreed that when he spoke to the police on August 7, 2002, he knew that any hope he might have of receiving bail on the York Region charges would disappear if he were charged in connection with the Glock handgun. He also believed that because of his connection to the gun, he could be charged with the murders of Watson and Lewis. Finally, he knew that by cooperating with the police, he would put himself at risk in jail and he was not about to do that without obtaining a benefit in return.

[125] In cross-examination by Hamilton's counsel, Coward changed his explanation again. He now conceded that he had no explanation as to why he had implicated himself in the boutique incident on Eglinton Avenue West or the shooting incident involving Colin Allen on Falstaff Avenue. He agreed that this was information he volunteered to the police; it was not something the police forced him to say. He also could not explain why he felt that the information relating to the boutique and the shooting of Colin Allen would be of any assistance to the Toronto police in their investigation of the Watson and Lewis murders.

**The Trial Judge's Ruling on Coward's August 7 and December 12, 2002
K.G.B. Statements**

[126] At trial, the defence argued that Coward's two *K.G.B.* statements were inadmissible for the truth of their contents for one reason: they were the product of police coercion, having been obtained by promises or inducements.

[127] In support of this position, defence counsel referred to Lamer C.J.'s reasons in *K.G.B.* where, at pp. 298 and 299, the Chief Justice reserved to trial judges a residual discretion to disallow the admission of a statement for its truth even though the statement had been videotaped and there had been a warning and oath administered. In this regard, Lamer C.J. was concerned that there could be situations where the oath and videotape and the acknowledgement of the warning were made in circumstances that rendered them suspect "in the same way that confessions may be suspect if coerced by police investigators."

[128] To account for those situations, Lamer C.J. suggested that “the test developed ... for the admission of confessions” should be applied to prior statements where such statements are being tendered for their truth. Trial judges were to satisfy themselves, usually on a balance of probabilities, “that the statement was not the product of coercion of any form, whether it involves threats, promises, excessively leading questions by the investigator ... or other forms of investigatory misconduct.”

[129] In view of that requirement, the defence maintained that because the Toronto police had promised Coward certain things, including transactional immunity in Canada in connection with the gun located in Davis’ car, Coward’s two *K.G.B.* statements should be treated as “suspect” and not admitted for their truth.

[130] The trial judge disagreed. In concluding that the two *K.G.B.* statements were admissible for their truth, he found as a fact that there were “two promises held out to Clarence Coward by the police” – one being transactional immunity in relation to the gun, the other being an implicit promise by D.C. Sepkowski that if Coward were truthful, the Toronto police could approach the York Regional Police “on the outstanding [home invasion] charges Mr. Coward faced in Newmarket ... Obviously, Mr. Coward wanted some consideration if he cooperated with the Toronto Police, should he eventually be found guilty of the Newmarket charges”. In the trial judge’s opinion, however, “neither promise, nor both promises combined, coerced Mr. Coward into making the first videotape statement.”

[131] In his ruling, the trial judge acknowledged that “had the Crown attempted to use the statements against Mr. Coward as an accused, the statements would have been involuntary in the traditional sense of the voluntariness rule *qua* accused.” He believed, however, that different considerations apply to statements taken from a witness as opposed to an accused, one being the right of an accused to be free from self-incrimination. In the case of a witness, an inducement provided to obtain information needed “to bring real perpetrators to justice is generally proper, unless the inducement is coercive, thereby depriving the person giving the *K.G.B.* statement of his or her freedom of choice.” In this case, Coward was not deprived of his free will by virtue of the promises made to him. Accordingly, in the opinion of the trial judge, his “videotape statements [were] voluntary within the criteria delineated by the Supreme Court in *R. v. B. (K.G.)*, *supra*.”

[132] Having made that determination, the trial judge went on to consider, in the exercise of his “residual discretion”, whether the admission of the *K.G.B.* statements “would bring the administration of justice into disrepute or render the trial unfair to the accused; for example, where the declarant is manifestly unreliable and the statement is devoid of confirmatory evidence.”

[133] In this regard, while the trial judge accepted that Coward may have had a motive to lie about Davis because Davis had made negative comments about him on the wiretaps and because he had reason to fear Davis, in his view, those factors prompted Coward to tell the truth so that he and his family could be “entered into the witness protection

program.” As for Reid, the trial judge was satisfied that “Coward had no motive whatsoever to lie” about him.

[134] Having addressed the issue of Coward’s motive to speak to the police, the trial judge turned next to consider whether Coward’s videotaped statements were “manifestly unreliable.” In the opinion of the trial judge, they were not. Rather, he found them to be highly reliable for two distinct reasons:

I find ... that the statements are highly reliable because they are confirmed in detail by independent evidence and because the highly-detailed particulars of the statement were volunteered by the declarant and were not in any way suggested by the police to the declarant. In fact, the police were surprised by the declarant’s statement that he was with Davis and Reid earlier on the day of the killings and that Reid had shot up Colin Allen’s van. Those details were totally unexpected, even though the details were merely incidental to the later killings.

[135] Lastly, the trial judge considered the defence submission that “it would be unfair to the accused if the jury were to assess the ultimate reliability of Clarence Coward in the absence of his cross-examination before them and in the absence of their opportunity to observe his demeanour.” The trial judge answered this concern by noting that the Crown had conceded that Coward’s “recantation in his third statement and at the preliminary inquiry should go to the jury so as to give them a complete picture of Clarence Coward.” Added to that, the trial judge noted that the jury would be privy to “hundreds of pages of cross-examination of Clarence Coward” from the preliminary inquiry and the jury could “observe his demeanour during the videotape statements.”

[136] In the end, the trial judge was satisfied that “the admission of the videotape statements [would] not render the accused’s trials unfair or bring the administration of justice into disrepute.” Accordingly, he ordered that the “four statements ... be admitted, subject to requisite editing.”

Analysis

[137] We are satisfied that in admitting Coward’s two *K.G.B.* statements for their truth, the trial judge addressed the pertinent issues and came to the correct conclusion. The trial judge did not have the benefit of the Supreme Court’s helpful and instructive reasons in *R. v. Khelawon* (2006), 215 C.C.C. (3d) 161 when he delivered his ruling.

[138] *Khelawon* advocates a holistic approach to the question of threshold reliability. In some instances, the threshold test for reliability will be met by simply looking at the circumstances under which the statement came about. In others, circumstances external to the making of the statement will allow for sufficient testing of the truth and accuracy of the statement. At para. 49 of *Khelawon*, Charron J. succinctly explained the two different criteria that are relevant to the reliability requirement:

The criterion of reliability is about ensuring the integrity of the trial process. The evidence, although needed, is not admissible unless it is sufficiently reliable to overcome the dangers arising from the difficulty of testing it. As we shall see, the reliability requirement will generally be met on the basis of two different grounds, neither of which excludes consideration of the other. *In some cases, because of the circumstances in which it came about, the contents of the hearsay statement may be so reliable that contemporaneous cross-examination of the declarant would add little if anything to the process. In other cases, the evidence may not*

be so cogent but the circumstances will allow for sufficient testing of evidence by means other than contemporaneous cross-examination. In these circumstances, the admission of the evidence will rarely undermine trial fairness. However, because trial fairness may encompass factors beyond the strict inquiry into necessity and reliability, even if the two criteria are met, the trial judge has the discretion to exclude hearsay evidence where its probative value is outweighed by its prejudicial effect. [Emphasis added.]

[139] For present purposes, *Khelawon* is significant because of the court's clear statement, at para. 100, that the inquiry into threshold reliability need not be limited to the circumstances surrounding the making of the statement. Rather, the broader picture, including the existence of corroborative evidence, may be considered in deciding whether the statement is inherently trustworthy and thus sufficiently reliable to warrant its reception as evidence of the truth of the matters stated therein.

[140] Before addressing in fuller terms the impact of *Khelawon* on the issue at hand, we propose to return to *K.G.B.* and address the appellants' chief, and indeed only complaint, that because the police made promises to Coward to induce him to speak, the trial judge erred in admitting his two *K.G.B.* statements for their truth. According to the appellants, because the two *K.G.B.* statements were the product of inducements, pursuant to the Supreme Court's decision in *K.G.B.*, they ought not to have been admitted regardless of Coward's status as a witness rather than as an accused.

[141] We refuse to give effect to that argument. In particular, we do not read *K.G.B.* as laying down a hard and fast rule that all witness statements taken in contravention of the

traditional confessions rule must necessarily be rejected as evidence of the truth of their contents.

[142] In *K.G.B.*, Lamer C.J. introduced the pertinent discussion of “the rule relating to confessions” at p. 298 as follows:

Even where there has been a warning and oath administered, and the statement videotaped, or sufficient substitutes established, the trial judge will still have *the discretion* to refuse to allow the jury to make substantive use of the statement. [Emphasis added.]

[143] The Chief Justice’s choice of the word “discretion” is, in our view, significant. It leads us to believe that he did not intend to create a hard and fast rule, particularly in view of the rationale he gave, also at p. 298, for concluding that trial judges should retain a residual discretion:

Proponents of the orthodox rule voice the concern that malign influences on the witness by police may precede the making of the statement and shape its content, in the same way that confessions may be suspect if coerced by police investigators. That is, it still may be the case that the oath and videotape, and the acknowledgement of the warning, *were made under circumstances that make them suspect*.

For this reason, the test developed by this court for the admission of confessions is well suited to making a threshold determination of whether the circumstances under which the statement was made *undermine the veracity of the indicia of reliability*. [Emphasis added.]

[144] In this passage, the Chief Justice is cautioning trial judges not to become mesmerized by the indicia of reliability. When the indicia of reliability are found to exist, normally this will justify the admission of a statement for its truth. But there may be

cases where the trial judge is concerned that the indicia of reliability are a façade – and in such circumstances, the voluntariness branch of the confessions rule provides a ready-made guide to assist trial judges in making their threshold reliability determination. For example, if a trial judge were to entertain a real concern that a witness’ statement was the product of police coercion and the witness simply told the police “what the police wanted to hear”, this would necessarily undermine the veracity of the indicia of reliability and render the proposed statement inadmissible for its truth. In that sense, the residual discretion vested in trial judges may be seen as a safety valve. It ensures that the decision to admit a statement for its truth does not devolve into a merely mechanical exercise.

[145] Interpreting *K.G.B.* in this fashion does not undermine the concerns raised by the Chief Justice in which he expressed the view that judges must be given a residual discretion. But just as the question of admission should not be treated as a mechanical exercise, neither in our view, should the question of exclusion. The *per se* rule suggested by the appellants runs precisely that risk – and we reject it for that reason.

[146] Common sense alone would indicate that the Chief Justice was not advocating a *per se* rule in the case of witness statements. Surely, he did not intend, without more, that the valuable evidence of a terrified witness should be lost because the witness would only speak on the promise that the police would take steps to enroll the witness in a witness protection program.

[147] In this case, the trial judge considered the promises and inducements held out to Coward. He was clearly satisfied that they did not impact on the voluntariness of Coward's statements, nor were his statements a product of police coercion. On the contrary, he found that Coward spoke willingly to the police and his statements were voluntary and the product of his free will.

[148] Those findings were available to the trial judge and we see no basis for interfering with them. In short, having considered the promises and inducements made to Coward, the trial judge was satisfied that they did not undermine the veracity of the indicia of reliability. Hence, he concluded that Coward's two *K.G.B.* statements were admissible for their truth. In our view, that conclusion is unassailable.

[149] If, however, we are wrong in our assessment of *K.G.B.* and the appellants are correct that it stands for the proposition that where the police make promises to a witness to induce the witness to speak, the ensuing statement can never be admitted for its truth, we are respectfully of the view that *K.G.B.* has, to that extent, been overtaken by *Khelawon*.

[150] Without being critical, when *K.G.B.* was decided, the law was at best murky on the extent to which a court could look beyond the circumstances surrounding the making of the statement in assessing threshold reliability. It can, however, be fairly said that the spotlight was definitely focused on the circumstantial guarantees of trustworthiness surrounding the making of the statement.

[151] Following *K.G.B.*, the law on this subject remained unsettled until the Supreme Court gave its decision in *R. v. Starr*, [2000] 2 S.C.R. 144. *Starr* put to rest any notion that a court could look beyond the four corners of the statement in making its threshold reliability assessment. At paras. 215 and 217, the court stated:

Threshold reliability is concerned not with whether the statement is true or not; that is a question of ultimate reliability. *Instead, it is concerned with whether or not the circumstances surrounding the statement itself provide circumstantial guarantees of trustworthiness.*

...

At the stage of hearsay admissibility the trial judge should not consider the declarant's general reputation for truthfulness, nor any prior or subsequent statements, consistent or not. These factors do not concern the circumstances of the statement itself. *Similarly, I would not consider the presence of corroborating or conflicting evidence.* [Emphasis added.]

[152] But *Starr*, like *K.G.B.*, has been overtaken by *Khelawon*. Trial judges are no longer restricted to considering the circumstances surrounding the making of the statement in assessing threshold reliability. They can now consider the broader picture, including the existence of corroborative evidence, in deciding whether a statement is inherently trustworthy and thus sufficiently reliable to warrant its admission for the truth of its contents.

[153] In short, post-*Khelawon*, the emphasis appears to have shifted away from potential unreliability and is now more focused on actual reliability – something the confessions rule does not concern itself with. This point was made succinctly by Cory J. in *R. v.*

Hodgson, [1998] 2 S.C.R. 449, at paras. 19 and 20, some five years after *K.G.B.* was decided:

It must be recognized that the purpose of the confessions rule is to exclude putatively unreliable statements, not actually unreliable statements. *In other words, the confessions rule excludes statements obtained by force, threat or promises as somehow inherently unreliable, but does not inquire into the actual truth or falsity of the statement. If the concern of the confessions rule were truly the reliability of the statement, then the court's inquiry would focus on objective corroboration of the confession evidence; if additional evidence confirmed the confession was accurate, it should be admitted under a reliability rationale.*

Instead, the confessions rule asks only if the statement was voluntary, not if the statement is true. [Emphasis added.]

[154] Once it is accepted that the threshold reliability assessment is not restricted to the circumstances surrounding the making of the statement, using the confessions rule as the sole arbiter upon which to base the assessment is counter-intuitive, if not plainly illogical. That is the position the appellants seek to persuade us of and it is one we reject.

[155] *Khelawon*, in our view, requires trial judges to ask two questions in deciding whether a witness statement should be admitted for its truth:

1. On the basis of the evidence presented, is the trier of fact able to sufficiently test the truth and accuracy of the statement in issue?
2. If the answer to question one is “yes”, are there overriding policy considerations that would prevent the statement from being admitted for its truth?

[156] With respect to the first question, as *Khelawon* explains, in some instances, the answer will be apparent having regard to the circumstances under which the statement came about. In others, circumstances external to the making of a statement will be such that the trier of fact can sufficiently test the statement's truth and accuracy. In still others, a combination of the two will satisfy the threshold reliability requirement.

[157] With respect to the second question – policy concerns – if the police were to engage in misconduct such as beating a witness to obtain a statement, or conduct that would otherwise bring the administration of justice into disrepute, such as posing as a priest in a confessional, the statement would almost certainly be rejected as evidence of the truth of its contents: see *K.G.B.*, at p. 299 and *R. v. Rothman* (1981), 59 C.C.C. (2d) 30 (S.C.C.), at p. 74. Another example would be where the probative value of the statement is outweighed by its prejudicial effect: see *Khelawon*, at para. 49.

[158] Applying those principles to the case at hand, we note that although the trial judge did not have the benefit of *Khelawon*, he considered in his reasons under the heading, “Residual Discretion”, the strong corroborative evidence that lent support to the veracity of Coward's two *K.G.B.* statements. He also noted that although Coward was absent from the trial, the jury would have the benefit of his evidence from the preliminary inquiry where he was fully cross-examined by the defence. Moreover, the videotapes of his *K.G.B.* statements would provide the jury with a window into his demeanour.

[159] Those factors, in combination with the trial judge's earlier finding that despite the promises made to him, Coward's two *K.G.B.* statements were given voluntarily, of his own free will and without coercion, were sufficient in the trial judge's view to warrant the admission of the *K.G.B.* statements for their truth. In line with *Khelawon*, we are satisfied that he came to the correct conclusion.

[160] Accordingly, we would not give effect to this ground of appeal.

2. Did the trial judge err in including Coward's preliminary inquiry testimony in the package of evidence presented to the jury?

[161] The appellants contend that the trial judge erred in providing the jury with Coward's preliminary inquiry testimony. In particular, they submit that in doing so, the jury was improperly exposed to the Crown's cross-examination of Coward (following a finding that Coward was a hostile witness) in which the Crown suggested that it was the "violent dispositions" of Reid and Davis that prompted Coward's recantation. Alternatively, the appellants submit that defence counsel should have been given an "election as to what portions of their cross-examination would be placed before the jury."

[162] In support of their primary submission – that Coward's evidence from the preliminary inquiry should have been withheld from the jury – the appellants submit that Coward's third statement, in which he recanted his two *K.G.B.* statements, should simply have been left to the jury as a prior inconsistent statement, which the jury could consider in testing the veracity of his *K.G.B.* statements. Had the third statement been treated in that fashion, there would have been no basis for the Crown to introduce Coward's

testimony from the preliminary inquiry. Admitting the third statement for the fact that it was made, and not for its truth, would have left Coward's substantive evidence unaffected. And because the subsequent inconsistent statement would not have rendered Coward a hostile witness, there would have been no basis for the Crown to cross-examine him under s. 9(2) of the *Canada Evidence Act*, R.S.C. 1985, c. C-5.⁵

[163] According to the appellants, "the ruling of the trial judge effectively allowed the prosecution, in redirect, to cross-examine their own witness on a statement not raised by the defence in cross-examination." Moreover, it exposed the jury to the Crown's suggestion that Coward's recantation was driven by his fear of Reid and Davis, thereby "needlessly risk[ing] an inference of guilt from bad character."

[164] As for the secondary argument – that defence counsel should have been given an election as to what portions of their cross-examination would be placed before the jury – the appellants submit that "defence counsel may well pursue lines of cross-examination at a preliminary inquiry that are abandoned at trial" and that their "control over trial strategy should not be suspended because the witness is unavailable" and the Crown "resorts to s. 715 of the *Criminal Code*⁶ or the principled exception to the hearsay rule." In

⁵ Section 9(2) of the *Canada Evidence Act* states:

9 (2) Where the party producing a witness alleges that the witness made at other times a statement in writing, reduced to writing, or recorded on audio tape or video tape or otherwise, inconsistent with the witness' present testimony, the court may, without proof that the witness is adverse, grant leave to that party to cross-examine the witness as to the statement and the court may consider the cross-examination in determining whether in the opinion of the court the witness is adverse.

⁶ The relevant portion of s. 715 of the *Criminal Code* states:

715 (1) Where, at the trial of an accused, a person whose evidence was given at a previous trial on the same charge, or whose evidence was taken in the investigation of the charge against the accused or on the

particular, the appellants submit that it was improper to permit the Crown to take advantage of a portion of Coward's cross-examination in which defence counsel for Hamilton effectively "discredited Coward's explanation for the statements of August 7, 2002 and December 16, 2002."

[165] We do not give effect to these submissions for several reasons, the primary one being that they were not raised at trial and bear no relation to the submissions made by defence counsel to the trial judge.

[166] At trial, defence counsel sought to have Coward's third statement admitted for its truth. No one suggested that it should simply be treated as a prior inconsistent statement – and with good cause, at least from Davis' perspective.

[167] In his third statement, Coward shifted the spotlight from Davis to Patrick Webb. He now claimed that the gun he had purchased in Florida was for Webb, not Davis. He further stated that he had implicated Davis because Webb was threatening his family.

[168] From Davis' perspective, it was important that he be able to point the finger at Webb as a third party suspect. Coward's allegations against Webb provided Davis with the core information he needed to pursue that defence – but he could only do so if

preliminary inquiry into the charge, refuses to be sworn or to give evidence, or if facts are proved on oath from which it can be inferred reasonably that the person

...

(d) is absent from Canada,

and where it is proved that the evidence was taken in the presence of the accused, it may be admitted as evidence in the proceedings without further proof, unless the accused proves that the accused did not have full opportunity to cross-examine the witness.

Coward's allegations against Webb, contained in the third statement, were admitted for their truth.

[169] And that explains, at least in part, why defence counsel at trial were insistent that Coward's third statement be treated as a *K.G.B.* statement, either independently or as an addendum to his two earlier *K.G.B.* statements. Those arguments, which the trial judge rejected, are not pursued on appeal. Instead, the appellants seek to advance the "prior inconsistent" statement argument – an approach that does not coincide with the approach they took at trial. For that reason alone, we would not give effect to it.

[170] Likewise, defence counsel at trial did not raise concerns about exposing the jury to the Crown's cross-examination of Coward in which the Crown suggested that it was the "violent dispositions" of Reid and Davis that prompted Coward's recantation. In any event, the trial judge provided the jury with a strong limiting instruction on the use of bad character evidence. In the light of this instruction, there is no basis for inferring that the jury would have misused the preliminary inquiry evidence as the appellants now suggest.

[171] Finally, the appellants did not ask the trial judge to limit the preliminary inquiry evidence that went to the jury. Like the other complaints that we have mentioned, this one too suffers from the fact that it was not raised at trial.

[172] It is apparent that the real reason why the defence did not want Coward's preliminary inquiry evidence left with the jury is because it exposed the incredulity of his reasons for recanting and the inanity of his explanations for providing the *K.G.B.*

statements in the first place – all of which served to undermine, if not eviscerate, the veracity of his recantations.

[173] By way of elaboration, in his third statement to the police, which the appellants wanted the jury to have, Coward provided two reasons for recanting. First, he claimed that although he had purchased the gun in Florida for Webb, not Davis, Webb had threatened to harm Coward's family if Coward implicated him in the purchase of the gun. Second, Coward chose to falsely implicate Davis because he was angry at Davis for making disparaging remarks about him on the wiretaps. Notably, he gave no reason for falsely implicating Reid.

[174] At the preliminary inquiry, Coward provided a litany of explanations for implicating Davis and Reid in his *K.G.B.* statements. First, he claimed that the police coerced him into naming Davis as the person for whom he had purchased the gun. He was told that if he did not do so, he would be charged with offences relating to the gun and he would also face murder charges in relation to Watson and Lewis.

[175] As for the shooting incident on Falstaff Avenue, Coward stated that he told the police he had heard rumours about it but he did not know who was involved. The police told him to implicate Reid and Davis. Coward made the same claim in relation to the incident at the boutique on Eglinton. He later denied that the police told him what to say in relation to those incidents. Contrary to his second *K.G.B.* statement, in which he confirmed that nothing untoward occurred on August 7, 2002 when he was off-camera,

Coward now maintained that the police threatened him and told him what they wanted to hear when the camera was not running.

[176] Coward testified that there were other reasons for falsely implicating Reid and Davis in his *K.G.B.* statements. These included his claim that he had been roughed up before by one of the York Region officers and he was frightened of him; he was upset with Davis because of the negative things Davis had been saying about him; Webb had told him to say that he had given the gun to Davis; and in an effort to get bail on the York Region charges, he lied to the police to help his position.

[177] In cross-examination by Hamilton's lawyer, Coward conceded that he had no explanation for why he had implicated himself in the Falstaff shooting or the Eglinton boutique incident. He also could not explain why he felt the information relating to the shooting or the boutique would assist the Toronto police in their investigation of the Watson and Lewis murders.

[178] Against this backdrop, it is little wonder that the defence only wanted the jury to receive Coward's third statement and not his evidence from the preliminary inquiry.

[179] But, as the trial judge rightly concluded, the defence was not entitled "to have their cake and eat it too". If the defence wanted to have Coward's initial recantation placed before the jury, they had to accept the good with the bad. Coward's motivation for recanting was critical. The Crown put it down to his fear of Reid and Davis. The defence wanted to limit it to the two reasons Coward mentioned in his third statement.

[180] While the trial judge was quite properly concerned, as a matter of fairness to the defence, that the jury should be apprised of Coward's recantation, he was not prepared to leave the jury with a false and misleading impression at the instance of the defence. While the defence was entitled to a level playing field, it was not entitled to a field that tilted unfairly and misleadingly in its favour. The jury was entitled to the full picture – and that is precisely what the jury got: see generally Charron J.'s reasons in *R. v. Laboucan* (2010), 253 C.C.C. (3d) 129 (S.C.C.), at paras. 15, 21 and 22.

[181] In these circumstances, we need not decide whether Coward's preliminary inquiry evidence was admissible under s. 715 of the *Criminal Code* or under the principled approach to hearsay or merely as a function of the trial judge's discretion to ensure a fair trial. Whatever the basis for admissibility, in our view, Coward's evidence from the preliminary inquiry was properly placed before the jury.

[182] Accordingly, we do not give effect to this ground of appeal.

3. Did the trial judge err in failing to give the jury a *Vetrovec* warning in relation to Coward?

[183] The appellants submit that the trial judge erred in failing to give the jury a *Vetrovec* warning in relation to Coward. They submit that Coward's evidence was essential to the Crown's case against Reid and integral to its case against Davis. They further submit that Coward's credibility was highly suspect given his unsavoury background, his criminal record, his admitted perjury and his willingness to tell the police

whatever the police wanted to hear to better his own situation. In these circumstances, the appellants submit that a *Vetrovec* warning was mandatory.

[184] The trial judge did not see the necessity of a *Vetrovec* warning. In his view, Coward did not present as an unsavoury witness and his criminal record was relatively modest. It consisted of a dated drug-related conviction for which he received a 15-day sentence and convictions for robbery and unlawful possession of a firearm. The robbery charge related to the York Region home invasion and the firearm charge related to the gun found on Coward when he was arrested for the home invasion charges. That was the extent of his criminal record at the time his evidence was tendered at trial and there was little else in his background and character that would justify an “unsavoury witness” finding.

[185] Against that backdrop, the trial judge did not feel that a *Vetrovec* warning was required. For reasons that follow, we find it unnecessary to decide whether he was correct. We do note, however, that trial judges are entitled to a good deal of latitude in this area and their decisions should not be lightly interfered with on appeal: see *R. v. Bevan* (1993), 82 C.C.C. (3d) 310 (S.C.C.), per Major J. at p. 326.

[186] That said, we think the safer course would have been to provide the jury with a *Vetrovec* warning. Coward’s evidence was central to the Crown’s case against Reid and important to its case against Davis. There were credibility problems with his evidence. If nothing else, prudence dictates that the jury should have been impressed with the need to

proceed with considerable caution before acting on Coward's evidence, without more, to convict Reid and/or Davis: see *R. v. Brooks* (2000), 141 C.C.C. (3d) 321 (S.C.C.), per Major J. for the majority on this point at p. 347.

[187] However, when the charge is considered as a whole, we are satisfied that the jury received the equivalent of a *Vetrovec* instruction. Specifically, the jury would clearly have understood that they were to proceed with caution before convicting either Reid or Davis on Coward's evidence, without more, and the reasons for this need for caution.

[188] In his charge, the trial judge told the jury that Coward "either perjured himself during the first two statements or did so at the preliminary inquiry" and that as an "admitted perjurer", the jury "must be most careful in assessing his evidence." Both versions of his evidence could not "each be true" and the jury was to "look for confirmatory evidence supportive of one or the other versions."

[189] Pausing here, the appellants take issue with that instruction. They submit that it invited the jury to simply choose between the two versions and in doing so, effectively shifted the burden away from the Crown where it belonged. Moreover, they argue that to the extent Coward's evidence helped Reid and Davis, there was no need for the jury to "look for confirmatory evidence" to act on it and the trial judge erred in instructing the jury otherwise.

[190] We would not give effect to those submissions. Commencing with the first complaint, the trial judge in the ensuing paragraph specifically told the jury that the Crown bore the onus of proving that the *K.G.B.* statements were truthful:

However, the onus is on the Crown to satisfy you that the videotaped statements are truthful with respect to Everal Davis and Michael Reid.

[191] The trial judge repeated this instruction at the end of his specific instructions on Coward:

In the end, it is the Crown who must satisfy you to find as fact that Clarence Coward is telling the truth about giving Everal Davis the gun prior to July 24, 2002 [sic], that he is telling the truth about the visit to the jewellery store with Reid and Davis, and that he is telling the truth about Reid's shooting up of Colin Allen's rental van. You may so find but only after a most careful assessment of Clarence Coward, given his subsequent recantation under oath. He was a perjurer either during the first two sworn videotape statements or at the preliminary inquiry.

[192] As for the second complaint, while we agree that the jury could act on Coward's "helpful" evidence without more, the impugned instruction did not direct the jury otherwise. Rather, in our view, it simply amounted to a common sense proposition that the jury would wish to consider in deciding whether the Crown had met its onus of establishing that Coward was telling the truth.

[193] The more fundamental concern of the appellants is that the trial judge inappropriately focused the jury's attention on Coward's admitted perjury and in doing so, he failed to mention the many other factors that impacted on his credibility and

heightened the need for caution in assessing his evidence. According to the appellants, the jury should have been alerted to Coward's criminal antecedents; his involvement in the importation of guns into Canada; his interest in escaping liability for bringing guns into Canada and, in that regard, the inducements he obtained from the Toronto police; his knowledge that the Toronto police were looking for information pertinent to the Watson and Lewis murders; and the advantage he hoped to gain for himself on the York Region charges.

[194] We do not deny the significance of those matters, nor do we question the importance of alerting the jury to them. But when the addresses of counsel are considered along with the trial judge's charge as a whole, it becomes apparent that these matters, or most of them, were brought to the jury's attention time and time again.

[195] Fixing solely on the charge, the trial judge reviewed in painstaking detail, not once but twice, the positions of Reid and Davis both on a general level and specifically in relation to Coward. By way of example, in his review of Reid's position, the trial judge stated:

As for Clarence Coward he lied in his videotaped statements to get back at Everaldd Davis. He lied about Michael Reid because Reid was Davis's friend and Coward wanted to get back at Davis. Clarence Coward's first videotape statement is replete with internal inconsistencies and patent lies. He initially said that he had not been at the jewellery store, that he had not been at Falstaff, that he had not been in the parking lot behind 1620 to 1622 Lawrence Avenue West. Given those initial denials, it is impossible to believe that he

is later telling the police the truth that he indeed did visit those locations with Michael Reid and Everaldd Davis.

...

The Crown's case depends on the evidence of a gun-toting, car-washing drug bandit, Clarence Coward. Clarence Coward has absconded and therefore prevents you from assessing his demeanour and his credibility as a witness at this trial. His evidence is unreliable and you must not convict Michael Reid on the basis of Clarence Coward's perjured evidence.

...

Defence counsel urges you to reject as untrue the evidence of Clarence Coward, an inveterate liar. After his arrest on September 10th, 2001, with a loaded gun on his person, Coward immediately lied to the police. He denied his guilt but later pled guilty to the kidnapping and robbery charges. On January 16th, 2002, Coward attempted to get back at Everaldd Davis when he said that Michael Reid had shot at Colin Allen's vehicle. Coward lied about Reid because Reid was Davis's friend. Coward's videotaped statement on August 7th, 2002, was bought testimony. It was purchased. He was given immunity from the gun charges.

...

Colin Allen also said that his car was shot at between 11 a.m. and 1 p.m. ... At 1:02 p.m. Reid phoned Coward and at 1:07 p.m. Coward phoned Davis. At those times Coward was obviously with neither Reid or Davis. Clarence Coward is an unsavoury person, a congenital liar. You must not convict Michael Reid on the basis of Clarence Coward's purchased evidence.

[196] The trial judge provided the jury with a similar review in relation to Davis:

As for Clarence Coward, you must be most careful in assessing his perjured evidence. He is a manipulative liar whose lies are always self-serving. The police used coercion and promise of advantage to get Coward to falsely accuse Everaldd Davis. Be mindful and circumspect about what

happened off camera between Clarence Coward and Detective Nicol who threatened to charge Coward with murder unless he switched from Ginga to Ninja as being the person to whom he had given the Glock 26 murder weapon prior to the killings of Watson and Lewis.

...

As for Clarence Coward, you should be most careful in assessing his evidence. He is a manipulative perjurer who lied to serve his own self-interest. Clarence Coward had from June 2002 until August 7th, 2002, to think about what he might tell the police about the murders. Furthermore, Coward was aware that Davis on the intercepts was upset with Coward, though, of course, there were no direct threats by Davis on the intercepts to harm Coward. By December 18th, 2002, Davis, through Essue, had learned that Coward was running off his mouth about the Falstaff incident. Nothing more.

Keep in mind the presence of coercion or promises by the police which may have caused Coward to falsely accuse Davis and Reid. Be suspect or suspicious of what allegedly happened off camera. Coward testified at the preliminary inquiry that the police had threatened to charge him with a gun and two murders unless he switched from Ginga to Ninja as the man in possession of the Glock murder weapon. He had to switch the identities even though it was false. The police forced him to do so under threat of serious criminal charges.

[197] The trial judge also provided instructions about Coward that were pertinent to both

Reid and Davis. One such example appears below:

However, a different rule applies to the rumours as they relate to Clarence Coward. It is the position of the accused Michael Reid and Everaldd Davis that Clarence Coward fabricated his videotaped statements as they relate to the visit to the jewellery store on Eglinton Avenue West and to the shooting at Roach's vehicle on Falstaff Avenue and to the visit at the hangout behind 1620 and 1622 Eglinton Avenue West (sic).

Rumours were rife in the Jamaican community as to these incidents, and Clarence Coward, who knew of the rumours, could have simply positioned himself together with Michael Reid and Everaldo Davis as participants in the incidents when, in fact, neither was involved in either incident. It was simple for Clarence Coward to substitute Reid and Davis for the real participants because Clarence Coward knew all the details of the rumours, particularly those relating to the visits to the jewellery store and to Falstaff Avenue.

[198] In addition to the comments of defence counsel and the trial judge, Crown counsel drew the jury's attention to the concerns surrounding Coward and the need to look for confirmatory evidence before acting on his evidence:

... Mr. Coward's evidence does not stand alone. Make no mistake about it. The Crown would not stand here and argue that you should base your decision on his unconfirmed evidence. Mr. Coward is a flawed individual with criminal antecedents who has given differing accounts of what happened. We're asking you to consider Mr. Coward's evidence in light of all of the other evidence in this trial, much of which supports and confirms what Mr. Coward told the police on August 7, 2002, and December 12, 2002.

[199] We agree with the following submissions made at paras. 109 and 113 of the Crown's factum:

Bearing in mind everything this jury heard about Coward, it could not have escaped their attention that his evidence was highly controversial, that it required great caution before acting on it, and that they had to look for independent corroboration before doing so.

...

In short, a substantial portion of the charge was devoted to reviewing Coward's lies, his statements, his unsavoury past and present, the fact the jury had to exercise caution, and how corroboration should be approached. The jury had all the

Vetrovec tools it needed. At the end of the day, convictions flowed on Reid and Davis because the jury did their job, looked for corroboration, and found it in piles of evidence.

[200] In view of our conclusion that the jury was given the functional equivalent of a *Vetrovec* instruction, we need not revert to the curative proviso in s. 686(1)(b)(iii) of the *Criminal Code*. Had we found it necessary to do so, we would have paid particular attention to the way in which Coward's first *K.G.B.* statement came about and the trial judge's findings in relation to it, including his findings that Coward was forthcoming, that he prompted the police to question him about the Falstaff shooting incident and that he volunteered information that was not in the public domain. We also would have placed considerable emphasis on the fact that Coward's evidence was confirmed in its material respects by a wide and impressive body of independent evidence.

[201] In the end, for these reasons, we do not give effect to this ground of appeal.

IV. The Severance Application

[202] The appellant Reid contends that the trial judge erred in refusing his application for an order severing his trial from that of the co-accused. Severance was sought principally on the basis of the prejudicial effect of the intercepted communications of the co-accused, wherein they were plotting to kill Reid because he was "telling people everything that he did on the road". The trial judge dismissed the application as follows:

However, defence counsel contends that Mr. Reid cannot obtain a fair trial because the jury would hear wiretap intercepts which are inadmissible against him but which indicate that he participated in the killings of Watson and Lewis and in the shooting of Medder. It seems to me that this

situation is analogous to a confession made by one accused which implicates another accused. The jury must be instructed that the evidence is admissible only against the maker and not admissible against the other person who was not a party to the confession and who, thus, had no opportunity to refute the truth of the accusation.

[203] Reid argues that the evidence that his co-accused had formed a conspiracy to kill him because they were concerned that he would divulge information to an undercover police officer was so prejudicial to him that his case should have been tried separately from the others so that his jury would not hear this evidence. Reid contends that no instruction to the jury could cure the prejudicial effects of the wiretap conversations. He says that the taped statements had no relevance unless the jury concluded that Reid was a participant in the homicides. It is therefore unrealistic, he submits, to expect that the jury could use the evidence against his co-accused but not against him. He submits that the decision of the trial judge not to allow severance was unreasonable and resulted in an injustice.

[204] With respect to the policy considerations weighing against severance, Reid asserts that there was very little risk of inconsistent verdicts and that cost efficiencies are outweighed by the risk of a miscarriage of justice.

[205] We do not give effect to these submissions. In our view, the trial judge was entitled to refuse to grant severance and his decision is entitled to deference. We reach this conclusion for several reasons.

[206] A trial judge may order severance of the trial of a co-accused only if satisfied that “the interests of justice so require”: *Criminal Code*, s. 591(3)(b). The interests of justice encompass those of the accused, the co-accused, and society’s interest in seeing that justice is done in a reasonably efficient and cost-effective manner: see *R. v. Last*, [2009] 3 S.C.R. 146, at para. 16.

[207] A trial judge will direct severance only if the accused seeking it overcomes the presumption that two co-accused, who are jointly charged and are said to have acted in concert, should be tried together: see *R. v. Savoury* (2005), 200 C.C.C. (3d) 94 (Ont. C.A.), at para. 22. In addition, factors that a court may consider in deciding to refuse severance include the desire to avoid a multiplicity of proceedings and the prospect of two lengthy trials, having regard to the evidence to be called: see *Last*, at para. 18.

[208] A trial judge’s decision on severance is an exercise of discretion and is entitled to deference: see *R. v. Litchfield*, [1993] 4 S.C.R. 333, at pp. 353-54. This court will interfere where the trial judge fails to consider relevant principles, or has considered irrelevant principles. However, even then, this court will review the exercise of a trial judge’s discretion against a reasonableness standard: see *R. v. McKnight* (1999), 44 O.R. (3d) 263 (C.A.), at p. 273.

[209] As noted, Reid submits that the prejudice to him of being tried with his co-accused outweighed the slight risk of inconsistent verdicts. He says this risk was minimal because his defence was not antagonistic towards the defences advanced by his co-accused. In

other words, he says that there was no danger of inconsistent verdicts because he was not pointing at anyone, and no one was pointing at him.

[210] While Reid is correct that the risk of inconsistent verdicts was minimal, such a risk is merely one of several policy reasons to be considered in ordering separate trials. We are of the view that, although the risk of inconsistent verdicts was slight, any chance of a miscarriage of justice was eliminated by the trial judge's various instructions to the jury on the way they could use the wiretap conspiracy evidence.

[211] The jury was clearly instructed that the intercepts of Reid's co-accused about killing Reid and the inferences that could be taken from those comments were not admissible against Reid because he was not a party to the discussions to kill himself. In his instruction to the jury on the use they could make of the evidence of the plot to kill Reid, the trial judge said:

In the end, it would be open to you to infer and find as fact, though you need not do so, that Davis's statement during the intercepts, that Schloss's statements during the intercepts, and that Hamilton's statements during the intercepts constitute an implicit admission that the maker of the particular statement indeed had participated in the murders of Paul Watson and Michael Lewis. However, you may not so infer unless you first find as fact from the context of the intercepts that the fear and panic that the three accused expressed about Reid's conduct was because Michael Reid was, in fact, talking to third parties in jail about his own involvement and the involvement of Hamilton, Schloss and Davis in the murders of Paul Watson and Michael Lewis. That is a precondition. Finally, I repeat that whatever Michael Reid may have said to the third parties in jail is not in any manner admissible for or against him. He was not a party to the wiretap interceptions.

[212] This instruction was repeated in varying ways in the charge. It was also repeated in response to a question by the jury:

The evidence, of course, is not admissible, not admissible against Michael Reid, a non-party to the interceptions, in fact, the proposed target of murder himself. So they are not admissible against Mr. Reid in the least.

[213] The jury would have understood these instructions, as well as those given mid-trial, and would have followed them. This is especially true given that the Crown also provided an additional warning to the jury during its closing address about not using the co-accused's intercepts against Reid.

[214] It is well established that juries should be assumed to understand and follow such instructions: *R. v. Suzack* (2000), 141 C.C.C. (3d) 449 (Ont. C.A.), at paras. 99-102, (application for leave to appeal dismissed, [2000] S.C.C.A. No. 583), quoting *R. v. Corbett*, [1988] 1 S.C.R. 670, at pp. 692-93. We see no reason to believe that the jury did not understand the trial judge's instructions. On the contrary, we assume that the jury properly considered the plot to kill Reid when weighing the evidence against the co-accused, and then disregarded this same evidence when turning their minds to the guilt of Reid.

[215] Reid relies on several cases, including this court's decision in *Savoury*, where severance was granted to a co-accused. However, in *Savoury*, the defendant was able to establish that a single trial would have denied him his right to make full answer and

defence because of his desire to call his co-accused as a defence witness, something he would not be able to do if the two were tried together. That case is thus distinguishable.

[216] Reid makes one additional argument. He says that severance was also required because he was identified by his nickname “Killer” in the wiretap intercepts. He contends that references to his street name or nickname “Killer” were prejudicial and that the way the trial judge dealt with the editing of the name from the transcripts and intercepts only compounded the prejudice associated with this nickname.

[217] We disagree. At defence counsel’s request, Reid’s nickname was carefully edited from all transcripts and intercepts and each side ensured that their witnesses did not use it. There was only one occasion when the name “slipped out” and this was found to be the fault of everyone involved. The jury was clearly and unequivocally instructed after the error occurred as follows:

Members of the jury, last week you heard an intercept in which there was reference to one of the accused Michael Reid’s nicknames not being either Dog or Richie. The nickname used was unfair and irrelevant and must, therefore, be completely disregarded. In fairness to Mr. Reid, do not speculate as to what the nickname was. Simply disregard it if, indeed, you recall it.

[218] The trial judge was correct to refuse severance and his instructions more than addressed the attendant prejudice that may have resulted. Reid has failed to establish that the trial judge did not act judicially or that the decision to refuse severance worked an injustice to him. This ground of appeal is dismissed.

V. Admissibility of Schloss' Song

[219] The appellant Schloss complains that the trial judge erred in admitting, over the objection of defence counsel, an intercept containing a song that Schloss sang over the phone to an acquaintance known as Keisha. The song contained the lyric “From the day I see my friend die, That’s the day I let my gun cry.”

[220] Schloss submits that the prejudicial effect of the song substantially outweighed its probative value. He relies on *R. v. Terry*, [1996] 2 S.C.R. 207, at para. 29 for the proposition that a song as a form of artistic expression is not necessarily probative of the “truth” expressed in it. There is a danger that the jury would “accept the [song’s] oblique factual similarity with actual events to infer directly that the appellant was the author of both the [song] and the events.”

[221] In a brief ruling on the admissibility of the song, the trial judge held that he was “satisfied that it is open to the jury to find that the accused Lennox Schloss implicitly admitted that he discharged his gun at Paul Watson and Michael Lewis during his singing on the intercept.” According to the trial judge, that Schloss had undoubtedly written the song was the “over-riding consideration” in favour of its admissibility.

[222] We accept that the song by Schloss was open to other interpretations than a reference to his participation in the shootings of Watson and Lewis after Christian’s murder. The Crown in closing acknowledged as much when he told the jury that the song “would never stand on its own, but, again, it’s another piece that you can stack up on top of other pieces.” Moreover, the trial judge instructed the jury to carefully assess the value

of the song and to consider whether it reflected fact, “wishful thinking”, or “imaginative concoction”:

In assessing the evidentiary value of the song, you must first determine whether the accused Schloss is referring to the death of his friend Omar Christian. If so, you must next determine whether the accused Schloss is implicitly asserting that he personally participated in the vengeance of his friend’s murder or simply that it was wishful thinking on his part. Counsel for the accused Schloss respectfully submits that the song is fanciful and is merely a fictional, imaginative concoction. It in no way reflects reality and must not be considered to be an admission that Lennox Schloss participated in the murders of Watson and Lewis.

In making your assessment of the evidentiary value of this song, you must not view this song or the intercept in isolation. You must assess it in the context of all of the other evidence admissible for or against Lennox Schloss... So do not consider the song in isolation. Consider it in the context of all of the other evidence in this case. In the end, the Crown must satisfy you to find as fact that the song constitutes an implicit admission by Lennox Schloss that he participated in the murders of Paul Watson and Michael Lewis.

[223] In the light of this careful instruction, we are satisfied that this song would not have been given undue weight by the jury. We therefore dismiss this ground of appeal.

VI. Failure to Leave a Critical Finding of Fact with the Jury

[224] The appellant Schloss argues that the trial judge removed a critical factual issue from the jury’s consideration by instructing them that there were four people involved in the crimes even though the evidence was not decisive as to whether there was a fourth person, the driver of the getaway van, or whether one of the three shooters was also the driver. Schloss contends that the issue of whether there were three or four participants

was “of monumental importance” to his defence. If only three men were involved in the crimes, he says the Crown’s case against him was weakened because, unlike Reid and Davis, he was not connected by the evidence to any particular firearm.

[225] In closing argument, counsel for Schloss had acknowledged that “four might have been involved”, but reminded the jury that “three culprits at most were ever seen, and even if there’s four...”

[226] In his objections to the charge, Schloss’ counsel referred to what he called the “presumption” in the charge that there were three shooters and one getaway driver. He then commented to the trial judge:

Well, it seems the way it was put to the jury is that is something they can find. Yes, it is something they can find, but they have to find it because there is evidence that something might lead some of them, in fact all of them, that there were only three of them at the scene both doing the shooting and doing the driving.

The following brief exchange occurred:

Trial Judge: Okay, I’m not going to go there.

Defence counsel: Very good.

[227] We decline to interfere with the trial judge’s decision not to charge the jury on this factual issue. There was ample eyewitness evidence supporting the Crown theory of three shooters and a getaway driver. Defence counsel were not strenuously arguing otherwise. Indeed, counsel for Hamilton acknowledged in closing: “So while the evidence is not conclusive on that point, it sort of makes sense that there might have been a getaway

driver” in addition to the three shooters. Counsel for Schloss in recapping his position did not even suggest to the jury that there were only three participants. Moreover, his objection to this aspect of the charge can hardly be said to have been strenuous. Indeed, defence counsel’s treatment of the three participant issue is not in keeping with appeal counsel’s suggestion that it was of “monumental importance” to Schloss’ defence.

[228] Moreover, we do not accept the argument that Schloss’ defence was undermined by the so-called “presumption” in the charge that four men were involved. Defence counsel’s strongest argument on behalf of Schloss was that he was not involved in the murders because the cell phone evidence indicated that he was not with Hamilton shortly before or shortly after the shootings, and that Hamilton appeared to have been with Webb shortly after the murders. Schloss pointed to Webb as the fourth participant. In other words, the cogency of Schloss’ defence did not turn on whether there were three or four participants in the shootings.

[229] We thus do not give effect to this ground of appeal.

VII. Three Grounds of Appeal Related to the Cell Phone Evidence

Introduction

[230] Each of the four appellants had a cell phone. The cell phones of three of the appellants – Hamilton, Schloss and Davis – registered incoming or outgoing calls at a cell phone tower in the vicinity of the murder scene around the time the shootings occurred.

[231] At trial, the Crown called three “cell phone witnesses”, representatives of the carriers Telus Mobility, Rogers Wireless, and Bell Mobility. These witnesses testified about three matters germane to this appeal: the rules governing the location of a cell phone in relation to a cell phone tower; the times and towers at which the cell phones of each of the appellants registered; and the extent of the synchronization between the times used by the cell phone carriers and the 911 system.

[232] After these three witnesses testified, the Crown called a police witness, who, with the aid of a PowerPoint presentation, collated and summarized the cell phone location evidence for the jury.

[233] This cell phone evidence played a prominent role at the trial, where identity was the central issue. The Crown relied on the cell phone evidence as a compelling piece of circumstantial evidence showing that the appellants were together near the scene of the murders minutes before and minutes after the shootings took place. Hamilton, and to a lesser extent Davis, also relied on the cell phone evidence to show that neither was close to the murder scene when Watson and Lewis were murdered and Medder was wounded, and thus were innocent of the charges against them.

Grounds of Appeal Related to the Cell Phone Evidence

[234] The appellants Schloss, Davis and Reid raise the following ground of appeal concerning the cell phone evidence:

- The trial judge erred by admitting the evidence of three Crown witnesses concerning the location of cell phones without first conducting a *voir dire* on its admissibility.

[235] Hamilton, on the other hand, does not object to the admissibility of the cell phone evidence. Indeed, he relies on this evidence to establish his alibi. His argument focuses on the trial judge's instructions to the jury. He puts forward two grounds of appeal:

- The trial judge misdirected the jury on the applicability of the exceptions to the general rule that a cell phone ordinarily registers at the nearest cell phone tower.
- The trial judge misdirected the jury on the lack of synchronization between the Telus clock and the 911 clock.

[236] Before considering these grounds of appeal, we briefly outline the important cell phone evidence.

The Cell Phone Evidence

(i) The “general rule” and its exceptions

[237] The Crown called Michael Rickard, an investigator in the security department of Bell Canada, Salvatore Iaccio, a senior analyst with Telus Mobility, and Cindy Hopper, manager of law enforcement support for the fraud and security department of Rogers.

[238] All three witnesses testified that the relationship between a cell phone tower and the location of a cell phone is governed by a general rule: a call to or from a cell phone will usually register at the tower closest to that cell phone. The basis of the general rule is that a cell phone will register at the tower with the strongest signal, which is usually, though not always, the closest tower.

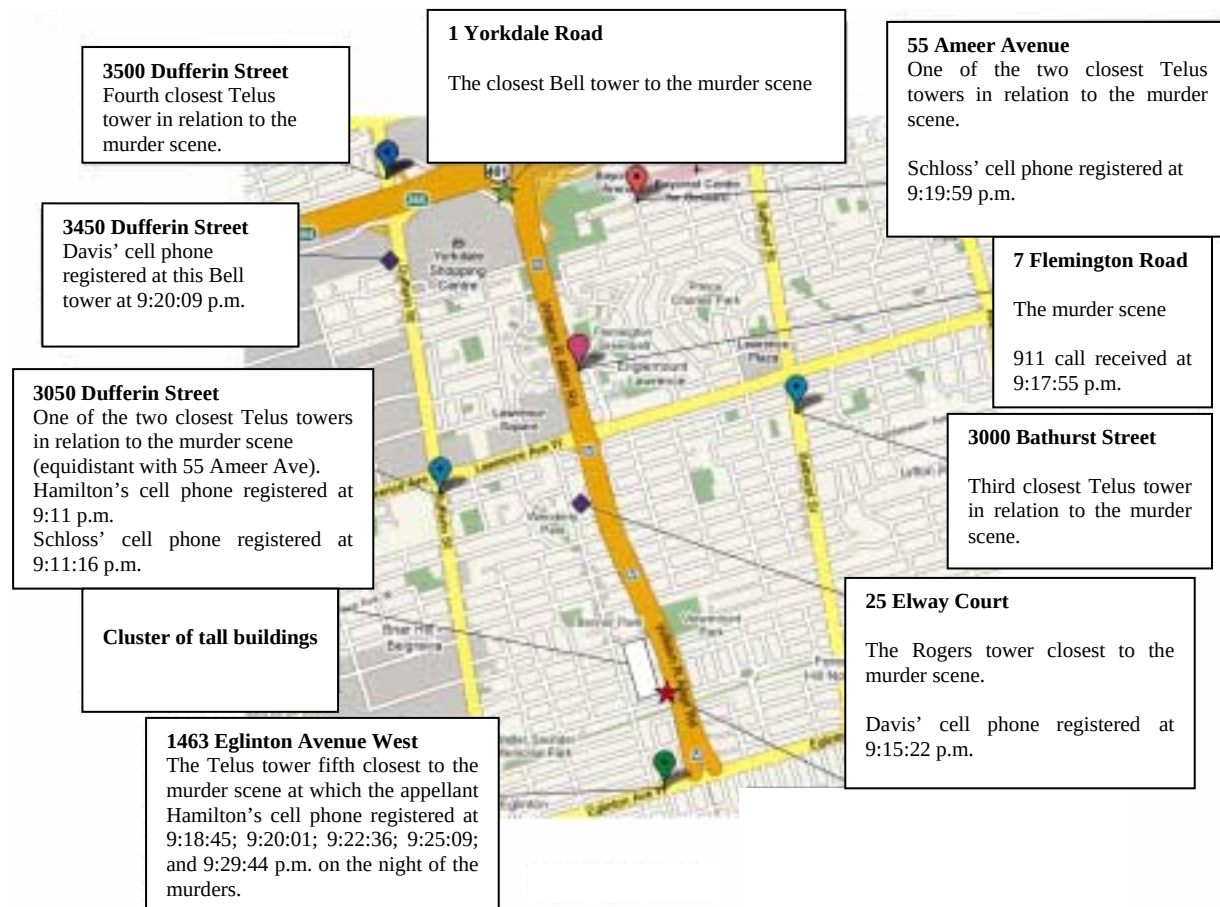
[239] The witnesses also testified that the general rule is subject to certain exceptions, including that a cell phone will not register at the closest tower if: (1) the closest tower is at capacity; (2) there is a body of water between the cell phone and the closest tower; and (3) there is a large obstruction (for example a multi-storey building) between the cell phone and the closest tower, and an unobstructed line of sight or flat area between the cell phone and a more distant tower. Hamilton maintains that this third exception is important to his appeal.

[240] In brief then, it is possible that a cell phone will not register at the nearest tower if a more distant tower gives out a stronger signal or if any of the exceptions apply. Thus, though cell phone records assist in determining the approximate location of a particular cell phone at a particular time, these records reflect probabilities, not certainties.

(ii) The cell phone records of the appellants around the time of the shootings

[241] Hamilton's and Schloss' cell phone carrier was Telus Mobility. Davis' cell phone carrier was Rogers Wireless. Reid's cell phone carrier was Bell Mobility. Figure 1 depicts the murder scene and the surrounding area, the location of the cell phone towers of each of the three carriers within that area, the times close to the shootings at which Hamilton's, Schloss' and Davis' cell phones registered, and the tower at which each call registered (Reid's cell phone did not register at any time close to the shootings).

Figure 1 - Towers at which each appellant's cell phone registered around the time of the murders



[242] We summarize Figure 1 as follows. The shootings took place at 7 Flemington Road, near the Allen Road, north of Lawrence Avenue West. There were five Telus towers in the area bounded by Eglinton Avenue West and just north of Highway 401, and by Dufferin Street and Bathurst Street. There were two Rogers towers and two Bell towers in that area.

(a) The 911 calls

[243] The first 911 call reporting the shootings was made by Michael Lewis' brother and was received at 9:17:55 p.m. on July 24, 2001. A second 911 call reporting the shootings, by Ms. Hiralal, was received at 9:19:40 p.m.

(b) The appellants made no calls at the time of the shootings

[244] Hamilton, Schloss and Davis used their cell phones extensively throughout the day of the murders. However, none of them made a call between 9:12 and 9:19 p.m. that night.

(c) Hamilton's cell phone

[245] At 9:11:21 p.m., Hamilton received a call from Schloss. Hamilton's phone registered at the Telus tower at 3050 Dufferin Street, just south-west of the scene of the murders and one of the two Telus towers closest to the scene. Hamilton's cell phone then registered five times shortly after the first 911 call. The first of these five calls registered 50 seconds after the first 911 call. All five calls registered at the Telus tower at 1463 Eglinton Avenue West, which was the Telus tower fifth closest to the murder scene and 3.6 kilometres away from it. Hamilton's alibi depended on this cell phone evidence.

(d) Schloss' cell phone

[246] At 9:11:16 p.m. Schloss' cell phone registered his outgoing call to Hamilton. That call, too, registered at the Telus tower at 3050 Dufferin Street. Within two minutes of the first 911 call, Schloss' cell phone registered an outgoing call to Hamilton at the Telus tower at 55 Ameer Avenue, the other Telus tower closest to the murder scene.

(e) Davis' cell phone

[247] Within the two and a half minutes before the first 911 call, Davis' cell phone registered at the Rogers tower at 25 Elway Court, which was the Rogers tower closest to the murder scene and just south-west of it. About two minutes after the first 911 call, Davis' cell phone registered at the other Rogers tower, at 3450 Dufferin Street, near the Yorkdale Mall and just north of the murder scene.

(iii) Evidence on synchronization

[248] The evidence on synchronization was of two sorts: the extent of the synchronization between the 911 clock and the clocks of the three cell phone carriers, and the extent of the synchronization between the clocks of the three carriers.

[249] On the question of synchronization between the 911 clock and the clocks of the carriers, Mr. Iaccio, the Telus representative, testified that the Telus clock and the 911 clock were not synchronized. Although he could not say how the Telus clock was set, he said that the times between it and the 911 clock "rarely ever" matched.

[250] Indeed, Mr. Iaccio testified that the two clocks could be out of synchronization by as much as three minutes, although the normal difference would be considerably less. The following is the relevant portion of Mr. Iaccio's testimony, which was adduced in cross-examination by counsel for Schloss and by counsel for Davis:

Q. Your phone system. Now, you're very careful to keep track of times, etc., so you make sure that people get billed properly. Right?

A. Correct.

Q. One of the things about your time system is that it's not synchronized with 911, is it?

A. No, it's not.

Q. So if we have a time up there of a 911 call which we've seen on the slide many times now, that doesn't come from your company. Right?

A. No.

Q. And when we see times of phone calls from Telus Mobility in and around the 911 call, you have no idea whether or not those times are accurate relative to the 911 call right?

A. Correct.

Q. Can you explain to the jury why that is? Why they are on a different clock?

THE COURT: Are they? That's the question

Q. Yeah, they are, aren't they?

A. I don't know what 911 uses.

Q. You're not synchronized with 911 and you know that as a fact.

A. Yes.

Q. Because you told that to Detective Carter before.

A. Correct.

Q. So can you explain to the jury what it is you know about this discrepancy?

A. In terms of how our phone – our network is not synched with 911?

Q. Yes, sir?

A. I guess –

THE COURT: How do you set your clock? That's what he's asking.

THE WITNESS: Well, uh, I'm not too certain how we, uh, set our clock. Uh, I believe it's every 10 or 20 minutes our network, uh, cross-references with a satellite and synchs the time with our – the entire network with that satellite, but I do not know what – where the source of that time is for the satellite.

Q. Okay.

A. So if I were to look at my cell phone now, the time on my phone is not gonna be the same as 911 and I don't know where the 911 call centres receive or synch their time or how often they check it or anything like that.

Q. So at any particular moment in time, let's just say 8 p.m., okay, at 8 p.m. the 911 clock would say 8 p.m. and your clock would say 7:57.

A. Sure.

Q. Or 8:03.

A. Yes.

Q. It could be off as much as three minutes?

A. Sure. Actually, yes, three minutes is fair.

Q. It could be off by more than three minutes.

A. I can't recall if I've ever seen it being more than three minutes, but I wouldn't be surprised if I did see it more than three minutes.

...

Q. You said that it could be out by as much as three minutes or more. Right?

A. Yes.

Q. And you're seen that repeatedly in your experience when asked to locate – asked to locate Telus customers who have called 911.

A. Correct.

Q. Your times of your Telus customers are rarely ever synchronized with 911 time.

A. Exactly.

[251] This lack of synchronization between the Telus clock and the 911 clock became an issue at trial and on appeal, and it is the focal point of Hamilton's fresh evidence application.

[252] Ms. Hopper testified about the Rogers clock and her evidence on synchronization was similar to that of Mr. Iaccio. She testified that the Rogers clock could vary by as much as two minutes from the 911 clock.

[253] On the other hand, Mr. Rickard of Bell Mobility testified that he had never seen the 911 times and the Bell Mobility times out of synch. He said that the Bell Mobility clock was synchronized with the Atomic Clock in Ottawa, and though he did not know what the 911 clock was synchronized with, in his long experience he had never seen an instance where the 911 and Bell Mobility times did not coincide.

[254] The other sort of synchronization evidence led at trial concerned the variances of times between the clocks of the three carriers. That evidence came mainly from the cell

phone records of Bell Mobility, Telus and Rogers, which were filed as exhibits. The records showed that there was never a discrepancy between the times recorded by the three carriers that approached three minutes on the day of the shootings. Rather, the discrepancy was almost invariably in the range of 10 to 20 seconds, and in no case more than 30 seconds.

[255] We now consider the three grounds of appeal concerning the cell phone evidence.

1. Did the trial judge err in admitting the evidence concerning the location of cell phones?

[256] The appellants Schloss, Davis and Reid submit that the cell phone evidence should not have been admitted. They contend that this evidence, especially the evidence about the general rule and its exceptions, is opinion evidence, which can only be given by a qualified expert after holding a *voir dire*. The trial judge did not hold a *voir dire* and these appellants contend that as neither Mr. Rickard, Mr. Iaccio nor Ms. Hopper was an engineer, none of them was qualified to give this evidence.

[257] In response, the Crown submits that these appellants made a deliberate and tactical decision not to object in any meaningful way to the admissibility of the cell phone location evidence. The Crown says that it is now too late for the appellants to raise this issue, and accordingly this court should not entertain their objections. Alternatively, the Crown submits that the cell phone location evidence was properly admissible either because it was factual evidence, not opinion evidence, or, if opinion evidence, because it met the criteria for admissibility.

[258] We do not accept the appellants' submission for two reasons. First, we agree with the Crown that these appellants tactically and deliberately chose not to seriously contest the admissibility of this cell phone evidence. Because they pursued this strategy at trial, we are not inclined to allow them to change course and now on appeal object to the admissibility of this evidence.

[259] Second, the evidence given by the three employees of the carrier companies was not opinion evidence but factual evidence, which they were qualified to give because of their knowledge, observations and experience. Moreover, their evidence was reliable, probative and understandable. It was therefore properly admissible.

(i) The appellants' tactical decision ought not to be revisited on appeal

[260] Before discussing the position the appellants took at trial on the admissibility of the cell phone evidence, we make two preliminary points. First, this evidence did not come as any surprise to the appellants. They knew full well that this cell phone evidence was going to go before the jury because it was highly probative of the central issue in the case, the identity of the perpetrators. The appellants also knew what the employees of the carrier companies would say – a cell phone is “likely” going to register at the closest tower. The appellants knew all this because the Crown had called cell phone evidence at the preliminary inquiry, and it had led that evidence through a qualified engineer, Mr. Wang. Moreover, less than two months earlier, in a case called *R. v. Zvezdaryk*, [2004]

O.J. No. 6137 (S.C.J.), Mr. Wang had given similar evidence concerning the location of cell phones and his testimony was ruled admissible.

[261] Second, each of the appellants had his own tactical reasons for wanting the cell phone evidence before the jury. Hamilton, whose position we will discuss in the next section of these reasons, most obviously did. As we have said, he relied on this evidence to give him an alibi.

[262] Davis, too, relied on this evidence to give him an alibi, and to point the finger at the alternate suspect, Webb. Davis' alibi depended on the evidence of some of the eyewitnesses, who testified that the perpetrators remained at the scene for between five to eight minutes after the shootings. If the jury believed this evidence, then Davis could not have been at the scene because his cell phone registered some distance away at the Rogers tower near Yorkdale Mall within just over two minutes after the first 911 call. Davis also pointed to the cell phone records of Webb. His cell phone registered at the Bell Mobility tower at 145 Elm Ridge Drive, directly south of the murder scene, three times within the first five and a half minutes after the first 911 call.

[263] Reid, too, relied on the cell phone evidence because his phone was not used within a reasonable timeframe before or after the murders. The Crown, therefore, could not place Reid at the murder scene through the cell phone evidence. Reid also relied on the cell phone evidence to discredit Coward's testimony, and to give him an alibi for the jewellery store and Falstaff incidents.

[264] Schloss' position was more difficult. On its face, the cell phone evidence against him was incriminating. It placed him near the scene of the murders shortly before and after the shootings occurred. However, by not objecting to the qualifications of the employees of the carriers, and especially the qualifications of Mr. Iaccio, the employee of Schloss' own carrier, Telus Mobility, Schloss gained a tactical advantage. He was able to argue to the jury that Mr. Iaccio was neither an engineer nor qualified as an expert and therefore his evidence ought to be disregarded or at least discounted.

[265] We now turn to the position taken by the defence when the Crown led the cell phone location evidence, first through Mr. Rickard, then Mr. Iaccio and finally Ms. Hopper. This evidence (including the PowerPoint presentation that accompanied it) took seven days. Yet at no time in the seven days did defence counsel ask for a *voir dire*. And they repeatedly turned down the trial judge's invitation to cross-examine the three witnesses on their qualifications. They advanced but two mild objections, one when Mr. Rickard testified and the other when Mr. Iaccio testified.

[266] Mr. Rickard said that he had testified in court over 50 times previously. Early in his evidence, he explained the general rule. Then counsel for Davis asked whether Mr. Rickard was being put forward as an expert, and if so, said that he ought to be able to question him on his expertise. These comments led to an exchange between the trial judge, Crown counsel and counsel for Davis in the absence of the jury:

[Counsel for Davis]: How are we going to be able to ask any specific questions about this when it's just, you know, what

he's been told and he doesn't have any real knowledge about, you know what is behind the observation?

The Court: I don't know that an engineer can tell you anymore differently. Right? He's going to give the same evidence. Are you proposing to call anybody else or not?

[Crown counsel]: No, my lord. This witness testified at length at the preliminary inquiry, so by reading the preliminary inquiry transcript, [counsel] and everyone else will know exactly what he's going to say. There are no surprises here in terms of his expertise. The Crown's position is that we are dealing with probabilities here that to be able to tell the time you don't have to know how the clock was made.

...

And his expertise is based on how the system works. That's how they make their money. That's how they bill people. If they didn't go on what his knowledge was, the companies would go broke.

The Court: Anybody want to make any further submissions?

[Counsel for Davis]: No thank you sir.

...

The Court: Okay. He'll be taken as qualified to give opinion evidence with respect to the workings of the cell phone system for Bell Mobility and the location of the towers in relationship to the signals either received or sent by telephone. So I'll let him explore that area and the interpretation of the raw data documents.

[267] As is evident, this exchange petered out quickly because counsel for Davis did not press his objection and no other counsel took up the matter. The trial judge held that Mr. Rickard was qualified to give opinion evidence. No counsel disagreed.

[268] Mr. Iaccio then gave evidence. He said that he had testified many times before, including at the preliminary inquiry in this case. The Crown asked that Mr. Iaccio be qualified to give expert opinion evidence on the location of cellular phones. Only counsel for Schloss raised a concern. His concern was narrow. He was content that Mr. Iaccio give the evidence but he did not want him referred to as an expert:

The Court: Okay, Mr. Rickard, the last witness, I don't think gave opinion evidence, quite frankly.

[Counsel for Schloss]: That's right.

The Court: Because he was, in fact, giving the general rule, the exceptions to the rule, and he did not as some people use the word opine as to where the cellular phone was at the particular time.

[Counsel for Schloss]: Right.

The Court: He simply said the records indicate tower 131, section S (sic) and that's located. He gave us an address but he didn't say, in my opinion the phone was in this particular location. So are you going there with this witness?

[Crown counsel]: I'm not going any further than I did with – than Mr. Rickard did with this witness.

[Counsel for Schloss]: Well, then, he doesn't need to be called an expert in the location of cellular phones. It's just he understands what the data means and he's going to relate what the data is to the jury.

The Court: I want him to interpret the data.

...

But I gather the Crown, subject to your comments, it doesn't sound like you have an objection, but I don't think he's going to give an opinion or proffer an opinion with respect to the

location of the particular phone. Simply what the records indicate.

[Counsel for Schloss]: Right. Well, then, my objection is that he should not be referred to before the jury as an expert in the location of phones. That's all. I didn't mean to be difficult.

The Court:... I don't think he's going to offer an opinion so I tend to agree with [counsel for Schloss].

[269] As we have already said, counsel for Schloss' decision not to object to the evidence given by Mr. Iaccio was tactical. He wanted to be able to argue to the jury – as he did – that Mr. Iaccio was not an expert. And, he did not want to push the Crown into calling Mr. Wang, who would have given essentially the same evidence as Mr. Iaccio, but with the added credibility given by his engineering degree. We note that the trial judge gave effect to the position of Schloss' counsel, because, when referring to Mr. Iaccio, he did not call him an expert.

[270] Finally Ms. Hopper testified, as she had done many times over the previous 15 years. No counsel objected to her evidence or her qualifications.

[271] As this brief review demonstrates, none of the appellants mounted any serious objection to the admissibility of the cell phone evidence or to its being led through the testimony of the three employees of the cellular phone carriers without first holding a *voir dire*. Each appellant had his own tactical reasons for wanting this evidence in or for not wanting the Crown to lead the evidence through a qualified engineer such as Mr. Wang. Having deliberately pursued this strategy at trial, it is now too late on appeal

for Schloss, Davis and Reid to object to the admissibility of the cell phone evidence on the basis that the trial judge did not hold a *voir dire*.

[272] This alone is sufficient to dispose of this ground of appeal. However, we are also satisfied that the cell phone evidence given by the employees of the carriers was factual evidence, which they were qualified to testify about.

(ii) The cell phone evidence was admissible as factual evidence and was not opinion evidence

[273] The Crown did not ask for a *voir dire*, the defence did not seek one, and the trial judge did not hold one. Now on appeal, Schloss, Davis and Reid argue that Mr. Rickard, Mr. Iaccio and Ms. Hopper gave opinion evidence, and if a proper *voir dire* were held, they would not have met the criteria for the admissibility of expert opinion evidence set out by Sopinka J. in *R. v. Mohan*, [1994] 2 S.C.R. 9, and more recently by Doherty J.A. of this court in *R. v. Abbey*, 2009 ONCA 624. In particular, they contend that in testifying about the general rule and its exceptions, the employees were giving a technical, scientific opinion that they were not qualified to give. In short, they could not satisfy the second *Mohan* criterion: the witness must be qualified to give the opinion.

[274] Whether testimony about the general rule and its exceptions is factual evidence, as the Crown maintains, or opinion evidence, has been a matter of debate. Case law on the question has gone both ways. The two sides of the debate are reflected in the Manitoba decision of *R. v. Korski*, [2007] M.J. No. 275 (Q.B.), affirmed 2009 MBCA 37, and the

Ontario cases of *Zwezdaryk, R. v. McFarlane*, [2006] O.J. No. 4858 (S.C.J.) and *R. v. Spackman*, [2009] O.J. No. 1066 (S.C.J.).

[275] In *Korski*, Beard J. concluded at paras. 11-12 that “evidence regarding the operation of the cellular telephone network and explaining the billing record information” was factual evidence. Her conclusion was upheld on appeal. In *Zwezdaryk*, on the other hand, Clark J., in thorough reasons, held that evidence about the operation of the cellular telephone system was opinion evidence, but admissible through the testimony of Mr. Wang. In the later case of *McFarlane*, Clark J. refused to qualify Mr. Rickard as an expert in the field of cellular telephone communications, in part because he was not an engineer. In *Spackman*, Trafford J. refused to qualify a Rogers Wireless employee as an expert on the location of cell phones in relation to cell towers, in part because the employee was not an engineer, and in part because the cell tower configuration data for Fido phone towers, which were the pertinent towers in that case, was no longer available and so the employee’s evidence could not be challenged effectively by the defence.

[276] We accept that if the cell phone location evidence given by Mr. Rickard, Mr. Iaccio and Ms. Hopper was opinion evidence, then the trial judge ought to have conducted a *voir dire*. And if it was opinion evidence, the trial judge likely overstepped the bounds by ruling that Mr. Rickard was an expert qualified to give cell phone location evidence. But in fairness to the trial judge, as we have said, no counsel sought a *voir dire* or seriously objected to Mr. Rickard’s evidence.

[277] However, we are satisfied that the evidence given by the three employees of the carrier companies was factual evidence, not opinion evidence. Each of them, by reason of their knowledge, observation and experience in dealing with cell phones for their respective companies could give the testimony they provided without being qualified as experts. They could testify about the times each appellant's cell phone registered, the number calling and the number called, the duration of the call and the location of the towers at which the calls registered. These were factual details on which the carriers based their billing practices. Further, these employees had the knowledge and experience to testify about the general rule and its exceptions. They did not have to understand the scientific and technical underpinnings of the rule or have an engineering degree to give this evidence.

[278] It is perhaps understandable why some courts in years past treated this kind of evidence as opinion evidence. The introduction of cell phone evidence in criminal trials was in its infancy. Now, with the benefit of hindsight, we know that this evidence is routinely admitted: see, for example, *R. v. Tomlinson*, [2008] O.J. No. 817 (S.C.J.), *R. v. H.B.*, [2009] O.J. No. 1088 (S.C.J.), *R. v. Smith*, [2009] O.J. No. 4544 (S.C.J.).

[279] Even if evidence about the general rule and its exceptions could at one time have been considered opinion evidence, it is now simply factual evidence that witnesses with the knowledge and experience of Mr. Rickard, Mr. Iaccio and Ms. Hopper can testify about. They were not proffering a novel scientific or behavioral theory that was open to debate. They were testifying about uncontroversial facts related to the operation of cell

phone networks. As the trial judge noted, their evidence was essentially the same as the evidence that could have been given by an engineer. Indeed, an engineer, Mr. Wang, gave largely the same evidence about the general rule at the preliminary inquiry. With the benefit of that testimony, no appellant insisted that an engineer give this evidence at trial.

[280] Importantly, none of the three cell phone witnesses was asked to give an opinion about the precise location of an appellant's cell phone when a particular call was made or received. Evidence of that nature might well be opinion evidence and subject to the *Mohan* criteria: see *R. v. Ranger*, 2010 ONCA 759, at para. 17. Testimony about the general rule and its exceptions is not opinion evidence, and thus no *voir dire* was necessary.

[281] The Crown in closing submissions to the jury made it clear that the cell phone witnesses were not giving evidence of the precise location of a cell phone:

The evidence makes it clear, however, that there are significant limitations on the ability of records to precisely identify a phone's location. In substance, where the records indicate that a phone is registering on a particular cell tower, there is a probability but not a certainty that the phone is somewhere within the expected coverage area of the cell site. The general rule from all of – that we heard from Mike Rickard who represented Bell Mobility, Sal Iaccio who represented Telus Mobility, and Ms. Hopper who represented Rogers AT&T was that the phone registers on the tower with the strongest signal and that usually is the closest tower, but there are definite exceptions to that general rule, and in your experience and your common sense, general rules always have exceptions.

[282] Additionally, the jury would have had no difficulty in understanding the cell phone location evidence, especially after it was summarized in a PowerPoint presentation. That presentation undoubtedly clarified the evidence and put to rest any possibility the jury might have been confused by it. The presentation of the cell phone evidence did take a fair amount of time, seven days. But in the context of a four-month trial, this was not an overly long amount of time.

[283] Finally, the probative value of this evidence strongly favoured its admission. In a case where identity was the key issue at trial, the cell phone evidence was highly probative circumstantial evidence of the general location of three of the appellants, Hamilton, Schloss and Davis, at the critical times.

[284] Accordingly, we do not give effect to the appellants' challenge to the admissibility of the cell phone evidence.

Hamilton's Grounds of Appeal Concerning the Cell Phone Evidence

Overview

[285] Unlike the other appellants, Hamilton does not challenge the admissibility of the cell phone evidence. Instead, he relies on it to establish his alibi. He points to an incoming call from his friend Ben from Jamaica right after the murders occurred. This call registered a mere 50 seconds after the first 911 call, and it registered at a Telus tower at 1463 Eglinton Avenue West (near Marlee Avenue), a tower that was farther away from the murder scene than four other Telus towers in the area. Hamilton claims that when he

received this call he was driving a van with Patrick Webb and two others in it along Eglinton Avenue West near Oakwood Avenue.

[286] Hamilton points to three other facts to buttress his alibi. First, during his initial interview with the police, he told them to check his phone records as they would show he was innocent. Second, he told the police that he was with Patrick Webb at the time of the shootings and Webb's cell phone registered within minutes of the first 911 call at a Bell Mobility tower at 145 Elm Ridge Drive, near Eglinton Avenue West. Third, Hamilton and Schloss spoke to each other about two minutes after the first 911 call, and their phones registered at different Telus towers, indicating that they were not together.

[287] To disprove Hamilton's alibi, the Crown relied on there being a lapse of time between the shootings and the 911 call, on his ability to get very quickly from the murder scene to the vicinity of the Telus tower at 1463 Eglinton Avenue West by driving at a high rate of speed, and on the lack of synchronization between the Telus clock and the 911 clock. The Crown theorized that Hamilton joined the other appellants right before the shootings and separated from them right after. The Crown then maintained that when Hamilton received a call on his cell phone 50 seconds after the first 911 call, he was speeding away from the murder scene and had entered the call area of the Telus tower at 1463 Eglinton Avenue West.

[288] In essence, the strength of Hamilton's alibi turns on four variables: the lapse of time between the shootings and the first 911 call; the getaway route of the murderers and

the amount of time needed to drive toward 1463 Eglinton Avenue West; the application of the general rule and its exceptions; and the extent to which the Telus clock and the 911 clock were synchronized. The third and fourth variables are the subject of Hamilton's submission that the trial judge misdirected the jury on the cell phone evidence.

[289] On the first variable, the initial 911 call was made by Milton Lewis, the brother of one of the victims. He testified that he was on the phone in his mother's apartment on the fourth floor of 7 Flemington Road when he heard the shooting and looked outside. He saw a black man standing over his brother, Michael, and firing a gun at him. Milton Lewis yelled "yo" and the shooter looked up and ran. He told his mother what had happened and then got back on the phone and told the person he was speaking to what had happened. Only then did he call 911.

[290] In the course of his examination-in-chief and cross-examination, Milton Lewis gave several different estimates of how long he took to call 911 after he saw his brother shot. In his examination-in-chief, he first said five to eight minutes, and then "maybe a minute or two." When cross-examined by counsel for Hamilton, he testified that it was "a minute, I guess ... maybe a minute." Later in the cross-examination, a test was conducted in the courtroom, and Mr. Lewis estimated the time as between seven to nine seconds after the shooter jumped over a railing and went out of sight. Finally when cross-examined by counsel for Davis, he said that because he had gone through a traumatic experience he was not keeping track of time: "I don't know if it was two

minutes, three minutes.” As this brief review shows, Milton Lewis was not consistent about how much time passed between the shooting and his 911 call.

[291] On a second variable – the getaway route and the time needed to drive toward the Telus tower at 1463 Eglinton Avenue West – Hamilton asked the jury to assume that the getaway car drove from the murder scene going east on Old Meadow Lane, north on Replin Road, east to Varna Drive, south to Lawrence Avenue West, west to the Allen Road, and then south on the Allen Road to Eglinton Avenue West. Hamilton referred to evidence he led from an articling student who had done a test drive of this route. He submitted to the jury in closing argument that it would take “a considerable period of time” to get from 7 Flemington to the area where a cell phone would register at the 1463 Eglinton Avenue West tower.

[292] The articling student’s actual testimony was that it took him between one minute and 47 seconds and one minute and 50 seconds to get from the murder scene to the intersection of Lawrence Avenue West and the Allen Road, driving mostly at the speed limit. Of course it was open to the jury to conclude that the murderers followed a different route than the student took, or that they drove well in excess of the speed limit.

[293] We now address Hamilton’s two grounds of appeal.

1. Did the trial judge misdirect the jury on the application of the exceptions to the general rule and the evidence in support of these exceptions?

[294] Hamilton submits that the trial judge's instructions on the cell phone evidence unfairly undermined his alibi defence. The trial judge referred to the cell phone evidence many times in his charge. The following passage captures the essence of his instructions:

In assessing whether or not the Crown has proven beyond a reasonable doubt the identity of a particular accused as a participant in the shootings either as a gunman or driver, it is important that you carefully assess the cell phone records to assist you to determine the location of the four accused at relevant times. However, because the phone records do not reflect certainty but merely probability, admit of many exceptions to the general rule that the call registers at the nearest cell tower and are not synchronized as to times, it is also important to consider other evidence including evidence of motive, association, opportunity and after-the-fact conduct, including implicit admissions of participation in determining whether or not the Crown has proven beyond a reasonable doubt the identity of the particular accused as having participated either as a shooter or driver in the double murders and attempted murder at 7 Flemington Road on Tuesday, July 24th, 2001, at approximately 9:17 that evening.

[295] Hamilton contends that by this instruction the trial judge effectively told the jury they could not rely on the general rule (that a cell phone ordinarily registers at the closest tower) and suggested that a cell phone could arbitrarily register at a more distant tower. He says that where a cell phone registers is not a matter of chance: there is a general rule and recognized exceptions.

[296] And, Hamilton says none of the exceptions apply. Indeed, if anything, the geography of the area reinforces his position that the general rule governed the location

of his cell phone. The evidence at trial established that there were no obstructions between the scene of the shootings and three of the four closest Telus towers, and only one possible obstruction – a tall bank building – between the murder scene and the fourth Telus tower closest to the scene. Yet there was a significant obstruction – a group of tall buildings – in the path between the scene of the murders and the tower at 1463 Eglinton Avenue West, the tower where Hamilton’s incoming call registered less than a minute after the first 911 call. Nonetheless, despite defence counsel’s objection, the trial judge refused to charge the jury on the applicability of the exceptions to the general rule or on the presence of the tall buildings between 7 Flemington Road and 1463 Eglinton Avenue West.

[297] We do not accept Hamilton’s contention. We acknowledge that in his charge, the trial judge did not refer to the group of tall buildings. However, as we will discuss shortly, the trial judge expressly brought to the jury’s attention the absence of any major obstructions between 7 Flemington Road and the other four closer Telus towers. Moreover, the law does not require the trial judge to review for the jury every fact on which the defence relies. What the law does require the trial judge to do is instruct the jurors on the evidence in a way that they can fairly appreciate the issues and the defence presented. See *R. v. Daley* (2007), 226 C.C.C. (3d) 1 (S.C.C.), at para. 57. We are satisfied that the trial judge did so.

[298] In the passage Hamilton impugns, the trial judge correctly stated the general rule. He also correctly stated that the general rule was subject to exceptions. Although he did

not spell out these exceptions, the jury would have been well aware of them from the evidence and the addresses of counsel.

[299] Moreover, the trial judge was right to say that the cell phone evidence reflected probability, not certainty, and thus the jury should also consider the other evidence implicating the appellants. That evidence included Hamilton's "implicit admissions" of guilt. Most important for this ground of appeal, the trial judge spelled out fairly and in detail for the jury Hamilton's alibi defence:

The timing of the cell phone records prove that Anthony Hamilton was not in the immediate area of 7 Flemington Road at the time of the murders. ...

Hamilton's cell phone registered at 1463 Eglinton Avenue West near the Telus site at Allen Road at 9:18:45 p.m. However, there were four other Telus sites closer to 7 Flemington than the one on Eglinton Avenue West. At 9:18:45, about one minute after the shootings, Hamilton's cell phone, had he been in the murder van, would still likely not have registered at 1463 Eglinton West. It takes time to get there from 3 Old Meadow Lane to the area of Eglinton Avenue West and the Allen Expressway. There are traffic lights on the way. It takes at least two minutes to drive from 3 Old Meadow Lane to Lawrence Avenue West and the Allen Expressway. The Telus cell towers at 55 Ameer, at 3000 Bathurst and at 3050 Dufferin all would have been closer to 7 Flemington.

Following the 911 call at 9:17:55, Hamilton had calls at 9:18:45 and 9:20:01. At that time he had a call from Schloss who was at 55 Ameer, and at 9:25 p.m. and at 9:29 p.m. Hamilton also had calls. The 9:20:01 p.m. call was, as I have stated, from Lennox Schloss. At 9:11:16 p.m., at an earlier time, Lennox Schloss had phoned Anthony Hamilton when Schloss was nearer the 350 (sic) Dufferin tower. Obviously, they were not in the same vehicle at that time, that time being

9:11:16. Likewise they were not in the same vehicle at 9:20:01 p.m. when Schloss later phoned Hamilton.

The 9:18:45 p.m. call does not indicate – this is the one registered at 1463 Eglinton Avenue West, shortly after the shootings – the location of the other party to the call, to the call with Hamilton. The Telus representative indicated that it could have been a long distance call. Hamilton told the police that at that time he was involved in a long distance call from Jamaica with Ben. According to defence counsel, the cell phone records indicate that it would have been a physical impossibility for Hamilton to have participated in the murders at 7 Flemington at 9:17. Keep in mind that, for the most part, there are no high rise buildings to obstruct the phone calls to the closer Telus cell phone sites.

[300] As this passage reveals, the trial judge not only told the jury that there were four Telus towers closer to the murder scene than the Telus tower at 1463 Eglinton Avenue West, but as well that there were, for the most part, no high buildings to obstruct calls to the closer towers.

[301] From the trial judge's general instructions on the cell phone evidence and his instructions on Hamilton's alibi, we are satisfied the jury would have appreciated that right after the shootings Hamilton's cell phone did not register at any of the Telus towers closest to the murder scene. They would have also appreciated that Hamilton's cell phone could have registered at any of the closer Telus towers if he were in the vicinity of the murder scene at the time of his incoming call at 9:18:45 p.m., and that the exception to the general rule for obstructions did not apply to the four closest Telus towers, but could apply to the tower where Hamilton's phone registered.

[302] In summary, the trial judge's instructions on the cell phone evidence did not undermine Hamilton's alibi defence. In our view, the trial judge presented Hamilton's defence fairly. We therefore decline to give effect to this ground of appeal.

2. Did the trial judge misdirect the jury on the lack of synchronization between the Telus clock and the 911 clock?

[303] Hamilton submits that the trial judge further compromised his position by repeatedly instructing the jury that the Telus clock and the 911 clock were not synchronized and could be out of synch by as many as three minutes. For example, Hamilton complains about the following passage from the trial judge's summary of the Crown's case:

The Telus representative testified that he could not say with certainty where the cell phone would register if the caller was in the general area of 7 Flemington around the time of the murders. Furthermore, the Telus times are not synchronized with 911 times. Hamilton's phone was in the area of 1620 Lawrence just before the murders and south of 7 Flemington after the murders. 7 Flemington is somewhat north of Lawrence just east of the Allen Expressway. Please keep in mind that the Telus times may be off the 911 times by up to three minutes, though it is likely to be far less than that.

[304] Hamilton argues that the trial judge's instructions on the lack of synchronization between the Telus clock and the 911 clock gave the jury a false impression that the two clocks were not synchronized around the time of the shootings. According to Hamilton, the trial judge should have told the jury to assume that the two clocks matched on the day of the murders because there was no evidence of any lack of synchronization on that day.

[305] We do not agree with Hamilton's argument. The trial judge's instructions on the lack of synchronization between the Telus clock and the 911 clock reflected the evidence of Telus' representative Mr. Iaccio, which we referred to earlier in these reasons. And even though the trial judge told the jury that the clocks could be out by as many as three minutes, he also told them that the variance was "likely to be far less than that." Indeed, that the variance on the day of the murders was far less drew firm support from the evidence of Mr. Rickard that the Bell Mobility and 911 clocks always coincided, combined with the cell phone records, which showed a variance in the clocks used by the three carriers that was almost always less than 20 seconds and never more than 30 seconds. Thus, on the basis of the trial judge's instructions and the evidence, it was open for the jury to find that on the day of the murders, the Telus clock and the 911 clock were very close to being synchronized, which was Hamilton's best position.

[306] The instructions Hamilton sought – to assume the two clocks matched on the day of the murders – would have been contrary to Mr. Iaccio's uncontradicted evidence that the two clocks rarely match. That instruction would also have prejudiced the Crown's position.

[307] We conclude this section of the reasons by noting that the trial judge's instructions on synchronization had to reflect the competing positions of Hamilton and Schloss. Hamilton sought an instruction that compelled the jury to conclude that the two clocks matched on the day of the murders. Schloss, however, sought exactly the opposite instruction because his cell phone registered at a Telus tower very close to the murder

scene both before and right after the first 911 call. Indeed, Schloss' counsel actively sought an instruction on the lack of synchronization, going as far as asking for a notation to that effect on every page of the paper copy of the PowerPoint presentation. The trial judge declined Schloss' request, but before the Crown presented its PowerPoint he did instruct the jury that the two clocks were not synchronized. Hamilton's counsel agreed with this instruction, no doubt because it was faithful to the evidence of Mr. Iaccio.

[308] For the above reasons, we do not give effect to this ground of appeal. Accordingly, Hamilton's submission that the trial judge misdirected the jury on the cell phone evidence and by doing so undermined his alibi defence fails.

VIII. Fresh Evidence Application

1. Introduction

[309] At the conclusion of oral argument on the appeal, Mr. Lockyer, counsel for Hamilton, brought an application for leave to introduce fresh evidence. He asked for an adjournment to bring forward evidence that would show, in his words, that "the times recorded in the records for Lewis' 911 call at 9:17:55 p.m. and the call received by Hamilton at 9:18:45 p.m. were both accurate within seconds of each other, and were both within seconds of Atomic Time."

[310] The panel granted the adjournment request. The argument of the appeal was put over for six months to permit both sides to assemble their materials.

[311] The fresh evidence consists of nine affidavits – seven filed by Hamilton and two by the Crown – as well as the transcripts of cross-examinations on some of these affidavits. Hamilton’s evidence includes affidavits from employees of Toronto Police Service, Bell Mobility and Telus Mobility and from his counsel at trial. The Crown’s evidence includes an affidavit from Mr. Iaccio, which supplements his evidence at trial. The parties also filed lengthy factums on the application.

[312] In essence, Hamilton seeks to counter Mr. Iaccio’s trial evidence that the Telus clock and the 911 clock could differ by as much as three minutes. Hamilton submits that the fresh evidence demonstrates the two clocks varied little or not at all on July 24, 2001 and that therefore, based on the timing of the 911 call and the incoming call to Hamilton 50 seconds later, which registered at the Telus tower at 1463 Eglinton Avenue West, he could not have been at the scene of the shootings when they occurred.

2. The Legal Framework for the Application

[313] Section 683(1) of the *Criminal Code* gives an appellate court power to admit fresh evidence on appeal “where it considers it in the interests of justice” to do so. As this court said in *R. v. Truscott*, 2007 ONCA 575, at para. 81:

The “interests of justice” control the admission of all evidence offered on appeal. That phrase signals a broad discretion to admit evidence following a context-sensitive inquiry into the totality of the circumstances.

[314] The fresh evidence Hamilton seeks to introduce is directed at evidence at trial that may have been material to the jury’s verdict. Fresh evidence of this sort continues to be

governed by the test in *R. v. Palmer*, [1980] 1 S.C.R. 759, a test that has been discussed and elaborated on in several recent decisions of this court: see *R. v. Maciel*, 2007 ONCA 196, leave to appeal to S.C.C. refused, [2007] S.C.C.A. No. 258; *Truscott*; *R. v. Phillion*, 2009 ONCA 202; *R. v. Reeve*, 2008 ONCA 340; and *R. v. Dooley*, 2009 ONCA 910, leave to appeal to S.C.C. refused, [2010] S.C.C.A. No. 83 and [2010] S.C.C.A. No. 179.

[315] As described in *Truscott*, at para. 92, under the *Palmer* test, an appellate court should consider three questions:

- Is the evidence admissible under the operative rules of evidence?
- Is the evidence sufficiently cogent in that it could reasonably be expected to have affected the verdict?
- What is the explanation offered for the failure to adduce the evidence at trial and should that explanation affect the admissibility of the evidence?

[316] In this case, in respect of the first inquiry, the proposed fresh evidence is admissible under the rules of evidence.

[317] The third inquiry invites the court to consider whether by due diligence the evidence could have been adduced at trial. However, the due diligence component of the *Palmer* test is usually applied less strictly in criminal appeals than in civil appeals. In a criminal case, even if the proffered evidence was available and could have been led at trial, when that evidence undermines the reliability of the verdict and the liberty interest of an appellant is at stake, it is not ordinarily in the interests of justice to maintain the

verdict simply because an appellant failed to exercise due diligence. In this case, we do not rest our decision on the due diligence component of the *Palmer* test.

[318] The present application turns on the cogency inquiry. This inquiry requires an appellate court to answer three further questions (*Truscott*, at para. 99):

- Is the evidence relevant in that it bears upon a decisive or potentially decisive issue at trial?
- Is the evidence credible in that it is reasonably capable of belief?
- Is the evidence sufficiently probative that when taken with the other evidence adduced at trial, it could reasonably be expected to have affected the result?

[319] These questions call for a qualitative assessment of Hamilton's proposed fresh evidence. The probative value of this evidence must be assessed in the context of all the evidence admitted at trial and on appeal. If, in this context, the evidence Hamilton seeks to introduce could reasonably be expected to have changed the result at trial, the evidence ought to be admitted and his convictions set aside. Depending on the cogency of the fresh evidence, the court would then have to determine whether an acquittal should be entered or a new trial ordered: *Maciel*, at para. 46.

[320] The Crown accepts that Hamilton's proposed fresh evidence is relevant to a potentially decisive issue at trial, his alibi. The Crown, however, raises concerns about the credibility of the proposed evidence. We will summarize the proposed evidence later in these reasons. Here, we simply say that we are prepared to accept that the evidence tendered by Hamilton is credible.

[321] To decide this application, we need only focus on the third question in the cogency inquiry: Is the proposed fresh evidence sufficiently probative that when taken with the other evidence adduced at trial, it could reasonably be expected to have affected the result? In our view, the answer to this question is no. Accordingly, for the reasons that follow, we dismiss the application to introduce fresh evidence.

3. The Context for the Application

[322] Hamilton's defence at trial and maintained on appeal was one of alibi. His alibi rested on the cell phone records, especially the timing of the two critical calls at 9:17:55 p.m. and 9:18:45 p.m. on July 24, 2001 and the location of the cell tower at which the second call registered. Hamilton claimed that the timing of these two calls, coupled with the cell phone location evidence indicating that the second call registered at the Telus tower at 1463 Eglinton Avenue West – approximately 3.6 kilometres away from the crime scene – proves that he could not have been at the crime scene when the shootings occurred. For his defence to succeed, it was important to show that on the day of the shootings the 911 clock and the Telus Mobility clock were synchronized exactly or within seconds of each other.

[323] At trial, however, Salvatore Iaccio, the Telus Mobility representative, testified in cross-examination by counsel for Schloss that the Telus clock was not synchronized with the 911 clock. He agreed with the proposition put to him that the two clocks could be off by as much as three minutes. He also agreed with the suggestion by counsel for Davis that at the time of the 9:18:45 p.m. call that registered at the Telus tower, the 911 clock

could have read as late as 9:21:45 p.m., or “possibly” even later. Hamilton contends that Mr. Iaccio’s evidence left a lingering doubt in the jury’s mind about the accuracy of the Telus times. Moreover, he contends that Mr. Iaccio’s evidence received undue attention from Crown counsel and from the trial judge.

[324] Hamilton points to the Crown’s closing address to the jury in which the jury was urged to find that Hamilton’s alibi was false, in part because the Telus time was not coordinated with the 911 time, and could be off by up to three minutes. And Hamilton also points to the trial judge’s charge in which the jury was told repeatedly that Telus times were not synchronized with 911 times, and especially to his review of the Crown’s position and Schloss’ position that these times at the extreme could show a variance of three minutes.

[325] Hamilton submits that if the jury had evidence showing that the Telus time and the 911 time varied by a few seconds at most, that evidence taken with the other evidence at trial could reasonably be expected to have affected the jury’s determination. What then did the fresh evidence show?

4. The Fresh Evidence

[326] The fresh evidence is extensive. The evidence Hamilton relies on broadly falls into two categories: evidence of the recorded times of various cell phone calls; and evidence about the systems used by 911 and the carriers to record the times of calls, and about the accuracy of those systems.

[327] This evidence came mainly from three witnesses: Karen Dmytryshyn, a civilian member of the Toronto Police Service, who testified about the 911 system; Sean Meisner, a technician at Telus Mobility in 2001 and now a network specialist there, who testified about the Telus system; and David Broad, the manager of wireless network security for Bell Canada Enterprises Inc., who testified about the Bell Mobility system.

[328] Hamilton then used the evidence of these three witnesses to put forward four methods for showing the accuracy of the Telus times on the day of the shootings: an analysis of the internal synchronization procedures used at Telus Mobility; a comparison of the Telus records and the 911 records for the same calls; a comparison of the Telus records and the records of the other carriers for the same calls, and; a comparison of the records of Telus Mobility and Bell Mobility for a call between Hamilton and Webb that was made in the early morning of July 24, 2001.

[329] The evidence concerning the time recording systems used by 911 and the carriers is technical and detailed. The comparisons relied on by Hamilton are similarly detailed. We do not think it necessary to recite this detail or the underlying technical descriptions of the systems used by 911 and the cell phone carriers. A summary of what the evidence shows is sufficient to decide this application. In saying that, we do not in any way minimize the efforts of counsel for Hamilton and the Crown in assembling this evidence. Their preparation and presentation of the fresh evidence application was very thorough, competent and helpful to the panel.

[330] In a nutshell, the fresh evidence shows the following:

- 911, Telus Mobility and Bell Mobility all synchronized their systems to the Atomic Clock operated by the National Research Council, Canada's official time keeper.
- Toronto Police Service uses two systems to record 911 calls. The systems are synchronized with the Atomic Clock every 24 hours. The discrepancy between the two systems is typically 2 to 4 seconds but variances of up to 8 to 9 seconds have occurred. Generally, however, 911 call times are accurate to within 2 to 4 seconds of Atomic Time.
- The Telus clock is synchronized with the Atomic Clock twice a year. According to Mr. Meisner, ordinarily the variance between the two clocks is not more than 15 seconds. However, Mr. Meisner also acknowledged that a variance of 30 seconds or more, while unusual, is not impossible. Indeed, a test he ran on a switch in Montreal produced a 40 second variance between Telus time and Atomic Time.
- Bell Mobility times are within 0 – 3 seconds of Atomic Time.
- The times of the three carriers were within 21 seconds or less of each other on the day of the homicides.
- A comparison between the Telus Mobility and Bell Mobility records for the end time of the call made by Hamilton to Webb at 4:17:30 a.m. on July 24, 2001 showed a discrepancy of 8 seconds (including tear down time).⁷
- Mr. Iaccio and Mr. Meisner, both Telus employees, differed in their evidence on the extent of the variance between Telus times and 911 times. Mr. Iaccio

⁷ Tear down time is the time between when the first party ends a call and the second party ends the call. Tear down time is included in the duration of the call on the cell phone records of the second party.

continued to maintain that he had compared 911 records and Telus records and had observed time differentials of up to 3 minutes. He had no documents to support his observations. Mr. Meisner said that he “would have a hard time believing” the Telus clock differed from the 911 clock by 3 minutes. However, he had never compared 911 records and Telus records.

[331] With this brief summary of the fresh evidence, we turn to consider whether it could reasonably be expected to have affected the result at trial.

5. Could the Fresh Evidence Reasonably be Expected to Have Affected the Result at Trial?

[332] Hamilton submits that the fresh evidence, when taken with the other evidence adduced at trial, could reasonably be expected to have changed the verdict. He contends the fresh evidence shows that Milton Lewis’ 911 call and the incoming call to Hamilton recorded as 50 seconds apart, did occur within 50 seconds of each other, plus or minus a few seconds. Thus, the trial evidence of Mr. Iaccio of a possible three-minute variation is unreliable and not something on which a defence of alibi to a first degree murder charge should have failed.

[333] To assess this submission, we have considered the fresh evidence and what was before the jury at trial on the degree of synchronization between the 911 clock and the Telus clock, the limitations of the cell phone evidence, as well as the other evidence at trial from which the jury could determine whether Hamilton was a perpetrator of the crimes.

(a) The fresh evidence and the trial evidence on the degree of synchronization between the Telus and 911 times

[334] Taking Hamilton's position at its best, which means disregarding Mr. Iaccio's evidence on the application, the fresh evidence shows that the Telus times and the 911 times could have varied by 15 to 20 seconds, perhaps as much as 30 seconds, on the day of the shootings. If this is a fair distillation of the fresh evidence, and we think it is, then it does not appreciably improve Hamilton's alibi defence. Essentially, the same evidence on the degree of synchronization between Telus time and 911 time was before the jury.

[335] It is, of course, true that Mr. Iaccio testified at trial to a lack of synchronization of up to three minutes. However, he did not testify that there was in fact a three-minute variance between the 911 time and the Telus time on the day of the shootings. We think it fanciful that the jury would have relied on a variance of this magnitude to reject Hamilton's defence of alibi to a first degree murder charge.

[336] In the light of the trial judge's instructions, the trial evidence and defence counsel's powerful closing to the jury, we think it is reasonable to conclude the jury would have based their decision on a much smaller variance, likely in the range of 20 to 30 seconds. We discuss each of these three factors in turn.

[337] First, although the trial judge referred in his instructions to the evidence that the Telus time could be off by as much as three minutes from the 911 time, he did so in the context of summarizing the position of Schloss, who sought to rely on the three-minute differential, and in summarizing the position of the Crown. Moreover, in the portions of

his charge describing the Crown's position, the trial judge twice indicated to the jury that the time variance was likely significantly less than three minutes:

All carriers may also vary somewhat with 911 times. The extreme has been a three-minute variance, *though the normal variance would be considerably less than that.*

...

Please keep in mind that the Telus times may be off the 911 times by up to three minutes, *though it is likely to be far less than that.* [Emphasis added.]

[338] Second, as we have outlined earlier in these reasons, the evidence of the Bell Mobility representative, Michael Rickard, combined with the records of the cell phone carriers themselves, showed a discrepancy of no more than 30 seconds. Mr. Rickard, who gave essentially the same evidence as Mr. Broad, testified that 911 time and Bell Mobility time were synchronized to within a few seconds of each other. The phone records of the three carriers showed a discrepancy between them in the range of 15 to 20 seconds for the same call and never more than 30 seconds, in other words, nothing close to a three-minute differential. Putting Mr. Rickard's evidence together with the phone records yields the undeniable conclusion that the Telus times and the 911 times diverged by no more than 15 to 20 seconds, perhaps 30 seconds at the most, on the day of the shootings. The jury heard Mr. Rickard's evidence and also had a PowerPoint summary of the phone records, which could be examined and compared to reach this conclusion.

[339] Finally, in his closing, Hamilton's trial counsel asked the jury to make this very comparison:

Just before I leave the whole issue of cell phones, there was an issue raised during the course of this trial as to timing and whether the times on the cell phone records can be off and how much they can be off. Mr. Iaccio, on behalf of Telus, testified that he's heard of cases where they can be off as much as by three minutes. This is a theoretical possibility based on Mr. Iaccio's testimony. There is no evidence that is the case here. In fact, the evidence suggests otherwise. The reason I say that is that, when you compare by looking at the hard copy of the Power Point presentation a call for example that's made from a Telus phone to a Bell phone or from a Rogers phone to a Telus or Bell phone, you'll see that there may be some discrepancy in the timing but in no case is it more than 15 to 20 seconds. So any discrepancy in timing between the various telephone companies, the cell phone service providers, is not in the area of three minutes here. It's, at best, in the area of 15 to 20 seconds, and you can simply see that by analysing the Power Point... So there isn't any time discrepancy here.

[340] Thus, although the fresh evidence may render Mr. Iaccio's evidence of a possible three-minute variance less concerning from Hamilton's perspective, it otherwise simply repeats and reinforces the much more minor timing discrepancies evident from the records of the cell phone carriers. The jury had these records and heard extensive argument on them.

(b) Limitations of the cell phone evidence

[341] However, even if we accept Hamilton's argument that the fresh evidence shows the time records of 911 and Telus were synchronized exactly or within a few seconds of each other, this evidence could not, as Hamilton asserts, prove the truthfulness of his alibi. The fresh evidence could not do so because it cannot be viewed in isolation. It has to be taken in the context of what may have occurred on the evening of the shootings and

of the application of the general rule that a cell phone usually registers at the closest cell phone tower. This context is shrouded in considerable uncertainty. This uncertainty significantly limits the extent to which the timing of the two calls by itself can prove Hamilton's alibi.

[342] For example, there was uncertainty about the length of time between the shootings and the time Milton Lewis called 911. Even though the trial judge and the Crown suggested that he called within as short a time as seven to nine seconds after he saw the shooter run away, Mr. Lewis' testimony was inconsistent on the timing of the 911 call, and his own evidence suggested that a few minutes may have passed before he made the call. The jury could reasonably have concluded that the perpetrators were already fleeing the murder scene in a getaway vehicle before Mr. Lewis placed his 911 call at 9:17:55 p.m. on July 24, 2001.

[343] There was also uncertainty about the route used by the getaway vehicle and the time it may have taken to get within the coverage area of the Telus tower at 1463 Eglinton Avenue West. The jury could reasonably have concluded that the driver of the getaway vehicle was driving away from the crime scene far more quickly than the articling student drove when he did a test run, mainly keeping within the speed limit. As well, the jury could reasonably have concluded that the getaway vehicle used a different route than did the student, including taking a route that would have avoided the tall buildings on the west side of the Allen Road.

[344] There was even uncertainty about whether the Telus tower at 1463 Eglinton Avenue West was the closest tower to Hamilton's cell phone when it registered there at 9:18:45 p.m. The general rule stipulates that a cell phone will usually register at the closest tower because that tower usually has the strongest signal. However, Mr. Iaccio testified during cross-examination by counsel for Hamilton that cell towers in Toronto have differing strengths and he could not say what the actual strengths of the various towers were in this case. If another tower farther away has a stronger signal, which can on occasion occur, then a cell phone will not register at the closest tower.

[345] These uncertainties make the point that in deliberating on Hamilton's alibi, the jury would not have focused on the timing of the two calls in isolation. Indeed, these uncertainties surrounding the cell phone evidence prompted the trial judge to tell the jury that they should consider the other evidence pertaining to Hamilton's possible role in the murders. And because of these uncertainties, the Crown relied on the cell phone evidence not as the core of its case but as one piece of circumstantial evidence that placed the appellants in the vicinity of the shootings when they occurred. As did the trial judge, the Crown urged the jury to consider the other evidence implicating Hamilton in the murders.

(c) The other evidence

[346] In fact, a considerable amount of other evidence at trial implicated Hamilton. This evidence included his motive and his association with the other accused. Most compelling, it included various intercepted telephone conversations in which Hamilton:

(i) took credit for killing Watson and Lewis; (ii) conspired with Schloss and Davis to kill Reid because Reid was telling others about his role in “serious things”, that is, as the Crown alleged, the murders of Watson and Lewis; (iii) berated his spouse, Carol Lawrence, for not giving him an alibi when homicide police asked her where he had been on the day of the shootings; and (iv) discussed in a telephone call with Schloss creating an alternative alibi.

[347] Even Hamilton’s statement to the police, on which he relied to buttress his alibi, was not entirely credible. He told the police that while he was speaking to Ben from Jamaica (the 9:18:45 p.m. call), he received an incoming call from a girl who said he should watch the news because “something just happened down by the Jungle.” Yet the incoming call, which came at 9:19:59 p.m. and was received by Hamilton at 9:20:01 p.m., was not from a woman but from his co-accused Schloss. Further, in his statement to the police, Hamilton said that at around 6 p.m. on July 24, 2001, he was on Eglinton Avenue West to pick up a stripper named Tasha to drive her to work for her 7 p.m. shift. However, in that timeframe, Hamilton’s cell phone did not register anywhere near Eglinton Avenue West.

[348] The jury undoubtedly would have taken this other highly incriminating evidence into account when assessing Hamilton’s alibi.

6. Conclusion

[349] We are not persuaded that the fresh evidence could reasonably be expected to have changed the result of the trial. We simply do not think that the jury would have relied on a variance in the time records of 911 and Telus of three minutes or anything close to it to reject Hamilton's alibi and convict him of first degree murder. The other cell phone evidence at trial demonstrated a much smaller variance, a variance in line with that shown by Hamilton's fresh evidence.

[350] Moreover, the uncertainties surrounding the cell phone evidence made it most unlikely that the timing of the two critical calls alone would have dictated the jury's determination of Hamilton's guilt or innocence. It is far more likely that the jury would have looked at the cell phone evidence as but one piece of circumstantial evidence placing Hamilton in the vicinity of the murder scene. The jury would then have looked at all the other evidence implicating Hamilton in the shootings, including his own confession, captured on his intercepted telephone conversations.

[351] The case against Hamilton was very strong. The fresh evidence does not undermine the reliability of the jury's verdict. The application to introduce fresh evidence is dismissed.

Disposition of the Appeals

[352] For these reasons, we dismiss the appeals of all four appellants.

Signed: “John Laskin J.A.”
 “M. J. Moldaver J.A.”
 “H. S. LaForme J.A.”

RELEASED: “JL” May 24, 2011

TAB 10

PUBLIC VERSION

Reference: *The Commissioner of Competition v. CCS Corporation et al.*, 2012 Comp. Trib. 14
File No.: CT-2011-002
Registry Document No.: 189

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

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

AND IN THE MATTER OF the acquisition by CCS Corporation of Complete Environmental Inc.

B E T W E E N:

The Commissioner of Competition
(applicant)

and

**CCS Corporation, Complete Environmental Inc.,
Babkirk Land Services Inc., Karen Louise Baker,
Ronald John Baker, Kenneth Scott Watson,
Randy John Wolsey, and Thomas Craig Wolsey**
(respondents)



Dates of hearing: Nov.16-18, Nov.22-25, Nov.29 - Dec.2, and Dec.13&14, 2011

Before: S. Simpson J. (Chairperson), P. Crampton C.J. and Dr. W. Askanas

Date of reasons and order: May 29, 2012

Reasons and order signed by: S. Simpson J. (Chairperson), P. Crampton C.J. and Dr. W. Askanas

Concurring reasons signed by: P. Crampton C.J.

REASONS FOR ORDER AND ORDER

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A. EXECUTIVE SUMMARY

[1] The Tribunal has decided on a balance of probabilities that the Merger is likely to prevent competition substantially in the market for the supply of secure landfill services for solid hazardous waste from oil and gas producers in a geographic market which, at a minimum, is the area identified by CCS' expert, Dr. Kahwaty, as the "Potentially Contestable Area".

[2] The Tribunal has concluded that CCS is a monopolist in the geographic market and that it exercises significant market power which is being maintained as a result of the Merger.

[3] Although Dr. Baye, the Commissioner's expert, suggested a wide range of likely price decreases in the absence of the Merger, the Tribunal has found that a decrease in average tipping fees of at least 10% was prevented by the Merger.

[4] There is significant time and uncertainty associated with entry. The Tribunal has concluded that effective entry would likely take a minimum of 30 months from site selection to the completed construction and operation of a secure landfill in the relevant market.

[5] The Tribunal has also decided that, in the absence of the Merger, the Vendors would likely not have sold the Babkirk Facility in the summer of 2010 but would have operated it themselves and would have constructed a new secure landfill with a capacity of 125,000 tonnes by October of 2011. This landfill would likely have operated as a complement to the Vendors' bioremediation business until no later than October 2012.

[6] The Tribunal has also concluded that the Vendors' bioremediation business would likely have been unprofitable and that by October 2012, the Vendors would likely have changed their business plan to significantly focus on the secure landfill part of their business or would have sold the Babkirk Facility to a secure landfill operator. In either case, no later than the spring of 2013, the Babkirk Facility would have operated in meaningful competition with CCS' Silverberry secure landfill. It is the prevention of this competition by the Merger which constitutes a likely substantial prevention of competition.

[7] The efficiencies claimed by CCS do not meet the requirements of section 96 of the Act.

[8] Divestiture is an effective remedy and is the least intrusive option.

[9] The application has been allowed. The Tribunal has ordered CCS to divest the shares or assets of BLS.

[10] In dealing with the facts of this case, the Tribunal's conclusions were all based on an analysis of whether the events at issue were likely to occur.

B. INTRODUCTION

[11] The Commissioner of Competition (the “Commissioner”) has applied for an order under section 92 of the *Competition Act*, R.S.C. 1985, c. C-34, as amended (the “Act”), dissolving a transaction in which CCS Corporation (“CCS”) acquired the shares of Complete Environmental Inc. (“Complete”) and ownership of its wholly-owned subsidiary Babkirk Land Services Inc. (“BLS”) on January 7, 2011 (the “Merger”). In the alternative, the Commissioner requests a divestiture order requiring CCS to dispose of the shares or assets of BLS in a manner to be directed by the Tribunal.

[12] In her application (the “Application”), the Commissioner alleges that the Merger is likely to prevent competition substantially in the market for hazardous waste disposal services in North-Eastern British Columbia (“NEBC”) because, at the date of the Merger, Complete was a poised entrant by reason of having obtained the regulatory approvals needed to operate a secure landfill for hazardous solid waste on a site at Mile 115, Alaska Highway, Wonowon, B.C. (the “Babkirk Site”).

[13] Pending the Tribunal’s decision on this application, CCS undertook to maintain all approvals, registrations, consents, licenses, permits, certificates and other authorizations necessary for the operation of a hazardous waste disposal facility (the “Babkirk Facility” or “Babkirk”) on the Babkirk Site. Complete’s other assets and businesses were not subject to this undertaking.

C. THE PARTIES

[14] The Commissioner is the public official who is responsible for the enforcement of the Act.

[15] CCS is a private energy and environmental waste management company. Its customers are mainly oil and gas producers in Western Canada. CCS owns the only two operating secure landfills in NEBC that are permitted to accept solid hazardous waste. One is the Silverberry secure landfill (“Silverberry”). It opened in 2002. It is located approximately 50 km north-west of Fort St. John. The other is called Northern Rockies secure landfill (“Northern Rockies”). It opened in 2009 and is situated about 340 km northwest of Silverberry, about 260 km from the Babkirk Site and approximately 20 km south of Ft. Nelson. CCS also operates a variety of different types of secure landfills in Alberta and Saskatchewan and owns a separate waste management business called Hazco Waste Management (“Hazco”). Schedule “A” hereto is a map showing the locations of the landfills which are relevant to this Application.

[16] BLS was founded in 1996 by Murray and Kathy Babkirk (the “Babkirks”). BLS operated a facility which was not a secure landfill. It had a permit for the treatment and short-term storage of hazardous waste on the 150 acre (approx.) Babkirk Site. It is located approximately 81 km or 1 ½ hours by car, northwest of Silverberry. The Babkirks operated their facility for approximately six years under a permit from the British Columbia Ministry of the Environment

(“MOE”) which was issued in 1998. However, in 2004, they stopped accepting waste. Two years later, the Babkirks retained SNC Lavalin (“SNCL”) to prepare the documents BLS needed to apply for permits for the construction of a secure landfill capable of accepting solid, hazardous waste at the Babkirk Site.

[17] The individual Respondents are the former shareholders of Complete who sold their shares to CCS in the Merger. Karen and Ron Baker are married and Ken Watson is their son-in-law. Tom Wolsey is Randy Wolsey’s father. The former shareholders will be referred collectively as the “Vendors”. All the Vendors, except Tom Wolsey, gave evidence in this proceeding.

[18] In November of 2006, Randy Wolsey, acting on his own behalf and on behalf of other individual Respondents, negotiated a “handshake agreement” with the Babkirks to purchase the shares of BLS. The deal was conditional on BLS obtaining approval for the secure landfill from the Environmental Assessment Office (“EAO”). In April 2007, the Vendors incorporated Complete (initially called Newco) to be the company that would eventually purchase the shares of BLS. After an extensive process of consultation and review, the EAO issued a certificate (the “EA Certificate”) to BLS on December 3, 2008. Four months later, in April 2009, Complete acquired all the outstanding shares of BLS and it became a wholly-owned subsidiary of Complete. Thereafter, on February 26, 2010, BLS received a permit from the MOE authorizing the construction of a secure landfill, with a maximum storage capacity of 750,000 tonnes, and a storage and treatment facility with a maximum capacity of 90,000 tonnes (the “MOE Permit”).

[19] At the time of the Merger, Complete had other business interests. It operated municipal solid waste landfills for the Peace River Regional District as well as a solid waste transfer station. In addition, it owned a roll-off container rental business (the “Roll-off Bin Business”). Since the Merger, those businesses have been operated by Hazco.

[20] CCS, Complete and BLS will be described collectively as the “Corporate Respondents”.

D. THE PARTIES’ POSITIONS

The Commissioner

[21] The Commissioner alleges that because CCS owns the only two operational secure landfills for solid hazardous waste in NEBC, it has a monopoly and associated market power which allows it to price discriminate between different customers and set the prices for hazardous waste disposal above a competitive level. These prices are known as “Tipping Fees”.

[22] The Commissioner alleges that Complete was ready to enter the market for secure landfill services in NEBC and that it was likely that competition between Complete and CCS would have caused a decline in average Tipping Fees in NEBC of at least 10%. Alternatively, the Commissioner alleges that the Vendors would have sold Complete to a purchaser which would have operated a secure landfill in competition with CCS. Finally, the Commissioner maintains that any efficiencies associated with the Merger are likely to be *de minimis*.

The Respondents

[23] The Vendors submit that their sale of Complete was not a Merger under the Act because there was no business in operation at the Babkirk Site. They also deny (i) that Complete was poised to enter the market for the direct disposal of hazardous waste into a secure landfill and (ii) that, in the absence of the Merger, an alternative buyer would have purchased Complete and operated a secure landfill. The Respondents maintain that if the Vendors had not sold Complete to CCS, they would likely have processed hazardous waste at the Babkirk Facility using a treatment technique called bioremediation. This type of treatment would have been complemented by a half cell (125,000 tonnes) of secure landfill. The secure landfill would only have been used to store the small amount of hazardous waste that could not be successfully treated, and would not have been used to engage in meaningful competition with CCS in respect of the supply of secure landfill services.

[24] The Corporate Respondents challenge both the Commissioner's interpretation of CCS' pricing behaviour and her prediction of the anti-competitive effects she has alleged would likely result from the Merger. Among other things, they allege that the Commissioner's approach to market definition is fundamentally flawed and that the area in which there is scope for competition between the Babkirk and Silverberry facilities is, at best, limited to the very small "Potentially Contestable Area" identified by CCS' expert, Dr. Kahwaty (the "Contestable Area").

[25] The Corporate Respondents also submit that the efficiencies resulting from the Merger are likely to be greater than, and will offset, the effects of any prevention of competition brought about by the Merger. They further argue that the Commissioner failed to meet her burden of quantifying the deadweight loss as part of her case in chief. As a result, they say that the Tribunal should conclude that the Merger is not likely to result in any quantifiable effects.

[26] Finally, all the Respondents submit that if there is to be remedy, it should be divestiture, rather than dissolution.

E. THE EVIDENCE

[27] Attached as Schedule "B" is a list of the witnesses who testified for each party and a description of the documentary evidence.

F. INDUSTRY BACKGROUND

[28] The management of solid hazardous waste generated by oil and gas operators is regulated in British Columbia by the *Environmental Management Act*, SBC 2003, c 53 (the "EMA") and regulations. If the waste produced meets the definition of "hazardous waste" found in the *Hazardous Waste Regulation*, (B.C. Reg. 63/88) (the "HW Regulation"), oil and gas operators wishing to dispose of hazardous waste must do so within the confines of the legislative framework. The MOE is responsible for administering the EMA and HW Regulation.

Hereinafter, hazardous waste as defined in the HW Regulation which is solid will be described as “Hazardous Waste”.

[29] Under the HW Regulation, a person must receive a permit from the MOE to operate a facility called a secure landfill that can accept Hazardous Waste for disposal. A “secure landfill” is defined in the HW Regulation as a disposal facility where Hazardous Waste is placed in or on land that is designed, constructed and operated to prevent any pollution from being caused by the facility outside of the area of the facility (“Secure Landfill”).

Disposal at Secure Landfills

[30] Oil and gas drilling operators (also called waste generators) produce two major types of Hazardous Waste that can be disposed of at a Secure Landfill: contaminated soil and drill cuttings. The contaminants are typically hydrocarbons, salts, and metals.

[31] Hydrocarbons are categorized as light-end hydrocarbons and heavy-end hydrocarbons. The evidence shows that Hazardous Waste often includes hydrocarbons of both types.

[32] Oil and gas generators can contaminate soil with salt when, among other things, they inadvertently spill produced water or brine. Produced water is water that has been trapped in underground formations and is brought to the surface along with the oil or gas. Metals can be found in Hazardous Waste because they occur naturally or because they have been included in additives used in drilling.

[33] The HW Regulation states that a Secure Landfill cannot be used to dispose of liquid hazardous waste.

[34] Hazardous Waste from “legacy sites” can also be disposed of at Secure Landfills. Dr. Baye defined legacy waste as “accumulated waste from decades of drilling activity that has been left at the drilling site” (“Legacy Waste”).

[35] Operators pay third-party trucking companies to transport Hazardous Waste to Secure Landfills. Transportation costs are typically a substantial portion of waste generators’ overall costs of disposal. Dr. Baye estimated that a generator would pay \$4 to \$6 per tonne for every hour spent transporting waste from, and returning to a generator’s site.

[36] At the hearing, Mr. [CONFIDENTIAL] and Mr. [CONFIDENTIAL], indicated that no ongoing liability is shown on their books once Hazardous Waste is sent to Secure Landfills, even though generators could be liable if a Secure Landfill operator goes bankrupt or if the landfill fails and Hazardous Waste leaches out of the facility.

[37] The MOE has issued five permits for Secure Landfills. Four of them are in NEBC and are currently valid: Silverberry, Northern Rockies, Babkirk and Peejay.

[38] Silverberry has a permitted capacity which allows it to accept 6,000,000 tonnes of waste. At 1.52 tonnes per cubic meter, which is the same figure used to calculate tonnes at Silverberry,

Northern Rockies' permitted capacity is 3,344,000 tonnes. In 2010, [CONFIDENTIAL] tonnes of Hazardous Waste was tipped at Silverberry and, in that year, Northern Rockies accepted [CONFIDENTIAL] tonnes.

[39] Tipping Fees vary depending on the type of waste. According to the evidence given by Dr. Baye, the average Tipping Fee for all substances at Silverberry was [CONFIDENTIAL] per tonne in 2010 and the average Tipping Fee for all waste tipped at Northern Rockies in the same year was [CONFIDENTIAL] per tonne.

[40] Peejay is located in a relatively inaccessible area near the Alberta border. It was developed by a First Nations community to serve nearby drilling operators such as Canadian Natural Resources Limited ("CNRL"). Construction specifications and an operational plan for Peejay were approved by the MOE on March 11, 2009. However, the Secure Landfill has not yet been constructed and there may be financial difficulties at the project.

[41] There are presently no Secure Landfills in operation in NEBC which are owned by oil and gas generators.

Bioremediation - Methodology

[42] Bioremediation is a method of treating soil by using micro-organisms to reduce contamination. The microbes can be naturally occurring or they can be deliberately added to facilitate bioremediation. In NEBC, bioremediation usually takes place on an oil and gas producing site where the waste is generated. Bioremediation can also be undertaken offsite but the evidence indicates that there are no offsite bioremediation facilities currently operating in NEBC.

[43] A common bioremediation technique is landfarming. In landfarming, contaminated waste is placed on impermeable liners and is periodically aerated by being turned over or tilled. The landfarming technique the Vendors planned to use involves turning soil to create windrows which are [CONFIDENTIAL] triangular-shaped piles of soil [CONFIDENTIAL].

[44] The preponderance of the evidence showed that, given sufficient time, light-end hydrocarbons can be successfully bioremediated in NEBC despite the cold if the clay soil is broken up. However, the Tribunal has concluded that soil contaminated with heavy-end hydrocarbons is not amenable to cost effective bioremediation because it is difficult, unpredictable, and very time consuming. Further, waste contaminated with metals and salts cannot be effectively bioremediated with technologies currently approved for use in Canada.

[45] Once bioremediation is complete, an operator will normally hire a consultant to determine whether the Hazardous Waste can be certified as "delisted" in accordance with a delisting protocol. If so, there is no further liability associated with that particular waste.

[46] Mr. Watson testified that his company, Integrated Resource Technologies Ltd. ("IRTL"), had successfully bioremediated hydrocarbon-contaminated soil throughout the winter in NEBC

and Northern Alberta. Since about 2002, he has been using a specially designed machine from Finland, the “ALLU AS-38H”. This machine [CONFIDENTIAL] is capable of breaking up heavy clay so that bacteria can enter the windrow and consume the hydrocarbon contaminants.

G. THE ISSUES

[47] The following broad issues are raised in this proceeding:

1. Is CCS’ acquisition of Complete a “merger”?
2. What is the product dimension of the relevant market?
3. What is the geographic dimension of the relevant market?
4. Is the Merger Pro-Competitive?
5. What is the analytical framework in a “prevent” case?
6. Is the Merger likely to prevent competition substantially?
7. What is the burden of proof on the Commissioner and on a Respondent when the efficiencies defence is pleaded pursuant to section 96 of the Act?
8. Has CCS successfully established an efficiencies defence?
9. Is the appropriate remedy dissolution or divestiture?

ISSUE 1 IS CCS’ ACQUISITION OF COMPLETE A MERGER?

[48] As a threshold matter, the Vendors submit that the Application should be dismissed because, at the date of the Merger, Complete was not a “business” within the meaning of section 91 of the Act, given that it was not actively accepting and treating Hazardous Waste, and was not otherwise operational in relation to the supply of Secure Landfill services. Instead, they maintain that Complete was simply an entity which held the assets of BLS, i.e. permits and property. Accordingly, the Vendors’ position is that, because CCS acquired assets which had not yet been deployed, it did not acquire a “business”, as contemplated by section 91 of the Act. The Vendors also submit that the other businesses owned by Complete and acquired in the Merger are not relevant for the purposes of this Application because the Commissioner does not allege that they caused or contributed to a substantial prevention of competition.

[49] A merger is defined in section 91 as the acquisition of a “business”. The section reads as follows:

In sections 92 to 100, “merger” means the acquisition or establishment, direct or indirect, by one or more persons, whether by purchase or lease of shares or assets, by amalgamation or by combination or otherwise, of control over or significant interest in the whole or a part of a business of a competitor, supplier, customer or other person.

Pour l’application des articles 92 à 100, « fusionnement » désigne l’acquisition ou l’établissement, par une ou plusieurs personnes, directement ou indirectement, soit par achat ou location d’actions ou d’éléments d’actif, soit par fusion, association d’intérêts ou autrement, du contrôle sur la totalité ou quelque partie d’une entreprise d’un concurrent, d’un fournisseur, d’un client, ou d’une autre personne, ou encore d’un intérêt

relativement important dans la totalité ou quelque partie d'une telle entreprise.

[50] Business is defined as follows in subsection 2(1) of the Act (the "Definition"):

"business" includes the business of

(a) manufacturing, producing, transporting, acquiring, supplying, storing and otherwise dealing in articles, and

(b) acquiring, supplying and otherwise dealing in services.

It also includes the raising of funds for charitable or other non-profit purposes.

« entreprise » Sont comprises parmi les entreprises les entreprises :

a) de fabrication, de production, de transport, d'acquisition, de fourniture, d'emmagasiner et de tout autre commerce portant sur des articles;

b) d'acquisition, de prestation de services et de tout autre commerce portant sur des services.

Est également comprise parmi les entreprises la collecte de fonds à des fins de charité ou à d'autres fins non lucratives.

[51] The Tribunal notes two features of the Definition. First, it uses the word "includes", which means that it is not exhaustive. Second, unlike the definitions of the term "business" found in statutes such as the *Investment Canada Act*, R.S.C. 1985, c. 28 (1st Supp.), the Definition makes no reference to generating profits or revenues.

[52] Turning to the facts, it is the Tribunal's view that, for the reasons described below, Complete was actively engaged in the development of the Babkirk Site as a hazardous waste treatment facility.

[53] Before the Merger, Complete had taken the following steps:

- It had purchased the shares of BLS, thereby acquiring the EA Certificate and the Babkirk Site;
- It had continued the application process and had secured the MOE Permit;
- It had held numerous shareholders' meetings to plan how the Babkirk Site would be developed as a bioremediation facility and how that facility would operate in conjunction with other businesses owned by the Vendors;
- Its shareholders had discussed bioremediation with Petro-Canada and had solicited its interest in becoming a customer for both bioremediation and Secure Landfill services;
- It had hired IRTL and had paid it [CONFIDENTIAL] to bioremediate the soil in cell #1 at the Babkirk Facility. This work was undertaken because it was a condition precedent to the construction of the half cell of Secure Landfill;
- It was developing an operations plan for the Babkirk Facility.

[54] In the Tribunal's view, these activities demonstrate that Complete was engaged in the business of developing the Babkirk Site as a Hazardous Waste treatment service that included a Secure Landfill. Since the Definition is not exhaustive, the Tribunal has concluded that it

encompasses the activities in which Complete and its shareholders had been engaged at the time of its purchase by CCS. Further, the absence of a requirement for revenue in the Definition suggests to the Tribunal that it covers a business in its developmental stage.

[55] For all these reasons, the Tribunal has concluded that Complete was a business under section 91 of the Act at the date of the Merger.

[56] In view of this conclusion, it is not necessary to decide whether Complete's Roll-off Bin Business or its management of municipal dumps could be businesses for the purposes of section 91 of the Act.

[57] However, in the Chairperson's view, a business being acquired in a merger must have some relevance to a Commissioner's application. In other words, it must have the potential to impact competition in the markets at issue. This observation means that, in this case, Complete's Roll-off Bin Business and its management of municipal dumps would not have been caught by the definition in section 91 because they are not involved in any way in the disposal or treatment of Hazardous Waste. In his separate reasons, Crampton C.J. has taken a different position on this point.

ISSUE 2 WHAT IS THE PRODUCT DIMENSION OF THE RELEVANT MARKET?

The Analysis

[58] In defining relevant markets, the Tribunal generally follows the hypothetical monopolist approach. As noted in *Commissioner of Competition v. Superior Propane*, 2000 Comp. Trib. 15, 7 C.P.R. (4th) 385 (Comp. Trib.) ("*Propane I*"), at para. 57, the Tribunal embraces the description of that approach set forth at paragraph 4.3 in the Commissioner's Merger Enforcement Guidelines ("MEGs"), which state:

Conceptually, a relevant market is defined as the smallest group of products, including at least one product of the merging parties, and the smallest geographic area, in which a sole profit-maximizing seller (a "hypothetical monopolist") would impose and sustain a small but significant and non-transitory increase in price ("SSNIP") above levels that would likely exist in the absence of the merger.

[59] The price that would likely have existed in the absence of or "but for" the merger in a "prevent case" is the Base Price. The burden is on the Commissioner to demonstrate the "Base Price". In this case, Dr. Baye has predicted a decrease in Tipping Fees in the absence of the Merger of at least 10% and in some of his economic modelling the price decrease is as large as 21%. In *The Commissioner of Competition v. Canadian Waste Services Holdings Inc.*, 2001 Comp. Trib. 3; 11 C.P.R. (4th) 425; aff'd 2003 FCA 131, at para. 92, the Tribunal observed that, when a price change can be predicted with confidence, it is appropriate to delineate markets based on the likely future price even if the future level of that price cannot be predicted precisely.

In such cases, it may be sufficient for the Commissioner to demonstrate a range in which the likely future price would have fallen.

[60] However, if a reasonable approximation of the likely future price cannot be demonstrated, it may be difficult for the Tribunal to clearly define the boundaries of the relevant market. In such cases, it will nevertheless be helpful for the Tribunal to be provided with sufficient evidence to demonstrate why substitutes that appear to be acceptable at the prevailing price level would or would not remain acceptable at price levels that would likely exist “but for” the merger or anti-competitive practice in question. In any event, evidence about various practical indicia is typically required to apply the hypothetical monopolist approach. The Tribunal recognizes that, like other approaches to market definition, the hypothetical monopolist approach is susceptible to being somewhat subjective in its practical application, in the absence of some indication of what constitutes a “small but significant and non-transitory increase in price” (SSNIP). For this reason, objective benchmarks such as a five percent price increase lasting one year, can be helpful in circumscribing and focusing the inquiry.

[61] In the Application at paragraph 11, the Commissioner alleged that “[t]he anti-competitive effects of the Merger “primarily” affect oil and gas companies disposing of Hazardous Waste produced at oil and gas fields within NEBC.” [our emphasis]. However, in his initial report Dr. Baye did not limit the product market to Hazardous Waste produced at oil and gas fields. Nevertheless, during the hearing, Dr. Baye and Dr. Kahwaty essentially agreed that the amount of solid hazardous waste generated by non-oil and gas sources and tipped at Secure Landfills in British Columbia is so small that it does not warrant consideration in these proceedings. Accordingly, in the Tribunal’s view, the Commissioner’s product market definition is “solid hazardous waste generated by oil and gas producers and tipped into secure landfills in NEBC”.

[62] However, the Respondents deny that the product market is as narrow as the Commissioner suggests. They say that it also includes bioremediation and the storage or risk management of waste on the sites where the waste was generated. They assert that these options constrain any market power that CCS may have. We will deal with these positions in turn.

Evidence about the Use of Bioremediation

[63] Bioremediation has been described above and the evidence is clear that it is not an acceptable substitute for generators of Hazardous Waste if soil is contaminated with salts or metals. The Tribunal also accepts that, if heavy-end hydrocarbons are present, bioremediation is not cost effective or successful in a reasonable timeframe.

[64] Mr. Andrews gave evidence about the use of bioremediation. He joined the MOE in January 2011. At that time, he was asked to review the E-Licensing Database, which keeps track of the progress made by operators who are bioremediating Hazardous Waste. He found that approximately 50% of the operators who had entries in the Database had reported no annual activity. He said that this indicated that many operators “had stopped actively treating H[azardous] W[aste] at these sites, or at least had stopped reporting any activities to the MOE.”

[65] He therefore contacted Conoco Philips Canada, Suncor Energy Inc. ("Suncor"), Progress, Devon Canada Corporation ("Devon") and Apache Canada Ltd. ("Apache"). They accounted for 80% of the registered sites with no reported activity. Among other things, he asked these operators to update their operations plans and submit annual reports.

[66] According to Mr. Andrews' witness statement, three of the operators reported that they had dealt with the Hazardous Waste they were bioremediating by sending it to a Secure Landfill and he anticipated that the remaining operators would do the same because bioremediation had failed. Mr. Andrews also said that Suncor filed an operations plan for its registered bioremediation sites which stated that, in the future, it would be sending all its Hazardous Waste to a Secure Landfill.

[67] Mr. Andrews also described his experience with onsite treatment before he joined the MOE. He stated the following in his witness statement [paragraphs 23-26]:

I managed the HW at seven sites that CNRL had registered. These sites were allocated north of Fort St John and on existing oil and gas lease sites or on abandoned sites. There were approximately 50,000 tonnes of HW at these sites.

Initially, we tried treating the HW onsite. At each of these sites we put the HW into windrows and used a turner to turn the HW three times per year at each site. Hazco Environmental Services was the contractor that provided the windrow turner. We also added fertilizers and nutrients in the soil to assist in the bioremediation process. The fertilizer is meant to add additional nutrients to aid the bacteria to process the hydrocarbons.

CNRL pursued this treatment process for two years. While CNRL was able to reduce the contaminants in the HW at these sites, it failed to reduce the contaminants enough to "delist" the HW. Delisting HW means reducing the presence of contaminants low enough so that the soil is no longer considered to be HW. CNRL spent significant amounts of money on treatment because the sites required constant monitoring. The sites would get wet and require dewatering out to prevent berm overflow and enable equipment access.

Ultimately, after two years of treatment, it was clear that bioremediation would not work to address the contamination issues. CNRL decided to send the remaining HW to a Secure Landfill, specifically Silverberry, which was the landfill closest to the sites. I was also responsible for this process. It took CNRL approximately 2-3 years and several million dollars to send all the waste to Silverberry.

[68] [CONFIDENTIAL], who works as a Contracting and Procurement Analyst for [CONFIDENTIAL], testified that its current operations in NEBC are in two fields called [CONFIDENTIAL]. He indicated that [CONFIDENTIAL] uses Secure Landfills to dispose of its Hazardous Waste and that it does not bioremediate because of the associated costs, the time necessary to bioremediate, and the manpower required to undertake bioremediation. He stated

that liability has the potential to remain if the Hazardous Waste is not effectively bioremediated and that additional costs might be incurred if the Hazardous Waste, which is not effectively treated, must be tipped into a Secure Landfill. He added that there is ongoing uncertainty about whether bioremediation is effective or not.

[69] [CONFIDENTIAL], the Vice-President of Operations at [CONFIDENTIAL], testified that [CONFIDENTIAL] uses an oil-based mud system to reduce friction on horizontal wells and that the oil-based mud cuttings are typically tipped into Secure Landfills. He also stated that [CONFIDENTIAL] sees disposal at a Secure Landfill as the most economic alternative for dealing with the Hazardous Waste from drilling, as disposal eliminates the increased environmental risk and cost of long term storage and/or site remediation. He explained that “[c]ontainment, transport and disposal of hazardous waste generated from drilling operations is currently the only option used by [CONFIDENTIAL] for managing hazardous waste generated from drilling.” Accordingly, it is clear that, at its current drilling sites, only Secure Landfills are used for disposal.

[70] However, with respect to the Legacy Waste in NEBC on drilling sites which [CONFIDENTIAL], Mr. [CONFIDENTIAL] testified that [CONFIDENTIAL] will bioremediate some of the waste on these sites. He explained that bioremediation of the Legacy Waste had already been started by [CONFIDENTIAL]. He stated that the decision to dispose of Hazardous Waste instead of treating it is taken on a case-by-case basis, and depends on the type and amount of Hazardous Waste present on the legacy site, the likelihood of successful remediation, and the cost of excavation, transport and disposal.

[71] During a review of the HW Regulation undertaken by the MOE, the MOE retained Conestoga-Rovers & Associates to conduct a report on Secure Landfill disposal. The report is entitled “Secure Landfill Disposal Policy Review” and dated March 2011. It states:

Based on equal weighting of cost, cost variability, timeline, and treatment certainty landfilling [Secure Landfill] is the preferred option under all scenarios. Landfarming [bioremediation] can be an appropriate method for treating hydrocarbon contaminated soils given appropriate concentrations and a multi-year timeline.

[72] Devin Scheck, the Director of Waste Management and Reclamation at the British Columbia Oil and Gas Commission, testified that many operators still choose to dispose of their contaminated soils in Secure Landfills, even in situations where bioremediation is feasible, because of the associated costs and timeframe. He said the following in his witness statement [paragraphs 25-27]:

In my experience, a significant number of the sites that Operators seek to remediate are remediated by the Operator disposing of the contaminated soils at a landfill. With sites that are only contaminated with light end hydrocarbons, Operators may seek to bioremediate the soil on site, but heavy end hydrocarbons tend to have a poor response to bioremediation. As well, tight clay (which is prevalent in North Eastern B.C. where the oil and gas activity is most prevalent)

makes bioremediation difficult, as does the relatively cold weather in the region. The presence of other contaminants, such as salts or metals that exceed CSR standards, prevent bioremediation from being an appropriate option, as salts and metals cannot be bioremediated.

Accordingly, when dealing with anything other than light end hydrocarbons, my experience is that Operators will usually dig up the soil, and dispose of it at a Secure Landfill like Silverberry in B.C. or a closer landfill across the Alberta border, such as the CCS Class II Alberta Landfill at LaGlance.

In my experience, even where bioremediation may be feasible, many Operators will still choose to landfill their contaminated soils. With bioremediation there is much uncertainty about costs, and the timeframe required for treatment is also uncertain. Weather conditions, site access issues, amount/type of treatment, future equipment and labour costs, as well as the costs of ongoing access for treatment and sampling to determine if the soils are remediated contribute to this uncertainty.

[73] Mark Polet, an expert environmental biologist with specialized knowledge in environmental assessment, remediation and reclamation, as well as waste facility management development, stated as follows in paragraph 17 of his expert report:

Once an Operator in NEBC decides to clean up its waste, the two most practical options available are: 1) the disposal of the waste at an appropriate landfill; or 2) the treatment of the waste onsite through a process known as bioremediation. Operators do not have a uniform preference for either option but, in my experience, will choose an option based on cost, risk, efficacy and other reasons such as environmental stewardship.

[74] At the hearing, Mr. Polet testified that the costs of bioremediation and secure landfilling can be comparable. He stated:

Once you define the types [of contaminants], you can decide on the most prudent response. And so, for instance, if I found on a site just the light end hydrocarbons with no other types of contamination mixed with it, I would look at bioremediation as an alternative. If it had salts and metals associated with the contamination, as well, then I would lean very strongly to landfill. If it had heavier end hydrocarbons, I would lean strongly to landfill, as well.

In terms of cost, there -- can be quite comparable in price, but of course bioremediation is very limited in what it can be applied to. And the one thing that we've noticed in working in the field is that when bioremediation is not managed properly, then much material actually lands back up in the landfill, anyway. So it has to be well managed to work properly.

[75] There is also evidence about bioremediation in the Statement of Agreed Facts (the “Agreed Facts”). However, at the hearing it became clear that, contrary to the way in which they are presented, some of the facts were not actually agreed. The problematic evidence concerns bioremediation and was gathered in two ways. The evidence in paragraphs 63-67 of the Agreed Facts was given directly to the Commissioner’s staff. This evidence will be called “Evidence A”.

[76] Evidence A has two significant characteristics. The sources are not named and the Agreed Facts state in paragraph 63 that “...the Bureau has not confirmed the truth of the facts communicated to it by the operators...” Evidence A is in the Agreed Facts because CCS insisted that it be included and CCS asks the Tribunal to give it weight and assume it is true.

[77] Evidence A reflects that operator “F” bioremediates at least 70% of its waste in BC because it considers bioremediation to be better for the environment. Operators “H” and “J” bioremediate about 50% their waste. These operators appear to be bioremediating on their drilling sites to avoid the transportation charges and Tipping Fees associated with Secure Landfills.

[78] Although the Commissioner cannot confirm its truth, the Tribunal is nevertheless prepared to give Evidence A some weight because it can see no reason why industry participants would lie to the Commissioner about their use of onsite bioremediation. However, without knowing the volume of waste produced by “F”, “H” and “J”, it is impossible to determine whether bioremediation is being undertaken on a significant scale. In any event, it is clear that, even for these waste generators, there is a substantial portion of Hazardous Waste in respect of which bioremediation is not used.

[79] The second category of evidence is found in paragraphs 69-74 of the Agreed Facts. It was gathered in July 2011 by representatives of National Economic Research Associates (“NERA”). Dr. Baye works at NERA and it appears that NERA was retained by the Commissioner to interview industry participants. The Commissioner’s staff attended these interviews and the six sources are named ([CONFIDENTIAL]). No concern is expressed about the reliability of this evidence. This evidence will be called “Evidence B”.

[80] The Commissioner only called witnesses from [CONFIDENTIAL] and [CONFIDENTIAL] who, as discussed above, indicated that they do not bioremediate as a matter of policy [CONFIDENTIAL].

[81] CCS states the evidence of the other four operators, described in Evidence B, shows that they are active bioremediators and CCS asks the Tribunal to draw an adverse inference from the fact that they were not called by the Commissioner. However, in the Tribunal’s view, no such inference should be drawn because the Commissioner had no obligation to adduce the evidence and it was open to CCS to do so.

[82] Evidence B shows that [CONFIDENTIAL] bioremediates 10-15% of its waste. [CONFIDENTIAL] engages in some bioremediation at about 70% of its sites and [CONFIDENTIAL] bioremediates about 75% of its treatable material onsite. (It also appears to treat the balance of treatable material offsite but this is not explained. Since there are no offsite

bioremediation facilities in NEBC, the Tribunal has concluded that this statement must refer to offsite treatment elsewhere.) [CONFIDENTIAL] bioremediates onsite and sometimes moves waste between its sites for bioremediation. In the last 3-4 years, it has bioremediated 60-70% of its abandoned well waste.

[83] It is noteworthy that this evidence gives no volumes for treatable and Legacy Hazardous Waste. In these circumstances, and given that the Respondent did not call witnesses from these four operators or other operators, the Tribunal is not persuaded that bioremediation is being undertaken on a significant scale in NEBC.

Evidence about Storage and Risk Management

[84] Storage means that Hazardous Waste is left untreated on a drilling site which is still under lease. As long as the MOE does not order a cleanup, this option is available even though drilling has finished, as long as the operator continues to make the lease/tenure payments for the site. Since such payments are low compared to the cost of cleaning up the site, doing nothing may be an attractive option in some cases and the evidence from Trevor Mackay's examination for discovery is that "many" operators have waste stored on their sites. However, Mr. [CONFIDENTIAL] testified that [CONFIDENTIAL] does not store the Hazardous Waste generated from drilling operations for long periods of time, due to the cost and potential liability issues. He explained that the typical well site storage costs during drilling operations are [CONFIDENTIAL] per well.

[85] Risk Management is a process undertaken when drilling is finished and an operator wishes to terminate a lease. The operator must restore the site's surface as nearly as possible to the condition it was in before drilling. Once this has been accomplished, a Certificate of Restoration (also referred to as a Certificate of Compliance) is issued and the operator's lease is terminated. However, the operator remains liable for any issues arising from the Hazardous Waste that is left behind and is obliged to comply with conditions such as monitoring even after the certificate is issued.

[86] On this topic, Mark Polet said the following in his reply report:

Based on my experience, Operators use risk management as a last resort if treatment or disposal are not practical. I rarely recommend it because even if approval is obtained, which in my experience is very difficult, the Operator retains liability and there is a recognition that the site may need to be revisited if issues arise.

[87] Pete Marshal, an expert in Hazardous Waste management, testified that, although disposal in a Secure Landfill, bioremediation and risk management are each potentially available methods for dealing with Hazardous Waste, he did not know how many operators choose risk management.

[88] This evidence leads the Tribunal to conclude that risk management is seldom used and is not considered to be an acceptable substitute for disposing of Hazardous Waste in a Secure Landfill.

Conclusions about the Product Market

[89] Although some operators with Hazardous Waste which is contaminated with light-end hydrocarbons consider bioremediation to be an acceptable substitute for disposal in a Secure Landfill, there is no evidence about the volumes of waste which are successfully bioremediated. More importantly, there is no evidence that the availability of bioremediation has any constraining impact on Tipping Fees in NEBC. In addition, the Tribunal finds that bioremediation is not considered by at least some waste generators to be an acceptable substitute for disposal in a Secure Landfill, particularly in respect of soil that is contaminated with heavy-end hydro-carbons, salts or metals.

[90] With regard to storage and risk management, there was no evidence about the volumes stored in NEBC and no evidence to suggest that the tenure payments or the cost to obtain a certificate of restoration have any impact on Tipping Fees at Silverberry.

[91] Because bioremediation is not cost effective and is slow for a substantial volume of contaminated soil in NEBC and because it does not work at all on salts and metals, the Tribunal is satisfied that a substantial number of generators do not consider bioremediation to be a good substitute for the disposal of such Hazardous Waste in a Secure Landfill and would not likely switch to bioremediation in response to a SSNIP. Accordingly, the Tribunal is satisfied that the relevant product is “solid hazardous waste generated by oil and gas producers and tipped into secure landfills in NEBC”.

ISSUE 3 WHAT IS THE GEOGRAPHIC DIMENSION OF THE RELEVANT MARKET?

[92] The Tribunal and the courts have traditionally considered it necessary to define a relevant market before proceeding to assess the competitive effects of mergers under the Act. (See, for example, *Director of Investigation and Research v. Hilsdown Holdings (Canada) Ltd.* (1992), 41 C.P.R. (3d) 289, at 297; *Canada (Director of Investigation and Research) v. Southam Inc.*, [1997] 1 S.C.R. 748, at para. 79). However, they have cautioned against losing sight of the ultimate inquiry, which is whether the merger being assessed prevents or lessens, or is likely to prevent or lessen, competition substantially. (*Southam*, above; “*Propane I*”, above, at para. 48). With this admonition in mind, it is the Tribunal’s view that, in this case, the Tribunal may evaluate the competitive effects of the Merger without precisely defining the relevant geographic market.

[93] This conclusion is important because, as will be discussed below, the evidence that has been adduced does not permit the Tribunal to delineate the exact boundaries of the geographic market.

[94] The Tribunal agrees with the approach taken in the MEGs. The process begins with a small area around one of the merging parties' locations (in this case, a Secure Landfill site) and then asks whether all rivals operating at locations in that area, if acting as a hypothetical monopolist, would have the ability and incentive to impose a small but significant price increase (typically 5%) and sustain that increase for a non-transitory period of time (typically one year). If the postulated price increase would likely cause purchasers of the relevant product in that area to switch sufficient quantities of their purchases to suppliers located outside that area to render the price increase unprofitable, then the geographic dimension of the relevant market would be progressively expanded until the point at which a seller of the relevant product, if acting as a hypothetical monopolist, would have the ability and incentive to impose a SSNIP.

[95] In the case at bar, the evidence dealt with three geographic regions:

- I. **The Contestable Area** – this was identified by Dr. Kahwaty on behalf of CCS.
- II. **All of NEBC** – the Commissioner, supported by her expert Dr. Baye, submitted this definition of the geographic market.
- III. **The Babkirk Polygon** – this area was identified in internal CCS documents dealing with the potential impact of the Babkirk Facility on CCS.

I. The Contestable Area

[96] In broad terms, the Contestable Area identified by Dr. Kahwaty encompasses an hourglass shaped area of 11,000 square kilometres which lies between the Babkirk Site and Silverberry. In his analysis, the road network in this area is such that there are some areas in which both Silverberry and a potential landfill at the Babkirk Site may be viable disposal options for customers with well sites in those areas. Dr. Kahwaty acknowledges that the transportation costs required to reach Silverberry or the Babkirk Site are such that both may be economic alternatives for these customers. In Dr. Kahwaty's view, the geographic scope of the relevant market should be limited to this area.

[97] Dr. Kahwaty used Dr. Baye's 10% predicted decline in Tipping Fees as his benchmark for defining the geographic scope of the relevant market. In short, he assessed every well site and calculated whether, if given a 10% reduction off the Tipping Fees paid at Silverberry, the customer would be indifferent as between tipping at Babkirk and Silverberry, having regard for the fact that their total disposal cost (transportation plus Tipping Fee) would be the same for each Secure Landfill. Twelve such customers were identified, accounting for approximately 41,900 tonnes in the Contestable Area. Dr. Kahwaty acknowledged that a larger critical price discount would produce a larger contestable area.

[98] The Tribunal is satisfied that a hypothetical monopolist supplying Secure Landfill services to these twelve customers in respect of the Hazardous Waste generated in the Contestable Area would have the ability and incentive to impose and sustain a SSNIP above levels that would likely exist in the absence of the Merger.

[99] Indeed, the Tribunal considers that the Contestable Area is likely understated and, in fact, smaller than the minimum area in which a hypothetical monopolist would have the ability and incentive to impose and sustain a SSNIP. The Tribunal has reached this view for several reasons. First, the Tribunal accepts Dr. Baye's position that "Babkirk need not have a location advantage for a customer – and the customer need not switch from Silverberry to Babkirk – for that customer to significantly benefit from the lower Tipping Fees stemming from competition". Second, the evidence suggests that new wells are likely to be drilled in the area between Babkirk and Northern Rockies, and that there is Legacy Waste sitting on abandoned well-sites in that region. Meaningful price and non-price competition between Babkirk and Northern Rockies for at least some of that waste likely would have developed in the absence of the Merger. Third, the geographic extent of the Contestable Area is necessarily limited by Dr. Kahwaty's assumption of a base price that is only 10% below prevailing levels. If that figure is too low Dr. Kahwaty admitted that the geographic market would be larger than the Contestable Area.

[100] In addition, the Tribunal notes that the volume of Hazardous Waste generated in the Contestable Area likely is greater than reported by Dr. Kahwaty because he only used data for 2010. Moreover, Dr. Kahwaty excluded CCS' national customers from his analysis and this may also have resulted in an understated geographic market.

[101] With respect to the possibility that Secure Landfills in Alberta might be economically accessible for generators of waste in the Contested Area, Dr. Kahwaty stated that "transportation costs are too great for [customers located to the south and east of Silverberry, who currently tip their waste in Alberta] to opt to dispose at a potential landfill at the Babkirk site (even with a significant discount) as compared to disposing at Silverberry at current prices." The Tribunal extrapolates from this and concludes that customers generating Hazardous Waste in the Contestable Area are unlikely to transport their waste to secure landfill sites in Alberta due to the significant transportation costs and potential liability that would be associated with hauling waste over such a long distance.

[102] For all these reasons, the Tribunal concludes that the geographic market is at least as large as the Contestable Area. We now turn to whether it could be as large as all of NEBC.

II. All of NEBC

[103] NEBC covers approximately 118,800 square kilometres and is vast in comparison to Dr. Kahwaty's Contestable Area. NEBC and the much smaller Contestable Area are compared on the map attached hereto as Schedule "C", which is taken from Tab 29 of Dr. Kahwaty's report of October 21, 2011.

[104] Dr. Baye concludes that the relevant geographic market is NEBC on the basis that this is the region where targeted customers are located, including current customers at both Silverberry and Northern Rockies Secure Landfills.

[105] In reaching this conclusion, Dr. Baye relies on an economic theory of market equilibrium which predicts that CCS would have an incentive to compete with an independently operated

Babkirk Facility for customers located outside of Dr. Kahwaty's Contested Area. This theory is based on his understanding that CCS' average 2010 Tipping Fees at Silverberry were approximately [CONFIDENTIAL] per tonne and its average landfill costs were approximately [CONFIDENTIAL] per tonne, yielding a margin in excess of 60%. Using these figures, Dr. Baye assumes that CCS would be prepared to reduce its Tipping Fees by 25% or greater in some areas to retain business in the face of competition from an independent Babkirk Facility.

[106] However, among other problems, Dr. Baye's theory fails to take into account the opportunity cost to CCS that would be associated with substantially reducing its Tipping Fees to sell landfill capacity today, which could be sold in the future at higher Tipping Fees to customers located closer to Silverberry. In the absence of any analysis of how this opportunity cost would factor into CCS' current decision-making process, the Tribunal finds that the economic theory relied on by Dr. Baye is not particularly helpful in defining the geographic scope of the relevant market.

[107] In his initial report, Dr. Baye also provides estimates based on econometric regression models which he asserts are consistent with this theory and his definition of the geographic market as extending throughout all of NEBC. The first set of models, found at Exhibits 19 and 20 of Dr. Baye's initial report, test his hypothesis that the distance between a Secure Landfill and its closest competitor is a significant predictor of the average Tipping Fees at that landfill.

[108] Exhibit 20 predicts that the opening of an independent landfill at the Babkirk Site will result in a large decline in average Tipping Fees at Northern Rockies, because it would reduce the distance to Northern Rockies' nearest competitor to three hours and 49 minutes. However, this ignores (i) the substantial transportation costs that the vast majority of customers who tip at Northern Rockies would have to incur to transport their waste to Babkirk, (ii) the very small number of well-sites located between those two facilities, and (iii) the apparent absence of any incentive for CCS to alter its Tipping Fees at Northern Rockies in response to entry at Babkirk.

[109] The second set of regression models are estimates offered by Dr. Baye which relate to a "natural experiment" involving SES' entry at Willesden Green, Alberta, in December 2008. That facility became the closest competitor to CCS' Rocky Mountain House landfill ("Rocky"), located approximately one hour away. In his analysis of CCS' 2010 transactions data, Dr. Baye discovered that CCS substantially reduced the Tipping Fees it charged to several customers subsequent to the opening of SES' facility at Willesden Green.

[110] To address the possibility that these substantial price reductions were purely coincidental, Dr. Baye developed "difference in difference" ("DiD") regression models, reported at Exhibit 26 of his initial report. The DiD approach controls for unobserved events, other than SES' entry at Willesden Green, which might have led to the observed decline in Tipping Fees at Rocky. In short, the DiD models include a "treatment" setting in which the event (in this case, entry) occurred and a "control" setting in which the event did not occur. Dr. Baye took the change in Tipping Fees that occurred in the treatment setting and subtracted any change that occurred in the control setting. He interpreted the difference in the change (or the "difference in difference") as the effect of entry at Willesden Green on Tipping Fees at Rocky.

[111] It is significant that, in selecting a control landfill, Dr. Baye considered it important to pick a site that “is unlikely to be affected by the treatment event – in this case entry at Willesden Green.” One of the principal criteria that he employed in making that selection was that the control landfill had to be “at least 300 km away” from Willesden Green. The same logic would imply that entry at Babkirk would not likely affect Tipping Fees at Northern Rockies, which is situated 260 km away from the Babkirk Site. A key assumption underlying Dr. Baye’s DiD models is therefore inconsistent with his definition of the geographic market as all of NEBC. This, together with the fact that Northern Rockies is almost four times further away from Babkirk than SES’ Willesden Green facility is away from CCS’ Rocky facility, lead the Tribunal to conclude that Dr. Baye’s DiD analysis is not particularly helpful in defining the geographic scope of the relevant market. That said, as discussed in detail below, the transactions data which reveals substantial price reductions by CCS to seven of its customers following SES’ entry at Willesden Green is relevant to the Tribunal’s assessment of the likely competitive effects of the Merger.

[112] Finally, the Tribunal notes that Dr. Baye also points to internal documents of CCS which he says are consistent with his definition of the relevant geographic market. However, those documents simply: (i) make projections of the overall annual operating margin ([CONFIDENTIAL]) that CCS stood to lose at Silverberry and Northern Rockies were an independent landfill to open at the Babkirk Site; (ii) predict a pricing war if the Babkirk Facility was operated independently or acquired by a third party; (iii) discuss the likelihood of having to compete through “value propositions”; and (iv) reflect that CCS likely takes into account its customers’ transportation costs to the next closest competing landfill in setting its Tipping Fees. While these types of statements assist in assessing whether the Merger is likely to prevent competition substantially, they are not particularly helpful to the Tribunal in defining the geographic scope of the relevant market.

III. The Babkirk Polygon

[113] The Babkirk Polygon is the third area that was discussed at the hearing. That area was identified by a member of CCS’ business development team who was asked to project Babkirk’s market capture area. The Tribunal has added a rough depiction of that area on Schedule “C” hereto.

[114] The Babkirk Polygon was apparently intended to identify the locations of existing Silverberry customers who would be likely to tip at Babkirk rather than at Silverberry, if Babkirk was operated as a Secure Landfill. In other words, the Babkirk Polygon was CCS’ representation of the geographic locations of business it risked losing if Babkirk opened as a Secure Landfill. It includes territory north and west of Babkirk and is a larger area than Dr. Kahwaty’s Contestable Area.

[115] The Tribunal is satisfied that the locational advantage that the Babkirk Facility would enjoy for customers with drilling operations situated to its north and west is such that those customers would not likely tip at Silverberry in the absence of a very substantial reduction in its Tipping Fees. Given the opportunity cost that CCS would incur by offering such a substantial

reduction in its Tipping Fees, and given the absence of any analysis by the Commissioner or Dr. Baye of the impact of that opportunity cost on CCS's decision-making, the Tribunal is not persuaded that CCS would have an incentive to compete for those customers in the absence of the Merger.

[116] Likewise, the Tribunal has not been persuaded on a balance of probabilities that such customers who operate to the north and west of the Babkirk Facility would tip at Silverberry, in response to a SSNIP above the maximum average tipping fee level that it believes is likely to exist in the absence of the Merger. For the reasons discussed below, the Tribunal has concluded that such price level will be at least 10% below existing levels. However, transportation costs and the liability associated with transporting Hazardous Waste over the long distance to Silverberry are such that it would require more than a SSNIP to induce waste generators located in those regions to tip their Hazardous Waste at Silverberry.

[117] The Tribunal has concluded that the geographic scope of the relevant market is at least as large as the Contestable Area identified by Dr. Kahwaty, and likely falls between the limits of that area and the bounds of the Babkirk Polygon, which includes some of the Contestable Area, but adds significant territory north and west of Babkirk.

[118] The Tribunal is satisfied that it would not matter if the geographic scope of the relevant market actually includes additional customer locations in the Babkirk Polygon, beyond the Contestable Area, because CCS would remain the sole supplier of Secure Landfill services to any reasonably defined broader group of customers.

ISSUE 4 IS THE MERGER PRO-COMPETITIVE?

[119] CCS has suggested that the Merger is pro-competitive because it brings to the market a new Secure Landfill at the Babkirk Site. CCS further asserts that the Merger will most quickly transform the Babkirk Site into a Secure Landfill to complement CCS' existing business and serve the growing oil and gas industry in NEBC. CCS says that these facts explain its customers' failure to complain about the Merger.

[120] The Tribunal disagrees. In its view, a merger which prevents all actual or likely rivalry in a relevant market cannot be "pro-competitive," even if it expands market demand more quickly than might otherwise be the case. Such a merger might be efficiency-enhancing, as contemplated by the efficiency defence in section 96 of the Act. However, it has adverse consequences for the dynamic process of competition and the benefits that such process typically yields. In the absence of actual rivalry, or a very real and credible threat of future rivalry, meaningful competition does not exist.

ISSUE 5 WHAT IS THE ANALYTICAL FRAMEWORK IN A “PREVENT CASE?”

[121] The “prevention” branch of section 92 was raised in three previous Tribunal cases: *Canada (Director of Investigation and Research) v. Southam Inc.* (1992), 43 C.P.R. (3d) 161 (Comp. Trib.), rev’d on other grounds (1995), 63 C.P.R. (3d) 1 (F.C.A.), rev’d, [1997] 1 S.C.R. 748, *Propane 1* and *Canadian Waste Services*. However, since those cases were primarily concerned with allegations involving a substantial lessening of competition, the Tribunal did not address in any detail the analytical framework applicable to the assessment of an alleged substantial prevention of competition.

[122] In determining whether competition is likely to be prevented, the Tribunal will assess whether a merger is more likely than not to maintain the ability of the merged entity to exercise greater market power than in the absence of the merger, acting alone or interdependently with one or more rivals. For the purposes of this case, this requires comparing a world in which CCS owns the relevant Secure Landfills in NEBC (i.e. Northern Rockies, Silverberry and Babkirk) with a world in which Babkirk is independently operated as a Secure Landfill.

[123] In assessing cases under the “prevent” branch of section 92, the Tribunal focuses on the new entry, or the increased competition from within the relevant market, that the Commissioner alleges was, or would be, prevented by the merger in question. In the case of a proposed merger, the Tribunal assesses whether it is likely that new entry or expansion would be sufficiently timely, and occur on a sufficient scale, to result in: (i) a material reduction of prices, or in a material increase in non-price competition, relative to prevailing price and non-price levels of competition, (ii) in a significant (i.e., non-trivial) part of the relevant market, and (iii) for a period of approximately two years. If so and if the entry or expansion likely would occur within a reasonable period of time, the Tribunal will conclude that the prevention of competition is likely to be substantial.

[124] The Tribunal also considers whether other firms would be likely to enter or expand on a scale similar to that which was prevented or forestalled by the merger, and in a similar timeframe. Where the Tribunal finds that such entry or expansion would probably occur, it is unlikely to conclude that the merger is likely to prevent competition substantially.

[125] As noted earlier and as recognized by all parties, the price against which the prevailing prices will be compared will be the price that would likely have existed in the absence of the merger. The burden will be on the Commissioner to demonstrate that price level, or the range of prices, that likely would have existed “but for” the merger.

[126] In final argument, the Commissioner and CCS suggested that helpful guidance on the approach that should be taken to prevention of competition cases can be provided by the U.S. jurisprudence pertaining to mergers that have been alleged to reduce potential competition. In the Tribunal’s view, that jurisprudence is not particularly helpful to merger assessment under the Act, because it was developed in respect of a different statutory test and, for the most part, many years ago. (It appears that the US Supreme Court and the federal appellate courts have not had an opportunity to revisit that jurisprudence since the 1980s. See M. Sean Royall and Adam J. Di

Vincenzo, “Evaluating Mergers between Potential Competitors under the New Horizontal Merger Guidelines”, *Antitrust* (Fall 2010) 33, at 35.)

ISSUE 6 IS THERE A SUBSTANTIAL PREVENTION OF COMPETITION?

A. The “But For” analysis

Introduction

[127] In *Commissioner of Competition v. Canada Pipe Company Ltd.*, 2006 FCA 233, the Federal Court of Appeal decided that a “but for” analysis was the appropriate approach to take when considering whether, under paragraph 79(1)(c) of the Act, “...the practice has had, is having or is likely to have the effect of preventing or lessening competition substantially.” The specific question to be asked is stated, as follows, at paragraph 38 of the decision “...would the relevant markets – in the past, present or future – be substantially more competitive but for the impugned practice of anti-competitive acts?”

[128] Language similar to that found in section 79 appears in section 92 of the Act. Section 92 says that an order may be made where “...the Tribunal finds that a merger or proposed merger prevents or lessens, or is likely to prevent or lessen competition substantially.” For this reason, the parties and the Tribunal have determined that the “but for” approach is also appropriate for use in cases under section 92 of the Act. The parties recognize that the findings will be forward looking in nature and CCS has cautioned the Tribunal against unfounded speculation. With this background, we turn to the “but for” analysis.

[129] The discussion below will address the threshold issue of whether effective competition in the supply of Secure Landfill services in the Contestable Area identified by Dr. Kahwaty likely would have materialized in the absence of the Merger. Stated alternatively, would effective competition in the relevant market likely have emerged “but for” the Merger? After addressing this issue, the Tribunal will turn to the section 93 factors that are relevant in this case, as well as the issue of countervailing power.

[130] In undertaking the “but for” analysis, the Tribunal will consider the following questions:

- (a) If the Merger had not occurred, what new competition, if any, would likely have emerged in the Contestable Area?
- (b) If the Merger had not occurred, what would have been the likely scale of that new competition?
- (c) If the Merger had not occurred, when would the new competition likely have entered the market?

[131] The Commissioner suggested that either June or July, 2010 be used as the timeframe for considering the “but for” world. CCS, on the other hand, was more precise and suggested that the relevant time for this purpose should be the end of July 2010, when CCS and Complete signed

the letter of intent which led to the Merger. Since the parties have essentially agreed, the Tribunal will focus on the end of July.

[132] The Tribunal's view is that, as of the end of July 2010, there were only two realistic scenarios for the Babbirk Site absent the Merger. They were:

1. The Vendors would have sold to a waste company called Secure Energy Services Inc. ("SES"), which would have operated a Secure Landfill; or
2. The Vendors would have operated a bioremediation facility together with a half cell of Secure Landfill.

[133] Extensive evidence was adduced on these topics. The discussion below summarizes the most important aspects of that evidence.

Scenario #1 – A sale of Complete to SES

[134] In February of 2007 when the Vendors first met to organize Complete, they decided that their exit strategy would be to sell the company to Newalta Corporation or to CCS. Newalta is a waste company which operates Secure Landfills in Alberta. However, it was always the Vendors' intention to sell only when they could achieve an acceptable return on their investment.

[135] In November 2007, Canaccord Capital sent a four-person investment team to Fort St. John to investigate the purchase of a number of the Vendors' companies, including Complete. At that time, the Vendors' intentions about a sale of Complete were recorded in the company's minutes, which, among other things, stated:

...consensus at Complete's meeting was to carry on the way we are going unless we are presented with a very attractive proposal from outside. We don't want to do all the work for the benefit of others – better to take a longer time, but to have higher rewards for ourselves...

[136] Subsequently, a Vision Statement, dated June 22, 2008, was prepared by Karen Baker. That document stated that they wanted to make a "good return on sale of company". The Statement also observed:

The VISION of Complete Environmental Inc. is to become a diversified, highly efficient, environmental corporation in NEBC generating a high profit margin thus, presenting itself as an attractive acquisition to multiple potential purchasers.

[137] After Complete received its MOE Permit on February 26, 2010, Ken Watson's company, IRTL, offered to purchase Complete for [CONFIDENTIAL]. Before that offer was made, the Vendors had not been actively considering a sale. However, IRTL's offer spurred them to seriously consider the matter and, before they responded to IRTL's, they authorized Randy Wolsey to contact CCS and SES for expressions of interest.

[138] On March 23, 2010, Randy Wolsey spoke to SES but was told that it had no interest in making an offer because it was busy with its initial public share offering. However, SES did indicate a possible future interest and stated that it valued BLS at approximately [CONFIDENTIAL] in either mixed cash and shares or [CONFIDENTIAL] plus a share offering. In contrast, CCS expressed immediate interest and Dan Wallace of CCS verbally offered [CONFIDENTIAL] for BLS.

[139] The Vendors eventually decided to sell Complete to IRTL. However, IRTL's offer was withdrawn in early June 2010 after Ken Watson learned that, contrary to his expectations, Canaccord Capital would not finance IRTL's acquisition of Complete. After Cannacord declined, he did not have time to arrange alternative financing.

[140] According to Karen Baker, after IRTL's offer was withdrawn, the Vendors decided to try to sell Complete one last time. They concluded that, if they did not receive an interesting offer, they would operate the Babkirk Facility themselves. This would involve moving forward with an operating plan and constructing a half cell of Secure Landfill. To ascertain if a sale was possible, Randy Wolsey was again asked to contact CCS and SES. In addition, he was asked to contact Newalta. He did so, but Newalta did not respond to his email.

[141] At about that time, Dan Wallace of CCS apparently heard that IRTL's offer had fallen through and sent Randy Wolsey an email asking if CCS could renew its earlier offer. Mr. Wolsey responded by offering to sell BLS for [CONFIDENTIAL]. On June 22, 2010, CCS agreed to purchase the shares of BLS for that amount.

[142] Inexplicably, Randy Wolsey did not tell the other Vendors about his deal with CCS. Instead, he arranged a meeting with SES (the "Meeting"). It was held on June 29, 2010 and was attended by Rene Amirault, President and CEO of SES, Dan Steinke, SES' Vice-President of Business Development, and Corey Higham, SES' Business Development Representative (the "SES Group").

[143] According to the Vendors, the SES Group spent much of the Meeting giving a presentation to show that SES was an attractive investment. An SES brochure prepared for potential investors was used for this purpose. However, the Vendors were not interested in acquiring shares of SES and they testified that no price for BLS or Complete was ever suggested and no offer was discussed.

[144] According to Mr. Amirault, he indicated during the Meeting that an all cash offer could be made. The Vendors denied this. Since this evidence is significant and was not included in Mr. Amirault's witness statement, the Tribunal has concluded an all cash offer was not mentioned and that the Vendors understood that SES would only purchase Complete if it could use its shares to finance part of the purchase price.

[145] During the Meeting, the SES Group had questions about how to secure the necessary regulatory approvals to allow SES to expand the permitted capacity of the Babkirk Facility and to upgrade the design of the Secure Landfill cells (the "Questions"). The Vendors could not answer the Questions and Mr. Amirault testified that he asked for and was refused permission to

Speak to Del Reinheimer about the Questions. However, some Vendors could not remember anyone from the SES Group asking for permission to speak to Del Reinheimer about the Questions and other Vendors denied that anyone asked for such permission at that time. Mr. Reinheimer was the Section Head, Environmental Management in the Environmental Protection Division of the MOE.

[146] Mr. Amirault stated that following the Meeting, SES was actively interested in purchasing Complete and gave the following reasons to explain its failure to make an offer or submit a letter of intent in July 2010:

- The Questions had to be answered before a price could be established.
- There was no particular urgency about making an offer because there were no other buyers. Mr. Amirault testified that the Vendors had indicated at the Meeting that Complete had promised a First Nation that it would not sell to CCS and the SES Group knew that Newalta was not interested.

[147] Mr. Amirault acknowledged that the Questions were about process i.e. “how to” go about getting approvals for increased permitted capacity and enhanced cell design. He also stated that he had no doubt that the approvals would be forthcoming. In these circumstances and because, as described below, SES was actively engaged in the development of another Secure Landfill, it is the Tribunal’s view that SES would have known what it needed to spend to increase the permitted capacity and upgrade the landfill cells at the Babkirk Site. Accordingly, the Tribunal does not accept Mr. Amirault’s evidence that SES could not establish a purchase price without the answers to the Questions.

[148] There is a dispute about whether, on July 6, 2010, Corey Higham sent Ron Baker an email setting out the Questions which had been discussed at the Meeting. Mr. Amirault stated in hearsay evidence in his witness statement that Corey Higham had told him that the email had been sent. A photocopy of that alleged email was appended to Mr. Amirault’s witness statement. However, after Ron Baker made a witness statement stating that he did not recall having received the email, no reply evidence was filed by Corey Higham to say that it had, in fact, been sent. The email is an important document to the extent that it evidences an ongoing interest by SES in receiving answers to the Questions. However, given that it was not properly adduced, the Tribunal gives it no weight.

[149] As mentioned above, Mr. Amirault testified that Ron Baker told the SES Group during the Meeting that he had promised a First Nation that the Vendors would not sell the Babkirk Facility to CCS. This meant that SES understood that the Vendors were not likely to receive a competing offer. However, this apparently significant detail did not appear in Mr. Amirault’s witness statement and was not referred to in his examination-in-chief. It was mentioned for the first time in answer to a question posed by the Tribunal. For this reason, this evidence is not accepted as an explanation for SES’ failure to show a more active interest in purchasing Complete.

[150] Mr. Amirault acknowledged that the window for undertaking construction in 2010 “...was closing, closing fast” and that SES wanted to begin construction at Babkirk at the end of August or by mid-September at the latest. This meant that, if SES had been actively interested in

acquiring Complete, it would have moved quickly to present the Vendors with a letter of intent. Mr. Amirault also testified that, apart from updating its earlier market study of the Babkirk Facility, no further due diligence was required. In addition, he testified that he did not need the approval of his Board of Directors to deliver a letter of intent. In these circumstances, the Tribunal has concluded that SES' failure to follow up more quickly on its meeting with the Vendors and its failure to demonstrate any interest in making an offer at that time are attributable to a lack of active interest in acquiring BLS in July 2010.

[151] Ron Baker recalls that he was called by Corey Higham on July 28, 2010. However, Mr. Baker does not remember what Mr. Higham said during that telephone call. Since Corey Higham did not give evidence, the Tribunal considers it fair to assume that he did not make an offer to purchase Complete or propose a letter of intent. Although Mr. Baker does not recall much of his own side of the conversation, he does remember telling Mr. Higham that Complete had just signed a letter of intent with CCS.

[152] The Tribunal considers it noteworthy that, since 2007, SES had been developing a new Secure Landfill called Heritage. It was located approximately 153 km south of the Babkirk Site. However, it was not favourably received during public consultations because it was to be located near a populated area and on a site where a landslide had occurred. Corey Higham of SES was told on July 26, 2010 that the EA's review of the Heritage Project had been "suspended" pending further evidence from SES about the suitability of the site. SES eventually abandoned the project in December of 2010.

[153] Based on this evidence, the Tribunal has concluded that SES had an ongoing general interest in the Babkirk Facility. It had spoken to Murray Babkirk when he owned BLS and it had indicated possible future interest when Randy Wolsey contacted it in March of 2010. SES also sent its most senior executive to the Meeting in June 2010. However, the Tribunal has also concluded that SES was not actively interested in a purchase in July 2010. It never discussed a potential price, and, although it asked the Questions, the answers were not crucial to setting the price and SES already knew that it would be granted the additional approvals it sought. Finally, although Mr. Amirault testified that there was no due diligence of any consequence to be undertaken, SES did not send a letter of intent and there are no internal SES documents showing that it was preparing to make an offer. The Tribunal has concluded that SES' failure to take a more active interest in purchasing Babkirk is explained by the fact that it was still giving priority to its project at the Heritage site. This is understandable, since it had already invested three years and approximately \$1.3 million in developing the project.

[154] In all these circumstances, the Tribunal has concluded, on a balance of probabilities, that SES likely would not have made an acceptable offer for Complete by the end of July 2010 or at any time in the summer of 2010 and that the Vendors would have moved forward with their own plans to develop the Babkirk Facility.

Scenario #2 – The Vendors Operate Babkirk

[155] The Vendors' position is that Complete was created to purchase BLS and to operate a bioremediation facility on the Babkirk Site. They assert that their plan was to accept only

Hazardous Waste contaminated with light-end hydrocarbons which could be treated using bioremediation.

[156] However, the Vendors recognized that bioremediation might sometimes fail and that they might be left with clumps of contaminated soil (“Hot Spots”) after the surrounding waste had been successfully treated. The Vendors understood that the contaminated soil would have to be placed in a Secure Landfill before the remaining soil could be tested and de-listed as non-hazardous waste.

[157] To enable BLS to permanently dispose of the contaminated soil from the Hot Spots and to attract customers to the Babkirk Facility, the Vendors proposed to construct a Secure Landfill on the Babkirk Site, which they described as “incidental” to their treatment operation. This meant that only soil that was not successfully treated using bioremediation would be moved into the Secure Landfill. The Tribunal will give this meaning to the term “Incidental” in the context of the Vendors’ Secure Landfill in the balance of this decision.

[158] The Commissioner denies that the Vendors’ Secure Landfill was only to be used on an Incidental basis. She maintains that the Vendors always intended to accept and directly and permanently dispose of all types of Hazardous Waste in their Secure Landfill. We will refer to this business model as a “Full Service” Secure Landfill. To support her position, the Commissioner relies, in part, on the documents used to obtain the EA Certificate and the MOE Permit. These documents will be described collectively as the Regulatory Approval Documents (“RADs”). As discussed below, the RADs clearly indicate that a Secure Landfill was to be opened on the Babkirk Site. The Commissioner also relies on the Draft Operations Plans (the “Operations Plan”) for the Babkirk Site, which show that a Full Service Secure Landfill was planned.

[159] Finally, the Commissioner relies on statements in a variety of documents which she asserts reflect that the Vendors intended to compete with CCS. She submits that references in those documents to competing with CCS meant operating the Babkirk Facility as a Full Service Secure Landfill.

The Vendors’ Documents

[160] The Vendors explained that they needed an EA Certificate and an MOE Permit for a Secure Landfill in order to accept Hazardous Waste of any kind for any type of treatment at the Babkirk Facility. However, they also stated that neither document required them to operate on a Full Service basis. In other words, although they were entitled to do so, they were not required to accept all types of Hazardous Waste for direct disposal. Instead, they were free to operate an “Incidental” Secure Landfill.

[161] The Vendors ask the Tribunal to focus on the documents which were prepared when Complete was being incorporated and when the MOE Permit was finally granted, as the best evidence of their intention, which they say was to use the Secure Landfill on the Babkirk Site only as Incidental to their bioremediation. The five documents in this category will be described as the “Vendors’ Documents”. We will deal with them in turn below.

[162] Minutes of a meeting that Randy Wolsey and Ken Watson attended with Del Reinheimer and other MOE and EAO officials on January 24, 2007. The minutes state:

Ken [Watson] discussed the remediation side of the facility's operations, which will continue even after (if) the landfill is constructed. He stated that he has had interest expressed from companies who wish to pursue remediation as well as landfilling. Ken outlined some of the practices and equipment currently used in other operations with which he is involved, and showed some pictures and videos of the equipment (e.g. ALLU AS 38 composting machine) in action.

Ken and Randy stated that their intention would be to have an ALLU AS 38 kept at the facility full-time. They cited that it would be capable of processing up to about 25,000m per day of Peace River region clay.

[our emphasis]

[163] In his testimony, Mr. Reinheimer agreed that his understanding was that the Vendors were going to operate a bioremediation facility and that it was an open question whether or not the Secure Landfill, for which application had been made, would ever be built. In the Tribunal's view, this evidence supports the Incidental nature of the Secure Landfill.

[164] Minutes of a Newco meeting dated in February 2007. These minutes record the Vendors' vision for their new business, which was to become Complete. The minutes make no mention of a Secure Landfill at the Babkirk Site. They speak only of processing waste. The document also describes CNRL and Petro-Canada as customers for treatment and indicates that Petro-Canada has been interested for years. In context, it is clear that Petro-Canada's interest was in bioremediation. The fact that a Secure Landfill is not mentioned even though the application for its approval was already underway, strongly suggests that it was to play an Incidental role in Complete's business at the Babkirk Site.

[165] The minutes read as follows:

Newco name should be "**Environmental Services Co.**" not "Waste Management (Facility) Co." **Services** to be offered by Newco were suggested to include drilling for sites in the 115 area, remediation on clients' sites, excavation at client sites, and processing at 115 landfill. We could also coordinate the trucking to haul clients' contaminated dirt that we would excavate at client sites to Mile 115 for processing, although we would not own such trucks.

The **Target Market** would be environmental engineering companies and end-user oil and gas companies such as PetroCanada and CNRL. It would be good if we could get a letter from PetroCan/Matrix regarding the potential amount of work. Our services are needed – PetroCan has been interested for years now. This should be a "Market Pull" rather than "Product Push" situation.

There would considerable **landfill preparation** at Mile 115 [the Babkirk Site]. Randy suggested Tom would probably like to be involved here with heavy equipment operation. We expect to have the permit by Nov 1/07. It would probably take 1 year for money to come in from sales for the landfill itself since we have to build the cells.

[the emphasis is in the original]

[166] The Tribunal has studied the final passage quoted above and has concluded that, although the term “landfill” is used, the topic under discussion was actually bioremediation and the Vendors’ plan to sell the successfully treated soil.

[167] **A diagram outlining Newco’s operation.** This document shows how Complete’s treatment facility on the Babkirk Site would complement other businesses operated by the Vendors. The diagram does not refer to the existence of a Secure Landfill. This omission also suggests that a Secure Landfill was not a significant part of Complete’s business or of the Vendors’ plan to integrate a number of their businesses.

[168] **Minutes of January 20, 2010.** This document describes a meeting that Ken Watson and Ron Baker attended with Del Reinheimer and other officials from the MOE to discuss the Vendors’ plans for the Babkirk Site. By this time, Complete owned Babkirk and had received the EA Certificate. The issuance of the MOE Permit for the Secure Landfill was the next step. The relevant portions of the minutes read as follows:

Ken [Watson] and Ron [Baker] both stressed that although they would rather not use Babkirk as a Landfill but as a treatment facility, industry demands that Babkirk is Permitted as a Secure Landfill prior to transporting materials to or using Babkirk in any way. The term “Secure” appears to be of utmost importance to all major oil and gas companies.

- Although Del [Reinheimer of the MOE] didn’t understand why industry perceives as such, he realized the concern.
- He stated that even though the Permit may be approved, operation of a Secure Landfill may not begin until the Operating Plan is also approved and the landfill has been constructed.
- Ken and Ron agreed it is rather the perception of the word “Secure” that is required at this time to entice clients, than the use of an actual operating landfill.
- Ken suggested that prior to approved Secure Landfill operations, unacceptable material could be sent to CCS (small amount around contamination source) and the remainder could be accepted at Babkirk.

All agreed construction of the landfill is to commence within 2 years of Permit issuance; and that the Landfill Operating Plan must be completed prior to construction but the issuance of the Permit itself is not affected by the existence or not of the Operating Plan.

Ron [Baker] suggested that the Permit read that the construction phase of the landfill be completed in small segments of a ½ cell over a period of time rather than the construction of a full ½ cell at one time (as suggested by Reg).

[our emphasis]

[169] In the Tribunal's view, there are several reasons why this document indicates that the Secure Landfill at the Babkirk Site was to be Incidental. First, Ron Baker was suggesting that even a half cell was not needed and proposed that smaller segments be constructed. This approach makes sense only if the Secure Landfill was to be Incidental. No one intending to compete with CCS' Full Service Secure Landfill at Silverberry would contemplate the construction of a small segment of a half cell.

[170] Second, the Incidental nature of the Secure Landfill is disclosed when Ken Watson suggested that, before the Secure Landfill was operational at Babkirk, unacceptable material could be moved to CCS. The interesting point is that the unacceptable material is not material delivered by waste generators for direct disposal into the Secure Landfill at the Babkirk Site. Rather, it is only the "small amount around [the] contamination source" or, in other words, the material around Hot Spots. Once again, this confirms that the Vendors' intention was that their Secure Landfill would only be used on an Incidental basis.

[171] **Minutes dated March 20, 2010.** These minutes reflect the Vendors' thinking in response to the offer to purchase that they received from IRTL. The minutes indicate that, at that time, they believed they had the following three options:

1. Operate start first secure cell and bioremediate [inc salt];
2. Bioremediate without cell;
3. Sell ???

The Minutes also stated:

"Need 12 month season to see how well bioremediation works."

[172] The Vendors ask the Tribunal to note that this evidence all predates CCS' purchase of Complete and the Commissioner's interest in the Merger. The Vendors also submit that their evidence at the hearing was consistent with their intention to operate only an Incidental Secure Landfill. Both the proposed manager of the Babkirk Facility (Randy Wolsey) and the man who would be in charge of daily operations (Ken Watson) testified that the only waste they intended to accept at Babkirk was waste which could be bioremediated.

The RADs

[173] There are numerous RADs, however, those which are particularly relevant are: the "Terms of Reference" dated August 29, 2007; the "Application for an Environmental Assessment Certificate" dated February 11, 2008; the "Babkirk Secure Landfill Project Assessment Report" dated November 12, 2008; and a "BC Information Bulletin" dated December 9, 2008.

[174] The first significant RAD is the Terms of Reference for the Babkirk Secure Landfill Project. It was approved by the EAO on August 29, 2007.

[175] Section 3.1 reads as follows:

The Proponent [Murray Babkirk] has experienced a considerable decline in the amount of waste brought to the existing facility for storage and treatment since the approval of the Silverberry Secure Landfill Facility application (north of Fort St. John, B.C.) as understandably, direct disposal forms a more cost effective option for clients than treatment and disposal. The conversion of the existing facility from a purely Short-term Storage and Treatment Facility to a Secure Landfill and Short-term Storage and Treatment Facility will allow fair competition between the Proponent and Silverberry facilities in providing responsible waste management solutions for local industry.

[...]

This section will provide:

[...]

- a list of the materials to be accepted at the Project for disposal;
- a general description of the criteria that will be used to determine whether contaminated soil will be disposed of directly into the secure landfill or treated by bioremediation;

[...]

[our emphasis]

[176] This document suggests that the proposed facility on the Babkirk Site would accept Hazardous Waste for direct disposal into the Secure Landfill and that the Secure Landfill was being developed so that the Babkirk Site could compete with CCS at Silverberry. This document was first drafted by SNCL on the instructions of Murray Babkirk, who was effectively the proponent, since, with his wife, he owned BLS. However, as discussed below, some of the Vendors later reviewed it and they did not suggest changes to reflect their intention to operate only an Incidental Secure Landfill. Since the further RADs contain similar language, it is not necessary to describe them in detail. The Tribunal is satisfied that they all indicate that there would be a Full Service Secure Landfill on the Babkirk Site.

[177] It is clear that some of the Vendors were, in Karen Baker's words, "integrally involved" during the regulatory process leading to the EA Certificate. Some attended and assisted with information sessions, consultation meetings, and presentations to First Nations; some were included in correspondence regarding the EA Certificate; some participated directly in drafting or reviewing some of the RADs; and some assisted the Babkirks with technical matters. The Vendors also advanced funds which the Babkirks were able to use to finance the environmental assessment process and pay the fees charged by SNCL. This financial support totalled

approximately \$300,000 and was deducted from the purchase price that Complete eventually paid the Babkirks for the BLS shares. In all these circumstances, the Commissioner submits that the RADs reflect the Vendors' true intentions.

[178] However, the Vendors state that while the RADs authorized the construction of a Full Service Secure Landfill, they say nothing about the Vendors' intentions. Mr. Baker explained that, as far as the Vendors were concerned, as long as they had an approval for a Secure Landfill, no one would complain if they chose to operate it on an Incidental basis. He also stated that, if they had asked to amend the Terms of Reference, which is clearly the document on which the later RADs were based, it would have slowed down the approval process for changes that, in the Vendors' opinion, were unnecessary.

[179] The Tribunal has concluded that this explanation is reasonable and that it underpins Mr. Baker's response when he was asked why the Vendors didn't correct the Terms of Reference to reflect their intention to operate an Incidental Secure Landfill. He testified:

[...] There was nothing in it that was that onerous to us or important to us to warrant changing.

[180] In view of this explanation and in view of the Vendors' Documents which, starting in January 2007, consistently show that their plan was to operate an Incidental Secure Landfill, the Tribunal concludes that, although the RADs accurately described what could be offered at the Babkirk Facility, they did not accurately reflect the Vendors' intentions.

The Operations Plan

[181] The Vendors never completed an Operations Plan for the Secure Landfill on the Babkirk Site.

[182] The first Operations Plan was prepared by SNCL. An early and incomplete draft of that document is dated January 9, 2008. The evidence showed that a revision was prepared in December 2008. The Tribunal is satisfied that both versions provided in several places that the Secure Landfill could be operated on a Full Service basis. For example:

[...] The addition of secure landfill capabilities to this facility would allow for direct disposal in addition to treatment and remediation of contaminated soil. This addition would allow the Babkirk facility to compete with the nearby Silverberry Secure Landfill facilities. The proposed facilities would be contained entirely within the footprint of the former facilities.

[our emphasis]

[183] Mr. Baker's evidence was that the Vendors worked directly with SNCL on the Operations Plan and that they had worked "quite a little bit" on revisions to the first draft. However, he testified that when the Vendors reviewed the revised version they were not satisfied and decided to prepare their own plan. He added that writing a new plan would have taken "months" of work.

[184] However, other evidence makes it clear that the Vendors did not pursue the idea of rewriting the Operations Plan. Minutes of Complete's meeting, which Ron Baker attended in March 2010, show that the Vendors then thought that it was "mostly in order" and that only a couple of weeks were needed to put it in final form for the MOE. Minutes of a later meeting in May 2010 suggest that the Operations Plan needed "4-5 days work".

[185] Mr. Baker acknowledged that he understood the Operations Plan to be saying that waste generators could directly and finally dispose of untreatable Hazardous Waste into the Secure Landfill at the Babkirk Site. In this regard, the transcript of his cross-examination at p. 1212 reads:

Mr. Iatrou: So you would accept waste. Some of it might be highly contaminated, not really treatable. That would stay in [the secure landfill], but the stuff that could be treated would come out of that cell as capacity and the bioremediation cell was freed up?

Mr. Baker: That's correct.

[186] However, a review of Mr. Baker's entire cross-examination on the Operations Plan reveals, in the Tribunal's view, that when he gave that answer, he was not saying that the Vendors intended to operate a Full Service Secure Landfill. Rather, he was describing what was possible under the plan. This difference becomes clear in the following exchange:

Mr. Iatrou: You would accept the same sort of material that you could take to Silverberry?

Mr. Baker: Yes, correct. We could accept it. Our plan was not to accept the type of soil that can only go to Silverberry, if you get my drift here. I suppose I have to explain that slightly.

[our emphasis]

[187] Towards the end of his cross-examination, Mr. Baker began to answer questions from the Vendors' perspective. For example, when asked about the section of the Operations Plan that spoke about closing secure cells once they were filled, he stated "This was the concept, that if we ever got around to using the Secure Landfill section of our facility..." [our emphasis].

[188] And at the end of his examination, when asked whether or not all three secure cells had to be built at once, Mr. Baker said "No, no, no. This whole idea of graded construction was that we – our intention half of one cell and never have to do anything further. That was our intention. We would store so little of this landfillable material in that portion of a cell that it would last us the lifetime of our interest in this operation." [our emphasis].

[189] In the Tribunal's view, it is clear that the Vendors' approach to the Operations Plan was the same as it had been to the RADs. A plan that permitted the direct disposal of Hazardous Waste did not oblige the Vendors to accept it. It is obvious to the Tribunal that, from the early days of Newco in 2007, the Vendors wanted to make the Babkirk Facility as attractive as possible for sale and this meant that it had to be capable of being operated as a Full Service Secure Landfill. However, this does not mean that the Vendors intended to operate the Babkirk Facility in that manner given their long expressed preference for a bioremediation facility with an Incidental Secure Landfill.

Was Babkirk Going to Compete with CCS?

[190] The Commissioner also relies on what she describes as the Vendors' expressed intention to compete with CCS to support her allegation that Complete was poised to operate a Full Service Secure Landfill at the Babkirk Site. The statements on which she relies are found in the RADs, the Operations Plan and in Complete's minutes.

[191] There is no doubt that, in 2006 when the Babkirks approached SNCL to work on documents for the EA Certificate, they intended to operate a Full Service Secure Landfill on the Babkirk Site once the approvals were in place. As noted earlier, the original project description prepared by SNCL makes this clear when it says:

The Proponent [BLS owned by the Babkirks] has reportedly experienced a considerable decline in his soil storage and treatment business since the approval of the Silverberry Secure Landfill Facility application (north of Fort St. John, BC) as understandably, direct disposal forms a more cost effective option for clients than treatment and disposal. The conversion of the existing facility from a purely Short-term Storage and Treatment Facility to a Secure Landfill and Short-term Storage and Treatment Facility will allow fair competition between the Proponent and Silverberry facilities in providing responsible waste management solutions for local industry.

[our emphasis]

[192] This language is repeated in the Terms of Reference and the point is made even more clearly in the application for the EA Certificate. It states that the proposed facility would allow the proponent to provide "market competition for direct disposal of waste soil" and speaks of the Babkirk Facility being in "direct competition" with CCS at Silverberry.

[193] The Vendors' Operations Plan also mentions that the Secure Landfill has been added to the Babkirk Site to allow it to compete with Silverberry and, in the Vision Statement she wrote for Newco, which is attached to minutes dated June 22, 2008, Karen Baker stated that the Vendors wanted Complete "...to become the Number One Competitor to the industry leader [CCS/Newalta]".

[194] In his cross-examination at the hearing, Randy Wolsey acknowledged an intention to compete with CCS. However, he testified that while landfilling and competing with Silverberry

was “going to happen”, it would be on a “very different scale” because the Vendors were going to supply a “brand new service”.

[195] Mr. Baker also acknowledged in his testimony that the Vendors did intend to compete with CCS and others, but not on price. He stated that they were going to compete by offering a service that was different from anything offered by CCS or Newalta.

[196] The Tribunal has concluded that Complete intended to “compete” with Silverberry by offering a new bioremediation service, and that its statements about competition were not intended to mean that the Vendors planned to operate a Full Service Secure Landfill on the Babkirk Site.

Conclusions

[197] If the Merger had not occurred, it is the Tribunal’s view that, at the end of July 2010, in the absence of a letter of intent from SES, the Vendors would have proceeded to develop the Babkirk Facility. This would have involved:

- Completing the Operations Plan;
- Securing the MOE’s approval for the Operations Plan;
- Constructing a half cell of Secure Landfill capacity i.e. 125,000 tonnes; and
- Accepting Hazardous Waste for bioremediation and moving waste that could not be successfully bioremediated into the Incidental Secure Landfill.

[198] Although there was evidence to suggest that the Vendors might have decided to start accepting waste for bioremediation without any Secure Landfill capacity, the Tribunal has concluded that the Vendors would likely have built their half cell of Secure Landfill as soon as possible for two reasons. First, the Vendors told Del Reinheimer of the MOE on January 20, 2010 about the importance customers placed on having Secure Landfill capacity available. Indeed, Petro-Canada had refused to deliver waste for bioremediation until the Vendors opened a Secure Landfill. Second, Ken Watson testified that the plan was to store in the Secure Landfill all waste that was awaiting treatment. Presumably, this storage capacity would have been needed as soon as the business started in earnest.

[199] The Tribunal has also concluded that it is more likely than not that the Vendors would have had an approved operations plan by the end of October 2010 and that the three months of preparatory work, which Ken Watson testified was needed before the Babkirk Facility could accept waste, would have been substantially completed by the end of October 2010.

[200] This means that in the spring of 2011, the Vendors would have been able to accept waste for bioremediation. However, since generators had advised that they would not tip until a Secure Landfill was available, it is unlikely that any meaningful quantity of waste would have been delivered. Construction of the half cell of Incidental Secure Landfill would have begun as soon as the construction season opened in June 2011. Accordingly, given that the evidence showed that the construction would take three or four months, the Tribunal has concluded that the Babkirk Facility would have been fully operational by October 2011.

[201] The evidence establishes that the Vendors felt that a twelve month period was needed to see how well bioremediation would work. The Tribunal therefore considers it reasonable to project that the Vendors would have carried on with bioremediation as their principal focus through the fall of 2012. However, the Tribunal has also concluded that, notwithstanding Ken Watson's contacts and his experience with bioremediation, the Vendors' bioremediation business would have been unprofitable for the reasons discussed below.

[202] There would have been few if any customers for two reasons. First, while the evidence showed that there is a significant amount of treatable soil on drilling sites in the area around the Babkirk Facility, the bioremediation that presently occurs is done by generators on their own sites. There was no evidence that any companies are paying to transport waste to offsite bioremediation facilities in NEBC. Although Ken Watson testified that he expected that CNRL, Encana, and Bonavista would be interested in disposing of their waste in this fashion and, although Petro-Canada had been interested, the Vendors did not call evidence from any prospective customers to say that they would be prepared to truck their waste to the Babkirk Facility for bioremediation. Further, the Vendors provided the Commissioner with a list of potential customers and [CONFIDENTIAL] was first on that list. However, Mr. [CONFIDENTIAL], Vice-President, Operations at [CONFIDENTIAL], testified for the Commissioner that [CONFIDENTIAL] philosophy is "going to landfill". In other words, his company was not a significant potential customer for the Vendors' bioremediation facility.

[203] Second, the Vendors testified that the Tipping Fees they would charge for bioremediation would be significantly higher than Silverberry's Tipping Fees for Secure Landfill services. It is difficult to imagine that generators with waste that could be bioremediated on their own sites would pay large sums to transport their Hazardous Waste to Babkirk and tip there at rates higher than those at Silverberry, given that they could continue to bioremediate on their own sites or tip for less at Silverberry.

[204] Further, there was no evidence from any potential purchasers who might have bought treated waste from Complete for use as cover for municipal dumps or as backfill for excavations. It does not appear that any such sales would have been available to generate revenue for Complete.

[205] It is not clear how long the Vendors would have been prepared to operate on an unprofitable basis, without beginning to accept more waste at the Secure Landfill part of the Babkirk Facility. In their final written submissions, the Vendors ask the Tribunal to assume that they would have incurred losses for two years before they decided that their venture had failed.

[206] However, the Tribunal has concluded that, because there was no evidence that the Vendors have deep pockets or significant borrowing power, it is unreasonable to suppose that they would have been prepared to operate unprofitably beyond the fall of 2012, when they could have generated additional revenues by accepting more waste into the Secure Landfill part of their facility.

[207] Accordingly, it is the Tribunal's view that the Vendors would have started to operate a Full Service Secure Landfill at least by the spring of 2013. In other words, they would have

begun to accept significant quantities of Hazardous Waste for direct disposal into Babkirk's Secure Landfill, in competition with CCS. In the alternative, they would have sold Complete or BLS to a purchaser which would have operated a Full Service Secure Landfill. Given that the Vendors had a valuable and scarce asset and given the evidence that demand for Secure Landfill services has, for some time, been projected to increase as new drilling is undertaken in the area north and west of Babkirk, the Tribunal is satisfied that such a sale would have been readily available to the Vendors. Finally, whether Babkirk was operated by the Vendors or a new owner, Babkirk and Silverberry would have become direct and serious competitors by no later than the spring of 2013.

[208] We have reached this conclusion notwithstanding CCS' submission that the Vendors' lack of experience and the smaller capacity of the Babkirk Facility would have constrained it from functioning as a serious competitor. In our view, as they had done in the past when they retained IRTL, the Vendors would have hired experts, if needed, to redress their lack of expertise. Moreover, 750,000 tonnes of permitted capacity was sufficient to allow the Vendors or a purchaser to compete effectively with CCS at Silverberry.

[209] To summarize, the Tribunal has decided that it is likely that the Vendors would have operated a bioremediation treatment facility with an Incidental Secure Landfill for approximately one year from October 2011 to October 2012 (the "Initial Operating Period"). Thereafter, in the spring of 2013, the Babkirk Facility would have become a Full Service Secure Landfill.

[210] Turning to the impact of these developments, it is the Tribunal's view that, as soon as the half cell of the Secure Landfill capacity at the Babkirk Facility was operational in October of 2011, waste generators who tipped at Silverberry would have seen that there was a potential alternative to Silverberry at the Babkirk Facility. The Tribunal cannot predict what would actually have happened. However, we can reasonably expect that, during the Initial Operating Period, some generators of Hazardous Waste would have asked the Vendors to take their waste for direct disposal, if only to use the possibility of disposing at Babkirk as a basis for negotiating lower Tipping Fees at Silverberry. This would have been possible because many oil and gas producers have one year non-exclusive contracts with CCS.

[211] As well, given that the Vendors would have needed revenue and given that it might have been convenient for some of their customers, it is reasonable to assume that the Vendors would have accepted at least some Hazardous Waste for direct disposal during the Initial Operating Period, in spite of their evidence that this was not their intention. This possibility was foreseen by Ron Baker when, in his cross-examination, he was asked about the decision matrix in the Operations Plan which reflected that soil which arrived and could not be bioremediated would be landfilled with other soil that could not be bioremediated. He said that, "if we had room", "chances are" such soil would be put in the Secure Landfill.

[212] The question is whether this competition afforded by Babkirk in the Initial Operating Period can be considered substantial. In *Director of Investigation and Research v. Tele-Direct (Publications) Inc.* (1997), 73 C.P.R. (3d) 1, the Tribunal addressed the question of the potential importance of a small amount of competition, in the course of examining the impact on Yellow

Pages consultants of Tele-Direct's discriminatory anti-competitive practices. In that case, the Tribunal was considering whether there had been a substantial lessening of competition.

[213] The Tribunal heard evidence that consultants, who charged fees to place Yellow Pages advertisements, had lost time and money and that their ability to attract new customers had been damaged by Tele-Direct's conduct. The Tribunal also found that, although the consultants only occupied a small segment of the market and had a limited and fragile ability to compete with Tele-Direct, they had had a significant positive influence on the level of service Tele-Direct provided to customers who were purchasing yellow pages advertisements. In this context the Tribunal stated at paragraph 758:

Where a firm with a high degree of market power [Tele-Direct] is found to have engaged in anti-competitive conduct, smaller impacts on competition resulting from that conduct will meet the test of being "substantial" than where the market situation was less uncompetitive to begin with. In these circumstances, particularly Tele-Direct's overwhelming market power, even a small impact on the volume of consultants' business, of which there is some evidence, by the anti-competitive acts must be considered substantial.

[214] In contrast, in this case, the Tribunal has concluded that the competition offered by the Babkirk Facility in the Initial Operating Period would likely have had no material, let alone significant, impact on pricing at Silverberry, because any competition would have been offered on an extremely small scale. In our view, during the Initial Operating Period, Silverberry could have ignored any requests by customers for lower prices because the Babkirk Facility would not have been a viable alternative for the volumes of Hazardous Waste oil and gas producers tipped at Silverberry. This means that the prevention of any competition that would have developed in the Initial Operating Period would not have been "substantial".

[215] Turning to the spring of 2013, the competition that would have been offered by Babkirk as a Full Service Secure Landfill would have been direct and substantial and, as discussed below, it is this competition that was substantially prevented by the Merger.

B. What are the Relevant Assessment Factors?

Conditions of Entry

[216] The conditions of entry into a relevant market can be a decisive factor in the Tribunal's assessment of whether a merger is likely to prevent or lessen competition substantially. This is because, "[i]n the absence of significant entry barriers it is unlikely that a merged firm, regardless of market share or concentration, could maintain supra-competitive pricing for any length of time" (*Hillsdown*, above, at 324; see also *Propane 1*, above, at para. 127).

[217] To be effective, entry must be timely, likely and sufficient to ensure that any prevention of future competition will not be substantial.

[218] CCS maintains that the evidence in this case is that the Secure Landfill business is not characterized by significant entry barriers and that the conditions for entry are conducive for potential competitors. In this regard, CCS asserts that (i) the regulatory regime is permissive, as evidenced by the fact that a number of permits to operate a Secure Landfill have been granted in NEBC in recent years, (ii) there is a growing market in the NEBC region for oil and gas drilling and related services, coupled with a growing demand and pressure for socially responsible waste management alternatives, and (iii) the industry practice of engaging in short-term contracts is conducive to entry. CCS further asserts that the Commissioner's reliance on the fact that BLS took nearly four years to obtain its Secure Landfill permit is misplaced, most importantly because BLS did not pursue concurrent permitting. Concurrent permitting allows an applicant to pursue applications for EA Certificates and an MOE Permits (together the "Authorizations") in tandem. CCS also asserts that entry is much less time consuming if a remote area near Babkirk is selected. Thus, attempts to develop secure landfills in populated areas around Dawson Creek should not be accepted as precedents for the timing that entry might involve near Babkirk.

[219] Among other things, prior to seeking the Authorizations, a new entrant must spend several months selecting a site from among various potential sites. This involves drilling test holes to determine whether the site's subsurface characteristics are appropriate for Secure Landfilling. If so, a further assessment is undertaken which involves drilling multiple test holes and installing monitoring equipment. There is no evidence about the time needed to complete only a site selection. However, [CONFIDENTIAL] spent 15 to 18 months on site selection and the preparation of an application for a potential landfill.

[220] Once a potential entrant has completed the site selection described above, it must then obtain the required Authorizations. The evidence is that this process would likely take at least 18-24 months and that a further 3 to 4 months are needed for construction.

[221] Notwithstanding the time and money (\$1.3 million) it spent during the development process, as described earlier, SES abandoned its plans to open the Heritage landfill and, after spending \$885,000.00, CCS abandoned its proposed Sunrise Landfill in NEBC, due to opposition from local residents. These two incidents of site abandonment by knowledgeable industry participants underscore the risk and uncertainty associated with new entry, as well as the "sunk" nature of the entry costs in the event that an entry initiative is unsuccessful.

[222] Based on this evidence, the Tribunal has concluded that, even in a remote location and even with concurrent permitting, it would take a new entrant at least 30 months to complete the process of selecting a new site, obtaining the required Authorizations and constructing a new Secure Landfill. That said, the Tribunal notes that there is no evidence of any proposed entry in the Contestable Area.

Absence of Acceptable Substitutes/Effective Remaining Competition

[223] For the reasons given earlier, the Tribunal is satisfied that, for some product and for some generators, bioremediation does not compete in the same market as the supply of Secure Landfill services and does not exercise any constraining influence on price or non-price competition within the latter market.

[224] This conclusion is supported by the fact that CCS' Tipping Fees are significantly higher in areas where it does not face competition from other Secure Landfill operators, than they are in areas where CCS does face such competition. In addition, the "natural experiment" that occurred when SES opened its facility in Willesden Green Alberta, and CCS substantially reduced its Tipping Fees to seven of its significant customers, strongly suggests that CCS' pricing behaviour is primarily determined by reference to the location of competing suppliers of Secure Landfill services, rather than by competition with suppliers of bioremediation services.

[225] Dr. Baye provided extensive evidence with respect to CCS' alleged ability to price discriminate in order to show that it had market power. However, given the foregoing and because CCS is a monopolist in the relevant market and is not constrained by any actual or potential competition from within or outside the market, it is clear that CCS has significant market power. This conclusion is further supported by the discussion of countervailing market power immediately below. For this reason, it is not necessary to consider the allegation of price discrimination.

Countervailing Power

[226] CCS correctly notes that none of its customers have complained about the Merger. CCS encourages the Tribunal to infer from this that the Merger is not likely to prevent competition substantially. However, the Tribunal is not persuaded that this is a reasonable inference.

[227] The Tribunal recognizes that CCS' largest customers pay lower Tipping Fees than its smaller customers. However, the Tribunal notes that Dr. Baye's report indicates that even CCS' largest customers are forced to pay higher Tipping Fees in areas where CCS faces no competition than in areas where such competition exists and this evidence was not contested. In 2010, the average Tipping Fees at Silverberry and Northern Rockies were [CONFIDENTIAL] and [CONFIDENTIAL] respectively. However, Tipping Fees at CCS' South Grande Prairie [CONFIDENTIAL] and Rocky [CONFIDENTIAL] in Alberta were significantly lower because they both face competition from SES. This no doubt explains why Mr. [CONFIDENTIAL], who testified for the Commissioner, made it clear in his testimony that he would welcome competition for CCS in NEBC.

[228] The attenuated or limited nature of any countervailing power that may be in the hands of CCS' largest customers is also reflected in the evidence that written requests by them for price relief were rejected by CCS during the industry downturn in late 2008 and early 2009.

C. Conclusions

[229]

- (i) Based on all of the foregoing, the Tribunal has concluded that the Merger is likely to prevent competition substantially. The Merger prevented likely future competition between the Vendors and CCS in the supply of Secure Landfilling services in, at the very least, the Contestable Area. Although the

competition that was prevented in 2012 is not likely to be substantial, the Tribunal is satisfied that by no later than the spring of 2013, either the Vendors or a party that purchased the Babkirk Facility would have operated in direct and serious competition with CCS in the supply of Secure Landfill services in the Contestable Area.

- (ii) In estimating the magnitude of the likely adverse price effects of the Merger, the Commissioner relied on expert evidence adduced by Dr. Baye. That evidence included economic theory and regression models. However, for reasons discussed below the Tribunal has not given significant weight to that economic theory or to those regression models in assessing the magnitude of the likely adverse price effects of the Merger. In reaching this decision, the Tribunal took into account the fact that the models do not control for costs, and the fact that, although Dr. Baye acknowledged that his theory of spatial competition should only be used if other data were unavailable, he used his theory even though he had actual CCS data.
- (iii) Nevertheless, as discussed below in connection with the “effects” element of section 96, the Tribunal is satisfied that prices likely would have been at least 10% lower in the Contestable Area in the absence of the Merger.
- (iv) The Tribunal therefore finds that the Merger is more likely than not to maintain the ability of CCS to exercise materially greater market power than in the absence of the Merger, and that the Merger is likely to prevent competition substantially.

ISSUE 7 WHEN THE EFFICIENCIES DEFENCE IS PLEADED, WHAT IS THE BURDEN OF PROOF ON THE COMMISSIONER AND ON THE RESPONDENT?

[230] CCS has alleged that the Commissioner failed to properly discharge her burden to prove the extent of the quantifiable effects of the Merger. CCS alleges that the Commissioner’s failure to prove those effects in her case in chief has precluded CCS from being able to meet its overall burden to prove the elements of the efficiencies defence on a balance of probabilities. CCS asserts that the Commissioner’s failure means that the effects should be zero and that the Application should therefore be dismissed.

[231] In paragraph 48 of its response to the Commissioner’s Application, CCS pleaded the efficiencies defence in the following terms:

The Acquisition has brought about or is likely to bring about gains in efficiency that will be greater than, and will offset, the effects of any prevention of competition that will result from the Acquisition, and the gains in efficiency will not likely be attained if the requested order or orders are made by the Tribunal.

[232] The burdens of proof under section 96 were established and applied over the course of the four decisions in *Propane (Propane 1*, at para. 48, rev’d on other grounds 2001 FCA 104, [2001] 3 F.C. 185 (“*Propane 2*”), leave to appeal to SCC refused, 28593 (September 13, 2001),

redetermination, *The Commissioner of Competition v. Superior Propane Inc.*, 2002 Comp. Trib. 16, 18 C.P.R. (4th) 417 (“*Propane 3*”), aff’d 2003 FCA 53, [2003] 3 F.C. 529 (“*Propane 4*”). “The effects of any prevention or lessening of competition” must be demonstrated by the Commissioner on balance of probabilities (*Propane 1*, above, at para. 402; *Propane 2*, above, at para. 177, *Propane 4*, at para. 17). Her burden is to prove (i) the extent of the *anti-competitive* effects in question where they are quantifiable, even if only roughly so (*Propane 4*, at paras. 35-38), and (ii) any non-quantifiable or qualitative *anti-competitive* effects of the merger. It also includes the burden to demonstrate the extent of any *socially adverse* effects that are likely to result from the merger, i.e., the proportion of the otherwise neutral wealth transfer that should be included in the trade-off assessment contemplated by section 96, as well as the weighting that should be given to those effects (*Propane 4*, above, at paras. 35-38, and 61-64). In this case, there being no socially adverse effects, the term “Effects” will be used to described quantifiable and non-quantifiable anti-competitive effects.

[233] That said, the respondents bear the burden on the ultimate issue, namely, that the efficiency gains are likely to be greater than, and to offset, the effects of any prevention or lessening of competition likely to result from the merger (*Propane 2*, above, at para. 154).

[234] There is no dispute about the fact that, in his expert report in chief, Dr. Baye only calculated that an average price decrease of at least 10% would be prevented by the Merger. This meant that CCS did not have a figure for the Effects and was obliged to serve its expert report on efficiencies with no ability to take a position about whether the number it calculated for its total efficiencies was greater than the Effects. As a result, CCS maintains that, as a matter of substantive and procedural fairness, it was effectively denied a right of response and the ability to properly meet its own burden under section 96. It therefore asserts that the Tribunal should conclude that there are no quantified Effects as a result of the Merger.

[235] Dr. Baye did eventually quantify the Effects but not until he wrote his reply report, which was only made available to CCS two weeks before the hearing. By then, the Tribunal’s Scheduling Order did not permit CCS to bring a motion or file a further expert report. In addition, the Tribunal accepts that, in practical terms, there was insufficient time before the hearing to permit CCS to move to strike Dr. Baye’s report or to seek leave to file a further report in response to the Commissioner’s quantification of the Effects.

[236] The Commissioner maintains that her substantive burden to quantify the Effects only arises once a respondent advances its affirmative defence by proving efficiencies. She submits that any other result would require her to respond to every bald assertion of efficiencies, regardless of whether a respondent actually relies on efficiencies at the hearing. She asserts in her final written argument that this “would be an incredible waste of resources, and one that is antithetical to the notion of responding to an affirmative defence”.

[237] In the Tribunal’s view, the Commissioner’s argument about resources does not justify her failure to meet her burden to prove the Effects as part of her case in chief. Once CCS pleaded section 96, the efficiencies defence became part of the fabric of the case and, if it had not been pursued by CCS, the Commissioner would have been entitled to costs fully compensating her for work done by her experts to calculate the Effects.

[238] The Commissioner also defended her approach by stating that, until CCS served Dr. Kahwaty's report on efficiencies ("Efficiencies Report"), it was an open question whether it was going to pursue the efficiencies defence at all. In this regard, she noted that prior to serving that report, CCS advanced no facts or proof of efficiencies, and provided no guidance on the types of efficiencies that Dr. Kahwaty planned to identify and quantify. She also observed that the Tribunal's Revised Scheduling Order, dated August 19, 2011, indicated that CCS might not pursue the efficiencies defence.

[239] The revised scheduling order required the "Corporate Respondents to serve expert reports, *if any*, on efficiencies and provide them to the Tribunal" on or before October 7, 2011 (our emphasis). However, since the phrase "if any" was proposed by the Commissioner and not by CCS, the Tribunal does not accept that it suggests that CCS had resiled from its pleading.

[240] In addition, the Tribunal can find no basis in the record for concluding that CCS did not intend to mount the efficiencies defence. The Tribunal notes that the Commissioner asked questions about efficiencies during examination for discovery and asked, during a case management teleconference on August 15, 2011, that CCS be ordered to produce documents relevant to the issue. During that teleconference, the Presiding Judicial Member stated that efficiencies were at issue and that, if relevant documents existed, their production was required.

[241] Given the pleading of section 96 and these developments, the Tribunal concludes that there was no reason to doubt that CCS would pursue an efficiencies defence.

[242] The Commissioner further asserts that the legislation and the case law do not dictate how she must meet her burden to prove the extent of the Effects. She submits that she is not obliged in every case to lead evidence about demand elasticities and provide detailed calculations about the range of likely Effects. This is particularly so in a case such as this in which she asserts that the efficiencies are "plainly so minimal that it was an open question whether [the efficiencies defence would even be pursued]".

[243] The Tribunal acknowledges that the legislation and the jurisprudence do not dictate how the Commissioner must meet her burden. However, as noted above, where it is possible to quantify the Effects of a merger, even if only in "rough" terms, the Commissioner has the onus to provide an estimate of such Effects (*Propane 4*, above, at paras. 35 – 38).

[244] Indeed, where the necessary data can be obtained, the Commissioner will be expected in future cases to provide estimates of market elasticity and the merged entity's own-price elasticity of demand in her case in chief. These estimates facilitate the calculation of the magnitude of the output reduction and price effects likely to result from the merger. They are also necessary in order to calculate the deadweight loss ("DWL") that will likely result from the output reduction and related price effects. DWL is the loss to the economy as a whole that results from the inefficient allocation of resources which occurs when (i) customers reduce their purchases of a product as its price rises, and shift their purchases to other products that they value less, and (ii) suppliers produce less of the product.

[245] Given that there will often be shortcomings in the data used to estimate market elasticities and the merged entity's own-price elasticity of demand, prudence dictates that a range of plausible elasticities should be calculated, to assist the Tribunal to understand the sensitivity of the Commissioner's estimates to changes in those elasticities. The Tribunal will be open to making its assessment of the quantitative extent of the Effects on the basis of persuasively supported "rough estimates" of those Effects, but only if the data required to reliably estimate elasticities cannot reasonably be obtained. Such rough estimates may be derived from evidence with respect to the magnitude of the likely price effects of the merger, including statements or projections made in the internal documents of the respondent or its advisors (including its investment bankers); persuasive estimates by customers, other lay witnesses, or expert witnesses; and persuasive evidence from "natural experiments."

[246] Although the Commissioner failed to meet her burden, in the unusual circumstances of this case, CCS was not prejudiced by that failure because, instead of doing the required independent analysis of elasticities, Dr. Baye relied on his assumed price decrease of at least 10% and on certain assumptions used by Dr. Kahwaty in calculating CCS' claimed market expansion efficiencies. In making that calculation, Dr. Kahwaty assumed that the opening of a Secure Landfill at Babkirk would lead waste generators to dispose of approximately [CONFIDENTIAL] additional tonnes of Hazardous Waste, as forecast in CCS' internal documents. Further, during the hearing, Dr. Kahwaty was able to effectively attack Dr. Baye's DWL calculations on various grounds, including his failure to base them on conventional calculations of elasticities when he could have obtained the data necessary to perform those calculations. In short, CCS was able to effectively assert the defence and argue that the efficiencies its expert presented were greater than the Effects (i.e. the DLW) calculated by Dr. Baye. For these reasons, the Tribunal declines to dismiss the Application.

[247] There is a second reason why CCS' request is being denied. CCS was also required to show that the cognizable efficiencies would be likely to *offset* the Effects. This means that even if the Tribunal had accepted CCS' submission that a zero weighting should be given to the quantifiable Effects, it would not necessarily follow that the Tribunal would find that the *offset* element of section 96 has been established on a balance of probabilities.

[248] This is so for two reasons. First, as noted in *Propane 3*, above, at para. 172, "it cannot be concluded that the Tribunal would find that efficiency gains (whether large or small) that marginally exceeded the effects (whether large or small) would necessarily offset those effects." This is because the loss of dynamic competition will always merit some non-trivial qualitative weighting in the trade-off assessment. Indeed, dynamic efficiencies and dynamic Effects can have a major impact on the trade-off assessment. Second, in this case, the Commissioner adduced evidence of *qualitative* Effects in Dr. Baye's expert report in chief. As well, CCS adduced evidence of qualitative efficiencies, such as improved service, reduced risk for customers and the environment, which put in play the issue of whether a substantial prevention of competition likely would adversely impact upon these matters.

[249] Accordingly, the Commissioner's failure to meet her burden to quantify the Effects, even in rough terms, at the appropriate time is not a sufficient reason to conclude that CCS is relieved of its obligation to meet its burden to meet the "offset" element in section 96.

ISSUE 8 HAS CCS SUCCESSFULLY ESTABLISHED AN EFFICIENCIES DEFENCE?

What are the Claimed Efficiencies?

[250] We now turn to summarizing the efficiencies claimed by CCS. In that regard, Dr. Kahwaty testified on behalf of CCS that the Merger would likely result in efficiencies that he grouped into the following five categories.

[251] **Transportation efficiencies:** These were described as being productive efficiencies realized by those customers presently serviced at Silverberry, who have an aggregate of [CONFIDENTIAL] locations that are situated closer to the Babkirk Facility than to Silverberry. Once CCS opens the Babkirk as a Secure Landfill, those customers will realize significant transportation cost savings, thereby freeing up resources for other uses. Based on what he described as the “going rate” of approximately [CONFIDENTIAL] for trucking services, the number of loads shipped from each of the above-mentioned [CONFIDENTIAL] locations in 2010, and the time saved by tipping at Babkirk instead of Silverberry, Dr. Kahwaty estimated the annual aggregate transportation cost savings for the aforementioned customers to be [CONFIDENTIAL]. Using a lower trucking rate of [CONFIDENTIAL] per hour per load (or \$5 per tonne per hour of transport), Dr. Kahwaty provided a second estimate of those annual transportation cost savings, which totaled [CONFIDENTIAL]. Dr. Kahwaty also calculated that his two estimates represented approximately [CONFIDENTIAL] and [CONFIDENTIAL] respectively of CCS’ 2010 revenue derived from the [CONFIDENTIAL] customer locations in question.

[252] **Market expansion efficiencies:** Dr. Kahwaty stated that, absent the opening of a Secure Landfill at Babkirk, a significant volume of existing Legacy Waste and newly generated Hazardous Waste, within the drawing area of the Babkirk Facility, would not have been transported to Silverberry due to the significant risk, and related financial liability, that would be associated with transporting such waste over the long distance to Silverberry. However, with the opening of a Secure Landfill at the Babkirk Site, CCS estimated that approximately [CONFIDENTIAL] tonnes per year of such waste (“Market Expansion Waste”) likely would be transported for disposal at Babkirk. Dr. Kahwaty acknowledged that this estimate is “necessarily imprecise,” and suggested that the incremental volume of Market Expansion Waste could substantially exceed CCS’ estimate of [CONFIDENTIAL] tonnes per year. Based on the reported margin for Silverberry in 2009 of [CONFIDENTIAL] and a price of [CONFIDENTIAL] per tonne, Dr. Kahwaty estimated an increase in producer surplus from this incremental volume of [CONFIDENTIAL]. In addition, based on an estimated reduction in disposal costs of [CONFIDENTIAL] per tonne, Dr. Kahwaty estimated that customers would gain approximately [CONFIDENTIAL] per year in consumer surplus. This is only 50% of the product of multiplying [CONFIDENTIAL] by [CONFIDENTIAL], because Dr. Kahwaty felt that customers do not gain the full reduction in the costs of disposal when they are induced to dispose of their waste by virtue of a lower overall cost of disposition. The sum of the estimated [CONFIDENTIAL] in producer surplus gains and the estimated [CONFIDENTIAL] in consumer gains, was a total of [CONFIDENTIAL] of annual market expansion efficiencies.

[253] **Overhead Efficiencies:** Dr. Kahwaty estimated that the Merger would result in annual overhead savings of approximately [CONFIDENTIAL]. He stated that these savings likely would be achieved by virtue of the fact that CCS could draw upon its existing administrative staff (e.g., those persons who deal with legal, regulatory, marketing, engineering, financial and health & safety matters) in operating the Babkirk Facility. In the absence of the Merger, he stated that the Vendors likely would have had to incur expenses associated with these functions. In reaching his estimate of [CONFIDENTIAL], Dr. Kahwaty used the cost reductions that CCS has achieved in operating Complete's Roll-off Bin Business as a proxy. In addition, he submitted that some "qualitative" credit should be given to this category of efficiencies, because Complete would otherwise need to expend resources developing administrative systems and to deal with some of the matters identified above.

[254] **Roll-off Bin Business Efficiencies:** Dr. Kahwaty estimated that CCS's Merger of the Roll-off Bin Business has resulted in annual cost savings of approximately [CONFIDENTIAL]. These savings were described as having been achieved as a result of (i) the upgrading of its trucks to meet higher safety standards, (ii) investments in business development efforts, and (iii) the absorption of administrative functions, such as billing, into CCS' pre-existing corporate systems.

[255] **Qualitative efficiencies:** Dr. Kahwaty listed the following qualitative efficiencies as being likely to result from the Merger:

- a. the landfill services to be offered by CCS at the Babkirk Site will be of higher (and known) quality and involve less risk for customers due to CCS's knowledge and experience in the operation and management of hazardous waste landfills;
- b. customers will benefit from being able to purchase bundled packages of services that may include, for example, loading, trucking and tipping services;
- c. the landfill services to be offered by CCS at the Babkirk Site will reduce risks for customers due to CCS's substantial financial resources, which provide assurance to customers regarding the long-term management of the Babkirk Facility and the potential continuing liability for wastes disposed in that landfill;
- d. CCS will have the capability and resources necessary to expand the Babkirk Facility as necessary and to meet special customer needs (e.g., rapid responses to increased disposal needs);
- e. since landfilling is CCS' business and since the Vendors were not planning to operate a Secure Landfill, CCS will promote landfilling services to a greater extent than the Vendors would have done, once the Babkirk Site is operational, making trucking cost efficiencies available to more customers;
- f. the provision of Secure Landfill services by CCS at the Babkirk Site will reduce risks for generators, trucking firms, and other road users related to the transportation of Hazardous Waste on roads over long distances;
- g. increased competition in the Roll-off Bin Business will benefit roll-off customers and may reduce the extent of any DWL in the roll-off industry, which will increase the total surplus generated in the roll-off marketplace; and
- h. increased site remediation from reduced trucking costs will benefit area residents, wildlife, and the overall environment, and will also further the government's policy of expanding contaminated site remediations.

[256] Dr. Kahwaty also stated that some or all of the efficiencies identified above would likely be achieved sooner by CCS than by Complete or by any third-party who might acquire the Babkirk Facility pursuant to an order of the Tribunal.

[257] In addition, Dr. Kahwaty stated that CCS should be given credit for some of the efficiencies that it has already achieved in respect of the Roll-off Bin Business.

[258] Finally, Dr. Kahwaty provided reasoned estimates about the extent to which the above-mentioned trucking and market expansion efficiencies would increase under market growth scenarios of 1%, 2% and 4% compounded annually over the next 10 years. Based on this work, he suggested that these increased efficiencies ought to be considered by the Tribunal.

[259] After providing his annual estimates of the quantifiable efficiencies, Dr. Kahwaty calculated the net present value of those efficiencies as of January 1, 2012 using three different discount rates: (i) a risk-free interest rate of 1%, which he described as being the annual yield on one to three year government of Canada marketable bonds over the 10 week period preceding the date of his report (October 7, 2011); (ii) an interest rate of 10%, which he described as being “roughly equivalent to rates prevailing in the oil and gas industry”; and (iii) an intermediate rate of 5.5%.

[260] The Tribunal accepts the evidence of Mr. Harrington, the Commissioner’s expert, that, in broad terms, the discount rate used in calculating the net present value of efficiencies typically does not matter, so long as the same discount rate is used to calculate the net present value of the Effects. That said, the Tribunal also accepts Mr. Harrington’s evidence that, (i) as a general principle, the appropriate discount rate to use in discounting a set of future cash flows is a function of the risk of those cash flows being wrong, (ii) there is some uncertainty associated with the efficiencies identified and estimated by Dr. Kahwaty and CCS, and therefore (iii) the midpoint (5.5%) of the three discount rates identified by Dr. Kahwaty is the most defensible of the three rates to use in calculating efficiencies and Effects in this case.

The assessment of the claimed efficiencies

[261] In the initial stage of assessing efficiencies claimed under section 96 of the Act, the Tribunal applies five screens to eliminate efficiencies that are not cognizable under that section.

[262] The first screen eliminates claims that do not involve a type of productive or dynamic efficiency, or that are not otherwise likely to result in any increase in allocative efficiency. The second screen narrows the claimed efficiencies to those that the Tribunal is satisfied are *likely* to be brought about by the Merger. Efficiencies that cannot be demonstrated to be more likely than not to be attained in the Merger are filtered out at this stage. The third screen filters out claimed efficiency gains that would be brought about by reason only of a redistribution of income between two or more persons, as contemplated by subsection 96(3). These types of gains include savings that result solely from a reduction in output, service, quality or product choice, as well as from increases in bargaining leverage and reductions in taxes. The fourth screen filters out claimed efficiency gains that would be achieved outside Canada and would not flow back to

shareholders in Canada as well as any savings from operations in Canada that would flow through to foreign shareholders.

[263] In the case at bar, the application of the first four screens does not result in the elimination of any of the claimed efficiencies.

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

[265] In this case, the fifth screen eliminates most of the efficiencies claimed by CCS. With three exceptions, being the one year of transportation efficiencies and the one year of market expansion efficiencies discussed at paragraph 269 below, as well as the overhead efficiencies discussed above, virtually all of the efficiencies claimed by CCS would likely be achieved even if the order referred to in the preceding paragraph is made. That order is an order for the divestiture of the shares or assets of BLS (the “Order”).

[266] Although there is currently some uncertainty regarding the identity of a prospective purchaser, the Tribunal is satisfied that a divestiture will ultimately be made to a purchaser who will operate the Babkirk Facility and attract essentially the same volumes of Hazardous Waste as were assumed by Dr. Kahwaty in arriving at his estimates of transportation and market expansion efficiencies.

[267] The Tribunal has decided that, absent exceptional circumstances, it will not be prepared to conclude that the claimed efficiencies that would be realized by any acceptable alternative purchaser should be included in the trade-off assessment, on the basis that it is not possible to identify any particular *likely* purchaser of the shares or assets contemplated by the divestiture order.

Transportation and Market Expansion Efficiencies

[268] Based on the reasonable assumption that a purchaser under the Order will emerge and attract, in its first year of operation, the volume of Hazardous Waste that formed the basis for Dr. Kahwaty’s estimates of CCS’ claimed transportation and market expansion efficiencies, those efficiencies cannot be considered in the section 96 assessment because they are likely to be achieved even if the Order is made.

[269] A noteworthy exception to this conclusion concerns the transportation and market expansion efficiencies that CCS claims would be achieved more quickly by CCS than by a purchaser. In this regard, CCS asserted that it would already have been operating at Babkirk but for the Commissioner’s intervention and that, in any event, it is likely to be in a position to operate a Secure Landfill at the Babkirk Site by the summer of 2012. In contrast, CCS stated that a purchaser following a divestiture is unlikely to be in a position to operate a Secure Landfill facility at the Babkirk Site before mid-2013, having regard to the time required (i) for the

Tribunal to render a decision in this proceeding, (ii) to effect the actual sale of the shares or assets of BLS (which it estimates to will require “at least six months, or more,” inclusive of due diligence), (iii) to modify or prepare an operations plan for the landfill, (iv) for the MOE to approve the operations plan, and (v) for the purchaser to construct the landfill, bearing in mind that construction can only be undertaken between June and September.

[270] In the Tribunal’s view, claimed efficiencies that would not likely be achieved by a purchaser under the Order, but that would likely be achieved by CCS solely because of the types of delays identified immediately above and associated with the implementation of the Order, are not cognizable efficiencies under section 96. These will be described as “Order Implementation Efficiencies”. In the case at bar, CCS and the Vendors completed the Merger after being advised that the Commissioner intended to apply to the Tribunal. To give the Respondents the benefit of Order Implementation Efficiencies in such circumstances, and thereby potentially preclude the Tribunal from issuing the Order in respect of their anticompetitive Merger, would be contrary to the purposes of the Act.

[271] In any event, even if CCS were given full credit for the Order Implementation Efficiencies, those efficiencies are only likely to be between [CONFIDENTIAL] and [CONFIDENTIAL] (which represents one year of transportation cost savings) plus [CONFIDENTIAL] (which represents one year of annual market expansion efficiencies). As discussed below in connection with the Tribunal’s treatment of the “offset” element of section 96, these efficiencies are not sufficient to change the Tribunal’s overall determination with respect to section 96.

The Roll-off Bin Business Efficiencies

[272] The divestiture of the shares or assets of BLS will not have any impact on the Roll-off Bin Business efficiencies claimed by CCS. Stated alternatively, those efficiencies will likely be attained even if the Order is made. Accordingly, those efficiencies cannot be considered in the trade off assessment contemplated by section 96.

[273] CCS has also submitted that certain productive efficiencies have already been achieved as a result of (i) its upgrading and sale of trucks to meet higher safety standards and to operate more efficiently, and (ii) CCS having absorbed certain administrative functions into its pre-existing corporate functions. However, as Mr. Harrington testified on behalf of the Commissioner, these efficiencies would only be lost if CCS were required to divest the Roll-off Bin Business. Given that the Order does not include the Roll-off Bin Business, those efficiencies will not be affected by the Order as contemplated by subsection 96(1) of the Act. Accordingly, they are not cognizable. In any event, given the value of these efficiencies, which Dr. Kahwaty estimated to be approximately [CONFIDENTIAL], the Tribunal’s overall conclusion with respect to section 96, set forth below, would not change even if these efficiencies were given full value in the trade-off assessment.

[274] More generally, if certain efficiencies have already been achieved, they cannot be considered to be a potential “cost” of making the order contemplated by section 96. Therefore, they cannot be considered in the assessment under section 96. In other words, it cannot be said

that those efficiencies “would not likely be attained if the order were made,” as required by subsection 96(1).

The Overhead Efficiencies

[275] As has been noted, Dr. Kahwaty estimated that these efficiencies would likely total approximately [CONFIDENTIAL] per year. He arrived at this assessment by, among other things, using as a proxy the cost reductions that CCS has achieved in operating the Roll-off Bin Business. Those cost reductions amounted to approximately 21% of the overhead expenses that previously were incurred by Complete in operating the Roll-off Bin Business. Dr. Kahwaty applied this 21% to the overhead expenses incurred at Silverberry, to reach his estimate of approximately [CONFIDENTIAL] in annual overhead savings. Mr. Harrington took issue with this methodology, in part because the Roll-off Bin Business is different from the landfill business. In addition, he opined that if there is a divestiture, some of these savings, which he described as being equivalent to one-half of the annual cost of a full time back-office employee, would likely be achieved by the purchaser. The Tribunal is persuaded by this reasoning and therefore accepts Mr. Harrington’s conclusion that the annual overhead efficiencies which are cognizable under section 96 are reasonable but are probably somewhat less than the [CONFIDENTIAL] that CCS has claimed.

[276] As a practical matter, given the conclusion that the Tribunal has reached with respect to the “offset” element of section 96, discussed below, the fact that a more precise estimate of the cognizable overhead efficiencies is not available does not affect the Tribunal’s overall determination with respect to the efficiencies defence in section 96.

The Qualitative Efficiencies

[277] As discussed above, Dr. Kahwaty identified eight types of qualitative efficiencies that he claimed would likely result from the Merger. The Tribunal is not persuaded that any of these efficiencies “would not likely be attained if the Order were made,” as provided in subsection 96(1). Ultimately, the answer to that question is dependent upon the expertise, financial resources, and reputation of the purchaser under the Order. Given that the purchaser may well have the same expertise, financial resources and reputation as CCS, the Tribunal cannot give significant weight to these claimed efficiencies. Indeed, given that the purchaser will have to be approved by the Commissioner, the Tribunal is of the view that all, or virtually all, of these claimed efficiencies are likely to be achieved by that purchaser.

[278] Regardless of the identity of the purchaser, some of the types of qualitative efficiencies identified by Dr. Kahwaty will be achieved, including those related to the Roll-off Bin Business, the reduction of risks related to the transportation of Hazardous Waste over long distances and the increased site remediation that will benefit residents, wildlife, and the overall environment. In fact, to the extent that the Merger is likely to substantially prevent competition, as the Tribunal has found, we conclude that it is entirely appropriate to take into account, in the trade-off assessment, the likelihood that there will be less site clean-up and tipping of Hazardous Waste in

Secure Landfills than otherwise would have occurred if an Order were made. This will be described below when non-quantifiable effects are considered.

[279] The Tribunal concludes that the only efficiencies claimed by CCS that are cognizable under section 96 are a maximum of [CONFIDENTIAL] in annual overhead efficiencies, having a net present value of approximately [CONFIDENTIAL], using a discount rate of 5.5%.

[280] If, contrary to the Tribunal's conclusion, the Order Implementation Efficiencies are also cognizable under section 96, then it would be appropriate to include in the trade-off assessment further amounts of approximately [CONFIDENTIAL] to [CONFIDENTIAL] (i.e., one year of transportation cost savings) plus [CONFIDENTIAL] (i.e., one year of annual market expansion efficiencies).

What are the Effects for the Purposes of Section 96 of the Act?

[281] As CCS noted in its Final Argument, the total surplus approach remains the starting point in assessing the effects contemplated by section 96. Under that approach, the cognizable quantifiable efficiencies will be balanced against the DWL that is likely to result from a merger. In addition, the Tribunal considers any cognizable dynamic or other non-quantifiable efficiencies and *anti-competitive* Effects. Where there is evidence of important dynamic or other non-quantifiable efficiencies and anti-competitive effects, such evidence may be given substantial weight in the Tribunal's trade-off assessment.

[282] After the Tribunal has assessed the evidence with respect to the quantifiable (i.e., DWL) and non-quantifiable *anti-competitive* Effects of the merger, it will assess any evidence that has been tendered with respect to the other effects contemplated by section 96 and the purpose clause in section 1.1 of the Act. It is at this point that the Tribunal's assessment will proceed beyond the total surplus approach. In brief, at this stage of the Tribunal's assessment, it will determine whether there are likely to be any *socially adverse* effects associated with the merger. If so, it will be necessary to determine how to treat the wealth transfer that will be associated with any adverse price effects that are likely to result from the merger. In a merger among sellers of products, that wealth transfer will be from the merging parties' customers to the merged entity. Of course, to the extent that the merging parties' rivals may be likely to follow such price effects, the wealth transfer would need to be calculated across the sales or purchases of such rivals as well.

[283] The Tribunal expects that in most cases, it will be readily apparent that the wealth transfer should be treated as neutral in its analysis, because the socio-economic profiles of consumers and the merged entity's shareholders will not be sufficiently different to warrant a conclusion that the wealth transfer is likely to lead to *socially adverse* Effects. For greater certainty, the cognizable social Effects under section 96 do not include broader social effects, such as those related to plant-closings and layoffs (*Propane 1*, at para. 444).

[284] In these proceedings, the Commissioner adduced no evidence with respect to *socially adverse* effects. Indeed, in her Final Argument (at para. 208) she conceded that the Merger is not likely to result in any such effects, and that the wealth transfer should be treated as being neutral

in this case. Accordingly, the discussion below will be confined to *anti-competitive* effects. In other words, in making its determination under section 96 in the case at bar, the Tribunal will adopt the total surplus approach.

Quantifiable Effects

[285] Quantifiable *anti-competitive* Effects are generally limited to the DWL that is likely to result from a merger.

[286] In this case, the DWL is the future loss to the economy as a whole that will likely result from the fact that purchasers of Secure Landfill services in the Contestable Area will purchase less of those services than they would have purchased had the Tipping Fees for such services declined due to the competition that would likely have materialized between CCS and Babkirk operated as a Full Service Secure Landfill.

[287] The DWL that is likely to result from a merger is likely to be significantly greater when there is significant pre-existing market power than when the pre-merger situation is highly competitive (*Propane* 3, above, at para. 165). In the case at bar, as in *Propane*, the Commissioner did not adduce specific evidence of pre-existing market power, for example, with respect to the extent to which prevailing Tipping Fees exceed competitive levels. Therefore, the Tribunal is not in a position to quantify the impact that any such pre-existing market power likely would have on the extent of the DWL. Where, as in this case, the pre-existing market situation is characterized by a monopoly and the Tribunal is not provided with sufficient persuasive evidence to enable it to quantify the Effects associated with such market power, it will be open to the Tribunal to give qualitative weight to those Effects. Given the very limited nature of the cognizable efficiencies in this case, it has not been necessary for the Tribunal to attribute such a qualitative weighing to those Effects in making its determination under section 96.

[288] As discussed above, CCS submitted that the Tribunal should conclude that there are no quantifiable Effects as a result of the Merger, because the Commissioner did not lead any evidence with respect to such Effects until she served Dr. Baye's reply report, on November 4, 2011. The Tribunal has rejected that position because CCS was not ultimately prejudiced in this regard. The Tribunal will therefore proceed to address the evidence adduced in Dr. Baye's reply report. As will be noted below, the Tribunal is satisfied that CCS would not have met its burden under section 96, even if the quantifiable Effects had been deemed to be zero.

[289] At the outset of his reply report, Dr. Baye summarized a number of the conclusions set forth in his initial report, dated September 30, 2011. These included the following:

- a. the Merger likely prevents the prices for the disposal of Hazardous Waste generated in NEBC from falling significantly for many customers;
- b. the effects of the Merger are unlikely to be uniform across all customers in the relevant market; and
- c. the average reduction in the Tipping Fees throughout NEBC is likely to be at least 10%, but the effects are likely to be significantly higher for customers generating Hazardous

Waste in the vicinity near Babkirk and Silverberry and lower for customers located near the southern and northern boundaries of NEBC.

[290] The Tribunal is satisfied, on a balance of probabilities, that with the exception of the geographic extent of the Effects, the foregoing conclusions are supported by the weight of the evidence that it has found to be credible and persuasive. As to the geographic region over which the aforementioned Effects are likely to result from the Merger, the Tribunal finds that, at a minimum, such Effects are likely to extend throughout the Contestable Area identified by Dr. Kahwaty. Given the conclusions that the Tribunal has reached regarding the minimal nature of the efficiencies claimed by CCS, it is unnecessary to define the scope of the anti-competitive Effects with greater precision.

[291] As Dr. Baye explicitly noted, his conclusions were based on a range of different sources of information and economic analyses, rather than on any specific source of information or economic methodology. Those sources included CCS' internal documents and a "natural experiment." The Tribunal has not placed weight on the economic models that are set forth in Dr. Baye's reports, for example, the tipping fee and DiD regressions presented at exhibits 20 and 26 of his initial Report, which are also briefly discussed in his reply report. In the Tribunal's view, some of the assumptions underlying those models are questionable. The same is true of some of the outcomes of those models, such as the prediction of greater adverse price effects for customers located closer to Northern Rockies than to Babkirk. In the Tribunal's view, those predictions of Dr. Baye's models are counterintuitive and are not supported by the weight of the other evidence adduced in these proceedings.

[292] More generally, as noted above, Dr. Baye's models do not account for the opportunity cost that CCS would incur if it were to lower Tipping Fees to the 20 - 25% range necessary to attract business from customers located farthest away from Silverberry and Babkirk, respectively, as discussed at paragraphs six and seven of his reply report. The Tribunal is not persuaded that it would be in CCS' interest to reduce prices to that extent in the near future, and to thereby deplete its finite Secure Landfill capacity at Silverberry, assuming that CCS would likely be able to attract business at higher Tipping Fees further in the future to fill that capacity.

[293] Notwithstanding the fact that the Tribunal has found the models at exhibits 20 and 26 to be unreliable, we are satisfied, on a balance of probabilities, that competition from an independently owned and operated Full Service Secure Landfill at the Babkirk Site likely would result in CCS reducing its prices by an average of at least 10% for customers in the geographic market described above. This conclusion is based on evidence from CCS' own internal documents, evidence given by [CONFIDENTIAL] of [CONFIDENTIAL] and the transactions data pertaining to the "natural experiment" at Willesden Green modelled in Dr. Baye's DiD analysis.

[294] The internal CCS documents referenced above include:

- a. a slide presentation, dated August 26, 2010, which is attached at Exhibit K to Mr. D. Wallace's witness statement, [CONFIDENTIAL]

- b. an e-mail, dated July 15, 2010, sent by Trevor Barclay to Ryan Hotston and Lance Kile, [CONFIDENTIAL]
- c. a document, entitled [CONFIDENTIAL], containing several slides dated “3/9/2009/ [CONFIDENTIAL]
- d. a financial analysis prepared by Dan Wallace, attached to an e-mail dated March 31, 2010, and at Exhibit C to his witness statement, [CONFIDENTIAL]
- e. a document dated March 31, 2010, entitled [CONFIDENTIAL], attached at Exhibit D to Dan Wallace’s witness statement, [CONFIDENTIAL]
- f. a document, entitled [CONFIDENTIAL], dated September 15, 2009 and included at Tab 32 of the Parties’ Admissions Brief, [CONFIDENTIAL].

[295] Turning to evidence from customers, there was, as mentioned earlier, an unusual paucity of such evidence in this case. However, Mr. [CONFIDENTIAL], Vice President, Operations, at [CONFIDENTIAL] testified that “competition, in our mind, provides a more competitive playing field in terms of your pricing setup” and that “in Northeast B.C. we currently don’t have that same level of competition in this facet of our business.”

[296] Lastly, the transactions data from the “natural experiment” at Willesden Green, which is found in Dr. Baye’s initial report, demonstrates that CCS reduced its prices significantly to seven customers after SES’ entry at South Grande Prairie.

[297] For all these reasons, we have concluded that, in the absence of the Merger, competition in the provision of Secure Landfill services at Silverberry and the Babkirk Site likely would have resulted in prices being, on average, at least 10% lower in the geographic market described above. This is a sufficient basis for concluding that the Merger likely will prevent competition substantially, particularly given that the Merger preserves a monopolistic market structure, and thereby prevents the emergence of potentially important competition.

[298] In his reply report, Dr. Baye opined that even if competition is only likely to be substantially prevented in the Contestable Area identified by Dr. Kahwaty, the welfare loss is likely to be significant. Specifically, Dr. Baye estimated that loss to be approximately [CONFIDENTIAL] annually. That estimate was based on an assumed price decrease of 10%, from [CONFIDENTIAL] to [CONFIDENTIAL] per tonne, and certain assumptions and estimates used by Dr. Kahwaty in calculating the market expansion efficiencies, discussed above. In making that calculation, Dr. Kahwaty assumed that the opening of a Secure Landfill facility at Babkirk would likely lead customers to dispose of approximately [CONFIDENTIAL] additional tonnes of Hazardous Waste, as forecast in CCS’ internal documents. As discussed earlier in these reasons, that forecast increase in demand concerned Legacy Waste and future waste that would not otherwise be transported to Silverberry, due to (i) the level of the current disposal cost (Tipping Fees plus transportation cost) and (ii) the risk that would be associated with transporting Hazardous Waste to Silverberry. Dr. Kahwaty estimated that the total disposal costs of customers located in the Contestable Area that he identified likely would decline by approximately [CONFIDENTIAL] per tonne, due to the closer proximity of the Babkirk Facility, relative to Silverberry.

[299] Based on the foregoing numbers used by Dr. Kahwaty to estimate the market expansion efficiencies, and the linear demand that was assumed by Dr. Kahwaty, Dr. Baye estimated that a 10% price reduction (from [CONFIDENTIAL] to [CONFIDENTIAL]) for customers in the Contestable Area would increase the volume of waste disposed of by those customers from [CONFIDENTIAL] tonnes to [CONFIDENTIAL] tonnes, annually. He further estimated CCS' unit costs to be approximately [CONFIDENTIAL], based on the average 2010 price at Silverberry of [CONFIDENTIAL] across all substances, and the [CONFIDENTIAL] landfill margin reported for Silverberry in 2009, which was used by Dr. Kahwaty in estimating the market expansion efficiencies.

[300] Given the foregoing estimates, Dr. Baye calculated the area under the demand curve for the Contestable Area to be (i) a rectangle that is approximately [CONFIDENTIAL] tonnes multiplied by [CONFIDENTIAL], for a total of [CONFIDENTIAL], plus (ii) a right triangle that is [CONFIDENTIAL] high and [CONFIDENTIAL] wide, for an area of [CONFIDENTIAL]. Summing (i) plus (ii) yielded a figure of [CONFIDENTIAL]. From this latter amount, Dr. Baye deducted CCS' unit cost of [CONFIDENTIAL] multiplied by [CONFIDENTIAL], to arrive at an estimated welfare loss of [CONFIDENTIAL].

[301] The Tribunal is persuaded that, on a balance of probabilities, the approach adopted by Dr. Baye, and the numbers he used in reaching his estimate of the likely DWL, are reasonable for the purposes of the Tribunal's assessment of Effects under section 96 of the Act. In the Tribunal's view, the manner in which Dr. Baye proceeded in this regard is sound, and the inputs that he used are reliable and conservative. The fact that Dr. Baye relied on certain assumptions made by Dr. Kahwaty is not particularly important for the purposes of the Tribunal's assessment under section 96. What is important is that there is reliable evidence before the Tribunal that permitted the DWL to be estimated.

[302] The Tribunal acknowledges Dr. Kahwaty's testimony that, to calculate the DWL, it is necessary to know the shape of the demand curve, and that, when prices are likely to differ across customers, it is necessary to have customer-specific elasticity data. However, the Tribunal is persuaded that, in the absence of such information, a reliable "rough" estimate of the likely DWL can be obtained based on information such as that which was used by Dr. Baye in reaching his estimated annual welfare loss of approximately [CONFIDENTIAL].

[303] Accordingly, the Tribunal accepts Dr. Baye's estimate of [CONFIDENTIAL], as being the minimum annual DWL.

[304] Dr. Baye then speculated that, (i) if the average price decrease in that area was 21 percent, the annual DWL would be approximately [CONFIDENTIAL], (ii) if prices across all Hazardous Waste tipped at Silverberry in 2010 decreased by 10%, the DWL would be approximately [CONFIDENTIAL], and (iii) if prices across all such waste decreased by 21%, the DWL would be approximately [CONFIDENTIAL]. However, the Tribunal is not persuaded that these speculations about prices are reasonable.

Non-quantifiable Effects

[305] The Tribunal is satisfied that the Merger likely would result in certain important qualitative or other non-quantifiable Effects.

[306] In his initial report, Dr. Baye identified at least two important qualitative anti-competitive Effects of the Merger. First, at paragraph 157, he stated that lower Tipping Fees would induce waste generators to more actively clean up legacy sites in NEBC. At paragraph 91 of his report, he described this in terms of lower Tipping Fees inducing waste generators to substitute away from “delay,” or bioremediation, towards disposal at a Secure Landfill. As Dr. Kahwaty noted at paragraph 96 of his Efficiencies Report, increased site remediation from lower disposal costs benefits “area residents, wildlife, and the overall environment.”

[307] Second, at paragraph 137(c) of his initial report, Dr. Baye stated that, to retain its waste volumes in the face of competition from an independently owned and operated Babbirk Facility, CCS “would have had an incentive to compete through ‘value propositions’ that, among other things, link prices on various services to provide customers with a lower total cost for waste services.” Although the services in question were not further discussed by Dr. Baye, they were addressed in “read-in” evidence adduced by the Commissioner and cited by Dr. Baye (at footnote 93 of his initial report). The Tribunal is satisfied, on a balance of probabilities, that competition between CCS and an independently owned and operated Babbirk Facility would have led to important non-price benefits to waste generators in the form of various “value propositions” that include either existing services being provided at lower prices, or new or enhanced services being provided that likely would not otherwise be provided if the Order is not made.

Are the Cognizable Efficiencies Greater than and do they Offset the Effects?

[308] Section 96 requires the Tribunal to determine whether the cognizable efficiencies “will be greater than, and will offset” the cognizable effects of any prevention or lessening of competition that will result or is likely to result from a merger.

[309] The Tribunal considers that the terms “greater than” and “offset” each contemplate both quantifiable and non-quantifiable (i.e., qualitative) efficiencies. In the Tribunal’s view, “greater than” connotes that the efficiencies must be of larger magnitude, or more extensive than, the effects referred to in section 96. This contemplates a balancing of commensurables, even if some of the efficiencies being balanced are not capable of accurate or rough quantification. By contrast, the term “offset” is broad enough to connote a balancing of incommensurables (e.g., apples and oranges) that requires the exercise of subjective judgment to determine whether the efficiencies compensate for the likely effects referred to in section 96.

[310] In the case at bar, the Tribunal has found that the cognizable, quantifiable, efficiencies likely to result from the Merger will be a maximum of [CONFIDENTIAL] annually. Those are the overhead efficiencies estimated by Dr. Kahwaty. In addition, the Tribunal has found that CCS has not demonstrated, on a balance of probabilities, that the qualitative efficiencies it has

claimed are cognizable. In other words, it has not demonstrated that those efficiencies would not likely be attained if the Order were made.

[311] On the other hand, the Tribunal has found that the quantifiable Effects are likely to be at least [CONFIDENTIAL] annually. That is the value of the minimum DWL associated with the Contestable Area.

[312] Based on these findings, it is readily apparent that CCS has not demonstrated that the cognizable, *quantifiable*, efficiencies likely to be brought about by the Merger will likely be “greater than” the *quantifiable* Effects that are likely to result from the Merger. Using a 5.5% discount rate, CCS estimated that the present value of these (overhead) efficiencies to be approximately [CONFIDENTIAL], in comparison with a present value of [CONFIDENTIAL] for the aforementioned Effects.

[313] Given the Tribunal’s conclusion that the Merger would result in a number of important qualitative or other non-quantifiable effects, and that it would not likely bring about significant qualitative, cognizable, efficiencies, it is also readily apparent that the combined quantitative and qualitative efficiencies are not likely to be “greater than” the combined quantitative and qualitative Effects.

[314] In addition, the Tribunal is persuaded, on a balance of probabilities, that even if a zero weighting is given to the *quantifiable* Effects, as CCS submitted should be done, CCS has not satisfied the “offset” element of section 96. In short, the Tribunal is satisfied that the very minor *quantitative* efficiencies, ([CONFIDENTIAL] annually) that are cognizable, together with any qualitative or other non-quantifiable efficiencies that may be cognizable, would not “offset” the significant qualitative Effects that it has found are likely to result from the Merger.

[315] This conclusion would remain the same even if the Tribunal were to accept and give full weight to the Order Implementation Efficiencies, which only amount to a maximum of [CONFIDENTIAL] (which represents one year of transportation cost savings) plus [CONFIDENTIAL] (which represents one year of annual market expansion efficiencies).

[316] This is because, in the Tribunal’s view, the qualitative Effects, when taken together merit substantial weight. That weight is greater than the weight attributable to the aggregate of the cognizable quantitative and qualitative efficiencies under any reasonable approach. In brief, those qualitative Effects are (i) reduced site clean-up and the benefits that such remediation would confer upon “area residents, wildlife, and the overall environment”; and, more importantly, (ii) reduced “value propositions” than would likely otherwise emerge in the relevant market, linking prices to various new or enhanced services.

[317] Most importantly, in the absence of the Order, the Merger will maintain a monopolistic structure in the relevant market. In other words, the Merger will not only give rise to the qualitative effects summarized immediately above, but it will also preclude benefits of competition that will arise in ways that will defy prediction.

[318] In summary, the Tribunal is satisfied that CCS has not met its burden to establish, on a balance of probabilities, the “greater than” or “offset” elements set forth in section 96.

ISSUE 9 WHAT IS THE APPROPRIATE REMEDY – DISSOLUTION OR DIVESTITURE?

[319] An important question under this heading is whether SES is currently a willing purchaser for the Babkirk Site. Surprisingly, when Mr. Amirault of SES testified for the Commissioner, neither her counsel during questioning in chief nor counsel for the Vendors during cross-examination asked Mr. Amirault if SES is still interested in acquiring BLS.

[320] The Commissioner’s position is that, once she showed that dissolution was an effective and available remedy, the burden of proof shifted to the Vendors to demonstrate that divestiture was an available, effective and less intrusive remedy. The Commissioner maintains that the Vendors were obliged to ask Mr. Amirault if SES is still interested and, because they failed to ask that question and because they failed to lead any evidence about other prospective purchasers, they have no basis to argue that divestiture will be an effective remedy.

[321] The Tribunal does not accept the Commissioner’s characterization of the onus. In the Tribunal’s view, if the Commissioner proposes alternative remedies, as she did in this case, she bears the onus of showing that, although one may be preferable, each is available and effective. Accordingly, the Commissioner’s counsel should have asked Mr. Amirault about SES’ interest in purchasing the shares of BLS.

[322] The Tribunal notes that, in her written final argument, the Commissioner asks the Tribunal not to infer that SES is an interested purchaser. However, in contrast, in final oral argument, counsel for the Commissioner suggested that SES is an interested buyer.

[323] The Tribunal accepts the latter submission and has determined, for the following reasons, that SES is likely to make an offer to purchase the Babkirk Facility at some point during the divestiture process under the Order:

- SES has already decided to operate a Secure Landfill in NEBC. It tried unsuccessfully and at considerable expense to secure the Authorizations at its Heritage Site;
- Babkirk already has the necessary Authorizations and SES is confident that its plans to expand the permitted capacity at Babkirk and upgrade the cell design will be approved;
- SES has demonstrated an active and continuing interest in the Babkirk Facility since the Merger. Among other things, this is demonstrated by SES’ lawyers’ written submissions to the Commissioner and by the participation of its CEO, Mr. Amirault, as a witness in these proceedings.

[324] We now turn to the proposed remedies.

[325] The Commissioner wants the Babkirk Site operated as a competitive Full Service Secure Landfill and she believes that dissolution will produce this result more quickly than divestiture.

[326] Her submission is that, once the Vendors again hold the shares of Complete and have repaid CCS the purchase price, they will be highly motivated to resell Complete or the shares of BLS because this will enable them to recover their funds as soon as possible. However, this submission assumes that the Vendors will immediately be offered a price they are prepared to accept. In the Tribunal's view, there is no basis for this assumption. The evidence is clear that the Vendors have never been willing to be pushed into a quick sale.

[327] The Commissioner's submission also assumes that the Vendors will have an incentive to sell quickly because they will be short of funds as a result of having to repay CCS as soon as the shares of Complete are returned to them. This assumption is also questionable, in part because it appears that CCS has indemnified the Vendors against all claims arising from any investigation or actions by the Bureau with respect to the Merger. Given this background, it is possible that CCS may not insist on immediate payment.

[328] Even if the Commissioner is correct and the Vendors are cash-strapped and anxious to resell BLS or Complete, the Tribunal still anticipates that they will want an attractive price. It is also important to remember that all five individual Vendors must agree to accept an offer and they will not necessarily be like-minded, in part because some are near retirement and others are in mid-career.

[329] The Tribunal notes that two years will have passed since the Babkirk Facility was last for sale. This means that purchasers, other than SES, may show interest, especially given the increasing rate of gas production in the area northwest of Babkirk. Dr. Baye testified that he thought SES, Newalta and Clean Harbours were potential purchasers. As well, it is not unreasonable to think that an oil and gas producer may decide to own and operate a Secure Landfill. The Tribunal heard evidence that [CONFIDENTIAL] is considering becoming a part-owner of the Secure Landfill at Peejay. If the Vendors receive multiple offers, protracted negotiations may follow.

[330] Finally, if they do not receive an offer they consider attractive, the Vendors are free to change their minds and resurrect their plan to operate a bioremediation facility with an Incidental Secure Landfill. This would not result in the competition the Commissioner seeks because it will only be realized if the Babkirk Facility operates as a Full Service Secure Landfill.

[331] There is also the question of whether a purchaser after dissolution will be an effective competitor. In the proposed order for dissolution found at the conclusion of the Commissioner's final argument, she does not seek the right to approve a purchaser and she only asks for notice of a future merger if it is "among the Respondents". In our view, this makes dissolution a less effective remedy.

[332] Given all these observations, the Tribunal is concerned that dissolution may not be effective in that it may not lead to a prompt sale and a timely opening of the Babkirk Facility as a Secure Landfill.

[333] It is also the case that dissolution is the more intrusive remedy.

[334] Three of the Vendors testified about the financial hardship they would face if dissolution were ordered by the Tribunal. Ken Watson's share of the proceeds of the transaction was [CONFIDENTIAL]. He testified that if ordered to return the proceeds to CCS, [CONFIDENTIAL], he expects to face significant financial hardship.

[335] Randy Wolsey's share of the proceeds was approximately [CONFIDENTIAL]. He testified that almost half of the proceeds have been used to develop a property on which he is constructing a new family home. The balance has been invested in the purchase of various investment products. According to Mr. Wolsey, he expects to lose approximately [CONFIDENTIAL] if he is forced to make a quick sale on the residential property before the house under construction has been completed.

[336] Karen Baker testified that if required to return her share of the proceeds, approximately [CONFIDENTIAL], then her ability to continue to provide financial support to certain small business will be compromised. She also indicated that if the transactions were to be dissolved, she expects that the "work required to reverse the sale and calculate the adjustments required to account for changes in Complete's assets, working capital and lost opportunity costs, as well as the opportunity costs in time away from the other businesses in which [she is] involved, and cost to some of those businesses for replacement personnel to do the work that [she] should be doing, would cause [her] significant stress and emotional hardship."

[337] The Commissioner asserts that, in the particular circumstances of this case, hardship is irrelevant, because she warned the Vendors that she would seek dissolution before they sold Complete to CCS. However, in the Tribunal's view it is the right of private parties to disagree with the Commissioner and make their case before the Tribunal. Accordingly, they are not estopped from raising issues of hardship.

[338] The Tribunal is also of the view that dissolution is overbroad, since it involves Complete's other businesses and not just BLS.

[339] In the spring of 2007, Complete acquired the assets of a municipal waste management business based in Dawson Creek, British Columbia. As noted earlier, those assets included contracts for the management of the Fort St. John and Bessborough municipal landfills and the Dawson Creek Transfer Station, the supply and hauling of roll-off bins, and the provision of rural refuse collections and transfer services. At the time of the Merger, those contracts and related equipment were transferred to CCS. Hazco has been responsible for this business since then.

[340] Mr. Garry Smith, the president of Hazco, testified that Hazco has upgraded Complete's trucks and has sold some older equipment which it considered surplus. The two municipal landfill contracts have been extended and are now held directly by Hazco. Complete's employees are now employed by Hazco and there have been personnel changes. At the hearing, Mrs. Baker

testified about the impact of the sale of some of the assets. She stated:

Now, that equipment was older equipment. It wouldn't have brought big money, but the point is it was sufficient for us to do the work that we wanted it to do. Well, now the oil and gas industry is hot, hot up there. Trying to get equipment back, we certainly wouldn't get that equipment back. Any decent used equipment, I have no idea. The prices would be through the roof. Would we buy new equipment? I don't know. So right now, we don't even have the equipment to go back to work

[341] To conclude, the Tribunal has decided that dissolution is intrusive, overbroad and will not necessarily lead to a timely opening of the Babkirk Facility as a Full Service Secure Landfill.

[342] Turning to divestiture, the Tribunal finds that it is an available and effective remedy. If reasonable but tight timelines are imposed, it will not matter if, as the Commissioner alleges, SES and CCS are reluctant to negotiate because of their outstanding litigation. In the end, if they cannot agree, a trustee will sell the shares or assets of BLS, either to SES or another purchaser approved by the Commissioner. In other words, divestiture will be effective.

[343] A divestiture with tight timelines has other advantages. The Commissioner will have the right to pre-approve the purchaser, the person responsible for effecting the divestiture will ultimately be CCS or a professional trustee, rather than five individuals, the timing will be certain, a sale will ultimately occur and the approved purchaser will compete with Silverberry on a Full Service basis.

[344] For all these reasons, the Tribunal will order CCS to divest the shares or assets of BLS.

H. COSTS

[345] The Commissioner chose dissolution as her preferred remedy when she commenced the Application. She made this choice because she believed that at the time of the Merger, the Vendors were about to construct and operate a Full Service Secure Landfill. For this reason she concluded that the most timely way to introduce competition was to return Babkirk to the Vendors.

[346] However, for the reasons given above, the Tribunal has concluded that the Vendors did not intend to operate a Full Service Secure Landfill. This means that the Commissioner has failed to prove the premise which caused her to name the individual Vendors as parties to the Application. In essence she failed to prove her case against them and for this reasons she is liable for their costs.

[347] However, during the Vendors' motion for summary disposition which was heard two weeks before the hearing, they indicated that, if the motion was successful and they were removed as parties, four of them would nevertheless attend the hearing to give evidence. The Tribunal assumes that, had done so, they would have been represented by one counsel.

Accordingly, the Commissioner is to pay their costs less the legal fees which would have been incurred had they appeared as witnesses.

I. FOR THESE REASONS THE TRIBUNAL ORDERS THAT:

[348] CCS is to divest the shares or assets of BLS on or before December 28, 2012 failing which a trustee is to effect a sale on or before March 31, 2013. If possible, the terms for this process are to be agreed between the Commissioner and CCS and are to be submitted to the Tribunal on or before June 22, 2012. If the agreed terms are accepted by the Tribunal, they will be incorporated in a further order to be called the Divestiture Procedure Order. If the Commissioner and CCS cannot agree to terms, each party is to submit a proposed Divestiture Procedure Order on or before June 29, 2012. If necessary, the Tribunal will hear submissions about each party's proposal in early July and then make the Divestiture Procedure Order.

[349] CCS is to pay the Commissioner's costs and, because dissolution was not ordered, the Commissioner is to pay the Vendors' costs less the fees they would have paid for legal representation if they had attended as non-parties to give their evidence. The Commissioner is to prepare a bill of costs to be submitted to CCS and the Vendors are to submit a bill of costs to the Commissioner both on or before August 31, 2012. Both are to be prepared in accordance with Federal Court Tariff B at the mid-point of column 3. If by September 14, 2011 no agreement is reached about lump sums to be paid, the Tribunal will hear submissions and fix the awards of costs.

DATED at Ottawa, this 29th day of May, 2012.

SIGNED on behalf of the Tribunal by the Panel Members.

(s) Sandra J. Simpson J. (Chairperson)

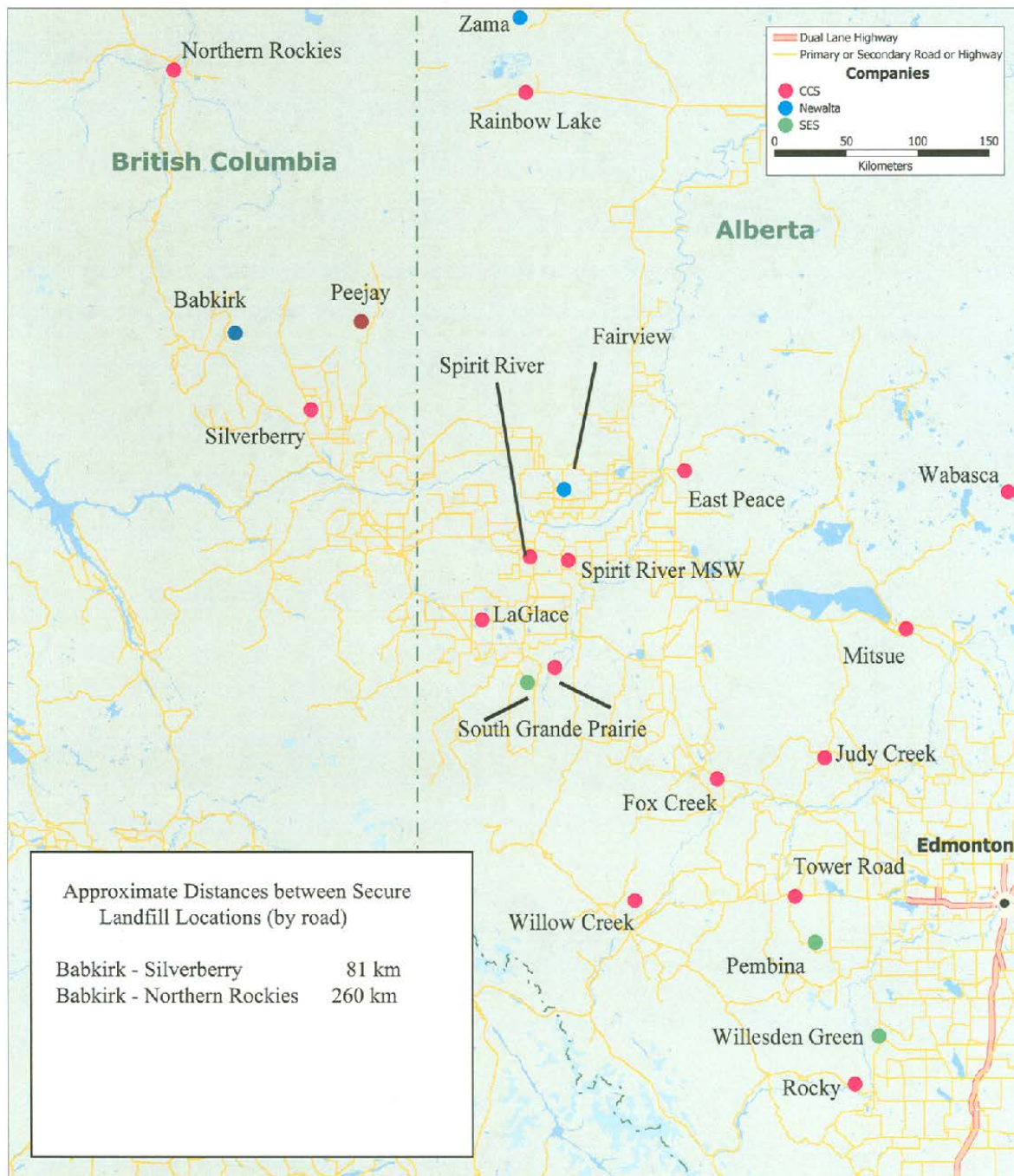
(s) Paul Crampton C.J.

(s) Dr. Wiktor Askanas

J. THE SCHEDULES

[350] The schedules appear on the following pages:

Schedule A: Map Showing Secure Landfills (based on Exhibit 4-A to Dr. Baye's Expert Report)



Source: CCS, SES, and Newalta company websites.

This map may be printed in colour.

SCHEDULE “B”**THE EVIDENCE****Witnesses who gave oral testimony (in alphabetical order)****For the Commissioner of Competition**

- **Rene Amirault**
President & CEO of Secure Energy Services Inc.
- **Robert Andrews**
Section Head- Environmental Management, Government Unit in the British Columbia Ministry of the Environment.
- **Michael Baye**
Expert Economist - Special Consultant at National Economic Research Associates, Inc. and the Bert Elwert Professor of Business Economics and Public Policy at the Indiana University Kelley School of Business.
- **Chris Hamilton**
Project Assessment Director at the British Columbia Environmental Assessment Office.
- **Andrew Harrington**
Expert on Efficiencies - Managing director of the Toronto office of Duff & Phelps.
- **[CONFIDENTIAL]**
Contracting and Procurement Analyst for the [CONFIDENTIAL].
- **[CONFIDENTIAL]**
Vice-President, Operations at [CONFIDENTIAL].
- **Mark Polet**
Associate at Kohn Crippen Berger Ltd. ("KCB"). KCB is a private, specialized engineering and environmental consulting firm with its head office in Vancouver.
- **Del Reinheimer**
Environmental Management Officer in the Environmental Protection Division at the British Columbia Ministry of the Environment.
- **Devin Scheck**
Director, Waste Management & Reclamation at the British Columbia Oil and Gas Commission.

For the Vendors

- **Karen Baker**
One of the founding shareholders of Complete Environmental Inc.
- **Ronald Baker**
One of the founding shareholders of Complete Environmental Inc.
- **Kenneth Watson**
One of the founding shareholders of Complete Environmental Inc.
- **Randy Wolsey**
One of the founding shareholders of Complete Environmental Inc.

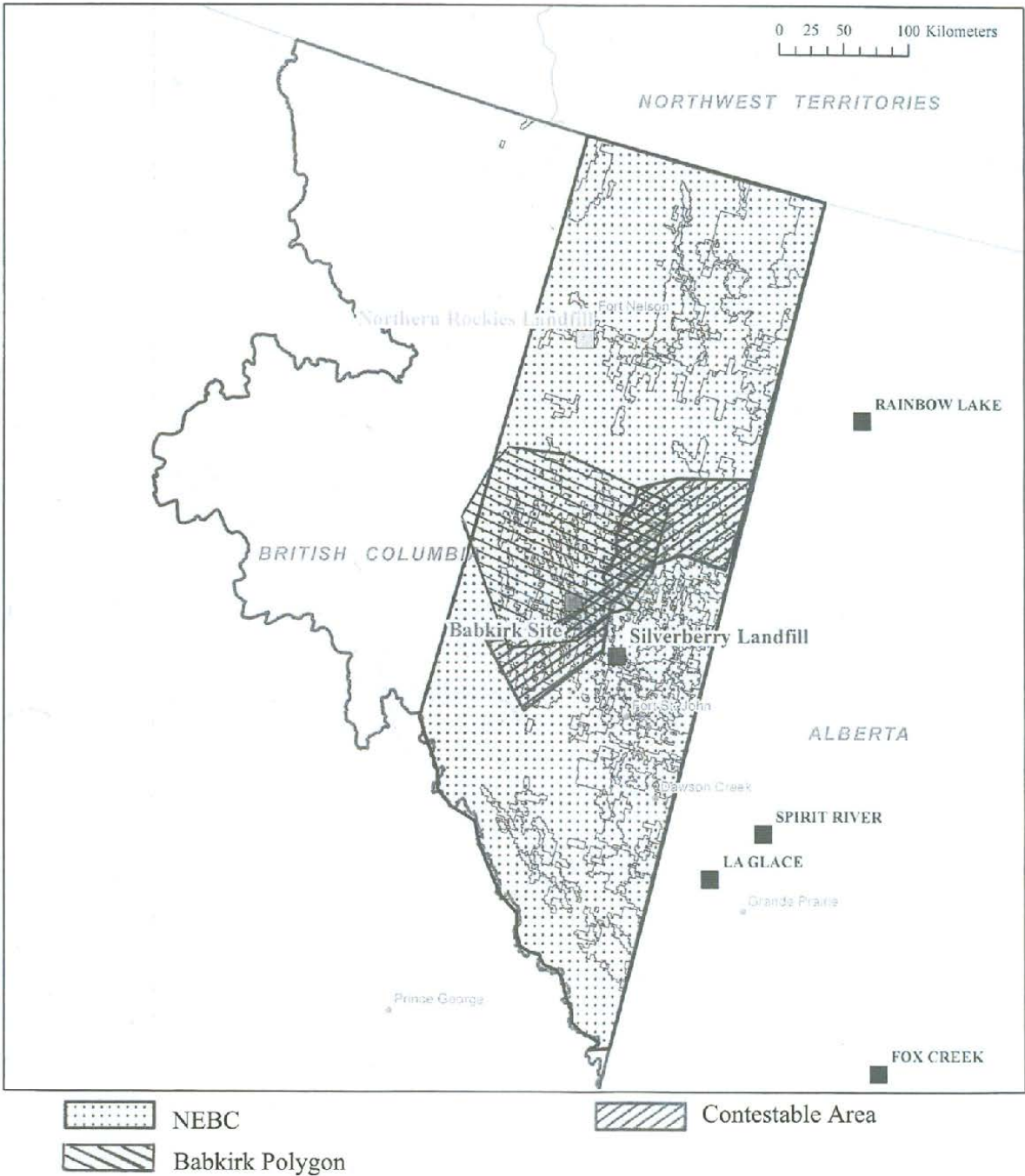
For the Corporate Respondents

- **Trevor Barclay**
Landfill Manager of the Northern Rockies Secure Landfill.
- **James Coughlan**
Director of Sales and Marketing of CCS Corporation
- **Henry Kahwaty**
Expert economist - Director with Berkeley Research Group, LLC.
- **Richard Lane**
Vice-President of CCS Midstream Services, a division of CCS Corporation.
- **Pete Marshall**
Principal of Adelantar Consulting, an environmental consultancy based in Edmonton, Alberta.
- **Daniel Wallace**
Manager, Business Development of CCS Corporation's Midstream Services division

Other Evidence

- The witness statements from those who testified.
- Read-ins from Examinations for Discovery of Karen Baker and Kenneth Watson for the Vendors, Daniel Wallace for the Corporate Respondents and Trevor MacKay for the Commissioner of Competition
- The statement of agreed facts.
- The witness statements of **Robert Coutts**, President of SkyBase Geomatic Solutions Inc. and **Garry Smith**, President of Hazco Waste Management (owned by CCS). On consent these witnesses were not called to give oral testimony.
- A Joint list of agreed documents.
- The exhibits marked during the hearing.

Schedule C: Map of NEBC, the Contestable Area and the Babkirk Polygon



K. CONCURRING REASONS BY P. CRAMPTON C.J.

[351] Although I participated in the writing of, and signed, the Panel's decision in this case, I would like to comment on certain additional matters.

A. IS CCS'S ACQUISITION OF COMPLETE A MERGER?

[352] At paragraph 56 of the Panel's reasons, it is noted that it was not necessary to decide whether Complete's Roll-off Bin Business or its management of municipal dumps could be a business for the purposes of section 91 of the Act. That said, the conclusion reached by the Chairperson on this point was articulated at paragraph 57. That conclusion was stated as follows:

"[A] business being acquired in a merger must have some relevance to a Commissioner's application. In other words, it must have the potential to impact competition in the markets at issue. This observation means that, in this case, Complete's Roll-off Bin Business and its management of municipal dumps would not have been caught by the definition in section 91 because they are not involved in any way in the disposal or treatment of Hazardous Waste."

[353] I respectfully disagree. In my view, the term "business", as contemplated by section 91 of the Act, is not, as the Vendors maintained, confined to a business that competes with a business of an acquiring party. There is no such limitation in section 91 or in the definition of the term "business" that is set forth in subsection 2(1) of the Act.

[354] The Vendors attempted to support their position by noting that section 92 of the Act requires that a "merger" prevent or lessen, or be likely to prevent or lessen, competition substantially. However, it is not necessary for a merger to involve two or more competing businesses to have the potential to prevent or lessen competition substantially. For example, the inclusion of the terms "supplier" and "customer" in section 91 reflects Parliament's implicit recognition that a vertical merger may have such an effect. The words "or other person" in section 91 reflect that Parliament also did not wish to exclude the possibility that other types of non-horizontal mergers may also have such an effect.

[355] Considering the foregoing, I am not persuaded that the Vendors' position is assisted by reading the words of section 91 "in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament" (E. A. Driedger, *Construction of Statutes* (2nd ed. 1983), at p. 87, quoted in *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, at 41; and *Canada (Canadian Human Rights Commission) v. Canada (Attorney General)*, 2011 SCC 53, at para. 33 ("Mowat")). In the absence of any apparent ambiguity, one must adopt an interpretation of section 91 "which respects the words chosen by Parliament" (*Mowat*, above). The principle that the Act be given "such fair, large and liberal construction and interpretation as best ensures the attainment of its objects" also supports the view that section 91 ought not be read in the limited manner suggested by the Vendors (*Interpretation Act*, R.S.C. 1985, c. I-21, s. 12).

[356] Indeed, if anything, a reading of section 91 in a manner that is harmonious with the scheme and object of the Act and the intention of Parliament arguably further supports interpreting section 91 in a way that does not require the type of assessment of competitive effects that is contemplated by the interpretation advanced by the Vendors. That is to say, when viewed in the context of the scheme and object of the Act as a whole, it is arguable that section 91 was intended by Parliament to be a gating provision, in respect of which an assessment ordinarily is to be made relatively early on in the evaluation contemplated by sections 92 and 93.

[357] For example, all but one of the assessment factors in the non-exhaustive list that is set forth in section 93 refer to the “merger or proposed merger” in respect of which an application under section 92 has been made. In my view, this suggests that the merger or proposed merger in question should be identified before the assessment contemplated by sections 92 and 93 is conducted.

[358] If an agreement, arrangement or practice cannot properly be characterized as a merger, it will fall to be investigated under another provision of the Act, such as section 45, section 79, or section 90.1, each of which has a substantive framework which differs in important respects from the framework set forth in section 92. Indeed, in the case of agreements or arrangements that may be investigated under section 45, which is a criminal provision, there are important procedural implications associated with the decision to pursue a matter under that section, versus under section 90.1, 79 or 92. I recognize that there may be cases in which it may be appropriate to assess a matter under section 92 as well as under one or more of the other provisions mentioned immediately above, for a period of time before an election is made under section 98, 45.1, 79(7) or 90.1(10). However, the scheme of the Act and the interests of administrative efficiency arguably support the view that a determination as to whether a matter ought to be investigated as a merger, rather than a type of conduct addressed elsewhere in the Act, ordinarily should be made before the central substantive determinations under the applicable section of the Act are made. Among other things, such substantive determinations often take several months, and sometimes take much longer, to make.

[359] In summary, for all of the foregoing reasons, I have concluded that the term “business” in section 91 is sufficiently broad to include any business in respect of which there is an acquisition or establishment of control or a significant interest, as contemplated therein. In the case at bar, this would include Complete’s Roll-off Bin Business, which was fully operational at the time of Complete’s acquisition by CCS. It would also include Complete’s management of municipal dumps.

B. MARKET DEFINITION

[360] Market definition has traditionally been a central part of merger analysis in Canada and abroad for several reasons. These include (i) helping to focus the assessment on products and locations that are close substitutes for the products and locations of the merging parties, (ii) helping to focus the assessment on the central issue of market power, (iii) helping to identify the merging parties’ competitors, (iv) helping to understand the basis for existing levels of price and non-price competition, and (v) facilitating the calculation of market shares and concentration levels. In turn, changes in market shares and concentration levels can be very helpful, albeit not

determinative, in understanding the likely competitive effects of mergers and in assisting enforcement agencies to triage cases and to provide guidance to the public.

[361] In recent years, developments in antitrust economics have reached the point that the United States Department of Justice and Federal Trade Commission have begun to embrace approaches that “need not rely on market definition” (*Horizontal Merger Guidelines* (August 19, 2010), at § 6.1). Likewise, the MEGs, at paragraph 3.1, have been amended to stipulate that market definition is not necessarily a required step in the Commissioner’s assessment of a merger.

[362] These developments can be accommodated within the existing framework of the Act and the Tribunal’s jurisprudence.

[363] In discussing market definition, the Panel noted, at paragraph 92 of its reasons, that the Tribunal has in the past cautioned against losing sight of the ultimate inquiry, which is whether the merger being assessed prevents or lessens, or is likely to prevent or lessen, competition substantially. The Tribunal has also previously noted that the Act does not require that a relevant market be defined in assessing whether competition is likely to be prevented or lessened substantially (*Propane I*, above, at para. 56). The logical implication is that defining a relevant market is not a necessary step in assessing whether a merger prevents or lessens, or is likely to prevent or lessen, competition substantially. Accordingly, it will be open to the Tribunal, in an appropriate case, to make this assessment without defining a relevant market.

[364] That said, at this point in time, it is anticipated that such cases will be exceptional. Indeed, failing to define a relevant market may make it very difficult to calculate, or even to reasonably estimate, the actual or likely DWL associated with a merger, for the purposes of the efficiencies defence in section 96 of the Act.

C. THE ANALYTICAL FRAMEWORK IN A “PREVENT” CASE

[365] At the outset of the Commissioner’s final oral argument, her counsel urged the Tribunal to clarify the analytical approach applicable to three areas, namely, (i) the assessment of whether a merger prevents, or is likely to prevent, competition substantially, (ii) the efficiencies defence, and (iii) the circumstances in which the Tribunal will entertain the remedy of dissolution, and what factors will be taken into account in determining the appropriate remedy in any particular case.

[366] These topics are all addressed to some extent in the Panel’s decision. I would simply like to add some additional comments, particularly with respect to the analytical framework applicable to the Tribunal’s assessment of whether a merger prevents, or is likely to prevent, competition substantially.

[367] The Tribunal’s general focus in assessing cases brought under the “substantial prevention of competition” and “substantial lessening of competition” branches of section 92 is essentially the same. In brief, that focus is upon whether the merged entity is likely to be able to exercise materially greater market power than in the absence of the merger. The same is true with respect to other sections of the Act that contain these words.

[368] In determining whether competition is likely to be *lessened*, the more particular focus of the assessment is upon whether the merger is likely to facilitate the exercise of new or increased market power by the merged entity, acting alone or interdependently with one or more rivals. In determining whether competition is likely to be *prevented*, that more particular focus is upon whether the merger is likely to preserve the existing market power of one or both of the merging parties, by preventing the erosion of such market power that otherwise likely would have taken place if the merger did not occur.

[369] In making its assessment in the latter context, and with respect to a proposed merger, the Tribunal compares (i) the state of competition that would likely exist if the merger were to proceed, with (ii) the state of competition that would likely exist if the merger did not proceed. Scenario (ii) typically is referred to as the “but for”, or “counterfactual”, scenario. In the case of a completed merger, that “but for” scenario is the market situation that would have been most likely to emerge had the merger not occurred.

[370] When the Tribunal determines that a merger is not likely to enable the merged entity to exercise greater market power than in the absence of the merger, the Tribunal generally will conclude that the merger is not likely to prevent or lessen competition at all, let alone substantially. With respect to allegations that competition is likely to be *lessened*, this conclusion generally will flow from a finding that the merger is not likely to enable the merged entity to *enhance existing, or to create new*, market power. With respect to allegations that competition is likely to be *prevented*, this conclusion generally will flow from a finding that the merger in question is not likely to enable the merged entity to *maintain* greater existing market power than in the absence of the merger. Once again, the foregoing also applies with respect to other sections of the Act that contain the “prevent or lessen competition substantially” test.

[371] With respect to sellers, market power is the ability to profitably maintain prices above the competitive level, or to reduce levels of non-price competition (such as service, quality or innovation), for an economically meaningful period of time. With respect to purchasers, market power is the ability to profitably depress prices below the competitive level, or to reduce levels of non-price competition, for such a period of time.

[372] In assessing whether market power is likely to be created, enhanced or maintained by a merger or a reviewable trade practice, the Tribunal assesses the intensity of competition, as reflected in its price and non-price dimensions. Competition is a dynamic, *rivalrous process* through which the exercise of market power is prevented or constrained as firms strive, among other things, to develop, produce, distribute, market and ultimately sell their products in rivalry with other firms. That rivalrous process generates the principal source of pressure on firms to innovate new or better products or business methods, and to deliver those products at competitive prices. In turn, those innovations and competitive prices serve to increase aggregate economic welfare in the economy, the economy’s international competitiveness and the average standard of living of people in the economy.

[373] In assessing the intensity of price competition, the Tribunal focuses upon whether prices are likely to be higher than in the absence of the merger. In assessing the intensity of non-price

competition, the Tribunal focuses upon whether levels of service, quality, innovation, or other important non-price dimensions of competition are likely to be lower than in the absence of the merger. This focus ensures that the assessment of the intensity of price and non-price dimensions of competition is *relative*, rather than *absolute*, in nature (*Canada Pipe*, above, at paras. 36 – 38). In short, the assessment of levels of price and non-price competition is made relative to the levels of price and non-price competition that likely would exist “but for” the merger. The same approach is taken with respect to non-merger matters that require an assessment of whether competition is likely to be prevented or lessened substantially.

[374] Competition may be said to be *prevented* when future competition is hindered or impeded from developing. Common examples of such prevention of competition in the merger context include (i) the acquisition of a potential or recent entrant that was likely to expand or to become a meaningful competitor in the relevant market, (ii) an acquisition of an incumbent firm by a potential entrant that otherwise likely would have entered the relevant market *de novo*, and (iii) an acquisition that prevents what otherwise would have been the likely emergence of an important source of competition from an existing or future rival.

[375] In determining whether a prevention or lessening of competition is likely to be *substantial*, the Tribunal typically will assess the likely magnitude, scope and duration of any adverse effects on prices or on non-price levels of competition that it may find are likely to result from the creation, enhancement or maintenance of the merged entity’s market power. That is to say, the Tribunal assesses the likely degree of such price and non-price effects, the extent of sales within the relevant market in respect of which such effects are likely to be manifested, and the period of time over which such effects are likely to be sustained.

[376] With respect to magnitude or degree, the Tribunal has previously defined substantiality in terms of whether customers are “likely to be faced with *significantly* higher prices or *significantly* less choice over a *significant* period of time than they would be likely to experience in the absence of the acquisitions” (*Southam*, above, at 285, emphasis added). However, given that the Tribunal has now embraced the hypothetical monopolist framework and the SSNIP test for market definition, it is necessary to revisit this definition of substantiality. This is because if the degree of market power used to define relevant markets is the same as the degree of market power used to assess competitive effects, a merger would not be found to be likely to prevent or lessen competition substantially unless the degree of new, enhanced or maintained market power of the merged entity is the same degree of market power held by as the hypothetical monopolist that was conceptualized for the purposes of market definition.

[377] Accordingly, the degree of market power used in assessing whether competition is likely to be prevented or lessened substantially must be recalibrated downwards. That recalibrated degree of market power is a level of market power required to maintain prices *materially* higher, or to depress one or more forms of non-price competition to a level that is *materially* lower, than they likely would be in the absence of the merger. As a practical matter, in the case at bar, this distinction between “material” and “significant” is of little significance, because the Panel has found that prices are likely to be significantly (i.e., at least 10%) higher than they would likely have been in the absence of the Merger.

[378] Turning to the scope dimension of “substantiality”, the Tribunal will assess whether the merged entity, acting alone or interdependently with other firms, likely would have the ability to impose the above-mentioned effects in a material part of the relevant market, or in a respect of a material volume of sales.

[379] With respect to the duration dimension of “substantiality”, the Tribunal typically will assess whether the merged entity, acting alone or interdependently with other firms, likely would have the ability to sustain the above-mentioned effects for approximately two years or more, relative to the “but for” scenario. This explains why the Tribunal typically assesses future entry and the expansion of potential rivals to the merged entity by reference to a benchmark of approximately two years.

[380] When, as in this case, the merger has already occurred and the Commissioner alleges that the merger is likely to prevent competition substantially, the Tribunal’s assessment of the duration dimension of “substantiality” will focus on two things. First, the Tribunal will assess whether the entry or expansion that was prevented or forestalled by the merger likely would have been sufficiently timely, and on a sufficient scale, to have resulted in a material reduction of prices, or a material increase in one or more non-price dimensions of competition, had the merger not occurred. If so, the Tribunal will assess whether the entry or expansion of third parties likely will achieve this result, notwithstanding the fact that the merger has occurred.

[381] Before assessing whether a likely prevention of future competition would be “substantial,” the Tribunal also will assess whether that future competition likely would have materialized “but for” the merger in question. In this regard, the Tribunal will assess whether such competition likely would have developed within a reasonable period of time.

[382] What constitutes a reasonable period of time will vary from case to case and will depend on the business under consideration. In situations where steps towards entry or expansion were being taken by the firm whose entry or expansion was prevented or forestalled by the merger, a reasonable period of time would be somewhere in the range of time that typically is required to complete the remaining steps to enter or expand on the scale described above. Similarly, in situations where the entry or expansion was simply in the planning stage, a reasonable period of time would be somewhere in the range of time that typically is required to complete the plans in question and then to complete the steps required to enter or expand on the scale described above. In situations where entry on such a scale cannot occur for several years because, for example, a new blockbuster drug is still in clinical trials, a reasonable period of time would be approximately the period of time that it typically would take for such trials to be completed, relevant regulatory approvals obtained, and commercial quantities of the drug produced and sold. In situations where entry on the scale described above cannot occur for several years because of long term contracts between customers and suppliers, a reasonable period of time would be approximately one year after a volume of business that is sufficient to permit entry or expansion on that scale becomes available.

[383] In all cases, the Tribunal must be satisfied that the future competition that is alleged to be prevented by the merger likely would have materialized within a reasonable period of time. If so,

the Tribunal will assess whether the prevention of that competition likely would enable the merged entity to exercise materially greater market power than in the absence of the merger, for a period of approximately two years or more, subsequent to that time.

[384] Notwithstanding the foregoing, it is important to underscore that the magnitude, scope and duration dimensions of “substantiality” are interrelated. This means that where the merged entity is likely to have the ability to prevent a particularly large price decrease that likely would occur “but for” the merger, the volume of sales in respect of which the price decrease would have had to be experienced before it will be found to be “material” may be less than would otherwise be the case. The same is true with respect to the period of time in respect of which the likely adverse price effects must be experienced – it may be less than the two year period that typically is used. Likewise, where the volume of sales in respect of which a price decrease is likely to occur is particularly large, (i) the degree of price decrease required to meet the “materiality” threshold may be less than would otherwise be the case, and (ii) the period of time required for a prevention of competition to be considered to be “substantial” may be less than two years.

[385] In conducting its assessment of whether a merger is likely to prevent competition substantially, the Tribunal also assesses whether other firms likely would enter or expand on a scale similar to that which was prevented or forestalled by the merger, and in a similar timeframe. Where the Tribunal finds that such entry or expansion likely would occur even if the merger proceeds, it is unlikely to conclude that the merger is likely to prevent competition substantially.

[386] In summary, to demonstrate that a merger is likely to prevent competition substantially, the Commissioner must establish, on a balance of probabilities, that “but for” the merger, one of the merging parties likely would have entered or expanded within the relevant market within a reasonable period of time, and on a sufficient scale, to effect either a material reduction of prices or a material increase in one or more levels of non-price competition, in a material part of the market, for approximately two years. Alternatively, the Commissioner must establish a similar likely effect on prices or on levels of non-price dimensions of competition as a result of the development of another type of future competition that likely would have occurred “but for” the merger.

D. WHEN EFFICIENCIES CAN BE CONSIDERED

[387] The Tribunal’s decision in *Propane 3*, above, has been interpreted as suggesting that cost reductions and other efficiencies can never be considered prior to the triggering of the defence set forth in section 96. This appears to be a misreading of *Propane 3*. The source of this misunderstanding appears to be found in paragraph 137 of that decision. The focus of the discussion in that paragraph was on the differences between the Canadian and American approaches to efficiencies, and, specifically, whether section 96 requires the efficiencies likely to result from a merger to be so great as to ensure that there are no adverse price effects of the merger.

[388] There may well be situations in which any cost reductions or other efficiencies likely to be attained through a merger will increase rivalry, and thereby increase competition, in certain ways. These include: (i) by enabling the merged entity to better compete with its rivals, for example, by assisting two smaller rivals to achieve economies of scale or scope enjoyed by one or more larger rivals, (ii) by increasing the merged entity's incentive to expand production and to reduce prices, thereby reducing its incentive to coordinate with other firms in the market post-merger, and (iii) by leading to the introduction of new or better products or processes.

[389] There is no "double counting" of such efficiencies when it is determined that the merger in question is likely to prevent or lessen competition substantially and a trade-off assessment is then conducted under section 96. This is because, in that assessment, such efficiencies would only be considered on the "efficiencies" side of the balancing process contemplated by section 96. They would not directly or indirectly be considered on the "effects" side of the balancing process, because they would not be part of any cognizable (i) quantitative effects (e.g., the DWL or any portion of the wealth transfer that may be established to represent socially adverse effects), or (ii) qualitative effects (e.g., a reduction in dynamic competition, service or quality). Moreover, at the section 92 stage of the analysis, they typically would not be found to be a source of any new, increased or maintained market power that must be identified in order to conclude that the merger is likely to prevent or lessen competition substantially.

E. THE EFFICIENCIES DEFENCE

[390] The analytical framework applicable to the assessment of the efficiencies defence has been set forth in significant detail in the Panel's decision. I simply wish to make a few additional observations.

(i) Conceptual framework

[391] In broad terms, section 96 contemplates a balancing of (i) the "cost" to the economy that would be associated with making the order that the Tribunal has determined should otherwise be made under section 92 (the "Section 92 Order"), and (ii) the "cost" to the economy of not making the Section 92 Order. The former cost is the aggregate of the lost efficiencies that otherwise would likely be attained as a result of the merger. The latter cost is the aggregate of the effects of any prevention or lessening of competition likely to result from the merger, if the Section 92 Order is not made.

[392] Section 96 achieves this balancing of "costs" by (i) confining efficiencies that are cognizable in the trade-off assessment to those that "would not likely be attained if the [Section 92 Order] were made", as contemplated by subsection 96(1), and (ii) confining the effects that may be considered in the trade-off assessment to "the effects of any prevention or lessening of competition that will result or is likely to result from the merger or proposed merger".

[393] In short, the efficiencies that are eliminated by this language in subsection 96(1), which is referred to at paragraph 264 of the Panel's decision as the fifth "screen" established by section 96, are not considered in the trade-off assessment because they would not represent a "cost" to society associated with making the Section 92 Order. That is to say, the efficiencies excluded by

this screen either would likely be achieved through alternative means in any event, or they would be unaffected by the Section 92 Order. This could occur, for example, because they would be attained in one or more markets or parts of the merged entity's operations that would be unaffected by the Section 92 Order. It is in this sense that the assessment contemplated by section 96 is heavily dependent on the nature of the Section 92 Order.

[394] That said, to the extent that there are efficiencies in other markets that are so inextricably linked to the cognizable efficiencies in the relevant market(s) that they would not likely be attained if the Section 92 Order were made, they are cognizable under section 96 and will be included in the trade-off assessment.

[395] In assessing whether efficiencies are likely to be achieved through alternative means, the Tribunal will assess the realities of the market(s) concerned, and will not exclude efficiencies from its analysis on the basis of speculation that the efficiencies could *possibly* be achieved through such alternative means.

[396] It bears emphasizing that, under section 96, the relevant counterfactual is the scenario in which the Section 92 Order is made. This is not necessarily the scenario in which the merger does not occur.

(ii) Socially adverse effects

[397] At paragraph 284 of the Panel's decision, it was observed that the Commissioner adduced no evidence with respect to what the Tribunal in the past has characterized as being *socially adverse* effects. The Panel also observed that the Commissioner conceded that the merger is not likely to result in any such effects. Accordingly, the Panel confined its assessment to the *anti-competitive* effects claimed by the Commissioner.

[398] However, given that the Commissioner requested, in her final oral submissions, that the Panel clarify the analytical approach applicable to the efficiencies defence, the following observations will be provided with respect to the potential role of socially adverse effects in the trade-off analysis contemplated by section 96, in future cases.

[399] At paragraph 205 of its final argument, CCS characterized the approach established by the Federal Court of Appeal in *Propane 2*, above, as being the "balancing weights approach." This is the same terminology that was used by Dr. Baye at footnote 14 of his reply report, where he referred to the approach established in *Propane 3*, above, and *Propane 4*, above. However, as the Tribunal noted in *Propane 3*, at para. 336, balancing weights "is incomplete [as an approach] and useful only as a tool to assist in its broader inquiry" under section 96. With this in mind, the Tribunal characterized that broader inquiry mandated by *Propane 2* in terms of the "socially adverse effects" approach. However, on reflection, the term "weighted surplus" approach would seem to be preferable.

[400] As noted at paragraphs 281 – 283 of the Panel's decision, the total surplus approach remains the starting point for assessing the effects contemplated by the efficiencies defence set forth in section 96 of the Act. After the Tribunal has assessed the evidence with respect to the

quantifiable (i.e., the DWL) and non-quantifiable anti-competitive effects of the merger in question, it will assess any evidence that has been tendered with respect to socially adverse effects. In other words, if the Commissioner alleges that the merger is likely to give rise to socially adverse effects, the Tribunal will determine how to treat the wealth transfer that is likely to be associated with any adverse price effects of the merger. The wealth transfer is briefly discussed at paragraph 282 of the Panel's decision.

[401] As the Tribunal observed in *Propane 3*, above, at para. 372, “demonstrating significant adverse redistributive effects in merger review will, in most instances, not be an easy task.” Among other things, determining how to treat the wealth transfer will require “a value judgment and will depend on the characteristics of [the affected] consumers and shareholders” (*Propane 3*, above, at para. 329). It will “rarely [be] so clear where or how the redistributive effects are experienced” (*Propane 3*, above, at para. 329). In general, the exercise “will involve multiple social decisions” and “[f]airness and equity [will] require complete data on socio-economic profiles on [*sic*] consumers and shareholders of producers to know whether the redistributive effects are socially neutral, positive or adverse” (*Propane 3*, above, at paras. 329 and 333).

[402] Where it is determined that the merger likely will result in a socially adverse transfer of wealth from one or more identified lower income group(s) to higher income shareholders of the merged entity, a subjective decision must be made as to how to weigh the relevant part(s) of the wealth transfer. (If the entire wealth transfer will involve a socially adverse transfer, then it would be necessary to decide how to weigh the full transfer.) If the income effect on some purchaser groups would be more severe than on others, different weightings among the groups may be required.

[403] It is at this point in the assessment that the balancing weights tool can be of some assistance. As proposed by Professor Peter Townley, one of the Commissioner's experts in *Propane*, above, this tool simply involves determining the weight that would have to be given to the aggregate reduction in consumer surplus (i.e., the sum of the deadweight loss, including any deadweight loss attributable to pre-existing market power, plus the wealth transfer) in order for it to equal the increased producer surplus that would likely result from the merger (i.e., the sum of the efficiency gains and the wealth transfer). (See the Affidavit of Peter G.C. Townley, submitted in *Propane*, above, (available at http://www.ct-tc.gc.ca/CMFiles/CT-1998-002_0115_38LES-1112005-8602.pdf).)

[404] For example, in *Propane*, the aggregate reduction in consumer surplus was estimated to be \$43.5 million, i.e., the estimated \$40.5 million wealth transfer plus the estimated \$3 million DWL. By comparison, the aggregate increase in producer surplus was estimated to be \$69.7 million, i.e., the sum of the efficiency gains accepted by the Tribunal, namely \$29.2 million, plus the wealth transfer of \$40.5 million. The balancing weight was therefore represented by w in the following formula: $1(69.7) - w(\$43.5) = 0$. Solving for w yielded a value of 1.6, which was the weight at which the consumer losses and the producer gains just balanced. (See *Propane 3*, above, at paras. 102-104.) Accordingly, for consumer losses to outweigh producer gains, they would have had to be given a weight of greater than 1.6, assuming that producer gains were given a weight of 1.

[405] Professor Townley's helpful insight was that members of the Tribunal often would be in a position to subjectively determine, even in the absence of substantial information, whether there was any reasonable basis for believing that a weighting greater than the balancing weight ought to be applied to the socially adverse portion(s) of the wealth transfer. If not, then notwithstanding an insufficiency of the information required to accurately calculate a full set of distributional weights, it could be concluded that the efficiencies likely to result from the merger would outweigh the adverse effects on consumer surplus. Unfortunately, there was not sufficient information adduced in *Propane* to permit the Tribunal to assess whether the estimated balancing weight of 1.6 was reasonable, given the socio-economic differences between and among consumers and shareholders (*Propane 3*, above, at para. 338).

[406] Where the balancing weights tool does not facilitate a determination of the weights to be assigned to any identified socially adverse effects, other evidence may be relied upon to assist in this regard. For example, in *Propane 3*, the Tribunal relied upon Statistics Canada's report entitled *Family Expenditure in Canada, 1996*, which suggested that only 4.7% of purchasers of bottled propane were from the lowest-income quintile, while 29.1% were from the highest-income quintile. The Tribunal ultimately determined that the redistributive effects of the merger on customers in the lowest-income quintile would be socially adverse, and included in its trade-off analysis an estimate of \$2.6 million to reflect those adverse effects. Although it found that it had no basis upon which to determine whether the DWL should be weighted equally with adverse redistribution effects, the Tribunal ultimately concluded that, even if the \$2.6 million in adverse distribution effects were weighted twice as heavily as the \$3 million reduction in DWL and a further \$3 million to represent the adverse qualitative effects of the merger, the combined adverse impact on consumer surplus would not exceed \$11.2 million (*Propane 3*, above, at para. 371). Since that estimate was still far below the recognized efficiency gains of \$29.2 million, it concluded that the defence in section 96 had been met. This conclusion was upheld on appeal.

(iii) Non-quantifiable/qualitative effects

[407] The Panel's assessment of the non-quantifiable effects that were considered in the section 96 trade-off assessment in this case is set forth at paragraphs 305-307 of its reasons.

[408] I simply wish to add that where there is not sufficient evidence to quantify, even roughly, effects that ordinarily would be quantifiable, it will remain open to the Tribunal to accord *qualitative* weight to such effects. For example, in the case at bar, it would have been open to accord qualitative weight to the anti-competitive effects of the Merger expected to occur outside the Contestable Area, given that the evidence established that such effects were likely, but could not be calculated due to shortcomings in the evidence. As it turned out, it was unnecessary for the Panel to give those effects any weighting whatsoever.

[409] Similarly, had the Panel not accepted the Commissioner's evidence with respect to the quantitative magnitude of the DWL, such that there was then no evidence on this specific matter, it would have been open to the Panel to accord qualitative weight to the fact that there would have been *some* significant DWL associated with the adverse price effects which it determined were likely to result from the Merger. The same will be true in other cases in which either it is

not possible to reliably quantify the likely DWL, even in rough terms, or the Commissioner fails to adduce reliable evidence regarding the extent of the likely DWL, at the appropriate time.

DATED at Ottawa, this 29th day of May, 2012.

(s) Paul Crampton C.J.

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TAB 11

Federal Court



Cour fédérale

Date: 20250513

Dockets: T-294-25
T-432-25

Citation: 2025 FC 878

Ottawa, Ontario, May 13, 2025

PRESENT: The Honourable Mr. Justice Zinn**BETWEEN:****UNIVERSAL OSTRICH FARMS INC****Applicant****and****CANADIAN FOOD INSPECTION AGENCY****Respondent****JUDGMENT AND REASONS****TABLE OF CONTENTS**

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I. Overview

[1] The Applicant, Universal Ostrich Farms Inc., challenges two related decisions made by the Respondent, Canadian Food Inspection Agency [the CFIA or the Agency], under section 48 of the *Health of Animals Act*, SC 1990, c 21 [the *Act*]. The first decision, a Notice to Dispose issued on December 31, 2024, ordered the destruction of all ostriches on the farm after laboratory tests confirmed infection with H5N1 highly pathogenic avian influenza [HPAI]. The second, an Exemption Denial, dated January 10, 2025, refused the farm’s request to spare the flock on the basis that the ostriches formed a self-contained, unexposed “distinct epidemiological unit” with “rare and valuable poultry genetics,” thus qualifying for an exemption from the Notice to Dispose under the CFIA’s *Highly Pathogenic Avian Influenza 2022 Event Response Plan* [the *2022 ERP*].

[2] At the heart of this proceeding lies an inevitable tension between the CFIA's mandate to protect public health and the Applicant's wish to preserve its ostriches. Parliament has charged the CFIA with preventing the spread of designated zoonotic and enzootic diseases and with protecting the food supply, public health, and Canada's reputation in global trade. To do so, the Agency complies with the internationally recognized and applied "Stamping-Out Policy" approach recommended by the World Organisation for Animal Health [WOAH] that requires rapid culling of affected avian populations. Conversely, the Applicant faces the loss of decades of selective breeding work, disruption to valuable commercial and scientific research, and destruction of birds that might no longer pose an active, ongoing risk of transmitting HPAI. Against this backdrop, the Applicant contends that the CFIA has, in issuing the Notice to Dispose and Exemption Denial, disregarded its unique circumstances and fallen short of providing basic procedural fairness.

[3] These two applications address whether the CFIA's decisions were reasonable and procedurally fair based on facts available to the Agency at the time. This is not an appeal. The Court is not stepping into the shoes of the Agency and making the decisions that the Court feels ought to have been made. Instead, the focus of the review is on the Agency's reasoning and process.

[4] I dismiss both applications for judicial review. The Agency's decisions were reasonable based on the record before the decision-maker and were made in a procedurally fair manner.

[5] Courts must respect Parliament's choice to assign decision-making power to administrative bodies. This respect comes from the principle of separation of powers, a

cornerstone of Canadian public law: *Wilson v Atomic Energy of Canada Limited*, 2015 FCA 17 at para 30. The separation of powers compels courts to respect the legislature's choice to assign decision-making power to specialized administrative bodies, such as the CFIA, rather than to the judiciary: *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*] at para 30.

[6] Courts must also respect the demonstrated scientific and technical expertise of administrative agencies. In administrative law, courts generally stay out of scientific debates and focus on whether the decision-makers used their expertise to make reasonable and procedurally fair decisions. When Parliament leaves technical or scientific assessments to specialized administrative bodies, it signals that those bodies, not the courts, are best positioned to make judgments on complex, expertise-driven matters. Indeed, Canadian administrative law explicitly warns that courts must not resolve scientific disputes or substitute their own views for those of specialized decision-makers authorized by Parliament to handle such issues: *Vavilov* at para 93. Judges are experts in law, not in public health, virology, epidemiology, or veterinary medicine. This case undeniably has a strong technical flavour. Both parties have submitted expert affidavits supported by scientific literature. The role of this Court is not to conduct afresh its own studies of that material and decide which science is correct, but to determine whether the CFIA's decisions were reasonable and procedurally fair based on the record before it.

[7] Judicial review hinges on what was before the decision-maker. With very few exceptions, reviewing courts on judicial review must mentally travel back to the moment when the decision was made, and judge the decision with only the evidence that was before the decision-maker at that moment. Here, the dates are December 31, 2024 for the Notice to Dispose

and January 10, 2025 for the Exemption Denial. A reviewing court must assess administrative decisions based exclusively on the information available to the decision-makers at the time they made those decisions: *Association of Universities and Colleges of Canada v. Canadian Copyright Licensing Agency (Access Copyright)*, 2012 FCA 22 at para 19; *Alberta (Information and Privacy Commissioner) v Alberta Teachers' Association*, 2011 SCC 61 at paras 22-26.

[8] If courts conducted judicial review with information that did not exist at the time of decision-making, they would be faulting decision-makers for lacking a crystal ball. No one has the gift of foresight, so courts must avoid reviewing decisions through the lens of hindsight. Therefore, this Court cannot consider “new” evidence, such as the current health status of the ostriches, recent test results, or updated scientific developments that become available only after January 10, 2025, the date of the Agency’s last decision.

[9] Concepts like “reasonableness” and “procedural fairness” have specific meanings in administrative law, defined and refined over years of jurisprudence. Reasonableness asks whether the CFIA’s explanation of its decisions tells a compelling story of how it reached them. Whether the story is compelling enough depends on whether the outcome and reasons are logically supported by the evidence on record, consistent with applicable law, and aligned with the Agency’s past practices and own policies. Reasonableness does not ask whether the outcome is the best or most persuasive course of action.

[10] Procedural fairness is about the decision-making process itself, not the outcome. This assessment asks questions such as whether the Applicant received timely notice, whether the Applicant had meaningful chance to be heard, and whether the CFIA followed the procedures

that it promised it would. In this context, fairness is not about whether the substantive outcome feels fair in an everyday understanding, but whether the CFIA adhered to the required legal standards of fairness in the process it followed to reach its decisions. Keeping these legal meanings in mind helps avoid the understandable, but legally misplaced, reaction of equating “harsh outcome” with “unfair decision.”

[11] This Court accepts that there is a real and negative impact of the CFIA’s two decisions on the Applicant and its principals. Beyond the economic loss, the destruction of a long-established ostrich population is also a source of emotional distress, particularly given the decades of work and investment the principals have dedicated to breeding and raising their flock. I have considerable sympathy for them.

[12] Nonetheless, such personal losses must be weighed against the broader public interest in protecting public health and maintaining trade stability. Avian influenza is a virus capable of causing serious harm to both animals and humans, with significant implications for Canada’s poultry businesses and international trade status. To combat threats like this virus, Parliament has authorized the CFIA to act decisively making swift decisions with far-reaching consequences, often under conditions of scientific uncertainty. This is a challenging mandate.

II. Background

A. The parties

[13] The Applicant operates a privately owned ostrich farm and research business located approximately ten kilometres outside Edgewood, British Columbia. The 65-acre operation is primarily managed by two principals with ostrich husbandry and selective breeding experience

dating back to the mid-1990s. Over the years, the Applicant has diversified its business portfolio to encompass operations in selling breeding stock, raising birds for slaughter, processing limited amounts of meat, offering agri-tourism tours, and, in recent years, focusing on extracting immunoglobulin Y from ostrich eggs for use in human-virus diagnostics.

[14] The CFIA has the statutory authority granted by the *Act* and the *Canadian Food Inspection Agency Act*, SC 1997, c 6. While commonly associated with the regulation of food safety and quality in Canada, the Agency's broader mandate includes preventing and controlling communicable diseases in animals and plants that threaten public health, environmental integrity, or Canada's economic interests, including international trade in livestock and animal products. In furtherance of this mandate, the CFIA administers the 2022 *ERP*, which is the latest formalization and operationalization of the Stamping-Out Policy. The Agency reports to the Minister of Health, except where the *Act* assigns powers, duties, or functions to the Minister of Agriculture and Agri-Food for matters unrelated to food safety.

B. *The avian influenza virus*

[15] Avian influenza, also known as bird flu, is caused by influenza A viruses. Like all viruses, avian influenza viruses cannot replicate on their own and must infect hosts to do so. Their usual hosts are wild birds. Migratory waterfowl, particularly wild ducks, serve as natural hosts, potentially returning from their overwintering grounds each year with new viral variants. These viruses can also occasionally spread to domestic birds and, more rarely and sporadically, to mammals like humans.

[16] For domestic birds, transmission of the virus can occur through direct contact with infected wild or domestic birds, as well as through indirect exposure to contaminated environments. The ability of avian influenza to persist in the environment contributes to its transmission. It can persist outside of hosts in feces, grass, and soil. It can remain viable for months or even years in fresh water at low temperatures, creating long-lasting sources of infection or re-infection. On small holding operations like the Applicant's ostrich farm, common risk factors for transmission include direct contact between domestic and wild birds, proximity to environments such as wetlands, ponds, swamps, lakes, rivers, and grain fields, and the acquisition of birds with unknown health status.

[17] Human infection with avian influenza is rare but potentially deadly. Infection typically occurs through close contact with infected birds or contaminated environments, particularly where appropriate personal protective equipment and hygiene measures are lacking. Some strains of the virus are particularly lethal. For instance, approximately half of the more than 900 reported cases of human H5N1 infection worldwide since 1997 have resulted in death.

[18] Each strain of the avian influenza is identified by two special proteins on its surface: hemagglutinin, designated "H," and neuraminidase, designated "N." Hemagglutinin helps the virus bind to and enter host cells, while neuraminidase enables release and propagation of the virus from the host cells. The combination of H and N proteins plays a large role in deciding which specific animals the virus can infect, how easily it spreads, and how the host immune system recognizes and reacts to it. To date, sixteen hemagglutinin subtypes, H1-H16, and nine neuraminidase subtypes, N1-N9, have been documented in birds, producing the familiar binomial viral strain names such as "H5N1" or "H7N9."

[19] However, knowing the H and N subtypes of an avian influenza strain alone does not sufficiently reveal how harmful it is for birds. The avian influenza ability to cause serious disease, or its “pathogenicity,” strongly depends on a small section of the hemagglutinin protein called the “cleavage site.” At this site, certain host enzymes must cut the hemagglutinin to activate the virus. Depending on the sequence of amino acids at the cleavage site, the virus may either spread systematically throughout the host’s body and damage multiple organs, or stay limited to the lungs, kidneys, or gastrointestinal tract and cause less serious consequences. In other words, the level of pathogenicity of avian influenza in birds depends heavily on the molecular structure of its cleavage site, as revealed by the amino acid sequence there.

[20] To find out the pathogenicity of a particular strain of avian influenza, one performs pathotyping. This usually involves testing three things: the subtype of hemagglutinin, the subtype of neuraminidase, and the amino acid sequence at the cleavage site. To do this, the laboratory technique called real-time reverse-transcription polymerase chain reaction [RRT-PCR] is used to detect the genes for hemagglutinin and neuraminidase and identify their subtypes, such as “H5” and “N1.” To analyze the cleavage site, the part of the hemagglutinin gene containing the cleavage site is amplified and then sequenced to see whether it has the amino acid pattern linked to high or low pathogenicity avian influenza [LPAI].

C. *Avian influenza outbreaks in Canada*

[21] Canada first confronted a major HPAI outbreak in 2004 in British Columbia. In February of that year, an LPAI H7N3 virus was detected in the Fraser Valley region. By March, the virus had mutated into an HPAI, spreading rapidly across both commercial and non-commercial premises. To contain the virus, over 14 million birds were disposed of. Two human cases were

reported, both presenting with conjunctivitis and mild influenza-like symptoms. Both individuals recovered fully. The outbreak was declared over by June 2004.

[22] Several smaller HPAI events occurred between 2004 and the current outbreak. The most significant occurred in 2015, when North America faced widespread outbreaks of H5N2 and H5N8 HPAI strains. In Canada, the impact was concentrated primarily in commercial poultry flocks in Ontario.

[23] The current nationwide HPAI outbreak began in November 2021 and has affected every province except Prince Edward Island. The outbreak started with detection of clade 2.3.4.4b H5N1 in wild bird populations in Canada before spreading to domestic poultry. Since then, HPAI has been confirmed on 527 domestic premises across the country, with British Columbia reporting the highest number of cases and some premises experiencing repeated infections. The outbreak has affected operations ranging from small backyard flocks to large scale commercial farms. Canada also recorded its first domestically acquired human case in late 2024, when a British Columbia teenager became critically ill and required intensive care. The individual has since made a full recovery.

III. Facts

A. The Applicant's ostrich operation

[24] The Applicant's property features open-air enclosures with shared facilities and proximity to wildlife. The farm is arranged with fenced and cross-fenced areas intended to separate groups of ostriches for breeding and care, while also providing a degree of biosecurity. No roofed barns

segregate ostriches of different age groups. A large natural pond, routinely visited by wild ducks and other waterfowl, lies near the centre, in between two of the outdoor bird pens.

[25] The Applicant has developed what it considers a uniquely large strain of ostriches through selective breeding since the 1990s. The ostriches are allegedly selected for body size and favourable genetic traits, with surplus birds not meeting these standards being discarded or culled. Some ostriches currently on the farm trace back to early imports from Africa and remain part of the breeding stock.

[26] From approximately 2020 onward, the Applicant shifted its primary commercial focus to extracting and studying antibodies, notably immunoglobulin Y, from ostrich eggs. For the Applicant, these antibodies have lucrative commercial and research values, especially in the development of diagnostics or therapeutics relevant to human viruses, such as the COVID-19 causing virus of SARS-CoV-2. To advance this antibody-based venture, the Applicant has collaborated with both domestic and international partners, including scientific researchers and private sector entities. Despite this strategic shift, some level of ostrich sales, along with sales or planned sales of products derived from ostrich fat and eggshells, continued through to at least December 2024.

[27] By early December 2024, the farm reportedly housed about 450 ostriches, including older breeding stock and newly introduced birds.

B. Infections, investigations, and CFIA interventions

[28] In February 2020, the Applicant's ostriches experienced a significant illness, reportedly resulting in roughly ten deaths. Laboratory tests confirmed bacterial infections caused by *Proteus spp.*, *Pseudomonas aeruginosa*, and *Escherichia coli*. Although unsupported by laboratory findings, the farm's principals speculated in hindsight that avian influenza might have contributed to the illness. Most ostriches were said to have recovered within weeks, leading the principals to suspect survivors might have developed natural immunity to future outbreaks of HPAI.

[29] In early December 2024, a new outbreak of respiratory symptoms emerged shortly after wild duck exposure. The Applicant observed respiratory or "flu-like" symptoms among a subset of ostriches, reminiscent of the 2020 illness. According to the farm's principals, those symptoms appeared roughly one week after "300-500 ducks ... landed on the premises." By late December, mortalities began increasing, particularly among newer ostriches, prompting consultation with a local veterinarian. Approximately 25 to 30 ostriches died within a three-week period.

[30] The CFIA intervened on December 28, 2024, following an anonymous report of multiple ostrich deaths at the Applicant's premises. The Agency promptly contacted the Applicant and imposed a verbal quarantine order on the premises, with formal documentation to follow. The next day, the Applicant requested that a CFIA veterinarian assess the flock for avian influenza. Four additional ostriches died that same day.

[31] On December 30, 2024, CFIA inspectors visited the premises, collected swab samples from two carcasses suitable for laboratory testing, noted wild-bird activity at the pond, and observed that staff and equipment were shared and moved freely among open pens. That same day, the CFIA sent the Applicant a Declaration of Infected Place pursuant to section 22 of the *Act* and a Requirement to Quarantine per section 91.4 of the *Health of Animals Regulations*, CRC, c 296. These orders imposed movement controls and established biosecurity measures aimed at containing the HPAI outbreak on the Applicant's premises by preventing access to infected birds, carcasses, and contaminated areas by wild birds, other animals, and people.

[32] On December 31, 2024, the Canadian Animal Health Surveillance Network laboratory in Abbotsford, British Columbia, reported positive test results for the H5 avian influenza subtype. On January 3, 2025, the National Centre for Foreign Animal Disease in Winnipeg, Manitoba, confirmed through genome sequencing that the pathogen was a HPAI subtype, H5N1 clade 2.3.4.4b, and noted the virus's cleavage-site motif with amino acids "PLREKRRKR/GLF" was "compatible with HPAI viruses that came to Canada via the Pacific's flyway."

[33] The CFIA issued the Notice to Dispose on December 31, 2024, immediately after receiving confirmation of a positive test result for H5 avian influenza. Just 41 minutes after obtaining the test result, the CFIA issued the Notice to Dispose as guided by the 2022 ERP and pursuant to subsection 48(3) of the *Act*. The CFIA set February 1, 2025, as the deadline for disposal of all affected birds and related materials.

[34] On January 2, 2025, the CFIA Case Officer assigned to the Applicant's case contacted its principals to introduce herself, provide an overview of the situation, and establish a line of

communication to guide them through the multi-step administrative process. Their first interaction was a phone call, during which the principals first raised their theory that the older ostriches may have developed herd immunity because of the unreported 2020 “flu-like” illness, and expressed interest in seeking an exemption from depopulation. The Case Officer explained the exemption application process, emphasized its time-sensitive and document-intensive nature, and highlighted the need to submit a formal “Distinct Unit Request” in a package that the Agency would provide.

[35] Later that same day, the Case Officer sent two follow-up emails. The first email [the Process Introduction Email] was provided three hours following the call. This introductory email included several important attachments: the Notice to Dispose, the Declaration of Infected Place, the Requirement to Quarantine, and a document titled *What to Expect – Steps on How CFIA Will Work Through the Process on Your Farm*. This last document explained that the entire administrative process of depopulation is “fluid” in that while it consists of well-defined discrete steps, these may overlap in practice. It also detailed the anticipated procedural steps, including discussions with the Case Officer, a lengthy Premises Investigation Questionnaire interview, biocontainment assessment, depopulation, disposal, cleaning and disinfection, and compensation.

[36] The second email [the Exemption Process Overview Email] detailing exemption requirements was sent four hours after the call. It outlined various requirements, including official guidance on exemptions for birds with “rare and valuable genetics,” and reiterated that the process is “document heavy.” It provided information on how to apply for an exemption from depopulation on this basis. The email reproduced relevant policy content regarding this

category of exemption and explained that the assessment is based on both the submission of a completed *Distinct Unit Request Package*, which was attached to the email, and supporting evidence demonstrating the genetic value of the birds.

[37] Open and frequent communication between the Applicant and CFIA continued after the initial intake process. Following January 2, 2025, communications included virtual meetings, phone calls, emails, and a further on-site inspection. These interactions facilitated discussion and assessment of several key issues, including ostrich immunity, the genetic distinctiveness of the flock, the potential to identify an epidemiologically unexposed subgroup, and the farm's biosecurity conditions.

[38] On January 3, 2025, CFIA officials held a virtual meeting with the Applicant's principals to assist them in completing the Premises Investigation Questionnaire and to gather more information about the property. During the meeting, the son of one principal reported observing a neighbour entering areas already designated as an Infected Place. The Case Officer reminded the Applicant's principals of the importance of managing public perception, noting that their neighbours continued to contact the Agency with concerns about mortality management. The Case Officer emphasized the situation's urgency throughout the meeting, stressing the need for the Applicant to promptly submit evidence supporting their claimed relationship with Kyoto University and the asserted special genetic characteristics of the flock.

[39] On January 7, 2025, CFIA inspectors conducted another site visit at the Applicant's premises, which revealed further concerns with the biosecurity conditions at the farm. Inspectors observed wild ducks following them into the quarantine zone and noted the presence of weasels

in the barns. More than 50 wild ducks were seen within one of the ostrich enclosures. Although the Applicant's principals had attempted to fence off a nearby pond, they explained that the wild ducks continued to access the ostrich feed dishes by flying in. The principals also sought guidance from the inspectors on completing the *Distinct Unit Request Package*. The inspectors reiterated the importance of submitting as much supporting evidence as possible to strengthen their exemption request.

[40] Between January 4 and 9, 2025, the Applicant submitted several documents to support its exemption application while ostrich deaths continued. The main document was the completed *Distinct Unit Request Package*. Other supporting documents included letters of support, and information detailing its business selling ostrich antibodies and other commercial ventures as support for the Applicant's claim that its ostriches should be exempted for their "rare and valuable genetics" worthy of preservation.

[41] On January 10, 2025, the CFIA issued the Exemption Denial. It concluded that the Applicant had failed to demonstrate the existence of any distinct epidemiological unit free from exposure risk. Additionally, the CFIA found that the Applicant had not submitted sufficient evidence to support its claims of genetic rarity and value qualifying the flock for an exemption.

[42] By mid-January 2025, the spread of illness had reportedly plateaued, although some ostriches remained ill or continued to die. CFIA officials continued to monitor the situation. By the end of January 2025, total ostrich mortalities tied to flu-like illness reportedly reached 69 birds. The Applicant alleges that the last death occurred on January 15, 2025, with the

surviving majority appearing healthy or recovered. This reinforced its belief in the flock's attainment of at least partial herd immunity against H5N1.

[43] Late in January 2025, the Applicant requested permission to conduct or arrange additional tests on apparently healthy ostriches to confirm whether they were shedding virus. The Applicant also sought to have recognized genetic experts examine the flock. The record indicates the CFIA did not approve further testing at that stage. It focused instead on the confirmed H5N1-positive test results and reiterated the infection risk associated with an open-air ostrich operation like that of the Applicant's.

IV. Decisions Below

[44] This judicial review arises from the CFIA's Notice to Dispose and its Exemption Denial. The Notice to Dispose mandates the destruction and disposal of the Applicant's ostriches, while the Exemption Denial refuses the Applicant's request that some or all the birds be spared. Together, these two decisions illustrate the CFIA's position that the Applicant's entire ostrich flock must be culled due to H5N1, with no exemption warranted. The underlying record includes not only the formal instruments themselves, but also supporting documentation such as meeting minutes, telephone call summaries, email correspondence, and internal memoranda. These materials together form the pertinent decision record before this Court.

[45] Before highlighting key aspects of the decision record, it is helpful to situate these decisions within the CFIA's broader administrative process that implements the disposal of animals and things contemplated by subsection 48(1) of the *Act*. The Notice to Dispose and Exemption Denial are two steps in the multi-step process for containing and eradicating the

current wave of HPAI, as set out in the 2022 *ERP*, which operationalizes the Stamping-Out Policy pursuant to the statutory discretion provided by subsection 48(1). The Notice initiates destruction of affected flocks based on established epidemiological criteria. The Exemption Denial serves as a secondary review that evaluates whether specific circumstances justify departing from the primary disease-control protocol.

A. Notice to Dispose

[46] On December 31, 2024, the CFIA issued the Notice to Dispose requiring destruction of all poultry on the premises. This Agency did this through a Form 4202 Requirement to Dispose of Animals or Things, citing statutory authority under section 48 of the *Act*. This Order stated that “Avian Influenza” had been “determined or suspected” on the premises and required “all poultry and poultry carcasses along with other material approved by CFIA disposal crew” to be destroyed. The operative period ran from the date of the order to February 1, 2025. The Order treated ostriches as “poultry” for disease-control purposes. At this initial stage, the CFIA did not consider whether any portion of the flock might be exempted.

[47] On January 12, 2025, the CFIA issued an Amended Notice to Dispose, revoking and replacing the initial order of December 31, 2024, to correct several technical details without changing the ordered depopulation. This amendment corrected certain updated quarantine details, primarily the GPS coordinates, while leaving unchanged the substantive requirement to depopulate all ostriches and the original disposal timeline. The amended Order reaffirmed that ostriches fall under the classification of “poultry” for HPAI control purposes and reiterated that all listed animals and items remained subject to destruction. An accompanying explanatory note confirmed that the effective date of the original Notice to Dispose remained December 31, 2024.

[48] Immediately following the issuance of the original Notice to Dispose, the CFIA communicated with the Applicant providing further details regarding movement restrictions, quarantine measures, and the CFIA's avian influenza Stamping-Out Policy. While these additional communications did not add any new formal reasons, they clarified the administrative processes and reinforced the CFIA's position that full flock depopulation was mandatory unless an exemption was explicitly approved. On January 3, 2025, the CFIA Compensation Unit contacted the Applicant to provide information regarding compensation for the ordered destruction of the ostriches pursuant to *Compensation for Destroyed Animals and Things Regulations*, SOR/2000-233 [the *Compensation Regulations*].

B. Exemption Denial

[49] Following receipt of the Notice to Dispose, the Applicant sought exemption from depopulation claiming, first, that there is a distinct epidemiological unit within its flock that was either unexposed or at reduced risk and, second, that the flock contained "rare and valuable poultry genetics," which warranted preservation from complete depopulation. On January 10, 2025, the CFIA denied both exemption requests. Three sets of documents within the record are particularly significant in illustrating the CFIA's reasoning and decision-making process in evaluating and rejecting the Applicant's exemption request.

[50] The first set of documents consists of the Exemption Process Overview Email with the attached *Distinct Unit Request Package*, both dated January 2, 2025. This Email from the Case Officer and its attachment detailed the criteria for qualifying as a distinct epidemiological unit and listed the type of supporting documentation required for exemption under the "rare and valuable genetics" category. According to the Email, examples of acceptable documentation

included historical records of genetic investment, evidence that the flock consists of high-quality purebred birds, and proof of genomic testing for specific traits.

[51] These documents were sent shortly after the Case Officer's initial intake phone call with the Applicant's principals, during which the principals expressed interest in seeking an exemption. In the Exemption Process Overview Email, the Case Officer invited the Applicant to submit supporting documentation for the exemption request, characterizing the application process as "document heavy." The Email reads:

Hello Again,

Sorry for the multiple emails!

This process is document heavy, but I'm here to help you navigate the process!

Based on the information we've gathered, you fall into the "birds classified as having rare and valuable genetics" category. I've copied CFIA's description here:

Rare and valuable genetics in poultry refers to uncommon genetic lines of poultry that hold a high economic value. *Genetic breeding of poultry involves the creation of multi-generation genetically diverse populations on which selection is practiced to create adapted animals with new combinations of specific desirable traits. It is this combination of an uncommon breed or line of poultry, which undergoes a selection process to create specific desirable traits which leads to its high economic value.*

3.1 Initial screening to classify birds as having rare and valuable genetics

The genetics of the flock can be demonstrated to be distinctive from standard commercial flocks with criteria such as but not limited to the following:

- *There is historical evidence of genetic investment (e.g. breeding books, use of closed flocks of breeding pure line birds for a prolonged period, a selection program from trained geneticists is implemented);*

- *The flock consists of high quality pure-bred birds (e.g. are recognized by breed associations, 3rd party national/international organizations or by the poultry industry as top producers/prized genetics/suppliers of genetics);*
- *Genomics testing for specific traits has been undertaken*

Here's what we need from you at this time to get started:

- We need documented proof that these birds are distinctive from standard commercial flocks. The highlighted section above gives good examples of the types of documents we're looking for.
 - If you have any documentation of the agreement between you and the university – that'd be really helpful to send to us.
- I'll also need you guys to fill out the attached document Distinct Unit Package that will need to be completed and sent back to me.

Thanks,
[bold and italic in the original]

[52] The second set of documents comprises the Applicant's submissions supporting their exemption request. These documents, submitted to the CFIA Case Officer between January 2 and 10, 2025, included business plans highlighting research into ostrich antibodies, the potential commercialization of specific genetic lines, and assertions about the flock's unique African genetic heritage. They also contained diagrams illustrating the farm's physical layout, depicting fenced partitions and a large central natural pond, as well as letters from collaborators affirming the distinctiveness and commercial or research value of the flock.

[53] The third set of documents consists of the CFIA's formal communication of the denial and reasoning. This includes the Case Officer's January 10, 2025, email communicating the denial, the attached Response Letter providing formal reasons, and an Internal Recommendation

Memorandum that formalized internal decision-making discussions. The email acknowledged the emotional distress that the Applicant's principals may experience and offered follow-up discussion opportunities with CFIA officials. The attached Response Letter explained that ostriches are “poultry” under its existing policy and the WOAHP definitions, that selective disposal of birds would conflict with Canada’s Stamping-Out obligations, and that the evidence did not satisfy the distinct epidemiological unit exemption threshold and the criteria for the “rare and valuable genetics” exemption. It concluded: “This decision is final and is not subject to appeal” [emphasis in the original].

[54] Informing the Exemption Denial was the Internal Recommendation Memorandum prepared and reviewed by the Exemption Committee. This Memorandum forms part of the Exemption Denial decision, as administrative decision-makers are entitled to adopt the reasoning of recommending bodies, such as the Exemption Committee, with the adopted reasoning being treated as that of the decision-makers: *Canada (Attorney General) v Sketchley*, 2005 FCA 404 at para 37–39.

[55] The Exemption Committee reviewed the Applicant’s submissions and the Agency’s internal policies and concluded there was “no evidence of a subset of birds existing as a distinct unit or at a different level of risk.” This finding was based on site visits and documentation confirming that the Applicant’s ostriches roamed outdoors across multiple pens, shared feed and staff, and frequently interacted with wild birds attracted to the central pond. Given the open layout of the farm, the shared equipment and staff, and the uniform risk of H5N1 transmission, the Committee concluded it was impractical to subdivide the flock for biosafety purposes, finding no distinct epidemiological units that could qualify for exemption.

[56] The Committee also determined that the Applicant failed to show the genetic uniqueness or economic value of the flock. The Exemption Committee highlighted that the Applicant had “a significant burden of proof... to demonstrate the high economic value the flock provides to the broader Canadian poultry industry” and the nature of the “robust processes ... to actively select and breed for specific desirable traits.” The Committee concluded that the Applicant had not met either requirement based on the evidence it had provided. Additionally, the Committee conducted an analysis on trade implications of non-adoption or non-implementation of the Stamping-Out Policy and wrote about a preliminary scientific literature review indicating that ostriches can harbour and spread sub-clinical H5N1 and potentially facilitate further viral mutations and reassortments.

[57] Collectively, these documents articulate this rationale: ostriches, classified as poultry under Canadian avian influenza control policies, must be destroyed pursuant to the WOAHP-supported Stamping-Out Policy upon confirmation of HPAI infection unless strict exemption criteria are met. Based on this rationale, the CFIA determined the Applicant’s flock was uniformly exposed to risk and concluded the Applicant failed to supply sufficient evidence to satisfy the exemption criteria.

C. Injunction

[58] The Applicant filed a motion to enjoin the CFIA from enforcing the Notice to Dispose and the Requirement to Quarantine. By Order dated January 31, 2025, this Court stayed the Notice to Dispose “until a decision is rendered in the underlying application for judicial review.” The Requirement to Quarantine was left untouched.

V. Issues

[59] The Applicant identifies five issues in their written submissions:

- 1) The applicable standard of review;
- 2) Whether the CFIA properly exercised its discretion in issuing the Notice to Dispose;
- 3) Whether the CFIA breached procedural fairness in making the Exemption Denial;
- 4) Whether the CFIA properly applied its own exemption criteria; and
- 5) Whether the CFIA properly exercised its discretion in issuing the Exemption Denial.

[60] At the hearing, the Applicant raised two novel issues, both bearing on the reasonableness of the CFIA's implementation of the Stamping-Out Policy in the Applicant's specific circumstances. First, whether the CFIA relied on an incorrect factual assumption about the pathogenicity of the virus in deciding to apply the Policy. Second, whether the CFIA's classification of the farm's ostriches as "poultry" was incorrect and, if so, whether that misclassification rendered its application of the Policy unreasonable.

[61] The Respondent proposes a different three-part framing of the issues:

- 1) Should portions of the five expert reports filed by the Applicant be struck;
- 2) Was the Notice reasonable and issued in a procedurally fair manner; and
- 3) Was the Exemption Refusal reasonable and made in a procedurally fair manner.

[62] Although neither party's framing fully captures the scope and complexity of the issues in this judicial review, I find two submissions made by the Respondent's counsel at the hearing particularly helpful in structuring the analysis. First, the Respondent correctly points out that the

Applicant devotes significant attention to challenging the reasonableness of the Stamping-Out Policy itself. Hence, addressing the reasonableness of the Policy as a distinct issue yields a clearer and more logical analysis. Second, the Respondent's conceptual distinction between the formulation and implementation of the Stamping-Out Policy strikes at the heart of this case. Treating these as distinct parts to be analyzed, each subject to different contextual factors and judicial review considerations, provides a more coherent and analytically sound framework.

[63] Accordingly, this Court frames the issues as follows:

1. Whether the CFIA's Stamping-Out Policy, as currently operationalized through the 2022 *ERP* policy document, is reasonable in law?
2. Whether the CFIA's implementation of the Stamping-Out Policy was reasonable and procedurally fair given the Applicant's specific circumstances?
 - 2.1. Whether the Notice to Dispose was made through a fair process, unfettered, and reasonable?
 - 2.2. Whether the Exemption Denial was made through a fair process and reasonable?

[64] Finally, this Court also needs to address several evidentiary objections raised by both parties. These include admissibility and weight to be afforded to portions of each other's expert reports, certain challenged parts of the affidavit of Dr. Cathy Furness submitted by the Respondent, and the challenge to the reliability of the Respondent's Report of Inspector, authored and signed by Inspector Dykstra on January 31, 2025.

VI. Standard of Review

A. The fundamentals

[65] The parties submit that the applicable standard for review of procedural fairness is correctness. However, based on the jurisprudence, I find a more accurate characterization to be one that resembles the correctness standard but shifts the focus from determining the correct procedure to assessing “whether the procedure was fair having regard to all of the circumstances”: *Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69 [*Canadian Pacific*] at para 54; *Heiltsuk Horizon Maritime Services Ltd v Atlantic Towing Limited*, 2021 FCA 26 at para 107. The goal of the procedural fairness review should always be investigating “the ultimate question [of] whether the applicant knew the case to meet and had a full and fair chance to respond”: *Canadian Pacific* at para 56.

[66] For substantive review, I agree with the parties that the CFIA’s decisions to issue the Notice to Dispose and Exemption Denial are reviewable on the standard of reasonableness, as articulated by the Supreme Court of Canada in *Vavilov*.

[67] Reasonableness review is one single deferential yet robust standard: *Vavilov* at paras 12-13 and 89. The Court must give considerable deference to the decision-maker, recognizing that this entity is empowered by Parliament and equipped with specialized knowledge and understanding of the “purposes and practical realities of the relevant administrative regime” and “consequences and the operational impact of the decision” that the reviewing court may not be attentive towards: *Vavilov* at para 93. Judicial intervention is warranted only when the flaws or shortcomings are “sufficiently serious... such that [the

decision] cannot be said to exhibit the requisite degree of justification, intelligibility and transparency.” *Vavilov* at para 100. Absent exceptional circumstances, reviewing courts must not interfere with the decision maker’s factual findings and cannot reweigh and reassess evidence considered by the decision-maker: *Vavilov* at para 125.

[68] However, reasonableness review is not a mere “rubber-stamping” process: *Vavilov* at para 13. It is the reviewing court’s task to assess whether the decision as a whole is reasonable; that is, it is one that is based on an internally coherent and rational chain of analysis and that is justified in relation to the facts and law that constrain the decision-maker: *Vavilov* at para 85.

[69] A court conducting reasonableness review is not, and must not become, an “academy of science”: *Coldwater First Nation v Canada (Attorney General)*, 2020 FCA 34 [*Coldwater First Nation*] at para 119; *Inverhuron & District Ratepayers Ass. v Canada (Minister of The Environment)*, 2001 FCA 203 [*Inverhuron*] at para 40. When conducting reasonableness review of decisions involving highly scientific and technical subject matters, courts must pay careful attention to the decision-maker’s expertise: *Vavilov* at paras 92 and 93. This expertise warrants judicial deference in the assessment of facts: *Vavilov* at para 125; *Safe Food Matters Inc. v Canada (Attorney General)*, 2023 FC 1471 [*Safe Food Matters*] at para 121; *Dias v. Canada (Attorney General)*, 2018 FCA 126 at para 8. Similarly, deference is also warranted in the interpretation of law, particularly when it pertains to the decision-maker’s home statutes: *Safe Food Matters* at paras 8 and 111; *Balogh v. Canada (Citizenship and Immigration)*, 2022 FC 447 at para 18. However, such expertise must be demonstrated by the decision-makers for the judiciary to afford it deference: *Vavilov* at para 93; *Mason v Canada (Citizenship and Immigration)*, 2023 SCC 21 at para 70.

[70] In addition to considering the administrative decision-maker's demonstrated expertise, the relevant evidentiary record, and the applicable legal framework, reviewing courts must also pay attention to the impact of the decision on those affected by its consequences. This dimension of judicial scrutiny has been brought to the forefront of reasonableness review by the Supreme Court in paragraphs 133 to 135 of *Vavilov*: "concerns regarding arbitrariness will generally be more acute in cases where the consequences of the decision for the affected party are particularly severe or harsh, and a failure to grapple with such consequences may well be unreasonable."

B. Reasonableness review of policy decisions

[71] The context of administrative decisions shapes what constitutes reasonable decision-making, even though it does not alter the standard of review itself. As established in *Vavilov* at paragraph 89, although context does "not modulate the standard or the degree of scrutiny by the reviewing court," it does "constrain [...] what will be reasonable for an administrative decision maker to decide in a given case." This distinction means that while courts must apply consistent analytical rigour for judicial reviews of all administrative decisions, the outcomes of a reasonableness review will necessarily vary depending on the decision-making context, with "some decisions [being] more likely to survive reasonableness review because they are relatively unconstrained," while "other decisions may be less likely to survive because they are relatively more constrained": *Entertainment Software Association v Society of Composers, Authors and Music Publishers of Canada*, 2020 FCA 100 [*Entertainment Software*] at para 25.

[72] Policy decisions fall into the "very much unconstrained" category and therefore are "harder to set aside": *Entertainment Software* at paras 24-28 and 31. They typically require

balancing of complex social, scientific, economic, and public interest considerations, which are better left for the executive branch of the government and its various administrative arms. This is particularly true for policy decisions establishing general frameworks “without reference to particular cases,” as they are even less adjudicative and administrative in nature. Importantly, courts should not recast such decisions as administrative acts merely because certain actors may experience a sharper economic impact than others: *South Shore Trading Co. Ltd. v Canada (Fisheries, Oceans and Coast Guard)*, 2025 FC 174 [*South Shore*] at paras 44–48.

[73] Historically, judicial intervention in policy decisions has been limited to specific, narrow grounds. Precedents such as *Maple Lodge Farms v Government of Canada*, [1982] 2 SCR 2 [*Maple Lodge Farm*], have established that courts may interfere only where the policy is tainted by bad faith, breaches an express requirement of statutory natural justice, or relies on considerations that are “irrelevant or extraneous” to the statute’s purpose: *South Shore* at para 50, citing *Maple Lodge Farms* at pp 7-8.

[74] The Supreme Court of Canada has now folded these traditional grounds for intervention into *Vavilov*’s unified reasonableness framework. In *Auer v. Auer*, 2024 SCC 36 [*Auer*], the Supreme Court established that subordinate legislation, such as regulations, is presumptively reviewed for reasonableness. The “irrelevant, extraneous or completely unrelated” test from *Katz Group Canada Inc. v Ontario (Health and Long-Term Care)*, 2013 SCC 64, now functions merely as a reminder that subordinate rules must remain within the enabling statute’s boundaries, rather than as a separate threshold distinct from *Vavilov*’s framework: *Auer* at paras 29–36, 41–47 and 50–65. At paragraphs 59 to 65 of *Auer*, the Supreme Court stressed that “the governing statutory scheme, other applicable statutory or common law and the principles of statutory

interpretation are particularly relevant constraints” under reasonableness review. The central question for reviewing courts is whether the impugned instrument can plausibly be located within the purpose, text, and overall architecture of the enabling statute. Weighing the substantive merits of policymaking is strictly off limits: *Auer* at paras 55-58.

[75] Although *Auer* addressed specifically decisions to make subordinate legislation, its reasoning logically extends to policymaking decisions. The key connective tissue is the source of authority: in both contexts, the decision-maker exercises broad, delegated discretionary power to pursue legislative objectives. *Vavilov* has identified the governing statute, other relevant law, and factual context as the “legal and factual constraints” on every administrative act: *Vavilov* at paras 105-135. Therefore, whether discretion manifests through formal regulations or through general policy directives, administrative decision-makers must always interpret their enabling provisions purposively, act within statutory boundaries, and demonstrate that their legislative or quasi-legislative actions advance the statutory objectives given the available legal and factual constraints.

[76] Consequently, the core reasonableness review considerations articulated in *Auer* should also apply to policymaking decisions. The analytical framework should not turn on the formal label of “regulation.” What matters most is the nature of the decision itself. Specifically, whether it creates generally applicable rules on statutory authority to be applied by more frontline decision-makers in the administrative decision-making chain. This description encompasses ministerial directives, Cabinet guidelines, and disease-control policies no less than regulations. Accordingly, the analytical framework in *Auer* that includes the principles of presumption of validity, purposive interpretation, and prohibition on merits review should also

guide courts reviewing any policymaking decision. Ultimately, the inquiry remains whether the decision to adopt the policy instrument is grounded in a rational, purposive interpretation of the enabling statute and respects all relevant procedural, substantive, and contextual limits.

[77] Deference is particularly warranted for policy decisions intended to safeguard animal and public health from high-risk disease. Case law has shown this principle consistently. In *Kohl v Canada (Department of Agriculture)*, [1995] FCJ No. 1076 (FCA) [*Kohl*], the Federal Court of Appeal described a ministerial order made under section 48 of the *Act* as a “policy decision obviously not subject to the requirements of the rules of natural justice or procedural fairness,” reviewable solely for abuse or misuse of power: *Kohl* at para 18.

[78] The teaching from *Kohl* is clear. Where a policy decision ordering blanket disposal of affected animals and things is made in good faith, reviewing courts should confine their reasonableness analysis to whether the destruction advances the objectives of the *Act* and whether there is some evidence to support the underlying suspicion. Following *Vavilov*, the threshold for finding sufficient support today is undoubtedly reasonableness, meaning the question is whether the suspicion is reasonably supported by the evidence and consistent with applicable legal constraints. Substituting a different view of the scientific and operational determinations underlying the policy decision would risk treading on the executive’s policy prerogative: *Kohl* at paras 20–22.

[79] *Entertainment Software*, *South Shore*, *Kohl* and *Auer* converge into a single guiding principle: courts serve as guardians of legality, not arbiters of the wisdom of policy. When the legislature explicitly delegates public interest decisions, such as the management of animal and

public health, to administrative actors, courts must leave assessment of policy merits, especially the nuanced balancing of scientific, economic, and social factors, to decision-makers tasked by Parliament with those responsibilities. Judicial review of policy decisions should only target compliance with legal and factual constraints, and verification of whether the alleged exercise of technical expertise in formulating the policy decisions has been sufficiently demonstrated.

VII. Legal Framework

A. The law and policy on disposal of affected or contaminated animals and things

(1) The Statutory and Regulatory Scheme

[80] Under the *Act*, the Minister of Agriculture and Agri-Food [the Minister] holds significant powers to manage diseases in animals. These powers advance the *Act*'s core objectives by proactively preventing and controlling animal diseases and reducing the risk of transmission to humans, thereby protecting public health and preserving Canada's international trade status: *River Valley Poultry Farm Ltd v Canada (Attorney General)*, 2009 ONCA 326 [*River Valley Poultry Farm*] at para 68; *Paradis Honey Ltd v Canada (Agriculture and Agri-Food)*, 2024 FC 1921 [*Paradis Honey*] at para 23; *Jerram v Canada (Minister of Agriculture) (T.D.)*, [1994] 3 FC 17 [*Jerram*] at para 30; *Kohl* at paras 7-12.

[81] The *Act* provides multiple tools for containing disease outbreaks, including infected place declarations, quarantines, and control zones. The Minister and their delegates have authority to declare infected places under sections 22 to 23, impose quarantines per section 25, and establish primary control zones pursuant to section 27. These declarations trigger strict prohibitions against the movement of animals or related items within or out of affected areas without a licence to facilitate swift containment of potential outbreaks. Notably, Parliament has

anticipated the need for broad and proactive containment measures. As such, under subsection 22(2), control orders automatically extend not only to directly affected premises but also to adjacent lands, buildings, or properties owned or occupied by the same individual.

[82] Central to this judicial review is section 48 of the *Act*. Subsection 48(1) empowers the Minister and their delegates to order the destruction of animals or things in three scenarios: (a) if the animal is infected, suspected of infection, or contaminated by a disease or toxic substance; (b) if the animal has been in contact with or in proximity to an infected animal or thing; or (c) if the animal itself is a vector, causative agent, or toxic substance. Enforcement is governed by subsection 48(3), which mandates a written “Notice to Dispose” specifying the timeline and method of destruction. Compliance is compulsory, as failure to act permits authorities to directly dispose of the animals. Subsection 48(2) offers an alternative to destruction, allowing treatment instead, but only where the Minister is satisfied that treatment will “eliminate or prevent the spread” of the disease or toxic substance.

[83] Parliament has clearly conferred broad discretion on the Minister and their delegates under section 48 of the *Act*. The Federal Court of Appeal has confirmed that even a mere suspicion of exposure, without confirmed contamination, is sufficient to justify issuing a Notice to Dispose under the *Act*: *Kohl* at para 20. This broad latitude is also reflected in Parliament’s use of the permissive language “may.” However, this discretion is limited to a functional binary of destruction and treatment. Within this framework, the discretion focuses on two key decisions: (1) whether to order destruction or authorize treatment; and (2) how to carry out the chosen course of action. The statute leaves no room for a third “wait-and-see” approach. Interpreting section 48 to allow for such an option would violate the “well established principle

of statutory interpretation that the legislature does not intend to produce absurd consequences,” which include situations where an interpretation “is incompatible with other provisions or with the object of the legislative enactment”: *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 SCR 27 at para 27. Given the *Act*’s objectives of proactive disease prevention and control, a “wait-and-see” approach, unless it can be reasonably nested under a destruction or treatment plan, would undermine those core mandates and result in precisely the kind of incompatible interpretation the law forbids.

[84] Moreover, discretion under the treatment option is narrowly circumscribed by scientific and operational realities. Subsection 48(2) explicitly limits treatment to situations “where the Minister considers that the treatment will be effective in eliminating or preventing” the spread of disease. This means that the Minister and their delegates’ discretion to authorize treatment is therefore limited by scientific and operational realities: they must have confidence that treatment is both scientifically viable and practically feasible. Consequently, where the Minister and their delegates determine that treatment provided by subsection 48(2) of the *Act* cannot reliably eradicate or prevent the spread of a high-risk disease, the *Act* effectively compels the ordering of destruction contemplated by subsection 48(1).

[85] Recognizing that the CFIA’s mandate is protective rather than punitive, the *Act* also balances depopulation requirements with compensation to affected animal owners. Specifically, under subsection 51(1) of the *Act*, owners whose animals are destroyed or die after being required to be destroyed are entitled to compensation calculated based on the animal’s market value prior to destruction, less any residual value in the carcasses. Nevertheless, this market valuation is subject to regulatory caps provided by the *Compensation Regulations*. Specifically,

pursuant to subsection 2(a) and the associated Schedule, compensation for an ostrich is limited to a maximum of \$3,000 per animal. The compensation framework also extends beyond the value of the animals themselves. Subsection 51(4) of the Act permits additional compensation for disposal-related costs, which, as specified by subsection 3(1) of the *Compensation Regulations*, may include reasonable costs of transportation, slaughter, cleaning and disinfection, disposal services, and personal labour expended by the owner.

[86] Importantly, this compensation scheme is no-fault in nature and tied to compliance with CFIA directives. Compensation becomes payable after destruction pursuant to section 48 of the *Act*. In this way, the framework encourages timely cooperation with the Agency's disease control measures while recognizing the significant economic impact borne by owners whose flocks must be sacrificed in the interest of protecting the broader public good.

(2) The Jurisprudence on the *Act*'s Objective and the Decision-Maker's Discretion

[87] This Court has long recognized that, when faced with urgent threats to animal health, public safety, or economic interests, the Minister and their delegates are entitled to adopt drastic measures that may seriously and adversely impact individuals affected by the decision, particularly in economic terms. As Justice Cullen recognized in *David Hunt Farms Ltd v Canada (Minister of Agriculture)*, 1994 CarswellNat 1859 (FC TD) [*David Hunt FC*] at para 51, the authorities may legitimately pursue an “admittedly draconian approach,” provided it is pursued in good faith and for legitimate public-interest objectives. In such circumstances, the broader public interest in disease-control prevails over individual property rights, especially given the statutory compensation mechanisms available under section 51 of the *Act*: *David Hunt FC* at para 52.

[88] The jurisprudence further makes clear that the Minister's discretion under subsection 48(1) includes the power to develop general policy directives, the implementation of which is delegated to subordinate officials: *David Hunt FC* at para 43, aff'd *David Hunt Farms Ltd v Canada (Minister of Agriculture)*, 1994 CarswellNat 1876 (FCA) [*David Hunt FCA*] at paras 4-5, leave to appeal to the Supreme Court of Canada refused [1994] SCCA No. 353; *Carpenter Fishing Corp. v. Canada*, [1997] FCJ No 1811 (FCA) [*Carpenter Fishing*] at paras 28-29. This principle reflects the recognized distinction between two types of discretion under the *Act*: a broad discretion involving the formulation of general policy, and a constrained discretion exercised by officials responsible for implementing that policy.

[89] This distinction gives rise to a two-phase framework for understanding the exercise of discretion under subsection 48(1). In the first phase, at the ministerial level, the Minister exercises broad discretion to formulate general policies governing the control of animal diseases. As Justice Cullen noted in paragraph 43 of *David Hunt FC*, "section 48(1) vests the discretion to require the disposal of animals in the Minister, not in a person such as an inspector, or a District Veterinarian." In the second phase, at the administrative level, frontline officials implement the policies established by the Minister, typically exercising little to no independent discretion. This division mirrors the approach identified by the Federal Court of Appeal in *Carpenter Fishing* at paragraph 28, where the Court explicitly distinguished between "the imposition of a quota policy" as "a discretionary decision in the nature of policy or legislative action" and "the granting of a specific license" as an administrative action.

[90] This two-phase structure aligns with established administrative law principles and ensures operational feasibility. The structure conforms with principles distinguishing between

the more permissible delegation of administrative tasks and the more problematic delegation of quasi-legislative or judicial functions: *The Queen v Harrison*, [1977] 1 SCR 238 at p 245; *Re Peralta and the Queen*, [1985] OJ No 2304 at paras 63-73; *The Dene Nation v The Queen*, [1984] 2 FC 942 at p 947. Practically, requiring the Minister to personally make every decision concerning animal health across the country would be unworkable and inconsistent with the need for an efficient and effective animal disease response system. By allowing the Minister and their delegates to set general policy and entrust its routine implementation to officials, the two-phased statutory scheme promotes operational feasibility and consistency in a large tribunal like the Agency, which exercises discretionary powers with significant consequences for Canadians: *Canada (Citizenship and Immigration) v Thamothers*, 2007 FCA 198 [*Thamothers*] at para 60. As the case law recognizes, the adoption and application of general policies are both permissible and desirable, provided such policies are not applied blindly and the decision-maker remains attentive to specific circumstances: *Carpenter Fishing* at para 29.

[91] The distinction between policy formulation and implementation has real impacts on judicial review. First, reviewing courts must carefully differentiate between the review of general policy decisions, which are more quasi-legislative in nature, and the review of specific decisions implementing those policies, which are more administrative in nature. As the Federal Court of Appeal emphasized in *Carpenter Fishing* at paragraph 29, courts must not apply the standards of review appropriate to administrative decisions when assessing legislative policy-making. The Federal Court of Appeal further instructed that, where a challenge to an administrative decision indirectly attacks an underlying policy, courts should isolate the policy component and apply standards appropriate to legislative action. Consequently, courts afford

greater deference to general policy decisions, while applying more rigorous scrutiny to their specific administrative application.

[92] Second, the obligations of procedural fairness also vary depending on whether the exercise of administrative discretion involves general policy formulation or specific administrative implementation. Decisions grounded in high-level policy formulation, especially at ministerial or institutional levels, and aimed explicitly at the public interest typically trigger minimal procedural protections for individuals, with the generally viable route being challenges on grounds of abuse of discretion: *David Hunt FC* at para 52, citing *Martineau v Matsqui Disciplinary Board*, [1980] 1 SCR 602 at 628-629; *Kohl* at paras 19-21. In contrast, decisions that are “not of a legislative nature,” delegated to frontline officials, and directly “affect[ing] the rights, privileges, or interests of an individual,” attract heightened procedural fairness obligations: *Cardinal v. Director of Kent Institution*, [1985] 2 SCR 643 [*Cardinal*] at para 14; *Knight v Indian Head School Division No. 19*, [1990] 1 SCR 653 at p. 670; *Blois v. Onion Lake Cree Nation*, 2020 FC 953 at para 69.

(3) The “Stamping-Out” Policy

(a) Overview

[93] The Stamping-Out Policy is Canada’s adaptation of internationally recognized and applied principles for managing HPAI outbreaks. It prioritizes swift elimination of infected populations rather than individual testing and disposal of affected animals. Adopted during and developed following Canada’s first HPAI outbreak in British Columbia in 2004, the Policy aligns with three sequential steps of the stamping-out approach outlined by the World Organisation for Animal Health, *Terrestrial Animal Health Code* (Paris: WOAH, 2024)

[*Terrestrial Code*]: killing affected animals and those suspected of exposure, disposing of carcasses, and cleansing and disinfecting establishments. Rather than prescribing detailed operational procedures, the Stamping-Out Policy sets only high-level guidance, with specific implementation protocols developed through instruments that translate the broader Policy into individual processes and actionable steps at the field level. This approach has been maintained as a directive of general applicability across different outbreak scenarios, with implementation triggered by specific conditions. Currently, the trigger is defined in the *2022 ERP* as laboratory confirmation of H5-subtype HPAI detection in domestic birds within a defined epidemiological unit.

[94] Since its inception, the Stamping-Out Policy has been consistently implemented by the CFIA as its primary strategy for managing HPAI outbreaks. Previously formalized in the 2007 and 2013 *Notifiable Avian Influenza Hazard-Specific Plans* [the *NAI HSPs*] and now operationalized through the *2022 ERP*, the Policy has been found by the Agency to be the most successful method for eradicating viruses, eliminating environmental contamination, halting transmission, and reducing public health risks. The *2022 ERP* sets out a flexible set of guidelines informed by past decisions, and is intended to: 1) cover situations not addressed by an existing policy; 2) allow deviation from or modification of an existing policy; 3) clarify existing policy; or 4) provide a range of adaptable policy options in varying decision-making contexts. Along with other guidelines, this instrument is regularly refined and amended, particularly when sufficiently unique situations necessitate more tailored response mechanisms.

[95] The Stamping-Out Policy's legal foundation rests in both subsection 48(1) of the *Act* and the long-established administrative law principle that agencies may use "soft law" instruments to

guide the exercise of their discretion without requiring an express statutory mandate: *Canadian Association of Refugee Lawyers v. Canada (Immigration, Refugees and Citizenship)*, 2020 FCA 196 at para 45, citing *Thamotharem* at para 56. Scientifically and operationally, the Policy is informed by international standards, particularly those set by WOAAH, and by scientific research and practical considerations tailored to Canada's agricultural, biosafety, and economic realities. Canada's international commitments and trade agreements also guide the design of the Stamping-Out Policy. They also further reinforce and incentivize the consistent domestic application of the Policy to protect its international reputation and maintain market access.

[96] The Stamping-Out Policy operates as an automatic response protocol once triggered, with discretion reserved for exemptions. The overall process of administering the Policy is multi-stepped. In practice, the very first step of exercising discretion granted under subsection 48(1) to decide whether to destroy or to treat HPAI-infected animals has already been done at the stage when the CFIA, as a delegate of the Minister, decided to develop and adopt the Stamping-Out Policy. As a result, once a triggering laboratory result arises, the Policy functions more as an automatic response protocol rather than an occasion for fresh discretionary judgment. At that point, the roles of relevant CFIA officials are to implement the established procedures for the depopulation and destruction of animals and things, not to decide anew how to respond. As part of this process, the CFIA must define the epidemiological unit, which by default encompasses birds on the entire premises unless scientific evidence justifies a narrower designation. Once such unit is determined, all remaining steps follow according to the prescribed protocol: depopulation, disposal, and disinfection of the entire unit, along with the surveillance periods consistent with WOAAH standards. Discretion remains available, however, through the

exemption process, where the CFIA evaluates on a case-by-case basis whether certain birds can be exempted under one of three narrow categories.

[97] This predominantly automatic approach, with discretion reserved for case-specific exemptions, reflects the scientific and operational realities of managing HPAI outbreaks: to counteract a virus with high transmissibility, capacity for rapid spread prior to visible clinical symptoms, and potential to seriously harm Canada's animal health, human health, and international trade interests. This unique decision-making context drives the Stamping-Out Policy's prioritization of immediate containment and depopulation to prevent further spread. It also explains why both Parliament and the judiciary have consistently endorsed the proactive, preventive philosophy underpinning both the *Act* and the relevant jurisprudence such as the *David Hunt* cases, *Kohl*, *Paradis Honey*, and *River Valley Poultry Farm*.

(b) *International Obligations and Trade Implications*

[98] The adoption and operationalization of the Stamping-Out Policy reflects Canada's commitment to fulfill binding international obligations, rather than mere domestic policy preference. Annex A(3)(b) of the World Trade Organization's *Agreement on the Application of Sanitary and Phytosanitary Measures* has designated the WOAHP as the authoritative international standard-setting body for animal health. Unsurprisingly, Canada's major trade agreements, including Article 9.6 of the *Canada-United States-Mexico Agreement* and Chapter 5 of the *Canada-European Union Comprehensive Economic and Trade Agreement*, explicitly incorporate selected WOAHP standards and condition market access to Canada's trading partners on demonstrated compliance with specific WOAHP protocols.

[99] Non-compliance with the Stamping-Out Policy can cause severe national economic consequences through extended trade restrictions in at least two ways. First, Article 10.4.3 of the *Terrestrial Code* establishes dramatically different waiting periods for regaining HPAI-free status: only 28 days after completing stamping-out and disinfection, versus a minimum of 12 months if stamping-out is not implemented. If the Policy is not adopted or observed, this extended trade restriction period can devastate not just individual farming operations but potentially a significant portion of Canada's agricultural export sector.

[100] Second, proper adoption and observation of the Stamping-Out Policy are the bedrocks of Canada's negotiated regional containment zoning agreements, which limit trade impacts to specific geographical areas during outbreaks while allowing exports to continue from unaffected regions. Dr. Suminder Sawhney, Senior Director of Animal Import and Export at CFIA, confirms that deviations from the Policy, even for smaller-scale outbreaks involving uncommon species, could invalidate entire agreements. The resulting comprehensive trade bans could impose economic costs far exceeding the immediate costs of containing individual outbreaks and harm the broader Canadian poultry industry, not just the affected premises.

(c) Operationalization through the 2022 ERP: Trigger and Implementation

[101] The 2022 ERP is the latest instrument that operationalizes the Stamping-Out Policy. Section 7.1 of the 2022 ERP sets out the triggering mechanism for implementing the Stamping-Out Policy, which varies depending on whether the case is the first occurrence, known as an index case, in a province or a subsequent detection in the same province. For an index case, the policy requires both H5 detection and pathotyping confirmation of the level of pathogenicity at the National Centre for Foreign Animal Disease in Winnipeg. For any subsequent cases within

the same province, any H5 RRT-PCR positive result from a Canadian Animal Health Surveillance Network approved laboratory immediately activates the Policy without requiring pathotyping.

[102] When triggered, the Policy applies uniformly to all domestic birds susceptible to avian influenza, regardless of species characteristics. Section 7.3 of the *2022 ERP* states: “The classification of an IP [Infected Premises] as non-poultry does not change the eradication actions required on the IP. These will be the same as for an IP classified as non-commercial (small holding) poultry.” While the *2022 ERP* does distinguish between “Commercial poultry,” “Non-commercial poultry,” and “Non-poultry,” these classifications of Infected Premises affect only trade reporting, zoning requirements, and surveillance protocols. They do not alter the fundamental eradication measures applied to the premises itself. As section 7.6 of the *2022 ERP* confirms, “Regardless of the classification of an IP (7.3), individual IP actions include application of stamping out measures.” Susceptibility to avian influenza - not size, commercial value, rarity, or expected lifespan - is the sole determining factor for whether a particular species falls within the Policy’s scope. Consequently, all susceptible birds - from common farm species like chickens and turkeys to less frequently domesticated birds like emus and ostriches - face the same depopulation protocol when H5 or H7 is detected in an epidemiological unit.

[103] Critical to proper implementation of the Stamping-Out Policy is the determination of the “epidemiological unit,” which the *2022 ERP* defines in Section 7.2 as: “A group of animals with the same likelihood of exposure to the pathogenic agent.” By default, this encompasses the entire premises, unless evidence demonstrates that smaller units maintain physical and functional separation. In essence, this determination of an epidemiological unit represents a scientific

assessment of exposure risk, not individual animal infection status. Once the CFIA defines the unit, every bird within it must be destroyed, except for three strictly defined exemption categories, and the environment must undergo the depopulation, disposal, and disinfection measures prescribed in the 2022 ERP Sections 7.6 through 7.8.

[104] Once triggered, the Stamping-Out Policy mandates a structured sequence of three operational phases that closely mirror those described by the *Terrestrial Code*. Sections 7.6 to 7.8 of the 2022 ERP outline these steps. First, depopulation requires humanely destroying all birds in the identified epidemiological unit using CFIA-approved methods. Second, disposal requires securely eliminating all carcasses and contaminated materials through biosecure methods that prevent environmental contamination. Third, premises must undergo primary cleaning and disinfection or, where infeasible, an extended 120-day fallow period at temperatures below 4°C for natural viral inactivation. These steps progress through a structured sequence: 1) completing the destruction phase permits disposal operations; 2) properly disposing of carcasses reduces airborne risk sufficiently to allow bird placement outside infected premises and begins a 14-day surveillance period in the surrounding control zone; 3) finishing the cleaning and disinfection phase triggers duty to notify WOA of outbreak closure and initiates a 28-day surveillance period in the broader control area; and 4) either a 14-day post-cleaning vacancy period or 120-day fallow period permits lifting all restrictions and quarantine orders.

(d) Exemption Framework and Assessment Criteria

[105] The 2022 ERP permits three narrow exemptions from depopulation required by the Stamping-Out Policy under specific scientifically defensible circumstances: “distinct units,” “rare and valuable genetics,” and “pet birds.” Conceptually speaking, this exemption does not

constitute a detachment of the birds in question from the Policy itself, but rather excludes said birds from the epidemiological unit to which depopulation must be applied. Pursuant to sections 7.2.1 and 7.6 as well as the *Exemptions from depopulation* appendix of the 2022 ERP, these exemptions all share a common threshold requirement: the birds must constitute a distinct epidemiological unit with no exposure to the virus.

[106] In addition to the basic requirement of a distinct epidemiological unit, each of the three exemption categories also has specific qualifying criteria. For “distinct units,” a portion of an infected premises may qualify for exemption if it maintains both physical and functional separation from the rest of the premises. This requires demonstrating separation through factors such as dedicated ventilation systems, physical barriers, separate staff, and biosecurity protocols preventing cross-contamination. For “rare and valuable genetics,” poultry lines must demonstrate high economic or genetic value and maintain status as a distinct epidemiological unit. For “pet birds,” exemptions may apply where birds are kept indoors, remain clinically healthy, and form a distinct epidemiological unit separate from the exposed population.

[107] A brief clarification is warranted to avoid confusion of the similarly named terms of “distinct unit” and “distinct epidemiological unit.” While closely related, these terms are not interchangeable, and thus have important differences in application. Unlike “distinct unit,” which typically requires physical and infrastructural separation, “distinct epidemiological unit” turns on demonstrated epidemiological independence. This can be shown through strict health monitoring, assigned staff, and rigorous biosecurity protocols that prevent exposure to the pathogen. In practice, however, achieving this level of epidemiological independence will often require many of the same physical and functional separations associated with a “distinct unit.”

[108] Assessment of exemption requests follows a rigorous, evidence-based, and discretionary process. Interdisciplinary committees like the Exemption Committee evaluate applications filled out by applicants against twenty distinct criteria related to physical separation, operational biosecurity, and risk management. As indicated on the self-assessment questionnaire in the *Distinct Unit Request Package* itself, any “NO” answers to these criteria likely precludes exemption. Additionally, the committees also weigh international trade and public health implications before granting an exemption. Furthermore, any exemption granted is automatically void if subsequent testing detects infection in the exempted birds, triggering the immediate application of the full Stamping-Out Policy to the previously exempted birds.

[109] The CFIA has strictly observed this distinct epidemiological unit threshold requirement in its evaluation of exemption applications. To date, it has granted only one exemption during the current outbreak: a March 2022 decision on a turkey production facility [the March 2022 Exemption]. In that case, CFIA ordered the destruction of turkeys in only two barns, while sparing those in other barns on the same premises. This limited exemption was justified by multiple biosafety measures establishing demonstrated epidemiological separation: 1) each grow-out barn maintained “distinct/separate air space in regards to ventilation”; 2) the facility implemented “various biosecurity measures...to mitigate the risk of transmission between other flocks/barns,” including “shower in/shower out procedures, dedicated clothing, footwear, equipment”; and 3) “official CFIA control mechanisms... have been placed on the premise.” Only after establishing the existence of a distinct epidemiological unit did the CFIA proceed to evaluate whether the facility qualified for the “rare and valuable genetics” exemption. It concluded that the spared turkeys met this criterion, as they were “high value pedigree birds that are the genetic cornerstone for the further production of commercial turkeys.”

B. The law on fettering

[110] Fettering is a serious flaw in administrative decision-making. It unlawfully removes or abandons the discretion that legislatures intended to be exercised in relation to individual cases: *Vavilov* at para 108, citing *Delta Air Lines Inc. v. Lukács*, 2018 SCC 2 at para 18. Fettering occurs when decision-makers blindly follow soft law instruments as if they were binding law, without genuinely considering how to exercise their discretion in the specific circumstances: *Thamotharem* at para 62; *Stemijon Investments Ltd v Canada (Attorney General)*, 2011 FCA 299 [Stemijon Investments] at para 22, citing *Maple Lodge Farms* at p 6.

[111] However, merely showing that decision-makers were “influenced significantly by... policy and its objectives” falls short of establishing the requisite “blindness” to constitute fettering, as influence alone does not show that decision-makers “afforded no consideration to the possibility of” pursuing an alternative course: *Publicover v. Canada (Attorney General)*, 2023 FC 659 at para 54; *Thamotharem* at para 59. Applicants bear the burden of showing that the decision-maker treated the policy as binding, ignoring their duty to exercise independent judgment based on the facts of each case: *Shin v. Canada (Public Safety and Emergency Preparedness)*, 2012 FC 1106.

[112] Once a court finds that discretion has been fettered, the decision must be set aside, as “a decision that is the product of a fettered discretion must *per se* be unreasonable.” *Stemijon Investments* at para 24; *Barco v Canada (Public Safety and Emergency Preparedness)*, 2018 FC 421 at para 20; *Gordon v Canada (Attorney General)*, 2016 FC 643 at para 28. No degree of deference can cure the flaw that flows from fettering.

[113] The prevailing view is that fettering does not engage a standard of review analysis in the usual sense. While some cases, such as *Singh Bajwa v. Canada (Citizenship and Immigration)*, 2012 FC 864 at para 46 have suggested that correctness may apply, the now prevailing view in the Federal Courts is that the core question is simply whether the decision was, in fact, the result of fettered discretion: *Desgagnés Transarctik Inc. v. Canada (Attorney General)*, 2014 FCA 14 at para 65; *Austin v. Canada (Citizenship and Immigration)*, 2018 FC 1277 at para 16; *Matharoo v Canada (Citizenship and Immigration)*, 2020 FC 664 at para 21; *Yanasik v Canada (Citizenship and Immigration)*, 2021 FC 1319 at para 25.

[114] The Federal Courts have identified key factors to watch for within policy instruments for distinguishing between permissible guidance and impermissible fettering. In paragraph 64 of *Thamotharem*, the Federal Court of Appeal endorsed the approach from *Ainsley Financial Corp. v Ontario Securities Commission*, [1994] OJ No 2966 [*Ainsley*], which examines: 1) the language of the instrument; 2) the practical effect of non-compliance; and 3) the expectations of the agency and its staff regarding implementation. A policy that uses mandatory language, prescribes detailed procedures, threatens sanctions for non-compliance, and is treated by staff as binding law, is more likely to amount to fettering. The key question is whether a decision is made “solely by reference to the mandatory prescription of a guideline, despite a request to deviate from it in the light of the particular facts:” *Thamotharem* at para 62.

[115] Two Federal Court cases applying section 48 of the *Act* have further clarified the distinction between permissible policy guidance and impermissible fettering in the multi-step decision-making of infected animal disposal. In *David Hunt FC*, Justice Cullen found that fettering cannot arise where no independent judgment remained at the implementation level.

That case involved a district veterinarian tasked with destroying cattle imported from the United Kingdom. The destruction decision followed a pre-established blanket policy directing that all cattle imported before 1990 be culled. Because the Minister had already made a categorical policy decision at the national level, the field officer's role was purely mechanical. Justice Cullen held that because no individual discretion survived at the field level, there was nothing left to fetter, a conclusion upheld on appeal: *David Hunt FC* at paras 33-37, aff'd *David Hunt FCA* at paras 3-7.

[116] In *Jerram*, the exercise of the same statutory power was upheld for the opposite reason: Justice Noël found that the regional inspector had residual discretion and genuinely exercised it. Specifically, the inspector “personally ascertained the circumstances of the subject bull,” and then, during cross-examination, “referred to the decision... as his own” and “confirmed his conviction that the bull had to be destroyed”: *Jerram* at para 35. Justice Noël emphasized that while the national policy strongly favoured destruction, it did not compel that outcome in every case. Therefore, what proved determinative was that the inspector's suspicion was genuinely formed and supported by evidence specific to the individual animal in question: *Jerram* at paras 42-52.

[117] These animal disease-control cases yield two foundational principles for analyzing fettering in multi-step administrative processes guided by a policy instrument. First, discretion must be understood as a unified whole across the entire process. Whether discretion of the overall process is fettered cannot be judged by looking at individual decision points in isolation. It must instead be assessed holistically, considering whether, when aggregated across the process, the appropriate overall level of discretion is preserved. Second, varying levels of

discretion at different stages are permissible, provided that the process preserves the proportional discretionary authority mandated by statute. This framework explains why the outcomes in the *David Hunt* cases and *Jerram* align despite differing levels of in-field discretion. In the former, discretion was concentrated at earlier, ministerial stages, leaving implementation largely mechanical. For the latter, the policy left field-level officials with some meaningful discretionary power to assess the situation before them. Neither caused fettering because the decision-makers in each case properly exercised the discretion allocated to them within the respective policy frameworks.

[118] To summarize, when reviewing fettering claims in multi-phase administrative processes, courts should make two key considerations:

- 1) Evaluate the architecture of the entire administrative process to determine whether it as a whole preserves sufficient discretion for case-specific judgment or unlawfully diminishes discretion. This is a qualitative assessment of whether the overall process maintains discretionary power proportionate to what is granted by the statute or improperly removes or abandons discretion; and
- 2) Examine the specific decision-making step under review to determine how much discretion, if any, was left to the decision-maker at that step, and whether the individual properly exercised that discretion. This is the more traditional fettering inquiry, centered on whether the decision-maker treated non-binding soft law as legally binding.

C. The law on legitimate expectation

[119] The doctrine of legitimate expectation is a core part of the procedural fairness principle.

If an applicant has a legitimate expectation that a certain procedure will be followed, this procedure will be required by the duty of fairness: *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 at para 26; *Agraira v Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36 [*Agraira*] at paras 94-95.

[120] To establish a legitimate expectation, applicants must demonstrate that the relevant public authority has made clear, unambiguous, and unqualified representations about the procedure it will follow, or have consistently adhered to certain procedural practices in the past: *Canada (Attorney General) v Mavi*, 2011 SCC 30 [*Mavi*] at para 68. Moreover, the representations must be within the authority's power to make, and applicants must have reasonably relied on the representations: *Agraira* at para 94.

[121] Applicants are entitled to rely on the administrative body's established procedures and publicly available policies, even if they are in general not legally binding. A failure by the decision-maker to follow its own procedures, or a unilateral departure from established practices without notice, may constitute a breach of procedural fairness: *Tafreshi v Canada (Citizenship and Immigration)*, 2022 FC 1089 at para 18; *Kandiah v Canada (Citizenship and Immigration)*, 2018 FC 1096 [*Kandiah*] at paras 25-27.

[122] When an administrative body changes or deviates from its procedures in a way that affects applicants, procedural fairness may require that affected individuals be given notice of the changes and an opportunity to adjust or comply with the new procedures, especially if the

changes or deviations could have significant or “fatal” consequences: *Kandiah* at paras 26-27; *Popova v Canada (Citizenship and Immigration)*, 2018 FC 326 at para 11.

[123] However, the law is clear that the doctrine of legitimate expectation creates only procedural rights, not substantive ones: *Agraira* at para 97; *Chelsea (Municipality) v Canada (Attorney General)*, 2024 FCA 89 at para 36. Even if an individual had “a legitimate expectation that a particular outcome will be reached, that expectation is not enforceable”: *Canada (National Revenue) v JP Morgan Asset Management (Canada) Inc*, 2013 FCA 250 [*JP Morgan*] at para 75; *Jennings-Clyde, Inc. (Vivatas, Inc.) v. Canada (Attorney General)*, 2024 FC 1141 [*Jennings-Clyde*] at para 40.

VIII. Analysis

A. Evidentiary issues: expert reports, affidavit, and Report of Inspector

(1) There is No Need to Rule on the Admissibility and Weight of the Expert Reports

[124] I do not need to rule on the admissibility or weight of the challenged portions of the parties’ expert reports, as the issues in this judicial review do not require weighing the scientific or technical insights they offer to properly conduct the reasonableness analysis. In fact, since the parties have marshalled their expert reports specifically to attack or defend the merits of the Stamping-Out Policy, examining and weighing these reports would lead to assessment of the Policy’s merits. As described in the Legal Framework section, courts at all levels have consistently held that the merits of policy decisions are strictly off limits in a reasonableness review: *Entertainment Software*; *South Shore*; *Kohl*; *Auer*.

[125] The parties, especially the Applicant, have staked much of their respective cases on competing visions of the science and practice of avian-influenza control, and each vision is carried almost entirely through expert opinion. The Applicant's expert suite consists of three individuals drawn from outside of public service. Collectively, their reports are deployed by the Applicant attempting to show that the measures offered by the Stamping-Out Policy are neither scientifically supported nor the least-intrusive means available and, therefore, unreasonable in law.

[126] I summarize below in very broad strokes the key opinions offered in the expert reports submitted by both sides.

[127] Dr. Steven Pelech, a UBC professor and biochemist with years of training and experience in immunology and virology, supplies in his two reports the central thesis that the H5N1 detected at the Applicant's farm behaved phenotypically like a low-pathogenic strain. He cites as evidence the low mortality of adult birds, short-lived viral shedding, and the flock's likely attainment of immunity to the virus by mid-January. Dr. Pelech's conclusion goes to the heart of the Applicant's claim that CFIA's response failed to consider the disproportionality of implementing the Stamping-Out Policy on its premises as well as the lack of consideration of monitoring and further research, and therefore is unreasonable.

[128] Dr. Byram Bridle, an immunologist at the University of Guelph with research focused on virology, also furnishes microbiology and immunology opinions. He argues that detecting an H5 gene by RRT-PCR is not, without full pathotyping, proof of a highly pathogenic virus. Faced

with a novel genotype, he opines, CFIA should first have performed a fresh risk assessment and considered vaccination or natural-immunity studies.

[129] Dr. Jeff Wilson, a current director of a veterinary science and infectious disease management consulting firm and former senior epidemiologist and manager at the Public Health Agency of Canada, overlays Dr. Pelech and Dr. Birdle's microbiology and immunology opinions with his epidemiological knowledge. Ostriches, Dr. Wilson says, live longer, range farther, and populate at far lower densities than conventional poultry, so close surveillance and targeted culling would have met international obligations with less collateral loss. Dr. Wilson further frames CFIA actions in adopting and implementing the Stamping-Out Policy as a policy failure when benchmarked against proper pandemic-response principles.

[130] The Respondent's scientific foundation rests on a single report by Dr. Shannon French, a CFIA veterinary epidemiologist who completed her doctorate research on the wildlife disease ecology of parasites and received various post-graduate trainings on epidemiology, virology, and poultry health management. Dr. French traces the full-genome sequencing that identified the virus on the Applicant's premises as a new HPAI H5N1 lineage, reviews international outbreak data illustrating silent but intense viral shedding in ratites, and explains why neither vaccination nor a "burn-out" strategy has gained WOAHP endorsement for commercial poultry.

[131] Unsurprisingly, each side seeks to narrow the evidentiary footprint of the other, and asks this Court to rely on the opinion of their experts should opinions diverge. For the Respondent's expert report, the Applicant takes issue with Dr. French's impartiality, arguing that she joined CFIA as a doctoral student in 2020, and claiming her report strays into advocacy by endorsing

the very policy under review. They also attempt to undermine the accuracy and credibility of her opinion on the characterization of the virus found on the Applicant's premises as an HPAI by pointing to her lack of specialized qualifications and experience focused on virology or immunology. The Applicant's counsel has not pinpointed any specific portions or paragraphs of Dr. French's affidavit that they ask to be struck or given no weight.

[132] For its part, the Respondent launches a two-pronged counterattack. It moves to strike 24 different portions of the Pelech, Wilson, and Bridle reports on the grounds that: 1) none of the authors have ever worked with ostrich production under outbreak conditions; 2) they rely on post-decision data and speculative modelling rather than contemporaneous evidence; and 3) their "herd-immunity" thesis sits well outside mainstream peer-reviewed literature. The Respondent also underlines that Drs. Pelech and Bridle have been criticized by courts in other legal proceedings for advocacy masquerading as expertise and have had their reports rejected. Concurrently, the Respondent defends Dr. French's credibility by pointing to her systematic review of relevant peer-reviewed literature, her concessions where data are uncertain, and the fact that her conclusions line up with WOAHP manuals and with the culling protocol upon HPAI outbreaks in ostriches in South Africa, where the Applicant's line of flock reportedly originated.

[133] As previewed in the beginning of this section, I do not need to resolve the parties' battle over the admissibility and weight of their expert material. The dispute they invite the Court to referee is, in substance, a contest over whose science on the virus in question is "better" and therefore whose preferred animal and public health policy is "wiser." To decide a winner in this contest will cause this Court to commit two cardinal sins in reasonableness review. First, it will prompt this Court to reach beyond the legitimate scope of reasonableness review of a broad

policy decision. Second, it will effectively make this Court an academy of science and an arbiter of truth in immunology and animal and public health.

[134] To reiterate, under *Vavilov*, this Court’s task on this judicial review is to decide whether the Stamping-Out Policy, when read considering its enabling statute, falls within a range of outcomes that can be said to be rational, intelligible and justified. As the Federal Court of Appeal explained in *Entertainment Software*, decisions “very much unconstrained” by tight statutory language or adjudicative methodology, namely policy decisions with broad public interest implications, are correspondingly “harder to set aside” because merits-based disagreement is not a ground for intervention. The Stamping-Out Policy under review is precisely of that character. Like the policy decisions examined in *South Shore* and *Kohl*, it is a preventative, nationwide disease-control measure adopted to proactively manage and eradicate a serious threat to animal and public health, as well as international trade. As *Auer* teaches us, for such decisions, the reviewing court asks whether the policy can plausibly be located within the text, purpose and architecture of the *Act*, not whether it represents the optimal balance of virological, economic, or public health considerations.

[135] The rivalling expert reports add fuel to precisely such an inadmissible balancing exercise. The Applicant’s evidence says the Stamping-Out Policy is economically wasteful, scientifically unnecessary, and ineffective, especially when it comes to the less studied situation of ostriches. The Respondent’s evidence says it has been effective, epidemiologically indispensable, and trade-critical. Accepting either view would require me to adjudicate the substantive merits of the policy and, as support, to resolve contested matters of viral pathogenicity, host biology, export-

market tolerance of policy changes and the like, a task the case law forbids: *Coldwater First Nation* at 119; *Inverhuron* at 40.

[136] Nor is it necessary to parse the expert evidence for the limited purpose of checking whether the CFIA had *some* evidentiary foundation to support its suspicion of HPAI infection and implementation of the Stamping-Out Policy during this wave of HPAI outbreak, including in the Applicant's situation specifically. The record already contains unchallenged factual materials, such as the existence of positive RRT-PCR results, whole-genome sequencing report, and information on contemporaneous HPAI outbreaks, on which the reasonableness of the suspicion and continuation of the Policy can be assessed. Whether different scientists might have drawn different risk conclusions, and which assessment this Court might prefer, is irrelevant to the reasonableness review at hand.

[137] In short, the parties' expert reports, however scientifically accurate, provide opinions on scientific truth, the weighing of which lies with the specialized administrative bodies, which are better positioned to assess the comparative prudence, efficacy, or proportionality of animal disease-control measures of general applicability. These are questions of policy merit and have no role in the reasonableness analysis of administrative decisions. For that reason, I decline to rule on the admissibility of the expert reports and afford them no weight in my reasons.

(2) Dr. Cathy Furness' Affidavit is Admissible as Factual Narrative

[138] I find Dr. Cathy Furness' affidavit, tendered by the Respondent, admissible. To the extent that her affidavit refers to scientific concepts, these statements provide factual context for understanding CFIA's regulatory decisions rather than offering scientific or technical

conclusions that would require expert qualification. Additionally, I treat those statements as factual narrative explaining what the CFIA understands and considers in its decision-making, not as definitive statements of scientific truth. I therefore find no basis to exclude Dr. Furness' affidavit or disregard portions of it as impermissible expert evidence.

[139] Dr. Furness is the Deputy Chief Veterinary Officer of the CFIA. Her affidavit offers background on the CFIA's understanding of the current HPAI outbreak that began in November 2021, the HPAI H5N1 virus detected at the Applicant's premises, and Canada's international obligations to implement the Stamping-Out Policy upon detection of HPAI. It also explains how the Stamping-Out Policy facilitates a faster return to disease-free status according to relevant international treaty, protects Canada's export markets through negotiated trade agreements, and supports coordinated global efforts to reduce public health risks from this zoonotic disease. The affidavit further details the Agency's legal authority under the *Act*, the specific application of these policies to the UOF case including the denial of their exemption request, and the coordinated federal-provincial response framework between CFIA and British Columbia authorities.

[140] The Applicant's counsel first raised their objection to the admissibility of this affidavit at the hearing. They insist that Dr. Furness' affidavit is inadmissible because it contains statements that offer opinion on technical and scientific matters, but is never tendered as an expert report properly qualified under Rule 52.2 of the *Federal Courts Rules*, SOR/98-106. However, they did not identify any specific paragraphs or portions of the affidavit they sought to have struck or disregarded.

[141] The Respondent's counsel objected to the Applicant's challenge, noting that the case management judge had directed the parties identify any admissibility objections in advance of the hearing. Respondent's counsel argued that raising the challenge for the first time at the hearing was contrary to that direction. Respondent's counsel also asked for the specific parts of Dr. Furness' affidavit which the Applicant's counsel had challenged, so that they could address it in their submission. I agreed with the Respondent at the hearing on the request for clarification and pressed the Applicant to identify the challenged portions. In response, Applicant's counsel stated: "it is quite obvious when you read [Dr. Furness'] report where she is offering virology or immunology opinions."

[142] I am of the view that the Applicant's evidentiary challenge here must fail, if not for the fact that it did not observe case management procedures, than for the fact that, contrary to what the Applicant's counsel claims, Dr. Furness' affidavit does not obviously contain the type of statement that veers into expert evidence on virology and immunology.

[143] Having carefully reviewed Dr. Furness' affidavit in detail, I find this characterization inaccurate. The statements contained therein predominantly consist of facts that one would expect a Deputy Chief Veterinary Officer to possess through her official position, responsibilities, and direct involvement in Canada's HPAI response. Jurisprudence is clear that such information does not constitute "expert information, since it was not the kind of information that could only be acquired and understood with special training or expertise," but rather information gained through knowledge, observation, and experience in the ordinary course of one's position: *R. v Millard*, 2023 ONCA 426 at para 108; *R. v Hamilton*, 2011 ONCA 399 at para 277.

[144] For example, when Dr. Furness describes avian influenza variants being categorized into HPAI and LPAI strains or identifies which subtypes are listed in the *Reportable Diseases Regulations*, SOR/91-2, she is stating factual information learned from her responsibilities, not offering specialized scientific opinions that require specialized training. Similarly, when describing the current outbreak timeline, detection of specific virus subtypes, or international standards for response, Dr. Furness is stating facts directly accessible in her role. Her statements about the absence of effective treatments for HPAI in birds represent factual declarations about available options within CFIA's policy framework, not scientific opinions on treatment efficacy. These are matters that would reasonably be known to anyone in her position without requiring special expertise beyond what is necessary for her role. It is particularly telling that, when making these statements, she cites and attaches supporting documentation as exhibits, which include fact sheets and publications from authorities such as the Public Health Agency of Canada and the World Health Organization. In other words, Dr. Furness is recounting and relaying information from these established sources, rather than communicating her opinions on scientific matters.

[145] The remaining portions of Dr. Furness' affidavit similarly consist of factual statements, such as descriptions of relevant WOA standards, CFIA internal processes, and federal-provincial coordination frameworks, all of which fall within the realm of factual narrative. Her account of the Stamping-Out Policy's requirements and the consequences for disease-free status restates international standards that guide the CFIA's work. Her descriptions of the CFIA's emergency response framework, hazard-specific plans, and operational procedures reflect institutional knowledge directly linked to her official role. When detailing the coordinated response with British Columbia authorities, including the liaison officer structure, weekly

meetings, and information-sharing protocols, Dr. Furness provides facts about administrative arrangements known to her through ordinary professional experience, not through specialized scientific training. These are precisely the kinds of statements expected from a senior public official addressing matters within her regulatory and operational mandate, not scientific opinions based on specialized training and expertise.

(3) The Respondent's Report of the CFIA Inspector is Admissible Under the Business Record Exception

[146] The last piece of evidentiary dispute I must address before turning to the substance of the reasonableness analysis is whether the one-page "Inspection Report" dated January 31, 2025, and tendered as Exhibit O to the affidavit of Dr. Cathy Furness, may be received as evidence of what occurred during CFIA Inspector Dykstra's onsite visit of and the testing done at the Applicant's premises on December 30, 2024. I find that it is, based on the business record exception provided by section 30 of the *Canada Evidence Act*, RSC 1985, c C-5 [the *CEA*].

[147] The Inspection Report is a formal summary of the site visit of the Applicant's premises conducted by Inspector Dykstra, with particular focus on the availability of carcasses for sampling and the applicable biosecurity measure. The Report shows that Inspector Dykstra explained that "he would like to swab up to ten mortalities," but the Applicant's principal who accompanied him "stated there were only two mortalities in good enough condition to be sampled" since "the remaining mortalities had either been scavenged on by wild animals or were in later stages of decomposition." The Applicant contests this account, alleging that Inspector Dykstra refused additional carcasses despite being offered more. Based on this alternative version of events, the Applicant argues that the CFIA failed to comply with section 4 of the 2022

ERP, which requires sampling of *all* available dead birds up to ten at maximum, and therefore lacked a sufficient factual foundation for reasonably issuing the Notice to Dispose.

[148] The Applicant submits that the Report of Inspector should be struck as inadmissible hearsay that falls outside of the business record exception, applying evaluative frameworks in *Ares v Venner*, [1970] SCR 608 [*Ares*] and *Eli Lilly Canada Inc. v Teva Canada Limited*, 2017 FC 88 [*Eli Lilly*]. The Applicant advances three main arguments in support of this position. First, the Report lacks contemporaneity, as it was signed a month after the site visit without explanation for the delay. Second, the way the Report is tendered does not satisfy the personal knowledge element, since Inspector Dykstra did not provide direct evidence about the circumstances surrounding its creation. Third, the Report lacks independence, asserting that it was prepared “in contemplation of litigation,” given that the CFIA had been notified of the Applicant’s intention to seek judicial review of the Notice to Dispose shortly before the Report was finalized.

[149] The Applicant’s objections rest on a misunderstanding of the law and a failure to read the Report of Inspector in conjunction with other similar reports furnished by the Respondent. The legal error concerns the requirement for personal knowledge. The Applicant’s counsel specifically emphasized during the hearing that “we have no evidence from... Dykstra... the inspector, as to how and why he created the record a month later, the circumstances surrounding his creation of it.” This submission misstates what is required to satisfy the personal knowledge requirement. The correct inquiry is whether the author of the document, in this case Inspector Dykstra, had personal knowledge of the matters being recorded, not whether the document must be tendered and supported by a direct attestation from that author personally.

[150] As the Supreme Court held in *Ares*, the reliability of business records arises from the circumstances of their creation, not the presence of the author:

Hospital records, including nurses' notes, made contemporaneously by someone having a personal knowledge of the matters then being recorded and under a duty to make the entry or record should be received in evidence as *prima facie* proof of the facts stated therein.

[151] The Supreme Court explicitly rejected the notion that the author's testimony is required to validate such records, pointing to the impracticality of demanding testimony from specific individuals in large organizations where "clerks and servants are changed from time to time, whose evidence may be difficult and often impossible to obtain": *Ares* at p 619, citing *Ashdown Hardware Co. v Singer et al* (1951), 3 WWR (NS) 145 (AD CA). This understanding of the personal knowledge element has not been modified by this Court in *Eli Lilly*, nor by the Federal Court of Appeal on appeal: *Eli Lilly Canada Inc. v Teva Canada Limited*, 2018 FCA 53. Accordingly, the relevant inquiry here is whether the author of the record, Inspector Dykstra, had firsthand knowledge of the events recorded. Whether he provided a direct attestation about the context in which the report was created is irrelevant. That function was properly fulfilled by Dr. Furness, who has explained in her affidavit about how the preparation of such reports are done in the ordinary course of business at the CFIA.

[152] The business record exception exists because institutional safeguards enhance reliability. The Applicant's insistence on requiring direct evidence from Inspector Dykstra misapprehends this underlying rationale of the exception. It is neither practical nor necessary to call every author of a record when institutional practices ensure its trustworthiness. In a national agency like the CFIA, where frontline officers like Inspector Dykstra routinely document field

observations as part of their statutory duties, the absence of an affidavit from the author, who clearly had personal knowledge presented in the Report, does not undermine its reliability. This is particularly so where Dr. Furness, a senior CFIA official with institutional knowledge, has provided an affidavit situating the Report within the broader decision-making and operational context of the Agency.

[153] The Applicant's failure to consider the Report of Inspector within the context of the record undermines its submission regarding its contemporaneity and independence. Parties do not dispute that the Report, as presented in Exhibit O, although documenting events from a site visit on December 31, 2024, was created and signed on January 31, 2025. The difference in dates is apparent. Equally apparent, however, as noted the Respondent, are the detailed, timestamped entries throughout the Report. A comparison with two other Reports of Inspector reinforces this pattern: one was again prepared and signed by Inspector Dykstra on January 20, 2025, to describe another site visit on January 7, 2025, and another by the Applicant's Case Officer on January 23 to record all interactions with the Applicant between January 2 and 10, 2025. All three reports use the same forms and format, include detailed entries that were timestamped, and are prepared and signed weeks after the events they describe.

[154] The central concern underlying the requirements of contemporaneity and independence is the reliability of the tendered documentation: *Cowichan Tribes v Canada (Attorney General)*, 2020 BCSC 357 paras 29-40; *R. v Farhan*, 2013 ONSC 7094 at para 12, citing *Performing Rights Organization of Canada Ltd. v Lion d'or (1981) Ltée*, [1987] FCJ No 934 at p 3. In my view, the consistent use of standardized forms, the inclusion of detailed and timestamped entries, and the common institutional practice of preparing and signing reports after the events described

are strong indicators of reliability. These features, which are all present in the Report of Inspector in dispute, demonstrate contemporaneous notetaking with formal compilation into the report-format occurring later, and thus they enhance the reliability of evidence that the business records exception is intended to ensure.

[155] Moreover, there is no evidence that the Report was prepared “in contemplation of litigation,” aside from its date. Strategically, there would have been little reason for the Respondent to fabricate information about the number of carcasses available, since section 7.1 of the 2022 *ERP* sets the key trigger for the issuance of a Notice to Dispose as the detection of “H5 Avian Influenza by RRT-PCR,” not by the number of carcasses swabbed or number of samples collected. The Respondent gains nothing by claiming only two carcasses were available rather than more. In short, the Report of Inspector is not necessary to justify the reasonableness of issuing the Notice to Dispose. Its evidentiary necessity lies more in describing the occurrence of carcass decomposition and scavenging, which, along with other epidemiological evidence, demonstrates the transmission pathways and poor biosafety practices on the Applicant’s farm, and informs the broader risk assessment underpinning the CFIA’s decision-making in the Applicant’s case.

[156] On a balance of probabilities, I am satisfied that the Report of Inspector is “made in the usual and ordinary course of business” as required by section 30 of the *CEA*, and is therefore admissible.

B. *The Stamping-Out Policy is reasonable*

[157] I agree with the Respondent that the Stamping-Out Policy is reasonable in law, for it aligns with the text, structure, and purpose of the *Act*. As explained in the Legal Framework section, Parliament has delegated broad power to the Minister and their delegates under section 48 to protect public health and preserve the health of humans and animals in Canada as well as Canada's international trade status by proactively preventing and controlling animal disease outbreaks and reducing the risk of zoonotic transmission. The Stamping-Out Policy represents a legitimate policy-level exercise of this discretion, grounded in a science-informed framework that mandates swift depopulation following laboratory confirmation of H5 avian influenza. The Policy is further operationalized by measures aimed at halting viral amplification, permitting sanitization of affected premises, and facilitating the rapid restoration of disease-free status. Additionally, the CFIA complements these measures by providing operators with post-depopulation biosecurity guidance tailored to minimize future infection risks, further promoting the *Act's* proactive approach to disease control.

[158] Since the Applicant does not allege any inconsistency between the Stamping-Out Policy and the text or scheme of the pertinent provisions of the *Act*, the central inquiry is whether the Policy remains consistent with the *Act's* legislative purposes. It is important to remember that ongoing outbreaks among wild or domestic birds do not, by themselves, render the Policy incompatible with statutory objectives. The jurisprudence has made clear that the *Act* does not demand instantaneous or perfect eradication of specific pathogens. Rather, Parliament expects regulatory measures that can significantly mitigate disease spread, limit viral amplification, and reduce mutation and cross-species transmission risks. It is through this lens of mitigation and

risk reduction, not absolute eradication, that this Court must assess the Applicant's challenges regarding the Policy's consistency with the *Act*'s purpose and, by extension, its reasonableness.

[159] Although the Applicant has not explicitly categorized its arguments under a specific heading such as "Policy Unreasonableness," two core claims challenging the reasonableness of the Stamping-Out Policy can be synthesized from various parts of its submissions. In essence, the Applicant's position is that, first, the Policy has demonstrably failed to achieve its legislative objectives and, second, the scientific basis underpinning the Policy is outdated and thus cannot advance the objectives of the *Act* as intended. On this basis, the Applicant contends that the Policy must be rejected as unreasonable under *Vavilov*, even considering the significant deference typically paid to broad policy decisions involving public interest considerations.

[160] On the flaw of empirical ineffectiveness, the Applicant submits that the Stamping-Out Policy has not achieved its stated goals and thus cannot advance the statutory mandate of the *Act*. The Applicant highlights the destruction of approximately 14.5 million birds since early 2022, alongside Canada's ongoing reports of hundreds of new H5N1 detections, including repeated infections on previously cleared premises. In the Applicant's submission, this shows the Policy has failed to meaningfully contain or eradicate HPAI and therefore no longer constitutes a measure within the defensible range of reasonableness.

[161] Concerning outdated scientific assumptions, the Applicant argues the CFIA has inappropriately adopted the Stamping-Out Policy based on the unscientific assumption that any detection of H5N1 indicates uniformly high pathogenicity and therefore requires immediate depopulation. According to the Applicant, this approach disregards emerging scientific research

regarding subclinical or silent infection in ratites, the polyphyletic group that includes ostriches, and neglects the CFIA's own data showing brief viral shedding periods among these birds. Additionally, the Applicant emphasizes that such approach completely neglects the novel genotype of the avian influenza virus detected on its farm, which its experts describe as being associated with lower adult mortality rates and quicker recovery times. Since the Stamping-Out Policy was formulated before these recent scientific developments and clinical observations, and has not been substantively revised in response, the Applicant submits that the Policy's foundational scientific assumptions are outdated, undermining its reasonableness as a continuing mechanism to advance the statutory objectives of the *Act*.

[162] I cannot accept the Applicant's positions. Both of the Applicant's core policy-level criticisms invite this Court to engage in precisely the kind of assessment that *Vavilov*, *Entertainment Software*, *South Shore*, *Kohl*, and *Auer* say reviewing courts must not do: arbitrating scientific disputes, reassessing social and economic trade-offs, and pronouncing on the empirical effectiveness of broad public-interest policies. Those are tasks that are better left to the agencies like the CFIA that wield administrative and technical expertise. This Court's role, by contrast, is confined to determining whether the CFIA's Stamping-Out Policy fits rationally within the *Act*'s text, scheme, and purpose, given the legal and factual constraints that bear on the Minister and their delegates. It is not to decide whether the CFIA's chosen balance of virology, trade protection, public-health precaution and animal-health logistics is the *best* or the *most up-to-date*, or whether the Applicant's proposed policy changes are the *better* or *more up-to-date* ones.

[163] First, the allegation of “empirical ineffectiveness” improperly invites the Court to substitute its own metric of success and understanding of science for those of the CFIA. Questions about the overall success of the CFIA’s Stamping-Out Policy, its comparative effectiveness against alternative disease-control strategies, or how to interpret epidemiological data, lie beyond judicial review and are not for this Court to answer. So long as the CFIA’s adoption of the Stamping-Out Policy remains linked to the *Act*’s objectives, this Court must refrain from second-guessing the policy choices of the Agency to which Parliament has assigned responsibility for managing animal health and disease control.

[164] Evaluated within this proper scope of judicial review, the record supports the conclusion that the CFIA’s application of the Stamping-Out Policy continues to advance the objectives of the *Act*. In his affidavit and during cross-examination, Dr. Harchaoui, Laboratory Network Director in the CFIA’s Science Branch, affirmed that the Agency tracks key performance indicators such as timeliness of detection, speed of depopulation, viral clearance, duration of movement controls, and re-listing of zones for trade purposes. These indicators, he stated, have improved consistently since 2004. He also confirmed that Canada, like most WOAHP member countries, continues to regard stamping-out as the most effective approach for rapidly regaining disease-free status and lowering mutation risks. Dr. Furness similarly confirmed during cross-examination that, through application of the Policy combined with robust biosecurity measures, the CFIA limited H5N1 outbreaks during the current wave to 527 of more than 30,000 poultry premises. These points were not disputed by the Applicant’s counsel during cross-examination or at the hearing. On this record, I find no basis to conclude that the Stamping-Out Policy is incompatible with the purposes of the *Act*.

[165] Second, the Applicant's contention regarding "outdated science" similarly calls upon the Court to engage in an impermissible reassessment of the CFIA's scientific and policy determinations. The Applicant contends that the CFIA's continued reliance on a policy developed in 2004, with little efforts to update it to "accord with what's actually happening," is unreasonable, especially when recent scientific literature undermines the effectiveness of mass culling. However, this assertion is not supported by the record. The record, particularly as developed during cross-examination of CFIA officials by the Applicant's counsel, clearly demonstrates that the CFIA has continually refined and updated the Stamping-Out Policy since its initial formulation.

[166] For instance, the *2013 NAI HSP* revisions incorporated lessons from prior outbreaks and drew upon multidisciplinary expertise, extensive literature reviews, international coordination, most notably with U.S. counterparts, and consultations with Canadian poultry industry stakeholders. These continuous updates and refinements have persisted through to the current *2022 ERP* instrument, which integrates ongoing decision records, regular multidisciplinary reviews, and international expert consultations, including with the U.S. Department of Agriculture's Animal & Plant Health Inspection Service [APHIS].

[167] Besides refinements to specific policy guides, the CFIA has also consistently explored alternatives to the Stamping-Out Policy itself throughout the years, including vaccination, containment strategies such as "burn out," and selective culling. The *2013 NAI HSP* specifically contemplated a "burning out" option for LPAI strains in remote, non-commercial premises with inadequate resources, though this option was removed from the *2022 ERP* due to the greater risks to animal health, public health and the environment caused by the spread of HPAI. In

December 2022, the CFIA conducted extensive consultations in response to requests from poultry producers in British Columbia to apply selective killing rather than complete stamping out. These consultations were both internal and external. The Agency weighed the benefits and harms of selective killing, specifically factors such as increased prevalence of HPAI, the immediate loss of some international markets, and a potential increase in resources required in the longer term for surveillance, and delayed depopulation procedures. Ultimately, the CFIA concluded that the Stamping-Out Policy remained the most effective in controlling the spread of highly infectious HPAI to other flocks, wild birds and mammals, including humans, while also maintaining alignment with the internationally accepted approach to HPAI management and control.

[168] All these extensive, iterative, and consultative review and update processes directly address the only question properly before this Court on this point: whether the CFIA has remained responsive to evolving scientific and policy developments, and nonetheless determined, on reasoned grounds and with material factors considered, that continued application of the Stamping-Out Policy properly advances the objectives of the *Act*. The record before me supports a resounding answer in the affirmative. Whether the Applicant's experts might weigh scientific data differently, or prefer alternative policy approaches, is irrelevant to the reasonableness review that this Court must conduct here.

[169] In sum, the Applicant's arguments are in substance disagreements about the scientific foundations and policy merit judgments underpinning the Stamping-Out Policy, rather than a demonstration of statutory incompatibility. Applying *Vavilov* and *Auer*, I am satisfied that the

Stamping-Out Policy, as operationalized by the 2022 ERP, remains reasonable and consistent with the *Act*.

C. *The implementation of the Stamping-Out Policy in this case withstands judicial scrutiny*

(1) *The Applicant's Two New Arguments Raised at the Hearing Are Unpersuasive*

[170] At the hearing, when challenging the reasonableness of applying the Stamping-Out Policy to the Applicant's case, counsel for the Applicant raised two arguments that were not included in their memorandum of fact and law. First, they argued that the CFIA's decisions were premised on a mistaken factual assumption. Namely, that the virus present on the farm was indeed HPAI under the definition of WOA's *Terrestrial Code*, rather than what the *Code* defines to be an "emerging disease." If that assumption were mistaken, counsel argued, the decisions would necessarily be unreasonable, as the issuance of the Notice to Dispose under the Stamping-Out Policy is triggered specifically by the detection of HPAI. Second, they contended that the CFIA misinterpreted the definition of "poultry" in the *Terrestrial Code*, leading to the improper classification of the ostriches as poultry subject to the Policy. But for that misclassification, counsel argued, the Stamping-Out Policy would not have applied to the ostriches, and the CFIA's subsequent decisions dependent on that misclassification would therefore be unreasonable.

[171] I reminded counsel of the basic principle in Federal Courts practice that "only arguments included in a party's memorandum should be advanced in oral argument": *Bridgen v Canada (Correctional Service)*, 2014 FCA 237 [*Bridgen*] at para 35; *Sandhu v Canada (Minister of Citizenship and Immigration)*, [2000] FCJ No 902 (FCA) at para 4; *Sibomana v Canada*, 2020 FCA 57 at para 6. In response, counsel submitted that one of the arguments could be inferred

from one sentence in the Statement of Facts section of their memorandum, while notice of the other had been communicated to the Respondent prior to the hearing.

[172] Neither of these two submissions comes close to meeting the bright line threshold set by the jurisprudence for arguments that may be advanced during oral submissions. If an argument is not set out in argumentative form in a party's memorandum of fact and law, it is not properly before the Court at the hearing. I advised counsel at the hearing that I could decline to consider these arguments on that basis alone.

[173] However, I find that it is in the interests of justice to entertain the new arguments.

Whether such new arguments should be considered is a discretionary decision to be guided by the balancing of the interests of justice as they affect all parties: *Quan v Cusson*, 2009 SCC 62 at paras 36–37; *President's Choice Bank v Canada*, 2024 FCA 135 at para 47; *Koch v Borgatti Estate*, 2022 FCA 201 at para 67; *Kaiman v. Graham*, 2009 ONCA 77 at para 18.

[174] Three considerations support engaging with the new arguments. First, addressing the substance of these arguments allows for a necessary clarification of the relationship between the CFIA's Stamping-Out Policy and the WOA's *Terrestrial Code*, and a better understanding of the precise triggering mechanism for issuing a Notice to Dispose under the 2022 ERP. This clarification not only assists in resolving the issues raised in this case, but also may provide guidance for future judicial reviews involving the CFIA's Stamping-Out Policy. Second, the Respondent has already presented extensive counterarguments during the hearing and expressly stated that its position could succeed based solely on the existing evidentiary record. Notably, the Respondent did not object when the Applicant's counsel devoted considerable time in oral

submissions to advancing their new arguments. Third, the record before this Court provides a sufficient factual foundation for ruling on these issues without requiring further evidentiary submissions from either party. In these circumstances, and considering the significant consequences the CFIA's decisions have had and may continue to have on the Applicant, I determine that the Applicant's case should be adjudicated fully on the merits and not be prejudiced by its counsel's procedural fouls.

[175] In my view, these two new arguments have little merit. The flaw in both is the same: the Applicant's counsel assumes that CFIA's Stamping-Out Policy is operationalized by adopting relevant portions of the *Terrestrial Code*, leading to their conclusion that the *Code*'s definitional distinctions between (a) "highly pathogenic" and "emerging" influenza and (b) "poultry" and "non-poultry" are what guide the CFIA in its implementation of the Stamping-Out Policy. This assumption is baseless. Canada's current domestic response to the avian flu is executed through the 2022 ERP. While the *Terrestrial Code* is an influential reference, it is not adopted by law or policy in its entirety and does not directly structure the CFIA's outbreak response.

[176] A quick review of the cross-examination transcript of Dr. Harchaoui shows that the Applicant's counsel should have known that their assumption is baseless:

Q. Now, did WOAHP itself have any input in the creation of the policy?

Let me clarify. I know that there's the terrestrial animal health and it was a general policy, but was there any actual -- were there meetings with representatives or was there kind of a sample policy or anything like that that you adopted from WOAHP?

A. So the role of WOAHP is not to dictate any type of policy, but they have recommendations in their terrestrial code. One element where WOAHP intervened, it was in the past through what we call

the PVS. It's the evaluation of the veterinary structure in any of the countries...

[emphasis added]

When reading this testimony alongside the *2022 ERP*, there can be no doubt that the instrument operationalizing the Stamping-Out Policy and guiding the CFIA's decision-making process is the *2022 ERP*, not the *Terrestrial Code*.

[177] A review of the relevant sections in the *2022 ERP* confirms that the Policy applies to the Applicant's situation. Section 7.1 sets the trigger for confirmed case response as the confirmation that the sample yields a RRT-PCR H5 positive result for all cases that are not the first in that province. No further pathogenicity determination or "poultry" classification is required. Section 7.3 explicitly states:

The classification of an [infected premises] as non-poultry does not change the eradication actions required on the [infected premises]. These will be the same as for an [infected premises] classified as non-commercial (small-holding) poultry.

[emphasis added]

[178] Section 7.3 further clarifies that distinguishing poultry from non-poultry affects only international reporting and zoning calculations. It does not alter the core measures of depopulation, disposal, and disinfection. Accordingly, even if the ostriches were "non-poultry" or the virus could be characterized as an "emerging disease" pursuant to the *Terrestrial Code*, a confirmation of H5-positive RRT-PCR result would still unambiguously guide the CFIA to initiate the same response.

(2) The Notice to Dispose Withstands Judicial Scrutiny

(a) The Notice to Dispose was Issued in a Procedurally Fair Manner

[179] I find that the issuance of the Notice to Dispose did not breach procedural fairness. The duty of fairness the CFIA owed to the Applicant in issuing the Notice to Dispose lies on the lower end of the spectrum described in *Baker*. In the context of disease control, the urgency and emergency inherent to such situations justify a uniquely minimal duty of fairness that, as the Supreme Court recognized in *Cardinal*, may exclude prior notice or participatory rights. The CFIA's issuance of the Notice did not violate this minimal level of duty.

[180] The Applicant contends that the CFIA's issuance of the Notice to Dispose violated both the common law duty of procedural fairness and the Agency's own Open and Transparent Agency Policy [the Transparency Policy]. The Applicant highlights that the Transparency Policy commits the CFIA to "open-by-design" decision-making and timely release of information. In its view, the inspector who issued the Notice, fell short of that commitment by offering no explanation beyond checking statutory boxes on the form. On this footing, the Applicant submits that the applicable duty of fairness was moderate to robust, requiring a more participatory process before subsection 48(1) of the *Act* was invoked and the Stamping-Out Policy applied. In particular, the Applicant argues that fairness entitled it to an advance notice of the decision, disclosure of relevant materials, and more extensive participatory opportunities in reviewing and contesting the laboratory results, proposing alternative mitigation strategies such as selective culling, vaccination, or burn-out, submitting evidence of the flock's natural immunity, and receiving more detailed reasons than those provided in the standard-form Notice.

[181] The Respondent submits that, at the initial notice stage of this multi-step administrative process, the duty of procedural fairness is minimal, if it exists at all. In its view, the Notice to Dispose constitutes a mechanical implementation of a standing emergency policy, involving little to no discretionary judgment and therefore attracting a very low fairness threshold. On the Transparency Policy, the Respondent argues it is aspirational and non-binding. Even so, it maintains that real-time disclosure of evolving emergency-response data and documents during an active investigation is neither practical nor required. In the Respondent's view, the only procedural requirement at this stage, particularly given the urgency inherent in disease-control decisions, is to issue a subsection 48(3) compliant notice that sets out the legal basis and substantive instructions for disposal without the need for prior notice or participatory opportunities. According to the Respondent, requiring advance notice or adversarial participation before issuing the Notice would frustrate the statutory purpose of enabling rapid containment of serious disease threats.

[182] Applying the factors outlined in *Baker* at paragraphs 23 and 27, I find that the procedural fairness does exist at this stage of the multi-step decision-making process, but it lies on the lower end of the spectrum. First, as the Respondent correctly observes, the issuance of a Notice to Dispose is a largely mechanical act guided by clear triggering criteria and procedural steps outlined in the 2022 ERP. It is further removed from a judicial model of decision-making and involves limited discretion on the part of individual inspectors. As this Court recently reaffirmed, the narrower the discretion is afforded to the decision-maker, the lower the level of procedural fairness is required: *Osakwe v Canada (Public Safety and Emergency Preparedness)*, 2023 CanLII 111754 (FC) at para 9.

[183] Second, the Notice to Dispose does not represent a final determination of the Applicant's legal rights or entitlements. The Stamping-Out Policy contemplates an immediate follow-up opportunity to apply for an exemption, which the CFIA promptly extended to the Applicant. The existence of this subsequent participatory opportunity within the broader process supports the conclusion that a lower level of fairness is owed at this initial stage.

[184] Third, issuing the Notice to Dispose undoubtedly carries significant adverse consequences for the Applicant. The ostrich operation appears to be the entirety, or at the very least the core, of the Applicant's business, and the principals have devoted considerable time, financial resources, and labour into developing the flock. A full depopulation of the farm will seriously disrupt the Applicant's business operation, producing a long-lasting, if not permanent, economic consequence. Although the Applicant may be entitled to some compensation under the *Compensation Regulations*, the extent and sufficiency of this relief is disputed. In all, the magnitude and irreversibility of the impact raises the level of procedural fairness owed in this case.

[185] Fourth, as discussed in the Legal Framework section, Parliament has delegated broad discretionary power to the Minister and their delegates under section 48 of the *Act*. It has prescribed only minimal procedural entitlements with the requirement to issue notices pursuant to subsection 48(3). While I agree with the Respondent that the CFIA's Transparency Policy is not legally binding, I do not accept that it is irrelevant to the procedural fairness analysis. The Supreme Court in *Baker* has made clear that reviewing courts should "take into account and respect the choices of procedure made by the agency," especially when "the agency has an expertise in determining what procedures are appropriate in the circumstances": *Baker at*

para 27. However, the Transparency Policy sets out only broad aspirational principles and offers no concrete procedural directives applicable to the implementation of the Stamping-Out Policy. For instance, its commitment to “open-by-design” provides general value statements rather than offering concrete procedural measures. As such, it cannot represent a deliberate procedural choice made by the CFIA in the way that the *2022 ERP* and the *What to Expect – Steps on How CFIA Will Work Through the Process on Your Farm* document do, neither of which contemplate document disclosure or participatory elements at this stage of the administrative process. Hence, this factor also supports a lower duty of fairness.

[186] Weighing these factors cumulatively, I determine that the overall procedural fairness owed to the Applicant is minimal. In fact, this very limited duty of fairness applicable here does not require either prior notice or participatory rights before the issuance of the Notice to Dispose, nor does it demand detailed substantive reasons. As the Respondent rightly notes, the Supreme Court has established in *Cardinal* at paragraphs 15 and 16 that even where a duty of fairness exists, urgent or emergency situations may mean that the duty of fairness involves no requirement for notice or participation before the decision. This is precisely the scenario Parliament anticipated the Minister and their delegates, including the CFIA, would encounter in daily operations, and accordingly enacted sections 22 and 48 of the *Act* to authorize immediate action based on mere “suspicion” of a reportable disease to achieve rapid and proactive disease mitigation and prevention. On this uniquely minimal standard, I find that the CFIA met its procedural obligations. Before issuing the Notice, Agency officials had communicated with the Applicant and conducted an on-site inspection. These interactions informed the Applicant of the essential basis for the Agency’s action and gave its principals an opportunity to comment on

sampling logistics and demonstrate biosafety conditions. No further advance notice, participation, or detailed reasons were legally required.

[187] The issuance of the Notice to Dispose itself also properly complied with subsection 48(3) of the *Act*. The Notice, delivered on December 31, 2024, cited subsection 48(1) as the legal authority, ordered the destruction of all birds within the defined epidemiological unit, outlined the procedures for carcass disposal, and set a compliance deadline of February 1, 2025.

[188] Because the CFIA had discharged the procedural obligations applicable at this initial stage of an extended decision-making process, the Applicant's challenge to the Notice to Dispose on procedural fairness grounds cannot succeed.

(b) *The Notice to Dispose was Unfettered*

[189] I find that Inspector Zhang was unfettered in making the decision to issue the Notice to Dispose. As explained in the Legal Framework section, fettering is only a concern when the decision-maker wields discretion in making the decision. In my view, the 2022 *ERP* has structured the CFIA's statutory discretion into a multi-step process where issuing the Notice becomes a non-discretionary action following H5-positive detection through RRT-PCR. The discretionary element is reserved exclusively for the exemption evaluation step. Since Inspector Zhang had no discretion to exercise at the Notice issuance stage, he could not have been fettered in his decision-making.

[190] The Applicant argues that section 48 of the *Act* expressly permits treatment as an alternative to destruction, which the CFIA has not seriously pursued. According to the

Applicant, the CFIA expressly refused even to consider options such as selective depopulation, sentinel surveillance, vaccination trials or permitting naturally immune birds to remain on-site, which are approaches the Applicant's experts characterize as feasible for low-density, long-lived ostriches. In the Applicant's view, by slavishly mirroring non-binding WOAHP guidance aimed mostly at avian species that do not resemble ostriches, Inspector Zhang, and by extension the Agency, was fettered by the Stamping-Out Policy.

[191] I am not persuaded. To begin, the Applicant's argument again falsely equates WOAHP policies with the Stamping-Out Policy. The operative instrument that implements the Policy is the *2022 ERP*. If any fettering were to be found, it would need to be traced to that document. Yet, a reading of the *2022 ERP* shows that the "case response trigger" stage functions in a mechanical manner: once an accredited laboratory confirms a positive H5 RRT-PCR result on a premises that is not the provincial index case, the issuance of a Notice to Dispose proceeds almost automatically.

[192] While this may, at first glance, appear to reflect the textbook definition of fettering, where a decision-maker applies a policy as legally binding without considering whether deviation is possible, such a conclusion does not withstand closer examination. The Applicant's submission that subsection 48(1) of the *Act* contemplates treatment and therefore requires the inspector to weigh alternative approaches ignores how the statutory discretion has been legitimately structured by the *2022 ERP*. Although subsection 48(1) does indeed vest broad discretion in the Minister and their delegates, the CFIA has operationalized that discretion by allocating it unevenly across different stages of the *2022 ERP*. As recognized in *Thamotharem* and *Ainsley*, such allocation is lawful, so long as the total discretion of the entire process is not

diminished. Here, the discretion is concentrated at the exemption stage, where CFIA officials evaluate case-specific facts and weigh multiple policy and scientific considerations in deciding whether to exempt an applicant from depopulation. Viewed holistically, the overall statutory discretion remains intact. It is not abolished, merely channelled. That allocation is operationally sensible given the urgency and importance of HPAI responses, and finds support in *Carpenter Fishing*, the *David Hunt* cases, and *Kohl*. Given that such allocation of discretion among different decision points in a multi-step administrative process is permissible in law, the lack of discretion in the issuance of the Notice to Dispose is legal. Consequently, because no discretion exists at this step, nothing can be unlawfully constrained.

[193] Accordingly, the fettering claim fails. The jurisprudence and statute permit the CFIA to channel discretion through a policy of general application. The 2022 ERP has done exactly that by allocating where that discretion is to be exercised based on the real urgency of disease-control and Inspector Zhang, having no discretion at the trigger stage, could not possibly have abdicated or fettered it.

(c) *The Notice to Dispose was Reasonable*

[194] I find that Inspector Zhang's decision to issue the Notice to Dispose was reasonable. He acted within the scope of his designated responsibilities in the broader disease-control process: not as an independent assessor of potential alternatives, but as an implementer of the Stamping-Out Policy as structured through the 2022 ERP. At the stage of issuing the Notice, his role did not require individualized deliberation over alternative disease-management strategies, as those policy determinations had already been made upstream in the policymaking process. I also reject the Applicant's "common sense" argument that Inspector Zhang should have awaited further

confirmatory testing and weighed alternative options before acting. This submission is rhetorical, unsupported by evidence, and ignores the specialized nature of disease-control decision-making. What the Applicant portrays as “common sense” is not some self-evident truth but rather a policy preference masquerading as intuitive reasoning. This Court cannot replace science-based, expertise-driven judgments with counsel’s appeals to lay intuition, particularly in a domain involving the management of potentially serious and fast-evolving animal and public health risk.

[195] In challenging the reasonableness of the Notice to Dispose, the Applicant advances two primary arguments. The first closely mirrors its earlier submissions on fettering and takes issue with Inspector Zhang’s decision to issue the Notice without considering alternatives to the Stamping-Out Policy. Framed within the reasonableness inquiry, the Applicant characterizes this as a failure to consider relevant evidence, such as the potential benefits and efficacy of selective depopulation, quarantine and surveillance, and vaccination treatments. The Applicant argues that this omission contravenes the requirement articulated in paragraph 126 of *Vavilov*, which obliges administrative decision-makers to engage with relevant evidence before them.

[196] The second, closely related argument was raised during oral submissions. It concerns whether Inspector Zhang acted unreasonably by issuing the Notice to Dispose without deliberating other options and awaiting confirmatory testing from the National Centre for Foreign Animal Disease in Winnipeg. According to the Applicant’s counsel, proceeding in the absence of such deliberation and confirmation defied common sense. Faced with a novel or potentially altered pathogen, counsel argued, commonsense prudence demands that sufficient information be gathered and alternative routes be considered before issuing a consequential

decision like the Notice to Dispose. Acting in the absence of such information and deliberation, counsel asserted, reflected hasty decision-making driven by a lack of common sense. This, in turn, undermined the internal coherence of Inspector Zhang's reasoning and rendered the decision unreasonable: *Vavilov* at paras 102-104.

[197] I do not find either argument persuasive. Regarding the first claim that the decision-maker failed to consider all relevant evidence, I reject it for reasons similar to why I found the fettering argument unconvincing. As outlined in the Legal Framework section and discussed in the fettering analysis, Inspector Zhang's role within the broader disease-control process was not to independently assess the situation, but to implement the Stamping-Out Policy as operationalized through the *2022 ERP*. His actions were governed by a decision-making framework that has been long adopted and developed by the CFIA pursuant to its statutory authority under section 48 of the *Act*. As I have already found the Stamping-Out Policy reasonable in its design, which does not require case-specific deliberation at the stage of issuing a Notice to Dispose, there is nothing unreasonable in Inspector Zhang's execution of the framework as provided.

[198] Even assuming that Inspector Zhang was required to exercise independent judgment based on the information available to him, I am not persuaded that he overlooked any relevant evidence that was before him. First, the material before Inspector Zhang did not include the alternative disease-control strategies now advanced by the Applicant. As outlined in the Overview, judicial review is confined to the record that was before the decision-maker at the time of the decision. As the Respondent correctly submits, the record before the Inspector consisted of the *2022 ERP*, laboratory test results confirming that the Applicant's ostrich herd

was positive for H5 via RRT-PCR, and information obtained by the CFIA during phone communications and an on-site inspection regarding the biosecurity practices at the premises.

[199] Given this evidentiary context, I agree with the Respondent that the Inspector's brief written reasons, when read together with the surrounding record, provide a justification that meets the standard of reasonableness. As *Vavilov* explains at paragraph 97, citing *Komolafe v Canada (Minister of Citizenship and Immigration)*, 2013 FC 431 at para 11, even where formal reasons are limited or absent, reviewing courts may connect the "dots on the page" if the record and outcome clearly suggest the underlying rationale. In this case, those dots are especially clear and easily connectable, given the nature of disease-control decision-making where officials are often required to act swiftly and decisively in response to rapidly evolving and potentially catastrophic threats.

[200] Even if the alternative strategies proposed by the Applicant were available to Inspector Zhang at the relevant time, I would still find no basis to conclude that his decision to issue the Notice to Dispose was unreasonable. My exploration of the pertinent statutory and regulatory framework in the Legal Framework section demonstrates that the scheme under section 48 of the *Act* outlines a functional binary of destruction and treatment, and treatment refers only to measures the Minister and their delegates deem "effective in eliminating or preventing the spread of the disease or toxic substance." The legislative scheme does not contemplate a third "wait-and-see" option. Accordingly, if the Minister's delegates like Inspector Zhang do not consider a proposed treatment effective, destruction is the only reasonable route prescribed by the statute.

[201] Here, Inspector Zhang opted for destruction, indicating that he did not consider the alternative measures sufficient to prevent the spread of or eliminate the disease. That determination rests on making scientific and technical judgments, tasks Parliament has entrusted to CFIA officials like Inspector Zhang. It is not the function of this Court to doubt the scientific merits of such expert assessments, particularly in the context of infectious disease-control where decisions often must be made quickly and decisively in the face of uncertainty.

[202] Concerning the “common sense” submission advanced by the Applicant’s counsel at the hearing, I find it to be rhetorical in nature, unsupported by evidence, and unhelpful to this Court’s analysis. Common sense arguments have their time and place. The Supreme Court has repeatedly acknowledged that judicial reasoning and fact-finding may necessarily require common sense and lived experience. For instance, as observed in paragraph 39 of *R. v S. (R.D.)*, [1997] 3 SCR 484, “the trier of fact is entitled simply to apply common sense and human experience in determining whether evidence is credible and in deciding what use, if any, to make of it in coming to its finding of fact.”

[203] However, common sense is also a concept that is too often misused both in and outside of the courtroom. Sound commonsense reasoning must be sufficiently supported by the evidence and appropriately responsive to the context in which the decision is made. It cannot rest on pure speculation or assumption, especially in decision-making contexts that are not at all common in an ordinary person’s lived experience. Indeed, the Supreme Court has recently cautioned against making common sense “a catch-all phrase that licenses any form of reasoning, no matter how faulty,” since it “is not always ‘common’, does not always make ‘sense’, and worst of all, may be based on falsehoods or discriminatory beliefs”: *R. v. Kruk*, 2024 SCC 7 at para 99.

[204] With respect, the invocation of “common sense” reasoning in the present case reveals a fundamental misunderstanding, or neglect, of the complexities involved in scientific and technical decision-making performed by the Agency. What the Applicant’s counsel characterizes as “common sense,” the idea that Inspector Zhang, and by extension the CFIA, should have waited for confirmatory testing before acting, is a policy preference masquerading as self-evident truth. It presupposes that the “wait-and-see” strategies proposed by the Applicant are inherently the more rational or common choices when facing a rapidly spreading disease with unknown attributes that was actively killing the Applicant’s ostriches. Even setting aside the fact that established epidemiological protocols such as the *ERP 2022* often dictate precisely the opposite, I am not convinced that reasonable individuals without specialized training in virology, epidemiology, or public health would instinctively view a “wait-and-see” approach as the commonsense response to such a pathogen.

[205] Moreover, as explained, common sense in decision-making only becomes truly “common” and “sensible” when ordinary individuals are familiar with or routinely exposed to the type of decision being made. That is not the case here. The complex, science-driven, and high-stakes decisions involved in managing the spread of avian influenza fall well outside the realm of commonly shared lived experience. To be clear, I do not suggest that the course of action proposed by the Applicant’s counsel is inherently wrong or unworthy of consideration. I merely observe that it is not as self-evidently “common” or “sensible” as counsel suggest.

[206] What concerns me more is the “common sense” reasoning proposed by counsel seems to suggest, without any support, that there exists a universal layperson standard of rational decision-making in disease-control that should override the need for specialized expertise. As I have

repeatedly emphasized throughout my reasons, this Court cannot replace the technical judgment of officials, nor accept counsel's rhetorical appeals to intuition, in place of the expertise exercised within a well-established policy framework for managing potential disease outbreaks that carry significant implications for public and animal health across Canada. Indeed, the Supreme Court in paragraph 93 of *Vavilov* expressly cautioned against such an approach:

Respectful attention to a decision maker's demonstrated expertise may reveal to a reviewing court that an outcome that might be puzzling or counterintuitive on its face nevertheless accords with the purposes and practical realities of the relevant administrative regime and represents a reasonable approach given the consequences and the operational impact of the decision. This demonstrated experience and expertise may also explain why a given issue is treated in less detail.

[207] Considering the facts and law before me, I conclude that the "common sense" argument is rhetorical in nature and not suitably responsive to the scientific and institutional context in which the CFIA operates. Inspector Zhang's issuance of the Notice to Dispose does not suffer from such a defect and therefore must stand.

(3) The Exemption Denial Withstands Judicial Scrutiny

(a) *The Exemption Denial was Issued in a Procedurally Fair Manner*

[208] I conclude that the CFIA has fulfilled the high level of duty of fairness it owed to the Applicant in the exemption evaluation process. The Applicant asserts that it held a legitimate expectation of outcome, but in law such expectation cannot give rise to substantive rights. Even when viewed from a procedural perspective, no legitimate expectation could have arisen because the CFIA never made any clear, unambiguous, or unqualified representations about procedure to the Applicant. The Applicant further did not suffer unfairness from the claimed disclosure defects, as the "significant burden of proof" language in the final decision merely restated the

consistently communicated evidentiary threshold, and all material content from the *Exemptions from depopulation* appendix relevant to the Applicant's situation had already been provided.

Throughout the eight-day evaluation process, CFIA officials engaged extensively with the Applicant, emphasizing the specific documentation requirements and the urgency of the process. I am convinced that the process left the Applicant with full awareness of the case it needed to meet and adequate opportunities to do so.

[209] The Applicant submits that a high level of fairness applied to the CFIA's exemption evaluation process. Unlike the effectively automatic issuance of a Notice to Dispose, the exemption decision was discretionary and, importantly, expressly contemplated participatory opportunities under the *2022 ERP*. The Applicant argues that the duty was further heightened considering the gravity of the Exemption Denial's consequences: the decision has effectively sealed the fate of some 400 ostriches, threatened the livelihoods of the principals, and jeopardized ongoing antibody research projects.

[210] The Applicant contends that this high standard of fairness was breached in two main ways. First, it argues that it had a legitimate expectation that the exemption would either be granted or, at the very least, seriously considered in a flexible and open-ended manner. This expectation, according to the Applicant, was grounded in the Exemption Process Overview Email sent by the Case Officer on January 2, 2025, which the Applicant interpreted as indicating that its ostriches had already been accepted into a specific procedure that led toward the "rare and valuable genetics" exemption, and that the evaluative process was an open-ended one. The Applicant says that such impression was further reinforced during a meeting on the next day, when, in response to a question from one of the principals about whether the ostriches would be

culled, the Case Officer reportedly stated that the Agency “would have told UOF at the outset of the meeting if they had made that decision.” From the Applicant’s perspective, these interactions had established a legitimate expectation for a favourable outcome:

...in [Case Officer’s January 2, 2025] email it seemed to us that CFIA had already placed the UOF’s ostriches into the “bird classified as having rare and valuable genetics” category. We were just told to send in some documents to show what we had been doing.

The Applicant asserts that this legitimate expectation was breached when: 1) the Agency unilaterally shifted from an open-ended process to a narrow one requiring specific documentation, without notice; and 2) the Agency imposed a brand new “significant burden of proof” standard, which was only disclosed to the Applicant in the Exemption Denial decision itself, and thus constituted an unannounced deviation from the procedure that the Applicant expected.

[211] Second, the Applicant argues that the CFIA’s failure to make necessary disclosures prevented it from knowing the case it had to meet. Specifically, the Applicant takes issue with two items that were not provided: 1) the evidentiary standard of “significant burden of proof;” and 2) the *Exemptions from depopulation* appendix to the 2022 ERP, which outlines and explains the exemption criteria. The Applicant contends that, without being informed of the applicable evidentiary threshold and exemption criteria, it did not know the case it had to meet and was unable to properly prepare its case. As a result, it did not gather or submit expert opinions, genetic data, or business documentation that it otherwise would have provided to meet the standard. The Applicant further submits that these disclosure failures were aggravated by the

CFIA's breach of its own Transparency Policy, which commits to the timely provision of relevant information.

[212] The Respondent does not dispute the level of duty owed to the Applicant, but maintains that the process was fair, and in any event, no additional procedural safeguards could have changed the outcome. In its view, the Exemption Process Overview Email from the Case Officer, when appropriately examined in context, clearly sets out the case the Applicant needed to meet. The email described upfront that the process was "document heavy," explained in detail the "rare and valuable genetics" exemption category, and included the *Distinct Unit Request Package*, which detailed the relevant exemption criteria and provided a self-reporting checklist for biosafety measures. The email also instructed the Applicant to submit "documented proof" of distinct genetics and gave specific examples of acceptable evidence, such as historical breeding records, genomic testing results, or third-party valuations. According to the Respondent, the Applicant failed to provide any of the requested documentation and, in completing the *Distinct Unit Request Package*, answered "no" to 13 of the 20 biosecurity-related self-reporting questions that would support a finding of distinct epidemiological status. As such, the Respondent argues that the refusal should not have come as a surprise and confirms that the process was fair.

[213] The Respondent also denies that any new standard was introduced. The use of the phrase "significant burden of proof" in the written decision, it argues, simply reiterated what the term "documented proof" had already conveyed. It was not an unexpected or new evidentiary threshold introduced at the last moment, especially given the repeated detailed list of sample

documents and the detailed explanation of the exemption process set out in the *Distinct Unit Request Package*.

[214] The Respondent further rejects the notion that the Transparency Policy or staff communications created enforceable procedural rights. According to the Respondent, a general transparency commitment cannot give rise to binding obligations, and no applicant can reasonably expect a particular procedure or favourable decision based solely on general assurances without clear operational promises. Legitimate expectations, it argues, concern procedural fairness, not the outcome itself.

[215] Lastly, the Respondent contends that even if there had been a procedural shortcoming, such as a failure to disclose all documentation in advance, it would not have affected the result. The record shows that every ostrich in the flock had shared the same exposure risk, and under the 2022 ERP and its appendix *Exemptions from depopulation*, no flock in such circumstances could qualify as a distinct epidemiological unit.

[216] I agree with the Applicant that the procedural fairness owed here is high for the factors it has listed: an inherently discretionary process, the contemplation of participatory elements, and the serious impact of the decision on the Applicant. However, I reject the Applicant's claim that the CFIA breached this heightened duty.

[217] The Applicant's first claim of fairness breach is unpersuasive, because its position on legitimate expectation lacks legal foundation and factual support. It is trite law that legitimate expectations cannot give rise to substantive entitlements or outcomes: *JP Morgan* at para 75;

Jennings-Clyde at para 40. If the Applicant's counsel erred in submission and instead intended to assert a procedural legitimate expectation, I nevertheless find no basis for it. The Exemption Process Overview Email from the Case Officer does not contain any representation capable of generating a procedural expectation.

[218] To ground a legitimate expectation, the Applicant must show that the Agency made a clear, unambiguous, and unqualified representation as to the procedure it would follow, or that it has consistently adopted a particular procedural practice in similar contexts: *Mavi* at para 68. The Applicant relies on the former basis and builds its arguments primarily upon two sentences from the Exemption Process Overview Email. The first sentence reads: "Based on the information we've gathered, you fall into the 'birds classified as having rare and valuable genetics' category." The Applicant asserts that this is a clear confirmation from the CFIA that its ostriches had been locked into the procedure leading to exemption based on "rare and valuable genetics." Even when read in isolation, this statement does not rise to the level of a clear, unambiguous, and unqualified representation about the procedure the CFIA would follow. At best, and even under the most generous interpretation, it is only suggesting that, based on the information available at that time, the Applicant *might* be eligible for consideration under that category.

[219] When viewed in context, there should be no reasonable doubt left about what the Case Officer meant by this sentence, that the Applicant's exemption request, based on the CFIA's understanding of the preliminary information it has gathered, falls into the "rare and valuable genetics" category, and to fully qualify for the exemption the Applicant needed to provide the

requested information to support its case. Two contextual clues are especially illuminating. The first one comes within the Email itself:

Here's what we need from you at this time to get started:

- We need documented proof that these birds are distinctive from standard commercial flocks. The highlighted section above gives good examples of the types of documents we're looking for.

I find the phrases “to get started” and “we need documented proof” both convey that the process was at a preliminary stage and exemption was conditional on the Applicant’s provision of specific supporting materials. The reference of “to get started” expressly signals that the evaluation process had not yet concluded, while the request for “documented proof” reveals that the burden was on the Applicant to substantiate its exemption claim. Given this analysis, CFIA officials’ statement that they “would have told UOF at the outset of the meeting if they had made that decision” also clearly indicates that the Agency was still in the process of gathering information and had not yet reached a conclusion, rather than that the exemption approval was forthcoming or that the process would be open-ended. The language used in the email or at the meeting does not support any inference that the CFIA had already committed the Applicant’s exemption application to a specific procedural route.

[220] The second contextual clue is found in the phone log documenting the Case Officer’s first interaction with the Applicant’s principals, some four hours before the Exemption Process Overview Email was sent. That log contains a key portion that describes how the Case Officer briefed the principals on the exemption process:

It was indicated December 31, 2024, after CFIA informed Mr. [Principal] of the positive Avian Influenza (AI) test result that Mr. [Principal] was interested in a [sic] exemption from depopulation for his ostriches. CO...

briefed Mr. [Principal] on the process, that a Distinct Unit Request (DUR) would have to be submitted to CFIA to start the process. Mr. [Principal] requested his business partner... to be in the call and a three-way phone call was started to include Mrs. [Principal]... CO... further explained that the DUR process is very time sensitive and document heavy, stressed the importance of submitting everything to CFIA in time and would further explain in an email and attach the DUR template.

[emphasis added]

The underlined parts directly undermine the Applicant's argument. First, the Case Officer explicitly explained to the Applicant's principals that a "Distinct Unit Request... would have to be submitted to CFIA to start the process." This alone dispels any notion that, at the time the Exemption Process Overview Email was received, the process had been set on a procedural track leading toward exemption, because that very Email was the one that provided the *Distinct Unit Request Package* necessary to initiate the process. Second, the Case Officer emphasized to the principals that the exemption process would be "very time sensitive and document heavy," stressing the importance of "submitting everything to CFIA in time." This unequivocally conveyed the provisional and conditional nature of the exemption process, reinforcing that the responsibility to meet the requirements rested with the Applicant. These statements cannot reasonably be interpreted as creating an expectation of the procedure sought by the Applicant.

[221] Viewed alone or collectively, these two contextual clues put to rest any dispute that a legitimate expectation could somehow have arisen from this: "Based on the information we've gathered, you fall into the 'birds classified as having rare and valuable genetics' category."

[222] The second sentence relied on by the Applicant to assert its legitimate expectation claim that the evaluative process was promised to be an open-ended one: "The Exemption Email went

on to state that “[t]he genetics of the flock can be demonstrated to be distinctive from standard commercial flocks with criteria such as but not limited to the following...” [italics in the original; emphasis added by the Applicant]. However, apart from doing underlining, the Applicant has offered no explanation, either in written or oral submissions, on how this sentence establishes a procedural commitment to an open-ended procedure.

[223] With respect, I am of the view that, again, when properly read in context, this sentence conveys precisely the opposite of what the Applicant suggests. The relevant excerpt from the Email reads:

The genetics of the flock can be demonstrated to be distinctive from standard commercial flocks with criteria such as but not limited to the following:

- *There is historical evidence of genetic investment...;*
- *The flock consists of high quality pure-bred birds...;*
- *Genomics testing for specific traits has been undertaken*

Here’s what we need from you at this time to get started:

- We need documented proof that these birds are distinctive from standard commercial flocks. The highlighted section above gives good examples of the types of documents we’re looking for.
 - If you have any documentation of the agreement between you and the university – that’d be really helpful to send to us.

[emphasis added]

The language “The highlighted section above gives good examples of the types of documents we’re looking for” links the request for documentation directly to the previously listed criteria.

This indicates that while the Applicant’s underlined “with criteria such as but not limited” signals that the list is not strictly exhaustive, it does not support the Applicant’s interpretation of

an open-ended process in which its submitted documents will be sufficiently probative. Rather, it clarifies that the CFIA was seeking materials of a comparable nature and probative value, which are documents capable of substantiating the distinctive genetic characteristics of the flock. Similarly, the request for “any documentation of the agreement between you and the university – that’d be really helpful to send to us” points to the Agency’s interest in targeted, relevant information, not an invitation for the Applicant to define the expected procedure and submit evidence according to its wants and wishes. These communications reflect a structured procedural framework, not an undefined or open-ended process.

[224] Beyond the Email’s plain language, other contextual indicators further undermine the Applicant’s interpretation. The exemption application required completion of a self-reporting form with predefined criteria, and the Case Officer repeatedly requested specific documents, including those supporting the Applicant’s alleged collaboration with Kyoto University and evidence of the flock’s purportedly unique genetic profile. Additionally, the *What to Expect – Steps on How CFIA Will Work Through the Process on Your Farm* document attached to the Process Introduction Email overwhelmingly reinforces this conclusion. Although the document acknowledges some “fluidity” in terms of overlapping of procedural steps, it lays out clear, defined, and sequential steps in the overarching administrative process. Taken together, these materials show that the exemption process was tightly structured and driven by specific criteria, not open-ended as the Applicant suggests.

[225] The Applicant’s second claim of fairness breach is also unconvincing, because its submissions on disclosure defects are misguided. Regarding the alleged omission of the “significant burden of proof” that was ultimately imposed on the Applicant and, it says, resulted

in its inability to meet the case because it had no knowledge of the case it had to meet, I find it to be mostly a claim that plays on semantics. While there is no doubt that the exact wording of “significant burden of proof” only appeared for the first time in the Exemption Denial, they add no substantive hurdle beyond what the Applicant had already been told from January 2, 2025 and onwards.

[226] The Exemption Process Overview Email warned that an exemption request is “document heavy” and must include documented proof that the birds are genetically distinct. The attached Distinct Unit Request Package stated only “in some exceptional circumstances, a distinct population of birds may be recognized,” and explained the CFIA may exercise its discretion to exempt it from depopulation. It also warned “any ‘no’ responses” to the twenty self-reporting biosecurity questions “will likely result in a denial of the request.”

[227] The CFIA’s subsequent communications made it even more evident that the Applicant was or should have been aware of the high evidentiary threshold it needed to meet. Over eight days, CFIA officials held virtual meetings and made phone calls to discuss the situation with the Applicant, conducted another on-farm assessment, answered questions about completing the package, and repeatedly urged the owners to supply “as much supporting evidence as possible.” These interactions emphasized the need for specific kinds of documentation and made it clear that a heavy evidentiary burden rested on the Applicant.

[228] In my view, both the plain language of the Exemption Process Overview Email and the surrounding contextual communications made it sufficiently clear that the Applicant bore a substantial onus to present persuasive documentation aligned with the exemption criteria. The

phrase “significant burden of proof,” as used in the *Exemption Denial*, simply restated that existing and obvious obligation in more concise terms. While I acknowledge that the CFIA could have provided greater clarity by using that exact wording from the outset, I do not find the Agency’s later use of this language introduced or imposed a new, higher evidentiary threshold that would amount to a breach of procedural fairness.

[229] The Applicant’s second claim of disclosure failure is similarly unconvincing, because the alleged failure neither was an actual failure nor prevented the Applicant from understanding the case it needed to meet. I find it puzzling why the Applicant insists that it was entitled to receive the full *Exemptions from depopulation* appendix, when all content relevant and material to its exemption request from that appendix had already been conveyed through the Exemption Process Overview Email.

[230] Two examples suffice to illustrate this point. First, the Exemption Process Overview Email reproduced in full the key part of the appendix concerning the “rare and valuable genetics” category of exemption, which was the very category that the Applicant expressed interest in pursuing and did pursue. Second, the attached *Distinct Unit Request Package* clearly outlined the criteria for establishing a distinct epidemiological unit. In fact, together, these two sources provided the entirety of the core requirements that the Applicant needed to satisfy to obtain an exemption: the threshold of distinct epidemiological units and the documentary evidence necessary to support a claim under the rare genetics category.

[231] Apart from the already addressed argument regarding the “significant burden of proof,” the Applicant has identified no specific omission in the material disclosed to it that impaired its

ability to make its case. At the hearing and in its written submissions, it failed to point to any particular section or passage from the *Exemptions from depopulation* appendix that was relied upon in the exemption evaluation process but was withheld from it. Instead, the Applicant simply asserts in broad terms that the entire appendix should have been disclosed. The Applicant does cite again the Transparency Policy in support of this argument. But, as explained above, the Transparency Policy is aspirational in nature and contains no specific procedural commitments relevant to the administration of exemptions under the Stamping-Out Policy. It does not entitle the Applicant to receive internal policy guidelines in full, especially where the CFIA has already disclosed the material operative criteria and evidentiary expectations relevant to the request at hand.

(b) *The Exemption Denial was Reasonable*

[232] I find that the CFIA's Exemption Denial was reasonable. Most of the Applicant's arguments on Exemption Denial are more accurately understood as challenges to the reasonableness of the Stamping-Out Policy and have therefore already been addressed in my above analysis on the Policy's reasonableness. Accordingly, I have consolidated the remaining relevant objections and distilled them into three arguments that directly concern the reasonableness of the Exemption Denial.

[233] First, the Applicant argues that the Exemption Denial was rendered when a pivotal piece of scientific input was still outstanding. This evidence was Dr. French's rapid literature review on avian influenza in ostriches, which the Exemption Committee had itself commissioned on the morning of January 10, 2025. The Applicant notes that the Agency asked for this review because it acknowledged that the Stamping-Out Policy had primarily been developed based on

experience with chickens and turkeys, not ostriches. Yet, the Exemption Denial was finalized and sent roughly five hours before Dr. French submitted her report. The Applicant contends that the Committee's failure to wait even just one day for the results of a report it had commissioned and acknowledged as important constitutes a fatal flaw. In its view, by proceeding without this key scientific input, the Exemption Committee acted on an incomplete record and thereby reached an unreasonable decision.

[234] Second, the Applicant submits that the Exemption Committee misconstrued its own exemption framework by improperly welding together the two distinct exemption pathways of "rare and valuable genetics" and "distinct unit." According to the Applicant, the Agency's internal Decision Record titled *Updates to Distinct Unit Recognition Process* lists these as separate, disjunctive categories for exemptions. The Exemption Denial, however, treated "distinct unit" status as a pre-requisite to the genetics exemption and rejected the request on the basis that there was no physically and epidemiologically segregated subgroup. The Applicant contends that this conflation led the Committee to apply the policy incorrectly, making the Exemption Denial unreasonable.

[235] Third, the Applicant contends that the Exemption Committee failed to consider relevant evidence that bears on its decision. This evidentiary neglect manifested in two major ways. First, the Committee ignored operation-specific factors that distinguished the Applicant's situation from other more common poultry farms: the ostriches' documented natural immunity following recovery from a 2020 "flu-like" illness; their uniquely long lifespan when compared to more common poultry; the relative difficulty of replacing ostriches once depopulated; the farm's isolation from other commercial poultry operations; a 30-year breeding program conferring

exceptional research value; and expert testimony that maintaining a naturally immune flock posed less risk than introducing new stock. Second, the Committee disregarded a central piece of contradictory evidence that undermined its trade-impact justification for rejecting exemption. Namely, that the granting of the March 2022 Exemption had caused no trade disruptions, suggesting that “evidently the exemption was not as impactful as” the Agency asserts. By selectively ignoring this evidence that directly challenged its reasoning, the Applicant argues, the Committee’s decision is not justified considering the evidentiary record before them: *Vavilov* at para 126. For the Applicant, this neglect renders the Exemption Denial unreasonable.

[236] I will first explain, in turn, why I find each of the three arguments unpersuasive. Then, I will assess whether the CFIA’s reasons for denying the exemption appropriately reflect the gravity of its decision on the Applicant. Although the Applicant did not advance a focused argument on this specific point, it repeatedly emphasized, in written and oral submissions, that the ordered depopulation could result in the operational collapse of the farm and significant financial hardship for its principals. Cognizant of the substantial consequences of the Exemption Denial and in keeping with *Vavilov*’s instruction that administrative decisions must reflect the stakes of the decisions, I consider it this Court’s obligation to examine whether the CFIA gave adequate consideration to those consequences in its reasoning.

(i) The Applicant’s Argument on Dr. French’s Rapid Literature Review Fails

[237] The Applicant’s first argument is that the Exemption Denial was unreasonable because it was made without awaiting Dr. French’s scientific inputs. I find, on close review, that this outstanding piece of information was not so essential to the CFIA’s decision that proceeding without it rendered the decision unreasonable. I accept the Applicant’s submission that the

Exemption Committee had not reviewed Dr. French's report at the time the Exemption Denial was issued. However, this omission is not the fatal flaw the Applicant makes it out to be.

[238] The record shows that the Exemption Committee properly set its central task as assessing whether any ostriches on the Applicant's premises met two criteria: 1) that they formed a distinct epidemiological unit; and 2) that they possessed "rare and valuable genetics" warranting preservation. Those twin criteria, laid out in the *Distinct Unit Request Package* and repeatedly explained to the Applicant's principals, turn on proper biosecurity practices, documentary pedigree and third-party recognition of genetic worth, rather than on a preliminary survey of avian influenza in ostriches. Indeed, the formal reasons for denial found both the Response Letter and the Internal Recommendation Memorandum show that the Committee focused primarily on the evidence directly relevant to those criteria: repeated on-site observations of wild bird and weasel ingresses into ostrich enclosures, the continued practice of shared feed sources, equipment, and personnel, the Applicant's predominantly negative responses to the twenty-question biosecurity checklist, unrestricted human movement into areas designated as an Infected Place, and the absence of genomic testing or registry evidence demonstrating a unique and commercially valuable genetic line.

[239] With this gathered information, the Exemption Committee gave serious consideration to whether a subset of the Applicant's ostriches might be spared. However, after "significant debate," the Committee ultimately rejected this possibility. Their decision was driven by two key factors: the Applicant's poor biosecurity conditions and practices, and the lack of sufficient documentation to support the Applicant's claims regarding the genetic rarity and value of its ostriches. In that context, Dr. French's review—which found that ostriches are classified as

poultry under WOA, that South Africa implements stamping-out measures for HPAI in ostriches, and that avian influenza can mutate spontaneously in ostriches to facilitate interspecies transmission—would have provided no evidence to contradict, let alone alter, the Committee’s denial of exemption.

[240] Nor was the rapid literature review a necessary piece of science on ostriches for the Exemption Committee to make an informed decision. First, contrary to the Applicant’s claim, its own cross-examination of Dr. Furness confirms that the Stamping-Out Policy was not designed solely for chickens or turkeys, but applies to “all avian species susceptible to highly pathogenic avian influenza, which includes ostriches and emus.” This undermines the suggestion that the Agency lacked any foundational consideration of ostriches in its policy framework. Second, prior to issuing the Exemption Denial on January 10, 2025, the Committee had already consulted both internal experts and international counterparts, including officials at the U.S. Department of Agriculture’s APHIS, on HPAI management in ostriches. All confirmed that the stamping-out approach continued to apply to ostriches without modification. In short, while Dr. French’s report undoubtedly would have provided more extensive scientific understanding on the matter, the Committee did have access to current scientific and policy input on the issue and was not relying on an incomplete or outdated understanding.

[241] Even if I were to accept the Applicant’s premise that Dr. French’s rapid literature review was indispensable to the exemption assessment, the CFIA’s decision would not be rendered unreasonable. If anything, it would be reinforced; that Dr. French’s key conclusions, delivered later that evening, confirmed that ostriches are classified as poultry, that South Africa includes ostriches in its stamping-out approach, and that mutations of avian influenza in ostriches are

spontaneous and can increase interspecies transmissibility. Had the Committee waited, this information could only have further supported the decision to deny the exemption. Consistent with *Vavilov*'s teaching that judicial review is not a "line-by-line treasure hunt for error," it would be unreasonable for this Court to fault the Agency for not waiting for a document that would have led to the same result, especially given the time-sensitive decision-making context within which it operates.

[242] With the above observations, I am satisfied that the CFIA's decision to deny the exemption was not unreasonable simply because it was rendered without examining the contents of Dr. French's rapid literature review. The Agency had done an extensive evidence-gathering process focusing on evidence going to the exemption criteria set out in the 2022 ERP, and then turned its attention to the evidence it had gathered and the Applicant had submitted. The Supreme Court instructs that decision-makers must meaningfully grapple with "key issues or central arguments raised by the parties," not pursue "every... line of possible analysis": *Vavilov* at para 128. Here, the CFIA had properly focused its assessment on the core issues: the ostriches' exposure to the virus, the Applicant's biosecurity conditions and practices, as well as the documentation of genetic rarity and value. These corresponded directly to the two criteria at the heart of the exemption request and engaged with the very evidence submitted by the Applicant. This demonstrates that the Agency was, in the language of *Vavilov*, "alert and sensitive to the matter before it." It was not required to delay its decision for a report that ultimately contributed no outcome-altering information. Instead, the Committee appropriately grappled with relevant and material evidence and submissions, striking the proper balance between decision-making thoroughness and administrative efficiency, as *Vavilov* envisions.

[243] The Applicant's assertion that the Exemption Committee was obliged to await Dr. French's literature review also fundamentally misunderstands how administrative agencies operate in time-sensitive and high-stakes decision-making contexts. This argument incorrectly assumes that information described as "important" and "informing the decision" becomes indispensable to a reasonable decision-making process. Agencies like the CFIA routinely draw on multiple sources to build as complete an understanding as possible within limited timeframes. Dr. Furness' acknowledgment during cross-examination that Dr. French's rapid review was "important" and would help inform the Exemption Denial does not make it a determinative piece of evidence. It was still one of many documents that may be "important" in building a better understanding without being decisive to the outcome. As the statutory authority entrusted by Parliament to handle the high-stakes role of animal disease-control, the CFIA has the expertise and discretion to determine when its evidentiary foundation is sufficient to justify acting.

[244] Therefore, although it may seem counterintuitive for the Exemption Committee to request a scientific review and then proceed without waiting even a single day for its completion, this course of action aligns with the practical reality and operational urgency of disease-control. As the Supreme Court emphasized at paragraph 93 of *Vavilov*, an administrative decision must be evaluated against specific purpose, context, and operational demands of the administrative regime, and what may seem puzzling in isolation often becomes reasonable when properly contextualized. On January 10, 2025, the date of the Exemption Denial, the Agency was managing an active outbreak of avian influenza at the Applicant's premises with ongoing ostrich deaths. Beyond commissioning Dr. French's rapid literature review, the Agency had already consulted internal experts and international counterparts, who all confirmed that stamping-out measures applied to ostriches, collected extensive on-site evidence of poor biosecurity, and

determined that the Applicant had failed to substantiate claims of genetic rarity or value. In this context, it was open to the CFIA to conclude that the Stamping-Out Policy needed to be implemented at the Applicant's premises, and thus the exemption request must be denied without further waiting.

[245] I repeat—judicial review must never be conducted with the benefit of hindsight. Although the infection had later abated with many ostriches surviving, that could not have been foreseen at the time. The Stamping-Out Policy guided the Agency to depopulate the entire exposed epidemiological unit without delay. In such circumstances, the Agency was entitled, indeed compelled by its statutory mandate under the *Act*, to act decisively once it had gathered sufficient information to make a sound determination. In my view, this approach of soliciting information from multiple sources and proceeding when receiving adequate rather than all solicited information reflects a demonstrated expertise of properly balancing thoroughness and urgency that characterizes effective disease control. Accordingly, I conclude that the Agency acted reasonably in finalizing the Exemption Denial when it did.

(ii) The Applicant's Argument on Conflation of Exemption Criteria Fails

[246] The Applicant's second argument is that the Exemption Denial was unreasonable because the Exemption Committee allegedly misread "rare and valuable genetics" and "distinct unit" as conjunctive requirements. I find the misunderstanding instead lies with the Applicant, not with the Committee. A brief review of the record clarifies this point.

[247] I agree with the Applicant that the 2022 *ERP*, its *Exemptions from Depopulation* appendix, and the *Distinct Unit Request Package*, shared with it via the Exemption Process

Overview Email, all list the “rare and valuable genetics” and “distinct unit” as separate, alternative exemption categories. However, the Exemption Committee never bolted these two categories together. Instead, the concepts the Committee paired in its reasons were “rare and valuable genetics” and distinct *epidemiological* unit. The Applicant’s objection rests on a mix-up between “distinct unit,” which is a standalone exemption category, and “distinct epidemiological unit,” which is a threshold criterion applicable to all exemption requests.

[248] As I explained in the Legal Framework section, the exemption regime is clear that all three available exemption categories of “distinct unit,” “rare and valuable genetics,” and “pet birds” share the same initial threshold of demonstrating distinct epidemiological status. In fact, the very Decision Record the Applicant cites in support of its argument, *Updates to Distinct Unit Recognition Process*, explicitly confirms this common threshold:

1. Policy to be included as part of the ERP

In some exceptional circumstances, the CFIA may assess domestic birds on an [Infected Premise] to determine if they can be classified as a distinct epidemiological unit, and therefore not considered part of the susceptible population. Populations that are considered a distinct epidemiological unit may be exempt from depopulation.

There are three categories for the recognition of a distinct epidemiological unit:

- Distinct units
- Rare and valuable genetics
- Pet birds

Criteria for evaluation of each of the above categories is available in ERP Appendix - Exemptions from depopulation

[emphasis added]

[249] While the Applicant's confusion is not entirely unexpected given the similarity between "distinct unit" and "distinct epidemiological unit," any ambiguity should have been resolved by a review of the *Distinct Unit Request Package* provided to it. The cover page of that document clearly states: "If a group of birds are physically and functionally separate from the rest of an infected [epidemiological] unit, the CFIA may exercise its discretion to consider this group of birds as a distinct unit and exempt it from depopulation."

[250] Both the formal reasons set out in the Response Letter and the accompanying Internal Recommendation Memorandum demonstrate that the Exemption Committee applied the correct exemption criteria. The Committee first assessed whether any subgroup of the Applicant's flock qualified as a distinct epidemiological unit. Based on substantial evidence of inadequate biosecurity at the Applicant's facility, it reasonably concluded that none did. Since demonstrating distinct epidemiological status is a threshold requirement for all exemption categories, that finding alone was sufficient to justify denying the application. The Committee's additional analysis of "rare and valuable genetics" were supplementary comments, or justification in the alternative, not a sign of an analysis that conflated criteria.

[251] In any event, even if the "rare and valuable genetics" category of exemption were to be assessed independent of the distinct epidemiological unit threshold, the Applicant's submissions would still fall well short of demonstrating the required criteria. The documentation provided by the Applicant fundamentally misunderstood what constitutes "rare and valuable poultry genetics" within the regulatory framework. Rather than presenting evidence of genomic distinctiveness, pedigree documentation, breed registry verification, or third-party scientific validation of unique genetic characteristics, the Applicant submitted materials primarily focused on commercial

applications of ostrich antibodies, business plans, and proposed research projects. These materials spoke to potential commercial value of ostrich products generally rather than demonstrating any genetically unique characteristics of the specific birds in the Applicant's flock. Moreover, the Applicant's submissions addressed the herd as a whole rather than identifying particular birds with exceptional genetic traits of significance to the broader poultry industry. The Response Letter correctly noted that "robust processes must be in place (ex. genomic testing) to actively select and breed for specific desirable traits," yet the Applicant provided neither evidence of such systematic genetic selection nor molecular-level proof of genetic uniqueness. Simply put, the Applicant's documentation has failed to establish the fundamental premise that its birds possessed genetics that are both rare and valuable, regardless of their epidemiological status.

[252] In short, it was the Applicant, not the Exemption Committee, that confused the exemption category of "distinct unit" with the threshold concept of "distinct epidemiological unit." The Committee adhered to the exemption framework as set out in policy and applied it correctly. Therefore, the Applicant's second unreasonableness allegation cannot succeed.

(iii) The Applicant's Argument on Inadequate Engagement with Evidence Fails

[253] The Applicant's third argument is that the Exemption Committee ignored operation-specific factors unique to the Applicant's situation and neglected a key precedent exemption that allegedly contradicts the Committee's reasoning on trade. I find that this argument is an improper invitation for this Court to reweigh evidence and a misreading of the facts and policy surrounding the precedent. While reasonableness review must be robust, reviewing courts cannot nitpick and fault a decision-maker for not cataloguing every fact and argument the

Applicant considers important. That is not what *Vavilov* expects. Reasons in administrative decisions are required to show that the decision maker grappled with the determinative issues and stayed attuned to the relevant evidence before them, but they do not need to read like a treatise addressing every factor deemed important by the applicants: *Vavilov* paras 91-93 and 125-128.

[254] I am satisfied that the content of the Response Letter and Internal Recommendation Memorandum demonstrates that the Exemption Committee did turn its mind to many of the operation-specific factors the Applicant highlights. It records the on-site inspection and the Premises Investigation Questionnaire, noting shared personnel and equipment, the central pond attracting hundreds of wild birds, and outdoor pens. Those observations go directly to the claim that the operation-specific conditions of natural immunity and efforts of isolation rendered selective depopulation feasible and shows to this Court the facts that the Committee deemed important in evaluating these alternative measures. The Memorandum then addresses the correct threshold question under the 2022 ERP: could any subgroup be “separated from an infected susceptible population such that they are not considered exposed.” The answer that “all birds on the infected premises were under the same risk of HPAI exposure” shows that the Committee rejected the Applicant’s on-premise condition as meeting the threshold of epidemiological separation that underpins every exemption pathway. Moreover, the Memorandum records that “a significant policy deviation was considered (i.e. to employ selective culling ... rather than stamping-out)” but was declined after multidisciplinary consultation because of domestic-disease, public-health, and trade risks. This explicit reference confirms that alternatives such as retaining a naturally immune flock were examined and even debated, not ignored.

[255] *Vavilov* cautions that a specialized agency’s demonstrated expertise may justify treating some issues in less detail, and that such an agency’s reasons will often rely on concepts and language specific to its field: *Vavilov* at paras 92-93. Many of the “unique” factors the Applicant presses, including longer lifespan, relative difficulty of repopulation, and remoteness of the premises from commercial poultry operations, are precisely the kind of scientific, medical, and veterinary risk variables the CFIA is equipped to weigh. Here, the Committee’s heavier focus on explaining about exposure pathways, biosecurity realities, and international obligations reflects a proper exercise of the Agency’s expertise. As such, its decision to focus less, or not at all, on each individual factor deemed important by the Applicant aligns squarely with the principles set out in *Vavilov*.

[256] When situated in the context of the full record, the Committee’s chosen focus is even more reasonable. Beyond what is listed by the Committee in the Internal Recommendation Memorandum regarding shared personnel and equipment, the central pond, and outdoor pens, the record also shows that the Applicant’s farm also exhibited sick ostriches being moved to treatment pens in contravention of quarantine requirements, dead ostriches dragged through pens populated with living ones without robust separation measures, and unauthorized individuals walking inside the infected zone. Seeing the many issues with the biosecurity conditions at the Applicant’s premises, I find no basis to interfere with the Exemption Committee’s approach of engaging more substantively with epidemiological and trade considerations and not providing lengthy elaboration and addressing every point that the Applicant deems more important.

[257] As to the Exemption Committee’s alleged failure to address “contradictory” evidence that the March 2022 Exemption did not cause trade disruptions, I find this submission unpersuasive.

In my view, the suggestion that the earlier exemption contradicts the Committee's present reasoning on trade rests on two fundamental errors in logic.

[258] The first error is a flawed analogy. For the March 2022 exemption to serve as a contradiction, it must be meaningfully analogous to the present case. Only then could the Applicant plausibly argue that the CFIA's concern about trade consequences in this instance is inconsistent with and thus contradicted by its past practice. However, the factual circumstances in these two cases cannot be more different. The March 2022 Exemption was granted only after the barns of turkeys in question met the strict distinct epidemiological unit threshold: they were fully enclosed, ventilated independently, staffed separately, and never exposed to the virus. No comparable epidemiological segregation exists on the Applicant's open-air ostrich premises, where wild ducks, weasels, and shared staff had roamed without much hindrance. Given these substantial differences, the March 2022 Exemption simply does not meaningfully contradict the Exemption Committee's analysis or conclusions in the present matter.

[259] The second error is a defect in causal reasoning. Specifically, the Applicant appears to conflate the absence of negative trade consequences in a prior case with the absence of risk in its own. This reasoning is faulty. The fact that one exemption under materially different circumstances did not result in adverse outcomes does not imply that a different exemption under weaker biosecurity conditions poses no risk. The Internal Recommendation Memorandum records the Exemption Committee's consultation with experts both internal and international, who confirmed that major partners, such as the United States, have "and would continue to, apply a stamping-out approach to the detection of HPAI on ostrich farms." This expert

assessment directly supports the Exemption Committee's conclusion regarding potential international implications for this specific case.

[260] Properly understood, the March 2022 Exemption is not contradictory evidence but rather complementary evidence that reinforces the importance of strict biosecurity conditions for any exemption consideration. True contradictory evidence would need to demonstrate either that similarly situated premises received different treatment or that international partners had explicitly indicated acceptance of exemptions for premises with compromised biosecurity. The Applicant offered neither. Instead, it has relied on a factually and epidemiologically distinct precedent that does not demand explicit engagement by the Exemption Committee. Its omission from the Committee's reasons does not render the Exemption Denial unreasonable.

(iv) The CFIA's Reasons Properly Reflect the Impact of Its Decision on the Applicant

[261] The law is clear that near-draconian measures may be justified when necessary to safeguard broader public interests, even where such measures may negatively impact private property or economic interests: *David Hunt FC* at para 52. However, this principle does not license the imposition of such measures without due regard for their impact on those affected. Indeed, the central tenet of Canadian administrative law, and the animating purpose of judicial review, is to ensure that administrative decision-makers remain accountable and do not exercise "absolute and untrammelled 'discretion':" *Roncarelli v Duplessis*, [1959] SCR 121 at p 140.

[262] Since the Supreme Court's decision in *Vavilov*, there has been an increased emphasis on engaging with the perspective of the individuals affected by administrative decisions. Reasons must not only be coherent with legal interpretation and institutional logic, but must also reflect

meaningful, humane engagement with the lived realities and consequences for those whose rights, livelihoods, liberty, or dignity are at stake. In practical terms, administrative decision-makers must remain responsive to the applicants' specific circumstances and the gravity of the decision's impact, and their reasons must be calibrated accordingly. This obligation is particularly important where decisions result in harsh or irreversible impacts, as is the case here, because it is in such moments that the administrative decision-maker's duty to explain "why its decision best reflects the legislature's intention" becomes most acute.

[263] Having reviewed the reasons provided to the Applicant, including the email communicating the denial and the attached Response Letter, I find that the CFIA's explanation has met this standard. The reasons adequately responded to the Applicant's circumstances, and articulated, in a transparent and clear manner, why the decision aligned with Parliament's intent. The Agency's communication demonstrated a humane engagement with the gravity of its decision and the impact it would have on the Applicant and its principals.

[264] The email, likely the first communication read by the Applicant, recognizes "the tremendous amount of stress" the decision may cause, and provides mental health resources while offering opportunities for continued dialogue with "the necessary parties from the CFIA." This overt acknowledgment of human impact reflects precisely the responsive justification that *Vavilov* calls for in paragraphs 133 to 135 when a decision threatens an individual's livelihood. I couple this language with the extensive and continuous communications the CFIA had maintained with the Applicant's principals through virtual meetings, phone calls, emails, and on-site visits throughout the entire process. I am convinced that the Agency did not treat the

Applicant's case as just another routine bureaucratic exercise, but recognized the severe economic and emotional consequences for the Applicant's principals.

[265] On a substantive level, the Response Letter explicitly ties the Exemption Denial to the legislative purpose set out in the *Act*. It first explains that the Stamping-Out Policy “reflects the risks posed by HPAI infected poultry flocks to humans, domestic animals, and wildlife,” and then states that implementation was necessary “for Canada to mitigate the risks posed by HPAI infected poultry, maintain its international obligations and the expectation of our trading partners.” This directly addresses the *Act*'s core purposes of proactive disease management, protection of public health, and preservation of Canada's international trade status, as recognized in the *David Hunt* cases, *River Valley Poultry Farm*, *Paradis Honey*, and *Kohl*. The Agency's explanation clearly indicates that the decision was made to fulfil the statutory mandate, not as a whimsical punishment. This level of specific reasoning satisfies *Vavilov*'s demand that the decision-maker justify how the outcome aligns with the legislature's purpose when the stakes are high.

[266] The CFIA's reasons also demonstrate substantive engagement with the Applicant's specific circumstances rather than merely providing generic justifications. The Response Letter acknowledged the Applicant's submission of a *Distinct Unit Request Package* and addressed the specific exemption category the Applicant had attempted to meet with the documents it had provided. The Letter provided clear explanations why the Applicant's premises failed to qualify as a distinct epidemiological unit and why the claimed genetic value did not meet the threshold for the “rare and valuable poultry genetics” exemption.

IX. The Applicant's *Charter*, *Bill of Rights*, and jurisdictional arguments have been abandoned

[267] The Applicant's Notice of Application and Amended Notice of Application both raised arguments that were not pursued in its memorandum of fact and law. These included claims that the CFIA's decisions interfered with provincial jurisdiction over health, property rights, and animal genetic development, and that the decisions violated the Applicant's right to property under the *Canadian Bill of Rights* and infringed unidentified *Charter* rights.

[268] During the hearing, Respondent's counsel noted these arguments were absent from the Applicant's memorandum. When questioned on this point, Applicant's counsel acknowledged the *Charter* issue was abandoned, but suggested the jurisdictional issue should still somehow work its way into the reasonableness analysis, despite admitting it was not in their memorandum.

[269] I deem all these grounds to have been abandoned by virtue of the Applicant counsel's failure to include them in their memorandum of fact and law. Counsel cannot expect this Court to address and resolve an unsupported jurisdictional argument. For a case that is of such urgency and significance to both parties, issues and arguments should be clearly presented so they can be properly addressed and assessed on their merits. Hearings are no places for surprises, and counsel, I note, brought more than one to this hearing.

X. Conclusion

[270] For the reasons provided, these applications for judicial review are dismissed.

[271] The parties agreed that if the Respondent was successful, a lump sum award of costs in its favour of \$15,000 would be appropriate. I agree with this assessment and hereby award costs to the Respondent in that amount.

[272] I apologize for the length of these Reasons. The Applicant advanced many issues and made detailed submissions over two days of hearing. Although none was successful, they were deserving of detailed consideration and assessment.

JUDGMENT IN T-294-25 and T-432-25

THIS COURT'S JUDGMENT is that these applications are dismissed, the injunction dated January 31, 2025 is vacated, and the Respondent is awarded costs of \$15,000, all in.

"Russel W. Zinn"

Judge

ANNEX***Health of Animals Act, SC 1990, c 21***

Infected Places and Control Zones	Lieux contaminés et zones de contrôle
Declaration of infected place	Déclaration
22 (1) Where an inspector or officer suspects or determines that a disease or toxic substance exists in a place and is of the opinion that it could spread or that animals or things entering the place could become affected or contaminated by it, the inspector or officer may in writing declare that the place is infected and identify the disease or toxic substance that is believed to exist there, and such a declaration may subsequently be amended by the inspector or officer.	22 (1) L'inspecteur ou l'agent d'exécution peut, par écrit, déclarer contaminé tout lieu où il soupçonne ou constate la présence d'une maladie ou d'une substance toxique qu'il estime susceptibles soit de se propager, soit de contaminer les animaux qui s'y rendent ou les choses qui y sont apportées; il doit alors préciser la nature de la maladie ou de la substance. Il peut ensuite, de la même manière, modifier la déclaration.
Delivery of declaration	Effet
(2) When the declaration is delivered to the occupier or owner of the place to which it relates, the place, together with all contiguous lands, buildings and other places occupied or owned by the occupier or owner, constitutes an infected place.	(2) Sur remise de la déclaration au propriétaire ou à l'occupant, le lieu visé par celle-ci et les terrains, bâtiments et autres lieux qui lui sont contigus et sont occupés par la même personne, ou dont celle-ci est propriétaire, constituent des lieux contaminés.
...	[...]
Prohibition — infected place	Interdiction — lieu contaminé
25 (1) No person shall, without a licence issued by an inspector or officer, remove	25 (1) Il est interdit, sans permis signé par un inspecteur ou un agent d'exécution, de

from or take into an infected place any animal or thing.

sortir tout animal ou toute chose d'un lieu contaminé ou de l'y introduire.

Return

(2) Where an inspector or officer believes on reasonable grounds that any animal or thing has been removed from or taken into an infected place in contravention of subsection (1), the inspector or officer may, whether or not the animal or thing is seized,

(a) return it to or remove it from the infected place, or move it to any other place; or

(b) require its owner or the person having the possession, care or control of it to return it to or remove it from the infected place, or move it to any other place.

Renvoi

(2) L'inspecteur ou l'agent d'exécution peut soit renvoyer du lieu contaminé ou y rapporter tout animal ou toute chose — saisis ou non — qui ont été déplacés, à son avis fondé sur des motifs raisonnables, en contravention avec le paragraphe (1), soit les transférer dans un autre lieu; il peut aussi ordonner au propriétaire de l'animal ou de la chose, ou à la personne qui en a la possession, la responsabilité ou la charge des soins, de le faire.

Notice

(3) A requirement under paragraph (2)(b) shall be communicated by personal delivery of a notice to the owner or person having the possession, care or control of the animal or thing or by sending the notice to the owner or person, and the notice may specify the period within which and the manner in which the animal or thing is to be returned or removed.

Avis

(3) L'ordre est signifié au propriétaire ou à la personne concernée, soit en mains propres, soit par envoi postal ou autre, sous forme d'avis en précisant éventuellement le délai ou les modalités d'exécution.

...

[...]

Primary control zone

27 (1) If the Minister believes that a disease or toxic substance exists in an area, he or she may, by order, declare the area to be a primary control zone, in which case the Minister shall describe the zone and identify the disease or toxic substance.

Designated animal or thing

(2) The Minister may, by order, designate any animal or thing that is capable of being affected or contaminated by the disease or toxic substance in respect of which the primary control zone is declared.

Prohibition — primary control zone

(3) No person shall remove from, move within or take into the primary control zone a designated animal or thing except in accordance with a permit issued by the Minister.

Secondary control zone

27.1 (1) If the Minister makes an order under subsection 27(1), he or she may — for the purpose of preventing the spread of the disease or toxic substance identified in the order or monitoring that disease or toxic substance — by order, declare any area that he or she considers necessary

Zone de contrôle primaire

27 (1) Le ministre peut, par ordonnance, déclarer comme zone de contrôle primaire toute région où, à son avis, sévit la maladie ou existe la substance toxique dont il précise la nature; il doit alors délimiter cette zone.

Animal ou chose désignés

(2) Le ministre peut, par ordonnance, désigner tout animal ou toute chose susceptibles d'être contaminés par la maladie ou la substance en cause.

Interdiction — zone de contrôle primaire

(3) Il est interdit, sauf en conformité avec un permis délivré par le ministre, de sortir de la zone de contrôle primaire tout animal ou toute chose désignés, de les y introduire ou de les y déplacer.

Zone de contrôle secondaire

27.1 (1) S'il prend l'ordonnance prévue au paragraphe 27(1) et afin d'empêcher la propagation de la maladie ou de la substance toxique qui y est précisée ou de surveiller cette maladie ou cette substance toxique, le ministre peut, par ordonnance, déclarer comme zone de

to be a secondary control zone, in which case the Minister shall describe the zone.

contrôle secondaire toute région qu'il estime nécessaire; il doit alors délimiter cette zone.

Disease outside Canada

Maladie hors du Canada

(2) If the Minister believes that a disease or toxic substance exists in an area outside Canada, he or she may — for the purpose of preventing the spread of that disease or toxic substance into Canada or monitoring that disease or toxic substance — by order, declare any area in Canada that he or she considers necessary to be a secondary control zone, in which case the Minister shall describe the zone and identify that disease or toxic substance.

(2) S'il est d'avis qu'une maladie sévit ou qu'une substance toxique existe dans une région à l'étranger, le ministre peut, par ordonnance, afin d'empêcher la propagation au Canada de cette maladie ou de cette substance toxique, ou de surveiller cette maladie ou cette substance toxique, déclarer comme zone de contrôle secondaire toute région du Canada qu'il estime nécessaire; il doit alors délimiter cette zone et préciser la nature de la maladie ou de la substance toxique en cause.

Designated animal or thing

Animal ou chose désignés

(3) The Minister may, by order, designate any animal or thing that is capable of being affected or contaminated by the disease or toxic substance in respect of which the secondary control zone referred to in subsection (2) is declared.

(3) Le ministre peut, par ordonnance, désigner tout animal ou toute chose susceptibles d'être contaminés par la maladie ou la substance à l'égard de laquelle la zone visée au paragraphe (2) a été déclarée.

Conditions

Conditions

(4) The Minister may, by order, prohibit or impose conditions on — including requiring a permit for — removing from, moving within or taking into a

(4) Le ministre peut, par ordonnance, interdire l'entrée, la sortie ou le déplacement dans toute zone de contrôle secondaire d'animaux ou de choses désignés, ou y imposer

secondary control zone a designated animal or thing.

des conditions, notamment l'obtention d'un permis.

Compliance

Obligation de se conformer à l'ordonnance

(5) Any person to whom an order made under subsection (4) applies shall comply with it.

(5) Toute personne visée par l'ordonnance prise en vertu du paragraphe (4) doit s'y conformer.

Permits

Permis

27.2 A permit referred to in subsection 27(3) or 27.1(4) may be issued as a general permit to owners or persons having the possession, care or control of a designated animal or thing.

27.2 Les permis visés aux paragraphes 27(3) et 27.1(4) peuvent être délivrés, à titre de permis d'application générale, aux propriétaires ou aux personnes qui ont la possession, la responsabilité ou la charge des soins d'animaux ou de choses désignés.

Order amended

Modification

27.3 The Minister may, by order, amend or revoke an order made under subsection 27(1) or (2) or one made under any of subsections 27.1(1) to (4).

27.3 Le ministre peut, par ordonnance, modifier ou révoquer l'ordonnance prise en vertu des paragraphes 27(1) ou (2) ou de l'un des paragraphes 27.1(1) à (4).

Measures

Mesures

27.4 The Minister may take all reasonable measures that are consistent with public safety to remedy any dangerous condition or mitigate any danger to life, health, property or the environment that results, or may reasonably be expected to result, from the existence of a disease or toxic substance in a primary control zone.

27.4 Le ministre peut prendre les mesures compatibles avec la sécurité publique en vue de remédier à toute situation dangereuse ou de réduire les risques que constitue — ou peut normalement constituer — pour la vie, la santé, les biens ou l'environnement, la présence d'une maladie ou d'une substance toxique dans la zone de contrôle primaire.

Regulations

27.5 The Minister may make regulations prohibiting or regulating the movement of persons or designated animals or things from, within or into a primary or secondary control zone for the purpose of controlling or eliminating a disease or toxic substance, in respect of which the primary control zone or a secondary control zone referred to in subsection 27.1(2) was declared, or preventing its spread.

Treatment or disposal

27.6 (1) The Minister may, in respect of a designated animal or thing that is or has been in a primary or secondary control zone,

(a) treat that animal or thing or require its owner or the person having the possession, care or control of it to treat it or to have it treated if the Minister considers that the treatment will be effective in eliminating the disease or toxic substance or preventing its spread; or

(b) dispose of that animal or thing or require its owner or the person having the

Règlements

27.5 Le ministre peut, par règlement, régir ou interdire l'entrée, la sortie ou la circulation dans une zone de contrôle primaire ou secondaire des personnes ou des animaux ou choses désignés, en vue de lutter contre la maladie ou la substance toxique en cause, de les en éliminer ou d'éviter leur propagation.

Traitement ou disposition

27.6 (1) Le ministre peut, à l'égard des animaux ou des choses désignés se trouvant dans une zone de contrôle primaire ou secondaire, ou s'y étant trouvés, prendre les mesures suivantes :

a) les soumettre à un traitement ou ordonner à leur propriétaire ou à la personne qui en a la possession, la responsabilité ou la charge des soins de les traiter, ou de les faire traiter, s'il estime que le traitement sera efficace pour éliminer la maladie ou la substance toxique ou prévenir leur propagation;

b) prendre toute mesure de disposition, notamment de destruction, ou ordonner à leur propriétaire ou à la personne qui en a la

possession, care or control of it to dispose of it.

possession, la responsabilité ou la charge des soins de le faire.

Return animal or thing

Renvoi d'animaux ou de choses

(2) If an inspector or officer believes on reasonable grounds that a designated animal or thing has been removed from, moved within or taken into a primary control zone in contravention of subsection 27(3) — or a secondary control zone in contravention of an order made under subsection 27.1(4) — the inspector or officer may, whether or not that animal or thing is seized, move it to any place or require its owner or the person having the possession, care or control of it to move it to any place.

(2) L'inspecteur ou l'agent d'exécution peut transférer dans un autre lieu tout animal ou toute chose désignés — saisis ou non — qui, à son avis fondé sur des motifs raisonnables, ont été sortis d'une zone de contrôle primaire ou introduits ou déplacés dans cette zone en contravention avec le paragraphe 27(3) ou ont été sortis d'une zone de contrôle secondaire ou introduits ou déplacés dans cette zone en contravention avec une ordonnance prise en vertu du paragraphe 27.1(4); il peut aussi ordonner au propriétaire de l'animal ou de la chose, ou à la personne qui en a la possession, la responsabilité ou la charge des soins, de le faire.

Notice

Avis

(3) A requirement under subsection (1) or (2) shall be communicated by the personal delivery of a notice to the owner or person having the possession, care or control of the animal or thing, or by sending the notice to the owner or person. The notice shall specify the period within which and the manner in

(3) L'ordre donné en vertu du paragraphe (1) ou (2) est signifié au propriétaire ou à la personne concernée, soit à personne, soit par envoi postal ou autre, sous forme d'avis en précisant éventuellement le délai ou les modalités d'exécution.

which the requirement is to be met.

...

[...]

Disposal and Treatment

Disposition et traitement

Disposal of affected or contaminated animals and things

Mesures de disposition

48 (1) The Minister may dispose of an animal or thing, or require its owner or any person having the possession, care or control of it to dispose of it, where the animal or thing

48 (1) Le ministre peut prendre toute mesure de disposition, notamment de destruction, — ou ordonner à leur propriétaire, ou à la personne qui en a la possession, la responsabilité ou la charge des soins, de le faire — à l'égard des animaux ou choses qui :

(a) is, or is suspected of being, affected or contaminated by a disease or toxic substance;

a) soit sont contaminés par une maladie ou une substance toxique, ou soupçonnés de l'être;

(b) has been in contact with or in close proximity to another animal or thing that was, or is suspected of having been, affected or contaminated by a disease or toxic substance at the time of contact or close proximity; or

b) soit ont été en contact avec des animaux ou choses de la catégorie visée à l'alinéa a) ou se sont trouvés dans leur voisinage immédiat;

(c) is, or is suspected of being, a vector, the causative agent of a disease or a toxic substance.

c) soit sont des substances toxiques, des vecteurs ou des agents causant des maladies, ou sont soupçonnés d'en être.

Treatment

Traitement

(2) The Minister may treat any animal or thing described in subsection (1), or require its

(2) Le ministre peut par ailleurs soumettre ces animaux ou choses à un

owner or the person having the possession, care or control of it to treat it or to have it treated, where the Minister considers that the treatment will be effective in eliminating or preventing the spread of the disease or toxic substance.

traitement, ou ordonner à ces personnes de le faire ou d'y faire procéder, s'il estime que celui-ci sera efficace dans l'élimination de la maladie ou de la substance toxique ou la prévention de la propagation.

Notice

(3) A requirement under this section shall be communicated by personal delivery of a notice to the owner or person having the possession, care or control of the thing or by sending a notice to the owner or person, and the notice may specify the period within which and the manner in which the requirement is to be met.

Avis

(3) L'ordre est signifié au propriétaire ou à la personne concernée, soit en mains propres, soit par envoi postal ou autre, sous forme d'avis en précisant éventuellement le délai ou les modalités d'exécution.

...

[...]

Compensation

Indemnisation

Compensation to owners of animals

Indemnisation : animal

51 (1) The Minister may order compensation to be paid from the Consolidated Revenue Fund to the owner of an animal that is

51 (1) Le ministre peut ordonner le versement, sur le Trésor, d'une indemnité au propriétaire de l'animal :

(a) destroyed under this Act or is required by an inspector or officer to be destroyed under this Act and dies after the requirement is imposed but before being destroyed;

a) soit détruit au titre de la présente loi, soit dont la destruction a été ordonnée par l'inspecteur ou l'agent d'exécution mais mort avant celle-ci;

(b) injured in the course of being tested, treated or

b) blessé au cours d'un examen ou d'une séance de

identified under this Act by an inspector or officer and dies, or is required to be destroyed, as a result of the injury; or

traitement ou d'identification effectués, au même titre, par un inspecteur ou un agent d'exécution et mort ou détruit en raison de cette blessure;

(c) reserved for experimentation under paragraph 13(2)(a).

c) affecté à des expériences au titre du paragraphe 13(2).

Amount of compensation

Montant de l'indemnité

(2) Subject to subsections (3) and (4), the amount of compensation shall be

(2) Sous réserve des paragraphes (3) et (4), l'indemnité payable est égale à la valeur marchande, selon l'évaluation du ministre, que l'animal aurait eue au moment de l'évaluation si sa destruction n'avait pas été ordonnée, déduction faite de la valeur de son cadavre.

(a) the market value, as determined by the Minister, that the animal would have had at the time of its evaluation by the Minister if it had not been required to be destroyed

minus

(b) the value of its carcass, as determined by the Minister.

Maximum value

Plafond

(3) The value mentioned in paragraph (2)(a) shall not exceed any maximum amount established with respect to the animal by or under the regulations.

(3) La valeur marchande ne peut dépasser le maximum réglementaire correspondant à l'animal en cause.

Additional compensation

Indemnité supplémentaire

(4) In addition to the amount calculated under subsection (2), compensation may include such costs related to the disposal of the animal as

(4) L'indemnisation s'étend en outre, lorsque les règlements le prévoient, aux

are permitted by the regulations.

frais de disposition, y compris de destruction.

Compensation for Destroyed Animals and Things Regulations, SOR/2000-233

Maximum Amounts

Plafond de la valeur marchande

2 For the purpose of subsection 51(3) of the Act, the amount that is established as the maximum amount with respect to an animal that is destroyed or required to be destroyed under paragraph 27.6(1)(b) or subsection 48(1) of the Act is

2 Pour l'application du paragraphe 51(3) de la Loi, la valeur marchande d'un animal qui est détruit ou qui doit l'être en application de l'alinéa 27.6(1)b) ou du paragraphe 48(1) de la Loi ne peut dépasser :

(a) if the animal is set out or included in column 1 of an item of the schedule, the amount set out in column 3 of that item; and

a) le montant prévu à la colonne 3 de l'annexe, pour tout animal visé à la colonne 1;

(b) in any other case, \$30.

b) 30 \$, dans tout autre cas.

Compensation for Costs of Disposal

Indemnisation pour frais de disposition

3 (1) Compensation for the following costs related to the destruction of an animal or the disposal of a carcass or thing may be paid to the owner:

3 (1) En cas de destruction d'un animal, de la disposition d'un cadavre ou de la disposition d'une chose, une indemnité pour les coûts ci-après peut être versée à son propriétaire :

(a) subject to subsection (2), if the animal is destroyed or required to be destroyed under paragraph 27.6(1)(b) or subsection 48(1) of the Act by slaughter at an abattoir and it is transported to the abattoir within the period and in the manner

a) sous réserve du paragraphe (2), dans le cas d'un animal qui, en application de l'alinéa 27.6(1)b) ou du paragraphe 48(1) de la Loi, est détruit ou doit l'être à un abattoir et qui y est transporté selon le délai et les modalités

specified in the notice of requirement delivered or sent under subsection 27.6(3) or 48(3) of the Act,

d'exécution précisés dans l'ordre de destruction signifié conformément au paragraphe 27.6(3) ou 48(3) de la Loi :

(i) the reasonable costs of transporting it to the abattoir that were paid or incurred by the owner of the animal, to a maximum amount equal to the amount that a commercial trucker would normally charge for transporting it to the abattoir if it had not been required to be destroyed,

(i) les frais raisonnables payés ou engagés par le propriétaire pour le transport de l'animal à l'abattoir, à concurrence du prix qu'une entreprise exigerait normalement pour ce service si la destruction n'avait pas été ordonnée,

(i.1) the reasonable costs of labour for the owner's personal labour in transporting the animal to the abattoir, to a maximum amount equal to the amount that a local agricultural worker would normally be paid for the work, and

(i.1) les coûts raisonnables de main-d'oeuvre pour le travail qu'a effectué lui-même le propriétaire relativement au transport de l'animal à l'abattoir, à concurrence de la somme qu'un travailleur agricole exigerait normalement pour ce travail,

(ii) the reasonable costs of slaughtering it at the abattoir that were paid or incurred by its owner and that are related to the reason for which it was required to be destroyed; and

(ii) les frais raisonnables payés ou engagés par le propriétaire pour l'abattage de l'animal liés au motif sur lequel est fondé l'ordre de destruction;

(b) subject to subsection (3), if the animal is destroyed or required to be destroyed under paragraph 27.6(1)(b) or subsection 48(1) of the Act other than by slaughter at an abattoir and it is destroyed or its carcass or

b) sous réserve du paragraphe (3), dans le cas d'un animal qui, en application de l'alinéa 27.6(1)b) ou du paragraphe 48(1) de la Loi, est détruit ou doit l'être ailleurs qu'à un abattoir et qu'il est

the thing is disposed of within the period and in the manner specified in the notice of requirement delivered or sent under subsection 27.6(3) or 48(3) of the Act,

effectivement détruit, ou que la disposition du cadavre de l'animal ou d'une chose, dans le délai et selon les modalités d'exécution précisés dans l'ordre de destruction signifié conformément au paragraphe 27.6(3) ou 48(3) de la Loi :

(i) the reasonable costs of transporting the animal to the place of destruction or transporting the carcass or thing to the place of disposal that were paid or incurred by the owner, to a maximum amount equal to the amount that a commercial trucker would normally charge for that service,

(i) les frais raisonnables payés ou engagés par le propriétaire pour le transport de l'animal au lieu de destruction ou le transport du cadavre ou de la chose au lieu de disposition, à concurrence du prix qu'une entreprise exigerait normalement pour ce service,

(ii) the reasonable costs that were paid or incurred by the owner for cleaning and disinfecting the conveyance used to transport the animal, carcass or thing, to a maximum amount equal to the amount that a commercial service would normally charge for that service,

(ii) les frais raisonnables payés ou engagés par le propriétaire pour le nettoyage et la désinfection du véhicule ayant servi au transport de l'animal, du cadavre ou de la chose, à concurrence du prix qu'une entreprise exigerait normalement pour ce service,

(iii) the reasonable costs, to a maximum amount equal to the amount that a commercial service would normally charge to destroy the animal or dispose of the carcass or thing, that were paid or incurred by the owner

(iii) les frais raisonnables payés ou engagés par le propriétaire pour la destruction de l'animal ou la disposition du cadavre ou de la chose, à concurrence du prix qu'une entreprise exigerait

normalement pour ce service :

(A) if the owner destroyed the animal or disposed of the carcass or thing, for the supplies, equipment and labour expended to do so, or

(A) soit pour le matériel, l'équipement et la main-d'oeuvre utilisés par le propriétaire pour ce faire,

(B) if a commercial service was used to destroy the animal or dispose of the carcass or thing, for that service, and

(B) soit pour les services fournis par une entreprise pour ce faire,

(iv) the reasonable costs of labour, to a maximum amount equal to the amount that a local agricultural worker would normally be paid for the work, for the owner's personal labour in

(iv) les coûts raisonnables de main-d'oeuvre pour le travail qu'a effectué lui-même le propriétaire relativement aux tâches ci-après, à concurrence du montant qu'un travailleur agricole local exigerait normalement pour ce faire :

(A) transporting the animal to the place of destruction or transporting the carcass or thing to the place of disposal,

(A) le transport de l'animal au lieu de destruction ou le transport du cadavre ou de la chose au lieu de disposition,

(B) cleaning and disinfecting the conveyance used to transport the animal, carcass or thing, or

(B) le nettoyage et la désinfection du véhicule ayant servi à transporter l'animal, le cadavre, ou la chose,

(C) destroying the animal or disposing of the carcass or thing.

(C) la destruction de l'animal ou la disposition du cadavre ou de la chose.

(2) The maximum amount of compensation that may be paid under paragraph (1)(a) is an amount equal to (a) if the carcass of the animal has not been condemned, the value of the carcass according to paragraph 51(2)(b) of the Act; and (b) if the carcass of the animal has been condemned, the value that the carcass would have had according to paragraph 51(2)(b) of the Act had it not been condemned. (3) Compensation for costs related to the disposal of a thing may be paid only with respect to the following: (a) animal food; (b) refrigerators, refrigerator-freezers and freezers intended primarily for use in a dwelling, but not commercial or walk-in refrigerators, refrigerator-freezers and freezers;	(2) Le plafond de l'indemnité qui peut être versée au titre de l'alinéa (1)a est : a) dans le cas où le cadavre de l'animal n'a pas été condamné, la valeur du cadavre déterminée conformément au paragraphe 51(2) de la Loi; b) dans le cas où le cadavre de l'animal a été condamné, la valeur du cadavre qui aurait été déterminée conformément au paragraphe 51(2) de la Loi si le cadavre n'avait pas été condamné. (3) L'indemnisation pour les frais liés à la disposition d'une chose ne s'applique qu'aux choses suivantes : a) tout aliment pour animaux ; b) tout réfrigérateur, tout réfrigérateur-congélateur ou tout congélateur, conçu principalement pour être utilisé dans une habitation, à l'exclusion d'un réfrigérateur commercial, réfrigérateur-chambre commerciale, d'un réfrigérateur-congélateur commercial, d'un congélateur commercial ou un congélateur-chambre commercial;

- (c) cages, crates and nesting boxes; and

(d) feed troughs.
- c) toute cage, tout cageot ou tout nichoir;

d) toute mangeoire.

SCHEDULE

(Section 2)

	Column 1	Column 2	Column 3
Item	Animal	Family	Maximum Amount (\$)
ANIMALS NOT LISTED BY ORDER			
...			
Farm Animals			
...			
51	Ostrich (<i>Struthio camelus</i>)	Struthionidae	3,000
...			

ANNEXE

(article 2)

	Colonne 1	Colonne 2	Colonne 3
Article	Animal	Family	Montant maximal (\$)
ANIMAUX CLASSÉS AUTREMENT QUE SELON LES ORDRES DU RÈGNE ANIMAL			
[...]			
Animaux de ferme			
[...]			
51	Autruche (<i>Struthio camelus</i>)	Struthionidés	3,000
[...]			

FEDERAL COURT
SOLICITORS OF RECORD

DOCKETS: T-294-25 AND T-432-25

STYLE OF CAUSE: UNIVERSAL OSTRICH FARMS INC v CANADIAN
FOOD INSPECTION AGENCY

PLACE OF HEARING: VANCOUVER, BRITISH COLUMBIA

DATE OF HEARING: APRIL 15 AND 16, 2025

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DATED: MAY 13, 2025

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FOR THE RESPONDENT

TAB 12

White Burgess Langille Inman, carrying on business as WBLI Chartered Accountants and R. Brian Burgess *Appellants*

v.

Abbott and Haliburton Company Limited, A.W. Allen & Son Limited, Berwick Building Supplies Limited, Bishop's Falls Building Supplies Limited, Arthur Boudreau & Fils Ltée, Brennan Contractors & Supplies Ltd., F. J. Brideau & Fils Limitée, Cabot Building Supplies Company (1988) Limited, Robert Churchill Building Supplies Limited, CDL Holdings Limited, formerly Chester Dawe Limited, Fraser Supplies (1980) Ltd., R. D. Gillis Building Supplies Limited, Yvon Godin Ltd., Truro Wood Industries Limited/Home Care Properties Limited, Hann's Hardware and Sporting Goods Limited, Harbour Breton Building Supplies Limited, Hillier's Trades Limited, Hubcraft Building Supplies Limited, Lumbermart Limited, Maple Leaf Farm Supplies Limited, S.W. Mifflin Ltd., Nauss Brothers Limited, O'Leary Farmers' Co-operative Ass'n. Ltd., Pellerin Building Supplies Inc., Pleasant Supplies Incorporated, J. I. Pritchett & Sons Limited, Centre Multi-Décor de Richibucto Ltée, U. J. Robichaud & Sons Woodworkers Limited, Quincaillerie Saint-Louis Ltée, R & J Swinamer's Supplies Limited, 508686 N.B. INC. operating as T.N.T. Insulation and Building Supplies, Taylor Lumber and Building Supplies Limited, Two by Four Lumber Sales Ltd., Walbourne Enterprises Ltd., Western Bay Hardware Limited, White's Construction Limited, D. J. Williams and Sons Limited and Woodland Building Supplies Limited *Respondents*

and

Attorney General of Canada and Criminal Lawyers' Association (Ontario) *Interveniers*

White Burgess Langille Inman, faisant affaire sous la raison sociale WBLI Chartered Accountants et R. Brian Burgess *Appellants*

c.

Abbott and Haliburton Company Limited, A.W. Allen & Son Limited, Berwick Building Supplies Limited, Bishop's Falls Building Supplies Limited, Arthur Boudreau & Fils Ltée, Brennan Contractors & Supplies Ltd., F. J. Brideau & Fils Limitée, Cabot Building Supplies Company (1988) Limited, Robert Churchill Building Supplies Limited, CDL Holdings Limited, auparavant Chester Dawe Limited, Fraser Supplies (1980) Ltd., R. D. Gillis Building Supplies Limited, Yvon Godin Ltd., Truro Wood Industries Limited/Home Care Properties Limited, Hann's Hardware and Sporting Goods Limited, Harbour Breton Building Supplies Limited, Hillier's Trades Limited, Hubcraft Building Supplies Limited, Lumbermart Limited, Maple Leaf Farm Supplies Limited, S.W. Mifflin Ltd., Nauss Brothers Limited, O'Leary Farmers' Co-operative Ass'n. Ltd., Pellerin Building Supplies Inc., Pleasant Supplies Incorporated, J. I. Pritchett & Sons Limited, Centre Multi-Décor de Richibucto Ltée, U. J. Robichaud & Sons Woodworkers Limited, Quincaillerie Saint-Louis Ltée, R & J Swinamer's Supplies Limited, 508686 N.B. INC. faisant affaire sous la raison sociale T.N.T. Insulation and Building Supplies, Taylor Lumber and Building Supplies Limited, Two by Four Lumber Sales Ltd., Walbourne Enterprises Ltd., Western Bay Hardware Limited, White's Construction Limited, D. J. Williams and Sons Limited et Woodland Building Supplies Limited *Intimées*

et

Procureur général du Canada et Criminal Lawyers' Association (Ontario) *Intervenants*

INDEXED AS: WHITE BURGESS LANGILLE INMAN v. ABBOTT AND HALIBURTON Co.

2015 SCC 23

File No.: 35492.

2014: October 7; 2015: April 30.

Present: McLachlin C.J. and Abella, Rothstein, Cromwell, Moldaver, Wagner and Gascon JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR NOVA SCOTIA

Evidence — Admissibility — Expert evidence — Basic standards for admissibility — Qualified expert — Independence and impartiality — Nature of expert's duty to court — How expert's duty relates to admissibility of expert's evidence — Forensic accountant providing opinion on whether former auditors were negligent in performance of duties — Former auditors applying to strike out expert's affidavit on grounds she was not impartial expert witness — Whether elements of expert's duty to court go to admissibility of evidence rather than simply to its weight — If so, whether there is a threshold admissibility requirement in relation to independence and impartiality.

The shareholders started a professional negligence action against the former auditors of their company after they had retained a different accounting firm, the Kentville office of GT, to perform various accounting tasks and which in their view revealed problems with the former auditors' work. The auditors brought a motion for summary judgment seeking to have the shareholders' action dismissed. In response, the shareholders retained M, a forensic accounting partner at the Halifax office of GT, to review all the relevant materials and to prepare a report of her findings. Her affidavit set out her findings, including her opinion that the auditors had not complied with their professional obligations to the shareholders. The auditors applied to strike out M's affidavit on the grounds that she was not an impartial expert witness.

The motions judge essentially agreed with the auditors and struck out M's affidavit in its entirety. The majority of the Court of Appeal concluded that the motions judge erred in excluding M's affidavit and allowed the appeal.

RÉPERTORIÉ : WHITE BURGESS LANGILLE INMAN c. ABBOTT AND HALIBURTON Co.

2015 CSC 23

N° du greffe : 35492.

2014 : 7 octobre; 2015 : 30 avril.

Présents : La juge en chef McLachlin et les juges Abella, Rothstein, Cromwell, Moldaver, Wagner et Gascon.

EN APPEL DE LA COUR D'APPEL DE LA NOUVELLE-ÉCOSSE

Preuve — Admissibilité — Preuve d'expert — Normes fondamentales d'admissibilité — Expert qualifié — Indépendance et impartialité — Nature de l'obligation de l'expert envers le tribunal — Rapport entre l'obligation de l'expert et l'admissibilité de son témoignage — Opinion d'une juricomptable sur la négligence possible des vérificateurs précédents dans l'exercice de leurs fonctions — Requête en radiation de l'affidavit de l'expert présentée par les vérificateurs précédents au motif que l'expert n'était pas un témoin expert impartial — Les éléments de l'obligation de l'expert envers le tribunal jouent-ils au regard de l'admissibilité du témoignage plutôt que simplement de la valeur probante de celui-ci? — Dans l'affirmative, l'indépendance et l'impartialité constituent-elles un critère d'admissibilité?

Les actionnaires ont intenté une action pour négligence professionnelle contre les anciens vérificateurs de leur compagnie après avoir engagé un autre cabinet comptable, GT, de Kentville, pour effectuer diverses tâches comptables, qui, selon eux, avaient révélé des erreurs par les vérificateurs précédents. Les vérificateurs ont présenté une requête en jugement sommaire visant à faire rejeter l'action. En réponse, les actionnaires ont fait appel à M, une associée en juricomptabilité du cabinet GT de Halifax, pour qu'elle examine tous les documents pertinents et rédige un rapport de ses constatations. Son affidavit expose ces dernières, notamment que les vérificateurs, selon elle, ne se sont pas acquittés de leurs obligations professionnelles envers les actionnaires. Les vérificateurs ont présenté une requête en radiation de l'affidavit de M au motif qu'elle n'était pas un témoin expert impartial.

Le juge des requêtes s'est dit d'accord avec les vérificateurs pour l'essentiel et a radié intégralement l'affidavit de M. Les juges majoritaires de la Cour d'appel ont conclu que le juge des requêtes avait eu tort d'exclure l'affidavit de M et ont accueilli l'appel.

Held: The appeal should be dismissed.

The inquiry for determining the admissibility of expert opinion evidence is divided into two steps. At the first step, the proponent of the evidence must establish the threshold requirements of admissibility. These are the four factors set out in *R. v. Mohan*, [1994] 2 S.C.R. 9 (relevance, necessity, absence of an exclusionary rule and a properly qualified expert). Evidence that does not meet these threshold requirements should be excluded. At the second discretionary gatekeeping step, the trial judge must decide whether expert evidence that meets the preconditions to admissibility is sufficiently beneficial to the trial process to warrant its admission despite the potential harm to the trial process that may flow from the admission of the expert evidence.

Expert witnesses have a duty to the court to give fair, objective and non-partisan opinion evidence. They must be aware of this duty and able and willing to carry it out. The expert's opinion must be impartial in the sense that it reflects an objective assessment of the questions at hand. It must be independent in the sense that it is the product of the expert's independent judgment, uninfluenced by who has retained him or her or the outcome of the litigation. It must be unbiased in the sense that it does not unfairly favour one party's position over another. The acid test is whether the expert's opinion would not change regardless of which party retained him or her. These concepts, of course, must be applied to the realities of adversary litigation.

Concerns related to the expert's duty to the court and his or her willingness and capacity to comply with it are best addressed initially in the "qualified expert" element of the *Mohan* framework. A proposed expert witness who is unable or unwilling to fulfill his or her duty to the court is not properly qualified to perform the role of an expert. If the expert witness does not meet this threshold admissibility requirement, his or her evidence should not be admitted. Once this threshold is met, however, remaining concerns about an expert witness's compliance with his or her duty should be considered as part of the overall cost-benefit analysis which the judge conducts to carry out his or her gatekeeping role.

Imposing this additional threshold requirement is not intended to and should not result in trials becoming longer or more complex. The trial judge must determine, having regard to both the particular circumstances of the proposed expert and the substance of the proposed evidence, whether the expert is able and willing to carry out his or her primary duty to the court. Absent challenge, the

Arrêt : Le pourvoi est rejeté.

La démarche qui permet de déterminer l'admissibilité du témoignage d'opinion de l'expert est scindée en deux. Dans un premier temps, celui qui veut présenter le témoignage doit démontrer qu'il satisfait aux critères d'admissibilité, soit les quatre critères énoncés dans l'arrêt *R. c. Mohan*, [1994] 2 R.C.S. 9, à savoir la pertinence, la nécessité, l'absence de toute règle d'exclusion et la qualification suffisante de l'expert. Tout témoignage qui ne satisfait pas à ces critères devrait être exclu. Dans un deuxième temps, le juge-gardien exerce son pouvoir discrétionnaire en déterminant si le témoignage d'expert qui satisfait aux conditions préalables à l'admissibilité est assez avantageux pour le procès pour justifier son admission malgré le préjudice potentiel, pour le procès, qui peut découler de son admission.

L'expert a l'obligation envers le tribunal de donner un témoignage d'opinion qui soit juste, objectif et impartial. Il doit être conscient de cette obligation et pouvoir et vouloir s'en acquitter. L'opinion de l'expert doit être impartiale, en ce sens qu'elle découle d'un examen objectif des questions à trancher. Elle doit être indépendante, c'est-à-dire qu'elle doit être le fruit du jugement indépendant de l'expert, non influencée par la partie pour qui il témoigne ou l'issue du litige. Elle doit être exempte de parti pris, en ce sens qu'elle ne doit pas favoriser injustement la position d'une partie au détriment de celle de l'autre. Le critère décisif est que l'opinion de l'expert ne changerait pas, peu importe la partie qui aurait retenu ses services. Ces concepts, il va sans dire, doivent être appliqués aux réalités du débat contradictoire.

C'est sous le volet « qualification suffisante de l'expert » du cadre établi par l'arrêt *Mohan* qu'il convient d'abord d'examiner les préoccupations concernant l'obligation de l'expert envers le tribunal et s'il peut ou veut s'en acquitter. Le témoin expert proposé qui ne peut ou ne veut s'acquitter de son obligation envers le tribunal ne possède pas la qualification suffisante pour exercer ce rôle. S'il ne satisfait pas à ce critère d'admissibilité, son témoignage ne devrait pas être admis. Or, dès lors qu'il y est satisfait, toute réserve qui demeure quant à savoir si l'expert s'est conformé à son obligation devrait être examinée dans le cadre de l'analyse coût-bénéfices qu'effectue le juge dans l'exercice de son rôle de gardien.

L'idée, en imposant ce critère supplémentaire, n'est pas de prolonger ni de complexifier les procès et il ne devrait pas en résulter un tel effet. Le juge de première instance doit déterminer, compte tenu tant de la situation particulière de l'expert que de la teneur du témoignage proposé, si l'expert peut ou veut s'acquitter de sa principale obligation envers le tribunal. En l'absence d'une

expert's attestation or testimony recognizing and accepting the duty will generally be sufficient to establish that this threshold is met. However, if a party opposing admissibility shows that there is a realistic concern that the expert is unable and/or unwilling to comply with his or her duty, the proponent of the evidence has the burden of establishing its admissibility. Exclusion at the threshold stage of the analysis should occur only in very clear cases in which the proposed expert is unable or unwilling to provide the court with fair, objective and non-partisan evidence. Anything less than clear unwillingness or inability to do so should not lead to exclusion, but be taken into account in the overall weighing of costs and benefits of receiving the evidence.

The concept of apparent bias is not relevant to the question of whether or not an expert witness will be unable or unwilling to fulfill its primary duty to the court. When looking at an expert's interest or relationship with a party, the question is not whether a reasonable observer would think that the expert is not independent. The question is whether the relationship or interest results in the expert being unable or unwilling to carry out his or her primary duty to the court to provide fair, non-partisan and objective assistance.

In this case, there was no basis disclosed in the record to find that M's evidence should be excluded because she was not able and willing to provide the court with fair, objective and non-partisan evidence. The majority of the Court of Appeal was correct in concluding that the motions judge committed a palpable and overriding error in determining that M was in a conflict of interest that prevented her from giving impartial and objective evidence.

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Applied: *R. v. Mohan*, [1994] 2 S.C.R. 9; *Mouvement laïque québécois v. Saguenay (City)*, 2015 SCC 16, [2015] 2 S.C.R. 3; **adopted:** *R. v. Abbey*, 2009 ONCA 624, 97 O.R. (3d) 330, leave to appeal refused, [2010] 2 S.C.R. v; **referred to:** *Lord Abinger v. Ashton* (1873), L.R. 17 Eq. 358; *R. v. D.D.*, 2000 SCC 43, [2000] 2 S.C.R. 275; *Graat v. The Queen*, [1982] 2 S.C.R. 819; *R. v. Abbey*, [1982] 2 S.C.R. 24; *R. v. J.-L.J.*, 2000 SCC 51, [2000] 2 S.C.R. 600; *R. v. Sekhon*, 2014 SCC 15, [2014] 1 S.C.R. 272; *Masterpiece Inc. v. Alavida Lifestyles Inc.*, 2011 SCC 27, [2011] 2 S.C.R. 387; *R. v. Trochym*, 2007 SCC 6, [2007] 1 S.C.R. 239; *R. v. Boswell*, 2011 ONCA 283, 85 C.R. (6th) 290; *R. v. C. (M.)*, 2014 ONCA 611, 13 C.R. (7th)

contestation, il est généralement satisfait au critère dès lors que l'expert, dans son attestation ou sa déposition, reconnaît son obligation et l'accepte. Toutefois, si la partie qui s'oppose à l'admission démontre un motif réaliste de croire que l'expert ne peut ou ne veut s'acquitter de son obligation, il revient à la partie qui produit la preuve d'en établir l'admissibilité. La décision d'exclure le témoignage à la première étape de l'analyse pour non-conformité aux critères d'admissibilité ne devrait être prise que dans les cas manifestes où l'expert proposé ne peut ou ne veut fournir une preuve juste, objective et impartiale. Dans les autres cas, le témoignage ne devrait pas être exclu d'office, et son admissibilité sera déterminée à l'issue d'une pondération globale du coût et des bénéfices de son admission.

La notion d'apparence de parti pris n'est pas pertinente lorsqu'il s'agit de déterminer si le témoin expert pourra ou voudra s'acquitter de sa principale obligation envers le tribunal. Lorsque l'on se penche sur l'intérêt d'un expert ou sur ses rapports avec une partie, il ne s'agit pas de se demander si un observateur raisonnable penserait que l'expert est indépendant ou non; il s'agit plutôt de déterminer si la relation de l'expert avec une partie ou son intérêt fait en sorte qu'il ne peut ou ne veut s'acquitter de sa principale obligation envers le tribunal, en l'occurrence apporter au tribunal une aide juste, objective et impartiale.

En l'espèce, le dossier ne révèle aucun élément qui permette de conclure que le témoignage de M devrait être exclu parce que celle-ci ne pouvait ou ne voulait rendre devant le tribunal un témoignage juste, objectif et impartial. La majorité de la Cour d'appel a eu raison de conclure que le juge des requêtes avait commis une erreur manifeste et dominante en estimant que M était dans une situation de conflit d'intérêts qui l'empêchait de rendre un témoignage objectif et impartial.

Jurisprudence

Arrêts appliqués : *R. c. Mohan*, [1994] 2 R.C.S. 9; *Mouvement laïque québécois c. Saguenay (Ville)*, 2015 CSC 16, [2015] 2 R.C.S. 3; **arrêt adopté :** *R. c. Abbey*, 2009 ONCA 624, 97 O.R. (3d) 330, autorisation d'appel refusée, [2010] 2 R.C.S. v; **arrêts mentionnés :** *Lord Abinger c. Ashton* (1873), L.R. 17 Eq. 358; *R. c. D.D.*, 2000 CSC 43, [2000] 2 R.C.S. 275; *Graat c. La Reine*, [1982] 2 R.C.S. 819; *R. c. Abbey*, [1982] 2 R.C.S. 24; *R. c. J.-L.J.*, 2000 CSC 51, [2000] 2 R.C.S. 600; *R. c. Sekhon*, 2014 CSC 15, [2014] 1 R.C.S. 272; *Masterpiece Inc. c. Alavida Lifestyles Inc.*, 2011 CSC 27, [2011] 2 R.C.S. 387; *R. c. Trochym*, 2007 CSC 6, [2007] 1 R.C.S. 239; *R. c. Boswell*, 2011 ONCA 283, 85 C.R. (6th) 290; *R. c.*

396; *National Justice Compania Naviera S.A. v. Prudential Assurance Co.*, [1993] 2 Lloyd's Rep. 68, rev'd [1995] 1 Lloyd's Rep. 455; *Fellowes, McNeil v. Kansa General International Insurance Co.* (1998), 40 O.R. (3d) 456; *Royal Trust Corp. of Canada v. Fisherman* (2000), 49 O.R. (3d) 187; *R. v. Docherty*, 2010 ONSC 3628; *Ocean v. Economical Mutual Insurance Co.*, 2010 NSSC 315, 293 N.S.R. (2d) 394; *Handley v. Punnett*, 2003 BCSC 294; *Bank of Montreal v. Citak*, [2001] O.J. No. 1096 (QL); *Dean Construction Co. v. M.J. Dixon Construction Ltd.*, 2011 ONSC 4629, 5 C.L.R. (4th) 240; *Hutchingame v. Johnstone*, 2006 BCSC 271; *Alfano v. Piersanti*, 2012 ONCA 297, 291 O.A.C. 62; *Kirby Lowbed Services Ltd. v. Bank of Nova Scotia*, 2003 BCSC 617; *Gould v. Western Coal Corp.*, 2012 ONSC 5184, 7 B.L.R. (5th) 19; *United City Properties Ltd. v. Tong*, 2010 BCSC 111; *R. v. INCO Ltd.* (2006), 80 O.R. (3d) 594; *R. v. Klassen*, 2003 MBQB 253, 179 Man. R. (2d) 115; *Gallant v. Brake-Patten*, 2012 NLCA 23, 321 Nfld. & P.E.I.R. 77; *R. v. Violette*, 2008 BCSC 920; *Armchair Passenger Transport Ltd. v. Helical Bar Plc*, [2003] EWHC 367; *R. (Factortame Ltd.) v. Secretary of State for Transport*, [2002] EWCA Civ 932, [2003] Q.B. 381; *Gallaher International Ltd. v. Tlais Enterprises Ltd.*, [2007] EWHC 464; *Meat Corp. of Namibia Ltd. v. Dawn Meats (U.K.) Ltd.*, [2011] EWHC 474; *Matchbet Ltd. v. Openbet Retail Ltd.*, [2013] EWHC 3067; *FGT Custodians Pty. Ltd. v. Fagenblat*, [2003] VSCA 33; *Collins Thomson v. Clayton*, [2002] NSWSC 366; *Kirch Communications Pty Ltd. v. Gene Engineering Pty Ltd.*, [2002] NSWSC 485; *SmithKline Beecham (Australia) Pty Ltd. v. Chipman*, [2003] FCA 796, 131 F.C.R. 500; *Rodriguez v. Pacificare of Texas, Inc.*, 980 F.2d 1014 (1993); *Tagatz v. Marquette University*, 861 F.2d 1040 (1988); *Apple Inc. v. Motorola, Inc.*, 757 F.3d 1286 (2014); *Agribands Purina Canada Inc. v. Kasamekas*, 2010 ONSC 166; *R. v. Demetrius*, 2009 CanLII 22797; *International Hi-Tech Industries Inc. v. FANUC Robotics Canada Ltd.*, 2006 BCSC 2011; *Casurina Ltd. Partnership v. Rio Algom Ltd.* (2002), 28 B.L.R. (3d) 44; *Prairie Well Servicing Ltd. v. Tundra Oil and Gas Ltd.*, 2000 MBQB 52, 146 Man. R. (2d) 284; *Deemar v. College of Veterinarians of Ontario*, 2008 ONCA 600, 92 O.R. (3d) 97; *Coady v. Burton Canada Co.*, 2013 NSCA 95, 333 N.S.R. (2d) 348; *Fougere v. Blunden Construction Ltd.*, 2014 NSCA 52, 345 N.S.R. (2d) 385.

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Alan D’Silva, James Wilson and Aaron Kreaden, for the appellants.

Jon Laxer and Brian F. P. Murphy, for the respondents.

Michael H. Morris, for the intervenor the Attorney General of Canada.

Matthew Gourlay, for the intervenor the Criminal Lawyers’ Association (Ontario).

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POURVOI contre un arrêt de la Cour d’appel de la Nouvelle-Écosse (le juge en chef MacDonald et les juges Oland et Beveridge), 2013 NSCA 66, 330 N.S.R. (2d) 301, 361 D.L.R. (4th) 659, 36 C.P.C. (7th) 22, [2013] N.S.J. No. 259 (QL), 2013 CarswellNS 360 (WL Can.), qui a infirmé en partie une décision du juge Pickup, 2012 NSSC 210, 317 N.S.R. (2d) 283, 26 C.P.C. (7th) 280, [2012] N.S.J. No. 289 (QL), 2012 CarswellNS 376 (WL Can.). Pourvoi rejeté.

Alan D’Silva, James Wilson et Aaron Kreaden, pour les appelants.

Jon Laxer et Brian F. P. Murphy, pour les intimées.

Michael H. Morris, pour l’intervenant le procureur général du Canada.

Matthew Gourlay, pour l’intervenante Criminal Lawyers’ Association (Ontario).

The judgment of the Court was delivered by

Version française du jugement de la Cour rendu
par

CROMWELL J. —

LE JUGE CROMWELL —

I. Introduction and Issues

I. Introduction et questions en litige

[1] Expert opinion evidence can be a key element in the search for truth, but it may also pose special dangers. To guard against them, the Court over the last 20 years or so has progressively tightened the rules of admissibility and enhanced the trial judge's gatekeeping role. These developments seek to ensure that expert opinion evidence meets certain basic standards before it is admitted. The question on this appeal is whether one of these basic standards for admissibility should relate to the proposed expert's independence and impartiality. In my view, it should.

[1] Le témoignage d'expert peut constituer la pièce maîtresse dans la recherche de la vérité tout comme il peut présenter des dangers particuliers. Pour se prémunir contre ces dangers, la Cour depuis une vingtaine d'années resserre graduellement les règles d'admissibilité et renforce le rôle de gardien du juge de première instance. Ainsi, l'admission du témoignage d'expert est subordonnée au respect de certaines normes fondamentales. La question à trancher dans le cadre du présent pourvoi est de savoir si l'indépendance et l'impartialité de l'expert que l'on se propose de citer comme témoin devraient compter au nombre de ces normes fondamentales d'admissibilité. À mon avis elles devraient l'être.

[2] Expert witnesses have a special duty to the court to provide fair, objective and non-partisan assistance. A proposed expert witness who is unable or unwilling to comply with this duty is not qualified to give expert opinion evidence and should not be permitted to do so. Less fundamental concerns about an expert's independence and impartiality should be taken into account in the broader, overall weighing of the costs and benefits of receiving the evidence.

[2] Le témoin expert a l'obligation particulière d'apporter au tribunal une aide juste, objective et impartiale. La personne que l'on se propose de citer à ce titre, mais qui ne peut ou ne veut se conformer à cette obligation, n'a pas la qualification pour témoigner à titre d'expert et ne devrait pas y être autorisée. Des réserves moins fondamentales quant à l'indépendance et à l'impartialité de l'expert devraient jouer dans l'analyse globale des coûts et des bénéfices de l'admission du témoignage.

[3] Applying these principles, I agree with the conclusion reached by the majority of the Nova Scotia Court of Appeal and would therefore dismiss this appeal with costs.

[3] Appliquant ces principes, je partage la conclusion à laquelle sont parvenus les juges majoritaires de la Cour d'appel de la Nouvelle-Écosse et suis d'avis de rejeter le présent pourvoi avec dépens.

II. Overview of the Facts and Judicial History

II. Rappel des faits et historique judiciaire

A. Facts and Proceedings

A. Les faits et la procédure

[4] The appeal arises out of a professional negligence action by the respondents (who I will call the shareholders) against the appellants, the former auditors of their company (I will refer to them as the auditors). The shareholders started the action after they had retained a different accounting firm, the

[4] Le présent pourvoi découle d'une action pour négligence professionnelle intentée par les intimées (ci-après « les actionnaires ») contre les appelants, les anciens vérificateurs de leur compagnie (ci-après « les vérificateurs »). Les actionnaires ont intenté cette poursuite après avoir engagé un autre cabinet

Kentville office of Grant Thornton LLP, to perform various accounting tasks and which in their view revealed problems with the auditors' previous work. The central allegation in the action is that the auditors' failure to apply generally accepted auditing and accounting standards while carrying out their functions caused financial loss to the shareholders. The main question in the action boils down to whether the auditors were negligent in the performance of their professional duties.

[5] The auditors brought a motion for summary judgment in August of 2010, seeking to have the shareholders' action dismissed. In response, the shareholders retained Susan MacMillan, a forensic accounting partner at the Halifax office of Grant Thornton, to review all the relevant materials, including the documents filed in the action, and to prepare a report of her findings. Her affidavit set out her findings, including her opinion that the auditors had not complied with their professional obligations to the shareholders. The auditors applied to strike out Ms. MacMillan's affidavit on the grounds that she was not an impartial expert witness. They argued that the action comes down to a battle of opinion between two accounting firms — the auditors' and the expert witness's. Ms. MacMillan's firm could be exposed to liability if its approach was not accepted by the court and, as a partner, Ms. MacMillan could be personally liable. Her potential liability if her opinion were not accepted gives her a personal financial interest in the outcome of the litigations and this, in the auditors' submission, ought to disqualify her from testifying.

[6] The proceedings since have been neither summary nor resulted in a judgment. Instead, the litigation has been focused on the expert evidence issue; the summary judgment application has not yet been heard on its merits.

comptable, Grant Thornton srl, de Kentville, pour effectuer diverses tâches comptables, qui, selon eux, avaient révélé des erreurs par les vérificateurs précédents. Les actionnaires reprochent essentiellement aux vérificateurs de ne pas avoir appliqué les normes de vérification et comptables généralement reconnues et de leur avoir ainsi causé une perte. La principale question dans le cadre de l'action est de savoir si les vérificateurs ont fait preuve de négligence dans l'exercice de leurs fonctions.

[5] En août 2010, les vérificateurs ont présenté une requête en jugement sommaire visant à faire rejeter l'action. En réponse, les actionnaires ont fait appel à M^{me} Susan MacMillan, une associée en juricomptabilité du cabinet Grant Thornton de Halifax, pour qu'elle examine tous les documents pertinents, notamment ceux déposés dans le cadre de l'action, et rédige un rapport de ses constatations. Son affidavit expose ces dernières, notamment que les vérificateurs, selon elle, ne se sont pas acquittés de leurs obligations professionnelles envers les actionnaires. Les vérificateurs ont présenté une requête en radiation de l'affidavit de M^{me} MacMillan au motif qu'elle n'était pas un témoin expert impartial. Ils ont fait valoir que l'action se résumait à une bataille d'opinions entre deux cabinets comptables, en l'occurrence celui des vérificateurs et celui du témoin expert. Le cabinet de M^{me} MacMillan pourrait être tenu responsable si sa démarche n'était pas acceptée par le tribunal et, en tant qu'associée, M^{me} MacMillan pourrait être tenue personnellement responsable. Sa responsabilité potentielle — si son opinion n'était pas acceptée — se traduit par un intérêt financier personnel dans le règlement du litige; or, de l'avis des vérificateurs, cela devrait suffire à la rendre inhabile à témoigner.

[6] Depuis, l'instance a été tout sauf sommaire et ne s'est toujours pas soldée par un jugement. Le litige a plutôt porté sur la question du témoignage de l'expert; la requête en jugement sommaire n'a pas encore été entendue sur le fond.

B. *Judgments Below*

- (1) Nova Scotia Supreme Court: 2012 NSSC 210, 317 N.S.R. (2d) 283 (Pickup J.)

[7] Pickup J. essentially agreed with the auditors and struck out the MacMillan affidavit in its entirety: para. 106. He found that, in order to be admissible, an expert's evidence "must be, and be seen to be, independent and impartial": para. 99. Applying that test, he concluded that this was one of those "... does not meet the threshold requirements for admissibility": para. 101.

- (2) Nova Scotia Court of Appeal: 2013 NSCA 66, 330 N.S.R. (2d) 301 (Beveridge J.A., Oland J.A. Concurring; MacDonald C.J.N.S. Dissenting)

[8] The majority of the Court of Appeal concluded that the motions judge erred in excluding Ms. MacMillan's affidavit. Beveridge J.A. wrote that while the court has discretion to exclude expert evidence due to actual bias or partiality, the test adopted by the motions judge — that an expert "must be, and be seen to be, independent and impartial" — was wrong in law. He ought not to have ruled her evidence inadmissible and struck out her affidavit.

[9] MacDonald C.J.N.S., dissenting, would have upheld the motions judge's decision because he had properly articulated and applied the relevant legal principles.

III. AnalysisA. *Overview*

[10] In my view, expert witnesses have a duty to the court to give fair, objective and non-partisan opinion evidence. They must be aware of this duty and able and willing to carry it out. If they do not meet this threshold requirement, their evidence should not be admitted. Once this threshold is met,

B. *Les juridictions inférieures*

- (1) Cour suprême de la Nouvelle-Écosse : 2012 NSSC 210, 317 N.S.R. (2d) 283 (le juge Pickup)

[7] Le juge Pickup s'est dit d'accord avec les vérificateurs pour l'essentiel et a radié intégralement l'affidavit de M^{me} MacMillan (par. 106). Il était d'avis que, pour être admissible, le témoignage de l'expert [TRADUCTION] « doit être indépendant et impartial et être perçu comme tel » (par. 99) et, par conséquent, a conclu qu'il s'agissait de l'un des « cas les plus évidents où la fiabilité de l'expert [...] ne satisfait pas aux critères d'admissibilité » (par. 101).

- (2) Cour d'appel de la Nouvelle-Écosse : 2013 NSCA 66, 330 N.S.R. (2d) 301 (le juge Beveridge, avec l'appui de la juge Oland; le juge en chef MacDonald est dissident)

[8] Les juges majoritaires de la Cour d'appel ont conclu que le juge des requêtes avait eu tort d'exclure l'affidavit de M^{me} MacMillan. Le juge Beveridge a écrit que, si le tribunal peut, en vertu de son pouvoir discrétionnaire, écarter le témoignage de l'expert pour cause de partialité réelle, le critère retenu par le juge des requêtes, en l'occurrence que l'expert « doit être indépendant et impartial et être perçu comme tel », était mal fondé en droit. Il n'aurait pas dû déclarer inadmissible le témoignage de M^{me} MacMillan ni radier son affidavit.

[9] Le juge en chef MacDonald, dissident, était d'avis de confirmer la décision du juge des requêtes, parce que ce dernier avait selon lui exposé et appliqué correctement les principes juridiques pertinents.

III. AnalyseA. *Aperçu*

[10] Selon moi, l'expert a l'obligation envers le tribunal de donner un témoignage d'opinion qui soit juste, objectif et impartial. Il doit être conscient de cette obligation et pouvoir et vouloir s'en acquitter. S'il ne satisfait pas à ce critère, son témoignage ne devrait pas être admis. Or, dès lors qu'il y est satisfait,

however, concerns about an expert witness's independence or impartiality should be considered as part of the overall weighing of the costs and benefits of admitting the evidence. This common law approach is, of course, subject to statutory and related provisions which may establish different rules of admissibility.

B. *Expert Witness Independence and Impartiality*

[11] There have been long-standing concerns about whether expert witnesses hired by the parties are impartial in the sense that they are expressing their own unbiased professional opinion and whether they are independent in the sense that their opinion is the product of their own, independent conclusions based on their own knowledge and judgment: see, e.g., G. R. Anderson, *Expert Evidence* (3rd ed. 2014), at p. 509; S. N. Lederman, A. W. Bryant and M. K. Fuerst, *The Law of Evidence in Canada* (4th ed. 2014), at p. 783. As Sir George Jessel, M.R., put it in the 1870s, “[u]ndoubtedly there is a natural bias to do something serviceable for those who employ you and adequately remunerate you. It is very natural, and it is so effectual, that we constantly see persons, instead of considering themselves witnesses, rather consider themselves as the paid agents of the person who employs them”: *Lord Abinger v. Ashton* (1873), L.R. 17 Eq. 358, at p. 374.

[12] Recent experience has only exacerbated these concerns; we are now all too aware that an expert's lack of independence and impartiality can result in egregious miscarriages of justice: *R. v. D.D.*, 2000 SCC 43, [2000] 2 S.C.R. 275, at para. 52. As observed by Beveridge J.A. in this case, *The Commission on Proceedings Involving Guy Paul Morin: Report* (1998) authored by the Honourable Fred Kaufman and the *Inquiry into Pediatric Forensic Pathology in Ontario: Report* (2008) conducted by the Honourable Stephen T. Goudge provide two striking examples where “[s]eemingly solid and impartial, but flawed, forensic scientific opinion has played a prominent role in miscarriages of justice”: para. 105. Other reports outline the critical need for impartial and independent expert evidence in civil litigation: *ibid.*, at para. 106; see the Right

les réserves quant à l'indépendance ou à l'impartialité du témoin expert devraient être examinées dans l'évaluation globale des coûts et des bénéfices de l'admission du témoignage. Cette démarche issue de la common law cède le pas bien sûr aux dispositions législatives et connexes établissant dans certains cas des règles d'admissibilité différentes.

B. *Impartialité et indépendance du témoin expert*

[11] Les préoccupations quant à savoir si les témoins experts retenus par les parties sont impartiaux — c'est-à-dire s'ils expriment leur opinion professionnelle sans parti pris — et indépendants — c'est-à-dire si leur opinion est le fruit des conclusions auxquelles ils sont parvenus de façon indépendante en se fondant sur leurs propres connaissances et jugement — ne datent pas d'hier (voir, p. ex., G. R. Anderson, *Expert Evidence* (3^e éd. 2014), p. 509; S. N. Lederman, A. W. Bryant et M. K. Fuerst, *The Law of Evidence in Canada* (4^e éd. 2014), p. 783). Comme le soulignait Sir George Jessel, maître des rôles, dans les années 1870, [TRADUCTION] « [i]l existe indubitablement une tendance naturelle à faire quelque chose d'utile pour celui qui nous emploie et nous rémunère bien. C'est tout à fait naturel et si infailible que nous voyons constamment des personnes qui se considèrent, non pas comme des témoins, mais comme les mandataires rémunérés de la personne qui les emploie » (*Lord Abinger c. Ashton* (1873), L.R. 17 Eq. 358, p. 374).

[12] L'expérience récente n'a fait qu'aviver ces préoccupations; nous savons que trop bien que le manque d'indépendance et d'impartialité d'un expert peut donner lieu à de très graves erreurs judiciaires (*R. c. D.D.*, 2000 CSC 43, [2000] 2 R.C.S. 275, par. 52). Comme l'a souligné le juge Beveridge dans la présente affaire, la *Commission sur les poursuites contre Guy Paul Morin : Rapport* (1998), rédigé par l'honorable Fred Kaufman, et le *Rapport de la Commission d'enquête sur la médecine légale pédiatrique en Ontario* (2008), de l'honorable Stephen T. Goudge, donnent deux exemples concrets de cas où [TRADUCTION] « [l']opinion apparemment solide et impartiale, mais erronée, d'un scientifique expert a joué un rôle de premier plan dans des erreurs judiciaires » (par. 105). D'autres rapports mettent en évidence la nécessité cruciale que l'expert

Honourable Lord Woolf, *Access to Justice: Final Report* (1996); the Honourable Coulter A. Osborne, *Civil Justice Reform Project: Summary of Findings & Recommendations* (2007).

[13] To decide how our law of evidence should best respond to these concerns, we must confront several questions: Should concerns about potentially biased expert opinion go to admissibility or only to weight?; If to admissibility, should these concerns be addressed by a threshold requirement for admissibility, by a judicial discretion to exclude, or both?; At what point do these concerns justify exclusion of the evidence?; And finally, how is our response to these concerns integrated into the existing legal framework governing the admissibility of expert opinion evidence? To answer these questions, we must first consider the existing legal framework governing admissibility, identify the duties that an expert witness has to the court and then turn to how those duties are best reflected in that legal framework.

C. *The Legal Framework*

(1) The Exclusionary Rule for Opinion Evidence

[14] To the modern general rule that all relevant evidence is admissible there are many qualifications. One of them relates to opinion evidence, which is the subject of a complicated exclusionary rule. Witnesses are to testify as to the facts which they perceived, not as to the inferences — that is, the opinions — that they drew from them. As one great evidence scholar put it long ago, it is “for the jury to form opinions, and draw inferences and conclusions, and not for the witness”: J. B. Thayer, *A Preliminary Treatise on Evidence at the Common Law* (1898; reprinted 1969), at p. 524; see also C. Tapper, *Cross and Tapper on Evidence* (12th ed. 2010), at p. 530. While various rationales have been offered for this exclusionary rule, the most convincing is probably that these ready-formed inferences are not helpful to the trier of fact and might even be misleading; see, e.g., *Graat v. The Queen*, [1982] 2

soit impartial et indépendant dans les procès civils (*ibid.*, par. 106; voir le très honorable lord Woolf, *Access to Justice : Final Report* (1996); l’honorable Coulter A. Osborne, *Projet de réforme du système de justice civile : Résumé des conclusions et des recommandations* (2007)).

[13] Pour déterminer la meilleure solution en droit de la preuve à ces préoccupations, il nous faut nous poser plusieurs questions. Est-ce que les réserves au sujet du parti pris possible d’un expert jouent au regard de l’admissibilité de son témoignage ou seulement de la valeur probante de ce dernier? Dans le premier cas, devrait-on y répondre par un critère d’admissibilité, par un pouvoir discrétionnaire permettant d’écarter la preuve ou les deux? Quand justifient-elles que soit exclu un témoignage? Enfin, comment la solution s’inscrit-elle dans le cadre juridique actuel régissant l’admissibilité des témoignages d’experts? Pour répondre à ces questions, nous devons d’abord nous pencher sur ce cadre juridique, circonscrire les obligations du témoin envers le tribunal, puis voir comment ces dernières s’intègrent le mieux dans le cadre juridique.

C. *Le cadre juridique*

(1) La règle d’exclusion des témoignages d’opinion

[14] La règle générale moderne selon laquelle toute preuve pertinente est admissible est assortie de nombreuses exceptions. L’une d’elles a trait au témoignage d’opinion, lequel fait l’objet d’une règle d’exclusion complexe. La déposition des témoins doit relater les faits qu’ils ont perçus, et non présenter les inférences, ou opinions, qu’ils en tirent. Comme l’a dit il y a longtemps un éminent spécialiste de la preuve, [TRADUCTION] « c’est au jury de se faire une opinion et de tirer des inférences et des conclusions, pas au témoin » (J. B. Thayer, *A Preliminary Treatise on Evidence at the Common Law* (1898; réimprimé 1969), p. 524; voir également C. Tapper, *Cross and Tapper on Evidence* (12^e éd. 2010), p. 530). Même si plusieurs raisons ont été avancées pour expliquer cette règle d’exclusion, la plus convaincante est probablement celle selon laquelle ces inférences toutes faites ne sont

S.C.R. 819, at p. 836; *Halsbury's Laws of Canada: Evidence* (2014 Reissue), at para. HEV-137 “General rule against opinion evidence”.

pas utiles au juge des faits et peuvent même l’induire en erreur (voir, p. ex., *Graat c. La Reine*, [1982] 2 R.C.S. 819, p. 836; *Halsbury's Laws of Canada : Evidence* (2014 réédition), par. HEV-137 « General rule against opinion evidence »).

[15] Not all opinion evidence is excluded, however. Most relevant for this case is the exception for expert opinion evidence on matters requiring specialized knowledge. As Prof. Tapper put it, “the law recognizes that, so far as matters calling for special knowledge or skill are concerned, judges and jurors are not necessarily equipped to draw true inferences from facts stated by witnesses. A witness is therefore allowed to state his opinion about such matters, provided he is expert in them”: p. 530; see also *R. v. Abbey*, [1982] 2 S.C.R. 24, at p. 42.

[15] Cependant, ce ne sont pas tous les témoignages d’opinion qui sont exclus. L’exception qui nous intéresse plus particulièrement dans le présent pourvoi est celle qui s’applique au témoignage d’opinion d’un expert sur des questions qui exigent des connaissances spécialisées. Pour reprendre les propos du professeur Tapper, [TRADUCTION] « le droit reconnaît que, dans la mesure où les questions exigent des connaissances ou des compétences particulières, les juges et les jurés ne sont pas forcément en mesure de tirer une véritable conclusion d’après les faits relatés par les témoins. Le témoin est par conséquent admis à faire part de son opinion sur ces questions, pourvu qu’il soit un expert en la matière » (p. 530; voir également *R. c. Abbey*, [1982] 2 R.C.S. 24, p. 42).

(2) The Current Legal Framework for Expert Opinion Evidence

(2) Le cadre juridique actuel régissant le témoignage d’opinion d’un expert

[16] Since at least the mid-1990s, the Court has responded to a number of concerns about the impact on the litigation process of expert evidence of dubious value. The jurisprudence has clarified and tightened the threshold requirements for admissibility, added new requirements in order to assure reliability, particularly of novel scientific evidence, and emphasized the important role that judges should play as “gatekeepers” to screen out proposed evidence whose value does not justify the risk of confusion, time and expense that may result from its admission.

[16] Depuis au moins le milieu des années 1990, la Cour a répondu à nombre de préoccupations concernant l’incidence d’une preuve d’expert d’une valeur douteuse sur le déroulement de l’instance. La jurisprudence a clarifié et resserré les critères d’admissibilité, établi de nouvelles exigences de fiabilité, notamment en ce qui concerne la preuve issue de sciences nouvelles, et renforcé l’important rôle de « gardien » du juge qui consiste à écarter d’emblée les témoignages dont la valeur ne justifie pas la confusion, la lenteur et les frais que leur admission risque de causer.

[17] We can take as the starting point for these developments the Court’s decision in *R. v. Mohan*, [1994] 2 S.C.R. 9. That case described the potential dangers of expert evidence and established a four-part threshold test for admissibility. The dangers are well known. One is that the trier of fact will inappropriately defer to the expert’s opinion rather

[17] Nous pouvons prendre comme point de départ de cette nouvelle tendance la décision de la Cour dans l’affaire *R. c. Mohan*, [1994] 2 R.C.S. 9. Cet arrêt a mis en lumière les dangers du témoignage d’expert et établi un critère à quatre volets pour en évaluer l’admissibilité. Ces dangers sont bien connus. Il y a notamment le risque que le juge des faits

than carefully evaluate it. As Sopinka J. observed in *Mohan*:

There is a danger that expert evidence will be misused and will distort the fact-finding process. Dressed up in scientific language which the jury does not easily understand and submitted through a witness of impressive antecedents, this evidence is apt to be accepted by the jury as being virtually infallible and as having more weight than it deserves. [p. 21]

(See also *D.D.*, at para. 53; *R. v. J.-L.J.*, 2000 SCC 51, [2000] 2 S.C.R. 600, at paras. 25-26; *R. v. Sekhon*, 2014 SCC 15, [2014] 1 S.C.R. 272, at para. 46.)

[18] The point is to preserve trial by judge and jury, not devolve to trial by expert. There is a risk that the jury “will be unable to make an effective and critical assessment of the evidence”: *R. v. Abbey*, 2009 ONCA 624, 97 O.R. (3d) 330, at para. 90, leave to appeal refused, [2010] 2 S.C.R. v. The trier of fact must be able to use its “informed judgment”, not simply decide on the basis of an “act of faith” in the expert’s opinion: *J.-L.J.*, at para. 56. The risk of “attornment to the opinion of the expert” is also exacerbated by the fact that expert evidence is resistant to effective cross-examination by counsel who are not experts in that field: *D.D.*, at para. 54. The cases address a number of other related concerns: the potential prejudice created by the expert’s reliance on unproven material not subject to cross-examination (*D.D.*, at para. 55); the risk of admitting “junk science” (*J.-L.J.*, at para. 25); and the risk that a “contest of experts” distracts rather than assists the trier of fact (*Mohan*, at p. 24). Another well-known danger associated with the admissibility of expert evidence is that it may lead to an inordinate expenditure of time and money: *Mohan*, at p. 21; *D.D.*, at para. 56; *Masterpiece Inc. v. Alavida Lifestyles Inc.*, 2011 SCC 27, [2011] 2 S.C.R. 387, at para. 76.

[19] To address these dangers, *Mohan* established a basic structure for the law relating to the admissibility

s’en remettrait inconsiderément à l’opinion de l’expert au lieu de l’évaluer avec circonspection. Comme le souligne le juge Sopinka dans l’arrêt *Mohan* :

La preuve d’expert risque d’être utilisée à mauvais escient et de fausser le processus de recherche des faits. Exprimée en des termes scientifiques que le jury ne comprend pas bien et présentée par un témoin aux qualifications impressionnantes, cette preuve est susceptible d’être considérée par le jury comme étant pratiquement infallible et comme ayant plus de poids qu’elle ne le mérite. [p. 21]

(Voir également *D.D.*, par. 53; *R. c. J.-L.J.*, 2000 CSC 51, [2000] 2 R.C.S. 600, par. 25-26; *R. c. Sekhon*, 2014 CSC 15, [2014] 1 R.C.S. 272, par. 46.)

[18] Il s’agit de préserver le procès devant juge et jury, et non pas d’y substituer le procès instruit par des experts. Il y a un risque que le jury [TRADUCTION] « soit incapable de faire un examen critique et efficace de la preuve » (*R. c. Abbey*, 2009 ONCA 624, 97 O.R. (3d) 330, par. 90, autorisation d’appel refusée, [2010] 2 R.C.S. v). Le juge des faits doit faire appel à son « jugement éclairé » plutôt que simplement trancher la question sur le fondement d’un « acte de confiance » à l’égard de l’opinion de l’expert (*J.-L.J.*, par. 56). Le danger de « s’en remettre à l’opinion de l’expert » est également exacerbé par le fait que la preuve d’expert est imperméable au contre-interrogatoire efficace par des avocats qui ne sont pas des experts dans ce domaine (*D.D.*, par. 54). La jurisprudence aborde un certain nombre d’autres problèmes connexes : le préjudice qui pourrait éventuellement découler d’une opinion d’expert fondée sur des informations qui ne sont pas attestées sous serment et qui ne peuvent pas faire l’objet d’un contre-interrogatoire (*D.D.*, par. 55); le danger d’admettre en preuve de la « science de pacotille » (*J.-L.J.*, par. 25); le risque qu’un « concours d’experts » ne distraie le juge des faits au lieu de l’aider (*Mohan*, p. 24). Un autre danger bien connu associé à l’admission de la preuve d’expert est le fait qu’elle peut exiger un délai et des frais démesurés (*Mohan*, p. 21; *D.D.*, par. 56; *Masterpiece Inc. c. Alavida Lifestyles Inc.*, 2011 CSC 27, [2011] 2 R.C.S. 387, par. 76).

[19] Pour parer à ces dangers, la Cour dans l’arrêt *Mohan* a établi une structure de base à deux volets

of expert opinion evidence. That structure has two main components. First, there are four threshold requirements that the proponent of the evidence must establish in order for proposed expert opinion evidence to be admissible: (1) relevance; (2) necessity in assisting the trier of fact; (3) absence of an exclusionary rule; and (4) a properly qualified expert (*Mohan*, at pp. 20-25; see also *Sekhon*, at para. 43). *Mohan* also underlined the important role of trial judges in assessing whether otherwise admissible expert evidence should be excluded because its probative value was overborne by its prejudicial effect — a residual discretion to exclude evidence based on a cost-benefit analysis: p. 21. This is the second component, which the subsequent jurisprudence has further emphasized: Lederman, Bryant and Fuerst, at pp. 789-90; *J.-L.J.*, at para. 28.

[20] *Mohan* and the jurisprudence since, however, have not explicitly addressed how this “cost-benefit” component fits into the overall analysis. The reasons in *Mohan* engaged in a cost-benefit analysis with respect to particular elements of the four threshold requirements, but they also noted that the cost-benefit analysis could be an aspect of exercising the overall discretion to exclude evidence whose probative value does not justify its admission in light of its potentially prejudicial effects: p. 21. The jurisprudence since *Mohan* has also focused on particular aspects of expert opinion evidence, but again without always being explicit about where additional concerns fit into the analysis. The unmistakable overall trend of the jurisprudence, however, has been to tighten the admissibility requirements and to enhance the judge’s gatekeeping role.

[21] So, for example, the necessity threshold criterion was emphasized in cases such as *D.D.* The majority underlined that the necessity requirement exists “to ensure that the dangers associated with expert evidence are not lightly tolerated” and that “[m]ere relevance or ‘helpfulness’ is not enough”: para. 46. Other cases have addressed the reliability of the science underlying an opinion and indeed technical evidence in general: *J.-L.J.*; *R. v. Trochym*, 2007 SCC 6, [2007] 1 S.C.R. 239. The question remains, however, as to where the cost-benefit analysis

définissant les règles d’admissibilité du témoignage d’opinion d’un expert. En premier lieu, celui qui cherche à faire admettre une preuve d’opinion émanant d’un expert doit démontrer qu’elle satisfait à quatre critères : (1) la pertinence; (2) la nécessité d’aider le juge des faits; (3) l’absence de toute règle d’exclusion; (4) la qualification suffisante de l’expert (*Mohan*, p. 20-25; voir également *Sekhon*, par. 43). L’arrêt *Mohan* insiste par ailleurs sur le rôle important du juge du procès pour déterminer si une preuve d’expert par ailleurs admissible devrait être exclue parce que sa valeur probante est surpassée par son effet préjudiciable — un pouvoir discrétionnaire résiduel permettant d’exclure une preuve à l’issue d’une analyse coût-bénéfices (p. 21). Il s’agit du second volet de la structure, mis en évidence par la jurisprudence ultérieure (Lederman, Bryant et Fuerst, p. 789-790; *J.-L.J.*, par. 28).

[20] L’arrêt *Mohan* et la jurisprudence ultérieure ne précisent toutefois pas comment cette analyse « du coût et des bénéfices » s’inscrit dans l’analyse globale. La Cour dans cet arrêt procède à l’analyse coût-bénéfices relativement à certains des quatre critères, mais elle fait aussi observer qu’une telle analyse peut relever de l’exercice d’un pouvoir discrétionnaire général qui permet d’exclure une preuve dont la valeur probante ne justifie pas son admission, compte tenu de ses effets potentiellement préjudiciables (p. 21). Depuis l’arrêt *Mohan*, la jurisprudence s’est également intéressée à des aspects particuliers du témoignage d’opinion d’un expert, mais souvent sans expliciter la place qu’occupent ces autres préoccupations dans l’analyse. Cependant, la jurisprudence, dans son ensemble, tend indubitablement à resserrer les critères d’admissibilité et à renforcer le rôle de gardien du juge.

[21] Par exemple, le critère de nécessité a été mis en évidence dans des décisions telles que *D.D.* La majorité y souligne que l’exigence de nécessité « vise à ce que les dangers liés à la preuve d’expert ne soient pas traités à la légère », ajoutant que « [l]a simple pertinence ou “utilité” ne suffit pas » (par. 46). D’autres décisions ont abordé la fiabilité des principes scientifiques à la base d’une opinion et, en fait, des éléments de preuve techniques en général (*J.-L.J.*; *R. c. Trochym*, 2007 CSC 6, [2007] 1 R.C.S. 239). Toutefois, on ne sait toujours pas où exactement,

and concerns such as those about reliability fit into the overall analysis.

[22] *Abbey* (ONCA) introduced helpful analytical clarity by dividing the inquiry into two steps. With minor adjustments, I would adopt that approach.

[23] At the first step, the proponent of the evidence must establish the threshold requirements of admissibility. These are the four *Mohan* factors (relevance, necessity, absence of an exclusionary rule and a properly qualified expert) and in addition, in the case of an opinion based on novel or contested science or science used for a novel purpose, the reliability of the underlying science for that purpose: *J.-L.J.*, at paras. 33, 35-36 and 47; *Trochym*, at para. 27; Lederman, Bryant and Fuerst, at pp. 788-89 and 800-801. Relevance at this threshold stage refers to logical relevance: *Abbey* (ONCA), at para. 82; *J.-L.J.*, at para. 47. Evidence that does not meet these threshold requirements should be excluded. Note that I would retain necessity as a threshold requirement: *D.D.*, at para. 57; see D. M. Paciocco and L. Stuesser, *The Law of Evidence* (7th ed. 2015), at pp. 209-10; *R. v. Boswell*, 2011 ONCA 283, 85 C.R. (6th) 290, at para. 13; *R. v. C. (M.)*, 2014 ONCA 611, 13 C.R. (7th) 396, at para. 72.

[24] At the second discretionary gatekeeping step, the judge balances the potential risks and benefits of admitting the evidence in order to decide whether the potential benefits justify the risks. The required balancing exercise has been described in various ways. In *Mohan*, Sopinka J. spoke of the “reliability versus effect factor” (p. 21), while in *J.-L.J.*, Binnie J. spoke about “relevance, reliability and necessity” being “measured against the counterweights of consumption of time, prejudice and confusion”: para. 47. Doherty J.A. summed it up well in *Abbey*, stating that the “trial judge must decide whether expert evidence that meets the preconditions to admissibility is sufficiently beneficial to the trial process to warrant its admission despite the potential harm to the trial process that may flow from the admission of the expert evidence”: para. 76.

dans l’analyse globale, s’inscrivent l’analyse coût-bénéfices et les préoccupations comme celles relatives à la fiabilité.

[22] L’arrêt *Abbey* (ONCA) a apporté des précisions utiles en scindant la démarche en deux temps. Je suis d’avis de l’adopter, à peu de choses près.

[23] Dans un premier temps, celui qui veut présenter le témoignage doit démontrer qu’il satisfait aux critères d’admissibilité, soit les quatre critères énoncés dans l’arrêt *Mohan*, à savoir la pertinence, la nécessité, l’absence de toute règle d’exclusion et la qualification suffisante de l’expert. De plus, dans le cas d’une opinion fondée sur une science nouvelle ou contestée ou sur une science utilisée à des fins nouvelles, la fiabilité des principes scientifiques étayant la preuve doit être démontrée (*J.-L.J.*, par. 33, 35-36 et 47; *Trochym*, par. 27; Lederman, Bryant et Fuerst, p. 788-789 et 800-801). Le critère de la pertinence, à ce stade, s’entend de la pertinence logique (*Abbey* (ONCA), par. 82; *J.-L.J.*, par. 47). Tout témoignage qui ne satisfait pas à ces critères devrait être exclu. Il est à noter qu’à mon avis, la nécessité demeure un critère (*D.D.*, par. 57; voir D. M. Paciocco et L. Stuesser, *The Law of Evidence* (7^e éd. 2015), p. 209-210; *R. c. Boswell*, 2011 ONCA 283, 85 C.R. (6th) 290, par. 13; *R. c. C. (M.)*, 2014 ONCA 611, 13 C.R. (7th) 396, par. 72).

[24] Dans un deuxième temps, le juge-gardien exerce son pouvoir discrétionnaire en soutesant les risques et les bénéfices éventuels que présente l’admission du témoignage, afin de décider si les premiers sont justifiés par les seconds. Cet exercice nécessaire de pondération a été décrit de plusieurs façons. Dans l’arrêt *Mohan*, le juge Sopinka parle du « facteur fiabilité-effet » (p. 21), tandis que, dans l’arrêt *J.-L.J.*, le juge Binnie renvoie à « la pertinence, la fiabilité et la nécessité par rapport au délai, au préjudice, à la confusion qui peuvent résulter » (par. 47). Le juge Doherty résume bien la question dans l’arrêt *Abbey*, lorsqu’il explique que [TRADUCTION] « le juge du procès doit décider si le témoignage d’expert qui satisfait aux conditions préalables à l’admissibilité est assez avantageux pour le procès pour justifier son admission malgré le préjudice potentiel, pour le procès, qui peut découler de son admission » (par. 76).

[25] With this delineation of the analytical framework, we can turn to the nature of an expert's duty to the court and where it fits into that framework.

D. *The Expert's Duty to the Court or Tribunal*

[26] There is little controversy about the broad outlines of the expert witness's duty to the court. As Anderson writes, "[t]he duty to provide independent assistance to the Court by way of objective unbiased opinion has been stated many times by common law courts around the world": p. 227. I would add that a similar duty exists in the civil law of Quebec: J.-C. Royer and S. Lavallée, *La preuve civile* (4th ed. 2008), at para. 468; D. Béchard, with the collaboration of J. Béchard, *L'expert* (2011), c. 9; *An Act to establish the new Code of Civil Procedure*, S.Q. 2014, c. 1, art. 22 (not yet in force); L. Chamberland, *Le nouveau Code de procédure civile commenté* (2014), at pp. 14 and 121.

[27] One influential statement of the elements of this duty are found in the English case *National Justice Compania Naviera S.A. v. Prudential Assurance Co.*, [1993] 2 Lloyd's Rep. 68 (Q.B.). Following an 87-day trial, Cresswell J. believed that a misunderstanding of the duties and responsibilities of expert witnesses contributed to the length of the trial. He listed in *obiter dictum* duties and responsibilities of experts, the first two of which have particularly influenced the development of Canadian law:

1. Expert evidence presented to the Court should be, and should be seen to be, the independent product of the expert uninfluenced as to form or content by the exigencies of litigation

2. An expert witness should provide independent assistance to the Court by way of objective unbiased opinion in relation to matters within his [or her] expertise An expert witness in the High Court should

[25] Le cadre analytique ainsi délimité, penchons-nous sur la nature de l'obligation de l'expert envers le tribunal et voyons comment elle s'inscrit dans ce cadre.

D. *L'obligation de l'expert envers le tribunal*

[26] Les grandes lignes de l'obligation du témoin expert envers le tribunal sont peu contestées. Comme Anderson l'écrit : [TRADUCTION] « L'obligation de fournir une aide indépendante au tribunal sous la forme d'avis objectif et exempt de parti pris a été énoncée à de nombreuses reprises par les tribunaux de common law un peu partout dans le monde » (p. 227). J'ajouterais qu'une obligation semblable existe en droit civil québécois (J.-C. Royer et S. Lavallée, *La preuve civile* (4^e éd. 2008), par. 468; D. Béchard, avec la collaboration de J. Béchard, *L'expert* (2011), c. 9; *Loi instituant le nouveau Code de procédure civile*, L.Q. 2014, c. 1, art. 22 (non en vigueur); L. Chamberland, *Le nouveau Code de procédure civile commenté* (2014), p. 14 et 121).

[27] On trouve dans l'arrêt anglais *National Justice Compania Naviera S.A. c. Prudential Assurance Co.*, [1993] 2 Lloyd's Rep. 68 (Q.B.), un énoncé des éléments de cette obligation qui fait autorité. Au terme d'un procès de 87 jours, le juge Cresswell a conclu qu'une méconnaissance des obligations et responsabilités des témoins experts avait contribué à prolonger le procès. Il a dressé, dans une remarque incidente, une liste des obligations et responsabilités des experts, dont les deux premiers points ont particulièrement influencé l'évolution du droit canadien :

[TRADUCTION]

1. Le témoignage de l'expert présenté à la Cour devrait être le produit indépendant de l'expert n'ayant subi quant à la forme ou au fond aucune influence dictée par les exigences du litige et être perçu comme tel . . .

2. Le rôle du témoin expert consiste à fournir une aide indépendante au tribunal sous la forme d'avis objectif et exempt de parti pris sur des questions relevant de son champ d'expertise [. . .] La personne qui témoigne

never assume the role of an advocate. [Emphasis added; citation omitted; p. 81.]

(These duties were endorsed on appeal: [1995] 1 Lloyd's Rep. 455 (C.A.), at p. 496.)

[28] Many provinces and territories have provided explicit guidance related to the duty of expert witnesses. In Nova Scotia, for example, the *Civil Procedure Rules* require that an expert's report be signed by the expert who must make (among others) the following representations to the court: that the expert is providing an objective opinion for the assistance of the court; that the expert is prepared to apply independent judgment when assisting the court; and that the report includes everything the expert regards as relevant to the expressed opinion and draws attention to anything that could reasonably lead to a different conclusion (r. 55.04(1)(a), (b) and (c)). While these requirements do not affect the rules of evidence by which expert opinion is determined to be admissible or inadmissible, they provide a convenient summary of a fairly broadly shared sense of the duties of an expert witness to the court.

[29] There are similar descriptions of the expert's duty in the civil procedure rules in other Canadian jurisdictions: Anderson, at p. 227; *The Queen's Bench Rules* (Saskatchewan), r. 5-37; *Supreme Court Civil Rules*, B.C. Reg. 168/2009, r. 11-2(1); *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, r. 4.1.01(1); *Rules of Court*, Y.O.I.C. 2009/65, r. 34(23); *An Act to establish the new Code of Civil Procedure*, art. 22. Moreover, the rules in Saskatchewan, British Columbia, Ontario, Nova Scotia, Prince Edward Island, Quebec and the Federal Courts require experts to certify that they are aware of and will comply with their duty to the court: Anderson, at p. 228; Saskatchewan *Queen's Bench Rules*, r. 5-37(3); British Columbia *Supreme Court Civil Rules*, r. 11-2(2); Ontario *Rules of Civil Procedure*, r. 53.03(2.1); Nova Scotia *Civil Procedure Rules*, r. 55.04(1)(a); Prince Edward Island *Rules of Civil Procedure*, r. 53.03(3)(g); *An Act to establish the new Code of*

comme expert devant la Haute Cour ne doit jamais s'aroger le rôle de défenseur. [Je souligne; référence omise; p. 81.]

(La Cour d'appel a confirmé ces obligations ([1995] 1 Lloyd's Rep. 455 (C.A.), p. 496).)

[28] Plusieurs provinces et territoires ont des directives expresses en ce qui concerne l'obligation du témoin expert. En Nouvelle-Écosse, par exemple, les *Règles de procédure civile* prévoient que le rapport d'expert, signé par ce dernier, déclare notamment qu'il fournit une opinion objective pour prêter assistance à la cour; qu'il est disposé à se former un jugement indépendant dans l'assistance qu'il prête à la cour; que son rapport comprend tout ce qu'il considère comme pertinent par rapport à l'opinion exprimée et attire l'attention sur tout ce qui pourrait mener raisonnablement à une conclusion différente (al. 55.04(1)a), b) et c)). Même si ces exigences n'ont aucune incidence sur les règles de preuve sur l'admissibilité d'une opinion d'expert, elles résument bien la conception assez largement partagée de l'obligation d'un témoin expert envers le tribunal.

[29] L'obligation de l'expert est définie de façon similaire dans les règles de procédure civile d'autres provinces et territoires du Canada (Anderson, p. 227; *Règles de la Cour du Banc de la Reine* de la Saskatchewan, règle 5-37; *Supreme Court Civil Rules*, B.C. Reg. 168/2009, par. 11-2(1); *Règles de procédure civile*, R.R.O. 1990, Règl. 194, par. 4.1.01(1); *Règles de procédure*, Y.D. 2009/65, par. 34(23); *Loi instituant le nouveau Code de procédure civile*, art. 22). De plus, les règles de la Saskatchewan, de la Colombie-Britannique, de l'Ontario, de la Nouvelle-Écosse, de l'Île-du-Prince-Édouard, du Québec et des Cours fédérales en la matière exigent que les experts certifient qu'ils sont informés de leur obligation envers le tribunal et s'en acquitteront (Anderson, p. 228; *Règles de la Cour du Banc de la Reine* de la Saskatchewan, par. 5-37(3); *Supreme Court Civil Rules* de la Colombie-Britannique, par. 11-2(2); *Règles de procédure civile* de l'Ontario,

Civil Procedure, art. 235 (not yet in force); *Federal Courts Rules*, SOR/98-106, r. 52.2(1)(c).

par. 53.03(2.1); *Règles de procédure civile* de la Nouvelle-Écosse, al. 55.04(1)a); *Rules of Civil Procedure* de l'Île-du-Prince-Édouard, al. 53.03(3)(g); *Loi instituant le nouveau Code de procédure civile*, art. 235 (non en vigueur); *Règles des Cours fédérales*, DORS/98-106, al. 52.2(1)c)).

[30] The formulation in the Ontario *Rules of Civil Procedure* is perhaps the most succinct and complete statement of the expert's duty to the court: to provide opinion evidence that is fair, objective and non-partisan (r. 4.1.01(1)(a)). The *Rules* are also explicit that this duty to the court prevails over any obligation owed by the expert to a party: r. 4.1.01(2). Likewise, the newly adopted *Act to establish the new Code of Civil Procedure* of Quebec explicitly provides, as a guiding principle, that the expert's duty to the court overrides the parties' interests, and that the expert must fulfill his or her primary duty to the court "objectively, impartially and thoroughly": art. 22; Chamberland, at pp. 14 and 121.

[30] Les *Règles de procédure civile* de l'Ontario énoncent sans doute le plus succinctement et complètement l'obligation de l'expert envers le tribunal, en l'occurrence celle de rendre un témoignage d'opinion qui soit équitable, objectif et impartial (al. 4.1.01(1)a)). Les *Règles* prévoient également expressément que cette obligation l'emporte sur toute obligation de l'expert envers la partie qui l'a engagé (par. 4.1.01(2)). De même, la *Loi instituant le nouveau Code de procédure civile* du Québec prévoit expressément, parmi ses principes directeurs, que la mission première de l'expert envers le tribunal prime les intérêts des parties et qu'il doit l'accomplir « avec objectivité, impartialité et rigueur » (art. 22; Chamberland, p. 14 et 121).

[31] Many of the relevant rules of court simply reflect the duty that an expert witness owes to the court at common law: Anderson, at p. 227. In my opinion, this is true of the Nova Scotia rules that apply in this case. Of course, it is always open to each jurisdiction to impose different rules of admissibility, but in the absence of a clear indication to that effect, the common law rules apply in common law cases. I note that in Nova Scotia, the *Civil Procedure Rules* explicitly provide that they do not change the rules of evidence by which the admissibility of expert opinion evidence is determined: r. 55.01(2).

[31] Bon nombre de règles de procédure ne font que reprendre l'obligation à laquelle le témoin expert est tenu envers le tribunal en common law (Anderson, p. 227). À mon avis, c'est le cas des *Règles* de la Nouvelle-Écosse en la matière. Bien sûr, il est loisible à chaque province ou territoire d'établir des règles d'admissibilité différentes, mais à défaut d'indication claire en ce sens, ce sont les règles de la common law qui s'appliquent dans les affaires de common law. Je souligne qu'en Nouvelle-Écosse, les *Règles de procédure civile* disposent expressément qu'elles n'ont aucune incidence sur les règles de preuve servant à déterminer si l'opinion d'expert est admissible (par. 55.01(2)).

[32] Underlying the various formulations of the duty are three related concepts: impartiality, independence and absence of bias. The expert's opinion must be impartial in the sense that it reflects an objective assessment of the questions at hand. It must be independent in the sense that it is the product of the expert's independent judgment, uninfluenced by who has retained him or her or the outcome of the litigation. It must be unbiased in the sense that it does not unfairly favour one party's

[32] Trois concepts apparentés sont à la base des diverses définitions de l'obligation de l'expert, à savoir l'impartialité, l'indépendance et l'absence de parti pris. L'opinion de l'expert doit être impartiale, en ce sens qu'elle découle d'un examen objectif des questions à trancher. Elle doit être indépendante, c'est-à-dire qu'elle doit être le fruit du jugement indépendant de l'expert, non influencée par la partie pour qui il témoigne ou l'issue du litige. Elle doit être exempte de parti pris, en ce sens qu'elle ne doit pas

position over another. The acid test is whether the expert's opinion would not change regardless of which party retained him or her: P. Michell and R. Mandhane, "The Uncertain Duty of the Expert Witness" (2005), 42 *Alta. L. Rev.* 635, at pp. 638-39. These concepts, of course, must be applied to the realities of adversary litigation. Experts are generally retained, instructed and paid by one of the adversaries. These facts alone do not undermine the expert's independence, impartiality and freedom from bias.

E. *The Expert's Duties and Admissibility*

[33] As we have seen, there is a broad consensus about the nature of an expert's duty to the court. There is no such consensus, however, about how that duty relates to the admissibility of an expert's evidence. There are two main questions: Should the elements of this duty go to admissibility of the evidence rather than simply to its weight?; And, if so, is there a threshold admissibility requirement in relation to independence and impartiality?

[34] In this section, I will explain my view that the answer to both questions is yes: a proposed expert's independence and impartiality go to admissibility and not simply to weight and there is a threshold admissibility requirement in relation to this duty. Once that threshold is met, remaining concerns about the expert's compliance with his or her duty should be considered as part of the overall cost-benefit analysis which the judge conducts to carry out his or her gatekeeping role.

(1) Admissibility or Only Weight?

(a) *The Canadian Law*

[35] The weight of authority strongly supports the conclusion that at a certain point, expert evidence should be ruled inadmissible due to the expert's lack of impartiality and/or independence.

favoriser injustement la position d'une partie au détriment de celle de l'autre. Le critère décisif est que l'opinion de l'expert ne changerait pas, peu importe la partie qui aurait retenu ses services (P. Michell et R. Mandhane, « The Uncertain Duty of the Expert Witness » (2005), 42 *Alta. L. Rev.* 635, p. 638-639). Ces concepts, il va sans dire, doivent être appliqués aux réalités du débat contradictoire. Les experts sont généralement engagés, mandatés et payés par l'un des adversaires. Ces faits, à eux seuls, ne compromettent pas l'indépendance, l'impartialité ni l'absence de parti pris de l'expert.

E. *Les obligations de l'expert et l'admissibilité de son témoignage*

[33] Comme nous l'avons vu, il existe un large consensus quant à la nature de l'obligation de l'expert envers le tribunal. Il n'en va toutefois pas de même du rapport entre cette obligation et l'admissibilité du témoignage de l'expert. Deux questions importantes se posent : les éléments de l'obligation de l'expert jouent-ils au regard de l'admissibilité du témoignage plutôt que simplement de la valeur probante de celui-ci et, dans l'affirmative, l'indépendance et l'impartialité constituent-elles un critère d'admissibilité?

[34] Dans la présente section, j'explique pourquoi je réponds par l'affirmative à ces deux questions : l'indépendance et l'impartialité de l'expert proposé jouent au regard de l'admissibilité de son témoignage plutôt que simplement de la valeur probante de celui-ci, et l'obligation de l'expert constitue un critère d'admissibilité. Une fois qu'il est satisfait à ce critère, toute réserve qui demeure quant à savoir si l'expert s'est conformé à son obligation devrait être examinée dans le cadre de l'analyse coût-bénéfices qu'effectue le juge dans l'exercice de son rôle de gardien.

(1) Admissibilité ou valeur probante?

a) *Le droit canadien*

[35] La jurisprudence dominante appuie solidement la conclusion qu'il convient, à un certain point, de juger inadmissible le témoignage de l'expert qui fait preuve d'un manque d'indépendance ou d'impartialité.

[36] Our Court has confirmed this position in a recent decision that was not available to the courts below:

It is well established that an expert's opinion must be independent, impartial and objective, and given with a view to providing assistance to the decision maker (J.-C. Royer and S. Lavallée, *La preuve civile* (4th ed. 2008), at No. 468; D. Béchard, with the collaboration of J. Béchard, *L'expert* (2011), chap. 9; *An Act to establish the new Code of Civil Procedure*, S.Q. 2014, c. 1, s. 22 (not yet in force)). However, these factors generally have an impact on the probative value of the expert's opinion and are not always insurmountable barriers to the admissibility of his or her testimony. Nor do they necessarily "disqualify" the expert (L. Ducharme and C.-M. Panaccio, *L'administration de la preuve* (4th ed. 2010), at Nos. 590-91 and 605). For expert testimony to be inadmissible, more than a simple appearance of bias is necessary. The question is not whether a reasonable person would consider that the expert is not independent. Rather, what must be determined is whether the expert's lack of independence renders him or her incapable of giving an impartial opinion in the specific circumstances of the case (D. M. Paciocco, "Unplugging Jukebox Testimony in an Adversarial System: Strategies for Changing the Tune on Partial Experts" (2009), 34 *Queen's L.J.* 565, at pp. 598-99).

(*Mouvement laïque québécois v. Saguenay (City)*, 2015 SCC 16, [2015] 2 S.C.R. 3, at para. 106)

[37] I will refer to a number of other cases that support this view. I do so by way of illustration and without commenting on the outcome of particular cases. An expert's interest in the litigation or relationship to the parties has led to exclusion in a number of cases: see, e.g., *Fellowes, McNeil v. Kansa General International Insurance Co.* (1998), 40 O.R. (3d) 456 (Gen. Div.) (proposed expert was the defendant's lawyer in related matters and had investigated from the outset of his retainer the matter of a potential negligence claim against the plaintiff); *Royal Trust Corp. of Canada v. Fisherman* (2000), 49 O.R. (3d) 187 (S.C.J.) (expert was the party's lawyer in related U.S. proceedings); *R. v. Docherty*, 2010 ONSC 3628 (expert was the defence counsel's father); *Ocean v. Economical Mutual Insurance Co.*, 2010 NSSC 315, 293 N.S.R. (2d) 394 (expert was also a party to the litigation); *Handley v. Punnett*,

[36] La Cour vient de confirmer cette position dans un arrêt dont ne disposaient pas les juridictions inférieures :

Il est acquis que l'expert doit fournir une opinion indépendante, impartiale et objective, en vue d'aider le décideur (J.-C. Royer et S. Lavallée, *La preuve civile* (4^e éd. 2008), n^o 468; D. Béchard, avec la collaboration de J. Béchard, *L'expert* (2011), chap. 9; *Loi instituant le nouveau Code de procédure civile*, L.Q. 2014, c. 1, art. 22 (non encore en vigueur)). Par contre, ces facteurs influencent généralement la valeur probante de l'opinion de l'expert et ne sont pas toujours des obstacles incontournables à l'admissibilité de son témoignage. Ils ne rendent pas non plus le témoin expert nécessairement « inhabile » (L. Ducharme et C.-M. Panaccio, *L'administration de la preuve* (4^e éd. 2010), n^{os} 590-591 et 605). Pour qu'un témoignage d'expert soit inadmissible, il faut plus qu'une simple apparence de partialité. La question n'est pas de savoir si une personne raisonnable considérerait que l'expert n'est pas indépendant. Il faut plutôt déterminer si le manque d'indépendance de l'expert le rend de fait incapable de fournir une opinion impartiale dans les circonstances propres à l'instance (D. M. Paciocco, « Unplugging Jukebox Testimony in an Adversarial System : Strategies for Changing the Tune on Partial Experts » (2009), 34 *Queen's L.J.* 565, p. 598-599).

(*Mouvement laïque québécois c. Saguenay (Ville)*, 2015 CSC 16, [2015] 2 R.C.S. 3, para. 106)

[37] Je renvoie à plusieurs autres affaires pour étayer mon opinion. Je procède ainsi pour illustrer mon propos, sans émettre d'avis sur l'issue des affaires en question. Dans certaines, l'intérêt de l'expert dans le procès ou ses liens avec l'une des parties ont mené à l'exclusion (voir, p. ex., *Fellowes, McNeil c. Kansa General International Insurance Co.* (1998), 40 O.R. (3d) 456 (Div. gén.) (l'expert proposé était l'avocat de la défenderesse dans une affaire connexe et, dès le début de son mandat, il avait monté un dossier en vue d'une poursuite pour négligence contre la demanderesse); *Royal Trust Corp. of Canada c. Fisherman* (2000), 49 O.R. (3d) 187 (C.S.J.) (l'expert était l'avocat d'une des parties dans une instance connexe introduite aux États-Unis); *R. c. Docherty*, 2010 ONSC 3628 (l'expert était le père de l'avocat de la défense); *Ocean c. Economical Mutual Insurance Co.*, 2010 NSSC

2003 BCSC 294 (expert was also a party to the litigation); *Bank of Montreal v. Citak*, [2001] O.J. No. 1096 (QL) (S.C.J.) (expert was effectively a “co-venturer” in the case due in part to the fact that 40 percent of his remuneration was contingent upon success at trial: para. 7); *Dean Construction Co. v. M.J. Dixon Construction Ltd.*, 2011 ONSC 4629, 5 C.L.R. (4th) 240 (expert’s retainer agreement was inappropriate); *Hutchingame v. Johnstone*, 2006 BCSC 271 (expert stood to incur liability depending on the result of the trial). In other cases, the expert’s stance or behaviour as an advocate has justified exclusion: see, e.g., *Alfano v. Piersanti*, 2012 ONCA 297, 291 O.A.C. 62; *Kirby Lowbed Services Ltd. v. Bank of Nova Scotia*, 2003 BCSC 617; *Gould v. Western Coal Corp.*, 2012 ONSC 5184, 7 B.L.R. (5th) 19.

[38] Many other cases have accepted, in principle, that lack of independence or impartiality can lead to exclusion, but have ruled that the expert evidence did not warrant rejection on the particular facts: see, e.g., *United City Properties Ltd. v. Tong*, 2010 BCSC 111; *R. v. INCO Ltd.* (2006), 80 O.R. (3d) 594 (S.C.J.). This was the position of the Court of Appeal in this case: para. 109; see also para. 121.

[39] Some Canadian courts, however, have treated these matters as going exclusively to weight rather than to admissibility. The most often cited cases for this proposition are probably *R. v. Klassen*, 2003 MBQB 253, 179 Man. R. (2d) 115, and *Gallant v. Brake-Patten*, 2012 NLCA 23, 321 Nfld. & P.E.I.R. 77. *Klassen* holds as admissible any expert evidence meeting the criteria from *Mohan*, with bias only becoming a factor as to the weight to be given to the evidence: see also *R. v. Violette*, 2008 BCSC 920. Similarly, the court in *Gallant* determined that a challenge to expert evidence that is based on the expert having a connection to a party or an issue in the case

315, 293 N.S.R. (2d) 394 (l’expert était également partie au litige); *Handley c. Punnett*, 2003 BCSC 294 (l’expert était également partie au litige); *Bank of Montreal c. Citak*, [2001] O.J. No. 1096 (QL) (C.S.J.) (l’expert était effectivement « coentrepreneur » dans cette affaire, notamment en raison du fait que 40 p. 100 de sa rémunération dépendait de l’issue favorable du procès (par. 7)); *Dean Construction Co. c. M.J. Dixon Construction Ltd.*, 2011 ONSC 4629, 5 C.L.R. (4th) 240 (les termes du mandat de l’expert étaient discutables); *Hutchingame c. Johnstone*, 2006 BCSC 271 (la responsabilité de l’expert risquait d’être engagée, selon l’issue du procès)). Dans d’autres affaires, l’attitude ou le comportement de l’expert, qui s’était fait le défenseur d’une partie, a justifié l’exclusion (voir, p. ex., *Alfano c. Piersanti*, 2012 ONCA 297, 291 O.A.C. 62; *Kirby Lowbed Services Ltd. c. Bank of Nova Scotia*, 2003 BCSC 617; *Gould c. Western Coal Corp.*, 2012 ONSC 5184, 7 B.L.R. (5th) 19).

[38] Dans un grand nombre d’autres affaires, les tribunaux, tout en acceptant en principe qu’un manque d’indépendance ou d’impartialité pouvait mener à l’exclusion du témoignage de l’expert, ont néanmoins estimé qu’il n’y avait pas lieu d’écarter ce témoignage eu égard aux faits particuliers de l’espèce (voir, p. ex., *United City Properties Ltd. c. Tong*, 2010 BCSC 111; *R. c. INCO Ltd.* (2006), 80 O.R. (3d) 594 (C.S.J.)). C’est le point de vue qu’a adopté la Cour d’appel dans le cas qui nous occupe (par. 109; voir également par. 121).

[39] Toutefois, certains tribunaux canadiens étaient d’avis que ces questions jouaient exclusivement au regard de la valeur de la preuve, et non au regard de son admissibilité. Les décisions les plus souvent citées à cet égard sont sans doute *R. c. Klassen*, 2003 MBQB 253, 179 Man. R. (2d) 115, et *Gallant c. Brake-Patten*, 2012 NLCA 23, 321 Nfld. & P.E.I.R. 77. Dans la première, le tribunal a déclaré admissible tout témoignage d’expert qui satisfaisait aux critères énoncés dans l’arrêt *Mohan* et précisé que le parti pris n’entraînait en jeu que lorsqu’il s’agissait de déterminer la valeur probante du témoignage de l’expert (voir également

or a possible predetermined position on the case cannot take place at the admissibility stage: para. 89.

[40] I conclude that the dominant approach in Canadian common law is to treat independence and impartiality as bearing not just on the weight but also on the admissibility of the evidence. I note that while the shareholders submit that issues regarding expert independence should go only to weight, they rely on cases such as *INCO* that specifically accept that a finding of lack of independence or impartiality can lead to inadmissibility in certain circumstances: R.F., at paras. 52-53.

(b) *Other Jurisdictions*

[41] Outside Canada, the concerns related to independence and impartiality have been addressed in a number of ways. Some are similar to the approach in Canadian law.

[42] For example, summarizing the applicable principles in British law, Nelson J. in *Armchair Passenger Transport Ltd. v. Helical Bar Plc*, [2003] EWHC 367 (Q.B.), underlined that when an expert has an interest or connection with the litigation or a party thereto, exclusion will be warranted if it is determined that the expert is unwilling or unable to carry out his or her primary duty to the court: see also H. M. Malek et al., eds., *Phipson on Evidence* (18th ed. 2013), at pp. 1158-59. The mere fact of an interest or connection will not disqualify, but it nonetheless may do so in light of the nature and extent of the interest or connection in particular circumstances. As Lord Phillips of Worth Matravers, M.R., put it in a leading case, “[i]t is always desirable that an expert should have no actual or apparent interest in the outcome of the proceedings in which he gives evidence, but such disinterest is not automatically a precondition to the admissibility of his evidence”: R. (*Factortame Ltd.*) v. *Secretary of State for Transport*, [2002] EWCA Civ 932, [2003]

R. c. *Violette*, 2008 BCSC 920). De même, dans la deuxième, la cour a statué que la contestation du témoignage de l’expert fondée sur l’existence d’un rapport entre ce dernier et l’une des parties ou une question en litige ou sur une préconception de sa part ne pouvait être formulée à l’étape de l’admissibilité (par. 89).

[40] Je conclus que selon la conception prédominante en common law canadienne, l’indépendance et l’impartialité ont une incidence non seulement sur la valeur de la preuve, mais aussi sur son admissibilité. Je signale que, même s’ils soutiennent que les questions concernant l’indépendance de l’expert ne devraient jouer qu’au regard de la valeur probante, les actionnaires invoquent des affaires comme *INCO*, dans laquelle le tribunal reconnaît expressément qu’une conclusion quant au manque d’indépendance ou d’impartialité peut entraîner l’inadmissibilité dans certaines circonstances (m.i., par. 52-53).

b) *Ailleurs dans le monde*

[41] À l’extérieur du Canada, les questions d’indépendance et d’impartialité ont été abordées de diverses façons, dont certaines s’apparentent à la démarche canadienne.

[42] Par exemple, résumant les principes applicables en droit britannique, le juge Nelson, dans l’arrêt *Armchair Passenger Transport Ltd. c. Helical Bar Plc*, [2003] EWHC 367 (Q.B.), a souligné que lorsque l’expert a un intérêt dans un litige ou un rapport avec celui-ci ou avec une partie, l’exclusion est justifiée s’il est établi que l’expert ne peut ou ne veut pas s’acquitter de sa principale obligation envers la cour (voir également H. M. Malek et autres, dir., *Phipson on Evidence* (18^e éd. 2013), p. 1158-1159). Le simple fait d’avoir un intérêt ou un rapport ne rend pas quelqu’un inhabile à témoigner, sauf dans certaines circonstances, selon la nature et l’importance de l’intérêt ou du rapport. Comme lord Phillips de Worth Matravers, maître des rôles, l’explique dans un arrêt de principe : [TRADUCTION] « Il est toujours souhaitable qu’un expert n’ait aucun intérêt réel ou apparent dans l’issue d’un procès dans lequel il témoigne, mais une telle neutralité n’est pas automatiquement essentielle à l’admissibilité de son témoignage »

Q.B. 381, at para. 70; see also *Gallaher International Ltd. v. Tlais Enterprises Ltd.*, [2007] EWHC 464 (Comm.); *Meat Corp. of Namibia Ltd. v. Dawn Meats (U.K.) Ltd.*, [2011] EWHC 474 (Ch. D.); *Matchbet Ltd. v. Openbet Retail Ltd.*, [2013] EWHC 3067 (Ch. D.), at paras. 312-17.

[43] In Australia, the expert's objectivity and impartiality will generally go to weight, not to admissibility: I. Freckelton and H. Selby, *Expert Evidence: Law, Practice, Procedure and Advocacy* (5th ed. 2013), at p. 35. As the Court of Appeal of the State of Victoria put it: "... to the extent that it is desirable that expert witnesses should be under a duty to assist the Court, that has not been held and should not be held as disqualifying, in itself, an 'interested' witness from being competent to give expert evidence" (*FGT Custodians Pty. Ltd. v. Fagenblat*, [2003] VSCA 33, at para. 26 (AustLII); see also Freckelton and Selby, at pp. 186-88; *Collins Thomson v. Clayton*, [2002] NSWSC 366; *Kirch Communications Pty Ltd. v. Gene Engineering Pty Ltd.*, [2002] NSWSC 485; *SmithKline Beecham (Australia) Pty Ltd. v. Chipman*, [2003] FCA 796, 131 F.C.R. 500).

[44] In the United States, at the federal level, the independence of the expert is a consideration that goes to the weight of the evidence, and a party may testify as an expert in his own case: *Rodriguez v. Pacificare of Texas, Inc.*, 980 F.2d 1014 (5th Cir. 1993), at p. 1019; *Tagatz v. Marquette University*, 861 F.2d 1040 (7th Cir. 1988); *Apple Inc. v. Motorola, Inc.*, 757 F.3d 1286 (Fed. Cir. 2014), at p. 1321. This also seems to be a fair characterization of the situation in the states (*Corpus Juris Secundum*, vol. 32 (2008), at p. 325: "The bias or interest of the witness does not affect his or her qualification, but only the weight to be given the testimony.").

(c) Conclusion

[45] Following what I take to be the dominant view in the Canadian cases, I would hold that an expert's lack of independence and impartiality goes to the admissibility of the evidence in addition to being considered in relation to the weight to be given to

(*R. (Factortame Ltd.) c. Secretary of State for Transport*, [2002] EWCA Civ 932, [2003] Q.B. 381, par. 70; voir également *Gallaher International Ltd. c. Tlais Enterprises Ltd.*, [2007] EWHC 464 (Comm.); *Meat Corp. of Namibia Ltd. c. Dawn Meats (U.K.) Ltd.*, [2011] EWHC 474 (Ch. D.); *Matchbet Ltd. c. Openbet Retail Ltd.*, [2013] EWHC 3067 (Ch. D.), par. 312-317).

[43] En Australie, l'objectivité et l'impartialité de l'expert jouent généralement au regard de la valeur de la preuve, et non de son admissibilité (I. Freckelton et H. Selby, *Expert Evidence : Law, Practice, Procedure and Advocacy* (5^e éd. 2013), p. 35). Pour reprendre les propos de la Cour d'appel de l'État de Victoria : [TRADUCTION] « ... dans la mesure où il est souhaitable que les témoins experts aient l'obligation d'aider le tribunal, on ne devrait pas juger inhabile à témoigner un expert du seul fait qu'il est "intéressé" » (*FGT Custodians Pty. Ltd. c. Fagenblat*, [2003] VSCA 33, par. 26 (AustLII); voir également Freckelton et Selby, p. 186-188; *Collins Thomson c. Clayton*, [2002] NSWSC 366; *Kirch Communications Pty Ltd. c. Gene Engineering Pty Ltd.*, [2002] NSWSC 485; *SmithKline Beecham (Australia) Pty Ltd. c. Chipman*, [2003] FCA 796, 131 F.C.R. 500).

[44] Aux États-Unis, au niveau fédéral, l'indépendance de l'expert joue au regard de la valeur de la preuve, et une partie peut témoigner à son propre procès à titre d'expert (*Rodriguez c. Pacificare of Texas, Inc.*, 980 F.2d 1014 (5th Cir. 1993), p. 1019; *Tagatz c. Marquette University*, 861 F.2d 1040 (7th Cir. 1988); *Apple Inc. c. Motorola, Inc.*, 757 F.3d 1286 (Fed. Cir. 2014), p. 1321). Il semble que la situation soit à peu près la même à l'échelle des États (*Corpus Juris Secundum*, vol. 32 (2008), p. 325 : [TRADUCTION] « Le parti pris ou l'intérêt du témoin n'influe pas sur son habilité à témoigner, mais seulement sur la valeur probante de son témoignage. »).

c) Conclusion

[45] Conformément à ce qui me semble le courant prédominant dans la jurisprudence canadienne, je suis d'avis que le manque d'indépendance et d'impartialité d'un expert joue au regard tant de l'admissibilité de son témoignage que de la valeur du

the evidence if admitted. That approach seems to me to be more in line with the basic structure of our law relating to expert evidence and with the importance our jurisprudence has attached to the gate-keeping role of trial judges. Binnie J. summed up the Canadian approach well in *J.-L.J.*: “The admissibility of the expert evidence should be scrutinized at the time it is proffered, and not allowed too easy an entry on the basis that all of the frailties could go at the end of the day to weight rather than admissibility” (para. 28).

(2) The Appropriate Threshold

[46] I have already described the duty owed by an expert witness to the court: the expert must be fair, objective and non-partisan. As I see it, the appropriate threshold for admissibility flows from this duty. I agree with Prof. (now Justice of the Ontario Court of Justice) Paciocco that “the common law has come to accept . . . that expert witnesses have a duty to assist the court that overrides their obligation to the party calling them. If a witness is unable or unwilling to fulfill that duty, they do not qualify to perform the role of an expert and should be excluded”: “Taking a ‘Goudge’ out of Bluster and Blarney: an ‘Evidence-Based Approach’ to Expert Testimony” (2009), 13 *Can. Crim. L.R.* 135, at p. 152 (footnote omitted). The expert witnesses must, therefore, be aware of this primary duty to the court and able and willing to carry it out.

[47] Imposing this additional threshold requirement is not intended to and should not result in trials becoming longer or more complex. As Prof. Paciocco aptly observed, “if inquiries about bias or partiality become routine during *Mohan* voir dire, trial testimony will become nothing more than an inefficient reprise of the admissibility hearing”: “Unplugging Jukebox Testimony in an Adversarial System: Strategies for Changing the Tune on Partial Experts” (2009), 34 *Queen’s L.J.* 565 (“Jukebox”), at p. 597. While I would not go so far as to hold that the expert’s independence and impartiality should be presumed absent challenge, my

témoignage, s’il est admis. Cette façon de voir semble s’accorder davantage avec l’économie générale de notre droit en ce qui concerne les témoignages d’experts et l’importance que notre jurisprudence accorde au rôle de gardien exercé par les juges de première instance. Le juge Binnie cerne bien l’optique canadienne dans l’arrêt *J.-L.J.* : « La question de l’admissibilité d’une preuve d’expert devrait être examinée minutieusement au moment où elle est soulevée, et cette preuve ne devrait pas être admise trop facilement pour le motif que toutes ses faiblesses peuvent en fin de compte avoir une incidence sur son poids plutôt que sur son admissibilité » (par. 28).

(2) Teneur du critère

[46] J’ai déjà exposé l’obligation du témoin expert envers le tribunal : il doit être juste, objectif et impartial. Selon moi, le critère d’admissibilité découle de cette obligation. Je suis d’accord avec le professeur Paciocco (maintenant juge de la Cour de justice de l’Ontario), selon qui [TRADUCTION] « la common law en est venue à concevoir [. . .] que les témoins experts ont l’obligation d’aider le tribunal, qui l’emporte sur celle qu’ils doivent à la partie qui les cite. Le témoin qui ne peut ou ne veut s’acquitter de cette obligation n’est pas habile à exercer son rôle d’expert et devrait être exclu » (« Taking a “Goudge” out of Bluster and Blarney : an “Evidence-Based Approach” to Expert Testimony » (2009), 13 *Rev. can. D.P.* 135, p. 152 (note de bas de page omise)). Par conséquent, les témoins experts doivent être conscients de leur obligation principale envers le tribunal et pouvoir et vouloir s’en acquitter.

[47] L’idée, en imposant ce critère supplémentaire, n’est pas de prolonger ni de complexifier les procès et il ne devrait pas en résulter un tel effet. Comme le souligne le professeur Paciocco, à raison : [TRADUCTION] « . . . si les débats sur la partialité deviennent chose courante pendant un voir-dire de type *Mohan*, le témoignage qui sera donné au procès ne sera plus qu’une répétition inefficace de l’audience sur l’admissibilité » (« Unplugging Jukebox Testimony in an Adversarial System : Strategies for Changing the Tune on Partial Experts » (2009), 34 *Queen’s L.J.* 565 (« Jukebox »), p. 597). Sans aller jusqu’à affirmer qu’il faut présumer l’indépendance

view is that absent such challenge, the expert's attestation or testimony recognizing and accepting the duty will generally be sufficient to establish that this threshold is met.

[48] Once the expert attests or testifies on oath to this effect, the burden is on the party opposing the admission of the evidence to show that there is a realistic concern that the expert's evidence should not be received because the expert is unable and/or unwilling to comply with that duty. If the opponent does so, the burden to establish on a balance of probabilities this aspect of the admissibility threshold remains on the party proposing to call the evidence. If this is not done, the evidence, or those parts of it that are tainted by a lack of independence or impartiality, should be excluded. This approach conforms to the general rule under the *Mohan* framework, and elsewhere in the law of evidence, that the proponent of the evidence has the burden of establishing its admissibility.

[49] This threshold requirement is not particularly onerous and it will likely be quite rare that a proposed expert's evidence would be ruled inadmissible for failing to meet it. The trial judge must determine, having regard to both the particular circumstances of the proposed expert and the substance of the proposed evidence, whether the expert is able and willing to carry out his or her primary duty to the court. For example, it is the nature and extent of the interest or connection with the litigation or a party thereto which matters, not the mere fact of the interest or connection; the existence of some interest or a relationship does not automatically render the evidence of the proposed expert inadmissible. In most cases, a mere employment relationship with the party calling the evidence will be insufficient to do so. On the other hand, a direct financial interest in the outcome of the litigation will be of more concern. The same can be said in the case of a very close familial relationship with one of the parties or situations in which the proposed expert will probably incur professional liability if his or her opinion is not accepted by the court. Similarly, an expert who, in his or her proposed evidence or otherwise,

et l'impartialité de l'expert si elles ne sont pas contestées, je pense qu'en l'absence d'une telle contestation, il est généralement satisfait au critère dès lors que l'expert, dans son attestation ou sa déposition, reconnaît son obligation et l'accepte.

[48] Une fois que l'expert a produit cette attestation ou a déposé sous serment en ce sens, il incombe à la partie qui s'oppose à l'admission du témoignage de démontrer un motif réaliste de le juger inadmissible au motif que l'expert ne peut ou ne veut s'acquitter de son obligation. Si elle réussit, la charge de démontrer, selon la prépondérance des probabilités, qu'il a été satisfait à ce critère d'admissibilité incombe toujours à la partie qui entend présenter le témoignage. Si elle n'y parvient pas, le témoignage, ou les parties de celui-ci qui sont viciées par un manque d'indépendance ou d'impartialité, devrait être exclu. Cette démarche est conforme à la règle générale du cadre établi dans l'arrêt *Mohan*, et généralement en droit de la preuve, selon laquelle il revient à la partie qui produit la preuve d'en établir l'admissibilité.

[49] Ce critère n'est pas particulièrement exigeant, et il sera probablement très rare que le témoignage de l'expert proposé soit jugé inadmissible au motif qu'il ne satisfait pas au critère. Le juge de première instance doit déterminer, compte tenu tant de la situation particulière de l'expert que de la teneur du témoignage proposé, si l'expert peut ou veut s'acquitter de sa principale obligation envers le tribunal. Par exemple, c'est la nature et le degré de l'intérêt ou des rapports qu'a l'expert avec l'instance ou une partie qui importent, et non leur simple existence : un intérêt ou un rapport quelconque ne rend pas d'emblée la preuve de l'expert proposé inadmissible. Dans la plupart des cas, l'existence d'une simple relation d'emploi entre l'expert et la partie qui le cite n'emporte pas l'inadmissibilité de la preuve. En revanche, un intérêt financier direct dans l'issue du litige suscite des préoccupations. Il en va ainsi des liens familiaux étroits avec une partie et des situations où l'expert proposé s'expose à une responsabilité professionnelle si le tribunal ne retient pas son opinion. De même, l'expert qui, dans sa déposition ou d'une autre manière, se fait le défenseur d'une partie ne peut ou ne veut manifestement pas s'acquitter de

assumes the role of an advocate for a party is clearly unwilling and/or unable to carry out the primary duty to the court. I emphasize that exclusion at the threshold stage of the analysis should occur only in very clear cases in which the proposed expert is unable or unwilling to provide the court with fair, objective and non-partisan evidence. Anything less than clear unwillingness or inability to do so should not lead to exclusion, but be taken into account in the overall weighing of costs and benefits of receiving the evidence.

[50] As discussed in the English case law, the decision as to whether an expert should be permitted to give evidence despite having an interest or connection with the litigation is a matter of fact and degree. The concept of apparent bias is not relevant to the question of whether or not an expert witness will be unable or unwilling to fulfill its primary duty to the court. When looking at an expert's interest or relationship with a party, the question is not whether a reasonable observer would think that the expert is not independent. The question is whether the relationship or interest results in the expert being unable or unwilling to carry out his or her primary duty to the court to provide fair, non-partisan and objective assistance.

[51] Having established the analytical framework, described the expert's duty and determined that compliance with this duty goes to admissibility and not simply to weight, I turn now to where this duty fits into the analytical framework for admission of expert opinion evidence.

F. *Situating the Analysis in the Mohan Framework*

(1) The Threshold Inquiry

[52] Courts have addressed independence and impartiality at various points of the admissibility test. Almost every branch of the *Mohan* framework has been adapted to incorporate bias concerns one

sa principale obligation envers le tribunal. Je tiens à souligner que la décision d'exclure le témoignage à la première étape de l'analyse pour non-conformité aux critères d'admissibilité ne devrait être prise que dans les cas manifestes où l'expert proposé ne peut ou ne veut fournir une preuve juste, objective et impartiale. Dans les autres cas, le témoignage ne devrait pas être exclu d'office, et son admissibilité sera déterminée à l'issue d'une pondération globale du coût et des bénéfices de son admission.

[50] Comme nous l'avons vu en examinant la jurisprudence anglaise, la décision de permettre ou non à un expert de témoigner malgré son intérêt dans un litige ou son rapport avec celui-ci dépend de leur importance et des faits. La notion d'apparence de parti pris n'est pas pertinente lorsqu'il s'agit de déterminer si le témoin expert pourra ou voudra s'acquitter de sa principale obligation envers le tribunal. Lorsque l'on se penche sur l'intérêt d'un expert ou sur ses rapports avec une partie, il ne s'agit pas de se demander si un observateur raisonnable penserait que l'expert est indépendant ou non; il s'agit plutôt de déterminer si la relation de l'expert avec une partie ou son intérêt fait en sorte qu'il ne peut ou ne veut s'acquitter de sa principale obligation envers le tribunal, en l'occurrence apporter au tribunal une aide juste, objective et impartiale.

[51] Nous avons posé le cadre analytique, défini l'obligation de l'expert et établi que le respect de cette dernière joue au regard de l'admissibilité, et non simplement de la valeur probante. Voyons ensuite où cette obligation s'inscrit dans le cadre analytique régissant l'admissibilité du témoignage d'opinion d'un expert.

F. *L'analyse au sein du cadre établi par l'arrêt Mohan*

(1) L'analyse fondée sur les critères d'admissibilité

[52] Les tribunaux ont abordé la question de l'indépendance et de l'impartialité à divers stades de l'examen des critères d'admissibilité. Presque tous les volets du cadre établi par l'arrêt *Mohan* ont servi

way or another: the proper qualifications component (see, e.g., *Bank of Montreal*; *Dean Construction*; *Agribrands Purina Canada Inc. v. Kasamekas*, 2010 ONSC 166; *R. v. Demetrius*, 2009 CanLII 22797 (Ont. S.C.J.)); the necessity component (see, e.g., *Docherty*; *Alfano*); and during the discretionary cost-benefit analysis (see, e.g., *United City Properties*; *Abbey* (ONCA)). On other occasions, courts have found it to be a stand-alone requirement: see, e.g., *Docherty*; *International Hi-Tech Industries Inc. v. FANUC Robotics Canada Ltd.*, 2006 BCSC 2011; *Casurina Ltd. Partnership v. Rio Algom Ltd.* (2002), 28 B.L.R. (3d) 44 (Ont. S.C.J.); *Prairie Well Servicing Ltd. v. Tundra Oil and Gas Ltd.*, 2000 MBQB 52, 146 Man. R. (2d) 284. Some clarification of this point will therefore be useful.

[53] In my opinion, concerns related to the expert's duty to the court and his or her willingness and capacity to comply with it are best addressed initially in the "qualified expert" element of the *Mohan* framework: S. C. Hill, D. M. Tanovich and L. P. Strezos, *McWilliams' Canadian Criminal Evidence* (5th ed. (loose-leaf)), at 12:30.20.50; see also *Deemar v. College of Veterinarians of Ontario*, 2008 ONCA 600, 92 O.R. (3d) 97, at para. 21; Lederman, Bryant and Fuerst, at pp. 826-27; *Halsbury's Laws of Canada: Evidence*, at para. HEV-152 "Partiality"; *The Canadian Encyclopedic Digest* (Ont. 4th ed. (loose-leaf)), vol. 24, Title 62 — Evidence, at §469. A proposed expert witness who is unable or unwilling to fulfill this duty to the court is not properly qualified to perform the role of an expert. Situating this concern in the "properly qualified expert" ensures that the courts will focus expressly on the important risks associated with biased experts: Hill, Tanovich and Strezos, at 12:30.20.50; Paciocco, "Jukebox", at p. 595.

(2) The Gatekeeping Exclusionary Discretion

[54] Finding that expert evidence meets the basic threshold does not end the inquiry. Consistent with the structure of the analysis developed following *Mohan* which I have discussed earlier, the judge

à l'examen des préoccupations relatives au parti pris : la qualification requise (voir, p. ex., *Bank of Montreal*; *Dean Construction*; *Agribrands Purina Canada Inc. c. Kasamekas*, 2010 ONSC 166; *R. c. Demetrius*, 2009 CanLII 22797 (C.S.J. Ont.)); la nécessité (voir, p. ex., *Docherty*; *Alfano*); et l'analyse coût-bénéfices, qui appelle l'exercice d'un pouvoir discrétionnaire (voir, p. ex., *United City Properties*; *Abbey* (ONCA)). À d'autres occasions, les tribunaux en ont fait un critère distinct (voir, p. ex., *Docherty*; *International Hi-Tech Industries Inc. c. FANUC Robotics Canada Ltd.*, 2006 BCSC 2011; *Casurina Ltd. Partnership c. Rio Algom Ltd.* (2002), 28 B.L.R. (3d) 44 (C.S.J. Ont.); *Prairie Well Servicing Ltd. c. Tundra Oil and Gas Ltd.*, 2000 MBQB 52, 146 Man. R. (2d) 284). Des précisions s'imposent donc.

[53] À mon avis, c'est sous le volet « qualification suffisante de l'expert » du cadre établi par l'arrêt *Mohan* qu'il convient d'abord d'examiner les préoccupations concernant l'obligation de l'expert envers le tribunal et s'il peut ou veut s'en acquitter (S. C. Hill, D. M. Tanovich et L. P. Strezos, *McWilliams' Canadian Criminal Evidence* (5^e éd. (feuilles mobiles)), 12:30.20.50; voir également *Deemar c. College of Veterinarians of Ontario*, 2008 ONCA 600, 92 O.R. (3d) 97, par. 21; Lederman, Bryant et Fuerst, p. 826-827; *Halsbury's Laws of Canada : Evidence*, par. HEV-152 « Partiality »; *The Canadian Encyclopedic Digest* (Ont. 4^e éd. (feuilles mobiles)), vol. 24, titre 62 — Evidence, §469). Le témoin expert proposé qui ne peut ou ne veut s'acquitter de cette obligation envers le tribunal ne possède pas la qualification suffisante pour exercer ce rôle. En abordant cette préoccupation sous le volet de la « qualification suffisante de l'expert », les tribunaux pourront s'attacher à évaluer les risques importants que présentent les experts qui ont un parti pris (Hill, Tanovich et Strezos, 12:30.20.50; Paciocco, « Jukebox », p. 595).

(2) Le pouvoir discrétionnaire du juge en tant que « gardien »

[54] La constatation que le témoignage de l'expert satisfait aux critères ne met pas fin à l'analyse. Conformément au cadre établi dans la foulée de l'arrêt *Mohan* dont nous avons discuté précédemment,

must still take concerns about the expert's independence and impartiality into account in weighing the evidence at the gatekeeping stage. At this point, relevance, necessity, reliability and absence of bias can helpfully be seen as part of a sliding scale where a basic level must first be achieved in order to meet the admissibility threshold and thereafter continue to play a role in weighing the overall competing considerations in admitting the evidence. At the end of the day, the judge must be satisfied that the potential helpfulness of the evidence is not outweighed by the risk of the dangers materializing that are associated with expert evidence.

G. Expert Evidence and Summary Judgment

[55] I must say a brief word about the procedural context in which this case originates — a summary judgment motion. (I note that these comments relate to the summary judgment regime under the Nova Scotia rules and that different considerations may arise under different rules.) It is common ground that the court hearing the motion can consider only admissible evidence. However, under the Nova Scotia jurisprudence, which is not questioned on this appeal, it is not the role of a judge hearing a summary judgment motion in Nova Scotia to weigh the evidence, draw reasonable inferences from evidence or settle matters of credibility: *Coady v. Burton Canada Co.*, 2013 NSCA 95, 333 N.S.R. (2d) 348, at paras. 42-44, 87 and 98; *Fougere v. Blunden Construction Ltd.*, 2014 NSCA 52, 345 N.S.R. (2d) 385, at paras. 6 and 12. Taking these two principles together, the result in my view is this. A motions judge hearing a summary judgment application under the Nova Scotia rules must be satisfied that proposed expert evidence meets the threshold requirements for admissibility at the first step of the analysis, but should generally not engage in the second step cost-benefit analysis. That cost-benefit analysis, in anything other than the most obvious cases of inadmissibility, inevitably involves assigning weight — or at least potential weight — to the evidence.

le juge doit encore tenir compte des réserves émises quant à l'indépendance et à l'impartialité de l'expert lorsqu'il évalue la preuve à l'étape où il exerce son rôle de gardien. Il peut être utile de concevoir la pertinence, la nécessité, la fiabilité et l'absence de parti pris comme autant d'éléments d'un examen en deux temps, qui entrent en ligne de compte à la première étape, celle qui sert à déterminer s'il est satisfait aux critères d'admissibilité, et jouent également un rôle à la deuxième, dans la pondération des considérations concurrentes globales relatives à l'admissibilité. Au bout du compte, le juge doit être convaincu que les risques liés au témoignage de l'expert ne l'emportent pas sur l'utilité possible de celui-ci.

G. Témoignage d'expert et jugement sommaire

[55] Je me dois de glisser quelques mots sur le contexte procédural dans lequel s'inscrit le présent pourvoi, en l'occurrence celui d'une requête en jugement sommaire. (Mes commentaires concernent le régime des jugements sommaires établi par les règles de la Nouvelle-Écosse. Je reconnais que d'autres considérations sont susceptibles de jouer dans un autre régime.) Il est bien reconnu que le tribunal saisi de la requête ne peut examiner que la preuve admissible. Cependant, suivant la jurisprudence néo-écossaise, qui n'est pas remise en question dans le présent pourvoi, il n'appartient pas au juge saisi d'une requête en jugement sommaire, en Nouvelle-Écosse, de soupeser la preuve, de tirer des inférences raisonnables de celle-ci ou de trancher des questions de crédibilité (*Coady c. Burton Canada Co.*, 2013 NSCA 95, 333 N.S.R. (2d) 348, par. 42-44, 87 et 98; *Fougere c. Blunden Construction Ltd.*, 2014 NSCA 52, 345 N.S.R. (2d) 385, par. 6 et 12). Si l'on considère ces deux principes ensemble, le résultat est à mon avis le suivant. Le juge saisi d'une requête en jugement sommaire en vertu des règles de procédure de la Nouvelle-Écosse doit être convaincu que le témoignage de l'expert proposé satisfait aux critères d'admissibilité à la première étape de l'analyse; en règle générale, il doit toutefois se garder de passer à la seconde étape, celle de l'analyse coût-bénéfices. Cette analyse, sauf dans les cas d'inadmissibilité les plus manifestes, appelle inévitablement l'attribution d'une valeur — ou, à tout le moins, d'une valeur possible — à la preuve.

H. Application

[56] I turn to the application of these principles to the facts of the case. In my respectful view, the record amply sustains the result reached by the majority of the Court of Appeal that Ms. MacMillan's evidence was admissible on the summary judgment application. Of course, the framework which I have set out in these reasons was not available to either the motions judge or to the Court of Appeal.

[57] There was no finding by the motions judge that Ms. MacMillan was in fact biased or not impartial or that she was acting as an advocate for the shareholders: C.A. reasons, at para. 122. On the contrary, she specifically recognized that she was aware of the standards and requirements that experts be independent. She was aware of the precise guidelines in the accounting industry concerning accountants acting as expert witnesses. She testified that she owed an ultimate duty to the court in testifying as an expert witness: A.R., vol. III, at pp. 75-76; C.A. reasons, at para. 134. To the extent that the motions judge was concerned about the "appearance" of impartiality, this factor plays no part in the test for admissibility, as I have explained earlier.

[58] The auditors' claim that Ms. MacMillan lacks objectivity rests on two main points which I will address in turn.

[59] First, the auditors say that the earlier work done for the shareholders by the Kentville office of Grant Thornton "served as a catalyst and foundation for the claim of negligence" against the auditors and that this "precluded [Grant Thornton] from acting as 'independent' experts in this case": A.F., at paras. 17 and 19. Ms. MacMillan, the auditors submit, was in an "irreconcilable conflict of interest, in that she would inevitably have to opine on, and choose between, the actions taken and standard of care exercised by her own partners at Grant Thornton" and those of the auditors: A.F., at para. 21. This first submission, however, must be rejected.

H. Application

[56] J'aborde maintenant l'application de ces principes aux faits de l'espèce. À mon humble avis, le dossier appuie largement la conclusion à laquelle est parvenue la majorité de la Cour d'appel que le témoignage de M^{me} MacMillan était admissible pour l'instruction de la requête en jugement sommaire. Bien sûr, ni le juge des requêtes ni la Cour d'appel ne disposaient du cadre que j'établis dans les présents motifs.

[57] Le juge des requêtes n'a pas conclu que M^{me} MacMillan avait un parti pris, qu'elle n'était pas impartiale ou qu'elle se faisait le défenseur des actionnaires (motifs de la C.A., par. 122). Au contraire, M^{me} MacMillan a reconnu expressément connaître les normes et exigences voulant que l'expert soit indépendant. Elle était également au fait des directives précises dans le milieu de la comptabilité applicables aux comptables cités comme témoins experts. Elle était consciente à titre de témoin expert de sa principale obligation envers le tribunal (d.a., vol. III, p. 75-76; motifs de la C.A., par. 134). Même si, selon le juge des requêtes, il faut une « apparence » d'impartialité, ce facteur ne constitue pas un critère d'admissibilité, comme je l'explique précédemment.

[58] La prétention des vérificateurs selon laquelle M^{me} MacMillan manquerait d'objectivité repose sur deux principaux points que j'aborde successivement.

[59] D'abord, les vérificateurs soutiennent que le travail fait antérieurement à l'intention des actionnaires par le bureau de Grant Thornton à Kentville [TRADUCTION] « a servi de catalyseur et de fondement à l'action pour négligence » intentée contre les vérificateurs et que cela « empêche [Grant Thornton] d'agir comme expert "indépendant" en l'espèce » (m.a., par. 17 et 19). Selon les vérificateurs, M^{me} MacMillan se trouvait dans « une situation de conflit d'intérêts irréductible qui la forçait inévitablement à commenter et approuver les mesures prises et la norme de diligence observée soit par ses propres partenaires chez Grant Thornton » soit par les vérificateurs (m.a., par. 21). Ce premier argument doit cependant être rejeté.

[60] The fact that one professional firm discovers what it thinks is or may be professional negligence does not, on its own, disqualify it from offering that opinion as an expert witness. Provided that the initial work is done independently and impartially and the person put forward as an expert understands and is able to comply with the duty to provide fair, objective and non-partisan assistance to the court, the expert meets the threshold qualification in that regard. There is no suggestion here that Grant Thornton was hired to take a position dictated to it by the shareholders or that there was anything more than a speculative possibility of Grant Thornton incurring liability to them if the firm's opinion was not ultimately accepted by the court. There was no finding that Ms. MacMillan was, in fact, biased or not impartial, or that she was acting as an advocate for the shareholders. The auditors' submission that she somehow "admitted" on her cross-examination that she was in an "irreconcilable conflict" is not borne out by a fair reading of her evidence in context: A.R., vol. III, at pp. 139-45. On the contrary, her evidence was clear that she understood her role as an expert and her duty to the court: *ibid.*, at pp. 75-76.

[61] The auditors' second main point was that Ms. MacMillan was not independent because she had "incorporated" some of the work done by the Kentville office of her firm. This contention is also ill founded. To begin, I do not accept that an expert lacks the threshold qualification in relation to the duty to give fair, objective and non-partisan evidence simply because the expert relies on the work of other professionals in reaching his or her own opinion. Moreover, as Beveridge J.A. concluded, what was "incorporated" was essentially an exercise in arithmetic that had nothing to do with any accounting opinion expressed by the Kentville office: C.A. reasons, at paras. 146-49.

[62] There was no basis disclosed in this record to find that Ms. MacMillan's evidence should be

[60] Le cabinet professionnel qui découvre ce qu'il estime être une négligence professionnelle ou ce qui pourrait l'être n'est pas d'emblée interdit de donner son opinion en tant que témoin expert. Dès lors que le travail initial est fait de façon indépendante et impartiale et que l'expert proposé comprend son obligation d'apporter au tribunal une aide juste, objective et impartiale et qu'il peut s'acquitter de cette obligation, il est satisfait au critère relatif à la qualification sur ce plan. Or, rien ne permet de penser ici que le cabinet Grant Thornton a été engagé pour exprimer un point de vue dicté par les actionnaires, ni qu'il y ait eu plus qu'une hypothétique possibilité que le cabinet soit tenu responsable envers ces derniers si, en fin de compte, le tribunal n'avait pas retenu son opinion. Le juge n'a pas conclu que M^{me} MacMillan avait un parti pris, qu'elle a manqué d'impartialité ou qu'elle s'était faite le défenseur des actionnaires. De plus, l'argument des vérificateurs selon lequel M^{me} MacMillan a en quelque sorte « admis » en contre-interrogatoire se trouver dans une situation de « conflit d'intérêts irréductible » n'est pas corroboré par une interprétation raisonnable de son témoignage dans son contexte (d.a., vol. III, p. 139-145). Au contraire, il ressort clairement de son témoignage qu'elle comprenait son rôle d'expert et son obligation envers le tribunal (*ibid.*, p. 75-76).

[61] Deuxièmement, M^{me} MacMillan ne serait pas indépendante, puisqu'elle avait « incorporé » une partie du travail fait par son cabinet au bureau de Kentville. Cette prétention est également non fondée. D'abord, je n'accepte pas qu'un expert ne satisfasse pas au critère de la qualification suffisante, dans la mesure où il est question de son obligation de rendre un témoignage juste, objectif et impartial, simplement parce qu'il se fonde sur le travail d'autres professionnels pour se faire une opinion. De plus, comme le juge Beveridge l'a conclu, ce qui a été « incorporé » consistait essentiellement en un exercice arithmétique qui n'avait rien à voir avec quelque opinion comptable qu'aurait exprimée le bureau de Kentville (motifs de la C.A., par. 146-149).

[62] Le présent dossier ne révèle aucun élément qui permette de conclure que le témoignage de

excluded because she was not able and willing to provide the court with fair, objective and non-partisan evidence. I agree with the majority of the Court of Appeal who concluded that the motions judge committed a palpable and overriding error in determining that Ms. MacMillan was in a conflict of interest that prevented her from giving impartial and objective evidence: paras. 136-50.

IV. Disposition

[63] I would dismiss the appeal with costs.

Appeal dismissed with costs.

Solicitors for the appellants: Stikeman Elliott, Toronto.

Solicitors for the respondents: Lenczner Slaght Royce Smith Griffin, Toronto; Groupe Murphy Group, Moncton.

Solicitor for the intervener the Attorney General of Canada: Attorney General of Canada, Toronto.

Solicitors for the intervener the Criminal Lawyers' Association (Ontario): Henein Hutchison, Toronto.

M^{me} MacMillan devrait être exclu parce que celle-ci ne pouvait ou ne voulait rendre devant le tribunal un témoignage juste, objectif et impartial. Je conviens avec la majorité de la Cour d'appel que le juge des requêtes a commis une erreur manifeste et dominante en estimant que M^{me} MacMillan était dans une situation de conflit d'intérêts qui l'empêchait de rendre un témoignage objectif et impartial (par. 136-150).

IV. Dispositif

[63] Je suis d'avis de rejeter le pourvoi avec dépens.

Pourvoi rejeté avec dépens.

Procureurs des appelants : Stikeman Elliott, Toronto.

Procureurs des intimées : Lenczner Slaght Royce Smith Griffin, Toronto; Groupe Murphy Group, Moncton.

Procureur de l'intervenant le procureur général du Canada : Procureur général du Canada, Toronto.

Procureurs de l'intervenante Criminal Lawyers' Association (Ontario) : Henein Hutchison, Toronto.

TAB 13

Expert Report of Dr. Nick Feamster

Case: CT-2024-012 - Commissioner of Competition v. Rogers Communications Inc.

Date: February 18, 2026

Expert: Dr. Nick Feamster, Professor of Computer Science, University of Chicago

I. Introduction and Qualifications

A. Scope of Engagement

1. I have been retained by Lax O’Sullivan Lisus Gottlieb LLP, counsel for Rogers Communications Inc., to provide expert opinion on technical matters related to mobile network performance and user experience at throttled mobile data speeds—that is, data speeds that have been limited by the network provider to a specified maximum rate. Specifically, I have been asked to evaluate technical claims made in the expert report of Simon Lee, conduct independent empirical testing of mobile applications at throttled speeds, and provide expert opinion on whether throttled speeds of up to 512 kbps provide functional mobile data connectivity.
2. This report presents my opinions based on my expertise in network measurement, internet performance, and Quality of Experience (QoE), as well as independent empirical testing that I conducted with the support of a team working under my supervision.

B. Expert Qualifications

1. Educational Background

3. I received my Ph.D. in Computer Science from the Massachusetts Institute of Technology (MIT) in 2005, where I completed a dissertation entitled “Proactive Techniques for Correct and Predictable Internet Routing.” My doctoral research developed new methods to analyze and predict the behavior of large-scale internet routing systems, focusing on ensuring that networks route traffic correctly and predictably.
4. Prior to completing my Ph.D., I earned a Master of Engineering in Electrical Engineering and Computer Science at MIT in 2001. My Master’s thesis, entitled “Adaptive Delivery of Real-time Streaming Video,” developed new internet transport protocols to deliver streaming video over internet paths with variable packet loss

II. Summary of Opinions

29. Rogers offers Infinite/Unlimited wireless data plans that provide customers with a monthly allocation of high-speed data, followed by continued connectivity at reduced speeds after the high-speed allocation is exhausted. Under these plans, customers receive a specified amount of high-speed mobile data each month (depending on the plan tier). This high-speed data operates at the full available speeds of Rogers' LTE or 5G network, which can reach tens or hundreds of megabits per second depending on network conditions and device capabilities.
30. Once a customer exhausts their monthly high-speed data allocation, Rogers throttles (reduces) the connection speed to 512 kilobits per second (kbps) for the remainder of the billing period (the "Rogers Throttled Speed").⁶ This throttled speed represents the available bandwidth—that is, the maximum data transfer rate—for all subsequent data usage until the next billing cycle begins and the high-speed allocation is reset. Customers receive notifications as they approach their high-speed data limit and when throttling begins. The key technical question addressed in this report is whether the Rogers Throttled Speed provides functional mobile data connectivity, meaning whether mobile applications continue to work in a satisfactory and practically usable manner at this reduced bandwidth.
31. The central question I have been asked to address is whether the Rogers Throttled Speed provides functional mobile data connectivity. Based on my expertise in network measurement and performance, technical analysis of how modern applications work, including how they adapt to variable network conditions, and independent empirical testing, my answer is yes. The Rogers Throttled Speed maintains core mobile functionality—including communication, information access, navigation, and entertainment including streaming at reduced quality—in a manner that is practically usable for everyday mobile needs. I summarize my main conclusions in the following sections, followed by a more detailed discussion.

Conclusion 1: Modern Mobile Applications Are Designed to Adapt to Network Conditions, including Available Bandwidth

32. Modern mobile applications, particularly video streaming services, employ adaptive bitrate (ABR) streaming technology. Adaptive bitrate streaming is a technique that detects a user's bandwidth and CPU capacity in real time and adjusts the quality of

⁶ Due to normal network variability, observed throughput under throttled conditions may exceed or fall below the 512 kbps limit at any given moment. The 512 kbps figure represents the maximum rate imposed by Rogers' throttling mechanism; actual throughput varies based on network conditions, application behavior, and measurement timing.

the media stream accordingly.⁷ In other words, applications adapt to the user's network conditions by matching the quality of certain media to the currently available bandwidth rather than ceasing to function below specific thresholds. This allows applications to remain functional even when network conditions vary over short or long time periods.

33. ABR technology was developed between 2004 and 2006 and started gaining widespread attention in 2007.⁸ The world's largest streaming services, including Netflix, Disney, NBC Universal, Warner Bros. Discovery, Apple, Google, and Amazon, have all been actively using adaptive bitrate technology for many years, making it standard practice for high-end streaming providers.⁹ These applications probe available bandwidth and select appropriate quality tiers. Quality adjustment is continuous and automatic. This allows services to maintain functionality across a wide range of network conditions.
34. Historical evidence demonstrates the adaptive nature of these applications. YouTube launched in 2005 and Netflix streaming launched in 2007.¹⁰ Both services worked on third-generation (3G) mobile networks, which typically provided speeds of 384 kbps to 2 Mbps,¹¹ for years. Applications were explicitly designed to work in varying network environments by encoding content at multiple quality levels.

⁷ Adaptive bitrate streaming is formalized in [ISO/IEC 23009-1:2022](#), "Information technology — Dynamic adaptive streaming over HTTP (DASH) — Part 1: Media presentation description and segment formats" (International Organization for Standardization, August 2022). See also Abdelhak Bentaleb et al., "[A Survey on Bitrate Adaptation Schemes for Streaming Media Over HTTP](#)," IEEE Communications Surveys & Tutorials, vol. 21, no. 1, pp. 562–585 (First Quarter 2019) ("Adaptive bitrate streaming is a technique used in streaming multimedia over computer networks... it works by detecting a user's bandwidth and CPU capacity in real time and adjusting the quality of the media stream accordingly").

⁸ Bentaleb et al. (2019) documents that HTTP adaptive streaming emerged commercially in the mid-2000s, with the MPEG-DASH standard ratified by ISO in November 2011. See also "[MPEG-DASH](#)," [MPEG Official Website](#) (noting DASH "enables the deployment of streaming services using the existing low cost and wide-spread Internet infrastructure").

⁹ Id. ("The world's largest streaming services, such as those operated by Netflix, Disney, NBC Universal, Warner Bros. Discovery, Apple, Google, Amazon and others, have all been actively using adaptive bit rate technology for many years now, making it standard practice for high-end streaming providers").

¹⁰ See supra notes 3-5.

¹¹ See supra notes 1-2.

35. Importantly, while services have added higher quality tiers (HD, 4K) as network speeds increased, they have not removed lower quality options. The same 240p and 360p quality tiers that enabled streaming on 3G networks remain available today and continue to use the same adaptive bitrate technology. Modern services are not designed exclusively for high-speed networks; they are designed to adapt across the full range of network conditions, from slow mobile connections to fast fiber optic broadband.
36. Published “recommended” speeds are marketing specifications for premium quality such as high-definition (HD) or 4K, not minimum functional requirements.¹² As I discuss in greater detail below, Mr. Lee repeatedly conflates “recommended” speeds for requirements. That is not correct, as services can and do work at lower speeds with adjustments to quality (such as 360p or 240p).

Conclusion 2: Core Mobile Functionality is Maintained at the Rogers Throttled Speed and is Practically Usable

37. Based on technical analysis and empirical testing, core mobile use cases—communication, information access, navigation, financial transactions, and entertainment—maintain practical, usable functionality at the Rogers Throttled Speed. Email and messaging applications, including text and photo sharing, function without degradation. Audio streaming services for music and podcasts operate without degradation even at high quality settings. Banking and financial applications work without limitation. Navigation and mapping applications provide full functionality. Web browsing remains functional though with longer load times than would be the case at higher speeds. Voice and video calls function, though video calls operate at reduced quality.
38. Video streaming applications function with quality adjustment. Video streaming services such as Netflix and YouTube deliver content at 360p or 240p quality instead of HD or 4K. The video remains watchable, though at reduced resolution. Video conferencing applications such as Zoom and Teams can provide audio-only service or low-resolution video.
39. Social media applications function with minimal degradation. Applications such as Instagram, TikTok, and Facebook are designed for mobile use and employ adaptive

¹² Netflix’s published speeds are explicitly tied to quality tiers: “3 Mbps or higher” for 720p HD, “5 Mbps or higher” for 1080p HD, and “15 Mbps or higher” for 4K Ultra HD. See [“Internet Connection Speed Recommendations,” Netflix Help Center](#). YouTube supports 240p video at less than 0.5 Mbps and 360p at 0.7 Mbps, with published recommendations of 2.5 Mbps for 720p HD and 5 Mbps for 1080p. See [“How Much Internet Speed Do You Need for YouTube?,” HighSpeedInternet.com](#). These demonstrate that published “recommended” speeds correspond to specific premium quality tiers, while services continue to function at lower speeds with reduced quality.

that throttled mobile data is non-functional. Rather, empirical data shows that users commonly choose to use WiFi for high-bandwidth activities even when they have access to full-speed mobile data, as WiFi is often faster, more reliable, and does not count against mobile data allotments.

Conclusion 3: Mr. Lee's Analysis and Conclusions Are Unsupported and Incorrect Because They Lack Empirical Foundation, Mischaracterize Technical Specifications, and Ignore Adaptive Streaming Technology

42. Mr. Lee's report does not include empirical measurements of user experience at throttled speeds. His analysis relies on published specifications and theoretical calculations rather than actual testing. His approach treats published "recommended" speeds as minimum functional requirements rather than marketing specifications for premium quality. His analysis does not address adaptive bitrate streaming technology.
43. It is important to note at the outset that even Mr. Lee acknowledges that certain core use cases remain functional at throttled speeds. For example, his report appears to acknowledge that audio streaming, text messaging, email, basic web browsing, and navigation applications can function at 512 kbps, though he disputes the quality or practicality of other services.
44. The available evidence indicates different conclusions than those reached by Mr. Lee, demonstrating that his claims with respect to certain use cases are both unsupported by empirical testing and incorrect. Rogers testing from 2019 and 2023 and my own empirical testing shows applications functioning well at throttled speeds. Industry practice demonstrates that these same services operated on slower 3G networks for years and continue to be designed to adapt across the full range of network conditions. Technical specifications from application providers document multiple quality tiers below the thresholds Mr. Lee identifies as requirements.
45. It is my expert opinion that Mr. Lee's theoretical calculations do not reflect the expected or observed experience of Rogers' wireless customers at throttled speeds. His analysis, based on published marketing specifications for premium quality and theoretical performance predictions without empirical validation, fails to account for how modern applications actually behave through adaptive technologies and quality adjustments. The empirical evidence demonstrates that throttled speeds provide functional and practically usable connectivity for most core mobile use cases, contrary to Mr. Lee's conclusions.

III. Technical Background

46. To understand whether throttled speeds provide functional connectivity, it is essential to understand how modern mobile applications, particularly video streaming services, actually work. This section provides technical background on

2. Information and Navigation

83. Modern web pages vary significantly in size depending on content complexity.³⁸ At the Rogers Throttled Speed, full page loads take longer than at higher speeds. However, progressive rendering shows content while loading continues, so users see text and basic layout before all images and scripts have loaded. Text-heavy websites load faster than media-rich sites. Caching reduces load times for repeated visits. Web browsing is functional at the Rogers Throttled Speed, though slower than at higher speeds.
84. Mapping and navigation applications download map tiles and directions data as needed. The critical use case of turn-by-turn navigation works during active use, as the data requirements for navigation directions are minimal. Maps and navigation function well at the Rogers Throttled Speed.
85. News and information applications display article text with accompanying images. The experience is similar to web browsing, functional with some delays for image loading. News and information applications are functional at the Rogers Throttled Speed.

3. Audio Streaming

86. Music streaming services offer multiple quality tiers. Spotify offers low quality at approximately 24 kbps, normal quality at approximately 96 kbps, and high quality at approximately 160 kbps.³⁹ These quality levels represent 5%, 19%, and 31% of 512 kbps capacity, respectively. Apple Music offers similar quality tiers. Music streaming functions well at the Rogers Throttled Speed, even at high quality settings. Notably, even Mr. Lee's report appears to acknowledge that audio streaming remains functional at throttled speeds, characterizing it as "marginally functional" rather than non-functional.
87. Podcasts and audiobooks use audio compression with modest bandwidth requirements. Spotify streams podcasts at approximately 96 kbps.⁴⁰ Users can buffer entire episodes when connected to WiFi. Streaming during playback is well within 512 kbps capacity. Podcasts and audiobooks function well at the Rogers Throttled Speed.

³⁸ HTTP Archive, "[Page Weight Report](#)," (accessed February 2026). The median mobile web page size is approximately 2.6 MB. However, page load behavior with progressive rendering means users see usable content before the entire page loads. Text-heavy pages load significantly faster than media-rich pages.

³⁹ "[Audio quality](#)," [Spotify Support](#) ("Low: Equivalent to approximately 24kbit/s"; "Normal: Equivalent to approximately 96kbit/s"; "High: Equivalent to approximately 160kbit/s").

⁴⁰ Id. (Podcasts stream at approximately 96 kbps across most devices).

satisfactory before becoming frustrated or abandoning a task. Research on user frustration with slow speeds typically studies unexpected slowdowns under optimal conditions, meaning situations where users expect fast, reliable service and experience an unexplained degradation. Such research does not address explained throttling that occurs after high usage, where users have been notified, understand the reason for reduced speeds, and can choose to upgrade their plan or manage their usage differently.

V. Empirical Testing Method

111. To provide an empirical foundation for my opinions, I conducted independent testing of mobile applications running on the Rogers network at throttled speeds, with the support of a team working under my supervision. This section describes the testing method. Results are presented in Section VI.

A. Testing Objectives

112. The testing was designed to answer the following questions. First, what bandwidth do common mobile applications actually consume during typical usage? Second, how do applications behave when network speed is throttled to the Rogers Throttled Speed? Third, do applications function, adapt, or experience degradation at this throttled speed? Fourth, what is the user-observable experience at this throttled speed? Fifth, is that experience practically usable?

B. Test Environment and Equipment

113. Testing was conducted on the evening of February 12, 2026 at the Charles River Associates (CRA) offices in Toronto, Canada. I conducted all testing with the assistance of Carlo Lakay at CRA.
114. Two mobile devices were used for testing:
- **Android Device:** Google Pixel 10 Pro Fold
 - **iOS Device:** Apple iPhone 16
115. Both devices were connected to the Rogers mobile network and configured to use Rogers SIM cards with throttled data plans (i.e., plans where the high-speed data allocation had been exhausted, resulting in data being delivered at the Rogers Throttled Speed).

C. Device Configuration

116. Both devices were configured in their default factory settings with standard application installations. Applications tested were downloaded from the Google Play Store (Android) and Apple App Store (iOS) and updated to their current versions at the time of testing.

D. Protocol Overhead

164. The Lee Report includes calculations suggesting that 512 kbps must be reduced by approximately 6% protocol overhead to determine “usable” bandwidth available to applications. As explained in Section III.E above, this analysis reflects a misunderstanding of how network throughput is measured. When throughput is measured via speed test or traffic monitoring, the measurement system counts payload bytes delivered to the application, with overhead already subtracted. The measured rate of 512 kbps is already the usable application rate, not a gross rate that must be reduced by overhead.

E. Performance Predictions

165. The Lee Report makes specific predictions about performance including page load times and email delivery times. These predictions are based on theoretical calculations rather than empirical testing.
166. By way of example, on web browsing, the Lee Report states that page loads will take “45 to 90 seconds.” The Lee Report did not conduct testing to measure actual load times. This prediction does not account for progressive rendering, which shows content to users while loading continues, caching, which makes repeated visits faster, compression, variation across different websites, or modern web optimization techniques. These predictions differ from the empirical measurements conducted for this report.

F. User Experience Research

167. The Lee Report cites general user experience research on page load times and user frustration with slow speeds. However, this research was conducted in contexts where users experienced unexplained degradation under normal operating conditions.⁵⁸ Quality of Experience research has established that user expectations and context significantly affect satisfaction with service quality.⁵⁹ The research Mr. Lee relies on does not address the specific context of throttling, where users

⁵⁸ The Google/SOASTA study that Mr. Lee cites examined page abandonment under normal browsing conditions on 3G networks where users had no reason to expect slow speeds. The Nielsen Norman Group research similarly addressed general web usability, not throttled connectivity scenarios.

⁵⁹ See Lea Skorin-Kapov et al., “A Survey of Emerging Concepts and Challenges for QoE Management of Multimedia Services,” *ACM Transactions on Multimedia Computing, Communications, and Applications*, vol. 14, no. 2s, pp. 1-29 (2018) (comprehensive survey documenting that QoE depends on user context, expectations, and prior experience); Florence Agboma & Antonio Liotta, “Addressing User Expectations in Mobile Content Delivery,” *Mobile Information Systems*, vol. 3, no. 3-4, pp. 153-164 (2007) (establishing that user expectations significantly affect perceived quality in mobile content delivery).

TAB 14

Expert Witness Reply

1. Executive Summary

1. This report is prepared in response to the expert report of Dr. Nick Feamster which is dated 18 February 2026 and was submitted on behalf of Rogers Communications Inc. It should be read alongside my original Expert Witness Statement as the two documents address the same topics. The opinions, analysis, and evidence in this report build upon and supplement the positions set out in my original report.

1.1 Purpose of This Reply

This reply has three objectives:

2. **To reaffirm the opinions expressed in my original report.** Where Dr. Feamster's criticisms do not identify any error in my analysis, my original conclusions stand and are restated here.
3. **To address Dr. Feamster's specific criticisms.** Where Dr. Feamster mischaracterises my report or advances arguments against it, those are addressed directly in Sections 6 and 9.
4. **To identify weaknesses in Dr. Feamster's methodology and conclusions.** Where Dr. Feamster's own testing and data do not support the conclusions he draws from them, this is set out in Sections 7 and 8.

1.2 Observations on Dr. Feamster's Recordings

5. In preparing this report, I have reviewed the video recordings of Dr. Feamster's testing in detail. Where I describe what appears to be happening in those recordings, for example, whether content appears to be pre-loaded or whether an application appears to have been actively running before the test (albeit in the background), I have been careful to use language that reflects the nature of that evidence. I am drawing conclusions from the visible evidence within those videos, rather than from direct access to Dr. Feamster's testing device, its internal running state or specific network logs. However, my conclusions are grounded in the technical principles described in Section 5 and are both consistent with well-understood device and application behaviour as well as my own replication testing.

1.3 Summary of Findings on Dr. Feamster's Recordings

6. Dr. Feamster's testing does not appear to follow his own stated methodology and cannot be relied upon as evidence of the real-world user experience under throttled conditions. The video recordings he has provided indicate that the applications he was testing were not cold-started¹ as stated in his report and that stored content was not cleared prior to testing. When applications are not cold-started or cached content is not cleared, previous stored data may load instead of being retrieved over the throttled

¹ For a definition of cold-start see section 5.3

connection, which materially alters the outcome of the test and obscures the effects of throttling.

7. In addition, the interactions shown in the recordings are artificially brief and simple which tends to produce more favourable results than typical real world usage. When testing is conducted using a methodology that reflects ordinary user behaviour the results consistently show the degraded experience described in my original report. To address these issues, I conducted replication testing of Dr. Feamster's demonstrations while following the procedures described in his report.

1.4 Replication Testing

8. My replication testing covers a representative subset of the applications Dr. Feamster tested. The applications I selected were chosen to cover the full range of weaknesses identified in Section 7: caching behaviour, streaming buffer depletion, video calling, and web browsing. The remaining applications are addressed in the analysis of Dr. Feamster's recordings in Sections 7 and 8, where the observations from a visual inspection of his recordings are sufficient to establish the relevant points without requiring a specific re-test.
9. For each application I have provided video evidence of two specific tests:
 1. A test showing what is required in order to reproduce Dr. Feamster's results.
 2. Another test showing the results seen when following a more comprehensive testing process.
10. The purpose of the first test is to demonstrate that Dr. Feamster's results appear to be an inaccurate representation of the true user experience due to his testing process. The second test is to show more realistic results based on following a clearer, more comprehensive testing process and how these results are consistent with, and reinforce, the conclusions set out in my original report.
11. For a couple of key applications I have also provided a side-by-side comparison presenting Dr. Feamster's recording alongside my cold-start test recording, where the launch sequence is slowed down to make the methodological difference directly observable.

1.5 Mischaracterisations and data interpretation issues

12. Dr. Feamster misrepresents my report in several key areas, including claiming I focused only on HD and premium quality video tiers. My report explicitly analyses every video tier down to 144p and the experience you would observe for each of them. Furthermore, Dr. Feamster conflates my severity classifications, misrepresenting services I categorised as severely degraded as though I had said they cannot function at all.

TAB 15

224

File No. CT-2024-012

THE COMPETITION TRIBUNAL

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

AND IN THE MATTER OF an application by the
Commissioner of Competition for an order pursuant
to Section 74.1 of the Competition Act regarding
conduct reviewable pursuant to
paragraph 74.01(1)(a) and subsections 74.011(1) and
74.011(2) of the Competition Act;

B E T W E E N:

COMMISSIONER OF COMPETITION

Applicant

- and -

ROGERS COMMUNICATIONS INC.

Respondent

225 1 --- This is the Continued Examination for Discovery 2 of KATHLEEN PHILLIPOWSKY, taken at the offices of 3 Catana Reporting Services, 170 Laurier Avenue West, 4 Suite 800, Ottawa, Ontario, on Wednesday, 5 the 4th day of September, 2025 at 10:00 a.m. 6 7 ----- 8 VOLUME 5 9 ----- 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25	227 1 A P P E A R A N C E S (Cont.): 2 3 ALSO PRESENT: 4 5 In Person: 6 BRENDAN ROSS (Competition Bureau) 7 8 Remote, Via Videoconference: 9 MARISA WYSE (Chief Legal Officer, Rogers) 10 JOELLA FLETCHER (Paralegal, Justice Canada) 11 MALLORY KELLY (Paralegal, Competition Bureau) 12 ADRIANO IMPERADEIRO (Paralegal, Competition Bureau) 13 SAM COOKE (Paralegal, Competition Bureau) 14 ANABEL LÉTOURNEAU (Paralegal, Competition Bureau) 15 ANNA SHARMA (Paralegal, Competition Bureau) 16 SAMUEL FOSTATY (Competition Bureau) 17 KRISTIN COVERLEY (Competition Bureau) 18 KEVIN FLETCHER (Competition Bureau) 19 20 21 22 23 24 25 REPORTED BY: Olivia Arnaud, CSR
226 1 A P P E A R A N C E S: 2 3 JONATHAN HOOD, ESQ., for the Applicant, 4 IRENE CYBULSKY, ESQ., the Commissioner of 5 KENDRA WILSON, ESQ., Competition 6 ANTOINE LIPPÉ, ESQ., (Remote) 7 8 CRAWFORD SMITH, ESQ., for the Respondent, 9 BRAD VERMEERSCH, ESQ., Rogers Communications 10 ANITA BANICEVIC, ESQ., Inc. 11 MATTHEW LAW, ESQ., 12 JOANNA MACDONALD, ESQ., 13 ALEXANDER MULLIGAN, ESQ., (Remote) 14 TERALEIGH STEVENSON, ESQ., (Remote) 15 16 17 18 19 20 21 22 23 24 25	228 1 I N D E X 2 3 WITNESS: KATHLEEN PHILLIPOWSKY 4 PAGE 5 EXAMINATION BY MR. SMITH..... 230 6 EXAMINATION BY MR. VERMEERSCH..... 308 7 FURTHER EXAMINATION BY MR. SMITH..... 406 8 9 10 **The following list of undertakings, advisements 11 and refusals is meant as a guide only for the 12 assistance of counsel and no other purpose** 13 14 15 INDEX OF UNDERTAKINGS 16 The questions/requests undertaken are noted by U/T 17 and appear on the following pages: 256, 256, 319, 18 319, 338 19 20 INDEX OF ADVISEMENTS 21 The questions/requests taken under advisement are 22 noted by U/A and appear on the following pages: 23 282, 292, 356, 356, 405, 412, 413, 413, 413, 24 414 25

341 1 A. That was the result. 2 1443 Q. Was there any other... 3 Okay. And so, then, we can now put 4 this away. No more watching videos. 5 So there are 12 other testing videos 6 that we have seen in the productions. And I 7 believe that they are all videos, not -- they're 8 all videos of either live TV or streaming news in 9 addition to the two that we just looked at; is that 10 correct? 11 A. That sounds correct, but I would 12 need to just look at each video just to confirm 13 100 percent, but... 14 1444 Q. As part of your testing, did you 15 do any other testing or screen-recording of other 16 activities outside of streaming videos? 17 A. I can't remember recording 18 anything else at the moment. 19 MR. HOOD: And, sorry, just to clarify, 20 you're talking about -- like, we've provided piles 21 of captures of videos going to the websites. 22 You're talking about aside from those now? 23 BY MR. VERMEERSCH: 24 1445 Q. Well, I'm asking about the testing 25 at the 512-kilobits-per-second speed. I mean,	343 1 1450 Q. Weather conditions can affect the 2 speed at which you use your phone? 3 A. That's my understanding. 4 1451 Q. Tower congestion? 5 A. Yes. 6 1452 Q. Factors on your device, like 7 insufficient memory storage, correct? 8 A. That, I don't know. 9 1453 Q. Outdated operating system? 10 A. I also don't know. 11 1454 Q. A lot of factors that affect the 12 speed and therefore the usage of the phone, like 13 using apps, correct? 14 A. Sorry, just repeat that last part? 15 1455 Q. A lot of factors affect the speeds 16 that phones receive from a mobile network, correct? 17 A. Yes. 18 1456 Q. And the effect on speed has a 19 direct affect on your ability to use apps on the 20 device? 21 A. Yes. 22 1457 Q. To access content on the device? 23 A. Yes. 24 1458 Q. Okay. But I have not seen -- and 25 this is my question, Ms. Phillipowsky: I have not
342 1 you've done all of these screen-captures, but 2 that's not capturing what the experience of 3 512 kilobytes per second is, correct? 4 A. It's a proxy through this 5 simulator, but it's not on a phone, a natural 6 phone, and it's also not through data. And it 7 doesn't have -- so from what I understand, it is 8 512 kilobits per second, but, of course, there's 9 other factors that could make it be less than 512 10 if you were to use it in the real world on a real 11 device -- a real-world device. 12 1446 Q. Yeah, and -- fair. That's the 13 same -- the same is true of the usage of a mobile 14 phone at any time, correct? 15 A. That's right. 16 1447 Q. A lot of factors affect the usage 17 of a mobile phone and the speed that you receive to 18 that phone, correct? 19 A. Yes. 20 1448 Q. Some of those factors include 21 where you're using the phone? The location? 22 A. Yeah. 23 1449 Q. The type of phone you're using? 24 The device? 25 A. I think so.	344 1 seen any screen-captures reflecting a review of 2 content other than live or streaming videos at 3 512 kilobits per second. 4 A. Okay. 5 1459 Q. Do you recall any testing that you 6 did of any other uses of the phone at 512 kilobits 7 per second other than live TV, YouTube, streaming 8 news programs? 9 A. I can't recall any other 10 screen-recordings that I did at 512. 11 1460 Q. Okay. How about 12 non-screen-recordings? Did you do any testing or 13 simulating using the mobile simulator of accessing 14 content at 512 kilobytes per second? 15 A. Yeah, I clicked around and tried 16 out different uses. 17 1461 Q. And did those uses include 18 content-rich websites? 19 A. I believe it did. 20 1462 Q. You didn't record those, though? 21 A. No. 22 1463 Q. Did you keep a log of those -- 23 that testing that you did at 512 kilobytes? 24 A. I did not. 25 1464 Q. Any notes?

357 1 MR. HOOD: Oh, sorry, I put it away 2 because the laptop was... 3 MR. VERMEERSCH: Okay. Let's go to -- 4 we'll go to -- 5 MR. HOOD: Sorry, we've been at it for 6 about an hour, 15 minutes. If we're going on to 7 another topic, maybe we could take, like, a 8 ten-minute break and then come back after -- 9 MR. VERMEERSCH: Sure, that's fine. 10 Yeah. 11 (RECESSED AT 2:47 P.M.) 12 (RESUMING AT 3:05 P.M.) 13 BY MR. VERMEERSCH: 14 1506 Q. Ms. Phillipowsky, we're going to 15 pull up RBMK00107_16, and my colleague will show 16 this to you. This is a comparison. 17 MR. HOOD: So I'll just put it -- is 18 this an important piece of equipment? 19 MR. VERMEERSCH: Not -- for the 20 reporter, so. 21 MR. HOOD: Okay. 22 BY MR. SMITH: 23 1507 Q. So my colleague is showing you 24 this video, and this is a comparison on the left 25 and the right-hand side, one without throttling,	359 1 without that restriction or that speed restriction? 2 A. That's right. Yeah, the one on 3 the right says "No Throttling." 4 1512 Q. Yeah. And in this particular 5 example, this is, again, comparing the performance 6 of streaming live TV from CBC, correct, using the 7 CBC Gem -- I don't know if it's an app or a 8 website, but... 9 A. It's a website, but I think 10 there's also an app. But this particular example 11 is a website. 12 1513 Q. Is just the website, not the 13 actual mobile application? 14 A. That's right. 15 1514 Q. Okay. So it's not testing the 16 actual application. It's directly through the 17 website, the CBC website? 18 A. That's right. 19 1515 Q. All right. We'll go to the next 20 one. RBMK00107_24. This is not a comparison and 21 appears to say "No Throttling." 22 A. Mm-hm. 23 1516 Q. So this is just the non-throttled 24 experience on a Windows PC through Chrome connected 25 to an Internet connection through a wireless
358 1 one with 512-kilobits-per-second speed; is that 2 correct? 3 A. I think that's correct. 4 1508 Q. Okay. Similar to the parameters 5 of the other two videos we looked at, these were 6 tests run using a Windows PC in Chrome, connected 7 to an Internet provider through a wireless 8 connection, correct? 9 A. Yes. 10 1509 Q. Okay. 11 MR. HOOD: I just want to be clear, I 12 mean, you keep calling them "tests." I think 13 they're not tests in the sort of official sense of 14 the word. They more just, like, experiments to see 15 what was -- what would happen if these can be 16 [indiscernible] applied. 17 BY MR. VERMEERSCH: 18 1510 Q. Fine. All right. I will use the 19 term "experiments," but they are performance 20 assessments performed by you as part of your 21 investigation, correct? 22 A. Yes. The purpose was to see what 23 the performance looked like. 24 1511 Q. Right. It was to test performance 25 at 512 kilobits per second against the performance	360 1 Internet router, correct? 2 A. Yes, I believe it's the same setup 3 as before. 4 1517 Q. And, again, this is now looking at 5 the performance of live TV on the CBC website, 6 cbc.ca; is that right? 7 A. Gem.cbc.ca. 8 1518 Q. Okay. Not through the CBC mobile 9 app? 10 A. That's correct. 11 1519 Q. And did you perform this test or 12 this -- I'm calling it a "test." I'm not trying to 13 put a qualifier or an assessment on it, but did you 14 perform -- 15 A. I made -- 16 1520 Q. -- the activities that are 17 underlying this particular screen-recording? 18 A. Yes. 19 1521 Q. All right. Good. We'll go now to 20 RBMK00107_37. 21 MR. HOOD: Was the last digit -- yeah, 22 okay. 23 BY MR. VERMEERSCH: 24 1522 Q. Now, this one, it says "Custom" on 25 the top bar of this particular screen. That

377 1 one or I think the last one, RBMK00107_449. So 2 does this screen-capture look familiar to you? 3 A. It does. 4 1610 Q. Okay. This one is different. 5 A. Yes. 6 1611 Q. So what's the difference here? 7 A. I see that the throttle is set 8 to -- I just need to make sure I see the amount of 9 zeros. So 90,000 kilobits per second. 10 1612 Q. Okay. Let's come to that in a 11 second. The setup is the same, Windows PC, 12 Incognito mode, Chrome browser, connected to a 13 wireless router through a wireless Internet 14 connection? 15 A. Yes. 16 1613 Q. And so what's the 9,000 kilobits 17 per second -- 18 MR. HOOD: I think she said 90. 19 BY MR. VERMEERSCH: 20 1614 Q. Sorry, did you say 90 kilobits? 21 A. I'm sorry. It's, yeah, 90,000, I 22 think. 23 1615 Q. Oh, sorry, 90,000. 24 A. Yes. 25 1616 Q. Okay. So what was the reason	379 1 1622 Q. Okay. And this is, again, through 2 the CBC Gem website, not the mobile application, 3 correct? 4 A. That's correct. 5 1623 Q. Okay. And so do you recall, 6 Ms. Phillipowsky, any other videos, live-streaming 7 videos, that you reviewed in 2022 as part of your 8 investigation other than the ones we've looked at? 9 A. Any additional recordings? 10 1624 Q. Not exactly. 11 A. Okay. 12 1625 Q. Not additional recordings but any 13 other live-streaming experiments you conducted, 14 either throttled at 512 kilobits per second or any 15 other speed, as part of your investigation? 16 A. I must have looked at other videos 17 but not necessarily recorded them. 18 1626 Q. Why do you say "must have"? 19 A. I have some recollection of 20 testing to make sure that this setup worked prior 21 to actually recording and making these videos. 22 1627 Q. Did you make any notes related to 23 those other setup videos that you reviewed? 24 A. No. 25 1628 Q. Okay. And have you conducted
378 1 behind selecting 90,000 kilobits per second? 2 A. I noticed that with the VPN, 3 through work, there was -- there were different 4 speeds. So I was just doing a test to see, setting 5 it at a certain speed. I picked 90,000, it seems, 6 just to experiment, just to see what it would be 7 like. 8 1617 Q. To see what the experience of 9 streaming video would be like? 10 A. To -- yeah, to go on the CBC Gem 11 website and stream this video. 12 1618 Q. Is there some significance to 13 90,000 in terms of -- does it convert -- does 14 90,000 kilobits per second convert to some number 15 in megabits per second? 16 A. Yeah, you can convert it to 17 megabits per second. Is that what you're asking? 18 1619 Q. Yeah. 19 A. Yes, so 1 megabit per second is 20 equal to a thousand kilobits per second, so... 21 1620 Q. So it'd be 90 megabits per second? 22 A. That's correct. 23 1621 Q. And did you pick that because of 24 some reference to mobile network speeds? 25 A. I can't recall.	380 1 any -- outside of the context of preparation or 2 anticipation of litigation, have you conducted any 3 other tests other than the ones we looked at since 4 2022? 5 A. And by "tests," you mean these 6 examples? Or -- 7 1629 Q. Yeah. 8 A. -- sorry, this type of -- 9 1630 Q. The type of -- 10 A. -- experiment. 11 1631 Q. -- screen-recording experiments 12 that we just saw. 13 A. Mm-hm. 14 1632 Q. Have you conducted any after 2022? 15 A. I can't recall. 16 1633 Q. Have you conducted any 17 throttled-speed experiments using applications of 18 any type since 2022 outside of those for the 19 preparation and anticipation of litigation? 20 A. I just want to read what you said. 21 MS. CYBULSKY: You want to read the 22 question? 23 THE WITNESS: Yeah, sorry. 24 I can't recall. 25 BY MR. VERMEERSCH:

TAB 16

Federal Court of Appeal



Cour d'appel fédérale

Date: 20160420

Docket: A-501-15

Citation: 2016 FCA 121

Present: STRATAS J.A.

BETWEEN:

AMGEN CANADA INC. AND AMGEN INC.

Appellants

and

**APOTEX INC. AND
THE MINISTER OF HEALTH**

Respondents

Dealt with in writing without appearance of parties.

Order delivered at Ottawa, Ontario, on April 20, 2016.

REASONS FOR ORDER BY:

STRATAS J.A.

Federal Court of Appeal**Cour d'appel fédérale****Date: 20160420****Docket: A-501-15****Citation: 2016 FCA 121****Present: STRATAS J.A.****BETWEEN:****AMGEN CANADA INC. AND AMGEN INC.****Appellants****and****APOTEX INC. AND
THE MINISTER OF HEALTH****Respondents****REASONS FOR ORDER****STRATAS J.A.**

[1] Apotex Inc. has brought a motion for an order dismissing this appeal as moot. The appellants, Amgen Canada Inc. and Amgen Inc. have responded. In Amgen's response, Amgen has raised an issue that Apotex did not address. If supported by the evidence, that issue may well prompt the Court to dismiss the mootness motion. But Apotex says that if it is permitted to offer evidence in reply, that issue will be eliminated.

[2] As we shall see, the Rules governing written motions do not expressly allow for evidence to be offered in reply. So Apotex has brought a motion within the mootness motion asking for leave to file this evidence in reply. Amgen opposes, submitting, among other things, that Apotex must satisfy the test for introducing fresh evidence on appeal. As is well-known, that test is a very difficult one to meet: *Palmer v. The Queen*, [1980] 1 S.C.R. 759, 106 D.L.R. (3d) 212; *Shire Canada Inc. v. Apotex Inc.*, 2011 FCA 10, 414 N.R. 270; *Brace v. Canada*, 2014 FCA 92.

[3] For the following reasons, Apotex succeeds on its motion and an order shall be issued on the terms described below.

[4] These reasons will say little about the particular facts of this appeal, the mootness motion, and the nature of Apotex's reply evidence. A sweeping confidentiality order covers this appeal and this motion. In any event, a detailed description of the facts and evidence is unnecessary.

A. The Federal Courts Rules

[5] A party bringing a motion in writing under Rule 369 must serve a motion record compliant with Rule 364. That motion record must contain a notice of motion, evidence required for the motion and written submissions or, in the case of motions falling under Rule 366, a memorandum of fact and law.

[6] A party responding to the motion must serve a responding motion record compliant with Rule 365(2). That motion record must contain evidence required for the motion and written representations or, in the case of motions falling under Rule 366, a memorandum of fact and law.

[7] Rule 369(3) provides that a moving party may reply to a responding motion record by filing written representations in reply. The Rule does not allow for reply evidence to be filed. Therefore, on a motion in writing, a party must seek leave of the Court in order to file reply evidence.

[8] Although Rule 369(3) is silent on the matter, the Federal Courts do have the jurisdiction to allow the filing of reply evidence:

- Rule 55 allows the court in “special circumstances” to vary or supplement a rule. In certain cases, the need to file reply evidence can constitute a “special circumstance.”
- Rule 3 requires the Rules to be interpreted and applied to “secure the just, most expeditious and least expensive determination of every proceeding on its merits.” Sometimes reply evidence must be filed for reasons of procedural fairness and to ensure that the Court has the evidence it needs to adjudicate a matter on the merits.

- Rule 4—frequently called the “gap rule”—provides that where the Rules do not speak to a procedure, we can look by analogy to other rules. As far as analogies are concerned, Rule 312 allows for additional affidavits to be filed in applications and, as a matter of procedure, reply evidence can be offered at trials.
- The Federal Courts have certain plenary powers that allow it to regulate procedures: *Canada (Human Rights Commission) v. Canadian Liberty Net*, [1998] 1 S.C.R. 626, 157 D.L.R. (4th) 385 at paras. 35-38; *Philipos v. Canada (Attorney General)*, 2016 FCA 79 at para. 10; *Canada (National Revenue) v. RBC Life Insurance Company*, 2013 FCA 50, 443 N.R. 378 at para. 36; *Mazhero v. Fox*, 2014 FCA 226 at para. 9. Procedural fairness and the need for the Court to have sufficient evidence before it to adjudicate a matter on the merits can trigger the use of plenary powers.

B. The principles to be applied

[9] Sometimes upon the filing of a responding motion record on a motion in writing, new issues arise. Or sometimes the responding motion record causes certain issues, understandably glossed over in the moving party’s motion record, to assume markedly greater importance or to be transformed.

[10] In such circumstances, considerations of procedural fairness and the need to make a proper determination can require the Court to allow the filing of reply evidence in a motion in writing:

- *Procedural fairness.* Sometimes a party has to be given the opportunity to file evidence on an issue that it could not practically or meaningfully address earlier.
- *The need to make a proper determination.* Where an issue in the motion might determine its outcome, sometimes the Court must allow additional evidence to be filed so that it can decide that issue on the basis of all proper and relevant facts, not just one side's version of the facts.

[11] The filing of reply evidence on a motion is permitted only in “unusual circumstances” where procedural or substantive considerations such as these are live: *Johnson & Johnson Inc. v. Boston Scientific Ltd.*, 2009 FCA 155 at para. 2. But caution must be exercised.

[12] At trial, it is a well-known rule of evidence that a plaintiff cannot split its case by adducing evidence on reply that is merely confirmatory of the case in-chief: *Allcock, Laight & Westwood Ltd. v. Patten* (1966), [1967] 1 O.R. 18. Instead, reply evidence must relate to issues raised in the defence's case that were not raised in the plaintiff's case in-chief: *Halford v. Seed Hawk Inc.*, 2003 FCT 141 at paras. 14-15. Further, there is good reason to restrict the admission of evidence on reply. As Wigmore argued, allowing a wide range of evidence could be unfair to the respondent who had supposed the case in chief would be the entire case to meet. It could also

create an unending alternation of successive fragments of the case coming forward: John Henry Wigmore, *Evidence in Trials at Common Law*, revised by James H. Chadbourn (Toronto: Little, Brown and Co, 1976) v. 6 at p. 672.

[13] Much guidance can also be found in the case law that has developed under Rule 312 concerning the admission of additional affidavits in applications. Additional affidavits are permitted only where it is “in the interests of justice”: *Atlantic Engraving Ltd. v. LaPointe Rosenstein*, 2002 FCA 503, 299 N.R. 244 at paras. 8-9. That means that the Court must have regard to whether:

- the evidence will assist the court (in particular, its relevance and sufficient probative value);
- admitting the evidence will cause substantial or serious prejudice to the other side;
- the evidence was available when the party filed its affidavits or it could have been discovered with the exercise of due diligence.

(*Holy Alpha & Omega Church of Toronto v. Canada (Attorney General)*, 2009 FCA 101 at para. 2; *Forest Ethics Advocacy Assn. v. National Energy Board*, 2014 FCA 88 at para. 6; *House of Gwasslaam v. Canada (Minister of Fisheries & Oceans)*, 2009 FCA 25, 387 N.R. 179 at para 4.) I note that this Court has applied these same factors in deciding whether a reply affidavit should be permitted to be filed in an application for leave to appeal under Rule 355, a rule that, like Rule

369(3), does not explicitly allow reply affidavits: *Quarmby v. National Energy Board of Canada*, 2015 FCA 19.

C. Adding conditions and making directions

[14] Rule 53 gives the Court the discretionary power to add any conditions to an order or make any directions that are just. On a motion for leave to file reply evidence, the parties should make submissions on whether, in light of the above considerations or in order to alleviate any prejudice, the Court should add conditions or make directions. For example, should provision be made for cross-examination of a deponent whose affidavit is being offered in reply? Is this the sort of exceptional situation where sur-reply evidence and associated cross-examinations are required? What is the time limit for these procedural steps?

[15] In exercising its discretion concerning conditions and directions, the Court must keep front of mind the requirement that proceedings generally—and motions in particular—must be conducted efficiently and fairly. Here again, Rule 3 must be mentioned: proceedings and motions are to be determined “on [their] merits” but “just[ly]...expeditious[ly] and [in a way that is] least expensive.”

[16] Procedures leading up to any judicial determination should be like a smooth highway leading directly to the destination. When the Court has to make an order concerning procedures, it should be nothing more than a small curve, not a set of potholes slowing everyone down—or worse—a detour.

D. Applying these principles to this case

[17] The issue is whether Apotex should be permitted to file reply evidence in the mootness motion and whether any conditions should be added or directions made.

[18] The issue is not whether Apotex should be allowed to file new evidence on the appeal. Accordingly, the cases Amgen cites (mentioned in para. 2 above), regarding the admission of fresh evidence on appeal, are irrelevant.

[19] In my view, the principles set out above support making an order allowing Apotex to file reply evidence in the mootness motion.

[20] To recap, the respondent's motion record in the mootness motion raises an issue that the moving party, Apotex, has not raised in chief in its original motion record. For that reason, Apotex has not yet filed evidence relevant to this issue. I am persuaded that the evidence Apotex proposes to file—a brief affidavit— is relevant to this issue.

[21] The need for the Court to make a proper determination weighs heavily in this case. The issue raised by Amgen is material and has the potential to affect the outcome of the mootness motion. If Apotex is not permitted to file its reply evidence, the Court might decide the mootness motion on an erroneous basis and work an injustice.

[22] I have also considered carefully whether Apotex should have been alert to the issue raised by Amgen and should have addressed it in chief in its original motion record. On the facts of this case, I consider this a close call. However, I am persuaded that the issue raised by Amgen in its responding record is new or has achieved an importance that Apotex could not have been reasonably anticipated when it filed its original motion record.

[23] In my view, an order allowing Apotex to file reply evidence will not work procedural unfairness or prejudice to Amgen, especially in light of the additional conditions I intend to impose.

[24] I have also considered whether Apotex, in not addressing the issue in chief, was engaging in the sort of unacceptable, tactical conduct that courts cannot countenance, especially given the litigation culture change prescribed by the Supreme Court of Canada in *Hryniak v. Maudlin*, 2014 SCC 7, [2014] 1 S.C.R. 87. As was said in *Apotex Inc. v. Bristol-Myers Squibb Company*, 2011 FCA 34, 91 C.P.R. (4th) 307 at para. 37, “[t]hose who disrespect the rules and their aims [set out in Rule 3] can hardly expect courts to smile upon them when they look for a favourable exercise of discretion under those rules”: see also *Pfizer Canada Inc. v. Apotex Inc.*, 2014 FCA 54, 117 C.P.R. (4th) 401 at para. 10. On this record, Apotex’s failure to deal fully with the issue now raised by Amgen in its responding record cannot be said to be the product of unacceptable tactics.

[25] Amgen asks for the opportunity to cross-examine the deponent of the reply affidavit Apotex files. This is fair. I will provide for this in my order.

[26] Amgen asks for the ability to file evidence on the mootness motion by way of surreply. Given the narrowness of the issue being addressed on reply, the narrowness of the reply evidence and Amgen's ability to put documents to the deponent on cross-examination, I am not convinced at this time of the need for surreply evidence.

[27] The narrowness of the issue being addressed on reply and the brief nature of the reply evidence suggest that the cross-examination will be brief and can be completed in the very near future.

[28] After the cross-examination is completed or the time for conducting a cross-examination has expired, Apotex shall file a reply record containing the reply evidence, the transcripts of any cross-examination, exhibits marked on the cross-examination, and any answers to undertakings.

[29] For clarity and to ensure that there is no later misunderstanding, the evidence in the reply record is admissible only on the mootness motion, not the appeal.

[30] In her discretion, the Judicial Administrator may refer to me any motions to answer refused questions on cross-examination. Upon the filing of the supplementary record, she may send the mootness motion to me for determination.

E. Disposition

[31] Apotex's motion to file reply evidence is granted with conditions attached. An order shall issue in accordance with these reasons. There shall be no costs of the motion.

“David Stratas”

J.A.

FEDERAL COURT OF APPEAL**NAMES OF COUNSEL AND SOLICITORS OF RECORD****DOCKET:**

A-501-15

STYLE OF CAUSE:AMGEN CANADA INC. AND
AMGEN INC. v. APOTEX INC.
AND THE MINISTER OF
HEALTH**MOTION DEALT WITH IN WRITING WITHOUT APPEARANCE OF PARTIES****REASONS FOR ORDER BY:**

STRATAS J.A.

DATED:

APRIL 20, 2016

WRITTEN REPRESENTATIONS BY:Andrew Shaughnessy
Andrew Bernstein
Yael Bienenstock
Nicole Mantini

FOR THE APPELLANTS

Nando De Luca

FOR THE RESPONDENT,
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Toronto, Ontario

FOR THE APPELLANTS

Goodmans LLP
Toronto, OntarioFOR THE RESPONDENT,
APOTEX INC.William F. Pentney
Deputy Attorney General of CanadaFOR THE RESPONDENT, THE
MINISTER OF HEALTH

TAB 17

Federal Court



Cour fédérale

Date: 20060804

Dockets: T-156-05
T-787-05

Citation: 2006 FC 953

Ottawa, Ontario, Friday, this 4th day of August 2006

PRESENT: MADAM PROTHONOTARY MIREILLE TABIB

BETWEEN:

ELI LILLY CANADA INC.

Applicant

- and -

APOTEX INC. and THE MINISTER OF HEALTH

Respondents

- and -

ELI LILLY AND COMPANY LIMITED

Respondent/Patentee

REASONS FOR ORDER

[1] "Be careful what you wish for...". The motion before me arises out of both parties having wished and having been granted leave to file reply and sur-reply affidavits without having

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first submitted a draft of the proposed affidavits. The result stands as a cautionary tale for those who would seek leave to file further affidavits, pursuant to Rule 312 of the *Federal Courts Rules*, without submitting the proposed affidavits as part of their motion record.

[2] The present motion is made in the context of an application by Eli Lilly Canada Inc. (“Lilly”) for a prohibition order pursuant to subsection 6(1) of the *Patented Medicines (Notice of Compliance) Regulations*, SOR 93-133 (the “*Regulations*”). By this motion Lilly seeks to strike a substantial portion of the sur-reply affidavits filed by Apotex Inc. (“Apotex”) pursuant to an order of this Court. That order, made on October 24, 2005 upon Lilly’s motion to strike parts of Apotex’s evidence and for leave to serve reply evidence, granted leave to Lilly to file “proper” reply evidence in respect of certain specified evidence of Apotex, and further, granted Apotex leave to file “proper” sur-reply evidence to Lilly’s reply.

[3] Although Lilly’s motion had identified the specific paragraphs of Apotex’s evidence which it desired struck or to which it wished to reply, Lilly had not tendered a draft of the affidavits it proposed to file in reply, nor, it seems, otherwise specified the scope or precise nature of the proposed reply. In response, Apotex took the position that if Lilly were to be permitted to file reply evidence, then it too, should be granted leave to file sur-reply. Obviously, at that time, Apotex could not define or circumscribe the issues upon which sur-reply evidence might be needed, let alone its nature and substance.

[4] In my opinion, the practice in which both parties engaged is to be discouraged. Whilst in some cases, the relevance, necessity and usefulness of additional evidence can appear on the face of the record, and therefore make it possible for leave to be granted without the support of the proposed affidavit, it is always far better for the proposed affidavits to be submitted to the Court on seeking leave. Not only does this better allow the Court to judge whether the criteria for granting leave have been met, but as this case demonstrates, it would permit the opposing side to determine in advance whether sur-reply evidence will be needed, to put before the Court a focused and precise draft of any proposed sur-reply, and ultimately would avoid motions to strike reply or sur-reply evidence, along with the significant waste of time and resources which these increasingly common motions represent.

[5] As the order of October 24, 2005 shows, the Court was satisfied that Lilly could not have anticipated Apotex's evidence or allegations as adduced or advanced, and granted it leave to file "proper" reply evidence in respect of specific paragraphs of Apotex's evidence. Presumably, in view of the large number of issues and wide scope of the leave granted – even as limited by reference to specific paragraphs – it was felt by the Court (and by Lilly whom I understand did not oppose Apotex's prayer for subsidiary relief) that there would likely be a need for sur-reply evidence. Again, I assume that all concerned expected that a motion by Apotex for leave to file sur-reply affidavits would be avoided if leave to file "proper sur-reply" evidence were granted in anticipation.

[6] Pursuant to the order, each party filed nearly as many affidavits in reply or sur-reply as they had filed in chief; the additional evidence filed by both parties consists of over 200 pages of affidavit text only, excluding exhibits. Lilly, having been permitted to reply to nine affidavits of Apotex, filed nine reply affidavits. While the evidence contained in these affidavits is generally restricted to what was specifically permitted by the order of October 24, the strict propriety of some of the evidence is questionable. There are substantial – and not necessarily justifiable – reiterations of previous evidence; some witnesses might have taken the opportunity to enlarge or supplement on prior evidence with little or tenuous value as “reply”; even if formally permissible, the relevance or usefulness of some of the evidence tendered is not always readily apparent. Still, Apotex chose to ignore any possible liberties taken by Lilly and did not challenge the propriety of any of the evidence tendered. Instead, Apotex filed 11 affidavits in sur-reply.

[7] Whereas it is arguable that Lilly took liberties with the authorisation it was given to file reply evidence (a matter I do not have to determine, as Apotex did not formally object to Lilly’s filing), I find Apotex’s filings to be a misuse of the privilege granted to it by the order of October 24, 2005.

[8] There is something that is inherently counter-intuitive in the proposition that evidence supposed to be in reply to something can be more voluminous and lengthy than that to which it purports to reply. The incongruity is all the greater when one realizes that the scope of Lilly’s

reply was specifically restricted to matters that had been raised for the first time by Apotex itself and on which Apotex had therefore already had a say.

[9] This inherent incongruity is not, however, the basis upon which I find Apotex's filings objectionable. The cause is in the general form and content of the affidavits. Most of Apotex's sur-reply affidavits, and more notably, those of Drs. Dordick, Jenike, Nagy, Castagnoli, and Brock, contain vast swaths of text that, if they refer at all to the evidence to which they purport to reply, do so in the broadest of terms, such as referring without discrimination to the affidavits of two or three witnesses, or worse, in some cases, to "Lilly's affiants" at large. This leaves the reader at a loss to understand and identify which of the statements purported to have been made in the replies are being attacked, where they might be found, and in some cases, whether they even exist. In the course of the hearing, this has resulted in several instances of counsel for Apotex leading the Court on a chase through the evidence in an attempt to pin parts of an affidavit to any part of Lilly's reply affidavits. In addition, in many cases, Apotex's affiants unnecessarily repeat, quote or restate at length what they have said in their previous affidavits.

[10] Good practice would dictate that a party, whose right to file additional evidence by way of sur-reply is defined solely by the criteria that it be "proper sur-reply", would identify with clarity and precision the exact statements or paragraphs of the reply to which it purports to sur-reply. To not do so is unfair to the other party and to the Court; Apotex's failure in this regard has turned

the hearing of this already long and complex matter into a frustrating game of hide-and-go-seek, and has substantially increased the time required to hear this matter.

[11] As a final point to this introduction, I should mention that the motion before me sought to strike and required the examination of 168 paragraphs of the sur-reply affidavits of Apotex, that the motion records comprised of over 800 pages, excluding authorities, that I have spent over twelve hours of personal preparation time prior to the hearings, have heard the parties on the merits of the motion (excluding scheduling conferences) for the equivalent of three full hearing days spread over three months, and have heard representations from six different counsel. I am intimately convinced that, had the parties been required to submit their draft affidavits in order to obtain leave to file them, they would both have been far more circumspect as to their scope and length, and this wasteful exercise would not have occurred.

APPLICABLE PRINCIPLES

Should admissibility be deferred to the Application Judge?

[12] At the outset of the hearing, as in their respective motion records, the parties' arguments placed substantial reliance on some of the principles applicable to preliminary motions to strike affidavit evidence filed pursuant to Rules 306 and 307, with Apotex urging that the issues raised

by Lilly should properly be left to be determined by the Application Judge, and Lilly seeking, if that were the case, that the Application Judge be designated immediately for that purpose.

[13] The parties' arguments on that issue fail to make a critical distinction between a motion to strike evidence filed pursuant to Rules 306 and 307 and a motion such as that at bar. While both may share the designation "motion to strike", the former seeks to attack, on grounds of admissibility, evidence filed by a party as of a right. In contrast, the motion before me seeks to strike an affidavit purportedly filed pursuant to a discretionary order of the Court, not on grounds of admissibility, as the term is commonly understood, but on the grounds that it does not comply with the conditions of the order pursuant to which it was filed. The former generally seeks rulings as to the admissibility of the evidence itself, that is, in terms of the laws of evidence and of its relevance to the pleadings; as such, the rationale for deferring these rulings to the Application Judge can clearly be seen.

[14] Here, with the exception of Lilly's argument to the effect that the evidence is inadmissible as being outside the scope of the NOA, Lilly's objections have no basis in relevance or admissibility as such, but call into issue whether or not Apotex's sur-reply evidence meets the criteria for filing additional evidence pursuant to Rule 312 and the terms of the order of October 24, 2005. Flowing from and being dependant upon a discretionary interlocutory order pursuant to Rule 312, the determination of whether the sur-reply evidence conforms with the

order of October 24, 2005 and should be allowed to stand on the record is a purely interlocutory and procedural matter. The Application Judge would be in no better position than any Judge or Prothonotary at an interlocutory stage to make that determination. Furthermore, it is obvious that the minutiae involved in reviewing the sequence of affidavits and determining whether specific paragraphs constitute “proper reply” would constitute a needless, time consuming and disruptive distraction to the determination of the merits of the application. Deferring its determination to the Application Judge would make as much sense as deferring the determination of a motion to file additional evidence pursuant to Rule 312 to the merits.

[15] I have therefore determined that unless an issue requires a determination of admissibility at law or of relevance, there is no justification for deferring the determination of Lilly’s motion to strike to the Application Judge.

What is “proper sur-reply”?

[16] The next issue to be addressed is that of the criteria that I should apply to determine whether Apotex’s evidence complies with the leave granted by the order of October 24, 2005.

[17] Latching onto the terms of the order of October 24, 2005, to the effect that Apotex was limited to “proper sur-reply”, Lilly urged the Court to apply the test for admissibility of reply

evidence as set out in *Halford v. Seed Hawk Inc.*, (2003), 24 C.P.R. (4th) 220 at 226; 2003 FCT 141 at paragraph [15]:

[15] “Consequently, I believe that the following principles govern the admissibility of reply evidence:

1 - Evidence which is simply confirmatory of evidence already before the court is not be allowed.

2 - Evidence which is directed to a matter raised for the first time in cross examination and which ought to have been part of the plaintiff's case in chief is not be allowed. Any other new matter relevant to a matter in issue, and not simply for the purpose of contradicting a defence witness, may be allowed.

3 - Evidence which is simply a rebuttal of evidence led as part of the defence case and which could have been led in chief is not be admitted.”

[18] This argument was presented to and dismissed by Justice Heneghan of this Court in *Abbott Laboratories et al. v. Canada (Minister of Health)*, (2003), 29 C.P.R. (4th) 450; 2003 FC 1512, at paragraphs [19] to [21]:

[19] “In my opinion, the strict test characterizing reply evidence in a trial does not necessarily apply in respect of proceedings taken under the Regulations. Such proceedings are dealt with by way of application; see *Bayer AG v. Canada (Minister of National Health and Welfare)* (1994), 58 C.P.R. (3d) 377 (F.C.T.D.). They are governed by Part 5 of the Rules.”

[20] “Those Rules are silent about filing reply evidence but Rule 312 provides for the filing of additional affidavits. The issue was considered in the context of the former Rules of the Federal Court in *Eli Lilly Co. v. Apotex Inc.* (1997), 76 C.P.R. (3d) 15 (F.C.T.D.), where the Court identified three factors that will be considered when a party seeks to file additional affidavit evidence: will the further *[page457]* evidence serve the interests of justice, will it assist the Court and will it cause substantial or serious prejudice to the other parties.”

[21] “Abbott here is attempting to impose a technical, legalistic meaning on the words “proper proceeding reply evidence” which is unwarranted. This is an application for judicial review, it is not a trial and the general rules concerning admissibility of evidence do not apply. The Prothonotary was adjudicating a motion to introduce further affidavits and in my opinion, she considered the appropriate factors as established in the existing jurisprudence.”

(Emphasis mine)

[19] This being said, I should add that I do not take the decision in *Abbott* to mean that the principles set out in *Halford* have no application whatsoever in a motion such as the present. Indeed, the *Abbott* decision confirms that the criteria for filing additional evidence in an application, including affidavits “in reply”, remain those set out for Rule 312 and that in determining whether an affidavit filed pursuant to conditional leave is “proper”, regard must be had to these criteria. The application criteria of Rule 312, as set out by the Federal Court of Appeal in *Lapointe Rosenstein v. Atlantic Engraving Ltd.*, (2002) 23 CPR (4th) 5, explicitly and implicitly echo some of the same principles as are set out in *Halford*. For instance, a condition of admissibility of additional evidence is that it must not have been available prior to cross-examinations, and that a party may not be allowed to split its case. Furthermore, the

disallowance of evidence that is simply confirmatory, expressed as a specific “rule” in *Halford*, would equally be of relevance in considering the other criteria of Rule 312, to the effect that the evidence must be of assistance to the Court and serve the interest of justice.

[20] In my opinion, *Abbott* merely cautions against the strict application of the characterization of “proper reply” in *Halford* to motions to strike evidence filed pursuant to an order under Rule 312. In the end, such motions are to be determined in light of the same criteria as a Rule 312 motion, which may well include consideration of whether the evidence constitutes “proper reply”. Indeed, the responsive nature of the evidence was a specific issue upon which Prothonotary Aronovitch’s underlying decision in *Abbott* turned and was upheld.

[21] As matters turned out, in the course of the hearing before me, Mr. Radomski for Apotex specifically endorsed and agreed with the principle that the very first criterion to be considered and determined for every impugned paragraph is whether it is properly responsive to the reply evidence filed by Lilly. If the impugned paragraph were found not to be “proper reply”, that is, not properly responsive to Lilly’s reply evidence, then it should be struck. If, on the other hand, the evidence is found to be responsive, but its admissibility is still contested by Lilly on the grounds of case-splitting or that it goes beyond the scope of the NOA, further consideration of the criteria applicable to supplementary evidence and of the spirit and intent of the order of October 24, 2005 would be required. Lilly also agreed with that approach.

[22] Addressing the responsive nature of the sur-reply as a first step not only had the advantage of meeting with the consensus of both parties, but is, in my view, the appropriate approach in the circumstances.

[23] Unlike the initial leave to file additional evidence granted in *Abbott*, which was made in the context of case management and specifically contemplated the possibility of a challenge as to the “propriety and scope” of the reply evidence, the order of October 24, 2005 in this matter does not contemplate a specific mechanism for controlling the propriety and scope of Apotex’s permitted sur-reply evidence; it simply grants leave to Apotex to file “proper sur-reply to the Applicant’s reply evidence”. In my view, the order of October 24 must be taken as having determined that evidence filed by Apotex in direct sur-reply to the reply of Lilly would *prima facie* meet the requirements of Rule 312 and should be permitted to be filed without further motion. Thus, if the material filed by Apotex in sur-reply is unresponsive to the reply affidavits filed by Lilly, it is simply not in compliance with the terms of the leave granted and must be struck. If, however, it is responsive, then Lilly would have to overcome the presumption created by the order of October 24 to the effect that the evidence should be allowed to be filed pursuant to Rule 312, subject to determination of admissibility on the merits.

The criteria for responsiveness

[24] As for the criteria by which the responsive nature of the sur-reply evidence should be judged, I have adopted the following, as suggested by counsel for Apotex:

- Evidence should address directly what is in fact said in the reply evidence.
- For evidence to be responsive, it must contradict, qualify or impeach what is stated in the reply evidence.
- It is not enough that the sur-reply be on the same subject-matter, related or relevant to the reply evidence.
- It is not a proper sur-reply to attack the conclusion reached by one expert in his reply affidavit on the basis of an argument different from that which forms the basis of the reply affidavit. In other words, the sur-reply must address, impeach or qualify the specific analysis or argument made in the reply affidavit, not merely its conclusion.

[25] In the course of applying these general principles to the specifically impugned paragraphs, I have further followed the following approach:

- Where an affidavit expressly purports to reply to a specific argument, affidavit or paragraph of an affidavit, it must be responsive to that specific evidence. Counsel may not sift through the component parts of its and its opponent's evidence and suggest how

the individual components of its sur-reply might otherwise validly be used to address, impeach or qualify other aspects of the reply evidence. The evidence herein consists of complex technical and scientific expert evidence. Counsel may not invent or supply evidence linking its expert's testimony to other parts of the evidence where that link is, *prima facie*, not intended by the express words of the affiant.

- While it is not fatal to an affidavit to fail to identify specifically the statements to which it purports to reply, the Court will not presume responsiveness merely because it uses the same terminology or is on the same subject matter as the reply evidence. Affidavits in such a case must be demonstrated to be in fact responsive, upon a fair reading of both the impugned affidavit and that to which it appears to respond.
- The statements contained in an affidavit and to which an affiant purports to reply must be given a fair reading, taking into account their context and the purpose for which they are made. A sentence cannot be taken out of context to provide an opportunity to expand on a subject which is not germane to the argument being made.

[26] Finally, I will admit to having taken a fairly strict view of responsiveness. NOC proceedings are meant to be summary in nature. Additional evidence beyond that contemplated in Rules 306 and 307 is not filed as of a right, but upon leave; it should not be perceived as a natural or inevitable part of NOC proceedings and when allowed, should be used with restraint. Sur-reply evidence should, all the more, be considered an exceptional step and be limited to essential

and vital points. It is not an exercise in having the last word on all issues. It is not the natural conclusion of a “new round” of evidence.

[27] In particular, where the sur-reply evidence introduced new studies and publications that directly support and bolster the opinions expressed in Apotex’s original affidavits, and frankly smacked of case-splitting, I have been particularly vigilant in ensuring that Lilly’s reply affidavits had indeed fairly invited and justified the introduction of this new evidence in sur-reply, and that the link between the sur-reply and reply was clearly made. To do otherwise would, I believe, have been prejudicial to Lilly and not have been in the interest of justice. Although Lilly, in crafting its reply evidence, had to expect criticism of its evidence by way of sur-reply, it was still entitled to assume that Apotex had put forward its case in full, and that it could critique it on that basis. Where, on a fair reading of Lilly’s reply, it appears that the experts are critiquing Apotex’s evidence or its sufficiency as presented, it would be prejudicial, and would not be of assistance to the Court, to allow Apotex to supplement its case under the guise of a reply.

[28] On the other hand, I have let stand passages of the sur-reply evidence that repeated or reiterated previously given evidence, even when their responsiveness was tenuous, as I could see no prejudice to Lilly in so doing.

APPLICATION TO THE FACTS

[29] In the end, all decisions to strike paragraphs or parts thereof were arrived at on the sole basis of lack of responsiveness. On that basis, I struck all or parts of 140 paragraphs, together with some 60 exhibits referred to therein. The remaining paragraphs were found to be responsive, and thus in compliance with the order of October 24, 2005; Lilly either did not attempt or did not succeed in persuading me that these paragraphs should be struck on a preliminary motion on any other ground.

[30] There being but one ground upon which parts of Apotex's sur-reply evidence were struck, it would be excessively long, and of limited use to review each paragraph individually in these reasons. Determination was made on a paragraph-by-paragraph basis in the course of the hearing, and parties advised verbally of the specific reasoning behind each determination. It may, however be of use to explain by way of a few examples, of how the principles outlined above applied to the facts and circumstances herein.

[31] The issue of an association or causal link between the use of Olanzapine and diabetes provides several relevant examples of how I applied the principles set out above to the particular circumstances of this case.

[32] Several of Apotex's experts, in their initial responding evidence, opined that Olanzapine use was associated with the development of diabetes, and cited diabetes as a side-effect of Olanzapine. Lilly's reply to that issue is contained in the affidavits of Drs. Williams and Nair.

[33] Dr. Williams' affidavit addresses this issue by drawing a difference between showing an association and proving causation. Dr. Williams' affidavit argues that references showing an association do not necessarily constitute evidence of causation, and explains the basis for his opinion. To explain the basis for his argument, he refers to a selection of studies, not referred to by Apotex's witnesses, which consider the relationship between the diseases being treated with Olanzapine and diabetes. He admits these studies are not exhaustive on the subject, and states the basis upon which he chose to rely on them. He concludes that the references relied upon by Apotex's witnesses do not demonstrate a causal link and at most, show a possible association.

[34] Dr. Nair essentially does the same exercise, although his affidavit states specifically that it replies to the original affidavit of Dr. Dordick, for Apotex, and is quite specific that it relies on the affidavit and studies cited in Dr. Williams' affidavit. Indeed it is clear on a fair reading of Dr. Nair's affidavit as a whole that the exercise he has conducted was to analyse the studies relied upon by Dr. Dordick and those cited by Dr. Williams and to give his opinion as to which set of studies is most conclusive. His conclusions are, as for Dr. Williams, to the effect that the studies so analysed do not prove causation.

[35] It should also here be mentioned that Dr. DiFonzo has also sworn a reply affidavit on behalf of Lilly in relation to the diabetes issue. However, Dr. DiFonzo is not tendered as an expert witness: his qualifications are not set out, and he presents himself as the Associate V.P. of Regulatory Affairs and Quality Compliance for Lilly. His affidavit does contain a brief statement of his understanding of whether scientific studies to date suggest or prove an association between Olanzapine and diabetes, but the affidavit as a whole is directed essentially to introducing Lilly's Canadian product monograph for Zyprexa, offering a risk-benefit analysis of treatment with Olanzapine and discussing off-label sales of Zyprexa.

[36] None of the impugned sur-reply evidence led by Apotex on the issue of diabetes address the basis and reasoning of Dr. Williams' argument as to how causation, as opposed to association, should be proven and as to the limitations of various types of studies, such as retrospective studies and studies with small populations, in proving causation. None address the manner in which Dr. Nair analyses the studies cited by Dordick and Williams, and how that analysis supports his conclusion.

[37] Instead, Dr. Brock discusses the history of diabetes, its correlation with weight gain and hyperglycaemia, and the association between the use of Olanzapine, weight gain, hyperglycaemia and diabetes, to conclude that there is indeed an association between Olanzapine use and diabetes. This affidavit is not responsive to anything contained in the Williams, Nair or even DiFonzo

affidavits, except perhaps to the very broad conclusions contained therein to the effect that a causal relationship between Olanzapine use and diabetes has not been established by Apotex. Even so, it is obvious that these broad conclusions are premised on these experts' own definition of "causation", which Dr. Brock does not address.

[38] Thus, the evidence is not responsive, on the criteria agreed to by Apotex's counsel at the hearing, as it merely disputes the conclusions of Lilly's reply affidavits, without addressing, impeaching or qualifying their specific analysis or the arguments upon which they were made.

[39] Similarly, Dr. Mayersohn, specifying that he was replying to Dr. Williams' affidavit, cites and introduces at paragraphs 11 to 20 eleven new studies and publications which support his conclusion that there is a "direct connection", "an association", a "relationship" between Olanzapine use and the incidence of diabetes. He does not discuss the distinction made by Dr. Williams between association and "causation". He does not address Dr. Williams' criticism about the limitations of retrospective studies – indeed, on the face of the affidavit, half of the new studies produced are retrospective studies. These paragraphs, again, simply attack the conclusion found in a specific paragraph of Dr. Williams' affidavit without discussing or expressly taking into consideration the basis for that conclusion. It is an instance where the affiant merely introduces additional evidence to support or bolster a conclusion previously given in chief, the

foundation for which was criticized in reply, without addressing the substance of the criticism. It is not responsive.

[40] These paragraphs, as well as several paragraphs of Dr. Dordick's sur-reply affidavit addressing new studies showing better or stronger links or associations between Olanzapine and diabetes were struck as being unresponsive. However, they also stand as examples of Apotex improperly splitting its case, since new evidence going to the same conclusions and facts as given previously is added after Lilly had responded to the evidence as initially presented. If this sur-reply evidence is allowed to stand when it does not closely track the reasoning of Lilly's reply, it then becomes evidence which Lilly does not have an opportunity to address directly, and is prejudicial. It also has the potential of leaving the hearing Judge with only one side of a new argument, which cannot be of assistance to the Court.

[41] This result is to be contrasted with the production, by Apotex in sur-reply, of the "Koro" and "Fuller" studies (Exhibits "B" and "C" of Dr. Dordick's sur-reply evidence). These studies appear to have been relied upon, but neither identified nor produced, in Dr. Dordick's initial affidavit. Dr. Nair, in reply, criticizes Dr. Dordick for this failure, but nonetheless makes an assumption as to the identity of the studies, and then proceeds to make his own analysis of them – yet without identifying or producing the studies. In sur-reply, Dr. Dordick finally confirms that Dr. Nair has correctly identified the papers. He then cites, produces and further comments on

them. I agree with Lilly that this is a form of case-splitting. However, that evidence clearly is responsive to Dr. Nair's. Furthermore, the "outing" of the shadow papers cannot prejudice Lilly, as it had to expect that possibility when it chose to guess at and comment on the unidentified studies. It is further clearly in the interest of justice that the Judge on the merits have the actual text of the studies before him or her, rather than simply each expert's conflicting views thereon.

[42] I will provide one final example. In Schedule "A" of its written representations, Apotex relies on paragraphs 6(d) and 67 of Dr. Williams' affidavit as justification for the responsiveness of several paragraphs of its sur-reply. Paragraphs 6(d) and 67 of the Williams affidavit contain general statements to the effect that Olanzapine shows substantial advantages over the other members of the genus described in the '687 patent. These statements are, I understand, a summary of conclusions and evidence already contained in Lilly's evidence in chief. They are made in the context of the broader argument that the presence or absence of diabetes was not, in any event, the basis for the selection of Olanzapine from the genus of the '687 patent. The statements are, further, bare assertions, without a substantive discussion. Yet Apotex has tendered evidence expanding on the validity of the Olanzapine patent as a selection patent, in the guise of a sur-reply to these statements. Such evidence is not "proper sur-reply". It may relate to a specific statement in an affidavit, but cannot be responsive, as a fair reading of the affidavit in which it is found shows that the statement is not the point being made, nor is one which forms the effective basis of the argument developed in the reply. "Responding" to such a statement does not serve to address, impeach or qualify the specific analysis or argument made.

COSTS

[43] Lilly originally presented its motion seeking, as its preliminary relief, the appointment of the hearing Judge for the purpose of determining the remainder of its motion to strike. After an initial scheduling telephone conference, Lilly maintained that order of proceeding and it was decided that the hearing would proceed in two parts, allowing Apotex to respond to the preliminary relief in a separate record. On the day scheduled for the hearing of the preliminary part, Lilly resiled from its initial position and submitted that the main body of the motion to strike should be heard first, with the appointment of the hearing Judge relegated to a subsidiary relief in the event the Court decided to defer determination of admissibility to the hearing Judge. Apotex's costs of travel and attendance at a half-day hearing and the preparation of a separate motion record were therefore thrown away and Apotex shall have its costs therefore. The scale, however should be the middle of Column III of the Tariff; Lilly's argument, while novel, was not unduly complex and the material not voluminous.

[44] As for the main part of the motion, Lilly was ultimately successful for over 80% of the impugned paragraphs. It should have its costs of the motion. I am not however prepared to award costs at a scale higher than the middle of Column III of the Tariff. Awarding costs on that scale does compensate Lilly for the length of the hearing since the Tariff takes into account the number of hours spent. While the evidence was certainly complex and voluminous due largely to the nature, scope and form of Apotex's impugned sur-reply, a conservative scale serves to take

into account the partial success of Lilly's motion, and the fact that Lilly's material and argument missed the essential issue of responsiveness; Lilly's motion material was instead based on arguments of reiteration, case-splitting and the scope of the NOA, which were not retained. Lilly's choice of argument, and the way in which its material was consequently structured, resulted in a hearing that was more disorganized and therefore lengthier than it should have been.

"Mireille Tabib"

Prothonotary

FEDERAL COURT**NAME OF COUNSEL AND SOLICITORS OF RECORD**

DOCKETS: T-156-05 and T-787-05

STYLE OF CAUSE: ELI LILLY CANADA INC. v.
APOTEX INC. and THE MINISTER OF HEALTH
- and - ELI LILLY AND COMPANY LIMITED

PLACE OF HEARING: Ottawa, Ontario

DATES OF HEARING: March 8, 21 and 24; April 18, 20 and 27; and June 7,
2006

REASONS FOR ORDER: MADAM PROTHONOTARY MIREILLE TABIB

DATED: August 4, 2006

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Mr. Jay Zakaib
Dr. John Norman

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24p.

TAB 18

Federal Court		Cour fédérale

Date: 20090915

Docket: T-1610-08

Citation: 2009 FC 914

Ottawa, Ontario, September 15, 2009

PRESENT: The Honourable Mr. Justice Zinn

BETWEEN:

**MERCK-FROSST - SCHERING PHARMA GP
and SCHERING CORPORATION**

Applicants

and

**THE MINISTER OF HEALTH and
NOVOPHARM LIMITED**

Respondents

REASONS FOR ORDER AND ORDER

[1] Novopharm Limited (Novopharm) seeks to set aside and reverse the Order of Prothonotary Milczynski dated August 13, 2009, dismissing its motion for leave to serve and file reply evidence.

[2] It is well established that the Court should not interfere with discretionary orders of a prothonotary, such as that under appeal, unless the questions raised are vital to the final issue in the case or the order is "clearly wrong" in the sense that the exercise of discretion was based upon an

incorrect principle of law or upon a misapprehension of the facts. In that event, the Court must exercise its discretion anew.

[3] The motion did not deal with any matter vital to the final issues and accordingly my analysis is restricted to determining whether the Prothonotary's Order was clearly wrong in the sense that the exercise of discretion was based upon an incorrect principle of law or upon a misapprehension of the facts.

[4] This application was commenced on October 12, 2008, by the Applicants under the *Patented Medicines (Notice of Compliance) Regulations* (the Regulations). Novopharm has applied for approval to market a generic version of the drug EZETROL® ezetimibe which the Applicants assert is covered by Canadian Patent 2,172,149 (the '149 Patent).

[5] As appears to have become common-place in NOC matters, both parties rigorously avoided specificity in the early stages of the proceeding. Novopharm filed a Notice of Application (NOA) with the Minister that was aptly described by the Applicants to have been "very broad" and which cited 223 pieces of prior art which were claimed as relevant to the '149 Patent. The Applicants responded with a Notice of Application that Novopharm aptly describes as being "devoid of substance." Although it contains some 48 paragraphs relating to the specifics of the NOA, it is not much of an exaggeration to say the response to the NOA could have been reduced to a single paragraph, paragraph 25 of the application, which reads as follows:

Each and every allegation in the NOA is unjustified. Each and every matter of opinion alleged in the NOA is wrong. Each and every fact

alleged is false. Each and every assertion of law is incorrect. Each and every conclusion, inference or step of logic is incorrect and unsupported by the basis alleged.

[6] The sequencing of evidence was ordered reversed from the usual practice; Novopharm served its Rule 307 evidence before the Applicants served their Rule 306 evidence. Novopharm served three affidavits: the affidavit of Dr. John Sutherland, an expert, and two non-expert affidavits. The Applicants served 7 affidavits: the affidavits of 5 experts Dr. Antonio M. Gotto, Dr. Neal Castagnoli, Dr. John Clader, Dr. Leslie Z. Benet and Professor Mark Wentland, and two non-expert affidavits.

[7] Novopharm sought leave to file one affidavit in reply to the affidavits of the Applicants' experts. Its motion was accompanied by an affidavit of a law clerk employed by the Respondent's counsel in which she swears as follows at paragraph 16:

I am informed and verily believe that the document attached as Exhibit "J" to my affidavit constitutes the reply evidence Dr. Sutherland will attest to if leave to file reply evidence is granted.

[8] Exhibit "J", the proposed reply evidence, is an unsworn affidavit of Dr. John Sutherland.

Paragraphs 1 to 3 are relevant for the purposes of this appeal.

1. I am the same John D. Sutherland who swore an affidavit on April 6, 2009. I have reviewed the following affidavits, all of which I received only on July 6, 2009:

(a) The Affidavit of Mark Wentland, sworn July 3, 2009.

(b) The Affidavit of Leslie J. Benet, Ph.D., sworn July 2, 2009.

(c) The Affidavit of Dr. John Clader (Inventor), sworn June 26, 2009.

(d) The Affidavit of Neal Castagnoli, Ph.D., sworn July 2, 2009.

2. I disagree with a number of the statements made in those affidavits, but have been asked by counsel for Novopharm to restrict my comments to matters that I could not have anticipated before reviewing these affidavits. I have limited the evidence that follows, accordingly.

3. My evidence directly responds to the following:

(a) Dr. Wentland's comparison of in vivo activity of the cis series compounds with their otherwise identical trans counterparts in the 007 Patent;

(b) Conclusions of Dr. Wentland, Dr. Benet and Dr. Castagnoli which are based on the skilled person having hindsight knowledge of the ezetimibe structure or invalid assumptions about the C4 substituent;

(c) Dr. Wentland's assertion that the skilled person would have relied upon logP calculations in respect to the compounds of the 007 Patent;

(d) Comparisons, examples and assertions of Dr. Wentland, Dr. Benet and Dr. Castagnoli pertaining to the skilled person's expectations about benzylic hydroxylation and the N1 phenyl group at the *para*-positions;

(e) The assertions of Dr. Benet and Dr. Castagnoli that the skilled person would have assumed metabolites were inactive; and

(f) The assertion of Dr. Benet and Dr. Castagnoli that the skilled person would have considered (1) phase II biotransformation in designing a compound and (2) that the possibility of glucoronidation would have taught away from a *para*-substituted C4 phenyl ring.

[9] The “007 Patent” referenced in the affidavit is a reference to Canadian Patent 2,114,007. Novopharm, in its NOA, asserts that claims 1, 2, 4, 5, 7 and 9 of the ‘149 Patent are inevitably anticipated by the 007 Patent.

[10] In considering the motion to file reply evidence, the Prothonotary correctly set out the relevant test as enunciated in *Pfizer Canada v. Canada (Minister of Health)*, 2007 FC 506, *Eli Lilly Canada v. Apotex Inc.*, 2006 FC 953, and other decisions of this Court. The test has four components as follows:

- (i) whether the further evidence serves the interests of justice;
- (ii) whether the further evidence assists the Court in making its determination on the merits;
- (iii) whether granting the motion will cause substantial or serious prejudice to the other side; and
- (iv) whether the reply evidence was available and/or could not be anticipated as being relevant at an earlier date.

[11] Novopharm submits that the decision of the Prothonotary was clearly wrong in the following respects:

- (i) She based her decision on a wrong principle by requiring sworn evidence from Dr. Sutherland as to why the evidence proposed in reply was not available and could not have been anticipated in his affidavit in chief;
- (ii) She based her decision on a wrong principle by holding that reply evidence that contradicts or critiques the Applicants' evidence does not constitute proper reply evidence; and
- (iii) She based her decision on a misapprehension of the facts, finding that "the proposed reply seeks to contradict or critique the Applicants' evidence, and have the 'last word' on the points of critique aimed at Dr. Sutherland's original affidavit, when in fact the proposed response does not merely address the points of critique but new purported facts and matters raised by the Applicants for the first time in their evidence.

[12] The Prothonotary makes much of the fact that the proposed reply evidence was contained in an unsworn affidavit of Dr. Sutherland and that he had not sworn an affidavit swearing that the proposed reply evidence was not available and/or could not be anticipated by him as being relevant at an earlier date:

It should be noted from the outset that the proposed reply affidavit of Dr. Sutherland was not sworn, and was before the Court as an exhibit to the affidavit of a law clerk for counsel for Novopharm. There was also no affidavit from Dr. Sutherland upon which the Court could assess some of the factors to be taken into consideration on a motion under Rule 312, in particular whether the evidence proposed in reply was available and could or could not be anticipated in the first round, and whether the proposed reply evidence would be of assistance to the judge hearing the application on its merits. By shielding Dr.

Sutherland from cross-examination, the Court is left on this motion with Novopharm's arguments on these points.

[13] The Prothonotary later describes the consequences of filing an unsworn proposed reply affidavit:

In respect of whatever might be considered to be “new” in Dr. Sutherland's proposed reply, *it is also not clear in Novopharm's record by way of admissible evidence, why Dr. Sutherland could not anticipate or include the information in his original affidavit. Having shielded him from cross-examination on these points, and relying upon unsworn assertions, the Court cannot adequately weigh the factors on this motion and find that Novopharm is not splitting its case.* (emphasis added)

[14] In large measure the Prothonotary adopted the submissions of the Applicants on these issues as set out in paragraphs 5 to 7 of their Memorandum on the motion before the Prothonotary.

[15] The Applicants submit that although the Prothonotary pointed out that there was no admissible evidence of Dr. Sutherland's subjective view as to whether or not he could have anticipated the evidence as being relevant at an earlier date, she did go on to do an objective assessment as to whether the evidence was “new”.

[16] With great respect to the Prothonotary, I find that she placed far too great an emphasis on the fact that the affidavit was not sworn and that her analysis as to the newness of the proposed reply evidence was flawed.

[17] Contrary to the view expressed by the Prothonotary, an affidavit in which the affiant states that the evidence proposed in reply could not have been anticipated earlier as being relevant is of marginal, if any, value. It is unlikely to warrant any greater weight than an affidavit from the opposite party, such as was provided in this case, in which an affiant swears that the evidence proposed in reply could have been anticipated. In this respect, I agree with the comment of Prothonotary Tabib in *Solvay Pharma Inc. et al. v. Apotex Inc. et al.* (T-427-06, June 15, 2007), quoted by Prothonotary Aalto in *Astrazeneca Canada Inc. et al. v. Novopharm Limited et al.*, 2009 FC 902:

I would add, as a general comment, that the bald statement by any expert that he or she could not have anticipated a certain approach or argument, or that a certain approach or argument is not in the notice of allegation, should be accorded very little weight, if any. To the extent the matter can be assessed on the plain reading of the notice of allegation and affidavits by a lay person, then a bald statement by an expert to the contrary will not carry weight. To the extent the assessment cannot be made without an expert's assistance, then a bald statement is of no assistance in understanding or justifying the subtle distinctions that apparently need to be made.

[18] What is required is an analysis of the materials filed and proposed to determine on an objective analysis whether the proposed reply evidence could reasonably have been anticipated as relevant. That was not done in this case as the learned Prothonotary permitted form to rule over substance.

[19] It is certainly true that the proposed reply affidavit of Dr. Sutherland was unsworn; however, that is not an uncommon or objectionable way of proceeding in such motions. Therefore, that fact alone ought not to have been fatal to Novopharm's application. Moreover, the unsworn affidavit

was an exhibit to a sworn affidavit that attested that if reply evidence was allowed, it would be sworn, served and filed in the form that was before the Prothonotary. Accordingly, it was entitled to be given more consideration than a mere unsworn statement alone.

[20] Although the burden was on Novopharm to show why reply evidence was required, the Applicants do not appear from the record to have indicated any desire to cross-examine Dr. Sutherland on the proposed affidavit prior to the motion. It is simply inappropriate to suggest, as it was, that he was “shielded from cross-examination” by Novopharm.

[21] The focus of the Prothonotary’s decision, and of the Applicants in opposition to the motion, was that the proposed reply evidence failed to meet the fourth test set out above at paragraph 10. No submissions were made before me that the first three tests had not been met and based on my review of the proposed evidence and the record, I am satisfied that the proposed reply evidence does meet the first three parts of the test for the reasons set out in paragraphs 12 to 16 of Novopharm’s Memorandum filed on the motion before the Prothonotary.

[22] When examining whether the proposed evidence is proper reply evidence that was not available and/or could not be anticipated as being relevant at an earlier date, the following two step analysis is required.

[23] The first step is to ask whether the proposed evidence is properly responsive to the other party’s evidence. It is responsive if it is not a mere statement of counter-opinion but provides

evidence that critiques, rebuts, challenges, refutes, or disproves the opposite party's evidence. It is not responsive if it merely repeats or reinforces evidence that the party initially filed.

[24] In my view the Prothonotary over-stated the law when she held that “engaging in a debate, critique, argument, rebuttal or disagreement is not proper reply – but may more properly [be] the subject of cross-examination and/or argument.” The Prothonotary’s statement is accurate only if there is nothing new in the evidence to which a reply is proposed. If the evidence to which the reply is proposed relates to evidence that is new and was not previously considered relevant by that first party, then it may well be proper reply evidence.

[25] If the proposed evidence is found to be responsive, one must then ask whether it could have been anticipated as being relevant at an earlier date. If it could have been anticipated earlier to be relevant, then it is being offered in an attempt to strengthen one’s position by introducing new evidence that could and should have been included in the initial affidavit. Such evidence is not proper reply evidence as the party proposing to file it is splitting his case. A party must put his best case forward for the other to meet, he cannot lie in the weed and after the party opposite has responded file additional evidence to bolster his case in light of the defence that has been mounted. It is improper because it could have been filed in the initial instance and the other party now has no opportunity to respond to it.

[26] It can be a difficult task to analyze whether the proposed reply evidence could have been anticipated as relevant, particularly in NOC applications where there is such an abundance of

scientific evidence available that may or may not be relevant based on the claims advanced by the second party as defined in the Regulations and the defence submitted by the first party. In this respect, I whole-heartedly endorse the following observation of Prothonotary Aalto in *Astrazeneca* at para. 15:

It is not for a generic/respondent to speculate [where the filing of evidence has been reversed] in its evidence as to every piece of evidence that an applicant may choose to put forward to support its application. This is especially so, as noted, where the notice of application contains mere denials.

[27] In this case the Prothonotary concluded that the proposed reply affidavit did in fact address the six matters set out at paragraph 3 of Dr. Sutherland's affidavit, set out above, finding that it "relates the analysis to the Applicants' evidence." It was therefore found to be responsive. However, in my view, she then failed to conduct a proper second step analysis.

[28] The Prothonotary saw the proposed reply evidence as seeking to contradict or critique the Applicants' evidence without first examining whether the areas that it sought to contradict or critique were matters that Novopharm could not have anticipated would be relevant.

[29] Novopharm is alleging that claim 21 of the '149 Patent is invalid under the *Patent Act*, as obvious in light of the state of the art at the relevant time. It was certainly foreseeable that the Applicants would file evidence disagreeing that claim 21 was obvious. To the extent that the Applicants' evidence is that Dr. Sutherland's analysis is faulty or misleading, that response and perhaps the details of it are unlikely to generate proper reply evidence. In such a circumstance,

while arguably responsive, reply evidence in most instances would not be proper as it would likely be a reiteration of previously made points or a boot-strapping exercise.

[30] However, to the extent that the Applicants' evidence is that claim 21 was not obvious and they set out reasons why that is so, those reasons and the facts behind them are likely to warrant reply evidence, as they are new. Further, where the Applicants' evidence is that Novopharm's expert is wrong in his opinion and they are not merely challenging his science but are raising new matters by way of different science, different authorities, different assumptions, and the like, that too at first blush will raise new matters that may require reply. While this type of evidence may be said to respond to the evidence of Novopharm in a very general and overarching manner, the detail of it may well be new. Novopharm could anticipate that some science and argument would be put forward for the inventiveness of the claim and challenging its expert's evidence, however, it need not deal with every argument it can anticipate being put forward because, until the Applicants put forward their evidence Novopharm has no way of knowing which of the possible arguments and supporting evidence it may have anticipated are truly relevant. To require it to do so earlier will result in lengthy affidavits containing many irrelevant paragraphs of "anticipatory evidence".

[31] I turn now to consider the proposed reply affidavit evidence anew. In doing so, I acknowledge that Dr. Sutherland may have repeated some assertions in his initial affidavit in order that his proposed reply reads well. That is unobjectionable. Further, it is appropriate to acknowledge that the Court is not skilled in the science of chemistry as are the parties' experts. Accordingly, it is inappropriate at this early stage of the litigation to parse each sentence or

paragraph in detail to ascertain whether it is truly reply evidence. In my view, at this stage, it is better to err on the side of inclusion in the record especially as there has not yet been any cross-examination on these affidavits. Accordingly, the following is my analysis of the proposed reply under the six heading described by Dr. Sutherland.

Proposed Reply Evidence

- (a) *Proposed Paragraphs 4 – 6: Dr. Wentland’s comparison of in vivo activity of the cis series compounds with their otherwise identical trans counterparts in the ‘007 Patent;*

[32] At paragraphs 4 to 6 of the proposed reply affidavit, Dr. Sutherland responds to paragraphs 72-74 of Dr. Wentland’s affidavit. In those paragraphs Dr. Wentland responds to the assertion in Dr. Sutherland’s first affidavit that the ‘007 Patent would have led the skilled person to make a compound having a trans configuration. Dr. Sutherland compares selected cis and trans compounds and concludes that there is a general trend in the ‘007 Patent favouring trans compounds.

[33] Dr. Sutherland, in the proposed reply, asserts that Dr. Wentland’s conclusion that trans compounds would not have been favoured is based on “incorrect facts” relating to the number of pairs of compounds in the ‘007 Patent, the number of pairs in which the cis compound has greater activity at either SC or CE than the trans counterpart, the number of pairs in which the trans has greater activity than the cis partner, the number of pairs in which the cis and trans compounds have similar activity and the number of pairs in which both cis and trans have no activity.

[34] Novopharm submits that it could not have been anticipated that in an attempt to contradict Dr. Sutherland's conclusion, Dr. Wentland would analyze only a favourable subset of data, but represent that the data was complete.

[35] I fail to see anything "new" in the evidence of Dr. Wentland. Dr. Sutherland referred to some pairs of cis/trans comparator compounds in his first affidavit and Dr. Wentland responded by considering others. The validity of those choices and the relevance to the parties' arguments may be properly tested through cross-examination. These paragraphs are not proper reply evidence.

(b) *Proposed Paragraphs 7 – 16: Conclusions of Dr. Wentland, Dr. Benet and Dr. Castagnoli which are based on the skilled person having hindsight knowledge of the ezetimibe structure or invalid assumptions about the C4 substituent;*

[36] The paragraphs of the Applicants' experts' affidavits to which Dr. Sutherland proposes to reply directly respond to his assertion in his initial affidavit where he does his cis/trans comparative analysis, concluding that it would have been obvious to the skilled person to design a trans compound and that a hydroxy substituent at the *para*- position of the C4 substituent was optimal. Having reviewed the relevant paragraphs of the affidavits filed, I find that Dr. Sutherland's proposed reply cannot be said to be responsive to "new" matters raised. Rather, the parties have engaged in a debate regarding the C4 substituent that can be tested through cross-examination. There is no proper foundation for reply evidence.

(c) *Proposed Paragraphs 17 – 20: Dr. Wentland's assertion that the skilled person would have relied upon logP calculations in respect to the compounds of the 007 Patent;*

[37] Dr. Sutherland proposes to reply to the assertion of Dr. Wentland at paragraph 69 of his affidavit that “the lipophilicity of a compound could have been easily determined by calculating its logP using software that was available to the skilled person in 1993” and that a skilled person might have attempted to design a compound based on a computer-calculated logP value greater than that of compounds 8F and 1L.

[38] Novopharm submits that the suggestion from Dr. Wentland that quantitative analysis should have been done is new and clearly falls outside Dr. Sutherland’s previous affidavit evidence dealing with the ‘007 Patent and is not found in the cited prior art on which Dr. Sutherland’s opinion was based. This appears to be accurate. Accordingly, the proposed reply is responsive to new evidence and these paragraphs are proper.

(d) Proposed Paragraphs 21 – 33: Comparisons, examples and assertions of Dr. Wentland, Dr. Benet and Dr. Castagnoli pertaining to the skilled person’s expectations about benzylic hydroxylation and the N1 phenyl group at the para-positions.

[39] Dr. Wentland references the molecules enalapril and lisinopril as examples of compounds that do not undergo benzylic hydroxylation. Novopharm submits that these examples from Dr. Wentland are new, clearly fall outside Dr. Sutherland’s previous affidavit evidence and are not found in the cited prior art on which Dr. Sutherland’s opinion was based. This appears to be accurate. Accordingly, paragraphs 21 – 24 of the proposed reply are responsive to new evidence and are proper.

[40] Dr. Sutherland also proposes to reply to Dr. Wentland and Dr. Castagnoli and specifically to their reference to compound 5AA. Although Dr. Castagnoli states in his affidavit that he is responding to “Dr. Sutherland’s evidence regarding compound 5AA and other compounds contained on page 52 of his affidavit”, it is not obvious to the Court that compound 5AA was referenced by Dr. Sutherland in his first affidavit and thus paragraphs 25 - 30 appear to respond to new evidence and are proper reply.

[41] Dr. Sutherland also wishes to reply to what he characterizes as Dr. Castagnoli misconstruing his initial evidence regarding compounds 5D, 5, 5S, 5T, 7M and 7P. He may disagree with Dr. Castagnoli’s analysis and his understanding of his previous evidence but that is a matter that may properly be explored in cross-examination. It is not new and proposed paragraphs 31 – 32 are not the proper subject of reply.

[42] Dr. Sutherland also wishes to reply to Dr. Wentland’s reliance on a paper written in 1965. That authority appears to be raised for the first time by Dr. Wentland and paragraphs 32-33 are proper reply evidence.

(e) *Paragraphs 34 – 35: The assertions of Dr. Benet and Dr. Castagnoli that the skilled person would have assumed metabolites were inactive.*

[43] I am satisfied that the impugned paragraphs of the affidavits of Dr. Benet and Dr. Castagnoli were responding to Dr. Sutherland’s initial affidavit evidence and raise nothing new. Accordingly, paragraphs 34 and 35 are not proper reply evidence.

- (f) *Paragraphs 36 – 46: The assertion of Dr. Benet and Dr. Castagnoli that the skilled person would have considered (1) phase II biotransformation in designing a compound and (2) that the possibility of glucoronidation would have taught away from a para-substituted C4 phenyl ring.*

[44] Novopharm submits that these paragraphs are proper reply as Dr. Sutherland in his initial affidavit discusses only Phase I biotransformation and Phase II only became relevant when it was raised by the Applicants' experts. I agree. It may be that one could have anticipated that the Applicants' experts might raise Phase II, but until they did, that was mere speculation. It only became relevant after it was raised. Accordingly, paragraphs 36-46 of the proposed affidavit are relevant reply evidence.

[45] In summary, the following paragraphs of the proposed reply affidavit are proper reply evidence and Novopharm is granted leave to file an affidavit from Dr. Sutherland incorporating them: Paragraphs 1 – 3, amended as required to reflect this decision, paragraphs 17 – 30, 32 – 33 and paragraphs 36 – 46.

ORDER**THIS COURT ORDERS that:**

1. Novopharm Limited is granted leave to file reply evidence consisting of: Paragraphs 1 – 3, amended as required to reflect this decision, paragraphs 17 – 30, 32 – 33 and paragraphs 36 – 46 of the proposed affidavit of Dr. Sutherland.
2. Costs of this appeal and the motion before the Prothonotary are to Novopharm, in any event of the cause.

“Russel W. Zinn”

Judge

FEDERAL COURT**SOLICITORS OF RECORD**

DOCKET: T-1610-08

STYLE OF CAUSE: MERCK-FROSST - SCHERING PHARMA GP and
SCHERING CORPORATION v. THE MINISTER OF
HEALTH and NOVOPHARM LIMITED

PLACE OF HEARING: Toronto, Ontario

DATE OF HEARING: August 31, 2009

**REASONS FOR ORDER
AND ORDER:** ZINN J.

DATED: September 15, 2009

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TAB 19

Federal Court



Cour fédérale

Date: 20201124

Docket: T-1184-17

Citation: 2020 FC 1087

Ottawa, Ontario, November 24, 2020

PRESENT: The Associate Chief Justice Gagné

BETWEEN:

**MERCK SHARP & DOHME CORP. and
MERCK CANADA INC.**

Plaintiffs

and

WYETH LLC

Defendant

ORDER AND REASONS

I. Overview

[1] In their impeachment action, Merck Sharp & Dohme Corp. and Merck Canada Inc. [Merck or the Plaintiff], who are currently developing a pneumococcal conjugate vaccine with 15 serotypes [V114] , are seeking an order invalidating Wyeth LLC's Composition Patent and two Formulation Patents relating to its current pneumococcal conjugate vaccine with 13 serotypes [Prevnar 13].

[2] As the twelve-day trial is scheduled to commence on November 30, 2020, Merck brings this motion for leave to file reply expert reports from its three experts.

[3] The parties have thus far tendered the following expert reports in support of their respective positions:

(1) For Merck (filed in June 2020):

Dr. Paton opines on the Composition Patent, including the credentials and common general knowledge of the skilled person, claims construction, anticipation, obviousness and overbreadth/lack of utility (his report is 136 pages);

Dr. Kasper opines on the Composition Patent, including the credentials and common general knowledge of the skilled person, and claims construction in relation to the obviousness of certain Method/Process claims (his report is 47 pages); and

Dr. Petrovsky opines on the Formulation Patents, including the credentials and common general knowledge of the skilled person, claims construction, anticipation, obviousness, and double patenting (his report is 118 pages).

(2) For Wyeth (filed in September 2020):

Dr. Ravenscroft opines on the Composition Patent, including the credentials and common general knowledge of the skilled person, claims construction, anticipation, and obviousness. He also responds to both Dr. Paton and Dr. Kasper's opinions (his report is 215 pages).

Dr. Dagan opines on the development of pneumococcal vaccines, including immune interference, carrier-induced suppression, and serotype selection. He also responds to both Dr. Paton and Dr. Kasper's opinion (his report is 114 pages).

Dr. Manning opines on the Formulation Patents, including the credentials and common general knowledge of the skilled person, claims construction, anticipation, obviousness, and double patenting. He also responds to Dr. Petrovsky's opinion (his report is 208 pages).

[4] Merck is now seeking to tender reply reports from Drs. Paton and Kasper, wherein they opine on new issues raised by Drs. Ravenscroft and Dagan, as well as a reply from Dr. Petrovsky to Dr. Manning on the Formulation Patents [Reply Reports]. In addition to his reply opinion on the Composition Patent, Dr. Paton provides a rebuttal opinion on Wyeth's prosecution history with the Canadian Intellectual Property Office [the patent office], as now permitted by section 53.1 of the *Patent Act*, RSC 1985 c P-4 [Rebuttal Opinion].

II. Issues

[5] The sole issue to be determined on this motion is whether Merck should be granted leave to serve and file the Reply Reports and Rebuttal Opinion.

III. Analysis

A. *The Governing Law*

[6] The general rules governing the filing of reply evidence are well known and relatively simple. However, they are not so simple to apply on a preliminary motion, out of context, and without the full evidentiary picture that the experts' testimonies and cross-examinations will provide the Court at trial.

[7] That said, the starting point is Rule 274(1) of the *Federal Courts Rules*, SOR/98-106, which sets out the order in which the parties present their evidence:

274(1) Subject to subsection (2), at the trial of an action, unless the Court directs otherwise,

- (a) the plaintiff shall make an opening address and then adduce evidence;
- (b) when the plaintiff's evidence is concluded, the defendant shall make an opening address and then adduce evidence;
- (c) when the defendant's evidence is concluded, the plaintiff may adduce reply evidence.

[8] There are a few rules that govern and limit the nature of evidence the plaintiffs can adduce in reply. They all flow from the fact that a plaintiff will not be allowed to split its case (*R v Krause*, [1986] 2 SCR 466 at 473); the reply evidence must relate to issues raised in defense that were not raised in chief by the plaintiff (*Amgen Canada Inc v Apotex Inc*, 2016 FCA 121 at para 12).

[9] As stated by Justice Manson in *Janssen Inc v Teva Canada Limited*, 2019 FC 1309 at para 16, the Trial Division of the Federal Court in *Halford v Seed Hawk Inc*, 2003 FCT 141 at para 15, had aptly broken this rule down to four principles:

1. Evidence which is simply confirmatory of evidence already before the court is not to be allowed.
2. Evidence which is directed to a matter raised for the first time in cross examination and which ought to have been part of the plaintiff's case in chief is not to be allowed. Any other new matter relevant to a matter in issue, and not simply for the purpose of contradicting a defence witness, may be allowed.
3. Evidence which is simply a rebuttal of evidence led as part of the defence case and which could have been led in chief is not to be admitted.
4. Evidence which is excluded because it should have been led as part of the plaintiff's case in chief will be examined to determine if it should be admitted in the exercise of trial judge's discretion.

[10] In *Merck-Frosst v Canada (Health)*, 2009 FC 914 at para 10 [*Merck-Frosst*], Justice Zinn added a few more factors to be considered when assessing whether evidence is being introduced as proper reply:

- (a) whether the further evidence serves the interests of justice;
- (b) whether the further evidence assists the Court in making its determination on the merits;
- (c) whether granting the motion will cause substantial or serious prejudice to the other side; and
- (d) whether the reply evidence was available and/or could not be anticipated as being relevant at an earlier date.

[11] Justice Zinn breaks down this fourth factor into a two-pronged analysis at paragraphs 23 and 25 of *Merck-Frosst*:

- (23) The first step is to ask whether the proposed evidence is properly responsive to the other party's evidence. It is responsive if it is not a mere statement of counter-opinion but provides evidence that critiques, rebuts, challenges, refutes or disproves the opposite party's evidence. It is not responsive if it merely repeats or reinforces evidence that the party initially filed.

...

- (25) If the proposed evidence is found to be responsive, one must then ask whether it could have been anticipated as being relevant at an earlier date. If it could have been anticipated earlier to be relevant, then it is being offered in an attempt to strengthen one's position by introducing "new" evidence that could and should have been included in the initial affidavit. Such evidence is not proper reply evidence as the party proposing to file it is splitting his case.

[12] On the other hand, Rule 279 of the *Federal Courts Rules* governs the admissibility of expert evidence. No expert witness' evidence is admissible unless the issue has been defined by the pleading or in an order of the Court; the expert must have previously served and filed an

affidavit or a statement made in accordance with the *Federal Courts Rules*; and, the expert must be available at the trial for cross-examination.

[13] In *R v Mohan*, [1994] 2 SCR 9 at paragraph 20, the Supreme Court developed a useful test to determine if expert evidence should be admitted:

- (a) It should be relevant;
- (b) It should be necessary to assist the trier of fact;
- (c) It should not be subject to any exclusionary rule; and
- (d) A properly qualified expert should adduce it.

[14] Mindful of all these principles, I will now turn to the topics covered in Merck's Reply Reports and Rebuttal Opinion and to the contradictory positions taken by the parties regarding each one of them.

B. *Dr. Paton's Rebuttal Opinion*

[15] In his Rebuttal Opinion (3 pages), Dr. Paton responds to Dr. Ravenscroft's opinion regarding the construction of the claims of the Composition Patent. Merck submits that Dr. Ravenscroft gave opinions which are inconsistent with statements made by Wyeth to the patent office during prosecution of the patents (*i.e.* that certain claims are not limited to 13 serotypes), which triggers the application of subsection 53.1(1) of the *Patents Act*. Merck asserts that Wyeth is estopped from bringing such contradictory evidence and it submits it could not have anticipated Wyeth would take such an inconsistent position.

[16] Wyeth submits that subsection 53.1(1) is a mere evidentiary rule that does not estop a patentee from taking an inconsistent position in litigation. It further argues that Dr. Paton's opinion is unnecessary because evidence from the patent office related to patent prosecution does not require a scientific expert.

[17] Without having to dig into the interpretation of subsection 53.1(1) at this stage of the proceedings, I disagree with Wyeth. The communication between Wyeth and the patent office describes the process of creating a conjugate vaccine. In my view, the Court would benefit from expert evidence on the content and impact of this exchange. In addition, since the rebuttal evidence is only admissible after a patentee takes an inconsistent position, Dr. Paton's rebuttal report is only proper in response to Dr. Ravenscroft's opinion. Therefore, Merck could not have raised this issue before Wyeth's expert took this so-called inconsistent position in its action. Filing of the Rebuttal Opinion will therefore be permitted.

[18] Given that I see this scientific interpretation as benefiting the Court, I will also grant leave to Wyeth to file Dr. Ravenscroft's surreply, without further edit.

C. *Dr. Paton's Reply Report*

[19] In his proposed Reply Report (23 pages), Dr. Paton discusses five points raised by Drs. Dagan and Ravenscroft. The parties have different views as to whether or not they were new issues or could have been anticipated:

First, Dr. Paton suggests that Dr. Ravenscroft raised for the first time in this litigation that a skilled person in assessing the obviousness of the Composition Patent would start with

pneumococcal protein-only composite and not with a pneumococcal conjugate vaccine. He states that he could not have anticipated that the starting point for a conjugate vaccine would not be a conjugate vaccine.

Second, Dr. Paton responds to Dr. Ravenscroft's opinion that the serotype specific conditions in Examples 1-15 of the patent are critical and required for a skilled person to make a 13 serotype conjugate composition. Dr. Paton says that this contradicts the clear terms of the Composition Patent and as such, could not have been anticipated.

Third, Dr. Paton responds to the unanticipated opinion by Dr. Dagan on obviousness in relation to a later date than the priority date of the Composition Patent.

Fourth, Dr. Dagan raises new prior art documents related to an aspect of obviousness and Dr. Paton could not have anticipated he would.

Fifth, Dr. Ravenscroft opines that certain information was not available outside pharmaceutical companies at a relevant date and Dr. Paton disagrees based on his personal experience.

[20] I would first like to note that Dr. Paton specifically enunciates the mandate received from counsel and states that he was asked to read the reports filed in defense and identify issues that he had not raised in chief and that he could not have anticipated as relevant, prior to Dr. Ravenscroft or Dr. Dagan raising them.

[21] I agree with Merck that a plaintiff is not expected to try to anticipate every argument of the defendant; to do so would hinder the efficiency of a well-circumscribed litigation and would force a plaintiff to file unnecessary and burdensome evidence. Most of Wyeth's counter-arguments to the Court are general in nature and are related to the fact that Merck was familiar with the issues raised by its experts and that it knew of the new evidence referenced by them. I do not believe that is the test to be met.

[22] Dr. Paton's Reply Report is short and well focussed. He specifically says why he could not have reasonably anticipated the subjects discussed therein and why he disagrees with Drs. Ravenscroft and Dagan. Wyeth has not provided me with sufficient reasons to find otherwise at this stage.

[23] Merck will be granted leave to file Dr. Paton's Reply Report.

D. *Dr. Kasper's Reply Report*

[24] In his separate Reply Report (13 pages), Dr. Kasper also provides his opinions on the following:

Dr. Ravenscroft's opinions regarding serotype-specific conditions for making conjugates;

Dr. Ravenscroft's opinions regarding the common general knowledge of the Skilled Person as of April 8, 2005;

Dr. Dagan's knowledge of immune interference as of April 26, 2006.

[25] Merck makes the same arguments in support of Dr. Kasper's reply evidence as it makes for Dr. Paton's reply evidence. In addition to raising similar arguments against Dr. Kasper's evidence, Wyeth submits that Dr. Kasper's evidence is duplicative of Dr. Paton's evidence.

[26] I reject Wyeth's main arguments for the same reasons I rejected them in regards to Dr. Paton's Reply Report.

[27] As for the duplicative aspect of Dr. Kasper's opinion, Wyeth states that since it is unnecessary it fails to meet the *Mohan* test. If we were to follow Wyeth's argument, two different experts with different fields of expertise could never opine on the same subject for the same party. According to Merck, Dr. Paton is a pneumococcal expert whereas Dr. Kasper is a polysaccharide-protein conjugate expert. Just as their reports in chief complement one another, their Reply Reports are not mere duplication, even if they do address the same or similar issues. I assume they will both assist the Court in understanding the science behind those issues.

[28] Merck will be granted leave to file Dr. Kasper's Reply Report.

E. *Dr. Petrovsky's Reply Report*

[29] Finally, Dr. Petrovsky's Reply Report (13 pages) responds to five issues raised by Dr. Manning. Merck submits these were not reasonably anticipated issues:

First, Dr. Manning was asked to provide his opinion on Merck's invention story and Dr. Petrovsky could not anticipate what story Wyeth would put forward;

Second, Dr. Manning says that Jones *et al.*, 2005 would not have been known to the skilled person. Dr. Petrovsky responds that this is inconsistent with binding admissions made in the Formulation Patents, which specifically cite Jones *et al.*, 2005;

Third, Dr. Manning relied on new prior art documents regarding the use of surfactants that Dr. Petrovsky did not initially view as relevant, although surfactants were discussed in his initial report;

Fourth, Dr. Petrovsky states it was inconsistent for Dr. Manning to say that the Formulation Patents only relate to physical stability since stability, as defined in the patents, refers to both chemical and physical stability;

Fifth, Dr. Manning raised a new issue regarding whether certain information would have been shared outside of pharmaceutical

companies at the relevant date. Dr. Petrovsky responds to this issue and provides specific examples of how his real-life experience in the field at the relevant date is inconsistent with the opinion provided by Dr. Manning.

[30] Merck argues that with respect to new prior art or new documents referred to by Wyeth's expert, it did not see them as relevant to its case until they were invoked to support an unanticipated position taken by Wyeth's experts. In addition, Wyeth's experts express opinions that could not be anticipated either because they contradict answers Wyeth provided during discovery or the impugned claims of the Composition Patent and the Formulation Patents.

[31] Wyeth responds that for all if not most of these prior arts or documents, they were listed in Appendix 1 to Merck's initial Statement of Claim.

[32] Again, it is not because a piece of prior art or other documentary evidence is initially known to a party or to an expert that it is considered relevant when addressing a specific issue or area of the science. It might only become relevant when linked to that issue or area of the science by the opposite party.

[33] Generally speaking, the issues raised in reply concern complicated scientific concepts that the Court requires expert evidence to clarify. As a result, it is in the interests of justice to allow the evidence where it plays an illuminating role for the Court.

[34] On the point of Jones *et al.*, 2005, I believe Wyeth's submissions misrepresent the issue. While Dr. Petrovsky indeed wrote about Jones *et al.*, 2005 in his initial report, he responds in the

reply evidence to Dr. Manning's position that it was not part of the common general knowledge.

It is clear from Dr. Petrovsky's response that Dr. Manning's position was unanticipated, at least to him.

[35] Merck will be granted leave to file Dr. Petrovsky's Reply Report.

IV. Conclusion

[36] Merck is granted leave to file the Reply Reports and Rebuttal Opinion since: (a) it has not yet had an opportunity to address those issues; (b) they were not and could not have been reasonably anticipated; and (c) the new matters require a response in order for the Court to have a complete and accurate picture of the scientific issues raised on important issues in the case.

[37] There will be no prejudice to Wyeth as its experts had the opportunity to comment on all the issues raised in Merck's expert reports and it is hereby granted leave to file Dr. Ravenscroft's Response to Rebuttal.

[38] Costs on this motion are granted to Merck.

ORDER in T-1184-17**THIS COURT ORDERS that:**

1. The Plaintiffs' Reply Motion is granted;
2. The Plaintiffs are granted leave to file the Reply Reports of Drs. Paton, Kasper and Petrovsky and the Rebuttal Opinion of Dr. Paton;
3. The Defendant is granted leave to file Dr. Ravenscroft's Response to Rebuttal;
4. Costs on this motion are granted to Merck.

"Jocelyne Gagné"
Associate Chief Justice

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-1184-17

STYLE OF CAUSE: MERCK SHARP & DOHME CORP., and MERCK
CANADA INC. v WYETH LLC

**MOTION HELD BY VIDEOCONFERENCE ON NOVEMBER 10, 2020 FROM
OTTAWA, ONTARIO (COURT) AND TORONTO, ONTARIO (PARTIES)**

ORDER AND REASONS: GAGNÉ A.C.J.

DATED: NOVEMBER 24, 2020

APPEARANCES:

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Amy Grenon
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FOR THE DEFENDANT

CT-2024-012

THE COMPETITION TRIBUNAL

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

AND IN THE MATTER OF an application by the Commissioner of Competition for an order pursuant to section 74.1 of the *Competition Act* regarding conduct reviewable pursuant to paragraph 74.01(1)(a) and subsections 74.011(1) and 74.011(2) of the *Competition Act*;

COMMISSIONER OF COMPETITION**Applicant**

– and –

ROGERS COMMUNICATIONS INC.**Respondent**

Compendium of the Commissioner of Competition

(Rogers' Motion to Strike the Witness Statements of Dr. Strathearn and Motion for Leave to File Sur-Reply from Dr. Nick Feamster)

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