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
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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 Tribunal[2] 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.

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[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 Markets[8]

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	**Preuve contre un participant**
69 (2) In any proceedings before the Tribunal or in any prosecution or proceedings before a court under or pursuant to this Act,	**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	**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) that the participant had knowledge of the record and its contents,	**(i)** que le participant connaissait le document et son contenu,
(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	**(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) 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.	**(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	**Documents qui font foi**
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.	**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 ([redacted]). He also satisfied the Tribunal that his failure to account for the temporary closure of Tervita's [redacted] Landfill was of little consequence because [redacted]

[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 witht 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."

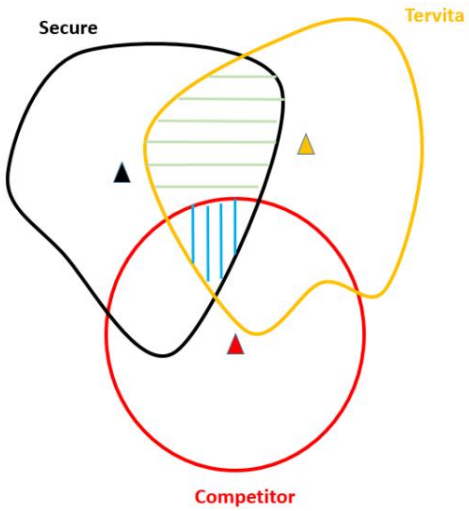
[134] Secure understandably stated in its Amended Response that this definition was unclear. The Tribunal agrees and observes that the Commissioner must do better in the future.

[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 suppliers[30] 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.

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[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:

[222] In the course of responding to Request 9 in the above-mentioned litigation, Tervita added the following:

[redacted]

[223] [redacted]

[224] [redacted]

[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]. 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 m^3/day (ConocoPhillips Witness Statement, at para 17). [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]." 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].

[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 or 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]

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]

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]. 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 in-sourcing 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] (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] [redacted]

(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] [redacted]

[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:

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[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 divesture 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 divestitures[52]

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] [redacted]

[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

[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 true for the South Wapiti facility, with respect to markets #86, 88, 92, 96, 98, and 129. The same 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.

[59] See discussion above with respect to Buck Creek, and below with respect to West Edson.

[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, 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 divestitures[60]

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

[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
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
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]. 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

[63] See p 153 of Appendix B to the Commissioner's closing submissions.

Landfill, which is almost full and will be capped in the near future (Blundell Witness Statement, at para 70).

(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			

[64] These facilities were all formerly owned by Tervita.

24	Silverberry	Landfill
25	South Wapiti	Landfill
26	Spirit River	Landfill
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

[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.

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 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

[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.

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 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;

[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).

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).

[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

[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

Non-Price Effects which relates to areas beyond the 271 areas of geographic overlap between 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

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.

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.

[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.

(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 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

[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).

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 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.

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[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.

[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 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

[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."

		consolidate the waste processed at this facility into its other nearby facilities.
-$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 category[77]

	Initial Values Based on Schedule 4.1 (Updated Harington Report)	Adjusted Values
TRD / SWD FACILITY RATIONALIZATION COST SAVINGS[78]		
Labour cost savings	[redacted]	[redacted]
Non-labour cost savings	[redacted]	[redacted]
Incremental customer transportation costs[79]	[redacted]	
TOTAL TRD / SWD INTEGRATION	$55,359,949	$60,449,729
Annualized Equivalent		*$8,668,714*
LANDFILL FACILITY RATIONALIZATION COST SAVINGS[80]		
Labour cost savings	[redacted]	[redacted]
Labour termination costs (4.7 months per Schedule 6.2)	[redacted]	[redacted]
Non-labour cost savings	[redacted]	[redacted]
Incremental customer transportation costs	[redacted]	
TOTAL LANDFILL INTEGRATION	$11,686,564	$14,270,895
Annualized Equivalent		*$2,046,499*
TOTAL GEOGRAPHIC BASED OPERATING COST SAVINGS[81]	$11,778,284	$6,285,983
Annualized Equivalent		*$901,433*
TOTAL CORPORATE COST SAVINGS	$59,632,068	$59,632,068
Annualized Equivalent		*$8,551,459*
Total	**$138,456,865**	**$140,638,674**
Annualized Equivalent	***$19,855,226***	***$20,168,105***

[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]

(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]

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]

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[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.

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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] (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).

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[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

[95] [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.

employees, or to undertake an independent workflow analysis. Such steps would not be in keeping 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). [redacted].[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 1*, at para 340). The same

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[97] [redacted] (Transcript, Confidential B, at pp 2575–2578), [redacted] (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 Effects[111] (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]

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[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] [redacted]. So, the total number of facilities involved is [redacted].

million (see Table 21 below). These additional adjustments, include additional facility closures, the timing of closures, and only those effects within the 271 areas of competitive overlap.

Table 21 – Additional adjustments to the Commissioner's estimates of Non-Price Effects[128]

Adjustments	Annual Amount	Comments
	$78,115,753	Revenue-based DWL due to facility closures, in 2019 dollars (Initial Miller Report, at Exhibit 24).
($6,304,154)	$71,811,599	Adjustment to reflect the additional variable costs asserted by Mr. Harington (Miller Rebuttal Report, at Exhibit 2).
($9,262,603)	$62,548,996	Adjustment for four partial closures identified by Dr. Duplantis. The four facilities are: [redacted]
($11,687,255)	$50,861,741	Initial adjustment to remove four facilities that were no longer included in Secure's final list of closures. The four facilities are: [redacted]
($5,768,030)	$45,093,711	Further adjustment to remove four other facilities that are not likely to close: [redacted][129]
($5,534,616)	$39,559,095	The Tribunal notes that Dr. Miller's estimates assume that the Closing Facilities close on the date of the Merger. As reported in Appendix 5 to these reasons, of the 21 facilities likely to close due to the Merger, [redacted] will close after that date during the 2021-2022 fiscal year ("**FY**"), [redacted] will close in FY 2022-2023, and [redacted] will close in FY 2026-2027. The NPV and annualized value of the DWL is adjusted by applying the specific closing date reported for each facility. For example, the [redacted] is shown in Appendix 5 to have an expected closing date of July 31, 2022. Thus, the facility specific DWL estimate for FY 2021-22 is removed, along with (1/12) of the DWL estimate for FY 2022-23. Similar adjustments are made for

[128] The first four rows simply reproduce Table 19 above. The remaining rows extend Table 19 to account for (i) additional facility closures, (ii) the timing of closures, and (iii) only those effects within the 271 areas of competitive overlap.

[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 KLDiscovery. 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.

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.

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.

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) 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.

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 competition[134]

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 certify[135] 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