Federal Court of Appeal Cour d'appel fédérale

Date: 20230801

Docket: A-89-23

Citation: 2023 FCA 172

CORAM: **WOODS J.A.**
LOCKE J.A.
LEBLANC J.A.

BETWEEN:

SECURE ENERGY SERVICES INC.

Appellant

and

THE COMMISSIONER OF COMPETITION

Respondent

Heard at Toronto, Ontario, on June 19, 2023.

Judgment delivered at Ottawa, Ontario, on August 1, 2023.

REASONS FOR JUDGMENT BY: LOCKE J.A.

CONCURRED IN BY: WOODS J.A.
LEBLANC J.A.

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REASONS FOR JUDGMENT

LOCKE J.A.

I. Overview

[1] The appellant, SECURE Energy Services Inc. (Secure), is the result of a merger with Tervita Corporation (Tervita) that closed on July 2, 2021 (the Merger). The respondent, the Commissioner of Competition (the Commissioner), as part of his responsibilities, looked into

whether the Merger "prevents or lessens, or is likely to prevent or lessen, competition substantially" such that section 92 of the *Competition Act*, R.S.C. 1985, c. C-34 (the Act), might apply to empower the Competition Tribunal (the Tribunal) to order the dissolution of the Merger or the disposition of certain assets or shares. Section 92 of the Act is reproduced in the Annex to these reasons.

[2] On June 29, 2021, the Commissioner commenced an application before the Tribunal pursuant to section 92 of the Act seeking an order for the divestiture of 41 of Secure's facilities. Among the various grounds cited in opposition to the Commissioner's application, Secure argued that section 96 of the Act prohibited the Tribunal from issuing an order under section 92. Subsection 96(1) of the Act provides as follows:

Exception where gains in efficiency	**Exception dans les cas de gains en efficience**
96 (1) The Tribunal shall not make an order under section 92 if it finds that the merger or proposed merger in respect of which the application is made has brought about or is likely to bring about gains in efficiency that will be greater than, and will offset, the effects of any prevention or lessening of competition that will result or is likely to result 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.

[3] Secure argued before the Tribunal that the gains in efficiency brought about by the Merger would be greater than, and would offset, any anti-competitive effects resulting therefrom, and those gains in efficiency would not likely be attained if the order were made.

[4] The Commissioner's application was heard over a period of 19 days in May and June 2022, hearing from dozens of witnesses and receiving over 40,000 pages of written evidence. On March 3, 2023, the Tribunal issued its decision on the Commissioner's application. Supported by reasons running more than 700 paragraphs, the Tribunal ordered the divestiture of 29 of the 41 facilities identified by the Commissioner. Of particular importance to the present appeal, the Tribunal found that Secure had not met its burden of establishing sufficient gains in efficiency to engage section 96 of the Act. It is this decision by the Tribunal (the Tribunal's Decision) that is the subject of the present appeal.

[5] Secure raises a number of issues on appeal. These can be identified as:

A. Interpretation of subsection 96(1) of the Act;

B. Exercising discretion in respect of the application of section 96;

C. Ignoring evidence of costs savings from the Elk Point facility in determining the relevant gains in efficiency;

D. Relying on the Tribunal's own expert opinion in determining the price elasticity of demand;

E. Errors related to the assessment of pre-order price effects;

F. Uneven approach to the application of the evidentiary standard of proof; and

G. Denial of procedural fairness.

[6] I will address each of these issues in the paragraphs below. However, I preface my comments by stating that I find no merit in any of the issues raised by Secure, and I would dismiss the appeal.

II. Standard of Review

[7] The parties agree, and I concur, that since this is a statutory appeal, the appellate standards of review apply: *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, [2019] 4 S.C.R. 653 at para. 37; *Law Society of Saskatchewan v. Abrametz*, 2022 SCC 29, 470 D.L.R. (4th) 328 at para. 27. The appellate standards of review are as contemplated in *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235: questions of law are reviewed on a standard of correctness, whereas questions of fact or of mixed fact and law, in which there is no extricable question of law, are reviewed on a standard of palpable and overriding error.

[8] With regard to the palpable and overriding error standard, it is helpful to note the comments of this Court in *Canada v. South Yukon Forest Corporation*, 2012 FCA 165, 431 N.R. 286 at paragraph 46:

> Palpable and overriding error is a highly deferential standard of review. "Palpable" means an error that is obvious. "Overriding" means an error that goes to the very core of the outcome of the case. When arguing palpable and overriding error, it is not enough to pull at leaves and branches and leave the tree standing. The entire tree must fall.
>
> [Citations omitted]

[9] It should be noted that Secure's right to appeal the Tribunal's decision to this Court is provided for in section 13 of the *Competition Tribunal Act*, R.S.C. 1985, c. 19 (2nd Supp.), in

which subsection 13(2) provides that an appeal on a question of fact lies only with the leave of this Court. Secure sought leave to appeal on questions of fact contemplated in issues C, D and E, but this Court (by Order dated April 21, 2023) granted leave only in respect of issues C and E. It denied leave to appeal on questions of fact arising out of issue D (Relying on the Tribunal's own expert opinion in determining the price elasticity of demand).

III. Interpretation of subsection 96(1) of the Act

[10] The core of the dispute between the parties on the interpretation of subsection 96(1) concerns which gains in efficiency are considered relevant (cognizable) in determining whether they "will be greater than, and will offset," anti-competitive effects of the merger in question. The parties appear to be agreed, and I concur, that this is a question of law, and that the applicable standard of review is correctness.

[11] This dispute centers on the final words of subsection 96(1): "and that the gains in efficiency would not likely be attained if the order were made." The Tribunal concluded, and the Commissioner agrees, that these final words qualify the "gains in efficiency" that are to be weighed against anti-competitive effects to determine whether section 96 applies to prohibit the Tribunal from making an order under section 92. Where subsection 96(1) asks whether the merger in question "has brought 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, the Tribunal applied the final words to limit the scope of the "gains in efficiency" underlined above to those that "would not likely be attained if the order were made."

Effectively, the Tribunal and the Commissioner interpret subsection 96(1) to read more or less as:

> 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 **not likely to be attained if the order were made** 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.
>
> 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 **qui ne seraient vraisemblablement pas réalisés si l'ordonnance était rendue, et qui** 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.

[12] The Tribunal required that, in order for Secure's section 96 defence to be successful, Secure would have to establish that the gains in efficiency brought about by the Merger and that would not likely be attained if the Tribunal issued an order under section 92 would be greater than all of the anti-competitive effects of the Merger. This is referred to as the order-driven approach.

[13] For its part, Secure argues that the order-driven approach leads to unintended asymmetry in the section 96 defence whereby only a subset of gains in efficiency brought about by the Merger (those that would not likely be attained if the order were made) are compared to all of the anti-competitive effects thereof. Secure argues that this "apple to oranges" approach should not be followed, and that the final words of subsection 96(1) should instead be read as a separate limitation on the Tribunal's power to make an order under section 92. By this approach, if the total of all gains in efficiency brought about by a merger "will be greater than, and will offset,"

all of the anti-competitive effects thereof, then the Tribunal cannot make an order that would cause any of those efficiencies to be lost. As characterized by Secure, subsection 96(1) asks two questions: (i) whether efficiency gains resulting from a merger exceed anti-competitive effects thereof, and (ii) whether efficiency gains will be attained if an order is made. Though Secure did not state its position this way, its argument appears to interpret subsection 96(1) to read more or less as:

> 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 **(i)** 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 **(ii)** would not likely be attained if the order were made.
>
> 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, **(i) qui** 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 **(ii) qui** ne seraient vraisemblablement pas réalisés si l’ordonnance était rendue.

[14] The Commissioner opposes this interpretation on the basis that it would prevent the Tribunal from making an order under section 92 even where most of the claimed gains in efficiency would likely be attained in any event. As argued by the Commissioner, a single dollar of efficiency gains that would be lost as a result of an order by the Tribunal would engage the section 96 defence, which could not have been Parliament’s intent. Secure does not dispute this consequence of its interpretation.

[15] Secure also offers an alternative interpretation in the event that this Court concludes that subsection 96(1) does indeed contemplate an order-driven approach. In that event, Secure argues

that this provision should nevertheless be interpreted to provide for a symmetrical analysis. By such an analysis, both gains in efficiency brought about by the merger and anti-competitive effects thereof should relate to the same time period and the same geographic markets. Presumably, they should also be similarly limited to such gains and effects as would not be attained if an order under section 92 were made. It is not clear to me what meaning is being given to the final words of subsection 96(1) under this interpretation.

A. *Principles of statutory interpretation*

[16] To resolve the dispute concerning the proper interpretation of subsection 96(1) of the Act, it is necessary to conduct an analysis following the relevant principles of statutory interpretation. In *Canada Trustco Mortgage Co. v. Canada*, 2005 SCC 54, [2005] 2 S.C.R. 601 at paragraph 10, the Supreme Court of Canada instructed as follows:

> It has been long established as a matter of statutory interpretation that "the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament": see *65302 British Columbia Ltd. v. Canada*, [1999] 3 S.C.R. 804, at para. 50. The interpretation of a statutory provision must be made according to a textual, contextual and purposive analysis to find a meaning that is harmonious with the Act as a whole. When the words of a provision are precise and unequivocal, the ordinary meaning of the words play a dominant role in the interpretive process. On the other hand, where the words can support more than one reasonable meaning, the ordinary meaning of the words plays a lesser role. The relative effects of ordinary meaning, context and purpose on the interpretive process may vary, but in all cases the court must seek to read the provisions of an Act as a harmonious whole.

[17] Following this guidance, I will consider first the text of subsection 96(1), and then the context and the purpose thereof.

B. *Text*

[18] For convenience, I reproduce subsection 96(1) here again:

Exception where gains in efficiency	**Exception dans les cas de gains en efficience**
96 (1) The Tribunal shall not make an order under section 92 if it finds that the merger or proposed merger in respect of which the application is made has brought about or is likely to bring about gains in efficiency that will be greater than, and will offset, the effects of any prevention or lessening of competition that will result or is likely to result 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.

[19] The parties' competing views on how to interpret this provision are set out in paragraphs 11 to 15 above. In summary, and as stated above, Secure argues that the order-driven approach imposes an asymmetrical "apples to oranges" analysis that was not intended by Parliament. There are two aspects to the asymmetry noted by Secure. First, because gains in efficiency that occurred in the past would be unaffected by any order under section 92, the Tribunal in this case compared 10 years of efficiency gains going forward, with about 12 years of anti-competitive effects, being 10 years forward and roughly two years back. The second asymmetry concerns the fact that gains in efficiency that would likely not be attained if an order were made would be limited to the 136 geographic markets addressed in the order, whereas anti-competitive effects

were considered in respect of all 271 overlapping markets affected by the Merger, regardless of whether they would be affected by an order.

[20] The Commissioner argues that there is nothing in the text of subsection 96(1) that requires a symmetrical approach, and in fact it is the words themselves of this provision that create the asymmetry of which Secure complains. With regard to gains in efficiency, the text expressly focuses on the subset of those that “would not likely be attained if the order were made.” On the other hand, with regard to anti-competitive effects, the text focuses on “any” prevention or lessening of competition, and is not limited in time or by whether such effects would be affected by the Tribunal’s order. In fact, the scope of anti-competitive effects to be considered for a section 96 defence is not even limited to substantial prevention or lessening of competition as it is in section 92.

[21] Secure argues that one indication that the Commissioner’s interpretation is wrong is that it leads to certain wording in subsection 96(1) being meaningless, which is inconsistent with the well-accepted principle that the law is always speaking (see *Interpretation Act*, R.S.C. 1985, c. I-21, s. 10), and that an interpretation that leaves certain wording without meaning is to be avoided. Specifically, Secure points to the fact that subsection 96(1) contemplates gains in efficiency that have been brought about or that are likely to be brought about. Secure argues that gains in efficiency that have been brought about have already been realized, and if the final words of subsection 96(1) limit the scope of relevant gains in efficiency to those that would not likely be attained if the order were made, then the reference to gains in efficiency that have been brought about would never apply since they have already been attained.

[22] I disagree that the reference to gains in efficiency that have been brought about would never apply under the Commissioner's interpretation. Section 92 contemplates the possibility of an order that dissolves a merger that has already happened. I see no reason that certain gains in efficiency that have been brought about by a merger could not be undone by an order under section 92. While some such efficiency gains will have been realized in the time between the merger and the order, others will not have been realized yet. Accordingly, it is relevant to consider whether such unrealized efficiency gains have been "brought about" by a merger, and "would not likely be attained if the order were made."

[23] In my view, the Commissioner's interpretation of subsection 96(1) is consistent with the text. In both English and in French, it is reasonable to read the concluding words of the provision as limiting the scope of "gains in efficiency" that are to be weighed against anti-competitive effects, thus creating the asymmetry.

[24] As regards Secure's interpretation, it is reasonable, in my view, to read subsection 96(1) as shown in the modified version quoted at paragraph 13 above. However, it does not necessarily follow from such a reading that even a single dollar of efficiency gains lost by an order is enough to engage section 96. Based on that reading of the text, it is not clear what threshold of lost efficiency gains would engage section 96. Moreover, it seems to me that subsection 96(1) could have been worded much more clearly if the intent had been as Secure argues: to prohibit certain kinds of section 92 orders (those that would eliminate any efficiency gains) in cases where efficiency gains resulting from a merger exceed anti-competitive effects thereof.

C. *Context*

[25] The defence contemplated in section 96 applies only where the Tribunal finds that a merger "prevents or lessens, or is likely to prevent or lessen, competition substantially", as contemplated in section 92. This section, together with the rest of the "Mergers" portion of the Act (ss. 91 to 103), forms the most relevant context for the interpretation of subsection 96(1). That said, I do not find anything in the sections other than 92 and 96 that requires comment for the purposes of this appeal.

[26] As indicated at the beginning of these reasons, section 92 empowers the Tribunal, in appropriate circumstances, to order the dissolution of a merger or the disposition of certain assets or shares. Section 96 acts as a check on this power in cases where a merger brings about certain gains in efficiency. As stated in *Tervita Corp. v. Canada (Commissioner of Competition)*, 2015 SCC 3, [2015] 1 S.C.R. 161 at paragraph 111 (*Tervita*), and as recognized by the Tribunal at paragraph 491 of its Decision, section 96 gives primacy to economic efficiency, but not without limitation. At paragraph 110 of *Tervita*, the majority of the Supreme Court of Canada rejected the argument that all gains in efficiency, however arising, should be considered under section 96. At paragraph 113, the majority stated:

> In order for a party to gain the benefit of the s. 96 defence, the Tribunal must be satisfied that the merger or proposed merger has brought about or is likely to bring about gains in efficiency. The Tribunal must also find that the gains in efficiency would not likely be attained if a s. 92 order were made. In addition, and despite the paramountcy given to economic efficiencies in s. 96, s. 96(3) prohibits the Tribunal from considering a "redistribution of income between two or more persons" as an offsetting efficiency gain. The limitation in s. 96(3) demonstrates that Parliament does not intend for all efficiency gains, however arising, to be taken into account under s. 96.
>
> [Emphasis added]

[27] In my view, the underlined sentence in the quote above, being part of a discussion of the limits of the section 96 defence, demonstrates that the majority of the Supreme Court of Canada favoured an interpretation of subsection 96(1) that is consistent with that argued by the Commissioner and found by the Tribunal: the gains in efficiency to be compared to anti-competitive effects are limited to those that would not likely be attained if a section 92 order were made. There is no suggestion in that paragraph that the final words of section 96 are intended to limit the scope of a section 92 order, as Secure argues.

D. *Purpose*

[28] Section 1.1 of the Act provides that its purpose is "to maintain and encourage competition in Canada in order to promote the efficiency and adaptability of the Canadian economy." The goal of efficiency is clearly the key motivation for the section 96 defence: *Canada (Commissioner of Competition) v. Superior Propane Inc.*, 2001 FCA 104 at paragraph 110 (see also *Tervita* at para. 87). That said, Parliament clearly tempered this goal by its choice of wording. It did not set aside entirely the goal of maintaining and encouraging competition, so as to deprive the Tribunal of the power to make an order under section 92 where such an order would stop any efficiency gains, even in the case of a merger with major anti-competitive effects. I do not accept Secure's argument that this is implicit in section 96. In the English version, when addressing anti-competitive effects, this provision refers to "the effects of any prevention or lessening of competition…" (Emphasis added). The word "any" was not included in addressing efficiency gains in section 96, though it could have been.

[29] Secure argues that another goal of the Act is predictability. It argues that the asymmetrical reading of subsection 96(1) urged by the Commissioner and applied by the Tribunal could not have been intended by Parliament because it prevents parties who are considering a merger from being able to properly assess in advance whether an order under section 92 is likely to be imposed. This is because the scope and the timing of such an order would be unknown to the merging parties until its issuance. Whereas all of the anti-competitive effects of the merger would be considered under subsection 96(1), those effects would be balanced against only a subset of gains in efficiency – those not likely to be attained if the order were made. Clearly, the scope and timing of the order would affect which efficiency gains are relevant.

[30] Secure also cites the majority in *Tervita* at paragraph 115 to the effect that "[e]fficiencies that are the result of the regulatory processes of the Act are not cognizable efficiencies under s. 96." Secure argues that an interpretation of subsection 96(1) of the Act that treats efficiency gains as cognizable or not depending on the scope and timing of the order under section 92 conflicts with this instruction by the majority of the Supreme Court.

[31] In my view, paragraph 115 of *Tervita* should not be understood to forbid an interpretation of subsection 96(1) that treats efficiency gains as being cognizable or not depending on the timing and scope of an order under section 92. That paragraph dealt with OIEs (order implementation efficiencies), which were distinguished in *Tervita* from efficiency gains resulting from the merger itself. At paragraph 107, the majority stated:

> A distinction should be drawn between efficiencies claimed because a merging party would be able to bring those efficiencies into being faster than would be the

> case but for the merger (what could be called “early-mover” efficiencies), and efficiencies that a merging party could realize sooner than a competitor only because the competitor would be delayed in implementing those efficiencies because of legal proceedings associated with a divestiture order (what the Tribunal identified as OIEs). While, as will be discussed, OIEs are not cognizable efficiencies under s. 96, early-mover efficiencies are real economic efficiencies that are caused by the merger, and not by delays associated with legal proceedings; were it not for the merger, the economy would not gain the benefit of those efficiencies that would have accrued in the time period between the merger and the actions of a future competitor.

[32] I accept the premises that predictability is important in merger reviews (see *Tervita* at para. 130), and that predictability may be limited by the Commissioner’s interpretation of subsection 96(1). However, I conclude that an interpretation that limits relevant efficiency gains (to those that would likely not be attained if the order were made) is the clearly expressed intention of the text of the provision. A limit on predictability is baked in. Parliament may simply have been less concerned about predictability than Secure would have liked.

[33] Secure points to the instruction in *Tervita* at paragraphs 124 and 150 that assessment of a section 96 defence should be as objective as possible. However, I do not accept that the Commissioner’s interpretation of subsection 96(1) introduces subjectivity to the assessment that is not present anyway. As recognized in *Tervita*, the Commissioner has a burden to quantify the quantifiable, but effects that cannot be quantitatively estimated can be considered qualitatively.

[34] Given the explicit asymmetry in the text of subsection 96(1), the Commissioner’s interpretation is correct. In my view, it is appropriate to read the words “and that the gains in efficiency would not likely be attained if the order were made” to limit the scope of cognizable efficiency gains in a way that does not apply to the scope of relevant anti-competitive effects.

[35] This explicit asymmetry in the text of subsection 96(1) is also a key reason that I reject Secure's alternative interpretation. In my view, this asymmetry precludes requiring the Tribunal to consider gains in efficiency and anti-competitive effects symmetrically in taking an order-driven approach.

[36] Secure draws the Court's attention to comments made concerning the final words of subsection 96(1) during a Parliamentary Committee meeting on May 21, 1986 by Mel Cappe, then Assistant Deputy Minister of Consumer and Corporate Affairs, Policy Coordination (see House of Commons, *Minutes of Proceedings and Evidence on the Legislative Committee on Bill C-91*, 33-1, No. 11 (21 May 1986) at 42). After quoting the clause in question, he stated:

> Here they are talking about the order of prohibition. Therefore, in order for this defence to be valuable to the parties which are merging, they would have to prove that the gains in efficiency overwhelmed the costs <u>and moreover show that the order of the tribunal would stop those efficiencies from taking place</u>.
>
> [Emphasis added]

[37] In my view, these comments are not sufficient to conclude, over the indications to the contrary discussed above, that the section 96 defence was intended to limit the scope of the Tribunal's power under section 92 to prohibit an order that would stop any amount of lost efficiency gains. As indicated at paragraph 24 above, such an intention could have been worded much more clearly.

[38] Secure argues that the asymmetrical interpretation of subsection 96(1) applied by the Tribunal and argued by the Commissioner leads to an absurd result, which is to be avoided. Secure also argues that the Tribunal even acknowledged this absurdity at paragraph 706 of its

reasons. I do not agree that the Tribunal acknowledged an absurdity in the interpretation it adopted. It acknowledged the asymmetry, but found that it was a product of the language of the provision. It then stated as follows:

> 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).

[39] In my view, the Tribunal clearly understood the principle that an interpretation that leads to an absurd result is to be avoided, and it clearly found no such absurdity. The Tribunal's use of the words "the type of absurdity that might otherwise warrant a search for a different interpretation" does not change my view.

[40] In any case, I do not agree with Secure's argument that the asymmetrical interpretation of subsection 96(1) is absurd. Secure repeatedly cites *Tervita* at paragraph 144 in support of its position that such an "apples to oranges" approach, which leads to a "balancing of incommensurables" should not be followed. I do not read paragraph 144 of *Tervita* as Secure urges. I reproduce that paragraph here for convenience:

> The statutory requirement that the efficiency gains be "greater than" and "offset" the anti-competitive effects imports a weighing of both quantitative and qualitative aspects. The term "greater than" suggests a numerical comparison of the magnitude of the efficiencies versus the extent of the anti-competitive effects. The use of the term "offset" implies a subjective analysis related to the "balancing of incommensurables (e.g., apples and oranges)" (Tribunal decision, at para. 309) — considerations that cannot be quantitatively compared because they have no common measure. The statutory use of the language of "offset" suggests that there is a more judgmental component to the analysis (see *Superior Propane II*, at para. 100). As indicated by the use of the term "*neutraliseront*" in the French version of s. 96, this requires a subjective assessment of whether the efficiency gains neutralize or counterbalance the anti-competitive effects.

[41] Firstly, the "incommensurables" cited are not efficiency gains versus anti-competitive effects. Rather, they are quantitative aspects versus qualitative aspects. Moreover, this paragraph acknowledged that the word "offset" implies that "apples and oranges" will be compared.

E. *Conclusion on interpretation of subsection 96(1)*

[42] Having considered the text, context and purpose of subsection 96(1) of the Act, I conclude that the Tribunal was correct in its interpretation of this provision.

IV. Exercise of discretion in application of section 96

[43] Secure argues that the Tribunal erred by purporting to exercise discretion, in the circumstances of this close case, to reject Secure's section 96 defence. Secure argues that the Tribunal had no discretion to exercise under section 96 since the wording is mandatory: "The Tribunal shall not make an order under section 92 if it finds…".

[44] It is true that the section 96 defence is mandatory in the sense that, once the requirements thereof are met, the Tribunal loses the power to make an order under section 92. In this sense, the Tribunal's use of the word "discretion" may give an incorrect impression. However, the Tribunal did not err. In fact, it did precisely what the majority of the Supreme Court of Canada instructed in *Tervita* at paragraph 154, which the Tribunal cited:

> Though it is necessary to re-emphasize that there is no requirement that efficiencies cross some formal "significance" threshold, this is not to ignore the truth that economic models are inherently probabilistic and will always carry some associated margin of uncertainty. Where the outcome of quantitative balancing under the first step of the s. 96 analysis shows positive but small net

> efficiencies relative to the uncertainty of the associated estimates, the Tribunal should be cognizant of this uncertainty in weighing the relevant considerations. This is not to suggest that quantitative efficiencies should be discounted in these situations, but merely to highlight that <u>close cases will require careful consideration of the assumptions underlying the quantitative analysis. In such cases, the Tribunal retains the discretion to reject the efficiencies defence, but must clearly explain the reasons for its decision. The reasons must be seen to be rational even though they reject what the quantitative analysis would otherwise strictly indicate.</u>
>
> [Emphasis added]

[45] At paragraphs 714 to 716 of the Tribunal's Decision, the Tribunal found that even though this might be said to be a close case, a closer look at the evidence (and specifically the conservative nature of the Commissioner's estimates of price and non-price effects) leads to the conclusion that the section 96 defence should not succeed. I do not accept that, in its first review of these estimates, the Tribunal reached clear conclusions that prevented it from further reviewing them and considering their conservative nature. In my view, the Tribunal adequately explained its conclusion as required in *Tervita*.

V. <u>Elk Point facility</u>

[46] The Elk Point Treatment, Recovery and Disposal facility was one of the facilities acquired by Secure in the Merger. Some months later, that facility was accidentally destroyed by fire. Secure had another facility that could be used to meet customers' requirements (the Tulliby Lake Treatment, Recovery and Disposal facility), and therefore Secure did not have to incur the cost of rebuilding the Elk Point facility.

[47] The Elk Point facility was one of the facilities that the Tribunal ordered to be divested. Secure argues that any purchaser of the Elk Point facility will have to incur the cost of rebuilding that Secure itself has avoided. Secure argues that this rebuilding cost is therefore a gain in efficiency resulting from the Merger that will not likely be attained if the Tribunal's order were maintained, and therefore such cost should have been taken into account in assessing the section 96 defence. Secure notes that the Tribunal's calculations of efficiency gains fail to consider evidence of the savings of rebuilding costs.

[48] The Commissioner responds that the Tribunal made no error in this respect because it found that Secure had failed to prove that processing at the Tulliby Lake facility rather than the Elk Point facility would be less costly overall (see Tribunal's Decision at paras. 569-570 and 574-583). The Commissioner argues that this is a fundamental deficiency, which would have been present even if the avoided rebuilding cost had been discussed. The Commissioner buttresses his argument by noting that it was Secure's original decision to close the Tulliby Lake facility and to maintain the Elk Point facility. According to the Commissioner, this suggests that maintaining the Tulliby Lake facility may well be the less efficient option.

[49] This is a factually-suffused issue that must be reviewed on a standard of palpable and overriding error. Based on the high threshold to be met to establish such an error, I am not convinced that this Court should intervene on this issue. Though it does indeed appear that the Tribunal's calculations of efficiency gains do not address evidence of saved costs of rebuilding the Elk Point facility, it also appears that considering such evidence would not have addressed the fundamental lack of evidence that processing at the Tulliby Lake facility rather than the Elk

Point facility would be less costly overall. The Tribunal's conclusions on this lack of evidence do not apply solely to day-to-day savings as Secure alleges. The Tribunal made clear at paragraph 580 of its reasons that "Secure has failed to demonstrate, on a balance of probabilities, the overall efficiency gains that it has claimed in respect of facility rationalizations."

[50] If there was any error by the Tribunal on this issue, I am not convinced that it was either palpable or overriding.

VI. Expert opinion on price elasticity of demand

[51] Secure argues that the Tribunal erred when it rejected expert evidence on price elasticity of demand submitted by both the Commissioner and Secure. Secure argues that, at the hearing, the Commissioner's expert (Dr. Miller) resiled from his initial estimate and agreed with the estimate provided by Secure's expert (Dr. Yatchew). Despite the apparent absence of disagreement, the Tribunal found that, "[g]iven 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" (see Tribunal's Decision at para. 659).

[52] The Tribunal followed up in paragraph 660 as follows: "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." The Tribunal found that this estimate was "consistent with where Dr. Yatchew and Dr. Miller ultimately landed."

[53] Secure argues that the Tribunal erred in law in two respects here. First, Secure argues that the Tribunal exceeded its judicial role, and denied procedural fairness, by substituting its own "expert" opinion for that expressed by the parties' experts. Second, Secure argues that the Tribunal was not entitled to rely on expert evidence of the parties after having rejected it.

[54] I start by noting that it was necessary for Secure to characterize these alleged errors as errors of law because, as noted at paragraph 9 above, leave to appeal on this issue as a question of fact had been denied. It is awkward for Secure, having characterized these alleged errors as questions of fact for the purposes of its motion seeking leave to appeal, to now characterize them as questions of law. In any case, I see no error of law.

[55] On the first point, I see no legal error in the Tribunal refusing to adopt as a whole the evidence of any one expert, and considering other evidence in reaching its conclusion. This neither exceeds the Tribunal's judicial role, nor denies procedural fairness. Secure has not shown any inconsistency between the Tribunal's conclusion and the evidence.

[56] With regard to the second point, I do not accept the premise that the Tribunal rejected the parties' expert evidence. As indicated in the quote reproduced at paragraph 51 above, the Tribunal simply found that it was unable to reach a definitive conclusion based on the experts' evidence alone. Its statement immediately thereafter that its conclusion was consistent with that of the experts further suggests that it did not entirely reject such evidence.

VII. Assessment of pre-order price effects

[57] Secure argues that the Tribunal erred in two closely related respects in its consideration of price effects of the Merger prior to its order. In both respects, Secure argues that it was manifestly inconsistent for the Tribunal to rely on alleged price effects from the date of closing without adjusting for its own conclusion that price effects are unlikely to have occurred. Secure characterizes these as errors of law, or alternatively as palpable and overriding errors of fact.

[58] Either way, I see no error.

[59] Firstly, I do not accept Secure's premise that the Tribunal concluded that price effects are unlikely to have occurred from the date of closing of the Merger. Rather, the Tribunal criticized the eight-month data set relied on by Secure's witness Dr. Duplantis as too short to produce reliable results (see Tribunal's Decision at para. 207). The Tribunal mentioned factors that Dr. Duplantis should have taken into account: (i) the time required to negotiate rates with customers, (ii) existing contracts that may remain in force during the eight-month period, and (iii) possible reluctance to increase prices while under the Commissioner's scrutiny. However, the Tribunal did not conclude that the result was that price effects are unlikely to have occurred from the date of closing.

[60] As regards the allegation that the Tribunal's treatment of the evidence on this subject was inconsistent, Secure's argument is that the Tribunal accepted the evidence of the Commissioner's witness Dr. Miller without insisting on the adjustments that it found missing in Dr. Duplantis'

evidence, and which prompted the Tribunal to discount that evidence. This is a factually-suffused issue in respect of which the Tribunal's expertise merits considerable deference (see *Canada (Commissioner of Competition) v. Rogers Communications Inc.*, 2023 FCA 16, 447 D.L.R. (4th) 553 at para. 7). Absent a palpable and overriding error, it would be inappropriate for this Court to intervene. Based on the paragraphs from the Tribunal's Decision cited by Secure (Tribunal's Decision at paras. 635, 662, 667), it is not obvious to me (palpable) that the Tribunal's treatment of the Dr. Miller's evidence was inconsistent with that of Dr. Duplantis.

VIII. Application of evidentiary standard of proof

[61] Secure argues that, in many respects, the Tribunal used an uneven approach in considering the evidence of the respective parties. It argues that this amounts to an error of law, including of procedural fairness.

[62] I should note that some of Secure's arguments on this issue depend on success on other issues it raises. These include the asymmetrical interpretation of subsection 96(1) as well as the treatment of expert evidence on price elasticity of demand. Given my conclusions discussed above, such arguments must fail.

[63] The other arguments raised by Secure alleging an uneven approach to the treatment of the evidence are directed to examples where the Tribunal criticized Secure's evidence and gave it no weight but made adjustments to evidence submitted by the Commissioner in order to overcome deficiencies therein, and give such evidence some weight.

[64] However, it is the Tribunal's role to review and weigh the evidence. I see no error of law in finding that certain evidence is so flawed that it should be given no weight, whereas other flawed evidence can be corrected. I also am not convinced that the Tribunal decided either to give no weight to flawed evidence, or to make adjustments thereto, based on whether that evidence was submitted by Secure or by the Commissioner.

[65] I am inclined to agree with the Commissioner that Secure's arguments on this issue are essentially a collateral attack on the Tribunal's findings of fact. Secure did not seek, and was not granted, leave to appeal on these issues as questions of fact. Therefore, we cannot consider these as alleged errors of fact. In any case, Secure has not convinced me that the Tribunal made any error in the treatment of the evidence that was either palpable or overriding.

IX. Procedural fairness

[66] Secure argues that it was denied procedural fairness when the Tribunal, having found that the Merger had not substantially lessened competition in several geographic markets, ordered divestiture of only 29 of the 41 facilities that the Commissioner had proposed. Secure notes that, in closing argument before the Tribunal, it requested that the Commissioner's application be dismissed entirely, but in the alternative, it requested the opportunity to lead evidence and make submissions on the issue of remedy. No such opportunity was granted.

[67] Secure cites this Court's decision in *Air Canada v. Robinson*, 2021 FCA 204 at paragraph 54 (*Air Canada*), for examples of situations in which procedural fairness requires that a party be

given an opportunity to be heard on a particular issue. These include where the adjudicator has received evidence or submissions from one party on an *ex parte* basis (without notice to the other), or has received input from other members of the administrative body without notice to the parties of new issues that arose therefrom. The idea is that the parties should know the case against them and be afforded an opportunity to answer it.

[68] The specific circumstances identified in the previous paragraph are not present in this case. Moreover, this Court clarified in *Air Canada* at paragraph 55 that, generally speaking, an administrative decision maker is not required to give a warning as to what remedy it is considering granting. In *Air Canada*, that general rule did not apply because Air Canada did not have a sense of the sort of remedies that might be imposed.

[69] In the present case, Secure was fully aware of the 41 facilities that the Commissioner proposed should be divested, and of the possibility that some subset of those facilities might be ordered divested. Secure had every opportunity during the hearing before the Tribunal to submit evidence and make submissions on the question of remedy. In short, Secure knew the case against it, and was afforded an opportunity to answer it. I see no breach of procedural fairness in this case.

X. Conclusion

[70] For the reasons discussed above, I would dismiss the present appeal with costs.

"George R. Locke"

J.A.

"I agree.
Judith Woods J.A."

"I agree.
René LeBlanc J.A."

ANNEX

Purpose of Act

1.1 The purpose of this Act is to maintain and encourage competition in Canada in order to promote the efficiency and adaptability of the Canadian economy, in order to expand opportunities for Canadian participation in world markets while at the same time recognizing the role of foreign competition in Canada, in order to ensure that small and medium-sized enterprises have an equitable opportunity to participate in the Canadian economy and in order to provide consumers with competitive prices and product choices.

…

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

Objet

1.1 La présente loi a pour objet de préserver et de favoriser la concurrence au Canada dans le but de stimuler l'adaptabilité et l'efficience de l'économie canadienne, d'améliorer les chances de participation canadienne aux marchés mondiaux tout en tenant simultanément compte du rôle de la concurrence étrangère au Canada, d'assurer à la petite et à la moyenne entreprise une chance honnête de participer à l'économie canadienne, de même que dans le but d'assurer aux consommateurs des prix compétitifs et un choix dans les produits.

[…]

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

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

(f) in the case of a proposed merger, make an order directed against any party to the proposed merger or any other person

(i) ordering the person against whom the order is directed not to proceed with the merger,

(ii) ordering the person against whom the order is directed not to proceed with a part of the merger, or

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;

f) dans le cas d’un fusionnement proposé, rendre, contre toute personne, que celle-ci soit partie au fusionnement proposé ou non, une ordonnance enjoignant :

(i) à la personne contre laquelle l’ordonnance est rendue de ne pas procéder au fusionnement,

(ii) à la personne contre laquelle l’ordonnance est rendue de ne pas procéder à une partie du fusionnement,

(iii) in addition to or in lieu of the order referred to in subparagraph (ii), either or both

(iii) en sus ou au lieu de l'ordonnance prévue au sous-alinéa (ii), cumulativement ou non :

(A) prohibiting the person against whom the order is directed, should the merger or part thereof be completed, from doing any act or thing the prohibition of which the Tribunal determines to be necessary to ensure that the merger or part thereof does not prevent or lessen competition substantially, or

(A) à la personne qui fait l'objet de l'ordonnance, de s'abstenir, si le fusionnement était éventuellement complété en tout ou en partie, de faire quoi que ce soit dont l'interdiction est, selon ce que conclut le Tribunal, nécessaire pour que le fusionnement, même partiel, n'empêche ni ne diminue sensiblement la concurrence,

(B) with the consent of the person against whom the order is directed and the Commissioner, ordering the person to take any other action.

(B) à la personne qui fait l'objet de l'ordonnance de prendre toute autre mesure à condition que le commissaire et cette personne y souscrivent.

Evidence

(2) For the purpose of this section, the Tribunal shall not find that a merger or proposed merger prevents or lessens, or is likely to prevent or lessen, competition substantially solely on the basis of evidence of concentration or market share.

Preuve

(2) Pour l'application du présent article, le Tribunal ne conclut pas qu'un fusionnement, réalisé ou proposé, empêche ou diminue sensiblement la concurrence, ou qu'il aura vraisemblablement cet effet, en raison seulement de la concentration ou de la part du marché.

…

[…]

Exception where gains in efficiency

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

Exception dans les cas de gains en efficience

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

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.

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.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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