
# STRIKE TWO... THE COMMISSIONER LOSES SECOND INJUNCTION TO BLOCK MERGER

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**Categories:** Insights, Publications

Unlike in some jurisdictions, Canadian merger review has not given rise to significant excitement of late. The recent *Secure/Tervita* case may have changed that. On June 30, 2021, the Commissioner of Competition brought an 11th hour application for an "interim interim" injunction to prevent Secure Energy Services Inc. from closing its acquisition of Tervita Corporation. That application failed, and a late night emergency appeal to the Federal Court of Appeal also failed. Minutes later, just after midnight on July 2nd, the transaction closed.

Once bitten but not twice shy, the Commissioner returned to the fray on August 4, 2021, seeking an order from the Competition Tribunal under section 104 of the *Competition Act* to prevent Secure from integrating the Tervita assets, and requiring that they be held and operated separately pending a decision by the Tribunal on the Commissioner's section 92 application as to whether the merger was likely to prevent or lessen competition substantially. This second kick at the cat was also unsuccessful. But in only its second contested Section 104 injunction decision, released August 16, 2021, the Tribunal has provided useful guidance with respect to merger injunctions.

The Tribunal's clear instruction to the Competition Bureau is that, if it seeks to enjoin a merger before it closes, it needs to either:

a. Bring a section 104 injunction application along with its merger challenge application early so there is a reasonable amount of time for such application to be heard (the Tribunal suggested at least one week) before the statutory no-close waiting period expires (or any agreement to extend closing expires);

or

b. Bring an interim section 100 injunction application without a merger challenge application in order to gain additional time to complete the review.

The parties agreed that the basic injunction test which the Tribunal was to apply is the three-part test

established in the *RJR MacDonald* case: serious issue to be tried/strong *prima facie* case; irreparable harm; and balance of convenience. The decision provides guidance for both the Commissioner and merging parties in applying that test.

**1. Serious Issue to be Tried v Strong *Prima Facie* Case**

Consistent with Supreme Court guidance on injunctions generally, the Tribunal determined that, when the relief sought by the Commissioner is primarily in the nature of a mandatory order, the higher "strong *prima facie* case" test will ordinarily apply. In the merger context, injunctive relief will likely be "mandatory" if sought after the merging parties have closed, but only "restraining" if sought pre-closing. The Tribunal agreed with Secure that, given that the merger had closed and could no longer be restrained, the relief sought by the Commissioner amounted to a mandatory order.

However, in the "very particular circumstances of the [Secure/Tervita] case" the Tribunal found that the test to be used was the more relaxed "serious issue to be tried" test. That was because the Tribunal found that Secure's conduct was "high handed" by closing in the face of a Section 104 application. In describing Secure as having attempted to "steal a march" on the Commissioner the Tribunal distinguished this case from situations where parties close in the face of a mere objection or "at you own risk" letter from the Commissioner.

Applying the serious issue to be tried test, the Tribunal had no difficulty concluding that the Commissioner had met his burden.

**2. Proof of Strong *Prima Facie* Case**

Had the Tribunal concluded that the Commissioner was required to show a strong *prima facie* case – which the Tribunal indicated is the test that will ordinarily apply if a mandatory order is sought – it was clear that the Commissioner would have failed. He would have been required to demonstrate a strong likelihood of showing both that the merger was likely to substantially lessen competition in the interim period before the section 92 application was determined, and that these effects would not be offset by efficiencies such that it would be "saved" by the section 96 efficiencies defence. Since the Commissioner did not attempt to address the section 96 defence, or provide evidence of price elasticity of demand or deadweight loss, the Commissioner could not have satisfied this requirement.

**3. What Irreparable Harm Need be Shown?**

The second significant question for the Tribunal to determine in a section 104 application is whether there would be irreparable harm if injunction were not granted. This has to be shown, or inferred, on 'clear and not speculative' evidence. Secure argued, based on the *Superior Propane* case, that the harm to be considered should be whether or not, if the Tribunal ultimately found that the merger should be unwound or its effects

mitigated, such unwinding could be achieved – that is, whether the eggs could be "unscrambled" – also referred to as "remedy impairment".

The Commissioner argued that, in addition to remedy impairment (which can be an issue in some cases, but was not in the *Secure* case), irreparable harm can also flow from the interim (between closing and the final determination) effects of the merger – increased prices and non-price effects on customers, and interim deadweight loss to the economy. The Tribunal accepted this argument – which flows from the decision in the *Parkland* case – and is different from the injunction test under Section 100 which is focused only on the issue of remedy impairment. The Tribunal also noted that the onus of demonstrating irreparable harm to the public interest is lower where the moving party is a public authority acting within its mandate, such as the Commissioner.

In the result, the Tribunal accepted the Commissioner's evidence respecting interim competitive effects related to Secure's ability to exercise increased market power, and held that the Commissioner had satisfied the "irreparable harm" portion of the injunction test.

**4. Merging Party's Evidence of Its Intent/Incentives**

With respect to the issue of interim harm, the Tribunal rejected Secure's evidence that it would not raise prices. The Tribunal will not rely on a merged entity to benevolently refrain from exercising increased market power. Secure's argument that it would not have an incentive to raise prices – because that would assist the Commissioner's pending section 92 case against it – was not persuasive, and that evidence of such an incentive will not typically be determinative. Rather, the Tribunal accepted the Commissioner's argument that the focus should generally be on the merged firm's *ability* to exercise market power.

**5. Balance of Convenience Analysis**

Finally, in determining whether to grant the injunction, the Tribunal considered the balance of convenience between the parties. This is where most interlocutory injunctions are won or lost, and here the Commissioner lost. While Secure had provided significant evidence of the damage it would suffer – including particularly lost efficiencies – if the injunction were granted, the Tribunal noted that "the Commissioner has made no effort to provide the Tribunal with even a very preliminary or rough sense of how all of [the evidence he had supplied] comes together, so that the Tribunal can have a least some appreciation of how the interim harm he alleges compares with the harm Secure has identified". The Tribunal indicated that particularly, where the merging parties have signalled that they will rely on an efficiencies defence in pre-litigation discussions, the Commissioner should be expected to provide at least rough estimates of the range of anticipated price effects and elasticities of demand; a ballpark estimate of the deadweight loss to the economy; and some sense of anticipated non-price effects. Customer complaints or examples of price increases may be evidence of

lessening of competition, but will not satisfy a failure by the Commissioner to address efficiencies, because the Tribunal requires some measure of how the total anti-competitive effects compare to the total alleged efficiencies. Such estimates should be qualified, at least roughly, where possible. This will be a tall order in many cases – but is the Tribunal's clear guidance.

**Conclusion**

The Commissioner's two attempts to obtain an injunction in the Secure/Tervita case have provided significant guidance as to what the Commissioner must demonstrate to obtain an injunction to prevent a merger or to require that the assets be held separate. It similarly provides merging parties with a roadmap of what to anticipate.

As a practical matter the decisions suggest that, in matters where the Bureau has serious concerns respecting the need for a remedy, it will turn its mind to preparing for litigation much earlier in the process than has been the case to date. Realistically, the Commissioner cannot fully analyze competitive effects (or efficiencies) until the parties have responded to a Supplementary Information Request (SIR). But, when the parties certify compliance with a SIR they are entitled to close 30 days later (absent an injunction). Accordingly, the Commissioner is very likely to shift efforts to preparing for injunctive litigation (under section 100, or section 104, or both) immediately upon – and presumably in some cases before – certification of compliance with the SIR, unless the parties are willing to provide an undertaking not to close without providing notice to the Commissioner. This will have implications for deal timing as well as, potentially, for standard deal terms.

Another question raised by this decision, coupled with the earlier decision holding that the Tribunal cannot order interim interim injunctions, is whether it may have the practical effect of preventing the Commissioner from enjoining a significant body of mergers at all. While an extension of time is available for an interim injunction under section 100, such an injunction is only available where there is a concern about remedy impairment. Where, as in the Secure case, and potentially in many other cases, the concern is about competitive effects during the interim period, rather than remedy impairment, a section 100 interim injunction, and therefore the extension of time which it can provide, appears not to be available.

Things may be getting a little more interesting, even in Canada.

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**A Cautionary Note**