

June 16, 2009

CT-2009-003

Jos LaRose for / pour
REGISTRAR / REGISTRAIRE

CT-2009-003

OTTAWA, ONT

001

THE COMPETITION TRIBUNAL

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

AND IN THE MATTER OF an inquiry under subparagraph 10(1)(b) of the *Competition Act*, relating to certain practices of Waste Services (CA) Inc. and Waste Management of Canada Corporation;

B E T W E E N:

THE COMMISSIONER OF COMPETITION

Applicant

-and-

**WASTE SERVICES (CA) INC. AND
WASTE MANAGEMENT OF CANADA CORPORATION**

Respondents

CONSENT AGREEMENT

WHEREAS, pursuant to paragraph 10(1)(b) of the *Competition Act* (the "Act"), the Commissioner of Competition (the "Commissioner") initiated an inquiry into certain practices by Waste Services (CA) Inc. ("WSI") and Waste Management of Canada Corporation ("WM") alleged to contravene section 79 of the Act;

AND WHEREAS, following an extensive investigation, the Commissioner has concluded that WSI and WM collectively hold a market share exceeding 80% with respect to the provision of the Product (as defined herein) in the Geographic Markets (as defined herein), and that WSI and WM are engaged in similar anti-competitive contracting practices;

AND WHEREAS the Commissioner has concluded that WSI and WM are jointly dominant in the provision of the Product in the Geographic Markets;

AND WHEREAS the Commissioner has concluded that WSI and WM are engaging in and have engaged in a practice of anti-competitive acts in respect of the provision of the Product in the Geographic Markets;

AND WHEREAS the Commissioner has concluded that competition has been substantially prevented and lessened in respect of the provision of the Product in the Geographic Markets;

AND WHEREAS the Commissioner, WSI and WM have reached an agreement to resolve the matters at issue;

AND WHEREAS the Commissioner, WSI and WM agree that, upon execution, this Consent Agreement shall be filed by the Parties with the Competition Tribunal for immediate registration;

AND IT BEING UNDERSTOOD THAT neither WSI nor WM accept the conclusions of the Commissioner and nothing in this Consent Agreement will be taken as an admission by the Parties, either now or in the future, of any facts, submissions or legal argument for any other purposes, nor will it derogate from any rights or defences available to the Parties under the Act or otherwise.

NOW THEREFORE the Commissioner, WSI and WM agree as follows:

I. DEFINITIONS

1. For the purposes of this Agreement, the following definitions shall apply:
 - (a) **“Act”** means the *Competition Act*, R.S.C. 1985, c. C-34, as amended;
 - (b) **“Affiliate”** has the meaning ascribed thereto in subsection 2(2) of the Act;
 - (c) **“Agreement”** means this Consent Agreement;
 - (d) **“Average Monthly Amount”** means the average monthly amount charged to a customer by WM or WSI, as applicable, for the provision of the Product, calculated over the most recent 12 full months of service before the date of termination of the Contract (or such lesser period as may be required for those Contracts in force for less than 12 months);
 - (e) **“Commissioner”** means the Commissioner of Competition, appointed pursuant to section 7 of the Act;
 - (f) **“Contract”** means a contract for the provision of the Product by WSI and/or WM in the Geographic Markets;

- (g) **“Geographic Markets”** means the Regional District of Nanaimo and the Cowichan Valley Regional District in the province of British Columbia, with respective geographic boundaries established by the *Local Government Act*, R.S.B.C. 1996, c. 323, as amended, as of the date of this Agreement;
- (h) **“Parties”** means the Commissioner of Competition, WSI and WM, each individually a “Party”;
- (i) **“Product”** means commercial, front-end, non-hazardous, solid waste haulage and disposal services (which includes waste, recycling and organic material), but excluding: (i) municipal waste services; (ii) roll-off waste services; (iii) direct disposal arrangements without a collection component; and (iv) arrangements where a compactor, baler or other asset financing is a feature;
- (j) **“Senior Officer”** has the meaning ascribed thereto in section 2 of the *Notifiable Transactions Regulations*, SOR 87-348, as amended;
- (k) **“Tribunal”** means the Competition Tribunal, established by the *Competition Tribunal Act*, R.S.C. 1985, c. 19 (2nd Supp.), as amended;
- (l) **“WM”** means Waste Management of Canada Corporation, its subsidiaries, divisions, groups, successors, assigns and Affiliates; and
- (m) **“WSI”** means Waste Services (CA) Inc., its subsidiaries, divisions, groups, successors, assigns and Affiliates.

II. APPLICATION

- 2. The provisions of this Agreement shall apply to WM, WSI and the Commissioner.

III. CONTRACTING PRINCIPLES

- 3. Each of WSI and WM shall contract with customers for the provision of the Product in the Geographic Markets according to the following principles (the “Contracting Principles”):
 - (a) Neither WSI nor WM shall enter into any Contract that provides for any of the following:
 - (i) an initial term of greater than two (2) years;
 - (ii) renewal terms (whether automatic or otherwise) of greater than one (1) year;
 - (iii) any limitation on the customer’s ability to terminate or decline to renew the Contract upon expiry of the initial term or renewal term of the Contract, other than requiring notice of termination, and

such notice may be delivered at any time during the applicable term up to thirty (30) days prior to the expiry of the applicable term;

- (iv) a right of first refusal in favour of WM or WSI, as applicable;
 - (v) a requirement that the customer divulge to WM or WSI, as applicable, any offer from a third party for the supply of the Product; or
 - (vi) any requirement for the customer to pay, upon termination prior to the end of the term of the Contract, liquidated damages of more than: (i) during the first year of the Contract, a sum equal to three times the Average Monthly Amount; (ii) during the second year of the Contract, a sum equal to two times the Average Monthly Amount; or (iii) during any renewal term, a sum equal to the Average Monthly Amount;
- (b) All Contracts shall include a clause requiring WSI or WM, as applicable, to provide notice to the customer of any increase in the price of the supply of the Product and an explanation for such increase; and
- (c) All clauses of a Contract relating to term and termination shall be stated clearly and in plain language on the same page as the customer's signature, and any additional pages shall be initialled by the customer.
4. Subject to section 5 of this Agreement, neither WSI nor WM shall enforce any clause or part of a Contract that does not comply with the Contracting Principles;
5. For greater clarity, the following Contracts are exempted from the application of sections 3(a)(i), 3(b), 3(c) and 8(c) of this Agreement:
- (a) Contracts containing terms that do not comply with sections 3(a)(i), 3(b), 3(c) and 8(c) of this Agreement because such terms are necessary in order to meet the conditions of a written request for tenders;
 - (b) Contracts containing terms that do not comply with sections 3(a)(i), 3(b), 3(c) and 8(c) of this Agreement which involve multiple geographic markets in addition to the Geographic Markets negotiated centrally with a customer; and
 - (c) Contracts prepared using a customer's own standard form of agreement that contains terms that do not comply with sections 3(a)(i), 3(b), 3(c) and 8(c) of this Agreement, provided that such terms are normally required by the customer in its supply contracts.

IV. Revised Contract Form

6. Each of WSI and WM shall develop a standard form of Contract that complies with the Contracting Principles (the “Standard Form Contract”), and shall provide a copy of such Standard Form Contract to the Commissioner no later than ten (10) business days from the date of this Agreement. The Commissioner shall advise WM and/or WSI, as applicable, in writing of any objections to the Standard Form Contracts based on non-compliance with the Contracting Principles within two (2) business days of receipt. Absent any objections within such two (2) business day period, the Standard Form Contracts shall be deemed to comply with the Contracting Principles. Notwithstanding section 10 of this Agreement, the receiving Party shall respond to any objections raised by the Commissioner within two (2) business days of receipt. In the event that the Commissioner and the receiving Party fail to resolve any such objections, the Commissioner may commence proceedings before the Tribunal to secure compliance with this Agreement.
7. For greater certainty, WSI and WM remain free to use forms of Contracts other than the Standard Form Contract, provided that, subject to section 5 of this Agreement, such Contracts comply with the Contracting Principles.
8. Subject to section 5 of this Agreement, for Contracts that were entered into prior to the date of this Agreement (and where such Contracts remain in effect or will come into effect following the date of this Agreement) (each a “Legacy Contract”), WSI or WM, as applicable, shall:
 - (a) not enforce any clause or part of a Legacy Contract to the extent that it does not comply with the Contracting Principles;
 - (b) advise parties to a Legacy Contract that any clause or part of the Legacy Contract, to the extent that it does not comply with the Contracting Principles, will not be enforced by WSI or WM, as applicable, and, no later than forty (40) days from the date of this Agreement, provide to each such party a written explanation of this Agreement in a form agreed upon by the Commissioner and WSI or WM, as applicable. Each of WSI and WM shall provide a copy of a proposed written explanation to the Commissioner within ten (10) business days of the date of this Agreement. The Commissioner shall advise WM and/or WSI, as applicable, in writing of any objections to the proposed written explanation within two (2) business days of receipt. Absent any objections within such two (2) business day period, the proposed written explanation shall be deemed acceptable to the Commissioner. Notwithstanding section 10 of this Agreement, the receiving Party shall respond to any objections raised by the Commissioner within two (2) business days of receipt. In the event that the Commissioner and the receiving Party fail to resolve any such objections, the Commissioner may commence proceedings before the Tribunal to secure compliance with this Agreement; and

- (c) provide each party to a Legacy Contract with the option to terminate or decline to renew the Legacy Contract on the earlier of:
 - (i) the expiry of the term of any such Legacy Contract; or
 - (ii) (1) for parties in the first year of the Legacy Contract, two years from the date of execution of the Legacy Contract; or
 - (2) for parties in the second, third or later year of the Legacy Contract, one year from the most recent anniversary of the date of execution of the Legacy Contract,

by giving written notice at any time during the applicable term up to thirty (30) days prior to the expiry of the applicable term. For greater clarity, the following examples will serve to illustrate the principles described in this section 8(c):

A customer in the first year of a four-year Legacy Contract will now have the option to terminate or decline to renew the Legacy Contract on the date that is two years from the date of execution of the Legacy Contract.

A customer in the second year of a five-year Legacy Contract will now have the option to terminate or decline to renew the Legacy Contract on the date that is one year from the most recent anniversary of the date of execution of the Legacy Contract.

A customer in the fifth year of a ten-year Legacy Contract will now have the option to terminate or decline to renew the Legacy Contract on the date that is one year from the most recent anniversary of the date of execution of the Legacy Contract.

V. DISSEMINATION TO SENIOR OFFICERS

- 9. WSI and WM shall provide a copy of this Agreement to each of their Senior Officers and any other officers, employees or agents directly or indirectly responsible for the sale or marketing of the Product in the Geographic Markets.

VI. COMPLIANCE

- 10. The Commissioner may, upon ten (10) business days written notice to WSI and/or WM (as applicable) describing an objection regarding compliance with this Agreement, commence proceedings before the Tribunal to secure compliance with this Agreement unless the Party(ies) receiving such notice addresses the objection to the satisfaction of the Commissioner within such ten (10) business day period.

VII. TERM

11. Unless otherwise agreed by the Parties, the term of this Agreement shall commence upon the date of this Agreement and end seven (7) years from the date of registration of this Agreement.

VIII. GENERAL

12. This Agreement constitutes the entire agreement between the Parties with respect to the subject matter hereof and supersedes all prior agreements, understandings, negotiations and discussions, whether written or oral.
13. The Commissioner, WSI and WM may mutually agree to amend this Agreement in writing pursuant to subsection 106(1) of the Act.
14. For greater certainty, the Tribunal shall retain jurisdiction for the purpose of any application by the Commissioner, WSI or WM to rescind or vary any of the provisions of this Agreement pursuant to section 106 of the Act.
15. This Agreement shall be governed by and interpreted in accordance with the laws of Canada.
16. The headings in this Agreement are for convenience of reference only and shall not affect the construction or interpretation thereof.
17. In the event of a dispute regarding the interpretation or application of this Agreement, any of the Commissioner, WM or WSI, may apply to the Tribunal for an order interpreting any of the provisions of this Agreement. In the event of any conflict or inconsistency between the English version of this Agreement and the French version of this Agreement, such conflict or inconsistency shall be resolved in favour of the English version of this Agreement.
18. Notices pursuant to the Agreement shall be given to the Parties at the following addresses or facsimile numbers:

(a) **The Commissioner**

Melanie L. Aitken
Interim Commissioner of Competition
Competition Bureau
Place du Portage, Phase 1, 50 Victoria Street
Gatineau (QC) K1A 0C9
Facsimile: (819) 953-5013

With copies to:

William J. Miller

General Counsel
Department of Justice
Competition Bureau, Legal Services
Place du Portage, Phase 1, 50 Victoria Street
Gatineau (QC) K1A 0C9
Facsimile: (819) 953-9267

(b) **WM**

Waste Management of Canada Corporation
117 Wentworth Court
Brampton, Ontario
L6T 5L4
Attention: President
Facsimile: (866) 374-0955

With copies to:

Waste Management, Incorporated
13225 NE 126th Place
Kirkland, Washington
98034
Attention: Area Vice President, Pacific Northwest Area
Facsimile: (866) 674-1183

And to:

Waste Management of Canada Corporation
117 Wentworth Court
Brampton, Ontario
L6T 5L4
Attention: Vice President and General Counsel
Facsimile: (905) 791-4158

And to:

Mark J. Nicholson
Cassels, Brock & Blackwell, LLP
2100 Scotia Plaza
40 King Street West
Toronto, Ontario
M5H 3C2
Facsimile: (416) 642-7168

(c) **Waste Services (CA) Inc.**

Ivan R. Cairns
Vice President and General Counsel
1122 International Boulevard
Suite 601
Burlington, Ontario
L7L 6Z8
Facsimile: (905) 319-9408

With copies to:

J. Kevin Wright
Davis LLP
2800 Park Place
666 Burrard Street
Vancouver, British Columbia
V6C 2Z7
Facsimile: (604) 605-3577

Any party hereto may from time to time change its address or facsimile number for notice by giving notice to the other parties hereto in accordance with the provisions of this section 18.

19. This Agreement may be executed in two or more counterparts, each of which shall be an original instrument, but all of which shall constitute one and the same Agreement.

The undersigned hereby agree to the registration of this Agreement.

DATED this 15th day of June, 2009

Waste Services (CA) Inc.

(signed) "Ivan R. Cairns"

Per: Ivan R. Cairns

Vice President

Waste Management of Canada Corporation

(signed) "Dean Kattler"

Per: Dean Kattler

Area Vice President

(signed) "Don Wright"

Per: Don Wright

Vice President and General Counsel

(signed) "Melanie L. Aitken"

Melanie L. Aitken

Interim Commissioner of Competition

Guillaume Phaneuf

From: Filing Depot
Sent: Tuesday, June 16, 2009 2:22 PM
To: Jos LaRose; Chantal Fortin; Patrice Lavoie; Lucia Shatat; Angele Cloutier; Guillaume Phaneuf
Subject: FW: Consent Agreement
Attachments: Final Consent Agreement Signed Commissioner.pdf; DOC001.PDF; DOC090616.pdf; ATT404126.gif

From: Jos LaRose
Sent: Tuesday, June 16, 2009 2:22:15 PM
To: Filing Depot
Subject: FW: Consent Agreement
Auto forwarded by a Rule

From: Richard.Bilodeau@bc-cb.gc.ca [mailto:Richard.Bilodeau@bc-cb.gc.ca]
Sent: June 16, 2009 2:17 PM
To: Jos LaRose
Cc: Bill.Miller@bc-cb.gc.ca
Subject: Consent Agreement

Joe, further to our discussion, please note that we are filing the consent agreement against Waste Services (CA) Inc. and Waste Management of Canada Corporation pursuant to Section 105 of the Competition Act. Please also find enclosed three signature pages of the Consent Agreement

<<Final Consent Agreement Signed Commissioner.pdf>> <<DOC001.PDF>> <<DOC090616.pdf>>

Richard Bilodeau
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