

**THE COMPETITION TRIBUNAL**

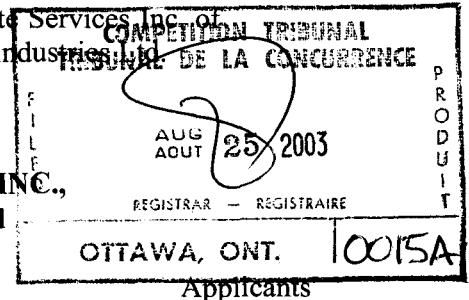
IN THE MATTER OF the *Competition Act*, R.S. 1985, c.C-34; as amended;

IN THE MATTER OF an application by Canadian Waste Services Holdings Inc.,  
Canadian Waste Services Inc. and Waste Management Inc. under s. 106 of the  
*Competition Act*;

AND IN THE MATTER OF the acquisition by Canadian Waste Services Inc. of  
the Ridge Landfill in Blenheim, Ontario from Browning-Ferris Industries Inc.

BETWEEN:

**CANADIAN WASTE SERVICES HOLDINGS INC.,  
CANADIAN WASTE SERVICES INC. and  
WASTE MANAGEMENT, INC.**



Applicants

- and -

**COMMISSIONER OF COMPETITION**

Respondent

- and -

**THE CORPORATION OF THE MUNICIPALITY OF CHATHAM-KENT**

Intervenor

**AMENDED Response of the Commissioner of  
Competition**

**FRASER MILNER LLP**  
1 First Canadian Place  
100 King Street West, Suite 3900  
Toronto, ON M5X 1B2

**Donald B. Houston**  
Tel: 416-863-4620  
Fax: 416-863-4592

**Michele Siu**  
Tel: 416) 367-7743

**AFFLECK GREENE ORR LLP**  
Barristers & Solicitors  
One First Canadian Place  
Suite 840, P.O. BOX 489  
Toronto, ON M5X 1E5

**W. Michael G. Osborne**  
Tel: 416-360-5919  
Fax: 416-360-5960

**DEPARTMENT OF JUSTICE**  
Place Du Portage, Phase 1  
50 Victoria Street, 22<sup>nd</sup> Floor  
Hull, Quebec K1A 0C9

**André Brantz**  
Tel: 819-997-3325  
Fax: 819-953-9267

Solicitors for the Respondent, the Commissioner of Competition

**TO: BORDEN LADNER GERVAIS LLP**  
Barristers and Solicitors  
1000-60 Queen Street  
Ottawa, Ontario K1P 5Y7

**David W. Scott, Q.C.**  
Tel: (613) 787-3535  
Fax: (613) 230-8842

**STIKEMAN ELLIOTT**  
Barristers and Solicitors  
Commerce Court West  
53rd Floor, P.O Box 85  
Toronto, Ontario M5L 1B9

**Shawn C.D. Neylan**  
Tel: (416) 869-5545  
Fax: (416) 947-0866

**Nick McHaffie**  
Tel: (613) 566-0546  
Fax: (613) 230-8877

Solicitors for the Appellants

**AND TO: WILLMS & SHIER**  
4 King Street West, Suite 900  
Toronto, ON M5H 1B6

Mr. John Willms  
Tel: (416) 863-0711  
Fax: (416) 863-1938  
Solicitors for the Intervenor

**AND TO: COMPETITION TRIBUNAL**  
600 – 90 Sparks Street  
Ottawa, ON K1P 5B4

## **A. Overview**

1. The Commissioner respectfully submits that this Application should be summarily dismissed, with costs.
2. On October 3, 2001, The Tribunal ordered the applicants (collectively “CWS”) to divest the Ridge by April 1, 2002 (the “Divestiture Order”). The Divestiture Order was the outcome of what was intended by the parties to be an expeditious process to determine whether or not CWS could retain the Ridge.
3. Instead, divestiture of the Ridge has been delayed while CWS has engaged in further litigation. In the meantime, while the Ridge has been subject to a hold separate Order, CWS has received all of the profits from the Ridge and has benefited from the fact that the Ridge has not yet been sold to an independent operator.
4. First, CWS appealed the Tribunal’s decision to the Federal Court of Appeal. In its appeal, it attacked, among others, the same findings of the Tribunal which it now seeks to attack under the guise of a change in circumstances. CWS’s appeal was dismissed by the Federal Court of Appeal, from the Bench, on March 12, 2003.
5. Then, in April, 2003, CWS applied to the Federal Court of Appeal for an Order staying the divestiture Order pending its intended Application for Leave to Appeal to the Supreme Court of Canada. The Federal Court of Appeal dismissed that motion on April 16, 2003.
6. Subsequently, on May 29, 2003, CWS filed this Application, which it then amended on July 3, 2003.
7. By not filing this Application until May 29, 2003, CWS effectively ensured that the Tribunal would not have sufficient time to deal with the Application before September 8, 2003, when CWS was required to complete divestiture of the Ridge. In order to allow the Tribunal to consider the Application, the Commissioner consented to a limited stay of the divestiture Order, until sixty days following disposition of this Application.

8. This Application is not about a change in the circumstances that led to the making of the divestiture Order. It is, instead, an attempt by CWS to launch another attack on the same findings of the Tribunal which it unsuccessfully appealed.

9. CWS' allegations do not constitute "changes in the circumstances that led to the making of" the Divestiture Order within the meaning of s.106. They are in fact arguments that the Tribunal was wrong in its findings that CWS's applications to expand its Warwick and Richmond landfills are likely to be approved, that there is likely to be excess disposal capacity in Ontario, and that prices of disposal in Ontario are likely to fall. The Tribunal's findings are not "circumstances that led to the making of" the Divestiture Order."

10. CWS does not allege that its own landfill expansions will not take place, but rather that they are taking longer than CWS expected. The timing of the applications is largely within CWS' control. CWS cannot allege that delays in its own applications constitute changes in circumstances. Further, all of the circumstances which CWS now says caused this delay were known or foreseeable to CWS at the time of the merits and remedy hearings before the Tribunal. In any event, the circumstances relating to the expansions remain substantially the same as they were at the original hearing. The applications are likely to be approved if CWS wants them to be.

11. The other "changed circumstances" alleged by CWS are also attacks against the Tribunal's findings that with an independent Ridge, prices would likely fall in Ontario and less waste would be shipped to Michigan. The Commissioner submits that CWS cannot use the litigation process to delay divestiture, and then claim that there has been a change in circumstances because the competitive benefits intended to flow from that divestiture have not yet occurred.

12. In addition to the fact that none of CWS's allegations constitute "changes in the circumstances which led to the making of the order" within the meaning of section 106, it cannot be said that in the present circumstances, the Tribunal's divestiture Order would not have been made. None of the circumstances which led the Tribunal to conclude that allowing CWS to have the Ridge would result in a substantial *lessening* of competition have changed.

13. With respect to the Tribunal's finding that there would be a substantial *prevention* of competition, the case for divestiture is stronger than it was in 2001. As a result of its expansion of its Petrolia site, CWS's share of the disposal market has increased. Its applications to expand its Richmond and Warwick landfills remain outstanding (as they were in 2001), and CWS now only needs to succeed in its application to expand Warwick for there to be excess disposal capacity in Ontario.

**B. Nature of this application**

14. This is an application by CWS (and related corporations, collectively, "CWS") to rescind or vary the order made by the Tribunal following its hearing of an application by the Commissioner pursuant to section 92 of the *Competition Act* (the "Act"), Tribunal file number 2000-002 (the "Section 92 Application").

15. The findings made by the Tribunal in its Merits Reasons issued on March 28, 2001, and its Remedy Reasons issued on October 3, 2001, are not open to question in this application.

16. The Commissioner and CWS filed an Agreed Statement of Facts and a Supplementary Agreed Statement of Facts in the Section 92 Application. CWS is not entitled to resile from any admissions contained in these agreed statements of facts, or those contained in its Response in the Section 92 Application, without leave of the Tribunal. In this application, CWS has not sought such leave.

17. The Commissioner relies on the Tribunal's Merits Reasons and Remedy Reasons, and on the Commissioner's Notice of Application and Statement of Grounds and Material Facts and Reply, filed in the Section 92 Application.

18. Terms used in this Response have the same meaning as they do in the Tribunal's Merits Reasons and Remedy Reasons, and in the Agreed Statement of Facts and Supplementary Agreed Statement of Facts.

19. The respondent, the Commissioner of Competition (the "Commissioner"), admits the truth of the allegations contained in the following paragraphs in the Statement of Grounds and Material Facts (the "Statement of Grounds"): 1, 2, 7, 8, 14-16, 20-21 (except that the Commissioner has no knowledge of the status of the environmental assessment at that time), 22-

25, 31-35, 45, 61, 75-76, 78, 87-88 (subject to the matters pleaded at paragraphs 96-98 hereof), 89-94, 113, and 117-119.

20. The Commissioner denies the truth of the allegations contained in the following paragraphs in the Statement of Grounds: 3-6, 9-13, 17-19, 26-30, 36-44, 45A-60, 62-74, 77, 79-81, 95-112, 114-116, 120, and 125.

20A. The Commissioner's response to paragraphs 82-86 of the Statement of Grounds is set out in paragraphs 90-95 hereof.

21. With respect to paragraphs 121-124 of the Statement of Grounds, the Commissioner has consented to a limited stay of the Divestiture Order, such that the 180 day time periods referred to in paragraphs 7, 8, 14(a) and 15 shall expire 60 days after any disposition of this Application that does not rescind or hold in abeyance the CWS' obligation to divest the Ridge landfill.

### **C. The parties**

22. The appellant, CWS, is the largest waste management company in Canada. It provides solid non-hazardous waste management services to institutional, commercial, industrial and residential customers, including collection, transportation and disposal of waste. CWS is owned by the appellant Waste Management, Inc. ("WMI"), which is the largest waste management company in the United States.

23. The Commissioner of Competition is appointed pursuant to the *Competition Act* (the "Act") and is charged with enforcing the Act.

### **D. The waste industry**

24. The following section provides an overview of the waste industry in summary form. A more complete overview of the waste industry is found in the Agreed Statement of Facts filed in Tribunal file 2000/002 and the Merits Reasons.

25. ***Kinds of waste:*** This case involves the market for disposal of ICI waste from the GTA and the Chatham-Kent area. ICI waste is generated by industrial, commercial, and institutional

customers. Residential waste is waste that is municipal or domestic in origin. Solid non-hazardous waste (“SNHW”) is comprised of ICI waste and Residential Waste.

26. **Waste disposal:** Once waste is collected it is disposed of in a landfill or incinerator. Some waste is diverted through recycling or composting.

27. **Transfer stations:** Transfer stations are temporary depositories of waste that consolidate waste from local collection trucks for transport to a landfill. Transfer stations allow waste to be economically disposed of at more distant landfills than would otherwise be the case. There are approximately 35 transfer stations in the GTA. CWS and the City of Toronto each own seven. The remaining 21 are “independent”. All of these transfer stations accept ICI waste from private waste collectors.

28. **Landfills:** Landfills are places where waste is disposed of. In Ontario, a landfill’s operations are governed by its Certificate of Approval, which sets out what kinds of waste a landfill is permitted to receive, how much, and from where.

29. **Transport and disposal:** Transfer stations are among a landfill’s customers. In order to dispose of waste at a landfill, transfer stations incur two costs: transport and disposal (also referred to as a “tipping fee”). The transport costs vary by distance and the size of the load. Disposal is usually priced by weight (per tonne). The total of these two costs is sometimes referred to together as the “T&D price”.

30. **Price discrimination:** Landfills charge different prices to different customers based on distance and other factors. Landfills that are far from the GTA charge lower tipping fees for waste from the GTA. Those same landfills charge higher tipping fees to their local customers because these customers would incur higher transport costs to use more distant landfills.

## **E. The section 92 proceedings**

### ***(1) The merger***

31. In May, 1999, CWS proposed acquiring the second largest waste management company in Canada, Browning-Ferris Industries Ltd. (“BFIL”). The Commissioner had numerous serious

competition concerns about the merger. CWS agreed not to acquire certain landfills, transfer stations, and collection operations of BFIL.

32. CWS also proposed acquiring the Ridge from BFIL. The Ridge has an annual permitted capacity, following a recent expansion, of 680,000 tonnes of waste. It can receive residential waste from its own municipality and five surrounding counties, and industrial, commercial and institutional (“ICI”) waste from the entire province.

33. The Commissioner and CWS agreed that CWS’ acquisition of the Ridge would be submitted to the Tribunal. The Commissioner and CWS’s intention was that this discrete issue would be determined in an expeditious manner.

34. CWS then acquired the Ridge subject to a consent interim “hold-separate” order.

35. There are relatively few landfills in southern Ontario capable of receiving ICI waste from the GTA. The Tribunal found that with the acquisition of the Ridge, CWS would own 70% of the likely capacity for ICI waste from the GTA in 2002. There are only two landfills in the Municipality of Chatham-Kent; with the Ridge, CWS would own both.

***(2) The section 92 application***

36. In April 2000, the Commissioner filed an application under s. 92 of the Act seeking an order requiring CWS to divest the Ridge (the “Section 92 Application”).

37. The Tribunal heard the application over 16 hearing days in November, 2000, and June 2001.

***(3) The Tribunal’s reasons***

38. In its Merits Reasons, issued on March 28, 2001, the Tribunal concluded that CWS’ acquisition of the Ridge would likely:

- a) substantially *prevent* competition for the disposal of ICI waste from the *GTA*;
- b) substantially *lessen* competition for the disposal of ICI waste from the *GTA*;



- c) substantially *prevent* competition for the disposal of ICI waste from *Chatham-Kent*; and
- d) substantially *lessen* competition for the disposal of ICI waste from *Chatham-Kent*.

39. In its Remedy Reasons, issued on October 3, 2001, the Tribunal ordered the divestiture of the Ridge.

*(i) Substantial lessening of competition*

40. The Tribunal held that landfills price discriminate between customers. The Tribunal found that the economic theory of spatial competition outlined by the Commissioner's expert, Prof. Baye, was consistent with the pricing in the market. The Tribunal rejected the argument of CWS and its first expert, Prof. Hay, that a perfectly competitive supply and demand framework explained the market for the disposal of ICI waste. The Tribunal held that the existence of price discrimination is a basis to delineate narrower geographic markets.

41. The Tribunal found that the relevant geographic market is southern Ontario. The Tribunal held that Michigan and New York landfills did not constrain Tipping Fees for ICI waste from the GTA at the time, or prospectively.

42. The Tribunal held that there are significant barriers to entry into the market for disposal of ICI waste.

43. The Tribunal held that CWS' acquisition of the Ridge would remove a vigorous and effective competitor in the market for disposal of ICI waste from the GTA. The Tribunal held that the Ridge and two CWS landfills near Sarnia (Blackwell and LaSalle) were each other's closest competitors for ICI waste from the GTA.

44. The Tribunal held that there was no effective foreign competition for ICI waste from the GTA. Although some waste was being shipped to Michigan and New York landfills, the Tribunal held that "observed shipment patterns at prevailing Tipping Fees do not establish that those alternatives would be good substitutes in a market characterized by competitive pricing". Indeed, the Tribunal held that Michigan and New York landfills are not effective competitors now. They do not constrain Tipping Fees for ICI waste from the GTA currently or prospectively,

and “would have a minimal impact on a potential exercise of market power by the merged entity over non-contracted waste volumes”.

45. The Tribunal found that there would be little effective remaining competition in the event that CWS were permitted to retain the Ridge. Disposal options in southern Ontario would be reduced to CWS, Essex-Windsor, Green Lane and Walker. Other landfills in southern Ontario would not be able to constrain an exercise of market power by CWS.

46. The Tribunal held that CWS’ acquisition of the Ridge would enhance its market power and substantially lessen competition in the disposal of ICI waste from the GTA. None of the circumstances that led to the Tribunal’s conclusion are challenged by CWS in this Application.

47. The Tribunal also held that that CWS' acquisition of the Ridge would enhance its market power and substantially lessen competition in the disposal of ICI waste from Chatham-Kent. None of the circumstances that led to the Tribunal's conclusion are challenged by CWS in this Application.

*(ii) Substantial prevention of competition*

48. The Tribunal also held that CWS’ applications to expand its Warwick and Richmond landfills are likely to be approved, leading to a likely excess of capacity in southern Ontario for ICI waste from the GTA beginning in 2002. The Tribunal relied on CWS’ internal documents and evidence from witnesses in reaching this conclusion. CWS did not call any evidence to suggest that approval was not likely, or to contradict its own internal documents.

49. The Tribunal found that with the emergence of an excess of disposal capacity in southern Ontario, if the Ridge were in independent hands, competition between landfills would lead to lower tipping fees for ICI waste from the GTA. But if CWS were permitted to retain the Ridge, this competition would not occur. CWS’ acquisition of the Ridge would thus also likely substantially prevent competition for disposal of ICI waste from the GTA.

50. The Tribunal concluded that following these expansions, CWS’ share of the total capacity for ICI waste from the GTA would likely reach 70% with the Ridge, as against 48% without; and its share of the excess capacity would be 85.8% with the Ridge, as against 63.6% without.

51. The Tribunal held that the same conclusions applied to the market for disposal of ICI waste from Chatham-Kent. In Chatham-Kent, CWS would have a 100% market share with the Ridge.

*(iii) Remedy*

52. The Tribunal concluded that divestiture of the Ridge was the appropriate remedy. The Tribunal found that contractual arrangements for the supply of disposal services proposed by CWS were not a remedy that it could order under s. 92(1)(e) of the Act. Moreover, these contracts were not a sufficient remedy; and they presented enforcement problems.

**F. No change in circumstances**

53. There has been no change in the “circumstances that led to the making of” the Divestiture Order.

54. The things that CWS alleges constitute changes in circumstances are findings made by the Tribunal as to the likelihood of certain events taking place. The Tribunal’s findings do not constitute “circumstances that led to the making of” the Divestiture Order. The circumstances that led the Tribunal to these findings have not changed in any material way.

55. It remains likely that CWS’ applications to expand its Warwick and Richmond landfills will be approved. Delay in this approval process does not constitute a “change in circumstances”.

56. CWS does not allege that the expansions of its Richmond and Warwick landfills will not take place. In its Response in the section 92 Application, CWS pleaded that:

[B]arriers to entry for new or expanded landfills are generally low except that regulatory approvals in Ontario usually time and expend in order to secure a permit for a new landfill or an expansion of an existing landfill.

57. The timing of the applications to expand Warwick and Richmond and the efforts made to secure approval, are largely within CWS’ control. A circumstance that is largely within the control of a party cannot constitute a “change in circumstances” within the meaning of s. 106 of the Act.

58. Most of the facts alleged by CWS to explain why its applications are taking longer than CWS expected in 2000 are things that CWS knew or ought to have known, or were reasonably foreseeable to CWS at the time of the hearing of the Section 92 Application in November 2000. In this application under s. 106, CWS is not entitled to present evidence available to it at the time of the Section 92 Application.

***(1) Warwick landfill***

59. CWS' Warwick landfill is located near Watford, Ontario. It currently has an annual permitted capacity of 56,000 tonnes and a service area encompassing a 50 km radius.

60. CWS has applied to expand Warwick's annual capacity to 750,000 tonnes, and its service area of all of Ontario.

61. CWS received approval of the ToR for this application on January 11, 2000.

62. The ToR phase is the first of the three major phases of the Environmental Assessment required for the approval of CWS' application to expand Warwick. The ToR set out the roadmap for the preparation of the Environmental Assessment itself. Its approval by the Ministry of the Environment indicates that the Ministry is satisfied that an Environmental Assessment prepared in accordance with the ToR will be consistent with the *Environmental Assessment Act* and the public interest.

63. The Tribunal relied on (among other things), an internal CWS internal documents. A CWS document entitled "Warwick Landfill Expansion Project" sets out the following timeline for Warwick:

- Terms of Reference approved by the Minister of the Environment on January 11, 2000
- Submission of the Environmental Assessment expected in Spring 2001
- EA approval by Minister expected Fall 2001
- Implementation of landfill and waste receipt scheduled for Summer 2002

64. At the hearing of the Section 92 Application, while CWS argued that the outcome of the Environmental Assessment process was uncertain, it did not call any witnesses in support of its argument or to otherwise contradict what was set out in its own documents.

65. The likely approval date for CWS' application to expand Warwick's capacity and service area is not a "circumstance that led to the making of the order" within the meaning of s. 106. The Tribunal did not make a specific finding as to when the application would be approved; it simply held that it would be. CWS' application to expand Warwick's capacity and service area remains likely to be approved, as the Tribunal found. CWS does not suggest in the Statement of Grounds that the expansion of Warwick is unlikely to occur.

66. In any event, findings of the Tribunal are not "circumstances that led to the making" of the Divestiture Order.

67. The timing of the environmental assessment is in large measure within CWS' hands. As proponent, CWS was entitled to decide, and decided, how to conduct the environmental assessment based on the ToR. A matter within the control of CWS cannot constitute a "change in circumstances" within the means of s.106.

68. CWS knew or ought to have known or foreseen the alleged facts set out in paragraph 65, 66, and 67 of the Statement of Grounds in the fall 2000. CWS could have, but did not, lead evidence during the hearing of the Section 92 Application to support these allegations. In this Application under s. 106, CWS is not entitled to prevent evidence available to it in the section 92 Application.

***(2) Richmond landfill***

69. CWS' Richmond landfill is located near Napanee, Ontario. It currently has an annual capacity of 125,000 tonnes and a service area for ICI waste of southern Ontario (including the GTA).

70. CWS has applied to expand Richmond's annual capacity to 750,000 tonnes.

71. CWS received approval of the Terms of Reference ("ToR") for this application on September 16, 2000.

72. The Tribunal relied on (among other things), internal CWS internal documents. A CWS document entitled “Richmond Landfill Expansion Project” sets out the following timeline for Richmond:

- Terms of Reference approved by the Minister of the Environment on September 16, 2000
- Submission of the Environmental Assessment expected in Spring 2001
- EA approval by Minister expected Fall 2001
- Implementation of landfill and waste receipt scheduled for Summer 2002

73. At the hearing of the Section 92 Application, while CWS argued that the outcome of the Environmental Assessment process was uncertain, it did not call any witnesses in support of its argument or to contradict its own documents.

74. The likely approval date for CWS’ application to expand Richmond’s capacity and service area is not a “circumstance that led to the making of the order” within the meaning of s. 106. The Tribunal did not make a specific finding as to when the application would be approved; it simply held that it would be.

75. CWS’ application to expand Richmond’s capacity and service area remains likely to be approved, as the Tribunal found. Although the quashing of the ToR by the Divisional Court is a setback, it merely amounts to a delay of the environmental assessment process. CWS does not suggest in the Statement of Grounds that the expansion of Richmond is unlikely to occur.

76. In any event, findings of the Tribunal are not “circumstances that led to the making” of the Divestiture Order.

77. The timing of the environmental assessment once the ToR are approved is in large measure within CWS’ hands. As proponent, CWS was entitled to decide, and decided, how to conduct the environmental assessment based on the ToR. A matter within the control of CWS cannot constitute a “change in circumstances” within the meaning of s.106.

78. CWS knew or ought to have known or foreseen the alleged facts set out in paragraphs 49, 50, and 52 of the Statement of Grounds in the fall 2000. CWS could have, but did not, lead

evidence during the hearing of the Section 92 Application to support these allegations. In this application under s. 106, CWS is not entitled to present evidence available to it at the time of the section 92 Application.

79. In particular, the Notice of Application for Judicial Review in Divisional Court file no. 622/2000, to review the decision of the Ministry of the Environment approving the ToR for Richmond, was issued on October 6, 2000, that is, one month before the hearing of the Section 92 Application. CWS knew about this application at the time of the hearing of the Section 92 Application, but did not bring it to the attention of the Tribunal.

***(3) Likely excess disposal capacity***

80. The likelihood of excess disposal capacity for ICI waste from the GTA emerging is not a “circumstance that led to the making of” the Divestiture Order. Rather, it is one of the findings made by the Tribunal in the course of its reasons. The circumstances that led the Tribunal to this finding (including the likelihood of CWS’ applications to expand Warwick and Richmond being approved) have not changed in any material way.

81. Because of the increase to Petrolia’s annual permitted capacity and service area, it is no longer necessary for both applications to be approved for there to be excess disposal capacity in southern Ontario. Once CWS’ application to expand Warwick is approved, there will be an excess of disposal capacity in southern Ontario, leading to a reduction in Tipping Fees as landfills compete for ICI waste.

82. The emergence of excess capacity is thus *more likely* than it was at the time of the hearing of the Section 92 Application. At that time, both expansions needed to be approved for the excess capacity to develop.

***(4) City of Toronto interest in the Ridge***

83. CWS claims that the City of Toronto is interested in buying the Ridge pursuant to the Divestiture Order, and that this interest shows that the City of Toronto is now interested in disposing of its Residential waste in Ontario.

84. This pleading is a collateral attack by CWS on the Tribunal's finding that before considering disposal options for its waste other than the Republic or Onyx landfills in Michigan, it would embark on a lengthy tender process.

85. The City of Toronto cannot acquire the Ridge to dispose of its Residential waste. Paragraph 10(c)(i) of the Divestiture Order requires that:

the Purchaser shall effect the purchase with the expressed intention of carrying on the business and competing effectively in the market for the disposal of ICI Waste from the GTA as well as the disposal of solid waste from the Chatham-Kent area;

86. Moreover, the Ridge's Certificate of Approval limits its service area for Residential waste to five counties (Kent, Elgin, Oxford, Middlesex, and Lambton). The Ridge cannot accept Residential waste from Toronto.

87. The City of Toronto would not likely be interested in buying the Ridge unless it could use it for Toronto's Residential waste. Since it cannot, it follows that the City of Toronto would not be interested in buying the Ridge.

88. In any event, the City of Toronto's interest in buying the Ridge, even for Residential waste, cannot amount to a change in circumstances within the meaning of section 106. In order for this alleged "change" to occur, the Ridge must first be sold pursuant to the Divestiture Order.

89. CWS is suggesting that at the time of the hearing of the Section 92 Application, the City of Toronto was not interested in disposing of its waste in Ontario. The Agreed Statement of Facts and the evidence showed that before deciding to send all of its waste to Michigan, the City of Toronto conducted an extensive bidding process. That process selected an Ontario site, the Adams Mine site. Negotiations with the consortium proposing the Adams Mine site broke down, however. The City of Toronto elected to send all of its waste to Michigan because there were no viable Ontario disposal options available to it apart from Adams Mine. That remains the case today. It has not changed.



*(5) Continued shipments to United States*

90. CWS alleges in paragraphs 82-86 of its Statement of Grounds that the continuation of the situation that existed at the time of the hearing of the Section 92 Application, that is, the shipment of waste to Michigan and New York, constitutes a change in circumstances. That cannot be the case.

90A. The Commissioner agrees that some Residential and ICI waste from the GTA continues to be shipped to the United States. The Commissioner has no knowledge as to the precise amounts of such waste that are currently being shipped to the United States. Those amounts are irrelevant to this Application.

91. The Tribunal predicted that with the Ridge in independent hands some (but not all) of the waste then being shipped to landfills in Michigan and New York would no longer be shipped there once prices in southern Ontario fell with the emergence of excess capacity. The Tribunal held that if CWS were permitted to retain the Ridge, this competition would not develop.

91A. The Commissioner acknowledges that the Tribunal's predicted reductions in shipments of ICI waste from the GTA to Michigan have not yet occurred, and are unlikely to occur until CWS expands its Warwick or Richmond landfills, and until CWS no longer owns the Ridge. This is consistent with the Tribunal's findings and is not a change in circumstances.

92. CWS has successfully delayed the divestiture of the Ridge. CWS cannot allege as changed circumstances the fact that the competitive benefits of that divestiture have not yet occurred.

93. This prediction was a finding made by the Tribunal and not a “circumstance that led to the making” of the Divestiture Order. The circumstances on which this finding is based have not changed in any material way.

94. Moreover, the Tribunal found that significant quantities of waste would continue to be shipped to Michigan and New York regardless of changes in the Tipping Fee for ICI waste from the GTA. Waste that would continue to be shipped to Michigan and New York included:

- a) Directed waste: CWS and its US parent, WMI, are vertically integrated waste management companies. The Tribunal held that direction/internationalization of

waste by CWS was likely to continue regardless of changes in Tipping Fees in Ontario.

- b) City of Toronto Residential and ICI waste: the Tribunal held that following the closure of the Keele Valley landfill, the City would send all of its Residential and ICI waste to Michigan. At the time of the hearing of the Section 92 Application, the City disposed of approximately 1.8 million tonnes of waste annually in landfills.
- c) Waste from outside of the GTA that was being shipped to Michigan and New York at the time of the hearing of the Section 92 Application.

95. The data CWS presents at paragraph 84 are not useful, for three reasons. First, the conversion factor is so imprecise that it is impossible to say with certainty that there has been an increase in waste being shipped to Michigan from Canada. Second, the figures are for waste imports to Michigan from all of Canada. The evidence at the hearing of the Section 92 Application was that there was waste being shipped to Michigan from places in Ontario other than the GTA. Third, the figures do not permit one to ascertain whether the volumes originated from CWS or independent transfer stations. This is particularly important in light of the Tribunal's finding that CWS is the largest vertically integrated disposal company in southern Ontario and engages in spatial price discrimination. This permits CWS to re-route its own waste to its own landfills in Michigan in order to free up space at those southern Ontario landfills where it is able to charge higher disposal prices to selected customers.

#### ***(6) Prices***

96. At paragraph 87, CWS observes that the Tribunal held that Tipping Fees charged by southern Ontario landfills for ICI Waste from the GTA would likely fall with the emergence of excess capacity, *if the Ridge were not owned by CWS*.

96A. The Commissioner acknowledges that the Tribunal's predicted Tipping Fee reductions have not yet occurred, and are unlikely to occur until CWS expands its Warwick or Richmond landfills, and until CWS no longer owns the Ridge. This is consistent with the Tribunal's findings and is not a change in circumstances.

96B. This prediction was a finding made by the Tribunal and not a “circumstance that led to the making” of the Divestiture Order. The circumstances on which this finding is based have not changed in any material way.

97. The Ridge is still owned by CWS, albeit under a hold-separate order. While the Tribunal ordered the divestiture of the Ridge in 2001, CWS has successfully delayed this divestiture. CWS cannot allege as changed circumstances the fact that the competitive benefits of that divestiture have not yet occurred.

98. Moreover, the excess capacity predicted by the Tribunal has not yet emerged, due in part to the length of the environmental assessment process chosen by CWS.

**G. The Tribunal would have made the same order in the current circumstances**

99. In addition to the fact that the circumstances that led to the making of the Divestiture Order have not changed, CWS cannot demonstrate that the Tribunal would not have made the same order in the current circumstances, for the reasons set out below.

***(1) ICI Waste from the GTA***

*(i) The Tribunal would have found the relevant geographic market to be southern Ontario*

100. The Tribunal relied on a number of factors in finding that the relevant geographic market is southern Ontario, only one of which was the emergence of excess capacity. The fact that landfills practise price discrimination was a significant factor leading the Tribunal to delineate the geographic market as it did.

101. Consequently, even if one of the circumstances that led the Tribunal to find the relevant geographic market to be southern Ontario had changed (which it has not), the other circumstances that led the Tribunal to this finding have not changed. In particular, landfills still practise price discrimination.

102. CWS cannot demonstrate that the Tribunal would not have found the relevant geographic market to be southern Ontario in the current circumstances.

*(ii) The Tribunal would have made the same findings in respect of the section 93 factors*

103. None of the circumstances relevant to the section 93 factors considered by the Tribunal has changed, nor has CWS alleged that they have changed.

104. The Tribunal held that:

- a) There are significant barriers to entry into the waste disposal market;
- b) CWS' acquisition of the Ridge removes the Ridge as a vigorous and effective competitor in the ICI Waste disposal market;
- c) There is a lack of effective foreign competition, as Michigan and New York landfills are not good substitutes for southern Ontario landfills; and
- d) There would be a lack of effective remaining competition if CWS were permitted to retain the Ridge:

[152] In light of the evidence, it appears to the Tribunal that if CWS is permitted to retain the Ridge, disposal options in Southern Ontario for independent Transfer Stations in the GTA will be limited to CWS, the Essex-Windsor landfill, the GreenLane or Walker landfills. Other landfills in Southern Ontario would not be able to constrain an exercise of market power by CWS.

105. With respect to the lack of effective foreign competition, the Tribunal held that because of direction and internalization of waste by CWS,

These volumes indicate that the Michigan and New York landfills would have a minimal impact on a potential exercise of market power by the merged entity over non-contracted waste volumes.

106. The Tribunal also held that Michigan and New York landfills are poor substitutes for southern Ontario landfills. CWS has not alleged any change in circumstances in regard to this finding.

107. In fact, Michigan and New York landfills are even poorer substitutes for southern Ontario landfills than at the time of the section 92 Application because of (among other things) more rigorous border controls imposed by the United States following the September 11, 2001, terrorists attacks.

*(iii) The Tribunal would have made similar findings in respect of CWS' market share*

108. The Tribunal found that with the Ridge and following the expansions of Warwick and Richmond, CWS would have 70% of the capacity available for ICI Waste from the GTA, against 48% without. In the current circumstances, the Tribunal would arrive at similar findings.

109. With the expansion of Petrolia's capacity and service area, but excluding the expansions of Warwick and Richmond, CWS' current share of the capacity available for ICI Waste from the GTA, if it is allowed to keep the Ridge, would be 53% (an increase from the 33% shown in Table 1 in the Merits Reasons), as against 20% without, as the following table indicates:

<b>Landfill</b>	<b>Affiliation</b>	<b>Annual capacity available for ICI Waste from the GTA (tonnes)</b>
Richmond	CWS	125,000
Petrolia	CWS	300,000
TOTAL CWS		425,000
Ridge	CWS (hold separate)	680,000
TOTAL CWS + RIDGE		1,105,000
Walker	Independent	617,000
Essex-Windsor	County of Essex- Windsor	100,000
Greenlane	Independent	262,500
TOTAL NON-CWS		979,500
TOTAL CAPACITY		2,084,500
CWS SHARE OF CAPACITY		20%
CWS + RIDGE SHARE OF CAPACITY		53%

*Note: the figures in this table are based on column 2 in Table 1 from the Tribunal's Merits Reasons, with the exception of the capacity of Petrolia, which has been expanded. The Essex-Windsor landfill has a total capacity of 320,000 tonnes annually, but has been authorized to market only 100,000 tonnes of that capacity for ICI Waste from the outside the county, as the Tribunal found.*

110. CWS' acquisition of the Ridge thus increases its market share by 33 percentage points in the current circumstances.

111. Once CWS' applications to expand Warwick and Richmond are approved, CWS' share of the capacity available for ICI Waste from the GTA will be 72%, as against 52% without, which is slightly higher than that predicted by the Tribunal in its Merits Reasons, as the following table shows:

<b>Landfill</b>	<b>Affiliation</b>	<b>Annual capacity available for ICI Waste from the GTA (tonnes)</b>
Richmond	CWS	750,000
Warwick	CWS	750,000
Petrolia	CWS	300,000
<b>TOTAL CWS</b>		<b>1,800,000</b>
Ridge	CWS (hold separate)	680,000
<b>TOTAL CWS + RIDGE</b>		<b>2,480,000</b>
Walker	Independent	617,000
Essex-Windsor	County of Essex-Windsor	100,000
Greenlane	Independent	262,500
<b>TOTAL NON-CWS</b>		<b>979,500</b>
<b>TOTAL CAPACITY</b>		<b>3,459,500</b>
<b>CWS SHARE OF CAPACITY</b>		<b>52%</b>

CWS + RIDGE SHARE OF  
CAPACITY 71.6%

112. CWS cannot demonstrate that the Tribunal would not have found that with the Ridge, CWS would have a high market share in the current circumstances.

*(iv) The Tribunal would still have found that CWS' acquisition of the Ridge would likely substantially lessen competition for the disposal of ICI Waste from the GTA*

113. The Tribunal found that CWS' acquisition of the Ridge would enhance CWS' market power and likely substantially lessen competition for the disposal of ICI Waste from the GTA.

114. CWS cannot demonstrate that in the current circumstances, the Tribunal would not have found that its acquisition of the Ridge was likely to substantially lessen competition, having regard to CWS' high market share with the Ridge, coupled with the Tribunal's finding that CWS has market power, and its findings on the section 93 factors outlined above.

115. The circumstances that led the Tribunal to conclude that there will be a likely substantial lessening of competition have not changed; and CWS does not allege that they have changed.

*(v) The Tribunal would still have found that CWS' acquisition of the Ridge would likely substantially prevent competition for the disposal of ICI Waste from the GTA*

116. Even if the delays in the environmental assessments for the proposed expansions of Warwick and Richmond constitute a "change in circumstances", the Tribunal would nevertheless have found that CWS' acquisition of the Ridge would likely substantially prevent competition for disposal of ICI Waste from the GTA.

117. The current circumstances are substantially the same as those encountered by the Tribunal in the Section 92 Application. CWS' has applications to expand two landfills that are likely to with the expansion of Petrolia, only one of these two applications needs to be approved for excess capacity to emerge. Thus in the current circumstances it is even more likely that the excess capacity will emerge than it was when the Tribunal heard the Section 92 Application.

118. Consequently, in the current circumstances, the Tribunal would still find that an excess in disposal capacity is likely to develop, leading to downward pressure on Tipping Fees.

119. Moreover, allowing CWS to retain the Ridge reduces its incentive to pursue its applications to expand Warwick and Richmond vigorously.

120. As well, with the Ridge, CWS would be able to use its market power strategically to prevent the emergence of excess capacity.

121. The Tribunal would thus also find in the current circumstances that CWS' acquisition of the Ridge would likely prevent this competition from occurring, leading to a substantial prevention of competition

***(2) Chatham-Kent***

122. The Tribunal found that CWS' acquisition of the Ridge would likely cause a substantial lessening and a substantial prevention of competition for the disposal of ICI Waste from Chatham-Kent.

123. CWS has not alleged any change in circumstances with respect to Chatham-Kent.

124. At the hearing of the Section 92 Application, CWS did not propose divesting the Gore landfill as an alternative to divestiture of the Ridge. The alternative remedy that CWS did propose, namely airspace agreements, was rejected by the Tribunal as being neither available nor effective. It is not open to CWS to now propose a remedy that it did not propose in the Section 92 Application in the absence of a change in circumstances.

**H. Order requested**

125. The Commissioner requests that the Tribunal dismiss CWS' application with costs.



**TO: BORDEN LADNER GERVAIS LLP**  
Barristers and Solicitors  
1000-60 Queen Street  
Ottawa, Ontario K1P 5Y7

**David W. Scott, Q.C.**  
Tel: (613) 787-3535  
Fax: (613) 230-8842

**STIKEMAN ELLIOTT**  
Barristers and Solicitors  
Commerce Court West  
53rd Floor, P.O Box 85  
Toronto, Ontario M5L 1B9

**Shawn C.D. Neylan**  
Tel: (416) 869-5545  
Fax: (416) 947-0866  
Solicitors for the Appellants

**AND TO: WILLMS & SHIER**  
4 King Street West, Suite 900  
Toronto, ON M5H 1B6

**Mr. John Willms**  
Tel: (416) 863-0711  
Fax: (416) 863-1938  
Solicitors for the Intervener

**AND TO: COMPETITION TRIBUNAL**  
600 – 90 Sparks Street  
Ottawa, ON K1P 5B4

**THE COMPETITION TRIBUNAL**

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

**IN THE MATTER OF** an application by Canadian Waste Services Holdings Inc., Canadian Waste Services Inc. and Waste Management Inc. under s. 106 of the *Competition Act*;

**AND IN THE MATTER OF** the acquisition by Canadian Waste Services Inc. of the Ridge Landfill in Blenheim, Ontario from Browning-Ferris Industries Ltd.

**B E T W E E N:**

**Canadian Waste Services Holdings, Inc.,  
Canadian Waste Services Inc., and Waste  
Management, Inc.**

Applicants

– and –

**Commissioner of Competition**

Respondent

---

**AMENDED RESPONSE OF THE  
COMMISSIONER OF COMPETITION**

---

**FRASER MILNER LLP**

1 First Canadian Place  
100 King Street West, Suite 3900  
Toronto, ON M5X 1B2

**Donald B. Houston**

Tel: 416-863-4620  
Fax: 416-863-4592

**AFFLECK GREENE ORR LLP**

Barristers & Solicitors  
One First Canadian Place  
Suite 840, P.O. Box 489  
Toronto, Ontario M5X 1E5

**W. Michael G. Osborne**

Tel: (416) 360-5919  
Fax: (416) 360-5960

**DEPARTMENT OF JUSTICE**

Place de Portage, Phase 1  
50 Victoria Street, 22<sup>nd</sup> Floor  
Hull, Quebec K1A 0C9

**André Brantz**

Tel: (819) 997-3325  
Fax: (819) 953-9267

Solicitors for the Respondent, the  
Commissioner of Competition