



Reference: *Canadian Waste Services Holdings v. Commissioner of Competition*, 2003 Comp. Trib. 16
File no.: CT2003005
Registry document no.: 0026

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

AND IN THE MATTER of an application by Canadian Waste Services Holdings Inc., Canadian Waste Services Inc. and Waste Management, Inc. under section 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.
Waste Management, Inc.
(applicants)

and

The Commissioner of Competition
(respondent)

and

The Corporation of the Municipality of Chatham-Kent
(intervenor)

Date of hearing: 20030904
Member: Simpson J. (Chairperson)
Date of Reasons and order: 20030909
Reasons and order signed by: Madam Justice Sandra J. Simpson



REASONS AND ORDER REGARDING APPLICANTS' MOTION FOR PRODUCTION OF INFORMATION ABOUT THE VOLUME OF WASTE DISPOSED OF BY EACH OF 22 ONTARIO TRANSFER STATIONS

1. REASONS

A. THE MOTION

[1] The applicants (collectively “CWS”) have moved for an order requiring the operators of twenty-two Ontario Waste Transfer Stations (the “Stations”) to provide information about how they disposed of the institutional, commercial and industrial solid non-hazardous waste they received from the Greater Toronto Area (the “GTA”) in 2002 and in the first six months of 2003 (the “Waste”).

[2] The information sought is described on Schedule “A” hereto. Simply stated, the Stations are asked to supply data about the volume of Waste they shipped to disposal facilities (landfill sites and incinerators) either themselves or using the services of brokers (the “Information”). Schedule “A” shows that the disposal facilities of interest are in Southern Ontario, New York State, Michigan State and “other” locations.

[3] This motion is brought in the context of an upcoming hearing, scheduled for October 20, 2003, in an application (the “Section 106 Application”) pursuant to subsection 106(1)(a) of the *Competition Act*, R.S.C. 1985, c. C-34, (the “Act”). It reads:

Rescission or variation of consent agreement or order

106. (1) The Tribunal may rescind or vary a consent agreement or an order made under this Part other than an order under section 103.3 or 104.1 or a consent agreement under section 106.1, on application by the Commissioner or the person who consented to the agreement, or the person against whom the order was made, if the Tribunal finds that

(a) the circumstances that led to the making of the agreement or order have changed and, in the circumstances that exist at the time the application is made, the agreement or order would not have been made or would have been ineffective in achieving its intended purpose;

Annulation ou modification du consentement ou de l'ordonnance

106. (1) Le Tribunal peut annuler ou modifier un consentement ou une ordonnance rendue en application de la présente partie, à l'exception d'une ordonnance rendue en vertu des articles 103.3 ou 104.1 et du consentement visé à l'article 106.1, lorsque, à la demande du commissaire ou de la personne qui a signé le consentement, ou de celle à l'égard de laquelle l'ordonnance a été rendue, il conclut que, selon le cas :

a) les circonstances ayant entraîné le consentement ou l'ordonnance ont changé et que, sur la base des circonstances qui existent au moment où la demande est faite, le consentement ou l'ordonnance n'aurait pas été signé ou rendue, ou n'aurait pas eu les effets nécessaires à la réalisation de son objet;

[4] Since the *Competition Tribunal Rules*, SOR/94-290, do not deal with discovery of non-parties, CWS is relying on Rules 233 and 238 of the Federal Court Rules, 1998 (the “Rules”). Contrary to the Rules, the Stations received no notice of this motion so, to that extent, it was made *ex parte*. The Commissioner of Competition (the “Commissioner”) was served and his counsel appeared. The Intervenor, The Corporation of the Municipality of Chatham-Kent, was also served but did not appear.

B. BACKGROUND

[5] The parties first came before the Competition Tribunal (the “Tribunal”) in a contested merger case involving the acquisition by CWS of, *inter alia*, the Ridge landfill site (the “Ridge”) owned by Browning-Ferris Industries Ltd. The Commissioner challenged this aspect of the merger and a “hold separate” agreement for the Ridge was put in place in a Consent Interim Order dated April 28, 2000, (2000 Comp. Trib. 5). The Tribunal issued public and confidential versions of its decision on the merits of the Commissioner’s case on March 28, 2001 (see *Canada (Commissioner of Competition) v. Canadian Waste Services Holdings Inc.* 11 C.P.R. (4th) 425, 2001 Comp. Trib. 3). The Tribunal concluded that CWS’s purchase of the Ridge both substantially lessened and substantially prevented competition in two geographic markets. For this reason, in its subsequent decisions on remedy (public and confidential) dated October 3, 2001 (see *Canada (Commissioner of Competition) v. Canadian Waste Services Holdings Inc.* 15 C.P.R. (4th) 5, 2001 Comp. Trib. 34), the Tribunal required CWS to divest the Ridge on or before April 1, 2002.

[6] The Federal Court of Appeal dismissed CWS’s appeal on March 12, 2003 (24 C.P.R. (4th) 178) and refused CWS a stay of the Divestiture pending a decision on its as yet undecided application for leave to appeal to the Supreme Court of Canada. Because the stay was denied, the Divestiture date for the Ridge would have been yesterday, September 8, 2003. However, on consent, the parties have agreed to a further stay of the Divestiture pending the outcome of this application and the hold separate agreement remains in place.

[7] As mentioned above, the Tribunal identified two geographic markets in the merger case under section 92 of the Act. One was the Chatham-Kent area and the other was the GTA. Only the latter is relevant to this Section 106 Application. The product was defined as Waste from the GTA. The Tribunal heard evidence that the Ontario Minister of the Environment (the “Minister”) had approved the Terms of Reference for substantial expansions of CWS’s Richmond (on September 16, 2000) and Warwick (on January 11, 2000) landfill sites in Ontario (the “Expansions”). However, the Expansions have been delayed and, to date, have not occurred although they are still being actively pursued by CWS. Accordingly, the excess capacity predicted by the Tribunal and the market conditions it would have created have not yet materialized.

[8] The Tribunal’s decision on the merits discloses that, based on the Expansions, the Tribunal predicted that the market for the disposal of Waste from the GTA would develop in the following manner:

- (i) the Expansions would be complete by the end of 2002;
- (ii) the Expansions would create significant excess capacity in Southern Ontario by the end of 2002;
- (iii) a divested and independently operated Ridge would provide competition for other landfill sites;

- (iv) the excess capacity and competition described above would cause prices to fall for disposal at landfills and incinerators in Southern Ontario; and
- (v) the falling prices would mean that sites in New York and Michigan would receive less Waste.

These items are collectively described as the “Predictions”.

C. THE SUBMISSIONS

[9] CWS submits that the Information described on Schedule “A” is relevant to its Section 106 Application. It argues that, while it has access to the Information from its own businesses, it does not have access to the Information from its competitors. It submits that the Minister’s approval for the Terms of Reference for the Richmond Landfill has been quashed by the Ontario Divisional Court and that, because of public opposition to the Warwick site, none of the Predictions have yet been realized. CWS says that, had the Tribunal known that events would unfold in this fashion, it would not have ordered CWS to divest the Ridge.

[10] In paragraphs 90A and 91A of his amended response to the Section 106 Application, the Commissioner conceded that there have been continued shipments of “some” Waste to landfills located in New York and Michigan and acknowledged that the reductions in volumes shipped have yet to materialize. However, although CWS alleged that volumes shipped to the United States from Canada have increased threefold, the Commissioner is not prepared to concede that volumes from the GTA have increased. The Commissioner has also conceded that the prices for the disposal of Waste in landfills in Ontario have not decreased as predicted. However, the Commissioner says that the predictions have not been met because the Expansions and the Divestiture have not yet occurred.

[11] The Commissioner argues that the only relevant change of circumstance for the Section 106 Application is the fact that the Expansions have been delayed. He says that the reduced shipments of Waste to Michigan and New York and the reduced prices predicted by the Tribunal cannot be considered independently. He describes them as consequential facts in that they depend entirely on the excess capacity which was to follow the Expansions and the competition which was to be created by the independent operation of the Ridge following the Divestiture.

[12] Counsel for CWS indicated during the hearing that, in his view, the Section 106 Application will be about expanding the geographic market to include Michigan and New York. The Information described in Schedule “A” is sought with the expectation that it will show that shipments of Waste to those states have significantly increased. The argument will be that the Tribunal should treat this as a change in circumstances and should, therefore, redefine the geographic market to include the two states. Once that is done, CWS will argue that, with respect to Waste from the GTA there is no longer any justification for the Divestiture.

D. CONCLUSIONS

[13] I agree with the Commissioner that a Section 106 Application is not a rehearing of an original merger case and that the Information which CWS seeks to compel from the Stations is not relevant given the Commissioner's agreement that shipments of Waste to the United States have continued and have not reduced. Accordingly, I am not prepared to make an order compelling the Stations to provide the Information. I say this because the volume of shipments to the United States was not a circumstance which led to the making of the Divestiture order. The basis for the Tribunal's refusal to include New York and Michigan in the geographic market was not the volumes of Waste being shipped but rather the fact that prices in the GTA were not competitive - see the Tribunal's Public Reasons of March 28, 2001, paragraph 145. In this regard, the Tribunal said at paragraph 71 of those Reasons:

In the Tribunal's view, pre-merger shipments patterns do not, by themselves, address the critical issue in market delineation, i.e., whether the firm would be able to exercise market power post-merger

[14] In dealing with the issue of identifying the relevant circumstances in a Section 106 Application, the statement made by Hugessen J.A. in *Canada (Director of Investigation and Research) v. Air Canada* is instructive (see [1994] 1 F.C. 154 at 166 (C.A.)). There he said:

In my view, the[re] is no warrant in the language of section 106 itself or in the scheme of the statute generally for reading the words "the circumstances that led to the making of the order" in other than their ordinary grammatical sense. This involves a determination by the Tribunal of the existence of a simple causal relationship between the circumstances and the order, but no more. It is not necessary that such relationship be "direct" or "demonstrable" other than in the very limited sense that the Tribunal must be satisfied that it exists. Nor is it necessary to relate the circumstances to the purposes sought to be achieved by the order, although it is of course always legitimate to look to such purposes as a guide to identifying some of the circumstances leading to it. (emphasis added)

[15] This quotation uses the word "exists" in dealing with the circumstances that led to the making of the order. The use of the present tense suggests that predictions and uncertain future events are not circumstances as that term is used in subsection 106(1)(a) of the Act. In this case the only circumstance that existed was the fact that the Terms of Reference for the Expansions had received Ministerial approval and were therefore likely to proceed.

[16] In my view, a circumstance is a demonstrable fact which exists at the time an order is made. The predictions and assumptions which flow from that fact are not circumstances as that term is used in subsection 106(1)(a) of the Act.

E. OTHER MATTERS

[17] Having decided to dismiss the motion on the basis that the Information is not relevant for the Section 106 Application, it is not strictly necessary to deal with the three other factors to be considered when ordering production from a non-party. However, I will note that I see no unfairness in refusing CWS access to the Information particularly given that, at this late date, it has not even provided the Commissioner with the Information from its own transfer stations. If CWS truly considered the issue of increased Waste shipments to the United States to be of significance, I would have expected it to have had its own Information assembled as soon as it became clear from his Amended Response of August 25, 2003 that the Commissioner was not going to agree that volumes of Waste shipped to the United States had increased. Further, in spite of CWS's suggestions about how to expedite the process of collecting the Information by sending lawyers and law students to help the transfer station operators complete Schedule "A" and by providing the data to the Commissioner on a daily basis, it will, in my view, be impossible to collect it, analyze it and incorporate it in the experts' reports which are scheduled to be exchanged on September 19, 2003. In these circumstances, delay would be inevitable and might mean that the hearing could not start on October 20, 2003 as scheduled.

[18] I am also troubled by the heavy handed nature of the order CWS seeks. It will come as a complete surprise and will place the onus on the Stations to provide the Information on Schedule "A" to a competitor (albeit with guarantees of confidentiality) in circumstances in which the onus will be on the Station Operators to come to the Tribunal and oppose the order for production if they are unwilling to comply. In my view, the Stations should have been served with the material for this motion.

II. ORDER

[19] **UPON** reading the material filed;

[20] **AND UPON** hearing the submissions of counsel for CWS and the Commissioner in Ottawa on Thursday, September 4, 2003;

[21] **AND UPON** reserving my decision in order to give this matter further consideration;

NOW THEREFORE THE TRIBUNAL ORDERS THAT:

[22] For the reasons given herein, CWS's application for the Information is hereby dismissed.

DATED at Ottawa, this 9th day of September, 2003.

(s) Sandra J. Simpson

SECTION I - 2002

1. For each transfer station operated by you that received solid non-hazardous waste from the Greater Toronto Area in the period from January 1, 2002 to December 31, 2002, complete Table 1 to identify:
 - (a) which disposal facilities you shipped waste to during this period (2002) (including disposal facilities in Ontario, Michigan, New York State or elsewhere);
 - (b) how much waste (expressed in tonnes) you shipped to each of these disposal facilities;

2. During this period (2002), did you use the services of a broker for the purposes of shipping and disposing of waste from your transfer station?

3. If the answer to question 2 is yes, complete Table 2 to identify, with respect to each transfer station operated by you:
 - (a) the name of each broker used;
 - (b) which disposal facilities the waste was shipped to, if known; and

SECTION II - 2003

4. For each transfer station operated by you that received solid non-hazardous waste from the Greater Toronto Area in the period from January 1, 2003 to June 30, 2003, complete Table 3 to identify:
 - (a) which disposal facilities you shipped waste to during this period (first half of 2003) (including disposal facilities in Ontario, Michigan, New York State or elsewhere);
 - (b) how much waste (expressed in tonnes) you shipped to each of these disposal facilities;

5. During this period (first half of 2003), did you use the services of a broker for the purposes of shipping and disposing of waste from your transfer station?

6. If the answer to question 5 is yes, complete Table 4 to identify, with respect to each transfer station operated by you:
 - (a) the name of each broker used;
 - (b) which disposal facilities the waste was shipped to, if known; and

APPEARANCES

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