Competition Tribunal Tribunal de la Concurrence

Reference: *The Commissioner of Competition v. Canadian Waste Services Holdings Inc.*, 2001 Comp. Trib. 34
File no.: CT2000002
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PUBLIC VERSION

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

AND IN THE MATTER of an application by the Commissioner of Competition under section 92 of the *Competition Act*;

AND IN THE MATTER of the acquisition by Canadian Waste Services Inc. of certain assets of Browning-Ferris Industries Ltd., a company engaged in the solid waste business.

B E T W E E N:

The Commissioner of Competition
(applicant)

and

Canadian Waste Services Holdings Inc.
Canadian Waste Services Inc.
Waste Management, Inc.
(respondents)

and

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

Dates of hearing: 20010620-22
Members: McKeown J. (presiding); L.P. Schwartz; and G. Solursh
Date of order: 20011003
Order signed by: McKeown J.

REASONS AND DECISION REGARDING REMEDY

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I. INTRODUCTION

[1] These reasons and decision are issued pursuant to the Tribunal's Reasons and Order of March 28, 2001 (the "Reasons"), and the remedy hearing that took place on June 20, 21 and 22, 2001. In its earlier decision, the Tribunal found that the acquisition of the Ridge Landfill ("Ridge") by Canadian Waste Services Inc. ("CWS") would likely substantially prevent and lessen competition for the disposal of institutional, commercial and industrial waste ("ICI Waste") in two Southern Ontario markets: the Greater Toronto Area ("GTA") and the Chatham-Kent area (Reasons, paragraphs 204, 205, 224 and 234). As requested by the parties, the Tribunal ordered that counsel appear for a further hearing on an appropriate remedy.

[2] The relevant background information is provided in the Reasons of March 28, 2001. For present purposes it is sufficient to note that the application brought by the Commissioner of Competition (the "Commissioner") arose from the acquisition by CWS on March 31, 2000, of parts of the solid waste business of Browning-Ferris Industries, Inc. in Canada through the acquisition of certain assets and shares held by the latter. As part of this merger, CWS acquired the Ridge located in Blenheim, Ontario. Prior to this acquisition, the respondents already owned or controlled six landfill facilities in Southern Ontario. The Commissioner alleged in the application that the merger was likely to prevent and lessen competition substantially in the disposal of ICI Waste in the GTA and the Chatham-Kent area due mainly to high barriers to entry and to the lack of effective remaining competition. The Tribunal found that if CWS would have been permitted to keep the Ridge, it would have controlled over 70 percent of the Southern Ontario landfill capacity for ICI Waste from the GTA in 2002 and 100 percent of the capacity for this type of waste from the Municipality of Chatham-Kent ("Chatham-Kent").

[3] The issue at this stage of the proceedings is to determine which remedy should be ordered by the Tribunal to eliminate, in all likelihood, the substantial prevention and lessening of competition. When deciding the appropriate remedy, the Tribunal must be satisfied that it is available and effective in restoring competition to the point at which it can no longer be said to be substantially less than it was before the merger.

[4] Two alternative orders were put forward by the parties and argued before the Tribunal at the remedy hearing. The Commissioner submits that the divestiture of the Ridge is the only effective remedy. The respondents propose that one or more Disposal Capacity Agreements ("DCAs") at the Ridge in an aggregate maximum amount of 163,000 tonnes will eliminate any substantial prevention or lessening of competition found by the Tribunal for the disposal of ICI Waste from the GTA and the disposal of ICI Waste from Chatham-Kent.

[5] The new evidence introduced at this hearing consisted of the affidavit and rebuttal affidavit of Michael R. Baye, the Commissioner's expert, and the affidavit and the rebuttal affidavit of Christopher Vellturo, the respondents' expert. Both provided their opinions regarding the appropriate remedy. While Professor Baye appeared on behalf of the Commissioner in the hearing regarding the allegation of a substantial prevention and substantial lessening of competition in this case, Dr. Vellturo appeared for the first time at the stage of the remedy hearing.

[6] No issue was raised before the Tribunal as to whether the divestiture of the Ridge would be an effective remedy. The Commissioner's proposal is very straightforward. However, the availability and the effectiveness of the respondents' proposed remedy is in dispute. The respondents' proposal is more complex and is set out in their draft remedial order.

[7] Both the Commissioner's draft divestiture order and the respondents' draft remedial order were filed as confidential documents. However, it is necessary to refer to the contents of these documents in order to meaningfully discuss the respondents' proposal. The following is a summary of the arguments advanced by the parties and by the intervenor.

II. REMEDIES PROPOSED BY THE PARTIES

A. COMMISSIONER

[8] The Commissioner submits that divestiture of the Ridge is appropriate to remedy the substantial lessening and prevention of competition for ICI Waste from the GTA and Chatham-Kent for the following reasons: 1) it is available to the Tribunal under section 92 of the *Competition Act*, R.S.C. 1985, c. C-34 (the "Act"); 2) it is effective because it creates competition to CWS landfills; and, 3) it is proportionate because it is an asset which formed a part of the merger.

(1) Divestiture of the Ridge Landfill

(a) Availability of remedies

[9] The Commissioner submits that the proposed remedy must be available under the Act. He argues that paragraph 92(1)(e) of the Act sets out the remedies available to the Tribunal once a finding has been made that the merger substantially prevents and lessens competition.

[10] The Commissioner argues that absent the consent of both parties, the Tribunal's authority is limited to the "blunt instruments" of dissolution or divestiture. Further, the Commissioner argues that the "airspace agreements" proposed by CWS are not available remedies because they do not constitute a dissolution of the merger or a divestiture of assets or shares as dictated by paragraph 92(1)(e) of the Act.

(b) Effectiveness of remedies

[11] It is the Commissioner's submission that the proposed remedy must be effective and that each party bears the onus of showing that the remedy they propose meets that requirement.

[12] According to the Commissioner, the Tribunal's findings make divestiture of the Ridge the appropriate remedy for the following reasons: 1) the Tribunal found that CWS's acquisition of the Ridge substantially prevents and lessens competition; 2) the Ridge is a vigorous and effective competitor in the ICI Waste disposal market; 3) it will discipline the Tipping Fees CWS charges

for ICI Waste from the GTA and Chatham-Kent; 4) the Ridge is the closest competitor to CWS's landfills; and, 5) it constrains the exercise of market power by CWS.

[13] The Tribunal found in its Reasons, at paragraph 136, that if the Ridge remains independent, the Ridge and CWS's Warwick landfill will be each other's closest competitors. In that respect, the Commissioner submits that divestiture of the Ridge would maintain competition among the Ridge and CWS landfills that are similar distances from the GTA such as the Warwick and the Richmond landfills.

[14] Moreover, the Commissioner suggests that divestiture of the Ridge is a proportionate remedy to the Tribunal's finding that the merger substantially prevents and lessens competition because: 1) it directly addresses the Tribunal's concerns; 2) CWS will enjoy as much disposal space as it did pre-merger; 3) the Ridge represents only part of a larger transaction that was allowed to proceed; and, 4) even after divestiture, CWS will retain ownership and control of nearly 50 percent of the Southern Ontario capacity for ICI Waste from the GTA.

[15] He relies on his expert, Professor Baye, who concludes that divestiture of the Ridge does not suffer from the shortcomings identified in the airspace agreements proposed by the respondents and would ensure that a landfill that is geographically and economically positioned to compete with other CWS landfills for ICI Waste remains independent.

[16] The Commissioner points out that even CWS's new expert in this case, Dr. Christopher Vellturo, acknowledges that the divestiture of the Ridge would be an effective remedy and that CWS has proposed divestiture of the Ridge as the alternative remedy in its draft order (CWS's Draft Remedial Order, under cover of June 5, 2001, at paragraphs 11-14, Joint Book of Pleadings, Tab 10. Expert affidavit of Christopher Vellturo (May 24, 2001): exhibit 424).

[17] While Dr. Vellturo, the respondents' expert, maintains that full divestiture of the Ridge would impose a social cost of reduced efficiency, the Commissioner points out that there is no evidence from which the Tribunal could find that divestiture of the Ridge is excessive. Further, there is no evidence of any efficiencies arising from this merger nor any evidence of a business rationale for the merger.

[18] In response, the respondents submit that the combined divestitures required to discipline both a price increase and to ensure that an anticipated price decrease is not prevented with respect to ICI Waste from the GTA and Chatham-Kent are relatively small. It is their position that requiring a full divestiture of the Ridge would go beyond the purpose of section 92 of the Act and would unnecessarily punish the respondents. They rely on Dr. Vellturo's conclusions and submit that requiring a full divestiture of the Ridge to alleviate the competitive harm found by the Tribunal would be a far more drastic remedy than what is necessary to eliminate the substantial lessening and prevention of competition found by the Tribunal.

B. RESPONDENTS

(1) Airspace agreements

[19] The respondents propose that a sale to one or more third parties of the right to dispose of a specified volume of waste on an annual and daily basis at the Ridge will be sufficient to eliminate the substantial lessening and prevention of competition found by the Tribunal. Counsel for the respondents filed a draft remedial order including a draft DCA.

[20] More specifically, they argue that one or more airspace agreements for the divestiture of a maximum of 155,647 tonnes (assuming the maximum price increases) of capacity at the Ridge will eliminate any likely substantial lessening or prevention of competition in the disposal of ICI Waste from the GTA, and a divestiture of a maximum of 7,154 tonnes of capacity at the Ridge will eliminate any likely substantial lessening or prevention of competition in the disposal of ICI Waste from the region of Chatham-Kent, resulting from the acquisition of the landfill by the respondents. Adding these tonnages, the maximum tonnage to be divested through airspace agreements is approximately 163,000 tonnes.

[21] Further, they propose that the DCAs commence on January 1, 2003, or such other date as the Tribunal finds appropriate in the circumstances. The respondents propose that the DCAs terminate in 2010 or 2011 or at such other time as deemed appropriate by the Tribunal. With respect to the tipping fee to be charged, they propose that the per tonne disposal fee to be paid by the purchaser of the rights under the DCAs be set at the marginal cost of the Ridge.

[22] The respondents submit that the only limitation on any prospective purchaser of these rights is that it be an arm's length third party with the expressed intention of carrying on the business of waste disposal in the province of Ontario and that it has the managerial, operational and financial capability to engage in the business of waste disposal services.

(a) Availability of remedies

[23] As stated above, the remedy proposed by the respondents contemplates the sale of the right to dispose of waste at the Ridge for a specified period of time. The respondents argue that these rights constitute an asset for the purposes of subparagraph 92(1)(e)(ii) of the Act. Hence, they submit that the Tribunal clearly has the jurisdiction to order the remedy proposed by the respondents by virtue of paragraph 92(1)(e) of the Act.

[24] The respondents argue that the rights under the airspace agreement have economic value to the owner. They submit that the case law supports a similarly broad definition of the word asset. In *Philips v. 707739 Alberta Ltd.* (2000), 77 Alta L.R. (3d) 302 at 332 (Alta.Q.B.), the term asset was found to mean "any owned physical object (tangible) or right (intangible) having economic value to its owner(...)" Further, they rely on *A.G. Canada v. Gordon*, [1925] 1 D.L.R. 654 (Ont. Sup. Ct.), where the expression "assets" was found to be "(...)frequently used and is well understood as including all kinds of property."

[25] They rely on the definition of "asset" found in The Dictionary of Canadian Law, Second Edition:

> 1. Any real or personal property or legal or equitable interest therein including money, accounts receivable or inventory.

In addition, they refer to Black's Law Dictionary with Pronunciations, (Sixth Edition) which provides that assets are:

> Property of all kinds, real and personal, tangible and intangible, including, *inter alia*, for certain purposes, patents and causes of action which belong to any person including a corporation and the estate of a decedent. The entire property of a person, association, corporation, or estate that is applicable or subject to the payment of his or her or its debts.

[26] They also suggest that an examination of certain definitions of assets from an accounting perspective illustrates that the agreements proposed by the respondents are clearly assets:

> Assets are economic resources controlled by an entity as a result of past transactions or events from which future economic benefits may be obtained.
>
> Assets have three essential characteristics:
>
> > (a) they embody a future benefit that involves a capacity, singly or in combination with other assets, in the case of profit oriented enterprises, to contribute directly or indirectly to future net cash flows,...;
> >
> > (b) the entity can control access to the benefit; and
> >
> > (c) the transaction or event giving rise to the entity's right to, or control of, the benefit has already occurred. (CICA Handbook-Accounting, Canadian Institute of Chartered Accountants March 1999.)

[27] The respondents referred the Tribunal to another accounting text that defines asset as:

> ...anything of use to future operations of the enterprise, the beneficial interest in which runs to the enterprise. Assets may be monetary or nonmonetary, tangible or intangible, owned or not owned. So long as they can make a contribution to future operations of the company and the company has the right to so use them without additional cost in excess of the anticipated amount of that contribution, they constitute assets and are so treated in accounting. (S. Davidson and R. L. Weil, Handbook of Modern Accounting 2nd Ed., McGraw-Hill Book Company, 1977, p.1-6.)

[28] Further, the respondents submit that section 12 of the *Interpretation Act*, R.S.C. 1985, c. I-21, provides that "[e] very enactment is deemed remedial, and shall be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects." They argue that the Commissioner's interpretation would not best ensure the attainment of the objectives of the Act. To restrict the definition of assets would lead to overly harsh remedies that go beyond what is necessary to achieve the purposes of the Act.

[29] The Commissioner has also alleged that the proposed remedy of the respondents does not constitute a "disposal" for the purposes of subparagraph 92(1)(e)(ii) of the Act. Black's Law Dictionary with Pronunciations (Sixth Edition) defines disposal as:

> Sale, pledge, giving away, use, consumption or any other disposition of a thing. To exercise control over; to direct or assign for a use; to pass over into the control of someone else; to alienate, bestow, or part with.

[30] The respondents submit that a narrow interpretation of the words "asset" and "disposal" will not serve the purpose of subparagraph 92(1)(e)(ii) of the Act which is to provide the Tribunal with the authority to order a remedy which eliminates the substantial lessening or prevention of competition. It is the respondents' position that the proposed remedy of a divestiture of airspace clearly contemplates the disposal of an asset for the purposes of subparagraph 92(1)(e)(ii) of the Act and that the Tribunal clearly has the jurisdiction to order the proposed remedy.

(b) Effectiveness of remedies

[31] The respondents submit that, as illustrated in Dr. Vellturo's expert report, the "combined divestitures" required to discipline both a price increase and to ensure that any anticipated price decrease is not thwarted with respect to ICI Waste from the GTA and Chatham-Kent are relatively small. Hence, they submit that a DCA in an aggregate maximum amount of approximately 163,000 tonnes will eliminate any substantial prevention or lessening of competition found by the Tribunal for the disposal of ICI Waste from the GTA and the disposal of ICI Waste from Chatham-Kent. The effectiveness of the remedy proposed by the respondents is assessed in detail below under the section entitled "Proposed Airspace Agreements", starting at paragraph 54.

C. INTERVENOR

[32] The Corporation of the Municipality of Chatham-Kent, the sole intervenor in this case, has maintained the position throughout the hearing of neither supporting nor opposing either the respondents or the Commissioner on the merits.

[33] At the remedy stage, the intervenor took the position that the Host Community Agreement ("Agreement"), entered into between Chatham-Kent and Browning-Ferris Industries Ltd. ("BFIL") in relation to the Ridge, should be be included in the list of assets of the Ridge to any order that the Tribunal will make. At the hearing, the respondents and the Commissioner consented to the request

of Chatham-Kent that the Agreement be included as an asset of the Ridge (transcript at 2325, 22 June, 2001).

III. TEST TO BE APPLIED TO DETERMINE APPROPRIATE REMEDY

[34] The issue at this stage of the proceedings is to determine which remedy should be ordered by the Tribunal to eliminate, in all likelihood, the substantial prevention and lessening of competition. The remedy must be available and effective. Subsection 92(1) of the Act sets out the Tribunal's jurisdiction to order a remedy upon a finding that a merger prevents or lessens, or is likely to prevent or lessen competition substantially. Specifically, paragraph 92(1)(e) provides:

> 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

[35] The Supreme Court of Canada set out the test to be applied in determining an appropriate remedy to a substantial lessening or prevention of competition in *Director of Investigation and Research v. Southam Inc.*, [1997] 71 C.P.R. (3d) 417 (SCC) at 445-446:

> The evil to which the drafters of the *Competition Act* addressed themselves is substantial lessening of competition. See *Competition Act*, s. 92(1). It hardly needs arguing that *the appropriate remedy for a substantial lessening of competition is to restore competition to the point at which it can no longer be said to be substantially less than it was before the merger*(...) (Emphasis added)

Further, the Supreme Court stated at page 446:

> (. . .) If the choice is between a remedy that goes farther than is strictly necessary to restore competition to an acceptable level and a remedy that does not go far enough even to reach the acceptable level, then surely the former option must be preferred. At the very least, a remedy must be effective. If the least intrusive of the possible effective remedies overshoots the mark, that is perhaps unfortunate but, from a legal point of view, such a remedy is not defective(...)

A. AVAILABILITY OF THE PROPOSED REMEDIES UNDER THE ACT

(1) Proposed "airspace agreements" are not a "dissolution" of the merger

[36] When the Tribunal makes a finding that a merger prevents or lessens competition substantially, the Tribunal may choose, as an appropriate remedy, to "dissolve" the merger pursuant to subparagraph 92(1)(e)(i) of the Act. The term "dissolve" undoubtedly connotes the undoing, separation or destruction of something. Such an interpretation is common to the everyday use of the term "dissolve", and the meaning attributed to it in some federal statutes. For instance, corporations that are dissolved cease to exist; Parliament is dissolved before an election; and marriages that end in divorce are "dissolved".

[37] When a merger is dissolved, the merger no longer exists and the parties are separated as before the merger. In this case, the merger consists of CWS's acquisition of a substantial portion of the assets and business of BFIL, one of which is the Ridge. The Tribunal is of the view that the remedy proposed by CWS does not dissolve the merger since CWS would retain ownership and control of all of its Ontario landfills and would have an ongoing contractual relationship with the contractor for airspace.

(2) Proposed "airspace agreements" are not a "disposal of assets or shares

[38] Further, pursuant to subparagraph 92(e)(ii) of the Act, the Tribunal may order a party to "dispose of assets or shares". The disposition of assets or shares contemplates the transfer of ownership over property. In *Harman v. Gray-Campbell Ltd.*, [1925] 2 D.L.R. 904 at 908 (Sask.C.A.) the Court of Appeal states:

> The words "dispose of" are giving [sic] the following meaning in Murray's New English Dictionary :-" (b) To put or get off one's hands; to get rid of; and (c) To make over or part with by way of sale or bargain"; and in Bouvier's Law Dictionary :-"To alienate or direct the ownership of."

[39] The respondents are not proposing to dispose of assets or shares but rather, to enter into an ongoing contractual relationship for the supply of disposal services at a landfill. The proposed "airspace agreements" are contracts that CWS proposes to enter into. The disposal services that would be contracted are not pre-existing assets that could be divested. They are new rights that CWS proposes to create.

[40] While CWS describes its proposed remedy as a "divestiture" of "airspace", its draft DCA does not, on its face, purport to "sell" either "airspace" or disposal "capacity". It merely creates a contractual right to deliver an amount of waste to a landfill.

[41] CWS's draft "airspace agreements" do not transfer ownership over property or even create an interest in property. Rather, they expressly negate the possibility that they create any proprietary interest in the following terms. Section 9 of CWS's draft DCA (Joint Book of Pleadings, Tab 10) states:

> (...)Hauler shall have a limited, non-exclusive license to enter the Facility for the limited purpose of, and only to the extent necessary for (i) off-loading Acceptable Waste at the location and in the manner directed by CWS, and (ii) removing or causing to be removed, Non-Conforming Waste(...)
>
> Except for the limited, non-exclusive license granted by CWS to the Hauler in Subsection 9(1) above, *Hauler acknowledges, agrees and confirms that it has no interest or rights whatsoever in respect of the Facility*. (emphasis added)

[42] One of the characteristics of an asset is that it can be bought and sold. However, section 17 of CWS's draft DCA (Joint Book of Pleadings, Tab 10) states that the proposed "airspace agreements" would not be transferable without the consent of CWS:

> Hauler may not assign, transfer or otherwise vest in any other Person any of its rights or obligations under this Agreement without the prior written consent of CWS(...)

[43] Under the proposed "airspace agreements", CWS would keep ownership and control of 70 percent of the capacity for the disposal of ICI Waste in the GTA and 100 percent of the capacity for the disposal of ICI Waste in Chatham-Kent (expert affidavit of Michael Baye, (May 23, 2001): exhibit 421, paragraph 13).

[44] The airspace agreements are not a "disposal" of assets. Rather, they are the creation of a disposal right on the part of the contracting party. They are agreements between CWS and a hauler that provides the hauler, over a period of time, a right to dispose of certain amounts of waste at the Ridge and a limited right of access to the facility. It does not have for effect of disposing of any part of the Ridge. It does not provide the contracting party any right in the Ridge. It simply gives the contracting party the right to dispose of some amount of waste at the Ridge over some period of time. The term "dispose of" connotes "getting rid of" something that is owned, as opposed to creating some right of access.

[45] Further, the Tribunal can only order divestiture of assets that are acquired as part of the merger, or that one of the parties to the merger may already have. That does not mean that, post-merger, creating a contract or entering into a contract to create a right constitutes the disposal of that right. In the Tribunal's view, the creation of a contract, post-merger, to provide a service to somebody does not constitute disposal of an asset.

[46] In *Director of Investigation and Research v. Air Canada et al.* (1993), 49 C.P.R. (3d) 417, the Federal Court of Appeal confirmed that, in a contested proceeding as opposed to a consent proceeding, the authority of the Tribunal is limited to the "blunt instruments" of dissolution or divestiture. Anything beyond that can only be done, as is shown in subparagraph 92(1)(e)(iii) of the Act, on a consent basis. The Court stated at page 430:

> Section 92(1)(e)(iii) by contrast allows the consent of the parties to expand the type of order that the Tribunal can make in merger cases. The power of the Tribunal to make the expanded order, however, is conditioned by and dependent upon the consent. Without consent, the Tribunal is limited to ordering the dissolution of the merger (subpara. (i)) or the divestiture of assets or shares (subpara. (ii)). These are important and even drastic powers, but in the hands of either the Director or the Tribunal, they constitute a rather blunt instrument for the implementation of Canada's competition policy. Indeed, it is the very bluntness of that instrument and the all-or-nothing nature of the orders that can be given under subparas. (i) and (ii) which no doubt give subpara. (iii) its vitality and increase its utility(...)

[47] Unlike dissolution or divestiture, the proposed "airspace agreements" involve behavioural components, since they create an ongoing contractual relationship involving mutual promises to be performed over a period of time. The proposed "airspace agreements" constitute a behavioural remedy and not a disposition of assets as suggested by the respondents. The Tribunal cannot order behavioural remedies under subparagraph 92(1)(e)(iii) of the Act, absent consent of both the respondent and the Commissioner.

[48] In *Director of Investigation and Research v. Southam Inc.* (1992), 47 C.P.R. (3d) 240 (C.T.) at 250-251, the Tribunal held that it did not have authority to order proposed service contracts in aid of a proposed divestiture of assets without the consent of the Commissioner:

> The Director's first objection to the respondents' proposal is that it would require the tribunal to exceed its jurisdiction, since the proposed order would go beyond the dissolution of the merger or the divestiture of shares or assets as contemplated in s. 92(1)(e)(i) and (ii). In his view, the terms that would require the respondents to offer such agreements to a purchaser fall within s. 92(1)(e)(iii). The tribunal can only make an order under that subparagraph on the consent of the parties. As previously stated, the Director does not consent. The respondents are of the view that the tribunal has considerable latitude in ordering the disposition of assets under s. 92(1)(e)(ii) "in such a manner as the Tribunal directs" and could issue the suggested order. The tribunal does not agree that requiring the respondents to provide would-be purchasers with an option to contract for services from the North Shore News or LMPL can be considered to fall within the terms it may place on the disposition of assets pursuant to s. 92(1)(e)(ii).

[49] Further at page 252, the Tribunal states:

> Without adopting any particular characterization such as "tame competitor", the tribunal agrees that a remedy that depends, for its possible success, on supply contracts between the only competitors in the market is somewhat suspect. While the nature of the proposed remedy necessarily precludes a detailed assessment of its terms and conditions, the tribunal considers that the small accommodations and goodwill that are required to make a long-run supply relationship work would not create the kind of climate that is desirable and necessary to restore the competitive situation disrupted by the merger (...)

[50] The Tribunal is of the view that the same reasoning applies in this case.

B. EFFECTIVENESS OF THE PROPOSED REMEDIES

[51] The Commissioner and the respondents submitted expert economic evidence regarding the effectiveness of each of their proposed remedies. The Tribunal assesses that evidence below.

(1) Proposed "Airspace Agreements"

[52] The respondents' remedy is to require CWS to enter into agreements with third parties to dispose of ICI Waste at the Ridge. In these agreements, CWS would sell, for an unspecified up-front payment to be negotiated, rights to dispose of such waste at the Ridge at this landfill's marginal cost of disposal. The third-party purchasers of these rights could be haulers or transfer stations that seek to dispose of ICI Waste from the GTA or from Chatham-Kent at the Ridge. Third parties might also be entities in the business of selling disposal services at the Ridge to haulers and transfer stations of that ICI Waste.

[53] During the term of these airspace agreements, CWS would continue to wholly-own the Ridge landfill and operate all aspects of waste disposal there. The respondents propose specific dates for the term of the airspace agreements and they indicate that the Tribunal may wish to

establish different dates based on its assessment of the onset and termination of the condition of excess capacity.

[54] The respondents' expert, Dr. Vellturo, uses the critical sales loss procedure to assess remedies for the substantial prevention and lessening of competition found by the Tribunal regarding the disposal of ICI Waste generated in the GTA and in Chatham-Kent. As a result of his critical sales loss analysis, he finds that relatively small reductions in waste volumes at the Ridge are required (2,400 tonnes -163,000 tonnes) to eliminate the substantial lessening and prevention of competition found by the Tribunal with respect to both the GTA and Chatham-Kent allegations. He concludes that airspace agreements covering such volumes are the appropriate remedy and that the total divestiture of the Ridge landfill sought by the Commissioner is unnecessary.

[55] Dr. Vellturo also states that total divestiture would prevent the attainment of efficiencies that would result from the acquisition of the Ridge by CWS, and on this basis he criticizes the Commissioner's proposed remedy as inappropriate (expert affidavit of Christopher Vellturo (June 13, 2001): exhibit 426).

[56] The Commissioner's economic expert, Professor Baye, opines that the airspace agreements are insufficient to alleviate the substantial lessening and prevention of competition. He concludes that they would likely lead to collusion, and would create a "trivial non-competitive fringe" of third parties with too little volumes to compete with CWS at the Ridge; he is also critical of Dr. Vellturo's critical sales loss analysis. His criticisms are directed mainly to Dr. Vellturo's analysis of the remedy regarding the GTA allegations (expert affidavit of Michael Baye (June 13, 2001): exhibit 422).

[57] As Dr. Vellturo's analysis of remedies for the GTA requires him to a undertake a spatial competition analysis, his assessment is more complicated than that for Chatham-Kent. In order to focus on the critical sales loss procedure, the Tribunal first addresses the remedies Dr. Vellturo advances for Chatham-Kent.

(a) Critical Sales Loss Analysis

[58] In his expert report, Dr. Vellturo defines the critical sales loss procedure as follows:

> The critical loss required to ensure that a firm would not have an incentive to raise price is determined by solving for the minimum volume loss that would render a price increase (or, correspondingly, a failure to decrease price) unprofitable to the firm. (expert report of Christopher Vellturo (May 24, 2001): exhibit 423, at page 6, item 2)

[59] Dr. Vellturo illustrates the procedure by positing a firm with a current output of 100 units, marginal cost of $2/unit and selling price of $5/unit. Accordingly, gross profit per unit (or margin) is $3 and gross profit is $3 x 100 units = $300 in the *status quo*. The firm determines whether to increase the price by 10 percent to $5.50 by considering the impact on gross profit. If the firm expects the price increase to reduce sales by 10 units, the gross profit per unit increases

to $3.50 and gross profit will increase to $315; hence, the increase will be profitable as compared to the *status quo*. However, if the firm expects a loss in sales of 20 units, gross profit will be $280 and the increase will be unprofitable (transcript at 1988 and 1989 (21 June, 2001)).

[60] In this example, the critical sales loss for a 10 percent price increase is that loss in unit sales that maintains gross profit at $300. With elementary algebra, the critical sales loss is found to be approximately 14 units. The firm will raise the price by 10 percent if the expected sales loss is less than 14 units, and it will not raise the price by 10 percent if the expected sales loss is greater than 14 units. Accordingly, as long as the firm can produce and sell at least 86 units after the price increase, that increase will be profitable as compared to the *status quo* (transcript at 1989 and 1990 (21 June, 2001)).

[61] The magnitude of the critical sales loss depends on the particular price increase being considered and the margin in the status quo. The critical sales loss procedure calls for a comparison of the loss of unit sales that the firm expects to result from a posited price increase with the critical sales loss. If the expected loss of unit sales is less than the critical sales loss, the price increase is profitable.

[62] The Tribunal notes that in this procedure, the marginal cost is presumed to be constant. In Dr. Vellturo's example, whether the firm's output is 100 units, 86 units, or some other figure, the increase in the firm's total cost due to the additional unit of output remains $2. As a broad indication or rule of thumb, this presumption is the usual one, although it should be refutable in a particular fact situation, particularly in situations involving large changes in output and/or price.

[63] The Tribunal notes that Dr. Velluro uses critical sales loss analysis to examine the competitive effect of the transaction directly. However, the critical sales loss procedure is also used to delineate relevant markets and is an alternative to the hypothetical monopolist approach. In the hypothetical monopolist approach, the key question is whether demand is so elastic that even a monopolist would not raise price by at least a small but significant and non-transitory amount. If demand is that elastic, a relevant market has not been identified and the candidate market must be expanded to include another product.

[64] The critical sales loss procedure delineates a market by asking whether a monopoly could increase the price by up to a given amount and be no worse off in terms of profit than before the price increase. If the monopoly would lose so much business that the price increase would not be profitable in this sense, then a relevant market has not been identified.

[65] While the two procedures share certain features, the hypothetical monopolist approach is consistent with conventional profit-maximization while the critical sales loss approach is not. Moreover, the hypothetical monopolist approach requires knowledge of, or an explicit assumption about, the demand curve while the latter does not. While there is debate in the American antitrust literature whether one procedure is to be preferred for delineating relevant markets, it appears that both procedures are widely used. The Tribunal relied heavily on the hypothetical monopolist approach when it decided the relevant market at the hearing on the merits.

[66] The Tribunal also observes that the lost sales volume that makes a 10 percent price increase unprofitable also makes any lesser price increase unprofitable. However, that critical sales loss does not indicate that even larger price increases of 20 percent, 50 percent or even 100 percent would also be unprofitable. Thus, a small price increase may be unprofitable based on a critical sales loss analysis but a larger increase may be profitable.

(b) Critical Sales Loss Analysis for Chatham-Kent

[67] In evaluating the airspace remedies proposed in regard to the disposal of ICI Waste from the GTA and to the disposal of ICI Waste from Chatham-Kent, Dr. Vellturo writes;

> The appropriate remedy for the competitive harm envisioned by the Tribunal...is to require divestitures that provide third parties with the right to dispose of ICI volumes. Sufficient volumes would be divested so that the amount of ICI volume that the Respondents stand to lose following a unilateral price increase (or a failure to decrease price from current market levels) would render the price increase unprofitable.
> ...
> If third parties did control such volumes, any unilateral price increase by the Respondents would result in the loss of volumes at least equal to the critical loss. Customers would dispose of their ICI waste with the third party who controlled the divested volume rather than with the Respondents. By design, this third party would be able to serve sufficient volume that the Respondents would face lower profits by having implemented the price increase. As a result, the Respondents would not implement the price increase in the first instance, since it would not be in their profit-maximizing interest to do so. (expert report of Christopher Vellturo (May 24, 2001): exhibit 423, at pages 6-7)

[68] As shown in Table 6 of Dr. Vellturo's expert report, he uses the total volume of ICI Waste from Chatham-Kent disposed of at the Ridge and Gore landfills per year. Using the pre-merger tipping fee at the Gore landfill and marginal cost at the Ridge, he calculates the gross profit per tonne and finds the post-acquisition, total gross profits at those landfills are $900,676 absent any decline in tipping fees due to expansion of capacity. This calculation assumes that both landfills would charge the same tipping fee for local ICI Waste and incur the same marginal cost.

[69] As the Tribunal noted in its decision, the annual permitted capacity at the Ridge will expand from 220,000 tonnes in 1999 to 680,000 tonnes in 2002. Accordingly, the capacity of landfills in Chatham-Kent to accept local ICI Waste will rise dramatically until the Gore closes. In Table 6 of his expert report, Dr. Vellturo examines three scenarios in which post-expansion price decreases of 5 percent, 10 percent, and 15 percent are thwarted by CWS after the acquisition of the Ridge. He analyzes these scenarios by asking what price increases would be needed to restore the original price and finds that increases of 5.3 percent, 11.1 percent and 17.6 percent would be needed respectively.

[70] In the first scenario, Dr. Vellturo hypothesizes that the expansion of capacity would lead to a 5 percent decline in tipping fees. Accordingly, gross profit per tonne would decline and total gross profit would then be $842,988. Absent a remedy, CWS would thwart this decline by

restoring the tipping fee through an increase of approximately 5.3 percent in the post-expansion price. In so doing, it would, or could expect to, lose volumes.

[71] He determines the annual disposal tonnage that would make CWS's gross profit from the Ridge and Gore sites following its price increase equal to the post-expansion level of $842,988. Since the price increase restores the profit margin per tonne, the critical annual volume is found to be approximately 35, 000 tonnes. If CWS's annual disposal tonnages exceed this level, the price increase would be profitable and hence would be imposed unilaterally.

[72] Accordingly, the critical sales loss is 2,384 tonnes. By taking slightly more than 2,384 tonnes of capacity out of CWS's control, Dr. Vellturo concludes that it would not be profitable for CWS to thwart the hypothesized 5 percent decline in tipping fees for ICI Waste from Chatham-Kent. In his testimony, Dr. Vellturo states that the tonnage required to be taken away is 2,500 tonnes (transcript at 2029, lines 19-21 (21 June, 2001)).

[73] On this basis, he concludes that the remedy for the substantial prevention and lessening of competition in the disposal of ICI Waste from Chatham-Kent is the divestiture, through airspace agreements to third parties, of 2,500 tonnes, in the event of a 5 percent decline in tipping fees due to capacity expansion. The respondents indicate that the airspace agreements would cover space at the Ridge.

[74] He repeats this analysis for hypothesized price declines of 10 percent and 15 percent. The required price increases needed to thwart these declines are 11.1 percent and 17.6 percent respectively, and the required divestitures are minimally 4,770 tonnes and 7,154 tonnes respectively.

(c) Tribunal's Assessment of Chatham-Kent Analysis

[75] The Commissioner's case regarding the Chatham-Kent allegation is premised on the assessment that, following its acquisition of the Ridge, CWS would be able to prevent the decline in tipping fees on locally-generated ICI Waste that excess capacity would bring about. The Tribunal accepted this position (Reasons, paragraph 205).

[76] According to Dr. Vellturo's analysis, CWS would, post-merger, stand to lose volumes of such waste, but increase gross profits if it were to raise the tipping fee, or equivalently if it failed to decrease the tipping fee, in response to excess capacity in Chatham-Kent. He regards either action as an effective increase in the tipping fee. His remedy, premised on the critical sales loss analysis, is to remove business volumes equal to the critical sales loss so as to make the effective price increase unprofitable.

[77] However, it is not clear to the Tribunal that, absent a remedy, CWS would lose any volume of locally-generated ICI Waste. First, the only capacity-expansion in Chatham-Kent will occur at the Ridge itself.

[78] Second, in its decision, the Tribunal noted that since the Gore landfill is owned by CWS, the acquisition of the Ridge by CWS would prevent competition between them. The Tribunal

also found that there is no effective remaining competition and little prospect of entry, and that CWS will control 100 percent of the Chatham-Kent disposal market for ICI Waste. It appears to the Tribunal that in this situation of inelastic demand**,** a remedy would have to remove very large volumes to make a small effective price increase unprofitable. While Dr. Vellturo's critical sales loss for a 5.3 percent price increase is 2,384 tonnes, this is only 6.4 percent of tonnages of locally-generated ICI Waste delivered to the Ridge and Gore landfills and nothing in the record indicates that CWS would lose, or expects to lose, even that amount of business.
[79] These considerations lead the Tribunal to doubt the effectiveness of airspace agreements in constraining any anti-competitive pricing policy of CWS in respect of ICI Waste generated in Chatham-Kent following the acquisition of the Ridge.

[80] However, even accepting Dr. Vellturo's critical sales loss analysis, on his figures, the gross profit per tonne at the lowest tipping fee at the Gore for local ICI Waste exceeds 70 percent of price and exceeds 300 percent of marginal cost at the Ridge. It appears to the Tribunal that there is considerable room for tipping fees to fall much farther than the 5 to 15 percent range that he analyzes, even if they do not fall to marginal cost. Accordingly, the Tribunal is of the view that Dr. Vellturo's critical sales loss estimates and remedies regarding Chatham-Kent are very likely too low.

[81] In this regard, the Tribunal notes that while Dr. Vellturo's remedies are designed to make the complete thwarting of price declines of 5 percent, 10 percent and 15 percent unprofitable, it cannot be concluded that a larger increase would not be profitable. Moreover, he does not predict a particular price decline for locally-generated ICI Waste in Chatham-Kent. He states only that, in that event of a decline in the 5 to 15 percent range, the remedies are the divestitures of airspace that he has found.

[82] Dr. Vellturo does not address how many different competitors need to be established in Chatham-Kent by airspace agreements. Professor Baye is concerned, in the GTA context, that the divestitures of airspace suggested by Dr. Vellturo would, at best, create a non-competitive fringe. Given the competitive situation in Chatham-Kent, the Tribunal shares this concern.

[83] Since Dr. Vellturo does not indicate which price decline might be expected, he puts the onus on the Tribunal to do so and to select from among his various remedies. In the Tribunal's view, this is inadequate. The Tribunal did not identify a specific price decline in its reasons regarding the Chatham-Kent allegation because no specific percentage decline was advocated or contested in the hearing on the merits. The Tribunal concluded that excess capacity at the Ridge would lead to greater competition and lower tipping fees for ICI Waste from Chatham-Kent and that the acquisition of the Ridge by CWS would prevent such competition from occurring (Reasons, paragraph 205).

[84] Without expert opinion evidence and rebuttal evidence thereon, the Tribunal has no basis for adopting a particular price decline and consequential remedy that Dr. Vellturo has advanced.

[85] In view of its previous findings that, after the acquisition of the Ridge, CWS would control all of the disposal capacity for locally-generated ICI Waste in Chatham-Kent and that there would be no effective competition to CWS for the disposal of such waste, and in light of its

concern about the critical sales loss methodology, and in light of the limited range of price changes that Dr. Vellturo has analyzed, the Tribunal is not satisfied that the remedies analyzed by Dr. Vellturo for Chatham-Kent would be effective.

(d) Critical Sales Loss Analysis for GTA

[86] Dr. Vellturo employs a spatial analysis of competition of disposal of ICI Waste from the GTA in the expected environment of substantial excess capacity. His procedure allocates ICI Waste from the GTA to a landfill in Southern Ontario based on its distance from the GTA, and its effective price per tonne, which is its minimum tipping fee plus the transportation cost per tonne from the GTA. In this framework, which he asserts is broadly similar to the analysis submitted by the Commissioner and accepted by the Tribunal, the last landfill to receive ICI Waste from the GTA is the "last active landfill". It sets its tipping fee in relation to that charged by the next distant landfill, the "marginal landfill", to the extent that the latter has excess capacity. The price charged by a landfill is the tipping fee that makes the transfer station indifferent between disposing there and hauling it to the next distant landfill. Accordingly, the tipping fee at the marginal landfill determines the tipping fees charged by all landfills closer to the GTA.

[87] Having established the tipping fees at each landfill, Dr. Vellturo allocates ICI Waste from the GTA to those landfills according to their distance from the GTA. He finds that the last active landfill is GreenLane, whose minimum tipping fee is just below that of the marginal landfill, the Essex-Windsor Solid Waste Authority. Dr. Vellturo concludes that since the marginal landfill is not owned by CWS, then whether or not CWS acquires the Ridge it will not be able to influence prices for ICI Waste from the GTA in Southern Ontario. On this basis, he cannot conclude that post-expansion prices will be lower than those currently prevailing and he opines:

> As a result, no remedy is needed in order to prevent the realization of assumed decreases in price that are less than 5 [percent] below currently prevailing prices, since Green Lane [sic] will continue to have sufficient excess capacity to discipline the Respondents from seeking such price increases (or correspondingly, failing to decrease price). (expert affidavit of Christopher Vellturo (May 24, 2001): exhibit 423, at p.8)

[88] During his examination and cross-examination, Dr. Vellturo restates and clarifies his opinion. It is that the model of spatial competition that the Tribunal has accepted does not, in his formulation using data from the record, lead to a forecast of declining tipping fees. Accordingly, the only price decline that could be expected is a small one.

[89] Using the critical sales loss procedure, Dr. Vellturo determines the volumes of waste capacity that, if taken out of CWS's control, would make it unprofitable for it to thwart small price decreases of 5 percent, 10 percent and 15 percent that might be expected absent its acquisition of the Ridge. To thwart these declines, CWS would have to raise the post-acquisition price by 5.3 percent, 11.1 percent and 17.6 percent respectively.

[90] Assuming a 5 percent price decrease, Dr. Vellturo finds that no divestiture of any volume is needed to make the thwarting thereof unprofitable. For decreases of 10 percent and 15 percent, he estimates that divestiture of 53,225 tonnes and 155,647 tonnes would suffice.

[91] In his rebuttal report, Dr. Vellturo conditions his conclusions by noting that all such volumes be divested at the Ridge and that the divested volumes must be done at CWS's marginal cost at the Ridge. He concludes that airspace agreements covering these volumes would accomplish the goal of eliminating the substantial lessening and prevention of competition that results from the acquisition of the Ridge in respect of ICI Waste from the GTA (expert rebuttal affidavit of Christopher Vellturo (June 13, 2001): exhibit 426).

(e) Tribunal's Assessment of GTA Analysis

[92] It appears to the Tribunal that Dr. Vellturo agrees with the Tribunal's conclusion from Professor Baye's evidence, that each landfill accepting ICI Waste from the GTA views demand as highly elastic. Even a small increase in its tipping fee would lead to a significant loss of business to competing landfills. Thus, in the Tribunal's view, the relatively small critical sales volumes found by Dr. Vellturo are not surprising. His estimate of gross profit per tonne at the Ridge is high: exceeding approximately 70 percent of sales and exceeding approximately 300 percent of cost. This means that even small reductions in output (i.e. tonnes disposed) will reduce gross profit significantly at the Ridge. CWS would not willingly impose such losses on itself and would hence refrain from small price increases that occasion large volume reductions. As a result, the critical sales loss volumes are small.

[93] However, the Tribunal cannot conclude that CWS views large price increases in the same way. As the Tribunal observed in its decision, after it acquires the Ridge, CWS would own 70 percent of total disposal capacity available for ICI Waste from the GTA after 2002. Moreover, it would own 85.8 percent of the excess capacity available for such waste. The Tribunal found that CWS would be able to affect the level of tipping fees in the relevant geographic market. In light of Dr. Vellturo's analysis, the Tribunal's concern is heightened by the evidence that the marginal and last active landfills have been weak competitors for ICI Waste from the GTA.

[94] The Tribunal accepted the evidence that the GreenLane site (i.e. the last active landfill) was not competitive on tipping fees; hence it received little ICI Waste from the GTA. As the Tribunal noted in its decision, GreenLane's high tipping fee is due, at least in part, to the significant community host fee that it must pay on every tonne of waste it receives (Reasons, paragraph 149). There is no indication on the record to suggest that GreenLane's pricing would change.

[95] Moreover, Essex-Windsor (i.e. the marginal landfill) had received no ICI Waste from the GTA in 1999 due to restrictions on its service area, though its board of directors had since authorized 100,000 tonnes of annual capacity to be marketed outside the municipality. As a result, there is no tipping fee for such waste in the record. To complete his analysis, Dr. Vellturo needed to make an assumption about the tipping fee that Essex-Windsor would have charged had it been able to accept such waste:

> Remember, the Essex-Windsor price I have here is an imputed price based on historical information (transcript at 2057, lines 9-11 (21 June, 2001)).

Thus, it appears to the Tribunal that a critical part of his analysis, the tipping fee that Essex-Windsor would have charged, and would have constrained the tipping fee at GreenLane, is a construct not based on actual tipping fee evidence for Essex-Windsor.

[96] Moreover, he implicitly assumes that while some Essex-Windsor capacity would be offered to transfer stations in the GTA seeking to dispose of ICI Waste, Essex-Windsor would receive none. In this regard, the practice of price discrimination may be relevant, but, by referring only to the lowest tipping fee charged by a landfill, Dr. Vellturo's allocation procedure does not take this practice into account. Given the widespread practice of price discrimination by landfills seeking to obtain ICI Waste from the GTA, the Tribunal is reluctant to conclude without better evidence that Essex-Windsor would not receive any such waste.

[97] As the last active landfill and marginal landfill respectively, the GreenLane and the Essex-Windsor landfills are crucial to Dr. Vellturo's analysis of remedies. In the Tribunal's view, there is insufficient evidence on the record for it to be confident that these sites would exert the discipline that he attributes to them.

[98] Professor Baye criticized the airspace remedy in the GTA context as likely to create a competitively insignificant fringe of parties that would collude with, rather than compete with, CWS. The respondents argue that any such collusion would be short-lived in light of the benefits a party would derive from cheating on any implicit agreement on price by even a very small amount. The Tribunal notes that airspace rights at the Ridge would place the parties and CWS literally side-by-side and CWS would be able to observe the conduct of parties easily. Professor Baye notes that CWS would be able to disrupt the operations of the parties at the Ridge by requiring unnecessary inspections and tests of waste delivered to the Ridge. As a result, the Tribunal is concerned that CWS has the ability to punish any deviations from an implied collusive agreement.

[99] Dr. Vellturo noted that, to be effective, a collusive agreement would require the cooperation of other landfills, specifically GreenLane and Walker, that have disparate interests. Having noted its concern about the competitiveness of GreenLane above, the Tribunal also refers to its decision wherein it noted that the Walker landfill is already at capacity, and that a significant amount of the volume of waste received at the Walker landfill is brought in by CWS (Reasons, paragraph 148). It is not clear to the Tribunal that Walker's interests would diverge in a collusive environment.

[100] The Commissioner notes that while the proposed airspace agreements makes provision for compensation in the event of disproportionate inspections by CWS, the administration of this contractual provision is itself problematic and could potentially lead to dispute resolution by the Tribunal. Third party rights must be clear in any order. The Tribunal does not favor ongoing monitoring particularly when, as in the case before it, there is a clear structural remedy which will be effective, that is the divestiture of the Ridge. The proposed airspace agreements could not detail the amount of compensation to be awarded in a variety of circumstances. CWS would have an incentive to oppose compensation or reasonable compensation given that these agreements are

designed to be unprofitable for CWS. There is reason to doubt the effectiveness of the airspace agreements.

[101] Similar concerns arise with respect to the provision of the airspace agreement that allows CWS to adjust price terms in the event of an unforeseen change in applicable law. Although the provision calls for the fair application of any such increase to all users of the facility, it places the Tribunal in the position of deciding whether the price adjustment was reasonable and fairly applied. Again, the Tribunal is reluctant to place itself in such a position. The force majeure clause and the restriction on assignment raise similar concerns.

[102] These contractual considerations, in conjunction with CWS's market share and the lack of effective remaining competition and entry, and its concerns with Dr. Vellturo's emphasis on GreenLane and Essex-Windsor sites, lead the Tribunal to believe that airspace agreements will not likely be effective remedies.

(2) Divestiture of the Ridge

[103] The Commissioner advocates that the only effective remedy is the total divestiture of the Ridge by CWS, and relies on the opinion evidence of Professor Baye. Professor Baye based his analysis of the remedy on the theory of spatial competition that he introduced at the hearing on the merits.

[104] In his expert report, Professor Baye noted that any effective remedy must maintain vigorous competition among the Ridge, Warwick and Richmond landfills, all of which are similar distance from the GTA. While the divestiture of any one of these landfills could, in his opinion, remedy the anti-competitive effects of the transaction on the disposal of ICI Waste from the GTA, he concludes that the divestiture of the Ridge is the appropriate remedy. He notes, *inter alia*, that unlike the Warwick or Richmond sites, the Ridge is not part of the CWS infrastructure and that divestiture of either of these other sites would not address the anti-competitive concern regarding the disposal of locally-generated ICI Waste in Chatham-Kent; hence another remedy would be required to address that concern (expert affidavit of Michael Baye (May 23, 2001): exhibit 421).

[105] In his expert rebuttal report, Dr. Vellturo suggests that total divestiture of the Ridge is excessive in light of the statutory goal of eliminating the substantial lessening or prevention of competition. In this connection, he states that Professor Baye's analysis of competition among similarly situated landfills is incorrect and that the airspace remedy restores such competition. In addition, he concludes that full divestiture of the Ridge will result in the loss of potential pro-competitive operational efficiencies (expert rebuttal affidavit of Christopher Velluturo (June 13, 2001): exhibit 426).

[106] With regard to efficiencies, Dr. Vellturo, relying on his experience, states that logistics savings are available to an operator who reallocates waste streams optimally when expanding its network of landfills. In addition, such expansion offers opportunities for specialization of facilities, hence creating additional operational efficiencies. Finally, a larger landfill network creates greater incentives for the owner or operator to consider investments in new technologies or procedures because the payout to such developments can be enjoyed across a greater range of

facilities. He concludes that a full divestiture would impose the social cost of reduced efficiency without any corresponding benefit in restoring competition.

(3) Tribunal's Assessment

[107] There is no issue about the effectiveness of divestiture of the Ridge as a remedy. There are, however, significant concerns about the effectiveness of these airspace agreements. CWS had the burden of establishing that these agreements would be effective to remedy the anti-competitive effects the Tribunal has found.

[108] As noted above, the Tribunal is not convinced that the airspace agreements proposed by the respondents, and analyzed by Dr. Vellturo, constitute an effective remedy. Moreover, in its decision, the Tribunal accepted that the Ridge competes with Warwick and Richmond landfills for ICI Waste from the GTA and that the present transaction prevents such competition (Reasons, paragraph 204).

[109] Regarding gains in efficiency, the Tribunal observes that no evidence of such gains from the present transaction was presented at the hearing on the merits; indeed, such gains were not even alleged. Accordingly, the Tribunal regards Dr. Vellturo's efficiency claims as speculative.

[110] As stated above, the remedy proposed by the respondents is not available under the Act. Since the Tribunal has found that the divestiture of the Ridge is an available and effective remedy and complies with the provisions of the Act, the Tribunal is not obliged to consider alternative submissions. However, the Tribunal is of the view that even if these airspace agreements constituted a remedy available under the Act, contractual arrangements of that nature would be of some concern. Indeed, once there has been a finding that a merger is likely to substantially prevent or lessen competition, a remedy that permanently constrains that market power should be preferred over behavioural remedies that last over a limited period of time and require continuous monitoring of performance. This is not to say that, in cases where both the respondents and the Commissioner consent, behavioural remedies cannot be effective. However, the Tribunal notes that enforcing the remedy proposed by the respondents would have the potential of being cumbersome and time-consuming and that monitoring such order would involve the Commissioner in commercial conduct more than would the administration of the divestiture order.

[111] In *United States v. E.I. Du Pont de Nemours et al.*, 366 U.S. 316 (1961), the court rejected Du Pont's proposed behavioural remedy under which Du Pont would retain the shares whose purchase gave rise to the violation, but would "pass through" the voting rights to Du Pont shareholders. The Supreme Court held, at page 6 (QL) paragraph 24, that divestiture is the appropriate remedy for mergers that violate the *Clayton Act* (15 U.S.C.):

> Divestiture or dissolution has traditionally been the remedy for Sherman Act violations whose heart is intercorporate combination and control [...]. Divestiture has been called the most important of antitrust remedies. It is simple, relatively easy to administer, and sure. It should always be in the forefront of a court's mind when a violation of [s] 7 has been found.

[112] Similarly, in *Community Publishers Inc. et al. v. NAT et al.*, 892 F. Supp. 1146 at 1176 (West. Dist. Ark., 1995) at 36 (QL), the United States District Court rejected a form of permanent hold separate order proposed by NAT.

[113] Further, as noted in Table 1 of its decision, the Tribunal found that CWS would own 70 percent of the available capacity for ICI Waste from the GTA if it did not divest the Ridge landfill, and 48 percent if it did. The Tribunal also accepted Professor Baye's estimates that CWS would control 85.8 percent of total excess capacity if it did not divest the Ridge, and 63.6 percent if it did (Reasons, paragraph 196). When these shares of capacity are considered in light of the various factors stated in section 93 of the Act, the Tribunal does not accept that the total divestiture of the Ridge constitutes an excessive remedy.

[114] Divestiture of the Ridge is the appropriate remedy to deal with the problem that the Tribunal has found and it is likely to be effective. It is neither excessive nor disproportionate. Indeed, in this case, the Commissioner is not asking the Tribunal to either dissolve a merger or order divestiture which goes beyond the specific assets which are the root of the problem. It is not, for instance, the situation that occurred in the *Southam* case (referred to above at paragraph 48), where the divestiture proposed by the Commissioner went beyond what was necessary to address the anti-competitive effects, but was nevertheless ordered because no other effective remedy was available. In this case, CWS will enjoy as much disposal space as it did pre-merger. Furthermore, the Ridge is only part of a larger transaction that was allowed by the Commissioner to proceed. Even after divestiture, CWS will retain ownership and control of nearly 50 percent of the Southern Ontario capacity for ICI Waste from the GTA. There is no evidence of hardship or anything of that nature that arises out of proposed divestiture. The Commissioner's remedy clearly meets the test of eliminating the substantial prevention and lessening of competition resulting from the acquisition of the Ridge.

[115] The Tribunal notes that the draft divestiture order incorporates terms and conditions with respect to the sale of the Ridge that are necessary and reasonable, including a deadline for effecting the sale and provision for the appointment of a trustee in default of a sale within that time limit. The draft divestiture order proposed by the Commissioner provides that CWS would have 90 days to divest the Ridge, failing which it would pass into the hands of a trustee for sale. The respondents argue that 90 days is too short a period of time.

[116] The Commissioner suggests that Deloitte & Touche be the trustee, in the event that a trustee is required. The reason for this is that Deloitte & Touche has been the monitor under the Consent Interim Order dated April 28, 2000. The Tribunal accepts counsel for the Commissioner's suggestion that Deloitte & Touche be the trustee. The respondents did not raise any objection in that regard following the remedy hearing. The Tribunal notes that the draft divestiture order contains usual terms expected to be found in a divestiture order.

IV. ORDER

[117] For these reasons, the Tribunal orders that the respondents divest the Ridge in accordance with the divestiture order attached hereto.

DATED at Ottawa, this 3rd day of October, 2001.

SIGNED on behalf of the Tribunal by the presiding judicial member.

(s) W.P. McKeown

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