

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 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.

BETWEEN:

COMMISSIONER OF COMPETITION

Applicant

– and –

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

Respondents

MEMORANDUM OF ARGUMENT
Admissibility of Baye Report

Kelly Affleck Greene
Barristers and Solicitors
One First Canadian Place
Suite 840, Box 489
Toronto, Ontario M5X 1E5

Donald B. Houston
W. Michael G. Osborne
Tel. 416-360-2800
Fax: 416-360-5960

COMPETITION TRIBUNAL
TRIBUNAL DE LA CONCURRENCE

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Suzanne Lagacé for / pour
REGISTRAR / REGISTRAIRE

OTTAWA, ONT.

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André Brantz (Department of Justice)

Tel. 819-953-3894

Fax: 819-953-9267

Counsel to the Commissioner of Competition

To: **Stikeman, Elliott**
Barristers & Solicitors
Suite 5400
Commerce Court West
Toronto, Ontario
M5L 1B9

Lawson A.W. Hunter Q.C.

Shawn Neylan

Nicholas McHaffie

Danielle Royal

Tel: 416-869-5545

Fax: 416-947-0866

Counsel to the Respondents

I Introduction

1. The respondents Canadian Waste Services et al. (“CWS”) seek to exclude the evidence of Dr Michael Baye evidence on grounds that it is not relevant.
2. Dr Baye’s evidence is relevant to a number of issues in this Application. In particular, it is relevant to the central issue: whether CWS’ acquisition of the Ridge is likely to result in a substantial lessening or prevention of competition for the disposal of the ICI component of solid non-hazardous waste (“SNHW”) from the GTA and Chatham-Kent. Accordingly, Dr Baye’s evidence is admissible and it should be admitted.
3. CWS waited until after the hearing of this Application began to allege prejudice arising from an expert report that was served nearly one month before the hearing began. CWS’ motion is highly technical in nature. It relies on a very restrictive reading of the pleadings. Nor has CWS suffered any prejudice. The Commissioner respectfully submits that this motion is simply a tactical attempt to exclude important evidence.

II Facts

4. The facts relevant to this motion are set out in the Statement of Grounds and Material Facts (“Statement of Grounds”) and the Agreed Statement of Facts. Other facts are referred to below as the need arises.

III Issues

5. CWS’ motion to exclude Dr Baye’s Affidavit and testimony raises the following issues:
 - a) Whether CWS is precluded by delay from bringing this motion;
 - b) Whether Dr Baye’s evidence is relevant to an issue in the Application; and
 - c) Whether Dr Baye’s evidence should be excluded on ground of prejudice.

IV Argument

A. CWS is Precluded by Delay from Bringing this Motion

6. Counsel for CWS received Dr Baye's Affidavit and Report on October 11, 2000. CWS claims that it was not until it received this report that it became aware that the Commissioner had "changed his case" and was now alleging a substantial lessening or prevention of competition in the disposal of ICI Waste as distinct from SNHW (of which ICI is a component).

7. CWS could have raised its concerns with counsel for the Commissioner upon receiving Dr Baye's Affidavit. CWS could have raised its concerns at the Pre-hearing Conference on October 24. It did not. Instead, CWS refrained from even mentioning its objections until the beginning of the hearing, and until the late evening before the day Dr Baye was to testify to supply the Commissioner with its draft argument.

8. In raising these concerns, CWS has not sought to remedy the alleged prejudice, but to oppose the admission of an important part of the Commissioner's case. CWS' failure to raise its concerns promptly, and its willingness to begin the hearing without having raised its concerns, should preclude it from raising them now.

B. Dr Baye's Evidence is Relevant to Issues in this Application

(1) The test for admitting an expert report

9. All evidence, including expert reports, must be relevant in order to be admissible. Rule 279 of the *Federal Court Rules, 1998*, codifies this common law rule by providing that in order to be admitted, an expert report must be in respect of an "issue defined in the pleadings".

R. v. Mohan, [1994] 2 S.C.R. 9 at 20, CWS Authorities, tab 3

10. The threshold requirement of relevance is a low one. Courts only exclude evidence if it is completely unrelated to the issues as disclosed by the pleadings. For example, in *Rai v. Wilson*, an expert report whose relevance to the issue in question was “tenuous at best” was not admitted.

Sopinka et al., *The Law of Evidence in Canada*, 2d ed., §2.41, CWS Authorities, tab 4

Rai v. Wilson (1999), 26 C.P.C. (4th) 143 (B.C.C.A.)

11. There is no requirement that an expert report relate to *all* of the issues in a case.

(2) Dr Baye's evidence is relevant to issues in this Application

12. Dr Baye concluded, among other things, that CWS' acquisition of the Ridge would likely result in a substantial lessening or prevention of competition with respect to the following:

- a) disposal of ICI waste from the GTA;
- b) disposal of ICI waste from Chatham-Kent.

See Baye Report, para 8, pp. 2-3 for a summary of these conclusions.

13. Dr Baye also found that this substantial lessening or prevention of competition in disposal would likely lead to a substantial lessening or prevention of competition in commercial waste collection markets in the GTA and Chatham-Kent.

See Baye Report, para 8, pp. 2-3 for a summary of these conclusions.

14. Dr Baye found that Residential Waste became irrelevant when the City of Toronto decided to send its Residential Waste to Adams Mine, and later, to send this waste to Republic or Arbor Hills in Michigan.

Transcript, Thursday, November 9, 2000, p. 458 l. 16 – p. 460 l. 7.

15. Each of these conclusions relates to an issue pleaded by the Commissioner in this Application. In particular, as discussed below, the Commissioner pleaded a substantial lessening or prevention of competition in the disposal of ICI waste from the GTA. As well, the

Commissioner pleaded that the acquisition of the Ridge by CWS will have anti-competitive effects on commercial waste collection markets in the GTA.

(3) The Commissioner pleaded a substantial lessening or prevention of competition in the disposal of ICI waste from the GTA

16. The Commissioner has expressly pleaded that CWS' acquisition of the Ridge would lead to a substantial lessening or prevention of competition for disposal of both components of SNHW, that is, ICI Waste and Residential Waste.

17. In the Statement of Grounds, the Commissioner stated the principal relevant product market is "solid non-hazardous waste disposal". "Solid non-hazardous waste" was defined as comprising two components: ICI Waste and Residential Waste.

Statement of Grounds, paras. 23, 24, 25, 27.

Note: "Solid non-hazardous waste" refers to the same thing as "SNHW" in the Agreed Statement of Facts.

18. The Statement of Grounds goes on to explain that both the City of Toronto and private transfer stations handle ICI waste, and that the City of Toronto handles Residential Waste through its facilities. The Statement of Grounds deals with ICI waste processed by private transfer stations separately from ICI and Residential Waste managed by the City of Toronto.

Statement of Grounds, paras. 48-61.

19. With respect to waste processed by private transfer stations, the Statement of Grounds concludes as follows:

99. If CWS is allowed to keep the Ridge, it will likely be able to exercise market power over private transfer stations and waste collectors in the GTA. [Emphasis added.]

Statement of Grounds, para. 99

20. The Commissioner also expressly alleged that:

112. Acquisition of the Ridge by CWS will likely result in a substantial lessening or prevention of competition in the market for the disposal of solid waste from the GTA, both for private transfer stations and waste collectors from the GTA, and for the City of Toronto. [Emphasis added.]

Statement of Grounds, ¶112.

21. Dr Baye's evidence tends to establish both of the allegations outlined above. It is thus relevant to those issues.

(4) The Commissioner pleaded that CWS' acquisition of the Ridge will have anti-competitive effects in commercial waste collection markets

22. In the Statement of Grounds, the Commissioner alleged that because of the vertical relationship between disposal and collection markets, acquisition of the Ridge by CWS and the ensuing effects on disposal markets will also have anti-competitive effects in commercial waste collection markets in the GTA and Chatham-Kent.

Statement of Grounds, para. 120

23. Dr Baye's conclusion in regard to commercial waste collection markets is relevant to this issue.

24. In essence, CWS is objecting to the fact that Dr Baye found that the anti-competitive effects on commercial waste collection markets were of greater magnitude than those alleged by the Commissioner. This is akin to a valuator in a civil case valuing a claim at a higher amount than that pleaded by a party. The valuator's report would be relevant and admissible; the plaintiff could, however, only recover the amount it had claimed. The same reasoning applies here.

(5) The place of market definition in merger analysis

25. Market definition is a tool used in merger analysis and not the end. Rather, the purpose of the exercise under section 92 is to determine whether a merger is likely to result in a substantial lessening or prevention of competition. The Tribunal stated in *Propane*,

¶48 While market definitions should be as precise as possible within the limit of reasonableness to provide a framework within which competition implications of a transaction can be analyzed, the Tribunal should not be preoccupied with market definition to the point of losing sight of the purpose of the exercise under the Act which is to determine whether the merger is likely to lead to a substantial lessening of competition. [Emphasis added.]

Canada (Commissioner of Competition) v. Superior Propane Inc. [2000] C.C.T.D. No. 15 (“Propane”)

26. The relevant market is the smallest market, in terms of the number of included products, over which market power can be exercised. If market power can be exercised over a certain product or group of products, then that product or group of products is the relevant market.

Propane, ¶57

27. The purpose of the present exercise is to determine whether CWS’ acquisition of the Ridge will result in a substantial lessening or prevention of competition. Dr Baye’s evidence bears directly on whether CWS’ acquisition of the Ridge will result in a substantial lessening or prevention of competition, and is therefore relevant and admissible.

28. *Propane* provides an example of the Tribunal’s flexible approach to dealing with relevant markets. The Commissioner suggested through expert evidence that certain end-use segments of the retail propane market constituted relevant markets. The Statement of Grounds in that case alleged that the relevant product market was the supply and delivery of propane and identified end-use segments only as components of this market (and not expressly as separate relevant markets). It did not expressly allege a substantial lessening of competition in respect of these segments individually. The Tribunal nevertheless considered the question of whether these end-use segments constituted relevant markets. (It held that they did not.)

Propane, ¶¶ 36, 70-72

Fresh as Amended Notice of Application & Statement of Grounds and Material Facts – Fresh as Amended, in *Propane*, dated December 7, 1998, para. 9.

29. Here, the Commissioner has identified ICI and Residential Waste as components of SNHW and has pleaded the existence of market power, and a substantial lessening or prevention of competition in each of these components individually.

C. Dr Baye's Evidence Should not be Excluded on Grounds of Prejudice

(1) No prejudice to CWS

30. CWS has not suffered any prejudice from the alleged change to the Commissioner's case. As set out in paragraphs 16 to 20 above, CWS has had notice that the Commissioner's case involved an allegation of market power over the disposal of ICI Waste from the beginning.

31. The only thing that has changed is that the Commissioner has dropped the Residential Waste part of the case. This does not prejudice CWS in any way. Rule 165 of the Federal Court Rules allows parties to discontinue a part of a proceeding.

Federal Court Rules, rule 165.

32. It is significant that CWS' expert, Dr George Hay, assumed that the City of Toronto and other GTA municipalities would enter a contract to dispose of their residential waste at Adams Mine beginning in 2003. Dr Baye made the same assumption.

Hay Report, para 11(d), p. 4

Transcript, Thursday, November 9, 2000, p. 458 l. 16-22

33. Dr Hay thus concluded that waste covered by this contract was irrelevant. Again, this is precisely the same as the conclusion reached by Dr Baye.

Hay Report, para 12, p. 4

Transcript, Thursday, November, 9, 2000, p. 458 l. 23 – p. 460 l. 2.

34. Further, in his Reply Report, Dr Hay noted that Dr Baye limited the product market to ICI Waste. Dr Hay commented,

However, as will become clear, the substantive problems with Professor Baye's analysis exist regardless of which product market he is addressing.

Hay Reply Report, para 2, p.1

(2) The remedy for the prejudice alleged by CWS is not exclusion of evidence

35. In its written argument, CWS refers to the *Mohan* case for the proposition that expert evidence can be excluded on the basis of prejudice.

36. The prejudice referred to in *Mohan* relates to excluding evidence whose probative value is outweighed by its prejudicial effect. In the case of expert evidence, the concern is that a jury may accept expert evidence as being virtually infallible when it is not.

R. v. Mohan, p. 21

37. No such concern exists here. Rather, the concern expressed by CWS relates to whether it had adequate notice of the case it had to meet. The kind of prejudice alleged by CWS is thus entirely irrelevant to the question of whether Dr Baye's evidence is admissible.

38. The appropriate remedy for such prejudice (if it existed) would be an adjournment or some similar relief to allow CWS time to respond to the Commissioner's case. The appropriate time for CWS to have requested this relief was before the hearing started, and not after.

v Relief Requested

39. The Commissioner requests that

- a) CWS' motion to exclude Dr Baye's Affidavit and testimony be dismissed; and

- b) Dr Baye's Report, Reply Report, and diagrams made during his testimony be marked as exhibits in this proceeding.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

November 15, 2000

Donald B. Houston

André Brantz

W. Michael G. Osborne

Counsel to the Commissioner of Competition

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Mr. Donald Houston
W. Michael G. Osborne
Kelly Affleck Greene
Suite 840, P.O. Box 489
One First Canadian Place
Toronto, ON M5X 1E5

Telephone: (416) 360-2810 / 5919
Facsimile: (416) 360-5960

Mr. Andre Brantz
Department of Justice
Competition Law Division
Industry Canada, Legal Services
Place du Portage, Phase I
50 Victoria Street
Hull, Quebec K1A 0C9

Telephone: (819) 997-3325
Facsimile: (819) 953-9267

Counsel to the Commissioner of Competition