

CT - 2000/002

THE COMPETITION TRIBUNAL

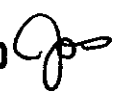
IN THE MATTER OF the Competition Act, R.S. 1985, c. C-34; as amended;

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

| | | | |
|----------------------------|----------------------------------------------------|-------------------------------------------------------------------------------------|---------------------------------|
| F E R R I S | COMPETITION TRIBUNAL TRIBUNAL DE LA CONCURRENCE | | P R O D U I T |
| | JUN 19 2000 JUN JUIN |  | |
| REGISTRAR - REGISTRAIRE | | OTTAWA, ONT. 14 (a) | |

Applicant

- and -

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

Respondents

RESPONDENTS' RESPONSE TO THE REQUEST FOR LEAVE TO INTERVENE BY THE CORPORATION OF CHATHAM-KENT

1. The Respondents Canadian Waste Services Holdings Inc. ("CWSH"), Canadian Waste Services Inc. ("CWS"), and Waste Management, Inc. ("WMI") oppose the request for leave to intervene by the Corporation of the Municipality of Chatham-Kent (the "Municipality").

I. Factual Background

2. In 1997, prior to the acquisition of the Ridge by CWS, Browning Ferris Industries Ltd. ("BFI") entered into a long-term contract (the "Host

Community Agreement”) with the Municipality for the disposal of residential waste collected by the Municipality at the Ridge landfill. Under the Host Community Agreement, the Municipality was provided the benefit of long-term solid waste disposal at a guaranteed price for all of the residential waste collected by it. Residents of Chatham-Kent were provided similar benefits for residential waste brought to the Ridge landfill in small volumes.

Paragraph 4 and Exhibit A of the Affidavit of Dominic Pio sworn June 16, 2000.

3. Pursuant to the purchase agreement between CWS and BFI in which CWS acquired the Ridge (the “Purchase Agreement”), CWS also acquired BFI’s rights under the Host Community Agreement, subject to the Municipality consenting to the assignment of the Host Community Agreement.

Paragraph 3 of the Pio Affidavit.

4. The Host Community Agreement contains a provision that requires the consent of the Municipality before it can be assigned to another party. The assignment provision also states that such consent shall not be unreasonably withheld.

Paragraph 7 and Exhibit A of the Pio Affidavit.

5. Following the acquisition of the Ridge by CWS, BFI sent a letter dated April 6, 2000, to the Municipality in which BFI requested the consent of the Municipality to the assignment of the Host Community Agreement to CWS.

Paragraph 8 and Exhibit B of the Pio Affidavit.

6. In a letter to CWS dated May 16, 2000, the Municipality responded to the request for consent to the assignment of the Host Community Agreement.

Paragraph 9 and Exhibit C of the Pio Affidavit.

7. In a letter dated May 23, 2000, CWS responded to the Municipality's letter and stated that it wished to assume BFI's obligations under the Host Community Agreement, and that, in the event of assignment of the Host Community Agreement to CWS, it could not be further assigned without the consent of the Municipality.

Paragraph 10 and Exhibit D of the Pio Affidavit.

8. The Municipality has not yet consented to the assignment of the Host Community Agreement.

Paragraph 11 of the Pio Affidavit.

II. Test for Intervention in the Competition Tribunal

9. Subsection 9(3) of the *Competition Tribunal Act* (the "Act") provides:

Any person may, with leave of the Tribunal, intervene in any proceedings before the Tribunal to make representations relevant to those proceedings in respect of any matter that affects that person.

10. All of the following tests must be satisfied before leave to intervene may be granted:

- (a) Any representations made by a person seeking leave to intervene, must be relevant to an issue specifically raised by the Commissioner;

Canada (Competition Act, Director of Investigation and Research) v. Tele-Direct (Publications) Inc., [1995] C.C.T.D. No.4 (QL) (Comp. Trib.).

- (b) The matter alleged to affect the person seeking leave to intervene must be legitimately within the purview of the Tribunal's consideration, or must be a matter sufficiently germane to the mandate of the Tribunal to justify allowing the intervention;

Canada (Director of Investigation and Research, Competition Act) v. Air Canada (1988), 32 Admin. L.R. 157 (Comp. Trib.); Rev'd on other grounds [1989] 2 F.C. 88 (C.A.); affirmed [1989] 1 S.C.R. 236.

Director of Investigation and Research v. Air Canada (1992), 46 C.P.R. (3d) 184 at 187 (Comp. Trib.).

- (c) There must be direct alleged affects on the person seeking leave to intervene;

Director of Investigation and Research v. Air Canada (1992), *supra*, at 187.

Washington v. Canada (Competition Act, Director of Investigation and Research), [1998] C.C.T.D. No. 4 (QL) (Comp. Trib.).

- (d) The person seeking leave to intervene must bring to the Tribunal a unique or distinct perspective which will assist the Tribunal in deciding the issues before it.

Washington v. Canada (Competition Act, Director of Investigation and Research), *supra*.

III. Alleged Matters in Issue and Alleged Competitive Consequences on the Municipality

11. In the Municipality's Request for Leave to Intervene (the "Intervention Request") the Municipality alleges that is affected by six matters in issue in the Commissioner's application. None of these matters justify an order allowing intervention.

Paragraphs II (a), (b) and (c) of the Intervention Request

12. The Municipality is not directly affected by any of the matters in paragraphs II (a), (b) or (c) of the Intervention Request (acquisition of Ridge may lessen or

prevent competition). Further, the Municipality is unable to offer a unique perspective to assist the Tribunal.

13. The Municipality is not directly affected by the alleged likely substantial lessening or prevention of competition as the Municipality has long-term access to the Ridge at a fixed price for the residential waste collected by or for it within the boundaries of Chatham-Kent, by virtue of the Host Community Agreement. The Municipality need only consent to the assignment of the Host Community Agreement to continue to dispose of waste thereunder.
14. Further, the CWS–Gore Road (Blenheim) facility will be closed long before the expiration of the original term of the Host Community Agreement. Accordingly, the retention of the Ridge by CWS can have no competitive impact upon the tendering prices for the collection and disposal of waste by the Municipality, at the expiration of the Host Community Agreement.

Paragraph 12 of the Pio Affidavit.

15. The Municipality does not collect ICI waste and as such can not be directly affected by any matter involving the disposal of ICI waste.
16. Further, the Municipality is unable to provide a unique or distinct perspective with respect to ICI waste and cannot make representations on behalf of third party waste collectors that would assist the Tribunal. The Municipality is not in a better position than the Commissioner to make arguments regarding competitive effects on third party waste collectors, who have not sought to intervene in this proceeding.

Washington v. Canada (Competition Act, Director of Investigation and Research), supra.

Southam Inc. v. Canada (Competition Act, Director of Investigation and Research), [1997] C.C.T.D. No. 47 (QL) (Comp. Trib.).

Paragraph II (d) of the Intervention Request

17. The Municipality's allegations in paragraph II (d) of the Intervention Request (economic and community benefits that it derives from the Host Community Agreement) fail to meet the test for leave to intervene, as these matters are not relevant to any issue raised by the Commissioner and are not matters legitimately within the purview of Tribunal consideration or sufficiently germane to the Tribunal's mandate to justify allowing intervention. Further, any representations that the Municipality might make with respect to the benefits it receives under the Host Community Agreement will not assist the Tribunal in determining the issues before it.

18. In *Tele-Direct, supra*, Mr. Justice McKeown stated that in determining relevancy, the representation must relate to an issue raised by the Commissioner in his application:

We agree with the respondents that intervenors are restricted to making representations on issues that are relevant to the proceedings *as defined by the pleadings*. We do not dispute that all the acts alleged by White and NDAP/DAC might be relevant to the general question of abuse of dominant position; however, if the Director has chosen not to put them in issue in his application, then they are not relevant to the instant proceeding before the Tribunal. In fairness to the respondents, the anti-competitive acts on which the Director relied must be pleaded with sufficient particularity to give adequate notice of the case that will be brought against them. [Emphasis added]

19. The Municipality's concerns regarding the possibility of the Ridge receiving less waste per year if it is owned by CWS than it would receive if it were owned by another entity, to the financial detriment of the Municipality, were not raised by the Commissioner in the application and are therefore irrelevant to the issues before the Tribunal.

20. Further, concern regarding the revenue that will accrue to the Municipality is not a matter that is legitimately within the purview of Tribunal consideration. In *Canada (Director of Investigation and Research, Competition Act) v. Air Canada* (1988), *supra*, Mr. Justice Strayer stated:

In considering whether any “matter” is involved in a proceeding that could affect the person requesting leave to intervene, it is necessary to consider whether such “matter” would legitimately be within the purview of Tribunal consideration. In the present context this means that one must consider the role of the Tribunal in respect of mergers and more generally in respect of the objectives of the Competition Act. This is an application under section 64 of the Competition Act which authorizes the Tribunal to stop or dissolve a merger which it finds “prevents or lessens, or is likely to prevent or lessen, competition substantially.” In making such a decision, the Tribunal is permitted to have regard to certain factors set out in section 65, all of which are related in one way or another to the question of competition. Whether that list is exhaustive or not we need not determine at this time, but it is certainly indicative that the focus of Tribunal consideration is to be on the question of competition.

...[I]t is important to underline that the Competition Tribunal has a particular responsibility to deal with competition issues and not to oversee the furtherance of a variety of public policies howsoever worthy those may be.

21. The Municipality’s revenue interests under the Host Community Agreement are not matters that are “related in one way or another to the question of competition”. Any entity that owns the Ridge will have an interest in deriving the maximum economic benefit from that facility. Operating decisions regarding the rate at which the Ridge landfill is filled are independent of the competition issues before the Tribunal in this proceeding.

Paragraph II (e) of the Intervention Request

22. The matters raised in paragraph II (e) of the Intervention Request (unknown environmental and economic effects) are not legitimately within the purview of Tribunal consideration. Further, any economic and environmental effects resulting from a divestiture of the Ridge are irrelevant to the issues before the Tribunal as they were not raised by the Commissioner in his application. It should be noted that there is a comprehensive provincial regulatory regime concerning environmental regulatory requirements. The Competition Tribunal is not the appropriate forum for these issues.

Canada (Competition Act, Director of Investigation and Research) v. Tele-Direct (Publications) Inc., supra.

Canada (Director of Investigation and Research, Competition Act) v. Air Canada (1988), supra.

Director of Investigation and Research v. Air Canada (1992), supra.

Paragraph II (f) of the Intervention Request

23. The Municipality alleges that it has a unique perspective on the potential effects arising from the retention of the Ridge by CWS on its residents and businesses. However, as noted above, the residents have long term access to the Ridge, provided that the Municipality consents to the assignment of the Host Community Agreement to CWS. Also, none of the businesses in Chatham-Kent have sought leave to intervene, and in any event, arguments concerning the competitive effects on such businesses can not be better advanced by the Municipality than the Commissioner. In any event, the affidavit material filed by the Municipality is largely silent with respect to the residents and businesses located in Chatham-Kent. The Municipality does not bring a unique or distinct perspective to any relevant subject matter in dispute in this proceeding. It should also be noted that the Municipality

states that it has already made available its information to the Commissioner.

Paragraph II (f) of the Intervention Request.

IV. Scope of Intervention, if Allowed.

24. The Commissioner and the Respondents have agreed to a streamlined process in the Tribunal. The procedure proposed by the Municipality will unduly prolong and complicate this process. In the event the Municipality is granted leave to intervene in this proceeding, such intervention should be limited to the presenting of argument only, on such specific issues as may be permitted by the Tribunal.

V. Procedure

25. A hearing has been scheduled by the Tribunal for June 22, 2000 at 3:00 p.m. in Toronto to determine this issue.

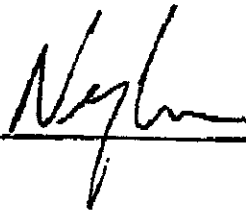
VI Order Sought

26. The Respondents request an order denying the Municipality's request for leave to intervene in this proceeding.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

DATED at Toronto, Ontario this 19th day of June 2000.

Lawson A.W. Hunter, Q.C.
Shawn C.D. Neylan
Danielle K. Royal

per:  _____

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RESPONSE CHATHAM-KENT INTERVENTION
REQUEST

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