

Competition Tribunal



Tribunal de la Concurrence

Reference: *The Commissioner of Competition v. Canadian Waste Services Holdings* 2000 Comp. Trib. 5  
File no.: CT2000002  
Registry document no.: 4

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)

Decided on the basis of the written record.  
Member: McKeown J. (presiding)  
Date of order: 20000428  
Order signed by: McKeown J.



**CONSENT INTERIM ORDER**

[1] FURTHER to the application (the "contested proceeding") of the Commissioner of Competition (the "Commissioner") pursuant to section 92 of the Competition Act, R.S.C. 1985, c. C-34, for an order requiring divestiture of the Ridge landfill;

[2] AND FURTHER to the application of the Commissioner in the contested proceeding for a consent interim order pursuant to sections 92 and 104 of the Act;

[3] AND ON READING the notice of application under section 92 of the Act dated April 26, 2000, the notice of application for a consent interim order under sections 104 and 105 of the Act dated April 26, 2000, the draft consent interim order, the affidavit of Lourdes DaCosta dated April 25, 2000, the memorandum of argument, and the consent of the parties;

[4] AND ON DETERMINING that this is an appropriate case for the issuance of an interim order pursuant to sections 92 and 104 of the Act;

THE TRIBUNAL ORDERS THAT:

### **Definitions**

[5] For the purposes of this order, the following definitions shall apply:

(a) "Acquisition" means the acquisition by Canadian Waste Services Inc. of certain assets of BFIL relating to the solid waste business, including those that constitute the business conducted at the Ridge and shares held by BFIL in companies which own assets relating to the solid waste business;

(b) "BFIL" means Browning-Ferris Industries Ltd., a corporation existing under the laws of Ontario;

(c) "Confidential information" means competitively sensitive or proprietary information relating to the Ridge not independently known to WMI-US, CWS or their affiliates, including, without limiting the generality of the foregoing, any such customer lists, price lists, marketing methods or other trade secrets;

(d) "CWSH" means Canadian Waste Services Holdings Inc., a corporation existing under the laws of Ontario, and an indirect wholly-owned subsidiary of WMI-US;

(e) "CWS" means Canadian Waste Services Inc., a corporation existing under the laws of Ontario, and a direct wholly-owned subsidiary of CWSH and its subsidiaries;

(f) "Person" means any natural person, corporation, association, firm, partnership or other business or legal entity;

(g) "Respondents" means WMI-US, CWSH and CWS;

(h) "Ridge" means the Ridge disposal facility in Blenheim, Ontario, owned by BFIL, and all assets and rights associated with and the business conducted at that facility; and

(i) "WMI-US" means Waste Management, Inc., a corporation existing under the laws of the State of Delaware, U.S.A.

### **Application**

[6] The provisions of this order shall apply to:

(a) the respondents;

(b) each division, subsidiary or other person controlled by the respondents, and each officer, director, employee, agent or other person acting for or on behalf of the respondents with respect to any matter referred to in this order;

(c) the successors and assigns of the respondents and all other persons acting in concert or participating with any of them with respect to the matters referred to in this order who shall have received actual notice of this order;

(d) Hugh Thomas Consulting Ltd. as described and appointed herein as independent manager of the Ridge and each employee, agent or other person acting for or on behalf of Hugh Thomas Consulting Ltd. with respect to any matter referred to in this order; and

(e) Deloitte & Touche Inc. as described and appointed herein as monitor and each employee, agent or other person acting for or on behalf of Deloitte & Touche Inc. with respect to any matter referred to in this order.

### **Independent Manager**

[7] Effective immediately upon issuance of this order, Hugh Thomas Consulting Ltd. is hereby appointed independent manager of the Ridge (the "independent manager") to manage and operate the Ridge independently of the respondents, as specified herein, pending final disposition of the Commissioner's application in regard to the Ridge. CWS shall be responsible for all fees and expenses properly charged or incurred by the independent manager.

### **Independent Management of the Ridge**

[8] Pending final determination of the Commissioner's application in regard to the Ridge, or until further order of the Tribunal, the independent manager shall take all necessary steps and give all necessary instructions to cause the Ridge and any servants or agents operating the Ridge to:

(a) operate the Ridge independently of the respondents;

- (b) operate the Ridge in compliance with all applicable laws;
- (c) maintain all material permits and approvals necessary for the operation of the Ridge;
- (d) accept for disposal at the Ridge only material permitted to be so disposed by applicable law;
- (e) use commercially reasonable efforts to maintain and enhance the competitiveness and the customer base of the Ridge and in particular, continue to solicit business and to submit bids in response to tenders as they arise;
- (f) maintain and hold the Ridge in good condition and repair, normal wear and tear excepted, and to standards at least equal to those maintained by BFIL prior to the date of this order;
- (g) establish all fees, deductions, discounts, credits or allowances with respect to the services provided by the Ridge;
- (h) take all commercially reasonable steps to honour all customer contracts and to maintain quality and service standards for customers at the level that existed prior to the date of this order;
- (i) ensure that the Ridge does not engage in any type of business other than the type of business conducted by the Ridge as of the date of this order;
- (j) not enter into any customer contract with a term longer than one year, or for a weight in excess of 68,000 tonnes, without the concurrence of the monitor that such contract would not materially and adversely affect the competitiveness, assets, operations or financial status of the Ridge;
- (k) not communicate any confidential information related to the Ridge to any of the respondents except as permitted herein;
- (l) not knowingly take or allow to be taken any action that materially and adversely affects the competitiveness, assets, operations or financial status of the Ridge;
- (m) not make any material changes to the financial arrangements of the Ridge with its bankers;
- (n) not materially curtail marketing, sales, promotional or other activities of the Ridge in connection with the solicitation of existing or prospective customers;
- (o) not, to any material extent, relocate, destroy or dismantle any fixed assets of the Ridge;
- (p) not, to any material extent, enter into any agreement to lease or otherwise encumber any assets of the Ridge, or real property occupied by the Ridge, to or in favour of any other person;

(q) not, to any material extent, alter, or cause to be altered, the management of the Ridge as it existed prior to the date of this order, except as may be necessary to comply with the terms of this order, or to replace employees that may resign; or

(r) not terminate or alter any current employment, salary or benefit agreements for any employees working in the Ridge, to any material extent.

**[9]** Subject to §[8](j) of this order the independent manager shall have authority to enter into or renew customer contracts in relation to the Ridge, in the name of CWS.

**[10]** The respondents shall contribute working capital with respect to the Ridge to permit the Ridge to continue to operate at standards at least equal to those existing at the date of the acquisition and may contribute funds for significant capital expenditures in consultation with the independent manager and the monitor.

**[11]** Notwithstanding any other provision of this order, the independent manager is permitted to use the managerial, administrative and operational (including maintenance) resources of the respondents for the following purposes:

(a) to maintain, in accordance with Canadian generally accepted accounting principles, separate and adequate financial ledger books and records of material financial information with respect to the Ridge;

(b) human resources and payroll;

(c) accounts payable;

(d) occupational health and safety;

(e) environmental permitting and liability issues;

(f) insurance, including notification of claims for which coverage is sought; and

(g) financial services including banking;

except that, in using such resources the independent manager shall not, other than as permitted below, disclose any confidential information. The independent manager may provide confidential information to the following persons: (i) any person employed by Arthur Andersen, the external auditors of CWS; and (ii) George Close, senior accountant of landfills, employed by WMI-US (the "permitted persons"), only for the purposes of preparing standard financial and regulatory reports, tax returns and benefits administration and to comply with applicable law and governmental authorities in Canada and the United States (the "permitted purposes") and provided that:

- prior to disclosure of any confidential information, each permitted person shall execute a confidentiality undertaking in the form attached hereto as Schedule "A"; and

- the permitted persons shall use the confidential information only for the permitted purposes and shall not disclose such information to any other person, whether or not an employee of any of the respondents. This order does not preclude disclosure of summaries in aggregate form such as revenue summaries, cash receipt summaries and tonnage summaries, provided that no confidential information is disclosed.

[12] The respondents shall:

- (a) take all reasonable steps to ensure that the Ridge is independent of the respondents;
- (b) not exercise any direction or control over the operations of the Ridge or influence the marketing of the services of the Ridge; and
- (c) cause the operational manager of the Ridge to follow the reasonable instructions and directions of the independent manager given pursuant to the provisions and purposes of this order.

[13] The respondents shall not directly or indirectly receive, have access to, or use any confidential information relating to the Ridge, except as may be necessary to comply with the terms of this order.

[14] The independent manager is bound by the terms of this order but shall otherwise not be subject to liability for any act or omission arising out of his duties pursuant to this order.

[15] The independent manager shall not communicate any confidential information acquired in the performance of his duties under this order to any person except to the extent required or permitted by this order.

### **Monitor**

[16] Deloitte & Touche Inc. is hereby appointed monitor (the "monitor"). The monitor shall be responsible for monitoring compliance by the respondents with this order. CWS shall be responsible for all fees and expenses properly charged or incurred by the monitor.

[17] In the event that the monitor is unable to perform monitoring duties under the terms of this order because of death, disability, termination for cause or any other reason, the Commissioner shall apply to the Tribunal for an order appointing a new monitor within 15 days and this order shall apply to such appointment.

[18] For the purposes of monitoring compliance by the respondents with this order, subject to any valid claim to a legally recognized privilege, the respondents and the independent manager shall respond to requests for information and give the monitor unlimited access to:

- (a) the premises of the Ridge, and all premises in which records relating to the Ridge are located;

- (b) all information, records and documents relating to the Ridge; and
- (c) meetings of the management and directors of any of the respondents relating to the Ridge.

[19] The respondents shall not exert or attempt to exert any influence, direction or control over the monitor which may adversely affect the discharge of the monitor's duties under the terms of this order.

[20] If the monitor considers that any of the respondents are in default of any of the terms of this order, the monitor shall immediately notify the Commissioner of such breach, who shall forthwith give notice to such respondent(s) setting out the particulars of such default.

[21] The monitor shall provide to the Commissioner, upon request, a written report in affidavit form relating to compliance with the terms of this order.

[22] The monitor is bound by the terms of this order but shall not otherwise be subject to liability for any act or omission pursuant to the terms of this order. This order shall not be construed as providing the monitor with ownership, management, possession, charge or control of the Ridge.

[23] The monitor shall not communicate any confidential information acquired in the performance of his or her duties to any person except to the extent required or permitted by this order.

[24] If the monitor advises the Commissioner, that any respondent is in default of any of the terms of this order, or if the Commissioner otherwise believes such to be the case, then for the purpose of determining or securing compliance with this order, subject to any valid claim to a legally recognized privilege, and upon written request on 48 hours notice to the relevant respondent(s), such respondent(s) shall permit any duly authorized representative of the Competition Bureau:

- (a) access during office hours to inspect and copy all books, ledgers, accounts, correspondence, memoranda, and other records and documents in the possession or under control of the respondents; and
- (b) without restraint or interference from any respondent, to interview directors, officers or employees of the respondents.

### **General**

[25] The respondents shall immediately provide a copy of this order to the senior managers of the Ridge, and shall direct such managers to operate and manage the Ridge in accordance with the terms of this order.

[26] CWS shall immediately provide a copy of this order to the senior managers of the CWS operations in Ontario and CWS shall direct such managers to operate and manage the operations for which they are responsible in accordance with the terms of this order.

[27] Notices, reports or other communications required or permitted pursuant to this order shall be in writing and shall be considered to be given if dispatched by confirmed personal delivery or facsimile transmission to the parties listed in Schedule "B" to this order.

[28] If the Commissioner's approval is sought pursuant to this order and such approval is not granted, or if a decision of the Commissioner is unreasonably delayed or withheld, any respondent may apply to the Tribunal for approval.

[29] This order does not prohibit anyone from providing confidential information to the Commissioner for purposes of the administration or enforcement of the Act, including for the purposes of this proceeding.

[30] The parties have liberty to apply to the Tribunal with respect to any issue concerning this order.

DATED at Ottawa, this 28<sup>th</sup> day of April, 2000.

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

(s) W.P. McKeown

A handwritten signature in cursive script, appearing to read "W.P. McKeown", is positioned below the typed name.



**COMPETITION TRIBUNAL**

The Commissioner of Competition

applicant

and

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

respondents

IN CONSIDERATION of being provided with confidential documents and information relating to the Ridge landfill facility in Blenheim, Ontario, I, \_\_\_\_\_, of the City of \_\_\_\_\_, in the \_\_\_\_\_ of \_\_\_\_\_, agree to strictly maintain the confidentiality of all such documents and information.

**I HEREBY CONFIRM** that I have read the Consent Interim Order of the Competition Tribunal dated April 28, 2000 (the "Order"), a copy of which is annexed hereto, and I agree to be bound by the Order.

**I HEREBY UNDERTAKE** that I shall not disclose any confidential documents or information that may be provided to me to any other person, except as expressly permitted by the Order, and that I shall not use any such documents or information for any purpose other than those expressly permitted by the Order.

**I HEREBY ACKNOWLEDGE** that any breach of this undertaking by me will be considered to be a breach of the Order.

**DATED** at \_\_\_\_\_, this \_\_\_\_\_ day of \_\_\_\_\_, 2000.

Witness:

\_\_\_\_\_  
Print Witness Name

\_\_\_\_\_  
Print Name

[32] Schedule "B": Service List

The Commissioner:

**Donald B. Houston**  
**W. Michael G. Osborne**  
Kelly Affleck Greene  
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and Waste Management, Inc.

The independent manager:

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Counsel to the independent manager

The monitor:

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For the applicant:

The Commissioner of Competition

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W. Michael G. Osborne  
Andre Brantz

For the respondents:

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Canadian Waste Services Inc.  
Waste Management, Inc.

Lawson A.W. Hunter, Q.C.  
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