

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

Applicant

- and -

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

Respondents

MEMORANDUM OF ARGUMENT
Interim Relief

Introduction

COMPETITION TRIBUNAL TRIBUNAL DE LA CONCURRENCE	
CT-2000/002	
APR 26 2000	
REGISTRAR - REGISTREUR	
Ottawa, Ont.	#2(D)

1. This is an application by the Commissioner of Competition (the "Commissioner"), on consent, for an interim order under s. 104 of the *Competition Act* (the "Act") requiring the Ridge landfill to be held separate from the Respondents' other businesses pending determination of the Commissioner's Application for its divestiture. The interim order is needed to preserve the Tribunal's ability to order divestiture of the Ridge landfill to remedy the substantial lessening or prevention of competition which the Commissioner alleges will likely occur if the Respondents are permitted to retain the Ridge. The Respondents, Canadian

Waste Services Inc., Canadian Waste Service Holdings Inc. and Waste Management Inc. (collectively, "CWS") have consented to the interim order sought by the Commissioner.

Facts

2. On March 31, 2000, CWS acquired parts of the solid waste business of Browning-Ferris Industries Ltd ("BFIL") in Canada through the acquisition of certain assets and shares held by BFIL (the "Merger").

Affidavit of Lourdes DaCosta sworn April 25, 2000 ("DaCosta Affidavit"), paras. 7-8.

3. As part of the Merger, CWS acquired BFIL's Ridge landfill located in Blenheim, Ontario (the "Ridge"), subject to an undertaking to the Commissioner that the Ridge would continue to be operated by BFIL, without CWS' involvement, pending the Commissioner's application for a consent interim order from this Tribunal.

DaCosta Affidavit, paras. 8, 11.

Undertaking, exhibit "A" to DaCosta Affidavit.

4. The Commissioner has filed an Application with the Tribunal under s. 92 of the Act seeking divestiture of the Ridge

5. The Commissioner believes that the acquisition of the Ridge by CWS will likely substantially lessen or prevent competition in solid waste disposal in two markets in southern Ontario: the Greater Toronto Area ("GTA") and the Chatham-Kent area.

DaCosta Affidavit, para. 22.

6. CWS already owns or controls six landfill facilities in southern Ontario. If CWS is permitted to keep the Ridge it will control a significant proportion of the current solid waste disposal capacity in southern Ontario, which proportion is expected to increase by 2002.

DaCosta Affidavit, para. 17.

7. The Ridge landfill facility has been a strong competitor to the CWS disposal facilities, particularly those in southwestern Ontario. The Ridge recently underwent a significant expansion which will enhance its ability to compete with CWS, so long as it remains in competitive hands.

DaCosta Affidavit, para. 18.

8. If CWS is permitted to take control of the Ridge, it will thereby eliminate the Ridge as a competitor. For some southern Ontario communities, local disposal options are sufficient. For the GTA, however, and for the Chatham-Kent area, the Ridge is an important competitive disposal option which will be eliminated if retained by CWS. Acquisition of the Ridge will enable CWS to exercise market power in the disposal markets relating to the GTA and the Chatham-Kent area.

DaCosta Affidavit, para. 19.

9. Control of the Ridge by CWS will substantially lessen the disposal options for waste collected in the GTA. Apart from the Ridge, there is little effective competition to CWS' facilities, and barriers to new entry are high. Transfer stations and waste collectors in the GTA will effectively be forced to either use CWS' facilities, or to incur additional costs and uncertainty by transporting their waste to distant sites in the United States.

DaCosta Affidavit, para. 20.

10. In the Chatham-Kent area, the only disposal options are the Ridge and CWS' Gore landfill. If it acquires control of the Ridge, CWS will then control 100% of the Chatham-Kent waste disposal market.

DaCosta Affidavit, para. 21.

11. Accordingly, the acquisition of the Ridge by CWS will likely result in a substantial lessening or prevention of competition in the following markets:

- (a) The disposal of solid non-hazardous waste from the GTA; and
- (b) The disposal of solid non-hazardous waste from the Chatham-Kent area.

DaCosta Affidavit, para. 22.

12. In addition, 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 waste collection markets in the GTA and Chatham-Kent.

DaCosta Affidavit, para. 23.

13. The Commissioner has therefore applied under s. 92 of the *Act* for divestiture of the Ridge, which is contested by the Respondents. (the “Contested Proceeding”).

Notice of Application — Statement of Grounds and Material Facts

14. The Commissioner requests that an interim order be issued requiring the Ridge to be held separate from the Respondents’ other businesses pending the Tribunal’s final determination of the Contested Proceeding. The proposed order provides for the Ridge to be managed by an Independent Manager, under the supervision of an independent Monitor.

Draft consent interim order.

DaCosta Affidavit, paras. 24-25.

15. The Respondents have consented to the proposed interim order. The proposed Independent Manager, Hugh Thomas Consulting Ltd., and Monitor, Deloitte & Touche Inc., have also consented to their appointments.

Consents of the Respondent, the Independent Manager, and the Monitor.

DaCosta Affidavit, para. 26.

Issues and Law

Issues

16. Section 104 of the *Act* empowers the Tribunal to issue an interim order pending the determination of an application under s. 92. In exercising this power, the Tribunal must have regard to the principles ordinarily considered by superior courts when granting interlocutory or injunctive relief. The Tribunal must thus consider three issues: (i) whether there is a serious issue, (ii) whether irreparable harm would ensue if the interim relief is not granted, and (iii) where the balance of convenience lies.

Competition Act, R.S.C. 1985, c. C-34, s. 104

Canada (Director of Investigation and Research) v. Superior Propane Inc. Reasons for Order released December 6th, 1998 at para. 5. (“*Superior Propane*”)

RJR-MacDonald v. A.G. Canada, [1994] 1 S.C.R. 311 at 334 (“*RJR-MacDonald*”)

(i) Serious issue

17. The serious issue threshold is a low one. The Supreme Court has held that it is only necessary to determine that “the claim is not frivolous or vexatious; in other words, that there is a serious question to be tried”. The Tribunal has applied this statement of the law to s. 104 of the *Act*.

*RJR MacDonal*d, *supra*, at 335.

Superior Propane, supra, at para. 7

Canada (Director of Investigation and Research) v. Southam Inc. (1991), 36 C.P.R. (3d) 22 (C.T.) at 25 (“*Southam*”)

18. The Contested Application raises a serious issue. As set out in paragraphs 6 to 12 above, the Commissioner alleges that CWS’s acquisition of the Ridge will likely result in a substantial lessening or prevention of competition in the disposal of solid non-hazardous waste from the GTA and the Chatham-Kent area.

(ii) Irreparable harm

19. “Irreparable harm” refers to the nature of the harm rather than its magnitude. Harm is irreparable if it cannot be compensated for by money or be cured.

RJR-MacDonald, supra, at 340

20. Irreparable harm to competition will likely ensue in the absence of the consent interim order. The likely harm to competition includes:

- (a) CWS will be able to integrate the Ridge with its other operations and exercise market power;
- (b) CWS will have access to pricing, customer lists and other confidential information pertaining to the Ridge; and
- (c) CWS will be in a position to use the expanded capacity of the Ridge for its own purposes, thus significantly impairing the effectiveness of divestiture as a remedy.

DaCosta Affidavit, para. 27.

21. The Commissioner submits that the consent interim order is necessary to protect divestiture as a valid remedial option in the event the Commissioner is successful in the Contested Proceeding. As Teitlebaum J. stated in *Southam*:

Protecting divestiture as a valid remedial option will always be a strong impetus for interim relief in merger cases. The futility of attempting to “unscramble the eggs” upon a later finding that the merger will indeed likely lessen competition substantially is apparent. The legislative scheme attempts to guard against this eventuality by, for example, instituting a regime for pre-notification of some mergers and allowing the Director to apply for interim relief under ss. 100 and 104.

Southam, supra, at 26.

(iii) Balance of convenience

22. In determining where the balance of convenience lies, the Tribunal must “balance the equities between the parties” with a view to ensuring that the interim order is “adequate to its purpose but not any more intrusive or restrictive than is absolutely necessary”.

Southam, supra, at 26.

23. The purpose of the interim order is to preserve the Tribunal’s ability to remedy the substantial lessening or prevention of competition that the Commissioner believes is likely to result from the Merger. This is in the public interest. Courts and the Tribunal have recognized the importance of the public interest in competition assessing the balance of convenience.

RJR-MacDonald, supra, at 343-347.

D&B Companies of Canada Ltd. v. Director of Investigation and Research (1994), 58 C.P.R. (3d) 342 (F.C.A.), aff’g C.T. decision, appended, at 352

24. Where, as here, the Respondents have consented to the order requested, that should determine the balance of convenience in favour of granting the order.

25. The Commissioner submits that the terms of the proposed interim order are adequate to preserve divestiture as a valid remedy. They do so by requiring that the Ridge be held separately from the Respondents' other businesses, managed by an independent manager, and supervised by an independent Monitor who will be responsible for monitoring the Respondents' compliance with the proposed order.

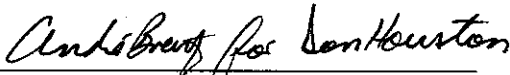
26. The Commissioner submits that the terms of the proposed interim order are not any more intrusive or restrictive than is necessary to preserve divestiture as an adequate remedy. Further, as noted above, the Respondents have consented to the proposed interim order.

Order Requested


27. The Commissioner requests, with the consent of the Respondents, that the Tribunal issue an interim order in accordance with the Draft Order attached to the Notice of Application.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

April 26, 2000



Donald B. Houston



Andre Brantz

Audio Transcript for Michael Osborne
Michael Osborne

Counsel to the Commissioner of
Competition

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.

B E T W E E N:

Commissioner of Competition

Applicant

- and -

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

Respondents

MEMORANDUM OF ARGUMENT

Mr. Donald B. Houston
Mr. W. Michael G. Osborne
Kelly Affleck Greene
Suite 840, P.O. Box 489
One First Canadian Place
Toronto, Ontario 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