



Reference: *The Commissioner of Competition v. Canadian Waste Services Holdings Inc.*, 2001 Comp. Trib.3
File no.: CT2000002
Registry document no.: 59a

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: 20001106-10, 14-17, 20, 22, 24
Members: McKeown J. (presiding); L.P. Schwartz; and G. Solursh
Date of order: 20010328
Order signed by: McKeown J.



REASONS AND ORDER

TABLE OF CONTENTS	Paragraph
I. DEFINITIONS	[1]
II. INTRODUCTION.....	[3]
III. OVERVIEW OF THE WASTE INDUSTRY	[18]
A. WASTE MANAGEMENT IN SOUTHERN ONTARIO	[28]
B. ADAM’S MINE.....	[36]
IV. PRODUCT AND GEOGRAPHIC MARKET DEFINITION	[38]
A. COMMISSIONER’S POSITION	[40]
B. RESPONDENTS’ POSITION.....	[43]
C. ANALYSIS OF PRODUCT DIMENSION.....	[47]
D. ANALYSIS OF GEOGRAPHIC DIMENSION	[61]
E. GREATER TORONTO AREA ("GTA").....	[70]
(1) Shipment Patterns	[70]
(2) T&D Price.....	[74]
(3) Pre-merger Conditions	[84]
(4) Impediments to the Use of Disposal Sites in the United States.....	[95]
F. CHATHAM-KENT AREA	[101]
V. SUBSTANTIAL PREVENTION AND LESSENING OF COMPETITION	[108]
A. SUBSTANTIAL PREVENTION OF COMPETITION.....	[109]
(1) Greater Toronto Area ("GTA").....	[109]
(2) Chatham-Kent Area	[112]
B. SUBSTANTIAL LESSENING OF COMPETITION	[114]
(1) Greater Toronto Area ("GTA").....	[114]
(2) Chatham-Kent Area	[116]

C. SECTION 93 FACTORS.....	[118]
(1) Barriers to Entry.....	[119]
(a) Time and Cost Associated with Regulatory Approval Process	[123]
(b) Capital Costs and Time to Develop New or Additional Capacity	[127]
(2) Removal of a Vigorous and Effective Competitor	[129]
(3) Foreign Competition	[138]
(4) Effective Remaining Competition	[146]
D. ANALYSIS OF CHANGES IN CAPACITY AND DEMAND	[153]
(1) Reconciliation of Capacity and Demand Estimates.....	[156]
(a) Residential Waste Managed by the City of Toronto Currently Going to the Keele Valley Site	[161]
(b) GTA Waste Currently Going to Michigan and New York Sites	[167]
(c) Non-GTA Waste Going to Blackwell and LaSalle Sites	[169]
(d) Non-GTA Waste Currently Going to Michigan and New York Sites	[170]
(e) Waste Currently Going to Britannia Site in Ontario.....	[171]
(f) GreenLane.....	[172]
(g) Essex-Windsor	[176]
(h) Petroliia	[178]
(2) Likelihood of future expansions	[179]
(3) Implications for Market Definition.....	[189]
E. MARKET SHARES AND CONCENTRATION.....	[192]
F. CONCLUSION OF THE TRIBUNAL.....	[198]
(1) Substantial prevention of competition	[198]
(2) Substantial Lessening of Competition	[206]
(a) Greater Toronto Area ("GTA").....	[206]
(b) Chatham-Kent Area	[225]
VI. ORDER	[235]
VII. REMEDY.....	[236]

I. DEFINITIONS

[1] For the purposes of these reasons, the following definitions, agreed upon by the parties in the agreed statement of facts, shall apply:

- "Allied" shall mean Allied Waste Industries Inc.;
- "Annual Capacity" shall mean the maximum amount of waste that may be received or disposed of at a Permanent Disposal Facility or Transfer Station in a year under the applicable permit;
- "Arbor Hills Contract" shall mean the contract entered into on December 23, 1996, between the former Municipality of Metropolitan Toronto (now the City of Toronto) and BFII, BFIL and BFI Waste Systems of North America, Inc. for the disposal of waste from the City of Toronto at the Arbor Hills Landfill for a period of five years, starting on January 1, 1998, and expiring on January 1, 2003;
- "BFI Canada" shall mean BFI Canada Inc., a corporation that is not affiliated with BFIL, BFII or Allied;
- "BFII" shall mean Browning-Ferris Industries, Inc.;
- "BFIL" shall mean Browning-Ferris Industries Ltd.;
- "C&D Waste" shall mean construction and demolition waste which is a distinct type of ICI Waste;
- "Certificate of Approval" shall mean a certificate of approval or provisional certificate of approval issued under the *Environmental Protection Act*, R.S.O. 1990, c. E.-19, that governs the construction and operation of a Permanent Disposal Facility or Transfer Station in Ontario;
- "Chatham-Kent" shall mean the area under the governance of the Municipality of Chatham-Kent;
- "CWS" shall mean the respondent Canadian Waste Services Inc.;
- "CWSH" shall mean the respondent Canadian Waste Services Holdings Inc.;
- "Environmental Assessment" shall mean an environmental assessment pursuant to the *Environmental Assessment Act*, R.S.O. 1990, c. E-18;
- "GTA" shall mean the Greater Toronto Area which is comprised of the City of Toronto, and the Regional Municipalities of Durham, York, Peel, and Halton;
- "ICI Waste" shall mean solid non-hazardous waste which is generated by institutional, commercial and industrial customers and includes C&D Waste;

- "Municipality of Chatham-Kent" shall mean the intervenor in this application, the Corporation of the Municipality of Chatham-Kent;
- "MOE" shall mean the Ministry of the Environment of the province of Ontario;
- "Onyx" shall mean Onyx Arbor Hills Landfill Inc., a subsidiary of Vivendi SA, which now owns the Arbor Hills Landfill in Michigan. Onyx was formerly named Superior Arbor Hills Landfill, Inc.;
- "Permanent Disposal Facility" shall mean a landfill or incinerator that is used for the permanent disposal of waste;
- "RCN Ltd." shall mean Rail Cycle North Ltd., a wholly-owned subsidiary of CWS;
- "Residential Waste" shall mean waste which is municipal or domestic in origin;
- "Ridge Host Community Agreement" shall mean the agreement entered into between the Municipality of Chatham-Kent and BFIL in relation to the Ridge Landfill;
- "Ridge Landfill" shall mean the Ridge Landfill near Blenheim in Chatham-Kent that was acquired by CWS from BFIL on March 31, 2000 and is the subject of this application;
- "SNHW" shall mean the type of waste in regard to which the Commissioner alleges a likely substantial lessening or prevention of competition and shall mean solid non-hazardous waste comprised of ICI Waste and Residential Waste but shall not include Special Waste;
- "Special Waste" shall mean non-hazardous contaminated soils and industrial process wastes;
- "T&D Price" shall mean the combined price for transporting and disposing of waste at a Permanent Disposal Facility;
- "ToR" shall mean terms of reference as described in the *Environmental Assessment Act* of Ontario;
- "Tipping Fee" shall mean the fee charged by a Permanent Disposal Facility or Transfer Station for the disposal or receipt of waste at the facility, and shall not include transportation to the facility;
- "Total Permitted Capacity" shall mean the total amount of waste that can be permanently disposed of at a landfill over the course of its operating life under the applicable permit;
- "Transfer Stations" shall mean facilities where waste collection vehicles may unload waste and where the waste is then consolidated with waste from other collectors for transport to Permanent Disposal Facilities; and
- "WMI" shall mean the respondent Waste Management, Inc.

[2] The Tribunal's analysis will use the terms "Residential Waste", "ICI Waste" and "SNHW" when it is appropriate to refer to the definitions adopted by the parties in the agreed statement of facts.

II. INTRODUCTION

[3] The applicant seeks an order from the Tribunal requiring the respondents to divest the Ridge Landfill facility acquired by the respondents as part of a purchase of shares and assets in the waste disposal business from BFIL in March, 2000.

[4] The applicant is the Commissioner of Competition (the "Commissioner"), the public official charged with enforcement of the *Competition Act*, R.S.C. 1985, c. C-34, (the "Act"). The Commissioner brings an application pursuant to section 92 of the Act against the respondents, Canadian Waste Services Holdings Inc., Canadian Waste Services Inc. and Waste Management, Inc. The application was filed on April 26, 2000. The goal of the application is to obtain from the Tribunal an order requiring the respondents to divest the Ridge Landfill facility located in Blenheim, Ontario (the "Ridge") along with all associated business, shares and assets, as well as such further or other shares or assets as the Tribunal considers necessary.

[5] The Commissioner alleges that the acquisition of the Ridge is likely to result in a substantial prevention and lessening of competition in the disposal of institutional, commercial and industrial waste in two Southern Ontario markets: the GTA and the Chatham-Kent area. The respondents already own or control six landfill facilities in Southern Ontario. According to the Commissioner, if CWS is permitted to keep the Ridge, it will control 70 percent of the Southern Ontario landfill capacity for ICI Waste from the GTA in 2002 and 100 percent of the capacity for ICI Waste from Chatham-Kent.

[6] The respondents dispute most of the grounds of the Commissioner's application. In particular, as set out in the context of an objection to the admissibility of the evidence of the Commissioner's expert, Michael Baye, referred to in paragraph [16], the respondents alleged that the Commissioner changed his position regarding product market definition by opting for a narrower definition since the application was filed and that the appropriate product market was SNHW. They also submitted that the Commissioner agreed to that definition in the agreed statement of facts filed on October 3, 2000. The Tribunal decided at the hearing that there was no agreement between the parties on product market definition. Further, the respondents dispute the geographic limits of the market for disposal of waste from the GTA and submit that it must be considered to include both Michigan and New York. According to them, landfills in these states clearly compete with Ontario landfills for SNHW from the GTA. With respect to the allegation of substantial prevention of competition, they dispute that there will be excess capacity for disposal of GTA waste in Southern Ontario in 2003 and beyond. Finally, the respondents challenge the Commissioner's allegation that the acquisition of the Ridge is likely to result in a substantial lessening of competition. More specifically, they dispute the Commissioner's submission that CWS will be able to use market power in the disposal market in order to increase disposal prices, thereby putting a cost/price squeeze on CWS's competitors in collection markets.

[7] The main issue to be decided by the Tribunal is to determine whether the acquisition of the Ridge is likely to result in a substantial prevention and/or lessening of competition, or in other words, whether the merger will create or enhance market power. Market power is the ability to profitably influence price, quality, variety, service, advertising, innovation or other dimensions of competition. In order to answer that question, the Tribunal has to examine various issues including product and geographic market definition, price discrimination, the likelihood of future events such as excess capacity and the proper base price to use when applying the hypothetical monopolist paradigm. The case also raises the concept of "cost/price squeeze" in connection with vertical links between waste disposal and waste collection.

[8] On March 31, 2000, CWS acquired parts of the solid waste business of BFIL in Canada through the acquisition of certain assets and shares held by BFIL. As part of this merger, CWS acquired the Ridge Landfill located in Blenheim, Ontario, subject to an undertaking to the Commissioner that it would continue to be operated by BFIL pending the Commissioner's application for the consent interim order referred to in paragraph [13]. In addition to the Ridge, CWS also purchased the following businesses in Ontario from BFIL (as well as other businesses in other parts of Canada) with the consent of the Commissioner: the exclusively industrial and recycling collection businesses; the industrial and recycling collection businesses relating to customers requiring a combination of commercial, industrial and recycling collection services; the commercial collection businesses in the GTA (excluding Halton); and the Windsor Transfer Station.

[9] CWS is the largest waste management company in Canada. It is engaged in the business of providing SNHW management services to institutional, commercial, industrial and residential customers located in Canada. These services include the collection, compaction, recycling, resource recovery, transfer, transportation and disposal of SNHW. CWS is an Ontario corporation that has its head office in Oakville, Ontario. All of its issued and outstanding shares are owned by CWSH, an Ontario corporation. WMI, a Delaware corporation, is the largest waste management company in the United States and the parent company of CWSH.

[10] Prior to selling its assets to CWS and BFI Canada, BFIL was the second largest waste management company in Canada providing SNHW management services to institutional, commercial, industrial and residential customers. BFIL is an Ontario corporation with its headquarters in Concord, Ontario. BFIL owned and operated the Ridge until March 31, 2000.

[11] The Ridge Landfill is permitted to receive Residential Waste from the counties of Kent, Elgin, Oxford, Middlesex and Lambton, and ICI Waste from the entire province. The Ridge Landfill used to be owned by BFIL. In June 1998, it received approval to increase its Annual Capacity from 220,000 to 680,000 tonnes.

[12] One intervenor, the Corporation of the Municipality of Chatham-Kent, has participated in these proceedings. The Municipality alleges that it will be affected by the acquisition of the Ridge Landfill by the respondents as the only other landfill available to Chatham-Kent, the Gore, is presently owned by CWS. The Corporation of the Municipality of Chatham-Kent was granted leave to intervene in these proceedings on June 22, 2000 to address the divestiture issues which are relevant to the matter and to make submissions of legal arguments on competition law matters.

[13] A Consent Interim Order was issued by the Tribunal on April 28, 2000, to ensure that the Ridge would be held separate from the operations of the respondents until the issuance of a decision by the Tribunal.

[14] Shortly after the filing of the application by the Commissioner, at the request of the Registry of the Tribunal, the parties agreed to participate in an electronic filing and hearing pilot project. All the documents have been filed in an electronic format by the parties. The panel members worked with a document management software.

[15] Further, to expedite the hearing of this application, an agreed statement of facts was filed by the parties on October 3, 2000, prior to the commencement of the hearing, which intended to reflect the facts as of September 15, 2000, and a supplementary agreed statement of facts was filed on November 22, 2000. The agreed statement of facts provides detailed information about the parties, the transaction, the waste industry, a description of possible future events believed to occur in the industry, a description of the regulatory environment, the approval process and the costs of new or expanded Permanent Disposal Facilities and Transfer Stations in Ontario. The supplementary agreed statements of facts provides further information on some Permanent Disposal Facilities and Transfer Stations. The Tribunal is of the opinion that the agreed statement of facts and the supplementary agreed statement of facts have been of great assistance and have reduced the hearing time considerably.

[16] On November 15, 2000, in the course of the hearing of the application, the Tribunal heard submissions by the respondents with respect to their objection to the admissibility of the evidence of the Commissioner's expert, Professor Baye. The Tribunal ruled that his report would be admissible, with the exception of his conclusions on substantial lessening of competition and substantial prevention of competition in vertical markets, which are set out in the last two lines of paragraph 114 and paragraphs 101, 116(b), 135 and 141 of his initial expert affidavit dated October 12, 2000.

[17] Also, on November 15, 2000, the Tribunal indicated that, given the agreement of the parties, any remedy hearing would be held at a future date to be determined after the issuance of a decision by the Tribunal on the merits of the Commissioner's application.

III. OVERVIEW OF THE WASTE INDUSTRY

[18] As discussed more fully in the agreed statement of facts, waste management is the process by which waste is moved from the waste generator to final disposal. Different kinds of waste can be distinguished; SNHW and its sub-categories are the types of waste that are at issue in this application.

[19] Residential Waste refers to SNHW that is municipal or domestic in origin. ICI Waste is waste that is generated by institutional, commercial and industrial sites, and includes C&D Waste. Non-hazardous contaminated soils and industrial process waste ("Special Waste") are not considered to be part of SNHW for this application.

[20] SNHW is gathered by municipal or commercial collectors and taken either to Transfer Stations for intermediate disposal or directly to a Permanent Disposal Facility. Different types of waste are usually collected with different methods and equipment. Residential Waste is a municipal responsibility and is collected by local governments either directly or pursuant to contracts with commercial collectors. ICI Waste is collected under private contracts arranged between commercial collectors and the generators. The fees for waste removal services will vary by location, type of waste and volume.

[21] A Transfer Station is a temporary depository where waste collection vehicles unload their waste and return to their collection routes. At the Transfer Stations, unloaded waste is weighed and commingled with waste from other vehicles. The consolidated waste is then loaded onto large trailers and taken to a Permanent Disposal Facility. Transfer Stations may be owned and operated by municipal authorities or by commercial enterprises. They charge collectors for unloading waste on a per-tonne basis according to volume and type of waste. Usually, a Transfer Station must make arrangements for the final disposal of the waste it receives, but tolling arrangements under which the collector remains responsible for the transport and final disposal of waste are common.

[22] In some cases, the waste collector directs the Transfer Station to dispose of its waste (or of equivalent volumes) at a particular Permanent Disposal Facility. When the collector arranges for the waste to be disposed of at an affiliated Permanent Disposal Facility, such waste is deemed to be "internalized".

[23] A Transfer Station may transport waste to Permanent Disposal Facilities with its own equipment or contract for haulage and/or disposal with a waste broker who consolidates such waste volumes in order to benefit from lower transport and disposal costs than may be available to the Transfer Station or collector.

[24] Permanent Disposal Facilities are landfill sites and incinerators that are owned and operated either by commercial enterprises or by local or regional governments or their authorities. These facilities accept waste according to the terms of Certificates of Approval which specify, *inter alia*, the type of waste that can be accepted, the area from which waste can be received ("service area") and limitations on volumes received.

[25] Landfilling involves the disposal of solid waste in controlled conditions by placing the waste in cells, compacting it and then covering the waste with soil. For reasons of environmental safety, the production and emission of leaching chemicals from the waste must be controlled. Incinerators burn waste that is combustible, and dispose the residue at landfill sites.

[26] The approval process required for the establishment of Permanent Disposal Facilities in Ontario and the regulation of such facilities in the United States are described at length in the agreed statement of facts and are discussed below.

[27] Permanent Disposal Facilities compete for waste volumes and charge Transfer Stations prices ("Tipping Fees") for the right to dispose of waste. Tipping Fees vary depending on the type, volume and density of the waste, and may vary further with the area from which the waste is shipped. Accordingly, when selecting a Permanent Disposal Facility, a Transfer Station will generally be concerned with the total of the Tipping Fee charged by that facility and the transport cost that it incurs in shipping waste to that facility ("T&D Price").

A. WASTE MANAGEMENT IN SOUTHERN ONTARIO

[28] Over three million tonnes of SNHW are generated in the GTA. Approximately one third is Residential Waste and the remaining waste is ICI Waste. In 1999, approximately half of the SNHW generated was disposed of at the Keele Valley site and the remaining half was disposed of at Permanent Disposal Facilities outside of the GTA.

[29] All Residential Waste generated in the GTA is the responsibility of municipal governments. ICI Waste generated in the GTA is collected principally by private commercial collectors. The City of Toronto, which owns the Keele Valley site, allows private collectors in the GTA to take ICI Waste there for a Tipping Fee which defrays the City's cost of waste management.

[30] The City of Toronto disposes of a portion of the waste it manages at the Arbor Hills site in Michigan, pursuant to a contract entered into with BFII in December 1996 ("Arbor Hills Contract"). Following the acquisition of BFII by Allied, the latter sold the Arbor Hills site to Onyx and the Arbor Hills Contract was also transferred with the consent of the City of Toronto. The Arbor Hills Contract expires on January 1, 2003.

[31] The Gore and the Ridge landfills in the Municipality of Chatham-Kent received approximately 64,000 tonnes of SNHW in 1999 of locally generated waste. A substantial portion of that waste was ICI Waste.

[32] Waste generated outside of the GTA is disposed of at Permanent Disposal Facilities in Southern Ontario and sites in the states of Michigan and New York. Municipal disposal sites are frequently limited in the amount of waste that can be accepted from outside of their service areas.

[33] The respondents presently own and operate landfills at six locations in Ontario. These landfills are the following: Blackwell, LaSalle and Warwick in Sarnia; Petrolia in Petrolia; Gore in Blenheim; and Richmond in Napanee. Through the merger, CWS acquired BFIL's Ridge Landfill at Blenheim, Ontario.

[34] Apart from the respondents' sites and the Ridge, the only other privately owned sites that can receive non-local waste in Southern Ontario are the landfill owned by GreenLane Environmental Group in St. Thomas, Ontario ("GreenLane landfill") and the landfill owned by Walker Industries Holdings Limited in Thorold, Ontario ("Walker landfill").

[35] While there are numerous municipal landfills in Ontario, almost all such sites have service areas or waste sheds that are limited to their local area of responsibility and, in some circumstances, neighboring municipalities. With the exception of the landfill owned and operated by the Essex-Windsor Solid Waste Authority ("Essex-Windsor landfill"), which has an Ontario-wide service area, no other municipal sites accept waste from outside of their municipal jurisdiction.

B. ADAM'S MINE

[36] In anticipation of the closure of the Keele Valley site, the City of Toronto developed a bidding process in 1998 in order to identify qualified disposal sites. The outcome of the process was the identification of the Adam's Mine site near Kirkland Lake, Ontario, as proposed by RCN Ltd., a wholly-owned subsidiary of CWS. Originally, the City's Commissioner of Works and Emergency Services recommended that RCN Ltd. dispose of all of the GTA's Residential Waste and that Republic Canada Inc. ("Republic") dispose of the privately-collected ICI Waste managed by the City at its Carleton Farms site in Michigan.

[37] However, the City of Toronto did not reach agreement with RCN Ltd. and has made arrangements with two sites located in the United States, affiliated with Republic and Onyx, for the disposal of its Residential Waste. There is no solution in Ontario at this time as the only two proponents from Ontario that came forward with proposals cannot dispose of the volume of municipal waste that the City handles. The status of the City's contracts with Onyx and Republic is reviewed below.

IV. PRODUCT AND GEOGRAPHIC MARKET DEFINITION

[38] According to the Commissioner, the transaction substantially prevents and lessens competition with respect to the GTA and the Chatham-Kent area. In order to make such findings the Tribunal must define both the product and geographic dimensions.

[39] The purpose of defining the relevant product market is to identify the possibility for the exercise of market power. At paragraph 47 in *Commissioner of Competition v. Superior Propane Inc.* (2000), 7 C.P.R. (4th) 385 at 404, [2000] C.C.T.D. No. 15, the Tribunal notes:

The purpose of defining the relevant product market is to identify the possibility for the exercise of market power. This purpose was clearly asserted in the two previous merger cases heard by the Tribunal. In *Director of Investigation and Research v. Southam Inc.* (1992), 43 C.P.R. (3d) 161 at 177, 178, [1992] C.C.T.D. No. 7 (QL), the Tribunal reiterated:

The general issues with respect to the definition of a market in a merger case have been set in the *Hillsdown Holdings (Canada) Ltd.* decision, *supra*. The relevant market for purposes of merger analysis is one in which the merging firms acting alone or in concert with other firms could exercise market power. Market power is the ability of a firm or group of firms to maintain prices above the competitive level. Market power may also be exercised by offering, for example, poor service or quality or by restricting choice. When used in a general context,

"price" is thus a shorthand for all aspects of firms' actions that bear on the interest of buyers. . . .

The delineation of the relevant market is a means to the end of identifying the significant market forces that constrain or are likely to constrain the merged entity. . . .

The critical issue is to ensure that all factors have been considered that have a bearing on whether there has or is likely to be a prevention or lessening of competition to a substantial degree.

A. COMMISSIONER'S POSITION

[40] The Commissioner argues that the "relevant product" consists of ICI Waste and Residential Waste which together comprise SNHW and that the "relevant product market" is, in respect of the GTA allegations, the disposal of ICI Waste from the GTA. He submits that Residential Waste generated in the GTA is not relevant to this application as the City of Toronto decided to send all of its waste to Republic/Carleton Farms and Onyx/Arbor Hills. Whether CWS will control the Ridge or not will have no impact on Residential Waste as such waste will not be competing with ICI Waste from the GTA for space in Ontario landfills. Consequently, the Commissioner contends that CWS will be able to exercise market power over the disposal of ICI Waste in the GTA if it is allowed to take control of the Ridge.

[41] With respect to the Chatham-Kent allegation, the Commissioner argues that the relevant product market consists of ICI Waste and Residential Waste which together comprise SNHW generated in Chatham-Kent. Since the Municipality of Chatham-Kent has an agreement in place through the Ridge Host Community Agreement which guarantees disposal capacity and a favourable Tipping Fee for Residential Waste at the Ridge, the Commissioner argues that Residential Waste is not relevant to the question of whether the transaction will result in a likely substantial prevention or lessening of competition for disposal of SNHW from Chatham-Kent. Accordingly, ICI Waste from Chatham-Kent is the waste from that municipality that will be affected by the transaction.

[42] With respect to the GTA allegation, the Commissioner argues that the landfills in Southern Ontario (including Richmond landfill) that can take ICI Waste from the GTA constitute the relevant geographic market. Regarding the Chatham-Kent allegation, the Commissioner argues that the relevant geographic market is limited to the Municipality itself.

B. RESPONDENTS' POSITION

[43] The respondents argue that the relevant product market in respect of the GTA allegation is the disposal of SNHW and further, that the Commissioner's position has changed in this respect from the initial pleading that the relevant product was SNHW to the narrower concern with ICI Waste. They also state that the agreed statement of facts contains the parties' agreement that the relevant product market concerns SNHW.

[44] Similarly, in respect of the Chatham-Kent allegation, the respondents indicate that the product market is SNHW.

[45] Regarding the geographic dimension of the transaction in respect of the GTA, the respondents submit that Michigan and New York states landfills are in the geographic market for waste disposal from the GTA.

[46] In respect of Chatham-Kent, they do not propose a specific geographic market but they argue that competitive alternatives include disposal operations located in Tillbury, Dresden and Essex-Windsor.

C. ANALYSIS OF PRODUCT DIMENSION

[47] The Tribunal agrees with the approach to market definition in the report of the Commissioner's expert witness, Professor Baye, wherein he notes that the principal alternatives to landfill disposal are incineration and recycling (expert affidavit of M. Baye (12 October 2000): exhibit 348a). It appears to the Tribunal that, because incineration capacity is so low and cannot handle non-combustible waste, a hypothetical landfill monopolist could impose a significant and non-transitory price increase without losing so much business that the increase would not be profitable. This reasoning would suggest that there might be at least two markets for the purpose of merger review: landfill services, and disposal services (i.e., both landfill and incineration); the "smallest market principle" would lead the Tribunal to adopt the former as the relevant one.

[48] However, as neither side disputes this aspect of product market definition and because there is not sufficient evidence for the Tribunal to decide otherwise, the Tribunal accepts that the product market is disposal services. This definition is somewhat favourable to the respondents as the resulting market shares would be higher if incineration services were excluded; however, the Commissioner does not attempt to exclude incineration.

[49] The principal issue dividing the parties on product market definition is whether the market properly includes all SNHW.

[50] The Commissioner's position is that while Residential and ICI Waste share certain characteristics, there are significant differences in the management of the two waste streams. These differences include, for example, the fact that certain disposal sites may have regulatory limitations on the type and amount of waste they can accept; that ICI Waste disposal contracts are typically short-term spot contracts between disposal sites and privately-owned Transfer Stations while Residential Waste is disposed of under long-term contracts between municipalities and disposal sites; that municipalities have legal obligations to collect Residential Waste but no such obligation to collect ICI Waste; and that Residential Waste is hauled directly to disposal sites while ICI Waste is hauled to intermediate Transfer Stations which then take responsibility for disposal unless directed.

[51] Further, the Commissioner submits that, because the City of Toronto will send all of its ICI Waste to Republic (subject to the minimum tonnage requirement) and all of its Residential Waste to Republic or Onyx or both, this Residential Waste is not relevant to the application. He submits that various news releases by the City of Toronto confirm that the contracts with Republic and Onyx will handle all of the City's waste ("Toronto City Council approves disposal contracts" (13 October 2000): exhibit 123; "City of Toronto signs Republic Waste Disposal Contract (includes Backgrounder)" (30 October 2000): exhibit 329; "City of Toronto Confirms RCN Deal is Dead" (6 November 2000): exhibit 343). Further, the Commissioner submits that the testimony of Mr. Bacopoulos, General Manager of the Solid Waste Management Services from the City of Toronto Works and Emergency Services Department, confirmed that fact.

[52] In addition, the Commissioner submits that both Professor Baye and the respondents' expert, Professor George Hay, when they prepared their first reports, concluded that as a result of the anticipated contract between the City of Toronto and RCN Ltd., the waste subject to the contract was not relevant (expert affidavit of M. Baye (12 October 2000): exhibit 348a; expert affidavit of G. Hay (10 October 2000): exhibit 354a). He submits that the same conclusion should apply to the contracts that the City entered into with Republic and Onyx.

[53] Finally, the Commissioner submits that, even if the City of Toronto were to later consider other disposal options, contrary to its press releases and the evidence of Mr. Bacopoulos, the City would still have to engage in a new tender process. The Commissioner points out that the process which led to the Republic contract took two years and involved extensive negotiations, due diligence and environmental review. This leads the Commissioner to conclude that the residential waste under contract should not be considered in the analysis by this Tribunal as it is not likely that it could be subject to an exercise of market power by CWS.

[54] The respondents rely heavily on the fact that Residential Waste and ICI Waste streams are commingled at Transfer Stations, delivered to disposal sites and disposed of in the same way at the same Tipping Fee agreed with the operator, and that Residential Waste takes up space at landfill sites in the same way as ICI Waste. In this regard, they cite in particular the evidence of Mr. Bacopoulos (transcript at 3:300, 338, 349, 375, 376 (8 November 2000)).

[55] The respondents further argue that the Commissioner had initially pleaded a product market of SNHW but changed position when the City of Toronto stopped its negotiations for disposal at the Adam's Mine and decided instead to ship both Residential and ICI Waste managed by it to Michigan landfills under the Arbor Hills Contract with Onyx and a new contract with Republic. They assert that none of these contracts for waste disposal distinguish between Residential Waste and ICI Waste in any significant way. Accordingly, they submit that as far as the GTA is affected by the transaction, the market should be defined to include all SNHW generated in that area.

[56] The respondents therefore criticize the Commissioner's expert, Professor Baye, for eliminating Residential Waste from his analysis. In their view, Professor Baye erred in concluding that the agreement with Republic replaced the disposal capacity that the Adam's Mine site would have provided.

[57] They further argue that the contract with Republic does not replace the failed Adam's Mine agreement in all relevant respects. Whereas the latter would have contained guaranteed volumes covering essentially all of the waste in the GTA, the former commits the City of Toronto to minimum volumes of only 100,000 tonnes per year of either Residential Waste or ICI Waste. Hence, the respondents submit that all of the City's Residential Waste must be considered to be part of the demand for landfill space in 2003 and beyond and must be treated as part of the SNHW product market for the purposes of competitive analysis. They cite the opinion evidence of their economic expert, Professor Hay, in this regard.

[58] As stated during the hearing, the Tribunal does not accept the respondents' claim that the parties had agreed on the definition of the relevant product market in the agreed statement of facts. It appears to the Tribunal that the parties agreed only on a definition of SNHW. In any case, a product market is an analytical tool used to determine whether market power is created or enhanced by a merger. The Tribunal could accept the definition agreed upon by the parties of the relevant product market, if it were correct. However, as market definition is a matter of mixed law and fact, the Tribunal must determine whether it can adopt the product and geographic dimensions of the relevant market suggested by the parties.

[59] In this case, the Tribunal is of the view that even if the relevant market were found to be SNHW, the fact that Residential Waste managed by the City of Toronto is subject to firm long-term contracts suggests that it would be inappropriate to include that waste in market share calculations. Such quantities are not likely to be affected by the imposition of a significant price increase by a hypothetical monopolist of SNHW and hence would not affect the profitability of that increase. Considering that all the Residential Waste discussed in this case is subject to such contracts, a zero market share is equivalent to exclusion of Residential Waste from the relevant market. This treatment of market share is consistent with the approach taken at section 1.41 of the *Horizontal Merger Guidelines* of the Department of Justice and Federal Trade Commission of United States (2 April 1992) which states:

... In measuring a firm's market share, the Agency will not include its sales or capacity to the extent that the firm's capacity is committed or so profitably employed outside the relevant market that it would not be available to respond to an increase in price in the market.

[60] For the reasons stated above, the Tribunal accepts that the relevant product market consists of SNHW but excludes the contracted Residential Waste for the GTA and the Chatham-Kent allegations. Effectively, this exclusion limits the relevant product market to ICI Waste.

D. ANALYSIS OF GEOGRAPHIC DIMENSION

[61] The relevant geographic market is the smallest area over which market power could be exercised. In *Director of Investigation and Research v. Hilsdown Holdings (Canada) Limited* (1992), 41 C.P.R. (3d) 289 at 301, [1992] C.C.T.D. No. 4 (QL), the Tribunal states:

Determining the geographic dimensions of the relevant market is similar to determining the product dimensions; one asks whether there is a geographic area within which the merged firm either alone or in concert with others is likely to have market power. This requires identifying some area such that the merged firm has an advantage based on geographic considerations over firms not inside that area. Frequently, this advantage results from transportation costs but often other factors may also be relevant, such as differing labour costs in the two areas or governmental restrictions and regulations.

[62] The Tribunal notes that the parties are also divided on whether the relevant geographic market extends to Michigan and New York, as argued by the respondents, in connection with the GTA allegation.

[63] The Commissioner contends that the relevant geographic market is Southern Ontario only, thus excluding the states of Michigan and New York whose disposal facilities receive ICI Waste from the GTA. The Commissioner asserts that these sites receive such waste only because of the non-competitive market structure of the waste disposal industry in Southern Ontario in which prices for disposal generally significantly exceed marginal cost. The Commissioner attributes the non-competitive pricing to a current dearth of landfill capacity in Southern Ontario, which dearth will turn into excess capacity by 2002 due to expansions and new facilities (some currently in the planning stage) which would cause the price of ICI Waste disposal from the GTA to fall, but for the transaction.

[64] The respondents claim that the evidence of ICI Waste shipments from the GTA indicates that considerable volumes of ICI Waste flow to disposal sites in the states of Michigan and, to a lesser extent, New York. Indeed, the recent decision by the City of Toronto to send its Residential Waste and ICI Waste to sites in Michigan indicates to them that these areas must be considered part of the relevant market.

[65] The respondents further argue that the correct area for the analysis of market power is the area over which the combined costs of transportation and disposal incurred by GTA Transfer Stations are uniform. They present evidence that these costs are uniform over an area that includes all of Southern Ontario and those parts of the states of Michigan and New York in which disposal sites receive waste from Transfer Stations in Southern Ontario.

[66] Citing the expert opinion evidence of Professor Hay, the respondents assert that the market is currently competitive with no capacity shortfall because Michigan and New York sites are in the relevant market, and that Tipping Fees at Southern Ontario disposal sites accepting ICI Waste from the GTA are likely to rise due to a forthcoming capacity deficit by 2003.

[67] The Commissioner also asserts that the Municipality of Chatham-Kent constitutes a relevant geographic market for evaluating the transaction. The Municipality of Chatham-Kent consists of 21 lower tier municipalities comprising the Kent County and the former City of Chatham and covers 2 200 square kilometres. Accordingly, insofar as the Chatham-Kent allegation is concerned, only landfill sites that accept ICI Waste from Chatham-Kent and that lie within the municipal boundaries would be included for the purpose of calculating market shares.

[68] The respondents, while not invoking the concept of geographic market explicitly, argue that waste, including ICI Waste, generated in Chatham-Kent is currently tipped outside the Municipality and that waste collectors will, in future, have other disposal options that lie outside the Municipality and that would prevent any increase in disposal fees in Chatham-Kent.

[69] The Tribunal approaches the delineation of geographic markets in the same way as for product markets. Accordingly, it is appropriate to provisionally adopt a certain area and then ask whether a hypothetical monopolist in that area would impose a small but significant price increase and sustain that increase for at least one year. If so, then that area is the relevant geographic market; if not, then the area must be expanded to include other areas. An issue to be decided in this case was the proper base price for using this test which is discussed below.

E. GREATER TORONTO AREA ("GTA")

(1) Shipment Patterns

[70] In his report, the respondents' expert, Professor Hay, concludes that Michigan and New York disposal sites compete for ICI Waste from the GTA based largely on the observed volumes of such waste going to those sites (expert affidavit of G. Hay (10 October 2000): exhibit 354a). However, there is evidence that significant amounts of such waste were directed by integrated waste collectors to their Michigan sites to free up space at their affiliated sites in Southern Ontario in 1999. These directed flows are not a response to market prices and, therefore, such shipments do not indicate to the Tribunal that disposal sites in Michigan and New York would constrain the exercise of market power.

[71] In the Tribunal's view, pre-merger shipments patterns do not, by themselves, address the critical issue in market delineation, i.e., whether the firm would be able to exercise market power post-merger. The respondents relied on the first part (emphasized) of section 3.3.2.8 of the *Merger Enforcement Guidelines* (Consumer and Corporate Affairs Canada, Director of Investigation and Research, Information Bulletin No. 5 (Supply and Services Canada, March 1991)):

Significant shipments of the relevant product from a second area into the area in relation to which a significant and nontransitory price increase is being postulated generally suggest that the second area is in the relevant market. However, past trading patterns can be a poor indicator of the extent to which supply sources in the second area are likely to be able to constrain the ability of sellers in the first area to profitably increase prices. Information demonstrating significant shipments from the first area into the second, in and of itself, provides little information regarding the extent to which sellers in the first area are likely to be prevented from being able to profitably increase prices. . . .

[72] The Tribunal, however, takes note of the entire section which suggests that the mere observation of historical patterns does not establish the constraining effect and is insufficient to justify broadening the geographic market. As noted in *Superior Propane*, cited above at paragraph [39], while there may be a correlation between the area established by managers for operational purposes and the relevant geographic market adopted for analysis of competitive effects, this may not always be the case.

[73] The Commissioner states that existing shipment patterns reflect the fact that Michigan and New York landfills have become acceptable substitutes only because of the non-competitive prices in Southern Ontario and that no such shipments would occur if competitive Tipping Fees prevailed. In the Tribunal's view, such an approach to market definition is inconsistent with the hypothetical monopolist approach in which an area is progressively expanded as long as a small but significant and non-transitory price increase would not be imposed over that area even by a monopolist. The question accordingly is whether such an increase in an area would result in the loss of so much revenue to all other areas (whether identified or not) that the increase would not be profitable. The answer to this question concerns the elasticity of demand for disposal in a provisionally-defined area and does not necessarily require the identification of particular competing areas; a particular area that is a poor substitute may be part of a relevant geographic market. However, the Commissioner has raised an important issue that the Tribunal will discuss further in its consideration of section 93 factors below.

(2) T&D Price

[74] The expert economic witnesses for the parties offer competing economic theories. The respondents' expert, Professor Hay, characterizes the disposal industry in Southern Ontario as competitive. In his view, there is no exercise of market power and any supranormal profit earned by a disposal site reflects a "locational rent" rather than any restriction of output by it. Indeed, in his testimony, he compared the position of an individual waste disposal site to that of a farmer in a competitive wheat market who may, by virtue of some location advantage, be more profitable than other wheat farmers who are not so advantaged, yet no wheat farmer restricts production.

[75] The respondents suggest that uniformity of the T&D Price over a certain area indicates that a disposal firm attracting waste from that area would be very reluctant to raise Tipping Fees significantly above current levels since the Transfer Station could ship to a competitor at no increase in total cost. This suggests that demand for disposal is highly price-sensitive (elastic) at prevailing prices. In response to a question from the Tribunal, the respondents stated that because of this price-sensitivity, it would not matter whether there was one disposal site or many at a given distance from a Transfer Station; no disposal site would be able to exercise market power.

[76] The Commissioner's expert economist, Professor Baye, offers a different view based on spatial competition theory. Recognizing that a Transfer Station will incur additional transportation costs to switch to a more distant disposal site, he views such costs as the costs of switching to a competing disposal site. He further argues that the disposal site has the ability to increase the Tipping Fee to that Transfer Station as long as the fee increase is less than the additional transportation cost to the competitor. Hence that disposal site has at least some market power with respect to a particular Transfer Station.

[77] It appears to the Tribunal that if Professor Baye is correct, the observed pattern of Tipping Fees reflects the exercise of that power, and it would not be profitable for any disposal site to raise its fee further, *ceteris paribus*. Therefore, Professor Baye's theory appears to be consistent with the observed uniformity of combined transportation and disposal pricing although inconsistent with Professor Hay's characterization of the industry as competitive.

[78] The issue to be decided here is the implication of those theories for geographic market definition. In the Tribunal's view, the respondents' theory of combined transportation and disposal pricing may be the correct one if the question is whether a provisional Southern Ontario geographic market ought to be expanded to include certain parts of Michigan and New York. Indeed, based on the hypothetical monopolist paradigm, the respondents may even be correct in their position that such market should be expanded. However, where price discrimination is possible, it is appropriate to delineate additional smaller markets based on the location of customers against whom price discrimination would be exercised. The evidence of Tipping Fees indicates that price discrimination is currently being practised by disposal sites in Southern Ontario, Michigan and New York. To attract ICI Waste from Transfer Stations in the GTA, disposal sites increasingly distant from the GTA solicit business from those Transfer Stations by reducing their Tipping Fees, resulting in freight allowed pricing, as described by the Commissioner's witness, Mr. Wagner, of Earthwatch Waste Systems, Inc., who is in the waste brokerage business in Buffalo, New York.

[79] Further, Mr. Collins, a sale representative in the Special Waste Group of CWS, testified that he determines the price of a particular customer based on the best price he thinks he can get, keeping in mind the minimum threshold price set by the company.

MR. HOUSTON: When you set the price that you are going to give to that customer, you set it in relation to what you think the customer can get elsewhere and you price to be able to get the business from that customer, knowing what you think his other alternatives are. Is that fair?

MR. COLLINS: No. I believe I price to the maximum dollar I can get for the client above my minimum threshold because I do have a minimum that I can sell into the landfills at that has been set. So if I can sell above that, I do.

MR. HOUSTON: When you say "a minimum that has been set", that is a minimum set by somebody in CWS management who says "We are not going to sell space below some number"?

MR. COLLINS: Yes.

transcript at 8:992 (16 November 2000).

[80] Further evidence of price discrimination exists in the form of customer lists where prices are shown to be determined based on the customer location.

[81] In his statistical analysis, Professor Baye indicates that transfer stations in the GTA are willing to pay a Tipping Fee premium of about five cents per tonne per kilometer a disposal site is closer to the transfer station (expert affidavit of M.R. Baye (12 October 2000); exhibit 348a at paragraph 54). This evidence is not criticized by the respondents. Such targeted pricing by distance is indicative of price discrimination.

[82] Such price discrimination would not be possible if disposal sites accepted non-directed ICI Waste on a free-on-board basis at the disposal site gate. Absent evidence that the basis for industry pricing would change to this format, the existing practice of delivered pricing indicates that price discrimination is possible in a post-merger environment. This finding supports the delineation of a market that is narrower than the area over which uniform combined transportation and disposal prices prevail.

[83] The Tribunal regards Professor Hay's theory of locational rent as inconsistent with the evidence that individual disposal sites actively seek out Transfer Stations in the GTA and negotiate Tipping Fees based on distance. Such marketing and negotiating practices are not part of the idealized wheat market that Professor Hay uses as an example. In such a competitive market, the wheat price a farmer receives is not adjusted based on the transportation costs that the farmer incurs in getting the wheat to market.

(3) Pre-merger Conditions

[84] In the Tribunal's view, geographic market definition is influenced by the extent of competition in the waste disposal industry prior to the transaction. The Commissioner argues that the waste disposal industry in Southern Ontario is not competitive and presents evidence suggesting that Tipping Fees considerably exceed marginal cost at several disposal sites.

[85] The Commissioner argues that the source of this non-competitive price is the lack of disposal capacity in Southern Ontario, which in turn results in the shipment of ICI Waste from the GTA to disposal sites in Michigan and New York. Were the Tipping Fees in Southern Ontario competitive, the Commissioner asserts, no such waste would flow to those sites, and they would not be in the relevant geographic market.

[86] As noted above, Professor Hay characterizes the industry as competitive and he states that the Commissioner has not measured marginal cost properly, arguing that the relevant measure should take into account the fact that many landfills are at the limits imposed by regulation and hence face very high marginal costs. However, he does not present any data or estimates of his own to establish that marginal cost pricing prevails in the industry. The Tribunal does not accept Professor Hay's characterization of the industry as competitive.

[87] In the Tribunal's view, the ultimate question in reviewing a merger is whether market power will be created or enhanced, not whether the pre-merger price exceeds marginal cost, and relevant markets must be delineated accordingly. If the pre-merger price exceeds marginal cost, then a hypothetical monopolist would be less willing to impose the same significant and non-transitory price increase than if competitive pricing prevailed. Hence that monopolist would have less market power than if the industry were competitive pre-merger. Paradoxically perhaps, non-competitive pricing in the industry prior to a merger suggests a broader, rather than a narrower definition of the market.

[88] To clarify the issue, the Tribunal handed out for comment a published article by G.J. Werden, an American expert in market definition research, entitled "Four Suggestions on Market Delineation" ((1992) 37 Antitrust Bulletin 107 at 115) that addresses this matter and advocates that merging parties should consider the price-cost margin in order to justify an expanded market.

[89] The Tribunal notes that Professor Hay advocates a broad definition of the market on the basis that the disposal industry is competitive, while the Commissioner seeks a narrower market definition on the basis that the market is not competitive. In view of the Tribunal's understanding of merger review and market definition principles as stated in paragraph [87], neither party's position can be correct.

[90] Responding to the Tribunal, the Commissioner submitted a discussion of market delineation in monopolization and merger cases from a well-regarded text by J. Church and R. Ware, entitled *Industrial Organization - A Strategic Approach* (Boston: Irwin McGraw-Hill, 1999) at 617, 618). The text indicates that the hypothetical monopolist test could fail to identify an anti-competitive merger where prevailing non-competitive prices were used to define the relevant market. The example used in the text is a merger of two firms that have already colluded to raise the price above marginal cost and seek a merger "to cement their monopoly gains", i.e., to prevent prices from falling.

[91] The Tribunal agrees that using distorted prevailing prices as the base in reviewing such a merger could well lead to an over-broad definition of the market. The correct approach in such cases is, as the text by Church and Ware states, to use the future lower price "if it is determined that prices were to fall, but for the merger" (*ibid.*).

[92] When a price change can be predicted with confidence, it is appropriate to delineate markets based on the likely future price, even if the future level of that price cannot be predicted precisely. In this regard, as G.J. Werden notes in his article "Market Delineation and the Justice Department's Merger Guidelines" (1983) Duke L.J. 514 at 526 at footnote 45:

... Moreover, the requisite level of "confidence" should not be particularly high. If a change is much more likely to occur than not, this should be a sufficient basis for choosing a benchmark price other than the prevailing price.

[93] In the case at hand, if the evidence shows that Tipping Fees paid by Transfer Stations in the GTA would fall, but for the merger, then the provisional market should not be expanded. Even if the pre-merger Tipping Fees were found to be so high that even a monopolist would not raise them, that monopolist would still have market power if it could prevent prices from falling to competitive levels.

[94] Professor Baye concludes that Tipping Fees in Southern Ontario will fall to competitive levels due to a significant net expansion of disposal capacity at sites capable of accepting ICI Waste from the GTA. This excess capacity is the principal evidence supporting the Commissioner's allegation that the transaction will substantially prevent competition and will be reviewed by the Tribunal in that context. All that can be concluded at this point is that if that evidence is sustained, then it tends to support the Commissioner's assertion that the areas of the states of Michigan and New York should not be considered part of the geographic market in this case.

(4) Impediments to the Use of Disposal Sites in the United States

[95] The Commissioner asserts that several other features of the waste disposal business make the Michigan and New York sites poor substitutes for Southern Ontario sites and should, therefore, lead to the exclusion of these sites from the geographic market. These features include possible border closure, "flow control", superfund liability, border delays and costs, difficulty in finding truck drivers able to enter the United States, weight restrictions in the United States, and fines for violating those restrictions. Other business risks, such as foreign exchange risks and volatile fuel prices, and drivers' preferences for shorter trips were also suggested as reasons why Transfer Stations in Southern Ontario prefer to tip their waste at Ontario sites.

[96] The Tribunal notes that relevant markets are delineated with respect to relatively short time periods; the non-transitory period over which a significant price increase could be sustained is often taken as one year. Yet no evidence suggests that certain of the above impediments (e.g., border closure) will occur within that period. Other impediments, such as the cost of border delays and the possibility of environmental liability do not seem to prevent certain volumes of waste from continuing to enter the states of Michigan and New York. For instance, Mr. Wagner, of Earthwatch Waste Systems, Inc., testified to the effect that crossing the border was not problematic:

MR. NEYLAN: As a waste broker, Mr. Wagner, I submit to you that Earthwatch has considerable expertise with the issues involved in crossing the border into the United States.

MR. WAGNER: Yes, sir.

MR. NEYLAN: In particular, including the transport of waste from the GTA into Michigan and New York State?

MR. WAGNER: Yes, sir.

MR. NEYLAN: Those border issues do not prevent Earthwatch from shipping considerable volumes of waste into the United States?

MR. WAGNER: They have not caused a major problem.

MR. NEYLAN: When I say significant volumes, I mean a significant proportion of the waste that Earthwatch brokers. Would you agree?

MR. WAGNER: Yes, sir.

MR. NEYLAN: To the extent that there are costs that Earthwatch incurs in crossing the border, Mr. Wagner, would you agree that those costs are factored into the price that Earthwatch charges its customers?

MR. WAGNER: Yes, sir.

transcript at 5:650-51(10 November 2000).

[97] Similarly, as noted by the respondents, while rising fuel costs in the United States and declines in the value of the Canadian dollar could be avoided by not using Michigan and New York disposal sites, the opposite trends would make such use more profitable. It is difficult to predict which trend will develop.

[98] Part of the reason for waste shipments to Michigan and New York may lie in the evidence that some Transfer Station operators have intentionally developed good business relationships with disposal sites on both sides of the border. It was suggested by a witness called by the Commissioner, Mr. Micallef, general manager and part owner of Complete Disposal Services, that by diversifying their disposal options in this way, those operators could continue to tip their waste across the border.

[99] Professor Baye's statistical evidence indicates that Transfer Stations in the GTA pay \$5 per tonne more to tip their waste at domestic sites rather than cross the border. However, it appears to the Tribunal that this premium has not prevented certain volumes from crossing the border, and it concludes that it should not place weight on these factors in delineating markets.

[100] On the basis of the evidence of price discrimination and on the evidence (discussed below) that excess capacity would likely lead to a decline in Tipping Fees for ICI Waste from the GTA absent the transaction, the Tribunal finds that the relevant geographic market excludes the states of Michigan and New York in regard to the GTA allegation. Effectively, this means that the relevant geographic market is that area of Southern Ontario containing disposal sites capable of accepting ICI Waste from the GTA.

F. CHATHAM-KENT AREA

[101] The narrowest such provisional market would be the area in Chatham-Kent including and surrounding the Ridge Landfill. Given its proximity to the Gore landfill that is also in the Municipality, any significant increase in Tipping Fees at the Ridge would lead collectors of ICI Waste from Chatham-Kent to tip such waste at the Gore landfill. Accordingly, the geographic market must be expanded to include the area in Chatham-Kent around the Gore landfill site.

[102] If the Ridge and Gore sites were monopolized and a small but significant and non-transitory price increase imposed, collectors of ICI Waste from Chatham-Kent could tip such waste at a Transfer Station in Wallaceburg that is located in the extreme northwest corner of the Municipality. However, the Commissioner notes that this Transfer Station currently charges \$95 per tonne for such ICI Waste (mainly C&D Waste). Accordingly, even with a small but significant and non-transitory price increase at the Ridge and Gore landfills whose Tipping Fees are currently in the range \$31-35 per tonne, it would still be cheaper for local collectors to dispose at those sites rather than at Wallaceburg.

[103] The evidence indicates that some ICI Waste collected in Chatham-Kent is currently disposed of at the Essex-Windsor landfill. One collector (Erie Environmental Services) lacks the waste volume from Chatham-Kent to fill up its collection truck there, and hence tips at Essex-Windsor. Some ICI Waste deemed to be from Chatham-Kent is actually generated by plants on the border with Essex County; hence this waste may not be from Chatham-Kent. Some C&D Waste from Chatham-Kent is tipped at Essex-Windsor by Essex county collectors who are, apparently, completing routes that begin and end in Windsor. Windsor Disposal also collects waste from Chatham-Kent and tips at Essex-Windsor. However, as noted above with respect to the GTA allegation, existing shipment patterns are not conclusive.

[104] The respondents refer to the Transfer Station operated by Waste Wood Disposal Limited site in Dresden and to a Transfer Station in Tillbury. It appears that these businesses handle very small amounts of ICI Waste from Chatham-Kent, which suggests that these areas do not have enough disposal capacity to restrain a price increase at the Ridge and Gore sites. While the Essex-Windsor site has plans to accept more waste from out-of-county, there is no indication that any ICI Waste collector in Chatham-Kent that currently disposes at the Ridge and Gore would switch to that site. There is an indication, however, that a collector with large volumes would have to establish a Transfer Station in Chatham-Kent, which would take 9 to 12 months in order to tip waste at Essex-Windsor.

[105] While some of the ICI Waste currently going to the Ridge and Gore sites might be diverted to other sites in the event of a small but significant and non-transitory price increase, these facts do not suggest that sufficient volumes would shift so as to make the increase unprofitable, particularly in the relatively short time period for which geographic markets are defined.

[106] As to the "future events" to which the respondents refer, they are more properly considered under entry rather than under market definition, which as noted above, is subject to relatively short time periods.

[107] On the basis of the above, the Tribunal is of the view that the relevant geographic area in respect of the Chatham-Kent allegation is not larger than the Municipality of Chatham-Kent and excludes the Wallaceburg Transfer Station.

V. SUBSTANTIAL PREVENTION AND LESSENING OF COMPETITION

[108] Section 92 of the Act states that, on application by the Commissioner, the Tribunal must determine whether a merger prevents or lessens competition substantially. To do so, the Tribunal may consider evidence of concentration, market share and other factors such as those listed in section 93 of the Act. Part 2 of the *Merger Enforcement Guidelines*, cited above at paragraph [71], states clearly that a prevention or lessening of competition will occur as a result of an increase of the merged entity's market power compared with what would occur if the merger did not take place. As the Tribunal stated at paragraph [258] in *Superior Propane*, cited above at paragraph [39]:

... What is necessary is evidence that a merger will create or enhance market power which, according to paragraph 2.1 of the MEG's, cited above at paragraph [57], is "the ability to profitably influence price, quality, variety, service, advertising, innovation or other dimensions of competition". There is no requirement under the Act to find that the merged entity *will* likely raise the price (or reduce quality or service). The only requirement under section 92 is for the Tribunal to decide whether the merged entity has the ability to do so.

A. SUBSTANTIAL PREVENTION OF COMPETITION

(1) Greater Toronto Area ("GTA")

[109] The Commissioner submits that allowing CWS to take control of the Ridge would likely prevent competition substantially in the market for disposal of ICI Waste from the GTA. He further submits that current prices charged at Southern Ontario landfills for ICI Waste from the GTA are well above competitive levels (for example, the Ridge charged Tipping Fees that included a very significant mark-up over its marginal cost). In the Commissioner's view, those prices reflect the shortage of landfill capacity and the ability of those landfills to charge prices in relation to their customers' next best option. The Commissioner asserts that excess capacity will develop in 2002 and that the transaction will prevent tipping fees from falling to the competitive level.

[110] Further, the Commissioner asserts that the Ridge Landfill and the CWS landfills located at Warwick and Richmond are at a similar distance from the GTA. The Commissioner argues that an independent Ridge would provide competition to these sites for disposal of ICI Waste from the GTA. The transaction prevents this competition from developing.

[111] The respondents submit that it is not likely that in 2003 and beyond, there will be a substantial prevention of competition arising from the merger with respect to the disposal of waste from the GTA. The respondents submit that there are a variety of scenarios for changes in the waste disposal landscape over the coming years but that the evidence simply does not support the fact that capacity will exceed demand. The respondents note that the Commissioner relies on the fact that approvals of CWS's application for expansion to the Richmond and Warwick sites are likely to be granted, a position that the respondents dispute. They rely on their expert, Professor Hay, who provides an opinion in his report in rebuttal that there would be no excess capacity for disposal of ICI Waste generated in the GTA, rather that there would be a shortfall beginning in 2003 (expert rebuttal affidavit of G. Hay (25 October 2000): exhibit 355a). They also rely on the evidence of factual witnesses who describe the marketplace for disposal of waste from the GTA as currently competitive with Michigan and New York landfills providing competitive disposal options.

(2) Chatham-Kent Area

[112] The Commissioner argues that if the Ridge were owned by a company other than CWS, prices for disposal in Chatham-Kent would likely fall. The Commissioner relies on the same reasoning as for the GTA. That leads the Commissioner to argue that the acquisition of the Ridge by CWS will likely prevent competition for disposal of ICI Waste in Chatham-Kent.

[113] The respondents argue that the Chatham-Kent allegation is a "tag along" to the allegation of a substantial lessening of competition or substantial prevention of competition in the GTA and that the Commissioner would never have brought an application to the Tribunal on that basis. Further, the respondents argue that there are alternate disposal options in Chatham-Kent capable of imposing market discipline in order to prevent any increase in disposal costs for waste originating in Chatham-Kent.

B. SUBSTANTIAL LESSENING OF COMPETITION

(1) Greater Toronto Area ("GTA")

[114] The Commissioner submits that the acquisition of the Ridge will result in a likely substantial lessening of competition in the disposal of ICI Waste in the GTA. He further submits that allowing CWS to take control of the Ridge would permit CWS to profitably raise Tipping Fees at its sites such as the Ridge, Warwick and Richmond whether or not there will be excess capacity. The Commissioner asserts that the acquisition of the Ridge gives CWS the ability to use its control of disposal capacity to increase the costs of its collection rivals through a cost/price squeeze.

[115] The respondents dispute the Commissioner's position that CWS will be able to use market power in the disposal market in order to increase disposal prices, thereby putting a cost/price squeeze on CWS's competitors in collection markets. They submit that there cannot be a cost/price squeeze in the collection market as the acquisition of the Ridge does not lead CWS to have increased market power in the disposal market. They submit that the Commissioner consented to the acquisition by CWS of BFIL's collection business in the GTA, conceding that it would not lead to a substantial lessening or a substantial prevention of competition in collection markets.

(2) Chatham-Kent Area

[116] The Commissioner claims that the acquisition of the Ridge Landfill site by CWS will create a monopoly in the disposal of ICI Waste from Chatham-Kent. As CWS already owns the Gore landfill site, the merger will substantially lessen competition as there is no effective remaining competition and little prospect of entry. The Commissioner notes that even the respondents' expert, Professor Hay, acknowledges that allowing CWS to take control of the Ridge would create an anti-competitive situation in Chatham-Kent.

[117] The respondents note that the Gore landfill site will close in the next five years and that new options for disposal will develop. Accordingly, they submit that there will be sufficient discipline to negate any likelihood of a substantial lessening of competition.

C. SECTION 93 FACTORS

[118] Before examining the section 93 factors below, the Tribunal takes note that it did not hear any evidence from the respondents as to the business rationale for CWS's acquisition of the Ridge Landfill. However, the Tribunal accepts that the intent of the parties is irrelevant in determining whether a merger will likely reduce competition.

(1) Barriers to Entry

[119] The Commissioner submits that the extensive approval process for establishing or expanding disposal capacity requires significant time and expenditure and thus constitute barriers to entry into the waste disposal business. Because of these barriers, a new entrant would not be able to constrain the exercise of market power by CWS if it were able to take control of the Ridge Landfill.

[120] The respondents submit that the only requirements for entry into the SNHW disposal business are a site, a permit, construction of the facility and the provision of equipment and personnel. The only costs that are sunk are those associated with the permitting process, as the site may be sold if all necessary permits are not obtained.

[121] As stated above, the Commissioner and the respondents filed an agreed statement of facts on October 3, 2000, prior to the commencement of the hearing intended to reflect conditions in the industry as of September 15, 2000. This agreed statement of facts provided, among other things, a description of the regulatory environment, the approval process and the costs of new or expanded Permanent Disposal Facilities and Transfer Stations in Ontario.

[122] After reviewing the agreed statement of facts and the evidence of factual witnesses, the Tribunal concludes that the time and cost associated with the regulatory approval process, and the capital costs and time to develop new capacity represent significant barriers to entry into the waste disposal market to the extent that they represent sunk costs.

(a) Time and Cost Associated with Regulatory Approval Process

[123] As described by the parties in the agreed statement of facts, the establishment of a new landfill or the expansion of a landfill or incinerator (through the expansion of Annual Capacity, the Total Permitted Capacity or of the service area) requires numerous regulatory approvals: a Certificate of Approval pursuant to the *Environmental Protection Act*; approval following the Environmental Assessment process pursuant to the *Environmental Assessment Act*; and zoning and other municipal approvals. The environmental assessment process comprises the following three major phases: preparation, submission and review of ToR; preparation, submission and review of Environmental Assessment; and decision by the MOE or public hearing.

[124] Further, it appears that depending on the municipality within which the proposed site is to be situated, an applicant may require approvals, such as an official plan amendment, re-zoning, and/or a site plan approval, with associated fees. Re-zoning may require an additional concept plan and a site plan approval will require detailed site plans for the site and surrounding lands, beyond those otherwise required. These processes may be followed concurrently and may take approximately one year if no appeals, or approximately two years with appeals.

[125] Prior to the legislative amendments that were designed to streamline the approval process, it appears that new landfill or expansion applications have historically required three to seven years review before approval by the MOE or a hearing by an administrative tribunal.

[126] The time required to complete the Environmental Assessment process for a new landfill or a significant landfill expansion includes: the time for planning of the project within the applicant's organisation and performing appropriate feasibility studies; approximately six months for pre-submission consultation with the MOE; and from one to three years, approximately, for the setting of ToR for the Environmental Assessment process, the full Environmental Assessment itself, the MOE review and the issuance of a decision by the Environmental Assessment Board or the Minister. The cost of the *Environmental Assessment Act* / *Environmental Protection Act* process for a significant expansion of an existing landfill is approximately \$ 4-5 million exclusive of any hearing costs.

(b) Capital Costs and Time to Develop New or Additional Capacity

[127] After receiving regulatory approval for a new landfill or an expansion to an existing landfill, additional significant investment is required to develop or expand the capacity at the site. The majority of this investment constitutes a sunk cost that cannot be recovered in the event of exit. The Commissioner points out in his statement of grounds and material facts that new guidelines and regulations affecting the design, environmental performance and financial assurance of new and expanded landfills, recently implemented by the MOE, are likely to lead to higher landfill development costs.

[128] In the case of a new landfill, capital costs include the cost to purchase land and to develop landfill capacity which include environmental monitoring, excavation of cells, lining of cells, leachate management, gas collection system, cost to purchase equipment, cost to construct access roads and office. After these costs have been incurred and operations commence, a waste disposal site has limited, if any, alternative uses; hence the investment is effectively non-recoverable except by sale to another enterprise in the waste disposal business. For instance, the Ridge expansion was a multi-million dollar investment, most of which was sunk.

(2) Removal of a Vigorous and Effective Competitor

[129] The Commissioner submits at paragraph 71 of the statement of grounds and material facts that the Ridge has been a strong competitor to CWS in the disposal of solid waste from the GTA and to the Gore with respect to Chatham-Kent. He further submits that this competition would have been enhanced by the recent expansion of the Ridge's annual permitted capacity from 220,000 tonnes to 680,000 tonnes.

[130] The Commissioner argues that the Ridge is located at a similar distance from the GTA as the CWS Warwick, Blackwell and LaSalle landfills, which makes it a an effective alternative to these sites. He submits that the cost of transporting waste from the GTA to these four landfills is roughly equivalent.

[131] The respondents admit at paragraph 13 of their response that the Ridge has recently undergone an expansion of available capacity. However, they point out that, compared to other competing facilities in the Lower Great Lakes area, the Ridge has not been a vigorous competitor to the respondents' disposal facilities.

[132] The respondents argue that the Ridge and the CWS Blackwell and LaSalle landfills have not been each other's closest competitors for ICI Waste collected in the GTA as various Michigan landfills have been the price setters for the disposal of SNHW collected in the GTA. They further argue that, due to combined transportation and disposal prices, the distance to any of these disposal facilities is irrelevant.

[133] It appears to the Tribunal that while the Ridge may not have the lowest Tipping Fees, the evidence suggests that the Ridge competes effectively in other ways. For example, according to the evidence of Mr. Wagner, Earthwatch brings its waste mainly to the Ridge despite the fact that it does not offer the lowest price. He testified that the Ridge provides reliability that Transfer Stations value in their every day operations as compared with the lower cost alternative. He also indicated that some of the drivers prefer to go to the Ridge in view of the shorter travel time as compared to the Michigan sites. According to Mr. Wagner, the Ridge is usually open on American holidays and remains open later on Saturdays (transcript at 5:640, 641 (10 November 2000)).

[134] Further, Mr. Micallef, from Complete Disposal Services, explained that he uses the Ridge and the American Ref-Fuel incinerator because they are the closest and that he and his employees can go home earlier when they use these sites (transcript at 6:719, 720 (14 November 2000)).

[135] The Tribunal is of the view that the Ridge and the CWS Blackwell and LaSalle landfills have been each other's closest competitors for ICI Waste generated in the GTA. According to table 3 in Professor Baye's affidavit, entitled "Where ICI Waste from the GTA was Permanently Disposed, 1999" (exhibit 348a), the Ridge was the fourth largest recipient of ICI Waste from the GTA in 1999 among landfills, including those located in Michigan and New York. The other three recipients are the Keele Valley site, the Walker Brothers site, and the CWS Sarnia sites (Blackwell and LaSalle).

[136] Although it appears that the Blackwell and LaSalle landfills are scheduled to close in 2002, the anticipated expansion of CWS Warwick landfill is expected to replace the capacity at these two sites. Since Warwick is located in close proximity to Blackwell and LaSalle, it is expected that CWS and the owner of the Ridge would continue to be each other's closest competitors if the Ridge remains independent of CWS.

[137] In the Tribunal's view, the transaction will result in the removal of the Ridge as a vigorous and effective competitor from the ICI Waste disposal market.

(3) Foreign Competition

[138] The Commissioner submits that foreign competitors do not provide effective competition. He argues that if CWS were to take control of the Ridge, the only other option for independent Transfer Station operators in the GTA would be to incur substantial transportation costs, risk and uncertainty associated with transporting waste across the border. While the Commissioner recognizes that some disposal sites in Michigan and New York receive limited amounts of waste from the GTA, he points to the fact that of the small amount of waste from the GTA which has been transported to Michigan or New York, a large proportion has been directed and/or internalized by CWS and BFIL. Further, he submits that four of the Michigan landfills which have received Ontario waste are owned by WMI in the United States and that three other landfills (plus an incinerator in New York) are owned by Allied, which has a non-compete agreement with CWS in Canada.

[139] The Commissioner also argues that American Ref-Fuel which operates an incinerator located in New York was 50 percent owned by a BFIL affiliate. This ownership interest is currently held by Allied. American Ref-Fuel has a large Annual Capacity but has received only a small amount of waste from the GTA. Further, the Ref-Fuel facility cannot accept non-combustible waste such as C&D Waste.

[140] The respondents submit that there is no additional risk or uncertainty in transporting waste to landfills in the United States. They submit that transportation costs for waste from the GTA to Michigan are somewhat higher than for the Ridge, but that the Michigan landfills are cost competitive on a T&D Price basis due to their lower Tipping Fees.

[141] They further submit that significant volumes of waste from the GTA are currently shipped to the states of Michigan and New York. They point out that these facilities have lower costs per tonne than landfills in Southern Ontario and are not constrained in their ability to compete.

[142] They also submit that there is no substantial risk or uncertainty in relying on landfills in the United States for the disposal of waste collected in Southern Ontario. Legislative initiatives at the state

level to control waste flows in the United States have been found by American courts to be unconstitutional to the extent that such legislation is an attempt to regulate interstate commerce. Further, efforts to institute waste flow legislation at the federal level have been unsuccessful. Accordingly, there is no basis to find that imports of SNHW into the United States from Canada will be reduced or prohibited by state or federal legislation.

[143] The Tribunal will not speculate on the likelihood of future border closure or on other matters such as foreign exchange and fuels costs that affect the profitability of doing business in the United States. However, the Tribunal notes that of the ICI Waste generated in the GTA in 1999, approximately 79 percent was disposed of at Ontario sites and the remaining 21 percent went to sites in Michigan and New York (expert affidavit of M. Baye (12 October 2000): exhibit 348a at table 3). Based on amendments to the agreed statement of facts dated October 30, 2000, it appears to the Tribunal that of the ICI waste volumes going to the sites in the United States, approximately 29 percent was directed or internalized, and such direction/internalization would likely continue regardless of changes in Tipping Fees in Southern Ontario. These volumes indicate that the Michigan and New York landfills would have a minimal impact on a potential exercise of market power by the merged entity over non-contracted waste volumes.

[144] In discussing market definition, the Commissioner stated that the only reason the disposal sites in Michigan and New York receive ICI Waste from the GTA is that Tipping Fees in Southern Ontario are already above marginal cost; accordingly these sites would receive no waste if competitive pricing prevailed and are hence poor substitutes for sites in Southern Ontario. Although the Tribunal does not consider this argument applicable to market definition, it believes that the Commissioner has raised an important issue.

[145] If the Commissioner is correct that Tipping Fees exceed marginal costs, then to regard sites in Michigan and New York as good substitutes on the basis of existing shipment patterns commits the well-known "cellophane fallacy". Where buyers purchase alternatives to a product at prevailing prices only because the price of that product has been raised to supra-competitive levels, there cannot be any inference that such alternatives would be purchased in the same quantities if the product price were at or close to marginal cost. Hence, observed shipment patterns at prevailing Tipping Fees do not establish that those alternatives would be good substitutes in a market characterized by competitive pricing. As noted above, the Tribunal considers the issues raised by the cellophane fallacy under its analysis of section 93 factors rather than in its treatment of market definition.

(4) Effective Remaining Competition

[146] The Commissioner alleges that in Southern Ontario, the only other privately owned landfill sites that can receive GTA waste are the GreenLane and Walker landfills. He submits that other landfills could theoretically take ICI Waste from the GTA but they do not or cannot receive this waste. These landfills are the Essex-Windsor landfill, the Taro landfill, the Halton landfill and the Britannia landfill.

[147] The respondents submit that in addition to the GreenLane (St. Thomas) and Walker Brothers (Thorold) landfills, the Lafleche (Moose Creek) landfill is permitted to receive GTA waste. They argue that disposal options available to independent Transfer Stations in the GTA will not be significantly reduced if CWS retains the Ridge.

[148] Walker Industries Holdings Limited owns the Walker landfill in Thorold, Ontario. This landfill has a permitted Annual Capacity of 617,000 tonnes. Walker utilizes all of its permitted Annual Capacity. A significant amount of the volume of waste received at the Walker landfill is brought in by CWS. The Commissioner submits that, although this landfill is attractive because of its location close to the GTA, Walker is capacity constrained and is, therefore, unable to accept the waste of other Transfer Station operators and waste brokers (for example, see Mr. Wagner, of Earthwatch Waste Systems, Inc.: transcript at 5:645 (10 November 2000); Mr. Micallef, general manager and part owner of Complete Disposal Services: transcript at 6:721, 722 (14 November 2000)).

[149] The GreenLane landfill is owned by GreenLane Environmental Group and is located in St. Thomas, Ontario, near London. This landfill has a permitted Annual Capacity limit of 262,500 tonnes. GreenLane Environmental is required to pay a significant community host fee on every tonne of waste brought to the GreenLane landfill. The Commissioner submits that this landfill is unattractive to GTA Transfer Stations and waste brokers because its Tipping Fee are too high. In addition, it appears that it is more expensive than Michigan landfills on a combined transportation and disposal basis.

[150] With the exception of the Essex-Windsor landfill, municipal landfills do not wish to receive waste generated outside of their mandated areas so as to prolong the life of their landfills. The Essex-Windsor landfill has an annual permitted fill rate of 320,000 tonnes. However, the board of Essex-Windsor has approved a reallocation of 100,000 tonnes of existing annual capacity to outside sources. The Commissioner submits that this landfill also charges too high a Tipping Fee to be competitive for GTA waste. Certain factual witnesses testified that the Tipping Fee was high:

MR. HOUSTON: What about the Essex-Windsor landfill. Have you had any discussions with them about disposing of waste there?

MR. VANROBOYS: Yes. We met with them several different times. Their pricing is pretty high. Again, by the time you figure in the transportation and disposal, it is just not competitive. That is basically the main reason we are not going there.

transcript at 6:760 (14 November, 2000).

[151] The Taro landfill does not accept ICI Waste from GTA Transfer Stations. The Halton landfill located in Halton is not licensed to take ICI Waste from outside the region of Halton. Further, it charges a high Tipping Fee for ICI Waste that makes it unattractive to Transfer Stations. The Britannia landfill, operated by the region of Peel and the KMS Peel Incinerator, cannot receive waste from outside the region of Peel and charges high Tipping Fees.

[152] In light of the evidence, it appears to the Tribunal that if CWS is permitted to retain the Ridge, disposal options in Southern Ontario for independent Transfer Stations in the GTA will be limited to CWS, the Essex-Windsor landfill, the GreenLane or Walker landfills. Other landfills in Southern Ontario would not be able to constrain an exercise of market power by CWS.

D. ANALYSIS OF CHANGES IN CAPACITY AND DEMAND

[153] The Commissioner contends that the transaction and its effects must be evaluated in light of the expected increase in disposal capacity at Southern Ontario landfills capable of accepting ICI Waste from Transfer Stations in the GTA. This excess capacity will begin developing in 2002 and would result in significantly lower Tipping Fees for such waste at those landfills but for the transaction. In particular, the transaction would bring the Ridge and landfills equidistant from the GTA under common ownership of CWS which would then have such a large share of the disposal capacity for that waste that competition would be prevented and Tipping Fees would not fall to the competitive level.

[154] The respondents argue that no excess capacity will develop; indeed, they argue, a capacity shortage will prevail following the closure of the Keele Valley site at the end of 2002. The respondents emphasize that the Commissioner has not considered all the waste volumes that will require disposal and hence has ignored the upward pressure on Tipping Fees that would result from any temporary decline thereof in Southern Ontario that would attract those volumes. As a result, they contend, Tipping Fees in Southern Ontario will not fall and the transaction will not prevent competition in 2003 and beyond.

[155] Excess capacity is perhaps the central point at issue in the GTA allegation of substantial prevention of competition. As noted above, the use of likely future price is appropriate for estimating the impact of a small but significant price increase by a hypothetical monopolist where the price would fall but for the merger, so that the matter of excess capacity is vital for market definition as well.

(1) Reconciliation of Capacity and Demand Estimates

[156] The Commissioner's expert, Professor Baye, examines the implications of proposed closures and expansions of ICI Waste capacity (through planned capacity increases and reallocation of unused capacity) of disposal sites in Southern Ontario that accepted ICI Waste from GTA Transfer Stations in 1999. He compares the resulting annual disposal capacity with the level of that waste going to all those sites in 1999 data and concludes that annual tipping capacity would exceed ICI Waste tipped by GTA Transfer Stations by approximately 1.2 million tonnes starting in the year 2002.

[157] The respondents' expert, Professor Hay, is critical of this analysis. On the supply side, he argues that Professor Baye should have excluded any capacity at the Essex-Windsor and GreenLane sites on the basis that Professor Baye has concluded that these sites are not price competitive with Michigan sites (expert rebuttal affidavit of G. Hay (25 October 2000): exhibit 355a, table 1, footnote1). Otherwise, he is prepared to accept Professor Baye's annual disposal capacities at the other sites, even if the required licenses have not yet been obtained (although the respondents have called such unapproved volumes into question).

[158] On the demand side, Professor Hay criticizes Professor Baye for failing to include (a) the Residential Waste managed by the City of Toronto currently going to the Keele Valley site; (b) the GTA waste currently going to Michigan and New York sites; (c) the non-GTA waste going to the Blackwell and LaSalle sites near Sarnia that will close (Blackwell in February 2001 and LaSalle in Spring 2002); (d) the non-GTA waste currently going to Michigan and New York sites; and (e) the waste currently going to the Britannia site in Ontario. The Tribunal is of the view that the treatment of (f) the GreenLane site and (g) the Essex-Windsor site in the analyses of demand and supply requires clarification.

[159] On this basis, Professor Hay concludes that annual demand for disposal will exceed available Annual Capacity at Ontario landfills that can accept SNHW from the GTA on a cost-effective basis in 2002. In his report in rebuttal (exhibit 355a), he estimates that Annual Capacity deficit at approximately 1.56 million tonnes, which figure was raised by the respondents to approximately 1.68 million tonnes as a result of amendments to the agreed statement of facts.

[160] In light of his estimate of a large capacity deficit, Professor Hay concludes in his report in rebuttal (exhibit 355a at paragraph 11) that Professor Baye's conclusion of falling Tipping Fees is not plausible and that regardless of ownership of Ontario capacity, a price (i.e., Tipping Fee) significantly below current levels is not sustainable (*ibid.*, paragraph 16) because any decline in Tipping Fees would attract large volumes of waste to Ontario disposal sites hence putting upward pressure on those prices.

(a) Residential Waste Managed by the City of Toronto Currently Going to the Keele Valley Site

[161] The Tribunal agrees with Professor Baye that it is appropriate to exclude the volumes of Residential Waste managed by the City of Toronto currently going to the Keele Valley site from the analysis. The Tribunal finds credible the evidence of Mr. Bacopoulos, the manager of the City's waste management programme, who testified concerning the City's options.

[162] Moreover, Mr. Bacopoulos testified that the City of Toronto had established a lengthy and detailed evaluation process for selecting disposal sites to handle the waste it manages given its legal obligation to collect Residential Waste. This process had qualified Republic, Onyx and Adam's Mine, but no other sites that had expressed interest in the City's business. Accordingly, any attempt to divert such waste in response to lower Tipping Fees would require the City to undertake similar lengthy review which, in the Tribunal's opinion, would be uncertain and too long to affect waste volumes currently shipped to Michigan and New York sites in any reasonable period of time.

[163] The Tribunal accepts that all of the Residential Waste managed by the City of Toronto will go to either Onyx site at Arbour Hills or to the Republic site at Carleton Farms. The failure of the deal with RCN Ltd. leads Mr. Bacopoulos to conclude that there are no Ontario disposal options for the City at this time.

[164] Hence, Residential Waste currently going to Keele Valley will very likely be shipped to Michigan sites beginning in 2003 and will not be diverted. Accordingly, these volumes cannot be considered in a reckoning of demand for disposal in Ontario.

[165] As Mr. Bacopoulos indicated, ICI Waste from City of Toronto Transfer Stations could be diverted under the contract with Republic because that contract establishes a minimum required annual volume of waste (100,000 tonnes) to be delivered (see Waste Transport and Disposal Agreement Between the City of Toronto and Republic Services Inc., dated October 25, 2000: exhibit 337 at clause 11.4(b)(i)). When asked about the intention of the City of Toronto with respect to the Republic contract in a "falling price" environment, Mr. Bacopoulos testified as follows:

MR. NEYLAN: In a falling price environment, it is to the advantage of the city to be able to redirect waste away from the party that it contracts with in order to take advantage of potentially lower prices?

MR. BACOPOULOS: That is correct.

MR. NEYLAN: I would suggest to you that the Republic contract does a pretty good job of achieving those objectives for the city, in that --

I am sorry, I should ask you one question at a time.

MR. BACOPOULOS: Yes, it does to a certain degree. It is a five-year contract. Under the second scenario, if there are falling prices in the second year of that five-year contract we are obviously obliged to send certain volumes to Republic over the life of that five-year contract.

We would not be able to divert all of our waste away from them, but certainly when the five-year contract was up we would have the ability at that point in time to negotiate a deal with a lower cost alternative.

MR. NEYLAN: *During the five-year period I would suggest that you would be able to divert everything away that was above the minimum contractual obligation.*

MR. BACOPOULOS: *That is correct, for the ICI, yes. (emphasis added)*

transcript at 3:380-81 (8 November 2000).

[166] It appears to the Tribunal that amounts of ICI Waste beyond the minimum level of 100,000 tonnes could stay in Ontario if Tipping Fees were to fall below those agreed upon in the contract. Both Professors Baye and Hay include the 568,000 tonnes of ICI Waste going to Keele Valley in their estimates of waste that could be diverted to Ontario and thereby ignore the minimum required volume stated in the Republic contract. The Tribunal is of the view that the amount of waste to include in the demand for Southern Ontario disposal is 468,000 tonnes at best (once the minimum required volume of waste has been sent to Republic/Carleton Farms site).

(b) GTA Waste Currently Going to Michigan and New York Sites

[167] The parties agree that 697,969 tonnes of GTA waste goes to Michigan and New York sites. According to the respondents and Professor Hay, this volume could be diverted back to Ontario sites in the event that Tipping Fees fall and hence, they include it in demand. The Commissioner points out that a significant portion of this waste goes to Onyx/Arbor Hills under the Arbor Hills Contract, and will either continue to go there after 2002 or it will go to Republic/Carleton Farms when the City makes its decision. The Commissioner notes further that from the amount remaining, about 29 percent was directed to those sites in 1999 by BFIL.

[168] For these reasons, the Tribunal cannot accept the respondents' position that all of the 697,969 tonnes under discussion should be included in the demand for disposal in Ontario landfills should Tipping Fees decline. In final argument in reply, the Commissioner presented a separate reconciliation entitled "Reality Check: Supply and Demand Assumptions" (the "Commissioner's reconciliation") which includes the remaining amount referred to above, even though Professor Baye had not included any of this volume in his analysis of excess capacity. The Tribunal agrees with the Commissioner's reconciliation in this respect.

(c) Non-GTA Waste Going to Blackwell and LaSalle Sites

[169] Regarding the non-GTA waste currently going to the Blackwell and LaSalle sites near Sarnia, Professor Baye had assumed that when those sites closed (Blackwell is scheduled to close in February 2001 and LaSalle by spring 2002), those volumes would go to Michigan sites due to proximity, and hence would not form part of the demand for disposal in Ontario. The respondents and Professor Hay regard this assumption as inappropriate and, in response, the Commissioner includes the amount in demand in the Commissioner's reconciliation. The Tribunal agrees that it is an appropriate way to treat these volumes.

(d) Non-GTA Waste Currently Going to Michigan and New York Sites

[170] Regarding the non-GTA waste currently going to Michigan and New York sites, the Commissioner indicates that such waste will continue to be disposed of in the United States in and after 2002 and should therefore be excluded from demand in Ontario. Referring to the practice of price discrimination, the Commissioner points out that there is no reason to believe that the lower Tipping Fees offered to GTA Transfer Stations by Ontario landfills with excess capacity would be offered to non-GTA Transfer Stations. Hence, there is no basis for assuming that the non-GTA waste currently going to Michigan and New York would be diverted back to Ontario. Indeed, if there is competition between those sites and Ontario sites, the American sites would likely reduce their Tipping Fees to non-GTA Transfer Stations to retain their custom. Accordingly, the Tribunal cannot conclude that non-GTA waste would be diverted to Ontario disposal sites even if Tipping Fees for ICI Waste from the GTA came down.

(e) Waste Currently Going to Britannia Site in Ontario

[171] Finally, Professor Baye excludes all waste going to the Britannia site in Ontario from demand because information from CWS indicated that the site would close in 2007. More recent information indicates that the site will close in 2002, and accordingly the Commissioner's reconciliation is consistent with that of the respondents and includes the Britannia volume. Since Britannia has been unable to accept any ICI Waste from the GTA, its capacity is appropriately excluded from supply.

(f) GreenLane

[172] There is some confusion whether Professor Baye adequately treats the volumes of ICI Waste from the GTA going to GreenLane and the capacity of that site. His table shows a substantial number of tonnes of annual capacity in supply but no volumes actually going to that site in demand. It is clear, however, that his annual capacity number is a net figure and takes into account the non-GTA waste going there. Accordingly, Professor Baye indicates that a substantial number of tonnes of annual capacity would be available at GreenLane to accept ICI Waste from the GTA. Therefore, his figure does not take into account the current volume of such waste currently going to GreenLane.

[173] Professor Hay's analysis excludes GreenLane's capacity entirely from supply, based on Professor Baye's opinion that GreenLane's prices are high and that it would not attract any additional waste from the GTA if tipping fees declined. He includes the annual volume of ICI Waste from the GTA currently going to GreenLane in his analysis of demand for disposal at Ontario sites that can accept such waste, on the theory that if prices declines, that waste would go elsewhere in Ontario. Professor Hay excludes all non-GTA waste going to GreenLane from demand.

[174] The Commissioner's reconciliation attempts to resolve the matter by putting all of the volumes disposed of at GreenLane into demand, i.e. both the ICI Waste from the GTA and the non-GTA waste. The Commissioner then argues that the site's total annual capacity (262,500 tonnes) should be included in supply.

[175] In the Tribunal's view, Professor Hay understates the capacity at GreenLane to accept ICI Waste from the GTA in the future. It accepts the Commissioner's reconciliation as more complete than the analysis of either Professor Baye or Professor Hay and it finds that there will be excess capacity at the GreenLane site for ICI Waste from the GTA above the volumes thereof currently received.

(g) Essex-Windsor

[176] Up to now, Essex-Windsor has taken no waste from the GTA because of restrictions on its service area. In 1999, its board of directors allocated 100,000 tonnes of unutilized capacity to non-local customers. Accordingly, Professor Baye includes that non-local capacity in his reckoning of capacity available to accept ICI Waste from the GTA. Professor Hay excludes that capacity.

[177] The Commissioner's reconciliation adds Essex-Windsor's total capacity (320,000 tonnes) to supply even though only 100,000 tonnes thereof would be available for out-of-county waste, and correspondingly adds the actual total volumes (none of which is ICI waste from the GTA) disposed there in demand.

(h) Petrolia

[178] The Commissioner includes the CWS Petrolia site which Professor Baye ignored. The Commissioner adds this capacity on the supply side because the volume of ICI Waste going to this site is included in the Commissioner's assessment of the demand for non-GTA waste going to this site. The Tribunal agrees that this treatment is appropriate.

(2) Likelihood of Future Expansions

[179] It appears that the landscape for disposal capacity in Ontario will change in the near future. First, many landfills are expected to close while others are expected to undergo expansions. Overall, it appears that these changes will result in additional disposal capacity in Southern Ontario for ICI Waste from the GTA.

[180] The Keele Valley landfill owned by the City of Toronto is scheduled to close by 2002. This closure is expected to result in a loss of approximately 1,625,000 tonnes of Annual Capacity. As stated above, the LaSalle and Blackwell landfills owned by CWS are also scheduled to close (Blackwell is scheduled to close in February 2001 and LaSalle by spring 2002), which would lead to a further loss of 675,000 tonnes of Annual Capacity.

[181] However, as stated earlier, additional capacity is expected to arise in 2000-2001 through the construction of an additional capacity of 505,000 tonnes expected to be completed by the end of November, 2000 (transcript at 11:1355 (22 November 2000)). In addition, CWS has obtained approval to expand the Annual Capacity at its LaSalle landfill from 365,000 to 680,000 (see Amendment to Provisional Certificate of Approval (Waste Disposal Site), issued to Canadian Waste Services Inc. for the LaSalle Landfill Site by the Ministry of the Environment of Ontario: exhibit 363).

[182] Further, CWS prepared applications to expand its landfills of Warwick (near Sarnia) and Richmond (near Napanee). In addition to these applications, CWS has also applied to expand the service area of the Warwick landfill to cover all of Ontario, which would allow the Warwick landfill to receive ICI Waste from the GTA. As for the Richmond landfill, it is currently able to receive (and does receive) ICI Waste from the GTA (although that volume is directed or internalized).

[183] There is a dispute among the parties as to whether CWS's applications to expand its landfills of Warwick and Richmond are likely to be approved. The Commissioner submits that approval is likely on the basis of evidence from CWS's internal documents, the fact that the process leading to the approval is well underway and that host municipalities are supporting the expansions. The respondents submit that there is no guarantee as to the approval at this stage and that to conclude otherwise would be speculation.

[184] The Tribunal accepts that these applications are likely to be approved.

[185] Further, it appears that CWS, under the Environmental Assessment process, was required to submit ToR for the MOE. The ToR for the expansion of Warwick were approved on January 11, 2000 while the ToR for the expansion of Richmond were approved on September 16, 2000.

[186] The Tribunal relies on the testimony of Mr. Pepper, General Manager of the Essex-Windsor Solid Waste Authority and President of Solid Waste Association of North America, who stated that approval of the ToR is one of the most significant steps in the Environmental Assessment process:

MR. BRANTZ: ... Could you tell us what the importance is of getting the TOR approval?

MR. PEPPER: Well, from my perspective, when you get a terms of reference approval you have gone a long way -- first of all, you have identified the issues which means you are not trying to fight a lot of battles, you are looking at specific issues -- along the approval process.

transcript at 3:264 (8 November 2000).

[187] Mr. Pepper testified that support of the host municipality of the Essex-Windsor landfill resulted probably in a two-year saving in time in the approval process and that generally, a landfill was 75-80 percent of the way toward receiving final approval (transcript at 3:265-66 (8 November 2000)).

[188] Taking into account the landfill closures and expansions that are likely to occur, the Tribunal is of the view that there is likely to be excess capacity in Southern Ontario for ICI Waste from the GTA (see expert affidavit of M. Baye (12 October 2000): exhibit 348a at table 6).

(3) Implications for Market Definition

[189] In addition to its relevance for determining a substantial prevention of competition, the issue of excess capacity is, as noted earlier, relevant to market definition.

[190] The hypothetical monopolist approach asks whether a small but significant and non-transitory increase over the prevailing price would be imposed on a product or area. If the answer is negative, then a market has not been found. If the prevailing price is expected to drop because of excess capacity, then the application of the approach could fail to identify a market over which market power could be exercised. In such circumstances, it is appropriate to define the market based on the likely future price rather than the prevailing price.

[191] The evidence of a significant increase in capacity in Southern Ontario for ICI Waste from the GTA indicates to the Tribunal that Tipping Fees for such waste will likely fall in the absence of the transaction. Accordingly, the Tribunal is of the view that the market should be defined with reference to the likely future price rather than the prevailing price. Thus, as stated earlier, while a broader geographic market would be justified when premised on prevailing prices, the relevant market as identified using the hypothetical monopolist approach in the context of the lower future prices that are likely would be limited to Southern Ontario.

E. MARKET SHARES AND CONCENTRATION

[192] The Commissioner alleges that CWS, if it were permitted to take control over the Ridge, will then control approximately 70 percent of the landfill capacity in Southern Ontario capable of taking ICI Waste from the GTA. If CWS were not allowed to take control of the Ridge, CWS's share of landfill capacity will be just under 50 percent.

[193] After reviewing the various estimates of annual permitted capacity and demand, the Tribunal accepts the 1999 figures for total capacity and for capacity for ICI Waste from the GTA for all sites in Southern Ontario capable of accepting such waste, as provided by Professor Baye; it adds thereto the Petrolia capacity. For the 2002 year end, the Tribunal accepts the figures in the Commissioner's reconciliation as the best indication of total disposal capacity and Professor Baye's figures plus Petrolia for the capacities for ICI Waste from the GTA. On this basis, the Tribunal calculates the market shares of the various competitors based on their capacity as follows:

TABLE 1: Disposal Capacity at Sites in Southern Ontario Capable of Accepting ICI Waste from the GTA

Landfill Sites	Total Annual Capacity 1999 ¹	Tribunal's Estimates of Capacity Available for ICI Waste from GTA, 1999 ¹	Total Annual Capacity 2002 ¹	Tribunal's Estimates of Capacity Available for ICI Waste from GTA, 2002 ¹
LaSalle/Blackwell	675	*	0	*
Walker	617	617	617	617
Ridge	220	220	680	680
Warwick	56	56	750	750
Richmond	125	125	750	750
Essex-Windsor	320	0	320	100
GreenLane	262.5	*	262.5	*
Petrolia	65	*	65	*
Keele Valley	1497.4	568.2**	0	0
Total	3837.9	2153	3444.5	3156.5
Share of Capacity				
Ridge	6 %	10 %	20 %	22 %
CWS	22 %	23 %	44 %	48 %
CWS + Ridge	28 %	33 %	64 %	70 %

¹ all capacity figures in thousands of tonnes per annum at the year-end.

* confidential information

** equals actual ICI Waste accepted from GTA.

[194] Having reviewed the various estimates of the parties and their experts, the Tribunal is of the view that the figures presented in table 1 display the changes in capacity for ICI Waste from the GTA and permit the Tribunal to infer the proper market share estimates. On these figures, the Tribunal finds that while total capacity will decline at the Ontario disposal sites that can take ICI Waste from the GTA, the capacity for such waste at those sites will increase by approximately 47 percent between 1999 and 2002.

[195] These figures indicate that the combined share of capacity of CWS and the Ridge to accept ICI Waste from the GTA was approximately 33 percent in 1999. In 2002, this share will be 70 percent. If CWS is not permitted to acquire the Ridge, its share of capacity would be approximately 48 percent.

[196] The Commissioner also alleges that if CWS takes control of the Ridge, it will control approximately 80 percent of the total excess capacity for ICI Waste from the GTA. In this regard, the Commissioner relies on Professor Baye's calculation of the distribution of total excess capacity and the Herfindhal indicies with and without the merger. Professor Baye's estimates show that at the end of the 2002 CWS will control 63.6 percent of the total excess capacity if it does not control the Ridge and 85.8 percent if it does (expert affidavit of M. Baye (12 October 2000); exhibit 348a at table 7). Having accepted above Professor Baye's capacity estimates and shares thereof, the Tribunal also accepts his calculation of the distribution of excess capacity.

[197] In the Chatham-Kent area, the Ridge and CWS' Gore are the two local landfills that compete for solid waste generated in Chatham-Kent. Therefore, if it retains the Ridge, CWS will control 100 percent of the Chatham-Kent disposal market.

F. CONCLUSION OF THE TRIBUNAL

(1) Substantial Prevention of Competition

[198] The Commissioner's reconciliation attempts to correct certain shortcomings in Professor Baye's capacity analysis, and to treat supply and demand symmetrically to resolve confusion. The Commissioner's reconciliation produces an excess capacity of 393,119 tonnes, much less than Professor Baye's estimate (1.2 million tonnes), yet much larger than Professor Hay's expected deficit of 1.68 million tonnes. If the Commissioner's reconciliation is correct, there would still be downward pressure on Tipping Fees at disposal sites in Southern Ontario that accept ICI Waste from the GTA.

[199] The Tribunal agrees that Residential Waste is appropriately excluded from the analysis of demand given the contracts with Republic and Onyx negotiated by the City of Toronto. Moreover, the Tribunal accepts that the planned expansions of the Warwick and Richmond sites are likely to occur although the required evaluation process under environmental legislation and regulation has not been completed.

[200] The Tribunal also accepts the Commissioner's argument concerning price discrimination. In light of the evidence of the practice of price discrimination, the fact that excess capacity may lead a disposal site in Ontario to reduce its Tipping Fee for ICI Waste from a GTA Transfer Station does not, in and of itself, indicate that this site would reduce its Tipping Fee to other Transfer Stations. Accordingly, on the evidence presented, the Tribunal cannot conclude, as suggested by the respondents, that non-GTA waste currently going to Michigan and New York would be permanently disposed of in Ontario at those sites where Annual Capacity will increase due to the anticipated expansions and reallocations of unused capacity.

[201] Finally, the Tribunal finds a difficulty in Professor Hay's conclusion that lower Tipping Fees in Ontario would attract non-GTA waste and hence put upward pressure on Tipping Fees in Ontario. First, the Commissioner does not argue that Tipping Fees in Southern Ontario will fall, only that Tipping Fees for ICI Waste from the GTA would fall but for the transaction. Second, if Professor Hay's conclusion were correct, then, as the Commissioner points out, Tipping Fees could never fall. The Tribunal agrees with the Commissioner that Professor Hay's approach seems to confuse a change in demand with a change in quantity demanded.

[202] As shown above in table 1, the Tribunal accepts that the supply of disposal capacity in Southern Ontario at sites capable of accepting ICI Waste from the GTA at the end of 2002 is 3,444,500 tonnes per annum as shown in the Commissioner's reconciliation. This represents a decline of approximately 10.25 percent over total capacity at such disposal sites in 1999. However, as noted above, the capacity for ICI Waste from the GTA will increase by approximately 47 percent at those sites.

[203] The Tribunal is of the view that Professor Hay's estimate of demand for disposal in Southern Ontario is flawed principally as it includes volumes currently going to Michigan and New York sites that the Tribunal concludes will not likely be diverted to Southern Ontario. This error leads the Tribunal to adopt the estimate of demand (i.e., demand for disposal at those Southern Ontario sites capable of accepting ICI Waste from the GTA) presented by the Commissioner, i.e., 3,051,381 tonnes per annum, even though this estimate is significantly higher than the figure advanced by the Commissioner's expert (Professor Baye estimates demand to be as low as 1,894,395). Therefore, the Tribunal accepts the Commissioner's estimate of 393,119 tonnes of excess capacity (which equals 11 percent of total capacity) and concludes that there is likely to be downward pressure on Tipping Fees for ICI Waste from the GTA in the absence of the transaction.

[204] As stated above, the capacity of the Ridge will increase from 220,000 tonnes to 680,000 tonnes by 2002. The Tribunal finds that the acquisition of the Ridge by CWS will prevent the Ridge (with its 22 percent share of capacity for ICI Waste) from providing competition for ICI Waste from the GTA within Southern Ontario. The Tribunal is of the view that an independent Ridge would provide competition against other landfills such as Warwick and Richmond and in light of the expansions, would cause Tipping Fees for ICI Waste from the GTA to fall toward marginal costs at those sites. The factors considered above under section 93 of the Act by the Tribunal make it unlikely that such competition will come from other industry participants. Accordingly, the Tribunal concludes that by increasing CWS' expected significant share of excess capacity (from 64 percent to 86 percent), the acquisition of the Ridge enhances CWS' market power over such capacity and prevent competition substantially.

[205] The Tribunal is also of the view that the same conclusion applies to Chatham-Kent. Indeed, the excess capacity at the Ridge would, in the Tribunal's view, lead to greater competition and lower Tipping Fees for ICI Waste from Chatham-Kent. However, as the Gore landfill in Chatham-Kent is owned by CWS, the acquisition of the Ridge by CWS would prevent such competition from occurring. As these two sites are the only permanent disposal sites in Chatham-Kent, the Tribunal concludes that the transaction will lead to a likely substantial prevention of competition.

(2) Substantial Lessening of Competition

(a) Greater Toronto Area ("GTA")

[206] The Commissioner submits that the acquisition of the Ridge by CWS will result in a substantial lessening of competition in the disposal of ICI Waste from the GTA. The Commissioner submits that there are two ways in which this substantial lessening will occur. First, the acquisition enables CWS to increase Tipping Fees above those levels that would occur absent the acquisition.

[207] Second, even if the acquisition did not give CWS market power in disposal, it would nonetheless be able to raise Tipping Fees and recoup the losses by effecting a "cost/price squeeze" in the collection of ICI Waste in the GTA.

[208] The respondents argue that the acquisition does not enable CWS to raise Tipping Fees and, as a result, CWS will not be able to exploit that market power in the GTA collection market.

[209] As shown in table 1, the Tribunal finds that, with the acquisition of the Ridge, CWS will have 70 percent of the capacity available for ICI Waste from the GTA at those sites in Southern Ontario that can receive such waste. Without the acquisition, CWS would have only 48 percent of that capacity.

[210] The respondents cite Professor Hay's evidence that any increase in Tipping Fees by CWS would result only in more waste going to the United States. Based on its analysis of the geographic market, the Tribunal is satisfied that disposal sites in Michigan and New York are not part of the relevant market for the purpose of evaluating market shares arising from this acquisition. Having regard to the factors considered under section 93 above, the Tribunal concludes that CWS will not be constrained in setting its Tipping Fees by competition from either new entrants, because entry barriers are high, or from existing competitors in Ontario who are either too costly currently (Essex-Windsor, GreenLane) or capacity-constrained (Walker).

[211] The Tribunal does not regard the American sites as effective competitors now. Such non-directed ICI Waste that they currently receive from the GTA is largely due to the non-competitive Tipping Fees in Ontario. As these fees would likely fall due to the developing excess capacity, the Tribunal would expect the American sites to receive less such waste. In the Tribunal's view, these sites do not constrain Tipping Fees for ICI Waste from the GTA currently or prospectively.

[212] In his review of substantial lessening of competition, Professor Baye compares the combined transportation and disposal cost of shipping ICI waste from the GTA to the Ridge with the cost to the City of Toronto of shipping waste to Carleton Farms under the contract with Republic in 2002. He concludes that CWS could easily raise its Tipping Fee by 10 percent to the City of Toronto and still be lower than Carleton Farms' Tipping Fee. He also concludes that the Michigan, Walker, Essex-Windsor and GreenLane are, for various reasons, poor substitutes for the City (expert affidavit of M. Baye (12 October 2000): exhibit 348a at paragraphs 84-93).

[213] However, the Ridge received no ICI waste from the City of Toronto in 1998 or 1999. Accordingly, the Tribunal regards Professor Baye's comparison for the City of Toronto as hypothetical and uninformative. Aside from Professor's Baye's comparison, the Tribunal accepts the Commissioner's allegation that the acquisition substantially lessens competition in the disposal of ICI Waste from the GTA.

[214] In the second scenario, the Commissioner begins by assuming, in effect, that the demand for disposal is so price-sensitive that CWS's 10 percent post-acquisition price increase forces Transfer Stations in the GTA to dispose of their ICI Waste at competing sites, which results in significant revenue loss in its disposal business. Thus, the acquisition of the Ridge does not give CWS the power to raise Tipping Fees profitably in the disposal market; the strategy is profitable only because of the increased

collection revenue it obtains after squeezing its collection competitors. Clearly, the vertical link is the key to the Commissioner's concern; if CWS were not integrated into the ICI Waste collection business in the GTA, the acquisition of the Ridge would not, in this scenario, lead to a substantial lessening of competition in disposal.

[215] Yet in his testimony in which he characterizes CWS as a monopoly post-merger, and in his expert report, Professor Baye emphasizes that the squeeze in collection can only be effected if the acquisition of the Ridge gives CWS market power in disposal. He states at paragraph 101 of his report (exhibit 348a):

The higher tipping fees that are likely to result in the disposal market, coupled with the fact that CWS is the only vertically integrated ICI collector in the GTA collection market, would be likely to substantially lessen or prevent competition in vertically related markets.

[216] It appears to the Tribunal that Professor Baye is asserting that market power in disposal is required to effect a squeeze in collection. However, the Commissioner does not premise his argument on market power in disposal; indeed, the Commissioner's premise in this scenario is that CWS does not have market power in the disposal market after acquiring the Ridge.

[217] The Commissioner also asserts that CWS's higher Tipping Fees would be imposed on independent Transfer Stations in the GTA who would pass the increases in disposal cost on to

... independent haulers in the GTA who compete against CWS in ICI collection. This increase in rivals' costs in ICI collection would ultimately force independent ICI haulers in the GTA to raise their prices for ICI collection services.

Memorandum of argument (final argument) of the Commissioner at paragraph 162.

In the Commissioner's approach, it is only through independent transfer stations that do not go elsewhere in response to CWS's higher Tipping Fees that the squeeze is effected.

[218] For this argument to succeed, the Commissioner needs to assume that enough such Transfer Stations would continue to tip ICI Waste from the GTA at CWS sites and pass on the cost increases to independent collectors to make the squeeze effective. If this assumption is warranted, it suggests that CWS does have the power to increase Tipping Fees profitably in the upstream market, contrary to the Commissioner's basic premise for this scenario.

[219] At paragraph 102 of his report (exhibit 348a), Professor Baye suggests that, as a result of the merger of the CWS and BFIL collection assets in Toronto, CWS will have market power in collection:

... Overall, both of these markets [Eastern Toronto commercial market and Eastern Toronto market] are highly concentrated, with the top three firms in each market accounting for more than 75% of the commercial waste collected.

[220] However, the Commissioner claims that the acquisition of the Ridge will give CWS market power in disposal, not in collection.

[221] The Commissioner's scenario cannot be ruled out, however. It may indeed be profitable for CWS to raise disposal prices, accept losses in disposal and recoup them by exercising market power in collection. If this is the case, however, then it would be even more profitable for CWS simply to raise its collection prices for ICI Waste in the GTA. This would indicate that a substantial lessening of competition is likely in ICI Waste collection in the GTA without a squeeze.

[222] In addition to denying that a squeeze is possible, the respondents point out that the Commissioner should not have consented to CWS's acquisition of BFIL's collection business in the GTA if he was concerned that CWS would attempt to squeeze out its collection competitors.

[223] It appears to the Tribunal that the Commissioner's expectation of a squeeze absent market power in disposal is contradicted by Professor Baye. Moreover, the Commissioner does not adequately explain the role of independent Transfer Stations in effecting the squeeze. Finally, the Tribunal is of the view that if the acquisition of the Ridge by CWS made a squeeze possible, it would result in a substantial lessening of competition in collection, which the Commissioner does not allege.

[224] Accordingly, on its view of the factors in section 93, the Tribunal is satisfied that the acquisition of the Ridge by CWS enhances market power and substantially lessens competition in the disposal of ICI Waste from the GTA. However, the Tribunal does not find that the ability to effect a squeeze in collection constitutes a substantial lessening of competition in disposal.

(b) Chatham-Kent Area

[225] The Commissioner also submits that the acquisition of the Ridge Landfill by CWS will create a monopoly in the disposal of SNHW but concludes that Residential Waste is not relevant because of the Ridge Host Community Agreement. As CWS already owns the Gore landfill site, the merger will substantially lessen competition for ICI Waste disposal as there is no effective remaining competition and little prospect of entry. Indeed, the Ridge and CWS's Gore are the two local landfills that compete for solid waste generated in Chatham-Kent. Therefore, if it retains the Ridge, CWS will control 100 percent of the Chatham-Kent disposal market. The Commissioner notes that even the respondents' expert, Professor Hay, acknowledged that allowing CWS to take control of the Ridge would create an anti-competitive situation in Chatham-Kent.

[226] The respondents dispute this allegation and submit that the Gore landfill is a small facility with an Annual Capacity limit of 40,000 tonnes per year. They also point out that a significant percentage of the waste sent to the Gore comes from the Chatham-Kent area. Further, they argue that waste transfer facilities exist in Chatham-Kent and that municipal landfill facilities are available.

[227] The respondents refer to the Transfer Station operated by Waste Wood Disposal Limited in Dresden and to a Transfer Station in Tillbury operated by Environmental Services Inc. It appears that these businesses handle very small amounts of ICI Waste from Chatham-Kent, which suggests that these areas do not have enough disposal capacity to restrain a price increase at the Ridge/Gore sites. In any

event, Transfer Stations are only intermediate disposal facilities and must make arrangements for final disposal. No information was provided on where these stations dispose or would likely dispose of their waste in response to an increase in Tipping Fees at the Ridge/Gore sites.

[228] The respondents also submit that the Ridge Host Community Agreement with BFIL, the previous owner of the Ridge, provides for the disposal of up to 35,000 tonnes of waste at the Ridge by the Municipality at a fixed Tipping Fee (see Host Community Agreement with Chatham-Kent: exhibit 157).

[229] The respondents note that the Gore site will close in the next five years and that new options for disposal will develop. Accordingly, they submit that there will be sufficient discipline to negate any likelihood of a substantial lessening of competition.

[230] As to future events, the respondents observe that BFI Canada collects significant volumes of ICI Waste generated in Chatham-Kent and disposes this waste at the Ridge. It can certainly look after its own interests in the event of a price increase. The respondents state that BFI Canada, given its management strength, could readily determine alternate disposal options in the event of a price increase and they suggest that BFI Canada would make greater use of the Essex-Windsor municipal site. The Commissioner does not address this issue. The Tribunal is of the view that the respondents' submission regarding BFI Canada's options is not supported by the evidence.

[231] It appears that BFIL (now BFI Canada) collected a significant amount of ICI Waste generated in Chatham-Kent in 1999 and delivered it to the Ridge. The remaining ICI Waste was collected and delivered to landfill sites by small collectors and many small waste generators. While BFI Canada handles significant volumes that might make a price increase by CWS at the Ridge and Gore unprofitable if those volumes were lost, no evidence presented at the hearing suggests that BFI Canada would or would likely switch to Essex-Windsor. Moreover, given the evidence of price discrimination, CWS might be expected to charge different Tipping Fees to different collectors in Chatham-Kent in order to retain their custom. Thus, there is insufficient evidence for the Tribunal to find that Essex-Windsor would attract the BFI Canada volumes and hence restrain CWS from imposing an across-the-board price increase.

[232] As stated above, the respondents emphasize the expansion of facilities by Waste Wood Disposal Limited. The proprietor, Mr. Smith, indicated his intention to expand the operations of his Transfer Station in conjunction with the development of a materials recycling facility. The respondents argue that the recycling and the profits therefrom would permit Waste Wood Disposal to tip the residual waste at the Ridge or Gore landfills at a lower overall cost owing to the lower waste volumes. Accordingly, Waste Wood Disposal would be able to provide a competitive alternative to straight disposal at these sites. Mr. Smith indicated that he could use his current equipment to ship waste to Michigan for final disposal.

[233] It is not clear to the Tribunal that this plan would likely defeat or prevent a significant price increase by CWS in Chatham-Kent. Mr. Smith indicated that his expansion would be profitable if he could charge a Tipping Fee close to that being charged currently to many Chatham-Kent customers by the Ridge and Gore sites. However, the respondents state that Waste Wood Disposal is now paying much less at the Gore site, which may be the reason why Mr. Smith views this expansion as not in his immediate plans.

[234] It appears to the Tribunal that expansion by Waste Wood Disposal is predicated on a post-merger price increase, rather than offering any significant restraint thereto. As the respondents offer no other evidence of entry, the Tribunal can conclude only that there will likely be a significant lessening of competition for ICI Waste disposal in the Chatham-Kent area.

VI. ORDER

[235] For these reasons, the Tribunal hereby orders that the Commissioner's application for an order under section 92 of the Act is allowed.

VII. REMEDY

[236] In view of this order, the Tribunal will shortly direct counsel to attend a pre-hearing conference to determine a date for a remedy hearing.

DATED at Ottawa, this 28th day of March, 2001.

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

(s) W.P. McKeown

APPEARANCES:

For the applicant:

The Commissioner of Competition

Donald Houston

André Brantz

W. Michael G. Osborne

For the respondents:

Canadian Waste Services Holdings Inc.

Canadian Waste Services Inc.

Waste Management, Inc.

Lawson A. W. Hunter, Q.C.

Shawn C. D. Neylan

Nicolas McHaffie

Danielle K. Royal

For the intervenor:

The Corporation of the Municipality of Chatham-Kent

Brian Knott