

THE COMPETITION TRIBUNAL

IN THE MATTER OF an application by the Director of Investigation and Research under sections 92 and 105 of the *Competition Act*, R.S.C. 1985 c. C-34 as amended.

AND IN THE MATTER OF an acquisition by Canadian Waste Services Inc. of certain non-hazardous solid waste management assets of WMI Waste Management of Canada, Inc. in Edmonton, Alberta

BETWEEN:

THE DIRECTOR OF INVESTIGATION AND RESEARCH

Applicant

- and -

**CANADIAN WASTE SERVICES INC. and
CAPITAL ENVIRONMENTAL RESOURCE INC**

Respondents

NOTICE OF APPLICATION FOR A CONSENT ORDER

TAKE NOTICE THAT:

1. Pursuant to sections 92 and 105 of the *Competition Act* (the "*Act*"), the applicant, the Director of Investigation and Research, by his delegate, the Senior Deputy Director of Investigation and Research, (the "Director") will make an application on a day to be fixed, to the Competition Tribunal, Royal Bank Building, Suite 600, 90 Sparks Street, Ottawa, for:

a) An order, on consent of the respondents, in accordance with sections 92 (1)(e)(ii), (iii) and 105 of the *Competition Act* directing that:

1) the respondent Canadian Waste Services Inc ("CWS") with respect to its acquisition (the "merger") of the non-hazardous solid waste management business of WMI Waste Management of Canada, Inc ("WMI") carried on in the Edmonton, Alberta market (the "acquired business") do complete the merger and operate the acquired business subject to:

a) the divestiture of certain commercial lift on board routes and appurtenant equipment by the assignment of service contracts and other related assets respecting such customers whether those of CWS or acquired from WMI to the respondent Capital Environmental Resources Inc ("CER");

b) the divestiture of the Strathcona transfer station to CER;

c) the execution of a landfill tipping agreement (the "tipping agreement") as referred to herein which will, *inter alia*, provide CER with cost based access to the Ryley, Alberta landfill site, heretofore exclusively operated by CWS, and provide competitive volumes of waste to CER for such purposes;

2) the respondent CER do also execute the Tipping Agreement; and

b) Such further or other order as the applicant and the respondents, on consent, may advise or the Tribunal considers appropriate.

AND TAKE NOTICE THAT:

2. In support of this application for a consent order, the Director will rely upon the draft consent order attached to the Affidavit of Lourdes Da Costa as Schedule "A" thereto, the said Affidavit of

Lourdes Da Costa as aforesaid, the Consent Order Impact Statement filed, the Consent of the Parties to this application, filed, and such other material as counsel may advise.

3. The name and address of the persons against whom the consent order is sought are:

a) Canadian Waste Services Inc.,
1275 North Service Road West,
Suite 700,
Oakville, Ontario, L6M 3G4.

b) Capital Environmental Resource Inc.
500 Rennie St.
Hamilton, Ontario
L8H 3P6

4. The applicant and respondents request that this application be heard in the English language in Ottawa.

5. The applicant and respondents request, in accordance with Rule 72 of the *Competition Tribunal Rules* and Rule 6 of the *Federal Court Rules*, that the service requirements of the *Competition Tribunal Rules* be dispensed with.

6. The applicant and respondents request, subject to order, that no oral evidence will be given at the hearing of this application and that the evidence will be limited to the testimony by affidavit.

DATED at Hull, Quebec this *6th* day of March, 1998.

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STATEMENT OF GROUNDS AND

AGREED MATERIAL FACTS

I. INTRODUCTION

1. The Director of Investigation and Research ("the Director") brings this application for a consent order (the "consent application") on the grounds that the acquisition (the "merger") by Canadian Waste Services Inc. ("CWS") of the non-hazardous solid waste management business of WMI Waste Management of Canada, Inc. ("WMI") carried on in the Edmonton, Alberta market, (hereinafter referred to as the "acquired business"), prevents or lessens, or is likely to prevent or lessen, competition substantially in the provision of certain non-hazardous solid waste management services in Edmonton, Alberta, in that:

a) with respect to the collection services business the merger will result in market dominance by CWS in the collection lift on board market based upon the combined market shares of the merging entities which, coupled with high barriers to entry, will impede effective entry of other potential competitors; and,

b) with respect to the disposal services business relating to municipal solid waste the merger will result in market dominance by CWS since it will control both primary commercial sanitary landfill sites in the Edmonton market, West Edmonton and Ryley; due to the extensive regulatory controls, costs and delays in opening new landfill sites, barriers to entry will be very high and actual entry will be foreclosed; and there will be no effective remaining competition. Moreover control of the disposal business will provide CWS with the ability, through vertical integration to dominate the commercial lift on board collection business and further reinforce the substantial lessening of competition in that collection market as aforesaid.

2. The Director submits herewith a draft order, consented to by the respondents, (the "draft consent order") which, if implemented, will eliminate the substantial lessening of competition resulting from the merger.
3. The within Statement of Grounds and Agreed Material Facts form the basis of the consent application. CWS and the Director have agreed to the facts set out herein solely for the purposes of this consent application.

II. THE PARTIES

4. The applicant is the Director appointed under section 7 of the *Competition Act* ("Act") and is the sole person authorized to make this application to the Competition Tribunal. The Senior Deputy Director of Investigation and Research is authorized, pursuant to subsection 8(2) of the Act, and Order in Council P.C. 1994-1449, dated August 30, 1994, to exercise the powers and perform the duties of the Director in respect of this matter.
5. The respondent CWS is a corporation incorporated pursuant to the laws of the Province of Ontario, having its head office or principal place of business in Oakville, Ontario. CWS is a wholly owned subsidiary of USA Waste Services, Inc., ("USA Waste") a corporation existing under the laws of the State of Delaware.
6. CWS first entered the Canadian marketplace in 1996 through several acquisitions, the first significant one being the acquisition of the non-hazardous solid waste management business of Philip Environmental Inc. in August 1996. CWS subsequently purchased Laidlaw Waste Systems Ltd and Laidlaw Waste Systems (Canada) Ltd. from Allied Waste Holdings (Canada) Ltd ("Allied") in March 1997 (the "Allied acquisition"). It operates non-hazardous solid waste collection and disposal facilities in Ontario, Quebec and western Canada.

7. The respondent Capital Environmental Resource, Inc, ("CER") is a corporation incorporated pursuant to the laws of Ontario, with a head office or principal place of business in Hamilton, Ontario. It is a person against whom an order is sought in the consent application, and consents to the draft consent order insofar as it directs it to enter into the tipping agreement as hereinafter set out.

8. CER is a subsidiary of Branard Investment Corp., a company formed by Philip Fracassi and Allen Fracassi, principals of Philip Services Inc. (formerly Philip Environmental Inc.), a substantial Canadian environmental recovery, salvage and waste collection operator. CER has agreed with CWS to, inter alia, :
 - a) undertake the purchase of the divested assets and the performance of any contractual obligations pertaining thereto, respecting the merger referred to in the draft consent order (the "divested business");

 - b) purchase the assets ordered to be divested by the consent order made by the Competition Tribunal dated April 16, 1997 in the matter of *The Director of Investigation and Research v Canadian Waste Services Inc, CT-97/1* (the "Allied consent order");

 - c) purchase other waste management assets in other local markets in Canada agreed to be divested by CWS at the request of the Director obtained from WMI concurrently with the merger;

 - d) purchase a 50% interest in Western Canadian Waste Services, Inc, ("WCW") from USA Waste and reorganize the ownership of WCW so that it is now a fully owned subsidiary of CER, through which the latter operates a waste collection and disposal business in Edmonton, Alberta.

9. WMI is a corporation incorporated pursuant to the laws of Canada having a head office or principal place of business at Toronto, Ontario.

III. THE TRANSACTIONS

A. The Merger

10. The merger involves the purchase of certain collection and disposal assets, including trucks, containers, administration and maintenance garages or hubs, a transfer station, landfill site, as well as customer contracts and employees comprising the acquired business in Edmonton.
11. Without the procedures outlined in the draft consent order, the merger will likely substantially prevent or lessen competition in the provision of solid non-hazardous waste management services as described in paragraph one hereof.

B. Other Relevant Transactions

12. On April 8, 1997, CWS and WMI made a short-form filing pursuant to section 121 of the *Competition Act* (the "Act") with respect to the merger, and the purchase of other solid non-hazardous waste management assets of WMI in Vancouver, British Columbia; Calgary and Red Deer, Alberta; Toronto, Barrie, Kitchener and Belleville, Ontario; Trois-Rivières, Quebec; and further smaller markets, which were the subject of a Letter of Intent between CWS and WMI dated March 17, 1997 (the "agreement").
13. The agreement provided that the transactions comprised therein were to close on May 15; however this was subsequently postponed to June 6, 1997.
14. Based on a preliminary examination and assessment of the agreement, the Director commenced a formal inquiry on June 4, 1997.

15. Over the past approximately 18 months, a significant proportion of the solid non-hazardous waste management business in Canada has been rationalized. Successive acquisitions by the principal integrated service providers have occurred in this period so that two such operators, Philip Environmental Inc. and Laidlaw Waste Systems, Ltd. ("Laidlaw") have withdrawn from the marketplace, and with the consummation of the agreement, WMI will also similarly effectively exit from almost all local markets in Canada.
16. The Director has formally or informally investigated each of these transactions.
17. The Allied consent order referred to in paragraph 8 hereof dealt with the CWS acquisition of all of the relevant waste collection and disposal assets of Allied and indirectly, those of Laidlaw previously acquired by Allied on December 30, 1996.

IV. COMPETITIVE ANALYSIS

A. Product Market

18. Commercial lift on board collection services and disposal services at sanitary landfill sites are the relevant product markets in this application.
19. CWS is engaged in the business of providing solid non-hazardous waste management services to institutional, commercial, industrial, and residential customers located in Canada. Solid waste management services include the collection, compaction, transportation, recycling, resource recovery, transfer and disposal of non-hazardous solid waste.
20. The non-hazardous solid waste collection business is comprised of four distinct product markets :

a) the commercial lift on board market, also known as front-end service, involves the collection of containers of waste by front-end trucks from customers who generate a significant quantity of solid waste and are often restaurants, offices, and small commercial establishments.

b) the industrial market, also known as roll-off service, is required by industrial customers who generate large amounts of waste, which is often not compactable. The large containers used to collect this waste are loaded onto flat-bed trucks and taken to dry disposal sites. Dry disposal sites are not the subject of this draft consent order.

c) the residential market involves the collection of small quantities of waste from individual residences and apartments pursuant to contracts with cities, towns and municipalities. Contracts are generally awarded on the basis of tenders.

d) the recycling market involves the collection of recyclable solid waste from residences and apartments. Like residential service, this service is provided under contracts with cities, towns and municipalities, a significant portion of which are awarded on the basis of tenders.

21. Once collected, non-hazardous solid waste is disposed at either transfer stations or sanitary landfills. The provision of disposal services at such sites is a distinct market within the non-hazardous solid waste management business. Transfer stations are commonly used in urban centres as areas where waste is off-loaded into larger open top transport trailers which are then taken to landfills. Transfer stations and landfills are owned and operated either by municipal or regional governments or by private companies, some of whom are also involved in the collection of non-hazardous solid waste. Landfill sites that are open to the public are known as commercial landfills. The cost of disposal is a very significant component of the total cost of providing non-hazardous solid waste collection and disposal services to customers, and as such it is important for those companies who do not have their own disposal facilities to have access to transfer stations and landfills at competitive rates.

B. Geographic Market

22. This application concerns the Edmonton, Alberta market (the “relevant market”).

23. The relevant geographic markets for both commercial lift on board non-hazardous solid waste collection and disposal services are local in nature. The geographic limits of the collection market are circumscribed by such factors as permissible over the road payloads and other transport capacity limits and regulatory requirements, category, route density and arrangement of customers, and cost of disposal. In the collection business it is generally considered that the areal extent of the market to be served is demarcated by a distance of 50 kilometres from the relevant hub. In the disposal business proximity to the “collection shed”, measured by the time taken to travel to and from customers and then to disposal sites, and the extensive municipal and provincial operating and environmental controls are the principal determinants of the extent of the geographic market. A more distant landfill site located outside of an urban core, may be included in the relevant market if sufficient volumes can be consolidated at a local transfer station and subsequently transported to the landfill site, as with Strathcona and Ryley.

C. Nature of the Application

24. The agreement will result in a substantial lessening of competition in Edmonton. While the Director had concerns regarding other local markets arising out of the agreement, it was concluded that competition issues in other markets subject to the agreement have been satisfied by voluntary divestitures by CWS to CER, following arm’s length negotiations with respect thereto. Prior to such divestitures the Director examined the capabilities, intentions and the competitive impact thereon of CER and its principals.

25. The said divestitures consisted of:
 - a) assets acquired by CWS from WMI;
 - b) CWS assets;

- c) a 50% equity interest in WCW by CWS' parent USA Waste ;and
- d) a combination of some or all of the foregoing in various markets.

26. In addition to the divestitures as aforesaid, CER was also identified as a suitable purchaser for the assets to be divested by CWS pursuant to the Allied consent order of the Tribunal dated April 16, 1997.
27. Having identified CER as a suitable purchaser under the aforesaid conditions, the Director permitted CWS to transfer to CER certain commercial lift on board contracts acquired from WMI, and to add thereto other commercial lift on board contracts which provided a sufficient threshold, in combination with the acquisition of the Strathcona transfer station, and the provision of cost based access to the Ryley landfill site to enable CER (and its collection subsidiary WCW) to create a competitive alternative to CWS in Edmonton, and a platform for the fostering of continued competitive rivalry. In order to accelerate this process CER took possession of the divested business under an interim arrangement on June 6, 1997.
28. The negotiation of a suitable arrangement for access to the Ryley site was complex and extended. Final approval of all relevant parties did not occur until December, 1997.

D. Edmonton

(1) Assets

29. CWS's asset base in the market pre-merger included certain collection equipment including trucks, containers, a hub, customer contracts and access to a landfill site at Ryley, Alberta under a landfill operating agreement between it, as a successor to Laidlaw, and the Beaver Waste Services Management Commission ("Beaver"). Beaver is an Alberta municipal corporation which represents the interests of several municipalities located to the south and east of Edmonton. The Ryley site itself is located approximately 70 km southeast of Edmonton. WMI's asset base included certain collection equipment including trucks,

containers, a hub, as well as customer contracts in Edmonton. WMI also owned the West Edmonton Landfill site which is the primary waste destination site in Edmonton.

(2) Market Concentration

30. Regarding commercial collection, post-merger, CWS would hold approximately 81% of the market. The remainder of the collection market is held by a number of much smaller operators, and Browning Ferris Industries Inc. ("BFI"), a large multi national waste management operator, none of whom have significant market shares. Most significantly none of the remaining participants are vertically integrated back into disposal services.
31. CWS would also control approximately 78% of the disposal service activity (based on the amount of waste from Edmonton disposed of in 1996 at the three commercial sanitary landfills in the market), through control over the principal landfill sites. This share is likely understated since capacity limitations in the only other commercial landfill in Edmonton, a city owned site, Cloverbar, limit its ability to provide a competitive constraint.

(3) Section 93 Factors

(a) Foreign Competition

32. Edmonton is located too far from the international border for economic rivalry to be generated from a US base.

(b) Acceptable Substitutes

33. There are no acceptable substitutes for commercial lift on board waste collection other than privately owned enterprises. Although municipalities have the option of buying trucks and containers to provide waste removal services, this option would be confined to residential waste collection, unless there was a legislative scheme which permitted municipalities to enter into the commercial waste collection business. Furthermore, with

respect to any one of commercial lift on board, industrial, residential and recycling services, there are operational impediments to such services being a cost-effective substitute to any of the other alternatives. Customers would not switch to these alternatives in the face of a significant, non-transitory price increase.

34. The City of Edmonton is pursuing a substantial composting project designed to extend the life of its Cloverbar site. However, the composter will be reserved for residential waste and its tipping fee is not expected to be price competitive with West Edmonton and Ryley. Cloverbar itself is of limited availability either as a substitute or alternative competitor. It is not operated on a basis that would make large scale commercially sourced waste disposal competitive with the other sites operated by commercial waste collectors.

(c) Barriers to Entry

(i) collection:

35. Barriers to entry differ in each of the relevant aspects of the collection product markets. Barriers to entry in the commercial lift on board market are higher than in the other markets. Entry into this business is characterized by the need for a large critical mass of customers and route densities in order to establish and operate a viable business. In particular, a route has to have a large number of customers over a short driving distance. This is referred to as "route density".
36. Additionally, commercial lift on board business is often subject to exclusive long term contracts, with automatic renewal clauses, and sixty-day notice of early termination provisions. These contract terms may act as a barrier to entry since they inhibit the ability of a competitor to obtain customers.
37. Furthermore, the threat of selective price cutting by incumbents, facilitated by right of first refusal and other contractual terms, impedes the ability of new firms to establish route density, and thereby acts as a barrier to entry.

(ii) disposal

38. The establishment, operation and expansion of landfill sites is fraught with complex, costly, and lengthy regulatory approvals and controls. The fundamental requirement of environmental probity of any suggested site largely confines the choice of likely locations to a finite handful respecting the collection area that it must support. Thus the governmental and political barriers to entry to the disposal market are very high. Other than municipal operations, it is unusual for landfill sites to be operated on a non-integrated basis. Entry or expansion then, is unlikely to be timely or sufficient to prevent harm to competition.
39. Access to landfill sites at a competitive rate is important to aggressive entry into the collection market. Control of such sites, as a separate product market, provides advantages to obtaining a superior competitive position regarding other components of the waste management business. Post merger, CWS will control the principal disposal sites in the market, and can price on a preferential competitive basis through its integrated operations to deter entry. While BFI has a time limited short term preferential access arrangement to the West Edmonton site, this will not support competitive expansion.

(d) Effective Remaining Competition

40. Post-merger, without the divestiture sought herein, the only remaining competition in the commercial lift on board market will come from small fringe players and BFI, none of whom are vertically integrated back into disposal services.
41. In addition, absent the remedy, there will be no effective remaining competition in the municipal solid waste disposal market since the only other commercial sanitary landfill site in Edmonton is capacity constrained.

(e) Removal of Vigorous and Effective Competitor

42. WMI operated the West Edmonton site as part of its integrated services in the market. With respect to landfill disposal sites, Ryley is large and is functionally capable of extensive expansion consistent with applicable management regulations. Pre merger CWS competitively operated Ryley against the alternative sites on an integrated basis.
43. There had been aggressive price competition between WMI and CWS, as the successor to Laidlaw, in the provision of the solid non-hazardous waste management services in the market. Therefore, the merger removes a vigorous and effective competitor.

(f) Change and Innovation

44. The merger will have no material impact upon significant change and innovation in the Edmonton market. The increasing use and development of recycling in the waste management industry and its application to the market is expected to proceed apace. As heretofore pleaded, the advent of composter operations or other novel disposal schemes do not impinge upon the continued importance of the operation of traditional landfill sites. There is no suggestion that collection procedures are likely to be the subject of extensive innovative developments.

V. RELIEF SOUGHT

45. The Director has therefore concluded that the acquisition by CWS of WMI's solid waste management business in the market prevents or lessens, or is likely to prevent or lessen, competition substantially in the commercial lift on board collection market and the municipal solid waste disposal market. Because of vertical integration, the exercise of market power as a result of the substantial lessening of competition can most clearly be identified in the collection market because of the rolled in price of collection and disposal services to customers. High barriers to entry and high market shares are evident. Divestiture, rather than prohibition, or dissolution is the preferred remedy in order to ensure there is no substantial lessening of competition. Such remedy will serve to create a

viable business in the market by diminishing the dominant position of CWS post-merger, and providing a judicially mandated breach of the anti-competitive entry conditions that the merger would otherwise sponsor.

46. The Director has concluded that the resolution of the substantial lessening of competition can only be accomplished through the inclusion of significant, cost based access to a disposal site in the divested business. CER is prepared to enter the market through the acquisition of the divested business including access to the Ryley disposal site. In the interest of attaining a balance between the public interest in competition and the interests of third parties (some of whom are public entities) and the preservation of advantageous settled commercial relationships, the tipping agreement is an element of the divested business.
47. The tipping agreement, as described more fully in the Impact Statement filed herewith, will ensure that CER meets the concern set out in paragraph 43 hereof. The respondents have consented thereto and Beaver is satisfied with its terms. This will provide immediate competitive advantage to CER, not otherwise attainable, through assured waste disposal site access and assured waste flows therefor.
47. Accordingly, the substantial lessening of competition that would be likely to ensue from the agreement in the Edmonton market will be eliminated by the implementation of the draft consent order, which will restore effective competition, as explained more fully in the Impact Statement.
49. The Director therefore seeks, pursuant to sections 92 and 105 of the Act, the issuance of the draft consent order attached hereto to remedy the substantial prevention or lessening of competition in the relevant market.

DATED at Hull, Quebec this day of March, 1998.

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Research
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THE COMPETITION TRIBUNAL

IN THE MATTER OF an application by the Director of Investigation and Research, for an order pursuant to sections 92 and 105 of the *Competition Act*, R.S.C. 1985 c. c-34 as amended.

AND IN THE MATTER OF the acquisition by Canadian Waste Services Inc. of certain non-hazardous solid waste management assets of WMI Waste Management of Canada, Inc. in Edmonton, Alberta

BETWEEN:

THE DIRECTOR OF INVESTIGATION AND RESEARCH

Applicant

- and -

**CANADIAN WASTE SERVICES INC. and
CAPITAL ENVIRONMENTAL RESOURCE INC.**

Respondents

CONSENT ORDER IMPACT STATEMENT

1. This statement is filed by the Director of Investigation and Research pursuant to section 77 of the Competition Tribunal Rules. It describes the circumstances surrounding, and the anticipated effect on competition of, the draft consent order submitted by agreement of the parties to this proceeding. Unless otherwise expressly defined herein, terms used in this statement incorporate the meaning ascribed to them in the draft consent order.

NATURE AND PURPOSE OF THE PROCEEDING

2. The Director files with this statement, a statement of grounds and agreed material facts as part of the application for a consent order under sections 92 and 105 of the *Competition Act* (the “Act”).

3. As indicated in the statement of grounds, the Director has concluded that the acquisition by CWS of certain assets of WMI prevents or lessens, or is likely to prevent or lessen, competition substantially in the provision of commercial lift on board waste collection services and of non-hazardous municipal solid waste disposal services in Edmonton, Alberta.

4. Collection and disposal markets are defined as distinct product markets for competition purposes. However, since the cost of disposal (as a primary input into the prices charged for commercial lift on board services) is critical in a market where not all haulers are vertically integrated, a substantial lessening of competition in the disposal market has the effect of further reinforcing the substantial lessening of competition in the collection market.

5. Because of vertical integration, the exercise of market power as a result of the substantial lessening of competition can most unequivocally be identified in the collection market due to the rolled in price of collection and disposal services to final customers.

6. The Director has also filed a draft consent order. This order, if implemented, will eliminate the substantial prevention or lessening of competition resulting from the merger. The Director requests the Competition Tribunal’s approval of the draft consent order pursuant to section 105 of the Act to give effect to this agreement.

GENERAL DESCRIPTION OF THE DRAFT CONSENT ORDER

7. The draft consent order provides for a combination of divestiture and access obligations between CWS and a third party, Capital Environmental Resource Inc. (“CER”).

8. The draft consent order, designed to eliminate the substantial lessening of competition which would otherwise arise from the merger, provides for the divestiture of collection routes and the Strathcona transfer station, accompanied by a landfill access or tipping agreement ("tipping agreement") pursuant to which CWS will make available to CER access to the Ryley landfill site at a cost-based tipping fee calculated on an annual basis for a period of eight years terminating no later than December 31, 2005.

PROPOSED REMEDY

9. The proposed remedy which the Director seeks involves the divestiture of certain commercial lift on board collection routes and related assets such as trucks, containers, and service contracts, the Strathcona transfer station, as well as the execution of a tipping agreement in order to reduce CWS' market share and to enable the establishment of an effective vertically integrated competitor in the Edmonton market ("relevant market").

Divestiture of Commercial Lift on Board Routes

10. The Director has determined that the divestiture of certain commercial lift on board routes is a required element of an effective remedy to preserve competition in the relevant market because it provides CER, a new entrant, with a base of business from which to build route density and achieve the requisite economies of scale.

11. To address the substantial lessening of competition in the commercial lift on board market, CWS voluntarily agreed to divest eight commercial lift on board routes in Edmonton, aggregating \$4.9 million in annual revenues, plus three additional routes comprising the Western Canadian Waste business and related assets such as containers, trucks and service contracts. This divestiture was negotiated prior to the closing of the WMI Transaction on June 6, 1997, became effective simultaneously with the closing of the WMI Transaction, and was subject to an interim operating agreement between CWS and CER during a transition period.

Divestiture of Strathcona Transfer Station

12. The Strathcona transfer station is a necessary element of the divestiture package since it provides the requisite depot to which non-hazardous solid waste that has been collected can be initially taken and consolidated for subsequent shipment to the Ryley landfill.

13. This transfer facility is equipped to handle large volumes of waste and is located just southeast of the City of Edmonton, thereby facilitating accessibility to the Ryley landfill site, which is located approximately 70 km southeast of the City of Edmonton.

Access to Landfill Site

14. The Director has determined that the tipping agreement is a critical element of the remedy to preserve competition in the relevant market since it provides a third party, CER, with access to disposal under cost-based conditions.

15. The tipping agreement attached to the draft consent order as schedule B, provides CER with the right, subject to availability of authorized airspace, to tip non-hazardous solid waste (defined in the tipping agreement as "acceptable solid waste") originating from the Strathcona transfer station in Edmonton at the Ryley landfill site on a put or pay basis at a cost-based tipping fee for a period of eight years terminating on December 31, 2005. An addendum to the tipping agreement stipulates that, should the Ryley site have no further available authorized space, CER will have access to the West Edmonton landfill site under the same terms as the tipping agreement until December 31, 2005.

16. This period coincides with the remaining life of an ongoing Operating Agreement between CWS and The Beaver Regional Waste Management Services Commission ("Beaver"). The tipping agreement also provides that CWS will make available to CER at the Strathcona transfer station 85,000 tonnes per year of non-hazardous solid waste at a price linked to the annual tipping fee to enable CER to meet its annual minimum tip requirement of 120,000 tonnes, considered necessary to reach the commercially viable threshold.

17. The tipping agreement sets out a price to be paid by CER to CWS to dispose of waste at Ryley (the "tipping fee") which is based on the costs at the Ryley landfill site. In effect, CWS'

costs will flow through to CER. The objective is to put CER in approximately the same position as if it were the operator of Ryley. The pricing formula and the methodology upon which it is based has been verified by Doug Woodruff of Meyers, Norris, Penny, Chartered Accountants as being consistent with generally accepted accounting principles. The pricing formula will be applied on a yearly basis using volume and cost data from the previous annual period. Yearly changes to the tipping fee are in part capped by the consumer price index. The tipping agreement, as approved by the draft consent order, requires that any disputes between CWS and CER with respect to its terms and provisions be resolved through a specified and binding arbitration process.

ANTICIPATED IMPACT OF THE PROPOSED REMEDIES

18. The effect of the divestiture of collection routes coupled with the Strathcona transfer station is to reduce CWS' post-merger market share from 81% to approximately 51% based on commercial lift on board routes in 1996 and to restore effective competition in the relevant market for commercial lift on board waste. The divestiture provides commercial lift on board customers with an alternative service provider whose 30% market share approximates that previously held by WMI.

19. The effect of the execution of the tipping agreement is to reduce CWS' post-merger share, based on the amount of waste from Edmonton disposed of in 1996 at the three commercial landfills in the relevant geographic market, from 78% to approximately 58% and to remove control of two of these three sites from the hands of one operator, CWS. This will provide third party commercial lift on board collectors in Edmonton with the ability to negotiate tipping arrangements (subject to volume considerations) with either CWS at the West Edmonton site or with CER at the Strathcona transfer station and thereby maintain an effective level of competition for disposal.

20. Moreover, the divestiture of collection routes and the Strathcona station is a necessary but not sufficient condition for removing the substantial lessening of competition in the commercial lift on board market. Without a remedy in the disposal market, CWS would become the only vertically integrated competitor in the commercial lift on board market and would have an

increased incentive and ability to raise disposal prices to rival haulers in Edmonton, or to selectively raise prices to squeeze or impede independent haulers who attempt to compete with it in Edmonton.

21. The effect of the tipping agreement, in combination with the Strathcona transfer station, is to reinstate a vertically integrated competitor in the market. The tipping agreement replicates the effects of a complete divestiture of one of the landfill sites by maintaining two arms length operators capable of effectively competing for commercial lift on board customers.

22. Pre-merger, CWS and its predecessor, Laidlaw, were able to compete vigorously and effectively against WMI's local West Edmonton landfill site by using the Strathcona transfer station combined with the Ryley disposal option. A critical element to transporting waste to the more distant landfill site was the high level of tonnage consolidated at the Strathcona transfer station. The tonnage collected by CER in the divested collection business (representing approximately 30% of the commercial lift on board market) coupled with 85,000 tonnes to be transported to the Strathcona transfer station by CWS on a yearly basis, will provide CER with the necessary economies of scale to operate the Strathcona transfer station at competitive levels comparable to CWS pre-merger.

23. Furthermore, sufficient throughput at the Strathcona transfer station has a direct impact on the annual tipping fee calculated for CER's access to the Ryley landfill, since as provided by the pricing formula, a higher volume tipped in a given year will generate a lower tipping fee in the subsequent period, unless other factors significantly change the costs at the Ryley landfill site. A lower tipping fee in turn enables CER to be a more effective competitor in the collection business and thereby provides the incentive for CER to increase its market share.

24. The combination of collection routes, Strathcona transfer station and tipping agreement therefore maintains the same basic market structure as that which existed pre-merger, in that there will continue to be two relatively large, viable, vertically integrated and effective competitors in the market. The proposed remedy puts CER in a position to constrain a significant and non-transitory price increase by CWS.

25. The termination of the tipping agreement coincides with the termination of the current operating agreement between CWS and Beaver. At that time, CER as well as CWS and other potential bidders will have the opportunity to bid for the right to operate the Beaver landfill site. While CWS has waived its right to renew the term of the operating agreement, it is not barred, subject to possible competition analysis, from bidding for the right to operate Ryley after December 31, 2005. Appropriate notice provisions have been specified in the tipping agreement to enable the Director to review a potential extension of CWS' current status as the exclusive operator of the Ryley landfill before it occurs. Although CER is currently a new competitor to the market, its position as a vertically integrated player during its first eight years of operation will provide it with the opportunity to establish a strong franchise and thereby increase its chances of successfully bidding for the next term of the operating agreement with Beaver.

26. For all the above reasons, the combined divestiture and tipping agreement package ensures that any substantial prevention or lessening of competition which would have otherwise arisen as a consequence of the merger in relation to the provision of non-hazardous solid waste collection and disposal services in the commercial lift on board market in Edmonton will be eliminated.

27. Although made subject to approval and any required changes by the Competition Tribunal, in the interest of continued service to customers and the preservation of the integrity of the assets in question, the divestiture of collection routes and the Strathcona transfer station to CER effectively took place on June 6, 1997, simultaneously with the closing of the WMI transaction, and CWS and CER have been operating under the terms of the tipping agreement since October 1997.

MARKET INTEREST

28. The Director met and discussed the proposed remedy with interested market participants. Most particularly, the Director consulted and addressed the concerns in the proposed settlement with Beaver, the ultimate owner of the Ryley landfill, as well as the City of Edmonton, the largest customer of waste collection and disposal services in the market.

ALTERNATIVE TO THE SETTLEMENT

29. The alternative to the settlement proposed would be to proceed with a fully contested hearing of the Director's challenge to the merger as it relates to landfill access in the market, namely the divestiture of the West Edmonton landfill site, in combination with the fix it first divestiture of collection routes and the Strathcona transfer station. The Director has accepted the draft consent order for two reasons. First, the proposed collection divestiture and landfill tipping agreement will, in the Director's view, remove the substantial lessening of competition arising from the merger. Second, the draft consent order provides a more timely and certain outcome for customers of waste management services in Edmonton than litigated proceedings.

CONCLUSION

30. For the reasons presented herein, the Director recommends the settlement and asks the Competition Tribunal to approve the draft consent order.

THE COMPETITION TRIBUNAL

IN THE MATTER OF an application by the Director of Investigation and Research under sections. 92 and 105 of the Competition Act, R.S.C. 1985 c. C-34 as amended.

AND IN THE MATTER OF an acquisition by Canadian Waste Services Inc. of certain non-hazardous solid waste management assets of WMI Waste Management of Canada, Inc. in Edmonton, Alberta

BETWEEN:

THE DIRECTOR OF INVESTIGATION AND RESEARCH

Applicant

- and -

**CANADIAN WASTE SERVICES INC. AND
CAPITAL ENVIRONMENTAL RESOURCE INC**

Respondents

CONSENT ORDER

UPON THE application of the Director of Investigation and Research ("the Director"), pursuant to sections 92 and 105 of the Competition Act, R.S.C. 1985, c. C-34 as amended (the "Act"), for a Consent Order directing the divestiture of certain non-hazardous solid waste management assets encompassed within the acquisition and certain other remedies;

AND UPON READING the Notice of Application dated the 6th day of March, 1998, the Statement of Grounds and Agreed Material Facts attached thereto, the Consent Order Impact Statement, the Affidavit of Lourdes DaCosta, filed, and the consent of the parties filed herein;

AND CONSIDERING THAT the Director and the respondents have reached an agreement which is reflected in this Consent Order;

AND CONSIDERING THAT the Director declares himself satisfied that, on the basis of the considerations outlined in the Consent Order Impact Statement, the remedies provided herein, if ordered, will be sufficient to remove the substantial lessening or prevention of competition in the non-hazardous solid waste management and related businesses in the Edmonton, Alberta market, as described in the application.

AND UPON HEARING counsel for the parties in respect of this application;

AND IT BEING UNDERSTOOD by the parties that nothing in these proceedings shall be taken as an admission of any facts, submissions or legal arguments for any other purposes.

THE TRIBUNAL ORDERS THAT:

Application

1. The provisions of this order apply to the respondents and:
 - (a) each division, subsidiary, or other person controlled by the respondents and each officer, director, employee, agent or other person acting for or on behalf of the respondents with respect to any matter referred to in this order;
 - (b) The respondents' successors and assigns and all other persons acting in concert or participating with any of them with respect to the matters referred to in this order who shall have received actual notice of this order;

Divestiture

2. That the respondent Canadian Waste Systems, Inc ("CWS") with respect to its acquisition (the "merger") of the non-hazardous solid waste management business of WMI Management of Canada Inc ("WMI") carried on in the Edmonton, Alberta market (the "acquired business") do complete the merger and operate the acquired business subject to the divestiture of the following "divested business" (as referred to in subparagraphs (a) and (b)):

a) the divestiture of certain front end commercial lift on board routes and appurtenant equipment by the assignment of service contracts respecting customers whether those of CWS or acquired from WMI to the respondent Capital Environmental Resource Inc, ("CER") as listed in Schedule "A" hereto;

b) the divestiture of the Strathcona transfer station to CER;

c) the execution of the landfill tipping agreement as attached in Schedule "B" hereto;

3. The respondent CER do also execute the said landfill tipping agreement;

Divestiture Procedure

4. (a) CWS shall divest itself of all its right, title and interest of whatever character in the divested business by acknowledging by quit claim or other such declaration, a copy to be provided to the Director, that upon issuance of this order all conditions, restrictions, interim or other arrangements under which that portion of the acquired business that the divested business represents has heretofore been operated are terminated and full ownership of the divested business is vested in CER subject to and in accordance with this order.

(b) CWS shall provide a copy of the executed tipping agreement to the Director.

3. Notices, reports or other communications required or permitted pursuant to this order shall be in writing and shall be considered to be given if dispatched by personal delivery to the party to whom such notice is to be given or by registered mail or telecopier to the address or telecopier number below:

If to the Director:

Director of Investigation and Research
Bureau of Competition Policy
50 Victoria Street
Hull, Quebec K1A 0C9
Attention: William J Miller
Tel: (819) 997-3325
Fax: (819) 953-9267

If to the respondents:

Blake, Cassels & Graydon
Box 25
Commerce Court West
Suite 2800
Toronto, Ontario
M5L 1A9

Attention: Warren Grover QC
Counsel for the respondent CWS
Tel: (416) 863-2709
Fax: (416) 863-2653

Turkstra Mazza
15 Bold St
Hamilton Ont
L8P 1T3

Attention: Herman Turkstra
Counsel for the respondent CER
Tel: (905) 529-3476
Fax: (905) 529-3663

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

DATED AT OTTAWA, Ontario, this day of March, 1998.

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

SCHEDULE A

Schedule of Assets

| | |
|-------------------------------|---|
| Number of Customer Contracts: | 2477 |
| Annual Revenue: | \$3,853,524 |
| Number of Containers: | 3253 |
| List of Trucks (9 in total): | 1997 Volvo 1996 Volvo 1995 GMC 1994 GMC 1993 GMC 1991 GMC 1991 GMC 1991 Volvo 1993 IMC Picker |

Transfer Station, Strathcona County

| <u>Transfer Station Equipment</u> | <u>Original Cost</u> |
|-----------------------------------|---------------------------|
| Grizzly Crane | \$ 324,273 |
| Radio Base and Mobiles | 5,808 |
| Shop Equipment | 1,991 |
| Office Equipment/Computers | 26,826 |
| Transfer Station Trailers | 646,882 |
| Case Bobcat | 30,078 |
| Komatsu Forklift | 26,583 |
| MRF Equipment/Scale | 801,002 |
| Total | 801,002 |
| | <u>\$1,863,443</u> |

SCHEDULE B

LANDFILL TIPPING AGREEMENT

This Landfill Tipping Agreement ("LTA") is made this _____ day of _____, 199____, by and between Canadian Waste Services Inc. ("CWS"), and Capital Environmental Resource Inc. ("CER").

W I T N E S S E T H:

WHEREAS CWS has acquired from WMI a major landfill site in Edmonton Alberta ("WMIS");

AND WHEREAS CWS as a result of its acquisition of the shares of Laidlaw Waste Systems (Canada) Ltd. is the current Operator, operating under the terms of an Agreement dated January 5, 1995 ("Operator Agreement"), of the Ryley Regional Landfill Site ("RLS") owned or leased by Beaver Regional Waste Management Services Commission ("Beaver");

AND WHEREAS the Competition Bureau has alleged that the control of the WMIS and RLS is contrary to the provisions of the *Competition Act* section 92;

AND WHEREAS the only other landfill site available to tip ASW collected in Edmonton, except the landfill owned by the City of Edmonton, is the RLS;

AND WHEREAS CWS has sold to CER 8 front end routes in the City of Edmonton and the STS;

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AND WHEREAS, in conjunction with the acquisition of the Strathcona Transfer Station ("STS") and in accordance with the consent order issued by the Competition Tribunal on • , 1997, CWS has agreed to permit CER to tip acceptable solid waste ("ASW") at the landfill site operated by CWS and located at Ryley in the Province of Alberta at cost;

AND WHEREAS the purpose of this Agreement is to allow CER to bid for ASW contracts in the Edmonton market as a competitor to CWS and other landfill site owners or operators;

NOW, THEREFORE, in consideration of the premises and the mutual covenants as set forth herein, it is agreed as follows:

1. Tip Rights

- (a) CWS shall make available to CER the right, subject with respect to tonnage in excess of 150,000 tonnes per year, the availability of authorized space, to tip ASW originating from the STS at RLS;
- (b) CWS will make available to CER at STS 85,000 tonnes of ASW per year to permit CER to meet its minimum tip requirement;
- (c) CER will tip at least 120,000 tonnes per year from STS to RLS or pay the tipping fee for 120,000 tonnes, thus ensuring CWS of that volume on a tip or pay basis;
- (d) For the purposes of this agreement "acceptable solid waste" shall mean mixed household and commercial solid waste (including trash, refuse and garbage) that has the characteristics of non-hazardous solid waste normally produced by residences, stores, other commercial buildings, schools and offices provided that under no circumstances shall acceptable solid waste material include waste which is: (a) liquid, radioactive, reactive, ignitable, corrosive, pathological, acidic or otherwise defined as hazardous by federal,

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provincial or local laws, regulations or orders; or (b) waste material which requires special handling, such as discarded or wrecked automobiles or trucks.

2. Prices

2.1 The initial prices will not exceed:

(a) In the first 15 months of this LTA (i.e. until January 1, 1999) the price to be paid by CWS for ASW delivered by it to CER at the STS shall be \$32.50 per tonne;

(b) In the first 15 months of this LTA, the price to be paid by CER to tip ASW at RLS will be \$12.99 per tonne for the first 150,000 tonnes, which is equal to the cost incurred by CWS or its predecessors in 1996, including royalties, based on a tip volume of 188,000 tonnes total in 1996, such costs being those set out in more detail in section 2.2.

(c) In the first 15 months of this LTA, for volumes in excess of 150,000 tonnes, the tipping fee payable by CER to CWS will decrease by \$0.75 per tonne for each 10,000 tonnes over 150,000 tonnes down to a maximum decrease of \$2.00 per tonne.

2.2 Beginning on January 1, 1999 the annual base price per tonne for tipping at RLS to be paid by CER to CWS shall be the aggregate of:

(a) The actual royalty payable to Beaver which is currently set at \$5.85 per tonne until December 31, 1999 but may be reduced or increased as a result of negotiations between Beaver and CWS, including those negotiations envisioned in section 1.4 of the Operator Agreement;

(b) The average operating cost per tonne incurred by CWS in the operation of the landfill site for the 12 month period ended September 30 of the preceding year, including equipment maintenance and depreciation, amortized closing costs, all labour costs, operating costs and administrative costs;

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- (c) The average cost per tonne for the same 12 month period of any permit fees, taxes or other like expense arising at RLS as a result of governmental requirements, whether federal, provincial or local but not including any expense arising as a result of the failure of CWS to operate RLS in accordance with applicable laws or regulations; and
- (d) \$1.50 per tonne to cover head office expenses;

provided that the increase over the previous year for the aggregate of all items other than (a) and (c) shall not exceed the increase in the CPI as published by Statistics Canada for the same period.

The base price shall apply to the tonnage tipped in the previous year. Any tonnage tipped in excess of the tonnage tipped in the previous year shall receive a decrease of \$0.75 per tonne for each 10,000 tonnes of excess down to a maximum decrease of \$2.00 per tonne.

2.3 Beginning on January 1, 1999, the price to be paid by CWS in any calendar year for ASW required to be delivered to STS of 85,000 tonnes shall not exceed the price set out in 2.1(a) adjusted to reflect,

- (a) Any increase or decrease in the base price per tonne payable under 2.2;
- (b) Any change in permit fees, taxes or other expense at STS arising as a result of governmental action, whether federal, provincial or local; and
- (c) Any increase or decrease in the CPI.

3. Payment

- (a) CWS shall invoice CER monthly for ASW tipped at RLS during the immediately preceding month. CER shall make full payment of each invoice to CWS without set-off, within 30 days following the date of each invoice. Interest shall accrue on past due accounts at an annual rate of 2% over the

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prime rate charged by the Canadian Imperial Bank of Commerce from time to time to its commercial customers for domestic loans.

(b) CER shall invoice CWS monthly for ASW delivered to STS during the immediately preceding month. CWS shall make full payment to CER of each invoice to CWS without set-off, within 30 days following the date of each invoice. Interest shall accrue on past due accounts at an annual rate of 2% over the prime rate charged by the Canadian Imperial Bank of Commerce from time to time to its commercial customers for domestic loans.

(c) In the event CER's or CWS's account becomes in arrears, CWS or CER, as the case may be, shall give notice thereof to the defaulter. If full payment of the amount in arrears is not made within five days of receipt of such notice, and if no notification has been sent pursuant to section 4 of this agreement with respect to the invoice(s) in arrears, the party not in default may, without prejudice to any other remedies at law or in equity, cancel this agreement.

4. Audit

(a) If there is a question or dispute regarding section 2 or 3 of this agreement, the following procedure shall apply. Either party may, within 10 days of a question or dispute regarding section 2 or 3, notify the other party of such question or dispute. Within 15 days of receipt of such notification, the party receiving the notification shall provide the other party with a written explanation, including supporting documents where appropriate, of the matters questioned or in dispute. If the party receiving the written explanation is not satisfied and the question(s) or dispute is not otherwise resolved, such party, within 15 days following receipt of the written explanation, may submit the matter to KPMG (an "independent auditor") for resolution. The decision of the independent auditor shall be issued within 30 days and be binding upon the

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parties. The cost of the audit shall be borne by the party that loses the audit, unless otherwise determined by the independent auditor.

(b) If the question or dispute submitted to the independent auditor relates to pricing, no cost information submitted to the independent auditor shall be made available to the other party hereto.

5. Term

(a) This agreement shall continue in full force and effect until January 1, 2006.

(b) This agreement may be cancelled by CWS if RLS has no more authorized capacity to accept any ASW.

(c) CWS will advise the Competition Bureau of any cancellation.

6. Indemnity: Insurance

(a) CER shall defend, indemnify and hold CWS, its affiliated companies, and their respective directors, officers, employees and agents harmless from and against any and all third party claims, actions, causes of actions, arbitrations, lawsuits, judgments and awards, including costs and fees (including legal fees), as a result of any hazardous waste being included in any ASW delivered at RLS, other than ASW shown to have originated with CWS.

(b) CWS shall defend, indemnify and hold CER, its affiliated companies, and their respective directors, officers, employees and agents harmless from and against any and all third party claims, actions, causes of actions, arbitrations, lawsuits, judgments and awards, including costs and fees (including legal fees), as a result of any hazardous waste being included in any ASW delivered at STS by CWS.

(c) Both CWS and CER shall maintain throughout the term of this agreement general liability insurance in commercially reasonable amounts.

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7. Relationship Between The Parties

(a) This agreement shall not create any agency, joint venture or partnership relationship between CSW and CER. CER is not authorized or empowered under this agreement to act as agent for CWS for any purpose and will not on behalf of CWS enter into any contract, undertaking or agreement of any kind whatever.

(b) CWS will not raise capacity constraints as a reason for not accepting ASW from CER at RLS.

(c) CWS will treat CER equally with other haulers, including itself, so far as access to RLS and other non-price factors are concerned.

(d) CWS will not exercise its rights to negotiate to continue as operator of RLS beyond the initial term ending December 31, 2005, as contemplated in section 1.3 of the Operator Agreement, but may continue as Operator beyond that date if other potential operators acceptable to Beaver are given an opportunity by Beaver to negotiate to become the operator and the Director of Investigation and Research approves of such continuation. CWS will, at the request of Beaver, terminate the Operator Agreement before December 31, 2005 if another potential operator acceptable to Beaver is identified, provided such potential Operator will take over the obligations of CWS under this Agreement and under the Operator Agreement.

(e) CWS and Beaver Regional Waste Management Services Commission shall be entitled at any time, upon reasonable prior notice and without disruption or interference to business operations, to examine or cause to be examined the operation of STS to ensure that the ASW accepted there complies with all environmental requirements for disposition at RLS.

8. Applicable Laws and Changes

CER acknowledges that CWS must comply and CWS acknowledges that CER must comply with all local, provincial and federal laws, regulations and orders

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relating to ASW which may be handled at RLS or STS, and each party agrees to abide by and comply with any such laws, regulations or orders in delivering and presenting ASW for disposal. This agreement creates no obligations on CWS or CHR to receive or accept any ASW which is illegal or unsuitable for handling or disposal pursuant to applicable laws, regulations or orders, or pursuant to reasonable internal standards, established by CWS or CHR as the case may be, which may be in general force and effect. In the event that there is any assessment, imposition or increase of any taxes relating to the handling or disposal of ASW under this agreement, or any change, revision or amendment in the laws, regulations, orders or permits pertaining to the operation of RLS or STS or the handling or disposal of ASW which increases the costs of conducting such operations, CWS with respect to STS or CHR with respect to RLS, as the case may be, shall pay such increased tax or the proportionate amount of such increased costs with respect to ASW delivered hereunder.

9. Force Majeure

Neither party will be liable for its failure to perform hereunder caused by occurrences reasonably beyond its control, including but not limited to acts of God, fire, flood, wars, sabotage, accidents, labour disputes (whether or not such disputes are within the power of such party to settle), government actions or inability to obtain power, materials, equipment, transportation or any other similar occurrence.

10. Assignment

(a) Any assignment of this agreement without the prior written consent of the other party shall be void, except that either party may assign its rights and obligations hereunder to an affiliate. For purposes of the foregoing sentence, the term "affiliate" shall mean any corporation or business entity which

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directly or indirectly controls, is controlled by, or is under common control with a party.

(b) This agreement shall be binding upon and enure to the benefit of and be enforceable by the parties, their respect successors and permitted assigns, and any person who subsequently acquires substantially all of the assets of either party hereto.

11. Notices

(a) All notices or other communications required hereunder shall be in writing and shall be deemed given on the date of receipt thereof, if delivered by hand or by facsimile transmission, or by e-mail to the CEO at:

i) **Canadian Waste Services Inc.,**
1275 North Service Road West,
Suite 700,
Oakville, Ontario. L6M 3G4
Facsimile: 905-825-5603

ii) **Capital Environmental Resource Inc.,**
500 Rennie Street,
Hamilton, Ontario. L8H 3P6.

and such other persons and addresses as either party shall have specified in writing to the other.

b) When required hereunder CWS shall also provide notice to the Director of Investigation and Research at the:

Competition Bureau,
Industry Canada,
50 Victoria Street,
Hull, Quebec. K1A 0C9.
Attn.: Senior Deputy Director,

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Mergera Branch,

Facsimile: (819) 953-6169

(c) It is recognized by the Parties hereto that the continued operation of RLS may require long term commitments by both Beaver and the operator prior to December 31, 2005. CWS will not enter into negotiations with Beaver at any time relating to such long term commitments until CWS has notified both CHR and the Director of Investigation and Research of such proposed negotiations. If any such commitment has the effect of extending CWS's position as Operator beyond December 31, 2005 then CWS will not enter into such commitment unless CWS has obtained the consent of the Director of Investigation and Research, failing which consent, Beaver may terminate the Operator Agreement.

d) CWS will provide notice to CHR and the Director of Investigation and Research of any material change in the provision of the Operator Agreement.

e) Until December 31, 2006 CWS will notify the Director of Investigation and Research, at least 60 days before completion, of any proposed transaction whereby CWS directly or indirectly will increase its rights with respect to RLS. CWS will also notify the Director of any material change in this Agreement.

12. Headings

The headings contained in this agreement are for reference purposes only and shall not in any way affect the meaning or interpretation of this agreement.

13. Choice Of Law

This agreement shall be governed by and construed and enforced in accordance with the laws of the Province of Alberta and the laws of Canada applicable therein and shall be treated in all respects as an Alberta contract.

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14. Confidentiality

During the term of this agreement and for a period of three years following the expiration or termination hereof, the parties shall maintain all information furnished by either party to the other confidential and shall not, except as required by law, disclose such information to any third parties.

15. Arbitration

(a) Any dispute arising under this agreement, other than questions or disputes contemplated by section 4 of this agreement, shall be definitively resolved and settled by arbitration, to the exclusion of the courts in accordance with the Arbitration statute then in force in the Province of Alberta. Any such arbitration shall be held in *Edmonton* and conducted in English. The decision of the arbitrator shall be final and without appeal.

(b) Any arbitration must be commenced within 60 days of the circumstances or events giving rise to the dispute.

16. Entire Agreement

This agreement contains all of the representations and agreements between the parties hereto with respect to the matters covered by this agreement and supersedes all previous communications, either oral or written, between the parties hereto. No modifications of this agreement or waiver of the terms and conditions thereof shall be binding upon either party unless approved in writing by an authorized representative of such party, or will be effected by the acknowledgement or acceptance of purchase order forms or releases containing other or different terms or conditions whether or not signed by an authorized representative of such party.

IN WITNESS THEREOF, the parties hereto have caused this agreement to be executed as of the day and year first above written.

CANADIAN WASTE SERVICES INC.

By: _____

Its: _____

CAPITAL ENVIRONMENTAL RESOURCE INC.

By: _____

Its: _____

AGREEMENT

CANADIAN WASTE SERVICES INC. ("CWS")

and

CAPITAL ENVIRONMENTAL RESOURCE INC. ("CER")

WHEREAS CER and CWS wish to enter into an agreement with respect to waste disposal in the City of Edmonton, substantially in the form of the agreement annexed hereto (the "Landfill Tipping Agreement");

AND WHEREAS the Landfill Tipping Agreement is subject to the approval of the Competition Bureau;

AND WHEREAS if the Competition Bureau does not approve the Landfill Tipping Agreement, CER's EBITDA (Earnings Before Interest, Taxes, Depreciation and Amortization) will be adversely affected in the approximate amount of \$930,000.00 per annum;

NOW THEREFORE the Parties hereto agree that for good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged:

1. CWS agrees that in the event the Competition Bureau does not approve the Landfill Tipping Agreement, CWS shall indemnify and hold CER harmless from any loss of EBITDA occasioned thereby.
2. The parties agree that the value of the Landfill Tipping Agreement to CER is \$930,000.00 in EBITDA per annum.
3. If the Competition Bureau has not approved the Landfill Tipping Agreement by July 31, 1998, CWS agrees to replace CER's lost EBITDA through the transfer to CER of other assets acceptable to CER.

DATED at Oakville, Ontario, this 24 day of ^{December} ~~November~~, 1997.

CANADIAN WASTE SERVICES INC.

Per: _____

CAPITAL ENVIRONMENTAL RESOURCE INC.

Per: _____

Tony Buscari, President

Handwritten initials: "DWN" in a circle, "IB" above it, and "DWN" in another circle to the right.

AGREEMENT

CANADIAN WASTE SERVICES INC. ("CWS")

and

CAPITAL ENVIRONMENTAL RESOURCE INC. ("CER")

WHEREAS CER and CWS wish to enter into an agreement with respect to waste disposal in the City of Edmonton, substantially in the form of the agreement annexed hereto (the "Landfill Tipping Agreement");

AND WHEREAS the Landfill Tipping Agreement may be cancelled by CWS, pursuant to subclause 5 (b), if RLS has no more authorized capacity to accept any ASW;

AND WHEREAS this agreement ("Agreement") is entered into for the purpose of giving CER the right to tip ASW at CWS's other landfill site in Edmonton, Alberta, known as WMIS, in the event that CWS cancels the Landfill Tipping Agreement;

NOW THEREFORE the Parties hereto agree that for good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged:

1. CWS agrees that in the event it cancels the Landfill Tipping Agreement, pursuant to Subclause 5(b), on the grounds that RLS has no more authorized capacity to accept any ASW, CWS shall make available to CER the right to tip ASW originating from STS, or elsewhere, so long as the ASW would have gone to STS, at WMIS on the same terms and conditions and at the same prices as provided for in the Landfill Tipping Agreement; *DvW JB*
2. Notwithstanding the invocation of subclause 5 (b) by CWS, all of the terms and provisions of the Landfill Tipping Agreement, including specifically the provision contained in sub-clause 1(b) that CWS will make available to CER at STS 85,000 tonnes of ASW per year to permit CER to meet its minimum tip requirement, shall remain in full force and effect, except as amended by this Agreement.
3. The capitalized terms used in this Agreement shall have the same meaning as set out or defined in the Landfill Tipping Agreement.

DATED at Oakville, Ontario, this ^{December} 24 day of October, 1997. *DvW JB*

CANADIAN WASTE SERVICES INC.

Per: *[Signature]*
Dick van Wyck, Vice-President & General Counsel

CAPITAL ENVIRONMENTAL RESOURCE INC

Per: *[Signature]*
Tony Bussan, President

and only for the duration of the Landfill Tipping Agreement until January 1, 2006, after which any such disposal rights shall cease and terminate

AGREEMENT**CANADIAN WASTE SERVICES INC. ("CWS")****- and -****CAPITAL ENVIRONMENTAL RESOURCE INC. ("CER")**

WHEREAS CER and CWS wish to enter into an Agreement with respect to waste disposal in the City of Edmonton substantially in the form of the Agreement annexed hereto (the "Landfill Tipping Agreement");

AND WHEREAS the Competition Bureau wishes the Landfill Tipping Agreement to be approved by the Competition Tribunal pursuant to a Consent Order under section 105 of the *Competition Act*, the Application for which Consent Order both CWS and CER are willing to support;

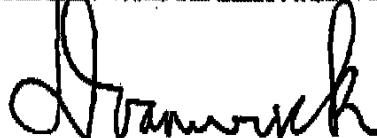
NOW THEREFORE the Parties hereto agree that for good and valuable consideration receipt of which is acknowledged:

1. CER and CWS will enter into an Agreement in the form annexed hereto with only such changes as may be required by the Competition Bureau or the Competition Tribunal, provided such changes are acceptable to CER and CWS;
2. In the period between October 8 and approval of the Landfill Tipping Agreement by the Competition Tribunal, the Parties will dispose of waste in accordance with the Landfill Tipping Agreement.

DATED at Oakville, Ontario this 8th day of October, 1997.

CANADIAN WASTE SERVICES INC.

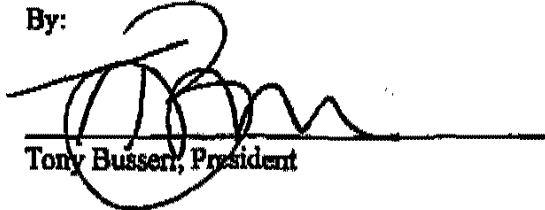
By:



Dick van Wyck, Vice-President

CAPITAL ENVIRONMENTAL RESOURCE INC.

By:



Tony Bussert, President

AGREEMENT**CANADIAN WASTE SERVICES INC. ("CWS")****- and -****CAPITAL ENVIRONMENTAL RESOURCE INC. ("CER")**

WHEREAS CER and CWS wish to enter into an Agreement with respect to waste disposal in the City of Edmonton substantially in the form of the Agreement annexed hereto (the "Landfill Tipping Agreement");

AND WHEREAS the Competition Bureau wishes the Landfill Tipping Agreement to be approved by the Competition Tribunal pursuant to a Consent Order under section 105 of the *Competition Act*, the Application for which Consent Order both CWS and CER are willing to support;

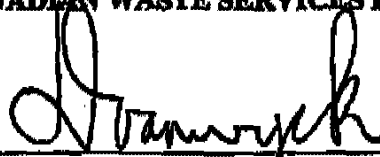
NOW THEREFORE the Parties hereto agree that for good and valuable consideration receipt of which is acknowledged:

1. CER and CWS will enter into an Agreement in the form annexed hereto with only such changes as may be required by the Competition Bureau or the Competition Tribunal, provided such changes are acceptable to CER and CWS;
2. In the period between October 8 and approval of the Landfill Tipping Agreement by the Competition Tribunal, the Parties will dispose of waste in accordance with the Landfill Tipping Agreement.

DATED at Oakville, Ontario this 8th day of October, 1997.

CANADIAN WASTE SERVICES INC.

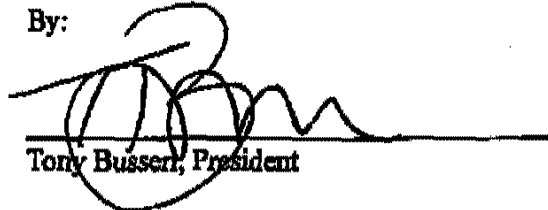
By:



Dick van Wyck, Vice-President

CAPITAL ENVIRONMENTAL RESOURCE INC.

By:



Tony Bussari, President

THE COMPETITION TRIBUNAL

IN THE MATTER OF an application by the Director of Investigation and Research under sections 92 and 105 of the *Competition Act*, R.S.C. 1985 c. C-34, as amended.

AND IN THE MATTER OF an acquisition by Canadian Waste Services Inc. of certain non-hazardous solid waste management assets of WMI Waste Management of Canada, Inc. in Edmonton, Alberta

BETWEEN:

THE DIRECTOR OF INVESTIGATION AND RESEARCH

Applicant

and

**CANADIAN WASTE SERVICES INC. and
CAPITAL ENVIRONMENTAL RESOURCE INC.**

Respondents

AFFIDAVIT OF LOURDES DACOSTA

I, Lourdes DaCosta, of the City of Ottawa, in the District of Ottawa-Carleton, in the Province of Ontario, Public Servant, MAKE OATH AND SAY:

1. I am a commerce officer in the Competition Bureau of Industry Canada ("CB") Mergers Branch, engaged in the review of the transaction by which Canadian Waste Services Inc. ("CWS") seeks to acquire the majority of the non-hazardous solid waste business of WMI Waste Management of Canada Inc. ("WMI") and assets related thereto, and responsible for the conduct and management of the examination of that portion of the transaction pertaining to the province of Alberta.

2. I have been an employee of the CB since 1992. I graduated from the University of Toronto in 1992 with a Masters in economics. I have held increasingly responsible positions with the CB during my employment, advancing to my present position as commerce officer (CO-2) in 1994. I have spent the last year focussing upon competition issues in the waste management industry and have been involved in other significant inquiries into the waste management industry, including that which led to the consent order of the Competition Tribunal in April, 1997.

3. As part of my duties I have reviewed public sources of information about the waste industry, including a comparative review of relevant jurisprudence and economic analyses and relevant articles in trade and other publications. I have interviewed numerous executives in the industry and representatives of customers and government agencies at all levels. I have also conducted economic analyses and identified product and geographic markets, calculated market shares and measured market power in such markets. I have become familiar with the nature of entry in this industry and the barriers thereto, including an industry-wide practice of entering into long term exclusive contracts. I make this affidavit on the basis of the information so gathered from secondary sources, except where I have referred to events which took place during the CB's investigation of the merger, hereinafter referred to, and with respect to which I have personal knowledge thereof. Otherwise this affidavit is made generally on information and belief.

The Merger

4. The present examination into the acquisition by CWS of the WMI non-hazardous solid waste management businesses was commenced by the Bureau in early March, 1997. The transaction was formalized by a Letter of Intent dated March 17, 1997, (the "agreement") which outlines an asset purchase by CWS of WMI's solid non-hazardous waste management businesses in Vancouver, Edmonton, Calgary, Kitchener, Toronto, Barrie, Brockville, Trois-Rivières, and other smaller markets. The transaction comprised in the agreement is valued at \$185.6 million (US). CWS and WMI are the first and third largest solid waste collection and disposal companies in Canada respectively. The first meeting with the parties to discuss the agreement was held on April 8, 1997, the same date the parties completed their filings of pre-notification forms pursuant

to s. 121 of the *Competition Act* ("Act"). A formal inquiry under the *Act* was commenced on June 4, 1997.

5. CWS is a wholly owned subsidiary of USA Waste Services Inc ("USA") and is a substantial operator in the North American waste management industry. It owns and operates waste disposal sites as well as collection businesses in the residential (curbside or hand pick up), roll-off (industrial and construction waste), and commercial (front end or lift on board operations) segments. Other significant activity occurs in the operation of transfer stations and recycling operations. Residential collection is predominately operated pursuant to municipal tender as an extension of the local government obligation to serve the public. Roll-off operations are typically subject to numerous competitors since the service is generally required on a temporary basis and entry into this activity is relatively easy.

6. Commercial lift on board operations are usually conducted pursuant to set routes of restaurant, institutional and other customers requiring at least weekly retrieval of bins of a capacity under approximately 10 cubic yard. Such customers will usually have contracted for service for terms of from one to three years plus renewals for a like term. Over the past few years and as a result of the Tribunal's order in *DIR v Laidlaw Waste Systems Ltd. (1991), 40 CPR (3) 289 ("Laidlaw")* the more excessively restrictive terms of such contracts, the fine print and the "adhesion" character of the contracts have been reduced by some major industry participants. Commercial contracts, i.e. contracts with commercial lift on board customers, are highly sought by participants in most of the markets. Ownership or operating control of the scarce disposal sites is an important competitive factor in this industry. There is a well documented and commented upon trend to vertical integration in the industry.

7. Many markets in Canada are local in nature (as confirmed by the Tribunal in *Laidlaw*). They are highly concentrated, usually with the presence of at least two of the three multinationals, CWS, WMI, and Browning Ferris Industries Ltd. ("BFI"), and perhaps regional and/or local operators. Hence any transaction of the scale of that in the agreement is closely examined by the CB. CWS acquired the waste management business of Allied Waste Holdings (Canada) Ltd. in the last year, and through that transaction, the business of Laidlaw. The former transaction is the subject of a consent divestiture order of the Tribunal dated April 16, 1997 (the "Allied divestiture

order”), respecting acquired assets and the competitive situation in Sarnia, Brantford and Ottawa and the Outaouais markets.

8. The merger is that portion of the agreement which pertains to the Edmonton, Alberta market, and is subject to the divestiture outlined in the draft consent order attached hereto as Exhibit A.

The Examination

9. Upon the inception of the investigation, four officers were assigned to the investigation of the matter, including those who were involved in the inquiry which culminated in the *Laidlaw* case. Counsel from the Department of Justice were assigned to assist in the matter. The preliminary investigation consisted of meetings with and a review of submissions from the parties, as well as industry contacts. Several meetings with representatives of CWS, and to a lesser extent WMI, were held. Numerous discussions with counsel for CWS were held. Aside from formal information requests, numerous informal flows of information were instituted between the CB and representatives of CWS. CWS advised that it was aware that there would be competition issues in several markets from the outset, and endeavoured to create a pragmatic resolution-oriented approach to the matter through a pre-closing (or fix it first) remedy solution which would also encompass its obligations under the Allied divestiture order. The CB undertook a two day interview session with seven regional managers of CWS with the cooperation of the merging parties.

10. As is the practice of the CB, independent market checks are the principal source of competitive information, once the fundamental structure of the relevant markets and the industry is identified. In this matter meetings, telephone interviews and written questionnaires with 54 interested parties were undertaken. Customers, competitors and governmental agencies were consulted.

11. To advance the investigation, expert assistance regarding economic analysis of the markets, the state of competition and the presence or absence of a substantial lessening of competition therein was obtained from external consultants and experts and from Mr. Patrick Hughes, a staff economist with the CB. Mr. Hughes' report is attached hereto as exhibit B.

The Findings

12. As a result of the foregoing examination and analyses, the CB determined that a substantial lessening of competition would likely be caused by the Merger. In addition other competitive issues in other markets were identified.

13. As a result of the CB's communication of its concerns to CWS and CWS' subsequent unsuccessful efforts to obtain a pre-closing sale of sufficient assets (as hereinafter described) to satisfy those concerns, the agreement, scheduled to close on May 15, 1997 was postponed week to week to May 23 and then to May 30, 1997.

The Negotiations

14. CWS, through its president, David Sutherland-Yoest has, in discussions with the CB, indicated a willingness to resolve any competition issues established by the CB investigation by a "fix it first" scenario. In essence CWS agreed to divest a package of assets from those acquired through the transaction in the agreement, and where necessary to supplement same by other assets to reach an appropriate mix of assets to alleviate the predicted substantial lessening of competition. Such package was identified through negotiations between the CB and CWS and was acceptable to the Director.

15. On April 16, 1997, CWS introduced Allen Fracassi, a potential purchaser of a divestiture package, at that time, not precisely ascertained, to the CB. The CB investigated the appropriateness of this purchaser, including his lengthy and substantial experience in the waste management industry as a principal of Philip Services Inc., a substantial national environmental recovery, salvage and waste collection operator, his independence from CWS, and his intention to operate the divestiture package in a vigorous competitive manner in the relevant markets. The CB was satisfied with the candidacy of the purchaser who would, subject to the comments in the next paragraph, be a new entrant in most relevant markets. Allen Fracassi and his brother Philip and other shareholders, through Branard Investments Ltd., formed Capital Environmental Resource Inc. ("CER") to acquire the divested assets referred to herein.

16. Two aspects of the divestiture package warrant specific exposition:

1) Under the Allied divestiture order certain assets identified therein were to be divested in four markets. CWS wished to package these assets with any fix it first transaction with the said purchaser.

2) CWS' affiliate, USA Waste, had a 50% interest in Western Canada Waste Services Inc. ("WCW"), which, *inter alia* carries on business in Calgary and Edmonton. The acquisition of the WMI business in those markets would increase or contribute to the increase in the CWS market shares in those markets in particular, to a problematic level under the *Act*. CWS resolved to cause its affiliate USA, to dispose of its interest in WCW, and to include that interest in the divestiture package.

17. In Edmonton, CWS acquired the WMI West Edmonton landfill site. It also operates a substantial landfill site outside of Edmonton (about 70 km to the southeast) at Ryley, pursuant to an operating agreement with the owner. The right to operate the landfill was obtained in the Allied acquisition. It is owned by the Beaver Regional Waste Management Services Commission ("Beaver"), a municipal corporation. CWS used the Ryley site in conjunction with the Strathcona transfer station located on the outskirts of the Edmonton urban area. The operating agreement is only assignable with the consent of the owner, which in the event proved to be a lengthy and complex matter. Advice from economic experts indicated that a divestiture of either the operating agreement for Ryley or the acquired WMI site would alleviate the substantial lessening of competition condition occasioned by the Merger. In addition to assured right of access to one of the two landfill sites, eight commercial collection routes and 3 additional routes obtained through the WCW interest as well as the Strathcona storage and transfer station comprised the divestiture package. The collection assets so divested would exceed the minimum threshold which our expert advice suggested.

18. Other divestitures in other markets arising out of the agreement were as follows:

- a) Barrie: Barrie commercial collection routes, and associated assets to a value of \$1.2 million;
- b) Kitchener: Kitchener commercial collection routes and associated assets to a value of \$2.6 million;
- c) Calgary: Two commercial collection routes from the acquired business and two routes obtained through the WCW interest;

- d) Vancouver: Six commercial collection routes to a value of \$4 million;
- e) Allied divestiture order: Those assets specified in the said order in Sarnia, Ottawa, Outaouais and Brantford;
- g) Interest in WCW: the 50% equity interest of USA Waste to be sold, which will have the effect in Calgary of adding two commercial collection routes, and in Edmonton of adding three commercial routes, that are independent of CWS or its affiliates.

The Resolution

19. Market contacts advised and I verily believe that the assets which are to be conveyed in the merger were losing value as the customer base dwindled in the prolonged interim period pending divestiture. This is a typical phenomenon following the public announcement of a transaction which I have observed in previous merger reviews. In addition, there was uncertainty regarding the impending change of control and direction in the conduct of the waste management business.

20. CWS was able to consummate a sale of the divestiture package to CER on June 6, 1997 simultaneously with the closing of the agreement. With respect to the Edmonton assets it anticipated that it would have been able to obtain an assignment of the Ryley operating agreement within a few weeks thereafter. The assignment of the commercial contracts and related assets was accordingly made subject to a satisfactory resolution of the disposal site issue and approval of the divestiture package in Edmonton by the Competition Tribunal. Similarly, CER agreed to purchase and undertook the interim operation of collection and disposal services at Strathcona pending the approval of the Merger sought in the within application. These steps were taken to obtain a smooth transition of the WMI business to a new operator.

21. Had the parties proceeded to close the Merger without divestiture, there would be an exposure to CWS of certain relevant customer information including pertinent details of contractual service arrangements which would be practically impossible to "erase", much to the detriment of CER if eventually confirmed as purchaser of those assets should an order for eventual divestiture be made.

22. The CB issued a press release on June 6, 1997, announcing the divestiture package and forwarded a copy to all of its market contacts thought to have any interest in the transaction, totalling approximately 150 persons. A true copy of the said release is attached as Exhibit C.

23. An assignment of the Ryley operating agreement to CER proved to be unavailable, since Beaver refused to consent thereto. An alternative arrangement was settled upon which would provide CER with right of access to Ryley, leaving CWS as the operator but only charging CER its actual cost. This arrangement was embodied in a tipping agreement between CER and CWS, the final form of which was not concluded until mid-December, 1997, attached hereto as Exhibit D. The elements of the tipping agreement are further discussed in the Impact Statement filed herewith. A particular aspect thereof ensures that if the agreement is frustrated by lack of authorized disposal space, the same access is afforded CER at west Edmonton, along with compensation for any loss of earnings from delayed approval of the agreement. The Director and Beaver have reviewed Exhibit D and are satisfied with its terms. Attached hereto as Exhibit E is a copy of the report of Meyers, Norris Penny & Co, per DP Woodruff, C.A.. regarding the probity of the costs set out therein.

24. I believe that the grant of the order sought herein will provide a finite framework for the conclusion of this matter. If the Tribunal agrees that the divestiture and the access provided to the Ryley site thereby alleviates the substantial lessening of competition, an order under s. 92 (1)(e)(iii) with the consent of the respondents will ensure that this be accomplished.

Order Sought

25. I make this affidavit in support of an application under s. 92 of the *Act* for an order in the terms of the draft order attached hereto as Exhibit A.

26. I have read the Statement of Grounds and Agreed Material Facts filed in support of the application for a consent order in this matter and to the best of my knowledge I believe the matters stated therein to be true.

SWORN before me, at
the City of Hull,
in the Province of Quebec

this __ day of March, 1998

Lourdes DaCosta

A Commissioner, etc.

EXHIBIT A

CT-98/01

THE COMPETITION TRIBUNAL

IN THE MATTER OF an application by the Director of Investigation and Research under sections. 92 and 105 of the Competition Act, R.S.C. 1985 c. C-34 as amended.

AND IN THE MATTER OF an acquisition by Canadian Waste Services Inc. of certain non-hazardous solid waste management assets of WMI Waste Management of Canada, Inc. in Edmonton, Alberta

BETWEEN:

THE DIRECTOR OF INVESTIGATION AND RESEARCH

Applicant

- and -

**CANADIAN WASTE SERVICES INC. AND
CAPITAL ENVIRONMENTAL RESOURCE INC**

Respondents

CONSENT ORDER

UPON THE application of the Director of Investigation and Research ("the Director"), pursuant to sections 92 and 105 of the Competition Act, R.S.C. 1985,

c. C-34 as amended (the "Act"), for a Consent Order directing the divestiture of certain non-hazardous solid waste management assets encompassed within the acquisition and certain other remedies;

AND UPON READING the Notice of Application dated the th day of March, 1998, the Statement of Grounds and Agreed Material Facts attached thereto, the Consent Order Impact Statement, the Affidavit of Lourdes DaCosta, filed, and the consent of the parties filed herein;

AND CONSIDERING THAT the Director and the respondents have reached an agreement which is reflected in this Consent Order;

AND CONSIDERING THAT the Director declares himself satisfied that, on the basis of the considerations outlined in the Consent Order Impact Statement, the remedies provided herein, if ordered, will be sufficient to remove the substantial lessening or prevention of competition in the non-hazardous solid waste management and related businesses in the Edmonton, Alberta market, as described in the application.

AND UPON HEARING counsel for the parties in respect of this application;

AND IT BEING UNDERSTOOD by the parties that nothing in these proceedings shall be taken as an admission of any facts, submissions or legal arguments for any other purposes.

THE TRIBUNAL ORDERS THAT:

Application

27. The provisions of this order apply to the respondents and:

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

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

Divestiture

28. That the respondent Canadian Waste Systems, Inc ("CWS") with respect to its acquisition (the "merger") of the non-hazardous solid waste management business of WMI Management of Canada Inc ("WMI") carried on in the Edmonton, Alberta market (the "acquired business") do complete the merger and operate the acquired business subject to the divestiture of the following "divested business" (as referred to in subparagraphs (a) and (b)):

- a) the divestiture of certain front end commercial lift on board routes and appurtenant equipment by the assignment of service contracts respecting customers whether those of CWS or acquired from WMI to the respondent Capital Environmental Resource Inc, ("CER") as listed in Schedule "A" hereto;

- b) the divestiture of the Strathcona transfer station to CER;

- c) the execution of the landfill tipping agreement as attached in Schedule "B" hereto;

3. The respondent CER do also execute the said landfill tipping agreement;

Divestiture Procedure

4. (a) CWS shall divest itself of all its right, title and interest of whatever character in the divested business by acknowledging by quit claim or other such declaration, a copy to be provided to the Director, that upon issuance of this order all conditions, restrictions, interim or other arrangements under which that portion of the acquired business that the divested business

represents has heretofore been operated are terminated and full ownership of the divested business is vested in CER subject to and in accordance with this order.

- ii. CWS shall provide a copy of the executed tipping agreement to the Director.

29. Notices, reports or other communications required or permitted pursuant to this order shall be in writing and shall be considered to be given if dispatched by personal delivery to the party to whom such notice is to be given or by registered mail or telecopier to the address or telecopier number below:

If to the Director:

Director of Investigation and Research
Bureau of Competition Policy
50 Victoria Street
Hull, Quebec K1A 0C9
Attention: William J Miller
Tel: (819) 997-3325
Fax: (819) 953-9267

If to the respondents:

Blake, Cassels & Graydon
Box 25
Commerce Court West
Suite 2800
Toronto, Ontario
M5L 1A9

Attention: Warren Grover QC
Counsel for the respondent CWS
Tel: (416) 863-2709
Fax: (416) 863-2653

Turkstra Mazza
15 Bold St
Hamilton Ont
L8P 1T3

Attention: Herman Turkstra
Counsel for the respondent CER

Tel: (905) 529-3476
Fax: (905) 529-3663

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

DATED AT OTTAWA, Ontario, this day of March, 1998.

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

EXHIBIT B

CT-98/01

THE COMPETITION TRIBUNAL

IN THE MATTER OF an application by the Director of Investigation and Research, for an order pursuant to sections 92 and 105 of the *Competition Act*, R.S.C. 1985 c. c-34 as amended.

AND IN THE MATTER OF the acquisition by Canadian Waste Services Inc. of certain non-hazardous solid waste management assets of WMI Waste Management of Canada, Inc. in Edmonton, Alberta

BETWEEN:

THE DIRECTOR OF INVESTIGATION AND RESEARCH

Applicant

- and -

**CANADIAN WASTE SERVICES INC. and
CAPITAL ENVIRONMENTAL RESOURCE INC.**

Respondents

AFFIDAVIT OF PATRICK HUGHES

I, Patrick Hughes, of the City of Ottawa, in the District of Ottawa-Carleton, in the Province of Ontario, Public Servant, MAKE OATH AND SAY:

1. I am a senior economist at the Competition Bureau. I have been with the Bureau since 1988, and in that time have performed internal Bureau economic analysis of numerous enforcement matters, including matters involving the waste collection and disposal industry. I have also provided economic analysis relating to the use of access remedies in the telecommunications industry. Additional background on my experience is provided in an appendix to this report.

2. This report provides an economic analysis of the likely competitive impact of the draft consent order (“order”). It focuses in particular on the relative efficiency of the landfill tipping agreement (“tipping agreement”) referred to in paragraph 1(a)1(c) of the Notice of Application as an alternative remedy to a landfill divestiture. The report concludes that, from an economic perspective, the tipping agreement puts Capital Environmental Resources (“CER”) in approximately the same position as if it were the operator of the Ryley landfill. Together with the divestiture of certain commercial lift on board customers and the divestiture of the Strathcona transfer station as specified in paragraphs 1(a)1(a) and 1(a)1(b), the tipping agreement ensures that the substantial prevention or lessening of competition which would have otherwise arisen from the acquisition, is eliminated.

BACKGROUND

3. The acquisition by Canadian Waste Service (“CWS”) of certain assets of Waste Management Inc. (“WMI”), which is described in more detail in the statement of grounds, would result in a significant increase in concentration in both the collection and disposal markets. The acquired assets include contracts of commercial lift on board customers and a landfill. The transaction would result in an increase in market share of CWS in the collection market from about 51 percent to about 81 percent, and an increase from about 58 percent to about 78 percent in terms of the volume of municipal solid waste disposed.

4. The provision of commercial lift on board waste collection service is a distinct relevant antitrust product market. Customers using this service, typically restaurants, offices and small commercial establishments are not likely able or willing to substitute toward alternative forms of

waste disposal service such as residential curb-side or roll-off in response to a small but significant increase in the price charged for commercial lift on board service. Edmonton is a distinct relevant geographic market as there are no existing competitors in adjacent geographic areas that would be likely to extend the scope of their operations to include Edmonton in response to a small but significant price increase. Contractual practices together with the need for route densities likely act as a barrier to entry which inhibit the scope for entry in response to a price increase by incumbents. Thus, from an economic perspective, the increase in concentration in the commercial lift on board collection market raises market power concerns.

5. From the perspective of haulers that provide commercial lift on board waste collection services, there are no commercially viable alternatives to the two landfills that CWS would operate post-merger. Haulers are not likely able or willing to substitute toward other landfills because either they face capacity constraints and therefore charge much higher prices or do not have sufficient regulatory approval to accept some types of waste collected from commercial lift on board customers. Landfills in adjacent areas are not a commercially viable alternative because of prohibitive transportation costs. The need for regulatory approval for new landfills constitutes a barrier to entry.

6. The acquisition would likely generate a substantial lessening of competition for two reasons. First, by increasing concentration in the collection market, it would increase the market power of CWS. Second, by concentrating control of the only two competitively significant landfills for commercial lift on board waste, the acquisition increases the scope for CWS to raise the price in the disposal market. The cost of disposal is a significant component of the costs of providing collection service. From an economic perspective, a firm with power over price in the market for a necessary input such as disposal service, and at the same time has market power in the downstream collection market, has an incentive to increase the price of disposal service to raise rivals' costs. By raising rivals' costs, the vertically integrated hauler can reduce the ability and willingness of rivals to compete vigorously and thus enhance its ability to raise price in the collection market.

7. The order seeks to remedy the substantial lessening of competition in two main ways. First, it assures that CWS divests enough commercial lift on board customers so that customers have an alternative service provider, CER, whose market share approximates that previously held by WMI. Second, it seeks to limit the scope for CWS to raise the disposal costs facing rivals in the Edmonton collection market. The second step is necessary because a divestiture of commercial customers, by itself, would not be sufficient to remedy competition concerns. The vertical integration incentives arising from the acquisition of the WMI landfill make it necessary for the remedy to address concentration in the disposal market.

8. A divestiture of one of the two landfill facilities would be the first-best solution to remedy the incentive for CWS to raise rivals' costs in that it would return the disposal market to the pre-merger situation where there are two vertically integrated competitors in the Edmonton market.¹ As an alternative to divestiture, CWS proposes that it continue to operate the Ryley landfill pursuant to its existing agreement with the Beaver Commission and provide CER access to dispose of waste at the facility under the terms of the tipping agreement. From an economic perspective, an access remedy is sufficient to address the incentive for CWS to raise rivals' costs if it assures that CER's effective cost of disposal is not significantly higher than the "internal" cost it would incur if it were the operator of the Ryley landfill.

9. In general, an access remedy is less effective than structural divestiture because it does not eliminate the underlying incentive to engage in anticompetitive conduct but instead seeks to limit the ability to raise rivals' costs. As a practical matter, there are often terms and conditions of access that are difficult to monitor, verify or contract on. There is usually scope for the operator of a

¹ Where "divestiture" would include all assets necessary to provide the service of disposing waste to Edmonton waste haulers. Thus, the term "divestiture" as it is used here would include, in the case of divestiture of the Ryley facility, the Strathcona transfer station.

facility to raise rivals' costs in dimensions not covered in the access agreement (usually non-price terms), and thus an access remedy is generally an imperfect substitute for divestiture. Whether such a second best remedy is sufficient to eliminate the substantial lessening of competition depends on the specific fact situation.

AN ECONOMIC ASSESSMENT OF THE LANDFILL REMEDY

10. There are two principal landfills at which waste collected by providers of commercial lift on board service in Edmonton is disposed. These are the WMI landfill located in West Edmonton and the Ryley landfill which is located about 70 kilometres to the Southeast of Edmonton. Because of the distance involved, waste destined for the Ryley landfill is consolidated into larger loads at the Strathcona transfer station which is significantly closer to Edmonton. There are significant practical and regulatory constraints to the establishment of new landfill or transfer stations. Until recently, the Strathcona transfer station and the Ryley landfill were operated by Laidlaw Waste Services and were acquired by CWS through the Allied acquisition which is described in the statement of grounds. The acquisition considered in this report resulted in CWS acquiring the WMI landfill.

11. As an alternative to divestiture, CWS proposes that it continue to operate the Ryley landfill pursuant to its existing agreement with the Beaver Commission and provide CER access to dispose of waste at the facility under the terms of the tipping agreement. Pending the approval of the merger, CER purchased and undertook the interim operation of collection and disposal services at Strathcona. The tipping agreement was arrived at through negotiations between CWS and CER. It provides a pricing formula under which the per tonne dumping fee (the "tipping fee") is set equal to average total costs based on historic, accounting records. In particular, the tipping agreement provides that the per tonne tipping fee paid by CER for the period October 1, 1997 to September 30, 1998 is set at the average total cost incurred by Laidlaw Waste Service when it operated the landfill during the period January 1, 1996 to December 31, 1996.² In subsequent fiscal years (for example, the second period runs from October 1, 1998 to September 30, 1999), the tipping fee is adjusted to reflect average total cost incurred by CWS in the previous year (e.g., for the second period the cost

²The initial period of January 1, 1996 to December 31, 1996 was chosen because it is the most recent twelve month period for which accounting records were available when the tipping agreement was negotiated.

realized during the period October 1, 1997 to September 30, 1998). Yearly increases in the tipping fee are capped by the consumer price index. Other terms of access are subject to arbitration.

12. The acquisition of the WMI facility by CWS and the divestiture of the Strathcona transfer station will likely generate an increase in the amount of waste disposed of at the West Edmonton landfill and a corresponding decrease in the amount of waste disposed of at Ryley since CWS has the largest share of commercial lift on board business. The cost function of landfills exhibit economies of scale, and thus a reduction in the volume of waste causes a significant increase in per unit average total cost of operating the site. The degree to which the volume of waste disposed at Ryley will fall is mitigated by the provision in the tipping agreement that CWS continue to dump 85,000 tonnes of waste at Ryley through Strathcona. Even with the agreement to dump 85,000 tonnes of CWS waste at Ryley, it is likely that there will be a significant reduction in volume relative to the tonnage that Laidlaw Waste Services disposed of at Ryley in 1996.

13. The tipping fee in the initial period is based on the average total cost of Laidlaw Waste Services in 1996. This is likely significantly below the average total cost that CER would have faced as the operator of Ryley, and depending on the relevant cost curves, could be below the average variable cost that CER would have incurred. Thus, the tipping fee in the initial period is likely not significantly above the “internal” cost CER would have faced as the operator of Ryley.

14. For future periods, a safeguard that costs are not increased excessively is provided by the provision in the tipping agreement that the annual increase in the tipping fee not exceed the consumer price index. The accounting examination concludes that there is a system in place that is appropriate in the landfill business that covers the allocation of future costs and liability has been charged for closure and post-closure costs. The use of average total rather than average variable costs raises the theoretical possibility of the tipping fee rising above the relevant internal cost, but the practical scope for this to occur is limited.

15. Due to the nature of the technology in the waste disposal industry, there is likely not significant scope to raise the non-price costs and terms of access afforded to CER. The most important non-price terms of access relate to the time it takes for trucks to unload and any limits on

the amount of waste disposed. Degradation in these terms can likely be verified and thus addressed by the arbitration provision of the tipping agreement.

CONCLUSION

16. From an economic perspective, the tipping agreement puts Capital Environmental Resources (“CER”) in approximately the same position as if it were the operator of the Ryley landfill. While it is a second-best solution, together with the divestiture of certain commercial lift on board customers and the divestiture of the Strathcona transfer station as specified in paragraphs 1(a)1(a) and 1(a)1(b), the tipping agreement ensures that the substantial prevention or lessening of competition which would have otherwise arisen, is eliminated. This conclusion is based on two principal findings. First, the pricing formula in the tipping agreement is “cost-based” in that it sets the per tonne fee at a level not significantly above the average variable cost that would have faced CER as the operator of Ryley. Second, other non-price dimensions of the cost of access can be monitored relatively easily and the tipping agreement contains an arbitration provision to address any concerns that CWS has increased rivals’ effective access cost.

SWORN before me, at
the City of Hull,
in the Province of Quebec,
this ____ day of March, 1998.

Patrick Hughes

A Commissioner etc.

Appendix

Curriculum Vitae

Patrick James Hughes
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Education

Ph.D. (coursework all but dissertation), Economics, University of Western Ontario; fields: industrial organization, international trade, 1984-1988.

M.A., Economics, University of Western Ontario, 1985.

B.A., Economics, University of Windsor, 1984.

Experience

Economist, Economics and International Affairs Branch, Competition Bureau, 1988 to present.

At the Competition Bureau, I have provided internal economic analysis on numerous competition policy and antitrust enforcement matters including merger, abuse of dominance and conspiracy cases as well as international trade interventions. For example, I provided analysis in the course of the 1991 *Laidlaw* case and the Abuse of Dominance inquiry related to the waste disposal industry in the British Columbia lower mainland region. I have also been the lead economist on the Bureau's "Telecom Task Force," and in this role have provided analysis as input to the Competition Bureau's approach to access remedies in telecommunications.

Papers Accepted in Refereed Journals

"Conspiracy Law and Jurisprudence in Canada: Towards an Economic Approach," joint with Margaret Sanderson, accepted without revisions, Review of Industrial Organization, forthcoming Feb 1998.

Papers Presented at Scholarly Meetings

"Conspiracy Law and Jurisprudence in Canada: Towards an Economic Approach," with Margaret Sanderson, Annual Meetings of the Canadian Economics Association, St. John's, Newfoundland, June 1997.

"Most-Favoured-Customer-Clauses and Competition Policy," paper presented at conference of the Carleton University Industrial Organization Research Unit, Ottawa, May 1994.

"Cournot Oligopoly Distortions, Efficiency Gains and the Competition Policy Approach to Horizontal Mergers," paper presented at the Annual Meetings of the Canadian Economics Association, Ottawa, May 1993.

"Rationalizing Mergers and the Merger Guidelines" joint with Tim Hazeldine, paper presented at 1992 Meetings of the European Association for Research in Industrial Organization, Stuttgart Germany, September 1992.

Participation in Other Policy Seminars and Panels

Panelist on seminar series on Antitrust Issues in Eastern European Economies, held by the Organization for Economic Cooperation and Development, Kiev, Ukraine, June 23-27, 1997, June 24-28, 1996 and January 1994.

Presentation for Authors' Symposium: Ten Years of the Canadian Competition Act chaired by Thomas Ross and held by the Bureau of Competition Policy, May 24-25, 1996.

Presentation on "From Monopoly to Competition in Telecommunications Services and Pricing," conference entitled Telecommunications Service and Pricing Competition: The New Era of Flexibility and Choice held by the Canadian Institute, Toronto, March 6-7, 1996.

Other Academic Involvements

Review of SSHRC applications in 1998 and 1997.

Co-organizer with Jeffrey Church of conference entitled Telecom Antitrust Symposium, held by the Canadian Competition Bureau, Ottawa, November 1995.

Several seminars presented to undergraduate economics classes at Carleton University and the University of Ottawa and industrial organization training courses within the Competition Bureau.