Competition Tribunal Tribunal de la Concurrence

CT - 1991 / 002 – Doc # 72

IN THE MATTER OF an application by the Director of Investigation and Research under section 79 of the *Competition Act*, R.S.C., 1985, c. C-34, as amended;

AND IN THE MATTER OF certain practices by Laidlaw Waste Systems Ltd. in the communities of Cowichan Valley Regional District, Nanaimo Regional District and the District of Campbell River, British Columbia.

B E T W E E N:

The Director of Investigation and Research

Applicant

- and -

Laidlaw Waste Systems Ltd.

Respondent

REASONS FOR ORDER

Dates of Hearing:

October 28 - November 19, and December 16, 1991

Presiding Member:

The Honourable Madame Justice Barbara J. Reed

Lay Members:

Dr. Frank Roseman
Madame Marie-Hélène Sarrazin

Counsel for the Applicant:

Director of Investigation and Research

William J. Miller
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Laidlaw Waste Systems Ltd.

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Patrick Selinger

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COMPETITION TRIBUNAL

REASONS FOR ORDER

The Director of Investigation and Research

v.

Laidlaw Waste Systems Ltd.

I. INTRODUCTION

An application is brought by the Director of Investigation and Research ("Director") pursuant to section 79 of the *Competition Act* ("the Act"),[1] for orders prohibiting Laidlaw Waste Systems Ltd. ("Laidlaw") from engaging in certain anti-competitive acts and for orders to redress the anti-competitive situation created by those acts. Subsection 1 of section 79 provides:

> 79. (1) Where, on application by the Director, the Tribunal finds that
>
> *(a)* one or more persons substantially or completely control, throughout Canada or any area thereof, a class or species of business,
> *(b)* that person or those persons have engaged in or are engaging in a practice of anti-competitive acts, and
> *(c)* the practice has had, is having or is likely to have the effect of preventing or lessening competition substantially in a market,
>
> the Tribunal may make an order prohibiting all or any of those persons from engaging in that practice.

[1] R.S.C., 1985, c. C-34, as amended.

Subsection 2 of section 79 authorizes the Tribunal to make orders to restore competition to the market. This is the second case brought under section 79 since its enactment in 1986. The first was *Director of Investigation and Research v. The NutraSweet Company*. [2]

II. CLASS OR SPECIES OF BUSINESS - PRODUCT MARKET

There is no dispute in this case as to the relevant product market. It is a specific category of waste collection and disposal service.

Solid waste collection and disposal services can be classified into three categories: the collection and disposal of garbage which has been placed in bags or cans, usually at curbside; the collection and disposal of garbage which has been placed in bins which remain on the customer's premises at all times; the collection and disposal of garbage which has been placed in very large containers which are transported to the dump site to be emptied.

The first type of service is usually required by residences, small apartments and those establishments which generate relatively small quantities of garbage. The vehicles used for this service are often of a rear- or side-load

[2] (1990), 32 C.P.R. (3d) 1 (Competition Trib.).

configuration, usually containing a compactor, into which the bags of garbage are loaded manually.

The third type of service (roll-off or giant-haul service) is required by customers who generate large amounts of waste, some of it non-compactible. These customers are often industrial undertakings such as large factories or construction sites. The large containers (up to forty cubic yards in size) are loaded onto a flat-bed roll-off truck and, as has been noted, taken to the dump site for emptying. The empty container is then returned to the customer's premises unless it has been rented for one occasion only.

It is the second type of service which is the product in issue in this case. While it is sometimes referred to in the evidence as commercial service or front-end service, it is common ground that a more accurate description is lift-on-board service. This service is required by customers who generate a significant quantity of solid waste. These customers are often commercial enterprises such as restaurants, office buildings and campgrounds. The bins may be as small as two cubic yards or as large as twelve cubic yards. The vehicles used for collection are often front-load vehicles which lift the bin over the front of the truck by a hydraulic hoist. The waste material is thus emptied into the vehicle where it is compacted. These trucks while usually of a front-load configuration may also be of either a side-load or rear-load variety.

Lift-on-board customers can be subdivided with respect to their size and method of purchasing. Some, who most likely sign the standard form contracts which are in issue in this case, are small enterprises often requiring no more than one bin for service. Others, who either because of the volume of service they require or because as public entities they are bound by certain purchasing standards, seek service only through a process of public tender. No argument has been made that a distinction should be made for product market definition purposes between these two and the Tribunal does not make any.

III. LAIDLAW'S CONDUCT

A. Acquisitions and Related Activity

Laidlaw's conduct which is the subject of this application can be described by reference to a number of geographic areas[3] on the eastern side of Vancouver Island: the Cowichan Valley (Duncan) area; the Nanaimo area; the Courtenay-Comox-Cumberland area; and the Campbell River area.

(1) Cowichan Valley (Duncan) Area

In 1986 there were three lift-on-board disposal service companies in the Cowichan Valley (Duncan) area: C.W. Disposals Ltd. ("C.W."), Fox's Disposal

[3] More fully described *infra* at 46-48.

Service (1977) Ltd. ("Fox"), and PAN Garbage Disposal ("PAN"). C.W. was by far the largest player in the market. It held a municipal contract with the Corporation of the District of North Cowichan. Fox held a five-year contract with the Village of Lake Cowichan which it served together with some outlying areas. PAN was and is a very small family-run business operating to the south of Duncan.

(a) Acquisition of C.W. Disposals Ltd. - Restrictive Covenant

In May 1986, Laidlaw acquired the assets of C.W. The acquisition agreement included a restrictive covenant obligating the shareholders and chief operating officers of the company not to engage directly or indirectly in any waste disposal business, for a period of five years after the acquisition, anywhere within the province of British Columbia. The covenant provides alternatively for non-competition within a 300-mile radius of Duncan and in the further alternatives within a 200-mile radius, a 100-mile radius or a 50-mile radius of Duncan. An internal memorandum, dated May 21, 1986 and prepared by Laidlaw's in-house counsel, indicated that it was a 300-mile radius which had been agreed to despite the fact that the signed contract provides for a covenant extending over the whole province of British Columbia.

(b) Municipal Contract of C.W. Disposals Ltd. - Pre-emption by Laidlaw Waste Systems Ltd.

The acquisition agreement also provided for the assumption by Laidlaw of the contract which C.W. held with the Corporation of the District of North Cowichan. That contract had been signed first in 1975. It had a one-year term which renewed automatically each year in the absence of notice by either party terminating the contract. The municipal council annually approved the prices to be charged to those who used the lift-on-board garbage disposal service. In December 1985 the council approved the rates which were to be charged for 1986.

While initially the municipality had billed the customers for the lift-on-board service, there is some evidence that in early 1986 it was expecting C.W. to take over this administrative task. This does not mean that the municipality was withdrawing from the contract but merely that it expected C.W. to assume certain administrative tasks related thereto. The council accepted Laidlaw as the successor to C.W. under this contract. It was known by June 1986 that the council planned, in the fall, to call for public tenders with respect to the contract. Before this could occur, however, Laidlaw managed to have many of C.W.'s ex-customers sign individual contracts with Laidlaw even though Laidlaw was at the time serving these customers pursuant to its contract with the Corporation. The council had asked Laidlaw to cease the practice but Laidlaw did not comply.

When the tender for the municipal contract was called, Laidlaw suggested to the council that this process was futile since most of the individuals to whom the service was being provided were by this time directly under contract with Laidlaw. The council proceeded with the tendering process. Laidlaw took part in that process. Laidlaw was the high bidder. Fox was the low bidder. Laidlaw then questioned the authority of the council to award the contract since Laidlaw had individual contracts with many of the users of the service. Laidlaw threatened the council with a lawsuit. The council cancelled the tendering process and did not award a contract. The council took this course of action because it did not want the expense and political embarrassment of being involved in a lawsuit with Laidlaw.

(c) Fox's Disposal Service (1977) Ltd. Leaves the Market

In April 1987 the contract which Fox held with the Village of Lake Cowichan came up for retender. The Village decided to provide its own lift-on-board collection and disposal service for its inhabitants. This left only the outlying areas to be covered by the tender. Fox was the low bidder for the lift-on-board service but Laidlaw was the low bidder with respect to the residential portion of the collection service covered by the contract. Fox lost the contract to Laidlaw. Fox was thereafter out of business.

(d) Advance Waste Systems Inc. - A New Entrant

Advance Waste Systems Inc. ("Advance") entered the lift-on-board business in the Cowichan Valley (Duncan) area in April 1987. Advance was financed by Daniel Jack McLeod. He had been operating a roll-off waste disposal service in the Duncan area for many years. The lift-on-board service of Advance was run on a day-to-day basis by Michael Wallace. After commencement of the business, Mr. Wallace was approached on several occasions by a representative of Laidlaw, Dean Woods, seeking to purchase the Advance lift-on-board business. Mr. Wallace was also harassed by Mr. Woods with verbal taunts regarding the future of Advance.

Part of Advance's marketing strategy was to emphasize the fact that it was a local company. In a communication to Laidlaw's customers, Mr. Wallace mistakenly referred to Laidlaw as "of Chicago, Illinois".[4] He had seen Laidlaw referred to in that way in a newspaper article even though he thought Laidlaw originated in Hamilton, Ontario. In fact, Laidlaw Waste Systems Ltd. did go through several metamorphoses and, at one point in the early 1980s, it was listed as Laidlaw Industries Inc. on the NASDAQ Exchange in Chicago. Laidlaw responded to the Advance letter in a wildly overly aggressive manner by launching an action against Advance seeking damages for libel, injurious

[4] Joint Book of Documents, vol. VII, tab F-2 at 9 (Exhibit VII).

falsehood and interference with contractual relations. Mr. Woods again approached Mr. Wallace and sought to buy the Advance lift-on-board business. Mr. Wallace was told that if this business was not sold to Laidlaw, Laidlaw would ensure that Advance was put out of business. Mr. Wallace understood that part of the strategy for doing so involved the pursuit of legal action against Advance for the support of which Laidlaw was willing to spend $100,000.

Eventually, on February 28, 1990, Mr. McLeod sold the Advance lift-on-board business to Laidlaw; it had been suggested to him that Laidlaw might begin operating in the roll-off business in the Duncan area.

(e) Acquisition of Advance Waste Systems Inc. - Restrictive Covenants

The acquisition agreement pursuant to which Laidlaw purchased the Advance lift-on-board assets in February 1990 requires Advance and its principal officers not to engage either directly or indirectly in the lift-on-board business, for a period of five years after the acquisition, within a geographic area commencing 15 miles north of Victoria and ending at the northern city limits of Nanaimo and extending 30 miles westward from the coastline of Vancouver Island between those limits.[5] Laidlaw agreed not to operate any roll-off business within this same

[5] The actual text of the covenant, although different in wording, is not different in substance:

Commencing at Goldstream Provincial Park, then following northward up the coastline of Vancouver Island to Parksville, then inland a distance of thirty miles, then returning down the Island staying a distance thirty miles from the coast until at the same parallel as Goldstream

area for the same period of time. In fact, undoubtedly unknown to Mr. McLeod, Laidlaw was already under a restrictive covenant not to engage in the roll-off business in this area as a result of an agreement signed with Jones Disposal Services Ltd. in May 1986.[6] Under the agreement with Advance, Laidlaw also obtained a right of first refusal to purchase Advance's roll-off business, should it decide to sell.

With the withdrawal of Advance from the lift-on-board business in the Cowichan Valley (Duncan) area, Advance ceased a small amount of business which it had been doing in Nanaimo for ex-customers of another company which had been purchased by Laidlaw, SCS Waste Systems Inc.[7] After the acquisition of Advance the only competitor to Laidlaw in the Cowichan Valley (Duncan) area was and is PAN.

(f) Attempted Acquisition of PAN Garbage Disposal

Laidlaw tried on several occasions to acquire PAN. On one occasion Mr. McLeod was asked by Laidlaw to purchase PAN and turn it over to Laidlaw.

Provincial Park and then across to the Park. (Joint Book of Documents, vol. II, tab A-5-8 at 93 (Exhibit II)).

[6] *Infra* at 19.

[7] *Infra* at 20-21.

PAN had refused to deal with Laidlaw. Mr. McLeod refused. Mr. McLeod was left with the impression that Laidlaw intended to move into the residential garbage collection business in the area in which PAN operates in order to bring prices down so low that Niko Pfaffe, who together with his wife owns and operates PAN, would be driven out of business. Mr. Pfaffe who has met Laidlaw as a competitor in the residential collection business has also been left with that message.

(2) Nanaimo Area

In 1986 there were three businesses providing lift-on-board service in the Nanaimo area: Nanaimo Disposal Service (1980) Ltd. ("Nanaimo Disposal"); Jones Disposal Services Ltd. ("Jones"); and United Disposal Ltd. ("United"). Laidlaw purchased Nanaimo Disposal in March 1986. It purchased the lift-on-board businesses of Jones and United in May and August respectively of the same year.

(a) Acquisition of Nanaimo Disposal Service (1980) Ltd.
- Restrictive Covenant

The acquisition agreement respecting Nanaimo Disposal contains a non-competition clause whereby the vendors (the company and its two principals) are obligated not to carry on either directly or indirectly any waste disposal business, for a period of five years after the acquisition, within a 300-mile radius of the City

of Nanaimo or within a 300-mile radius of the City of Vancouver. An exception to this restriction allowed one of the principals, Kalvin Fox, to continue to carry on a garbage disposal business in the District of Port Hardy. Port Hardy is 391 kilometres (250 miles) north of the City of Nanaimo.

(b) Acquisition of Jones Disposal Services Ltd. - Restrictive Covenants

The May 1986 acquisition agreement with Jones contained a non-competition clause obligating both the company and Norman Jones not to carry on directly or indirectly any commercial lift-on-board service or any residential side- or rear-load collection and disposal service, for a period of ten years after the acquisition, anywhere within the province of British Columbia. Laidlaw's in-house counsel's reporting letter indicates that a ten-year 300-mile radius had been agreed upon.[8] At the same time, Laidlaw signed a companion agreement not to compete with Jones in the roll-off waste disposal business for ten years within a 50-mile radius of Nanaimo.[9] Laidlaw sold the roll-off equipment it had acquired when it purchased Nanaimo Disposal to Jones and obtained a right of first refusal,

[8] The restrictive covenants are again set out in a step arrangement, both in terms of time and in terms of area (within a 500-mile radius, a 400-mile radius, a 300-mile radius of the City of Nanaimo or anywhere on Vancouver Island; the alternative time periods descend in one year decrements to one year). There is some uncertainty from the materials in evidence as to exactly what covenants were in fact signed. Both executed and unexecuted versions exist and these differ. Also, the executed version does not seem to contain a time dimension but it is clear from the asset purchase agreement (Joint Book of Documents, vol. XIII, tab L-2 at 276 (Exhibit XIII (confidential)) and vol. II, tab A-5-4 at 56 (Exhibit II)) that a covenant for ten years was agreed upon.

[9] This covenant was also of a "step" variety going from a 50-mile radius downward in decrements of ten to a ten-mile radius and in time from ten years to one year.

for a ten-year period, to purchase Jones' roll-off business or assets should that company decide to sell.

(c) Acquisition of United Disposal Ltd. - Restrictive Covenant

The August 1986 acquisition agreement with United obligated that company and its two principals, Peter Kupiak and Ivan Paquette, not to compete either directly or indirectly in the waste disposal business, for a period of five years after the acquisition, within a 300-mile radius of Parksville (Parksville is 36 kilometres northwest of Nanaimo).[10] After that acquisition there were no competitors to Laidlaw in the lift-on-board service in the Nanaimo area.

(d) SCS Waste Systems Inc. - A New Entrant - Acquisition - Restrictive Covenant

In April 1987, SCS Waste Systems Inc. ("SCS Waste Systems") commenced business in the Nanaimo area. This business was started by Charles Saunders in conjunction with a steel container manufacturing business he operated under the name of SCS Steel Container Systems Inc. ("SCS"). That company manufactured a variety of steel containers used for waste disposal services including the bins used for lift-on-board service. Mr. Saunders

[10] This covenant was also a "step" variety going from a 300-mile radius downward to a 50-mile radius.

approached Laidlaw when he first started his container manufacturing business to see if that company would purchase containers from him. He was told that Laidlaw was not buying anything at the time and in any event it had its own source of supply for containers.

After SCS Waste Systems had been in the business for four months, a Laidlaw representative approached Mr. Saunders and he understood from that meeting that Laidlaw had $265,000 for the purchase of new containers. He understood that Laidlaw would be willing to deal with SCS, but not while SCS Waste Systems was a competitor to Laidlaw.

SCS Waste Systems was sold to Laidlaw in August 1987. The acquisition agreement contains a non-competition clause obligating SCS Waste Systems, SCS and Mr. Saunders not to engage either directly or indirectly in the solid waste collection and disposal business, for a period of five years after the acquisition, within a 400-mile radius of the City of Nanaimo.[11] Since that time Laidlaw has purchased steel containers for its business from SCS. After SCS Waste Systems went out of business, as noted above, some of its customers approached Advance to see if that company would provide lift-on-board collection and disposal services in the Nanaimo area.

[11] This covenant was also of a "step" variety going from a radius of 400 miles downward to a 50-mile radius.

(e) West Coast Waste Systems Inc. - A New Entrant - Invoking a Restrictive Covenant

In April 1989, Peter Kupiak's brother, Jerry Kupiak, started West Coast Waste Systems Inc. ("West Coast"). Jerry Kupiak tendered on a recycling contract with the Regional District of Nanaimo. The details are not important; it is sufficient to note that on a retender, which included both lift-on-board service and the recycling service, West Coast was the low bidder.

It was assumed by the Kupiak brothers that Peter Kupiak could be involved in the business as recycling manager. They were aware of the restrictive covenant which Peter Kupiak had signed with Laidlaw in connection with its acquisition of United but did not believe that the covenant prevented Peter Kupiak's involvement in recycling as opposed to the traditional type of garbage collection in which United had been engaged. Laidlaw commenced an action against both Peter and Jerry Kupiak as well as against West Coast, seeking an interim injunction to prevent any of them from engaging in the waste disposal business.

After obtaining legal advice the Kupiak brothers realized that Peter Kupiak's involvement in recycling was covered by the covenant. A letter, dated October 31, 1989, was written to the Regional District recognizing this obligation and giving a commitment that Peter Kupiak would not be involved in the

business. Jerry Kupiak also signed an affidavit, dated November 29, 1989, in response to Laidlaw's application for an interim injunction, stating that he and his brother now understood the scope of the covenant and that Peter Kupiak would not be involved in the business. Despite this commitment, Laidlaw pursued the action and had a consent judgment issued against Peter Kupiak on February 20, 1990. There is no evidence that Laidlaw communicated with the Kupiak brothers regarding its concerns about the covenant prior to starting its action for an injunction.

A Laidlaw manager also wrote to the Regional District on September 11, 1989:

> I am writing in follow up to the opening of Tender 89-102.
>
> I am quite concerned, as in the past I have seen a similar situation where a low bidder was chosen when there was reason to believe they would be unable to perform.
>
> The situation took place in Delta where Laidlaw had been serving for a number of years. ...
>
> We attempted to explain to the decision makers that it was below cost for the service they were anticipating but they went with the low bid.
>
> Since then, the poor performance and lack of funds has been headline news in that community.
> ...
>
> The Council has had a political problem on its hands and is now contemplating retendering in lieu of the requested increase.

> The stress on the system and inconvenience on the taxpayer has left those involved with a desire to roll back the clock.
>
> Here in Nanaimo there is a chance to avoid the same problem. ...
>
> ...
>
> I would suggest that the Regional District of Nanaimo does not want the problems attendant with an underbid contract that is so significant.[12]

Employees of the Regional District received a subsequent communication from Laidlaw, dated October 31, 1989, suggesting that it would be reasonable if the District decided to retender, particularly given the fact that Peter Kupiak was now not going to be involved in West Coast. The contract was not retendered. West Coast was awarded the contract. West Coast is still in business in the Nanaimo area. The uncertainties created by Laidlaw's legal action against the Kupiak brothers and West Coast, however, delayed the signing of the contract with the Regional District for over a year. The contract was not finally signed until September 24, 1990 and service thereunder was not begun until January 8, 1991.[13]

In addition to West Coast, Browning-Ferris Industries ("B.F.I.") is also presently attempting to establish itself as a competitor in the Nanaimo area. In the spring and summer of 1990 it obtained two tendered contracts: one is a

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[12] Joint Book of Documents, vol. VII, tab F-1 at 150-51 (Exhibit VII).

[13] Transcript at 116-17 (28 October 1991).

Department of National Defence contract and the other a Regional and City School Board contract. There is evidence that these were bid not with the primary objective of making a profit but in order to get a foothold in the market in that area.[14]

(3) Courtenay-Comox-Cumberland Area

(a) Attempted Acquisition of Lacey Garbage Disposal Limited

There are two disposal services in the Courtenay-Comox-Cumberland area: Lacey Garbage Disposal Limited ("Lacey") and Valley Disposal Limited. Lacey is by far the larger company, holding contracts with the City of Courtenay, the Town of Comox and Canadian Forces Base Comox. Laidlaw approached Lacey on several occasions to see if that company was interested in selling. This initiative was temporarily dropped. Lacey was given to understand that its asking price was too high. Laidlaw had learned that in the event of a purchase it was unlikely that the City of Courtenay would assign the Lacey garbage collection contract to Laidlaw. Laidlaw has on subsequent occasions sought to purchase Lacey, often just before one or other of the contracts that Lacey holds came up for retender.

[14] Transcript at 360ff (29 October 1991).

(4) Campbell River Area

(a) Acquisition of Borgfjord Trucking (1986) Ltd. and Campbell River Sanitation Service Ltd. - Restrictive Covenants

In the spring of 1986 there were two competitors in the Campbell River area: Borgfjord Trucking (1986) Ltd. ("Borgfjord") and Campbell River Sanitation Service Ltd. ("Campbell River Sanitation"). Laidlaw purchased Borgfjord and Campbell River Sanitation on the same day, May 1, 1986. The agreement with Borgfjord contained a non-competition clause under which that company and its two principals agreed not to directly or indirectly engage in any solid waste disposal business, for a period of five years after the acquisition, within a 500-mile radius of Campbell River. The agreement with Campbell River Sanitation contained a clause which required the company and its three principals not to carry on directly or indirectly any waste disposal business in competition to Laidlaw, for a period of five years after the acquisition, anywhere within the province of British Columbia. Laidlaw's in-house counsel's reporting letter indicates that only a 300-mile radius had been agreed to in the case of Campbell River Sanitation even though the signed contract provides for the broader term.[15]

(b) B & D Disposal Ltd. - A New Entrant

[15] Both covenants are of a "step" variety descending in 100-mile decrements with a 50-mile radius being the smallest.

In March 1988 a new company commenced offering lift-on-board service in the Campbell River area: B & D Disposal Ltd. ("B & D"). This company was run by Dwight Bakken and Brian Preston. Mr. Bakken was motivated to get into the business by an experience he had had with Laidlaw. He had spoken to a Laidlaw representative to obtain garbage pick-up for his residence. He was asked to pay for service twelve months in advance. He did not consider this request appropriate and was further outraged by remarks which he remembers as indicating that there was no competition to Laidlaw in the market and therefore he had no choice.

(c) Acquisition of B & D Disposal Ltd. - Restrictive Covenant

In any event, Mr. Bakken and Mr. Preston commenced business and the business grew, initially at least. In June 1989, Mr. Bakken was forced to leave the business as a result of personal financial difficulties. Mr. Preston decided he could not carry on alone. His new partner was not as experienced as Mr. Bakken. Mr. Preston had other businesses and could not afford the time and effort to make B & D a viable operation. He attempted to find a purchaser other than Laidlaw and was unable to do so. He sold B & D to Laidlaw on September 1, 1989. The agreement contained a non-competition clause obligating B & D and its two principals (at the time Brian Preston and Kenneth Pople) not to engage either directly or indirectly in the solid waste disposal business, for a period of five

years after the acquisition, within a 100-mile radius of the municipal boundaries of Campbell River.

In May 1990, Bernard Bakken, brother of Dwight Bakken, and his partner Claude Vermette started a lift-on-board disposal business in Campbell River under the name Camvest Disposals ("Camvest"). They are presently trying to establish this business in that area.

B. Laidlaw's Contracting Practices

(1) Signing the Contracts

Immediately after acquiring the lift-on-board collection and disposal assets of the above companies, Laidlaw approached the customers of those firms to have them sign service contracts (customer service agreements) with Laidlaw. This was done, when possible, by using the locally known owner/operator of the acquired company.[16] That individual was asked to approach his "ex-customers" to explain that he had sold his business to Laidlaw and that Laidlaw's corporate practice was to obtain a signed container service agreement from its customers. In addition, Laidlaw would at times organize "sales blitzes" and bring in sales personnel from

[16] Transcript at 319-23 (29 October 1991) and at 505-11 (30 October 1991).

outside the local area to assist in signing customers to contracts or to assist in obtaining renewals of existing contracts. Laidlaw would seek the renewal of contracts, at times, long before their expiry date. A disturbingly recurring theme through much of the evidence before the Tribunal was that signatures on many of these contracts had been obtained by representing to the customers that the documents they were being asked to sign were "a mere formality", or because it was "the national corporate practice which Laidlaw followed", or because Laidlaw simply wanted "to up-date its information", or because the acquisition entailed switching information to Laidlaw's computer system and it was necessary "to verify where the various containers were located". The issue in this case does not require a determination as to how many of these contracts were obtained through misrepresentation. The above details are set out merely for the purpose of setting the context within which many signatures were obtained.[17]

(2) Terms of the Contracts

The contracts thus signed were for a three-year term. After three years the contract would automatically renew ("evergreen clause") unless notice had been given by registered mail 60 days before the expiration of the three-year period. There is no provision limiting the number of times the contracts are to roll over in this way. If the customer wished to terminate because he or she was going out of

[17] Transcript at 268-75 (29 October 1991).

business or was relocating to an area in which Laidlaw did not provide lift-on-board service, then the contract could be terminated on 30 days notice.[18] If Laidlaw wished to terminate because a customer refused to accept a proposed price increase, then this could be done by giving the customer 30 days written notice under some contract forms, or ten days written notice in more recent versions. The most recent version has no notice provisions.

Laidlaw's standard form contract changed from time to time and all versions presently exist in the market as a result of the evergreen clause and because, even after the issuance of new contract forms, the older forms were often used until the supply was exhausted.

The contracts used in 1986 contained a clause which obligated the customer, even if the contract had been terminated, to take service from Laidlaw if Laidlaw was willing to meet a competitor's terms and conditions of service (right of first refusal clause):

> If, during the term of this Agreement or of any renewal period (and regardless whether the Customer has given notice of termination under this Agreement) or during a period of 90 days after the termination of this Agreement, the Customer receives a bona fide offer from another supplier for the provision of solid waste disposal services or if the Customer wishes itself to make a bona fide offer to another supplier, then the Customer shall not accept or make such offer unless the Customer first offers to enter into an agreement with the Company [Laidlaw] on the same or

[18] Early versions of the standard form contract do not contain an express provision in this regard.

> equivalent terms and conditions with respect to monthly charges, number and size of bins, frequency of service, date of service, and term (including renewal periods) as are contained or are to be contained in such bona fide offer. The Customer's offer to the Company shall be in writing, delivered by hand or by registered mail, and shall be open for acceptance for 14 days following actual receipt by the Company. If the Company accepts the Customer's offer, the Customer shall execute the Company's then standard Container Service Agreement containing the terms and conditions agreed to.... [19] (underlining added)

This was subsequently changed to a right to compete clause:

> Customer grants the Company the right to compete with any bona fide offer which Customer receives or intends to make during the term of this Agreement or of any renewal period relating to the provision of non-hazardous solid waste disposal services after the termination of this Agreement. Customer shall notify Company forthwith in writing if Customer receives or intends to make any such bona fide offer, disclosing to the Company all of the terms and conditions thereof. Customer shall not accept or make such offer for the period of fourteen (14) days after such notification and, if the Company within fourteen (14) days of such notification submits an offer of its own Customer shall consider the Company's offer, but is not bound to accept it. Nothing stated in this clause shall be interpreted as relieving the Customer of its obligation to comply strictly with the provisions of this Agreement until such time as this Agreement has been terminated in accordance with its terms.[20] (underlining added)

This clause was eventually dropped from Laidlaw's standard form contract in 1991 insofar as the Vancouver Island markets are concerned. Laidlaw took the position before the Tribunal that it did not intend to try to enforce the clauses in existing contracts. However, no notice of this had been given to Laidlaw's

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[19] Joint Book of Documents, vol. V, tab D-1 at 1 (Exhibit V).

[20] *Ibid.* at 3.

customers in the markets under consideration prior to the hearing of this application.

Certainly, there is no disagreement that these clauses are anti-competitive. Requiring a customer to provide information about bids from other companies allowed Laidlaw to know who was competing with it and on what terms before the competitor could succeed in obtaining a single customer from Laidlaw. Laidlaw therefore did not have to respond to competition by lowering prices generally. It could target price reductions only on the customer that a competitor was seeking to acquire, thereby reducing the costs of using predatory or disciplinary pricing to discourage price competition. In addition, these kinds of clauses prevent secret price-cutting which is widely recognized to be an important means of maintaining competitive markets. Since it has been agreed that these clauses will be dropped, they will not be referred to again for the purposes of these reasons except when the remedies which are requested are discussed.

Although the contracts with customers specifically mention the number of bins, the size thereof and the frequency per week with which they were to be emptied, the contracts also purport to bind the customer to employ Laidlaw for *all* its garbage disposal purposes:

> Customer agrees that the Company shall have the sole and exclusive right to pick up and dispose of all

> garbage and other refuse during the currency of this agreement.[21] (underlining added)

Other versions read:

> This agreement shall include collection and disposal of all solid waste generated by Customer excluding radioactive, volatile .... [22](underlining added)

and

> During the term of the Agreement, Customer shall solely and exclusively use Company's Equipment and Service for the collection, removal and disposal of all of its non-hazardous solid waste.[23]

This was used, for example, to prevent one customer (Bayside Inn Resort) from participating in a pilot recycling project with respect to part of its garbage at a time when Laidlaw did not provide such service.[24] It was used to attempt to prevent another customer (Island Hall Beach Resort) from using a competitor to service two bins located close to the hotel kitchen when that customer's contract with Laidlaw, on its face, only referred to service for one bin located close to the Crossroads Pub[25] which was also part of the resort complex.

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[21] *Ibid.* at 1.

[22] *Ibid.* at 2.

[23] *Ibid.* at 3.

[24] Transcript at 434-35 (30 October 1991).

[25] Transcript at 736ff (31 October 1991).

The price to be charged under the contracts can be increased automatically if landfill site dumping fees charged to Laidlaw are increased. Price increases for reasons not covered by the automatic price increase clause can be charged if the customer consents. Customers are assumed to consent unless on receipt of notice they specifically notify Laidlaw that they object to the price rise (a negative option clause). The early contract forms required Laidlaw to give the customer a 30-day notice of a proposed price rise. The 30-day notice requirement was changed in later contract forms to a 15-day notice. On some occasions at least the notice given to customers was nothing more than a statement in the bottom corner of one month's invoice that a price rise was going to be added to the following month's bill. If the customer did nothing to object and the invoice containing the price rise was paid, the customer was deemed under the contract to have agreed to the price rise.

The most recent of the contract forms is structured differently. The automatic price increase clause covers not only increases in landfill site dumping fees but also increases in taxes, duties, levies, fuel costs, certain administrative fees and "other costs of doing business". No notice of proposed increases is required to be given with respect to price rises for other reasons. The forms simply state that price increases which the company proposes and which are agreed to by the customer will be incorporated into the contract. Consent to increases is said to be "evidenced by the action and practices of the parties." If

Laidlaw interprets the customer's paying of a bill to which a price increase has been added as an action implying agreement, then this contract also contains a negative option clause. A negative option clause under this most recent standard form contract will of course be less important because of the increased number of items and their open-ended nature for which automatic cost increases may now be charged.

There is evidence to indicate that Laidlaw used the occasion of landfill dumping fee increases to raise its price to customers in an amount which considerably exceeded a straight flow-through of the increased dumping fees charged to Laidlaw.[26]

If a customer, despite the three-year term, insists that the contract be terminated, some versions of the contract provide for the payment of liquidated damages in an amount six times the customer's average monthly charge.[27] This clause was changed in more recent contracts to provide for an amount equal to 30% of the customer's charge for the month preceding default multiplied by the number of months remaining under the contract.

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[26] Based on Mr. Woods' evidence regarding measured weight and the comparison of Laidlaw's additional costs and those required to be paid by the customer.

[27] Again, the early standard form contracts do not contain this provision.

Although the details differ, Laidlaw's contracts contain many elements which are also found in the standard form contracts used by the two other major international garbage collection firms, Browning-Ferris Industries ("B.F.I.") and Waste Management Inc. ("W.M.I."). Indeed, some forms of contracts were adopted by Laidlaw in response to B.F.I.'s contracting practices.

(3) Enforcement of the Contracts

As has been noted, often customers did not know they had signed a contract with Laidlaw. One such form contains almost no indication on its face that it is a contract. There is an indication in very minute printing that general conditions concerning the agreement are found on the reverse side of the paper. It is on this reverse side that one finds the terms of the contract described above. Since customers were not always aware that they had a written contract with Laidlaw, when they were approached by a Laidlaw competitor seeking their business or if disgruntled by Laidlaw's service or price and seeking an alternate supplier, they would purport to cancel what they thought to be their verbal contract with Laidlaw and hire the competitor. It would then be brought to their attention that a written three-year contract existed.

In the meantime it is possible that the competitor had placed a bin on the customer's premises and started to provide service to that customer. Both the

customer and the competitor would then be told by Laidlaw that a contract with Laidlaw existed and the potential competitor would have to remove its bin and cease serving the customer. The chilling effect this had on competition is amply illustrated by the evidence of Peter Kupiak concerning the experience of West Coast,[28] Jack McLeod concerning the experience of Advance,[29] and Brian Preston concerning the experience of B & D.[30] The difficulties encountered as a result of the Laidlaw contracts led them to discontinue actively seeking new customers. Instead they waited to be approached by potential customers.

When a customer attempted to obtain service from another hauler, the customer was likely to receive a letter from Laidlaw as follows:

> We are forwarding a copy of your existing contract to your attention, on the off chance that you were not aware of the service contract.
> We would ask you to review terms and conditions governing the contract which is in force.
>
> We are continuing and will continue to provide service as per our contractual obligation and respectfully request that you, our customer do the same.
>
> ...
>
> Thank you in advance for your continued business.[31]

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[28] Transcript at 121-23, 142-44 (28 October 1991).

[29] Transcript at 611, 620 (30 October 1991).

[30] Transcript at 1220ff (4 November 1991).

[31] Joint Book of Documents, vol. V, tab D-5 at 13 (Exhibit V).

Alternatively or additionally, if the customer persisted, a letter would be sent by Laidlaw's local legal counsel to the customer's lawyer:

> I act for Laidlaw Waste Systems Ltd. and have been provided with a copy of your letter to my client's Nanaimo division, dated November 1, 1988.
>
> ...
>
> It is apparent that your client has contrived an excuse to cancel its Container Service Agreement and that it has done so because of a competitive price quote from Advance Waste Systems Inc. This occasionally happens and has consistently prompted Laidlaw to sue for damages for breach of its Container Service Agreement. I have personally handled several such actions and can tell you that none has been dismissed to date. If Mr. Andrinopolos winds up paying Laidlaw damages for breach of contract, he will inevitably find that the expected short-term price reduction will disappear.
>
> I am writing in the hope that your client can be persuaded to abide by his Container Service Agreement with Laidlaw to the end of its current term on February 16, 1990. The alternative is an action by Laidlaw for damages for breach of contract, in the context of which we do not believe your client's complaints of poor service will stand up to scrutiny.[32] (underlining added)

In fact, Laidlaw's practice in the Vancouver Island markets seems to have been one of not pursuing litigation against customers. No evidence was adduced of any action against a *customer* having been commenced to enforce the contracts. Only the threat of litigation was used.

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[32] *Ibid.* at 16-17.

[33] Transcript at 1477 (6 November 1991).

[33.1] The Tribunal thinks it is important to point out that the counsel who wrote these letters was not in any way connected to or associated with the counsel who appeared for Laidlaw in these proceedings.

In addition to writing to the customer or the customer's lawyer, Laidlaw's local legal counsel[33.1] would also write to the competitor. An example of this type of letter follows:

> I have been asked to bring to your attention two recent incidents of unlawful competition by Advance. First, Advance has initiated service to Katerina's Place at 15 Front Street, in Nanaimo, notwithstanding that the customer has a valid and subsisting Container Service Agreement with Laidlaw. The customer has purported to cancel the Laidlaw Container Service Agreement on the ground of poor service, but this excuse is entirely contrived. ...
>
> I enclose for your reference copies of the two Container Service Agreements in question. You will see that both contracts are for terms of three years and can be cancelled only at the end of a contract period and only by 60 days' prior written notice by registered mail. Both contracts remain in force, and Laidlaw intends to see that they are enforced, if necessary by litigation against both the customers and your client. Laidlaw has pursued many such actions against its customers over the last few years and has not been unsuccessful to date. ...
>
> Unless Advance's containers are removed from these two sites immediately, Laidlaw will have no alternative but to take action against the two customers in question for breach of contract and against Advance for inducing breach of contract. In addition, Laidlaw will seek an injunction against
>
> Advance, if a pattern of unlawful interference becomes apparent.[34] (underlining added)

Another such letter reads as follows:

> Almost all of Laidlaw's customers have entered into written Container Service Agreements, virtually all of which have a minimum term of three years. This is standard in the industry. This means that, any time your client calls on a prospective customer and finds that the customer is at present being serviced by Laidlaw, there is a very high probability that the customer has an existing contract with Laidlaw. It would therefore be unlawful for your client to invite such a customer to enter into a service contract with your client, unless of course the term of your client's contract was not to commence until the expiration of the existing Laidlaw contract. Such unlawful competition has been the subject of litigation between major waste disposal suppliers in the Lower

[34] Joint Book of Documents, vol. IX, tab H-4 at 137-38 (Exhibit IX).

> Mainland, and I am aware of at least two injunctions that have been pronounced to restrain unlawful interference in a competitor's contractual relations.
>
> Laidlaw does not want to have to sue to protect its patronage, but it is certainly prepared to do so. Would you kindly raise this matter with your client and urge your client not to interfere with any of Laidlaw's existing contracts. Your client can safely assume that there is an existing contract in all cases where a Laidlaw container is on site. If either your client or the customer in question is uncertain whether a Laidlaw contract exists, the customer or your client need only contact Mr. Dean Woods at Laidlaw's office in Nanaimo to be provided with an answer.[35] (underlining added)

As has already been noted, in May 1990, Claude Vermette and Bernard Bakken started a lift-on-board service in Campbell River under the name Camvest Disposals. Vermette and Bakken began to solicit customers for this business before its May 3, 1990 opening by placing advertisements in the local newspaper and by calling on potential customers. They received a number of favourable responses and on commencement of their business placed bins on the premises of those individuals who had decided to become their customers. Many of these individuals had contracts with Laidlaw and did not realize it. Camvest began to get letters from Laidlaw with copies of contracts attached and, in general, removed its bin unless the customer indicated otherwise. On May 16, 1990, Camvest received a letter from Laidlaw's local legal counsel indicating that he had been advised by Laidlaw that Camvest was inducing Laidlaw's customers to breach their contracts:

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[35] *Ibid*., tab H-1 at 25.

> We demand that you remove your waste containers from the customers' premises immediately. If the waste containers are not removed immediately, we will seek our client's instructions to bring an injunction application against you. We will seek an Order that you be prevented from placing any of your waste containers on premises where Laidlaw already has waste containers in place. We will also be seeking an Order that the containers already placed on the premises of Laidlaw customers be removed forthwith. Of course, we will also seek damages and costs of the action against you.[36]

On June 7, 1990, Laidlaw commenced an action against Camvest seeking both an interlocutory and a permanent injunction to prevent Camvest from placing containers on premises where a Laidlaw container existed and to require Camvest to remove the bins it had already placed. Damages for inducing breach of contract were also sought. This was supported by an affidavit listing eleven customers who had allegedly been induced to breach their contracts with Laidlaw. Attached were the relevant copies of the Laidlaw contracts. The eleven customers responded by filing affidavits stating that Camvest had not induced any of them to break their contract with Laidlaw. One such affidavit reads, in part, as follows:

> 4. THAT in about March, 1990, I advised Laidlaw Waste Systems Ltd. (hereinafter referred to as "Laidlaw") that I would no longer be requiring their services. I advised Laidlaw that I would be using the services of Camvest Disposals it started *(sic)*.
>
> 5. THAT at the time I cancelled, Laidlaw claimed that I had a contract with them but I do not believe that I had any contract with Laidlaw. If I had one, I was unaware of it.

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[36] Joint Book of Documents, vol. X, tab H-7 at 14-15 (Exhibit X).

> 6. THAT approximately one month after I had advised Laidlaw I would not need their services any longer, a representative of Laidlaw attended at our office and had my wife sign a three year contract, a copy of which is marked as Exhibit "P" to the Affidavit of William Alexander Muise. My wife attends the office only about once per week. She was unaware of what she was signing. Laidlaw obtained a contract signed by my wife knowing full well that Greenstone Creek Logging Ltd. was no longer going to be using their services.[37]

Another affidavit reads in part:

> 1. THAT I am the owner/operator of M & H Kitchens.
>
> 2. THAT I deny advising William Alexander Muise that I was under any pressure to enter into a contract with Camvest Disposals.
>
> 3. THAT I terminated my contract with Laidlaw Waste Systems Ltd. (hereinafter referred to as "Laidlaw") after obtaining legal advice by reason of Laidlaw's breach of that contract by raising monthly charges without authorization. A copy of my lawyer's letter dated May 29, 1990 is attached hereto and market Exhibit "A".
>
> 4. THAT neither Camvest Disposals nor any of its agents or representatives in any manner induced, persuaded, encouraged, pressured or suggested that I breach my contract with Laidlaw. There was no interference by Camvest Disposals with any contractual relations between Laidlaw and M & H Kitchens.
>
> 5. THAT I asked Laidlaw to remove their waste container from my premises but Laidlaw has failed or refused to do so. I wish their waste container removed.[38]

Laidlaw's application for an interlocutory injunction was refused but the judge who heard that application indicated that there was a serious issue to be tried with respect to the dispute. This would be dealt with on the hearing of the claim for a permanent injunction and damages. Laidlaw filed an appeal of the decision

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[37] *Ibid.* at 128-29.

[38] *Ibid*. at 138.

refusing an interlocutory injunction. In reporting to Messrs. Vermette and Bakken on these developments, their counsel indicated that he was making an attempt to negotiate a settlement with Laidlaw and to come to "some agreeable manner of doing business". The attempt to reach a negotiated settlement was prompted by the fact that a considerable amount of money had already been spent by Camvest in defending the application for an interlocutory injunction and Camvest could not support extended legal fees. Camvest's costs to that point were in excess of $8,000 and are now in excess of $14,000. Camvest's counsel reported that the response he received to his attempt to obtain a settlement was: "Laidlaw's lawyer feels they have to proceed with the appeal and injunction application". Negotiations for settlement did continue, however, but before either a settlement could be agreed upon or the appeal could be heard, Camvest became aware of the Bureau of Competition Policy's investigation into Laidlaw's activities. Neither the appeal nor the application for a permanent injunction has been pursued.

IV. AN AREA OF CANADA - GEOGRAPHIC MARKET

Subsection 79(1) of the Act only applies if the respondent "substantially or completely controls" the relevant class or species of business "throughout Canada or any area thereof." In order to determine whether complete or substantial control exists it is necessary to define the market, both its product and geographic dimensions, within which the control is alleged to operate. As has been noted

above, the product market dimensions are not in dispute. The product is the provision of lift-on-board garbage collection and disposal service. There is considerable dispute, however, about the geographic dimensions of the market.

A. Description of the Area

The geographic area relevant for the purposes of this case is a longitudinal portion of the eastern side of Vancouver Island. It stretches, in general, along Highway No. 1 (north from the City of Victoria to the City of Nanaimo) and Highway No. 19 (from the City of Nanaimo to the District of Campbell River and then to the Village of Sayward). Population is clustered at intervals along the spine created by these highways. The first significant population centre north of Victoria is the City of Duncan (population approximately 4,100). It is 60 kilometres from Victoria. A dump site is located south of Duncan (TRP No. 2).[39] North of Duncan are a number of small communities which fall into the District of North Cowichan (population approximately 20,000) and immediately north of that is the Town of Ladysmith (population approximately 5,000). Ladysmith is 28 kilometres from Duncan. A landfill site exists just south of Ladysmith (TRP No. 3).[40] Directly to the west of Duncan and not on Highway No. 1 is the Village of Lake Cowichan. It is 30 kilometres from Duncan. A dump site is located

[39] Thermal Reduction Plant ("TRP") No. 2, Koksilah Road.

[40] Peerless Road.

approximately a further 20 kilometres northwest of that village (TRP No. 1).[41] The communities of Duncan, the District of North Cowichan, the Village of Lake Cowichan and the Town of Ladysmith are all located in the Cowichan Valley Regional District.

The next significant population centre north of Ladysmith along the longitudinal route defined by Highway No. 1 is the City of Nanaimo (population approximately 56,000). Nanaimo is 23 kilometres northwest of Ladysmith. It is 51 kilometres from Duncan. A dump site is located south of Nanaimo, the Cedar Road landfill site. The City of Parksville (population approximately 6,800) and the Town of Qualicum Beach (population approximately 4,100) are 36 and 47 kilometres, respectively, northwest of Nanaimo along Highway No. 19. Until recently a landfill site existed at Qualicum Beach. It was closed at the beginning of September 1991 and a transfer station was opened just west of Parksville, the Church Road transfer station. Garbage which is collected in the Parksville/Qualicum Beach area is taken to this transfer station and dumped into rail cars. The Nanaimo Regional District then transports this garbage south to the Cedar Road dump outside Nanaimo. The communities of Nanaimo, Parksville and Qualicum Beach are all located in the Nanaimo Regional District.

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[41] Meads Creek.

The next major population cluster along the spine created by Highway No. 19 is formed by the Town of Comox (population approximately 7,800), the City of Courtenay (population approximately 11,000) and the Village of Cumberland (population approximately 2,000). Courtenay is 73 kilometres from Parksville and 108 kilometres from Nanaimo. A landfill site exists south of the Courtenay-Comox-Cumberland area, the Pigeon Lake disposal site. The District of Campbell River (population approximately 20,000) is 45 kilometres northwest of the Courtenay-Comox-Cumberland area along Highway No. 19. Quadra Island is located to the east of Campbell River and is reached by ferry. The Village of Sayward (population approximately 400) is located 79 kilometres northwest of Campbell River. A dump site is located in the vicinity of this community. A dump site exists to the southwest of Campbell River. The communities of Courtenay, Comox, Cumberland, Campbell River, Quadra Island and Sayward are located in the Comox-Strathcona Regional District.

B. Positions of the Parties

While the Director has alleged in his application that anti-competitive acts lessened competition substantially in the Cowichan Valley Regional District, the Nanaimo Regional District and the District of Campbell River, the dimensions of the geographic markets are more specifically delineated by his expert as being within a radius of 50 kilometres or less from each of Laidlaw's hubs in the

Cowichan Valley (Duncan) area, the City of Nanaimo and the District of Campbell River.

The respondent argues that the relevant geographic markets are two in number. It is its position that the Cowichan Valley Regional District and the Nanaimo Regional District together form one geographic market and that the eastern portion of the Comox-Strathcona Regional District forms the other. This eastern portion of the Comox-Strathcona Regional District includes not only the District of Campbell River and the Courtenay-Comox-Cumberland area but also the community of Sayward and the whole of Quadra Island. There is no dispute that the geographic markets, however they may be defined, do not include the City of Duncan and the Village of Lake Cowichan. These two communities employ their own crews and trucks to provide lift-on-board garbage collection and disposal service.

C. Market Definition and Determination

The general test for determining the geographic dimensions of a market is the same as that used to determine the product dimensions: identification of the universe of effective competition. That is, insofar as the relevant geographic dimensions are concerned, for the purposes of this case one asks what are the boundaries of the geographic area within which competitors must be based if they

are to provide effective competition to Laidlaw. Effective competition means that the competitor provides a significant restraint on Laidlaw's ability to raise prices above the competitive level.

The Director's position is that the determination of the geographic boundaries of the market should be based on a review of how the market in the relevant areas operated in the past as well as on observation of the existing market: the past and present conduct of the customers and providers of lift-on-board service. The respondent's position is that the conceptual test, found in the Director's *Merger Enforcement Guidelines*,[42] should be used: could a provider of the service (as a hypothetical monopolist) impose a significant non-transitory price increase without causing the buyers of the service to purchase the service from suppliers located in other regions. A significant price rise is sometimes considered to be 5%; non-transitoriness is sometimes said to exist if the rise can be sustained for a two-year period.[43]

(1) Essential Issue - Dimensions of Market in which Campbell River is Located

It must first of all be noted that whether the Cowichan Valley (Duncan) area and the Nanaimo area are classified as one market or as two is not of great

[42] Director of Investigation and Research, Information Bulletin No. 5, March 1991 (Supply and Services Canada, 1991).

[43] [U.S.] Justice Department Merger Guidelines 49 Fed.Reg. 26,823 (1984); J. Whalley, "Department of Justice Merger Enforcement" (1988) 57 Antitrust L.J. 109.

import in this case. It was agreed at the opening of the hearing that however that market(s) is(are) defined, Laidlaw's market share is extensive. It is so high under either classification that it will give rise to a *prima facie* conclusion that Laidlaw is dominant in that(those) market(s). The main dispute respecting geographic dimensions is whether the communities of Courtenay-Comox-Cumberland are in the same geographic market as the District of Campbell River. If they are, then Laidlaw's share of that market is probably below 50% and no *prima facie* finding of dominance would arise. If they are not, then Laidlaw's market share is considerably higher.

(2) Hypothetical Monopolist

The expert opinion, filed on behalf of the respondent, that a hypothetical monopolist would be restrained by a competitor based more than 50 kilometres away, relies upon evidence respecting the incremental cost of operating a garbage disposal service at a distance equal to 50 kilometres from the base. This analysis is based on information obtained from Laidlaw as to its cost of providing service into the Cowichan Valley (Duncan) area from Nanaimo, which it does once a week, and the revenue received therefrom. The analysis assumes a route density for the one-day service in the remote region equal to the route density in what might be called the home area.

With respect to the use of Laidlaw cost and revenue information in the Cowichan Valley (Duncan) - Nanaimo areas, if the Director's position is correct and Laidlaw is without effective competition in those areas, then there is no reason to assume that the revenue figures which have been provided are ones which would exist if Laidlaw were constrained by a competitive market ("the cellophane fallacy").[44] Accordingly, an analysis of the incremental costs, which a provider of the service could sustain and still compete effectively in the remote market, based on such figures is not persuasive.

Counsel for Laidlaw argues that the criticism of commentators on the holding in *United States v. E. I. du Pont de Nemours & Co.* (the cellophane case) does not apply because that case was concerned with the product boundaries of a market, not its geographic boundaries. It is noted that different sets of evaluative criteria are used for defining the geographic boundaries and the product boundaries of a market (e.g., transportation costs and shipment patterns are particularly relevant to the former). He also argues that the revenue figures ($20 per pick-up) on which Laidlaw's experts founded their analysis is a competitive price. He maintains that this is so because Laidlaw's competitors did not attempt to compete with Laidlaw on that price.[45]

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[44] *United States v. E.I. du Pont de Nemours & Co.*, 351 U.S. 377 (1956); D.F. Turner, "Antitrust Policy and the Cellophane Case" (1956-7) 70 Harv. L.R. 281.

[45] Transcript at 1147-48, 1283 (4 November 1991).

The alleged non-competition on price does not demonstrate that the price is a competitive one. Such behaviour can be explained in two ways: (1) the competitors did not wish to engage in price competition with Laidlaw because they were afraid that Laidlaw's market power would enable it to undercut them selectively with respect to price and thus force them out of the market; (2) they were exhibiting normal pricing behaviour in a concentrated market and sheltering under the price being charged by the dominant firm.

With respect to the arguments concerning the applicability of the "cellophane fallacy", different evaluative criteria may be relevant for determining the product and geographic market dimensions. This does not lead to the conclusion, however, that the logic of the criticism (using prices or revenue as they exist in a non-competitive market as a surrogate for competitive prices) is invalid.

Counsel for Laidlaw argues that it is not open to the Director to argue that the model used by Laidlaw's experts is flawed on the basis of the "cellophane fallacy" when he did not adduce any expert evidence to this effect. The Director's objection to the evidence relates to the weight to be given to it in the absence of evidence by Laidlaw that the cost and revenue information contained therein relates to the competitive level. This criticism can be made without support by expert evidence. It is Laidlaw which is relying on the opinion in question and

therefore Laidlaw has the responsibility of providing the factual basis to support it.

In addition, to analyze the Campbell River market area with respect to Courtenay-Comox-Cumberland, one should be using prices and costs from those areas. And, in any event, it is not at all clear that all relevant costs have been included in the analysis. For example, no allocation is made for the extra costs involved in the initial delivery of the container to the customer and related sales representative or service calls to the extent that these might require physical attendance at the customer's premises. No allocation is made for contingencies such as the breakdown of a truck in the remote area. With respect to the assumption that the route density (for the one-day a week service) in the remote area is the same as in the home area, this does not mirror the initial competitive situation which exists when a new supplier attempts to provide service in the remote market. It assumes that the new supplier has obtained customers in a tight geographic area, comparable to that which exists where the supplier is well established. It is likely that customers would be scattered and far more dispersed for a new competitor than they are for Laidlaw in the Cowichan Valley (Duncan) area. The model, therefore, does not demonstrate that the remote supplier of the service could be an *effective* competitor.

Also missing from the analysis is a consideration of further costs and strategic factors that a Courtenay based firm would have to contend with in trying

to operate in Campbell River. The 5% hypothetical increase is imposed on a volume base derived from the pick-up of 74 bins in a single day. The assumption is that the distant firm is able to attract that volume of business for a *particular* day. The evidence is that customers often have a preference with regard to the day that their bins are picked up. This factor would add to the difficulties facing the Courtenay seller in attracting a sufficient number of customers who were not tied by Laidlaw contracts. Based on the experience of entrants in Campbell River, there is no reason to believe that the Courtenay firm would quickly attract the required volume of business. During the period that fewer than 74 bins were being picked up the firm would be experiencing losses compared to operating in Courtenay. For these losses to be recovered the price differential would have to be more than the 5% difference assumed by the respondent's experts. Additionally, it is clear from the evidence that prices for garbage disposal are not uniform. Selective price-cutting by Laidlaw would be another factor that could confront the would-be entrant.

Indeed, as counsel for the Director argues, it is not obvious that a significant non-transitory price increase test for determining market boundaries is useful in an abuse of dominant position case. In an abuse of dominant position case it is not the *potential* dominant position or the increase in dominance of a firm which is at issue. The respondent firm is alleged already *to have* a dominant

position in the relevant market. The market definition issue relates to an existing situation rather than a prospective one.

The Tribunal wishes to emphasize that the above discussion of the respondent's expert evidence should not be taken as an acceptance that the 5% price rise criterion is necessarily a useful one even in a merger case. While the test of a non-transitory significant price increase may be conceptually useful, what percentage will be significant and what period of time will satisfy the test of non-transitoriness can only be determined by reference to the facts of a particular case.

(3) Regulatory Constraints on Dump Sites

All three regional districts have by-laws or rules which require that only solid waste from certain areas is to be dumped in the various landfill sites. The Cowichan Valley Regional District requires that only waste from that district may be deposited in its dump sites (TRP No. 1, TRP No. 2 and TRP No. 3). In addition, conditions attached to the permits authorizing the operation of the sites require that only refuse collected from its vicinity be deposited in the particular site.

The Nanaimo Regional District requires with one exception that only refuse generated within its boundaries is to be disposed of at its dump sites. That

district prescribes dump site usage by reference to school district boundaries. Refuse collected from residents of School District No. 68 (located in the southern portion of the district) must be disposed of in the Cedar Road landfill site located south of the City of Nanaimo. School district boundaries in British Columbia are not necessarily coincident with regional district boundaries. School District No. 68 takes in part of the northern area of the Cowichan Valley Regional District and thus refuse collected in that area may also be disposed of at the Cedar Road dump. Refuse collected from residents of School District No. 69 (the northern part of the Nanaimo Regional District) was required to be dumped at the Qualicum Beach landfill site until it was closed at the beginning of September 1991. It now may be deposited at either the Church Road transfer station or taken to the Cedar Road site south of Nanaimo.

In the Comox-Strathcona Regional District the use of dump sites is also restricted to residents of the district. With respect to the Pigeon Lake disposal site located in the Courtenay-Comox-Cumberland area, only refuse collected from those municipalities is to be disposed of at that site. Insofar as the Campbell River dump is concerned, the District of Campbell River (By-Law No. 1261) allows only residents of that district and the surrounding electoral areas D, E and F as well as a defined portion of J to dispose of garbage at that dump site. Electoral areas E and F are small areas adjacent to the District of Campbell River. Electoral area D is larger in size but apart from the area close to the District of Campbell

River is sparsely populated; indeed, much is completely uninhabited. The "defined portion of J" refers to a small part of Quadra Island closest to Campbell River. The dump site at Sayward is limited to refuse collected from the vicinity of that village.

While the regulations respecting the use of dump sites are factors which constrain the geographic market, these regulations do not prevent a hauler operating in one area on one day and dumping at the appropriate site, and operating in another area on another day and dumping at the site appropriate to that area. Also, it is clear that arrangements can be made with dump site operators to allow for the dumping of small volumes which have been collected outside their area.[46]

(4) Past and Present Behaviour of Market Participants

The Director relies heavily on evidence respecting the past and present behaviour of the providers of lift-on-board service in the areas in question. He uses that evidence to support a conclusion that the outer boundaries of the geographic market are generally within 50 kilometres or less from a hauler's hub of operation. Such hubs are usually located in close proximity to a substantial population centre and a disposal site.

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[46] Transcript at 366 (29 October 1991).

The evidence discloses, for example, that Fox[47] operated around the Village of Lake Cowichan and sought business no further afield than the District of North Cowichan. Advance[48] operated in the Duncan and North Cowichan area. On the sale of SCS Waste Systems[49] to Laidlaw, Advance attempted to service some customers in the City of Nanaimo but this was found to be uneconomical.[50] The market in that area was more difficult to penetrate because of Laidlaw's contracts than was the case in the Cowichan area.

Nanaimo Disposal[51] operated in the Town of Ladysmith and the City of Nanaimo.[52] (It faced some competition in Ladysmith from C.W. which at the time operated out of Duncan). United[53] and its predecessors, Mid-Island Disposal Co. Ltd. and B & B Garbage Disposal Ltd., operated in the Parksville-Qualicum Beach area (from Nanoose Bay to Qualicum Beach). SCS Waste Systems served customers located in the Ladysmith-Nanaimo area and West Coast similarly limits its scope of operation[54].

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[47] *Supra* at 11, 14.

[48] *Supra* at 14-17.

[49] *Supra* at 20-21.

[50] Transcript at 890, 892 (1 November 1991).

[51] *Supra* at 18.

[52] "We tried to stay within a reasonable amount of travelling time. If you get out too far, it costs you too much to get back to the garbage dump, and time-wise". (Transcript at 316 (29 October 1991)).

[53] *Supra* at 18, 20.

[54] Except for some customers in Chemainus and Crofton who are part of a "package deal". *Supra* at 20-24.

B & D[55] operated in the Campbell River District area,[56] never going south of the Oyster River. The Oyster River crosses Highway No. 19 approximately halfway between Courtenay and Campbell River. Camvest operates within a 15-mile radius of Campbell River. Insofar as the Campbell River area is concerned, it is most significant that Lacey, which operates in the Courtenay-Comox-Cumberland area, does not consider it economical to operate north of the Oyster River. It is significant that Laidlaw does not operate south of it.

Evidence respecting past and present players in the market must of course be considered carefully. The conduct may result from characteristics particular to those players (e.g., a decision to run a family business and remain small) rather than being evidence of the actual geographic scope of possible effective competition. In this case, however, the evidence of the historical and present conduct of what might be called the small collection and disposal participants in the market is buttressed by other evidence.

In a written submission to the Bureau of Competition Policy with respect to another transaction, Laidlaw itself described the geographic markets in the solid waste services industry as being:

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[55] *Supra* at 27-28.

[56] "... we wanted to concentrate as close to the dump as possible." (Transcript at 1152 (4 November 1991)).

> ... generally local in nature essentially defined by political jurisdictions and transportation economics. They tend to cluster around metropolitan areas.[57]

Laidlaw also continued to operate hubs in both Nanaimo and Duncan despite its claim that these two areas fall into one market. Laidlaw's evidence that in the future it might conduct itself differently is not persuasive. Laidlaw does service the Cowichan Valley (Duncan) area once a week with a truck sent from Nanaimo. However, this does not demonstrate that the two areas are one market. The conduct is more properly characterized as cost minimization behaviour by a participant who operates in two adjacent markets and has excess capacity in one of them. The evidence that Laidlaw serves Sayward from Campbell River is unconvincing as evidence that the communities of Courtenay-Comox-Cumberland and Campbell River are in the same geographic market. Sayward is a small (population 400) and remote area. It is considerably farther from Campbell River than is Courtenay-Comox-Cumberland. As far as is known Laidlaw is the closest supplier of garbage disposal services to Sayward. It would be out of the question to station equipment in Sayward; the volumes could not support it. The fact that Laidlaw now apparently finds it profitable to service Sayward provides no information about the economies of Laidlaw competing in Courtenay-Comox-Cumberland or Lacey competing in Campbell River. There is simply insufficient information regarding this new service to allow the Tribunal to give that

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[57] Exhibit A-55: Appendix X, Waste Services Industry, at 1.

development much weight. There is no information, for example, concerning the price that is being charged to the residents of Sayward.

It is significant that when the Nanaimo Regional District closed the Qualicum Beach landfill site, the Church Road transfer station was opened. The Regional District did not require haulers in the Parksville-Qualicum Beach area to transport the refuse they collected to the Cedar Road site. The Regional District had received advice that it was uneconomical to expect a hauler to serve customers located more than 30 kilometres from a landfill site.

The Tribunal accepts the proposition that when assessing the boundaries of the geographic market, the place at which the trucks are parked is relevant as a hub. In the case of the small local businesses this is likely to be the place at which the administrative functions are also carried out. In the case of a firm such as Laidlaw the administrative functions (e.g., billing, accounting, etc.) may take place many miles away, in Victoria, Edmonton or Hamilton, but such functions are not relevant to the geographic dimensions of the lift-on-board service market. These dimensions must be assessed by reference to factors relevant to the geographic scope of the market, primarily transportation costs, and not by reference to factors which are independent of such costs.

(5) Conclusion

One does not expect to be able to define the geographic dimensions of a market with precision. The boundaries will necessarily overlap with adjacent markets and be indistinct from those adjacent markets at many points.

The Tribunal's conclusion is that the Courtenay-Comox-Cumberland area is not in the same market as Campbell River. This conclusion is based in part on the evidence respecting the conduct of the past and present market participants in all three areas under consideration: the fact that the providers of lift-on-board service generally did not, and do not, on a regular and on-going basis attempt to provide service to customers located more than 50 kilometres from the base of operation at which their trucks are parked, is a response to the higher cost of operating at further distances. Laidlaw's retention of the two hubs, one in the Cowichan Valley (Duncan) area and the other in the Nanaimo area, is significant, as is the evidence of Lacey. If one found that Laidlaw operated at greater distances in the Cowichan Valley (Duncan) and Nanaimo areas, then one might be prepared to accept the argument that Lacey's view of the boundaries of its market, operating from Royston (between Comox and Cumberland) was based on considerations particular to it and was too limited but that is not the case.

In addition, there is virtually no credible evidence that prices charged in the Campbell River area are or would be disciplined by the prices which pertain in the Courtenay-Comox-Cumberland area or that customers in the Campbell River area look outside that area for providers of the service.

One of the most significant factors in the determination of the geographic boundaries of the market is that the area between Courtenay-Comox-Cumberland and Campbell River is sparsely populated. This creates a significant barrier to effective overlapping competitive areas by firms operating in the two different localities. The geographic boundaries of a market cannot be glibly defined by reference to a certain kilometre or mileage distance. A more careful analysis is required. In this case the extensive, sparsely populated area between the communities of Courtenay-Comox-Cumberland and Campbell River together with the locations of the dump-sites which serve those areas are significant to the conclusion that the two population centres are not in the same geographic market with respect to the provision of the lift-on-board garbage collection and disposal service.

V. SUBSTANTIAL OR COMPLETE CONTROL

In deciding whether a firm has substantial or complete control of a market, one asks whether the firm has market power in the economic sense. Market power

in the economic sense is the power to maintain prices above the competitive level without losing so many sales that the higher price is not profitable. It is the *ability* to earn supra-normal profits by reducing output and charging more than the competitive price for a product. As was said in the *NutraSweet* decision:

> Market power is generally accepted to mean an ability to set prices above competitive levels for a considerable period.[58] (underlining added).

As was also stated in the *NutraSweet* decision:

> While this [the ability to set prices above the competitive level] is a valid conceptual approach, it is not one that can readily be applied; one must ordinarily look to indicators of market power such as market share and entry barriers. The specific factors that need to be considered in evaluating control or market power will vary from case to case.[59]

A ***prima facie*** determination as to whether a firm is likely to have market power can be made by considering the share of the relevant market held by that firm. If that share is very large the firm will very likely have market power.[60] But other considerations must also be taken into account including: how many competitors there are in the market and their respective market shares; how much

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[58] *Supra*, note 2 at 28.

[59] *Ibid*.

[60] See, for example, H. Hovenkamp, *Economics and Federal Antitrust Law* (St.Paul, Minn.: West, 1985) at 58 for a discussion of this assumption.

excess capacity the firms in the market have; how easily a new firm can establish itself as a competitor.

A. Market Share

There is no dispute that the most appropriate method of measuring market share is by comparing the revenues earned by each of the providers of lift-on-board service in the relevant geographic markets. Such information was not available to the expert witnesses of either party when their affidavits of expert evidence were filed.

Two alternative methods of measuring market share were used by the experts: a comparison of the respective weights of refuse dumped at the various dump sites and a physical count of the number of containers of each provider which could be seen within the relevant geographic markets. Both these measures were recognized to be flawed. A customer is charged for lift-on-board service by reference to the size of the bin and the frequency with which it must be emptied. Since the weight of the refuse emptied from one bin may vary considerably from that emptied from another, weight is not necessarily an accurate surrogate for revenue. The weight of the garbage dumped by one hauler vis-à-vis others may not precisely reflect market share. More important, however, is the fact that this kind of data is not available for all dump sites. No weight data is available from

the Campbell River dump site nor from the Lake Cowichan (TRP No. 1) site. Tipping fees are not charged at those locations and weight information was not collected. Also, with respect to the Lake Cowichan dump, Laidlaw's experts did not include in their calculations Laidlaw's estimate of the amount of material dumped by Laidlaw at that site. Information obtained by the experts from the dump site operator indicated that no commercial lift-on-board waste was deposited at that location. The operator of the dump did not realize that Laidlaw was using side-load (or rear-load) vehicles to service the lift-on-board customers in that area.

Insofar as assessing market share by container count is concerned, there is no guarantee that all bins will be located and counted. Some may not be easily visible (i.e., they may be located inside buildings). In addition, the bins were only counted in a sample area and there is no reason to believe that the sample area is truly representative. Another flaw in this technique arises because counting containers does not provide information as to how often they are emptied. Assumptions in this regard must be made.

During the course of the hearing, information concerning the gross revenue of the various suppliers of lift-on-board service was sought. Some of this data may lack precision to the extent that the information given relates to the gross revenue of a hauler's total operation (if that operation includes both lift-on-

board service and residential collection service or other services).[61] Nevertheless, any inaccuracies that might arise from the inclusion of mixed revenues by the smaller firms can only operate to Laidlaw's benefit.

The data collected indicates that in the District of Campbell River area Laidlaw's market share exceeds 87%. The only other provider of lift-on-board service in that area is Camvest, a company, as previously noted, that commenced business on May 3, 1990. There is also a small hauler on Quadra Island but little information about that firm was placed before the Tribunal and its scope of operation is not of great import.

In the combined markets of Cowichan Valley (Duncan) and Nanaimo, Laidlaw's market share, according to the gross revenue figures, also exceeds 87%. Three firms hold the remaining share. PAN, the small family business operating in the Cowichan Valley (Duncan) area has 1.3%. West Coast and B.F.I. operate in the Nanaimo area and hold 6.4% and 4.7% respectively.

B. Excess Capacity

Share of sales may overstate a firm's market power when there is excess capacity since other firms are able to increase their market shares by increasing

[61] Exhibit A-57-C: Market Share Calculation by Gross Revenue for Commercial (Lift-on-Board) Solid Waste Collection in Relevant Geographic Markets (confidential); Exhibit A-91-C: Market Share Calculation by Gross Revenue for Commercial (Lift-on-Board) Solid Waste Collection in Relevant Geographic Markets (confidential).

output and sales. With respect to waste removal, capacity is probably best measured in terms of the capacity of trucks. However, capacity cannot be measured simply by counting the number of trucks; age, type of equipment and state of repair have to be taken into account. Bins too must be considered when measuring capacity, but this input does not have the "lumpiness" of trucks (i.e., a truck has to be bought regardless of the number of bins to be serviced) and therefore the operator can avoid expanding the number of bins too far ahead of actual need.

In any event, the evidence is clear that Camvest in the District of Campbell River area, West Coast in the Nanaimo area and B.F.I. in the Cowichan Valley (Duncan) area are servicing far fewer bins than their truck capacity allows. The pressure on them to expand to more fully utilize their truck capacity is not in doubt. Their share of truck capacity is probably greater than their share of current sales and, if they survive, can be taken as an indicator of their future share of sales. However, the importance of excess capacity is tempered by the extent to which customers are bound by long-term contracts and by the apparent unwillingness of Laidlaw's competitors to use price as an inducement to attract customers.

C. Pricing Practices

Counsel for Laidlaw argues that there is no convincing evidence that Laidlaw is dominant in the markets in question because there is no evidence that it has been charging prices above the competitive level.

Insofar as tendered contracts are concerned, in 1987 Laidlaw held the Campbell River School Board contract. The Board paid $22,440 to Laidlaw under that contract. When B & D entered the market, it bid for this contract. It bid $18,780 for the 1988 year and was awarded the contract. This was a profitable price for B & D. The following year, 1989, B & D tendered the same bid. Laidlaw won the contract with a tender of $14,580. Laidlaw claims that its ability to reduce its price so dramatically was the result of its adoption of a computerized grid routing system. This is not convincing. The computer program would appear to be a fairly standard and simple routing program which replaced what had previously been a manual task. It is not believable that the adoption of this system or the installation of a computer system for Laidlaw's administrative functions generally result in cost savings leading to the price reductions which occurred. Also, there was no lowering of prices generally to all customers in this regard.

In 1987, Laidlaw held the North Cowichan School District contract. When the contract came up for tender in 1987, Advance bid $2,600 per month. It was lower than Laidlaw's bid. When the contract again came up for tender in 1989, Advance lowered its bid to $1,750 per month because it had heard of what had

happened in Campbell River. Laidlaw's tender on the contract was $1,760 per month. Mr. Paquette, who worked for Laidlaw at the time, was told to write up another contract and take it to the individual in charge (the Maintenance Superintendent) to try to resubmit a bid at a lower price: "I was just told to lower the contract rate under the pretence that the original bid was charging them for extra pick-ups which they would normally have got for free"[62]. This initiative was not successful; Advance was retained on the contract.

With regard to pricing pursuant to the standard form contracts, it must first be noted that there was no evidence from Laidlaw as to its pricing policies during most of the years in question. Its representatives and ex-employees could give no guidance as to how prices were set or what costs Laidlaw took into account when deciding how to price its services. More recently (since January 1990 in Nanaimo, January 1991 for Campbell River) price lists have been available but still no analysis of costs has been provided. The price lists contain A, B and C levels of pricing for the use of sales representatives. Laidlaw's representative, Dean Woods, indicated that in general Laidlaw was successful in getting customers to agree to the highest level, the A level.

It is argued that Laidlaw's financial statements demonstrate that Laidlaw was not exercising market power. For the fiscal year ending August 31, 1991, the

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[62] Transcript at 528 (30 October 1991).

Campbell River Divisional Income Statement shows a net income of $27,481 as against a total revenue of $1,027,720 (50% of which is for commercial accounts). Net income on that basis is 2.7% of total revenue. The Nanaimo Divisional Income Statement (which includes the Cowichan Valley area) shows a net income of $23,021 on total revenue of $2,889,468 (82% of which is for commercial accounts). The net income shown by these figures then is only 0.8% of total revenue.

There is a general concern that accounting profits or net income is not a reliable indicator of economic profit.[63]In the case of Laidlaw there is a more specific problem. It relates to the numerous acquisitions made by Laidlaw and the amortization of the goodwill as an expense in its statements. Since most of the cost of the acquisitions appears to have been a payment for goodwill rather than for tangible assets, it is reasonable to conclude that the amortizations represent significant amounts. These are not part of the normal cost of waste disposal and including them totally clouds even accounting net income.

Customers gave evidence as to the rises in price which Laidlaw kept imposing pursuant to the terms of the standard form contracts and the negative option price clauses contained therein. Mr. Thomson of Muffy's Muffins Ltd. gave evidence that he tried to terminate his contract with Laidlaw because "we

[63] See F.M. Fisher & J.J. McGowen, "On the Misuse of Accounting Rates of Return to Infer Monopoly Profits" (1983) 73 Am. Econ. Rev. 82.

were getting a little tired of the rates going up constantly".[64] Mr. Thomson sought a quotation from Advance for provision of the same service that he was getting from Laidlaw and discovered that Advance's prices were 20-25% below Laidlaw's.

Mr. Clarke, property manager for School District No. 69 in the Regional District of Nanaimo, also experienced repeated efforts to raise prices. In October 1990 he received a notice that Laidlaw's price was going to rise as a result of a "temporary fuel surcharge". After obtaining legal advice, he wrote back to Laidlaw noting that the contract between them did not provide for an automatic price rise on that basis. Laidlaw responded that a mistake had been made and the price increase was rolled back.[65] Shortly thereafter a notice was received stating that a price rise was to occur as a result of increased landfill site dumping fees being charged to Laidlaw. Mr. Clarke wrote back asking for supporting documentation. At the time, refuse collected from School District No. 69 was deposited at the Qualicum Beach disposal site where no dumping fees were charged. Laidlaw responded saying a mistake had been made and the price increase was rolled back. More recently, Laidlaw has moved to a flat rate[66] format with respect to customer charges in conjunction with increases imposed as a result

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[64] Transcript at 764 (31 October 1991).

[65] Transcript at 807-9 (31 October 1991).

[66] Transcript at 2903 (18 November 1991): a charge based on a customer's lift rate times the number of lifts per year, divided by 12, to which the appropriate portion of the yearly rental for the bin is added to obtain the amount billed monthly.

of the dumping fees now being charged at the Church Road transfer station.[67] Mr. Clarke has not paid the most recent invoices but has asked for a breakdown of the flat rate fees in comparison to the previous method of charging. He notes that there appears to be at minimum a 100% increase as a result of these changes.

Donald Bruce, who was Maintenance Supervisor for Pat Carson Bulldozing, noted that Laidlaw would often "slip ... a price increase through without notifying me ahead of time". He would then phone Laidlaw to get the increase rolled back. He gave evidence:

> If I spent my energy chasing them I could keep it [the price] where I felt it was reasonable. The minute you turned your back and a raise got through, it was too late to fight it. This is what happened in the last, I can't remember the increase, but it was quite a jump ....[68]

Mr. Paquette who worked for Laidlaw between 1986 and 1989 gave evidence that Laidlaw asked its various divisions to aim for a 20-25% profit margin. He noted, however:

> In Parksville we had no competition at all. I believe we hit ... 42 per cent in one month.[69]

While, as counsel for Laidlaw argues, there is no firm evidence that Laidlaw was charging monopoly prices in the markets in question, the anecdotal evidence is more consistent with a firm exercising market power than the reverse.

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[67] Transcript at 812 (31 October 1991).

[68] Transcript at 1060 (1 November 1991).

[69] Transcript at 536 (30 October 1991).

D. Barriers to Entry

Market share is only a *prima facie* indication of market power. As has been noted, other considerations must also be taken into account. One of these is barriers to entry: how easily can a firm commence business in the relevant market and establish itself there as a viable competitor? The term "entry" for an economist when used in the phrase "barriers to entry" is a term of art which carries with it the connotation of sustainability. The term "entry" will be used in that sense in these reasons. Related words such as "to enter" or "entrant" are used in their non-technical sense as meaning "to begin" or "to commence".

In general, in this industry barriers to entry are very low.[70] The amount of equipment required is limited: a truck and some containers. The capital to purchase these can easily be obtained: the equipment will itself serve as security for a loan. There is no requirement for extensive technical training or expertise although experience as a mechanic is useful. There are limited administrative and overhead expenses. Many of the providers of the service have operated and still operate out of their homes.[71] The most significant barrier to entry is acquiring a sufficient customer base within a reasonable period of time to allow the business to become profitable.

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[70] See also *infra* at 108-9.

[71] Transcript at 833-34 (31 October 1991), 1186 (4 November 1991), 1369 (5 November 1991).

While barriers to entry in the industry are low, much higher barriers exist in the markets under discussion as a result of the contracting practices of Laidlaw. It is these contracting practices, along with other allegedly anti-competitive acts, which it is argued lead to both Laidlaw's dominant position and a substantial lessening of competition in the markets in question.

VI. ANTI-COMPETITIVE ACTS RESULTING IN A SUBSTANTIAL LESSENING OF COMPETITION

A. Anti-Competitive Acts

There is no *general* definition in the Act as to what characterizes an anti-competitive act. Section 78 contains a list of examples of behaviour which are included in that definition.[72] There is no dispute that this list is not exhaustive. The various acts of Laidlaw which are alleged to be anti-competitive, that is, a

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[72] Section 78 reads:

78. For the purposes of section 79, "anti-competitive act", without restricting the generality of the term, includes any of the following acts:
(a) squeezing, by a vertically integrated supplier, of the margin available to an unintegrated customer who competes with the supplier, for the purpose of impeding or preventing the customer's entry into, or expansion in, a market;
(b) acquisition by a supplier of a customer who would otherwise be available to a competitor of the supplier, or acquisition by a customer of a supplier who would otherwise be available to a competitor of the customer, for the purpose of impeding or preventing the competitor's entry into, or eliminating the competitor from, a market;
(c) freight equalization on the plant of a competitor for the purpose of impeding or preventing the competitor's entry into, or eliminating the competitor from, a market;
(d) use of fighting brands introduced selectively on a temporary basis to discipline or eliminate a competitor;
(e) pre-emption of scarce facilities or resources required by a competitor for the operation of a business, with the object of withholding the facilities or resources from a market;
(f) buying up of products to prevent the erosion of existing price levels;
(g) adoption of product specifications that are incompatible with products produced by any other person and are designed to prevent his entry into, or to eliminate him from, a market;
(h) requiring or inducing a supplier to sell only or primarily to certain customers, or to refrain from selling to a competitor, with the object of preventing a competitor's entry into, or expansion in, a market; and
(i) selling articles at a price lower than the acquisition cost for the purpose of disciplining or liminating a competitor.

pattern of acquisitions designed to create and maintain a monopoly position together with contracting practices designed to preserve that position, are not among those enumerated in section 78.

The principle underlying section 79 is that the public interest is best served when markets are competitive. The refusal of the common law courts to enforce contracts which contain unreasonable restraints of trade is one manifestation of that principle. Such contracts are deemed to be contrary to public policy. In *Nordenfelt v. Maxim Nordenfelt Guns & Ammunition Co. Ltd.*, Lord Macnaghten said:

> The true view at the present time I think, is this: The public have an interest in every person's carrying on his trade freely: so has the individual. All interference with individual liberty of action in trading, and all restraints of trade of themselves, if there is nothing more, are contrary to public policy, and therefore void. That is the general rule. But there are exceptions: restraints of trade and interference with individual liberty of action may be justified by the special circumstances of a particular case. It is a sufficient justification, and indeed it is the only justification, if the restriction is reasonable -- reasonable, that is, in reference to the interests of the parties concerned and reasonable in reference to the interests of the public, so framed and so guarded as to afford adequate protection to the party in whose favour it is imposed, while at the same time it is in no way injurious to the public.[73]

Useful descriptions of the antecedents of competition law can be found in: *Competition Law* by R. Whish;[74] and *Canadian Competition Policy* by B. Dunlop et al.[75] Part of that history includes the Sherman Act[76] in the United States; it was

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[73] [1894] A.C. 535 (H.L.) at 565.

[74] (London: Butterworths, 1985) c. 2.

[75] (Toronto: Canada Law Book Inc., 1987) c. 1-3.

[76] 15 U.S.C. § 1-7.

enacted in 1890. Read literally it condemns every contract in restraint of trade (although subject to statutory and judicially developed exceptions). Another manifestation in more recent times is article 85 of the Treaty of Rome.[77] It prohibits acts:

> which may affect trade between the member states [of the European Economic Community] and which have as their object or effect the prevention, restriction or distortion of competition within the common market ...

A review of the literature indicates that attempting to establish some general criteria as to when an act or practice is anti-competitive and should be restrained, as opposed to when it is a sign of healthy or at least normal commercial competition, is not easy. As has often been said, every contract is a contract in restraint of trade: the commercial freedom of the contracting parties is limited by their obligations to perform the contract. To the extent that any general criteria exist they seem to require an assessment of the nature and purpose of the acts which are alleged to be anti-competitive and the effect that they have or may have on the relevant market. An analysis is required which takes into account the commercial interests of both parties served by the conduct in question and the degree of restraint or distortion of competition which results.

(1) Acquisitions

[77] 298 U.N.T.S. 11 (25 March 1957).

It is agreed, as counsel for Laidlaw argues, that acquisitions by themselves are not anti-competitive acts. That does not mean, however, that they might not be used as such and thereby become so. An acquisition can be a legitimate method of entering a market; it can be a legitimate method of growing in a market. The pattern of acquisitions and attempted acquisitions in this case together with the evidence respecting their surrounding circumstances make it clear that Laidlaw's practice of acquiring firms in the lift-on-board business was for the purpose of initially acquiring a monopolistic position in the markets in question and then eliminating competitors from those markets. This characterization results from a number of factors.

(a) Frequency, Timing and Result of Acquisitions

One important factor is the time frame within which the acquisitions occurred. In the Campbell River area the only two competitors were acquired on the same day. In the Nanaimo area the only three competitors were acquired within five months of each other. Not only were all the existing firms acquired in those two areas, but there was a clear pattern of attempting to acquire any new entrant which appeared on the scene both in those areas and in the Cowichan Valley (Duncan) area. The attempted acquisition of Lacey in the Courtenay-Comox-Cumberland area and of PAN in the Cowichan Valley (Duncan) area also supports the conclusion that the acquisitions and attempted acquisitions were

entered into for the purpose of monopolizing the markets. The effect of the acquisitions was to give Laidlaw at times 100% of the market.

(b) Expressions of Subjective Intent

While subjective intent may not be a required element in order to find that a given practice (series of acts) is of an anti-competitive nature in this case such exists. It can therefore be taken into consideration as part of the relevant evidence. Charles Saunders was encouraged to sell SCS Waste Systems to Laidlaw on the promise that Laidlaw would thereafter purchase bins from him. Michael Wallace was given to understand that if Advance was not sold to Laidlaw, Laidlaw would see it put out of business by causing Advance extensive and expensive litigation costs. PAN, which has not been acquired, was left with the impression that if it refused to sell, Laidlaw would use its market power to ensure that it was put out of the market by way of price competition. Lacey was left with the message that if it would not sell to Laidlaw, Laidlaw had other methods of achieving what it wanted. Laidlaw argues that the activity of some of its employees in these markets, for example, in leaving the above-described messages with SCS Waste Systems, Advance, PAN and Lacey, should not be taken as evidence of intent on Laidlaw's part. It may be that there will be occasions when an employee is off on a "frolic of his own" and his conduct will not be taken as evidence of the intent of his corporate employer but that will rarely be the case and it is not the case here.

Indeed, one acquisition was undertaken at the specific direction of a senior corporate officer after he saw a non-Laidlaw bin in the market when visiting the Nanaimo area.

(c) Laidlaw's Business Purpose Explanation - Not Convincing

It is argued that the acquisitions were not anti-competitive acts but were merely a manifestation of Laidlaw's general corporate policy to enter markets and achieve growth through acquisitions. In support of this position it was stated that the acquisitions in question were subjected to the same *pro forma* financial analysis as other acquisitions and were completed after it was determined that they made good business sense. Yet, the only acquisition for which any analysis was provided was that of B & D on September 1, 1989 and some relating to the possible acquisition of Lacey. No *pro forma* analysis was available with respect to the acquisition of Advance which occurred in February 1990 after the standardized *pro forma* spread sheets were allegedly in use by Laidlaw. The *pro forma* analyses for the acquisitions supposedly determine whether an acceptable rate of return would be garnered from the acquisitions. One assumption which enters into these *pro forma* analyses is that there will be no competition in the market place over the length of the pay-back period.[78] In addition, the length of that period (eight years) is itself an indication of the fact that the acquisitions were

[78] Transcript at 2626-30 (15 November 1991).

proceeding on the assumption that Laidlaw would face no or at least little competition in the future in the markets in question. The fact that so much of the purchase price for these acquisitions is related to goodwill could very well be an indication that a premium might have been paid by Laidlaw for the firm being acquired.

(d) Restrictive Covenants

Finally, the overly restrictive covenants in the acquisition agreements also demonstrate an intent to monopolize the markets. It is trite law that in order to be enforceable restrictive covenants must be reasonable. The leading case on this subject is the *Nordenfelt* decision.[79] Restrictive covenants must be reasonable with reference to both the interests of the parties themselves and the interests of the public. As stated by Blair J.A. in *Tank Lining Corp. v. Dunlop Industrial Ltd.*, *Nordenfelt* essentially established a four stage inquiry:

> Firstly, is the covenant under review in restraint of trade? ... Secondly, is the restraint one which is against public policy and, therefore, void? ... Thirdly, can the restraint be justified as reasonable in the interests of the parties? Fourthly, can it also be justified as reasonable with reference to the interests of the public?[80]

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[79] *Supra*, note 73.

[80] (1982), 40 O.R. (2d) 219 (C.A.) at 223.

With respect to the geographic scope of such covenants, reasonable boundaries are usually determined by the location of the customers of the business which is sold[81]. Covenants preventing a vendor from operating within a 300-mile radius with respect to the purchase of a business which operated generally within an area having less than a 30-mile radius, are clearly unreasonable.

Counsel for Laidlaw argues that restrictive covenants are a normal and usual part of acquisition agreements and that it is not unusual to find these drafted in a series of step-type decrements. He argues that the covenants used in these acquisitions were a standard type used by Laidlaw with respect to a variety of acquisitions and that the overbreadth of the covenants was simply an oversight. While some of the covenants, at least, are of a "standard form" format, it is clear that a representative of Laidlaw did address his or her mind to their application in the relevant markets. Reporting letters by Laidlaw's in-house counsel specifically note the scope of the covenants which were agreed to. These, in general, were of a 300-mile radius. It is also significant that when Laidlaw was the party giving covenants these were always very carefully limited in scope.

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[81] M.J. Trebilcock, *The Common Law of Restraint of Trade: A Legal and Economic Analysis* (Toronto: Carswell, 1986) at 240:

> ... the covenantee [the purchaser] must typically show that the business sold previously operated throughout the area subject to restraint, although not necessarily in every community within that area.
>
> ... in cases where the customers of the business sold are concentrated in one part of the geographic area subject to restraint, the courts will commonly strike a covenant down, if it cannot be severed.

The reciprocal agreements with Jones and Advance by which Laidlaw agreed to stay out of the roll-off market in return for the vendor's agreement to stay out of the lift-on-board market are the type of acts (market sharing arrangements) that fall under section 45 of the Act. Whether or not these result in a substantial lessening of competition in the roll-off market for the purposes of section 79 is not clear from the evidence adduced in this case. Whether they results in an "undue lessening" of competitive in the roll-off market for the purposes of section 45 is also not clear. While intuitively one would expect this to be so, given the small size of the markets in question, there is simply insufficient evidence with respect to the roll-off markets for the purposes of section 79 to enable the Tribunal to come to any conclusion in that regard.

Regardless of the conclusion with respect to the effects of any or all of the restrictive covenants they provide some evidence of intent. It is clear from the evidence as a whole that the acquisitions were part of a pattern of anti-competitive acts.

(2) Mergers or Acquisitions and Section 79 - Legal Considerations

With respect to acquisitions one further matter must be addressed: whether they properly can be considered under section 79 at all. In the *NutraSweet* decision the Tribunal refused to classify a voluntary agreement between

competitors as an anti-competitive act. The agreement in question was a worldwide market sharing agreement by The NutraSweet Company with its suppliers. Reference was made in this regard to the fact that a feature of the enumerated acts listed in section 78 (except for that in paragraph (f)) is that the competitor of the dominant firm is a target, not a fellow actor.[82] At the same time, the Tribunal left open the question as to whether or not such horizontal arrangements might be classified as anti-competitive acts. It commented that it was reluctant to conclude that all horizontal arrangements were excluded from sections 78 and 79 and that, in any event, it was sufficient for the purposes of the *NutraSweet* decision to state that the Tribunal had not been provided with adequate justification (insofar as effects in Canada were concerned) to allow the Tribunal to categorize the market sharing agreement as an anti-competitive act.

The Tribunal in this case, insofar as the acquisition agreements are concerned, is dealing with horizontal arrangements between willing competitors. Extensive and detailed evidence and argument has been heard respecting the anti-competitive effects of the conduct in question. It is not seriously in dispute, as the Tribunal noted in the *NutraSweet* decision, that the enumeration in section 78 is not controlling with respect to the scope of section 79. The Tribunal in this case has no difficulty classifying the acquisitions as acts constituting an anti-competitive practice.

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[82] *Supra*, note 2 at 37.

Counsel for Laidlaw argues that acquisitions and mergers do not fall under section 79 at all because they are dealt with elsewhere in the Act. A detailed set of provisions concerning the prevention or dissolution of anti-competitive mergers and acquisitions is found in sections 91 to 107 inclusive. Laidlaw argues that, based on the maxim *expressio unius* (explicit mention of one case involves implicit exclusion of the others), Parliament could not have intended that mergers be dealt with under the abuse of dominance provisions. Laidlaw's argument is based on two sections of the Act: (a) paragraph 78(b) includes as anti-competitive acts the acquisition by a supplier of a customer and the acquisition by a customer of a supplier, but not the acquisition of a competitor; and (b) section 91 defines merger, in part, as "the acquisition ... of control over or significant interest in the whole or a part of a business of a competitor ...". Laidlaw says that because the acquisition of a competitor is explicitly mentioned in section 91 but not in paragraph 78(b) Parliament intended such acquisitions to be dealt with under the merger provisions and not under the abuse of dominance provisions. Had Parliament intended otherwise, Laidlaw contends that it would have listed the acquisition of a competitor as an anti-competitive act under paragraph 78(b).[83]

Laidlaw's *expressio unius* argument is not convincing. Firstly, paragraph 78(b) is explicitly non-exhaustive. The fact that an act is not listed in paragraph 78(b), even if it is listed elsewhere in the statute, is no reason to

[83] Written Argument of the Respondent at 44-45.

conclude that it is excluded as an anti-competitive act. Secondly, while section 91 does state that the acquisition of a competitor is a merger, it does not necessarily follow that such an acquisition *exclusively* falls under the merger provisions.

Moreover, there would not appear to be any other indication in the Act that merger and abuse of dominance are to be mutually exclusive, such that a merger case could never be brought under section 79. Nor would there seem to be anything inconsistent or repugnant in the finding that a merger case could be brought as an abuse of dominance case. As such, the following words of E.A. Driedger, are applicable:

> If the overlapping provisions, whether in the same statute or not, are not in conflict, then the question is whether they both operate with respect to a particular situation or whether only one operates. It would seem that *prima facie* both operate, unless there is something to indicate that the legislature intended one provision to be exhaustive or exclusive ...
>
> Acts should be so construed as to avoid or remove inconsistent overlapping. But there is no principle that they should be construed so as to avoid or remove overlapping not inconsistent.[84] (underlining added)

If there were any doubt at all about this question, subsection 79(7) makes it clear that Parliament contemplated the possibility of mergers being the subject

[84] *Construction of Statutes*, 2d. ed. (Toronto: Butterworths, 1983) at 235-36.

of either a section 92 application or a section 79 application.[85] Subsection 79(7) and companion sections 45.1 and 98 are relevant. Subsection 79(7) provides that where proceedings are commenced under the conspiracy or merger provisions of the Act, no application may be made under the abuse provision based on the same or substantially the same facts.[86] These provisions prohibit concurrent proceedings and require that a choice initially be made between the abuse, merger, and conspiracy provisions. The mere inclusion of these sections clearly contemplates that an application on the same facts could be made under either the merger or the abuse of dominance provisions. Otherwise, there would be no need for these sections at all as merger and abuse of dominance would be mutually exclusive and there would be no possibility of concurrent proceedings.

Counsel for the Director referred to the interpretation of section 79 suggested by Anderson and Khosla:

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[85] Subsection 79(7) reads:

> (7) No application may be made under this section against a person
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> *(a)* against whom proceedings have been commenced under section 45, or
> *(b)* against whom an order is sought under section 92.
>
> on the basis of the same or substantially the same facts as would be alleged in the proceedings under section 45 or 92, as the case may be.

[86] Sections 45.1 and 98 are similar. Section 45.1 provides that where proceedings are commenced under the merger or abuse of dominance provisions, no application may be made under the conspiracy provision based on the same or substantially the same facts. Section 98 provides that where proceedings are commenced under the conspiracy or abuse of dominance provisions, no application may be made under the merger provision based on the same or substantially the same facts.

> The choice between the merger and abuse of dominance provisions could arise, for example, in situations involving a series of acquisitions in an industry by a dominant firm. In such situations it may be the cumulative effect of such actions (i.e., the practice of anti-competitive acts) rather than any single purchase which lessens competition substantially. In these circumstances, the abuse provisions may be more readily applicable than the merger provision.[87]

This accords with the Tribunal's interpretation of the provisions in question.

(3) Contracting Practices

Professor Noll, in his affidavit of expert evidence,[88] (counsel for Laidlaw chose not to cross-examine him) notes that in most cases long-term, exclusive contracts do not raise significant anti-competitive issues. They can contribute to economic efficiency and thereby benefit consumers. They serve to allocate future business risks; investment decisions, for example, which must be made today can be made with some degree of assurance that they will not be subject to the vagaries of future price increases and other factors. Such timing may be particularly important when a supplier provides a product or service to a customer which is specifically tailored to that customer's needs and which entails a "relation

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[87] R.D. Anderson and S.D. Khosla, "Reflections on McDonald on Abuse of Dominant Position" (1987) 8:3 Can. Comp. Pol. Rec. 51 at 56. See also R.D. Anderson and S.D. Khosla, "Recent Developments in Canadian and U.S. Merger Policy" (1986) 7:3 Can. Comp. Pol. Rec. 46 at 58.

[88] Expert Affidavit of Professor R.G. Noll (Exhibit A-52).

- specific investment", that is, one made solely for the purpose of serving a particular customer.[89]

Roll-over provisions can be beneficial in some circumstances because they can lower transaction costs. Liquidated damages clauses can often avoid litigation costs. Automatic price rise clauses (often called negative option price clauses) can eliminate unnecessary negotiation or litigation and apportion the risk related to future events between the vendor and the purchaser. In a negotiated contract when there is more or less equal bargaining power one can assume that benefits to both sides will arise.

While certain of the contract terms may in many circumstances be entirely unobjectionable, it is necessary to look at the particular combination of clauses in the contracts in question as they relate to the vendor and purchaser of lift-on-board service in the relevant markets and to balance this against the effect the contracts are having on competition in those markets.

(a) Contract Terms - From the Supplier's Point of View

With respect to the long-term nature of the contracts in issue, Professor Noll notes that the relation-specific investments that we would normally expect to

[89] *Ibid.* at 9-10. Professor Noll offers the example of a railway spur built specifically to serve a coal mine. The long-term exclusive contract with liquidated damages clauses protects the parties against future opportunistic behaviour on either side that seeks to take advantage of the lock-in nature of the investments.

find when there is exclusivity, long terms and liquidated damages clauses, do not exist in the lift-on-board service business.[90] He notes that the customer-specific investment made by Laidlaw consists "primarily of the costs of negotiating the agreement". This is borne out by the evidence. The Tribunal notes that this investment will not be independent of the contract terms since the amount that Laidlaw is willing to spend in obtaining a customer's signature to a contract will depend upon how long and profitably the customer is bound by that contract. Professor Noll expresses the opinion that the other terms of the contract[91] (other than exclusivity, long term and liquidated damages) also do not have any identifiable efficiency rationale. The Tribunal agrees with that opinion.

The terms of the Laidlaw contracts are not justified as necessary to protect Laidlaw against any cost exposure on termination by a customer. In the first place, no such cost exposure exists because the costs associated with commencing service to a customer are minimal. Secondly, if such terms were necessary to protect Laidlaw, one would not expect to find that customers who go out of business or move to locations where Laidlaw does not provide service, would be able to terminate on a 30-day notice, while in all other circumstances they are bound for three years. It is also significant that Laidlaw does not offer customers a

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[90] *Ibid.* at 14. While the text of the affidavit refers to the "waste disposal business", it is clear from the context that it is the lift-on-board segment of the industry which is under discussion.

[91] *Supra* at 30ff.

lower price for signing a long-term contract; nor does it refuse to provide service if a customer refuses to sign any contract.

The automatic price increase clause protects Laidlaw from any exposure to increases in dump fees, which are a significant portion of its costs, and, under the most recent standard form contract, against increases in taxes, levies, duties, fuel costs, administrative and other costs of doing business. The negative option price clause in the earlier contract gives Laidlaw the power to adjust prices to monopoly level as long as there are no other suitable competitors in the market. The customer is then locked in by the long-term provisions of the contract so that even if a competitor eventually enters the market there is no opportunity to take advantage of that event and thereby obtain the benefit of a price which is closer to that which pertains in a competitive market.

There is no credible explanation for many of the provisions of these contracts other than to create barriers to entry for would-be competitors by making customer purchase decisions inflexible. The tying of the customers to Laidlaw operates to exclude other competitors from the market.

(b) Contract Terms - From the Purchasers' Point of View

The three-year term, the automatic roll-over provisions, the inability to cancel the contract after 60 days before the end of each three years, the liquidated

damages clauses and the exclusivity provision bind the customer tightly to Laidlaw for a long period of time. These terms prevent a customer from accepting an offer of service from a Laidlaw competitor unless the customer is careful to arrange for such at some time prior to the 60 days before the expiration of the three-year term.

The negative option price clauses can lead to monopoly pricing even when competitors are present in the market[92]. Since lift-on-board service is usually a minor cost item for a business, there is a tendency for those in charge to overlook the increases which are being levied simply because contesting them takes more time than it is worth.[93] If a customer responds negatively to a price increase he or she is immediately faced with having to arrange for alternate service and within a very short period of time: ten days under some contracts.

The fact that the contracts in question are contracts of adhesion is also significant. Laidlaw notes that some terms in some cases were negotiated. This was clearly an infrequent occurrence and does not detract from the characterization of the contracts as contracts of adhesion. The dominant position

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[92] *Supra*, note 88 at 19.

[93] Transcript at 1060 (1 November 1991).

of the respondent is both secured by and reflected in these contracts.[94] The evidence makes it clear that the customer derives virtually no benefit from them.

(c) Intent Required

One last consideration with respect to the contracting practices must be addressed: the nature of the intent which must be proven in order to find that a respondent has engaged in anti-competitive practices. Counsel for Laidlaw argues that it is necessary to find a clear subjective intention. He argues that in this case the contract forms were general forms used by Laidlaw everywhere in the North American market. He argues that they are designed to meet competition from Laidlaw's two main competitors on that broader stage: Browning-Ferris Industries ("B.F.I.") and Waste Management Inc. ("W.M.I.") All three firms operate continent-wide. W.M.I., with gross revenues of approximately $5 billion annually, is six to eight times the size of Laidlaw. B.F.I. is three to four times the

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[94] F. Kessler, "Contracts of Adhesion - Some Thoughts about Freedom of Contract" (1943) 43 Columbia L.R. 629 at 632:

> In so far as the reduction of costs of production and distribution thus achieved is reflected in reduced prices, society as a whole ultimately benefits from the use of standard contracts. And there can be no doubt that this has been the case to a considerable extent. The use of standard contracts has, however, another aspect which has become increasingly important. Standard contracts are typically used by enterprises with strong bargaining power. The weaker party, in need of the goods or services, is frequently not in a position to shop around for better terms, either because the author of the standard contract has a monopoly (natural or artificial) or because all competitors use the same clauses. His contractual intention is but a subjection more or less voluntary to terms dictated by the stronger party, terms whose consequences are often understood only in a vague way, if at all.

size of Laidlaw. In the context of Canadian markets, however, Laidlaw is the largest of the three.

Counsel for Laidlaw argues that the contracts in the North American context are standard in the industry, that they were not designed with the particular markets here in question in mind. Therefore, Laidlaw could have had no specific intention to restrict competition in the Vancouver Island markets.

Proof of subjective intention on the part of a respondent is not necessary in order to find that a practice of anti-competitive acts has occurred. Such intention is almost impossible of proof in many cases involving corporate entities unless one stumbles upon what is known as a "smoking-gun".[95] Section 79 of the Act provides for a civil proceeding and civil remedies. In that context corporate actors and individuals are deemed to intend the effects of their actions.

In addition, the claim that the contracts are designed to compete with B.F.I. and W.M.I. on the national and indeed North American stage seems to be saying no more than "we are doing it because they are doing it." The three firms may be international in size but many markets in which they operate are local. The contracts in question exclude not only the small, local competitors but also

[95] A document which makes it clear that the purpose of the conduct in question was to exclude competitors from the market.

B.F.I. or W.M.I. as the case might be. There is nothing before the Tribunal with respect to how these contracts operate in larger markets. Nevertheless, insofar as the markets in issue are concerned, there is no doubt that they have anti-competitive effects. It is no answer to say that they were designed for a different market and therefore not intended to have anti-competitive effects in the smaller market. As has been noted, actions will be presumed to have been intended to have the effects which actually occur in the absence of convincing evidence to the contrary. The argument that Laidlaw lacked the requisite intention because the contracts were designed to counter B.F.I. and W.M.I. contracting practices is not convincing.

(d) Jurisprudence Considered

In general, the jurisprudence which has been cited to the Tribunal with respect to anti-competitive acts, as it relates to various contracting practices, is not *directly* relevant. It relates to the statute law of other jurisdictions. At the same time, that jurisprudence does provide illustrations as to how the law in those other jurisdictions has developed. This is useful background information for the Tribunal. Of particular interest in this regard were: *Hoffmann-La Roche & Company AG v. Commission of the European Communities*;[96] *International Salt*

[96] [1979] E.C.R. 461.

Co., Inc. v. U.S.[97]; Use of Negative Option Plans by Sellers in Commerce;[98] *Washington v. TCI Cablevision*; *Soda Ash-Solvay*;[100] *European Gas*;[101] and "Monopolization and the Definition of "Abuse" of a Dominant Position under Article 86 E.E.C. Treaty" by J.T. Lang.[102]

(4) Aided by Questionable Litigation Practices

No one can read the evidence concerning the use Laidlaw made of litigation and the threat of litigation in this case without a sense of outrage. The respondent used its vastly larger size and economic resources together with the threat of litigation to prevent customers from switching to competitors. It commenced spurious litigation and threatened litigation against its competitors to drive or attempt to drive them out of business by raising their costs of doing business. This is certainly predatory behaviour.

It is useful to quote from R.H. Bork:

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[97] 332 U.S. 392 (1947).

[98] 16 C.F.R. § 425 (1973).

[99] No. 91-2-11299-1 (Wash. Super. Ct. 4 June 1991).

[100] Commission of the European Communities decision 91/299, [1991] 2 CEC 2029.

[101] (1989) 10 E.C.L.R. 299.

[102] (1979) 16 C.M.L. Rev. 345 at 363.

> As a technique for predation, sham litigation is theoretically one of the most promising. Litigation, whether before an agency or a court, can often be framed so that the expenses to each party will be about the same. Indeed, if, as is usual, the party seeking to enter the market bears the burden of going forward with evidence, litigation expenses may be much heavier for him. Expenses in complex business litigation can be enormous, not merely in direct legal fees and costs but in the diversion of executive time and effort and in the disruption of the organization's regular activities. Thus, the firm resisting market entry through sham litigation can impose equal or greater costs upon the entrant and, if it has greater or even equal reserves, may be able to outlast the potential rival. This tactic is likely to find unqualified success only against smaller firms, since the costs of litigation must loom large relative to reserves if the firm is to be driven out. The tactic may be successful against larger firms if the costs are large relative to expected profits in a small market.
>
> The predator need not expect to defeat entry altogether. He may hope only to delay it. Sham litigation then becomes a useful tactic against any size firm, regardless of relative reserves, for it may be worth the price of litigation to purchase a delay of a year or several years in a rival's entry into a lucrative market. In such cases, successful predation does not require that the predator be able to impose larger costs on the victim, that the predator have greater reserves than the victim, or that the predator have better access to capital than the victim. No other technique of predation is able to escape all of these requirements, and that fact indicates both the danger and the probability of predation by misuse of governmental processes.
>
> This mode of predation is particularly insidious because of its relatively low antitrust visibility.[103]

It would be hoped that when courts become aware of this kind of oppressive use of the legal system they would at the very least be prepared to award costs to the defendant on a full indemnity basis.

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[103] R.H. Bork, *The Anti-Trust Paradox* (New York: Basic Books, Inc., 1978) at 347-48.

B. Substantial Lessening of Competition

Pursuant to paragraph 79(1)(c) of the Act, the Tribunal must determine if the practice of anti-competitive acts has had, is having or is likely to lessen competition substantially.

(1) Market Concentration

Laidlaw argues that the Director has not demonstrated that there has been any substantial lessening of competition in the relevant markets. It is argued that no analysis has been done of the state of competition in the markets before Laidlaw entered compared to what exists now. While it is true that the Director has provided no statistical information concerning the state of competition in the markets before Laidlaw's entry, it is known that in the Cowichan Valley (Duncan) area there were two businesses that *could* compete in that area: Fox and C.W. Whether PAN should be included as a vigorous competitor is unclear given its size. In the Nanaimo area there were three companies: Nanaimo Disposal, Jones and United. In the Campbell River area there were two: Borgfjord and Campbell River Sanitation. The markets are clearly small and would not likely support more than two competitors in the Cowichan Valley (Duncan) area, two in the Campbell River area and three in the Nanaimo area. This does not mean, however, that there has not been a substantial lessening of competition in those markets.

In addition, it is argued that the Nanaimo-Cowichan market is becoming increasingly competitive. The changing market shares calculated by the Ross-Levelton study[104] are as follows:

Date	Laidlaw	PAN	B.F.I.	West Coast
January 1991	90.89%	3.40%	5.45%	0.26%
June 1991	83.43%	3.69%	11.11%	1.77%
October 1991	77.96%	3.97%	8.72%	9.36%

The evidence disclosed that the West Coast percentages for January 1991 and June 1991 were significantly understated. It is likely that the market share for West Coast in the months in question is much larger than indicated. Laidlaw's market share and that of the other market participants would be correspondingly reduced. This means that the evidence of a trend is not very convincing. Indeed, one could not conclude that a trend existed by reference to such a short time frame and particularly when all the data relate to the period after the Director's investigation commenced.

The acquisition practices increased concentration in the market, at times to monopoly levels. Laidlaw bought all the firms in the market so that at times it held a 100% market share. This by itself constitutes at least a *prima facie*

[104] Exhibit A-69: Market Trend Analysis at 2.

lessening of competition which is substantial. The Tribunal does not purport to determine whether those practices alone, in the absence of the Laidlaw contracts, could have resulted in a substantial lessening of competition. It is sufficient to say that the acquisitions form part of the anti-competitive practices in that regard.

(2) Creation of Artificial Barriers to Entry

It is not just the number of competitors and comparative market shares which are relevant in considering whether a substantial lessening of competition has occurred. In this case the linchpin of Laidlaw's maintenance of its dominant position is the standard form contracts of adhesion which it uses to lock in a customer base. In this regard, the substantial lessening which is to be assessed need not necessarily be proved by weighing the competitiveness of the market in the past with its competitiveness at present. Substantial lessening can also be assessed by reference to the competitiveness of the market in the presence of the anti-competitive acts and its likely competitiveness in their absence.

Counsel for Laidlaw argued that the evidence discloses that competitors can still enter the market easily and grow. Reference was made to the fact that SCS Waste Systems placed about 80 containers with customers in a four-month period. Advance acquired about 350 container rentals in a three-year period. West Coast placed 150 containers in the market between its commencement of business

in January 1990 and October 1991. B & D acquired about 180 container placements in a fourteen-month period. Camvest had approximately 135 containers after a seventeen-month period.

In evaluating the number of containers placed by Laidlaw's past and present competitors it is important to bear certain things in mind. To the extent that Laidlaw did not succeed in having all customers sign contracts there was a small pool of customers available to competitors when they entered. It is clear from the evidence that the firms which tried and are trying (since they are not yet viable at their current scales) to establish themselves in the market experienced an initial surge of growth and then ran into the barrier created by Laidlaw's contracts. Extrapolation from the number of containers placed in the early months of operation is therefore not justified. The evidence further discloses that the local firms benefited from the preference of many customers to deal with a local firm. Thus, the firms had an advantage that should have translated into easy success if they were willing, at least, to meet Laidlaw's price. The evidence also discloses that the number of bins placed by Advance and West Coast overstates their success. Messrs. McLeod and Wallace, the owner and manager of Advance, stated that they succeeded in placing many bins with rural customers who otherwise took care of their own garbage disposal. The prices received from these customers were low and the cost of servicing them high. Advance was forced into these arrangements by the need to utilize its trucks and personnel. Similarly,

Mr. Kupiak of West Coast described having to go much farther afield than he would choose to go if he had access to customers closer to his base of operation.

It is argued that without evidence as to how long it normally takes to become established as a viable business in these markets, one cannot conclude that the time horizons have been too long. It is argued that Fox's entry into the Nanaimo market in 1980 was no more rapid than is the case for some of the companies now trying to establish themselves in the relevant markets. It is difficult to put much reliance on Fox's experience of so many years ago as a benchmark for a reasonable period of entry today.

Professor Noll's description, which is fully supported by the evidence, notes that the costs of getting into the business are not great. It requires an investment in a truck, some containers, a minimum commitment in work hours to waste collection employees and a similar commitment in advertising. The most significant factor facing an entrant is to obtain a minimum number of customers to keep the truck and collection workers fully occupied and to cover the other initial commitments necessary for entry. But once a minimum number of customers is obtained, the future scale economies in the provision of lift-on-board service are very small and diminish quite rapidly. (These additional economies arise from being able to design more efficient pick-up routes as more customers are added). The implication is that for a very small company, attaining quickly a

minimum number of customers is very important, but for a large company with several trucks and pick-up routes, scale economies are not important. Delay in achieving the minimum scale necessary to operate means that the new firm must experience higher costs than incumbent firms, and probably losses. Losses experienced during early periods increase the risk and reduce the incentive to enter. In the event that the firm does not succeed, the losses absorbed are not recoverable. But in any event these losses must be taken into account when estimating future profits. Professor Noll notes that, in addition, the contracts enable one geographic area to be monopolized regardless of competitive conditions in an adjacent area: they segment the market so that each can be separately monopolized.

There is no reason to doubt that based solely on the economics of lift-on-board service these should be highly competitive markets. The evidence shows, however, that the effect of the contracts is to make entry sufficiently difficult so that it no longer effectively polices the market. The evidence demonstrates that a new firm can acquire a certain number of customers but that it cannot establish a customer base with sufficient rapidity to make entry attractive. In the markets in question there is no doubt that acquisition practices of Laidlaw buttressed by the creation of artificial barriers to entry through the contracts have resulted in a substantial lessening of competition.

VII. EVIDENCE CONSIDERATIONS

Counsel for Laidlaw correctly points out that few of the witnesses in this case were truly neutral. Some of the past competitors and customers of Laidlaw certainly do not view Laidlaw in a positive light. The Tribunal has been conscious of that fact when weighing the evidence. It has equally been aware that many of Laidlaw's witnesses are also not disinterested in the outcome of these proceedings.

Part of the evidence of Michael Wallace was heard by the Tribunal subject to its admissibility being determined at a later time. The evidence relates to a conversation which Mr. Wallace taped. The conversation was with Dean Woods, District Manager of Laidlaw, and took place over lunch. The tape was not submitted in evidence. It was used by Mr. Wallace to refresh his memory before giving evidence. A copy of the tape was provided to counsel for Laidlaw sometime before the hearing and the original was made available to him during the hearing. The tape appears to be undecipherable, because of background noise, to everyone except Mr. Wallace.

Counsel for Laidlaw argued that evidence of the luncheon conversation should not be accepted in evidence because it had been taped by Mr. Wallace

without Mr. Woods' consent. This argument was based on the recent decision of the Supreme Court of Canada in *R. v. Duarte*.[105]

While subsection 184(1) of the *Criminal Code*[106] makes it a criminal offence to electronically "intercept" a private conversation, it is not illegal for one of the participants to a conversation to record that conversation without the knowledge of the other participants. The tape recording by Mr. Wallace of a conversation in which he participated is not illegal. In the *Duarte* case, the Supreme Court decided that when this kind of "participant" or "consent" taping is carried out by "an instrumentality of the state" (e.g., a police officer) it amounts to a search or seizure. As such it would be unreasonable unless it had been authorized by judicial warrant. The Court held that it was unacceptable in a free society that agents of the state be free to use the technology of electronic surveillance at their sole discretion. The unauthorized audio-visual recording in issue in the *Duarte* case was therefore said to offend section 8 of the *Canadian Charter of Rights and Freedoms*. At the same time, the Court held that the admission of the evidence, even though it had been obtained without authorization by judicial warrant, would not bring the administration of justice into disrepute. The evidence had been obtained on the understanding of the law as it existed pre-

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[105] [1990] 1 S.C.R. 30.

[106] R.S.C., 1985, c. C-46, as amended.

Duarte and not through a deliberate or wilful breach of *Charter* rights. The evidence was therefore held to be admissible.

In the present case, it is sufficient to note that Mr. Wallace was not acting as an instrumentality of the state when he recorded his conversation with Mr. Woods. He was acting as a private individual. The *Duarte* decision does not apply. There is no impediment to the admissibility of Mr. Wallace's evidence on the basis of the *Duarte* decision.

Laidlaw also questioned the credibility of the evidence given by Darlene Gunter. Laidlaw suggests that she forged signatures on some container service agreements. Laidlaw has made no attempt to pursue its allegations in this regard through the criminal courts and the handwriting expert called by Laidlaw did not do a blind analysis.[107] The Tribunal does not doubt the credibility of Ms. Gunter's evidence.

VIII. REMEDIES

The Director seeks the following remedies:

[107] An analysis in which the expert is not aware of the identity and handwriting of the person suspected of writing the documents.

... an Order or Orders prohibiting the Respondent from entering into or continuing to use any agreement for the provision of the Product in the Markets which contain terms:

1.(i) a) creating an automatic renewal thereof;
b) requiring notice of termination beyond one payment period;
c) creating or containing a term of more than one year;
d) creating a right of first refusal on the part of the Respondent for the continuation or acquisition of the business of a customer or potential customer;
e) obliging a customer to reveal competitive bids or information regarding discussions, negotiations or quotes provided to the customer from competitors of the Respondent;
f) requiring the customer, if it requires the Product at multiple locations or in differing quantities, or levels of service to obtain it exclusively from the Respondent;
g) requiring a customer to pay any stipulated sum upon early termination.

(ii) declaring null and void any such provisions in contracts in place in the Markets.

2. [An order] prohibiting the acquisition of any competitor in the Markets for a period of three years from the date of the Order of this Tribunal.

3. An Order prohibiting the Respondent from exiting the Markets for a period of three years from the date of the Order of this Tribunal.

4. An Order prohibiting the Respondent for a period of three years from charging a price for the Product in any of the Markets, for the purpose of meeting or undercutting the price of a competitor in such market unless the price so charged by the Respondent is applied or made available uniformly by it to customers similarly situated.

5. An Order directing that the Respondent may only supply the Product in the Markets, if, by written contract, which contract shall prominently and unambiguously state thereon that the document is a contract for waste disposal for a fixed term; and that all such contracts in place therein at the time that the orders sought herein are granted and entered into thereafter for a period of three years be provided to the Applicant at the Applicant's request;

6. An order declaring any clause in any contract of purchase and sale or appurtenant or ancillary thereto of a competitor or any other provider of the product in the Markets or its business which restricts that vendor or any of its principals or any other

person a party thereto from competing in the Markets or each of them, in any business or activity competitive with that of the Respondent's, null and void until such time that the Respondent demonstrates that it is no longer dominant in the Markets;

7. An order declaring any existing agreements between the Respondent and any other person which allocates customers, fixes territorial limits on the extent of the involvement of the parties in the market for the supply of the Product in the Markets, or which stipulates conditions or prohibitions as to entry into the Markets, are null and void; and prohibiting the Respondent from entering into any such agreement;

8. An order requiring the Respondent to develop a system to determine the cost of service of each of its customers based upon an approved Canadian Institute of Chartered Accountants Generally Accepted Accounting Principles formulation thereof derived from the weight of waste generated by each customer as weighed at the time of pick up;

9. An order requiring the Respondent, for a period of five years from the date of the Order to create and circulate to its customers in the Markets and each of them a price list regarding its scale of charges for the supply of the Product;

10. An order requiring the Respondent to provide timely notice to each of its customers of any change in its standard form of container service agreement and providing therein an explanation of each such change and providing to each of its customers an option to adopt such changes or new form of container service agreement in lieu of its then extant contract;

11. An order directing the Respondent to provide a copy of this Order and a synopsis thereof as approved by the Applicant to each customer as of the date thereof;

12. An order directing the Respondent to similarly provide a copy of such order and a synopsis thereof to each of its managerial employees a statement of its policy of compliance with the Competition Act, an explanation of the said Act, and in particular the implications of ss. 78 and 79 thereof; and

13. Such other and further order as may to this Tribunal appear just.[108]

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[108] Written Argument of the Applicant at 57-60.

The remedies which the Director seeks can be classified as: (a) prohibition of certain acquisition practices in the future and the voiding of restrictive covenants in existing acquisition agreements; (b) prohibition of certain contracting practices in the future and the alteration of existing contracts so that the anti-competitive terms are made inoperative; (c) other substantive orders designed to restore competition; and (d) notice requirements respecting any order which the Tribunal might make.

Subsection 79(1) authorizes the Tribunal to issue orders preventing the future occurrence of anti-competitive acts. In addition, subsection (2) provides:

> 79. (2) Where, on an application under subsection (1), the Tribunal finds that a practice of anti-competitive acts has had or is having the effect of preventing or lessening competition substantially in a market and that an order under subsection (1) is not likely to restore competition in that market, the Tribunal may, in addition to or in lieu of making an order under subsection (1), make an order directing any or all the persons against whom an order is sought to take such actions, including the divestiture of assets or shares, as are reasonable and as are necessary to overcome the effects of the practice in that market.

The Tribunal is aware that its orders pursuant to subsections 79(1) and 79(2) must only go as far as it considers necessary in order to restore competition in the relevant markets. It agrees with counsel for Laidlaw's argument that it is not part of the Tribunal's function to impose penalties or punitive measures. What is necessary to restore competition is a judgment which must be made by reference to the evidence which has been put before the Tribunal as to how the markets in

question operate and have operated and the effects the anti-competitive acts are having thereon. The Tribunal has taken these considerations into account in deciding which of the orders requested by the Director it is prepared to grant.

A. Acquisitions and Restrictive Covenants

The Tribunal is willing to grant an order prohibiting Laidlaw from acquiring any competitor in the market for a period of three years from the date of the order (Director's remedy 2). Laidlaw's acquisition practices clearly constituted anti-competitive acts which were a significant element leading to the substantial lessening of competition which occurred in these markets. The acquisition practices have, in some circumstances, made customers reluctant to use the services of a Laidlaw competitor because of a belief, resulting from past experience, that Laidlaw will acquire that new company in the not too far distant future and the customer will be disadvantaged as a result of having left Laidlaw. The Tribunal is therefore of the view that the three-year ban on acquisitions is a necessary aspect of an order designed to restore competition to the markets.

Insofar as declaring the restrictive covenants in the acquisition agreements to be null and void (Director's remedies 6 and 7), counsel for Laidlaw argues that this type of remedy is not within the jurisdiction of the Tribunal because it is a blatant interference with the property rights of the parties to those contracts. It is argued

that the Tribunal is a creature of statute and not a court of inherent jurisdiction and therefore cannot grant the remedy sought.

There is no doubt that the Tribunal is not a court of inherent jurisdiction and is a creature of statute. At the same time, it is clear from the types of remedies which are expressly *included within* the Tribunal's mandate (ordering sales of shares and assets) that the Tribunal was given broad jurisdiction to interfere with property rights not only of the party or parties before it but also of third parties who have contracts with the respondent. This is clear not only from the remedies expressly described but also from the types of activity which the Tribunal is mandated to restrain: pre-emption of scarce resources; buying up products to prevent erosion of existing price levels; adoption of product specifications; requiring or ordering a seller to sell only or primarily to certain customers.

Five of the covenants in question have already expired. Three of the remaining four which relate to lift-on-board service, that given by Jones, that given by B & D, and that given by SCS Waste Systems, are clearly overly broad. The covenants given by Jones and B & D purport to cover areas within a 300-mile radius of Nanaimo and a 100-mile radius of Campbell River respectively. The covenant given by SCS Waste Systems is a step covenant of which the smallest decrement is a 50-mile radius from Nanaimo. This covers large parts of highly populated areas of mainland British Columbia, including at least parts of Vancouver. These

are areas in which SCS Waste Systems never operated. The covenants are clearly wildly overly broad and therefore void.

With respect to the covenant given by Advance concerning lift-on-board service, it is carefully crafted so as to be no broader than 30 miles across following the spine of Highway No. 1 (which also follows the coastline of Vancouver Island). It is difficult to conclude that it is an unreasonable restriction on the basis of the applicable common law principles.

With respect to the two covenants respecting the roll-off business given by Laidlaw (one to Jones and the other to Advance), characterizing those covenants is more difficult. While intuitively one is led to the conclusion that given the size of the markets they must constitute either an undue restriction in the terms of section 45 or lead to a substantial lessening of competition in the terms of section 79, on reviewing the evidence there is simply insufficient information concerning the state of the roll-off market to allow such a conclusion.

Counsel for Laidlaw argues that even if the lift-on-board covenants are overly broad, they do not lead to a substantial lessening of competition because they keep such a small number of potential competitors out of the market. Therefore, it is argued that remedies with respect to them are not within the Tribunal's purview.

While it may be clear that an application of the common law principles respecting restrictive covenants would lead to the conclusion that all of the unexpired covenants would be unenforceable as being overly broad, the Tribunal has not been convinced that declaring the unexpired restrictive covenants void is necessary to restore competition in the markets. There is merit in the argument that their effect on the markets and on competition therein is marginal. At the same time, in some sense, the Tribunal's refusal to issue a declaration in this regard is somewhat irrelevant since the parties to the lift-on-board covenants will by virtue of these reasons have an appreciation of the legal weakness of those covenants.

B.Contracts

With respect to future and existing contracts, as has already been noted, Laidlaw has removed the right of first refusal and the right to compete clauses from its standard form contracts. Thus future contracts will not contain those terms. Insofar as existing contracts are concerned, Laidlaw has undertaken not to enforce those clauses and to notify its customers of this position. Similarly, Laidlaw has undertaken to remove the liquidated damages clause from its standard form contracts. Laidlaw is willing to notify its customers that those terms contained in existing contracts will not be enforced (Director's remedies 1(i)(d), (e), (g) and (ii) as it relates to subparagraphs (d), (e), (g) of paragraph (i)).

Laidlaw has revised its contract forms so that there is bold printing on the face which warns the customer that it is a contract for three years which is being signed (part of Director's remedy 5).

Laidlaw has also decided to alter the term of the roll-over renewal period found in the contracts. Under this arrangement the original term of the contract would be for three years but renewals thereafter would be for one year only. The Tribunal does not consider this sufficient to reduce the artificial barriers to entry caused by the contracts. The Tribunal is prepared to grant an order that the contracts, both present and future, shall have no longer initial term than one year. An automatic right of renewal is appropriate but only for a one-year period. At the expiration of the initial one-year term, cancellation of the contract may occur on one-month's notice by either party.[109] It would seem preferable that the existing contracts expire on their anniversary dates within a year of the Tribunal's order rather than all on one day (Director's remedies 1(i)(a), (b), (c) and (ii) as it relates to subparagraphs (a), (b), (c) of paragraph (i)).

[109] Madame Sarrazin is of the view that a more appropriate and perhaps effective method of eliminating the abusive practices would be to simply require that all Laidlaw contracts be terminable on 60 days notice. She notes, first, that there was much evidence that prior to Laidlaw's entry into the markets no formal written contracts were in use and termination of service in general was effected by 30 days notice, that the customer service agreements were not introduced as a result of the customer's preferences and that the competition used them only as a reaction to Laidlaw practices. Professor Noll pointed out that the contracts do not create efficiencies and are the key to maintaining and enforcing market power for Laidlaw. It is further emphasized that in all cases, simple clear cut remedies targeted at the fundamental issues are preferable to more complex and interventionist ones that will have a perpetual life and may not cover adequately all situations present and future. With the evidence before the Tribunal, and in light of the above principle, Madame Sarrazin notes that it would have been reasonable for the Director to have asked for contracts terminable on 60 days notice to overcome the effects of Laidlaw practices in the market. Such remedy would serve the purpose required and would allow the market to restore itself.

The Tribunal is willing to grant an order that the standard form contracts not contain terms requiring a customer to obtain service exclusively from Laidlaw with respect to all its lift-on-board service (Director's remedy 1(i)(f) and (ii) insofar as it relates to subparagraph (f) of paragraph (i)). Laidlaw argued that these exclusivity clauses were included in order to ensure that the customer did not stream recyclable and therefore more profitable waste from the waste stream, which would otherwise have been available to Laidlaw. This is not convincing. In the first place, it is the customer not Laidlaw which does the streaming. In the second place, the reference to recyclable waste only appears in the latest Laidlaw contracts; there is no way that this can be seen as a situation relevant to the earlier contracts. More importantly, however, there is no reason to tie a customer to a location (or quality of service (e.g. recyclable)) for which he or she has not specifically initially contracted. In the context of the present application such clauses abet the anti-competitive reach of the contracts by excluding competitors from these other areas.

In deciding to grant an order relating to the contracts as described above, the Tribunal is aware that only Laidlaw will be bound to conduct itself in this fashion. Other firms in these markets will not be so constrained. No order will exist preventing Browning-Ferris Industries (B.F.I.) from seeking three-year contracts from its customers. This, however, is the consequence of the authority granted to the Tribunal under the Act. Orders can only be made pursuant to section 79

against a dominant firm. While the situation created by such orders would seem to be unbalanced, the Tribunal is aware that if customers are faced with a choice between a three-year lock-in type contract such as that which Laidlaw now uses and a one-year contract from which the anti-competitive clauses have been removed, it seems likely that they would choose the less onerous version.

C. Other Substantive Remedies

The Tribunal is not willing to grant an order preventing Laidlaw from exiting any of the markets for a period of three years from the date of the order (Director's remedy 3). If the Director can provide a fairly precise definition of what is meant by "exiting", the Tribunal is prepared to include in its order a requirement that Laidlaw give the Director 60 days notice of any such intended action. The Tribunal is also willing to include in its order a provision that an application to amend or alter the existing order could be made in reference to this exit activity if it was deemed desirable to do so, despite the fact that section 106 of the Act provides for application for variation of an order in changed circumstances.

The Tribunal is willing to require that Laidlaw provide the Director with copies of all of its existing and future contracts (second half of Director's remedy 5). It is not prepared to require Laidlaw to provide an opportunity to each existing customer to change its contract to new contract forms whenever such forms are

introduced (Director's remedy 10). The Tribunal notes that the existing contract between any given customer and Laidlaw will be based on a number of interrelated factors including price. The purpose to be served by obligating Laidlaw, merely because it introduces a new form of contract, to offer that contract to all existing contracted customers is not immediately obvious. At the same time, the Tribunal is willing to include in its order a requirement that if and when any new contract form is prepared, it should be accompanied by an explanation describing the differences between it and the contract which the customer had previously signed when submitted to existing customers.

That leaves for consideration what might be called the pricing remedies: (a) prohibition against Laidlaw charging a price in any of the markets for the purpose of undercutting a competitor unless the price so charged is made available uniformly to all its customers (Director's remedy 4); (b) Laidlaw to create and circulate price lists to all its customers for a period of five years (Director's remedy 9); and (c) requires Laidlaw to develop a system to determine a cost of service to each of its customers (Director's remedy 8).

The Tribunal has difficulty accepting that orders of this nature should be issued. The Tribunal's difficulty arises because no argument has been articulated as to why these remedies are sought and what will potentially be achieved through

them. In addition, these remedies, on their face, raise serious questions for the Tribunal.

With respect to the request for an order requiring Laidlaw not to charge a price in any of the markets for the purpose of undercutting a competitor unless it is made available uniformly to all customers (Director's remedy 4), it is difficult to see how customers would benefit from a policy which prevented them from playing off suppliers against each other. Predatory pricing while originally pleaded was not seriously at issue in this case. More importantly, no argument has been made demonstrating that the possible pay-off from such activity would not be greatly reduced, if not eliminated, by the lowering of the barriers to entry which will result from the other remedies.

With respect to the request that Laidlaw be required to circulate price lists to its customers (Director's remedy 9), it has not been demonstrated to the Tribunal that this could serve any useful purpose since it is conceded that any such price list would be a "suggested price" list only. It is understood that any such list would not be binding on Laidlaw and that Laidlaw would be free to negotiate with individual customers. The list, at the same time, could become the focus for implicit pricing agreement by the suppliers in these very concentrated markets.

With respect to the requirement that Laidlaw develop a cost of service for each of its customers (Director's remedy 8), the Tribunal notes that this remedy is conceptually inconsistent with the Director's remedies 4 and 9. The request that the cost of service to each individual customer be determined is inconsistent with the notion underlying remedies 4 and 9 that standardized pricing is possible. If the concern is that Laidlaw may be charging some customers too little compared to average variable cost, the disadvantage would be Laidlaw's as long as the rest of the customer base turned over quickly enough so that it was available to competition from other suppliers.

The Tribunal is willing to reconsider its refusal to include in the order what is referred to as the pricing remedies. It takes this stand because it wishes to ensure that all valid reasons for seeking such remedies have been brought to its attention. Accordingly, the Director, if he so wishes, may file written argument setting out the rationale on which the request for those remedies is based, within ten days of the date of these reasons. This should include, for example, an explanation as to what the remedies are intended to accomplish, why they are justified on the evidence and why they are necessary in the light of the other remedies which the Tribunal has agreed to grant. If the Director chooses to exercise this option the respondent will of course be given a corresponding ten days within which to reply.

D. Notice Requirements

Laidlaw does not object to notifying all its customers of any order the Tribunal might make in accordance with a communication drafted by the Director (Director's remedy 11). Laidlaw does object to providing to its managerial employees notice of any order plus a statement that its policy is to comply with the Act (Director's remedy 12). It is argued that this last is a new remedy which did not appear in the notice of application nor in any documentation before counsel's final written argument. Counsel for the Director indicated that if it was necessary he would make a formal motion to amend the notice of application in this regard. Counsel for Laidlaw's argument, that it is not open to the Tribunal to make the order requested, is based on the Tribunal's decision in the *NutraSweet* case:

> In formulating an appropriate order the Tribunal is of the view that it must confine itself essentially to the kind of orders requested by the Director in his original application with such modifications as may fairly be considered to have been in issue in the case. While other possible remedies were discussed during argument, no amendment was sought to the application in this respect. It is a matter of fairness that the respondent not now be faced with a remedy of which it had no formal notice.[110] (underlining added)

If a formal notice to amend the application is required, then it is hereby granted. At the same time, the "additional" remedy being sought is not different in *kind* from that sought under the original application. It is merely an addition to the scope of the notice to be given with respect to any order the Tribunal might make, and a

[110] *Supra*, note 2 at 57-58.

requirement that Laidlaw make an express commitment to abide by the provisions of the Act. The test regarding additions or alternatives to remedies is whether or not the respondent will be prejudiced as a result of not having had earlier notice of the request, of not having had an opportunity to adduce relevant evidence respecting the effects of the remedy or an opportunity to explain why it is inappropriate. The respondent will not be prejudiced in this manner by the expanded notice requirements now being requested and the Tribunal is willing to grant an order which includes such requirements.

E. Request that Order be Drafted

The Tribunal asks that counsel for the Director, in consultation with counsel for the respondent, draft an order for issuance by the Tribunal in accordance with these reasons. A draft shall be submitted within ten days of the date of these reasons.

DATED AT Ottawa, this 20th day of January, 1992.

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

(s) B. Reed
B. Reed