COMPETITION TRIBUNAL
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CT-91/2

THE COMPETITION TRIBUNAL

IN THE MATTER OF an Application by the Director of Investigation and Research under s.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

REPLY

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1. Same as hereinafter pleaded the Applicant denies the allegations set out by the Respondent in the Response and puts the Respondent to the strict proof thereof.

2. The Applicant repeats the allegations set out in its Application herein.

3. The Applicant pleads that until discovery or the provision of particulars by the Respondent it is unable to reply to the Respondent's allegation of market definition herein. The Applicant therefore pleads that paragraphs 3, 4, and 5 of the

Response are accordingly no more than a denial of the Application.

4. The Applicant pleads that the Respondent is estopped from denying the market alleged by the Applicant in that in acquiring the businesses referred to in paragraphs 40, 41, 46 and 47 of the Response, the Respondent has acknowledged the geographic and product divisions of its activities into separate businesses in the markets therein referred to.

5. Further or in the alternative, the Applicant pleads that the existence of other waste haulage operators in the markets is not determinative or even relevant to the criteria to determine the class or species of business alleged by the Applicant. Such undertakings are not substitutes for the businesses as alleged by the Applicant.

6. The Applicant pleads that in particular, paragraph 6 of the Response is irrelevant in that the Respondent has failed to relate its claim of superior competitive performance therein and elsewhere in the Response to a particular practice referred to in the Application or in sections 79 and 78 of the Competition Act.

7. The Applicant pleads that the Respondent has from time to time organized campaigns for the enrolment of its customers under written contracts. The Applicant pleads that contrary to the matters referred to in paragraphs 26, 27, 31, 32, 33 and 34 of the Response, the Respondent has and is using the technique of placing its customers under exclusive written contracts as a proprietary device, disproportionate to the exigencies of the commercial relationship between it and its customers in the markets defined by the Applicant. The Applicant specifically puts the Respondent to the strict proof of the phrase "good

business practice" referred to in paragraph 33 of the Response, and pleads that the said contracts lack mutuality and fair dealing characteristic of a negotiated contractual consensus.

8. If, which is denied, the Respondent does not currently use forms of customer contracts which contain terms which require customers to disclose to the Respondent the terms and conditions of bona fide offers received by customers from competitors of the Respondent, as stated in paragraph 32 of the Response, nevertheless contracts containing such clauses are still in place in the markets. The Applicant states that the effect of this provision and the exercise thereof by the Respondent, as well as other provisions which inter alia provide the Respondent with the first right of refusal for customers under contract receiving bona fide offers from competitors, have assisted the Respondent in attaining and maintaining its dominant position in the relevant markets. The deletion of the said provisions, in and of themselves, do not remedy the substantial lessening of competition by the Respondent in the relevant markets.

9. The Applicant pleads that with respect to paragraph 48 of the Response that the obtaining of non competition clauses as therein set out was in the circumstances unreasonable and against the public interest in free competition in that:

a) unlike "common commercial practice" the said clauses were obtained to promote the Respondent's attainment of dominance in the defined markets;

b) the said clauses facilitated the Respondent's abuse of dominance therein and themselves became the practice of an anti-competitive act;

c) notwithstanding any financial structuring of an acquisition by the Respondent of a competitor, in the circumstances, any goodwill of the acquired competitor, the existence of which is not admitted, is personal in nature and not capable of transfer;

d) the said clauses were obtained to further the Respondent's view of the customers of the acquiree as proprietary, and to exclude any possibility of a contestable market for their patronage.

10. With respect to paragraph 52 of the Response, the Applicant denies that the said harm is transient in nature but rather it is of lasting and permanent effect so long as the Respondent is free to pursue its course of anti-competitive practices. To the extent that the Respondent has attained dominance or near monopoly position in the markets defined in the Application, if, which is denied, certain efficiencies have been generated in that regard, the Applicant pleads that such efficiencies are not a justification of the Respondent's conduct complained of herein. The Applicant pleads that the question of efficiencies as referred to in paragraph 52 of the Response is irrelevant and untenable in law with respect to this Application.

11. The Applicant pleads that the Competition Tribunal is not empowered in the context of an application under Part VIII of the Competition Act to make an order for costs.

12. The Applicant therefore joins issue with the Respondent upon its Response.

Dated at Hull, Quebec this 10 day of May, 1991.

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