

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.

**BETWEEN:**

**The Director of Investigation and Research**

<b>COMPETITION TRIBUNAL TRIBUNAL DE LA CONCURRENCE</b>	
APR 26 1991	<i>RECEIVED</i>
<small>REGISTRAR - REGISTRAIRE</small>	
OTTAWA, ONT.	
Applicant	

**AND:**

**Laidlaw Waste Systems Ltd.**

Respondent

<b>COMPETITION TRIBUNAL TRIBUNAL DE LA CONCURRENCE</b>	
APR 26 1991	<i>FILED</i>
<small>REGISTRAR - REGISTRAIRE</small>	
OTTAWA, ONT.	

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**RESPONSE**

**A. STATEMENT OF GROUNDS ON WHICH THE APPLICATION IS OPPOSED**

The Respondent opposes the Application (the "Application") dated the 22nd day of March, 1991 on the following grounds:

1. The Respondent does not substantially or completely control, throughout Canada or any area thereof, a class or species of business.

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2. The Respondent has not engaged in and is not engaging in a practice of anti-competitive acts which has had, is having or is likely to have the effect of preventing or lessening competition substantially in a market.

**B. MATERIAL FACTS ON WHICH THE RESPONDENT RELIES**

3. As to the whole of the Application, the Respondent denies that the provision of the product (as defined by the Applicant) is a distinct class or species of business. The Applicant defines the product (the "Defined Product") as "the provision to commercial customers of the service of containerized solid waste haulage and disposal." Containerized solid waste haulage and disposal is in fact only one of several waste haulage and disposal services offered to customers of any type (the "Actual Product") by the Respondent and by the Respondent's competitors. The Applicant's allegations that containerized solid waste haulage and disposal services are utilized virtually exclusively by commercial customers, that hand-bagged service is utilized virtually exclusively by residential customers, and that roll-off service is utilized virtually exclusively by industrial customers, are artificial and inaccurate. Each such

service is available to any customer, regardless of how that customer may be classified. The type or types of service chosen by a customer will depend upon that customer's specific requirements.

4. As to the whole of the Application, the Respondent says that the geographic markets defined by the Applicant do not constitute discrete areas of the country which are relevant geographic markets appropriate for the evaluation of the Respondent's business activities. The Applicant defines the markets (the "Defined Markets") as the Cowichan Valley, Nanaimo, and Campbell River, British Columbia. The Defined Markets are in fact only a segment of the much wider actual market (the "Actual Market") in which the Respondent and the Respondent's competitors carry on business.
  
5. As to the whole of the Application, the Respondent denies that it substantially controls the supply of the Actual Product in the Actual Market, or of the Defined Product in the Defined Markets and each of them. Competition in the Actual Market (of which the Defined Markets form part) is significant. Indicia of competition in the Actual Market include the following:

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- (a) there are several competitors of the Respondent carrying on business in both the Actual Market and in the Defined Markets;
- (b) entry into the Actual Market or Defined Markets for a prospective supplier of the Defined Product or the Actual Product (or any of the individual services which collectively form the Actual Product) is relatively easy;
- (c) most of the Respondent's customers are sophisticated consumers capable of considering and evaluating alternate available services and of changing sources of supply. The contractual arrangements between the Respondent and its customers are negotiated freely and serve the interests of each contracting party;
- (d) price increases in recent years in the Actual Market and Defined Markets have been primarily a result of increases in cost beyond the control of the Respondent and its competitors, such as increased landfill costs levied by local governmental authorities. Price levels in the Actual Market and Defined Markets have been otherwise maintained by competitive pressures.

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6. As to the whole of the Application, the Respondent denies that it has attained a dominant position in the Actual Market or in the Defined Markets and maintains such dominance through the weight of its market power and through the practice of anti-competitive acts which have had and, unless restrained, will continue to have, the effect of preventing or lessening competition substantially in the Defined Markets and in each of them. The Respondent's success in the Defined Markets and in the Actual Market has been achieved through superior competitive performance. The Respondent has effectively served the interests of its customers by providing excellent service and customer support. The Respondent's superior competitive performance has enabled the Respondent to attract and retain customers.
  
7. The Respondent admits the allegations contained in paragraphs 1 and 2 of the Statement of Grounds and Material Facts (the "Statement") filed with the Application.
  
8. As to paragraph 4 of the Statement, the Respondent admits that it is engaged in the business of the provision to commercial customers of the service of containerized solid waste haulage and disposal, but

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denies that the provision of the Defined Product is a distinct class or species of business. The Defined Product is in fact only one of several waste haulage and disposal services offered by the Respondent and its competitors to customers of any type which collectively constitute the Actual Product.

9. The Respondent admits the allegations contained in paragraph 5 of the Statement except to say that the landfill sites in the Defined Markets are regionally owned.
  
10. As to paragraph 6 of the Statement, the Respondent denies that service to commercial customers, as defined in the Statement, accounts for more revenues than service to any other type of customer in the Defined Markets. The Respondent further denies that commercial customers as defined in the Statement typically generate far more waste than residential customers. Such commercial customers may place their material in metal containers as alleged, but many such customers utilize other types of waste disposal service instead of, or in combination with, containerized service. Alternate types of waste disposal service include roll-off service, hand-bagged service, and recycling. The

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type or types of service chosen by a customer will depend upon that customer's specific requirements. There are a wide variety of container sizes available, depending upon the needs of the individual customer.

11. As to paragraph 7 of the Statement, the Respondent admits that many commercial customers are served by front-load vehicles as alleged, but denies that rear-end loaders cannot physically handle large containers. It is inaccurate to suggest that commercial customers use front-load containerized services except in unusual circumstances. There are a number of different waste haulage and disposal services available from the Respondent and from the Respondent's competitors which commercial customers can and do utilize.
  
12. As to paragraph 8 of the Statement, the Respondent admits that solid waste haulage firms may also provide service to residential and industrial customers, but denies that it is accurate to classify such industrial customers as "roll-off customers". Roll-off service is available to any customer, regardless of how that customer may be classified, and is not utilized solely by industrial customers.

13. As to paragraph 9 of the Statement, the Respondent admits that many residential customers such as households and small apartments individually generate small amounts of waste, disposed of as alleged. However, the Respondent says that many business establishments that generate large quantities of solid waste dispose of such waste in the same manner. The type or types of service chosen by a customer will depend upon that customer's specific requirements.
14. As to paragraph 10 of the Statement, the Respondent denies that industrial customers necessarily generate the largest amount of waste. Many commercial customers generate larger volumes of waste than industrial customers. As a result, depending upon its own requirements an industrial customer may utilize types of service other than, or in addition to, roll-off service. Much of the waste generated by industrial customers is compactible. Compactors are frequently installed in roll-off units. Roll-off units are available in a wide range of sizes, many of which are significantly smaller than 40 cubic yards.
15. As to paragraph 11 of the Statement, the Respondent denies that commercial containerized solid waste

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haulage service has no practicable substitutes. Front-end containers may, from a customer's perspective, be interchangeable with roll-off containers or with other types of waste disposal and haulage services, depending upon the individual customer's requirements. The Respondent denies that it is necessarily impractical and too costly for commercial customers to bag and carry their garbage as alleged. In fact, many commercial customers utilize this type of waste disposal and haulage service. The Respondent denies that commercial containerized service offers a greater degree of cleanliness and relative freedom from scavengers than hand-bagged service. The Respondent further denies that roll-off service is too costly and takes up too much space for most commercial containerized service customers or that only customers that generate the largest volumes of solid waste can economically consider roll-off service.

16. As to paragraph 12 of the Statement, the Respondent denies that there is no reasonable substitute to which a significant number of customers could turn in response to a small but significant and non-transitory price increase in commercial containerized haulage service. Any customer may choose from

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a wide variety of waste disposal and haulage services from the Respondent and from the Respondent's competitors, including containerized service, roll-off service, hand-bagged service, recycling, or any combination thereof. The Respondent denies that for the purposes of the Competition Act commercial containerized haulage service constitutes a distinct class or species of business.

17. As to paragraph 13 of the Statement, the Respondent has no specific knowledge as to the financial burden which solid waste haulage constitutes to customers, but the Respondent denies that such customers participate relatively passively in the competitive process. The Respondent further denies that customer participation is confined to the initial contracting phase, and says that on-going client support and contact is essential to the business of the Respondent and its competitors. The Respondent admits that economies of density result from a contracted customer base and that this is conducive to practices directed to create and maintain acceptable levels of customer retention. However, the Respondent denies that it has engaged in or is engaging in any such practices which constitute anti-competitive acts, and says that such economies of density are ultimately of benefit to customers.

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18. As to paragraph 14 of the Statement, the Respondent denies that it has utilized anti-competitive practices as alleged and denies that it substantially controls the business of the provision of the Defined Product in the Defined Markets as alleged or of the provision of the Actual Product in the Actual Market. The Respondent has no specific knowledge of its market share by revenue generated in the Actual Market or Defined Markets and puts the Applicant to the strict proof of the allegations as to market share set out in paragraph 14 of the Statement.
19. As to paragraph 15 of the Statement, the Respondent denies that it has focused upon providing service to customers concentrated in urbanized areas rather than to diffusely distributed customers in non-urban territory. Much of the territory within the Defined Markets is rural. The Respondent denies that the geographical boundaries of the Actual Market are limited as alleged and denies that the Defined Markets constitute discrete areas of the country and are relevant geographic markets.
20. As to paragraph 16 of the Statement, the Respondent has no specific knowledge as to the plans of its rivals, but denies that expansion into the Defined

Markets has been constrained by the Respondent's dominant market share and contracting practices as alleged.

21. As to paragraph 17 of the Statement, the Respondent says that entry into either the Defined Markets or Actual Market for the provision of services to customers in the form of either the Defined Product or Actual Product, or any of the services which collectively constitute the Actual Product, is relatively easy. A relatively modest investment is required for a new competitor to enter into the Actual Market for the Actual Product. The Respondent denies that a new entrant cannot compete effectively until it possesses a customer base sufficient to achieve operating efficiencies comparable to existing firms, and further denies that route density of a minimum scale is required or that, if it is, it takes a substantial period of time to achieve such density. The Respondent says that, if the Respondent makes entry for new competitors difficult, it is because of the Respondent's superior competitive performance and not because of anti-competitive practices.
  
22. As to paragraph 18 of the Statement, the Respondent admits that it has accumulated a substantial

customer base contracted exclusively to the Defined Product, but says that it has done so through superior competitive performance and not through anti-competitive practices. The Respondent denies that its customer base has been a barrier to effective new entry into each of the Defined Markets.

23. As to paragraph 19 of the Statement, the Respondent denies that the elimination of one of a small number of significant competitors would significantly increase the impact of anti-competitive practices, had they been engaged in.
24. As to all of paragraph 20 of the Statement, the Respondent denies that it has used anti-competitive practices to substantially lessen competition, attain a dominant position in the Defined Markets or each of them, and to maintain and abuse such dominance and prevent competition therein.
25. As to paragraph 20(a) of the Statement, the Respondent admits that it has purchased competing businesses from time to time, but denies that it has used its market power and wealth to coerce competitors into selling their businesses. The Respondent denies that non-competition clauses or

agreements obtained from vendors or from vendor companies' principals are unreasonable or anti-competitive. The Respondent denies that any non-competition clauses or agreements were intended to have a predatory, exclusionary or disciplinary effect on competitors and says that such clauses and agreements were freely reached by the contracting parties.

26. As to paragraph 20(b) of the Statement, the Respondent admits that it has developed and used standard form contracts which bind commercial customers to an exclusive relationship with the Respondent. However, customers frequently negotiate different contractual terms with the Respondent than those contained in the Respondent's standard form contract. The Respondent's standard form contract provides for a three year term. The Respondent denies that such three year term is "substantial". The Respondent further denies that the automatic right of renewal contained in its standard form contract can be voided only if a customer actively invokes a notice clause within stringent time and mode constraints. The Respondent's standard form contract provides that either party may give notice of its intention to terminate (effective at the end of the term) at any time up to the final sixty days

of the term. The Respondent denies that such contractual provisions have had the effect of restricting customer mobility and freedom of contract, of extending the term of such contracts and of substantially lessening the opportunity of competitors to supply the Defined Product to customers so contracted. The Respondent denies that any such contractual provisions are intended to have a predatory, exclusionary or disciplinary effect on competitors.

27. As to paragraph 20(c) of the Statement, the Respondent denies that it causes its customers to enter into standard form contracts through unreasonable means such that customers are deprived of an opportunity to review their positions before engaging obligations thereunder.
  
28. As to paragraph 20(d) of the Statement, the Respondent denies that, through actual or threatened litigation against customers and potential or actual competitors in the Defined Markets, it has used its dominant position to discourage customers and competitors from discussing supply alternatives other than the Respondent's.

29. As to paragraph 20(e) of the Statement, the Respondent admits that it has entered into agreements with two competitors, but denies that these agreements have ensured the dominance of each party in certain territorial areas. The Respondent further denies that each signatory to these agreements is dominant in certain territorial areas, or that such agreement was intended to have a predatory, exclusionary or disciplinary effect on competitors.
30. As to paragraph 20(f) of the Statement, the Respondent admits that it has engaged in competitive pricing practices, but denies that it has sold the Defined Product below its average variable cost. The Respondent denies that its pricing practice has the object of eliminating new entrants.
31. As to paragraph 20(g) of the Statement, the Respondent denies that, until mid-1987, the Respondent's contracts with its customers were of a minimum three-year term. Customers of the Respondent frequently negotiated terms shorter than three years. The Respondent denies that such contracts gave the Respondent the option to continue supply of the Defined Product indefinitely. The Respondent further denies that many such contracts

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continue to bind customers beyond their initial term and were renewed on identical terms.

32. As to paragraph 20(h), the Respondent admits that, pursuant to the terms of its previous forms of contract, customers agreed to disclose to the Respondent the terms and conditions of bona fide offers received by the customer relating to the provision of solid waste disposal services. The Respondent frequently did not insist upon strict compliance by its customers with these provisions and has now deleted such provisions from its standard form contract. The Respondent denies that such provisions were intended to have a predatory, exclusionary or disciplinary effect on competitors.
33. The Respondent denies having engaged in any of the anti-competitive practices set forth and for the purposes alleged in paragraph 20(i). As to paragraph 20(i)(i), the Respondent says that it strives, as good business practice, to have as many of its customers under written contract as possible.
34. The Respondent denies that the liquidated damages clause contained in its standard form contract is a substantial penalty for early termination as

alleged in paragraph 20(j), and says that the clause provides for a genuine estimate of damages.

35. The Respondent denies that it has engaged in real or threatened nuisance litigation against its competitors as alleged in paragraph 20(k). The Respondent has sought to protect and enforce its contractual rights through legitimate legal means, and has not commenced litigation intended to have a predatory, exclusionary or disciplinary effect on competitors.
36. As to paragraph 21 of the Statement, the Respondent denies that it has foreclosed most of the Defined Markets to alternative suppliers and denies that it has substantially prevented or lessened competition in the Defined Markets.
37. As to paragraph 22 of the Statement, the Respondent admits that it has from time to time acquired assets from, and sold assets to, competitors in the Defined Markets. The Respondent has also from time to time acquired shares of competing companies carrying on businesses in the Defined Markets, particulars of which are provided below. The Respondent denies that such acquisitions have augmented the Respondent's control of a class or species of

business in the Defined Markets and each of them, thereby permitting the Respondent to engage in anti-competitive practices as alleged. The Respondent denies that it has, through acquisition, removed all incumbent participants in the Defined Markets, thereby becoming the sole supplier of the Defined Product therein. The Respondent further denies that the intent of any of its acquisitions was to preserve its market share by removing threatening competitors from the Defined Markets. The Respondent has competed for customers through superior competitive performance.

38. As to paragraph 23 of the Statement, the Respondent admits that it acquired the shares of C.W. Disposals (1986) Ltd., but says that the acquisition occurred in 1986. The Respondent denies that in 1986 either C.W. Disposals (1986) Ltd. or C.W. Disposals Ltd. was the primary supplier of the Actual Product. The Respondent has no knowledge as to the market share allegedly attained by Advance Waste Systems Inc. ("Advance") in the Cowichan Valley area, but denies that any inability of Advance to meaningfully penetrate the Cowichan Valley area as alleged was a result of anti-competitive practices by the Respondent.

39. As to paragraph 24 of the Statement, the Respondent says that it purchased certain customer accounts relating to Advance's front-end load business in the Cowichan Valley and Nanaimo areas.
40. As to paragraph 25 of the Statement, the Respondent says that Advance, Advance Operations Ltd., and Jack McLeod freely agreed, for a period of five years, not to engage in any business competitive with the solid waste collection and hauling service business carried on from time to time or at any time by the Respondent, or formerly carried on by Advance, Advance Operations Ltd., and/or Jack McLeod, other than the business of providing solid waste roll-off collection and hauling services, in the area specified in the agreement. The Respondent agreed, for a period of five years, not to engage in any business competitive with the solid waste roll-off collection and hauling service business carried on from time to time or at any time by Advance and/or Advance Operations Ltd., or formerly carried on by the Respondent, in the area specified in the agreement.
41. As to paragraph 26 of the Statement, the Respondent says that in 1986 it purchased certain assets from Jones Disposal Services Ltd. ("Jones") relating to

commercial front loading and residential side and rear loading operations and that Nanaimo Disposal Services (1986) Ltd. sold to Jones certain assets relating to roll-off operations. The Respondent says that Jones and Norman J.T. Jones freely agreed, for a period of ten years, not to engage in any business competitive with the commercial front loading or residential side and rear loading waste disposal business carried on from time to time or at any time by the Respondent, or formerly carried on by Jones and/or Norman J.T. Jones, in the areas set out in the agreement. The Respondent further says that the Respondent agreed, for a period of ten years, not to engage in any business competitive with the industrial roll-off waste disposal business carried on from time to time or at any time by Jones and/or Norman J.T. Jones in the areas set out in the agreement. The Respondent admits that in 1986 it acquired the shares of Nanaimo Disposal Service (1986) Ltd. The Respondent says that Nanaimo Disposal Service (1980) Ltd., Myron Ratzlaff, and Kelvin Fox freely agreed, for a period of five years, not to engage in any business competitive with the waste disposal business then carried on by Nanaimo Disposal Service (1986) Ltd. and formerly carried on by Nanaimo Disposal Service, (1980) Ltd., Myron

Ratzlaff, and/or Kelvin Fox, in the areas set out in the agreement. The Respondent denies that as a result of the acquisitions set out in paragraph 26 of the Statement, the Respondent became the sole supplier of the Defined Product in the Nanaimo area.

42. As to paragraph 27 of the Statement, the Respondent admits that in 1986 it acquired the shares of United Disposal (1986) Ltd., and admits that United Disposal Ltd. was at that time the only supplier of the Defined Product in the City of Parksville. However, the Respondent repeats its claim that the Defined Product is not a distinct class or species of business and that the Defined Markets do not constitute discrete areas of the country which are relevant geographic markets appropriate for the evaluation of the Respondent's business activities. The Respondent says that United Disposal Ltd., Peter Kupiak, and Ivan Paquette freely agreed, for a period of five years, not to engage in any business competitive with the waste disposal business carried on from time to time or at any time by United Disposal (1986) Ltd., or formerly carried on by United Disposal Ltd., Peter Kupiak, and/or Ivan Paquette, in the areas set out in the agreement.

43. As to paragraph 28 of the Statement, the Respondent says that in 1987 it purchased certain assets from SCS Waste Systems Inc. and SCS Steel Container Systems Inc. The Respondent says that SCS Waste Systems Inc., SCS Steel Container Systems Inc. and Charles H. Saunders freely agreed, for a period of five years, not to engage in the solid waste collection, removal or disposal business, in the areas set out in the agreement. The Respondent has no specific knowledge as to the market share allegedly attained by SCS Waste Systems Inc.
44. As to paragraph 29 of the Statement, the Respondent has no specific knowledge as to the alleged relative market shares, but says that the market share of the Respondent was attained through superior competitive performance and not through anti-competitive practices.
45. As to paragraph 30 of the Statement, the Respondent says that other competitors in the Nanaimo area presently include J.B. Disposal, Milner Trucking, Advance, Jones, and City Waste Systems. The Respondent has no specific knowledge of its market share for the Defined Product in this Defined Market.

46. As to paragraph 31 of the Statement, the Respondent admits that in 1986 it acquired the shares of Borgfjord Trucking (1986) Ltd. and Campbell River Sanitation Service (1986) Ltd. The Respondent says that Borgfjord Trucking Ltd., Daniel J. Borgfjord, and David S. Borgfjord freely agreed, for a period of five years, not to engage in any business competitive with the solid waste disposal business carried on from time to time or at any time by Borgfjord Trucking (1986) Ltd., or formerly carried on by Borgfjord Trucking Ltd., Daniel J. Borgfjord and/or David S. Borgfjord, in the areas set out in the agreement. The Respondent further says that Campbell River Sanitation Service Ltd., Charles E. Rodway, Terence E. Rodway, and Roderick G. MacDonald freely agreed, for a period of five years, not to engage in any business competitive with the waste disposal business carried on from time to time or at any time by Campbell River Sanitation Service (1986) Ltd., or formerly carried on by Campbell River Sanitation Service Ltd., Charles E. Rodway, Terence E. Rodway, and/or Roderick G. MacDonald, in the areas set out in the agreement.
47. As to paragraph 32 of the Statement, the Respondent says that in 1989 it purchased certain assets from

B & D Disposal Ltd. The Respondent says that B & D Disposal Ltd., Ernest Preston, and Kenneth Pople freely agreed, for a period of five years, not to engage in any business competitive with the waste collection and transportation business carried on from time to time or at any time by the Respondent or formerly carried on by B & D Disposal Ltd. in an area anywhere within the municipal boundaries of Campbell River, B.C., as well as within 100 miles of the municipal boundaries of Campbell River, B.C. The Respondent has no specific knowledge as to the market share attained by B & D Disposal Ltd., and has no specific knowledge as to whether B & D's customers were, for the most part, arranging for the supply of the Defined Product for the first time, or had refused to sign a written agreement with the Respondent.

48. As to each of paragraphs 25, 26, 27, 28, 31, and 32 of the Statement, the Respondent says that each of the agreements referred to therein was freely reached by the contracting parties and the Respondent denies that any such agreements were intended to have a predatory, exclusionary or disciplinary effect on competitors. The Respondent says that obtaining such an agreement upon the acquisition of a business is a common commercial practice intended to protect the investment made by

the purchaser in the goodwill of the acquired business.

49. As to paragraph 33 of the Statement, the Respondent denies that its injunction application was intended to protect the Respondent's control of the market for the supply of the Defined Product as alleged, but says that the application was legal action legitimately taken to protect the Respondent's rights.
50. As to paragraph 34 of the Statement, the Respondent has no specific knowledge as to the alleged market share of Camvest Disposals in the Campbell River area.
51. As to paragraph 35 of the Statement, the Respondent denies that it has employed its market power to attain and maintain a dominant position in each of the Defined Markets. The Respondent says that it has acquired the shares of only one competitor in the Cowichan Valley area, the shares of two competitors in the Nanaimo area and the shares of two competitors in Campbell River. The Respondent says that it has acquired assets from one competitor in the Nanaimo area and one competitor in Campbell River. The Respondent says that it has acquired assets from and sold assets to one

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competitor in the Cowichan Valley area and one competitor in the Nanaimo area.

52. The Respondent says further that any harmful effects that may be found to exist, or to have existed, are or were of a transient nature and are more than offset by efficiency benefits of the acts that may have led to them.

53. The Respondent says that the Competition Tribunal does not have jurisdiction to make the orders applied for in paragraphs 36(iii), (iv), (v), (vi), (vii), (viii), or (x).

54. The Respondent requests that the Application be dismissed with costs to the Respondent.

55. Documents may be served on the Respondent:

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DATED at the City of Vancouver, in the Province of British  
Columbia, this 26th day of April, 1991.

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A.G. Henderson  
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Systems Ltd.

TO: The Registrar  
The Competition Tribunal

AND TO: W.J. Miller  
Attorney General of Canada  
Counsel to the Applicant