

COMPETITION TRIBUNAL TRIBUNAL DE LA CONCURRENCE	
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OTTAWA, ONT.	# <i>(6)</i>

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

STATEMENT OF GROUNDS AND MATERIAL FACTS RESPECTING
THE DIRECTOR'S APPLICATION UNDER S.79 OF
THE COMPETITION ACT

A. The Parties

1. The Applicant, the Director under the Competition Act, (the "Act") is the officer appointed under s.7 of the Act and is charged with the administration of the Act.

2. The Respondent, Laidlaw Waste Systems Ltd., is a corporation incorporated pursuant to the Canada Business Corporations Act. It carries on business in Canada, in inter alia, the Province of British Columbia.

B. Basis of the Director's Application

3. The Director pleads that the Respondent substantially controls the supply of the Product in the Markets and each of them; that the provision of the Product is a distinct class or species of business; and, that the Respondent has attained such dominant position in the 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 Markets and in each of them.

C. Material Facts

The Subject Business

4. The Respondent is engaged in the business of the provision to commercial customers of the service of containerized solid waste haulage and disposal (the "Product").

5. Solid waste haulage and disposal involves the collection of paper, food, construction material and other solid wastes from residential, commercial and industrial customers, and the transporting of that waste to a landfill or other disposal site. Solid waste haulage and disposal services may be provided by private cartage companies directly to their customers, or indirectly through municipal contracts. The most common methods of solid waste disposal include burial in a sanitary landfill and

incineration. Landfills are usually owned and operated by a municipality, or by private waste haulage and disposal firms. The landfill sites in the Markets are municipally owned.

6. Service to commercial customers accounts for more revenues than service to any other type of customer in the Markets. Commercial customers include restaurants, large apartment complexes, retail and wholesale stores, office buildings, government facilities and industrial parks. These customers typically generate far more waste than residential customers, and generally place their material in metal containers of various volumes (usually three, four and six cubic yards and, exceptionally, as small as two cubic yards and as large as ten cubic yards) provided by waste haulage and disposal firms.

7. Commercial customers are served primarily by front-load vehicles that lift the containers over the front of the truck by means of a hydraulic hoist and empty them into the storage section of the vehicle, where the waste is compacted. Automated rear-end and side loaders can also be used to service some commercial customers, but these trucks cannot physically handle large containers. The trucks used to service commercial customers can drive directly up to a container and hoist the container in a manner similar to a forklift hoisting a pallet; the containers may need to be manually rolled into position by a truck crew.

8. Solid waste haulage firms may also provide service to residential and industrial (or "roll-off") customers.

9. Residential customers are households and small apartments that individually generate small amounts of waste, normally disposed of at curbside in bags or garbage cans. Rear and side-load manual vehicles generally serve these customers (and business establishments that generate relatively small quantities of solid waste, similar in amount to that generated by residential customers). They use a one or two person crew which manually loads the waste into the rear or side of the vehicle.

10. Industrial or roll-off customers include factories and construction sites, which generate the largest amount of waste, much of which is non-compactable, such as concrete or building debris. These customers deposit their waste in very large containers (up to 40 cubic yards) that are loaded onto a roll-off truck and transported individually to the disposal site where they are emptied before being returned to the customer's premises.

11. Front end containers are not interchangeable with industrial or roll-off containers and specific types of trucks must be employed with each category of service. Commercial containerized solid waste haulage service has no practicable substitutes. Commercial customers will not generally use

residential service because, except at very small volumes and where it is not otherwise prohibited by municipal by-law, it is impractical and too costly for commercial customers to bag and carry their garbage to the curb for hand pick-up. Commercial customers also value the cleanliness and relative freedom from scavengers afforded by commercial containerized service - attributes that residential-type service does not provide to nearly the same degree. Similarly, roll-off service is too costly and takes up too much space for most commercial containerized service customers. Only customers that generate the largest volumes of solid waste can economically consider roll-off service.

12. 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. For the purposes of the Act, commercial containerized haulage services constitutes a distinct class or species of business.

13. Individual customer charges for solid waste haulage do not constitute a significant financial burden to such customers and this contributes to their relatively passive participation in the competitive process. Their participation is usually confined to the initial contracting phase. Suppliers of the Product attain economies of density by the maintenance of a contracted

customer base. This is conducive to practices directed to create and maintain acceptable levels of customer retention.

14. Through the utilization of the anti-competitive practices hereinafter referred to, the Respondent substantially controls the business of the provision of the Product in the geographic markets of Cowichan Valley, Nanaimo and Campbell River, British Columbia (the "Markets" as herein defined) as follows:

**Estimated Market Share held by Laidlaw
of the Business (By Revenue*)**

MARKET

Cowichan Valley	99%
Nanaimo	90%
Campbell River	88%

*(Market shares and reference to position in the economic market are herein based upon the revenue attributed to containers placed with customers as a percentage of all containers placed by participants in the Markets and each of them.)

15. The geographic markets within which solid waste haulage services are provided are generally local because it is not economically efficient for heavy waste haulage equipment to travel long distances to landfills or between customers. In addition, solid waste haulage and disposal firms are not permitted, by regulation, to transport solid waste from one

municipality to another for the purpose of dumping in the Markets. Waste disposal firms, therefore, must usually establish garages and related facilities within each local area served. The geographic boundaries of solid waste haulage markets are generally limited to a range of 20 to 30 miles radius from a base. The Respondent has focused upon providing service to customers concentrated in urbanized areas rather than to diffusely distributed customers in non-urban territory. The Markets constitute discrete areas of the country and are relevant geographic markets.

16. Rivals of the Respondent maintain plans to expand in the Markets, but such expansion has been constrained by the Respondent's dominant marketshare and contracting practices.

17. A new entrant into the waste haulage and disposal business cannot compete effectively with existing firms until it possesses a customer base sufficient to achieve operating efficiencies comparable to existing firms. In commercial containerized solid waste haulage, achieving operating efficiency requires achieving route density of a minimum scale, which typically takes a substantial period of time. By the use of pricing and contracting practices, the Respondent makes it difficult for new entrants into its solid waste haulage markets to win customers away from its contracted base.

18. Through its business practices the Respondent has accumulated a substantial customer base contracted exclusively to its Product. Such customer base has been a barrier to effective new entry into each of the Markets, thereby maintaining the Respondent's dominance in the Markets.

19. The elimination of one of a small number of significant competitors and the resulting increase in concentration, such as has occurred through the entry and subsequent acquisitions of competitors by the Respondent in the Markets, significantly increases the impact of anti-competitive practices designed to maintain such dominance.

D. Grounds for the Application

i) Anti-Competitive Acts

20. The following acts of the Respondent are anti-competitive practices that have been used by the Respondent to substantially lessen competition, attain a dominant position in the Markets or each of them, and to maintain and abuse such dominance and prevent competition therein:

- a) The Respondent has employed its market power and wealth to purchase the business, operations, customer lists,

assets, personal goodwill or corporate personality of other participants in the Markets or each of them, as hereinafter set out in paragraph 22. The Respondent ensures, through the use of unreasonable non-competition clauses, that such incumbents do not, subsequent to an acquisition, participate in the Markets and each of them - usually for a period of five years.

- b) The Respondent has developed and used standard form contracts and certain contracting practices in accordance therewith which bind commercial customers to an exclusive relationship with the Respondent for a substantial minimum term. Such contracts contain an automatic right of renewal which can be voided only if a customer actively invokes a notice clause within stringent time and mode constraints. As the Respondent knew, or could be expected to know, these contract 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 Product to customers so contracted.

- c) The Respondent causes its customers to enter such standard form contracts through unreasonable means such

that customers are deprived of an opportunity to review their positions before engaging obligations thereunder.

- d) Through actual or threatened litigation, against customers and potential or actual competitors in the Markets, the Respondent uses its dominant position to discourage customers and competitors from discussing Product supply alternatives other than the Respondent's.

- e) The Respondent, has, in addition, ensured the continuation of its dominant position in the Markets by entering into a reciprocal agreement with a competitor to restrict the territorial extent of each of their respective operations. Each signatory to this agreement is dominant in certain territorial areas and has agreed to refrain from entering areas other than those already subject to its dominance.

- f) The Respondent has offered price reductions to selected customers approached for business by new entrants. In so doing, the Respondent has sold the Product below its average variable cost of providing such service in the Markets. The Respondent has employed this practice with the object of maintaining or enhancing its

dominant position through the elimination of such new entrants.

- g) Until mid-1987, the Respondent's contracts with customers were of a minimum three-year term. Such contracts gave the Respondent the option to continue, indefinitely, supply of the Product to the customer if the Respondent matched a competitor's bid, which bid the contract compelled the customer to reveal to the Respondent. Many contracts whose terms had not ended in 1987 continued to bind customers beyond that date and were renewed on identical terms.
- h) The Respondent has continued to protect its dominance by requiring that customers reveal the terms of any competing bids to the Respondent, thereby permitting it to selectively meet the prices of any competing bidder.
- i) The Respondent has engaged in various anti-competitive practices to build a large contracted customer base which it has employed as a barrier to entry to entrench its dominant position in the Markets and each of them including:
 - i) as part of its program of misuse of contracting techniques, urging its personnel to obtain a 90%

- plus level of its customer base under a written contract;
- ii) employing deceptive mail-outs of contracts to customer personnel, other than those who had already refused to accept service, in order to obtain an authorized signature for a written contract;
 - iii) misdescribing to customers the nature of the Respondent's standard form of contract;
 - iv) threatening to refuse to supply, or to continue to supply, the Product unless a written contract was entered into; and
 - v) suggesting to customers contemplating switching their patronage to a competitor that such competitors would inevitably have to exit the Market, and that, in such event, those customers would receive poor service from the Respondent.
- j) The Respondent maintains its contracted customer base by requiring customers to pay substantial penalty for early termination.
- k) The Respondent has engaged in real or threatened nuisance litigation against its competitors as part of its program of anti-competitive practices.

21. The cumulative effect of the Respondent's practices in paragraph 20 above, foreclose most of the Markets to alternative suppliers and substantially prevent or lessen competition in the Markets.

ii) Nature of Acquisitions

22. The Respondent has historically engaged in a program of acquisitions of smaller competitors in the Markets. Each of such acquisitions has augmented the Respondent's control of a class or species of business in the Markets and each of them, which has permitted it to engage in the anti-competitive practices herein referred to:

- i) To the extent that such acquisitions were a means of entry to the Markets, the Respondent has chosen this mode of entry rather than competitive entry to gain market share. The Respondent has entered the Markets by removing all incumbent participants by purchase, thereby becoming the sole supplier of the Product therein; and
- ii) The Respondent used the technique of acquisition to preserve its market share by removing threatening competitors from the

Markets rather than entering into a contest for available business.

iii) Activities in Particular Markets

a) Cowichan Valley

23. The Respondent entered the Cowichan Valley Market in 1985 by acquiring C.W. Disposal Ltd., then the primary supplier of the Product. In April 1987 Advance Waste Systems Inc. ("Advance") entered the Cowichan Valley Market and subsequently attained approximately 15% of the market for the supply of this Product (by revenue). In the face of the Respondent's contracting practices, selective pricing strategies, including the provision of service below its average variable cost to contested commercial customers, and litigation launched to limit Advance's ability to seek new customers, Advance was unable to meaningfully penetrate the Cowichan Valley Market.

24. In March 1990 the Respondent purchased Advance's commercial accounts in the Cowichan Valley and Nanaimo Markets.

25. It was a term of the purchase agreement that the principals of Advance would not provide commercial collection service in the Cowichan Valley and Nanaimo Markets for a period

of five years. In return, the Respondent agreed to stay out of the industrial roll-off segment of those Markets for five years.

b) Nanaimo

26. In 1986 the Respondent entered this Market by purchasing the two existing competitors, Jones Disposal ("Jones") and Nanaimo Disposal ("Nanaimo Disposal"), in the City of Nanaimo. In the former case, the Respondent purchased Jones' commercial accounts. The purchase agreement included a non-competition clause barring the principals of Jones from engaging in commercial waste disposal activities for a period of 10 years in the Markets of Nanaimo and Cowichan Valley. As well, the Respondent agreed to stay out of the industrial roll-off business for 10 years in the same Markets. In respect to the acquisition of Nanaimo Disposal, the Respondent obtained the agreement of the principals of the company to stay out of the waste disposal business for five years on the whole of Vancouver Island except the Port Hardy area. As a result, the Respondent became the sole supplier of the Product in this Market.

27. In 1986 the Respondent also entered the City of Parksville (in the Nanaimo Market) by purchasing United Disposal ("United"), the only supplier of the Product therein. The Respondent obtained a covenant in the purchase agreement which restricted United's principals from engaging in the waste

disposal business in the Nanaimo Market for five years.

28. In 1987 the Respondent purchased a new entrant, SCS Waste Systems, which had captured 5% of the City of Nanaimo market (by revenue). Again, the Respondent exacted a five year restrictive covenant from the principals of the acquired firm.

29. Subsequent to this acquisition the Respondent had, through the sum of its acquisitions and its long-term contracting practices, captured 85% of the market (by revenue) in the City of Nanaimo. This left 15% of the market to be contested by the Respondent and Advance, its sole rival. Advance had entered the City of Nanaimo in 1987 and had obtained, by 1990, 2% of the said market (by revenue) for the supply of the Product therein. Advance subsequently exited this market as aforesaid.

30. At present, in addition to the Respondent, West Coast Waste Systems Inc. and Browning Ferris Industries Waste Systems Limited also provide the Product in the Nanaimo market. The Respondent has 90% of the market for the supply of the Product (by revenue).

c) Campbell River

31. The Respondent entered this Market in 1986 by acquiring the two competitors then extant therein: Borgfjord Trucking and

Campbell River Sanitation, again securing its position by including a restrictive covenant in the purchase agreement.

32. In March, 1988 B&D Disposal Ltd. ("B&D") entered the Campbell River Market and eventually attained 25% of the market for the supply of the Product (by revenue). B & D's customers were, for the most part, arranging for the supply of the Product for the first time, or had refused to sign a written contract with the Respondent. The Respondent acquired B&D in 1989, and once again obtained a restrictive covenant in the purchase agreement.

33. In 1990, Camvest Disposals entered the Campbell River Market. In less than a month the Respondent commenced proceedings to obtain an injunction to prevent Camvest from approaching the Respondent's customers to induce breach of contract. The application for an injunction was dismissed and then appealed, but the appeal was subsequently withdrawn. Such litigation was designed to protect the Respondent's control of the market for the supply of the Product, which was based upon its contracting practices.

34. To date, Camvest has obtained approximately 12% of the Market for the supply of the Product.

d) Summary

35. In each of the Markets above referred to, the Respondent has employed its market power to attain and maintain its dominant position. The Respondent has inter alia acquired two competitors in Cowichan Valley, three in Campbell River and five in Nanaimo.

E. Relief Sought

36. The Director pleads that the Respondent is in breach of s.79 of the Competition Act and requests that the Tribunal make the following orders:

- i) An order prohibiting the Respondent from entering into or continuing any agreement for the provision of the Product in the Markets which contains terms:
 - a) which create an automatic renewal thereof;
 - b) which require notice of termination;
 - c) which create or contain a term of more than one year;
 - d) which create 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) which oblige a customer to reveal competitive bids or information regarding discussions, negotiations or quotes provided to the customer from competitors of the Respondent;
 - f) which require the customer, if it requires the Product at multiple locations or in differing quantities, to obtain it exclusively from the Respondent;
 - g) requiring a customer to pay any sum upon early termination;
- ii) 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;
- iii) An order declaring any provisions referred to in subparagraphs of i) (a), (b), (c), (d), (e) (f) and (g) in agreements now in place between the Respondent and customers unenforceable;

- iv) An order restraining the Respondent or any of its affiliates from acquiring any competitor in the Markets for a period of seven years from the date that the order of this Tribunal becomes final by judicial declaration, the effluxion of time or the completion of any appeals or judicial review thereof;

- v) An order declaring any clause in any contract of purchase and sale of a competitor or its business which restricts that competitor or any of its principals from competing in the Markets or each of them, null and void, or in the alternative reducing such terms, by way of rectification, to reasonable limits affecting the scope, duration and economic and geographic extent of the competitor's activities;

- vi) An order declaring any 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;

- vii) An order directing that the Respondent may only supply the Product in the Markets by written contract which shall prominently 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;

- viii) An order prohibiting the Respondent from exiting the Markets and each of them for a period of five years, unless otherwise ordered by this Tribunal;

- ix) An order prohibiting the Respondent 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 uniformly by it, for customers similarly situated;

- x) An order requiring the Respondent, for a period of five years, 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; and

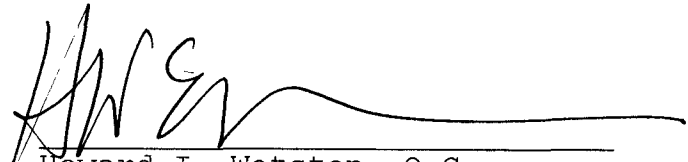
xi) Such other and further order as may to this Tribunal appear just.

37. The Director requests that the hearing of this Application be fixed at a locality in British Columbia.

38. The Director will seek directions from the Tribunal regarding interlocutory proceedings herein and for the expeditious hearing of this Application. The Director accordingly requests a pre-hearing conference.

39. The Applicant's address for service is as set out in the Notice of Application herein.

Dated at Hull, this 22nd day of March, 1991.


Howard I. Wetston, Q.C.
Director of Investigation
and Research