Competition Tribunal Tribunal de la Concurrence

CT-1997/001 – Doc # 12a

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

AND IN THE MATTER OF the proposed acquisition by Canadian Waste Services Inc. of the totality of shares of certain corporations engaged in the solid waste management and related businesses that are owned by Allied Waste Holdings (Canada) Ltd.

B E T W E E N:

The Director of Investigation and Research

Applicant

- and -

Canadian Waste Services Inc.

Respondent

REASONS FOR CONSENT ORDER

Date of Hearing:

April 14, 1997

Members:

McKeown J. (presiding)
Dr. Frank Roseman
Ms. Christine Lloyd

Counsel for the Applicant:

Director of Investigation and Research

D. Martin Low, Q.C.
Elspeth A. Gullen

Counsel for the Respondent:

Canadian Waste Services Inc.

Mark J. Nicholson

COMPETITION TRIBUNAL

REASONS FOR CONSENT ORDER

The Director of Investigation and Research

v.

Canadian Waste Services Inc.

On March 5, 1997, the Director of Investigation and Research ("Director") filed an application for a consent order to cure the alleged substantial lessening of competition resulting in Sarnia and Brantford from the acquisition by Canadian Waste Services Inc. ("CWS") of the non-hazardous solid waste management business of Laidlaw Waste Systems (Canada) Ltd. and Laidlaw Waste Systems Ltd. (collectively "Laidlaw"). The Director also sought to cure the alleged substantial lessening that resulted in Ottawa and the Outaouais from the previous acquisition by Laidlaw of the assets of Waste Management Inc. ("WMI"), which assets were subsequently transferred to CWS as part of its acquisition of Laidlaw. The CWS/Laidlaw merger affected a number of local markets across Canada. The consent order application is restricted to the competitive effects of the merger and the previous Laidlaw/WMI transaction in the four local markets mentioned above.

The basic test for approving a consent order is well known. The Tribunal's role is to determine if the proposed consent order meets a minimum test, namely whether with the proposed order in place, the substantial lessening of competition which it is presumed will arise

from the merger has, in all likelihood, been eliminated. Simply, does the proposed order cure the alleged substantial lessening of competition? It is the Director, in the notice of application and supporting documentation, who identifies and describes the effects arising from the merger which result in the substantial lessening of competition which is to be eliminated by means of the proposed order that the parties have agreed on.

The notice of application filed by the Director in this matter states that the non-hazardous solid waste management business consists of four distinct product markets: commercial lift-on-board, industrial, residential and recycling. The draft consent order ("DCO") requires CWS to divest Laidlaw's, or in Brantford, its own, business operations in each local market. As a complete "business" is to be divested in each case, the assets to be divested include those pertaining to all four types of waste management services. In the Sarnia and Ottawa/Outaouais markets, the DCO also requires that CWS enter into a contractual licence for a period of ten years to provide the purchaser of the assets in each of those markets with a favourable rate per tonne for disposal of waste at landfill sites owned or operated by CWS in the market (called a "tipping fee"). Further, with respect to the Sarnia business, if CWS does not receive an acceptable binding offer to purchase the business within four months of the date of the order, a specified landfill site must be included as part of the assets to be divested. CWS has six months from the date of the order to divest the businesses, after which a trustee has three months to effect a sale. Divestiture is in all cases subject to the approval of the Director.

What is the substantial lessening of competition that the DCO is intended to cure? In the notice of application at page 21, under the heading "Relief Sought", the Director provides a

summary statement of the competitive problem at issue here and how the DCO provides an adequate solution:

> The Director has therefore concluded that the acquisition by CWS of Laidlaw's solid waste management business in the Sarnia and Brantford markets, and the previous acquisition by Laidlaw of WMI's solid waste management business in Ottawa and Outaouais prevents or lessens, or *is likely to prevent or lessen, competition substantially in the provision of solid waste management services to institutional, commercial, industrial and residential customers*. Although barriers to entry and high market shares are *most evident in the commercial lift-on-board market*, in order to preserve the integrity of a possible remedy, namely to create a viable business in the commercial lift-on-board market in Sarnia, Brantford, Ottawa and Outaouais, it is considered crucial that all waste management businesses in these areas, including commercial lift-on-board, industrial, residential, and recycling businesses, be divested pursuant to the Draft Consent Order. It is submitted that the substantial lessening or prevention of competition that would be likely to ensue from the Proposed Transaction and from the WMI Transaction will be eliminated by the implementation of the Draft Consent Order, which will restore effective competition, as explained more fully in the Consent Order Impact Statement. (emphasis added)

The consent order impact statement states the issues somewhat differently. In paragraph 22 of that statement, the Director explains with respect to the Brantford market:

> . . . the merger will likely substantially lessen or prevent competition in the Brantford *commercial lift-on-board market*. . . . Given the relative size of the commercial lift-on-board market and other markets in Brantford, the Director is of the view that it is necessary to include in any divestiture designed to overcome a substantial prevention or lessening of competition, the additional assets involved in industrial, residential and recycling businesses in order to create an effective, viable and independent competitor to CWS post-merger. (emphasis added)

Similar statements are made at paragraphs 30 and 34 with respect to the Ottawa and Outaouais markets.

Regarding Sarnia, paragraph 26 of the consent order impact statement says only that:

> The high post-merger market shares and the existence of barriers to entry provide *prima facie* evidence that the merger will likely substantially lessen or

> prevent competition *in the Sarnia market*. The DCO, by proposing divestiture, will provide an effective competitor to CWS post-merger. (emphasis added)

Later in the impact statement, at paragraph 38, however, the Director concludes that:

> [i]n the Sarnia market, the DCO will overcome the substantial lessening of competition *in the commercial lift-on-board market*, and a long term viable competitive entity will be divested because the complete divestiture of the collection business of Laidlaw is required, and the tipping fee arrangement will provide access to disposal facilities at competitive rates. (emphasis added)

Reading these different statements together, in light of the replies to comments and the submissions of counsel at the hearing, the only sensible interpretation is that, in each of the four geographic markets, it is only in the commercial lift-on-board services market that the Director is concerned that the merger results in a likely substantial lessening of competition. The remaining assets are included to make an attractive and saleable package for divestiture.

The Tribunal notes that the documentary presentation of the application, for which the Director must bear responsibility, leaves much to be desired. In a consent application, the Director benefits from a presumption that the order he is proposing is in the public interest. But the Tribunal must still conclude that the proposed consent order meets its test. In making its decision, the Tribunal relies heavily on the notice of application and the consent order impact statement. In some cases, this may be the only material before it. In light of this, the notice of application and the consent order impact statement should be as clear and explicit as possible, particularly regarding fundamental matters like the relevant markets, the alleged substantial lessening of competition and how the DCO cures the perceived competitive problems. Unfortunately, that was not the case here. All the documentation was characterized by a general

degree of sloppiness, from the substantive points in the notice of application to the numerous easily avoidable errors in the DCO itself, which is inexcusable. This was a relatively simple consent order application as the DCO proposes complete divestiture and a return to the pre-merger structure (plus certain additional measures) in each local market covered by it.

At first glance, the DCO, as filed, appeared to be close to ideal: complete divestiture in each market along with further provisions relating to tipping fees. In each market, the pre-merger structure is, at a minimum, restored. The public comment process, however, revealed a difficulty which led to amendments to the DCO. The City of Brantford filed comments pointing out that its residential contract with CWS is non-assignable and that the City is not necessarily disposed to consent to its assignment to the purchaser of the CWS assets. The contract expires on October 31, 1997 and the tendering process for the subsequent period from November 1, 1997 to October 31, 2002 is already well underway, thus precluding a prospective purchaser from bidding for a renewal of the City contract. The City was concerned that the purchaser of CWS's business in Brantford would do no more than the absolute minimum for the City and would concentrate its resources on contracts with a longer time to run and for which the purchaser had an opportunity to bid for the renewal business. The City thus requested that those portions of the Brantford business which are required to service the City contract be excluded from the DCO.

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[1] This comment is not intended to be in any way a criticism of the fact that the parties did not call evidence in this case. In many consent applications, particularly those as straightforward as this, evidence may not be necessary or appropriate.

Both parties consented to amend the list of assets pertaining to the Brantford business accordingly. At the hearing of the application, however, it became apparent that the non-assignability of municipal contracts was a problem not so easily resolved. Even if the City of Brantford contract were eliminated, which the Tribunal agrees it should be because of the short time left to run on that contract and the practical implications of including it, the Brantford business includes four other municipal contracts, two for waste collection and two for recycling collection. Counsel for the respondent confirmed at the hearing that these four contracts, along with the three municipal contracts forming part of the Ottawa/Outaouais business, require the consent of the municipality to be assigned. This raised the question of whether the assets listed in the DCO could be divested given the way in which the order was drafted. Was the wording of the DCO sufficiently specific to provide for divestiture over the objections of the other party to the contract? Was that, in fact, the result the Tribunal wished to sanction by issuing the DCO as drafted but excluding only the City of Brantford contract?

Pointing out that it would be premature to assume that the municipalities concerned would object to assigning their contracts and that there is no real issue unless and until they do object, the parties proposed an amendment to the DCO. The amendment provides that if a municipality withholds its consent, the parties will apply to the Tribunal, with notice to the municipality, for directions and any order the Tribunal considers appropriate. The Tribunal noted that if and when the parties return to the Tribunal under that provision, the Tribunal might

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[2] All bids have been received and the City Engineer has recommended that the residential collection contract be awarded to a firm other than CWS. According to the comments filed by the City, the City Engineer's recommendations are normally accepted by city council.

require evidence relating to the presence of economies of scope in the waste collection business to address the issue of whether something less than full divestiture would be sufficient to remove the alleged substantial lessening in the relevant market or whether the municipal contracts would have to be divested over the objections of the municipalities. While the Director took the position at the hearing that the whole package of assets listed for each geographic market must be divested to remove the alleged substantial lessening, the Tribunal, in issuing the consent order, is not necessarily adopting that position. The Tribunal finds only that the proposed divestiture removes the alleged substantial lessening identified by the Director. It does not rule out the possibility that some lesser divestiture might also meet the test. Whether it does or does not will have to be dealt with to the Tribunal's satisfaction in any future application under the consent order.

While the focus of attention was on the municipal contracts, during the hearing counsel for the respondent indicated that the majority of commercial waste contracts, the market with which the Director is primarily concerned, contain a "change of control" clause which allows for termination of the contract upon a change of control of the supplier. He also submitted that such clauses are rarely enforced as commercial customers are primarily concerned with continuity of waste collection service. The importance of continuous waste collection service to restaurants and the like is common knowledge. The consent order provides that, for a period of 12 months after divestiture, CWS cannot solicit any customer of the divested businesses.

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[3] This provision is paragraph 8 in the consent order as issued.

Therefore, if a commercial customer terminates its contract after divestiture under the consent order in reliance on the change of control clause, as CWS can no longer service or solicit that customer's business, the customer will have to contract with yet another service provider, and relatively quickly, in order to maintain its collection service. There is, therefore, an incentive to go with the purchaser but, if not, an existing or new third service provider has the opportunity to compete for the business. These considerations will be reflected in the price potential purchasers of the assets will be prepared to pay. It is unlikely that the presence of clauses of this type raises a problem respecting the economic viability of the assets to be divested.

In conclusion, the Tribunal is satisfied that the consent order, as amended at the hearing, will likely eliminate the identified substantial lessening of competition resulting from the CWS/Laidlaw

[4] Except contracts subject to tender. It is difficult to conceive of commercial customers utilizing a tender process.

merger and the Laidlaw/WMI transaction in Brantford, Sarnia, Ottawa and the Outaouais. The consent order issues concurrently under separate cover.

DATED at Ottawa, this 16th day of April, 1997.

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

(s) W.P. McKeown
W. P. McKeown