Reference: *Commissioner of Competition* v. *Canadian Waste Services Holdings Inc.* 2004 Comp. Trib. 10
File No. CT2003005
Registry Document No.: 0040a

PUBLIC VERSION

IN THE MATTER OF the *Competition Act*, R.S.C. 1985, c. C-34, as amended;

AND IN THE MATTER OF an application by Canadian Waste Services Holdings Inc., Canadian Waste Services Inc. and Waste Management Inc. under section 106 of the *Competition Act*;

AND IN THE MATTER OF the acquisition by Canadian Waste Services Inc. of the Ridge Landfill in Blenheim, Ontario from Browning-Ferris Industries Ltd.

BETWEEN:

Canadian Waste Services Holdings Inc.,
Canadian Waste Services Inc. and
Waste Management Inc.
(applicants)

and

The Commissioner of Competition
(respondent)

and

The Corporation of the Municipality of
Chatham-Kent
(intervenor)

Dates of Hearing: 20031020-24; 20031027-30; 20031201-03
Members: Simpson J. (Chairperson), P. Gervason and G. Solursh
Date of Reasons and Order: 20040628
Reasons and Order signed by: Madam Justice Sandra J. Simpson, Paul Gervason and Gerry Solursh

REASONS AND ORDER IN SECTION 106 APPLICATION

I. INTRODUCTION

[1] This case began with an application by the Commissioner under section 92 of the *Competition Act*, R.S.C. 1985, c. C-34. Following a 13-day hearing, the Competition Tribunal (the "Tribunal") issued its Section 92 Decision, dated March 28, 2001, in which it allowed the Commissioner's application and ordered a remedy hearing. At the conclusion of that 3-day hearing, the Tribunal issued an order, dated October 3, 2001, in which it required CWS to divest the Ridge Landfill. In this Section 106 Application, CWS seeks to set aside the Divestiture Order and replace it with an order requiring the divestiture of a different landfill site on the basis that the circumstances which led to the making of the Divestiture Order have changed. Information about the transactions and proceedings that predate the present application is available in paragraphs 9 to 11 in the Section 92 Decision as well as in paragraphs 18 to 21 of the Statement of Facts which was marked as Exhibit A-4 during the hearing of this application.

[2] A list of abbreviations and definitions was developed during the Commissioner's initial application under section 92 of the Act. Many were used in this application and, for ease of reference, they have been included herein as Appendix "A".

[3] At this time CWS owns the Ridge but is operating it independently of its other assets pursuant to the terms of the Hold Separate Order. As well, the Tribunal has ordered a stay of the Divestiture Order pending the outcome of this application.

[4] There have been Court proceedings since the Section 92 Decision. The Federal Court of Appeal dismissed CWS' appeal from the Divestiture Order (see *Canada (Commissioner of Competition)* v. *Canadian Waste Services Holdings Inc.* 2001 Comp. Trib. 34; *Canadian Waste Services Holdings, Inc.* v. *Canada (Commissioner of Competition)* 2003 FCA 131). Thereafter, CWS sought leave to appeal to the Supreme Court of Canada, but leave was denied on January 8, 2004.

II. THE INTERVENOR

[5] On July 29, 2003, the Tribunal granted the Corporation of the Municipality of Chatham-Kent leave to intervene in this Application. However, since the Corporation's concerns were met in a consent order made by the Tribunal on October 20, 2003, they are not addressed in these reasons.

III. THIS SECTION 106 APPLICATION

[6] Section 106 of the Act provides, in part, that:

106. (1) **The Tribunal may rescind or vary** a consent agreement or **an order made under** this Part other than an order under section 103.3 or 104.1 or a consent agreement under section 106.1, on application by the Commissioner or the person who consented to the agreement, or the person against whom the order was made, **if the Tribunal finds that**	106. (1) **Le Tribunal peut annuler ou modifier** un consentement ou **une ordonnance rendue en application** de la présente partie, à l'exception d'une ordonnance rendue en vertu des articles 103.3 ou 104.1 et du consentement visé à l'article 106.1, lorsque, à la demande du commissaire ou de la personne qui a signé le consentement, ou de celle à l'égard de laquelle l'ordonnance a été rendue, **il conclut que,**

(a) **the circumstances that led to the making of the** agreement or **order have changed and, in the circumstances that exist at the time the application is made, the** agreement or **order would not have been made or would have been ineffective in achieving its intended purpose**; or [Tribunal emphasis]

selon le cas :

a) **les circonstances ayant entraîné le** consentement ou **l'ordonnance ont changé et que, sur la base des circonstances qui existent au moment où la demande est faite**, le consentement ou **l'ordonnance n'aurait pas été signé ou rendue, ou n'aurait pas eu les effets nécessaires à la réalisation de son objet**; ou [Le tribunal souligne]

[7] In *Canada (Director of Investigation & Research)* v. *Air Canada*, [1994] 1 F.C. 154 (C.A.), Hugessen J.A. of the Federal Court of Appeal addressed the meaning of "the final circumstances that led to the making of the order" in paragraph 106(1)(a) of the Act in the following terms:

> In my view, there is no warrant in the language of section 106 itself or in the scheme of the statute generally for reading the words "the circumstances that led to the making of the order" in other than their ordinary grammatical sense. This involves a determination by the Tribunal of the existence of a simple causal relationship between the circumstances and the order, but no more. It is not necessary that such relationship be "direct" or " demonstrable" other than in the very limited sense that the Tribunal must be satisfied that it exists. Nor is it necessary to relate the circumstances to the purposes sought to be achieved by the order, although it is of course always legitimate to look to such purposes as a guide to identifying some of the circumstances leading to it.

[8] In this Section 106 Application, CWS alleges that the circumstances that led the Tribunal to make the Divestiture Order have changed and that the Alleged Changes described below in paragraph 17 justify both rescinding that order (thereby enabling CWS to both own and operate the Ridge) and replacing it with a new order requiring CWS divest the Gore Landfill (the "Proposed Order"). Both parties agree that the Proposed Order would remedy the likelihood of a SLC in Chatham-Kent.

III. A PRELIMINARY ISSUE

[9] In its Section 92 Decision, the Tribunal concluded that CWS' acquisition of the Ridge would likely cause both a SPC and a SLC in southern Ontario with regard to the disposal of ICI waste from the GTA. Against this background, the Commissioner's counsel began with an argument which was tantamount to a motion to dismiss this application. He argued that, even if CWS was able to satisfy the Tribunal that the Alleged Changes had occurred, the Tribunal would not vary the Divestiture Order because the Alleged Changes all relate to the issue of Excess Capacity and Excess Capacity was not a circumstance which led to the SLC finding which underlay the Divestiture Order.

[10] Essentially, the Commissioner said that the SLC finding would stand even if the Alleged Changes were proved. The Commissioner did concede that, if the Alleged Changes were proved the SPC finding would no longer be supported but said that, since the SLC finding would remain in place, the Divestiture Order could not be varied under section 106.

[11] The Commissioner's position was that, although Excess Capacity was the underpinning for the Tribunal's identification of a likely SPC, it was not the basis for its conclusion about the SLC. The Commissioner relied on paragraphs 78 and 82 of the Section 92 Decision in support of his submission that the Tribunal would have defined the geographic market to exclude the U.S. Landfills based only on its finding of price discrimination whether or not it predicted Excess Capacity.

[12] On the other hand, CWS said that the SLC finding was dependent on the Tribunal's geographic market definition and that the Tribunal relied on its prediction about the likelihood of future Excess Capacity when it excluded the U.S. Landfills from the geographic market. Therefore, in CWS' submission, the SLC finding was predicated on the development of Excess Capacity as can be seen by the language in paragraph 100 of the Section 92 Decision.

[13] The Tribunal agrees with CWS that the definitive statement about the geographic market is found in paragraph 100 of the Section 92 Decision which states:

> On the basis of the evidence of price discrimination **and on the evidence that excess capacity would likely lead to a decline in Tipping Fees for ICI Waste from the GTA absent the transaction**, the Tribunal finds that the relevant geographic market excludes the states of Michigan and New York in regard to the GTA allegation. Effectively, this means that the relevant geographic market is that area of Southern Ontario containing disposal sites capable of accepting ICI Waste from the GTA. [Tribunal Emphasis]

[14] Based on this paragraph, the Tribunal accepts CWS' submission and concludes that the Tribunal's prediction about the development of Excess Capacity was a significant basis for its conclusion about the likelihood of a SLC. Accordingly, the Tribunal will consider the Alleged Changes.

V. THE ALLEGED CHANGES

[15] The Expansions that CWS intends to undertake at both the Warwick and Richmond Landfills are significant in that they involve more than doubling the Annual Capacity at each site. The steps required to achieve the Expansions include:

- CWS developing ToR which define the parameters of an Ontario EA
- the MOE approving the ToR
- CWS conducting the Ontario EA according to the ToR
- the MOE approving the Ontario EA
- CWS constructing the expanded landfill

[16] In CWS' submission, the Alleged Changes all relate to the Tribunal's conclusion that the Ontario EAs for the Expansions were likely to be approved by the autumn of 2001 and that, as a consequence, Excess Capacity would be available when the work on the Expansions was finished by the end of 2002.

[17] The six Alleged Changes can be divided into the following three categories:

(a) The ToR

(i) the approval of the ToR for the Ontario EA of the Richmond Landfill expansion has been quashed by the Ontario Divisional Court;
(ii) the approval of the ToR for the Ontario EA of the Warwick Landfill expansion has been affected by the Divisional Court decision because the Ontario Minister of the Environment has said that an Ontario EA based on the current ToR will not be approved;

(b) Host Municipality Support

(i) the TGN has declared that it is not a willing host to the Richmond Landfill expansion application;
(ii) the Township of Warwick has declared itself to be opposed in principle to the Warwick Landfill expansion application;

(c) CWS' Expectations

(i) CWS no longer "expects" to receive approval for the Richmond Landfill expansion application by the autumn of 2001. Instead, it believes that approval cannot be obtained before 2007, if at all; and
(ii) CWS no longer "expects" to receive approval for the Warwick Landfill expansion application by the autumn of 2001, but that approval cannot be obtained before 2007, if at all.

A. TERMS OF REFERENCE

[18] The following paragraphs in the Tribunal's Section 92 Decision demonstrate that the existence of HMS and the fact that the ToR for the Expansions had received MOE approval led the Tribunal to conclude that the Expansions were likely to proceed.

> **[183]** There is a dispute among the parties as to whether CWS' applications to expand its landfills of Warwick and Richmond are likely to be approved. The Commissioner submits that approval is likely on the basis of evidence from CWS' internal documents, the fact that the process leading to the approval is well underway and that host municipalities are supporting the expansions. The respondents submit that there is no guarantee as to the approval at this stage and that to conclude otherwise would be speculation.
>
> **[184]** The Tribunal accepts that these applications are likely to be approved.

[19] The ToR for the Richmond Landfill were approved by the MOE on September 16, 1999 and the Warwick Landfill's ToR were approved on January 11, 2000.

[20] As noted above, the Tribunal relied, in part, on the fact that ToR for the Expansions had received the approval of the MOE for its prediction that Excess Capacity was likely to develop.

However, at the Section 92 Hearing in November 2000, the Tribunal was not told by CWS that, in the case of the Richmond Landfill, two applications for judicial review had been filed asking the court to quash the Minister's approval of the ToR.

[21] On September 20, 2000, two months before the Section 92 Hearing, the Canadian Environmental Law Association supported an application by Helen Kimmerly and Ben Sutcliffe for judicial review of the ToR for the Richmond Landfill. A copy of the Sutcliffe judicial review application was sent to CWS. Then, on October 5, 2000, the Mohawks of the Bay of Quinte also filed an application for judicial review.

[22] Dan Pio (then CWS' Comptroller and now its President) testified in this Section 106 Hearing that, at the time of the Section 92 Hearing, he was aware of the judicial review proceedings but also testified that, because CWS thought the applications had no merit, it did not disclose their existence to the Tribunal.

[23] In the Tribunal's view, CWS' assessment of the merits of the judicial review applications was not a proper basis for withholding the fact that they existed. The Tribunal was left to believe that the ToR approvals were unchallenged. This meant that the Ontario EAs were likely to proceed in an orderly and predictable manner leading to their approval by MOE in the autumn of 2001. With the ToR approvals in place and unquestioned, it was reasonable for the Tribunal to conclude that the Expansions would be in operation by the end of 2002.

[24] CWS is now asking the Tribunal to accept that (i) the fact that the Divisional Court quashed the MOE's approval of the Richmond ToR and (ii) the fact that the MOE is treating the Warwick ToR as if they had also been quashed, are changes in the circumstances that led to the making of the Divestiture Order. However, on the unusual facts of this case, the Tribunal has determined that CWS' silence about the existence of the applications for judicial review had the effect of misleading the Tribunal about the likelihood that the Ontario EAs would be approved in the autumn of 2001. At the time of the Section 92 Hearing, the ToR approvals were caught in the uncertainty of litigation. They remain in that state today as the case awaits disposition by the Ontario Court of Appeal. In reality, there has been no change and the Alleged Changes are not *bona fide* because they exist only because CWS failed to provide the Tribunal with all the relevant facts.

B. HOST MUNICIPALITY SUPPORT

(1) The Richmond Landfill

[25] There was some controversy in this Section 106 Application about how the Tribunal dealt with the issue of HMS in the Section 92 Hearing. The relevance of HMS is that, if it were available, the likelihood that the Expansions would be built, thereby creating Excess Capacity, would be greatly improved.

[26] CWS says that HMS was not addressed in the Commissioner's Section 92 Application or in his supporting Statement of Grounds and Material Facts. CWS also says that there was no evidence that

the Expansions had HMS. CWS submits that the issue of HMS was not raised until the Commissioner's final written argument, thus precluding CWS from tendering evidence on the point.

[27] The Tribunal has reviewed the record and agrees that the Commissioner's initial pleadings did not mention HMS. However, the record also shows that HMS became an issue during the Section 92 Hearing and that, contrary to CWS' submission, there was evidence on the matter. The Section 92 Reasons refer to the evidence of Todd Pepper, who testified, in general terms, that, in the development and expansion of landfills, HMS was very important. By way of example he said that, in the case of the Essex-Windsor landfill, it had shortened the approval process by two years. As well, in the transcript at 3:287 (8 November 2000), Member Schwartz asked Mr. Pepper about the significance of HMS. This question signaled the Tribunal's interest in HMS.

[28] There was also specific evidence in a document marked as Exhibit 298 in the Section 92 Hearing and as Exhibit R-18 in this hearing. It is entitled "CWS Ontario Division Landfill Expansion - Project Requirement and Scheduling" (the "Report") and is dated September 22, 1997. It was prepared by Kevin Bechard, Area Senior Manager of Facilities Development for CWS. It indicated at page 5 that, three years before the Section 92 Hearing, CWS believed that HMS was a key attribute for a landfill expansion site and that both the Richmond and Warwick Landfills were strong candidates for expansion. The relevant passage in the Report reads as follows:

> **CANDIDATE SITES FOR LANDFILL EXPANSION**
>
> The candidate sites for landfill expansion have a number of key attributes (not ranked):
>
> - Proximity to central Ontario marketplace;
> - Land assembly for landfill expansion;
> - **Supportive host community**;
> - Appropriate hydrogeological conditions; and,
> - Good transportation access.
>
> Sites which possess these attributes must be deliverable within a three year time frame in order to meet CWS requirements from internal growth and to provide capacity to respond to the Metro Toronto waste disposal contract. **The strongest candidate sites for expansion**, within the current CWS portfolio of sites, are the **Richmond Twp. LF**, **Warwick Twp. LF** and Blenheim LF. [Tribunal Emphasis]

[29] The Tribunal accepted the Commissioner's submissions that the Expansions had HMS. This conclusion was reasonable because, at the Section 92 Hearing, CWS made no submissions and called no evidence which cast doubt on the existence of HMS for the Expansions. However, it now appears that such evidence was available. For example, with respect to the Richmond Landfill and the TGN, CWS knew but did not tell the Tribunal:

- That representatives of the TGN had met with the MOE on February 18 and August 24, 1999, to raise concerns about the proposed ToR for the Environmental Assessment for the Richmond Landfill expansion.

- That another meeting between the TGN and the MOE was held on August 15, 2000, at a time when the ToR had not yet been approved. The TGN again expressed concerns about the process.
- That the TGN asked the MOE not to approve the ToR because, *inter alia*, they addressed neither the size nor the necessity for the Expansion.
- That, when the ToR were approved for the Richmond Landfill on September 16, 1999, none of the TGN's concerns had been addressed.
- That the TGN held a town council meeting on October 23, 2000. Messrs. Bechard and Pinkerton of CWS were in attendance and they reported to CWS that the Chief of the Mohawks of the Bay of Quinte had also been there and had informed the council that the Band was seeking a Federal EA for the Richmond Expansion.
- That, in October 2000, CWS' consultants began to express concern. In a memo dated October 26, 2000, to Kevin Bechard of CWS from Peter Homenuck, of IER Planning, Research and Management Services ("IER") about changing circumstances related to both the Richmond and Warwick Expansions, Mr. Homenuck stated "We can anticipate an increasingly aggressive and focused opposition".

[30] While it is true that the TGN passed a formal resolution concerning its lack of support for the Richmond Expansion on March 26, 2001, the evidence shows that, long before the Section 92 Hearing began in November 2000, CWS knew that its Richmond Expansion project did not have HMS from the TGN. Yet, CWS asks the Tribunal to conclude that the fact that the TGN has "declared" its status as an unwilling host in a formal resolution is a change in circumstances which should engage section 106 of the Act.

(2) The Warwick Landfill

[31] Exhibit R-18 indicated that the Warwick Expansion enjoyed HMS in September 1997. In the Section 106 Hearing, Paul Murray, CWS' Project Manager for the Warwick Expansion testified that the Township formally stated that it was opposed, in principle, to Warwick Expansion as far back as 1998.

[32] As well, as mentioned above, Mr. Homenuck was a consultant on both Expansions and, in his memo of October 26, 2000, he spoke of his expectation that the Warwick Expansion would face ". . . an increasingly aggressive and focused opposition . . .". CWS received this memo directly from Mr. Homenuck.

[33] At a date before January 1999, at a meeting attended by Kevin Bechard on behalf of CWS, Warwick's Township council passed a motion regarding the Warwick Expansion at 750,000 tonnes per year. It said "Opposed in principle to a landfill of this size". The document which referred to the motion was marked as Exhibit R-65 in this hearing. It shows that, at the time of the Section 92 Hearing, CWS knew that the Warwick Expansion proposed by CWS had no HMS. Yet, because CWS called no reply evidence on the issue, the Tribunal was left with the impression that the project had the support of its host municipality.

[34] The Tribunal concludes that the Alleged Changes regarding HMS for the Expansions are not *bona fide*. They exist only because CWS did not inform the Tribunal about the true state of affairs. Such changes will not be accepted for the purpose of an application under section 106 of the Act.

C. CWS' EXPECTATIONS

[35] CWS' evidence in this Section 106 Hearing is that it still believes that the judicial review applications will fail and that the Ontario EAs will proceed based on the ToRs as originally approved. Dan Pio stated that the Expansions are a top priority for CWS and that CWS' consultants are still retained and are working on documents to be used during the Ontario EAs. The Alleged Change is limited to CWS' expectations about the timing. In the Section 92 Decision, the Tribunal found, largely based on internal CWS documents, that the Expansions would be in operation by the summer of 2002. Mr. Pio testified at the Section 106 Hearing that CWS now expects the Expansions to receive waste in 2007 at the earliest. There was also some confidential evidence on the matter. It is discussed in the next paragraph of this decision and is deleted in the public version of this document.

[36] [Confidential]

[37] The Tribunal concludes that, at the Section 92 Hearing, CWS did not present a realistic assessment about when the Expansions could be in operation. This appears to have occurred because it did not consider the possible impact of the judicial review applications and the lack of HMS. In the Tribunal's view, it is not open to CWS to raise revised expectations about timing as changes of circumstances when the facts which could reasonably have been expected to impact the timing were known to CWS and not presented at the Section 92 Hearing.

FOR THESE REASONS THE TRIBUNAL ORDERS THAT:

[38] This application is hereby dismissed with costs to the Commissioner. If the parties cannot agree on a lump sum for costs, they may apply to the Tribunal for an order fixing costs.

DATED at Ottawa this 28th day of June 2004.

SIGNED on behalf of the Tribunal by the members.

(s) Sandra J. Simpson

(s) Paul Gervason

(s) Gerry Solursh

APPEARANCES

For the applicants:

Canadian Waste Services Holdings Inc.
Canadian Waste Services Inc.
Waste Management Inc.

Shawn C.D. Neylan
Nicholas McHaffie
Vicky Eatrides

For the respondent:

The Commissioner of Competition

Donald B. Houston
W. Michael G. Osborne
André Brantz
Michele Siu

For the intervenor:

The Corporation of the Municipality of Chatham-Kent

Carolyn Shaw

APPENDIX "A"

"Act" means the *Competition Act*, R.S.C. 1985, c. C-34.

"Agreed Statement of Facts" means the Agreed Statements of Facts, dated October 2, 2000 and used in the Section 92 Hearing.

"Alleged Changes" are the changes in circumstances alleged by CWS in the Section 106 Hearing.

"Annual Capacity" means the maximum amount of waste that may be received or disposed of at a landfill in a year under the applicable permit.

"CWS" means the applicants Canadian Waste Services Inc., Canadian Waste Services Holdings Inc. and Waste Management Inc.

"Chatham-Kent Area" means the geographic area under the governance of the Corporation of the Municipality of Chatham-Kent.

"Commissioner" means the Commissioner of Competition under the Act.

"Divestiture Order" means the Tribunal's Order dated October 3, 2001, requiring CWS to divest the Ridge Landfill (see *Canada (Commissioner of Competition) v. Canadian Waste Services Holdings Inc.* 15 C.P.R. (4th) 5, 2001 Comp. Trib. 34).

"Excess Capacity" means the excess of Annual Capacity in Southern Ontario for ICI Waste from the GTA, as identified by the Tribunal in the section 92 Reasons.

"Expansions" means CWS' plans to expand the Richmond and Warwick landfill sites so that each would be permitted to accept 750,000 tonnes of waste annually.

"Federal EA" means an environmental assessment governed by the *Canadian Environmental Assessment Act*, S.C. 1992, c. 37.

"GTA" means the Greater Toronto Area which includes the City of Toronto and the Regional Municipalities of Durham, York, Peel and Halton.

"Gore Landfill" means the Gore Landfill as defined in the Tribunal's Order dated October 20, 2003.

"HMS" means Host Municipality Support.

"Hold Separate Order" means the Tribunal Order made on consent, dated April 28, 2000, ordering CWS to hold the Ridge separate from its other assets pending the resolution of the dispute (2000 Comp. Trib. 5).

"ICI Waste" means solid non-hazardous waste which is generated by institutional, commercial and

industrial customers and includes construction and demolition waste.

"Landfill" means a disposal facility that is used for the permanent disposal of waste.

"Merger" means CWS' acquisition of the Ridge on March 31, 2000.

"MOE" means the Minister of the Environment of the Province of Ontario.

"Ontario EA" means an environmental assessment governed by the Ontario *Environmental Assessment Act*, R.S.O. 1990, c. E-18.

"Section 92 Decision" means the Tribunal's reasons dated March 28, 2001 following the decision and in the Section 92 Hearing which led to the "Divestiture Order" dated October 3, 2001.

"Section 92 Hearing" means the hearing of the Commissioner's application under section 92 of the Act, which took place November 6-24, 2000. (See *Canada (Commissioner of Competition)* v. *Canadian Waste Services Holdings Inc.* 11 C.P.R. (4th) 425, 2001 Comp. Trib. 3).

"Ridge" means the Ridge Landfill near Blenheim in the Municipality of Chatham-Kent that was acquired by CWS from Browning-Ferris Industries Ltd. on March 31, 2000.

"Section 106 Application" means CWS' application under section 106 of the Act, which was made on May 29, 2003.

"Section 106 Hearing" means the hearing of CWS' Section 106 Application, held in Ottawa, Ontario from October 20 to December 3, 2003.

"SLC" means a Substantial Lessening of Competition.

"SPC" means a Substantial Prevention of Competition.

"TGN" means the Town of Greater Napanee.

"ToR" means Terms of Reference for an environmental assessment under Ontario's *Environmental Assessment Act* R.S.O. 1990, c. E-18.

"U.S. Landfills" means the landfills located in the states of Michigan and New York identified on Exhibit 1 in the Section 106 Hearing.