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Competition Tribunal orders sale of landfill (again); CWS appeals (again)

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Canadian Waste Services has appealed the latest Tribunal decision in its long-running merger case to the Federal Court of Appeal. On June 28, 2004, the Competition Tribunal rejected CWS' "change of circumstances" application that sought to rescind the Tribunal's October 2001, order that it sell the Ridge landfill. The Tribunal made that order after concluding that CWS' acquisition of the Ridge would substantially lessen and prevent competition.

The merger (s. 92) application

In March, 2000, Canada's largest waste company, CWS, acquired its main competitor, BFI. The transaction was allowed to proceed after CWS agreed not to acquire certain assets, and that its acquisition of the Ridge landfill in southwestern Ontario would be submitted to the Tribunal.

The Commissioner of Competition commenced an application under s. 92 of the Competition Act in the spring, 2000, seeking divestiture of the Ridge on the basis that CWS' acquisition of it would substantially lessen and prevent competition for the disposal of industrial, commercial and institutional ("ICI") waste from the Greater Toronto Area and Chatham-Kent.

On March 28, 2001, the Tribunal agreed, and on October 3, 2001, it ordered CWS to sell the Ridge within six months.

One of the factors that led the Tribunal to this finding was its conclusion that CWS would likely obtain approval to expand two of its landfills. With these two expanded landfills, plus the Ridge, CWS would have had a very high market share for the disposal of ICI waste, the Tribunal found.

CWS appealed. The Federal Court of Appeal heard – and dismissed – CWS' appeal on March 12, 2003. CWS then sought leave to appeal to the Supreme Court of Canada. The Supreme Court denied leave on January 8, 2004.

The change of circumstances (s. 106) application

In May 2003, CWS brought an application under s. 106 of the Competition Act claiming that the divestiture order should be rescinded or stayed as a result of several alleged changes in circumstances since the 2001 decision in the merger application.

CWS' alleged changed circumstances revolved around its applications to expand the two landfills. In particular, CWS said that a judicial review application that quashed ministerial approval of the "Terms of Reference" for environmental assessments for the expansions, and a lack of host community support, were changes in circumstances.

The Tribunal's decision

The Tribunal found that CWS' alleged changes in circumstances were not bona fide. The judicial review application and indications of community opposition existed at the time of the hearing in the merger application in November 2000; yet CWS failed to raise them, the Tribunal found. These "changes" only occurred because CWS failed to inform the Tribunal of the true state of affairs.

The Tribunal also noted that CWS still believed its applications to expand the two landfills would ultimately succeed. In the merger application, CWS had not presented realistic assessment of when the expansions would be operational. But, the Tribunal held, it was 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" hearing of the merger application.

The Tribunal's decision, and other materials relevant to the case, can be found on the Tribunal's website: <http://www.ct-tc.gc.ca/english/cases/ct-2003-005/waste.html>

CWS has appealed the Tribunal's decision and has obtained a stay of the divestiture order pending that appeal. The appeal has been scheduled to be heard on November 4, 2004.

[Michael Osborne](#) of Affleck Greene Orr LLP acted for the Commissioner of Competition in this case.