Competition Tribunal Tribunal de la Concurrence

Reference: *Burns Lake Native Development Corporation et al. v. Commissioner of Competition and West Fraser Timber Co. Ltd. et al.* 2006 Comp. Trib. 16
File No. CT2004-013
Registry Document No.: 0058

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

AND IN THE MATTER OF the Reference of the Commissioner of Competition filed April 4, 2005.

B E T W E E N:

The Commissioner of Competition
(applicant)

and

Burns Lake Native Development Corporation, Council of Lake Babine Nation and Emma Palmantier, on her own behalf and on behalf of all members of Lake Babine Nation, Council of Burns Lake Band and Robert Charlie, on his own behalf and on behalf of all Members of Burns Lake Band and Council of Nee Tahi Buhn Indian Band and Ray Morris, on his own behalf and on behalf of all Members of Nee Tahi Buhn Indian Band
(respondents)

and

West Fraser Timber Co. Ltd. and West Fraser Mills Ltd.
(in support of the applicant)

Before: Simpson J. (Chairperson)
Date of hearing: 2006-01-16 to 2006-01-18
Date of Reasons and Order: March 27, 2006
Reasons and Order signed by: Madam Justice Sandra J. Simpson, Chairperson

REASONS AND ORDER ON THE COMMISSIONER'S REFERENCE ABOUT
[i] THE DEFINITION OF "DIRECTLY AFFECTED" IN SUBSECTION 106(2) OF THE ACT;
[ii] THE APPLICATION OF THE DEFINITION TO THE RESPONDENTS;
[iii] WHETHER EVIDENCE OF A SUBSTANTIAL LESSENING OR PREVENTION OF COMPETITION MUST BE FILED WITH A CONSENT AGREEMENT.

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INTRODUCTION

[1] This reference is brought by the Commissioner of Competition (the “Commissioner”) in the course of an application to the Competition Tribunal (the "Tribunal") by the Burns Lake Development Corporation et al. (the "Applicants") under subsection 106(2) of the *Competition Act* (the “106(2) Application”). In the 106(2) Application, the Applicants ask the Tribunal to set aside a consent agreement between West Fraser Timber Co. Ltd. and West Fraser Mills Ltd. (collectively "West Fraser") and the Commissioner, which was registered with the Tribunal on December 7, 2004 (the "Consent Agreement"). It provides that West Fraser must divest itself of two sawmills and related assets including timber tenures and harvesting rights (the “Divestiture”). The questions on this reference are posed pursuant to subsection 124.2(2) of the *Competition Act*, R.S.C. 1985, c. C-34, as amended (the "Act") and address the issues of standing and proof in the 106(2) Application.

THE QUESTIONS

[2] The first question concerns the interpretation and application of the phrase "directly affected by a consent agreement" in subsection 106(2) of the Act. Third parties such as the Applicants must be “directly affected” to have standing to apply to the Tribunal to vary or rescind a consent agreement made between the Commissioner and another party.

Section 106(2) provides as follows:

(2) A person directly affected by a consent agreement, other than a party to that agreement, may apply to the Tribunal within 60 days after the registration of the agreement to have one or more of its terms rescinded or varied. The Tribunal may grant the application if it finds that the person has established that the terms could not be the subject of an order of the Tribunal. [emphasis added]	(2) Toute personne directement touchée par le consentement -- à l'exclusion d'une partie à celui-ci -- peut, dans les soixante jours suivant l'enregistrement, demander au Tribunal d'en annuler ou d'en modifier une ou plusieurs modalités. Le Tribunal peut accueillir la demande s'il conclut que la personne a établi que les modalités ne pourraient faire l'objet d'une ordonnance du Tribunal. [nos soulignés]

[3] Question 1 is in two parts. It reads as follows:

Part I

(a) What is the nature and scope of the interest sufficient to satisfy the "directly affected" requirement for standing in subsection 106(2) of the Act?

(b) In particular, must an applicant under subsection 106(2) be "affected":
- (i) in relation to competition; and
- (ii) in relation to its substantive rights and/or pecuniary interests?

(c) In particular, must an applicant under subsection 106(2) be affected "directly" in that the alleged effect must be:

(i) suffered (or threatened to be suffered) by the applicant exclusively as a consequence of the Consent Agreement, and not as a result of other factors, influences or circumstances; and

(ii) imminent and real, and not hypothetical or speculative?

Part II

As to the application of subsection 106(2), have the Applicants, as grouped below, disclosed in their Notice of Application herein facts which, if proved, establish that they are "directly affected" for the purposes of subsection 106(2):

(i) Burns Lake Native Development Corporation, as body corporate established in 1974 ("BLNDC");

(ii) Council of Burns Lake Band, Council of Lake Babine Nation, Council of Nee Tahi Buhn Indian Band (the "Bands"); and

(iii) Robert Charlie, Emma Palmantier and Ray Morris (the "Chiefs")?

[4] The second question deals with whether the Commissioner is required to file evidence demonstrating a substantial lessening of competition ("SLC") or a substantial prevention of competition ("SPC") when a consent agreement is filed with the Tribunal for registration under section 105 of the Act.

[5] Question 2 reads as follows:

> At the time a consent agreement is registered under section 105 of the Act, are the parties required to file evidence to substantiate that the merger or proposed merger is likely to substantially lessen or prevent competition without the remedial terms in the consent agreement? If so, is the absence of such filed evidence sufficient to support a finding that "the terms could not be the subject of an order of the Tribunal" as required to be established by an applicant under subsection 106(2) of the Act?

THE PARTIES

THE APPLICANTS IN THE 106(2) APPLICATION

[6] The Applicants are the Burns Lake Native Development Corporation (the "BLNDC"), the Councils of three Bands which are shareholders in the BLNDC and the Chiefs of those Bands.

[7] In 1973, the Government of British Columbia decided to establish a sawmill complex in the Burns Lake region of the province to process timber harvested on provincial Crown land (the "Sawmill Project"). The government gave six First Nations Bands the

opportunity to participate in the Sawmill Project. To facilitate their participation, the Bands established the BLNDC in 1974 as a not-for-profit corporation registered in British Columbia.

[8] While the Lake Babine Nation holds the majority interest in the BLNDC, the Burns Lake Band and Nee Tahi Buhn Indian Band are also shareholders. The Chiefs of those Bands and their Band Councils are applicants in the 106(2) Application and respondents in this reference. These Bands have all asserted Aboriginal title to land in the Burns Lake region, and are engaged in on-going treaty negotiations. Their claims apply to the land on which some of the assets to be divested are situated. The Burns Lake Band's reserve is the location of one of the sawmills to be divested (the "Burns Lake Mill") and the Band claims the land on which the other (the "Decker Lake Mill") is located. In addition, while both the Lake Babine Nation and the Nee Tahi Buhn Indian Band claim Aboriginal title to lands related to the timber harvesting rights and tenures which are to be divested, they have not made any claims to the lands on which the sawmills are located.

WEST FRASER

[9] On December 31, 2004, West Fraser acquired Weldwood of Canada Ltd. (the "Merger"). West Fraser is the party which is obliged to undertake the Divestiture required by the Consent Agreement.

THE COMMISSIONER

[10] The Commissioner is the applicant in this reference and a respondent in the 106(2) Application. She entered into a Consent Agreement with West Fraser dated December 7, 2004 to remedy the anti-competitive effects which she concluded would be likely to result from the Merger.

THE SAWMILL PROJECT'S CORPORATE STRUCTURE

[11] The BLNDC began its participation in the Sawmill Project by purchasing 8% of the shares of Babine Forest Products Limited ("BFPL" or "Babine F. P. Ltd."). BFPL owned and operated the Burns Lake Mill and its timber harvesting rights. Westar Timber LTD ("Westar"), Eurocan Pulp & Paper Co. Ltd. ("Eurocan") and Weldwood of Canada Ltd. ("Weldwood") were the other shareholders.

[12] In 1984, BFPL's shareholders decided to change its corporate structure. To that end, they established Babine Forest Products Company to operate the Burns Lake Mill and its timber harvesting rights as a joint venture. Eventually Eurocan and Westar sold their shares in BFPL. Thereafter, the BLNDC increased its shareholding in BFPL to 15.4% and Weldwood held the remaining shares.

[13] According to documents supplied by West Fraser, the joint venture initially involved the Burns Lake Mill and its related timber harvesting rights. However, it appears that sometime after 1984, the Decker Lake Mill and its timber harvesting rights

were folded into the joint venture. The Burns Lake and Decker Lake Mills and their timber harvesting rights will be referred to as the "Sawmills and Timber Rights".

[14] For ease of reference, a current organizational chart is included as Appendix A. The parties agree that it represents the joint operations and shows the respective roles and interests of the BLNDC, West Fraser and BFPL. These reasons adopt the terminology used by the parties in their submissions and on Appendix A. BFPL's and West Fraser's management and operation of the Sawmills and Timber Rights will be referred to as the "Babine Joint Venture". West Fraser directly and indirectly holds a 90% interest in the Babine Joint Venture and the BLNDC indirectly holds the remaining 10% interest through its 15.4% shareholding in BFPL. The Bands' minority interests in the Babine Joint Venture are twice removed through their shareholdings in the BLNDC.

[15] The BLNDC has the right to have one nominee on the Babine Joint Venture's management committee (the "Management Committee"). It may be comprised of up to ten individuals; however, it presently has a membership of four – three representatives from West Fraser and one from the BLNDC.

[16] The BLNDC is also entitled to a dividend representing a share of all surplus cash or funds on a basis which reflects its interest in the Babine Joint Venture. However, the amount available for distribution will depend on whether any surplus exists and, if it does, on whether the Management Committee decides to declare a dividend. It may instead decide to set reserves aside or carry funds forward.

[17] Counsel for the Commissioner noted that the BLNDC has a right of first refusal which it may exercise if West Fraser decides to sell its majority interests in the Babine Joint Venture. Counsel for the Applicants agreed that such a right exists, and said that once a purchaser for West Fraser's majority interest is identified during the Divestiture, the BLNDC will have three options. It may accept the purchaser as its new partner, it may buy the majority interest or it may choose to sell its own minority interest.

THE CONSENT AGREEMENT

[18] The Consent Agreement states that the Commissioner believes that the Merger is likely to lessen competition substantially in the British Columbia Highway 16 Corridor and the Cariboo Area in the market for the purchase of logs and, in the Highway 16 Corridor, in the market for the supply of inputs to lumber re-manufacturers. However, the Consent Agreement indicates that West Fraser does not admit that the Merger is likely to result in an SLC.

[19] To address the Commissioner's concerns, the Consent Agreement requires West Fraser to divest the 90% interest it holds directly and indirectly in the Sawmills and Timber Rights. The Consent Agreement also deals with the divestiture of other assets but since they are not of interest to the Applicants, they are not referred to in these Reasons.

[20] The Consent Agreement provides that the Commissioner must approve the Divestiture, which is to be carried out in a manner that will permit the continued operation of the Sawmills as going concerns. In particular, the purchaser must have the managerial, operational and financial capability to operate the Sawmills and must use them for the same purpose for which they were used prior to the Merger.

QUESTION 1 – PART I: MEANING OF DIRECTLY AFFECTED

THE PARTIES' POSITIONS

The Commissioner

[21] The Commissioner submits that to be "directly affected" a party must have a substantive right, either legal or pecuniary, that has been infringed by a consent agreement. The Commissioner further submits that to satisfy the requirement for being directly affected, a party must show that the impact of a consent agreement is imminent and real, as opposed to speculative or hypothetical. The term "directly" is said to require a linear and immediate relationship between the terms of a consent agreement and the alleged harm. Finally, if there is no way of knowing how a consent agreement will affect a party claiming to be directly affected, the Commissioner says that the harm is merely speculative and that the party is not "directly affected".

West Fraser

[22] West Fraser submits that in the context of subsection 106(2), a "directly affected" person must show a "material and clearly identifiable right which is obviously and demonstrably prejudiced" by a consent agreement.

The Applicants

[23] The Applicants ask that "directly affected" be given its plain meaning and say that all that is required is a direct causal link between a consent agreement and its effect on a person claiming standing. They add that the effect should relate to a legal interest but that it need not be substantive, pecuniary or related to competition issues. The Applicants also say that "directly affected" need not import notions of real and immediate harm. In their view "directly affected" covers a situation in which a person's interests are affected even though the long term consequences of a consent agreement are not known. They suggest that this interpretation is reasonable because a party cannot be expected to identify consequences in the short sixty day time period in which one must apply to rescind or vary a consent order under subsection 106(2).

[24] The Applicants further submit that Tribunal decisions show that minority shareholders and parties who may bid for assets can be "directly affected". Finally, they say that since subsection 106(2) purports to limit the right to intervene in a proceeding, this limit must be read narrowly, in accordance with the principle of statutory

interpretation which says that a restrictive approach should be taken to provisions which take away rights.

THE LEGISLATIVE HISTORY OF SECTION 105 AND SUBSECTION 106(2) OF THE ACT

[25] In *Rizzo & Rizzo Shoes Ltd., Re)*, [1998] 1 S.C.R. 27, Justice Iacobucci, writing for the Court, said at para. 31: "[…] the use of legislative history as a tool for determining the intention of the legislature is an entirely appropriate exercise and one which has often been employed by this Court […]". As well, in *Bell ExpressVu Limited Partnership v. Rex*, [2002] 2 S.C.R. 559, at paragraph 27, the Court expressed a preference for Driedger's modern approach to statutory interpretation and said:

> The preferred approach recognizes the important role that context must inevitably play when a court construes the written words of a statute: as Professor John Willis incisively noted in his seminal article "Statute Interpretation in a Nutshell" (1938), 16 Can. Bar Rev. 1, at p. 6, "words, like people, take their colour from their surroundings".

To take context into account in this case, the legislative history of the change from consent orders to consent agreements requires consideration.

The Former Consent Order Approval Process

[26] Before amendments to the Act were made in 2002, section 105 of the Act required the Commissioner and a party who had negotiated a settlement to file an application with the Tribunal for approval of a draft consent order ("DCO"). The application included an impact statement which explained the DCO, a description of the remedies it provided and a statement showing that the remedies would effectively deal with the anticompetitive effects of a party's conduct.

[27] Before approving a DCO, the Tribunal considered any comments filed by interested parties and it often held hearings to consider evidence from the Commissioner, the party and intervenors. Thereafter, the Tribunal could either approve the DCO or refuse approval. In the latter case, the Tribunal might indicate how the DCO could be amended to secure approval. This process will be described as the "DCO Approval Process".

[28] The DCO Approval Process was time-consuming, unpredictable and expensive. The Commissioner who filed applications for the approval of DCOs and parties who settled with the Commissioner would not know how long the process would take, whether there would be a hearing and, if so, whether any third parties would intervene. They also had no idea whether the terms of their settlement would be approved or whether changes to the DCO would be required. The usual benefits of a settlement which include an end to litigation, certainty about ongoing obligations and reduced costs were not features of settlements with the Commissioner because of the DCO Approval Process and, for this reason, the process was much criticized.

[29] A report prepared by the Organisation for Economic Co-operation and Development in 2002 (OECD, *The Role of Competition Policy in Regulatory Reform – Regulatory Reform in Canada*. Paris, OECD, 2002, p.16) includes the following statement about the DCO Approval Process:

> The consent order process at the Tribunal has been problematic. All orders, including those from negotiated settlements, must be issued by the Tribunal, which is the first-instance decision-maker. The process of reviewing a proposed consent order takes at least 60 days, for publishing notice and providing an opportunity for intervention and so on. It can stretch out to 6 months, though. Moreover, the Tribunal has sometimes demanded changes to the deal that the Bureau and the parties have reached. The risk of uncertainty and delay has reportedly encouraged firms to seek more informal resolutions rather than negotiating consent orders.
>
> [emphasis added]

[30] An article entitled "Rethinking the Role of the Competition Tribunal" stated that,"[…] time, cost and uncertainty of consent proceedings has […] given the Director a powerful incentive to resolve reviewable practice complaints through undertakings." (Neil Campbell, Hudson Janisch and Michael Trebilcock, "Rethinking the Role of the Competition Tribunal" (1997) *Can. Bar. R.* 297 at p. 313)

The Current Consent Agreement Registration Process

[31] The House of Commons Standing Committee on Industry Science and Technology (the "Standing Committee") held hearings to consider Bill C-23, which contained proposed amendments to the Act, and accepted the views of witnesses who supported the portion of the Bill which introduced registered consent agreements to replace the DCO Process. One such witness was Mr. Tim Kinnish, then Chairman of the National Competition Law Section of the Canadian Bar Association. He testified, in part, as follows:

> We agree that the existing consent process has been unsatisfactory virtually from its inception. It is uncertain in its operation, time-consuming and costly. We support the need for reform in this area and generally support the provisions of Bill C-23 providing for the registration of consent agreements. [Standing Committee on Industry, Science and Technology, Evidence, November 7, 2001]

[32] The subsequent amendments to the Act in 2002 increased the reliability of the Commissioner's settlements by eliminating the DCO Process and replacing it with a "Consent Agreement Registration Process" in which the terms of settlements are incorporated in consent agreements. They are then simply registered with the Tribunal. This change has had two consequences. First, the Tribunal no longer approves the Commissioner's settlements before they became final and second, intervenors who are directly affected no longer have an opportunity to express their concerns before the settlements are finalized. Instead, subsection 106(2) was enacted to give third parties an opportunity to persuade the Tribunal to rescind or vary the terms of the settlement after it had been finalized and registered. However, this right is circumscribed in that:

- it must be exercised within sixty days of the registration of a consent order
- it can only be exercised by "directly affected" third parties.

- it can only succeed if the third party can show that the Tribunal could not have ordered the remedies that appear in the terms of a consent agreement

THE USE OF "DIRECTLY AFFECTED"

Directly Affected Elsewhere in the Act

[33] The parties sought to illustrate the meaning of "directly affected" with reference to decisions of the Tribunal under subsection 9(3) of the *Competition Tribunal Act*, R.S., 1985, C. 19 (2nd Supp.) (the "CT Act") and decisions of the Courts dealing with the terms "affected" and "directly affected". However, before turning to the parties' submissions, I will consider the use of "directly affected" in other sections of the Act.

[34] Section 103.1 was added to the Act in the 2002 amendments to allow private parties to apply to the Tribunal with leave. Before these provisions were introduced, only the Commissioner could bring a case to the Tribunal. The private access amendments were considered over a lengthy period and were controversial. (See, for example, Public Policy Forum, *Amendments to the Competition Act and the Competition Tribunal Act: A Report on Consultations – Final Report* (Ottawa: Public Policy Forum, 2002) at pp. 18-21). They were the result of compromises between those who, on the one hand, wanted unrestricted access to the Tribunal and those who, on the other hand, preferred no private access fearing that Tribunal cases would be brought for improper strategic purposes. However, the latter group also said that, if private access were to be allowed, it should only be with leave of the Tribunal.

[35] This section was adopted and the Tribunal is now able to grant leave to a private party to make an application if the Tribunal has reason to believe that the "applicant is directly and substantially affected in the applicant's business". The provision specifies the degree of impact ("substantially") as well as the type of interest that must be affected ("the applicant's business").

[36] It could be said that the fact that no such restrictive language was included in subsection 106(2) of the Act suggests that it should be given a more liberal interpretation. I agree with this approach in principle but in this case, because of the legislative history of section 105 which shows that a need for increased certainty led to the Consent Agreement Registration Process, I have concluded that it would not be appropriate to a liberal approach to the interpretation of subsection 106(2).

[37] The expression "directly affected" is also found in subsections 103.3(9) and 104.1(10) of the Act. However, there are no applicable Tribunal decisions.

The Use of "Affected" in Subsection 9(3) of the Competition Tribunal Act

[38] Counsel for the Applicants said that, when interpreting subsection 106(2) of the Act, the Tribunal should rely on the case law it has developed about the meaning of "affected" in subsection 9(3) of the CT Act.

[39] Subsection 9(3) provides that "any person may, with leave of the Tribunal, intervene in any proceedings before the Tribunal […] to make representations relevant to those proceedings in respect of any matter that *affects* that person." In *Canada (Director of Investigation and Research) v. Air Canada et al.* (1992), 46 C.P.R. (3d) 184, the Tribunal concluded that the term "affects" must be read to mean "directly affects".

[40] The Applicants said that the fact that they hold minority interests (once and twice removed) in the Babine Joint Venture should not prevent a finding that they are "directly affected" by the Consent Agreement. They say that there is a precedent in the Tribunal for their position and refer to the *Commissioner of Competition v. United Grain Growers Limited*, 2002 Comp. Trib. 21. In that case, the Commissioner filed an application for an order requiring United Grain Growers Limited ("UGG") to divest, at its option, all of its interest in one of two grain terminals in the Port of Vancouver. The Saskatchewan Wheat Pool ("SWP") held a minority 30% interest in one of the terminals and sought intervenor status under subsection 9(3) of the CT Act on the basis that it was "directly affected".

[41] The Tribunal did grant the SWP leave to intervene. However, in my view, the decision was not based on the fact that SWP was a minority shareholder. Rather, it was the potential harm to SWP under contracts between SWP and UGG that justified the intervention. Accordingly, there is no case law which suggests that a party is "directly affected" simply because it is a minority shareholder. Equally, however, it cannot be said that minority shareholders' status alone prevents a party from obtaining standing.

[42] The Applicants also said that, because they have a right of first refusal, they are potential bidders for the Sawmills and Timber Rights and noted that, under subsection 9(3)of the CT Act, the Tribunal has held that potential bidders were "directly affected".

[43] In this regard, they referred to *Washington v. Canada (Director of Investigation and Research)*, 78 C.P.R. (3d) 472, in which an application had been made to vary a consent order to delete a requirement for the divestiture of certain assets. The proposed intervenor had bid on the assets to be divested and the Tribunal concluded that it was directly affected even though leave to intervene was denied on other grounds. As well, in *Commissioner of Competition v. Trilogy Retail Enterprises L.P.*, 2001 Comp. Trib. 12, the Tribunal concluded that a potential bidder could be directly affected and granted leave to two investors who were considering a bid for the divested assets. However, the Tribunal stated that the two investors were "not just another 'potential bidder'" because the evidence showed that they had a serious and real interest in the assets to be divested and serious concerns about the effectiveness of the draft consent order.

[44] In my view, these two cases do not assist the Applicants. In *Washington*, the intervenor had actually made a bid and in *Trilogy*, the proposed intervenor was seriously considering a bid. There is no evidence in this case that the Applicants have decided to exercise their right of first refusal or that they have the funds necessary to complete a purchase.

Decisions of the Supreme Court of Canada and the Federal Court of Appeal

[45] *T.W.U. v. Canada (Canadian Radio-Television & Telecommunications Commission),* [1995] 2 S.C.R. 781 involved a CRTC decision which allowed companies, other than BC Tel, to install cable support systems. BC Tel's union, TWU, applied to the Federal Court of Appeal for judicial review of the CRTC's decision and then appealed to the Supreme Court of Canada. The Supreme Court ruled that the CRTC did not have a duty to notify TWU of the application and proceedings which led to its decision, because the CRTC's decision had nothing to do with the "work jurisdiction" of the TWU. For that reason, although the TWU was affected, the effect was indirect. The Court said:

> 33 In general, I agree with the submissions of the respondent. In my view, the TWU's interest in the proceedings before the CRTC was purely indirect. The CRTC decision concerned questions of telecommunication policy. The CRTC was required to decide on the best way to regulate a monopoly telephone company in order to preserve the public interest. The purpose behind the CRTC decision was totally unrelated to the "work jurisdiction" of the TWU. In fact, such a consideration would have been irrelevant to the CRTC decision. Consequently, the TWU had no relevant interest to represent before the CRTC. While the TWU may have been affected by the CRTC decision, the effect of this decision on the TWU was purely indirect.

[46] In *United Telegraph Workers v. Canadian Brotherhood of Railway Workers*, [1982] 1 F.C. 603 (FCA), the issue was whether the applicant union was "directly affected" under subsection 18.1(1) of the *Federal Courts Act*, R.S.C. 1985, c. F-7. If so, it had standing to make an application for a judicial review of a decision of the Canada Labour Relations Board which certified another union. The Applicant was concerned that the union which had been certified might eventually be in a position to challenge the applicant's certification. However, the Federal Court of Appeal held that that concern did not constitute a direct effect because all the applicant faced was a situation which could potentially affect it in the future.

[47] In *Independent Contractors & Business Assn. v. Canada (Minister of Labour)***,** [1998] F.C.J. No. 352, 6 Admin. L. R. (3d) 92 (FCA), the regional director of the Department of Labour wrote to federal contracting authorities and advised them of a change in the wage for workmen on federal government contract projects. The Independent Contractors & Business Association and some of its members who were contractors brought an application for judicial review of the regional director's decision. The Federal Court of Appeal ruled that, although the contractors themselves were directly affected since they had or intended to bid on federal government contracts, the Association was not directly affected because it was not in the construction business and therefore would never bid.

[48] I have found these decisions helpful in reaching a determination about what constitutes a sufficient interest to give an applicant standing under subsection 106(2) of the Act. These cases indicate that both legal rights and interests are capable of supporting a finding that a party is directly affected. As well, they show that speculative effects are not direct and that effects which have no connection to the mandate of the decision maker are not direct.

CONCLUSIONS ON QUESTION 1 PART I

[49] Given the Supreme Court's finding in *Bell ExpressVu* that context is important in statutory interpretation and given the very serious concerns with the DCO Approval Process which led to the amendment of section 105 of the Act, I have concluded that in this case, the context is the most important factor in deciding what constitutes a sufficient interest to give a third party standing to bring an application under subsection 106(2) of the Act. Although standing will always be decided based on the facts of a particular case, I am satisfied that to respect Parliament's intention to give greater expedition and certainty to parties to a settlement, a fairly restrictive approach should be taken to the definition of "directly affected".

[50] With this approach in mind, I have concluded that a party seeking standing to vary or set aside a term or terms of a consent agreement must be able to show that the consequences for that party are definite. Parliament provided a window of sixty days to challenge a consent agreement. The Applicants argue that it is impossible in that time to know for certain what the effects of the Consent Agreement will be, given that the Divestiture has not yet occurred. However, the use of "directly affected" suggests to me that parties must be able to show, in concrete terms, how a consent agreement will adversely affect them and that those effects will definitely occur even if they have not actually been experienced at the time a subsection 106(2) application is made.

[51] The Commissioner and West Fraser said that an applicant's legal or pecuniary rights had to be "directly affected". The Applicants said that interests should also provide a basis for standing. It is my view that it would be contrary to Parliament's intention to allow "mere" interests to support standing to apply to rescind or vary a registered consent agreement. That said, interests that are significant and are seriously adversely affected by the terms of a consent agreement may be considered. Whether such interests will be sufficient to justify standing will be a matter to be decided by the Tribunal in its discretion and will depend on the facts of a particular case.

[52] Another fundamental question is whether the right or interest affected must relate to competition. This question is posed in this reference as Question 1 Part 1(b)(i). Again, context has played a key role in my decision and the contextual factors described below support my conclusion that the Tribunal should consider only competition effects in 106(2) applications.

[53] The first factor is that the Act and the CT Act establish a regime in which the Tribunal is to use its specialized legal, economic and business expertise to adjudicate civil competition cases. The Act's purpose clause focuses on competition when it provides that:

1.1 The purpose of this Act is to maintain and encourage competition in Canada in order to promote the efficiency and adaptability of the Canadian economy, in order to expand opportunities for Canadian participation in world markets while at the	1.1 La présente loi a pour objet de préserver et de favoriser la concurrence au Canada dans le but de stimuler l'adaptabilité et l'efficience de l'économie canadienne, d'améliorer les chances de participation canadienne aux marchés

same time recognizing the role of foreign competition in Canada, in order to ensure that small and medium-sized enterprises have an equitable opportunity to participate in the Canadian economy and in order to provide consumers with competitive prices and product choices.

mondiaux tout en tenant simultanément compte du rôle de la concurrence étrangère au Canada, d'assurer à la petite et à la moyenne entreprise une chance honnête de participer à l'économie canadienne, de même que dans le but d'assurer aux consommateurs des prix compétitifs et un choix dans les produits.

[54] Secondly, the nature of Consent Agreements and the scope for relief in a 106(2) application suggest that only effects related to competition should be considered. Consent Agreements are crafted to include terms which the Commissioner believes will remedy the anticompetitive impact of a merger or other reviewable practice. They are narrow documents which focus exclusively on solutions to competition problems. As well, to obtain relief in a 106(2) application, a party must demonstrate that the term(s) of the Consent Agreement could not have been the subject of an order of the Tribunal and the Tribunal's jurisdiction is limited to making orders which remedy anticompetitive effects.

THE DEFINITION OF "DIRECTLY AFFECTED"

[55] For these reasons, Part 1 of Question 1 is answered in the following manner: a party that is directly affected by a consent agreement under subsection 106(2) of the Act is a third party who experiences first hand a significant impact on a right which relates to competition or on a serious interest which relates to competition. The impact must be definite and concrete (i.e. not speculative or hypothetical) and must be caused by the consent agreement and not by another agreement or obligation. This answer will be described as the "Definition of Directly Affected".

QUESTION 1 – PART II: THE APPLICATION OF THE DEFINITION OF DIRECTLY AFFECTED TO THE APPLICANTS

THE TEST

[56] In the Tribunal's Reasons and Order following the Applicants' motion to strike this reference (*Burns Lake Native Development Corporation et al. v. Commissioner of Competition and West Fraser Timber Co. Ltd. et al*, 2005 Comp. Trib. 19), the Tribunal included the following statement at paragraph 36:

> The Commissioner accepts and the Applicants agree that on the Reference, when dealing with Question 1 (d), the Commissioner will have to show that it is plain and obvious that the Applicants are not directly affected within the meaning of subsection 106(2) of the Act.

[57] The test for "plain and obvious" is generally applied in the context of motions to strike part or all of a statement of claim. In *Operation Dismantle v. The Queen*, [1985] 1 S.C.R. 441, which involved such a motion to strike, the applicants failed the "plain and obvious" test because the link between the government's action and the alleged infringement of the applicants' rights under the *Canadian Charter of Rights and Freedoms* was "simply too uncertain, speculative and hypothetical to sustain a cause of action" [at 447]. Quoting from *Attorney General of Canada v. Inuit Tapirisat of Canada*, [1980] 2 S.C.R. 735 at 740, Justice Dickson, writing for the majority, reproduced the following passage:

> As I have said, all the facts pleaded in the statement of claim must be deemed to have been proven. On a motion such as this a court should, of course, dismiss the action or strike out any claim made by the plaintiff only in plain and obvious cases and where the court is satisfied that "the case is beyond doubt". [*Operation Dismantle* at 449].

[58] In the context of this reference, for it to be "plain and obvious" that the Applicants are not "directly affected", the Tribunal must be satisfied on the facts as pleaded, which are presumed to be true, that it is beyond doubt that the Applicants do not fall within the Definition of Directly Affected.

THE BLNDC

[59] The BLNDC says that it is directly affected because its right to participate in the management of the Babine Joint Venture is prejudiced by the Consent Agreement which provides that, pending the Divestiture, contracts cannot be terminated, material assets cannot be sold and changes to the business cannot be made without the Commissioner's consent.

[60] The BLNDC also says that the underlined portions of subsections 2(a) and (b) of the Consent Agreement (set out below) apply to it and that it is directly affected in its role as member of the Management Committee.

> 2. The provisions of this Consent Agreement shall apply to:
>
> (a) each of the Respondents, including each Affiliate or any other Person controlled by either of them and each officer, director, employee, or other Person acting for or on behalf of the Respondents with respect to any of the matters referred to in this Consent Agreement, and any successors and assigns of either of them; and all other Persons acting in concert or participating with either of them or any successor(s) or assign(s) in respect of the matters referred to in this Consent Agreement;
>
> (b) following the completion of the Transaction, Weldwood, including each Affiliate or any other Person controlled by Weldwood and each officer, director, employee, or other Person acting for or on behalf of Weldwood with respect to any of the matters referred to in this Consent Agreement, and any successors and assigns of Weldwood; and all other Persons acting in concert or participating with Weldwood or any successor(s) or assign(s) in respect of the matters referred to in this Consent Agreement;

[61] However, as a minority shareholder in the Babine Joint Venture, the BLNDC is only entitled to one representative on a ten member management committee. Accordingly, while it participates in the sense that it has a right to be heard, it has no right to decide what decisions will be made. I have therefore concluded that the BLNDC is not directly affected in its management role because the Definition of Directly Affected requires a significant impact on a right or serious interest, and no such impact is demonstrated in this case.

[62] The Consent Agreement does not in any way alter any rights the BLNDC has in the Babine Joint Venture. After the Divestiture, the BLNCD will continue to hold the same 15.4% interest in BFPL and the BLNDC will be entitled to exercise its right of first refusal once a purchaser for the Sawmills and Timber Rights is identified. In addition, the BLNDC will continue to have the right to be heard at the Management Committee meetings, and will be entitled to receive dividends.

[63] The BLNDC adds that the Divestiture affects it by forcing it to consider whether to exercise and how to finance its right of first refusal. It also says that if a purchase goes ahead, the Divestiture will result in the replacement of its partner in the Babine Joint Venture with one or more new partners who will control the management and operation of the business in place of West Fraser. The BLNDC is dismayed at the loss of its cooperative and competent partner and is concerned that a new partner may not operate in an amiable and profitable manner. Specifically, it is concerned that its revenue from dividends may decrease because a new partner will not enjoy the low anti-dumping duty ("ADD") rate which was available to West Fraser and which has contributed to the profitability of the Babine Joint Venture in the year since the Merger. The BLNDC is also concerned that a new partner may not be as experienced in the forestry business as West Fraser.

[64] However, the BLNDC's concerns about a new partner do not meet the Definition of Directly Affected because they are entirely speculative. Further, in my view, the BLNDC is not "directly affected" by having to consider whether to exercise a contractual right.

[65] Lastly, the BLNDC says that it is "directly affected" in relation to competition because, if the new majority partner is not as successful as West Fraser, the Babine Joint Venture will be less profitable and therefore less competitive. However, the test within the Definition which provides that the effect must be related to competition is not met. The effectiveness of individual competitors is not a competition issue, and on the facts as pleaded, the Applicants have not shown that their concerns with the Consent Agreement are in any way related to the competition concerns which led to the making of the Consent Agreement.

[66] For all these reasons, I have concluded that it is beyond doubt that the BLNDC is not Directly Affected by the Consent Agreement.

THE CHIEFS AND BAND COUNCILS

[67] The Bands are three of the BLNDC shareholders and the Applicants are the Chiefs and Councils of those Bands. Since the rights they claim are the same, I have not differentiated between them in my analysis. They claim to be directly affected under the following headings: the Divestiture and Aboriginal Rights.

The Divestiture

[68] The BLNDC takes the dividends it receives from the Babine Joint Venture and provides the Bands with social and educational programs and other benefits. The Bands are concerned that after the Divestiture, the Babine Joint Venture will be less profitable and the dividends paid to BLNDC will decrease. This, they say, will cause a reduction in their benefits and programs.

[69] I have however concluded that the Definition of Directly Affected does not apply to the Chiefs and Band Councils' concerns about the Divestiture. Their concerns about the

post-Divestiture prospects for the Babine Joint Venture are entirely speculative. There is no way to reach any conclusions about the business acumen or cordiality of an unknown future partner.

Aboriginal Rights

[70] The Divestiture will involve a transfer of the majority interest in Sawmills and Timber Rights to a new partner and thereafter that purchaser will manage those assets. The Bands say that these changes are entirely the product of the Commissioner's involvement in the Merger. They say that, because she is a representative of the Crown, the duty to consult imposed by the Supreme Court of Canada in *Haida Nation v. British Columbia (Minister of Forests)*, [2004] 3 S.C.R. 511, applies. They submit that their right to be consulted was breached by the Commissioner when she negotiated and registered the Consent Agreement without notice to them. If granted standing, their submission will be that the entire Consent Agreement should be rescinded because its terms could not have been the subject of an order of the Tribunal due to the Commissioner's breach of the duty to consult.

[71] This submission is at the heart of this case. However, the failure to consult is not related to competition and is not caused by the Consent Agreement. In these circumstances, this concern does not bring the Chiefs and Band Councils within the Definition of Directly Affected.

[72] Further, the Tribunal's mandate is the adjudication of competition issues and, to the extent that the Chiefs and Band Councils are affected by an alleged breach of the duty to consult that effect is not direct because it has no relationship to the Tribunal's work. In this regard, see the Supreme Court of Canada's decision in *TWU*.

[73] The Bands have for many years been contented shareholders in the BLNDC. They have participated in and benefited from the exploitation of the Sawmills and Timber Rights. The Consent Agreement does not change the terms on which those resources are being harvested, milled and sold and the Bands' rights to benefit from those activities are unchanged. Further, there is nothing in the Consent Agreement which prejudices any claim to sovereignty the Bands may wish to assert in treaty talks.

[74] For these reasons, it is beyond doubt that the Chiefs and Band Councils are not directly affected by the Consent Agreement.

CONCLUSION ON QUESTION 1 PART II

[75] It is beyond doubt, based on the Applicants' pleadings, which are presumed to be true, that the Applicants are not directly affected by the Consent Agreement.

QUESTION 2 – IS THERE A REQUIREMENT TO FILE EVIDENCE OF AN SLC OR AN SPC WHEN REGISTERING A CONSENT AGREEMENT?

[76] The Applicants say that the Tribunal could not have made an order in the terms found in the Consent Agreement without making a finding of an SLC or an SPC under section 92 of the Act and that it would have required evidence of an SLC or an SPC to make such a finding. That being so, the Applicants say that such evidence should have been filed with the Tribunal when the Consent Agreement was registered. In response, the Commissioner says that such a requirement is not mentioned in the Act and that it conflicts with the Tribunal's obligation under subsection 105(3) of the Act to register a consent agreement "immediately". As well, she says that a requirement to file evidence is contrary to amendments to the Act which were made in 2002 which eliminated the Tribunal's supervisory role in connection with the Commissioner's settlements.

[77] The Applicants' submission that, in a contested hearing, an order could not have been made without a finding of an SLC or an SPC is correct but is not helpful in the present case because a consent agreement is not an order of the Tribunal and never becomes one. Subsection 105 (4) simply states that a consent agreement "has the same force and effect" as an order of the Tribunal. The subsection reads:

Consent agreement	*Consentement*
105.(4) Upon registration of the consent agreement, the proceedings, if any, are terminated, and the consent agreement has the same force and effect, and proceedings may be taken, as if it were an order of the Tribunal.	**105.** (4) Une fois enregistré, le consentement met fin aux procédures qui ont pu être engagées, et il a la même valeur et produit les mêmes effets qu'une ordonnance du Tribunal, notamment quant à l'engagement des procédures

[78] Subsection 105(3) of the Act says that a consent agreement is to be filed "for immediate registration". Since the Tribunal has no time or mandate to review a consent agreement and since the Act does not require a filing, there is no reason to conclude that any evidence must be submitted when a consent agreement is filed for registration with the Tribunal.

CONCLUSION ON QUESTION 2

[79] Since the answer to the first query in Question II is "No", the balance of the question need not be addressed.

[80] In view of the fact that the answer to Question 1, Part II means that the Applicants have no standing to pursue the 106(2) Application, that application will be dismissed in a further order.

ORDER

[81] The questions on the reference are answered in the following manner:

Question 1 – Part I

> **[i]** In order to satisfy the "directly affected" requirement for standing in subsection 106(2) of the Act, an applicant must show that it is a third party who

experiences first hand a significant impact on a right which relates to competition or on a serious interest which relates to competition. The impact must be definite and concrete (i.e. not speculative or hypothetical) and must be caused by the consent agreement and not by another agreement or obligation.

Question 1 – Part II

[ii] It is plain and obvious that the Applicants have not disclosed in their Notice of Application and Reply material facts which, if proved, would establish that they are "directly affected", that term is defined by the Tribunal in the preceding reasons.

Question 2

[iii] At the time a consent agreement related to a merger is registered with the Tribunal under section 105 of the Act, the parties are not required to file evidence to substantiate that the merger or proposed merger is likely to substantially lessen or prevent competition without the remedial terms in the consent agreement. That being so, the second part of Question 2 need not be answered.

[82] In view of the fact that this is the first time the Commissioner's new reference power has been used, there will be no order as to costs.

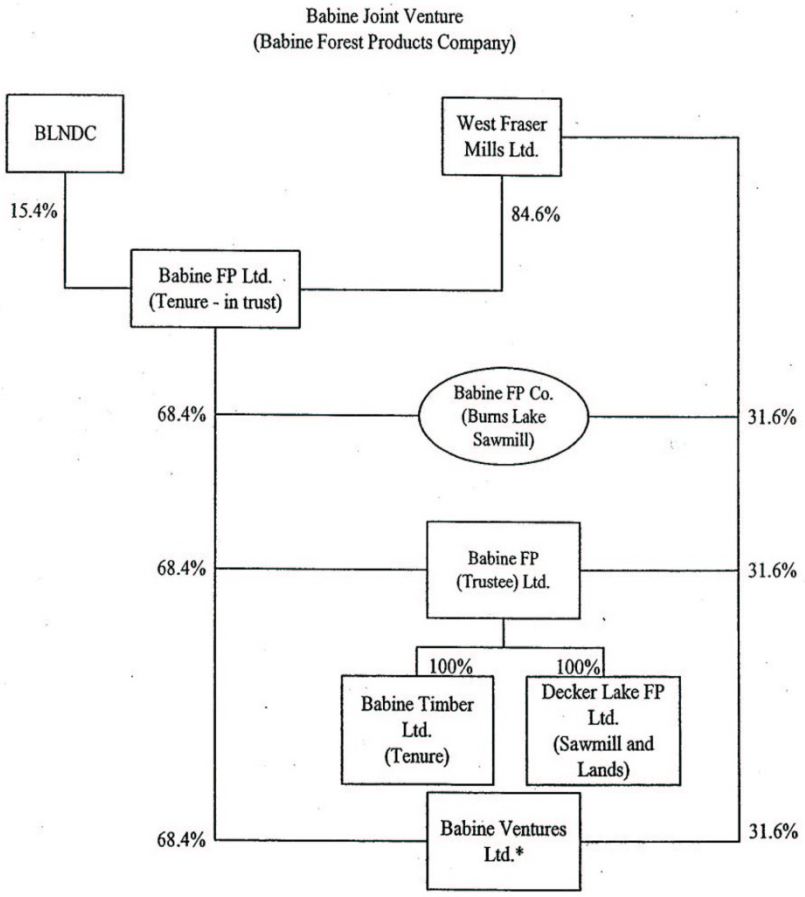
DATED at Ottawa, this 27th day of March, 2006.

SIGNED on behalf of the Tribunal by the Chairperson.

(s) Sandra J. Simpson

APPENDIX A

Babine Forest Products Company,
a joint venture of West Fraser Mills Ltd. and
Babine Forest Products Limited



* Formerly held interest in Burns Lake Specialty Wood Ltd. which was sold in 2004.

APPEARANCES

For the applicant Commissioner of Competition:

Ms. Melanie Aitken
Mr. Duane Schippers
Mr. Derek Bell

For the respondents Burns Lake Native Development Corp. et al.:

Mr. Orestes Pasparakis
Mr. Dany Assaf

For the West Fraser Timber Co. Ltd.
and West Fraser Mills Ltd. in support of the applicant:

Mr. James Musgrove