Court File No. CT-2004-013

COMPETITION TRIBUNAL

IN THE MATTER OF the *Competition Act*, R.S.C. 1985, c.C-34, as amended; and Sections 3 and 49 of the *Competition Tribunal Rules,* Can. Reg. SOR/94/290;

AND IN THE MATTER OF the acquisition by West Fraser Timber Co. Ltd. of Weldwood of Canada Limited;

AND IN THE MATTER OF an application under Section 106(2) of the *Competition Act* by Burns Lake Native Development Corporation, Lake Babine Nation, Burns Lake Band, Nee Tahi Buhn Indian Band to rescind or vary the Consent Agreement between the Commissioner of Competition and West Fraser Timber Co. Ltd. and West Fraser Mills Ltd. filed and registered with the Competition Tribunal on December 7, 2004, under Section 105 of the *Competition Act*.

BETWEEN:

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

Applicants

- and -

COMMISSIONER OF COMPETITION, WEST FRASER TIMBER CO. LTD. and WEST FRASER MILLS LTD.

Respondents

REPLY
OF THE COMMISSIONER OF COMPETITION
(Reference re. Section 106 of the *Competition Act*)

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PART I ~ OVERVIEW

1. The applicants advance an interpretation of subsection 106(2) of the *Competition Act* ("*Act*")which would require a return to the substantive review of consent agreements by the

Competition Tribunal ("Tribunal"). This contradicts Parliament's clear intent to delegate to the Commissioner of Competition ("Commissioner") and the merging parties the responsibility to resolve competition concerns consensually where possible, subject only to a very narrow review jurisdiction in the Tribunal where the terms of the consent agreement impose obligations on non-consenting persons.

2. "Directly affected", as the gateway to standing, must be interpreted in the context of the limited review available in subsection 106(2). As such, the applicants' reliance on intervention cases in the context of substantive hearings is of no assistance in determining who is a "directly affected" person under subsection 106(2).

3. Properly construed, the terms of the consent agreement (the "Consent Agreement") between the Commissioner and West Fraser Timber Co. Ltd. and West Fraser Mills (collectively "West Fraser") do not "directly affect" the applicants. Any affect on the applicants is attributable to the terms of the various business agreements into which they voluntarily entered. Indeed, no provision of the Consent Agreement seeks to bind the applicants and they have failed to plead material facts that could support a binding effect.

4. West Fraser could have sold its interests in the joint venture *volenti* pursuant to the terms of the joint venture agreement and related agreements – the applicants could not complain in that circumstance and should not be able to complain here.

5. The applicants' claims to rights allegedly affected by breach of an alleged duty to consult or fiduciary obligation are without merit and irrelevant. Any complaint regarding the Commissioner's conduct is properly the subject of judicial review; the Tribunal is without jurisdiction to entertain such a complaint. In any event, although irrelevant to this reference, no duty to consult or fiduciary obligation could arise in the circumstances alleged by the applicants.

6. The applicants' memorandum of argument does not distinguish between the pleading of "material facts" in support of their application and the pleading "bare assertions" and "conclusions" that lack any prospect of evidentiary support. The bulk of the applicants' arguments depend on bare assertions which, in the context of even a motion to strike, are not "accepted", but ignored. The applicants rely on these latter pleadings in asserting many of their unsupportable and irrelevant claims.

7. Finally, in support of their submissions, the applicants assert that the Commissioner must convince the Tribunal that her position is "plain and obvious". This is not correct. The "plain and obvious" test can only be relevant to the Tribunal's consideration of Question 1(d) of the Reference specific to the "material facts" pleaded by the applicants in assessing whether to strike the applicants' pleadings. In all other respects, the applicants must persuade the Tribunal that their submissions and interpretations are correct.

PART II ~ REPLY

A. The Proper Construction Of Subsection 106(2)

(i) Generally

8. Section 105 of the *Act* permits the Commissioner and a person in respect of whom the Commissioner has applied or may apply for an order under section 92 to sign a consent agreement. A consent agreement may be filed with the Competition Tribunal ("Tribunal") for immediate registration and once so filed has the same force and effect as if it were an order of the Tribunal.

9. Subsection 105(2) requires that a consent agreement be based on terms that could have been ordered by the Tribunal.

10. In a merger review proceeding, subsection 92(1) of the Act prescribes the terms of orders which the Tribunal can make:

92. (1) Where, on application by the Commissioner, the Tribunal finds that a merger or proposed merger prevents or lessens, or is likely to prevent or lessen, competition substantially (a) in a trade, industry or profession, (b) among the sources from which a trade, industry or profession obtains a product, (c) among the outlets through which a trade, industry or profession disposes of a product, or (d) otherwise than as described in paragraphs (a) to (c), the Tribunal may, subject to sections 94 to 96, (e) in the case of a completed merger, order any party to the merger or any other person	92. (1) Dans les cas où, à la suite d'une demande du commissaire, le Tribunal conclut qu'un fusionnement réalisé ou proposé empêche ou diminue sensiblement la concurrence, ou aura vraisemblablement cet effet : a) dans un commerce, une industrie ou une profession; b) entre les sources d'approvisionnement auprès desquelles un commerce, une industrie ou une profession se procure un produit; c) entre les débouchés par l'intermédiaire desquels un commerce, une industrie ou une profession écoule un produit; d) autrement que selon ce qui est prévu aux alinéas

(i) to dissolve the merger in such manner as the Tribunal directs, (ii) to dispose of assets or shares designated by the Tribunal in such manner as the Tribunal directs, or (iii) in addition to or in lieu of the action referred to in subparagraph (i) or (ii), with the consent of the person against whom the order is directed and the Commissioner, to take any other action, or (f) in the case of a proposed merger, make an order directed against any party to the proposed merger or any other person (i) ordering the person against whom the order is directed not to proceed with the merger, (ii) ordering the person against whom the order is directed not to proceed with a part of the merger, or (iii) in addition to or in lieu of the order referred to in subparagraph (ii), either or both (A) prohibiting the person against whom the order is directed, should the merger or part thereof be completed, from doing any act or thing the prohibition of which the Tribunal determines to be necessary to ensure that the merger or part thereof does not prevent or lessen competition substantially, or (B) with the consent of the person against whom the order is directed and the Commissioner, ordering the person to take any other action.	a) à c), le Tribunal peut, sous réserve des articles 94 à 96 : e) dans le cas d'un fusionnement réalisé, rendre une ordonnance enjoignant à toute personne, que celle-ci soit partie au fusionnement ou non : (i) de le dissoudre, conformément à ses directives, (ii) de se départir, selon les modalités qu'il indique, des éléments d'actif et des actions qu'il indique, (iii) en sus ou au lieu des mesures prévues au sous-alinéa (i) ou (ii), de prendre toute autre mesure, à condition que la personne contre qui l'ordonnance est rendue et le commissaire souscrivent à cette mesure; f) dans le cas d'un fusionnement proposé, rendre, contre toute personne, que celle-ci soit partie au fusionnement proposé ou non, une ordonnance enjoignant : (i) à la personne contre laquelle l'ordonnance est rendue de ne pas procéder au fusionnement, (ii) à la personne contre laquelle l'ordonnance est rendue de ne pas procéder à une partie du fusionnement, (iii) en sus ou au lieu de l'ordonnance prévue au sous-alinéa (ii), cumulativement ou non : (A) à la personne qui fait l'objet de l'ordonnance, de s'abstenir, si le fusionnement était éventuellement complété en tout ou en partie, de faire quoi que ce soit dont l'interdiction est, selon ce que conclut le Tribunal, nécessaire pour que le fusionnement, même partiel, n'empêche ni ne diminue sensiblement la concurrence, (B) à la personne qui fait l'objet de l'ordonnance de prendre toute autre mesure à condition que le commissaire et cette personne y souscrivent.

(emphasis added)

11. In turn, subsection 106(2) provides that a person "directly affected" by a consent agreement may apply to have one or more of the terms of the consent agreement varied if it finds that the person has established that the terms could not be the subject of an order of the Tribunal. "Directly affected", as considered further below in section (iii), must be interpreted in the context of section 92, subsections 105(2) and 106(2) and, in particular, the limited scope of Tribunal review contemplated.

(ii) No Substantive Review And No Requirement To File Evidence

12. The interpretation of subsection 106(2) proposed by the applicants offends the clear legislative intent of Parliament. The applicants effectively insist that the Tribunal could, in every 106(2) application, substantively review the basis for a section 92 order (i.e. whether there is a substantial lessening or prevention of competition), as opposed to being restricted to the actual task specified in subsection 106(2); namely, to test whether the *specific terms* of the order could have been the subject of an order of the Tribunal. The applicants' interpretation is a throw-back to the old substantive reviews of consent agreements, expressly rejected by Parliament.

13. Despite the applicants' express acknowledgement to the Tribunal that they are not seeking a *de novo* review by the Tribunal of the Commissioner's conclusions, that is, in fact, precisely what they now demand – a review of whether there was a likely substantial lessening or prevention of competition. However, the Tribunal struck that highly contentious issue from the Reference relying on the applicants' representations that the applicants would not pursue it. Accordingly, the applicants' proposed interpretation of subsection 106(2) and their arguments that the underlying basis for an order is ever in issue on a subsection 106(2) application must be rejected as irrelevant to this Reference.

14. Of course the only reason to file evidence at the time a consent order is completed would be for the Tribunal to engage in a substantive review of the existence or non-existence of a likely substantial lessening or prevention of competition and whether the consent agreement remedies that substantial lessening or prevention. It is no coincidence that there is no ability to file evidence with the Tribunal in the context of a consent agreement. Parliament has denied to the Tribunal such a substantive review role in the circumstances of a consent agreement under subsection 106(2); the Tribunal's only jurisdiction is to review the specific terms of the consent order (where a third party is able to satisfy the Tribunal that its substantive legal rights are directly affected) to determine whether the Tribunal had the jurisdiction to issue the order *on those very terms*. That is, whether the order imposes terms on a third party beyond the general authority of the Tribunal to impose such terms in a contested section 92 proceeding.

15. Contrary to the applicants' allegations contained in paragraphs 89 and 90 of their memorandum of argument, section 92 limits the authority of the Tribunal to issue an order

directed to a party that does not consent to the order. The review jurisdiction of the Tribunal is limited to determining whether the Commissioner and the merging parties have exceeded their authority in respect of the scope of a consent agreement's application to third parties.

16. Specifically, under section 92, the Tribunal has the authority in contested proceedings to make certain specified orders in respect of any party to the merger or any other person. With the consent of the Commissioner and the merging parties, section 92 also permits the Tribunal to make any other order(s) against the person against whom the order is directed. Thus, a consent agreement can only prescribe terms on this basis; any term that goes beyond the orders that may be made in contested proceedings may only apply to a party who has consented to such additional term(s). In this case, that is West Fraser.

17. Subsection 106(2) is a prescribed safety valve to address a case where the Commissioner and the parties to a consent agreement attempt to bind a third party. That third party may apply as one who is "directly affected" by the consent agreement to have it varied or rescinded on the grounds that the Tribunal could not have issued such an order against that third party, notwithstanding the consent of the Commissioner and the merging parties, in this case, West Fraser.

18. This is precisely the interpretation that Parliament intended. To give effect to the applicants' interpretation completely undermines the clear and unequivocal legislative intent. The Consent Agreement does not purport to bind, nor does it bind in fact, any of the applicants; only West Fraser is subject to the terms of the Consent Agreement.

(iii) The Applicants Mischaracterize The Meaning Of "Directly Affected"

19. The applicants' characterization of "directly affected" equates to merely an "affected" standard. That cannot be right as a matter of logic and statutory interpretation.

20. The meaning of "directly affected" in subsection 106(2) must be interpreted within the context of the provision. That is, applicants must show that they are directly affected by the consent agreement in question, meaning that the terms of the consent agreement itself specifically binds them or abrogates a substantive legal right.

21. All parties agree that the language used in subsection 106(2) of the *Act* is different from the language used in section 9(3) of the *Competition Tribunal Act:*

Directly affected persons 106(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. R.S., 1985, c. 19 (2nd Supp.), s. 45; 1999, c. 2, s. 37; 2002, c. 16, s. 14.	Personnes directement touchées 106(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. L.R. (1985), ch. 19 (2e suppl.), art. 45; 1999, ch. 2, art. 37; 2002, ch. 16, art. 14.

Interventions by persons affected 9(3) Any person may, with leave of the Tribunal, intervene in any proceedings before the Tribunal, other than proceedings under Part VII.1 of the Competition Act, to make representations relevant to those proceedings in respect of any matter that affects that person.	Intervention des personnes touchées 9(3) Toute personne peut, avec l'autorisation du Tribunal, intervenir dans les procédures se déroulant devant celui-ci, sauf celles intentées en vertu de la partie VII.1 de la Loi sur la concurrence, afin de présenter toutes observations la concernant à l'égard de ces procédures.

22. For a person to have standing under subsection 106(2), that person must be "directly affected by the consent agreement (directement touchée par le consentement)". The language used in subsection 9(3) of the *Competition Tribunal Act* is much broader: "any matter that affects that person (toutes observations la concernant à l'égard de ces procédures)". The Tribunal has adopted a narrow interpretation of "affects" for intervention under subsection 9(3); it is axiomatic that the qualifier "directly" must have meaning that narrows that qualifying standard. Moreover, the very limited nature of the review contemplated in subsection 106(2) of the *Act* counsels a narrow interpretation of "directly affected".

23. Further, the meaning of persons "affected" pursuant to subsection 9(3) of the *Competition Tribunal Act* relates to persons affected from a broader competition perspective – persons affected by a substantial lessening in the market, as opposed to the narrower language used in subsection 106(2) of the *Act*, which is restricted to granting standing to "a person directly affected by the consent agreement" in order to argue that the terms of the consent order "could not" have been as imposed, in contrast to "would not" have been imposed, by the Tribunal.

Therefore the Tribunal must consider the specific terms of this Consent Agreement and whether those terms produce a sufficiently direct as opposed to an indirect or ancillary affect upon each of the applicants.

24. The cases relied upon by the applicants all relate to a broader test of "affects" that flow from a proposed transaction. For example, the *United Grain Growers* decision of the Tribunal cited by the applicants does not stand for the proposition they assert. The Tribunal did not, in its reasons, indicate the basis for determining that the intervenor, the Canadian Wheat Board, was directly affected. Further, the applicants' situation is different for two reasons: (1) they are not a customer, supplier or competitor – they are merely either a shareholder of an indirect interest in the Mills or, more remote still, shareholders of a shareholder of an indirect interest; and (2) this is not an application for intervention with broader competitive impacts – the scope of this application is, by definition, restricted to a demonstrable legal right that is allegedly abrogated by operation of the Consent Agreement. An applicant does not, in a section 106(2) matter, seek to assist the Tribunal in understanding the competitive impacts of a proposed transaction or remedy; rather its interest is that of its own demonstrable legal rights since the Tribunal has no role to consider broader competitive impacts or re-open the competitive assessment of the Commissioner or substitute its judgment for that of the Commissioner.

25. The decision of the Tribunal in *United Grain Growers* relating to the application of the Saskatchewan Wheat Pool ("SWP") for leave to intervene, is equally of no assistance to the applicants. In that case, SWP was limited in its intervention to making representations regarding the impact of potential divestiture options on its own contractual or proprietary interests (a far narrower undertaking than that sought by the applicants herein); and it was conceded by the Commissioner and the respondent that on the facts of that particular case, the potential remedies could directly affect SWP's contractual or proprietary rights – it was a prospective possibility of an affect in the context of a broader competitive impacts assessment by the Tribunal. This case is different: there is no agreement that the applicants' contractual or proprietary rights are affected; in fact, the evidence is clear and unequivocal from the pre-existing agreements that no contractual or proprietary right of the applicants is or could be affected. Further, the applicants must establish that they are "directly affected" by the consent agreement within the meaning of subsection 106(2) – not that they might be affected.

26. In fact, the decision allowing SWP to intervene in *United Grain Growers* supports the interpretation of "directly affected" advanced by the Commissioner; that is, an applicant's substantive legal rights must be directly affected by the consent agreement. The applicants in this case, on the face of their pleadings, cannot demonstrate any direct affect on a substantive legal right(s).

27. The remaining cases referred to by the applicants in paragraph 33 are irrelevant as having been decided under the previous statutory provisions which provided for a substantive review of the effectiveness of those proposed consent orders. Intervention was permitted to "make representations relevant to those proceedings in respect of any matter that affects that person" a much broader standard than that under subsection 106(2). In any event, it is doubtful as mere shareholders or shareholders of shareholder that the applicants would qualify, even under that broader standard.

28. The logical extension of the applicants' arguments and conclusions is that a single shareholder of a public company or a municipal government would have standing to interfere in a consent order (and delay the implementation of the remedies contemplated therein). On the basis of that allegation, the shareholder could argue that he will experience a decrease in value of his shares following a merger; the municipal government could complain that it will suffer a decrease in its tax revenue following a merger – all of which are indirectly affected pecuniary interests. Parliament did not contemplate such scope for intervention under subsection 106(2) of the *Act*.

(iv) The Applicants Are Not "Directly Affected" By The Consent Agreement

29. Despite their best efforts and multiple opportunities to plead, the applicants have failed to demonstrate in their pleadings that they are "directly" affected as opposed to "indirectly" affected by the Consent Agreement.

30. Specifically, as considered further below, the applicants fail to distinguish between broad affects flowing indirectly as a result of their various business relationships and a direct effect from the Consent Agreement itself. The applicants also fail to distinguish between each of the individual applicants as to how the Consent Agreement directly affects their individual substantive legal rights.

31. In fact, the only direct affect of the Consent Agreement is visited upon West Fraser as it is West Fraser that is obliged to undertake certain efforts to divest its own interests in and maintain the viability of the joint venture assets pending such divestiture. The applicant BLNDC, if affected, which is at best speculative, is only affected indirectly by virtue of the terms of its agreements with West Fraser. The effects on the remaining applicants of the Consent Agreement are at most highly remote and speculative, not direct.

32. Further, the Commissioner denies that the terms of the Consent Agreement, specifically article 2 thereof, in any way bind the applicants. The terms of article 2 refer to the actions of persons for whom West Fraser will be held responsible in the event of non-compliance with the terms of the Consent Agreement. There is no remedy against any person for breach of the consent agreement *other than* West Fraser. Further, the concluding words of articles 2(a) and (b) of the Consent Agreement "...in respect of the matters referred to in this Consent Agreement" limits the application of the Consent Agreement so as to exclude the applicants, since there are no other matters relevant to the applicants which bind any person except for West Fraser.

33. The applicants argue that the Consent Agreement stipulates that, pending divestiture, the "business" cannot undertake certain activities. Again, the applicants' interpretation of the Consent Agreement is without foundation. Paragraph 16 of the Consent Agreement is clear and unequivocal that West Fraser shall take or refrain from taking certain actions without the consent of the Commissioner in order to maintain the competitive viability of the Mills. The Consent Agreement does not purport to bind the actions of any of the applicants; it addresses only the conduct of West Fraser.

34. The applicants have not identified, and could not identify, a single provision of the Consent Agreement that actually obliges them to do or refrain from doing anything or otherwise directly affects them. Therefore it is "plain and obvious" that none of the terms of the Consent Agreement "directly" affects any of the applicants.

B. Alleged Aboriginal Rights And Any Duty To Consult Are Irrelevant

(i) Generally

35. The Commissioner's authority is circumscribed and limited to the administration and enforcement of the Competition Act and certain other market regulatory legislation. Her role is that of an independent law enforcement official.

Competition Act s.7

36. If the Commissioner had a duty to consult and failed to do so, even on the most favourable interpretation of the applicants' bald, the Tribunal is not the proper forum to address such complaints. The proper course is an application for judicial review, which the applicants failed to pursue. Of course, as the applicants undoubtedly are aware, the standard of review applicable to the exercise of the Commissioner's discretion is high, and she is entitled to considerable deference in exercising her mandate under the *Act*.

Charette v. *Canada (Commissioner of Competition)* (2003) 29 C.P.R. (4th) 61

37. If ever there were any doubt that the applicants are in the wrong forum, one only need refer to the tenor of the materials filed by the applicants which depend upon allegations impugning the conduct of the Commissioner *qua* administrative decision-maker. The applicants' allegations of direct affects flow not from the terms of the Consent Agreement itself (which is the test), but rather from their baseless allegations relating to the conduct of the Commissioner, conduct which is only reviewable by the Federal Court on an application for judicial review.

(ii) Alleged Interference With Aboriginal Rights – Not Supported By Law Or "Material Facts"

38. Any yet to be identified or hypothetical adverse affect on aboriginal land or resources or claims thereto could only flow from possible future decisions made by the new controlling partner. Of course, this could be the applicant BLNDC itself given its rights of first refusal. Any adverse effect would flow not from the Consent Agreement, but rather from the conduct of the applicants in negotiating the initial joint venture and related agreements. Had they wanted to prevent larger shareholders such as Weldwood and West Fraser from taking action that could indirectly adversely impact their interests, the applicants could have provided for such protection in the relevant joint venture and shareholder agreements; they did not.

39. The applicants have not pleaded that the joint venture agreement, shareholders' agreement and other agreements relating to the operation of the joint venture were entered into under unfair circumstances or without the approval of the applicants, or that such agreements are in any way invalid. In fact the applicants rely on those agreements.

40. The very scarce facts pleaded by the applicants do not establish a duty to consult or the existence of any actual or potential aboriginal right which is directly affected by the terms of the Consent Agreement. At most, the applicants establish a "hoped for" cooperative relationship with Weldwood and, to a lesser extent, West Fraser, which, even if it came to fruition as alleged, was always subject to change by a new managing partner pursuant to the joint venture and shareholder agreements.

(iii) No Fiduciary Duty

41. While there is an overarching fiduciary relationship between the Crown and aboriginal peoples, the fiduciary duty imposed on the Crown does not exist at large (i.e. not all obligations of the parties to that relationship will themselves be fiduciary in nature). It arises only where there is a cognizable aboriginal interest over which the Crown exercises discretionary control in the nature of a private law duty.

Wewaykum Indian Band v. *Canada*, [2002] 4 S.C.R. 245 at para. 85

42. Only certain aspects of the Crown-aboriginal relationship impose a fiduciary duty upon the Crown. To date that duty has only been recognized by the Supreme Court of Canada in relation to aboriginal interests in land or where an aboriginal or treaty right protected by section 35(1) of the *Constitution Act, 1982*, is involved.

Constitution Act, 1982, s.35(1)

43. Neither the 30-year relationship with Weldwood (or West Fraser) nor the claimed rights to economic autonomy and self-government of the applicants would qualify as a cognizable aboriginal interest at law.

44. Even if one accepts that in this case aboriginal land interests are engaged given the alleged use of lands by the joint venture that may be subject to aboriginal land claims, the

Supreme Court of Canada is clear that where aboriginal rights and title have been asserted but not defined or proven, the aboriginal interest is insufficiently specific to attract a fiduciary duty.

Haida v. *British Columbia (Minister of Forests)* 2004 S.C.C. 73 at Para 18

45. The applicants do not allege that the Commissioner has assumed discretionary control over any specific aboriginal interests nor have they alleged facts giving rise to a fiduciary duty on the part of the Federal Government, much less the Commissioner, an independent law enforcement official.

(iv) No Duty To Consult And No Right Of Consultation

46. There is no duty to consult unless the Crown has knowledge (actual or constructive) of the existence or potential existence of an aboriginal treaty right and contemplates conduct that might adversely affect that right. The applicants have pleaded no material facts alleging that the Commissioner had the requisite knowledge of the potential existence of an aboriginal right or treaty right or contemplated conduct that might adversely affect any such right.

Haida v. *British Columbia (Minister of Forests)* 2004 S.C.C. 73 at Para 35

47. The types of legal rights giving rise to a duty to consult are those aboriginal interests subject to treaty negotiation. The jurisprudence speaks of the Crown unilaterally exploiting a claimed resource. This is clearly not the case here. The Commissioner has imposed obligations upon West Fraser's business conduct, not upon any of the applicants. Far from exploiting any claimed resource or allowing any other person to exploit such a resource, the consent agreement actually prohibits West Fraser from acting in a manner that would negatively affect the overall business operations of the joint venture.

Haida v. *British Columbia (Minister of Forests)* 2004 S.C.C. 73 at Para 27

48. None of the provisions of the Consent Agreement affect the sovereignty of aboriginal persons; in fact, the Consent Agreement obligations are restricted to requiring actions of West Fraser within the scope of any negotiated agreements with third parties, including the applicants. No terms are imposed upon any aboriginal person or organization.

49. In this case it is "plain and obvious", even in the face of the alleged existence of aboriginal rights, that the Commissioner's decision to enter into the Consent Agreement could not adversely affect, much less directly affect, any aboriginal right, since after the divestiture, the applicants will hold the same minority shareholder interest in the joint venture assets to which they agreed in 1974. As such, they will continue to have the same level of opportunity that their indirect minority interest has always accorded them to participate in the development of those assets and rights and to minimize the adverse impacts resulting from that development on their land.

50. Finally, there is no judicial authority that supports the applicants' claim to "other rights" arising from a 30-year relationship with a particular business partner. Aboriginal rights are customs, practices or traditions which are integral to the distinctive culture of the aboriginal group claiming such rights and which have continuity with the practices, customs and traditions that existed prior to contact between aboriginal and European societies. The rights which the applicants allege to be affected flow from commercial business relationships and do not meet the test for aboriginal rights described by the Supreme Court of Canada.

R. v. Van Der Peet [1996] 2 S.C.R. 507 at paras 46, 59 and 60.

C. Scarce "Material Facts"

51. The applicants take considerable liberties with their pleadings and rely on conclusions and bare allegations such as referred to in paragraphs 5 and 87 of their memorandum of argument. These allegations are spurious, irrelevant and wholly incapable of proof.

52. The "facts" to be treated as "true" for the purpose of this Reference are only those material facts pleaded by the applicants.

Burns Lake Native Development Corporation et al. v. *Commissioner of Competition et. al.* (2005) CT2004-13 No. 0030 decision of Simpson J. June 1, 2005 at paras 16 and 17

53. Bare assertions of conclusions are not material facts. Material facts do not encompass facts that are based on assumptions or speculation.

Premakumaran v. *Canada (A.G.)* (2003), 28 Imm. LR. (3d) 98 at para 12
Johnson v. *Royal Canadian Mounted Police*, [2002] F.C.J. No. 1212 at para. 24

54. Further, pleadings cannot be allowed to stand where it is clear that the person making the allegations has no evidence to support them.

> *Cdn Olympic Association* v. *USA Hockey Inc.* (1997), 74 C.P.R. (3d) 348 (Fed. T.D.)

55. The applicants' amended notice of application, reply and memorandum of argument are replete with bare assertions and conclusions all absent any prospect of evidentiary support. For example, the only actual material fact referred to by the applicants in paragraph 87 of their memorandum of law is the fact that the Commissioner did not file any evidence of a substantial lessening of competition prior to the registration of the Consent Agreement. The remaining allegations are not allegations of fact so much as bare assertions and conclusions void of any prospect of evidentiary support. Similarly, the statements contained at paragraphs 5, 6, 14, 23, and 77 are not assertions of material fact, but rather, bare assertions without a scintilla of supporting fact or prospect of success.

D. The "Plain And Obvious" Standard Is Relevant Only To Question 1(D)

56. The Commissioner is only required to meet the plain and obvious test with respect to Question 1(d) of the Reference in order to successfully strike the applicants' notice of application. This is the only extent to which the "plain and obvious" standard is relevant.

> *Burns Lake Native Development Corporation et al.* v. *Commissioner of Competition et. al.* (2005) CT2004-13 No. 0030 decision of Simpson J. June 1, 2005 at para 36

PART III ~ ORDER REQUESTED

57. For the foregoing reasons, the Commissioner respectfully requests that the questions appearing on the Notice of Reference be answered as indicated in the Commissioner's Memorandum of Argument.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

December 14th, 2005

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Solicitors for the Respondent, the
Commissioner of Competition

Court File No. CT-2004-013

COMPETITION TRIBUNAL

BETWEEN:

BURNS LAKE NATIVE DEVELOPMENT CORPORATION, et al

Applicants

-and-

COMMISSIONER OF COMPETITION, WEST FRASER TIMBER CO. LTD. and WEST FRASER MILLS LTD.

Respondents

REPLY
OF THE COMMISSIONER OF COMPETITION
(Reference re. Section 106 of the *Competition Act*)

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