File No: CT-2004-013

COMPETITION TRIBUNAL

IN THE MATTER OF the Competition Act, R.S.C. 1985, c.C-34, as amended, and ss. 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 s. 106(2) of the *Competition Act* by Burns Lake Native Development Corporation, Lake Babine Nation, Burns Lake Band, and 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 s. 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

MEMORANDUM OF ARGUMENT OF THE APPLICANTS
(Commissioner's Reference Re Subsection 106(2) Of The Competition Act)

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PART I — FACTS

Overview

1. This Reference is brought by the Commissioner of Competition (the "Commissioner") with the intent of striking out the claim of the Applicants prior to the hearing of their Application.

2. This Reference is proceeding on the basis that:

   (a) the Commissioner will have to show that it is "plain and obvious" that the Applicants are not directly affected within the meaning of section 106(2) of the *Competition Act* (the "Act"); and

   Competition Act, R.S.C. 1985, c.C-34, as amended in 2002 ("*Competition Act*").

   (b) the facts as pleaded by the Applicants are to be deemed to be true for the purpose of this Reference.

   Competition Tribunal Order, June 1, 2005, paras. 16 and 36

3. In summary, it is the Applicants' position that:

   (a) the Commissioner's proposed interpretation of section 106(2) of the Act contradicts the plain language of the section and the governing principles of statutory construction;

   (b) the Commissioner's proposed interpretation is also inconsistent with fair and effective merger remedy policy;

   (c) the Applicants have been directly affected by the Consent Order. By its very terms, it binds the Applicants. In any event, the Commissioner cannot come close to meeting the "plain and obvious" test; and

   (d) the Commissioner has no jurisdiction to interfere with a merger unless the merger is likely to prevent or lead to a lessening of competition. The Commissioner has exceeded her authority by demanding the divesture of

assets, to the detriment of the Applicants, in the absence of any evidence of the lessening of competition.

Background

4. On December 7, 2004, the Commissioner and West Fraser Mills Ltd. and West Fraser Timber Co. Ltd. ("West Fraser") entered into a consent agreement (the "Consent Agreement") in connection with the Weldwood/West Fraser merger (the "Merger") which was filed with the Tribunal pursuant to section 105 of the Act.

Competition Act, section 105

Amended Notice of Application to Rescind the Consent Agreement of Burns Lake et al., dated February 11, 2005 ("Amended Notice of Application"), page 24, para. 1.

5. Accepting the Applicants' facts as true, the Commissioner has never had any evidence that the Merger prevents or lessens, or is likely to prevent or lessen competition substantially, or at all.

Applicants' Reply, paras. 27 and 28

6. Without consulting the Applicants and despite the fact that there is no evidence of a substantial lessening of competition, the Commissioner nonetheless required West Fraser to enter into the Consent Agreement, which resulted in West Fraser agreeing to divest its interest in Babine Forest Products Limited ("BFPL"). West Fraser had no intention of otherwise divesting its interest in BFPL.

Applicants' Reply, para. 5

The Applicants

7. The Applicant Burns Lake Native Development Corporation (the "Native Development Corporation") is a joint venture shareholder and partner with West Fraser in BFPL.

Amended Statement of Grounds and Material Facts, para. 5

8. The Applicants Burns Lake Band, Lake Babine Nation and Nee Tahi Buhn Indian Band (the "Bands") are First Nations situated in the Burns Lake region of British

Columbia and shareholders in the Native Development Corporation. The Bands claim Aboriginal right and title to the lands upon which the Decker Lake Saw Mill, Burns Lake Saw Mill and Associated Tenures[1] (timber harvesting rights) are located.

Amended Statement of Grounds and Material Facts, paras. 7, 8 and 9

9. The individuals Robert Charlie, Emma Palmantier and Ray Morris are the Chiefs of the Bands and Aboriginal persons living in the Burns Lake region (the "Chiefs").

Amended Statement of Grounds and Material Facts, para. 10, 11 and 12

The Business of BFPC

10. The Native Development Corporation was established in 1974 to:

(a) hold a portion of the First Nations peoples' interest in the use of the natural resources in the Burns Lake region; and

(b) promote First Nations peoples' economic development and the right of self-determination.

Amended Statement of Grounds and Material Facts, para. 20

11. The Bands, through the Native Development Corporation, were given an interest in the business of BFPL in recognition of:

(a) the impact the saw mill complexes would have on the First Nations peoples of Burns Lake and their ability to pursue economic development and self-sufficiency; and

(b) any inchoate rights of the First Nations peoples.

Amended Statement of Grounds and Material Facts, para. 14

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[1] As defined in the Consent Agreement

12. The Native Development Corporation holds a 15% interest in BFPL. In turn, BFPL holds a 68% interest in the Decker Lake Saw Mill, the Burns Lake Saw Mill and the Associated Tenures.

Amended Statement of Grounds and Material Facts, para. 18

The Joint Venture Relationship

13. The Native Development Corporation's relationship with Weldwood (now West Fraser) is 30 years old. West Fraser has also held an interest in the Mills[2] and Associated Tenures for over 20 years. Through the years, the Native Development Corporation has built a valued business relationship with both Weldwood and West Fraser.

Amended Statement of Grounds and Material Facts, para. 22

14. Contrary to the submissions of the Commissioner and West Fraser, the rights of the Native Development Corporation in BFPL are not solely governed by the joint venture agreement. The accepted facts are that the joint venture agreement does not properly explain or capture:

(a) the relationship between the Native Development Corporation and Weldwood/ West Fraser, its joint venture partner; nor

(b) the achievements of the past 30 years or the continuing influence the joint venture enterprise has had on the First Nations peoples of Burns Lake.

Amended Statement of Grounds and Material Facts, para. 23

15. Moreover, the relationship does not just involve the Native Development Corporation. During the lengthy and ongoing negotiation process for rights to title and use of the land, the Bands and Chiefs have established a relationship with West Fraser/Weldwood pursuant to which they have been able to:

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[2] As defined in the Consent Agreement

(a) seek to ensure that the land on which the Mills are situated and the land from which the timber is harvested has been effectively managed and controlled by its joint venture partner for over 30 years;

(b) communicate many of their specific concerns regarding the land surrounding and encompassing the sawmill operations and resources used from the Burns Lake region. By virtue of the longstanding joint venture partnership, many of these concerns have been acknowledged and accommodated; and

(c) be informed of, and involved in, discussions regarding initiatives that may require additional land resources or changes to harvesting practices.

Amended Statement of Grounds and Material Facts, paras. 35-38

16. The Consent Agreement, and in particular its provision for the divestiture of Weldwood/West Fraser's interest in BFPL, will result in the forced termination of a 30 year relationship which:

(a) the First Nations peoples of Burns Lake have worked hard to foster and helped promote their economic development and goals of self-determination;

(b) has resulted in a common vision between Aboriginal and non-Aboriginal peoples regarding the land, the controlled use of natural resources, and the interaction between industry and the First Nations peoples of Burns Lake;

(c) has resolved and settled many issues and potential problems that have been encountered over the years regarding the management of resources and the treatment of First Nations peoples' rights and title claims;

(d) the First Nations peoples of Burns Lake have come to value;

(e) like other partnerships, essentially represents and comprises a great deal of the value and goodwill of the business; and

(f) has resulted in the operation of a viable and competitive business.

Amended Statement of Grounds and Material Facts, para. 24

17. With the Consent Agreement, the Commissioner now seeks to force the dissolution of this carefully built and successful relationship in circumstances where:

(a) no effort was made to consult with either the First Nations or the First Nations peoples of Burns Lake, regarding the impact the Consent Agreement will have on:

(i) their interests in the Mills and Associated Tenures and the viability of the associated businesses going forward;

(ii) their ability to pursue economic autonomy and self-government; and

(iii) their management and participation in the land and the controlled use of the natural resources of the Burns Lake area; and

(b) it is contrary to the interests of either the First Nations or the First Nations peoples of Burns Lake.

Amended Statement of Grounds and Material Facts, para. 25

PART II — ISSUES

18. The issues on this Reference are:

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

(b) In particular, must an applicant under section 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 section 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?

(d) As to the application of section 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 section 106(2):

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

(ii) Counsel 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")?

2. 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 section 106(2) of the Act?

PART III – SUBMISSIONS

19. The ultimate goal of the Commissioner's Reference is to strike out the claim of the Applicants on the basis that the Applicants have no standing. Central to the Commissioner's argument is that the Applicants are not "directly affected" by the Consent Agreement.

20. The Commissioner's submission is entirely spurious. The Respondents have filed lengthy argument on this issue yet do not mention the terms of the Consent Agreement itself.

21. By its very terms, the Consent Agreement directly affects the Applicants. In fact, it is an order that expressly serves to bind them.

Competition Act, section 105 and 106
Consent Agreement, Articles 2 and 16

22. Article 2 of the Consent Agreement provides that the Consent Agreement applies to West Fraser, Weldwood and "all other Persons acting in concert or participating [with

them] in respect of the matters referred to in this Consent Agreement". The Consent agreement is broadly worded and is drafted to capture and bind third parties, such as the Applicants.

Consent Agreement, Article 2

23. The Applicants clearly fall within the Consent Agreement and are all persons acting in concert or participating with West Fraser/Weldwood in respect of matters referred to in their Consent Agreement or the accepted facts:

(a) The Native Development Corporation is the joint venture partner of Weldwood/West Fraser. The Native Development Corporation has worked in conjunction with Weldwood/West Fraser for thirty years and has developed a special working relationship with respect to BFPL, the Mills and the Associated Tenures;

(b) The Chiefs and the Bands also have a special relationship with West Fraser in relation to the use of the Aboriginal lands and Associated Tenures and the management of these resources which is also characterized as a "partnership".

Amended Statement of Grounds and Material Facts, paras. 23-25 and 35-38

24. The interests of the Applicants are not only directly affected by the forced divesture but also by other terms of the consent Agreement that stipulate, in the interim, that the business cannot:

(a) enter into or terminate material contracts or arrangements without consent of the Commissioner;

(b) make any material change to the operations; or

(c) terminate certain employees.

Consent Agreement, para. 16

25. Given that the Consent Agreement, by its very terms, binds the Applicants they are, by any definition, "directly affected". No further inquiry is necessary.

Plain and Obvious

26. In any event, to strike the Applicants' claim the Commissioner must meet the plain and obvious threshold. The Courts have described this test to be exceedingly difficult and only to be exercised in the clearest of cases. In *Rona,* the Tribunal referred to the remedy as "draconian".

> *Commissaire de la concurrence c. RONA Inc.,* 2005 Trib. Concur. 9
> *Hunt v. Carey Canada Inc.,* [1990] 2 S.C.R. 959, at p. 976-979 ("*Hunt* v. *Carey*")

27. The "plain and obvious" is described more fully by the Supreme Court of Canada:

> ... assuming that the facts as stated in the statement of claim can be proved, is it "plain and obvious" that the plaintiff's statement of claim discloses no reasonable cause of action? As in England, if there is a chance that the plaintiff might succeed, then the plaintiff should not be "driven from the judgment seat". Neither the length and complexity of the issues, the novelty of the cause of action, nor the potential for the defendant to present a strong defence should prevent the plaintiff from proceeding with his or her case. ***Only if the action is certain to fail because it contains a radical defect*** ... should the relevant portions of a plaintiff's statement of claim be struck out.
>
> *Hunt v. Carey*, *supra* at p. 980

28. The Federal Court has held that even if there are no factual issues in dispute, a motion to strike under Rule 221 will fail if there exists a contentious legal issue of statutory interpretation to be resolved. Unless the resolution of such an issue is clear and obvious it should be left to be determined at trial.

> *The Queen v. Amway of Canada,* [1986] 2 F.C. 312 at p. 326 (F.C. T.D.)
> *Pfizer Canada Inc. v. Apotex Inc.* (1999), 1 C.P.R. (4th) 358 at p. 369 (F.C. T.D.)

29. By all accounts, the issues raised in this Application are novel and complex. The scope and effect of section 106(2) has never been judicially considered. Neither has the duty of the Commissioner to consult when affecting First Nation's rights. These issues cannot be determined on a "plain and obvious" standard.

Questions 1(a), (b) and (c) – "Directly Affected"

30. Questions 1(a), (b) and (c) of the Reference all relate to the meaning of the term "directly affected" contained in section 106(2) of the Act. The Applicants assert that

"directly affected" should not be circumscribed as the Respondents propose. Rather, the provision should be read in accordance with its plain terms and past precedent.

31. As the Commissioner and West Fraser have noted, the phrase "directly affected" has been considered in the Tribunal's jurisprudence.

32. *United Grain Growers Limited* is directly on point. In that case, a minority shareholder in a company potentially divested pursuant to a consent order was found to be "directly affected". Based on *United Grain Growers Limited*, it cannot be said that it is "plain and obvious" that the Applicants' claim that they are directly affected fails[3]. Indeed, this case suggests that the Applicants actually meet the standard.

> *Canada (Commissioner of Competition) v. United Grain Growers Limited* (2002), 19 C.P.R. (4th) 157 (Comp. Trib.)

33. The Tribunal's prior jurisprudence also makes it clear that it will not read-in requirements of "in relation to competition" or "pecuniary" interests when considering directly affected. Rather, the Tribunal acknowledged that each case must be decided on its facts:

(a) In *Trilogy Retail Enterprises L.P.*, potential bidders were noted to be "directly affected" by a consent order providing for the divesture of certain assets; and

(b) In *Canadian Pacific Ltd.*, the Tribunal noted that a broad range of persons are capable of being directed affected: customers, suppliers and other industry participants.

> *John Graham & Co. v. CRTC* (1975), 68 D.L.R. (3d) 110 (F.C.A.)
> *Commissioner of Competition v. Trilogy Retail Enterprises LP.* (2001), 14 C.P.R. (4th) 216 (Comp. Trib.)
> *Canada (Director of Investigation & Research) v. Canadian Pacific Ltd.* (1997), 74 C.P.R. (3d) 37 (Comp. Trib.)

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[3] In *John Graham & Co. v. CRTC*, the Federal Court similarly found that a minority shareholders was "directed affected" by an order concerning its involvement.

34. The cases referred to above predate the amendments to the Act and therefore relate to applications by third parties to intervene in section 92 proceedings before the Tribunal rather than applications under section 106(2). However, the third parties' interests being protected in the section 92 intervention cases are the same and the principles established in those cases are clearly applicable to the question of standing under section 106(2).

35. Based on the added inconvenience and "disruption" to the Tribunal and the Commissioner associated with the commencement of proceedings under section 106(2), the Commissioner argues in paragraph 24 of her Memorandum that standing under section 106(2) must require "something more" than is required to obtain intervener status on a pre-existing section 92 proceeding. The Applicants submit that the opposite is true.

36. On a section 92 application a potential intervener's rights may well be adequately protected without that party's participation in the proceedings. The denial of intervener status does not end the proceedings. The Tribunal will still consider the appropriateness of any section 92 order and the effect of the order on various interests.

37. Conversely, the denial of standing under section 106(2) ends the inquiry altogether. If standing is not granted, the Consent Agreement will not be subject to any review by the Tribunal. Basic principles of fairness and fundamental justice suggest that the scope of "directly affected" under section 106(2) should be at least as broad as, if not broader than, the scope of "affected" or "directly affected" as defined in the section 92 intervention jurisprudence.

38. As the Supreme Court of Canada held in *American Airlines*, the overriding considerations of fairness and fundamental justice work to avoid a narrowed and pinched reading of the rights of affected parties. To do otherwise raises concerns about the denial of natural justice and a breach of the *Canadian Bill of Rights*.

> *American Airlines v. Competition Tribunal*, [1989] 2 F.C. 88; aff'd [1989] 1 S.C.R. 236 ("*American Airlines*")

Canadian Bill of Rights, R.S.C. 1960

39. A broad interpretation of "directly affected" is consistent not only with the protection of the Applicants' legal rights, it is also consistent with the effective crafting of merger remedies.

40. It is trite to point out that merger remedies are a critical component of Canadian competition law and policy. In that regard, it is important that relevant parties, such as joint venture partners like the Applicants, who have a direct interest in the future viability and competiveness of the relevant businesses, are consulted or otherwise permitted a role in the process to craft effective merger remedies.

41. Ideally, such relevant parties will be consulted at an early stage, before a Consent Agreement is registered. However, in the event that a relevant party is not consulted, through inadvertence or otherwise, section 106(2) provides a mechanism for obtaining that party's input after the fact and modifying the terms of the Consent Agreement accordingly, if necessary.

Nature and Scope of "Directly Affected"

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

42. The Commissioner argues that the Applicants must show that they were directly affected "in relation to competition". This proposed interpretation of section 106(2) is untenable and contrary to the rules of statutory construction.

43. While the Commissioner cites the Supreme Court of Canada case in *Rizzo Shoes,* she does not apply it. In *Rizzo Shoes*, the Court stated:

> Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.
>
> *Re Rizzo & Rizzo Shoes*, [1998] 1 S.C.R. 27
> *Alberta v. Canada*, [1996] 1 S.C.R. 963 ("*Alberta*")

44. The Commissioner's interpretation ignores the plain words of the Act. The Act does not stipulate that one has to be directly affected in relation to competition. It is clear from the materials filed by the Respondents that the language of section 106 was carefully chosen. Parliament could have added these words, but it did not.

Alberta, supra

45. The Commissioner wants to read language into section 106(2) and specifically the words "in relation to competition." The law of statutory interpretation is clear, language is not to be read-in absent extraordinary circumstances:

> It is a basic principle of statutory interpretation that the court should not accept an interpretation which requires the insertion of extra wording where there is another acceptable interpretation which does not require any additional wording. ... If Parliament had intended [that] ..., it would have added the necessary phraseology to make that clear.
>
> *Friesen v. Canada*, [1995] 3 S.C.R. 103 ("*Friesen*")
> *Markevich v. Canada*, [2003] 1 S.C.R. 94

46. In its memorandum of argument, West Fraser also disagrees with the Commissioner's primary submission:

> Although it is clear that the Competition Tribunal has a specialized expertise and jurisdiction which relates to competition, it is not necessarily clear that a person whose material and clearly identifiable rights were obviously and demonstrably prejudice by a Consent Agreement could not avail themselves of section 106(2) unless that prejudice was in relation to competition.
>
> West Fraser, Memorandum of Argument, para. 34

47. Similarly, both the Commissioner and West Fraser suggest that "directly affected" must be in relation to some substantive, or pecuniary right. Clearly, some interest must be affected, from the case law cited by the Commissioner it is clear that a "legal interest" is sufficient. The section does not confine the nature of the interest and it should not be read to add the limitation "substantive" or "pecuniary".

Friesen, supra

48. The Commissioner wants to limit the rights of affected parties beyond the words of the Act. It is clear that access to justice is a fundamental right. It is also clear that the rights of affected parties cannot be derogated without clear and unequivocal language.

R. v. Domm (1996), 31 O.R. (3d) 540 (C.A.)
Leiriao v. Val-Bélair, [1991] 3 S.C.R. 349

49. Also, and in any event, the Applicants are directly affected in relation to competition given that the relative strengths and weaknesses of their new Joint Venture partner and their working relationship with that partner will clearly have an impact on the viability and the competitiveness of the Joint Venture going forward.

The Meaning of "Directly Affected"

50. It is neither possible, nor desirable, to attempt to codify the meaning of "directly affected". From the language used and based on the principles of statutory interpretation, the provision should be read to require:

(a) a direct causal link between the Consent Agreement and its terms on the one hand and the affect on the other; and

(b) the affect must be in relation to a legal interest. That interest does not necessarily have to be substantive, pecuniary or in relation to competition. There must simply be a legal interest that is affected.

51. In the jurisprudence, the term "directly affected" has been used to distinguish special or particular interest from that held by the public generally who may be affected.

United Grain Growers Ltd., supra

52. To go further unnecessarily limits the discretion of the Tribunal in future cases in circumstances which we cannot anticipate.

Question 1(d) - The Applicant's Affected Interests

As to the application of section 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 section 106(2):

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

(ii) Counsel 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").

53. The Applicants accept that at the hearing of the Application they must demonstrate that some legal interest has been directly affected. At this juncture, however, the test is whether it is plain and obvious that no interest of the Applicants have been directly affected.

54. It is the submission of the Applicants that the following interests have been directly affected:

(a) pecuniary and other business interests in the Mills and Associated Tenures and their rights in relation to competition;

(b) right to consultation and accommodation;

(c) the right of self-government; and

(d) their Aboriginal rights and title.

55. Also it is of no response to the Applicants that, as West Fraser suggests, the Applicants' interests are any less directly affected because of the formal corporate structure in which their interests in the Mills and Associated Tenures are held.

i. The Right to Consultation

56. The Commissioner entered into the Consent Agreement without consulting the Applicants. The Applicants assert a legal, constitutional right to consultation which was breached (and thereby directed affected) when the Commissioner entered into the Consent Agreement.

57. The honour of the Crown requires that First Nations rights and potential rights, which are protected by section 35 of the *Constitution Act*, 1982, be determined, recognized, and respected through a process of negotiation. The honour of the Crown gives rise to

a legal duty to consult and accommodate any First Nations' interests that may be adversely affected by conduct of the Crown.

Haida Nation v. British Columbia [2004], 3 S.C.R. 511 ("*Haida Nation*")

58. By forcing the termination of the joint venture relationship, the rights of First Nations and First Nations peoples of Burns Lake are unnecessarily jeopardized. The Commissioner was obliged, but failed to:

(a) consult with the First Nations of Burns Lake and their peoples;

(b) consider the interests of the First Nations of Burns Lake and their peoples; and

(c) accommodate the best interests of the First Nations of Burns Lake and their peoples.

Haida Nation, supra

59. The Commissioner has failed to act in accordance with the honour of the Crown and has effectively ignored the interests of the First Nations and First Nations peoples of Burns Lake as their claims affecting these interests are being negotiated in the British Columbia Treaty Process.

60. In this case, the honour of the Crown required that the Commissioner:

(a) act in the best interests of the First Nations and First Nations peoples of Burns Lake, as a fiduciary; and

(b) fulfil her duty to consult and accommodate the First Nations and First Nations peoples of Burns Lake where their interests may be adversely affected by the Consent Agreement.

Haida Nation, supra

61. The direct consequence of the Consent Agreement is that the Applicants' rights have been violated. These rights are guaranteed by section 35(1) of the *Constitution Act*, 1982.

Haida Nation, supra

ii. Right to Economic Autonomy and Self-Government

62. The First Nations of British Columbia have a constitutionally protected right to economic autonomy and self-government which has been recognized by the Courts.

Haida Nation, supra
Amended Statement of Grounds and Material Facts, para. 26

63. The Native Development Corporation fulfils a quasi-governmental role for its First Nations members by funding and delivering social and cultural programs, training and education to Aboriginal peoples.

Amended Statement of Grounds and Material Facts, para. 28

64. With the income from BFPL, the Native Development Corporation is able to fund and deliver social, economic, and cultural services to the First Nations peoples of Burns Lake, including employment counselling, skills training, education programs, small business loans, student programs, education bursaries, and the Burns Lake Aboriginal Day activities. These quasi-government programs are designed to foster self-sufficiency and ultimately help promote self-determination.

Amended Statement of Grounds and Material Facts, para. 31

65. The financial success and resources available to the Native Development Corporation to be able to pursue and promote Aboriginal self-sufficiency and economic autonomy is obviously dependent on its successful relationship and partnership with its joint venture partner in BFPL.

United Grain Growers Ltd., supra
Amended Statement of Grounds and Material Facts, para. 32

66. Over the years, the Native Development Corporation has been able to rely on this partnership that has developed to shape and direct the use and operation of the Mills and Associated Tenures to take into account, and advance the interests of, the First Nations of Burns Lake and their peoples.

Amended Statement of Grounds and Material Facts, para. 33

iii. Rights in Relation to Competition

67. The Applicants deny that they must demonstrate that they are directly affected in a way that is "related to competition" in order to maintain standing as "directly affected" persons in this application.

68. In any event, the accepted facts are that the Applicants are directly affected by the Consent Agreement in a manner that relates directly to competition.

Applicant's Reply, para. 9

69. Although the Native Development Corporation plays a part in the management of the Joint Venture, primary control and management over the Joint Venture rests with its Joint Venture partner, West Fraser.

Applicant's Reply, para. 11

70. The success or failure of the Joint Venture is directly linked to West Fraser's ability to compete in the highly competitive forest products business. As a large multi-national diversified forest products company, West Fraser brings with it the competitive synergies and strengths that are necessary to the continued success of the Joint Venture.

Applicant's Reply, para. 12

(a) Anti-Dumping Duties

71. One of West Fraser's significant competitive strengths is its low anti-dumping duty rate. A significant portion of the lumber produced by the Joint Venture is sold into the United States. Softwood lumber exports to the United States are currently subject to an anti-dumping duty ("ADD").

Applicant's Reply, para. 13

72. West Fraser's current ADD rate is the lowest ADD rate of all Western Canadian softwood lumber producers and is less than half the rate of any other producer.

Applicant's Reply, para. 14

73. BFPL and the Applicants benefit directly from this competitive advantage resulting from West Fraser's low ADD rate. This is a competitive advantage that the Applicants would not enjoy if they were forced to take on a new primary Joint Venture partner as a result of the Consent Agreement.

Applicant's Reply, para. 15

(b) West Fraser's Experience

74. West Fraser owns and operates sawmills in British Columbia and has extensive experience in the B.C. softwood lumber industry. Most importantly, West Fraser and its predecessor Weldwood have over 30 years experience managing and operating the Mills and Associated Tenures that are the subject of the divestiture under the Consent Agreement.

Applicant's Reply, para. 16

75. As a result of this 30 years of experience West Fraser is intimately familiar with all aspects of the business of the Joint Venture including the technical aspects of the particular facilities, the local trade practices, the local labour supply, the local timber resource, and the local community in general.

Applicant's Reply, para. 17

76. West Fraser's knowledge and expertise in managing the Mills and Associated Tenures has continually developed over time. This knowledge and expertise is not directly transferable. In this regard, any potential new Joint Venture partner would have to climb this steep learning curve over time just to bring the Joint Venture back to where it is today.

Applicant's Reply, para. 18

(c) Competitive Effect

77. For the purposes of this Reference it is a fact that there is no other forest products company in Canada or elsewhere that would be able to manage and operate the Joint

Venture as effectively, efficiently, cooperatively, profitably and competitively as West Fraser.

Applicant's Reply, para. 19

78. Given that the ability of the Joint Venture to compete in the forest products industry is directly related to the competitive abilities of its primary Joint Venture partner, it follows that any change in the primary Joint Venture partner will have a direct effect in relation to competition on the business of the Joint Venture and the Native Development Corporation.

Applicant's Reply, para. 20

(d) Pecuniary Interests Affected

79. The ability of the primary Joint Venture partner to work effectively with the Applicants and their ability to compete in the forest products industry will have a direct effect on the pecuniary interests of all of the Applicants.

Applicant's Reply, para. 21

80. The primary source of income for the Native Development Corporation is its share in the profits of BFPL through an annual dividend. In 2004, that dividend was approximately $2.8 million. A new Joint Venture partner will not be able to operate as efficiently, competitively and profitably. As a result, the annual dividend will be lower than otherwise expected and possibly eliminated altogether.

Applicant's Reply, para. 22

81. Any loss of income will have an immediate and real impact on the Applicants' pecuniary interests. This income funds the economic, social and cultural programs described in the Amended Statement of Grounds and Material Facts.

Applicant's Reply, para. 23

82. Furthermore, the principal value of the Applicants' stake in the Joint Venture will be negatively affected by such reduction in profitability and West Fraser's compelled departure from the Joint Venture.

Applicant's Reply, para. 24

83. Like any other joint venture, the value of the Joint Venture is a direct reflection of the individual partners to the joint venture. Joint venture partners are not fungible. Contrary to the position of the Commissioner, which has no basis in business reality, the value of the Applicants' stake in the Joint Venture is directly related to the ability, experience, reputation and, therefore, the identity, of its Joint Venture partner.

Applicant's Reply, para. 25

iv. Aboriginal Rights and Title

84. As well, the First Nations and First Nations peoples of Burns Lake's interest in the use of natural resources, in land rights and their economic autonomy will be affected because the Consent Agreement will result in, *inter alia*:

(a) the termination of the Native Development Corporation's successful 30 year relationship with West Fraser/Weldwood as the managing partner of the Mills and Associated Tenures;

(b) the transfer of control and management of the Mills and the Associated Tenures to person(s) unknown to the Native Development Corporation; and

(c) uncertainty, upheaval and change with respect to issues of operation, economics, management, and participation in the joint venture.

Amended Statement of Claim, para. 43

85. The Bands and the Chiefs are also directly affected by the Consent Agreement, *inter alia*, as:

(a) stakeholders in the Native Development Corporation which indirectly holds the relevant interests in the Mills and Associated Tenures;

(b) beneficiaries of the Native Development Corporation's programs; and

(c) First Nations and First Nations peoples with rights to economic autonomy, to self government, and to the lands and their use.

Amended Statement of Claim, para. 44

v. Conclusion on Question 1(d)

86. It cannot be said that it is plain and obvious that the Applicants have not been directly affected. The express terms of the Consent Agreement as well as the myriad of complex rights and interest involved cannot and should not be determined summarily.

Question 2: Evidence of SLC

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?

87. The facts for this reference are that:

(a) Not only did the Commissioner fail to file or otherwise provide to the Tribunal any evidence of a substantial lessening of competition prior to the registration of the Consent Agreement, the Commissioner had no such evidence in her possession prior to such registration; and

(b) Moreover, the Commissioner did not conduct an appropriate review to consider all relevant factors and their impact on competition prior to the registration of the Consent Agreement.

88. The crux of the test under section 106(2) of the Act and the only basis to challenge a consent order is that it "could not be the subject of an order of the Tribunal".

89. In turn, the jurisdiction of the Tribunal to issue orders in respect of mergers is based upon subsection 92(1) of the Act. That section provides no limit on the authority of the Tribunal to order any action where there is consent of the parties. Given that any

challenge under section 106(2) involves a Consent Agreement, the Tribunal always has the authority to make any order.

90. Obviously, this reading is circular and absurd. The absurdity is avoided by the introductory language in section 92 governing the jurisdiction of the Tribunal. It provides that the Tribunal can only make an order ***if*** it "finds that a merger or proposed merger prevents or lessens, or is likely to prevent or lessen, competition substantially in a trade, industry or profession".

91. Looked at differently, section 105(4) gives the consent agreement the authority of a Tribunal's order. In turn, the authority of the Tribunal to make any order arise from section 92 and is dependent on the presence of a substantial lessening of competition.

92. However, in the absence of a finding of the substantial lessening of competition, the Tribunal has ***no*** authority to make ***any*** order. Thus, if there is no evidence of substantial lessening of competition, there is no authority for the Tribunal to make an Order. In these circumstances, a challenge under section 106(2) is available.

93. This interpretation accords with the purposes of the Act: the Tribunal only has the authority to issue orders affecting third parties where a competition concern exists.

> *Director of Investigation and Research v. Palm Dairies Ltd.* (1986), 12 C.P.R. (3d) 425 (Comp. Trib.) ("*Palm Dairies*")

94. In this case, no evidence or argument with respect to a substantial lessening of competition was filed with the Tribunal Registrar or otherwise tendered by the Commissioner to the Tribunal.

95. In fact, the preamble to the Consent Agreement actually states that "West Fraser does not agree with the facts alleged and does not admit to any substantial lessening of competition". Moreover, it describes the question of whether there has been a substantial lessening of competition as only "the Commissioner's initial conclusions".

96. At best, the Consent Agreement appears to be based on "initial conclusions" of the Commissioner that are disputed by West Fraser and are not supported by any evidence before the Tribunal whatsoever.

97. In the absence of an evidentiary basis to support a finding of a substantial lessening of competition, there is simply no jurisdiction for the Consent Agreement forming an order since "the terms could not be the subject of an order of the Tribunal".

98. The fact that the parties have signed a consent agreement cannot remedy this jurisdictional issue since it has been long established that the consent of the parties to the jurisdiction of a Tribunal does not give a Tribunal jurisdiction that does not otherwise exist.

> As we stated to counsel at the hearing, the consent of parties to the exercise of jurisdiction of a tribunal does not give a tribunal jurisdiction, if such odes not otherwise exist. We appreciate counsel for the respondents concern that contesting the director's position that jurisdiction does exist in this case, leaves them open to a protracted appeal process through the courts and the attendant delay which, from a business point of view, they do not wish to tolerate. Nevertheless, the tribunal does not consider it appropriate to automatically approve requested orders when there are issues which in its view require a fuller consideration. We would note that there are procedures for expedited appeals through the courts if the director and the respondents agree thereto.
>
> *Palm Dairies, supra* at 429

99. By failing to have or to file any evidence or arguments upon which the Tribunal could have made a finding and asserted jurisdiction, the Consent Agreement can have no force or effect.

PART IV — ORDER SOUGHT

100. The Applicants respectfully request an order answering the questions as follows:

101. 1(a)-(c) It is neither possible, nor desirable, to attempt to codify the meaning of "directly affected". From the language used and based on the principles of statutory interpretation, the provision should be read to require:

(a) a direct causal link between the Consent Agreement and its terms on the one hand and the affect on the other; and

(b) the affect must be in relation to a legal interest. That interest does not necessarily have to be substantive, pecuniary or in relation to competition. There must simply be a legal interest that is affected.

The term "directly affected" is used to distinguish the general public (who may be indirectly affected) and those with a specific interest.

1(d) It is not plain and obvious that the Applicants fail to meet the directly affected test.

2. There must be evidence at the time of the consent agreement to support a finding that the merger is likely to prevent or lessen competition substantially. Without such evidence, there is no jurisdiction for an Order of the Tribunal.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

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DATED at Toronto this 7th day of December, 2005.

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File No. CT-2004-013

COMPETITION TRIBUNAL

BETWEEN:

BURNS LAKE NATIVE DEVELOPMENT CORPORATION ET AL.,

Applicants.

AND:

COMMISSIONER OF COMPETITION ET AL.,

Respondents.

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