Court File No. CT-2004-013
Proceeding 2

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 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 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 RESPONDENTS WEST FRASER TIMBER CO. LTD. and WEST FRASER MILLS LTD.

(Reference re Section 106 of the Competition Act)

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PART I
OVERVIEW

1. This Application under section 106(2) of the *Competition Act* seeks to challenge the disposition of West Fraser's interest in certain assets – essentially two sawmills and associated assets in the Burns Lake area of British Columbia ("the Assets") – agreed to between West Fraser Timber Co. Ltd. and West Fraser Mills Ltd. (collectively, "West Fraser"), and the Commissioner of Competition (the "Commissioner").

> **Amended Statement of Grounds and Material Facts, Schedule A to the Amended Notice of Application of Burns Lake Native Development Corporation et al. dated February 11, 2005, at paras. 1-2.**
>
> **Memorandum of Argument of the Commissioner of Competition (Reference re. Section 106 of the *Competition Act*) dated April 1, 2005, at para. 8.**
>
> **Response of the Commissioner of Competition dated April 18, 2005 at paras. 21-25.**

2. The persons seeking to challenge this disposition are the Applicant Burns Lake Native Development Corporation ("BLNDC"), a not-for-profit corporation registered in British Columbia which owns approximately 15.4% of the outstanding shares of Babine Forest Products Limited ("Babine"), which in turn has a 68.4% interest in companies which own, directly or indirectly, the sawmills; the Applicant Bands (Lake Babine Nation, Burns Lake Band and Nee Tahi Buhn Indian Band) , which plead that they own BLNDC; and certain individuals who are the Chiefs of the Applicant Bands (Emma Palmantier, Robert Charlie and Ray Morris) (collectively, the "Applicants").

> **Amended Statement of Grounds and Material Facts, Schedule A, *supra* at paras. 4-5, 7-12, 15-16, 18.**
>
> **Memorandum of Argument of the Commissioner of Competition, *supra*, at paras. 10-13.**
>
> **Response of the Commissioner of Competition, *supra* at paras. 12-20.**

3. That is, the disposition of West Fraser's interest in the Assets is being challenged by a company, BLNDC, which has a minority interest in a second company (Babine) which in turn has an interest in companies which, in their turn, own the sawmills and associated assets, but BLNDC

has no ownership of West Fraser's interests in the Assets, which is what is being divested. The disposition is also being challenged by individuals and associations of individuals who reside in the area of the Assets to be disposed of or who are shareholders of BLNDC.

> **Amended Statement of Grounds and Material Facts, Schedule A,** ***supra*** **at paras. 5, 7, 10-11, 29.**
>
> **Memorandum of Argument of the Commissioner of Competition,** ***supra*****, at paras. 8, 11-13.**
>
> **Response of the Commissioner of Competition,** ***supra*** **at paras. 1, 27-34.**

4. West Fraser has the legal right to dispose of its interest in the Assets without the permission or approval of any of the Applicants, subject to compliance with any rights of first refusal which the Applicant BLNDC may have under contracts to which West Fraser and BLNDC are parties. West Fraser has not proposed to breach or fail to comply with such contracts.

> **Memorandum of Argument of the Commissioner of Competition,** ***supra*** **at para. 37.**
>
> **Response of the Respondents West Fraser Timber Co. Ltd. et al. dated March 30, 2005, at para. 10.**
>
> **Response of the Commissioner of Competition,** ***supra*** **at paras. 7, 30-31.**

5. The Applicants do not contradict any of the above facts.

6. The Applicants seek to challenge the Consent Agreement on the basis that they were owed certain duties by the Commissioner in relation to the Consent Agreement which duties the Commissioner failed to discharge. West Fraser did not, during the negotiation of the Consent Agreement, and does not presently, believe that the duties identified by the Applicants exist. Certainly, these are not duties owed by West Fraser.

> **Amended Statement of Grounds and Material Facts, Schedule A,** ***supra*** **at paras. 3, 46-73.**
>
> **Response of the Respondents West Fraser Timber Co. Ltd. et al.,** ***supra*** **at para. 16.**
>
> **Response of the Commissioner of Competition,** ***supra*** **at paras. 1-2, 4, 6, 35-44.**

7. In addition to the lack of any material, clearly identifiable rights of any of the Applicants which have been breached, there is an overriding pressing practical problem for West Fraser related to the Application, in that with the Application outstanding West Fraser is hindered in its ability to divest of its interest in the Assets it has agreed with the Commissioner to divest. This is both a legal and a commercial difficulty, in that the Consent Agreement contemplated a specific time for West Fraser's interest in the Assets to be sold and that time is being reduced while this Application is outstanding. West Fraser entered into the Consent Agreement in a good faith effort to resolve the Commissioner's concerns, and did not breach any duty it owed in doing so. With the present Application outstanding, however, West Fraser's rights are being prejudiced, through no fault of its own. Therefore, expeditious resolution of the Application will limit the prejudice which the Application is causing West Fraser.

Response of the Respondents West Fraser Timber Co. Ltd. et al., *supra* at para. 21.

PART II
ISSUES

8. The questions raised in this Reference are as follows:

Question 1

(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?

(d) 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, a body corporate established in 1974 (the "Corporation");

(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")?

Question 2

At the time a consent agreement is registered under section 105 of the Act, are 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?

PART III
ARGUMENT

9. **Question 1**

(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?

10. It is submitted that, in the context of a section 106(2) application, the "directly affected" interest must be a material and clearly identifiable right which is obviously and demonstrably prejudiced

by the Consent Agreement. The new Consent Agreement regime was intended to provide certainty to, and improve the efficiency of, the Commissioner's process and so the term "directly affected" should be interpreted in order to provide certainty and efficiency to the merger review process.

The New Consent Agreement Regime

11. The conclusion that the nature of the affect referred to in section 106(2) must be material and clearly identifiable follows from the goal of the recent restructuring of the *Competition Act*, in 2002, to replace Consent Orders with Consent Agreements.

12. The time, cost and uncertainty of consent proceedings under the prior regime prompted former Director of Investigation and Research Calvin Goldman to openly question its continued viability as a practical remedy for difficult merger cases:

> [The developments in *Imperial Oil*] have generated considerable discussion in the Canadian legal and business communities about the procedures and burden placed on applicants for a consent order...a question that is currently being discussed is what are the consequences of this type of potentially more litigious proceeding in relation to the continued and realistic use of the consent order vehicle as a remedy for problematic merger cases.
>
> **C. Goldman, "A Perspective on Merger Review and Other Current Topics Under the Competition Act" (1991) 29 Alta. L. Rev. 171, at p. 182 [Tab 1].**
>
> **A.N. Campbell, H. Janisch & M. Trebilcock et al., "Rethinking the Role of the Competition Tribunal" (1997) 76 Can. Bar Rev. 297, at pp. 312-313: "Calvin Goldman indicated after *Palm Dairies* and *Imperial Oil* that as Director of the Bureau he could not persuade merging parties to accept consent order resolutions...The time, cost and uncertainty of consent proceedings has also given the Director a powerful incentive to resolve reviewable practice complaints through undertakings" [Tab 2].**

13. In addition, the time-consuming, uncertain and expensive nature of the highly formalized prior consent order regime has been commented on by practitioners in the area, as well as economists and academics:

> With respect to consent order hearings, the early decisions, culminating with the judgment in the Imperial Oil proceedings [citation omitted] were so offensive to all parties concerned that the whole procedure was abandoned for several years. Part of the

> problem...was that counsel for the Director encouraged the Chair to let in all intervenors except the Liberal Party. That led to a circus. A second major problem was the idea that the parties had agreed on the problem areas and had alleged that the consent order would fix them. Then the intervenors could adduce evidence and argument to show that the proposed order would not fix all the problems. Again the Director's counsel did not attack this approach, which the Tribunal adopted.
>
> This is not an expeditious or sensible way to proceed.
>
> **W.M.H. Grover, "Pricing Practices: The VanDuzer Report" (Insight Research Roundtable on *Competition Act* Amendments, Insight Information Co., 25 May 2000), at p. 8 [Tab 3].**
>
> The deficiencies in the Canadian merger review process are, in our view, serious. The formalization of merger review proceedings before the Canadian Competition Tribunal has led to two sets of substitution effects, both of which threaten to marginalize the Tribunal and undermine the role contemplated for it by most proponents of an expert tribunal...the formalization of the Tribunal's proceedings and the attendant costs and delays have caused parties to resolve as many issues as possible informally with the Competition Policy Bureau...
>
> ...the processes of the Tribunal need to be radically reconceived...
>
> **M. Trebilcock & L. Austin, "The Limits of the Full Court Press: Of Blood and Mergers" (Winter 1998) XLVIII: 1 U.T.L.J. 1, at pp. 55-56 [Tab 4].**
>
> The business and legal communities have, in the past, expressed concern over the length of time involved in consent orders.
>
> **M. Sanderson & A. Wallwork, "Divestiture Relief in Merger Cases: An Assessment of the Canadian Experience" (1993) 38 McGill L.J. 757, at p.777 [Tab 5].**

14. Sections 105 and 106 of the *Competition Act* reflected the introduction by Parliament of a regime designed to more efficiently resolve competitive issues arising under the *Competition Act* by promoting Consent Agreements. This was in contrast to the substantive review of proposed Consent Orders by the Tribunal previously required, which extended the time within which resolutions agreed to between the Commissioner and private parties could be implemented, and exposed the agreement to attack by those who could secure intervention status before the Tribunal.

15. In *Canada (Director of Investigation and Research) v. Air Canada*, the challenges faced by the Competition Tribunal in attempting to define the role of interveners under the prior consent order regime while simultaneously balancing the statutory requirements of informality, expedition and fairness is evident in the following comments of Strayer, J., on behalf of the Tribunal:

> It has typically taken at least six months in this Tribunal from the time an application is filed to have a hearing and sometimes it has taken much longer. If the Tribunal is to have any relevance to the present problem, regardless of what decision the Tribunal may ultimately make, it must be allowed to act much more quickly – as quickly as requirements of basic fairness to the parties will permit...
>
> This is the background against which I have tried to balance the statutory requirements of informality and expedition with the requirements of fairness also prescribed by the statute. In doing so, I have had to consider very seriously to what extent intervenors should be allowed to prolong and complicate the process.
>
> ***Canada (Director of Investigation and Research)* v. *Air Canada* (1992), 46 C.P.R. (3d) 184 (Comp. Trib.), at p. 187 (*"Air Canada #2"*) [Tab 6].**

16. The intention with the amendments in 2002 was to statutorily circumscribe such challenges, as expressed in the comments of Tim Kennish, Chair, National Competition Law Section to the Standing Committee on Industry, Science and Technology on behalf of the Canadian Bar Association during the hearings on Bill C-23:

> 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...
>
> One procedural area that has historically plagued enforcement is the problem on consent orders, and I think that's been effectively fixed in this bill. It's an important change and it will allow things to get resolved more quickly.
>
> **Standing Committee on Industry, Science and Technology Evidence, October 23, 2001 [Canadian Bar Association Comments], at 0915, 1130 [Tab 7].**

17. This view that the existing consent process was problematic and in need of reform was echoed in comments on Bill C-23 provided to the Committee by Professor Thomas Ross:

> There has been concern raised that the consent-order process has not worked the way we intended...The tribunal saw fit to use its powers to reopen these things a little more readily than we had hoped, and that of course sent a chill through the community. People are much less willing to go with the commissioner to the tribunal on consent orders.
>
> **Standing Committee on Industry, Science and Technology Evidence, October 23, 2001 [Professor Thomas W. Ross Comments], at 0925 [Tab 7].**

18. Furthermore, several practitioners in the area commented on the problems inherent in the prior consent order procedure in the context of the proposed new consent agreement regime provided by Bill C-23:

> [Amendments to the Competition Act that allow the Commissioner to enter into consent agreements with persons who are the subject of a Tribunal application] replaced the prior consent order application procedure that often resulted in consent orders being the subject of protracted litigation at the behest of third party interveners.
>
> **R. E. Kwinter & N. Joneja, "Competition law remedies in Canada" (2004) *The Antitrust Review of the Americas 2004*, at p. 87 [Tab 8].**

19. During the Standing Committee Hearings into Bill C-23 the then Commissioner of Competition commented on the ability of a third party to apply to have one or more terms of a private access consent agreement rescinded. In this context, the Commissioner's comments suggest that such an ability is ultimately circumscribed by the Tribunal's authority to impose remedies:

> [I]t has to be something that is within the four comers of the tribunal's authority. It's something the tribunal could have done, but we can save ourselves the necessity of going through a trial if both parties agree, "Yes, this is a fair resolution." We do it, we sign it, we register it, it becomes effective.
>
> Now if it affects a third party and somebody gets sideswiped by it whom we didn't think of – unlikely, but it's this kind of ... that third party should have in our view a right to have a term rescinded as of right, if we did something the tribunal couldn't have done.
>
> If the tribunal could have done the same thing, then the case is exactly what we have here: we have something that is within the power of the tribunal to do...
>
> What you want to have here is control. If there's something that's being done that is really outside the purview of the Competition Tribunal, then it shouldn't be done by consent decree either, because the whole idea is to substitute a consent decree for a full trial. But the outcome should be something that could have been ordered by the tribunal.
>
> **Standing Committee on Industry, Science and Technology Evidence, November 7, 2001 at 1720 [Tab 9].**

The Language "Directly Affected"

20. In addition to the statutory reform goals, as evidence of the type of affects which are relevant in a section 106(2) application, it is also necessary to look to the statutory language. Subsection 106(2) of the *Act* provides that 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.

> *Competition Act*, R.S.C. 1985, c. C-34, s. 106(2) [Tab 10].

21. The results of previous intervention applications under section 9(3) of the *Competition Tribunal Act* ("CTA") are instructive. Section 9(3) provides for intervention by third parties at the Tribunal, stating that 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. That was a lower statutory formulation, a more open intervention test, than is articulated in section 106(2) of the *Competition Act*.

> ***Competition Tribunal Act*, R.S.C. 1985, c. 19 (2nd supp.), as am., s. 9(3) [Tab 11].**

22. It should be noted even within that lower statutory standard, that in *Canada (Director of Investigation and Research)* v. *Air Canada*, the Tribunal held that the term "affects" in section 9(3) "must be read as meaning 'directly affects'".

> ***Canada (Director of Investigation and Research)* v. *Air Canada* (1992), *supra* [Tab 6].**

23. Previously, the Tribunal had taken a broader interpretation of that term, stating that section 9(3):

> [I]mposes a very low threshold for the granting of such leave. The subsection does not require that such "person" have an "interest", whether direct or indirect. By implication it requires only that there be some matter involved which "affects that person", as it is only in respect of such a matter that an intervener can "make representations".
>
> We have little difficulty in finding that there are matters involved in these proceedings which will affect the bodies seeking leave to intervene. Each of them has identified matters potentially in issue which would affect them or those they represent.
>
> ***Canada (Director of Investigation and Research)* v. *Air Canada et al.* (1988), 23 C.P.R. (3d) 160 (Comp. Trib.); rev'd [1989] 2 F.C. 88 (C.A.); rev'd [1989] 1 S.C.R. 236, at p. 164 [Tab 12].**

24. In rejecting this earlier interpretation of the meaning of "affects" in *Air Canada #2*, the Tribunal explained its reasons in the following terms:

> Firstly, I did not attempt then to qualify the word "affects" as it was unnecessary to do so. Secondly, the statement was made in the context of a decision in which I understood s. 9(3) to restrict interveners to presenting argument only. This led me to think that Parliament intended that interventions could more readily be allowed since the consequence would not be very burdensome on the tribunal's process and thus would be

> consistent with the "expeditious" proceedings required by s. 9(2). That interpretation of the word "representations" in s. 9(3) was rejected on appeal [citations omitted]. The implication of the Federal Court of Appeal decision seems to the be that if interveners are admitted then, because the tribunal must consider giving them the right to present evidence relevant to their intervention, the normal requirements of fairness may well oblige the tribunal to allow them to present such evidence if it has not otherwise been presented to the tribunal. A broader role of this sort should not, in my view, be automatically accorded to anyone who as a member of the public may have strong views on the appropriate outcome of the case but can demonstrate no direct effect on him or her that is different from all or a large segment of the public at large. In the present case, if one accepts the thesis of the Director, it is arguable that the decision on this application will "affect" indirectly a vast number of Canadians, at least all of those who travel by air. But it could not have been contemplated that the tribunal is obliged to admit interveners on such a scale.
>
> ***Canada (Director of Investigation and Research)* v. *Air Canada* (1992), *supra*, at pp. 187-188 [Tab 6].**

25. Thus, even in the looser test of section 9(3) of the *Competition Tribunal Act*, the Tribunal concluded that the intervener must have some sort of particular or special impact to be "affected" within the meaning of the statute.

26. In *Canada (Commissioner of Competition)* v. *United Grain Growers*, the parties consented to Saskatchewan Wheat Pool's ("SWP") intervention in section 9(3) of the *Competition Tribunal Act*. That is, the issue of intervention, and as to whether or how, the SWP was "affected" was not contested. The Tribunal noted:

> SWP has a 30 percent interest in the Pacific terminal facilities in Vancouver. Therefore, its economic interests could be affected by the respondent's decision regarding divestiture. However, if the respondent were to divest the UGG facility or reach an agreement with SWP concerning the divestiture either of its 70 percent interest in the Pacific terminal facility or concerning divestiture of the Pacific 1 facility, SWP would not need to appear before the Tribunal to make representations about its contractual or proprietary interests.
>
> ***Canada (Commissioner of Competition)* v. *United Grain Growers*, 2002 Comp. Trib. 21, at para. 5 [Tab 13].**

27. Although the Tribunal permitted SWP to intervene, it is uncertain whether its decision was motivated by the preceding argument or the fact that the parties consented to the intervention. The Tribunal did, however, define the interest of SWP as limited to ensuring "...that its proprietary or contractual interests in the Pacific terminal are not affected adversely by an order this Tribunal might make."

> ***Canada (Commissioner of Competition)* v. *United Grain Growers, supra.*, at para. 6 [Tab 13].**

28. In the present case, the Applicants do not allege that their proprietary or contractual interests have been affected by the Consent Agreement. Rather, they argue that their desire to retain a preferred partner (West Fraser) has been affected. This is neither a proprietary nor a contractual interest. Proprietary and contractual interests may be interests which are sufficiently material and clearly identifiable so as to meet an "affected" or "directly affected" test. The desire to retain a preferred partner, it is submitted, is not.

29. This issue of directly affected has been considered in the context of intellectual property rights, which is in some respects similar to competition law rights. In *Pharmascience Inc.* v. *Canada (Commissioner of Patents)*, Pharmascience sought judicial review of a decision of the Commissioner of Patents to grant GD Searle a late entry allowance when Searle missed the date for national entry of an international patent. At the same time, Pharmascience was developing formulations for its new product and was monitoring the Searle application. Pharmascience was concerned that it would be sued by Searle for infringement and brought an application for judicial review. In dismissing the application, the Court stated:

> In my view, the only person "directly affected" by decisions taken during the prosecution of a patent application before the Canadian Patent Office is, generally, the patent "applicant" as defined in section 2 of the Patent Act. In my opinion, like in Re Canadian Telecommunications Union and Canadian Brotherhood of Transport & General Workers et al. (1981), 126 D.L.R. (3d) 228, Pharmascience is only affected indirectly by the decisions which merely create a situation which may, eventually, affect Pharmascience. Indeed, there is not enough evidence on the record to show that Pharmascience is directly affected by the decision of the Commissioner of Patents.
>
> ***Pharmascience Inc.* v. *Canada (Commissioner of Patents)* (1998), 85 C.P.R. (3d) 59 (F.C. T.D.), at pp. 64-65 [Tab 14].**

30. This decision reflects the Court of Appeal's reasoning in the earlier case *Pfizer Canada Inc.* v. *Canada (Minister of National Health and Welfare)*, where Pfizer sought review of the Minister's decision to issue Apotex a Notice of Compliance for a new drug. Pfizer argued that it was "directly affected" because its property interests had been infringed both by Apotex's new

product monograph and by the supporting data for Apotex's application for a notice of compliance. In rejecting this argument, the Court of Appeal stated:

> Vis-à-vis the Minister's decision, the interest of Pfizer's affected was a competitive rather than a property interest: Rothman's of Pall Mall Canada Ltd. v. Minister of National Revenue, [1976] 2 F.C. 500; Canadian Telecommunications Union v. Canadian Brotherhood of Railways, Transport and General Workers (1982), 42 N.R. 243. The Minister's decision did not directly affect property rights, certainly not Pfizer's property rights. If Pfizer's property was directly affected at any time, it was not by the Minister. The applicant is not therefore a party directly affected by the ministerial decision, and so does not qualify for standing under subsection 28(2).
>
> ***Pfizer Canada Inc.* v. *Canada (Minister of National Health and Welfare)*, [1986] F.C.J. No. 721 (C.A.), at para. 4 [Tab 15].**

31. Given the intention of Parliament in establishing the expedited Consent Agreement process, as articulated above, and given the statutory requirement that in order to bring an application under section 106(2) a person must be "directly affected" – a higher statutory formula than is required under section 9 of the *Competition Tribunal Act* to intervene in a proceeding – it is submitted that for a person to be "directly affected" with respect to section 106(2) they must have a material, clearly identifiable right which is obviously and demonstrably prejudiced by the Consent Order.

32. **Question 1**

(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?

33. The question of whether the affect must be "in relation to competition" is complex. It may well be the case that the affect must relate to competition, given the Tribunal's mandate and expertise, but in our submission it is not necessary to come to a determination on this issue in order to deal with the subject Application.

34. 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 prejudiced by a Consent Agreement could

not avail themselves of section 106(2) unless that prejudice was in relation to competition. However, if the prejudice need not necessarily be in relation to competition, this further highlights the need for such prejudice to be both material and clearly identifiable. Otherwise the Tribunal would be asked to undertake a review which it is unsuited to pursue.

35. Further, of course, the only challenge available under section 106(2) arises if the terms of the Consent Agreement could not have been the subject of an Order of the Tribunal. Such a situation could only arise if a third party's clearly identifiable and material rights were obviously and demonstrably prejudiced. In such cases the Tribunal, although it has particular expertise in competition issues, may be able to adjudicate and address such a concern. Absent such a clear, material prejudice, however, the matter would not be appropriate for the Competition Tribunal to address.

> ***Competition Act*, s. 106(2)**, *supra* **[Tab 10]**: "*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].**"

36. As is implicit in the above, the affect referred to in section 106(2) must, at minimum, be to the Applicants' substantive rights and/or pecuniary interests.

37. **Question 1**

(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?

38. In our submission the affect which is subject to an application under section 106(2) must of necessity be as a consequence of the Consent Agreement. That is axiomatic from the language of section 106(2), and it is logical because the right to apply is given only because of the Consent Agreement.

39. With respect to the need for the direct affect to be imminent and real, rather than hypothetical or speculative, we submit that a hypothetical, speculative or indirect affect on one's rights cannot be the subject of a valid complaint.

> ***Re Canadian Telecommunications Union and Canadian Brotherhood of Transport & General Workers et al.* (1981), 126 D.L.R. (3d) 228 (F.C.A.), at p. 233: "In my opinion the applicant is only affected indirectly by that decision which merely creates a situation that may, eventually, affect the applicant" [Tab 16].**

40. **Question 1**

(d) 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, a body corporate established in 1974 (the "Corporation");

(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")?

41. For the reasons described above, the Applicants have not disclosed in their Notice of Application facts which, if proved, establish that they are "directly affected" for the purposes of subsection 106(2). BLNDC has no direct interest in any asset in issue. BLNDC holds a minority interest in a second company, Babine, which, indirectly, owns certain assets, but none of BLNDC's assets, including none of its shares in Babine, nor any of its contractual rights, are affected, let alone directly affected. by the Consent Agreement. The Applicant Bands' and Chiefs' interests in the

divestiture contemplated by the Consent Agreement are even less direct than BLNDC's interests, if any.

42. Certainly, West Fraser had not considered any of these parties as having standing to challenge the Consent Agreement at the time the Consent Agreement was negotiated.

Question 2

At the time a consent agreement is registered under section 105 of the Act, are 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?

43. It is submitted that the answer to this question must be no. Under the previous statutory arrangement, in which the Tribunal was permitted to exercise its discretion in determining whether a proposed Consent Order effectively remedied the anticompetitive concerns raised by the Commissioner, it was necessary for the Tribunal to be given evidence of those anticompetitive concerns.

> ***Canada (Commissioner of Competition)*** **v.** ***Ultramar Canada Inc.*** **(2000), 63 C.P.R. (3d) 161 (Comp. Trib.) [Tab 17].**

> ***Director of Investigation and Research*** **v.** ***Palm Dairies Ltd.*** **(1986), 12 C.P.R. (3d) 425 (Comp. Trib.) [Tab 18].**

44. Even then, however, a full evidentiary record was not required.

> ...we understand that the Bureau considers that it needs to assemble a very wide scope of information and evidence before filing an application for a consent order because of a concern that the Tribunal may engage in a wide-ranging examination and expect the Bureau to provide evidence of underlying premises and conclusions, such as the basis for defining the relevant product and geographic markets. However, in light of the Tribunal's indication in a number of cases that it will presume the substantial lessening of competition alleged by the Commissioner, and the indication in *Chapters* that the parties should exercise due diligence in bringing the matter to the Tribunal promptly after an agreement is reached, in our view, the Bureau is imposing an unnecessary burden and

> delay on the parties. Furthermore, the tremendous cost and delay imposed on the parties risks undermining the incentives to engage in the consent order process in the first place.
>
> **J. Bodrug & C. Margison, "The Consent Order Process: Post-*Ultramar* and Looking Ahead" (Spring/Summer 2002) 21:1 Can. Comp. Record 59, at p. 67 [Tab 19].**

45. It was precisely due to dissatisfaction with these previous regime that a new regime, one which explicitly contemplated that the Tribunal would not exercise such discretion, was established.

> **Standing Committee on Industry, Science and Technology Evidence, October 23, 2001, *supra* [Tab 7].**

46. Consent Agreements are now just that – agreements between the Commissioner and a party. Under such a statutory scheme it would be inappropriate for the Commissioner to have to file a statement of his or her anticompetitive concerns – let alone "evidence to substantiate" such concerns. Indeed, if evidence to substantiate such concerns did have to be filed, this would significantly inhibit the Commissioner and the merging parties from reaching a compromise solution prior to the Commissioner having completed her entire inquiry. This cannot have been the intent of Parliament, as it is entirely inconsistent with the concept of a negotiated compromise resolution. Further, it undermines the role of the Commissioner as the guardian of the public interest in respect of merger matters, and would invite private applicants under section 106(2) to argue that no remedy was necessary at all, or that the remedy sought went too far. This is inconsistent with the scheme of the *Competition Act*, when giving this role to the Commissioner. The appropriate role for an application under section 106(2) is, as noted above, very limited.

47. Although the Commissioner must negotiate the terms of consent agreements in a *bona fide* manner based on the facts and evidence available to her at the time, she is not required to establish the entire evidentiary framework as a pre-requisite to such negotiations. Such a requirement should only be imposed by clear and precise statutory language which is absent in this case. The framework of merger reviews clearly places a premium on timely and predictable outcomes which can only be achieved if both sides are able to seek satisfactory compromises in

the absence of a completed investigation. As a result, it could not have been contemplated that the Commissioner would be required to effectively prove its case by filing with the Tribunal evidence that would justify the consent agreement outcome.

PART IV
ORDER REQUESTED

48. For the foregoing reasons, West Fraser respectfully requests that the questions in the Reference be answered as follows:

49. Question 1

(a) The nature and scope of the interest sufficient to satisfy the "directly affected" requirement for standing in subsection 106(2) of the *Act* must be a material, clearly identifiable right which is obviously and demonstrably prejudiced by the Consent Agreement.

(b) We do not believe it is necessary to determine if an applicant under subsection 106(2) must be "affected" in relation to competition. An Applicant, however, must be materially affected in relation to a clearly identifiable substantive right and/or pecuniary interests.

(c) An applicant under subsection 106(2) must be affected "directly" in that the alleged effect must be:

(i) suffered (or threatened to be suffered) by the applicant as a consequence of the Consent Agreement; and

(ii) imminent and real; and not hypothetical or speculative.

(d) The Applicants have not disclosed in their Notice of Application facts which, if proved, establish that they are "directly affected" for the purposes of subsection 106(2).

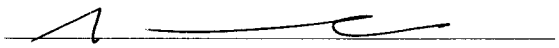
50. Question 2

At the time a consent agreement is registered under section 105 of the Act, 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.

51. Further, West Fraser respectfully requests that the Notice of Application herein be struck, the Application dismissed.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

Dated at Toronto this 22nd day of November, 2005.



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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 RESPONDENTS

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