Competition Tribunal Tribunal de la Concurrence

Reference: *Burns Lake Native Development Corporation et al. v. Commissioner of Competition and West Fraser Timber Co. Ltd. et al.* 2005 Comp. Trib. 19
File No. CT2004-013
Registry Document No.: 0030

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

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*;

AND IN THE MATTER OF a motion by the Applicants to strike the Reference of the Commissioner of Competition filed April 4, 2005.

B E T W E E N:

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

The Commissioner of Competition, West Fraser Timber Co. Ltd. and West Fraser Mills Ltd.
(respondents)

Date of hearing: May 18, 2005
Member: Simpson J. (Chairperson)
Date of Order: June 1, 2005
Order signed by: Simpson J.

APPLICANTS' MOTION TO STRIKE COMMISSIONER'S REFERENCE
ORDER AND REASONS FOR ORDER

[1] This motion is brought by Burns Lake Native Development Corporation et al. (the "Applicants") for an order to strike the notice of reference filed by the Commissioner of Competition (the "Commissioner") in the context of the Applicants' application to rescind or vary a consent agreement (the "Consent Agreement") made between the Commissioner and West Fraser Mills Ltd. and West Fraser Timber Co. Ltd ("West Fraser").

I. THE PROCEEDINGS TO DATE

The Consent Agreement

[2] On December 7, 2004, the Commissioner and West Fraser entered into the Consent Agreement in connection with West Fraser's acquisition (the "Merger") of Weldwood of Canada Limited ("Weldwood"). Under the terms of the Consent Agreement, West Fraser was obliged to divest, among other things, its post-merger 89.8% interest in the Burns Lake Mill, the Decker Lake Mill, certain timber harvesting rights, and associated assets ("Mill Assets and Timber Rights").

[3] The Consent Agreement was registered by the Tribunal on December 7, 2004, at which time it acquired the same force and effect as if it were an order of the Tribunal.

The Applicants' Application to rescind or vary

[4] On February 3, 2005, the Applicants filed a Notice of Application for an order to rescind or vary the Consent Agreement, under subsection 106(2) of the *Competition Act*, R.S.C. 1985, c.C-34 as amended in 2002 (the "Act"). The Notice of Application and the Statement of Grounds and Material Facts were both amended on February 11, 2005, to add West Fraser as a Respondent. The terms "Section 106 Application" and "Statement of Grounds" will be used to refer to the amended versions of the documents.

[5] Without dealing in detail with the underlying corporate structure, it is fair to say that in broad terms the Applicants are aggrieved because they participated as minority shareholders in a satisfactory long term joint venture with a partner who operated the Mill Assets and Timber Rights to their satisfaction. As a result of the divestiture requirement in the Consent Agreement, they are faced with the prospect of a new unknown joint venture partner.

[6] The Applicants submit that the Consent Agreement must be rescinded or varied to take into account the Applicants' various interests in the divestiture of the Mills Assets and Timber Rights. These interests include their Aboriginal land claims. The grounds for their position are described in the Statement of Grounds in the following terms:

> (i) subsections 105(3) and (4) of the *Competition Act*, which permit directly affected persons to be subject to and/or impacted by an order of

the Tribunal without a fair hearing, are contrary to the *Canadian Bill* of *Rights* and inoperative;

(ii) by entering into the Consent Agreement, the Commissioner has breached her duties to the First Nations and the First Nations peoples of Burns Lake, including her fiduciary duties, duty to consult, and duty to accommodate; and

(iii) the Consent Agreement could *not* be the subject of an order of the Tribunal. There is no evidentiary record on which to find that there has been a substantial lessening of competition and, in the absence of such evidence, there is no basis in law for a Tribunal to order the divestiture of the Mill Assets and Timber Rights.

The Reference

[7] On April 4, 2005, the Commissioner filed a Notice of Reference pursuant to subsection 124.2(2) of the Act (the "Reference"). The Reference consists of three questions ("Questions"), which will be presented in their entirety later in these Reasons. Basically, the Commissioner is asking the Tribunal (i) to determine the scope and meaning of "directly affected person" and whether the term applies to the Applicants, (ii) whether it is necessary at the time a consent agreement is registered with the Tribunal to file evidence of substantial lessening or prevention of competition, and (iii) whether the Tribunal is authorized under subsection 106(2) to engage in a *de novo* review of the impact of a merger.

The Case Conference

[8] A case conference was held on April 13, 2005. At that time, the presiding judicial member indicated that although she considered a reference to be the appropriate procedure for addressing whether the Applicants are directly affected, she would be willing to entertain a motion by the Applicants alleging that the contents of the Questions were inappropriate. Accordingly, the Applicants filed this motion on April 22, 2005 to strike the Reference.

The Appeal

[9] During the case conference described above, the judicial member also dealt with the Applicants' submission that the reference procedure (as distinct from the contents of the Questions) was inappropriate and that the Tribunal's gap rule should be used to require the Commissioner to move to strike the Section 106 Application. The judicial member decided that the reference procedure was appropriate. That ruling was appealed when the Applicants filed a Notice of Appeal in the Federal Court of Appeal on
April 25, 2005.

This Motion

[10] In this motion, the Applicants state that none of the three Questions posed in the Reference should be considered. However, as will be later described, Question 3 is no longer at issue. With regard to Question 2, while the Applicants acknowledge that it is an appropriate question for a reference, they ask that it be heard as part of the main hearing in the Section 106 Application rather than on a separate reference to avoid delay.

[11] The hearing was held in Ottawa on May 18, 2005, and oral submissions were made by all parties. The Applicants and the Commissioner both filed written material but West Fraser did not. At the end of the hearing, only one issue was left for post-hearing written submissions. It was whether the material facts pleaded in the Applicants' Reply would be accepted as true on the Reference. The Tribunal received written submissions from the Commissioner on May 20, 2005, from the Applicants on May 30, 2005 and again from the Commissioner on May 30, 2005. These submissions were considered only on the issue of the Reply. To the extent that the submissions dealt with other issues, they were not appropriate and have been disregarded.

II. THE ISSUES

[12] The first issue is whether the Questions fit within subsection 124.2(2) of the Act. To decide this issue, the following questions must be addressed:

(a) What is the evidence to be considered on the Reference in this case?
(b) What are the parameters of the Reference power in subsection 124.2(2) of the Act?
(c) Are the Questions appropriate?

[13] The second issue is whether, if Questions 1 and 2 are appropriate on the Reference, there are any other reasons why they should not be heard.

A. ISSUE 1

(1) *The Evidence*

[14] The Commissioner's Memorandum of Argument of April 1, 2005 made it clear at paragraph 60 that the Questions were to be considered on the Reference on the basis that the facts pleaded by the Applicants in their Statement of Grounds were true. After the Reference was filed, the Commissioner filed her Response in the Section 106 Application and, in due course, the Applicants filed their Reply.

[15] In the Reply the Applicants pleaded facts which they say show how, in a competition law sense, they are directly affected by the Consent Agreement.

[16] The Commissioner argued at the hearing of the motion that the Reply should not form part of the pleadings to be accepted as true on the Reference. She said that the Applicants' case crystallized when she filed the Reference and that the Tribunal is not entitled to consider the facts raised in the Reply. However, in her subsequent written submissions dated May 20, 2005, the Commissioner conceded, for the purpose of the Reference, that the material facts (if any) contained in the Reply may be considered on the Reference. Accordingly those facts, like those in the Section 106 Application, will be treated as true on the Reference.

[17] Accordingly, the Reference will be based on the facts alleged in the Applicants' Statement of Grounds and their Reply and those facts will be treated as true for the purpose of the Reference.

(2) The Parameters of the Reference Power

[18] The Applicants say that subsection 124.2(2) of the Act is identical for all practical purposes with section 18.3 of the *Federal Courts Act*, R.S.C. 1985, c. F-7, and that it should therefore be interpreted according to the case law related to that section.

[19] However, I have not been persuaded that the two sections are virtually identical. In my view, there are significant differences between the relevant sections of the Act and the *Federal Courts Act*. For ease of comparison, they are set out below:

THE COMPETITION ACT

Reference by Commissioner	Renvois par le commissaire
124.2(2) The Commissioner may, at any time, refer to the Tribunal for determination a question of law, jurisdiction, practice or procedure, in relation to the application or interpretation of Parts VII.1 to IX.	124.2(2) Le commissaire peut, en tout temps, soumettre au Tribunal toute question de droit, de compétence, de pratique ou de procédure liée à l'application ou l'interprétation des parties VII.1 à IX.

THE FEDERAL COURTS ACT

Reference by federal tribunal	Renvoi d'un office fédéral
18.3 (1) A federal board, commission or other tribunal may at any stage of its proceedings refer any question or issue of law, of jurisdiction or of practice and procedure to the Federal Court for hearing and determination.	18.3 (1) Les offices fédéraux peuvent, à tout stade de leurs procédures, renvoyer devant la Cour fédérale pour audition et jugement toute question de droit, de compétence ou de pratique et procédure.

[20] The first difference concerns the time when a reference may be brought. In the case of 18.3(1), a reference can only be brought in the context of a proceeding before a federal tribunal. However, under the Act, a reference is possible "at any time". For this reason, I have concluded that subsection 124.2(2) allows the Commissioner to refer a question to the Tribunal which is not raised in the context of a case. This means that the determinations made on a reference under 124.2(2) of the Act need not be dispositive of a "live" or case-related issue. In other words, the Commissioner may bring a free-standing reference which is not related to an inquiry under the Act or litigation before the Tribunal.

[21] Secondly, although both provisions refer to questions of law, jurisdiction, practice and procedure, the language which qualifies those words is found only in the Act. It says that the questions must be in relation to the "application" or "interpretation" of specific parts of the Act. The word "application" suggests to me that questions on a reference to the Tribunal under 124.2(2) may properly deal with the issue of how the Act applies to the facts of a particular case.

[22] Both provisions indicate that the questions are for determination and I accept the Applicants' submission that the Tribunal has not been given the power to "consider" questions, which is available to the Supreme Court under subsection 53(1) of the *Supreme Court Act*, R.S.C. 1985, c. S-26.

[23] The Applicants also state that the case law under section 18.3 of the *Federal Courts Act* applies to section 124.2(2) of the Act and establishes principles relevant to this reference. Specifically, the Applicants rely on the Federal Court of Appeal's decisions in *Public Service Staff Relations Act (Canada) (Re)*, [1973] F.C. 604 (C.A.), *Martin Service Station Ltd.* v. *Canada (Minister of National Revenue)*, [1974] 1 F.C. 398 (C.A.) and *Rosen (Re)*, [1987] 3 F.C. 238 (C.A.) to argue that questions in the Reference must be posed so that the Tribunal (i) determines one or more issues and does not merely provide an advisory opinion, (ii) disposes of an actual fact situation in a case rather than a hypothetical question, and (iii) deals only with material facts which are agreed or are not in dispute.

[24] Counsel for the Applicants also argued that a reference cannot answer a mixed question of fact and law. When law is applied to facts, according to the Applicants, the Tribunal is deciding a mixed question of fact and law (see *Canada (Director of Investigation and Research)* v. *Southam Inc.*, [1997] 1 S.C.R. 758 at paragraph 35). They submit that such questions are outside the jurisdiction of the Tribunal on a Commissioner's reference under subsection 124.2(2) because the subsection refers only to questions of law.

[25] However, I have not been persuaded that *Southam* applies. It is clear to me that, in *Southam*, the Supreme Court was describing a mixed question in the context of an adversarial hearing. In my view, in situations such as this Reference, in which no material facts are in dispute for the purpose of the Reference, it cannot be said that questions of fact are involved. There will be no questions of fact on the Reference and no findings of fact will be made.

[26] The exercise of determining the law and then determining how it applies to undisputed facts is, in my view, a question of law which is appropriate for a reference under subsection 124.2(2) of the Act.

(3) Are the Questions appropriate?

[27] **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?

[28] The Applicants say that this question is inappropriate because it seeks an advisory opinion, not a determination of a legal issue. However, I find that the Tribunal is asked to interpret the words "directly affected" and decide their meaning. The answer to the question will impact the application of section 106 of the Act and, therefore, falls squarely within the provisions of 124.2(2).

[29] I recognize that this question will not, by itself, be dispositive of an issue before the Tribunal in this case. However, as discussed above, there is no requirement that a reference under subsection 124.2(2) relate to a specific case. Given that a question of law can be a matter of interpretation only, the fact that the question is determinative of an issue is sufficient.

[30] **Questions 1(b) and (c)**

(2) 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?**

(3) 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?**

[31] The Applicants' say that these questions are also inappropriate because, although more precise than question 1(a), they call for opinions which will not be dispositive of issues in a case before the Tribunal.

[32] For the reasons given above, this submission is not accepted and I find that the questions are appropriate.

[33] **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")?**

[34] The objection to this question is that it requires an application of the law to the facts and is, therefore, a mixed question of fact and law which cannot be considered in a Commissioner's reference under subsection 124.2(2) of the Act.

[35] As discussed above, there are no facts in dispute which are material to the issue of standing. Accordingly, no questions of fact will be considered and no findings of fact will be made during the Reference. For this reason, I find that this question is not properly characterized by the Applicants as a mixed question of fact and law. In my view, it is best characterized as a question of jurisdiction relating to the application of the Act. At its core is the question of whether the Tribunal has jurisdiction to entertain the Applicants' Section 106 Application. If the Applicants are not directly affected by the Consent Agreement, they have no standing and the Tribunal has no jurisdiction to hear their Section 106 Application. In my view, this question is appropriate for the Reference.

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

[37] **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?

[38] The Applicants have conceded that this is a proper question.

[39] **Question 3**
In an application under subsection 106(2) of the Act to vary or rescind the terms of a consent agreement, is the Tribunal authorized, by the language "that the terms could not be the subject of an order of the Tribunal," to engage in a *de novo* review of whether the merger or proposed merger is likely to substantially lessen or prevent competition?

[40] The Commissioner agreed during the hearing not to proceed with this question on the Reference because the Applicants made it clear that they had no intention of asking the Tribunal to engage in a *de novo* analysis of whether there was a substantial lessening or prevention of competition. The Commissioner, in her written submissions dated May 20, 2005, attempted to put post-hearing conditions on this concession. This portion of the written submissions has been disregarded because, as noted above, counsel's right to file further submissions was restricted to the relevance of the Reply.

B. Issue 2 - Other Reasons Not to Hear the Reference

[41] The Commissioner's submission is that the Tribunal must hear the Reference if it finds that the questions fall within the ambit of subsection 124.2(2). I am not persuaded by this submission. Subsection 124.2(4) does not oblige the Tribunal to hear a reference – it simply indicates the procedure to be followed if the Reference is entertained. There could be circumstances in which the Tribunal might decide not to hear a reference even though it posed appropriate questions. That being so, I will consider the Applicants' submissions on this subject.

[42] The Applicants ask that the Reference not be heard because there are "huge" disputes between the parties and a hearing is required for their resolution. I agree that there are significant disagreements which will be considered if this matter proceeds to a hearing. However, for the purpose of the Reference, all the Applicants' allegations of material fact will be accepted. In these circumstances, the fact that the Commissioner may dispute those allegations in the future is not a reason to decline to hear a proper reference.

[43] The Applicants also say that, in spite of their agreement that Question 2 is appropriate, the Reference should not proceed because it is unreasonable to delay a hearing on the merits for a question which could easily be dealt with at the hearing.

[44] This submission illustrates a situation in which the Tribunal might exercise its discretion not to hear a reference. However, the facts do not support the submission in this case. Since Question 1, in its entirety, is proper for the Reference, and since the reference power in subsection 124.2(2) of the Act provides for the threshold determination of issues in a summary way and since the answers to Question 1 will decide the issue of standing, I have concluded that it would not be appropriate to exercise my discretion against the Reference for reasons of expedition.

[45] The Applicants also argue that the Reference should not proceed because they have raised constitutional issues relating to their allegations that the Commissioner had a duty to consult them about the Consent Agreement. The Commissioner counters that the issue of standing is a proper preliminary issue in a constitutional matter, and cites and refers to four Supreme Court of Canada decisions to support this argument : *Canada (Min. of Justice) v. Borowski* [1981] 2 S.C.R. 575; *Canadian Council of Churches v. Canada (Minister of Employment and Immigration)* [1992] 1 S.C.R. 236; *Finlay v. Canada (Minister of Finance*) [1986] 2 S.C.R. 607; and *Nova Scotia (Board of Censors) v. McNeil* [1976] 2 S.C.R. 265. In these cases, the issue was whether the Applicants had public interest standing and the Court applied the facts of the Applicants' situations to its definition of the required interest to decide the issue as a preliminary matter. In my view, it is therefore clear that standing is a question which may be decided as a preliminary issue even though constitutional issues will be considered if a case proceeds.

[46] This case, however, is different in that the duty to consult (i.e. the constitutional issue) may be argued on the Reference as well as at a future hearing on the merits if the matter proceeds. The questions on the Reference will be whether the facts are sufficient to give rise to the duty to consult and, if so, whether the existence of the duty is relevant to the definition of directly affected. In my view, the fact that a constitutional issue may be argued during the Reference on standing does not preclude the determination of standing as a preliminary matter when all relevant facts are admitted.

[47] The Applicants further submit that the presence of constitutional issues bars the Reference because the law is clear that such issues should not be addressed in a factual vacuum. However, as discussed earlier, there will be no such vacuum on the Reference. All the Applicants' material facts will be accepted as true by the Tribunal.

[48] The Applicants have alleged that section 2 of the *Canadian Bill of Rights* (1960, c. 44) is infringed in two respects. Firstly, they state that the Reference should not proceed because the decision on the Reference might deprive them of a hearing on the merits. It is accurate to say that if the Applicants have no standing, their Section 106 Application will not proceed, but that outcome is not contrary to section 2. The section does not require a hearing when the party has no standing. Secondly, the Applicants say that subsections 105(3) and (4) of the Act are incompatible with subsection 2*(e)* of the *Bill of Rights* because the consent agreement registration process did not provide the Applicants with a fair hearing. This allegation is not relevant to standing and, in my view, it does not operate to bar the Reference.

[49] Finally, the Applicants say that the Reference should not proceed because the Commissioner failed to comply with the Tribunal's Practice Direction dated August 30, 2002, when she filed the Notice of Reference and failed to file a supporting affidavit. The relevant text of the Practice Direction reads as follows:

98. (2) A notice of reference shall be accompanied by:	**98.** (2) Sont joints à l'avis de renvoi :
(a) an affidavit or affidavits setting out the facts on which the reference is based or an agreed statement of facts; and	a)un ou des affidavits indiquant les faits sur lesquels s'appuie le renvoi ou un exposé conjoint des faits;
…	(…)

[50] The Commissioner's response is that she made it clear in paragraph 60 of her Memorandum of Argument for the reference dated April 1, 2005 that the relevant facts were those pleaded by the Applicants and that, in these circumstances, an affidavit is not required. I agree. It would serve no useful purpose to file an affidavit which simply exhibits the Applicants' pleadings. Accordingly, this submission does not provide a basis for refusing to entertain a proper reference.

[51] FOR ALL THESE REASONS, THE TRIBUNAL ORDERS THAT:

(i) Questions 1 and 2 remain in the Reference,

(ii) Question 3 is hereby struck from the Reference, and

(iii) The Applicants are to pay to the Respondent, the Commissioner of Competition, her costs of this motion which are hereby fixed in the amount of $1,000.00.

(iv) The Commissioner of Competition is granted leave to file a fresh Memorandum of Argument to address any allegations in the Reply which she identifies as new.

DATED at Ottawa, this 1st day of June, 2005.

SIGNED on behalf of the Tribunal by the presiding judicial member.

(s) Sandra J. Simpson

APPEARANCES:

For the applicant:

Burns Lake Native Development Corp. et al.

Orestes Pasparakis

For the respondent:

Commissioner of Competition

Melanie Aitkin
Duane Schippers
Derek Bell

West Fraser Timber Co. Ltd.

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