Court File No. CT-2004-013

COMPETITION TRIBUNAL

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

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

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

BETWEEN:

BURNS LAKE NATIVE DEVELOPMENT CORPORATION, COUNCIL OF LAKE BABINE NATION AND EMMA PALMANTIER, ON HER OWN BEHALF AND ON BEHALF OF ALL MEMBERS OF LAKE BABINE NATION, COUNCIL OF BURNS LAKE BAND AND ROBERT CHARLIE, ON HIS OWN BEHALF AND ON BEHALF OF ALL MEMBERS OF BURNS LAKE BAND AND COUNCIL OF NEE TAHI BUHN INDIAN BAND AND RAY MORRIS, ON HIS OWN BEHALF AND ON BEHALF OF ALL MEMBERS OF NEE TAHI BUHN INDIAN BAND

Applicants

- and -

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

Respondents

MEMORANDUM OF ARGUMENT OF THE COMMISSIONER OF COMPETITION (Motion re Content of Reference)

COMPETITION TRIBUNAL
TRIBUNAL DE LA CONCURRENCE
FILED / PRODUIT
April 29.2005
CT- 2004-013
Chantal Fortin for / pour
REGISTRAR / REGISTRAIRE
OTTAWA, ONT. # 0019

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Court File No. CT-2004-013

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

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MEMORANDUM OF ARGUMENT
OF THE COMMISSIONER OF COMPETITION
(Motion re Content of Reference)

PART I ~ OVERVIEW

1. The Applicants' motion is ill-conceived and without merit. The Applicants seek (i) to re-litigate the unconditional authority of the Commissioner of Competition (the "Commissioner") to initiate a Reference, a matter already decided by the Competition Tribunal (the "Tribunal"); and (ii) a triumph of form over substance by insisting on a particular procedural route for the preliminary determination of the efficacy of their Notice of Application so as to

avoid, for as long as possible, its fatal deficiencies. The first basis for the motion is unavailable as a matter of law; the second is unprincipled and without foundation. In any event, the "fear" raised by the Applicants--that they will somehow be disadvantaged in a Reference, as opposed to a motion to strike or some other unspecified summary disposition of the proceedings—has no merit.

2. Contrary to the Applicants' allegation, the Commissioner's Reference is not only legitimate but advisable, in that it promotes the overall goals of the statutory scheme by serving two purposes. First, the Tribunal would clarify the law. Specifically, the Tribunal would determine the meaning of the phrases "directly affected" and "terms could not be the subject of an order of the Tribunal" in subsection 106(2) of the *Competition Act*, R.S.C. 1985, c. C-34 (the "Act"). The Commissioner is expressly authorized under the Act to seek clarification of the law and, in doing so, advances the important interest of providing guidance to the parties and the public at large in the context of a complex regulatory economic scheme. Second, the Tribunal would determine at an early stage whether the Application justifies the further commitment of public resources. Specifically, the Tribunal would apply the requirements of subsection 106(2) to the Applicants' pleading to determine whether, as a matter of law, the Application would necessarily fail for having no genuine foundation. That approach is consistent with the demands of the *Competition Tribunal Act*, R.S.C. 1985, c. 19 (2nd Supp.) (the "CTA") and the *Competition Tribunal Rules*, SOR/94-290 (the "Rules") to determine matters in an efficient and expeditious fashion, and is authorized by the Act and the Tribunal's authority to control its own process.

3. As noted above, the Applicants' motion demonstrates a profound misapprehension of not only the statutory scheme, but the purpose and value of the Commissioner's Reference. Further, there is no arguable basis at law for the challenge; accordingly, in pursuing the motion (and a parallel improper appeal to the Federal Court of Appeal), the Applicants are simply frustrating the Tribunal's ability to resolve the Application in an efficient and expeditious manner. First, the Applicants complain that the Reference brought by the Commissioner is inappropriate. However, the Tribunal has already ruled that a Reference is perfectly appropriate. Second, the Applicants complain that, in a motion to strike, the facts as pleaded would be assumed to be true, whereas in a Reference, they might not. However, the Commissioner has already conceded that the facts pleaded by the Applicants would, for the purposes of this Reference, be assumed to be proved. Third, the Applicants complain that, in a motion to strike,

the "plain and obvious" test would apply. However, the Commissioner has conceded that, in applying the law to the Notice of Application, that test would govern. Simply put, while adopting a dire tone, the Applicants' materials fail to identify any justiciable or meritorious challenge to the Reference.

4. For all these reasons, the motion is without foundation and serves only to delay the proceedings, to the prejudice of the Commissioner and the public interest in the efficient and effective use of limited Tribunal and Commissioner resources. As such, the motion should be dismissed.

PART II ~ FACTS

5. On February 3, 2005, the Applicants filed a Notice of Application, naming the Commissioner as Respondent, purporting to challenge a Consent Agreement filed by the Commissioner and West Fraser made on December 7, 2004 (the "Consent Agreement") under subsection 106(2) of the Act. On February 11, 2005, the Applicants amended their Notice of Application to add the West Fraser entities as Respondents.

Notice of Application of Burns Lake Native Development Corporation et al., dated February 3, 2005

Amended Notice of Application of Burns Lake Native Development Corporation et al., dated February 11, 2005

6. On February 23, 2005, the Tribunal issued a directive *ex proprio motu* to the parties to consider whether a Reference might be appropriate to determine the Applicants' standing in this case.

Letter from the Tribunal, dated February 23, 2005

7. The Commissioner agreed with the Tribunal that a Reference would be appropriate to deal with, among other things, the inability of the Applicants to meet the specific standing requirements of the Act. In contrast, the Applicants argued that a Reference would be inappropriate.

Letter from M. Aitken to the Competition Tribunal, dated March 15, 2005

Letter from M. Brown to the Competition Tribunal, dated March 15, 2005

8. The Commissioner's authorization to bring a Reference at any time, without leave, is found in section 124.2(2) of the Act: "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." As the deadline for the Commissioner's Response pleading was fast approaching, on April 4, 2005, the Commissioner exercised this power and issued a Notice of Reference. The cover letter attaching the Notice of Reference and accompanying Memorandum acknowledged the Applicants' objection and expressly stated:

> We have addressed as a preliminary issue in the Memorandum the Applicants' objections to proceeding by Reference. While the Commissioner believes that the Applicants' objections are unfounded (particularly in alleging abuse when the Tribunal canvassed the very question), as noted in our letter to you, dated March 15, 2005, should the Tribunal have an objection to the Commissioner proceeding by Reference, the Commissioner anticipates filing a motion to strike and/or for a preliminary determination of questions of law.
>
> **Letter from M. Aitken to the Tribunal, dated April 3, 2005**

9. The Reference raises three questions for clarification. First, what do the words "directly affected" in the standing requirement for subsection 106(2) mean? Second, does the Commissioner have an obligation to file evidence with a consent agreement and, if so, is a failure to do so a basis on which a consent agreement can be challenged? Third, can the Tribunal on a subsection 106(2) application inquire into whether there was a likely substantial lessening or prevention of competition so as to justify interfering with a filed consent agreement. Once these provisions are clarified, the Commissioner seeks a determination as to whether the Notice of Application, even accepting the facts pleaded as proved, is fatally defective, as a matter of law, for (i) lack of standing; and/or (ii) the Applicants' failure to satisfy their burden to activate the Tribunal's discretion to interfere with the Consent Agreement. These preliminary questions were framed in the Notice of Reference as follows:

> 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")?

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 subsection 106(2) of the Act?

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?

Notice of Reference of the Commissioner of Competition

10. On April 13, 2005, the Tribunal held a Case Management Conference on, among other matters, the appropriateness of the Reference procedure. During the course of those submissions, counsel for the Applicants conceded that the Commissioner "absolutely" had the power to bring a motion to strike, but argued that a Reference was "somehow qualitatively different." The Applicants further submitted that the Commissioner was unable to bring the Reference and, instead, should resort to the *Federal Court Rules, 1998*, through the "gap" rule (section 72 of the Rules), to support a motion to strike. The Chair of the Tribunal, Justice Simpson, disagreed:

> Now, first thing I'm going to do is decide where we are going from here. My preference is to use the reference provision in the rule. In my view, the gap rule only applies when there is a gap. There is no gap. The reference rule is the proper way to go. [emphasis added]

Transcript of Conference Call held on April 13, 2005, pp. 6-7, 13

11. In her Order following the Case Management Conference (the "Order"), Justice Simpson confirmed that the only matter pending before the Tribunal on the Applicants' challenge to the Commissioner's Reference is "the appropriateness of the contents of the Notice of Reference".

Order of the Competition Tribunal, dated April 13, 2005, para. 1

12. Subsequently, on April 22, 2005, Justice Simpson denied the Applicants' request to entertain submissions, a second time, on the availability of the Reference procedure:

> The order correctly described the motion which is to deal with the content of the reference and whether it is appropriate. The motion is not to consider whether the reference is the correct process or vehicle to bring forward the Commissioner's issues. That was decided during the management conference. [emphasis added]

Email from the Tribunal, dated April 22, 2005

Letter from M. Brown to the Tribunal, dated April 22, 2005

13. On April 27, two days before the Commissioner's Memorandum was due on this motion, the Applicants filed a Notice of Appeal in the Federal Court of Appeal purporting to appeal Justice Simpson's Order on the Reference issues and seeking, as relief, that the Commissioner's Reference be struck.

Notice of Appeal to the Federal Court of Appeal, dated April 25, 2005

PART III ~ ISSUES

14. The Applicants raise a litany of complaints in their Memorandum on this motion, most of which relate to issues that have already been decided and which the Chair of the Tribunal has confirmed will not be redetermined. While the Commissioner would have much to say by way of response to these arguments, the Commissioner respects the Tribunal's rulings and does not intend to re-argue matters on which the Tribunal has already ruled.

15. In these circumstances, all that remains of the Applicants' motion are the complaints about the *content* of the Reference, and what legal tests might be applied in that Reference, as follows:

(i) The Applicants insist that the "plain and obvious" inquiry is the appropriate test to strike a pleading, and express concern that a Reference might invoke some lesser standard;

(ii) The Applicants complain that the Notice of Reference is defective because (a) no affidavit evidence was filed; (b) it is inappropriate to have a Reference where facts are in dispute; and (c) it is somehow, at the same time, inappropriate for the Commissioner to accept the facts pleaded by the Applicants as true for the purposes of the Reference; and

(iii) As the statutory Reference power is granted only to the Commissioner, the exercise of that power by the Commissioner is somehow "unfair", "inappropriate", "circumvents decades of Canadian jurisprudence", "usurp[s] the Tribunal's role", and contravenes the *Canadian Bill of Rights*, among other alarmist charges.

PART IV ~ ARGUMENT

A. The Statutory Framework Authorizes the Reference

16. While the availability of a Reference has been determined, the statutory context of the power is relevant in assessing the frivolous nature of the Applicants' complaints as to content.

17. Subsection 124.2(2) of the Act authorizes the Commissioner to refer to the Tribunal a question of law, jurisdiction, practice or procedure in relation to the application or interpretation of Parts VII.1 to IX of the Act. Contrary to the Applicants' urging to "read down" subsection 124.2(2) and to impose restrictions at odds with the terms of the provision and the statutory scheme, the Reference power, like all federal enactments, must be given a large and liberal construction.

***Competition Act*, s. 124.2(2)**

***Interpretation Act*, R.S.C. 1985, c. I-21, s.12**

18. Unlike subsection 124.2(1) of the Act, which requires an outstanding inquiry under section 10 of the Act to authorize a Reference on consent of the Commissioner and the parties, or subsection 124.2(3) of the Act, which requires Tribunal consent in a private access

context, the Commissioner-initiated Reference power is not so limited. A Reference may be made "at any time".

Competition Act, **s. 124.2(3)**

19. Contrary to the Applicants' assertion, References are clearly contemplated in the context of pending applications. Subsection 124.1(1) permits a Reference "whether or not an application has been made"; in turn, subsection 124.1(3) is not even engaged unless an application has been made (and leave granted to proceed). Consistently, the authorization granted to the Commissioner to bring a Reference "at any time" is unconditioned by whether or not an application has been commenced.

Competition Act, **s. 124.1(1), 124.1(3)**

20. Any question of law, including whether an application can be sustained as a matter of law, is appropriate for such a Commissioner Reference under subsection 124.2(2).

21. In other words, the Reference procedure is available to dispense with applications which, as a matter of law (even accepting the facts pleaded as proved), could not succeed. In such circumstances, there is no issue of evidence being required to resolve the question of law – either the pleading supports a cause of action or it does not.

B. The Reference is Advisable

22. The proposed Reference poses certain foundational questions of general application that will be of benefit not only to the parties hereto, but to the public at large, including future litigants. This is just like references made to appellate courts: general questions are posed, and the Courts provide answers without reference to the *minutiae* of the particular facts of the case. The questions posed in the Reference are "classic" reference questions:

(i) The first question asks the Tribunal to clarify the standing requirement to bring a section 106 application.

(ii) The second question asks whether, notwithstanding the clear terms of the Act, the Commissioner has some obligation to file evidence with a consent

agreement and, if so, whether a failure to do so is a basis on which a consent agreement can be challenged.

(iii) The third question asks what types of arguments section 106 applicants can raise to trigger the Tribunal's discretion to interfere with a consent agreement; in other words, can the Tribunal legitimately look at the likelihood of a substantial lessening or prevention of competition in assessing whether the terms of the consent agreement are ones the Tribunal could not have made.

23. As to the first question, on standing, the Commissioner will advance the position at the Reference that, to bring a section 106 application, a party must be affected in relation to competition, and its substantive or pecuniary rights must be affected in a direct, imminent, real, and non-speculative way.

24. As to questions two and three, the Commissioner will argue that, even if the Applicants had standing, their pleading fails to identify any issues that would trigger the Tribunal's discretion to interfere with the Consent Agreement:

(i) there is no requirement (nor is it even contemplated as possible) in the statute or elsewhere that the Commissioner file evidence to accompany a consent agreement; quite the contrary;

(ii) the Tribunal is only authorized to assess whether there is a remedial term in the Consent Agreement that the Tribunal itself could not have ordered; and

(iii) the Tribunal is not authorized in a subsection 106(2) application to engage in a substantive *de novo* assessment as to whether there was a likely substantial lessening or prevention of competition.

In such circumstances, the Applicants cannot meet their burden. The Applicants have not made any legitimate complaint, nor is there any foundation for one. Had the Consent Agreement required the payment of damages, or the divestiture of property held by a foreign state or located outside of the geographic reach of the Tribunal, such terms *could* be criticized by the Applicants.

But no such remedial excess is alleged here, and none could be. Instead, the Consent Agreement in this case seeks the classic remedy imposed by the Tribunal – the divestiture of property.

25. The answers to these questions will be of significant benefit to the parties and the public by clarifying legal issues critical to the scope of the Commissioner's statutory authority and the overall functioning of the regulatory regime. The parties to the Application herein will further benefit, in a very direct way: once the legal issues are clarified, the Tribunal would examine their application to the Applicants' pleading to determine whether, as a matter of law, the Application can or cannot proceed. If there is no merit to the Application, it is in the interest of all parties and the public to determine that at the outset.

C. The Test for Applying the Legal Conclusions to the Pleadings is "Plain and Obvious"

26. The Commissioner had expected that the *Hunt v. Carey* test would govern in the application of the legal principles to the Applicants' pleading. It was for this reason that the Commissioner has taken the position that, for the purposes of this Reference, the facts, as pleaded by the Applicants, are assumed to be proved.

> ***Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959**

27. Accordingly, there is no substantive dispute between the parties on this issue.

D. Whether Evidence is Required

28. The Applicants claim that the Commissioner had to file affidavit material on the Reference and that the failure to do so must have been to avoid highlighting the fact that "facts" are in dispute on the merits of the Application. Curiously, the Applicants appear to complain later in their materials about having the Reference proceed on their own facts *uncontested.*

> Memorandum of the Applicants, dated April 22, 2005, paras. 64-69

29. Contrary to the Applicants' suggestion, the Commissioner filed no evidence because (i) the questions referred are questions of law (statutory interpretation); and (ii) that part of the Reference relating to the pleadings can (and must) be determined on the Notice of Application alone. The very purpose of the Reference is to determine whether the Tribunal

should review any evidence on the merits, or whether the Application is fatally flawed for failing to establish standing and/or activating the Tribunal's discretion.

30. Finally in this regard, the Applicants' reliance on section 98(2) of the *Practice Directions* is misplaced. While this section refers to filing affidavits, it could not have been the Tribunal's intention to require the Commissioner to file affidavits in all References; in the case of References on questions of law, for example, affidavits would be improper. To the contrary, the Reference power must be read in a manner that is consistent with subsection 124.2(4) of the Act and subsection 9(2) of the CTA, both of which direct that proceedings before the Tribunal generally, and References in particular, are to be decided in an expeditious and informal manner. There is nothing expeditious or informal, or indeed useful, about requiring the Commissioner to file an affidavit to resolve questions of law and the application thereof to the pleadings.[1]

> ***Competition Act*, s. 124.2(4)**
>
> **Competition Tribunal Act, s. 9(2)**

E. *Canadian Bill of Rights* and Other Claims of Unfairness

31. As for the miscellaneous allegations of manifest unfairness, including purported resort to the *Canadian Bill of Rights*, the Commissioner submits that these allegations have no basis in fact or law, and should be disregarded.

32. As is the case with the Applicants' other allegations of "unfairness", the *Canadian Bill of Rights*' challenge to the legislation is without foundation. Section 2(e) of the *Canadian Bill of Rights* only protects pre-existing common law requirements of procedural fairness from being overridden by statute. The *Canadian Bill of Rights* cannot be relied upon to create positive entitlements. Section 124.2(2) of the Act does not preclude a "fair hearing", nor deny procedural protections otherwise available at common law; it is neutral. It confers a right on the Commissioner to refer matters to the Tribunal, in a context where the Applicants will fully participate with rights of notice, evidence filing, and oral argument. Accordingly, there is no basis whatsoever on which to suggest any contravention of the *Canadian Bill of Rights*.[2]

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[1] If deemed necessary by the Tribunal, the Commissioner is prepared to file a solicitor's affidavit, attaching the Applicants' pleadings to address this frivolous and overly technical argument of the Applicants.

[2] Moreover, contrary to the Applicants' assertion, there is no deficit to the scheme or unfairness to the Applicants. Given section 72 of the Rules and the power of the Tribunal to control its own process, it may well be that the

Canadian Bill of Rights, s. 2(e)

Competition Act, s. 124.2(2)

***Bell Canada v. Canadian Telephone Employees Association,* [2003] 1 S.C.R. 884, at para. 28**

PART V ~ ORDER REQUESTED

33. For the foregoing reasons, the Commissioner respectfully requests that the Applicants' motion be dismissed, with costs.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

April 29, 2005

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Applicants could seek the determination of legal issues prior to a hearing, for example, by way of a motion to determine a question of law by way of Rule 220 of the *Federal Court Rules, 1998.*