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 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 Bank, Tee 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

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A. OVERVIEW

1. This Application, under subsection 106(2) of the *Competition Act*, R.S.C. 1985, c.C-34 ("*Competition Act*" or the "Act"), to rescind or vary a duly registered consent agreement between the Commissioner of Competition ("Commissioner") and West Fraser Timber Co. Ltd. and West Fraser Mills Ltd. dated December 7, 2004 (the "Consent Agreement"), is without merit and, as such, should be dismissed. As detailed herein, the Applicants lack standing to bring this proceeding. Further, the Applicants cannot establish the condition precedent necessary to trigger the Competition Tribunal's ("Tribunal") discretion to consider the Applicants' request for a variance or rescission of the Consent Agreement. Specifically, they cannot establish that the Consent Agreement contains "terms that could not be the subject of an order of the Tribunal". Finally, the Applicants' challenges, to the validity of the legislative regime and the Commissioner's exercise of her statutory obligations and alleged breach of fiduciary and other duties, are without merit.

2. As to standing, the Applicants cannot demonstrate that they, or any one of them, are "directly affected" by the Consent Agreement. The Applicants assert Aboriginal entitlements to create new "rights" (e.g., imposing fiduciary duties and duties to consult on the Commissioner); however, the fact is that, whatever the merit of the Applicants' underlying claims, the alleged "rights" on which this Application depends do not exist and, in any event, could not be engaged by the impugned Consent Agreement.

3. Further, while the Applicants seek to extend the scope of the inquiry in subsection 106(2) of the Act into the Tribunal's authority to order "terms", that power is, on its face, and by necessary implication, limited to a remedial authority. As such, there is no scope for the Applicants' allegation that the legislative regime established for the registration of consensual resolutions between the Commissioner and private parties requires that the Commissioner or any other party file evidence that would be relevant in a *contested* proceeding. The Applicants make no allegation that the Consent Agreement contains remedies that the Tribunal could not have ordered; accordingly, the Application must fail.

4. Not only are the Applicants' allegations incapable of sustaining a subsection 106(2) challenge as a matter of law, the Applicants' specific challenges, to the validity of the statutory scheme and to the Commissioner's performance of her statutory obligations, are wholly irrelevant and, variously, improper, without foundation, non-justiciable and beyond the jurisdiction of the Tribunal.

5. Most notably, the Applicants' challenge to the consent agreement provisions of the Act as being contrary to the *Canadian Bill of Rights* is baseless. The Applicants have no "rights and obligations" protected by the *Canadian Bill of Rights* in the present circumstances. Moreover, there is no diminution of common law entitlements to procedural fairness. Regardless, the Tribunal does not have the jurisdiction to determine a *Canadian Bill of Rights*' challenge.

6. Likewise, the Applicants' claims that the Commissioner owes a fiduciary duty and/or a duty to consult and accommodate are without merit in this case. Indeed, as addressed below, the Applicants fail to establish the prerequisite essential to engage such alleged duties, let alone establish that the Consent Agreement will directly affect such interests. Moreover, even if there was any basis in law or in fact to the Applicants' claims, the jurisdiction to adjudicate the Applicants' allegations would lie exclusively with the Federal Court.

7. The Consent Agreement simply reflects the parties' resort to the statutory scheme established by Parliament to promote the public interest in the efficient and expeditious resolutions of competitive concerns. In this case, West Fraser agreed to exercise its commercial rights to address competitive concerns raised by the Acquisition (defined below); those promises to effect certain divestitures, a remedy contemplated in section 92 of the Act, were simply formalized and made enforceable using this statutory scheme established by Parliament for that purpose.

8. In these circumstances, the Notice of Application discloses no basis on which a subsection 106(2) application can proceed.

B. PLEADINGS

9. The Commissioner admits the allegations contained in paragraphs 2 and 41 of the Applicants' Amended Statement of Grounds and Material Facts.

10. The Commissioner has no knowledge of the allegations contained in paragraphs 4, 6-17, 19-21, 31 and 34-35 of the Applicants' Amended Statement of Grounds and Material Facts.

11. The Commissioner denies the balance of the allegations contained in the Applicants' Amended Statement of Grounds and Material Facts.

C. THE RELEVANT PARTIES

12. The Respondents West Fraser Timber Co. Ltd. and West Fraser Mills Ltd. are companies amalgamated pursuant to the laws of British Columbia, in 1966 and 2005, respectively. West Fraser Timber Co. Ltd. and West Fraser Mills Ltd. are collectively referred to herein as "West Fraser".

13. Prior to its acquisition by West Fraser, effective on December 31, 2004, Weldwood of Canada Limited ("Weldwood") was a company manufacturing a variety of wood products and which, at all material times, owned various mills in British Columbia and Alberta. Weldwood was a subsidiary of International Paper Company ("IPC"), a company publicly traded on the New York Stock Exchange.

14. Babine Forest Products Limited ("BFPL") is a company incorporated pursuant to the laws of British Columbia.

15. As described below, Weldwood (in addition to being a major shareholder of BFPL) was, prior to the acquisition by West Fraser, a party to a joint venture agreement with BFPL and certain other parties. Those other parties included, from time to time: Eurocan Pulp & Paper Co. ("Eurocan"), a joint venture of Enso Forest Products Ltd. and West Fraser Mills Ltd.; Westar Timber Ltd. ("Westar"), a company incorporated pursuant to the laws of British

Columbia; and Babine Forest Products (Trustee) Ltd. ("BFPT"), a trustee established by the joint venture agreement.

D. RELEVANT WELDWOOD INTERESTS

16. At all material times prior to the acquisition by West Fraser, Weldwood was, among other things, a joint venturer in a sawmill located at or near Burns Lake, British Columbia, which included certain Crown timber rights appurtenant thereto (the "Burns Lake Sawmill"). Until May 30, 1984, Weldwood's interest in the Burns Lake Sawmill was through its shareholder interest in BFPL. At that time, BFPL was held as follows: the Applicant Burns Lake Native Development Corporation ("BLNDC") 8%; Westar 24%; Eurocan 24%; and Weldwood 44%.

17. On May 29, 1984, BFPL purchased Westar and Eurocan's shareholdings in BFPL. In exchange, BFPL sold each of Westar and Eurocan a proportionate interest in the inventories and other assets of BFPL. Thereafter, Weldwood's shareholding interest in BFPL was 84.6%; from that time forward, BLNDC held the remaining 15.4% interest.

18. As Westar and Eurocan continued to hold an interest (but not a shareholding interest) in the operations of the Burns Lake Sawmill, Weldwood, BFPL, Eurocan, Westar, BLNDC, and BFPT entered into a Joint Venture Agreement dated May 30, 1984 (the "Joint Venture Agreement"). The Joint Venture Agreement created, among other things, a Management Committee to oversee the joint venture's operations (the "Joint Venture").

19. The parties to the Joint Venture Agreement were also signatories to a number of other agreements, including a Shareholders' Agreement, dated May 30, 1984 (the "Shareholders' Agreement"), among Weldwood, BLNDC, BFPL, Westar, and Eurocan. BLNDC has a right of first refusal to purchase shares sold by Weldwood in BFPL. This BLNDC right of first refusal is acknowledged in the Joint Venture Agreement. BLNDC acquires no new rights under the Joint Venture Agreement.

20. On or about March 11, 1988, BFPL and Eurocan agreed to purchase all of Westar's interest in the Joint Venture. Amendments were made to the Joint Venture Agreement and an acknowledgment signed with respect to the Shareholders' Agreement to reflect this purchase.

E. WEST FRASER'S ACQUISITION OF WELDWOOD

21. In or about July 2004, West Fraser announced publicly that it intended to acquire the only outstanding share of Weldwood from IPC (the "Acquisition"). The transaction, if completed, would include the acquisition by West Fraser of Weldwood's interest in the Burns Lake Sawmill.

22. In October 2004, the Commissioner expressed concerns to West Fraser that the proposed transaction, if completed, was likely to lessen and/or prevent competition substantially in, among other markets, the British Columbia Highway 16 Corridor and Cariboo Area markets (as defined in the Consent Agreement) for the purchase of logs and, in the Highway 16 Corridor, for the supply of inputs to lumber re-manufacturers.

23. In the circumstances, the Commissioner and West Fraser negotiated and agreed to certain divestitures, including the disposition by the merged entity of all interests in the Burns Lake Sawmill (according to certain safeguards and terms as recorded in the Consent Agreement), to adequately redress the competitive issues identified by the Commissioner. The merging parties thereby avoided a contested proceeding before the Tribunal.

F. THE CONSENT AGREEMENT

24. The Commissioner and West Fraser entered into the Consent Agreement and registered it with the Tribunal on December 7, 2004.

25. The Consent Agreement addressed the Commissioner's concerns about the competitive effects of the proposed transaction by requiring, among other things, that West Fraser divest (or cause Weldwood to divest) all of its direct and indirect combined interest in:

(a) the Burns Lake Sawmill;

(b) a sawmill owned by Decker Lake Forest Products Limited ("DLFPL"), a joint venture operation of Weldwood and others located at Decker Lake (the "Decker Lake Mill");

(c) Forest Licences A16823 and A16825 (the "Associated Tenures"); and

(d) related assets.

26. To register the Consent Agreement, the Commissioner and West Fraser filed a signed copy of the Consent Agreement with the Tribunal, fulfilling the requirements of the Act and the Tribunal's *Practice Direction* in respect of consent agreements; no other materials or information was submitted.

G. THE APPLICANTS ARE NOT DIRECTLY AFFECTED

27. Contrary to the Applicants' allegations in paragraphs 40 through 45 of the Amended Statement of Grounds and Material Facts, the Applicants are not "directly affected" as alleged, or at all.

28. The Consent Agreement does not refer to BLNDC or any of the Applicants, purport to require them to take any action, or affect their rights in any way.

29. Specifically, contrary to the Applicants' allegation that Article 2 of the Consent Agreement purports to bind one or more of them, the provision is merely addressed to, and binds, those persons with any measure of control or authority over the Divestiture (as defined in the Consent Agreement); that class of persons does not include any of the Applicants. This limited reach of the provision is obvious from the plain language of Article 2, the context in which it was agreed to, and the necessary restrictions at law on the ability of those who signed the Consent Agreement to bind third parties:

> 2. The provisions of this Consent Agreement shall apply to:

> (a) each of the Respondents, including each Affiliate or any other Person controlled by either of them and each officer, director, employee, or other Person acting for or on behalf of the Respondents with respect to any of the matters referred to in this Consent Agreement, and any successors and assigns of either of them; and all other Persons acting in concert or participating with either of them or any successor(s) or assigns(s) in respect of the matters referred to in this Consent Agreement;...

30. Further, the Consent Agreement does not require BLNDC or any of the Applicants to divest any interests, nor are any rights they may have compromised in any way. In particular, the Consent Agreement does not deprive or affect any rights the Applicants may have in the Shareholders' Agreement, the Joint Venture Agreement, or otherwise.

31. Contrary to the Applicants' allegation (at paragraphs 42 through 44 of the Amended Statement of Grounds and Material Facts) that their interests are affected because there will be a new joint venture partner and majority shareholder in BFPL, as a matter of law, equity and contract, no "right" is affected, as the Applicants have never had the ability to control who those persons would be. As to BLNDC, the fact is that its rights, as the only Applicant with any interest in BFPL, are limited to a right of first refusal to purchase the shares of other parties to the Shareholders' Agreement and acquire an increased Joint Venture interest. That right is wholly unaffected by the Consent Agreement. As to the Applicants other than BLNDC, they have no interest whatsoever in the subject of the Consent Agreement; by definition, they cannot be "directly affected". As mere shareholders (at most) in BLNDC, whose minority interest in turn is restricted by the terms of the agreements to which it is a party and whose rights are entirely unaffected by the Consent Agreement, there is no basis for a claim that the shareholders are "directly affected" by the Consent Agreement.

32. Moreover, notwithstanding the restricted scope of the *Competition Act* to matters affecting competition, none of the Applicants even allege that they are directly affected in any way related to competition, nor are they. Likewise, notwithstanding that only directly affected *substantive* rights can engage the Tribunal, instead, the Applicants advance a claim on the basis of "rights" such as alleged rights to "protect a common vision" and to avoid "uncertainty, upheaval and change" in BLNDC's commercial dealings; these "rights" have no foundation at

law. In an effort to give credence to their claim to these unrecognized rights, the Applicants couple them with claims to rights protected by section 35 of the *Constitution Act, 1982.* However, these latter claims have no relevance in the context of the Consent Agreement and, moreover, cannot serve to legitimize otherwise baseless claims.

33. In effect, the Applicants seek to use the *Competition Act*, and specifically the limited intervention mechanism in subsection 106(2) of the Act for persons "directly affected" by a consent agreement, to create minority shareholder veto rights for BLNDC (and its shareholders) with respect to BFPL in an effort to control outcomes beyond their reach. In this effort, the Applicants rely upon claims to Aboriginal entitlements to allege corporate law and other "rights" which, in the circumstances here, have no foundation at law. Whatever the merit of the Applicants' claims to Aboriginal entitlements, such claims are of no relevance to the Consent Agreement or the statutory scheme for the consensual resolution of competitive concerns raised, *inter alia*, by proposed mergers.

34. Accordingly, the Applicants have no standing to bring this Application as they are not directly affected by the Consent Agreement.[1]

H. CONSENT AGREEMENT NOT CONTRARY TO FIRST NATIONS' INTEREST

35. The Tribunal has no jurisdiction to consider the allegation in paragraph 25(b) of the Amended Statement of Grounds and Material Facts that the Consent Agreement is "contrary to the interests of either the First Nations or the First Nations peoples of Burns Lake". In merger matters, the Tribunal's jurisdiction is restricted to considerations relating to competition. In any event, the Commissioner denies the allegation.

[1] Contrary to the Applicants' claims in paragraph 45 of the Amended Statement of Grounds and Material Facts, the Commissioner consented to a Tribunal order allowing disclosure by West Fraser of certain provisions of the Consent Agreement to which the Applicants claimed they needed access to evaluate the impact of the Consent Agreement on them.

I. NO VIOLATION OF THE *CANADIAN BILL OF RIGHTS*

36. Contrary to the Applicants' allegations at paragraphs 46 to 57 of the Amended Statement of Grounds and Material Facts, the consent agreement registration process provided for in subsections 105(3) and (4) of the *Competition Act* does not violate the *Canadian Bill of Rights* as alleged, or at all.

37. First, the Applicants have no "rights or obligations" at stake which are "determined" by the Consent Agreement so as to attract the rules of fairness. Any rights, which are denied, are too remote. The Consent Agreement is directed at ameliorating the anticompetitive impacts of the Acquisition in the market economy at large, not at determining the private interests claimed by the Applicants. Accordingly, the protections of the *Canadian Bill of Rights* against the abrogation of common law procedural entitlements are not engaged.

38. Second, section 2(e) of the *Canadian Bill of Rights* only protects the 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 105 of the *Competition Act* does not preclude a "fair hearing", nor deny procedural protections otherwise available at common law; it is neutral. In turn, subsection 106(2) confers a limited right to challenge registered consent agreements by persons who are directly affected by a consent agreement.

39. Third, and in any event, a *Canadian Bill of Rights*' challenge to the legislation (and/or a challenge to the Commissioner's actions as "unfair", as seems to be alleged) are outside the scope of section 106 of the *Competition Act*; in particular, such allegations do not constitute legally cognizable grounds under subsection 106(2) to activate the Tribunal's discretion to rescind or vary the terms of a consent agreement.

40. In the further alternative, any fairness owed to any one or more of the Applicants, which is denied, was furnished.

J. NO BREACH OF DUTIES

41. Contrary to the allegations in paragraphs 58 to 64 of the Amended Statement of Grounds and Material Facts, the Commissioner has not failed to act in accordance with the honour of the Crown as alleged, or at all. Further, and in any event, the allegation that the Commissioner breached duties to Aboriginal peoples is outside the scope of a hearing under subsection 106(2) of the Act. The Applicants' claims, even if they have merit, which is denied, do not constitute legally recognized grounds to rescind or vary any of the terms of the Consent Agreement pursuant to subsection 106(2).

42. The Commissioner denies that the Commissioner owes the Applicants a fiduciary duty as alleged, or at all in the circumstances of this case. The fiduciary duty imposed on the Crown at law does not exist at large but is dependant on the identification of a cognizable Aboriginal interest and the Crown undertaking of discretionary control in respect of that interest that is in the nature of a private law duty. Contrary to the Applicants' pleading, neither the allegedly harmonious thirty-year relationship between BLNDC and West Fraser (or others), nor the claimed rights to, among other things, economic autonomy and self-determination, constitute cognizable Aboriginal interests, let alone interests over which the Commissioner exercises discretionary control. Moreover, the Commissioner's authority, defined and delimited by the *Competition Act*, is restricted to matters relating to competition. Accordingly, the alleged rights on which the Applicants rely could not be subject to Commissioner oversight or control. In any event, any rights of the Applicants to economic autonomy, self-determination or land are wholly unaffected by the Consent Agreement. The Applicants' allegations of "unilateral" and "non-transparent" exercises of authority are not only unfounded, they cannot serve to create rights not recognized expressly or impliedly by the governing statutory scheme.

43. Further, contrary to the Applicants' allegations, the Commissioner owed no legal duty to consult and/or accommodate the Applicants with respect to the Consent Agreement, as alleged, or at all, in the circumstances of this case. No such duty can exist since the Commissioner's conduct will not adversely affect any right protected by section 35(1) of the *Constitution Act, 1982* that is claimed by the Applicants. Even if the Commissioner, whose

authority and responsibilities are restricted to issues expressly contemplated in the *Competition Act*, had some duty to consult directly affected persons, which duty is denied, nothing in the Consent Agreement directly affects any of the Applicants' interests. Any effect that may or may not flow to BLNDC (and/or the other Applicants) in the future will flow from the private contractual agreements to which BLNDC is a party, not the Consent Agreement.

44. Finally, and in any event, contrary to the allegations in paragraph 25(a) and elsewhere in the Amended Statement of Grounds and Material Facts, the Commissioner did make efforts to consult with the Aboriginal people of Burns Lake in the course of investigating the likely competitive effects of the Acquisition. The Commissioner approached and/or interviewed various aboriginal individuals and group representatives concerning competitive impacts.

K. NO OBLIGATION TO FILE EVIDENCE OF COMPETITIVE EFFECTS

45. The 2002 amendments to the *Competition Act* were designed to streamline the procedure for implementing consensual resolutions of the concerns of the Commissioner with the anticompetitive effect of certain conduct, including mergers, to promote the expeditious and efficient resolution of those concerns. The amended sections 105 and 106 of the Act reflect that clear initiative. Accordingly, the Commissioner denies the allegations that the Commissioner owed any statutory or other obligation to file evidence or otherwise substantiate to the Tribunal (or others) a likely substantial prevention or lessening of competition. Not only does the Act clearly dispense with any such obligation, to require the Commissioner to file evidence would defeat the very purpose of the 2002 Amendments.

46. While carefully avoiding the unsupportable assertion in their pleading, the Applicants effectively seek a *de novo* review by the Tribunal of whether the substantive basis for the remedial terms of the Consent Agreement has been (or could be) established, and--as explicitly acknowledged--whether the remedial terms negotiated between the Commissioner and the merging parties are "appropriate, effective and sufficient" and/or "whether there might exist alternative means" to address the relevant anticompetitive effects. Quite apart from the

Applicants' inability to establish their right to trigger any such inquiry, such an investigation and determination are expressly excluded by the amended Act.

L. ORDER SOUGHT

47. The Commissioner respectfully requests that the Tribunal dismiss the within Application, with costs.