

SCHEDULE "A"

COMPETITION TRIBUNAL

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

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

AND IN THE MATTER OF an application under s. 106(2) of the *Competition Act* by Burns Lake Native Development Corporation, Lake Babine Nation, Burns Lake Band, and Nee Tahí 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

AMENDED STATEMENT OF GROUNDS AND MATERIAL FACTS

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COMPETITION TRIBUNAL	
TRIBUNAL DE LA CONCURRENCE	
F I L E D	FEB 11 2005
REGISTRAR - REGISTRAIRE	
OTTAWA, ON	00036

Solicitors for the Applicants

PART I – OVERVIEW

1. In accordance with section 106(2) of the *Competition Act*, the Applicants bring this Application, as persons directly affected, seeking to rescind or vary the consent agreement between the Commissioner of Competition and West Fraser Timber Co. Ltd. and West Fraser Mills Ltd. (“**West Fraser**”) filed and registered with the Competition Tribunal on December 7, 2004 (the “**Consent Agreement**”), concerning the acquisition by West Fraser of Weldwood of Canada Limited (“**Weldwood**”).
2. Under the terms of the Consent Agreement, West Fraser is obliged to divest, among other things, the 89.8% interest held by it and Weldwood in the Burns Lake Mill, the Decker Lake Mill, certain timber harvesting rights, and associated assets (collectively the “**Mill Assets and Timber Rights**”).
3. The provisions of the Consent Agreement that provide for the forced divestiture of the Mill Assets and Timber Rights should be rescinded since:
 - (a) 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;
 - (b) 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
 - (c) 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.

PART II – BACKGROUND

A. The Applicants

4. The Applicant Burns Lake Native Development Corporation (the “**Native Development Corporation**”) was established in 1974 by the First Nations peoples of the Burns Lake region of British Columbia to enable them to participate in the development of the Mill Assets and Timber Rights. After substantial negotiation, the Provincial Government of British Columbia granted the Native Development Corporation an opportunity to hold an interest in the Mill Assets and Timber Rights in order minimize the adverse impact resulting from the development on the local community and environment.
5. The Native Development Corporation is a joint venture shareholder and partner with Weldwood (now amalgamated with West Fraser) in Babine Forest Products Limited (“**BFPL**”). Through BFPL, the Native Development Corporation indirectly holds a 10.2% interest in the Mill Assets and Timber Rights.
6. The Native Development Corporation is a not-for-profit organization whose sole mandate, as set out in its constating memorandum, is restricted to carrying on businesses:

“that are exclusively for the purpose of identifying and developing opportunities for the Native Peoples of the Burns Lake Region of British Columbia including the development of personal, operational and managerial abilities of such peoples”.
7. Burns Lake Band is a First Nation situated in the Burns Lake region and a shareholder in the Native Development Corporation. Burns Lake Band has asserted Aboriginal title to the Burns Lake region which title pre-dates European contact. In particular, Burns Lake Band claims right and title to the lands upon which the Decker Lake Saw Mill is located. In addition, the Burns Lake Saw Mill (Babine Forest Products) is located upon the reserve lands of Burns Lake Band (collectively the “**Mill Assets**”).

8. Lake Babine Nation is a First Nation also located in the Burns Lake region of British Columbia and is the majority shareholder in the Native Development Corporation. Lake Babine Nation has also claimed Aboriginal title to land in the Burns Lake region, particularly to lands that are subject to Timber Rights which are subject to the Consent Agreement.
9. Nee Tahi Buhn Indian Band is a First Nation also located in the Burns Lake region of British Columbia and is a shareholder in the Native Development Corporation. Nee Tahi Buhn Indian Band has also claimed Aboriginal title to land in the Burns Lake region, particularly to lands that are subject to Timber Rights which are subject to the Consent Agreement.
10. Robert Charlie is the Chief of Burns Lake Band and an Aboriginal person living in the Burns Lake region.
11. Emma Palmantier is the Chief of Lake Babine Nation and an Aboriginal person living in the Burns Lake region.
12. Ray Morris is the Chief of Nee Tahi Buhn Indian Band and an Aboriginal person living in the Burns Lake region.

B. The Mill Assets and Timber Rights

13. In 1973, the British Columbia Government decided to establish a saw mill complex in the Burns Lake region. It received proposals from the First Nations peoples of Burns Lake as well as other non-Aboriginal industry groups.
14. As part of this process, the British Columbia Government entered into negotiations with the First Nations peoples of Burns Lake in recognition of:
 - (a) the impact the saw mill complex would have on the First Nations peoples of Burns Lake and their ability to pursue economic development and self-sufficiency; and
 - (b) any inchoate rights of the First Nations peoples.

15. Through a negotiation and consultation process, the rights of the First Nations peoples of Burns Lake were formally given partial recognition by awarding the Native Development Corporation an 8% interest in BFPL.
16. Six First Nations hold a direct interest in the Native Development Corporation, namely: Lake Babine Nation, Burns Lake Band, Cheslatta Carrier Nation, Wet'suwet'en First Nation, Skin Tyee Band, and Nee Tahi Buhn Indian Band. A further interest is held by the Native Development Corporation in trust for all off-reserve First Nations peoples of the Burns Lake region.
17. The Native Development Corporation's participation in the new development was an early and unique effort by the British Columbia Government to partially recognize the rights of First Nations peoples to the land and to promote economic development and self-sufficiency. As the then British Columbia Minister responsible for Northern Affairs stated, the Native Development Corporation was:

“...the first time in history of this province, in the history of the country, and perhaps in the history of the North American continent, where native people are becoming directly involved in a major lumber industrial processing operation ...”
18. The Native Development Corporation was granted the opportunity to purchase an initial 8% interest in BFPL which was subsequently increased to 15% following a 1984 reorganization. Today, BFPL holds a 68% interest in:
 - (a) Babine Forest Products Company which owns the Burns Lake Saw Mill and Timber Rights; and
 - (b) Babine Forest Products (Trustee) Limited which owns the Decker Lake Saw Mill and Timber Rights.
19. The Native Development Corporation's interest in the Mill Assets and Timber Rights also reflected the importance of promoting economic development and self-sufficiency for First Nations peoples. As the Honourable Minister explained:

“This provides for Indian People to be on the board of directors and to participate in the ownership of the sawmill...”

20. Today, the Native Development Corporation continues to fulfil dual functions:
 - (a) holding a portion of the First Nations peoples’ interest in the use of the natural resources in the Burns Lake region; and
 - (b) promoting First Nations peoples’ economic development and the right of self-determination.

21. The Native Development Corporation, and its involvement in BFPL, has been repeatedly identified over the years as a model to bring about progress toward self-government and self-sufficiency for First Nations peoples as well as an outstanding example of an economic joint-venture between Aboriginal and non-Aboriginal peoples.

22. The Native Development Corporation’s relationship with Weldwood is now 30 years old. West Fraser has also held an interest in the Mill Assets and Timber Rights for over 20 years. Through the years, Native Development Corporation has built a valued business relationship with both Weldwood and West Fraser.

23. While the rights of the Native Development Corporation in BFPL are, to some extent, contained in a joint venture agreement, this type of corporate document does not properly explain or capture:
 - (a) the relationship between the Native Development Corporation and Weldwood/ West Fraser, its joint venture partner; nor
 - (b) the achievements of the past 30 years or the continuing influence the joint venture enterprise has had on the First Nations peoples of Burns Lake.

C. The Consent Agreement

24. The Consent Agreement, and in particular its provision for the divestiture of Weldwood/West Fraser's interest in BFPL, will result in the forced termination of a 30 year relationship which:
- (a) the First Nations peoples of Burns Lake have worked hard to foster and helped promote their economic development and goals of self-determination;
 - (b) has resulted in a common vision between Aboriginal and non-Aboriginal peoples regarding the land, the controlled use of natural resources, and the interaction between industry and the First Nations peoples of Burns Lake;
 - (c) has resolved and settled many issues and potential problems that have been encountered over the years regarding the management of resources and the treatment of First Nations peoples' rights and title claims;
 - (d) the First Nations peoples of Burns Lake have come to value; and
 - (e) like other partnerships, essentially represents and comprises a great deal of the value and goodwill of the business.
25. With the Consent Agreement, the Commissioner now seeks to force the dissolution of this carefully built and successful relationship in circumstances where:
- (a) no effort was made to consult with either the First Nations or the First Nations peoples of Burns Lake, regarding the impact the Consent Agreement will have on:
 - (i) their interests in the Mill Assets and Timber Rights;
 - (ii) their ability to pursue economic autonomy and self-government; and
 - (iii) their management and participation in the land and the controlled use of the natural resources of the Burns Lake area; and

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

D. First Nations Interests At Stake

(i) Right to Economic Autonomy and Self-Government

- 26. The First Nations of British Columbia have a constitutionally protected right to economic autonomy and self-government which has been recognized by the Courts.
- 27. The right of First Nations to economic autonomy and self-government is a fundamental value of the Canadian Constitution and lies outside the division of powers found in section 91 and 92 of the *Constitution Act, 1867*.
- 28. The Native Development Corporation's interest in the Mill Assets and Timber Rights has a direct and important impact on the First Nations and the First Nations peoples of Burns Lake's ability to achieve economic autonomy and pursue self-determination.
- 29. The First Nations of Burns Lake rely on the Native Development Corporation to help support and promote their efforts toward economic autonomy and self-determination. In fact, the Native Development Corporation fulfils a quasi-governmental role for its First Nations members by funding and delivering social and cultural programs, training and education to Aboriginal peoples.
- 30. In turn, the Native Development Corporation's major source of funding to carry out this purpose is derived through its interest in BFPL.
- 31. With the income from BFPL, the Native Development Corporation is able to fund and deliver social, economic, and cultural services to the First Nations peoples of Burns Lake, including employment counselling, skills training, education programs, small business loans, student programs, education bursaries, and the Burns Lake Aboriginal Day activities. These quasi-government programs are designed to foster self-sufficiency and ultimately help promote self-determination.

32. The financial success and resources available to the Native Development Corporation to be able to pursue and promote Aboriginal self-sufficiency and economic autonomy is obviously dependent on its successful relationship and partnership with its joint venture partner in BFPL.
33. Over the years, the Native Development Corporation has been able to rely on this partnership that has developed to shape and direct the use and operation of the Mill Assets and Timber Rights to take into account, and advance the interests of, the First Nations of Burns Lake and their peoples.

(ii) The Right to Land and the Use of the Land

34. Burns Lake Band asserts the right to its traditional territory through the British Columbia Treaty Process which includes its reserve lands on which Burns Lake Saw Mill is situated, its traditional lands on which the Decker Lake Saw Mill is situated, as well as lands in the Burns Lake region that are subject to the Timber Rights.
35. Lake Babine Nation and Nee Tahí Buhn Indian Band also assert their rights to their traditional territory through the British Columbia Treaty Process which includes lands in the Burns Lake region that are subject to Timber Rights.
36. During the lengthy and ongoing negotiation process for rights to title and use of the land, Burns Lake Band, Lake Babine Nation, and Nee Tahí Buhn Indian Band have been able to seek to ensure that the land on which the Mill Assets are situated and the land from which the timber is harvested has been effectively managed and controlled by its joint venture partner for over 30 years.
37. Burns Lake Band, Lake Babine Nation, and Nee Tahí Buhn Indian Band, through representatives on the Native Development Corporation, have been able to communicate many of their specific concerns regarding the land surrounding and encompassing the sawmill operations and resources used from the Burns Lake region. By virtue of the longstanding joint venture partnership, many of these concerns have been acknowledged and accommodated.

38. In addition and because of the long history of successful partnering with Weldwood and West Fraser, Burns Lake Band, Lake Babine Nation, and Nee Tahi Buhn Indian Band have been informed of, and involved in, discussions regarding initiatives that may require additional land resources or changes to harvesting practices.
39. The forced divestiture under the Consent Agreement will provide person(s) unknown with control and management of the joint venture and yet neither Burns Lake Band, Lake Babine Nation nor Nee Tahi Buhn Indian Band were consulted about these fundamental changes and the impact they may have on their rights to, and use of, the land.

PART III – THE APPLICANTS ARE DIRECTLY AFFECTED

40. Although the Applicants are not a party to the Consent Agreement and were never consulted about its terms, the Consent Agreement purports to bind them.
41. Article 2 of the Consent Agreement provides that the Consent Agreement applies to West Fraser, Weldwood and “all other Persons acting in concert or participating [with them] or any successor(s) or assign(s) in respect of the matters referred to in this Consent Agreement”.
42. Moreover, as a holder of a 10.2% interest in the Mill Assets and Timber Rights, the Native Development Corporation will therefore be directly affected by the Consent Agreement in terms of its contractual and proprietary interests in BFPL and its working relations with Weldwood and West Fraser.
43. As well, the First Nations and First Nations peoples of Burns Lake’s interest in the use of natural resources, in land rights and their economic autonomy will be affected because the Consent Agreement will result in, *inter alia*:
 - (a) the termination of the Native Development Corporation’s successful 30 year relationship with West Fraser/Weldwood as the managing partner of the Mill Assets and Timber Rights;

- (b) the transfer of control and management of the Mill Assets and the Timber Rights to person(s) unknown to the Native Development Corporation; and
 - (c) uncertainty, upheaval and change with respect to issues of operation, economics, management, and participation in the joint venture.
44. Lake Babine Nation, Burns Lake Band, Nee Tahi Buhn Indian Band, and their First Nations members are also directly affected by the Consent Agreement, *inter alia*, as:
- (a) stakeholders in the Native Development Corporation which indirectly holds the relevant interests in the Mill Assets and Timber Rights;
 - (b) beneficiaries of the Native Development Corporation's programs; and
 - (c) First Nations and First Nations peoples with rights to economic autonomy, to self government, and to the lands and their use.
45. However, at this juncture the full effect of the Consent Agreement on the Applicants is still unknown. The only version of the Consent Agreement that the Applicants have seen (despite the fact that it specifically purports to bind them), has been redacted in material respects. For example:
- (a) Under the heading "Divestiture" paragraph 5(a) sets out how the divestiture is to proceed and reads:

"in a manner that will permit the continued operation as a going concern of the Burns Lake Mill [CONFIDENTIAL]"

The Applicants are very concerned that (i) the Decker Lake Mill is not mentioned, and (ii) decisions about the divestiture have already been made but not communicated; and
 - (b) Under the headings "Divestiture" and "Maintenance of Assets Pending Divestiture" whole paragraphs have been excised which would appear to impact directly on the Applicants and their interests.

PART IV - NO FAIR HEARING

46. The Native Development Corporation is a success story which resulted from a forward thinking initiative of the British Columbia Government and the First Nations peoples of Burns Lake. This success story is now threatened by virtue of the federal Competition Bureau's unilateral and non-transparent approach to a long and complex joint venture relationship.
47. The consent agreement registration process provided for in subsections 105(3) and (4) of the *Competition Act* and as undertaken by the Commissioner is incompatible with Applicants' right to "a fair hearing in accordance with the principles of fundamental justice for the determination of [their] rights and obligations" as guaranteed under section 2(e) of the *Canadian Bill of Rights*.
48. Under subsection 105(3) of the *Competition Act*, a consent agreement may be filed with the Tribunal for immediate "registration" at which time it has the same force and effect as an Order of the Tribunal and may be enforced against directly affected persons such as the Applicants.
49. Notwithstanding the fact that a registered consent agreement carries the force of an Order directly affecting the rights and obligations of affected persons, the *Competition Act* does not provide any opportunity for such persons to be heard prior to the registration of the consent agreement and it coming into force as a final and binding order.
50. In this case, the Consent Agreement was registered and made binding upon the Applicants without:
 - (a) any opportunity for the Applicants to be heard; and
 - (b) any prior notice to the Applicants of the Consent Agreement or any of its terms.

51. The application procedure provided for under subsection 106(2) of the Competition Act is not a “fair hearing ... for the determination of [an affected person’s] rights and obligations” in accordance with section 2(e) of the *Canadian Bill of Rights* and the principles of fundamental justice.
52. A subsection 106(2) application may only be commenced *after* the registration of a consent agreement by which time an affected person’s rights and obligations have already been effectively determined. Moreover, significant time will pass before the application is finally adjudicated.
53. Furthermore, the scope of review under subsection 106(2) is too narrow to allow for a fair hearing to determine the rights and obligations of affected persons. Under subsection 106(2), a consent agreement will be rescinded or varied only if the applicant can show that the terms of the agreement “**could not** be the subject of an order of the Tribunal”. There is no opportunity for affected persons to make representations to the Tribunal as to whether the particular terms of the agreement **should not** be the subject of an Order of the Tribunal.
54. In this case, the Applicants have no opportunity for a fair hearing on the very issues that are directly relevant to the determination of their rights and obligations. In particular:
 - (a) whether the Consent Agreement and, in particular, the divestiture of West Fraser/Weldwood’s interest and participation in the Mill Assets and Timber Rights, is an appropriate, effective, and sufficient means of avoiding or mitigating a substantial lessening of competition; and
 - (b) whether there might exist alternative means of avoiding or mitigating a substantial lessening or prevention of competition that do not do violence to the Applicants’ rights and interests (as described above).

55. The Applicants are even further disadvantaged by the fact that many of the key terms in the Consent Agreement have been kept confidential by the Commissioner and have been redacted from the publicly available documents.
56. As a result of the application of subsections 105(3) and (4) of the *Competition Act* in this context, the Applicants now find themselves to be subject to, and bound by, what is effectively an Order of the Tribunal, certain terms of which have been kept secret from them, without any opportunity for a fair hearing on the subject matter of the Order either before the Order became effective or, for all practical purposes, at any time thereafter.
57. The regime set out under subsections 105(3), 105(4), and 106(2) of the *Competition Act* clearly infringe the right to a fair hearing guaranteed under section 2(e) of the *Canadian Bill of Rights* and are therefore inoperative.

PART V – BREACH OF DUTIES TO THE FIRST NATIONS AND FIRST NATIONS PEOPLES

58. The fundamental right of First Nations to economic autonomy, to self-government, to the land and to the use of the land are at stake, and yet no effort was afforded to consider their best interests, to consult with them, or to accommodate their concerns.
59. The honour of the Crown requires that First Nations rights and potential rights, which are protected by section 35 of the *Constitution Act*, 1982, be determined, recognized, and respected through a process of negotiation. The honour of the Crown gives rise to a legal duty to consult and accommodate any First Nations' interests that may be adversely affected by conduct of the Crown.
60. By forcing the termination of the joint venture relationship, the rights of First Nations and First Nations peoples of Burns Lake are unnecessarily jeopardized. The Commissioner was obliged, but failed to:
 - (a) consult with the First Nations of Burns Lake and their peoples;

- (b) consider the interests of the First Nations of Burns Lake and their peoples; and
 - (c) accommodate the best interests of the First Nations of Burns Lake and their peoples.
61. The Commissioner has failed to act in accordance with the honour of the Crown and has effectively ignored the interests of the First Nations and First Nations peoples of Burns Lake as their claims affecting these interests are being negotiated in the British Columbia Treaty Process.
62. In this case, the honour of the Crown requires that the Commissioner:
- (a) act in the best interests of the First Nations and First Nations peoples of Burns Lake, as a fiduciary; and
 - (b) fulfil her duty to consult and accommodate the First Nations and First Nations peoples of Burns Lake where their interests may be adversely affected by the Consent Agreement.
63. Had the interests of the First Nations and First Nations peoples of Burns Lake been considered, a compromise may have been possible through good faith negotiation resulting in the best interests of all stakeholders being fulfilled.
64. In addition, in view of the Commissioner's failure to act in accordance with her duty to consult and accommodate the First Nations and First Nations peoples of Burns Lake, the terms of the Consent Agreement could not have been the subject of an order of the Tribunal.

PART VI – NO AUTHORITY TO MAKE ORDER

65. Pursuant to subsection 105(4), a consent agreement once registered has the same force and effect as an order of the Tribunal. However, pursuant to subsection 105(2) a consent agreement must be based on terms which could be the subject of an order of the Tribunal.

66. In turn, the jurisdiction of the Tribunal to issue orders in respect of mergers is based upon subsection 92(1) of the *Competition Act*. It provides that the Tribunal can only make an order *if* it “finds that a merger or proposed merger prevents or lessens, or is likely to prevent or lessen, competition substantially in a trade, industry or profession”.
67. In the absence of a finding of the substantial lessening of competition, the Tribunal has *no* authority to make *any* order.
68. In this case, no evidence or argument with respect to a substantial lessening of competition was filed with the Tribunal Registrar or otherwise tendered by the Commissioner to the Tribunal.
69. In fact, the preamble to the Consent Agreement actually states that “West Fraser does not agree with the facts alleged and does not admit to any substantial lessening of competition”. Moreover, it describes the question of whether there has been a substantial lessening of competition as only “the Commissioner’s initial conclusions”.
70. At best, the Consent Agreement appears to be based on “initial conclusions” of the Commissioner that are disputed by West Fraser and not supported by any evidence before the Tribunal whatsoever.
71. In the absence of an evidentiary basis to support a finding of a substantial lessening of competition, there is simply no jurisdiction for the Consent Agreement forming an order since “the terms could not be the subject of an order of the Tribunal”.
72. The fact that the parties have signed a consent agreement cannot remedy this jurisdictional issue since it has been long established that the consent of the parties to the jurisdiction of a Tribunal does not give a Tribunal jurisdiction that does not otherwise exist.
73. By failing to file any evidence or arguments upon which the Tribunal could have made a finding and asserted jurisdiction, the Consent Agreement can have no force or effect.

PART VII – CONCLUSION

74. The regime set out under subsections 105(3), 105(4), and 106(2) of the *Competition Act* permit persons to be directly affected by an Order of the Tribunal without a fair hearing, are contrary to the *Canadian Bill of Rights* and are inoperative.
75. Furthermore, by entering into the Consent Agreement, the Commissioner has breached her duties to the First Nations of Burns Lake and their peoples, including her fiduciary duties, duty to consult, and duty to accommodate.
76. The Consent Agreement purports to remedy a substantial lessening of competition. However, the Consent Agreement could not properly be the subject of an Order of the Tribunal as no evidence has been furnished by the Commissioner to demonstrate that there has been a substantial lessening of competition. In the absence of any such evidence, there is no basis in law for the Tribunal to make or enforce an order for the divestiture of the Mill Assets and Timber Rights.

PART IX – ORDER SOUGHT

77. The Applicants request that the Tribunal rescind the Consent Agreement or, in the alternative, that the Tribunal vary the Consent Agreement so as to recognize the Applicants' rights and interests.
78. The Consent Agreement significantly and irrevocably impacts the rights of the Applicants on its face as well as by terms that have remained secret to it. In light of these special circumstances, the Applicants request that the Tribunal stay the Consent Agreement pending determination of this Application.

DATED at Toronto this 3rd day of February, 2005.

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