File No. CT-2014-002

COMPETITION TRIBUNAL

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

AND IN THE MATTER OF an inquiry commenced under section 10 of the *Competition Act,* relating to certain alleged anti-competitive conduct in the markets for E-books in Canada;

AND IN THE MATTER OF the filing and registration of a consent agreement pursuant to section 105 of the *Competition Act;*

AND IN THE MATTER OF an application under section 106(2) of the *Competition Act,* by Kobo Inc. to rescind or vary the Consent Agreement between the Commissioner of Competition and Hachette Book Group Canada Ltd., Hachette Book Group, Inc., Hachette Digital, Inc.; HarperCollins Canada Limited; Holtzbrinck Publishers, LLC; and Simon & Schuster Canada, a division of CBS Canada Holdings Co. filed and registered with the Competition Tribunal on February 7, 2014, under section 105 of the *Competition Act*.

BETWEEN:

KOBO INC.

Applicant/Moving Party

- and -

**THE COMMISSIONER OF COMPETITION,
HACHETTE BOOK GROUP CANADA LTD.,
HACHETTE BOOK GROUP, INC.,
HACHETTE DIGITAL INC.,
HARPERCOLLINS CANADA LIMITED,
HOLTZBRINCK PUBLISHERS, LLC, and
SIMON & SCHUSTER CANADA, A DIVISION OF
CBS CANADA HOLDINGS CO.**

Respondents/Responding Parties

MOTION RECORD
(Motion to strike Notice of Reference)

Date: April 29, 2014

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INDEX

I N D E X

TAB 1

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Respondents/Responding Parties

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Lawyers for the Applicant

TAKE NOTICE THAT the Applicant will make a motion to the Competition Tribunal ("**Tribunal**") to be heard on June 25, 2014 by the Tribunal at Ottawa, Ontario.

THE MOTION IS FOR:

1. An Order striking out the Notice of Reference filed by the Commissioner of Competition ("**Commissioner**");

2. In the alternative, an Order declining to hear the Reference; and

3. Such further and other final or interim orders as the Tribunal deems just.

THE GROUNDS FOR THE MOTION ARE:

1. The Tribunal has the power to strike a reference question as being inappropriate.

2. The Tribunal has the discretion to decline to hear a reference question where, although the question is appropriate, the reference process is inappropriate.

3. The question the Commissioner has advanced is inappropriate, as is the process in the circumstances of this case.

(i)

The Question is Inappropriate

4. The Reference question is two inappropriate questions compounded into one:

   (a) what is the nature and scope of the Tribunal's jurisdiction under subsection 106(2) of the Competition Act ("**Act**")?

   and

   (b) what is the meaning of the words "the terms could not be the subject of an order of the Tribunal" ("**impugned language**") in subsection 106(2) of the Act?

5. The first (sub)question is overly broad and academic in nature, and the Commissioner's Reference Record does not propose to answer it. Accordingly, it ought to be struck.

6. The second (sub)question is inappropriate, in that it assumes that the impugned language lends itself to a single interpretation that can be applied in the same manner regardless of the facts underpinning a s. 106(2) application or the section in reference to which a consent agreement is filed.

7. Section 106(2) is meant to apply to all of Part VIII of the Act. Either the Tribunal needs to interpret it to have one universal meaning that can be applied to all of Part VIII or it needs to interpret it to have a variable meaning that will be applied flexibly, depending on the facts of each case and the section in relation to which the consent agreement is filed.

8. If the universal approach is correct, the interpretation advanced by the Commissioner is clearly wrong, as it would result in s. 106(2) having no application with respect to consent agreements filed in reference to alleged violations of sections 77[1] and 90.1 (more specifically for s. 90.1, it would have no application in reference to prohibition orders that are included in a consent agreement[2]).

9. Such a narrow universal interpretation would frustrate Parliament's intention to have a review process that would be applicable to all sections in Part VIII of the Act. It would violate the first rule of modern statutory interpretation, that the words of a statute must be read in their grammatical and ordinary sense harmoniously with the rest of the Act and Parliament's intentions.

10. If the variable approach is correct, the Commissioner's Reference question cannot be answered in the abstract: it needs to be answered in light of the allegations that underpin the s. 106(2) application and the allegations that form the basis of the consent agreement. In such circumstances, the Tribunal should decline to hear the Reference.

11. The Commissioner is wrong to state that "no facts are required" for the determination of the question. The interpretive exercise that the Commissioner seeks is more properly undertaken in the hearing of Kobo's Application, with the Tribunal having the benefit of the facts of the case and being able to consider how to apply s. 106(2) in respect of a consent agreement that contains prohibition clauses whose alleged basis is s. 90.1.

---

[1] Under s. 77, the Tribunal can make any order it sees fit to overcome the effects of exclusive dealing or tied selling and to restore or stimulate competition in the market. On the Commissioner's interpretation of s. 106(2), the inclusion of any term in a s. 77 consent agreement, so long as it was defined enough to be enforceable, would be immune from Tribunal review under s. 106(2). This is absurd and renders s. 106(2) effectively inapplicable to s. 77. For s. 106(2) to have any meaning for reviews of s. 77 consent agreements, the Tribunal must be allowed to consider the facts that gave rise to the consent agreement.

[2] Under s. 90.1(1)(a), the Tribunal may make an order "prohibiting any person – whether or not a party to the agreement or arrangement – from doing anything under the agreement or arrangement". As Kobo stated in its Notice of Application, without the ability to probe into what the terms of the alleged agreement or arrangement are, the Tribunal is effectively foreclosed from performing any review under s. 106(2).

(ii)

The Process is Inappropriate

12. Even if the question is appropriate and the section lends itself to a single, universal interpretation as advocated by the Commissioner, the reference process is still inappropriate on the facts of this case, as it ignores the Tribunal's order that Kobo's Application be determined "swiftly" and Parliament's intention that s. 106(2) applications be determined expeditiously. The Reference unnecessarily delays matters.

13. Bringing a reference in the middle of a live application serves to delay the hearing of the application. References should therefore only be used sparingly and where they will result in judicial economy and will obviate the need for a hearing on the merits.

14. Although the Commissioner has the power to bring a reference at any time, and although every competition law case in Canada tends to raise new and interesting questions about the application and interpretation of the Act, the Commissioner only uses the reference power when third parties seek relief, never on his own applications.

15. It is inappropriate to only bring references in the face of s. 106(2) applications, given Parliament's intention that s. 106(2) applications in particular be determined expeditiously. In this case, where the Tribunal has ordered Kobo's Application to proceed swiftly, it is especially inappropriate to delay responding to the Application by bringing a reference.

16. A reference is only appropriate in the course of a s. 106(2) application where, like in *Burns Lake*, the reference might result in the disposition of the s. 106(2) application, thus fulfilling rather than frustrating Parliament's intention. That is not the case here. The Reference will not obviate the need for Kobo's Application, even if the Commissioner is correct about the section's interpretation.

17. If the interpretation of s. 106(2) is determined by reference, a question of complex statutory interpretation will be answered in the abstract (and will still be up for debate when the time comes for the Tribunal to apply the interpretation during the course of the hearing). Because of the importance of this question – and because of the diametrically opposed interpretations that have arisen in this case to date – an appeal of the Tribunal's Reference decision is all but assured.

18. Based on the events in *Burns Lake* – the only case in which the Commissioner has exercised the s. 124.2(2) reference power, and which was appealed to the Federal Court of Appeal on procedural grounds – the hearing of the Reference and disposition of any appeals could delay the hearing of the Application by one year.[3] In *Burns Lake*, this was a worthwhile investment of time, as it obviated the need for the hearing of the s. 106(2) application. In this case, Kobo's Application will proceed, regardless of the answer to the Reference.

19. It is more appropriate and expeditious to address the interpretive issues within the context of Kobo's Application. This would also allow any appeals to benefit from the necessary factual context.

20. The *Competition Act*, RSC 1985 c C-34, as amended, including sections 77, 90.1, 106(2), and 124.2.

21. The *Competition Tribunal Act*, RSC 1985, c 19 (2nd Supp), as amended.

22. The *Competition Tribunal Rules*, SOR/2008-141.

23. The *Federal Court Rules*, SOR/98-106.

24. Such further and other grounds as counsel may advise and the Tribunal may permit.

[3] Affidavit of Chinda Kham, sworn April 29, 2014, Kobo's Motion Record, Tab 2.

THE FOLLOWING DOCUMENTARY EVIDENCE will be used at the hearing of the motion:

1. The Affidavit of Chinda Kham sworn April 29, 2014;

2. The pleadings and proceedings herein; and

3. Such further and other documents as counsel may advise and the Tribunal may admit.

DATED AT Toronto this 29th day of April, 2014.

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TAB 2

File No. CT-2014-002

COMPETITION TRIBUNAL

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AND IN THE MATTER OF an inquiry commenced under section 10 of the *Competition Act,* relating to certain alleged anti-competitive conduct in the markets for E-books in Canada;

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I, CHINDA KHAM, of the City of Toronto in the Province of Ontario, MAKE OATH AND SAY:

1. I am a legal assistant at WeirFoulds LLP, and as such I have personal knowledge of the matters set out below.

2. Attached hereto as **Exhibit "A"** is a printout of the Case Details page for file CT-2004-013, *Burns Lake Native Development Corp. v. Canada (Commissioner of Competition)*, printed from the Competition Tribunal ("**Tribunal**") website.

3. Attached hereto as **Exhibit "B"** is the Order and Reasons for Order of the Tribunal on the applicants' Motion to Strike the Commissioner's Reference in *Burns Lake*.

4. The following is a summary of the timeline of the reference procedure in *Burns Lake*:

   (a) The applicants' Notice of Application to vary or rescind a consent agreement was filed February 3, 2005 (see **Exhibit "A"**).

   (b) The Commissioner's Notice of Reference was filed April 4, 2005 (see **Exhibit "A"**).

   (c) During a case management conference call on April 13, 2005, the Tribunal made an Order determining that the reference procedure was appropriate (see **Exhibits "A" and "B"**).

   (d) The applicants filed a Motion to strike the reference on April 22, 2005 (see **Exhibit "A"**).

   (e) The Motion to strike was heard May 18, 2005, and the Tribunal's Order and Reasons for Order on the applicants' Motion to strike were released June 1, 2005 (see **Exhibits "A" and "B"**).

   (f) The Applicants appealed the April 13, 2005 and June 1, 2005 orders to the Federal Court of Appeal. The appeals were heard March 6, 2006, with judgment delivered the next day. Attached hereto as **Exhibit "C"** is the judgment of the Federal Court of Appeal.

   (g) The Tribunal's Reasons and Order on the Commissioner's Reference were released March 27, 2006 (see **Exhibit "A"**).

SWORN before me at the City of Toronto on April 29, 2014.

Commissioner for Taking Affidavits

Hayley Alexandra Peglar, a Commissioner, etc., Province of Ontario, while a Student-at-Law. Expires July 17, 2016.

(Signature of Deponent)

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TAB A

This is **Exhibit** "**A**" referred to in the Affidavit of Chinda Kham sworn before me this 29th day of April, 2014

A Commissioner for taking Affidavits, etc.

Hayley Alexandra Peglar, a Commissioner, etc., Province of Ontario, while a Student-at-Law. Expires July 17, 2016.

Competition Tribunal / Tribunal de la concurrence

Canada

Case Details: CT-2004-013

NOTE: Some of the documents on this web page have been provided by external sources and have been inserted, as received, in the language and format of record.
Questions or comments may be sent by e-mail to: tribunal@ct-tc.gc.ca

CT-2004-013 (West Fraser - Burns Lake Native Dev. Corp.)

Proceeding 1
The Commissioner of Competition v. West Fraser Timber Co. Ltd. and West Fraser Mills Ltd.

Section(s):	Section 105 (RS85, amended 1999 & 2002) - Consent agreement (Registered) Section 92 (RS85, amended 1999) - Merger
Filed on:	2004-12-07
Status:	Decided - 2004-12-07

Applicant(s):	Commissioner of Competition
Respondent(s):	West Fraser Timber Co. Ltd. West Fraser Mills Ltd.

Case Documents

Decision(s)

#	Format	Title	Date
1b	PDF	Registered Consent Agreement	2004-12-07

Proceeding 2
Burns Lake Native Development Corporation et al v. Commissioner of Competition and West Fraser Timber Co. Ltd. and West Fraser Mills Ltd.

Section(s):	Section 106 (RS85) - Rescission or variation of consent agreement or order
Filed on:	2005-02-03
Status:	Decided - 2006-04-03

Applicant(s):	Burns Lake Native Development Corporation et al
Respondent(s):	West Fraser Timber Co. Ltd. West Fraser Mills Ltd. Commissioner of Competition

Hearing Date:	2006-01-16
Hearing Location:	Ottawa

Case Documents

Pleading(s)

#	Format	Title	Date

2a	PDF	NOTICE OF APPLICATION TO RESCIND CONSENT AGREEMENT	2005-02-03
3a	PDF	AMENDED NOTICE OF APPLICATION	2005-02-11
11a	PDF	Notice of Reference	2005-04-04
11b	PDF	Memorandum of Argument of the Commissioner of Competition	2005-04-04
12	PDF	Response of the respondents West Fraser Timber Co. Ltd. and West Fraser Mills Ltd.	2005-04-04
16	PDF	Response of the Commissioner of Competition	2005-04-18
20	PDF	Reply	2005-05-02
46	PDF	Reply of the Commissioner of Competition (Reference re. Section 106 of the Competition Act)	2005-12-14

Other(s)

#	Format	Title	Date
2b	PDF	STATEMENT OF GROUNDS AND MATERIAL FACTS	2005-02-03
3b	PDF	AMENDED STATEMENT OF GROUNDS AND MATERIAL FACTS	2005-02-11
17a	PDF	Notice of Motion	2005-04-22
17b	PDF	Memorandum of Argument	2005-04-22
19	PDF	Memorandum of Argument of the Commissioner of Competition	2005-04-29
40	PDF	Memorandum of Argument of the Respondents - West Fraser	2005-11-23
42	PDF	Memorandum of Argument of the Commissioner of Competition	2005-11-23
45a	PDF	Memorandum of Argument of Burns Lake Native Development Corporation et al. in response to Commissioner's Reference regarding s. 106	2005-12-07

Decision(s)

#	Format	Title	Date
35	PDF	Order made during the Case Management Conference Call Held on April 13, 2005.	2005-04-13
15	PDF	Order following the Case Management Conference Call held on April 13, 2005.	2005-04-15
30	PDF	Order and Reasons For Order On Applicants' Motion to Strike Commissioner's Reference	2005-06-01
37	PDF	Scheduling Order for the hearing of the Commissioner's Reference	2005-08-23
39	PDF	Amended scheduling Order for the hearing of the Commissioner's Reference	2005-09-09
58	PDF	Reasons and Order on the Commissioner's reference	2006-03-27
59	PDF	Order dismissing the Subsection 106(2) Application	2006-04-03

Date Modified:2013-09-06

TAB B

This is **Exhibit** "**B**" referred to in the Affidavit of Chinda Kham sworn before me this 29th day of April, 2014

A Commissioner for taking Affidavits, etc.

Hayley Alexandra Peglar, a Commissioner, etc., Province of Ontario, while a Student-at-Law. Expires July 17, 2016.

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.

James Musgrove

TAB C

This is **Exhibit "C"** referred to in the Affidavit of Chinda Kham sworn before me this 29th day of April, 2014

A Commissioner for taking Affidavits, etc.

Hayley Alexandra Peglar, a Commissioner, etc., Province of Ontario, while a Student-at-Law. Expires July 17, 2016.

Case Name:

Burns Lake Native Development Corp. v. Canada (Commissioner of Competition)

IN THE MATTER OF the Competition Act, R.S.C. 1985, c. C-34, as amended; and ss. 3 and 49 of the Competition Tribunal Rules, Can. Reg. SOR/94-290
AND IN THE MATTER OF the acquisition by West Fraser Timber Co. Ltd. of Weldwood of Canada Limited
AND IN THE MATTER OF an application under Section 106(2) of the Competition Act by Burns Lake Native Development Corporation, Lake Babine Nation, Burns Lake Band, Nee Tahi Buhn Indian Band to rescind or vary the Consent Agreement between the Commissioner of Competition and West Fraser Timber Co. Ltd. and West Fraser Mills Ltd. filed and registered with the Competition Tribunal on December 7, 2004, under s. 105 of the Competition Act
Between
Burns Lake Native Development Corporation, Council of Lake Babine Nation and Emma Palmantier, on her own behalf and on behalf of all members of Lake Babine Nation, Council pf 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, appellants, and Commissioner of Competition, West Fraser Timber Co. Ltd. and West Fraser Mills Ltd., respondents

[2006] F.C.J. No. 372

[2006] A.C.F. no 372

2006 FCA 97

2006 CAF 97

346 N.R. 140

47 C.P.R. (4th) 343

146 A.C.W.S. (3d) 631

Dockets A-189-05, A-276-05

Federal Court of Appeal
Toronto, Ontario

Evans, Sharlow and Malone JJ.A.

Heard: March 6, 2006.
Judgment: March 7, 2006.

(25 paras.)

Administrative law -- Judicial review and statutory appeal -- Deference to expertise of decision-maker -- Appeals from decisions of Competition Tribunal dismissed -- The Commissioner had power to make a reference at any time -- The facts were not in dispute for the purpose of the reference.

Appeals by Burns Lake Native Development from the Competition Tribunal's orders that a reference question was not procedurally improper as having been brought by the Commissioner after Burns Lake had filed their proceeding, and that a reference question was not substantively improper on the ground that the Tribunal was being asked to decide abstract or hypothetical questions, or questions that were of mixed fact and law.

HELD: Appeals dismissed. The Tribunal did not err in holding that the Commissioner's power to make a reference at any time enabled the Commissioner to refer a question arising in the course of a proceeding before the Tribunal instituted under the Act to which the Commissioner was party. The Tribunal held that the reference question would be answered on the assumption that the facts set out by Burns Lake in their application and reply were true. In these circumstances, the facts were not in dispute for the purpose of the reference.

Statutes, Regulations and Rules Cited:

Competition Act, R.S.C. 1985, c. C-34, ss. 7, 105, 106(2), 124.2(1), 124.2(2)

Competition Tribunal Act, R.S.C. 1985, c. 19 (2nd Supp.)

Federal Courts Act, R.S.C. 1985, c. F-7., ss. 18.3, 18.3(1)

Counsel:

Orestes Pasparakis and D. Michael Brown, for the appellants.

Melanie Aitken and Derek Bell, for the respondent, Commissioner of Competition.

James Musgrove, for the respondent, West Fraser Timber Co. Ltd. et al.

[Editor's note: An amendment was released by the Court on June 28, 2006. The changes were not indicated. This document contains the amended text.]

The judgement of the Court was delivered by

1 EVANS J.A.;-- In these consolidated appeals the Burns Lake Native Development Corporation and others ("the appellants") appeal from orders of the Competition Tribunal, dated April 13, 2005, and June 1, 2005. The appellants say that the Competition Tribunal erred in making orders upholding the procedural propriety of a reference to the Tribunal by the Commissioner of Competition, and ordering that Question 1 of the reference proceed to hearing.

2 The reference by the Commissioner asks the judicial member of the Tribunal to determine questions pertaining to the interpretation of the words "directly affected" in subsection 106(2) of the *Competition Act*, R.S.C. 1985, c. C-34 ("the Act"), and their application to particular facts.

3 Subsection 106(2) provides:

> (2) A person directly affected by a consent agreement, other than a party to that agreement, may apply to the Tribunal within 60 days after the registration of the agreement to have one or more of its terms rescinded or varied. The Tribunal may grant the application if it finds that the person has established that the terms could not be the subject of an order of the Tribunal.
>
> * * *
>
> (2) Toute personne directement touchée par le consentement -- à l'exclusion d'une partie à celui-ci -- peut, dans les soixante jours suivant l'enregistrement, demander au Tribunal d'en annuler ou d'en modifier une ou plusieurs modalités. Le Tribunal peut accueillir la demande s'il conclut que la personne a établi que les modalités ne pourraient faire l'objet d'une ordonnance du Tribunal.

4 The Commissioner made this reference in response to an application by the appellants under subsection 106(2) requesting the Tribunal to rescind or vary certain terms in a consent agreement

entered into by the Commissioner and two companies ("West Fraser"), following West Fraser's acquisition of Weldwood of Canada Co. Ltd.. The consent agreement was registered by the Tribunal in accordance with section 105 of the Act. The appellants named the Commissioner and West Fraser as respondents to their application.

5 The appellants allege, among other things, that they will be injured by a provision in the consent agreement requiring West Fraser to divest itself of certain timber mill interests and harvesting rights. They say also that the consent agreement is invalid because there was no evidence that the acquisition would lessen competition substantially, and it was entered into in breach of the Commissioner's duties to First Nations peoples of Burns Lake.

6 The Commissioner made her reference to the Tribunal pursuant to subsection 124.2(2) of the Act, which provides:

> (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.
>
> * * *
>
> (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.

7 The propriety of Question 1 of the reference is still in dispute. It is 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 consequences 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")?

8 The Commissioner referred this question in the interests of settling legal questions likely to recur relating to the standing of parties to make a subsection 106(2) application, and to determine, on the basis of the relevant legal tests, if the appellants had standing to make their application as persons "directly affected". If the Tribunal were to answer the questions (and especially Question 1(d)) in the manner advocated by the Commissioner, it would probably not be necessary for the Tribunal to enter into the merits of the appellants' application. Delay in determining the subsection 106(2) application may also prejudice the interests of West Fraser.

9 The judicial member of the Tribunal, acting as the case management judge of the subsection 106(2) application, made two orders respecting the reference which are the subject of these appeals. First, she held that the reference was not procedurally improper as having been brought by the Commissioner *after* the appellants had filed their subsection 106(2) proceeding. This is the subject of the appeal in Court File No. A-189-05.

10 Second, she held that Question 1 was not substantively improper on the ground that the Tribunal was being asked to decide abstract or hypothetical questions, or questions that were of mixed fact and law. The Commissioner is only authorized by subsection 124.2(2) to refer to the Tribunal questions of law, jurisdiction or procedure.

11 I should add that the Tribunal has now held a two-and-a-half-day hearing on the question of whether the appellants are "directly affected" by the consent agreement. Its decision is under reserve. In an attempt to obtain a ruling from the Tribunal that would obviate the need for a possibly lengthy hearing on the merits of the subsection 106(2) application, the Commissioner accepted that

the "plain and obvious" standard applicable to motions to strike should also apply to the determination of the reference.

12 Having described the background to the appeals, I shall discuss each separately.

The A-189-05 appeal

13 I am not persuaded that the Tribunal erred in holding that the Commissioner's power to make a reference under subsection 124.2(2) "at any time" enables the Commissioner to refer a question arising in the course of a proceeding before the Tribunal instituted under the Act to which the Commissioner is party.

14 In view of the plain meaning of the words "at any time", it is not justifiable to limit their scope by reading in words to the effect that no question may be referred in connection with a proceeding which had already been initiated before the Tribunal and to which the Commissioner was party. That the Commissioner, like the appellants, may raise an issue by way of a motion to strike is irrelevant. The fact that there may be an overlap between subsection 124.2(2), as interpreted by the Tribunal, and subsection 124.2(1) is not a reason for imposing implied limits on the words "at any time".

15 Counsel for the appellants submitted that the words "at any time" must be construed in their context. He argued that, since subsection 124.2(2) was located in the *Competition Act*, not the *Competition Tribunal Act*, R.S.C. 1985, c. 19 (2nd Supp.), it should not be regarded merely as a rule of procedure applicable to proceedings before the Tribunal.

16 I do not agree. Section 7 of the *Competition Act* creates the office of Commissioner. Since subsection 124.2(2) confers a power on the Commissioner it is not surprising to find it included in the *Competition Act*, rather than the *Competition Tribunal Act*. It is not a provision governing the procedure of the Tribunal, but a power exercisable by the Commissioner in the administration of the Act.

17 Nor am I persuaded that the appellants were denied a fair hearing when the Tribunal rendered its decision on the basis of a case management telephone conference. The propriety of the use of the reference procedure once a proceeding had commenced was fully argued before the Tribunal, both in writing and orally. In these circumstances, fairness did not require the Tribunal to permit the appellants to bring a formal motion to strike the reference.

The A-276-05 appeal

18 In the alternative, the appellants advance two grounds for saying that the Tribunal erred in denying their motion to strike Question 1 from the reference.

19 First, they argue that the Commissioner may refer a question under subsection 124.2(2) only if

it has a factual foundation. They allege that parts (a), (b), and (c) of Question 1 are academic, hypothetical or advisory in nature. They rely on jurisprudence of this Court dealing with questions referred by administrative tribunals under the similarly worded section 18.3 of the *Federal Courts Act*, R.S.C. 1985, c. F-7.

20 I do not accept this argument. An application may be made under subsection 124.2(2) outside the context of a specific proceeding, while a federal tribunal may refer a question to the Federal Court under section 18.3(1) "at any stage of its proceedings". Consequently, the case law under section 18.3 does not, in my view, help the appellants.

21 As for part (d) of Question 1, the appellants rely on *Canada (Director of Research & Investigation) v. Southam Inc.*, [1997] 1 S.C.R, 748, to argue that the application to the stated facts of the statutory words "directly affected" is a question of mixed fact and law, not a question of law alone, and is thus not authorized by subsection 124.2(2). The appellants submit that a reference question must be based on undisputed facts and that Question 1(d) was not, since many of the facts that they asserted in the statement of grounds in their subsection 106(2) notice of application are disputed by the Commissioner.

22 The Tribunal held that Question 1(d) would be answered on the assumption that the facts set out by the appellants in their subsection 106(2) application, and reply, were true. In these circumstances, I do not agree that the facts were in dispute for the purpose of the reference.

23 The appellants concede that whether they have standing as persons "directly affected" to make a section 106(2) application would have been a question of law if the facts on which the reference was based were not in dispute. However, for reasons already given, I agree with the Tribunal that the facts were not in dispute.

24 The Commissioner also points out that subsection 124.2(2) states that a question about the interpretation or *application* of the Act may be referred to the Tribunal, and that Parliament therefore must have contemplated that some questions of statutory application were questions of law.

Conclusion

25 For these reasons, I would dismiss both appeals with costs payable to the Commissioner by the appellants. Costs were not requested by counsel for West Fraser.

EVANS J.A.
SHARLOW J.A.:-- I agree.
MALONE J.A.:-- I agree.

File No. CT-2014-002

COMPETITION TRIBUNAL

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

AND IN THE MATTER OF an inquiry commenced under section 10 of the *Competition Act,* relating to certain alleged anti-competitive conduct in the markets for E-books in Canada;

AND IN THE MATTER OF the filing and registration of a consent agreement pursuant to section 105 of the *Competition Act;*

AND IN THE MATTER OF an application under section 106(2) of the *Competition Act,* by Kobo Inc. to rescind or vary the Consent Agreement between the Commissioner of Competition and Hachette Book Group Canada Ltd., Hachette Book Group, Inc., Hachette Digital, Inc.; HarperCollins Canada Limited; Holtzbrinck Publishers, LLC; and Simon & Schuster Canada, a division of CBS Canada Holdings Co. filed and registered with the Competition Tribunal on February 7, 2014, under section 105 of the *Competition Act*.

BETWEEN:

KOBO INC.

Applicant

- and -

**THE COMMISSIONER OF COMPETITION,
HACHETTE BOOK GROUP CANADA LTD.,
HACHETTE BOOK GROUP, INC.,
HACHETTE DIGITAL INC.,
HARPERCOLLINS CANADA LIMITED,
HOLTZBRINCK PUBLISHERS, LLC, and
SIMON & SCHUSTER CANADA, A DIVISION OF
CBS CANADA HOLDINGS CO.**

Respondents

MOTION RECORD
(Motion to strike Notice of Reference)

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