

Competition Tribunal



Tribunal de la Concurrence

Reference: *Commissioner of Competition v. Abitibi-Consolidated Inc.*, 2002 Comp.Trib. 08
File no.: CT2001009
Registry document no.: 024

IN THE MATTER OF an application by the Commissioner of Competition for a consent order pursuant to sections 92 and 105 of the *Competition Act*, R.S.C. 1985, c. C-34, as amended;

AND IN THE MATTER OF the acquisition by Abitibi-Consolidated Inc. of all of the outstanding shares of Donohue Inc.

B E T W E E N:

The Commissioner of Competition
(applicant)

and

Abitibi-Consolidated Inc.
(respondent)



Decided on the basis of the written motion record, the letter from Borden, Ladner and Gervais dated February 12, 2002, and submissions made at the hearing of the motion and the application for a consent order.

Member: McKeown J. (presiding)

Date of order: 20020221

Order signed by: McKeown J.

ORDER GRANTING LEAVE TO AMEND THE DRAFT CONSENT ORDER

[1] FURTHER TO the Notice of Motion dated February 1, 2002, brought by the applicant, the Commissioner of Competition, for leave to amend the Draft Consent Order filed on December 18, 2001;

[2] AND UPON CONSIDERING the consent of the parties dated February 1, 2002;

THE TRIBUNAL ORDERS THAT:

[3] Leave is granted to the applicant to amend the Draft Consent Order, which schedule is in the format attached hereto as Schedule "A", in accordance with the amended Draft Consent Order attached as Schedule "A" to the Notice of Motion, and as further amended at the hearing.

DATED at Toronto, Ontario, this 21st day of February, 2002.

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

(s) W.P. McKeown

[4] Schedule "A"-Draft Consent Order.

Reference: *Commissioner of Competition v. Abitibi-Consolidated Inc.*
File no.: CT2001009

IN THE MATTER OF an application by the Commissioner of Competition for a consent order pursuant to sections 92 and 105 of the *Competition Act*, R.S.C. 1985, c. C-34, as amended;

AND IN THE MATTER OF the acquisition by Abitibi-Consolidated Inc. of all of the outstanding shares of Donohue Inc.

B E T W E E N:

The Commissioner of Competition
(applicant)

and

Abitibi-Consolidated Inc.
(respondent)

DRAFT CONSENT ORDER

[1] FURTHER TO the application of the Commissioner of Competition pursuant to sections 92 and 105 of the *Competition Act* (the “Act”), R.S.C. 1985, c. C-34, as amended, for a consent order directing the divestiture of certain assets and other remedies;

[2] AND UPON READING the Notice of Application dated December 17, 2001, the Statement of Grounds and Material Facts, the Consent Order Impact Statement, the Affidavit of John Pecman sworn on December 17, 2001, and the Consent of the parties, filed herein;

[3] AND ON CONSIDERING THAT the Commissioner and the respondent are in agreement with respect to the terms of this consent order;

[4] AND ON CONSIDERING THAT the Commissioner declares himself as being satisfied that, on the basis of the considerations outlined in the Consent Order Impact Statement, the remedies provided herein, if ordered, will be sufficient to eliminate the substantial lessening or prevention of competition in the supply of newsprint in Eastern Canada (*i.e.*, all provinces east of Manitoba with the exception of Newfoundland) as described in the Statement of Grounds and Material Facts;

[5] AND IT BEING UNDERSTOOD by the parties that the Commissioner has alleged certain material facts, and the respondent does not accept all the facts alleged but does not contest the Statement of Grounds and Material Facts and Consent Order Impact Statement only for the purpose of this application and any proceeding initiated by the Commissioner relating to this Consent Order, including an application to vary or rescind the Order;

THE TRIBUNAL ORDERS THAT:

Definitions

[6] For the purposes of this order, the following definitions shall apply:

(a) “ACI” means the respondent, Abitibi-Consolidated Inc., a company engaged in the production of newsprint and other products in Canada;

(b) “affiliate” is defined in accordance with subsection 2(2) of the Act;

(c) “Agent” means the person or entity appointed by the Commissioner pursuant to terms of the undertaking executed by the parties effective as of December 15, 2000 (the “Undertaking”), to carry out the divestiture of the Designated Assets;

(d) “Agent Sale Period” means the period of time described in confidential Schedule “A” attached hereto, subject to any extensions of time granted pursuant to paragraph 12 herein;

(e) “Bowater” means Bowater Inc., a corporation engaged in the production of newsprint and other products, and its affiliates, including, but not limited to, Bowater Pulp and Paper Canada Inc.;

(f) “Commissioner” means the Commissioner of Competition appointed pursuant to section 7 of the Act; and

(g) “Designated Assets” means all of the assets owned or operated by ACI and used in the operation of the paper mill located at Ville-de-la-Baie, Quebec, referred to as the Port-Alfred Mill; all equipment on the mill site owned or operated by ACI; all systems and intellectual property owned by ACI and used exclusively for the operation of the mill; all current assets, excluding cash and accounts receivable; and, all books and records relating to the foregoing.

Application

[7] The provisions of this order shall apply to ACI and its affiliates and to:

(a) each division, subsidiary or other person controlled by them and each officer, director, employee, agent or other person acting for or on behalf of any of them with respect to any of the matters referred to in this order;

(b) each of their respective successors and assigns, and all other persons acting in concert or participating with any of them with respect to the matters referred to in this order who shall have received notice of this order; and

(c) the Agent appointed by the Commissioner and as defined herein.

Preservation of Designated Assets

[8] Subject to the provisions of this Order and any federal and provincial laws and regulations and municipal and regional by-laws, from the date of this Order until the expiry of the Agent Sale Period, ACI shall not take any action or cause or permit any affiliate or any other person to take any action that will materially impair, dismantle, move or destroy any of the Designated Assets or any part thereof or materially degrade the Designated Assets so as to inhibit or delay the divestiture of the Designated Assets on the terms contemplated by this Order.

Agent Sale of Designated Assets

[9] The Agent shall carry out the sale of the Designated Assets in accordance with the Undertaking and the following terms:

(a) the Designated Assets may be sold by the Agent within the Agent Sale Period at a price and on terms that are then most advantageous to ACI and consistent with accomplishing the sale, in the opinion of the Agent, acting reasonably (the “Agent Sale”), and, without in any manner limiting the foregoing, in no event will the price and terms of an Agent Sale equate to those of a “going out of business”, “fire” or liquidation sale;

- (b) after the appointment of the Agent becomes effective, the Agent shall have the sole right to effect a sale of the Designated Assets during the period of its mandate, which mandate shall terminate upon the end of the Agent Sale Period or by such other date fixed in accordance with paragraph 12 below and neither the Agent nor the Commissioner shall have further rights in respect of the Designated Assets following the expiry of that period of time;
- (c) after the appointment of the Agent becomes effective, the Agent shall have the sole right to effect a sale of the Designated Assets;
- (d) the Agent shall have the full power and authority to effect the sale and shall use all reasonable efforts to do so;
- (e) ACI shall use its best efforts to assist the Agent in accomplishing the Agent Sale. In connection therewith, the Agent shall have full and complete access as is reasonable in the circumstances, subject to an appropriate confidentiality agreement, to the personnel, books, records and facilities of ACI relating to the Designated Assets and ACI shall take no action to interfere with or impede the Agent's accomplishment of the Agent Sale;
- (f) the Agent shall, every 30 days, file reports with ACI and the Commissioner setting out the Agent's efforts to sell the Designated Assets;
- (g) the Agent shall promptly notify ACI and the Commissioner of any negotiations with a prospective purchaser regarding the sale of the Designated Assets that, in the opinion of the Agent, may lead to a sale of the Designated Assets;
- (h) the Agent shall provide ACI and the Commissioner with notice of any proposed sale, including the identity of the proposed purchaser and all details of the proposed sale;
- (i) all direct expenses and fees reasonably and properly incurred by the Agent in the course of the sale shall be paid by ACI;
- (j) the net proceeds of any sale by the Agent shall be paid to ACI or as ACI may direct;
- (k) the Agent shall not be a person that has a direct or indirect conflict of interest with ACI or that has been disqualified pursuant to agreement between the parties; and
- (l) ACI shall not object to any sale by the Agent on grounds other than the Agent's malfeasance, gross misconduct or breach of the Undertaking or this Order.

Supply Obligations of ACI

[10] ACI shall supply, or cause to be supplied, fibre to any purchaser of the Designated Assets or its affiliate, agent or nominee, from the same sources of supply and in no less than the same quantities as were supplied to the Designated Assets during the 2000 calendar year, subject only to all necessary third party approvals. ACI shall use its reasonable best efforts to obtain the agreement of such third parties. If desired by the purchaser, supply agreements with ACI shall be long term and, in addition, shall provide for the supply of fibre at fair market value.

[11] ACI will use reasonable commercial efforts to transfer to the purchaser of the Designated Assets or its affiliate, agent or nominee, all customers currently being supplied from the Designated Assets at the time of the sale of the Designated Assets, subject always to the customers' own preferences.

Extensions of Time

[12] In the event that during the Agent Sale Period described above, the Agent receives a letter of intent, offer or similar written communication of intention to purchase the Designated Assets from a *bona fide* purchaser, the time period for the Agent Sale Period shall be extended for such reasonable period of time required to complete the divestiture of the Designated Assets or otherwise conclude negotiations with that prospective purchaser, but in no event shall the period of such extension exceed three months from the date of the termination of the Agent Sale Period, unless further extended by the parties in writing.

Commissioner's Approval

[13] The Agent shall notify the Commissioner of any proposed divestiture and provide reasonable particulars of the proposed purchase and the identity of the proposed purchaser, as well as any additional information requested by the Commissioner.

[14] The divestiture of the Designated Assets by the Agent is subject to the approval of the Commissioner and the provisions of the Act.

Confidentiality of Agent Sale Period

[15] The Agent Sale Period described in confidential Schedule "A" shall not be disclosed by the parties or Agent unless such disclosure is necessary, in the opinion of the Agent, to negotiate a divestiture or sale of the Designated Assets within the Agent Sale Period and where the person or entity to whom the Agent Sale Period is to be disclosed has executed an agreement to maintain the confidentiality of this information.

Notice

[16] Notices and reports required to be given pursuant to any of the terms of this order, shall be considered given if dispatched by personal delivery, registered mail or facsimile to the address or facsimile number below:

(a) If to the Commissioner:

The Commissioner of Competition
Competition Bureau
Place du Portage, Phase I
50 Victoria Street, 21st Floor
Hull, Québec
K1A 0C9

Facsimile: (819) 953-5013

(b) If to the respondent:

Abitibi-Consolidated Inc.
1155, rue Metcalfe, Suite 800
Montréal, Québec
H3B 5H2

Attention: Isabel Pouliot

Facsimile: (514) 394-3644

Phone: (514) 394-3277

Davies, Ward, Phillips & Vineberg
Barristers & Solicitors
1501 McGill College Avenue, 26th Floor
Montréal, Québec
H3A 3N9

Attention: Hillel W. Rosen

Facsimile: (514) 841-6499

Phone: (514) 841-6400

[17] Schedule "A": CONFIDENTIAL

1. Not part of the public record.

COUNSEL

For the applicant:

The Commissioner of Competition

Josephine A.L. Palumbo

Robert S. Russell

Adam F. Fanaki

For the respondent:

Abitibi-Consolidated Inc.

Kent E. Thomson

James Doris