



CT-1989-001 – Doc # 146a

IN THE MATTER OF an application by the Director of Investigation and Research under sections 92 and 105 of the *Competition Act*, R.S.C., 1985, c. C-34, as amended;

AND IN THE MATTER OF the proposed acquisition by Asea Brown Boveri Inc. of certain assets and property comprising the electrical transmission and distribution business of Westinghouse Canada Inc., including those of its wholly-owned subsidiary Transelectrix Technology Inc.

**BETWEEN:**

The Director of Investigation and Research

Applicant

and

Asea Brown Boveri Inc.  
Westinghouse Canada Inc.  
Transelectrix Technology Inc.

Respondents



**REASONS FOR THE ORDER OF DECEMBER 18, 1989  
VARYING THE CONSENT ORDER OF JUNE 15, 1989**

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**Date of Hearing:**

December 18, 1989

**Presiding member:**

The Honourable Mr. Justice Leonard A. Martin

**Lay Members:**

Dr. Frank Roseman  
Madame Marie-Helene Sarrazin

**Counsel for the Applicant**

**Director of Investigation and Research**

William J. Miller  
John S. Tyhurst

**Counsel for the Respondents:**

**(a) Asea Brown Boveri Inc.**

Michael L. Phelan  
Timothy Kennish  
Peter A. Magnus

**(b) Westinghouse Canada Inc.  
Transelectrix Canada Inc.**

Not Represented

## COMPETITION TRIBUNAL

### REASONS FOR THE ORDER OF DECEMBER 18, 1989 VARYING THE CONSENT ORDER OF JUNE 15, 1989

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*The Director of Investigation and Research*

v.

*Asea Brown Boveri Inc. et al.*

#### **Introduction**

On November 8, 1989 Asea Brown Boveri Inc. (ABB Canada) filed an application to vary the consent order issued by the Tribunal on June 15, 1989 against ABB Canada, Westinghouse Canada Inc. (WECAN) and Transelectrix Technology Inc. (TTI). Upon hearing Michael L. Phelan for ABB Canada, and William J. Miller, for the Director of Investigation and Research consenting, the Tribunal approved the variation at the close of the hearing on December 18, 1989, with written reasons to follow. These are the reasons of the Tribunal.

As set out more fully in the reasons of the Tribunal approving the original order<sup>1</sup> the terms of the consent order condition the purchase by ABB Canada of the electrical equipment manufacturing assets of WECAN, including TTI, its wholly-owned subsidiary. Both ABB Canada and TTI manufacture large power transformers (referred to in the consent order as "Subject Power Transformers" or SPT<sup>2</sup>) and the consent order is directed at correcting the presumed anticompetitive effects of the merger in the Canadian market for those transformers. The merger resulted in a single Canadian manufacturer of very large transformers<sup>3</sup>, namely ABB Canada, and two manufacturers of large transformers<sup>4</sup>, ABB Canada and Federal Pioneer Limited. The

1 *Director of Investigation and Research v. Asea Brown Boveri Inc.* (15 June 1989), CT-89/1, Consent Order (Competition Trib.); *Director of Investigation and Research v. Asea Brown Boveri Inc.* (6 September 1989), CT-89/1, Reasons for Consent Order Dated June 15, 1989 (Competition Trib.).

2 TTI has two operations, located at Guelph and at Hamilton; only the Guelph business currently manufactures SPT.

3 Referred to as "Group A SPT" in the original reasons.

4 Referred to as "Group B SPT" in the original reasons.

consent order contemplates a scheme of tariff remission and reduction on SPT, combined with undertakings by ABB Canada to forego bringing any anticumping proceedings for five years that is designed to ensure that the merged entity will face international competition in the SPT market. A hold separate on the assets of TTI preserves those assets for the alternative remedy of divestiture should the tariff remedies not come into effect in a timely manner. The divestiture is intended to provide domestic competition for ABB Canada should foreign competition remain excluded by tariff barriers.

### **Variation Sought**

ABB Canada seeks to vary three aspects of the consent order. First, ABB Canada asks that the January 1, 1990 deadline to obtain regulatory approval for accelerated tariff reduction on imports of Group B SPT originating in the United States be extended to June 30, 1990<sup>5</sup>. The five-year tariff remission on worldwide imports of Group A SPT has been obtained, commencing January 1, 1990<sup>6</sup>. Second, ABB Canada asks that the hold separate be terminated and that the assets and operations of TTI be integrated into its own in a manner that would maintain the Guelph business in a "ready for sale" condition. Third, ABB Canada applies to delete all references to the Hamilton business from the divestiture provisions.

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<sup>5</sup> Accelerated tariff reduction is contemplated by Article 401.5 of the Canada-United States Free Trade Agreement (FTA).

<sup>6</sup> *Electrical Power Transformer Remission Order*, SOR/90-23. The Order-in-Council was issued on December 14, 1989 and published in the *Canada Gazette* on January 3, 1990.

## Legal Test

ABB Canada has applied for variation of the consent order under paragraph 33 of that order, which reads:

THE TRIBUNAL ORDERS THAT jurisdiction is retained by the Tribunal for the purpose of any application by the Director, any of the respondents, the Trustee, the Manager or the Accountant to rescind or vary any of the provisions of this Order in the event of a change in circumstances.

Clearly, this particular application by ABB Canada falls within the broadly worded enabling provision. Arguably, the application also meets the threshold conditions in section 106 of the *Competition Act*, R.S.C. 1985, c. C-34, in particular paragraph 106(b), which provides statutory authority for variation of Tribunal orders. In argument, both counsel referred back to section 106 for guidance with respect to the substantive test to be used by the Tribunal to evaluate the proposed variation. Section 106 does not, in fact, explicitly set out such a test but states that the Tribunal "*may* rescind or vary the order accordingly" if the requisite change in circumstances or consent of the parties is present.

The Tribunal adopts the standard of review set out in the memorandum of fact and law of the Director. The Tribunal will therefore apply the same test to a variation of a consent order as it applies when considering a draft consent order:

That test is whether the merger, as conditioned by the terms of the consent order, results in a situation where the substantial lessening of competition, which it is presumed will arise from the merger, has, in all likelihood, been eliminated<sup>7</sup>.

In the case of a proposed variation, it is the consent order *as proposed to be varied* that the Tribunal will evaluate against this standard.

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<sup>7</sup> *Director of Investigation and Research v. Air Canada* (1 July 1989), CT -88/1, Reasons for Consent Order Dated July 7, 1989 at 66 (Competition Trib.).

## **Evidence Submitted**

The following affidavit evidence in support of the variation was submitted to the Tribunal by ABB Canada: the affidavit of Professor Donald McFetridge of Carleton University, which assesses recent changes in the competitive presence of imports in the Canadian SPT market; the affidavit of Mr. Peter Magnus, counsel to ABB Canada, which describes the progress of the negotiations on the tariff remedies; two affidavits of Mr. Peter Janson, President of ABB Canada, which outline the problems experienced by the TTI Guelph plant that are common knowledge in the industry and pledge ABB Canada's help to remedy those problems; and two affidavits of Mr. John Churchman, the manager of the TTI division appointed pursuant to the original consent order, which contain commercially sensitive information on the productivity, costs and profits of the Guelph operation. The latter are only available on the confidential record to the Tribunal and counsel to the parties.

The other affidavits form part of the public record.

## **Analysis of the Variation Sought**

### *(i) Extension of Time to Obtain FTA Accelerated Tariff Reduction*

As of the date of the hearing of the application for variation on December 18, 1989, it had become apparent that it would not be possible for the respondents to meet the January 1, 1990 deadline for approval of an accelerated tariff reduction schedule. The evidence before the Tribunal establishes that the respondents took all the required steps in order to obtain approval within the time limit and that the delay arises from the vagaries of the administrative and political processes.

ABB Canada takes the position that there is a high probability the tariff relief will be achieved within the new, extended deadline of June 30, 1990. Background information released by the Department of Finance and the Department of External Affairs, following bilateral consultations on the accelerated tariff reductions, indicates

the agreement of both Canada and the United States on all listed items, including the relevant power transformers<sup>8</sup>. That agreement is subject to final political approval in each country but it is expected that it will be implemented by April 1, 1990. During the consultation phase, the list of all applications for accelerated tariff reduction was published in each country and comments solicited. No objections were received regarding power transformers.

*(ii) Termination of the Hold Separate*

Under the terms of the original consent order, the hold separate remains in effect until *both* the tariff remission and the tariff reduction are in place. If the tariff reduction is not achieved, the respondents must divest the Hamilton business, with divestiture of the Guelph business (or both) as a fallback should the first divestiture attempt fail.

ABB Canada submits that the extension of the hold separate until, at the earliest, April 1, 1990 will result in further diminishment of the potential for TTI to be a significant independent competitor should divestiture ultimately be required. It maintains that the value of its assets is declining owing to unanticipated adverse developments at the Guelph operation.

The evidence indicates that there are production, labour and capital management problems at the Guelph facility. There have been delays in delivery, some cancellation of orders and exclusions from invitations to tender on other contracts. The confidential affidavit of the manager of TTI confirms that the Guelph business is experiencing difficulties. As the Director points out, however, the first affidavit of the manager is much more positive than that of the President of ABB

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<sup>8</sup> Canada, Department of Finance & Department of External Affairs, List of Tariff Lines and Products where Canada and the United States have Agreed to Accelerate the Elimination of the Tariff (30 November 1989) (**Exhibit 1**).

Canada with respect to the ability of the Guelph business to solve these problems on its own, over time. The later affidavits of both Mr. Churchman and Mr. Janson, which were drafted following face-to-face discussion of ABB Canada involvement in the Guelph business, do indicate that if ABB Canada integrates that operation into its own, the situation will likely improve more rapidly. As the Director comments: "[E]arlier access by ABB Canada to TTI Division is desirable but may or may not be essential to the viability of TTI Division as a divestiture target<sup>9</sup>."

ABB Canada proposes to replace the hold separate with a maintenance requirement fastening on the Guelph facility only. The Hamilton business would be fully integrated into its own operations. The Guelph business would become a free standing division of ABB Canada available, if necessary, on a "ready for sale" basis. To accomplish this, the varied consent order would require that ABB Canada operate the Guelph business as a self-contained and self-sufficient profit centre, develop and maintain adequate resources and personnel within the division in key areas, and maintain its physical property and goodwill. ABB Canada would be allowed to provide working capital, necessary capital improvements and management to the Guelph business as one of its own divisions.

This alteration would allow ABB Canada, in its submission, to take remedial action without impairing the ultimate independent competitive capability of the facility should a divestiture become necessary. The Director is somewhat more restrained in his endorsement of the change; he points out that increased access by ABB Canada to competitive information, technology and on-going operations will have some effect on the divestiture potential of the Guelph business. He concludes, however, that the divestiture remedy will still be sufficiently viable under the new maintenance requirement in case of the somewhat unlikely prospect of failure of the FTA tariff remedy.

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<sup>9</sup> Memorandum of fact and law of the Director of Investigation and Research at para. 28.



*(iii) Deletion of References to the Hamilton Business*

Following upon the requested removal of the hold separate and the proposed integration of the Hamilton business into the operations of ABB Canada, elimination of all reference to the Hamilton business in the consent order is sought. Divestiture of the Hamilton business would no longer be a first step should the accelerated tariff reduction not be achieved; the divestiture procedure for the Guelph business would commence immediately.

ABB Canada points out that the elimination of the preliminary step will shorten the time required for divestiture. The Director is satisfied with divestiture of the Guelph business alone as a fallback since the Hamilton facility is not currently manufacturing SPT. Both counsel noted the reservations expressed by the Tribunal in its earlier reasons with respect to the potential role of the Hamilton business as a competitive force in the SPT market.

**Public Comment**

The public comment process proved very useful in refining and clarifying the original consent order. All of the original commenters were notified expressly of the application by ABB Canada to vary that order. In addition, the usual public notice appeared in the *Canada Gazette* and various newspapers as required by the *Competition Tribunal Rules*.

Federal Pioneer Limited and Hydro-Quebec filed comments on the proposed variation with the Tribunal. Neither objected to the changes requested by ABB Canada. In addition, the Director filed an affidavit summarizing the reactions of various utility customers to the application. Generally, these customers were not opposed to the extension of time to obtain a tariff reduction and either did not object to or supported increased involvement by ABB Canada in the operations of TTI<sup>10</sup>.

<sup>10</sup> Response of the Director of Investigation and Research, Affidavit of P. Humber and I. Scott, dated December 6, 1989.

## Conclusion

The Tribunal concludes that the consent order as varied meets the applicable test. The grant of additional time to obtain approval of the accelerated tariff reduction under the FTA does not change the nature of the consent order. The extension responds to circumstances outside the control of the parties and it is for a reasonable length of time. Should the tariff reduction not be approved, the divestiture alternative still exists.

The Tribunal is satisfied that, even with the alteration of the hold separate arrangement, the Guelph business will be preserved in saleable condition and that it will likely have at least the same potential to become an independent competitive force in six months, should divestiture be required. The substitution of the Guelph business as the primary candidate for divestiture does not adversely affect the divestiture remedy and may, in fact, enhance it.

DATED at Ottawa, this 16<sup>th</sup> day of March, 1990.

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

(s) Leonard A. Martin

Leonard A. Martin