



CT-1989 / 001 – Doc # 92a

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



CONSENT ORDER

Date of Hearing:

June 15, 1989

Presiding Member:

The Honourable Mr. Justice Barry L. Strayer

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 L. Glossop

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

John W. Brown, Q.C.
Iain W.M. Hendry, Q.C.
John J. Quinn

COMPETITION TRIBUNAL

CONSENT ORDER

The Director of Investigation and Research

v.

Asea Brown Boveri Inc. et al.

THE APPLICATION of the Director of Investigation and Research under the *Competition Act*¹ (the "Director") for an order pursuant to section 105 of the said Act was heard the 15th day of June, 1989, alleging that the proposed acquisition by the respondent Asea Brown Boveri Inc. ("ABB Canada") of certain assets and property comprising the electrical transmission and distribution business of the respondents Westinghouse Canada Inc. ("WECAN") and its whollyowned subsidiary, Transelectrix Technology Inc. ("TTI"), (the "Merger") will substantially prevent or lessen competition for large power transformers in Canada, and requesting an Order on consent of the parties, to remedy the alleged lessening of competition;

ON READING the Notice of Application, Statement of Competitive Impact under Rule 34 of the *Competition Tribunal Rules*² the Consent of the parties to a draft Order accompanying the said application, the reports of Woods Gordon, Joseph Harbell, and Frank Mathewson with supporting affidavits, the

¹ R.S.C., 1985, c. C-34, as amended.

² S.O.R. / 87 373.

affidavits of Iain W.M. Hendry, Q.C., Grywacheski, and the consents of Jack Churchman and Touche Ross to act as the Manager and Accountant, respectively, all filed;

NOTICE of the within application having been given in accordance with Rules 35 and 37;

ON HEARING counsel for the parties with respect to this application, counsel for the respondents advising that the Merger will not be effected until the issuance of the within Order;

AND IT BEING UNDERSTOOD BY THE PARTIES HERETO THAT nothing in this Order shall be taken as an admission by the respondents of any facts or law which would support the allegation that the Merger prevents or lessens, or is likely to prevent or lessen, competition substantially.

Definitions

1. THE TRIBUNAL ORDERS THAT for the purposes of this Order the following definitions shall apply:

(a) "Standard" means Canadian Standards Association National Standard of Canada CAN3-C88-M79 (published March, 1979) pertaining to "power transformers and reactors";

(b) "transformer" means a device falling within the scope of the Standard;

(c) "auto-transformer" means a transformer in which part of one winding is common to both the primary and secondary circuits associated with that winding pursuant to section 4.25 of the Standard;

(d) "Subject Power Transformer" means an autotransformer having a base MVA of greater than 100 megavolt amperes (MV A) and other transformer having a base MV A of greater than 50 MV A and/or a voltage classification of the 765 kilovolt (KV) class or greater;

(e) "voltage classification" means the level of power frequency voltage selected by the purchaser as a basis on which to identify the system of insulation levels and associated tests applicable to the transformer pursuant to section 4.26 of the Standard and which power frequency voltage is used to identify the class of transformers referable to the dielectric tests prescribed by the Standard at Tables 4 and 5 therein;

(f) "base MVA" means the sum of the equivalent ONAN ratings of all windings, divided by two. The base MV A rating may be an equivalent rating and is not intended to be a thermal rating. For types of cooling other than ONAN, the equivalent ONAN rating shall be obtained by multiplying:

(i) ONWF rating x 0.75;

(ii) ONAF (ONAN plus 113) rating x 0.75;

(iii) ONAF/ONAF (ONAN rating plus 2/3) rating x 0.6;

(iv) OFWF or OF AF rating x 0.6, as provided in section 4.16 of the Standard;

(g) "person" includes a natural person, partnership, and body corporate;

(h) "Hamilton business" means the Beach Road, Hamilton, Ontario, undertaking of TTI and includes all the equipment, the right to use any relevant technology or know-how, trade secrets, contracts and other property and interests owned by or licenced to TTI and used in the production and sale of electrical distribution and transmission equipment and all such property or interests needed to manufacture Subject Power Transformers;

(i) "Guelph business" means the Guelph, Ontario, undertaking of TTI and includes all the equipment, the right to use any relevant technology or know-how, trade secrets, contracts and other property and interests owned by or licenced to TTI and used in the production and sale of electrical distribution and transmission equipment and all such property or interests needed to manufacture Subject Power Transformers;

(j) "TTI" means the respondent Transelectrix Technology Inc. and includes the Hamilton business and the Guelph business; and

(k) "hold separate" means the arrangement described in paragraphs 3 to 9 herein.

Application

2. THE TRIBUNAL ORDERS THAT:

(a) the provisions of this Order apply to each of the respondent corporations and

(i) each division, subsidiary, or other person controlled by it; and each officer, director, employee, agent or other person acting for or on behalf of any of them;

(ii) each of their successors and assigns, and all other persons in active concert or participation with any of them who shall have received actual notice of this Order; and

(iii) the Trustee, the Accountant and Manager, as defined and specifically referred to herein;

(b) nothing in this Order or the consent of the applicant and the respondents shall be construed to confer any rights upon any person except the applicant and the respondents, other than as specifically provided in this Order.

Hold Separate

3. THE TRIBUNAL ORDERS THAT the respondent ABB Canada shall hold separate the operations of TTI from its own operations and not take any action towards combining the assets or operations of TTI with its own assets or operations with the exception of taking legal title to the TTI assets pursuant to the Merger.

4. THE TRIBUNAL ORDERS THAT in order to preserve the separation of the TTI assets acquired pursuant to the Merger, ABB Canada shall:

(a) maintain the TTI assets purchased pursuant to the Merger in a separate identifiable division of ABB Canada established for this purpose (the "TTI Division") for the term of this hold separate;

(b) contract with an independent accounting firm (the "Accountant"), to prepare separate financial statements for the TTI Division, in accordance with generally accepted principles, on a monthly basis.

5. THE TRIBUNAL ORDERS THAT ABB Canada shall not influence or attempt to influence any operational or financial decisions of the TTI Division, including the tendering of bids, and shall not obtain, directly or indirectly, from the TTI Division, any information except as follows:

(a) monthly financial statements prepared by the Accountant pursuant to subparagraph 4(b) which statements will be filed with the Tribunal on a confidential basis when issued to ABB Canada;

(b) information concerning the financial condition and performance of the ITI Division necessary for ABB Canada to comply with the provisions of this Order, or information necessary to deal with post-closing matters arising from the Merger, provided that:

(i) such information shall not be disclosed to ABB Canada without the prior written permission of the Director; and

(ii) such information shall only be disclosed to the following individuals in ABB Canada, who shall not disclose this information to anyone without the prior written permission of the Director: Sven Hindrikes, Executive Vice-President; Gilles Sicotte, Director of Finance, Power Transmission Segment; and Alan MacNamara, Corporate Comptroller.

6. THE TRIBUNAL ORDERS THAT ABB Canada shall refrain from taking any action that would jeopardize the sale or operation of the TTI Division or otherwise adversely affect its capability to compete effectively in the production and sale of Subject Power Transformers.

7. THE TRIBUNAL ORDERS THAT during the term of the hold separate herein:

(a) the TTI Division shall be managed by Jack Churchman, Vice-President, TTI (the "Manager"). ABB Canada and the Manager shall incorporate into any employment contract entered into between them the terms of this Order governing the conduct of the Manager;

(b) the Manager shall have complete managerial responsibility over the TTI Division, subject to the provisions of this Order, and shall maintain, in accordance with sound accounting practice, separate, true and complete financial ledgers, books and records recording material financial information of the TTI Division;

and

(c) the Manager shall be assisted by the Accountant in such manner as he may require in managing the on-going operation of the TTI Division.

8. THE TRIBUNAL ORDERS THAT the TTI Division shall be operated in the ordinary course of business by the Manager except as required by a purchaser. ABB Canada and the Manager shall actively maintain the physical property of and the goodwill associated with the TTI Division to standards at least equal to those existing at the date of closing of the Merger and they shall not:

(a) permit any deterioration in such standards;

(b) cause the laying off of key personnel and ABB Canada shall not hire any management, technical staff or other personnel of the TTI Division; or

(c) cause any disposition of the assets of the TTI Division other than in the ordinary course of business or pursuant to any order of the Tribunal.

9. THE TRIBUNAL ORDERS THAT nothing in paragraphs 3 to 8 shall restrict ABB Canada from:

(a) providing for and maintaining sufficient working capital to permit the TTI Division to continue to operate as a viable on-going business;

(b) providing for and authorizing all necessary capital improvements to the TTI Division required to enable it to continue to operate up to at least the standards referred to in paragraph 8.

Conditions

10. THE TRIBUNAL ORDERS THAT the following conditions shall apply to the paragraphs 11, 12 and 13 hereof:

(a) by January 1, 1990, or earlier, the necessary regulatory approvals will have been obtained so that the customs tariff on all imports under tariff item 8504.23.00 of transformers of base MY A as follows:

(i) auto-transformer greater than 300 MYA;

(ii) other transformer greater than 275 MY A;

and/or a voltage classification of 765 KY class or greater shall be subject to a full duty remission for a period of not less than five years effective January 1, 1990;

(b) by January 1, 1990, or earlier, the necessary regulatory approvals will have been obtained so that the customs tariff on tariff item 8504.23.00 of transformers of base MY A as follows:

(i) auto-transformer greater than 100 MYA up to and including 300 MY A;

(ii) other transformer greater than 50 MY A up to and including 275 MY A;

and/or a voltage classification of 765 KV class or greater with respect to imports originating in the United States of America shall be reduced to a

maximum of six percent effective January 1, 1990, three percent effective January 1, 1991 and to zero percent effective January 1, 1992;

(c) by June 16, 1989, or earlier, the agreement of Federal Pioneer Limited to the proposed tariff reductions set out in paragraph (b), or a written indication from the appropriate legal authority that he will recommend such reductions to Privy Council, will have been obtained;

(d) the above conditions (a) and (b) will have been accomplished by filing with the Registrar of this Tribunal copies of the necessary statutory instruments or approvals evidencing such reductions;

(e) the above condition (c) will have been accomplished by filing with the Registrar correspondence from Federal Pioneer Limited or the appropriate legal authority, as the case may be, which sets out their support as required.

11. THE TRIBUNAL ORDERS THAT the hold separate will continue to apply until either:

(a) all the conditions in paragraph 10 have been satisfied; or

(b) the divestiture referred to in paragraphs 12 or 13, if required by this Order, has been accomplished.

Divestiture of the Hamilton Business

12. THE TRIBUNAL ORDERS THAT if either condition 10(b) or 10(c) has not been accomplished within the time specified, ABB Canada shall proceed to divest all its right, title and interest in the Hamilton business in accordance with the procedure for divestiture set out in this Order.

Divestiture of the TTI Division

13. THE TRIBUNAL ORDERS THAT if either condition 10(a) or the divestiture of the Hamilton business pursuant to paragraph 12, as required, is not accomplished within the time specified therefor, ABB Canada shall proceed to divest all its right, title and interest in the TTI Division in accordance with the procedure for divestiture set out in this Order.

14. THE TRIBUNAL ORDERS THAT for the purposes of the divestiture required by paragraph 13, reference to divestiture of the TTI Division shall mean the divestiture of either the TTI Division or the Guelph business, as defined herein, at the option of the Director.

Divestiture Procedure

15. THE TRIBUNAL ORDERS THAT divestiture of the Hamilton business or the TTI Division as defined in paragraph 14 (the "Assets") shall be accomplished:

(a) by sale of the fee simple title, assignment of lease or sublease, assignment of contract, or other disposition necessary to ensure that by completion of the divestiture, ABB Canada has no remaining right, title or interest in the Assets inconsistent with the intent of this Order;

(b) by way of disposition of the Assets as a going concern;

(c) to an arm's length purchaser or purchasers who:

(i) will effect the purchase for the purpose of competing effectively in the manufacture and sale of Subject Power Transformers or in power transformers over a range of power ratings acceptable to the Director and in any case up to a maximum power rating of not less than 300 MV A for auto-transformers and 275 MV A for other transformers;

(ii) have the managerial, operational and financial capability to compete effectively in the manufacture and sale of Subject Power Transformers;

(d) by including in the divestiture the TTI trademark or trade name, the personnel, inventory, customer lists, supply contracts and other assets, interests or

personal property necessary for a purchaser to operate the Assets as a going concern and which a purchaser is desirous of acquiring;

(e) by way of tender, bidding or other procedure instituted in a manner to allow a fair opportunity to prospective purchasers to acquire the Assets;

(f) on usual commercial terms; and

(g) by including with the divestiture, in the case of the divestiture of the Hamilton business, the assignment of contracts of ABB Canada for the current production of Subject Power

Transformers satisfactory to the Director.

16. THE TRIBUNAL ORDERS THAT any person making an inquiry regarding the possible purchase shall be notified that the sale is being made pursuant to this Order and provided with a copy of this Order. Any *bona fide* prospective purchaser shall be furnished, subject to the execution of a customary confidentiality agreement, all pertinent information regarding the Assets; such information to be provided to the Director on request. The prospective purchaser shall be permitted to make such inspection of the plant and of all financial, operational or other documents and information as may be relevant to the divestiture, except for all documents which have been and shall be made the subject of an order of confidentiality of this Tribunal.

17. THE TRIBUNAL ORDERS THAT ABB Canada shall use its best efforts to accomplish the divestiture within the time period specified and WECAN shall cooperate in carrying out such divestiture.

18. THE TRIBUNAL ORDERS THAT ABB Canada shall advise the Director every 30 days in writing of the progress of its efforts to accomplish the divestiture, including a full description of contacts or negotiations and the identity of all parties contacted and prospective purchasers who have come forward.

Trustee Sale

19. THE TRIBUNAL ORDERS THAT if the divestiture is not completed within 120 days from the date paragraphs 12 or 13 become effective, the Tribunal, on the application of the Director, and after affording the respondents a reasonable opportunity to be heard, may appoint a trustee ("Trustee") to be nominated by the Director for the sale of the Assets on the following terms ("Trustee Sale"):

(a) the Assets shall be divested by the Trustee within 60 days of the Trustee's appointment at the most favourable price and on the most favourable terms and conditions available;

(b) the Trustee Sale shall be accomplished in accordance with paragraph 15 herein;

(c) the Trustee Sale shall be considered to have been completed when the purchaser has signed a binding agreement that has not been the subject of objection by the Director pursuant to paragraph 28;

(d) after the appointment of the Trustee becomes effective, only the Trustee shall have the right to effect the divestiture required by this Order;

(e) the Trustee shall have the full power and authority to effect the Trustee Sale and shall use all reasonable efforts to accomplish it;

(f) ABB Canada and the Manager shall use their best efforts to assist the Trustee in accomplishing the Trustee Sale. The Trustee shall have full and complete access to the personnel, books, records and facilities of the Assets, and ABB Canada and the Manager shall provide to the Trustee such financial or other information relevant to the Assets as the Trustee may request. ABB Canada and the Manager shall take no action to interfere with or impede the Trustee's accomplishment of the Trustee Sale;

(g) after appointment, the Trustee shall, every 30 days, file reports with the Director and ABB Canada setting forth the Trustee's efforts to accomplish the Trustee Sale;

(h) the Trustee Sale shall be conducted at ABB Canada's expense and the proceeds of the divestiture paid to ABB Canada;

(i) the Trustee shall have such other powers as the Tribunal shall deem appropriate.

20. THE TRIBUNAL ORDERS THAT ABB Canada shall not object to a divestiture by the Trustee on any grounds other than the Trustee's malfeasance or gross misconduct and then only subject to the provisions of paragraph 27.

21. THE TRIBUNAL ORDERS THAT in the case only of the divestiture of the TTI Division, if the Trustee has not accomplished the divestiture within 60 days of its appointment, the Trustee shall thereupon promptly file with the Tribunal on a confidential basis a report setting forth: (1) the Trustee's efforts to accomplish the required divestiture or disposition, (2) the reasons, in the Trustee's judgment, why the required divestiture or disposition has not been accomplished, and (3) the Trustee's recommendations. The Trustee shall at the same time furnish such report to the Director and the respondents, who shall each have the right to be heard and to make additional recommendations consistent with the purpose of the divestiture. The Tribunal may thereafter make such orders as it shall deem appropriate in order to carry out the divestiture, which may, if necessary, include extending the term of the Trustee's appointment.

22. THE TRIBUNAL ORDERS THAT in the case of the divestiture of Hamilton business, if the Trustee has not accomplished the divestiture within 60

days of its appointment, ABB Canada shall divest the TTI Division pursuant to paragraph 13.

23. THE TRIBUNAL ORDERS THAT following the divestiture or Trustee Sale, neither ABB Canada nor any of its agents or representatives will make further direct or indirect use of the Assets or acquire the Assets for a period of 10 years, but nothing in this paragraph shall preclude the exchange or sale of products or like arrangements acceptable to the owner or operator of the Assets or the purchase by ABB Canada of any of the Assets if the business associated with the Assets has failed or is likely to fail, subject to the provisions of the *Competition Act*.

Notification

24. THE TRIBUNAL ORDERS THAT ABB Canada or the Trustee, whichever is then responsible for effecting the divestiture or disposition required herein, shall notify the Director of any proposed divestiture required by this Order. If the Trustee is responsible, it shall similarly notify ABB Canada. The notice shall set forth the details of the proposed transaction and list the name, address, and telephone number of each person not previously identified who offered or expressed an interest or desire to acquire any of the Assets (as defined herein) together with full details of the same.

25. THE TRIBUNAL ORDERS THAT within seven days after receipt of the notice, the Director may request additional information concerning the proposed divestiture, the proposed purchaser and any other potential purchaser. ABB Canada or the Trustee shall furnish the additional information within seven days of the receipt of the request unless the Director agrees in writing to extend the time.

26. THE TRIBUNAL ORDERS THAT within 15 days after receipt of the notice or within 15 days after receipt of the additional information, whichever is later, the Director shall notify in writing ABB Canada and the Trustee, if there is one, if he objects to the proposed divestiture.

27. THE TRIBUNAL ORDERS THAT if the Director fails to object within the period specified, or if the Director notifies in writing ABB Canada and the Trustee, if there is one, that he does not object, then the divestiture may be consummated, subject only to ABB Canada's limited right to object to the sale under paragraph 20. Upon objection by ABB Canada under paragraph 20, the proposed divestiture shall not be accomplished unless approved by the Tribunal.

28. THE TRIBUNAL ORDERS THAT if the Director objects, he may apply to the Tribunal for an Order that the proposed purchase not be consummated.

Financing

29. THE TRIBUNAL ORDERS THAT ABB Canada shall not provide financing for all or any part of any divestiture under this Order which would permit ABB Canada to influence or control the operation of the Assets after the divestiture (such as through a right of repossession) and no financing shall occur without the prior written consent of the Director.

Compliance Inspection

30. THE TRIBUNAL ORDERS THAT ABB Canada, the Manager and WECAN shall, for the purpose of determining or securing compliance with this Order, and subject to any legally recognized privilege, from time to time permit duly authorized representatives of the Director, including counsel, consultants and other persons retained by the Director, upon the written request of the Director, and on seven days' notice:

(a) access during office hours to inspect and copy all books, ledgers, accounts, correspondence, memoranda, and other records and documents in the possession or under the control of ABB Canada, the TTI Division and WECAN, which may have counsel present, relating to any matters contained in this Order; and

(b) subject to the reasonable convenience of ABB Canada, the Manager and WECAN and without restraint or interference from them, to interview their officers, employees, and agents, who may have counsel present, regarding any such matters.

31. THE TRIBUNAL ORDERS THAT upon the written request of the Director, ABB Canada, the Manager and WECAN shall submit such written reports, under oath if requested, with respect to any of the matters contained in this Order as may be requested.

32. THE TRIBUNAL ORDERS THAT no information or documents obtained by the means provided in paragraphs 30 and 31 herein shall be divulged by any representative of the Director to any person except in the course of legal proceedings to which the Director is party, or for the purpose of securing compliance with this Order, or as otherwise required by law.

33. 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 or otherwise.

DATED at Ottawa, this 15th day of June, 1989, with reasons to be issued at a later date.

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

(s) B.L. Strayer
B.L. Strayer