

THE COMPETITION TRIBUNAL

IN THE MATTER OF an Application by Southam Inc., *et al.*,
under Section 106 of the *Competition Act*, R.S.C 1985, c.
C-34, as amended;

AND IN THE MATTER of the direct and indirect acquisitions
by Southam Inc. of equity interests in the business of publishing
The Vancouver Courier, the North Shore News and the *Real*
Estate Weekly.

B E T W E E N :

**SOUTHAM INC.
LOWER MAINLAND PUBLISHING LTD
RIM PUBLISHING INC.
YELLOW CEDAR PROPERTIES LTD.
NORTH SHORE FREE PRESS LTD.
SPECIALTY PUBLISHERS INC.
ELTY PUBLICATIONS LTD.**

Applicants

-and -

THE DIRECTOR OF INVESTIGATION AND RESEARCH

Respondent

**SECOND AMENDED REPLY TO THE RESPONSE OF THE
DIRECTOR OF INVESTIGATION AND RESEARCH
APPLICATION TO VARY DIVESTITURE ORDER**

1. This Reply is filed on behalf of Southam Inc. *et al.*, the Applicants in this application under section 106 of the *Competition Act* (the "Act").

2. The Applicants deny the allegations contained in the Response of the Director of Investigation and Research, as amended (the "Director's Response"), except as specifically admitted herein.

3. The Applicants accept that, in its Reasons delivered in connection with the original hearing (the "Original Reasons"), the Tribunal made the finding in subparagraph 6(a) of the Director's Response that, while it may be relatively easy to start a community newspaper in the North Shore, it is difficult to survive. However, the Applicants contend that this finding is not relevant to the [^] Applicants' application to vary the divestiture order released on March 8, 1993 (the "Divestiture Order"). [^] The North and West Voice (the "Voice") can not be considered a new [^] entrant into community newspaper publishing whose survival is at risk. [^] The Voice, of which Mr. Delesalle [^] has effective control, was introduced in July, 1996 and has published as an active competitor to the *North Shore News* for more than a year. The [^] change in control of the *Voice* does not constitute new entry.

4. The Applicants accept that the Tribunal made the finding in subparagraph 6(b) of the Director's Response that non-traditional houses had increased in relation to traditional houses. Nevertheless, this statement does not refute the [^] Applicants contention that there has been a significant shift from traditional houses to 100% houses since 1991.

5. The Applicants accept that, in the Original Reasons, the Tribunal made the findings set out in subparagraph 6(c) and 6(d) of the Director's Response that there have been several attempts to start new print real estate publications on the North Shore, and in the Lower Mainland generally, and that entry into the print real estate advertising market is not easy but involves significant risk and investment. However, the Applicants submit that these findings are not relevant to [^] their section 106 application. None of the entrants into print real estate publishing in the North Shore since 1991, described in the application, can be considered to be a new and untried entrant. In addition, the rack distribution publications

identified by the Applicants in the Notice of Application are evidence of viable and successful entry since 1991.

6. The Applicants agree with the Director's assertion in subparagraph 6(e) of his Response[^] that in 1991 the Tribunal found that actual entry, or threat of entry, into the North Shore print real estate publication market was insufficient to relieve the likely substantial lessening of competition created by the acquisitions of the *North Shore News* and the *Real Estate Weekly*. However, the Applicants deny that this finding is determinative of any issue with respect to a section 106 application in 1997; the Applicants submit that the current circumstances have materially changed.

7. The applicants [^] agree with the Director's assertion [^] in subparagraph 6(f) of his Response that, in 1991, the Tribunal found that Canada Post Admail was a relatively small player compared to the community newspapers in the aggregate. However, the Applicants submit that the Tribunal made its finding on the basis of "limited evidence on the extent to which unaddressed Admail is an effective competitor in flyer delivery." (at p. 241) In fact, the Tribunal specifically noted that its findings with respect to this matter were potentially useful as background, but did not "address the situation in the Lower Mainland". (at p. 242)

8. With respect to paragraph 7 of the Director's Response [^], the Applicants do not allege that the Tribunal made any findings with respect to the competitiveness of Canada Post in the North Shore. Instead, the Tribunal found that Canada Post had delivered four billion pieces of addressed and unaddressed Admail annually. Paragraph 28 of the Second Amended Statement of Grounds and Material Facts refers to the status of Canada Post as one of the largest distributors of flyers in Canada. Further, it should be noted that despite the Tribunal's finding that Canada Post was a relatively small player compared to community newspapers in general, it noted the competitive significance of [^] Admail with respect to the flyer delivery market in the lower mainland.

^9. In response to subparagraph 9(a) of the Director's Response, the Applicants submit that the *Voice* has evolved into an effective competitor to the *North Shore News* (the "NSN") and will continue to be an effective competitor with the financing and direction provided by Mr. Michael Delesalle.

10. In response to subparagraph 9(c) of the Director's Response, the Applicants accept that the Tribunal anticipated the possibility of entry of new community newspapers in the North Shore when considering whether there had been a likely substantial lessening of competition in the newspaper retail advertising services market in the City of Vancouver, on the North Shore or throughout the Lower Mainland. With respect the market for real estate advertising, the Applicants submit that the Tribunal only anticipated the possible effect of the entry of new real estate publications.

11. In further response to subparagraph 9(c), the Applicants submit that the Tribunal did not consider the effects of integrating the *REW-NS* with a community newspaper competing with the NSN and delivered by an its own independent distribution network. Indeed, it could not have done so as no competitive community newspaper existed at the time.

12. With respect to the Director's assertion in paragraph ^ 10 of the Director's Response that the Applicants raised the possibility of divesting only *REW-NS* at the remedies hearing, the Applicants accept that they made a passing reference to the possibility of divesting the *REW-NS* at the Tribunal hearing on remedies in November 1992; however, the Applicants did not make any submissions on this possibility. Indeed, counsel to the Director recognized as much at the remedies hearing.

^ 13. To the assertion contained in paragraph ^ 10 of the Director's Response, that the Director argued against the divestiture of the *REW-NS* and that the Tribunal considered and rejected this remedy, the Applicants reply that the competitive implications of the sale of

the *REW-NS* to a qualified buyer were not canvassed by the Tribunal. In fact, the Tribunal's conclusion that the divestiture of the *REW-NS* was not a realistic remedy was expressly made "in the circumstances" that (a) there was no specific proposal regarding the sale of the *REW-NS* before the Tribunal and (b) the Applicants (the respondents in that hearing) had not responded to the Director's objections made in anticipation of such a proposal. The proposal by Mr. Delesalle to buy the *REW-NS* therefore constitutes a change in the circumstances that were specifically identified by the Tribunal as underlying its original conclusion regarding the sale of the *REW-NS*.

[^] 14. The Applicants also deny the Director's contention in paragraph [^] 13 of the Director's Response that the Tribunal rejected the divestiture of the *REW-NS* in principle, irrespective of the identity of the purchaser or the terms of the proposal that would be made by such a purchaser.

[^] 15. The Applicants deny the assertion in paragraph [^] 13 of the Director's Response that the proposal to divest only the *REW-NS* is *res judicata*. The Director fails to distinguish between an appeal of a decision of the Tribunal on a question of law or mixed fact and law and a section 106 application. The underlying basis of a section 106 application is that the circumstances alleged in the application did not exist at the time of the Tribunal's consideration of the original application, and that these new circumstances, when considered in light of the applicable law, would produce a different order. This differs fundamentally from an appeal from a Tribunal decision, which necessarily is grounded in the particular factual context of the hearing.

[^] 16. The Applicants accept the facts set out in paragraphs [^] 11 and [^] 12 of the Director's Response that the Applicants sought leave of the Federal Court of Appeal to introduce further evidence at the hearing of their appeal of the Tribunal's decision on remedies and that the Federal Court of Appeal dismissed the Applicants' motion to introduce fresh evidence for the reason that the proposed fresh evidence was not practically conclusive

of any issue in the appeal as to remedies. The Applicants contend, however, that the findings of the Federal Court of Appeal are not relevant to this section 106 application.

¹⁷. The Applicants deny the assertions contained in paragraph ¹⁴ of the Director's Response and submit that the ^{changed circumstances identified in paragraphs 28 through 30 of the Second Amended Statement of Grounds and Material Facts do constitute a sufficient change in the circumstances that led to the Divestiture Order ^{within the meaning of section 106 of the Act. These circumstances, in conjunction with the developments described in paragraphs 32 to 34 of the Second Amended Statement of Grounds and Material Facts, constitute significant developments having regard to the reasons underlying the Remedies Decision and, more specifically, on the availability and effectiveness of remedies other than those contemplated by the Divestiture Order.}}

18. In further response to the assertions contained in paragraph 14 of the Director's Response, the applicants deny that the Tribunal considered the withdrawal of Admail from the flyer delivery business, the significance of developments in production and printing technology beyond a finding that it would mean that the equipment that had to be purchased was minimal for an entrant publication (at p. 279) or the competitive impact of integrating a competing community newspaper with an independent distribution system with a divested REW-NS. Further, the Tribunal at no time considered the proposed divestiture of Homes or the divestiture of the REW-NS within the context of a specific purchaser who addressed the concerns raised by the Tribunal in the Remedies Decision.

¹⁹. The Applicants deny the allegations contained in paragraph ¹⁵ of the Director's Response for the reasons contained in the Applicants' Notice of Application.

²⁰. The Applicants state that the assertions contained in paragraph ¹⁶ of the Director's Amended Response are irrelevant to these proceedings. Section 8 of the Divestiture Order only applies to a divestiture of the entire REW or NSN and it is submitted

that it would be inappropriate, in these circumstances, to require that the Applicants have followed the sale process, as set out in the Divestiture Order, with respect to the proposed divestiture of the *REW-NS*. In moving towards partial divestiture, Southam is entitled to act in a commercially reasonable manner and respond to expressions of interest.

Dated at the City of Toronto, in the Province of Ontario, this ^ 7th day of ^
November, 1997.

John J. Quinn

Mark J. Nicholson

Blake, Cassels & Graydon
Barristers and Solicitors
199 Bay Street, Suite 2800
Commerce Court West
Toronto, Ontario
M5L 1A9
Telephone: (416) 863-2648
Facsimile: (416) 863-2653
Counsel to the Applicant, Southam Inc.

TO: THE REGISTRAR
Competition Tribunal
600 – 90 Sparks Street
Ottawa, Ontario
K1P 5B4

AND TO: DAVIS & COMPANY
2800 Park Place
666 Burrard Street
Vancouver, B.C.
V6C 2Z7
Attention: Mr. Stanley Wong
Counsel for the Director of Investigation and Research