

Competition Tribunal



Tribunal de la Concurrence

CT-1990 / 001 – Doc # 388

IN THE MATTER of an application by the Director of Investigation and Research for orders pursuant to section 92 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 businesses of publishing *The Vancouver Courier*, the *North Shore News* and the *Real Estate Weekly*.

B E T W E E N:

The Director of Investigation and Research

Applicant

and

Southam Inc.  
Lower Mainland Publishing Ltd.  
Rim Publishing Inc.  
Yellow Cedar Properties Ltd.  
North Shore Free Press Ltd.  
Specialty Publishers Inc.  
Elty Publications Ltd.

Respondents



**REASONS AND ORDER REGARDING  
EXTENSION OF DIVESTITURE PERIOD AND APPOINTMENT OF TRUSTEE**

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**Date of Hearing:**

December 12, 1997

**Member:**

Rothstein J. (presiding)

**Counsel for the Applicant:**

**Director of Investigation and Research**

Stanley Wong  
J. Kevin Wright

**Counsel for the Respondents:**

**Southam Inc.**  
**Lower Mainland Publishing Ltd.**  
**Rim Publishing Inc.**  
**Yellow Cedar Properties Ltd.**  
**North Shore Free Press Ltd.**  
**Specialty Publishers Inc.**  
**Ely Publications Ltd.**

John J. Quinn  
Mark J. Nicholson  
David Fruitman

## COMPETITION TRIBUNAL

### REASONS AND ORDER REGARDING EXTENSION OF DIVESTITURE PERIOD AND APPOINTMENT OF TRUSTEE

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*The Director of Investigation and Research*

v.

*Southam Inc. et al.*

#### Extension of Divestiture Period

Pursuant to paragraph 2(2) of the Tribunal's divestiture order dated March 8, 1993,<sup>1</sup> the respondents Southam Inc. et al. filed a motion on December 8, 1997 seeking an extension of time to divest themselves of either the *Real Estate Weekly* ("REW") or the *North Shore News* ("NSN") as required by paragraph 2(1) of the divestiture order. The divestiture order allows the respondents 180 days to complete the divestiture ("180-day divestiture period"), after which time the Director of Investigation and Research ("Director") may move under paragraph 12 of the divestiture order to have a trustee appointed to effect the divestiture on behalf of the respondents.

Although the divestiture order is now about five years old because appeals had been taken and stays granted, neither the REW nor the NSN has been sold and no trustee has been appointed to effect the divestiture order. The respondents appealed the divestiture order and the Tribunal stayed the divestiture order pending a resolution of the appeal by the Federal Court of

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<sup>1</sup> *Director of Investigation and Research v. Southam Inc.* (1993), 48 C.P.R. (3d) 224, [1993] C.C.T.D. No. 12 (QL) (Comp.Trib.) ("divestiture order").

Appeal. A further appeal was taken by the respondents to the Supreme Court of Canada; the divestiture order was stayed by the Supreme Court until its final disposition of the appeal. On March 20, 1997, the Supreme Court of Canada affirmed the Tribunal's divestiture order.<sup>2</sup> This decision triggered the 180-day divestiture period within which the respondents were allowed to divest themselves of either the REW or the NSN and before which the Director could not move to have a trustee appointed.

On July 28, 1997, the respondents brought an application under section 106 of the *Competition Act*<sup>3</sup> to vary the divestiture order as well as an application to suspend (stay) the 180-day divestiture period pending a disposition of the variation application. By order dated August 22, 1997, the suspension application was dismissed, without reasons, and without prejudice to the respondents' right to renew the motion at a later date.

The Tribunal dismissed the variation application on January 8, 1998. While the 180-day divestiture period has long since expired, the respondents' variation application, although unsuccessful, cannot be considered to have been frivolous or vexatious or an unjustified attempt to gain time to effect the sale of either the REW or the NSN as required by the divestiture order. The variation application was filed approximately 130 days into the 180-day divestiture period. The requested extension of 50 days, if granted, would provide the respondents the benefit of the full 180-day divestiture period by effectively discounting the period during which the variation application was outstanding.

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<sup>2</sup> *Director of Investigation and Research v. Southam Inc.*, [1997] 1 S.C.R. 748.

<sup>3</sup> R.S.C. 1985, c. C-34.

It appears to the Tribunal, taking into account the long history of this case, the lengthy period during which the requirement to divest was stayed and the interruption of the 180-day divestiture period by the variation proceedings, that granting a further 50 days for the respondents to effect the divestiture order would not be unreasonable. Accordingly, the request for a 50-day extension of the time allowed for the respondents to divest themselves of either the REW or the NSN is granted to run from the date of this order.

### **Appointment of Trustee**

By notice of motion dated December 2, 1997, the Director applied for an order appointing Robert M. Rusko as the Trustee pursuant to paragraph 12 of the Tribunal's divestiture order dated March 8, 1993. As discussed above, on December 8, 1997, the respondents applied for an extension of the 180-day divestiture period within which they were allowed to divest themselves of either the REW or the NSN and before which the Director could not move for the appointment of a trustee. The respondents initially objected to the Director's motion for the appointment of a trustee on the basis that if their motion for an extension of time were granted, the Director's motion for an appointment of a trustee would be premature. However, at the hearing of the motions, the respondents consented to an order which would have the effect of appointing the trustee automatically, without the need for further steps being taken by the Director, on the day following the expiry of the 50-day extension of time, if granted. The Tribunal is satisfied that such an approach is reasonable.

The divestiture order sets out the terms in accordance with which a trustee is to be appointed. In addition to those terms, the respondents request that a number of terms be added. Each of the proposed additional terms shall be dealt with in turn.

(1) The first additional term proposed by the respondents is the following:

That in the event the Trustee receives two or more offers to purchase from prospective purchasers who meet the criteria established under sections 3 and 7 of the Order, the Trustee shall consult with the Respondents and the Respondents will have the power to determine which of the purchasers shall be proposed by the Trustee to the Director.

The Director submits that this provision is inconsistent with paragraph 17(2) of the divestiture order which provides:

The respondents may object to the proposed Trustee Sale solely on the grounds of the Trustee's malfeasance, gross misconduct or contravention of any of the terms of this order. If the respondents object to the proposed Trustee Sale, the Director may apply to the tribunal for an order approving the proposed Trustee Sale.

The Director also says that the respondents' right to object to a proposed purchaser could only be made under paragraph 17(2) of the divestiture order, and only on the grounds of the Trustee's malfeasance, gross misconduct or contravention of any of the terms of the divestiture order, which do not apply here.

Paragraph 16 of the divestiture order sets out the provisions applicable to the Trustee selling the elected business, i.e., either the REW or the NSN at the election of the respondents.

Paragraph 16(f) provides:

The respondents shall take no action to interfere with or impede the Trustee's accomplishment of the Trustee Sale. At the request of the Trustee, the respondents shall assist the Trustee in accomplishing the Trustee Sale.

The term requested by the respondents does not appear to be consistent with the scheme of the divestiture order, particularly as that scheme is reflected through paragraphs 16(f) and 17(2). Nothing in the divestiture order implies that the respondents should have the power to determine which purchaser shall be proposed by the Trustee to the Director. Accordingly, the Tribunal cannot agree to the proposed term.

The Tribunal does, however, recognize that it is the respondents' assets, those comprising either the REW or the NSN, that are being divested. Paragraph 16(c) provides:

The elected business shall be sold by the Trustee within 60 days of the Trustee's appointment, subject to an extension on the consent of the Director or by further order of the Tribunal, at the most favourable price and on the most favourable terms and conditions available.

While the most favourable price might be obvious to the Trustee, the most favourable terms and conditions available for the sale might not. For this purpose, the Trustee should be required to provide the respondents with an opportunity to comment on the price, terms and conditions in an offer to purchase the elected business that the Trustee proposes to accept and to recommend to the Director. Any such comments by the respondents must be provided to the Trustee within three business days of the respondents having been provided by the Trustee with the proposed price, terms and conditions. The Trustee shall notify the Director that the price, terms and conditions in an offer to purchase have been forwarded to the respondents for their comments.

(2) The second proposed term for which the respondents seek approval reads as follows:

Should the REW constitute the elected business, the Trustee will not provide confidential information to David Black personally or to any company directly or indirectly controlled by David Black.

The respondents' concern is that Mr. Black is a direct and ongoing competitor in the market for print real estate advertising in the Lower Mainland. The respondents submit that disclosure of confidential REW information to Mr. Black might cause other potential purchasers to place a lower value on the REW as there would be a chilling effect if a competitor, Mr. Black, had had access to competitively sensitive information about the REW.

The Director submits that the respondents' requested term is inconsistent with paragraphs 8(1) and 16(d) of the divestiture order. Paragraph 8(1), which falls within that part of the divestiture order which deals with the procedure for divestiture by the respondents themselves, provides:

The divestiture shall be carried out in a manner that provides a fair opportunity to potential purchasers to obtain notice of the sale and to acquire the business to be divested.

Paragraph 16(d) of the divestiture order incorporates paragraph 8(1) into the procedure to be followed for a sale by the Trustee. Paragraph 16(d) provides:

The Trustee Sale shall be accomplished in accordance with paras. 3, 4, 5, 6, 7 and 8 of this order.

It is apparent that paragraph 8(1) does not provide for any limitation on potential purchasers. The evidence before the Tribunal is that Mr. Black is a potential purchaser. A term



that would exclude a potential purchaser, and in particular Mr. Black, would be inconsistent with paragraph 8(1). While the Tribunal is mindful of the respondents' concern, it is not prepared to impose a term that is inconsistent with the divestiture order.

(3) The parties agree to the following terms:

- (a) Prior to the Trustee employing such persons as reasonably necessary pursuant to paragraph 16(i) of the divestiture order, any such appointment and its material terms must be approved by the respondents or, if rejected by the respondents, by the Tribunal.
- (b) The Trustee will keep all non-public information provided by the respondents confidential except information designated as information which can be transmitted to potential purchasers.
- (c) The appointment of a Trustee shall not take effect if the respondents have entered into a binding purchase agreement for one of the publications subject only to approval under the divestiture order. If such approval is not granted the appointment shall be effective forthwith.

These terms are acceptable to the Tribunal.

The application for the appointment of a Trustee is granted to take effect on the day following the expiry of the 50-day extension of the 180-day divestiture period as granted by the Tribunal. The appointment of the Trustee is subject to the provision that the appointment shall not take effect if the respondents have entered into a binding purchase agreement for one of the publications, subject only to approval under the divestiture order. If such approval is not granted, the appointment shall be effective forthwith. The terms of the appointment of the Trustee shall be pursuant to the provisions of the divestiture order and to the additional terms ordered herein.

**FOR THESE REASONS, THE TRIBUNAL ORDERS THAT:**

1. The respondents' motion for an order extending the 180-day time period in paragraph 2(1) of the divestiture order for a further 50-day period from the date of this order is granted.

2. Subject to paragraph 3(c), the Director's application for an order under paragraph 12 of the divestiture order appointing Robert M. Rusko as Trustee is granted, to take effect on the fifty-first day from the date of this order.

3. The appointment of Mr. Rusko as Trustee is subject to the provisions of the divestiture order and to the following terms:

(a) The Trustee shall provide the respondents with an opportunity to comment on the price, terms and conditions in an offer to purchase the elected business that the Trustee proposes to accept and to recommend to the Director. All such comments shall be provided to the Trustee within three business days of the respondents having been provided by the Trustee with the proposed price, terms and conditions. The Trustee shall notify the Director that the price, terms and conditions in an offer to purchase have been forwarded to the respondents for their comments.

(b) Prior to the Trustee employing such persons as reasonably necessary pursuant to paragraph 16(i) of the divestiture order, any such appointment and its material terms must be approved by the respondents or, if rejected by the respondents, by the Tribunal.

(c) The Trustee will keep all non-public information provided by the respondents confidential except information designated as information which can be transmitted to potential purchasers.

(d) The appointment of a Trustee shall not take effect if the respondents have entered into a binding purchase agreement for one of the publications subject only to approval under the divestiture order. If such approval is not granted the appointment shall be effective forthwith.

DATED at Winnipeg, this 13<sup>th</sup> day of January, 1998.

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

(s) Marshall Rothstein  
Marshall Rothstein