

THE COMPETITION TRIBUNAL

CT-90/1

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.
SPECIALITY PUBLISHERS INC.
ELTY PUBLICATIONS LTD.

Applicants

- and-

THE DIRECTOR OF INVESTIGATION AND RESEARCH

Respondent

RESPONSE OF THE DIRECTOR OF INVESTIGATION AND RESEARCH TO THE
SECOND AMENDED STATEMENT OF GROUNDS AND MATERIAL FACTS
APPLICATION TO VARY DIVESTITURE ORDER

1. This ^ Response is filed on behalf of the Director of Investigation and Research (the "Director").
2. The Director denies the allegations contained in the Notice of Application (the "Application") except as specifically admitted herein.
3. The Director admits the allegations contained in paragraphs 2 and 3 of the Second Amended Statement of Grounds and Material Facts attached as Schedule "A" to the Application (the "Statement of Grounds and Material Facts").
4. The Director accepts as substantially accurate those aspects of the prior proceedings described in paragraphs 4 to 18 of the Statement of Grounds and Material Facts, subject to the modifications, additions, omissions and corrections described herein.
5. The Director relies on the entire records before and decisions of the Competition Tribunal ("Tribunal"), Federal Court of Appeal and Supreme Court of Canada.
6. In particular, the Director relies on the following findings by the Tribunal in its decision on the merits released June 2, 1992 (the "Tribunal Decision on the Merits"):
 - (a) While it may be relatively easy to start a community newspaper in the North Shore, it is difficult to survive.
 - (b) By the time of the original hearing, non-traditional "100 per cent houses" for real estate agencies had rapidly increased in proportion to "traditional homes."

- (c) There have been several attempts to start new print real estate publications in the North Shore and in the Lower Mainland generally.
- (d) Entry into the print real estate advertising market is not easy but involves significant risk and investment.
- (e) Actual entry or the threat of entry into the North Shore print real estate advertising market is insufficient to relieve the substantial lessening of competition created by the acquisitions of the *North Shore News* and the *Real Estate Weekly*.
- (f) Canada Post Admail is a relatively small player compared to the community newspapers.

7. In answer to paragraphs 28 of the Second Amended Statement of Grounds and Material Facts, the Tribunal did not find that Canada Post was a "dominant" distributor of economy mail (flyer) delivery in 1991 in the North Shore.

8. In further answer to paragraph 28 of the Second Amended Statement of Grounds and Material Facts, the Director says that the extent and nature of Canada Post's current delivery operation in the North Shore are not known to him at present. The Director puts the Applicants to the strict proof of the allegations in that paragraph.

9. In further answer to paragraph 30 of the Second Amended Statement of Grounds and Material Facts, the Director admits that the *North Shore News* was the only home-delivered community newspapers in the North Shore in 1991, that the *Voice* is a newsprint publication that is now published twice monthly and that it is distributed via its own distribution network to homes in the North Shore, Squamish and Whistler, *inter alia*. The Director says further that,

- (a) The *Voice* is not a viable, effective competitor to the *North Shore News*;
- (b) the distribution network of the *Voice* has been and is unreliable;
- (c) The Tribunal anticipated the entry of new community newspapers in the North Shore.

10. At the remedies hearing of the Tribunal held in November 1992, the Applicants raised the possibility of divesting only the North Shore edition of the *Real Estate Weekly*. The Director argued that divestiture of the North Shore edition of the *Real Estate Weekly* would not be an effective remedy to address the substantial lessening of competition. The Tribunal considered and rejected such a remedy.

11 In a motion dated January 25, 1995, the Applicants sought leave of the Federal Court of Appeal to introduce further evidence at the hearing of their appeal of the Tribunal Remedies Decision. The Applicants sought to introduce evidence of a prospective purchaser of the real estate supplement of the *North Shore News ("Homes")*, and evidence relating to existing and potential new publications having real estate advertising.^

12. On February 15, 1995, 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.

13. The Tribunal considered and rejected the remedy only divesting only the North Shore edition of the *Real Estate Weekly*. It did so in principle, irrespective of the identity of the purchaser or the terms of the proposal that would be made by such purchaser. The present proposal to divest only the North Shore edition of the *Real Estate Weekly* does not constitute a change in "the circumstances that led to the making of the [divestiture] order" as required by s. 106(a) of the *Competition Act*. Further, the proposal to divest only the North Shore edition of the *Real Estate Weekly* is *res judicata* and the Applicants are estopped from proposing such a remedy.

14. ^Further, the allegations made in paragraphs 28 to 30 of the Second Amended Statement of Grounds and Material Facts, which are not admitted, ^ individually or collectively do not amount to a sufficient change in the circumstances that led to the Divestiture Order within the meaning of section 106(a) of the *Competition Act* in that:

- (a) the alleged developments are *de minimus* having regard to the reasoning underlying the Tribunal Remedies Decision,^
- (b) The Tribunal anticipated the alleged developments; and
- (c) further, or in the alternative, the alleged developments to not relate to the issuance of the Divestiture Order.

15. Further, and in the alternative that there has been a change in the circumstances that led to the Divestiture Order, which is not admitted but denied, the change in circumstances is not such that the Divestiture Order would not have been made. As of the time of the Application:

- (a) there still is a substantial lessening of competition resulting from the acquisition by Southam Inc. of the *North Shore News* and the *Real Estate Weekly*;
- (b) the Divestiture Order is still an effective remedy to the substantial lessening of competition; and
- (c) the remedy proposed by the Applicants to divest only the North Shore edition of the *Real Estate Weekly* would not likely result in a vigorous and viable competitor to the *Homes* real estate supplement to the *North Shore News* and therefore, would not effectively eliminate the substantial lessening of competition in the North Shore print real estate advertising market.

16. In the event that the Tribunal concludes that a partial divestiture of the *Real Estate Weekly* through the North Shore edition of that publication would be an adequate remedy, it ought not approve the sale to Mr. Delesalle as proposed by Southam because Southam had not complied as it ought to have, with s. 8 of the Divestiture Order to ensure that all potential purchasers have had a fair opportunity to purchase the North Shore edition of the *Real Estate Weekly*.

17. Accordingly the Director requests that the application under s. 106 to Vary the Divestiture Order be dismissed.

18. The Director requests that the hearing of this matter be heard in the English language in Vancouver, British Columbia, the location of the original proceedings.

DATED at the City of Vancouver, in the Province of British Columbia, this 3rd day of November 1997.

Stanley Wong

J. Kevin Wright

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