

SCHEDULE "A"

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., *et al.* of equity interests in the business of
publishing *The Vancouver Courier*, the *North Shore News* and
the *Real Estate Weekly*.

COMPETITION TRIBUNAL	
TRIBUNAL DE LA CONCURRENCE	
F I L E D	OCT 27 1997 <i>RA</i>
REGISTRAR - REGISTRAIRE	
OTTAWA, ONT. # <i>358(a)</i>	

BETWEEN:

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 STATEMENT OF GROUNDS AND MATERIAL FACTS

I. MATERIAL FACTS

1. The Applicants allege the following material facts as the basis of this Application under section 106 of the *Competition Act* (the "Act") for a variation of the divestiture order dated March 8, 1993 (the "Divestiture Order") issued by the Competition Tribunal (the "Tribunal").

A. The Parties

2. Applicant Southam Inc. ("Southam") is a diversified Canadian communication company whose principal business is newspaper publishing. Through its Pacific Press subsidiary, Southam currently owns two Vancouver-area daily newspapers: the *Vancouver Sun* and the *Province* (the "Pacific Press Dailies") which circulate in the Lower Mainland¹ of British Columbia and throughout the rest of the Province. In a series of transactions carried out in 1989 and 1990, Southam and the other Applicants acquired a direct or indirect controlling interest in thirteen community newspapers in the Lower Mainland, including the *North Shore News* ("NSN"). As well, they acquired three distribution businesses, two printing businesses and the *Real Estate Weekly* ("REW"), a zoned real estate advertising publication circulating throughout the Lower Mainland. Prior to the acquisitions, there were two independent competitors in the North Shore market for print real estate advertising: the "Homes" supplement of the NSN and the North Shore edition of the REW. After the acquisition, Applicant Lower Mainland Publishing Limited ("LMPL") owned and managed both of these publications.

3. The Director is the officer appointed under section 7 of the Act and is charged with the administration of the Act.

¹ Capitalized terms used herein such as Lower Mainland and the North Shore are defined in the Tribunal's Reasons of June 2, 1992. (See *Director v. Southam*, (1992) 43 C.P.R. (3d) 161).

B. History of the Proceedings in *Director v. Southam Inc., et al.*

4. In its decision of June 2, 1992, (the "Tribunal Decision"), the Tribunal held that the common ownership by LMPL, one of the Respondents in that proceeding, of the *NSN* and *REW*, resulted in a likely substantial lessening of competition in the market for print real estate advertising services in the North Shore. The Tribunal found that the relevant geographic market was the North Shore area of Vancouver. The Tribunal also concluded that the *NSN* and the *REW* were the only effective competitors in the narrowly-defined market of print real estate advertising services in the North Shore. The Tribunal Decision was based on the competitive environment as it existed in the summer and fall of 1991.

5. In 1991, the *REW* was a tabloid publication devoted exclusively to real estate advertisements placed by real estate brokers and agents. The *REW* was delivered free, door-to-door, on a weekly basis, in 14 separate zoned editions. In total, the *REW* circulation area encompassed all of Vancouver and most of the Lower Mainland. The North Shore edition of the *REW* ("*REW-NS*") accounted for \$1.164 million, and roughly 11% of the *REW*'s total revenue in 1991. This edition was distributed to approximately 50,000 households in the North Shore per week.

6. In 1991, the *NSN* was a community newspaper distributed free door-to-door on the North Shore three times per week. Its circulation was approximately 62,000, and the Friday edition of the paper included a real estate insert, the "*Homes*" supplement, which contained only real estate advertising, primarily for resale properties. The *NSN*'s total revenue from real estate advertising was \$1.284 million and represented approximately 12% of *NSN*'s total revenue in 1991.

7. As stated earlier, the Tribunal held that LMPL's ownership of these two North Shore publications resulted in a likely substantial lessening of competition in the market for print real estate advertising services in the North Shore. This conclusion was based on a number

of determinations regarding the relevant market and other statutory criteria. First, the Tribunal excluded cable, television, and radio from the relevant service market based on its finding that these electronic media were not close substitutes for print real estate advertising; it found that realtors spent very little on advertising in these media, and regarded them as having little effectiveness in attracting either prospective buyers or new listings.

8. Second, the Tribunal considered whether the two Pacific Press Dailies were competitors in this narrowly-defined service market. In making this evaluation, the Tribunal determined that the print real estate advertisements placed by Vancouver realtors served two purposes: the sale of the property being advertised, and obtaining additional listings for the agent or firm.

9. The Tribunal determined that the *REW* and *Homes* supplement were distinct from the *Sun* and *Province* in that: (a) their advertising rates were low enough that agents' pictures could be used, while such advertising was in general too costly in the two Dailies; (b) the *REW-NS* and *Homes* supplement efficiently reached the vast majority of prospective purchasers since the individuals and families who account for approximately two-thirds of total sales in the North Shore are already residents of the North Shore; and (c) the Pacific Press Dailies were used sparingly by realtor advertisers, primarily for the specialized purposes of announcing open homes or attracting out-of-town buyers.

10. In short, the Tribunal concluded that the Pacific Press Dailies did not provide close substitutes for the advertising services provided to realtors by the *REW* and *Homes* supplement. Moreover, since the Tribunal had found that there were no acceptable substitutes for print advertising services, it concluded that there was no effective competition remaining in the North Shore once the *NSN* and *REW* came under the ownership of LMPL.

11. Since the Tribunal found that it was only on the North Shore where the Director might be able to demonstrate a likely substantial lessening of competition in the relevant

service market, it examined the relative difficulty of entry into the business of supplying print real estate advertising services in the North Shore. The primary barrier identified by the Tribunal was the need for credibility with real estate agents and firms. The Tribunal found that past attempts by major realtor firms to introduce competing real estate publications had failed because other unaffiliated agents (*i.e.*, prospective advertisers) were not convinced that such a real estate newspaper would be operated in an unbiased manner. The Tribunal found that there was no convincing evidence that entry could be achieved in the North Shore market without both significant risk and investment and, therefore, held that there would likely be a substantial lessening of competition in the supply of print real estate advertising services on the North Shore.

12. Two alternative remedies were proposed by the parties. The Director submitted that the complete divestiture of either the *NSN* or the *REW* was the only effective remedy, while the Respondents proposed the sale of the *Homes* supplement of the *NSN*, including certain optional rights and proposed ancillary agreements which would permit the purchaser of *Homes* to retain the efficiencies and goodwill generated by an ongoing relationship with the *NSN*.

13. The Tribunal evaluated the two proposed alternatives on the basis of whether they would likely restore the pre-merger competitive situation in the relevant market; this legal standard for divestiture remedies was subsequently rejected in the Supreme Court of Canada's decision in this proceeding. The Tribunal examined the proposal for divestiture of the *NSN*'s *Homes* supplement to determine whether it would "ensure the existence of a real estate publication with both financial viability and competitive vigour" (Tribunal Decision at p. 247). An important issue for the Tribunal was whether a potential buyer of *Homes* would be able to replace (by some means) the benefits which the real estate insert realized as an integral part of the *NSN*. The Tribunal noted that the value of the *Homes* supplement was enhanced by its being inserted in the *NSN*, as evidenced by the fact that its advertising rates were somewhat higher than those of the *REW-NS*. As well, the Tribunal noted that the North

Shore was a relatively costly area for door-to-door distribution and that distributional efficiencies were realized in the joint delivery of the *Homes* supplement with the *NSN*. Finally, with respect to the general cost structure of the *Homes* supplement, the Tribunal noted that it could not be assumed that its overall cost structure would remain the same post-divestiture, and that its post-divestiture cost structure would vary depending on the purchaser's resources and capabilities that might complement the *Homes* business.

14. After evaluating the optional production, printing and distribution agreements offered by the Respondents, the Tribunal rejected any divestiture remedy that depended for its likely effectiveness on long-term supply contracts between the only two competitors in the North Shore market. Unless a prospective buyer of *Homes* could purchase competitively-priced production, printing and distribution services from suppliers at arm's length from the Respondents, or had the capability to self-supply, the Tribunal did not believe that a stand-alone *Homes* supplement would be a vigorous competitor for the long run.

15. In short, the Tribunal held that the Respondents' proposed divestiture remedy was not able to satisfy what it viewed as the minimum acceptable standard--that it restore the pre-merger competitive situation. As a result, the Tribunal ordered the Respondents to divest either the *NSN* or the *REW* in their entirety. The Tribunal also found that the Respondents' proposed remedy did not meet the threshold applicable to divestitures in consent order proceedings (*i.e.*, that it would not likely eliminate any substantial lessening of competition in the market).

16. In August, 1995, the Federal Court of Appeal allowed the Director's appeal against the Tribunal's findings on the likely effects of the Respondents' newspaper acquisitions on competition in the market for print retail advertising services, and substituted its own finding that daily and community newspapers were in the same relevant service market.² With

² 63 C.P.R. (3d) 1.

respect to the Divestiture Order, the Court of Appeal dismissed the Respondents' appeal completely, holding that it found no basis upon which to disturb the Tribunal's findings regarding the appropriate remedy.³

17. In March, 1997, the Supreme Court of Canada held that the Tribunal's findings, while perhaps not correct, were certainly reasonable and, therefore, should stand;⁴ as a result, the Supreme Court upheld the Tribunal's definition of the relevant service market and the Divestiture Order. It took issue with the Tribunal on only one significant legal point. The Supreme Court held that the appropriate test for a merger remedy in a contested proceeding was the same test that had previously been applied in consent proceedings before the Tribunal (*i.e.*, whether the proposed remedy is likely to eliminate any substantial lessening of competition that the merger may have caused). However, the Supreme Court noted that the Tribunal found the Respondents' proposed remedy did not meet this lesser threshold either and, therefore, it declined to order the Tribunal to reconsider the necessity for the Divestiture Order.

18. The Divestiture Order permits the Respondents 180 days to divest, at their option, either the *NSN* or the *REW* as a going concern to an arm's length purchaser. The Tribunal stayed the Divestiture Order pending the Federal Court of Appeal's disposition of the parties' appeals. The Respondents then obtained an order from the Supreme Court of Canada staying the Divestiture Order until the final disposition of appeals by that Court. The decision of the Supreme Court of Canada was released on March 20, 1997, and that triggered the 180 day period for finding a suitable buyer pursuant to the Divestiture Order.

³ 63 C.P.R. (3d) 67.

⁴ See *Canada (Director of Investigation and Research) v. Southam Inc.* (March 20, 1997), ("S.C.C. Decision") unreported decision of the Supreme Court of Canada, File No. 24915.

II. STATEMENT OF GROUNDS

A. Section 106

19. Section 106 provides:

Where, on application by the Director or a person against whom an order has been made under this Part, the Tribunal finds that

- (a) the circumstances that led to the making of the order have changed and, in the circumstances that exist at the time the application is made under this section, the order would not have been made or would have been ineffective to achieve its intended purpose, ...

the Tribunal may rescind or vary the order accordingly.

20. In interpreting section 106 of the Act, the Federal Court of Appeal held in *Director v. Air Canada* that the words "the circumstances that led to the making of the order" involve:

a determination by the Tribunal of the existence of a simple causal relationship between the circumstances and the order, but no more. It is not necessary that such relationship be "direct" or "demonstrable" other than in the very limited sense that the Tribunal must be satisfied that it exists. Nor is it necessary to relate the circumstances to the purposes sought to be achieved by the order although it is of course always legitimate to look to such purposes as a guide to identifying some of the circumstances leading to it.⁵

21. We submit that the Tribunal's power to vary an order is constrained only by the same conditions which must be satisfied under section 92 to make the order in the first instance.⁶ Without the consent of all parties, the Tribunal is limited to ordering the dissolution of the

⁵ *Canada (Director of Investigation and Research) v. Air Canada* (1993), 49 C.P.R. (3d) 417 at 426, Fed. Ct. of Appeal, per Hugessen.

⁶ *Id.*

merger (subparagraph 92(1)(e)(i)) or the divestiture of assets or shares (subparagraph 92(1)(e)(ii)).⁷ On an application to vary an order under section 106, therefore, the Tribunal may rescind the order or direct the dissolution of the merger or the divestiture of shares or assets.⁸

22. As indicated earlier, the Supreme Court has held in this proceeding that the appropriate test to apply to a proposed remedy in a section 92 case is whether the remedy is likely to be effective in eliminating the substantial lessening of competition causally attributable to the merger.⁹

23. The purpose of a section 92 order is remedial, not punitive. At page 245 of the Tribunal Decision, the Tribunal stated:

There can be no dispute that orders under Part VIII of the Act should be designed solely as remedies and not as a punishment. The tribunal is of the opinion that a remedy is not punitive unless it goes further than necessary to be effective. In the tribunal's previous reasons, it commented (p. 266, at pp. 306-7 C.P.R.):

The tribunal is aware that the North Shore edition of the Real Estate Weekly and the real estate section of the North Shore News each account for only 10-15% of their respective revenues. The challenge will be to devise an effective remedy that does not harm the interests of the respondents in a disproportionate way.

These remarks were meant to convey the tribunal's willingness to consider remedies that effectively restore competition in the relevant market without affecting more of the respective businesses than necessary to accomplish the purpose. (underlining added)

⁷ Ibid., at 430.

⁸ Ibid. at 431.

⁹ S.C.C. Decision at paragraphs 84 and 85.

24. In *Canada (Director of Investigation and Research) v. Air Canada*, (1993) 51 C.P.R. (3d) 143, the Tribunal held that it is reasonable in making a section 92 order to do it on terms that are the least harmful to all parties consistent with protecting the public interest in competition.

B. Grounds for Section 106 Application

25. The circumstances that led to the making of the March, 1993, Divestiture Order have materially changed since 1991 and, in the existing circumstances, the Divestiture Order would not likely have been made.

26. These material changes in circumstances since 1991 relate to [^] two aspects of the case which were pivotal to the Tribunal's decisions with respect to [^] the alternative remedies: (1) the [^] alterations to the competitive environment which permit cost-effective production, printing and distribution of the REW-NS apart from the remainder of the REW group and which permit the emergence of an acceptable buyer of the REW-NS; and (2) the existence of an actual purchaser for the REW-NS on terms that would make the REW-NS a vigorous competitor to the *Homes* supplement. If these circumstances had existed at the time the Tribunal was considering the appropriate remedy, we submit that the Divestiture Order would not likely have been made.

[^] 1. Background

[^] 27. There has been a significant increase in the volume of print real estate advertising in the North Shore since 1991. Additionally, both the diversity of print publications and alternative media offering real estate advertising on the North Shore has increased. However, during this period the page count of the REW-NS has remained effectively constant while the page count of the NSN has decreased. The reasons for these changes relate to

changes in the real estate industry and, in particular, to the move from "traditional houses" to "100% houses".

Jurock Affidavit – paras. 10-23 (Sch. 1).

^ 2. Material Changes in the Competitive Environment

^(i) Changes in the Market for Flyer Distribution

28. Canada Post, a dominant distributor of economy mail delivery ^ (flyers) in 1991, exited this business. Consequently, Canada Post no longer maintains a specialized flyer delivery force, nor does it competitively price its delivery services for economy mail. This exit has created an opportunity in the market, most notably for the community newspapers.

^(ii) Changes in Technology

^ 29. Since 1991, ^ developments in digital and electronic publication and printing technologies have significantly reduced the degree of manual labour required to produce and print newsprint publications. These changes allow a zoned edition like the REW-NS to operate independently of the other editions of the REW without suffering a significant cost penalty.

(iii) New Community Newspaper Competition

30. In 1991, the NSN was the only home-delivered ^ community newspaper in the North Shore. Since that time, the Voice has emerged as a competitive community paper. The Voice is a newsprint magazine published twice monthly and ^ distributed ^ via its own distribution network to homes throughout the North Shore, Squamish and Whistler. The existence of the Voice gives the new owner of the REW-NS a distribution option other than

the NSN. If that new owner owns the Voice, the combination produces significant distribution economies.

(iv) Cumulative Effect of the Material Environmental Changes

31. The changes outlined in paragraphs 28 to 30 together make it possible for a purchaser to emerge who is able to purchase the REW-NS only and operate it as a viable, vigorous competitor in the North Shore.

^ 3. The Emergence of an Actual Buyer of REW-NS

^ 32. The effect of these material changes need not and should not be considered in the abstract. An entrepreneur has emerged who recognized the opportunities which the changes afforded and who acted to take advantage of them. Thus, the final material change since the Tribunal's remedy decision has been the identification of ^ an actual buyer for the REW-NS who fully meets the concerns originally expressed by the Tribunal when it considered a sale of the Homes supplement to an independent, unidentified buyer.

^ 33. The Applicants submit that the principal buyer ^ of the REW-NS, Mr. Michael Delesalle, has the financial resources and has assembled the publishing ^ expertise to make the REW-NS into a vigorous, arm's length competitor to the Homes supplement. ^ Mr. Delesalle^ has no affiliation with the Applicants^ and has recently acquired a substantial interest in the Voice, the twice monthly home-delivered North Shore community newspaper described above. He is also the former owner of Lumberland, a retail company which, among other things, published flyers for itself and other retailers in the Lower Mainland. In addition, through his acquisition of the Voice and his business plan to acquire other components of the niche publishing business, he has shown his commitment to community newspaper publishing. Mr. Delesalle intends to make the Voice a weekly community paper by combining the business of the REW-NS with that of the Voice.

34. In contrast to the ^ factual environment in which the Tribunal considered the Homes Divestiture, Mr. Delesalle's acquisition of the *REW-NS* would permit significant synergies relating to the ^ cost advantages of association with the Voice. Further, the integration of the REW-NS with the Voice will create further synergistic revenue opportunities as the advertising value of each publication is enhanced by its association with the other. This new North Shore publishing business would not have to rely upon a competitor for the supply of services such as production and distribution. Finally, the proposed variation means that the real estate publication (the *REW-NS*) with the higher circulation (as compared to the *Homes* supplement) would be divested.

Letter to Applicants' Counsel from Counsel for Mr. Delesalle dated July 23, 1997, attached as Schedule 2.

^ 4. Conclusion

^ 35. If the changed circumstances identified above had existed in 1991, the Applicants submit that the Divestiture Order would not have been made ^ for a number of reasons. First, the changes in the competitive environment ^ have made possible effective, independent competition in the relevant market by a divested REW-NS. Second, Mr. Delesalle has assembled the properties and developed a business plan that will allow him to be an effective competitor on the North Shore. ^ Consequently, the Divestiture Order is no longer the least intrusive, effective remedy available to eliminate the substantial lessening of competition due to the ability and willingness of Mr. Delesalle to acquire the *REW-NS*. The Divestiture Order's requirement that the Applicants dispose of either the *NSN* or the *REW* in their entirety is ^ a remedy that goes beyond the product and geographic market within which the Tribunal found a substantial lessening of competition, i.e., the market for print real estate advertising services in the North Shore. ^ Thus, the Divestiture Order ^ has become punitive ^ because it goes considerably further than necessary to provide an effective remedy.

III. RELIEF SOUGHT

[^] 36. The Applicants hereby apply for a variation of the terms of the Divestiture Order to strike the requirement that the Applicants divest themselves, at their option, of either the *NSN* or the *REW*, and to order instead that the Applicants divest themselves of the *REW-NS* to Mr. Delesalle or to a company controlled by Mr. Delesalle.

[^] 20401663.02