

Competition Tribunal



Tribunal de la Concurrence

CT - 1990 / 001 – Doc # 277

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 DECISION REGARDING REMEDY

Date of Hearing:

November 9, 10, 1992

Presiding Member:

The Honourable Mr. Justice Max Teitelbaum

Lay Members:

D^r Frank Roseman
Mr. Victor Clarke

Counsel for the Applicant:

Director of Investigation and Research

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Southam Inc.
Lower Mainland Publishing Ltd.
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North Shore Free Press Ltd.
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COMPETITION TRIBUNAL
REASONS AND DECISION REGARDING REMEDY

Director of Investigation and Research

v.

Southam Inc. et al.

I. INTRODUCTION

These reasons and decision are issued pursuant to the Tribunal's Reasons and Order of June 2, 1992 and the hearing on remedies of November 9 and 10, 1992. In its earlier decision, the Tribunal found that the common ownership by Lower Mainland Publishing Ltd. ("LMPL") of the *North Shore News* and the *Real Estate Weekly* resulted in a likely substantial lessening of competition in the advertising of real estate on the North Shore. As requested by the parties, the Tribunal ordered that counsel appear for a further hearing on an appropriate remedy.

The relevant background information regarding the publications and their ownership is provided in the reasons of June 2, 1992. For present purposes it is sufficient to note that the *North Shore News* is a community newspaper distributed three times per week, without charge, to homes on the North Shore. Circulation is approximately 62,000. The Friday edition of the paper includes a

separate section, the "Homes" supplement, that contains only real estate advertising. Revenue from real estate advertising was \$1.284 million for the year ended August 31, 1991 and represented about 12% of total revenue for the paper.

The *Real Estate Weekly* is a publication specializing in real estate advertisements placed by real estate brokers or agents. Fourteen separate editions are published weekly covering all of Vancouver and most of the Lower Mainland. Like the *North Shore News* and other community newspapers, the *Real Estate Weekly* is distributed without charge to homes in each of the 14 areas covered by its editions. In addition, copies of each edition are delivered to real estate offices for the use of agents and their clients. The North Shore edition, which accounted for \$1.164 million and roughly 11% of total revenue, is distributed in 51,500 copies in the same area as the *North Shore News*.

The Tribunal found, and it was not a matter in dispute, that the advertising of real estate on the North Shore constitutes a market for purposes of section 92 of the *Competition Act*¹. It also found that the *North Shore News* and the *Real Estate Weekly* are the only effective competitors in this market.

II. PROPOSED REMEDIES

¹ R.S.C., 1985, c. C-34, as amended.

Two alternative orders were put forward by the parties and argued before the Tribunal at the remedies hearing. The Director submits that the complete divestiture of either the *North Shore News* or the *Real Estate Weekly* is the only effective remedy. The respondents propose the sale of the real estate advertising section presently published and distributed by North Shore Free Press Ltd ("NSFP") as an inserted supplement to the *North Shore News*. In these reasons, the existing real estate supplement to the *North Shore News* will be referred to as the "supplement" while the independently-owned publication that would exist post-divestiture in the event of a Tribunal order to that effect will be referred to as "HOMES".

The Director's proposal is straightforward. The respondents proposal is more complex and is set out in a draft divestiture order and accompanying Confidential Information Memorandum. Both the draft divestiture order and the memorandum were filed as confidential documents. It is, however, impossible to discuss meaningfully the respondents' proposal without reference to the contents of these documents.

The respondents' proposal contemplates that the Tribunal would order the sale of the assets of the real estate supplement: the "HOMES" trademark and all assets specifically associated with the publication of the supplement². NSFP

² Customer lists, accounting and administrative information, an extensive photo library of homes on the North Shore, a production library containing standardized headers, layouts, photographs of North Shore realtors and other production materials, a computer data base and associated software and miscellaneous furniture and equipment.

would also be required to "divest" itself of the "insertion agreement, composition agreement, [and] printing services agreement ... substantially as described in the Confidential Information Memorandum". The memorandum lists the assets to be purchased and, under the heading "Optional Rights which may be Acquired by Agreement with NSFP", describes the various contractual arrangements that LMPL would be prepared to enter into if the buyer desired. These relate to insertion (distribution), composition and printing services. The memorandum also contains other information, such as disclaimers, restrictions on the use of the information, a guarantee and an overview of various aspects of the business of publishing HOMES, which are not relevant for these purposes.

III. APPLICABLE TEST FOR ISSUING ORDER

The Tribunal has concluded that the merger of the *Real Estate Weekly* and the *North Shore News* through LMPL is likely to cause a substantial lessening of competition in the print real estate advertising market on the North Shore. Having made such a finding, pursuant to section 92 of the Act, the Tribunal has the jurisdiction to order the dissolution of the merger or the disposition of assets or shares designated by the Tribunal, in such a manner as the Tribunal directs, and in addition to or in lieu of the above, the Tribunal may order any other action with the consent of the Director and the person against whom the order is sought.

92. (1) Where, on application by the Director, the Tribunal finds that a merger or proposed merger prevents or lessens, or is likely to prevent or lessen, competition substantially

- (a) in a trade, industry or profession,
- (b) among the sources from which a trade, industry or profession obtains a product,
- (c) among the outlets through which a trade, industry or profession disposes of a product, or
- (d) otherwise than as described in paragraphs (a) to (c),

the Tribunal may, subject to sections 94 to 96,

- (e) in the case of a completed merger, order any party to the merger or any other person
 - (i) to dissolve the merger in such manner as the Tribunal directs,
 - (ii) to dispose of assets or shares designated by the Tribunal in such manner as the Tribunal directs, or
 - (iii) in addition to or in lieu of the action referred to in subparagraph (i) or (ii), with the consent of the person against whom the order is directed and the Director, to take any other action. . . .

Sections 94, 95 and 96 of the Act deal with, respectively, bank mergers, joint ventures and efficiency gains and are not applicable in the present case.

Subparagraph 92(1)(e)(iii) is not available to the Tribunal as there is no proposed consent order before it. Counsel for the Director informed the Tribunal that the Director does not consent to a remedy under that subparagraph.

The standard or test that should guide the Tribunal in evaluating a proposed remedy in a contested merger case was the subject of dispute between the parties. To date this question has been addressed by the Tribunal solely in connection with consent order proceedings.

The Director's position is as follows:

The task before the Tribunal is to order a remedy which will restore, to the extent possible, the level of competition which existed prior to the acquisition by LMPL/Southam of the *North Shore News* and the *Real Estate Weekly*. . . . If two or more proposed remedies are equally effective in restoring competition, the Tribunal will then have to make a choice in light of additional considerations³.

The respondents argue that

A remedy imposed pursuant to Section 92 cannot go farther than is strictly required to remedy the lessening of competition. It cannot harm the interests of the Respondents in a disproportionate way. That accords with the remedial nature of Part VIII of the Act⁴.

Thus, the respondents submit that the test is whether the proposed remedy will resolve the likely substantial lessening of competition identified by the Tribunal. They would, in fact, restrict the Tribunal from going any further than necessary or practicable to deal with that likely substantial lessening of competition. The respondents accept that the burden is on them to show that the remedy that they favour will have a reasonable chance of success.

In support of their argument the respondents refer to statements of the Tribunal in consent order proceedings. In *Director of Investigation and Research v. Palm Dairies Ltd.*, Madame Justice Reed, speaking for the Tribunal, states that as regards consent orders,

³ Applicant's Outline of Preliminary Argument: Remedies Hearing, November 9, 1992 at para. 5.

⁴ Respondent's Outline of Argument at para. 4.

In support of their argument the respondents refer to statements of the Tribunal in consent order proceedings. In *Director of Investigation and Research v. Palm Dairies Ltd.*, Madame Justice Reed, speaking for the Tribunal, states that as regards consent orders,

It is incumbent on the tribunal to satisfy itself that the order sought meets a critical threshold of effectiveness, namely, that of eliminating the likely prevention or lessening substantially of competition that gave rise to the application for the order⁵.

In *Director of Investigation and Research v. Air Canada*, after a detailed discussion of the role of the Tribunal in approving a consent order, Madame Justice Reed, again speaking for the Tribunal, states:

The tribunal accepts the Director's argument that the role of the tribunal is not to ask whether the consent order is the optimum solution to the anti-competitive effects which it is assumed would arise as a result of the merger. The tribunal agrees that its role is to determine whether the consent order meets a minimum test. That test is whether the merger, as conditioned by the terms of the consent order, results in a situation where the substantial lessening of competition, which it is presumed will arise from the merger, has, in all likelihood, been eliminated⁶.

Counsel for the respondents characterizes the Director's test as advocating the "optimum solution" and invites the Tribunal to adopt the standard set out by it in consent proceedings in the circumstances of this case.

⁵ (1986), 12 C.P.R. (3d) 540 at 547.

⁶ (1989), 27 C.P.R. (3d) 476 at 513-14.

The standard that was applied by the Tribunal in evaluating the proposed consent orders in the cases referred to was clearly stated to be a *minimum* standard. The Tribunal does not believe that it would be appropriate to apply only that minimum standard in contested proceedings. In contested proceedings, the appropriate test is whether the proposed remedy will restore the pre-merger competitive situation in the market in question. Evidently, any remedy which passes this test will also meet the minimum standard.

Restoring the pre-merger competitive situation may entail dissolution of the merger, total divestiture of assets or shares or partial divestiture of assets or shares. All three options are contemplated under subparagraphs 92(1)(e)(i) and (ii).

The respondents argue that the remedy proposed by the Director is punitive as it harms the interests of the respondents in a disproportionate way. They submit that it amounts to obtaining the result that the Tribunal found was not warranted on the facts.

The remedy proposed by the Director does affect parts of the businesses of the *North Shore News* and *Real Estate Weekly* that are not related to the market for real estate advertising on the North Shore, which is the only market in which the Tribunal found there was likely to be a substantial lessening of competition.

This does not in itself make it punitive. 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:

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 way⁷.

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.

While the Tribunal is in broad agreement with the Director's submission on the standard to be applied, the Director adds that other factors, such as inconvenience to the respondent or other persons, should enter into consideration when two or more equally effective remedies are being considered. Without deciding the question, which does not arise on these facts, the Tribunal doubts that two or more "equally effective" remedies are likely to be available in most situations involving the issue of substantial lessening of competition as a result of a merger.

⁷ Reasons and Order at 266.

The Director also argues that the Tribunal does not have the discretion to leave the situation as it found it, once a substantial lessening of competition has been identified. That is, he submits that the "may" in section 92 which precedes the list of remedial options is not permissive but rather should be read as "shall". The Tribunal does not accept this submission. Subsection 92(1) provides that the Tribunal "may" take any of the listed actions. Section 11 of the *Interpretation Act*⁸ reads:

The expression "shall" is to be construed as imperative and the expression "may" as permissive.

The Director has not put forward any compelling reason to exclude the application of the *Interpretation Act* to section 92. Therefore, the "may" gives the Tribunal the discretion to choose to take one of those actions or not, as it judges appropriate.

In summary, the Tribunal concludes that its paramount goal when fashioning remedies in contested proceedings under section 92 is to restore the pre-merger competitive situation in the affected market. As long as the remedy does not seek to go beyond the pre-merger situation, it cannot be considered punitive. This is true even when parts of the merged businesses outside the market are affected. Considerations of harm or inconvenience to the respondents or third parties or other factors are not relevant in assessing the effectiveness of a

⁸ R.S.C. 1985, c. I-21.

proposed remedy. Once the Tribunal has concluded that the result of a merger is a substantial lessening of competition in a market or a likely substantial lessening of competition in a market, the remedy to be ordered must restore the pre-merger competitive situation in the market. In appropriate circumstances, the Tribunal may, of course, be persuaded to choose to do nothing.

IV. ASSESSMENT OF PROPOSED ORDERS

As discussed above, the question to be put regarding the two proposals before the Tribunal is the effectiveness of each in restoring competition. There is no issue as to whether the complete divestiture of either the *North Shore News* or the *Real Estate Weekly* would be an effective remedy. The effectiveness of the respondents' proposed remedy is in dispute.

The new evidence introduced by the Director at this hearing consisted of a further affidavit of D. Jeffrey Harder, an accountant who had already appeared as an expert on behalf of the Director, and additional material from the examinations for discovery of Peter Speck, the publisher of the *North Shore News* and of John Collison, the publisher of the *Real Estate Weekly*. David Perks, the publisher of *The [Montreal] Gazette* and the principal architect of the acquisitions by Southam in the Lower Mainland, appeared on behalf of the respondents. He had already testified extensively in this case.

Mr. Harder's mandate was to evaluate the financial viability of HOMES and the North Shore edition of the *Real Estate Weekly* as independent publications. By reason of the absence of financial information in the record on these parts of the *North Shore News* and the *Real Estate Weekly*, his ability to fulfil his mandate was limited to developing general criteria, that is, a conceptual framework.

Mr. Perks' most recent testimony dealt with the allocation of costs to the real estate supplement. This exercise was performed for the purpose of the remedies hearing by the controller of the *North Shore News*. A record of separate costs for the real estate supplement is not routinely maintained since this part of the business is not treated as a profit centre by the *North Shore News*. Mr. Perks had little knowledge of the assumptions used in allocating the costs; therefore, the figures must largely be treated as uninformative. Nevertheless, there is little reason to doubt the principal conclusion that emerged from Mr. Perks' testimony: the revenues earned by the supplement exceed the costs allocated to this part of the *North Shore News's* operations. It would have been surprising to have found otherwise; the supplement has been in existence since the late 1970s and the *North Shore News* is a profitable business.

It does not necessarily follow that HOMES would enjoy similar profitability. Furthermore, as argued by the Director, the test of the proposed

divestiture is not financial feasibility or profitability but rather competitive effectiveness. To what extent would the sale of the supplement, as set out in the respondents' proposed order, ensure the existence of a real estate publication with both financial viability and competitive vigour? To answer this question it is necessary to inquire into the ways that the supplement is integrated into the operations of the *North Shore News*, and the ways that this integration could be replaced by a potential buyer through its own operations or by taking advantage of the terms of the proposed order.

One of the important ways that real estate advertising is integrated into the *North Shore News* is as a result of the supplement being physically part of the paper, albeit an inserted part. Although there is no editorial content in the supplement, its presence in the paper may contribute to the sale of real estate advertising. The evidence from the realtors clearly indicates that this is indeed the case. Frank Stanhope, Manager of Sutton Group - West Coast Realty in North Vancouver, was of the opinion that the supplement had an advantage over the *Real Estate Weekly* because:

it is a paper that gets read -- even though it's an insert, people still pick it up because they want to read the news and find out what's going on, so they end up somehow with the real estate section on their lap, and there is a chance they could look at it⁹.

⁹ Transcript at 2605 (1 October 1991).

Owen K. Ewart, President of Crest Realty Ltd., was also of the view that:

the North Shore News may have better readership because besides the real estate section it does have other North Shore news in it and perhaps would stay around on somebody's coffee table or whatever and have more readership than the Real Estate Weekly¹⁰.

Charles Mitten, President of Mitten Realty Ltd., concluded that the *Real Estate Weekly* was the more effective vehicle for his company because advertising in it generated more calls. He also noted, however, that an advantage of the *North Shore News* was that it tended to lie around "on the coffee table" longer¹¹.

Chris O'Brien, Vice-President and General Manager of Sussex Realty Ltd., whose company prefers the *North Shore News*, stated that:

the North Shore News was read by everybody, whether they were interested in real estate or not. Therefore, with a personal picture in the paper, that was a reminder to all this individual's friends and connections that he was still in real estate. So there was an additional marketing benefit, we felt, in the North Shore News¹².

The realtors' evidence was given in the context of comparing the *North Shore News* and the *Real Estate Weekly*. What is clear from the evidence, however, is that whether the realtors see one or the other publication as offering better value for their advertising dollar, the value of the supplement is enhanced because it is a part of the *North Shore News*.

¹⁰ Transcript at 2639 (2 October 1991).

¹¹ Transcript at 2669 (2 October 1991).

¹² Transcript at 2829 (3 October 1991).

Additional evidence of the added value of the supplement as an insert is provided by the fact that the rates in the supplement are somewhat higher than those in the *Real Estate Weekly*. According to Mr. Perks, the *North Shore News* enjoys about a 15% premium over the *Real Estate Weekly* North Shore edition which is "based on its association with the good will of the North Shore News and a very hard and aggressive sales effort"¹³.

In spite of its higher rates, the *North Shore News* supplement held the somewhat larger market share, as measured by revenue, for the year ended August 1991¹⁴. There is no evidence that indicates that a stand-alone HOMES would be worth as much to realtors as the *Real Estate Weekly*. In any event, it is clear that the revenue figures given by Mr. Perks do not carry over to an independent HOMES.

A similar difficulty exists on the cost side. The available information with respect to the operation of the supplement cannot be extended to a stand-alone HOMES. This is particularly evident with respect to distribution. The fact that the supplement is delivered as part of the *North Shore News* means that there are savings in distribution as compared to separate delivery. Furthermore, since there is unequivocal evidence that the North Shore is a costly area in which to distribute, the savings associated with joint delivery are greater for the North

¹³ Transcript at 6540 (9 November 1992).

¹⁴ Expert affidavit of D.J. Harder, dated 23 October 1992 at 2 (Exhibit A-119).

Shore than for other areas of the Lower Mainland. According to the discovery evidence of Mr. Collison, the actual cost (as opposed to the average cost across all regions in which the *Real Estate Weekly* is distributed that was used for accounting purposes) of delivering the North Shore edition of the *Real Estate Weekly* was well above the cost in other areas¹⁵. Mr. Speck described the North Shore as a very difficult area in which to distribute¹⁶.

The *North Shore News* distribution system has been utilized by various related companies since the *North Shore News* was acquired in 1989: by Flyer Force for flyers, by *The Vancouver Sun* for its supplement, and currently by the *Real Estate Weekly* for its North Shore edition (although the *Real Estate Weekly* is no longer inserted in the *North Shore News*, which it was for a time). The delivery system established by the *North Shore News* appears to be the most cost-effective one on the North Shore. Thus, apart from the cost penalty associated with not benefitting from joint delivery, a stand-alone HOMES would incur higher costs than the *North Shore News*. Even if the purchaser could develop a similarly cost-effective system, such an attempt would require the investment of time and resources.

Further, it cannot be assumed that the independent production of HOMES would result in the same level of costs as are incurred by the *North Shore News* in

¹⁵ Examination for discovery of J. Collison, vol. 1 at Q. 548-54, vol. 2 at Q. 632-37, vol. 3 at Q. 1057-66 (Exhibit A-117).

¹⁶ Examination for discovery of P. Speck, vol. 1 at Q. 179 (Exhibit A-116).

producing the supplement. Some staff members deal solely with real estate advertising and there is no doubt about how their costs should be allocated. In other cases, and only that of composition was dealt with in any detail in cross-examination, staff members work on both the supplement and the body of the paper as each part is developed over the period leading to its printing. In the matter of composition, printing, the purchase of newsprint, and support functions such as accounting, it is impossible to reach any conclusions regarding the comparative cost structures of the supplement and HOMES without knowing the identity of the potential buyer of HOMES. Economies of scale enjoyed by the *North Shore News* that contribute to the cost structure of the supplement might or might not be available to a potential buyer of HOMES.

The respondents' proposed remedy anticipates and attempts to deal with the difficulties raised in the foregoing. The memorandum offers potential buyers the opportunity to obtain certain rights by agreement with NSFP. Most noteworthy is the offer by NSFP to continue to distribute HOMES as a supplement to the *North Shore News*. According to the proposed order the purchaser may also obtain, at its option, a licence "to refer to the HOMES product as the *North Shore News* real estate supplement for so long as HOMES is delivered as an inserted supplement to the *North Shore News*". The price for this service would be negotiated. Also offered is the opportunity to purchase composition services at the *North Shore News*'s "fully allocated costs from time to time" and to require NSFP to use its best efforts to continue existing printing

arrangements on "at least as favourable terms" as are available to it. Any future disputes regarding the distribution or composition agreements, including price, would be settled by arbitration. When questioned by counsel for the Director, Mr. Perks stated that LMPL would be prepared to go beyond the terms set out in the memorandum if necessary to make a deal, but of course the terms of any supply contracts entered into would be related to the price received for the assets.

The Director's first objection to the respondents' proposal is that it would require the Tribunal to exceed its jurisdiction, since the proposed order would go beyond the dissolution of the merger or the divestiture of shares or assets as contemplated in subparagraphs 92(1)(e)(i) and (ii). In his view, the terms that would require the respondents to offer such agreements to a purchaser fall within subparagraph 92(1)(e)(iii). The Tribunal can only make an order under that subparagraph on the consent of the parties. As previously stated, the Director does not consent. The respondents are of the view that the Tribunal has considerable latitude in ordering the disposition of assets under subparagraph 92(1)(e)(ii) "in such a manner as the Tribunal directs" and could issue the suggested order. The Tribunal does not agree that requiring the respondents to provide would-be purchasers with an option to contract for services from the *North Shore News* or LMPL can be considered to fall within the terms it may place on the disposition of assets pursuant to subparagraph 92(1)(e)(ii).

The Director's second objection to the proposed remedy is that in the event that the arrangements contained in the memorandum were entered into, HOMES would be a "tame competitor". Alternatively, he argues that if the would-be purchaser chose not to take advantage of the opportunities provided in the memorandum, HOMES would be the equivalent of a new entrant. Although the Tribunal is of the view that it cannot order the terms contained in the memorandum without the consent of both parties, that fact does not obviate the need to consider the effect on competition of a sale on those or similar terms. Mr. Perks stated that LMPL would be willing to consider a number of possible supply agreements with a potential buyer in order to achieve a sale of the supplement. The Tribunal must therefore take into account the possibility that the kinds of arrangements outlined in the memorandum would be entered into if the Tribunal ordered the sale of the supplement.

The Director submits that it is not feasible or desirable to try to provide a would-be purchaser with a comparable cost structure to that of the *North Shore News*. The proposition is that it is simply too difficult to anticipate and contract for all contingencies. As an example, the *North Shore News* might discontinue Friday delivery of its paper. Evidently this would impact on any distribution arrangement with the new owner of HOMES. It is true that one cannot anticipate and guard against every eventuality. It is also true that one might not want to do so. There could be a business reason for the decision that was

totally independent of any desire to cause a competitive disadvantage to the owner of HOMES.

More importantly, the Director argues that a purchaser that entered into supply agreements with NSFP/LMPL would be a "tame competitor" because it would be dependent on the *North Shore News* and LMPL for its cost structure. The respondents deny that this is a real danger since there would be firm contracts in place that would provide adequate protection to the purchaser, with provision for disputes to be settled through arbitration. The Director also submits that a purchaser would not have any incentive to compete since most of the decisions associated with running an independent business would be out of its control and, thus, it would be more in the position of an annuitant than of an independent competitor.

Without adopting any particular characterization such as "tame competitor", the Tribunal agrees that a remedy that depends, for its possible success, on supply contracts between the only competitors in the market is somewhat suspect. While the nature of the proposed remedy necessarily precludes a detailed assessment of its terms and conditions, the Tribunal considers that the small accommodations and goodwill that are required to make a long-run supply relationship work would not create the kind of climate that is desirable and necessary to restore the competitive situation disrupted by the merger. The respondents' argument that the realtors can be relied on to police the market has

been disposed of in the Tribunal's reasons of June 2, 1992 regarding the possibility of new entry into this market. The Tribunal does not believe that a divestiture of HOMES dependent on supply contracts between a would-be purchaser of HOMES and the *North Shore News* (or LMPL) would effectively restore competition in the real estate advertising market on the North Shore.

Therefore, if the remedy proposed by the respondents is to be accepted, that acceptance must be based on the prospects of HOMES as a stand-alone publication independent of the *North Shore News* in every way. The Tribunal does not accept the Director's position that HOMES would be the equivalent of a new entrant. Nevertheless, the fact that it no longer would have the sales and cost advantages of association with the *North Shore News* is of critical importance. The evidence points away from HOMES being a vigorous competitor. There is no market anywhere in the Lower Mainland in which there are two stand-alone real estate publications. (Excluded are in-house publications put out by realtors for their own use, which do not depend on the sale of advertising space.) The pattern throughout all markets is that the competition faced by the *Real Estate Weekly* emanates to a greater or lesser extent from community newspapers. The marketplace has not provided any signal that there is room for two specialized real estate publications. This is not to deny that it may be possible to find a buyer for HOMES, but that is not the same thing as evidence of some reasonable likelihood that the stand-alone HOMES would have the pre-merger competitive strength of the *North Shore News* supplement. The evidence of the realtors

previously cited is also relevant in this connection. Their attraction to the supplement was dependent on the fact that it was part of the *North Shore News*.

Given these considerations, the respondents' proposed remedy fails the test of being likely to restore competition effectively in the market. In fact, the proposed remedy does not even reach the minimum threshold applicable in consent order proceedings. It will not likely eliminate the substantial lessening of competition.

The Tribunal is left with three alternatives: the Director's proposed remedy, the sale of the North Shore edition of the *Real Estate Weekly* and the option of doing nothing. The last alternative has not been proposed and the Tribunal has not identified any circumstances that would cause it to consider adopting it. Although the respondents have referred to the sale of the North Shore edition of the *Real Estate Weekly* as a possibility they have not made any specific proposal, nor have they offered any response to the Director's objections made in anticipation of such a proposal. In the circumstances the Tribunal does not consider the sale of the North Shore edition of the *Real Estate Weekly* to be a realistic option.

As noted at the outset, the Director's remedy clearly meets the test of restoring competition. It is not punitive in the sense of going beyond the competitive situation that existed prior to the merger. While the Director's

proposed remedy affects more markets than are at issue, it does not go farther than necessary to restore the pre-merger competitive situation in the print real estate advertising market on the North Shore. Therefore, the Tribunal concludes that the respondents must sell, at their option, either the *North Shore News* or the *Real Estate Weekly*.

The Tribunal asks that counsel for the parties draft an order in accordance with these reasons for issuance by the Tribunal. The draft order should incorporate such terms and conditions with respect to the sale as counsel agree are necessary and reasonable, including, but not limited to, a deadline for effecting the sale and provision for the appointment of a trustee in default of a sale within that time limit. If counsel for the parties cannot agree on the terms and conditions, counsel for each party shall file a draft order for the consideration of the Tribunal. The draft order or orders shall be filed with the Registrar on or before December 31, 1992.

DATED at Vancouver this 10th day of December, 1992.

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

(s) M.M. Teitelbaum
M.M. Teitelbaum