

Competition Tribunal



Tribunal de la Concurrence

CT - 1990 / 001 – Doc # 229a

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 business 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

Dates of Hearing:

September 4-6, 12-13, 16, 19-20, 23-27, 30; October 1-4, 7-11, 15-18, 21-25, 1991; January 13-17, 22-24, 1992

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The Honourable Mr. Justice Max M. Teitelbaum

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COMPETITION TRIBUNAL

REASONS AND ORDER

The Director of Investigation and Research

v.

Southam Inc. et al.

I. INTRODUCTION

On November 29, 1990, the Director of Investigation and Research ("Director") filed an application with the Competition Tribunal pursuant to section 92 of the *Competition Act* ("the Act"),¹ seeking certain divestiture orders against Southam Inc. ("Southam") and various related companies. Section 92 of the Act deals with mergers that are reviewable by the Tribunal to determine if they prevent or lessen competition substantially.

The particular acquisitions challenged by the Director are part of a larger purchase by Southam in the area of British Columbia encompassing Vancouver and the surrounding suburban communities. Through a series of transactions Southam, a company best known for its daily newspaper publishing interests, acquired a direct or indirect controlling interest in 13 community newspapers, a

¹ R.S.C., 1985, c. C-34, as amended.

real estate advertising publication, three distribution businesses and two printing businesses. Southam, through its wholly-owned subsidiary Pacific Press Limited ("Pacific Press"), already owns the two Vancouver-area daily newspapers, *The Vancouver Sun* ("*Sun*") and *The Province* ("*Province*"). The Director asks that the Tribunal order Southam to dispose of its interests in two of the community newspapers and the real estate publication: *The Vancouver Courier* ("*Courier*"), the *North Shore News* and the *Real Estate Weekly*. Briefly, the Director contends that the joint control of these publications and the two Vancouver dailies by Southam prevents or lessens or is likely to prevent or lessen competition substantially in the supply of newspaper advertising services, including real estate advertising, in various markets in the Vancouver area. The Director's competitive concerns extend only to the impact of the merger on those persons who wish to buy advertising space in a newspaper to advertise their products or services. The Director's case is not directed at questions of the editorial independence of any of these publications.

Interlocutory proceedings in this matter were long, complex and strenuously contested. Upon application by the Director, a consent interim order was issued on March 18, 1991 to preserve as independent and viable the business of each publication potentially subject to divestiture. The parties agreed on the terms of that order following directions from the Tribunal outlining the general contents of the order it was prepared to grant. Various orders regarding the confidentiality of documents and the scope of discovery were also issued by the

Tribunal. On July 4, 1991, the Tribunal granted leave to the Director to amend the notice of application to add a further ground for the remedies requested.

The hearing of this matter took 40 days; 50 witnesses were called and a large number of documents were entered as exhibits. In light of the scope and complexity of the case and in light of the fact that this is only the second decision issued by the Tribunal in a contested merger case,² the reasons of the Tribunal are long and detailed.

A. Constitutionality of the Tribunal

The respondents submit that the merger provisions of the Act and the relevant provisions of the *Competition Tribunal Act*³ infringe sections 2, 7, 11 and 15 of the *Canadian Charter of Rights and Freedoms*⁴ and are not saved by section 1, violate sections 1 and 2 of the *Canadian Bill of Rights*⁵ and are *ultra vires* Parliament as contrary to sections 96 to 101 of the *Constitution Act, 1867*.⁶

² The first is *Director of Investigation and Research v. Hillsdown Holdings (Canada) Limited* (9 March 1992), CT-91/1, Reasons and Order (Competition Trib.).

³ R.S.C., 1985 (2d Supp.), c. 19.

⁴ Part I of the *Constitution Act, 1982*, being Schedule B of the *Canada Act 1982* (U.K.), 1982, c. 11.

⁵ S.C. 1960, c. 44.

⁶ (U.K.), 30 & 31 Vict., c. 3.

At the conclusion of the hearing, counsel for the respondents did not elaborate on the submission as stated in the written argument. Counsel for the respondents refers the Tribunal to three cases in its written argument: *Alex Couture Inc. c. P.G. Canada*,⁷ *P.G. Canada c. Alex Couture Inc.*⁸ and *Director of Investigation and Research v. The NutraSweet Company*,⁹ decisions of the Quebec Superior Court, the Quebec Court of Appeal and the Tribunal respectively. As counsel stated, the submission is made in the event that the Federal Court of Appeal or the Supreme Court of Canada should decide that the merger provisions do infringe sections 2, 7, 11 and 15 of the *Canadian Charter of Rights and Freedoms* and are *ultra vires* Parliament as contrary to sections 96 to 101 of the *Constitution Act, 1867*.

Mr. Finkelstein: I guess the point of the whole thing and the point of my standing up now is to say that we are making that argument, we are relying upon that argument, for the record and for the purposes of appeal, should there be one, but having regard to the state of the law in NutraSweet and the Quebec Court of Appeal, we don't intend to make further argument than I have just done, unless the Tribunal wants it.¹⁰

In *Director of Investigation and Research v. The NutraSweet Company*, the Tribunal dealt with this issue. There is no need to review what was decided in that case other than to say that those findings shall be followed in the present

⁷ [1990] R.J.Q. 2668 (C.S.), rev'd in part (9 September 1991), Quebec 200-09-000250-909 (C.A.).

⁸ (9 September 1991), Quebec 200-09-000250-909 (C.A.). Application for leave to appeal pending, (S.C.C.).

⁹ (1990), 32 C.P.R. (3d) 1 (Competition Trib.). Appeal discontinued (22 May 1992), A-903-90 (F.C.A.).

¹⁰ Transcript at 5952-53 (22 January 1992).

decision that is, "that the tribunal panel hearing this case has been validly constituted" and this for the reasons given there.

B. Expert Affidavits

The Director filed into the record four expert affidavits in accordance with the rules of the Tribunal. A further expert affidavit was filed, with the permission of the Tribunal, as part of the Director's case in reply. Each of these expert witnesses was presented by the Director for cross-examination.

The respondents filed into the record the expert affidavits of 10 witnesses in accordance with the rules of the Tribunal. The respondents failed to call three of the expert witnesses for cross-examination, namely Joya Dickson, Charles Dunbar and Christine Urban.

Rule 42 of the *Competition Tribunal Rules*¹¹ governs the procedure by which a party who intends to introduce the evidence of an expert witness at the hearing must proceed. Rule 42 states:

42. (1) Every party to proceedings before the Tribunal who intends to introduce evidence of an expert witness at a hearing shall, at least 30 days before the commencement of the hearing, file with the Registrar an affidavit of the expert witness setting out a full statement of that evidence and serve a copy of the affidavit on each of the other parties to the proceedings.

¹¹ SOR/87-373.

(2) Each party on whom a copy of an affidavit described in subsection (1) has been served and who wishes to rebut with expert evidence any matter set out in the affidavit shall, not less than 15 days before the commencement of the hearing, file with the Registrar an affidavit setting out the evidence to be introduced in rebuttal and serve a copy of the affidavit on each of the other parties to the proceedings.

(3) Each party on whom a copy of an affidavit described in subsection (2) has been served and who wishes to reply with expert evidence to any matter set out in the affidavit shall, not less than five days before the commencement of the hearing, file with the Registrar an affidavit setting out the evidence supporting the reply and serve a copy of the affidavit on each of the other parties to the proceedings.

(4) Unless the Tribunal orders otherwise, at the proceedings referred to in subsection (1),

(a) the affidavit described in subsections (1) to (3) shall form part of the record and need not be read aloud; and

(b) an expert witness referred to in that subsection shall not be examined in chief thereon but shall be made available at the hearing and may be cross-examined and re-examined.

In that the respondents filed 10 expert affidavits into the record but only made seven of the expert witnesses available at the hearing to be cross-examined, counsel for the Director made an oral motion requesting an order that the affidavit evidence of Ms. Dickson, Mr. Dunbar and Dr. Urban "be removed from the record or are not part of the record".¹²

Counsel for the respondents replied that "as far as Dr. Urban is concerned that is fine. ... I think that one or two of them [respondents' expert witnesses] said they read Joya Dickson's or one of the others and agree with it. To that extent they form part of the record".¹³

¹² Transcript at 5498-99 (15 January 1992).

¹³ Transcript at 5499 (15 January 1992).

The Tribunal ruled that the affidavits of the three experts not made available for cross-examination were not part of the record notwithstanding the fact that expert witnesses made available for cross-examination referred to those affidavits.

The following are the reasons for that decision.

Rule 42 is clear as to the procedure that *must be* followed in order to introduce the evidence of an expert witness. Pursuant to rule 42(1) the affidavit evidence of the expert must be filed 30 days before the commencement of the hearing and a copy of the affidavit served on the other party to the proceeding. This was done.

Rules 42(2) and (3) are not applicable to the present issue. Pursuant to rule 42(4), unless the Tribunal orders otherwise, the affidavit described in rule 42(1) shall form part of the record and the expert witness shall be made available at the hearing and may be cross-examined. The Tribunal takes this to mean that in order for the affidavit of a witness to form part of the record and be considered as evidence, that expert witness *must* be made available for cross-examination on that affidavit. The mere fact that another witness refers to that affidavit does not, in the Tribunal's opinion, make the affidavit part of the evidence presented to the Tribunal. A witness referring to the affidavit of an expert not presented for cross-examination simply means that the witness read the affidavit and nothing more.

The fact that the witness agrees or disagrees with what is in the affidavit is immaterial as the affidavit is not before the Tribunal.

II. BACKGROUND

A. The Acquisitions

Three dates are key in the chain of events that led to Southam's acquisition of a controlling interest in 13 community newspapers and the *Real Estate Weekly*: January 27, 1989, May 8, 1990 and February 1, 1991.

On January 27, 1989, Southam purchased 49% of the shares of North Shore Free Press Ltd. ("NSFP") from Peter Speck and his holding company (Yellow Cedar Properties Ltd.) for about \$6 million. NSFP carries on the business of publishing the *North Shore News*. Mr. Speck is the founder and publisher of the *North Shore News*. Along with 49% ownership Southam also acquired an option to purchase the remaining 51% of NSFP, while Mr. Speck gained the right to require Southam to take up the remaining shares (a "put/call agreement").

In May 1990, Lower Mainland Publishing Ltd. ("LMPL") was created. As of May 8, 1990, Southam owned 63% of LMPL and the Madison Venture Corporation ("Madison") and four of its subsidiaries owned 37% of LMPL. As of August 1991, immediately prior to the hearing in this case, those interests

remained the same. Southam also had and still has the right to purchase Madison's shares; Madison has the right to compel such a purchase. Madison is a private company with approximately 25 shareholders, all from the Vancouver area. Through various subsidiaries Madison is involved in a variety of local businesses, including engineering and real estate ventures and, most relevant to this case, the publication, printing and distribution of community newspapers and flyers. Madison was started in 1977 by Sam Grippo, now President of LMPL.

As a result of a series of purchases and exchanges of assets, shares and cash on May 8, 1990, LMPL owned 100% of the nine community newspapers previously jointly owned by Madison and Netmar Inc. ("Netmar") (loosely referred to as the Now/Times group of papers), a 50% interest in one other paper that Madison/Netmar also held, 49% of the *North Shore News*, 100% of two other community newspapers acquired by Southam through NSFP and 75% of the *Courier*, also purchased through NSFP. LMPL also received a 100% interest in the *Real Estate Weekly* from Madison/Netmar along with majority interests in three distribution companies¹⁴ and all the shares of two printing businesses. Netmar received \$6.8 million in cash for its 50% interest in the Madison/Netmar assets.¹⁵ Southam and Madison each contributed one-half of that amount.

¹⁴ Netmar City-Wide Distribution Systems Ltd. (100%), Fraser Valley Flyer Delivery Service Ltd. (89%), Chilliwack Flyer Services Ltd. (75% owned by Fraser Valley Delivery Service Ltd.).

¹⁵ In 1989, Madison and Netmar had entered into a joint venture involving the publishing and distribution businesses which resulted in each holding a 50% interest in those assets.

The 75% interest in the *Courier* was acquired by NSFP for about \$6 million. At the time Madison held a right of first refusal on the purchase of the *Courier*. Peter Ballard and Philip Hager, co-publishers of the *Courier*, retained a 25% interest in the *Courier* which is subject to a put/call agreement giving NSFP the right to acquire their shares in two years, or on termination of their employment with the paper, for \$2 million. At the same time NSFP acquired two other community newspapers from Bex Publishing Ltd.

On February 1, 1991, Southam exercised its option and purchased the remaining 51% of the *North Shore News* for about \$6 million. That interest was then transferred to LMPL which, therefore, now owns 100% of the *North Shore News*.

B. Daily and Community Newspapers: General

The term "daily newspaper" needs no explanation. Daily newspapers come in broadsheet and tabloid format¹⁶ with varying editorial¹⁷ slants and are of variable quality. Some are published every day, others only six days a week. In general, readers must pay for the pleasure of reading a daily newspaper. While every daily has a base of operations, circulation of the paper may extend well

¹⁶ The terms "broadsheet" and "tabloid", as used in these reasons, have no necessary connection with the content of the paper. They relate solely to the size of the page. One broadsheet page equals two tabloid pages placed horizontally. A broadsheet page contains six columns of text, a tabloid five.

¹⁷ References to "editorial" content include all non-advertising content in a newspaper.

beyond this area to as many people in as many places as are willing to pay for it (thus, for example, a "national" daily).

In contrast, a community newspaper targets a distinct geographic location or "community". The publisher of the paper selects a certain maximum area for distribution. Most community newspapers are distributed free of charge to each household within the identified distribution area, usually once or twice but possibly three times a week. Some have partially paid circulation. All community newspapers focus on local news and events. As with dailies, the overall quality of the publication varies from paper to paper.

Daily and community newspapers both rely on readers and advertisers for success. Clearly, the more successful a paper is in attracting readers, the more attractive it will be to advertisers. Likewise, people read a newspaper in part for its advertising. In these two related areas daily newspapers are in decline while community newspapers are growing.

Edwin L. Bolwell, a publishing industry consultant who appeared as an expert witness for the Director, cited statistics from the Canadian Daily Newspaper Association to demonstrate the declining popularity of daily newspapers in Canada. In 1971 daily newspapers averaged 80 copies per 100 households.¹⁸ By 1990 the number of copies sold fell to 60.8 per

¹⁸ Copies sold per 100 households is also referred to as "household penetration".

100 households.¹⁹ James Nelson Rosse, an economist specializing in communications industries who appeared for the respondents, observed that the interaction of circulation and advertising, along with economies of scale in production costs, has resulted in the disappearance of direct competition between daily newspapers in all but the largest cities in the United States and Canada. In both countries there has been a decline in the number of cities supporting two or more daily newspapers.²⁰

Mr. Bolwell pointed out that the number of community newspapers in Canada, on the other hand, has increased substantially over the past ten years.²¹ *Community newspapers now distribute approximately twice as many copies as they did ten years ago.*²² At least some of these community newspapers are being read. A 1990 Print Measurement Bureau Study, quoted by Mr. Bolwell, reveals that 60% of all English-speaking adults (i.e., persons over 18 years of age) in Canada had read a community newspaper in the previous seven days.²³

In the past decade daily newspapers along with radio, television and magazines have suffered a decline in their respective shares of total net

¹⁹ Expert Affidavit of E.L. Bolwell at 27 (Exhibit A-2).

²⁰ Expert Affidavit of J.N. Rosse at 5-6 (Exhibit R-50).

²¹ *Supra*, note 19 at 31. Membership in the Canadian Community Newspaper Association ("CCNA"), which probably covers only 80% of all community newspapers (membership is voluntary and the Quebec industry has its own association), increased from 547 in 1980 to 670 in 1990 and now stands at more than 700.

²² *Ibid.* CCNA members distributed 2.5 million copies in 1980 and 5.0 million copies in 1990.

²³ *Ibid.*, Appendix A.

advertising revenues in Canada. Community newspapers are among the group of advertising vehicles which have increased their share of advertising revenues (along with catalogues/direct mail/flyers, directories, billboards and transit shelters and stations). Between 1980 and 1990 the dailies' share dropped from 26.5% to 22.7%; the community newspapers' share grew from 5.5% to 7%.²⁴

C. Lower Mainland Newspaper Industry

The facts in this case relate specifically to the newspapers operating in an area of British Columbia known as the Lower Mainland. It is important for a clear understanding of the evidence and the issues to have some conception of the geography of the area. The parties have agreed that the "Lower Mainland" consists of the Fraser Valley south of the town of Hope. More particularly, it includes Vancouver and its immediate environs: Burnaby and New Westminster to the east, West Vancouver and North Vancouver to the north across Burrard Inlet,²⁵ and to the south the island occupied mainly by Richmond. Moving farther inland from the city of Vancouver, it also includes along the southern bank of the Fraser River, Delta, Surrey, White Rock, Langley, Matsqui, Abbotsford and Chilliwack, and north of the river moving from Hope back towards the city of Vancouver, Mission, Maple Ridge, Pitt Meadows, Port Coquitlam, Coquitlam and Port Moody. About 1,600,000 people live in the Lower Mainland.

²⁴ *Ibid.*, Appendix B.

²⁵ Specifically, the city of North Vancouver, the Municipality of North Vancouver and the Municipality of West Vancouver, collectively referred to in these reasons as the "North Shore".

As mentioned above, Southam publishes both Vancouver-based dailies, the *Sun* and the *Province*. The *Sun* is a broadsheet published Monday to Saturday. Until September 1991 it was an afternoon paper. At that time Pacific Press repositioned the *Sun* from an afternoon to a morning publication. The paper focuses on international, national and regional news, roughly in that order of priority. There are no written guidelines regarding editorial content but there is no argument between the parties that the emphasis of the *Sun* is not local.

In 1989, the *Sun* averaged 57% paid advertising content, as against editorial content. Advertising generated in excess of \$98 million in revenues for the paper.²⁶

The *Province* is a tabloid published daily except Saturdays. It too is a morning paper. The *Province's* mandate is to cover provincial news first; its editorial focus is regional, national and international. Again, there is no argument that the focus is not local. The *Province* averaged 54% advertising in 1989 and generated total advertising revenues of more than \$46 million.

In Mr. Bolwell's opinion, the Pacific Press dailies fall short of other major dailies in terms of printing quality and colour reproduction. The *Province* is also below average in terms of design and organization for readability compared to other major city tabloids. The *Sun* compares well in this respect with other

²⁶ The Agreed Statement of Facts, Schedule C, includes revenue data for the *Sun*, *Province* and *North Shore News* from 1985 to 1989 and for the *Courier* from 1986 to 1990 (Exhibit CA-104 (confidential)).

broadsheets. He also felt that both papers offer less local coverage than most dailies.²⁷

In terms of circulation neither the *Sun* nor the *Province* is doing particularly well. Circulation data for daily newspapers is typically presented for the "city zone" and the "retail trading zone" (or other similar terminology). The city zone is a circle drawn by the publisher with its origin at the place where the newspaper is published. This is the area in which the paper normally has its biggest audience and is represented to advertisers as the primary market of the newspaper. By judiciously selecting the boundaries of the city zone, the publisher can present an attractive combination of geographic coverage and household penetration to advertisers. According to Mr. Bolwell the latter is very important to advertisers. The retail trading zone is a concentric circle outside the city zone which the publisher considers to be further effective circulation for an advertiser, although perhaps secondary to the city zone. The *Sun* and the *Province* have the same designated city zone: Vancouver, the North Shore, Burnaby, New Westminster and Richmond.

Between 1985 and 1990, the *Sun's* circulation declined overall. The *Province* increased its total circulation but lost circulation in the city zone.²⁸ The *Sun's* average household penetration in the city zone fell from 43% to 33% over

²⁷ *Supra*, note 19 at 43-44.

²⁸ *Ibid.*, Appendix G.

the same time period. The *Province* dropped from 25% to 22%.²⁹ The *Sun* currently does somewhat better than its average in penetrating households in the city of Vancouver (36%) and on the North Shore (42%). The household penetration of the *Province* in those areas is much the same as its 1990 average (22.5% and 23%).³⁰ There is no direct evidence with respect to household penetration by the papers in the retail trading zone. None of the other evidence indicates that either paper is doing any better, on average, in the retail trading zone than in the city zone. Given that the city zone is supposed to be the prime area, the opposite is more likely to be true, particularly for the *Sun*.

Community newspapers abound in the Lower Mainland. Mr. Bolwell states that there are relatively more in Vancouver than in most, if not all, other Canadian cities.³¹ The parties conclude that there are more than 30 community newspapers currently published and distributed in the area. Many of these papers were merely identified or mentioned in passing during the proceedings. Those players in community newspaper publishing that are of some significance are described briefly here, beginning with the two papers that the Director seeks to have divested.

The *Courier* is a tabloid community newspaper published on Wednesdays and Sundays in the city of Vancouver. Founded in 1908, the *Courier* went into

²⁹ *Ibid.*, Appendix H.

³⁰ *Ibid.*, Appendix L.

³¹ *Ibid.* at 43.

receivership in 1979 after a brief experiment as a daily. It was then purchased and revitalized by its current management. The Wednesday edition (65,000 copies) is distributed to homes and businesses on the West Side of Vancouver.³² The larger Sunday edition (120,000 copies) is distributed more broadly in the city of Vancouver. According to Mr. Bolwell, "the *Courier* is easily the best community newspaper in Vancouver and among the most remarkable published anywhere in Canada".³³ In mid-1990, the *Courier* was running 60% advertising content. Different witnesses involved in community newspaper publishing gave the Tribunal different advertising content targets. Most community newspapers aim for between 60% and 70% advertising.³⁴ In 1989, the *Courier's* gross advertising revenues were approximately \$4.5 million.

Mr. Speck started the *North Shore Shopper* in 1969. It later became the *North Shore News*; he has been its publisher ever since.³⁵ Mr. Bolwell describes the *North Shore News* as "one of the best community newspapers in Canada".³⁶ The *North Shore News* distributes approximately 62,000 copies throughout the North Shore on Wednesdays, Fridays and Sundays. It averaged 74% advertising

³² The parties define the "West Side" as that part of the city of Vancouver west of Main Street, excluding the downtown area of the city.

³³ *Supra*, note 19 at 52.

³⁴ Transcript at 932 (13 September 1991); transcript at 1041 (16 September 1991).

³⁵ According to *North Shore News* promotional material, the paper developed "from a monthly newspaper to a twice-weekly; from 6,000 circulation to more than 53,000; from a staff of 1 to nearly 100, with over 600 carriers; from virtually nothing to a position of dominance in the market of North and West Vancouver." (Exhibit A-3) This capsule history reflects the justified pride of Mr. Speck in his accomplishments.

³⁶ *Supra*, note 19 at 56.

content and generated total gross advertising revenues of about \$9 million in 1989.

The other community papers now controlled by Southam belonged prior to the acquisitions to either The Now Times Group Inc. or Bex Publishing Ltd. The Now Times Group Inc. was ultimately owned by Madison. Bex Publishing Ltd. was owned by the Bexley family. The Now/Times papers are located in Burnaby, Surrey, Delta and various Fraser Valley communities (Abbotsford, Chilliwack, Coquitlam, Maple Ridge/Pitt Meadows). The Now/Times group also owned 50% of a Richmond paper (*Richmond News*). Bex Publishing Ltd. ran a paper in Richmond (*Richmond Times*) and in Delta (*Delta Optimist*).

The Now/Times group consists mainly of relatively young papers started within the last eight years or so. The partly-owned *Richmond News* was an established paper. The first four papers in the group (*Burnaby Now*, *Coquitlam/Port Moody/Port Coquitlam Now*, *Surrey-North Delta Now* and *The Royal City Record Now* in New Westminster) commenced publishing in December 1983 or early in 1984. The [*Maple Ridge/Pitt Meadows*] *Times* started up in 1985. The [*Abbotsford/Clearbrook*] *Times* and the [*Chilliwack*] *Times* were converted from TV listings into full-fledged community newspapers some time later, around 1986 or 1987. The *North Delta Today* seems to have disappeared while the *South Delta Today* has since been amalgamated into the *Delta Optimist* (previously owned by Bex Publishing Ltd.). The Now papers are published twice

a week with the exception of the *Surrey-North Delta Now* which comes out only once. The [*Maple Ridge/Pitt Meadows*] *Times* is published twice weekly and the other two once weekly, as is the *Richmond News*. The combination of the *South Delta Today* and the *Delta Optimist* publishes three times a week. In 1989 the Now/Times papers ran second to the Metro Valley papers in most areas in terms of their share of community newspaper advertising³⁷ dollars (capturing 10-30%). (The MetroValley papers are described below.) Only in Burnaby and New Westminster did the Now/Times papers have the majority of those advertising dollars (a 60/40 split).³⁸

Little is known about the two Bexley papers except that the *Delta Optimist* has been around for 30 or 40 years. The *Richmond Times* was not even referred to in the evidence. Based on the unaudited income statements for the period ending August 31, 1991, except for the *Courier* and the *North Shore News*, all the community newspapers now owned by LMPL were in a loss position.³⁹

The other major presence in community newspaper publishing in the Lower Mainland is the MetroValley group of papers owned by Trinity Holdings Inc. ("Trinity").⁴⁰ With the exception of the North Shore, South Delta and most of

³⁷ Run-of-press and classified advertising.

³⁸ Transcript at 3847 (15 October 1991).

³⁹ Exhibit CR-20 (confidential) and Exhibit CR-22 (confidential).

⁴⁰ Trinity is ultimately owned by Trinity International Holdings plc which also has newspaper interests in the United Kingdom and the United States (including daily newspapers).

the city of Vancouver, the MetroValley group has a paper in each Lower Mainland community and generally publishes twice a week. In the city of Vancouver, a MetroValley paper distributes in the West End and in the Kitsilano area only. Most of the papers in this group received little or no attention during the hearing. Several individual papers were, however, referred to more extensively in the evidence. These papers will be described in greater detail.

Eric Cardwell, formerly the advertising director at the *North Shore News*, left that paper in 1982 to buy the *West Ender*. In 1983 he introduced a second publication, the *East Ender*, that shared much advertising and editorial content with the *West Ender*. When he sold both papers to Trinity in January 1990, their combined advertising revenues were \$2-3 million. At that time, the *West Ender* distributed 56,000 copies, mainly in the West End of the city of Vancouver with some penetration across the bridges into Kitsilano (about 10,000 copies), while the *East Ender* distributed about 50,000 copies in the south and east portions of the city of Vancouver. Trinity renamed the *East Ender* the *Metro Vancouver News* and then split it into the *Vancouver East News* and the *Vancouver South News*. In September 1991, *The Kitsilano News* was created out of the distribution area of the *West Ender*. It distributes about 26,000 copies in the Kitsilano area of Vancouver while the *West Ender* continues to distribute 31,000, all in the West End of Vancouver. To date *The Kitsilano News* has not performed up to expectations in terms of advertising revenue generated. In December 1991, Trinity ceased publication of the *Vancouver East News* and *Vancouver South*

News due to their poor performance. Mr. Bolwell commented that neither the *West Ender* nor the *East Ender* was an "outstanding" community newspaper.⁴¹

The Richmond Review is another recent addition to the MetroValley group. Trinity bought *The Richmond Review* in April 1990. It is published in broadsheet format on Wednesdays, Fridays and Sundays. Interestingly, the Friday circulation is 11,000 paid copies. Distribution is free on the other two days and 40,000 copies are delivered. In 1990, based on data for eight months, a fair estimate of the gross advertising revenues of *The Richmond Review* would be in excess of \$3 million. Mr. Bolwell rated *The Richmond Review's* readability as "well above average".⁴²

The [Surrey/North Delta] Leader is another Trinity property that has attracted some attention during the proceedings. Trinity has owned *The Leader* since 1979. *The Leader* distributes more than 70,000 copies on Wednesdays and Sundays. It generally runs over 65% advertising and its 1990 revenues were \$4-5 million, the second highest of all the MetroValley papers. Barbara Baniulis, project administrator for Trinity, although not totally objective, called *The Leader* one of the province's "superior" community newspapers.

⁴¹ *Supra*, note 19 at 52.

⁴² *Ibid.* at 34.

Two other community newspapers are still independently published: the *Langley Advance* and *The Vancouver Echo*. In April 1991, however, LMPL acquired a 15% interest in *The Vancouver Echo* from Jack Burch, its long-time owner. Mr. Burch retained 25% ownership of the paper and his two daughters and son-in-law each purchased 20% from him. LMPL guaranteed the substantial bank loan which enabled them to purchase these shares from Mr. Burch. In return each granted LMPL a right of first refusal on the sale of their shares which total 60%. *The Vancouver Echo* has a long history and publishes twice a week. Its distribution area covers mainly the eastern portion of the city of Vancouver. The *Langley Advance* has been around for some fifty years; it publishes twice a week.

According to Mr. Grippo's estimate, as confirmed by figures filed for MetroValley, LMPL (for not quite the same time period) and *The Vancouver Echo*, the MetroValley publications received 50-55% of the advertising revenue flowing to the community newspapers in the Lower Mainland. LMPL had 40-45% and the independents 5%.⁴³ Within LMPL, the *North Shore News* and the *Courier* accounted for 60% of revenue and the remaining community newspapers for the rest. The combined advertising revenue of all the community newspapers is of the order of 30% of total newspaper advertising revenue in the Lower Mainland.

⁴³ Transcript at 3861 (15 October 1991); Exhibit CA-49 (confidential)(MetroValley); Exhibit CR-20 (confidential) and Exhibit CR-22 (confidential)(LMPL); and Exhibit A-32 (*The Vancouver Echo*).

III. THE MARKET

A. General Considerations

The general issues with respect to the definition of a market in a merger case have been set out in the *Hillsdown Holdings (Canada) Limited* decision.⁴⁴ The relevant market for purposes of merger analysis is one in which the merging firms acting alone or in concert with other firms could exercise market power. Market power is the ability of a firm or group of firms to maintain prices above the competitive level. Market power may also be exercised by offering, for example, poor service or quality or by restricting choice. When used in a general context, "price" is thus a shorthand for all aspects of firms' actions that bear on the interest of buyers. The following quotation neatly summarizes these points:

The modern concept of market power focuses on the potential for consumers to suffer injury through the actions of a single firm or a group of firms acting in concert. It has become traditional to think of the ability of a firm or group of firms to maintain prices above the competitive level, although the meaning of "price" can easily be expanded to take into account other forms of consumer injury such as inferior quality.⁴⁵

The aspects of market power that are of concern in a particular case will depend on the allegations of the Director and the evidence brought forward by both parties. The focus on market power in the conceptualization of markets brings to

⁴⁴ *Supra*, note 2.

⁴⁵ G.A. Hay, "Market Power in Antitrust" (1992) 60 Antitrust L.J. 807 at 808.

the fore the central concern: whether the merger will create, increase or preserve market power.

The delineation of the relevant market is a means to the end of identifying the significant market forces that constrain or are likely to constrain the merged entity. Initially, it is necessary to identify the output of other firms that buyers can avail themselves of in the event that the price or other characteristics of the product offered by the merged firm are unacceptable to buyers. This is the task of delineating the product market, i.e., identifying the products that are close substitutes for that of the merged firm.

The second problem is to identify the firms or classes of firms that produce or can quickly produce the products in question and can influence the offerings to the customers of the merger. Generally this question is cast in terms of the geographic boundaries of the relevant market. It may also relate to firms that use similar technology to that used by firms that currently produce the product or products and that could quickly change their output if it were profitable to do so. Firms with convertible capacity can be counted as part of the relevant market where conversion can be performed quickly and with small investments. The firms in question can be treated as potential entrants where these conditions do not apply and there is no history of firms changing their product line. It matters little in the end whether the relevant market is expanded to include firms with similar technology or whether it is concluded that these firms can enter with ease

in the event that attractive profit opportunities appear in the relevant market because of the exercise of market power or for other reasons. There is room for flexibility in the application of rubrics. The critical issue is to ensure that all factors have been considered that have a bearing on whether there has or is likely to be a prevention or lessening of competition to a substantial degree.

B. The Product Market

(1) The Position of the Parties

The central issue in this case is that of determining the relevant product market. There is no difference between the parties with respect to the geographic markets.

The Director's position is that the product market consists of newspaper retail advertising services provided by the two Pacific Press dailies and the community newspapers in the Lower Mainland and parts thereof. The respondents argue, first, that dailies and community papers are not close substitutes and, second, that if the product market is enlarged to include both dailies and community newspapers, then all advertising channels (television, radio, free-standing flyers, billboards, yellow pages, etc.) should also be included because they too are substitutes for advertisers in the dailies and community papers.

Whether two or more goods or services are close substitutes can in principle be measured by the extent to which buyers would switch from one to another in response to a change in relative prices. This measurement, the cross-elasticity of demand, is rarely available. In practice it is usually necessary to draw on more indirect evidence such as the physical characteristics of the products, the uses to which the products are put, and whatever evidence there is about the behaviour of buyers that casts light on their willingness to switch from one product to another in response to changes in relative prices. The views of industry participants about what products and which firms they regard as actual and prospective competitors are another source of evidence that is sometimes available. In this case, the views of industry participants -- newspaper suppliers and advertisers, including representatives from advertising agencies -- have been the main source of information. This has been supplemented by the view of experts concerning the extent to which media and advertising vehicles may be substituted. The Director has relied very heavily on the views expressed in the internal documents of Southam and Pacific Press regarding competition between the dailies and the community newspapers and the means of confronting that competition.

It has been a challenging task to arrive at a coherent picture of the forces at play and how they relate to the acquisitions in question. Neither of the parties totally denies the position of the other. The Director does not say that advertising on television, for example, is not a substitute for the advertising in newspapers.

He argues, however, that this medium in conjunction with the other weaker substitutes do not provide a sufficient check on the market power created by the acquisition of community papers by Southam. The respondents similarly do not deny that the community newspapers and the dailies are substitutes for a number of advertisers. Their position is that this is a relatively small group of large advertisers for whom other advertising channels are good substitutes.

(2) Newspaper Retail Advertising Services

The Director defines the market as consisting of newspaper retail advertising services. This definition of the market excludes two of the three broad classes of advertising services sold by newspapers. The first excluded class is classified advertising which, according to the Agreed Statement of Facts:

is advertising which is printed in a specific section of a newspaper known as the 'classified section' and placed in one of the category headings pre-determined by the newspaper according to the type of product advertised.⁴⁶

The evidence is that most newspapers charge separate rates for classified advertising and publish a separate rate card. This price difference was not pleaded by the Director but is of considerable importance to his position that classified advertising is not part of the alleged newspaper retail advertising market.

⁴⁶ Agreed Statement of Facts at para. 27.

Advertising that is interspersed with editorial content is referred to as run-of-press ("ROP") or display advertising. In the Notice of Application, the Director states that:

The two main sources of display advertising are retailers ("retail display advertising") and national advertisers. Retail advertisers are suppliers of products who have one or more retail outlets in the primary circulation area of the newspaper. National advertisers are suppliers of products who may not have a retail outlet in the primary circulation area of a newspaper and usually place their newspaper advertising through an advertising agency. The third source of display advertising is governments and non-profit organizations.⁴⁷

According to the Response:

National advertisers comprise manufacturers and distributors of brand name consumer products, governments and institutions. Such advertisers generally utilize advertising to promote the image of a product or service, or of the company, institution or government itself to a large audience; ... Retail advertisers promote the purchase or use of a product or service at a particular location.⁴⁸

As in the case of classified advertising, the Director does not explicitly draw a distinction between "retail" and "national" advertising that is based on price differences. There is, however, a critical difference between classified and display advertising that makes the existence of a price difference of paramount importance in drawing distinctions within the class of display advertising. Classified and display advertising are in separate parts of the newspaper and there is usually a difference in the appearance of the advertisements. However, this is

⁴⁷ Notice of Application at para. 33.

⁴⁸ Response at para. 12.

not so with respect to "national" and "retail" display advertising. The product sold by the newspaper is the same. What differs, according to the Director, is the location of the retail outlets of the advertiser and whether or not the advertising is placed through an advertising agency. The respondents distinguish between the two based on the nature of the business of the advertiser and the type of advertising that the advertiser does. Although the respondents clearly recognize a difference between national and retail advertising, it is the Director who alleges that the product market should be defined to include only retail advertising services. The Director must therefore convince the Tribunal that such a distinction is relevant for evaluating the competition law effects of the mergers in question here. Unless the identity of "national" and "retail" advertisers is translated into corresponding price differences there is no basis for considering them to be separate products and in separate markets.

Although a price (rate) difference was not specifically put forward by the Director in the pleadings, through witnesses or in argument, various newspaper rate cards were filed in evidence. The rate cards for the Pacific Press dailies reveal that there are separate national and retail advertising rates for those papers. A simple calculation further shows that the national rates for the *Sun* (for 1990) were 20% higher than its retail rates. The corresponding differences were 15%, 20% and 25% for the *Province*, depending on the day of the week. Among the community newspapers, some have separate national and retail rates (e.g., the

MetroValley papers take this approach) while others have only one display rate (e.g., the VanNet papers).

In the view of the Tribunal, whether there is or is not a price difference between retail and national advertising for the *dailies* is critical to the issue of market delineation. It is clear that even the most successful community newspapers carry relatively little national advertising.⁴⁹ There is no difference between national and retail advertising as far as the location of an advertisement and its cost to the newspaper are concerned. In effect there is price discrimination. Without the price difference it would not be sufficient that the Director is not alleging that the community papers are in the same market as the dailies with respect to national advertising; there would in fact be a single price class as far as the dailies were concerned. Although there would be different segments, they would all have to be considered in evaluating the extent of the relevant product market in this case. For example, competition from other vehicles and media for national advertising would have to be taken into account in determining which advertising channels were close substitutes.

Taken at face value the rate cards indicate that there is a difference in national and retail rates for the dailies. None of the other evidence before the Tribunal contradicts this, although details of how the different rates are applied and to whom are vague. Given the price differences between retail and national

⁴⁹ See Table 1, *infra* at 42.

advertising, the question is: what are the criteria used to place advertisers in one or the other category? Note that in the discussion which follows, the Tribunal will use the term "retailer" to refer to anyone that sells goods or provides services directly to members of the public. A "retail advertiser" is one charged the retail rate for advertising in a newspaper (likewise, "national advertiser").

Ms. Baniulis stated that her company identified national advertising on the basis that such advertisements are "subject to a 15 per cent agency commission."⁵⁰ However, Norm Weitzel, who spent 33 years in newspaper advertising, stated that advertisers identified as retailers were charged the retail rate regardless of whether the advertisement was placed through an agency.⁵¹ Similarly, George A. Jarvis, a principal of Palmer Jarvis Advertising for 15 years, referred to the classification of the Bank of British Columbia as a national advertiser irrespective of whether the advertisement was placed by his agency or directly by the bank.⁵² This is an example of a borderline case since the bank has retail outlets and could be conceived of as a "retailer". While such a case obviously is resolved one way or another by each newspaper, it illustrates that for certain advertisers it is difficult to know exactly where the line is drawn. In general, the Tribunal heard evidence that some retailers, such as travel agents and automobile dealers, are not charged the

⁵⁰ Transcript at 794 (13 September 1991). She is referring to the discount provided by the paper to an advertising agency that books an advertisement.

⁵¹ Transcript at 1065-68 (16 September 1991).

⁵² Transcript at 1150-51 (16 September 1991).

retail rate by the dailies.⁵³ The rates they are charged by the *North Shore News*, the *Courier* and other important community papers are not known. No representatives of these retailers appeared as witnesses and there has been only passing reference to them by other witnesses. Since the only evidence on the record is that they are not charged the retail rate, there is no basis for extending the market to include automobile dealers and travel agents. Any other retailers not charged the retail rate should also be excluded.⁵⁴

Neither party called a witness to address the question of display rate classes and price differences directly. The parties stressed the different characteristics of the advertisers, perhaps on the assumption that the differences in rates were an obvious given. All the advertisers called as witnesses by the Director placed their own newspaper advertisements, all were retailers and all almost certainly paid the retail rate. The evidence of representatives of advertising agencies also is to the effect that retailers tend to book their own advertisements in newspapers. The evidence is that most retailers are charged retail rates and there is no evidence that non-retailers are charged these rates. The fact that the Director focused on "retailers" rather than on a price class has not affected the

⁵³ Transcript at 1598 (23 September 1991). Mr. Weitzel stated that the dailies treat travel agents as national and automobile dealers as classified.

⁵⁴ Based on his experience in the United States, Dr. Rosse testified that for a single daily there may be numerous rate classes and thus a number of "submarkets" among daily advertisers. However, he did not examine the rates for the *Sun* and the *Province* and there is no basis for the Tribunal to conclude that Pacific Press' advertisers could meaningfully be subdivided into price classes based on the type of retailer (regardless of whether this class was in retail, national (e.g., travel agents) or classified (e.g., automobile dealers)). Ms. Baniulis stated that she believed that the dailies charged the automobile dealers a special rate, but this observation provides no basis for reaching any conclusion without first-hand evidence from either automobile dealers or a representative of the dailies.

main thrust of his position, but there are some discrepancies that have to be resolved. The Director refers to automobile dealers in final argument and some evidence was put forward regarding them. As discussed above, there is no basis for including these particular "retailers" in the market.

Another part of the alleged market consists of flyers inserted in newspapers. The Director alleges that inserts are part of the newspaper retail advertising services market. The pleadings excluded from that market flyers delivered by other means, such as independent carriers and Admail, a service offered by Canada Post. In his final argument counsel for the Director concedes that all flyers, however delivered, might arguably be included in the market. His position is that it does not matter whether the alleged market is expanded in this way since the conclusions regarding the effects of the acquisitions would be unchanged.

The respondents are of the view that the broadening of the alleged market by the Director is fatal because their case was geared to deal with the market alleged in the pleadings. The Tribunal is somewhat mystified by this position since a crucial element in the respondents' argument and evidence is that the Director's alleged market, once one goes beyond the respective "market niches" of dailies and community newspapers, is defined too narrowly; that all vehicles and media are part of a broad advertising services market including free-standing flyers. One of the seven expert witnesses who appeared on behalf of the

respondents, Jack Mar, dealt almost solely with flyers, and a good part of the opinion of a second expert, Dr. Rosse, was based on the importance of free-standing flyers as a source of competition for community newspapers. It is difficult to see how any prejudice is suffered by the respondents if the Director concedes that part of their case may have merit.

In any event, at the end of the day the alleged retail advertising market consists of display advertising that is subject to the dailies' retail rate and one or the other of flyers inserted in newspapers and flyers delivered by any means (including newspapers).

Table 1, below, sets out the percentage distribution of the categories of advertising revenue for the dailies combined and for the *North Shore News* and the *Courier* combined. There is no evidence regarding the advertising content of the *TV Times* and it has been excluded in any calculations of the division between national and retail advertising. The *Courier* treats advertising as "national" when it is placed through an agency and as "retail" when it is not. This should not materially affect the comparisons with the dailies. The big difference between the dailies and the two community papers is in the relative importance of national and retail advertising. Further, inserts are seen to be of considerably greater relative importance for the community newspapers.

TABLE 1

Percentage Distribution of Newspaper Advertising Revenue, 1989

	<u>Dailies</u>	<u>North Shore News and Courier</u>
Classified	35.6%	24.5%
<i>TV Times</i>	1.9	--
National	26.6	5.8
Retail	32.6	57.4
Inserts	3.3	11.5

Source: Agreed Statement of Facts, Schedule C (Exhibit CA-104 (confidential)).

Although fairly complete information on total advertising revenue of other community newspapers in the Lower Mainland is in evidence, there is no comparable breakdown to that found in Table 1. The general thrust of the evidence is that the relative contribution of national advertising is much higher in the *North Shore News* and the *Courier* than in the other community newspapers. The contribution of national advertising in *The [Surrey/North Delta] Leader* was about 2% of gross revenues.

C. Dailies and Community Newspapers: Similarities and Differences

(1) The Geographic Dimension

There is an intrinsic geographic dimension to the advertising services available from the dailies and the community newspapers given that they have defined distribution areas at any time. Since the dailies rely on paid subscriptions or the purchase of single papers, what is sold to advertisers is not only determined by the overall coverage of their distribution system, but also the relative success in the various identifiable regions of their coverage area as measured by circulation and household penetration. According to the evidence of Mr. Bolwell, advertisers consider household penetration more important than circulation.

Community papers do not rely on selling the papers to their readers. Generally, they serve an area within which they deliver to each home or to specified homes; that is, there is controlled distribution. Since the editorial content of a community newspaper is focused on the community, the area served by it should ideally have a common local interest. Some community papers in the Lower Mainland serve areas defined by political boundaries while others, including the *Courier* and the *North Shore News*, appear to find common interest based on geography and the similar socio-economic status of their respective readers. Since the advertising rates charged must reflect the breadth of coverage and the corresponding cost, publishers must be sensitive to the geographic reach for which their clients are willing to pay.

They may do this by publishing zoned editions. All editions have a common core of editorial content and advertising; each edition also has editorial

and advertising content that is of specific interest to the readers in that zone. This allows the paper to serve advertisers who hope to draw on customers from the entire distribution area and are willing to pay to reach them as well as the advertisers in the zoned editions who are only willing to pay for a much narrower reach.

For example, the *East Ender* was introduced because Mr. Cardwell was reluctant to expand the distribution of the *West Ender* into east Vancouver, even though the *West Ender* had achieved some success there. This would have meant raising rates and becoming less attractive for retailers who drew customers solely or primarily from the West End. The current publisher of the *West Ender* started a zoned edition in Kitsilano. All advertisers in the *West Ender* also appear in the Kitsilano edition, but advertisers may choose to use solely the Kitsilano paper. The *Courier* delivers 120,000 papers on Sunday in two zoned editions. The *North Shore News* apparently published zoned editions at one time. Other community newspapers also publish zoned editions. (*The Vancouver Echo* also has or had zoned editions.)

As is undoubtedly apparent from the foregoing, the geographic dimension of newspaper advertising services relates to both the product market and to geographic markets. On the product side, the area reached by the newspapers is one of several dimensions in which community newspapers and the dailies differ.

(2) Household Penetration

Closely related to the question of coverage is that of the level of household penetration, which in turn relates to the fact that the dailies are sold and the community newspapers are not usually merely given away but delivered to all or to designated homes. The high penetration of the community newspapers in comparison with the dailies is one of the strengths of the community newspapers, but the means by which this is achieved is a source of weakness that the community newspapers have had to confront. They have had to assure advertisers that the newspapers were in fact delivered. This is ordinarily done by calling a sample of households after each delivery to ensure that the newspapers were delivered rather than abandoned somewhere by the carriers. If a community newspaper is sufficiently popular so that households which have not received their copy call to complain, then this is both a source of pride to the publisher, a further check on the reliability of the delivery system and a selling point with advertisers.

(3) Readership

Since community newspapers are given away they must try not only to satisfy advertisers that the newspapers are delivered, but also that they are read. This is usually done by showing advertisers the results of internal readership surveys. Carol A. Kirkwood, Media Director for McKim's Vancouver office, was

very skeptical of the reliability of such surveys and compared them unfavourably with those conducted on daily readership by independent agencies. This view illustrates that the question of readership can be important for some representatives of buyers.

(4) Quality

The physical appearance of newspapers and their editorial content are other dimensions that advertisers might consider to be important. Mr. Bolwell was of the view that the community newspapers in the Vancouver area were generally "pretty ordinary" with the exception of the *North Shore News*, the *Courier*, *The Richmond Review* and perhaps one or two others, such as *The [Surrey/North Delta] Leader*. The respondents have not denied that the *North Shore News*, in particular, has enjoyed a very good reputation, nor that Mr. Speck has been an acknowledged pioneer in improving the quality and credibility of his publication. The respondents also do not dispute that the *Courier* is a well respected community newspaper. The respondents do argue, however, that regardless of the physical and editorial quality of community newspapers, they are fundamentally different from a daily because their editorial content is almost exclusively local.

(5) Difficulty of Making Price Comparisons

These combinations of different attributes of dailies and community newspapers must be weighed by advertisers taking into account the relative cost of advertisements. The relevant comparisons depend greatly on the situation of individual advertisers. For some advertisers the editorial content of the dailies and the community newspapers may be paramount. An advertiser that would like to reach readers who, for example, are interested in financial news would conclude that the community newspapers do not provide an alternative to the dailies. But the evidence is clear that there are many retailers that are willing to use either dailies or community newspapers, or both, and that for them the critical considerations relate to coverage and penetration.

By taking into account the combination of penetration and readership of the community newspapers and the dailies it is possible for advertisers to compare the cost per thousand readers of advertising in each. However, although it may be possible for advertisers to exercise such judgment, the same cannot be said for others.

The reason for this is that the circumstances of advertisers vary so greatly that there is no typical case that can be referred to. Advertisers might be interested in the areas covered by one, two or any number of community newspapers. The penetration of the dailies vary from community to community. Therefore, apart from the situation where an advertiser is interested in only one community, and possibly at most two, it is virtually impossible to compare the cost per thousand

readers with any degree of generality. As illustrated by Table 2, below, differences in circulation and coverage translate into rate structures of very different magnitude for dailies and community newspapers, further inhibiting comparisons.

TABLE 2

<u>Newspaper</u>	<u>Circulation</u>	<u>Full Page (Tabloid)*</u>
<i>Sun</i>	224,170 [#]	\$6039.00 (M-Th) 7245.00 (F,Sa)
<i>Province</i>	190,230 [#]	3852.00 (M-Th) 4239.00 (F) 4815.00 (S)
<i>North Shore News</i>	60,946	2419.55
<i>Courier</i>	65,100(W) 125,100(S)	2321.90 3092.25
<i>The Vancouver Echo</i>	52,906	1492.65
<i>West Ender</i>	56,000	1972.38
<i>The Kitsilano News</i>	n/a	n/a
<i>Richmond News</i>	39,000	1255.50
<i>Richmond Times</i>	39,000	1255.50
<i>The Richmond Review</i> ^{**}	39,100(W) 40,000(S)	1594.95
<i>Burnaby Now</i>	50,050	1160.95
<i>The Burnaby News/The New West News</i>	58,814	1453.13
<i>Royal City Record Now</i>	15,050	813.75
<i>Coquitlam/Port Moody/Port Coquitlam Now</i>	43,500	1106.70
<i>The Tri-City News</i>	47,033	1092.75

<i>[Maple Ridge/Pitt Meadows] Times</i>	20,527	781.20
<i>The Maple Ridge/Pitt Meadows News</i>	21,217	887.38
<i>Delta Today/Delta Optimist</i>	15,200 (W,F,S)	737.80
	33,000 (Th)	976.50
<i>Surrey/North Delta Now</i>	73,400	1193.50
<i>The [Surrey/North Delta] Leader</i>	66,626	1193.50
<i>The Peace Arch News</i>	24,551	848.63
<i>Langley Advance</i>	10,000(W)	736.25
	30,600(F)	813.75
<i>Langley Times</i>	30,678	875.75
<i>[Abbotsford/Clearbrook] Times</i>	37,876	1085.00
<i>The [Abbotsford/Clearbrook/Matsqui/ Mission/Aldergrove] News**</i>	39,574(Sa)	1181.88
<i>[Chilliwack] Times</i>	24,261	954.80
<i>The Chilliwack Progress**</i>	23,062	1035.40
<i>The Hope Standard**</i>	paid only	
<i>The Fraser Valley Record**</i>	paid only	

* 1/2 page broadsheet is used where appropriate.

** Circulation and rates for the day on which circulation is paid are not included.

Average daily circulation for 1990, taken from Expert Affidavit of E.L. Bolwell, *supra*, note 19, Appendix G.

Note: The full page casual rate for the *North Shore News* is calculated as 5 col. x 15.5 in. x open rate per col. in. (Exhibit 3A-11 at 19). The same calculation was used for all community papers; i.e., it is assumed that all pages are exactly the same size although apparently community tabloids do come in varying sizes. The Pacific Press rate card specifies that 1 full page broadsheet = 1848 m.a.l. while 1 full page tabloid = 900 m.a.l. All rates as of August 1991.

Sources: Rates taken from VanNet retail rate card (Exhibit R-56), MetroValley retail rate card (Exhibit 3B-62) and *Sun/Province* retail rate cards (Exhibit 2F-87).

(6) Who are the Advertisers in the Alleged Market?

Both the Director and the respondents have pointed to what they regard as general characteristics that enhance or inhibit substitutability between community and daily newspapers. The respondents stress the fact that a high percentage of advertisers in community newspapers are retailers that draw their customers exclusively or primarily from the area covered by one community newspaper. Community newspapers offer these advertisers lower cost and higher household penetration in their trading area than they could obtain from the dailies. These advertisers have no reason to switch from the community newspaper to the dailies in the event of a small rise in price. Any substitution against the community newspaper must almost certainly be in favour of other media.

Mr. Grippo was called by the respondents to present the results of an analysis of retail display advertisers in the *North Shore News* and the *Courier*.⁵⁵ The goal was to arrive at an estimate of the percentage of the dollar volume represented by "local" advertisers: those whose trading area, or areas in the case of multi-outlet advertisers, is too small to use the dailies profitably. As counsel for the Director has pointed out, there is no category of accounting maintained by the newspapers that permits one to draw out a set of advertisers that are "local". Once one goes beyond obvious single outlet advertisers whose trading areas are almost certainly restricted to Vancouver or the North Shore, questions of judgment and

⁵⁵ Exhibit CR-40 (confidential), Exhibit CR-41 (confidential) and Exhibit CR-42 (confidential).

the quality of information used to arrive at the judgments enter. This caveat bears on the confidence that can be placed on the estimate of roughly 70% local advertising proposed by the respondents. The Tribunal accepts that a figure of at least 50% is reasonable, and this figure is not seriously at variance with the estimate proposed by counsel for the Director.

There is therefore no debate about the existence of a significant volume of advertising by retailers that do not qualify as part of the relevant market. The relative size and the price sensitivity of this group of advertisers are critical to a determination of the likely effects of the acquisitions. This group disciplines the ability of the community newspapers to raise prices in a way that is independent of competition with the dailies. If the community newspapers were to raise prices, roughly 50% of their retail advertisers (by revenue) would either swallow the increase or reduce their volume in part or altogether. While they might move to other vehicles, the dailies certainly would not benefit.

Establishing the order of magnitude of the group of advertisers that have at least the potential to use the dailies is merely a first step. With regard to the remaining 50% of advertisers in the *North Shore News* and the *Courier* that use or might use dailies, serious questions still remain as to whether the dailies and community papers are substitutes in the sense that these advertisers would change the volume of advertising from one vehicle to another in response to small changes in relative price. Furthermore, in the event that this is found to be the

case, there is an issue as to whether other advertising channels are sufficiently close substitutes for these advertisers so that they too should be included in the market. In order to answer these questions, the views of the industry participants, both advertisers and publishers, will be canvassed in detail later on in these reasons.⁵⁶

D. The Geographic Markets

The Director alleges a prevention or lessening of competition in three geographic markets: the North Shore, the city of Vancouver, and the entire Lower Mainland. The Director concedes that from the standpoint of display advertising in the dailies there is a single geographic market since the dailies charge advertisers the same price for the same space and colour regardless of where the outlets are located or where the advertising is directed. It is not possible for the Director to allege a substantial lessening that would occur through an increase in daily rates for the North Shore and the city of Vancouver only. Therefore, with respect to the North Shore and the city of Vancouver, the alleged lessening of competition for display advertising can only consist of higher rates being charged by the *Courier* and the *North Shore News*.

The Director argues that the dailies are not constrained from making the prices for the delivery of flyers dependent on the area where they are delivered.

⁵⁶ *Infra* at 55ff.

This point was not addressed by the respondents and there is no evidence that bears directly on it.

A lessening of competition could also occur, counsel for the Director notes, as a result of the dailies raising their rates throughout the Lower Mainland after Southam assessed the overall gains and losses. Gains by the *North Shore News* and the *Courier* might outweigh losses to community newspapers elsewhere. While this is a logical possibility, the Tribunal sees little point in considering it in the context of the North Shore and Vancouver; advertisers throughout the Lower Mainland would be affected and market forces throughout the area have to be taken into account when considering this possibility.

The Lower Mainland market was addressed by the Director in amended pleadings. In the Amended Notice of Application the Director alleges that direct or indirect control of the dailies and a number of community newspapers marketed as a group enhances Southam's market power:

Each or both of the Mergers [the acquisitions of the *Courier* and the *North Shore News*] is likely to enable Southam to unilaterally impose and maintain a significant price increase in a substantial part of the Lower Mainland Newspaper Retail Advertising Market for a substantial period of time.⁵⁷

⁵⁷ Amended Notice of Application at para. 172.

IV. SOUTHAM/PACIFIC PRESS VIEWPOINT

The Director relies heavily on statements found in internal Southam and Pacific Press documents in support of his position that the community newspapers were regarded as serious competitors of the Pacific Press dailies. In the same vein, a videotape of a local television broadcast, originally aired in June 1988, was presented to the Tribunal. During the interview, the publisher of the Pacific Press dailies expressed his concern about aggressive competition from the community newspapers, particularly in light of their recent efforts at organization.

There is no doubt that the strength of community newspapers in the Lower Mainland was a source of concern to the management of Pacific Press and Southam. Furthermore, it is clear that steps were taken and contemplated to compete more aggressively with the community newspapers. However, determining that Pacific Press regarded the community newspapers as "competitors" is not by itself enough to place them in the same market. Competition means many things to many people. What the Tribunal must establish is whether dailies and the community newspapers are in the same product market for the purposes of assessing the implications of the acquisitions in question in this case. As discussed above in general terms, that exercise involves resolving whether dailies and community newspapers are effective substitutes for newspaper retail advertising services. The actions taken and the views expressed by participants in the alleged market are recognized by both

parties and by expert witnesses as an important source of information in trying to answer this question.

A. The Urban Report

In 1986, Christine Urban, the principal of Urban & Associates, Sharon, Massachusetts, was hired to do a study of Pacific Press' prospects and to "recommend viable strategic options that could improve the value of Southam's present franchise and the return on its investment over both the short and the long term".⁵⁸ The resulting report has been much referred to during the proceedings, under the rubric "The Urban Report".⁵⁹ Dr. Urban was retained by Paddy Sherman, then a senior vice-president of Southam Inc. and a member of its Board of Directors. Dr. Urban was well-regarded by Southam since she was also asked to do an analysis of the Edmonton Journal. An expert affidavit updating her views to 1991 was filed by the respondents but this update does not form part of the record.

Dr. Urban regarded the community newspapers as much stronger in Vancouver than in other markets where Southam operates and considered them at least partly responsible for the relatively low advertising revenues earned by

⁵⁸ Joint Book of Documents, vol. 1A, tab 7 at 1 (Exhibit 1A-7). This statement is found in the research proposal.

⁵⁹ Joint Book of Documents, vol. 1A, tab 3 (Exhibit 1A-3).

Pacific Press compared to dailies operated by Southam in other parts of the country.

What is the reason for this substantial difference in market performance seen between Vancouver and other markets? We believe strongly that it is the large number of aggressive weeklies in Vancouver, which are siphoning revenues (logically) due to the Sun and/or Province by virtue of their readership and market presence.⁶⁰

The report considered four strategies for improving the performance of the dailies. "Compete Your Way Out" and "Save Your Way Out" were the two proactive strategies considered and it was the latter that was recommended. This entailed an effort to bring down Pacific Press' widely recognized high costs. Although not part of the principal strategy, the report also recommends that:

Despite these factors, Pacific Press must consciously and proactively construct a strategy to aggressively compete with the weeklies: a strategy that, at worst, will continue to preserve the dailies' 27% share and, at best, blunt the weeklies' ability to form better/stronger confederations. It would be especially dangerous if the weeklies were given any "open" period of time in which to operate with impunity, consolidating the gains they may have made with major advertisers and having the opportunity to teach advertisers new comparative criteria for their selection of print media.⁶¹

Two points stand out with respect to the quotation. The 27% share referred to is Pacific Press' share of total local advertising dollars spent on all media in the Lower Mainland. This suggests a broad view of the "market". On the other hand, there is no discussion in the report that relates to media or advertising vehicles

⁶⁰ *Ibid.* at 51.

⁶¹ *Ibid.* at 92.

other than community newspapers.

The available evidence strongly indicates that the community newspapers continued to gain strength after 1985, while the combined performance of the dailies was relatively weak. Between 1985 and 1989 the retail advertising revenue of the *Sun* was virtually unchanged; the *Province* had approximately 75% growth. But, when combined, the growth of the dailies' retail revenues over the five years was just 17%. Over the same period dailies throughout Canada had growth of 37% in retail advertising revenue.⁶² Comparative information is also available for the *North Shore News* which had growth of about 42% over the same period.⁶³ Between 1986 and 1990, the *Courier* enjoyed retail growth of 88%. Given the rapid population growth in the area south of Vancouver and the description by Ms. Baniulis of increased credibility with advertisers enjoyed by *The [Surrey/North Delta] Leader* over the years, the community newspapers in the rest of the Lower Mainland also probably increased their revenues from retail advertising relative to the dailies. The fact that community newspapers throughout Canada had an increasing share of overall advertising revenue, and had an even more pronounced increase vis-à-vis dailies, also reinforces the conclusion that the community newspapers in the Lower Mainland continued to grow relative to Pacific Press.⁶⁴ Although there is no necessary connection between the

⁶² *Supra*, note 19, Appendix F.

⁶³ For some reason the revenue from real estate advertisements is combined with that from retail for the *North Shore News* in the Agreed Statement of Facts. In 1989, the only year for which there is separate information, real estate revenue was 19% of the combined figure.

⁶⁴ *Supra*, note 19, Appendix B.

performance of the community newspapers throughout Canada and those in the Lower Mainland, there is no reason to believe that the latter performed any worse than the national average.

B. Flyer Force

Flyer Force is a flyer delivery system operated as a division of Southam. Flyer Force delivers flyers to those households in a given area that do not subscribe to the daily newspaper. By buying a combination of the daily and Flyer Force, advertisers can have their flyer delivered as an insert in the daily to subscribers and delivered alone by Flyer Force to non-subscribers. A different, lower rate is charged for delivery to non-subscribers.

Flyer Force currently operates as such in Ottawa, Calgary and Edmonton. In Hamilton the operations of Flyer Force were merged into those of *The Hamilton Spectator*. The Winnipeg Flyer Force was sold and those in Montreal and Vancouver were closed down.

Although the parties put forward different dates in written argument,⁶⁵ Mr. Weitzel, Advertising Director at Pacific Press from April 1985 to April 1990, stated that Flyer Force was launched in the Lower Mainland in September 1986, serving the city of Vancouver and Burnaby. From there Flyer Force was to

⁶⁵ The Director uses February 1986 as the start-up date; the respondents select January 1987.

proceed throughout the Lower Mainland, zone by zone. By early 1987, Flyer Force appears to have reached the North Shore. In later years coverage of some of the outlying areas was eliminated. Eventually, in early 1991, Flyer Force was closed down completely, having lost more than \$10 million since it was introduced in the Lower Mainland.

According to David Perks of Southam, Flyer Force functions very well in Edmonton and Calgary and successfully complements *The Ottawa Citizen*, although it does lose some money in Ottawa. The Hamilton version was also effective. Flyer Force was closed down in Montreal when it became apparent that it could not flourish there without a French language partner and negotiations to take on such a partner failed.

It is noncontroversial that Flyer Force was not expected to be profitable on a stand-alone basis in the Lower Mainland and was seen primarily as a means of supporting the insert revenues of the *Sun* and attracting new business to it. Of the two dailies, the *Sun* was regarded as the better vehicle for inserts since it had larger circulation. The respondents argue that Flyer Force was terminated because of its poor financial performance which in turn was inevitably linked to its high cost structure. The Director implies that the closure was linked to the acquisitions.

Given the volume of the *Sun's* insert business it is difficult to see that the *additional business* attracted by the *Sun* during the time that Flyer Force was in

place could justify the level of Flyer Force losses. The following table tracks the *Sun's* advertising revenues from inserts from 1985 to 1989. During 1987, 1988 and 1989, at least, Flyer Force was in place in a significant part of the Lower Mainland.

TABLE 3

The Vancouver Sun: Advertising Revenues from Inserts

	<u>1985</u>	<u>1986</u>	<u>1987</u>	<u>1988</u>	<u>1989</u>
Revenue from Inserts (\$000)	3,470.20	3,084.80	3,506.40	4,182.00	3,980.90

Source: Agreed Statement of Facts, Schedule C (Exhibit CA-104 (confidential)).

The fact that Flyer Force has been maintained in other markets is of no help in evaluating whether the level of losses in the Lower Mainland was acceptable to Southam since no information on these markets was provided. There is considerable evidence that Flyer Force was a high cost operation in the Lower Mainland. Considering these factors and the magnitude of the losses sustained by Flyer Force, the Tribunal is of the opinion that it is more likely that Flyer Force was discontinued in the Lower Mainland because of its financial performance than because of the acquisitions. However, they probably hastened its demise.

C. Zoned Supplements

Based on Mr. Weitzel's description, zoned supplements are separate publications, produced by the daily, devoted to community news and distributed within the community in question.

When the decision was taken in 1988 to build a new Pacific Press printing plant in Surrey, the primary purpose was to introduce a more modern, lower cost facility than the existing one on Granville Street. The "Surrey Plant Proposal" also offers the additional rationale that the plant could contribute to the planned launch of zoned supplements to the *Sun*, to be introduced in various Lower Mainland communities.

As shown in the 1986 Urban Report, ... the community newspapers in 1986 held an abnormally high share of the Lower Mainland print medium advertising and flyer distribution business.

Despite the introduction of Flyer Force, which in 1988 will produce \$2 million positive swing in the contribution of inserts to Pacific Press, the community newspapers continue to consolidate their position.⁶⁶

Pacific Press has delayed plans to launch the first 'Sun Plus', which is the working title for a series of weekly zoned products. Profit pressure in 1988 caused this delay. Unless we are prepared to concede (forever?) a substantial portion of what is normally daily newspaper business to the community newspapers, this project must be activated in 1989.

High production costs at Granville Street will substantially lengthen the period before the 'Sun Plus' product reaches break-even.⁶⁷

⁶⁶ This statement of Flyer Force's contribution seems highly exaggerated in light of the available information on the *Sun's* insert revenues discussed above.

⁶⁷ Joint Book of Documents, vol. C2A, tab 4 at 15 (Exhibit C2A-4 (confidential)).

The proposal went to the Boards of Pacific Press, Southam Newspaper Group and Southam. It was authored by Mr. Perks who was the principal actor on behalf of Southam in the acquisitions of the community newspapers and other assets in the Lower Mainland. He was also the sole witness who appeared on behalf of Southam. Mr. Perks stated during his appearance that he included the references to the zoned supplements at the request of the management of Pacific Press. He did not believe that the supplements could succeed in regaining business that had been lost to the community newspapers. His view was that an "irreversible flow" to the community newspapers had occurred. The Tribunal finds it difficult to believe that Mr. Perks would have included statements that clearly were more than a token reference to the zoned supplements if he held serious reservations about them, or that he would not have communicated his disagreement to the management of Pacific Press. In any event, there is no doubt that the top administration of Pacific Press believed that the zoned supplements were a means of competing with the community newspapers.

(1) *North Shore Extra*

Although widespread introduction of this innovation in the Vancouver area was delayed, a single bi-weekly version was launched on the North Shore in September 1988. It was discontinued in April 1990, after 39 issues. According to the evidence of Mr. Weitzel, the *North Shore Extra*, as the supplement was called, was intended as a competitor of the *North Shore News* and not merely as an

adjunct to the *Sun* to increase its circulation. He noted that if solely the latter had been the goal, then the *North Shore Extra* would not have been distributed free to all homes that did not subscribe to the daily.

At the time of the closure of the *North Shore Extra* it was losing \$20,000 per month. There is no way of forming a view from available information as to whether these losses were considered large or had been anticipated and were considered acceptable by management for the start-up of a new supplement. In the last part of the quotation from the Surrey Plant Proposal, initial losses for the contemplated zoned supplements appear to have been taken for granted. The duration of the losses is stated to be extended due to the high cost of the Granville Street facility. Moreover, the reported losses are much less than those shown for the community newspapers now owned by LMPL, other than the *North Shore News* and the *Courier*, in the unaudited statements filed for the year ending August 31, 1991.

The question of the *North Shore Extra* is taken up in the Suburban Task Force Report, the output of a management committee struck by the President of Pacific Press, Stu Noble, in January 1990. The initial mandate of the committee was to consider zoned supplements. Its conclusion with regard to the *North Shore Extra* was that:

To have any chance at making the product succeed, Pacific Press sales staff say that we must match the publication frequency of our competition in the area, North Shore News.

Such a move, of course, would simply pit us against ourselves, as Southam owns 49 per cent (soon to be 100 per cent) of the thrice-weekly News.⁶⁸

No further plans or discussions regarding zoned supplements were introduced in evidence.

D. Implications for Market Definition

Zoned editions and Flyer Force raise a number of important issues. There is no doubt that while Flyer Force was in existence the dailies and the community newspapers were in the same relevant market with respect to the insert side of retail advertising. Counsel for the respondents admitted as much with the reservation that Flyer Force was a far too high cost operation to be competitive and therefore was not truly part of the market. As discussed above, the Tribunal accepts that Flyer Force was discontinued primarily for financial reasons.

Two of the important differences between the dailies without zoned supplements and the community newspapers that of geographic coverage and household penetration, disappear when zoned supplements are added. At the time of the acquisition of the *North Shore News* there was a zoned supplement on the North Shore and therefore the *Sun* and the *North Shore News* were in the same market.

⁶⁸ Joint Book of Documents, vol. C2A, tab 5 at 22 (Exhibit C2A-5 (confidential)).

Counsel for the respondents argues that although the *North Shore Extra* was losing "only" \$20,000 per month, if this loss were multiplied by the number of supplements required to cover the Lower Mainland in all the areas carved out by community newspapers, the resulting losses would be sizeable. The implication is that the zoned supplements would not have been economically viable and therefore should not be considered part of the same relevant market as the community newspapers.

The views of Dr. Rosse are relevant to this issue. His evidence was that it was common for newspapers to use zoned editions but that in his experience they were rarely very successful.⁶⁹

The Pacific Press documents and Mr. Perks' evidence regarding them lead the Tribunal to the conclusion that left to its own devices the management of the dailies would have proceeded with the zoned supplements. Mr. Perks stated that the coverage of the supplements would not have been contiguous with the community newspapers. According to Mr. Weitzel there was no plan to create a zoned supplement for the city of Vancouver. With that exception there is reason to question whether there would have been appreciable divergences between the zones and the various Lower Mainland "communities" served by community newspapers. Given the number of zoned supplements in Calgary and Edmonton (eight and nine) and the relative difference in size between the Lower Mainland

⁶⁹ Transcript at 5365-66 (14 January 1992); *Supra*, note 20 at para. 49.

and the two Alberta cities, one would expect at least as many supplements in the Lower Mainland.

Apart from the figures on average monthly losses, the respondents have not led any evidence to show that the *North Shore Extra* could not have succeeded. The information respecting the *North Shore Extra* is that the acquisition did affect the alternatives considered by Pacific Press management. In contrast to Flyer Force, which can be considered a mature experiment, there is far less reason to conclude that the *North Shore Extra* would have been discontinued because it could not succeed financially rather than because the acquisition of the *North Shore News* made it pointless to continue with it.

In fact, the Director has not alleged that either Flyer Force or the *North Shore Extra* was cancelled as a result of the acquisitions or that plans for the other zoned editions were affected by the acquisitions. He goes no further than to query whether the relative coincidence of these events with the acquisitions was the result of chance. He argues that the dailies' attempts to use Flyer Force and Sun Plus provide evidence that the dailies are in the same market as the community newspapers. Are these actions truly consistent with a view that dailies and community newspapers are substitutes?

The discussions in Pacific Press' planning documents show that a decision to introduce zoned supplements is a major one. It is likely that it involves the

same magnitude of investment as is entailed in starting a number of community newspapers of moderate size.⁷⁰ It is relevant to note in this connection that Mr. Bolwell referred to the zoned supplements published by Southam in Calgary and Edmonton as "community newspapers".⁷¹ The decision to publish zoned supplements resembles a decision on entry into the community newspaper business.

More importantly, the zoned supplements were not intended to benefit the daily as a daily. No one at Pacific Press was under any illusion that offering zoned supplements would attract advertisers from the community newspapers into the body of the *Sun* at regular daily advertising rates. It was hoped that these advertisers would advertise in the supplement at its rates. According to Linda Stewart, Advertising Director of the *North Shore News*, those rates were much lower than the rates of the *North Shore News*; this is confirmed by the 1989 retail rate card.⁷² Mr. Weitzel was categorical in his statement that the *North Shore Extra* was not intended to increase the circulation of the *Sun* on the North Shore since it was distributed free to non-subscribers. When asked about the performance of the *North Shore Extra*, he stated that he considered it had been successful in attracting "new" advertising for Pacific Press, customers that the

⁷⁰ A moderately-sized publication would fall, in the Tribunal's opinion, somewhere between the ambitious publication described by Mr. Cardwell as necessary to compete with the *Courier* in a head-to-head confrontation and the much smaller *North Shore Today*. This material is discussed further in the section dealing with entry into community newspaper publishing, *infra* at 222.

⁷¹ Transcript at 273-76 (5 September 1991).

⁷² Joint Book of Documents, vol. 1B, tab 25 (Exhibit 1B-25).

daily formerly did not have. Given these considerations it is difficult to see how one can conclude that a daily newspaper includes, by definition, zoned supplements. For purposes of market definition either the supplements exist at the relevant time or they do not.

Flyer Force, in contrast to zoned supplements, clearly is intended to enhance the ability of the *daily* to attract insert business. More so than zoned supplements Flyer Force can be viewed as integral to the daily, as necessary to its success.

What does the introduction of Flyer Force and zoned supplements imply about whether dailies are in the same relevant market as the community newspapers *without* these additions to the dailies' offerings? One reading of the evidence is that while the management of Pacific Press was indeed concerned about the strength of the community newspapers in the Lower Mainland, they had no way of confronting it without significant changes to their product. While the modified product may have been competitive with the community newspapers, the dailies in their traditional form were not. Relevant to this possible interpretation are the following discussions in the Suburban Task Force Report:

One of the more obvious ways of tackling the threat to our advertising and circulation base posed by the weeklies would simply be to buy one (or several), or start our own.⁷³

...

⁷³ *Supra*, note 68 at 19.

As for starting our own, we couldn't see much sense in adding to confusion out there, and competing in one market, not only against the existing dailies, but also against the huge number of strong weeklies which can offer the advertiser anything he wants from Vancouver to Chilliwack.⁷⁴

This material is cited by counsel for the Director as evidence that the participants in this committee in fact believed that the community newspapers and the dailies were in the same market. The reference to "one market ... against the existing dailies" points in that direction. However, the idea of competing by starting community newspapers suggests the exact opposite. If the dailies and the community newspapers are already in the same market, why would the dailies consider starting community newspapers?

E. Price Sensitivity of Advertisers

In the Pacific Press document discussing the repositioning of the *Sun* and the *Province*, which led to the *Sun* being turned into a morning paper, there is a discussion of the spread between the advertising rates of the dailies and the community newspapers and the reasons why it is justified.

But none of these reasons will entice clients who cannot afford Pacific Press rates. They will be forced to go to the weeklies. If the Province were to dramatically raise its ad rates, Pacific Press would then be leaving the low end of the market to the weeklies.⁷⁵

⁷⁴ *Ibid.* at 21.

⁷⁵ Joint Book of Documents, vol. C2A, tab 3 at 13-14 (Exhibit C2A-3 (confidential)).

Even this bald statement is not free of ambiguity with respect to substitutability between the dailies and the community newspapers. While some form of substitution is implied in the quotation, it is not of the sort that one ordinarily looks for in deciding that two products are close substitutes and therefore in the same market, namely that a small change in the price of *either* product will result in a shift of purchases. The quotation implies that advertisers would be forced by limited budgets to switch from the dailies to the community newspapers. At least as important as the expressed concern about these advertisers is the absence of any reference to a loss of advertisers for whom affordability was not an issue. Movement by those advertisers to the community papers consequent upon a daily price increase would more clearly indicate substitutability. It might be noted that the loss of smaller advertisers when rates are increased also affects community newspapers. Ronald Hopkins, a former employee of the *North Shore News* who unsuccessfully tried to establish a competing community newspaper, based his attempt on the view that the *North Shore News* had priced itself beyond the reach of many smaller advertisers.

Less ambiguous than the preceding views of Pacific Press management are references by Pacific Press and Southam to the efforts of the Lower Mainland community newspapers to form an organization to provide advertisers with a "group buy".⁷⁶ In 1986, Dr. Urban expressed a concern about the danger to

⁷⁶ A single point of entry, single invoice system for selling a number of papers as a group, with discounts for multiple placements.

Pacific Press of "better/stronger confederations" of community newspapers.⁷⁷ The

1990 Strategic Plan of Pacific Press states:

The weekly newspapers continue to pose a significant competitive threat, which will grow as their move towards providing clients with coordinated "multi paper" advertising takes hold.⁷⁸

Mr. Perks expressed agreement with this conclusion⁷⁹ and during re-examination explained the basis for his agreement:

The co-ordinated multi-paper advertising process, which has been evolving here, has featured heavy discounting of the community weeklies' rates based on the number of papers in which advertising is placed. It was my view that, as effective co-ordinated multi-paper advertising with heavily discounted rates took hold, more advertising would be available to them and that some of it would come from the daily newspapers.⁸⁰

There is no evidence as to what other vehicles Mr. Perks believed would be affected by the multi-paper selling efforts of the community newspapers.

F. The Acquisitions

The key question is whether the *North Shore News* and the *Courier* were acquired because they were good investments allowing for cost saving possibilities, or whether the motivation was to eliminate these newspapers as

⁷⁷ *Supra*, note 59 at 92.

⁷⁸ Joint Book of Documents, vol. C2A, tab 2 at 24 (Exhibit C2A-2 (confidential)).

⁷⁹ Transcript at 3711 (11 October 1991).

⁸⁰ Transcript at 3813-14 (15 October 1991).

competitors to the dailies and to preclude other potential buyers from taking advantage of their strategic value. One strand of evidence consists of the views of Mr. Perks and other personnel in Southam on the reasons for the acquisitions, as expressed in communications with colleagues and with the Southam Board of Directors. The other strand relates to the prices paid for the newspapers.

The evidence of Mr. Perks makes it clear that the acquisition of the *North Shore News* was the first of a number of intended acquisitions of community newspapers in the Lower Mainland. The acquisition proposal that went to the Board pointed out that the *North Shore News* would be a key element in any community newspaper chain in the Lower Mainland. It is useful to bear this in mind when considering the evidence regarding its acquisition.

The documentary evidence and the oral evidence of Mr. Perks indicate that regardless of whether the *North Shore News* was regarded as a valuable property in its own right and as part of the other acquisitions that Southam was planning to make, it also had strategic importance to Southam relative to the Pacific Press dailies. One element of its strategic importance relates to its possible use by someone who wanted to start a third daily in Vancouver. This consideration is of peripheral relevance to the understanding of markets and is treated in the discussion of whether the acquisitions had the effect of substantially preventing competition in the form of a new daily.

The second element is related to the damage that Pacific Press had suffered and the benefits that had accrued to the community newspapers during past strikes at Pacific Press. A third element related to the advantages of ensuring that a Vancouver "Metroland"⁸¹ would be controlled by Southam rather than by a competitor.

These considerations are set out in a memorandum dated April 11, 1990, sent by Mr. Perks to Russ Mills, President of the Southam Newspaper Group, and John Craig, Senior Vice-President, Finance for Southam, in preparation for a meeting with the Southam Board regarding the formation of LMPL. The considerations that relate to LMPL also by implication relate to the *North Shore News* and the *Courier*, its two most important community newspaper parts. The Director has relied heavily on this document and it is extensively quoted below.

The Urban report of a couple of years ago and the justification for the Surrey plant both make reference to the potential threats and current problems posed by the weeklies.

1. A significant portion of advertising which goes to the daily newspaper(s) in smaller, less diverse markets goes to the community newspapers on the Lower Mainland. This limits the current profitability and the long term potential for Pacific Press.
2. The Sun and The Province are not all that well positioned to cover the spectrum of customer demand for daily newspapers. The Globe does very well in Vancouver and it is possible to conceive of a profitable market position for some new Vancouver-based product as well.

⁸¹ The term is used here to refer generally to a chain of community newspapers whose advertising space could be sold as a group as well as individually (a "group buy"). The original Metroland is a community newspaper group operating in suburban Toronto (e.g., Ajax/Pickering, Brampton, Mississauga, etc.) and as far away as Peterborough and Kingston.

3. The union situation at Pacific Press is always unstable. Any attempt to deal seriously with this problem might mean facing some extended period of less than full publication.

While each of these situations is being very well addressed by Pacific Press management, the fact remains that a Vancouver Metroland controlled by some hostile group could seriously challenge our hold on the daily market, could negatively impact on Pacific Press profitability, and could create a potentially competitive environment which would severely limit our ability to deal with our labour problems.

I believe that we are convinced that a Vancouver Metroland will develop in the next year or two. So it becomes a question of who controls it: SNG or some group whose basic interests are antagonistic to our position in Pacific Press.

Even though an SNG controlled Vancouver Metroland must be free to compete hard against Pacific Press and must remain completely independent of Pacific Press, it would serve as a defense to Pacific Press in several fundamental ways. It would never become the basis for a new daily. If Pacific Press publication was in any way impaired, it would surge forward to fill the gap and then retreat in an orderly fashion when full publication was resumed at Pacific Press.

The document which goes to the Southam Board will demonstrate that the recommended investment in the creation of Lower Mainland Publishers is reasonable on its own merits. These background strategic imperatives should make the investment compelling.⁸²

There was extensive questioning on the reasons that led Mr. Perks to write a separate memorandum to Mr. Mills and Mr. Craig (with copies to John Phillips, in-house counsel to Southam and Paddy Sherman, a Director of Southam and Chairman of the Board of Pacific Press), rather than to include the strategic considerations in the report to the Board. It is Mr. Perks' position that the memorandum contains secondary considerations and that all the important ones were dealt with in the formal proposal of April 25, 1990 to the Board regarding

⁸² Joint Book of Documents, vol. 1A, tab 2 at 1-2 (Exhibit 1A-2).

LMPL;⁸³ that the memorandum was meant to provide Mr. Mills with some topics to discuss that did not require dealing with the financial analysis; that it was intended that Mr. Perks would speak to the financial analysis. Mr. Perks also stated that the material in the memorandum was not included in the document that went to the Board because of a fear of the effect that a leak could have on labour relations. He also stated that if the Board received the material in writing, there would be nothing for Mr. Mills to discuss since it would then all be before the Board. The Tribunal does not find these explanations convincing. But the Tribunal also sees no reason to speculate on the reasons that led the strategic considerations in the memorandum to be presented orally by Mr. Mills rather than to be submitted as part of the written proposal. The key consideration is whether there is reason to doubt that the views conveyed to Mr. Mills accurately reflected Mr. Perks' analysis of the situation.

There is no dispute that the community newspapers benefited greatly during past strikes at Pacific Press.⁸⁴ Customers of the dailies flocked to them to fulfill their newspaper advertising needs. Following the strikes there was an immediate return to the dailies. This did not necessarily reflect anything more than the fact that most advertisers had contracts with the dailies for annual volumes. According to the evidence of Ms. Baniulis, the strikes helped to increase the stature of the community newspapers in the eyes of many larger advertisers

⁸³ Joint Book of Documents, vol. C1A, tab 4 (Exhibit C1A-4 (confidential)).

⁸⁴ Pacific Press was shut down by a strike from roughly November 1978 to July 1979 and again for about two months in 1984. A rumoured strike in early 1987 never materialized.

that had not previously been their customers and thus the strikes were more than just a short-run benefit to the community newspapers. Mr. Perks stated that it was his impression that the *Courier* and the *North Shore News* did not benefit in this way, that they were already attracting the larger advertisers. However, Mr. Hopkins, who was employed in sales at the *North Shore News* both before and after the strike, stated that it acquired many more medium-sized and large accounts in the 1985-89 period. Furthermore, the Friday edition of the *North Shore News* was added in 1985, immediately following the 1984 strike.

The fact that the customers of the dailies turned to community newspapers during strikes is very weak evidence of substitutability since they had little choice. But it does show that in the short run, while a given advertising plan is in place, the community newspapers are the closest substitute for the dailies. Further, Mr. Perks' reference in the memorandum to "retreat in an orderly fashion" implies that the community newspapers are substitutes for the dailies and that increased volumes obtained by them during a strike could be retained. When asked what he meant by that statement, Mr. Perks explained that he was referring to the possibility that community papers in unfriendly hands might be tempted to continue to publish with the same frequency after the strike as during it.⁸⁵ While this explanation does not necessarily lend support to the existence of a high degree of cross-price elasticity between dailies and community newspapers published less frequently, it does strengthen the view that modifications in the

⁸⁵ Transcript at 3667-68 (11 October 1991).

dimensions of the product offered by community newspapers reduces the differences between them and increases the degree to which they are substitutes.

Mr. Perks was also questioned about his reference to a challenge to the dailies from a "hostile" Metroland. Did he mean that a community newspaper group would present additional competition to the dailies? He categorically denied that this was intended; what was being referred to was the danger of a daily being started with the intelligence gained in operating the Metroland. The points in the memorandum were intended to help convince the Board of the net benefit to be gained from setting up LMPL, and according to Mr. Perks the Board was concerned about the threat of a new daily and had little interest in or knowledge of community newspapers.

(1) Prices Paid

There is considerable evidence relating to whether the prices paid for the *North Shore News* and the *Courier* exceeded market value and therefore were acquired for strategic reasons, as the Director argues, rather than because they were a good investment in their own right, as the respondents argue. Complicating the issue is the fact that the two motives (strategic reasons and good investment) are not mutually exclusive. The argument that was made to the Board was that the investment in the *North Shore News* and in LMPL was a good stand-alone investment *and* yielded additional strategic benefits. It is also possible that the

strategic value of the purchases may not relate solely to factors that bear on the challenge of community newspapers to the dailies, but may involve strategic factors within the field of community newspapers. More specifically, if the *North Shore News* and the *Courier* are key participants in a Metroland, then anyone interested in establishing one might be willing to pay more for these publications than they would otherwise. Whether the principal gains of a Metroland would come at the expense of the dailies is a separate question.

The evidence supports the conclusion that the prices paid for the *Courier* and the *North Shore News* included a payment for their strategic value. The document prepared by Mr. Perks in January 1989 dealing with the *North Shore News* defends the acquisition as a stand-alone investment as well as pointing out its strategic value as a key element in a chain of community newspapers. The acquisition is also stated to have defensive value "against the intrusion of hostile owners".⁸⁶ Mr. Perks explained that this referred to a concern that a daily publisher might acquire the *North Shore News* and through it become familiar with the daily newspaper market in the Lower Mainland.⁸⁷

Further, the Tribunal is struck by the testimony of Mr. Perks that he had based his projections of revenue for the *North Shore News* on the assumption that rates could be raised 10% per year and lineage still increased. This conclusion

⁸⁶ Joint Book of Documents, vol. C1A, tab 3 at 2 (Exhibit C1A-3 (confidential)).

⁸⁷ Transcript at 3455 (10 October 1991).

was the result of discussions with Mr. Speck. After the acquisition Mr. Perks found that rates were already "dangerously high". While surprises to acquiring firms are probably not a rare event, the nature of the surprise in this case raises a question about whether adequate attention had been paid by Southam to the details of the business of the *North Shore News* as opposed to its strategic value.

The most important information relating to acquisition prices comes from the review by Coopers & Lybrand in May 1990 of the proposed transactions leading to the creation of LMPL. Two statements stand out:

No formal valuation has been done, however, the market value approach assessing comparable alternatives has greatest applicability for the target situations. We understand from SNG management that competitive bids comparable to or greater than target candidate offering prices have been received by certain of the target companies. In addition, existing industry statistics tend to support the purchase price contemplated for the weekly papers.⁸⁸

The community newspapers in question can only refer to the *Courier* and the Bexley papers since these were the only acquisitions that were to be made on a stand-alone basis. The only evidence regarding other offers that came to light during the proceedings concerned a tentative offer to the *Courier* by Trinity.

The report also includes the following:

⁸⁸ Joint Book of Documents, vol. C1B, tab 12 at 8 (Exhibit C1B-12 (confidential)).

We have reviewed the draft memorandum dated April 11, 1990 prepared by Mr. David Perks and Mr. Don Ross. We have the following comments:

- Non-financial benefits to be realized are significant.
- Earnings Before Interest and Tax (EBIT) and Revenue Projections for LMPL in the current year and 1991 are aggressive. ...
- It is clearly indicated that these acquisitions are considered to be strategic and further, that the projected earnings, if they are to be achieved, depend upon improved group performance and rationalization of the existing units.
- Detailed financial projections with assumptions have not been prepared.⁸⁹

The "draft memorandum" referred to is of the same date as that sent by Mr. Perks to Mr. Mills and others which has been quoted at length and discussed above. Although the draft memorandum is not in evidence, the reference to the earnings projections shows that the content of the draft memorandum was different than the one sent by Mr. Perks to his colleagues. What is clear from the discussion of the draft memorandum by Coopers & Lybrand and the content of Mr. Perks' memorandum is that he and his colleagues placed great emphasis on the strategic value of LMPL.

Also germane to the evaluation of the prices paid for the *North Shore News* and the *Courier* is an unsolicited recommendation by Coopers & Lybrand regarding the division of ownership of LMPL between Southam and Madison:

⁸⁹ *Ibid.* at 10.

We appreciate that the basic structure for the acquisition has been substantially agreed. It would be our preference, however, if possible, to reconsider this structure to include a performance-based formula for determining the respective holding percentages of LMPL by SNG and MVC. The SNG contributions to LMPL are closely related to market values established at the time of purchase of the business units being vended into LMPL. In addition, the performance of these business units is such that the values ascribed more closely approximate the current economic returns received from them.⁹⁰

The details (and workability) of the recommendation are not relevant; the concern motivating it is. On the one hand, the last sentence provides *some* support for the respondents' position. On the other hand, the obvious concern regarding the ascribed values of the properties contributed by Madison undercuts the evidence of Mr. Grippo to the effect that since Madison has no interest in promoting Southam strategic interests, they would not have accepted an overpayment for the *Courier* or the *North Shore News* based on those interests when negotiating the ownership structure of LMPL. The difficulty with this argument is that the arm's length value of the properties contributed by Madison is unknown. Therefore, if there was an overpayment for the *Courier* and the *North Shore News* that represented strategic value to Southam, this could easily be accommodated in the value ascribed to the assets contributed to LMPL by Madison.

Further casting doubt on the proposition that the value ascribed to the Madison properties can be of any help in evaluating the prices paid for the *Courier* and the *North Shore News* is the transaction with Netmar that Southam

⁹⁰ *Ibid.*

and Madison entered into when LMPL was established. Netmar received only \$6.8 million for its 50% share in the properties that were contributed to LMPL by Madison. Yet, for purposes of determining the ownership structure of LMPL, Madison's 50% was ascribed a value of approximately \$13 million. The explanation for the discrepancy provided by Mr. Grippo was that Netmar needed the cash. That may well be, but if the discrepancy is solely due to this factor it is surprising that Netmar could not find other buyers that would have been willing to pay a higher price than the one it received.

Coopers & Lybrand may have neglected to consider the value to Southam of the right of first refusal on the *Courier* that was held by Madison. However, its value would be imbedded in the ownership structure of the LMPL and this amount should be added to the amount paid to the owners of the *Courier* to arrive at its total cost to Southam. The only information bearing on the value of the option comes from Mr. Perks and is qualitative:

It was clear that the right of first refusal might complicate the prospective *Courier* transaction; whereas if it could all be wrapped up into one larger transaction, the right of first refusal would not be an impediment.⁹¹

D. Jeffrey Harder, a chartered accountant and Vice-President of Dunwoody & Company, is an expert witness called by the Director. He concluded that the prices paid for the papers now owned by LMPL could only be justified in the expectation of significant synergies and because of their joint strategic value. His conclusion is

⁹¹ Transcript at 3459 (10 October 1991).

based on the fact that the prices paid for the *Courier* and the *North Shore News* exceeded those that would be expected given their operating revenues and operating earnings. He was of the opinion that:

In Canada, community newspaper businesses are generally bought and sold for between 75% of, to one and one-half times operating revenues, or between four times to eight times operating earnings.⁹²

He concluded that the price paid for the *North Shore News* was 1.51 times operating earnings and 9.73 times operating revenues and the corresponding ratios for the *Courier* acquisition were 1.57 and 14.26.

The ratios used by Mr. Harder were also exceeded in the acquisition of *The Richmond Review* by Trinity. Southam had also been considering its purchase. Similarly, the price Trinity paid for the *West Ender* and *East Ender* was within but at the high end of the range used by Mr. Harder to assess the prices paid by Southam.⁹³ An initial proposal by Trinity to the *Courier* also suggests that they would have been willing to exceed the ranges considered normal by Mr. Harder.

⁹² Expert Affidavit of D.J. Harder at para. 20 (Exhibit A-59(a)).

⁹³ Available evidence indicates that the price paid for *The Richmond Review* was 1.9 times operating revenues (Exhibit CA-49 (confidential)) while the purchase price for the *West Ender/East Ender* was 1.4 times operating revenues (Exhibit A-4; transcript at 631 (12 September 1991)). Multiples of operating earnings cannot be calculated from the information placed on the record (purchase price and gross revenues).

As in much of this case, the evidence is mixed. The Tribunal accepts that the *Courier* and the *North Shore News* were not purchased solely as stand-alone investments. There is no dispute that the purchase of the *North Shore News* and the other community newspapers and the subsequent creation of LMPL were for the purpose of creating a chain or a group of community newspapers. The issue, and it relates directly to market definition, is whether LMPL is primarily an investment vehicle, as contended by Mr. Perks, or is designed to block the creation of a "hostile" Metroland that would take away business from the dailies, as alleged by the Director. The evidence on the prices paid is inconclusive on this point, merely supporting the conclusion that community newspapers in combination are more valuable than when they are operated and marketed separately.

G. Marketing of the Dailies

To support his allegation that the dailies and the community newspapers are in the same market the Director also refers to market research efforts by the dailies and to brochures and other marketing aids prepared for the use of their sales representatives when dealing with advertising clients.

Pacific Press participated in the NADbank national survey every other year and in the Vancouver-area ConsumerScope survey twice a year.⁹⁴

⁹⁴ NADbank is the Newspaper Advertising Data Bank which is operated by an association of daily newspapers called the Newspaper Marketing Bureau. The Bureau, through consumer surveys, collects

Although the results of the NADbank survey are generally available to all participating daily newspapers, each newspaper is permitted to insert a certain number of "proprietary" questions into the questionnaire for its area. Those questions and responses are available only to that newspaper. With the ConsumerScope survey, Pacific Press could ask as many questions on any topic as it was willing to pay for.

The Director argues that if Pacific Press paid to have ConsumerScope ask a specific question on readership of the community newspapers in the Lower Mainland or included it along with the questions of more general interest to subscribers to the NADbank survey, this was for the purpose of obtaining information that would permit Pacific Press to convince advertisers that the community newspapers did not compare well to the dailies. In fact, based on the survey results, a number of charts were prepared by Pacific Press to illustrate that proposition.⁹⁵ These charts were used in sales presentations to advertisers.

The respondents point to similar material based on the surveys that relates to television, radio, magazines and flyers to demonstrate that, based on the Director's test, Pacific Press considered all vehicles as competitors.

As counsel for the Director notes, there is a question whether the comparisons with other media were prepared for use in approaching retailers or national

information on topics relevant to newspapers and advertisers. The ConsumerScope survey is conducted by a Vancouver company on behalf of firms that pay to participate.

⁹⁵ Joint Book of Documents, vol. 2D, tab 41 (Exhibit 2D-41).

advertisers. According to Mr. Weitzel, with whom this evidence was explored by both sides, any sales tools relating to another vehicle were used to address advertisers known to be using that vehicle. Since both national and retail advertisers use a mix of media there is no way of determining the extent to which the research results were used with each set of advertisers.

The respondents also drew on the results of the surveys as evidence of the intensity of competition among the dailies, the community newspapers and the other vehicles. The following question was included in the ConsumerScope survey in May 1989: "Which of the following media serving the Vancouver area, [that is, magazines, daily newspapers, community newspapers, radio, TV or none of these] would you say is YOUR ONE BEST SOURCE of information for ...?" Listed are clothing or accessories, drug store items, supermarket items, home furnishings, home electronics, cars and trucks, entertainment, travel and financial information. The results of the survey, excluding cars and trucks, travel and financial information, are summarized in Table 4. As already noted, cars and trucks and travel were treated as "classified" and "national" advertising by Pacific Press. Financial information is excluded for reasons discussed below.

TABLE 4

Summary of Results of ConsumerScope (May 1989) Survey Question:

**Which of the following media serving the Vancouver area
would you say is your one best source of information for various items?**

	Clothing or Accessories %	Drug Store Items %	Supermarket Items %	Home Furnishings %	Home Electronics %	Entertainment %
Magazine	5	1	0	4	4	3
Daily Newspaper	32	16	18	26	29	57
Community Newspaper	8	13	15	5	3	8
Radio	2	0	0	1	1	4
T.V.	3	3	2	5	3	7
None	33	34	33	41	43	19
Flyer	14	29	29	14	12	1
Don't Know	2	3	2	5	5	2

Source: Joint Book of Documents, vol. 2E, tab 73 at 48-61 (Exhibit 2E-73).

The first difficulty that this material presents for the Tribunal is that the question asked does not necessarily refer to advertising. "Financial information" is obviously something quite different from the advertising of outlet-specific financial services. With respect to the other items, the information may or may not relate to the advertising content of the vehicles in question, and when it does it may relate to brand or image advertising as well as to advertising for retail outlets. There are thus two confounding factors: the information in question may not be contained in an advertisement, and if it is, the advertisement might just as easily have been placed by a national advertiser as by a retailer. Even though these factors probably increase the percentages for magazines, television and radio, the community newspapers are nevertheless considered a better source of information for shopping than these vehicles. But since it is unknown to what extent the importance of radio, television and magazines as a source of retail advertising is overstated, the results are not a useful indicator of the intensity of competition for retail advertising among dailies, community newspapers, television, radio and magazines.

The same cautions do not extend to "flyers". It is safe to assume that they contain predominantly, if not exclusively, retail advertising. As seen in Table 4, flyers consistently score higher as a useful source of information for shoppers than community papers, except with respect to entertainment. Here too there is a complicating factor. Based on the instructions given to the interviewers, responses that specified that the flyers consulted were inserted in a daily or community

newspaper were included in the daily or community newspaper category. Non-specific responses were included in "flyers". Mr. Weitzel suggested that this might have been done to obtain results that understated the importance of the community papers. Nevertheless, the results indicate that either the persons surveyed tended to place no importance on how the flyer reached them, or that free-standing flyers were a much more important source of shopping information than community newspapers, including inserts.

Another area of evidence relates to the efforts of Pacific Press to track the advertising in community newspapers and the flyers carried by them. There are two versions of this evidence. One is the evidence of John H. Stratford, Marketing Services Manager with Pacific Press from 1985 until he retired in 1989. He stated that the initiative for the project came from David Manley, Retail Advertising Manager, who was setting up a committee to develop strategies to offset the inroads of the community newspapers. Mr. Manley enlisted Mr. Stratford to organize a system to track advertising in all the community newspapers. Pacific Press employees living in various parts of the Lower Mainland were asked to bring in the community newspapers, including inserts, delivered to their homes. A student was hired part-time to record the size and location of advertisements for a number of advertisers. Copies of the summary reports were sent to Flyer Force for inserts and to Mr. Manley and Mr. Weitzel for all advertising. A copy or summary was stated to have been sent to head office in Toronto. The student in question

was placed under the supervision of Robert Groulx, Advertising Sales Promotion Manager, who reported to Mr. Stratford.

Mr. Groulx was called as a witness by the respondents. His evidence differs in an important respect from that of Mr. Stratford. Initially he stated that the purpose of the project was to track flyers, and only flyers, in whatever form they reached the homes of employees. The specific objective was to develop a grid in connection with the setting up of Flyer Force. He said that the reports were sent to Flyer Force, to the person handling inserts for the *Sun*, and to someone concerned with national advertising. Copies of the reports are no longer in existence. Later on in his examination in chief, Mr. Groulx was asked whether the community newspapers were "reviewed principally for their flyer content". He replied: "That's correct." The difficulty with both the question and the response is that the qualifier "principally" introduces a modification of earlier statements. When then asked about ROP, he replied that "we looked at it a few times". Further, he added that sales representatives had access to the information collected and "they rarely found any advertisers in the community newspapers that were potential advertisers in the dailies."⁹⁶ This is different from collecting only flyers for the purpose of setting up a grid.

During cross-examination Mr. Groulx recognized that Flyer Force was already established when the project started. The Tribunal also questions why a

⁹⁶ Transcript at 4185 (18 October 1991).

project to set up a grid would proceed over a two-year period. When pressed about whether the tracking of ROP might have been going on, Mr. Groulx stated that it may have happened but he did not remember it, that the only form he remembered was the one that went to Flyer Force. Although Mr. Groulx was closer to the preparation of the reports and therefore might be considered to have been in a better position to state exactly what was done, his evidence suffers from a lack of consistency and internal logic. Not much turns on the difference between Mr. Groulx and Mr. Stratford since their evidence involves only one of many strands bearing on the delineation of the product market. Nevertheless, a choice in favour of Mr. Stratford's version is warranted in the light of the obvious weaknesses in the alternative.

V. COMMUNITY NEWSPAPER VIEWPOINT

Ms. Baniulis was the publisher of *The [Surrey/North Delta] Leader*, one of the most important Metro valley newspapers, before she moved to the Trinity corporate headquarters in the Lower Mainland in 1990. She joined *The Leader* in 1983 when it was the weaker of two community newspapers in Surrey. The source of advertising leads was the stronger community newspaper in Surrey, a community newspaper in nearby Langley, a local magazine and some publications of television listings. At that time the dailies were considered out of reach.

Ms. Baniulis considered that the strike at Pacific Press in 1984 opened many doors. Although it did not lead to an immediate increase in business, apparently advertisers recognized the advantages that community newspapers offered in terms of density of coverage. The main gains came from flyers. She thought, however, that something more was at work: advertisers must have been convinced of an acceptable level of readership in order to conclude that the community newspaper, along with the inserts, would not be tossed in the garbage.

Another change that the strike produced was internal to the *The Leader* -- there was a growth of confidence. The dailies along with monthly magazines became sources of advertising leads to supplement the routine knocking on doors. Ms. Baniulis stated that *The Leader* never "chased" the electronic media; it is easier to get advertisers to switch once they have bought into newspaper advertising. When questioned concerning the options available to advertisers in *The Leader* in the event that it raised its display rates, she mentioned other community newspapers, free-standing flyers and Admail. She disagreed with the suggestion that the broadcast media would be an option.

Mr. Cardwell worked in the newspaper industry for a number of years in England before joining the *North Shore News* in January 1978 where he served as the advertising director until June 1982. He then published the *West Ender* and *East Ender* until January 1990.

Mr. Cardwell described the marketing efforts at the *North Shore News*. Promotional material used in sales presentations was entered as evidence.⁹⁷ The material contains demographic information on the North Shore and comparisons of the circulation and readership of the *North Shore News* and the dailies. No other advertising vehicle is mentioned.⁹⁸

During the four and a half years that Mr. Cardwell was at the *North Shore News*, the dailies and, while it was in existence, the *North Shore Citizen*, a competing community newspaper that closed in 1979, were checked for advertising leads. The dailies were checked every day. When he was asked why he persisted with this practice over such a long period, Mr. Cardwell explained that they were not only looking for leads but also for ideas. The effort to obtain clients entails more than the selling of space. An important part of the effort involves showing the prospective client possible presentations. In searching for leads they were mainly interested in businesses which had outlets on the North Shore. Their principal success with other outlets was in the entertainment field.

Beyond the specific references discussed above, Mr. Cardwell made the more general statement that the print media were the main source of leads. This

⁹⁷ Exhibit A-3.

⁹⁸ This material was compiled by augmenting, twice a year, the questions asked in the weekly telephone survey used to assure that delivery responsibilities had been fulfilled. Use was also made of surveys conducted by a local community college as class projects. The two sources of information are referred to in the promotional material.

does not rule out the use of magazines or even the electronic media as sources, but the fact that no details were provided suggests that they were given low priority.

Mr. Cardwell also discussed his experience while publishing the *West Ender*. Most of the area it covers consists of apartments (in most cases the newspapers are left in the lobby rather than delivered to each apartment) and this influences the character of the advertising that it is able to attract. It had very little success in obtaining inserts. In display advertising its strength was entertainment. Its main competition was *The Georgia Straight*, a newspaper specializing in entertainment; *Night Moves*, a magazine published in Richmond; and an outfit that put posters in glass cases. He did not consider two radio stations referred to him by counsel for the respondents as competitors. He did look for some leads in the dailies. The example given of the type of retailer that might appear in the dailies that he would solicit was a jeweller, as opposed to a butcher. Presumably a jeweller would advertise in the dailies because it drew its clientele from a fairly wide area. Mr. Cardwell would promote the drawing power of the *West Ender* in the immediate area of the store.

There was some overlap in the distribution areas of the *West Ender* and the *Courier* but, even apart from the evidence of Mr. Cardwell that they did not compete directly, it is obvious on comparing the two publications that they are addressing very different audiences and attracting different advertisers for the

most part. After Mr. Cardwell expanded by introducing the *East Ender*, he faced competition from *The Vancouver Echo* and a Chinese language publication.

Ms. Stewart gave evidence regarding the practices of her department and her perception of the competitive situation of the *North Shore News*. After working part-time for several years at the *North Shore News*, Ms. Stewart joined the sales staff in 1982. Her department reviews all media on the North Shore, including magazines, television and radio, primarily looking for North Shore-based businesses⁹⁹ to see if they are using other vehicles. It also looks to businesses not present on the North Shore, in particular Vancouver businesses, because many residents either work or shop "over town". She estimated that less than 5% of *North Shore News* advertising revenue comes from off-North Shore retailers.

From the cross-examination of Ms. Stewart it emerges that little has changed in the marketing efforts of the *North Shore News* vis-à-vis the dailies since Mr. Cardwell was there. *North Shore News* sales staff continue to review the dailies regularly. Ms. Stewart stated that this was done to keep up with the news and to track the advertising of "both large stores with multi-outlets or national advertisers." Sales representatives approach advertisers that are considered to "relate" to the "affluent" North Shore market, particularly those with a North

⁹⁹ Including the North Shore outlet of a multi-outlet retailer.

Shore outlet.¹⁰⁰ The sales representatives emphasize to the advertisers that the *North Shore News* has higher penetration than the dailies on the North Shore and attempt to convince them that they can increase their sales on the North Shore by transferring some of their advertising from the dailies to the *North Shore News*. Ms. Stewart also stated that the *North Shore News* made strong attempts to solicit off-North Shore retailers that drew from a wide area, such as restaurants, fashion boutiques and furniture stores. While efforts with daily advertisers with large trading areas are ongoing, they have had little success with the restaurants and they were only able to attract the boutiques when they ran a special fashion section. Ms. Stewart was asked whether she could think of any major retailers that advertise in the dailies that do not relate to or are not interested in the affluent North Shore consumer. She could not think of any. Thus, it is apparent that *North Shore News* sales staff continue to approach all major daily advertisers. The *North Shore News* continues to survey its readers in order to develop arguments that their representatives can use when soliciting advertisers that use the dailies, with particular emphasis on comparative penetration.

Ms. Stewart listed other community newspapers, magazines, *Yellow Pages* and Admail as the significant competitors to the *North Shore News*. It is difficult to understand why the two community newspapers referred to¹⁰¹ were stated to be

¹⁰⁰ Transcript at 3903-04 (17 October 1991).

¹⁰¹ The *Deep Cove Crier* and a paper produced on Bowen Island and distributed in West Vancouver. Deep Cove is a community at the east end of the North Shore.

significant competitors. They each have very limited distribution. One was described as being distributed in West Vancouver every second or third month.¹⁰²

The magazines that Ms. Stewart had in mind were *Vancouver Magazine*, *Western Living* and *Homes and Ideas*. They were stated to be competitors because they were "demographically targeted to the same affluent readers that we try to sell advertising to."¹⁰³

Ms. Stewart placed the *Yellow Pages* at the top of her list of significant competitors. In her opinion, many small firms that advertise in the *Yellow Pages* "just feel that it is the only advertising they have to do."¹⁰⁴ She invested \$3,000 in 1989 to obtain promotional material from a company in the United States targeted at selling to these companies:

The general thrust [of the promotional material] is to demonstrate to advertisers that are using the Yellow Pages that it definitely makes sense to take some of their advertising dollars out of the Yellow Pages and do creative ads in a newspaper.¹⁰⁵

¹⁰² Reference was also made to a forthcoming publication, *The Leader* of West Vancouver. Ms. Stewart was not aware of the identity of the publisher. The publication was, according to the information available to Ms. Stewart, scheduled to be published every second week for approximately two and a half months and weekly from January 1992 onwards. No copy of this publication was filed with the Tribunal. There was an extensive filing of sample issues of other community newspapers after resumption of the hearing in January 1992, approximately three months after Ms. Stewart gave evidence.

¹⁰³ Transcript at 3911 (17 October 1991).

¹⁰⁴ *Ibid.*

¹⁰⁵ Transcript at 3914 (17 October 1991).

While the Tribunal does not question Ms. Stewart's view that the *North Shore News* may be able to mine business out of this group, it is somewhat surprising that it is the most expensive community newspaper that sees significant potential in the *Yellow Pages*. This target audience was estimated to be spending a total of \$2.8 million in *Yellow Pages* advertising, with expenditures that ranged from \$2027 to \$6823.¹⁰⁶ The cost of a single advertisement covering one-quarter of a page in the *North Shore News* is about \$600. A very small one-column three-inch advertisement runs approximately \$100. The level of the *North Shore News'* rates was seen by one failed entrant, whose experience is discussed in the section on entry, as creating the opportunity for a second newspaper that would cater to smaller advertisers by offering lower rates. Perhaps this apparent paradox may be explained by the *North Shore News'* great success; it has already done very well with the larger accounts and must look elsewhere for additional business.

The final significant competitor mentioned by Ms. Stewart was Admail. She described a project launched in December 1990 to track flyers other than inserts delivered to the homes of employees on the North Shore. Based on these efforts a list of the names of companies whose flyers were delivered by Canada Post was entered as evidence. For a brief period prior to Ms. Stewart's appearance as a witness the flyers themselves were saved and entered as an exhibit. This evidence is reviewed in the discussion on flyers. Within the *North Shore News* the information collected is passed on to the sales representatives as a source of leads.

¹⁰⁶ Joint Book of Documents, vol. 3B, tab 82 (Exhibit 3B-82).

Ms. Stewart stated that since a small number of customers, of the order of 20, account for the major part of the *North Shore News*' insert business, the loss of one or two flyer customers has a significant impact.

With regard to competition to the *North Shore News* from other advertising vehicles, Ms. Stewart stated:

It is certainly competition because we do have advertisers that spend their money elsewhere. However, it would be secondary, busboard advertising, billboard advertising, bus shelters, radio, TV. There is lots of advertising on the North Shore.¹⁰⁷

VI. ADVERTISERS

The essence of the product market drawn by the Director is that despite the various differences between daily and community papers, advertisers regard them as sufficiently good substitutes for display advertising and delivery of inserts that dailies and community papers are effectively competing against each other. Allowing the *North Shore News*, the *Courier* and the Pacific Press dailies, the argument goes, to come under the common ownership of Southam removes this competitive discipline.

The first step in assessing the Director's argument is to determine if, and to what extent, retail advertisers in the Lower Mainland regard the daily and the

¹⁰⁷ Transcript at 3906 (17 October 1991).

community press as interchangeable vehicles for transmitting their advertising message to consumers. Both past behaviour patterns and predictions about future behaviour will be relevant.

The evidence of the buyers or consumers of the product, in this case, takes the form of anecdotal evidence (as opposed to survey results or statistical studies) from selected retail advertisers carrying on business in the Lower Mainland. Additional, more general evidence comes from advertising agency representatives and individuals who have worked in the publishing industry and thus have observed and contributed to patterns of advertiser behaviour.

The advertisers who testified before the Tribunal in these proceedings were all retailers. Some were large national retailers; others were local family-owned businesses. With the exception of the Oakridge Mall, all the businesses had at least two retail outlets in the Lower Mainland. All the retailers spent at least \$100,000 annually on advertising. The actual budgets ranged from \$100,000 to more than \$20 million. Various types of retailers were represented: two grocery stores, two department stores, two paint and wallcovering stores, a shopping centre, a linen shop, a furniture store, a carpet retailer and a music and electronics store.

TABLE 5

Overview of Advertisers

<u>Advertiser</u>	<u>Budget (range)</u>	<u>Main Vehicle</u>
A&B Sound	\$2M to \$4M	ROP - daily
Buy Low	\$300,000 to \$600,000	ROP - community ¹
Color Your World	\$300,000 to \$600,000	ROP - community
Ed's Linens	\$100,000 to \$300,000	ROP - community
Fabricland	\$300,000 to \$600,000	ROP - community
J. Collins Furniture	\$300,000 to \$600,000	ROP - daily
Mills Paint	\$100,000 to \$300,000	ROP - daily/ ROP - community ²
Oakridge Centre	\$300,000 to \$600,000	flyers
Sears	\$5M+	flyers
Stong's	\$300,000 to \$600,000	ROP - community
United Carpet	\$100,000 to 300,000	television
Woodward's	\$20M+ (1987)	flyers (1987)

Notes:

1. The witness indicated that he spent 75% of his *print* advertising budget on ROP community. He also advertises on radio but did not give any amount.
2. The *print* advertising budget was split 50/50 between daily and community.

Three representatives of advertising agencies appeared as expert witnesses on behalf of the respondents. They are Roald Thomas, Vice-President, Corporate Development, at Palmer Jarvis Advertising; Carol Kirkwood, Media Director for McKim's Vancouver office; and David Stanger, Senior Vice-President and National Media Director at Baker Lovick. They provided their views on the extent to which community newspapers, dailies and other advertising vehicles are close substitutes.

According to counsel for the respondents, these witnesses were intended to provide a distillation of their experiences with a large number of clients, allowing a broader degree of generalization than would be possible by calling a number of individual advertisers to relate their own particular experience. While the experiences and point of view of each of the witnesses contributed to the Tribunal's understanding of the use of various advertising channels, the purpose for which the witnesses were put forward was not achieved. The combined experience of the witnesses with retail advertisers was limited, both in the number of retail clients and the extent of agency involvement. This is consistent with other evidence that agencies do not play a large role in the media decisions of retailers; the advertisers who testified used agencies primarily in the creative and production side of advertising, if at all. Retail advertisers rarely use agencies to do their bookings in newspapers. This is related to the fact that the newspapers will not pay the agency's commission in the case of retail advertising. While the expert witnesses maintained that agencies do contribute to decisions regarding the

allocation of the advertising budget among media, in the three important examples that they gave (Superstore, Beaver Lumber and Pharmasave) there is no reason to conclude that this was the case. This does not negate the value of the examples but it does affect the perspective with which the examples are viewed: the decisions were taken by the clients and they merely add to the anecdotal evidence provided by advertisers called by the Director.

A. Print Advertising

The Director argues that retailers are highly oriented towards, if not dependent on, print advertising. The reason for this, the argument goes, is that retailers tend to do advertising which involves the display of prices and products and that the amount of detail in such advertising cannot be duplicated outside the print media. Therefore, it is only display advertising and flyers that provide the physical means of setting out the kind of detail that retailers appear to favour. Other advertising channels either do not provide the hard copy that records the price/product detail or, as in the case of magazines or billboards, require long lead times or cannot be changed frequently enough to meet the needs of sellers in fast-changing markets.

Lindsay N. Meredith, a marketing expert called by the Director, provided a conventional textbook approach to the use of media. According to this view, the media have strengths and weaknesses that determine the kind of advertising

messages for which they will be used. The short spots of thirty seconds or so do not favour the use of radio or television for the presentation of a lot of detail that the consumer is expected to remember. As admitted by Dr. Meredith, this approach abstracts from the relative cost of different media.

The conclusion of Mr. Thomas' affidavit captures well the position adopted by the three advertising agency witnesses:

All media, used creatively, can be used to convey the same message; it would just be done in a different way. This means that no single medium, including each print medium, is indispensable.¹⁰⁸

More particularly, there are many ways to deliver a message and therefore newspapers, whether dailies alone or dailies and community newspapers together, could not raise prices without the agencies searching for alternatives. Advertising budgets are limited. When the price of a vehicle increases without providing greater benefit, for example, increased circulation, this causes the agency to rethink the advertising plan. Fueled by necessity, and perhaps resentment, an attempt is made to obtain the maximum benefit per dollar spent.

The Tribunal fully accepts that the agencies, and advertisers acting on their own as well, do not easily accept what they consider to be unwarranted price

¹⁰⁸ Expert Affidavit of R. Thomas at para. 39 (Exhibit R-34).

increases. If they can they will substitute against the offending vehicle. The question is the extent to which they can do so.

Mr. Bolwell testified that newspaper retail advertising is not often image advertising. He admitted that retail newspaper advertisers can do image advertising but held to the position that not many of them actually choose this type of advertising. Most use non-image or price/product advertising; that is, the advertisements tend to contain information about the products carried by the store and their prices as opposed to having content designed merely to invoke an image. This distinction raises a critical issue. Unless the content of advertisements (image or price/product) can be categorized in some systematic way, there is no basis for distinguishing among advertising vehicles based on their suitability for a particular type of advertising. The Tribunal accepts that although there is fuzziness around the dividing line between the categories of image and price/product, there is a meaningful distinction to be drawn that someone with Mr. Bolwell's general experience is capable of making. Furthermore, his conclusion has not been challenged by the respondents and it is consistent with the remaining evidence before the Tribunal. Most of the advertisers who appeared as witnesses before the Tribunal concentrate on price/product in their print advertisements. While the Tribunal accepts that the content of retail display advertisements in daily and community newspapers (and flyers) is heavily weighted towards price/product, there is some retail newspaper advertising that

would qualify as "image". Based on the analysis of Dr. Meredith, it should be possible to transfer effectively this kind of advertising to other vehicles.

Price/product advertising can further be subdivided into multiple price/product advertising and other price/product advertising. Mr. Bolwell's evidence was that certain retailers, of which supermarkets, drugstores and electronics outlets are examples, rely heavily on advertisements which convey detailed information about a large number of products. Sample advertisements filed by the Director and the evidence of his advertiser witnesses reveal that Color Your World, A&B Sound, Buy Low, Fabricland and Ed's Linens typically use multiple price/product advertisements. The number of items featured ranges anywhere from around five for Fabricland to 50 or 60 titles for pre-recorded music in an A&B Sound advertisement.

Although the respondents have not provided any evidence that deals with the preponderance of price/product advertising in retail print advertising, they do challenge the conclusion that radio and television are not effective vehicles for price/product advertising. Largely through the evidence of Mr. Stanger and the example of the Real Canadian Superstore, the respondents attempted to show that price/product advertising, including multiple price/product, could be transferred to electronic media.

The Real Canadian Superstore, unlike most other supermarket chains, currently uses television extensively to convey price information. Some of the advertisements feature only a few items; other advertisements feature a fast-moving list of items and prices with a running total and a concluding statement of the savings that are available to consumers when shopping at Real Canadian Superstore. With respect to the latter multiple-price advertisement, Mr. Stanger admitted that the viewer was not expected to remember or record even one of the prices shown. He explained that the intended message is that if you shop at Real Canadian Superstore you can anticipate significant savings on a group of items. Although he would not go as far as to say that this amounted to "awareness" (or image) advertising, he conceded that the price message being conveyed was not a "conventional price message". Mr. Stanger explained that the Real Canadian Superstore regards the advertisements as conveying a "price message" since they are part of a widely used strategy of employing loss leaders to get consumers into the store.¹⁰⁹ Dr. Meredith was of the opinion that the message in the advertisements in question was primarily one of image: the consumer could save by shopping at Real Canadian Superstore.

According to Mr. Stanger, consequent upon what it considered an "outrageous" increase in television prices in 1991, Real Canadian Superstore curtailed its television advertising without any corresponding increase in the use of other vehicles. However, Mr. Stanger does not actually know how much was

¹⁰⁹ Transcript at 5141-43 (13 January 1992).

spent on newspapers or flyers in 1991 or in any other period. If he is correct, the failure to shift expenditures strongly indicates that television is not a close substitute for print and it is more accurate to view the messages as designed to create an image that can best be created through television.

Mr. Thomas gave two examples of advertisers that changed from newspapers to television. First, some time prior to 1988 when it moved to Palmer Jarvis Advertising, Speedy Auto Glass abandoned a campaign that was mainly newspaper ROP with some radio in favour of television, some radio and a little ROP. What apparently prompted the change was a reassessment of the style of the advertising campaign. The newspaper advertisements generally featured a price for repairing auto glass and perhaps a description of the repair system. The objective of the television advertising is to maintain customer awareness of the company and highlight its speed of service. The advertisement reminds potential customers to consult the *Yellow Pages* for the outlet closest to them in the event that they have need of the services of Speedy Auto Glass. Mr. Thomas confirmed that price is not an important aspect of the television campaign as it is largely regulated by the insurance companies.

In the second example, Beaver Lumber, a national company which had been using flyers for a number of years as its primary vehicle with ROP to reinforce the flyers, gave the supporting role to television. It adopted the change throughout the country after running a lengthy pilot program in the Lower

Mainland. The ROP advertisements featured 10 or 20 items. The television advertisements use what has been called a "doughnut"; a 15 or 30 second commercial containing in part an unchanging message and in part a changing price message about specific products. Each doughnut contains from one to three items. Therefore, with four or five doughnuts running at different times, as many as 12 or 15 items and prices can be covered.

Although he has not had personal involvement with it, Mr. Thomas is also familiar with the Safeway account which has been with his agency for a number of years. Safeway uses both television and radio in addition to flyers and newspapers. The radio messages, but not those on television, often contain price/product information. There is little reason to believe that radio is being used as more than a support for the print vehicles. Apart from some participation by the agency when a particular theme is being used, Safeway handles all print advertising in-house. Mr. Thomas had no information on the volume or placement of the display advertising and flyers.

Ms. Kirkwood introduced the case of Pharmasave as an example of price/product advertising in the electronic media. This firm relies on flyers as its primary vehicle. It also uses television and radio but only the radio commercials were referred to as containing price/product information. The radio messages are evidently designed to support the current flyer since they contain references to coupons that Ms. Kirkwood agreed were probably part of the flyer.

One of the electronic media is the primary channel for the other retailers with which Ms. Kirkwood is familiar. In the case of The Keg restaurant, the largest expenditures are in radio. Eye Masters Optical prefers television as its major vehicle. These examples have been mentioned since the advertisers are clearly retailers even though it is unclear whether they qualify as such with the newspapers.

There are two ways that substitution between the print and electronic media might be shown. One is through a direct response to a price change that leads to a change in the use of advertising vehicles. The other is more indirect, consisting of evidence that the two vehicles are used for the same purpose.

In the view of the Tribunal the limited examples of the use of electronic media provided by the expert witnesses do not demonstrate that television and radio are close substitutes for display advertising or flyers. The witnesses did not refer to a single case where the switch was prompted by a change in prices. There are clearly retailers such as Eye Masters or Speedy Auto Glass that consider the electronic media more effective than print. These examples tend to illustrate a point conceded by the Director: retailers interested in image advertising can use television as well as newspapers to obtain it. Greater significance was attributed by the respondents to the examples showing the use of electronic media for price/product advertising. But in all cases discussed the retailers rely very heavily on non-electronic media to deliver multiple price/product messages. Even in the

case of Real Canadian Superstore, the impression of Mr. Stanger that dollars were not switched from television to print in 1991 indicates that if price/product advertising was important to it, this type of advertising was being obtained through means other than television.

The Tribunal accepts that multiple price/product advertising cannot effectively be produced other than in print, and particularly in newspaper display advertising and flyers, given considerations of timeliness and flexibility which eliminate magazines, catalogues and billboards as options.

On the other hand, the change from newspaper display advertising to television by Beaver Lumber and the use of radio by Pharmasave provide evidence that electronic media as well as newspapers can be used to support flyers. The Beaver Lumber television commercial explicitly directs the viewers to consult the current flyer for more information. The evidence of the advertisers called by the Director also indicates that a small number of price points can be adequately transferred to radio or television. The majority of the advertisers that use television or radio in this way further characterized their use as a support vehicle for the print campaign. These examples indicate some weak substitution possibilities for newspapers: "weak" because the examples do not indicate a single instance where the electronic media have been relied on to deliver a multiple price/point message.

The majority of the advertisers that testified before the Tribunal favour newspapers or flyers as their primary advertising vehicle. United Carpet was the only advertiser that used a different medium as its main advertising vehicle. United Carpet spends approximately 50% of its total budget on television advertising. With respect to Buy Low, Color Your World and Mills Paint, insufficient information was put on the record to determine definitively that all three are mainly print advertisers. This conclusion appears to follow, however, from the general tenor of the witnesses' evidence.

B. ROP Advertising

All the advertisers that testified before the Tribunal do at least some ROP advertising. For the majority of them ROP is the single largest item in their advertising budget. As the Director points out, the majority of them are currently using both daily and community newspapers for their retail advertising.

TABLE 6

ROP Advertising

<u>Advertiser</u>	<u>% of ROP* in dailies</u>	<u>% of ROP* in CNPs**</u>
Buy Low	0%	100%
Ed's Linens	0%	100%
Stong's	0%	100%
Fabricland	30%	70%
Oakridge Centre	30%	70%
Color Your World	some	mainly
Mills Paint	50%	50%
Sears	50%	50%
United Carpet	50%	50%
J. Collins Furniture	85%	15%
A&B Sound	90%	10%
Woodward's	n/a	n/a

* Rounded to nearest 5%

** CNPs = Community newspapers

The Director places some significance on the fact that most of the retailers are using both community and daily newspapers for retail advertising. He further emphasizes that of those retailers who use both community and daily newspapers, a number places exactly the same advertisement, except for size, in both vehicles. The Director also argues that the evidence shows that there has been substantial

movement by advertisers between the daily and community press in the last ten years and that this illustrates a high degree of substitutability between the two.

The respondents counter that advertisers that use both community and daily newspapers do so for different purposes or in a "complementary" fashion.

The advertising decisions of the retail witnesses are discussed in greater detail below. In a few cases the witnesses are very explicit as to why they have chosen a particular mix of advertising channels. In most others the rationale is unclear.

Prior to October 1990, Ed's Linens was advertising ROP in both the dailies and a number of community papers. In October 1990 it changed its approach and placed all its ROP dollars in the community papers, increasing the frequency from fortnightly to weekly in those papers and phasing out (by December 1990) the previous advertising in the dailies. Ed's Linens is a retailer of white goods with four stores in the Greater Vancouver area: Richmond, Coquitlam, North Vancouver and Surrey. A fifth store was scheduled to open on the West Side of Vancouver in November 1991. The target market for each of the four stores centres around the municipality in which the store is located and spreads into neighbouring districts. For example, the Richmond store draws customers from Richmond, the south part of the city of Vancouver, White Rock and Delta, while

the North Vancouver store draws from North Vancouver, West Vancouver, Deep Cove, Horseshoe Bay, Lion's Bay, Squamish and Whistler.

As is the case with most of the advertisers, it is difficult to pinpoint exactly why Ed's Linens moved from the dailies to the community papers. The inherent complexity of any decision relating to advertising severely complicates the issue. Lionel Zuzartee, the advertising manager, testified that he analyzed the effectiveness of the existing strategy by looking at a number of factors: circulation data for the *Sun* and the community newspapers, duplication arising from using both the *Sun* and the community newspapers, location of the stores, the target consumer market, price, effectiveness of the advertisements and various technical (appearance of the advertisements) factors.

Mr. Zuzartee agreed with counsel for the respondents that community newspapers target specific communities in a way that the dailies do not and that to that extent the two vehicles serve a different purpose. He also agreed that community papers provide much greater penetration in their respective communities than the dailies.

Although cost was clearly a factor in the decision by Ed's Linens to switch more of its budget from the dailies to the weeklies, the relative overall effectiveness of the two types of vehicles seems to have been a governing consideration. Once the decision was made to reallocate daily money to the

weeklies, then Mr. Zuzartee began discussing rates with various community newspapers. Mr. Zuzartee testified that he had in mind as a comparison the rates of other community newspapers with roughly the same distribution area. Thus, he stated, there was no valid price comparison for the *North Shore News*.

Fabricland is a fabric retailer with twelve outlets dispersed throughout the Lower Mainland. It has been in the Lower Mainland for 12 years. There is no outlet in the Delta area, although there is one in each of neighbouring Surrey and Richmond and there are two outlets on the North Shore. Anna Lisa Millard, Advertising Co-ordinator for Fabricland West, was not asked what she and her company consider to be the prime geographic market for their stores. The most that can be said is that the sheer number of outlets would seem to indicate a strong local clientele rather than broad drawing power for any one store.

Ms. Millard explained that originally, when Fabricland had only a few stores, they used mainly the Pacific Press dailies. There has been a distinct change from this early period since the major part of Fabricland's expenditures on ROP is now with the community newspapers. As it started to expand and open more outlets, it added the relevant community paper. For example, when a store was opened in Surrey it started advertising in the Surrey paper. At the same time, however, with more stores the sales revenues increased and thus the advertising budget, with the result that Ms. Millard concluded that in recent years the relative percentage of ROP advertising in each vehicle has remained fairly constant.

Each month each Fabricland store features a number of items that are on sale for the entire month. At the same time, other items are promoted as specials during shorter events (two to five days) during the month. There are two shorter events in a typical month. Ms. Millard allocates her monthly advertising budget as follows: she first buys weekly ads in community newspapers which distribute in the areas where Fabricland has stores; then, if there is money left in the budget that is not earmarked for radio she goes into the *Sun* about twice a month to promote the shorter events; finally, if there are still excess funds, she will buy space in the *Province* to promote the biggest short event of the month. Fabricland only ends up advertising in the *Province* about once every two months. The community newspapers are used to promote both the month-long sale and the shorter events; the dailies are used only to support the shorter, more time-sensitive promotions.

The Director contends that the case of Fabricland illustrates movement from the dailies to the community newspapers. This is only true relative to the early years and does not reflect more recent experience.

Ms. Millard's pattern of ROP advertising in 11 community newspapers corresponds closely to the outlets of Fabricland located in Vancouver, Richmond, Surrey, Burnaby, New Westminster, Coquitlam, Port Moody, Langley, Abbotsford, Chilliwack and North Vancouver (where there are two). For this advertiser use of the daily appears to be a mechanism to get extra impact for a

special event, an additional boost for the regular advertising program which is carried mainly in the community press.

The Oakridge Centre is a shopping mall located on Vancouver's West Side. It draws 70% of its customers from the West Side of Vancouver; the remaining shoppers come from the rest of Vancouver and from Richmond.

The Oakridge Centre's largest single ROP expenditure in a publication goes to the *Courier*. Elaine Mylett, Marketing Director, spends roughly twice as much on the *Courier* as she does on the Pacific Press dailies (mainly the *Province*) and about four and a half times as much as on all other community papers combined (principally the *North Shore News*, *The Richmond Review* and the *Now* papers in Burnaby/New Westminster). Oakridge Centre advertisements appear in the *Courier* two or three times a month while they appear in the *Province* and the other community newspapers during the Christmas season and during the January and July sidewalk sale periods only. The *Sun* is used even less frequently, mainly at Christmas.

Ms. Mylett explained that she uses the *Courier* on a regular basis because of its high penetration on the West Side, the Oakridge Centre's primary customer base. The *Courier* was used exclusively until 1986 when it became apparent that the mall was drawing customers from beyond the West Side for Christmas shopping and the January and July sidewalk sales. The *Province* was added to the

ROP mix on an occasional basis to encourage this extended reach. One or two years later the other community newspapers were also added for extended market coverage for special events and because they were cost-effective. They were used at the same time as the *Province*.

William C. Courian, General Manager for Western Canada for Color Your World, described the newsprint advertising (including inserts) of Color Your World as being "mainly" in the community papers. The company has 21 retail paint and wall covering outlets in the Lower Mainland, situated throughout the area, except Abbotsford. Mr. Courian described his target customers as homeowners throughout the Lower Mainland. Again, the number of outlets would indicate that customers prefer to shop for this kind of product within easy reach of their home.

In 1991, Color Your World advertised predominantly in a number of community newspapers. It places 40 advertisements per year in the community press, that is, they appear slightly less than once a week in each paper used. In contrast, it placed only 12 strip advertisements (two columns by the length of the page) with the *Sun* in 1991. Mr. Courian testified that this was done only to use up some remaining contractual lineage with the *Sun*.

In 1990 the reverse was true. Forty display advertisements per year went into the *Sun*. Mr. Courian did not say how frequently advertisements were placed

with the community press in 1990 but he did establish that fewer community newspapers were used; only those papers serving the Fraser Valley locations were used at all, not those distributing in Vancouver and the adjacent municipalities or the North Shore.

The shift of ROP from the *Sun* to the weeklies seems to have been something of an afterthought that followed upon the shift of flyer distribution to the community press. Mr. Courian examined the market coverage of the *Sun* and the weeklies and determined that he could more than double circulation and approach total market coverage by putting his inserts in a collection of community newspapers instead of the *Sun*. The ROP advertisements were moved later, again, Mr. Courian testified, upon the realization that Color Your World could obtain double the distribution for its ROP advertising for the same cost.

Mills Paint, a manufacturer, distributor, wholesaler and retailer of paint and wall coverings, has 13 retail outlets in the Lower Mainland. Their stores cover the Lower Mainland except Maple Ridge. Again, although the witness was not asked the question, the market for each store is probably strongly local.

Mills Paint conducts its retail advertising on a "promotion" basis. They run about five promotions a year and spend about the same total amount on each one. The two examples given by Gregory Mills, General Manager, both featured ROP and electronic media (radio or television). ROP appears to play a major role in

most, if not all, of the promotions. Typically, there is a 50/50 split in spending on ROP in community and daily papers for any given promotion. This has been the case since about 1989. Prior to 1989, Mills Paint used the *Sun* more and the community newspapers less.

Mr. Mills justified the use of both vehicles by pointing out that the company has traditionally used the *Sun* and finds it effective, particularly in Vancouver, Richmond and Burnaby, while the community newspapers are important for areas outside Vancouver -- White Rock, Surrey, Langley, Coquitlam and the North Shore -- where the dailies' coverage is not as good. Post-1989 more Fraser Valley stores were opened and the store managers wanted the localized total market coverage that the community newspapers could provide. Use of the *North Shore News* commenced two years ago when the North Vancouver store opened.

In the Lower Mainland, Sears has five retail outlets: in North Vancouver, Burnaby, Richmond, Surrey and Chilliwack. James Patenaude, National Manager of Media and Distribution Services, described the retail trading area for Sears as encompassing the whole Lower Mainland.

Sears splits its ROP advertising roughly equally between the daily and community press. It should be kept in mind that ROP supports the primary advertising vehicle, namely flyers.

Sears moved strongly although not completely away from the *Sun* and into the community papers around 1988.¹¹⁰ Mr. Patenaude explained that much of the community newspaper advertising is driven by the requests of local store managers. Since these managers are charged by head office for any advertising in their respective areas, they want a vehicle that is effective at targeting their particular customers so that those advertising dollars bring in the maximum benefit to their stores. ROP is placed in the community newspapers to get penetration in the immediate vicinity of each store that the dailies cannot offer. Sears uses the dailies for broader coverage and because it is a paid vehicle which is generally considered to have more credible readership than free papers. Also, Mr. Patenaude pointed out that Sears feels the need to maintain a "presence" in the *Sun*.

Although Sears indirectly compares the rates of community newspapers and dailies in that they look to the overall "cost of going to market" with a particular vehicle, they do not use daily rates to bargain for a better deal in the community papers or vice versa. One *daily* would be compared to another *daily* of similar circulation to provide a check on whether the rates are comparable.

United Carpet is a franchised carpet vendor. There are seven franchises in the Lower Mainland, of which two are owned and operated by Nils Thaysen, who appeared before the Tribunal. Mr. Thaysen's stores are located in Richmond and North Vancouver. The Richmond store has been around since 1972 while the

¹¹⁰ According to Mr. Stratford, who was Marketing Services Manager for Pacific Press at that time: transcript at 2103-09 (27 September 1991).

North Vancouver store opened in 1990. According to Mr. Thaysen, customers come to the Richmond store from, first, Vancouver, second, Richmond and the North Shore and, third, the broader Lower Mainland. The North Vancouver store draws its patrons mainly from throughout the North Shore. The Richmond store has maintained its broad drawing power even after the opening of the North Shore store. Richmond apparently has a concentration of floor covering stores and customers will travel to that area in order to compare goods and prices.

In terms of the total dollars spent in each, Mr. Thaysen's United Carpet stores have an equal presence in the dailies and in the community papers. The budget for advertising in the dailies, however, represents mainly Mr. Thaysen's contribution to combined advertising in the dailies by all of the United Carpet franchisees in the Lower Mainland. Mr. Thaysen spends very little in the dailies on his own. His purchase of the community newspapers, on the other hand, is his independent decision and pertains to his stores only.

The United Carpet group went to the dailies to buy space because they considered it a cost-effective way to advertise on a franchise-wide basis, for example, franchise-wide promotions. The overall cost is divided among the member stores and the United Carpet name benefits from having a presence in the dailies where all significant competitors to the chain also advertise. Mr. Thaysen is personally satisfied with the daily advertising; he finds it effective for his stores but some of the other franchisees criticize the low penetration of the dailies in

their local areas. Mr. Thaysen uses his community paper advertising to reach the specific communities from which he draws customers. He indicated that he uses the *North Shore News*, *The Richmond Review* and the *Courier*; he may also use others. He would not consider giving up the community newspapers to move totally into the dailies and, in fact, has increased his use of community newspapers recently.

J. Collins Furniture is a "medium-high to high end" furniture retailer with two stores, one in Burnaby near the Vancouver border and one in downtown Vancouver. It is the exclusive British Columbia distributor for an American-based line of furniture called "Thomasville" which accounts for some 70% of its total sales. John Collins Ryan, founder and owner of the business, reported that customers from the West Side of Vancouver and the North Shore alone account for 65% of his total sales.

It is far from clear, given the dominance of West Side and North Shore residents in his customer base, why Mr. Ryan relies so strongly on the dailies. Fifty per cent of his total advertising budget is spent in the dailies; 85% of his ROP budget is spent with Pacific Press. Most of the remaining 15% of the ROP budget is spent in the *North Shore News*, primarily, and in the *Courier*. Yet, Mr. Ryan admitted that the problem with the *Sun* or the *Province* on the North Shore or the West Side is that penetration is quite low, particularly, he volunteered, on

the North Shore. Therefore, he uses the community papers in those areas for their total coverage and to target these prime markets for his products.

In 1988-89, by the Tribunal's calculation, Mr. Ryan spent 40% of his ROP budget on community newspapers. By 1990-91 it had decreased to about 15%. No explanation of this dramatic decline in the use of the community press was elicited from Mr. Ryan by the Director's counsel. The total advertising budget decreased between the two years, yet the amount of advertising in the dailies actually increased and, it appears, did so at the expense of the community papers. The proportion of the total budget spent in other media remained relatively constant.

A&B Sound spends 90% of its ROP budget in the daily press. A&B Sound is a combination retailer of consumer electronics (stereo equipment, etc.) and pre-recorded music (tapes, compact disks, etc.). A&B Sound has six stores in the Lower Mainland: four in Vancouver (including one that sells only mobile electronics like car phones, etc.) and one each in Surrey and Burnaby. Sandra Sansan Lee, Advertising Manager, stated that the downtown Vancouver store (on Seymour Street) alone accounts for over one-quarter of the total revenues for the entire chain (including the six Lower Mainland stores and the two on Vancouver Island). She explained that customers come from all over the Lower Mainland to that store.

Ms. Lee confirmed that using the dailies allows A&B Sound to address a broad geographical area in a cost-effective way. She has other reasons for using the

daily press, particularly the *Province*, extensively: the majority of their competitors are in the *Province*; there is a perception among the electronics/music-buying public that in the Lower Mainland the *Province* is "the place to look" for that type of product; the A&B Sound name will be before the public frequently (four days per week). Ms. Lee assured counsel for the respondents that for these reasons she is presently quite committed to advertising in the *Province*.

A&B Sound does, however, do some ROP advertising in the community press. In late 1990, A&B Sound started placing a full-page advertisement once per month in each of approximately six community newspapers. Ms. Lee uses the *Courier*, *The Vancouver Echo*, *The [Surrey/North Delta] Leader*, *Burnaby Now* (alternating with the *Burnaby News*), *North Shore News* and *Richmond Times* and, occasionally, *Langley Times*. A&B Sound has used the *Courier* at various times and in varying degree since 1983, but apparently did not start using the other papers until 1990. A&B now uses the additional community newspapers because the "dailies do not have deep enough penetration within certain areas of where our stores are."¹¹¹

The Tribunal also heard from George R. Bailey, Vice-President, Marketing, at Woodward's from 1980 to 1988. In 1988 Woodward's had nine stores in the Lower Mainland, the same number as at present.

¹¹¹ Transcript at 2214 (27 September 1991).

Woodward's is another retailer that in recent years has moved increasingly into flyers. The evidence elicited from Mr. Bailey with respect to the amount of ROP advertising done by Woodward's is rather vague and, since Mr. Bailey left the store in 1988, his information is somewhat dated. Mr. Bailey's evidence indicates that by 1987 Woodward's was placing five to six pages of ROP per month in both the dailies and the community newspapers. Given the difference in rates in the two vehicles, this means that relatively more of their ROP dollars went to the daily press than to the community press. Total ROP spending represented at most 20% of the overall budget.

Mr. Bailey provided an overview of Woodward's choice of print advertising vehicles from 1978 to 1988. In 1978, Woodward's used mainly ROP advertising with only eight or nine major flyer distributions. Most of the ROP advertising appeared in the *Sun* and the *Province* with a small amount in the community newspapers. During the strike in 1978-79 they moved heavily into flyers, a trend which continued until at least 1988. ROP advertising as a whole was shrinking over the years. It is impossible to tell if the dailies were gaining any ground relative to the community newspapers or vice versa. What is clear is that both were losing out to flyers.

The Director emphasizes that some of the advertisers that use both the community and daily newspapers place exactly the same advertisement, except for size, in both. This is indeed the case for Fabricland, Ed's Linens, J. Collins

Furniture and Mills Paint. Ms. Lee described the electronics advertisements of A&B Sound in the *Courier* as "fairly similar" to those running in the Pacific Press papers. Color Your World uses a completely different advertisement in the *Sun*, a strip advertisement featuring only two products. The content of the advertisements for the Oakridge Centre in the dailies depends on the event being announced. Some of the community paper announcements would be similar but the *Courier* is used for much more than event advertising. The practice of the remaining advertisers (Woodward's, Sears, United Carpet) is not known.

The Director also points out that, for advertisers that are part of a national company, the placement of ROP advertising in the Lower Mainland differs from its placement elsewhere. The community newspapers play a much greater role in the Lower Mainland than they do in other areas. The general policy of Color Your World is to use the dailies for its ROP advertising but a different strategy, emphasizing community newspapers, has been adopted in the Lower Mainland. Sears spends 50% of its ROP dollars in the community newspapers in the Vancouver area. In other cities, only 10% goes to community newspapers. Fabricland relies heavily on the dailies for its ROP advertising in Edmonton, Calgary and Winnipeg. Of its ROP budget for the Lower Mainland, 30% was spent in the *Sun* and the *Province*. In Calgary and Winnipeg, only the daily was used. In Edmonton, 95% of the ROP budget went to the daily.

The remaining two advertiser witnesses called by the Director, both representing grocery chains, do not advertise in the dailies at all. Bjarne William Rossum, President of Stong's, and Jay D. Hallen, Advertising Manager for Buy Low, emphasized the local nature of the target market in their trade; most consumers prefer to shop for groceries close to where they live. Stong's, which only has stores on Vancouver's West Side and on the North Shore, restricts its advertising to the *North Shore News* and the *Courier*. Mr. Rossum pointed out the weak penetration of the dailies in the very areas he is most concerned about. The dailies' broad circulation would also provide Stong's with a great deal of not very useful exposure in other areas. (This concept is referred to as "wastage" in the evidence.) Mr. Hallen emphasized that total market coverage of the areas near his stores was important to him -- everyone buys food -- and the dailies cannot provide it.

There is no evidence that either Stong's or Buy Low has in the past done any significant amount of advertising with the daily press. In fact, there is no indication whatsoever that either has ever used the dailies at all. Both witnesses perceived a separate, unique role for daily and community newspapers; each is currently using the community press because it best meets his marketing objectives. There is no evidence that either currently regards the two types of ROP as alternatives in any sense of the word, or that he will do so in the future.

The other evidence before the Tribunal regarding the advertising behaviour of grocery stores in general leads us to believe that Stong's and Buy Low are not necessarily typical. What little we know about them would, in fact, tend to the opposite conclusion. Neither chain compares to a Canada Safeway or IGA. Stong's is obviously on the small side in comparison to any of the major chains. Buy Low has ten Buy Low stores in the Lower Mainland (excluding those run under the name "Budget Foods" which do little advertising), including four franchises for which corporate management exercises substantial control over advertising. References by other witnesses indicated that other grocery chains use both the daily and community press to some degree. The only detailed treatment is of the Real Canadian Superstore and that is restricted to their television advertising.

While the Director argues that evidence relating to the response of advertisers to rate changes in daily and community newspapers is significant, he does not specify how the responses recorded in the evidence in this case support the product market that he is proposing. The respondents argue that the evidence of the advertisers clearly does not show any price sensitivity. A number of witnesses were asked about their likely response to hypothetical price increases in the community newspapers or the dailies but there was no systematic pursuit of this line of questioning.

Neither of the Ed's Linens' witnesses was asked what their probable response would be to a price increase in the weekly press. Mr. Zuzartee did say

that he keeps his eye on the rates in the *Sun* and the *Province*, comparing them to the community newspapers that he is using about every three months.

Mr. Ryan of J. Collins Furniture was also not presented with any hypothetical price increases in either the dailies or the community newspapers. In response to a question from counsel for the respondents, Mr. Ryan stated frankly, however, that the merger, of which he was aware in general terms, had not so far affected him as an advertiser and he was not worried that it would do so in the future.

Mr. Bailey was not asked to speculate on Woodward's reaction to possible future price changes and obviously there would have been little value in his doing so.

Ms. Millard of Fabricland was only asked about her probable response if the rate for the *Sun* were to increase. She replied that she would cut back on the *Sun* advertising and first look to the *Province*. If the *Province* proved to be ineffective in getting sales results, she would then increase Fabricland's presence in the community press.

If rates in the *Courier* were to increase significantly, Ms. Mylett would first consider decreasing the size and frequency of the *Courier* advertisements for the Oakridge Centre. She was certain that the dailies would not provide an effective replacement because of their poor penetration on the West Side. She would consider the other community newspapers which distribute in Vancouver

but was doubtful about their ability to replace the *Courier* since they do not have its reputation or readership.

On the other hand, if rates were to increase in the *North Shore News*, which is outside her core area, Ms. Mylett did not see too much difficulty in simply dropping it and advertising only in the *Province*. Likewise, if rates in the *Province* were to increase, she might drop it and use several community newspapers instead.

In the face of overall price increases in the community papers, Mr. Courian of Color Your World was adamant that he would not move back to the dailies for the type of advertisements he currently runs. He would shrink his advertisements or reduce their frequency rather than go back to the dailies, which do not target local markets and have insufficient penetration. He would only consider the dailies for a promotion or for image-type advertising. Even when faced with a hypothetical whereby the absolute cost of an advertisement in the *Sun* and the absolute cost of advertisements in enough community newspapers to match the geographic circulation area of the *Sun* were equal, Mr. Courian would only consider the *Sun* an effective vehicle in Vancouver proper.

If the price of advertising in the *Sun* were to increase, Mr. Mills of Mills Paint speculated that he would use the community newspapers more. If only one of the group of community papers increased its rates, he said it was "unlikely" he

would increase his advertising in the *Sun*. If the overall price of the group increased, he would first consider reducing the size of his advertisements or buying from the other group of community newspapers.

Mr. Patenaude of Sears was quite certain that if the overall cost of ROP, both daily and community, rose in the future by 10-15%, he would increase his use of flyers. If only the community press increased in price, however, he was less certain about his possible reaction. He thought that he might spend more in the dailies or he might simply reduce the volume of advertising in the community newspapers or the number of papers used. Another option would be to extend the flyer program; however, this would involve altering the national marketing plan.

If the price of advertising in the *North Shore News* or the *Courier* were to increase slightly, Mr. Thaysen of United Carpet would simply reduce the frequency or the size of his advertisements. If the price increase were larger, he would look to other alternatives, like the dailies or flyers. If the *Sun's* rates increased, without a corresponding increase in circulation, he would likely reduce the frequency or size of the advertisements placed by the United Carpet group in the *Sun*. If the *Sun's* circulation decreased but the rates increased, he would consider moving more advertising to the community newspapers or to flyers.

If presented with a significant price increase in the community press, Mr. Rossum of Stong's hypothesized that he would move to hand-delivered flyers.

Mr. Hallen of Buy Low indicated that he would continue to use the *North Shore News*, even in the face of a steep price increase, because of the emphasis he placed on penetration.

Views about whether the community newspapers and the dailies are substitutes varied among the agency witnesses. Ms. Kirkwood gave the community newspapers very low marks because they did not provide objective, comparative readership surveys. She also found that their limited editorial content made them uninteresting. She would not select a combination of community newspapers instead of one of the dailies even if prices changed substantially in favour of community newspapers. Ms. Kirkwood uses community newspapers only occasionally to address potential customers in specific communities.

While Mr. Stanger's agency at times makes extensive use of community newspapers, he regards them as functionally different from the dailies even when the same advertisements are run in both types of newspapers. He referred to advertisements for A&W in the *Province* that are meant to reach a target audience 18 to 34 years old. The same advertisements run in community newspapers where the A&W outlets are located, to reach a more general audience. He stated that the advertisements in the dailies are intended to increase awareness of all A&W outlets while those in the individual community newspapers are intended to increase awareness of the outlets in their respective distribution areas.

In a number of hypothetical examples regarding the use of various advertising channels by retailers at different stages of growth Mr. Thomas did not anticipate many circumstances where the dailies and the community newspapers would be good alternatives. It should be noted, however, that none of the witnesses professed or displayed any detailed knowledge of the community newspapers in the Lower Mainland. Their experience with them was limited.

As with substitution between the print and electronic media, substitution between daily and community newspapers can be shown directly or indirectly. The first type of evidence has not been apparent in the testimony of the Director's advertiser witnesses. The changes in newspaper use were not prompted by any discernible change in prices. With respect to indirect evidence of the use of both for the same purpose, it is a matter of determining whether "purpose" can be inferred from the content of the advertisement and the circumstances related to the use of a particular vehicle. Almost by definition it can be said that community newspapers are used to reach customers in the respective areas where the papers are distributed and that dailies are used to reach customers throughout the Lower Mainland. It is not helpful to adopt this notion of purpose when evaluating whether dailies and community newspapers are effective substitutes.

C. Flyers

The Director defines the product market in the Notice of Application as consisting of ROP in dailies and community newspapers and of flyer inserts in these vehicles. The respondents do not deny that flyers and ROP are in the same market. However, they take the position that, first, flyers delivered by community newspapers and dailies differ because of the differences in coverage and penetration, and, second, free-standing flyers delivered by Canada Post or independent delivery companies are close substitutes for flyer inserts, whether in the dailies or the community newspapers. In final argument the Director took the position that while he was not abandoning the market definition initially adopted, the final outcome -- i.e., whether there was a lessening of competition -- did not depend on whether the market was defined to include either or both flyers delivered by Canada Post and by independents. Nevertheless, the issues with respect to market definition must be resolved. Are the dailies and the community newspapers in the same market with respect to flyer delivery? Are other methods of delivery close substitutes for either or both flyer inserts in dailies and community newspapers?

Most of the advertisers called by the Director as witnesses had used flyers and their experience and impressions are germane. The only witness called by either side whose evidence was devoted to the subject of flyers was Mr. Mar who was called as an expert by the respondents.

Mr. Mar spent all but the last year or so of his professional life with Woodward's. He retired from Woodward's in April 1990 after 37 years of service and then served as a consultant with them until October of that year. Mr. Mar reported to Mr. Bailey, whose evidence has already been referred to in the discussion of advertisers, in the six years prior to the latter's retirement. He has had limited experience as an advertising consultant since October 1990, including a three-week contract with Flyer Force that primarily related to developing a questionnaire to elicit responses from major retail advertisers that would allow improved service to such customers.

The reason for dwelling on Mr. Mar's background is that his evidence illustrates a general problem with which the Tribunal is very frequently confronted. What distinguishes expert evidence is the right of experts to express opinions. Yet, it is not the opinion *per se* that generally determines the contribution of the expert; it is rather the facts and reasoning on which it is based. In most cases the opinions relate to matters on which the Tribunal has heard extensive evidence and the weight accorded the expert's opinion will not only depend on the direct testing of the opinion in cross-examination, but also on whether it is credible in the light of other evidence. In Mr. Mar's case there is an additional consideration. There is little in his background to distinguish him from "ordinary" witnesses, whether Mr. Bailey who was his superior or other advertisers who have struggled with making choices among advertising vehicles.

The principal content of Mr. Mar's evidence is the information he gathered on firms offering flyer delivery services in the Lower Mainland. He had mixed success in this endeavour. Mr. Mar reported that there were three independent flyer delivery companies (other than those associated with LMPL), namely, Maple Leaf, Kingsway and Henry's. His only contact with two of the companies consisted of telephone conversations in connection with his appearance as an expert witness. He could neither confirm nor deny the suggestion put to him in cross-examination that the business of the three firms named consisted primarily of deliveries for small retailers, covering a limited area. Nor could he confirm or deny the suggestion that the insert business of the dailies was provided by major retailers. Lack of knowledge of the overall composition of the customers of the few participants in flyer delivery, apart from the community newspapers, indicates a singular lack of preparation for someone put forward as an expert on all aspects of flyer use.¹¹²

Little is known about independent flyer delivery companies. On its face flyer delivery is a very simple business. But the value that Southam placed on the delivery companies without any tangible assets in evidence that became part of LMPL indicates that it must take skill and time to create effective organizations.

Leaving aside for the moment advertiser preferences as between inserts and free-standing flyers, the principal concern that advertisers have with

¹¹² It should be absolutely clear that these comments and any others that relate to the weight of Mr. Mar's evidence are not intended as criticisms of Mr. Mar. He was an honest, forthright witness.

independent delivery companies is that the flyers will not be delivered, that they will simply be dumped or otherwise disposed of. One witness referred to a delivery company having exported the flyers as scrap. It is immaterial for present purposes whether this did or did not occur. The fact that it was related as part of sworn testimony indicates the strength of the concern.

Insofar as the most important characteristic of a flyer delivery service is reliability, it is impossible to generalize about independent delivery companies. The evidence indicates that the delivery companies acquired by Southam are considered reliable. Ms. Baniulis stated that she considered Netmar City-Wide Distribution Systems Ltd., one of those companies, a more significant competitor for flyer business for *The [Surrey/North Delta] Leader* than either the *Surrey Now* or the *Delta Optimist*.¹¹³ Although Mr. Mar was unable to confirm that the independent delivery companies that he had mentioned tended to deal with smaller retailers, his reasoning respecting reliability in his pre-filed evidence leads precisely in that direction:

Door-to-door distribution is also widely available from a number of smaller independent distributors throughout the Lower Mainland. These distributors are flexible in their delivery times and offer very competitive rates. This would make them very attractive to smaller cost-conscious retailers with small trade zones who can personally monitor the quality of delivery with relative ease. Major retailers with larger trading zones (such as Woodward's) cannot monitor delivery as easily; consequently, they tend to look to delivery systems whose independent verification methods [lend] them [credibility] (i.e., newspapers and Ad Mail).¹¹⁴

¹¹³ Transcript at 877 (13 September 1991).

¹¹⁴ Expert affidavit of J. Mar at para. 25 (Exhibit R-51).

Mr. Mar went on to state that an independent company would have to hire adult, bonded, delivery personnel, have a program of random checks and ensure access to apartments or at least lobbies in order to overcome the resistance of major retailers. There is no evidence that any of the independent delivery companies have overcome the concerns about reliability expressed by Mr. Mar and others and have been able to attract major retailers.

The other delivery service for free-standing flyers is Canada Post's Admail. According to the Canada Post promotional volume entitled *Advertising by Mail: The Manual* there are two kinds of Admail: addressed and unaddressed mail.¹¹⁵ It is only the latter that might be competitive with other forms of flyer delivery in terms of cost. Addressed Admail is prohibitively expensive for use as a general flyer delivery service.

There is limited evidence on the extent to which unaddressed Admail is an effective competitor in flyer delivery. One very rough indication is provided in the Canada Post manual. It refers to Admail carrying close to four billion pieces annually. Since both addressed and unaddressed pieces are included and their proportion is unknown, the only certain conclusion that can be drawn is that the total number of unaddressed pieces was less than four billion. While four billion is an impressive number, it becomes less so when placed in the context of the number of pieces carried by a community newspaper such as the *North Shore*

¹¹⁵ Exhibit R-52.

News. Based on a quote obtained by Mr. Mar, which is undoubtedly much higher than the cost to regular customers, and the insert revenue earned by the *North Shore News* in 1989, the *North Shore News* delivered about eighteen million pieces in that year. Alternatively, Canada Post throughout Canada carried 222 times as many pieces as the *North Shore News*. However, it is known that Canada Post carried less than four billion unaddressed pieces and that the *North Shore News* carried significantly more than eighteen million pieces. Therefore, the ratio is actually much less, perhaps by as much as half. Whether the ratio is 222 to one or 100 to one, allowing for the fact that the *North Shore News* is only one (albeit one of the largest) of over a thousand community newspapers in the country, Admail is still a relatively small player compared to the community newspapers. This broad perspective may be useful as background but it does not address the situation in the Lower Mainland.

Table 4¹¹⁶ contains information that shows that, after dailies, flyers are the most important source of information for consumers in the Vancouver area when shopping for clothing or accessories, drug store items, supermarket items, home furnishings and electronics. No inference can be drawn from these results about the importance of free-standing flyers because free-standing flyers and flyers inserted in dailies and community newspapers were combined to an unknown extent. Another survey that is free of this ambiguity was also reviewed with Mr. Weitzel, this time by counsel for the Director. The results for the largest

¹¹⁶ *Supra* at 92.

population centers are contained in Table 7.¹¹⁷ They show that consumers in Vancouver used free-standing flyers for *non-food shopping* somewhat more often (23.0%) than they used inserts in dailies (20.5%) and community newspapers (21.2%). Also of interest are the comparisons with other cities where Southam has dailies (non-Southam dailies are included where they exist). They tend to strongly confirm the uniqueness of Vancouver. The dailies in Vancouver fared much worse than in other cities, save for Montreal which is obviously a special case since households in Montreal are predominantly French-speaking and only English-language dailies were covered in the survey. Community newspapers in Vancouver, in contrast, were well ahead of all other cities. So were free-standing flyers, once again save for Montreal.

¹¹⁷ In the interest of manageability the results from the seven smallest centers -- Brantford, Sault Ste Marie, North Bay, Owen Sound, Medicine Hat, Prince George and Kamloops -- are not included in the table. The figures for these cities are not much different than for the rest, apart from Vancouver and Montreal. The range for daily-carried inserts is 34.0% to 65.0%; for community-paper-carried inserts it is 1.9% to 7.5%; and for free-standing flyers it is 3.6% to 15.2%.

TABLE 7

Results of NADbank Survey, 1988 Regarding Use of Advertising for Non-food Shopping in Large Cities

Single Ad Source Used Most Often For Personal Shopping (Excluding <u>Food</u>)	Non-Fr. Montreal <u>%</u>	Ottawa - Hull <u>%</u>	Hamilton <u>%</u>	Windsor <u>%</u>	Calgary <u>%</u>	Edmonton <u>%</u>	Vancouver <u>%</u>	Southam <u>Total</u>
Advertising Flyers/Folded Inside Daily Newspaper	18.0	38.0	38.2	51.7	42.6	34.1	20.5	31.9
Flyers/Ad Supplement with Weekly Community Newspaper	7.6	8.4	8.0	5.7	4.7	11.2	21.2	10.9
Flyers Delivered to Door	34.2	16.7	19.3	6.8	22.0	16.5	23.0	20.9
Shoppers/Weekly with Classifieds Or Advertising	22.0	2.5	1.4	4.7	1.1	1.2	2.0	5.3

BASE: TOTAL POPULATION (18+ YEARS OLD)

Source: Joint Book of Documents, vol. 2C, tab 29 (Exhibit 2C-29).

Based on this survey, insofar as consumers are concerned, free-standing flyers are an important source of shopping information for non-food items relative to both display advertisements and inserts in newspapers. The results of a survey such as this undoubtedly reflect not only the perceptions and recalled practices of consumers, but also the advertising to which consumers are exposed. That is, they will rely more on free-standing flyers if they receive a high volume rather than just the odd one or two. Furthermore, although it is retailers and not consumers that buy advertising, the results are meant to be used to influence the decisions of retailers.

Various *North Shore News* sales tools relating to flyers were also entered in evidence.¹¹⁸ Survey data from 1988 indicates that 64% of North Shore residents prefer to receive flyers in the *North Shore News* while only 4% prefer to receive them through the mail or by hand delivery (9% would prefer not to receive them at all).¹¹⁹ Other charts also place inserts first, as the preferred delivery method and with regard to their use by consumers. According to one chart, inserts are used at least occasionally by 86% of consumers while flyers delivered by mail are used by 76% and hand-delivered flyers are used by 68%.¹²⁰

It is not clear whether the latter charts are specific to the North Shore only. In any case, the results do not contradict the conclusion that free-standing flyers

¹¹⁸ Joint Book of Documents, vol. 3A, tabs 1 to 5 (Exhibits 3A-1, 3A-2, 3A-3, 3A-4 and 3A-5).

¹¹⁹ *Ibid.*, tab 2.

¹²⁰ *Ibid.*, tab 3.

are an important source of shopping information for consumers since they are used by a significant proportion of them. Knowing how consumers prefer to receive flyers, without more information, is not particularly useful. Advertisers want their flyer to be used.

The choices and views of advertisers regarding desirable methods of flyer delivery are also highly relevant to a determination of which delivery systems belong in the relevant market. Among the advertisers that appeared as witnesses, the three largest users of flyers are Sears, Woodward's and the Oakridge Centre. Three other advertisers, A&B Sound, Color Your World and Fabricland, spend 10-20% of their total budgets on flyers; Buy Low spends 25% of its print budget on flyers. The remaining five advertisers are not currently using flyers.

Although not using flyers as such, Stong's purchases what is known as an "integrated insert" from the *Courier* and the *North Shore News*, the only newspapers in which it advertises. The integrated insert consists of four pages of advertising with no intervening editorial content, printed as part of the newspaper. Stong's integrated insert is printed on different coloured paper from the rest of the newspaper. Mr. Rossum testified that the rates paid by Stong's for this type of advertising were, for the *North Shore News*, contract ROP rates and, for the *Courier*, negotiated contract rates which were closer to ROP than to insert rates. The rates, along with the fact that an integrated insert is literally ROP since it is printed by the newspaper rather than supplied by the advertiser for distribution

alone, have led the Tribunal to consider Stong's as primarily a ROP advertiser at present.

Stong's, however, has used "true" flyers in the past. Stong's used flyers hand-delivered in Vancouver by various independent distributors for a number of years. Mr. Rossum noted that the system was a very effective way of delivering his advertising message when it was functioning properly. He related various problems, like the dumping of flyers and missed streets, which seem to plague independent distributors. In the early 1980s, the *Courier* commenced publishing a Sunday edition, the day on which Stong's requires delivery of its advertising, and Mr. Rossum switched to it. It is not clear from the evidence whether he went into ROP with the *Courier*, integrated insert or straight insert.

In April 1990, Stong's closed its store in east Vancouver, leaving only its West Side store. Mr. Rossum then moved out of the *Courier*, which distributed to the entire city on Sunday, because of wastage. He returned to hand-delivered flyers for the West Side only. Then, in September 1990, the *Courier* started a more limited distribution West Side Sunday edition and Stong's reverted once more to using the *Courier*.

Mr. Rossum's reaction to Admail was that it requires too much lead time prior to distribution and that it cannot provide Sunday delivery. With the *Courier*, Stong's goes to press on Friday night for Sunday delivery. Admail wanted the

material three working days prior to the start of distribution on Monday and delivery could extend until Wednesday.

Since Fall 1990, A&B Sound has been sending out a monthly flyer which is distributed in Vancouver, the North Shore, Burnaby, Surrey, the White Rock area, Langley and the Tri-City region by a number of community newspapers. In the West End of Vancouver and in Metrotown in Burnaby, where there is a high concentration of apartment buildings, the flyers are distributed by Canada Post. In those areas the community newspapers do not have access to mailboxes and can only make lobby drops. According to Ms. Lee, A&B Sound simply pays regular postage for the items it wants Canada Post to deliver. This suggests that the flyers are addressed and that A&B Sound is targeting particular households based on lists it has prepared from its customer files or which it has obtained from other sources. Otherwise it is difficult to understand why it would choose to pay regular postal rates rather than the much lower rates that apply to unaddressed Admail.

Over the years A&B Sound has tried various flyer delivery mechanisms: Canada Post, independent distributors, *Sun/Flyer Force* and community newspapers. Ms. Lee stated that she preferred to have the flyer as an insert where feasible. She also prefers a guaranteed day of delivery so that a sale event can be timed to give competitors the least possible time to react and to still inform customers before it is over. Canada Post cannot provide either of these features.

Ms. Lee was also dissatisfied with Flyer Force on the two occasions when she used it.

Buy Low publishes a flyer 15 to 16 times a year. The flyers are distributed as inserts in various community newspapers (the same ones in which Buy Low does ROP advertising). Its flyer appears as an integrated insert in the *Courier*.

Mr. Hallen has always used the community newspapers to deliver his flyers. He recounted what he had heard about flyers being "dumped" by one of the independent distributors and criticized Admail for its lack of timeliness. He would consider using Admail if it provided Sunday delivery.

Fabricland used flyers twice in the last fiscal year. The flyers were distributed by the same community newspapers that carry its ROP advertising. Fabricland tried an independent distributor in the past but was dissatisfied with the results. According to Ms. Millard it cost too much and it was difficult to monitor delivery. Furthermore, Fabricland prefers to keep its flyers in the same place as its ROP advertising, thereby building on the readers' familiarity with its name.

Inserts made up an estimated 15-25% of the advertising budget for Color Your World in 1991. The flyers were distributed by the community newspapers but Color Your World is conducting a trial run with Admail. The insert

programme was moved from the *Sun* to the community newspapers to achieve better penetration. Mr. Courian also mentioned that he had tried both independent delivery services and Flyer Force. He considers that free-standing flyers are not as likely to be read as inserts.

At present, flyers, or as referred to by the witness "preprints", are the primary advertising vehicle for Sears. Its ROP advertising merely supports the preprint campaign. It costs Sears less to produce and distribute flyers, Mr. Patenaude stated, than to use ROP. The more flyers they print the more economical it becomes. In addition, Sears can control the distribution of their flyers in order to reach the very people who shop at Sears.

Sears was, according to Mr. Patenaude, instrumental in bringing Flyer Force to the Lower Mainland. Sears was and is using Flyer Force in other cities where it is available, like Ottawa, Calgary and Edmonton. Prior to the advent of Flyer Force in the Lower Mainland, Sears used a number of different distributors, including community papers, and experienced problems with overlapping distribution areas and with control. Flyer Force provided more sophistication than was available to Sears from other distributors; for example, Flyer Force could target customers right down to the street address level.

Sears continued using Flyer Force until it closed down. Since then it has

been using VanNet¹²¹ for distribution. Sears simply indicates to a VanNet representative which areas it wants to cover and the VanNet organization takes care of disbursing the flyers to the appropriate papers for distribution. VanNet can fine-tune its distribution to small areas ("census track level") that either receive or do not receive delivery depending on the wishes of the advertiser. On some occasions Sears also uses the dailies for flyer distribution, for example, to get distribution on a day when the community papers do not publish. Sears does not use Admail anywhere in Canada because of its three-day delivery window.

The Oakridge Centre uses as its primary advertising vehicle a coloured, four-page (both sides), fold-out publication printed on glossy paper. This "glossy magazine" is distributed through Admail. *Sun*/Flyer Force was used previously, zoned to cover homes on the West Side only. Ms. Mylett found the service satisfactory. The *Sun* alone did not provide adequate coverage of the West Side so she changed to Admail upon the demise of Flyer Force. In the past the Oakridge Centre has also used the *Courier* to deliver its flyer. Ms. Mylett explained she now wants her brochure in the mailbox and not in the paper along with several other lesser quality flyers. She also pointed out that she was largely indifferent with respect to the day of delivery of her flyer.

Woodward's used a number of distribution methods for its flyers during Mr. Bailey's time with the company. In the late 1970s they distributed through the

¹²¹ The LMPL-owned chain of community newspapers.

dailies. Then they used some free-standing distribution but changed primarily to the community newspapers by the early 1980s. Woodward's continued to use an independent, the Fraser Valley Delivery Service Ltd., in the Abbotsford, Matsqui, Chilliwack and Seven Oaks area up until Mr. Bailey left Woodward's. This particular service had started out delivering only for Woodward's and grew from there into a successful distribution business. (It is one of the distribution businesses acquired by Southam.) Woodward's did not experience any of the usual difficulties of dumped or shredded flyers with this distributor, as they did with several other independents they used.

Woodward's remained with the community press for its flyers even after Flyer Force came to the Lower Mainland. Mr. Bailey explained that it did this because it was concerned that if it left the community newspapers they would be critically weakened and Flyer Force would get a stranglehold on the market. He added, however, that he thought Woodward's had used Flyer Force after he left.

During Mr. Bailey's time with Woodward's it did not use Canada Post for regular flyer delivery. In 1991, however, Woodward's used Admail almost exclusively to deliver its flyers under a contract that contained discounts related to volumes. Peter Michael Watts, Print Manager for Woodward's, stated that Admail was selected because Woodward's had decided to try early week rather than weekend sales. Admail could provide Monday/Tuesday delivery and the community newspapers could not. Woodward's was reviewing its policy when

Mr. Watts gave evidence in January 1992; guaranteed Wednesday delivery had become the preferred option. It appeared likely that Woodward's would be changing back to the community newspapers for flyer delivery in the Lower Mainland.

Mr. Watts stated that the view at Woodward's was that their customers preferred their flyers inserted in a newspaper. He referred to problems with the quality of service provided by Admail -- some dumping of flyers and flyers not always placed in the mailbox -- but admitted that the service received from the community newspapers in the past had not always been perfect. He also noted that Admail was more expensive than the community newspapers.

Additional information on the substitutability of free-standing flyers with inserts, at least on the North Shore, comes from exhibits filed during Ms. Stewart's testimony. They consist of lists of companies whose flyers were delivered on the North Shore by Canada Post from December 1990 to September 1991, as well as some of the flyers themselves for a brief period leading up to Ms. Stewart's appearance as a witness.¹²² Particular attention is paid here to the content of the flyers collected since this is the only evidence addressing the principal reservation that has been expressed regarding Admail, namely, that it has weaknesses for time-sensitive material. As explained by several of the

¹²² List of flyers received by mail, December 1990 - February 1991 (Joint Book of Documents, vol. 3B, tab 78 (Exhibit 3B-78)); List of flyers received by mail, March 1991 - September 1991 (Exhibit R-30); Selected flyers (Exhibit R-31).

advertisers, when companies advertise time-limited specials, they want to wait as long as possible before finalizing the flyer for tactical reasons or because of concerns over the availability of the items in question and then distribute it rapidly once finalized.

Before turning to the content of the flyers, there is a problem regarding the confidence that can be placed in Ms. Stewart's statement that all the flyers filed in evidence were delivered by Canada Post. The flyers were collected by *North Shore News* employees at their homes. In the case of a flyer for Hollyburn Lumber Company, a note attached by the employee strongly suggests that the flyer was not delivered by Admail.¹²³ This indicates that there may be other errors in the monitoring of the delivery and that some of the flyers collected and listed may have been delivered by independents rather than by Canada Post.

Ten flyers were filed by Ms. Stewart. No significance can be attached to the number and no meaningful comparisons can be made with the number of flyers carried by the *North Shore News* because the period over which the ten were collected is not known. Nor is it known whether all flyers received during this unknown period were filed in evidence.

It is straightforward to identify the flyers that contain highly time-sensitive advertising. A number of the flyers do not fall into this category, such as those

¹²³ The note describes how the flyer was dropped off after the usual mail delivery by someone in a rented van.

featuring sales or coupons valid for an extended period or containing more general information, for example, announcing the fall fashions. Three flyers from drugstores (Shoppers Drug Mart, Pharmasave and London Drugs) easily qualify as highly time-sensitive. They contain a starting date for a sale that runs for five or six days only. Although food items are featured in the Shoppers Drug Mart flyer, a relatively small number of items are shown and no fruits or vegetables are included.

Ms. Stewart also described particular experiences of the *North Shore News* with Admail. Home Hardware was an important customer that used an integrated insert in the *North Shore News* and then changed to a flyer delivered by Admail. The *North Shore News* also lost part of Zellers' flyer business to Admail for a time. Eaton's, Woodward's, Pharmasave, Capilano Mall, Park Royal Mall, London Drugs, Early Bird, Shoppers Drug Mart and Beaver Lumber have all used the *North Shore News* and Admail at one time or another.

Finally, there is the matter of relative prices. Mr. Mar obtained some information on comparative prices by proposing a hypothetical delivery of 28,000 flyers to various companies. This amount was too small to be considered by the dailies. For the other methods of delivery he obtained the following prices per thousand: \$40 from an independent, \$45 for the *Courier* and the *West Ender*, \$60 for the *North Shore News* and \$66 for Admail. These prices do not reflect the cost of delivery for most advertisers since the one-shot, small volume (relative to the

distribution of most community newspapers), hypothetical delivery is far from typical. It corresponds most closely to the case of a small retailer promoting a special event. Ms. Baniulis mentioned a price as low as \$35 per thousand as a current possibility for flyer delivery. However, the relative order of the prices obtained by Mr. Mar is consistent with the evidence of the advertisers which indicates that Admail is more expensive than the community newspapers. In light of the invidious comments regarding their reliability, it is also clear that the smaller independents could not survive if their prices were not lower than the community newspapers.

Several conclusions can be drawn from the evidence. First, without Flyer Force the dailies do not meet the needs of most flyer advertisers that often desire saturation of a complete community or parts of a community. While the dailies continue to attract a certain volume of flyer business, this business must depend on advertisers that find that their insert is more effective when received as an insert in a daily. (This is a particular kind of targeting.) There is therefore very little overlap, and thus substitutability, between inserts in the dailies and other forms of delivery.

Second, Admail is a substitute for inserts in community newspapers and delivery by well-regarded independents. It has the advantage of having access to the mailbox in apartments and the disadvantage of not being able to guarantee delivery

dates or provide weekend delivery.¹²⁴ From the point of view of substitutability, the critical group of advertisers are those that do not regard these advantages and disadvantages as so decisive that they would not change delivery methods in response to relatively small changes in the price of Admail or the other forms of delivery. The evidence suggests that while there are many users of the community newspapers, led by the supermarkets, that do not regard the two forms of delivery as substitutes, there is a significant group of other retailers that do so regard them.

Third, the established delivery companies owned by LMPL are sufficiently well-regarded that they are a substitute for community newspapers and Admail as long as they can provide a price advantage. There is no evidence that the other independents named by Mr. Mar are considered a substitute by any of the advertisers that appeared as witnesses and there is no evidence regarding who their customers are.

D. Angus Reid Survey

Counsel for the respondents commissioned a survey of advertisers in the Lower Mainland from the Angus Reid Group, Inc. The survey results were submitted in evidence by Angus Reid who was called as an expert witness by the

¹²⁴ Ms. Stewart testified that Admail had contracted out its delivery to a private service and would in future be offering *Sunday*, Monday or Tuesday delivery. An advertisement for carriers distributed by Salt Spring Freight Service Ltd., Admail Division tends to confirm this (Exhibit R-29). The Tribunal's analysis is based on Admail as it was known to exist at the time of the hearing. Without further evidence, any speculation on possible future "improvements" would be just that. This particular development would, however, merely reinforce Admail's substitutability for other delivery methods.

respondents. The study provides a breakdown of advertising expenditures by advertising vehicle. Advertisers currently using newspapers were also asked how they might respond to a hypothetical increase in the price of newspaper advertising.

Dr. Reid was extensively cross-examined by counsel for the Director regarding the methodology employed in conducting the survey. He was also questioned by members of the Tribunal. Yet, it was only after Dr. Reid was recalled to respond to the criticisms of an expert called by the Director in reply that the nature of the population surveyed for the study became clear. For reasons which will be explained more fully, the study submitted by Dr. Reid is not usable. The Tribunal is satisfied that the population from which the samples were drawn and interviews conducted is not the correct one. This has resulted in a serious distortion of the results of the study in a direction that can only favour the respondents' case. Although a screening question asked at the start of each interview might have resulted in the removal of inappropriate respondents to the survey, there is evidence that this was not accomplished. In addition, there are a number of other concerns brought out during the cross-examination of Dr. Reid or raised by the Director's expert witness, Bertram Schoner. While these concerns (which are not further discussed) reinforce the decision to completely disregard Dr. Reid's evidence, taken by themselves they would not be sufficient to justify this step. In other circumstances these flaws would merely have affected the weight given the evidence.

A number of steps were involved in conducting the survey. First, a list of advertisers was compiled from lists of business customers of the *Sun*, the *Province*, the *Courier* and the *North Shore News*. The two daily lists and the two community newspaper lists were combined and an attempt was made to remove duplication. The two combined lists were then compared to determine if the same names appeared on both. This group of advertisers was identified as the "Both" group. The two remaining groups were labelled "Daily Only" and "Community Only". Then, businesses located in the distribution areas of the *Courier* and the *North Shore News* were randomly canvassed to determine the proportion of retailers that do and do not advertise in newspapers. The fourth group consisted of retailers that did not advertise in newspapers. For good reasons, non-proportional samples were drawn from each group to conduct the actual interviews. This meant that weights had to be applied to the results in order to draw any conclusions about the entire target population of advertisers.¹²⁵

The survey was ostensibly about retailers' advertising behaviour. The Tribunal assumed throughout Dr. Reid's testimony that the survey was based on a population of *retailers*. This proved not to be the case. In fact, the initial lists used by Dr. Reid included *all* business customers of the newspapers regardless of the nature of their business (e.g., government agencies, institutions and manufacturing firms as well as retailers), the nature of the advertising (e.g., offers

¹²⁵ The report submitted by Dr. Reid and his early oral evidence at times referred to the target population as retailers throughout the Lower Mainland and at times as retailers interested in consumers accessed by the *Courier* and the *North Shore News*. This resulted in a great deal of confusion. It was finally established that it was the latter that was intended.

of employment, course announcements by educational institutions, promotions of employees) and the rate charged (e.g., retail, national, classified). There is no conceivable reason for treating every business customer of the newspapers as part of the population of retail advertisers. If Dr. Reid believed he had good reasons for extending the population somewhat beyond those customers charged the retail rate, this should have been done explicitly and with explanations.¹²⁶

By starting from the lists of all business customers Dr. Reid had no chance of creating an accurate profile of retail advertiser behaviour. The composition of retail, national and classified advertising is simply too different in the dailies and the community newspapers.¹²⁷ One group that was particularly likely to be affected was "Both". Dr. Reid recognized that this category was particularly important; its members were considered the most likely to shift advertising dollars from one type of newspaper to another in response to changes in relative prices. The large differences in the composition of advertisers in the dailies and community newspapers almost certainly had the effect of understating the relative size and thus the importance of this group. What percentage of national advertisers could be expected to advertise in both dailies and community newspapers given the tiny contribution that they make to the revenue of the community newspapers?

¹²⁶ The lack of precision in the Director's pleadings regarding what he meant by "retail advertisers" certainly would have justified Dr. Reid to have gone beyond the population of retailers subject to the retail rate.

¹²⁷ See Table 1, *supra* at 42.

There was an intimation that there was a difficulty with the initial population base prior to the discovery that the wrong customer lists had been used. During the cross-examination of Dr. Reid regarding the methodology he used to determine the percentage of retailers that did not advertise in newspapers, he revealed that the random sample of retailers was asked, in the event that they did advertise in newspapers, whether they used the dailies only, community newspapers only, or both. Shown below under the heading "Random Sample" are the proportions obtained in this survey. Also shown are the proportions obtained from the newspaper lists on which Dr. Reid actually based his weights. When Dr. Reid was questioned about the marked discrepancy between the two sets of proportions, the only explanation he could provide was that since neither the *North Shore News* nor the *Courier* distributes to the downtown core, retailers located there were not covered. It was his view that the downtown retailers were more likely to be daily advertisers and that therefore this survey understated the percentage of "daily only" advertisers relative to "community only" advertisers. Nevertheless, the enormous difference between the two proportions should have caused Dr. Reid to be cautious. Assuming that he did not know that the newspaper lists were inappropriate, the results of the random sample which were available to him at an early stage of his study should have caused him to at least ask some questions.

TABLE 8

	<u>Random Sample</u>	<u>Newspaper Lists</u>
Dailies only	5%	38%
Community only	30%	11%
Both	17%	3%
Neither	47%	47%

Source: Exhibit A-93; Expert Affidavit of A. Reid at 11 (Exhibit R-2).

Another indication of the serious problems caused by the lists arose earlier in the cross-examination of Dr. Reid. Table 9, below, shows the disposition of calls made for the telephone survey. The second row shows the number of potential respondents contacted, the subsequent row shows the number of completed interviews, while the remaining rows show the number of calls that did not lead to completed interviews and the reasons for the failure.

The fifth row is of particular interest because it indicates the reasons for incomplete interviews. "DQ" or "do not qualify" covers cases in which the interviewer terminated the interview on learning that the firm did not qualify for the survey. This could be because the firm reported advertising in newspapers even though its name came from a list that supposedly excluded newspaper advertisers or because it was not a retailer. The first question on the survey asks the respondent: "How many retail outlets in Vancouver/the Lower Mainland does your business have?" This is meant to be a screening question as well as one that

provides useful information. "Language" indicates the respondent did not speak English. "Head Office" means that the interviewer had difficulty reaching the person at head office who could supply the required information.

Unfortunately, there is no breakdown of the number of disqualifications for each particular reason. The only specific indication provided by Dr. Reid was that "Head Office" came up most often when calls were made to names on the "Both" list. What is clear is that the number of incomplete interviews in "Other" is very large relative to the number of completed interviews. Furthermore, the pattern is not uniform across categories. Again, this underlines the problems arising from the initial lists.

TABLE 9**Call Disposition for Telephone Survey**

	<u>Dailies</u>	<u>Community Papers</u>	<u>Both</u>	<u>Neither</u>	<u>Total</u>
1. Total Sample Pulled	1,103	1,097	556	1,418	4,174
2. Sample Used (Contacts)	638	652	530	553	2,373
3. Completed Interviews	153	137	153	151	594
4. Terminated Interviews	5	11	6	2	24
5. Other (Language, DQ, Head Office)	212	243	122	109	686
6. Refused	268	261	249	291	1,069

Source: Exhibit A-92

The names of the advertisers with which interviews were completed were filed during the last day of Dr. Reid's appearance.¹²⁸ Based solely on names that are familiar to the Tribunal or which clearly indicate the nature of the business (e.g., automobile dealer or travel agent), it is evident that the results of the interviews cannot be used to understand the behaviour of newspaper retail advertisers.

The list includes many firms that do not fall into this category although they may or may not be "retailers" in the sense of offering goods and services to final consumers. Well represented on the list are automobile dealers, travel agents and real estate agents. All clearly qualify as "retailers", but in all cases these advertisers do not pay the retail rate. The Director's lack of precision can be blamed for the inclusion of automobile dealers and travel agents. There is absolutely no excuse for including real estate agents as part of the sample. Both sides recognized real estate advertising as constituting a separate market. Combining real estate advertisers that pay different rates and have totally different options with other retailers only succeeded in corrupting the results.

A number of other individual names also indicates that the sample included advertisers that do not qualify as newspaper retail advertisers. Two examples are used by way of explanation: the Federal Business Development Bank (which appeared twice) and the British Columbia Nurses Federation. The first difficulty is that these advertisers as government agencies or institutions would pay the national rate and not the retail rate. This is a key consideration. In

¹²⁸ It is important to note that there is no way for the Tribunal to tie these names to completed questionnaires that were also filed with the Tribunal. Dr. Reid has quite appropriately guarded the anonymity of his respondents.

addition, in neither case would one even consider the institutions as "retailers", although it is possible that the nurses' association operates a retail outlet of some kind. There can be no doubt in the case of the Federal Business Development Bank; it lends strictly to business customers. The respondents' reply to this complaint is that the person interviewed identified the advertiser as a retailer. This would be an adequate answer if Dr. Reid had started, to the best of his knowledge, with a list that included *only* retail advertisers. But having started with far too wide a category, the door was opened for errors that never should have been possible at the outset.

The Tribunal would like to stress that it would have appreciated having available the kind of broad coverage of advertiser behaviour that Dr. Reid attempted to provide. Furthermore, it understands that a thorough testing by cross-examination of such an ambitious effort is likely to reveal some methodological or empirical imperfections. The Tribunal emphasizes that parties should not solely rely on trying to reveal imperfections in an effort to disqualify the other side's evidence, rather than attempting to make a positive contribution of their own. Such imperfections do not generally render the evidence valueless; they merely go to weight. Unfortunately, the use of improper source lists so permeated Dr. Reid's survey that any dependence on it became impossible.

VII. COMMUNITY NEWSPAPER GROUPS

A. MetroGroup

According to Mr. Cardwell, Mr. Speck instigated the first real effort to create a community newspaper group when Southam brought Flyer Force into the Vancouver area.¹²⁹ All the Lower Mainland community newspapers were concerned about Flyer Force and at least one general meeting was held to discuss the threat and possible strategies to counteract it. The Now/Times group, Trinity, *The Richmond Review*, *Courier*, *West Ender*, *East Ender* and *North Shore News* participated in trying to create a single buy, single flyer delivery force system. In Mr. Cardwell's opinion, the initiative failed due to the presence of both the Trinity interests and the Now/Times group which competed directly with each other, particularly in Burnaby. It proved impossible to reach any agreement on how the two would divide up flyer business between them.

The next attempt at co-ordination took place in 1988. Sometime during the first six months of that year a group buy for classified advertising was successfully launched which included the *North Shore News*, *Courier*, *The Richmond Review*, *West Ender*, *East Ender* and *The [Surrey/North Delta] Leader*. On this occasion the Now/Times group was not invited to join. The group was referred to, somewhat later, as MetroVan.

The publishers of the MetroVan papers and a representative of Trinity then embarked on an effort to expand their group buy concept to display advertising and flyer distribution. Records of the meetings reveal that the publishers met fairly regularly from at least June to October 1988 to discuss, among other things, who would be included in the group, rates and volume

¹²⁹ Messrs. Cardwell and Speck had discussed the formation of a group while Mr. Cardwell was with the *North Shore News* but there was little interest among community newspaper publishers at that time.

discounts, division of revenue, inserts, sales representatives and other administrative matters.¹³⁰

At some point the publishers evidently reached a consensus on who the members of the group would be since, according to Mr. Cardwell, they then turned over the resolution of the other matters to their respective advertising directors. Ms. Stewart said that during the second year of the initiative (1989) she attended meetings approximately once a month with her counterparts from the other papers.

The resulting group was called MetroGroup, composed of the MetroVan papers (*North Shore News*, *Courier*, *The Richmond Review*, *West Ender* and *East Ender*) and the 10 MetroValley papers then owned by Trinity. MetroVan established its own group discount structure; the MetroValley group co-ordinated its papers' group discount rates.

By the fall of 1989, MetroGroup appears to have been well underway, at least with respect to display advertising. There is no evidence that any functioning arrangement was ever reached with respect to flyer distribution rates and policies for the combined group.

Mr. Cardwell stated that the news that Mr. Speck had sold, in January 1989, an interest in the *North Shore News* to Southam had a chilling effect on the

¹³⁰ Joint Book of Documents, vol. 3B, tabs 32-39 (Exhibit 3B-32 to Exhibit 3B-39).

functioning of MetroGroup. The group reacted adversely because he and the other members felt "like there was a spy in the camp."¹³¹ According to Mr. Cardwell, the group was designed to sell against the Pacific Press dailies and it did not seem appropriate to him that Southam would sell "against themselves". Based on the representations of Mr. Speck the group members decided to allow the *North Shore News* to continue as a member on a trial basis for six months or a year to see whether it would work. And, as already noted, the efforts to establish MetroGroup seemed to be ongoing throughout 1989.

The January 1990 acquisition by Trinity of the *West Ender* and *East Ender*, its April 1990 acquisition of *The Richmond Review* and, of course, the May 1990 acquisitions by Southam through LMPL led to a reshuffling of papers and group membership. Currently there are two community newspaper groups operating in the Lower Mainland: the MetroValley group and VanNet.

B. MetroValley Group

The MetroValley group includes all the community newspapers published by Trinity. It currently consists of the following twelve papers: *West Ender/The Kitsilano News*, *The Richmond Review*, *The [Surrey/North Delta] Leader*, *The Peace Arch News* (White Rock), *The Burnaby News/The New West News*, *The Tri-City News*, *The Maple Ridge/Pitt Meadows News*, *Langley Times*, *The [Abbotsford/Clearbrook/Matsqui/Mission/Aldergrove] News*, *Fraser Valley*

¹³¹ Transcript at 611 (12 September 1991).

Record, The Chilliwack Progress and The Hope Standard. As noted, the *Vancouver East News/Vancouver South News* were discontinued effective December 18, 1991.

C. VanNet

VanNet was formed in the fall of 1990. There is a VanNet retail rate card in evidence that is effective October 1, 1990. At that time, fifteen community newspapers participated in VanNet: twelve of the thirteen papers acquired by LMPL in the May 1990 transactions (the North Delta paper apparently ceased publication), the *Richmond News* (in which LMPL has a 50% interest), the *Langley Advance* and *The Vancouver Echo*. VanNet's most recent retail rate card was revised in July 1991 (effective March 1, 1991) to reflect rate changes that had taken place at some of the member papers. The revised rate card also reflects certain other minor changes in the group. Eighteen community newspapers now participate in VanNet: twelve LMPL papers,¹³² *Richmond News, Langley Advance, The Vancouver Echo, Semiahmoo Sounder* (White Rock), *Whistler Question* and *Squamish Chief*. Nothing is known about the ownership of the three most recent additions to the group.

D. Market Definition

¹³² *North Shore News, Courier, The Richmond Times, Burnaby Now, Royal City Record Now* (New Westminster), *Coquitlam Now, [Maple Ridge/Pitt Meadows] Times, Delta Today, Delta Optimist, Surrey/North Delta Now, [Abbotsford/Clearbrook] Times, [Chilliwack] Times.*

The Director alleges that the community newspaper groups and the dailies are in the same market in the Lower Mainland. He contends that the acquisition of the *North Shore News* and the *Courier* by Southam prevented the formation of an effective community newspaper group that was independent from the dailies. The allegation implies that the acquisitions were designed to ensure that these newspapers would not participate in any group that was "hostile" to the dailies. This implication is entirely consistent with Mr. Perks' statements prior to the acquisitions regarding the critical importance of the *North Shore News* for anyone hoping to form an effective community newspaper group in the Lower Mainland. It would seem to follow, therefore, that the *Courier* and the *North Shore News* would not participate in a group selling against the dailies and VanNet.

According to the evidence of Ms. Stewart, however, the *North Shore News* accepts advertisements placed through MetroValley and honours its discounts. Evidence introduced through Mr. Grippo shows that the *Courier* also accepts orders from MetroValley for flyer delivery and ROP advertisements. Ms. Stewart explained that she accepts advertisements from MetroValley because she accepts business from anyone. She also felt that dealing with MetroValley reduced the threat that Trinity would seek to start a competing newspaper on the North Shore. Ms. Baniulis was under the impression that the *North Shore News* and the *Courier* did not honour MetroValley's discounts, but she is not directly involved in the sale of advertising by MetroValley and does not have first-hand knowledge.

Does the fact that the *Courier* and the *North Shore News* are currently available to advertisers that make group buys through MetroValley mean that the

Director's allegation is without merit? The *North Shore News* and the *Courier* have undoubted strategic importance in the joint marketing of community newspapers in the Lower Mainland. How their strategic value is exploited may vary from time to time but the decisions made in that regard will always be in the anticipated best interests of their owners. Ms. Stewart's rationale for the *North Shore News'* current practice regarding MetroValley certainly does not create a presumption that those best interests lie in continuing to accommodate MetroValley. The documentary evidence regarding the acquisition of the *North Shore News* and the formation of LMPL, including the generous prices paid by Southam for the newspapers (and by Trinity for the *West Ender*, *East Ender* and *The Richmond Review*), point unequivocally in the other direction.

Nevertheless, the current availability of the *Courier* and the *North Shore News* as part of a MetroValley group buy is important. Because of it the Tribunal is better able to evaluate whether community newspapers sold as a group which can offer coverage of the North Shore and the city of Vancouver are a close substitute for the dailies. The Tribunal recognizes that the availability of the two newspapers through MetroValley is not the same as their active participation in the group. At the same time, there is no evidence on the record demonstrating that the demand for MetroValley's advertising services is significantly lower than it might have been if the *North Shore News* and the *Courier* were "true" group members.

According to Mr. Cardwell, the original groups (MetroVan, MetroValley and together as MetroGroup) had hoped to attract national advertisers and large department stores, the kinds of advertisers with which the individual community

newspapers had had little success. This thrust is reflected in the promotional material prepared by the groups and their advertisements in *Marketing*, a magazine widely subscribed to by advertising agencies.¹³³ The primary audience apparently was Toronto-based advertising agencies and head offices which might not be familiar with the geography and demographics of the Lower Mainland or with the important position that the community newspapers held there. The promotional material stressed the large population served by the combined distribution of the community newspapers and made invidious comparisons with the dailies regarding household penetration.

Ms. Baniulis' explanation of the pricing strategy adopted by MetroValley indicates that the groups were also seen as a way of competing against other community newspapers:

By increasing the discount based on the number of papers, we wanted to provide an incentive for them [advertisers] to buy more of our papers and perhaps move out of other community papers that might have been in the area and for them to look at total penetration. So, our weaker papers ideally would benefit from that approach.¹³⁴

According to Ms. Stewart, the rate cards for MetroValley, along with those of the "Ring Rhode Island" newspaper group, were consulted when setting VanNet rates. Greater reliance was placed on the MetroValley rate structure.

¹³³ See e.g., Joint Book of Documents, vol. 1A, tabs 14 and 15, vol. 3A, tabs 22, 27 and 31 (Exhibits 1A-14, 1A-15, 3A-22, 3A-27, 3A-31). These are the MetroGroup Press Release (Exhibit 3A-27), a MetroVan brochure (Exhibit 3A-22), a MetroValley brochure (Exhibit 1A-15), and advertisements in *Marketing* for MetroGroup (Exhibit 3A-31) and for MetroValley (Exhibit 1A-14).

¹³⁴ Transcript at 839 (13 September 1991).

On the available evidence, it is difficult to determine how successful the groups have been. Sales for the MetroValley group are generated by representatives of the individual newspapers through contacts in their territories, and also by representatives who operate out of a central office and are expected to contact the regional head offices and the advertising agencies. The rise in MetroValley group sales has been very rapid, as a percentage of MetroValley's total sales and in absolute terms. The group was barely underway in 1988 and its sales constituted less than 5% of total sales. In 1990 well over 20% of total sales were attributed to the group. This percentage is all the more impressive because total sales rose significantly in 1990, due primarily to the acquisitions of the *West Ender*, *East Ender* and *The Richmond Review*. By far the largest part of group sales consists of ROP advertising rather than flyer distribution.¹³⁵

This evidence must be interpreted with care: it is not possible to distinguish between new business attracted to the community newspapers as a result of the formation of the group and simple adjustments in the way existing advertisers deal with the various community newspapers. The likelihood that a significant proportion of group sales is not new or additional sales is strongly indicated by the figures for 1988 and 1989. There was an extremely large increase in the group sales while the increase in MetroValley's total sales was modest. The absolute increase in the group sales was over twice as large as the increase in total sales. The only reasonable inference is that most of the increase in the group sales constituted a change in category rather than new sales generated by the availability of the group.

¹³⁵ Exhibit CA-49 (confidential).

(It is not possible to perform the same kind of exercise for 1989 and 1990 because the acquisitions referred to above cloud the growth of total sales.)

All four advertisers that stated that they purchased advertising through one of the groups were advertising in the community newspapers previously. Furthermore, there is no evidence that they increased the number of newspapers in which they advertised *as a result of* the group discount. The increased convenience of dealing with groups rather than individual newspapers apparently did lead Sears to increase its display advertising in the community newspapers. But, as the example of Sears will illustrate, there is considerable ambiguity surrounding the classification of advertisers as customers of the "group" as opposed to customers of several individual papers. The evidence of Mr. Patenaude and the other advertisers is discussed later.

Very few large retailers make group buys. The average number of papers included in a group buy through MetroValley is about three. The only large retailer specifically identified by Ms. Baniulis was Safeway; it uses ten or eleven newspapers in a group buy. She also stated that MetroValley enjoys good success with paint stores. (The evidence relating to Color Your World and Mills Paint is discussed later.) Ms. Baniulis was questioned about the buying patterns of a number of large retailers. Unfortunately, the questions and her answers did not clearly distinguish between group buys through MetroValley and the purchase of display advertising or flyer distribution from individual MetroValley newspapers. No information was provided by Ms. Baniulis on the contribution to the revenue of the MetroValley group of large, multi-paper advertisers.

The dollar value of ROP advertising placed in the *North Shore News* through the groups from the Spring of 1989 until July 1991 was introduced through Ms. Stewart. (She dealt only with display advertising when discussing groups. There is no doubt that a number of large advertisers, such as Sears, purchase flyer distribution from the groups.) Revenues from advertisements that were placed through MetroVan and MetroValley (MetroGroup) in 1989 were recorded together. They amount to \$23,831. Group bookings in the *North Shore News* for January to September 1990 total \$48,807. This amount again includes bookings through MetroVan and MetroValley, although after May 1990, MetroVan included only the *North Shore News* and the *Courier* as *The Richmond Review*, *West Ender* and *East Ender* had become part of MetroValley (the *West Ender* and *East Ender*) in January 1990. In October 1990, VanNet commenced operations. In the four months from October 1990 to January 1991, VanNet and MetroValley combined placed \$53,740 in advertising in the *North Shore News*. For the period February through July 1991 bookings through VanNet were \$199,140 and through MetroValley \$36,257.¹³⁶ The group booking totals are very modest until 1991.

There is a large decline in the value of advertisements placed in the *North Shore News* through MetroValley after March 1991. In contrast, orders emanating from VanNet sharply increased after February 1991. There is no further evidence regarding these pronounced and opposite changes, which are shown below.¹³⁷

¹³⁶ All totals except those for February-July 1991 based on Joint Book of Documents, vol. 8A, tab 8 (Exhibit 8A-8). The February-July 1991 data is taken from Joint Book of Documents, vol. C3A, tab 7 (Exhibit C3A-7 (confidential)). Exhibit 8A-8 incorrectly records the VanNet total as \$195,540, presumably an arithmetical error.

¹³⁷ And, in fact, little reliance can be placed on these monthly totals. In addition to filing the monthly totals as shown on summary sales reports for the *North Shore News* (Exhibits C3A-4 to C3A-7 (confidential)), counsel for the respondents also filed the actual MetroValley insertion orders for selected months (Exhibit R-

TABLE 10

Value of Advertisements Placed in the *North Shore News* in 1991

	<u>Through MetroValley</u>	<u>Through VanNet</u>
February	\$11,512	\$13,409
March	10,237	36,008
April	7,350	27,095
May	2,758	36,273
June	3,456	49,869
July	944	36,486

Source: Joint Book of Documents, vol. C3A, tab 7 (Exhibit C3A-7 (confidential)).

Ms. Stewart stated that only one large advertiser, Woodwynn's (a Woodward's store), has used VanNet for display advertising. In her view they had done so more for convenience than for savings. She believes that the discounts for advertising in additional newspapers are not an incentive for large advertisers that already enjoy substantial volume discounts from individual papers. She stated that to her surprise VanNet had resulted in a net benefit to the *North Shore News*. The Tribunal interprets "net benefit" to mean that the additional group discounts given to customers already advertising in the *North Shore News* are outweighed by the

33). By totalling up the insertion orders for March 1991 and July 1991, one arrives at a total for March that is \$1,200 higher than reported in the summary and a total for July that is twice that reported. Nothing in Ms. Stewart's testimony would explain or even lead one to expect such a difference. Exhibit R-33 was evidently quickly and carelessly compiled. The second of two packages of insertion orders for May 1990 contained only duplicates from the first package, except for three new orders inserted in the middle of the package. This gave a very misleading impression of the volume of group business done that month. Even with the duplication eliminated, the total still did not reflect the total on the monthly report. (It was lower, as was the case for August 1990.) While one might expect that some of the actual insertion orders were lost or discarded (thus yielding a lower total than appears in the monthly report), it is more difficult to understand why the orders should add up to *more* than the amount recorded in the monthly report, as occurred in 1991.

extra business attracted by the group discounts. She described the latter as consisting of "an awful lot of small retailers advertising through VanNet that I did not really expect."¹³⁸ The names on the MetroValley insertion orders for the *North Shore News* and on the list of bookings in the *Courier* through MetroValley (discussed below) do not exactly match this description. There are a number of national advertisers such as Hitachi, Mazda and Atlas Tours. Included among the retailers are Bay Optical, Zellers and a furniture store, Segal's, noted in the evidence as drawing from a wide area. In other cases the value of the orders themselves indicates a sizeable company. However, it is not known to what extent the bookings through MetroValley represented new business for the *North Shore News* or the *Courier*.

The evidence regarding bookings in the *Courier* through MetroValley and VanNet covers both flyer distribution and display advertisements from 1990 and part of 1991.¹³⁹ (For some reason evidence on bookings for flyer distribution in the *North Shore News* through the groups was never introduced.) As in the case of the *North Shore News*, the numbers raise unanswered questions.

In 1990, MetroValley placed \$130,983 worth of advertising in the *Courier*, of which \$40,517 consisted of flyers. In the first six months of 1991 the total was \$75,051, with all except \$11,724 consisting of flyer business. The relative importance of ROP and flyers was thus reversed. The increase in the volume of flyer business is easy to trace and poses no mysteries: several large

¹³⁸ Transcript at 3937 (17 October 1991).

¹³⁹ Joint Book of Documents, vol. C4A, tabs 1-3 (Exhibits C4A-1, C4A-2, C4A-3 (confidential)).

customers greatly increased their use of flyers. But the sharp decline in the volume of display advertisements is largely inexplicable. To a limited extent it can be traced to a reduction in display advertising and an increase in the use of flyers by the large customers referred to. For the rest, a number of advertisers disappear completely between 1990 and 1991 and they are not replaced. The dominance of flyer business for the first six months of 1991 is even more pronounced in the bookings through VanNet: of the total bookings of \$114,002, all but \$6,898 related to flyers. This is in sharp contrast to the large volume of bookings through VanNet for display advertisements placed in the *North Shore News* in roughly the same period.

The Tribunal examined the detailed information provided for the *North Shore News* and the *Courier* in order to place dollar values on the group buys described by several advertisers and to better appreciate their evidence. Several serious discrepancies between the evidence of the advertisers and the evidence submitted on behalf of the *North Shore News* and the *Courier* were revealed.

Mr. Courian of Color Your World stated that he purchased ROP and placed flyers in the *North Shore News* and the *Courier* in 1991 through MetroValley. In 1991 this company is a consistent user of community newspapers. While its name appears once in the 1990 listings of the *Courier* as having booked display advertising through MetroValley, it does not appear in 1991. It does not show up at all in the limited information filed for the *North Shore News*.

Ms. Lee of A&B Sound is another advertiser who uses a group. She stated that she placed flyers in the *North Shore News* through MetroValley in 1991. As noted, the information regarding flyers was not included in the evidence filed for the *North Shore News*. The evidence for the *Courier* shows that A&B Sound also placed flyer business with the *Courier* through MetroValley.

Ms. Lee was not asked to specify how she purchased display advertising in the community newspapers. She did say that she selected "the best papers from each of the groups" in the approximately eight communities where A&B Sound advertises.¹⁴⁰ She stated that she started to use display advertising in the *Courier* in late 1990 and continued into 1991. The information for the *Courier* shows one invoice for display advertising that was placed through MetroValley in 1990. A second invoice number for A&B Sound for advertising placed in 1990 through the group is blank with respect to the value of the order and identification as to whether it is for a flyer or for display advertisements. The *Courier* records for 1991 do not show any A&B Sound display advertising placed through MetroValley.

Mr. Mills of Mills Paint stated that prior to the formation of the groups he had purchased the community newspapers individually and that it had been a problem dealing with so many different people in order to get the desired coverage. Currently he uses both MetroValley and VanNet to target the areas where he has stores. This includes Vancouver and the area served by the *Courier*, although Mr. Mills does not use the paper as consistently as he does other papers.

¹⁴⁰ Transcript at 2228 (27 September 1991).

Where the networks overlap, Mr. Mills alternates between the MetroValley and VanNet newspapers. Based on this evidence, one would expect Mills Paint to be present at least once on one of the lists containing the bookings in the *Courier* through MetroValley or VanNet. This is not the case.

Ms. Millard of Fabricland was not specifically asked about her use of the groups; her company appears on the *Courier* lists as occasionally booking flyer delivery through MetroValley.

According to Mr. Patenaude, co-ordination efforts by the community newspapers in the Lower Mainland have led Sears to spend more ROP dollars in those papers. Being able to deal with one person on behalf of a number of papers is valuable to Sears given the volume of advertising that it places across the country. It divides its ROP expenditures in the community newspapers about evenly between VanNet and MetroValley. Sears does not choose the individual newspapers; it just indicates to the group representative which areas it wants to cover.

In Mr. Patenaude's view, the group buy of community newspapers is price competitive with the dailies given the flexibility to buy selected areas and get a high degree of coverage.

Mr. Patenaude was not clear whether Sears was invoiced separately by each newspaper and he was also not sure whether it received a group discount. It is safe to assume that Sears receives a substantial discount. Whether it is a group discount or a volume discount given by each of several individual newspapers is

undoubtedly immaterial to Sears. But it may affect whether Sears is considered by the community newspapers in question as making several individual buys or one group buy. There is obviously no doubt on the part of Mr. Patenaude; he believes that he is dealing with groups and not with individual newspapers. Yet, Sears does not appear in the *Courier* records for group bookings of ROP.

Sears is shown in the information for the *Courier* as making group buys for flyer distribution. There is no difficulty regarding flyers. Sears deals solely with VanNet, which is charged with ensuring delivery to the areas specified by Sears throughout the Lower Mainland.

For both Color Your World and A&B Sound the documentary evidence of the *Courier* is apparently consistent with the advertisers' testimony for 1990 and apparently inconsistent for 1991. Mills Paint does not appear at all in the *Courier* records. While the evidence of these advertisers is not specific enough to conclude on that basis alone that the *Courier* records are in error, the lack of conformity raises doubt about the validity of the records. Coupled with the sharp reduction in the number of advertisers that placed display advertisements through MetroValley in 1991, it indicates that there may well have been an error in the way that the *Courier's* information was prepared. This is unfortunate since much of the other evidence on group buys elicited by the Director from the advertisers is general in nature and somewhat vague.

To further complicate matters, the evidence also reveals that it is possible for advertisers to purchase one community paper through another one but not

necessarily as part of a group buy. Ms. Baniulis described providing this kind of service for customers when she was at *The [Surrey/North Delta] Leader*. Personnel in the community newspaper with whom the advertiser has a good relationship prepare a camera-ready advertisement and pass it on to the other community newspapers that will carry the advertisement. This agency function may be performed with respect to community newspapers under different ownership. Mr. Zuzartee of Ed's Linens said that *The Richmond Review* now performs this service for him with respect to all the community newspapers with which he deals. He made no reference to using a group and was not asked any further questions about this practice and its relation to a group buy. Thus, even without a group customers are provided with a level of service that is superior to that which individual, non-cooperating newspapers can provide.

In conclusion, on the basis of the available evidence the Tribunal is not convinced that the multi-paper discount is an important factor in the community newspapers' ability to attract business from the dailies or, in fact, that the new business coming to the community newspapers through the groups would otherwise advertise in the dailies.

VIII. CONCLUSIONS REGARDING PRODUCT MARKET

The community newspapers are uncommonly strong in the Lower Mainland and the dailies are uncommonly weak. Unlike in any other Canadian city, there are prospering community newspapers in virtually all parts of the

dailies' city zone. The relative strength of the community newspapers outside the city zone is even greater. These facts concerned Pacific Press and it sought means of coping with the attraction of the community newspapers for advertisers. In broad terms, this shows that the two kinds of newspapers are "in competition". However, a more focused analysis is required to determine whether they are in the same market, pursuant to section 93 of the Act:

In determining, for the purpose of section 92, whether or not a merger or proposed merger prevents or lessens, or is likely to prevent or lessen, competition substantially, the Tribunal may have regard to the following factors:

- (a) the extent to which foreign products or foreign competitors provide or are likely to provide effective competition to the businesses of the parties to the merger or proposed merger;
- (b) whether the business, or a part of the business, of a party to the merger or proposed merger has failed or is likely to fail;
- (c) the extent to which acceptable substitutes for products supplied by the parties to the merger or proposed merger are or are likely to be available;
- (d) any barriers to entry into a market, including
 - (i) tariff and non-tariff barriers to international trade,
 - (ii) interprovincial barriers to trade, and
 - (iii) regulatory control over entry,

and any effect of the merger or proposed merger on such barriers;

- (e) the extent to which effective competition remains or would remain in a market that is or would be affected by the merger or proposed merger;
- (f) any likelihood that the merger or proposed merger will or would result in the removal of a vigorous and effective competitor;
- (g) the nature and extent of change and innovation in a relevant market; and
- (h) any other factor that is relevant to competition in a market that is or would be affected by the merger or proposed merger.

A. Geographic Dimension

The geographic dimension of the market must be related to the case that the Director is proposing to the Tribunal. The Director alleges that the acquisitions are likely to lead to an increase in the price of newspaper retail advertising services throughout the Lower Mainland, by impairing the effectiveness of the community newspaper groups. Both the groups and the dailies distribute throughout the alleged geographic market; it is therefore uncontroversial.

The Director also alleges that the acquisitions are likely to lead to an increase in the price of newspaper retail advertising services both on the North Shore and in Vancouver. The North Shore and Vancouver each form only part of the dailies' distribution areas. There is no meaningful daily newspaper market that covers only part of a daily's area of distribution unless it publishes zoned editions or zoned supplements, or it charges its customers different rates for advertising on the basis of the location of their outlets. There was a zoned supplement on the North Shore but counsel for the Director has not relied on it to support this geographic dimension of the alleged market. There is no evidence of geographic price discrimination by the dailies for display advertisements. Counsel for the Director proposes that it is possible for the dailies to discriminate on the basis of geography with respect to distribution of flyers. While this is a logical possibility, there is no evidence that the dailies do discriminate in this way.

Counsel for the Director argues that there are two specific avenues by which the alleged price increase may be implemented: the *Courier* and the *North Shore News* could raise their rates; and the dailies as well as the two community newspapers could raise their rates. The first scenario is, again, a logical possibility if the dailies and the *North Shore News* and the *Courier* are indeed in the same market. Any evidence pertaining to the effect of such an action goes to the issue of whether there will likely be a substantial lessening of competition. Much of the Director's evidentiary base, which focused on Pacific Press' concerns regarding the inroads of community newspapers in general and the strategic importance of these particular papers to Southam, has little to do with a prospective increase in the rates of *North Shore News* and the *Courier*.

The second possibility, that the dailies as well as the two community newspapers could raise rates, requires at least initially a determination of how community newspapers collectively compete against the dailies. If the dailies and community newspapers are found to be in the same market, it will then be necessary to consider how common ownership of the *Courier* and the *North Shore News* and the dailies might affect this market. This question also goes more to the issue of whether there is a substantial lessening of competition than to that of market definition.

B. Product Dimension

Most of the evidence before the Tribunal relates to whether community newspapers collectively are in the same market as the dailies. It is the only meaningful approach. The great difference in the cost and coverage of a daily and a single community newspaper means that with few exceptions the alternative to a daily is not one community newspaper but several. The dailies and the community newspapers are effective alternatives only when a combination of community newspapers are compared with the dailies. Community newspapers that do not have overlapping territories are clearly complementary products, and therefore must be considered together when evaluating them as an alternative for former or current daily advertisers.

There are two conceptual frameworks that run through the evidence and argument. One can be characterized as narrow and highly focused on Southam's ability post-merger to raise prices, while the other is broader and refers to Southam's ability post-merger to influence any one of several dimensions of competition. It is the first that is emphasized in the Director's Notice of Application: the acquisitions will allegedly give Southam market power in the newspaper market and this will likely lead to an increase in prices for advertising services on the North Shore, in the city of Vancouver and, as a result of the negative effect of the acquisitions on the effectiveness of groups, throughout the Lower Mainland.

The broader approach relates to all dimensions of competition between the dailies and the community newspapers -- all the ways that they compete for the advertising dollar. This is the approach signalled in the Director's opening statement and primarily adopted in his final argument. It has two parts. The first part draws on the evidence dealing with changes in the product offerings of the dailies and the community newspapers that are designed to allow each to compete more effectively against the other as proof that they are in the same market.

The essence of the second part of the argument is that the strength of the community newspapers in the Lower Mainland is largely the result of the failure of the dailies to compete more effectively and that the success of one group of newspapers at the expense of the other is proof that both are in the same market. The implication is that now that the community newspapers have matured and become a more significant threat, Southam is avoiding the long-standing need to improve by acquiring the principal opposition. This part of the argument will be explored first.

Counsel for the Director points to the low penetration of the dailies as the principal failing that opened the door for the growth of the community newspapers. Accepting for the moment the Director's approach, this implies that improved penetration of the dailies would win back advertisers from the community press. There is no evidence that anything short of *dramatically* higher household penetration would help the dailies in attracting a significantly larger

volume of flyer business in the Lower Mainland. Very high levels of penetration are required by most retailers using flyers. Southam has found it necessary to supplement the dailies' delivery capability with Flyer Force or something similar in a number of large markets. With respect to display advertising, the dailies' penetration is higher in the areas served by the *Courier* and the *North Shore News* than in other parts of the Lower Mainland. Yet, this has not blunted the success of these newspapers. Several advertisers stated that they used the *North Shore News* precisely because it provided higher penetration than the dailies. Based on this evidence, improvements in circulation in other parts of the Lower Mainland would have to be dramatic indeed to overcome the dailies' disadvantage.

There is very little evidence regarding why the circulation and penetration of the dailies are not higher. Mr. Bolwell was of the opinion that the dailies did not offer enough coverage of Vancouver news and were therefore not sufficiently attractive to readers. The Tribunal has no basis on which to evaluate this opinion. But it is difficult to accept that Southam would not remedy the situation if it agreed with Mr. Bolwell's analysis or otherwise knew what was the appropriate solution. Furthermore, the presence of effective substitutes is supposed to police the performance of a supplier. It is therefore difficult to see how the long-standing poor performance of the dailies and the fact that improvement would attract more readers and therefore more advertisers -- if it could only somehow be brought about -- are evidence that the dailies and the community newspapers are substitutes.

According to the respondents, the major factors explaining the relative performance of the dailies and the community newspapers throughout Canada are the movement of population and retailers to the suburbs and the relative decline of downtown department stores. Based on the evidence of the advertisers, there can be little question that the dispersal of retailing affected their advertising strategy. Counsel for the respondents points out that the share of total advertising revenue lost by the dailies in Canada was much greater than the gains experienced by the community newspapers. This is undoubtedly true for the country as a whole but there is no information on the record on how this conclusion applies to the Lower Mainland. The *Courier* and the *North Shore News* certainly had much greater growth in retail display advertising revenue over the last six years than the Pacific Press dailies. Furthermore, the rapid growth of the *Courier* cannot be explained by the shift of retailers and consumers to the suburbs. Here, as elsewhere in the evidence, it is difficult to reconcile general information regarding community newspapers as a whole with specific information on the fortunes of a single community newspaper.

It is possible that the strength of the community newspapers in the Lower Mainland results from the unique geography that has, in turn, fostered a strong sense of community identity. Whether it is the geography or other less easy to identify factors, there are clearly forces affecting the community newspapers that transcend the performance of the dailies. These forces may also contribute to the dailies' woes.

Counsel for the Director stressed the fact that only Vancouver of all major Canadian cities has strong community newspapers within the dailies' city zone. This fact alone does not reveal anything about the relative success of the *Courier* and the *North Shore News*. The *Courier* was founded at the turn of the century and there was a long-established community newspaper on the North Shore prior to the start-up of the *North Shore News*. Neither of the present Pacific Press' dailies had been in existence long when the *Courier* started up.¹⁴¹ Was this situation unique to the Lower Mainland? Without more information the Tribunal finds it difficult to attribute much importance to the fact that the *Courier* and the *North Shore News*, or any other community newspapers, flourish within the dailies' city zone.

Other factors also helped the community newspapers gain strength. Poor performance by the dailies did not cause either the strikes at Pacific Press or the strong shift to flyers by advertisers. Although some retailers, such as Sears, prefer narrowly targeted distribution of their flyers, many large-scale flyer users, particularly supermarkets, rely on complete market coverage. The community newspapers could provide saturation and the dailies could not.

In the final analysis, the reasons for the present strength of the community newspapers are of secondary importance compared to the evidence that bears directly on whether the dailies and the community newspapers are substitutes. The

¹⁴¹ The *Sun* was founded in 1886, the *Province* in 1898 and the *Courier* in 1908. No specific date is available for the *North Shore Citizen*.

two areas of evidence are not mutually exclusive, however, and they tend to create a unified picture.

To return to the first part of the argument, there are various ways in which community newspapers and dailies could conceivably compete for advertising dollars. They could compete on price or through changes in their respective products that make them more attractive to advertisers. For example, modifying its product by increasing the number of editions from one per week to two or three obviously means that a community newspaper is offering advertisers a broader choice and coming much closer to matching what is available from dailies with regard to frequency. The majority of the community newspapers in the Lower Mainland currently offer at least two editions per week.

Would it make any difference to competition between community newspapers and dailies if they were under common ownership and the number of editions of the community newspapers could be controlled by the dailies? The answer is yes, if frequency is an important element of choice for a significant number of advertisers with the potential to use either type of newspaper. There is little evidence before the Tribunal on this point. The only evidence before the Tribunal is that the *North Shore News* moved from two to three editions per week following the strike in 1984. The *Courier* has had plans to launch a third edition since prior to its acquisition by Southam in 1990. Nothing more is known about those plans.

A second product modification that has improved the community newspapers' ability to attract more advertising dollars is the offer of a group buy. This is the kind of coordination that Dr. Urban referred to as posing a danger for the dailies. As previously concluded, however, the evidence does not support the premise that the additional business was attracted *from* the dailies *because* of the group discount.

The dailies have also modified their product offering through the introduction of Flyer Force and the *North Shore Extra*. There is no question that Flyer Force was in the same market as the community newspapers with respect to flyer delivery. While the evidence regarding the *North Shore Extra* is more sketchy, there is little doubt that it was intended to be a competitor of the *North Shore News* but that the necessary resources to make it a serious competitor had not yet been committed. Although still in relative infancy, the *North Shore Extra* was in the same market as the *North Shore News*.

Two key questions must be answered with regard to these innovations. First, were they related to the basic product offered by the dailies or were they separate products? Second, were they viable? The first question is enough to arrive at a market definition. The second question determines if a "substantial lessening" is possible. If necessary, it will be answered later in these reasons.

With respect to Flyer Force it is clear that it was (and is elsewhere) intended to make the insert service of the dailies more attractive to customers by providing supplementary household penetration. This is the reason that some level of losses for Flyer Force *per se* was acceptable to Southam. Flyer Force is therefore closely related to what might be termed the main business of the dailies, selling advertising -- here, in the form of inserts. The dailies and the community newspapers were in the same market by reason of Flyer Force at the time of the acquisitions. Whether Flyer Force was economically viable goes to the issue of whether there was a substantial lessening of competition.

There is sparse evidence on the record regarding the *North Shore Extra*. Where there is ambiguity, this counts against the Director as the burden of proof is on him. The evidence that exists indicates that the *North Shore Extra* did not add value to the *Sun* since it was delivered to all households and not just to daily subscribers. This suggests that any additional advertising generated by the *North Shore Extra* would only appear in it, not in the daily. Additional advertising in the supplement adds little to the daily's business of selling display advertising within its pages. Therefore the *North Shore Extra*, and by extension zoned supplements in general, are not a modification of the product offered by the dailies; they are a separate product. The advertisers attracted to the zoned supplement might otherwise have used a community newspaper. In competing with community newspapers through zoned supplements the dailies are drawing on their supply capabilities (i.e., their ability to produce newspapers) in much the same way that a

community newspaper in a contiguous area might introduce a new publication to compete with a neighbouring community newspaper.

The introduction of one or more zoned supplements requires more than a minor diversion of resources on the part of a daily. The decision entails the level of investment that is associated with entry. Pacific Press management engaged in a lengthy discussion process before launching the *North Shore Extra*. Establishing the credibility of the supplement with advertisers takes time and money. Even if the dailies had the printing capacity to do it, which in fact they did not, the dailies' publication of the *North Shore Extra* and their plans to publish additional supplements are not evidence that the dailies and the community newspapers are in the same market. While the dailies clearly are potential entrants into the narrower geographic markets occupied by individual community newspapers, the Director did not deal with this aspect of the dailies' relationship with the community newspapers at any point in his pleadings or his final argument.

The dailies and the community newspapers could conceivably also compete on price. In spite of a reference in MetroGroup's early promotional material comparing the cost of a group-wide buy with the cost of an advertisement in the dailies, the Tribunal is not convinced that the community newspapers, either individually or collectively, gear their prices to the dailies.

In areas where there are two community newspapers, one paper generally sets its rates with an eye towards the other's rates. This is not always symmetrical; while the weaker paper will always look to the stronger paper's rates, the stronger paper may ignore the prices of the weaker entrant. According to Ms. Stewart, the *North Shore News* appears to have disregarded the *North Shore Today* and the Pacific Press publication, the *North Shore Extra*.

According to the evidence of Ms. Baniulis, the objectives of the MetroValley rate card do not include competing with the dailies, but rather focus on exploiting the strengths of the stronger papers to benefit the entire chain. The fact that VanNet's rate card was established with an eye primarily to MetroValley's and not those of the dailies might not be considered very important given the relationship between VanNet and the dailies. In fact, it supports the conclusion drawn from Ms. Baniulis' evidence that MetroValley has not paid any particular attention to the dailies' rates. VanNet might be expected to avoid following MetroValley's rate card too closely if doing so would lead to a price confrontation with the dailies.

Within Pacific Press there was an expression of concern over the level of prices in the *Province*. The nature of the concern was that the smaller advertisers would no longer be able to afford this daily's rates if they were appreciably increased and that these advertisers would therefore be forced to turn to the community newspapers. As noted when this evidence was discussed, it shows

weak sensitivity to relative prices for advertisers as a group because only the smaller among them might be affected.

Mr. Perks was of the view that the smaller advertisers had left the *Sun* some time ago and that there was no chance that they would be back. This is consistent with his general conclusion that the business lost to the community newspapers was part of a "one-way flow". If, however, it was high rates that drove the smaller advertisers away, then lower rates could bring them back.

The key question regarding the shift from the dailies to the community newspapers is whether this is the kind of substitution that occurs when a better product is introduced, or whether it reflects the weighing of combinations of characteristics of two products that are seen as offering very similar value per dollar. In the first scenario the superior product gradually replaces the existing product. While it may appear that the products are in the same market, they are not; customers are insensitive to prices and would not return to the old product in response to a small change in relative prices.

The respondents in effect argue that this alternative represents what happened in the Lower Mainland. While community newspapers are not new, changes in the retail environment have made them a much better fit than they were previously. The growth in communities outside the city core and the dispersal of population and retail outlets created an opportunity for community

newspapers. The development of computer-assisted technology allowed the publication of high quality newspapers at reasonable cost. Once advertisers were given the opportunity to have high penetration in any community and to avoid paying for coverage that was of limited interest to them, they had a vehicle that better met their needs than the dailies did. Accordingly, advertisers are not sensitive to small price changes because they are using what they regard as a superior product, a product for which the dailies are not a substitute.

On the other hand, the Director's allegations imply that a sufficiently large segment of users of community newspapers and dailies are sensitive to the relative cost of the two vehicles and would significantly change which vehicle they use in response to fairly small changes in price. Counsel for the Director argues that advertising decisions are complex and that advertisers have difficulty pinpointing the role of relative prices in their decisions. This is undoubtedly true. Price is just one of many variables that the advertisers have to take into account because advertising vehicles are highly differentiated products. Are the products in question here too highly differentiated for buyers to respond to small price changes? There are obvious differences and similarities between the dailies and the community newspapers. There is no reason to review them. In light of the differences, it is incumbent on the Director to show that buyers regard the two products as highly similar and that small changes in relative price would cause a significant shift in advertising volume between the two vehicles. Evidence

showing that advertisers use one or the other vehicle mainly because of the characteristics of the particular vehicle suggests the opposite.

There is in fact no evidence before the Tribunal that advertisers are highly sensitive to the relative prices of the dailies and the community newspapers. With community newspapers throughout the Lower Mainland, with two and sometimes three editions per week, with apparently good overall quality including secure distribution, the community newspapers appear to have become the preferred vehicle for many advertisers that formerly relied solely on the dailies. The evidence is that the ability to obtain very high household penetration in the areas from which they draw customers is a major advantage that advertisers find in community newspapers. They are unlikely to be willing to give that up simply because the cost of advertising in the dailies goes down. With their present product configurations the dailies and community newspapers are at best weak substitutes for some advertisers.

A high proportion of advertisers in the community newspapers are not candidates for the dailies: their trade is too local. While there is *some* price sensitivity vis-à-vis dailies and community newspapers among multi-outlet or high reach advertisers, there is no evidence that it is greater than among the smaller advertisers in community newspapers vis-à-vis the alternatives that are open to them.

Ms. Stewart was the only witness with direct experience with smaller advertisers. Her evidence is not very helpful since it focused on sources of new customers rather than alternatives open to existing ones. For example, while she believes that advertisers in the *Yellow Pages* could be a fruitful source of new business for the *North Shore News*, there is nothing in her evidence that suggests that smaller advertisers would substitute the *Yellow Pages* for the *North Shore News* in the event that the latter's rates went up. Whether smaller advertisers cut back on the volume of their advertising or use another vehicle in response to higher rates in the community newspaper, the fact that they constitute a large proportion of advertising in the *Courier* and the *North Shore News*, and by inference in other community newspapers, means that their reactions to increased prices are a highly relevant consideration.

Mr. Hopkins provided indirect evidence on the price sensitivity of smaller advertisers. He based his decision to start a second community newspaper on the North Shore on his perception that the *North Shore News*' rates were driving away smaller advertisers. The publication of zoned editions by community newspapers is additional evidence bearing on the price sensitivity of smaller advertisers. As explained by Mr. Cardwell, zoned editions respond to the needs of smaller advertisers that do not want to pay for reaching readers throughout the distribution area of the community newspaper. Based on the evidence relating to the *Courier*, the *North Shore News*,¹⁴² the *West Ender* and the *East Ender*, zoned editions are

¹⁴² Mr. Perks mentioned that Mr. Speck had published several zoned editions or supplements but the topic was not pursued.

common in community newspaper publishing. While the evidence relating to the price sensitivity of smaller advertisers is not extensive, the indications are that it is an important consideration in the pricing of community newspapers.

Thus, the evidence regarding the demand for newspaper advertising leads the Tribunal to conclude that the community newspapers and the dailies are very weak substitutes: small changes in relative prices are not likely to induce a significant shift by advertisers from one type of newspaper to the other. Although community newspapers have over time succeeded in attracting business from the dailies, this has been caused more by changes in the conditions facing advertisers than by their responses to changes in price.

Examined solely as an unchanging product at a given point in time, the dailies and the community newspapers are too weak substitutes to be considered part of the same market. Yet, there is little doubt that they have been striving to attract many of the same advertisers. This competition has taken the form of modifications to their product offerings to take advantage of the changes in market conditions. With *Flyer Force* and the *North Shore Extra*, the *Sun* and the community newspapers were in the same market with respect to flyer delivery through much of the Lower Mainland and in the same market with respect to display advertising on the North Shore.

The evidence with respect to the electronic media is that they are too weak substitutes to be considered part of the same retail advertising market as newspapers. Flyers delivered by Canada Post or by independent distributors that have achieved a reputation for reliability are clearly in the same market as inserts in community newspapers and the dailies with Flyer Force.

The presence of groups does not materially affect the conclusion that the dailies and the community newspapers are not close substitutes. The evidence on the demand for the groups' services indicates that the groups have not had a significant impact on competition between the dailies and the community newspapers. The acquisition of the *North Shore News* and the *Courier* appears more likely to affect competition between VanNet and MetroValley than between the groups and the dailies.

IX. ENTRY INTO COMMUNITY NEWSPAPER PUBLISHING

Mr. Bolwell expressed very well the two strands that run through the subject of entry conditions into community newspaper publishing: it is easy to get in but difficult to survive. In the view of the Tribunal, both aspects are important. It is undisputed that there are many would-be entrants into the community newspaper business, individuals with experience in the field who would like to run their own paper. It is equally undisputed that the capital required to start a community newspaper is modest. Modern desk-top publishing and the possibility of contracting out printing mean that the equipment that has to be purchased is

minimal (some computers and office furniture). The fact that delivery of the newspapers can also be purchased means that the important and undoubtedly time-consuming task of setting up a delivery system can be avoided. These are the considerations that support the conclusion that it is easy to get into community newspaper publishing.

There is an immediately perceptible difference between community newspapers and other businesses that do not require extraordinary skill or large amounts of capital to start up: these other sectors, such as the restaurant business, tend to become overcrowded. In some areas of the Lower Mainland there is a single community newspaper; in most areas there are only two. The reason is, as indicated in the second part of Mr. Bolwell's conclusion, that there is more to entry into publishing a community newspaper than opening for business. This is, of course, true of any endeavour but in the case of community newspapers it is what happens after the doors open that is critical.

Dr. Rosse concludes from his studies of daily newspapers that because there are persistent economies of scale in producing and distributing additional pages and more copies, it is very difficult for two dailies to survive in the same market unless they appeal to different audiences. The presence of persistent economies of scale means that once one of the papers acquires a lead in circulation and in the size of the newspaper (as the Tribunal understands it, these would ordinarily go together) it gains a decisive advantage that is likely to grow.

Dr. Rosse conceded that the same conditions applied to community newspapers but pointed out that the order of magnitude was very different between daily and community newspapers. He did agree that in both cases there was likely to be a single survivor unless the newspapers addressed different audiences. Based on the distribution of community newspapers in the Lower Mainland, the Tribunal concludes that while the same economics are at play as among dailies, the forces are somewhat attenuated in the case of community newspapers. There are two newspapers in most communities but in almost all cases one is much stronger than the other; only in New Westminster and Burnaby does there appear to be something approaching a balance. In the other communities not only is one paper clearly stronger than the other, the weaker paper has experienced losses over a number of years.

As discussed in *Laidlaw Waste Systems Ltd.*,¹⁴³ "entry" means viable entry. This is consistent with common sense; all the factors that contribute to success or failure need to be considered in evaluating the conditions of entry. Evidence from several different sources supports the conclusion that entry is difficult where there is an incumbent, which is the only relevant circumstance in the instant case. The difficulties have to do with the prospects for survival rather than with getting one's foot in the door.

¹⁴³ *Director of Investigation and Research v. Laidlaw Waste Systems Ltd.* (20 January 1992), CT-91/2, Reasons for Order (Competition Trib.).

One source of evidence is observed conduct: what do people do and are their actions consistent or inconsistent with one conclusion or another? The numerous acquisitions of community newspapers are relevant in this regard. Experienced newspaper operators such as Trinity and Southam both chose to enter new markets by acquisition rather than start-up. One could perhaps reason that as large organizations start-up is not their strength and so it makes more sense for them to buy rather than to build. However, they both paid large sums of money for community newspapers that are almost entirely intangible assets. The prices paid only make sense if the streams of expected profits continue over long time horizons. This conduct runs strongly counter to the view that entry is easy. They would not pay premium prices for goodwill that could, if entry were easy, quickly be eroded by the entry of others.

On the other hand, Steven Globerman, an economist called as an expert witness by the respondents, also relied on conduct to reach the opposite conclusion, that is, that entry is easy. Professor Globerman drew on a reported statement by an employee of the *North Shore News*, Ms. Stewart, who was subsequently called as a witness by the respondents, to the effect that there had been approximately 25 attempts at entry on the North Shore over an unknown period. He concluded from this that entry must be easy since, if the would-be entrants were assumed to be rational, and one cannot assume otherwise, then their conduct could only be explained on the basis that entry was easy. This too is a reasonable implication, like the implication that experienced business people do

not pay large amounts of money for goodwill if it could easily be eroded by themselves or someone else. There is in fact no evidence of the 25 attempts that Professor Globerman assumed in reaching his conclusion. The testimony of Ms. Stewart did not deal with this topic. If there were a number of attempts at entry on the North Shore, absolutely nothing is known about them. The only evidence that dealt specifically with entry on the North Shore came from Mr. Hopkins, who was called by the Director.

The economist called as an expert witness by the Director, Thomas W. Ross, discussed barriers to entry in a general, theoretical manner in his evidence. Dr. Ross did not express any opinion about the conditions of entry into the community newspaper business.

Dr. Ross is of the view that sunk costs by themselves create an entry barrier and that economies of scale do not contribute to entry barriers. Sunk costs are the part of the investment required for entry that cannot be recovered in the event that a venture fails. As a general rule, assets that are of value only to a specific enterprise are sunk and those that are of value to other firms are not sunk, or only partially sunk. For example, expenditures to build the reputation of a firm are sunk in the event of failure while, at the other extreme, common assets such as trucks are not. Economies of scale exist when average costs fall as the volume

produced increases under conditions where the firm has the opportunity to increase the size of its productive capacity.¹⁴⁴

Unlike Dr. Ross, the Tribunal concluded in *The NutraSweet Company*¹⁴⁵ that a combination of sunk costs and economies of scale are sufficient conditions for a finding that entry is not easy. Neither factor by itself is sufficient to create an entry barrier. In the absence of sunk costs there would be no risk since a would-be entrant that was not satisfied with the results could simply sell its assets. Therefore, the risk of entry rises as sunk costs account for a higher proportion of the investment. Furthermore, would-be entrants need to consider that incumbents have already incurred the sunk costs and that these will be treated as bygones in the event that entry triggers a competitive struggle. The potential entrant is at the point of incurring these costs and must consider whether to put the investment they represent at risk, taking into account that earnings could fall below pre-entry levels. Clearly, the presence of sunk costs creates a risk that would otherwise be absent. Although, all things being equal, the industry would be more attractive to potential entrants if there were no sunk costs, this is not enough to conclude that the presence of sunk costs creates a barrier to entry. There must be something more.

Economies of scale qualify. This is evident when one considers the implications of their absence. If an entrant can come in at a very small scale

¹⁴⁴ Economies of scale are distinguished from falling unit costs as a result of operating a given plant more intensively, i.e., at higher levels of capacity.

¹⁴⁵ *Director of Investigation and Research v. The NutraSweet Company* (1990), 32 C.P.R. (3d) 1 (Competition Trib.).

without being at a disadvantage relative to larger firms in the industry, the risk that entry will change the competitive situation is greatly reduced because the entrant need not attract significant numbers of customers from incumbents in order to succeed. A firm can come in small and grow slowly without drawing competitive responses from incumbents. The reverse is true if a firm must enter at a large scale in order to achieve comparable costs to those of incumbents. It must then quickly attract a significant number of customers away from the incumbents. The entrant faces the prospect that prices will be forced lower or selling expenses much higher as the struggle for the volume required by the entrant is joined.

Economies of scale without sunk costs are not enough either. Although a struggle for the customers needed to achieve adequate scale will take place, by definition the entrant has nothing to lose if there are no sunk costs. If the entry attempt does not succeed, the entrant has merely to sell the assets invested in the attempt and walk away.

The evidence is that both sunk costs and economies of scale are important in the newspaper industry. The level of sunk costs that must be incurred in starting a community newspaper is related to the need to establish credibility with advertisers. Credibility is based on all the dimensions of the newspaper that attract advertisers. These include appearance, editorial content and advertising content. The first two are under the control of the publisher; advertising content depends on the newspaper's success in attracting advertising. This latter aspect might also

be called a "co-ordination problem", as the term was used by Dr. Ross.¹⁴⁶ Advertisers will be attracted to a new community newspaper if they are sure that others will be as well.

According to Mr. Cardwell, the investment required to attract a sufficient volume of advertising to cover costs is likely to be substantial in a full-scale attempt at entry into the territory of the *Courier*. He expressed the view that it would be a disaster to attempt to compete against a strong incumbent with a publication that did not rival its editorial content. He estimated that one could expect accumulated losses in excess of \$4 million during the first two years, with the prospect of covering operating costs during the third year. These figures were considered by the Tribunal as providing only an order of magnitude. Mr. Cardwell does not have any direct experience with such an entry nor, judging from the absence of evidence, does anyone else. In any event, it is reasonable to conclude that the gains from entry would have to be large relative to the magnitude of the investment in sunk costs and the likelihood for success fairly high before the scale of entry described by Mr. Cardwell could be expected to occur.

There are alternatives to full-scale entry. These have been described as "creeping entry". One example is the creation of a "shopper", a newsprint

¹⁴⁶ Expert Affidavit of T.W. Ross at para. 27ff. (Exhibit A-18). The "co-ordination problem" in economics refers to a situation where all buyers, for example, would be better off if they acted together. In the case in point, Dr. Ross is hypothesizing that advertisers would benefit if they could agree to try a new newspaper rather than each holding back waiting to see what others will do. While it may be useful at a certain level of abstraction to consider "co-ordination problems" in the economy, it is more straightforward in the present context to deal with the need of entrants to attract advertisers in terms of the overall problem of establishing credibility.

advertising vehicle without editorial content. A shopper can gradually be converted to a community newspaper through the addition of editorial content. Another possibility is the gradual expansion by an established publisher into a contiguous territory. While the barriers to the entry of these vehicles are less than for full-scale entry, the length of time required for them to achieve the same effects in disciplining the incumbent is also much longer.

Mr. Hopkins' evidence is the only description of an actual attempt to enter the community newspaper industry in the Lower Mainland.¹⁴⁷ As mentioned earlier, Mr. Hopkins was employed by the *North Shore News* from 1983 to 1989, first in sales and then as the co-op advertising manager. He left the *North Shore News* to start his own newspaper, *North Shore Today*, in 1989. He maintained this publication for six months before he shut down because he ran out of capital. His personal losses during the six months totalled \$70,000 and he also failed to draw any salary. He stated that he had a partner who held 51% ownership and that it was the decision of this individual to close down in July 1990. Mr. Hopkins did not have the capital to continue on his own.

The *North Shore Today* was started in the belief that the rates of the *North Shore News* were too high for small advertisers that were forced to curtail or discontinue their advertising. Mr. Hopkins hoped to be able to attract them to the *North Shore Today* with rates that were about half of those at the *North Shore*

¹⁴⁷ Gordon Robson testified about his experience in the community newspaper business but this was peripheral evidence.

News. He also hoped to be able to join a community newspaper group that was to be established by the Now/Times group. This never came to fruition. Mr. Hopkins expressed the view that a year was required to establish a reputation as a community newspaper and that due to problems of underfinancing he had to abandon the effort too soon. He stated that he believed that the North Shore was sufficiently large and affluent to support a second newspaper.

Mr. Hopkins may be right about the potential of the North Shore. Nevertheless, his experience supports the conclusion that it is easy to start a community newspaper but difficult to survive. The *North Shore Today* was of good appearance and it got underway quickly with very little initial investment. The problem was attracting sufficient advertising so that the shortfall between the cost of each issue and the revenue from it was manageable. It is noteworthy that Mr. Hopkins was not able to find a buyer or a new partner in order to recover something from his investment of capital and personal effort. This suggests that others were less sanguine about the prospects on the North Shore. Also relevant to whether the threat of entry disciplines incumbents is the fact that the *North Shore Today* was aimed at a specific niche of advertisers, those supposedly squeezed by the pricing of the *North Shore News*. Drawing on the perception of Mr. Hopkins, any threat of entry was apparently having little effect. Furthermore, according to the evidence of Ms. Stewart, the *North Shore News* did not change its pricing in response to the introduction of the *North Shore Today*.

There is no evidence that the fact that it is easy to start a community newspaper has a disciplining effect on the prices charged. However, it is very likely that discipline is exercised on the conduct of incumbents with respect to appearance and editorial content. An ambitious entrant can quickly show that he or she can put out a more attractive and interesting product if the incumbent has let things slide. It is reasonable to conclude that there are a significant number of would-be entrants, such as Mr. Hopkins, who would try to seize an opening created by a poor community newspaper in a community that had the potential to offer significant rewards.

X. PREVENT OR LESSEN COMPETITION SUBSTANTIALLY

According to section 92 of the Act, the Tribunal may make an order only if it 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)

There are a number of equivalent ways of asking whether the acquisitions of the *Courier* and the *North Shore News* have caused or are likely to result in a substantial lessening of competition. Most simply, are advertisers likely to be

faced with significantly higher prices or significantly less choice over a significant period of time than they would be likely to experience in the absence of the acquisitions?

Since the dailies and community newspapers are weak substitutes the likelihood of the acquisitions resulting in significantly higher prices is very low. Moderate changes in relative prices are not likely to affect advertisers' choices in a significant way. Thus, if the object of the acquisitions is to protect the dailies, this can only be done through fairly dramatic changes in the prices of the community newspapers, considered collectively. Southam would have to concentrate its price increases in the *Courier* and the *North Shore News* as all the other papers it owns face significant competition from a rival community newspaper. Advertisers would switch to the rival before considering the dailies. Raising prices would undoubtedly be costly to the *Courier* and the *North Shore News* but *might* be profitable to Southam as a whole if the dailies were able to maintain prices at a higher level than they otherwise could or, alternatively, to slow down the drift of advertisers to the community newspapers. Southam does not have the market power to follow this course.

First, ROP advertisers in the *Courier* and the *North Shore News* that might use the dailies have other options, chief of which is flyers. They could increase their use of flyers in the distribution areas of the *Courier* and the *North Shore News* and either maintain their display advertising in other community

newspapers or increase flyer use. Southam cannot control prices in the flyer market because of the presence of Admail as an alternative for a significant number of advertisers.

Second, dramatic price increases create a highly risky scenario that could result in entry on the North Shore and in Vancouver and significant losses for Southam. While entry is not easy in usual circumstances, it is a real threat under such extreme conditions which alienate customers and create a comfortable price umbrella for would-be entrants.

Since it is clear that both the dailies and the community newspapers "competed" by attempting to modify their product offering to better attract advertisers, placing both under common control could result in fewer product choices being available to advertisers. The Director has not argued the question of choice *per se*. The evidence and argument relating to Flyer Force and zoned supplements, which are most directly concerned with the topic, were put forward in connection with the attempt to show that the community newspapers and the dailies are in the same market. While it has been concluded that Flyer Force undoubtedly placed the dailies and the community newspapers in the same market, the only evidence before the Tribunal indicates that Flyer Force was not financially viable in the Lower Mainland because of its high costs. While the timing of its discontinuance may have been affected by the acquisitions, it is

highly likely that it would have been discontinued in any event. Thus, the effect of the acquisitions on Flyer Force is immaterial.

The Tribunal has rejected the Director's position that the *North Shore Extra* and the other planned supplements are proof that the dailies and the community newspapers are in the same market. The very limited evidence on the *North Shore Extra* indicates that this supplement was more like a community newspaper than an integral part of the daily. This area of evidence was not further developed and argument on the dailies' possible participation in what appears to be essentially a community newspaper market was not presented.

With respect to the possibility that Southam might find it in its interest to manipulate the product offered by the *Courier* and the *North Shore News* in order to make community newspapers less attractive to advertisers vis-à-vis the dailies, the reasoning used to consider the similar proposition respecting prices applies. In theory, Southam could control, for example, the number of editions that community newspapers publish in the Lower Mainland by reducing the frequency of the *Courier* or the *North Shore News* or by not responding to a trend to a higher frequency in other parts of the Lower Mainland. Once again, it is highly doubtful such a policy could succeed. Entry would be an even greater threat than in the case of a price increase since a new publication need not compete head to head with the incumbent, but could publish on the days for which there was a demand that was not being met by the incumbent. Taking into account the degree of

control of community newspapers exercised by Southam, the existence of other substitutes in the form of free-standing flyers and the conditions of entry, it is unlikely that advertisers will be disadvantaged in a significant way by the acquisition of the *North Shore News* and the *Courier*.

Moreover, there is reason to believe that competition between community newspapers has been strengthened through the combination of the weaker Now/Times newspapers with the *Courier* and the *North Shore News* in VanNet. To the extent that the community newspapers and the dailies are weak substitutes, this enhanced competition does not benefit the dailies.

The Director also alleges that the acquisitions have prevented or are likely to prevent competition by frustrating the formation of an effective group that would have included the *Courier* and the *North Shore News*. The Tribunal has concluded that the existence of groups does not appreciably increase substitutability between the dailies and the community newspapers. There is, therefore, no need to examine whether or not the *North Shore News* and the *Courier* are critical to an effective group. The allegation cannot succeed if dailies and community newspaper groups are not in the same market.

The Director also alleges that the acquisitions will prevent entry by a new daily using the *North Shore News* or a successful group as a springboard. Virtually the only evidence in support of this allegation is that of Mr. Perks.

Mr. Perks expressed fear in internal communications about the use of the *North Shore News* or an unfriendly Metroland to start a third daily. Mr. Perks also testified that Mr. Speck told him that several publishers of dailies in other parts of the country had approached him about selling the *North Shore News*. Nothing is known regarding the reasons for their expression of interest. Additionally, the Director was only able to point to the conversion of a community newspaper into a daily in Kamloops and the development of a community newspaper into a daily decades ago on Long Island, New York. No examples were provided of a community newspaper that was converted to a daily in any large North American city. On the other hand, there have been several recent new entries by dailies in Toronto, Edmonton and Ottawa that were not in any way connected with community newspapers. Whether Mr. Perks had a genuine concern about the use of one or more community newspapers to start a new daily or had his own reasons for promoting the possibility, the evidence in support of the allegation is not convincing.

For all these reasons, the acquisition of the *North Shore News* and the *Courier* by Southam is not likely to prevent or lessen competition in the newspaper retail advertising services market in the city of Vancouver, on the North Shore or throughout the Lower Mainland.

XI. REAL ESTATE ADVERTISING

The Director alleges that the acquisition of the *Real Estate Weekly* by Southam will likely prevent or lessen competition substantially in the market for print real estate advertising services (a) in the Lower Mainland and (b) on the North Shore. The product market, as pleaded, thus incorporates both advertising for older (resale) homes and for new homes or developments.

In the Notice of Application the Director listed the participants in the Lower Mainland market as the *Sun*, the *Province* and the *Real Estate Weekly*. In his written argument, the Director acknowledged that the *Sun* provides only limited competition for the *Real Estate Weekly* with respect to resale homes but maintained that it competes actively for new homes advertising.¹⁴⁸ He restated his position as follows: if new homes advertising is a distinct market, then the acquisition substantially lessens competition; if new homes and resale advertising are both in the same market then it is unlikely that any substantial lessening will result from the acquisition. Competition will, however, have been *prevented* because Pacific Press was the most likely entrant into the resale advertising portion of the combined market.¹⁴⁹

Counsel for the respondents contends that the Director cannot make the submission set out in the written argument, in that the respondents have developed and presented their case on the basis of the original alleged market.

¹⁴⁸ The *Province* is not mentioned at all. The evidence and argument of both parties focused almost exclusively on the *Sun*.

¹⁴⁹ Memorandum of Argument at para. 450.

Because of the prejudice to the respondents from a change in the alleged market at this late date, the Director's case must stand or fall on proof of a likely substantial lessening of competition in the market as originally pleaded: print real estate advertising services. Further, there is no evidence on the record that could support the "prevention" argument as advanced by the Director. One witness referred briefly to his belief that the *Sun* had, at some point in the late 1980s, considered introducing a real estate publication similar to the *Real Estate Weekly*. This is clearly insufficient.

With respect to the market on the North Shore, the respondents concede in their written argument that the *North Shore News*, through its real estate supplement, and the North Shore edition of the *Real Estate Weekly* compete for the advertising of realtors on the North Shore.¹⁵⁰ There is, therefore, no question that these two publications are in the same market.

The respondents deny that the *Sun* competes with the *Real Estate Weekly*. Their position is that real estate is primarily advertised locally and that therefore the community newspapers are more competitive with the *Real Estate Weekly* than is the *Sun*. Apart from this difference between the parties, the principal point of contention relates to the conditions of entry into real estate newspaper publishing. The respondents deny that the *Real Estate Weekly* can exercise any market power since its existence is dependent on the goodwill of the real estate

¹⁵⁰ Argument on behalf of the Respondents at para. 260.

sales community that is easily capable of acting as a unit to establish or support a new publication.

While the respondents pleaded that cable television was part of the relevant market, in final argument they did not take exception to the Director's position that it is not a close substitute for print real estate advertising. Indeed, there is no question that realtors spend relatively little on cable television and regard it as having limited effectiveness.

A. Background

The *Real Estate Weekly* is a publication that is apparently unique to the Lower Mainland of British Columbia. It consists of 14 zoned editions of exclusively real estate advertising without editorial content, apart from the front page. Advertisements are only accepted from licensed realtors and, under certain conditions, real estate developers. Copies are distributed to individual homes in each zone. In fact, the *Real Estate Weekly* is distributed along with the Now/Times community newspapers in several areas outside Vancouver.¹⁵¹ In addition to home distribution, a number of copies, including those from other zones, are delivered to real estate offices throughout the Lower Mainland.

¹⁵¹ Examination for discovery of J. Collison, vol. 1 at Q. 444-54 (Exhibit A-81). Except for the North Shore, this was also the case prior to the acquisitions by Southam. John Collison is the publisher of the *Real Estate Weekly*. He was not called to give *viva voce* evidence but was one of the representatives of the respondents during examination for discovery. Excerpts from that discovery form part of the record.

Publications devoted to real estate advertising are published by real estate boards in several cities. The *Real Estate Weekly* differs from these publications in that it is a private, for-profit publication divided into a relatively large number of zoned editions that are delivered to the home.

The *Real Estate Weekly* was formed on the North Shore in 1975. Several realtors that were dissatisfied with existing options approached Jack Maitland, a local printer and publisher, with the idea of starting a new publication that would better meet their needs. Mr. Maitland followed up this initiative with some market research of his own which ultimately led to the first edition of the *Real Estate Weekly*. Initially it was delivered by mail; subsequently, other arrangements were made for direct home delivery.

Prior to the debut of the *Real Estate Weekly*, the principal real estate advertising vehicle on the North Shore was the *Sun* and, to some extent, the *North Shore Citizen*. The advertising of North Shore realtors very quickly flowed out of the *Sun* to the *Real Estate Weekly*. The *North Shore News* started publishing a real estate section within a few years of the *Real Estate Weekly*. While the exact date is unclear, it was apparently in existence by 1978 or 1979.

A second edition of the *Real Estate Weekly* was started on the West Side of Vancouver in 1978. The exact date in 1978, relative to the Pacific Press strike of 1978-79, is not in evidence. Following the strike of 1978-79, NRS Block

Brothers Realty Ltd. ("NRS"), one of the larger companies in the Lower Mainland, was practically only in the *Real Estate Weekly*.¹⁵² It is unlikely that this was atypical. Three other editions were launched prior to 1985: Burnaby/east Vancouver, Langley/Surrey, and Maple Ridge/Coquitlam/New Westminster. Exact dates are again unavailable.

Madison acquired the *Real Estate Weekly* in 1985. At the time of the purchase it consisted of five editions and plans were already in place for the imminent launch of an edition in Richmond.¹⁵³ In the four years following the acquisition, the *Real Estate Weekly* went from six editions (including Richmond) to fourteen. Several new editions were started and existing editions were subdivided. Two of the early editions were divided into two and the third into three.¹⁵⁴ The current 14 editions and their per page cost are shown in Table 11.

¹⁵² Transcript at 2388-89 (30 September 1991).

¹⁵³ Examination for discovery of J. Collison, vol. 1 at Q. 117 (Exhibit A-81).

¹⁵⁴ *Ibid.* at Q. 110-20. New editions: Abbotsford (1986), Mission (1986), Chilliwack (1987), Tsawwassen-Ladner (1988). Subdivisions of original editions: Surrey and Langley (1986), Burnaby and east Vancouver (1989), Coquitlam, New Westminster and Maple Ridge (1989).

TABLE 11

**Real Estate Weekly: Cost of a Full Page
Advertisement, By Zoned Edition**

<u>Area</u>	<u>Full Page</u>
Chilliwack	\$ 405
Abbotsford	305
Langley	455
Surrey	565
(Langley/Surrey)	695
Mission	305
Maple Ridge	455
(Mission/Maple Ridge)	n/a
Coquitlam, POCO, Pt. Moody	530
(Maple Ridge/Coquitlam)	650
Burnaby	590
(Maple Ridge/Coquitlam/Burnaby)	840
(Coquitlam/Burnaby)	775
New Westminster	535
Eastside Vancouver	690
(Burnaby/Eastside)	810
Tsawwassen, Ladner	265
Richmond	455
Westside Vancouver	615
North Shore	515

Source: Real Estate Weekly Rate Schedule, effective 10 August 1990 (Exhibit A-42).

With a few exceptions, "combination buy" discounts are offered when the same advertisement is placed in editions of the *Real Estate Weekly* in contiguous areas. The combinations of communities for which discounts are offered have changed in the last few years. In 1987, after Chilliwack, Abbotsford and Mission were added and Langley and Surrey were split, various two-, three-, and a single four-paper discount were offered. Apart from the Langley/Surrey combination, which was one of the early editions, these choices disappeared in 1988. The reasons for these shifts are not in evidence. They are mentioned in order to give perspective to Table 11, which appears to reflect divisions and combinations of editions in effect from 1989.

Apart from its growth, overall and in the number of editions, two events stand out in the history of the *Real Estate Weekly* since it was acquired by Madison. These were attempts by several realtors to start new publications. In the view of the Tribunal, these events can only be understood in relation to the changes that were and are occurring in the residential real estate industry.

B. Lower Mainland Real Estate Industry

Until recently the standard relationship between a real estate agent and a real estate company was one in which the agent and the company shared the commission earned on the sale of property and the company assumed responsibility for office expenses and advertising. A 50/50 split of the

commission and 4-5% allocation for advertising listed properties is a representative arrangement. Currently (and it may have been the case in the past), the commission split changes in favour of the agent in line with larger commission earnings. A company operating on this type of system is referred to in these reasons as a "traditional" company.

Non-traditional arrangements are, however, becoming more common. Commission earnings as well as responsibility for office expenses and advertising have shifted to the agent. In so-called "100 per cent houses" the agent receives 100% of the commission, pays for office space and makes a set monetary payment to the company upon the sale of a property. The growth of these non-traditional companies was described by witnesses as very rapid. Frank Stanhope, Manager of Sutton Group - West Coast Realty in North Vancouver, guessed that in 1991 commissions were not split in about one-third of offices, as compared to about 5% in 1985. In the franchises of the Sutton Group the agents keep 100% of the commission; they simply "rent their desk" from the company. Joseph B. Pearson, Senior Vice President of the Brokerage Division of NRS, was of the view that at least 35-40% of all agents in the Lower Mainland now rent their desks, in contrast to about 20% in 1986.

These estimates do not include those agents in "hybrid" houses who pay for their own advertising. NRS is an example of a hybrid house. It has a split commission arrangement with its agents that at lower levels of commission

earnings resembles that of a traditional house. At high levels of commission earnings the split is 80/20 in favour of the agent who also takes responsibility for advertising, similar to a 100 per cent house. Mr. Pearson estimated that at any one time about one-third of the agents with NRS pay for their own advertising.

The newer, non-traditional relationship between agent and company originated with companies in east Vancouver, according to Mr. Pearson. He estimates that approximately 90% of the licensees in this part of Vancouver are with 100 per cent companies. In contrast, the corresponding percentage on the West Side was stated to be in the range of 25-30%.

Not only have the 100 per cent companies enjoyed a rapidly increasing share of the market, they also occupy the ranks of the largest companies. Gerald W. Jackman, Senior Vice President for Western Canada for Royal LePage R.E. Services Ltd. ("Royal LePage"), ranked the largest companies by sales in the Lower Mainland as: Sutton Group, Re/Max, Royal LePage (a close third) and NRS (a distant fourth), with a sharp decline after NRS.¹⁵⁵ Both Sutton Group and Re/Max are 100 per cent companies. Three of the top four companies in the Lower Mainland are represented in the top six North Shore companies: Sutton

¹⁵⁵ The value of properties multiple-listed with the Real Estate Board of Greater Vancouver and the Fraser Valley Real Estate Board and sold by each real estate office is public information. Multiple-listed properties account for the vast majority of sales through real estate companies. This information has been filed in evidence (Exhibits A-54 and A-56). It clearly confirms Mr. Jackman's summary. In the first seven months of 1991 the top four companies in the Greater Vancouver Board were Sutton Group, Re/Max, Royal LePage, NRS. Two other companies that produced large total sales were Canada Trust Realty Inc. and Realty World. The order is somewhat different in the Fraser Valley Board (Re/Max, NRS, Sutton Group and Royal LePage) but since the volumes are much lower the combined totals for the two boards still conform to Mr. Jackman's ranking.

Group is first, Re/Max is third and Royal LePage is fifth. Canada Trust Realty Inc. is sixth.¹⁵⁶ Evidently, 100 per cent companies are strong, both on the North Shore and generally throughout the Lower Mainland. This evidence illustrates another important feature of the industry -- the uneven distribution of company strength community by community. The other two companies among the top six on the North Shore are primarily strong in that area.

C. The Relevant Market

(1) Older Homes

The advertising of homes for resale has a dual purpose. One, of course, is as an aid in selling the property. The other is to obtain additional listings for the agent. Under some arrangements the listing agent receives one-half the commission even when the property is sold by someone else. Research commissioned by Royal LePage reveals that each objective is best accomplished by a different kind of advertisement. Purchasers rank a picture of the property last of four types of information provided by advertising -- after location, price and a description of the property.¹⁵⁷ Vendors, on the other hand, rank highly the promise of a picture in the advertising of their properties. Since vendors generate

¹⁵⁶ Exhibit A-45. Ranked by multiple-listed dollar values.

¹⁵⁷ Exhibit A-67.

listings, the witnesses who discussed the topic agreed that a picture is important to agents.

Pictures of agents have also become a regular part of advertisements for older homes. When the *Real Estate Weekly* began publishing on the North Shore it had a policy of not allowing pictures of agents. This policy obviously reflected the wishes of the real estate companies which were at that time more or less exclusively traditional houses that paid for all advertising. When the *North Shore News* set out to attract this advertising it placed no such restrictions. After several years the *Real Estate Weekly* altered its policy and permitted pictures of agents in all zones except the West Side, where the traditional companies evidently were sufficiently strong to maintain the restriction.

One of the great strengths of the *Real Estate Weekly* vis-à-vis the *Sun* is that as a result of zoning its prices are low enough to allow agents and companies to use pictures of resale properties and, less frequently, of the agent. Except in the case of very expensive properties this is simply out of the question in the *Sun*.

Additionally, the majority of purchasers of North Shore homes already live on the North Shore. The North Shore edition of the *Real Estate Weekly* effectively addresses these potential purchasers without wastage. The profile of purchasers in other areas is not as clear. Mr. Pearson stressed the mobility of home buyers, particularly movement into the Fraser Valley from other parts of the

Lower Mainland and into the Lower Mainland from out of province. Mr. Jackman referred to movement from the city core to the suburbs and vice versa.

The companies represented at the hearing use the *Sun* sparingly and for specialized purposes: to announce open houses or to attract out-of-town buyers. NRS, a large traditional company, buys several pages for announcements of open houses. Even so, its expenditures in the *Sun* accounted for only about 12% of its newspaper advertising for its corporate offices in the Lower Mainland in 1991.¹⁵⁸

The only evidence of extensive use of the *Sun* is by Royal LePage, on an experimental basis in the first half of 1990. Royal LePage advertised all its new listings and open houses weekly in approximately two broadsheet pages in the real estate section. Once a month all current listings, open houses and an institutional advertising component were included in 16 tabloid-size pages inserted in the real estate section. The programme was to run all year but was discontinued as a result of the weak real estate market.

Royal LePage commenced the experiment with the *Sun* because of its dissatisfaction with the *Real Estate Weekly*. Mr. Jackman stated that advertising in the *Real Estate Weekly*'s numerous editions diluted the impact of Royal LePage's overall strength in the Lower Mainland and that it was not an easy paper for

¹⁵⁸ Transcript at 2384 (30 September 1991). The remaining corporate newspaper advertising was in the *Real Estate Weekly*. NRS franchises advertise independently. In the Lower Mainland, NRS has 15 corporate offices (Exhibit A-36).

potential buyers to read. The advertisements in the *Sun* attempted to distinguish Royal LePage from its competitors and to provide potential buyers with the information they wanted -- location and price. Listings and open houses were grouped by area. Pictures were rarely used. The advertisements resulted in a significant increase in recognition by the public of Royal LePage advertising, from 6% to 18%.¹⁵⁹ A new foray into the *Sun* is in the offing.

Throughout the programme in the *Sun*, Royal LePage continued to advertise in the *Real Estate Weekly*. At least during the period in question advertising in the *Sun* was not regarded as a substitute for the *Real Estate Weekly*.

The evidence with regard to the extent to which the community newspapers, other than on the North Shore, and the *Real Estate Weekly* are substitutes is almost non-existent. According to Mr. Grippo, there is a real estate section in each of *The Burnaby News*, *The New West News*, *The Tri-City News* and *The Maple Ridge/Pitt Meadows News*. All are MetroValley papers. The real estate section may be the same in all four papers, which publish a joint Sunday edition. *The [Abbotsford/Clearbrook/Matsqui/Mission/ Aldergrove] News* and possibly the *Langley Advance* also have real estate sections.¹⁶⁰ All the real estate witnesses with close day-to-day contact with agents represented offices on the North Shore. The Tribunal is satisfied that the *North Shore News* and the *Real*

¹⁵⁹ Transcript at 3171 (7 October 1991). Royal LePage hired a local market research group to conduct a telephone survey.

¹⁶⁰ Exhibit R-26; confidential transcript at 198-202 (16 October 1991). In the case of *The [Abbotsford/Clearbrook/Matsqui/Mission/Aldergrove] News*, the real estate section is a separate publication.

Estate Weekly are substitutes. Although realtors use other community newspapers, there was no indication that they regard them as close substitutes for the *Real Estate Weekly*.

Pictures of properties and of agents are more important in obtaining listings than in selling properties. Advertisements with pictures are affordable in the *Real Estate Weekly* and are clearly not affordable in the *Sun*. Smaller companies and single offices acting alone are only able to make use of the *Sun* occasionally and in limited volume. Larger, traditional companies, such as Royal LePage, may be able to make extensive use of the *Sun* by combining the resources of all their branches. But even when the *Sun* is used, it does not appear to be a good substitute for the zoned editions of the *Real Estate Weekly*. Royal LePage's advertising in the *Real Estate Weekly* was not curtailed when the *Sun* advertising programme was underway. There is also no evidence that advertising in the *Real Estate Weekly* was affected in any way when the experiment in the *Sun* was discontinued.

Community newspapers are more likely to be a closer substitute to the *Real Estate Weekly*, if they have managed to obtain a critical mass of real estate advertising. The evidence is too limited to reach any positive conclusions that this has occurred anywhere outside the North Shore.

(2) New Homes

The demand for the advertising of new homes is decidedly different from that for older homes. New homes tend to be located in developments, often of very large size. As far as the Tribunal can discern, the advertising requirements of developers of large-scale condominium or single-family home projects are similar to those of high-reach retailers and unlike those of real estate agents or real estate offices. Attracting new listings is not an issue; the only concern is attracting purchasers. The sheer size of the developments means that the developers have to draw from a large area in order to sell all the units.

Although only one witness representing a developer was called by the Director, there is no reason to believe that her company is not representative. No argument to this effect has been made. Eileen Doole is the Marketing Manager for Bosa Development Corporation ("Bosa"), one of the five largest developers in the Lower Mainland. At the time that Ms. Doole gave evidence, Bosa was in the process of selling condominiums in two large developments -- one on the east side of False Creek in Vancouver (the first two buildings of seven that are planned) and the other in New Westminster.

At one time the *Real Estate Weekly* did not allow developers to advertise. That policy was subsequently modified. Developers may advertise in the *Real Estate Weekly* if the advertisement indicates that a commission will be paid to agents who locate purchasers. The more permissive policy does not apply to the

West Side edition, according to Ms. Doole.¹⁶¹ The *Sun* does not have a similar requirement. For Bosa, however, this does not appear to be a significant difference; it advertises the same developments in both publications.

During the first nine months of 1991, Bosa spent \$65,000 in the *Sun*, mainly in the new homes section, and \$25,000 in the *Real Estate Weekly*. Radio was a close third at \$20,000. Bosa also spent \$5,000 on Chinese language newspapers, \$8,000 on magazines, \$2,000 on community newspapers and \$5,000 on cable television.¹⁶²

When projects are being actively marketed, Bosa does some advertising every week. Often the *Real Estate Weekly* and the *Sun* are used in alternate weeks. Bosa carefully tracks the source of information of anyone who comes to a display suite or a sales office at a project. The company has a very good idea which types of advertising attract potential clients. Ms. Doole described the *Sun* as expensive but effective in generating traffic. People interested in a new home or condominium are aware of the new homes section in the *Sun*. She considered the zoned editions of the *Real Estate Weekly* useful for targeting certain audiences. Bosa typically uses several editions to advertise a project. For the New Westminster project, Ms. Doole advertised in the Burnaby, east Vancouver, Coquitlam and New Westminister editions. For the False Creek development, the

¹⁶¹ See also the examination for discovery of J. Collison, vol. 1 at Q. 198-207 (Exhibit A-81). Ms. Doole stated that her firm advertises one of their developments in the West Side edition. She did not explain, nor was she asked to explain, how she did this in light of the restriction.

¹⁶² Exhibit A-70.

editions used were east Vancouver, the West Side, Richmond and sometimes Burnaby and the North Shore.

The cost in the new homes section of the zoned *Real Estate Weekly* of a full (tabloid) page advertisement (larger than that taken out by Bosa) for the New Westminster development, after a four-paper discount, would be \$1642.¹⁶³ The same would apply for the False Creek development if the editions on the North Shore and in Burnaby are assumed to be used alternately. The cost of the equivalent of a tabloid page (one-half of a broadsheet page) in the *Sun* would be about \$3,700.¹⁶⁴

Ms. Doole also commented on a new publication started by the *Real Estate Weekly* that is devoted to the advertising of new homes. *New Homes and Developments* is a bi-weekly publication that made its first appearance the week before Ms. Doole testified.¹⁶⁵ It differs in fundamental respects from the *Real Estate Weekly*: it is neither zoned nor delivered door-to-door. Rather, the 30,000 copies are distributed to real estate offices along with the zoned Friday editions of the *Real Estate Weekly* and to newsstands and convenience stores. This method of distribution is similar (apart from the real estate offices) to that used for other

¹⁶³ Exhibit A-42. This rate is calculated from the *Real Estate Weekly* 1990 base rates for the four zones (Burnaby, east Vancouver, Coquitlam, New Westminister) with the new homes discount.

¹⁶⁴ Joint Book of Documents, vol. 2D, tab 44 (Exhibit 2D-44). Based on a contract for a half page 13 times per year. Increased frequency yields a lower price per advertisement. The rates are taken from the *Sun's* New Homes Section - Discount Plan, effective January 1991.

¹⁶⁵ It was launched on Friday, October 4, 1991. Ms. Doole testified on Wednesday, October 8, 1991.

specialty newspapers such as *The Georgia Straight*. Ms. Doole had expressed misgivings about the proposed method of distribution when she was approached about the new publication prior to its launch. Nevertheless, her firm placed advertisements in the first edition. She was disappointed with the response for one of Bosa's developments which was new and therefore expected to generate more interest. She thought that the response might improve once the publication became better known. The price of a full page advertisement in the new publication alone is \$850. If the advertisement is also placed in one or more zoned editions, discounts apply.¹⁶⁶

The Tribunal is satisfied that advertisers of new homes are a distinct group. The evidence also indicates that their treatment by the *Sun* and the *Real Estate Weekly* distinguishes them from other real estate advertisers. The *Sun* has a new homes section with rates that apply specifically to it. The *Real Estate Weekly* not only has a specific policy regarding advertising by developers but a different discount structure for new homes advertising as well. The launch of the new publication further confirms that the advertising of new homes represents a separate market.

(3) Conclusion

¹⁶⁶ Exhibit A-71 at 2.

Are the *Sun* and the *Real Estate Weekly* close substitutes for print real estate advertising? The evidence relating to the older homes segment of the alleged market clearly indicates that they are not. The advertising of new homes differs in fundamental ways from that of older homes and the evidence respecting this segment supports a different conclusion. The *Sun* and the zoned editions of the *Real Estate Weekly* are the closest available substitutes for the advertising of new homes; no other vehicle is equally close to either. They are probably as close substitutes as one can expect such differentiated products to be. Even though there is no direct evidence regarding the likely effects of price changes on expenditures in either vehicle, the indirect evidence favours this conclusion. Advertising of developments is directed at a wide geographic audience and can effectively be placed in the *Sun*, which clearly provides broad coverage, or the *Real Estate Weekly*, by using a combination of zones to achieve the same result. There is no evidence that an appreciable percentage of the new homes advertising in the *Real Estate Weekly* was placed by smaller developers that limit their advertisements to one or two zoned editions.

The Director, however, has grouped both segments together in his allegations. No evidence has been tendered to show that the advertising of new homes forms the larger or even a substantial part of the alleged market for print real estate advertising services. In fact, the impression created by the totality of the evidence is that the reverse is probably true.

D. Entry into Real Estate Newspaper Publishing

It is only on the North Shore, where the *North Shore News* and the *Real Estate Weekly* are in the same market, that the Director might be able to show a likely substantial lessening or prevention of competition. The probability of the acquisitions having such an effect depends in large measure on the relative difficulty of entry into the real estate newspaper market. The respondents, naturally, contend that entry is easy, while the Director argues that it is difficult enough to permit a substantial lessening of competition.

As in the case of community newspaper publishing, there are both sunk costs and economies of scale involved in the publishing of a real estate newspaper. There is a major difference, however, between community newspapers and the *Real Estate Weekly* and *New Homes and Developments* -- the real estate newspapers do not contain any significant editorial content. Thus, a new publication would not have to develop the editorial aspect in order to begin to establish credibility with advertisers, which eliminates an important class of expenditures. It does not, however, change the fact that the publication must establish credibility. For a real estate publication, establishing credibility involves attracting numerous individual agents. The agents have a strong voice in where advertising is placed, whether they pay for it themselves or merely want to ensure that the monies coming out of their allocations are well spent. When a specialized United States-based real estate publication attempted to enter the market in 1989,

it first approached Mr. Jackman at the head office of Royal LePage, a traditional company. When he declined to advertise with the publication, it then offered free advertising to the branches, which Mr. Jackman believed most accepted. (The publication withdrew after six or eight weeks.)

The experiences regarding new entry drawn on by the parties throw light on the importance of sunk costs. In arguing that the industry would create its own publication or support a new one in the event that the *Real Estate Weekly* tried to increase its rates, the respondents are saying that sunk costs and risk are very low. The respondents have relied on evidence relating to the North Shore and Richmond to show that real estate advertisers can quickly move their real estate advertising from one publication to another. They argue that entrants can rapidly become established and that incumbents have to be careful to satisfy the needs of their customers.

The first example was provided by Mr. Cardwell from his experiences at the *North Shore News*, which date from 1978 to January 1982. Mr. Cardwell described how the publisher of the *Real Estate Weekly* complained on at least two separate occasions that the *North Shore News* was taking too much of its real estate advertising. The realtors responded by transferring most of their advertising in the *North Shore News* to the *Real Estate Weekly*. On each occasion the *North Shore News* then had to rebuild its real estate business.¹⁶⁷ Mr. Cardwell's

¹⁶⁷ Transcript at 668-69 (12 September 1991).

recollection was not confirmed by Charles Mitten, President of Mitten Realty Ltd., who has been a realtor on the North Shore for many years. Mr. Mitten answered "No" when counsel for the respondents asked him:

We have heard that after the Real Estate Weekly started on the North Shore that the North Shore News a couple of times was able to build up a section for a time, only to lose most of it again back to the REW. Do you recall that at all?¹⁶⁸

Even more important than the differences between Mr. Mitten and Mr. Cardwell is the timing of the incidents. If they occurred at all, it was prior to 1982 when the structure of the industry was very different from the present.

¹⁶⁸ Transcript at 2674 (2 October 1991).

With respect to events in Richmond, Arnold Schepel, Vice President of Advertising for NRS, agreed that most of the real estate advertising that had been with *The Richmond Review* moved in the early 1980s to a new real estate publication, the *Real Estate News*. He further agreed that "in about 1985 the Real Estate Weekly went into Richmond, and most of the advertising, or virtually all of it, moved out of The Real Estate News and into the Real Estate Weekly."¹⁶⁹ This evidence reinforces what is already known about realtors (or any other advertisers). They will move their advertising if they have reason to do so. The problem is to identify those reasons. When the *Real Estate Weekly* was introduced it met the needs of realtors better than the dailies and the changeover was rapid. Nothing is known about the Richmond publication that converted the realtors from *The Richmond Review* -- the product or the pricing. Moreover, as with the North Shore, there have been major changes in the industry structure since 1985 as previously discussed. Neither example provides convincing evidence of the current ability of the real estate community to quickly transfer en masse to a new publication.

There is evidence that since the advent of the *Real Estate Weekly* there have been two main attempts at entry into real estate publishing. The first occurred in 1985 on the West Side. None of the witnesses had first-hand knowledge of the events and the factors motivating the decision, first, to start a publication and, later, to abandon it.

¹⁶⁹ Transcript at 2538 (1 October 1991).

As far as can be inferred from the sketchy evidence, this was an attempt by the traditional companies to organize a publication that they would own and control. The attempt was abandoned because, apparently, some of the companies involved became aware that their proposed policy of excluding certain 100 per cent companies would contravene the competition legislation. Mr. Schepel, who became involved in the project partway through, thought another consideration in the decision to abandon it was that the *Real Estate Weekly* initiated a \$35 discount simply for appearing in the West Side edition. Even if NRS received such a discount, it is not known if any other companies benefited from it. A letter dated October 1985 from *Real Estate Weekly* management to various realtors regarding changes to the West Side edition does not mention this discount.¹⁷⁰ It does list a combined typed copy/prompt payment discount of \$40, which Mr. Collison said he implemented on the West Side in the fall of 1985 because the proposed paper would have required both from its advertisers.¹⁷¹

The letter mentions several other modifications which might represent concessions to the realtors. The distribution of the West Side edition was modified, presumably to cover the same area as the proposed new publication. The discontinuance of deliveries to the West End also resulted in savings to the *Real Estate Weekly* and was, in fact, motivated at least in part by that consideration.¹⁷²

The other changes: advertising for developments would no longer be accepted

¹⁷⁰ Joint Book of Documents, vol. 5A, tab 13 (Exhibit 5A-13).

¹⁷¹ Examination for discovery of J. Collison, vol. 1 at Q. 90 (Exhibit A-81).

¹⁷² *Ibid.* at Q. 115.

unless submitted by a licensed realtor; only non-real estate flyers would be distributed with the *Real Estate Weekly*; the edition would be limited to 56 pages. A list of discounts follows. The discounts referred to are the typed copy/prompt payment discount, a "56-page paper" discount¹⁷³ and the existing corporate (volume) discount, which is reconfirmed. It is not clear that any of these were new discounts; obviously the corporate discount was not.

A second attempt at entry, in 1989, was led by Royal LePage, NRS, Canada Trust Realty Inc. and Montreal Trust Co. of Canada. Messrs. Schepel and Pearson were directly involved in this initiative on behalf of NRS, as was Mr. Jackman on behalf of Royal LePage.

According to Mr. Pearson, the group had considered starting only a West Side paper but thought that this would give the *Real Estate Weekly* the opportunity to cut prices selectively in that zone. It is clear that a West Side edition alone would not have met the concern of NRS and Royal LePage about the number of editions being published by the *Real Estate Weekly*. As the number of editions of the *Real Estate Weekly* increased, the distribution of each narrowed. To expose a property in several areas, more editions had to be purchased. According to Mr. Jackman, this increased his advertising costs. Mr. Pearson agreed that fewer editions would mean savings. While Mr. Pearson's preference would have been a

¹⁷³ This discount is not described in the letter.

single edition covering the entire Lower Mainland, the planned publication, to be called "Home and Realty", was to have had seven editions.

When Mr. Jackman was asked whether the initiative was driven by pricing issues, he responded that it was about both pricing *and* control. He stated that while Royal LePage had always supported the *Real Estate Weekly* and was one of its larger advertisers, the *Real Estate Weekly* had been indifferent to his company's concerns. The other planned features of Home and Realty were the elimination of agents' pictures from advertisements¹⁷⁴ and the standardization of advertisements with regard to size and format.¹⁷⁵ The paper was to run on a non-profit, cost recovery basis. There were to be no discounts from published rates available to anyone.¹⁷⁶

Apart from any dissatisfaction that NRS might have felt with the *Real Estate Weekly*, it had another reason to participate in the project. It had excess computer capacity that it hoped to use in the production of Home and Realty. According to Mr. Pearson, although there was general dissatisfaction in the industry with the pricing, service and number of editions of the *Real Estate Weekly*, the primary impetus in getting the project underway was a former employee of the *Real Estate Weekly*.

¹⁷⁴ Pictures of agents would be allowed to promote top salespersons, announce promotions or new employees, etc.

¹⁷⁵ For materials regarding the proposed publication, see Joint Book of Documents, vol. 5A, tab 3 (Exhibit 5A-3).

¹⁷⁶ Transcript at 2479 (1 October 1991).

The four founding companies sent a letter outlining the Home and Realty project to a number of companies and invited them to a breakfast meeting. At the meeting three or four additional companies expressed interest in participating, apparently the high-water mark of the project. Later, two of the sponsoring companies withdrew, leaving only Royal LePage and NRS. If the publication had successfully been established, NRS and Royal LePage hoped to eventually turn it over to the Real Estate Board of Greater Vancouver.

Mr. Jackman stated that the organizers had concluded they would need support from at least 50% of the realtors in each of the seven proposed zones (based on pages advertised). The four original companies provided between 15-35% in each area. They were hoping to pick up the next largest advertisers in each area to make up the balance.¹⁷⁷ Mr. Schepel said that commitments of the four founders amounted to 100 to 120 pages of the 300 that had been planned for the weekly combined editions.¹⁷⁸

Mr. Jackman concluded that the project foundered mainly because of a lack of trust in the industry that was contributed to by the *Real Estate Weekly*. The remaining realtors were suspicious of the impartiality of a non-profit paper run by four of the larger real estate companies. In October 1989 the *Real Estate Weekly* circulated a letter to all *Real Estate Weekly* customers that cleverly played on the

¹⁷⁷ Transcript at 3184, 3227 (7 October 1991).

¹⁷⁸ Transcript at 2484 (1 October 1991). The *Real Estate Weekly* currently publishes 600 to 700 pages per week. This total and the planned total for Home and Realty cannot be compared since the effect of the proposed changes in format and the resultant number of advertisements appearing on a page are not known.

divisions in the industry and on concerns that recipients might have about the organizers and their agenda. The letter refers in a less than veiled way to the previous attempt by real estate companies to start an alternate paper and to pursue policies that excluded "certain segments of the real estate industry."¹⁷⁹ The letter may not have been necessary. Judging by the other witnesses who appeared, all from the North Shore, the attitude to Home and Realty was very much one of "wait and see".

The principal targets of this letter were presumably traditional and hybrid companies. Mr. Jackman pointed out that the 100 per cent companies benefit from corporate (volume) discounts from the *Real Estate Weekly* that they do not pass on to their agents, which were not available with the breakeven rate structure of Home and Realty.¹⁸⁰ In any event, it is unclear how they could have supported the effort or what their support would have meant. The agents with these companies pay for their own advertisements and choose where they will appear. For example, the agents from the Sutton Group and Crest Realty Ltd. on the North Shore, who control and pay for their own advertising, advertised primarily in the *North Shore News* in 1991.¹⁸¹ Unlike the case of NRS, which chose in December 1990 to switch all its advertising to the *Real Estate Weekly* on the North Shore, 100 per cent companies have no power to make such a decision. But, as Mr. Pearson makes

¹⁷⁹ Joint Book of Documents, vol. 5A, tab 4 at 2 (Exhibit 5A-4).

¹⁸⁰ Mr. Stanhope confirmed that the volume discount provided by the *Real Estate Weekly* to the Sutton Group is not passed on to agents.

¹⁸¹ Exhibit A-48 and Exhibit A-50.

clear, the wishes of agents are seriously considered in all companies; agents are the companies' "only assets".¹⁸²

The letter from the *Real Estate Weekly* also discusses problems with publications run by the real estate boards in other cities; these were cited with approval by the proponents of Home and Realty. One of the difficulties mentioned is the absence of home delivery. Also discussed were claimed weaknesses in the proposed method of production.

The major beneficiary of the attempt to organize Home and Realty appears to have been NRS, which requested and was granted an increased corporate discount after learning that it was not receiving as good a discount as it had been led to believe.¹⁸³ Mr. Jackman maintained that Royal LePage obtained no additional discounts.¹⁸⁴

More recently, the Greater Vancouver Real Estate Board decided to dedicate "an area of the proposed premises for future production of a newspaper".¹⁸⁵ (The Board is currently looking at building new offices.) Mr. Jackman had approached the Management Board, as distinct from the full

¹⁸² Transcript at 2766 (2 October 1991).

¹⁸³ Letter from J. Collison to J. Pearson d. 20 November 1989 re Home and Realty: Joint Book of Documents, vol. 5A, tab 7 (Exhibit 5A-7). See also transcript at 2805, 2811-12 (2 October 1991).

¹⁸⁴ Transcript at 3228 (7 October 1991).

¹⁸⁵ *Ibid.* at 3217.

Board of Directors, in 1989 to propose that the Board buy the planned new publication for \$1 once it was in operation. They turned him down mainly because the Board was "not in the publishing business".¹⁸⁶

A decision by the Board of Directors to start a real estate publication would have to be ratified at a general meeting by the "active members" of the Greater Vancouver Real Estate Board, who number approximately 2,000. The Board of Directors consists of 19 elected directors plus the Past President. Twelve are elected at large by the "active" members; the others are elected in seven geographic divisions by all 7,000 members voting in their respective divisions. There is no evidence on who qualifies as an "active" member.

The valuation placed by Southam on the *Real Estate Weekly* indicates that in its view entry is not easy but that it is far easier than into community newspaper publishing. The valuation reflects a higher downside risk. Nevertheless, Southam paid an appreciable amount for the goodwill of the *Real Estate Weekly*. It must have had some confidence that the flow of profits would continue. Its assessment is probably a reasonable conclusion on the conditions of entry into the industry. Successful entry does not depend on appealing to a small number of actors with

¹⁸⁶ *Ibid.* at 3185. ¹⁸³ Letter from J. Collison to J. Pearson d. 20 November 1989 re Home and Realty: Joint Book of Documents, vol. 5A, tab 7 (Exhibit 5A-7). See also transcript at 2805, 2811-12 (2 October 1991).

¹⁸⁴ Transcript at 3228 (7 October 1991).

¹⁸⁵ *Ibid.* at 3217.

¹⁸⁶ *Ibid.* at 3185.

relatively common interests. To succeed, many agents must be convinced that advertising in a new publication will effectively reach their target audience. There is no convincing evidence that this can be done without significant risk and investment.

E. Prevent or Lessen Competition Substantially

On the North Shore the acquisitions have resulted in the elimination of all existing competition. The Tribunal is instructed to consider the factors listed in section 93 of the Act when evaluating the effect or likely effect of a merger or acquisition on competition. There are no other acceptable substitutes for print real estate advertising; whether one focuses on the *North Shore News* or the *Real Estate Weekly*, an effective competitor has been eliminated; and there is no effective competition remaining. This brief statement captures paragraphs 93 (c), (e) and (f). Of the remaining factors mentioned in section 93, only barriers to entry are relevant. As the review of the evidence demonstrates, this is where the parties placed their emphasis. In the light of the fact that all the other relevant elements clearly point to a substantial lessening of competition, the question is whether entry barriers are sufficiently low that actual entry or the threat of entry can be relied on to conclude that the acquisitions have not lessened competition substantially and are not likely to do so.

The mixed picture of entry conditions already reviewed hardly supports such a conclusion. The most formidable threat of entry would be by the Real Estate Board. The evidence does not indicate that it is a poised entrant. Given the strong divisions in the industry it is difficult to know what it would take for effective joint action that was acceptable to a majority of Board members. Furthermore, the fact that the North Shore constitutes only a part of the territory covered by the Vancouver Board makes its direct involvement there highly unlikely unless there is a more widespread problem. For all these reasons, there is likely to be a substantial lessening of competition in the print real estate advertising market on the North Shore.

XII. ORDER

Both counsel for the Director and for the respondents have requested that, in the event that the Tribunal reaches a decision on the substantive issues that is adverse to the respondents, a special hearing be convened to consider possible remedies. Given that the Tribunal has found in favour of the Director only with respect to the print real estate market on the North Shore, this request is particularly appropriate. 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.

FOR THESE REASONS, THE TRIBUNAL HEREBY ORDERS THAT counsel for both parties re-attend at a time convenient to counsel and members of the Tribunal to submit evidence and argument on the appropriate remedy given the findings of the Tribunal with respect to the print real estate advertising market on the North Shore.

DATED at Ottawa, this 2nd day of June, 1992.

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

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