Competition Tribunal | Tribunal de la Concurrence

CT - 1990 / 001 – Doc # 46

IN THE MATTER of an application by the Director of Investigation and Research for orders pursuant to section 92 of the *Competition Act*, R.S.C., 1985, c. C-34, as amended;

AND IN THE MATTER of the direct and indirect acquisitions by Southam Inc. of equity interests in the businesses of publishing The Vancouver Courier, the North Shore News and the Real Estate Weekly

B E T W E E N:

The Director of Investigation and Research

Applicant

and

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

Respondents

REASONS FOR CONSENT INTERIM ORDER DATED MARCH 18, 1991

Date of Hearing:

March 7, 1991

Presiding Member:

The Honourable Mr. Justice Max M. Teitelbaum

Counsel for the Applicant:

Director of Research and Investigation

Stanley Wong
Mary L. Ruhl

Counsel for the Respondents:

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

Neil R. Finkelstein
Jay D. Kendry

COMPETITION TRIBUNAL

REASONS AND INTERIM ORDER

The Director of Investigation and Research

v.

Southam Inc. et al

On November 29, 1990, the Director of Investigation and Research filed a notice of application with the Competition Tribunal under section 92 of the *Competition Act*, R.S.C. 1985, c. C-34, as amended, asking the Tribunal to order Southam Inc. to divest certain publishing businesses that it had acquired in the Vancouver area. In broad terms, the Director alleges that the acquisitions have and will lessen competition substantially in the market for advertising services in that area. The Director has now applied to the Tribunal for an interim order pursuant to section 104, pending its final resolution of the case on the merits.

The interim order originally proposed by the Director was attached to the notice of application for an interim order as Appendix I. The interim order requested was against the respondents Southam Inc., Lower Mainland Publishing Ltd ("LMPL"), Rim Publishing Inc. ("Rim"), North Shore Free Press Ltd ("NSFP"), Speciality Publishers Inc. and Elty Publications Ltd ("Elty"). It excluded only the respondent Yellow Cedar Properties Ltd.

At the close of the hearing on March 7, 1991, I gave certain directives from the bench which resulted in the submission by counsel of a revised interim order on consent. It is the latter order which was issued by the Tribunal on March 18, 1991. The following are my reasons for the decisions that ultimately resulted in the approval of that consent interim order.

Principles for Granting Interlocutory or Injunctive Relief

Section 104 of the Act reads as follows:

> (1) Where an application has been made for an order under this Part, other than an interim order under section 100, the Tribunal, on application by the Director, may issue such interim order as it considers appropriate, having regard to the principles ordinarily considered by superior courts when granting interlocutory or injunctive relief.
>
> (2) An interim order issued under subsection (1) shall be on such terms, and shall have effect for such period of time, as the Tribunal considers necessary and sufficient to meet the circumstances of the case.
>
> (3) Where an interim order issued under subsection (1) is in effect, the Director shall proceed as expeditiously as possible to complete proceedings under this Part arising out of the conduct in respect of which the order was issued.

As stated in the notice of application for an interim order filed by the Director:

2. The grounds for this application are:

   a. there is a serious issue to be determined by the Competition Tribunal, that is, whether the acquisition by the Respondent Southam Inc. of direct and indirect control of, or, a significant interest in the businesses of publishing The Vancouver Courier, the North Shore News, and the Real Estate Weekly prevents or lessens, or is likely to prevent or lessen, competition substantially in relevant markets within the meaning of sections 91 and 92 of the Competition Act;

   b. irreparable harm will result if an interim order is not made and if as a result, the Respondents proceed to partially or fully implement the challenged acquisitions, the Tribunal's ability to remedy the effects of the acquisitions will be substantially impaired; and

   c. the balance of convenience favours the granting of an interim order, in that, the public interest in maintaining and encouraging competition outweighs any inconvenience or harm to the Respondents that may result.

In support of the application, the Director also filed two affidavits of André Brantz , sworn on March 4 and March 7, 1991, respectively, together with exhibits. Mr. Brantz is a public servant employed by the Government of Canada as a senior commerce officer on the staff of the Director.

In reply, the respondents filed the affidavit, with exhibits, of David Perks, an employee of Southam Inc. and publisher of *The Gazette* in the City of Montreal.

Pursuant to section 104 of the *Competition Act*, in considering an application for an interim order the Tribunal is to have regard to "the principles ordinarily considered by superior courts when granting interlocutory or injunctive relief." The parties do not disagree on the relevant principles for granting such relief. Neither disputes that the framework set out by the Supreme Court of Canada in *A.G. Manitoba v. Metropolitan Stores (MTS) Ltd.* is an appropriate starting point. In that case, Beetz J. outlined the three broad tests that govern injunctive relief: a preliminary assessment of the merits of the case of the party requesting the relief, the existence of irreparable harm to the interests of that party and an evaluation of the balance of convenience as between the parties[1].

I need do no more than quote Pinard J. in *Willem George Poolman v. Eiffel Productions S.A.* for a concise statement of what must be demonstrated to the court before an interlocutory (or interim) injunction will issue:

> In determining whether or not the Court should grant an interlocutory injunction, the plaintiff must convince the Court that there is a serious question to be tried. Once the plaintiff has satisfied this prerequisite, the granting of relief depends upon a consideration of other matters, including the threatened harm to the plaintiff which is not adequately compensable by way of damages, the relative effect of the injunction upon both parties, and the balance of convenience (see *Manitoba (A.G.) v. Metropolitan Stores Ltd.*, [1987] 1 S.C.R. 110; *American Cyanamid Co. v. Ethicon Ltd.*, [1975] A.C. 396; *Turbo Resources Ltd. v. Petro-Canada Inc.*, (1989), 24 C.P.R (3d) 1).

[1] [1987] 1 S.C.R. 110 at 127-29.

[2] (26 February 1991), T-196-91 at 2 (F.C.T.D.).

I will now consider each of these requirements as it relates to this case. It should be noted at the outset that counsel for the respondents indicated that he did not oppose the Director's position on the questions of a serious issue to be tried and irreparable harm to the applicant. The respondents are on the record with their agreement that, in principle, they had no objection to the issuance of an interim order. They did, however, vigorously oppose the issuance of the particular interim order originally proposed by the Director and attached to his notice of application for an interim order. Thus, the particular terms of the interim order became the focus of the argument or, in other words, the parties only joined issue over the question of the balance of convenience. I will briefly review the other two requirements merely to provide a context for the later discussion.

(a) Serious Issue

I do not intend to repeat here what the Director has alleged in his application to the Tribunal under section 92 of the Act. Having reviewed the documentation I am satisfied that there are serious issues to be tried. Surely no one can claim that the application of the Director is frivolous or vexatious. Whether the Director is correct in his conclusions and statements of fact is not a question to be determined at this time. The allegations in the notice of application raise serious issues with respect to the market influence resulting from the merger of Southam Inc. and the other respondents. The Director alleges that the remaining participants in the market may not be able to provide effective

competition and that the merged operations will be in a position to impose and sustain increased charges for advertising for a significant period of time.

(b) Irreparable Harm

The Director has no private interest in the present proceedings before the Tribunal. It is the public interest in maintaining and encouraging competition in Canada that he argues will be irreparably harmed in the absence of an interim order. He further argues that injury to the public interest may be caused by the lack of an adequate remedy should the Tribunal eventually order divestiture of the acquired businesses only to find that they were no longer viable, independent units and the harm to competition in the market in the meantime. The two are clearly linked; the more integrated and coordinated are the operations of the various publishers, the less they are actively competing in their markets.

Protecting divestiture as a valid remedial option will always be a strong impetus for interim relief in merger cases. The futility of attempting to "unscramble the eggs" upon a later finding that the merger will indeed likely lessen competition substantially is apparent. The legislative scheme attempts to guard against this eventuality by, for example, instituting a regime for pre-notification of some mergers and allowing the Director to apply for interim relief under sections 100 and 104.

(c) Balance of Convenience

The Tribunal must look to balancing the equities between the parties by canvassing the alternative forms of interim relief. If an interim order is to issue, it should be adequate to its purpose but not any more intrusive or restrictive than is absolutely necessary. The balancing operation cannot be an exact science since the relative degrees of harm or inconvenience are largely unquantifiable.

It is over the exact terms of the order, what is necessary and what is too onerous, that the parties join issue. The most contentious feature of the draft order originally submitted by the Director was the appointment by Rim, Elty and NSFP of an independent supervisor to monitor compliance with the remainder of the order by the managers of the publications owned by those companies. The supervisor would report to the Director any instances of non-compliance and he was also given the power to veto certain expenditures by the businesses (over $10,000). The remainder of the order implemented a hold separate arrangement; the individual businesses were to be maintained in a competitive, independent and separate state, current management was not to be altered and the exchange of confidential information was restricted.

The respondents objected that this arrangement was too onerous and was unnecessary to safeguard the public interest in preserving the businesses

as independent, competitive entities for divestiture. The businesses would be unduly impeded in their daily operations. Southam Inc. also argued that it was entitled to the means to monitor its substantial investment in these companies. The respondents thus proposed that an arrangement similar to the undertakings that were in place during the Director's investigation would be sufficient. Under that arrangement, Mr. Perks, the publisher of *The Gazette* supervised compliance with the terms of the hold separate and the respondents argued that he should continue in that supervisory capacity. The respondents also proposed that the current managements of both the *Vancouver Courier* and the *North Shore Free Press* be replaced by Messrs. Grippo and Aunger, who would jointly manage the two papers.

At the close of argument, I informed counsel that I was of the opinion that an interim order in the general form produced by the Director should issue, including the appointment of independent supervisors. I concluded that the balance of convenience weighed in favour of granting the request for independent supervisors. The following are my reasons for so concluding.

In the event that the Tribunal eventually orders a divestiture of some or all of the publishing businesses acquired by Southam Inc., there must still be something to be divested in order to remedy a substantial lessening of competition. How is this to be achieved? This is to be achieved only by ensuring that the three businesses, although owned directly or indirectly by Southam Inc.,

are kept and operated, to the fullest extent possible, separate from each other and separate from Southam.

It would not be sufficient, in my view, to simply order that the businesses be kept separate and apart. In the final analysis, all the persons involved work for the same company, Southam. I rejected the suggestion of the respondents that Mr. Perks should continue in the role of supervisor because it would place him, in my opinion, in an untenable situation. This is not to suggest that Mr. Perks would not make every effort to fulfill the obligations placed upon him in good faith. But, the fact remains that he is an employee of the Southam Group and, as publisher of one of its major newspapers, a high-ranking employee. He has also been involved in various aspects of the acquisitions in question and is a director of LMPL, NSFP and Rim. These companies own the publications which are to be held separate. It would be impossible for Mr. Perks to sufficiently divorce himself from the interests of the Southam Group, naturally his first loyalty, in order to adequately police compliance with an interim order of this nature.

These observations with respect to Mr. Perks apply in some degree to all of the employees directly involved with these publications. Extra measures are required to ensure that the businesses are indeed operated independently. I am satisfied that the appointment of a supervisor to supervise the management of

each business will ensure that the existing managements effectively carry on the businesses as if they were not part of the Southam empire, to the extent possible.

In the course of my remarks, I also informed counsel, however, that since the supervisors were to report any breach of the interim order to the Director, they should be paid by the Director and not by the respondents.

I indicated as well that the independent supervisor should only supervise and not interfere in any way with the operation of the businesses. Counsel for the Director described the supervisor as a "sort of watchdog". His sole function is to ensure that none of the three newspapers "cooperate" in any way with each other.

Finally, I should point out that, whatever the inconvenience of the interim relief to the respondents, which was not in fact specifically addressed in argument, the commitment of the Tribunal to expeditious proceedings will ensure that this arrangement will only be in place for a relatively short period of time. It will be in the interest of all involved to work towards a quick resolution of the section 92 application.

Counsels were able to produce a consent interim order in accordance with these directions, which I have signed. That order comprises a hold separate arrangement with the businesses managed by the current

management teams. Compliance with the order is safeguarded by a "monitor" who has access to the premises, to information on operations and to meetings of management and who reports any breach to the Director and to Southam. It is, of course, up to the Director to then take such steps as he thinks appropriate. Furthermore, the Director may also request periodic written reports on compliance from the monitor. The monitor has no other powers. The monitor may be an employee of the Southam Group but the appointment of a particular individual is subject to the approval of the Director. If the monitor is not an employee then the Director will pay all remuneration and expenses of that individual.

I am satisfied that this case requires the services of a monitor, notwithstanding the good faith of all of the parties and that the consent interim order is appropriate in the circumstances.

DATED at Ottawa, this 22nd day of March, 1991.

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

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