

CT-90/1

Public version

THE COMPETITION TRIBUNAL

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 -

COMPETITION TRIBUNAL TRIBUNAL DE LA CONCURRENCE	
MAR 6 1991 <i>108</i>	P R O D U I T
REGISTRAR -- REGISTRAIRE	SOUTHAM INC., LOWER MAINLAND PUBLISHING LTD., BIM PUBLISHING INC., YELLOW CEDAR PROPERTIES LTD., NORTH SHORE FREE PRESS LTD., SPECIALITY PUBLISHERS INC., ELTY PUBLICATIONS LTD.
OTTAWA, ONT.	#35

SOUTHAM INC., LOWER MAINLAND PUBLISHING LTD.,
BIM PUBLISHING INC., YELLOW CEDAR PROPERTIES
LTD., NORTH SHORE FREE PRESS LTD., SPECIALITY
PUBLISHERS INC., ELTY PUBLICATIONS LTD.

Respondents.

AFFIDAVIT OF DAVID PERKS

I, DAVID PERKS, of the City of Westmount in the Province of Quebec MAKE OATH AND SAY AS FOLLOWS:

1. I am employed by the Respondent Southam Inc. ("Southam") as the Publisher of The Gazette of Montreal. I was involved in the negotiation of the transactions completed on January 27, 1989 and May 8, 1990 whereby Southam acquired direct and indirect control of a significant interest in the publishing businesses of the Real Estate Weekly, The Vancouver Courier and the North Shore News (the "Businesses"). Since

- 2 -

that time, I have been responsible for Southam's investments in the Businesses and have received information about them from the managers of the Businesses. Accordingly, I have knowledge of the matters set forth below.

A. The Businesses

2. RIM is the publisher of The Vancouver Courier (the "Courier"). The Courier is a community paper which focuses on coverage of local news. It is distributed free-of-charge twice a week to households in selected parts of the City of Vancouver. It attracts advertising revenue mostly from local retailers.

4. NSFP is the publisher of the North Shore News. The North Shore News is distributed free-of-charge three times a week to almost every household in the North Shore of Vancouver. It reports primarily on local news and attracts a

- 3 -

large portion of its revenue from advertising by local retailers.

6. The Real Estate Weekly is published by Elty, which is 100% owned by Speciality Publishers Inc. Speciality Publishers Inc. is a holding company which is not involved in the business of publishing the Real Estate Weekly. The Real Estate Weekly published once a week as fourteen separate editions, each of which is circulated free-of-charge to a different community in the Lower Mainland of British Columbia.

- 4 -

B. Hold Separate Undertakings

8. I have reviewed the affidavit of Andre Brantz, dated March 4, 1991 (the "Brantz Affidavit") filed in support of this Application for an Interim Order by the Director. With respect to paragraph 4 which discusses the January 7, 1989 transaction involving NSFP, the Director investigated this transaction and provided to Southam written confirmation that this transaction would not result in a substantial lessening of competition in the relevant market. Attached as Exhibit "D" to this my affidavit is a true copy of a letter dated March 6, 1989 from Howard I. Wetston to counsel for Southam.

9. As for the May 8, 1990 transactions referred to in the Brantz Affidavit involving NSFP, RIM and Elty, I have been informed by counsel and do believe that the transactions completed were not notifiable under the provisions of the Competition Act. Consequently, Southam was not obliged to advise the Director of those transactions prior to their completion. However, as a courtesy to the Director, Southam informed the Bureau of Competition Policy (the "Bureau") of the May 8, 1990 transactions prior to their becoming public.

10. On or about May 9, 1990 the Director expressed concern to Southam about Southam's May 8, 1990 transactions and

- 5 -

requested time to investigate them. In order to assist the Bureau with its examination of the May 8, 1990 transactions, Southam agreed to provide to the Director hold-separate undertakings and to provide voluntarily to the Bureau information concerning these transactions.

11. To assist the Director in the negotiation of hold-separate undertakings, Southam provided to Gilles Ménard of the Bureau, a letter dated May 11, 1990 setting forth details of the transactions and a framework for drafting any undertakings. A true copy of this letter is annexed as Exhibit "C" to the Brantz Affidavit.

12. On or about May 18, 1990, the Director delivered to Southam draft hold-separate undertakings which he proposed Southam provide to him to cover the period of time required for the examination, inter alia, of the acquisitions of the Businesses. Attached hereto as Exhibit "E" to this my affidavit is a true copy of those draft undertakings.

12. Between May 18 and June 6 of 1990, the Director and Southam engaged in extensive negotiations to arrive at mutually acceptable undertakings. Final undertakings were agreed to on or about June 6, 1990 and were signed by the parties thereto and delivered to the Director by facsimile on June 7, 1990 (the

- 6 -

"June 7 Undertakings"). A true copy of those undertakings is annexed as Exhibit "B" to the affidavit of Paul Renaud dated December 6, 1990 (the "Renaud Affidavit") and filed by the Director in support of this Application for an Interim Order.

13. As mentioned in the Renaud Affidavit, the June 7 Undertakings were extended a number of times in order to give the Bureau further time to investigate the May 8, 1990 transactions. The June 7 Undertakings were amended on September 18, 1990 at the request of the Respondents in order to limit their application to the acquisitions which still concerned the Bureau (the "Amended Undertakings"). A true copy of the Amended Undertakings is annexed as Exhibit "D" to the Brantz Affidavit.

14. Southam advised the Director by letter dated November 23, 1990 that the Amended Undertakings would not be extended beyond the two week grace period provided for therein. However, on November 29, 1990, the Director filed with the Tribunal an Application pursuant to section 92 of the Competition Act, seeking orders which, if granted, would require Southam to dispose of any direct or indirect interest in the Businesses. Shortly thereafter, the Respondents commenced an action by statement of claim filed in the Federal Court and brought a motion for a stay of the proceedings in the

- 7 -

Southam undertook to abide by the Amended Undertakings until the decision of the Federal Court of Canada in regard to its December 3, 1990 action. That decision was rendered by the Honourable Mr. Justice MacKay on February 13, 1991. A true copy of that decision is annexed as Exhibit "F" to this my affidavit.

16. In early December 1990, Stan Wong, counsel for the Director, discussed with Glenn F. Leslie, John H. Phillips and Jay D. Kendry, of counsel for the Respondents, modification of the Amended Undertakings to cover the period between the filing of an application by the Director and its final adjudication. A true copy of the draft order proposed by the Respondents and given to counsel for the Director on December 3, 1990 is attached as Exhibit "F" to this my affidavit.

17. From December 3 to January 24, 1991, John H. Phillips made several inquiries of Stan Wong and Mary Ruhl of any concerns with regard to the proposed draft consent order. None were expressed, although instructions from the Director was still pending. During this time, Southam remained willing to discuss a form hold-separate order.

18. At the hearing of the stay application on January 24, 1991 Stan Wong indicated to the Court that the Amended Undertakings were insufficient to protect the public interest

- 8 -

17. At the hearing of Southam's motion for a stay on January 24, 1991, Stan Wong indicated to the Court that the Amended Undertakings were insufficient to protect the public interest or to satisfy the Director. This was the first notification to Southam that the Director perceived any deficiencies in the Amended Undertakings or the December 3 draft. No mention was made at the hearing of what these specific deficiencies were.

18. On the evening of March 1, the Director provided to Southam a ^{first} draft of the draft hold-separate order which is attached to the Director's Application for an Interim Order. Prior to that time, Southam had not been approached to negotiate a draft hold-separate order or to comment on the draft hold-separate order of the Director. I do not understand why the Director has not initiated discussions about a mutually agreeable hold-separate order or why this Application for an Interim Order had to be brought on such short notice.

C. Effectiveness of the June 7 and Amended Undertakings

19. In designing and negotiating both the June 7 Undertakings and the Amended Undertakings (collectively, the "Undertakings"), Southam agreed that the ultimate goal was to maintain the firms involved in the merger as competitive,

- 9 -

viable entities which could be divested, if necessary, at a later date.

20. The Undertakings were intended to preserve the goodwill of all of the publications acquired by Southam, including the Businesses, and to ensure that the management of these publications remained separate and distinct from Southam, and continued to operate the publications as before. Good management and goodwill are the two key elements of a successful weekly newspaper.

21. I am the only employee of Southam that has been involved in the management of LMPL and its subsidiaries. My role under the Undertakings has been to monitor the activities of LMPL to ensure the preservation of Southam's substantial interest in the Businesses. The extent of my involvement with LMPL and the Businesses has been less extensive than suggested by Mr. Brantz in his affidavit.

22. I devote most of my efforts publishing The Gazette of Montreal. I spend on average only two or three days a month on LMPL management issues. I do not report on my role as supervisor of LMPL to anyone in the management of Southam.

- 10 -

23. Shortly after June 7, 1990, I provided copies of the June 7 Undertakings to the managers of Elty, RIM and NSFP, and instructed them, with the assistance of counsel, on the operation of the June 7 Undertakings.

24. I have not been involved in the day-to-day operation of the Businesses. To my knowledge there is no information which would be of competitive interest to Pacific Press Ltd. I have not and will not communicate any confidential information I have obtained to Southam.

25. I have always ensured that the activities of LMPL and its subsidiaries complied with the Undertakings. There was no violation of the Undertakings by any employee or manager of LMPL or of its subsidiaries through to their expiry, and even subsequently, there has been no violation of their terms, even though they are not in effect. Moreover, the Director has never indicated to me, my counsel or anyone at LMPL that the Undertakings were violated during the time that they were in effect.

26. I believe that the Businesses today are at least as viable and competitive as when the June 7 Undertakings first came into effect.

- 11 -

27. I am not aware of any steps than have been taken that would hinder the divestiture of the Businesses.

28. I was personally bound by the Undertakings and I am prepared to be bound by the Interim Order of the Competition Tribunal.

D. Proposed Hold-Separate Order

29. Compliance with the provisions of the Interim Order proposed by the Director (the "Proposed Order") will be extremely onerous to the Businesses and will hinder the competitiveness of the businesses as set forth below.

Supervisors

30. The Businesses are run on small budgets with relatively few managers. The imposition of outside supervisors into the management structure of the Businesses will substantially increase the expense of operating these Businesses. I estimate that it will cost each of the Businesses anywhere from \$100,000 to \$150,000 a year for each supervisor. This cost represents a major proportion of the expected gross profits of the Businesses and possibly all the net profits of the Business.

31. Even if the Bureau were prepared to bear the cost of hiring supervisors and were prepared to indemnify the supervisors, their imposition will severely hinder the operation of the Businesses. The imposition of supervisors will lead to time delays in decision making and will frustrate the managers of the Businesses and lead to an erosion of revenues, profits and market share. This would be a severe blow to the long term viability of the Businesses and continuing competition in the marketplaces.

32. Moreover, it is unlikely that experienced managers will be found to operate these businesses as supervisors on a part-time basis because of a shortage of such personnel. The Real Estate Weekly has been looking for over six months without success for an assistant manager. Ultimately, receiver/manager type staff from accounting firms may be retained. These have the wrong type of skill set to keep the Businesses lean, fast, agile and profitable in rapidly changing environments. Even if the role of the supervisors was restricted to notification of the Directors and to Southam and did not include approval of all decisions of the Managers, as required by Section 1.03 of the proposed Supervisors' Agreement, the delays incurred would materially inhibit the Managers from effectively managing the operations of the Businesses.

No Overlap in Management

33. LMPL is managed by Sam Grippo, John Collison and Bruce Aunger pursuant to a Shareholders Agreement dated May 8, 1990 (the "Shareholders Agreement"). These three individuals directly and indirectly have a substantial investment in

- 13 -

Madison. None of them has any equity interest in Southam Inc. or its subsidiaries other than LMPL. A true copy of the Shareholders Agreement is annexed as Exhibit "G" to this my affidavit.

34. Pursuant to section 2.06 of the Shareholders Agreement, Madison is given a veto over any significant change to the business of LMPL. Further, pursuant to section 2.08 of the Shareholders Agreement, Madison is given this veto in regard to the subsidiaries of LMPL. Moreover, section 7.01 of the Shareholders Agreement provides that LMPL is free to compete with Southam in the Lower Mainland media market. In addition, pursuant to section 3.06 of the LMPL Shareholders Agreement, the parties agree that each of the Newspapers shall be operated under a policy of editorial independence and that no shareholder shall influence or seek to influence the editorial policy of any Newspaper. These provisions give Madison substantial power to ensure that Southam does not harm the Businesses at the expense of Madison.

35. With regard to Schedule "A" of the Amended Undertakings, Messrs. Hager and Ballard worked for RIM prior to Southam's acquisition of RIM. Similarly, Messrs. Speck and Foot worked for NSFP prior to its acquisition by Southam. Finally, Sam Grippo, Bruce Auger and John Collison all worked for the businesses of Madison including the Real Estate Weekly prior to its acquisition by LMPL.

36. Madison owns 38% of the issued and outstanding shares of LMPL. On May 8, 1990 that interest was valued at

- 14 -

approximately \$17 million. Further, I estimate the Businesses represent about 70% of the value of LMPL.

37. John Collison and Sam Grippo have been actively managing a number of businesses in the printing and publishing industry in the Lower Mainland since 1980.

38. Because of this, it is in Messrs. Collison, Grippo and Aunger's personal interest to protect these companies and make sure that Pacific Press Ltd. is not favoured over LMPL. Moreover, Southam is aware of its duties as a majority shareholder of LMPL not to oppress or unfairly prejudice the minority shareholder of LMPL, Madison.

39. There is no competition between the Courier and the North Shore News and the Director has not made any allegation in that regard in the Application. Accordingly, there is no harm in having overlapping management of those two publications. Sam Grippo and Bruce Aunger have informed me that they are prepared to run those two publications and to refrain from any management involvement with the North Shore edition of Real Estate Weekly for the period of time that any order granted pursuant to this Application for an Interim Order is in effect and are prepared to be bound by the terms of an Interim Order granted pursuant to this application to maintain the Businesses as viable independent competitive businesses.

- 15 -

40. John Collison does not now have any supervisory or management role in the businesses of the Courier and the North Shore News. In order to maintain the level of competition currently existing between the North Shore News and the North Shore edition of the Real Estate Weekly, John Collison is prepared to undertake not to have any role in the management of RIM and NSFP until the expiration of any order granted pursuant to this Application.

41. John Collison will continue to manage the Real Estate Weekly. Bruce Auinger and Sam Grippo do not now have and do not intend to have any management or supervisory function in the operations of Elty and in the Real Estate Weekly publishing business and are willing to be obliged not to have any such role during the pendency of any interim order provided pursuant to this Application.

Prohibition on Changes

42. Several provisions in the Proposed Order, such as subsections 4(c) and (f) and subsection 10(b), prohibit the Businesses from altering certain practices. This will severely reduce the ability of the Businesses to modify their operations in order to react to changes in the highly competitive environment in which they operate. As stated in the Response,

- 16 -

the Businesses, especially the Courier, face significant competition from certain publications of Hacker Press Inc. Moreover, competition from other media for advertising expenditures has increased during the current recession. In order to respond to changes in this competitive environment, the Businesses require the flexibility to be allowed to change their operations by emphasizing certain aspects of their operations and deemphasizing less profitable ones. In the recent past, the Courier proposed commencement of a Friday edition. This proposal was shelved due to a downturn in the economy. If it had started such an edition, it would be forced to carry on this edition under the terms of the Proposed Order even if this edition proved to be highly unprofitable.

Preservation of Investments


40. I estimate Southam's investment in LMPL is worth about \$33 million. This is a substantial investment, yet the Proposed Order does not give Southam any means by which it can see to the long term viability of their investments. The Supervisors recommended by the Director are not accountable to

- 17 -

Southam, nor is Southam permitted to participate in directing or managing the Businesses.

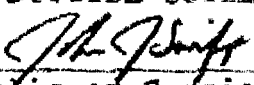
41. In order to remedy this oversight, I am willing to continue to be responsible for Southam's substantial investment in LMPL and the Businesses under terms and conditions similar to those set forth in the June 7 and Amended Undertakings. For greater certainty, I will promise again to maintain secret from Southam all confidential information regarding the businesses as defined in the undertaking.

DATED at the City of Vancouver in the Province of British Columbia this 6th day of March, 1991.



DAVID PERKS

Sworn before me this 6th day of March, 1991 in the City of Vancouver, in the Province of British Columbia



A Notary Public or Commissioner for Oaths in and for the Province of British Columbia

TO: The Registrar
The Competition Tribunal

AND TO: Stanley Wong
Mary L. Ruhl
Keith E.W. Mitchell
Counsel to the Director of Investigation
and Research