

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-

**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

**NOTICE OF APPLICATION FOR AN INTERIM ORDER
UNDER SECTION 104 OF THE COMPETITION ACT**

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**MEMORANDUM OF ARGUMENT OF THE
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**MEMORANDUM OF ARGUMENT
OF THE DIRECTOR OF INVESTIGATION AND RESEARCH**

I. Nature of the Interim Order Sought

1. This is an application by the Director of Investigation and Research (the "Director") for an interim order pursuant to section 104 of the Competition Act (the "Act"), section 11 of the Competition Tribunal Act, and section 20 of the Competition Tribunal Rules, pending the disposition of the Notice of

Application filed on November 29, 1990 by the Director for remedial orders pursuant to section 92 of the Act (the "Application"), with respect to the direct and indirect equity investments by the Respondent Southam Inc. ("Southam") of the businesses of publishing The Vancouver Courier, the North Shore News and the Real Estate Weekly (the "Businesses").

2. The Director is seeking an interim order for the purpose of preserving the Businesses as independent, viable, on-going and competitive businesses in order to preserve the Competition Tribunal's ability to order appropriate and effective relief with respect to the Application and to maintain and encourage competition in the relevant markets pending the disposition of the Application on its merits.

3. Accordingly, the Director is seeking an interim order, in the form attached as Appendix I to the Notice of Application, which orders, inter alia, the Respondents except Yellow Cedar Properties Ltd.:

- a. not to divest the Businesses or alter the direct and indirect ownership of the Businesses from that existing as of May 8, 1990, in the case of The Vancouver Courier and the Real Estate Weekly and February 1, 1991, in the case of the North Shore News;

- b. not to take any action that could adversely affect the competitiveness, assets, operations or financial status of the Businesses or jeopardize the divestiture of any of the Businesses;
- c. to ensure that the Businesses are maintained as separate businesses, operated independently of each other, The Vancouver Sun, The Province and any other businesses operated by Southam or a person controlled by Southam (the "Southam Group");
- d. to retain current management for each of the Businesses, but appoint independent supervisors for the Businesses to supervise current management and monitor compliance with the terms of the interim order, if granted.

II. Nature of Application under Section 92

4. On or about January 27, 1989 Southam acquired a 49% equity interest in the Respondent North Shore Free Press Ltd ("NSFP").

Application, para. 16

Response, para. 10

5. By letter dated March 6, 1989 the Director advised

counsel for Southam that he did not have, at that time, grounds to commence an inquiry under section 10 of the Competition Act in respect of the transaction whereby Southam acquired a minority interest in NSFP and further advised that the Director has up to three years from the completion of the transaction to bring such application.

Letter, March 6, 1989, Ex. A to the Affidavit of Paul Renaud (Ex. "I" to the Affidavit of Andre Brantz)

6. On May 8, 1990, Southam completed a series of transactions whereby Southam acquired direct and indirect equity interests in 13 community newspapers including The Vancouver Courier and the North Shore News, a real estate advertising publication called the Real Estate Weekly, three flyer distribution businesses and two printing businesses operating in the Lower Mainland area of British Columbia.

Application, para.8

Response, para. 10

7. After the completion of the May 8, 1990 transactions, the Director learned of such transactions. Subsequently, at the request of the Director, Southam and others gave on June 7, 1990 to the Director undertakings in writing which provided, among other things, that Southam would not integrate the businesses purchased pending the Director's review of the transactions under the merger provisions of the Act (the "Undertakings").

Affidavit of Andre Brantz, para. 6

Letter dated May 11, 1990 from George Addy to J.J. Quinn (Ex. "B" to the Affidavit of Andre Brantz)

Undertakings, June 7, 1990 (Ex. "B" to the Affidavit of Andre Brantz)

8. The Respondents have stated that the purpose of hold separate undertakings during the course of a review by the Director of a merger transaction is to "maintain the firms involved in a merger as competitive, viable entities which can be divested, if necessary during the period of time the Bureau of Competition Policy is reviewing the merger".

Letter dated May 11, 1990 from J.J. Quinn to Gilles Menard (Ex. "C" to the Affidavit of Andre Brantz)

9. The Undertakings given on June 7, 1990 were extended from time to time as necessary to allow the Director to continue his review of the merger transactions. On September 14, 1990 the original undertakings were amended primarily to release those businesses in respect of which the Director advised that he did not, at that time, have any further concerns (the "Amended Undertakings"). The Amended Undertakings were also extended and modified, as necessary, from time to time. On November 23, 1990, the Amended Undertakings expired.

Amended Undertakings, (Ex. "E" to the Affidavit

of Andre Brantz)

Affidavit of Andre Brantz, paras. 9 to 12

10. In connection with the review of the merger transactions, the Director obtained information, orally and in writing, from representatives of the Respondents, their counsel and from other persons. During the course of the review, the Director advised Southam from time to time in respect of those transactions with which he did not have any concerns. On October 4, 1990, the Director advised counsel for the Respondents that he had instructed counsel to file an application under section 92 to the Tribunal with respect, inter alia, to the acquisition of the Businesses.

Affidavit of Andre Brantz, para. 8

Letter dated October 4, 1990 from George Addy to J.J. Quinn (Ex. "F" to the Affidavit of Andre Brantz)

11. On November 29, 1990, the Director filed the Application in the Competition Tribunal for remedial orders with respect to the direct and indirect equity investments by Southam of the Businesses on the grounds that the investments prevent or lessen, or are likely to prevent or lessen, competition substantially in the following markets in the Lower Mainland area of British Columbia:

- a. the supply of newspaper retail advertising services in the City of Vancouver in which market The Vancouver Courier is the major competitor of The Vancouver Sun and The Province, daily newspapers

which are indirectly owned by Southam;

- b. the supply of newspaper retail advertising services in the North Shore in which market the North Shore News is the only competitor of The Vancouver Sun and The Province;
- c. the supply of print real estate advertising services in the Lower Mainland excluding the North Shore in which market the Real Estate Weekly is the major competitor of The Vancouver Sun and The Province;
- d. the supply of print real estate advertising services in the North Shore in which market the Real Estate Weekly is the major competitor of the North Shore News, The Vancouver Sun and The Province.

The remedial orders, if granted, would in effect require the divestiture of the Businesses.

Application

12. Also on December 3, 1990, the Respondents commenced an action by statement of claim filed in the Federal Court, Trial Division seeking declarations that certain provisions of the Competition Act, including section 92, and the Competition Tribunal Act, contravene provisions of the Canadian Charter of Rights and Freedoms and of the Canadian Bill of Rights and that the Tribunal as constituted violates the Charter and is contrary to sections 96 and 101 of the Constitution Act, 1867. The action also sought an order staying proceedings before the Tribunal in relation to the

Application. The statement of claim named as defendants the Attorney General of Canada, the Competition Tribunal and the Director of Investigation and Research.

Statement of Claim, Statement of Defence and Notice of Motion (Ex. "G" to the Affidavit of Andre Brantz)

13. Also, on December 3, 1990 the Respondents filed a notice of motion seeking the stay. Pending the disposition of the motion on its merits, the Respondents agreed to abide by the Amended Undertakings, as amended and modified.

Letter dated December 4, 1990 from Stanley Wong to Glenn F. Leslie (Ex. "H" to the Affidavit of Andre Brantz)

Letter dated December 4, 1990 from Glenn F. Leslie to Stanley Wong (Ex. "H" to the Affidavit of Andre Brantz)

14. In support of the application for a stay of proceedings, the Respondents stated that they were prepared to abide by the Amended Undertakings with variations pending the ultimate resolution by the Supreme Court of Canada of the constitutional issues raised in the action. The motion was heard before the Honourable Mr. Justice MacKay on January 24, 1991 and judgment was reserved. On February 13, 1991, Mr. Justice Mackay delivered his Judgment dismissing the Respondents' application.

Affidavit of Paul Renaud, para. 11 (Ex. "I" to the Affidavit of Andre Brantz)

Southam Inc., supra, at 15

15. On February 1, 1991, the Southam acquired the remaining 51% of the issued and outstanding shares of the Respondent NSFP and transferred them to the Respondent LMPL.

Response, paras. 10 and 11

16. On February 21, 1991 the Respondents filed a Response to the Application.

17. On February 22, 1991 the Respondents filed an appeal of the Judgment of the Honourable Mr. Justice MacKay to the Federal Court of Appeal.

Notice of Appeal (Ex. "J" to the Affidavit of
Andre Brantz)

18. On February 27, 1991 the Competition Tribunal ordered, inter alia, that the hearing of the Application shall commence on Wednesday, September 4, 1991 before the Competition Tribunal sitting in Vancouver, British Columbia.

Order Regarding Scheduling of Pre-Hearing
Procedures and Hearing, CT-90/1, February 27,
1991

III. Law

19. In considering an application for an interim order under section 104 the Tribunal is to have regard to "the principles ordinarily considered by superior courts when granting interlocutory or injunctive relief".

section 104, Competition Act

20. In considering whether to make an interim order, the Tribunal should be satisfied that:

- a. there is a serious issue to be tried;
- b. the public interest would suffer irreparable harm if the interim order were not made; and
- c. the balance of convenience favours the making of the interim order.

Attorney General of Manitoba v. Metropolitan Stores (MTS) Ltd., [1987] 1 S.C.R. 110

American Cyanimid v. Ethicon, [1975] A.C. 396 (H.L.)

Turbo Resources Ltd. v. Petro Canada Inc. (1989), 24 C.P.R.(3d) 1 (F.C.A.)

Southam Inc. et al. v. The Attorney General of Canada et al., F.C.T.D. No. T-3180-90, unreported, MacKay J., February 13, 1991

IV. Serious Issue

21. The Application raises serious issues, which are not vexatious or frivolous, to be tried. This is evident from:

- a. the Application;
- b. the Response;
- c. the extensive discussions between the parties from the time the Director became aware of the transactions and the date of the filing of the

Application;

- d. the hold separate Undertakings dated June 7, 1990;
- e. the Amended Undertaking dated September 14, 1990;
- f. the agreement of the Respondents to abide by the Amended Undertakings as modified from December 4, 1990 to the date of judgment on the stay application before the Federal Court of Canada, Trial Division;
- g. the offer to have the Amended Undertakings incorporated as terms of an order if the application for a stay of these proceedings before the Tribunal were granted.

Application

Response

Affidavit of Andre Brantz, para. 8

Undertakings dated June 7, 1990 (Ex. "D" to the Affidavit of Andre Brantz)

Amended Undertakings dated September 14, 1990 (Ex. "E" to the Affidavit of Andre Brantz)

Letter dated December 4, 1991 from Glenn F. Leslie to Stanley Wong (Ex. "H" to the Affidavit of Andre Brantz)

Affidavit of Paul Renaud, para. 11 (Ex. "I" to the Affidavit of Andre Brantz)

V. Irreparable Harm

22. The Director has no interest in these proceedings before the Tribunal other than the public interest in maintaining and encouraging competition in Canada through the discharge of his duties under the Act.

section 1.1, Competition Act

Metropolitan Stores, supra, at 136

Southam Inc., supra, at 14

23. If the application for an interim order were not granted, and if Southam proceeds to integrate any of the Businesses with any business of the Southam Group, there will be irreparable harm to the public interest, which could not be compensated for by monetary damages.

"'Preliminary Preliminary' Relief Against Anticompetitive Mergers," 82 Yale Law Journal 154 (1972) at 163

McKenna, "Hold Separate Orders in Government Antimerger Suits," 70 Georgetown Law Journal 1307 (1982) 1351

24. Once a merger has been partially or completely implemented, the anti-competitive effects of the merger can never be reversed, resulting in irreparable harm to the public interest in competition.

"'Preliminary Preliminary' Relief Against Anticompetitive Mergers," supra at 163

McKenna, supra, at 1355 and 1364

25. Furthermore, if the Businesses are permitted to integrate with other Southam businesses, or do not remain viable, competitive entities, the Tribunal's ability to order effective relief on disposition of the Application will be impaired, also resulting in

irreparable harm to the public interest in competition.

26. To preserve the ability of the Tribunal to order divestiture, the Businesses must be maintained and operated independently of the businesses of the Southam Group.

27. Independence is not sufficient in and of itself to preserve the effectiveness of a divestiture order to maintain and encourage competition and to the extent possible, to restore competition to the market conditions existing before the merger transactions. The Businesses must also be operated in their respective markets in competition with other market participants.

28. In the absence of an interim order which maintains the Businesses as competitive as well as independent businesses, Southam may, if it wishes to do so, integrate the Businesses into the Southam Group and thereby reducing competition as between the Businesses and any of their competitors which belong to the Southam Group.

VI. Balance of Convenience

29. The irreparable harm to the public interest in maintaining and encouraging competition in the relevant markets pending the disposition on the merits of the Application outweighs any inconvenience to the Respondents.

"'Preliminary Preliminary' ...", supra, at 170

30. Any inconvenience to the Respondents that may be caused as the result of the granting of this application would not be significantly different from that caused to the Respondents by virtue of the hold separate undertakings given by them:

- a. during the period from June 7, 1990 to November 23, 1990 when the Undertakings and Amended Undertakings were in effect pending the review of the merger transactions by the Director;
- b. during the period from December 4, 1990 to February 13, 1991 when the Respondents agreed to abide by the Amended Undertakings in respect of the Businesses pending the disposition of their application in the Federal Court, Trial Division for a stay of proceedings in the Tribunal in respect of the Application

31. Furthermore, the Respondents were prepared to accept any inconvenience resulting from their offer to abide by the Amended Undertakings for an uncertain and lengthy period of time as terms of an order, if granted, staying these proceedings in the Tribunal pending the ultimate resolution of the constitutional issues raised in the Federal Court action by the Respondents.

Affidavit of Andre Brantz

Affidavit of Paul Renaud, para. 11 (Ex. "I" to the Affidavit of Andre Brantz)

Southam Inc., supra, at 15

32. Furthermore, any inconvenience or harm to the Respondents if the present application were granted would be of short duration, that is, until the disposition of the Application on its merits by the Tribunal.

33. The Respondents have stated that the purpose of the undertakings given during the course of the review of a merger transaction by the Director is to maintain the businesses acquired by Southam as competitive, viable, independent businesses which could be divested, if necessary.

Letter dated May 11, 1990 from J.J. Quinn to Gilles Menard (Ex. "C" to the Affidavit of Andre Brantz)

34. The Amended Undertakings, however, are not adequate to prevent anti-competitive harm in the period before the Application is disposed of on its merits and as a result, the Tribunal's ability to order effective relief on disposition of the Application is impaired.

35. It has been recognized in the American experience in antitrust enforcement of mergers that after the completion of a merger and pending the final disposition of proceedings challenging the merger, there are inevitably anti-competitive effects which are difficult to remedy by any interim measure. For example, one cannot expect a newly acquired subsidiary and its managers and employees to compete as vigorously with its parent's businesses as

with businesses independent of its parent.

McKenna, supra, at 1357

Note, "Preliminary Relief for the Government under Section 7 of the Clayton Act," 79 Harvard Law Review 391 (1965) at 395

36. The Amended Undertakings, if incorporated into an interim order of this Tribunal, and the currently existing situation are inadequate to maintain the competitiveness and independence of the acquired businesses, in the following ways:

- a. the Respondents are not required to maintain the current corporate ownership structure of the Businesses, alterations of which would make it more difficult for the Tribunal to order appropriate relief;
- b. Southam is not required to maintain the competitiveness and viability of the Businesses, jeopardizing divestiture of the Businesses;
- c. the independence of each Business from the Southam Group is undermined by the presence of one or more individuals serving both as a director or officer of the company owning one of the Businesses and of another company in the Southam Group;
- d. the current managers of the Businesses have an inherent conflict of interest in operating the Businesses in competition with, and independently from, the Southam Group as they are now employees

of the Southam Group;

- e. David Perks, who was appointed pursuant to the Amended Undertakings to supervise the managers of the Businesses and to monitor compliance of the Businesses with the Amended Undertakings, is not independent of the Southam Group;
- f. the Amended Undertakings did not provide a mechanism for Mr. Perks to enforce compliance by the Businesses with the Amended Undertakings.

Corporate Structure (Ex. "A" to the Affidavit of Andre Brantz)

Undertakings (Ex. "D" to the Affidavit of Andre Brantz)

Amended Undertakings (Ex. "E" to the Affidavit of Andre Brantz)

37. The form of the interim order requested by the Director builds upon the provisions of the Amended Undertakings and seeks to rectify the deficiencies of the Amended Undertakings and the currently-existing situation, in order to preserve the public interest in competition and the effectiveness of the remedies available to the Tribunal on the disposition of the Application.

DATED this 4th day of March, 1991



Stanley Wong
Mary L. Ruhl

Counsel for the
Director of Investigation and
Research