

OUTSIDE THE COURTS

KENT COMMISSION RECOMMENDS STRUCTURAL REMEDIES FOR NEWSPAPER INDUSTRY

The report of the Royal Commission on Newspapers, which was released on August 18, calls for some divestiture, strict measures to prevent further concentration of newspaper ownership, and other measures to promote editorial independence and high quality. The reforms would be embodied in a Canada Newspaper Act.

The mandate of the Commission was essentially to report on the consequences of high concentration in the newspaper industry and to make recommendations. The Commission, while emphasizing the unique features of the industry, found links between its structure, conduct and performance of kinds which are familiar to students of Joe S. Bain (Industrial Organization, New York, 1959) and his successors.

According to the report, while Canadian newspapers have improved technically, they leave much to be desired in many other respects. Most of them are now in local monopoly positions and profits, which are high, can be maximized at undesirably low levels of expenditure on editorial content. There has, for example, been "a loss of political vigor", a sameness brought about by excessive reliance upon the Canadian Press news service, little expenditure upon international news coverage, lack of professional journalist development and insufficient journalistic specialization. The French language press was found to be performing somewhat better than the English language press. Concentration of ownership is even higher but, unlike their English language counterparts, the French language chains compete vigorously with one another in the principal cities of Quebec.

Both chains and independents produce good newspapers and bad ones, depending partly upon the "accident of ownership". However, when chains produce bad newspapers the effects are more widespread and consequently more serious. The worst ownership situation is where a chain is a conglomerate in the sense that its owners have large interests other than newspapers. The Commission states;

"A corporation whose holdings are confined to newspapers, or even more widely to communications, is likely to put more emphasis on its public-service function than a business conglomerate with a minor interest in newspapers... For conglomeracy, almost nothing can be said. Industrial conglomerates produce poor newspapers; it is a law of general application.

"Thomson Newspapers Limited, though very big in Canada, is a minute part of an international conglomerate and exhibits the characteristics of the breed. Its small-town monopoly papers are, almost without exception, a lacklustre aggregation of cash boxes... The Irving papers of New Brunswick, stepchildren of another conglomerate, are chiefly noteworthy for their obeisance to every industrial interest.

"Southam Inc. is the Canadian exemplar of a media conglomerate with interests in communications only. It is not only our view, but the consensus of informed critics, that it takes its service responsibility more seriously than the mixed industrial conglomerates, being motivated in part by a family tradition that imparts a sense of something like noblesse oblige. Southam is above the industry average, for example, in its investment for editorial product." (page 177).

.

"The process of corporate growth, by concentration into larger groups within the industry, has been accompanied by a reduction in the diversity of news and comment that is the vital element of a free society. The quality of what remains has not improved, and in some respects has declined. The decline can be traced, at least in some measure, to the normative influence of corporatism, applied to an exercise that is essentially individualistic and intuitive. Innovation, creativity, even a desirable degree of eccentricity give way to the pressures for uniformity." (pages 178-9).

Coming to remedies, the Commission concludes that newspaper competition at the local level cannot be resurrected because of the economics of newspaper advertising. Moreover, it sees limits to the extent to which it can propose retroactive laws for divestiture of legally acquired chains. Nevertheless, within those limitations structural remedies form a large part of the Commission's recommendations. There would be retroactive legislation to prevent:

- common ownership or control of a daily newspaper and a broadcasting outlet in the same community (Southam would be affected)
- ownership of a "national" newspaper printed at several locations along with other dailies (Thomson would have to sell either the Globe and Mail or its thirty-nine other dailies).
- extreme concentration of ownership in a geographical area (e.g., Irving would have to sell one of its New Brunswick dailies).

In addition, future acquisitions would be restricted in the following ways:

- control of a newspaper business could not be acquired by a person having other business interests larger than the newspaper.
- there could be no new chains if they involved more than five newspapers, more than 270,000 daily circulation, or newspapers that are geographically close.
- there could not be common ownership of a daily and weekly in the same circulation area.
- "A newspaper could be an 'information provider', by contract, for the new 'screenprint' media but could not be the carrier systems operator".

Surveillance of the concentration provisions would be among the functions of a Press Rights Panel consisting of three persons appointed for seven year terms by the federal government. It would have the power of a superior court of record and its duties in respect of concentration would be:

- "(6) In cases of doubt it would make a final determination whether under the terms of the Canada Newspaper Act, divestment is required in situations of cross-media ownership of daily newspapers and other media; for this purpose it would have authority to make reasonable exceptions, within the spirit of the Act, from exact application of mathematical guidelines.
- (7) At intervals of not more than five years it would review the concentration of newspaper ownership, particularly on a regional basis, and have power to order further divestments if it found that they were required, in the spirit and intent of the Act.
- (8) It would have authority to extend, for good reason and within the limits specified earlier, the maximum time allowed for divestment.
- (9) It could qualify application of the rule against 'conglomerate' acquisitions of divested papers, if there were good reason to do so.
- (10) It would receive notice of intended closings and, in the event of a proprietor failing to arrange the satisfactory sale as a going concern of a newspaper which it wished to cease publishing, the Panel would determine whether a sale of physical assets was at least as remunerative to the proprietor as any offer available for the business and, if it found otherwise, would prohibit the sale of assets.

- (11) It would review and rule on acquisitions of newspapers that involve small chains, with modest flexibility in the application of the statutory guidelines."

The Commission made other recommendations as well, including:

- tax incentives to encourage widespread ownership and higher outlays on editorial content.
- a requirement that editors-in-chief be appointed under a contract designed to ensure their editorial independence.
- creation of a seven member advisory committee for each newspaper, to include representatives of the proprietor, of the journalistic staff and of the community.
- various watchdog functions for the Press Rights Panel.
- Government subsidization of news services to help improve their quality.

While the proposals for structural remedies are clearly in the field of competition policy the Commission recommended strongly that they be enacted in the context of a Canada Newspaper Act rather than as amendments to the Combines Investigation Act. One reason is the "sad legacy" of the Irving case. While they welcome the intention of the government to reform competition law provided it "is not once more allowed to expire on the Order Paper", they point out that the amended law would be unlikely to deal effectively with past acquisitions. However, their main reason for wanting separate legislation is that newspapers are not like other business ventures; the public's interest in vigorous competition among newspapers "has to do with the number and quality of independent voices finding expression, voices undaunted and undiminished by dollar concerns". And they quote with approval from the 1962 United Kingdom Royal Commission on the Press on why that body proposed to treat newspapers differently from other industries:

"The answer is that the public interest in relation to the newspaper industry is different. The discrimination is based on the proposition that freedom and variety in the expression of opinion and presentation of news is an element which does not enter into the conduct of other competitive industries and that it is of paramount public interest."

Most initial reactions to the report by English language publishers, editors and journalists have been extremely critical, although many of the comments have included expressions of concern about the high concentration of ownership. A common thread running through many of the criticisms is that, contrary to the avowed aims of the Commission, the recommendations would

open the door to the government interference with freedom of the press. The following were among the more detailed criticisms:

- There was some disagreement with the Commission's negative evaluation of the performance of the press.
- That obligations such as to report to or answer to a government appointed Press Rights Panel, or to create advisory committees, would amount to unacceptable federal regulation of the press.
- That the proposed structural remedies would amount to empowering the government to decide who may and who may not publish newspapers, and that the retroactivity of some of the proposals would be an unwarranted interference with property rights. Some, however, expressed support for a stronger merger provision in the Combines Investigation Act.
- That, despite the Commission's arguments to the contrary, many of the recommendations would be unconstitutional as invasions of the property and civil rights power of the provinces.

At the same time, an editorial in the Gazette of August 22 found "a fair number" of the proposals to be constructive. For example, while finding the Kent proposals "unduly strict", they favour an agency to review press ownership to prevent excessive concentration especially where the owners have interest conflicts. Douglas Fisher, writing in the Toronto Sun of August 21 criticized many aspects of the Report but supported the ones for structural changes.

The French language press was somewhat more receptive to the Report. Michel Nadeau, in particular, writing in Le Devoir, favoured the divestiture proposals and was generally supportive.

The Consumers Association of Canada stated that it "strongly endorses the recommendations... especially as it concerns concentration of ownership in the newspaper industry". A number of trade unions issued supportive statements. The Canadian Labour Congress issued a joint statement with the International Typographical Union urging the government to act on the recommendations.