



CT - 1996 / 001 – Doc # 262c

IN THE MATTER OF an application by the Director of Investigation and Research for orders pursuant to sections 92 and 105 of the *Competition Act*, R.S.C. 1985, c. C-34;

AND IN THE MATTER OF an application by Dennis Washington et al. for an order pursuant to section 106 of the *Competition Act*, R.S.C. 1985, c. C-34;

AND IN THE MATTER OF the merger whereby Dennis Washington and K & K Enterprises acquired a significant interest in, and control of, Seaspan International Ltd.;

AND IN THE MATTER OF the merger whereby Dennis Washington acquired Norsk Pacific Steamship Company, Limited.

B E T W E E N:

The Director of Investigation and Research

Applicant

- and -

Dennis Washington  
K & K Enterprises  
Seaspan International Ltd.  
Genstar Capital Corporation  
TD Capital Group Ltd.  
Coal Island Ltd.  
314873 B.C. Ltd.  
C.H. Cates and Sons Ltd.  
Management Shareholders  
Preference Shareholders  
Norsk Pacific Steamship Company, Limited

Respondents



**CONSOLIDATED CONSENT ORDER OF JANUARY 29, 1997  
AS AMENDED ON MARCH 9, 1998**

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**Date of Hearing by Conference Call:**

March 9, 1998

**Members:**

McKeown J. (presiding)  
Rothstein J.  
Mr. Lorne R. Bolton

**Counsel for the Applicant:**

**Director of Investigation and Research**

William J. Miller

**Counsel for the Respondents:**

**Dennis Washington  
K & K Enterprises  
C.H. Cates and Sons Ltd.  
Norsk Pacific Steamship Company, Limited  
Seaspan International Ltd.**

Nils E. Daugulis  
Sharon Dos Remedios

**COMPETITION TRIBUNAL**

**CONSOLIDATED CONSENT ORDER OF JANUARY 29, 1997  
AS AMENDED ON MARCH 9, 1998**

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*Director of Investigation and Research*

*v.*

*Dennis Washington et al.*

THE TRIBUNAL ORDERS THAT:

**Definitions**

1. For the purposes of this order the following definitions shall apply:
  - (a) "Cates" means the respondent C.H. Cates and Sons Ltd.;
  - (b) "identified assets" means the Seaspan barging assets and Norsk barging assets;
  - (c) "K & K" means the respondent K & K Enterprises;
  - (d) "Norsk" means either the respondent Norsk Pacific Steamship Company, Limited or Norsk Pacific Steamship Canada Ltd., as applicable;

- (e) "Norsk barging assets" means those assets and interests owned by Norsk and identified in schedule D and schedule E hereto;
- (f) "Norsk chip barge assets" means those assets and interests owned by Norsk and identified in schedule D hereto;
- (g) "Norsk covered barge assets" means those assets and interests owned by Norsk and identified in schedule E hereto;
- (h) "person" includes a natural person, partnership and body corporate;
- (i) "Seaspan" means the respondent Seaspan International Ltd.;
- (j) "Seaspan barging assets" means those assets and interests owned by Seaspan identified in schedule B and schedule C hereto;
- (k) "Seaspan chip barge assets" means those assets and interests owned by Seaspan identified in schedule B hereto;
- (l) "Seaspan covered barge assets" means those assets and interests owned by Seaspan identified in schedule C hereto;
- (m) [DELETED]

(n) "trustee" means the person appointed as trustee pursuant to paragraph 15 hereof to effect a sale of the Norsk covered barge assets and the Norsk chip barge assets, or either of them;

(o) "trustee sale" means the sale or sales by the trustee referred to in paragraph 15 hereof;

(p) "Washington" means the respondent Dennis Washington;

(q) "Washington Group" means Washington, K & K, Cates, Seaspans and Norsk.

Any reference in subparagraphs 1(f), (g), (k) and (l) to assets shall include all appurtenances and equipment as are customarily included in the sale of such assets and normally used in their day-to-day operation.

### **Application**

2. The provisions of this order shall apply to each of Washington, Cates, Seaspans, K & K and Norsk, whether natural persons or corporations, and to:

(a) each division, subsidiary or other person controlled by them and each officer, director, employee, agent or other person acting for or on behalf of any of them with respect to any of the matters referred to in this order;

(b) each of their respective successors and assigns, and all other persons acting in concert or participating with any of them with respect to the matters referred to in this order who shall have received actual notice of this order; and

(c) the trustee.

### **Preservation of Assets and Interests**

3. In order to preserve the identified assets for divestiture, Washington and K & K shall cause Seaspan and Norsk, and Seaspan and Norsk shall use reasonable best efforts, as applicable:

(a) [DELETED]

(b) to maintain and hold the Seaspan barging assets in good condition and repair in accordance with best industry practices until they have been divested according to the procedures established in this order, or the divestiture of the Norsk barging assets becomes required under the provisions of this order, as the case may be;

(c) to maintain and hold the Norsk barging assets in good condition and repair in accordance with best industry practices until the Seaspan barging assets have been divested pursuant to this order or the divestiture of the Norsk barging assets is completed pursuant to this order, as the case may be.

(d) [DELETED]

4. The Washington Group shall refrain from taking any action that would unreasonably, within the intent of this order, jeopardize the sale of the identified assets as required by this order.

5. [DELETED]

#### **Divestiture of the Seaspam Barging Assets**

6. The Washington Group, as applicable, shall promptly commence their efforts to divest and shall complete divestiture of the Seaspam barging assets within 12 months from the date of this order in accordance with the procedure for divestiture set out in this order.

7. Washington may at his discretion:

(a) vary, with a view to promptly effecting a sale, the assets and interests listed in schedules B and C, to provide a greater quantity or quality of asset, by including a group of assets which are of lesser age, better condition or of greater relative horsepower, as the case may be, or by including any of the assets listed in schedules D and E, or by including other assets; or

(b) [DELETED]

(c) in lieu of a divestiture of the Seaspam chip barge assets, divest the Norsk chip barge assets; or

(d) in lieu of a divestiture of the Seaspan covered barge assets, divest the Norsk covered barge assets.

**Divestiture of the Norsk Barging Assets**

8. If the divestiture of the Seaspan covered barge assets pursuant to paragraph 6 is not completed within the time specified therefor, the Washington Group, as applicable, shall proceed to divest the Norsk covered barge assets in accordance with the procedure for the trustee sale set out in this order.

9. If the divestiture of the Seaspan chip barge assets pursuant to paragraph 6 is not completed within the time specified therefor, the Washington Group, as applicable, shall proceed to divest the Norsk chip barge assets in accordance with the procedure for the trustee sale set out in this order.

10. [DELETED]

**Divestiture Procedure**

11. Divestiture of the Seaspan barging assets or, in the case of a trustee sale pursuant to this order, divestiture of the Norsk barging assets (collectively, in paragraphs 11 and 12, referred to as the "divested assets") shall be completed on the following terms:

(a) by sale, assignment of lease or sublease, assignment of contract, or other disposition necessary to ensure that, by completion of the divestiture, the Washington Group have, directly or indirectly, no remaining right, title or interest in the divested assets inconsistent with the intent of this order;

(b) by way of disposition of the divested assets for use as a going concern, respectively;



(c) to an arm's length purchaser or purchasers who shall meet the following objective criteria:

(i) [DELETED]

(ii) in the case of the Seaspan barging assets (or the Norsk barging assets, in the event of a trustee sale), shall effect the purchase with the expressed intention of using the assets to compete effectively as a provider of barging services on British Columbia domestic routes;

(iii) in any case, shall have the managerial, operational and financial capability to operate and compete effectively in the markets in question;

(iv) shall not be, directly or indirectly, or shall not be proposed to be, a purchaser of services historically provided in connection with or by the divested assets unless that purchaser intends to use those assets to make the relevant barging services generally available to third parties; and

(v) shall purchase the divested assets as a package, in the case of a divestiture by the Washington Group, consisting of not less than any one of the Seaspan chip barge assets or the Seaspan covered barge assets and, in the case of a trustee sale, consisting of not less than any one of the Norsk chip barge assets or the Norsk covered barge assets. For greater certainty, a purchaser may bid upon, to the extent they are available pursuant to a divestiture under this order, any

combination of the Seaspan chip barge assets, the Seaspan covered barge assets, the Norsk chip barge assets, or the Norsk covered barge assets;

(d) by way of a commercially reasonable public tender, bidding or other procedure instituted in a manner to allow a fair opportunity to any bona fide prospective purchasers who receive notice of the prospective divestiture to make an offer to acquire the divested assets; and

(e) otherwise on usual commercial terms for transactions of the size and nature of those contemplated in this order.

12. Any person making a bona fide inquiry of the relevant seller or its agent regarding the possible purchase by that person or its principal of the divested assets offered for sale shall be notified that the sale is being made pursuant to this order and provided with a copy of this order. Any bona fide prospective purchaser shall be furnished, subject to the execution of a customary confidentiality agreement, with all pertinent information regarding the assets or interests being divested; such information shall be provided to the Director on request. Any bona fide prospective purchaser shall, subject to an appropriate confidentiality agreement, be permitted to make such inspection of the assets and of all financial, operational or other documents and information as may be relevant to the divestiture, except for all documents which have been or shall be made the subject of an order of confidentiality of this Tribunal.

13. The Washington Group, as applicable, shall use their reasonable best efforts to accomplish the divestiture within the time period specified.

14. The Washington Group, as applicable, shall advise the Director every 30 days in writing of the progress of their efforts to accomplish the divestiture, including a description of contacts or negotiations and the identity of all parties contacted and prospective purchasers who have come forward, all with reasonable detail.

### **Trustee Sale**

15. If the divestiture of the Seaspan chip barge assets or the Seaspan covered barge assets is not completed within 12 months from the date of this order, the Tribunal, on the application of the Director, after affording the Washington Group a reasonable opportunity to be heard with respect to the identity of the trustee, which opportunity in no way restricts rights otherwise given under this order, shall appoint a trustee to be nominated by the Director for the sale of the Norsk covered barge assets in the event that the Seaspan covered barge assets are not divested, and for the sale of the Norsk chip barge assets in the event that the Seaspan chip barge assets are not divested, (the "assets"), as the case may be, on the following terms:

- (a) the relevant assets shall be divested by the trustee within 6 months of the trustee's appointment at the most favorable price and on the most favorable terms and conditions available;
- (b) the trustee sale shall be accomplished in accordance with paragraph 11 herein;
- (c) the trustee sale shall be considered to have been completed when the purchaser has signed a binding agreement that has not been the subject of objection permitted by this order;

(d) after the appointment of the trustee becomes effective, only the trustee shall have the right to effect the divestiture required by this order;

(e) the trustee shall have the full power and authority to effect the trustee sale and shall use all reasonable efforts to accomplish it;

(f) the Washington Group, as applicable, shall use their reasonable best efforts to assist the trustee in accomplishing the trustee sale. In connection therewith, the trustee shall have full and complete access as is reasonable in the circumstances, subject to an appropriate confidentiality agreement, to the personnel, books, records and facilities of Norsk, as applicable, who shall take no action to interfere with or impede the trustee's accomplishment of the trustee sale;

(g) after appointment, the trustee shall, every 30 days, file reports with the Director and the Washington Group, setting forth the trustee's efforts to accomplish the trustee sale;

(h) all expenses reasonably and properly incurred by the trustee in the course of the trustee sale shall be paid by Washington or his nominee and the proceeds of the trustee sale paid to the Washington Group, as applicable; and

(i) the trustee shall have such other powers as the Tribunal shall deem appropriate.

16. The Washington Group shall not object to a divestiture by the trustee on any grounds other than the trustee's malfeasance, gross misconduct or breach of this order and any such objection shall be made in accordance with the provisions of paragraph 23.

17. If the trustee has not accomplished the required divestiture within 90 days of appointment, the trustee shall thereupon promptly file with the Tribunal on a confidential basis a report setting forth: (1) the trustee's efforts to accomplish the required divestiture, (2) the reasons, in the trustee's judgment, why the required divestiture or disposition has not been accomplished, and (3) the trustee's recommendations. The trustee shall at the same time furnish such report to the Director and the Washington Group, who shall each have the right to be heard by and to make additional recommendations to the Tribunal consistent with the purpose of the divestiture. The Tribunal may thereafter make such orders as it shall deem appropriate in order to carry out the divestiture, which may, if necessary, include extending the term of the trustee's appointment.

#### **General Provisions Regarding Divestiture**

18. Following a divestiture or trustee sale, none of the Washington Group nor any of its agents or representatives shall make further direct or indirect use of the assets or interests divested or acquire same for a period of 10 years, but nothing in this paragraph shall preclude:

- (a) the exchange or sale of services or like arrangements of a customary nature acceptable to the new owner; or
- (b) a repurchase by the Washington Group for use outside the relevant markets:

(i) if the business associated with the divested assets has failed or is likely to fail within the meaning of those terms in the Act,

(ii) [DELETED]

except that any such purchase by the Washington Group shall be subject to the provisions of the Act.

18A. Washington will not acquire any of the assets of Tiger Tugz Inc. or any related entity employed in the ship berthing business in Vancouver Harbour, or a significant interest in such entities, for a period of ten years from the date of this order.

19. [DELETED]

### **Notification**

20. The Washington Group or the trustee, whichever is then responsible for effecting the divestiture required herein, shall notify the Director and, in the case of a trustee sale, the Washington Group, and any person who has a contract for the purchase of services related to the Seaspan barging assets or the Norsk barging assets and identified in schedules B, D or E to this order, of the identity of the purchaser in any proposed divestiture required by this order. The notice to the Director and, in the case of a trustee sale, to the Washington Group, shall set forth the details of the proposed transaction and list the name, address and telephone number of each person not previously identified who offered or expressed an interest or desire to acquire any of the assets to be divested together with complete details of the offer or expression of interest.

21. Within 7 days after receipt of the notice referred to in paragraph 20, the Director and, in the case of a trustee sale, the Washington Group, may request additional information concerning the proposed divestiture, the proposed purchaser and any other potential purchaser. The Washington Group or the trustee shall furnish the additional information within 7 days of the receipt of the request unless the Director agrees in writing to extend the time.

22. Within 15 days after receipt of the notice in paragraph 20 or, in the case of the Director, if additional information is requested by the Director within the time specified in paragraph 21, within 15 days after receipt of the additional information, the Director or any person notified pursuant to paragraph 20 shall notify the Washington Group and the trustee, if there is one, in writing of any objections they have to the proposed divestiture on the ground that it does not conform to the terms of this order and give reasonably detailed reasons therefor.

23. If the Director or any person notified pursuant to paragraph 20 fails to object within the period specified in accordance with paragraph 22, or if the Director notifies the Washington Group and the trustee, if there is one, in writing that there is no objection, then the divestiture may be completed, subject only to the limited right of the Washington Group to object to the sale on the grounds set out in paragraph 16. Upon such objection by the Washington Group, the proposed divestiture shall not be completed unless approved by the Tribunal.

24. If the Director or any person notified pursuant to paragraph 20 objects pursuant to paragraph 22, they may apply to the Tribunal for an order that the proposed divestiture not be completed.

## **Financing**

25. None of the Washington Group shall provide financing for all or any part of any divestiture under this order which would permit any of the Washington Group to influence or control the operation of the assets after the divestiture (such as through a right of repossession) without the prior written consent of the Director.

## **Compliance Inspection**

26. The Washington Group shall, for the purpose of determining or securing compliance with this order, and subject to any legally recognized privilege, from time to time permit representatives of the Director, including counsel, consultants and other persons retained by the Director (which representatives shall be subject to an appropriate confidentiality arrangement whether by statute or contract, as applicable), upon the written request of the Director and on 7 days notice to the Washington Group, as applicable:

(a) to have access during office hours to inspect all books, ledgers, accounts, correspondence, memoranda, and other records and documents in the possession or under the control of the Washington Group, as applicable, which may have counsel present, relating to any matters contained in the order; and

(b) subject to the reasonable convenience of the Washington Group, as applicable, and without restraint or interference from them to interview their officers, employees and agents, who may have their respective counsel and counsel for the Washington Group, as applicable, present regarding any such matters.



27. Upon the written request of the Director, the Washington Group, as applicable, shall submit written reports, under oath if requested, with respect to any of the matters contained in this order.

### **General**

28. No information or documents obtained by the means provided in paragraphs 26 and 27 herein shall be divulged by any representative of the Director to any person except in the course of legal proceedings to which the Director and any of the respondents are a party, and only to the extent such information needs to be divulged for the purpose of securing compliance with this order, or as otherwise required by law.

29. Jurisdiction shall be retained by the Tribunal for the purpose of any application by the Director, the Washington Group or the trustee to rescind or vary any of the provisions of this order in the event of a change in circumstances or otherwise.

30. The Interim Consent Order, dated April 19, 1996, as amended, is hereby rescinded as of the date of the making of this order.

31. The application of the Director commenced by notice of application filed March 1, 1996 and amended by an amended notice of application filed July 16, 1996, and by a second amended notice of application filed December 17, 1996, is otherwise hereby dismissed.

32. Nothing in this order shall require the variation, alteration or amendment of the present provisions of those agreements identified in schedules D and E hereto, except to the extent necessary to permit the assignment to a new purchaser of such contracts for the purposes of any divestiture of the assets employed in those contracts required under this order.

### **Notice**

33. When notice is required to be given pursuant to any of the terms of this order, it shall be deemed given if dispatched by registered letter and if so dispatched shall be deemed to have been given 3 days thereafter.

### **Interpretation**

34. In the event of a dispute as to the interpretation of this order, the Director, the trustee or Washington, or his nominee, shall be at liberty to apply to the Tribunal for a further order interpreting any of the provisions of this order. Nothing in this paragraph is intended to restrict the power of the Tribunal to rescind or vary this order pursuant to paragraph 29 hereof or section 106 of the Act or take other action authorized by the Act or the Competition Tribunal Act.

DATED at Ottawa, this 29th day of January, 1997, and amended this 9th day of March, 1998.

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

(s) W.P. McKeown

W.P. McKeown

**SCHEDULE A**

[DELETED]

## SCHEDULE B

### Seaspan Chip Barge Assets

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"Seaspan chip barge assets" means:

- (a) six Seaspan chip barges, described in the table below;
- (b) an option:
  - (i) to purchase, for a period of up to one year from and including the date of purchase of the six barges referred to in (a) above, on normal and reasonable commercial terms, up to four additional Seaspan chip barges of substantially equivalent age, capacity and condition and in similar service as the six barges referred to in (a) above;
  - (ii) with, if the purchaser chooses to subcontract the barges to remain in Seaspan's service, the associated barge hire revenue, subject to the ability of the purchaser to remove such barge or barges from Seaspan's service on reasonable commercial notice; and
  - (iii) at a purchase price to be determined between Seaspan and the purchaser, the barge asset value component of which shall be agreed upon by the parties or be fixed by a competent marine surveyor, ship broker or other similarly qualified person mutually appointed by Seaspan and the purchaser or should they fail to agree on the person to be appointed, such barge asset value component of the said purchase price shall be determined by arbitration pursuant to the rules of the Vancouver Maritime Arbitrators Association.
- (c) the business described in paragraph 33 of the contract made between Seaspan International Ltd. and Avenor Inc., dated August 1, 1995; and
- (d) a tug, more properly described as the "Seaspan Sentry" (official number 320254).

| Name of Barge | Official Number | Type       |
|---------------|-----------------|------------|
| Seaspan 383   | 320297          | chip barge |
| Seaspan 392   | 322469          | chip barge |
| Seaspan 394   | 323249          | chip barge |
| Seaspan 395   | 323291          | chip barge |
| Seaspan 400   | 325653          | chip barge |
| Seaspan 408   | 326494          | chip barge |

## SCHEDULE C

### Seaspan Covered Barge Assets

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"Seaspan covered barge assets" means either the Seaspan 618 and Seaspan 619 or the Seaspan 610 and Seaspan 616 (all of which are described in the table below) as selected by Washington.

| <u>Name of Barge</u> | <u>Official Number</u> | <u>Type</u>   |
|----------------------|------------------------|---------------|
| Seaspan 618          | 314844                 | covered barge |
| Seaspan 619          | 314859                 | covered barge |
| Seaspan 610          | 323846                 | covered barge |
| Seaspan 616          | 322476                 | covered barge |

## SCHEDULE D

### Norsk Chip Barge Assets

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"Norsk chip barge assets" means:

- (a) twelve chip barges described in the table below; and
- (b) the Chip Barge Transportation Contract between Norsk and Fletcher Challenge Canada Limited, dated March 31, 1979 and amended March 31, 1994.

| <u>Name of Barge</u> | <u>Official Number</u> | <u>Type</u> |
|----------------------|------------------------|-------------|
| Norsk Pacific 11     | 392223                 | chip barge  |
| Norsk Pacific 12     | 392743                 | chip barge  |
| Norsk Pacific 13     | 392990                 | chip barge  |
| Norsk Pacific 14     | 393358                 | chip barge  |
| Norsk Pacific 15     | 392783                 | chip barge  |
| Norsk Pacific 16     | 392979                 | chip barge  |
| Norsk Pacific 17     | 800201                 | chip barge  |
| Norsk Pacific 18     | 800202                 | chip barge  |
| Norsk Pacific 19     | 800203                 | chip barge  |
| Norsk Pacific 20     | 801004                 | chip barge  |
| Norsk Pacific 21     | 801052                 | chip barge  |
| Norsk Pacific 22     | 801523                 | chip barge  |

## SCHEDULE E

### Norsk Covered Barge Assets

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"Norsk covered barge assets" means:

- (a) the nine covered barges described in the table below;
- (b) the Covered Barge Towing Services Agreement (Domestic) between Fletcher Challenge Canada Sales Inc. and Norsk dated April 1, 1995; and
- (c) two tugs, more properly described as the "Texada Crown" (official number 323577) and the "Comox Crown" (official number 348790).

| <u>Name of Barge</u> | <u>Official Number</u> | <u>Type</u>   |
|----------------------|------------------------|---------------|
| Norsk Pacific 10     | 810141                 | covered barge |
| Norsk Pacific 61     | 328960                 | covered barge |
| Norsk Pacific 62     | 810501                 | covered barge |
| Norsk Pacific 63     | 810502                 | covered barge |
| Norsk Pacific 64     | 815115                 | covered barge |
| Norsk Pacific 65     | 188354                 | covered barge |
| Norsk Pacific 66     | 189270                 | covered barge |
| Norsk Pacific 67*    | 812363                 | covered barge |
| Norsk Pacific 68     | 818622                 | covered barge |

\* Not in use in Fletcher Challenge service; occasionally chartered