

COMPETITION TRIBUNAL

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, as amended;

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;

BETWEEN:

DENNIS WASHINGTON,
K&K ENTERPRISES,
SEASPAN INTERNATIONAL LTD.,
C.H. CATES AND SONS, LTD.

Applicants

- and -

THE DIRECTOR OF INVESTIGATION AND RESEARCH and
NORSK PACIFIC STEAMSHIP COMPANY, LIMITED

Respondents

NOTICE OF APPLICATION FOR A CONSENT ORDER

TAKE NOTICE THAT the Applicants will make an application to the Competition Tribunal (the "Tribunal") pursuant to section 106 (b) of the *Competition Act*, R.S.C. 1985, c.C-34, as amended, for an Order, more particularly set out in the Draft Consent filed herewith, varying the Consent Order of the Tribunal dated January 29, 1997 (the "January 29, 1997 Order"):

(a) by removing the requirement that the applicants divest themselves of the ship berthing assets, as defined in the January 29, 1997 Order and referred to in Schedule "A" of the

January 29, 1997 Order or divest themselves of C.H. Cates & Sons Ltd., and any provisions ancillary to those requirements;

(b) by adding the following paragraph:

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.

and:

(a) — a variation of the Consent Order of the Tribunal dated January 29, 1997 (the “Consent Order”) as indicated in the Draft Amended Consent Order annexed as Schedule “A” to this Notice of Application, to remove the requirement that the Applicants divest themselves of the ship berthing assets, as defined in the Consent Order and referred to in Schedule “A” of the Consent Order (the “Ship Berthing Assets”), or divest themselves of C.H. Cates & Sons, Ltd., and any provisions ancillary to those requirements; and

(bc) such further and other relief, including interim relief, that the Applicants may request and the Tribunal may permit.

AND TAKE NOTICE THAT this Application is brought pursuant to section 106 (ba) of the *Competition Act*, R.S.C. 1985, c C-34, as amended, and the *Competition Tribunal Rules*.

AND TAKE FURTHER NOTICE THAT the grounds upon which the Application is brought are that the Applicants and the Director have consented to an alternative order to the January 29, 1997 Order filed herewith as the Draft Consent Order, circumstances which led to the making of the Consent Order have changed such that (1) the Consent Order would not have been made or (2) the order would be ineffective to achieve its intended purpose and the Applicants will rely upon the Statements of Grounds and Material Facts annexed as Schedule “B” to this Notice of Application.

AND TAKE FURTHER NOTICE THAT in support of the Application the Applicants will rely upon the Consent Order Impact Statement, Agreed Statement of Facts, Draft Consent Order and Consent of the Director and the Applicants, filed herewith, and the pleadings and materials filed in respect of the January 29, 1997 Consent Order Application, and such further and other materials as counsel may advise and the Tribunal may permit. Following materials, items (a) to (e) of which are annexed as Schedule “C” to this Notice of Application:

~~(a) the Affidavit of Douglas Towill, sworn on November 28, 1997;~~

~~(a) the Affidavit of John Barker, sworn on November 27, 1997;~~

~~(a) the Affidavit of Richard Schwindt, sworn on November 27, 1997;~~

~~(a) The affidavit of Henry W. (Jay) Winship, sworn November 27, 1997;~~

~~(a) the Affidavit of William E. Cascadden, sworn on November 25, 1997;~~

~~(a) the pleadings and materials filed in respect of the Consent Order Application; and~~

~~(c) such further and other material as counsel may advise and this Tribunal may permit.~~

~~**AND TAKE FURTHER NOTICE THAT** the Applicants may make such motions as necessary to stay the enforcement of or extend the time for compliance with the Consent Order pursuant to section 8 of the *Competition Tribunal Act* and the *Federal Court Rules*.~~

AND TAKE FURTHER NOTICE THAT The parties are available for a conference call, at the Tribunal’s convenience to establish a schedule for the disposition of this Application.

AND TAKE FURTHER NOTICE THAT the parties would be prepared to have the application dealt with by the Tribunal without necessity of a hearing.

AND TAKE FURTHER NOTICE THAT the Applicants request, should an oral hearing of this Application be necessary, that the hearing of this Application be held either by conference call or in the City of Vancouver, British Columbia.

AND TAKE FURTHER NOTICE THAT the Applicants wish to use the English language at the hearing of the Application.

DATED at the City of Vancouver, this 26^m day of January ~~November~~, 19987.



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and Sons, Ltd. and for Norsk Pacific
Steamship Company, Limited

TO: The Registrar
Competition Tribunal
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COMPETITION TRIBUNAL

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, as amended;

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.;

DENNIS WASHINGTON,
K&K ENTERPRISES,
SEASPAN INTERNATIONAL LTD.,
C.H. CATES AND SONS, LTD.

Applicants

- and -

THE DIRECTOR OF INVESTIGATION AND RESEARCH and
NORSK PACIFIC STEAMSHIP COMPANY, LIMITED

Respondents

AFFIDAVIT OF SHARON DOS REMEDIOS

I, SHARON DOS REMEDIOS, of 3000 - 1055 West Georgia Street, in the City of Vancouver, in the Province of British Columbia, MAKE OATH AND SAY AS FOLLOWS:

1. I am a lawyer at the law firm of Bull, Housser and Tupper, Counsel for the Applicants and Norsk Pacific Steamship Company, Limited, and as such have personal knowledge of the facts and matters hereinafter deposed to in this Affidavit, save and except where the same are stated to be based on information and belief and where so stated I verily believe them to be true.

2. The Applicants and the Director have agreed to a settlement of the Notice of Application filed by the Applicants on December 1,1997. The Applicants and the Director seek to amend the Notice of Application for the purpose of obtaining a Consent Order from tile Tribunal.

3. The Applicants will be filing, as required pursuant to the Competition Tribunal Rules, a Consent Order Impact Statement, a Draft Consent Order, an Agreed Statement of Facts, and the Consent of the patties.

4. I make this Affidavit in support of a Motion to Amend the Notice of Application filed December 1,1997 for the purpose of seeking a Consent Order of the Competition Tribunal.

SWORN BEFORE ME at the City of)
Vancouver, in the Province of British)
Columbia, this 26th day of January, 1998)



A Commissioner for taking)
Affidavits for British Columbia)



SHARON DOS REMEDIOS

COMPETITION TRIBUNAL

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, as amended;

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

DENNIS WASHINGTON,
K&K ENTERPRISES,
SEASPAN INTERNATIONAL LTD.,
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Applicants

- and -

THE DIRECTOR OF INVESTIGATION AND RESEARCH and
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CONSENT ORDER IMPACT STATEMENT

I. INTRODUCTION

1. This statement is filed by the Applicants pursuant to section 77 of the *Competition Tribunal Rules* in support of an Application for a variation of the Consent Order of the Tribunal dated January 29, 1997. It provides an explanation of the Draft Consent Order, filed herewith by agreement of the parties, the circumstances giving rise to the D&t Consent Order, the relief which will be obtained if the order is made and the anticipated effect on competition of the Draft Consent Order.

2. The Applicants file this Statement pursuant to section 106(b) of the *Competition Act* R.S.C. 1985, c. C-34, as amended, (“the *Act*”). The parties have also filed an Agreed Statement of Facts which pursuant to section 105 of the *Act* forms the evidentiary basis for this Application.

3. The Applicant Dennis Washington is a businessman based in Missoula, Montana., who, in 1992, acquired the Applicant C.H. Cates and Sons, Ltd. (“Cates”), a company which provides ship berthing services in Burrard Inlet, British Columbia. Cates was the sole provider of ship berthing services in Burrard Inlet prior to the entry of the Applicant Seaspan International Ltd. (“Seaspan”) in September 1993.

4. The Applicant K&K Enterprises is a partnership, formed under the laws of the State of Montana, between the Kevin Washington Irrevocable Trust and the Kyle Washington Irrevocable Trust Dennis Washington is the settler of those trusts. On October 13, 1994, K&K Enterprises acquired 33% of the shares of Seaspan, a company which provides ship berthing services in Burrard Inlet and Roberts Bank, British Columbia. In June 1996, Dennis Washington acquired the remaining shares of Seaspan.

5. On December 17, 1996, the Director filed a Second Amended Notice of Application which alleged that a substantial lessening of competition had occurred in the provision of ship berthing services in the Burrard Inlet and Roberts Bank ship berthing markets as a result of the acquisition by Dennis Washington of a significant interest in and control of Seaspan (defined in the Second Amended Notice of Application as the “Seaspan Merger”). The Second Amended Application alleged that the Seaspan Merger removed Seaspan as a vigorous and effective competitor in the Burrard Inlet ship berthing market and recreated the monopoly position which existed prior to Seaspan’s entry into the market. The Second Amended Application further alleged that entry sufficient to offset any market power resulting from the Seaspan Merger was unlikely to occur in the market.

II. THE CIRCUMSTANCES GIVING RISE TO THE DRAFT CONSENT ORDER

6. On January 13, 1997, the Director filed a Notice of Application for a Consent Order and a Consent Order Impact Statement in the proceedings and the Applicants, the Respondent Norsk Pacific Steamship Company, Limited (“Work”) and the Director filed a Consent in respect of the

Draft Consent Order submitted. The other parties in the proceedings did not file a consent in respect of the Draft Consent Order and, consequently, were not parties to the Consent Order.

7. On January 29, 1997, the Tribunal issued a Consent Order in respect of those proceedings (the "January 29, 1997 Order"). The January 29, 1997 Order required the Applicants to undertake certain divestitures, including the divestiture of Ship Berthing Assets more particularly described in Schedule "A" to the January 29, 1997 Order, or if they failed to do so within twelve months of the Order, the Order required a divestiture of Cates.

8. At the time of the January 29, 1997 Order it did not appear likely that anyone would enter the market unless a divestiture occurred to create an entrant. At Paragraph 16 of the earlier Consent Order Impact Statement, the Director stated:

It is further alleged that successful de novo entry into the ship berthing markets is difficult because of factors including the sunk costs associated with an investment in equipment which comprise highly specialized assets, such as high horsepower tractor tugs which have very limited alternative uses, the substantial costs and time lags in establishing an efficient scale of ship berthing operations, and the need to become a qualified, credible supplier acceptable to the major users of ship berthing services who face high delay and other costs in the event of inadequate ship berthing services.

9. At paragraph 24 of the earlier Consent Order Impact Statement, in respect of the settlement proposed by the Applicants, Norsk and the Director, the Director stated:

The proposed settlement relies upon the divestiture of key assets in . . . ship berthing . . . designed to alleviate the anti-competitive effects of the mergers. The Director has determined that the primary remedy to achieve competition is to require the divestiture of prescribed assets which, in her view, are necessary to restore competition. Should the divestiture of identified asset packages in the Draft Consent Order not be obtained, the Director has agreed with Washington that a "backstop" package will be sold consisting, with respect to ship berthing of Cates . . . which would effect a practical reversal to the effect of the Seaspan . . . merger . . .

10. At paragraph 28 of the earlier Consent Order Impact Statement, in respect of the proposed package of Ship Berthing Assets to be divested, the Director: stated:

The proposed divestiture package with respect to ship berthing consists of two tractor tugs of 2400 BHP, three conventional backup tugs (one of which of 1800 BHP) and one line boat, all selected from a group of tugs in the Cates and Seaspan fleets. This new group of vessels effectively replicates the fleet with which Seaspan entered Burrard Inlet in 1993. Thus, the proposed divestiture of ship berthing assets effectively restores the pre-Seaspan merger competitive situation in Burrard Inlet.

11. In its reasons for the January 29, 1997 Order, the Tribunal stated that it was satisfied, on the basis of the material filed, that the January 29, 1997 Order accomplished what it was intended to accomplish, that is that it cured the substantial lessening of competition which allegedly resulted from the Seaspan Merger.

12. In accordance with the January 29, 1997 Order, the Washington Group selected the following vessels to constitute the Ship Berthing Assets for divestiture and began the process for divestiture of these assets:

TUG NAME	LENGTH	HORSEPOWER	PROPULSION
CATES I	75 ft.	2,400	twin z-drives-tractor
CATES II	75 ft.	2,400	twin z-drives - tractor
SEASPAN CORSAIR	83 ft.	1,800	twin screw
SEASPAN TROJAN	65 ft.	1,200	single screw-(w/bow thruster)
SEASPAN PRINCE	55 ft.	1,000	single screw
CATES XVI	46 ft.	750	single screw (line boat)

13. On or about October 4, 1997, a new provider of ship b&g services, Tiger Tugz Inc. ("Tiger Tugz") commenced operations in the Burrard Inlet ship berthing market. Tiger Tugz is a corporate affiliate of Rivtow Marine Ltd. and Rivtow Straits Limited ("Rivtow"). Rivtow has been the primary supplier of ship berthing services in the Ports of New Westminster, Kitimat and Prince Rupert for a number of years. Essentially, Tiger Tugz is an entry by Rivtow in the Burrard Inlet ship berthing market.

14. Tiger Tugz currently has four vessels dedicated to its ship berthing operation in Burrard Inlet:

TUG NAME	HORSEPOWER	PROPULSION
TIGER SPIRIT (ex RIVTOW SPIRIT)	3,000	twin Z-drive - tractor
TIGER PRIDE	3,000	twin Z-drive - tractor
TIGER SHARK 2	1,800	twin screw - kort nozzle
TIGER SHAMAN	1,200	twin screw - kort nozzle

Tiger Tugz also plans to build a fifth vessel, the ‘TIGER WOLF’ (1,800 horsepower), as a sister vessel to the TIGER SHARK 2. The five vessels identified in this paragraph are hereinafter referred to as the ‘Tiger Tugz Fleet’.

15. The Applicants and the Director have agreed to an alternate form of the January 29, 1997 Order pursuant to section 106(b) of the *Act*. The alternate order varies the existing order by removing the requirement that the Applicants divest of Ship Berthing Assets or Cates and adds an additional prohibition regarding a purchase of Tiger Tugz by Dennis Washington. As explained below, the entry by Rivtow conditions the substantial lessening of competition alleged to have occurred as a result of the Seaspan Merger such that the divestiture of the Ship Berthing Assets or Cates is not required and the variation ensures that the alleged anti-competitive effect of the Seaspan Merger continues to be eliminated.

III. TEST FOR VARIATION OF ORDER BY CONSENT

16. This Application is brought pursuant to section 106(b) of the Act which states:

106. Where, on application by the Director or a person against whom an order has been made under this Part, the Tribunal finds that . . .

(b) the Director and the person against whom an order has been made have consented to an alternative order,

the Tribunal may rescind or vary the order accordingly.

17. Section 105 of the *Act* states:

105. Where an application is made to the Tribunal under this Part for an order and the Director and the person in respect of whom the order is sought agree on the terms of the order, the Tribunal may make the order on those terms without hearing such evidence as would ordinarily be placed before the Tribunal had the application been contested or further contested.

18. In its reasons for the January 29, 1997 Order in *Canada (Director of Investigation and Research) v. Washington* (1997), 73 C.P.R. (3d) 538 at 543 (Comp. Trib.), the Tribunal held that the appropriate test for approval of a consent order in merger proceedings was that set out in *Canada (Director of Investigation and Research) v. Air Canada* (1989), 27 C.P.R. (3d) 476 at 513-514 (Comp. Trib.), namely:

The decision in *Director of Investigation and Research v. Air Canada* set out the test for assessing a proposed consent order in the context of a merger case. The Tribunal held:

The Tribunal accepts the Director's argument that the role of the Tribunal is not to ask whether the consent order is the optimum solution to the anticompetitive effects which it is assumed would arise as a result of the merger. The Tribunal agrees that its role is to determine whether the consent order meets a minimum test. That test is whether the merger, as conditioned by the terms of the consent order, results in a situation where the substantial lessening of competition, which it is presumed will arise from the merger, has, in all likelihood, been eliminated.

As the *Air Canada* decision makes clear, the Tribunal will not merely "rubber stamp" the terms of a consent order put before it by the Director; the Tribunal must be satisfied that the consent order cures the substantial lessening of competition alleged by the Director. The Tribunal must be satisfied that the proposed order is an adequate solution to the alleged substantial lessening of competition in the markets identified by the Director.

19. In *Canada (Director of Investigation and Research) v. Asea Brown Boveri Inc.* (16 March, 1990) Ottawa CT 8901/146 {Comp. Trib.} in respect of the test for an application to vary an order by consent, the Tribunal held that it should apply the same test to a variation of a consent order as is applied to a draft consent order:

The Tribunal adopts the standard of review set out in the memorandum of facts and law of the Director. The Tribunal will therefore apply the same test to a variation of a consent order as it applies when considering a draft consent order:

That test is whether the merger, as conditioned by the terms of the consent order, results in a situation where the substantial lessening of competition, which it is presumed will arise from the merger, has, in all likelihood, been eliminated ...

In the case of a proposed variation, it is the consent order as proposed to be varied that the Tribunal will evaluate against this standard.

20. In the subject application, the test for approval of the Draft Consent Order is whether the merger, conditioned by the January 29, 1997 Order as modified by the proposed variation in the Draft Consent Order, would result in a situation where the substantial lessening of competition, presumed to arise from the merger, has in all likelihood, been eliminated.

21. In respect of the ship berthing markets, for the reasons outlined below, the parties submit that, given the entry of Rivtow in the ship berthing market, the Seaspan Merger no longer results in a substantial lessening of competition in that market. As such, the Seaspan Merger, as conditioned by the January 29, 1997 Order and the proposed variation, and in particular, the additional prohibition against a purchase of Tiger Tugz, continues to result in a situation where the presumed substantial lessening of competition has in all likelihood been eliminated. Accordingly, the remedial part of the order requiring a divestiture of the Ship Berthing Assets or Cates is no longer required.

22. In respect of the covered and chip barging markets, which the January 29, 1997 Order also conditioned, the proposed variation has no impact on the remedial nature of the Order in those markets. Moreover, the Applicants and Norsk have already fulfilled their obligation to divest of the covered and chip barging assets.

IV. THE PROPOSED VARIATION AND THE ANTICIPATED EFFECT OF THE DRAFT CONSENT ORDER ON COMPETITION

A Removal of the Requirement to Divest of the Ship Berthing Asset

23. The proposed variation, as more particularly set out in the Draft Consent Order, removes the requirement that the Applicants divest themselves of the Ship Berthing Assets or Cates as required under the January 29, 1997 Order and any provisions ancillary to those requirements.

24. The Applicants and the Director agree that the entry of Rivtow restores a vigorous and effective competitor to the market and that, as a result of the Rivtow entry, effective competition remains in the ship berthing market after the Seaspan Merger such that the requirement that the Applicants divest themselves of the Ship Berthing Assets or Cates is not necessary.

Burrard Met Market

25. In the Second Amended Notice of Application, the Director alleged that the Seaspan Merger resulted in the removal of Seaspan as a vigorous and effective competitor in the Burrard Inlet ship berthing market and that *de novo* entry was not likely to occur to re-create a vigorous and effective competitor in the market. The Applicants and the Director agree that such entry has now sufficiently occurred by Rivtow, through its Tiger Tugz operation.

26. In the earlier Consent Order Impact Statement, the Director stated that a *de novo* entry would be difficult to achieve due to the following factors: (a) the sunk costs associated with the requisite investment in highly specialized assets; (b) the need to become a credible, qualified service provider; and (c) substantial costs and time lags in establishing an efficient scale of operation. The Rivtow entry has overcome these factors.

a Investment in Highly Specialized Assets

27. The Rivtow entry represents a significant investment in highly specialized assets namely two new 3,000 BHP tractor tugs and three other conventional tugs. The two tractor tugs, the “TIGER SPIRIT” and the “TIGER PRIDE”, are newer than and as powerful or more powerful than any of the tugs in the Seaspan or Cates fleet. The Tiger Tugz Fleet has a greater capacity than the fleet Seaspan initially stationed in Burrard Inlet upon entry in 1993. Like Seaspan at the time of entry, Tiger Tugz has the ability to increase its operational capacity by drawing on the “back up” capability of the substantial Rivtow fleet. The Tiger Tugz Fleet is also comparable to the Ship Berthing Assets in the Divestiture Package.

b. Credibility and Qualifications

28. Rivtow is already a qualified, credible supplier of ship berthing services and has a proven reputation among the buyers of such services which it has established in the three other British Columbia ports within which it operates. Rivtow has an on-going relationship with agents and shippers in providing ship docking services in other ports as many of the ships which call in Burrard Met also call in other Rivtow ports, and the same agents are responsible for arranging ship berthing services. Further, the Tiger Tugz operation is a qualified provider of service in the Burrard Inlet in terms of its fleet and crewing.

c. Establishment of Efficient Scale of Operation

29. Rivtow has already successfully endured the costs of and time lag associated with the establishment of ship berthing operations in Burrard Inlet. In addition to the significant capital investment in its Tiger Tugz Fleet, Rivtow already has other capabilities necessary for a Burrard Inlet ship berthing operation, namely: crews experienced in congested, but protected waters and, in particular, crews experienced in Burrard Inlet, an existing shore side dispatch and office, and infrastructure for necessary equipment maintenance in Burrard Inlet. Rivtow's existing Fraser River operation, and the other competitive advantages of Rivtow outlined earlier, suggest that Rivtow will establish a sufficient scale of entry and will do so more expeditiously than a new purchaser of the Ship Berthing Assets. It is estimated that, in the four months since commencement of operations, Tiger Tugz has obtained approximately fifteen percent of the Burrard Inlet ship berthing market.

30. Further, Rivtow has the potential for a competitive pricing advantage over another new entrant or over Seaspan when it entered in 1993. As a multi-port provider of ship berthing services, Rivtow has available multi-market pricing strategies which are unavailable to a single port operator,

31. To the extent that buyers of ship berthing services wish to support a second supplier in Burrard Inlet, they will assist Tiger Tugz in achieving an efficient scale of operation by dedicating a portion of their business to Tiger Tugz.

Roberts Bank Market

32. In the earlier Consent Order Impact Statement, the Director stated that a divestiture of the Ship Berthing Assets would create a credible alternative competitor to Seaspan in respect of

competition for future business at Roberts Bank. Rivtow is a credible, potential entrant at Roberts Bank.

Conclusion

33. In order to recreate a vigorous and effective competitor in the market, paragraph 11 of the January 29, 1997 Order required that the purchaser of the Ship Berthing Assets: (a) have an expressed intention to compete in Burrard Inlet market; (b) have the necessary operational, financial and managerial capability to compete in the market; and (c) not be directly or indirectly a purchaser of services historically provided in connection with the Ship Berthing Assets or Cates

34. The Applicants and the Director agree that Rivtow meets these necessary criteria, Rivtow is actively competing in the Burrard Inlet market through Tiger Tugz. From its Fraser River and other operations (see Statement of Admitted Facts), Rivtow has the necessary operational and managerial capabilities for competition in the relevant market. In particular, Rivtow has many years of experience it can use to develop the Tiger Tugz operation. The Director considers the Rivtow group of companies to be financially capable of such an operation. Rivtow has made a significant capital investment made in the Tiger Tugz Fleet. Finally, Rivtow has not historically been a purchaser of ship berthing services.

35. The Applicants and Director agree that Rivtow is capable of providing vigorous and effective competition in the Burrard Inlet ship berthing market and is a credible potential entrant at Roberts Bank. Its entry re-establishes the pre-merger competitive environment and restores competition sufficient to offset any market power resulting from the Seaspan Merger. As such, any substantial lessening of competition which allegedly occurred in the relevant ship berthing markets as a result of the Seaspan Merger has been alleviated and the remedial portion of the January 19, 1997 requiring the divestiture of the Ship Berthing Assets is no longer necessary and should be removed.

B. Addition of Requirement not to Purchase Tiger Tugz

36. The proposed variation adds an additional term, paragraph 18A, as indicated in the Draft Consent Order, to which the Applicants and the Director have agreed, which requires that Dennis Washington not acquire any of the assets of the new ship berthing provider, Tiger Tugz, 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.

37. The addition of this requirement to the January 29, 1997 Order ensures that Rivtow's Tiger Tugz entry will remain independent from the Washington Group and operate as a competitor to Seaspans and Cates for a period of ten years. It is anticipated, therefore, that the Rivtow entry will continue to condition the alleged anti-competitive effects of the Seaspans Merger in the Burrard Inlet and Roberts Bank ship berthing markets for that period of time.

C. Other Obligations

38. The proposed variations will not impact upon the other obligations of the Applicants under the January 29, 1997 Order. Moreover, the Applicants and Norsk have already fulfilled the requirements that they divest of the chip barging and covered barging assets identified in that Order.

V. ALTERNATIVE TO DRAFT CONSENT ORDER

39. The alternative to the proposed variations in the Draft Consent Order would be for the parties to proceed with the contested Application for variation of the January 29, 1997 Order filed by the Applicants on December 1, 1997 pursuant to section 106(a) of the *Act*.

Dated at Vancouver this 16 th day of January, 1998.

COMPETITION TRIBUNAL

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, as amended;

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.;

BETWEEN:

DENNIS WASHINGTON,
K&K ENTERPRISES,
SEASPAN INTERNATIONAL LTD.,
C.H. CATES AND SONS, LTD.

Applicants

- and -

THE DIRECTOR OF INVESTIGATION AND RESEARCH and
NORSK PACIFIC STEAMSHIP COMPANY, LIMITED

Respondents

DRAFT CONSENT ORDER

UPON the application of the Applicants pursuant to section 105 and 106(b) of the *Competition Act*, R.S.C. 1985, c. C-34 (the "Act") for an order varying the Consent Order of the Tribunal dated January 29, 1997;

AND UPON considering that the Applicants and the Director have agreed to an alternate form of the Consent Order dated January 29, 1997;

AND UPON considering the pleadings herein, the Consent Order Impact Statement and the Consent of the Applicants, Norsk Pacific Steamship Company, Limited and the Director of Investigation and Research, filed herein;

AND WITH the consent of the Applicants and the Director;

THE TRIBUNAL ORDERS THAT:

1. The Consent Order of the Tribunal dated January 29,1997 be varied by removing the requirement that the Applicants divest themselves of the ship berthing assets, as defined in the January 29, 1997 Consent Order or divest themselves of C.H. Cates and Sons, Ltd and any provisions ancillary to those requirements, as indicated in Schedule "A" attached hereto;

2. The Consent Order of the Tribunal dated January 29,1997 be varied by inseting the following paragraph and paragraph 18 :

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.

DATED at Ottawa, this ____ day of _____, 1998.

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

SCHEDULE "A" TO THE DRAFT CONSENT ORDER

Director of Investigation and Research

v.

Dennis Washington et al.

FURTHER TO the application of the Director of Investigation and Research (the "Director") pursuant to sections 92 and 105 of the *Competition Act*, R.S.C. 1985, c. C-34 (the "Act") and further to the second amended notice of application, filed December 17, 1996, for a consent order directing the divestiture of certain assets as provided for in the draft consent order and other remedies specified in the draft consent order;

AND ON CONSIDERING the pleadings herein, the consent order impact statement and consent of the parties dated January 12, 1997 filed herein;

AND ON CONSIDERING THAT the Director and the respondents, Dennis Washington, K & K Enterprises, Seaspan International Ltd., C.H. Cates and Sons Ltd. and Norsk Pacific Steamship Company, Limited (the 'respondents') have reached a settlement which is reflected in the draft consent order;

AND ON CONSIDERING THAT the Director declares herself satisfied that, on the basis of the considerations outlined in the consent order impact statement, the remedies provided herein, if ordered, will be sufficient to remove the substantial lessening or prevention of competition in the ship berthing and barging markets described in the second amended notice of application;

AND IT BEING UNDERSTOOD by the parties hereto that nothing in this order shall be taken as an admission by the respondents of any facts or law which would support the allegation that the acquisitions, as described in the proceedings, prevent or lessen, or are likely to prevent or lessen, competition substantially;

AND IT BEING UNDERSTOOD BY THE PARTIES HERETO THAT the Director has alleged certain material facts, and the respondents do not agree with all the facts alleged but do not contest the statement of grounds and material facts and consent order impact statement for the purposes of this application and any proceeding initiated by the Director or the respondents relating to this consent order only, including an application to vary or rescind under section 106 of the Act;

AND ON HEARING counsel for the parties in respect of this application;

AND FOR THE REASONS issued on this date under separate cover;

THE TRIBUNAL ORDERS THAT:

Definitions

1. For the purposes of this order the following definitions shall apply:
 - (a) “Cates” means the respondent C.H. Gates and Sons Ltd.;
 - (b) “identified assets” means ~~the ship-berthing assets~~, Seaspan barging assets, and Norsk barging assets;
 - (c) “K & IV 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) “Norks 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) “ship berthing assets” means those assets and interests identified in schedule A hereto;~~

(n) “trustee” means the person appointed as trustee pursuant to paragraph 15 hereof to effect a sale of ~~Cates~~, the Norsk covered barge assets and the Norsk chip barge assets, or any 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, Seaspan and Norsk.

Any reference in subparagraphs 1(f), (g), (k), (l) and (m) 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, Seaspan, 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 the 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.

Prevention of Assets and Interests

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

~~(a) to maintain and hold the ship berthing 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 Cates becomes required under the provisions of this order, as the case may be;~~

(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; and

~~(d) to maintain Cates at least the same standards of competition and operation that existed prior to the date of the application until the ship berthing assets have been divested or the divestiture of Cates is complete pursuant to this order, as the case may be. Until either of those divestitures has been completed, Washington and Cates shall not:~~

~~(I) permit any deterioration in such competitive standards of Cates;~~

~~(ii) cause the termination of employment of key personnel of Cates, except termination for cause; or~~

~~(iii) cause any disposition of the assets of Cates other than in the ordinary course of business or pursuant to any order of the Tribunal.~~

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 ~~or Cates~~ as required by this order.

5. ~~Nothing in this order shall restrict the Washington Group from:~~

~~(a) providing for and maintaining sufficient working capital to permit Cates to continue to operate as a viable on-going business; and~~

~~(b) providing for and authorizing all necessary capital improvements to Cates required to enable it to continue to operate up to the standards referred to in paragraph 3(d).~~

Divestiture of the ~~Ship Berthing Assets and Seaspam Barging Assets~~

6. The Washington Group, as applicable, shall promptly commence their efforts to divest and shall complete divestiture of the ~~ship berthing assets and~~ 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 interest listed in schedules ~~A~~, 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) in lieu of a divestiture of the ship berthing assets, divest cats, or~~

(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.

Divestiture of Cates

~~10. If the divestiture of the ship berthing assets pursuant to paragraph 6 is not completed within the time specified therefor, Washington shall proceed to divest Cates in accordance with the procedure for the trustee sale set out in this order.~~

Divestiture Procedure

11. ~~Divestiture of the ship berthing assets and Seaspan barging assets or, in the case of a trustee sale pursuant to this order, divestiture of Cates and the Norsk barging assets, or either of~~

them, (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) in the case of the ship berthing assets (or Cates, in the event of a trustee sale), shall effect the purchase with the expressed intention of carrying on the business of ship berthing in Burrard Inlet to compete effectively with Cates or Seaspan, as the case may be;~~

(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 service 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 or ship berthing 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, the Seaspan covered barge assets, or the ship berthing assets; and, in the case of a trustee sale, consisting of not less than any one of Cates, 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 ship berthing assets, Cates, 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 ship berthing assets or~~ 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 ~~Cates in the event that the ship berthing assets are not divested, 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 ~~and Cates, or either of them,~~ shall be divested by the trustee within 6 months of the trustee’s appointment at the most favourable price and on the most favourable 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 ~~Cates~~, or 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 30 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 the 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 ~~or a divested Cates~~ has failed or is likely to fail within the meaning of those terms in the Act; or

~~(ii) where the new owner has made an independent decision for bona fide business reasons to remove, and removes, the ship berthing assets or the assets of a divested Cates from the Port of Vancouver to operate them elsewhere;~~

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

~~19. To the extent required by a purchaser of the ship berthing assets, Seaspan or Cates shall provide reasonable assistance, not to exceed a period of 6 months, to such purchaser with respect to crew training necessary to provide competent crews to man the vessels to be used in ship berthing. Such assistance shall be subject to the purchaser agreeing to waive any claims against Washington, Seaspan and Cates arising out of such assistance and to pay the reasonable costs incurred in providing such assistance.~~

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, and 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 Croup 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 subject 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 provision 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.

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

(s) W.P. McKeown
_W.P. McKeown

SCHEDULE A

Ship Berthing Assets

"Ship berthing assets" means:

~~(a) two tractor tugs certified as being of approximately 2400 or greater BHP;~~

~~_____ (b) three conventional tugs, one of which is 1800 BHP; and~~

~~_____ (c) one line boat~~

which Washington may select from the following ship berthing tugs which will be, at the time of sale, of the standard of the ship berthing tugs used in Burrard Inlet and as recognized and accepted by the marine industry as ship berthing vessels:

<u>Name of Tug</u>	<u>Official Number</u>	<u>Horsepower</u>	<u>Configuration</u>
Charles H. Cates I	807889	2400 BHP	Tractor/Z-Peller
Charles H. Cates II	803541	2400 BHP	Tractor/Z-Peller
Charles H. Cates III	814182	2400 BHP	Tractor/Z-Peller
Charles H. Cates IV	369221	800 BHP	Twin Screw/Kort Nozzle
Charles H. Cates V	391885	1800 BHP	Twin Screw/Kort Nozzle
Charles H. Cates VI	395353	1800 BHP	Twin Screw/Kort Nozzle
Charles H. Cates VII	383382	1800 BHP	Twin Screw/Kort Nozzle
Charles H. Cates VIII	395948	1800 BHP	Twin Screw/Kort Nozzle
Charles H. Cates X	811176	1450 BHP	Tractor/Z-Peller
Charles H. Cates XVI	189260	700 BHP	Open Wheel
Charles H. Cates XVIII	346375	1000 BHP	Twin Screw/Kort Nozzle
Charles H. Cates XX	330470	700 BHP	Twin Screw/Kort Nozzle
Seaspan Falcon	816602	3000 BHP	Tractor/Z-Peller
Seaspan Hawk	816601	3000 BHP	Tractor/Z-Peller
Seaspan Corsair	370217	1800 BHP	Twin Screw/Kort Nozzle
Seaspan Scout	816475	1800 BHP	Twin Screw/Kort Nozzle
Seaspan Guardian	369175	1550 BHP	Twin Screw/Kort Nozzle
Seaspan Defender	368711	1550 BHP	Twin Screw/Kort Nozzle
Seaspan Trojan	322313	1200 BHP	Single Screw/Open Wheel
Seaspan Prince	322492	1000 BHP	Single Screw/Kort Nozzle
Seaspan Charger	331309	1000 BHP	Twin Screw/Kort Nozzle
Seaspan Stormer	323204	750 BHP	Twin Screw/Kort Nozzle

~~At the request of the purchaser the ship berthing tugs listed below may also form part of the aforementioned list:~~

Seaspan Mariner*	311797	1700 BHP	Twin Screw/Kort Nozzle
Seaspan Venture*	330844	1450 BHP	Single Screw/Kort Nozzle
Seaspan Tempest*	314838	700 BHP	Single Screw/Open Wheel

~~*Currently inactive~~

SCHEDULE B

Seaspan Chip Barge Assets

“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 purchaser 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 purchaser 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).

<u>Name of barge</u>	<u>Official Number</u>	<u>Type</u>
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

327494

chip barge

SCHEDULE C

Seaspan Covered Barge Assets

“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

“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 3 1, 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	392330	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

“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

COMPETITION TRIBUNAL

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, as amended;

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;

BETWEEN:

DENNIS WASHINGTON,
K&K ENTERPRISES,
SEASPAN INTERNATIONAL LTD.,
C.H. CATES AND SONS, LTD.

Applicants

- and -

THE DIRECTOR OF INVESTIGATION AND RESEARCH and
NORSK PACIFIC STEAMSHIP COMPANY, LIMITED

Respondents

AGREED STATEMENT OF FACTS

1. The Applicants and the Director of Investigation and Research (the "Director") have agreed to the following statement of facts.

A. Background - The Parties & Proceedings

2. Dennis Washington is a businessman based in Missoula, Montana, who, in 1992, acquired C.H. Cates and Sons, Ltd. ("Cates"), a company which provides ship berthing services

in Burrard Inlet, British Columbia. Cates was the sole provider of ship berthing services in Burrard Inlet prior to the entry of Seaspan International Ltd. (“Seaspan”) in September 1993.

3. K&K Enterprises is a partnership, formed under the laws of the State of Montana, between the Kevin Washington Irrevocable Trust and the Kyle Washington Irrevocable Trust. Dennis Washington is the settler of those trusts. On October 13, 1994, K&K Enterprises acquired 33% of the shares of Seaspan, a company which provides ship berthing services in Burrard Inlet and Roberts Bank, British Columbia.

4. In June 1996, Dennis Washington acquired the remaining shares of Seaspan.

5. On December 17, 1996, the Director filed a Second Amended Notice of Application which alleged that a substantial lessening of competition had occurred in the provision of ship berthing services in the Burrard Inlet and Roberts Bank ship berthing markets as a result of the acquisition by Dennis Washington of a significant interest in and control of Seaspan (defined in the Second Amended Notice of Application as the “Seaspan Merger”),

6. The other parties named in the proceedings, Genstar Capital Corporation, TD Capital Group Ltd., Coal Island Ltd., 314873 B.C. Ltd., the Management Shareholders and the Preference Shareholders, were, at their request, permitted to restrict their participation in the proceedings only to, and in the event of, a hearing on the remedy.

B. Relevant Markets and the Seaspan Entry

7. The relevant market was defined in the Statement of Admitted Facts in the Consent Proceedings as the provision of ship berthing services by tug boats, or “ship berthing services”, in the geographic markets of Burrard Inlet and Roberts Bank.

8. Ship berthing services entail the use of tug boats to pull and push ships from areas of water in which they can safely utilize their own steering controls and power to confined port facilities where berthing of a ship under its own power and steering control would be unsafe. The customers of ship berthing services are ship owners directly or indirectly as represented by agents

in various ports who are responsible for deciding which ship berthing firm will be used and for making payment for these services.

9. Seaspan entered the Burrard Inlet ship berthing market in September 1993. Prior to Seaspan's entry, Cates was the primary ship berthing provider in Burrard inlet, operating with a fleet of tractor tugs of varying brake horsepower ("horsepower" or "BHP") and conventional tugs, and Seaspan was the provider of ship berthing services at Roberts Bank. Seaspan entered the Burrard Inlet market with the following vessels:

TUG NAME	LENGTH	HORSEPOWER	PROPULSION
SEASPAN HAWK	80 ft.	3,000	twin Z drives - tractor
SEASPAN FALCON	80 ft.	3,000	twin Z drives - tractor
SEASPAN STORMER	49 ft.	750	twin screw - lineboat

The "SEASPAN HAWK" and "SEASPAN FALCON" were new, purpose-built vessels while the "SEASPAN STORMER" was engaged in barge yarding in Burrard Inlet and was diverted from that work, as required, to act as a lineboat in support of the "SEASPAN HAWK" and "SEASPAN FALCON". In addition, Seaspan had a substantial conventional tug fleet engaged in towing which could be drawn up to perform back-up ship berthing services in Burrard Inlet.

10. In preparation for its entry into Burrard Inlet, Seaspan contacted numerous users of ship berthing services to advise them of the impending entry and actively sought out customers for ship berthing services.

C. Consent Proceedings

11. On January 29, 1997, the Tribunal issued the Consent Order which required a divestiture of certain ship berthing assets, covered barging assets and chip barging assets, identified in that Order, within 12 months of the Order. In the event that the ship berthing assets were not divested within the time period, the Applicants were to divest themselves of Cates.

12. In February 1997, the Washington Group began a process to divest the assets under the January 29, 1997 Order. In this process, the Washington Group identified which assets were to be included in the divestiture packages and the investment firm of Batchelder & Partners, Inc., on behalf of the Washington Group, oversaw the tendering process for the divestitures. To date, the Washington Group has divested the covered barging and chip barging assets as required under the Order.

13. By July 1997, in accordance with the January 29, 1997 Order, the Washington Group selected the following vessels to constitute the Ship Berthing Assets for divestiture:

TUG NAME	LENGTH	HORSEPOWER	PROPULSION
CATES I	75 ft.	2,400	twin z-drives- tractor
CATES II	75 ft.	2,400	twin z-drives tractor
SEASPAN CORSAIR	83 ft.	1,800	twin screw
SEASPAN TROJAN	65 ft.	1,200	single screw-(w/bow thruster)
SEASPAN PRINCE	55 ft.	1,000	single screw
CATES XVI	46 ft.	750	single screw (lineboat)

D. Entry by New Competitor

14. In early July 1997, a new provider of ship berthing services, a company called Tiger Tugz Inc. (“Tiger Tugz”), was preparing to enter the Burrard Inlet market. Tiger Tugz is a corporate affiliate of Rivtow Marine Ltd. and Rivtow Straits Limited (hereinafter referred to as “Rivtow” or the “Rivtow companies”). Rivtow is a coastal tug, barge and ship berthing company headquartered in Burrard Inlet and has been the primary supplier of ship berthing services in the Ports of New Westminster, Kitimat and Prince Rupert for a number of years. Essentially, Tiger Tugz is an entry by Rivtow in the Burrard Inlet market.

15. In August and September 1997, as Seaspan did prior to its entry, Tiger Tugz approached a number of agents and shippers involved in the Burrard Inlet market prior to its entry and marketed its services as a new ship berthing operator. Tiger Tugz also made its affiliation with Rivtow known to the marketplace. On or about October 4, 1997, Tiger Tugz commenced operations in the Burrard Inlet ship berthing market.

Rivtow Companies and Rivtow 's Vessels

16. Rivtow Straits Limited is a company formed in 1971 through the merger of River Towing and Straits Towing. Rivtow is engaged in ship berthing and coastal marine transportation operating approximately 43 tugs and 59 barges. From the 1950's Straits Towing provided shift tugs in Burrard Inlet. This barge yarding service continued until 1982. Rivtow has continued to provide back-up ship berthing services to Cates in Burrard Inlet from time to time as called upon, Rivtow has continued to station tugs in Vancouver Harbour and maintains its headquarters, dock, dispatch and shore side maintenance facilities on the south shore of Burrard Inlet.

17. Rivtow has been a primary supplier of ship berthing services in the Ports of New Westminster, Kitimat and Prince Rupert for many years. At New Westminster, through its subsidiary, Westminster Tug Boats, it operates four vessels on station for the purpose of ship berthing. At Kitimat, Rivtow has been involved in ship berthing since the 1950's and is currently the sole provider of those services operating three vessels. At Prince Rupert, Rivtow is the sole provider of ship berthing services, except for the Ridley Island Coal Terminal, operating four vessels. Tug crews with experience berthing ships in these ports and qualified to berth ships in Burrard Inlet. This experience and proven fleet of tugs engaged in ship berthing makes Tiger Tugz, at least, a comparable competitor to Seaspan when it entered the Burrard Inlet market. Prior to entry into Burrard Inlet in September 1993, Seaspan's ship berthing experience was limited primarily to servicing the bulk terminal at Roberts Bank.

18. Many of the ships which call at New Westminster, Kitimat and Prince Rupert also call in Burrard Inlet and most of those ships would have the same agent to look after them in any port in B.C. waters. Masters and agents of vessels calling in Burrard Inlet will be familiar with the capabilities and reputation of the Rivtow corporate family in ship berthing. The same individuals who pilot ships in Burrard Inlet also pilot ships in Kitimat and Prince Rupert and they too would be familiar with the capability of the Rivtow corporate family in ship berthing and the capability of the Tiger Tugz fleet (particularly the "TIGER SPIRIT" and its sister ship the "TIGER PRIDE"). Pilots and agents will also have the assurance that through the affiliated Rivtow companies, Tiger Tugz will have sufficient experience to meet whatever needs arise.

19. At New Westminster, Rivtow provides ship berthing services through Westminster Tug Boats of which it has been the majority owner since approximately 1976. Westminster Tug Boats' vessels would be available to provide back-up service to Tiger Tugz in Burrard Inlet if needed.

20. There is an operational connection between Tiger Tugz and the Rivtow companies. One of Tiger Tugz principal vessels, the "TIGER SPIRIT", is a former Rivtow vessel, the "RIVTOW SPIRIT". As well, Tiger Tugz vessels are dispatched from the offices of Rivtow by the same individuals who dispatch Rivtow tugs. Tiger Tugz moors its vessels at Rivtow's dock on the south shore of Burrard Inlet.

Tiger Tugz Fleet and Entry

21. Tiger Tugz currently has four vessels dedicated to its ship berthing operation in Burrard Inlet:

TUG NAME	HORSEPOWER	PROPULSION
TIGER SPIRIT (ex RIVTOW SPIRIT)	3,000	twin Z-drive - tractor
TIGER PRIDE	3,000	twin Z-drive - tractor
TIGER SHARK 2	1,800	twin screw - kort nozzle
TIGER SHAMAN	1,200	twin screw - kort nozzle

Tiger Tugz also plans to build a fifth boat, the "TIGER WOLF" (1,800 horsepower), as a sister vessel to the TIGER SHARK 2. The five vessels identified in this paragraph are hereinafter referred to as the "Tiger Tugz Fleet". The Tiger Tugz Fleet can be supplemented as required by Rivtow's many other ship berthing capable vessels.

22. In the creation of the Tiger Tugz Fleet for ship berthing operations in Burrard Inlet, Rivtow has deployed assets worth approximately nine million dollars, into its entry into the market.

23. The TIGER SPIRIT” and “TIGER PRIDE’ (both tractor tugs) are newer than and as powerful or more powerful than any of the tugs in the Seaspan and Cates fleets. They have the identical bollard pull as the Seaspan tractor tugs (the “SEASPAN HAWK” and “SEASPAN FALCON”) at 88,000 pounds and slightly more than the Cates tractor tugs (the “CATES I, II and III”) which are rated at 82,000 pounds. The Tiger Tugz Fleet has a greater capacity than the fleet Seaspan initially stationed in Burrard Inlet upon entry in 1993. Like Seaspan at the time of entry, Tiger Tugz has the ability to increase its operational capacity by drawing on the “back up” capability of the substantial Rivtow fleet. The Tiger Tugz fleet is also comparable to the Ship Berthing Assets in the Divestiture Package.

24. In addition to the tugs which are listed above, Rivtow also owns and/or operates a significant number of additional tugs capable of ship berthing. While not all those tugs would be available at any given time to assist with ship berthing, there are a significant number of tugs which could provide adequate back-up to the dedicated ship berthing tugs should additional tugs be needed. Rivtow has, excluding lineboats, fifteen tugs capable of ship berthing, plus four additional tugs with Westminster Tug Boats available to it as possible back-up to the Tiger Tugz Fleet. As a corporate affiliate of Westminster Tug Boats and the Rivtow companies, Tiger Tugz could be sure of adequate assistance in the event of strong demand for services or break down of machinery or equipment. In addition to Tiger Tugz’s access to the Rivtow fleet, Tiger Tugz, as is the norm in the industry, could request assistance from Seaspan and Cates when necessary.

25. The capability of the Rivtow/Tiger Tugz entry for performing ship berthing in Burrard Inlet compares favourably with the capability of Seaspan in 1993/1994. Tiger Tugz, through Rivtow, has proven ship berthing experience in other ports in British Columbia, a significant number of proven ship berthing tugs available to back up their primary entry fleet, crews experienced in congested, but protected waters and crews experienced in Burrard Inlet, an existing shore side dispatch, office and maintenance infrastructure in Burrard Inlet and an on-going relationship with the customer (agents and owners’ representatives) for providing ship docking service.

26. Between October 4 and the date of this Statement to Vary, Tiger Tugz has performed a significant number of ship berthing jobs in the harbour at the request of shippers or agents.

Agents and shippers which have used the services of Tiger Tugz include PacNord Agencies Ltd., Greer Shipping Ltd., Maple Shipping, Gearbulk Shipping Canada Ltd., Interocean Steamship Corporation, Compass Marine Services Inc., Sinotrans Canada Inc., Asia Shipping Agencies Ltd., NOL (Canada) Inc., Pacific North West Ship & Cargo Services, Hyundai America Shipping Agency (PN), Inc., Worldwide Shipping and Chartering Co. Ltd., Seaboard Shipping Co. Ltd., Hanjin Shipping Co. Ltd., SMI Marine Ltd., Trans-Oceanic Shipping Co. Ltd., Star Shipping (Canada) Ltd. and Canpotex Shipping Services Limited.

27. At least one agent, Saga Forest Products (“Saga”) committed to using Tiger Tugz until the end of 1997 and intends to hold a bidding process to decide which ship berthing company it will use in 1998. Saga has approximately 260 ships calling in Vancouver each year.

28. Tiger Tugz has published a tariff or rate sheet, effective October 1, 1997, for its ship berthing operation in Burrard Inlet.

29. The Applicants estimate that for the period between October 4 and October 31, 1997, based on the number of jobs performed by Cates and Seaspan during that same period, that Tiger Tugz performed approximately 4.8% of the total ship berthing jobs during that period of time. Based on the Tiger Tugz’s published tariff that figure translates into approximately 4.4% of the total revenue available during that period. Commencing October 18, 1997, when Tiger Tugz commenced full operations, until October 31, 1997, it is estimated that Tiger Tugz performed approximately 7.8% of the total ship berthing jobs during that period of time which translates into approximately 7.9% of the total revenue available during that period. Similarly, for the period between November 1, 1997 to November 24, 1997, it is estimated that Tiger Tugz performed 11.1% of the total ship berthing jobs during that period of time which translates into approximately 11.4% of the total revenue available to November 24, 1997.

30. The Director understands that, as of early December 1997, Tiger Tugz had between ten and eleven percent of the Burrard Inlet market. The Applicants, have additional market information which indicates that as of mid-January 1998, Tiger Tugz market share has risen to approximately fifteen percent.