

CT-96/1

THE COMPETITION TRIBUNAL

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

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

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

BETWEEN:

THE DIRECTOR OF INVESTIGATION AND RESEARCH

COMPETITION TRIBUNAL TRIBUNAL DE LA CONCURRENCE	
JAN 13 1997 <i>RS</i>	
REGISTRAR - REGISTRAIRE	
<i>Revised</i>	<i>#208(a)</i>

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, and
NORSK PACIFIC STEAMSHIP COMPANY, LIMITED**

Respondents

NOTICE OF APPLICATION FOR A CONSENT ORDER

1. TAKE NOTICE that an application will be made before the Tribunal on the 13th day of January, 1997 at the hour of 10 o'clock in the forenoon or so soon thereafter as the matter can be heard, in Courtroom 702, IBM Building, 7th Floor, 701 West Georgia Street, Vancouver, British Columbia, for:

-2-

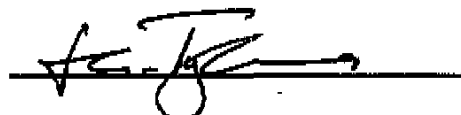
(a) a consent order pursuant to sections 92(1)(e) and 105 of the Competition Act, as requested in subparagraph (b)(3) of the Notice of Application filed herein dated March 1, 1996, and in subparagraph (b)(4) of the Second Amended Notice of Application dated November 22, 1996 and entered by order of the Tribunal dated December 17, 1996, and in the form of the Draft Consent Order filed herewith; and

(b) for an order pursuant to the provisions of the relevant Rules of the Tribunal with respect to:

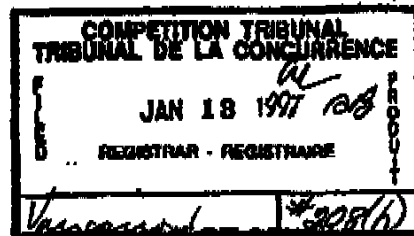
- (i) the holding of further pre-hearing conferences for receiving comments from the Tribunal or interested parties, if required;
- (ii) fixing the date for any public hearing, if necessary; and
- (iii) or for such other or further order as may be just.

2. AND TAKE NOTICE that in support of this application will be read the Draft Consent Order, the Consent of the parties thereto, the Consent Order Impact Statement, the Statement of Admitted Facts, the Second Amended Notice of Application and such other or further material as counsel may advise.

DATED at Vancouver, B.C., this 12th day of January, 1997



Department of Justice
Legal Services, Industry Canada
Place du Portage, Phase I
50 Victoria Street, Hull, Quebec
K1A 0C9
Telephone: (819) 997-3325
Facsimile: (819) 953-9267



THE COMPETITION TRIBUNAL

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

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

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

BETWEEN:

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, and
NORSK PACIFIC STEAMSHIP COMPANY, LIMITED**

Respondents

CONSENT ORDER IMPACT STATEMENT

-2-

1. This statement is filed by the Director of Investigation and Research ("Director") pursuant to s.77 of the Competition Tribunal Rules. It describes the circumstances surrounding, and anticipated effect on competition of, the Draft Consent Order submitted by agreement of the parties to this proceeding.

I. NATURE AND PURPOSE OF THE PROCEEDING

2. The Director files this Statement pursuant to an application for a consent order under paragraph 92(1)(e) and section 105 of the *Competition Act* (the "Act"). Attached hereto as Schedule "A" is a Statement of Admitted Facts ("Facts"), drawn from the pleadings of the parties, which from time to time is referred to in this Statement. This application was commenced by a Notice of Application pursuant to s. 92 of the Act respecting two mergers - the Seaspan Merger and the Norsk Merger - and their respective impacts upon ship berthing in the Burrard Inlet and Roberts Bank markets of British Columbia, and upon the chip and covered barging markets of the B.C. coast. The Notice of Application outlines a number of specific concerns regarding the impact of the completed mergers on competition in these markets.

3. The respondents Washington, K & K, Cates, Seaspan and Norsk ("Washington") have been subject to a consent hold separate order of the Tribunal to date. This order has restricted the extent to which the said respondents have been able to direct, manage and influence the conduct of the business of Seaspan and Norsk.

4. The respondent Fletcher Challenge has been released from the application by Order of the Tribunal dated December 17, 1996. All other respondents, save

-3-

Washington have been, at their request, permitted to restrict their participation in the proceedings only to, and in the event of, a "remedy" hearing.

5. The Director and Washington have reached a settlement, which is designed to eliminate the alleged anti-competitive effects of the mergers and the Director requests that the Competition Tribunal approve the Draft Consent Order pursuant to paragraph 92(1)(e) and section 105 of the Act to effect this settlement.

6. The settlement involves the divestiture of ship berthing and barging assets and associated businesses by Washington, as well as certain additional undertakings by Washington. As explained below, these measures are intended to restore any competition which has been or is likely to be eliminated as a result of the mergers.

II. EVENTS GIVING RISE TO THE ALLEGED SUBSTANTIAL PREVENTION OR LESSENING OF COMPETITION IN RESPECT OF SHIP BERTHING AND BARGING

7. In October 1992, Washington acquired C.H. Cates and Sons Ltd. ("Cates"). Cates is a company incorporated pursuant to the laws of British Columbia. Cates was the sole direct provider of ship berthing services in Burrard Inlet for more than a century, prior to the entry of Seaspan International Ltd. ("Seaspan") in September 1993.

8. In September 1994, Dennis Washington notified the Director that he intended to acquire Seaspan. The "Seaspan Merger" was to be effected by a letter of intent and term sheet dated August 31, 1994, to be accomplished through a reorganization of

-4-

Seaspan, which was completed on October 13, 1994. Seaspan is a company incorporated pursuant to the laws of British Columbia and is the largest tug and barge company in Canada. Seaspan's businesses include ship berthing, barging, shipbuilding and repair. In particular, Seaspan has historically been the sole provider of ship berthing at Roberts Bank and, since September 1993, became Cates' direct competitor in ship berthing in Burrard Inlet. Seaspan is the dominant provider of chip barging services and a significant provider of covered barging services in B.C. coastal waters.

9. In June 1995, Washington acquired Norsk Pacific Steamship Company, Limited ("Norsk"), a Bahamian company. Norsk's wholly owned Canadian subsidiary, Norsk Pacific Steamship Company Canada Limited (also "Norsk") possesses, inter alia, a fleet of chip and covered barges which serve, almost exclusively, Fletcher Challenge Canada Limited ("FCCL"). Other than Seaspan and Rivtow Marine Ltd, Norsk has the only chip and covered barging fleet in the domestic B.C. barging market.

10. Seaspan's entry into the Burrard Inlet ship berthing market in 1993, which had historically been served solely by Cates, brought direct competition into that market for the first time. With respect to the ship berthing market at Roberts Bank, Cates announced its intention to construct tugs for competing at Roberts Bank and eventually submitted a proposal, in response to a call from a coalition comprised of the Chamber of Shipping, the Port of Vancouver and others, for the business at Roberts Bank. The Seaspan Merger removed competition with respect to these two markets.

11. The sale of Norsk to Washington, rather than to a person unaffiliated with Seaspan, strengthened Seaspan's position in the already concentrated chip and covered barging markets in B.C. coastal waters.

~~5~~

12. On March 1, 1996 the Director filed an application for remedial orders respecting the mergers. Washington has subsequently agreed to take actions that, in the Director's view, are necessary and effective to alleviate any adverse effects of the mergers on competition in the said markets. These actions are set out in the Draft Consent Order and this Statement. Washington will remain subject to the hold separate order pending the consideration by the Competition Tribunal of the Draft Consent Order.

III. THE ALLEGED EFFECTS ON COMPETITION

13. Reference is made to para. 22 ff., para. 41 ff. of the Facts and Appendix "A" hereto to describe the relevant ship berthing and barging markets.

Ship Berthing

14. The Notice of Application alleges, as confirmed by the Facts, that ship berthing services in Burrard Inlet and Roberts Bank constitute distinct product and geographic markets.

15. The Notice of Application alleges, and the Facts confirm, that foreign suppliers of ship berthing services have not and are unlikely to enter de novo and provide effective competition to the business of Washington for a number of reasons, including United States legislation which prevents firms from using ships in U.S. markets that have ever been registered outside the U.S. This prevents large U.S. firms from taking advantage of their size by running an integrated network of tugs and

-6-

deploying equipment where and when it is needed. Other regulatory barriers include cabotage regulations and Canadian regulatory and operating standards on imported tugs.

16. It is further alleged that successful de novo entry into the subject 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.

Barging

17. The Notice of Application alleges that similar difficulties to entry as set out in paragraphs 15 and 16 herein, particularly with respect to sunk costs, are present in the ship and covered barge markets, and that such markets are accompanied by the high concentration of such specialized barges in the hands of Seaspan and Norsk. A third competitor, Rivtow, also exists but it is not at present viewed as having sufficient available capacity to overcome the adverse impact on competition represented in the barging markets by the Seaspan and Norsk mergers.

18. An additional barrier to entry into the barging markets is the prevalence of contracted services of multi-year duration with notice periods of some significant length, often reducing competition to episodic periods of available contestable business.

-7-

IV. TEST FOR CONSENT ORDER

19. Section 105 of the Competition Act provides:

"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." (emphasis added)

20. The underlined portion reflects Parliament's judgement that a consent order situation is a special case. A detailed evidentiary basis is not a pre-requisite to the issuance of an order. It is submitted that this view is founded on the desirability of consent settlements, in terms of savings in time and cost and the reduction in uncertainty that may be afforded by such proceedings.

The Minimum Test

21. At the same time, as the Tribunal recognized in Air Canada, it is not a mere rubber stamp in consent proceedings. The Tribunal must ensure that the settlement satisfies what it termed a "minimum test":

"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 anti-competitive 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

-8-

it is presumed will arise from the merger, has, in all likelihood, been eliminated."

Director of Investigation & Research v. Air Canada et al. (1989), 27 C.P.R. (3d) 476 at pp. 513-14.

22. The Tribunal set out the test again later in the same decision (p. 516):

"... the tribunal does not consider that it has been given a mandate to craft the best possible terms and conditions for protection of competition. Its role is limited to vetting the order before it to ensure that the proposed terms and conditions are likely to be effective in eliminating any adverse effects of the merger."

Air Canada, supra. at p. 516.

23. The Tribunal reiterated its rejection of an "optimum solution" test in Imperial Oil:

"The Tribunal recognizes in this case, as it has in others, that there is a range of possible solutions which might be adopted to eliminate a substantial lessening of competition in any given market situation. The Tribunal's role is not to require that the consent order be the optimum solution to the anti-competitive effects of a merger. Its role is only to ensure that the order falls within the range of acceptable solutions."

The Director of Investigation and Research v. Imperial Oil Limited 1989, unreported, at p.15.

see also D.I.R. v. Asea Brown Boveri Inc. et al (1989), 27 C.P.R. (3d) 65.

-9-

V. DESCRIPTION OF THE PROPOSED SETTLEMENT

24. The proposed settlement relies upon the divestiture of key assets in both ship berthing and barging 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 the 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, and with respect to barging, of the barging assets of Norsk, which would effect a practical reversal of the effects of the Seaspan and Norsk mergers insofar as the relevant markets are concerned.

25. Washington (and the related respondents), in the first instance, will proceed forthwith to divest all interest in the identified ship berthing and barging assets, according to the procedure for divestiture set out in the Draft Consent Order.

"Backstop" Divestiture

26. If the divestiture of the above packages of ship berthing and barging assets is not accomplished by Washington within 12 months, Cates and the Norsk barging assets will be required to be divested by a trustee. The presence of this "backstop" provides both the incentive to Washington to accomplish the primary divestitures successfully and in a timely way and provides the Director and the Tribunal some assurance that if these divestitures to a qualified purchaser do not occur, a remedy which re-institutes the status quo ante will be put into effect.

-10-

27. In addition, Washington will, under the Draft Consent Order, maintain and not imperil Cates and the Norsk barging assets as well as the identified asset packages pending the completion of the proposed divestiture remedies provided for. This arrangement is intended to ensure that the assets are preserved, maintained in a viable state, and are kept competitively independent pending any divestiture.

Ship Berthing

28. 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.

29. With respect to Roberts Bank, Cates was a competitive alternative with respect to future service at Roberts Bank. The divestiture fleet re-creates a credible alternative competitor to Seaspan with respect to competing for future business at Roberts Bank.

Covered Barging

30. The proposed divestiture package with respect to covered barging consists of two covered barges. Norsk's current presence in the B.C. covered barging market consists of the equivalent of approximately three covered barges dedicated to FCCL, under contracts expiring in 1998. Norsk possesses other covered barges, as well as two tugs, involved in the international market or inactive. Seaspan's divestiture of two

-11-

covered barges establishes an additional source of independent covered barge capacity that did not exist to the same extent prior to the Norsk merger (the Norsk covered barges were partially committed to FCCL). The two covered barges also represent sufficient capacity to serve the spot market and to bid on contract work.

Chip Barging

31. The proposed divestiture package in chip barging consists of ten chip barges, a tug boat, and associated business. The associated business includes contracted work covering chip barge towage, ship berthing and other work for a forest industry customer. The chip barging and associated business represents a comparable level of revenue to that derived from Norsk's fleet of twelve barges. While the Norsk chip barging fleet has a greater overall capacity (the divested chip barges represent approximately 60% of the Norsk chip barge capacity), the revenue associated with the Norsk fleet is confined to barge hire and is dedicated to FCCL under contract until 2003. The revenue associated with the proposed divestiture fleet consists of barge hire, towing and other work. The proposed divestiture package includes a tug boat and therefore constitutes, unlike Norsk, a self standing entity. Overall, the proposed divestiture fleet creates a third option in the marketplace, as well as providing a useful benchmark for market prices through the activity of the new entrant in securing business. In addition, a base of ten chip barges constitutes a critical mass of chip barge capacity from which to expand and compete for future business on a longer term basis.

-12-

VI. ALTERNATIVES TO THE SETTLEMENT

32. The alternative to the settlement proposed would be to proceed with a full opposed hearing of the Director's challenge to the mergers in their entirety. The possibility of appeals, regardless of outcome, and thereby assured continued exclusion of Dennis Washington from the management of his otherwise legally acquired assets, will continue a management vacuum in these central activities to important British Columbia industries.

33. The Director has accepted the within settlement because the proposed divestitures will effectively alleviate the competition concerns raised by the mergers. They will bring effective competition to the ship berthing markets of Burrard Inlet and Roberts Bank by recreating the competitive dynamic removed by the Seaspan Merger, and to the B.C. covered and chip barging markets by creating a viable third competitor.

VII. CONCLUSION

34. For the reasons outlined herein, the Director recommends the settlement and asks the Competition Tribunal to approve the Draft Consent Order.

Dated at Vancouver, B.C. this 10th day of January, 1997

SCHEDULE "A"

CT-9871

THE COMPETITION TRIBUNAL

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

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

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

BETWEEN:

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, and
NORSK PACIFIC STEAMSHIP COMPANY, LIMITED**

Respondents

STATEMENT OF ADMITTED FACTS

-2-

I. BACKGROUND - THE PARTIES

1. (II-13) The Director is the person appointed under section 7 of the Act and is the sole person authorized to make this application to the Tribunal.

2. (II-14) Washington is a business man based in Missoula, Montana, who has interests, through Washington Corporations, in a broad range of industries, including mining, rail transportation, construction and, more recently, marine transportation services on the west coast of British Columbia. Washington acquired a significant interest in Seaspan in October 1994. Since 1992, Washington has controlled Cates, a company which provides ship berthing in the harbour of Burrard Inlet, the principal component of the Port of Vancouver. On June 30, 1995, Washington acquired Norsk.

3. (II-15) Washington's interests in transportation services include trucking, rail, terminals, warehouses, barging, ship assist and deep sea shipping.

4. (II-16) K&K is a partnership formed by a general partnership agreement dated September 21, 1994 under the laws of the State of Montana. Its partners are the Kyle Washington Trust and the Kevin Washington Trust. Washington is the settlor of the trusts having provided the funds for each trust and is the principal creditor of each trust. The beneficiary of each trust are his sons Kyle and Kevin respectively. The "K&K Group", as defined in the Shareholder Agreement dated October 13, 1994 governing the shareholders of Seaspan ("Shareholder Agreement"), includes as two of its members K&K and Washington. The Shareholder Agreement permits the transfer of Seaspan shares between members of the K&K Group. For purposes of this Application, Washington controls directly or indirectly the affairs of K&K.

5. (II-17, SS 6) Seaspan, a company established pursuant to the laws of British

-3-

Columbia, is the largest tug and barge company in Canada. Seaspan's businesses include, but are not limited to, ship berthing, barging, log barging, shipbuilding and ship repair.

6. (II-18, SS 7) Genstar Capital Corporation ("GCC") is a holding company incorporated under the laws of the Province of Alberta. In addition to its holdings in Seaspan, GCC has share holding interests in companies which produce copper and copper alloy tube, alternators, slate products and building products, and electrical motors and electrical components for various other industries.

7. (II-19, TDC 1) TD Capital Group Ltd. ("TD Capital") is a wholly-owned subsidiary of the Toronto-Dominion Bank ("TD") and was incorporated as a venture capital corporation as defined under subsection 193(1) of the *Bank Act*, R.S.C. 1985, c. B-1. TD is a diversified financial institution governed by the *Bank Act*, S.C. 1991, c. 46.

8. (II-20, SS 8) Coal Island Ltd. ("Coal Island"), a company existing under the laws of British Columbia, was the largest shareholder of Seaspan prior to the Seaspan Merger. The Class Y preference shares held by Coal Island, now held by 3897 Investments Ltd., are the only class of preference shares possessing voting rights. Coal Island is a shareholder of 3897 Investments Ltd.

9. (II-21) 314873 B.C. Ltd. ("314873"), a company existing under the laws of British Columbia, was the second largest preference shareholder in Seaspan prior to the Seaspan Merger. 3897 Investments Ltd. is now the second largest preference shareholder in Seaspan.

10. (II-22) The "Management Shareholders" set forth in Schedule "A" of the Application

-4-

hold less than 10% of the voting rights in Seaspan. The "Preference Shareholders" set forth in Schedule "B" do not hold, voting rights in Seaspan. TD Capital, Coal Island, 314873 and the Management and Preference shareholders were the vendors in the Seaspan Merger transaction.

11. (II-23) C.H. Cates & Sons Ltd. ("Cates") is a company incorporated under the laws of the Province of British Columbia and is controlled by Washington. Its principal business is the provision of ship berthing in Burrard Inlet. Since 1988 Cates has controlled Seaforth Towing & Salvage Ltd. ("Seaforth"), a company providing ship berthing services which were limited to that portion of Burrard Inlet east of the Second Narrows Bridge in the City of Vancouver.

12. (II-24) Norsk Pacific Steamship Company, Limited ("Norsk") is a Bahamian corporation which was wholly owned by Fletcher Challenge Limited prior to the Norsk Merger, and is now wholly owned by Washington. Norsk focuses on transportation and distribution of bulk and neo-bulk commodities, primarily forest products. Norsk carries on operations in Canada with or through its subsidiary Norsk Pacific Steamship Canada Ltd., and the term "Norsk" also applies to this subsidiary.

13. (II-25) Fletcher Challenge Limited ("Fletcher Challenge") is a New Zealand diversified industrial company whose principal operations include pulp and paper, energy, forests, and building industries which sold Norsk to Washington.

II. BACKGROUND - THE MERGERS

14. (II-26) Washington purchased Cates in October, 1992. Commencing in January 1993, Washington attempted at various times to acquire Seaspan either by means of direct

-5-

acquisition or by merger with Cates but was not successful in acquiring any interest in Seaspan until October, 1994.

15. (II-27) GCC entered into an acquisition agreement dated July 25, 1994 ("Acquisition Agreement") with the existing shareholders of Seaspan, including TD Capital, Coal Island, 314873 and certain other parties. The Acquisition Agreement provided that these parties would have various voting interests in a newly constituted Seaspan, a company continuing from the proposed amalgamation of Seaspan and an indirect subsidiary of GCC formed for the purposes of the acquisition. The completion of the transactions contemplated by the Acquisition Agreement was subject to, among other things, at least \$20,000,000 of subordinated debt financing available to be drawn down by Seaspan at the time of closing.

16. (II-28) Prior to the closing of the above-described transaction, Washington renewed attempts to acquire an interest in Seaspan and to obtain a significant interest therein. Washington entered into a letter of intent and term sheet dated August 31, 1994 ("Term Sheet") with GCC, outlining the principal terms and conditions of a transaction pursuant to which Washington and/or his affiliates would become a party to the above contemplated acquisition of Seaspan by a group of investors led by GCC. The Term Sheet included the obligation to subscribe for shares and provide debt financing which was sufficient to satisfy the condition precedent to closing described in paragraph 15.

17. (II-6) On October 13, 1994, as part of an overall change in the share holdings of Seaspan, Washington, through K&K Enterprises ("K&K"), acquired a significant interest in Seaspan. Among other terms, K&K became Seaspan's second largest shareholder and acquired representation on Seaspan's Board of Directors. Additionally, on that same date, as part of the same overall transaction, Washington entered into a Joint Investment Agreement with Seaspan's largest shareholder, Genstar Capital Corporation, which was

-6-

terminated in June, 1996.

18. (II-6, II-30) On October 13, 1994, pursuant to the July 25, 1994 Acquisition Agreement and the August 31, 1994 Term Sheet, the Seaspan acquisition occurred with the following results:

- (i) K&K invested \$4,999,980 in common equity, acquiring 33.3% of the common shares of Seaspan, which represents approximately a 30.0% voting interest in Seaspan. The remaining voting interests are approximately: GCC at 38.6%, TD Capital at 12.3%, Management Shareholders at 9.0% and Preference Shareholders (being Coal Island) at 10.1%. (The remaining Preference Shareholders do not hold preference shares having voting rights).
- (ii) K&K acquired equity warrants which allow it to increase its holding of common shares and its voting interest in Seaspan to a level at par with GCC, at the earliest of: (i) September 30, 1997, (ii) default under the senior subordinated debentures (see below); and (iii) an initial public offering.
- (iii) Pursuant to the Shareholder Agreement, K&K has the right to nominate one of nine directors on the Board of Directors of Seaspan. In addition and in the event that there are four specified defaults in the preference dividend, the size of the Board will increase to ten directors, two of which may be nominated by K&K. Similarly, in the event that there are eight such defaults, the size of the Board will increase to thirteen directors, three of which may be nominated by K&K. Pursuant to the Shareholder Agreement, K&K also has certain other rights regarding the affairs of Seaspan.

-7-

- (iv) K&K purchased \$15,000,000 in senior subordinated debentures in Seaspan.
- (v) Washington and GCC entered into a Joint Investment Agreement.

19. (II-7, II-31) On January 10, 1996, Washington publicly announced that he had entered into an agreement to acquire control of Seaspan, and completed that transaction in June, 1996.

The Norsk Merger

20. (II-8, II-89) Seaspan is a leading company in the covered and chip barging business in British Columbia. Rivtow Marine Ltd. ("Rivtow") and Norsk operate smaller fleets of covered and chip barges. At various times since 1992, Washington expressed an interest in acquiring and took steps to acquire each of these three companies.

21. (II-33, II-127, II-133) On June 30, 1995, Norsk Holding Ltd. acquired 100% of Norsk from Fletcher Challenge.

III. INDUSTRY AND MARKET BACKGROUND

A. SHIP BERTHING

22. (II-34) The Pacific Pilotage Regulations, promulgated pursuant to the *Pilotage Act*, S.C. 1970-71-72, c. 52, define the parameters of compulsory pilotage in British Columbia coastal waters. As a result of these Regulations, nearly all ships within the defined coastal waters of British Columbia, including those entering from either the coastal waters of the United States or international waters, require the assistance of a licensed pilot to navigate

-8-

within the coastal waters of British Columbia and to berth and unberth at port facilities along the coast of British Columbia. The standard practice is that pilots require that the berthing and unberthing of ships at port facilities in British Columbia be undertaken with the assistance of one or more tug boats.

23. (II-35) 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. Once the ship has been loaded or unloaded, tug boats are required to pull and push the ships from the port facilities back to areas of water where they can safely utilize their own steering controls and power. Ships fitted with bow and/or stern thrusters and/or advanced steering mechanisms may, in the instance of passenger ships, require no tug boats, or, in respect of cargo ships, require fewer or no tug boats.

24. (II-37) The customers of ship berthing services are the ship owners. Ship owners are frequently represented in various ports by agents, who are responsible for deciding which ship berthing firm(s) will be used, and for making payment for these services. The agents invoice the ship owners for the port costs of each vessel, which include the ship berthing fees.

25. (II-51) The average size of vessels docking in Burrard Inlet has increased over time. Cates has a fleet of tractor tugs and conventional tugs, purpose built for ship berthing and Seaspan has two purpose built tractor tugs at Burrard Inlet. Pilots have a preference for tractor tugs when and where available. As well, they regularly use conventional tugs at both Burrard Inlet and Roberts Bank.

26. (II-58) In order to engage in marine transportation in Canada foreign vessels must first be registered in Canada and must comply with Canadian regulatory standards, which

-9-

are high as compared to foreign standards including the US. Consequently, such compliance will generate likely costs.

27. (II-59, II-60) As a result of the Free Trade Agreement and NAFTA, a U.S. entrant would face duty coming into Canada with U.S. equipment of only 5% and a U.S. entrant is in the same position as any other potential entrant in terms of acquiring tugs in the international marketplace.

Relevant Markets

(a) Product Market

28. (II-38) The relevant product market for the assessment of the effects of the Seaspan Merger on competition in the ship berthing industry is the provision of ship berthing services by tug boats.

(b) Geographic markets

Burrard Inlet

29. (II-2, I-15, I-34, I-37) For most of the 20th century, C.H. Cates & Sons Ltd. ("Cates") was the sole direct provider of ship berthing services within the principal portion of Burrard Inlet.

30. (II-4, I-62) In October 1992, Dennis Washington ("Washington") acquired, through his ownership of 534544 Alberta Ltd., control of Cates.

-10-

31. (II-5) Seaspan entered the Burrard Inlet ship berthing market in September 1993 a market in which Cates had been the sole direct provider. Following Seaspan's entry, the market experienced a shift in market share of 25 percent from Cates to Seaspan, a short-lived decrease in price of 5 per cent. Following these events in the Burrard Inlet market, Cates announced, in June 1994, its intention to enter the expanding Roberts Bank ship berthing market in competition with Seaspan.

32. (II-41) Seaspan entered Burrard Inlet in September, 1993. Prices decreased by 5% by June 1994. In January 1995 Cates raised prices 3.8% and Seaspan raised prices 3.5% by November 1995. Between January 1 1995 and November 1 1995 Cates regained market share.

33. (II-105, II-133, SS 15) Seaspan is not a failed or failing firm.

34. (II-47, SS 16) Prior to Seaspan's entry into Burrard Inlet, it contacted numerous users of ship berthing services to advise them of its impending entry. Seaspan responded to Cates' offer of a discount by meeting the discount shortly thereafter but without having an exclusivity requirement. Seaspan competed for customers of ship berthing services.

35. (II-66) It is unlikely that a material price increase in ship berthing services in Burrard Inlet would result in retrofitting of advanced steering equipment/bow thrusters/stern thrusters on existing vessels calling at Burrard Inlet.

Roberts Bank

36. (II-3, I-16, I-63, I-65, I-67) Since the opening of the coal loading terminal at Roberts Bank in 1970, Seaspan International Ltd. ("Seaspan") has been, and continues to be, the

-11-

nominated provider of ship berthing services at these facilities. Seaspan tugs were more often than not involved in any given ship movement and Seaspan dispatch and accounting handled the administrative matters.

37. (II-68) Cates publicly announced its intention to enter Roberts Bank in June 1984, though it did not enter subsequently. Ship berthing at Roberts Bank has been controlled by Westshore Terminals which chose to nominate Seaspan as the ship docking company for Roberts Bank. From 1970 to 1984 the volume of ships at the terminal did not justify on-station tugs. Ship berthing during those years was carried out by Seaspan tugs together with tugs of various other companies assembled as necessary and as available. In 1984 when Westshore expanded their operations Seaspan at Roberts Bank built and placed on station the 4000 BHP docking tug 'SEASPAN DISCOVERY'. The Respondents believe that Seaspan had no contract with Westshore Terminals. In its 25 year history Westshore Terminals could, at any time they so desired, have chosen another firm for ship berthing services other than to use Seaspan.

38. (II-69) A development subsequent to the Seaspan Merger has altered the nature of possible entry into the Roberts Bank ship berthing market. In the Fall of 1985, a coalition of interested parties, including the Vancouver Port Corporation, issued a request for proposals regarding the provision of ship berthing services in Roberts Bank. The objective was to award one ship berthing company with a lease on the only tug basin at Roberts Bank, effectively, to designate one ship berthing company as the exclusive provider of ship berthing services at Roberts Bank for five years. The initiative was undertaken as a result of a desire on the part of the coalition to facilitate the application of competitive forces on the provision of ship berthing services at Roberts Bank. The request for proposals went to five specific companies only, Cates, Crowley Maritime, Foss Maritime, Rivtow and Seaspan. Cates and Seaspan responded to the request for proposals, Seaspan was the successful bidder.

-12-

39. (II-71, SS17) Seaspan has committed to the coalition to run the SEASPAN FALCON or the HAWK, now stationed at Burrard Inlet, to Delta Port to handle container ships should a pilot request a second tractor tug to work with SEASPAN DISCOVERY.

40. (II-74) Burrard Inlet and Roberts Bank markets are quite distinct. Burrard Inlet is characterized by a large volume of ships in a variety of sizes and types calling at a variety of different docks, piers and terminals, moving at certain peak periods of tide and often moving more than once to different piers. In contrast, Roberts Bank at present consists of one terminal frequented by similar large bulk carriers, soon to be supplemented by an adjacent terminal frequented by similar container ships.

B. BARGING

Relevant Market

41. (II-91) Captives with excess capacity must be considered part of the relevant product market which for the assessment of the effects on competition in the barging industry of the Seaspan and Norsk Mergers is the provision by independent operators of coastal marine cargo transportation services via the use of barges and tug boats, or "coastal barging services".

42. (II-92) The relevant geographic market for the assessment of the effects on competition in the barging industry of the Seaspan and Norsk Mergers is comprised of all barging routes from one location on the coast of British Columbia to another location on the coast of British Columbia, or "the B.C. domestic routes".

43. (II-93) The relevant market may, therefore, be defined as the "B.C. domestic routes for coastal barging services". For simplicity, this market shall henceforth be referred to as

-13-

the "B.C. barging market".

44. (II-96) The barging business involves the transportation of a range of commodities from one coastal location to another on various types of barges, constructed for different purposes, and in various sizes towed by tugboats. The tugs and barges are interdependent. Tugs do not carry cargo and barges which do carry cargo cannot move without tugs. Therefore the extent to which any company is in the barging business is a function of both tugs and barges (except self-propelled rail barges). Purpose-built ship berthing tugs are sophisticated in technology relating to ship berthing but as a result thereof are not suitable for towing barges. On the other hand, tugs designed to tow barges can be and are of considerable size and sophistication in their own right and have the added characteristic that though perhaps less efficient than tractor tugs, those of suitable power and configuration are very suitable for berthing ships.

45. (II-97) An accurate description of the various types of barges used in British Columbia include:

a) Self-loading (with two cranes mounted aboard), self-unloading (self-ballasting) log barges, which transport logs from harvest sites, log storage areas or dry land sorts to sawmills or booming grounds for sorting and preparation of booms.

b) Chip barges, which transport wood chips, sawdust and hog fuel from sawmills, chipping plants or terminal locations (receiving chips from truck or rail, for transport to coastal pulp and paper mills);

c) Covered dry-cargo barges, which transport pulp, paper and newsprint from pulp and paper mills to coastal terminals or alongside ships. On some barges liquid chemicals

-14-

are carried in the hull or in on-deck tanks.

d) Chemical barges, which are used for the carriage of chemical products.

e) Rallcar barges, which carry rallcars on deck, containing pulp, newsprint, lumber chemicals or other products, sometimes these barges have chemical capacity below.

f) Tanker barges which are used for transport of petroleum products.

g) Bulk carrier barges and flat-deck barges which transport limestone, sand and gravel, salt, packaged lumber, scrap steel, equipment and miscellaneous deck cargoes.

h) General freight and tractor-trailer barges

46. (II-88) Norsk was a captive and continues in Canada as such with its barges serving only the needs of Fletcher Challenge.

47. (II-88) Captive barging companies, or those which are owned by and primarily serve their affiliates, to the extent they have excess capacity, have historically and continue to exert considerable competitive influence on the independent barging companies. Those with excess capacity are prepared to compete with independents in the general market. For any excess work that the captive's parent may have, the independents are required to compete against the internal rate structure set by the captive. Therefore, to say that "a small number of users of barge services have their own barges..." understates the size and influence of these captives on the marketplace.

-15-

48. (II-80) The independent bargaining business is generally characterized by contracts between primary producers and bargaining companies which vary in length from approximately one to five years. Less frequently, other purchasers of bargaining services do not contract exclusively with one bargaining company but rather engage operators on an ad hoc basis.

DATED at Vancouver, B.C. this 10th day of January, 1997.



Department of Justice,
Counsel to the Director of Investigation
and Research



Bull, Housser, Tupper,
Counsel to Washington et al

APPENDIX "A" - THE MARKETS AT ISSUE

In this matter the Director has alleged a likely substantial prevention or lessening of competition from the subject mergers in the following markets:

(a) ship berthing:

product market: "the provision of ship berthing services by tug boats" or "ship berthing services"

geographic markets:

- (i) Burrard Inlet; and
- (ii) Roberts Bank.

(b) barging:

product market: "the provision by independent operators of coastal marine cargo transportation services via the use of barges and tug boats" or "coastal barging services". The relevant submarkets are:

- (i) "chip barging"; and
- (ii) "covered dry cargo barging".

geographic market: "all barging routes from one location on the coast of British Columbia to another location on the coast of British Columbia" or "the B.C. barging market".

Statement of Grounds, paras. 40, 91, 92;
Director's Reply to Response of Dennis Washington et al, paras. 12, 13.

UNRESTRICTED

THE COMPETITION TRIBUNAL

IN THE MATTER of an application by the Director of Investigation and Research for orders pursuant section 92 of the *Competition Act*, R.S.C. 1985, c.34, as amended;

COMPETITION TRIBUNAL TRIBUNAL DE LA CONCURRENCE	
JAN 13 1997 AB	
REGISTRAR - REGISTRE	
<i>Van... /</i>	#208(c)

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

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

BETWEEN:

THE DIRECTOR OF INVESTIGATION AND RESEARCH

Applicant

AND:

DENNIS WASHINGTON,
K&K ENTERPRISES,
SEASPAN INTERNATIONAL LTD.,
GENSTAR CAPITAL CORPORATION, LTD.,
TD CAPITAL GROUP LTD.,
COAL ISLAND LTD.,
314873 B.C. LTD.,
C.H. CATES AND SONS LTD.,
MANAGEMENT SHAREHOLDERS,
PREFERENCE SHAREHOLDERS and
NORSK PACIFIC STEAMSHIP COMPANY, LIMITED

Respondents

DRAFT CONSENT ORDER

UNRESTRICTED

2

UPON 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, as amended (the "*Act*") to the Competition Tribunal (the "Tribunal") and pursuant to a Second Amended Notice of Application, dated 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 UPON CONSIDERING the Pleadings herein, the Consent Order Impact Statement and Consent of the Parties filed herein;

AND ON CONSIDERING THAT the Director and 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 Pleadings, 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 UPON HEARING counsel for the parties in respect of this application;

UNRESTRICTED
3

Definitions

1. THE TRIBUNAL ORDERS THAT for the purposes of this Order the following definitions shall apply:

- (a) "Cates" means the respondent C.H. Cates & Sons Ltd.;
- (b) "identified assets" means the Ship Berthing Assets, 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) "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;

UNRESTRICTED

4

- (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 paragraph 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 TRIBUNAL ORDERS THAT the provisions of this Order apply to each of Washington, Cates, Seaspan, K & K and Norsk, whether natural persons or corporations and:

- (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. THE TRIBUNAL ORDERS THAT 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

UNRESTRICTED

5

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 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 completed 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 TRIBUNAL ORDERS THAT 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. THE TRIBUNAL ORDERS THAT 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 Seaspan Barging Assets

6. THE TRIBUNAL ORDERS THAT the Washington Group, as applicable, shall promptly commence their efforts to divest; and shall complete divestiture of the Ship

UNRESTRICTED

6

Berthing Assets and Seaspan Barging Assets within 12 months from the date of this Order in accordance with the procedure for divestiture set out in this Order.

7. THE TRIBUNAL ORDERS THAT Washington may, at his discretion:
- (a) vary, with the view to promptly effecting a sale, the assets and interests 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 Cates; or
 - (c) in lieu of a divestiture of the Seaspan 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. THE TRIBUNAL ORDERS THAT, 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. THE TRIBUNAL ORDERS THAT, 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. THE TRIBUNAL ORDERS THAT 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

UNRESTRICTED

7

11. THE TRIBUNAL ORDERS THAT 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/or 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 will meet the following objective criteria:
 - (i) in the case of the Ship Berthing Assets (or Cates, in the event of a Trustee Sale) will 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) will effect the purchase with the expressed intention of using the assets to compete effectively as a provider of barging services on B.C. domestic routes;
 - (iii) in any case, will have the managerial, operational and financial capability to operate and compete effectively in the markets in question;
 - (iv) is not, directly or indirectly, or is not 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) will 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

UNRESTRICTED

8

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

12. THE TRIBUNAL ORDERS THAT 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 to 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 TRIBUNAL ORDERS THAT the Washington Group, as applicable, shall use their reasonable best efforts to accomplish the divestiture within the time period specified.

14. THE TRIBUNAL ORDERS THAT 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. THE TRIBUNAL ORDERS THAT, 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

UNRESTRICTED

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/or Cates 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

UNRESTRICTED

10

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

16. THE TRIBUNAL ORDERS THAT 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. THE TRIBUNAL ORDERS THAT if the Trustee has not accomplished the required divestiture within 90 days of its 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. THE TRIBUNAL ORDERS THAT following a divestiture or Trustee Sale, none of the Washington Group nor any of its agents or representatives will 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 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,

RESTRICTED

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

19. THE TRIBUNAL ORDERS THAT, to the extent required by a purchaser of the Ship Berthing Assets, Seaspan and/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 TRIBUNAL ORDERS THAT 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 the 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, 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. THE TRIBUNAL ORDERS THAT within seven 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 seven days of the receipt of the request unless the Director agrees in writing to extend the time.

22. THE TRIBUNAL ORDERS THAT 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.

UNRESTRICTED

12

23. THE TRIBUNAL ORDERS THAT 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. THE TRIBUNAL ORDERS THAT 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. THE TRIBUNAL ORDERS THAT 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 TRIBUNAL ORDERS THAT 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 seven 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.

UNRESTRICTED

13

27. THE TRIBUNAL ORDERS THAT 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. THE TRIBUNAL ORDERS THAT 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. THE TRIBUNAL ORDERS THAT jurisdiction is 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 TRIBUNAL ORDERS THAT the Interim Consent Order dated April 19, 1996, as amended is hereby rescinded as of the date of the making of this Order.

Notice

31. THE TRIBUNAL ORDERS THAT when notice is required to be given pursuant to any of the terms of this Order, it shall be considered given if dispatched by registered letter and if so dispatched will be deemed to have been given 3 days thereafter.

Interpretation

32. THE TRIBUNAL ORDERS THAT, 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 _____, this _____ day of _____ 1997.

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

UNRESTRICTED**Schedule A****Ship Berthing Assets**

The 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	189280	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		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

UNRESTRICTED

2

** Official Numbers not provided will be provided in a complete Schedule

and 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

JUNRESTRICTED

Schedule B

Seaspan Chip Barge Assets

The 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 [intentionally deleted] of the contract made between Seaspan International Ltd. and [intentionally deleted], dated [intentionally deleted]; 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	326494	chip barge

UNRESTRICTED

Schedule C

Seaspan Covered Barge Assets

The 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

UNRESTRICTED

Schedule D

Norsk Chip Barge Assets

The Norsk Chip Barge Assets means:

- (a) twelve chip barges described in the table below; and
- (b) the Chip Barge Transportation Contract between Norsk and [intentionally deleted], dated [intentionally deleted] and amended [intentionally deleted].

<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		chip barge
Norsk Pacific 15	392783	chip barge
Norsk Pacific 16		chip barge
Norsk Pacific 17	800201	chip barge
Norsk Pacific 18		chip barge
Norsk Pacific 19		chip barge
Norsk Pacific 20	801004	chip barge
Norsk Pacific 21	801052	chip barge
Norsk Pacific 22		chip barge

** Official Numbers not provided below will be provided in a complete Schedule as soon as possible

UNRESTRICTED

Schedule E

Norsk Covered Barge Assets

The Norsk Covered Barge Assets means:

- (a) the nine covered barges described in the table below;
- (b) the Covered Barge Towing Services Agreement (Domestic) between [intentionally deleted] and Norsk dated [intentionally deleted]; 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*		covered barge
BMC 29		covered barge

* Not in use in [intentionally deleted] service; occasionally chartered

** Official Numbers not provided below will be provided in a complete schedule as soon as possible