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 CP Containers (Bermuda) Limited acquired certain assets held by The Cast Group Limited and of the acquisition by 3041123 Canada Inc. of all the shares of Cast North America Inc. by way of agreements entered into between or among The Royal Bank of Canada, The Cast Group Limited, 3041123 Canada Inc., C.P. Containers (Bermuda) Limited and Canadian Pacific Limited.

B E T W E E N:

THE DIRECTOR OF INVESTIGATION AND RESEARCH

Applicant

\- and -

CANADIAN PACIFIC LIMITED, CANADA MARITIME LIMITED, C.P. CONTAINERS (BERMUDA) LIMITED, 3041123 CANADA INC., CAST NORTH AMERICA INC. and THE ROYAL BANK OF CANADA

Respondents

NOTICE OF APPLICATION

TAKE NOTICE that the Applicant, the Director of Investigation and Research (the "Director"), will make an application to the Competition Tribunal pursuant to section 92 of the *Competition Act* (hereinafter referred to as the "*Act*") for the following orders with respect to the

acquisition by CP Containers (Bermuda) Limited of certain assets held by The Cast Group Limited and of the acquisition by 3041123 Canada Inc. of all the shares of Cast North America Inc. (the "Merger"):

(a) an order pursuant to subsection 92(1)(e)(i) of the *Act* directing the Respondents to dissolve the Merger in such a manner as the Tribunal may direct;

(b) in the alternative, an order pursuant to subsection 92(1)(e)(ii) of the *Act* requiring the Respondents, or some of them, to dispose of assets or shares designated by the Tribunal in such a manner as the Tribunal may direct;

(c) in the further alternative, any other order that the Tribunal considers appropriate to which the Respondents and the Director consent pursuant to subsection 92(1)(e)(iii) and section 105 of the *Act*; or

(d) in the further alternative, such further or other order pursuant to subsection 92 (1)(f) of the *Act* as the Tribunal deems advisable.

AND TAKE FURTHER NOTICE that the Director may apply pursuant to section 104 of the *Act* for such interim order or orders as may be appropriate with respect to the Merger.

AND TAKE FURTHER NOTICE that if you do not file a response with the Registrar of this Tribunal within thirty days of the date on which this application is served upon you, the Tribunal may, upon the *ex parte* application by the Director, make such order as it considers appropriate.

AND TAKE FURTHER NOTICE that in support of this application the Director will rely upon the Statement of Grounds and Material Facts attached hereto.

TO: Registrar, Competition Tribunal
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Ottawa, Ontario
K1P 5B4

AND TO: Canadian Pacific Limited
Canada Maritime Limited
CP Containers (Bermuda) Limited
3041123 Canada Inc.

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AND TO: Cast North America Inc.

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AND TO: Mr. Neil Finkelstein
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STATEMENT OF GROUNDS AND MATERIAL FACTS

I. OVERVIEW

1. The Director submits that the Respondents have completed a transaction which constitutes a merger as defined by section 91 of the *Act* and which prevents or lessens, or is likely to prevent or lessen, competition substantially in a trade or industry in Canada within the meaning of section 92 of the *Act*.

2. This Application is concerned with the Merger whereby CP Containers (Bermuda) Limited and 3041123 Canada Inc., which are all directly or indirectly controlled by Canadian Pacific Limited, have acquired certain assets and shares of The Cast Group Limited and Cast North America Inc. held by Cast Marine Holdings Limited by virtue of agreements entered into between or among The Royal Bank of Canada, The Cast Group Limited, 3041123 Canada Inc., CP Containers (Bermuda) Limited and Canadian Pacific Limited.

3. This Application alleges that the Merger has led to, or is likely to lead to, a substantial lessening or prevention of competition with respect to the provision of intermodal non-refrigerated containerized shipping services through the Port of Montreal between Northern Continental Europe/United Kingdom and Ontario and Quebec (the “Market”). In particular, the Director submits that the Merger prevents or lessens, or is likely to prevent or lessen, competition substantially in the provision of intermodal non-refrigerated containerized shipping services:

(a) eastbound from Ontario and Quebec through the Port of Montreal to Northern Continental Europe;

(b) westbound from Northern Continental Europe to the Port of Montreal for destinations in Ontario and Quebec;

(c) eastbound from Ontario and Quebec through the Port of Montreal to the United Kingdom; and

(d) westbound from the United Kingdom to the Port of Montreal for destinations in Ontario and Quebec.

4. Prior to the Merger, Cast was the most vigorous competitor of Canada Maritime Limited ("Canada Maritime") which is the dominant member of the St. Lawrence Coordinated Service ("SLCS"), a shipping consortium which Canada Maritime operates with Orient Overseas Container Line ("OOCL") and Hapag-Lloyd A.G. ("Hapag-Lloyd"). Following the Merger, Cast has been integrated into the SLCS thereby removing the only competitor who could effectively constrain a non-transitory price increase by Canada Maritime in the Market.

5. The Director submits that the Merger confers market power to Canada Maritime by providing it with a market share of approximately 63% in a market that was already highly concentrated and with respect to which there are significant barriers to entry. The market share of the SLCS increases to approximately 85% as a result of the Merger. The existence of the SLCS enhances Canada Maritime's ability to exercise the market power conferred upon it as a result of the Merger.

6. A glossary of terms as used in this Notice of Application is attached hereto as Appendix "A".

II. THE PARTIES

7. The Director is the person appointed under section 7 of the *Act*. The office of the Director has been vacant since June 30, 1996. Pursuant to subsection 8(2) of the *Act*, Francine Matte was authorized by an Order in Council to exercise the powers and perform the duties of the Director

during the vacancy in the office of the Director. As a result, Francine Matte is authorized to make this application to the Tribunal.

8. Canadian Pacific Limited is a large conglomerate involved directly or indirectly through its subsidiaries in an array of businesses, including transportation by rail and ocean shipping. Canadian Pacific Limited's wholly-owned subsidiary, Canada Maritime, operates a fully integrated intermodal transportation system for moving containerized cargo between North America and Northern Continental Europe, the United Kingdom and the Mediterranean. CP Containers (Bermuda) Limited ("CP Bermuda") was incorporated in July, 1994 for the purpose of acquiring certain assets and shares held by The Cast Group Limited ("The Cast Group") and is a wholly-owned subsidiary of Canadian Pacific Limited. 3041123 Canada Inc., formerly an inactive company, was purchased by Canadian Pacific Limited for the purpose of acquiring the shares of Cast North America Inc. For the purposes of this Application, Canadian Pacific Limited and its affiliates will be collectively referred to as "CP".

9. The Cast Group and Cast North America Inc. ("Cast NA") are wholly-owned subsidiaries of Cast Marine Holdings Ltd., a Bermuda based company that provides a fully integrated intermodal service for moving non-refrigerated and non-specialized containerized cargo between Canada, the United States and Europe. For the purposes of this Application, Cast Marine Holdings Ltd. and its affiliates will be referred to collectively as "Cast".

10. The Royal Bank of Canada (the "RBC") is a chartered bank within the meaning of the *Bank Act*, S.C. 1991, c. 46. The RBC was the secured creditor of Cast that entered into certain agreements, as described herein, for the purposes of effecting the Merger.

a) The Acquisition

11. In the early 1980s, The Cast Group had granted comprehensive debenture security over its assets to the RBC. On June 16, 1994, the RBC entered into an agreement with CP whereby

the business of the Cast Group would be purchased by CP on a going concern basis (the "Agreement in Principle"). In addition, the Agreement in Principle allowed CP to acquire the container shipping business which was operated by the Cast Group and its subsidiaries, as well as the shares of Cast NA. As a result, CP directly acquired control over Cast through a purchase of assets and shares. The Director therefore submits that the acquisition constitutes a merger within the meaning of section 91 of the *Act*.

12. Cast's assets were acquired by way of an enforcement of security held by the RBC in its capacity as a secured creditor of Cast. On February 21, 1995, to facilitate the terms of the Agreement in Principle, RBC recalled its loans made to Cast and issued notices of its intention to enforce its security. An Asset Sale Agreement was executed between The Cast Group, the Receivers of The Cast Group and CP Bermuda by which The Cast Group sold certain assets to CP Bermuda through its receivers, including: containers, goodwill, intellectual property, marketing information including customer lists, outstanding receivables, computer systems, contracts and the rights to the use of the name "Cast".

13. A Share Purchase Agreement was entered into by 3041123 Canada Inc. and the RBC which allowed 3041123 Canada Inc. to acquire the 145,010 Common Shares held by Cast Marine Holdings Ltd. in Cast NA.

14. The total price for the shares and assets was U.S. $55,000,000 and the closing of the transaction occurred on March 31, 1995.

III. MARKET PARTICIPANTS

15. As a result of the Merger, the container shipping industry operating out of the Port of Montreal to and from Northern Continental Europe and the United Kingdom has effectively only two remaining competitors:

(a) the SLCS, a shipping consortium which includes: Canada Maritime, OOCL, Cast, and Hapag-Lloyd; and

(b) B.O.L.T. Canada Line ("BOLT").

The St. Lawrence Coordinated Service

16. The Director submits that the SLCS is a consortium which may be treated for most purposes as a single competitor. The SLCS participants prior to the Merger included Canada Maritime, OOCL and Hapag-Lloyd. Cast became a participant in the SLCS in 1996 subsequent to the Merger.

17. Prior to the Merger, the SLCS provided a twice-weekly "Gateway Express" service out of Montreal to Europe through three routes: Route 1 served the Ports of Antwerp and Felixstowe; Route 2 served the Ports of Antwerp and Hamburg; and Route 3 served the Ports of Liverpool and LeHavre. Following the Merger, in mid-June, 1996, Cast entered into an agreement with OOCL and Canada Maritime as members of the SLCS which requires Cast to provide space on its vessels operating a weekly service to Liverpool while Cast takes an equal number of eastbound and westbound slots on OOCL and Canada Maritime vessels. Under this arrangement, Cast currently provides a weekly service to Zeebrugge, Hamburg, Felixstowe and Liverpool using its own vessels and SLCS vessels.

18. The SLCS was formed in 1978 when Canadian Pacific combined its North Atlantic Service with two other shipping lines: Compagnie Maritime Belge ("CMB") and Hong Kong based C.Y. Tung Group which operated in the trade as Manchester Lines. The combined service consisted of four vessels: one contributed by each of the three participants and one jointly-owned vessel. The SLCS initially served as a revenue pool, with both revenues and expenses being shared among the participants.

19. In 1983, CP completed a merger with CMB to form a new jointly-owned company, Canada Maritime. As a result, Canada Maritime assumed CP's share in the SLCS giving it 70% of the interest in the SLCS while Manchester Lines maintained its 30% share.

20. In 1987, the SLCS was converted from a revenue sharing pool to a capacity sharing agreement. Space on the vessels was shared in accordance with the interest held by each member giving Canada Maritime 70% of the space available. Manchester Lines, which received the remaining 30% of space, was renamed in 1987 as Orient Overseas Container Line ("OOCL"). In February, 1993, CP acquired the interest held by CMB in Canada Maritime. As a result, Canada Maritime became a wholly-owned subsidiary of CP.

21. OOCL is a subsidiary of Orient Overseas (International) Line, a publicly held company listed on the Hong Kong Stock Exchange. OOCL owns and operates container vessels, container terminals, containers and container chassis. OOCL operates two vessels in the SLCS and charters space on the vessels operated by Cast and Canada Maritime in the SLCS. OOCL also performs container service management, road haulage, shipping agency, cargo consolidation and freight forwarding.

22. Hapag-Lloyd is a German based shipping group which offers worldwide intermodal container transport combining ocean transport with inland transport by rail, truck and barge resulting in complete door-to-door transportation services. Hapag-Lloyd does not operate its own ships out of the Port of Montreal but slot charters approximately 225 TEUs of space per week on the vessels owned or operated by other participants in the SLCS. The SLCS arrangement allows Hapag-Lloyd to offer a door-to-door service using space on SLCS vessels for the ocean portion of the voyage.

23. Cast is a company incorporated in Bermuda which is an intermodal container carrier serving Northern Europe and the United Kingdom through the Port of Montreal. Cast participates

in the SLCS through the use and contribution of slots on its own vessels and the use of slots on vessels owned or operated by Canada Maritime and OOCL.

B.O.L.T. Canada Line

24. BOLT is a carrier operating out of the Port of Montreal which is represented in Canada by its affiliated and exclusive agent Morlines Maritime Agency Ltd. ("Morlines"), a company incorporated under the *Canada Business Corporations Act*, which formally operated under the name Morflot Freight Liners Limited. Both Morlines and BOLT are subsidiaries of Sovfracht, a Russian based shipping company. BOLT was preceded by Balt-Canada Line ("Balt-Canada"), a wholly-owned affiliate of Baltic Shipping Company ("Baltic Shipping"), a Russian based company.

25. BOLT serves the ports of Liverpool, Rotterdam, Bremerhaven, Thamesport and Montreal on an irregular schedule.

Atlantic Conbulk Services

26. ACS is a company incorporated in Panama in June 1995. The majority shareholder in ACS is Atlantska Plovidba, a Yugoslavian shipping company. ACS has two subsidiary companies, Atlant Ship Management (Europe) N.V. in Antwerp, Belgium and Atlantship Maritime Inc. in Montreal. ACS operates in Canada through its general agent Trans Trade Inc.

27. In mid-June, 1995, ACS introduced a bi-monthly, single port operation servicing the Ports of Montreal and Antwerp. The two vessels utilized in this service were built in 1983 for the St. Lawrence River trade and carry both containers and bulk cargo (conbulker vessels). The vessels were used by Cast prior to Cast's conversion to vessels solely dedicated to carrying containerized cargo (known as "fully cellular vessels"). In 1994, the vessels were leased by the now defunct

Orion Shipping Ltd. Following the demise of Orion in 1995, ACS assumed operation of these vessels.

28. Prior to mid-October, 1996, ACS operated a monthly service between the ports of Antwerp and Montreal carrying both bulk and containerized cargo. The service frequency was determined by the demand for bulk shipping services and transit times were typically much longer than dedicated containerized shipping services.

29. In mid-October, 1996, ACS discontinued its containerized shipping service and now offers one sailing per month carrying only bulk cargo. As a result, ACS is no longer a participant in the Market.

IV. BACKGROUND

30. On or about July 21, 1994, CP informed the Director of the then proposed Merger. A presentation was made to the Director on or about July 27, 1994. An Information Request was sent to Canada Maritime on August 18, 1994. Responses to the Information Request were provided throughout the period ending late October, 1994.

31. On August 22, 1994, the National Transportation Agency ("NTA") received notice of the then proposed Merger pursuant to section 252 of the *National Transportation Act* ("*NTA Act*"). The NTA, as part of its review of the proposed merger, held public hearings from December 5, 1994 to December 16, 1994 in Montreal, Quebec. On January 20, 1995, the NTA released its decision finding that the proposed Merger was not against the public interest and therefore would not be disallowed. Pursuant to section 265 of the *NTA Act*, the *Competition Act* applies to the Merger even though the NTA has made a finding that the Merger is not against the public interest. On July 1, 1996, the *Canada Transportation Act* was proclaimed by Parliament, which removed the jurisdiction of the NTA to review transportation mergers. The review of these mergers is now solely under the purview of the *Competition Act*.

32. A motion for leave to appeal to the Federal Court of Appeal by CN North America from the decision of the NTA was denied on March 2, 1995.

33. On January 13, 1995, the Director commenced an inquiry into the proposed Merger pursuant to subsection 10(1)(b)(ii) of the *Act* (the "Inquiry"). During the course of the Inquiry, the Director obtained a number of Orders pursuant to section 11 of the *Act*.

34. The parties filed the pre-notification information required by section 122 of the *Act* on February 22, 1995.

35. On March 6, 1995, the Director obtained an Order from the Honourable Mr. Justice Farley of the Ontario Court (General Division) requiring Mr. Peter Raimondo, the Chairman of the Canadian Continental Eastbound Freight Conference and the Canada United Kingdom Freight Conference (referred to in paragraph 66 herein), to produce relevant documents and information to the Director pursuant to subsection 11(1)(b) of the *Act* and an Order requiring Peter I. Keller, the former President and Chief Executive Officer of Cast, to attend an examination by the Director before the Presiding Officer pursuant to subsection 11(1)(a) of the *Act*.

36. On March 9, 1995, CP brought an application in the Ontario Court of Justice seeking to stay an Order granted to the Director under subsection 11(1)(a) of the *Act* on the basis that the Director did not have reasonable grounds for proceeding with an inquiry pursuant to section 10 of the *Act* in view of the NTA decision. The Court dismissed CP's application and ruled that the jurisdiction of the Director and the Competition Tribunal was unaffected by the exercise of jurisdiction by the NTA.

37. The Director requested that the Parties postpone the completion of the transaction pending the completion of the Inquiry. The Parties were not prepared to postpone the closing of the transaction. On March 16, 1995, the RBC made representations to the Director that it would not

continue to support Cast beyond the end of the month and that unless the transaction proceeded Cast was unlikely to survive without the support of the RBC.

38. On March 21, 1995, the Director obtained Orders requiring Raymond R. Miles and Michael Beauregard, Officers of Canada Maritime, to attend an examination by the Director before the Presiding Officer pursuant to subsection 11(1)(a) of the *Act*. Further, on that date, the Director obtained Orders requiring CP and The Cast Group, or any of their affiliates, to produce records or other information pursuant to subsection 11(1)(b) of the *Act*.

39. The transaction closed on March 31, 1995. Prior to closing, the Director advised the Parties that he did not have sufficient grounds at that time to commence an application pursuant to section 92 of the *Act*. However, the Parties were also informed that the Inquiry would continue notwithstanding the closing of the transaction and that the *Act* provided a three year period during which the Director may bring the matter before the Tribunal.

40. On May 31, 1995, CP brought an application to Mr. Justice Farley pursuant to section 19 of the *Act* claiming privilege for a large number of documents which otherwise would be required to be produced by CP and Cast pursuant to the Orders obtained under subsection 11(1)(b) of the *Act*.

41. On August 25, 1995, the Director obtained an Order requiring RBC to provide records or other information to the Director pursuant to subsection 11(1)(b) of the *Act*.

42. On December 7, 1995, the Director obtained Orders requiring the following shipping lines to provide records or other information to the Director pursuant to subsection 11(1)(b) of the *Act*: (a) Hapag Lloyd, A.G.; (b) Halo Maritime Inc.; and, (c) OOCL (Canada) Inc.

43. On December 14, 1995, RBC made an application to Mr. Justice Farley pursuant to subsection 19(4) of the *Act* claiming privilege over certain documents which were required to be provided to the Director pursuant to the Orders obtained under section 11 of the *Act*.

44. On December 22, 1995, the Director obtained an Order requiring Morlines Maritime Agency Ltd., to produce records or other information to the Director pursuant to subsection 11(1)(b) of the *Act*.

45. Mr. Justice Farley issued written Reasons for Judgment or Endorsements on June 2, 1995; December 31, 1995; April 30, 1996; and, May 21, 1996 concerning the issue of privileges claimed pursuant to section 19 of the *Act* and setting out various documents over which privilege was properly or improperly claimed.

46. By way of a Notice of Appeal dated June 20, 1996, CP has appealed the Orders of Mr. Justice Farley with respect to the determination of privilege pursuant to section 19 of the *Act*.

47. On July 3, 1996, the Director obtained Orders requiring the following shipping lines and their agents to provide records or other information to the Director pursuant to subsection 11(1)(b) of the *Act*: (a) Atlantic Conbulk Services; (b) Trans Trade Inc.; (c) Polish Ocean Lines; (d) Seabridge International Shipping Inc.; (e) Atlantic Container Line, A.B.; and, (f) Maersk Canada Inc.

48. On July 3, 1996, the Director obtained an Order requiring Mr. Joseph A. Storozuk, the Vice-President and a Director of Morlines Maritime Agency, to attend an examination by the Director before the Presiding Officer pursuant to subsection 11(1)(a) of the *Act*. The examinations were held on July 29 and 30, 1996 and were adjourned *sine die*.

49. On August 1, 2 and 19, 1996, the Director examined Mr. Peter Keller, the former Chief Executive Officer of Cast, pursuant to subsection 11(1)(a) of the *Act*.

50. On October 15, 1996, the Director obtained Orders requiring the following shipping lines and their agents to provide electronically stored ship manifests and other records to the Director pursuant to subsection 11(1)(b) of the *Act*: (a) Cast; (b) CP; (c) OOCL; and (d) Hapag-Lloyd.

51. By way of a Consent Order dated November 7, 1996, the Director consented to a variation of the Order issued on October 15, 1996 with respect to Cast and consented to an extension of the time in which Cast was required to provide the records.

V. THE NATURE OF THE INDUSTRY

(a) Types of Services

52. Ocean-going shipping services fall into three main categories, each of which has its own distinct uses and advantages:

(i) Containerized shipping services;

(ii) Bulk shipping services; and

(iii) Break-bulk shipping services.

(i) Containerized Shipping Services

53. The concept of containerized shipping services was developed in 1956. The standardization of container sizes made the development of full intermodal shipping systems possible; integrating land and water shipping services to create door-to-door shipping services. In providing a fully integrated door-to-door intermodal system, a carrier arranges for a standardized container loaded with a shipper's product to be transported by truck, rail and/or barge to a container handling facility operated by the carrier. Once at the handling facility, the container is loaded onto the carrier's vessel and transported by water to the destination port. Once the container arrives at the appropriate destination port, the carrier arranges to have the container transported by truck, rail and/or barge to its final destination.

54. The introduction of containerized shipping required the carrier to acquire a substantial pool of containers, establish dedicated container handling facilities in each port served, establish reliable commercial relationships with inland carriers (truck and rail), develop sophisticated container tracking and management systems and modify existing ships or build specialized ships for this type of service. Many customers require that carriers offer a fixed day weekly sailing in order to properly coordinate their production schedules and shipping patterns.

55. The majority of containers are either twenty feet or forty feet in length. A standard twenty foot container measures eight feet by eight feet and has a volume of 33 cubic metres with a net capacity of 18,000 kg. The standards of twenty foot equivalent unit ("TEU") and forty foot equivalent unit ("FEU") are used as a means of measuring ship capacities and total volumes. As an example, 100 TEUs represents either 100 twenty foot containers or 50 forty foot containers.

56. Containerized shipping services include some specialized forms of service such as refrigerated containers and specialized containers such as high cube, 45 foot containers, open top, flatrack, platform and half height containers. Prior to the Merger, Cast offered only non-refrigerated containerized shipping.

57. The handling of containers requires specialized equipment on land and specially designed and equipped ocean vessels. Offsetting the costs of specialized equipment is the advantage for the carrier of dealing with a relatively few, standardized container sizes which are stacked on container ships with specialized fittings.

58. Containerized shipping is considered a separate mode of service due to its unique characteristics. It offers a faster and less costly service and advantages such as better security and protection as compared to other forms of shipping and has become the only acceptable form of shipping for many products. Many commodities that had traditionally been shipped by breakbulk have been rapidly converted to containerized shipping services. When containerized service

began in 1956 it was considered appropriate only for relatively high-value cargoes, particularly those prone to pilferage such as auto parts, which are today invariably shipped in containers. Containerized shipping has since replaced other forms of ocean-going shipping to become the dominant means of transporting cargoes between Ontario/Quebec and Europe.

(ii) Bulk and Break-bulk Cargo

59. Cargoes such as wheat, ore and other high volume cargoes are typically shipped in bulk, which requires specialized vessels and handling equipment. Ships are often chartered directly by bulk shippers and loaded using specialized equipment at the shippers plant or facility. Bulk shipping of materials such as agricultural products, minerals, and mined materials can be efficiently loaded and unloaded from the cargo hold of suitably equipped ships through mechanized transport devices.

60. The shipping of palletized or crated cargo which is not containerized is known as break-bulk cargo. Break-bulk shipping requires the shipper to crate or palletize many types of cargo. The carrier must cope with the difficulty and inefficiency of attempting to optimize the space utilization of the ship's cargo holds with irregular-sized crates, boxes, or oddly shaped palletized cargo. Break-bulk cargo is also labour-intensive for dockside handling.

61. Break-bulk was the traditional alternative to bulk shipping, but with the development of containerized shipping, break-bulk has been largely replaced as a form of ocean shipping service.

(b) Pricing of Containerized Shipping Services

62. Prices for door-to-door service are quoted by carriers operating out of the Port of Montreal to shippers in fully aggregated form. The components of such bundled rates include: inland transportation from origin to port (truck or rail); terminal handling charges; ocean freight rate (pier-to-pier); and inland transportation to destination (truck, rail or barge).

(c) The Shipping Conferences Exemption Act

63. The *Shipping Conferences Exemption Act*, R.S.C. c. S-10.1, ("*SCEA*") creates an exemption from the application of the *Act* for conference and interconference agreements to the extent that these agreements deal with specific subjects and to the extent that such agreements are properly filed and complied with by the conference members. In particular, subsection 4(1)(a) of *SCEA* provides an exemption from the application of the *Act* for conference agreements to the extent that they require a member of the conference to use a tariff. Subsection 4(1) also exempts conference agreements which: establish the terms and conditions applicable to loyalty contracts, service contracts, allocation of the ports in Canada or elsewhere; regulate the time of sailing and the kinds of service; regulate sharing by members of earnings and losses; or, regulate the admission of ocean carriers to membership.

64. The Director retains the jurisdiction to review any conduct or matter which falls within the purview of the *Act* but which does not fall within the specific exemption found in subsection 4(1) of *SCEA*.

65. *SCEA* was amended in 1987 to "provide for greater competition in the liner conference shipping segment"[1]. The amendments included three new provisions which were intended to encourage greater competition: independent actions; confidential service agreements; and, a complaint procedure. Parliament clearly intended to introduce measures to stimulate increased competition in the containerized shipping industry.

66. The carriers participating in the SLCS are all members of four shipping conferences (collectively known as the "Conference") described below:

(a) The Canadian North Atlantic Westbound Freight Conference ("CNAWFC") is the conference which establishes tariffs for the movement of cargo from points and through

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[1] *House of Commons Debates*, 5 March 1987 at 3863.

ports in the United Kingdom and Ireland to points and through ports in Canada (excluding direct shipments to ports on the western seaboard of North America, and Hudson's Bay).

(b) The Continental Canadian Westbound Freight Conference ("CCWFC") is the conference which establishes tariffs for the movement of cargo from points in the Continent of Europe (excluding Italy) through ports within the Le Havre/Hamburg range to points and through ports in Canada (excluding direct shipments to ports on the western seaboard of North America, and Hudson's Bay).

(c) The Canada United Kingdom Freight Conference ("CUKFC") is the conference which establishes tariffs for the movement of cargo from points and through ports in Canada (excluding direct shipments from ports on the western seaboard of North America, and Hudson's Bay) to points and through ports in the United Kingdom and Ireland.

(d) The Canadian Continental Eastbound Freight Conference ("CCEFC") is the conference which establishes tariffs for the movement of cargo from points and through ports in Canada (excluding direct shipments from ports on the western seaboard of North America and Hudson's Bay) to points in the Continent of Europe (excluding Italy) through ports within the Le Havre/Hamburg range.

67. BOLT and ACS are not members of any shipping conference. Polish Ocean Lines withdrew from the Conference in 1996.

(d) Inland Transportation

68. Inland transportation of containers between origin/destination points and the ports is usually by rail although Cast developed and still owns a specialized trucking operation for container transport from Southern Ontario and Quebec to Montreal. In general, the limit for economical truck transport is about 640 kms. Carriers typically have negotiated long term

contracts with inland carriers. Canada Maritime is vertically integrated with C.P. Rail so that all of Canada Maritime's inland rail needs are provided by C.P. Rail, an affiliate company of Canada Maritime. C.P. Rail also provides rail services to Cast and all other members of the SLCS, as it did prior to the Merger.

VI. COMPETITION ANALYSIS

THE RELEVANT MARKETS

(a) Relevant Product Market

69. The Director submits that the relevant product market in respect of transportation service markets is primarily determined by customer demand for point-to-point shipping services. Both Canada Maritime and Cast offer regularly scheduled non-refrigerated containerized transportation services between points in Canada and points in North Continental Europe and the United Kingdom, routed through the port of Montreal. The Director submits that there is a distinct relevant product market which is generally defined as non-refrigerated containerized transportation services between each origin/destination pair for which the merged parties compete.

70. To move cargo between Canada and Northern Continental Europe or the United Kingdom, the necessary means of transportation includes either an ocean transportation segment or an air transportation segment. Containerized shipping services are not generally, easily or cost effectively substituted by other modes of shipping services such as air freight, break-bulk or bulk shipping.

71. Due to the cost involved in shipping large cargoes via air freight and the natural constraints on the size or weight of the cargoes that can be transported in this fashion, industry

evidence concerning transportation patterns indicates that there are numerous types of industrial supplies, raw materials and finished goods where economic considerations dictate that the cargo must travel via ocean transportation services. Air freight is significantly more costly than ocean freight services and is only utilized for very high value cargoes where shipping costs as a percentage of the cost of the goods is insignificant and where the cargo is extremely time sensitive.

72. Bulk shipping is appropriate for large volumes of certain types of commodities, such as chemicals and agricultural products (e.g. grains). Products which are typically shipped in bulk are those which are not packaged, but which are placed in the hold of a vessel by means of a mechanized loading system and unloaded in a similar fashion. Bulk shippers require specialized dockside storage and handling facilities. Bulk cargoes are characterized as being relatively low-valued, heavy and are not readily damaged by rough handling. These characteristics of bulk cargoes render them inappropriate for shipping by container.

73. Break-bulk cargoes are unitized by being fixed to pallets (e.g. machinery) or bundled or wrapped in a manner which permits limited stacking of the packages (e.g. board lumber). These cargoes must be loaded either singly or in small batches into the vessel’s cargo holds. The loading and unloading process of break-bulk cargo is necessarily slower than for bulk cargoes and more labour intensive. These cargoes are also more vulnerable to physical damage while being handled and while stowed in the hold. Because break-bulk cargo is readily identifiable when dockside and comprises relatively manageable package sizes, it is more vulnerable to theft than bulk cargoes. Break-bulk cargoes are typically higher valued than bulk cargoes.

74. Bulk and break-bulk ocean freight services are not generally substitutes for containerized shipping services. Containerized cargoes are typically of higher value than either bulk or break-bulk cargoes, and the shipper benefits by having the cargo protected from theft by the sealed container. The widespread adoption of containerized shipping has led shippers to integrate container handling equipment into their physical plant and sometimes their production processes.

Reverting to bulk or break-bulk shipping would require retooling the shippers' or customers' facilities to handle these different shipping formats. The increasing use of "just-in-time" inventory and production methods has enhanced the attractiveness of containerized shipping for some shippers, even to the extent that some low-value commodities which, until recently were routinely treated as bulk or break-bulk cargo, now move in containers.

75. The expanding reliance on container shipping services and diminishing reliance on break-bulk services has reduced the availability of the latter. There is currently no weekly break-bulk service out of the Port of Montreal with the result that, where regularity of shipment is necessary, some shippers who would otherwise use break-bulk services are compelled to rely on containerized services instead.

76. It is therefore submitted that most shippers of cargo between Canada and Northern Continental Europe and the United Kingdom that currently utilize containerized transportation service would find that air transportation services or bulk or break-bulk ocean transportation services are impractical alternatives to containerized ocean transportation services because they are sufficiently higher in cost or sufficiently lower in quality when compared to containerized services. Consequently, substantial numbers of shippers would not switch to alternative means of transportation services in response to a significant, nontransitory increase in the price of containerized ocean shipping services.

77. The Director submits that the relevant product markets for antitrust or competitive analysis are non-refrigerated containerized transportation services between each origin or destination point which the merged parties offered in competition with each other prior to the Merger.

(b) Relevant Geographic Market

78. The Director submits that the relevant geographic markets in respect of transportation markets is defined by the availability of alternative routings serving the same origins and

destinations. There may be several different routings which may be available to transport goods from one point to another. The collection of origin/destination pairs for a group of carriers offering a similar routing may be considered an appropriate geographic market if those carriers would find it profitable to collectively impose a significant, nontransitory price increase for such a geographic grouping. This may indeed be the case when sufficient numbers of customers are unwilling or unable to switch to carriers offering different routings, or when carriers offering different routings are unable to expand their services sufficiently to handle an increase in demand.

79. Ocean-going containerized shipping services are available through various eastern seaboard ports in North America. Destinations in Northern Continental Europe and the United Kingdom are available through the Port of Montreal, the Port of Halifax and various ports on the United States East Coast ("USEC"). Ocean-going containerized shipping services routed through these ports are accessible to shippers by rail or trucking services. Consequently, the primary determinant of the choices available to shippers and consignees is related to the costs of inland transportation services to access the ports. For the vast majority of shippers and consignees in Ontario and Quebec, the non-refrigerated containerized shipping services routed through the Port of Montreal are the lowest cost services available for shipment of goods between Ontario/Quebec and Northern Continental Europe/United Kingdom.

80. Shippers and consignees in Ontario and Quebec do not regularly substitute container shipping services available through ports in Halifax and on the USEC. The additional cost for accessing container shipping services routed through these ports is a significant impediment to substitution, representing as much as 30% to 50% of the total price of shipping services.

81. The Director submits that with respect to non-refrigerated containerized shipping services between Northern Continental Europe/United Kingdom and Quebec and Ontario, carriers offering routings through the port of Montreal constitute a distinct geographic market.

82. The product and geographic markets are hereinafter collectively referred to as the "Market".

(i) Carriers Operating out of the Port of Halifax

83. The Director submits that carriers operating out of the Port of Halifax are at a significant cost disadvantage to Montreal carriers for Ontario and Quebec shipments and are not likely to constrain a significant, nontransitory price increase in the Market.

84. The primary cost disadvantage is the incremental inland cost required to transport shipments from Montreal to Halifax. Land transport is four times more costly than water transport over the same distance. The additional rail cost for the Port of Halifax represents approximately 10% to 30% of the total price of the service for a given shipment. This asymmetry in inland costs becomes more pronounced as the origin/destination moves closer to Montreal.

85. Carriers operating out of the Port of Halifax are further disadvantaged by the additional time required to transport shipments to Halifax. Routing through the Port of Halifax requires that shipments be ready to be transported by rail from Toronto or Montreal at least three days prior to the departure date from Halifax. This extends the effective transit time for shipments routed through the Port of Halifax. Such shipments take approximately two days longer to arrive in Europe than if shipped out of Montreal.

86. All of the carriers operating out of the Port of Halifax consider it a discretionary port-of-call. Their liftings out of and their available capacity at Halifax fluctuates with the amount of capacity left over from their primary call at one or more of the ports on the USEC. This generally prohibits the Halifax carriers from guaranteeing a certain number of containers to a particular shipper. Many shippers will not use carriers who are unable to provide such guarantees.

87. Although there are some shipments to and from Ontario and Quebec through the Port of Halifax, this activity is often the result of Halifax carriers attempting to reposition containers out of the Market. These carriers are worldwide carriers and therefore they may occasionally move containers into the Market from their other trade lanes. Since the carriers at times may need to reposition these containers for their Atlantic operations, they will price their services at the point required to attract demand instead of moving empty containers which provide no revenue. These practices are short-lived and do not impact on the overall competitive dynamic in the Market. As prices generally increase, the price set by these carriers to effect repositioning will also increase. Approximately 15% of all container movements through the Port of Halifax in 1994 involved repositioning empty containers as compared to approximately 5% at the Port of Montreal.

88. The Director therefore submits that the carriers operating out of the Port of Halifax could not provide a supply response to effectively constrain a significant, nontransitory price increase by the merged parties and are therefore not considered to be part of the relevant geographic market.

(ii) Carriers Operating Out of the Ports on USEC

89. Carriers operating out of ports on the USEC are at an even greater cost disadvantage in the Market which is reflected by their historically limited penetration into the Market. The incremental rail or truck cost to move containers into or out of the Market ranges from 10% to 50% of the total price of the service. Carriers operating out of the ports on the USEC are also subject to higher container handling fees which further aggravates the cost disadvantage. These carriers are therefore not able to generally offer competitive rates in the Market and would likely not be able to constrain a significant, nontransitory price increase by the merged parties.

90. Like their Halifax counterparts, the carriers operating out of ports on the USEC will occasionally offer short-term competitive prices in the Market for the purposes of repositioning

containers out of the Market. These offerings do not affect the general competitive state of the Market. The Director therefore submits that the carriers operating out of the ports on the USEC could not provide a supply response to effectively constrain a significant, nontransitory price increase by the merged parties and are therefore not considered to be part of the relevant geographic market.

VII. PRE-MERGER COMPETITION

91. The Director submits that Canada Maritime's primary motive for the transaction was the removal of Cast as the principal competitor of both Canada Maritime and the SLCS. A longstanding and vigorous state of competition existed between Cast and Canada Maritime prior to the transaction. Canada Maritime, the leading carrier in terms of volume through the Port of Montreal, was continuously challenged by Cast. Cast was Canada Maritime's main rival and chief competitor. The competitive dynamic between these two carriers was evident both within and outside of the Conference structure. The competition between Cast and Canada Maritime has been an important factor in the tariff setting process within the Conference structure.

92. Conference carriers also frequently price below the published tariffs in order to secure business. Both Cast and Canada Maritime have, in the past, engaged in independent rate reductions which are not in compliance with the formal mechanism of the Conference agreements. This informal independent action is often referred to as "malpractice" or "non-compliance" by Conference members. Informal independent action was especially strong in the early 1990s to the extent that there were discussions among Conference members of abandoning the Conference structure. *SCEA* does not provide for enforcement of Conference agreements, but rather provides minimum statutory requirements to permit independent action. Although Conference agreements may provide policing mechanisms, these provisions have not been applied. The Director has determined that such informal independent action or non-compliance through discounted rates, rebates, commodity misdeclarations and other means is commonplace and was an important factor in intra-Conference competition.

93. In mid-1994, Cast began using vessels which are solely devoted to carrying containerized cargo, thereby enhancing its overall competitiveness.

VIII. MARKET STRUCTURE

94. Based on containerized shipping data for the pre-merger year, 1994, the Merger increases Canada Maritime's share of the Market from approximately 32% to 63% while the four firm concentration ratio increases from approximately 85% to 100%. The Herfindahl-Hirschman Index ("HHI"), which is a measure of the degree of concentration in a market, increases from 2,462 to 4,427.[2] In addition, the market share of the SLCS increases from approximately 54% to 85% with a corresponding increase in the HHI from 4,118 to 8,220. The following table shows the 1994 market shares for carriers in the Market.

CARRIER	TONNES	SHARE
Canada Maritime	662,608	31.7%
CAST	648,288	31.0%
POST MERGER	**1,310,896**	**62.7%**
OOCL	306,481	14.7%

[2] The four firm concentration ratio is determined by adding the market shares of the four largest firms in a relevant market. The Merger Enforcement Guidelines of the Director state that concerns relating to the interdependent exercise of market power increase when the four firm concentration ratio is above 65% and the market share of the merged entity is greater than 10%. Concerns relating to the unilateral exercise of market power increase as the market share of the merged entity exceeds 35%.

The HHI is determined by adding the squares of the market shares of each firm in a market in the form HHI=$\sum s^2$, where s is the market share of the i firm and n is the number of firms in the market. The U.S. Department of Justice and Federal Trade Commission joint Revised Merger Guidelines (1992) state that where the post merger HHI is greater than 1800 such markets are defined as being highly concentrated and where the merger increases the HHI by more than 100 points, such mergers are likely to create or enhance market power or facilitate its exercise.

Hapag-Lloyd	162,283	7.8%
SLCS Pre-Merger	**1,131,372**	**54.2%**
SLCS Post-Merger	**1,779,660**	**85.2%**
BOLT	308,424	14.8%
Other	2,652	0.0%
Total	**2,090,736**	

95. Market share information for the post-merger year, 1995, shows that Canada Maritime's and Cast's share of the Market was approximately the same as in 1994.

96. The market share information shown in the previous paragraphs and the above table does not include shipments into and out of Ontario and Quebec by carriers operating outside of the Port of Montreal. As demonstrated in paragraphs 78 through 90 herein, those carriers operating outside of the Port of Montreal are not in a position to effectively compete for shipments to and from Ontario and Quebec due principally to substantial inland transportation costs. Those shipments by carriers operating outside of the Port of Montreal that do move into and out of Ontario and Quebec do so for special reasons such as container repositioning, special high value cargo and global contractual relationships.

IX. STATUTORY FACTORS - SECTION 93 of the ACT

(a) Foreign Competition

97. Foreign competition is typically defined as non-domestic suppliers who sell, or may be capable of selling, their product in the relevant domestic market. In respect of ocean-going transportation services many of the domestic service providers are foreign entities with no "plant"

in Canada, but rather call at Canadian ports. Foreign carriers are those carriers that service the Market operating out of USEC ports.

98. The Director submits that competition from foreign sources is not likely to constrain the ability of the merged parties to sustain a significant, nontransitory price increase in the Market for the reasons set out in paragraphs 89 and 90 herein.

(b) Acceptable Substitutes

99. The Director has determined that there are insufficient acceptable substitutes available in the Market such that a significant, nontransitory price increase would be rendered unprofitable.

100. Bulk and break-bulk services are not acceptable substitutes for the vast majority of shippers due to the reduced service characteristics and switching costs as noted earlier herein. Air cargo is not an acceptable substitute due to its high cost and lack of sufficient intermodal infrastructure.

(c) Barriers to Entry

101. The Director submits that there are a number of significant barriers to entry into the Market such that entry is unlikely to occur within two years of the Merger on a scale sufficient to offset the market power resulting from the Merger.

102. Establishing and operating a container shipping line involves complex logistics and significant capital investments. Most shippers demand that carriers offer a fixed day weekly sailing in order to properly coordinate their production schedules and shipment patterns. To provide a weekly fixed day service which offers two Northern Continental Europe ports of call

and a United Kingdom port of call, the entrant would be required to enter on a three or four ship model. At this scale of entry, the investor would be faced with significant sunk costs and significant delay prior to achieving profitability.

103. The types of ships used in the Montreal/North Atlantic trade are not currently available in the Market. These ships are smaller than the current standard since they must be able to navigate the St. Lawrence River and the Port of Montreal, which is shallow in comparison to ocean ports. Furthermore, ice-strengthening is required which would be a cost borne by the new entrant if the ship had not been ice-strengthened previously. Sunk costs would be incurred to the extent to which the new entrant would be unable to recoup his charter and refitting costs in the event of failure.

104. The Director submits that approximately fifty percent (50%) of all Canadian cargo and sixty percent (60%) of all cargo originating from the United States is shipped pursuant to service contract arrangements existing between one or more of the Conference members and the shippers. These service contracts are for fixed terms of one to three years. Many service contracts require the shipper of goods to meet certain volume commitments and have liquidated damages provisions if those commitments are not met. The existence of these contracts effectively precludes any new entrant for a significant period following entry from securing business from fifty percent (50%) of the Canadian customers and sixty percent (60%) of U.S. customers shipping through the Port of Montreal. This would delay a new entrant from obtaining sufficient container volumes which are required for profitability.

105. The anticipated strategic behaviour of established competitors can also result in a significant barrier to entry. The SLCS has engaged in strategic behaviour against its competitors in the past and potential entrants would view entry as potentially invoking adverse strategic responses by the SLCS.

106. The fact that failed entry has occurred in the past does not in and of itself indicate that additional new entry will not occur in response to a significant, nontransitory price increase. The

Director, however submits that previous failed entries are a relevant factor to be considered when examining barriers to entry. Throughout the period between 1978 and 1996, there have been nine previous failed entries which offered containerized shipping services in the Market; namely: Chase, Sofati Ltée, Holland Canada Line, United American Line, Atlantic Express Line, Europe Canada Line, Beaver Express Container Line, Orion Maritime and ACS.

107. Apart from providing evidence as to the substantial barriers to entry which exist in the Market, frequent failure, some of which has resulted in seized cargoes, has resulted in reluctance on the part of shippers and consignees to utilize the services of a new entrant. As a result, a new entrant will be required to maintain a sufficient level of investment to establish goodwill by providing a reliable and consistent service over a substantial period of time. Prior to establishing such a position in the Market, it is unlikely that a new entrant will be able to attract sufficient volumes of cargo to offset the sunk costs resulting from maintaining this level of investment. The influence of reputation and service capabilities of the established competitors in the Market will require a new entrant to price at rates lower than established competitors.

108. Given the history of failed entry in the Market, the prospects for successful entry must be viewed by potential entrants as slim. Therefore, entry at a scale which would bring about a real competitive effect is unlikely given the low probability of success and the significant level of sunk costs.

109. The Director also submits that entry by existing carriers operating outside of the Market is unlikely in response to a significant, nontransitory price increase. Such existing carriers would face the investment requirements normally associated with new entry since in order to offer an effective service they would need to operate vessels through the Port of Montreal. Ships operating through the Port of Halifax and the ports on the USEC are unable to navigate the St. Lawrence River due to their size. Therefore, existing carriers operating outside of the Market would face similar entry costs as a *de novo* entrant.

110. The Director submits that entry will be more difficult as a result of the Merger. In particular, the Merger removed an important entry opportunity for a potential entrant who would have been more likely to enter by acquiring Cast or some or all of Cast's assets.

(d) Effective Competition Remaining

(i) The SLCS

111. The Director submits that the participants of the SLCS, OOCL and Hapag-Lloyd, are not effective competitors of the merged parties.

112. Hapag-Lloyd does not operate any vessels in the Market and is limited to a slot charter arrangement which constrains its ability to increase capacity in the face of any increased demand from the market which may occur if the merged parties were to raise prices. This limited slot charter arrangement, terminable upon 90 days written notice, provides an effective constraint that prevents Hapag-Lloyd from restraining any significant, nontransitory price increase that may be instituted by the merged parties following the Merger.

113. OOCL operates two of the ten ships in the SLCS entitling them to an allocation of approximately 30% of the SLCS capacity. There is no credible threat of withdrawal from the SLCS by OOCL as OOCL could not provide weekly service with two ships. Even if OOCL achieved minimal scale by adding additional ships, the number of ports of call that OOCL serves would be drastically reduced. OOCL is unlikely, therefore, to offer a supply response to any significant, nontransitory price increase that may be instituted by the merged parties following the Merger.

(ii) BOLT

114. BOLT is a company that took over the operations of Baltic Shipping in a more limited form following the financial difficulties that emerged in 1994. In 1994, Baltic Shipping Company experienced financial difficulties and was the subject of a legal action initiated by the Moscow Narodny Bank. In September, 1994, Baltic Shipping transferred operation of Balt-Canada Line to its general agent Sovfracht. In December, 1995, as a result of the financial difficulties of Baltic Shipping Company, three of the vessels used in Balt-Canada Line's service were seized resulting in an interruption of Balt-Canada Line's service. The vessels involved in the Balt-Canada Line service were subsequently sold to Uniship Shipping, a Greek company. The three vessels were then chartered back from Uniship Shipping and the Balt-Canada Line's name was changed to B.O.L.T. Canada Line.

115. As a result of this reorganization, Balt-Canada's operations continued through BOLT on a much reduced scale. Now operating on a three ship model, BOLT can no longer offer weekly or regular service. Balt-Canada's container inventory was also seized by creditors with the result that BOLT must now rely on leased containers which has significantly increased the operating costs of the service.

116. Although BOLT is not a Conference member, BOLT has historically been a price follower of the Conference members. The Director has obtained evidence of an arrangement between some or all of the Conference participants and BOLT, whereby BOLT will price its services at approximately 10% below the Conference tariff. This price co-ordination along with BOLT's limited capacity suggests that BOLT is unlikely to provide an effective constraint to any significant, nontransitory price increase by the merged parties. Therefore, BOLT is not an effective competitor to the merged parties.

117. The Director therefore submits that the remaining sources of competition in the Market would not likely provide effective competition to the market power of the merged entity. All but

one of the remaining competitors in the Market are participants in the SLCS consortium with the merged entity. The only remaining competitor is BOLT, which is a non-Conference carrier. These competitors are unable to provide an effective constraint against any significant, nontransitory price increase in the Market.

(e) Removal of a Vigorous and Effective Competitor

118. The Director submits that the Merger was motivated by Canada Maritime's desire to remove its most vigorous competitor.

(f) Change and Innovation

119. The Director submits that there is no change or innovation in the industry which is likely to increase competition in the Market. The most recent development in the industry which affects the Market has been the adoption of electronic data interchange systems (EDI). Many shippers have turned to electronic means of managing the flow of products and materials in and through their plants and facilities. For shippers who rely on just-in-time production methods in particular, the need for more accurate shipping information is an important component of this system. Moreover, many of these shippers require that carriers be able to accommodate and communicate with their systems to ensure reliable service. The effect of this development has been to add another layer of complexity to the containerized shipping industry thereby increasing the cost of entry.

(g) Failing Business

120. By way of a letter dated March 21, 1996, CP made a formal submission to the Director alleging that Cast, at the time of its acquisition by CP on March 31, 1995, was a business that was failing within the meaning of subsection 93(b) of the *Act*.

121. The Director submits that Cast was not a failing business at the time of its acquisition by CP in the context of the Merger Enforcement Guidelines. Further, in the alternative that Cast was a failing business, the Director submits that the Merger's anti-competitive effects could have been avoided through one of the following alternatives: (i) acquisition of Cast by a third party; (ii) liquidation of Cast; and/or (iii) retrenchment of Cast.

(i) Acquisition of Cast by a Third Party

122. The Director submits that, prior to and following the acceptance of the offer from CP, there existed a third party whose purchase of Cast would likely result in a materially higher level of competition in the Market. The competitively preferred purchaser was willing and able to pay a price which, net of the costs associated with making the sale, would have been greater than the proceeds that would flow from liquidation, less the costs associated with such liquidation (the "net price above liquidation value").

123. Four investor groups made proposals to RBC for the purchase of Cast, the details of which are set out below:

(a) In February, 1994, a group consisting of: Helix Investments Limited; C.N.; and, various U.S. investors made a proposal to RBC to acquire Cast;

(b) In March, 1994, a group consisting of: The Bridgeford Group, Helix Investments Limited, Vestar Equity Partners, L.P.; Cast management, and C.N. made a proposal to RBC to acquire Cast;

(c) In March, 1994, a group consisting of: Chase Manhattan Capital Corporation; Advent International Corporation; Smith McDonnell Stone & Co. Inc.; Helix Investments Limited; C.N.; and, Cast management made a proposal to RBC to acquire Cast; and

(d) In May and June, 1994, a group consisting of Vitran Corporation Inc.; Helix Investments Limited; CN; and, Cast management made a proposal to RBC to acquire Cast.

124. The Director submits that there are competitively preferred potential purchasers who are willing and able to acquire Cast in the event that the Order sought in this Application is granted.

125. The Director further submits that the search for alternative buyers of Cast, which was undertaken by or on behalf of the RBC, was inadequate and did not provide a thorough search for a third party purchaser for the following reasons:

(a) RBC refused to allow access to all such information which is generally required by prospective purchasers. For example, the RBC insisted upon a non-refundable deposit in the amount of US $5 Million from the investor group consisting of Vitran Corporation Inc., Helix Investments Limited, CN and Cast management prior to allowing this group to have access to all of the information required by a potential purchaser of Cast;

(b) the Director has been advised that RBC actively dissuaded Cast management from seeking alternative purchasers for Cast in the belief that RBC would receive a premium price from CP; and

(c) RBC set a minimum price for the purchase of Cast in the amount of US $35 Million.

(ii) Liquidation of Cast

126. The Director submits that the liquidation of Cast would likely result in a materially higher level of competition in a substantial part of the Market than if the Merger was entitled to

continue. The liquidation of Cast would facilitate entry into the Market by new competitors or expansion by established competitors with the result of a materially higher level of competition. In particular, the liquidation of Cast would allow a new entrant or an established competitor to compete for Cast's customer base and assets that remained in the Market, as well as making space available at the Port of Montreal.

(iii) Retrenchment of Cast

127. The Director submits that in examining whether the failing business factor is relevant, an assessment should be made of whether the firm which is alleged to have been failing would likely remain in the Market in its existing state or in a retrenched form. At the time of its acquisition, Cast was beginning to experience positive cash flows and would likely have had some prospect of successful reorganization through bankruptcy or *Company Creditors Arrangement Act* proceedings. As a result, the Director submits that the retrenchment of Cast would have likely resulted in a materially greater level of competition than if the Merger were allowed to continue.

128. The Director submits that CP would be unable to satisfy the burden of establishing that, without the Merger, the productive assets of Cast would have been removed from the Market.

X. CONCLUSION

129. The Director submits that the Merger will prevent or lessen, or is likely to prevent or lessen competition substantially in the market comprised of non-refrigerated containerized transportation services between Ontario and Quebec and Northern Continental Europe and the United Kingdom. Due to reduced service characteristics and switching costs, bulk and break-bulk shipping services are not acceptable substitutes to containerized transportation services.

130. The Director submits that the Merger confers market power to Canada Maritime by providing it with a market share of approximately 63% in a market that was already highly concentrated and with respect to which there are significant barriers to entry. The market share of the SLCS increases to approximately 85% as a result of the Merger. The existence of the SLCS enhances Canada Maritime's ability to exercise the market power conferred upon it as a result of the Merger.

131. The remaining sources of competition in the Market and foreign competition would not likely provide effective competition to the market power of the merged entity. In addition, there are a number of significant barriers to entry into the Market such that entry is unlikely to occur on a scale sufficient to offset the market power resulting from the Merger. The Merger also resulted in the removal of a vigorous and effective competitor to Canada Maritime.

XI. RELIEF SOUGHT

132. In order to remedy the substantial lessening or prevention of competition in the Market brought about by the Merger, the Director seeks the following orders pursuant to subsection 92 of the *Competition Act*:

(a) an order pursuant to subsection 92(1)(e)(i) of the *Act* directing the Respondents to dissolve the Merger in such a manner as the Tribunal may direct;

(b) in the alternative, an order pursuant to subsection 92(1)(e)(ii) of the *Act* requiring the Respondents, or some of them, to dispose of assets or shares designated by the Tribunal in such a manner as the Tribunal may direct;

(c) in the further alternative, any other order that the Tribunal considers appropriate to which the Respondents and the Director consent pursuant to subsection 92(1)(e)(iii) and section 105 of the *Act*; or

(d) in the further alternative, such further or other order pursuant to subsection 92(1)(f) of the *Act* as the Tribunal deems advisable.

XII. PROCEDURAL MATTERS

133. The Director requests that the hearing of this Application be held in the City of Ottawa.

134. The Director requests that these proceedings be conducted in the English language.

135. For the purpose of this Application, service of all documents on the Director may be served on:

Robert S. Russell
Adam F. Fanaki
Borden & Elliot
Barristers & Solicitors
40 King St. West
Toronto, Ontario
M5H 3E9

Tel No. (416) 367-6256/367-6107
Fax No. (416) 361-7060/361-2452

Agents of the Attorney General of Canada
and Counsel to the Director of Investigation
and Research

DATED at Hull, Quebec, this day of December, 1996.

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Francine Matte, Q.C.
Director of Investigation and Research

Appendix "A" - Glossary of Terms

bill of lading	a document attached to the cargo indicating the shipper, destination, description of cargo, and other information
breakbulk (cargo)	cargo which is prone to physical damage if stacked in storage and which is therefore placed in relatively small packages or affixed to pallets
bulk (cargo)	commodity type cargoes; examples are liquids (crude oil), agricultural products (grain), chemical products which are shipped in large quantities.
chassis	a simple trailer chassis on which a container can be loaded and pulled behind a truck tractor
commodity misdeclarations	the practice by members of the Conference of improperly classifying cargo for the purpose of shipping it at a rate which is lower than the agreed upon tariff rate for that cargo
Conference	an association of ocean carriers that has the purpose or effect of regulating rates and conditions for the transportation by those ocean carriers of goods by water, as defined by s. 2(1) para. 2 of the *Shipping Conferences Exemption Act*.
container	normally a corrugated steel box of standard dimensions to correspond to standardized handling equipment in an intermodal system; specialized boxes may be constructed of aluminum or may be open frames for transporting specialized cargo
double-stack	practice of stacking containers 2 high on rail cars
draft	the depth of a water channel, usually refers to the maximum available depth of water at a port or particular terminal
drayage	positioning containers at a port (e.g. from a storage yard to the loading terminal)
EDI	Electronic Data Interchange systems permit carriers and shippers to exchange pertinent information electronically (larger shippers may demand this capability)
freight forwarding	consolidating the cargoes of various shippers and making all arrangements for the transportation of this cargo from origin to destination
FEU	Forty Foot Equivalent, these containers are 8 feet wide by 9.5 feet high by 40 feet in length
fixed-day sailing	the carrier offers sailings on the same day(s) of the week every week (e.g. every Friday morning)

ice class/ice rating	there are several classification and rating systems for insurance purposes to reflect the risk associated with hulls of varying strength (depending on reinforcement) in ice-laden waters
ice-strengthened hull	physical reinforcement of the ship's hull to improve its ability to perform in ice-laden waters (such as the St. Lawrence Seaway in mid-winter)
intermodal (shipping systems)	the 4 basic modes of transporting cargo are air, truck, rail and water; intermodal shipping systems integrate 2 or more of these modes to provide the shipper with lower cost and greater convenience
just in time	just-in-time inventory minimization scheme whereby components are delivered to the factory for nearly immediate use (rather than warehoused and retrieved as needed)
loyalty contract	an agreement between a shipper and a carrier which provides the shipper with certain advantages in exchange for assuring the carrier of a certain volume of business
malpractice	independent rate reductions by Conference members which are not in compliance with the formal mechanisms of the Conference agreements. Also referred to as “non-compliance”
manifest	a document describing, for each container on a ship, the cargo, shipper, destination, and other information for each sailing
mismanifest	the practice by members of the Conference of improperly classifying cargo for the purpose of shipping it at a rate which is lower than the agreed upon tariff rate for that cargo. Also referred to as “commodity misdeclarations”.
non-compliance	independent rate reductions by Conference members which are not in compliance with the formal mechanism of the Conference agreements. Also referred to as “malpractice”
OD points	origin and destination points
open-top	a container without a metal cover
pallet	a wooden or metal base designed to carry cargo and facilitate the handling of same (example a wooden pallet has slots to accept the forks of a lift truck)
reefer	refrigerated container
repositioning	a major cost element in the container shipping trade is moving empty containers to the next customer's premises
shuttle service	vessel sails back and forth across the same body of water between 2 areas (e.g. Montreal and Europe over the North Atlantic)

slot charter arrangement	an arrangement for a fixed period of time during which one or more carriers pay for the use of an agreed upon number of container spaces (“slots”)
specialized containers	any container other than the standard covered non-refrigerated van (e.g. refrigerated containers, open tops, tankers etc.)
stevedoring	moving of cargoes at dockside, traditionally a labour-intensive procedure now normally automated
terminal	port facility where vessels are loaded and unloaded
TEU	Twenty Foot Equivalent, the standard measure of traffic in the container industry; the standard container is 8 feet wide by 8 feet high by 20 feet in length (see also FEU)

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 acquisition by CP Containers (Bermuda) Limited of certain assets held by The Cast Group Limited and of the acquisition by 3041123 Canada Inc. of all the shares of Cast North America Inc. by way of agreements entered into between or among The Royal Bank of Canada, The Cast Group Limited, 3041123 Canada Inc., C.P. Containers (Bermuda) Limited and Canadian Pacific Limited.

BETWEEN:

THE DIRECTOR OF INVESTIGATION AND RESEARCH

Applicant

- and -

CANADIAN PACIFIC LIMITED, CANADA MARITIME LIMITED, CP CONTAINERS (BERMUDA) LIMITED, 3041123 CANADA INC., CAST NORTH AMERICA INC. and THE ROYAL BANK OF CANADA

Respondents

NOTICE OF APPLICATION

Robert S. Russell

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Agents of the Attorney General of Canada and Counsel to the Director of Investigation and Research

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