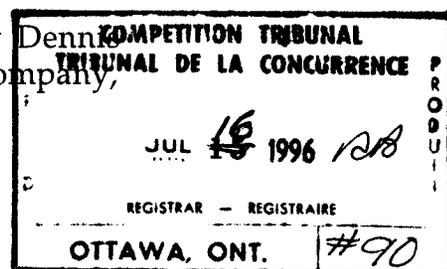


**THE COMPETITION TRIBUNAL**

**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 propose to acquire control of, Seaspan 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,  
NORSK PACIFIC STEAMSHIP COMPANY, LIMITED, AND  
FLETCHER CHALLENGE LIMITED.**

Respondents

**AMENDED 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* ("the Act") for the following orders with respect to:

- (a) the merger whereby the Respondents Dennis Washington and K&K Enterprises acquired a significant interest in the Respondent, Seaspan International Ltd. from the Respondents Genstar Capital Corporation, TD Capital Group Ltd., Coal Island Ltd., 314873 B.C. Ltd., the Management Shareholders and the Preference Shareholders (the "Seaspan Merger") and propose to acquire control of the Respondent Seaspan International Ltd..
  
- (b) the merger whereby the Respondents Dennis Washington and Norsk Holdings Ltd. acquired control of the Respondent Norsk Pacific Steamship Company, Limited from the Respondent Fletcher Challenge Limited (the "Norsk Merger"):
  - (1) pursuant to subparagraph 92(1)(e)(ii) of the *Competition Act*, an order directing the Respondents K&K Enterprises and Dennis Washington to dispose of all their shares and assets in the Respondent Seaspan International Ltd. in such manner as the Tribunal may direct; or

- (2) pursuant to subparagraph 92(1)(e)(i) of the *Competition Act*, an order directing the Respondents to dissolve the Seaspan Merger in such manner as the Tribunal may direct; or
- (3) in the alternative, pursuant to subparagraph 92(1)(e)(ii) of the *Competition Act*, an order directing the Respondents K&K Enterprises and Dennis Washington to dispose of their shares and assets in whole or in part in the Respondent Seaspan International Ltd. in respect of shipberthing or directing the Respondent Dennis Washington to dispose of all his shares and assets in C.H. Cates and Sons Ltd., and
- (a) pursuant to subparagraph 92(1)(e)(ii) of the *Competition Act*, an order directing the Respondent Dennis Washington to dispose of his shares and assets in whole or in part in the Respondent Norsk Pacific Steamship Company, Limited; or
- (b) pursuant to subparagraph 92(1)(e)(i) of the *Competition Act*, an order directing the Respondents Dennis Washington and Fletcher Challenge to dissolve the Norsk Merger
- in such manner as the Tribunal may direct; or

- (4) pursuant to subparagraph 92(1)(e)(iii) and section 105 of the *Competition Act*, any other order that the Tribunal considers appropriate to which the Respondents and the Director consent; or
- (5) such further or other order as the Tribunal deems advisable pursuant to section 92, and in particular section 92(1)(f), of the Act.

**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 either or both mergers or the acquisition of control of Seaspan International Ltd.

**AND TAKE 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 of the Director, make such order as it considers appropriate.

**AND TAKE 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  
90 Sparks Street  
6th Floor  
Ottawa, Ontario  
K1P 5B4

AND TO: Dennis Washington  
101 International Way  
Missoula, Montana  
U.S.A. 59807

AND TO: K & K Enterprises  
P.O. Box 8182  
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Missoula, Montana  
U.S.A. 59807

AND TO: C.H. Cates and Sons Ltd.  
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AND TO: Norsk Pacific Steamship Company, Limited  
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Walnut Creek, California  
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AND TO: Seaspan International Ltd.  
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V7P 2R1

AND TO: Bull Housser & Tupper  
Barristers & Solicitors  
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AND TO: 314873 B.C. Ltd.  
c/o Angroup Holdings Limited  
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V7X 1L4

AND TO: Russell & DuMoulin  
Barristers & Solicitors  
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Vancouver, British Columbia  
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Barbara Vanderburgh

Counsel to Coal Island Ltd. and 314873 B.C. Ltd.

AND TO: Management Shareholders  
c/o Seaspam International Ltd.  
10 Pemberton Avenue  
North Vancouver, British Columbia  
V7P 2R1

AND TO: Preference Shareholders  
c/o Coal Island Ltd.  
210 - 195 West 2nd Avenue  
Vancouver, British Columbia  
V5Y 1B8

AND TO: Fletcher Challenge Limited  
Private Bag 92 114  
810 Great South Road  
Penrose  
Auckland  
New Zealand

Attention: Gary Key

## STATEMENT OF GROUNDS AND MATERIAL FACTS

### OVERVIEW

1. This application contains four allegations of a substantial prevention and/or lessening of competition with respect to the British Columbia marine transportation industry. Three of the allegations result from the October 13, 1994 "Seaspan Merger", which affects the ship berthing markets of Burrard Inlet and Roberts Bank, as well as the British Columbia barging market. The fourth allegation results from the June 30, 1995 "Norsk Merger", which affects only the British Columbia barging market. [The two mergers are described in more detail in Part III. The competition analyses of the ship berthing and barging markets are addressed, respectively, in Parts IV and V.] The four allegations are summarized below:

#### **(A) SHIP BERTHING SERVICES**

##### **(i) Burrard Inlet - Effect of Seaspan Merger**

The Director submits that the Seaspan Merger prevents or lessens or is likely to prevent or lessen competition substantially in the provision of ship berthing services at the harbour of Burrard Inlet in the Port of Vancouver in the Province of British Columbia.

**(ii) Roberts Bank - Effect of Seaspn Merger**

The Director submits that the Seaspn Merger prevents or lessens or is likely to prevent or lessen competition substantially in the provision of ship berthing services at the harbour of Roberts Bank in the Port of Vancouver in the Province of British Columbia.

**(B) BARGING SERVICES**

**(iii) Effect of Seaspn Merger**

The Director submits that the Seaspn Merger prevents or lessens or is likely to prevent or lessen competition substantially in the provision of barging services in and around the coastal waters of the Province of British Columbia.

**(iv) Effect of Norsk Merger**

The Director submits that the Norsk Merger prevents or lessens or is likely to prevent or lessen competition substantially in the provision of barging services in and around the coastal waters of the Province of British Columbia.

## I. INTRODUCTION

### (A) SHIP BERTHING SERVICES

#### Effect of Seaspan Merger on Burrard Inlet and Roberts Bank Markets

2. 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.

3. Since the opening of the coal loading terminal at Roberts Bank in 1970, Seaspan International Ltd. ("Seaspan") has been, and continues to be, the sole direct provider of ship berthing services at these facilities.

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

5. Seaspan entered the Burrard Inlet ship berthing market in September 1993 bringing competition, for the first time, to a market which had experienced a long standing monopoly. Following Seaspan's entry, the market experienced a shift in market share of 25% from Cates to Seaspan, unprecedented price decreases and improved customer relations. In response to the competitive effect 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.

6. Approximately four months later, on October 13, 1994, as part of an overall change in the shareholdings of Seaspan, Washington, through K&K Enterprises ("K&K"), acquired a significant interest in Seaspan (the "Seaspan Merger") within the meaning of section 91 of the Act. 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 restricted the parties' rights to independently engage in new marine transportation and shipbuilding businesses or expand such businesses.

7. On January 10, 1996, Washington publicly announced that he has entered into an agreement to acquire control of Seaspan. This transaction has not yet closed.

8. The Director submits that the Seaspan Merger prevents or lessens or is likely to prevent or lessen competition substantially in the Burrard Inlet and Roberts Bank ship berthing markets in that Washington has direct or indirect control of one, and a significant interest in the other, of the ship berthing companies operating in Burrard Inlet, and operating or likely to operate at Roberts Bank.

**(B) BARGING SERVICES**

**Effect of Seaspan Merger**

9. For several decades, the dominant company engaged in the barging business in British Columbia has been Seaspan. Rivtow Marine Ltd. ("Rivtow") and Norsk Pacific Steamship Company, Limited with or through its Canadian subsidiary, Norsk Pacific Steamship Canada Ltd. (individually and collectively referred to as "Norsk") are the second and third largest barging companies but are considerably smaller than Seaspan. At various times since 1992, Washington expressed an interest in acquiring and took steps to acquire each of these three companies.

10. The Director submits that the Seaspan Merger prevents or lessens or is likely to prevent or lessen competition substantially in the B.C. barging market in that, absent merging with Seaspan, Washington would likely have emerged as a vigorous and effective competitor to Seaspan through the acquisition of one or more of Seaspan's competitors, thereby providing a substantially higher level of competition in the B.C. barging market.

**Effect of Norsk Merger**

11. On June 30, 1995, Washington acquired control of Norsk Pacific Steamship Company, Limited, (the "Norsk Merger"). Subject to Washington's acquisition of

control of Seaspan pleaded in paragraph 7, the future independent expansion of Norsk in barging by Washington is effectively prevented by the provisions of the October 13, 1994 Joint Investment Agreement.

12. The Director further submits that the Norsk Merger prevents or lessens or is likely to prevent or lessen competition substantially in the B.C. barging market, in that Washington now controls the third largest company in the B.C. barging market in addition to his significant interest in, and potential control of, the dominant provider in the same market. This effect on competition in the B.C. barging market is in addition to the effect described in paragraph 10.

## **II. BACKGROUND - THE PARTIES**

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.

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. 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. Washington has a significant interest in Seaspan, Cates' principal competitor, all as described more fully in the Application. On June 30, 1995, Washington acquired Norsk, the third largest barging company in B.C.

15. Washington's interests in transportation services which impact on the West Coast of British Columbia include trucking, rail, terminals, warehouses, barging, ship assist and deep sea shipping.

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.

17. Seaspan, a company established pursuant to the laws of British Columbia, is the largest marine transport company operating in British Columbia and the largest tug and barge company in Canada. Seaspan's businesses include, but are not limited to, ship berthing, barging, log towing, shipbuilding and ship repair.

18. 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 shareholding 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.

19. 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.

20. 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 and is now the largest preference shareholder in Seaspan. The Class Y preference shares held by Coal Island are the only class of preference shares possessing voting rights and Coal Island is the only holder of class Y preference shares.

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

22. The "Management Shareholders" set forth in Schedule "A" hold no greater than 9% of the voting rights in Seaspan. The "Preference Shareholders" set forth in Schedule "B" do not hold, with the exception of Coal Island as described in paragraph 20, voting rights in Seaspan. The parties named in paragraphs 18-22 were the vendors in the Seaspan Merger transaction.

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.

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’s businesses include the third largest tug and barge operations in British Columbia. As referred to in paragraph 9, 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.

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. Fletcher Challenge is the vendor in the Norsk Merger transaction.

### **III. BACKGROUND - THE MERGERS**

#### **The Seaspán Merger**

26. Commencing in January 1993, Washington attempted at various times to acquire Seaspán either by means of direct acquisition or by merger with Cates.

27. GCC entered into an acquisition agreement dated July 25, 1994 ("Acquisition Agreement") with the existing shareholders of Seaspán, 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 Seaspán, a company continuing from the proposed amalgamation of Seaspán 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 Seaspán at the time of closing.

28. Prior to the closing of the above-described transaction, Washington renewed attempts to acquire an interest in Seaspán and was successful in acquiring a significant interest. 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 Seaspán 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 27.

29. On September 21, 1994, K&K, the Washington affiliate contemplated by the Term Sheet, was created for the purpose of making the investment in Seaspan.

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 will 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 will be nominated by K&K. Pursuant to the Shareholder Agreement, K&K also has certain other rights regarding the affairs of Seaspan.
- (iv) K&K purchased \$15,000,000 in senior subordinated debentures in Seaspan.
- (v) Washington and GCC entered into a Joint Investment Agreement which effectively prohibits either party, directly or indirectly, from proceeding with or otherwise participating in an investment opportunity in the marine transportation and shipbuilding industries for a period of six years unless the opportunity to participate or invest is offered to the other on an equal basis. In the event that the opportunity relates to a business which competes with Seaspan, GCC could require that such opportunity be offered entirely to Seaspan.

31. On January 10, 1996, Washington publicly announced that he had entered into an agreement to acquire control of Seaspan.

32. The Director submits that the October 13, 1994 transaction constitutes an acquisition of a significant interest in Seaspan within the meaning of section 91 of the Act, described as the Seaspan Merger, and that the proposed transaction announced on January 10, 1996 constitutes a proposed acquisition of control of Seaspan within the meaning of section 91 of the Act.

#### **The Norsk Merger**

33. On June 30, 1995, Norsk Holding Ltd. acquired 100% of Norsk from Fletcher Challenge. Norsk Holding Ltd. is a Bahamian corporation wholly owned by Washington and affiliates of Washington.

#### **IV. COMPETITION ANALYSIS - SHIP BERTHING SERVICES**

##### **A. INDUSTRY AND MARKET BACKGROUND**

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 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.

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. Tug boats are frequently required to move a ship from one port facility to another within the same harbour or to a temporary mooring site and back to the same port facility.

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.

36. Given this standard practice, ports along the B.C. coast at which ships under the conduct of pilots routinely call are serviced by ship berthing companies. Currently, the principal component of the Port of Vancouver, the harbour of Burrard Inlet, is serviced by Cates and Seaspan, while the port facility at Roberts Bank is serviced only by Seaspan.

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 shipberthing 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.

## **B. RELEVANT MARKETS**

38. The Director submits that 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.

39. The Director submits that the relevant geographic markets for the assessment of the effects of the Seaspan Merger on competition in the ship berthing industry are

the harbour of Burrard Inlet and the harbour of Roberts Bank, each of which constitute a distinct geographic market in the provision of ship berthing services.

40. The relevant markets for the purpose of the assessment of the effects on competition in the ship berthing industry of the Seaspan Merger may, therefore, be defined as the provision of ship berthing services by tug boats in the harbours of Burrard Inlet and Roberts Bank. For simplicity, these markets shall henceforth be referred to as the "Burrard Inlet ship berthing market" and the "Roberts Bank ship berthing market".

### **C. NATURE OF THE APPLICATION - BURRARD INLET**

41. The Director submits that the Seaspan Merger prevents or lessens, or is likely to prevent or lessen, competition substantially in the Burrard Inlet ship berthing market. The Seaspan Merger has recreated a monopoly in this market. As referred to in paragraph 2, for most of the 20th century, Cates was the sole direct provider of ship berthing services within the principal portion of Burrard Inlet. In September 1993, competition in this market occurred for the first time with Seaspan's entry, with the result that prices decreased and customer relations improved. The Seaspan Merger has effectively returned this market to its pre-September 1993 monopolistic state.

**D. STATUTORY FACTORS - SECTION 93 OF THE ACT -  
BURRARD INLET**

42. The Director is guided by the Act to consider certain factors as relevant to an assessment of the effects on competition of a merger. These factors, contained in section 93 of the Act, are considered in paragraphs 43 to 67 in respect of Burrard Inlet and in paragraphs 74 to 85 in respect of Roberts Bank.

**(i) Foreign Competition**

43. For reasons set forth in respect to Entry in paragraphs 58 to 61, foreign competitors do not and are not likely to provide effective competition in the Burrard Inlet ship berthing market.

**(ii) Failing Business**

44. The business of Seaspan has not failed and no submissions have been made to the Director that it is likely to fail. As a result, paragraph 93(b) of the Act is not a relevant factor in determining the effect of the Seaspan Merger on competition in the Burrard Inlet ship berthing market.

**(iii) Acceptable Substitutes**

45. There are no acceptable substitutes in the Burrard Inlet ship berthing market. While a limited number of newer vessels are equipped with advanced ship steering equipment, which lessens the need for ship berthing assistance by tug boats, this equipment is not considered to be a close substitute and, consequently, is not likely to have a significant impact on the demand for ship berthing services in the foreseeable future. The Director also relies upon the facts pleaded in paragraphs 65 and 66 in respect of change and innovation.

**(iv) Removal of a Vigorous and Effective Competitor**

46. The Director submits that the Seaspan Merger results in the removal of a vigorous and effective competitor in the Burrard Inlet ship berthing market; namely, Seaspan. Seaspan entered into competition with Cates at Burrard Inlet in September 1993 by commencing the deployment of two high-horsepower, technically sophisticated tractor tug boats in this market.

47. Seaspan's entry into the Burrard Inlet market precipitated vigorous competition for customers of ship berthing services. Prior to entry, Seaspan contacted numerous users of these services, advised them of its impending entry and, several months after entering, had secured a significant market share. In response, Cates approached certain customers and offered a 5% discount on ship

berthing rates, on the condition that agents agreed to a one-year exclusive arrangement with Cates for these services. Seaspan responded shortly thereafter by matching the discount offered by Cates, without the requirement of an exclusive agreement.

48. The discounting of ship berthing prices in Burrard Inlet following Seaspan's entry is unprecedented in this market. Customer relations also improved in Burrard Inlet following Seaspan's entry. The Seaspan Merger eliminates the only significant competitive influence the Burrard Inlet ship berthing market has experienced.

(v) **Entry**

49. An assessment of the competitive effects of a merger includes a consideration of whether entry into the relevant market is likely to occur in response to an attempt by the merged entity to exert market power, such as by imposing material price increases. An assessment of the likelihood of entry includes a consideration of the significance of barriers to entry into that market.

50. The Director submits that there are a number of barriers to entry into the Burrard Inlet ship berthing market which, in combination, are significant such that entry is unlikely to occur on a scale sufficient to offset the market power resulting from the Seaspan Merger. These barriers are more fully described firstly in

paragraphs 51 and 52 with respect to the types of general costs of entry facing any potential entrant, and secondly, in paragraphs 53 to 62 with respect to the likelihood of entry by the four most likely modes: entry by other Canadian ship berthing firms; entry by U.S. ship berthing firms; entry by other foreign ship berthing firms; and entry by vertical integration of ship berthing services customers.

### General Costs

51. Certain customer requirements make the cost of entry significant for this market, and act to decrease the likelihood of entry.

- (i) The average size of the vessels being docked at Burrard Inlet has increased over time. Both Cates and Seaspan have high horsepower tractor tug boats which use technically sophisticated propulsion systems that suit these larger vessels. As well, both Cates and Seaspan have tug boats which include features which have been specifically designed for ship berthing use in Burrard Inlet, making it difficult for a potential entrant to enter by purchasing similar equipment on the resale market. Pilots have shown a preference for the efficiency and safety of these tug boats, as opposed to smaller, conventional tug boats. This trend toward larger, more sophisticated tug boats has increased the cost of entry over time.

- (ii) In addition to an increase in the size of vessels being berthed, costs are also increased by the necessity that a ship berthing firm have the ability to berth several ships simultaneously, in order to provide expeditious service to customers, especially during peak periods. This requirement increases the number, horsepower and/or technical sophistication of the tug boats which an entrant would need in order to provide a sufficient level of service.

52. The likelihood of entry is also decreased by the significant sunk costs of entry into the Burrard Inlet ship berthing market. In the event that entry is unsuccessful, the potential costs of disposal of the type of tug boats used in Burrard Inlet, especially the likely loss on resale, would be high. The high cost of capital investment required to build the type and number of tug boats necessary to satisfy the market demands is likely to lead to a substantial loss on resale due to the highly variable resale markets.

53. As described in paragraphs 54 to 62, other impediments to entry which face potential entrants vary depending on whether the potential entrant is Canadian, American or of other foreign origin, and whether the company currently provides ship berthing services.

Likelihood of Canadian Entry

54. In addition to the general deterrents, described in paragraphs 51 and 52, facing any entrant, Canadian firms currently providing ship berthing services in other British Columbia markets face additional specific deterrents. First, they are smaller companies which would likely need the assurance provided by contracts with fixed prices and long term commitments from customers in order to secure appropriate financing to acquire tug boats. Customers are unlikely to enter into such contracts, in part because the primary role of an agent is the acquisition of necessary port services at the lowest possible cost to its principal.

55. Secondly, many of the potential Canadian entrants in the Vancouver area obtain revenues through work subcontracted to them in the Burrard Inlet ship berthing market by Seaspan and/or Cates. This source of business would likely be terminated or significantly reduced upon any attempt by them to enter into this market.

56. A further entry deterrent for these Canadian firms results from fear of retaliation and the potential for loss of business in their own markets due to the competitive responses of the incumbent to the new entrant, including entry by the parties to the merger into these markets. The sense of risk is heightened by Washington's proposal to acquire the remaining shares of Seaspan.

57. For these reasons, the Director submits that it is unlikely that any firm currently providing ship berthing services in British Columbia markets or any other Canadian ship berthing firm will enter Burrard Inlet on a scale sufficient to offset the market power resulting from the Seaspan Merger.

#### Likelihood of U.S. Entry

58. In addition to the general deterrents, described in paragraphs 51 and 52, facing any entrant, U.S. ship berthing firms contemplating entering the Burrard Inlet ship berthing market face additional regulatory barriers. In order to engage in marine transportation in Canada on a regular basis, foreign vessels must first be registered in Canada, and then upgraded accordingly, where necessary, to meet Canadian regulatory standards, pursuant to the *Canada Shipping Act* R.S.C. 1985, c. S-9. The Canadian standards are high as compared to foreign standards, including the U.S., as are the costs of compliance with these standards.

59. Further, a U.S. vessel registered in Canada is effectively barred from engaging in the U.S. coastwise trade. The U.S. Merchant Marine Act (known as the "Jones Act") prohibits ships which have been built or documented under U.S. laws and have later been sold, registered or rebuilt outside the U.S., from being permitted to re-engage in domestic trade in the U.S. In order to re-engage in marine transportation in the U.S., a Special Act of Congress is required. U.S. firms would be

reluctant to enter the Canadian market where they are effectively unable to redeploy the assets used in Canada back to their home markets.

60. For these reasons, the Director submits that it is unlikely that U.S. tug boat operators will enter the Burrard Inlet ship berthing market on a scale sufficient to offset the market power resulting from the Seaspan Merger.

#### Likelihood of Other Foreign Entry

61. Other foreign entrants would be confronted with the general entry costs affecting all potential competitors and, in addition, a tariff of 25% on the value of tug boats imported by such a foreign entrant. The *Canada Shipping Act* would also affect other foreign competitors in the same way as it does U.S. competitors. As a result, the Director submits that foreign providers of ship berthing services are similarly unlikely to enter the Burrard Inlet market on a scale sufficient to offset the market power resulting from the Seaspan Merger.

#### Likelihood of Entry by Vertical Integration

62. The Director submits that the prospect of entry by ship owners, through vertical integration into ship berthing services or by joint venture, is also unlikely to occur on a scale sufficient to offset the market power resulting from the Seaspan

Merger. Such participation by ship owners is extremely rare in this industry worldwide.

(vi) **Effective Remaining Competition**

63. The Director submits that there are no remaining sources of competition in Burrard Inlet which would provide effective competition to the combined market power of Cates and Seaspan.

64. There are other firms providing a minimal amount of ship berthing services in Burrard Inlet, but these services are provided indirectly through subcontracting by Seaspan or Cates. Customers are billed for these services by Cates and Seaspan.

(vii) **Change and Innovation**

65. The *Pilotage Act* dictates that any ship weighing over 350 tons must dock and undock with the assistance of tugs. The exceptions are those ships which are fitted with bow and stern thrusters and/or advanced rudder control mechanisms. There are a limited number of newer vessels which are equipped with this advanced ship steering equipment. This equipment lessens the need for ship berthing assistance in docking and undocking, and is used on many passenger ships and ferries. The capital cost of incorporating this equipment at the time of construction is high, and retrofitting ships is very expensive.

66. Given the costs described in paragraph 65, it is unlikely that a material price increase in shipberthing services would result in the retrofitting of advanced steering equipment on existing vessels calling at Burrard Inlet. Any movement towards the inclusion of such equipment in new ships can be characterized as gradual and longterm and, therefore, is not likely to have a significant impact on the demand for shipberthing services in the foreseeable future.

**(viii) Other Factors**

67. The Burrard Inlet ship berthing market has been conditioned by the pre-1993 monopoly enjoyed by Cates. The Director submits that the history of the Seaspan Merger, including the negotiations thereof, raises reasonable concerns that the Seaspan Merger will effectively return the market to its pre-1993 condition.

**E. NATURE OF THE APPLICATION - ROBERTS BANK**

68. The Director submits that the Seaspan Merger prevents or lessens, or is likely to prevent or lessen, competition substantially in the Roberts Bank ship berthing market. This is in addition to the effects of the Seaspan Merger on the Burrard Inlet ship berthing market. Prior to the Seaspan Merger, as a direct response to Seaspan's September 1993 entry into Burrard Inlet, Cates announced its intention to enter the

Roberts Bank market. This entry would have effectively ended Seaspan's 25 year monopoly at Roberts Bank.

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 1995, a coalition of interested parties, including the Vancouver Port Corporation and the B.C. Chamber of Shipping, 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 boat basin available at Roberts Bank; effectively, to designate one ship berthing company as the exclusive provider of ship berthing services at Roberts Bank. This 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.

70. Only Cates and Seaspan submitted proposals responsive to the coalition's requirements, effectively representing two proposals from the same merged entity. Seaspan has been tentatively awarded the lease on the Roberts Bank tug boat basin on a month-to-month basis with a price escalation schedule, thereby maintaining the status quo with Seaspan remaining the sole operator at Roberts Bank.

71. Moreover, as part of the arrangement with the coalition, the two tug boats currently employed by Seaspan at Burrard Inlet are now dedicated to Roberts Bank and will be deployed there, if traffic at Roberts Bank dictates their availability. The

result of this redeployment would be the return of the ship berthing market to its state prior to Seaspan's entry into Burrard Inlet in which Cates dominated Burrard Inlet and Seaspan dominated Roberts Bank.

72. As evidenced by the number and identity of the bidders for the Roberts Bank lease, Cates and Seaspan remain the two most likely bidders for ship berthing services at Roberts Bank. The Merger effectively precludes the possibility of Cates and Seaspan submitting proposals on an independent basis when the coalition once again issues requests for proposals similar to those issued in the Fall of 1995.

73. Seaspan has had a monopoly position in the Roberts Bank ship berthing market since its opening in 1970. Cates' entry would likely have resulted in independent, vigorous and effective competition in this market. The Seaspan Merger precludes this possibility since Cates and Seaspan can now no longer compete as independent entities.

**F. STATUTORY FACTORS - SECTION 93 OF THE ACT -  
ROBERTS BANK**

**(i) Foreign Competition**

74. The Director submits that the same conclusions regarding the Burrard Inlet ship berthing market also apply to the Roberts Bank ship berthing market with respect to foreign competition, as described in paragraphs 58 to 61.

**(ii) Failing Business**

75. The Director submits that the same conclusions regarding the Burrard Inlet ship berthing market also apply to the Roberts Bank ship berthing market with respect to failing business, as described in paragraph 44.

**(iii) Acceptable Substitutes**

76. The Director submits that the same conclusions regarding the Burrard Inlet ship berthing market also apply to the Roberts Bank ship berthing market with respect to acceptable substitutes, as described in paragraph 45.

(iv) **Removal of a Vigorous and Effective Competitor**

77. The Director submits that the Seaspan Merger results in the removal of a likely vigorous and effective competitor in the Roberts Bank ship berthing market; namely, Cates. Since 1970 Seaspan has been, and continues to be, the sole provider of ship berthing services at Roberts Bank, with tug boats permanently stationed at Roberts Bank and operating from docking facilities located there. In June 1994, Cates announced publicly that it planned to build two tug boats specifically for use in servicing the Roberts Bank market, in competition with Seaspan. The occurrence of the Seaspan Merger precluded the possibility of such competition.

78. The introduction of a bidding process for the awarding of a contract to one ship berthing company at Roberts Bank means that the Seaspan Merger now has resulted in the removal of a likely vigorous and effective competitor in the submission of bids. In particular, the Seaspan Merger has and will have effectively precluded the coalition referred to in paragraph 69 from collecting independent bids from the largest, and likely only, Canadian ship berthing companies capable of servicing the Roberts Bank ship berthing market. No responsive bid was received from a Canadian ship berthing company other than Cates or Seaspan during the Fall 1995 process. U.S. companies operating on the Pacific coast face much higher entry risks into the Roberts Bank ship berthing market than do Seaspan and Cates due to the regulatory barriers referred to in paragraphs 58 and 59 and, as a result, are not likely to submit effective bids or proposals for the provision of ship berthing

services at Roberts Bank. This is evidenced by their failure to do so in the Fall of 1995.

79. The Director submits that the presence of competition between Cates and Seaspan in the Roberts Bank ship berthing market, through means such as Cates' physical entry or competitive bidding on contracts, would likely have resulted in long-term price reductions and improvements in customer relations similar to those which followed Seaspan's earlier entry into the Burrard Inlet ship berthing market.

(v) **Entry**

80. The Director submits that there are a number of barriers to entry into the Roberts Bank ship berthing market which, in combination, are significant such that entry is unlikely to occur on a scale sufficient to offset the market power resulting from the Seaspan Merger.

**General Costs**

81. The general costs of entry facing every potential entrant are of a similar nature but of a greater magnitude for a potential entrant at Roberts Bank than they are at Burrard Inlet. Specifically, potential entrants face higher capital requirements and concomitant sunk cost risks. This is because the vessels requiring ship berthing

services at Roberts Bank are, on average, larger than those visiting Burrard Inlet and operate in more difficult operating conditions, making it necessary for larger, more sophisticated tugs to be constructed or purchased by an entrant. This could require more expensive capital outlays and, as a result, could entail larger sunk cost risks should entry not succeed and disposal of tug boats be necessary.

#### Likelihood of Canadian Entry

82. It is unlikely that any Canadian firm, other than Cates, currently providing ship berthing services in British Columbia markets will enter or submit proposals for the entry into the Roberts Bank ship berthing market on a scale sufficient to offset the market power resulting from the Seaspan Merger. This is due to the same factors cited in paragraphs 54 to 56, with respect to the likelihood of entry by Canadian ship berthing firms into the Burrard Inlet ship berthing market.

#### Likelihood of U.S. or other Foreign Entry or Vertical Integration

83. U.S. and other foreign ship berthing companies and ship owners face similar sunk costs, risks and regulatory barriers that they face with respect to Burrard Inlet, as described in paragraphs 58 to 59 and 61 to 62. As a result, they also will not likely enter or submit proposals for entry into the Roberts Bank ship berthing market on a scale sufficient to offset the market power resulting from the Seaspan Merger.

(vi) **Effective Remaining Competition**

84. Seaspan continues to be the sole provider of ship berthing services in the Roberts Bank ship berthing market. As a result of the Seaspan Merger, there will not likely be effective remaining competition for the bidding for the ship berthing business at Roberts Bank.

(vii) **Change and Innovation**

85. The Director submits that the same conclusions regarding the Burrard Inlet ship berthing market also apply to the Roberts Bank ship berthing market with respect to change and innovation, as described in paragraphs 65 and 66.

## V. COMPETITION ANALYSIS - BARGING

### A. INDUSTRY AND MARKET BACKGROUND

86. The barging business involves the transportation of a range of commodities from one coastal location to another using non-self propelled unmanned flat bottomed hulls of various sizes (known as "barges") which are towed by tug boats. The tug boats used for barging are not of the size and degree of sophistication usually used in ship berthing at Burrard Inlet or Roberts Bank.

87. Users of barging services are principally the primary industry producers who need to transport their products from coastal locations to ports or other destinations. The largest user of these services in British Columbia is the forest products industry. The various types of barges used in coastal British Columbia include:

- (i) log barges, which transport logs from harvesting sites to saw mills;
- (ii) chip barges, which transport wood chips and saw dust from saw mills to pulp mills;
- (iii) covered dry cargo barges, which transport pulp, paper and plywood from pulp mills to ports and other locations;

- (iv) chemical barges, which are used for the carriage of chemical products;
- (v) railway car barges;
- (vi) tanker barges, which are used to transport petroleum products; and
- (vii) bulk carriers and scrap barges, which transport aggregates, scrap, gravel, salt, machinery, equipment and other such products.

Each of these types of barges vary in configuration and capacity, depending on their requirements.

88. The existing barging market is characterized by a high degree of concentration. Most barging is done by independent operators who provide specialized barging services, and are not affiliated with users of these services. However, a small number of users of barging services have their own barges that are used to transport their own products between their integrated operations.

89. Among the independent operators, Seaspan is the dominant provider of barging services, with operations in every form of barging. Rivtow is the second largest provider, with a market presence in virtually every segment. After Rivtow, the next largest provider is Norsk, a chip barging company which historically had primarily serviced its parent company, Fletcher Challenge Canada Limited, a forest

products company. The sale to Washington in June 1995 has made Norsk the third largest independent barging company in that it is no longer affiliated with a user of its services. The remaining independent operators are small companies who, collectively, constitute a negligible portion of the overall B.C. barging market.

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

## **B. RELEVANT MARKET**

91. The Director submits that the relevant product market 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".

92. The Director submits that 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".

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 “the B.C. barging market”.

### **C. NATURE OF THE APPLICATION - BARGING**

94. This Application is concerned separately with the effects of both the Seaspan and Norsk Mergers on competition in the B.C. barging market. Each of these concerns will be described separately. The effects of the Seaspan Merger will be discussed in Parts C and D. The effects of the Norsk Merger will be discussed in Parts E and F.

### **D. NATURE OF THE APPLICATION - EFFECT OF SEASPAN MERGER**

95. The Director submits that the Seaspan Merger prevents or lessens, or is likely to prevent or lessen, competition substantially in the B.C. barging market. This is in addition to the effects of the Seaspan Merger on the Burrard Inlet and Roberts Bank ship berthing markets.

96. For over one year prior to the Seaspan Merger, Washington had intended and had taken various actions to enter the B.C. barging market through acquisition of an

incumbent or incumbents. His options in this regard, prior to the Seaspán Merger, were:

- (a) to acquire, in whole or in part, the dominant provider, Seaspán;
- (b) to acquire the second-largest provider, Rivtow; and/or
- (c) to acquire Norsk or other small operators.

97. For at least two years prior to the Seaspán Merger, Washington actively pursued each of the options. In particular, Washington attempted to acquire or merge with Seaspán as pleaded in paragraph 26. Washington also entered into discussions with the principals of Rivtow and Norsk and other small operators for the explicitly stated purpose of acquisition of these companies or their businesses.

98. The Director submits that, having failed to acquire an interest in whole or in part of Seaspán, Washington would likely have pursued and achieved any of options (b) and/or (c) in paragraph 96.

99. Any of options (b) and/or (c) in paragraph 96, excluding the purchase of Seaspán, would have created more vigorous and effective competition to Seaspán in the B.C. barging market.

100. Specifically, with respect to the option of acquiring Rivtow and the option of acquiring Norsk without affecting the Seaspan Merger, the Director submits that Washington would have made either company a more active and vigorous competitor to Seaspan.

101. The Director further submits that with respect to any of options (b) and/or (c) in paragraph 96, excluding the purchase of Seaspan, the likelihood that Washington would achieve an alternative acquisition and have the effect of creating more active and vigorous competition to Seaspan is characterized by Washington's intention to become the major provider of coastal barging services, his incentives in this regard as a complement to his other transportation interests as described in paragraphs 14 and 15, and his significant financial resources. No other known potential entrant has this combination of incentives and abilities.

102. The Seaspan Merger precluded the possibility that Washington would become a vigorous and effective competitor to Seaspan through the acquisition of any of Seaspan's competitors. As a result, the Director submits that the Seaspan Merger prevents or lessens, or is likely to prevent or lessen, competition substantially in the B.C. barging market.

**E. STATUTORY FACTORS - SECTION 93 OF THE ACT**

103. The Director has considered the section 93 factors in paragraphs 104 to 126, with respect to the Seaspán Merger, and in paragraphs 132 to 138 with respect to the Norsk Merger.

**SEASPAN MERGER**

**(i) Foreign Competition**

104. With respect to paragraph 93(a), foreign competitors do not and are not likely to provide effective competition in the B.C. barging market, for reasons set forth in respect to Entry in paragraph 116.

**(ii) Failing Business**

105. With respect to paragraph 93(b), Seaspán is not a “failing business”. The business of Seaspán has not failed and no submissions have been made to the Director that it is likely to fail. As a result, paragraph 93(b) of the Act is not a relevant factor in determining the effect of the Seaspán Merger on competition in the B.C. barging market.

**(iii) Acceptable Substitutes**

106. There are no acceptable substitutes in the B.C. barging market. Seaspan primarily services locations on Vancouver Island or the B.C. coast where tug boats and barges are frequently the only means of cargo transportation. Many primary industry customers are dependent upon barge shipping because there are few roads or rail lines to the remote coastal locations in which they are situated. Generally, the most economically feasible methods of moving bulk commodities to and from these locations is by water. While certain mill locations may consider alternative means of transportation, such as truck, ship, or occasionally rail, for other locations, alternatives to barging are frequently either not available, or not cost-effective.

**(iv) Removal of a Vigorous and Effective Competitor**

107. As a result of the Seaspan Merger, the likelihood of the emergence of a vigorous and effective competitor to Seaspan, namely Washington, has been foreclosed, as described in paragraphs 95 to 102. It is likely that, absent the Seaspan Merger, Washington would have emerged as a vigorous and effective competitor to Seaspan through an alternative mode of entry.

(v) **Entry**

108. The Director submits that, in respect of the Seaspán Merger, the competitive concern is that Seaspán currently exercises market power which would have been mitigated but for the Seaspán Merger.

109. The B.C. barging market is characterized by a high level of concentration with only three significant competitors. The market has not experienced significant new entry in an economically viable manner in at least the last twenty years.

110. The Director further submits that for the reasons set forth in this part of the application, entry of new competitors is not likely to occur in the future in a manner that can significantly reduce Seaspán's market power.

111. The Director further submits that for purposes of establishing that the Seaspán Merger prevents competition in the barging market, it is relevant to consider the likelihood of entry by means of a new barging company ("entry de novo") and the likelihood of entry by means of acquisition of another incumbent in the market ("entry by toehold acquisition"). For ease of reference, these two methods of entry are treated separately, entry de novo in paragraphs 112-119 and entry by toehold acquisition in paragraphs 120-121.

Likelihood of entry de novo

General costs

112. Certain customer requirements make the cost of entry for any potential entrant significant for this market, and act to decrease the likelihood of entry de novo.

- (i) Large barging contracts tend to be limited to a firm which can offer sufficient equipment and capacity to meet customers' needs. As a result, the time and cost involved in entry would be high.
- (ii) Capital construction costs are very high. For example, a new chip barge alone costs several million dollars, and an average contract requires 10 to 15 barges. The cost of a new sizable log barge exceeds \$20 million. Rail and chemical barging are costly and involve specialized equipment. A new rail barge costs in excess of \$10 million. These capital requirements are a significant barrier to entry.

113. A new entrant would be subject to similar sunk costs of entry in respect to barging as are pleaded in respect of ship berthing, in paragraph 52. These costs can be expected to be high and will likely deter entry de novo.

114. It would also be very difficult for an entrant to build the amount of new equipment required to compete effectively and generate a return at the towing rates that a large incumbent can charge on depreciated equipment.

Likelihood of Canadian entry de novo

115. It is unlikely that any Canadian firms currently engaged in the provision of barging services or other marine-related industries would enter or expand their presence in the B.C. barging market, given the capital requirements, expected sunk costs and other entry factors cited above, on a scale sufficient to substantially increase the level of competition in a manner similar to that which, absent the Seaspan Merger, would have occurred as a result of Washington's entry as an independent entity. Nor has any such entry or expansion occurred in the last twenty years.

Likelihood of U.S. or other foreign entry de novo

116. As is the case with the relevant ship berthing markets, Canadian coastal trade regulations and inspection requirements make entry de novo into the Canadian barging market difficult. The regulations regarding foreign operations, which were described in paragraphs 58 and 59 in respect of entry of ship berthing tug boats into Burrard Inlet, apply equally to barges. In addition, foreign barge operators are prohibited from operating between Canadian points pursuant to the rules against cabotage under the *Coasting Trade Act* S.C. 1992, c. 31. As a result, it is unlikely that

foreign operators will enter the Canadian market de novo on a scale sufficient to substantially increase the level of competition in a manner similar to that which, absent the Seaspan Merger, would have occurred as a result of Washington's entry as an independent entity. Nor has any such entry occurred in the last twenty years.

Likelihood of vertical integration de novo

117. Vertical integration has occurred in this market in the past. Crown Zellerbach Corporation ("Crown Zellerbach"), created Norsk in 1962, and entered the B.C. chip barging segment in 1979. (Fletcher Challenge subsequently acquired Norsk from Crown Zellerbach in 1983.) However, the capital requirements necessary to effect that entry were severe, and Crown Zellerbach did not enter at a scale or in a manner sufficient to influence substantially Seaspan's ability to exercise market power. Norsk's barging capacity has primarily been employed for the needs of Crown Zellerbach, and later Fletcher Challenge, and, as a result, has not had a major impact on Seaspan's ability to exercise market power in the independent B.C. barging market as a whole while Norsk was a captive operator.

118. MacMillan Bloedel Ltd., "MacMillan Bloedel", also owns an in-house barging company, Kingcome Navigation, "Kingcome", which has been in operation since the early part of the 20th century. Kingcome, like Norsk prior to its sale by Fletcher Challenge, does not have a presence of a sufficient scale or nature to impact

substantially on Seaspan's ability to exercise market power in the independent B.C. barging market as a whole.

119. Faced with the general deterrents facing all potential entrants, as described in paragraphs 112 to 114, and the trend among primary industry companies to focus on core operations rather than transportation, it is unlikely that any major user of independent barging services will enter on a scale sufficient to substantially increase the level of competition in a manner similar to that which, absent the Seaspan Merger, would have occurred as a result of Washington's entry as an independent entity. This trend is exemplified by the recent decision by Fletcher Challenge to sell Norsk. Such entry on this scale has not occurred in the last twenty years.

Likelihood of entry by toehold acquisition

120. The Director submits that it is unlikely that any entity other than Washington is likely to enter the B.C. barging market by means of a toehold acquisition of another incumbent in this market in such manner as to create a vigorous and effective competitor to Seaspan.

121. In this regard, the Director submits that Washington has unique abilities and incentives to create vigorous and effective competition to Seaspan via the means of a toehold acquisition, and therefore, is the only likely such potential entrant. His uniqueness is characterized by his significant financial resources, his intention to

become the major provider of B.C. coastal barging services and his incentives in this regard as a complement to his other transportation interests as described in paragraphs 14 and 15. No other known potential entrant has this combination of incentives and abilities.

**(vi) Effective Remaining Competition**

122. The Director submits that no remaining competition exists in the B.C. barging market which would exert an effective and vigorous competitive influence on Seaspan's ability to exercise market power.

123. The only significant remaining competitor in the B.C. barging market is Rivtow. The Director submits that Rivtow has not been, and is not likely to become, a vigorous and effective competitor to Seaspan under current ownership. Rivtow does not have sufficient financial resources to become a major provider of barging services in this market. As a result, Rivtow has not, and will not, exert a substantial influence on Seaspan's ability to exercise market power, both before and after the Seaspan Merger.

124. From the time of its inception until the Norsk Merger, Norsk has not been an effective competitor to Seaspan for reasons set out in paragraph 117. Further, Norsk's potential to expand or otherwise exert a pro-competitive influence in the independent barging market in the future has been foreclosed by the Norsk Merger.

Had Washington acquired Norsk without the Seaspan Merger, or had Fletcher Challenge sold Norsk to a party other than Washington or Seaspan, Norsk could have emerged as a more effective and vigorous competitor to Seaspan. An assessment of the Norsk Merger follows in Part V, Section E.

125. Neither Kingcome, due to its captive affiliation with MacMillan Bloedel, nor any of the barging companies that operate on the margins of the B.C. barging market, due to their size, serve as effective remaining competition to Seaspan.

(vii) **Change and Innovation**

126. The Director submits that change and innovation do not exist in the B.C. barging market in a manner that would affect an assessment of the effects on competition in the B.C. barging market of the Seaspan Merger.

**F. NATURE OF THE APPLICATION - EFFECT OF NORSK MERGER**

127. Subsequent to the Seaspan Merger, Washington purchased Norsk ("the Norsk Merger"). The Director submits that the Norsk Merger prevents or lessens, or is likely to prevent or lessen, competition substantially in the B.C. barging market. This compounds the anticompetitive effect on competition in the B.C. barging market attributed to the Seaspan Merger.

128. As a result of the Norsk Merger, the dominant barging services provider in the market has effectively acquired the third largest provider; that is, Washington's acquisition of Norsk is equivalent to a merger of Seaspan and Norsk, due to Washington's significant interest in Seaspan.

129. The Norsk Merger results in a further concentration of what was already a highly concentrated market and can only serve to heighten the ability of a merged Seaspan and Norsk to exercise market power.

130. Any influence Norsk had or would in the future have on Seaspan's ability to exercise market power in the B.C. barging market has been foreclosed by the Norsk Merger. While Norsk's ability to exert market power had, from its inception until the Norsk Merger, been hampered by its primary role of servicing its affiliate, Fletcher Challenge and its predecessors, that limited impact was removed as a result of the Norsk Merger. The decision by Fletcher Challenge to sell Norsk, potentially enabling Norsk to become a significant player in the independent market, has been foreclosed by the Norsk Merger.

131. Therefore, the Director submits that the Norsk Merger prevents or lessens, or is likely to prevent or lessen, competition substantially in the B.C. barging market.

**G. STATUTORY FACTORS - SECTION 93 OF THE ACT - NORSK MERGER**

**(i) Foreign Competition**

132. The Director submits that the same conclusions regarding the Seaspan Merger also apply to the Norsk Merger with respect to foreign competition, as described in paragraph 104.

**(ii) Failing Business**

133. With respect to paragraph 93(b), Norsk is not a “failing business”. The business of Norsk has not failed and no submissions have been made to the Director that it is likely to fail. As a result, paragraph 93(b) of the Act is not a relevant factor in determining the effect of the Norsk Merger on competition in the B.C. bargaining market.

**(iii) Acceptable Substitutes**

134. The Director submits that the same conclusions regarding the Seaspan Merger also apply to the Norsk Merger with respect to acceptable substitutes, as described in paragraph 106.

**(iv) Removal of a Vigorous and Effective Competitor**

135. The Director submits that the Norsk Merger has resulted in the removal of a potentially vigorous and effective competitor to Seaspan in the B.C. barging market; namely, Norsk. Any influence Norsk had or would in the future have on Seaspan's ability to exercise market power in the B.C. barging market has been removed by the Norsk Merger. Norsk cannot exert independent influence on Seaspan's market power in the independent barging market, as it could have had it been sold by Fletcher Challenge to a party other than Washington.

**(v) Entry**

136. The Director submits that the same conclusions regarding the Seaspan Merger also apply to the Norsk Merger with respect to the various modes of entry de novo, as described in paragraph 112-119.

**(vi) Effective Remaining Competition**

137. The Director submits that the same conclusions regarding the Seaspan Merger also apply to the Norsk Merger with respect to effective remaining competition, as described in paragraph 123 with respect to Rivtow, and paragraph 125, with respect to the other remaining barging companies. Moreover, with the removal of Norsk, the sum of this remaining competition is even less effective.

(vii) **Change and Innovation**

138. The Director submits that the same conclusions regarding the Seaspan Merger also apply to the Norsk Merger with respect to change and innovation, as described in paragraph 126.

## VI. RELIEF SOUGHT

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

- (1) pursuant to subparagraph 92(1)(e)(ii) of the *Competition Act*, an order directing the Respondents K&K Enterprises and Dennis Washington to dispose of all their shares and assets in the Respondent Seaspan International Ltd. in such manner as the Tribunal may direct; or
- (2) pursuant to subparagraph 92(1)(e)(i) of the *Competition Act*, an order directing the Respondents to dissolve the Seaspan Merger in such manner as the Tribunal may direct; or
- (3) in the alternative, pursuant to subparagraph 92(1)(e)(ii) of the *Competition Act*, an order directing the Respondents K&K Enterprises and Dennis Washington to dispose of their shares and assets in whole or in part in the Respondent Seaspan International Ltd. in respect of shipberthing or directing the Respondent Dennis Washington to dispose of all his shares and assets in C.H. Cates and Sons Ltd., and

(a) pursuant to subparagraph 92(1)(e)(ii) of the *Competition Act*, a order directing the Respondent Dennis Washington to dispose of his shares and assets in whole or in part in the Respondent Norsk Pacific Steamship Company, Limited; or

(b) pursuant to subparagraph 92(1)(e)(i) of the *Competition Act*, an order directing the Respondents Dennis Washington and Fletcher Challenge to dissolve the Norsk Merger

in such manner as the Tribunal may direct; or

(4) pursuant to subparagraph 92(1)(e)(iii) and section 105 of the *Competition Act*, any other order that the Tribunal considers appropriate to which the Respondents and the Director consent; or

(5) such further or other order as the Tribunal deems advisable pursuant to section 92, and in particular section 92(1)(f), of the Act.

## VII. PROCEDURAL

140. The Director requests that the hearing of this Application be held in the City of Vancouver, British Columbia.

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

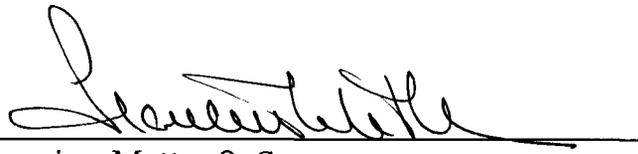
142. For purposes of this Application, service of all documents on the Director may be served on:

Michael L. Phelan  
Osler, Hoskin & Harcourt  
Barristers & Solicitors  
Suite 1500  
50 O'Connor Street  
Ottawa, Ontario  
K1P 6L2

Tel. No.: (613) 787-1017  
Fax No.: (613) 235-2867

Counsel to the Director of Investigation and Research

DATED AT HULL, QUEBEC, this 15<sup>th</sup> day of July, 1996.



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

Director of Investigation and Research  
Bureau of Competition Policy  
Industry Canada  
Place du Portage, Phase I  
50 Victoria Street  
Hull, Quebec  
K1A 0C9

**SCHEDULE A**

**MANAGEMENT SHAREHOLDERS**

Allen M. Fowlis (shares held through 3883 Investments Ltd.)

P.R. Wates

J.T.B. Chard

J.R. Barker

J.A. Brown

R.C. Stewart

J.B. Bishop

L.E. Hungle

D.R. Sutton

**SCHEDULE B**

**PREFERENCE SHAREHOLDERS**

Coal Island Ltd.  
314873 B.C. Ltd.  
3897 Investments Ltd.  
TD Capital Group Limited  
Point Ellice Shipyards Ltd.  
P.R. Wates  
J.T.B. Chard  
W.G. Sutherland  
J.D. Barker  
J.A. Brown  
R.C. Stewart  
J.B. Bishop  
L.E. Hungle  
D.R. Sutton  
D. Wotherspoon  
S. Osborne  
Mutual Trust Company