



CT - 1996 / 001 – Doc # 102

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;

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;

B E T W E E N:

The Director of Investigation and Research

Applicant

- and -

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

Respondents



CONFIDENTIALITY (PROTECTIVE) ORDER

Date of Pre-hearing Conference Call:

August 12, 1996

Member:

Rothstein J. (presiding)

Counsel for the Applicant:

Director of Investigation and Research

Michael L. Phelan
William J. Miller
M. Lynn Starchuk

Counsel for the Respondents:

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

Douglas G. Morrison

Genstar Capital Corporation

Robyn M. Bell

TD Capital Group Ltd.

Linda S. Abrams

Coal Island Ltd.
314873 B.C. Ltd.
Management Shareholders
Preference Shareholders

Charles F. Willms

Fletcher Challenge Limited

Harry B. Radomski

COMPETITION TRIBUNAL
CONFIDENTIALITY (PROTECTIVE) ORDER

The Director of Investigation and Research

v.

Dennis Washington et al.

FURTHER TO the Interim Confidentiality (Protective) Order dated May 16, 1996 and the Order Amending Interim Confidentiality (Protective) Order dated May 22, 1996;

AND ON CONSIDERING the form of order submitted by some of the parties;

THE TRIBUNAL ORDERS THAT:

1. This order supersedes the Interim Confidentiality (Protective) Order, as amended. Any confidentiality agreements which make reference to the Interim Confidentiality (Protective) Order, as amended, remain binding.
2. No document over which confidentiality has been claimed in this proceeding (hereinafter "confidential documents") shall be disclosed except in accordance with the terms of this order.
3. Documents over which no claim of confidentiality or privilege has been asserted shall form part of the public record in this proceeding if introduced into evidence at the hearing of the application or otherwise placed on the record. Public documents may be marked "Public" or "Unrestricted" on the face of the document. Any document which bears no marking on its face shall be presumed to be public in its entirety.
- 4.(1) **Level A** - Confidential documents designated as "Level A" documents may be disclosed to counsel for the parties, counsel's staff directly involved in this proceeding, independent

experts retained by the parties, the Director of Investigation and Research ("Director"), the Director's staff directly involved in this proceeding and the respondents. Confidential documents designated as "Level A" documents shall be clearly marked "Level A" on the face of the document.

(2) **Level B** - Confidential documents designated as "Level B" documents may be disclosed to counsel for the parties, counsel's staff directly involved in this proceeding, independent experts retained by the parties, the Director and members of the Director's staff directly involved in this proceeding, and two designated representatives of each of the respondents. Confidential documents designated as "Level B" documents shall be clearly marked "Level B" on the face of the document.

(3) **Level C** - Confidential documents designated as "Level C" documents may be disclosed to counsel for the parties, counsel's staff directly involved in this proceeding, the Director, members of the Director's staff directly involved in this proceeding, and independent experts retained by the parties. Confidential documents designated as "Level C" documents shall be clearly marked "Level C" on the face of the document.

5. Confidential documents shall not form part of the public record in the application, unless the Tribunal orders otherwise.

6. The parties shall attempt to arrive at agreement on the documents which should receive restricted disclosure and on the level of confidentiality to be applied to each document. If the parties are unable to agree on the level of confidentiality for particular documents, the parties may apply to the Tribunal to determine the question.

7. The confidential summaries provided by the Director pursuant to the Order Regarding Scheduling dated May 31, 1996 shall be designated as Level "B" documents.

8. Where a respondent is required to designate representatives who are permitted by the

terms of this order to receive confidential documents, such designation shall take place by written notice to the Tribunal, with copies sent to all parties.

9. For the purposes of this order, an independent expert is one who

(a) has no existing financial or employment relationship with one or more of the parties; and

(b) has signed a confidentiality agreement in the form attached to this order as Schedule A.

10. Prior to gaining access to confidential documents or to the confidential summaries referred to in this order, independent experts and designated representatives permitted by this order to have access to such documents, as the case may be, shall first execute confidentiality agreements in the form attached hereto as Schedule A. Each such confidentiality agreement shall be filed promptly with the Registrar of the Competition Tribunal who shall retain all such agreements in confidence until completion or final disposition of this proceeding and any appeals relating thereto, at which time such agreements may be disclosed to the parties upon request.

11. If a party receives written notice from a person who has signed a confidentiality agreement pursuant to this order that the person is required by law to disclose a confidential document, the party shall give prompt written notice to the party listing the document in its affidavit of documents so that the party may seek a protective order or other appropriate remedy.

12. All persons, including the Director and her staff, who obtain access to confidential documents and information in the course of discovery in this application are subject to an implied undertaking to use the confidential documents and information for the purposes of the application only.

13.(1) All documents produced by a party during the course of discovery shall be deemed

authentic with respect to such aspects of authorship, execution, copies, sending, service or delivery as appear on the face of the document.

(2) At the hearing of this application, a party may challenge the authenticity of a document in respect of any of the aspects referred to in subparagraph 1 above. The party or persons so challenging shall have the burden of proof.

(3) This order does not determine the admissibility of documents as evidence.

14.(1) Subject to subparagraph (2), no copies of any confidential documents shall be made without the consent of the party listing the document in its affidavit of documents.

(2) Counsel for a party and the Director and her staff may make such copies as they require in connection with these proceedings. Counsel for a party may make one copy of confidential documents available to each independent expert or designated representative of a respondent who meets the requirements of paragraphs 9, 10, and 12 of this order.

15. Upon completion or final disposition of this proceeding and any appeals, all confidential documents and any copies of confidential documents disclosed in accordance with this order, with the exception of confidential documents in the possession of the Director and her staff, shall be returned to the party that listed the documents in its affidavit unless the documents have become public or the party that listed the document states, in writing, that they may be disposed of in some other manner. The confidential documents and any copies in the possession of the Director and her staff shall be dealt with as directed by the Tribunal.

16. This order is subject to further direction of the Tribunal.

DATED at Ottawa, this 12th day of August, 1996.

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

(s) Marshall Rothstein
Marshall Rothstein

SCHEDULE "A"
COMPETITION TRIBUNAL
CONFIDENTIALITY AGREEMENT

TO: The Director of Investigation and Research
 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

IN CONSIDERATION of being provided with information or documentation in connection with this proceeding over which claims for confidentiality have been advanced, I, _____, of the City of _____, in the _____ of _____, hereby agree to maintain the confidentiality of such information or documentation so obtained. I will not copy or disclose to any other person, except

- (a) counsel for the party on whose behalf I am employed or have been retained and members of his or her firm who are directly involved in this application,
 - (b) other experts retained by or on behalf of the party on whose behalf I am employed or have been retained and who have signed a similar confidentiality agreement with the parties to this application and
 - (c) persons permitted by order of the Competition Tribunal,
- such information or documentation nor shall the information or documentation so obtained be used by me for any purpose other than in connection with this proceeding.

I acknowledge that I am aware of the order granted by the Competition Tribunal on May 16, 1996 as amended by order granted on May 22, 1996 and the Confidentiality (Protective) Order granted on August 12, 1996 in this regard, copies of which are attached as Schedules 1 and 2 respectively to this agreement, and agree to be bound by same. I acknowledge that any breach of this agreement by me will be considered to be a breach of the said orders of the Competition Tribunal. I further acknowledge and agree that none of the Director of Investigation and Research ("Director"), 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, or any other owner of the information or documentation may have an adequate remedy at law and would be irreparably harmed in the event that any of the provisions of this agreement are not performed in accordance with its specific terms or otherwise breached. Accordingly, I agree that any one or more of the Director, Dennis Washington, K & K Enterprises, Seaspac 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, or any other owner shall be entitled to injunctive relief to prevent breaches of this agreement and to specifically enforce the terms and provisions hereof, in addition to any other remedy to which they may be entitled at law or in equity.

In the event that I am required by law to disclose any of the information or documentation which is subject to this agreement, I will provide (insert name of retaining or employing party) with prompt written notice so that the person that claimed confidentiality over such information or documentation may seek a protective order or other appropriate remedy. In any event, I will furnish only that portion of the information or documentation which is legally required and I will exercise my best efforts to obtain reliable assurance that confidential treatment will be accorded to the information or documentation.

I will promptly, upon the request of the party which provided the information or listed the documents in its affidavit of documents, advise where such material is kept by me. At the conclusion of my involvement in these proceedings or upon completion or final disposition of these proceedings and any appeals, I will act in accordance with paragraph 8 of Schedule "1" attached hereto. I will destroy all other documents received or prepared by me relating to the material except that I may retain in my confidential files, subject to the requirements of confidentiality imposed by this agreement, materials prepared by me, such as study results and materials of a general nature, which do not replicate any confidential information.

I hereby attorn to the jurisdiction of the Federal Court of Canada and/or the Competition Tribunal to resolve any disputes arising under this agreement.

SIGNED, SEALED AND DELIVERED before a witness this _____ day of _____, 1996.

(Print Name)

(Witness)

(Signature)