



CT - 1996 / 001 – Doc # 28

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, Seaspac International Ltd.;

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

AND IN THE MATTER of an application for an interim order pursuant to section 104 of the *Competition Act*.

B E T W E E N:

The Director of Investigation and Research

Applicant

- and -

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  
Fletcher Challenge Limited

Respondents



**CONSENT INTERIM ORDER**

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**Decided on the basis of the written record.**

**Presiding Member:**

The Honourable Madame Justice Sandra J. Simpson

**Counsel for the Applicant:**

**Director of Investigation and Research**

Michael L. Phelan

**Counsel for the Respondents:**

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

George D. Burke

**Seaspan International Ltd.  
Genstar Capital Corporation**

Robyn M. Bell  
Joel T. Kissack

**TD Capital Group Ltd.**

Bradley P. Martin

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

Charles F. Willms

**Fletcher Challenge Limited**

Jon R. Johnson

**COMPETITION TRIBUNAL**  
**CONSENT INTERIM ORDER**

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*The Director of Investigation and Research*

v.

*Dennis Washington et al.*

FURTHER to the application by the Director of Investigation and Research pursuant to section 92 of the *Competition Act*, R.S.C. 1985, c. C-34 ("Application");

AND ON HEARING the application by the Director of Investigation and Research for an interim order pursuant to section 104 of the *Competition Act*;

AND ON READING the notice of the application for an interim order dated March 1, 1996 and the affidavit of Richard Taylor, sworn on March 1, 1996;

AND ON CONSIDERING the Revised Draft Interim Order filed April 18, 1996 and the letter of April 18, 1996 from counsel for the Director of Investigation and Research indicating the consent of the respondents who are directly affected by the provisions of the Interim Order and that the remaining respondents in this matter do not object to or take no position on the terms of the Interim Order;

THE TRIBUNAL ORDERS THAT:

**Definitions**

1. For the purposes of this order the following definitions shall apply:

- (a) "Businesses" shall mean the provision of ship berthing and barging services as carried out by Norsk Pacific Steamship Company, Limited, Seaspan International Ltd. and/or C.H. Cates and Sons Ltd., and "Business" shall mean one of such businesses;
- (b) "Cates" shall mean C.H. Cates and Sons Ltd. a company providing ship berthing services at Burrard Inlet, the location of the principal port facilities at the Port of Vancouver;
- (c) "Confidential Information" shall mean competitively sensitive or proprietary information not independently known to Dennis Washington, K & K Enterprises, C.H. Cates and Sons Ltd., Norsk Pacific Steamship Company, Limited or Seaspan International Ltd., and shall include, but shall not be limited to, customer lists, price lists, marketing methods or other trade secrets;
- (d) "Director" shall mean the Director of Investigation and Research as appointed pursuant to section 7 of the Act and includes members of the Director's staff;
- (e) "K & K" shall mean K & K Enterprises, a partnership formed under the laws of the state of Montana, United States of America. K & K currently owns a 30% voting interest in Seaspan International Ltd., as well as various other rights and interests in Seaspan International Ltd.;
- (f) "Norsk" shall mean Norsk Pacific Steamship Company, Limited, a company which is engaged in the transportation and distribution of bulk and neo-bulk commodities, primarily forest products. Norsk's businesses include tug and barge operation in British Columbia. 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;
- (g) "Proposed Acquisition" shall mean the transaction through which Dennis

Washington or his nominee will acquire all common shares in Seaspan International Ltd. other than those owned by K & K Enterprises;

(h) "Purchase Agreement" shall mean the acquisition agreement dated March 5, 1996 and related schedules consistent in substance with the acquisition agreement and with the draft schedules provided to the Director on April 15 and April 18, 1996 through which the proposed acquisition will take place;

(i) "Seaspan" shall mean Seaspan International Ltd., a company which provides, as part of its general marine transportation business, ship berthing services at Burrard Inlet and at Roberts Bank in the Port of Vancouver and barging services in British Columbia coastal waters; and

(j) "Washington" shall mean Dennis Washington of Missoula, Montana, United States of America, who is the ultimate owner of C.H. Cates and Sons Ltd. and Norsk Pacific Steamship Company, Limited;

### **Maintain Current Ownership**

2. Washington, K & K, Seaspan, Cates and Norsk shall not issue or cause to be issued, any additional equities, securities, rights or options to acquire additional equities or securities of Seaspan, Cates or Norsk respectively or amend the articles, by-laws, memoranda or other constating documents of Seaspan, Cates or Norsk respectively or do any other act which may directly or indirectly alter the ownership of Seaspan, Cates or Norsk respectively from that which existed as of the date of the Application without the consent of the Director, except for those issuances, amendments, redemptions or other acts in connection with the Proposed Acquisition as provided in the Purchase Agreement which are required for the Proposed Acquisition. In all cases, no issuances, amendments or other acts may take place which will alter the competitiveness, or viability of any of the Businesses or otherwise alter the terms of this Interim Order except as specifically provided herein.

## **Management**

3. Washington and/or K & K shall not alter or cause to be altered and Seaspan shall not alter, or cause or permit to be altered, the board of directors, the officers or the management of Seaspan, except:

- (a) to replace directors, officers and managers who have voluntarily resigned, died or become disabled or whose position has been eliminated or terminated for cause;
- (b) to cause, in connection with the purchase agreement, the termination or accept the resignation of appointees of Genstar Capital Corporation and TD Capital Group Ltd., and to replace such persons;
- (c) with the consent of the Director; or
- (d) as necessary to comply with the terms of this Interim Order;

provided, however, that no position shall be eliminated and no replacement director, officer or manager shall be appointed, elected or hired without the consent of the Director.

4. No director, officer, employee, or agent of Washington, K & K, Cates or Norsk may also hold a position of director, officer, employee or agent of Seaspan except with the consent of the Director. This prohibition shall not preclude counsel for Washington, K & K, Cates or Norsk from also acting for Seaspan.

5. Meetings of the Board of Directors of Seaspan, Cates and Norsk during the term of this Interim Order shall be accurately recorded in minutes and the minutes shall reflect all matters considered by and state the reason(s) for each action and vote taken by the Board. The minutes shall be retained for two years after the termination of this Interim Order.

## **Maintain Independent Viability of Business**

6. Washington and K & K shall not cause Seaspan, Cates or Norsk to, and Seaspan, Cates and Norsk shall not enter into, or withdraw from, any contracts or arrangements in regard to their Businesses, or make any changes to their operations or levels of service that could potentially or would be likely to have the effect of materially:

- (a) inhibiting or unreasonably delaying any divestiture of any of the Businesses; or
- (b) reducing the viability of the Businesses or the value of the assets of the Businesses;

in any case without the consent of the Director. For clarity, the execution and delivery of documents and the steps contemplated in connection with the Proposed Acquisition as provided in the Purchase Agreement are permitted on the basis that the execution, delivery and steps shall not in any way alter the obligations or prohibitions contained in this paragraph.

7. Washington and K & K shall cause Cates and Norsk to, and Seaspan, Cates and Norsk shall, to the extent permitted by this Interim Order and by law:

- (a) carry on business in accordance with the generally prevailing industry standards;
- (b) maintain all levels of financial support for their respective Business at at least the same level as existed as of the date of the Application;
- (c) provide quarterly financial statements including, but not limited to, income statements, statements of cash and borrowings, the amount of payables and a list of aged receivables on their respective business to the Director within 30 days of the end of the business quarter;
- (d) use best efforts to preserve and enhance the goodwill of their respective Businesses;

- (e) use best efforts to maintain their respective Businesses at at least the same level of competition and operation as existed prior to the date of the Application;
- (f) maintain the facilities and other assets of their respective Businesses in good repair in accordance with best industry practice;
- (g) use best efforts to maintain the competitiveness of their respective Businesses without regard to K & K's or Washington's interests in Seaspan; and
- (h) not otherwise take any action that they know will or could adversely affect the competitiveness, assets, operations or financial status of their respective Businesses;

8. Washington and K & K shall cause Cates and Norsk to, and Seaspan, Cates and Norsk shall, maintain the viability and marketability of Seaspan, Cates and Norsk, respectively, and shall not sell, transfer, encumber, or cause to be sold, transferred or encumbered (other than in the normal course of business), or otherwise impair the marketability and value of the assets of Seaspan, Cates or Norsk respectively without the consent of the Director.

9. Except as permitted by paragraph 8, assets of Seaspan, Cates or Norsk which are not, either directly or indirectly, connected or associated with the operation of the Businesses (the "Non-Business Assets") may be sold, transferred or encumbered provided the value of the individual non-business asset or group of Non-Business Assets sold to one or more purchasers does not exceed C\$500,000 in any one transaction or related transactions or exceed, in the aggregate, C\$1,000,000 and provided that any sale or sales of Non-Business Assets do not adversely affect the viability and marketability of each of Seaspan, Cates or Norsk. Sales of Non-Business Assets in excess of the threshold amounts set forth above may only take place with the consent of the Director.

10. Washington and/or K & K shall not cause Seaspan, Cates or Norsk to, and Seaspan, Cates or Norsk shall not, other than in the ordinary course of business or with the approval of the Director:

- (a) except as permitted in paragraphs 8 and 9 hereof, divest any assets of any of the Businesses to any person;



- (b) reduce any aspect of the Businesses' level of service to any customers;
- (c) alter Seaspan's, Cates' or Norsk's normal repair and maintenance schedules for all tugs and barges, as the case may be, and on any other facilities used in the Business and existing as of the date of the Application;
- (d) terminate, without replacement, any lines of credit for, or financial guarantee on behalf of, any of the Businesses or make any other material changes to the financial arrangements of the Businesses;
- (e) curtail marketing, sales, promotional or other activities of any of the Businesses in connection with the solicitation of existing or prospective customers for ship berthing or barging services;
- (f) terminate or alter any current financial, employment, salary or benefit agreements or arrangements for any executive, managerial, sales or marketing personnel of any of the Businesses except:
  - (i) as necessary to comply with the terms of this Interim Order;
  - (ii) for the termination or resignation of appointees of Genstar Capital Corporation and TD Capital Group Ltd. in connection with the Proposed Acquisition as provided in the Purchase Agreement; or
  - (iii) for cause;
- (g) remove from service any of the operating assets of Seaspan, Cates or Norsk used in the Businesses as of the date of the Application;
- (h) remove the vessels "Hawk" and "Falcon" from service in Burrard Inlet for a period exceeding 48 hours, other than for normal repairs or maintenance; or

(i) enter into any agreement to lease or lease any assets or real property occupied by the Businesses to any other person.

11. Each of Seaspan, Cates and Norsk shall take such action as is necessary to maintain the viability and marketability of the Businesses and the value of the assets thereof and shall not cause or permit the destruction, removal or impairment of any of its Business assets in any material way except:

- (a) in the ordinary course of business;
- (b) for ordinary wear and tear;
- (c) for acts beyond their control;
- (d) with the consent of the Director.

### **Maintain Separate Businesses**

12. Washington and K & K, and each of Seaspan, Cates and Norsk, shall take all steps necessary to ensure that Seaspan, Cates and Norsk respectively shall be held separate and apart and maintained as separate, independent and viable ongoing Businesses. All administrative functions, including but not limited to the dispatching and billing operations and the books and records of Washington, K & K, Seaspan, Cates and Norsk are to be kept entirely separate from those of any other person or business.

13. Neither Norsk nor Cates shall divulge any Confidential Information relating to their Businesses to Seaspan or to any other person except to Washington and except for Confidential Information required to prepare standard financial reports or as set out below.

14. Washington, or persons controlled by Washington, and/or K & K shall not receive or have access to, or the use of, any of Seaspan's Confidential Information.

15. Washington and/or K & K shall not report, convey or otherwise transmit Confidential Information between or among Cates, Norsk and Seaspn.

16. The persons named in Appendix A to this interim order (the "Named Persons") as agent for Washington may participate in the due diligence and other reviews of Seaspn for the purposes of the Proposed Acquisition as set out in the Purchase Agreement. Notwithstanding any other provision of this Interim Order and subject to the provisions of this paragraph 16, Seaspn may, until June 30, 1996 or such later date as the Director may agree to, convey to selected Named Persons (as defined below) Confidential Information, other than strategic plans, customer contracts or other materials not reasonably necessary to conduct the due diligence and other reviews strictly necessary to evaluate Seaspn for the purposes of the Proposed Acquisition as set out in the Purchase Agreement. Washington shall notify the Director of those of the Named Persons who will be receiving Confidential Information (the "Selected Named Persons") no later than three days prior to the commencement of the distribution of the Confidential Information to them. The Selected Named Persons may receive such Confidential Information:

(a) in the form of disclosure schedules to the Purchase Agreement; and

(b) in the course of the Selected Named Person's review of the affairs of Seaspn for the sole purpose of conducting the due diligence and other reviews strictly necessary to evaluate Seaspn for the purposes of the proposed acquisition.

17. The Selected Named Persons shall not disclose the Confidential Information to any other person (other than to accountants, independent financial advisors and legal counsel in connection with the Proposed Acquisition as set out in the Purchase Agreement) and shall use the Confidential Information only in connection with concluding the Proposed Acquisition.

18. No Selected Named Person shall be or become an employee, agent, director or officer of Seaspn, Cates or Norsk, or become involved with the Businesses in any way that could potentially or would be likely to have the effect of communicating any Confidential Information to Cates or Norsk. Without limiting the generality of the foregoing, in the event a director of

Cates or Norsk is chosen as one of the Selected Named Persons, that director shall, prior to obtaining access to Confidential Information, resign from his position as a director of Cates and Norsk and shall not, in addition to the prohibitions set out above, during the term of this Interim Order, accept a position as a director of Cates, Norsk or Seaspan.

19. Any breach of paragraphs 16, 17, or 18 by any of the Selected Named Persons shall be deemed to be a breach of this Interim Order also by Washington, K & K, Cates and Norsk.

20. Washington and/or K & K shall not cause Seaspan, Cates and Norsk to and Seaspan, Cates and Norsk shall not enter into any intercompany loans, transfers of funds or any other financial arrangements between themselves except with the consent of the Director.

### **Monitors**

21. Seaspan, Norsk and Cates shall each appoint an employee to act as monitor for its respective Business, who shall be responsible for monitoring the Businesses as necessary to ensure compliance with this Interim Order.

22. The appointment of each of the monitors shall be subject to the approval of the Director and if a monitor has not been appointed for each of the Businesses within thirty business days after the date of this Interim Order, the Director may apply to the Tribunal for the appointment of a monitor on behalf of Seaspan, Cates or Norsk, as the case may be.

23. In the event that any of the monitors is unable to perform monitoring duties under the terms of this Interim Order because of death, disability, termination for cause or any other reason, Seaspan, Norsk or Cates, as the case may be, shall appoint, subject to the Director's approval, a new monitor within fifteen business days. Should a new monitor not be so appointed, the Director may apply to the Tribunal for the appointment of a new monitor on behalf of such company.

24. If, in the Director's opinion, a monitor is not fulfilling the obligations of the monitor pursuant to this Interim Order, the Director may request that the company for which such monitor is acting appoint a new monitor, subject to the Director's approval. If a new monitor has not been appointed within twenty business days, the Director may apply to the Tribunal for such appointment.

25. All remuneration and expenses of each of the monitors shall be paid by Seaspan, Norsk and Cates respectively.

26. Nothing in this Interim Order shall be interpreted as preventing a monitor from carrying out the monitor's normal employment duties.

27. Each of the companies shall give its monitor unlimited access to:

- (a) the premises of its company and its Business;
- (b) any information relating to the operations and assets of the company and its Businesses; and
- (c) meetings of the management of the company;

as is required by the monitor to fulfil that monitor's obligations pursuant to the terms of this Interim Order. None of Seaspan, Cates or Norsk shall exert or attempt to exert any influence, direction or control over any of the monitors which has or could have the effect of adversely affecting the discharge of the monitor's duties under the terms of this Interim Order.

28. Each of Seaspan, Norsk and Cates shall direct its monitor to discharge its responsibilities on the following terms:

- (a) in the event that a monitor determines, in that monitor's reasonable opinion, that Seaspan, Norsk or Cates is in default of any of the terms of this Interim Order, the monitor shall notify the Director of such breach;

(b) the monitors shall not consult with any other member of Seaspan, Norsk or Cates, except as is necessary to ensure compliance with this Interim Order, and except as required to perform their regular duties as permitted by paragraph 26 hereof;

(c) the monitors shall not communicate Confidential Information about the respective company or the respective Business to any person, except to the extent required to carry out their monitoring obligations under this Interim Order or except as required to perform their regular duties as permitted by paragraph 26 hereof;

(d) the Director may request from the monitor from time to time, and forthwith upon such request the monitor shall provide to the Director, a written report relating to compliance with the terms of this Interim Order; and

(e) the monitor shall not be subject to personal liability for any breach by that monitor or by any of the companies of any of the terms of this Interim Order.

## **General**

29. For the purpose of determining or securing compliance with this Interim Order, subject to any legally recognized privilege, and upon written request with reasonable notice to Washington, K & K, Seaspan, Cates or Norsk, Washington, K & K, Seaspan, Cates or Norsk, as the case may be, shall permit any duly authorized representatives or representative of the Competition Bureau:

(a) access during office hours and in the presence of counsel to inspect and copy all books, ledgers, accounts, correspondence, memoranda, and other records and documents in the possession or under the control of Washington, K & K, Seaspan, Cates or Norsk, as the case may be, relating to compliance with this Interim Order; and

(b) upon five business days notice to Washington, K & K, Seaspan, Cates or Norsk, as the case may be, and without restraint or interference from it, to interview officers or

employees of Washington, K & K, Seaspan, Cates or Norsk, who may have counsel present, regarding any such matters.

30. Notices, reports or other communications required or permitted by this Interim Order shall be in writing and shall be given by personal delivery to the party to whom such notice is to be given or by registered mail or by facsimile to the address or facsimile number below:

For the Director of Investigation and Research:

Director of Investigation and Research  
Competition Bureau  
Industry Canada  
Place du Portage, Phase 1  
50 Victoria Street  
Hull, Quebec  
K1A 0C9  
Facsimile No.: (613) 953-6161

For Washington, K & K, Norsk and Cates:

George D. Burke  
Bull Houser & Tupper  
Barristers & Solicitors  
3000 Royal Centre  
P.O. Box 11130  
1055 West Georgia Street  
Vancouver, British Columbia  
V6E 3R3  
Facsimile No.: (604) 641-4949

For Seaspan:

Seaspan International Ltd.  
10 Pemberton Avenue  
North Vancouver, British Columbia  
V7P 2R1  
Facsimile No.: (604) 984-1615

with a copy to:

Calvin S. Goldman, Q.C.  
Davies, Ward & Beck

Barristers & Solicitors  
44th Floor  
1 First Canadian Place  
P.O. Box 63  
Toronto, Ontario  
M5X 1B1  
Facsimile No.: (416) 863-0871

31. Where the Director's consent is requested pursuant to this Interim Order, the Director shall provide his response to any such request within 14 days of the later of the day the request was received by the Director and the day any necessary supporting information was received. If the Director's consent is sought pursuant to this Interim Order and such consent is not granted, any of the respondents may apply to the Tribunal for directions.

32. Nothing in this Interim Order shall prevent the exchange of confidential information among counsel for the respondents solely in connection with their defence of the matters at issue in this Interim Order or the Application.

33. The terms of this Interim Order are in effect until the Tribunal orders otherwise.

DATED at Ottawa, this 19<sup>th</sup> day of April, 1996.

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

(s) Sandra J. Simpson  
Sandra J. Simpson



## APPENDIX A

NAME	COMPANY	AREA
Jim Zehentbauer	Batchelder	Finance
Bryan Douglass	Envirocon- consultant	Environmental Review
Terry Payne	Terry Payne & Associates	Risk Management
John Moran	Terry Payne & Associates	Risk Management and Safety
Houston Knox	Terry Payne & Associates	Risk Management
Bill Brodsky	MRL	Contracts and Operations
Brent Green	SRY	Accounting & Tax
Mike Haight	Washington Corporation	Accounting
Paul Gutierrez	Washington Corporation	Contracts
Mike Ragbourn	Washington Corporation	Data Processing
Jim Brouelette	Washington Corporation	Human Resources & Safety
Burt Foshag	Washington Corporation	Internal Systems
Walter Orze	Washington Corporation	Legal
Dorn Parkinson	Washington Corporation	Operations
Debbie Brown	Washington Corporation	Tax
Mike Jones	Washington Corporation	Tax