

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;

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

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

COMPETITION TRIBUNAL TRIBUNAL DE LA CONCURRENCE	
FILED	DEPOSE
MAR 1 1996	
REGISTRAR - REGISTRAIRE	
OTTAWA, ONT.	#2 (A)

Respondents

NOTICE OF APPLICATION FOR AN INTERIM ORDER

TAKE NOTICE that the Applicant, the Director of Investigation and Research (the "Director"), will make an application to the Competition Tribunal on Monday, March 25, 1996, at 10:00 a.m. or as soon thereafter as this Application may be heard at the Competition Tribunal hearing room in the Royal Bank Building at 90 Sparks Street, Ottawa, Ontario.

1. This Application is for

(a) An Interim Order pursuant to s. 104 of the *Competition Act* (the "Act"), as set out in Schedule A, requiring Dennis Washington ("Washington"), K&K Enterprises ("K&K"), Seaspan International Ltd. ("Seaspan"), C.H. Cates and Sons Ltd. ("Cates") and Norsk Pacific Steamship Company, Limited operating in Canada with or through its Canadian subsidiary Norsk Pacific Steamship Canada Ltd. (hereinafter collectively or individually referred to as "Norsk") to maintain the independent viability of Seaspan, Cates and Norsk and to hold separate the operations of Seaspan, Cates and Norsk;

(b) In the alternative, an Interim Order, as set out in Schedule B, prohibiting Washington and K&K from taking any further steps to acquire or acquiring any further shares, assets or other interests in Seaspan and requiring Washington, K&K, Seaspan, Cates and Norsk to hold separate the operations of Seaspan, Cates and Norsk; and

(c) Such further Interim Order as the Director may request and this Tribunal deem advisable.

2. The Grounds for the Application are:

(a) there are serious issues to be tried by the Tribunal, namely:

(i) whether the merger whereby Washington and K&K acquired a significant interest in Seaspan (the "Seaspan Merger") and propose to acquire control of Seaspan prevents or lessens or is likely to prevent or lessen competition substantially in ship berthing markets in the harbour of Burrard Inlet in the Port of Vancouver and in the harbour of Roberts Bank in the Port of Vancouver both in the Province of British Columbia within the meaning of section 92 of the Act;

(ii) whether the Seaspan Merger and proposal to acquire control of Seaspan prevents or lessens or is likely to prevent or lessen competition substantially in respect of the provision of barging services in and around the coastal waters of the Province of British Columbia within the meaning of section 92 of the Act; and

(iii) whether the merger whereby Washington acquired Norsk (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 within the meaning of section 92 of the Act;

(b) irreparable harm is likely to result if an Interim Order is not made, in that this Tribunal's ability to remedy the effects of the Seaspan Merger and the proposed acquisition of control over Seaspan and the Norsk Merger is substantially impaired both in respect of the ship berthing markets in the harbour of Burrard Inlet in the Port of Vancouver and in the harbour of Roberts Bank in the Port of Vancouver and in respect of the British Columbia barging market; and

(c) the balance of convenience favours the granting of an Interim Order, in that the public interest in maintaining and encouraging competition in

Canada outweighs the private interests of the Respondents, against whom this order is sought, in exercising its significant interest in, or acquiring control of, Seaspan.

3. The material facts are as stated in the Director's application for certain orders pursuant to section 92 of the Act in respect of the Seaspan Merger and the Norsk Merger, which has been filed concurrently with this Application.

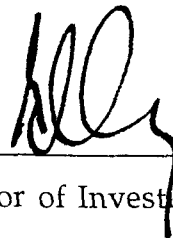
AND TAKE NOTICE that the following materials will be relied upon in support of this Application.

(a) The Application by the Director of Investigation and Research for certain orders pursuant to section 92(1)(e) of the Act in respect of the Seaspan Merger and Norsk Merger; and

(b) The Affidavit of Richard Taylor, sworn March 1, 1996.

AND TAKE NOTICE THAT the Director wishes to use English at the hearing of this Application.

Dated at Hull, Quebec, this 1st day of March, 1996.



The Director of Investigation and Research

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
101 International Way
Missoula, Montana
U.S.A. 59807

AND TO: C.H. Cates and Sons Ltd.
115 Carrie Cates Court
North Vancouver, British Columbia
V7M 3J4

AND TO: Bull Housser & Tupper
Barristers & Solicitors
3000 Royal Centre
P.O. Box 11130
1055 West Georgia Street
Vancouver, British Columbia
V6E 3R3

George D. Burke

Counsel to Dennis Washington, K&K Enterprises
and C.H. Cates and Sons Ltd.

AND TO: Seaspam International Ltd.
10 Pemberton Avenue
North Vancouver, British Columbia
V7P 2R1

AND TO: Genstar Capital Corporation
Scotia Plaza
Suite 4900
40 King Street West
Toronto, Ontario
M5H 4A2

AND TO: Davies, Ward & Beck
Barristers & Solicitors
44th Floor
1 First Canadian Place
P.O. Box 63
Toronto, Ontario
M5X 1B1

Calvin S. Goldman

Counsel to Seaspun International Ltd.
and Genstar Capital Corporation

AND TO: TD Capital Group Ltd.
P.O. Box 1
Toronto-Dominion Centre
Toronto, Ontario
M5K 1A2

AND TO: Tory Tory DesLauriers & Binnington
Barristers & Solicitors
3000 Aetna Tower
Toronto-Dominion Centre
P.O. Box 270
Toronto, Ontario
M5K 1N2

Bradley P. Martin

Counsel to TD Capital Group Ltd.

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

AND TO: 314873 B.C. Ltd.
c/o Angroup Holdings Limited
Suite 3464, #4 Bentall Centre
P.O. Box 49353
Vancouver, British Columbia
V7X 1L4

AND TO: Russell & DuMoulin
Barristers & Solicitors
1500-1075 West Georgia Street
Vancouver, British Columbia
V6E 3G2

Barbara Vanderburgh

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

AND TO: Management Shareholders
c/o Seaspans 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: Norsk Pacific Steamship Company, Limited
Two Walnut Creek Center, Suite 355
200 Pringle Avenue
Walnut Creek, California
U.S.A. 94108

Attention: John Stenstrom

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

Attention: Gary Key

SCHEDULE "A"

File No.: CT-96/

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;

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,
SEASPAN INTERNATIONAL LTD.,
GENSTAR CAPITAL CORPORATION,
TD CAPITAL GROUP LTD.,
COAL ISLAND LTD.,
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MANAGEMENT SHAREHOLDERS,
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NORSK PACIFIC STEAMSHIP COMPANY, LIMITED,
and FLETCHER CHALLENGE LIMITED

Respondents

INTERIM ORDER

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

AND FURTHER TO the application of the Director of Investigation and Research for an interim order pursuant to section 104 of the Act (the "Interim Order Application");

AND ON READING the notice of application for an interim order pursuant to section 104 of the Act (the "Interim Order Application"); and the affidavit of Richard Taylor, sworn on March 1, 1996;

AND ON HEARING the submissions of counsel for the parties:

THIS TRIBUNAL ORDERS THAT:

Definitions

1. For the purposes of this order the following definitions will apply:
 - (a) "Businesses" means the provision of ship berthing and barging services as carried out by Norsk, Seaspam and/or Cates, and "Business" means one of such businesses.
 - (b) "Cates" means C.H. Cates & Sons Limited, a company providing ship berthing services at Burrard Inlet, the location of the principal port facilities at the Port of Vancouver.
 - (c) "Confidential Information" means competitively sensitive or proprietary information or other information not independently known to

Washington, K&K, Cates, Norsk or Seaspan, and includes, but is not limited to, customer lists, price lists, marketing methods or other trade secrets.

(d) "Director" means the Director of Investigation and Research as appointed pursuant to s. 7 of the Act and includes members of the Director's staff.

(e) "K&K" means the K&K Enterprises partnership formed under the laws of the state of Montana in which the partners are the Kyle Washington Trust and the Kevin Washington Trust (collectively the "Trusts"). Washington is the settlor and principal creditor of the Trusts.

(f) "Norsk" means 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 the third largest tug and barge operations 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) "Seaspan" means 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.

(h) "Washington" means Dennis Washington of Missoula, Montana who is the ultimate owner of Cates and Norsk. Washington, through K&K, also currently owns a 30% voting interest in Seaspan, as well as various other rights and interests in Seaspan.

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, or the Businesses from that which existed as of the date of the Application, without the consent of the Director.

Management

3. Seaspan shall not alter, or cause or permit to be altered, the Boards of Directors, officers or managers of Seaspan except:

(a) to replace Directors, Officers and Managers who have voluntarily resigned, died or become disabled, or whose office or employment has been terminated for cause; or

(b) as necessary to comply with the terms of this Interim Order.

provided, however, that no replacement director, officer or manager will be appointed or elected without the consent of the Director.

4. No director, officer, employee, or agent of Washington, K&K, Seaspan, Cates or Norsk may hold one or more positions of director, officer, employee or agent of more than one of Washington, K&K, Seaspan, Cates or Norsk except with the consent of the Director.

5. Meetings of the Board during the term of this Agreement shall be accurately and fully recorded and the transcripts retained for two (2) years after the termination of this Agreement.

Maintain Independent Viability of Businesses

6. Washington and K&K shall not cause Seaspn, Cates or Norsk to, and Seaspn, 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 have the effect of materially inhibiting or unreasonably delaying the divestiture of any of the Businesses, or in any way materially reduce the value of the Businesses or the value of the assets of the Businesses without the consent of the Director.

7. Seaspn, Norsk and Cates shall, to the extent permitted by this Interim Order:
- (a) carry on business in accordance with the generally prevailing industry standards;
 - (b) use best efforts to preserve and enhance the goodwill of the Businesses;
 - (c) use best efforts to maintain each of the Businesses at at least the same level of competition as existed prior to the date of the Application;
 - (d) maintain facilities and other assets in good repair in accordance with best industry practice;
 - (e) use best efforts to enhance the competitiveness of each of the Businesses without regard to K&K or Washington's interests or potential interests in Seaspn; and

(f) not otherwise knowingly take any action that adversely affects the competitiveness, assets, operations or financial status of any of the Businesses.

8. Washington and/or K&K, and each of 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 or viability of the assets of Seaspan, Cates or Norsk respectively without the consent of the Director.

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

- (a) divest any assets of any of the Businesses to any person;
- (b) reduce any aspect of the Businesses' level of service to any customers for ship berthing or barging services;
- (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 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) except as necessary to comply with the terms of this Interim Order, 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 for cause;
 - (g) remove from service any of the operating assets of Seaspan, Cates or Norsk in the relevant markets 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; or
 - (i) enter into any agreement to lease or lease any assets or real property occupied by the Businesses, to any other person.
10. Each of Seaspan, Cates and Norsk shall take such action as is necessary to maintain the viability and marketability of its assets and shall not cause or permit the destruction, removal or impairment of any of its assets except in the ordinary course of business and except for ordinary wear and tear.
11. If necessary, Washington and K&K shall provide Cates and/or Norsk with sufficient working capital to maintain the Businesses of Cates and Norsk at current levels of operation.

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 will be held separate and apart and maintained as separate and independent, economically viable and 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 Seaspan, Norsk nor Cates shall divulge any Confidential Information relating to their Businesses to each other or to any other person except as necessary to comply with the terms of this Interim Order and except for Confidential Information required to prepare standard financial reports or as set out below.

14. Except as required by law, Washington and/or K&K shall not receive or have access to, or the use of, any of Seaspan's Confidential Information not in the public domain, except as necessary to comply with the terms of this Interim Order, and except for Confidential Information required to prepare standard financial reports.

15. Washington and/or K&K shall not report, convey or otherwise transmit Confidential Information from Cates or Norsk to Seaspan.

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

Monitors

17. 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.

18. 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 Tribunal, on application of the Director, shall appoint such monitor on behalf of Seaspan, Cates or Norsk as the case may be.

19. 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 (15) business days. Should a new monitor not be so appointed, the Tribunal, on application of the Director, shall appoint a new monitor on behalf of the company.

20. 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 (20) business days, the Director may apply to the Tribunal for such appointment.

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

22. The monitors shall be permitted to perform their regular duties in addition to their duties as monitor to the extent permitted by this Interim Order.

23. 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;
- (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. Neither Seaspan, Cates nor 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.

24. 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;
- (c) the monitors shall not communicate confidential information about the company or the Business to any person, except to the extent required by the terms of this Interim Order;

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

(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

25. 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 Bureau of Competition Policy:

(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, Seaspan, Cates or Norsk, as the case may be, relating to compliance with this Interim Order.

(b) Upon five (5) 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.

26. 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
Bureau of Competition Policy
Industry Canada
Place du Portage, Phase 1
50 Victoria Street
Hull PQ K1A 0C9

Facsimile No.: 953-6169

27. In the event that the Director's approval is sought pursuant to this Interim Order and such approval is not granted, or if a decision of the Director is unreasonably delayed or withheld, the Respondents may apply to the Tribunal for directions.

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

DATED at _____, this _____ day of _____, 1996.

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

SCHEDULE "B"

File No.: CT-96/

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;

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Applicant

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Respondents

INTERIM ORDER

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AND FURTHER TO the application of the Director of Investigation and Research for an interim order pursuant to section 104 of the Act (the "Interim Order Application");

AND ON READING the notice of application for an interim order pursuant to section 104 of the Act; and the affidavit of Richard Taylor, sworn on March 1, 1996;

AND ON HEARING the submissions of counsel for the parties:

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 - (c) "Confidential Information" means competitively sensitive or proprietary information or other information not independently known to

Washington, K&K, Cates, Norsk or Seaspan, and includes, but is not limited to, customer lists, price lists, marketing methods or other trade secrets.

(d) "Director" means the Director of Investigation and Research as appointed pursuant to s. 7 of the Act and includes members of the Director's staff.

(e) "Genstar" means Genstar Capital Corporation, a holding company which is currently the majority shareholder in Seaspan.

(f) "Joint Investment Agreement" means the agreement entered into on October 13, 1994 between Washington and Genstar with respect to the pursuit by either party of investment opportunities.

(g) "K&K" means the K&K Enterprises partnership formed under the laws of the state of Montana in which the partners are the Kyle Washington Trust and the Kevin Washington Trust (collectively the "Trusts"). Washington is the settlor and principal creditor of the Trusts.

(h) "Norsk" means 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 the third largest tug and barge operations 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.

(i) "Seaspan" means 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.

(j) "Shareholder Agreement" means the Agreement entered into on October 13, 1994 by the shareholders of Seaspan.

(k) "Washington" means Dennis Washington of Missoula, Montana who is the ultimate owner of Cates and of Norsk. Washington, through K&K, also currently owns a 30% voting interest in Seaspan, as well as various other rights and interests in Seaspan.

No Acquisition of Control over, or Increased Interest in, Seaspan

2. Washington and K&K are hereby prohibited from taking any further steps to acquire any further shares, assets or other interests in Seaspan.

3. Washington and K&K are prohibited from exercising any rights set out in the Shareholder Agreement which may in any way influence the management or operation of Seaspan.

4. Washington and K&K are prohibited from entering into any agreements or arrangements with any other shareholders in Seaspan or otherwise altering any relationship between Seaspan and any of its shareholders.

5. Washington and Genstar are prohibited from exercising their rights under the Joint Investment Agreement

6. 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, or the Businesses from that which existed as of the date of the Application, without the consent of the Director.

Maintain Independent Viability of Businesses

7. Washington and K&K shall not cause Seaspan, Cates or Norsk to, and Seaspan, Cates and Norsk will 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 have the effect of materially inhibiting or unreasonably delaying the divestiture of any of the Businesses, or in any way may materially reduce the value of the Businesses or the value of the assets of the Businesses without the consent of the Director.

8. Seaspan, Cates and Norsk shall, to the extent permitted by this Interim Order:

(a) carry on business in accordance with the generally prevailing industry standards;

(b) use best efforts to preserve and enhance the goodwill of the Businesses;

(c) use best efforts to maintain each of the Businesses at at least the same level of competition as existed prior to the date of the Application;

(d) maintain facilities and other assets in good repair in accordance with best industry practice;

(e) use best efforts to enhance the competitiveness of each of the Businesses without regard to K&K or Washington's interests or potential interests in Seaspan; and

(f) not otherwise knowingly take any action that adversely affects the competitiveness, assets, operations or financial status of any of the Businesses.

9. Washington and/or K&K, and each of 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 or viability of the assets of Seaspan, Cates or Norsk respectively without the consent of the Director.

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

- (a) divest any assets of any of the Businesses to any person;
- (b) reduce any aspect of the Businesses' level of service to any customers for ship berthing or barging services;
- (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 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) except as necessary to comply with the terms of this Interim Order, 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 for cause;

(g) remove from service any of the operating assets of Seaspan, Cates or Norsk in the relevant markets 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; 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 its assets and shall not cause or permit the destruction, removal or impairment of any of its assets except in the ordinary course of business and except for ordinary wear and tear.

12. If necessary, Washington and K&K shall provide Cates and/or Norsk with sufficient working capital to maintain the Businesses of Cates and Norsk at current levels of operation.

Maintain Separate Businesses

13. Washington and K&K, and each of Seaspan, Cates and Norsk, shall take all steps necessary to ensure that Seaspan, Cates and Norsk respectively will be held separate and apart and maintained as separate and independent, economically viable and 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.

14. Neither Seaspan, Norsk nor Cates will divulge any Confidential Information relating to their Businesses to each other or to any other person except as necessary to comply with the terms of this Interim Order and except for Confidential Information required to prepare standard financial reports or as set out below.

15. Except as required by law, Washington and/or K&K shall not receive or have access to, or the use of, any of Seaspan's Confidential Information not in the public domain, except as necessary to comply with the terms of this Interim Order, and except for Confidential Information required to prepare standard financial reports.

16. Washington and/or K&K shall not report, convey or otherwise transmit Confidential Information from Cates or Norsk to Seaspan.

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

General

18. In the event that the Director's approval is sought pursuant to this Interim Order and such approval is not granted, or if a decision of the Director is unreasonably delayed or withheld, the Respondents may apply to the Tribunal for directions.

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

DATED at _____, this _____ day of _____, 1996.

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

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;

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

- 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

COMPTON TRIBUNAL TRIBUNAL DE CONCURRENCE	
FILED	MAR 1 1996 <i>Se</i>
REGISTRAR - REGISTRAIRE	
OTTAWA, ONT.	#2(B)

Respondents

AFFIDAVIT OF RICHARD TAYLOR

I, Richard Taylor, of the City of Nepean, in the Province of Ontario, MAKE OATH AND SAY AS FOLLOWS:

1. I am on the staff of the Director of Investigation and Research (the "Director") as described in the *Competition Act* (the "Act") and am an authorized representative of the Director for purposes of this application. In such capacity I have knowledge of the matters in respect of the Application for an Interim Order referred to in this Affidavit, which I believe to be true.

2. This Affidavit is filed in support of the Director's application for an interim order pursuant to section 104 of the Act (the "Application for an Interim Order"). The Director has filed concurrently with the Application for an Interim Order, an application for certain orders pursuant to s. 92 of the Act ("the Application") in respect of:

(a) the merger whereby Dennis Washington ("Washington") and K&K Enterprises ("K&K") acquired a significant interest in, and propose to acquire control of, Seaspan International Limited ("Seaspan"); and

(b) the merger whereby Washington acquired Norsk Pacific Steamship Company, Limited ("Norsk").

3. A copy of the Notice of Application which was filed by the Director pursuant to s. 92 of the Act is attached to this affidavit as Exhibit "A". The Statement of Grounds and Material Facts which is attached to the Application sets out the material facts for the within Application for an Interim Order.

4. In the Application the Director has taken the following position:

(a) The merger whereby the Respondents Washington and K&K acquired a significant interest in (the "Seaspan Merger"), and propose to acquire control of, Seaspan 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 and at the harbour of Roberts Bank in the Port of Vancouver in the Province of British Columbia.

(b) The Seaspan Merger and the proposal to acquire control of Seaspan 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.

(c) The merger whereby the Respondents Washington and Norsk Holdings Ltd. acquired control of Norsk (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.

5. The Director's position is:

(a) that the Seaspan Merger and the proposal to acquire control of Seaspan 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 and is about to acquire control of the other ship berthing company operating in Burrard Inlet, and operating or likely to operate at Roberts Bank;

(b) that the Seaspan Merger and the proposal to acquire control of Seaspan also 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 markets; and

(c) 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 (Seaspan) in the same market.

6. The principal parties involved in the Seaspan Merger and in the Norsk Merger are:

(a) C.H. Cates & Sons Limited ("Cates"), a company providing ship berthing services at Burrard Inlet, the location of the principal port facilities at the Port of Vancouver.

(b) Coal Island Ltd. ("Coal Island"), a company existing under the laws of British Columbia and is the largest preference shareholder in Seaspan. Coal Island is the only preference shareholder with voting rights in Seaspan.

(c) Genstar Capital Corporation ("GCC"), a holding company which has investments in various businesses. GCC is the largest shareholder in Seaspan and holds a voting interest in Seaspan as set out below.

(d) K&K, a partnership formed under the laws of the state of Montana in which the partners are the Kyle Washington Trust and the Kevin Washington Trust (collectively the "Trusts"). Kyle Washington and Kevin

Washington are the sons of Washington. Washington is the settlor and principal creditor of the Trusts.

(e) "Management Shareholders", the shareholders set out in Exhibit "B" to this affidavit who hold no greater than 9% of the voting interests in Seaspan.

(f) Norsk, a company which is engaged in the 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. 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) "Preference Shareholders", the shareholders set out in Exhibit "C" to this affidavit who do not hold, with the exception of Coal Island, voting interests in Seaspan.

(h) Seaspan, 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.

(i) TD Capital Group ("TD Capital"), a venture capital corporation and a wholly owned subsidiary of the Toronto-Dominion Bank, a Canadian chartered bank. TD Capital is a shareholder in Seaspan and holds a voting interest as set out below.

(j) 314873 B.C. Ltd. ("314873"), a company existing under the laws of British Columbia and the second largest preference shareholder in Seaspan.

(k) Washington of Missoula, Montana, the owner of the shares of 534544 Alberta Ltd. which owns the shares of Cates. Washington is also the owner of Norsk and has a significant interest in Seaspan.

7. On October 13, 1994, a group comprised of GCC, TD Capital and K&K, along with Coal Island and Seaspan Management, acquired the shares of Seaspan such that, following closing of this transaction (the "Seaspan Merger"), the voting interests in Seaspan were as follows: GCC 38.6%; K&K 30%; TD Capital 12.3%; Coal Island 10.1%; and Management Shareholders 9.0%. The various proposals, discussions and negotiations with respect to K&K's investment were conducted by Washington and his associates.

8. Even at the time of the Seaspan Merger in October, 1994, Washington, acknowledging that some measures might be required to address issues relevant to the Merger Enforcement Guidelines in relation to the Seaspan Merger, proposed to nominate to the Board of Seaspan a person or persons who would be independent of Washington. Any such director would be instructed:

(a) not to participate in any discussions, motions or resolutions of the Board concerning the ship berthing business of Seaspan;

(b) not to disclose any confidential information concerning the business of Seaspan of a confidential nature; and

(c) to be fully informed of, and act in accordance with, his or her legal duties as a Director.

9. Washington also offered at that time to enter into a voting trust arrangement which would preclude Washington from voting its shares on any special resolution of Seaspan except in certain specified circumstances.

10. Finally, Washington offered to provide prior notice to the Director of any exercise of rights or any proposed amendments to the merger agreements which would or could result in a substantive change in the relationship between Washington and the parties to those agreements.

11. The Director's investigation continued from September 1994 through to the filing of the Application.

12. On January 9, 1996, Washington advised the Director that he now intends to increase his 30% interest in Seaspan to complete control (100% interest). The closing of this further transaction can occur following receipt of Investment Canada approval of the transaction, which could take place in March 1996.

SHIP BERTHING AT BURRARD INLET AND ROBERTS BANK IN THE PORT OF VANCOUVER

13. The ship berthing business involves the use of tugs to tow and push ships between areas of water in which they can safely utilize their own steering and power to those confined port facilities where the berthing or unberthing of a ship under its own power and steering is either not feasible or is unsafe.

14. 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 cargo ships entering the coastal waters of British Columbia 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. As a general rule, pilots require that the berthing and unberthing of cargo ships at any port facility in British Columbia be undertaken with the assistance of one or more tugs.

15. For many years Cates was the only ship berthing firm operating in Burrard Inlet. On September 15, 1993, Seaspan entered into competition with Cates at Burrard Inlet by commencing ship berthing operations at that location.

16. The entry of Seaspan into the Burrard Inlet market resulted for the first time in vigorous competition for the business of ship berthing customers. As a result of this competition, price discounts of at least 5% below the rates prevailing prior to the entry of Seaspan were given to customers, and customer relations improved.

17. If Washington's plans, as announced on January 9, 1996, are implemented, Washington will have control over both ship berthing companies in Burrard Inlet and an effective monopoly in that market.

18. In addition to Seaspan's operations in the Burrard Inlet market, Seaspan is the sole tug boat operator at Roberts Bank. To date Cates has not entered that market despite plans, announced prior to the Seaspan Merger, to do so.

19. In view of the competition resulting from the new entry of Seaspan at Burrard Inlet and the potential competition that would likely arise in the event of Cates' entry at Roberts Bank, I do verily believe that, absent other new entrants into either of these markets, the Seaspan Merger is likely to lessen or prevent competition substantially in the Burrard Inlet and in the Roberts Bank ship berthing markets.

20. The provision of ship berthing services at Roberts Bank has recently been the subject of a bidding process. 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 at Roberts Bank. The aim of this coalition was to obtain competitive prices for ship

berthing services. This process would effectively designate one ship berthing company as the exclusive provider of ship berthing services at Roberts Bank. Seaspan has been tentatively awarded the lease on the Roberts Bank tugboat basin on a month-to-month basis. The Seaspan Merger effectively precludes the possibility of Cates and Seaspan submitting proposals on an independent basis with respect to the provision of ship berthing services at Roberts Bank. With the elimination of Cates as an independent bidder with respect to ship berthing at Roberts Bank, I believe that Seaspan will enjoy an unlimited control over this market.

21. I do verily believe that there are a number of barriers to entry into the Burrard Inlet and Roberts Bank ship berthing markets 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 include the significant capital requirements, sunk costs and other risks facing any potential entrant into the Burrard Inlet and Roberts Bank ship berthing markets.

BARGING IN THE COASTAL WATERS OF BRITISH COLUMBIA

22. The barging business involves the transportation of a range of commodities from one coastal location to another using non-self propelled uncrewed flat bottomed hulls of various sizes (known as "barges") which are towed by tug boats. Users of barging services are principally primary industry producers who need to transport their products between remote coastal locations and ports or other locations. The largest user of these services in British Columbia is the forest products industry.

23. The British Columbia barging market is characterized by a high level of concentration. The market has not experienced new entry in an economically viable manner in the last twenty years.

24. Most barging is done by independent operators who provide specialized barging services and are not affiliated with users of these services. Seaspan is the dominant provider of barging services, with operations in virtually every form of barging. Rivtow Marine Ltd. ("Rivtow") and Norsk are the second and third largest barging companies, respectively, but are considerably smaller than Seaspan.

25. The independent barging business is generally characterized by contracts between large primary producers and barging companies.

26. For one year prior to the Seaspan Merger Washington had intended and had taken various actions to enter the British Columbia barging market through the acquisition of Seaspan and/or Rivtow and/or Norsk or other small operators. I do verily believe that, had the Seaspan Merger not been completed, Washington would have acquired Norsk and/or Rivtow and/or other small operators and would have created more vigorous and effective competition to Seaspan in the British Columbia barging market.

27. I believe that it is unlikely that any Canadian or other firm currently engaged in the provision of barging services or other marine-related industries would enter or expand their presence in the British Columbia barging market given the capital requirements, expected sunk costs and other entry factors, 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.

28. Subsequent to the Seaspan Merger, Washington purchased Norsk (the "Norsk Merger"). As a result of the Norsk Merger, Seaspan has gained control over the third largest provider of barging services in British Columbia. I verily believe that any influence that Norsk had or would in the future have on Seaspan's ability

to exercise market power in the British Columbia barging market has now been removed.

29. I do verily believe that the Norsk Merger compounds the anti-competitive effect on competition in the British Columbia barging market which is attributed to the Seaspan merger. 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. For the reasons set out in paragraph 27 above, it is unlikely that any new entrants will enter the British Columbia barging market to counter the effect the removal of Norsk as a competitor will have on the market.

30. An interim order requiring Seaspan, Norsk and Cates to operate separately and on a competitive basis and/or prohibiting Washington from acquiring or exercising further control over Seaspan is necessary in this matter in order to preserve competition in the ship berthing and barging markets and to preserve the Tribunal's ability to order appropriate relief on final disposition by the Tribunal of the application pursuant to section 92 of the Act. An interim order is necessary to preserve the competitive vigour in the ship berthing and barging markets.

31. Absent an interim order, Washington will have the power to consolidate his holdings in Seaspan, Norsk, and Cates, as well as the potential to encumber, alienate or otherwise deal with the assets of each of the Businesses in such a manner as to blur the distinction between the corporate entities and render it extremely difficult, if not impossible, at a later date to "unscramble" the assets and the operations of the corporate competitors in order to restore competition in the ship berthing and barging markets.

32. Absent an interim order, it is highly unlikely Cates and Seaspan in the ship berthing market and Seaspan and Norsk in the barging market would operate independently of each other on strategic matters, new initiatives and service

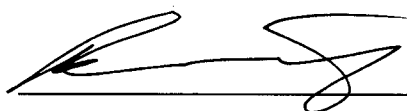
expansion outside the control and responsibility of local managers responsible for the day-to-day operations of the businesses of Seaspan, Cates or Norsk. Washington would be in a position to enjoy the financial and strategic benefits of a monopoly position in the ship berthing market as well as significant market power in the barging market in the coastal waters of British Columbia until such time as the Tribunal rendered its order in this case.

33. In particular, if Washington, K&K, Seaspan, Cates and Norsk are not required to operate independently and competitively or if Washington is able to acquire control of, or increase his influence in, Seaspan, it is highly unlikely that Cates and Seaspan in the ship berthing market and Seaspan and Norsk in the barging market would operate in an independent or competitive manner. The competitive bid process at Roberts Bank, and those similar processes that do or could exist in Burrard Inlet and in the B.C. barging market, would be nullified. This would leave, as result of the lack of independent activity in the ship-berthing and barging markets or as result of the acquisition of control over Seaspan by Washington, a monopoly provider in the ship berthing markets and a significantly weakened barging market given the control Washington will have over both Seaspan and Norsk.

34. I make this affidavit in support of the Director's application and to preserve the competitive status quo in the ship berthing and barging markets pending determination of this matter by the Tribunal.

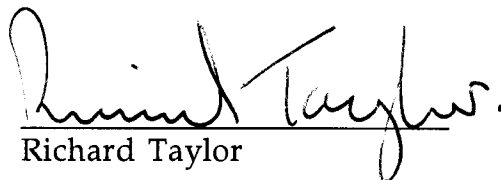
SWORN BEFORE ME at the City of)

Hull, in the Province of)
Quebec on March 1, 1996.)

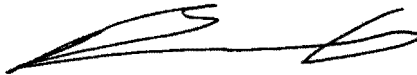


Commissioner for Taking
Affidavits, etc.

Avocat 175097-6


Richard Taylor

.....
*This is Exhibit "A" referred to in the affidavit
of Richard Taylor
sworn before me herein, this 1st
day of March, 1996*



A Commissioner, etc.

Avocat 175097-6

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, Seaspac 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,
SEASPACE 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

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 Seaspán Merger in such manner as the Tribunal may direct; or
- (3) 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
- (4) 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 Seaspán 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
101 International Way
Missoula, Montana
U.S.A. 59807

AND TO: C.H. Cates and Sons Ltd.
115 Carrie Cates Court
North Vancouver, British Columbia
V7M 3J4

AND TO: Norsk Pacific Steamship Company, Limited
Two Walnut Creek Center, Suite 355
200 Pringle Avenue
Walnut Creek, California
U.S.A. 94108

AND TO: Bull Housser & Tupper
Barristers & Solicitors
3000 Royal Centre
P.O. Box 11130
1055 West Georgia Street
Vancouver, British Columbia
V6E 3R3

George D. Burke

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

AND TO: Seaspan International Ltd.
10 Pemberton Avenue
North Vancouver, British Columbia
V7P 2R1

AND TO: Genstar Capital Corporation
Scotia Plaza
Suite 4900
40 King Street West
Toronto, Ontario
M5H 4A2

AND TO: Davies, Ward & Beck
Barristers & Solicitors
44th Floor
1 First Canadian Place
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M5X 1B1

Calvin S. Goldman

Counsel to Seaspan International Ltd. and Genstar Capital Corporation

AND TO: TD Capital Group Ltd.
P.O. Box 1
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Toronto, Ontario
M5K 1A2

AND TO: Tory Tory DesLauriers & Binnington
Barristers & Solicitors
3000 Aetna Tower
Toronto-Dominion Centre
P.O. Box 270
Toronto, Ontario
M5K 1N2

Bradley P. Martin

Counsel to TD Capital Group Ltd.

AND TO: Coal Island Ltd.
210 - 195 West 2nd Avenue
Vancouver, B.C.
V5Y 1B8

AND TO: 314873 B.C. Ltd.
c/o Angroup Holdings Limited
Suite 3464
#4 Bentall Centre
P.O. Box 49353
Vancouver, B.C.
V7X 1L4

AND TO: Russell & DuMoulin
Barristers & Solicitors
1500 - 1075 West Georgia Street
Vancouver, British Columbia
V6E 3G2

Barbara Vanderburgh

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

AND TO: Management Shareholders
c/o Seaspan 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 Seaspán 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 Seaspán and Norsk Mergers on competition in the B.C. barging market. Each of these concerns will be described separately. The effects of the Seaspán 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 Seaspán 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 Seaspán Merger on the Burrard Inlet and Roberts Bank ship berthing markets.

96. For over one year prior to the Seaspán 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 Seaspans Merger, were:

- (a) to acquire, in whole or in part, the dominant provider, Seaspans;
- (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 Seaspans Merger, Washington actively pursued each of the options. In particular, Washington attempted to acquire or merge with Seaspans 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 Seaspans, 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 Seaspans, would have created more vigorous and effective competition to Seaspans 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 Seaspán 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 Seaspán'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 Seaspán'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 Seaspán Merger, or had Fletcher Challenge sold Norsk to a party other than Washington or Seaspán, Norsk could have emerged as a more effective and vigorous competitor to Seaspán. 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 Seaspán.

(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 Seaspán Merger.

F. NATURE OF THE APPLICATION - EFFECT OF NORSK MERGER

127. Subsequent to the Seaspán 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 Seaspán 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 Seaspán 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 Seaspán 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) 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
- (4) 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.

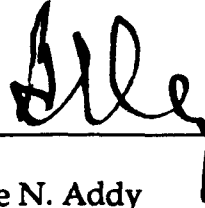
142. For purposes of this Application, service of all documents on the Director may be served on:

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 1st day of March, 1996.

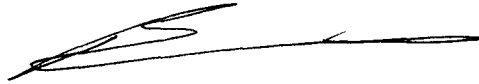
A handwritten signature in black ink, appearing to read 'G. Addy', is written over a horizontal line.

George N. Addy

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

.....

This is Exhibit "B" referred to in the affidavit
of Richard Taylor
sworn before me herein, this 1st
day of March, 1996

A handwritten signature in black ink, appearing to be a stylized 'B' or similar character, followed by a horizontal line.

A Commissioner, etc.

Avocat 175097-6

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

.....
This is Exhibit "C" referred to in the affidavit
of *Richard Taylor*
sworn before me herein, this *1st*
day of *March*, 1996


A Commissioner, etc.

175097-6

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

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;

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

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

COMPETITION TRIBUNAL TRIBUNAL DE LA CONCURRENCE	
FILED	MAR 1 1996 <i>pe</i>
REGISTRAR - REGISTRAIRE	
OTTAWA, ONT.	#2(c)

Respondents

MEMORANDUM OF ARGUMENT

INTRODUCTION

1. This is an application by the Director of Investigation and Research (the "Director") pursuant to s. 104 of the *Competition Act* (the "Act") for an Interim Order (the "Interim Order Application") pending the final determination of the application for certain orders pursuant to s. 92 of the Act (the "Application"). In the Application, the Director seeks orders in respect of the merger whereby Dennis Washington ("Washington") and K&K Enterprises ("K&K") acquired a significant interest in (the "Seaspan Merger"), and now propose to acquire control of, Seaspan International Ltd. ("Seaspan"), and in respect of the merger whereby Dennis Washington acquired Norsk Pacific Steamship Company, Limited (the "Norsk Merger").

2. In the Interim Order Application, the Director seeks an Interim Order requiring Washington, K&K, Seaspan, C.H. Cates and Sons Ltd. ("Cates") and Norsk Pacific Steamship Company, Limited, operating in Canada with or through its Canadian subsidiary Norsk Pacific Steamship Canada Ltd. (hereinafter collectively or individually referred to as "Norsk") to maintain the independent viability of Seaspan, Cates and Norsk and to hold separate the operations of Seaspan, Cates and Norsk.

3. In the alternative, the Director is seeking an Interim Order prohibiting Washington and K&K from taking any further steps to acquire or acquiring any further shares, assets or other interests in Seaspan and requiring Washington, K&K, Seaspan, Cates and Norsk to hold separate the operations of Seaspan, Cates and Norsk.

4. Where the Director has made an application under Part VIII of the Act, the Competition Tribunal (the "Tribunal") is empowered to issue such Interim Order as it considers appropriate, having regard to the principles ordinarily considered by

superior courts when granting interlocutory or injunctive relief. The Director has made an application pursuant to s. 92 of Part VIII of the Act in respect of the Seaspan Merger and in respect of the Norsk Merger.

Competition Act, s. 104

5. The Supreme Court of Canada has recently restated the principles to be considered by courts when granting interlocutory or injunctive relief. In such cases, there is a three-part test to be applied in determining whether the relief should be granted. Prior to granting interlocutory relief a court, and the Tribunal under s. 104 of the Act, should be satisfied that:

- (a) there is a serious issue to be determined;
- (b) in the absence of an Interim Order, irreparable harm is likely to result; and
- (c) the balance of convenience favours issuing the interlocutory relief.

RJR-Macdonald Inc. v. Canada (Attorney General) (1994), 111 D.L.R. (4th) 385 (SCC) (hereafter "*RJR-Macdonald*")

Metropolitan Stores (MTS) Ltd. v. Manitoba Food & Commercial Workers, Local 832 (1987), 38 D.L.R. (4th) 321 (hereafter "*Metropolitan Stores*")

American Cyanamid Co. v. Ethicon Ltd., [1975] A.C. 396 (hereafter "*American Cyanamid*")

6. This three-part test has been applied by the Competition Tribunal in determining an application for an interim order under s. 104 of the Act.

Canada (Director of Investigation and Research) v. Southam Inc. (1991), 36 C.P.R. (3d) 22 (Comp. Trib.) (hereafter "*Southam*")

A. The Applicant has Raised Serious Issues

7. In assessing whether an applicant for injunctive relief has raised serious issues in the proceeding in respect of which relief is sought, the threshold to be met is a low one. The Tribunal must assess whether there is a "serious question to be tried as opposed to a frivolous and vexatious claim."

RJR-Macdonald, at page 402

8. The Director has conducted a thorough review of the Seaspán Merger and the Norsk Merger and their effect on relevant product and geographic markets; namely (i) the provision of ship berthing services at the harbour of Burrard Inlet in the Port of Vancouver in the Province of British Columbia; (ii) the provision of ship berthing services at the harbour of Roberts Bank in the Port of Vancouver in the Province of British Columbia; and (iii) the provision of barging services in and around the coastal waters of the Province of British Columbia.

Notice of Application for an Interim Order,
pages 2-3;

Affidavit of Richard Taylor, page 3

9. The issues raised by the Director in the Application following his review of the Seaspán Merger and the Norsk Merger are neither frivolous nor vexatious. The issues raised in the Application are the following:

- (i) whether the Seaspán Merger and the proposal to acquire control of Seaspán prevents or lessens or is likely to prevent or lessen competition substantially in the provision of ship berthing services in the harbour of Burrard Inlet in the Port of Vancouver and in the harbour of Roberts Bank in the Port of Vancouver both in the Province of British Columbia;

(ii) whether the Seaspán Merger and the proposal to acquire control of Seaspán 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; and

(iii) whether 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.

Application, Statement of Grounds and
Material Facts, pages 7-8

10. It is submitted that, as a result of the information obtained by the Director and his staff during the course of the review of the Seaspán Merger and the Norsk Merger, the Director has concluded that the Seaspán Merger and the Norsk Merger prevent or lessen or are likely to prevent or lessen competition substantially in the ship berthing and barging markets as set out above. It is therefore submitted that there is a serious issue to be determined in the Director's Application.

B. If the Interim Order is not Granted Irreparable Harm will Result

11. In assessing whether irreparable harm has been established, the Tribunal has confirmed that protecting divestiture as a valid remedial option is a strong impetus for interim relief in merger cases:

The futility of attempting to "unscramble the eggs" upon a later finding that the merger will indeed likely lessen competition substantially is apparent. The legislative scheme attempts to guard against this eventuality by, for example, instituting a regime for pre-notification of some mergers and allowing the Director to apply for interim relief under ss. 100 and 104.

Southam, supra, at page 26

12. Orders of the Competition Tribunal must always aim at the elimination of the harm identified by the statute. It is respectfully submitted that if an Interim Order is not granted by the Tribunal, it is highly unlikely that Seaspan, Norsk and Cates would be operated independently or on a competitive basis and the effectiveness of any ultimate remedy issued by the Tribunal will be significantly decreased.

Affidavit of Richard Taylor, pages 11-12;

Canada (Director of Investigation and Research) v. Southam Inc., Unreported, Federal Court of Appeal, August 8, 1995 (Remedy Decision), at page 9.

13. An applicant is required to demonstrate only that the irreparable harm anticipated is reasonably based.

Southam Inc. v. Canada (Attorney-General) (1991), 42 F.T.R. 53

14. In assessing irreparable harm where a public authority is the applicant, the issue of public interest is to be considered not only as a factor in the balance of convenience, but also as an aspect of irreparable harm to the interests of the authority.

RJR Macdonald, supra, at page 405

Attorney General of Canada v. Fishing Vessel Owner's Association of B.C., [1985] 1 F.C. 791

15. Where a public authority is involved a court should presume that if the public authority is prevented from carrying out its duties under the statutory powers, it will suffer irreparable harm.

Esquimaux Anglers Association v. Canada (Ministry of Fisheries and Oceans) (1988), 21 F.T.R. 304

16. The Director's ability to effectively bring the Application to the Tribunal seeking orders remedying the effect of the Seaspan Merger, the proposed acquisition of control over Seaspan and the Norsk Merger will be materially affected if the businesses of Seaspan, Cates and Norsk are not operate independently and on a competitive basis. In such a case, the Director's ability to carry out his duties under the Act and to secure an effective remedy will be seriously jeopardized if, when the Tribunal considers an appropriate remedy following the hearing of the Application, relief is no longer available as assets have been mixed and competitive independence for each of Seaspan, Norsk and Cates can no longer be achieved.

17. The purpose of the Interim Order sought is to ensure Seaspan, Cates and Norsk are operated independently and on a competitive basis and, if necessary, to prevent Washington from taking further steps to acquire or acquiring control of Seaspan pending determination of the Director's Application. Washington has already acquired a significant interest in Seaspan and if an interim order is not granted, Washington will be in a position to enjoy the financial and strategic benefits of a monopoly position in the ship berthing market as well as significant market power in the barging market in the coastal waters of British Columbia (pages 11 and 12).

Affidavit of Richard Taylor

18. It is respectfully submitted that if this application is not allowed and an Interim Order is not granted, irreparable harm will result to the public interest, in that:

(a) Washington has announced his intention to acquire full control of Seaspan.

(b) If Washington is able to acquire full control over Seaspan, he will have obtained control over all the principal competitors in the relevant ship

berthing markets and control over the majority of principal competitors in the barging market. It would be difficult, if not impossible, to restore the relevant markets to the state that existed at the time of the Director's Application, particularly as it would be unlikely that Washington would hold separate the operations of the Seaspan and Cates in the ship berthing market and Seaspan and Norsk in the barging market.

(c) It is unlikely that in the time between filing the Application and the likely disposition of that application, any Canadian or other firm currently engaged in the provision of barging services or other marine-related industries would enter or expand their presence in the British Columbia barging market given the capital requirements, expected sunk costs and other entry factors, on a scale sufficient to substantially increase the level of competition in a manner similar to that which, absent the Seaspan Merger or the Norsk Merger, would have occurred as a result of Washington's entry as an independent entity.

(d) As a result of the Norsk Merger, any influence that Norsk had or would in the future have on Seaspan's ability to exercise market power in the British Columbia barging market has now been removed.

(e) Absent an Interim Order requiring Seaspan, Norsk and Cates to operate separately and on a competitive basis and/or an Interim Order prohibiting Washington from acquiring or exercising further control over Seaspan, Washington will have the power to consolidate his holdings in Seaspan, Norsk, and Cates, as well as the potential to encumber, alienate or otherwise deal with the assets of each of the businesses of Seaspan, Norsk and Cates in such a manner as to blur the distinction between the corporate entities and render it extremely difficult, if not impossible, at a later date, to "unscramble"

the assets and the operations of the corporate competitors in order to restore competition in the ship berthing and barging markets.

(f) If Washington is able to acquire full control over Seaspan, it is highly unlikely that Cates and Seaspan in the ship berthing market and Seaspan and Norsk in the barging market would operate independently or competitively. Any competitive bid processes, particularly the bidding process at Roberts Bank, would be nullified.

(g) Absent an interim order, it is highly unlikely Cates and Seaspan in the ship berthing market and Seaspan and Norsk in the barging market would operate independently of each other on strategic matters, new initiatives and service expansion outside the control and responsibility of local managers responsible for the day-to-day operations of the businesses of Seaspan, Norsk and Cates. Washington would be in a position to enjoy the financial and strategic benefits of a monopoly position in the ship berthing market as well as significant market power in the barging market in the coastal waters of British Columbia until such time as the Tribunal rendered its order in this case.

Affidavit of Richard Taylor, pages 10-12

C. The Balance of Convenience Favours Granting the Interim Order

19. An Interim Order granted by the Competition Tribunal must be adequate for its purpose but not any more intrusive or restrictive than is absolutely necessary.

Southam, supra, at page 26

20. The primary relief sought in the Interim Order Application is an Interim Order requiring Seaspan, Norsk and Cates to operate independently and on a competitive basis. If granted, this order will require Seaspan, Norsk and Cates to

operate in such a way as to maintain the independence, economic viability and competitive position of each of the businesses of Seaspac, Cates and Norsk. The alternative order sought in the Interim Order Application, the more intrusive injunctive relief prohibiting Washington and K&K from taking further steps to acquire or acquiring control of Seaspac, is sought only in the event the Tribunal does not grant the "hold-separate" order requested in the main relief in the Interim Order Application.

21. The balancing operation required to weigh the relative inconveniences to the parties is not an exact science as the relative degrees of harm and inconvenience are largely unquantifiable.

Southam, supra, at page 26

22. In assessing the balance of convenience, the availability of the ultimate remedy is a relevant consideration:

In the event that the tribunal eventually orders divestiture of some or all of the publishing businesses acquired by Southam Inc., there must still be something to be divested in order to remedy a substantial lessening in competition ... This is to be achieved only by ensuring that the three businesses, although owned directly or indirectly by Southam Inc., are kept and operated to the fullest extent possible, separate from each other and separate from Southam.

Southam, supra, at page 27.

23. It is submitted that, for the following reasons, the balance of convenience favours granting the Interim Order sought in this application:

- (a) Protection of the public interest in maintaining and encouraging competition in Canada;
- (b) Preservation of the status quo pending determination by the Tribunal;

(c) No prejudice to the Respondent;

(d) Delay will be minimized.

(a) **Protection of the Public Interest in Maintaining and Encouraging Competition in Canada**

24. The Director, as a statutory authority, has no separate interest other than the public interest in enforcing the Act.

Competition Act, s. 1.1

RJR-Macdonald, supra,

Southam, supra, at page 26

25. The purpose of the Act is to maintain and encourage competition in Canada. The Director is charged with the responsibility of carrying out the duties which have been entrusted to him under the Act.

Competition Act, s. 1.1, 7.

26. If, between the filing of the Application and the determination of the issues raised in the Application, the businesses of Seaspan, Cates and Norsk are not operated independently or on a competitive basis, or if Washington proceeds, as he has proposed, to acquire full control over Seaspan, the public interest in maintaining effective competition in the relevant markets will have been irreparably harmed. The loss of competitive vigour in the ship berthing and barging markets and the failure to take advantage of strategic initiatives or service expansion or Washington's control over the relevant markets operates to the detriment of the public interest in preserving and promoting competition.

27. If, at the end of the day, as result of the failure to pursue strategic initiatives or the scrambling of the assets, a dissolution or divestiture order would not remedy

the substantial lessening of competition arising from either the Seaspan Merger, the proposal to acquire control of Seaspan, or the Norsk Merger the public interest in a competitive ship berthing market and in a competitive barging market will have been irreparably harmed.

(b) Preservation of the Status Quo

28. The protection of the public interest in maintaining the competitive status quo in the relevant markets is greater than the private interest in the Respondents in confirming their control over the relevant markets.

29. The Director has sought an order of divestiture or dissolution in respect of the Seaspan merger and Washington's significant interest in Seaspan. The balance of convenience favours requiring the business and operations of Seaspan, Norsk and Cates to be operated competitively and on an independent basis or, in the alternative, favours maintaining the current holdings of Washington in the relevant markets so as to avoid further effects from the Seaspan merger in the relevant markets.

(c) No Prejudice to the Respondent

30. The Director's principal relief does not seek to prohibit Washington from holding or acquiring further shares in Seaspan. The Director simply seeks, in this application, an Interim Order maintaining the independent functioning of the businesses of Seaspan, Cates and Norsk or limiting Washington's ability to consolidate his control over the relevant markets until such time as the Tribunal is able to hear and determine the Application.

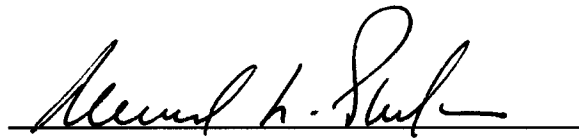
(d) **Delay will be Minimized**

31. As set out in s. 104(4) of the Act, the Director will proceed as expeditiously as possible to complete the proceedings commenced under Part VIII of the Act.

32. For all these reasons, it is respectfully submitted that it is appropriate that an Interim Order, as requested in the Notice of Application, should issue.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

Dated at Ottawa, this 1st day of March, 1996.

A handwritten signature in dark ink, appearing to read "Michael L. Phelan", is written over a horizontal line.

Michael L. Phelan

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