

**BEFORE THE CANADA INDUSTRIAL RELATIONS BOARD**  
**IN THE MATTER OF APPLICATIONS PURSUANT TO SECTIONS 35, 44 AND 94**  
**OF THE CANADA LABOUR CODE**

BETWEEN:

**CANADIAN MERCHANT SERVICE GUILD**

("APPLICANT")

AND:

**SEASPAN ULC**  
**SEASPAN FERRIES CORPORATION**

("RESPONDENTS")

**SINGLE EMPLOYER AND SUCCESSORSHIP APPLICATIONS**  
**UNFAIR LABOUR PRACTICE COMPLAINT**

**Applicant's contact information:**

Canadian Merchant Service Guild  
Western Branch  
310 – 218 Blue Mountain Street  
Coquitlam, BC V3K 4H2  
Email [zulema@cmsg.org](mailto:zulema@cmsg.org)  
Tel. 604-939-8990  
Fax 604-939-8950

**Attention:     Zulema Sanabria**  
**Secretary Treasurer**

Canadian Merchant Service Guild  
Western Branch  
310 – 218 Blue Mountain Street  
Coquitlam, BC V3K 4H2  
Email [jeff.s@cmsg.org](mailto:jeff.s@cmsg.org)  
Tel. 604-939-8990  
Fax 604-939-8950

**Attention:     Jeff Sanders**  
**Business Agent**

- and -

Caroline + Gislason Lawyers LLP  
15 Gore Avenue  
Vancouver, BC V6A 2Y8  
Email [gcaroline@carolinelaw.ca](mailto:gcaroline@carolinelaw.ca)  
Tel. 604-633-1880  
Fax 604-633-1883

**Attention:     Gary Caroline**

Caroline + Gislason Lawyers LLP  
15 Gore Avenue  
Vancouver, BC V6A 2Y8  
Email [jgislason@carolinelaw.ca](mailto:jgislason@carolinelaw.ca)  
Tel. 604-633-1880  
Fax 604-633-1883

**Attention:     Joanna Gislason**

**Respondents' contact information:**

Seaspan ULC  
10 Pemberton Avenue  
North Vancouver, BC V7P 2R1

Email [JWhitworth@Seaspan.com](mailto:JWhitworth@Seaspan.com)

Tel. 604-988-3111  
Fax 604-984-1613

**Attention: Jonathan Whitworth  
Chief Executive Officer**

- and -

Seaspan Ferries Corporation  
7700 Hopcott Road  
Delta, BC V4G 1B6

Email [JWhitworth@Seaspan.com](mailto:JWhitworth@Seaspan.com)

Tel. 604-940-7245  
Fax 604-940-7236

**Attention: Jonathan Whitworth  
President**

## **Introduction and Overview of Applications**

1. The Canadian Merchant Service Guild (the "Guild" or the "Union") represents the licensed ship officers of Seaspan ULC and Seaspan Ferries Corporation through two bargaining units and two collective agreements. The Guild's certifications for Seaspan ULC and Seaspan Ferries Corporation are found at Tabs 1 and 2 respectively.
2. In the summer of 2013, Seaspan ULC set out to rid itself of a group of employees it viewed as overly assertive of their collective bargaining rights. It did so through an ostensible "sale of assets" from Seaspan ULC to its wholly owned and controlled subsidiary Seaspan Ferries Corporation (also referred to as "SFC"). The Guild's collective agreement with SFC is in many respects less generous than the agreement with Seaspan ULC. In transferring two vessels without their bothersome crews, Seaspan has deliberately – and to date successfully – punished a group of longterm union members for their activism in the Union and has improperly eroded the Union's bargaining unit at Seaspan.
3. The assets transferred between Seaspan ULC and SFC (together the "Companies") were two vessels: the Seaspan Challenger (the "Challenger") and the Seaspan Greg (the "Greg"). The licensed officers regularly assigned to the Challenger and the Greg (together the "Vessels") fell into two categories: masters and mates (the "Deck Officers"), several of whom had recently pursued a grievance seeking compensation under their collective agreement for meal breaks they missed while fulfilling supervisory duties (the "Missed Meals Grievance"); and engineering officers (the "Engineers"), who did not have similar supervisory duties and thus did not participate in the Missed Meals Grievance. The Missed Meals Grievance was filed in March 2012 and heard by Arbitrator McConchie in February and April of 2013.
4. The Missed Meals Grievance – as petty as it may seem – so angered Seaspan ULC that it orchestrated the transfer of the Vessels to a wholly owned and controlled subsidiary as a means of achieving through corporate manoeuvring what it could not achieve at arbitration while punishing the Deck Officers for their efforts along the way. Seaspan denied the Deck Officers any opportunity to follow their Vessels to Seaspan Ferries Corporation. Deck Officers were offered a choice between (i) "realignment" to more junior, more physically demanding and less lucrative positions within the Seaspan ULC fleet or (ii) a buy-out package representing a few months' wages – this for a group of employees with an average of well over 20 years' service. At the same time, the Companies actively and concertedly courted the Engineers to follow the Vessels to Seaspan Ferries Corporation with the Companies' shared Director of Labour Relations even going so far as to assure the Engineers that they could transfer between the Companies with their seniority status intact – an assurance that was quickly retracted when the Guild insisted on equal treatment of both groups.
5. The relationship between Seaspan ULC and Seaspan Ferries Corporation over the past five years has been characterized by an integration of the Companies' management, operations and labour relations such that today any distinction that may exist between the Companies is not only superficial but deliberately and calculatedly artificial.

6. The Guild seeks a declaration that Seaspan ULC and Seaspan Ferries Corporation constitute a single employer within the meaning of s. 35 of the Canada Labour Code (the "Code"). In the alternative, the Guild submits that the transfer of the Vessels constitutes a sale of business within the meaning of s. 44 of the Code. In either case, the Guild further submits that Seaspan's conduct in transferring the Vessels constitutes an unfair labour practice under s. 94 of the Code.
7. The Guild requests an oral hearing of all three applications.

## **THE PARTIES**

### ***The Seaspan group of companies***

8. The Seaspan group of companies (the "Seaspan Group") is comprised of affiliated entities that hold themselves out to the public as a unified and complementary suite of marine services. On the website [www.seaspan.com](http://www.seaspan.com) whose copyright is held by Seaspan ULC, the Seaspan Group describes itself as follows (see **Tab 3**).

Seaspan is an association of Canadian companies primarily involved in coastal marine transportation, shipdocking/ship escort, ship repair and shipbuilding services in Western North America. In addition to the marine transportation services offered directly through Seaspan, commercial ferry, shipyard and bunkering services are provided via affiliate companies: Marine Petrobulk, Seaspan Ferries, Vancouver Drydock, Vancouver Shipyards and Victoria Shipyards.

The scope of Seaspan's services, the quality of its employees and over a century of successful participation in coastal commerce, make the company a major partner in the economy of the Pacific Northwest.

9. Seaspan ULC and Seaspan Ferries Corporation form the two prongs of the Seaspan Group's "Marine Transportation" division (see **Tab 3**).

### ***Seaspan ULC ("Seaspan")***

10. Seaspan ULC is a marine transportation company with a head office in North Vancouver, BC. Seaspan ULC's business primarily involves the transportation of goods for clients using its fleet of tugboats and barges. It often refers to this aspect of its operations as "Seaspan Marine".
11. Seaspan ULC is a federally regulated company whose regular operations extend as far north as Alaska and as far south as Mexico. For several decades, until the Vessels were sold in July 2013, Seaspan ULC was also involved in the intermodal transportation of rail cars and commercial trailers between mainland British Columbia and Vancouver Island. ("Intermodal transportation" generally refers to the movement of freight in containers using multiple modes of transportation such as ship, rail or truck.)

12. Seaspan International Ltd., the predecessor to Seaspan ULC, was created in or around 1970. In 2011, Seaspan International Ltd. changed its name to Seaspan Marine Corporation. In 2012, the name was changed again, this time to Seaspan ULC. Throughout these submissions, we will use "Seaspan" to refer to all three incarnations.

### ***Seaspan Ferries Corporation ("SFC")***

13. In 1998, Seaspan purchased the Coastal Marine Operations division of CP Rail and incorporated a subsidiary company, Seaspan Coastal Intermodal Company ("SCIC"), to operate its newly acquired CP Rail train ships, the Carrier Princess and the Princess Superior. In 2011, SCIC was rebranded as Seaspan Ferries Corporation ("SFC"). Throughout these submissions, we will use "SFC" to refer to both incarnations.
14. SFC is a wholly owned and controlled subsidiary of Seaspan with a main port on Tilbury Island in Delta, BC. SFC is involved in the intermodal transportation of goods between mainland BC and Vancouver Island. As such it is *prima facie* a provincial undertaking. However, for the reasons discussed below, the Guild submits that Seaspan and SFC are in fact so closely related and integrated as to constitute a single federal undertaking.
15. Before the events in question, SFC's fleet of vessels included the Carrier Princess and Princess Superior and four barges. It also chartered – and continues to charter – three tow boats from Sea-Link Marine Services ("Sea-Link") on a "trip-charter" basis meaning that Sea-Link provided both the vessels and their crews. SFC also chartered the Challenger and the Greg from its parent company Seaspan on a trip charter basis until July 13, 2013, at which time Seaspan decided to terminate the charter and have SFC buy the Vessels.

### ***The Guild***

16. The Guild is a trade union within the meaning of the *Canada Labour Code* (the "Code").
17. The Guild has a collective agreement with Seaspan (the "Seaspan Collective Agreement") under which Seaspan:  

...recognizes the Guild as the sole bargaining agent for all Masters, Mates and Engineers employed on vessels owned, operated or directly or indirectly controlled by the Company [i.e., Seaspan], provided that such vessels are operated within the coastal and inland waters of British Columbia or in waters bordering on the Yukon and Northwest Territories, or if operated on a national or international basis, that the port from which the vessel is dispatched is within those waters of British Columbia, Yukon and the Northwest Territories.
18. As of February 2014, the Seaspan Collective Agreement covers approximately 201 Guild members.

19. The Guild also has a collective agreement with SFC (the "SFC Collective Agreement") under which SFC:  
...recognizes the Guild as the sole collective bargaining agent for all Masters, Deck Officers, Engineer Officers employed [*sic*] on vessels owned and/or operated by the Company [*i.e.*, SFC].
20. As of February 2014, the SFC Collective Agreement covers approximately 43 Guild members.
21. Although the two collective agreements use slightly different language to describe the bargaining units, they in fact cover the exact same types of employees – *i.e.*, masters, mates and engineers – doing the exact same type of work.
22. Unlicensed personnel on the Vessels were represented by the International Longshore and Warehouse Union, Local 400 (the "ILWU").

***The affected employees and their bargaining unit***

23. Approximately 13 Deck Officers and Engineers (together the "Affected Employees") were regularly assigned to the Challenger and the Greg by Seaspan. The vast majority of the Affected Employees had over 20 years' service and at least 6 had over 30 years' service.
24. Among the Deck Officers were two masters who were actively involved with the Guild, namely Captains Milton Price and Victor McClelland. Both of these masters are members of the Guild's bargaining committee for the Seaspan Collective Agreement. One is a current and the other a former member of the Guild's executive committee. Both were well-apprised and outspokenly assertive of their bargained rights and indeed it was these two masters who spearheaded the Missed Meals Grievance.
25. Since the transfer of the Vessels on July 13, 2013, three of the Affected Employees have resigned in return for the payment of a sum of money. Several of the Affected Employees have participated in retraining and realignment within the Seaspan fleet, as a result of which they have been assigned to positions of lesser responsibility and remuneration. Others are incapable of assuming the more physically-demanding work offered by Seaspan. Still others are currently living off banked vacation time pending the outcome of these proceedings. None of the Affected Employees were transferred to or hired by SFC.

## BACKGROUND FACTS

### *The Missed Meals Grievance*

26. As mentioned, the Affected Employees were a particularly senior group of masters, mates and engineers. As an experienced group, the Affected Employees were well aware of their rights under the Seaspan Collective Agreement. In early 2012, this latter fact became a source of conflict between certain masters on the Challenger on the one hand, and Seaspan and SFC management on the other.
27. To fully understand this dispute, some background is necessary. A master is responsible for the safe operation of his vessel and this sometimes requires a master to supervise the loading and unloading of cargo. Commonly, the loading and unloading of the Challenger at the Nanaimo port would coincide with a master's scheduled meal break, meaning that the master would have to forgo his meal break in order to fulfill his supervisory duties. When this happened, the master was entitled to an overtime payment as compensation for the lost break.
28. Prior to 2010, the ordinary practice was for a master to submit an overtime sheet to Seaspan's North Vancouver office where it would be processed and paid out in due course. Beginning in or about 2009, a new procedure was instituted whereby masters' overtime sheets were first scrutinized by SFC management before being sent on to North Vancouver for processing. Initially, masters' overtime claims for missed meal breaks were routinely approved by both SFC and Seaspan. Beginning in January 2012, however, SFC management began rejecting the claims.
29. When Captain McClelland inquired with Michael Blake, then Marine Superintendent at SFC, as to why his overtime claims were being rejected, Michael Blake responded that the newly revised Seaspan Collective Agreement no longer contained language entitling the masters to overtime as compensation for missed meal breaks. It may seem odd that a SFC manager was interpreting and applying the Seaspan Collective Agreement but then Seaspan and SFC are hardly arms-length entities. As will become clear, this sort of managerial and labour-relations integration was in fact quite typical of the relationship between Seaspan and SFC in recent years.
30. In any event, certain masters on the Challenger disputed the SFC manager's interpretation of the Seaspan Collective Agreement and continued to submit overtime claims for missed meal breaks. These were consistently rejected by SFC management. As a result, the Guild filed the Missed Meals Grievance under the Seaspan Collective Agreement in March 2012 (**Tab 4**).

### *The Arbitration*

31. The first day of the Missed Meals Grievance arbitration was February 19, 2013. Present on the management side that day were Michael Blake, Marine Superintendent at SFC; James Earles, SFC's Port Captain at Tilbury; Gilbert Astorga, a labour relations specialist with Seaspan; and Seaspan's counsel.
32. Sometime in April 2013, between the first and second days of the Missed Meals Grievance arbitration, several masters, mates and unlicensed personnel on the Challenger were called in for a meeting at SFC's head office at Tilbury. Present at this meeting were Michael Blake, James Earles and Gilbert Astorga. During this meeting, Mr. Astorga repeatedly alleged that certain masters on the Challenger had authorized fraudulent overtime sheets submitted by crew members. No evidence was adduced in support of this spurious claim. Each attendee was then interviewed separately by all three management representatives. The unfounded allegations were roundly denied and no further action was taken.
33. The second day of arbitration was April 29, 2013. Messrs. Blake and Astorga were again present that day, as was Seaspan's counsel and Peter Pedersen, a manager at SFC. The main topic at arbitration was the operation of the Challenger as it related to SFC's business commitments including the scheduling of routes and other logistical issues. The goal of the discussions was to find a way of meeting these logistical demands without incurring missed meal breaks. By the close of the second day, no resolution had been achieved.
34. A third day of arbitration was scheduled for December 2013.

### *The Announcement*

35. On July 3, 2013, less than three months after the second day of arbitration, Robert Hedley, Senior Vice President of Seaspan, advised the Guild and the ILWU that Seaspan was terminating the charters of the Challenger and the Greg and transferring the vessels to SFC. Mr. Hedley's letter read, in part, as follows (see **Tab 5**).

... I wish to advise that following careful consideration, and as part of our ongoing efforts to align our structure, the decision has been made to discontinue the chartering of the Seaspan Greg and Seaspan Challenger to SFC. As such, the charter arrangements will expire effective July 13, 2013.

Effective that date, the Seaspan Challenger and the Seaspan Greg will be sold to SFC, who will assume all responsibilities for managing, operating, crewing, scheduling and dispatching those vessels, in addition to its existing vessels – the Carrier Princess and Princess Superior.

The Seaspan Challenger and the Seaspan Greg are primarily utilized for SFC's operations, and it is our belief that the day-to-day operation of the vessels, including crewing and scheduling, will be better managed as an integral part of SFC's fleet.

As you are aware, SFC is a separate business entity from Seaspan ULC, and employment with SFC is subject to its existing collective agreements. SFC advises us that the Seaspan Challenger will become an ATB vessel and be listed in Appendix A of the SFC/Guild collective



agreement. The Seaspans Greg will be operated on a periodic "as required" basis only, primarily to accommodate peak sailing requirements and/or volume backlogs.

We will be evaluating all opportunities for crew members currently working aboard the Seaspans Challenger and Seaspans Greg to transition into the Seaspans fleet. Every effort will be made by the Marine Personnel Department to take into account the individual circumstances of employees directly affected by this change.

[....]

#### *The attempted rehiring of the Engineers*

36. Following the July 3, 2013 announcement, Seaspans and SFC, through a shared human resources department, made concerted efforts to rehire the Challenger Engineers as SFC employees. Shortly after the transfer was announced, Phil Loewen, SFC's Superintendent of Maintenance and Engineering, personally contacted three of the Engineers who had been posted to the Challenger and a fourth Engineer who regularly did relief work on the Challenger. Mr. Loewen advised the four Engineers that SFC would soon be posting three engineer positions on the Challenger and encouraged all four to apply.
37. Within days of the July 3 announcement, SFC did indeed post an opening for three engineer positions (**Tab 6**). The posting was on SFC letterhead but invited applicants to send their resumes to Seaspans's North Vancouver office, which the four Engineers did. Interviews for the positions were held at SFC's Tilbury office. Present at the interviews were Phil Loewen; Samantha Adams, a human resources specialist based at Seaspans's North Vancouver office; and Peter Pedersen, Manager of Vessel Operations at SFC. Shortly after the interviews, the three engineers who had been posted to the Challenger were invited to work for SFC on the same vessel in an identical capacity doing identical work.
38. On July 10, 2013 Ian Lewis, Seaspans's Director of Labour Relations, wrote a letter to the Guild setting out what in effect was the combined position of Seaspans and SFC with respect to the seniority status of Seaspans engineers who might obtain employment with SFC (**Tab 7**). The letter read, in part, as follows.

This will confirm the Company's position regarding the seniority status of any successful Seaspans Guild applicants to vacant positions at Seaspans Ferry Corporation [*sic*] as a result of the acquisition of the Seaspans Challenger and Greg. As discussed, the position of Seaspans is that these changes be carried out in strict accordance with the Collective Agreements at both sites and based on the intentions of the parties at the last round of collective bargaining.

As such, in the event a Seaspans Engineer is the successful candidate for a vacant position at Seaspans Ferries Corporation, his/her Seaspans seniority will be recognized for the purposes of vacation and long service, and can be relied on when applying for a new position in the future at SFC. This was the clear intention and understanding of the Company and the Guild at the last round of collective bargaining.

[....]

39. This letter was copied to a number of vice presidents, senior managers and labour relations personnel at both Seaspan and SFC.

Mr. R. Hedley, SR VP of Marine Operations  
Mr. S. Roth, VP of Seaspan Ferry Corporation  
Mr. M. Houghton, VP of Vessel Operations  
Ms. L. Bumbaco, VP of Labour Relations & Human Resources  
Mr. S. Thompson, Manager of Marine Personnel  
Mr. B. Walker, Assistant Manager of Marine Personnel  
Mr. P. Loewen, Superintendent, Maintenance & Engineering, SFC  
Mr. G. Astorga, Marine Labour Relations Specialist

40. As mentioned, Seaspan promptly retracted this offer to the Engineers when the Guild insisted on equal treatment of the Deck Officers. Nonetheless, two key points are apparent from Ian Lewis's letter of July 10. The first is that Seaspan takes a holistic view of labour relations at both Seaspan and SFC. The second is that a central and directing mind that spanned both Seaspan and SFC made considerable efforts to court the Engineers who had worked on the Vessels during their charter.

*The differential treatment of the Deck Officers*

41. Significantly, neither Seaspan nor SFC made any efforts to recruit the Deck Officers. This fact is curious given that SFC lacked sufficient trained personnel to operate the Challenger and that nothing had changed in terms of the qualifications, skills or experience required to crew the vessel. On July 8, 2013, Peter Pedersen, SFC's Manager of Vessel Operations, wrote to SFC staff as follows (see **Tab 8**).

Good morning All,

Please find attached the Vessel Schedule for the week of July 14<sup>th</sup> to the 20<sup>th</sup>.

The Challenger will be doing one sailing only due to only 1 crew will be trained by then. The Fraser Link will be doing 1 sailing on Sunday and 2 sailings on Monday to Friday to pick up the slack.

[....]

42. Among the Deck Officers, SFC had a ready supply of able and experienced mates and masters who were eager to continue working on the Challenger and, when needed, the Greg. Nonetheless, Seaspan and SFC chose to run the Challenger on a reduced schedule while it trained a new and more junior crew. This was ostensibly because SFC already had sufficient staff to crew the Challenger. In an email of July 10, 2013, Steve Roth, Vice President of SFC, advised one of the Affected Employees that "[w]e do not foresee a crewing issue post sale of the vessel" (see **Tab 9**). In an email of the same day, Seaspan CEO Jonathan Whitworth responded to a similar inquiry with the following (see **Tab 10**).

[...] the fact is the vessels have been sold and we have SFC mariners who are ready to fill these positions. I'm not sure what else you want other than the fact that we have made the decision and we are moving on.

[....]

43. CEO Whitworth's email is revealing. He states that "we" have SFC mariners to fill the available positions. He does not say that SFC has mariners, despite Robert Hedley's assertion that "SFC is a separate business entity from Seaspan ULC". The use of the collective "we" again indicates a holistic approach to human resources and labour relations across both Seaspan and SFC. Mr. Whitworth uses the word "we" in the same sense in the following sentence, where he writes that "we have made the decision [to sell the vessels] and we are moving on".
44. The assertions of Messrs. Roth and Whitworth that SFC did not require any deck officers for the vessels is hard to accept, given that since June 2013 SFC has hired a total of eight new deck officers. The average age of the new hires is 42. Three are in their thirties, four are in their forties and one is 55. As a class, these officers are substantially younger and less experienced than the Affected Employees.

#### *Suspicions confirmed*

45. When the transfer of the Vessels was announced in 2013, many of the Affected Employees reasonably suspected that Seaspan, in terminating the charters and directing its subsidiary to purchase the Vessels without their crews, was motivated by a desire to (i) punish those Deck Officers who pursued the Missed Meals Grievance, (ii) rid Seaspan and SFC of a group of employees the Companies viewed as overly assertive of their rights or (iii) both.
46. These suspicions were confirmed only recently by comments made in January and February 2014 during bargaining for the Seaspan Collective Agreement. In the course of discussions about the displaced Deck Officers, Lisa Bumbaco, Seaspan's Vice President of Human Resources, stated that the officers had "won the battle but lost the war", the implication being that the Deck Officers had substantially succeeded in the Missed Meals Grievance and as a result they had lost their positions on the Vessels. At another point in these discussions, Ms. Bumbaco stated that the displaced Deck Officers had "worked their way out of a job", the suggestion being that the officers had lost their jobs because they had insisted on *working* through their scheduled meal breaks in order to fulfill their supervisory duties.

#### **SINGLE EMPLOYER APPLICATION**

47. The Guild seeks a declaration that Seaspan ULC and SFC are a single employer pursuant to section 35(1) of the Code.

48. Section 35 of the Code provides as follows:

35. (1) Where, on application by an affected trade union or employer, associated or related federal works, undertakings or businesses are, in the opinion of the Board, operated by two or more employers having common control or direction, the Board may, by order, declare that for all purposes of this Part the employers and the federal works, undertakings and businesses operated by them that are specified in the order are, respectively, a single employer and a single federal work, undertaking or business. Before making such a declaration, the Board must give the affected employers and trade unions the opportunity to make representations.

(2) The Board may, in making a declaration under subsection (1), determine whether the employees affected constitute one or more units appropriate for collective bargaining.

49. The current application could not be a clearer case of the sort of corporate mischief s. 35 seeks to guard against.
50. In *Pacific Coach Lines Ltd.*, 2012 CIRB 623, the Board explained the principled purpose behind s. 35 as follows (at para 88).

The primary purpose of s. 35 of the Code is to prevent an employer from using its corporate structure to avoid its collective bargaining responsibilities [...]. Essentially, this provision of the Code allows the Board to lift the corporate veil in order to determine whether rights granted under the Code are being defeated as a result of improper employer activities.

51. In other words, s. 35 is designed to hold corporate employers to their agreements, despite any efforts they may make to shirk their contractual obligations through restructuring.
52. In *J.R. Richard (1991) ltée (Re)*, [2001] CIRB No. 128 [*"J.R. Richard"*], the Board wrote as follows (at para 29).

The purpose of section 35 is to protect bargaining rights by defining true bargaining relationships. Thus, employers cannot circumvent their obligations by adopting corporate structures that conceal the true nature of their relationships with their employees.

53. The purpose of this application is, in part, to illuminate the "true nature" of the relationship that exists between Seaspan and SFC on the one hand and the Affected Employees and the Guild on the other. From a managerial, operational and labour-relations perspective, any distinction that may exist between Seaspan and SFC is artificial. This false "labour-relations" distinction between Seaspan and SFC cannot be permitted to undermine and erode the bargained rights of the Union. For this reason, a single-employer declaration is both legally justified and necessary.

### ***The test for a single-employer declaration***

54. The test for a single-employer declaration is well established. In *Murray Hill Limousine Service Ltd. et al* (1988), 74 di 127 (CLRB no. 699) the Canada Labour Relations Board set out five prerequisite criteria that must be established.

- i. There must be two or more enterprises;
- ii. under federal jurisdiction;
- iii. which are associated or related;
- iv. of which at least two are employers; and
- v. the enterprises must be operated by employers having common direction or control over them.

55. If these five criteria are established, the Board may make a single-employer declaration if it is satisfied that there is a labour relations purpose for doing so.

56. In 2004, the ILWU asked the Board to declare that Seaspan and SFC were a single employer based on the facts as they existed at the time: *Seaspan International Ltd. (Re)*, 2004 CIRB 267. The Board declined, disposing of the ILWU's application largely on the grounds that there was no labour relations purpose for making such a declaration. The Board in 2004 summarized its conclusion as follows (at para 32).

There has been no evidence presented that would convince the Board that the ILWU's bargaining or bargained rights are in any way being eroded, avoided or otherwise threatened by the relationship between Seaspan and the SCIC and the manner in which they each operate. Nor is the Board convinced on the evidence that such a declaration would otherwise promote harmonious labour relations in the circumstances.

57. Following the analytical framework adopted by the Board in 2004, these submissions will first address the existence of a labour relations purpose before specifically addressing the five prerequisite *Murray Hill* criteria.

### ***Labour relations purpose***

58. For the reasons described above, the Guild submits that Seaspan orchestrated the transfer of the Challenger and the Greg to SFC in order to rid itself of a group of union activists and to erode the bargaining unit in which they were members.

59. To date, Seaspan has been largely successful in this mischief. People are out of work or working in lesser positions and the bargaining unit is smaller and less powerful. The success of this mischief is attributable to a bifurcated corporate structure that Seaspan has utilized to evade its collectively bargained obligations and unilaterally restructure its workforce. Despite Seaspan's attempt to conceal its improper actions behind the veil of corporate restructuring, its collective bargaining obligations and duty to the Affected Employees remain. Because the "primary purpose of s. 35 of the Code is to

prevent an employer from using its corporate structure to avoid its collective bargaining responsibilities” (*J.R. Richard, supra*), there is in the present case a clear labour relations purpose for issuing a single-employer declaration.

***The criteria for a single-employer declaration***

60. It is self-evident that Seaspan and SFC constitute two enterprises, both of which are employers. The following submissions will therefore focus on the remaining three *Murray Hill* criteria, asking whether Seaspan and SFC are (i) under federal jurisdiction, (ii) associated or related, and (iii) subject to common direction and control. Due to the nature of the entities and facts at issue, these criteria will be addressed in reverse order. As the Board noted in *J.R. Richard, supra* (at para 41), in some cases – the present one included – the purposes of s. 35 can only be served by considering the relatedness of the enterprises before ruling on the jurisdictional question.

With respect to complaints of not having ruled on the federal or provincial nature of the companies prior to considering the relatedness of the operations, the Board is of the view that to isolate these criteria would be to allow the circumvention that section 35 is designed to prevent.

***Seaspan and SFC are subject to common control and direction***

61. SFC is a wholly owned and controlled subsidiary of Seaspan.
62. Each and every director and officer of SFC is either a director or officer of Seaspan (**Tabs 11 and 12**).
63. SFC has a total of two directors: Lawrence Simkins who is a director of Seaspan; and Jonathan Whitworth, the Chief Executive Officer of Seaspan.
64. SFC has a total of three officers: Nancy McKenzie, Steve Roth, and Jonathan Whitworth. Ms. McKenzie is the Chief Financial Officer and Secretary of SFC and is also the Chief Financial Officer and Secretary of Seaspan. Mr. Roth is vice president of SFC and is also a vice president of Seaspan. Mr. Whitworth is president of SFC and, as mentioned, is also Chief Executive Officer of Seaspan.
65. In short, SFC is wholly within the control of Seaspan directors and officers.
66. Further, several key members of SFC’s management team were previously employed by Seaspan. Before becoming Vice President of SFC in or about 2012, Steve Roth was Seaspan’s Vice President of Business Development. James Earles, SFC’s Port Captain at Tilbury, was a dispatcher at Seaspan before arriving at SFC in or about 2011. Phil Loewen, Superintendent of Maintenance and Engineering at SFC, worked for Seaspan in its North Vancouver maintenance shop before moving to SFC in or about 2010.

67. Moreover and as mentioned, the "Seaspan Group" holds itself out to the public as a unified and comprehensive group of marine-services companies of which SFC is a part. Seaspan maintains a single website – [www.seaspan.com](http://www.seaspan.com) – with different sections for its divisions and subsidiaries. Each page of the website, including each page devoted to SFC, reads at the bottom "Copyright © Seaspan ULC 2006-2014". On its website, Seaspan groups "Seaspan Ferries" and "Seaspan Marine" – i.e., the tug boat and barge transportation business operated by Seaspan ULC – together under the single heading "Marine Transportation" (see **Tab 3**). As this grouping suggests, Seaspan and SFC are complementary components of a unified business in the marine transportation industry.
68. This proposition is strongly supported by the content of the monthly "Marine KPI" reports (**Tab 13**). These internal reports, printed on "Seaspan Marine" letterhead, offer a direct, head-to-head comparison of Seaspan's and SFC's performance on three "key performance indicators": safety, efficiency, and "care for the environment". They include a "Seaspan Score", a "Seaspan Ferries Score" and a third "Combined Marine Score". In short, the KPI reports reinforce the conclusion that Seaspan and SFC are viewed by upper management as related and indeed complementary components of a single, overarching marine transportation enterprise.
69. This conclusion is further reinforced by the fact that in 2010, 2011 and 2012, Seaspan organized a single "Officers Conference" for masters, mates and engineers at both Seaspan and SFC. The bulletin for the 2010 conference (**Tab 14**) reads, in part, as follows:
- Seaspan is holding its first Officers Conference this fall for all Masters, Mates and Engineers sailing on both Seaspan and Seaspan Coastal Intermodal [SFC] vessels.
- The three day conference will engage sea going and shore side management in valuable and informative sessions covering current topics of interest, company strategy and goals, regulatory updates, and technical training. A Justice Institute facilitated training course will also be help in leadership, management and communication skills development. On the second evening, there will be a conference dinner with a keynote speaker providing a perspective on our industry from outside the company.
- [....]
- Two conference sessions are organized to ensure that all Officers are able to attend this mandatory event on one of the scheduled dates.
- [....]
70. Certain aspects of this bulletin are revealing. First, the conference is mandatory for all officers at both Seaspan and SFC. Second, the bulletin indicates that Seaspan and SFC hold themselves out to employees as a single entity. For example, the bulletin speaks of "company strategy and goals", making no distinction between the strategies and goals let alone the identities of Seaspan and SFC. Similarly, the bulletin speaks of "providing a perspective on **our** industry from outside **the** company" [emphasis added].

71. The Agendas for the 2010, 2011 and 2012 Officers Conferences (**Tab 14**) indicate a high degree of operational, managerial and organizational integration between Seaspan and SFC. In the 2010 Agenda, for instance, speakers addressing the combined officers of Seaspan and SFC included the following.
- Jonathan Whitworth, CEO of Seaspan and president of SFC;
  - Rick Plecas, then Vice President of SFC; and
  - Colin Eckford, Manager of Vessel Operations at Seaspan;
72. In 2010, Doug Towill, Vice President of Marketing at Seaspan, delivered a business review of Seaspan to the officers of both Seaspan and SFC. This was immediately followed by a business review of SFC by Rick Plecas, then Vice President of SFC. Several sessions were dedicated to topics of mutual concern including a "Business Development" session and a "Cost reduction workshop".
73. The 2011 and 2012 Officers Conference Agendas note a similar mix of speakers and topics. The first substantive session of the 2012 Officers Conference was titled "What is happening at Seaspan". This session was presented by four speakers, including Robert Hedley, Seaspan's Senior Vice President; Steve Roth, Vice President of SFC; and John Fowles, Seaspan's Vice President of Fleet Maintenance. Given the composition of the audience and the identities of the presenters, it is clear that "Seaspan" in this case was referring to both Seaspan and SFC.
74. At a Seaspan "Town Hall Meeting" on February 18, 2014, Jonathan Whitworth, CEO of Seaspan and President of SFC, made the following remarks.

We successfully moved the two vessels, the Greg and the Challenger, from Seaspan the Marine fleet to Seaspan the Ferries. 'Okay, you moved it from your right pocket to your left pocket.' Kind of. But they are two different companies and they actually also have different collective bargaining agreements, which is why I included these last words. It did also create some hardships for our mariners. **It's not something that we look for and what we're looking to do, but it was important to get all of our ferries under one flag. Get them all acting as one fleet, make sure all the people are in one pool, and that's what had been done.** It was probably 15 years past its due...It's been needed to be done for quite some time and we went ahead and did that in 2013. **It also meant that we had mariners that we had to retrain, move to other vessels,** some of them retired, and a select few actually stayed on with ferries, but it was a big change and we know that that was not easy for our mariners, so it was a tough year for part of the fleet. [all emphasis added]

75. As Mr. Whitworth's comments indicate, a central and directing mind at Seaspan takes a comprehensive view of all aspects of the Seaspan Group's "Marine Transportation" division – i.e., Seaspan and SFC.



***Seaspan and SFC are associated or related employers***

76. The degree of interrelationship between Seaspan and SFC from a managerial, operational and labour relations perspective is considerable. Submissions in this regard will therefore be divided into a number of subtopics.

***Labour Relations***

77. As the Board noted in *PLH Aviation Services Inc. (Re)*, [1999] CIRB No. 37, "section 35 is primarily concerned with control over the labour relations of one employer by another" (para 131). In the present case, there is abundant evidence that SFC's labour relations are wholly controlled and directed by Seaspan.
78. Notably, SFC has no stand-alone labour relations department. When it comes to collective bargaining, SFC is entirely reliant on Seaspan's centralized labour relations department based in North Vancouver. Indeed, Seaspan's Director of Labour Relations, Ian Lewis, and Seaspan's Vice President of Human Resources, Lisa Bumbaco, have represented management in the last two rounds of collective bargaining for both the SFC Collective Agreement and the Seaspan Collective Agreement.
79. Seaspan's centralized labour relations personnel also take a lead role in interpreting and implementing the SFC Collective Agreement. This much is clear from Ian Lewis's July 10, 2013 letter, set out above and found at **Tab 7**, wherein Mr. Lewis cites the SFC Collective Agreement and states with authority exactly how SFC would be applying a seniority provision to any Seaspan engineers who might be rehired at SFC. In the same letter, Mr. Lewis indicated very strongly that Seaspan takes a global view of labour relations at SFC and Seaspan, writing as follows.

As discussed, the position of Seaspan is that these changes be carried out in strict accordance with the Collective Agreements at both sites and based on the intentions of the parties at the last round of collective bargaining.

80. As mentioned, this letter was copied to a number of vice presidents, senior managers and labour relations personnel at both Seaspan and SFC. In short, Mr. Lewis's letter vividly illustrates that labour relations at both Seaspan and SFC are directed and controlled by a single operating mind.
81. Where the crews of the chartered Vessels were concerned, it is notable that SFC management also routinely interpreted and applied the Seaspan Collective Agreement. One example, described above, is SFC's Marine Superintendent Michael Blake's denial of overtime claims based on his interpretation of the Seaspan Collective Agreement. Other instances have involved, *inter alia*, the interpretation and application of realignment clauses. Emails from SFC management addressing these issues are routinely copied to management and staff at Seaspan, further indicating that where labour relations and

personnel decisions are concerned, any separation that may exist between Seaspan and SFC is almost entirely superficial.

#### *Human Resources*

82. Seaspan and SFC also share a centralized human resources department located at Seaspan's North Vancouver headquarters.
83. Seaspan's human resources staff coordinate the hiring of SFC staff. When there is a position to be filled at SFC, Seaspan's human resources staff typically create a job posting that solicits applications to Seaspan's North Vancouver office. (For a typical job posting, see **Tab 6**, which Seaspan posted in July 2013 to fill three engineering positions at SFC.) Seaspan human resources staff manage all aspects of the interview and hiring process. An example of this can be seen in the July 2013 interviews of the Engineers discussed above.
84. Payroll services for both Seaspan and SFC are also centrally provided by Seaspan out of its North Vancouver office.
85. As alluded to previously, however, where the Affected Employees were concerned, payroll administration in fact spanned both SFC and Seaspan. This two-tier process was instituted in or about 2009, and from then until the Vessels were transferred in July 2013, any overtime pay had to be authorized by SFC management before it would be paid out by Seaspan's payroll department in North Vancouver.
86. Predictably, this process involved quite a few staff at both SFC and Seaspan. As a result, there was routine and frequent communication among various managers and others across the Companies regarding the minutiae of overtime authorization.
87. Any incidents and injuries that occur on any Seaspan or SFC vessel are also routinely communicated to staff and management across both Companies, again indicating a high degree of integration in all personnel matters.

#### *Supply chain management*

88. Both Seaspan and SFC are serviced by Seaspan's "Supply Chain Management" department, indicating a high degree of vertical integration. On the Seaspan website, the department describes itself as follows (see **Tab 15**).

Seaspan's Supply Chain Management department is responsible for all supply chain related activities (ie: demand planning, supplier selection, sourcing, negotiation, purchasing management, warehouse management, logistics and distribution management) on behalf of the member group of companies.

SCM is a centre-led organization with decentralized access via local supply chain professionals located throughout the operations to leverage centralized strategies while allowing for local specific operational requirements.

SCM has the authority, ownership and accountability for the commitment of funds for the acquisition by purchase or lease of all materials and/or services required by Seaspan and its affiliates.

The companies included within the SCM scope, includes, but is not limited to: Seaspan Ferries Corporation, Seaspan ULC, Vancouver Drydock Company Ltd., Vancouver Shipyards Co. Ltd., Victoria Shipyards Co. Ltd.

#### *Provisioning and maintenance*

89. The considerable integration of Seaspan and SFC is clearly seen in the Companies' treatment of the Vessels up to their transfer in 2013.
90. Prior to 2010, most of the provisioning and maintenance of the Vessels was carried out by the Vessels' owner, Seaspan. Beginning in or about 2010, however, SFC gradually took over virtually all aspects of the provisioning and maintenance of the Vessels. For example, prior to 2010, engineers on the Vessels would order supplies – engine parts, lubricants, filters, etc. – from Seaspan's head office in North Vancouver and Seaspan would then deliver these supplies to Tilbury. Under the new procedure, engineers would submit requisition forms directly to SFC management and SFC would procure the supplies. Similarly, responsibility for fuel and oil services were all gradually transferred from Seaspan to SFC in this period.
91. SFC also arranged for virtually all maintenance of the Vessels. For example, when Seaspan officers posted to the Vessels noted something in need of repair or attention, the standard procedure was to advise SFC management, who would then arrange for the issue to be addressed.
92. Routine and scheduled maintenance of the Vessels was also coordinated by SFC. For example, the list of maintenance procedures to be performed during the Challenger's biannual refit was compiled by SFC management. SFC would then contract with a shipyard company to have the maintenance carried out.

#### *Crew scheduling and direction*

93. By the time the Vessels were transferred in 2013, nearly all responsibility for the Vessels and their crews had shifted from Seaspan to SFC. One of the only responsibilities that remained with Seaspan

was that of crew scheduling. Even this responsibility, however, was shared to a degree with SFC, which is to say that although Seaspan assigned individual officers to specific shifts on the Vessels, the shift schedules themselves were largely determined by SFC.

94. In the years immediately preceding the transfer of the Vessels, SFC management even had a role in determining which Seaspan employees would be assigned to specific shifts. For example, if a master on a chartered Vessel had an objection to being assigned a certain crew member – someone physically incapable of performing certain duties – SFC management would specifically solicit the master's objections in this regard, implying that SFC management was capable of making or influencing those personnel decisions.
95. Needless to say, by the time the Challenger and the Greg were formally transferred to SFC in 2013, they were hardly subject to a typical "trip charter" arrangement for by that point nearly all aspects of the charter were directly controlled by SFC. Indeed, SFC's authority extended even to directing the Seaspan crews' day-to-day operations. For example, masters on the Vessels had standing orders to comply with SFC policies and directives; to communicate with SFC dispatch and operations managers; and to report all incidents and injuries to both Seaspan and SFC management.
96. An incident during inclement weather in late 2008 is revealing of just how strong a role SFC management had in directing the Seaspan employees assigned to the Vessels. On this particular December night the Challenger's master, in accordance with safety rules, refused to sail in severe winds. As a result, SFC's then Vice President, Rick Plecas, telephoned the master on three separate occasions commanding that he sail.
97. Even discipline of Seaspan crews on the Chartered Vessels was orchestrated by SFC management. Although instances of discipline were rare, one occasion in 2012 is revealing. This incident involved a master on the Challenger who came into contact with a rock while traversing Active Pass. The master in question telephoned James Earles, SFC's Port Captain at Tilbury, to report the incident. Several days later, Michael Blake, SFC's Marine Superintendent, accompanied the master on his route to observe his procedures and practices and made a report and recommendation to Seaspan, which immediately issued the master a two-week suspension.

### ***Seaspan and SFC are both under federal jurisdiction***

98. Section 35 of the Code requires that both employers fall under federal jurisdiction before a single-employer declaration is issued.
99. There is no dispute that Seaspan falls under federal jurisdiction. There is also no dispute that SFC, as a ferry service operating wholly within British Columbia, is *prima facie* a provincial undertaking. However,

for the reasons that follow, the Guild says that SFC in fact falls under federal jurisdiction for labour relations purposes.

- <sup>100.</sup> In *Westcoast Energy Inc. v. Canada (National Energy Board)*, [1998] 1 SCR 322, the Supreme Court of Canada set out the applicable test for determining whether two or more enterprises constitute a single federal undertaking.

In order for several operations to be considered a single federal undertaking for the purposes of s. 92(10)(a), they must be functionally integrated and subject to common management, control and direction. Professor Hogg states, at p. 22-10, that '[i]t is the degree to which the [various business] operations are integrated in a functional or business sense that will determine whether they constitute one undertaking or not'. He adds, at p. 22-11, that the various operations will form a single undertaking if they are "actually operated in common as a single enterprise". In other words, common ownership must be coupled with functional integration and common management. A physical connection must be coupled with an operational connection. A close commercial relationship is insufficient.

- <sup>101.</sup> As discussed above, SFC is under the direct ownership and control of Seaspan, a fact which is evident from the identities of SFC's corporate directors, officers, and key management personnel.
- <sup>102.</sup> In terms of functional integration, it should first be noted that Seaspan and SFC constitute complementary components of a single, unified marine transportation business. This fact is evident from the Seaspan website, where "Seaspan Marine" and "Seaspan Ferries" are grouped together under the single heading "Marine Transportation" (**see Tab 3**). While it is true that Seaspan and SFC are engaged in separate aspects of the marine transportation business, this fact only reinforces the proposition that Seaspan and SFC constitute two prongs of a centrally directed and controlled approach to the marine transportation sector. After all, it would make little business sense to pit the two commonly-owned entities in competition with one another.
- <sup>103.</sup> Further, as discussed in detail above, SFC's labour relations, human resources and payroll are all directly controlled by Seaspan out of its North Vancouver headquarters.
- <sup>104.</sup> Further, Seaspan and SFC officers are commonly treated as a single and unified body of employees, a fact which is illustrated by, among other things, the mandatory Seaspan Officers Conferences discussed above.
- <sup>105.</sup> Moreover, there is frequent and routine communication among management, supervisors and other staff at both SFC and Seaspan about many aspects of the Companies' business, especially personnel issues.
- <sup>106.</sup> Evidence of thorough functional integration can also be found in the Companies' treatment of the Vessels and their crews. As discussed above, by the time the Challenger and the Greg were transferred to SFC, the Vessels and their crews – respectively the ostensible property and employees of Seaspan – were in fact maintained, managed and directed almost entirely by SFC. In this sense, where the Vessels and their crews were concerned, Seaspan and SFC were almost entirely functionally integrated.

- <sup>107.</sup> For all these reasons, the Guild submits that Seaspan and SFC today constitute a single federal undertaking for the purposes of s. 35 of the Code.

***The Board's 2004 decision revisited***

- <sup>108.</sup> As noted above, the Board in 2004 declined to issue a declaration that Seaspan International Ltd. (a predecessor of Seaspan ULC) and Seaspan Coastal Intermodal Company (the predecessor of Seaspan Ferries Corporation) constituted a single employer under s. 35 of the Code: *Seaspan International Ltd. (Re)*, 2004 CIRB 267.
- <sup>109.</sup> It of course goes without saying that the Board's 2004 decision was based not only on the facts as they existed a decade ago but also on the particular facts that were presented to the Board at that time. A lot can change in ten years, especially in the dynamic and competitive sector of transportation and logistics. Much of the shift in responsibility for the Vessels and their crews took place in the previous four or five years. Many other key managerial, operational and labour-relations factors have also changed.
- <sup>110.</sup> The Board's 2004 decision was based on a number of facts which are no longer present. For example, the Board found in 2004 that Seaspan and SFC did not have common labour relations and that "SCIC's [SFC's] General Manager and COO is responsible for collective bargaining and grievances and will authorize any termination of employment" (para 44). Today, the labour relations of both companies are centrally directed and controlled by the same individuals, principally Ian Lewis, Seaspan's Director of Labour Relations, and Lisa Bumbaco, Seaspan's VP of human resources.
- <sup>111.</sup> In 2004, the Board found "no evidence to suggest that the management of SCIC is directed by Seaspan" (para 52). Today, there is abundant evidence in this regard including the fact that key management personnel at SFC are *de facto* Seaspan appointees.
- <sup>112.</sup> In 2004, the Board found that there was "no supervision or management of the SCIC's [SFC's] employees by those of Seaspan entities or vice versa, even on the chartered vessels" (para 44). By the time the Greg and the Challenger were transferred in 2013, the supervision and management of Seaspan employees on the Vessels was entirely undertaken by SFC.
- <sup>113.</sup> In 2004, the Board found that "SCIC has its own Website advertising its services and publishing its ferry schedule, which is separate from the other Seaspan Websites" (para 44). Today, there is a single website – [www.seaspan.com](http://www.seaspan.com) – which holds SFC out as one half of Seaspan's "Marine Transportation" operations (see **Tab 3**).

- <sup>114</sup>. Perhaps most importantly, the Board in 2004 was unable to find a labour relations purpose for issuing a single-employer declaration, writing as follows (at para 32).

There has been no evidence presented that would convince the Board that the ILWU's bargaining or bargained rights are in any way being eroded, avoided or otherwise threatened by the relationship between Seaspan and the SCIC and the manner in which they each operate.

- <sup>115</sup>. Today, there is abundant evidence that Seaspan has exploited a superficial distinction between it and its wholly owned and controlled subsidiary to (i) punish a group of employees for exercising their collectively bargained rights and (ii) erode the bargaining unit to which these employees belonged. In short, there is today a clear labour relations purpose for issuing a single-employer declaration. Since all five prerequisite *Murray Hill* criteria are established, the Board ought to exercise its discretion under s. 35.

***A merger of bargaining units is justified and necessary***

- <sup>116</sup>. In addition to a declaration that Seaspan and SFC constitute a single employer under s. 35 of the Code, the Guild ultimately seeks a merger of the current bargaining units into a single bargaining unit governed by a comprehensive, federally regulated Seaspan Collective Agreement. As Seaspan's treatment of the Affected Employees illustrates, the current bifurcated arrangement has allowed and will continue to allow Seaspan to exploit an artificial labour relations distinction in order to erode or otherwise manipulate bargaining units, to punish or otherwise intimidate any employees who assert their collectively bargained rights, or both. To this end, the Guild requests that the Board exercise its power under s. 18.1 of the Code to review the two bargaining units.
- <sup>117</sup>. Given the similarity of work performed by Seaspan and SFC officers, and given that in many key respects Seaspan already treats Seaspan and SFC officers as a homogenous group, a merger of the two bargaining units is not only possible, it is practical. To the extent that the two collective agreements contemplate different vessels and operations, the Guild submits that any potential conflicts can be easily resolved by adding vessel-specific and/or operation-specific schedules to the single collective agreement. All this can and should be done without affecting the seniority rights or job security of employees in either of the existing units.
- <sup>118</sup>. Finally, it is noted that the two collective agreements have expired and are subject to collective bargaining.

### **Common Employer Application: RELIEF SOUGHT**

119. The Guild seeks the following relief:

- a. a declaration that Seaspan and SFC are a single employer in that, at all material times, they were associated or related undertakings or businesses under common direction and control within the meaning of s. 35 of the Code;
- b. a declaration that Seaspan and SFC, as a single employer under s. 35 of the Code, are bound to the Seaspan Collective Agreement;
- c. an order that Seaspan, SFC and the Guild meet forthwith but no later than 15 days from the issuing of a decision of the Board to this effect, to negotiate the merger of the terms of the SFC Collective Agreement into the Seaspan Collective Agreement;
- d. an order that the Board retain jurisdiction until such time as the merger process is complete.
- e. such further and other relief as may be appropriate in the circumstances.

### **SALE OF BUSINESS APPLICATION**

120. If Seaspan and SFC do not constitute a single employer under s. 35 then the Guild submits in the alternative that based on the facts described above, Seaspan's sale of the Challenger and the Greg constitutes a sale of business within the meaning of s. 44 of the Code which reads in part as follows.

44. (1) In this section and sections 45 to 47.1,

"business" means any federal work, undertaking or business and any part thereof;

[....]

"sell", in relation to a business, includes the transfer or other disposition of the business and, for the purposes of this definition, leasing a business is deemed to be selling it.

Sale of business

(2) Where an employer sells a business,

(a) a trade union that is the bargaining agent for the employees employed in the business continues to be their bargaining agent;

(b) a trade union that made application for certification in respect of any employees employed in the business before the date on which the business is sold may, subject to this Part, be certified by the Board as their bargaining agent;

(c) the person to whom the business is sold is bound by any collective agreement that is, on the date on which the business is sold, applicable to the employees employed in the business; and

(d) the person to whom the business is sold becomes a party to any proceeding taken under this Part that is pending on the date on which the business was sold and that affects the employees employed in the business or their bargaining agent.



[....]

- <sup>121.</sup> As the Board noted in *U.S. Airways Inc. (Re)*, 2001 CIRB No. 149, sections 35 and 44 of the Code are “complementary positions” (at para 13).

... Not only are alternate arguments and remedies a common aspect of pleadings before all courts and Boards, but it has also been recognized by the Board that under the provisions of the Code, sections 35 and 44 present complementary positions. As the Board noted in *British Columbia Telephone Company and Canadian Telephones and Supplies Ltd.* (1979), 38 di 205 (CLRB no. 225):

The use of section 133 [now section 35] in a remedial role, by itself, is rare. It is almost always used in combination with other provisions of the Code to effect a labour relations purpose which is being frustrated by reason of the peculiar legal status of corporations or the largely fictional distinctions of corporate relationships. The section serves to remove artificial barriers to a realistic application of the Code's provisions.

- <sup>122.</sup> There is no dispute that Seaspan decided to sell the Challenger and the Greg to SFC. The remaining question is thus whether the Challenger and the Greg constituted a part of Seaspan's “business” for the purposes of s. 44. For the reasons that follow, the Guild says they did.
- <sup>123.</sup> A concise summary of the principles and considerations around the sale of part of a business is found in *Curragh Resources Inc. and Anvil Range Mining Corporation*, [1996] CLRB No. 9, at para 18.

18 The same principles apply when the object of the transfer is a ‘part’ of a ‘business.’ The predecessor must have transferred a coherent and severable ‘part’ of its undertaking or business. A variety of factors must be considered to determine whether there was a transfer of a distinct part of the predecessor's business: plant, equipment, know-how, goodwill, employee skills, specific expertise, etc. The type of economic organization in question and the nature of the industry involved are of considerable significance in this analysis. As the OLRB stated in *Accomdex Franchise Management Inc.*, supra:

‘... Factors which may be sufficient to support a ‘sale of a business’ finding in one sector of the economy may be insufficient in another. In some industries, a particular configuration of assets - physical plant machinery and equipment - may be of paramount importance; while in others it may be patents, ‘know-how’, technological expertise or managerial skills which will be significant. Some businesses will rely heavily on the goodwill associated with a particular location, company name, product name or logo; while for other businesses these factors will be insignificant. ...’

19 Thus, even where no employees of the predecessor are employed by the successor (although this was not the case here), that is not a significant factor: *Victoria Flying Services Ltd. et al.* (1979), 35 di 73; and [1979] 3 Can LRBR 216 (CLRB no. 199).

- <sup>124.</sup> The two most important aspects of a marine transportation business are vessels and their crews. The Greg and the Challenger, together with their crews, formed a “coherent and severable” part of Seaspan's business. The Vessels constituted the physical infrastructure of this business and the crews constituted the equally important and necessary human component.

125. Specifically, this business was that of “trip-chartering” manned vessels to clients to service the intermodal transportation of goods between mainland BC and Vancouver Island.
126. Seaspan had been involved in this business since at least 1972 when it purchased F.M. Yorke and Sons Ltd. (“F.M. Yorke”) and with it acquired two ships – the Doris and the Greg – as well as F.M. Yorke’s trip-charter contracts with CP Rail’s intermodal transportation division. When in 1998 Seaspan purchased this division and incorporated SFC to operate it, Seaspan continued to provide trip-chartered vessels to SFC. In short, Seaspan, as part of its larger operations, operated for over 40 years a business in which it provided vessels and crews for the intermodal transportation of goods. This business predated the existence of SFC by over 25 years and only came to an end when Seaspan decided to have SFC purchase the Vessels in 2013.
127. In order to engage in this business, Seaspan owned and operated three, and more recently two, vessels, namely the Challenger, the Greg and the Doris the latter of which was retired in 2012. Seaspan crewed these vessels with competent and experienced Seaspan personnel who were knowledgeable in the various aspects of work required to operate these vessels.
128. Seaspan’s intermodal trip-charter business was separate and distinct from the tug-and-barge business which it continues to this day, often under the business name “Seaspan Marine”. Specifically, Seaspan’s intermodal trip-charter business used different vessels and different employees to service different clients. None of Seaspan’s other vessels ran a regularly scheduled mainland BC to Vancouver Island route and none performed commercial ferry service or serviced SFC. In short, the Challenger and the Greg were not simply assets. They instead constituted the physical infrastructure of a distinct and discernible part of Seaspan’s business operation.
129. When Seaspan transferred the Vessels to SFC in July 2013, SFC immediately resumed operating them in the exact same way – indeed, there was absolutely no hiatus in operations save for the Challenger’s reduced schedule while SFC trained a new crew. The Vessels serviced the same routes, transported the same goods and reported to the same Tilbury Island facility to start their work day.
130. The fact that SFC did not hire the Deck Officers and Engineers and continues to operate the Vessels with different crews is immaterial to the present analysis, for as noted above this fact is attributable only to Seaspan’s mischief. Further, given that Seaspan and SFC are members of the same group of companies, concepts like the transfer of goodwill, use of a logo or trademark and non-competition covenants are of marginal value here.
131. As a consequence of the transfer of part of Seaspan’s business, the Affected Employees have either been “realigned” to worse jobs within the Seaspan fleet; effectively forced into retirement; or otherwise sidelined – and all this while the business in which they worked and the vessels used to service that business continue to operate.

- <sup>132.</sup> This is the archetypal situation which section 44 of the Code was enacted to prevent. To be sure, Seaspan may deal as it will with its business but if it chooses to sell that business, as it has done here, the collective bargaining rights of its employees under the Seaspan Collective Agreement must move with the business. If a successorship is not recognized here, the Guild members' hard-won bargaining rights will be decimated by a simple and superficial change in corporate ownership. In short, the result of this sale of business will be that the collective bargaining rights of the Affected Employees will have disappeared.
- <sup>133.</sup> We note that in 2013 the ILWU Local 400 filed an application in respect of the Challenger and the Greg with the BC Labour Relations Board under the BC Labour Code's sale of business provisions (ss. 35 and 36 of the BC Code); the Guild subsequently intervened in those proceedings. The ILWU's application was a narrow one that had no single-employer or unfair labour practice component. On November 29, 2013, the BC Board issued a decision to the effect that the sale of the Challenger and the Greg was not a sale of business but instead a sale of assets. Given the limited factual and legal scope of the ILWU's application, however, the Guild submits that the BC Board's decision has little persuasive value in the present analysis and in any event has no bearing on the Guild's accompanying single-employer application under s. 35.

#### ***Sale of Business Application: RELIEF SOUGHT***

- <sup>134.</sup> The Guild seeks the following alternate relief:
- a. a declaration that Seaspan's transfer of the Challenger and the Greg to SFC constituted a sale of a part of Seaspan's business within the meaning of s. 44 of the Code;
  - b. a declaration that SFC is bound by the Seaspan Collective Agreement with respect to the Affected Employees pursuant to s. 44(2)(c).
  - c. such further and other relief as may be appropriate in the circumstances.

#### **UNFAIR LABOUR PRACTICE COMPLAINT**

- <sup>135.</sup> The Guild relies on the facts described above in support of its application that Seaspan has committed unfair labour practices.
- <sup>136.</sup> The Guild submits that Seaspan has committed one or more unfair labour practices by (i) punishing a group of employees for exercising their collectively bargained rights and (ii) deliberately and illegitimately eroding the Guild's bargaining unit at Seaspan. The Guild submits that Seaspan's actions in this regard are contrary to ss. 94(1)(a); 94(3)(a)(i) and (iii); 94(3)(b); 94(3)(d) and 94(3)(e) of the Code. The Guild further submits that Seaspan's actions were motivated in whole or in part by anti-union *animus*.

- <sup>137.</sup> To date, Seaspan has been largely successful in this mischief. As described above, this success has been attributable to a superficially bifurcated labour-relations arrangement that has allowed Seaspan to unilaterally restructure its workforce for improper purposes. In these circumstances, and to prevent further and similar abuses, the Guild seeks an order merging the bargaining units currently governed respectively by the Seaspan and SFC Collective Agreements into a single bargaining unit governed by a comprehensive, federally regulated Seaspan Collective Agreement. As noted, in many key regards Seaspan already treats Seaspan and SFC officers as a homogenous group. For this reason, a merger of the two bargaining units is not only possible, it is practical. To the extent that the two collective agreements contemplate different vessels and operations, the Guild submits that any potential conflicts can be resolved by adding vessel-specific and/or operation-specific schedules to the single collective agreement.
- <sup>138.</sup> Section 40(i) of the Canada Labour Code Regulations requires a complainant to include “the date on which the complainant knew of the action or circumstances giving rise to the complaint”. As described above, in July 2013 several of the Affected Employees had reasonable, but at that time unsupported, suspicions that Seaspan terminated the Vessels’ charters and sold them to a wholly owned and controlled subsidiary in order to rid Seaspan of a group of employees it viewed as activist and overly assertive of their collectively bargained rights. These suspicions, however, were confirmed only recently by a Seaspan vice president’s comments during collective bargaining in late January and early February 2014, less than two months ago.
- <sup>139.</sup> Section 40(j) of the Regulations requires a complainant to include “particulars of the measures taken, if any, to have the complaint referred to arbitration under a collective agreement or the reasons why the arbitration did not take place”. While the Guild has filed grievances under each of the relevant collective agreements (which are in abeyance), the essential nature of this dispute is such that an arbitrator can provide little meaningful relief. In the Guild’s view, the only remedy capable of preventing similar mischief by Seaspan in the future is a merger of the two bargaining units and the power to make such an order resides solely with the Board.

***Unfair Labour Practice Complaint: RELIEF SOUGHT***

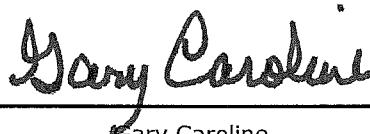
- <sup>140.</sup> The Guild seeks the following relief:
- a. a declaration that Seaspan has violated ss. 94(1)(a); 94(3)(a)(i) and (iii); 94(3)(b); 94(3)(d) and 94(3)(e) of the Code;
  - b. an order that Seaspan cease its violations of these provisions of the Code;
  - c. an order that Seaspan compensate the Affected Employees and the Guild for all losses arising from Seaspan’s breaches of these provisions of the Code;

- d. an order that the current bargaining units be merged into a single bargaining unit governed by a comprehensive, federally regulated Seaspan Collective Agreement.
- e. such further and other relief as may be appropriate in the circumstances.

All of which is respectfully submitted.

Dated at Vancouver, British Columbia, this 21<sup>st</sup> day of March, 2014.

**Canadian Merchant Service Guild by its solicitors**  
**Caroline + Gislason Lawyers LLP**

A handwritten signature in cursive script that reads "Gary Caroline". The signature is written in dark ink and is positioned above a horizontal line.

per:

Gary Caroline