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Workplace Law

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FROM Chris E. Leenheer
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TO Tom Panelli, Regional Director
COMPANY Canada Industrial Relations Board
CITY Vancouver, BC
FAX NO. 604 566 6071
PHONE NO. 1 800 575 9696

TO Paul Lumsden, Secretary Treasurer
COMPANY ILWU Local 400, Marine Section
CITY Vancouver, BC
FAX NO. 604 251 7241
PHONE NO. 604 251 7174

TO Jeff Sanders, Business Agent
COMPANY Canadian Merchant Service Guild
CITY Coquitlam, BC
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note

Re: Seaspan ULC (the "Applicant") -and- International Longshore & Warehouse Union Local 400, Marine Section and Canadian Merchant Service Guild (the "Respondent Unions")

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April 29, 2014

Chris E. Leenheer
D/ 604 691 2215

By Fax

leenheer@harrisco.com
Our file 004237001

Workplace Law

Canada Industrial Relations Board
Suite 501 - 300 West Georgia Street
Vancouver, BC V6B 6B4

Attention: Tom Panelli
Regional Director

Dear Sir:

Re: Seaspan ULC (the "Applicant") -and- International Longshore & Warehouse Union Local 400,
Marine Section and Canadian Merchant Service Guild (the "Respondent Unions")

We are legal counsel for Seaspan ULC in the above noted matter. We enclose an Application on
Seaspan's behalf pursuant to Section 91 of the *Canada Labour Code*.

Yours very truly,
Harris & Company LLP

Per:

A handwritten signature in black ink, appearing to read 'Chris E. Leenheer'.

Chris E. Leenheer

CEL/mso

Enclosure

cc ILWU Local 400, Marine Section
Attention: Paul Lumsden, Secretary Treasurer (by fax)
cc Canadian Merchant Service Guild
Attention: Jeff Sanders, Business Agent (by fax)
cc Client

GENERAL/004237 001/1398860.1

APPLICATION REGARDING UNLAWFUL STRIKE
BEFORE THE CANADA INDUSTRIAL RELATIONS BOARD

Between:

SEASPAN ULC

(the "Applicant")

And:

INTERNATIONAL LONGSHORE & WAREHOUSE UNION LOCAL 400,
MARINE SECTION

And:

CANADIAN MERCHANT SERVICE GUILD

(collectively, the "Respondent Unions")

**Application pursuant to Section 91
of the *Canada Labour Code***

1. The Applicant applies to the Canada Industrial Relations Board for relief under Section 91 of the *Canada Labour Code* (the "Code") in relation to an unlawful strike by
 - a. the International Longshore & Warehouse Union, Local 400 ("ILWU, Local 400") and the Canadian Merchant Service Guild (the "Guild") (herein referred to collectively as the "Respondent Unions"), and employees of the Applicant represented by the Respondent Unions, whom, on each day from April 17 to April 27, 2014 inclusive, have in concert, in combination, and/or with a common understanding, engaged in conduct that is designed to make onboard tugs unavailable to service the Applicant's customers in calout situations, thus causing the Applicant to obtain the services of a contractor and lose revenue.
2. The conduct of the Respondent Unions and their members has included, but not been limited to, the following actions:

- a. unreasonably refusing to perform callouts onboard tugs as they had previously; and
 - b. making themselves unavailable to perform callouts onboard tugs as they had previously.
3. The conduct of the Respondent Unions and its members occurred after recent unsuccessful conciliation sessions between the Applicant and the Respondent Unions and was intended to harm the Applicant's business and indirectly pressure the Applicant to alter its bargaining position with the Respondent Unions. With their conduct, the Respondent Unions and their members have engaged in an illegal strike against the Applicant.

The Parties:

4. (a) Name, address, telephone number, facsimile number and e-mail address of the Applicant:

Seaspan ULC
10 Pemberton Ave.
North Vancouver, BC V7P 2R1

Attention: Ian Lewis, Director, Labour Relations
Tel: (604) 998-3111
Fax: (604) 984-1613

- (b) Name, address, telephone number, facsimile number and e-mail address of counsel for the Applicant:

Harris & Company LLP
14th Floor Bentall 5
550 Burrard Street
Vancouver, BC
V6C 2B5

General Tel: (604) 684-6633
Facsimile: (604) 684-6632

Attention: Mr. Chris Leenheer
Direct Tel: (604) 891-2215
Email: cleenheer@harrisco.com

5. (a) Name, address, telephone number, facsimile number and email of the Respondent Unions:

ILWU, Local 400, Marine Section
120 – 111 Victoria Drive
Vancouver, BC V5L 4C4

Attention: Paul Lumsden, Secretary Treasurer
Tel: (604) 251-7174
Fax: (604) 251-7241
Email: ilwu400@telus.net

Canadian Merchant Service Guild
310 - 218 Blue Mountain St.
Coquitlam, BC V3K 4H2

Attention: Jeff Sanders, Business Agent
Tel: (604) 939-8990
Fax: (604) 939-8950
Email: jeff.s@cmsg.org

- (b) Name, address, telephone number, facsimile number and e-mail address of counsel for the Respondent Unions:

Unknown.

The Canada Labour Code

6. Section 3(1) of the *Code* defines "strike" as follows:

.. includes a cessation of work or a refusal to work or to continue to work by employees, in combination, in concert or in accordance with a common understanding, and a slowdown of work or other concerted activity on the part of employees in relation to their work that is designed to restrict or limit output.

7. Section 87.2 (1) of the *Code* requires that a trade union that has not been lawfully locked out must give advance notice to the employer of the date on which a strike will occur, as follows:

Unless a lockout not prohibited by this Part has occurred, a trade union must give notice to the employer, at least seventy-two hours in advance, indicating the date on which a strike will occur, and must provide a copy of the notice to the Minister."

8. Section 88.1 of the *Code* prohibits strikes during the term of a collective agreement:

Strikes and lockouts are prohibited during the term of a collective agreement except if

- (a) a notice to bargain collectively has been given pursuant to a provision of this Part, other than subsection 49(1); and
- (b) the requirements of subsection 89(1) have been met.

9. Section 89(1) of the Code provides as follows:

No employer shall declare or cause a lockout and no trade union shall declare or authorize a strike unless

- (a) the employer or trade union has given notice to bargain collectively under this Part;
- (b) the employer and the trade union
 - (i) have failed to bargain collectively within the period specified in paragraph 50(a), or
 - (ii) have bargained collectively in accordance with section 50 but have failed to enter into or revise a collective agreement;
- (c) the Minister has
 - (i) received a notice, given under section 71 by either party to the dispute, informing the Minister of the failure of the parties to enter into or revise a collective agreement, or
 - (ii) taken action under subsection 72(2);
- (d) twenty-one days have elapsed after the date on which the Minister
 - (i) notified the parties of the intention not to appoint a conciliation officer or conciliation commissioner, or to establish a conciliation board under subsection 72(1),
 - (ii) notified the parties that a conciliation officer appointed under subsection 72(1) has reported,
 - (iii) released a copy of the report to the parties to the dispute pursuant to paragraph 77(a), or
 - (iv) is deemed to have been reported to pursuant to subsection 75(2) or to have received the report pursuant to subsection 75(3);

- (e) the Board has determined any application made pursuant to subsection 87.4(4) or any referral made pursuant to subsection 87.4(5); and
- (f) sections 87.2 and 87.3 have been complied with.

10. Section 91 of the Code provides as follows:

- (1) Where an employer alleges that a trade union has declared or authorized a strike, or that employees have participated, are participating or are likely to participate in a strike, the effect of which was, is or would be to involve the participation of an employee in a strike in contravention of this Part, the employer may apply to the Board for a declaration that the strike was, is or would be unlawful.
- (2) Where an employer applies to the Board under subsection (1) for a declaration that a strike was, is or would be unlawful, the Board may, after affording the trade union or employees referred to in subsection (1) an opportunity to make representation on the application, make such a declaration and, if the employer so requests, may make an order
 - (a) requiring the trade union to revoke the declaration or authorization to strike and to give notice of such revocation forthwith to the employees to whom it was directed;
 - (b) enjoining any employee from participating in the strike;
 - (c) requiring any employee who is participating in the strike to perform the duties of their employment; and
 - (d) requiring any trade union, of which any employee which respect to whom an order is made under paragraph (b) or (c) is a member, and any officer or representative of that union, forthwith to give notice of any order made under paragraph (b) or (c) to any employee to whom it applies.

The Facts:

- 11. The Applicant, Seaspan ULC (also herein referred to as "Seaspan"), is a marine transportation company serving the west coast of North America with a large tugboat and barge fleet. Seaspan also provides ship docking service to the ports of Vancouver, Victoria, Esquimalt and other locations in British Columbia.
- 12. The Respondent Union, ILWU, Local 400, is the bargaining agent for all Unlicensed Personnel employed in the Deck, Engine Room, and Steward's Departments of vessels owned, operated, or directly or indirectly controlled by the Applicant.

13. The Applicant and ILWU, Local 400 are parties to a collective agreement that has a term of October 1, 2010 to September 30, 2013 (the "ILWU, Local 400 Collective Agreement"). The ILWU, Local 400 Collective Agreement remains in force. The parties are involved in collective bargaining for the purpose of reaching a new collective agreement. A copy of an excerpt of the collective agreement is attachment "A" to this Application. A copy of the complete document will follow.

14. Article 1.08(a) of the ILWU, Local 400 Collective Agreement states

The Company, signatory to this Agreement, and the Union agree there shall be no strikes or lockouts during the life of this Agreement.

15. Article 1.08(c) of the ILWU, Local 400 Collective Agreement states

There shall be no slow down or stoppage of work during the period when a grievance is being resolved.

16. Article 4.8 of the ILWU, Local 400 Collective Agreement states

This Agreement shall be effective from October 1, 2010 and shall remain in effect until September 30, 2013, and thereafter from year to year subject to five (5) months' notice in writing of desire to revise, amend or terminate same. Such notice may be given any time after April 30, 2013.

17. The Applicant and ILWU, 400 are in the process of bargaining a new collective agreement.

This process has entailed the following:

- Collective agreement expired on September 30, 2013
- Parties commenced bargaining on October 21, 2013
- Parties met to bargain 11 times
- Parties filed for conciliation on February 3, 2014
- Parties commenced conciliation meetings on February 17, 2014
- Parties met in conciliation seven (7) times
- Conciliation period expired on April 1, 2014
- 21-day "cooling-off" period expires on May 1, 2014

18. The Respondent Union, the Guild, is the bargaining agent for all Masters, Mates and Engineers employed on vessels owned, operated, or directly or indirectly controlled by the Applicant.
19. The Applicant and the Guild are parties to a collective agreement that has a term of October 1, 2010 to September 30, 2013 (the "Guild Collective Agreement"). The Guild Collective Agreement remains in force. The parties are involved in collective bargaining for the purpose of reaching a new collective agreement. A copy of an excerpt of the collective agreement is attachment "B" to this Application. A copy of the complete document will follow.

20. Article 1.07(1) of the Guild Collective Agreement states

The Company, signatory to this Agreement, and the Guild agree that there shall be no strikes or lockouts during the life of this Agreement.

21. Article 1.07(2) of the Guild Collective Agreement states

There shall be no slowdown or stoppage of work during the period when a grievance is being resolved.

22. Article 5.05 of the Guild Collective Agreement states

This Agreement shall be effective five (5) years commencing October 1, 2010 and shall remain in effect until September 30, 2013, and thereafter from year to year subject to four (4) months' notice in writing of desire to revise, amend or terminate same. Such notice may be given any time after May 31, 2013. After such notice has been given, specific proposals (if any) must be submitted and negotiations commenced within ten (10) days of the date of notice.

23. The Applicant and the Guild are in the process of bargaining a new collective agreement.

This process has entailed the following:

- Collective agreement expired on September 30, 2013
- Parties commenced bargaining on October 21, 2013
- Parties met to bargain 14 times
- Parties filed for conciliation on December 2, 2013
- Parties commenced conciliation meetings on January 13, 2014
- Parties met in conciliation 15 times

- Conciliation period was extended on February 13 to March 7, 2014
 - Parties met in 11 times during extended conciliation period
 - 21-day "cooling-off" period expired on March 28, 2014
24. Seaspan has an onboard tug callout procedure for work that it requires to be performed outside regular working hours. At the beginning of each week employees indicate whether they are available and interested in being called to perform this work during the upcoming week. Available employees are added to the "callout list". Seaspan has separate callout lists for employees at its Vancouver Harbour and Roberts Bank locations. Employees are listed on the callout list by position and in order of seniority.
25. When a callout is required, Seaspan goes to the callout list and contacts the most senior employees first. In order to man a vessel for a callout, Seaspan must receive affirmative responses from at least one employee represented by the Guild and at least one employee represented by ILWU, Local 400.
26. On each day from April 17 to April 27, 2014 inclusive, certain employees of the Applicant employed at its locations in Vancouver Harbour and Roberts Bank engaged in conduct consisting of, but not limited to, (1) unreasonably refusing to perform onboard tug callouts as they had previously, and (2) making themselves unavailable to perform onboard tug callouts as they had previously (the "Unlawful Conduct").
27. Evidence of the Unlawful Conduct is as follows:
- a. Between January 17 and April 16, 2014, Seaspan required 337 callouts at its Vancouver Harbour and Roberts Bank locations. Seaspan received affirmative responses from employees to 328 of these requests (i.e. 97.3% success rate). During this period, Seaspan was required to use the services of a contractor tug company a total of 124 hours.
 - b. Between April 17 and April 27, 2014, Seaspan required 72 callouts in at its Vancouver Harbour and Roberts Bank locations. Seaspan received an affirmative response to only one (1) of these requests (i.e. 1.4% success rate). Further, during this period Seaspan was required to use the services of a contractor tug company a total of 96 hours.

- c. The callout list for the week of April 9-15 at the Vancouver Harbour location had 56 employees listed on it.
 - d. The callout list for the week of April 9-15 at the Roberts Bank location had 56 employees on it.
 - e. The callout list for the week of April 23-29 at the Vancouver Harbour location had 40 employees on it.
 - f. The callout list for the week of April 23-29 at the Roberts Bank location had 40 employees on it.
28. The Unlawful Conduct was mandated and/or authorized by the Respondent Unions, and was carried out in combination, in concert or with the common understanding of the employees. The Unlawful Conduct was intended to, and in fact did, cause the Applicant's onboard tugs to be unavailable to service its customers and cause it to lose revenue.
29. The Unlawful Conduct occurred soon after recent unsuccessful conciliation sessions between Seaspan and the Respondent Unions.
30. The Respondent Unions have not met any of the preconditions for a lawful strike established by Sections 88.1 or 89(1) of the Code, and the Respondent Unions and the employees of the Applicant represented by the Respondent Unions are not in a position to engage in a legal strike.
31. By committing the Unlawful Conduct, the Respondent Unions and their members have attempted to apply the same economic pressure on the Applicant as may occur during a lawful strike (i.e. refusing callouts). The Unlawful Conduct has caused harm and interference to the Applicant's business and is a blatant violation of the Code.

Summary of the Applicant's Position:

32. The Applicant asserts that the Respondent Unions and their members employed at the Applicant's Vancouver Harbour and Roberts Bank locations have engaged in, and are continuing to engage in, an unlawful strike within the meaning of the Code during a period

when these employees are bound by a collective agreement, contrary to Section 138.1 of the Code.

33. The Applicant asserts that the Respondent Unions and their officers, employees and agents have authorized, encouraged, or incited the unlawful strike.
34. In the alternative, the Applicant asserts that the Respondent Unions and their officers, employees and agents have failed to act in a timely way to prevent the continuation of the unlawful strike by their members at the Applicant's Vancouver Harbour and Roberts Bank locations. In particular, the officers and employees of the Respondent Unions have failed to act in a timely fashion to prevent the unlawful strike; failed to inform employees of the Applicant who are members of the Respondent Unions in a timely fashion of the illegality of the strike and the appropriate manner to deal with their concerns; and failed to discipline members of the Respondent Unions employed by the Applicant for their involvement in the unlawful strike.

Remedy Sought:

35. The Applicant seeks the following remedies:
 - a. a declaration that the Respondent Unions and employees of the Applicant represented by the Respondent Unions have engaged and are continuing to engage in an unlawful strike contrary to the Code;
 - b. an order directing the Respondent Unions to cease and desist from violating the Code, and to refrain from further violating the Code;
 - c. an order directing all employees of the Applicant who are represented by the Respondent Unions to cease and desist from violating the Code and to refrain from further violating the Code;
 - d. an order directing any employee who has participated or is participating in the unlawful strike to perform the duties of his or her employment;
 - e. an order requiring the Respondent Unions forthwith to give notice of each such order to all employees represented by the Respondent Unions;

- f. that the Board file a copy of its order with the Federal Court pursuant to Section 23(1) of the *Code*; and
- g. Such further relief as may be appropriate.

Hearing

36. The Applicant requests that a hearing be held forthwith in Vancouver for the reasons set out earlier in this application. We estimate 1 day for this hearing.

Urgency

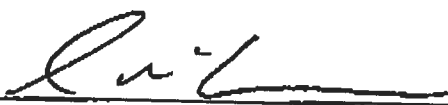
37. Section 14(e) of the *Regulations* states that an expedited process applies to applications for declaration of unlawful strike. The application involves unlawful strike activity and is of the utmost urgency.

Service

38. Pursuant to section 7(1)(c) of the *Regulations*, service of this application is currently being effected upon the Respondent Unions by facsimile.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

DATED at the City of Vancouver, in the Province of British Columbia, this 29th day of April, 2014.


for: _____
Solicitor for the Applicant, Seaspan ULC.
Chris Leenheer