Court File Number: T-1972-14

FEDERAL COURT

BETWEEN

COMMUNITIES AND COAL SOCIETY,
VOTERS TAKING ACTION ON CLIMATE CHANGE,
CHRISTINE DUJMOVICH
and PAULA WILLIAMS

Applicants

and

VANCOUVER FRASER PORT AUTHORITY,
and FRASER SURREY DOCKS LIMITED PARTNERSHIP

Respondents

and

THE CITY OF NEW WESTMINSTER and THE CITY OF SURREY

Interveners

MEMORANDUM OF FACT AND LAW OF THE APPLICANTS
Volume 11 of 13

Harry Wruck, QC, Karen Campbell and Fraser Thomson
214 – 131 Water Street
Vancouver, BC V6B 4M3
Phone: (604) 685-5618
Fax: (604) 685-7813
Email: hwruck@ecojustice.ca
kcampbell@ecojustice.ca
fthomson@ecojustice.ca

Counsel for the Applicants
Communities and Coal Society, Voters Taking Action on Climate Change, Christine Dujmovich, and Paula Williams

Harley J. Harris
Owen Bird Law Corp.
29th Floor Bentall III
595 Burrard Street
Vancouver, BC V7X 1J5
Phone: (604) 691-7520
Fax: (604) 632-4456
Email: hharris@owenbird.com

Counsel for the Respondent
Vancouver Fraser Port Authority

D. Geoffrey Cowper, Q.C. and Robert M. Lonergan
Fasken Martineau LLP
2900, 550 Burrard Street
Vancouver, BC V6C 0A3
Phone: (604) 631-4718
Fax: (604) 632-4718
E-mail:gcowper@fasken.com
rlonergan@fasken.com

Counsel for the Respondent
Fraser Surrey Docks Limited Partnership

Anthony Capuccinello
13450, 104 Avenue
Surrey, BC V3T 1V8
Phone: (604) 591-4124
Fax: (604) 599-1613
Email: acapuccinello@surrey.ca

Counsel for the Intervener
City of Surrey

Reece Harding
Young Anderson
1616, 808 Nelson Street
Vancouver, BC V6Z 2H2
Phone: (604) 689-7400
Fax: (604) 689-3444
Email: harding@younganderson.ca

Counsel for the Intervener
The City of New Westminster

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OVERVIEW

1. On August 21, 2014 the Vancouver Fraser Port Authority (the "Port") issued a permit approving Fraser Surrey Docks LP's ("FSD") proposal to construct and operate a 4 million tonne direct transfer coal facility in Surrey, British Columbia (the "Project"). On November 30, 2015, the Port granted FSD's request to amend the Project permit.

2. The Port operates under the authority of the *Canada Marine Act* and has mandatory duties under the *Canadian Environmental Assessment Act, 2012* ("*CEAA*"). Among these duties is the requirement to consider and avoid against significant adverse environmental effects and to ensure public safety, environmental protection and respond to local priorities. In execution of its public duties, Port staff are to conduct themselves in an impartial manner that will "bear the closest public scrutiny."[1]

3. The applicants, local residents and community environmental organizations, bring this application for judicial review challenging the lawfulness of the Project approval. This application gives rise to the legality of decision making by a federal authority, whether the requirements of *CEAA* were met, and serious issues of procedural fairness.

4. First, the Port's Board of Directors (the "Board") lacked the authority to delegate its powers to make the mandatory determination under s 67(a) of *CEAA* of whether the Project would cause significant adverse environmental effects (the "*CEAA* Determination") to the Port's Chief Executive Officer and President (the "CEO").

5. Second, if the Board did have the authority to delegate both the *CEAA* Determination and the decision to issue the Project permit, it improperly did so.

6. Third, if the Board did have the authority, and it was properly delegated, the CEO failed to make the *CEAA* Determination.

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[1] *CEAA*, *2012,* SC 2012, c 19, s 52, ss 5, 67 [Applicants' Book of Authorities [Applicants' BOA], Tab 2]; *Canada Marine Act*, SC 1998, c 10, s 4 [Applicants' BOA, Tab 1]

7. Fourth, the Port's approvals give rise to a reasonable apprehension of bias based on a contextual analysis of a number of factors, including: the Port's bonus scheme for Port staff and executives which vested statutory decision makers with a financial interest in the approvals, the Port's institutional structure, the Port's collaboration with FSD and the affiliations and actions of Port decision makers.

8. Finally, the Port's subsequent amendment to the Project permit cannot cure the underlying defects in the Project approval. The Project permit is a nullity, thus the amended permit is also a nullity.

PART I - STATEMENT OF FACTS

1. The Project and the Parties

9. FSD seeks to construct and operate a 4 million tonne direct transfer coal facility on Port lands it leases on the Fraser River in the City of Surrey, where it presently transports grain, steel and agricultural products.[2] The Project would see coal shipped from the United States by open top rail cars through White Rock, Surrey and North Delta (the "Rail Corridor"). The Project would cause an additional 640 trains with 124 to 135 open top rail cars to pass through the Rail Corridor yearly.[3] At the Project site, coal would be loaded onto barges bound for Texada Island in the Salish Sea, and transferred to deep sea vessels bound for Asia. An amendment to the Project also allows ocean going vessels to transport coal down the Fraser River for export to Asia.[4]

10. The applicants Voters Taking Action on Climate Change ("VTACC") and Communities and Coal Society are non-profit societies whose members live in B.C.'s

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[2] Affidavit of Jeff Scott, Affirmed December 17, 2014 [Scott Affidavit #1] at paras 2-3 and 5 [Fraser Surrey Docks' Respondent Record [FSDRR]].
[3] Affidavit of Paula Williams, Affirmed November 2, 2014 [Williams Affidavit] at paras 20 and 48 [Applicants' Record [AR] Vol. 6, Tab 17, pp 1219 and 1223].
[4] Affidavit of Kevin Washbrook, Affirmed November 2, 2014 [Washbrook Affidavit #1] at Exhibit F, p 3 and Exhibit G, p 2 [AR Vol. 3, Tab 16.F, p 463 and Tab 16.G, p 498] and Affidavit #3 of Jeff Arason, Sworn June 8, 2016 [Arason Affidavit #3] at Exhibit N [AR Vol. 7, Tab 22.N]; See also Transcript of the cross-examination of Peter Xotta [Xotta Transcript] at Exhibit 1 [AR Vol. 8, Tab 25.1, pp 1989 and 1991] for two maps of the region.

lower mainland. The majority of Communities and Coal supporters and members live along the Rail Corridor.[5]

11. The applicants Christine Dujmovich and Paula Williams live in Surrey in close proximity to the Project site and the Rail Corridor respectively. Both are members of Communities and Coal, and Ms. Williams is a founding director.[6]

12. The Port is a crown corporation incorporated by letters patent under s 8 of the *Canada Marine Act* and a federal authority for the purposes of s 67(a) of *CEAA*.[7]

2. The Port's Review and Permitting of the Project

13. On June 13, 2012, FSD submitted its Project application. The application was required to undergo the Port's project review process (the "Project Review Process") under ss 5 and 27 of the *Port Authorities Operations Regulations* (the *"Regulations"*) and s 67(a) of *CEAA*.[8]

14. Throughout the Project Review Process the applicants, the public, First Nations, government agencies and municipalities raised concerns about the Project, including: health and environmental risks from coal dust and shipping; increased rail and marine traffic; failure to assess the climate impacts of coal combustion; and inadequacies of FSD's Environmental Impact Assessment and of the Port's Project Review Process.[9]

15. In addition, the applicants wrote to the Port twice alleging that the Port's review and decision making process on the Project violated the rule against bias. The Port did not respond to these allegations.[10]

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[5] Williams Affidavit at para 48 [AR Vol. 6, Tab 17, p 1223].
[6] Affidavit of Christine Dujmovich, Affirmed November 2, 2014 [Dujmovich Affidavit] at paras 1, 4, 6 and 9 [AR Vol. 3, Tab 15, pp 365-366]; Williams Affidavit at paras 2 and 6 [AR Vol. 6, Tab 17, pp 1216-1217].
[7] Washbrook Affidavit #1 at Exhibits F and H [AR Vol. 3, Tab 16.F, p 470 and Tab 16.H, p 507].
[8] *CEAA,* s 67(a) [Applicants' BOA, Tab 2]; *Port Authorities Operations Regulations*, SOR/2000-55, ss 5, 27 [Applicants' BOA, Tab 4].
[9]Washbrook Affidavit #1 at paras 40, 41, 43, 44, 45, 46, 47, 48, and 97 [AR Vol. 3, Tab 16, pp 420-422 and 436] and Exhibit FF [AR Vol. 5, Tab 16.FF, p 933] and Williams Affidavit at paras 61-80 [AR Vol. 6, Tab 17, pp 1228-1236].
[10] Washbrook Affidavit #1 at para 99 [AR Vol. 3, Tab 16, p 437]; Exhibits R [AR Vol. 4, Tab 16.R] UU and VV [AR Vol. 5, Tab 16.UU and Tab 16.VV].

16. Yet, throughout the Project Review Process, the Port directly collaborated with FSD to advance the Project.[11] Correspondence between the CEO Robin Silvester, Mr. Peter Xotta, Vice President of Planning and Operations (the "VP"), and members of a Port committee tasked with reviewing the Project (the "Project Review Committee") and FSD suggest that the approval of the Project was predetermined.[12] This included a "Comfort Letter" sent by the VP to FSD in mid-2012 setting out the economic importance of FSD to the Port and expressing confidence that any challenges the application faced would be overcome.[13]

17. The Port and FSD jointly conducted Project related public engagement by consulting on press releases and coordinating responses to concerns about the Project from citizens and municipalities.[14] During the Project Review Process, FSD President Jeff Scott met and corresponded with the VP repeatedly, including providing the VP with materials trumpeting the benefits of coal and downplaying its environmental effects.[15] The Port (including the CEO and members of the Project Review Committee) and FSD regularly updated each other on public concerns about the Project, which referred to concerns about the Project originating from "opponents" of coal and the "anti-coal lobby".[16]

18. At the end of the Project Review Process, Port staff summarized their recommendations in an Environmental Review Decision Statement (dated August 12,

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[11] Affidavit of Kathryn Harrison, Affirmed October 29, 2014 [Harrison Affidavit] at Exhibit CC [AR Vol. 2, Tab 14.CC]; Xotta Transcript, Questions 108-110 and 185 [AR Vol. 8, Tab 25, pp 1862 and 1879-1880].
[12] Harrison Affidavit at Exhibits E, FF and GG [AR Vol. 2, Tabs 14.E, 14.FF, and 14.GG]; Affidavit of Kevin Washbrook, Affirmed May 11, 2015 [Washbrook Affidavit #4] at Exhibit B, see Deliverable "Issue Project Permit" [AR Vol. 6, Tab 20.B, pp 1404, 1409, and 1415].
[13] Harrison Affidavit at Exhibit E [AR Vol. 2, Tab 14.E]; Xotta Transcript, Questions 133-134 [AR Vol. 8, Tab 25, p 1867].
[14] Harrison Affidavit at Exhibits G, O, P, Q, S, Y [AR Vol. 2, Tabs 14.G, 14.O, 14.P, 14.Q, 14.S, and 14.Y]; Xotta Transcript, Questions 113-117, and 229 and Exhibit 4 [AR Vol. 8, Tab 25, pp 1863-1864 and 1895 and Tab 25.4]; Email from N Horsford to P Xotta et al, Jan 14 2013 [AR Vol. 10, Tab 31].
[15] Harrison Affidavit at Exhibits K and W [AR Vol. 2, Tab 14.K, p 188 and Tab 14.W, p 268]; Xotta Transcript, Questions 110 and 235-241 [AR Vol. 8, Tab 25, pp 1862 and 1897-1900].
[16] Harrison Affidavit at Exhibits K, R, U, V, W, EE, and NN [AR Vol. 2, Tabs 14.K, p 195, 14.R, 14.U, 14.V, 14.W, 14.EE, p 299, and 14.NN, p 357].

2014) stating that the Project was not likely to cause significant adverse environmental effects and in a Project Review Report (dated August 15, 2014) which recommended approval of the Project.[17]

19. On August 15, 2014, the Project Review Committee considered Project related materials including the Project Review Report and the Environmental Review Decision Statement. On that same day the VP sent a memorandum to the CEO recommending issuance of the Project Permit.[18]

20. On August 21, 2014, the Port issued project permit No. 2012-072 (the "Permit"). The Permit was signed by the CEO.[19] The Permit does not make any determination as to whether the Project would cause significant adverse environmental effects, nor does it reference s 67(a) of *CEAA*. Further, the Environmental Review Decision Statement was not attached to the Permit contrary to the Port's usual procedure.[20] The Port, nonetheless, asserts that the Permit contains the CEO's *CEAA* Determination.[21]

21. Despite the CEO's signature on the Permit, Port documents and the statutory scheme inconsistently suggest the authority to issue project permits rests with either the Port's Board, the CEO, the VP, or the Project Review Committee.[22]

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[17] Washbrook Affidavit #1 at Exhibits F [AR Vol. 3, Tab 16.F, p 491] and DD [AR Vol. 5, Tab 16.DD, p 925].
[18] Affidavit of Peter Xotta, Sworn June 1, 2015 [Xotta Affidavit] at paras 21- 31 and Exhibit E [AR Vol. 8, Tab 25.1, pp 1961-1963 and 2023-2024].
[19] PMV Project Permit 2012-072, August 21, 2014 [AR Vol. 1, Tab 2, pp 16 and 26].
[20] Xotta Transcript, Questions 273-291 [AR Vol. 8, Tab 25, pp 1913-1917]; PMV Project Permit 2012-072, August 21, 2014 [AR Vol. 1, Tab 2, pp 0016-0026].
[21] Washbrook Affidavit #4 at para 2 and Exhibit A [AR Vol. 6, Tab 20, pp 1375-1376 and Tab 20.A, pp 1380-1381]; Affidavit of Eugene Wat, Sworn March 2, 2015 [Wat Affidavit] at Exhibits B and E [AR Vol. 6, Tab 18.B, p 1364 and Tab 18.E, p 1367].
[22] *Canada Marine Act,* ss 20, 21 [Applicants' BOA, Tab 1]; Xotta Affidavit at Exhibit A and Exhibit J at para 1 [AR Vol. 8, Tab 25.1, pp 1971 and 2075]; Washbrook Affidavit #1 at Exhibit I [AR. Vol. 3, Tab 16.I, p 584] and Exhibit WW [AR Vol. 5, Tab 16.WW, p 1180]; Xotta Transcript, Question 378-381 and Exhibit 10 [AR Vol. 8, Tab 25, p 1946 and Tab 25.10, p 2205].

3. The Port's Approval of the Amended Permit

22. On May 4, 2015, just over eight months after the Project was approved, FSD indicated its intention to seek an amendment to the Permit to load coal onto ocean going vessels as well as barges; it submitted its application on July 9, 2015.[23]

23. The Port refused to conduct a *de novo* review of the Project, but instead considered only the proposed change – to also allow coal transfer to ocean going vessels – in its review of the proposed amendment.[24] As part of this amendment review process, Port staff completed a Project and Environmental Review Report on November 20, 2015 summarizing its findings.[25]

24. On November 30, 2015, the Port issued amended permit #2012-072-1 (the "Amended Permit"). The Amended Permit is essentially the same document as the Permit; 67 of the 81 original conditions are identical. Of the 14 changes, the majority are date changes or minor wording changes.[26]

4. The Port's Executive and Staff Compensation Scheme

25. All Port executives and full time staff receive an annual incentive bonus that supplements their base salary. These bonuses are generally awarded based on three metrics: i) how effectively an individual has performed relative to annual pre-set performance objectives and personal competencies;[27] ii) the Port's financial and

[23] Arason Affidavit #3 at Exhibits B and E [AR Vol. 7, Tab 22.B, p 1559 and Tab 22.E, p 1568].
[24] Affidavit of Alison Wold, Affirmed March 10, 2016 [Wold Affidavit] at Exhibits F and I [AR Vol. 7, Tab 24.F and Tab 24.I, p 1795].
[25] Arason Affidavit #3 at Exhibits J and K [AR Vol. 7, Tab 22.J and Tab 22.K].
[26] Arason Affidavit #3 at paras 25-31 and Exhibits H and I [AR Vol. 7, Tab 22, pp 1526-1529 and Tabs 22.H and 22.I]; Affidavit of Mehran Nazerman, Sworn June 8, 2016 at paras 16-18 [AR Vol. 7, Tab 24, pp 1682-1683].
[27] Affidavit of Helen Jackson, Sworn July 2, 2015 [Jackson Affidavit] at paras 22-26 and 35-37 [AR Vol. 9, Tab 27.1, pp 2430-2432]; Transcript of the cross-examination of Helen Jackson [Jackson Transcript], Questions 23-27 [AR Vol. 9, Tab 27, pp 2300-2301].

corporate performance; [28] and iii) whether the Port has achieved a requisite annual level of income, referred to as the Threshold Net Income.[29]

(a) CEO Silvester, VP Xotta and full time staff

26. While the CEO and the VP have different bonus plan structures and objectives, both had pre-set objectives that related to the FSD Project. The CEO receives two bonuses a year: a short-term bonus based on the past year's performance of up to 64% of his salary and a medium-term bonus based on the past three years of up to 40% of his salary.[30] Combined, he is eligible for a bonus of up to 104% of his salary. In 2013 and 2014, the CEO received $771,000 and $796,000 respectively in combined salary and bonus. The Port refused to provide a detailed breakdown between base salary and bonus amount, but it is clear that the CEO's bonus potential is at least equal to that of his salary.[31] For example, had the CEO received the maximum bonus in 2014, or an extra 104% of his base salary, he would have received $405,804 bonus.[32]

27. Several of the CEO's bonus objectives related to the FSD Project. The CEO's 2012-2014 medium-term bonus was based entirely on delivering, or achieving, the Port's gateway capacity, a Port initiative to expand regional growth that includes FSD.[33] His 2011-2013 medium-term bonus plan was based on the Port developing new facilities and meeting the capacity requirements of all cargo sectors, including coal. In his bonus performance self-review, the CEO stated that "the Port is successfully managing the development and permitting of all projects brought

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[28] Jackson Affidavit at paras 5-11 [AR Vol. 9, Tab 27.1, pp 2427-2428].
[29] Jackson Transcript, Question 86 [AR Vol. 9, Tab 27, pp 2316-2317]; Jackson Affidavit at paras 10 and 11 [AR Vol. 9, Tab 27.1, pp 2427-2428].
[30] Jackson Affidavit at paras 46-47 [AR Vol. 9, Tab 27.1, p 2434].
[31] Jackson Affidavit at Exhibit A, p 4 [AR Vol. 9, Tab 27.1, p 2440]; Affidavit of Eugenia Mui #4, Sworn March 1, 2016 at Exhibit B [AR Vol. 10, Tab 45.B, p 2825]; Jackson Transcript, Questions 239-242 [AR Vol. 9, Tab 27, p 2348].
[32] Had he received the maximum bonus in 2014, Mr. Silvester's compensation of $796,000 would be comprised of $390,196 in base salary and $405,804 in bonuses (104% of his base salary).
[33] Jackson Affidavit at Exhibits G and I [AR Vol. 9, Tab 27.2, pp 2605 and 2626]; Jackson Transcript, Questions 125-129 [AR Vol. 9, Tab 27, pp 2323-2324].

forward." It also noted that the FSD Project is "an important first step in crystallising, and realising, the bulk product development plans for their facility."[34] Several items in the CEO's 2014 short-term incentive plan also related to the FSD Project Review[35] and his 2013 and 2014 bonus objectives incentivized expanding Port shipping capacity.[36]

28. The VP receives an annual bonus of up to 58% of his salary.[37] His bonus is calculated based on performance objectives and the Port's corporate performance. In 2014, the VP earned between $70,000 and $80,000 in bonuses.[38] In 2014, one of Mr. Xotta's key bonus objectives was to "Deliver Key Planning Outcomes." This included delivering "key approvals" like the FSD Project to advance the Port's objectives.[39] In his 2014 year-end self-evaluation, the VP identified his role in the FSD Project Review as his first accomplishment for this objective.[40]

29. In addition to bonus objectives explicitly relating to the Project, both the CEO and VP also received a bonus based on customer relationships, responsiveness and satisfaction. Part of the VP's bonus was based on providing customers, including FSD, with "distinctive value to increase the Port's competitive advantage." Twenty-two percent of one component of his 2014 pre-set objectives was based on customer relationships as evaluated by key customers; another 22% was based on how well the VP restructured the Port's project review process to better meet customer expectations based on customer satisfaction, both of which related to FSD.[41]

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[34] Jackson Affidavit at Exhibit H [AR Vol. 9, Tab 27.2, pp 2614, 2615, 2617, and 2623].
[35] Jackson Affidavit at Exhibit G [AR Vol. 9, Tab 27.2, pp 2595-2596]; Jackson Transcript, Questions 430-464 [AR Vol. 9, Tab 27, pp 2393-2401].
[36] Jackson Affidavit at Exhibits F and G [AR Vol. 9, Tab 27.2, pp 2583 and 2594].
[37] Jackson Affidavit at para 24 [AR Vol. 9, Tab 27.1, p 2430].
[38] Confidential Xotta Transcript, Question 480 [AR Vol. 8, Tab 26, pp 2229-2230].
[39] Jackson Affidavit at Exhibit E [AR Vol. 9, Tab 27.2, p 2563]; Xotta Confidential Transcript, Questions 494-497 [AR Vol. 9, Tab 26, pp 2234-2235]; Jackson Transcript, Questions 127-129 [AR Vol. 9, Tab 27, pp 2409-2410].
[40] Jackson Affidavit at Exhibit E [AR Vol. 9, Tab 27.2, p 2572].
[41] Jackson Affidavit at Exhibits D, E, and F [AR Vol. 9, Tab 27.2, pp 2541-2542, 2569-2571, and 2590-2592]; Xotta Transcript, Questions 61-63, 107 [AR Vol. 8, Tab 25, pp 1846-1847 and 1862]; Xotta Confidential Transcript, Questions 518-526 [AR Vol. 9, Tab 26, pp 2240-2242].

30. All full time Port staff, including members of the Project Review Committee and the authors of the Project Review Report and the Environmental Review Decision Statement also receive an annual incentive bonus structured similar to the VP's, albeit with different objectives.[42]

(b) Bonuses are linked to Port revenues

31. Before the Port awards any bonuses, it must generate a certain level of revenues or a "Threshold Net Income". If the Port doesn't meet this revenue level in a given year, bonuses are not paid. Revenues from projects like FSD are thus critical for executive bonuses.[43] Even when the Port meets its Threshold Net Income, Port revenues still influence the amount of an individual's bonus. Fifteen percent of the CEO's short-term bonuses in 2013-2014 were calculated based on the Port's earnings.[44] Fifteen to fifty percent of the VP's bonus relating to the Port's performance was based on the Port's earnings.[45]

32. Once approved and built, the Project would provide additional Port revenues through fees and rents. According to its standard rates, the Port will receive $2,360,000 in wharfage fees alone every year for the 4 million tonnes of coal shipped.[46] The Port would also collect rent, berthage and gateway improvement fees, and harbour dues from FSD as a result of the Project.[47]

33. On cross-examination, the VP agreed the Project would be financially beneficial to the Port and that a "likely outcome" of the approval would be an

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[42] Jackson Transcript, Questions 19-46 [AR Vol. 9, Tab 27, pp 2299-2304].
[43] Jackson Transcript, Questions 86 and 98 [AR Vol. 9, Tab 27, pp 2316-2319]; Jackson Affidavit at paras 10 and 11 [AR Vol. 9, Tab 27.1, p 2427-2428].
[44] Jackson Affidavit, Exhibits F and G [AR Vol. 9, Tab 27.2, pp 2589 and 2608].
[45] Xotta Transcript, Questions 82-89 [AR Vol. 8, Tab 25, pp 1854-1856]; Petruk Affidavit #3 at Exhibit B [AR Vol. 7, Tab 21.B, pp 1501, 1505, and 1511].
[46] The Port charges $.59/tonne of coal (dry bulk) shipped through the Port. When applied to the 4,000,000 tonnes of coal to be shipped through the Project the Port would generate $2,360,000 in Wharfage Fees. See Washbrook Affidavit #1 at para 83 [AR Vol. 3, Tab 16, p 422] and Exhibit QQ [AR Vol. 5, Tab 16.QQ, p 1081]; Xotta Transcript, Question 200 [AR Vol. 8, Tab 25, p 1883].
[47] Washbrook Affidavit #1 at Exhibit RR [AR Vol. 5, Tab 16.RR, p 1135]; Xotta Transcript, Questions 83-84, 164, and 408 [AR Vol. 8, Tab 25, pp 1854, 1874, and 1954]; Jackson Transcript, Question 402-404 [AR Vol. 9, Tab 27, p 2383].

increase in Port revenues. He also agreed that his work on the Project helped in obtaining his bonus.[48]

PART II - STATEMENT OF ISSUES

34. The applicants submit that the issues are:

Issue 1: The applicants have standing.

Issue 2: The applicable standard of review for Issues 3-6 is correctness.

Issue 3: The Port's Board did not have the statutory authority to delegate the power to make the *CEAA* Determination.

Issue 4: Alternatively, the Board failed to, or improperly delegated its decision making authority to the CEO to issue the Permit and to make the *CEAA* Determination.

Issue 5: In the further alternative, the Port failed to make the *CEAA* Determination.

Issue 6: The Port, its officers and staff violated procedural fairness and the rule against bias when issuing the Permit and making the *CEAA* Determination.

Issue 7: The Amended Permit is a nullity.

PART III - SUBMISSIONS

1. The Applicants Have Standing

35. Christine Dujmovich and Paula Williams are directly affected by the Project.[49] Ms. Dujmovich has lived within a kilometre of the Project site for most of her life.[50] Ms. Williams and her family live in close proximity to the Rail Corridor.[51] When

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[48] Xotta Transcript, Questions 185-187, 460, 510, 522, 526, 529, 530, 542-544 and 550 [AR Vol. 8, Tab 25, pp 1879-1880 and AR Vol. 9, Tab 26, pp 2226, 2239, and 2241-2248]; See also Jackson Transcript, Questions 402-404 [AR Vol. 9, Tab 27, p 2383].
[49] *Federal Courts Act*, RSC 1985, c F-7, s 18.1(1) [Applicants' BOA, Tab 3]; *League for Human Rights of B'Nai Brith Canada v Odynsky,* 2010 FCA 307 (QL) at para 58 [Applicants' BOA, Tab 23].
[50] Dujmovich Affidavit at paras 1, 5, 9, and 12 [AR Vol. 3, Tab 15, pp 365-366].
[51] Williams Affidavit at paras 6-8 [AR Vol. 6, Tab 17, p 1217].

operating, Ms. Dujmovich, Ms. Williams and their families will experience, among other things, increased exposure to coal dust, diesel exhaust, and noise pollution.[52]

36. Many members of Communities and Coal are also directly affected as they live in Surrey, White Rock, New Westminster and Richmond near the Rail Corridor.[53]

37. In addition, Communities and Coal and VTACC meet the test for public interest standing as set out by the Supreme Court of Canada.[54] This application gives rise to serious justiciable issues of procedural fairness, the legality of decision making by a federal authority, and whether the Port met the requirements of *CEAA*.[55] These applicants have a real stake and genuine interest in the issues as they participated throughout the Project Review Process and are concerned about the environmental impacts of the Project.[56] This application is a reasonable and effective way to bring the issues before this Court.[57]

2. Standard of Review

38. Previous jurisprudence establishes that a correctness standard of review should be applied to procedural fairness issues, including reasonable apprehension of bias.[58]

39. It is also established by jurisprudence that the delegation issues are governed by correctness, including: a) the Port's lack of statutory power to delegate the *CEAA*

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[52] Williams Affidavit at paras 9-16, 20 and 21-35 [AR Vol. 6, Tab 17, pp 1217- 1221]; Dujmovich Affidavit at paras 14-16 and 43-61 [AR Vol. 3, Tab 15, pp 367 and 372-374].
[53] Williams Affidavit at paras 48 and 51 [AR Vol. 6, Tab 17, pp 1223-1224].
[54] *Canada (Attorney General) v Downtown Eastside Sex Workers United Against Violence Society,* 2012 SCC 45 (QL) at para 37 [*Downtown Eastside*] [Applicants' BOA, Tab 11].
[55] *Downtown Eastside, ibid* at para 42 [Applicants' BOA, Tab 11].
[56] Washbrook Affidavit #1 at paras 3-16, 37-54, 87-103, and 104-108 [AR Vol. 3, Tab 16, pp 414-416, 420-424, and 432-439]; Williams Affidavit at paras 10-42, 46, 54-67, 78-80, and 87-88 [AR Vol. 6, Tab 17, pp 1217-1238]; Dujmovich Affidavit at paras 14-16, 17-35, 36-41, 43-61, and 67 [AR Vol. 3, Tab 15, pp 367-375]; Harrison Affidavit at para 3 [AR Vol. 2, Tab 14, p 110].
[57] *Manitoba Metis Federation Inc v Canada (Attorney General),* 2013 SCC 14 (QL) at para 43 [Applicants' BOA, Tab 25]; *Public Mobile v Canada (Attorney General)*, 2011 FC 130 (QL) at para 75, rev'd on other grounds, 2011 FCA 194, leave to appeal to SCC refused, 2011 SCCA No 349 (QL) [Applicants' BOA, Tab 27].
[58] *Ali v Canada (Citizenship and Immigration),* 2015 FC 814 (QL) at para 19 [Applicants' BOA, Tab 7]; *Air Canada v Greenglass*, 2014 FCA 288 (QL) at para 26 [Applicants' BOA, Tab 5].

Determination;[59] b) the improper delegation by the Port to the CEO to issue the Permit and to make the *CEAA* Determination;[60] and c) the Port's failure to make the *CEAA* Determination.[61] Further, these issues meet the *Dunsmuir* test for correctness.[62]

3. The Port's Board Lacked the Authority to Delegate the *CEAA* Determination

40. The Port has two key responsibilities in exercising its jurisdiction to approve the Project. First, the Port must decide whether to issue a permit to allow the Project to proceed under s 5 of the *Regulations.* Second, the Port has a mandatory obligation under s 67(a) of *CEAA* to determine whether significant adverse environmental effects are likely to be caused by the Project, which is a superadded duty that Parliament has imposed on the Port.[63] In issuing the Project permit, the Port has maintained that the CEO made these two decisions.[64]

41. The Board's authority to delegate powers to the Port CEO is found in ss 20 and 21.1 of the *Canada Marine Act.* Section 20 establishes the Board as responsible for managing Port activities. Section 21.1 provides the Board the authority to delegate its "powers to manage the activities of the Port Authority to a committee of directors or to the officers of the Port." There is no equivalent provision authorizing delegation of authority in *CEAA*.

42. The applicants submit that the Board lacked the statutory authority to delegate the *CEAA* Determination. Section 21.1 of the *Canada Marine Act* makes clear that

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[59] *Twentieth Century Fox Home Entertainment Canada Ltd v Canada (Attorney General)*, 2012 FC 823 (QL) at para 19 [Applicants' BOA, Tab 34], aff'd on other grounds, 2013 FCA 25; *Dunsmuir v New Brunswick*, 2008 SCC 9 (QL) at para 59 [*Dunsmuir*] [Applicants' BOA, Tab 16].
[60] *Yang v Canada (Minister of Public Safety and Emergency Preparedness),* 2008 FC 158 (QL) at para 6, aff'd 2008 FCA 281 [Applicants' BOA, Tab 37].
[61] *Greenpeace v Canada (Attorney General)*, 2014 FC 1124 (QL) at para 5 [Applicants' BOA, Tab 21]; *Dunsmuir supra* note 59 at para 50 [Applicants' BOA, Tab 16].
[62] *Dunsmuir, supra* note 59 at para 64 [Applicants' BOA, Tab 16].
[63] *Friends of the Oldman River Society v Canada (Minister of Transport),* [1992] 1 SCR 3 (QL) at para 44 [*Oldman River*] [Applicants' BOA, Tab 19].
[64] Washbrook Affidavit #4 at para 2 and Exhibit A [AR Vol. 6, Tab 20, pp 1375-1376 and Tab 20.A, pp 1380-1381].

the Port can only delegate powers to manage the Port authority activities contemplated in the *Canada Marine Act.* It does not include granting the Board the authority to delegate to the CEO the power to make the *CEAA* Determination.

43. The Supreme Court of Canada has made clear that powers assigned under enabling legislation must be delegated: "[i]t is settled law that a body to which a power is assigned under its enabling legislation must exercise that power itself and may not delegate it to one of its members…without the express or implicit authority of the legislation, in accordance with the maxim…*delegatus non potest delegare*…"[65]

44. Parliament did not permit the Port, through its Board, to delegate the *CEAA* Determination. Parliament could have allowed the Board to delegate this power, as it did in s 104(1) of *CEAA*, which grants the Minister of the Environment the authority to delegate his/her powers. In the case of a federal authority such as the Port, Parliament chose not to do so given that the determination of whether an activity or a project will cause significant adverse environmental effects is integral to the *CEAA* scheme and is a power arising outside the *Canada Marine Act*.[66]

45. Section 67(a) of *CEAA* was enacted after s 21.1 of the *Canada Marine Act,* further indicating that Parliament did not intend to give the Port's Board the authority to delegate the *CEAA* Determination.[67] Section 21.1 of the *Canada Marine Act* only authorized the Board to delegate its powers under the *Canada Marine Act*. When Parliament enacted s 67(a) of *CEAA* it did not authorize the Board to delegate any powers under *CEAA*; this power was given to the Board and the Board alone.

4. Alternatively, the Board Failed to or Improperly Delegated its Decision Making Authority

46. Should this Court find that the Board had authority to delegate the *CEAA* Determination, the applicants challenge the Board's delegation to the CEO to make two types of decisions: (a) permit decisions under the *Canada Marine Act* and (b)

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[65] *Therrien (Re)*, 2001 SCC 35 (QL) at para 93 [*Therrien*] [Applicants' BOA, Tab 33].
[66] Sections 4(1)(a), (b), and (g) of the *CEAA* all reference the need to protect against significant adverse environmental effects. In addition to s 67(a), both ss 31 and 52 require a determination regarding significant adverse environmental effects [Applicants' BOA, Tab 2]
[67] Section 21.1 of the *Canada Marine Act* was enacted in 2008 and has not been amended since [Applicants' BOA, Tab 1].

CEAA determinations, on the basis that there was no express authorization or delegation from the board to the CEO for either permit decisions or *CEAA* determinations.

47. The focus of this part is on the two main decisions at issue: the Permit decision and the *CEAA* Determination. The Amended Permit and its associated *CEAA* determination flowed from those initial decisions and must also fail, as argued below at paragraphs 91 to 103.

48. It is the applicants' position that the delegation did not occur. Administrative law principles establish that all administrative tribunal decisions or actions must be supported by a grant of statutory authority or they have no legal force or effect. Courts will invalidate administrative action that contravenes an express or implied limit in the grant of authority conferred by the enabling legislation.[68]

49. The Port takes the position that the Board delegated its decision making authority to make the two decisions to the CEO. The Port cannot, however, point to any such grant of authority, nor has it provided proper documentation of any lawful delegation to the CEO. The various documents the Port has produced in response to this allegation do not establish lawful delegation. In fact, many of the Port's documents are contradictory, inconsistent with the statute and leave it unclear as to who, if anyone, has the lawful authority to issue the Project Permit or to make the *CEAA* Determination.

50. Delegating authority to issue the Project Permit or to make the *CEAA* Determination must be done expressly. The Port failed to do so, and therefore the delegation did not occur.[69]

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[68] *Dunsmuir, supra* note 59 at para 28 [Applicants' BOA, Tab 16]; *British Columbia (Milk Board) v Grisnich (c.o.b. Mountainview Acres)*, [1995] 2 SCR 895 (QL) at paras 19 [Applicants' BOA, Tab 9].

[69] *Alberta v Alberta (Public Service Grievance Appeal Board),* [1983] AJ No 807 (QL) at paras 28-29 (ABQB) [Applicants' BOA, Tab 6]; see also *Hanson v Universities Athletic Association,* [1975] 11 OR (2d) 193 (QL) at 8 (ONSC) [Applicants' BOA, Tab 22].

(a) The documents relied on by the Port do not establish delegation

51. The Port has relied on a number of documents to establish delegation. However, none of these documents, alone or combined, establish lawful delegation. Thus, if delegation did occur, it was unlawful.

i. The meeting extract is not a delegation instrument

52. The Port claims that delegation occurred at a Board meeting held on June 4, 2013, yet it has not produced the minutes from that meeting. It has instead produced a meeting extract (the "Extract") to establish authority for the CEO to issue the Permit and make the *CEAA* Determination. The Extract does not constitute a clear and necessary delegation from the Board to the CEO to make the decisions at issue.[70]

53. The shortcomings in the Extract as a delegation instrument are numerous. At paragraph (a), the Extract merely acknowledges that the CEO had been previously authorized, not by actual delegation, but rather by "historic decision-making principles" to issue project permits and "environmental authorities." Moreover, no historic delegation document was produced by the Port. Thus, an adverse inference should be drawn in relation to the Port's failure to produce the minutes of the Board meeting and from its failure to produce an accurate, or indeed any, delegation document when the Port knew these relevant documents ought to have been produced.[71]

54. Paragraphs (b) and (c) of the Extract purport to delegate authority to the CEO to establish a Project Review Process Directive, and to issue environmental authorizations pursuant to Environmental Policy B-007. However, nowhere does it delegate to the CEO the authority to issue project permits or make *CEAA* determinations.

55. Paragraph (c) of the Extract purports to allow the Board to delegate to the CEO and/or his delegate, the authority to issue "environmental authorizations" pursuant to

[70] Xotta Affidavit, Exhibit B [AR Vol. 8, Tab 25.1, p 1977].
[71] Xotta Affidavit, Exhibit B at para (a) [AR Vol. 8, Tab 25.1, p 1977]; Lederman, *The Law of Evidence in Canada*, 4th ed (Markham, Ont: LexisNexis, 2014) at 386-387 [Lederman] [Applicants' BOA, Tab 40].

the Environmental Policy B-007, yet it does not specify what such environmental authorizations are or whether this refers to powers under the *Canada Marine Act, CEAA* or both. As stated above, Section 21.1 of the *Canada Marine Act* does not permit the CEO to further delegate the powers granted to it by the Board. An attempt to sub-delegate environmental authorizations runs afoul of the *delegatus non potest delegare* principle in the absence of an express or implied statutory authorization.[72]

56. Finally, the fact that the Port only produced an extract of the June 4, 2013 meeting, rather than a transparent and clear set of delegation instruments and meeting minutes, prevents the applicants and the Court from comprehending the extract and its meaning. As a consequence, an adverse inference should be drawn against the Port for failing to fully disclose those materials.[73]

ii. Neither the Project Review Process Directive nor the Port's Guide to Project Review are delegation instruments

57. The purported delegation leaves it unclear as to who, if anyone, has the power to issue project permits and environmental authorizations. Port documents are inconsistent as to who has this authority, stating at different times that the CEO had the authority to make the *CEAA* Determination, while the requirements of *CEAA* were considered by various individuals in the Port and not the CEO to whom the purported delegation was made.[74]

58. The Project Review Process Directive does not expressly or implicitly delegate authority under the *Regulations* or *CEAA*.[75] The Port's Guide to Project Review (the "Guide") does not mention that it is the CEO who makes decisions. The Guide, which is designed to assist applicants like FSD understand the approval process, states: "the

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[72] *Therrien, supra* note 65 at para 93 [Applicants' BOA, Tab 33].
[73] Lederman, *supra* note 71 at 386-387 [Applicants' BOA, Tab 40].
[74] Washbrook Affidavit #4 at para 2 and Exhibit A, paras 13-14 [AR Vol. 6, Tab 20, pp 1375-1376 and Tab 20.A, pp 1380-1381]; *Canada Marine Act,* ss 20, 21 [Applicants' BOA, Tab 1]; Xotta Affidavit at Exhibit A [AR Vol. 8, Tab 25.1, p 1971]; Washbrook Affidavit #1 at Exhibit I [AR Vol. 3, Tab 16.I, p 584] and Exhibit WW [AR Vol. 5, Tab 16.WW, p 1180]; Xotta Transcript, Questions 378-381 and Exhibit 10 [AR Vol. 8, Tab 25, p 1946 and Tab 25.10, p 2205].
[75] Xotta Affidavit, Exhibit A [AR Vol. 8, Tab 25.1, pp 1967-1972].

project review committee is a standing committee comprised of representatives from several Port departments. The committee may choose to approve or decline the application or request additional information about the application prior to making a decision."[76] Yet there is no evidence that the Board delegated this power to that committee.

59. The Port has also not provided any evidence that the Project Review Process Directive referenced at paragraph (b) of the Extract is the same directive as the one provided in its Rule 318 of the *Federal Courts Rules* response, or that such a document exists.[77] The directive tendered by the Port is dated January 1, 2008.[78] This document predates the enactment of s 67(a) of *CEAA* by four years and predates the purported delegation of authority to the CEO to "establish" the Directive by over five years. Finally, the Project Review Process Directive does not identify an author nor a source of authority for its implementation. No person has signed it, nor is there any explanation as to how it applies to the Permit or the *CEAA* Determination.

iii. The Environment Policy Appendix I is not a delegation instrument

60. The Port has also produced the Environment Policy Appendix I (the "Appendix") which again does not support the purported delegation.[79] Paragraphs 1 and 2 of the Appendix make this clear by distinguishing between who can issue project permits and make s 67(a) *CEAA* determinations. The Appendix is completely devoid of delegation language, strongly suggesting that this important power was to remain with the Board.

61. Specifically, paragraph 1 of the Appendix states that "[r]esponsibility for… authorizations under section 5 of the *Regulations* lies with the VFPA officers and directors. This responsibility may be delegated to the VFPA staff." This indicates that the Board has retained this authority, as it has not been delegated to VFPA staff.

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[76] Washbrook Affidavit # 1, Exhibit I [AR Vol. 3, Tab 16.I, p 584].
[77] Xotta Affidavit, Exhibit B [AR Vol. 8, Tab 25.1, p 1977].
[78] Xotta Affidavit, Exhibit A [AR Vol. 8, Tab 25.1, pp 1967-1972].
[79] Xotta Affidavit, Exhibit J [AR Vol. 8, Tab 25.1, p 2075].

iv. The August 19, 2014 Board Minutes are not a delegation instrument

62. The Port further relies on additional Board meeting minutes from August 19, 2014 which state that the Project Review Committee concluded that the Project will not result in significant adverse environmental effects.[80] In fact the Project Review Committee never so concluded nor did it purport to make the *CEAA* Determination. Further, these minutes confuse matters because the Project Review Committee was not actually delegated the authority to make the *CEAA* Determination. According to the Port, only the CEO had that authority, and he did not make the *CEAA* Determination.

5. The Port Failed to Make the *CEAA* Determination

63. In the event that this Court finds that Board had the authority to delegate the *CEAA* Determination decision and that the delegation was done lawfully, the applicants submit that the Port failed to make the *CEAA* Determination altogether, thereby violating the requirements of *CEAA*.

64. The *CEAA* Determination required the Port to determine whether the Project was likely to cause significant adverse environmental effects prior to approval, which the Port did not do.

65. On March 16, 2015, the Port advised the applicants that the CEO made the *CEAA* Determination when he issued the Permit.[81] However, Port evidence makes it clear that the CEO did not do so. The Permit does not indicate that the *CEAA* Determination was made by the CEO, or at all. The VP confirmed on cross-examination that the Permit does not include any reference to the CEO making the *CEAA* Determination.[82]

66. The Environmental Review Decision Statement prepared by Port staff for the Project was referenced in the Project Review Report and provided to the CEO.

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[80] Xotta Affidavit, Exhibit G [AR Vol. 8, Tab 25.1, p 2046].
[81] Washbrook Affidavit #4 at para 2 and Exhibit A at paras 13-14 [AR Vol. 6, Tab 20, pp 1375-1376 and Tab 20.A, pp 1380-1381].
[82] Xotta Affidavit at para 45 [AR Vol. 8, Tab 25.1, p 1965]; Xotta Transcript, Questions 268-270, 278-291, at pp 82-88 [AR Vol. 8, Tab 25, pp 1911-1917].

However, despite being asked repeatedly for the record of the CEO's deliberations or exercise of authority under *CEAA* through Rule 317 of the *Federal Courts Rules*, the Port has not provided it because it does not exist.[83] The Port's VP explains the failure to make the *CEAA* Determination as a matter of "form rather than substance."[84] This cavalier attitude demonstrates that the CEO failed to consider or even refer to the mandatory *CEAA* obligations.[85]

67. Further, the Port has provided no evidence that the CEO actually considered the Environmental Review Decision Statement. The law requires the decision-maker to apply their own mind to the issues, and to make decisions personally in a meaningful way. A delegate such as the CEO may accept the advice of a person or other body, but cannot simply "rubberstamp" a recommendation of a subordinate.

68. There is no evidence that the CEO undertook his own evaluation, considered the document or rendered his own decision. The CEO could have sworn an affidavit to that effect, but chose not to do so. This situation is analogous to that found in *Roncarelli v. Duplessis*, where the real decision was made by the premier and was rubberstamped by the commission. As in *Roncarelli,* the party with the purported statutory authority (or at least some delegated authorization) to make the discretionary decision did not make it. This contravenes the rule of law.[86]

69. The CEO's failure to make the *CEAA* Determination is clear because the Permit does not even reference *CEAA* whereas it does explicitly reference the *Regulations* under the *Canada Marine Act*. The Port's Environmental Review Decision Statement specifically states that it is "not a project authorization" but that "it is a prerequisite to the issuance of a project permit". It also states that Port "authorization is required for the project to proceed and in such circumstances *CEAA* requires federal authorities to assure themselves that projects will not result in significant adverse environmental

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[83] Applicants' Amended 317 Request, dated January 16, 2015 [AR Vol. 10, Tab 28]; Xotta Affidavit Exhibit F at p 19 [AR Vol. 8, Tab 25.1, p 2026]
[84] Xotta Affidavit at para 45 [AR Vol. 8, Tab 25.1, p 1965].
[85] Xotta Affidavit at Exhibit I [AR Vol. 8, Tab 25.1, p 2071].
[86] *Roncarelli v Duplessis,* [1959] SCR 121 (QL) at 19 per Rand J, 55 per Abbott J [Applicants' BOA, Tab 30]; *Dunsmuir, supra* note 59 at para 28 [Applicants' BOA, Tab 16].

effects. This review provides that assurance."[87] Accordingly, the CEO, as the person purportedly delegated responsibility for making the *CEAA* Determination, was to have expressly done so. The Environmental Review Decision Statement, despite its name, did not make that decision.

6. The Project Approval Violated Procedural Fairness and the Rule Against Bias

70. The applicants also challenge the Project on the basis that it gave rise to a reasonable apprehension of bias. Procedural fairness and the rule against bias apply to all statutory delegates and administrative bodies.[88] A biased hearing cannot be fair and is void *ab initio*.[89]

71. The Supreme Court of Canada has established that a violation of the rule against bias occurs where there is a reasonable apprehension of bias. This test asks whether a reasonable and informed person, viewing the matter realistically and practically, would think that the decision maker was consciously or unconsciously influenced in the exercise of their public duty in an inappropriate manner by their interests or relationships.[90] If a Court determines that a reasonable observer would think it more likely that a matter was not decided fairly, regardless of the actual motivation of the decision maker, it is grounds for disqualifying bias.

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[87] Xotta Affidavit at Exhibit F [AR Vol. 8, Tab 25.1, p 2038].
[88] David Phillip Jones, QC & Anne S de Villars, QC, *Principles of Administrative Law*, 6th ed (Toronto: Thomson Reuters, 2014) at 247-248, 411 [Jones & de Villars] [Applicants' BOA, Tab 38]; *Newfoundland Telephone Co v Newfoundland (Board of Commissioners of Public Utilities)*, [1992] 1 SCR 623 (QL) at para 22 [*Newfoundland Telephone*] [Applicants' BOA, Tab 26].
[89] *Newfoundland Telephone, supra* note 88 at para 40 [Applicants' BOA, Tab 26]; Jones & de Villars, *supra* note 88 at 247-248, 257, 411 [Applicants' BOA, Tab 38]; see also Halsbury's Laws of Canada (online), *Administrative Law,* "Judicial Review: Requirement of Independence and Impartiality: Bias" at HAD-102 "Hearing rendered void" (2013 Reissue) [Applicants' BOA, Tab 39]; see also *Winning Combination Inc v Canada (Minister of Health)*, 2016 FC 381 (QL) at para 87 [*Winning Combination*] [Applicants' BOA, Tab 36].
[90] *Wewaykum Indian Band v Canada*, [2003] 2 SCR 259 (QL) at paras 60, 73-74 [*Wewaykum*] [Applicants' BOA, Tab 35].

72. *Reasonable* in this context has been interpreted as requiring "a reasoned suspicion" of bias.[91] In practice, each inquiry is "highly fact specific" and can only be inferred from *all* the relevant facts.[92] As the Supreme Court held in *Wewaykum*, where the facts point to a financial or personal interest of the decision-maker; present or past link with a party; or expression of views and activities, they must be addressed carefully *in light of the entire context*. There are no shortcuts.[93]

73. The focus on *apprehension* of bias emphasizes the importance of public confidence in the integrity of the administration of justice: "justice should not only be done, but should manifestly and undoubtedly be seen to be done." [94] As Lord Denning said, "[j]ustice must be rooted in confidence: and confidence is destroyed when right-minded people go away thinking: 'The Judge was biased.'"[95]

74. The onus is on the applicants to meet this reasonable apprehension of bias test. However, once the applicants apprehend bias and put that allegation to the decision-maker, which the applicants did twice during the Project review, the onus is on the decision maker to set out its position so that a proper record can be formed.[96] The Port did not do so in this case, and therefore an adverse inference should be drawn against it.[97]

(a) Application of the reasonable apprehension of bias test

75. In applying the reasonable apprehension of bias test in a contextual manner to the case at bar, the ultimate inquiry is whether a reasonable resident of Surrey or New Westminster, with knowledge of the circumstances, would conclude it more likely

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[91] *Committee for Justice and Liberty v Canada (National Energy Board)*, [1978] 1 SCR 369 (QL) at 18-19 [Applicants' BOA, Tab 15].
[92] Jones & de Villars, *supra* note 88 at 418 [Applicants' BOA, Tab 38]; *Ex p. PERRY,* [1929] PEIJ No 3 (QL) at para 23 (PEISC) [Applicants' BOA, Tab 18].
[93] *Wewaykum, supra* note 90 at para 77 [Applicants' BOA, Tab 35].
[94] *Wewaykum, supra* note 90 at para 66 [Applicants' BOA, Tab 35].
[95] *Metropolitan Properties v Lannon* [1969] 1 QB 577 at 599 (CA), cited in *Cipak v Canada (Minister of Citizenship and Immigration),* 2014 FC 453 (QL) at para 24 [Applicants' BOA, Tab 13].
[96] *Eckervogt v British Columbia (Minister of Employment and Investment),* 2004 BCCA 398 (QL) at para 47 [Applicants' BOA, Tab 17].
[97] *Winning Combination, supra* note 89 at paras 113, 116 [Applicants' BOA, Tab 36].

than not that the decision-maker was consciously or unconsciously influenced by the five factors described below. Consideration of the decision makers' state of mind requires careful assessment of influencing factors.[98]

76. In this case, the contextual analysis of whether the decision makers' exercise of discretion was improperly influenced includes five factors: i) pecuniary interest in the bonus objectives of Port executives and staff; ii) the Port's institutional structure; iii) previous affiliations between the CEO and coal industry advocacy organizations; iv) prejudging of the Project Review Process by Port executives and Port staff collaboration with FSD; and v) the Port's Code of Conduct. This is a context specific factual determination; the applicants need only demonstrate that the test is met where, looking cumulatively at all five factors, a reasonable apprehension of bias is established.[99]

77. The Port made two decisions when it approved the Project: the Project permit under the *Canada Marine Act* and the purported *CEAA* Determination. FSD received authority to construct and operate the Project in the Port's permit issued under the *Regulations*. The *CEAA* Determination is a superadded duty imposed by Parliament to ensure that the environmental effects of projects are considered carefully and impartially before approvals issue.[100]

i. Pecuniary interest factor

78. A reasonable apprehension of bias can arise when a decision maker has a financial interest in the outcome of a decision; it originates from the rule that no one should be permitted to adjudicate on a matter that will lead to his or her own profit or material interest.[101] Despite obligations to impartiality,[102] the fact that the CEO and

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[98] *Wewaykum, supra* note 90 at paras 63-67, 72, 77 [Applicants' BOA, Tab 35].
[99] *Wewaykum, supra* note 90 at paras 63-66, 77 [Applicants' BOA, Tab 35]; *R v Baldovi*, 2016 MBQB 220 (QL) at paras 29-30, 46 [Applicants' BOA, Tab 28].
[100] *CEAA,* s 67(a) [Applicants' BOA, Tab 2]; *Oldman River, supra* note 63 at para 44 [Applicants' BOA, Tab 19].
[101] Jones & de Villars, *supra* note 88 at 418-423 [Applicants' BOA, Tab 38].
[102] The CEO signed the Permit and the VP's recommendation played a significant role in the decision and his reasons were not supplemented by the CEO; *Baker v Canada (Minister of Citizenship and Immigration),* [1999] 2 SCR 817 (QL) at para 45 [*Baker*] [Applicants' BOA, Tab 8].

the VP were eligible to personally benefit from Project approval gave rise to a reasonable apprehension of bias. The objectives on which their bonus was calculated included incentives for delivery of project approvals, customer satisfaction, and increases in Port revenues. These objectives, in so far as they related to the Project, created an inherent conflict between the impartial exercise of their statutory duties and the financial interest in their bonus payment. Port staff, other than the CEO and VP, who recommended Project approval were also eligible for bonuses based on the same or similar criteria.

79. The Port's bonus schemes produce a reasonable suspicion of bias. In 2014, the CEO's bonus objectives included expanding the Port's growth and successfully handling the FSD Permit process.[103] The VP was to "deliver" key approvals like FSD and admitted that the Project factored into his bonus.[104] Less than four months after the Permit was issued, both executives relied on the Project approval in their year-end evaluations to substantiate their bonuses, to be paid in early 2015.[105]

80. As set out at paragraphs 28-29 above, the bonus objectives included customer responsiveness which was to be measured based on the opinion of customers like FSD. Thus, Port executives were awarded their bonus based on their relationship with the very same customers whose projects they are supposed to considered objectively.

81. The bonus objective of increasing Port revenues is also connected to the Project approval so as to constitute a personal interest in project approval. Once operating, the FSD Project will add to the Port's overall revenues including fees and lease payments as set out at paragraphs 32-33. The bonus scheme clearly links Port financial performance with bonuses; without adequate revenues the Threshold Net Income cannot be met and there are no bonuses. There is a very real chance that once

[103] Jackson Affidavit at Exhibits G and I [AR Vol. 9, Tab 27.2, pp 2596 and 2625].
[104] Xotta Transcript, Questions 460, 510, 522, 523, 526, 529, 530, 542-44, and 550 [AR Vol. 9, Tab 26, pp 2226-2248]; Jackson Transcript, Questions 381-382 [AR Vol. 9, Tab 27, pp 2376-2377].
[105] Jackson Transcript, Questions 226-227 [AR Vol. 9, Tab 27, p 2345].

the Project is approved, Port revenues will increase and so too will bonus rewards. This supports a reasonable apprehension of bias.[106]

82. Meeting these key criteria in bonuses constitutes a significant material interest as anywhere from 58% to 104% of the CEO and VP's base salary can be paid in bonuses. While not all of the bonus objectives related to FSD, as set out above at paragraphs 32-33, the Project was important in ensuring that the executives met their objectives, and played a key part in their 2014 bonus reports. The Project also related to their customer responsiveness objectives and would contribute to overall revenues, both of which would help the executives increase their bonuses. Increasing Port revenues would also ensure that the Port met its Threshold Net Income, a prerequisite to the payment of any bonuses.

83. As held by the Court in *Bostock*, another way of describing the test is as follows: would the executives or staff in deciding whether to approve the project be tempted to ask how it would affect them financially. The fact that they don't know with certainty if they will get the bonus does not mean that they do not have a pecuniary interest that disqualifies them.[107]

ii. Institutional structure factor

84. A reasonable apprehension of bias can arise from the structure and operation of the decision making body.[108] The Port's bonus program, which awards *all* executives and staff, creates an institutional structure that gives rise to a reasonable apprehension of bias when examined in the context of decisions like the Permit decision and the *CEAA* Determination.

85. The Port's bonus scheme operates such that all staff involved in reviewing, recommending, and decision-making relating to the Project are awarded bonuses based on the Port's economic performance as measured by the Threshold Net Income, personal pre-determined objectives and the Port's corporate objectives.[109] It

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[106] *Bostock v Kay*, 1989 WL 651132 at 6 (UKCA) [*Bostock*] [Applicants' BOA, Tab 10].
[107] *Bostock, ibid* at 6 [Applicants' BOA, Tab 10].
[108] Jones & de Villars, *supra* note 88 at 437-439 [Applicants' BOA, Tab 38].
[109] Jackson Affidavit at paras 5-11 and Jackson Transcript at Questions 82-91 [AR Vol. 9, Tab 27.1, pp 2427-2428 and Tab 27, pp 2315-2318].

is clear that projects like FSD will increase Port revenues, and thus a project approval can be capable of increasing bonus awards. Consequently, staff and executive bonuses can influence, or could reasonably been seen to influence, how those individuals exercise their discretion under the Port's superadded statutory mandate to make the *CEAA* Determination and their duties to regulate and protect the public and the environment under both the *Canada Marine Act* and *CEAA*.

iii. Port affiliation with coal industry organizations factor

86. The close affiliations between the Port, its decision makers and the coal industry further heightens the apprehension of bias. The Port is a member of advocacy groups that promote the coal industry, including the Coal Association of Canada.[110] In correspondence with the CEO, senior Port officials explained that the Port's membership in such organizations is to "support" the coal industry.[111] During the Project review, the Port was a financial "sponsor" of a Coal Association of Canada conference. When this sponsorship was made public, the CEO withdrew public endorsement due to "backlash", stating that the Port needed to be "less out-there at this time." Other Port officials noted concern over the "optics" of such a sponsorship. Recognizing this conflict the Port then paid $3,000 to remove its name from conference materials so that the public would not be aware of its affiliations.[112]

iv. Prejudgment and collaboration factors

87. The actions of the CEO, the VP and other Port staff contribute to the reasonable apprehension of bias that the Port was prejudging the outcome of the Project Review Process. As set out above at paragraph 16, at the outset of the review the VP told FSD that he was "confident" that any issues would be overcome and that approval would issue. The Port's conduct during the Project Review Process was not at all impartial: confidential communications were maintained between Port decision makers/staff

[110] Washbrook Affidavit at paras 67-72 and Exhibits HH, II, JJ, KK, and LL [AR Vol. 5, Tabs 16.HH, 16.II, 16.JJ, 16.KK, 16.LL]
[111] Harrison Affidavit at Exhibit I [AR Vol. 2, Tab 14.I].
[112] Harrison Affidavit at paras 20-29 and Exhibits L and M [AR Vol. 2, Tab 14, pp 116-118, Tabs 14.L and 14.M].

and FSD in relation to the application and managing public relations around the Project. In several cases, the Port and FSD collaborated on responses to concern over and opposition to the Project from members of the public they referred to as "opponents" of coal or "anti-coal activists."[113]

v. Port's Code of Conduct factor

88. A reasonable apprehension of bias can arise where the conduct of the Port, its CEO and VP, run afoul not only common law impartiality obligations, but also the Port's Code of Conduct. Section 28(4) of the *Canada Marine Act* prohibits any exercise of power contrary to the Letters Patent.[114] Section 1.2 of the Code of Conduct requires Port officers and directors to discharge their duties in a manner that preserves and promotes public confidence and trust in the integrity and impartiality of the Port, recognizing that public trust can be equally compromised by the appearance of a conflict as with an actual conflict.[115] The Port's Code of Ethical Conduct Policy states that employees should avoid "any situation that could cast doubt on their ability to act with total objectivity." The Code of Ethical Conduct Policy also requires staff to consider how the public would perceive any possibly unethical conduct and to act in a manner that will "bear the closest public scrutiny."[116]

89. The CEO and the VP both signed acknowledgements of their acceptance of Code of Conduct; they were both well aware of their public obligations, yet, they nonetheless participated in a bonus scheme that incentivized FSD Project approval as well as other approvals that would increase Port revenues. Their actual conduct and that of the Port does not reflect an objective application of the Code of Conduct: their support for the coal industry, their collaboration with FSD as a permittee, and failing to respond to the applicants' concerns of biased decision making display disregard for the Code of Conduct.

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[113] *Canadian Union of Postal Workers v Canada Post Corp*, 2012 FC 975 (QL) at para 103 and see above Paras 16-17 of the Facts section [Applicants' BOA, Tab 12].
[114] *Canada Marine Act*, s 28(4) [Applicants' BOA, Tab 1].
[115] Washbrook Affidavit #1 at para 100 [AR Vol. 3, Tab 16, p 437] and Exhibit H, p 61 [AR Vol. 3, Tab 16.H, p 565].
[116] Petruk Affidavit #3, Exhibit A [AR Vol. 7, Tab 21.A, pp 1466-1474].

(b) Conclusion on reasonable apprehension of bias

90. The reasonable apprehension of bias test demands a fulsome analysis of all the facts. The combination of all five factors establishes that a reasonably informed resident of Surrey or New Westminster would conclude that the Port's exercise of its mandatory obligations under the *Canada Marine Act* and *CEAA* gave rise to a reasonable apprehension of bias.

7. The Amended Permit is a Nullity

(a) The Amended Permit is a minor amendment of the Permit

91. The Amended Permit is not a standalone permit, but rather a minor amendment. This Court has already indicated that the "issuance of the permit and the amended permit are so closely linked that they should be considered together."[117] As such, the Permit is a nullity and it follows that the Amended Permit is also a nullity.

92. On May 4, 2015, FSD indicated that it was applying for an amendment 8 months after the project was approved; it submitted its application on July 9, 2015.[118]

93. Before issuing the Amended Permit the Port advised the City of New Westminster that it did "not intend to withdraw the previously issued permit".[119]

94. The Port's Project and Environmental Review Guide establishes a procedure for such reviews and makes clear that the Port was to either issue a new, separate permit, or to amend an existing permit.[120] The Port opted to issue an *amended* permit.

95. After approving the Amended Permit, the Port stated that the permit "amendment" was to "modify" the list of authorized works to allow coal to be shipped by ocean going vessels as well as barges. This was confirmed once the Amended Permit was granted.[121] The Port repeatedly characterizes the Amended Permit decision as an amendment and not a new permit, saying:

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[117] *Communities and Coal Society et al v Attorney General of Canada et al*, (July 22, 2016), Vancouver T-1972-14 (FC) at para 41 [AR Vol 1. Tab 11 pp 86].
[118] Arason Affidavit #3 at Exhibits B, E [AR Vol. 7, Tab 22.B, p 1559 and Tab 22.E, p 1568].
[119] Wold Affidavit at Exhibit H [AR Vol. 7, Tab 24.H, p 1795].
[120] Wold Affidavit at Exhibit J [AR Vol. 7, Tab 24.J, p 1817].
[121] Arason Affidavit #3 at Exhibit H [AR Vol. 7, Tab 22.H, p 1610].

i.) is "reviewing solely the aspects of the project that are proposed to change and not its decision on the original project permit"; and

ii.) It "does not constitute a review of the entire project, or the impacts of the entire project."[122]

96. Further, the Port admits that the second approval document "forms an addendum to the previously issued project review report, environmental review decision statement, and third-party reviews."[123]

97. Sixty-seven of the 81 conditions in the Permit issued remain unchanged. There are 18 changes overall, including 2 additions, 2 deletions and 14 condition changes. The modifications do not substantively change the project, and are either minor or narrow changes to enable coal to be transported by ocean going vessels as well as barges.[124]

98. After the Amended Permit was issued, FSD described the Permit as an "amendment" and not a new permit.[125] Therefore, when the Amended Permit states it "replaces" the original Permit, it does not mean that the conditions in the Permit no longer exist. It merely means that the Amended Permit incorporates the original Permit conditions with a few minor amendments.

99. The Amended Permit and the Port's decision to issue it are clearly founded upon the Permit and the initial Project Review Process. In issuing the Amended Permit the Port was not revisiting its Project approval, which is the target of the applicants' challenge; rather, it was merely reviewing whether to modify certain minor approval conditions.

(b) The Permit decision process taints the Amended Permit

100. As described above, the Permit and *CEAA* Determination processes were tainted by bias, which then tainted the issuance of the Amended Permit and the second purported *CEAA* determination. The respondents' claim that the Amended

[122] Arason Affidavit #3 at paras 26-27 [AR Vol. 7, Tab 22, p 1526-1528] and Exhibits J, K [AR Vol. 7, Tab 22.J and Tab 22.K].
[123] Arason Affidavit #3 at Exhibit J [AR Vol. 7, Tab 22.J].
[124] Arason Affidavit #3 at paras 39-40 and Exhibit I [AR Vol. 7, Tab 22, p 1531 and Tab 22.I].
[125] Wold Affidavit at Exhibit K [AR Vol. 7, Tab 24.K, p 1826].

Permit replaces the Permit does not magically make the illegal aspects of the Permit disappear.

101. During the Amended Permit review, the Port was clear that it was not a *de novo* review of the Project. As Cory J stated in *Newfoundland Telephone*, when there is a finding of a reasonable apprehension of bias, the damage cannot be remedied and "the hearing, and any subsequent order resulting from it, is void."[126]

(c) A nullity is void and cannot be amended

102. If an act is void, it is a nullity, and every proceeding that is founded on it is incurable.[127] It is the applicants' position that the Permit is a nullity, therefore the Amended Permit must also be a nullity. As Lord Denning stated: "if an act is void, then it is in law a nullity. It is not only bad, but incurably bad. … And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse."[128]

103. To put it another way, courts have no jurisdiction to amend a nullity.[129] Furthermore, subsequent actions founded on a nullity are also incurably bad, and are therefore also nullities.[130] This legal principle was applied recently by the Federal Court of Appeal, where it held that National Energy Board project certificates issued based on a Governor in Council approval were automatically quashed where the Governor in Council approval was overturned by the court. In other words, the decision flowing from a nullity is automatically a nullity.[131]

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[126] *Newfoundland Telephone, supra* note 89 at para 40 [Applicants' BOA, Tab 26]; see also *Winning Combination*, *supra* note 89 at para 87 [Applicants' BOA, Tab 36].
[127] Arason Affidavit #3 at Exhibit I [AR Vol. 7, Tab 22.I]; *MacFoy v United Africa Company Ltd*, [1961] UKPC 49; [1961] 3 All ER 1169 (PC) at 3 [*MacFoy*] [Applicants' BOA, Tab 24]; see also *Clapp v Macro Industries Inc,* 2007 BCSC 840 (QL) at paras 29-30 [Applicants' BOA, Tab 14]; *Tanney v Alberta (Energy Resources Conservation Board)*, [1982] AJ No 463 (QL) at para 19 (ABQB) [Applicants' BOA, Tab 32].
[128] *MacFoy, ibid* at 3[Applicants' BOA, Tab 24].
[129] *R v Smith,* [2015] N.W.T.J. No 32 (QL) at paras 26-27 (NWT Terr Ct) [Applicants' BOA, Tab 29]; see also *Seyffert v Toronto (City),* [2006] OMBD No 264 (QL) at para 4 [Applicants' BOA, Tab 31].
[130] *MacFoy, supra* note 127 at 51[Applicants' BOA, Tab 24].
[131] *Gitxaala Nation v Canada,* 2016 FCA 187 (QL) at para 333 [Applicants' BOA, Tab 20].

8. Costs

104. If the applicants are successful they seek costs against the respondents and seek leave to make submissions in relation to costs in any event after the decision is rendered on this judicial review application.[132]

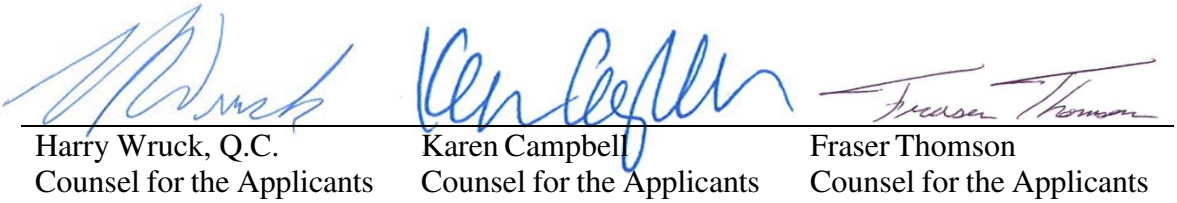
PART IV - ORDER SOUGHT

105. The Applicants respectfully seek the orders set out in their Further Amended Notice of Application.[133]

PART V - LIST OF AUTHORITIES

106. See Index to Applicants' Book of Authorities.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 22nd DAY OF FEBRUARY, 2017.



Harry Wruck, Q.C. Counsel for the Applicants 214-131 Water Street Vancouver, BC V6B 4M3 Tel: 604-685-5618 ext. 286 Fax: 604-685-7813 hwruck@ecojustice.ca	Karen Campbell Counsel for the Applicants 214-131 Water Street Vancouver, BC V6B 4M3 Tel: 604-685-5618 ext. 287 Fax: 604-685-7813 kcampbell@ecojustice.ca	Fraser Thomson Counsel for the Applicants 214-131 Water Street Vancouver, BC V6B 4M3 Tel: 604-685-5618 ext. 304 Fax: 604-685-7813 fthomson@ecojustice.ca

[132] *Communities and Coal Society et al v Attorney General of Canada et al*, (September 22, 2016), Toronto T-1972-14 (FC) [AR Vol 1. Tab 12 pp 104].
[133] Further Amended Notice of Application, [AR Vol. 1, Tab 1, pp 3-5].