

**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

e-document	T-1972-14
F I L E D	FEDERAL COURT COUR FÉDÉRALE  Jul 27, 2016  Tamsin Ramsay Vancouver, BC
D É P O S É	

**APPLICATION UNDER SECTIONS 18 and 18.1 OF THE  
FEDERAL COURTS ACT, RSC 1985, c F-7, FURTHER AMENDED  
PURSUANT TO THE ORDER OF THE COURT  
(JUSTICE RUSSELL) DATED JULY 22, 2016 AND RULE 3 AND  
75 OF THE FEDERAL COURTS RULES, SOR/98-106**

**FURTHER AMENDED NOTICE OF APPLICATION**

TO THE RESPONDENTS:

A PROCEEDING HAS BEEN COMMENCED by the applicants. The relief claimed by the applicants appears on the following pages.

THIS APPLICATION will be heard by the Court at a time and place to be fixed by the Judicial Administrator. Unless the Court orders otherwise, the place of hearing will be as requested by the applicants. The applicants request that this application be heard at **Vancouver, British Columbia.**

IF YOU WISH TO OPPOSE THIS APPLICATION, to receive notice of any step in the application or to be served with any documents in the application, you or a solicitor acting for you must prepare a notice of appearance in Form 305 prescribed by the *Federal Courts Rules* and serve it on the applicants' solicitor, or where the applicant is self-represented, on the applicant, WITHIN 10 DAYS after being served with this notice of application.

Copies of the *Federal Courts Rules*, information concerning the local offices of the Court and other necessary information may be obtained on request

to the Administrator of this Court at Ottawa (telephone 613-992-4238) or at any local office.

IF YOU FAIL TO OPPOSE THIS APPLICATION, JUDGMENT MAY BE GIVEN IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU.

Date: \_\_\_\_\_

Issued by: \_\_\_\_\_

Date Amended: April 28, 2015

Address of  
local office: Federal Court  
Vancouver Registry  
701 W Georgia St.  
Vancouver, BC  
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Date Further Amended: July 27, 2016

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AND TO:

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## APPLICATION

This is an application for judicial review of ~~the two~~ decisions of Vancouver Fraser Port Authority (the “**Port**”): first, the decision to issue Project Permit 2012-072 (the “Permit” or “Permit Decision”) to Fraser Surrey Docks Limited Partnership (“Fraser Surrey Docks”), on August 21, 2014; and second, the decision to issue Amended Permit 2012-072-1 (the “Amended Permit” or “Amended Permit Decision”) to Fraser Surrey Docks on November 30, 2015. The Permit Decision authorizes Fraser Surrey Docks to construct and operate a Direct Transfer Coal Facility in Surrey, British Columbia (the “**Project**”). The Amended Permit Decision makes several minor alterations to the Permit to authorize Fraser Surrey Docks to load coal to ocean going vessels in addition to barges, along with several other minor changes. This application is in respect of the Port’s

- a) lack of authority through its chief executive officer, Robin Silvester (the “CEO”) to issue the Permit and to make a determination under s. 67 (a) of the *Canadian Environmental Assessment Act, 2012*, SC 2012, c 19, s 52 (“*CEAA 2012*”), or alternatively, the Port’s failure to make a determination under s. 67(a) of the *CEAA 2012* at all,
- b) failure to consider certain environmental effects as required by the *CEAA 2012*,  
~~and~~
- c) that the conduct of the Port and its officers and staff during the Project review (the “**Project Review Process**”) violated the principles of natural justice, procedural fairness and the rule against bias, and that this conduct taints both the Permit and the Amended Permit, and
- d) that the Port was without authority to issue the Amended Permit due to the Permit being void and therefore a nullity.

### **The applicants make application for:**

1. An order or orders:
  - (a 1) declaring that the CEO lacked the authority to make the Permit Decision;
  - (a 1.1) declaring that the CEO lacked the authority to make the Amended

Permit Decision, by virtue of the Permit being void and a nullity;

- (a 2) declaring that the CEO lacked the authority to make a determination under s. 67(a) of *CEAA 2012* that the Project would not cause significant adverse environmental effects (the “**s. 67(a) CEAA 2012 Determination**”) in respect of the Permit Decision;
- (a 3) alternatively declaring that the CEO and the Port failed to make the s.67(a) *CEAA 2012 Determination* in respect of the Permit Decision;
- (a) declaring that the Port erred in its determination under subsection 67(a) of the *CEAA 2012* that the Project would not cause significant adverse environmental effects in respect of the Permit Decision;
- (b) declaring that the Port failed to consider changes to the environment that will be caused by the combustion of the coal that will be exported outside Canada, contrary to the requirements of subsection 5(2)(a) of *CEAA 2012*, in respect of the Permit Decision;
- (c) declaring that the Port and its officers and staff failed to observe the principles of natural justice, procedural fairness and the rule against bias, in the Project Review Process, and that this failure taints both the Permit Decision and the Amended Permit Decision;
- (c 1) declaring that the Permit Decision is a nullity and void;
- (c 2) declaring that the Permit is a nullity and void;
- (c 3) declaring that the Amended Permit Decision is a nullity and void by virtue of the Permit decision and the Permit being a nullity and void;
- (c 4) declaring that the Amended Permit is a nullity and void by virtue of the Permit decision and the Permit being a nullity and void.
- (d) quashing or setting aside the Permit;
- (d 1) quashing or setting aside the Amended Permit on the ground that it is a nullity and void by virtue of the Permit decision and the Permit being a nullity and void;

- (e) quashing or setting aside the purported s. 67(a)\_*CEAA 2012* Determination in respect of both the Permit and the Amended Permit;
  - (f) referring the permit and Amended Permit applications back to the Port to be determined in a manner that is in accordance with the law under subsections 20 and 21.1 of the *Canada Marine Act*, SC 1998, c. 10, and complies with the principles of natural justice, procedural fairness, and the rule against bias, and such other directions as the Court considers appropriate; and
  - (g) referring the permit and Amended Permit applications back to the Port to reconsider the Project in accordance with subsections 5(2)(a) and 67(a) of the *CEAA 2012*.
2. In the event that this application is dismissed, an order that the Applicants shall not be required to pay costs to the Respondents pursuant to Rule 400 of the *Federal Courts Rules*.
  3. Costs.
  4. Such further and other relief as this Honourable Court may deem just.

**The grounds for the application are:**

***The Parties***

1. The applicant Communities and Coal Society (“**Communities & Coal**”) is a non-profit society registered under British Columbia *Society Act* RSBC 1996, c 433 (“*Society Act*”). Communities & Coal was created as a result of genuine community concern about the detrimental environmental and health effects of the Project. Communities & Coal consists of persons who live in the communities in and around where the Project would operate and who are directly affected by the Permit Decision and Amended Permit Decision and the s. 67(a) *CEAA 2012* Determination.
2. The applicant Voters Taking Action on Climate Change (“**VTACC**”) is a non-profit society registered under the *Society Act*. VTACC has a genuine interest in encouraging action on climate change and is particularly concerned with the

climate, environmental and health impacts from the combustion of coal.

3. The applicant Christine Dujmovich (“**Ms. Dujmovich**”) resides in Surrey adjacent to the Project site and is directly affected by the environmental and health impacts of the decision to issue the Permit and Amended Permit and the s. 67(a) *CEAA 2012* Determination.
4. The applicant, Paula Williams (“**Ms. Williams**”) resides in Surrey and is directly affected by the environmental and health impacts of the decision to issue the Permit and Amended Permit and the s. 67(a) *CEAA 2012* Determination.
5. The Port does business as Port Metro Vancouver and is established by Letters Patent pursuant to the *Canada Marine Act*.
6. Fraser Surrey Docks Limited Partnership is the proponent of the Project and a limited partnership registered in British Columbia on December 27, 2000. Fraser Surrey Docks Limited is the general partner of Fraser Surrey Docks Limited Partnership.

### ***The Project***

7. On June 13, 2012, Fraser Surrey Docks submitted a project permit application (the “**Permit Application**”) to the Port for the construction and operation of the Project.
8. The Permit Application seeks to develop a direct transfer coal facility (the “**Facility**”) that would export up to four million metric tonnes of thermal coal per year.
9. The coal will be shipped by train from Wyoming’s Powder River Basin to the Facility for export and combustion outside of Canada. At the Facility, the coal will be transferred from trains to barges. The loaded barges will be towed by tug boats down the Fraser River and then north to Texada Island where the coal will be stored until transferred to deep-sea vessels and exported.
10. Section 27 of the *Port Authorities Operations Regulations*, SOR/2000-55 issued under the *Canada Marine Act*, empowers the Port to issue permit

authorizations to carry out certain activities within the Port's jurisdiction.

***The Project Review Process***

11. The Port's Guide to Project Review guided the review of the Project. The Project Review Process occurred between June 2012 and August 2014. The Project Review Process addressed the issuance of the Permit and the *CEAA 2012* Determination.
12. A Planning Review and an Environmental Assessment Procedure were part of the Project Review Process. The Port also considered an environmental impact assessment (the "EIA") submitted by Fraser Surrey Docks. Once the Planning Review and the Environmental Assessment Procedure were completed, a Project Review Report was prepared.
13. The Project Review Process includes a Project Review Committee to consider, recommend or decide on the Permit application.
14. There was significant and increasing public concern over the course of the review, including frustration with the Project Review Process. Between November 2012 and April 2013, the Port had received approximately 815 emails and letters expressing concerns about, and opposition to, the Project.
15. Throughout 2013, Communities & Coal and VTACC organized meetings, public forums, door to door petitions and community events to raise awareness of the climate, environmental and health impacts of the Project.
16. The applicants were among the many concerned stakeholders, including regional health authorities and other regional government bodies, who made submissions to the Port during the Project Review Process.
17. In their comments to the Port, the applicants raised concerns about climate change, environmental, and health impacts associated with the Project. These concerns included the manner in which the Project Review Process was conducted, alleging that the principles of natural justice, procedural fairness and the rule against bias had been breached.

18. On November 18, 2013, the Port released the EIA for a 30 day public comment period. Over 3,000 comments were submitted, the majority of which expressed concern about the Project.
19. On August 21, 2014, the Port purported to issue the Permit to Fraser Surrey Docks. At the time that the Permit was purported to be issued, the Port also published related decision documents on its website, including a Project Review Report, an Environmental Review Decision Statement, a Human Health Risk Assessment, a Mitigation Strategy Description and a Public Comments Response Memo.
20. The Project Review Report does not identify the members of the Project Review Committee. The Project Review Report recommended that the Project be approved subject to identified conditions.
21. The Port did not provide any documentation regarding its approval of the Project Review Report's recommendation. After receiving the Project Review Report the Port issued the Permit, which was signed by Port President and Chief Executive Officer Robin Silvester.
- 21A. The Port's own documents provide conflicting information regarding the decision makers for the two decisions at issue. While the Permit was signed by the CEO, various other Port documents indicate that the Project Review Committee made the decision or that the Vice President of Planning and Operations made the decision. Port documents also indicate that the s. 67(a) CEAA 2012 Determination was made by the CEO in the Permit, but the Permit does not mention the requirements of CEAA 2012 at all. The Port has provided no record of the s. 67 CEAA 2012 Determination.

**The Amended Permit**

21B1. On November 30, 2015, the Port purported to issue the Amended Permit to Fraser Surrey Docks.

21B2. The Amended Permit made minor changes to the Permit to allow Fraser Surrey Docks to load coal on ocean going vessels in addition to barges, as well as removing a shed, relocating the rail building and adjusting rail services. Sixty

seven of the original 81 permit conditions are unchanged, and of the 14 changed conditions, the majority are date changes and minor wording changes.

21B3. A second project review process relating specifically to the proposed amendments occurred between July 9, 2015 and November 30, 2015 (the “Second Project Review Process”). The Port did not review the project *de novo*, nor did it reconsider whether the project should be authorized; rather, it focused its review solely on the changes proposed by Fraser Surrey Docks.

***Grounds of review – the CEO lacked the authority to make the Permit Decision and the s. 67(a) CEAA 2012 Determination, or alternatively failed to make the s. 67(a) CEAA 2012 Determination***

- 21B. Under s. 20 of the *Canada Marine Act*, SC 1998, c. 10, the Parliament of Canada has granted to the Port’s board of directors the responsibility for management of the activities of the Port. This includes the authority to issue the Permit to the respondent, Fraser Surrey Docks, and to make the s. 67(a) *CEAA 2012* Determination.
- 21C. Under s. 21.1 of the *Canada Marine Act* the Port’s board of directors has the authority to delegate the power to manage the activities of the Port to the CEO.
- 21D. The Port’s board of directors failed to delegate those powers to the CEO and therefore the CEO did not have the authority to make the Permit Decision or the s. 67(a) *CEAA 2012* Determination thereby making the Permit Decision void and a nullity.
- 21E. The Port acted without jurisdiction, beyond its jurisdiction and erred in law by allowing the CEO to issue the Permit to the respondent, Fraser Surrey Docks and as such the Permit Decision ~~is a nullity~~ and the Permit are void and nullities.
- 21F. The Port acted without jurisdiction, beyond its jurisdiction and erred in law by allowing the CEO to make the s. 67(a) *CEAA 2012* Determination that the Project would not cause significant adverse environmental effects in respect of the Permit, and as such has not lawfully made the s. 67(a) *CEAA 2012* Determination. Therefore, the Permit Decision and the Permit are void and

nullities.

21G. Alternatively, the CEO and the Port failed to make the s. 67(a) *CEAA 2012* Determination in respect of the Permit. The Port in its reply argument to the Applicants' Rule 318 motion asserts that the CEO was tasked with the authority to make, and did make, the s. 67(a) *CEAA 2012* determination by issuing the Permit. However, the Project Permit, signed by the CEO, does not mention the *CEAA 2012* Determination or the requirements of s. 67(a) of *CEAA 2012* at all. The Port has provided no record of the CEO's determination under s. 67(a) of the *CEAA 2012*. Therefore, the Permit Decision and the Permit are void and nullities.

***Grounds of Review – the conduct of the Port and its officers and staff violated the principles of natural justice, procedural fairness and the rule against bias***

22. In purportedly exercising its statutory and administrative duties under *CEAA 2012* and the *Canada Marine Act*, the Port and its officers and staff failed to adhere to the principles of natural justice, procedural fairness and the rule against bias that it was required by law to observe. The Port and its officers were therefore without jurisdiction to make the Permit Decision. The Permit Decision and the Permit are, accordingly, void and nullities.
23. The Port has a Code of Conduct for Directors and Officers (the “**Code of Conduct**”) found in the Port's Letters Patent. Section 1.2(c) of the Code of Conduct emphasizes the principle that public confidence and trust in the integrity and impartiality of the Port may be as equally compromised by the appearance of a conflict as with an actual conflict.
24. Port officers and staff, including Robin Silvester, Peter Xotta and Greg Yeomans, made comments violating the rule against bias at various points during the review. The comments indicate that these individuals predetermined the outcome of the Project Review Process, the Permit Decision and the *CEAA 2012* Determination.
25. The executive compensation program links the economic performance of the Port to the compensation of executives. The Project will increase revenues for

the Port. Officers receive executive compensation through this program. The financial link between the Project and the pecuniary interests of officers tasked with making a determination under *CEAA 2012* and under the Project Review violated the rule against bias.

26. Prior to and throughout the Project Review Process, the Port and its officers and staff maintained institutional affiliations with and sponsorship of organizations. These organizations were actively promoting coal and the coal industry.
27. Further, through the Project Review Process, the Port and its officers and staff collaborated closely with Fraser Surrey Docks and Fraser Surrey Docks' contractors regarding messaging and public relations about the Project. This included sharing information related to the activities of groups and individuals
28. On December 17, 2013 Communities & Coal and VTACC wrote to the Port, expressing concern over bias and alleging that the conduct of the Port and its officers and staff gave rise to a reasonable apprehension of bias.
29. On August 6, 2014, Communities & Coal and VTACC wrote again to the Port, alleging that the Port and its officers and staff, and the Project Review Committee gave rise to concerns about actual or perceived bias.
30. The Port has not responded to any of the bias allegations, despite having been expressly so advised by the applicants Communities & Coal and VTACC.
31. As a consequence of making its decision to issue the Permit, the Port and its officers and staff failed to comply with the principles of natural justice, procedural fairness and the rule against bias that it was required by law to observe. The Port and its officers were therefore without jurisdiction to make the Permit Decision. The Permit Decision and the Permit are, accordingly, void and nullities.

***Grounds of Review – the CEAA 2012 Determination excluded certain environmental effects***

32. The Port acted without jurisdiction, beyond its jurisdiction and erred in law in making the purported s. 67(a) *CEAA 2012* Determination and in issuing the

Permit. Therefore, the Permit Decision and the Permit are void and nullities.

33. Section 67(a) of *CEAA 2012* requires that the Port determine that the Project is not likely to cause significant adverse environmental effects prior to making the Permit Decision.
34. Environmental effects that must be considered under s. 67 are identified in section 5 of *CEAA 2012*.
35. Section 5(2)(a) of *CEAA 2012* requires the Port to consider a change caused to the environment which is directly linked or necessarily incidental to the decision to issue the Permit.
36. The Port received comments throughout the Project Review Process regarding issues related to climate change, global warming and the export of coal.
37. The Port acknowledges in its Environmental Review Decision Statement that the end use of the coal is a greenhouse gas ("**GHG**") generator.
38. The Project will transport up to 4 million tonnes of thermal coal for export and combustion in Asia.
39. Combustion will result in GHG emissions. Emissions associated with coal combustion are a major source of GHGs and present significant harm to the environment.
40. The combustion of 4 million tonnes of thermal coal is roughly equivalent to 1% of Canada's 2012 GHG emissions.
41. The Environmental Review Decision Statement and the Project Review Report predate the Port's purported s. 67 *CEAA 2012* Determination in the Permit. Both the Environmental Review Decision Statement and the Project Review Report recommended that the Project would not cause significant adverse environmental effects. At no point in the Project Review Process, in the Environmental Review Decision Statement or the Project Review Report was there consideration of the environmental effects of the end use of coal.
42. The Port acted without jurisdiction, beyond its jurisdiction and erred in law by failing to consider the end use of the coal as an environmental effect of the

Permit Decision as required by s. 5(2)(a), and therefore erred in making its purported CEEA 2012 Determination, and in issuing the Permit. Therefore, the Permit Decision and the Permit are void and nullities.

**Grounds of Review – the Amended Permit, being a purported amendment to a nullity, is itself a nullity**

42A. It is legal principle that one cannot amend a nullity; any purported amendment to a nullity is itself a nullity.

42B. Because the Permit and the Permit Decision are void and nullities based on the grounds of review set out above that: a) the CEO lacked the authority to make the Permit Decision and the s.67(a) CEEA 2012 Determination, or alternatively failed to make the s. 67 CEEA 2012 Determination; b) the conduct of the Port and its officers and staff violated the principles of natural justice, procedural fairness and the rule against bias; c) and the s.67(a) CEEA 2012 Determination’s exclusion of certain environmental effects, the Permit and the Permit Decision cannot be be amended. Therefore the Amended Permit Decision and the Amended Permit are also void and nullities.

***General Grounds of Review***

43. The Applicants rely on sections 18 and 18.1 of the *Federal Courts Act*, RSC 1985, c F-7, the *Federal Courts Rules*, SOR/98-106, and the *Canadian Environmental Assessment Act, 2012*, the *Canada Marine Act* and the *Port Authorities Operations Regulations*.
44. Such further and other relief and additional grounds as counsel may identify and this Honourable Court may consider.

**This application will be supported by the following material:**

1. The affidavit on behalf of VTACC to be served.
2. The affidavit on behalf of Communities & Coal to be served.
3. The affidavit of Christine Dujmovich to be served.
4. The affidavit of Paula Williams to be served.
5. The affidavit of Matt Horne to be served.

6. Such further affidavits as counsel may advise and this Honourable Court may allow.
7. The record before the Port when the Port purported to make the decision at issue in this proceedings.
8. Such further and additional materials as counsel may advise and this Honourable Court may allow.

**Rule 317 Request:**

The applicants request that the Port, the Minister of the Environment, the Minister of Fisheries and Oceans, the Minister of Transport and the Canadian Environmental Assessment Agency send a certified copy of the following material not in the applicants' possession:

1. The record of materials considered or relied on by the Port in making the Permit Decision and the *CEAA 2012* Determination and all documents that could give rise to a violation of the rule against bias even if those documents were not directly before the Port.
2. The record of materials considered or relied on by the Project Review Committee in relation to the Project, the record of any decision or recommendation made by the Project Review Committee in relation to the Project, the membership and composition of the Project Review Committee for this Project, and all documents that could give rise to the issue of the rule against bias even if those documents were not directly before the Project Review Committee.
3. The record of correspondence and communications between the Port, any of its officers and staff, and government ministries or agencies in relation to the Project.
4. The record of correspondence and communications between the Port, any of its officers and staff and Fraser Surrey Docks or Fraser Surrey Docks' contractors, in relation to the Project and all documents that could give rise to a violation of the rule against bias even if those documents were not directly

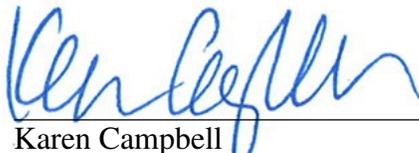
before the Port.

5. The Corporate Scorecard referred to in the Port's 2013 Executive Compensation Program summary, any other Port policies relating to compensation, incentive plans, or bonuses for Port officers and staff, including information on whether and the extent to which these plans and policies are affected by the economic performance of the Port.
6. Information indicating the circumstances under which Port officers and staff are eligible for additional compensation, including the names of those officers and staff.
7. Any record of material establishing the economic benefits of the Project accrued through fees, leases, rents, or any other form of compensation to the Port.

Date: September 19, 2014

Date Amended: April 28, 2015

Date Further Amended: July 27, 2016



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