

Federal Court



CANADA

Cour fédérale

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<b>Date:</b>	January 16, 2018	12:53 PM
<b>Subject:</b>	Communities and Coal Society et al. v. Vancouver Fraser Port Authority et al. Court File number: T-1972-14	

Total number of pages including this one

37

**Comments:****BY FAX ONLY**

Counsel,

Please find transmitted here a copy of the judgment and reasons of the Honourable Justice James W. O'Reilly rendered January 15, 2018 in the above-referenced file.

Regards,

Wayne Sawtell

Federal Court



Cour fédérale

Date: 20180115

Docket: T-1972-14

Citation: 2018 FC 35

Ottawa, Ontario, January 15, 2018

PRESENT: The Honourable Mr. Justice O'Reilly

BETWEEN:

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

Applicants

and

**ATTORNEY GENERAL OF CANADA,  
VANCOUVER FRASER PORT AUTHORITY  
AND FRASER SURREY DOCKS LIMITED  
PARTNERSHIP**

Respondents

and

**THE CITY OF NEW WESTMINSTER  
AND THE CITY OF SURREY**

Intervenors

**JUDGMENT AND REASONS**

I. Overview

[1] The applicants consist of two community groups, the Communities and Coal Society and Voters Taking Action on Climate Change, and two individuals, Ms Christine Dujmovich and Ms Paula Williams. Collectively, the applicants challenge two decisions of the respondent Vancouver Fraser Port Authority approving a proposal from the other respondent, Fraser Surrey Docks Limited Partnership, to construct a transfer coal facility at a marine terminal in Surrey, BC. The facility would transfer coal transported to the terminal by rail to barges or ocean-going vessels for shipment to Asia.

[2] The applicants contend that the Port Authority's decisions are invalid as they were made by the Port Authority's CEO, not its Board of Directors, and because no proper decision was made regarding the potential environmental impact of the project. Further, the applicants maintain that the decisions give rise to a reasonable apprehension of bias since the officers and employees of the Port Authority were financially motivated to approve the project, and because the Port Authority actually assisted Fraser Surrey Docks in putting forward a favourable proposal. The applicants ask me to quash the Port Authority's decisions and order a reconsideration of the proposal.

[3] I can find no basis for overturning the Port Authority's decisions – they were made fairly and lawfully, and untainted by a reasonable apprehension of bias. I must, therefore, dismiss this application for judicial review.

[4] The parties also exchanged written motions disputing the admissibility of information in their opponents' affidavits. Rather than argue those motions at the hearing, they agreed to present

their oral submissions on the main issues in this application based on the complete record and leave it to me to decide the preliminary evidentiary motions based on the written materials provided.

[5] The issues are:

1. Should all or part of the affidavits filed by the parties be struck?
2. Do the applicants have standing to bring this challenge?
3. Were the Port Authority's decisions made fairly and lawfully?
4. Do the Port Authority's decisions give rise to a reasonable apprehension of bias?
5. Is the permit issued by the Port Authority on November 30, 2015 a nullity?

## II. Factual Background

[6] In 2012, Fraser Surrey Docks applied for a permit to build and operate a transfer coal facility in Surrey. Currently, the location is used to ship grain, steel, and agricultural products. Fraser Surrey Docks proposed to bring coal to the facility from the United States by rail, then load the coal onto barges for shipment to Texada Island, where it would be transferred to vessels bound for Asia.

[7] The application underwent a review process at the Port Authority pursuant to the *Port Authorities Operations Regulations*, SOR/2000-55 (ss 5, 27) and the *Canadian Environmental Assessment Act*, SC 2012, c 19 (s 67) [CEAA] (see Annex for all enactments cited). The review process included consultations with community groups, First Nations, local authorities, and

municipalities. During the review, the applicants raised concerns about the environmental impact of the project and the review process itself.

[8] The applicants also expressed an apprehension of bias on the part of the Port Authority. Their concern arose from the fact that the Port Authority actively collaborated with Fraser Surrey Docks to help assure the success of the permit application, and to discount concerns raised by opponents of the project.

[9] In 2014, staff members at the Port Authority prepared an Environmental Review Decision Statement in which they expressed their conclusion that the project was unlikely to cause significant adverse effects. They also issued a Project Review Report recommending approval of the project. The Port Authority's Project Review Committee then considered these documents and other materials. The Vice President of Planning and Operations for the Port Authority, Mr Peter Xotta, recommended approval of the project to the Port Authority's CEO, Mr Robin Sylvester. The CEO approved the project and issued a permit to Fraser Surrey Docks on August 21, 2014. In 2015, at the request of Fraser Surrey Docks, the Port Authority's CEO amended the permit to allow coal to be loaded onto ocean-going vessels.

III. Issue One – Should all or part of the affidavits filed by the parties be struck?

A. *The Respondents' Motion*

[10] The Port Authority argues that the affidavits of the applicants Christine Dujmovich and Paula Williams should be admitted solely on the issue of standing. Their affidavits contain

information about the potential effect of the project, their involvement in the advocacy opposing the issuance of the permits, and their concerns regarding the project's impact.

[11] Similarly, the Port Authority argues that the affidavit of Kevin Washbrook, director of the applicant Voters Taking Action on Climate Change, should be admitted solely on the issue of standing. His affidavit describes the group's mandate and activities, including its advocacy in relation to the project in issue here.

[12] Further, the Port Authority disputes the admissibility of an affidavit tendered by Jeff Arason, Manager of the Utilities Division in the Engineering Department at the City of Surrey, as improper opinion evidence. In the same vein, the Port Authority argues that the affidavit of Mehran Nazeman, the Building Division Manager in the Planning Development Department of the City of Surrey, should also be struck.

[13] Finally, the Port Authority contends that certain exhibits attached to the affidavit of Alison Wold, an administrative assistant employed by counsel for the applicants, that relate to the amended permit issued in November 2015 should be struck because they are incomplete and irrelevant.

[14] I am satisfied that the affidavits of Christine Dujmovich, Paula Williams, and Kevin Washbrook are admissible. As explained below, they relate primarily to the question of standing but also provide background and context that is helpful in understanding the process leading up

to the issuance of the permits and, to a limited extent, provide evidence that may be relevant to the issue of bias.

[15] With respect to the Arason and Nazeman affidavits, I agree that a few passages in those documents contain opinions. The applicants say that they were entitled to file opinion evidence to counter the opinions offered in an affidavit of Timothy Blair, Senior Planner for the Vancouver Fraser Port Authority (dated May 24, 2016). However, in granting the applicants permission to file evidence responding to the Blair affidavit, Prothonotary Martha Milczynski noted that much of that impugned affidavit did not contain opinion at all; rather, it simply set out what was in the November 2015 permit (Order of June 1, 2016). As such, I will disregard any opinions set out in the Arason and Nazeman affidavits; it is unnecessary to strike them in their entirety. While the remaining evidence in those affidavits was not before the decision-maker, it describes the process leading up to the decisions in issue here, and I will consider it solely for that purpose.

[16] Regarding the Wold exhibits, I am satisfied that they are admissible as part of the record relating to the issuance of the amended permit in November 2015. While they may not represent the complete record, that is not a basis for excluding them. I have not considered any exhibits that are irrelevant.

[17] Fraser Surrey Docks also filed objections to the applicants' evidence similar to those presented by the Port Authority. I have not found it necessary to address those objections separately.

B. *The Applicants' Motion*

[18] The applicants seek to strike an affidavit of Timothy Blair dated March 1, 2016, or to strike out portions of that affidavit, as well as parts of three other affidavits filed by the respondents – the affidavit of Timothy Blair dated December 16, 2014, the affidavit of Jeff Scott (President and CEO of Fraser Surrey Docks) dated December 17, 2014, the affidavit of Peter Xotta (VP of the Port Authority) dated June 1, 2015.

[19] The Port Authority does not rely on the Blair affidavit of March 1, 2016, so I need not deal with that objection.

[20] With respect to the Blair affidavit of December 16, 2014, the applicants say that it contains hearsay, argument, conclusions of law, and inadmissible records that should be struck. Of the Scott affidavit, the applicants allege hearsay, argument, and conclusions of law. The applicants also contend that the Xotta affidavit contains argument and opinion.

[21] In fact, the Blair affidavit of December 16, 2014 provides much of the record that was before the decision-maker in this case. Prothonotary Milczynski referred to it as a “record affidavit” (Order of June 1, 2016) and noted that the applicants had not objected to it when it was filed. Nor did the applicants seek to cross-examine Mr Blair in respect to any of the contents of his affidavit or the exhibits attached to it. Further, the applicants have introduced many of the same documents through the Washbrook affidavit. I see no basis for the applicants’ objections.

[22] Regarding the Scott affidavit, I agree with the applicants that some statements set out in it may be based on something other than personal knowledge. However, I also note that Mr Scott's impugned statements are corroborated by other evidence in the record. Therefore, in my view, no real purpose would be achieved in striking from Mr Scott's affidavit information that was not within his personal knowledge.

[23] Finally, with respect to the Xotta affidavit, I note that the applicants cross-examined Mr Xotta and challenged the statements they found objectionable. In the circumstances, I would not strike the impugned portions of Mr Xotta's affidavit; rather, I would read them in light of the full record, including his cross-examination.

IV. Issue Two – Do the applicants have standing to bring this challenge?

[24] The Port Authority submits that the applicants do not have standing to bring this challenge because they are not “directly affected by the matter in respect of which relief is sought” (*Federal Courts Act*, s 18.1(1)). The Port Authority says that the matter in respect of which relief is sought here is the applicants' technical attack on the decisions approving the project. It contends that the applicants' legal rights are not directly affected or prejudiced by those narrow legal questions and, therefore, they have no standing to challenge the Port Authority's decisions.

[25] In addition, the Port Authority suggests that while the individual applicants, Ms Dujmovich and Ms Williams, may be concerned about the existing level of commercial activity

around the Fraser River that concern does not necessarily amount to a direct impact on them flowing from the proposed project.

[26] In terms of potential public interest standing, the Port Authority says that this application does not represent a reasonable and effective means to bring the relevant issues before the Court (as in: *Voters Taking Action on Climate Change v British Columbia (Energy and Mines)*, 2015 BCSC 471). The interveners here, the municipalities of New Westminster and Surrey, have a more tangible interest in the issues and are better placed to address them, according to the Port Authority.

[27] I disagree with the Port Authority on this point. The applicants have standing to bring this application for judicial review.

[28] In her affidavit, Ms Dujmovich describes her connection to the land adjacent to Fraser Surrey Docks and the rail tracks that connect to the facility; she lives about a half kilometer from Fraser Surrey Docks on land purchased by her grandfather in 1920. She has lived there most of her life with her disabled brother, Gregory. Ms Dujmovich is concerned that the transfer coal facility will cause detrimental health and environmental effects due primarily to coal dust and diesel exhaust emitted along the route, but also the broader effect on climate change brought about by burning coal as fuel. She is also worried about other adverse consequences – noise and a reduction in property values.

[29] In addition, Ms Dujmovich describes in detail the consultation process in which she and the Communities and Coal Society participated. In particular, she describes a meeting in May 2013 at which she spoke to the President of Fraser Surrey Docks, Mr Jeff Scott. After describing to him her concerns about the dust generated at that site, Mr Scott, according to Ms Dujmovich, assured her that her concerns would be addressed. However, a few months later, Mr Scott told Ms Dujmovich that she must have misheard him because he had not made any commitment to her on that issue.

[30] (In his affidavit, Mr Scott specifically addresses Ms Dujmovich's suggestion that he reneged on his commitment to reduce dust at Fraser Surrey Docks. He says that Ms Dujmovich must have misunderstood his statement – he said that improvements were underway, but they were not scheduled to be completed by the fall of 2013, as Ms Dujmovich may have thought.)

[31] The applicant Ms Paula Williams lives 300 metres from the rail line. She has watched the rail traffic along the line closely, especially cars carrying coal, and has measured the sound of train whistles.

[32] Since she first learned about the project, Ms Williams has been concerned about the health impact of transporting large volumes of coal through her community and near her home. She is also worried about the stability of the slopes the rail lines pass and the risk of mudslides caused by heightened rail traffic. Based on her concerns, Ms Williams co-founded Communities and Coal, which became involved in the process leading to the issuance of a permit to Fraser Surrey Docks. Communities and Coal has close to 300 supporters in the local area.

[33] Ms Williams explains that the applicant Communities and Coal's main concern is the health impact of transporting coal by rail. It drafted a petition in 2013 asking officials at the federal, provincial, and municipal levels to carry out a comprehensive health impact assessment of the project. The petition attracted 13,000 signatures. Communities and Coal organized and participated in numerous events to disseminate information and raise community awareness about the project.

[34] Ms Williams personally reviewed many documents regarding the potential health impacts of the project, which only reinforced her concerns. She was not satisfied that the Environmental Impact Assessment had fully considered the potential environmental impact of the project.

[35] Mr Kevin Washbrook is the Director of the applicant Voters Taking Action on Climate Change. His affidavit describes the group's mandate as advocating for the reduction of greenhouse gas emissions and urging governments to restrict the use of fossil fuels. The group has been involved in consultations on the Fraser Surrey Docks proposal since 2012. Mr Washbrook describes the lengthy review process undertaken by the Port Authority, his group's role in it, and the group's efforts to inform the public about it.

[36] Mr Washbrook also sets out the various documents issued by the Port Authority when it granted Fraser Surrey Dock's permit, including the Project Review Report, the Environmental Review Decision Statement, a Human Health Risk Assessment, a Public Comments Response Memorandum, and a number of other informational documents.

[37] In addition, Mr Washbrook describes some of the industry organizations with which the Port Authority has been associated, and provides information about the Port Authority's executive compensation arrangements. These factors caused his group to have concerns about bias and fairness in the project review process, which they expressed to the Port Authority by way of a series of letters.

[38] The evidence shows that Ms Dujmovich and Ms Williams are directly affected by the decisions in respect of which relief is sought and, therefore, have standing to bring this application for judicial review. They both live near the rail corridor through which the trains carrying coal to the transfer facility will travel. The trains would pass by once or twice a day, each with over a hundred open-topped cars. These applicants may be exposed to an increase in coal dust, exhaust fumes, and noise.

[39] Further, in my view, the two applicant community groups have public interest standing according to the criteria articulated by the Supreme Court of Canada in *Canada (Attorney General) v Downtown Eastside Sex Workers United Against Violence in Society*, 2012 SCC 45 at para 37. These applicants have raised serious issues, and have a genuine concern about whether the Port Authority's decisions were made fairly and lawfully, and about the impact of those decisions on the local community environment. Both groups have been actively involved in the process leading up to the Port Authority's decision to issue a permit to Fraser Surrey Docks. Their application for judicial review represents a reasonable and effective way to bring the relevant issues before the Court.

V. Issue Three – Were the Port Authority's decisions made fairly and lawfully?

[40] The applicants have not challenged the reasonableness of the Port Authority's decisions. However, they raise questions about the manner in which the Port Authority rendered its decisions, namely:

- Could the Port Authority delegate its decision-making responsibility under the CEAA to the CEO?
- If so, did it do so here?
- If so, did the CEO make the determination required under the CEAA?

[41] The applicants assert that the Board of Directors of the Port Authority, not the CEO, had an obligation to decide whether to issue a permit and to determine the potential environmental impact of the proposed project under the CEAA. They point to the *Canada Marine Act*, SC 1998, c 10, which makes clear that the Port Authority can delegate powers to manage its activities to a committee of directors or to its officers (s 21.1). However, the CEAA contains no such power of delegation. Accordingly, say the applicants, the Port Authority's CEO did not have the power to make the CEAA determination.

[42] Further, the applicants maintain that the Port Authority has not presented adequate proof that the Board of Directors authorized the CEO to make the decisions in question, or that the required CEAA determination was actually made.

[43] I disagree.

[44] As a federal authority, the Port Authority was required to determine whether the project would be likely to cause significant adverse environmental effects. It was not required to carry out a full environmental assessment or issue a decision statement; that would have been necessary only if the project was a “designated project” under the CEAA.

[45] The obligation under the CEAA fell to the Port Authority itself, a federal Crown corporation, not to the Board of Directors. Accordingly, the CEO had the authority to make the CEAA determination on behalf of the corporation.

[46] Further, the Port Authority was entitled to delegate the CEAA determination to the CEO. If the proposal had related to a designated project under the CEAA, the Port Authority would not have been entitled to delegate to a corporate officer the determination about the project’s likely environmental impact (ss 26(1), 27(1), 52(1)). However, the statute erects no similar obstacle for non-designated projects, such as the one here.

[47] In addition, the Port Authority’s Board of Directors had the statutory power to delegate the CEAA determination to the CEO as an activity of the Port Authority (*Canada Marine Act*, s 21.1). The Board of Directors can delegate to a corporate officer the power to “manage the activities” of the Port Authority.

[48] The two intervening municipalities, Surrey and New Westminster, submit that the phrase “manage the activities” does not include making a determination under the CEAA because the Port Authority is authorized under the *Canada Marine Act* only to engage in “activities related to

shipping, navigation, transportation of passengers and goods, handling of goods and storage of goods” (s 28(2)(a)). Accordingly, say the interveners, because there is no reference to making environmental determinations within the list of authorized activities, the Port Authority lacks the power to delegate those determinations to an officer of the company.

[49] I disagree with the interveners. I read the words “manage the activities” of the Port Authority broadly. I see no basis for excluding from them the responsibilities that fall to the Port Authority under the CEAA.

[50] In addition, I note that the Port Authority’s Letters Patent set out a far more detailed list of activities than is contained in the *Canada Marine Act*. The Letters Patent state specifically that the Port Authority may carry out environmental assessments (s 7.1(j)(i)).

[51] The interveners also point to the Letters Patent, but for another purpose. They point out that the power to delegate contained in s 21.1 of the *Canada Marine Act* is subject to the Letters Patent and argue that the Letters Patent restrict that power of delegation.

[52] Again, I disagree. The interveners rely on s 4.15 of the Letters Patent. That provision empowers the Board of Directors to create committees and to delegate to those committees the powers held by the Board itself (with some exceptions). The interveners rely on the fact that s 4.15 makes no reference to an authority to delegate to corporate officers to argue that the statutory power of delegation must be read down accordingly. However, the Letters Patent do not limit the power of the Board of Directors to delegate to officers; they expand the power of the

Board of Directors to delegate to committees. Therefore, while the statutory power of delegation to officers is, indeed, subject to the Letters Patent, there is nothing in the latter that restricts the breadth of the former. The Port Authority could, and in my view, the evidence shows that it did, delegate CEAA determinations to its CEO.

[53] At a special meeting of the Board of Directors on August 19, 2014, the VP referred to the directors the Project Review Committee's report. The report recommended that the project be approved, subject to 81 conditions that would serve to ensure that the project would be unlikely to have significant adverse environmental effects. After the directors discussed the issue, the CEO expressed his decision to approve the project. That decision is recorded in the Minutes of the Board Meeting.

[54] At the same meeting, the Board considered the Environmental Review Decision Statement which discussed the potential environmental impact of the project, and concluded that the proposed mitigation measures and conditions in the permit made it unlikely that the project would cause significant adverse environmental effects. The statement specifically addressed the Port Authority's responsibility under the CEAA and discussed the various environmental concerns arising from the project and the views of various stakeholders, including local authorities. The Board of Directors, with the CEO present, considered both of these documents. The CEO expressed his willingness to approve the project, and days later, issued his decision to issue a permit to Fraser Surrey Docks. From these circumstances, one can reasonably infer that the required determination had been expressly delegated to the CEO by the Board.

[55] In fact, the Board of Directors of the Port Authority had already specifically delegated the power to issue environmental authorizations to the CEO. In 2013, the Board passed a resolution delegating to the CEO the authority “to issue environmental authorizations pursuant to Environmental Policy B-007,” which expressly addresses the Port Authority’s obligations under the CEAA.

[56] The applicants point to other documents that they characterize as inadequate indicators of the delegation to the CEO – the Project Review Process Directive, the Guide to Project Review, and the Environment Policy Appendix I. However, the fact that these documents do not expressly address the subject of delegation is not proof that no delegation occurred. I am satisfied on the evidence cited above that a delegation of the CEAA determination was, in fact, made to the CEO.

[57] The applicants also submit that the fact that the CEO made a decision to issue a permit does not mean that he also made a determination under the CEAA. While the permit itself makes no reference to that determination, the process leading up to the CEO’s decision makes clear that proper consideration was given to Port Authority’s obligations under the CEAA. As mentioned, the CEAA’s requirements were expressly set out in the Port Authority’s Environmental Policy, its Environmental Review Decision Statement, the Project Review Report, and the VP’s report to the CEO. Further, the Board specifically discussed the CEAA determination at its meeting on August 19, 2014. This evidence satisfies me that the CEO would clearly have been aware of the requirements of the CEAA at the time he considered whether to grant the permit. As mentioned, the CEAA does not require any particular form of decision or statement in respect of non-

designated projects. Therefore, the fact that the permit made no specific reference to the CEAA determination is not evidence that the determination was never made. The overall circumstances indicate that it was.

[58] Indeed, as mentioned, the permit contains 81 conditions aimed at mitigating the environmental impact of the project. These include numerous measures addressing general environmental conditions: protection of vegetation, fish, and wildlife; spill prevention; sediment and erosion control; preservation of water, soil, and groundwater quality; protection of air quality; noise reduction; and disposal of debris and waste materials.

[59] Accordingly, I find that the Port Authority's decision to issue a permit to Fraser Surrey Docks was lawful and made fairly.

VI. Issue Four – Do the Port Authority's decisions give rise to a reasonable apprehension of bias?

[60] The applicants point to a total of five factors that they say support their accusation that the Port Authority's conduct gives rise to a reasonable apprehension of bias. First, the applicants suggest that the CEO and VP had a pecuniary interest in approving the project. Second, they contend that the Port Authority's institutional structure created an environment in which employees had an incentive to approve projects. In respect of these first two grounds the applicants rely on Justice Iacobucci's comments on this issue in *Pearlman v Manitoba Law Society*, [1991] 2 SCR 869, at p 883:

There are many different factual settings which could place the impartiality of a decision-making body in question. Among such

contexts are situations where the decision-makers have or are perceived to have a pecuniary interest, either direct or indirect, in the outcome of the hearing before them.

[61] Third, the applicants say that the Port Authority had an ongoing relationship with the coal industry, including sponsorship of a conference of the Coal Association of Canada. Fourth, the applicants point to the Port Authority's close collaboration with Fraser Surrey Docks in the prosecution of its permit application. Fifth, the applicants cite the Port Authority's failure to respect its own Code of Conduct, which obliges it to promote public confidence in its integrity and impartiality. I will address each of these allegations in order.

[62] The applicants rely heavily on the fact that the CEO and VP of the Port Authority are granted bonuses based on their individual performances measured against certain predetermined objectives. For the CEO, those objectives included expanding the Port's capacity, developing new facilities, and meeting the capacity requirements of users, including the coal industry. Clearly, approval of the transfer coal facility would have advanced those objectives. Similarly, the VP's personal objectives included delivering key approvals to advance the Port Authority's interests. In addition, both the CEO and VP received bonuses for improving relations with customers, which would include Fraser Surrey Docks. Bonuses were payable, however, only when the Port Authority achieved a Threshold Net Income. Therefore, increasing the revenues of the Port Authority by approval of projects such as the one proposed by Fraser Surrey Docks might also increase the likelihood of bonuses being paid out.

[63] In my view, these circumstances are not sufficient to give rise to a reasonable apprehension of bias. The Port Authority's overall executive compensation scheme does not

reward project approvals directly. The suggestion that approval of the Fraser Surrey Docks' project would generate future bonuses for senior executives is entirely speculative.

[64] The Port Authority's compensation program rewards both individual performance and corporate performance as measured against corresponding objectives. Approval of the project in issue here was neither an individual nor a corporate objective during the relevant time-frame. However, delivery of a decision on the Fraser Surrey Docks project was part of the VP's Performance Plan for corporate planning and development for 2013; he would have been rewarded even if the project had not been approved, since the stated objective was to realize a decision, not an outcome. Further, this category of the Performance Plan made up only 10% of the overall bonus calculation, included numerous other ongoing projects, and was subject to approval by the Board of Directors. The Fraser Surrey Docks permit decision, either approval or denial, might have resulted in a bonus to the VP of roughly 1% of his salary in 2013. However, the decision was not rendered until 2014 and, in that year, the VP's Performance Plan did not include an objective relating to project decisions, although it did refer to advancement generally of the gateway objectives of the Port, which presumably would have been enhanced by the project. But that, again, is no more than speculation.

[65] As for the CEO's performance plan, there was no stated objective relating to project approvals for 2013 or 2014. The CEO's plan for 2014 did include handling of challenging public engagement issues, which would have included shepherding the Fraser Surrey Docks file to a conclusion.

[66] In my view, this evidence does not indicate that the senior executives at the Port Authority had a direct or tangible financial interest in approving the project. Any pecuniary interest that the officers have been alleged to have “is far too attenuated and remote to give rise to a reasonable apprehension of bias” (*Pearlman*, above at p 891).

[67] Regarding the Port Authority’s institutional structure, the applicants contend that the bonus program applicable to all staff created a reasonable apprehension of bias because it rewarded those involved in approving projects that could improve the Port Authority’s economic performance. The potential for financial gains, say the applicants, would likely predispose Port Authority employees to exercise any discretion available to them to push through projects with potential economic value to their employer.

[68] Again, the potential for financial gains on the part of employees as a whole is speculative. The employee bonus program recognized many different factors, including corporate performance, threshold corporate income, personal performance targets, and the discretion of the Board of Directors. It is true that no bonuses would have been paid if the Port Authority had not achieved sufficient financial success in a given year. However, in my view, that factor alone cannot be enough to establish that the Port Authority’s personnel as a whole were biased towards approving lucrative projects, including the Fraser Surrey Docks project specifically, or even to support a reasonable apprehension of bias. There were simply too many other factors in play.

[69] The applicants also submit that the Port Authority’s close relationship with the coal industry raises a reasonable apprehension of bias in favour of approving coal-related projects,

such as the Fraser Surrey Docks proposal. Similarly, when she attended the May 2013 meeting, Ms Dujmovich thought that the Port Authority and Fraser Surrey Docks might be a single entity since they both spoke in favour of the project.

[70] The Port Authority is a member of the Coal Association of Canada and helped sponsor a conference organized by that association. When the sponsorship arrangement became publicly known, the Port Authority realized that the optics of its relationship with the association was a problem; it spent \$3,000.00 to have its name removed from conference materials.

[71] In respect of this allegation, as well as the others addressed above, the nature of the Port Authority must be kept in mind when considering whether its conduct gave rise to a reasonable apprehension of bias. It must be remembered that the question of bias in respect of a member of a court of justice cannot be examined in the same light as that relating to a member of an administrative tribunal who is entrusted by statute with an administrative discretion, which must be exercised based on experience and technical advice. (*Committee for Justice and Liberty v National Energy Board*, [1978] 1 SCR 369 at p 395).

[72] The Port Authority is a corporation with a statutory mandate to provide the marine infrastructure that Canada requires, to promote successful use of ports to advance Canada's economic interests, to provide safe and environmentally sound facilities, and to manage marine assets in a commercial manner with input from users and community members (*Canada Marine Act*, s 4). These roles necessarily require the Port Authority through its officers and employees,

to sustain relationships with user groups and individual tenants, including the coal industry generally and Fraser Surrey Docks specifically.

[73] In that context, I do not regard the Port Authority's membership in the Coal Association of Canada or even its sponsorship of a conference as evidence of actual bias or even a reasonable apprehension of bias. Rather, it is inherent in the nature of the Port Authority's statutory responsibilities for it to foster these kinds of contacts and relationships.

[74] Similarly, I cannot conclude that the Port Authority's ongoing communications with Fraser Surrey Docks, or even its expressed support for the project, supports the applicants' allegations of bias. The evidence shows that there was contact between the two entities, including expressions of confidence by the Port Authority that the project would ultimately be approved and that the concerns of opponents would be overcome. At face value, these communications do not strike me as indicative of prejudgment or bias. They simply reflect preliminary opinions about the nature of the project and the likelihood that concerns about its environmental impact could be mitigated. In that vein, the fact that Ms Dujmovich thought that the Port Authority and Fraser Surrey Docks were a single entity because they both spoke in favour of the project does not persuade me that the Port Authority was biased or that a reasonable apprehension of bias arises from these circumstances. The Port Authority's posture was consistent with its statutory mandate and its duty to provide responsible stewardship of Canada's marine infrastructure.

[75] Finally, the applicants maintain that the conduct of the Port Authority's directors, officers, and personnel violated the applicable codes of conduct. The Code of Conduct for directors and officers requires them to behave in a manner that would preserve and promote public confidence and trust in the integrity and impartiality of the Port Authority. The Code of Ethical Conduct Policy applicable to employees exhorts them to avoid behaviour that would put their total objectivity in doubt. The applicants point to the allegations I have described above and contend that they support a finding that a breach of ethical standards has taken place.

[76] Given my conclusions that the impugned conduct of the Port Authority's directors, officers, and employees does not support a finding of bias or of a reasonable apprehension of bias, it follows that I cannot conclude that the codes of conduct were violated.

VII. Issue Five -- Is the permit issued by the Port Authority on November 30, 2015 a nullity?

[77] The applicants maintain that the November 30, 2015 permit represented a minor amendment to the earlier permit, not a new permit. Most of the conditions in the original permit were maintained; only 18 amendments were made. Therefore, the issues of jurisdiction and bias that tainted the original permit were not cured by the issuance of a second one. The problems with the first permit rendered it void, say the applicants, so the second permit, issued in reliance on the first, must be considered a nullity.

[78] In support of the applicants' position, Mr Arason describes in his affidavit the City of Surrey's involvement in the project review process and the correspondence exchanged between the City and the Port Authority over the years. He also describes the amended permit of

November 30, 2015 and characterizes the review process leading up to the issuance of that permit as “very narrow in scope” and “of a very short duration,” with “limited stakeholder consultation.” In his view, based on the numbering given to the amended permit (2012-072-1) as compared to the original permit (2012-072), the original permit remains in force; the November 30, 2015 merely makes minor modifications to the original. Mr Arason relies on the following statements set out in the amended permit:

Where conditions have been amended from project permit 2012-072, the original condition has been struck, and replaced by the amended version shown here in italics. Two conditions have been removed, 14 amended and two conditions added at the end of the document. This amended project permit therefore replaces the previously issued document.

[79] Mr Arason interprets this statement as meaning that the amended permit is a consolidation of the original permit along with the approved modifications. The amended permit should not, therefore, be regarded as a fresh permit. Mr Nazeman agrees with Mr Arason’s interpretation.

[80] I disagree.

[81] The second permit, by its express terms, clearly replaced the first. Also, the first permit was valid on its face and enforceable until struck down. Further, given my conclusions on the validity of the first permit, it follows that the second permit was not tainted in any way.

[82] Therefore, there is no legal or factual basis for the applicants’ claim that the amended permit of November 30, 2015 is a nullity.

### VIII. Conclusion and Disposition

[83] The applicants have standing to bring this application for judicial review. However, I cannot conclude that the decision granting Fraser Surrey Docks a permit for its transfer coal facility was unfairly made or otherwise unlawful. I can find no evidence supporting a reasonable apprehension of bias on the part of the Port Authority or its personnel. Finally, the amended permit issued by the Port Authority in November 2015 is valid. Accordingly, I must dismiss the applicants' application for judicial review, with costs.

**JUDGMENT IN T-1972-14**

**THIS COURT'S JUDGMENT is that** the application for judicial review is dismissed,  
with costs.

"James W. O'Reilly"

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Judge

## Annex

*Port Authorities Operations Regulations,*  
SOR/2000-55

*Règlement sur l'exploitation des*  
*administrations portuaires, DORS/2000-55*

## Prohibitions

## Interdictions

5. Unless otherwise authorized under these Regulations, no person shall, by act or omission, do anything or permit anything to be done in a port that has or is likely to have any of the following results:

5. Sauf autorisation sous le régime du présent règlement, il est interdit de faire, ou de permettre de faire, par action ou omission, quoi que ce soit dans un port qui entraîne, ou est susceptible d'entraîner, l'une des conséquences suivantes :

(a) to jeopardize the safety or health of persons in the port;

a) menacer la sécurité ou la santé des personnes dans le port;

(b) to interfere with navigation;

b) gêner la navigation;

(c) to obstruct or threaten any part of the port;

c) obstruer ou menacer une partie du port;

(d) to interfere with an authorized activity in the port;

d) nuire à toute activité autorisée dans le port;

(e) to divert the flow of a river or stream, cause or affect currents, cause silting or the accumulation of material or otherwise reduce the depth of the waters of the port;

e) détourner le cours d'une rivière ou d'un ruisseau, de produire ou de modifier des courants, de provoquer un envasement ou l'accumulation de matériaux ou de diminuer de quelque autre façon la profondeur des eaux du port;

(f) to cause a nuisance;

f) occasionner une nuisance;

(g) to cause damage to ships or other property;

g) endommager un navire ou un autre bien;

(h) to adversely affect soil, air or water quality; or

h) altérer la qualité du sol, de l'air ou de l'eau;

(i) to adversely affect port operations or the property managed, held or occupied by the port authority.

i) avoir un effet néfaste sur l'exploitation du port ou les biens gérés, détenus ou occupés par l'administration portuaire.

## Authorizations to Persons

## Autorisation à une personne

27(1) A port authority may give a

27 (1) L'administration portuaire peut

written authorization under this section to a person to conduct, in the port, an activity set out in column 1 of the activity list if

(a) an "X" is set out in column 3; or

(b) an "X" is set out in column 2 and the person or any person who would be covered by the authorization is unable to comply with the conditions posted or set out on forms for the conduct of the activity under section 25.

(2) On receipt of a request for an authorization, along with payment of the applicable fee, if any, and the information required under subsection 28(2), the port authority shall

(a) give its authorization;

(b) if the results of the conduct of the activity are uncertain or if the conduct of the activity is likely to have any of the results prohibited under section 5,

(i) refuse to give its authorization, or

(ii) give its authorization subject to conditions designed to mitigate or prevent the results; or

(c) if the port authority required that the person obtain insurance coverage, performance security or

accorder par écrit à une personne, en vertu du présent article, l'autorisation d'exercer dans le port une activité mentionnée à la colonne 1 de la liste des activités, dans les cas suivants :

a) la mention « X » figure à la colonne 3;

b) la mention « X » figure à la colonne 2 et la personne ou l'une quelconque des personnes qui seraient visées dans l'autorisation n'est pas en mesure de respecter les conditions affichées ou indiquées sur des formulaires pour l'exercice de l'activité en vertu de l'article 25.

(2) À la réception d'une demande d'autorisation, du paiement du droit applicable, le cas échéant, et des renseignements exigés en vertu du paragraphe 28(2), l'administration portuaire doit, selon le cas :

a) accorder son autorisation;

b) si les conséquences de l'exercice de l'activité ne sont pas claires ou si l'exercice de l'activité est susceptible d'entraîner l'une quelconque des conséquences interdites à l'article 5 :

(i) refuser d'accorder son autorisation,

(ii) accorder son autorisation assortie de conditions visant à atténuer ou à prévenir ces conséquences;

c) refuser son autorisation si elle avait exigé que la personne obtienne une couverture d'assurance, une garantie

damage security in respect of the conduct of the activity and none is obtained or that which is obtained is inadequate, refuse to give its authorization.

*Canadian Environmental Assessment Act*, SC 2012, c 19

#### Delegation

**26 (1)** The responsible authority with respect to a designated project may delegate to any person, body or jurisdiction referred to in paragraphs (a) to (f) of the definition jurisdiction in subsection 2(1) the carrying out of any part of the environmental assessment of the designated project and the preparation of the report with respect to the environmental assessment of the designated project, but must not delegate the duty to make decisions under subsection 27(1).

#### For greater certainty

(2) For greater certainty, the responsible authority must not make decisions under subsection 27(1) unless it is satisfied that any delegated duty or function has been performed in accordance with this Act.

#### Responsible authority's or Minister's decisions

**27 (1)** The responsible authority or, when the Agency is the responsible authority, the Minister, after taking into account the report with respect to the environmental assessment of the designated project, must make decisions under subsection 52(1).

#### Decisions of decision maker

de bonne fin ou une garantie relative aux dommages à l'égard de l'exercice de l'activité et qu'aucune n'a été obtenue ou que celle qui a été obtenue n'est pas suffisante.

*Loi canadienne sur l'évaluation environnementale*, (2012) LC 2012, ch 19

#### Délégation

**26 (1)** L'autorité responsable d'un projet désigné peut déléguer à un organisme, une personne ou une instance visée à l'un des alinéas a) à f) de la définition de instance au paragraphe 2(1) l'exécution de tout ou partie de l'évaluation environnementale du projet ainsi que l'établissement du rapport d'évaluation environnementale relatif au projet, à l'exclusion de toute prise de décisions au titre du paragraphe 27(1).

#### Précision

(2) Il est entendu que l'autorité responsable qui a délégué des attributions en vertu du paragraphe (1) ne peut prendre de décisions au titre du paragraphe 27(1) que si elle est convaincue que les attributions déléguées ont été exercées conformément à la présente loi.

#### Décisions de l'autorité responsable ou du ministre

**27 (1)** Après avoir pris en compte le rapport d'évaluation environnementale relatif au projet désigné, l'autorité responsable ou, si celle-ci est l'Agence, le ministre prend les décisions prévues au paragraphe 52(1).

#### Décisions du décideur

**52 (1)** For the purposes of sections 27, 36, 47 and 51, the decision maker referred to in those sections must decide if, taking into account the implementation of any mitigation measures that the decision maker considers appropriate, the designated project

(a) is likely to cause significant adverse environmental effects referred to in subsection 5(1); and

(b) is likely to cause significant adverse environmental effects referred to in subsection 5(2).

Project carried out on federal lands

**67** An authority must not carry out a project on federal lands, or exercise any power or perform any duty or function conferred on it under any Act of Parliament other than this Act that could permit a project to be carried out, in whole or in part, on federal lands, unless

(a) the authority determines that the carrying out of the project is not likely to cause significant adverse environmental effects; or

(b) the authority determines that the carrying out of the project is likely to cause significant adverse environmental effects and the Governor in Council decides that those effects are justified in the circumstances under subsection 69(3).

*Federal Courts Act, RSC, 1985 c F-7*

Extraordinary remedies, federal tribunals

**18 (1)** Subject to section 28, the Federal Court has exclusive original

**52 (1)** Pour l'application des articles 27, 36, 47 et 51, le décideur visé à ces articles décide si, compte tenu de l'application des mesures d'atténuation qu'il estime indiquées, la réalisation du projet désigné est susceptible :

a) d'une part, d'entraîner des effets environnementaux visés au paragraphe 5(1) qui sont négatifs et importants;

b) d'autre part, d'entraîner des effets environnementaux visés au paragraphe 5(2) qui sont négatifs et importants.

Projet réalisé sur un territoire domanial

**67** L'autorité ne peut réaliser un projet sur un territoire domanial ou exercer les attributions qui lui sont conférées sous le régime d'une loi fédérale autre que la présente loi et qui pourraient permettre la réalisation en tout ou en partie du projet sur un tel territoire que si, selon le cas :

a) elle décide que la réalisation du projet n'est pas susceptible d'entraîner des effets environnementaux négatifs importants;

b) elle décide que la réalisation du projet est susceptible d'entraîner des effets environnementaux négatifs importants et le gouverneur en conseil décide, au titre du paragraphe 69(3), que ces effets sont justifiables dans les circonstances.

*Loi sur les Cours fédérales, LRC, (1985) ch F-7*

Recours extraordinaires : offices fédéraux

**18 (1)** Sous réserve de l'article 28, la Cour fédérale a compétence exclusive, en

## jurisdiction

(a) to issue an injunction, writ of *certiorari*, writ of prohibition, writ of mandamus or writ of *quo warranto*, or grant declaratory relief, against any federal board, commission or other tribunal; and

(b) to hear and determine any application or other proceeding for relief in the nature of relief contemplated by paragraph (a), including any proceeding brought against the Attorney General of Canada, to obtain relief against a federal board, commission or other tribunal.

*Canada Marine Act*, SC 1998, c 10

## Purpose of the Act

4 In recognition of the significance of marine transportation to Canada and its contribution to the Canadian economy, the purpose of this Act is to

(a) implement marine policies that provide Canada with the marine infrastructure that it needs and that offer effective support for the achievement of national, regional and local social and economic objectives and will promote and safeguard Canada's competitiveness and trade objectives;

(a.1) promote the success of ports for the purpose of contributing to the competitiveness, growth and prosperity of the Canadian economy;

(b) base the marine infrastructure and services on international practices and approaches that are consistent with those of Canada's major trading partners in order to foster

## première instance, pour :

a) décerner une injonction, un bref de *certiorari*, de mandamus, de prohibition ou de *quo warranto*, ou pour rendre un jugement déclaratoire contre tout office fédéral;

b) connaître de toute demande de réparation de la nature visée par l'alinéa a), et notamment de toute procédure engagée contre le procureur général du Canada afin d'obtenir réparation de la part d'un office fédéral.

*Loi maritime du Canada*, LC 1998, ch. 10

## Objectifs

4 Compte tenu de l'importance du transport maritime au Canada et de sa contribution à l'économie canadienne, la présente loi a pour objet de :

a) mettre en oeuvre une politique maritime qui permette au Canada de se doter de l'infrastructure maritime dont il a besoin, qui le soutienne efficacement dans la réalisation de ses objectifs socioéconomiques nationaux, régionaux et locaux aussi bien que commerciaux, et l'aide à promouvoir et préserver sa compétitivité;

a.1) promouvoir la vitalité des ports dans le but de contribuer à la compétitivité, la croissance et la prospérité économique du Canada;

b) fonder l'infrastructure maritime et les services sur des pratiques internationales et des approches compatibles avec celles de ses principaux partenaires commerciaux

harmonization of standards among jurisdictions;

(c) ensure that marine transportation services are organized to satisfy the needs of users and are available at a reasonable cost to the users;

(d) provide for a high level of safety and environmental protection

(e) provide a high degree of autonomy for local or regional management of components of the system of services and facilities and be responsive to local needs and priorities;

(f) manage the marine infrastructure and services in a commercial manner that encourages, and takes into account, input from users and the community in which a port or harbour is located;

(g) provide for the disposition, by transfer or otherwise, of certain ports and port facilities; and

(h) promote coordination and integration of marine activities with surface and air transportation systems.

#### Delegation

**21.1** Subject to the letters patent, the board of directors may delegate the powers to manage the activities of the port authority to a committee of directors or to the officers of the port authority.

#### Activities

**28(2)** The power of a port authority to operate a port is limited to the power

dans le but de promouvoir l'harmonisation des normes qu'appliquent les différentes autorités;

c) veiller à ce que les services de transport maritime soient organisés de façon à satisfaire les besoins des utilisateurs et leur soient offerts à un coût raisonnable;

d) fournir un niveau élevé de sécurité et de protection de l'environnement;

e) offrir un niveau élevé d'autonomie aux administrations locales ou régionales des composantes du réseau des services et installations portuaires et prendre en compte les priorités et les besoins locaux;

f) gérer l'infrastructure maritime et les services d'une façon commerciale qui favorise et prend en compte l'apport des utilisateurs et de la collectivité où un port ou havre est situé;

g) prévoir la cession, notamment par voie de transfert, de certains ports et installations portuaires;

h) favoriser la coordination et l'intégration des activités maritimes avec les réseaux de transport aérien et terrestre.

#### Délégation

**21.1** Sous réserve des lettres patentes, le conseil d'administration peut déléguer aux dirigeants ou à un comité constitué par les administrateurs les pouvoirs de gestion des activités de l'administration portuaire.

#### Activités portuaires

**28(2)** L'autorisation donnée à une administration portuaire d'exploiter un port

to engage in

(a) port activities related to shipping, navigation, transportation of passengers and goods, handling of goods and storage of goods, to the extent that those activities are specified in the letters patent;

est restreinte aux activités suivantes :

a) les activités portuaires liées à la navigation, au transport des passagers et des marchandises, et à la manutention et l'entreposage des marchandises, dans la mesure prévue par les lettres patentes;

**FEDERAL COURT****SOLICITORS OF RECORD**

**DOCKET:** T-1972-14

**STYLE OF CAUSE:** COMMUNITIES AND COAL SOCIETY, VOTERS  
TAKING ACTION ON CLIMATE CHANGE,  
CHRISTINE DUJMOVICH AND PAULA WILLIAMS v  
ATTORNEY GENERAL OF CANADA, VANCOUVER  
FRASER PORT AUTHORITY AND FRASER SURREY  
DOCKS LIMITED PARTNERSHIP AND THE CITY OF  
NEW WESTMINSTER AND THE CITY OF SURREY

**PLACE OF HEARING:** VANCOUVER, BRITISH COLUMBIA

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