Federal Court  Cour fédérale

Date: 20220726

Docket: T-538-19

Citation: 2022 FC 1109

Ottawa, Ontario, July 26, 2022

PRESENT: The Honourable Mr. Justice Pamel

BETWEEN:

GCT CANADA LIMITED PARTNERSHIP

Applicant

and

VANCOUVER FRASER PORT AUTHORITY and ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

Contents

I. Overview

[1] The *Canada Marine Act*, SC 1998, c 10 [CMA], invests port authorities with the power to manage the marine transportation of goods and people, as well as related and necessary services, within their ports, the whole as may be permitted under their letters patent and otherwise provided for under the CMA and its regulations. The Vancouver Fraser Port Authority [VFPA] is one such port authority. As operator of the Port of Vancouver, the VFPA is responsible for, amongst other things, the long-term commercial advancement of the port, undertaking commercially and environmentally sustainable development plans consistent with the purpose of the CMA, and following through on those development plans in line with its strategic goals. It can operate the port facilities itself, or act as landlord and lease port property to commercial operators.

[2] Global Container Terminals Canada Limited Partnership [GCT] is one such commercial operator, and operates two container terminals within the jurisdiction of the Port of Vancouver, one of which is at Roberts Bank in Delta, British Columbia [GCT Deltaport], by way of lease with the VFPA; GCT is the tenant. By way of judicial review, GCT challenges two decisions of the VFPA, the first by which the VFPA refused in March 2019 to formally process GCT's preliminary project enquiry [PPE] for the further expansion of GCT Deltaport [DP4 project] through the VFPA's Project and Environmental Review Process [PER Process], and the second, a few months later, by which the VFPA purportedly rescinded in September 2019 its earlier decision and advised GCT that the port authority would assess the DP4 project proposal through its PER Process, but on the understanding that the VFPA's preferred project for achieving capacity expansion at Roberts Bank continued to be a different project [RBT2 project], which

was being developed by the VFPA and which was at that time further advanced and undergoing environmental impact assessment; the VFPA advised GCT that its review of the DP4 project would be conducted having regard to, amongst other things, the status of the RBT2 project in meeting the anticipated increased shipping demands of the Port of Vancouver.

[3] GCT claims that the VFPA has, through its conduct, demonstrated an incurable failure to act as an impartial decision maker under its statutory mandate set out in the CMA to consider the DP4 project, and that its executives closed their mind to the DP4 project without even assessing it under the port authority's very own regulatory decision-making process, thus exhibiting actual bias against the project when the VFPA issued its decision to GCT in March 2019. The second decision in September 2019 purportedly reversing the earlier decision and confirming that the VFPA would assess the DP4 project under the PER Process was, according to GCT, an acknowledgment of such bias and a tactical attempt by the same executives to cover up the reversible error in the VFPA's earlier decision. GCT now seeks to set aside both decisions, and on account of what it claims to be actual bias on the part of the VFPA's executives which purportedly taints the entire review process, GCT is asking this Court to order an alternative assessment process—tantamount to an order for mandamus—compelling the Minister of Transport [Minister], or his delegate, such as Transport Canada, to step in and oversee the review process for the DP4 project and, as clarified by GCT during the hearing, to actually conduct certain components of the review process given the lack of process at the VFPA to address any of the issues of concern to GCT, in particular the VFPA's purported bias. In addition, GCT seeks a series of declarations confirming the existence of such bias.

[4] I am not persuaded by GCT that there is any evidence that the VFPA executives were actually bias against the DP4 project or that what GCT claims to be the indicia of such bias is in any way evidence of a reasonable apprehension of bias on the part of the VFPA executives. Consequently, and as a result of subsequent changes to the governing legislation which affect the environmental assessment process to which the DP4 project would be subject, as well as the VFPA's eventual decision to actually proceed with a review of the DP4 project under its PER Process, I am dismissing GCT's application as the issues between the parties have become moot.

[5] I should also state at the outset that, as pleaded, these proceedings were not meant to be, and were not argued before me as, a trial on the governance model and the quality of governance of port authorities under the CMA, and of the VFPA in particular. The principal issue before me was whether the VFPA breached its obligation of procedural fairness by issuing a biased decision by refusing to process GCT's application for DP4 or because it failed to respect GCT's legitimate expectations in relation to the VFPA's own process for regulatory review of large-scale projects within the Port of Vancouver. I leave the issue of optimization of proper and modern port authority governance in the hands of Transport Canada as part of its Ports Modernization Review commenced in 2018.

II. The parties

[6] GCT is an affiliate of GCT Global Container Terminals Inc. and is jointly owned by affiliates of the Ontario Teachers' Pension Plan Board, British Columbia Investment Management Corporation and Australian-based IFM Investors. In addition to GCT Deltaport, GCT operates three other terminals in North America: GCT Vanterm, which is also within the

Port of Vancouver; GCT Bayonne in New Jersey; and GCT New York situated on Staten Island, New York.

[7] The VFPA is a Canadian port authority established through letters patent dated December 22, 2007, issued by the Minister under the authority of section 8 of the CMA and is the result of the amalgamation of the Vancouver Port Authority, the Fraser River Port Authority and the North Fraser Port Authority; supplementary letters patent have been issued since 2007 dealing with specific matters such as acquisitions or dispositions of land. The VFPA is responsible for the management of federal port lands and waters within its jurisdiction in the Port of Vancouver. Its mandate under the CMA includes acting as both proponent and regulator with respect to land and project development under its authority. There is no issue between the parties that the VFPA's jurisdiction includes the area within which the development of the RBT2 and DP4 projects is intended to be undertaken.

[8] Section 28 of the CMA authorizes the VFPA to operate the port, without any statutory requirement that it do so through an independent terminal operator. Companies seeking to undertake activity within the Port of Vancouver, including the leasing of port land and the activities inherent in building and operating marine terminals, require the authorization of the VFPA (section 23 of the *Port Authorities Operations Regulations*, SOR/2000-55 [Regulations]). There is no issue between the parties that the VFPA has the authority to develop the RBT2 project on its own or that GCT must seek VFPA authorization to undertake the DP4 project, save that the VFPA has asserted that it has traditionally acted as the proponent of large-scale projects involving the reclaiming of land.

[9] As regards GCT Deltaport, the VFPA acts as landlord in a leasehold concession pursuant to lease and berth corridor agreements with GCT, under which GCT has tenancy obligations including, amongst other things, the payment of rent and obligations in relation to repair and maintenance, permitted use, compliance with laws, and landlord re-entry rights.

[10] The Attorney General of Canada [AGC] is named as a respondent because GCT seeks, as a possible remedy, that the Minister or another delegate of the Crown oversee the review and assessment process for the DP4 project.

III. History of Deltaport terminal expansion prior to the proposed DP4 project

[11] GCT Deltaport is today a 210-acre, 2.4 million TEU (twenty-foot equivalent unit) container terminal located in the outer harbour of Roberts Bank, constructed on pods of reclaimed land built on the southern end of a man-made causeway running over a shallow bank and connecting the terminal to the British Columbia lower mainland at Delta. It first began operating as a container terminal in 1997. In 2002, the predecessor to the VFPA (which I will refer to simply as the VFPA) embarked on a port expansion strategy in answer to the expected growth of trans-Pacific container shipping, which included, at the time, the development of two separate container terminal projects at Roberts Bank: the first being the Deltaport Third Berth Project [DP3], which was to consist of adding a third berth to the existing terminal, and the second being what was described at the time as the Terminal 2 Project [T2], which was a precursor to RBT2. DP3 would be an extension of the existing Deltaport terminal on its northern side, landward into shallower waters, and running along the eastern side of the causeway. The T2 project was to be developed along both the eastern and western sides of the causeway and also

leading north into shallower waters (E1 and W3 options), but included, in addition, a separate extension of the terminal to the southwest, and away from the causeway into deeper waters (W1 and W2 options). Assessment and review of the projects was to be undertaken, and on February 24, 2003, the VFPA, as proponent of the projects, submitted separate letters of intent for the projects to the British Columbia Environmental Assessment Office so as to initiate a pre-application review; meetings with federal and provincial regulators to discuss the two projects took place on March 11, 2003.

[12] As one of the agencies responsible for approving the projects, the Department of Fisheries and Oceans [DFO] reviewed the proposed projects: two letters were sent to the VFPA, the first by DFO on April 1, 2003, and the second by the Minister of Fisheries and Oceans on July 29, 2003 [2003 DFO letters]. The 2003 DFO letters expressed concerns regarding development and the reclaiming of additional land along the eastern side of the causeway on account of the "critical value of the fish habitat in the area". As regards the DP3 project, DFO stated that it "will not consider issuing a Fisheries Act Section 35(2) authorization for the destruction of this critical fish habitat". As regards the T2 project, DFO expressed similar concerns regarding the proposed expansion into shallower waters, both on the eastern and western side of the causeway, and thus confirmed that it would not authorize the development as proposed. Just as importantly, DFO suggested that the port authority, as proponent of the terminal expansion projects, focus its efforts on proposals that had less of a damaging impact on the environment, and confirmed that it would be willing to work with the port authority on the development of the separate area of T2 which extended beyond the edge of the causeway to the southwest—seemingly an area to the south of where the W1 and W2 options for T2 were being

proposed—"[a]s these options are in deeper water, where construction would likely have less impact on the Estuary's fish habitat".

[13] The 2003 DFO letters, amongst other things, caused the VFPA to reassess the projects. Eventually, a scaled down version of the DP3 project (about 30% less land mass on its north side so as to reduce its overall footprint on the landward side and thus accommodate DFO concerns) would move forward; on February 2, 2006, the VFPA advised the British Columbia Environmental Assessment Office that it was withdrawing its letter of intent to initiate a pre-application review request for T2 for the time being. From the point of view of the VFPA, the T2 project was thereby placed "on hold" pending further discussions with various stakeholders, including consultations with First Nations in the area, to address the outstanding environmental and community issues that had been identified during previous discussions. T2 would remain as a possible consideration for future expansion after the completion of DP3.

[14] DFO and Environment Canada jointly published a comprehensive study in July 2006 on the revised DP3 project, acknowledging that the reduced footprint minimized the potential effects on existing fish and fish habitat. The footprint-reduced DP3 project received final approval on December 8, 2006; the project was completed and became operational in January 2010, increasing the GCT Deltaport terminal's capacity by 600,000 TEUs per year.

[15] In October 2015, the VFPA issued a permit allowing GCT to undertake the Deltaport Terminal, Road and Rail Improvement Project: a series of improvements at GCT Deltaport, mostly involving upgrades to the existing road and rail infrastructure at the container terminal

and causeway, resulting in a further increase in container capacity of 600,000 TEUs per year, thereby bringing the terminal's total capacity to 2.4 million TEUs per year, where it stands today.

IV. The RBT2 and DP4 projects

[16] As a commercial enterprise, the VFPA must undertake long-term planning to accommodate the evolving needs of the industry and the Port of Vancouver. In 2010, the VFPA established the Container Capacity Improvement Program [CCIP] as part of its long-term strategy to meeting the increasing demand for container terminal capacity at the Port of Vancouver; the options that the CCIP was to consider included increasing the capacity and efficiency of existing terminals, possibly converting existing underutilized terminals to handle container traffic, and building new terminals as may be required.

[17] With the DP3 project becoming operational in January 2010, the VFPA turned its mind back to the possible development of a new terminal at Roberts Bank, and in September 2013, engaged the environmental assessment process when it submitted to the Canadian Environmental Assessment Agency its project description for the approval of an updated version of the T2 project (the RBT2 project), in preference to further development in the area to the north of DP3 previously identified as problematic for development; the RBT2 project entailed constructing a new marine terminal area in the waters off Roberts Bank, extending into deeper waters to the southwest of the causeway, and to the west of GCT Deltaport, thus avoiding development and the reclaiming of land to the north—landward side—in shallower waters, which was one of the problematic aspects identified by DFO in 2003 with the initial T2 project. The RBT2 project would provide up to three additional berths and add an estimated additional 2.4 million TEU

capacity to the Port of Vancouver. In January 2014, the Minister of the Environment (now the Minister of Environment and Climate Change) referred the environmental assessment of the proposed RBT2 project to a independent review panel [Review Panel] in accordance with section 38 of the then in force *Canadian Environmental Assessment Act*, SC 2012, c 19, s 52 [CEAA]. In fact, the VFPA's Land Use Plan adopted in October 2014 specifically provides for the development of RBT2.

[18] In the meantime, GCT was also moving forward with its expansion plans, and in 2014, began plans to further extend GCT Deltaport to add an additional 2 million TEUs of annual capacity [DP4 project]. DP4 would be built within VFPA-managed federal lands and water and within Tsawwassen First Nation water lots, and part of the project dredging would extend past VFPA-controlled lands into VFPA navigational jurisdictions and provincial seabed. The extension and necessary reclaiming of land would be contiguous to the existing terminal to the north—landward side—of GCT Deltaport, into shallower waters and to the east of the causeway, i.e., in the area of the E1 option for T2 which was identified as problematic for development in 2003 by DFO at the time.

[19] On March 27, 2015, the VFPA submitted its Environmental Impact Statement [EIS] for the RBT2 project, which included an alternatives assessment, for federal review. Eventually, the Review Panel determined that the EIS was sufficient and that the matter may proceed to public hearings on the project; public hearings on the RBT2 project would take place in May and June 2019. At the same time, GCT's PowerPoint presentation of its proposed expansion project along with the preliminary assessment of the DP4 project by VFPA management, in particular, the

financial and environmental considerations were discussed during a March 31, 2015, meeting of the VFPA board of directors.

[20] As part of the planning process for RBT2, the VFPA undertook a procurement process to identify and select a commercial operator for the new RBT2 container terminal; GCT applied in June 2015 to become the terminal operator for RBT2, along with continuing to be the operator of the adjacent Deltaport terminal, but was not successful.

[21] Informal discussions continued between GCT and the VFPA through 2016 when the parties began to discuss the DP4 project in detail, and on January 13, 2017, GCT made its first formal presentation of the proposed DP4 project to the VFPA. Within a few months of the meeting, the VFPA retained Hemmera Envirochem Inc. [Hemmera] to review regulatory changes, advances in scientific understanding and changes to DFO policies since the 2003 DFO letters, when DFO refused to authorize development of the area now being proposed for the DP4 project, and to consider the likelihood of DFO approving further expansion along the east side of the causeway to the landward side of the existing GCT Deltaport terminal. GCT agreed to pay half of the cost for the review.

[22] In November 2017, Hemmera delivered its report to the VFPA [Hemmera Report], which, although not squarely addressing the issue of whether the 2003 DFO letters constituted a prohibition of development in the area at the time, set out a series of sequenced activities (eight tasks) to be undertaken for any proponent looking to pursue future port infrastructure development on the east side of the causeway, landward of GCT Deltaport, in possible answer to

the concerns expressed by DFO in 2003. GCT argues that I should read the Hemmera Report as confirming that the 2003 DFO letters did not constitute a prohibition against development of the area now proposed for DP4. However, the Hemmera Report made it clear that Hemmera "draws no conclusions related to the potential likelihood of attaining approvals and authorizations for project(s) along the East Causeway of Deltaport."

[23] On December 8, 2017, GCT and the VFPA held a meeting during which GCT presented its views on the marketplace and existing competition amongst container terminal operators—issues of concern to the VFPA—and reiterated its intention to develop the DP4 project. In parallel to the discussions it was having with GCT regarding the DP4 project, the VFPA was moving forward with the development of RBT2.

[24] On December 6, 2017, the VFPA sent a briefing note to the then federal Minister of Public Services and Procurement—also the member of Parliament for the riding of Delta at the time [December 2017 Briefing Note]—espousing the benefits of the RBT2 project and the need for its development, and in particular outlining concerns with market concentration within the Port of Vancouver, with emphasis on avoiding dominance by any one single terminal operator within the port. I understand from the record and representations of GCT before me that GCT's two terminals (GCT Vanterm and GCT Deltaport) together serviced around 78% of the container traffic within the Port of Vancouver at that time.

[25] In line with its procurement process to identify and select an operator for the RBT2 container terminal, the VFPA stated in the December 2017 Briefing Note that, consistent with

the approach of maintaining healthy competition within the port, “no concessions or agreements will be granted for the Roberts Bank Terminal 2 [RBT2] Project that would result in an operator having more than 60 per cent of the container handling capacity within the Port of Vancouver.” The VFPA continued by stating that “[o]ngoing control by a single operator of more than 60 per cent of the container capacity within the Port of Vancouver has proven to be detrimental to customers of the gateway.” The briefing note went on to explain that any existing container terminal operator which sought to also operate RBT2 would have to demonstrate that, amongst other things, “its total container handling capacity within the Port of Vancouver would not exceed 60 per cent of the total available capacity.” The selection process seems to be ongoing from what I understand, at least as of the time of the hearing before me.

[26] The record includes similar briefing notes prepared by the VFPA in preparation for meetings with the then federal Minister of Transport and the British Columbia Minister of Transportation and Infrastructure in January and February 2018 to discuss and promote the need for the development of the RBT2 project. As regards the federal Minister of Transport in particular, the issues included that the VFPA’s borrowing limits under its letters patent would have to be increased in order to finance the RBT2 project. In discussing alternatives to the project, the briefing notes made it clear that the VFPA “concluded that the Roberts Bank Terminal 2 Project is the only viable option to ensure that the Port of Vancouver can efficiently handle growing trade in containers when it is required in the mid-2020s, and there are no other suitable alternatives that can reliably meet the need for additional capacity for the long-term” [emphasis added]. Specifically as regards the proposed DP4 project, the VFPA stated:

> No other proponent proposal has been formally submitted to the port authority or government, though we are aware one is

> contemplated by GCT, albeit in the area of Roberts Bank already dismissed by the Minister of Fisheries in 2003. If a proposal were to be submitted, it would likely take at least nine years for approval, based on the experience of the Terminal 2 proposal to date, as it would likely be reviewed by a federal panel.
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> [Emphasis added.]

[27] There is no issue between the parties that both RBT2 and DP4 are not required concurrently by the Port of Vancouver in order to meet short-and medium-term increases in demand for container space. On February 2, 2018, the VFPA sent a letter to GCT [February 2, 2018 letter] aiming to "provide clarity and transparency in respect of VFPA's approach" in its consideration of what was expected to be a permitting application for the DP4 project. After stating that it has, over several decades, "given extensive consideration to expansion of port facilities on either side of the causeway, and the decision to proceed with T2 was made having regard to this prior analysis (including environmental concerns associated with further development on the east side)", the VFPA stated the following in relation to how it would consider any application by GCT for the development of DP4:

> Specifically, GCT is at liberty to propose a project and apply to have it reviewed under VFPA's project and environmental review process. For a project of the nature contemplated by GCT, and having regard to the history of environmental issues associated with the eastern side of the causeway, any proponent of such a project should expect significant environmental assessment requirements. We would encourage GCT to speak with an independent environmental consultant familiar with VFPA's process and environmental assessment of similar projects to obtain a realistic understanding of the time that would take, the amount of information required, the cost of doing so and the likelihood of the environmental issues being amenable to sufficient mitigation at the end of the day.
>
> It is also important that we be clear that, even if the previously identified environmental issues associated with such a project proved to be mitigable to some extent, those impacts would have to

> be considered in a cumulative context with T2. Further, given the multifaceted role of VFPA as discussed above, we believe it would be entirely appropriate and indeed incumbent upon VFPA to also consider the impacts of a DP4 project on the overall port operations. VFPA would also consider the issue of timing, recognizing the very significant lead times required for such projects, and the looming need for more near term capacity in the Port of Vancouver.
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> [Emphasis added. The VFPA's reference to T2 is actually to the new RBT2 project.]

[28] The VFPA's concerns regarding container terminal market concentration within the Port of Vancouver and the perceived lengthy and difficult road ahead for DP4 to gain environmental approval were again expressed in the VFPA executive's briefing note on the status of the RBT2 project prepared for the board of directors meeting of March 21, 2018. The VFPA's campaign to develop RBT2—and according to GCT, a campaign to undermine the DP4 project—continued throughout April and May 2018 with letters to the then federal Minister of Transport on April 27, 2018, and to the then federal Minister of International Trade on May 5, 2018; both letters provided an update on the status of the RBT2 project and also comments on the reasoning for preferring RBT2 over DP4. The VFPA stated:

> We are aware of one other potential container terminal expansion project that has been discussed by an existing container terminal operator in the Vancouver gateway. Its proposed location is not a new idea, having first been mooted as a possible location for Terminal 2 over 15 years ago. It is, however, a highly sensitive location that the Minister of Fisheries stated unequivocally in 2003 would not be permitted. With that direction, we sought to avoid development in the area referred to by the minister to preserve the fragile inter-tidal marine aquatic ecosystems that exist there.
>
> Terminal 2 would introduce a new container terminal operator to the West Coast of Canada, respecting the principles of choice and commercial competition. We believe this will benefit the Canadian economy by ensuring three strong independent container terminal

> operators are in place to serve Canada's needs and provide a competitive market place.
>
> [Emphasis added.]

[29] In a May 11, 2018, email entitled "2003 letter ruling out terminal development adjacent to current Deltaport terminal", the VFPA sent a copy of the July 29, 2003 DFO letter to a government official. In particular, the email stated:

> Further to our brief discussion about the idea GCT have been raising around an extension of Deltaport, we looked into this at the start of the RBT2 process and did not pursue it as it was explicitly ruled out by the Liberal Minister of Fisheries Robert Thibault in 2003 (letter attached – options 2 & 3 are in the location GCT suggests).
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> Even if this could be overturned, which would be a challenge to say the least, it would be impossible to permit and develop a facility to be ready anywhere near in time to meet demand. It would almost certainly be a longer process than RBT2 and we've been working on permitting RBT2 (in the deeper location referred to in the letter) for 7 years already and it will likely be another 9 years to get through permitting, construction and commissioning.
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> [Emphasis added.]

[30] In October 2018, the VFPA published on its website an "Overview and Rationale" setting out the benefit of the RBT2 project and outlining the status of the project and the work that had been undertaken to date for the project as regards consultation with stakeholders, including First Nations communities, an environmental impact review, its terminal operator procurement process, and the actual building of the project. In the section on possible alternatives to the project, the VFPA stated that the expansion of the existing GCT Deltaport facility through the DP4 project was "not an option for two main reasons": first, DFO had prohibited any further land reclamation inland from Deltaport because of environmental sensitivity and, second, the

VFPA wished to prevent one terminal operator from controlling a significant majority of the market for container terminal services.

[31] On October 5, 2018, GCT delivered a further presentation to the VFPA in support of the DP4 project, during which a tour of the terminal and an overview of the proposed expansion was provided; present at the presentation was the majority of the VFPA's board of directors as well as the VFPA's senior executives. However, the issues of the environmental challenges to the development of DP4 in the area that proved problematic in 2003 and of terminal operator market dominance within the Port of Vancouver continued to play on the mind of the VFPA—the record before me includes a series of email exchanges dated between October 3 and 15, 2018 between the VFPA and outside consultants retained to review and prepare a report on the issue of market dominance within ports around the world, as well internal emails within the VFPA regarding a review of the Hemmera Report and its conclusions at the time.

[32] At the request of GCT, on January 24, 2019, GCT and the VFPA held a pre-PPE meeting as part of the first procedural requirement for review of capital projects under the VFPA's PER Process. The agenda for the meeting included a discussion on where engagement of the parties stood on the issue of DP4 as well as the status of the preliminary work undertaken by GCT in line with the three-phase/eight-task process outlined in the Hemmera Report for the advancement of future projects along the east side of the causeway—it would seem that GCT had completed Phase 1 of the eight phases recommended by Hemmera, being the pre-feasibility study. At the conclusion of that meeting, the VFPA suggested that a further pre-PPE meeting would be required. The next day, GCT asked for further clarity regarding such further meeting and

although hesitant as to whether it was even necessary, requested that any further pre-PPE meeting take place before the end of the week of February 4, 2019, otherwise GCT was to be "filing the PPE in accordance with all VFPA's posted guidelines." The VFPA proposed February 13, 2019, for the next meeting, but as the date was outside GCT's proposed window, on February 5, 2019, GCT formally submitted its PPE for the DP4 project to the VFPA for review in accordance with its PER Process.

[33] GCT's PPE was received and distributed internally amongst VFPA management. It would seem that the PER Process for the DP4 project was to begin, as internal VFPA emails state that "staff will be doing an internal review over the comings days/weeks, and no doubt a number of initial meetings with GCT will be required." In fact, on February 7, 2019, the VFPA confirmed to GCT receipt of its PPE and advised that VFPA staff "will undertake a review of the submission to better understand the project and determine if our submission criteria has been satisfied in order to continue processing. Once this is done, staff will either confirm our February 13 meeting with you or will reschedule a meeting should further information and engagement be necessary to process your submission." The proposed meeting for February 13, 2019, with GCT was eventually deferred at the suggestion of the VFPA on February 11, 2019, as its staff had not completed their review of the information submitted by GCT; as confirmed during the cross-examination of Mr. Peter Xotta, Vice-President, Planning and Operations for the VFPA, nor had a project lead for the GCT's proposal been appointed at that time.

[34] The affidavit of Mr. Xotta, filed in August 2021 in replacement of the initial affidavit of Mr. Yeomans who was no longer able to be cross-examined, indicates that he participated in

several discussions with other members of the VFPA executive regarding the PPE, and in particular, the port authority's pending decision whether to accept the PPE—although it had indicated to GCT that it was to undertake a review of the submission so as to better understand it—so as to advance "VFPA's statutory decision-making process under the [CMA]". The VFPA executives met on February 13, 2019 (it seems as though all members of the seven-person executive team were in attendance, including Mr. Xotta), with a decision being reached by consensus which was eventually to be communicated to GCT on March 1, 2019. In his cross-examination, Mr. Xotta confirmed that there were no documents that reflected the discussions and decision made by the executives at the time, other than the formal decision that was to be sent to GCT on March 1, 2019. In the meantime, exchanges continued between the parties during the last two weeks of February 2019, with GCT looking for a status report and the VFPA responding only that "senior management is considering the GCT request and the submission materials …". However, in response to a media request in relation to GCT's proposed expansion project, on February 26, 2019, the VFPA advised that it was:

> reviewing GCT's submission that was posted on the independent review panel registry, and don't have any specific comments at this time.
>
> However, what is important is that the Roberts Bank Terminal 2 Project is the only project on the West Coast that is currently in the review process and that could potentially meet the need for container terminal capacity when Canada needs it by the late 2020s.
>
> Should GCT decide to proceed with the Deltaport expansion, they would need many years to do all the planning and environmental work to enter into the federal review process, followed by the environmental review – which has taken already four years for the RBT2 Project – and then by construction. This would make it very difficult for GCT to meet demand that is just a few years away.

V. The March and September 2019 decisions and the institution of the present proceedings

[35] On March 1, 2019 (the letter is incorrectly dated February 29, 2019), the VFPA sent a letter to GCT, reflecting the decision reached by the VFPA executives on February 13, 2019, stating: "we will not be processing your [PPE] through our [PER Process] at this time" (emphasis added) [March 2019 decision]. In its letter, the VFPA noted that DP4 would involve a footprint expansion extending onto the same environmentally sensitive area on which the DFO expressed concerns in 2003 as involving "unacceptable impacts to critical fish habitat". The March 2019 decision continued by stating:

> It was very clear that the reduced footprint was a significant factor in the assessment and ultimate recommendation for approval of the DP3 Project by DFO and Environment Canada, and that the originally proposed footprint of 80 acres would not have been acceptable.
>
> It is notable that your proposed DP4 Project would involve a footprint expansion of 56 hectares (138 acres), extending into and well beyond the footprint on the very same intertidal habitat which was specifically protected by the reduced footprint of the DP3 Project to address the opposition of DFO to impacts on what they regarded as critical intertidal habitat.
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> [Emphasis added.]

[36] In addition, and underscoring the same two reasons stated in its 2018 "Overview and Rationale" document, i.e., the 2003 DFO letters and market concentration within the port, the VFPA stated that the RBT2 project was its preferred project for expansion of capacity at Roberts Bank:

> As you are aware, the VFPA plans for container capacity expansion at Roberts Bank have included additional expansion on the west side of the terminal, in deeper water, as encouraged by the Minister of Fisheries and Oceans in 2003.

> …
>
> The RBT2 Project is our preferred project for achieving the expansion of capacity to meet projected increases in demand.
>
> …
>
> You must understand that your DP4 proposal, even if it is able to receive the necessary environmental and regulatory approvals, could only be considered as subsequent and incremental to the RBT2 Project. We note that your proposed development timeline would conflict with the implementation of RBT2 capacity. Taking all of the above factors into consideration, we will not be processing your Enquiry through our project and environmental review process at this time. We would be prepared to review development plans for Deltaport with GCT at a point when we can more accurately project the need for incremental capacity beyond RBT2.
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> [Emphasis added.]

[37] On March 4, 2019, GCT expressed disagreement with the VFPA's decision not to process the PPE through the port authority's PER Process at that time, confirmed that it was nonetheless continuing to advance its environmental and engineering studies, and requested port authorization to access the causeway to undertake the necessary environmental studies.

[38] The record before me also contains a draft of a letter dated March 25, 2019, from the VFPA to the then Deputy Minister of Fisheries and Oceans [March 25, 2019 draft] seeking "clarification from Fisheries and Oceans Canada (DFO) on earlier direction regarding terminal expansion at Roberts Bank, B.C." and advising that it had "recently had an inquiry from a proponent interested in expanding a Roberts Bank port terminal by reclaiming lands east of the existing terminals … ." In the draft, the VFPA was requesting "confirmation from DFO that its earlier direction still stands, and that no terminal expansion on the east side of the causeway will

be permitted." For some reason, the draft letter was never sent, however, in response to what is expressed to be a public relations campaign undertaken by GCT to promote the DP4 project as an alternative to RBT2, the record before me includes an internal VFPA document entitled "Issues Management Plan", also dated March 25, 2019 [Issues Management Plan], that provides speaking points for the VFPA to address the DP4 project and to further promote the RBT2 project.

[39] On March 28, 2019, GCT served and filed the present notice of application for judicial review—at the time limited to the March 2019 decision; GCT also filed a second application for judicial review of the Review Panel's decision to proceed with public hearings for RBT2 (T-537-19); however, that application has been stayed.

[40] On March 29, 2019, the VFPA sent a briefing note to the Prime Minister's office following up on discussions that took place earlier in the week meant to address public concerns and opposition to the RBT2 project, and address the port authority's response to those concerns. The briefing note provided, *inter alia*, that the "location of the proposed terminal was guided in large part by direction from the minister of fisheries who advised in 2003 that only expansion options beyond the existing Deltaport terminal in deeper water should be considered, since *Fisheries Act* permits for options in highly sensitive habitat closer to the shore would not be granted." In reference to the DP4 project, the VFPA mentioned that the "port authority evaluated the same area suggested for DP4 as one of several location options for the RBT2 Project, but rejected it because Fisheries and Oceans Canada advised no *Fisheries Act* permits would be issued for projects in that area due to it being sensitive inter-tidal waters."

[41] On April 10, 2019, the VFPA met with the Prime Minister's office. The follow-up emails included a series of PowerPoint presentations and reports. The briefing note entitled "Concerns and opposition" was updated on April 3, 2019, and although it did not mention the DP4 project directly, it stated the following in the section on alternate options:

> Should another project be proposed, we expect it would take at least 15 to 20 years before the project could be built and operational, similar to the length of time it will ultimately have taken for the RBT2 Project. Therefore, any other project could not be ready to meet demand when needed by mid-2020s, but could possibly provide capacity for continually-growing demand by the late 2030s.

[42] In May and June 2019, the Review Panel under the CEAA held public hearings on RBT2 and received submissions from a number of stakeholders, including GCT. During the Review Panel hearings, representatives of DFO testified that the 2003 DFO letters were not meant to be a blanket prohibition on future development of the area now being proposed for DP4, but only addressed the proposed projects as they stood at that time. As stated during the Review Panel hearings by DFO: "each project is weighed and based on the application received, the current legislation and the current policies. So in future, should a project come in, DFO will review the application and make a decision based on the information that's presented to us." As part of its review process, the Review Panel considered whether the VFPA had carried out appropriate assessments on alternatives to RBT2; during the hearings, GCT participated and argued, *inter ali*a, that the Review Panel should reject RBT2 in favour of DP4. In the end, the Review Panel concluded that the VFPA had undertaken an appropriate assessment of alternatives to RBT2, and submitted its final report to the Minister of Environment and Climate Change about nine months later, on March 27, 2020. As of the hearing before me, final approval for the RBT2 project was still pending.

[43] In the meantime, on August 28, 2019, the CEAA was repealed and replaced with the *Impact Assessment Act*, SC 2019, c 28, s 1 [IAA], as a result of which DP4 would now be a "Designated Project" under the IAA so that it may have to undergo a federal environmental assessment process prior to review by the VFPA under its PER Process; the PER Process nonetheless remains a necessary step in project approval, but with the enactment of the IAA, the VFPA's PER Process Application Guide [Guide] provided that the port authority may rely on the results of the federal impact assessment where the assessment meets the VFPA's standards and requirements. That said, the IAA precludes the VFPA from making any decision on DP4 unless and until the Impact Assessment Agency [Agency] gives its approval, approval which may never be given if in fact the Agency rejects DP4. On the assumption that DP4 does pass Agency approval, however, final say on the approval of projects within the Port of Vancouver remains with the VFPA, with necessary permitting having to eventually pass through the PER Process. Consequently, notwithstanding the new impact review process under the IAA, the VFPA remains an active player in the approval process for DP4.

[44] Although I discuss this further below, on September 6, 2019, this Court issued an Order disqualifying the VFPA's legal counsel on the basis of a conflict of interest. According to the affidavit of Mr. Xotta, shortly after retaining new counsel, on September 23, 2019, the VFPA executives met by telephone to consider the implications of the said Order and the earlier March 2019 decision. Following further discussion amongst the VFPA executives, the VFPA informed GCT [September 2019 decision] that, after further consideration regarding the PPE for the proposed DP4 project, the VFPA was rescinding its March 2019 decision. The VFPA stated:

> Having regard to all relevant information available to the Port (including some which became available to us through the review

> panel process) we are hereby rescinding our [March 2019 decision] and will proceed with receiving GCT's Preliminary Project Enquiry. Port staff will be in touch with your staff shortly on this matter to discuss the timing of the Port's process relative to the impact assessment process DP4 would be required to undergo, pursuant to the recently enacted Impact Assessment Act and supporting regulations.
>
> [Emphasis added.]

[45] Although advising that it was prepared to review the proposed DP4 project, the VFPA reiterated its concerns:

> In making this decision I wish to note that, as we made clear in the review panel hearings, the Port still believes (based on prior assessments of the area) there are considerable risks with the proposed DP4 project as it relates to fish habitat. However, in the circumstances, we are no longer of the view that they are of such a nature that any consideration of DP4 is not an option. Instead, we are open to considering GCT submissions (and responses to any related questions or concerns) as part of a federal impact assessment of DP4 and our PER process.
>
> Similarly, in respect of the competitiveness and control question, we remain of the view that this is a significant issue – one that we have consistently made GCT aware of for some years now (including in our commercial agreements and through the terminal operator RFQ process). We continue to consider it potentially problematic for the proposed DP4 project, but we are prepared to further consider that issue through the information and analysis that will be undertaken through the federal impact assessment of DP4 and our PER process.
>
> [Emphasis added.]

[46] In the end, the VFPA again addressed the issue of the GCT's concerns over bias in the review process:

> With respect to your stated concerns about "bias" on the part of the Port given its different roles, the Port considers these multiple roles mandated by the Canada Marine Act and related regulations and

> thus an integral and appropriate aspect of the Port's mandate. Further, to the extent you may hold any residual concerns in this regard, we note that before any decisions would be made by the Port, the DP4 project would be subject to assessment under the Impact Assessment Act, and that process would materially inform the Port PER process.
>
> Ultimately, and having said all the above, I wish to reiterate the position noted in my [March 2019 decision] that, even if the DP4 project is able to satisfactorily address the above noted issues, the Port would ultimately make a decision on the project having regard to all relevant factors including effective and efficient port operations (as we are mandated). This wold include, but is not limited to, the status of the RBT2 project in terms of meeting anticipated increased shipping demands.
>
> [Emphasis added.]

[47] GCT responded to the VFPA on September 27, 2019, advising that it was of the view that its PPE would not receive fair consideration under the Port of Vancouver's PER Process. In any event, GCT advised the VFPA that it was mindful of the new legislation and that the DP4 project is considered thereunder as a Designated Project—meaning that any VFPA permitting decisions relating to the project could not be made until it favourably completed an impact assessment under the IAA—and accordingly, "GCT's view is that it is not necessary to immediately engage in the VFPA's permitting process" [emphasis added]. As asserted before me by GCT, had GCT resubmitted its PPE as invited to do by the VFPA, the PPE would likely have had to be amended slightly to reflect the change in legislative structure in place with the repeal of the CEAA and the enactment of the IAA; however, GCT declined to participate in a process which it felt was simply being reopened to it by the VFPA for tactical reasons.

[48] The VFPA replied to GCT on October 2, 2019, advising that the impact assessment under the IAA would be undertaken by an independent external agency and "[a] permitting decision by

the port authority would only be necessary if the project received approval under the [IAA], and any resulting report/federal decision would necessarily and substantially inform [the VFPA's] permitting process." The VFPA also asked GCT to confirm whether it was still asserting that the VFPA would be in a situation of bias at the time it may be called upon to make a permitting decision in the future, and, if so, to provide submissions on the matter for consideration so that if the concerns are considered valid, the VFPA could consider "what steps need to be taken to address those issues well before a decision is required" [October 2, 2019 letter].

[49] On October 8, 2019, GCT replied to the October 2, 2019 letter to advise that it recognized the effects of the new legislative regime on DP4 and that it was still asserting that the VFPA is in a situation of bias. GCT did not provide further submissions on the issue of the VFPA's purported bias, but advised simply that it would continue with the judicial review application as filed.

[50] Since then, the parties have continued to move forward with their respective proposals. As stated, the Review Panel under the CEAA submitted its final report on RBT2 to the Minister of Environment and Climate Change on March 27, 2020. Having to determine, amongst other things, whether the VFPA properly conducted an assessment of alternative means for carrying out RBT2, the Review Panel concluded that the VFPA reasonably eliminated the E1 and W3 options, and although the regulatory context had changed since 2003, the VFPA had reason to believe that "the potential for environmental effects on critical fish habitat in the intertidal area had not changed, and the destruction of that critical habitat would potentially not be permitted by

DFO". In concluding that the VFPA's assessment of alternative means of carrying out RBT2 was appropriate, the Review Panel stated the following:

> The Panel cannot ignore the fact that sensitive fish habitat has been identified on the east side of the causeway and building E1 would destroy that habitat which may or may not be fully mitigable. The Panel recognizes that the [VFPA] had continued conversations with DFO after 2003 and they never altered their position. After considering all arguments presented by GCT the Panel submits that GCT is proposing a competing Project, which the Panel has no mandate to review. The Panel has however, assessed alternative locations of [RBT2], including E1.
>
> [Emphasis added.]

[51] As stated, although not identical to E1, construction of DP4 is being proposed in the area where E1 was to be built, an area which was identified by DFO as problematic for development in 2003. In May 2020, the VFPA sent about 30 letters to various First Nations communities adjacent to the Roberts Bank facility and thus interested in port development in the area [May 2020 letters], purportedly to answer questions arising from information being disseminated by GCT, in which the VFPA asserted, amongst other things, the following:

i. The VFPA has decided to pursue the RBT2 project, having considered other options including expansion in the area being proposed for DP4;

ii. The DP4 project was rejected by the VFPA for reasons which included environmental and competition concerns;

iii. The Review Panel under the CEAA has concluded that the VFPA's assessment of alternative means of carrying out RBT2 was adequate and has supported the VFPA's conclusion to locate the proposed new terminal in deeper waters; and

iv. The VFPA has no plans to pursue development of DP4, and GCT does not have the ability to pursue an expansion of its existing facility without VFPA approval.

[52] For its part, and as part of the first step in the impact assessment process under the IAA, GCT submitted an initial project description for the DP4 project to the Agency in September 2020, with the intention of filing a detailed project description in the fall of 2021.

VI. Procedural history

[53] As stated, on March 28, 2019, GCT served and filed its notice of application for judicial review of the March 2019 decision; since then, the proceedings have been at times somewhat spirited. As stated earlier, on September 6, 2019, Mr. Justice Pentney granted GCT's motion disqualifying the VFPA's counsel from acting in relation to the present application for judicial review (2019 FC 1147), compelling the VFPA to retain new counsel.

[54] In addition, with the enactment of the IAA on August 28, 2019, rendering the DP4 project a Designated Project and the issuance of the September 2019 decision, amongst other things, GCT sought to amend its notice of application to include the September 2019 decision along with the March 2019 decision as the decisions for which judicial review was being sought; GCT also sought permission to file supplemental affidavits in support of such amendments.

[55] The VFPA and the AGC in turn filed motions seeking to strike GCT's underlying claim. The VFPA first argued that the rescission of the March 2019 decision by way of the September 2019 decision rendered GCT's application moot, as GCT is no longer prevented from accessing the PER Process given that the VFPA specifically advised GCT that it was ready to proceed with reviewing GCT's PPE in the September 2019 decision, and that it was GCT that refused to engage the PER Process; with no application in the pipeline for the VFPA to review, there was

no longer a live issue between the parties and no reason for the Court to exercise its discretion to hear a matter that had become strictly hypothetical. In addition, the VFPA sought to strike as premature GCT's requests seeking a declaration, amongst other things, that the VFPA cannot conduct a fair and impartial process because of actual bias, as the GCT had refused the invitation to first put the bias issue before the VFPA, thus not exhausting the required administrative route and denying the VFPA the opportunity to respond to the issue so as to provide a record for the Court to review. The port authority also sought to strike the application as a whole, given that the Court, it was argued, lacks jurisdiction to order the oversight remedy being requested by GCT and the Minister lacks the authority to oversee the VFPA in its assessment process.

[56] On March 9, 2020, Prothonotary Furlanetto, as she then was, who was acting Case Management Judge, allowed the various motions in part: GCT was permitted to amend its notice of application on the grounds that the inclusion of the September 2019 decision "is not an intention to raise judicial review of an additional decision but rather to indicate a continuing type of activity that it asserts supports the allegation of bias" (2020 FC 348). In addition, and although Prothonotary Furlanetto allowed the VFPA's motions to strike certain aspects of the relief sought by GCT, she nonetheless dismissed the request to strike other aspects which related to mootness and prematurity connected to the bias issue; under the test set out in *Borowski v Canada (Attorney General)*, [1989] 1 SCR 342 [*Borowski*], the Prothonotary considered that the allegations of underlying bias with respect to the March 2019 decision remained a live issue even though the March 2019 decision may itself have been rescinded by the September 2019 decision. Prothonotary Furlanetto explained that although there was a change in the legislative regime, the "VFPA's authority over GCT in respect of the DP4 Project is ongoing. The VFPA exercises

power over the DP4 Project under the PER Process and the authority granted to it under the [CMA]. While a change in the environmental regime has been effected by the implementation of the IAA, there is no change in the gatekeeper role of VFPA in the process". Citing *Michel v Adams Lake Indian Band Community Panel*, 2017 FC 835, Prothonotary Furlanetto determined that ""[e]ven where a decision is alleged to be moot, the bias underlying the decision may remain a live issue that can be determined by the Court at its discretion". As to the prematurity argument, the Prothonotary found that such a defence could not arise from the VFPA's own making in rescinding its March 2019 decision when the live issue—the purported bias of the VFPA—was tethered to that decision. The Prothonotary, however, made it clear that her decision was not intended to be a pronouncement of findings with respect to the merits of the case, but was limited strictly to the issues raised in the motions before her.

[57] On September 11, 2020, GCT filed its amended notice of application for judicial review with respect of both the March 2019 decision and September 2019 decisions—collectively referred to as the March and September 2019 decisions, seeking the following relief:

> (a) An Order in the nature of *certiorari* quashing the Decision and directing that the Minister of Transport (Canada) or an appropriate delegate of Her Majesty the Queen other than the VFPA, as determined by this Honourable Court (the "**Minister**"), oversee the assessment and permitting activities for the DP4 Project which are under the jurisdiction of the VFPA pursuant to the *Canada Marine Act*, S.C. 1998, c.10 (the "**Act**"), the *Port Authorities Operations Regulations*, SOR/2000-55 enacted under the Act, or such other process as this Honourable Court determines is appropriate;
>
> (b) Declarations that:
>
> > (i) the March 1st Decision was made pursuant to the VFPA's actual improper bias;

(ii) the September 23rd Decision, purportedly rescinding the March 1st Decision, was made pursuant to improper motives, and the VFPA's actual improper bias;

(iii) In the alternative, and if necessary, that the VFPA created an inescapable situational bias such that, where VFPA remains the decision maker, GCT has no possible opportunity of advancing DP4 before an unbiased decision maker;

(c) deleted;

(d) An Order directing independent oversight of the VFPA's administrative, permitting and other powers with respect to the DP4 Project in relation to:

(i) access for conducting studies, collecting data, and other works and activities related to the impact assessment and permitting processes of DP4;

(ii) leasing;

(iii) dredging;

(iv) construction;

(v) transportation activities;

(vi) undertaking offsetting measures; and

(vii) other activities and powers of the VFPA and its subsidiaries, including those related to port operations, pursuant to the VFPA's letters patent.

(e) A Declaration that the VFPA made the Decision relying upon extraneous and inappropriate considerations resulting from its own actual bias, thereby exceeding its jurisdiction under the Act. The VFPA relied upon its own immediate commercial interest in the Decision and its desire to protect and enhance its own competing project to fund and build a second terminal at Roberts Bank (the "**RBT2 Project**") – considerations incompatible with its role as a federal board, commission or other tribunal;

(f) A Declaration that the VFPA has not conducted, and cannot conduct, a fair and impartial process under the Act and its own Project and Environmental Review Process (the "**PER Process**"), and in accordance with the principles of natural justice and procedural fairness due to its actual bias;

> (g) A Declaration that the lands affected by the DP4 Project are not all within the jurisdiction of the VFPA and remain under the jurisdiction of the Minister of Transport (Canada), or such other delegate of Her Majesty the Queen as determined by this Honourable Court;
>
> (h) deleted;
>
> (i) An Order assigning a case management judge or prothonotary pursuant to Rule 383 of the *Federal Courts Rules*, SOR/98-106;
>
> (j) An Order expediting the hearing of this Application;
>
> (k) The Costs of this Application; and
>
> (l) Such other relief as counsel may advise and this Court deems just.

[58] As stated earlier, by requesting that this Court direct the Minister, by way of an order in *mandamus*, to oversee the assessment and permitting activities for the DP4 project, GCT is seeking an alternative assessment process where Transport Canada oversees certain aspects of the VFPA's review of the DP4 project and also conducts certain components of the review process itself. During the hearing, GCT explained that if I were to find bias on the part of the VFPA—which GCT contends means having a closed mind and a refusal to make a fair and rational decision based on objective considerations, and instead making a decision based on predeterminations on the part of the VFPA—the parties, with the assistance of the Court, would have to sketch out the exact process that will eventually have to be undertaken during the assessment process of the DP4 project. GCT's assertion, rightly or wrongly, that it was open to this Court to fashion a remedy of this kind under the circumstances is supported, it argues, by the decision of Madam Justice Sharlow, as she then was, in *Pushpanathan v Canada (Minister of Citizenship and Immigration)*, [1999] 4 FC 465. I should also mention that during the hearing,

GCT confirmed that it was no longer pursuing the declaration sought at paragraph 2(g) of the amended notice of application for judicial review.

[59] The VFPA appealed the Order of Prothonotary Furlanetto, strictly on the mootness and prematurity issues. On November 17, 2020, Mr. Justice Phelan dismissed the appeal, finding that the Prothonotary did not commit a palpable and overriding error in her decision (2020 FC 1062). The VFPA appealed Justice Phelan's decision, on the prematurity issue alone, to the Federal Court of Appeal [FCA] which, on September 17, 2021, dismissed the appeal (2021 FCA 183) on the grounds that it saw no palpable or overriding error in the decision of Justice Phelan. The FCA also made it clear that its decision was not meant to tie the hands of the judge hearing the matter on the merits, in the determination of the issues before me.

[60] In addition, following the disclosure under section 317 of the *Federal Courts Rules*, SOR/98-106 [Rules], GCT filed a motion seeking further disclosure of the record, primarily on the basis of the bias allegation. On October 15, 2020, Mr. Justice Pentney dismissed GCT's motion seeking an order for leave to cross-examine a senior official of the VFPA in advance of the hearing of its motion pursuant to subsection 318(2) of the Rules (2020 FC 970), and on June 17, 2021, Justice Pentney granted in part the motion to compel disclosure (2021 FC 624).

[61] That is where matters stood at the commencement of the hearing.

VII. Legislative framework

[62] I have set out in the annex to my decision the relevant statutory and regulatory provisions.

[63] By virtue of the enactment in 1998 of the CMA, Parliament relinquished the legislative means of the federal government to direct or control the actions of port authorities through the requirement under the *Financial Administration Act*, RSC 1985, c F-11, that they submit corporate plans to the Governor in Council. The purpose of enacting the CMA was to consolidate and simplify maritime regulations, reduce red tape, and shorten the time for commercial decision-making for, amongst other federal entities, port authorities; the overall goal was to make Canada's maritime sector more competitive (*British Columbia (Attorney General) v Lafarge Canada Inc*, 2007 SCC 23, [2007] 2 SCR 86 at paras 44 and 45).

[64] As seen from section 4 of the CMA, the legislative framework is designed to ensure that, in particular, port authorities are managed in a commercially sound and decentralized manner, for the most part free from the control of the Minister of Transport. The core commercial focus of the CMA is reflected in its legislative history, with the result that the VFPA is autonomous and financially sustainable. In fact, one of the conditions for the Minister to issue letters patent incorporating a port authority is that the Minister is satisfied that the port "is, and is likely to remain, financially self-sufficient" (CMA s 8(1)(a)).

[65] In the present case, the nature of the CMA is commercial—in fact, it is interesting that subsection 2(2) of the CMA looks to the *Canada Business Corporations Act* for greater certainty

in the interpretation of words and expressions used in the CMA—with its purpose being to, *inter alia*, "provide a high degree of autonomy for local and regional management … and be responsive to local needs and priorities" as well as to "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" (CMA ss 4(e) and (f)).

[66] The VFPA's power to authorize certain activities within the Port of Vancouver derives from section 28 of the CMA, which specifically authorizes a port authority to "operate" its port and, subject to the letters patent, to engage in port activities set out in subsection 28(2) of the CMA. There is no issue that GCT requires the authorization of the VFPA to proceed with DP4. Moreover, the Regulations do not establish the procedures that must be undertaken for an applicant to have its project reviewed by the port authority. Rather, the VFPA is empowered to set up its own procedures for project assessment and review. Its letters patent provide the following: "To operate the port, the [VFPA] may undertake the port activities referred to in paragraph 28(2)(a) of the [CMA]" which may include the "development, application, enforcement and amendment of rules, orders, bylaws, practices or procedures and issuance and administration of authorizations respecting use, occupancy or operation of the port" [emphasis added].

[67] A port authority is managed by a board of directors who "shall have generally acknowledged and accepted stature within the transportation industry or the business community" (CMA ss 15(1) and (2), and 20). The directors have to "act honestly and in good faith with a view to the best interests of the port authority" (CMA s 22(1)(a)). The VFPA's Code

of Conduct (Schedule E to its Letters Patent – *Certificate of Amalgamation of Port Authorities* (Department of Transport), PC 2007-1885, art 5.1) [Code of Conduct], governs the conduct of the directors of the VFPA. However, neither the CMA, nor the Regulations, nor the letters patent prescribe who, within the VFPA, must make a decision to authorize the building of a new project (*Communities and Coal Society v Canada (Attorney General)*, 2018 FC 35 at paras 45-46 [*Communities and Coal Society*]; *Carltona Ltd v Commissioners of Works and Others*, [1943] 2 All ER 560).

[68] Prior to the introduction of the IAA, the VFPA had environmental assessment powers under section 67 of CEAA. With the coming into force of the IAA, the VFPA, as a "federal authority", can only exercise its authorization powers in accordance with the IAA, and as mentioned, section 8 of the IAA prohibits the VFPA from acting with respect to a project proposal until a project is approved under the IAA process. In addition, and quite apart from approvals under the now repealed CEAA or the new IAA and under a myriad of other federal legislation and from the Tsawwassen First Nation for activities on their lands or water lots, authority from DFO would be required under the *Fisheries Act*, RSC 1985, c F-14, in respect of projects which may affect fish habitat.

VIII. Issues

[69] The present application raises three issues:

1. Is the present application moot or premature given the rescission of the March 2019 decision and the repeal of the CEAA in favour of the IAA?

2. Did the VFPA breach the principles of natural justice and procedural fairness by rendering a decision tainted by impermissible bias?

3. Does this Court have the jurisdiction to grant the relief sought by GCT?

IX. Standard of review

[70] As regards the second issue, questions of procedural fairness are not decided according to any particular standard of review; deference has no room in the analysis, and the Court must be fully and independently satisfied that procedural fairness has been met and that the decision-making process was fair, having regard to all of the circumstances (*Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69 at para 54 [*Canadian Pacific Railway Company*]; *Angara v Canada (Citizenship and Immigration)*, 2021 FC 376 at para 23 [*Angara*]).

X. Analysis

A. *Preliminary matter: Is the application for judicial review moot and premature?*

[71] The VFPA takes up before me the issues argued before Prothonotary Furlanetto during its earlier motion to strike and raises mootness and prematurity as preliminary issues. The port authority argues that the September 2019 decision rescinded the March 2019 decision and that whether flawed or not, the March 2019 decision no longer prevents GCT from submitting its PPE for DP4. Consequently, there is no need for an order in the nature of *certiorari* as the September 2019 decision already quashed the March 2019 decision. The matter is therefore moot as there is no practical effect of the relief sought by GCT.

[72] The VFPA also argues that the present application is premature for two reasons; first, and although invited to do so, GCT refused to make submissions on bias to the VFPA and is therefore now barred from raising the issue on judicial review. In addition, the VFPA argues that as the GCT failed to re-engage the PER Process after the September 2019 decision, it does not have an active application before the VFPA for a permitting decision, and with the repeal of the CEAA and the enactment of the IAA, the VFPA's authority to exercise any powers or perform any duties or functions is curtailed.

[73] Putting aside the issue of *res judicata* raised by GCT, I must agree with Prothonotary Furlanetto (2020 FC 348) and with Mr. Justice Phelan (2020 FC 1062), who maintained the Prothonotary's decision in refusing to strike GCT's application: after considering the test set out in *Borowski* on the issue of mootness, both Prothonotary Furlanetto and Justice Phelan determined that the issue of purported bias permeates the entire debate between the parties as well as their continued relationship in respect of the DP4 project. Mr. Justice Phelan summarized the bias concerns of GCT in this way: "how can [GCT] receive a fair and unbiased consideration of its own project in the face of VFPA's clear preference for its own project?" The fact that the VFPA may have rescinded its March 2019 decision does not make the bias concerns of GCT go away, even with the change in legislative landscape.

[74] GCT continues to argue that the VFPA cannot shake the bias shown with the March 2019 decision by making a tactical decision to "rescind" it with the September 2019 decision. In addition, this is not, as was the case in *0769449 BC Ltd (Kimberly Transport) v Vancouver Fraser (Port Authority)*, 2016 FC 645, and *Kozel v Canada (Citizenship and Immigration)*,

2015 FC 593, cited by the VFPA, a situation whereby the change in the legislation transferred the power to grant licences to access the Port of Vancouver's premises from the VFPA to another administrative body, or a case where the change in the statute resulted in the termination of an applicant's legal status. In this case, the statutory change did not transfer any responsibility relating to permitting from the VFPA to another administrative body; the VFPA still needs to conduct its review of DP4 under its PER Process with permitting authority regarding the tasks inherent in the actual construction and operations of the project, although admittedly now only following review under the IAA. In other words, regardless of the newly enacted IAA, GCT eventually still required port authority approval to pursue the project. Accordingly, deciding not to accept the PPE under the PER Process goes to the heart of GCT's bias claim. Moreover, the claim of prematurity arises from the purported rescission of the March 2019 decision; however, if GCT's bias concerns are valid, such a finding would certainly influence any determination as to whether the VFPA manipulated the prematurity doctrine with its September 2019 decision to shield itself from judicial review, and thus "game the system".

[75] With respect to the issue of exhaustion and the argument that GCT circumvented the VFPA's primary jurisdiction by not raising the bias issue first with the VFPA (*Chopra v Canada (Attorney General)*, 2013 FC 644 at para 66; *Lin v Canada (Public Safety and Emergency Preparedness)*, 2021 FCA 81 at para 6 [*Lin*]), I accept the general principle of non-interference with ongoing administrative processes subject only to exceptional circumstances, and I accept that concerns regarding procedural fairness or bias are not exceptional circumstances allowing parties to bypass an administrative process as long as that process allows the issues to be raised and an effective remedy to be granted (*Canada (Border Services Agency) v CB Powell Limited*,

2010 FCA 61 at para 33 [*CB Powell Limited*]). However, as was the case with Prothonotary Furlanetto, I have not been convinced that there existed an adequate route or process for the VFPA, as a non-adjudicative tribunal saddled with commercial and operational responsibility for running the Port of Vancouver, to have considered its own bias, and that informal correspondence was simply inadequate as a procedure under the circumstances.

[76] I also accept that what was before Prothonotary Furlanetto was a motion where the threshold for striking a notice of application is higher (*David Bull Laboratories (Canada) Inc v Pharmacia Inc (CA)*, [1995] 1 FC 588 at 600)—the test for which the VFPA simply did not meet—and thus the prism through which I should review the issues of mootness and prematurity is different. However, the fundamental problem remains the same, i.e., GCT's concerns over bias have a direct impact upon how these two issues are to be assessed.

[77] Under the circumstances, what remains is very much a live issue between the parties, and as stated by Prothonotary Furlanetto, "[t]he facts set out in the application raise issues as to the ability of the port authority to discharge its statutory duty and provide unbiased oversight and as to its accountability if it cannot do so. These allegations will persist until they are evaluated by the Court." I agree, and the situation that existed before Prothonotary Furlanetto and Justice Phelan—as well as the FCA, although only the issue of prematurity was raised on appeal—remains today, and as stated by Justice Phelan, it would be wasteful to compel GCT to file a fresh PPE containing the same basic request for project approval "only to end up in the same position as at present"; the issue of bias must be addressed.

B. *Did the VFPA breach the principles of natural justice and procedural fairness by rendering a decision tainted by bias and by breaching GCT's legitimate expectations regarding the review of its PPE?*

[78] There is no doubt that ""[a]ll administrative bodies, no matter what their function, owe a duty of fairness to the regulated parties whose interest they must determine" (*Newfoundland Telephone Co v Newfoundland (Board of Commissioners of Public Utilities*), [1992] 1 SCR 623 at 636 [*Newfoundland Telephone*]).

[79] The Court's assessment of the content of procedural fairness should be guided by the five non-exhaustive contextual factors set out by the Supreme Court in *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 [*Baker*] (*Angara* at para 23). As stated by Justice L'Heureux-Dubé, the concept of procedural fairness is flexible and variable as there is no set rule for what requirements will be applicable in any given case; there are several factors in the spectrum analysis which are relevant in determining the content of the common law duty of procedural fairness in a given set of circumstances (*Baker* at paras 21 and 22). Although not exhaustive, such factors include (*Baker* at paras 23 to 28):

i. the nature of the decision being made and the process followed in making it;

ii. the nature of the statutory scheme and the terms of the statute pursuant to which the body operates;

iii. the importance of the decision to the individual or individuals affected—the more important the decision is to the lives of those affected and the greater its impact on that person or those persons, the more stringent the procedural protections that will be mandated;

iv. the legitimate expectations of the person challenging the decision;

> v. the choices of procedure made by the agency itself, particularly when the statute leaves to the decision maker the ability to choose its own procedures.

[80] In addition, the common law has long recognized that bias on the part of an administrative decision maker erodes any sense of procedural fairness, which in turn negatively affects the duty of fairness which applies to all administrative bodies. In *Newfoundland Telephone,* the Supreme Court of Canada set out the issue as follows at page 636:

> Although the duty of fairness applies to all administrative bodies, the extent of that duty will depend upon the nature and the function of the particular tribunal. See *Martineau v. Matsqui Institution Disciplinary Board*, [1980] 1 S.C.R. 602. The duty to act fairly includes the duty to provide procedural fairness to the parties. That simply cannot exist if an adjudicator is biased. It is, of course, impossible to determine the precise state of mind of an adjudicator who has made an administrative board decision. As a result, the courts have taken the position that an unbiased appearance is, in itself, an essential component of procedural fairness. To ensure fairness the conduct of members of administrative tribunals has been measured against a standard of reasonable apprehension of bias. The test is whether a reasonably informed bystander could reasonably perceive bias on the part of an adjudicator.
>
> [Emphasis added.]

[81] The need for a spectrum or content analysis to establish the scope of the duty of procedural fairness was also outlined in *Newfoundland Telephone*, where Justice Cory stated:

> It can be seen that there is a great diversity of administrative boards. Those that are primarily adjudicative in their functions will be expected to comply with the standard applicable to courts. That is to say that the conduct of the members of the Board should be such that there could be no reasonable apprehension of bias with regard to their decision. At the other end of the scale are boards with popularly elected members such as those dealing with planning and development whose members are municipal councillors. With those boards, the standard will be much more

> lenient. In order to disqualify the members a challenging party must establish that there has been a pre-judgment of the matter to such an extent that any representations to the contrary would be futile. Administrative boards that deal with matters of policy will be closely comparable to the boards composed of municipal councillors. For those boards, a strict application of a reasonable apprehension of bias as a test might undermine the very role which has been entrusted to them by the legislature.
>
> [Emphasis added.]

[82] In *Old St Boniface Residents Assn Inc v Winnipeg (City)*, [1990] 3 SCR 1170 [*Old St Boniface*], the Supreme Court stated that "[t]he rules which require a tribunal to maintain an open mind and to be free of bias, actual or perceived, are part of the *audi alteram partem* principle which applies to decision-makers" (*Old St Boniface* at p 1190). In addition, Justice Sopinka set out the standard for the determination of whether a closed mind exists at page 1197:

> In my opinion, the test that is consistent with the functions of a municipal councillor and enables him or her to carry out the political and legislative duties entrusted to the councillor is one which requires that the objectors or supporters be heard by members of Council who are capable of being persuaded. The Legislature could not have intended to have a hearing before a body who has already made a decision which is irreversible. The party alleging disqualifying bias must establish that there is a prejudgment of the matter, in fact, to the extent that any representations at variance with the view, which has been adopted, would be futile. Statements by individual members of Council while they may very well give rise to an appearance of bias will not satisfy the test unless the court concludes that they are the expression of a final opinion on the matter, which cannot be dislodged. In this regard it is important to keep in mind that support in favour of a measure before a committee and a vote in favour will not constitute disqualifying bias in the absence of some indication that the position taken is incapable of change. The contrary conclusion would result in the disqualification of a majority of Council in respect of all matters that are decided at public meetings at which objectors are entitled to be heard.
>
> [Emphasis added.]

[83] In other words, in line with the spectrum analysis relating to the content of the scope of procedural fairness, a certain level of pre-judgment of decision makers is to be expected in certain circumstances, as long as it does not equate to intransigence—a closing of the mind to the point of no longer being able to be otherwise persuaded.

[84] In *Yukon Francophone School Board, Education Area #23 v Yukon (Attorney General)*, 2015 SCC 25 [*Yukon Francophone School Board*], the Supreme Court of Canada noted that the objective of the reasonable apprehension of bias test "is to ensure not only the reality, but the appearance of a fair adjudicative process" and that the issue of bias is thus "inextricably linked to the need for impartiality" (at para 22). In particular, as regards the judiciary, suspicions, speculations or the possibilities of bias is not enough. The test for a reasonable apprehension of bias requires a "real likelihood or probability of bias" (*Yukon Francophone School Board* at para 25, citing *Arsenault-Cameron v Prince Edward Island*, [1999] 3 SCR 851).

[85] That said, and as instructed in *Baker*, one must also look to the statutory scheme which is the source of the decision maker's legitimacy in determining the content of the duty of fairness owed when a particular administrative decision is made (*Baker* at para 24). Thus, in assessing the issue of bias, courts must also take into account the particular process at hand:

> In administrative law the question is not simply whether an administrative decision-maker has a bias. It is also whether any bias which the decision-maker has is authorized by law. This is an important distinction to make. To fail to take this into account will result in improper pigeon holing of administrative processes where individual administrative schemes are judged according to general standards rather than the standards appropriate to the particular process at hand.
>
> [Emphasis added.]

> (Robert W. MaCaulay & James L.H. Sprague, *Hearings Before Administrative Tribunals*, 5th ed (Toronto: Thomson Reuteurs. 2016) at p 39-5 – 39-6.)

[86] As stated by the Supreme Court of Canada in *Ocean Port Hotel Ltd v British Columbia (General Manager, Liquor Control and Licensing Branch)*, 2001 SCC 52 at paras 20, 22 and 42 [*Ocean Port Hotel*]:

> [20] … It is well established that, absent constitutional constraints, the degree of independence required of a particular government decision maker or tribunal is determined by its enabling statute. It is the legislature or Parliament that determines the degree of independence required of tribunal members. The statute must be construed as a whole to determine the degree of independence the legislature intended.
>
> …
>
> [22] However, like all principles of natural justice, the degree of independence required of tribunal members may be ousted by express statutory language or necessary implication. …
>
> …
>
> [42] Further, absent constitutional constraints, it is always open to the legislature to authorize an overlapping of functions that would otherwise contravene the rule against bias. …
>
> [Emphasis added.]

[87] Given the parameters of the CMA, I find that in its regulatory, decision-making role, the VFPA falls, as set out in *Newfoundland Telephone*, "[a]t the other end of the scale" where "the standard [for procedural fairness] will be much more lenient" and where in order to challenge a decision for reasons of bias, GCT must establish "that there has been a pre-judgment of the matter to such an extent that any representations to the contrary would be futile" (*Newfoundland Telephone* at p 638; *Old St Boniface* at p 1197).

[88] That said, Parliament can authorize an overlapping of functions that would otherwise run afoul of the rule against bias at common law. As stated by the Supreme Court in *Brosseau v Alberta Securities Commission*, [1989] 1 SCR 301 at page 310 [*Brosseau*]:

> Administrative tribunals are created for a variety of reasons and to respond to a variety of needs. In establishing such tribunals, the legislator is free to choose the structure of the administrative body. The legislator will determine, among other things, its composition and the particular degrees of formality required in its operation. In some cases, the legislator will determine that it is desirable, in achieving the ends of the statute, to allow for an overlap of functions which in normal judicial proceedings would be kept separate. In assessing the activities of administrative tribunals, the courts must be sensitive to the nature of the body created by the legislator. If a certain degree of overlapping of functions is authorized by statute, then, to the extent that it is authorized, it will not generally be subject to the doctrine of "reasonable apprehension of bias" *per se*.
>
> [Emphasis added.]

[89] GCT asserts that the matter under the present application for judicial review is not one regarding any permissible structural bias by virtue of the VFPA's overlapping statutory roles—to which, it argues, the decision in *Ocean Port Hotel* would apply—but rather one of actual bias, where the decision maker has a closed mind and a direct interest in the matter in the way in which it dealt with the DP4 project. GCT argues that the VFPA's "dogged pursuit of its competing project" has undermined its ability to objectively evaluate the DP4 project. In short, GCT asserts that the VFPA, as landlord, regulator and proponent, has closed its mind and cannot fairly review the DP4 project and that therefore any review of its project cannot continue under the existing structure on the grounds of actual bias, or at least a reasonable apprehension of bias.

[90] The AGC made no submissions on the issue of bias. Regarding the issue of possible structural bias, the VFPA argues that nothing in the CMA, the letters patent or the governing regulations obliges the VFPA to have regulated activities within the Port of Vancouver carried out by third-party operators or to defer to third-party operators the long-term operational and management objectives set by the VFPA. It asserts that the decision-making structure in place is determined by the governing legislation and consequently, absent constitutional constraints, it was open to Parliament to authorize an overlapping of functions that would otherwise contravene the rule against bias. Accordingly, argues the VFPA, even where the plurality of functions prescribed to a port authority under the CMA "would otherwise offend the rule against bias, it may well be that this structure was authorized by the [CMA] at the relevant time" (*Ocean Port Hotel* at paras 42 and 43) and that therefore the relevant statutory scheme of the CMA ousts the common law duty of procedural fairness in this case (*Ocean Port Hotel* at paras 20, 22 and 42; *Democracy Watch v Canada (Attorney General)*, 2018 FC 1290 at paras 5, 128).

[91] I agree with the VFPA on the structural bias issue. GCT defines bias as meaning a closed mind and a refusal to make a fair and rational decision based on objective evidence-based considerations, and instead making a decision based on predeterminations on the part of the VFPA. However, similar to the case in *Old St Boniface*, where there are, as here, statutorily created overlapping functions of the decision maker, including both a commercial and regulatory role, I would think that it is to be expected that "some degree of pre-judgment is inherent" in the decision-making process (*Old St Boniface* at p 1196). Throughout its submissions before me, GCT skilfully tried to tiptoe around the 6-ton elephant in the room, *to wit*, that the VFPA has been set up as a commercially driven, financially sustainable, non-adjudicative decision maker, and it

never properly addressed at what point on the spectrum analysis of procedural fairness did the VFPA, in its conduct or failings, cross the Rubicon from permissible, structural bias to the domain of impermissible bias; GCT only asserted that the indicia of bias it claimed to highlight were evidence of actual bias.

[92] The legislative scheme created by Parliament explicitly tasks the VFPA with overlapping functions: the VFPA is the commercial operator of the Port of Vancouver, a functioning, operational port authority focused on running the Port of Vancouver in accordance with the port activities as set out in section 28 of the CMA by managing, occupying and holding port property. At the same time, the VFPA acts as a regulator tasked, *inter alia*, with developing a land use plan that may regulate the use of the property it manages, holds and occupies, and with authorizing certain activities within the port (subsections 28(1), 44(2), and 44(6) and sections 45 and 48 of the CMA; sections 20 to 28 of the Regulations; article 3.2 of the letters patent). The determination of the level of impartiality that is expected of the decision maker is rooted in the statute that created it, and in the case of the CMA, it is a balance struck by Parliament as between competing interests: on the one hand, what is normally expected of a completely independent adjudicative decision maker, and on the other, the unbridled independence required in decision-making and commitment to long-term strategic planning so as develop and run a commercially sustainable port operation. The VFPA is free either to operate the terminals within the port itself or to lease the property to third-party commercial operators such as GCT. In short, by enacting the CMA legislative scheme, Parliament chose to vest the VFPA with all these roles, roles which cannot be parsed into separate silos.

[93] Accordingly, I am mindful that throughout the decision-making process, a certain level of pre-judgment is to be expected from the VFPA executives, who are primarily business-minded individuals tasked with making decisions in the exercise of long-term and ongoing developmental planning for the Port of Vancouver—such "bias" would be structural, and a consequence of the VFPA's plurality of operational and statutory functions; I should mention that GCT never truly took issue with what may be some level of permitted structural bias on the part of the VFPA executives, and I will consider GCT's arguments of actual bias through this prism.

[94] I should also mention that the VFPA has the discretion to refuse to authorize activities that are inconsistent with its long-term development plans and, in its reasonable opinion, the commercial interests of the Port of Vancouver. GCT argues that the full economic risk of RBT2 resides for the moment with the VFPA. That may be true, however, although RBT2 is being developed by the VFPA as project proponent, which is normally the case for large new infrastructure development projects, the evidence suggests that it is the intention of the VFPA to find, through an ongoing request for proposal (RFP) process, a third-party commercial tenant for RBT2 to operate the new terminal, and in fact, as mentioned, GCT had applied to be the terminal operator for RBT2. I do not accept GCT's argument before me that the fact that the full economic risk for RBT2 presently rests with the VFPA goes to the issue of its bias. It may be that under optimal circumstances, one would expect to have an operator, a lease and some operational structure already in place in advance of construction; however, the process to secure a third-party commercial operator for RBT2 continues for the VFPA, and I see nothing to suggest that one may not be found prior to the start of construction on RBT2, even assuming that

confirmation by that time of a third-party terminal operator being in place is even necessary. In any event, there is no indication that, throughout its dealings with GCT in relation to the DP4 project, the VFPA acted in any capacity that was not otherwise permitted under the governing legislation or its letters patent. Even if it can be argued that the overlapping functional structure under the CMA creates a reasonable apprehension of bias when port authorities are undertaking their regulatory role, it was open to Parliament to set up port authorities as it did under the CMA.

[95] That said, the Supreme Court in *Brosseau* did not close the door to a finding of actual bias where there is a plurality of functions undertaken by the decision maker; in other words, a statutorily-created overlapping structure is not a hall pass for actual bias. The fact that Parliament has created an overlapping structure which, itself, may support independence and the existence of some level of structural bias on the part of the decision maker does not shield the statutory decision maker from a finding of impermissible bias in its decision-making process. I use the expression "impermissible bias" because I recognize that the CMA, by creating overlapping roles for port authorities—where they are mandated to commercially run their ports in a financially sustainable fashion, act as proponents on major work projects, and manage external communication and outreach with stakeholders—can only be interpreted as tolerating a lesser degree of impartiality in its regulatory function as compared with a traditional, adjudicative decision maker whose role it is to act as arbiter between two competing positions. As stated by the Supreme Court in *Ocean Port Hotel*, "the degree of independence required of a particular government decision maker or tribunal is determined by its enabling statute", which "must be construed as a whole to determine the degree of independence the legislature intended" (*Ocean Port Hotel* at para 20). GCT is not arguing otherwise, but states simply that the VFPA was

actually biased—acting even below any permissible lower degree of independence or permissible bias that Parliament may have permitted with the enactment of the CMA.

[96] GCT argues that the VFPA never considered its PPE, which was submitted on February 5, 2019, because the VFPA, as a conflicted regulator, let its penchant for its own project cloud and displace its regulatory obligations. In a case of overlapping functions such as the powers vested in the VFPA by the CMA, I suspect that the port authority will always be somehow conflicted to a certain extent when performing its regulatory role given that it performs such a role with the baggage of also being the port operator, including having to consider its long-term plans for port development. I would think that this is what the parties refer to as structural bias, i.e., the displacement of the common law principles of procedural fairness that have been created by statute and permitted under *Brosseau*. However, what was stated by the Supreme Court in *Brosseau* was that where a decision maker is undertaking overlapping functions to the extent that they are authorized under statute, it will not generally be subject to the doctrine of reasonable apprehension of bias ***per se***. It seems to me therefore that legislative construct alone will not in all cases shield a decision maker from a finding of actual, impermissible bias when undertaking overlapping functions. In other words, although the VFPA is a regulator with an acceptable preference, it cannot allow that preference to cloud and displace its regulatory obligations, in particular the need for respect for a degree of natural justice and procedural fairness called for under the circumstances.

[97] It therefore becomes necessary to consider the indicia which GCT asserts demonstrates actual, impermissible bias, or at the very least is evidence of a reasonable apprehension of bias in

the decision-making process apart from the structural allowances, on the part of the VFPA. GCT argues that the indicia of bias on the part of the VFPA is clear and that in any event, the VFPA otherwise breached the principles of natural justice and procedural fairness by refusing to act in accordance with GCT's legitimate expectations in not processing its PPE in accordance with the PER Process and the Guide. The VFPA takes issue with what GCT calls the indicia of bias, asserting that such "indicia" pointed to by GCT do not in any way establish, or even suggest, bias on its part.

(1) Has the VFPA demonstrated impermissible bias by closing its mind to the DP4 project?

[98] As summarized by Mr. Justice Pentney in his Order of June 17, 2021, "the core of GCT's Amended Notice of Application for Judicial Review is its claim that VFPA's actual bias against GCT is evident from the decision letters regarding both the refusal to consider its project proposal in March 2019, as well as the subsequent rescission in September 2019." In particular, GCT sets out a series of primary facts which, it argues, are elements which demonstrate the VFPA's actual bias, as well as the desire to stonewall and undermine any objective consideration of DP4 culminating in the March 2019 decision, and that such bias renders void everything thereafter which the VFPA may have done in an attempt to right the ship, in particular, by issuing the September 2019 decision.

[99] The elements of actual bias raised by GCT are, it argues, reflected in the March and September 2019 decisions themselves, the manner in which those decisions were orchestrated, and the declared preference of RBT2 over DP4 by the VFPA. I will deal with GCT's arguments in relation to each of the identified indicia of bias on the part of the VFPA.

(a) *Were the March and September 2019 decisions, the manner in which they were made and the statements made therein, reflective of an actual bias or even a reasonable apprehension of bias on the part of the VFPA?*

[100] From a timing perspective, there is no evidence that GCT considered the VFPA to be biased against the DP4 project prior to the March 2019 decision. Before me, GCT conceded that the closest the evidence came on that issue was to be found in the cross-examination of Mr. Doron Grosman, President and CEO of GCT, where Mr. Grosman stated that GCT was aware that a "myriad of factors" would have to be considered by the VFPA upon receipt of the PPE.

[101] In the March 2019 decision—what GCT calls the initial declaration of bias—the VFPA set out the context and history of container terminal expansion in the Port of Vancouver, and in particular at Deltaport, and the fact that RBT2 has been in the planning stages since 2013. The port authority underscored that it plans for additional capacity to be built on the west side of the existing terminal, in deeper waters, as it was encouraged to do by DFO in 2003, and noted that the updated project rationale for RBT2, filed in 2018, emphasized that (1) DFO prohibited further land reclamation inland from Deltaport, and (2) healthy competition within the port would be encouraged. As to the earlier environmental studies, the VFPA reiterated that one of the driving factors in the eventual recommendation of DP3, which became operational in 2010, was the reduced footprint of the project, which minimized the potential effects on existing fish and wildlife habitat. Accordingly, the VFPA confirmed that its preferred project for capacity expansion to meet increased demand was RBT2. Although the VFPA decided not to proceed with reviewing GCT's PPE for DP4 at that time, in particular, because the proposed development

timeline for DP4 would conflict with the implementation of RBT2 capacity, it did not shut the door to future consideration of DP4 as a subsequent and incremental project.

[102] GCT submits that the VFPA's stated rationale for the March 2019 decision is baseless as it relies on what GCT calls a mischaracterization by the VFPA of the 2003 DFO letters and on vaguely framed competition concerns. The essence of GCT's argument is that such stated rationale, the tactical way the decisions were orchestrated and the fact that the VFPA stated that RBT2 was its preferred project without first conducting a formal review of DP4 can only lead to a conclusion that the VFPA was biased in its decision-making process in relation to DP4. I will now deal with each of those issues.

(i) Stated rationale

[103] GCT argues that the statements contained in the March 2019 decision in support of the decision to refuse to even consider the PPE, in particular regarding the effect of the 2003 DFO letters and regarding its competition concerns, demonstrate both a closed mind to exercising objective statutory decision-making regarding DP4 and an intention to mischaracterize and embellish facts to justify the VFPA's closed mind.

1. The notion of prohibition

[104] As a first rationale, the March 2019 decision provides the following:

> At Roberts Bank, expanding the existing Deltaport container terminal is not an option for two main reasons. First, [DFO] has prohibited further land reclamation inland from Deltaport, due to environmental sensitivity. The graphic below shows how further

> expansion at Deltaport would have to be built almost entirely in the sensitive intertidal habitat within the inter-causeway area.
>
> [Emphasis added.]

[105] As regards the 2003 DFO letters, GCT argues that the VFPA knew that the claim that it posted on the updated Project Rationale for the RBT2 project and that it outlined in the March 2019 decision that DFO had *prohibited* land reclamation inland of Deltaport—the proposed area for the DP4 project—was simply not true and that such a claim is further evidence of its bias against DP4. To understand GCT's position, a little context is needed.

[106] As mentioned earlier, the VFPA-sponsored T2 project was put on hold in 2006 in favour of the scaled down version of the DP3 project, which was completed; however, the project eventually to become RBT2 remained as a possible consideration for future expansion after the completion of DP3. With the DP3 project becoming operational in January 2010, the VFPA turned its mind back to the development of a new terminal at Roberts Bank—preferring to develop in deeper waters, to the west of the causeway, as recommended by DFO in 2003. Having moved the project forward sufficiently, the VFPA entered the review process for RBT2 in 2013 and proceeded to file its EIS for federal review in March 2015.

[107] Around the same time, GCT began discussing the development of DP4 with the port authority. Given the VFPA's role as project proponent for RBT2 and its concurrent role as regulatory gatekeeper for the DP4 project, the requirement to ensure transparency and objectivity for DP4 was directed by the VFPA's board of directors during a board meeting held on March 31, 2015, at which the VFPA executives were also in attendance. Following a PowerPoint

presentation of GCT's proposed expansion at Deltaport given by the one of the VFPA executives to the VFPA board of directors, as well as a summary of the VFPA management's preliminary assessment of GCT's proposal, the board noted that it was critical that GCT's proposal be evaluated by the VFPA with "an open mind"—echoing the requirements of the PER Process and the port authority's statutory obligations.

[108] In January 2017, GCT made a detailed presentation to the VFPA of the proposed DP4 project, including the business case for moving its project forward rather than RBT2 because, according to GCT, the DP4 project is the most competitive, cost-effective way to address growing container demand on the West Coast of Canada. It seems clear that at this point, GCT saw the RBT2 project moving forward, with the prospect of a new terminal operator eating into the existing share of the container market at the Port of Vancouver. Following the presentation, the VFPA raised various environmental issues, in particular those addressed in the 2003 DFO letters, which would make DP4 a challenge to be approved. The matter culminated in the port authority retaining Hemmera, as outlined earlier. The non-disclosure agreement between GCT and the VFPA in relation to the Hemmera Report, which was delivered in November 2017, expired in May 2019, allowing GCT to present that report to the Review Panel set up under the CEAA for the purpose of reviewing RBT2. As stated, although the Hemmera Report does not squarely address the issue of whether the 2003 DFO letters constituted a prohibition of development in the area at the time, the report—with the hindsight of the regulatory changes and advances in scientific understanding over the previous 14 years—did manage to set out eight mitigating factors to consider should a proponent seek to develop the area of the proposed DP4 project; in fact, the completion of DP3 is testament to the fact that development east of the

causeway, to the landward side, is possible with, as was the case with DP3, mitigating steps taken to address environmental concerns, including building in offsets for lost fish and wildlife habitat to the satisfaction of regulators, and building a smaller footprint than initially proposed. However, we should also keep in mind that the Hemmera Report also made it clear that it "draws no conclusion related to the potential likelihood of attaining approvals and authorizations for project(s) along the East Causeway of Deltaport."

[109] With the Hemmera Report in hand, as stated earlier, with the February 2, 2018 letter, the VFPA wrote to GCT confirming the terminal operator's right to apply to have DP4 reviewed under the PER Process and stated that, however, "having regard to the history of environmental issues associated with the eastern side of the causeway, any proponent of such a project should expect significant environmental assessment requirements. … [and that] even if the previously identified environmental issues associated with such a project proved to be mitigable to some extent, those impacts would have to be considered in a cumulative context with [RBT2]." The VFPA went on to state that "given the multifaceted role of VFPA as discussed above, we believe it would be entirely appropriate and indeed incumbent upon VFPA to also consider the impacts of a DP4 project on the overall port operations. VFPA would also consider the issue of timing, recognizing the very significant lead times required for such projects, and the looming need for more near term capacity in the Port of Vancouver." (Emphasis added).

[110] GCT states that the upshot of the February 2, 2018 letter is that the VFPA is confirming that it will consider the project if GCT wishes to propose it, given the concerns expressed, and also that there will be environmental assessments that the parties will have to work through in

order to get to an evidence-based objective conclusion about the environmental impacts. In addition, GCT reads the letter as indicating that it is incumbent on the VFPA to consider DP4 in connection with the impact on the overall port operations—which I take to include how the VFPA sees port development and operations moving forward and the policy decisions made by the port authority in relation thereto—and that due process will be followed and objective considerations will be made in coming to a final decision on whether DP4 moves forward.

[111] It seems to me that the February 2, 2018 letter was tantamount to a pre-emptive procedural fairness letter, meant to make clear the concerns of the port authority if called upon to act in its regulatory capacity should GCT trigger the PER Process—I deal with this issue further below—and provide GCT with some insight on the considerations the port authority would deem important in the assessment of DP4. GCT states that I am reading too much into the letter, that the Review Panel hearings had not yet commenced and that whether or not RBT2 would ever see the light of day was still an open question. That may be so, and I accept that RBT2 was not at that point a *fait accompli*, but the fact remains that the VFPA entered the environmental assessment process with RBT2 in September 2013 and had already submitted its EIS regarding the RBT2 project for federal review in March 2015, about three years earlier; GCT was still in the planning stages for DP4. I think that it is safe to say that when the VFPA mentioned that DP4 would need to be looked at in the context of overall port operations and that the issue of timing would also need to be taken into consideration (recognizing the very significant lead times required for such projects and the looming need for more near-term capacity in the port), the fact that RBT2 was already well ahead of DP4 in the regulatory pipeline should have been expected to be an important element in the eventual assessment decision of the port authority.

[112] A year later, on February 5, 2019, GCT formally submitted its PPE through the PER Process portal, which was met with the March 2019 decision, which GCT argues is an unequivocal declaration of a closed mind and actual bias as it was made clear that the motivation behind refusing to allow DP4 *into the regulatory gate* and therefore precluding it from any objective consideration on the merits, is that RBT2 is the VFPA's preferred project. With the March 2019 decision, GCT argues that the VFPA is cross-contaminating its two competing roles, the first as a proponent for a project, and the second as the regulator, and as stated earlier, although it may have properly reached the decision at some point that RBT2 was to be the preferred project, it was necessary that such a decision be reached only after a fair, independent, objective, evidence-based decision-making process was undertaken so that such a decision could be made on its merits. From GCT's perspective, any decision by the VFPA that its preferred project was to be RBT2 was arrived at through an opaque decision–making process without justification or transparency, and thus, an indicium of impermissible bias.

[113] GCT points to the Hemmera Report as well as to confirmation from the DFO witnesses themselves during the Review Panel hearings to argue that the 2003 DFO letters were <u>not</u> meant to constitute a prohibition against future development of the area proposed for DP4. GCT adds that, in fact, the VFPA was actually aware that no prohibition existed and GCT points to the speaking notes of Duncan Wilson, Vice-President of Environment, Community and Government Affairs [Mr. Wilson's speaking notes], prepared with the view of reporting on the status of the RBT2 project during a meeting of the VFPA board on March 21, 2018. In addressing the issue of support and opposition to RBT2, Mr. Wilson's speaking notes show what Mr. Wilson called "one minor, but important, change to my section." The passage reads as follows:

> GCT has conducted a quieter, more focused campaign against RBT2, since RBT2 would create additional competition for them. They have repeatedly claimed that further expansion of Deltaport (i.e. DP4) could provide required capacity in a more economic and environmentally friendly manner. And as we have mentioned, GCT's proposal is *likely unapprovable from an environmental perspective*, results in comsolidation [*sic*] of market control and has not entered any regulatory process.
>
> [Emphasis added.]

[114] I have underlined the reference to the VFPA's concern over the concentration of market share and the fact that DP4 had not ever entered the regulatory process at that time, issues that I will come back to later. For now, in the amended version of Mr. Wilson's speaking notes, the words "*likely unapprovable from an environmental perspective*" were changed to "*located in an area that has been rejected by DFO in the past (high value shallow-intertidal habitat)*". GCT argues that not only did Mr. Wilson avoid the use of the word "prohibited" in the first draft (choosing simply to say that DP4 was "likely unapprovable"), but he also shifted further away form the concept of prohibition in the amended draft, electing to say only that the location was in an area "rejected by DFO in the past". This, says GCT, is clear confirmation of the mindset of the VFPA executive, and when the VFPA echoed the statement in its March 2019 decision that development in the area of the proposed DP4 project was "prohibited", the port authority knew it to be an untruth, thereby revealing its impermissible bias against DP4.

[115] I accept that the use of the word "prohibition" outlined in the March 2019 decision is confusing. However, I am not convinced that the term was used by the VFPA in bad faith so as to mislead GCT into thinking that such a prohibition existed. I may have thought otherwise if GCT had not had a copy of the Hemmera Report in hand, but it did, and the VFPA knew that it

did. Consequently, this is not a case where the VFPA tried to mislead GCT with information only the VFPA had in hand; GCT was able to come to its own independent conclusions as to what the report said or did not say about the intent of the 2003 DFO letters. What is clear is that the Hemmera Report does not squarely address whether the 2003 DFO letters constitute a prohibition against development in the area proposed for DP4—GCT itself conceded before me that one must read into the report that the experts consider that the 2003 DFO letters do not constitute such a prohibition. Also, I think it important to point out that confirmation from DFO that the 2003 DFO letters did not constitute a prohibition against future development in the area was only obtained in testimony during the Review Panel hearings in May and June 2019.

[116] GCT also points to the March 25, 2019 draft, and although the letter was never sent, GCT argues that the port authority seemed to be asking a leading question so as to extract from DFO an *ex post facto* justification for its claim that DFO prohibited further development of the area where DP4 is now proposed. The March 25, 2019 draft provides:

> The [VFPA] has recently had an inquiry from a proponent interested in expanding a Roberts Bank port terminal by reclaiming land east of the existing terminals as shown below:
>
> The port authority is of the opinion that no further terminal expansion can be done in the area indicated, as directed by DFO to the port authority in the 1970s and in 2003. However, the proponent has stated that changes to both the existing *Fisheries Act* and proposed amendments (Bill C-68) have made the earlier direction obsolete.
>
> In a letter dated April 1, 2003 (enclosed), the [VFPA] was advised by [DFO] that: DFO will not be involved in any review of the Delta Port proposal as the only option proposed for that project results in the destruction of critical fish habitat on the east side of the causeway … .

> In a letter dated on or about July 29, 2003 (enclosed), the then minister of fisheries wrote "DFO staff has clearly identified the unacceptable impacts to critical fish habitat that would occur … .
>
> Therefore, the port authority requests confirmation from DFO that its earlier direction still stands, and that no terminal expansion on the east side of the causeway will be permitted.

[117] Certainly the March 25, 2019 draft may reasonably be read along the lines of GCT's interpretation, but it may also reasonably be read as an honest reflection of how the VFPA had understood the 2003 DFO letters, and given GCT's push-back and assertion "that changes to both the existing *Fisheries Act* and proposed amendments (Bill C-68) have made the earlier direction obsolete", the VFPA was seeking to know whether its initial assessment of the 2003 DFO letters was correct. In fact, during his cross-examination, Mr. Xotta confirmed as much, testifying that the assertion that the 2003 DFO letters constituted a "prohibition" against development in the area of the proposed DP4 project was something "that VFPA believed to be accurate at that time". No specific reason was given as to why the letter was never sent other than Mr. Xotta, on cross-examination, saying that the decision not to send the letter was taken "around the time other things were unfolding and, for whatever reason, [VFPA executives] determined that it would not be advisable to send this letter." GCT suggests that the March 25, 2019 draft was not sent because a few days later, GCT instituted the present application for judicial review and the VFPA simply did not want to know the answer. That said, I find that GCT also did not seriously press Mr. Xotta during cross-examination to ascertain the reason for the letter not having been sent; maybe GCT did not want to know the answer either. The game of cat and mouse continues!

[118] In any event, I am not prepared to imply bad faith on the part of the VFPA, and I rather chalk up what was confirmed afterwards by DFO as being an imprecise use of the word "prohibit" to a misunderstanding on its part. I note that after receiving the March 2019 decision, GCT, rather than pointing out to the VFPA what would seem to be an error in the VFPA's characterization of the 2003 DFO letters, instituted the present judicial review application, as was its right; in addition, DFO testimony during the Review Panel hearings confirming that no such prohibition was intended in the 2003 DFO letters was a factor mentioned by the VFPA in the September 2019 decision in deciding to rescind the March 2019 decision.

2. The competition concerns

[119] As a second rationale, the March 2019 decision provides the following:

> Second, expanding Deltaport would mean one terminal operator would control a significant majority of the market for container terminal services. Healthy competition is necessary to ensure users continue to pay reasonable rates for reliable service. For this reason, the [VFPA] is committed to fostering an appropriate level of competition within the Port of Vancouver. This competitive environment is especially relevant for Canadian exporters who rely on the Vancouver gateway.
>
> [Emphasis added.]

[120] In the December 2017 Briefing Note, the VFPA highlighted the need for market competition within the Port of Vancouver, and stated:

> It is of utmost importance to the [VFPA] that fair and appropriate competition be promoted and maintained among container terminal operators within the Port of Vancouver and that any dominance over container handling operations be avoided. Ongoing control by a single operator of more than 60 per cent of the container capacity within the Port of Vancouver has proven to be detrimental to customers of the gateway. This view was confirmed by market

> sounding and reflects the Competition Bureau's position that looks negatively on existing incumbents expanding to control markets.
>
> Allowing the new terminal to be run by one of the two existing operators without relinquishing some facilities would create a near-monopoly in container terminal services of as much as 80 per cent, which would be unhealthy for the supply chain marketplace. Typically, major ports around the world operate with at least three competitive container terminals, which we agree is best for Canada's trade competitiveness.
>
> Consistent with this approach, no concessions or agreements will be granted for the [RBT2] Project that would result in an operator having more than 60 per cent of the container handling capacity within the Port of Vancouver. For this reason, the operators of RBT2 and Deltaport will necessarily be entirely independent from each other.
>
> Existing Port of Vancouver container terminal operators were not precluded from participating in the terminal operator procurement process [for RBT2], but were required to clearly demonstrate, to the satisfaction of the port authority, the manner in which the participant would ensure fair competition would be maintained and confirm that its total container handling capacity within the Port of Vancouver would not exceed 60 per cent of the total available capacity.
>
> [Emphasis added.]

[121] GCT admits being aware of the VFPA's competition concerns as far back as 2017. According to GCT, in the lead-up to the January 2019 pre-PPE meeting for DP4, there was an ongoing dialogue regarding the development of the project, and GCT was trying to bring the VFPA over to its way of thinking. This ongoing dialogue, in particular as it regarded the issue of market concentration, prompted GCT, on December 8, 2017, to make a presentation to the VFPA, which included GCT's perspective on how competition should be measured and assessed and in which GCT asserted that looking at the issue of competition from its perspective, DP4 is actually good for consumers; as expressed by GCT before me, GCT educated the VFPA on

understanding the Herfindahl-Hirschman Index [the HHI], described as a commonly accepted measure of market concentration and competition. The VFPA's concerns over market concentration were also expressed by its executive to the VFPA board in March 2018, as seen from Mr. Wilson's speaking notes.

[122] As to having undertaken its own analysis of the competitive factors at play, on cross-examination, Mr. Xotta indicated that from time to time, the VFPA would undertake an analysis of the container market, including expertise on pricing, demand and forecasting, and that such material was filed as part of the port authority's RBT2 application under the CEAA; however, Mr. Xotta conceded that as part of the record before the Court on the present application for judicial review, there is no pricing analysis or report undertaken by an outside expert on competition matters. Mr. Xotta also testified that the CMA imposes an obligation on port authorities to consider the interests of the port in its commercial operations, and from time to time, the port authority would have disagreements with tenants on various issues, including the degree of market share the tenant should have going forward. However, Mr. Xotta conceded that there was no formal written competition policy applicable at the time the March 2019 decision was made setting out the extent of market share that would be appropriate for a single terminal operator within the Port of Vancouver.

[123] In addition to there being no evidence before the Court of any analysis which could have informed the VFPA's assertions or rationale regarding its competition concerns, GCT adds that rather than seeking outside professional advice regarding the impact that DP4 would have on competition, the VFPA had undertaken an in-house study using what the GCT characterizes as a

purpose-built tool to undermine DP4, but with a result that actually disproves the VFPA's hypothesis that DP4 would lessen competition.

[124] GCT claims that following the presentation on December 8, 2017, the VFPA tried to devise a competition case against DP4 that was not based upon a *bona fide* policy consideration. GCT claims rather that the port authority actually tried to create an analysis to support the VFPA's predetermined view—which GCT asserts is evidence of bias—that allowing GCT to build DP4 would result in unacceptable market concentration in the container terminal space at the Port of Vancouver. GCT points to an internal VFPA email sent two days following the December 8, 2017, meeting with GCT whereby Mr. Victor Pang sent a message to Mr. Robin Silvester, President and Chief Executive Officer of the VFPA, stating that he looked into the HHI, noting that the HHI was being used by the U.S. Department of Justice to assess anti-competition in merger and acquisition transactions, and indicating as follows: "We'll run the math as you suggested. But it looks like this framework (and the way DoJ interprets it) is a pretty strong tool for us!" [Emphasis added].

[125] GCT queries what "is a pretty strong tool for us" actually means, in particular considering the email sent the next day from Mr. Pang to the VFPA's finance staff asking them to undertake a review of the HHI; after setting out the basis of what the HHI was, Mr. Pang stated in his email: "Looks like this can be a really good tool for us to communicate market concentration on the container sector." Mr. Pang then asks that the HHI be run using various scenarios envisaging different scopes of the market (from more local ones involving only the Canadian West Coast at one end, to the entire west coast of North America on the other) as well

as different capacity scenarios, including existing capacity, capacity with the proposed Vanterm expansion, DP4 construction—whether or not GCT divests itself first of Vanterm or the VFPA exercises its right of cancellation of its terminal lease—and the construction of RBT2. Then, after setting out the different matrices and scenarios to run the HHI, Mr. Pang added: "Research on HHI applicability-the point here is to build a case for us to talk to GCT and/or officials about the need to increase competition in the container sector, using HHI as a tool." [Emphasis added].

[126] Mr. Pang mentioned that he wanted to know, amongst other things, whether Canadian agencies use this metric, whether the HHI has been used in situations "similar to GCT's market position and what it means to expand Vanterm and build DP4", and whether there were any examples "where HHI was used as an important factor to halt or place conditions on M&A/projects/expansion". As a final comment, Mr. Pang stated:

> Part of GCT's argument is that we should use a broader definition of market to include PNW [the ports in the Pacific Northwest] and LA/LB [the ports of Los Angeles and Long Beach, California]. Even if the shipping lines indeed think about the market as up and down the west coast, I would argue there are specific competitive concerns that need to be addressed at the national and local level. And the customers in this market are not just the shipping lines, but BCO, not to mention other stakeholders. Antitrust issues are also often looked at both at global and national level. It would be good if we can find examples where HHI was assessed both nationally/locally and internationally, and where the agency/court specifically mentioned that the national/local view is important/paramount.
>
> [Emphasis added.]

[127] GCT reads the message of Mr. Pang as giving direction on how to build a competition case against DP4. I can see where one might read Mr. Pang's message in that way, but there is also another reasonable way to read his messages. It seems to me that, given the importance of

maintaining healthy competition within the Port of Vancouver, Mr. Pang was looking to run different scenarios through the HHI and to come up with a series of results in line with those scenarios. The actual evidence is that, during his cross-examination, Mr. Xotta indicated that GCT was using the HHI "as a basis to advance the position that the market share concerns that VFPA has had for some time were unfounded. And so that discussion led to, [Mr. Xotta believed], the response or analysis undertaken within VFPA."

[128] Clearly, the VFPA was not aware of the HHI as a tool to measure market concentration—and to that extent was educated by GCT on the subject. However, given GCT's own bias in favour of DP4—a legitimate and understandable bias of any purely commercial proponent looking to safeguard its own project and commercial interests—it seems to me that it was incumbent upon the port authority to look into this matrix and run the series of scenarios so as to better understand how market concentration would be affected; looking for the parts of the matrix that GCT may not wish to share with the VFPA in its promotion of DP4 is fair game as regards the port authority. I can certainly understand that using GCT's methodology—looking at concentration over a larger area, say the entire west coast of North America—may diminish the relative weight of more localized market concentration than if the area of analysis was only, say, the Port of Vancouver. However, in the end, both the VFPA and GCT are using the same matrix, the results will be what they will be, and the discussion will continue.

[129] Turning now to the actual results of the VFPA's analysis of the various scenarios prepared in March 2018 using the HHI, GCT interprets the results as indicating that whatever area of the marketplace is adopted—whether just the Port of Vancouver, or Western Canada, or

Western Canada plus the Pacific Northwest, or the entire west coast of North America—the development of DP4 does not create increased market share for GCT. That may be true, but that is, it seems to me, beside the point. At the present time, operating both Vanterm and Deltaport, GCT controls 78% of the Port of Vancouver container market share, with Centerm (the other container terminal operator at the Port of Vancouver) having 22% of the market. The building of DP4 will not change those numbers—Centerm will continue to have its 22% share of the existing market, and GCT will continue to have its 78% share. With the building of DP4, and assuming that GCT concurrently divests itself of Vanterm—although before me GCT did not commit to doing so—its market share based on present container volumes drops to 64% when the assessment is based only on the Port of Vancouver, being the narrowest view of the marketplace area as stated in the March 2019 decision; market share for GCT drops even further, to 47%, even without it having to divest itself of Vanterm, if RBT2 is built and the concession to operate the terminal is given to a third operator.

[130] However, there is a difference between existing market share and eventual terminal capacity. From what I can tell, the HHI statistics do not account for future growth in the container traffic market or the fact that GCT will have, with the building of DP4, the additional terminal capacity to absorb the expected future increase in total traffic; with total container volume expected to increase, the proportion of total containers handled by Centerm, assuming full capacity is reached at that terminal, will continue to drop, meaning that that proportion will continue to increase for GCT until it reaches full capacity with DP4 having come on stream. That may be why the VFPA stated in its December 2017 Briefing Note that a near 80% concentration of market share within the Port of Vancouver represents an unhealthy situation for the supply

chain marketplace and that no concessions or agreements will be granted for RBT2 that would result in an operator having more than 60% of the container handling capacity within the Port of Vancouver.

[131] GCT has not argued that the results of the HHI analysis in the Court record are indicative of any bias against DP4, nor does it endorse or adopt any of the calculations or methodology in that chart. Rather, GCT simply states that the chart provides a window into what the VFPA was thinking at the time and argues only that the results of the analysis do not support the VFPA's assertion that its nearly 80% of market concentration will continue if DP4 is built. I do not read the statistics in the way that GCT is proposing—the concern of the VFPA has been how to handle future growth and the expected increase in container traffic at the Port of Vancouver. Rightly or wrongly, I can certainly understand the concern of the VFPA that with the building of DP4 and with no divesting by GCT of Vanterm, more containers are likely to flow to the area of available capacity, meaning more and more to a GCT-controlled terminal.

[132] Moreover, I do not agree as GCT asserts before me that in the March 2019 decision, the VFPA improperly limited the scope of the marketplace for the assessment of market concentration to only the Port of Vancouver, thus undertaking what GCT argued before me to be a "constrained view" of the marketplace; GCT argues that when shippers are selecting where to ship to or where to ship from along the West Coast, their geographic range is not limited to the Port of Vancouver. I agree; goods destined to or from Canada often have a U.S. West Coast port of loading or discharge, with the remaining leg of the transit being either by truck or rail carriage. However, that again misses the point. The VFPA is not operating along the entire West

Coast; it is concerned with market concentration, and logistics and supply chain management and efficiencies, in the Port of Vancouver. I cannot see how diluting the results of a study on market concentration by expanding the area of analysis is of any assistance to the Port of Vancouver, but then again, as I am not here to assess the merits of the arguments on market concentration, I leave that issue to the marketing specialists. Suffice it to say that, putting aside the issue of procedural fairness, which I will deal with below, I see Mr. Pang as someone who, in his emails, was exhibiting the excitement of having found a new tool to do his job, beyond any particular project—declaring it to be "a pretty strong tool for us" even before any analysis was undertaken as regards DP4—and as specifically regards DP4, as a healthy skeptic looking to find the counter argument to what GCT is pushing, *to wit*, the idea that the scope of the marketplace for competition assessment is not simply the Port of Vancouver or even the Canadian West Coast, but rather the market for container traffic all along the west coast of North America, and that, in any event, the building of DP4 will not increase its market share at the Port of Vancouver.

[133] There is nothing to suggest that the VFPA would not have then shared its findings with GCT, thus enhancing the dialogue on market concentration. I do not agree with GCT's assertion that Mr. Pang was seeking a results-oriented tool to undermine DP4 on competition grounds, nor am I convinced that the results of the analysis actually contradict the VFPA's rationale regarding its competition concerns. Given that the parties seem to be viewing the starting point of any competition analysis from different positions, I see nothing sinister in Mr. Pang's emails.

[134] I also do not accept GCT's assertion that the rationale articulated by the VFPA in the March 2019 decision to the effect that DP4 would reduce the number of terminal operators is

false. That is not what was stated in the March 2019 decision; that decision simply stated that "expanding Deltaport would mean one terminal operator would control a significant majority of the market for container terminal services." Even if, with present volumes, the construction of DP4 would not necessarily increase GCT's present market share in the Port of Vancouver, it seems to me that the issue has more to do with controlling capacity so as to absorb future growth.

[135] To add more fuel to the proverbial fire, GCT further argues that if the VFPA truly had a concern, as it claims in the March 2019 decision, with one terminal operator controlling a significant majority of the market for terminal services in Vancouver, why then subsequently, in March 2020, did the VFPA approve the purchase by DP World—a global port and terminal operator which operates Centerm at the Port of Vancouver—of Fraser Surrey Docks from the Macquarie Group, thus reducing the number of terminal operators in the port from three (GCT, DP World and Macquarie) to two. As GCT rhetorically posed the question, I rhetorically put it to GCT that maybe it was because the VFPA expected the coming on stream of RBT2, with a different operator, to create enough of a safeguard to competition; or quite simply, maybe it was the fact that Fraser Surrey Docks is a multi-purpose terminal. GCT states that there is no evidence in the record as to the reason why, yet insists that whatever the reason, the purchase renders the VFPA's concerns with one terminal operator controlling a significant majority of the market for terminal services in Vancouver as nothing but a fallacy—a further indicium of a closed mind. The trouble that I have with GCT's assertions is that what GCT is doing is making certain observations and insisting that there is only one way to interpret them. I disagree. There could be a myriad of reasons why the VFPA allowed one operator to take over operations at another terminal and while those reasons may not be in the tribunal record, I fail so see why they

should be; the sale of Fraser Surrey Docks is not the issue in dispute in this case. In the end, insinuations are not reality, and asserting them does not make it so.

[136] Coming back then to the March 2019 decision, GCT states that any concerns of market concentration expressed in the December 2017 Briefing Note are beside the point and that the issue is what was considered by the port authority at the time of the March 2019 decision when, just two months earlier, GCT had agreed to amend its Lease and Berth Corridor Agreement [Vanterm Lease amendment] with the VFPA, which purportedly addressed the port authority's market concentration concerns. The trouble that I have with that argument is that, when pressed by the Court, GCT also made it clear that it did not concede any right on the part of the VFPA to contractually compel GCT to divest itself of its operations at Vanterm under the circumstances set out in the Vanterm Lease amendment. In other words, GCT is setting up a proposition, but failing to concede the premise upon which it lies. In any event, GCT argues that examining the VFPA's rationale for its competition concerns in 2017, before Mr. Pang embarked on his competition analysis and before the Vanterm Lease amendment, is of limited assistance when we compare it with the tribunal record, which is supposedly contemporaneous with the March 2019 decision and which contains no documents to assess the rationale of the VFPA at the time the decision to shut the door on DP4 was made. I cannot agree. The argument of GCT may have been tenable if the decision maker was a more traditional, adjudicative tribunal. However, here, in the context of the running of a port authority, GCT cannot ask the VFPA to limit its decision-making to a snapshot in time and to disregard corporate history and the well-documented stated ongoing concerns regarding market concentration. Simply because a specific study on the issue is not in the tribunal record or was not before the VFPA executives at the time that they

expressed their concerns over market concentration in the March 2019 decision does not invalidate the concern, which had, by then, been longstanding. We are dealing with business people running what the CMA mandates to be a commercially-driven operation, and the DP4 project had been a work-in-progress for some time; if concerns are not fully addressed, they remain concerns going forward and do not stop being concerns just because they are not documented every day. GCT has not convinced me that either the HHI analysis or the Vanterm Lease amendment, especially with it having refused to concede the purported right of the VFPA to compel GCT to divest its interests in Vanterm under appropriate circumstances as part of that amendment, should have reasonably caused the VFPA to no longer have the competition concerns expressed in the December 2017 Briefing Note when the time came to issue the March 2019 decision.

[137] GCT argues that the VFPA, by not assessing its competition concerns on any evidence-based objective basis and by not having undertaken any analysis to ascertain whether further consolidation of terminal operators at the Port of Vancouver would have a bearing on pricing to consumers, or do anything to jeopardize Canada's competitiveness, which is part and parcel of its mandate under the CMA, closed its mind to considering the issue, thus exhibiting another indicium of bias. I do not agree. As I indicate further on, the failure to have the issue tested within a proper regulatory setting constituted a breach of procedural fairness. It may well be, as argued by GCT, that there is insufficient support for the port authority's long-held competition concerns; however, that would go to the reasonableness of the decision; as GCT's counsel put it to Mr. Xotta during his cross-examination, the competition discussion is a question of judgment and opinion, and reasonable people can differ on that issue.

[138] On the whole, I have not been convinced that the expression by the VFPA of concerns over market concentration as part of the rationale for the March 2019 decision was vaguely framed and unjustifiable, and even less so an indicium of bias against the DP4 project.

(ii) The tactical way that the March and September 2019 decisions were orchestrated

[139] In addition to the stated rationale of the March and September 2019 decisions, GCT asserts that the tactical way that the decisions were orchestrated also leads to a conclusion that the VFPA was biased in its decision-making process in relation to DP4; it cites further indicia of the VFPA's closed mind, which I deal with below.

1. The role of the VFPA's previous law firm in the decision-making process and the paucity of the tribunal record

[140] GCT asserts that the refusal to even consider DP4 on any objective, evidence-based basis was directed by the VFPA's previous law firm, which was legally precluded from advising the VFPA on matters related to GCT because of a disqualifying conflict of interest, as subsequently found by Justice Pentney in September 2019. It argues that there is no agenda item note and no circulated material, in particular, nothing as regards competition concerns or environmental imperatives in the tribunal record as reflecting the decision-making process. In fact, GCT argues that the March 2019 decision continues to be clouded in mystery with respect to how the decision was made, what documents were considered, what input was provided and by whom, and what was rejected.

[141] The record shows that the decision not to consider GCT's PPE was made at a meeting of the VFPA executives on February 13, 2019. GCT asserts that the VFPA, rather than showing its cards in order to demonstrate what it says now was a legitimate and authorized regulatory decision, instead went to great lengths to avoid appropriate production of the tribunal record. On the issue of the lack of documentation in the tribunal record, GCT argues that ultimately, and rather than depicting when, how, by whom and why the decisions regarding DP4 were made, other than documentation covered by solicitor-client privilege, the tribunal record is completely empty of any documentation which would allow for an understanding of the VFPA's decision-making. GCT continues by stating that the solicitor-client privilege in question is either privilege belonging to a client in connection with legal counsel who were acting in a legally impermissible conflict of interest in March of 2019, or privilege attaching to litigation counsel for the purpose of defeating the present application for judicial review, as opposed to a *bona fide* consideration of DP4 on its merits.

[142] The evidence of Mr. Xotta regarding the lead-up to the March 2019 decision is as follows:

> I participated in several discussions with other members of the VFPA executive regarding GCT's PPE, and in particular, VFPA's pending decision whether to accept the PPE and advance VFPA's statutory decision-making process under the [CMA]. VFPA executive met on February 13, 2019 and a decision was reached by consensus among the executive members. Based on that discussion, I issued [the March 2019 decision]. The rationale for the decision set out in [the March 2019 decision] reflects the reasoning applied by the executive in its discussions.

[143] GCT states that I should not have to speculate as to what went through the minds of the executives during their deliberations culminating in the decision not to move forward with the

assessment of GCT's PPE, and that the hush created by the lack of any evidence of any analysis, report or summary of any discussions leading to the March 2019 decision was deafening. In my experience, however, it is not.

[144] In a commercial setting where business people often make decisions by walking into other people's offices and sitting in the chair in front of their desks to discuss a project that has been front and centre as part of their daily business lives, the paucity of a written record of the precise moment of the decision-making process is not unusual. It is important that we keep in mind that the nature of the decision to be made, *to wit*, whether or not to even process the PPE application. Since 2017, there had already been a number discussions, presentations, and exchanges between GCT and the VFPA regarding DP4, including the February 2, 2018 letter to GCT, whereby the VFPA specifically addressed its concerns and advised GCT how it intended to review its application for DP4 under the PER Process when it came time to do so.

[145] I accept that the VFPA may have failed to live up to its commitment to review the PPE, an issue that I deal with when speaking to the issue of GCT's legitimate expectations; however, the point here is that the VFPA executives had convened to decide on how to deal with GCT's application, and whether to consider it through the PER Process. I do not find it unusual that for such purpose, we do not find in the tribunal record, as GCT insists we should, documents such as: documents scheduling meetings, circulated material, an agenda, expert reports regarding market saturation and competition as well as environmental issues, minutes to describe who chaired the discussion, who participated in the discussion, who may have spoken in opposition, how long the meeting took, who drafted the March and September 2019 decisions, the

amendments to any possible drafts of the decisions, or documents as may be required by the Guide that demonstrate that subject-matter experts conducted a review and considered the PPE on its merits.

[146] The fact is that the PPE was not considered on its merits and the reason for the meeting of the VFPA's executives was to determine whether to even consider the PPE on its merits and allow it to pass through the pipeline of the PER Process. Under the circumstances, I do not find it unusual that for the purposes of the discussion and the nature of the decision that was to be made, none of the documents that one may expect to find following a complete review of GCT's application under the PER Process were in hand, and that all that may have existed are documents exchanged with the VFPA's lawyers given the sensitivity and importance of the decision to both parties.

[147] It seems to me that what may be causing GCT's consternation with what it claims is the paucity of the tribunal record is its failure to appreciate that the VFPA executives have been living the DP4 project, by that point, for around five years. I find that GCT is missing the mark by continuously pounding the table on account of the little documentation that was in the actual hands of the VFPA executives when they sat to discuss what the port authority was to do with GCT's application for DP4; it would not be unexpected if the executives felt that they did not need to review the file because the history of the project and their continued, unresolved concerns and assessments of the project were committed to memory. That is not to say that the VFPA did not owe a duty of procedural fairness to GCT once it filed its PPE through the PER Process portal; in fact the port authority did, and I discuss this issue further below. However, the

issue here is that GCT is asking me to find the fact that there were no documents before the VFPA executives on February 13, 2019, went beyond rendering the March 2019 decision unreasonable, andf was actually an indicium of a closed mind on the part of the VFPA equating to impermissible bias. That I will not do as I do not agree with GCT's underlying premise that in a business context, and considering the reason for the meeting and the nature of the decision to be made at that stage of the regulatory process that was engaged, I should have expected to find such a fulsome tribunal record. Suspicions, speculations or the possibilities of bias is not enough. The test for a reasonable apprehension of bias requires a "real likelihood or probability of bias" (*Yukon Francophone School Board* at para 25, citing *Arsenault-Cameron v Prince Edward Island*, [1999] 3 SCR 851).

[148] In addition, the meeting of February 13, 2019, was not a board meeting, and I have not been shown any requirement as part of the VFPA's internal procedures requiring that when the executive team is assembled to make a decision on a very specific issue of which the members are aware, a documentary footprint of such a meeting should be kept. The failure to do so may in fact render the ultimate decision unreasonable, but escalating such a possible failure to the level of being an indicium of bias is untenable in the present case. It seems to me that this issue is a tempest in a teapot. Port authorities are commercial operations, with commercial people running a commercial establishment, precisely in the way that Parliament intended them to be when setting them up under the CMA. I have not been convinced that the criteria for documenting the decision-making process in a business environment is the same as in the context of regulatory adjudicative boards or tribunals. GCT argues before me that the Court, in judicial review, must be able to see the decision-making of the decision maker. Here, the tribunal record contains

about 710 documents outlining the history of the RBT2 and DP4 projects leading up to the March 2019 and September 2019 decisions. Under the circumstances, the decisions of the VFPA were properly reflected in the March and September 2019 decisions.

[149] Ultimately, I am not convinced that, under the circumstances, the failure to memorialize the deliberations that took place during the meeting of February 13, 2019, which resulted in the March and February 2019 decisions, or the fact that there were no documents before the executive members other than advice from counsel, are in any way a indicia of bias leading to a breach of procedural fairness. There is plenty of room in this scenario for the underlying considerations for the decision not to proceed with the review of GCT's PPE to have nothing to do with impermissible bias or any underhanded behaviour on the part of the port authority; there is not even a reasonable apprehension of bias as far as I can tell.

[150] Moreover, it would not be unusual for the VFPA to have sought legal advice in relation to a decision which was clearly controversial in the eyes of GCT, and a claim of solicitor-client privilege in this context would be expected. In any event, GCT's motion for disclosure of the documents on which solicitor-client privilege was invoked was dismissed by Mr. Justice Pentney in his Order dated June 17, 2021. Mr. Justice Pentney was not prepared to override the privilege associated with communications with counsel, but quite rightly stated that "if VFPA cannot defend its decisions as reasonable based on the record it has (and/or will) disclose, the decisions will be quashed. If those decisions could be defended based on something over which solicitor-client privilege is claimed or which was otherwise not disclosed, then VFPA has only itself to blame, in the sense that it could have constructed a decision-making process that would have

allowed it to disclose a better record." I agree with Mr. Justice Pentney, that the issue is one of reasonableness of the merits of the decision. However, here, GCT's argument is that the claim of privilege was somehow concocted to purposely avoid disclosure and that such conduct is an indicium of impermissible bias leading to a breach of procedural fairness. I disagree with GCT; there was a legitimate claim of privilege invoked by VFPA, and claiming malicious intent on the part of the VFPA does not make it so.

[151] Also, as regards the involvement of the VFPA's previous counsel, the privilege log filed by the VFPA shows that on February 6, 2019, the VFPA sent an email to its legal counsel regarding GCT's PPE, as well as indications of a draft response from counsel to both GCT and to the Review Panel regarding GCT's submission, and eventually a legal opinion on the issues. GCT argued in essence that there was a breach of the separation between the regulatory and proponent side of the VFPA's previous law firm and that the partner who had been assisting the VFPA on the proponent side for advancing RBT2 through the regulatory process was now giving advice to the VFPA on the regulatory side on whether the VFPA could legitimately refuse to process GCT's PPE.

[152] I am not quite sure what to make of GCT's submission on this issue; it is not suggesting that the VFPA should not have retained legal counsel, nor is it actually saying that legal counsel advised the VFPA not to have any documents in hand when it made its decision so as to not create a tribunal record. Innuendo alone is not convincing, even assuming that I knew of what I should have been convinced. I have no reason to doubt that the VFPA's previous counsel put themselves in a conflict of interest, and in the end, on September 6, 2019, Mr. Justice Pentney

made them pay the price, thus compelling the VFPA to retain new counsel. The fact that the VFPA's previous counsel put themselves in conflict of interest is unfortunate; however, I do not know what more to make of that fact; in the end, they were removed.

2. The current law firm and the tactical attempt to game the system

[153] GCT argues that in the midst of the present proceedings, and immediately after new counsel was retained by the VFPA, in an attempt to transform the March 2019 decision somehow into an interim or interlocutory decision after the fact and thereby immunize its bias from judicial scrutiny, the September 2019 decision was issued. GCT claims that this rescission decision was an attempt to "game the system", drafted by litigators in order to procure the foundation for a mootness and prematurity argument, and was thus, and in and of itself, proof of the bias; just like the March 2019 decision, the September 2019 decision was not based on any objective or *bona fide c*onsideration of the merits of DP4, but instead was just a litigation tactic fashioned exclusively by legal counsel. In any event, argues GCT, there would still be no assurance that GCT "would get a fair shake" if it was to re-engage the PER Process without further safeguards as it was invited to do with the September 2019 decision.

[154] GCT again points to the privilege log that was filed by the VFPA showing, in particular, that on September 13, 2019, the VFPA's current counsel gave preliminary legal advice regarding the present judicial review application and that Mr. Stewart—who is supposedly on the proponent side for the VFPA as regards RBT2—was copied on a message which related to the VFPA exercising its regulatory role regarding the DP4 project. On the same day, additional preliminary advice was provided regarding GCT's PPE and the port authority's previous

counsel. The matter becomes problematic, argues GCT, when the privilege log shows that on September 20, 2019, Mr. Stewart is directly involved with the port authority's new and current counsel in drafting what will eventually become the September 2019 decision. GCT claims that it is clear from the privilege log that this is a process directed by the VFPA's current counsel, specifically in relation to the judicial review application, and that Mr. Stewart is at the epicentre of it. GCT states that, accordingly, the September 2019 decision is not a freely made, *bona fide* regulatory decision based on evidence or any policy considerations, but rather purely a litigation tactic, driven by litigation counsel and the VFPA executive who was primarily responsible for RBT2, and has nothing to do with DP4 on its merits.

[155] Again, I cannot go where GCT is asking me to go on this issue; GCT's argument is pure conjecture. First, there is nothing wrong with the VFPA seeking, retaining and following the advice of outside counsel. Second, the whole point of the September 2019 decision is that it was a recognition that there were problems with the March 2019 decision, in particular, the VFPA's understanding regarding the effect of the 2003 DFO letters; had there been no issues with the first decision, there may never have been a rescission decision.

[156] GCT further points to the September 2019 decision—in particular where the VFPA states that although it continues to believe there to be considerable risks posed to fish habitat by DP4, the port authority was no longer of the view that such risks are of such a nature that any consideration of DP4 is not an option—as an excuse for not doing what the VFPA should have done back in March, and that the bias that existed in March cannot now be rectified. I have not been persuaded by GCT. The March 2019 decision raised the prospect of risk to fish habitat from

development in the area of the proposed DP4 project, as expressed in the 2003 DFO letters, as a concern militating against moving forward with a review of DP4. With the Review Panel hearings and, in particular, I must think, the testimony of DFO during those hearings that the 2003 DFO letters were not meant to be a prohibition against any development of the area in the future, I see nothing untoward in the VFPA setting aside the issue of risk to fish habitat as a prohibitive factor, pending the assessment process for DP4.

[157] GCT raises the same argument with the manner in which the VFPA treated the issue of maintaining competitiveness within the port in the September 2019 decision; the VFPA made it clear that although the question of competitiveness/capacity control remained a serious issue to be considered in review of DP4, the VFPA was nonetheless prepared to no longer treat that question as a gating issue militating against assessing the project, and was prepared to "further consider that issue through the information and analysis that will be undertaken though the federal impact assessment of DP4 and our PER process". GCT argues that the bias is patent in the VFPA having done what it did in March with refusing to even process its PPE, and that the VFPA was no longer in any position to deal with the review process in an unbiased fashion.

[158] Again, I have not been persuaded and must reject what I find to be GCT's bald assertion of improper purpose in the VFPA having rescinded the March 2019 decision. The evidence of Mr. Xotta on cross-examination is as follow:

> On September 23, 2019, shortly after retaining McMillan LLP, the VFPA executive met by telephone to consider the implications of the Federal Court ruling [I take it regarding Mr. Justice Pentney's decision to disqualify the VFPA's previous counsel] and the VFPA position set out in [the March 2019 decision]. Following a further discussion among VFPA executive members, on behalf of VFPA

> CEO Robin Silvester issued [the September 2019 decision] to GCT, rescinding [the March 2019 decision]. The rationale for the decision set out in that letter reflects the reasoning applied by VFPA executive in the September 23, 2019 meeting.

[159] It is clear to me from the September 2019 decision that events subsequent to the March 2019 decision which could legitimately inform the decision-making process did just that, and caused the VFPA to rethink its position regarding the review of DP4. In the September 2019 decision, the VFPA indicated that it further considered the concerns of GCT as expressed during the Review Panel hearings on RBT2 as well as in the judicial review application—which included GCT's claim of impermissible bias. The landscape had changed between the March 2019 decision and the September 2019 decision: hearings took place before the Review Panel under the CEAA and the enactment of the IAA shifted the heavy lifting of environmental assessment of "designated projects" from the VFPA to the Agency.

[160] It was also likely that a change of solicitors—upon which GCT looks with a cloud of suspicion—brought forth a fresh perspective on the appropriateness of proceeding with the PER Process, which the VFPA had not only set up, but which, in this case, had already been engaged before a stop was put on the process by the port authority. In addition, as admitted by the VFPA in the September 2019 decision, the filing of the application for judicial review also had a hand in the decision to rescind the March 2019 decision. I am simply not persuaded to go as far as GCT wishes to take me and find that the September 2019 decision was a tactical decision to shield the VFPA from judicial review rather than, just as likely, the result of a series of developments having the effect of focusing the minds of business people whose attention is more normally focused on commercial port operations. From a simple reading of both the March and

September 2019 decisions, it seems to me that the VFPA is not an impetuous or petulant decision maker that stubbornly sticks to its decision in the face of changing circumstances which would reasonably call for reconsideration of what clearly was an important decision for GCT. I have not been persuaded to read the March and September 2019 decisions as evidence of a closed mind beyond a simple level of pre-judgment on the part of the VFPA executives, which may be expected under the circumstances, and certainly not pre-judgment of the matter to such an extent that any representations to the contrary would be futile (*Newfoundland Telephone*; *Old St Bonifac* at p 1197).

[161] GCT also asks that I contrast the September 2019 decision with one of the May 2020 letters sent by the VFPA to various First Nations communities—in particular the May 25, 2020 letter sent to the Malahat Nation [Malahat Nation letter], where the VFPA asserts that the option to proceed with DP4 "was rejected by the port authority for a number or reasons, including environmental concerns with further development at that location, competition concerns and anticipated trade needs." The letter goes on to make clear that the VFPA has no plans to pursue DP4, that GCT requires port authority approval to pursue the project, that GCT was not at that time engaging the port authority in relation to DP4, and that nothing required the VFPA to ensure that GCT was the only container terminal at Roberts Bank. GCT asserts that these statements are evidence of the VFPA's closed mind and that the message being conveyed in the letter is that DP4 "is not on" and GCT cannot do anything without the port authority's approval; this is all independent evidence, says GCT, of the VFPA closing its mind to the PER Process.

[162] I am not convinced. The letter must be read in context. GCT had engaged in what one may describe as a public relations campaign in favour of the DP4 project—as far as I am concerned, fair game in the promotion of its commercial interests. The letter sent to the Malahat Nation by the VFPA includes the following introductory paragraph:

> Over the last number of weeks we have received several comments and questions from Indigenous groups related to information that appears to have been provided by [GCT]. We are writing to you today to respond to requests for further information about the status of the RBT2 project relative to the GCT claims about a project it has said it is proposing. In this regard, I am pleased to share the following with you.

[163] Clearly, the Malahat Nation letter, as with the remainder of the May 2020 letters sent by the VFPA to other First Nations communities, was meant to address questions which arose on account of information disseminated by GCT in support of DP4. I can hardly fault the VFPA in looking to clarify the status of the two projects in answer to stakeholder questions, nor do I see in the May 25, 2020 letter any sign of a closed mind creating impermissible bias. GCT has not argued that any of the statements made by the VFPA in that letter were incorrect. Rather, it seems to me that the VFPA had moved on given that GCT had refused to re-engage the PER Process. A port authority cannot be expected to suspend its development plans waiting for a particular proponent to engage its review process, which GCT refused to do following the September 2019 decision. The positions of the parties were clearly set out in the exchanges of the previous September and October; those positions had consequences for both parties. Nor can the prospect of an application for judicial review create a situation whereby the port authority is put in a state of suspended animation; life moves on, and GCT cannot expect the judicial process to act as a brake on the continuation of the VFPA's development plans pending the outcome of the judicial proceedings, and where such plans are not halted, claim that the VFPA has somehow

closed its mind in a manner that renders it biased. In a way, whenever we move on in life, we are somehow closing our mind to what may have been, but that cannot be equated to bias towards what could have been.

[164] On the whole, I am not convinced of any attempt by the VFPA to "game the system".

3. Deliberate avoidance of transparency by the VFPA in an effort to immunize itself from the bias allegation

[165] GCT argues that it has been forced to embark on a repeated effort to extract a proper tribunal record from the VFPA; between what it claims to be glaring omissions from the tribunal record, which shows that the VFPA predetermined its rejection of DP4 even before any application was submitted, and the scope of the questions that were the subject of improper refusals during the cross-examination of the VFPA—where GCT was trying to elicit explanations for such omissions so that they could be understood and reviewed by the Court—GCT claims that the VFPA's approach to the tribunal record compounds its bias and that there is clear evidence which demonstrates the VFPA's effort to immunize itself from the bias allegation. Again, some context is required.

[166] Following the dismissal by Prothonotary Furlanetto of the VFPA's motion to strike the judicial review on the basis of mootness and prematurity, GCT made a Rule 317 request for production of the tribunal record on March 12, 2020—the initial Rule 317 request included in the application for judicial review was struck by the Prothonotary—, about a year after the institution of the present application for judicial review and five days prior to the issuance of this Court's first Practice Direction and Order (COVID-19). This matter was heavily case managed,

and following a series of case management conferences dealing with, *inter alia*, scheduling issues, on September 9, 2020, the VFPA produced a tribunal record consisting of about 478 documents. GCT considered disclosure by the VFPA to be inadequate and brought a motion under Rule 318(2) for further disclosure, which was granted by Mr. Justice Pentney on June 17, 2021 [June 17, 2021 Order]; Mr. Justice Pentney found, *inter alia*, the VFPA's disclosure of board materials to be incomplete and found as troubling the fact that no material was provided for the entire 2019 year given that the decisions being challenged were made during that year. As a result, Mr. Justice Pentney ordered the VFPA to disclose certain specifically identified documents and to identify a senior official to supervise a review of its document holdings and to search for certain other categories of documents for disclosure.

[167] With cross-examinations on the merits of the present application set to begin in mid-August 2021, the VFPA produced another 100 documents at the end of July 2021. The VFPA concurrently prepared an affidavit from Mark Gustafson, its General Counsel and Corporate Secretary, outlining the manner in which he supervised and instructed the collection of documents in response to the June 17, 2021 Order; amongst other things, Mr. Gustafson stated in his affidavit that certain requested documents did not exist. GCT's informal request to cross-examine Mr. Gustafson on his affidavit was allowed by Mr. Justice Pentney on August 25, 2021 [August 25, 2021 Order], in particular on the efforts that had been undertaken to produce documents. Mr. Justice Pentney commented on the unusual situation of the parties, *to wit*, that the VFPA is both the decision maker and a full party to the proceeding, and that more commonly, the decision maker is not a party to the judicial review proceeding and provides its

Rule 317 disclosure as a matter of course, typically based on a clear record that is essentially the evidence that was presented before it by the parties.

[168] A few hours before the cross-examination of Mr. Gustafson was set to begin on September 3, 2021, the VFPA announced that additional documents within the scope of the June 17, 2021 Order were discovered; an additional 100 documents were produced by the VFPA, but only later in the afternoon of September 3, 2021, after the cross-examination of Mr. Gustafson. Finally, as confirmed by GCT, another 10 documents were disclosed a week later.

[169] GCT argues that such a chronology is hardly the conduct of a statutory decision maker attempting to provide transparency into a *bona fide* evidence-based decision, and as a result of such conduct, the VFPA cannot point to anything in the record, other than the privilege log or bald assurances, to refute the bias allegation or to defend the motivations behind the March and September 2019 decisions. The paucity of the record also provides the Court with no ability, argues GCT, to test the motivations behind such decisions, and results in restricting GCT's ability to test its bias allegation during its cross-examination of the port authority. GCT cites *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190; *Slansky v Canada (Attorney General)*, 2013 FCA 199, [2015] 1 FCR 81; and *Lukács v Canada (Transportation Agency)*, 2016 FCA 103, for the proposition that in order for the Court to fulfill its supervisory function in judicial review, it must have access to the records underlying the decision which is being reviewed and that an inadequate evidentiary record could immunize the decision maker from being reviewed on certain grounds.

[170] As regards the cross-examination of Mr. Gustafson, GCT listed a series of undertakings that it sought as to certain documents, for example, an agenda of the board meeting or minutes of that board meeting, which were not produced because the questions were met with an objection by VFPA counsel and an undertaking was taken under advisement; the undertakings were eventually refused on the grounds that the questions fell outside the scope of the August 25, 2021 Order. As a further example of the VFPA refusing production, GCT specifically points to the failure on the part of the VFPA to produce the email responses and questions posed by the board members (including the collated list of board questions, of which there were as many as 39) in advance of the March 21, 2018 board meeting, which purportedly went into the preparation of Mr. Wilson's speaking notes in advance of that board meeting. Again, it seems from the undertakings chart that the request was taken under advisement and eventually refused on the grounds that the question was outside the scope of the August 25, 2021 Order. As the hearing on the merits was soon approaching, dealing with the refusals was left to me.

[171] GCT argues that its requests for further production which were made during the cross-examination of Mr. Gustafson and which were ultimately refused by the VFPA were specifically authorized by Mr. Justice Pentney in his August 25, 2021 Order, which states at paragraphs 26 to 28:

> [26] As described above, the record's adequacy is tightly connected to GCT's underlying complaint in this case: VFPN's concurrent roles as both the decision-maker and a party to the dispute. It is likely that the record's adequacy will continue to be a live issue between the parties, and the hearing judge may be asked to either make a ruling or take this into account in reaching a decision on the merits. Either way, the hearing judge will benefit from a full understanding of the disclosure made, and Mr. Gustafson's answers to questions about this in cross-examination may provide useful and relevant clarification.

> [27] Permitting cross-examination will add a further step to the proceeding, but it will not unduly delay it or add great expense. Conversely, the absence of such an Order might result in an incomplete record for the hearing judge, thus impeding the Court's ability to determine the matter in a just manner.
>
> [28] The cross-examination will be limited in scope, and should not therefore impose an undue burden on VFPA or its counsel. The questions raised by GCT about alleged inconsistencies or gaps in the disclosure, as revealed by the affidavit of Mr. Gustafson, should be answered so that the hearing judge will have a full understanding of the nature of the record.

[172] At paragraph 31, Mr. Justice Pentney stated:

> [31] Therefore, I will order that GCT is permitted to cross-examine Mr. Gustafson, at a time and place to be agreed between the parties, only in relation to his evidence about the nature and scope of the search undertaken pursuant to my Order of June 17, 2021, and the documents that were found but not produced. No questions shall be asked of him relating to the merits of either the VFPA decisions being challenged or the VFPA decision-making process.
>
> [Emphasis added.]

[173] The dispositive portion of the August 25, 2021 Order is consistent with paragraph 31. In addition, the June 17, 2021 Order provided the following, at paragraphs 71 and 72:

> [71] In light of this, I find that the disclosure of Board materials is incomplete, and it is troubling that there is no material provided for the entire 2019 year, given that the decisions being challenged were taken during that year.
>
> [72] At a minimum, VFPA must complete the disclosures it has already made, including the Board agenda, minutes, and any other materials that mention the DP4 project for the meeting of March 21, 2018. VFPA must also disclose the contents of the .zip file attached to the e-mail that refers to the Project Board meeting on February 25, 2019 (VFPA Production 00028), as well as any minutes produced from that meeting which will confirm for the reviewing judge whether this is a reference to a meeting of the Board, or a Project Board as contended by VFPA. Prior case-law

> supports that where a disclosed document mentions an attachment, that document should also be disclosed (1185740 Ontario Ltd v Minister of National Revenue, 169 FTR 266, 1999 CanLII 8774 (FCA) at para 6).

[174] Finally, the dispositive portion of the June 17, 2021 Order provides, *inter alia*:

> …
>
> [4] VFPA is ordered to identify a senior official to supervise a review of its document holdings, including paper and electronic documents (including current holdings and any archives), to search for the following categories of documents:
>
> …
>
> d. Internal Correspondence Related to DP4:
>
> i. VFPA shall conduct a search and produce any internal documents relating to the analysis that VFPA officials undertook of GCT's PPE after it was submitted on February 5, 2019, and prior to the March 2019 decision.
>
> [Emphasis added.]

[175] GCT points to an email dated February 12, 2019—within the range of dates covered by the June 17, 2021 Order—which is listed in the privilege log produced by the VFPA and which the port authority's previous counsel sent to various people at the VFPA, including Mr. Bryan Nelson, identified as the Director of Infrastructure Sustainability for the VFPA; the email is described as, *inter alia*, draft responses to GCT's PPE dated February 5, 2019.

[176] GCT also asserts that previous counsel also copied in Ms. K. Bamford, identified as the Director of Trade Development for the VFPA. I do not follow GCT with this argument as the

email identified as involving Ms. Bamford was actually sent to her by Mr. Xotta, is dated a day earlier (February 11, 2019), and relates only to GCT's submissions to the Review Panel.

[177] In any event, the point of the matter is that GCT argues that both Mr. Nelson and Ms. Bamford are included in relevant communications which are subject to privilege, but are not included in the search criteria for the searches conducted in compliance with the June 17, 2021 Order. During the cross-examination of Mr. Gustafson, the request by GCT for the VFPA to perform relevant searches of the records of Mr. Nelson and Ms. Bamford was refused on the grounds that their roles did not include any aspect of permitting approvals or preliminary project review and were thus not relevant.

[178] First, I do not read either the June 17, 2021 Order or the August 25, 2021 Order as authorizing undertakings to be requested during the cross-examination. The August 25, 2021 Order allowed for the cross-examination of Mr. Gustafson "in relation to his evidence about the nature and scope of the search undertaken pursuant to my Order of June 17, 2021, and the documents that were found but not produced" [emphasis added]. In addition, I do not agree that the evidence pointed to by GCT supports the argument that the records of Ms. Bamford should have been included in the search criteria undertaken in compliance with the June 17, 2021 Order; however, I do agree as regards Mr. Nelson.

[179] The sole document involving Ms. Bamford was sent to her by Mr. Xotta on February 11, 2019, and is described as being GCT's submissions to the Review Panel. As she was the Director of Trade Development, I can understand why she may have been interested to read what GCT

had to say before the Review Panel; however, that is a completely separate issue to the one at hand. There is no evidence that Ms. Bamford is part of the VFPA executives who met on February 13, 2019, and September 23, 2019, to make the March and September 2019 decisions or that she was involved in permitting approvals or preliminary project review or in any analysis that the VFPA officials undertook of GCT's PPE after it was submitted on February 5, 2019, and prior to the March 2019 decision.

[180] However, the situation is different as regards Mr. Nelson; his capture by the search engine may well have been a stray hit; however, he was copied on the VFPA's previous counsel's email, which attached draft responses to GCT's PPE. I would have to think that counsel was instructed to copy him on it. It may well be that he was only copied on it because the email of February 12, 2019, also attached a draft response to the Review Panel regarding GCT's submissions of February 8, 2019, an issue in which Mr. Nelson may have been involved. Be that as it may, and although it is not clear what role he may have had in any analysis that the VFPA officials may have undertaken of GCT's PPE, to give full effect to the June 17, 2021 Order, I find that he should have been included in the search. I accept that the search may have been restricted to those who the VFPA states were involved in permitting approvals or preliminary project review, but the June 17, 2021 Order called for a search of documents relating to the analysis that the VFPA officials undertook of GCT's PPE after it was submitted on February 5, 2019, and Mr. Nelson's capture in the privilege log has not been sufficiently explained by the VFPA.

[181] GCT argues that the failure to produce the requested documents is more evidence of a lack of transparency, which demonstrates a closed mind, and that the examples of Mr. Nelson and Ms. Bamford are but two more examples of an attempt to immunize the VFPA from judicial review and sanitize the March and September 2019 decisions. I do not agree, nor do I find that this was a situation of "hiding the pea" as Mr. Justice Phelan put it at paragraph 16 in *Lafond v Ledoux,* 2008 FC 1369; skirmishes between counsel regarding the scope of document production and disclosure orders is not uncommon, and I am not prepared to find that the omission to include Mr. Nelson in the search criteria is evidence of bad faith on the part of the VFPA; nor am I inclined to accept that the VFPA resorted to an overbroad assertion of solicitor-client privilege so as to immunize itself from judicial review. Keep in mind that as a result of the June 17, 2021 Order, an additional 210 documents were produced. I am sympathetic to GCT's cry of foul and its claim that obtaining document disclosure from the VFPA—although nonetheless still deficient—was like pulling teeth. However, I am also conscious of the fact that we are dealing with a non-traditional regulatory decision maker whose tribunal record is not necessarily bundled up nicely within party records and, unlike traditional adjudicative regulatory decision makers, must resort to e-discovery tools to comply with production requirements; this is not, as alluded to by Mr. Justice Pentney, a more commonly found situation where the decision maker is not a party to the judicial review proceeding and provides its Rule 317 disclosure as a matter of course, typically based on a clear record that is essentially the evidence that was presented before it by the parties.

[182] More to the point, and putting aside the issue of why undertakings would be taken on cross-examination, I fail to see why email responses and questions posed by board members, or

any of the documents listed by GCT in its Supplemental Memorandum of Fact and Law, would necessarily have formed part of the tribunal record. These proceedings are not in the nature of an action, and the cross-examination of Mr. Gustafson as ordered by Mr. Justice Pentney was not a discovery. Before adjudicative decision makers, the parties appear and submit their material, which together, and aside from certain exceptions, form the tribunal record. Here, the CMA has created what Mr. Justice Pentney referred to as an "unusual situation" whereby the VFPA is both the decision maker and a full party to the proceeding, an entity with a commercial mandate, and it is that situation which must guide us on what we should or should not expect to be found in the tribunal record. If I am to accept the assertions of GCT, I should expect to see every email to and from the VFPA addressing DP4, or at least relating to the VFPA concerns regarding DP4 which formed the rationale behind the March and September 2019 decisions, as far back as 2014, when GCT first began putting the DP4 project together. That is untenable as it completely disregards the nature of the decision maker.

[183] As I stated earlier, in a commercial setting where large-scale projects have been front of mind for several years, decisions are regularly made based upon the appreciation, perspective, understanding and recollection of the business people called upon to make decisions on a day-to-day basis, without having to constantly gather up what may be thousands of previous emails, reports, submissions, presentations, notes and letters so that any decision can be made. That is not to say that had the PER Process continued, a fulsome record of any final decision would not have to be kept—a record which I would think would include the application and submissions of GCT and all reports, analyses, and exchanges supporting that final decision as called for in the PER Process, as well as a justified, transparent and intelligible final decision. However, again,

the context of the March and September 2019 decisions was to determine whether to even allow the PPE through the PER Process. In that context, I have not been convinced that I should expect to find what GCT is stating that I should find as part of the documents that were before the VFPA executives when they rendered the March and September 2019 decisions, and I have been even less convinced that the failure to find such documents evidences a closed mind leading to impermissible bias against DP4 by the VFPA.

4. Efforts to undermine DP4 to third-party stakeholders

[184] GCT argues that the tribunal record, rather than demonstrating any foundation behind the decisions, depicts repeated efforts by the VFPA to undermine DP4 to third parties, further evidence of its closed mind. It is one thing, argues GCT, for a regulator to claim that it has a policy-based preference for one expansion project over another, but it is quite different for a regulator to perpetuate a campaign to actively undermine DP4 to other stakeholders, an activity that is found nowhere in the VFPA's statutory mandate, and demonstrates its bias.

[185] GCT points to the VFPA's letter of April 27, 2018, to the then Minister of Transport and to the letter of May 5, 2018, to the then Minister of International Trade, sent just a few months following the Hemmera Report, which expressed the view that development in the area of the proposed DP4 project is "a highly sensitive location that the Minister of Fisheries stated unequivocally in 2003 would not be permitted." GCT states that such a mischaracterization of the 2003 DFO letters was intentional given that the Hemmera Report was already in hand and that DP3 was in fact permitted to be built in that area in 2010.

[186] GCT also points to the March 29, 2019, email by the VFPA to the Prime Minister's office, which was sent over four weeks after the March 2019 decision and the day after the present application for judicial review was filed and served, where the same mischaracterization took place; as stated earlier, the briefing note attached to the email stated that the VFPA had evaluated the same area as the one being proposed for DP4 as one of several option for RBT2, but rejected it because DFO advised that no *Fisheries Act* permits would be issued for that area given the sensitive intertidal waters, and thus the decision on where to build RBT2 was guided in large part by direction from DFO in 2003 that only expansion options beyond the existing Deltaport terminal in deeper water should be considered and that permits for options in highly sensitive habitat closer to the shore would not be granted.

[187] GCT also highlights the meeting between the VFPA and the Prime Minister's office on April 10, 2019. The next day, the VFPA sent over the briefing note, updated to April 3, 2019, as well as the PowerPoint presentation given during the meeting the day before, and the RBT2 Project Rationale document, with the same mischaracterization of the purported environmental non-starter as expressed by the VFPA in previous correspondence.

[188] GCT also cries foul because come the September 2019 decision, where the VFPA purports to reopen the PER Process for the PPE, it does not go and correct the record with the Prime Minister's office or with any of the Ministers, who are left with the false impression created earlier regarding the purported environmental concerns with DP4.

[189] The assertions made by GCT of the mischaracterization by the VFPA of the 2003 DFO letters, given the Hemmera Report and the development of DP3, must be placed into context. In 2003, the project that was being discussed with DFO was a larger terminal expansion at Deltaport, larger than what would eventually be built as DP3. In its letter of April 1, 2003, DFO stated at the time that it "will not be involved in any review of the Delta Port proposal as the only option proposed for that project results in the destruction of critical fish habitat on the east side of the causeway." In its July 29, 2003 letter, the Minister of Fisheries and Oceans stated that "DFO will not consider issuing a Fisheries Act Section 35(2) authorization for the destruction of this critical fish habitat." The letter went on to indicate that DFO had suggested that the VFPA "focus its efforts on options that have a lesser likelihood of damaging critical fish habitat … in deeper water, where construction would likely have less impact on the Estuary's fish habitat …".

[190] DFO did eventually sign off on the construction of DP3, but only after the footprint of the project was reduced by about 30% on the north—the intertidal water area—to accommodate DFO's expressed concerns. The DP4 project, on the other had, as I read the "description project layout" schematics provided by GCT, is looking to develop not only the 30% which was not acceptable to DFO in 2003, but proposes to continue north, into the intertidal water area on the landward side of the causeway. To claim, as GCT does, that the building of DP3 is proof positive that the VFPA mischaracterized the 2003 DFO letters is unfair. If one considers the area of the proposed DP4 project, it is very much in the area that DFO considered to be a "critical fish habitat."

[191] As regards the Hemmera Report, I do not agree with GCT's assertion that there has not been any controversy, since 2017, over the fact that the report laid to rest the notion of any prohibition. It is true that the Hemmera Report was issued several months earlier and was in the hands of the VFPA at the time that it sent the briefing notes to the Minister of Transport and Minister of International Trade; however, as stated already, the report does not come to the conclusion that the 2003 DFO letters did not constitute a "prohibition" on development in the area proposed for DP4—to the north and into shallower waters from the present DP3—but rather simply provides guidance and suggestions on how to possibly mitigate the environmental risks expressed by DFO at the time for projects being built today.

[192] As regards the legitimacy of the claim that the 2003 DFO letters constituted a "prohibition" against development in the area proposed for DP4, GCT says that the issue is conceded and that the record contains three separate confirmations of there being no prohibition against development of the area proposed for DP4. GCT first points to the testimony of Mr. Magnan, the DFO representative, during the RBT2 Review Panel hearing on May 22, 2019, regarding the 2003 DFO letters, as follows:

> MEMBER LEVY
>
> Okay. Given that the world has changed a lot since 2003, we have a new habitat policy, we have a new Fisheries Act that's in front of the Senate right now, is it still DFO's position that development in the intercauseway would be unacceptable?
>
> MR. MAGNAN
>
> And again, I just want to reference that the letter indicated that particular project based on a footprint and a time and a review, the legislation then, that development would not have been approved or issued an authorization. The letter was not meant to indicate that there was any kind of blanket statement in terms of any development in that area. It was very specific to that project.

> So - - and again, each project is weighed and based on the application received, the current legislation and the current policies. So in the future, should a project come in, DFO will review the application and make a decision based on the information that's presented to us.

[193] GCT then points to the affidavit, dated August 12, 2020, of Mr. Dave Carter, who is with DFO and is one of the affiants for the Attorney General in these proceedings, who states the following at paragraph 12 of his affidavit:

> The [July 29, 2003 letter from the Minister of Fisheries and Oceans to the VFPA] was based on the specific project applications at the time. In the future, should a proponent apply to DFO for an authorization for its proposed project, DFO would review the application and make a decision based on the information that is presented.

[194] Finally, GCT points to the cross-examination, on August 20, 2021, of Mr. Carter in these proceedings, as follows:

> Q. Mr. Carter, can you please confirm that if and when an application is provided for DP4 by GCT, DFO will review that application and make a decision based on the information requested - - or provided?
>
> A. Yes, it will.
>
> Q. And I take it from your evidence in paragraph 12 that that decision will include an objective review of the application material?
>
> A. It will definitely include a review of the application material.
>
> Q. And that review will be impartial?
>
> A. Yes.
>
> Q. And objective?
>
> A. Yes.

…

Q. Mr. Carter, can I just take you to paragraph 5 of your affidavit. It's on page 2.

A. Yes.

Q. You'll see there in the second sentence you describe the two 2003 letters we were speaking of earlier and saying "the VFPA sought DFO's advice to identify the options that presented the least risk to obtaining regulatory approval." Do you see that?

A. Yes, I do.

Q. And I take it from you evidence that neither of the two letters prevented subsequent applications to be made to the DFO in respect of projects in that area?

A. That's correct. There was no blanket ---yeah.

Q. No blanket prohibition?

Yeah.

Q. And by that I mean no blanket prohibition on further applications or further developments in the intercauseway area.

A. That's correct.

[195] GCT says that DFO has confirmed three times what the VFPA knew since November 2017, when it received the Hemmera Report, that is, that the suggestion of a prohibition on the development of DP4 is nonsense, but the VFPA was still promoting, through carefully worded language, the fiction of a prohibition well after the present application for judicial review was filed and served.

[196] I do not agree with GCT. No doubt that following the testimony of DFO during the Review Panel hearings in May and June 2019, the 2003 DFO letters were not to be taken as a blanket prohibition regarding development of the area proposed for DP4. But again, that misses

the point. Hindsight is 20/20, and in fact, in the September 2019 decision, the VFPA clearly referenced the DFO testimony during the Review Panel hearings as one of the reasons why it was rescinding the March 2019 decision. The question, rather, is whether, at the time the March 2019 decision was made (prior to the Review Panel hearings, and before the affidavit of Mr. Carter and his cross-examination), the claim of the existence of such a prohibition by the VFPA was evidence of bad faith, a closed mind beyond simple permissible pre-judgment, so as to constitute impermissible bias. Given the lack of clarity on this issue in the Hemmera Report, I am not prepared to say that it was. Again, as stated by Mr. Xotta during his cross-examination, at the time of the March 2019 decision, the VFPA executives, rightly or wrongly, understood such a prohibition to exist in the area north of what is presently DP3, and in the area of the proposed DP4 project.

[197] GCT then points to the Malahat Nation letter dated May 25, 2020, as further evidence of a closed mind regarding DP4. The Malahat Nation letter states, amongst other things:

> The port authority is, under the [CMA], fully responsible for decisions related to developments on port lands. After many years of consideration, we decided to pursue the RBT2 project to meet growing container terminal needs in the future … .
>
> In making this decision, the port authority considered numerous options including further development on the east side of the causeway adjacent to GCT's existing Deltaport terminal. This would generally correspond with what GCT refers to as the potential "DP4" project.
>
> That option was rejected by the port authority for a number of reasons, including environmental concerns with further development at that location, competition concerns and anticipated trade needs. The independent federal review panel expressly considered this issue and held a day of hearings specifically dedicated to alternatives. GCT participated extensively. The panel has now spoken and it has supported the port authority's

> conclusion to locate the terminal in deeper waters, stating at page 57 of its report:
>
> **The Panel concludes that the Proponent's assessment of alternative means of carrying out the Project was appropriate**.
>
> To be clear:
>
> - The port authority has no plans to pursue development adjacent to the existing GCT facility;
> - GCT does not have the ability to pursue an expansion without the port authority's approval (and in this regard it is noteworthy that the prior expansion of Deltaport Third Berth was initiated by the port authority – not GCT);
> - GCT is not engaging with the port authority in relation to any expansion of its facility; and
> - Nothing requires the port authority to ensure GCT continues to be the *only* container terminal operator at Roberts Bank.

[198] GCT argues that the VFPA, despite purportedly having an "open mind" and rescinding its March 2019 decision with the September 2019 decision, then asserted in the Malahat Nation letter that the DP4 project had been rejected by the VFPA for reasons which included environmental and competition concerns.

[199] I do not think that GCT is giving the Malahat Nation letter a fair reading. As stated earlier, the letter must be read in the context of addressing questions which arose on account of information disseminated to the First Nations communities by GCT in support of DP4. The VFPA set out its role under the CMA and stated that after many years of consideration, it decided to pursue RBT2 to meet the future needs of the port. The VFPA stated that in coming to that conclusion, the port authority considered several options, including the DP4 project.

However, DP4 "was rejected by the port authority for a number of reasons, including environmental concerns with further development at that location, competition concerns and anticipated trade needs." As at the March 2019 decision, that statement by the VFPA was correct. The VFPA also stated in the Malahat Nation letter that it "has no plans to pursue development adjacent to the existing GCT facility." That statement was also correct, particularly given that GCT has not re-engaged the PER Process following the September 2019 decision.

[200] What is central to understanding what the VFPA is saying is to recall that in the March 2019 decision, the VFPA made it clear that it would only consider DP4 as "subsequent and incremental to the RBT2 project." I disagree with GCT that the letter to the Malahat Nation is a declaration by the VFPA that DP4 is "dead". The evidence shows that the VFPA was concerned with the fact that it would take several years more for DP4 to achieve environmental assessment approval, if at all, than it would for RBT2, especially as it was looking to develop an area already flagged as problematic. The VFPA was also concerned with the fact that DP4 would be coming on stream when it was not clear just how much additional capacity would be needed beyond RBT2 and that its development timeline would conflict with that of RBT2. The September 2019 decision did not change that aspect of how the VFPA was inviting GCT to re-engage with the PER Process. That is also consistent with how the VFPA mentioned to GCT in its letter of February 2, 2018, that it would approach GCT's application for DP4 if and when made. In that letter, the VFPA stated: "… it would be entirely appropriate and indeed incumbent upon VFPA to also consider the impacts of a DP4 project on the overall port operations. VFPA would also consider the issue of timing, recognizing the very significant lead times required for such projects, and the looming need for more near term capacity in the Port of Vancouver."

[201] The concern regarding the delayed timing of DP4 was also expressed in the March 2019 decision when the VFPA stated: "We note that your proposed development timeline would conflict with the implementation of RBT2 capacity." In fact, the VFPA executive speaking notes for the March 21, 2018, board meeting include the subject of any alternatives to the RBT2 project that were considered. Particularly regarding DP4, the speaking notes of Cliff Stewart provide:

> Further expansion at Deltaport, or DP4 as it is known, is not a viable solution for the following reasons:
>
> - Past direction from [DFO], including a letter from the federal fisheries minister, that any further expansion on the east side of the intercauseway would not be given a permit due to environmental concerns. The proposed intertidal location would also destroy existing habitat compensation efforts from past expansion initiatives.
>
> - Given its proximity to sensitive environmental areas, GCT's proposal would likely be assessed as a designated project, which requires a lengthy federal review. As GCT has not commenced an environmental assessment of the project, it can be assumed that they are potentially up to 10 years behind RBT2 for delivery, even if their project was found to be approvable.
>
> …
>
> [Emphasis added.]

[202] I do not agree with GCT when it asserts that the Malahat Nation letter was a clear expression of opposition to DP4 after the VFPA claimed to no longer have a closed mind by rescinding the March 2019 decision. If there was a "closing of the mind" on the part of the VFPA, it was, as made clear in the March 2019 decision, only with respect to developing DP4 "at this time". That does not, in my view, suggest impermissible bias in this context, especially

given the concerns surrounding DP4; rather, that is a question of prioritizing conflicting projects, which was certainly within the bailiwick of the VFPA as constituted under the CMA. I accept that there may be an issue of whether the "prioritizing" function of the VFPA falls under its proponent role for RBT2 or its regulatory role as regards DP4, and I will deal with that below; however, for now, I do not consider this to be an attempt by the VFPA to undermine the DP4 project.

[203] As to the statement of the VFPA that "GCT is not engaging with the port authority in relation to any expansion of its facility", as stated earlier, the port authority cannot be expected to suspend its development plans waiting for a particular proponent to engage its review process.

[204] GCT also points to the Issues Management Plan developed just before the service and filing of the present application for judicial review, which, in addition to the financial compensation of the VFPA executives which I will deal with later on, reveals, according to GCT, the motivation behind the VFPA's bias. GCT points to the statement made in the Issues Management Plan, under Analysis and Assumptions: "Given that the proposed DP4 cannot be built, according to the minister of fisheries in 2003, it is curious why GCT is proposing it."

[205] GCT says that that statement is not true. From what I can tell, it may have been shown not to necessarily be correct through the testimony of DFO during the Review Panel hearings held a few months later, but what seems to be the case is that at the time the statement was inserted in the document, the evidence is that the VFPA actually believed it to be true. The statement was included in the Analysis and Assumptions section of the Issues Management

Plan—in other words, the VFPA was speaking to itself and setting down what it believed to be the state of affairs. This statement does not appear to me to be a series of talking points prepared by a communications director to assist the VFPA in conveying its position to the public. Accordingly, from my perspective, that statement confirms the statement of Mr. Xotta during his cross-examination, *to wit*, that the VFPA truly believed the prohibitive effect of the 2003 DFO letters.

[206] In addition, the Background section to the Issues Management Plan includes the following:

> GCT has begun a public campaign that includes, at least, the following:
>
> - Video of the proposed project showing the expanded footprint (though the video description states additional capacity can be handled on the existing footprint)
> - Robocalls to the Delta community, positioning DP4 as a "better way"
> - Extensive government and stakeholder lobbying
> - Public engagement, such as organization of community and business roundtables
>
> We can expect that GCT will continue to reach out to key stakeholders, such as those who have registered to speak in support of RBT2 at the upcoming public hearing.

[207] GCT argues that the Issues Management Plan equates to the VFPA setting out what it is going to do to undermine DP4, and a further indication of a closed mind amounting to impermissible bias on the part of the VFPA. I disagree. The evidence has me believe that, given the preference of the VFPA for RBT2, GCT had undertaken its own campaign to sell DP4 to the

public and the government. I would not expect anything less, and as mentioned earlier, that is fair game for any commercial operator which needs public and government support to move foreword with its development strategy; I see nothing wrong with such an approach. The VFPA says that this is not about RBT2 vs DP4; GCT says the opposite, that the present proceedings are all about RBT2 vs DP4. Whatever the true state of affairs may be, it does explain why the VFPA felt the need to have a concerted approach so as to respond to what may have become a battle for public opinion on further development of Deltaport. On the whole, and more to the point, I am not convinced that the VFPA undertook either an open or a clandestine campaign to undermine DP4. I have not been shown by GCT any statement in the Issues Management Plan that is incorrect, apart from opinions which later may have been found to not necessarily be correct; seeking to set the record straight is not evidence of insidious conduct.

[208] GCT also asks that I compare and contrast the statement made in the Issues Management Plan to the effect that the Review Panel is not mandated to consider project need or alternatives and therefore cannot make a recommendation that favours one project over another, on the one hand, with the statement made by the VFPA to the Malahat Nation in its letter of May 25, 2020 to the effect that "[t]he independent federal review panel expressly considered [the decision of the VFPA to reject DP4 for reasons of environmental and competition concerns] and held a day of hearings specifically dedicated to alternatives. … The panel has now spoken and it has supported the port authority's conclusion to locate the terminal in deeper waters …".

[209] I accept that the manner in which the VFPA expressed the role of the Review Panel as endorsing the rejection of DP4 was imprecise; however, I am not convinced that it was

determinative of any closing of the mind leading to impermissible bias on the part of the port authority.

[210] The GCT also wants me to compare and contrast the Issues Management Plan with how the board directed the VFPA during the board meeting of March 31, 2015 to review the DP4 project with objectivity and with an open mind. I have not been convinced that since 2015, the VFPA has dealt otherwise with GCT and the DP4 project. Given that the VFPA had to respond to a concerted campaign by GCT to sell DP4 to the public and the government, I see no contradiction between the directive of the board in 2015 and the development of the Issues Management Plan. On the whole, I find that GCT's argument that the VFPA was somehow strategically undermining DP4, and more so, that the VFPA was purposely mischaracterizing the consequences of the 2003 DFO letters, is not supported by the evidence.

[211] Finally, GCT argues that a reasonable apprehension of bias arises from apparent predeterminations, even on a less stringent test of the appearance of a closed mind. In particular, GCT asserts that the reasons given in the March 2019 decision demonstrate that the VFPA made a predetermined decision in favour of the RBT2 project and that its comments, made publicly, suggest a pre-judgment or impartiality on its part (*Chrétien v Gomery*, 2008 FC 802 at paras 78 to 80 and 106, aff'd 2010 FCA 283 [*Gomery*] and *Canadian Broadcasting Corp v Canada (Human Rights Commission)*, 1993 CanLII 16517 (FC) at para 43 [*CBC*]). Putting aside the fact that the situations in both *Gomery* and *CBC* were significantly different from the matter before me, under the circumstances, I am not prepared to find that the VFPA undertook a campaign to undermine DP4 or that its statements as regards the effect of the 2003 DFO letters were made in

bad faith, knowing them to be wrong. I am also not convinced that such public statements show a closed mind leading to actual impermissible bias. As stated by Mr. Xotta during his cross-examination, at the time the statements regarding the concerns over the 2003 DFO letters were made, the VFPA thought them to be correct; I have not been convinced otherwise.

(iii) The declaration of preference for RBT2 without a proper evidence-based assessment

[212] Finally, GCT argues that in addition to issues with the stated rationale of the March and September 2019 decisions and the tactical way that those decisions were orchestrated, the fact that the VFPA stated that RBT2 was its preferred project without first conducting a formal, evidence-based review of DP4 can only lead to a conclusion that the VFPA was biased in its decision-making process in relation to DP4. GCT asks that I keep in mind that such dogged preference for RBT2 emanates from the fact that there are people at the VFPA whose careers, salaries, and legacy are predicated upon RBT2 being completed; they have been working on the project since 2013 and thus have developed, says GCT, a mindset tantamount to bureaucratic inertia in their dedication to that project.

[213] I should point out that GCT is not arguing that the VFPA's regulatory role is to act as an independent arbiter, weighing RBT2 against DP4, or that in conducting its regulatory functions, the VFPA cannot have regard to the history of the projects, the port development priorities, decisions and commitments already made by the VFPA, past discussions and exchanges between the parties, the existing knowledge of both projects by the parties, or the stage of development of RBT2, in which the VFPA had already invested time and energy as part of its statutory mandate as commercial operator of the port. Rather, GCT argues that the port authority, before

determining that RBT2 was in fact its preferred project—a decision that the port authority may have made as part of its proponent role for RBT2—nonetheless had the obligation on its regulatory side to allow DP4 to be reviewed under a fair, independent, objective, evidence-based decision-making process, and failing to do so under the circumstances is evidence of impermissible bias. Although at some point articulating that the issues of these proceedings are very much centered around RBT2 vs DP4, GCT also says that for the purposes of determining the VFPA's bias here, it is not a question of weighing one project against another, but rather an issue of one project not even being allowed on the scale.

[214] In any event, Mr. Grosman admitted in cross-examination to knowing that RBT2 was the VFPA's preferred project from the time he joined GCT in July 2017; the VFPA's preference for RBT2 was no secret well before GCT filed its PPE in February 2019; however, GCT argues that it was not aware that such a preference amounted to a "shutting of the door" to the review of DP4 without at least the prerequisite fair, independent, objective, evidence-based decision-making process being undertaken so as to justify the preference, and asserts that proceeding in the way it did was evidence of the VFPA's bias against DP4, which only manifested itself with the March 2019 decision.

[215] Again, I cannot agree with GCT. The March 2019 decision sets out in very clear language the reason why the VFPA decided not to process GCT's PPE through its PER Process.

[216] As I indicated earlier, the proposition that the VFPA closed its mind, an argument which GCT has promoted throughout these proceedings as an indicium of impermissible bias, seems to

me to rather be the natural consequence of the port authority making, rightly or wrongly, commercial decisions, and simply wanting to move on. For the VFPA, moving forward with RBT2 began in 2013—if we do not consider the work undertaken prior to the completion of DP3—and was several years ahead on a development timeline than the DP4 project. It is not for the port authority to delay making long term policy decisions on the development of port infrastructure until a proponent is ready to submit its proposal, which in this case took place in February 2019. Putting aside the issue of any breach of procedural fairness by the VFPA in not allowing at least an initial assessment of GCT's PPE once submitted on February 5, 2019, I have not been convinced of any closing of the mind in the sense of creating impermissible bias on the part of the VFPA in having determined and expressed, prior to assessing the PPE through the PER Process, its preference for RBT2.

(b) *Failure to respect policy of separation of proponent and regulatory functions*

[217] GCT asserts that quite apart from whether the March and September 2019 decisions were reflective of actual bias on the part of the VFPA, that the bias of the VFPA may be seen in the manner in which it disregarded the admitted requirement on its part to keep its project proponent role separate from it regulatory role.

[218] GCT argues that the VFPA recognizes the conflict of interest inherent in its dual roles as proponent and regulator and assures stakeholders that it takes steps to have a clear separation of the two functions to address this inherent conflict by making certain that those who work on the proponent side for RBT2 do not cross-contaminate, through their involvement, the regulatory role of the VFPA in respect of DP4.

[219] In the midst of the submission of GCT's PPE for DP4, the VFPA was also stick-handling RBT2 through the regulatory process under the CEAA. In a letter dated February 22, 2019, to the Review Panel—GCT points out that this letter was sent after the February 13, 2019, decision by the VFPA executives not to process its PPE through the PER Process—meant to address the ability of the VFPA to oversee and to direct compliance and how conditions would be enforced in the event that RBT2 was approved to proceed, the port authority also addressed its dual role as both proponent and regulator under the CMA. In the letter, Mr. Stewart, who is part of the proponent side for RBT2, stated:

> Port authorities are tasked with addressing the technical merits of a project, including environmental impacts and mitigation. …
>
> A Canada Port Authority's role is to review project applications, including required studies, assess the technical merits of the application, and then make an evidenced-based permit decision. …
>
> The [VFPA] will not authorize or allow a proposed project to proceed if it is likely to result in significant adverse environmental effects that cannot be mitigated. Project permit applications may not be accepted if the port authority determines the project is not in the best interests of Canada's overall trade objectives.
>
> Occasionally, like other federal agencies, a Canada Port Authority is required to act as both permitting agency and project proponent, typically on common-use infrastructure projects where no other proponent would be forthcoming. To ensure the permit review process is entirely objective, the [VFPA] ensures clear separation of the regulatory and project proponent functions of the organization. For example, projects reviewed by the [VFPA] are conducted by environmental scientists and specialists who do not work on port authority-led projects.
>
> [Emphasis added.]

[220] GCT asserts that although admitting that this separation is a minimum requirement, the evidence actually demonstrates that, in breach of its own standard of natural justice and

procedural fairness, no such protections were implemented regarding DP4. GCT points to the privilege logs that show that Mr. Stewart—who, in cross-examination, Mr. Xotta described as the executive responsible for advancing RBT2 as well as other capital projects that VFPA was developing—was involved in both the March and September 2019 decisions and that Mr. Armstrong was, as GCT suggests, at the epicentre of the March 2019 decision despite his role as counsel for the proponent side of RBT2. Mr. Xotta also confirmed that the separation of functions described by Mr. Stewart was not reduced to a written policy of the VFPA and that no document exists setting out how that separation is to take place, but that the procedures associated with the project review were articulated in the Guide. GCT calls this a governance failure exemplifying once again the closed mindedness of the port authority in relation to the DP4 project; the element of bias is demonstrated, argues GCT, because after accepting that such a "church and state" separation is needed in order for stakeholders to be afforded proper procedural fairness, the VFPA secretly did the opposite, a fact discovered only after GCT undertook serial efforts to extract the true record.

[221] I disagree with GCT. First, although GCT promotes the theory that both projects were competing with each other, it seems to me that it was so only in GCT's mind. More importantly, I find that GCT is misapplying the principles addressed in Mr. Stewart's letter to the Review Panel. Again, context is important. The Review Panel was set up to review RBT2, and in the February 22, 2019 letter, Mr. Stewart was addressing how the VFPA was to be set up in order to review RBT2, a project where the VFPA itself was acting as a proponent. It may well be that such a "church and state" separation would have been put in place had the VFPA moved forward as the proponent of DP4, just as it was the proponent of DP3 and other large-scale projects of

land reclamation in the Port of Vancouver, but the VFPA decided, in its discretion, that it did not wish to move forward with DP4, preferring the RBT2 project to meet the growth in demand for container terminal capacity, and I see nothing to suggest that it did so by breaching its own expressed commitment to the separation of proponent and regulatory functions.

(c) *Are the VFPA decision makers biased as a result of any financial interest in the development of the RBT2 project?*

[222] As made clear by the Supreme Court in *Old St Boniface*, in addition to having a closed mind to the point of intransigence, a disqualifying bias may also result from a conflict of interest on account of financial interest in the decision to be made. At page 1196, Justice Sopinka stated:

> I would distinguish between a case of partiality by reason of pre-judgment on the one hand and by reason of personal interest on the other. It is apparent from the facts of this case, for example, that some degree of pre-judgment is inherent in the role of a councillor. That is not the case in respect of interest. There is nothing inherent in the hybrid functions, political, legislative or otherwise, of municipal councillors that would make it mandatory or desirable to excuse them from the requirement that they refrain from dealing with matters in respect of which they have a personal or other interest. It is not part of the job description that municipal councillors be personally interested in matters that come before them beyond the interest that they have in common with the other citizens in the municipality. Where such an interest is found, both at common law and by statute, a member of Council is disqualified if the interest is so related to the exercise of public duty that a reasonably well-informed person would conclude that the interest might influence the exercise of that duty. This is commonly referred to as a conflict of interest.
>
> [Emphasis added.]

[223] GCT argues that the VFPA executives who made the decisions in respect of DP4, both on the regulatory and the proponent side, were and are compensated based on the success of RBT2,

thereby creating a direct financial conflict that precludes lawful consideration of DP4 and gives rise to a reasonable apprehension of bias.

[224] Articles 1.1 and 1.2 of the Code of Conduct provide that its object "is to preserve and enhance public confidence in the integrity and impartiality of directors and officers" of the VFPA by "establishing clear conflict of interest rules", and that the Code of Conduct is to be interpreted in accordance with a series of general principles, *to wit*, that every director and officer shall discharge his or her duties as regards the preservation and enhancement of public confidence, that such discharge of duty may not necessarily be fulfilled by merely "acting in accordance with the technical requirements" of the governing instrument, and that the mere appearance of conflict, as opposed to actual conflict, may compromise public confidence and trust in the integrity and impartiality of the VFPA.

[225] In addition, the VFPA's Project and Environmental Review Policy [PER Policy] was created, *inter alia*, so as to establish a PER Process that meets the VFPA's responsibilities under applicable legislation, makes certain that port development reflects environmental, economic and social objectives, and provides efficient and effective service to VFPA stakeholders. Under the PER Policy, the VFPA's board of directors authorizes the President and CEO to establish procedures and issue permits, approvals and/or authorizations pursuant to the PER Policy and PER Process and to delegate this authority as appropriate to the VFPA executives and staff. In addition, the PER Policy makes it clear that the PER Process is to be "guided by principles and legal requirements of reasonableness, procedural fairness and ethical conduct."

[226] GCT argues that the VFPA's executives as decision makers must be presumed to be biased because of financial interest in the success of RBT2; a reasonable apprehension of bias can be presumed where a judge or member of a tribunal has an interest in the matter that he or she is called upon to adjudicate (*Ireland v Victoria Real Estate Board*, [1996] 1 WWR 349 at p 385).

[227] The VFPA argued initially that I should not consider this argument as GCT failed to plead this issue in its amended notice of application for judicial review and is now precluded from raising it (*Tl'azt'en Nation v Sam*, 2013 FC 226 at para 6 [*Kenny Sam*]; *Air Canada v Toronto Port Authority*, 2010 FC 774 at para 80). That is of course the general principle; however, as expressed by Justice O'Reilly in *Kenny Sam*, there is some room for discretion where, for example, the new issue is related to those set out in the notice and are supported by the evidentiary record, and where the respondent would not be prejudiced and no undue delay would result (*Kenny Sam* at para 7; *Al Mansuri v Canada (Minister of Public Safety and Emergency Preparedness)*, 2007 FC 22 at paras 12-13). Here, I find that the prospect of the executives having a financial interest in RBT2 is significant in the context of possible bias. Given that bias is the overriding issue put forward by GCT, and the issue that permeates all others in this case, I think it appropriate to exercise my discretion and address the issue.

[228] In this case, GCT submits that the decision-making of the VFPA was rife with a bias that each of the decision makers could not avoid in that each of the executive team members had a direct pecuniary interest in RBT2 being approved at the expense of DP4, and adds that at no time did any member of the executive declare such conflict at the time the March and September 2019

decisions were being contemplated. As an indicium of such bias and one more factor as to why the "mind was closed" over at the VFPA with respect to DP4, GCT points to the VFPA 2020 Financial Report, which illustrates that medium-term incentive plan, being a three-year, cash-based performance-based compensation, which GCT argues is specifically linked to the building of capital projects, including RBT2.

[229] I find that GCT is misconstruing the description of the incentive plan. The passage cited by GCT reads as follows:

> The medium-term incentive plan aligns executive compensation with completion of longer-term initiatives necessary to the port authority's strategic plan and the larger success of the port. To ensure the port authority retains and motivates key talent over the span of these multi-year projects, all executives are eligible for the 2019-2021 and future medium-term incentive plan grants.
>
> The 2019-2021 and 2020-2022 grants awarded in 2020 (referred to as "2020 Grant") focuses on strategic capital projects to build urgently needed container capacity (the Centerm Expansion Project and Roberts Bank Terminal 2 Project) and road and rail projects throughout the gateway. Collectively these projects are critical to the ability of the port to meet Canada's trade objectives.

[230] GCT reads the passage as suggesting that the executive members who rendered the March and September 2019 decisions were biased as their financial compensation rested, at least partially, upon the completion of RBT2. That is not the way I read the passage. Clearly, performance matrices have been introduced into the executive remuneration package, as is common with many companies looking to attract talent at the executive level. However, I do not read the description of the package as performance incentives being based upon approving or not approving any specific project; the mention of RBT2 is but a coincidence as that project was already identified as one of the lead development projects undertaken by the Port of Vancouver.

[231] It seems to me that had the VFPA also decided to move forward with DP4, that project would also have been singled out in the passage upon which GCT relies to make its argument. In this case, the VFPA's Land Use Plan dated October 28, 2014—in effect when the March and September 2019 decisions were made—identifies as one of its objectives the development of RBT2, amongst other things, as part of the VFPA's long-term strategy to meet projected growth. It makes perfect sense, therefore, that it would be RBT2 that is identified in the description of the executive package incentive plan as one of the relevant capital projects upon which the performance matrices is based.

[232] GCT asserts that it does not matter what the financial interest is or how significant it is, but rather that it exists. If I am to accept GCT's argument, the VFPA executives are in financial conflict every time they chose to move forward with any particular development project, regardless of which one they chose; that cannot be right. As was the case before Mr. Justice O'Reilly in *Communities and Coal Society*, the medium-term incentive plan in this case does not reward project approvals directly; the motivation for the executives is not to select one project over the other, but rather the see the project selected move forward in line with the port authority's statutory obligations and objectives. I find GCT's indignation to be misplaced.

(d) *Contradictions in the VFPA's positions as evidence of bias*

[233] GCT asserts that the many contradictory positions of the VFPA reveal a desire to make up the rules as it goes along, to say things when it is expedient to do so, thus evidencing its bias, which is the inevitable result of those contradictions and untenable positions. GCT highlights the following:

i. The VFPA publicly asserts that separation is required between its proponent function and its regulatory function, but it failed to deliver on that requirement, and has no written policy to secure compliance.

ii. Although the PER Process sets out steps that will be taken to ensure evidence-based, objective decision-making so that the regulatory function is exercised on the merits, such a policy was not followed by the VFPA when it rejected GCT's PPE out of hand.

iii. When GCT submitted its PPE on February 5, 2019, it was received and distributed amongst VFPA management with the expectation, even internally, that staff would begin the review of the proposal and that the PER Process would be followed; however, that process was halted by the VFPA executives.

iv. The VFPA's claim that it is entitled to have a closed mind on the regulatory side because of the structure under the CMA is at odds with its invitation to GCT to make submissions on its purported bias in its letter of October 2, 2019.

v. The VFPA invited GCT to re-submit its PPE in September 2019, yet asserts before this Court that it has no ongoing role in respect of DP4 under the IAA.

vi. Although the VFPA states that it is entitled to arrive at a decision preferring RBT2 over DP4, no documents or analysis engaging with the merits of both projects, or any evidence of any meetings or discussions reflecting this comparison, can be found in the tribunal record.

[234] I have already addressed the issues identified by GCT. I am of the view that any purported contradictions or inconsistencies in the VFPA's conduct is better dealt with in relation to whether it breached procedural fairness by not respecting the legitimate expectations of GCT. I see no element of impermissible bias on the part of the VFPA in the elements raised by GCT.

(e) *Final thoughts on the bias issue*

[235] On the whole, and although I find, as I set out below, that the VFPA breached its obligation of procedural fairness owed to GCT by not allowing GCT to address the VFPA's concerns within the regulatory process, I am not convinced that either the March or September 2019 decisions were reflective of impermissible bias on the part of the VFPA. The concern over DP4's timeline for coming on stream, if at all, had previously been expressed by the VFPA a year earlier in its letter of February 2, 2018, to GCT; the VFPA outlined the environmental hurdles that DP4 was expected to face in the regulatory approval process, and stated that when it comes time to formally review the project in conjunction with the PER Process, the port authority would have to consider the impacts of DP4 on overall port operations and in a cumulative context with RBT2, and that regarding the issue of timing, the port authority would have to recognize the very significant lead times required for the projects, and the increasing need for more near-term capacity in the Port of Vancouver. Accordingly, the VFPA advised in its March 2019 decision that it would not be processing GCT's PPE through the PER Process at that time but would be open to reviewing development plans for Deltaport when it could more accurately project the need for incremental capacity beyond RBT2.

[236] Although I will deal with this issue in greater detail when I address GCT's claim of breach of its legitimate expectations, I will say that a port authority under the CMA is a non-adjudicative decision maker, and its regulatory role is tethered to its role as manager and operator of the port. It seems to me that the March 2019 decision was more of a reflection of the VFPA improperly putting its commercial foot ahead of its regulatory foot. Although this may be a result of the overlapping structure created by Parliament in the manner that the CMA set up the VFPA, it is not, in my view, a manifestation of actual impermissible bias. Commercial people will act in commercial ways; that is not always a reviewable error.

[237] If Parliament gave port authorities commercial and operational responsibilities for a port while at the same time giving them regulatory responsibilities, it could only be because the regulatory functions must be undertaken alongside the role that the port authorities play in the development of long-term strategic and logistical planning for the port so as to maintain commercial competitiveness and facilitate trade, with port authorities at the same time having to act as good stewards of the environment that they are managing. In the end, the VFPA is not, as GCT argues, a competitor of GCT that is promoting it own project ahead of that of GCT; VFPA is a port authority which has been authorized by statute to commercially run the Port of Vancouver, including developing its own infrastructure, and it is ultimately for the VFPA to decide which project gets to move to the head of the class. In a purely commercial setting, and outside of any contractual rights, tenants do not normally have the right to impose on landlords the obligation of having to consider the tenant's further development projects. Here, I accept that we are not in a purely commercial setting, and the administrative requirements inherent in the VFPA's regulatory role of the VFPA must be respected, however I make the point simply to

underscore the context in which the VFPA was operating, which went to inform the manner in which it developed its decision-making processes, and thereby whether the purported indicia of bias to which GCT points can fairly support a finding of a reasonable apprehension of bias on the part of the port authority. In this case, I find that such indicia cannot.

[238] Moreover, I do not see that back-tracking on whether to have the PPE proceed through the PER Process a sign of bad faith or impermissible bias in any way. I can certainly understand the March 2019 decision from a business perspective—I read it as the culmination of what has gone on with respect to RBT2 and DP4 until that point, in particular the expression of the VFPA's concerns set out in its February 2, 2018 letter, save that the VFPA back-tracked on its previous invitation to process GCT's PPE through its PER Process. Rather, the problem lies not so much in the reasons for the March 2019 decision, but rather, as I deal with below, in its timing in relation to the regulatory, decision-making process that GCT had triggered in filing its PPE through the PER Process portal. Here, the RBT2 train had been on the rails for some six years, heading down the track of development, and on the whole, I am not convinced that the March 2019 decision of the VFPA not to consider at that time a project that would add additional capacity of 2 million TEUs when the need for such extra capacity beyond RBT2 was not projected by the VFPA, was a sign of a closed mind on the part of the port authority in the sense postulated by GCT.

[239] As regards the VFPA's invitation of October 2, 2019 for GCT to make submissions in relation to its claim of bias so that the port authority could address it, GCT asserts the invitation was yet another tactical decision; it argues that the VFPA has no process to deal with a situation

where its bias is raised, that at no time during the present proceedings has the VFPA articulated a process on how such a review of a claim of bias was to be undertaken, and that in any event it would have been the same executive members against whom the allegation of bias was made that would have ruled on their own bias. I put it to GCT's counsel whether in fact what the VFPA was inviting GCT to do was indeed to suggest an acceptable process whereby the port authority could address whether there existed any impermissible bias on its part, and if so, what steps need to be taken to alleviate it. GCT's response was that this was not the proper way for a statutory decision maker to address its own bias. However, context is important, and we must not forget that the VFPA is not set up as a traditional regulatory boards or tribunals. GCT provided no example of a process for how a statutory decision maker of the type of the VFPA was to deal with allegations of its own bias, yet took issue with the fact that the VFPA was suggesting that it may rule on its own bias while there was a live application for judicial review to deal with the issue. A tribunal's ability to rule on its own bias is a prominent feature of administrative law (*Lin* at para 6; *CB Powell Limited* at para 33; *Eckervogt v British Columbia*, 2004 BCCA 398).

[240] GCT also takes issue with the fact that it was only with the affidavit of Mr. Xotta, filed in August 2021 as part of the present proceedings, that it first became aware that it was the VFPA executives who made the decisions reflected in the March 2019 and September 2019 decisions; until then, the decision-making process was "opaque" according to GCT. For my part, I see nothing nefarious in the fact that the VFPA only disclosed that it was its executive team that made the decisions reflected in the March 2019 and September 2019 decisions in the affidavits filed in support of its defence of GCT's claim; I am not quite sure what earlier opportunity would have been more appropriate, notwithstanding that the March and September 2019 decisions were

signed by a VFPA executive. GCT concedes that it was the VFPA board of directors that would have delegated the decision-making to the port authority's executives; it therefore only makes sense that it would have been the members of the VFPA's executive team who made the relevant decisions.

[241] According to GCT, the rescission of the March 2019 decision by the September 2019 decision and the shielding of the documents that were before the VFPA executives who made both decisions behind a wall of solicitor-client privilege further demonstrate the VFPA's bias and do not cure the procedural fairness issue arising from the March 2019 decision. I put it to GCT counsel during the hearing whether or not it was still open to the VFPA, after an application for judicial review was instituted regarding the March 2019 decision, to simply have a change of heart and rescind that decision. GCT asserted that once a matter was before the courts, the concept of self-help was no longer in the hands of the VFPA and that the September 2019 decision was a blatant litigation strategy by the VFPA, which was somehow gaming the system in an attempt to shield itself from judicial review. The furthest GCT would go was to concede that there could be circumstances where a port authority feels that it genuinely made a mistake and rescinds an earlier decision, but GCT's counsel defied this Court to find a VFPA process that deals with rescission in the bias context. In essence, GCT is arguing that the March 2019 decision could not be rescinded in the context of bias, thus the VFPA is biased because it rescinded its March 2019 decision. I cannot agree as it seems to me that GCT is involved in an exercise of circular reasoning.

[242] In any event, this is again a tempest in a teapot. GCT argues that it could accept a scenario where a tribunal has a process for reconsideration and, in that context, finds that it made an error and rescinds an earlier decision. However, here there is an absence of such a process, thus no control and no ability to review because the tribunal record does not contain any document that was before the VFPA executives when the September 2019 decision was made. Again, I have not been convinced by GCT. I accept that the PER Process was not followed with the March 2019 decision, but that was the very reason the VFPA issued the September 2019 decision. I also accept that there is no process for reconsideration of a decision of the VFPA other than judicial review, but if there was to be such an internal process, it would be for the benefit of the stakeholder seeking reconsideration of a decision of the VFPA. I have not been convinced that the VFPA requires a process for itself to reconsider its own decision.

[243] On a final note on the issue of bias, GCT argues further that there can be no other way to interpret all the purported indicia of bias other than to find that the VFPA had a closed mind with respect to DP4, and that a closed mind necessarily implies actual bias. GCT asserts that it is one thing to exercise a discretion to refuse to approve a project after considering it on its merits, pursuant to the VFPA's regulatory obligations under the CMA, but it is quite another to purport to exercise such a discretion to refuse to even consider DP4 on its merits; all that GCT is required to do, it argues, is to demonstrate that there exists a regulatory regime that the VFPA is tasked by statute with administering—a regime that has obligations of fairness, impartiality, transparency, and objectivity—and which does not afford the port authority the right to have a closed mind and not even consider the project on an evidence-based basis. I agree with GCT, but find that although a purported exercise of discretion to refuse to consider DP4 on its merits may

constitute a breach of procedural fairness, it does not necessarily imply that the VFPA executives had a closed mind in the sense of creating an impermissible bias against DP4 in the present context. Rightly or wrongly, the VFPA may well have thought themselves justified to come to the March 2019 decision for the very reasons set out therein, reasoning which, again, rightly or wrongly, does not necessarily imply impermissible bias on its part.

(2) Has the VFPA breached GCT's legitimate expectations?

[244] GCT made it clear before me that it is not arguing that once its PPE was submitted through the PER Process portal, the VFPA had the obligation to see the review process through to its completion before coming to a decision on the project which, it admits, the port authority already knew well prior to the submission of its PPE. Rather, what GCT is arguing is that engaging the VFPA on February 5, 2019, as a statutory decision maker undertaking a public law function that has administrative law requirements, with obligations of procedural fairness, objectivity and transparency, required the port authority to dedicate the needed resources in order to provide some semblance of consideration on the merits of the proposal.

[245] GCT argues that the entire structure of the PER Policy is designed to deal with its PPE being allowed into the process, and thus, there is no room within the delegation, procedures and process that contemplates the VFPA being able to "shut the door" and not allow GCT to engage the PER Process. GCT asserts that the VFPA's closed mind in dealing with the DP4 project thwarted the legitimate expectations that it, and the port community, had that the VFPA would abide by the PER Process that it itself had established, and whereby, as part of that review process, the VFPA was expected to confirm the category of review, appoint a project lead and

complete tactical studies, and that once GCT's application was considered and confirmed complete, the technical review would go through and a final decision would be made, with the project permit being issued with conditions, if appropriate; DP4 should have been allowed to enter the PER Process but, as argues GCT, the VFPA summarily refused, with the March 2019 decision, to allow its PPE to continue through the review process in good faith, and in doing so, barred the door to any consideration of the DP4 project.

[246] The VFPA argues that I should not consider GCT's argument regarding the doctrine of legitimate expectations as GCT did not specifically plead it in the amended notice of application for judicial review, raising it for the first time in its memorandum of fact and law. In any event, argues the VFPA, the PER Process does not create a substantive right on the part of an applicant to have its proposal considered, but is simply a non-binding guide provided to assist project proponents in making their application; in fact, the Guide contains a disclaimer on the first page, which reads: "This application guide and its supporting documents are provided as information and should not be taken as scientific, business, legal or other professional advice". The introduction states: "this guide is provided for information purposes only and may be updated from time to time without notice". Notwithstanding the objection raised by the VFPA, for my part, I find the issue important enough that it must be addressed, in particular considering the history of this matter and the relationship of the parties.

[247] The doctrine of legitimate expectation was set out by the Supreme Court of Canada in *Agraira v Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36 at paragraphs 93 to 97:

[93] As this Court noted in *Dunsmuir*, at para. 79, "[p]rocedural fairness is a cornerstone of modern Canadian administrative law. Public decision makers are required to act fairly in coming to decisions that affect the rights, privileges or interests of an individual." The Court's comment that "[p]rocedural fairness has many faces" (*Dunsmuir*, at para. 77) is also relevant to this case.

[94] The particular face of procedural fairness at issue in this appeal is the doctrine of legitimate expectations. This doctrine was given a strong foundation in Canadian administrative law in *Baker*, in which it was held to be a factor to be applied in determining what is required by the common law duty of fairness. If a public authority has made representations about the procedure it will follow in making a particular decision, or if it has consistently adhered to certain procedural practices in the past in making such a decision, the scope of the duty of procedural fairness owed to the affected person will be broader than it otherwise would have been. Likewise, if representations with respect to a substantive result have been made to an individual, the duty owed to him by the public authority in terms of the procedures it must follow before making a contrary decision will be more onerous.

[95] The specific conditions which must be satisfied in order for the doctrine of legitimate expectations to apply are summarized succinctly in a leading authority entitled Judicial Review of Administrative Action in Canada:

> The distinguishing characteristic of a legitimate expectation is that it arises from some conduct of the decision-maker, or some other relevant actor. Thus, a legitimate expectation may result from an official practice or assurance that certain procedures will be followed as part of the decision-making process, or that a positive decision can be anticipated. As well, the existence of administrative rules of procedure, or a procedure on which the agency had voluntarily embarked in a particular instance, may give rise to a legitimate expectation that such procedures will be followed. Of course, the practice or conduct said to give rise to the reasonable expectation must be clear, unambiguous and unqualified.

…

> [96] In *Mavi*, Binnie J. recently explained what is meant by "clear, unambiguous and unqualified" representations by drawing an analogy with the law of contract (at para. 69):
>
> > Generally speaking, government representations will be considered sufficiently precise for purposes of the doctrine of legitimate expectations if, had they been made in the context of a private law contract, they would be sufficiently certain to be capable of enforcement.
>
> [97] An important limit on the doctrine of legitimate expectations is that it cannot give rise to substantive rights (Baker, at para. 26; Reference re Canada Assistance Plan (B.C.), 1991 CanLII 74 (SCC), [1991] 2 S.C.R. 525, at p. 557). In other words, "[w]here the conditions for its application are satisfied, the Court may [only] grant appropriate procedural remedies to respond to the 'legitimate' expectation" (C.U.P.E. v. Ontario (Minister of Labour), 2003 SCC 29, [2003] 1 S.C.R. 539, at para. 131.
>
> [First emphasis added; second and third emphasis in original.]

[248] At the outset, I find that the manner in which GCT approached the doctrine of legitimate expectations would suggest a merger of such a doctrine with the duty of procedural fairness, whereby a breach of the doctrine necessarily leads to a breach of the duty; such expression of the doctrine is incorrect. The doctrine of legitimate expectations is but one factor meant to inform the content or scope of the duty of fairness, a duty that varies from case to case (*Baker* at paras 23-27). The content of such a duty must also be determined in conjunction with other factors, and in particular, the statutory scheme which created the VFPA.

[249] Also, the doctrine of legitimate expectations cannot give rise to substantive rights; representations giving rise to the doctrine must be procedural in nature and must not conflict with the decision maker's statutory duty (*Canada (Attorney General) v Mavi*, 2011 SCC 30 at para 68). As stated, the VFPA argues that the PER Process only provides guidance on the

procedure to be followed, and any claim or expectation that a project application would be assessed through the PER Process could only be a substantive right, if at all, and under the circumstances, may well dilute a port authority's statutory duty to determine the projects that form part of the long-term strategic plan for the port. I agree. If I accept that the PER Process creates an obligation on the part of the VFPA to fully process any proposal under any circumstance, that would mean that any project proponent would be able to force the port authority to commit resources to reviewing an application for, say, a new liquid bulk terminal, when the addition of such a terminal is inconsistent with the commercial direction the port authority wishes to take at a particular time and for a particular area of the port, even where, quite possibly, the development of a new liquid bulk terminal at some point in the future is consistent with the goals, objectives, policy directions and land use designation included in the port authority's Land Use Plan. To do so would be tantamount to the tail wagging the dog, especially where, as is the case here, the proponent knew of the port authority's preference for another project well before it submitted its PPE.

[250] However, GCT is not arguing that it has substantive rights such as a right to a specific outcome or that its legitimate expectations extend to having the right to see its proposal for DP4 be run through the entire PER Process before the VFPA rendered its decision; what GCT is asserting is that once the PER Process is engaged, procedural fairness dictates that its PPE not be dismissed out of hand, in particular where the VFPA previously confirmed its right to access the PER Process. The VFPA does not seem to take issue with that aspect of GCT's argument and concedes that although the PER Process cannot give rise to substantive entitlements, it may

engage the right to procedural fairness as part of the VFPA's regulatory, decision-making function.

[251] I accept that the Guide provides that before an existing tenant is to file its PPE, it should first review its property agreement "to ensure the proposed works and uses are permitted or if landlord consent or an amendment to an agreement is first required"; however, I do not read this guidance as a condition precedent to engaging the VFPA's regulatory, decision-making process for projects requiring the port authority's review. Prior to the formal submission under the PER Process, any discussions between project proponents and the VFPA regarding a project, or any meetings or project presentations by proponents, would not necessarily engage the decision-making role of the port authority for such projects. Regardless of the previous discussions it may have had with the VFPA, and the various presentations it made regarding DP4, I agree with GCT that the VFPA had not made a decision regarding DP4 and did not have to until its regulatory role as a statutory decision maker was engaged. It is the engagement of the port authority's regulatory, decision-making function—with the filing of a preliminary project review application under the PER Process—which triggers the duty of procedural fairness, to which any project proponent has a right. As stated by the Supreme Court in *Baker*: "The fact that a decision is administrative and affects 'the rights, privileges or interests of an individual' is sufficient to trigger the application of the duty of fairness" (*Baker* at para 20; *Cardinal v Director of Kent Institution*, [1985] 2 SCR 643 at p 653).

[252] Consequently, with GCT filing its application under the PER Process, I find that the VFPA owed a duty of procedural fairness to GCT in respect of its PPE. That said, the next issue

is the content and scope of such a duty. As instructed by the Supreme Court in *Baker*, the content and level of the duty of fairness varies from case to case depending upon applicable factors (*Baker* at paras 21 to 27). As made clear by the FCA in *Canadian Pacific Railway Company*, in assessing a procedural fairness argument, a court is required to consider whether the procedure was fair having regard to all of the circumstances, including the *Baker* factors (*Canadian Pacific Railway Company* at para 54). In particular, and relevant in this case, one of the factors to consider in assessing whether there was a breach of procedural fairness in the VFPA putting an end to the PER Process review of GCT's PPE when it did includes, as indicated earlier, the "nature of the statutory scheme and the 'terms of the statute pursuant to which the body operates'" (*Old St Boniface* at p 1191; *Baker* at para 23).

[253] As stated earlier, the PER Policy makes it clear that the PER Process is to be "guided by principles and legal requirements of reasonableness, procedural fairness and ethical conduct." In addition, the PER Policy contains a "Procedures" section, which provides, *inter alia*, that the President and CEO of the port authority is to establish procedures and standards to guide and administer the PER Process, which is to apply to all physical works and activities within VFPA-managed lands and waters, and which also ensures that each proposed project reviewed under the process receives a level of assessment sufficient to determine compliance with relative requirements. I should also add that the guiding principles of the PER Process indicate that the process is to be transparent, apply the appropriate level of review relative to any potential impacts, and provide for the efficient use of resources.

[254] As set out in the Guide, the PER Process has six steps, beginning with (1) the submission by the proponent of the PPE through the VFPA's project and environmental review portal, (2) the assessment of the PPE, (3) submission of the full project application, (4) once the application is considered complete, the application is reviewed, (5) a project decision is made, and (6) if allowed, permitting conditions are issued. In this case, the VFPA acknowledged GCT's right to engage the PER Process in its February 2, 2018 letter. Moreover, upon submission of the PPE a year later, an internal VFPA email circulated the PPE and indicated, consistent with Step 2 of the process, that a team leader would be named and that staff was to be undertaking a review of the preliminary submissions. It is at the implementation stage of Step 2 where, in the words of GCT, everything ground to a halt. Consequently, it is what happened between then and the March 2019 decision that is at issue.

[255] The Guide indicates that the process is to apply the appropriate level of review relative to any potential impacts and provide for the efficient use of resources. The Guide also provides that the PER Process is meant to ensure that proposed projects are "carefully considered in the process of determining if they should proceed." Careful consideration does not imply a complete six-step assessment of the proposed project in all cases. If an element in a proposal is identified early by the port authority as being a non-starter, say, for example, where by-laws or regulations prohibit development in the proposed area of a project of the nature of the proposal, allowing the review process to proceed to the full application stage will not change matters and may not serve any purpose, and thus would not be an efficient use of resources. Although I agree with the GCT that the VFPA must "do what they say they will do", commercial efficacy has a role to play in the manner that the review process is undertaken.

[256] Likewise, I can certainly envisage a situation where the commitment of resources to assess beyond the preliminary review stage a project which has already formed the subject matter of lengthy discussions, previous consideration and formal presentations by its proponent to the port authority's directors and executives, may be unnecessary in the context of a fair process, and where it would not be unreasonable or a breach of procedural fairness for the port authority to postpone or cut short its protracted regulatory review process, and even more so where the VFPA's own long-term strategic plan includes another similar project.

[257] That said, however, having a proponent engage the decision maker in its regulatory role should be the right of all proponents. As stated, the PER Process is the VFPA-created portal through which project proponents engage the VFPA's decision-making regulatory regime for the assessment of projects requiring the port authority's review, and once a project proponent triggers the PER Process, the port authority could not simply give the proposal short shrift.

[258] Looking at the *Baker* factors, which inform the content of the duty of procedural fairness, I accept that the nature of the decision being made by the VFPA is one of a non-adjudicative decision maker, with little resemblance to judicial decision-making, thus rendering it more likely that commercial considerations in how and to what extent the process is followed come into play. This is consistent as well with the nature of the statutory scheme as outlined earlier. The role of the VFPA within the statutory scheme, its letters patent and other indicia as the commercial operator of the port would also tend to support the proposition that commercial considerations and the need for the efficient use of resources must play a role in the determination of the duty of fairness underpinning the March 2019 decision, keeping in mind that any such commercial

considerations must operate within a regulatory context once the PER Process is engaged. There is also no doubt that moving forward with DP4 is of financial importance to GCT as it would create a significantly larger footprint for GCT within the Port of Vancouver, an issue, as mentioned earlier, which is also of concern for the VFPA. That said, a financial interest is much lower on the scale in determining the scope of procedural fairness than, say, a right to freedom or another Charter protected right, and GCT has not gone as far as to suggest that its economic livelihood is dependent on the decision to move DP4 forward, whether locally or even internationally.

[259] The determination of when the review process can legitimately be cut short, if at all, so as to remain procedurally fair is, as set out in *Baker*, very much subject to a case-by-case determination of the surrounding circumstances. I agree with GCT that neither the CMA, nor its regulations, nor the VFPA's letters patent grant authority for the port authority to refuse to process its PPE through the project review regulatory process that the port authority has created; it asserts that the delegated authority was for a process—not a refusal to enter into the process, which would otherwise require clear language—and that transparency and consistency of treatment of applications are the hallmark of what the port stakeholders should expect. However, there is also nothing in the CMA, the letters patent, or the delegation under the PER Policy requiring the VFPA to run all projects through all the phases of the PER Process. Rather, it seems to me that what is required, as stated earlier, is that the procedures and standards ensure that each proposed project reviewed under the process receives a level of assessment sufficient to determine compliance with relative requirements, requirements that include, amongst other

things, the commercial needs of the port and the fulfilment of long-term planning commitments and strategies.

[260] GCT cites *North End Community Health Association v Halifax (Regional Municipality)* [*North End Health*], 2012 NSSC 330 at paragraph 52, for the proposition that a duty to act in accordance with legitimate expectations is owed, "particularly where the decision-maker has created a procedure which it says it will follow". I agree that legitimate expectations, as a factor under *Baker*, could heighten the degree of procedural fairness owed by a decision maker to where, without anything else, a failure to follow such procedures will amount to a breach of procedural fairness; that was the case in *North End Health*; however, that is not the case here. In this case, one cannot deny that other factors must come into play, including the history of development of the area around the proposed DP4 project and the engagement of the parties, as well as the statutory scheme under the CMA, the port authority's role as a non-adjudicatory regulator, and the commercial purpose for its continuation.

[261] I should also point out that a PPE is meant to be, as described by GCT, a very high level description of the proposed project. If the VFPA is to cut short the review process, its decision for not moving forward with a project must nonetheless be reasonable; I can imagine a decision of the port authority to refuse to complete the review process of a proposed project being set aside by a court on judicial review where the very foundation of the refusal could only reasonably have been ascertained through the completion of the review process. That is not the case here and, in fact, not the argument advanced by GCT.

[262] That said, GCT must be allowed to know the case that it must meet, and this within the regulatory process created with the triggering of the PER Process. As mentioned, prior to the formal submission under the PER Process, any discussions between project proponents and the VFPA regarding a project, or any meetings or project presentations by proponents, were outside the port authority's regulatory role, and would not necessarily engage the right to procedural fairness. Although the VFPA may have the right to exercise its discretion so as to put an end to the review process at a certain point, did the VFPA act fairly in "halting" the review process when it did? In fact, during his cross-examination, Mr. Xotta confirmed that the VFPA did not engage any of the steps of the PER Process, I take it, beyond Step 1.

[263] Step 2 of the PER Process is the preliminary review stage, which includes, amongst other things, the assignment of a port authority project lead, meeting with proponents to discuss the project, and the identification by the port authority of additional information or studies that may be required to support a complete application. It seems as though that stage is meant to act as a clearing house, initially vetting a preliminary project review application at a high level to spot any non-starters, for the determination of the appropriate level of review and for the initial meeting with the proponent to address, amongst other things, deficiencies, concerns and the requirements for the project prior to moving to the full application submission and assessment stage, where the heavy lifting is to take place.

[264] Here, there was no indication of any concerns expressed to GCT between the time it engaged the port authority's regulatory decision-making process and the March 2019 decision that would have allowed the VFPA to engage GCT in how it was proposing to address the

VFPA's concerns prior to the review process being shut down. In his cross-examination, Mr. Xotta suggested that the concerns were provided to GCT with the February 2, 2018 letter. As regard the reason why GCT's PPE was halted before proceeding to Step 2, Mr. Xotta also stated as follows:

> Q. Somebody stopped the process that Mr. Yeomans thought he was moving forward with, correct?
>
> A. Again, the project did not proceed through the subsequent phases. In other words, it stopped at step 2.
>
> Q. Well, it did not get going in step 2, did it?
>
> A. That's correct.
>
> Q. And it didn't get going in step 2 because somebody at VFPA told Mr. Yeomans and/or you not to do so, correct?
>
> A. The PPE failed to fundamentally address the issue that was referred to in [the February 2, 2018 letter], which is the timing of projects conflicting with other ones.

[265] In my view, every proponent has the right to engage the decision maker acting within its regulatory capacity, and the refusal of a decision maker to engage with the process that it itself created to trigger its regulatory function would be a breach of procedural fairness. Although I accept that the February 2, 2018 letter may have been the VFPA's effort to put its concerns to GCT, it was done prior to GCT engaging the port authority's regulatory process. In this case, GCT must be allowed to know the case that it must meet, and this within the regulatory process created with the triggering of the PER Process. Under the circumstances, allowing the process to move to the preliminary review stage by appointing a project lead and having the discussion and exchange with GCT within the regulatory context would have been, in my judgment, what the duty of fairness called for under the circumstances. That does not mean that the VFPA must

undertake self-induced amnesia in its consideration of DP4. It would make little commercial sense for the preliminary assessment process to begin from scratch every time an application is made under the PER Process; the port authority should be able to draw on its previous knowledge and discussions and exchanges with the proponent about a proposed project in determining whether to move beyond the preliminary project review stage.

[266] I note in particular that following GCT's submission of its PPE, the application was distributed internally amongst VFPA management confirming that staff would be doing an internal review over the coming days or weeks. The email highlights that GCT's proposal was intended to be a two-stage development and that "no doubt, a number of initial meetings with GCT will be required." As stated earlier, on February 7, 2019, the VFPA acknowledged receipt of the PPE and confirmed to GCT that staff "will undertake a review of the submission to better understand the project and determine if our submission criteria has been satisfied in order to continue processing." It also appears that the proposed meeting for February 13, 2019, was deferred on account of VFPA staff not having completed their review of the information submitted by GCT, although on February 15, 2019, the VFPA confirmed that GCT's request and submission materials were before VFPA senior management. In the end, it is not clear whether, or to what extent, if any, VFPA staff undertook their initial review of GCT's submission.

[267] Although the PPE is meant to be a high-level description of the project, it did provide insight regarding, amongst other things, the expectations of GCT undergoing PER Process review, a description of the project and its proposed location, project context and rationale, key elements of project scheduling and regulatory engagement, stakeholder outreach and, in

particular, environmental mitigation efforts and commitments. However, all the evidence establishes is that a project lead was not assigned for DP4, that no meeting took place between the VFPA and GCT, and that at no time was GCT advised of any concerns specifically addressing its submissions. The VFPA says that the deliberation of its executives is reflected in the March 2019 decision; however, I find that this was insufficient under the circumstances and—putting aside any issue of reasonableness and failure to engage with GCT's submissions—a breach of the port authority's duty of procedural fairness was owed to GCT.

[268] Given confirmation of the initial review by the VFPA, the legitimate expectations of GCT weighed even more heavily in the determination of the scope of the duty for procedural fairness. There is no doubt that the VFPA has the right, and I dare say the obligation, to set development priorities for the Port of Vancouver and, wearing its commercial hat, to cease the review of a project which is inconsistent with such priorities at the time, and which may be riddled with other concerns—concerns which, I might add, were expressed in the March 2019 decision. However, before ceasing such review, it was incumbent upon the VFPA, wearing its regulator's hat, to put those concerns to GCT within the framework of the regulatory process, where the duty of procedural fairness is engaged, and at least at a stage where, on the spectrum of efficient and justifiable use resources, the port authority is still at the lower end of the usage metre. In fact, in his cross-examination, Mr. Xotta conceded that the intention of the PER Process is to also "help inform potential applicants of the depth of analysis and questions that might arise in the process." This must be undertaken within the scope of the port authority's regulatory, decision-making process, regardless of the commercial discussions that may have taken place prior to the formal engagement of that process.

[269] It may also well have been that following the completion of the preliminary project review stage, and the expected meeting between the parties, no further material addressing those issues or concerns would have been submitted by GCT as part of its more fulsome application; however, the process does envisage at an early stage for proponents to discuss those concerns with the port authority wearing its regulator's hat, during which time the VFPA may well identify information that would be required if the process was to continue. Here, that part of the process was not fully undertaken. I accept that GCT was aware of the concerns that the VFPA had with DP4 well before February 5, 2019, and, as conceded by GCT before me, the nature of DP4 did not change significantly between the time GCT began discussing the DP4 project in detail with the VFPA in 2016 and the March 2019 decision. I also accept that the VFPA had put GCT on notice on February 2, 2018, regarding how it would view any formal application for assessment of DP4; however, the submission of the PPE through the PER Process was the first formal submission of DP4 by GCT to the VFPA. However as stated, up to that point, any discussions and concerns raised by the VFPA, such as those in the February 2, 2018 letter, were expressed prior to the triggering of the regulatory decision-making process and outside the protections afforded by such a process by its very nature—the February 2, 2018 letter contained no decision, and accordingly, could not form the subject matter of an application for judicial review.

[270] Also, it is possible that the March 2019 decision would have met the requirements for procedural fairness had it been issued after the completion of the preliminary review stage, where the parties were to engage, for the first time, with the formal submission of GCT, but it was not; the VFPA simply jumped the gun.

[271] On the whole, I find that the VFPA breached its duty of procedural fairness in not having, in this case, undertaken the tasks set out in Step 2 of the PER Process, in not having proceeded to review GCT's PPE at least through the preliminary review stage and, rather, in issuing its March 2019 decision when it did.

[272] GCT further argues that I cannot separate the issue of bias from the issue of procedural fairness and that if I were to find that the VFPA breached procedural fairness by refusing to assess its PPE through the PER Process without first having reviewed it, such conduct was tantamount to an act of pre-judgment which could only be attributable to a closed mind. I disagree with GCT. As stated, I see this more as the VFPA executive team improperly putting its commercial foot ahead of its regulatory foot, relying on what it knew, or at least thought it knew, of the DP4 project and the manner in which it would affect RBT2, without allowing that determination to be made within the regulatory process which any proponent, GCT included, had a right to engage.

[273] GCT also argues that according to Mr. Xotta, the decision not to move forward with processing GCT's PPE was made in a meeting of the executives on February 13, 2019, yet on February 15, 2019, the VFPA advised GCT that the matter was before senior management—which I assume to be the VFPA executives—and then it took another two weeks to issue the March 2019 decision. I am not sure what to make of GCT's insinuation, however I find nothing untoward in a decision having been made by the VFPA executives not to move forward with the review process and then, given the obvious magnitude of the decision, for the decision to be reviewed, and then for the VFPA to take the time needed to draft the appropriate response—

possibly even seeking legal advice regarding its drafting. In addition, as I stated earlier, the paucity of documents evidencing the decision-making process is not unusual, in my experience, in the context of this matter.

[274] That said, and given my finding of no bias on the part of the VFPA with respect to its decision-making process, I also find that any breach of procedural fairness was corrected with the September 2019 decision, whereby the VFPA advised, following the enactment of the IAA, that it was rescinding the March 2019 decision and that port staff would be in contact with GCT to re-engage the PER Process. Clearly, the VFPA continued to have jurisdiction under the permitting process, save that with the enactment of the IAA, its role during and following the impact assessment process of the review would henceforth be limited.

[275] I also find that the September 2019 decision corrects any concerns with the reasonableness of the March 2019 decision. In particular, I return to the February 22, 2019 letter from Mr. Stewart to the Review Panel, where he stated that the VFPA "will not authorize or allow a proposed project to proceed if it is likely to result in significant adverse environmental effects that cannot be mitigated" and that "[p]roject permit applications may not be accepted if the port authority determines the project is not in the best interests of Canada's overall trade objectives." Here, the landscape has now changed and environmental assessment will be undertaken under the IAA, with the decision of the Agency informing the remaining permitting process under the PER Process. Although it may well be that the port authority has the discretion not to accept a project permit application if the port authority determines that the project is not in the best interests of Canada's overall trade objectives, that is not the reason why the VFPA

refused to allow GCT's PPE to be run through the PER Process. The September 2019 decision rescinding the March 2019 decision and inviting GCT to re-submit its PPE—arguably with any amendments to take into consideration the change in the regulatory landscape brought on by the enactment of the IAA—corrects any reviewable errors in the first decision.

C. *Mootness and prematurity*

[276] GCT does not truly address the issue of mootness other than to say that the matter is now *res judicata*. As I mentioned earlier, I disagree, yet I determined that the issue of mootness and prematurity were intrinsically bound to the issue of bias. Having now considered the bias issue and found no impermissible bias on the part of the VFPA, the issues of mootness and prematurity return.

[277] GCT conceded before me that if I were to find no evidence of impermissible bias or no reasonable apprehension of bias on the part of the VFPA, it would be difficult for GCT to argue that the remedies it is seeking should be granted. I agree. In fact, GCT does not argue that I should nonetheless consider the matter further under the principles set down by the Supreme Court in *Borowski*.

[278] Considering the effect of the September 2019 decision, I am of the view that the issues surrounding the March and September 2019 decisions are now moot as there no longer exists a live issue that would affect the interests of the parties. First, I find that the status of GCT's PPE has been reset with the September 2019 decision. Also, the repeal of the CEAA and the enactment of the IAA has reshaped the landscape and regulatory relationship between the port

authority and GCT, with the need to significantly engage on DP4 having been punted well down the field of time.

[279] Given the change in legislation, any perceived preference—even assuming that such a preference was impermissible—is no longer a live issue if the VFPA is one day called upon to consider DP4 under its PER Process because RBT2, under the IAA, will necessarily form part of the impact assessment process of DP4; unlike the Review Panel under the CEAA, the review panel under the IAA is required to consider several factors, including the need for a Designated Project, alternative means, and the cumulative effects of other projects to be carried out (IAA at ss 22(1)(a)(ii), (d) and (f)). Although the VFPA retains permitting authority, it is no longer the port authority but rather the Agency under the IAA that would decide whether an impact assessment is required, as well as the any adverse effects of DP4.

[280] Given my finding that the matter has become moot, I need not address the issue of prematurity.

D. *Does this Court have the jurisdiction to grant the relief sought by GCT?*

[281] Given my findings that the evidence does not support the existence of impermissible bias on the part of the VFPA in relation to the March and September 2019 decisions, there is also no need to consider the availability of the remedies in the nature of *mandamus* being requested by GCT or any other relief claimed in the amended notice of application for judicial review.

XI. Conclusion

[282] I see no issue with the VFPA claiming, as a regulator, that it has a policy-based preference for one expansion project over another. Strategic decisions necessarily involve making choices between two competing visions for the development of the port. In this case, preferring to move forward with the RBT2 project did not constitute a closing of the mind on the part of the VFPA, as administrative decision maker, thus rendering it biased in the sense professed by GCT. Moving forward with infrastructure development necessarily includes putting other options aside - in a way, closing one's mind to them - but that is part of the decision-making process which allows a port authority to move forward with development and does not necessarily evidence a reasonable apprehension of bias on the part of the port authority in favour of its preferred project, nor does it mean that proponents of those competing visions for development may compel the port authority to go back and review its strategic decisions by simply throwing a new shiny penny into the mix.

[283] GCT has submitted a number of hypotheses purporting to be evidence of a closed mind on the part of the port authority in relation to the DP4 project, thereby constituting impermissible bias affecting the March and September 2019 decisions. Although providing an interesting perspective on the record, GCT has not convinced me that its perspective on the elements of fact that it gleans from the record is the one I should adopt. Cherry picking elements of the factual record in an attempt to create a reoccurring theme is difficult to uphold when the elements may be reasonably explained quite apart from that theme.

[284] Having found that GCT has failed to establish impermissible bias on the part of the VFPA, and in line with the reasons of my decision, I dismiss the present application for judicial review, with costs in favour of the respondents. As requested at the conclusion of the hearing before me, I will provide the parties time to submit written submissions on costs.

JUDGMENT in T-538-19

THIS COURT'S JUDGMENT is that:

1. The present application is dismissed, with costs in favour of the respondents.

2. The parties are encouraged to confer and come to an agreement as to costs. If the parties are unable to agree, the respondents may serve and file written submissions on costs not exceeding three pages (excluding schedules or appendices) within 15 days of the present judgment. The applicant may then serve and file written submissions in response not exceeding three pages (excluding schedules or appendices) within 15 days thereof, with reply submissions from the respondents within 5 days thereafter. I shall remain seized of the matter for the purpose of issuing my decision on costs. .

"Peter G. Pamel"
Judge

ANNEX

Canada Marine Act, SC 1998, c 10

Purpose of the Act	**Objectifs**
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	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) 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) mettre en œuvre 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) promote the success of ports for the purpose of contributing to the competitiveness, growth and prosperity of the Canadian economy;	a.1) promouvoir la vitalité des ports dans le but de contribuer à la compétitivité, la croissance et la prospérité économique du Canada;
(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 harmonization of standards among jurisdictions;	b) fonder l'infrastructure maritime et les services sur des pratiques internationales et des approches compatibles avec celles de ses principaux partenaires commerciaux dans le but de promouvoir l'harmonisation des normes qu'appliquent les différentes autorités;
(c) ensure that marine transportation services are organized to satisfy the needs	c) veiller à ce que les services de transport maritime soient organisés de façon à satisfaire

of users and are available at a reasonable cost to the users;

les besoins des utilisateurs et leur soient offerts à un coût raisonnable;

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

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

(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;

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) 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;

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

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

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

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

Definitions

Définitions

5 The definitions in this section apply in this Part.

5 Les définitions qui suivent s'appliquent à la présente partie.

airport means an airport situated in a port. (*aéroport*)

aéroport Aéroport situé dans un port. (*airport*)

letters patent means letters patent as amended by

lettres patentes Les lettres patentes telles que modifiées par lettres patentes

supplementary letters patent, if any. (*lettres patentes*)

supplémentaires, le cas échéant. (*letters patent*)

port means the navigable waters under the jurisdiction of a port authority and the real property and immovables that the port authority manages, holds or occupies as set out in the letters patent. (*port*)

port L'ensemble des eaux navigables qui relèvent de la compétence d'une administration portuaire ainsi que les immeubles et les biens réels dont la gestion lui est confiée, qu'elle détient ou qu'elle occupe en conformité avec les lettres patentes. (*port*)

user, in respect of a port, means a person that makes commercial use of, or provides services at, the port. (***utilisateur***)

utilisateur À l'égard d'un port, personne qui utilise le port à des fins commerciales ou y fournit des services. (*user*)

Application of Part

6(1) This Part applies to every port authority set out in the schedule and to every port authority for which letters patent of incorporation are issued or that has been continued under this Part and that has not been dissolved.

Application de la présente partie

6(1) La présente partie s'applique aux administrations portuaires inscrites à l'annexe et à celles pour lesquelles des lettres patentes ont été délivrées ou qui ont été prorogées sous le régime de la présente partie et n'ont pas été dissoutes.

Amendment of schedule

(2) The Minister may, by regulation, amend the schedule.

Modification de l'annexe

(2) Le ministre peut, par règlement, modifier l'annexe.

Agent of Her Majesty

7(1) Subject to subsection (3), a port authority is an agent of Her Majesty in right of Canada only for the purposes of engaging in the port

Mandataire de Sa Majesté : administration portuaire

7(1) Sous réserve du paragraphe (3), les administrations portuaires ne sont mandataires de Sa Majesté du chef du Canada que dans le cadre des activités

activities referred to in paragraph 28(2)(a).

portuaires visées à l’alinéa 28(2)a).

Not an agent of Her Majesty

Non-mandataire de Sa Majesté

(2) A wholly-owned subsidiary of a port authority is not an agent of Her Majesty in right of Canada unless, subject to subsection (3),

(2) Les filiales à cent pour cent des administrations portuaires ne sont pas mandataires de Sa Majesté du chef du Canada sauf si, sous réserve du paragraphe (3) :

(a) it was an agent of Her Majesty in right of Canada on June 10, 1996; and

a) d’une part, elles l’étaient au 10 juin 1996;

(b) it is an agent of Her Majesty in right of Canada under an enactment other than this Act.

b) d’autre part, elles le sont en vertu d’une loi autre que la présente loi.

Borrowing restriction

Réserve

(3) A port authority or a wholly-owned subsidiary of a port authority may not borrow money as an agent of Her Majesty in right of Canada.

(3) Ni les administrations portuaires ni les filiales à cent pour cent des administrations portuaires ne peuvent emprunter de fonds à titre de mandataires de Sa Majesté du chef du Canada.

Letters patent

Lettres patentes

8(1) The Minister may issue letters patent — that take effect on the date stated in them — incorporating a port authority without share capital for the purpose of operating a particular port in Canada if the Minister is satisfied that the port

8(1) Le ministre peut délivrer des lettres patentes — prenant effet à la date qui y est mentionnée — pour la constitution d’une administration portuaire sans capital-actions en vue d’exploiter un port spécifique au Canada, s’il est convaincu que les conditions suivantes sont réunies :

(a) is, and is likely to remain, financially self-sufficient;

a) le port est financièrement autonome et le demeurera vraisemblablement;

(b) is of strategic significance to Canada's trade;

b) il présente une importance stratégique pour le commerce du Canada;

(c) is linked to a major rail line or a major highway infrastructure; and

c) il est rattaché à une ligne principale de chemins de fer ou à des axes routiers importants;

(d) has diversified traffic.

d) il a des activités diversifiées.

Contents of letters patent

Contenu des lettres patentes

(2) The letters patent shall set out the following:

(2) Les lettres patentes doivent préciser ce qui suit :

(a) the corporate name of the port authority;

a) la dénomination sociale de l'administration portuaire;

(b) the place where the registered office of the port authority is located;

b) le lieu de son siège social;

(c) the navigable waters that are within the port authority's jurisdiction;

c) les eaux navigables qui relèvent de sa compétence;

(d) the federal real property and federal immovables under the management of the port authority;

d) les immeubles fédéraux et les biens réels fédéraux dont la gestion lui est confiée;

(e) the real property and immovables, other than the federal real property and federal immovables, held or occupied by the port authority;

e) les immeubles et les biens réels, autres que les immeubles fédéraux et les biens réels fédéraux, qu'elle occupe ou détient;

(f) the number of directors, between seven and eleven, to

f) le nombre d'administrateurs, compris entre sept et onze, nommés en

be appointed under section 14, to be chosen as follows:

conformité avec l’article 14 et choisis de la façon suivante :

(i) one individual nominated by the Minister,

(i) un administrateur est nommé sur la proposition du ministre,

(ii) one individual appointed by the municipalities mentioned in the letters patent,

(ii) un administrateur est nommé par les municipalités mentionnées dans les lettres patentes,

(iii) one individual appointed by the province in which the port is situated, and, in the case of the port wholly or partially located in Vancouver, another individual appointed by the Provinces of Alberta, Saskatchewan and Manitoba acting together, and

(iii) un administrateur est nommé par la province où le port est situé et, dans le cas du port situé partiellement ou complètement à Vancouver, un second administrateur est nommé par les trois provinces suivantes : l’Alberta, la Saskatchewan et le Manitoba,

(iv) the remaining individuals nominated by the Minister in consultation with the users selected by the Minister or the classes of users mentioned in the letters patent;

(iv) le reste des administrateurs sont choisis parmi les personnes dont la nomination est proposée par le ministre en consultation avec les utilisateurs qu’il choisit ou les catégories d’utilisateurs mentionnées dans les lettres patentes;

(g) a code of conduct governing the conduct of the directors and officers of the port authority;

g) le code de déontologie régissant la conduite des administrateurs et dirigeants de l’administration portuaire;

(h) the charge on the gross revenues of the port authority, or the formula for calculating it, that the port authority shall pay each year to the Minister on the day fixed by the Minister to maintain its letters patent in good standing;

h) le montant des frais — ou le mode de calcul de celui-ci — que l’administration portuaire devra payer annuellement au ministre, à la date fixée par celui-ci, pour le maintien en vigueur de ses lettres patentes, ces frais étant

calculés sur les revenus bruts de l'administration;

(i) the extent to which the port authority and a wholly-owned subsidiary of the port authority may undertake port activities referred to in paragraph 28(2)(a) and other activities referred to in paragraph 28(2)(b);

i) la mesure dans laquelle l'administration portuaire et les filiales à cent pour cent de l'administration portuaire peuvent exercer les activités portuaires visées à l'alinéa 28(2) a) et les autres activités visées à l'alinéa 28(2) b);

(j) the maximum term of a lease or licence of federal real property or federal immovables under the management of the port authority;

j) la durée maximale des baux ou permis octroyés à l'égard des immeubles fédéraux ou des biens réels fédéraux gérés par l'administration portuaire;

(k) the limits on the authority of the port authority to contract as agent for Her Majesty;

k) les limites aux pouvoirs de l'administration portuaire de conclure des contrats à titre de mandataire de Sa Majesté;

(l) the limits on the power of the port authority to borrow money on the credit of the port authority for port purposes or a code governing that power, as the case may be; and

l) les limites au pouvoir de l'administration portuaire d'emprunter des fonds sur son crédit pour l'exploitation du port ou le code régissant ce pouvoir;

(m) any other provision that the Minister considers appropriate to include in the letters patent and that is not inconsistent with this Act.

m) toute autre disposition que le ministre juge indiqué d'inclure dans les lettres patentes et qui n'est pas incompatible avec la présente loi.

Status of letters patent

Non-application de la *Loi sur les textes réglementaires*

(3) Letters patent are not regulations within the meaning of the *Statutory Instruments Act*, but shall be published in the *Canada*

(3) Les lettres patentes ne sont pas des textes réglementaires au sens de la *Loi sur les textes réglementaires*; elles sont toutefois publiées dans la

Gazette and are valid with respect to third parties as of the date of publication.

Gazette du Canada et sont opposables aux tiers à compter de leur date de publication.

When Ministerial approval required

(4) Any provisions of letters patent relating to the extent to which a port authority may undertake activities referred to in paragraph 28(2)(b) shall be approved by the President of the Treasury Board and the Minister of Finance before the letters patent are issued.

Approbation ministérielle

(4) Les dispositions des lettres patentes relatives à la mesure dans laquelle l'administration portuaire peut exercer les activités visées à l'alinéa 28(2) b) doivent être approuvées par le président du Conseil du Trésor et le ministre des Finances avant la délivrance des lettres patentes.

When Governor in Council approval required

(5) Any provisions of letters patent relating to limits on a port authority's power to borrow money on its credit for port purposes shall be approved by the Governor in Council, on the recommendation of the Minister and the Minister of Finance, before the letters patent are issued.

Approbation du gouverneur en conseil

(5) Les dispositions des lettres patentes relatives à la mesure dans laquelle l'administration portuaire peut emprunter des fonds sur son crédit pour l'exploitation du port doivent être approuvées par le gouverneur en conseil, sur recommandation du ministre et du ministre des Finances, avant la délivrance des lettres patentes.

Supplementary letters patent

9(1) The Minister may, either on the Minister's own initiative and after giving notice of the proposed changes to the board of directors, or when the board of directors has, by resolution, requested it, issue supplementary letters patent

Lettres patentes supplémentaires

9(1) Le ministre peut, soit de son propre chef et après avoir avisé le conseil d'administration des modifications proposées, soit sur demande de celui-ci autorisée par résolution, délivrer des lettres patentes supplémentaires modifiant les

amending the letters patent of a port authority if the Minister is satisfied that the amendment is consistent with this Act, and the supplementary letters patent take effect on the date stated in them.

lettres patentes de l'administration portuaire s'il est convaincu que les modifications sont compatibles avec la présente loi; les lettres patentes supplémentaires prennent effet à la date qui y est mentionnée.

Notice

(2) Notice must be given in writing and set out a time limit within which the board of directors may comment to the Minister regarding the proposed changes.

Avis

(2) L'avis est donné par écrit et prévoit le délai dans lequel le conseil d'administration peut faire parvenir au ministre ses observations sur les modifications proposées.

…

[…]

Capacity and powers

28(1) A port authority is incorporated for the purpose of operating the port in respect of which its letters patent are issued and, for that purpose and for the purposes of this Act, has the powers of a natural person.

Capacité et pouvoirs

28(1) Une administration portuaire est constituée pour l'exploitation du port visé par ses lettres patentes et a, à cette fin et pour l'application de la présente loi, la capacité d'une personne physique.

Activities

(2) The power of a port authority to operate a port is limited to the power to engage in

Activités portuaires

(2) L'autorisation donnée à une administration portuaire d'exploiter un port est restreinte aux activités suivantes :

(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

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

specified in the letters patent; and	mesure prévue par les lettres patentes;
(b) other activities that are deemed in the letters patent to be necessary to support port operations.	b) les autres activités qui sont désignées dans les lettres patentes comme étant nécessaires aux opérations portuaires.
…	[…]

Fisheries Act, RSC 1985, c F-14

Harmful alteration, disruption or destruction of fish habitat	**Détérioration, destruction ou perturbation de l'habitat**
35(1) No person shall carry on any work, undertaking or activity that results in the harmful alteration, disruption or destruction of fish habitat.	35(1) Il est interdit d'exploiter un ouvrage ou une entreprise ou d'exercer une activité entraînant la détérioration, la destruction ou la perturbation de l'habitat du poisson.
Exception	**Exception**
(2) A person may carry on a work, undertaking or activity without contravening subsection (1) if	(2) Il est permis d'exploiter un ouvrage ou une entreprise ou d'exercer une activité sans contrevenir au paragraphe (1) dans les cas suivants :
…	[…]
(b) the carrying on of the work, undertaking or activity is authorized by the Minister and the work, undertaking or activity is carried on in accordance with the conditions established by the Minister;	b) l'exploitation de l'ouvrage ou de l'entreprise ou l'exercice de l'activité est autorisé par le ministre et est conforme aux conditions que celui-ci établit;
…	[…]

Canadian Environmental Assessment Act, 2012, SC 2012, c 19, s 52 [Repealed, 2019, c 28, s 9] - 2019-08-28

Project carried out on federal lands	**Project réalisé sur un territoire domanial**
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	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) the authority determines that the carrying out of the project is not likely to cause significant adverse environmental effects; or	a) elle décide que la réalisation du projet n'est pas susceptible d'entraîner des effets environnementaux négatifs importants;
(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).	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.

Impact Assessment Act, SC 2019, c 28, s 1

Federal authority	**Autorité fédérale**
8 A federal authority must not 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 designated project to be carried out in whole or in part and must not	8 L'autorité fédérale ne peut 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 d'un projet désigné et ne peut accorder à

provide financial assistance to any person for the purpose of enabling that designated project to be carried out, in whole or in part, unless

quiconque une aide financière en vue de permettre la réalisation en tout en partie d'un tel projet que si, selon le cas :

(a) the Agency makes a decision under subsection 16(1) that no impact assessment of the designated project is required and posts that decision on the Internet site; or

a) l'Agence décide, au titre du paragraphe 16(1), qu'aucune évaluation d'impact du projet n'est requise et affiche sa décision sur le site Internet;

(b) the decision statement with respect to the designated project that is issued to the proponent of the designated project under section 65 sets out that the effects that are indicated in the report with respect to the impact assessment of that project are in the public interest.

b) la déclaration remise au promoteur au titre de l'article 65 relativement au projet donne avis d'une décision portant que les effets qui sont identifiés dans le rapport d'évaluation d'impact du projet sont dans l'intérêt public.

…

[…]

Project carried out on federal lands

82 An authority must not carry out a project on federal lands, 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 or provide financial assistance to any person for the purpose of enabling that project to be carried out, in whole or in part, on federal lands, unless

Project réalisé sur un territoire domanial

82 L'autorité ne peut réaliser un projet sur un territoire domanial, 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 ni accorder à quiconque une aide financière en vue de permettre la réalisation en tout ou en partie d'un projet sur un tel territoire que si, selon le cas :

(a) the authority determines that the carrying out of the project is not likely to cause significant adverse environmental effects; or	a) elle décide que la réalisation du projet n'est pas susceptible d'entraîner des effets environnementaux négatifs importants;
(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, under subsection 90(3), that those effects are justified in the circumstances.	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 90(3), que ces effets sont justifiables dans les circonstances.

Vancouver Port Authority Letters Patent - P.C. 2007-1885 December 6, 2007

CERTIFICATE OF AMALGAMATION OF PORT AUTHORITIES

…

NOW THEREFORE under the authority of section 59.1 of the *Port Authorities Management Regulations*, it is hereby certified that the Vancouver Port Authority, the Fraser River Port Authority and the North Fraser Port Authority are amalgamated and continue as one port authority to be named the Vancouver Fraser Port Authority, with the letters patent for the amalgamated port authority contained herein. The amalgamation takes effect on January 1, 2008.

VANCOUVER FRASER PORT AUTHORITY

…

NOW THEREFORE, under the authority of section 9 of the Act, the Letters Patent of the Vancouver Fraser Port Authority are as follows:

…

ARTICLE 4

DIRECTORS AND DIRECTOR' MEETINGS

4.1 **General Duties of the Board**. The Board is responsible for the management of the activities of the Authority.

…

ARTICLE 5

CODE OF CONDUCT

5.1 The Code of Conduct governing the conduct of the directors and officers is set out in Schedule E hereto.

…

ARTICLE 7

ACTIVITIES AND POWERS OF THE AUTHORITY AND SUBSIDIARIES

7.1 **Activities of the Authority Related to Certain Port Operations**. To operate the port, the Authority may undertake the port activities referred to in paragraph 28(2)(*a*) of the Act to the extent specified below:

(*a*) development, application, enforcement and amendment of rules, orders, bylaws, practices or procedures and issuance and administration of authorizations respecting use, occupancy or operation of the port and enforcement of Regulations or making of Regulations pursuant to subsection 63(2) of the Act;

…

SCHEDULE E

VANCOUVER FRASER PORT AUTHORITY

CODE OF CONDUCT

ARTICLE 1

OBJECTS AND INTERPRETATION

1.1 **Object of Code**. The object of this Code is to preserve and enhance public confidence in the integrity and impartiality of directors and officers of the Authority and the business activities and transactions carried on by the Authority by establishing clear conflict of interest rules for directors and officers of the Authority.

1.2 **Principles**. This Code shall be interpreted in accordance with the following general principles:

(*a*) every director and officer shall discharge their duties and arrange their private affairs in such a manner so as to preserve and promote public confidence and trust in the integrity and impartiality of the Authority;

(*b*) the obligations of a director or officer described in subsection 1.2(a) may not always be discharged merely by acting in accordance with the technical requirements of the Act, the Regulations, the Letters Patent, the by-laws and the policies and resolutions of the Board; and

(c) public confidence and trust in the integrity and impartiality of the Authority may be as equally compromised by the appearance of a conflict as with the existence of an actual conflict.

1.3 **Definitions**. In this Code terms used herein shall have the meanings ascribed to them in the Act and the Letters Patent, and in addition the following terms shall have the following meanings:

(*a*) "**Gift**" includes any good, service, benefit, hospitality, promise or favour; and

(*b*) "**Related Party**" means with respect to a director or officer of the Authority

(i) a spouse, child, brother, sister or parent of such director or officer;

(ii) a relative of such director or officer (other than a spouse, child, brother, sister or parent of such director or officer) or a relative of the spouse of such director or officer if the relative has the same residence as the director or officer;

(iii) a corporation, partnership, trust or other entity which is directly or indirectly controlled by such director or officer or by a spouse, child, brother, sister or parent of such director or officer or any combination of such persons; and

(iv) a partner of such director or officer acting on behalf of a partnership of which the director or officer and the partner are partners.

1.4 **Application of Code**. This Code applies to all directors and officers of the Authority.

1.5 **Scope of Obligations**. Conforming to the specific requirements of this Code shall not absolve a director or officer of responsibility for taking such additional action as may be necessary to conform with any standard of conduct or comply with any duty imposed by the Act, the Regulations, the Letters Patent, the by-laws and the policies and resolutions of the Board or otherwise by law.

1.6 **Acknowledgement by Directors and Officers**. Each director and officer shall acknowledge in writing to the Governance Committee that

(*a*) they have read and understood this Code;

(*b*) to the best of their knowledge they are in compliance with this Code and neither they nor any Related Party to them has a conflict or a potential conflict within the meaning of Article 2 of this Code; and

(*c*) in the case of each officer, compliance with this Code is a condition of their employment.

1.7 Timing of Acknowledgement. Each director and officer shall deliver the acknowledgement described in section 1.6 of this Code to the Governance Committee:

(*a*) with respect to the directors serving and officers employed on the date the Letters Patent take effect, forthwith upon the Letters Patent taking effect; and

(*b*) with respect to all other directors at the time of their appointment and with respect to all other officers at the time of the commencement of their employment.

1.8 **Annual Review**. Each director and officer shall regularly review their obligations under this Code and shall on the 15th day of March of each year provide the Governance Committee with a written acknowledgement confirming such review and that, to the best of the knowledge of the director or officer,

(*a*) they are in compliance with this Code; and

(*b*) neither they nor any Related Party to them has a conflict within the meaning of Article 2 of this Code.

ARTICLE 2

CONFLICTS OF INTEREST

2.1 **Conflicts Generally**. A director or officer shall not allow his or her personal interests or the personal interests of a Related Party to the director or officer to conflict with or to give rise to the appearance of a conflict with the duties and responsibilities of the director or officer to the Authority or the interests of the Authority.

2.2 **Specific Types of Conflicts**. Without restricting the generality of section 2.1, the following represent examples of specific matters which give rise to a conflict or the appearance of a conflict on the part of a director or officer:

(*a*) *Competition with the Authority*: A director or officer or a Related Party of a director or officer engages in any activity, or has a material interest in any person which engages in an activity, which is in competition or could reasonably be expected to be in competition with the Authority's present or proposed interests;

(b) *Transactions with the Authority or a User; Material Interests*: A director or officer or a Related Party of a director or officer

(i) has a material interest in a user;

(ii) owes material obligations to the Authority or a user, other than in connection with the duties of the director or officer arising from their position with the Authority;

(iii) conducts business with the Authority or a user; or

(iv) holds a material interest in a person which conducts business with, or acts as a consultant or advisor to, the Authority or a user;

(*c*) *Interest in Material Contract*: A director or officer

(i) is a party to a material contract or proposed material contract with the Authority; or

(ii) is a director or officer of or has a material interest in any person who is a party to a material contract or proposed material contract with the Authority; and

(*d*) *Acceptance of Offices with Conflicted Entities*: A director or officer accepts an appointment or a nomination for election to an office of, or employment with, any corporation, partnership, foundation, institute, organization, association or other entity, the business or activities of which are, or could reasonably be expected to be, in conflict with the interests of the Authority.

2.3 **Conflicts For Which Approval Satisfactory**. Engaging in the following activities shall be deemed not to give rise to a conflict or the appearance of a conflict on the part of a director or officer within the meaning of Article 2 of this Code provided that the director or officer obtains the written approval of the Governance Committee prior to engaging in such activities:

(*a*) *Acceptance of Offices With Entities Benefiting From Authority*: A director or officer accepts an appointment or a nomination for election to an office of, or employment with, any corporation, partnership, foundation, institute, organization, association or entity, the business or activities of which benefit or could reasonably be expected to benefit from the business of the Authority or decisions made by the Authority; and

(*b*) *Use of Authority Property*: A director or officer uses property of the Authority or property managed by the Authority for the personal benefit of the director or officer or a Related Party of the director or officer.

If a director or officer fails to obtain the written approval of the Governance Committee prior to engaging in any activity described in subsections (a) or (b) of this section, the engagement of the director or officer in such activity shall be deemed to give rise to a conflict of interest within the meaning of Article 2 of this Code.

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-538-19
STYLE OF CAUSE:	GCT CANADA LIMITED PARTNERSHIP v VANCOUVER FRASER PORT AUTHORITY and ATTORNEY GENERAL OF CANADA
PLACE OF HEARING:	VANCOUVER, BRITISH COLUMBIA
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