Federal Court  Cour fédérale

Date: 20200309

Docket: T-538-19

Citation: 2020 FC 348

Toronto, Ontario, March 9, 2020

PRESENT: Case Management Judge Angela Furlanetto

BETWEEN:

GCT CANADA LIMITED PARTNERSHIP

Applicant

and

VANCOUVER FRASER PORT AUTHORITY AND ATTORNEY GENERAL OF CANADA

Respondents

ORDER AND REASONS

[1] This judicial review raises the issue of bias in the role of the Respondent Vancouver Fraser Port Authority ("VFPA") as regulator of the Applicant, GCT Canada Limited Partnership's ("GCT") terminal Deltaport Expansion Project at Robert Banks, Deltaport, British Columbia, when it has its own competing proposed port expansion project.

[2] This Order arises from a series of five motions brought prior to cross-examination, all of which were heard together at a Special Sitting of the Federal Court in Toronto. The first motion, brought by the Applicant, GCT, seeks to amend the notice of application and to obtain leave to file two new affidavits: one, a supplemental affidavit from the Applicant's Rule 306 affiant, Doron Grosman, CEO of Global Container Terminals Inc., sworn September 18, 2019; and the second, an affidavit from a law clerk, Anna Hucman, from the Applicant's counsel's law firm, sworn November 20, 2019. Both requests for relief are sought to purportedly reflect factual and legal developments that took place after the Respondents' evidence was served, including changes in the governing environmental assessment legislation. The remaining motions, two filed by each Respondent, seek to strike the original notice of application for mootness, prematurity and/or lack of jurisdiction and separately to strike the original affidavit of Doron Grosman, sworn April 6, 2019, on the basis that the affidavit contains extraneous information, irrelevant content, hearsay, opinion evidence and/or argument. The Respondent Attorney General also challenges whether it should be named as a party Respondent. Except for consent to the additional Hucman affidavit, all motions were opposed.

I. Background to the Motions

[3] This proceeding began by notice of application, filed on March 28, 2019. As drafted, the notice of application seeks judicial review of a decision of the VFPA delivered on March 1, 2019 in which the VFPA declined to process a Preliminary Project Enquiry ("PPE") of GCT for the Deltaport Expansion Fourth Berth Project at Roberts Bank, Delta, British Columbia (the "DP4 Project") in favour of its competing RBT2 Project. As stated in the March 1, 2019 letter:

> …the RBT2 Project is our preferred project for expansion of capacity at Robert Bank. 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.

[4] The Applicant alleges that VFPA's refusal to process the DP4 Project through its PER process was the result of actual bias by VFPA in favour of its own competing project at a separate terminal at Roberts Bank, the RBT2 Project. The Applicant also alleges that the lands affected by the DP4 Project are located outside the jurisdiction of the VFPA. The notice of application seeks 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**"), conduct the assessment and permitting process for the DP4 Project which is the obligation 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, and section 67 of the *Canadian Environmental Assessment Act*, 2012, S.C. 2012, c. 19, s. 52 (the "**CEAA**") as more particularly set out on *Schedule "A"* hereto (the "**Permitting Process**") or such other process as this Honourable Court determines is appropriate;
>
> (b) A Declaration that the VFPA issued 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;

(c) A Declaration that the VFPA has not conducted, and cannot conduct, a fair and impartial process under the Act, the CEAA, 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;

(d) 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;

(e) An Order prohibiting the VFPA from further advancing the RBT2 Project until the Minister has conducted the Permitting Process for the DP4 Project;

[5] After the Respondents' Rule 307 evidence was served, the following events took place:

a) Between May 14, 2019 and June 24, 2019, a Review Panel established pursuant to section 38 of the CEAA held a 23-day public hearing in respect of the RBT2 Project and received submissions from a number of sources, including GCT relating to the ability to explore a terminal expansion adjacent to the existing Deltaport.

b) On August 28, 2019, the CEAA was repealed and replaced by new legislation, the *Impact Assessment Act*, S.C. 2019, c. 28 (the "IAA"). As a result of this legislative change, the DP4 Project is now a "Designated Project" under this new legislative framework and may be required to undergo an impact assessment by the Impact Assessment Agency of Canada prior to review by the VFPA under the PER Process.

c) On September 6, 2019, by Order of this Court, VFPA's former counsel Lawson Lundell LLP was disqualified as counsel for VFPA based on a conflict of interest.

d) On September 23, 2019, VFPA wrote to the Applicant and advised that it was rescinding its March 1, 2019 decision letter (the "September 23 Letter") and would proceed to receive GCT's Preliminary Project Enquiry for the DP4 Project.

e) In response to the September 23 Letter, on September 27, 2019, GCT advised VFPA that it was of the view that the VFPA would not give its application fair consideration and that with the newly enacted IAA it was not necessary to immediately engage in the VFPA's permitting process.

f) On October 2, 2019, VFPA invited GCT to provide further submissions on any alleged bias.

g) On October 8, 2019, by way of letter, GCT advised that it would not engage on the issue of bias with the VFPA.

[6] As a result of these events, the Applicant seeks to amend its notice of application. The proposed amended notice of application refers to both the decision delivered on March 1, 2019 and to the "purported withdrawal of the March 1, 2019 decision on September 23, 2019" as the "Decision" and requests as its amended 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**"), ~~conduct~~ oversee the assessment and permitting ~~process~~ activities for the DP4 Project which ~~is~~ are under the ~~obligation~~ 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, ~~and section 67 of the Canadian Environmental Assessment Act, 2012, S.C. 2012, c. 19, s. 52 (the "**CEAA**")~~ …

(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 1, 2019 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) An Order requiring the VFPA to deliver the record of the entire Decision, and to produce all documents, including all documents related to its decision-making process in the March 1st Decision and the September 23rd Decision;

(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 controlling 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) ~~(b)~~ Declaration that the VFPA ~~issued~~ 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 tis role as a federal board, commission or other tribunal;

(f) ~~(c)~~ A Declaration that the VFPA has not conducted, and cannot conduct, a fair and impartial process under the Act, ~~the CEAA~~, 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) ~~(d)~~ 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) ~~(e)~~ An Order prohibiting the VFPA from further advancing the RBT2 Project until ~~the Minister~~ an impact assessment has been conducted ~~the Permitting Process for~~ the DP4 Project, pursuant to the Impact Assessment Act, S.C. 2019, c.28 (the "**IAA**");

[7] In addition, the Applicant seeks to file two additional affidavits. The supplemental affidavit of Doron Grosman proposes to introduce information filed during the Review Panel Proceedings, to address the changes to the environmental assessment legislation and to provide details relating to the disqualification of VFPA's initial counsel, Lawson Lundell. The affidavit of Anna Hucman seeks to attach ongoing correspondence between VFPA and GCT, including the October 2, 2019 and October 8, 2019 letters; an earlier version of VFPA's motion to strike

the application on the basis of mootness; and correspondence from the Respondents' counsel relating to the proposed amended application and additional affidavits.

[8] The Applicant asserts that the proposed amendments to the notice of application and the proposed additional evidence update the Court and reflect the factual and legal changes that took place after their original evidence was filed. In particular, it asserts that the amendments to the notice of application seek to: (a) more clearly identify the relief now sought by GCT in respect of the March Decision; and to (b) provide particulars on the order previously sought regarding independent oversight of the VFPA's continued involvement in the approval process for DP4. The Applicant characterizes its judicial review as primarily an attack on the bias of VFPA for its competing expansion project. It asserts that there is no prejudice to the Respondents in allowing the proposed amendments, as they do not change the next steps in the application.

[9] The Respondents assert that the amendments should not be allowed as the relief sought in the original application is now moot as a result of the underlying decision under review (the March decision letter) now being rescinded and the DP4 Project becoming a Designated Project under the IAA. As asserted by the Respondents, there is no longer a jurisdictional basis to challenge any alleged procedural unfairness with respect to a decision that no longer exists, and any allegation of future bias is speculative and premature. The Respondents also allege other jurisdictional challenges to the relief requested. They further argue that as a result of the IAA, the primary responsibility for doing the environmental assessment of the project is now with the impact assessment agency and not with the VFPA.

[10] The Applicant raises as a preliminary issue on the motions whether they should proceed on the basis of the original application or on the basis of the proposed amended application. In this case, the amendments proposed were not in response to the Respondents motion to strike but rather brought under rule 75 of the *Federal Courts Rules*. However, the Respondents have also brought their own motions to strike the underlying application. Thus, the backbone on which the amendments are sought has been challenged. The practicality of the two sets of motions now pending is that the issues must be taken together. In view of the circumstances, it is my view that the underlying application must be considered first as to whether it should be struck and if so, whether the proposed amendments suffer from the same vulnerabilities. If the underlying application is not struck, the proposed amendments must then also be considered with regard to Rule 75.

II. The Issues

[11] The issues for determination are accordingly as follows:

a) Should the notice of application be struck?

b) Should the proposed amendments to the notice of application be allowed?

c) Is the Attorney General a proper party to the application?

d) Should the impugned paragraphs and exhibits of the original April 6, 2019 Grosman affidavit be struck and should the September 18, 2019 proposed Supplemental Grosman Affidavit be allowed?

III. Should the notice of application be struck?

[12] The legal test relating to a motion to strike an application is well established. The threshold for striking a notice of application is high: the Court will strike a notice of application for judicial review only in exceptional circumstances where it is "so clearly improper as to be bereft of any possibility of success": *David Bull Laboratories (Canada) Inc*. v. *Pharmacia Inc*., [1995] 1 F.C. 588 (C.A.), at page 600. As summarized in *JP Morgan Asset Management (Canada) Inc.* v. *Canada (National Revenue)*, 2013 FCA 250 at para 47 ("*JP Morgan*"), "[t]here must be a "show stopper" or a "knockout punch" an obvious, fatal flaw striking at the root of the Court's power to entertain the application: *Rahman v. Public Service Labour Relations Board*, 2013 FCA 117, at para 7; *Donaldson v. Western Grain Storage By-Products*, 2012 FCA 286, at para 6; *Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959."

[13] In considering a motion to strike, the Court must read the notice of application with a view to understanding the real essence of the application by reading it holistically and practically without fastening onto matters of form: *JP Morgan supra* at para 49-50.

[14] Where the issue raised for striking the application is debatable, the circumstances do not warrant dismissal of the application at a preliminary stage, but rather the issue should be determined by the applications judge: *David Suzuki Foundation* v. *Canada (Health)*, 2017 FC 682 at para 7 ("*David Suzuki*"); aff'd 2018 FC 380; *David Bull supra* at para 15; *Apotex Inc*. v. *Canada (Minister of Health)*, 2010 FC 1310 at para 12-13.

[15] As set out above, the Applicant raises five requests for relief in its original notice of application: (a) an Order for *certiorari* to quash the decision delivered on March 1, 2019 (the "March Decision") and direct that the Minister of Transport (Canada) or an appropriate delegate of Her Majesty the Queen conduct the assessment and permitting process for the DP4 Project; (b) and (c) respectively, seek a Declaration that the VFPA issued the March Decision relying upon extraneous and inappropriate considerations resulting from its own actual bias, thereby exceeding its jurisdiction, and a Declaration that the VFPA has not and cannot conduct a fair and impartial process due to actual bias; (d) seeks 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); and (e) seeks an Order prohibiting the VFPA from advancing the RBT2 Project until the Minister has conducted the Permitting Process for the DP4 Project.

[16] The Respondents collectively argue that all requests in the application should be struck as being moot, requests (c) and (d) should be struck for being premature, and that the application as a whole should be struck for want of jurisdiction.

[17] For the reasons that follow, I will allow the Respondents motions to strike in part, as they relate to the request for prohibition, but will otherwise dismiss the motions to strike on the remaining issues. Material to this outcome is my view that the underlying bias alleged remains a live issue such that the remaining requests for relief are not so clearly bereft of any possibility of success and should be left for disposition by the hearings judge.

[18] It should be noted that my findings on these motions are not intended to be a pronouncement of findings with respect to the merits of the case, but rather are to be read as addressing the issues raised on these motions.

A. *Should the application be struck for mootness?*

[19] The doctrine of mootness is well established: a case is moot where the decision of the court will not have the effect of resolving some controversy, which affects or may affect the rights of parties. Where the decision of the court will not have a practical effect on such rights, the court will decline to decide the case unless there is good reason to hear the case despite its mootness: *Borowski* v. *Canada (Attorney General)*, [1989] 1 S.C.R. 342 at para 15-16.

[20] To determine whether a case is moot, it is necessary to determine if there remains a live controversy. If no live controversy exists, the onus shifts to the party seeking to have the case proceed to justify why the Court should nonetheless exercise its discretion to hear the matter. In this second part of the test, the Court will consider such factors as: (i) the adversarial context; (ii) judicial economy; and (iii) the role of the Court: *Borowski supra* at para 31, 34-37, 40, 42; *Saskatchewan (Minister of Agriculture, Food & Rural Revitalization)* v. *Canada (Attorney General)*, 2005 FC 1027 at para 25-29.

[21] In this case, the underlying judicial review application is based on the March Decision in which the VFPA refused to process the PPE of GCT for the DP4 Project, purportedly because of its competing RBT2 Project. The September 23 Letter expressly states that it rescinds the March 1, 2019 letter (referred to in the September 23 Letter as the February 2019 decision letter as it

was incorrectly dated February 29, 2019 when there was no February 29 in 2019) and states that the VFPA will proceed to receive GCT's PPE for the DP4 Project. The September 23 Letter states:

> 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 February 2019 decision letter 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. [**my emphasis**]

[22] The Applicant argues that the March Decision has not practically been withdrawn as the VFPA has not agreed to process the DP4 Project at all, or in an unbiased manner under a timeline that can compete with the RBT2 Project. The Applicant relies on the last paragraph of the September 23 Letter which states:

> Ultimately, and having said all the above, I wish to reiterate the position noted in my February 2018 letter 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 would include, but is not limited to, the status of the RBT2 project in terms of meeting anticipated increased shipping demands.

[23] The Applicant also highlights the following paragraphs of the September 23 Letter. It asserts that these paragraphs reiterate the bias about environmental considerations and the predetermination on questions of competition:

> 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.

[24] According to the Applicant, the September 23 Letter should be taken as a continuation of the March Decision and of the allegations of actual bias with respect to VFPA's preference for the RBT2 Project. The practical effect of the timing of the RBT2 Project is that it will be processed in advance of the DP4 Project and will therefore be given priority consideration. As the VFPA retains ongoing jurisdiction over both the DP4 and RBT2 projects through the PER Process and its powers as landlord and regulator under the *Canada Marine Act*, the Applicant argues that there remains a live controversy as to the allegations of bias in VFPA's decision-making, including its purported withdrawal of the March Decision, and VFPA's involvement in the approval of the PPE for the DP4 Project.

[25] The Respondent VFPA argues that there is no live controversy between the parties as the March 1, 2019 decision letter has been rescinded and there is no current application from GCT before the VFPA. It argues that in its September 27 letter, GCT refused to reinitiate the process.

Therefore, there is no impact assessment review started by GCT and it is unclear whether GCT will proceed with the DP4 Project.

[26] GCT refers to this characterization of the status of their DP4 Project as "cute"; it asserts that the preliminary project inquiry has been before the VFPA since early February 2019 and could have been processed at any time. GCT refers to the new project and environmental review process guide that was issued after the implementation of the IAA, which states that: "Projects that meet the criteria for a designated project require a preliminary project review meeting and a preliminary review prior to submitting an application." This is a review that must be conducted by VFPA and an approval obtained by VFPA before a designated project can be submitted. The guide further states that "Upon receipt of the application, the port authority will undertake a completeness check of the submitted material, and once the application has been registered and confirmed as complete, the application review phase will commence." Thus, the VFPA still conducts a gate-keeping function over DP4. GCT asserts that the impact assessment phase cannot be started until the application has been checked and registered as complete by the VFPA.

[27] As noted by GCT, instead of proceeding with the preliminary checks as VFPA could have done, it wrote to the Applicant and asked GCT to confirm that they wanted VFPA to process the application. GCT calls this the "bait" as VFPA is requiring GCT to confirm they want VFPA to conduct a process that GCT asserts is biased. If not, their application will not be processed.

[28] In my view, it cannot be disputed by the express language used in the September 23 Letter that VFPA has stated that it rescinds its March 1, 2019 letter and is prepared to "receive" GCT's PPE in some manner. However, it is less than clear from the evidence before me at this stage as to the nature of the next steps in the process and the practical effect of the proposed rescission. The status of the communications between the parties is at a standstill with no procedural clarity as to how to address the issue of bias purported to arise from the March Decision and September 23 Letter, or as to the next steps in the processing of the DP4 Project. I agree with the Applicant that the September 23 Letter reiterates some of the same concerns raised by VFPA of the DP4 Project, including with respect to the lack of competitiveness and timing of the project as compared to RBT2. The perceived bias by the Applicant of VFPA's involvement in the project remains a live issue.

[29] This Court has considered issues of bias to be separate and ongoing where they may have an effect on ongoing decision-making. Even 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: *Michel* v. *Adams Lake Indian Band Community Panel*, 2017 FC 835 at para 28-31.

[30] In this case, the allegations of underlying bias with respect to the March Decision and the next steps in the processing of GCT's application remains a live issue even though the March 1, 2019 letter may itself be rescinded.

[31] 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 *Canada Marine Act*. 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.

[32] There is no question that the parties have been engaged in a dispute over whether DP4 is an appropriate competing proposal to RBT2. This has been reinforced by the September 23 Letter in which VFPA confirmed that it remains its view that the DP4 Project has ongoing concerns and that it must be considered "along with the status of the RBT2 Project in terms of meeting anticipated increased shipping demands." The role of the VFPA as proponent for its own RBT2 Project while maintaining a decision-making and review role over the DP4 Project is evidence of an ongoing adversarial context between the parties relating to the issue of bias.

[33] The 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. The issues of bias are, in my view, of sufficient importance and public interest to the ongoing processing of DP4 to justify the use of judicial resources to allow the issues to proceed to a hearing despite the argument of mootness: *Georgia Strait Alliance* v. *Canada (Minister of Fisheries and Oceans*), 2012 FCA 40 at para 60-64). Accordingly, I do not agree that the application should be struck at this stage on the basis of mootness.

B. *Is the relief requested in paragraphs 2(c) and 2(d) of the application premature?*

[34] At paragraphs 2(c) of its notice of application, GCT seeks a declaration that the VFPA cannot conduct a fair and impartial process due to an alleged actual bias. It also requests at paragraph 2(d) a declaration that that 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).

[35] The Respondent VFPA argues that any issue of ongoing bias is premature as the VFPA is not functus as there is no current application before the VFPA for a permitting decision. Further, even if an ongoing relationship could be considered, the VFPA asserts that GCT has not made an application to the VFPA itself on the issue of the alleged bias and has therefore not exhausted the required administrative routes nor obtained a final administrative decision. It relies on the general principles of exhaustion that courts should not interfere with ongoing administrative processes until after they are completed, or until the available, effective remedies are exhausted: *C.B. Powell Ltd*. v. *Canada (agence des services frontaliers)*, 2010 FCA 61 at para 30-32; *Halifax (Regional Municipality)* v. *Nova Scotia (Human Rights Commission)*, 2012 SCC 10. It asserts that this is no different when an assertion of bias is at play: *Eckervogt* v. *British Columbia (Minister of Employment & Investment)*, 2004 BCCA 398 at para 46-48.

[36] For the reasons set out above with respect to the issue of mootness, I do not agree that it can be concluded at this stage that no decision has been made. The issue of prematurity cannot arise from the decision-maker's own making. As discussed in *Whalen* v. *Fort McMurray No. 468*

First Nation, 2019 FC 732 at para 23 ("*Whalen*") a decision-making body cannot manipulate the prematurity doctrine to shield itself from judicial review simply by announcing that its decision is not definitive, or as in this case, that it has been rescinded. Even if interlocutory, allegations of bias by a non-adjudicative decision-maker may warrant judicial intervention: *Whalen supra* at para 25. In this case, I agree with the Applicant, the September 23 Letter reinforces the VFPA's position, as expressed in its March 1, 2019 letter, that DP4 may not be advanced under a timeline that can compete with RBT2. The prematurity doctrine should not apply.

[37] With respect to the issue of exhaustion, I agree with the Applicant that the facts of this case fall into exceptional circumstances.

[38] While the parties have had ongoing discussions on the issue of bias, there is no formal procedure in place for dealing with this issue.

[39] In its September 23 Letter, the VFPA acknowledged GCT's concerns regarding bias: and noted that in the review process the DP4 Project would be subject to the *Impact Assessment Act* prior which would inform any review by the Port's PER 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.

[40] In a letter dated October 2, 2019 (relevant portion reproduced below), the VFPA asked GCT to clarify its assertion of bias against the VFPA so that VFPA could consider whether the concerns would be accepted or the steps it would take to address the concerns before any decision relating to the DP4 Project was made:

> As you note, any port authority permitting decisions related to the proposed DP4 project could not be made unless and until the project had completed an impact assessment under the new *Impact Assessment Act* and obtained a favourable decision. The assessment will be undertaken by an independent external agency. A permitting decision by the port authority would only be necessary if the project received approval under the *Impact Assessment Act*, and any resulting report/federal decision would necessarily and substantially inform our permitting process.
>
> Given the above, please clarify if GCT is at this time asserting that the Vancouver Fraser Port Authority will be in a situation of bias at the time it may be called upon to make a permitting decision in future.
>
> If that is indeed the case, I also request that you provide a full submission on the matter, including references to any relevant legal authorities, so that we can properly consider whether we accept your concerns as valid in all the circumstances, and if so, what steps need to be taken to address those issues well before a decision is required.

[41] In a response to this letter on October 8, 2019, GCT advised that it did not wish to engage with VFPA on the issue of bias, stating, as set out below, that it did not have confidence that VFPA could or should make a ruling on its own bias:

> GCT recognizes and is mindful of the new *Impact Assessment Act* and its regulations and how that affects DP4.
>
> Given the history of VFPA's February 29, 2019 [sic] refusal to receive and advance the PER application of GCT based on inaccurate justifications, its resistance to the judicial review application brought in respect of that decision and its unfortunate defence of the Lawson Lundell's conflict of interest in the face of clear evidence of that conflict, followed by what appears to be an

> opportunistic "withdrawal" of the February 29, 2019 [sic] letter, GCT can have no confidence that VFPA can, or should be put in the position to, make any "ruling" on its own bias.
>
> Accordingly, GCT is proceeding, as you know, with the judicial review application, in order to ensure that it can be fairly and properly dealt with through an impartial process.

[42] I agree with the Applicant that the administrative route must be one that does not require the alleged bias to be determined by the body about which the allegations are being made. As noted in *Saskatchewan (Minister of Agriculture, Food & Rural Revitalization)* v. *Canada (Attorney General) supra* at para 38, it would be strange to raise the legality of a decision before the same authority which has approved it. The Court must be satisfied that there is an adequate route available to the parties to raise their assertions: *David Suzuki supra* at para 47-48. In this case, I am not convinced that such recourse is available through informal correspondence with VFPA, but rather that the allegation of bias should remain as a live issue to be determined by the Court.

[43] As such, the request to strike paragraphs 2(c) and 2(d) of the original application on the basis of prematurity is dismissed.

C. *Should the application be struck for want of jurisdiction?*

[44] The legal test on a motion to strike for want of jurisdiction is set out under Rule 221(1)(a) of the *Federal Courts Rules*. As stated in *Knight* v. *Imperial Tobacco Canada Ltd*., 2011 SCC 42 at para 17, a claim will only be struck if it is plain and obvious, assuming the facts pleaded to be true, that the pleading discloses no reasonable cause of action. In addition to meeting this legal

test, like with any other motion to strike a judicial review at a preliminary stage, the application must also be "bereft of any possibility of success": *Windsor (City)* v. *Canadian Transit Co*., 2016 SCC 54 at para 72.

[45] Under the three-prong test set out in *ITO – International Terminal Operators Ltd*. v. *Miida Electronics Inc*., [1986] 1 S.C.R. 752, at p. 766, the Federal Court has jurisdiction when: (1) a statute grants jurisdiction to the Federal Court; (2) federal law nourishes the grant of jurisdiction and is essential to the disposition of the case; and, (3) that federal law is constitutionally valid.

[46] There is no dispute that the VFPA's March Decision is that of a federally created body. Rather, the Respondent argues whether the Federal Court has jurisdiction to grant the oversight relief, declaratory relief, and prohibition order requested in the notice of application.

[47] As currently pleaded, the requested oversight relief asks that the Minister of Transport or an appropriate delegate of Her Majesty oversee the VFPA's assessment of the permitting activities. The Respondent argues both that the Federal Court lacks jurisdiction to order the oversight remedy and that the Minister lacks the authority to oversee the VFPA.

[48] On the first point, assuming the facts pleaded to be true, the question is what remedial powers are available when a federal decision-maker has become disqualified for bias, such that reconsideration by that same decision-maker is an inadequate remedy.

[49] The Applicant argues that the doctrine of necessary implication should apply. As stated in *Ontario* v. *974649 Ontario Inc.*, 2001 SCC 81 a para 70-71, the powers of a statutory court or tribunal extend beyond the express language of its enabling legislation to the powers necessary to perform its intended functions. Implied powers may be found where they are required as a matter of practical necessity for the court or tribunal to accomplish its purpose. Where there is actual bias, a gap may be created that requires the Court to find an adequate remedy. As argued by the Applicant, in the case of bias, the appointment of an independent body may be contemplated by the Court: *Pushpanathan* v. *Canada (Minister of Citizenship & Immigration)*, [1999] 4 F.C. 465 at para 29-30.

[50] The Respondent AG argues that even where the court has authority to rely on the doctrine of necessary implication and it is contemplating substituting another tribunal for the decision maker because of actual bias, it can only do so when what is proposed is consistent with Parliament's intention and the authority under the governing legislation: *Winning Combination Inc*. v. *Canada (Minister of Health)*, 2016 FC 282 at para 157; rev'd 2017 FCA 101.

[51] In this case, the role and function of the VFPA is derived from the *Canada Marine Act*, S.C. 1998, c. 10 (the "CMA"). In *B.C. (A.G.)* v. *Lafarge Canada*, [2007] 2 S.C.R. 86 at para 44-46, the Supreme Court provides the history behind the port's authority under the CMA. As stated at para 45, in 1998, Parliament substantially reorganized the structure of federal harbours with the CMA. When doing so, the Minister of Transport assured Member of Parliament that "[t]he revised act will consolidate and simplify maritime regulations, reduce red tape and speed up commercial decision-making. It will enable the ports to meet client needs more efficiently". The

Director of Port Development testified that the CMA would make local ports "more accountable, permitting them to perform acts, enter into contracts, and incur debts on their own without acting through the Federal government". Thus, the intention of bringing into force the CMA was to extend the port authorities further away from reach of the government and Minister.

[52] Under ss. 62(1) and 64.1(1) of the CMA, Parliament conferred upon the VFPA the power to adopt regulations for "the use and environmental protection of a port, including the regulation or prohibition of equipment, structures, works and operations" as well as regulations regarding undertakings proposed to be situated in a port, such as a new terminal. The Letters Patent specifically identifies activities such as engaging in environmental assessments as being part of the port's authority. Under s. 27 of the *Port Authorities Operations Regulations*, the Governor in Council transferred authority relating to project review and permitting and authorization for projects on port-administered land to the port authorities. There is no authority expressly provided in the CMA or its related Regulations to reassign a port's authority to the Minister of Transportation. Under the CMA, the Minister has retained only narrow powers over the ports, such as to dissolve or create port authorities (ss. 8 and 55 CMA) and to issue supplementary letters patent that are consistent with the CMA. The Minister has not expressly retained the power to oversee the operations of the port authority.

[53] The Applicant argues that the port can hand their decision-making authority back to the Minister as it is an agent for the Crown and the principal always has authority to do what the agent has authority to do. In my view, this issue is better left for the hearings judge as it will involve more detailed consideration of the role of the VFPA in the DP4 Project, the authority

conferred under the statutory scheme of the CMA and port regulations, the express agency provisions of the CMA (s. 7), as well as other agency principles. Further, I note that while the request for relief in paragraph 2(a) of the notice of allegation specifically refers to the Minister of Transport it does not limit delegation to the Minister of Transport (nor does the additional oversight relief proposed in the amended notice of application).

[54] It is not plain and obvious that the Federal Court does not have jurisdiction to award the oversight relief requested in the notice of application to some other delegate or that the relief requested is so bereft of any possibility of success to be struck at this preliminary stage.

[55] The Respondent Attorney General also argues that there is no jurisdiction to award the declaratory relief requested.

[56] Rule 64 of the *Federal Courts Rules* provides that the Court may make a binding declaration as of right in a proceeding, whether or not any consequential relief is, or can be, claimed. This may include a declaration of bias. I agree with the Applicant that it is not plain and obvious that the court lacks jurisdiction to grant a declaration of bias: *Democracy Watch* v. *Canada (Attorney General)*, 2004 FC 969 at para 97. The determination of whether this relief should be granted will flow from a determination of the allegations on their merits.

[57] With respect to the declaration regarding the jurisdiction over the port lands, I disagree that at this stage it can be concluded that this declaration is a pure question of fact instead of flowing from the determination of the legal status of the lands in question. However, the

declaration must also have utility. As stated in *Daniels* v. *Canada (Minister of Indian Affairs and Northern Development)*, 2016 SCC 12 at para 11, relying on *Khadr* v. *Canada (Prime Minister)*, [2010] 1 S.C.R. 44 (S.C.C.), "[t]he party seeking relief must establish that the court has jurisdiction to hear the issue, that the question is real and not theoretical, and that the party raising the issue has a genuine interest in its resolution. A declaration can only be granted if it will have practical utility, that is, if it will settle a "live controversy" between the parties."

[58] In this case, it is not plain and obvious that the legal status of the port lands for the DP4 Project would not be relevant to the requested oversight relief. Thus, it is not plain and obvious that such a declaration could not be granted.

[59] The Applicant also seeks an order of prohibition to restrain the VFPA from further advancing the RBT2 Project until the Minister has conducted the Permitting Process for the DP4 Project (original application) or until the environmental assessment of DP4 (proposed amendment).

[60] As argued by the Respondents this is not a remedy that can be granted from the application on this judicial review as there is no decision relating to RBT2 in issue and the request involves decision-makers and parties that are not parties to this application.

[61] The remedy of prohibition is intended to restrain a decision-maker from exceeding or misusing their powers. The particulars of the decision-making process relating to RBT2 is not at

issue in this application. Rather, the proceeding relating to RBT2 is now before the Review Panel. The relief requested is not appropriate for this application.

[62] While the Applicant seeks to rely on the "closed mind" principle that once a level of prejudgment is reached that renders submissions to the contrary futile, the decision-maker's mind is closed and the decision-maker should be disqualified: *Old St. Boniface Residents Assn. Inc.* v. *Winnipeg (City)*, [1990] 3 S.C.R. 1170 at para 94, this cannot, in my view, extend its reach to the decision-making for a separate project such as RBT2.

[63] The relief requested is also inappropriate if treated as a request for injunction as the appropriate test has not been pleaded. Further, the VFPA as applicant for the environmental assessment of RBT2 is not in the role of a federal board, commission or tribunal as defined by section 2 of the *Federal Courts Act* when wearing the hat of the proponent for the project.

[64] I agree with the Respondents that it is plain and obvious that the request for an order prohibiting the RBT2 Project cannot succeed through this application and that it should be struck.

IV. Should the proposed amendments to the notice of application be allowed?

[65] As a preliminary point, VFPA takes issue with the Applicant's reliance on the proposed supplemental affidavit of Doron Grosman as evidence to support its motion to amend. As noted by VFPA, it is well established that a motion to amend a pleading should not be accompanied by an affidavit dealing with the new facts set out in the proposed amendment: *Savanna Energy*

Services Corp. v. *Technicoil Corp*., 2005 FC 842 at para 22. I agree; this is particularly so where the evidence sought to be used is itself in dispute as a further aspect of the motion. The amendments should be considered on their face.

[66] The law relating to amendment to a notice of application is undisputed between the parties. The general rule on amendment of pleadings is that "an amendment should be allowed at any stage of an action for the purpose of determining the real questions in controversy between the parties, provided, notably, that the allowance would not result in an injustice to the other party not capable of being compensated by an award of costs and that it would serve the interests of justice": *Canderel Ltd*. v. *R*. (1993), [1994] 1 F.C. 3 (FCA) at page 10; *Enercorp. Sand Solutions Inc*. v. *Specialized Desanders Inc*., 2018 FCA 215 at para 19 ("*Enercorp*"). Consideration will be given to simple fairness, common sense and the interest that the courts have that justice be done: *Continental Bank Leasing Corp*. v. *R*., [1993] 93 D.T.C. 298 (TCC) at page 302; *AbbVie Corp*. v. *Janssen Inc*., 2014 FCA 242 at para 3.

[67] As a threshold issue, a motion to amend will not be allowed unless the amendment has a reasonable prospect of success when considering the chance of success in the context of the law and the litigation process: *Teva Canada Ltd*. v. *Gilead Sciences Inc*., 2016 FCA 176 at para 29-30. If it is plain and obvious that the amendment would be struck if pleaded; it should not be allowed: *Enercorp. supra* at para 22. Only after this initial threshold is met will the Court consider other matters, such as prejudice to the opposing party.

[68] As set out above, the proposed amendments seeks to: update the grounds for relief to reflect the change in status of the statutory regime; add requests for declarations relating to bias; seek an order directing independent oversight of the VFPA's administrative, permitting and other powers relating to the DP4 Project in relation to certain activities; and also seeks to add a request for an Order for production of the record relating to the March Decision and the September 23 Letter and all documents relating to the decision making process in these documents. The proposed amendments propose to refer to the "Decision" as both the March Decision and the September 23 Letter. The amendments also expand on the grounds for the application by reflecting the updates in the correspondence between the parties, the Tribunal Hearing, the changes to the legislative framework and the disqualification of Lawson Lundell.

[69] The Applicant asserts that its proposed amendments clarify that the primary challenge in the judicial review is one of bias and seek to update the context in which the decisions were made. The Applicant argues that such amendments are important in the present case since no formal record has been filed.

[70] The Respondents allege these additions should not be allowed as they suffer from the same deficiencies alleged with respect to the underlying application (i.e., mootness, prematurity and/or lack of jurisdiction) and are also beyond the scope of the original application. The Respondents assert that the amendments are also procedurally defective as they seek to initiate a judicial review of a second decision (the September 23 Letter) which is procedurally improper.

[71] The Court relies on the same comments and dispositions with respect to mootness, prematurity and attacks on jurisdiction as set out above. With the exception of the request under the new paragraph 2(h), on the basis of those dispositions, the threshold question relating to the proposed amendments has been met. Further, it is my view that the requested amendments will assist in centering the Court on the issues now in dispute. As cross-examination has not yet been conducted such amendments are not at a stage where they would be prejudicial to the Respondents.

[72] With respect to the procedural argument raised, the Applicant argues that its reference to the September 23 Letter 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. On the basis of my disposition above relating to the issue of mootness, I agree that this approach is reasonable. To force the Applicant to bring a new judicial review because of the September 23 Letter would be an inefficient use of judicial resources. The proposed amendments, in my view, make clear the underlying decision under review and the continuing nature of the activity that is alleged.

[73] With respect to the requested Order for production of documents being included as part of the relief requested at paragraph 2(c), I share the concern of the Respondents. Such a request is in my view inappropriate as a request for relief to the application. Any request for documents should be made by a specific request under Rule 317 with the appropriate provisions of Rule 318 available to the Respondent for response. The manner in which the request is made in the proposed amended application is improper.

[74] With the exception of the requests for relief at paragraphs 2(c) and 2(h), the proposed amendments to the notice of application will be allowed.

V. Is the Attorney General a proper party to the application?

[75] The Attorney General argues that it is not a necessary party to the application as the VFPA is the only decision-maker involved in the underlying decision and the Minister has no supervisory power over the VFPA and its decision-making capacity. As noted, the only remedies that implicate Canada are the oversight requests and the requested prohibition.

[76] On the basis of my findings above, the oversight relief will remain in the application in both its original and its amended form. As such, it is my view that the Attorney General remains a party interested in at least this limited capacity. As such, the request to remove the Attorney General as a party to the proceeding is denied.

VI. Should the impugned paragraphs and exhibits of the original April 6, 2019 Grosman affidavit be struck and should the September 18, 2019 proposed Supplemental Grosman Affidavit be allowed?

A. *The April 6, 2019 Grosman Affidavit*

[77] The parties agree that the record in a judicial review is limited to those documents that were before the decision-maker. Affidavit evidence may be extended outside these bounds only in limited circumstances, where the material is helpful background information that will assist the court in understanding the record before it, but that does not go to the merits of the matter;

material that highlights a complete absence of evidence before the decision-maker; and material relevant to an issue of procedural fairness or improper purpose that is under review: *Tsleil-Waututh Nation* v. *Canada (Attorney General)*, 2017 FCA 128 at para 98; *Association of Universities and Colleges of Canada* v. *Canadian Copyright Licensing Agency (Access Copyright)*, 2012 FCA 22 at para 19; *Bernard* v. *Canada Revenue Agency*, 2015 FCA 263 at para 20-25.

[78] Evidence has been held to be helpful background information where it describes the evidence before the decision-maker; it is important context and knowledge not otherwise in the Court's knowledge or on the record; it provides general background that will assist the Court in understanding the issues on judicial review; it does not provide an opinion on the disputed issue; and it consists of non-argumentative orienting statements: *Alberta Wilderness Association* v. *Canada (Environment)*, 2009 FC 920 at para 30, 34 ("*Alberta Wilderness*"); *Apotex Inc*. v. *Canada (Health)* 2013 FC 1217 at para 60, 61; *Delios* v. *Canada (Attorney General)*, 2015 FCA 117 at para 45.

[79] Helpful background information does not include evidence that varies or supplements the findings of the decision-maker; additional evidence on the factual merits designed to encourage the reviewing court to form its own views of the factual merits contrary to the demarcation of roles between it and the decision-maker; or information that is so intertwined with unnecessary opinion evidence that it cannot realistically be severed and its admission would be prejudicial: *Delios supra* at para 50, 52; *Alberta Wilderness supra* at para 34.

[80] Evidence submitted to establish an improper purpose may be evidence that suggests fettering of discretion or evidence suggesting some misconduct: *JP Morgan supra* at para 72; *Williams* v. *Canada (Public Safety and Emergency Preparedness)*, 2015 FC 32 at para 25. The onus is on the party submitting the evidence to demonstrate that it is probative and goes to the underlying claim of bad faith: *Bernard supra* at para 36.

[81] Affidavits should be confined to facts within the personal knowledge of the deponent and should not provide opinions or argue the case: Rule 81, *Federal Courts Rules*. Where an affidavit contains portions that are opinionated and argumentative, the Court can strike out those portions or the Court may exercise its discretion to give the evidence only limited weight: *Abi-Mansour* v. *Canada (Attorney General)*, 2015 FC 882 at para 30.

[82] Evidence should only be struck sparingly and in exceptional circumstances, where a party would be materially prejudiced or where not striking the evidence would impair the orderly hearing of the application if the matter was not dealt with at an early stage: *Armstrong* v. *Canada (Attorney General)*, 2005 FC 1013 at para 40.

[83] In considering whether to strike evidence at early stage, the Court must determine whether the advance ruling would result in a more timely and orderly adjudication of the matter or whether the issue should be left to the hearing as a matter of weight: *Bernard* v. *Canada Revenue Agency*, 2015 FCA 263 at para 11.

[84] In this case, the Respondents seek to strike the entirety of the April 6, 2019 Grosman Affidavit, or in the alternative those paragraphs that the Court considers appropriate. The Respondent Attorney General asserts that the affidavit contains information that is extraneous to the record, irrelevant, hearsay, opinion evidence and argument. The Respondent highlights certain paragraphs from the Grosman Affidavit for which it makes specific submissions, namely paras 6, 8, 9, 14-16, 20, 23, 33-35, 40, 41, 45-46, 50, 62, 67, 81, 82, 84-89, 91-96 and Exhibits 3, 11, 12, 15, 18-20, 22, 25, 26, 31-34, 37 and 28.

[85] The Applicant argues that the impugned paragraphs and exhibits meet the allowable exceptions and provide background information and context that is necessary for the proceeding. The Applicant further asserts that there is no prejudice to the Respondents in allowing the evidence to proceed as is, particularly as it is has already been responded to and a number of the objections to the information sought to be introduced are confirmed by the affidavits introduced by the Respondents. As such, it is the Applicant's view that the affidavit should more appropriately be put through the crucible of cross-examination.

[86] I have reviewed the submissions of the parties on the purported offending paragraphs and agree with the Respondents that the following paragraphs, or the identified phrases within those paragraphs, should be struck now as being based on inadmissible argument and/or opinion evidence, or extraneous information. In my view, these failings are clear and it would be prejudicial and distracting to the proceedings to maintain this information in the evidence. As additional evidence is also being sought by the Applicant, it is necessary to strike the following

paragraphs now before the offending types of information perpetuate through the additional evidence proposed. The following paragraphs will be struck:

a) Argument: paragraph 8, phrase "In furtherance of its competitive position, and contrary to its regulatory responsibilities"; paragraph 9; paragraph 82, second to last sentence; paragraph 84, use of phrases "erroneous and unsubstantiated" and "wrongly stating"; paragraphs 86 and 87; paragraph 91, third sentence; paragraph 96

b) Opinion evidence: paragraph 16, second sentence; paragraph 20; paragraph 35; paragraphs 40/41 (first two sentences); paragraph 85, second and third sentences; paragraph 94

c) Argument/opinion evidence: paragraph 6, third sentence; paragraph 23; paragraph 50; paragraph 88, phrase "required to"; paragraph 94; paragraph 95

d) Extraneous information: paragraph 92; paragraph 93

[87] In my view, there is no prejudice to the Respondents in leaving the remaining disputed paragraphs of the April 6, 2019 Grosman Affidavit to be dealt with on cross-examination and at the hearing.

[88] The Applicant asserts that the impugned exhibits included in the April 6, 2019 Grosman Affidavit (and those sought to be introduced in the Supplemental Grosman Affidavit) must be considered in context with the proposed amendments to the notice of application and fall into

three categories: (a) exhibits that were before the VFPA prior to the March Decision; (b) exhibits that were before the VFPA prior to the September 23 Letter; and (c) independent studies that the Applicant asserts are relevant background information and information that was likely before the VFPA when it made its decision.

[89] As there is no Tribunal Record for the application, the Applicant argues that more fulsome affidavit evidence is required to put the relevant documents for the application before the Court, particularly on the issue of bias. The Applicant asserts that as the application is based on an informal process, information that was available to the decision-maker provides relevant factual background: *Canada (Chief Electoral Officer)* v. *Callaghan*, 2011 FCA 74 at para 82, 83.

[90] The Respondent asserts that while there is no Tribunal Record in the proceeding, the application should be limited to only those documents that were filed by GCT with their PPE, the actual decision and those documents referenced in the decision. Documents that were available to the decision-maker do not qualify as documents that were before the decision-maker, which should be limited to the documents referenced. The Respondents assert that Exhibits 15, 18, 19, 20, 22, 26 of the Grosman Affidavit are not documents referenced in the March Decision and should not form part of the record of the application; the documents that arose after the March Decision should not be admissible; and the third party studies are extrinsic and are not relevant or admissible for the application.

[91] Regarding this third category of documents, pertaining to Exhibits 3, 11, 12, 25, 37 and 38, I agree with the Respondents. These documents, which are extraneous to the record, are not

known to have been before the VFPA, are not relevant and do not fall within the helpful background exception. As described in the Grosman Affidavit such documents are directed at encouraging the reviewing court to form its own views of the preferred project.

[92] With respect to the remaining exhibits, which were in the hands of the VFPA, at this stage, I see no prejudice in maintaining these exhibits within the evidence as they may provide useful background information for the decision-maker to help the decision-maker understand the context of the dispute between the parties. Any issues of relevance can be dealt with on cross-examination and are best left for the hearings judge. Further, I note that within this group while Exhibits 18, 19, 20, 31, 32, 33 have been objected to, the underlying paragraphs in which these documents are provided have not been challenged. As Mr. Grosman offers facts relating to the documents in question in these underlying paragraphs, I see no prejudice to attaching the documents themselves.

B. *The Supplemental Grosman Affidavit*

[93] Rule 312 of the *Federal Court Rules* provides that an Applicant may, with leave of the Court file affidavits, additional to those provided for in Rule 306. The test for leave under Rule 312 is set out in *Forest Ethics Advocacy Assn*. v. *Canada* (*National Energy Board*) 2014 FCA 88 ("*Forest Ethics*"). To obtain leave under Rule 312, an Applicant must satisfy two preliminary requirements: 1) the evidence must be admissible on the application for judicial review; and 2) the evidence must be relevant to an issue that is properly before the reviewing court.

[94] Additional evidence will be permitted only where it is in the interests of justice, where the evidence will assist the court, where admitting the evidence will not cause substantial or serious prejudice to the other side, and where the evidence was not available when filed original evidence filed: *Tsleil-Waututh Nation* v. *Canada (Attorney General)*, 2017 FCA 128 at para 10-16.

[95] As a general comment, I agree with the Respondents that it is important to make a distinction between the nature of this judicial review proceeding and that in T-537-19. In this proceeding the Applicant seeks to raise the purported bias relating to the VFPA's consideration of the PPE for the DP4 Project as reflected in the March Decision, and subsequently as proposed in the September 23 Letter. This judicial review is not about the Review Panel process for the RBT2 Project. While certain facts relating to the timing of RBT2 may be relevant, the details of the Review Panel process is not at issue in this proceeding, but rather is the subject of the separate proceeding in T-537-19, which is currently being held in abeyance.

[96] Based on my earlier findings regarding the motions relating to the notice of application and its proposed amendment, it is my view that documents relating to the September 23 Letter and the alleged bias of the VFPA would be admissible and relevant to the issues in the judicial review. While I share the concern of the Respondents regarding conflating the present application with the Review Panel proceeding, as noted above, it is my view that allowing paragraphs 4-6, 8, 9, 11-14, 16, 17, 21, 22, 24 and the exhibits associated therewith could be of assistance to the Court and would not be prejudicial to the parties. The remaining paragraphs in Part I of the proposed supplemental affidavit, in my view, include inadmissible opinion evidence

or argumentation. Further, while I will allow certain documents relating to the Review Panel proceeding, I do not consider the full transcripts from the Review Panel proceeding to be relevant to this judicial review or to be of assistance to the Court. Thus, paragraph 10, Exhibit F, and paragraph 20, Exhibit L will not be allowed.

[97] With respect to Part II of the Supplemental Grosman Affidavit, paragraphs 27-29 which relates to the implementation of the IAA is relevant to the judicial review and of assistance to the Court. Paragraphs 30 and 31 provide improper opinion evidence and will not be allowed.

[98] With respect to paragraphs 32-39, the facts and circumstances around the disqualification of Lawson Lundell were already considered by the Court for its September 6, 2019 decision. The Order of September 6, 2019 speaks for itself and is already part of the Court's record for this matter. I do not consider Mr. Grosman's comments on the Order to be relevant, necessary, or of assistance to the Court.

VII. Costs

[99] The Applicant and Respondent Attorney General each provided a draft bill of costs and all parties made oral submissions regarding the issue of costs at the hearing. While I have considered the submissions made, as there was mixed success on the motions, I consider it appropriate in this case for each party to bear its own costs.

ORDER in T-538-19

THIS COURT ORDERS that

1. The Respondents' motions to strike are allowed in part and the relief requested in paragraph 2(e) of the notice of application shall be struck from the application.

2. The proposed amended notice of application shall be allowed in part, except for the proposed amended paragraphs 2(c) and 2(h). An amended notice of application in accordance with this paragraph shall be served and filed within fifteen (15) days of the date of this Order.

3. The Attorney General shall remain as a named Respondent to the application.

4. Paragraphs 6 (third sentence), 8 (phrase "In furtherance of its competitive position, and contrary to its regulatory responsibilities"), 9, 16 (second sentence), 20, 23, 35, 40, 41 (first two sentences), 50, 82 (second to last sentence), 84 (use of phrases "erroneous and unsubstantiated" and "wrongly stating"), 85 (second and third sentences), 86, 87, 88 (phrase "required to"), 91 (third sentence), 92, 93, 94, 95, 96, and Exhibits 3, 11, 12, 25, 37 and 38 shall be struck from the Affidavit of Doron Grosman, sworn April 6, 2019.

5. The Supplemental Affidavit of Doron Grosman, sworn September 18, 2019, shall be allowed in part, except for paragraphs 7, 10, 15, 18-20, 23, 25, 26, 30, 31, 32-39 and the exhibits associated therewith. A revised supplemental affidavit shall be served within fifteen (15) days of the date of this Order.

6. Leave is granted to file the affidavit of Anna Hucman, sworn November 20, 2019.

7. The parties shall within fifteen (15) days of the date of this Order provide a jointly proposed timetable for the next steps in the application, along with joint dates of availability for a case management conference.

8. There shall be no award as to costs for these motions.

"Angela Furlanetto"
Case Management Judge

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:	TORONTO, ONTARIO
DATE OF HEARING:	DECEMBER 17, 2019
ORDER AND REASONS:	CASE MANAGEMENT JUDGE FURLANETTO
DATED:	MARCH 9, 2020

APPEARANCES:

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MICHELE CHARLES GWEN MACISAAC	FOR THE RESPONDENT ATTORNEY GENERAL

SOLICITORS OF RECORD:

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MCMILLAN LLP	FOR THE RESPONDENT VANCOUVER FRASER PORT AUTHORITY
DEPARTMENT OF JUSTICE	FOR THE RESPONDENT ATTORNEY GENERAL