Federal Court  Cour fédérale

Date: 20231107

Docket: T-2256-22

Citation: 2023 FC 1485

Ottawa, Ontario, November 7, 2023

PRESENT: The Honourable Mr. Justice Roy

BETWEEN:

PACIFIC COAST TERMINALS CO. LTD., VITERRA CANADA INC., CASCADIA PORT MANAGEMENT CORPORATION, FRASER GRAIN TERMINAL LTD. AND ALLIANCE GRAIN TERMINAL LTD.

Applicants

and

VANCOUVER FRASER PORT AUTHORITY

Respondent

and

ATTORNEY GENERAL FOR SASKATCHEWAN AND ATTORNEY GENERAL OF MANITOBA

Interveners

ORDER AND REASONS

[1] The BC Marine Terminal Operators Association [BCMT] appeals the Order of Associate Judge Trent Horne of the Federal Court (the Judge) who dismissed the motions to intervene of the Western Grain Elevators Association and BCMT. Only BCMT seeks to challenge the decision of the Judge pursuant to Rule 51 of the *Federal Courts Rules* (SOR/98-106). It is Rule 109 which gives the Court the power to grant leave to intervene in a proceeding not launched by the interveners.

[2] Associate Judge Horne granted the Attorney General for Saskatchewan and the Attorney General of Manitoba intervener status, but on strict conditions:

A. they shall not repeat any submissions made by the parties;

B. they shall not raise any new issues;

C. they shall not add to the evidentiary record or conduct cross-examinations

The Attorney General for Saskatchewan is allowed a memorandum of fact and law of 15 pages, while the Attorney General of Manitoba is allowed one not exceeding 10 pages.

[3] The Vancouver Fraser Port Authority opposed the four motions for intervention. Ultimately, Associate Judge Horne found that the Attorneys General have considerable latitude in motions based on Rule 110 and have broader rights of intervention. In effect, they intervene in order to advance the public interest. If there is a difference between the Attorneys General and the other aspiring interveners, it is because of the different rules and jurisprudence that apply to these two classes of interveners. The style of cause was amended to reflect the addition of the two interveners.

I. What is the underlying proceeding

[4] These interventions were sought with respect to a judicial review application launched by the five Applicants pursuant to s. 18.1 of the *Federal Courts Act* (RSC 1985, c F-7).

[5] It is a decision of the Vancouver Fraser Port Authority [VFPA] made on September 13, 2022, which is challenged on judicial review. The VFPA established fees relating to the Gateway Infrastructure Fee 2022 [GIF 2022 OR GIF 2]. The fee became effective on January 1, 2023, and it is imposed in accordance with s 49 of the *Canada Marine Act* (SC 1998, c 10).

[6] The Applicants operate terminals which handle bulk commodities that are subjected to higher fees. Since a port authority incurs operating expenses, it is allowed by s. 49 to fix fees about a variety of activities. Ss. 49(3) requires, however, that the fees be fixed at a level that allows the port authority to operate on a self-sustaining financial basis. The fees must be fair and reasonable.

[7] The Applicants complain that the fees are not fair and reasonable, such that VFPA acted beyond its jurisdiction. Among other things, they claim that the new fee structure requires the Applicants to fund railway infrastructure and costs that the railways have an obligation to furnish. It is alleged that there is cross-subsidization as the fees are not proportionate to the use of the infrastructure, thus offering a preference to certain classes of users. The Judge wrote at paragraph 10 of his decision:

> [10] The notice of application further alleges that VFPA ignored or misapprehended the evidence, acted beyond its jurisdiction, and erred in law by establishing a fee structure which has the effect of allocating to the applicants the costs of infrastructure that have little or no ostensible connection to the applicants, and allocates costs of infrastructure projects to the applicants that primarily benefit other users. It is also alleged that the fees exceed the amount that is required in order for VFPA to operate on a self-sustaining financial basis, and that the Decision unreasonably assumes that the applicants will be able to recover GIF2022 from their customers.

There is also an allegation that VFPA failed its obligation to abide by the principles of procedural fairness.

II. The decision under review

[8] Other than the two provincial Attorneys General, Western Grain Elevator Association and BC Marine Terminal Operators Association sought to intervene in these proceedings. Only BCMT remains, the provincial Attorneys General having been granted leave to intervene and the Western Grain Elevators Association having chosen not to appeal Associate Judge Horne's decision.

[9] The Associate Judge referred to the Court of Appeal's decision in *Canada (Citizenship and Immigration) v Canadian Council for Refugees*, 2021 FCA 13 [*Canadian Council for Refugees*], as a good articulation of the principles that govern in the federal courts the intervention in proceedings launched by others:

> [6] Thus, the current test for intervention under Rule 109 is as follows:
>
> > I. The proposed intervener will make different and useful submissions, insights and perspectives that will further the

> Court's determination of the legal issues raised by the parties to the proceeding, not new issues. To determine usefulness, four questions need to be asked:
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> (a) What issues have the parties raised?
>
> (b) What does the proposed intervener intend to submit concerning those issues?
>
> (c) Are the proposed intervener's submissions doomed to fail?
>
> (d) Will the proposed intervener's arguable submissions assist the determination of the actual, real issues in the proceeding?
>
> II. The proposed intervener must have a genuine interest in the matter before the Court such that the Court can be assured that the proposed intervener has the necessary knowledge, skills and resources and will dedicate them to the matter before the Court;
>
> III. It is in the interests of justice that intervention be permitted.

I note that this articulation of the test was endorsed recently in *Chelsea v Canada (Attorney General)*, 2023 FCA 179, para 9.

[10] Stratas J.A. had already stressed a few years earlier that it is the issues found in the notice of application that frame the scope of potential interventions. The Judge referred to paragraph 19 of *Canada (Attorney General) v Canadian Doctors for Refugee Care*, 2015 FCA 34 [*Canadian Doctors for Refugee Care*]:

> [19] Notices of application and notices of appeal serve to define the issues in a proceeding. Existing parties build their evidence and submissions around those carefully defined issues. An outsider seeking admission to the proceedings as an intervener has to take those issues as it finds them, not transform them or add to them. Thus, under Rule 109(2)(*b*) a proposed intervener must show its

> potential contribution to the advancement of the issues on the table, not how it will change the issues on the table.

It is not surprising that Judge Horne insisted on interventions not being allowed where an enthusiastic intervener wishes to make new legal arguments. At the end of the day, the test is whether the court will be better served in its consideration of the issue with which it has to grapple by the presence of the intervener (*Gordillo v Canada (Attorney General)*, 2020 FCA 198, at para 9).

[11] These were the governing principles the Judge applied to the motion for intervention by BCMT.

[12] The Judge described the Association as being composed of 17 marine terminal operators in British Columbia. They manage facilities loading and unloading goods from vessels for import and export. 16 of its 17 members operate terminals in the Port of Vancouver; 15 of the 16 are impacted by GIF2022. As a matter of fact, the Association participated in the consultations which resulted in the decision of VFPA; indeed, BCMT sits on the Gateway Infrastructure Program Advisory Committee.

[13] BCMT announced that its contribution as an intervener was to be to argue that the relationship between the port authority and the terminals, which are port users, was to be considered to assess the fairness and reasonableness of the fees imposed. That relationship was to be considered in assessing what costs are necessary and permissible. That relationship is also to be considered in assessing what procedural rights port users should have as a port authority fixes fees in accordance with s. 49 of the *Canada Marine Act*.

[14] The Associate Judge went on to note that the BCMT asserted the relationship is, or is in the nature of, a fiduciary relationship, generating duties such as duties of care, prudence and disclosure. The argument BCMT wished to make was characterized by the Judge as follows:

> [41] BCMT asserts that the relationship between VFPA and marine terminals and other fee-paying port users is, or is in the nature of, a fiduciary one, and VFPA accordingly has fiduciary-type duties, such as duties of care, prudence and disclosure. It intends to argue that a fee imposed on a beneficiary as a consequence of imprudent investment made without adequate consultation or sufficient basis cannot be fair or reasonable, and that a fee imposed due to investment purportedly made on a beneficiary's behalf without adequate disclosure cannot be fair or reasonable.

[15] The VFPA argued that the leave to intervene should not be granted because the fiduciary-like relationship was a new and novel issue, which should not be allowed on the part of an intervener. The Judge agreed.

[16] A notice of application is an important document as it must set out "a complete and concise statement of the grounds intended to be argued" (Rule 301(e)). The existence of some form of fiduciary relationship is argued in BCMT's written submissions, yet the Applicants did not make the allegation in what is presented as a lengthy notice of application. That, says the Associate Judge, is raising a new issue not raised by the Applicants. While BCMT argued that it is merely advancing new ideas about how to approach the issues in this case, the Judge found that the argument could not overcome the consistent jurisprudence of the Court of Appeal on the role to be played by an intervener in view of Rule 301.

[17] Rule 301 sets the boundaries of the issues that are to be determined. An applicant cannot raise an issue that has not been identified in the pleading. In the case at bar, the Applicants could not, at the eventual hearing of the judicial review application, argue the existence of a fiduciary-like relationship if the issue had not been raised in the notice of application. It should not be possible to broaden the scope and, in effect, amend the notice of application by raising a new issue. Referring back to *Canadian Doctors for Refugee Care* (*supra*), the Judge states that "[t]o conclude otherwise would permit interveners, and BCMT specifically, to "add food to the table"" (para 47).

[18] The conclusion reached by Associate Judge Horne is found at paragraph 48 of his decision:

> [48] The backbone of BCMT's motion is an intention to raise a new issue (the existence of a fiduciary or fiduciary like relationship) that is not before the Court. This exceeds the proper scope of intervention, and the motion will therefore be dismissed. I need not consider the extent to which BCMT is requesting leave to submit evidence, an issue addressed in the motion materials. In any event, and as set out above, an intervener cannot introduce new evidence.

III. Arguments and Analysis

[19] As noticed earlier, it is Rule 109 that governs intervention before the Federal Courts. I reproduce subsections 109(1) and (2):

109 (1) The Court may, on motion, grant leave to any person to intervene in a proceeding.	**109 (1)** La Cour peut, sur requête, autoriser toute personne à intervenir dans une instance.

(2) Notice of a motion under subsection (1) shall	**(2)** L'avis d'une requête présentée pour obtenir l'autorisation d'intervenir :
(a) set out the full name and address of the proposed intervener and of any solicitor acting for the proposed intervener; and	**a)** précise les nom et adresse de la personne qui désire intervenir et ceux de son avocat, le cas échéant;
(b) describe how the proposed intervener wishes to participate in the proceeding and how that participation will assist the determination of a factual or legal issue related to the proceeding.	**b)** explique de quelle manière la personne désire participer à l'instance et en quoi sa participation aidera à la prise d'une décision sur toute question de fait et de droit se rapportant à l'instance.

[20] BCMT appeals the decision of the Associate Judge. Surprisingly in my view, BCMT does not address the burden that it must support in its attempt to overturn the decision of the Associate Judge.

[21] Instead, it argues from the start that the Judge "improperly equates the applicants' grounds of review with the issues that arise from them" (memorandum of fact and law, para 2), a phrase that will be used more than once. What is not spelled out is the standard against which the alleged error must be measured. Instead, the Appellant speaks of the disagreement with the Judge turning on what constitutes a new issue, as raised by an intervener which the Associate Judge finds is prohibited by the jurisprudence of the Federal Court of Appeal. Only the issues on the table can be pursued by interveners.

[22] Here, BCMT asserts that the Judge misconstrues its argument regarding a "fiduciary-like relationship" because it is not a new ground of review. It puts its submission as a proposed argument in order to assess what is "fair and reasonable" in setting up the fees. It argues that "the Court needs to consider the relationship between the port authority imposing the fees and the port users that pay them" (memorandum of fact and law, para 3). That, in the view of the Associate Judge, constitutes a new issue, which should not be allowed in an intervention, while BCMT says that it is not a prohibited independent ground of review. One speaks of a new issue while the other one speaks of a ground of review.

[23] It should be obvious that the Applicants in this case never contemplated including in their grounds of review the relationship of the port authority with the port users. Indeed, their grounds of review do not include the type of relationship between the VFPA and the users of the facilities. Their grounds were of a different order. BCMT chose to reproduce only parts of paragraphs 3(a), (c), (f) and (h), as well as paragraph 3(g), of the Notice of Application in its attempt to show that its intervention would be within the boundaries of the grounds of review presented over eight pages in the notice of application. I believe these paragraphs should be reproduced in their entirety, and not only in part, to illustrate the true nature of the grounds the Applicants wish to advance. I have underlined in paragraphs 3(a), (c), (f) and (h) the portions not reproduced in BCMT's factum:

> 3. The grounds for the application are:
>
> (a) VFPA acted beyond its jurisdiction and erred in law in its interpretations an application of subsection 49(3) of the *CMA* by establishing fees that are not fair and reasonable to the Applicants. <u>Specifically</u>:
>
> (i) <u>the fee structure established by GIF2022:</u>

(A) is inconsistent with or in conflict with the statutory obligation of the railways to furnish adequate and suitable accommodation for the receiving and loading of all traffic ordered for carriage on the railway, pursuant to section 113 of the *Canada Transportation Act*, S.C. 1996, c. 10 ("*CTA*"),

(B) has the effect of requiring the Applicants, who are bulk commodity terminals, to remit payments to VFPA to fund railway infrastructure and costs that the railways have the legal obligation to furnish in order to provide adequate and suitable accommodation for the traffic that is offered for carriage on those railways, and

(C) has the effect of defeating or otherwise frustrating the ability of shippers to pursue statutory remedies under the *CTA*, to ensure that the railways (rather than the terminals, including the Applicants) pay for the infrastructure that the railways are obligated to furnish in order to provide adequate and suitable accommodation for the traffic that is offered for carriage on those railways.

(ii) the quantum of fees that the Decision has the effect of levying against the Applicants with respect to GIF2022 is not proportionate to the Applicants' use of that infrastructure or any direct or indirect benefits that the Applicants may receive from the infrastructure projects being funded;

(iii) the quantum of fees that the Decision has the effect of levying against the Applicants with respect to GIF2022 is not commensurate with any increase in demand resulting from the Applicants' operation that would necessitate the projects;

(iv) the fee structure established by GIF2022 does not reasonably reflect users' use of the infrastructure projects being funded or the benefit that users

derive from the projects, and thereby gives unreasonable preference to certain groups or classes of users including, *inter alia*, the following:

(A) terminals and shippers of containerized cargo;

(B) the railways, which will derive benefit from and retain ownership over the infrastructure being funded by the Applicants, despite the railways' statutory obligation under the *CTA* to provide that infrastructure to the extent it is necessary to enable them to furnish adequate and suitable facilities for the receiving, carriage and delivery of rail traffic; and

(C) the municipalities, which will derive benefit from and retain ownership over the road infrastructure and grade separations being funded by the Applicants;

(v) the quantum of fees that the Decision has the effect of levying against the Applicants with respect to GIF2022 is disproportionately higher than that being levied against other groups or classes of users, the effect of which will cause significant harm to the Applicants' market competitiveness; and

(vi) the quantum of fees that the Decision has the effect of levying against the Applicants with respect to GIF2022, on its own and in conjunction with concurrent increases to other fees levied against the Applicants by VFPA, will cause significant financial harm to the Applicants.

…

(c) VFPA acted beyond its jurisdiction and erred in law in its interpretation and application of subsection 49(3) of the *CMA* by establishing fees that exceed, or that unreasonably or unfairly exceed, the amount required in order to operate on a self-sustaining financial basis. In particular, there is no evidence on

the record establishing the need for VFPA to seek recovery of 90% of its investment through GIF2022 in order for VFPA's operations to self-sustaining.

…

(f) VFPA acted beyond its jurisdiction and erred in law in its interpretation and application of subsection 49(3) of the *CMA* by establishing a fee structure which erroneously, unfairly and unreasonably assumes that the Applicants will be able to recover GIF2022 from its customers, as the owners of the non-containerized cargo.

(g) VFPA acted beyond its jurisdiction and erred in law in its interpretation and application of subsection 49(3) of the *CMA* by levying fees on the Applicants that unreasonably or unfairly seek to recover costs that VFPA has chosen to incur for the purpose of investing in infrastructure projects that are unrelated or insufficiently connected to VFPA's operation of the Port of Vancouver (the "Port") or the Applicants' use of the Port or its facilities.

(h) VFPA failed to observe the principles of procedural fairness and deprived the Applicants of the opportunity to meaningfully consult and to present their cases in respect of GIF2022. Specifically, prior to making the Decision:

(i) VFPA failed or refused to disclose information, submissions or other materials relied upon by VFPA in its selection of infrastructure projects to be funded by GIF2022, and any cost-benefit analyses completed in respect of those infrastructure projects;

(ii) VFPA failed or refused to disclose the information, submissions or other materials relied upon by VFPA in deciding the basis for which GIF2022 will apply to the Applicants and others;

(iii) VFPA failed or refused to disclose the information, submissions or other materials relied upon by VFPA in determining the allocation of fees for GIF2022 between and among "trade areas" and amongst gateway infrastructure users,

> including the allocation of fees to the Applicants; and
>
> (iv) VFPA considered and relied on information, submissions or other materials prepared by third parties, including but not limited to:
>
> (A) information, including operational data, provided by the railways, which will derive benefit from and retain ownership over the infrastructure being funded by the Applicants, and
>
> (B) a consultant's report prepared by Mott MacDonald Group (the "Mott MacDonald Study")),
>
> without making those materials available to the Applicants, giving the Applicants any opportunity to evaluate or respond to them, or taking other steps to independently verify the information provided by the railways that VFPA relied on.

[24] Paragraphs 3(b), (d), (e) and (i) of the Notice od Application were not even alluded to in the factum. Paragraphs 3(b), (d) and (e) are concerned with misapprehending the evidence and alleging erroneous findings of fact made in a perverse and capricious manner. As for paragraph 3(i), the Applicants complain about VFPA changing *ex post facto* the criteria governing the implementation of GIF2022, thus violating principles of procedural fairness.

[25] The point of the matter is a simple one. The Applicants, operating in conformity with Rule 301(e), presented a complete and concise statement of the grounds they intend to argue. There is nothing in the grounds of review that even remotely can be associated with an alleged relationship in the nature of a fiduciary one. As can be seen from the full paragraphs from the Notice of Application referred to by BCMT, the grounds are of a technical nature, relating for

instance to statutory obligations or cross-subsidization, the quantum of fees not being proportionate to the use of the infrastructure. They suggest that the evidence does not establish the need to seek recovery of 90% of the investment. They contend that the users will not be able to recover the increased fees from their customers; indeed the infrastructure projects are either unrelated, or insufficiently connected to the operation of the Port of Vancouver or the use of its facilities. The Applicants also raise a number of concerns relating to procedural fairness with disclosure of information and submissions, thus depriving the Applicants from participating fully in the fixing of the fees.

[26] As I read the Notice of Application, I cannot find anything that could relate to a special relationship that operators of terminals may have with the port authority as was raised by the Applicants. Their grounds of review are of a different order and nature. Judge Horne concluded that this new layer, which was not in any way an issue raised by the Applicants as part of their judicial review application, constitute a new and novel issue.

[27] On appeal of a decision of an Associate Judge, the Federal Court of Appeal established unequivocally in *Hospira Healthcare Corporation v Kennedy Institute of Rheumatology*, 2016 FCA 215, [2017] 1 FCR 331, that the standard of review on appeals pursuant to Rule 51 is the same as in other civil matters. That is the standard described by the Supreme Court of Canada in *Housen v Nikolaisen*, 2002 SCC 33, [2002] 2 SCR 235.

[28] If the appeal is on a question of law, the standard of review on appeal will be correctness. No deference is owed the Associate Judge. As said by the Court of Appeal in *Mahjoub v Canada*

(Citizenship and Immigration), 2017 FCA 157, [2018] 2 FCR 344 [*Mahjoub*], "if there is error, this Court can substitute its opinion for that of the Federal Court" (para 58). On questions of fact or mixed fact and law, the standard is that of palpable and overriding error unless the appellant is able to isolate a question of law out of questions of mixed fact and law. It is naturally for an appellant to identify the question of law on which an appeal is based.

[29] What constitutes a palpable and overriding error? The Federal Court of Appeal has provided a clear articulation of the standard. The Supreme Court of Canada in *Benhaim v St-Germain*, 2016 SCC 48, [2016] 2 SCR 352, endorsed fully the description given by the Court of Appeal a few years earlier and that given by the Quebec Court of Appeal:

> [38] It is equally useful to recall what is meant by "palpable and overriding error". Stratas J.A. described the deferential standard as follows in *South Yukon Forest Corp. v. R.*, 2012 FCA 165, 4 B.L.R. (5th) 31, at para. 46:
>
> > Palpable and overriding error is a highly deferential standard of review…. "Palpable" means an error that is obvious. "Overriding" means an error that goes to the very core of the outcome of the case. When arguing palpable and overriding error, it is not enough to pull at leaves and branches and leave the tree standing. The entire tree must fall.
>
> [39] Or, as Morissette J.A. put it in *J.G. v. Nadeau*, 2016 QCCA 167, at para. 77 (CanLII), [TRANSLATION] "a palpable and overriding error is in the nature not of a needle in a haystack, but of a beam in the eye. And it is impossible to confuse these last two notions."

[30] The articulation was further explained in *Mahjoub* (*supra*). In spite of its length, I reproduce in their entirety paragraphs 60 to 65, which provide, in my view a very useful further explanation of what constitutes the 'palpable and overriding' standard:

> [60] In this case, many of Mr. Mahjoub's submissions focus on the Federal Court's fact-finding and its factually suffused application of legal standards to the facts, particularly on the issue of the reasonableness of the security certificate. These matters can only be reviewed for palpable and overriding error.
>
> [61] Palpable and overriding error is a highly deferential standard of review: *Benhaim v. St. Germain*, 2016 SCC 48, [2016] 2 S.C.R. 352 at para. 38; *H.L. v. Canada (Attorney General)*, 2005 SCC 25, [2005] 1 S.C.R. 401. When arguing palpable and overriding error, it is not enough to pull at leaves and branches and leave the tree standing. The entire tree must fall. See *Canada v. South Yukon Forest Corporation*, 2012 FCA 165, 431 N.R. 286 at para. 46, cited with approval by the Supreme Court in *St. Germain*, above.
>
> [62] "Palpable" means an error that is obvious. Many things can qualify as "palpable." Examples include obvious illogic in the reasons (such as factual findings that cannot sit together), findings made without any admissible evidence or evidence received in accordance with the doctrine of judicial notice, findings based on improper inferences or logical error, and the failure to make findings due to a complete or near-complete disregard of evidence.
>
> [63] But even if an error is palpable, the judgment below does not necessarily fall. The error must also be overriding.
>
> [64] "Overriding" means an error that affects the outcome of the case. It may be that a particular fact should not have been found because there is no evidence to support it. If this palpably wrong fact is excluded but the outcome stands without it, the error is not "overriding." The judgment of the first-instance court remains in place.
>
> [65] There may also be situations where a palpable error by itself is not overriding but when seen together with other palpable errors, the outcome of the case can no longer be left to stand. So to speak, the tree is felled not by one decisive chop but by several telling ones.

[31] In this case, BCMT identifies the standard of review as being that found in *Housen v Nikolaisen* (*supra*), but it refrains from identifying the alleged error if it is to be an error of law. Instead, it posits that the Associate Judge misconstrued its argument in concluding that the issue

raised about the fiduciary-like relationship between the port authority and users of the port is "an independent ground of review" (memorandum of fact and law, para 28). However, that is not how the matter was framed by the Associate Judge. He did not speak of a new ground of review, as VFPA opposed BCMT's intervention as it wished to intervene by raising a new and novel issue. The Judge agreed. He was concerned about a new issue being raised. The absence of an identification of the error of law would suggest that BCMT is held to the standard of palpable and overriding error.

[32] In essence, it seems to me that BCMT seeks to argue that it can raise new issues if they are within the grounds of review already identified in the Notice of Application. In my view, it is rather that interveners cannot raise new issues which is the standard to be applied on interventions.

[33] With respect, the jurisprudence of the Federal Court of Appeal does not support the BCMT contention. The analysis starts with Rule 109 which is "a provision in a regulation that is part of the binding law of Canada" and its requirements "are mandatory and cannot be reduced to mere factors that can be overridden" (*Tsleil-Waututh Nation v Canada (Attorney General)*, 2017 FCA 102, at para 31 [*Tsleil-Waututh Nation I*]). Rule 109(2) requires that the intervention be to "assist the determination of a factual or legal issue related to the proceeding", that is "the issues raised in the existing applications before the Court" (*Tsleil-Waututh Nation I*, para 47). [my emphasis]

[34] What constitutes a new issue was examined again recently in *Canada (Citizenship and Immigration) v Canadian Council for Refugees*, 2021 FCA 13. Stratas J.A. stressed that a "critical element of usefulness is the addressing of the real, actual issues in the case, not new issues" (para 26). The appellate Judge reminds us that the proceedings one wants to intervene in are limited by the Notice of Application:

> [27] At first instance, the issues in a proceeding are set by the originating document such as a statement of claim or notice of application, as explained by the arguments in the parties' memoranda of fact and law: *Kattenburg* at para. 9. A proposed intervener, has no standing to amend that originating document, add new issues or reinvent the theory of the case. It is the parties' case, the case has been defined by them, and their case cannot be commandeered by others: *Kattenburg* at para. 34. Still less should it become a reference case on general issues of law not pleaded by the parties.
>
> [Emphasis added]

[35] The point was stressed at paragraph 30:

> [30] Normally, parties cannot raise new issues in the appellate court: *Quan v. Cusson*, 2009 SCC 62, [2009] 3 S.C.R. 712; *Performance Industries Ltd. v. Sylvan Lake Golf & Tennis Club Ltd.*, 2002 SCC 19, [2002] 1 S.C.R. 678. The same is true for interveners: *Canadian Doctors* at para. 19; *Canada (Citizenship and Immigration) v. Ishaq*, 2015 FCA 151, [2016] 1 F.C.R. 686 at para. 17; *Teksavvy Solutions* at para. 11; *Kattenburg* at para. 9. As strangers to a proceeding they have not brought, they have no right to change it. If they wish, they can seek to bring their own proceeding as a public interest litigant to prosecute the issues they want.
>
> [Emphasis added]

Nowhere do we find that a new issue is in fact a new ground of appeal or ground of review.

[36] In *Tsleil-Waututh Nation v Canada (Attorney General)*, 2017 FCA 174 [*Tsleil-Waututh Nation II*], another decision on leave sought to intervene, it was British Columbia who wished to intervene pursuant to Rule 110 on a question of general importance. Stratas J.A. agreed that British Columbia had met the "question of general importance" requirement. He, however, limited the intervention such that new issues were not to be raised:

> [54] In this Court, an intervener is not an applicant: *Tsleil-Waututh Nation*, above. An intervener cannot introduce new issues or claim relief that an applicant has not sought. Instead, an intervener is limited to addressing the issues already raised in the proceedings, i.e., within the scope of the notices of application. As well, an intervener cannot introduce new evidence. See generally *Canada (Citizenship and Immigration) v. Ishaq*, 2015 FCA 151, [2016] 1 F.C.R. 686.
>
> [55] In this Court, interveners are guests at a table already set with the food already out on the table. Interveners can comment from their perspective on what they see, smell and taste. They cannot otherwise add food to the table in any way.
>
> [56] To allow them to do more is to alter the proceedings that those directly affected—the applicants and the respondents—have cast and litigated under for months, with every potential for procedural and substantive unfairness.
>
> [emphasis added]

In the *Canadian Council for Refugees* case (*supra*), paragraphs 55 and 56 are cited again for the proposition that the interveners cannot seek to add new issues. Here, BCMT wants to invite itself to the table already set and bring its own lunch; it wants to raise its issues that are not present in the Notice of Application.

[37] It is noteworthy that in its factum presented to Associate Judge Horne, BCMT had to state that "most of the applicant group are BCMT members" (para 61), yet the issue it wants to raise has not been included by the very participants in the judicial review application. That is a

further indication of the newness of the issue raised, together for the need expressed by BCMT at paragraph 57 of its factum to seek a limited right to file evidence. The matter of the relationship being a fiduciary-like nature is in fact so new that "(t)his Court has not considered the nature of the relationship between port authorities and port users" (para 46). In effect, BCMT attempts to broaden the scope of the proceedings led in part by its own members (para 62): "(a)n intervener cannot transform the proceedings into something different by, for example, raising issues foreign to the applications before this Court" (*Tsleil-Waututh Nation I*, para 48).

[38] The case law provides examples of issues that cannot be raised by an intervener. *In Tsleil-Waututh Nation II* (*supra*), British Columbia wanted to discuss the "constitutional limitations on British Columbia's ability to regulate the Project" [the Trans Mountain Pipeline] and the "regulatory regime that governs interprovincial pipelines" (para 58) in a case challenging administrative approvals on a number of grounds related to administrative law, statutory law and section 35 of the *Constitution Act*, 1982. Here, the interveners would also want to open a new front.

[39] Not only did the Court of Appeal order British Columbia to not advance these issues (para 61), but it was careful to prohibit new arguments that are nothing other than new issues:

> [62] British Columbia shall also take care not to advance new arguments that in effect are new issues. For example, submissions that extend the scope of the duty to consult and accommodate beyond those advanced by the applicants are not permissible.
>
> [63] British Columbia shall be limited to submissions commenting on the submissions advanced by other parties from its perspective as guardian of the public interest of British Columbia and as a government with responsibilities to discharge under provincial legislation. This is to be done with one goal front of mind: to assist the Court in deciding whether the administrative

> decisions before it should be quashed on account of administrative law and duty to consult principles.
>
> [64] For example, British Columbia may make submissions on the issue it raised in its reply representations on this motion: namely, whether marine spill risks were unreasonably assessed, resulting in risk to British Columbians and a breach of the duty to accommodate Indigenous peoples and First Nations. The applicants have placed this issue on the table.
>
> [emphasis added]

As can be seen, even a province that seeks to intervene on a question of general importance sees the scope of its intervention limited to issues placed on the table.

[40] Perhaps even closer to the type of issue BCMT wishes to raise, the *Canadian Council for Refugees* case (*supra*) illustrates the limitations to the legitimate scope of an intervention. In that case, would be interveners were denied the ability to broaden the scope of allegation already made concerning violations of sections 7 and 15 of the *Canadian Charter of Rights and Freedoms*.

[41] It is noted that the Notice of Application and the Notice of Appeal are precise and clear, as it is in this case. The new arguments offered by would be interveners are new issues. Concerning s. 7, one reads:

> [36] To some extent, the proposed interveners raise new section 7 arguments. For example, the British Columbia Civil Liberties Association submits that the principles of fundamental justice in section 7 must be interpreted in a way that incorporates various non-binding international instruments or incorporates the language of other sections of the *Charter*. These are new issues that were not raised at the Federal Court or in the originating documents before this Court. The submission fails to cite the lead authority on the interpretation of Charter provisions and on the relevance of non-binding international instruments to that issue and, thus, it is not

> sufficiently useful: *Quebec (Attorney General) v. 9147-0732 Québec Inc.*, 2020 SCC 32.
>
> [Emphasis added]

In the case at bar, BCMT wishes to introduce the fiduciary-like relationship as a component of the fee-fixing exercise conducted by VFPA, something that cannot be found in the Notice of Application which is the document that frames the proceedings.

[42] Even more to the point, the Court of Appeal refused an intervention the purpose of which was to claim that other grounds of discrimination ought to be considered:

> [37] The section 15 claim made in the Federal Court was based only on discrimination against women and children, not other groups. Some of the proposed interveners raise other grounds of discrimination not previously argued, such as religion, disability and sexual orientation. These are new issues. While one can find some evidence relevant to the treatment of these groups in the record, the issue of discrimination against these groups was not briefed or argued at the Federal Court, has not been argued by any of the parties, and, for practical purposes, would be a new issue in this Court. It is open to these moving parties to seek standing as public interest litigants to bring their own proceeding on these bases.
>
> [Emphasis added]

Unequivocally, while s. 15 of the *Canadian Charter of Rights and Freedoms* was part of the proceedings, the Court found that adding new groups constituted a new issue. I am convinced that the same is true in the case at bar. BCTM brings something which is new and was not even contemplated in the Notice of Application to which a number of its members contributed.

IV. Conclusion

[43] In my respectful view, Associate Judge Horne was correct to deny BCMT the ability to intervene in this case. I note that the Applicants in this Judicial Review application stated that they "take no position and do not expect to make submissions addressing the merits of the BCMT's motion at this time" (written representations of October 11, 2023, para 8).

[44] It goes without saying that if the conclusion is that the Judge was right to consider that the intervention sought by BCMT involved new issues, because that is not permissible, there is no palpable and overriding error. It remains that it is the burden of an appellant to identify the question of law clearly for the standard of review to be correctness to apply. That in my estimation was not done on this record. It is not clear whether the qualification of an issue as being new constitutes a question of law and, if so, what it is. In the case at bar, Judge Horne did not say that the argument around a fiduciary-like relationship was a new ground of review. He said that the new argument constituted a new issue. Is that a mixed question of fact and law? If it is, is there a way to isolate the question of law? That discussion never happened because counsel was willing to argue the case on the basis of the "palpable and overriding" standard of review. Be that as it may, it suffices at the end of the day to conclude that the Associate Judge was correct in his conclusion that "(t)he backbone of BCMT's motion is an intention to raise a new issue (the existence of a fiduciary or fiduciary-like relationship) that is not before the Court. This exceeds the proper scope of intervention, and the motion will therefore be dismissed" (Order and Reasons, para 48). There is no need to decide in this case whether the standard is correctness or palpable and overriding error. Applying the higher correctness standard, the appeal fails.

[45] In the recent decision in *Right to Life Association of Toronto and Area v Canada (Employment, Workforce and Labour)*, 2022 FCA 67, the Court of Appeal distilled three fundamental policies which guide Courts in exercising discretion to grant intervener status:

> [17] In offering the foregoing comments about interventions, the Court draws comfort from recent changes the Supreme Court has made to its policies on intervention: "November 2021 – Interventions" (15 November 2021), online: *Supreme Court of Canada* <www.scc-csc.ca/ar-lr/notices-avis/21-11-eng.aspx>. Although not binding on this Court, the Supreme Court's Notice underscores the importance and appropriateness of three fundamental policies of this Court evident from the above discussion: (1) intervention in another's case is a privilege, not a right; (2) the focus is on what the intervener can usefully do to help the Court determine the issues already before it, not other issues; and (3) the proceeding must be scrupulously fair, both in reality and appearance.
>
> [Emphasis added]

The same fundamental policies apply here.

[46] BCMT was not seeking costs and suggested that none be ordered in case its motion to intervene was dismissed. VFPA did not seek costs. As a result, there shall be no award of costs.

ORDER in T-2256-22

THIS COURT ORDERS that:

1. The appeal of the Order and Reasons of Associate Judge Trent Horne (August 11, 2023) is dismissed.

2. There is no award of costs.

"Yvan Roy"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-2256-22
STYLE OF CAUSE:	PACIFIC COAST TERMINALS CO. LTD., VITERRA CANADA INC., CASCADIA PORT MANAGEMENT CORPORATION, FRASER GRAIN TERMINAL LTD. AND ALLIANCE GRAIN TERMINAL LTD. v VANCOUVER FRASER PORT AUTHORITY AND ATTORNEY GENERAL FOR SASKATCHEWAN AND ATTORNEY GENERAL OF MANITOBA
PLACE OF HEARING:	HELD BY VIDEOCONFERENCE
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ORDER AND REASONS:	ROY J.
DATED:	NOVEMBER 7, 2023

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