

Court File No: T-

FEDERAL COURT

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

NOTICE OF APPLICATION
(Section 18.1 of the *Federal Courts Act*, RSC 1985, c. F-7)

TO THE RESPONDENTS:

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

THIS APPLICATION will be heard by the Court at a time and place to be fixed by the Judicial Administrator. Unless the Court orders otherwise, the place of hearing will be as requested by the applicants. The applicants request that this application be heard at 701 West Georgia Street, Vancouver, British Columbia.

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

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

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

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

(Date)

Issued by: _____
(Registry Officer)

Address of local office: Pacific Centre
PO Box 10065
701 West Georgia Street
Vancouver, BC V7Y 1B6

TO: **Vancouver Fraser Port Authority**
100 The Pointe
999 Canada Place
Vancouver, BC V6C 3T4T

The Respondent

APPLICATION

1. This is an application for judicial review in respect of the Vancouver Fraser Port Authority's ("**VFPA**") decision pursuant to sections 49 to 51 of the *Canada Marine Act*, S.C. 1998, c. 10 (the "**CMA**") to revise existing fees payable in respect of the Gateway Infrastructure Fee 2 ("**GIF2**") effective March 1, 2024 (the "**Amendment Decision**").
2. On October 14, 2022, Pacific Coast Terminals Co. Ltd. ("**PCT**"), Viterra Canada Inc. ("**Viterra**"), Cascadia Port Management Corporation ("**Cascadia**"), Alliance Grain Terminal Ltd. ("**AGT**"), and Fraser Grain Terminal Ltd. ("**FGT**" and collectively, the "**Applicants**") commenced an application for judicial review in respect of the VFPA's decision to establish GIF2 (the "**Original Decision**"). The Applicants' application in respect of the Original Decision is ongoing and is identified as Court File No. T-2256-22.
3. For greater certainty:
 - (a) the Original Decision included the recommendations issued by the VFPA in its "Gateway Infrastructure Fee 2022 Summary report for recommendation to implement fee" dated September 1, 2022, that was subsumed within the final decision made on the VFPA's behalf by its Board of Directors to approve that report and recommendations, thereby establishing the GIF2; and
 - (b) the Amendment Decision, which is the subject of this application for judicial review, similarly included any recommendations or reports issued by the VFPA and any and all other information considered and reasoning and analysis conducted by the VFPA that was subsumed within any final decision by the Board of Directors, by any VFPA officer, or by

any other agent of the VFPA to give final approval to the resulting amendment to the GIF2 fees payable under the Original Decision.

4. In particular, in amending the GIF2 fees payable under the Original Decision, the Amendment Decision necessarily relied on the information considered and the reasoning and assessment conducted by VFPA in making the Original Decision. The Original Decision, the Amendment Decision, and the VFPA's implementation of those decisions form part of a continuing course of conduct by the VFPA.
5. The Applicants make this application for:
 - (a) a declaration under subsection 18.1(3) of the *Federal Courts Act* that VFPA's Amendment Decision was made without lawful jurisdiction and was unreasonable, unfair and *ultra vires* VFPA;
 - (b) an order under subsection 18.1(3) of the *Federal Courts Act* in the nature of *certiorari*, quashing and setting aside the Amendment Decision;
 - (c) an order pursuant to Rule 400 of the *Federal Courts Rules*, granting the Applicants their costs of this application; and
 - (d) any other remedy that this Honourable Court deems just and reasonable.
6. The grounds for the application are:
 - (a) VFPA failed to observe the principles of procedural fairness and deprived the Applicants of the opportunity to meaningfully participate and to present their cases in respect of the Amendment Decision. Specifically, VFPA:

- (i) failed or refused to disclose the information, submissions or other materials relied upon in calculating or determining the revised allocation of fees for GIF2 between and among “trade areas”, and amongst gateway infrastructure users, including the revised allocation of GIF2 fees to the Applicants;
 - (ii) failed or refused to disclose the information, submissions or other materials relied upon by the VFPA in deciding the basis upon which the GIF2 fees would be revised including, but not limited to, its methodology for calculating or determining the revised GIF2 fees; and
 - (iii) considered and relied on information, submissions or other materials prepared by third parties 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 that VFPA relied on.
- (b) VFPA ignored or misapprehended the evidence, acted beyond its jurisdiction, and erred in law in its interpretation and application of subsection 49(3) of the *CMA* by establishing revised GIF2 fees that are not fair and reasonable to the Applicants. Specifically, the revised quantum of fees that the Amendment Decision has the effect of levying against the Applicants:
- (i) is not proportionate to the Applicants’ use of or any direct or indirect benefits that the Applicants may receive from the infrastructure projects being funded;

- (ii) is not commensurate with any increase in demand resulting from the Applicants' operations that would necessitate the infrastructure projects;
- (iii) 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 *Canada Transportation Act* 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;
- (iv) is disproportionately higher than the revised fees being levied against other groups or classes of users, including but not limited to the direct competitors of the Applicants, the effect of which will cause significant harm to the Applicants' market competitiveness; and

- (v) 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) It is necessarily implicit that VFPA based its Amendment Decision on erroneous findings of fact that were made in a perverse or capricious manner or without regard for the material before it. In particular, the VFPA must have erroneously found that the Applicants will receive a direct or indirect benefit from the gateway infrastructure improvements commensurate with the revised quantum of fees being levied against the Applicants.
7. This application will be supported by the following material:
- (a) VFPA's Notice of Fee Amendments dated October 31, 2023;
 - (b) VFPA's Notice of Fee Amendments dated December 15, 2023;
 - (c) Port of Vancouver fee document (dated January 1, 2024 but effective March 1, 2024 in respect of the revised GIF2 fees);
 - (d) Submissions made by the Applicants to VFPA in connection with the Notice of Fee Amendments dated December 15, 2023;
 - (e) Affidavit from Wade Leslie, President and Chief Executive Officer of PCT and/or other representatives of PCT;
 - (f) Affidavit from Peter Idema, Director - West Coast Terminal Operations for Viterro and/or other representatives on behalf of Viterro and Cascadia;

- (g) Affidavit from Sam Parrish, Vice-President - Grain Merchandising and Logistics for Parrish & Heimbecker, Limited, and/or other representatives on behalf of AGT and FGT;
 - (h) Such other evidence and further materials as counsel may advise and this Honourable Court may permit.
8. The Applicants request that VFPA send a certified copy of the following material that is not in the possession of the Applicants but is in the possession of VFPA, to the Applicants and to the Registry:
- (a) all materials considered by VFPA in making the Amendment Decision that were not provided to the Applicants including, but not limited to,
 - (i) any recommendations or reports issued by the VFPA and any and all other information considered and reasoning and analysis conducted by the VFPA in respect of the Amendment Decision;
 - (ii) any studies, reports and/or cost-benefit analyses obtained or completed by VFPA to determine the methodology for the Amendment Decision;
 - (iii) all materials, information and data considered by VFPA in calculating the quantum of the revised GIF2 fees payable under the Amendment Decision; and
 - (iv) all underlying materials considered by VFPA in making its decision communicated to the Applicants on or about September 16, 2022, pursuant to section 49 of the *CMA*, establishing fees payable in respect of the

Gateway Infrastructure Fee 2022 effective January 1,
2023.

DATED at Vancouver, British Columbia, this 2nd day of April, 2024.

DLA PIPER (CANADA) LLP

Per: _____

**John Landry, K.C., Jason Herbert, Taryn Urquhart and Shea
Coulson**

Solicitors for the Applicants

Pacific Coast Terminals Co. Ltd., Viterra Canada Inc., Cascadia
Port Management Corporation, Fraser Grain Terminal Ltd., and
Alliance Grain Terminal Ltd.

The Applicants' Address for Service is in care of their solicitors at:

**P. John Landry, K.C., Jason Herbert, Taryn Urquhart and Shea
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