

Court File No. T-538-19

FEDERAL COURT



GCT CANADA LIMITED PARTNERSHIP

Applicant

and

VANCOUVER FRASER PORT AUTHORITY and the ATTORNEY GENERAL
OF CANADA

Respondents

APPLICATION UNDER sections 18(1) and 18.1 of the *Federal Courts Act*, R.S.C., 1985, c. F-7,
as amended

NOTICE OF APPLICATION FOR JUDICIAL REVIEW

TO THE RESPONDENTS

A PROCEEDING HAS BEEN COMMENCED by the applicant. The relief claimed by the applicant appears on the following page.

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 applicant. The applicant requests that this application be heard at 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 file a notice of appearance in Form 305 prescribed by the *Federal Courts Rules* and serve it on the applicant's solicitor or, if the applicant is self-represented, on the applicant, 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.

ORIGINAL SIGNED BY
ANIL KAMAL
A SIGNÉ L'ORIGINAL

Date March 28, 2019

Issued by _____

(Registry Officer)

Address of

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Toronto, Ontario
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TO: **VANCOUVER FRASER PORT AUTHORITY**
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Vancouver, British Columbia
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AND TO: **THE ATTORNEY GENERAL OF CANADA**
c/o Deputy Attorney General of Canada
Office of the Deputy Attorney General of Canada
284 Wellington Street
Ottawa, ON
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APPLICATION

1. This is an Application for judicial review in respect of the decision (the “**Decision**”) of the Vancouver Fraser Port Authority (the “**VFPA**”) delivered on March 1, 2019 wherein it refused to process the Preliminary Project Enquiry (the “**Project Enquiry**”) of GCT Canada Limited Partnership (“**GCT**” or the “**Applicant**”) for the Deltaport Expansion Fourth Berth Project at Roberts Bank, Delta, British Columbia (the “**DP4 Project**”).

2. The Applicant makes Application for:

- (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;
- (f) An Order assigning a case management judge or prothonotary pursuant to Rule 383 of the *Federal Courts Rules*, SOR/98-106;
- (g) An Order expediting the hearing of this Application;
- (h) The Costs of this Application; and
- (i) Such other relief as counsel may advise and this Court deems just.

The Grounds for the Application are:

The Parties

3. GCT is an affiliate of GCT Global Container Terminals Inc. (together, hereinafter “GCT”). GCT is a container terminal operator headquartered in Vancouver, British Columbia, and jointly owned by affiliates of the Ontario Teachers' Pension Plan Board, IFM Investors and the British Columbia Investment Management Corporation.

4. GCT operates two terminals in British Columbia, one terminal in New York and one terminal in New Jersey. GCT’s terminal in Delta, British Columbia (“GCT Deltaport”) has been in operation since 1997.

5. The VFPA is responsible for the stewardship of certain federal port lands in the Port of Vancouver, as set out in its letters patent dated December 6, 2007. The VFPA is accountable to the Minister of Transport (Canada).

6. GCT Deltaport resides on lands leased by GCT pursuant to a lease agreement between GCT (as a successor in interest to the former tenant) and the VFPA dated January 1, 2009.

7. A significant portion of the lands underlying the DP4 Project are not within the jurisdiction of the VFPA pursuant to its letters patent. The lands that are not within the jurisdiction of the VFPA remain within the authority of the Minister.

GCT Deltaport Expansion

8. GCT Deltaport was originally designed with two berths to accommodate vessels. Due to increased shipping demand at the terminal, it was expanded to include a third berth in 2010 (the “**DP3 Project**”). The environmental assessment conducted for the DP3 Project was robust and identified a variety of habitats at Roberts Bank that required mitigation and protection. Steps were then taken to successfully effect the objectives of mitigation and protection mandated by the environmental assessment process.

9. In 2014, GCT began plans for the DP4 Project to further expand the existing GCT Deltaport with a fourth berth. The DP4 Project is designed to be contiguous to existing and operating port facilities, to take advantage of connectivity to this existing infrastructure. The expansion is illustrated in *Schedule “B”*.

10. The first formal presentation of the DP4 Project to the VFPA was delivered in January 2017. This was followed up with several meetings among GCT and the VFPA regarding expansion of port facilities.

11. On February 2, 2018, Robin Silvester, the President and CEO of the VFPA, wrote to GCT regarding the DP4 Project. The VFPA made the specific point that its processes remained open and that GCT remained at liberty to propose the DP4 Project and apply to have it reviewed pursuant to its PER Process. In addition, the VFPA set out several of the considerations that would be applied within its PER Process.

12. A further presentation was delivered to the VFPA, including the majority of its Board of Directors and members of its senior executive team, at GCT Deltaport in early October 2018.

13. After October 2018, there were various communications between GCT and the VFPA relating to the submission of a project enquiry by GCT. The VFPA was aware, at all material times, that GCT would submit the Project Enquiry and held several meetings with GCT to discuss the matter which took place in advance of the formal submission. At no time did the VFPA advise GCT that it would not consider the Project Enquiry for the DP4 Project.

14. The Project Enquiry for the DP4 Project was ultimately submitted to the VFPA on February 5, 2019 as required under its PER Process.

Roberts Bank Terminal 2 Project

15. The RBT2 Project is a significant proposed expansion to the Port of Vancouver as illustrated in *Schedule "C"*.

16. The VFPA is both the developer and promoter of the RBT2 Project. The RBT2 Project and the DP4 Project will compete for the same shipping volumes that call on ports across the western coast of North America.

17. In October 2018, the same month that the VFPA received a presentation on the DP4 Project, the VFPA published an "Overview and Rationale" for the RBT2 Project on its website. This presentation addressed expansion of the existing GCT Deltaport facility and argued that it was "not an option" for two reasons: (i) an asserted prohibition on inland land reclamation; and (ii) a desire to prevent one terminal operator from providing a significant majority of container terminal services.

18. The views in the October 2018 presentation were articulated by the VFPA despite the fact that the Project Enquiry for the DP4 Project had not yet been completed or submitted.

19. The VFPA had closed its regulatory mind to any alternatives to the RBT2 Project before the Project Enquiry was even submitted by GCT and considered by the VFPA.

The VFPA Refusal to Review the Project Enquiry

20. On March 1, 2019 the VFPA emailed the Decision to GCT. It acknowledged receipt of the Project Enquiry for the DP4 Project, but advised GCT that the VFPA would not process it through the PER Process. The VFPA's basis for the Decision reflects:

- (a) its bias in preferring the RBT2 Project;
- (b) unfounded and outdated environmental considerations; and
- (c) anecdotal, erroneous and unsubstantiated comments about market share.

Bias in Favour of the RBT2 Project

21. In the Decision the VFPA demonstrated its bias in favour of its own RBT2 Project:

We emphasize these points to ensure that you are fully aware that the RBT2 Project is our preferred project for expansion of capacity at Roberts 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.

22. The RBT2 Project has not received necessary approvals. The VFPA cannot presume approvals are a forgone conclusion and that the RBT2 Project will be approved or constructed. The VFPA identified no cogent rationale for why the RBT2 Project should be its preferred choice. In its submissions to the VFPA, GCT has repeatedly emphasized that the DP4 Project will:

- (a) cost significantly less than the RBT2 Project;
- (b) provide approximately 80% of the same increase in container capacity as the RBT2 Project;
- (c) result in approximately half the number of hectares of habitat lost from filling and dredging.

23. The Decision and the VFPA's other conduct demonstrate that it had closed its mind to any projects other than the RBT2 Project, and that it will never conduct a fair and impartial process. The VFPA's decision preferring the RBT2 Project was made at least as early as October 2018, four months before GCT's submission of the Project Enquiry for the DP4 Project. The VFPA's conflict of interest and actual bias demonstrates that it cannot conduct a fair and impartial process.

Unfounded Environmental Comments

24. The VFPA says in the Decision that the DP4 Project is "not an option" because any inland land reclamation was prohibited by Fisheries and Oceans Canada in 2003. The VFPA is wrong. It relies upon a letter from the Minister of Fisheries and Oceans written in July 29, 2003 (the "**2003 Letter**") in relation to the earlier DP3 Project and the original RBT2 Project proposal which has no legal effect. Those projects were far different in scope than the proposed DP4 Project.

25. In the over 15 years since the 2003 Letter both the *Fisheries Act*, R.S.C. 1985, c. F-14, and the CEAA were substantially amended. Among other changes, the regime in place in 2003 did not allow proponents to conduct a self-assessment process using specified guidance or experts in order to determine measures to avoid causing serious harm to fish as defined under the *Fisheries Act*. Now where a proponent incorporates such measures it does not need to submit to Fisheries and Oceans Canada for a review. Since the amendment to the *Fisheries Act*, the *Fisheries Productivity Investment Policy: A Proponent's Guide to Offsetting* guides offset choices and provides flexibility for proponents where they are unable to avoid serious harm to fish.

26. The changes in the legislative framework, and evolving changes to the environmental areas at issue, demonstrate that the VFPA has no basis to assert that any inland reclamation would be prohibited under the *Fisheries Act* in 2019 or later.

Superficial Market Share Justification

27. The VFPA has no mandate to raise micro-economic competition issues within the Port of Vancouver to justify a refusal to exercise its statutory duty to process, in good faith, the Project Enquiry for the DP4 Project.

28. Its attempted justification for the Decision on competition ground is cursory, lacking in analysis and not credible.

29. In the Decision, the VFPA asserts:

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

30. Market dominance is necessarily determined by proper, expert analysis of the appropriate market. Here, the relevant market for terminal services includes a multitude of ports on the West Coast of North America, including significant ports in the Western United States. In the Decision, the VFPA has failed to demonstrate any analysis, it takes the wrong market and anecdotally concludes, without support, that price competition will be affected by the DP4 Project.

31. The Decision is:

- (a) tainted by actual bias (and at the very least a reasonable apprehension of bias); and
- (b) self-justified by unsupportable assertions.

32. Accordingly, the Decision should be set aside in favour of the Permitting Process.

33. The Applicant further relies on sections 18(1), 18.1(1), 18.1(3)(b) and 18.4 of the *Federal Courts Act*, R.S.C., 1985, c. F-7, section 67 of the CEEA, and sections 23 and 44 of the Act.

This Application will be supported by the following material:

1. Supporting affidavits and exhibits thereto; and
2. Such further and other materials as counsel may advise and this Honourable Court permit.

March 28, 2019



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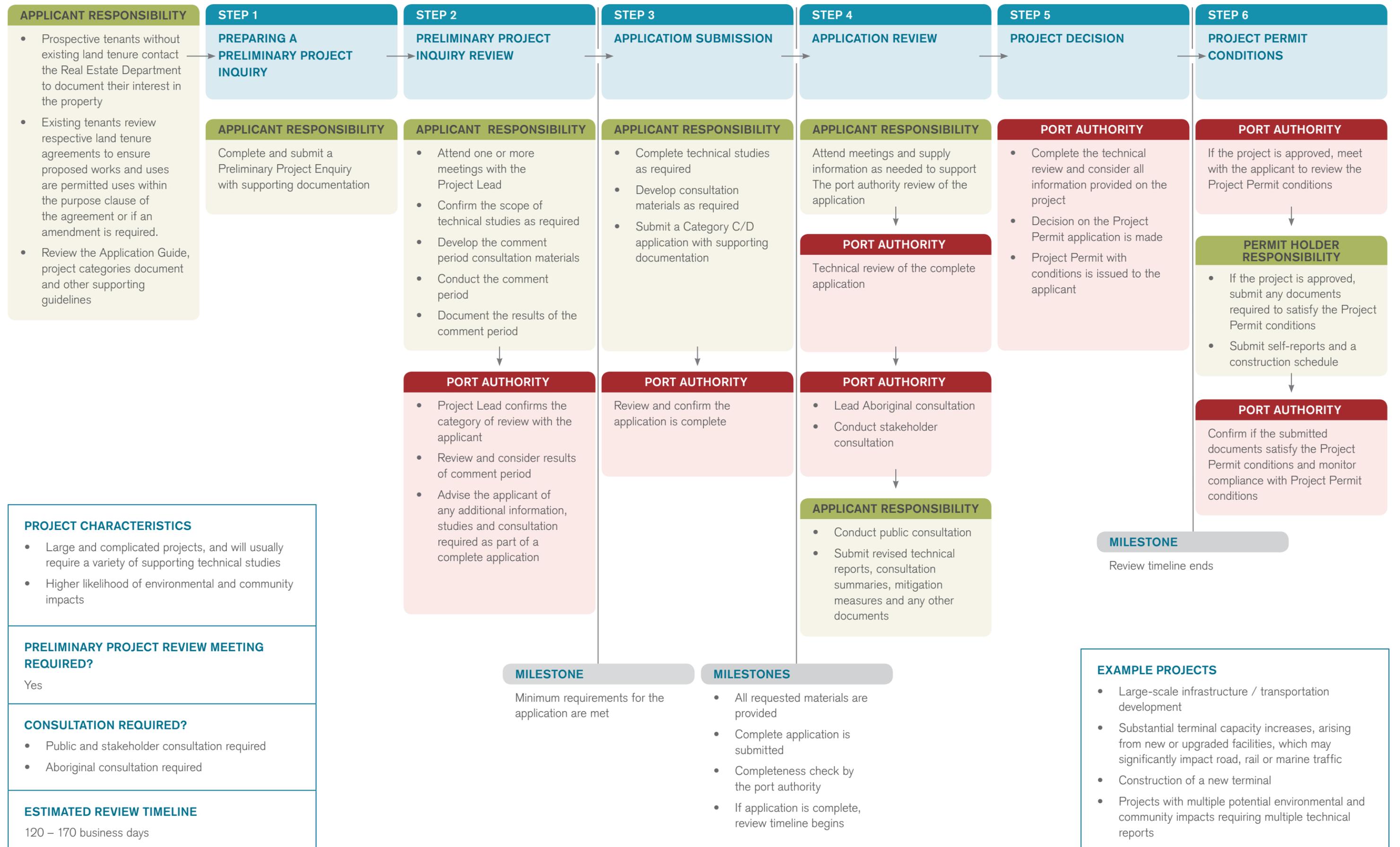
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SCHEDULE "A"

CATEGORY OF REVIEW D



SCHEDULE "B"

3 Project Location

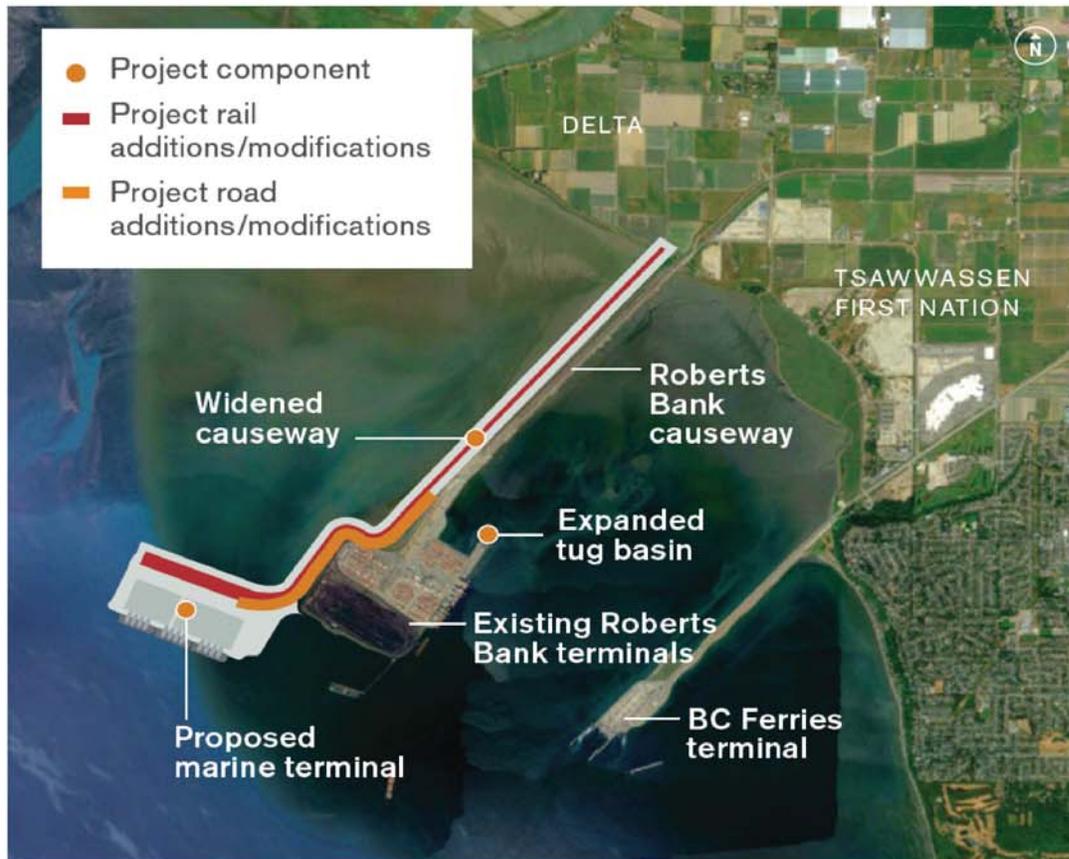
The proposed Project is located at Roberts Bank, in the City of Delta, British Columbia, between the Roberts Bank Way and Tsawwassen Ferry Terminal causeways. The main portion of the Roberts Bank Wildlife Management Area (WMA) lies to the north, and a smaller section of the WMA is situated immediately to the south. Most of the Project is proposed to be constructed in intertidal and subtidal marine waters on the southside of the existing GCT Deltaport facility shown in Figure 1. The proposed Project is contiguous to the existing and operating GCT Deltaport facilities. As such, location represents a strategic factor not only in design, but in the viability of the operations. Through expansion, GCT Deltaport's existing combined facilities and economies of scale are improved. This is a critical factor that will ensure the Port maintains its competitive position in relation to other west coast, particularly US port operators.

In comparison to other potential development options at Roberts Bank, the location of the proposed Project, according to preliminary reviews and engagement with local stakeholders contributes to a smaller adverse environmental effect. The Project proposal considers traditional marine uses of Indigenous communities via effective utilization and maximization of a smaller overall footprint. This is expected to be a positive factor in environmental approvals and permitting, and in continuous engagement with Indigenous communities.

FIGURE 1: PROJECT LOCATION



Schedule "C"



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B E T W E E N:

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PARTNERSHIP

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AUTHORITY, (CANADA)
MINISTER OF TRANSPORT and
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**NOTICE OF APPLICATION FOR
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I HEREBY CERTIFY that the above document is a true copy of
the original issued out of / filed in the Court on the _____

day of MAR 28 2019 A.D. 20____

Dated this MAR 28 2019 day of _____ 20____