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DECISION NO. EAB-EMA-20-A008(a)

In the matter of an appeal under section 100 of the *Environmental Management Act,* S.B.C. 2003, c. 53

BETWEEN:	Richardson International Limited	**APPELLANT**
AND:	District Director, *Environmental Management Act*	**RESPONDENT**
AND:	Attorney General of British Columbia Vancouver Fraser Port Authority	**THIRD PARTIES**
BEFORE:	A Panel of the Environmental Appeal Board Darrell Le Houillier, Panel Chair	
DATE:	Conducted by way of written submissions concluding on January 11, 2021	
APPEARING:	For the Appellant:	Graham Walker, Counsel Dionysios Rossi, Counsel
	For the Respondent:	Susan Rutherford, Counsel
	For the Third Parties: Attorney General of British Columbia	J. Gareth Morley, Counsel Caily DiPuma, Counsel
	Vancouver Fraser Port Authority	Did not appear

PRELIMINARY DECISION ON HEARING PROCEDURE

[1] Richardson International Limited ("Richardson") appeals a decision made by Ray Robb, District Director (the "District Director") for the Metro Vancouver Regional District ("Metro Vancouver"), denying Richardson's application to amend air quality management permit GVA0617 (the "Permit"). The Permit authorizes Richardson to discharge air contaminants to the air from its bulk grain terminal (the "Terminal") at the Port of Vancouver. Richardson's permit amendment application sought to remove an air dispersion modelling requirement (the "ADM Requirement") from the Permit.

[2] Richardson's grounds of appeal raise a question regarding the constitutionality of section 31 of the *Environmental Management Act*, S.B.C. 2003, c. 53 (the "*Act*"), and section 11 of the Greater Vancouver Regional District Air Quality Management Bylaw No. 1082, 2008 (the "Bylaw"), insofar as they apply to

the operation of Richardson's Terminal. The Permit is issued under both the *Act* and the Bylaw.

[3] This decision addresses whether the constitutional question should be heard before, and separately from, the other issues in the appeal.

BACKGROUND

[4] Richardson transports bulk grains from western Canada to the Terminal, and then exports those grains to global markets. The Terminal is located on land owned by the federal Crown (the "Lands") within the Port of Vancouver. Since 1954, Richardson (and its corporate predecessors) has leased the Lands from the Vancouver Fraser Port Authority ("VFPA") (and its legal predecessors), which operates the Port of Vancouver. The VFPA is a federal Crown corporation established under its Letters Patent and the *Canada Marine Act*, S.C. 1998, c. 10 (the "*Marine Act*").

[5] According to Richardson's submissions, VFPA has implemented initiatives aimed at tracking and reducing port-related air emissions that affect air quality and contribute to climate change. Those initiatives include conducting an air emissions inventory every five years to estimate air emissions from marine, rail, on-road, non-road, and administrative activities associated with Port of Vancouver tenants such as Richardson.

[6] The *Act* delegates authority to Metro Vancouver to regulate and legislate with respect to the discharge of air contaminants within Metro Vancouver's boundaries. Metro Vancouver enacted the Bylaw pursuant to section 31(1) of the *Act*, which states that Metro Vancouver "may provide the service of air pollution control and air quality management and, for that purpose, … may, by bylaw, prohibit, regulate and otherwise control and prevent the discharge of air contaminants". Under section 11 of the Bylaw, the District Director may issue a permit allowing the discharge of an air contaminant "subject to requirements for the protection of the environment that the district director considers advisable".

[7] The Permit was originally issued in December 1997. It has been amended several times since then, including on November 3, 2015. The 2015 amendments included adding the ADM Requirement and extending the Permit's expiry date to November 30, 2025.

[8] The ADM Requirement is set out on page 19 of the Permit, and is one of several reporting requirements. The ADM Requirement requires Richardson to submit a dispersion model plan, based on the current Metro Vancouver Dispersion Modelling Plan posted on Metro Vancouver's website, to the District Director for approval. Richardson must also prepare a report on air dispersion modelling of emissions from the Terminal to determine the potential impacts the predicted emissions would have on ambient air quality. The ADM Requirement further states that based on the results of the monitoring program, including stack sampling results or any other information, the District Director may: 1. amend the monitoring and reporting requirement of any of the information required by the Permit including plans, programs and studies; and, 2. require additional investigations, tests, surveys or studies.

[9] Since the 2015 amendment of the Permit, Richardson and Metro Vancouver have had discussions regarding the parameters for air dispersion modelling, and whether the ADM Requirement should have been a requirement of the Permit.

[10] On June 21, 2018, Richardson submitted a draft dispersion modelling plan to the District Director.

[11] On December 21, 2018, Metro Vancouver granted Richardson an extension to provide its air dispersion modelling report by June 30, 2019, as long as it submitted a revised dispersion modelling plan by December 31, 2018. On December 24, 2018, Richardson submitted its final draft dispersion modelling plan.

[12] On March 1, 2019, Metro Vancouver approved Richardson's dispersion modelling plan subject to conditions.

[13] On July 11, 2019, Richardson applied for an amendment to the Permit that would remove the ADM Requirement.

[14] In a letter dated March 31, 2020, the District Director denied Richardson's application to amend the Permit, for the following reasons:

- Metro Vancouver requires the dispersion model results to assess whether the emissions currently authorized by [the Permit] are advisable for the protection of the environment;
- the City of North Vancouver, Vancouver Coastal Health and members of the public do not support the removal of the dispersion model requirement;
- Vancouver Coastal Health has requested the dispersion model results so they can assess whether current emissions pose a negative health impact on the public; and
- there are still outstanding concerns with fugitive dust emissions from ship loading activities.

Appeal

[15] On April 30, 2020, Richardson appealed the District Director's refusal to amend the Permit. Richardson's Notice of Appeal provides several grounds of appeal which I have summarized as follows:

- The Permit, the Bylaw, and the *Act* are inapplicable or inoperative with respect to the Terminal to the extent that their regulation of air emissions impairs or conflicts with exclusive federal jurisdiction over federal undertakings, the use and development of federal lands, or matters related to navigation and shipping under the *Constitution Act, 1867* (U.K), 03 & 31 Vict. c. 3 (the "*Constitution Act, 1867*").
- The District Director breached his duty of procedural fairness to Richardson in adjudicating the Permit amendment application.
- Richardson had a legitimate expectation that the District Director's decision would be based on certain representations made by Metro Vancouver regarding the basis for imposing the ADM Requirement, and certain information to which Richardson had an opportunity to respond. The decision-making process included additional information and additional

discussions which were outside the decision-making process that Richardson had expected.

- The District Director's decision fails to adequately explain and justify his rationale for refusing to remove the ADM Requirement.
- The ADM Requirement is unreasonable because its terms and conditions are overbroad, and the proposed methodology has design flaws that will not measure actual or potential air emissions from the Terminal during normal business operations, and which fail to take into account relevant technical information regarding the Terminal's actual or potential emissions.

[16] Richardson requests that the Board reverse the District Director's decision and amend the Permit by removing the ADM Requirement, or alternatively, grant the Permit amendment application. In the further alternative, Richardson requests that the Board reverse the decision and remit the matter back to District Director with certain instructions. Richardson also requests an award of costs in its favour.

[17] After the appeal was filed, the District Director agreed to extend the deadline for Richardson to perform the air dispersion modelling until the appeal process concludes.

[18] On October 19, 2020, Richardson filed further particulars regarding its constitutional ground of appeal. Richardson submits that the District Director has no jurisdiction to impose the ADM Requirement because section 31 of the *Act* and section 11 of the Bylaw are inoperable or inapplicable to the Terminal, which is situated exclusively on federal Crown land. Section 31 of the *Act* and section 11 of the Bylaw are inapplicable to the Terminal's operations because they impair and intrude on a vital or essential part of a federal undertaking and a core competence of federal power over federal public property, navigation and shipping, and the grain trade, all which are within the exclusive jurisdiction of Parliament under sections 91(1A), 91(10), and 92(10)(c) of the *Constitution Act, 1867*. In addition, section 31 of the *Act* and section 11 the Bylaw are inoperable in relation to the Terminal under the doctrine of paramountcy because they give rise to an operational conflict with, and/or frustrate the purpose of, various federal statutes regulating the Terminal and its operations. For those reasons, Richardson submits that the ADM Requirement should be set aside.

Preliminary Issue - Hearing Procedure

[19] During a case management teleconference held on September 7, 2020, Richardson advised that it wanted the appeal to be heard in stages, with the constitutional ground of appeal being heard first and then, if necessary, the other grounds of appeal.

[20] In a follow up case management teleconference held on November 12, 2020, it was apparent that the parties disagreed on whether the appeal should be heard in stages as requested by Richardson. In a letter sent that same day, the Board set a schedule for the parties to provide written submissions on whether the appeal should be heard in stages.

[21] Richardson submits that adjudicating its constitutional ground of appeal before the other grounds of appeal would be a better use of the Board's and the

parties' time and resources. The constitutional ground of appeal raises a threshold question in the appeal, and a decision on this ground may (and, in Richardson's view, will) dispose of the entire appeal.

[22] The District Director submits that it is not in the interests of justice to hear the constitutional issue separately from the other issues in the appeal. The District Director maintains that the evidence on the constitutional issue is likely to be interwoven with evidence on the other issues. Inefficiencies, delay and prejudice would likely result from severing the constitutional evidence from the other evidence, and it is in the interests of justice for all issues to be heard together. Furthermore, constitutional issues should only be adjudicated if necessary, and at this stage it is impossible to determine whether such adjudication will be necessary, or even whether a constitutional conflict arises from the factual record.

[23] The appeal raises a constitutional question within the meaning of the *Constitutional Question Act*, R.S.B.C. 1996, c. 68. Section 8(2) of the *Constitutional Question Act* requires that Richardson serve notice of the constitutional question on the Attorney General of British Columbia ("AGBC") and the Attorney General of Canada at least 14 days before the day of the argument. Although notice is not yet required to be served, the AGBC became aware of the appeal and has provided submissions on this preliminary matter.

[24] The AGBC submits that a party seeking to bifurcate a proceeding must establish that it is in the interests of justice to do so, and in this case it would not be in the interests of justice. The AGBC agrees with the District Director that the appeal would be most efficiently and fairly resolved with a single oral hearing into all the issues. Bifurcation is the exception, not the rule, and there is no good reason to make an exception here.

[25] The VFPA provided no submissions on this preliminary matter.

ISSUE

[26] I have considered whether the appeal should be heard in stages, with the constitutional question being heard first and then, if necessary, the other grounds for appeal.

DISCUSSION AND ANALYSIS

Whether the appeal should be heard in stages, with constitutional question being heard first and then, if necessary, the other grounds for appeal.

Summary of Richardson's Submissions

[27] Richardson submits that adjudicating the constitutional ground of appeal first offers procedural advantages that minimize the time and expense incurred by all parties and the Board. In particular, it would minimize or eliminate:

a) the amount of documentary evidence that the parties would be required to produce;

b) the number of lay witnesses that would be required to provide oral evidence;

c) the need for expert evidence (and/or oral testimony from expert witnesses);

d) any interlocutory applications;

e) the scope of any legal submissions; and

f) the duration of what would otherwise appear to be a lengthy hearing.

[28] Richardson submits that this approach was recently endorsed by the Board in *Canadian National Railway v. Delegate of the Director, Environmental Management Act* (Decision Nos. 2018-EMA-043(c), 2018-EMA-044 (c), 2018-EMA-045(c), May 29, 2020) ["*CNR*"], wherein the Board stated at paragraphs 119 and 120:

> The Respondents would have the Panel consider whether the Orders are reasonable and necessary, without determining if there was any power to make the Orders in the first place. Such a determination would require the consideration of a number of evidentiary issues, including the veracity of the security issues raised by the Appellants, the expert evidence on the safety/security issues, the confidential nature of the security information, the impact of publication, the effectiveness in enhancing spill response. In the Panel's view, it would be inefficient and illogical to consider these issues first.
>
> …[it] makes more sense to first determine if the Legislature had the constitutional jurisdiction to make the Impugned Legislation that empowered the Director to make the Orders, and whether the doctrines of interjurisdictional immunity or paramountcy apply to render the Impugned Legislation and the Orders inapplicable or inoperative in respect of the Appellants. If the Orders could not have been validly made, or cannot apply to the Appellants, there is no need to consider the necessity and reasonableness of the Orders.

[29] Similarly, in *Assoc. des parents de l'école Rose-des-vents v. British Columbia (Minister of Education)*, 2015 SCC 21 [*Rose-des-vents*], the Supreme Court of Canada stated at paragraph 69 that:

> Properly structured, communicated, and understood, phasing can facilitate access to justice by ordering a proceeding in such a way as to resolve first those issues that can be dealt with more expeditiously, while leaving to later phases more time-consuming or complex issues, particularly where it may prove unnecessary to engage the later stages.

[30] Richardson maintains that those remarks apply equally here. The anticipated scope and complexity of this appeal are significant because:

a) Richardson's Terminal operations in the Port of Vancouver date back to 1954.

b) The Permit containing the ADM Requirement was issued in 2015.

c) Metro Vancouver will likely apply to the Board for an order compelling Richardson to produce documents that Richardson has refused to produce. Given the scope of the document production request, it is likely that the process of reviewing the documents sought, preparing response materials, and (if necessary) producing the documents will be lengthy, especially if redactions are required.

d) Richardson anticipates that it will have a significant document production request for Metro Vancouver that may raise similar procedural issues.

e) Richardson further anticipates there will likely be requests or applications for document production from other parties such as Vancouver Coastal Health.

f) Based on the grounds of appeal, an oral hearing will be required, including testimony from lay witnesses on behalf of Richardson, Metro Vancouver, and possibly Third Parties.

g) The hearing will also require reports and oral testimony from expert witnesses regarding air emissions generally, and the ADM Requirement specifically.

h) The hearing may require a site visit for the Board to better understand Richardson's Terminal operations and the ADM Requirement.

[31] Richardson submits that, in contrast, the constitutional ground for appeal can be determined by way of an agreed statement of facts and narrow affidavit evidence. In that regard, Richardson says there can be no serious dispute about the key facts underlying the constitutional analysis; i.e., that the Terminal is located on federal land, is engaged in port activities and wharf facilities, and was constructed for the purposes of handling and storing grain which is received from or loaded on railway cars and ships, etc.

[32] Richardson argues that determining the non-constitutional grounds of appeal first would only prolong the hearing and make it more complicated, expensive, and time-consuming. Any decision on the non-constitutional grounds will not resolve the constitutional issue. Accordingly, even if Richardson is unsuccessful on the non-constitutional grounds, the parties would still have to argue the constitutional issue. In contrast, if the Board determines that the impugned legislation is unconstitutional in relation to the Terminal's operations, this will dispose of the entire appeal and will result in a shorter and more efficient hearing process, as occurred in *CNR*.

[33] Richardson notes that in previous correspondence about the appeal, the AGBC asserted that the constitutional issue should only be heard if the appeal is not resolved on the non-constitutional grounds, citing *Phillips v. Nova Scotia (Commission of Inquiry into the Westray Mine Tragedy)*, [1995] 2 SCR 97 ["*Phillips*"]. Richardson submits that *Phillips* is distinguishable from the present appeal, because *Phillips* was not about when to hear a constitutional argument, but instead whether the constitutional issue should be decided at all. Richardson notes that in *CNR* at paragraph 114, the Board distinguished *Phillips* for that reason:

> … In *Phillips*, the entire basis for the alleged [*Canadian Charter of Rights and Freedoms*] infringement had disappeared by the time the matter reached the Supreme Court. Clearly, there was no reason to determine the *Charter* issues. In contrast, the issue of whether the exercise of the Director's powers to issue to Orders falls within the division of powers granted to the Province under the *Constitution Act* has been a central issue in these appeals from the outset and remains so.

[34] Similarly, Richardson submits that the inapplicability or inoperability of the impugned legislation to the Terminal's operations has been a central issue in this

appeal from the outset and will remain so even if the Board resolves the non-constitutional grounds. Richardson argues that *Phillips* has also been distinguished in other cases where the factual basis underlying a constitutional issue was not rendered moot prior to rendering a decision.

Summary of the District Director's Submissions

[35] The District Director submits that it would not be in the interests of justice to hear the constitutional issue before the other grounds of appeal, because:

a. constitutional issues should not be adjudicated in a factual vacuum, and for the Board to have a proper factual foundation to determine whether the facts give rise to the need for a constitutional adjudication, an oral hearing is most apt, with lay witnesses, expert witnesses and extensive documentary evidence all subjected to the test of cross-examination;

b. the evidence on the constitutional issue is likely to be interwoven with evidence on the other issues;

c. inefficiencies, delay and prejudice would be likely to result from severing the constitutional evidence from the other evidence, and it is more in the interests of justice for all issues to be heard together; and

d. constitutional issues should only be adjudicated if necessary, and it is presently impossible to determine whether such adjudication will be necessary or even whether a constitutional conflict will arise from the factual record.

[36] The District Director submits that in *Nguyen v. Bains*, 2001 BCSC 1130 [*Nguyen*], at para. 11, the BC Supreme Court summarized the considerations for making a discretionary severance order, which are summarized as follows:

a. The discretion to sever an issue is probably not restricted to extraordinary or exceptional cases, but it should not be exercised unless there is a real likelihood of a significant saving in time and expense.

b. Severance may be appropriate if the issue to be tried first could be determinative in that its resolution could put an end to the action for one or more parties.

c. Severance is most appropriate when the trial is by judge alone.

d. Severance should generally not be ordered when the issue to be tried is interwoven with other issues in the trial. This concern may be addressed by having the same judge hear both parts of the trial and ordering that the evidence in the first part applies to the second part.

e. A party's financial circumstances are one factor to consider.

f. Any pre-trial severance ruling will be subject to the ultimate discretion of the trial judge.

[37] In *British Columbia (Director of Civil Forfeiture) v. Lloydsmith*, 2014 BCCA 72 [*Lloydsmith*], at paragraph 22, the Court of Appeal clarified that among the criteria, the pre-eminent consideration is the interests of justice:

> The criteria on bifurcation, also referred to as severance, has been established for some time. They include trial fairness, convenience, efficiency, and the presence or absence of prejudice. I would suggest that the pre-eminent consideration is the interests of justice.
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> [Emphasis added]

[38] The District Director submits that in this case, severing the constitutional issue is more likely to result in inefficiencies and not be in the interests of justice, for the reasons that follow.

[39] First, the District Director disputes several of Richardson's arguments regarding the factual record needed to decide the constitutional issue. The District Director submits that the "key adjudicative facts" listed by Richardson, if proven, do not describe any impairment to a protected core of federal competence. Therefore, the District Director submits that those facts are not the "key adjudicative facts underlying the constitutional analysis".

[40] The District Director maintains that in order for the Board to determine whether there has been an effect or impact on a vital or essential part of a federal undertaking or a core competence of federal power, and if so, the nature and extent of the impact and whether it rises to the level of impairment or frustration of a core federal purpose, the Board will require: (1) arguments on the federal legislative framework, interests, and powers as well as the provincial legislative framework, interests and powers; and (2) significant evidence concerning at least the following:

a. the nature of Richardson's operations;

b. the purpose of the *Act* and the Bylaw, and the powers under section 11(5) of the Bylaw;

c. the nature of the alleged effects of section 11(5) of the Bylaw on federal powers;

d. expert evidence regarding:

   i. what are air contaminants;

   ii. discharges of air contaminants from Richardson operations;

   iii. the potential human health and environmental impacts of discharges of air contaminants, including those from Richardson operations, into the regional air shed, and their effect on various interests;

   iv. what is dispersion modelling, how models are developed, and what they entail;

   v. how air contaminants disperse and move;

   vi. the purpose of air dispersion modelling;

   vii. what information air dispersion modelling provides regarding the potential effects of air contaminant emissions on ambient air quality, including concentration and geographic range;

viii. the history, scope, terms and conditions of the air dispersion model plan that was submitted by Richardson and approved by the District Director;

ix. how the air dispersion modelling requirement for Richardson compares to air dispersion modelling requirements applicable to other dischargers, including similar kinds of facilities, within the region;

e. how an air dispersion model plan is developed under Metro Vancouver's regulatory process;

f. how dispersion modelling information is used by the District Director and Metro Vancouver within the air quality permitting framework, and in relation to the *Act*'s purposes;

g. air quality concerns and considerations regionally related to the discharge of air contaminants, including concerns expressed by members of the public;

h. the impact of the federal legislative framework on Richardson's discharge of air contaminants and operations more generally;

i. the impact of the provincial legislative framework, and the powers exercisable under section 11(5) of the Bylaw, on Richardson's discharge of air contaminants and operations more generally;

j. other facts to be ascertained following the (future) delivery of Richardson's notice of constitutional question.

[41] The District Director believes that credibility issues will arise from this evidence, and therefore, it should be presented through the testimony of lay and expert witnesses relying on what is expected to be an extensive documentary record, rather than through written submissions.

[42] Second, the District Director submits that much of the evidence needed to adjudicate the constitutional issue is interwoven with the evidence required to adjudicate the other issues in this appeal. Richardson will need to establish an impairment or frustration of federal purpose, and the facts necessary to evaluate that allegation are interwoven with facts needed to resolve other issues under appeal. Therefore, severing the constitutional issue is not in the interests of justice.

[43] Third, the District Director submits that Richardson has failed to prove that savings of time and expense are a real likelihood, or that is in the interests of justice to sever the constitutional issue. If the constitutional issue is severed, witness testimony would likely be divided, resulting in inefficiencies, an artificial division of evidence that is logically connected, and the likely duplication of evidence, given the overlap of issues. Moreover, the Board would most likely reserve its decision on the constitutional issue, and the second part of the hearing would take place only after that decision is made. This may make the second part of the hearing "vulnerable to unforeseen events": a party, counsel, or a Panel member could become unavailable. Moreover, all participants would need to "get up to speed" on the issues for the second part due to the passage of time. The District Director submits that this would be time consuming, expensive, and prejudicial to the District Director and the Third Parties.

[44] Fourth, the District Director says that courts (and tribunals) should exercise restraint in deciding questions of law unless necessary, especially in constitutional cases. As stated in *Phillips* at paragraphs 6 and 9:

> This court has said on numerous occasions that it should not decide questions of law that are not necessary to a resolution of an appeal. This is particularly true with respect to constitutional issues and the principle applies with greater emphasis in circumstances in which the foundation upon which the proceedings were launched has ceased to exist.
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> …
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> The policy which dictates restraint in constitutional cases is sound. It is based on the realization that unnecessary constitutional pronouncements may prejudice future cases, the implications of which have not been foreseen. Early in this century, Viscount Haldane in *John Deere Plow Co. v. Wharton*, [1915] A.C. 330, at p. 339, stated that the abstract logical definition of the scope of constitutional provisions is not only "impracticable, but is certain, if attempted, to cause embarrassment and possible injustice in future cases".

[45] The District Director disputes Richardson's assertion that the constitutional issue in the appeal will persist regardless of the outcome on the other issues. The District Director notes that if the Board were to remove the ADM requirement, any alleged constitutional concern would then be moot, as any conflict between the federal legislation and the provincial "decision" at issue would be remedied. Furthermore, although Richardson relies on *CNR* to advance its argument in favour of severance, the District Director notes that the constitutional question was not severed in *CNR*. The oral hearing on all issues proceeded, and after all the evidence was in, the Board decided the constitutional question first.

[46] In conclusion, the District Director submits that an oral hearing into all the issues is the preferred mode for hearing this appeal. Following an oral hearing into all issues, the Board will have the full factual record necessary to decide the issues, including any constitutional issue, in the order that the Board deems fit.

Summary of the AGBC's Submissions

[47] The AGBC generally agrees with the statements of law and submissions of the District Director. The AGBC also agrees with the District Director that the appeal would be most efficiently and fairly resolved with a single oral hearing into all issues raised by the appeal. Bifurcation is the exception, not the rule, and there is no good reason to make an exception here. The AGBC maintains that arguing everything all at once is usually fairest and most efficient way to proceed.

[48] The AGBC refers to the test for granting bifurcation in *Brennand v. Sun Life Assurance Co. of Canada*, 2011 BCSC 759 [*Brennand*], at paragraphs 22 and 23:

> There is no doubt that compelling reasons justify the reluctance of the court to [sever or bifurcate proceedings]. The policy of the law is that all claims should be brought and adjudicated at one time. Severing issues rarely saves time or expense, can produce unexpected procedural complications, cause delay and, where issues severed are inextricably interwoven, risk inconsistent findings of fact or verdicts.

> Nevertheless, there are situations in which severance is ordered. Typically, those are cases where there exist extraordinary, exceptional or compelling reasons for severance and not merely where doing so would be just and convenient.

[49] The AGBC maintains that bifurcating the appeal process in this case would not be in the interests of justice, for the following reasons.

[50] First, the AGBC submits that severance/bifurcation should generally not be ordered when the issue to be severed is interwoven with other issues in the trial: *Nguyen*, at paragraph 11. The AGBC maintains that Richardson's bifurcation proposal is based on an impoverished understanding of the role of facts in constitutional adjudication, particularly in cases such as this that raise the doctrines of interjurisdictional immunity and paramountcy. These doctrines require showing that the application or operation of provincial law will either impair a core of federal jurisdiction or will frustrate the purpose of a federal enactment. In deciding Richardson's interjurisdictional immunity argument, it will be necessary to understand the Terminal's operations, how they interact with core federal jurisdictions, as well as the implications of applying the *Act*, the Bylaw or the ADM Requirement on those operations. The AGBC says that the same is true for the paramountcy argument, which "is presumably about frustration of the purpose of some federal enactment". These are fact-specific inquiries and require a strong evidentiary foundation that would overlap with the other grounds of appeal.

[51] The AGBC says that deciding the constitutional question will require evidence of the potential impacts of air pollution, and the health and environmental benefits of air dispersion modelling, among other things. The Board will have to be informed of the air dispersion modelling process generally and with respect to Richardson's specific air dispersion modelling plan that was approved by Metro Vancouver. Evidence on the type of information provided by air dispersion modelling, and the effects of air contaminants on air quality, would also be relevant. The evidence needed to resolve the constitutional question, and the ground of appeal alleging that the ADM Requirement is unreasonable as the "proposed methodology is subject to design flaws", would overlap.

[52] Moreover, the AGBC argues that at least since 1995, the Supreme Court of Canada has made it clear that federal undertakings are, as a general rule, subject to provincial environmental laws, particularly those relating to air pollution: *R. v. Canadian Pacific Ltd.* [1995] 2 SCR 1028. Subsequently, in *Canadian Western Bank v. Alberta*, 2007 SCC 22 [*Canadian Western*], the Court confirmed that that the dominant tide in Canadian constitutional law is effective concurrency of provincial and federal jurisdiction (at paragraphs 24, 36, 37), and endorsed "the line of cases that have applied provincial environmental law to federal entities engaged in activities regulated federally" (at paragraph 66).

[53] Second, the AGBC says that Richardson assumes it will be successful on the constitutional issue, and ignores the possibility that it will instead be successful on its other grounds of appeal, which would make it unnecessary to decide the constitutional issue. If Richardson prevails on the other grounds, a judicial review is less likely. The Board's decision on the non-constitutional grounds would be reviewed by the courts on a more limited basis than a decision on the constitutional

question, if at all. Even if such a judicial review occurred, it would likely be simpler because it would not involve constitutional doctrines.

[54] The AGBC maintains that Richardson also ignores the prospect of judicial review if the constitutional issue is decided alone, which the AGBC says is "almost assured" regardless of the outcome, and the possibility of subsequent appeals to the higher courts. A final resolution of the matter could take years, such that the remaining grounds of appeal might not be heard until years from now and the evidence would be subject to "degradation". Moreover, it is crucial to consider the prejudice to the people in the Lower Mainland if the ADM requirements are found to be lawful and constitutionally applicable but are delayed as a result of judicial reviews and appeals.

[55] Third, the AGBC submits that if the bifurcation proposal is allowed, the courts will have to address a constitutional issue without the assistance of a factual decision by the Board on matters at the core of its expertise. Even if the Board concludes that these matters are unnecessary to address the constitutional question, the courts may not. The result could be a return of the whole proceeding to the Board with little progress either on the merits or the constitutional issue.

[56] In conclusion, the AGBC submits that even if Richardson succeeds on the constitutional issue, any savings would be illusory. Much of the same evidence needed to resolve the merits will be needed to determine what, if any, effects the ADM Requirement would have on the Terminal's operations. This leads to the prospect of inconsistent results or an inadequate factual record to determine the constitutional claims. In contrast, if the non-constitutional grounds of appeal can be resolved or settled, the need for a lengthy constitutional battle is avoided.

Summary of Richardson's Reply Submissions

[57] In reply, Richardson argues that deciding the constitutional question does not require as extensive an exploration of facts as the other grounds of appeal. Since Richardson is not contesting the *vires* of the impugned legislation, the Board need not engage in a pith and substance analysis, which would require examining the purpose and effects of the impugned legislation more broadly. Richardson submits that much, if not most, of the evidence that the District Director and the AGBC claim is needed to adjudicate the constitutional question is not, in fact, required to decide that question.

[58] To adjudicate the constitutional question, the Board must determine whether the impugned legislation trenches on the protected core of the federal competences at issue, whether the impugned legislation, and the powers granted to Metro Vancouver thereunder, frustrate a federal purpose, or whether there is an operational conflict between the impugned legislation and the federal legislative scheme regulating the Terminal's operations.

[59] Under the doctrine of interjurisdictional immunity, the Board will need to analyze the impact of the impugned legislation on the protected core of federal heads of power in this case: federal public property; navigation and shipping; and, the grain trade. Similarly, under the doctrine of federal paramountcy, Richardson submits that the impugned legislation either frustrates the purpose of the federal

legislation that regulates the Terminal and its operations, or results in an operational conflict between the provincial and federal regimes.

[60] Richardson submits that interjurisdictional immunity is not a fact-driven analysis. The question to be determined is whether the provincial legislation at issue trenches on the protected core of a federal competence. Under the doctrine of interjurisdictional immunity, the Board will need to analyze the impact of the impugned legislation on the protected core of federal heads of power in this case: federal public property; navigation and shipping; and, the grain trade.

[61] Similarly, under the doctrine of federal paramountcy, Richardson submits that the impugned legislation either frustrates the purpose of the federal legislation regulating the Terminal and its operations, or results in an operational conflict between the provincial and federal regimes. Determining whether the impugned legislation frustrates a purpose of the federal legislation is predominantly a legal question, not a factual question. This aspect of the doctrine of paramountcy requires evidence of the incompatibility of the provincial scheme with a federal purpose. Although Richardson acknowledges that additional facts may be required to determine whether an operational conflict exists for the purposes of that branch of the paramountcy analysis, Richardson maintains that the evidence would still be significantly less than that required to adjudicate the non-constitutional grounds of appeal.

[62] Specifically, Richardson submits that adjudicating the constitutional question requires evidence concerning:

a) the nature and location of the Terminal's operations (and whether the nature and extent of Richardson's activities at the Terminal fall within federal jurisdiction);

b) the impact of the impugned legislation on the federal power over federal public property, navigation and shipping, and the grain trade;

c) the purpose of the federal legislative scheme that regulates the Terminal's operations;

d) how the impugned legislation is incompatible with this purpose; and/or

e) how the impugned legislation results in an operational conflict with the federal legislative scheme.

[63] Richardson maintains that this evidence may be tendered through an agreed statement of facts, supplemented by affidavit evidence. If there are disputes regarding the evidence such that it needs to be tested, this may occur by cross-examination on the affidavits.

[64] In addition, Richardson submits that the evidentiary basis for the constitutional and non-constitutional grounds of appeal are distinct, and not as interrelated as the District Director and the AGBC claim. Richardson submits that the Board does not require extensive expert evidence pertaining to air contaminants or the rationale for the Bylaw and the ADM Requirement in order to adjudicate the constitutional question, as no pith and substance analysis is required. Also, evidence of the procedural fairness of the District Director's refusal of the Permit amendment application, and Richardson's assertion that it had

legitimate expectations about the basis for the ADM Requirement, is unnecessary to adjudicate the constitutional question.

[65] Richardson maintains that the existence of some "overlap" in the evidence required to determine the constitutional and non-constitutional issues does not mean that no efficiencies would be achieved by adjudicating the former first. To the extent that there is some limited overlap, it can be addressed as set out in *Nguyen* at paragraph 11, "by having the same judge hear both parts of the trial and ordering that the evidence in the first part applies to the second."

[66] Richardson reiterates that it is in the interests of administrative efficiency and judicial economy to hear the constitutional ground of appeal first, as only it could dispose of the appeal. In *Nguyen*, the Court stated at paragraph 11 that "Severance may be appropriate if the issue to be tried first could be determinative in that its resolution could put an end to the action for one or more parties." Further, Richardson submits that even if the appeal was resolved on the non-constitutional grounds of appeal, a live issue would remain regarding whether the impugned legislation may be inoperable or inapplicable with respect to the Terminal's operations. Removing the ADM Requirement from the Permit will not resolve the underlying issue of whether the District Director has the jurisdiction to regulate or restrict Richardson's activities at the Terminal under the Bylaw.

[67] In contrast, if the constitutional grounds are adjudicated first and the Board determines that the District Director did not have the requisite jurisdiction, the statutory grounds of appeal would be moot and there would be no need to hear those grounds. This would reduce the evidentiary burden on the parties and allow for a shorter hearing. Richardson submits that the AGBC's assertion that a judicial review of the Board's decision on the constitutional question is "almost assured regardless of the outcome" is speculative. The likelihood of a judicial review cannot be known until a decision is rendered, and the Board should give no weight to this consideration.

The Panel's Findings

[68] To assist the Panel in deciding this procedural matter, the parties refer to several judicial decisions. *Nguyen* involved a severance application under Rule 39(29) of the BC Supreme Court Rules, which provided the Court with the power to decide some of the issues in a case before the other issues "if satisfied that the determination is conclusive of all or some of the issues between the parties". At paragraph 10, the Court held that Rule 39(29) must be interpreted in light of the overall object of the Supreme Court Rules as stated in (then) Rule 1(5): "to secure the just, speedy and inexpensive determination of every proceeding on its merits".

[69] The Board's enabling legislation does not give it an express power akin to that in Supreme Court Rule 39(29). However, section 14(c) of the *Administrative Tribunals Act* provides the Board with a general power to make orders, and the language in that section is similar to the language in former Supreme Court Rule 1(5), now Supreme Court Rule 1-3(1). Section 14(c) states, "In order to facilitate the just and timely resolution of an" appeal, the Board may make any order "in relation to any matter that the [Board] considers necessary for purposes of controlling its own proceedings." Thus, although the Board's powers and processes

may be somewhat different from those of the BC Supreme Court, both the Board and the Court aim to resolve the matters that come before them in a just and timely way. Severance orders should be consistent with that objective.

[70] With that in mind, I find that some, but not all, of the considerations in paragraph 11 of *Nguyen* are relevant to the Board's consideration of a severance application. I agree with the finding in *Nguyen* that the discretion to sever an issue should not be exercised unless there is a real likelihood of a significant savings in time and expense, and that severance may be appropriate if the issue to be decided first could put an end to the appeal. I also agree that severance should generally not be ordered when the issue to be decided first (and the evidence relevant to it) is interwoven with other issues in the appeal (and the evidence relevant to them). While this concern may be addressed by having the same Panel hear both parts of the appeal and ordering that the evidence in the first part applies to the second part, if there is a significant delay between the hearing of the first issue and the hearing of the remaining issues, it may be more difficult for everyone involved to remember the evidence presented at the first hearing. This may undermine any efficiencies gained by severance, and is associated with an increased risk that a witness, party or Panel member may become unavailable for any reconvened hearing.

[71] In addition, I note that *Nguyen* did not involve a constitutional question, and additional factors may be relevant when considering whether to hear a constitutional question separately from the non-constitutional issues. To this end, I considered the decision in *Phillips*, which involved an alleged *Charter* violation. I find that the circumstances in *Phillips* can be distinguished from those in the present appeal, for similar reasons to those stated in paragraph 114 of *CNR*. In *Phillips*, the basis for the alleged *Charter* infringement had disappeared by the time the matter reached the Supreme Court of Canada, and therefore, the Court declined to answer the constitutional question. In contrast, the constitutional question in the present appeal was raised from the outset in Richardson's Notice of Appeal and remains a key issue. Also, the Permit remains in force until November 30, 2025, and the ADM Requirement remains a requirement in the Permit despite the District Director agreeing to extend the deadline for performing the air dispersion modelling until the appeal process concludes. Thus, unlike *Phillips*, the foundation of the constitutional issues has not ceased to exist, and it is unlikely to cease to exist before the Board hears and decides the appeal.

[72] The Court of Appeal addressed the question of severance of an issue in *Lloydsmith*. At paragraph 22 of that decision, the Court listed some criteria for deciding a bifurcation or severance application: fairness; convenience; efficiency; the presence or absence of prejudice; and most importantly, the interests of justice. The appellant in that case argued that the Supreme Court had misapprehended the efficiency component in the appealed decision.

[73] In its decision, the Court of Appeal considered several hypothetical scenarios as to how the proceedings might unfold if the bifurcation order was upheld, versus if it was reversed. Ultimately, the Court decided not to interfere with the bifurcation order, stating at paragraph 26 that "At the end of the day, it may be established that the procedure adopted was not optimum. However, now, … I cannot say this is apparent…". I agree that in considering hypothetical scenarios that may arise if a

preliminary severance application is granted versus denied, certain outcomes are unknown, and only hindsight will reveal which choice was optimal. In considering the time and expense associated with different ways of proceeding, different possibilities can be taken into account, but the likelihood of succeeding on any particular ground of appeal is speculative, as is the likelihood of judicial review.

[74] Although the Board's past decisions are not binding, it is helpful to examine how the Board proceeded in past appeals involving the constitutional division of powers.

[75] In *CNR*, the Board conducted a 10-day oral hearing on all grounds of appeal. The Board heard a great deal of evidence including testimony from lay and expert witnesses and a large amount of document evidence. Despite hearing evidence and arguments on all grounds of appeal, the Board ultimately decided the constitutional issues first. The Board's decision was based primarily on the parties' legal submissions regarding purposes of the impugned legislation, and the effects of the legislation on the appellants' railway operations as federal undertakings. The Board's analysis focused on statutory interpretation and the relevant case law. An extensive analysis of the evidence was not needed to decide the constitutional issues.

[76] Since the Board's decision on the constitutional issues disposed of the appeal, the Board saw no need to decide the other grounds of appeal. At paragraphs 119 to 120 of *CNR*, the Board concluded that deciding the merits of the appealed orders, without first determining if there was any power to make the orders, would require assessing much more evidence than needed to decide the constitutional issues, and it would be inefficient and illogical to consider the merits first. The Board found that it made more sense to first determine if the Legislature had the constitutional jurisdiction to make the impugned legislation, and/or whether the doctrines of interjurisdictional immunity or paramountcy applied to render the impugned legislation inapplicable or inoperative to the appellants' operations. If the orders were not validly made or did not apply to the appellants' operations, there was no need to decide the merits of the orders.

[77] I find that the decision in *CNR* is of little assistance in these circumstances. The panel in that case decided to consider constitutional questions first, after having received all the evidence. This is a matter of discretion for the panel. In this case, I must consider whether the Board will consider the constitutional questions with some evidence, and the remaining issues with a greater amount of evidence provided.

[78] The constitutional question in *Harvest Fraser Richmond Organics Ltd. v. District Director, Environmental Management Act* (Decision Nos. 2016-EMA-175(b) & 2016-EMA-G08, May 12, 2017)[*Harvest*], was somewhat similar to that in the present appeal. In *Harvest*, the permit holder challenged not only the merits of an air emissions permit issued by the District Director, but also the applicability or operability of section 31 of the *Act* and the permitting scheme in the Bylaw to the appellant's operations, which were located on federal Crown land leased from the VFPA. Like the present appeal, the appellant did not challenge the *vires* of the impugned legislation but relied on the doctrines of paramountcy and interjurisdictional immunity. After reviewing all of the grounds of appeal, the Board

determined that the constitutional question was a threshold jurisdictional question that should be adjudicated before the other issues. The Board heard the constitutional question based on written submissions, and made its decision based on an extensive analysis of case law, along with some document evidence which pertained mainly to the lease and the VFPA's powers and authority.

[79] In *Harvest*, the Board concluded that the impugned legislation applied to the permit holder's operations. The Board then proceeded with an oral hearing on the merits of the permit, which involved several days of testimony from lay and expert witnesses, as well as extensive document evidence.

[80] In *Halme's Auto Service Ltd. et al v. Regional Waste Manager* (Decision Nos. 1998-WAS-018(c) & 1998-WAS-031(a), March 24, 2014)[*Halme's*], the appeals were against a remediation order and a determination of minor contributor status with respect to a contaminated site. One of the issues was whether the determination of minor contributor status was invalid because section 27.3(3) of the former *Waste Management Act* (now section 50(3) of the *Act*) was beyond the legislative power of the Province and encroached on the federal government's exclusive jurisdiction to appoint judges pursuant to section 96 of the *Constitution Act, 1867*. All the issues were heard together, in writing. The Board's decision on the constitutional issue was based almost entirely on the parties' legal submissions. The other issue was who should be named in the remediation order as persons responsible for the contamination. That issue involved affidavit evidence and a large amount of technical and historical evidence about the use of the site, the possible sources of contamination, and the site's geology and hydrogeology.

[81] In *North Fraser Harbour Commission et al v. Deputy Director of Waste Management* (Appeal Nos. 98-WAS-14(b) and 98-WAS-28(a), August 23, 1999)[*North Fraser*], the Board held a preliminary hearing on two issues, one being a constitutional issue involving an order to remediate a contaminated site. One of the appellants argued that the respondent had no authority to issue a remediation order under the former *Waste Management Act* (now the *Act*) against a him because he did not reside in BC. He argued that section 96 of the *Constitution Act, 1867*, reserves the power to make orders with extra-provincial effects to judges appointed by the Governor General. Thus, that appellant challenged the constitutional applicability of the provincial legislation, but not its constitutional validity. The application was heard during a two-day oral hearing held before, and separately, from the merits of the remediation order. The Board's decision on the constitutional issue was based almost entirely on legal submissions. No facts were in dispute. The Board concluded that there was no statutory or constitutional limitation to a non-resident being named in a remediation order.

[82] To summarize, the Board's approach to hearing these types of issues has varied, depending on the circumstances in each case. However, in all four of these cases, the Board's decision on the constitutional questions was based primarily on the parties' legal submissions, and the Board's analysis focused on the principles of statutory interpretation and an extensive review of the relevant case law, with no need to delve into an extensive analysis of the evidence. This is not surprising given that constitutional questions involving the federal/provincial division of powers are, first and foremost, questions of law, rather than questions of fact.

[83] That these analyses depend on the specific circumstances of the case is consistent with the caselaw discussed by the parties in this case. I find that, as discussed in *Nguyen*, severance of an issue should generally only occur where:

- the issue(s) to be severed could be determinative, for at least one party involved in the appeal;
- there is a real likelihood of savings in time and expense by severing one or more issue(s); and
- there is tolerable risk of inconsistent findings if the severed issue(s) are not determinative of the appeal.

[84] I emphasize that the inter-relation of issues can be relevant to any of these considerations. This is part of the case-specific context to be assessed, in causing any likely gains in efficiency with severance, whether severance is likely to be determinative for at least one party, and if there is tolerable risk of inconsistent findings if the severed issue(s) are not determinative of the appeal. Consistent with the guidance of *Lloydsmith*, while efficiency is a driver to this exercise of discretion, the interests of justice (including, as noted in *Rose-des-vents*, access to justice) are paramount.

[85] With respect to the first point, I find that deciding the constitutional issues first could put an end to the appeal if Richardson succeeds in arguing either that the doctrine of paramountcy or the doctrine of interjurisdictional immunity renders section 31 of the *Act* and/or section 11 of the Bylaw inapplicable or inoperable in regard to the Terminal's operations.

[86] I acknowledge the AGBC's submission that the Supreme Court of Canada has indicated that the dominant trend in Canadian constitutional law is effective concurrency of provincial and federal jurisdiction, particularly when it comes to certain environmental matters. In the cases cited by the AGBC, the Supreme Court of Canada has also explained that the doctrine of interjurisdictional immunity has limited application today, and should generally not be applied where the legislative subject matter presents a double aspect and both federal and provincial authorities have a compelling interest (*Canadian Western*, at paragraphs 35 to 38).

[87] Nevertheless, the outcome on the constitutional questions in the present case is unknown at this stage, and should not be prejudged. Whether the dominant trend toward concurrency carries the argument in this case must be left to be considered in the merits of the constitutional arguments. In any event, this is not a case where, as in *Nguyen*, a decision on the issues proposed for severance is <u>not</u> likely to be decisive of the appeal. On the contrary, similar to *CNR*, if the Board determines that the District Director had no jurisdiction to impose the ADM Requirement in the Permit, that would be decisive of the appeal and there would be no need to hear the other grounds of appeal. Significant savings of time and resources would occur in those circumstances.

[88] Second, in terms of judicial economy and efficiency, I have already found that deciding the constitutional issues first could be decisive of the appeal (not just for one party). This would mean that the other issues need not be heard, and much technical, historical, or contentious evidence relevant to the other grounds of appeal would not need to be explored. This represents a significant potential

significant savings of time and resources for all parties and the Board, if the constitutional issues are decided in Richardson's favour. However, the likelihood of this outcome is presently unknown.

[89] It is also true that there is a risk of judicial review in that case, as the AGBC contends. If a judicial review occurred, it could take years to work its way through the court system. If the court(s) ultimately determined that the Board erred and needed to decide the non-constitutional issues, there would likely be a significant delay in the Board hearing and deciding those issues. The passage of time could affect the availability of the Panel members who heard the first part of the appeal hearing, the availability of witnesses needed to testify in the second part of the appeal hearing, and the quality of the witnesses' memories of past events. In any case, however, there are layers of speculation to this analysis, that not only might the Board decide in Richardson's favour, but that there would be a judicial review, that it would be successful, and that it could take years to work its way through the courts. Given this uncertainty, it is not appropriate for the Board to over-cautiously conduct its processes for fear of judicial review. The Board has been empowered to decide these constitutional questions, and it must assume that it will do so correctly. Accordingly, if Richardson is successful, there will be a significant savings in time and expense. The parties will benefit and there will be a greater access to justice. This is in the interests of justice.

[90] If the Board hears the constitutional issues first but its decision on those issues does not resolve the appeal, the Board would proceed to hear the remaining grounds of appeal as soon as possible. There would be some delay in commencing the hearing due to the time it took for the Board to hear and decide the constitutional issue, but this delay would not be more than a few months if the first hearing is conducted in writing, which appears to be the case. Judicial review would probably not be a source of delay, given that the Board's decision on the first part of the appeal hearing would not resolve the appeal. Any judicial review would likely occur only after the Board released its decision on the second part of the hearing and all the issues had been decided. There would be some delay in scheduling the second part of the hearing, assuming it is an oral hearing, depending on the availability of witnesses, legal counsel, and Panel members, but this kind of delay would be just as likely to occur if all the issues are heard together. Some delay may also occur if the Board is required to adjudicate preliminary applications for document disclosure orders, but again, this kind of delay would be just as likely to occur if all the issues are heard together.

[91] Whether there is overlap between the evidence needed to decide the constitutional issues and the non-constitutional issues also merits discussion at this point.

[92] I find that only one of the non-constitutional grounds of appeal, and the evidence that may be relevant to it, overlaps somewhat with the constitutional issues and the evidence that may be relevant to them: the ground alleging that the ADM Requirement is unreasonable because its terms and conditions are overbroad. Further, I find that this overlap is only partial, both in terms of the issues and in terms of the evidence needed to decide those issues.

[93] The evidence needed to decide the constitutional issues may not be as limited as Richardson claims, but it is also not as extensive or complex as the District Director and the AGBC claim. Specifically, to decide the constitutional issues, the Board will require submissions on the purposes and effects of the applicable federal legislation as well as section 31 of the *Act* and section 11 of the Bylaw. Determining whether the doctrines of paramountcy or interjurisdictional immunity apply is primarily a question of law that would be addressed through legal submissions, with a relatively small amount of evidence to establish certain facts, as was the case in *Harvest*. The Board will require some evidence to properly understand the nature of the Terminal's operations and its emissions that are the subject of the ADM Requirement, the effect of the federal legislation on the Terminal's operations and emissions, the effect of section 31 of the *Act* and section 11 of the Bylaw on the Terminal's operations and emissions, and the alleged effect of the impugned legislation on the federal heads of power. Some of this evidence may also be relevant to the issues of whether the ADM Requirement's terms and conditions are overbroad.

[94] Deciding the constitutional issues should not require extensive evidence, or any expert evidence, on the technical aspects of air dispersion modelling, the history and development of the ADM Requirement and the approved air dispersion model plan, how the ADM Requirement compares to similar requirements in other permits, or air quality concerns related to the discharge of air contaminants in Metro Vancouver. Although evidence of that nature may be needed for the Board to decide whether the ADM Requirement's terms and conditions are overbroad, and whether the proposed methodology has design flaws, such evidence should not be needed to decide the constitutional issues.

[95] I find that the grounds of appeal alleging procedural unfairness, breach of legitimate expectations, and failure to adequately explain the decision under appeal, and the evidence that is likely to be relevant to those issues, are not interwoven with the constitutional issues and the evidence needed to decide those issues. The issues of procedural unfairness, breach of legitimate expectation, and inadequacy of reasons relate to the process that led to the District Director imposing the ADM Requirement and, ultimately, his refusal to remove it from the Permit. These are largely factual inquiries that will require witness testimony as well as document evidence such as correspondence between key representatives of Richardson, Metro Vancouver, and possibly other parties that were involved in the process. Such evidence may go back several years in this case. It appears that disclosure of this evidence may involve document production requests and orders, which could be complex and time consuming. It also appears that credibility issues may arise from this evidence. These issues are, therefore, likely to require a live hearing where witnesses can testify before the panel, speak to the documents being tendered, and be cross-examined.

[96] For the reasons provided above, there would be little inefficiency related to the duplication of evidence at the first and second parts of the hearing, or needing to 'get up to speed' regarding the evidence on the non-constitutional issues. Overall, the process would likely be prolonged and made more expensive if the Board considered the Constitutional questions separate from the rest and if

Richardson is unsuccessful with respect to those questions, but not to a great degree.

[97] Third, I have considered the risk of inconsistent findings if the issues are separated and the Constitutional questions are not determinative of the appeal. I have already found that there is limited overlap in the evidence. To the extent that there is overlap in evidence, that which is required to decide the constitutional questions is more broad and general than the detail required to decide the remaining issues on appeal. I consider the risk of inconsistent findings to be acceptable, given in particular that the Board could appoint the same Panel to consider any severed issues from any that remain, if the resolution of the severed issues are not determinative of the appeal. After weighing the considerations above, I conclude that overall, it is in the interests of justice, and facilitating the just and timely resolution of the appeal, to decide the constitutional issues separately and before the other grounds of appeal. The constitutional issues and the evidence relevant to them are not, for the most part, interwoven with other issues in the appeal and the evidence relevant to them. If the Board decides the constitutional issues first, it could put an end to the appeal, and there is a real likelihood of a significant savings in time and expense if the constitutional issues are decided first.

[98] In closing, I recognize the comments of D.C. Harris J. in *Brennand*; however, that case involved an application for severance of issues in the context of a breach of contract case. The analysis turned on the particular circumstances at issue in that type of case, and did not consider severance applications in a constitutional context. Furthermore, D.C. Harris J. recognized that, though there was possible prejudice to the plaintiff in that case, the circumstances—including the "possible avoidance of unnecessary and expensive discovery and trial processes"—warranted severance.[1]

DECISION

[99] In making this decision, I have considered all of the relevant and admissible evidence and the submissions of the parties, whether or not specifically reiterated in this decision.

[100] For the reasons provided above, Richardson's application to hear the constitutional issues before, and separately from, the other grounds of appeal is granted.

"Darrell Le Houillier"

Darrell Le Houillier, Panel Chair
Environmental Appeal Board

February 26, 2021

[1] See paragraph 55.