BRITISH COLUMBIA

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**DECISION NOS. 2016-EMA-175(b) & 2016-EMA-G08**

In the matter of 24 appeals under section 100 of the *Environmental Management Act*, S.B.C. 2003, c. 53.

| | | |
|---|---|---|
| **BETWEEN:** | Harvest Fraser Richmond Organics Ltd. | **APPELLANT** |
| **AND:** | District Director, *Environmental Management Act* | **RESPONDENT** |
| **AND:** | City of Richmond | **THIRD PARTY** |
| **AND:** | Attorney General of British Columbia | **THIRD PARTY** |
| **AND:** | Don Tegart, Isabel and Marc Brenzinger, Siamak Zand, Robert and Susan Enslen, William C. Evans, Joel Shakin, Brian D. Milne, Christiana Shum, Edward Bruce, Klaus Kaufmann, Maria T. Reeve, Lori Chambers, Patricia Friesen, Devra Faye Samson, Jennifer Taylor, Trevor Tso, Lai Y.T. Lam, Yunn Lam, Arnold E. Shuchat, Maria Carmen and Carlos P. Alfaro, Chrtistie S.M. Michel, Burke Elizabeth Austin, C. Alexandra Neufeld | **APPELLANTS/ PARTICIPANTS** |
| **BEFORE:** | A Panel of the Environmental Appeal Board<br>Alan Andison, Chair | |
| **DATE:** | Conducted by way of written submissions concluding on March 27, 2017 | |
| **APPEARING:** | For Harvest Fraser Richmond Organics Ltd.: Sarah D. Hansen and Kelsey Sherriff, Counsel<br>For the Attorney General of British Columbia: David Cowie and Katherine Webber, Counsel<br>For the District Director: Gregory Nash, Counsel<br>For the City of Richmond: Simon Wells, Counsel<br>For Isabel and Marc Brenzinger: Isabel and Marc Brenzinger<br>For Arnold E. Shuchat: Arnold E. Shuchat | |

## PRELIMINARY DECISION – CONSTITUTIONAL QUESTION

[1] On September 30, 2016, Ray Robb, District Director (the "District Director") for the Greater Vancouver Regional District ("Metro Vancouver"), issued air quality permit GVA 1088 (the "Permit") to Harvest Fraser Richmond Organics Ltd. ("Harvest"). The Permit, which was issued under both the *Environmental*

*Management Act*, S.B.C. 2003, c. 53 (the "*Act*") and the Greater Vancouver Regional District Air Quality Management Bylaw No. 1082, 2008 (the "Bylaw"), authorizes Harvest to discharge air contaminants to the air from a composting anaerobic digester and combined heat and power facility (the "Facility"), located in the City of Richmond ("Richmond"), BC, on land owned by the federal Crown. Harvest leases the land from the Vancouver Fraser Port Authority (the "Port Authority").

[2] Between October 19 and November 1, 2016, the Board received numerous appeals against the Permit. One appeal was filed by Harvest (Appeal No. 2016-EMA-175), and the other appeals were filed by individuals (Group Appeal No. 2016-EMA-G08) who reside in Richmond or surrounding municipalities. The Appellants Isabel and Marc Brenzinger requested a stay of the Permit pending the Board's decision on the merits of the appeals.

[3] In Harvest's Notice of Appeal, and in its submissions on the Brenzingers' stay application, Harvest challenged the District Director's jurisdiction to regulate the discharge of air contaminants from the Facility, given that the Facility is located on federal land. On December 1, 2016, Harvest served notice of a constitutional question pursuant to section 8(2) of the *Constitutional Question Act*, R.S.B.C. 1996, c. 68. In that notice, Harvest challenged the application of the Bylaw and the *Act* to the Facility on the basis that the Bylaw and the *Act* impede the use and development of federal lands which fall within the exclusive jurisdiction of the Parliament of Canada under section 91(1A) of the *Constitution Act, 1867* (U.K.), 03 & 31 Vict., c. 3, and reprinted in R.S.C. 1985, App. II No. 5 (the "*Constitution Act, 1867*").

[4] By a letter dated December 2, 2016, the Board advised the parties that it considered the constitutional question to be a threshold jurisdictional question, and requested submissions from the parties on the constitutional question. The Board also suspended submissions on the Brenzingers' application for a stay of the Permit.

[5] This decision addresses the constitutional question raised by Harvest.

## BACKGROUND

*The Constitution Act, 1867*

[6] Under sections 91 and 92 of the *Constitution Act, 1867*, the federal Parliament and the Legislatures of the provinces and territories exercise legislative power with respect to specific subject matters or "heads of power." For example, Parliament has exclusive jurisdiction over federal public property under section 91(1A) of the *Constitution Act, 1867*, whereas the Legislatures have exclusive jurisdiction over property and civil rights within the province under section 92(13), matters of a merely local or private nature under section 92(16), and municipalities under section 92(8) of the *Constitution Act, 1867*.

[7] However, the listed heads of power do not expressly include or identify the "environment" as a subject matter under the jurisdiction of either Parliament or the Legislatures. As a result, legislative responsibility for environmental regulation is shared between Parliament and the Legislatures. Examples of federal

environmental laws include the *Canadian Environmental Protection Act, 1999* ("*CEPA*") and the *Canadian Environmental Assessment Act* ("*CEAA*"), among others. In BC, the *Act* is one of BC's primary provincial environmental statutes. Municipalities may also play a role in environmental regulation through powers that are delegated to them under provincial statutes.

*The Act and the Bylaw*

[8] The *Act* regulates the discharge of waste, including air contaminants, into the environment. Section 31 of the *Act* provides the Greater Vancouver Regional District (now known as Metro Vancouver) with certain powers regarding the control of air contaminants in the Metro Vancouver area. Pursuant to section 31 of the *Act*, Metro Vancouver enacted the Bylaw.

[9] Section 5 of the Bylaw prohibits a person from discharging air contaminants in the course of conducting an industry, trade or business, subject to section 7 of the Bylaw which lists a number of exceptions. Section 3(2) of the Bylaw defines "air contaminant" as follows:

> **"air contaminant"** means a substance that is emitted into the air and that
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> (a) injures or is capable of injuring the health or safety of a person;
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> (b) injures or is capable of injuring property or any life form;
>
> (c) interferes or is capable of interfering with visibility;
>
> (d) interferes or is capable of interfering with the normal conduct of business;
>
> (e) causes or is capable of causing material physical discomfort to a person; or
>
> (f) damages or is capable of damaging the environment;

[10] Under section 7(2) of the Bylaw, the discharge of an air contaminant is not prohibited where the discharge is "conducted strictly in accordance with the terms and conditions of a valid and subsisting permit, approval or order", subject to section 10 of the Bylaw which prohibits a person from discharging or allowing or causing the discharge of any air contaminant so as to cause pollution. Section 11 of the Bylaw provides that 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".

[11] Harvest does not challenge the *Act* or the Bylaw as valid exercises of the Province's legislative power under the *Constitution Act, 1867*; rather, Harvest claims that the *Act* and the Bylaw cannot apply to the Facility, to the extent that doing so would either intrude on the "core" of federal jurisdiction under section 91(1A) of the *Constitution Act, 1867*, or give rise to an operational conflict with valid federal laws.

*The federal lands, the Port Authority, and the Lease*

[12] The Facility is located on approximately 28 acres of land owned by Her Majesty the Queen in right of Canada. The Port Authority manages the land, and leases it to Harvest under a long-term lease (the "Lease") dated November 1, 2012.

[13] The Port Authority was established pursuant to the *Canada Marine Act*, and exercises certain powers under that Act. Under paragraph 7(1) of the *Canada Marine Act*, the Port Authority is "an agent of Her Majesty the Queen in right of Canada only for the purposes of engaging in the port activities referred to in paragraph 28(2)(a)." Paragraph 28(2) of the *Canada Marine Act* states:

> **28** (2) The power of a port authority to operate a port is limited to the power to engage in
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> (a) port activities related to shipping, navigation, transportation of passengers and goods, handling of goods and storage of goods, to the extent that those activities are specified in the letters patent; and
>
> (b) other activities that are deemed in the letters patent to be necessary to support port operations.

[14] The Port Authority was created in 2007 by amalgamating the Vancouver Port Authority, the Fraser River Port Authority, and the North Fraser Port Authority. A Certificate of Amalgamation (Order in Council P.C. 2007-1885) sets out the Letters Patent of the Port Authority. Article 7.1 of the Letters Patent states that the Port Authority "may undertake the port activities referred to in paragraph 28(2)(a) of the [Canada Marine] Act to the extent specified below:…." The activities listed under article 7.1 include "(c) management, leasing or licensing of federal real property described in Schedule B… provided such management, leasing or licensing is for, or in connection with, the following…" (various activities are then listed).

[15] Under Section II of Schedule A of the Lease, the lands covered by the Lease consist of the "Leased Premises" (four parcels of land totalling approximately 126,017 square metres), the "Easement Area" (four more parcels of land totalling approximately 37,112 square metres), and a smaller area designated as the "Access Area". Regarding the Leased Premises, Section II of Schedule A of the Lease provides that the Leased Premises "shall not include … any air space rights or subsurface rights appurtenant to the Leased Premises, all of which rights are expressly reserved to the Authority."

[16] Section III of Schedule A of the Lease sets out the purposes and uses of the Leased Premises, as follows:

> 1.1 The Tenant shall use the Leased Premises for the purposes of production and wholesale distribution of soil and soil-based products for renewable fuels and energy and for processing reclaimed or waste materials and mineral aggregates, which activities provide a public service including, but not limited to:
>
> (a) composting (including but not limited to wood composting), including but not limited to the windrow method, covered aerated static pile or similar technologies;

(b) renewable energy production by way of anaerobic digestion, biochar production, thermal gasification and related or similar technologies;

(c) screening, sorting, drying, pelletizing, bagging, grinding and other related or similar unit processes; and

(d) accessory uses including but not limited to offices, maintenance shops, parts storage, employee facilities and education centres, scales, energy power plants, gas refining, gas storage and compressed natural gas vehicle refueling or similar accessory uses,

and for no other purposes or uses whatsoever without prior written consent of the Authority.

[17] Section 8 of the Lease, titled "Compliance With Laws", states as follows:

8.1 The Tenant acknowledges that the Authority is a corporation established pursuant to the Canada Marine Act, and as such the Authority has paramount jurisdiction over provincial or municipal departments or agencies or their laws, by-laws, rules or regulations in relation to the use of the lands of the Authority or under its administration, management and control and notwithstanding all other sections of this Lease…, the Tenant attorns and submits irrevocably to the jurisdiction given the Authority under the Canada Marine Act, as amended or replaced from time to time.

8.2 Notwithstanding any other provision of this Lease, the Tenant agrees to abide by any and all rules, regulations, by-laws, notices and directions, which may from time to time be established by the Authority for the Leased Premises…

8.3 Subject to subsections 8.1 and 8.2, the Tenant shall abide by all applicable statutes, laws, by-laws and regulations from time to time in force including labour, environmental, safety and navigational laws and regulations. The Tenant acknowledges that it will not necessarily be entitled to any immunity from the application of certain statutes, laws, bylaws or regulations by virtue of the fact that the Authority may be exempt therefrom.

8.4 The Tenant shall not make or suffer any waste or cause or allow to be caused any damage or injury to the Leased Premises, or any part thereof, or use or permit to be used any part of the Leased Premises for any unauthorized, dangerous, noxious or offensive trade, business or other activity and shall not cause or maintain any nuisance in, at or on the Leased Premises or emanating therefrom.

[underlining in original]

[18] Section 17 of the Lease, titled "Environmental Provisions", includes the following:

17.1 Subject always to the provisions of subsection 8.1 herein, the Tenant shall at all times and in all respects comply with and abide by the requirements of the applicable Environmental Laws in effect from time to time including

> the Port Authorities Operations Regulations and the Canada Port Authority Environmental Assessment Regulations.
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> [underlining in original]

[19] In section 1 of the Lease, "Environmental Laws" and "hazardous Substances" are defined as follows:

> "Environmental Laws" means any applicable federal, provincial, regional or municipal statute, by-law, regulation, ordinance or order, or any other applicable law, as enacted or amended from time to time, relating to the environment, occupational health and safety, products liability, transportation, or Hazardous Substances.
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> …
>
> "Hazardous Substances" means any contaminant, pollutant, dangerous substance, dangerous goods, waste, liquid waste, industrial waste… as defined pursuant to any Environmental Law.

*The Facility*

[20] The Facility is authorized to accept compostable materials under a licence issued by the Greater Vancouver Sewerage and Drainage District, which is distinct from the Permit. The Facility uses a covered aerated status pile ("CASP") system to produce compost. The CASP maintains compost piles under negative air pressure, with exhaust air directed to biofilters that use microorganisms growing in a media bed to remove and oxidize odour compounds. The compost production areas, along with aging/curing piles and areas for product storage, occupy about two-thirds of the site. The Facility also includes an anaerobic digester and a combined heat-and-power plant. According to Harvest, an "Energy Garden" consisting of the anaerobic digester and biogas plant receives "commercial green and source-separated food waste" which is processed using anaerobic digestion to produce biogas. The biogas is burned in a generator to produce energy which is sold to BC Hydro under a long-term contract. The Facility also produces compost and soil products for sale.

[21] According to Harvest, in recent years the composting and Energy Garden operations have received and recycled 200,000 to 250,000 tonnes per year of organic material, consisting largely of yard waste (such as grass clippings and leaves), commercial source-separated food waste, and commingled yard and food waste from municipal curbside collections. The Facility receives yard and/or green waste from 13 of Metro Vancouver's 21 member municipalities, as well as over 100 private commercial and institutional customers.

[22] The Facility began as a smaller operation which has grown over the years. The composting operation began in 1993 under a different owner. In 2009, that business was purchased by Harvest Power Canada Ltd. ("Harvest Power"), and later renamed as Harvest. According to Harvest, the anaerobic digester and biogas plant received federal "approval" in 2010 following a screening process conducted by Natural Resources Canada ("NRC") pursuant to the *CEAA*, as well as a permit from the Port Authority in 2010 following an environmental review.

[23] According to a December 2010 report titled "Environmental Screening Report for the Fraser Richmond Soil and Fibre Urban Renewable Bioenergy Production Project" (the "Screening Report") prepared by NRC, the proposed project would have the capacity to process and convert "up to 27,000 tonnes per year of mixed food and commercial wastes into biogas". The incoming wastes would be composed of approximately 13,000 tonnes per year of green waste (grass, leaves and brush), 13,000 tonnes per year of grocery and food waste (including waste paper and cardboard), and 1,000 tonnes per year non-digestible contaminants including metal cans, plastic bags, broken glass, and rocks.

[24] Regarding the potential impacts of the Facility on air quality, the Screening Report states, in part, at page 9:

> … Emission sources will primarily be associated with biofilter units. Odours are the most significant management issue for the site. The compost pile aeration system will be coupled with a biofiltration system for odour control. Exhaust airflow from the composting process piles will be treated by biofiltration.

[25] The Screening Report discusses other potential air emissions from the Facility, and states that "infrequent" flaring of biogas is a source of nitrogen oxides, sulphur dioxides, particulate matter, and carbon monoxide. The Screening Report also states that the project proponent did not anticipate emissions of ammonia or volatile organic compounds from the biofilter, "however, Metro Vancouver has requested that they be included in the permit application." At page 12, the Screening Report states that the proponent "will obtain an Air Emissions Permit from Metro Vancouver, which takes into consideration cumulative effects of emissions on regional air quality."

*The Permit*

[26] In or about February 2012, Harvest applied to Metro Vancouver for an air emissions permit for the Facility. On May 11, 2013, Harvest received permit no. GVA 1054 (the "Previous Permit"), which was valid until June 30, 2015. The Previous Permit authorized and regulated the discharge of air contaminants from ten emission sources at the Facility. The Previous Permit set limits for certain air emissions including volatile organic compounds, sulphur oxides, nitrogen oxides, particulates, and odour. Regarding odour, the Previous Permit required "None past the plant boundary such that the District Director determines that pollution occurs." The Previous Permit also included certain monitoring and reporting requirements.

[27] In 2015, Harvest began the process of applying to renew the Previous Permit, which led to a lengthy public consultation process. For a period of time after the Previous Permit had expired and before the Permit was issued, Harvest operated under a temporary approval.

[28] Meanwhile, during 2015 and 2016, Metro Vancouver, Richmond, Vancouver Coastal Health, and Harvest received complaints from the public regarding odours that some complainants attributed to the Facility. The number of complaints received per month, or per day, varied during the year.

[29] On September 30, 2016, the Permit was issued. It is valid until April 30, 2020, and authorizes and regulates the discharge of air contaminants from ten emission sources at the Facility. Similar to the Previous Permit, the Permit sets limits for certain air emissions including volatile organic compounds, sulphur oxides, nitrogen oxides, particulates, and odour. Unlike the Previous Permit, the Permit also sets limits for hydrogen sulphide and ammonia emissions. The Permit also contemplates that by January 31, 2020, the District Director may set emission quality limits for total aldehydes, total ketones, total amines, total ammonia, total reduced sulphur compounds, total organic sulphur compounds, total volatile fatty acids, and other air contaminants (collectively, "Odorous Compounds") with respect to emission sources 3, 5, 6, and 8. However, the Permit does not specify numerical values for those future limits; rather, the Permit states that those limits are "as approved by the District Director."

[30] Further, the Permit regulates the waste received and handled at emission source 4 (described in the Permit as "Waste Receiving and Handling discharging through a Storage Pile(s)). Specifically, the Permit states that "Any highly odorous material such as pure (non-commingled) food waste must be mixed with Yard Waste or other carbonaceous material within four hours of receipt." The Permit also limits the monthly receipt of "comingled waste" at emission source 4 for subsequent placement on the CASPs during the period from June 1 to October 31 in 2017 and 2018.

[31] The Permit includes a provision whereby the District Director will monitor "malodourous impacts" from the Facility, and may order the Facility to stop receiving food waste if he determines that the malodourous impacts exceed the threshold set out in the Permit (the "Sniff Test"). The Sniff Test is set out on page 16 of the Permit, as follows:

> **EMISSION SOURCES 1 THROUGH 10: Facility Wide Emissions**
>
> The District Director will monitor malodourous impacts of air contaminants emitted from the Facility at the distances specified in Table 1. If the District Director determines on the balance of probabilities that malodourous impact from the Facility air contaminant emissions exceeds the limits specified in Table 1, then the Facility must immediately stop receiving, for placement in any CASP, any food waste, including comingled food and yard waste, until such time as the District Director determines that the source of malodours has been addressed.
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> The District Director will base his/her decision on, but not limited to, the following factors:
>
> - Written reports of observations by (an) Officer(s) of malodours from the Facility for 10 minutes in any hour, at the distances in Table 1;
> - Wind direction at the time of the observations; and
> - The odour described in the observations.
>
> For clarity, the impacts will be considered addressed if no malodours due to Facility emissions of air contaminants are observed by the Officer at the

distances and frequencies specified in Table 1, or the District Director is satisfied that adequate measures have been taken to address the cause of the malodour observations.

Table 1

| Calendar Year | Distance from Facility Fenceline | Maximum allowed number of days of malodour from Facility in any 14 day period |
|---|---|---|
| 2017 | 5 kilometres | 4 days |
| 2018 | 4 kilometres | 3 days |
| 2019 | 3 kilometres | 2 days |

[32] Based on Table 1 above, the Sniff Test came into effect on January 1, 2017.

[33] In addition, the Permit includes detailed emission testing and reporting requirements, including requirements for Harvest to sample some of its emissions sources and report on odours and the Odorous Compounds, among other things.

*Appeals of the Permit*

[34] Between October 19 and November 1, 2016, the Board received 25 appeals against the Permit. In addition to Harvest's appeal (Appeal No. 2016-EMA-175), 24 appeals were filed by individuals (Group Appeal No. 2016-EMA-G08, consisting of Appeal Nos. 2016-EMA-154 to 2016-EMA-174 and 2016-EMA-176 to 2016-EMA-178). One of the individual appeals was subsequently rejected as deficient (Appeal No. 2016-EMA-169), leaving 23 valid appeals by individuals. The individual Appellants were added as Participants in Harvest's appeal, and Harvest was added as a Third Party in the individual appeals. Richmond was added as a Third Party in all of the appeals.

[35] The individual Appellants are all residents of Richmond or surrounding municipalities. In general, they all appealed on the basis that Harvest is emitting unpleasant odours from the Facility that interfere with their ability to enjoy breathing fresh air where they live, recreate, work, etc. Some of them also appealed on the basis that the odours from the Facility adversely affect human health. The individual Appellants request a variety of remedies, including that the Permit be rescinded or varied, or that the matter be sent back to the District Director with directions regarding controlling odours from the Facility. Some individual Appellants request that Harvest be told to move, but the Board has no authority to make such an order.

[36] The Panel has summarized the grounds for appeal in Harvest's Notice of Appeal, as follows:

- The Permit adds to the requirements, conditions, criteria, standards, guidelines, objectives, works and procedures for the Facility where the authorized maximum emissions volumes and rates are neither necessary nor

advisable for the protection of the environment, and requires testing, reporting and monitoring of such compounds where such limits are unreasonable, arbitrary, vague and made without authority or jurisdiction.

- The Sniff Test is unreasonable, subjective, impracticable, unreliable, vague, punitive, and/or unsuitable for compliance and enforcement purposes.
- The volume and quality restrictions for compounds, including Odorous Compounds, and associated source testing and reporting requirements, are unreasonable, arbitrary, vague, incapable of compliance, and/or void for uncertainty.
- The limit on the volume of receipt of comingled waste per month at emission source 4 is unreasonable, arbitrary, overly broad, and does not accomplish the end that it seeks to achieve.
- The District Director has no authority to impose restrictions and limits for the discharge of emissions or volume restrictions for the Facility that interfere with the use and development of the Leased Premises and/or the operation of the Facility which is located on federal lands and is in accordance with the Lease and certain federal laws.

[37] Harvest requests that the Board reverse the decision to issue the Permit, or alternatively, send the matter back to the District Director with directions to vary and strike portions of the Permit, including the Sniff Test.

*The Brenzingers' application for a stay of the Permit*

[38] On November 1, 2016, the Brenzingers applied for a stay of the Permit pending the Board's decision on the merits of the appeals. They requested a stay on the basis that odours from the Facility adversely affect the environment, human health, and quality of life. The Board offered the Brenzingers, the District Director, Richmond, and Harvest an opportunity to provide written submissions on the stay application.

[39] In response to the Brenzingers' stay application, Harvest raised an argument that the Province, and by delegation the District Director, has no jurisdiction to regulate the discharge of air contaminants on federal lands, and the Permit can be of no force or effect to the extent that its terms and conditions are unreasonable and/or interfere with the use and development of the Facility and its operations on federal lands. Subsequently, on December 1, 2016, Harvest served notice of the constitutional question set out below.

[40] On December 2, 2016, the Board suspended submissions on the Brenzingers' stay application pending the Board's decision on the constitutional question.

*The constitutional question raised by Harvest*

[41] Harvest served notice of a constitutional question pursuant to section 8(2) of the *Constitutional Questions Act*, to the Attorney General of Canada and the Attorney General of British Columbia (the "AGBC"). The relevant portions of Harvest's notice state as follows:

> TAKE NOTICE, pursuant to section 8(2) of the *Constitutional Questions Act*, that, on a date to be set:
>
> 1. Harvest intends to challenge the application of the Greater Vancouver Regional District Air Quality Management Bylaw No. 1082, 2009 and the British Columbia *Environmental Management Act*, S.B.C. 2003, c. 53, to its composting operation, anaerobic digester, and combined heat-and-power plant, which operations take place on lands owned by her Majesty the Queen in Right of Canada and which lands are leased by Harvest from the Vancouver Fraser Port Authority pursuant to a long-term lease made under the *Canada Marine Act*, S.C. 1998, c. 10 and Letters Patent Supplement, *Canada Gazette*, Part 1, Vol. 141, No. 51 (December 22, 2007), on the basis that the application of these provincial and municipal laws impede upon the use and development of Federal lands which falls to the exclusive jurisdiction granted to Parliament under s. 91(1A) of the *Constitution Act, 1867* (U.K.), 03 & 31 Vict., c. 3, and reprinted in R.S.C. 1985, App. II No. 5.
>
> AND FURTHER TAKE NOTICE THAT the material facts on which Harvest intends to rely are as set out in the Notice of Appeal dated October 28, 2016, and Stay Argument of [Harvest] dated November 28, 2016, attached to this Notice ….

[42] By a letter dated December 2, 2016, the Board advised that the constitutional question was a threshold jurisdictional question that should be resolved before the Board proceeded with any further preliminary or final adjudication of the appeals. The Board requested submissions on the constitutional question from Harvest, the Attorney General of Canada, the AGBC, the District Director, and the City.

[43] In a letter dated January 20, 2017, the Attorney General of Canada advised that it would not be participating in the appeals.

*Subsequent events – the District Director's non-compliance order and Harvest's application for a stay of the Sniff Test*

[44] On March 22, 2017, the District Director notified Harvest that it had breached the requirements on page 16 of the Permit; i.e., the Sniff Test. The District Director ordered Harvest to immediately cease receiving, for placement on the CASP, any food waste including comingled food and yard waste, until such time as the District Director determined that the source of malodours had been addressed.

[45] On March 23, 2017, Harvest requested an expedited hearing of its application for a stay of the Sniff Test portion of the Permit. Previously, in late December 2016, Harvest had requested a stay of the Sniff Test, but that application was held in abeyance by the Board pending a decision on the constitutional question. In Harvest's request for an expedited hearing of its stay application, Harvest submitted that the District Director's March 22, 2017 order prevented it from receiving waste from its municipal customers such that it would be unable to perform its contract with Metro Vancouver. Harvest asserted that the order threatened its business and damaged its reputation with its customers.

[46] By a letter dated March 23, 2017, the Board set out an expedited schedule for the parties to provide submissions on Harvest's application for a stay. During the exchange of submissions, the Board was advised that the District Director's March 22, 2017 order was only in force for one day before it was rescinded by the District Director.

[47] On April 4, 2017, the Board issued a decision denying Harvest's application for a stay of the Sniff Test portion of the Permit (Decision No. 2016-EMA-175(a)).

*The Parties' positions on the constitutional question*

[48] The Panel has summarized the parties' positions on the constitutional question as follows.

[49] Harvest submits that the doctrines of interjurisdictional immunity and federal paramountcy preclude the application of the *Act* and the Bylaw to the Facility, and therefore, the Facility does not require a permit under the *Act* or the Bylaw.

[50] The doctrine of paramountcy stands for the proposition that when federal and provincial legislation come into conflict, the federal legislation is paramount and renders the provincial legislation inoperative. The doctrine of interjurisdictional immunity does not require a meeting of federal and provincial legislation, and becomes relevant where the law of one level of government impairs the "core" legislative competence of the other level of government, such that the impugned legislation is rendered inapplicable in that instance. As the Supreme Court of Canada explained in *Canadian Western Bank v. Alberta*, 2007 SCC 22 [*Canadian Western Bank*], at paras. 32:

> … in certain circumstances, the powers of one level of government must be protected against intrusions, even incidental ones, by the other level. For this purpose, the courts have developed two doctrines. The first, the doctrine of interjurisdictional immunity, recognizes that our Constitution is based on an allocation of exclusive powers to both levels of government, not concurrent powers, although these powers are bound to interact in the realities of the life of our Constitution. The second, the doctrine of federal paramountcy, recognizes that where laws of the federal and provincial levels come into conflict, there must be a rule to resolve the impasse. Under our system, the federal law prevails.
>
> [underlining added]

[51] Regarding interjurisdictional immunity, the Court explained as follows at paras. 33-34 of *Canadian Western Bank*:

> Interjurisdictional immunity is a doctrine of limited application, but its existence is supported both textually and by the principles of federalism. The leading modern formulation of the doctrine of interjurisdictional immunity is found in the judgment of this Court in *Bell Canada (1988)* where Beetz J. wrote that "classes of subject" in ss. 91 and 92 must be assured a "basic, minimum and unassailable content" (p. 839) immune from the application of legislation enacted by the other level of government. Immunity from such intrusion, Beetz J. observed in the context of a federal undertaking, is:

> an integral and vital part of [Parliament's] primary legislative authority over federal undertakings. If this power is exclusive, it is because the Constitution, which could have been different but is not, expressly specifies this to be the case; and it is because this power is exclusive that it pre-empts that of the legislatures both as to their legislation of general and specific application, in so far as such laws affect a vital part of a federal undertaking. [p. 840]
>
> The doctrine is rooted in references to "exclusivity" throughout ss. 91 and 92 of the *Constitution Act, 1867.* …

[52] Regarding the doctrine of interjurisdictional immunity, Harvest argues that the *Act* and the Bylaw are inapplicable to the Facility, to the extent that those laws impair the core of the federal power over the use and development of federal lands under section 91(1A) of the *Constitution Act, 186*.

[53] Regarding the doctrine of paramountcy, Harvest argues that the *Act* and the Bylaw are inoperable in relation to the Facility, to the extent that they conflict with prior federal approval of the Facility. In that regard, Harvest submits that both the Lease and the "approval" under the *CEAA* provide Harvest with the statutory authority to operate the Facility on the Leased Premises. Requiring Harvest to obtain a permit under the *Ac*t and/or the Bylaw to operate the Facility would frustrate the purposes of the *Canada Marine Act*, which authorizes the Port Authority to determine the use and development of its port lands. In addition, Harvest submits that there is no legal vacuum that the *Act* or Bylaw need to fill, as *CEPA* applies to federal lands, and the Facility meets all ambient air objectives set out in the Canadian Ambient Air Quality Standards ("CAAQS").

[54] The Panel notes that Harvest characterizes the present constitutional question as one of two jurisdictional arguments it has raised: one raised in response to the Brenzingers' stay application; and another raised in relation to the merits of the Permit. With respect to the Brenzingers' stay application, Harvest argues that the application of the principles of interjurisdictional immunity and/or federal paramountcy are pure questions of law, and were raised because a stay of the Permit would necessarily interfere with the Facility's operations, and thus would interfere with the use of federal lands. Harvest submits that its second jurisdictional argument, which relates to the merits of the Permit, arises if the Board determines that Harvest is subject to "a permit" under the *Act* or the Bylaw, in which case Harvest will argue that the Sniff Test portion of the Permit interferes with the use and development of the Facility on federal lands, and the Permit is inapplicable or inoperative to the extent that it interferes with the use and development of the Facility. Harvest maintains that consideration of the second jurisdictional question will require a full hearing with expert evidence regarding the aspects of the Permit that interfere with the use and development of the Facility.

[55] The AGBC submits that the *Act*, the Bylaw, and the Permit are constitutionally valid. The AGBC maintains that placing conditions on the manner in which Harvest may discharge air contaminants while operating the Facility on federal lands does not seriously intrude on any "core" federal jurisdiction, and Harvest has not established that the *Act*/Bylaw or the Permit give rise to on

operational conflict with a federal law or frustrates the purpose of the *Canada Marine Act*. The AGBC argues that this is an example of the overlap between federal and provincial schemes that often arises in the regulation of environmental matters, and is constitutionally permissible under contemporary principles of cooperative federalism.

[56] The District Director adopts the AGBC's submissions. The District Director submits that he is authorized to regulate the discharge of air contaminants from all facilities in Metro Vancouver, including facilities located on federal lands. In addition, the District Director argues that the Lease requires Harvest to comply with all applicable provincial, regional and municipal laws relating to the environment.

[57] Richmond also adopts the AGBC's submissions. In addition, Richmond submits that Harvest has no specific federal approval for the Facility's operations, and neither the *Canada Marine Act*, the screening process under the *CEAA*, nor the Lease provide Harvest with a positive entitlement that the *Act*, the Bylaw, or the Permit deny. Moreover, Richmond submits that there is no "complete code" of federal law that applies to air emissions from the Facility.

[58] The Brenzingers submit that the Facility is in the wrong location, and is causing pollution that is regulated by federal, provincial and municipal laws. They also submit that there has been collaboration between several levels of government regarding who would be the regulating authority.

[59] Arnold Shuchat concurs with the AGBC's submissions. Among other things, he also submits that Harvest failed to support its arguments with the best evidence available. In particular, he argues that Harvest has produced no documents that indicate that the Facility operates pursuant to federal regulation or oversight.

[60] The other Participants provided no submissions on the constitutional question.

## ISSUES

[61] The constitutional question stated in Harvest's December 1, 2016 notice is reproduced above. In deciding that question, the Panel has considered the following issues:

1. Whether interjurisdictional immunity prevents the application of the *Act* and/or Bylaw to regulate the discharge of air contaminants from the Facility, to the extent that the *Act* and/or the Bylaw interfere with the federal power over the use and development of federal lands.
2. Whether the *Act* and/or Bylaw trigger the doctrine of paramountcy, such that the provincial legislation is invalid to the extent that it conflicts with or frustrates the purpose of valid federal legislation.

[62] For clarity, in this decision the Panel is not addressing Harvest's jurisdictional argument regarding the merits of the Permit; namely, whether the Permit interferes with the use and development of federal lands, and is inapplicable or inoperative to the extent that it interferes with that use and development. Although some of the parties' submissions on the constitutional question delve into those matters, the

Permit was not mentioned in Harvest's December 1, 2016 notice of constitutional question, and therefore, the merits and potential effects of the Permit are not properly before the Board at this time. Also, it would be unfair to the Attorney General of Canada to make findings on such matters, given that the Attorney General of Canada declined to participate based on the December 1, 2016 notice of constitutional question. Moreover, Harvest asserts that those matters can only be decided with the benefit of evidence that is not presently before the Panel.

## RELEVANT LEGISLATION

[63] Some of the relevant legislation is reproduced below. Other relevant legislation is reproduced where it is referred to in the text of this decision.

[64] Sections 91, 92, and 92A of the *Constitution Act, 1867* set out the respective legislative authority of the Parliament of Canada and the provincial legislatures. The following provisions are relevant to this decision:

**91.** It shall be lawful for the Queen, by and with the Advice and Consent of the Senate and House of Commons, to make Laws for the Peace, Order, and good Government of Canada, in relation to all Matters not coming within the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces; and for greater Certainty, but not so as to restrict the Generality of the foregoing Terms of this Section, it is hereby declared that (notwithstanding anything in this Act) the exclusive Legislative Authority of the Parliament of Canada extends to all Matters coming within the Classes of Subjects next hereinafter enumerated; that is to say,

…

1A. The Public Debt and Property.

…

10. Navigation and Shipping.

…

And any Matter coming within any of the Classes of Subjects enumerated in this Section shall not be deemed to come within the Class of Matters of a local or private Nature comprised in the Enumeration of the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces.

**92.** In each Province the Legislature may exclusively make Laws in relation to Matters coming within the Classes of Subjects next hereinafter enumerated; that is to say,

…

13. Property and Civil Rights in the Province.

…

16. Generally all Matters of a merely local or private Nature in the Province.

**92A.** (1) In each province, the legislature may exclusively make laws in relation to

...

(*b*) development, conservation and management of non-renewable natural resources and forestry resources in the province, including laws in relation to the rate of primary production therefrom; and

(*c*) development, conservation and management of sites and facilities in the province for the generation and production of electrical energy.

[65] Section 31 of the *Act* provides the Greater Vancouver Regional District (i.e. Metro Vancouver) and the District Director with certain powers regarding the control of air contaminants, as follows:

**31** (1) Despite anything in its letters patent, the Greater Vancouver Regional District may provide the service of air pollution control and air quality management and, for that purpose, the board of the regional district may, by bylaw, prohibit, regulate and otherwise control and prevent the discharge of air contaminants.

(2) The board of the Greater Vancouver Regional District must appoint

(a) officers who may, with respect to the discharge of air contaminants in the Greater Vancouver Regional District, exercise all the powers of an officer under section 109 *[entry on property]* and the regulations, and

(b) a district director and one or more assistant district directors who may, with respect to the discharge of air contaminants in the Greater Vancouver Regional District, exercise all the powers of a director under this Act.

(3) Without limiting subsection (1), a bylaw under this section may do one or more of the following:

(a) provide that contravention of a provision of the bylaw that is intended to limit the quantity of air contaminants or that specifies the characteristics of air contaminants that may be discharged into the air is an offence punishable by a fine not exceeding $1 000 000;

(b) provide that a contravention of a provision of the bylaw, other than a provision referred to in paragraph (a), is an offence punishable by a fine not exceeding $200 000;

(c) require the keeping of records and the provision of information respecting air contaminants and their discharge;

(d) exempt from the application of section 6 (2) and (3) *[waste disposal]*, in relation to the discharge of air contaminants, any operation, activity, industry, trade, business, air contaminant or works that complies with the bylaw, if it also complies with any further restrictions or conditions imposed under this Act;

(e) establish different prohibitions, regulations, rates or levels of fees, conditions, requirements and exemptions

(i) for different persons, operations, activities, industries, trades, businesses, air contaminants or works, and

(ii) for different classes of persons, operations, activities, industries, trades, businesses, air contaminants or works.

(4) A district director may, by order, impose on a person further restrictions or conditions in relation to an operation, activity, industry, trade, business, air contaminant or works covered by a bylaw under subsection (3) (d) in order that the person may qualify for an exemption under that subsection, including a condition that the person obtain a permit.

## DISCUSSION AND ANALYSIS

### 1. Whether interjurisdictional immunity prevents the application of the *Act* and/or Bylaw to regulate the discharge of air contaminants from the Facility, to the extent that the *Act* and/or the Bylaw interfere with the federal power over the use and development of federal lands.

*The Parties' submissions*

[66] Harvest submits that Parliament has the exclusive jurisdiction to regulate the use and development of federal land under section 91(1A) of the *Constitution Act, 1867*. Pursuant to the federal powers in the *Constitution Act, 1867*, Parliament enacted the *Canada Marine Act*, under which the Port Authority's Letters Patent were issued. Those Letters Patent grant statutory authority for the Port Authority to make the Lease, which provides that Harvest "shall" use the Leased Premises for the purposes described in the Lease. Harvest argues that, to the extent that the permitting process in the *Act* and the Bylaw interferes with the purposes provided in the Lease, the permitting process is inapplicable to the Facility as an invasion of the federal power under section 91(1A) of the *Constitution Act, 1867*

[67] Harvest submits that the *Act* and the Bylaw regulate land use in the Province consistent with section 92(13) of the *Constitution Act, 1867*. However, Harvest submits that the application of the *Act* and the Bylaw to the Facility with respect to air emissions permits puts Harvest at the "mercy of largely discretionary decisions of Metro Vancouver", and impairs the exercise of the core federal power to regulate the use and development of federal lands. The doctrine of interjurisdictional immunity applies where laws enacted by one level of government impair the protected core of jurisdiction held by another level of government. Harvest argues that, based on the interjurisdictional immunity doctrine, the *Act* and the Bylaw should be "read down" or interpreted as not applying to the Facility.

[68] In particular, Harvest submits that section 91(1A) of the *Constitution Act, 1867*, is the underlying constitutional authority for the Lease, as "public harbours" are the property of Canada according to a Schedule to the *Constitution Act, 1867*. Pursuant to those powers, Parliament established the *Canada Marine Act*, under which letters patent were issued incorporating several port authorities that were later amalgamated to continue as the Port Authority, to operate ports that are federal property. Paragraph 28 of the *Canada Marine Act* provides the Port

Authority with the power to operate the port activities and other activities deemed in the Letters Patent to be necessary to support port operations.

[69] Harvest submits that the Port Authority's Letters Patent are a statutory instrument under the *Statutory Instruments Act*, R.S.C. 1985, c. S-22, and although the Letters Patent are not "identical" to a statute, they are a form of subordinate legislation. Pursuant to section 7(c) of the Letters Patent, the Port Authority's powers and activities include the management, leasing or licensing of the federal property described in Schedule B, which includes the Leased Premises. The Letters Patent state that the Schedule B lands are owned by the federal Crown and have been determined by the Minister to be "necessary" for port purposes. Harvest submits that the Lease provides that Harvest "shall" use the Leased Premises for the purposes of the production and wholesale distribution of soil and soil-based products for renewable fuels and energy and for processing reclaimed or waste materials and mineral aggregates. Harvest further submits that the permitting process under the *Act* and the Bylaw interferes with those purposes.

[70] In addition, Harvest submits that section 48(1) of the *Canada Marine Act* requires the Port Authority to "develop a detailed land-use plan that contains objectives and policies for the physical development of" the Leased Premises "that takes into account relevant social, economic, environmental matters and zoning by-laws that apply to neighbouring lands." Also, section 48(2) of the *Canada Marine Act* provides that the land use plan may "regulate the type of structure or works that may be erected." Harvest notes that the current land use plan for the Port Authority's lands is the 2014 "Port Metro Vancouver Land Use Plan".

[71] Harvest submits that the test for the application of interjurisdictional immunity is whether the provincial law "impairs" the exercise of the core of a federal power; simply "affecting" the federal power is insufficient: *Canadian Western Bank*. Harvest maintains that the doctrine of interjurisdictional immunity should be considered where there is case law favouring its application to the subject matter at hand, and in this case there are such precedents. Harvest submits that the courts have held that provincial legislation that impedes a lessee's activities on federal property is inapplicable due to the doctrine of interjurisdictional immunity: *Spooner Oils Ltd. v. Turner Valley Gas Conservation*, [1933] S.C.R. 629 [*Spooner Oils*]; *Canadian Occidental Petroleum Ltd. v. North Vancouver (District)* (1986) 13 B.C.L.R. (2d) 34 (C.A.) [*Canadian Occidental*], at para. 59; and *Mississauga (City) v. Greater Toronto Airports Authority* (2000), 192 D.L.R. (4th) 443 (Ont. C.A.) [*Mississauga*]. Harvest submits that, based on the case law, the doctrine of interjurisdictional immunity protects Harvest's operations under the Lease from the application of a provincial law that interferes with the use of the federal land, to the extent of that interference.

[72] In addition, Harvest submits that the Board has recognized that federal lands are not subject to the *Contaminated Sites Regulation* under the *Act*: *BC Hydro and Power Authority v. British Columbia (Director, Environmental Management Act)*, [2007] B.C.W.L.D. 4153, 30 C.E.L.R (3d) 1 (Decision No. 2006-EMA-008(a), June 5, 2007) [*BC Hydro*], at para. 7, and the BC Supreme Court has stated that municipal land use bylaws do not apply to federal land: *Sacks v. Canada Mortgage and Housing Corp.*, 2001 BCSC 394 [*Sacks*], at para. 11.

[73] Harvest also refers to the decision in *Commission de Transport de la Communauté Urbaine de Québec v. Canada (National Battlefields Commission),* [1990] 2 SCR 838 [*Battlefields Commission*]. Although that case did not involve leased federal lands, the Court held that a permitting system under provincial transport legislation could not be applied to transport businesses operating under contract with a federal Commission in a federal park. The Court held that application of the provincial legislation on permits would "make the setting up, substance and maintenance of the federal transport service subject to the largely discretionary control of the [provincial transportation commission and government], when those aspects are within exclusive federal jurisdiction."

[74] Harvest acknowledges that more recent Supreme Court of Canada decisions have cautioned against a broad application of the doctrine of interjurisdictional immunity, so as not to interfere with cooperative federalism. However, Harvest maintains that the doctrine continues to apply to provincial laws to the extent that they impair the core of a federal power: *Quebec v. Canadian Owners and Pilots Association*, 2010 SCC 39 [*COPA*], at paras. 50 to 52; and *Quebec v. Lacombe*, 2010 SCC 38 [*Lacombe*].

[75] Harvest submits that, in the past, it complied with the Bylaw and applied for a permit "as a matter of best practice to comply with reasonable provincial laws of general application." However, to the extent that the permitting process interferes with the purposes provided for in the Lease, the permitting process is inapplicable as an invasion of the federal power under section 91(1A) of the *Constitution Act, 1867*. In other words, according to Harvest, given that the Facility operates on federally owned land pursuant to the Lease, the Province, and by delegation the District Director, has no jurisdiction to regulate the discharge of air contaminants on those federal lands through a permitting system, to the extent that it interferes with the use and operation of that land.

[76] The AGBC submits that the doctrine of interjurisdictional immunity is not engaged in this case, as there is no existing jurisprudence favouring its application to the subject matter at hand (*Canadian Western Bank*, at para. 77; *COPA*, at para. 26), and the provincial legislation does not seriously or significantly trammel on the core of a federal power (*Canadian Western Bank*, at para. 48; *Marine Services International Ltd. v. Ryan Estate*, 2013 SCC 44 [*Marine Services*], at para. 64). The AGBC submits that the "core" of a federal legislative power is defined as the "minimum content necessary to make the power effective for the purpose for which it was conferred" (*Canadian Western Bank*, at para. 50). The AGBC submits that Harvest has failed to identify what aspects of the permitting regime impair the core of a federal legislative power.

[77] The AGBC argues that contemporary constitutional jurisprudence gives the interjurisdictional immunity doctrine a limited role in light of the need for constitutional doctrines to facilitate cooperative federalism (*Canadian Western Bank*, at para. 24). The AGBC maintains that this approach is particularly important in the context of environmental legislation, where there is "considerable overlap" between provincial and federal legislative jurisdiction (*Canadian Western Bank*, at para. 42; *Friends of the Oldman River Society v. Canada (Minister of Transport)*, [1992] 1 SCR 3 [*Oldman River Society*], at pp. 64-65).

[78] Regarding whether the jurisprudence provides a precedent for the application of the doctrine to the subject matter at hand, the AGBC submits that a precedential application of the doctrine must involve the same subject matter as the present case; namely, an impairment of the federal power over public property under section 91(1A) of the *Constitution Act, 1867,* by provincial environmental protection legislation (*Canadian Western Bank*, at para. 78; *Québec (Procureure générale) (Ministère du Développement durable, de l'Environnement et de la Lutte contre les changements climatiques) c. IMTT-Québec inc.*, 2016 QCCS 4337 [*IMTT-Québec*], at para. 237)[1]. The AGBC submits that there is no precedent establishing that the core of the federal power under section 91(1A) of the *Constitution Act, 1867,* includes or has any connection whatsoever with the control of air pollution. It is insufficient that the doctrine has been associated with that federal legislative power; rather, the precedents must show a nexus between that federal head of power and the subject matter of the provincial legislation (*Canada Post Corporation v. Hamilton (City)*, 2016 ONCA 767 [*Hamilton*], at paras. 93-96). The AGBC submits that the decision in *IMTT-Québec* aligns with this view, because the Court found that there was no precedent for the doctrine of interjurisdictional immunity rendering provincial environmental legislation inapplicable to federal lands that were owned by the Port of Québec and leased to a third party, IMTT-Québec Inc.

[79] Regarding the cases cited by Harvest as precedents for the application of the doctrine to the subject matter at hand, the AGBC submits that those decisions rest on the premise that provincial legislation merely needs to "affect" a federal power, as those decisions were rendered before *Canadian Western Bank* rejected that approach in favour of the more stringent "impairment" threshold. Moreover, the AGBC argues that none of those cases considered whether air quality falls within the "core" of the federal power under section 91(1A) of the *Constitution Act, 1867*, or whether provincial environmental legislation impaired that power. *Spooner Oils* considered a provincial law designed to limit natural gas production, *Canadian Occidental* involved a zoning bylaw, and *Mississauga* involved a building code. In addition, the AGBC submits that *Spooner Oils* did not even involve the doctrine of interjurisdictional immunity.

[80] Furthermore, the AGBC submits that federal ownership of land does not create a territorial enclave from which all provincial laws are excluded, and the Supreme Court of Canada has held that Port Authority lands are not a "federal enclave": *British Columbia (Attorney General) v. Lafarge Canada Inc.*, 2007 SCC 23 [*Lafarge*], at para. 72. The AGBC submits that, in assessing the relevance of the prior cases, it is important to distinguish laws that regulate the possession and use of land from laws that regulate activities taking place on land. The AGBC submits that the zoning bylaws in *Canadian Occidental* related to land use, whereas legislative constraints on air emissions relate to an activity occurring on the land. Moreover, in *IMTT-Québec*, the Court specifically considered *Spooner Oils*, *Canadian Occidental*, and *Mississauga*, and found that none of them provided precedential application of the doctrine, which informed the question of whether provincial environmental protection legislation applied to a facility operating on federal port lands.

[1] The parties provided a certified English translation of paras 1-55 and 172-273 of this case.

[81] In summary, the AGBC submits that, in the absence of a relevant precedent applying the doctrine of interjurisdictional immunity to the present legislative subject matter, the Board should proceed directly to an analysis of the paramountcy question, consistent with *Canadian Western Bank* at para. 78.

[82] Alternatively, if the Board decides to complete an interjurisdictional immunity analysis, the AGBC argues that the regulation of air emissions does not affect, let alone impair, the core of the federal power with respect to public lands under section 91(1A) of the *Constitution Act, 1867*. Specifically, the AGBC argues that the legislation under which the Permit was issued does not impair an aspect of the federal power over public lands "that has been considered absolutely indispensable or necessary to enable Parliament… to achieve the purpose for which the exclusive legislative jurisdiction was conferred" (*Canadian Western Bank*, at para. 77).

[83] Even if the Lease is considered an expression of a federal power, the AGBC submits that the need to hold an air emissions permit does not seriously intrude on that power, as evidenced by the fact that Harvest has operated under a permit pursuant to the Bylaw since May 2013. The AGBC also submits that the Lease requires compliance with the Bylaw, and nothing in the Lease confers blanket immunity on Harvest from having to comply with provincial or municipal laws. Moreover, the AGBC submits that Harvest has not identified what "core" aspect of the federal power over pubic land is impaired by the provincial legislation.

[84] The AGBC submits that the Lease, and the operation of the Facility on federal lands, is incidental to port development business, and lies beyond the core of any federal power. The AGBC maintains that the decision in *Lafarge*, at para. 72, supports the proposition that the Permit (and Bylaw under which it was issued) does not intrude on any core federal power in this case:

> The *CMA* [*Canada Marine Act*] is a federal law in pith and substance related to the management of public property and shipping and navigation. Its land use controls reach beyond Crown property to embrace uses that are "closely integrated" with shipping and navigation. This covers the Lafarge project. However, land use jurisdiction asserted by the VPA in this case, while valid, does not attract interjurisdictional immunity. The port is not a federal enclave. VPA lands are held and leased for a variety of activities. Authorizing the construction of a cement plant on these port lands does not fall within the core or vital functions of VPA. On the facts of this case, it rather belongs to an incidental port development business, which because of its integration in marine transportation is reached by federal jurisdiction, but which certainly lies beyond the core of s. 91(10).

[85] Furthermore, even if the core of the federal power is so broad as to include oversight over air quality, the AGBC argues that the exercise of that aspect of the federal power is not impaired by the Permit, which merely sets conditions whereby air contaminants may be released.

[86] For all of these reasons, the AGBC submits that the Board should find that the doctrine of interjurisdictional immunity does not apply in the present circumstances to render the Permit or the Bylaw inapplicable.

[87] The District Director adopts the AGBC's submissions. In addition, the District Director submits that he is authorized under the *Act* to regulate the discharge of air contaminants from all facilities within Metro Vancouver, and the Lease requires Harvest to comply with any applicable provincial, regional or municipal statute, bylaw, regulation, ordinance or order. Further, he submits that Harvest's compliance with the Permit does not "seriously" intrude on any "core" federal jurisdiction, and Harvest's denial of the routine overlap between valid federal and provincial regulatory schemes is inconsistent with the principles of cooperative federalism that the courts have upheld in recent jurisprudence (*Canadian Western Bank*, at para. 24).

[88] Richmond also adopts the AGBC's submissions. In addition, Richmond submits that the interjurisdictional immunity doctrine should be used with caution in light of cooperative federalism in Canada, especially given that constitutional jurisdiction over environmental matters is shared between Parliament and the Legislatures. In that regard, Richmond refers to *Tsilhquot'in Nation v. British Columbia*, 2014 SCC 44 [*Tsilhquot'in Nation*], at para. 148:

> Interjurisdictional immunity — premised on a notion that regulatory environments can be divided into watertight jurisdictional compartments — is often at odds with modern reality. Increasingly, as our society becomes more complex, effective regulation requires cooperation between interlocking federal and provincial schemes. The two levels of government possess differing tools, capacities, and expertise, and the more flexible double aspect and paramountcy doctrines are alive to this reality: under these doctrines, jurisdictional cooperation is encouraged up until the point when actual conflict arises and must be resolved. Interjurisdictional immunity, by contrast, may thwart such productive cooperation. In the case of forests on Aboriginal title land, courts would have to scrutinize provincial forestry legislation to ensure that it did not impair the core of federal jurisdiction over "Indians" and would also have to scrutinize any federal legislation to ensure that it did not impair the core of the province's power to manage the forests. It would be no answer that, as in this case, both levels of government agree that the laws at issue should remain in force.

[89] Richmond submits that, as was held in *Lafarge* at para. 55, federal ownership of land does not create an enclave from which all provincial laws are excluded. Richmond argues that carving out small areas in which provincial environmental legislation is inapplicable on the basis of federal land ownership would leave gaps and inconsistencies in air quality regulation in Canada. Moreover, air emissions have effects beyond the boundaries of any federal lands from which they originate.

[90] Furthermore, Richmond submits that none of the cases cited by Harvest provide a precedent for the application of the doctrine of interjurisdictional immunity as between the federal legislative power over property under section 91(1A) of the *Constitution Act, 1867*, and the provincial regulation of air emissions to protect the environment. For a precedent to apply, it must involve the same nexus between the identified federal head of power and the subject matter of the provincial legislation (*Hamilton*, at para. 95).

[91] Richmond argues that the cases cited by Harvest are distinguishable on the basis that the *Act* and the Bylaw are environmental protection legislation, and not land use or development legislation. *Spooner Oils* involved provincial legislation that limited natural gas production, and was not decided based on interjurisdictional immunity; *Canadian Occidental* concerned a municipal zoning bylaw that prohibited the production of chlorine on the leased lands, and the bylaw was found to affect the use of leased property; and *Mississauga* was primarily decided on the basis that the municipal building code intruded on the federal jurisdiction over aeronautics.

[92] In addition, Richmond argues that those cases were decided before *Canadian Western Bank*, based on the historical approach which merely required that provincial legislation "affect" rather than "impair" the core of a federal power. Richmond submits that the court has further held that impairment only occurs where the federal power is seriously or significantly trammeled (*Bank of Montreal v. Marcotte*, 2014 SCC 55 [*Marcotte*], at para. 64). In that regard, Richmond argues that Harvest has failed to demonstrate how the regulation of air emissions under the *Act* and the Bylaw significantly trammels a vital part of Parliament's jurisdiction over federal property.

[93] Moreover, Richmond supports the AGBC's argument that the Superior Court of Québec held in *IMTT-Québec* (at paras. 171, 225, and 238) that the interjurisdictional immunity doctrine should not apply in a case involving provincial environmental legislation and a facility located on federal property. Richmond also submits that even based on the historical approach to interjurisdictional disputes, the BC Supreme Court held that municipal nuisance bylaws are applicable on federal property, despite the fact that the application of the bylaw in that case required boat houses to be removed by lessees of federal foreshore lands (*Wheatley v. Vancouver (City)*, [1957] BCJ No. 65 (BCSC) [*Wheatley*]). As with an air emissions permit, the "harm" regulated under a nuisance bylaw extends beyond the property boundaries from which it originated.

[94] The Brenzingers submit that the project description in the NRC Screening Report does not match the Facility's operations. Specifically, the Screening Report was based on the Facility taking a total of 27,000 tonnes of waste per year, including 13,000 tonnes of green waste and 13,000 tonnes of food waste, but the Facility now receives over 200,000 tonnes of waste per year. Furthermore, the screening under the *CEAA* was done because NRC was considering providing funding for the anaerobic digester and power operations at the Facility.

[95] In addition, the Brenzingers submit that there is evidence that the air pollution regulatory authority for the Facility is Metro Vancouver and the Province. In that regard, the Brenzingers provided a copy of a letter dated January 25, 2017, from the federal Minister of Environment and Climate Change, which states that the air pollution from the Facility "falls within the jurisdiction of Metro Vancouver and the Government of British Columbia."

[96] Mr. Shuchat submits that Harvest has provided no evidence that the Facility operates pursuant to federal regulation; rather, the evidence is that Harvest applied for a permit under provincial legislation to operate its business. He argues that the mere execution of the Lease does not "import" federal statutory authority on the

operations contemplated by the Lease, if the pith and substance of the operation does not fall within federal jurisdiction. The fact that the landlord, the Port Authority, derives its powers from federal legislation does not act to expand the scope of federal jurisdiction. He also argues that the Facility's operations are purely of a local nature (i.e., under provincial jurisdiction under section 92(16) of the *Constitution Act, 1867*), and do not get absorbed into the federal constitutional power over shipping and navigation.

[97] Mr. Suchat also submits that the facts in the present case are distinguishable from those in *Lafarge*, as the Facility receives and treats regional waste, and there is nothing inter-provincial or marine/navigation-like about its operations to cause it to be a federal undertaking. The fact that the Facility leases federal land for its operation, and that it received federal financial aid, does not "convert" it into a federal undertaking. Furthermore, he argues that, unlike the bus service in *Battlefields Commission*, the composting operation is not "an integral part of" the Port Authority's mandate. Also, unlike the facts in *Lacombe*, Harvest's operations do not involve a "network system" like aerodromes; rather, the Facility is one isolated composting facility which happens to be on federal land.

[98] In reply, Harvest submits that the "federal purpose" of the land is evidenced by the Port Authority's land use plans and how the Facility fits within those plans. Harvest also submits that the Facility operates on top of a (former) landfill, and there are limited uses for such a site. Harvest maintains that it is not arguing that the Facility is in a federal "enclave" where provincial environmental legislation does not apply; rather, Harvest submits that provincial laws of general application apply to the Facility except where those laws interfere with and impair the use and development of the federal land that is subject to the Lease, in which case the interjurisdictional immunity doctrine applies.

[99] Regarding the cases that Harvest cited as precedents for the application of the interjurisdictional immunity doctrine, Harvest submits that, although they were decided before *Canadian Western Bank* set out the modern approach to the doctrine, *Canadian Western Bank* confirmed at paras. 77 and 78 that precedents must still be considered when they exist. In addition, Harvest submits that the cases establish a nexus with the subject matter in this case. Although Harvest acknowledges that the "exact substances" in the *Act* and the Bylaw differ from the precedent cases, there is sufficient nexus. Harvest submits that although the AGBC and Richmond characterize the *Act* and Bylaw as regulating air emissions rather than land use, Harvest submits that the Permit gives the District Director the discretion to order the Facility to stop accepting food waste, which Harvest submits is clearly an attempt to regulate land use at the Facility.

[100] In addition, Harvest submits that although the Court in *Spooner Oils* did not use the phrase "interjurisdictional immunity" as the doctrine has since become known, the concept was considered and applied to the federal "public property" power under section 91 of the (then) *B.N.A. Act, 1867* (now known as the *Constitution Act, 1867*). Harvest also submits that the *Wheatley* case cited by Richmond is inapplicable to the present circumstances, because the bylaw in that case was not challenged on the grounds of interjurisdictional immunity or paramountcy.

[101] In any event, Harvest submits that *Canadian Western Bank* does not preclude the application of interjurisdictional immunity in all cases in the absence of precedents; rather, the Court held at para. 78 that, in general, if there is no precedent, the analysis should proceed to a consideration of paramountcy.

[102] Regarding the "impairment" test for the application of the interjurisdictional immunity doctrine, Harvest submits that the arguments of the AGBC and Richmond ignore the fact that either the District Director's March 22, 2017 order or the granting of the Brenzingers' stay application would prohibit Harvest from carrying out activities that are specifically permitted by the Lease, which impairs the federal power to govern the land under the Lease.

[103] Harvest also points out that, in contrast to the facts in *Lafarge*, which dealt with "Schedule C" federal lands that were controlled, but not owned, by the federal Crown, the present case involves "Schedule B" land owned by the federal Crown. Thus, Harvest asserts an impairment of the federal power over public land under section 91(1A), rather than the federal power over navigation and shipping under section 91(10) of the *Constitution Act, 1867*. Harvest argues, therefore, that it is irrelevant that the use of the land under the Lease is incidental to port business.

[104] Finally, some aspects of Harvest's reply submissions address the merits of the Permit and the impacts of the District Director's March 22, 2017 order. However, Harvest states in its reply submissions that it "reserves the right to present evidence to further illustrate aspects of the Permit which interfere with the core use and operation of the Facility.

*The Panel's findings*

[105] As stated earlier in this decision, the Panel will not address matters relating to the merits of the Permit or its constitutionality, as those matters were not included in Harvest's notice of constitutional question.

[106] In *Canadian Western Bank*, at paras. 28 through 31, the Court discussed the "pith and substance" analysis of legislation, which is often the first step in a question involving the constitutionality of legislation. The Court explained at para. 28 that in a pith and substance analysis, the "dominant purpose" of the legislation is decisive, and the "incidental" effects of the legislation will not disturb the constitutionality of an otherwise *intra vires* law; "incidental" means "effects that may be of significant practical importance but are collateral and secondary to the mandate of the enacting legislature…". At para. 41, the Court stated that valid provincial laws may "quite permissively have "incidental effects" on matters within its scope that would otherwise fall within federal jurisdiction … provided such incidental effects are not precluded from doing so by (i) the doctrine of interjurisdictional immunity or (ii) the operation of federal paramountcy."

[107] In the present case, the parties have not delved into a pith and substance analysis, because the purpose of such an analysis is to determine whether the impugned legislation is valid, and Harvest does not challenge the validity of the *Act* or the Bylaw. Nevertheless, it is helpful to review the purposes and effects of the relevant legislation in this case, because the first step in an analysis of whether the

interjurisdictional immunity doctrine applies is to determine whether any judicial precedents have applied the doctrine to the "subject matter at hand" (*Canadian Western Bank*, at para. 78). In *COPA*, in determining the subject matter at hand, the majority held that the "matter" of a law is in essence "an abstract of the statute's content" (at para. 16) and is identified "by determining its dominant characteristic" (at para. 17). In essence, the question is "what in fact does the law do and why?" (at para. 17).

[108] Harvest's arguments focus on the federal legislative power over public property, and particularly the management of federally-owned land by the Port Authority pursuant to its powers under the *Canada Marine Act* and its Letters Patent. The Supreme Court of Canada held in *Lafarge* that the *Canada Marine Act* is, in pith and substance, a federal law "related to the management of public property" as well as shipping and navigation (at para. 72). The Panel finds that, pursuant to paragraph 28 of the *Canada Marine Act* and article 7.1(c) of the Port Authority's Letters Patent, which are a form of subordinate legislation, the Port Authority's statutory powers and activities include the management, leasing or licensing of the federally-owned property described in Schedule B, which includes the land covered by the Lease.

[109] Although Harvest notes that the Letters Patent state that the Schedule B lands have been determined by the Minister to be "necessary" for port purposes, Harvest acknowledges that its use of the land under the Lease is only "incidental" to port business, and in any event, Harvest does not frame its arguments around the federal power over navigation and shipping. Harvest maintains that applying the permitting scheme created by the *Act* and the Bylaw to the activities authorized under the Lease impairs the core of the federal power to regulate federal land use and development. Harvest relies on the fact that the Lease states that Harvest "shall" use the Leased Premises for the purposes of the production and wholesale distribution of soil and soil-based products for renewable fuels and energy and for processing reclaimed or waste materials and mineral aggregates. However, the Panel finds that the use of the word "shall" in the Lease is not determinative of whether those particular activities are part of the "core" of the federal power over the use and development of public land.

[110] The question of whether a particular activity is "integral" to the exercise of a federal head of legislative power, or is "sufficiently linked" to validate federal regulation, is essentially a factual inquiry: *Lafarge*, at para 35. While the Port Authority's statutory powers in relation to the management, leasing or licensing of federally-owned land, including the Leased Premises, may be part of the "core" of the federal power over public property, that does not necessarily mean that the operation of a facility that processes waste and produces soil products and energy on that land is within the core of the federal power over public property. In *Lafarge*, the Court stated at para. 72 that the port lands in that case were "held and leased for a variety of activities", and "the construction of a cement plant on these port lands does not fall within the core or vital functions of the VPA [Vancouver Port Authority]." Applying that reasoning to the present case, the Panel finds that Harvest has not established that the operation of a composting and biogas energy facility on federal lands is within the "core" of the federal power over public

property; rather, the operation of the Facility on federal lands appears to be incidental to the Port Authority's powers in relation to the use and development of federally-owned lands. However, for reasons that are discussed below, the Panel finds that the question of whether the Facility's operations fall within the "core" of the federal head of power over public property is not decisive of the interjurisdictional immunity issue.

[111] Turning to the purpose and effects of the *Act* and the Bylaw, the *Act* is provincial environmental legislation of general application that regulates the discharge of waste, including air contaminants, into the environment within the province. Section 31 of the *Act* provides Metro Vancouver and the District Director with certain powers to regulate air contaminants within Metro Vancouver. Although the Facility is situated on federally-owned land, that land is surrounded by Metro Vancouver.

[112] In addition to the specific powers provided under section 31 of the *Act*, section 31(1) states generally that Metro Vancouver "may provide the service of air pollution control and air quality management and, for that purpose, the board of the regional district may, by bylaw, prohibit, regulate and otherwise control and prevent the discharge of air contaminants." Regarding section 31(1), the Board has previously noted the following observations of the BC Supreme Court (cited in *West Coast Reduction Ltd. v. District Director of the Greater Vancouver Regional District* (Decision Nos. 2007-EMA-007(a), 2008-EMA-005(a), March 8, 2010), at paras. 35 and 36):

> In *Greater Vancouver (Regional District) v. Darvonda Nurseries Ltd.*, 2008 B.C.S.C. 1251, the B.C. Supreme Court explained the effect of this provision:
>
> > 20. The effect of the opening words … was to give the GVRD the authority to legislate concerning air quality even in areas formerly reserved to the province under the Letters Patent.
>
> The GVRD has regulated air quality within its boundaries since 1972.

[113] Pursuant to section 31 of the *Act*, Metro Vancouver enacted the Bylaw. To be clear, Harvest has not challenged the validity of the Bylaw, but has challenged the Bylaw's application to Harvest's operations on federal land.

[114] As explained in the Background to this decision, the Bylaw contains a general prohibition on the emission of air contaminants, subject to certain exceptions. One of those exceptions is where the discharge is "conducted strictly in accordance with the terms and conditions of a valid and subsisting permit". The definitions of "air contaminant" in the Bylaw and the *Act* are almost identical, and cover substances that can have adverse effects on humans, property, business, and the environment. Section 3(2) of the Bylaw defines "air contaminant" as follows:

> **"air contaminant"** means a substance that is emitted into the air and that
>
> (a) injures or is capable of injuring the health or safety of a person;
>
> (b) injures or is capable of injuring property or any life form;
>
> (c) interferes or is capable of interfering with visibility;

(d) interferes or is capable of interfering with the normal conduct of business;

(e) causes or is capable of causing material physical discomfort to a person; or

(f) damages or is capable of damaging the environment;

[115] Under section 11 of the Bylaw, the District Director may issue a permit allowing the discharge of an air contaminant. When issuing such a permit, the District Director has broad discretion to make the permit subject to requirements aimed at protecting the environment. Section 11 of the Bylaw states:

> **11** The district director may issue a permit to allow the discharge of an air contaminant subject to requirements for the protection of the environment that the district director considers advisable and without limiting the generality of the foregoing the district director may do one or more of the following in a permit:
>
> (1) place limits and restrictions on the quantity, frequency and nature of an air contaminant permitted to be discharged and the term for which discharge may occur;
>
> (2) require the holder of the permit to repair, alter, remove, improve or add works or to construct new works and to submit plans and specifications for the works specified in the permit;
>
> (3) require the permit holder to give security in the amount and form and subject to conditions the district director specifies;
>
> (4) require the permit holder to monitor, in the manner specified by the district director, an air contaminant, the method of discharging the air contaminant and the places and things that the district director considers will be affected by the discharge of the air contaminant;
>
> (5) require the permit holder to conduct studies, keep records and to report information specified by the district director in the manner specified by the district director;
>
> (6) specify procedures for sampling, monitoring and analyses, and procedures or requirements respecting the discharge of an air contaminant that the permit holder must fulfill.
>
> [underlining added]

[116] Metro Vancouver and the District Director also have compliance and enforcement powers under the Bylaw. Under section 21 of the Bylaw, Metro Vancouver's board of directors or the District Director may suspend or cancel a permit under certain circumstances. Under sections 28 and 29 of the Bylaw, respectively, the District Director may issue pollution prevention orders and pollution abatement orders. It should be noted that, in the Bylaw, the meaning of "pollution" is different from the meaning of "air contaminant." "Pollution" is defined to mean "the presence in the environment of substances or contaminants that substantially alter or impair the usefulness of the environment."

[117] Based on the foregoing, the Panel finds that the dominant purpose of the Bylaw and section 31 of the *Act* is the regulation and control of air emissions within the Metro Vancouver area. The permitting system created under this provincial and municipal legislation is in furtherance of that purpose. The dominant purpose of the legislation, and the permitting system, is not to regulate or control land use or land development.

[118] However, it is possible that the general application of the Bylaw to federal-owned lands could have incidental effects on activities or operations occurring on those lands. For example, under section 11, a permit containing "requirements for the protection of the environment" may: specify limits and restrictions related to the air contaminants that may be discharged; require the permit holder to construct, repair, alter, remove or improve works; and require the permit holder to monitor air contaminants, conduct studies, and report information to the District Director.

[119] Regarding the interjurisdictional immunity doctrine, the majority of the Supreme Court of Canada explained in *Canadian Western Bank* and *Lafarge* (released concurrently) that the doctrine 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 Bank* at paras. 35-38; *Lafarge* at para. 4). The Court has recognized that "some matters are by their very nature impossible to categorize under a single head of power: they may have both provincial and federal aspects" (*Canadian Western Bank*, at para. 30). The Panel finds that environmental regulation and protection is a subject matter in which both federal and provincial authorities have a compelling interest. Indeed, the Supreme Court of Canada has recognized that the matter of the "environment" was not assigned to either the provinces or Parliament (*Oldman River Society*, at p. 63), and "does not comfortably fit within the existing division of powers without considerable overlap and uncertainty" (*Oldman River Society*, at p. 64). The Court has also held that the doctrine of interjurisdictional immunity is not well suited to circumstances where effective regulation requires cooperation between interlocking federal and provincial schemes: *Tsilhquot'in Nation*, at para. 148. Further, at para. 37 of *Canadian Western Bank*, the Court held that courts "should favour, where possible, the ordinary operation of both levels of government" and "avoid blocking the application of measures which are taken to be enacted in furtherance of the public interest."

[120] Given that the *Act* and the Bylaw are environmental legislation aimed at regulating and controlling air emissions that may be harmful to human health and the environment, there can be little doubt that they were enacted "in furtherance of the public interest", as stated in *Canadian Western Bank*. The regulation of air contaminants also illustrates the "overlap" mentioned in *Oldman River Society*. Airborne contaminants can travel some distance away from the source where they are emitted, and can affect the air quality and the environment in surrounding areas. Air contaminants emitted from a source on federally-owned land will not necessarily remain within the air column directly above the boundaries of that land, and can have adverse effects in surrounding areas.

[121] While there are circumstances that justify the application of the interjurisdictional immunity doctrine, as in *COPA* and *Lacombe*, the Court explained at paras. 42-47 of *Canadian Western Bank* why the doctrine should be applied with caution. Among other things, the Court stated at para. 42:

> While the text and logic of our federal structure justifies the application of interjurisdictional immunity to certain federal "activities", nevertheless, a broad application of the doctrine to "activities" creates practical problems of application much greater than in the case of works or undertakings, things or persons, whose limits are more readily defined. A broad application also appears inconsistent, as stated, with the flexible federalism that the constitutional doctrines of pith and substance, double aspect and federal paramountcy are designed to promote. … It is these doctrines that have proved to be most consistent with contemporary views of Canadian federalism, which recognize that overlapping powers are unavoidable. Canadian federalism is not simply a matter of legalisms. The Constitution, though a legal document, serves as a framework for life and for political action within a federal state, in which the courts have rightly observed the importance of co-operation among government actors to ensure that federalism operates flexibly.
>
> [underlining added]

[122] Based on the legal principles in the case law summarized above, the Panel finds that caution should be exercised in applying the interjurisdictional immunity doctrine in the present circumstances.

[123] The first step in determining whether interjurisdictional immunity may apply to the present circumstances is to consider whether there is any judicial precedent for its application "to the subject matter at hand" (*Canadian Western Bank*, at para. 78). At para. 77 of *Canadian Western Bank*, the Court advised that the interjurisdictional immunity doctrine "should generally be reserved for situations already covered by precedent." The Court explained at paras. 77-78:

> … As we have already noted, interjurisdictional immunity is of limited application and should in general be reserved for situations already covered by precedent. This means, in practice, that it will largely be reserved for the heads of power that deal with federal things, persons or undertakings, or where in the past its application has been considered absolutely indispensable or necessary to enable Parliament or a provincial legislature to achieve the purpose for which exclusive jurisdiction was conferred, as discerned from the constitutional division of powers as a whole, or what is absolutely indispensable or necessary to enable an undertaking to carry out its mandate in what makes it specifically of federal (or provincial) jurisdiction. If a case can be resolved by the application of a pith and substance analysis, and federal paramountcy where necessary, it would be preferable to take that approach, as this Court did in *Mangat*.
>
> In the result, while in theory a consideration of interjurisdictional immunity is apt for consideration after the pith and substance analysis, in practice the absence of prior case law favouring its application to the subject matter at

> hand will generally justify a court proceeding directly to the consideration of federal paramountcy.
>
> [underlining added]

[124] More recently, in *Marine Services* and *Marcotte*, the Court reiterated that the doctrine "is of limited application and should in general be reserved for situations already covered by precedent" (*Marcotte* at para. 63, and *Marine Services* at para. 50, citing *Canadian Western Bank* at para. 77). In *Marine Services*, the Court only proceeded to the two-pronged interjurisdictional immunity analysis after finding that there was a precedent for the doctrine's application to the subject matter at hand in that case.

[125] Before turning to the cases cited by Harvest as precedents, the Panel has reviewed some of the post-*Canadian Western Bank* cases where the courts have found that there was, or was not, a judicial precedent for the application of the interjurisdictional immunity doctrine. These cases provide some guidance as to how the courts have characterized "the subject matter at hand" in different circumstances, and whether the subject matter in a previous case was similar enough to the subject matter at hand to conclude that a precedent existed.

[126] In *Marcotte*, the Supreme Court of Canada considered the federal legislative power over banking, specifically in relation to credit card systems. The Court held there was "no precedent for the doctrine's application to the credit card activities of banks" (at para. 63). In *Marine Services*, the Court held at paras. 51-52 that there was prior case law favouring the application of interjurisdictional immunity in regard to maritime negligence law, which the Court had previously held to be part of the core of the federal power over navigation and shipping. In *COPA*, the majority of the Court found that previous jurisprudence had consistently held that Parliament has power over aeronautics, and the core of that power includes the power to determine the location of aerodromes (at paras. 28-40). The Panel finds that, in those cases, the Court looked at whether the doctrine had been applied in the context of a core aspect of the federal head of power that was impaired by a provincial statute with a purpose or effect that was similar to the circumstances at hand, and not whether the doctrine had previously been applied to the federal head of power broadly speaking.

[127] In *IMTT-Québec*, the Superior Court of Québec also took that approach. In that case, the Court held at para. 225 that it is not sufficient for a precedent to have applied the doctrine to the federal head of power; rather, it must also have applied in a conflict involving provincial legislation enacted for the same type of purpose. In that case, which involved provincial environmental assessment legislation, the Court held that there was no precedent for the application of the doctrine in the context of a provincial environmental protection law impairing the federal power over public property (at paras. 230, 231, 236, 238).

[128] Similarly, in *Hamilton*, the Ontario Court of Appeal stated "[i]t is not sufficient that the doctrine has in the past been applied to the [federal] head of power…. There needs to be a closer nexus with the actual subject matter of the [municipal bylaw]" (at paras. 95). The Court held that there was no precedent for the application of the doctrine in the context of a municipal bylaw that controlled

the installation of equipment, including community mailboxes, on municipal roads, and the federal jurisdiction over national infrastructure, including postal services. The bylaw prohibited Canada Post from installing equipment on city roads without first obtaining a permit from the city. The Court held that the pith and substance of the bylaw was "to protect against risks of harm to property and harm to persons using municipal roads" (at para. 58).

[129] Moreover, in *IMTT-Québec*, the Court held at para. 226 that it was not enough for the doctrine to have been considered in cases prior to *Canadian Western Bank*, because earlier cases did not apply the "impairment" test (at paras. 226, 233, 237). The Panel finds that this approach is consistent with the Supreme Court of Canada's findings in *Marine Services*. At paras. 51-52 of *Marine Services*, the Court held that it had previously decided in *Ordon Estate v. Grail*, [1998] 3 S.C.R. 437 [*Ordon*], that maritime negligence law is part of the core of the federal power over navigation and shipping, and that interjurisdictional immunity will apply if provincial legislation of general application has the effect of indirectly regulating a maritime negligence law issue. Like *Ordon*, *Marine Services* involved reliance by one of the parties on a provincial law in relation to maritime negligence (at para. 53). The Court proceeded to consider the two-prong interjurisdictional immunity test, but found that the second prong was not met because the provincial law did not "impair" the federal power over navigation and shipping (paras. 60-63). In making that finding, the Court noted at para. 64 that *Ordon* predated *Canadian Western Bank* and *COPA*, and did not apply either the more recent "impairment" threshold (rather than the "affects" threshold) or the two-step test for interjurisdictional immunity. In other words, the Court found that there was a precedent that had applied the interjurisdictional immunity doctrine to the subject matter at hand, but the precedent no longer applied because it turned on the historical legal test that was no longer in use.

[130] Based on this review of the cases, the Panel finds that the question of whether there is a precedent for the application of the doctrine to the subject matter at hand depends on the dominant purpose of the *Act* and the Bylaw, which is the regulation and control of waste in order to protect human health and the environment, and whether that purpose has an effect that impairs the "core" of the federal power over public property. It is insufficient that the doctrine has previously been applied to that federal head of power. Also, even if there is a precedent that matches the subject matter at hand, the Panel finds that the Courts have indicated that such a precedent will not be applicable if it was decided before *Canadian Western Bank*, which set out the test requiring that the provincial law must "impair" (rather than simply "affect") the core of the federal head of power.

[131] The Panel finds that none of the cases cited by Harvest provide a precedent for the application of the interjurisdictional immunity doctrine to the subject matter at hand. The cases cited by Harvest involve provincial legislation that was primarily directed at prohibiting or limiting land use or land development activities. *Spooner Oils* involved provincial legislation that limited natural gas production. *Canadian Occidental* involved a municipal zoning bylaw that prohibited the production of chlorine on the leased lands. *Mississauga* involved a municipal building code and was primarily decided on the basis that the building code intruded on the federal

jurisdiction over aeronautics. None of those cases considered whether provincial or municipal environmental protection legislation impaired the federal power over public property. The Panel finds that this approach is consistent with *IMTT-Québec*, in which the Court found that there was no precedent for the doctrine of interjurisdictional immunity rendering provincial environmental legislation inapplicable to federal lands owned by the Port of Québec and leased to a third party, IMTT-Québec Inc.

[132] In addition, all of the cases cited by Harvest as precedents were decided before *Canadian Western Bank*. Thus, even if the Panel is wrong in finding that none of those cases involve the same subject matter as the present case, the Panel finds that none of those cases would be applicable because they were not decided based on the "impairment" test set out in *Canadian Western Bank*.

[133] The Panel has also considered the cases that Harvest did not refer to as precedents, but generally cited in support of its arguments. The Panel finds that *Battlefields Commission* is not a relevant precedent. Although it dealt with the application of interjurisdictional immunity relative to the federal head of power under section 91(1A) of the *Constitution Act, 1867*, it dealt with a provincial transportation permit system, and not environmental legislation. In addition, *Battlefields Commission* was decided before *Canadian Western Bank* set out the modern approach to, and test for, interjurisdictional immunity.

[134] In addition, in *Battlefields Commission*, the Supreme Court of Canada found that the application of a permitting system under provincial legislation to a bus transport business operating under contract with a federal Commission in a federal park had a "massive and intrusive impact" on the "vital and essential aspects" of a federal transport service, including where the service could be provided, the trip schedules, the bus categories, and the service's clientele (at paras. 40-41). The Court found that the provincial legislation would make the federal transport service subject to the "largely discretionary" decisions and control of a provincial transportation commission (at paras. 42, 46), and would cause the federal Commission that administered the park to lose "control over the substance of the service it provides under its mandate" (at para. 43). Harvest used similar language in arguing that the application of the permitting system in the *Act* and the Bylaw to the Facility puts Harvest at the "mercy of largely discretionary decisions of Metro Vancouver". However, the Panel finds that, on the face of the *Act* and the Bylaw, the permitting system in the present case does not have "massive and intrusive impacts" on the Port Authority's powers in relation to the Leased Premises. For example, the air emissions permitting system does not regulate where a composting and bioenergy facility may operate, what type of facility may operate on the federal lands, what clientele it may serve, or its operating schedule.

[135] Furthermore, the Panel finds that the BC Supreme Court decision in *Sacks* is not relevant, as it did not involve the doctrine of interjurisdictional immunity. Similarly, the Board's decision in *BC Hydro* did not consider the doctrine of interjurisdictional immunity, and the constitutional applicability of the provincial *Contaminated Sites Regulation* to federal lands was not even an issue in that case.

[136] In summary, the Panel finds that there is no judicial precedent for the application of the doctrine of interjurisdictional immunity to a question involving the applicability of provincial environmental legislation in relation to the federal legislative power over public property. According to *Canadian Western Bank* at para. 78, if there is no precedent for the application of interjurisdictional immunity to the subject matter at hand, the analysis should generally proceed to consider whether the doctrine of paramountcy applies.

[137] However, for greater certainty, before proceeding to the doctrine of paramountcy, the Panel has considered whether the permitting system created by the *Act* and the Bylaw "impairs" an aspect of the core of the federal legislative power over public property. In order for the interjurisdictional immunity doctrine to apply such that the *Act* and/or the Bylaw are rendered inapplicable to the Facility, the *Act* and/or the Bylaw must "impair" the core of that power. In *COPA*, the Supreme Court of Canada explained the meaning of "impairment" at para. 45:

> "Impairment" is a higher standard than "affects". It suggests an impact that not only affects the core federal power, but does so in a way that seriously or significantly trammels the federal power. In an era of cooperative, flexible federalism, application of the doctrine of interjurisdictional immunity requires a significant or serious intrusion on the exercise of the federal power. It need not paralyze it, but it must be serious.
>
> [underlining added]

[138] As stated above, according to *Lafarge*, the *Canada Marine Act* is a federal law that in pith and substance relates both to the federal power over "public property" as well as navigation and shipping. In asserting that the Facility's operations fall within the management of "public property", Harvest relies on the Port Authority's property management and leasing powers under the *Canada Marine Act* and its Letters Patent, and more specifically on the terms of the Lease which state that the Facility's operations "shall" occur on the Leased Premises.

[139] However, unlike the integrated ship offloading/concrete batching facility that was to be built on waterfront land in *Lafarge*, which was found to be "closely integrated" with the federal power over navigation and shipping, it is not clear that the Facility's operations are "closely integrated" with the federal power over public property. The Panel has already found that Harvest's reliance on the word "shall" in the Lease does not automatically mean that the Facility's operations on the Leased Premises are within the core of the federal power over public lands. The Panel finds that Harvest has not established that the permitting system created under the *Act* and the Bylaw impairs an aspect of the federal power over public lands "that has been considered absolutely indispensable or necessary to enable Parliament … to achieve the purpose for which the exclusive legislative jurisdiction was conferred" (*Canadian Western Bank*, at para. 77).

[140] Even if the Panel assumes that Harvest's operations on the Leased Premises fall within the core of the federal power over public property (which the Panel has not found), the Panel finds that the requirement under the *Act* and the Bylaw to hold an air emissions permit does not "seriously or significantly trammel" on that federal power. The permitting scheme, including the District Director's discretion to

issue a permit subject to requirements for the protection of the environment, and to enforce compliance with such a permit, does not significantly trammel on the Port Authority's power to lease the federal owned lands to whomever it chooses, for whatever activities or purposes may fall within its authority under its Letters Patent and the *Canada Marine Act*. On its face, the permitting scheme does not significantly or seriously intrude on the Port Authority's ability to lease federal land for the purposes listed in the Lease. More specifically, no aspect of the permitting scheme prohibits or restricts a waste treatment, composting, soil producing, or energy producing facility from operating on the Leased Premises. The permitting scheme enables the main purpose of the *Act* and the Bylaw, which is to regulate and control the quantity, quality, and type of air contaminants that can be discharged by a facility or business. Any requirements that may be imposed in a permit are in furtherance of that purpose. No aspect of the permitting system impairs that type or extent of land use, land development, or business activity that may take place on any land.

[141] In conclusion, the Panel finds that the doctrine of interjurisdictional immunity does not apply, as the *Act* and/or the Bylaw do not interfere with the core of the federal power over public lands.

### 2. Whether the *Act* and/or Bylaw trigger the doctrine of paramountcy, such that the provincial legislation is invalid to the extent that it conflicts with or frustrates the purpose of valid federal legislation.

*The Parties' submissions*

[142] Harvest submits that, if the *Act* and Bylaw apply to the Facility such that Harvest is required to hold a permit, the provincial legislation is inoperative to the extent that it conflicts with valid federal legislation. Harvest submits that under the doctrine pf paramountcy, such a conflict may arise if: (1) there is an operational conflict because it is impossible to comply with both laws; or (2) although it is possible to comply with both laws, the operation of the provincial law frustrates the purpose of the federal law (*Alberta (Attorney General) v. Moloney*, 2015 SCC 51 [*Moloney*], at para. 18). Harvest submits that both types of conflict exist in the present case.

[143] Specifically, Harvest submits that there is an operational conflict between federal laws that authorized the Facility in its present form, and the provincial requirement that Harvest obtain a new permit in 2016. In essence, one enactment says "yes" and the other says "no" in terms of the effect of each law (*Moloney*, at para. 19). Harvest submits that it obtained federal approval from the Port Authority and under the *CEAA*, and the requirement to obtain an air emissions permit would flout the purpose of the *Canada Marine Act* by depriving the Port Authority of its exclusive jurisdiction over the use and development of federally-owned port lands.

[144] According to Harvest, the 2014 "Port Metro Vancouver Land Use Plan" provides an environmental plan under the *CEAA*, and the Port Authority's environmental policy ensures that the Port Authority reviews all proposals in its

jurisdiction that are not "designated" projects under the *CEAA*. It also ensures that the Port Authority does not permit a project to be carried out on federal lands unless the Port Authority determines that the project is not likely to cause significant adverse environmental effects. Harvest submits that, further to the Port Authority's land use planning, the Facility gained federal approval under the *CEAA*.

[145] Harvest also submits that the Facility's anaerobic digester and biogas plant received approval from NRC on January 4, 2011, following an environmental screening process by NRC under the *CEAA*. Harvest maintains that NRC concluded under section 20 of the *CEAA* that the proposed project was not likely to cause significant adverse environmental effects. Harvest acknowledges that the NRC approval under the *CEAA* contemplated an air emissions permit from Metro Vancouver, but Harvest argues that the NRC approval did not require Harvest to obtain such a permit as a condition of the approval.

[146] Harvest maintains that *Lafarge* provides authority for the application of the paramountcy doctrine to the present circumstances. Harvest submits that in *Lafarge*, the Court found that a municipal land use plan was inapplicable to port lands where an integrated ship loading/cement facility was to be built. The Court held that there was an operational conflict between the municipal land use plan, under which one party sought an injunction preventing construction of the facility, and the Port Authority's land use plan, such that the application of the municipal law would have frustrated the federal purpose (at paras. 81-84). Turning to the present circumstances, Harvest submits that the Brenzingers' application for a stay of the Permit, and the District Director's power to suspend operations at the Facility for a breach of the Permit, show that there is an operational conflict between the permitting scheme and the federal legislation that authorizes the Port Authority to determine the use of the Leased Premises and enable Harvest's operations at the Facility.

[147] In addition, Harvest submits that there is no regulatory gap that the Bylaw needs to fill regarding ambient air quality standards for the Facility. Harvest maintains that the Facility is governed by *CEPA* regarding ambient air quality standards, practices and procedures. Under sections 54 and 55 of *CEPA*, air quality standards can be established as objectives, where the Minister may issue environmental quality objectives for preventing pollution. *CEPA* applies to federal lands, and on May 25, 2013, Parliament set the Canadian Ambient Air Quality Standards ("CAAQS"), which provide objectives for outdoor air quality including standards for fine particulate matter ($PM_{2.5}$) and ozone. Harvest submits that the Facility meets the ambient air quality objectives under the CAAQS. Harvest further submits that the Facility meets the BC Ambient Air Quality Objectives, which are non-binding objectives under the *Act*, as well as Metro Vancouver's Air Quality Objectives. Harvest maintains that there are no standards for odours in *CEPA*, the *Act*, or the Bylaw.

[148] In summary, Harvest submits that the requirement for it to hold a permit under the *Act* and the Bylaw in order to operate the Facility creates an operational conflict with the prior federal approval of the Facility under the Lease and the *CEAA*, and would frustrate the purposes of the *Canada Marine Act* which gives the Port Authority the power to determine the use and development of port lands.

Moreover, there is no legal vacuum that needs to be filled by the *Act*/Bylaw, and there is no justification for the Province's intrusion into the core federal power over public property. Harvest submits, therefore, that the federal law prevails, and the permitting system under the *Act* and the Bylaw is inoperable to the extent of the conflict.

[149] The AGBC submits that the *Act* and the Bylaw create no operational conflict with a federal law, and do not frustrate the purpose of any federal law. The AGBC submits that Harvest, as the party seeking to invoke paramountcy, bears the burden of proving the elements of the doctrine, and the standard is high (*COPA*, at para. 66; *Saskatchewan (Attorney General) v. Lemare Lake Logging Inc.,* 2015 SCC 53 [*Lemare*], para. 26). The AGBC submits that Harvest has not met that standard.

[150] The AGBC submits that an operational conflict invoking paramountcy only exists when there is an actual conflict; i.e., where dual compliance with both laws is impossible (*Lemare*, at para. 18). No conflict exists where the provincial law is merely more restrictive than the federal law (*COPA*, at para. 67; *Lemare*, at para. 25; *114957 Canada Ltée (Spraytech, Société d'arrosage) v. Hudson (Town)*, 2001 SCC 40 [*Spraytech*], at para. 35). Also, a real conflict, rather than a potential conflict, must exist (*Spraytech*, at para. 41).

[151] Moreover, to invoke the "frustration of purpose" branch of the doctrine, the AGBC argues that the party seeking to invoke the doctrine must first establish the purpose of the relevant federal law, and then prove that the provincial law is incompatible with that purpose (*COPA*, at para. 66; *Lemare*, at para. 26). In doing so, the purpose of the federal legislation should not be "artificially broadened beyond its scope" (*Lemare*, at para. 23). The AGBC submits that, based on the guiding principle of cooperative federalism, interpretations that allow for the concurrent operation of provincial and federal legislation should be applied (*Lemare*, at paras. 20-22), especially in situations such as environmental law where neither level of government has exclusive legislative power (*Oldman River Society*, at paras. 64-65; *Spraytech*, at para. 33).

[152] The AGBC submits that Harvest does not identify any specific operational conflict between the *Act*/Bylaw and a federal law, or how it is impossible for Harvest to comply with both the Permit and a federal law. In addition, the AGBC submits that the NRC Screening Report did not serve as an approval of the Facility; rather, it was a planning tool that served to authorize NRC's funding to Harvest. Moreover, the AGBC submits that the Screening Report was premised on Harvest's compliance with an air emissions permit from Metro Vancouver. At pages 10 and 12, the Screening Report states:

> EC [Environment Canada], in consultation with … Metro Vancouver, has found the Proponent to be demonstrating responsible environmental stewardship by proactively seeking to meet the requirements of the local government. As long as the amended composting licence and new air quality permit are obtained from Metro Vancouver and that other measures identified in the [Proponent's] EIS [Environmental Impact Assessment Report] and Addendum

> [to the EIS Report] are implemented, EC is satisfied that air quality and water quality issues related to EC's mandate have been adequately addressed.
>
> …
>
> … [Harvest] will obtain an Air Emissions Permit from Metro Vancouver, which takes into consideration cumulative environmental effects of emissions on regional air quality.

[153] Thus, the AGBC submits that the present circumstances are distinguishable from those in *Lafarge*, which involved both an operational conflict and a frustration of purpose between the *Canada Marine Act* and a municipal zoning bylaw. In that case, the Court held that requiring compliance with the bylaw would deprive the Vancouver Port Authority of its power to make a final decision regarding the development of port lands. The AGBC maintains that there is no such operational conflict in the present case. The mere fact that the Permit imposes conditions on the Facility does not render the Bylaw unconstitutional (*COPA*, at para. 67, *Lemare*, at para. 25, *Spraytech*, at para. 35; *Coastal First Nations v. British Columbia (Minister of Environment)*, 2016 BCSC 34 [*Coastal First Nations*], at paras. 71-73).

[154] The AGBC also disputes the contention that the requirement to hold a permit under the Bylaw frustrates the purpose of the *Canada Marine Act* with regard to the Port Authority's jurisdiction over federal land use and development. The AGBC argues that Harvest has provided no analysis or evidence establishing the purpose of the *Canada Marine Act*.

[155] The District Director adopts the AGBC's submissions.

[156] Richmond submits that the doctrine of paramountcy does not apply, and that Harvest has neither demonstrated an operational conflict between the *Act*/Bylaw and any federal legislation, nor established that the *Act*/Bylaw frustrates the purpose of any federal law.

[157] Richmond also submits that the present circumstances are distinguishable from those in *Lafarge*, because the facility in that case received a much more specific approval from the Vancouver Port Authority under section 48 of the *Canada Marine Act*. Following a consultation and review process, the Vancouver Port Authority issued an Approval in Principle (*Lafarge*, at para. 19) authorizing a facility that exceeded the municipal building height limit. The Court found that the facility was closely related to the federal power over shipping and navigation, and the municipal law restricting building height would frustrate the federal purpose, because the Vancouver Port Authority held the final say on matters falling within the federal jurisdiction over navigation and shipping (*Lafarge*, at para. 83). Richmond submits that there is no equivalent operational conflict or frustration of purpose in the present case.

[158] In particular, Richmond argues that Harvest has not received specific approval for the design of the Facility from the Port Authority under the Lease, and the Lease does not serve as authorization for all aspects of the Facility's operations. For example, the Lease does not authorize air emissions; rather, it requires compliance with all applicable provincial and municipal environmental legislation. Richmond maintains that the Lease serves to limit Harvest's use of the Leased

Premises, which is a normal term in a commercial lease and does not indicate substantive approval of a project. Similarly, Richmond submits that the Port Authority's general power under the Letters Patent to lease federally-owned lands does not establish a federal intent to authorize a composting facility which has no connection with navigation and shipping or port operations. Unlike the facility in *Lafarge*, the Facility has no docks, structures or activities that are related to navigation and shipping. Moreover, Richmond submits that Harvest has not pointed to anything in the Port Authority's land use plan that specifically authorizes Harvest's operations, and in any event, the land use plan is a policy document and not a statutory instrument (*Lafarge*, at para. 55).

[159] Regarding NRC's review and the resulting Screening Report, Richmond submits that a finding following a *CEAA* review that a project is not likely to cause adverse environmental effects does not serve as an approval of the project for all purposes, nor does it amount to a decision that the project requires no environmental regulation. In any event, the Screening Report's conclusion that the proposed project was not likely to cause adverse environmental effects was clearly premised on Harvest obtaining an air emissions permit from Metro Vancouver.

[160] In addition, Richmond submits that the Supreme Court of Canada has repeatedly held that a federal legislative purpose is not frustrated when provincial legislation restricts the scope of permissive federal legislation (*COPA*, at para. 66; *Moloney*, at para. 26). Provincial legislation will only frustrate the purpose of federal legislation if the federal law provides for a positive entitlement instead of merely being permissive (*Moloney*, at para. 26). Richmond maintains that, in the present case, the relevant provisions of the Lease, the *Canada Marine Act*, and the *CEAA* assessment are merely permissive, and do not provide Harvest with a positive entitlement that is denied by the *Act*, the Bylaw or the Permit. Similarly, in *Coastal First Nations*, the BC Supreme Court recently held that the mere existence of a condition does not amount to a prohibition: if a federal law says "yes with conditions", then a provincial law can also say "yes with further conditions" (at paras. 72-73).

[161] Regarding the regulation of air emissions, Richmond submits that unlike the comprehensive federal laws that regulated the storage facility in *IMTT-Québec*, there is no "complete code" of federal law that applies to air emissions from the Facility. Richmond submits that the CAAQS are merely objectives and are unenforceable. The provinces are invited to use the CAAQS as guidance when enacting environmental legislation. Thus, the CAAQS do not occupy the field, and there is no indication that the *Act* or the Bylaw conflicts with, or frustrates, the purpose of the *CEPA* or the CAAQS.

[162] The Brenzingers did not address this issue.

[163] Mr. Shuchat submits that the facts in the present case are distinguishable from those in *Lafarge*, and Harvest has not demonstrated any operational conflict with a federal law or that the Facility is subject to federal environmental regulation.

[164] In reply, Harvest submits that the Lease expressly contemplates paramountcy, as it states that the Port Authority has "paramount jurisdiction over

provincial or municipal" agencies or their laws, and that Harvest is only subject to any "applicable" provincial or municipal laws.

[165] Harvest also submits that the present circumstances are similar to those in *IMTT-Québec*, where the Court found that the doctrine of paramountcy applied such that provincial environmental assessment legislation did not apply to a storage facility operated by a third party on federal port lands. In that case, the provincial legislation required authorization for the storage facility's operations, and the Court concluded that the federal legislation provided a complete code which gave the port authority the final say on matters affecting the development, management and operations of federal port lands. The Court held that applying the provincial legislation would create a conflict with the federal laws and would impede the purpose of the federal laws (*IMTT-Québec*, at paras. 256-263). Harvest submits that the present circumstances are similar in that Parliament has given the Port Authority the final decision-making power over the use and development of port lands, and there is the possibility of a discretionary provincial intervention, given that the District Director could order Harvest to stop accepting food waste which could result in the Facility shutting down.

[166] Harvest agrees with Richmond that the Courts have held that the mere existence of a condition does not amount to a prohibition. However, Harvest notes that in *Coastal First Nations*, the Court stated that "this is not to say that any and all conditions would be permissible. This is just to say that on its face there are no obvious problems with the imposition of provincial environmental protection conditions" (at paras. 73-74). Harvest argues that, in *Coastal First Nations*, no further findings regarding an operational conflict under paramountcy could be made until the specific conditions were known, whereas in the present case, the specific permit conditions are known and are already in conflict. Harvest submits that it was able to comply with both the federal authority and the more stringent requirements under the Previous Permit. However, the current Permit gives the District Director untrammeled discretion to shut down the Facility, which creates an operational conflict and is contrary to Parliament's intention to give the Port Authority the final word on port land use and development. Harvest submits that uncertainty, delays, and the prospect of a refusal under the *Act*/Bylaw is incompatible with Parliament's intention under the *Canada Marine Act* to reserve the final say in the event of a conflict over any matter affecting the port system (*IMTT-Québec*, at para. 265).

[167] In addition, Harvest submits that there is no requirement for the Port Authority to create a statutory instrument approving the Facility, as the *Canada Marine Act* requires the Port Authority to develop a land use plan for the port lands under its jurisdiction, and the *CEAA* review was undertaken further to that land use plan. Following the *CEAA* approval, the Port Authority entered into the Lease. Harvest submits that this approval process is the same as in *Lafarge*, where the approval was an Approval in Principle issued by a port authority under section 48 of the *Canada Marine Act*, and was not a statutory instrument.

[168] In any event, Harvest submits that the Port Authority approved Harvest's application for a permit for the anaerobic digester and biogas energy plant. In that regard, Harvest provided a copy of Project Permit Number 2010-068, dated

September 28, 2010 (the "Port Authority Permit"). The Port Authority Permit includes several requirements, including a requirement that Harvest adhere to the conditions in the Port Authority's "Environmental Report and Schedule of Environmental Conditions" dated September 27, 2010 (the "Port Authority's Environmental Report"), which is attached to the Port Authority Permit.

[169] Regarding the regulation of air emissions, Harvest submits that *CEPA*, the CAAQS, and the *Environmental Emergency Regulations* (under *CEPA*) provide an extensive regulatory regime for air quality.

[170] Finally, Harvest maintains that, for the purposes of this preliminary matter, the District Director's "untrammeled discretion on the face of the Permit alone" triggers the doctrine of paramountcy based on the decisions in *Lafarge* and *IMTT-Québec*.

*The Panel's findings*

[171] First, the Panel will address Harvest's assertion that the District Director's "untrammeled discretion on the face of the Permit alone" triggers the doctrine of paramountcy. The Panel has already stated, above, that Harvest's notice of constitutional question does not refer to the Permit; it only challenges the applicability or operation of the *Act* and the Bylaw. Moreover, the merits of the Permit are to be decided following a full hearing of the appeals, whereby all parties will have the opportunity to present witnesses and evidence, cross-examine witnesses, and make submissions as to the facts and the law. Therefore, the Panel finds that the constitutionality of the Permit itself, including whether it gives the District Director untrammeled discretion to shut down the Facility or whether it triggers the doctrine of paramountcy, is not properly before the Board at this time. The constitutional question that is now before the Panel is whether the *Act* and/or Bylaw trigger the doctrine of paramountcy, such that the provincial legislation is invalid to the extent that it conflicts with or frustrates the purpose of valid federal legislation.

[172] Regarding the overall approach to deciding this issue, the Panel finds that the analysis should be guided by the principle of cooperative federalism, and the doctrine of paramountcy should be applied with restraint (*Lemare*, at paras. 20-22; *Marcotte*, at para. 84; *Moloney*, at para. 27). As stated in *Moloney* at para. 27:

> Be it under the first or the second branch [of the test for paramountcy], the burden of proof rests on the party alleging the conflict. Discharging that burden is not an easy task, and the standard is always high. In keeping with co-operative federalism, the doctrine of paramountcy is applied with restraint. It is presumed that Parliament intends its laws to co-exist with provincial laws. Absent a genuine inconsistency, courts will favour an interpretation of the federal legislation that allows the concurrent operation of both laws: *Western Bank*, at paras. 74-75, citing *Attorney General of Canada v. Law Society of British Columbia*, [1982] 2 S.C.R. 307 ("*Law Society of B.C.*"), at p. 356; see also *Rothmans*, at para. 21; *O'Grady v. Sparling*, [1960] S.C.R. 804, at pp. 811 and 820. Conflict must be defined narrowly, so that

> each level of government may act as freely as possible within its respective sphere of authority: *Husky Oil*, at para. 162, per Iacobucci J. (dissenting, but not on this particular point), referring to *Deloitte Haskins and Sells Ltd. v. Workers' Compensation Board*, [1985] 1 S.C.R. 785, at pp. 807-8, per Wilson J.
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> [underlining added]

[173] This is especially so because the present case involves the environment, where neither level of government has exclusive legislative power (*Oldman River Society*, at paras. 64-65; *Spraytech*, at para. 33), and given the fact that air contaminants originating from a facility located on federally-owned land may travel through the air to surrounding municipalities. Although there are times when a valid provincial law conflicts with a valid federal such that the doctrine of paramountcy must be invoked, the fact that air contaminants can, and do, readily travel significant distances from their sources makes it necessary for federal, provincial, and municipal levels of government to take a cooperative approach to this subject matter. This fact also distinguishes the present circumstances from those in *Lafarge* and *IMTT-Québec*, as there was no issue regarding emissions from those facilities having environmental effects on surrounding areas.

[174] As stated above in para. 27 of *Moloney*, the burden of proof in establishing that a conflict between overlapping provincial and federal legislation exists rests on the party alleging the conflict, which is Harvest in this case, and discharging that burden is not an easy task. The standard is high. Further, in assessing whether a conflict exists, the effect of the provincial legislation should be assessed (*Moloney*, at para. 28). As stated in para. 29 of *Moloney*:

> In sum, if the operation of the provincial law has the effect of making it impossible to comply with the federal law, or if it is technically possible to comply with both laws, but the operation of the provincial law still has the effect of frustrating Parliament's purpose, there is a conflict. Such a conflict results in the provincial law being inoperative, but only to the extent of the conflict with the federal law: *Western Bank*, at para. 69; *Rothmans*, at para. 11; *Mangat*, at para. 74. …
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> [underlining added]

[175] Harvest implies that the Lease is a form of federal approval, arising from the Port Authority's powers under the *Canada Marine Act* and the *CEAA*, and that there is an operational conflict between the permitting scheme and the federal legislation that authorizes the Port Authority to determine the use of the Leased Premises. The Panel finds that the Lease does not serve as a substantive approval of the Facility, or its operations, by the Port Authority. The Panel finds that the Lease specifies and limits the uses of the Leased Premises by Harvest, just as any commercial lease would do. Even if the Lease does serve as an approval by the Port Authority of Harvest's operation of a composting facility on the Leased Premises, the Panel finds that the Lease does not authorize air emissions; rather, it requires compliance with all "applicable" provincial and municipal environmental legislation. Although the Lease contemplates that the Port Authority has

paramount authority in certain respects, it does not specify what provincial or municipal laws may or may not be subject to paramountcy.

[176] Regarding Harvest's argument that the Port Authority reviews all proposals in its jurisdiction that are not "designated" projects under the *CEAA*, and that, further to the Port Authority's land use planning, the Facility gained federal approval under the *CEAA*, the Panel finds that Harvest has provided evidence, in the form of the Port Authority Permit and the Port Authority's Environmental Report, that the Port Authority approved Harvest's application for a permit for the anaerobic digester and biogas energy plant, following a review process. The question then becomes: what exactly did the Port Authority Permit approve?

[177] The Port Authority Permit expressly states that it is not a building permit, and it does not indicate whether it was issued pursuant to the *Canada Marine Act*, the *CEAA*, or some other federal legal authority. It makes no reference to any legal authority for its issuance. However, the Port Authority Permit was issued by a Senior Planner for the Port Authority, which suggests that it has some connection with the Port Authority's land use planning powers. The Port Authority Permit appears to be limited to authorizing Harvest to commence construction of the anaerobic digester and bioenergy plant. It does not approve the design, engineering, or operation of the plant. Condition 2 under the Port Authority Permit's "General Conditions of Approval" states that it "in no way endorses or warrants the design, engineering or construction" of the works contemplated, and "no person may rely upon this Permit for any purpose other than the fact that [the Port Authority] has permitted the contemplated construction works to commence … in accordance with the terms and conditions of this Permit [underlining added]."

[178] The Port Authority Permit contemplates that Harvest may need to obtain other approvals from other regulatory agencies, as condition 1 under the "General Conditions of Approval" states that "the issuance of the [Port Authority Permit] does not preclude compliance with the regulatory processes and requirements of other applicable agencies". In that regard, the Port Authority Permit includes a requirement that Harvest adhere to the conditions in the Port Authority's Environmental Report, and page 3 of that report states that "We understand that FRSF [Harvest] will be applying to Metro Vancouver … for an air emission permit …. FRSF [Harvest] will share the information with the VFPA [Port authority] at the time that the application is submitted to MV [Metro Vancouver]." Page 3 also states that "FRSF [Harvest] has indicated that they take great care to work closely with Metro Vancouver." As such, it appears that the Port Authority accepted that Metro Vancouver had some scope of jurisdiction to regulate air emissions from the Facility, and expected that Harvest would continue to work with Metro Vancouver in obtaining an air emissions permit.

[179] The Panel finds that the conclusion, at page 5 of the Port Authority's Environmental Report, that the potential adverse effects associated with the proposed project can be mitigated through the application of a list of environmental conditions, is based on the qualification that the project description summary "does accurately reflect the subject proposal". At page 2, the Report contains a summary of the proposed project, and states that the proposed project would have the capacity to process and convert 27,000 tonnes per year of organic waste. In

contrast, Harvest's submissions to the Board state that the Facility now receives and processes 200,000 to 250,000 tonnes per year of organic material. As such, the Panel finds that the project description summary that the Port Authority's Environmental Report and the Port Authority Permit were based on no longer "accurately reflects" the Facility's operations. Consequently, the conclusion in the Port Authority's Environmental Report that the potential adverse effects of the project could be mitigated through the application of the listed environmental conditions is no longer valid, and the Facility no longer meets the conditions attached to the Port Authority Permit.

[180] Moreover, the Port Authority Permit states that it is valid until September 30, 2012. Thus, the Panel finds that the Port Authority Permit was a time-limited or temporary approval that is no longer in effect.

[181] For all of these reasons, the Panel finds that the Port Authority Permit served as a federal approval for Harvest to commence construction of the anaerobic digester and biogas energy plant, which Harvest proceeded with and completed. The *Act* and the Bylaw did not hinder that in any way. The Port Authority Permit has long since expired, and the Panel finds that it does not serve as an approval of the Facility's current operations, which are substantially larger than those that were approved in 2010. The Facility is now processing over seven times more organic waste per year than was proposed when the Port Authority conducted the review that led to the Port Authority's Environmental Report, which set environmental conditions that attached to the Port Authority Permit. In this sense, the Port Authority Permit is unlike the Approval in Principle in *Lafarge*, as there was no issue regarding whether that facility actually complied with the terms and conditions of the Vancouver Port Authority's Approval in Principle.

[182] Similarly, the Panel finds that the NRC review under the *CEAA*, and the Screening Report's conclusion that the proposed anaerobic digester and biogas energy plant were not likely to cause significant adverse environmental effects, served as an approval under the *CEAA* for the purposes of NRC providing financial assistance to Harvest, which proceeded and was in no way unhindered by the *Act* or the Bylaw. However, the Panel also finds that the Screening Report's conclusions on environmental effects were based on a proposal to receive and process 27,000 tonnes per year, and not 200,000 to 250,000 tonnes per year, of organic waste. As such, the NRC approval was for a substantially smaller proposal than the Facility's current operations, and the conclusions regarding the likelihood of the project causing adverse significant environmental effects are based on information that is no longer valid. Consequently, the Panel finds that the Screening Report served as NRC's approval of funding for Harvest's proposal, but it does not serve as an approval for the current operations at the Facility.

[183] The Panel also finds that the Screening Report's conclusions are based on the premise that Harvest would obtain an air emissions permit from Metro Vancouver. At pages 10 and 12, the Screening Report states:

> EC [Environment Canada], in consultation with … Metro Vancouver, has found the Proponent to be demonstrating responsible environmental stewardship by proactively seeking to meet the requirements of the local government. As

> long as the amended composting licence and new air quality permit are obtained from Metro Vancouver and that other measures identified in the [Proponent's] EIS [Environmental Impact Assessment Report] and Addendum [to the EIS Report] are implemented, EC is satisfied that air quality and water quality issues related to EC's mandate have been adequately addressed.
>
> …
>
> … [Harvest] will obtain an Air Emissions Permit from Metro Vancouver, which takes into consideration cumulative environmental effects of emissions on regional air quality.
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> [underlining added]

[184] Moreover, unlike the municipal building bylaw in *Lafarge* and the provincial environmental assessment law in *IMTT-Québec*, the *Act* and the Bylaw do not give a provincial or municipal agency the discretion to prevent a composting and bioenergy facility from being built on the Port Authority's lands, and they do not deprive the Port Authority of its power to make a final decision regarding the leasing, use or development of port lands. On their face, the *Act* and the Bylaw merely regulate and control air contaminants that are emitted from the Facility. Indeed, the Facility has been operating in the present location for many years, and has held an air emissions permit under the Bylaw since 2013.

[185] Furthermore, the *Canada Marine Act* and the *CEAA* do not regulate air emissions, and the Port Authority Permit and the Screening Report expressly contemplate that Harvest would seek a permit from Metro Vancouver which would regulate air emissions from the Facility. A provincial law may add requirements that supplement the requirements of any federal legislation, such that compliance with both is possible (*Canadian Western Bank*, at para. 72, citing *Spraytech*; *Coastal First Nations*, at paras. 71-72).

[186] In *Coastal First Nations*, the Court stated that "this is not to say that any and all conditions would be permissible. This is just to say that on its face there are no obvious problems with the imposition of provincial environmental protection conditions" (at paras. 73-74). In *Coastal First Nations*, no further findings regarding an operational conflict under paramountcy could be made until the specific conditions were known. Harvest submits that, in contrast, the specific permit conditions are known in this case, and the Permit gives the District Director untrammeled discretion to shut down the Facility, which creates an operational conflict and is contrary to Parliament's intention to give the Port Authority the final word on port land use and development. Harvest essentially admits that it had no concerns about the effects of the Previous Permit, and that its present concern really stems from the potential effects on its operations if it breaches that Sniff Test portion of the current Permit and the District Director orders the Facility to stop receiving food waste. However, the Panel emphasizes that the actual effect of the Permit (as opposed to the effects of the *Act* and the Bylaw), and whether the Permit gives the District Director untrammeled discretion to shut down the Facility, was not part of Harvest's notice of constitutional question, and will be addressed at the hearing on the merits of the appeals. Therefore, the Panel makes no findings on those matters in this preliminary decision.

[187] For all of these reasons, the Panel finds that Harvest has failed to establish that the effects of the *Act* and the Bylaw create an operational conflict with the federal powers under the *Canada Marine Act* or the *CEAA* such that Harvest cannot comply with both the federal and provincial legislation. Harvest has also failed to establish that the permitting scheme created by the *Act*/Bylaw frustrates the purposes of the *Canada Marine Act* or the *CEAA*, with respect to the use and development of federal land or the approval of projects on federal land. In fact, the Panel finds that there is virtually no overlap between the permitting scheme in the *Act*/Bylaw and the federal powers under the *Canada Marine Act* or the *CEAA*.

[188] Regarding the federal regulation of air emissions under the *CEPA*, the Panel finds that the *CEPA* does regulate some air pollutants in some circumstances but it does not provide a complete code for the regulation of air emissions in Canada, and Harvest has not adequately explained what aspect of the *Act* or the Bylaw conflict with any federal laws that may apply to regulate air contaminants emitted from the Facility. The Panel finds that the CAAQS are merely guidelines which are not, on their own, legally binding. Furthermore, Harvest has not explained how, or what aspect of, the *Environmental Emergency Regulations* apply to air emissions from the Facility. Harvest also has not identified any provision in the *CEPA* that actually applies to the Facility. For example, in Part 7, Division 5, the *CEPA* regulates emissions from vehicles, certain types of engines, and equipment (defined in section 149 to mean "any prescribed equipment that is designed for use in or on a vehicle or engine"). Harvest has not submitted that this applies to the Facility. Division 6 regulates international air pollution, but Harvest has not submitted that this applies to the Facility either.

[189] The Panel notes that the Supreme Court of Canada previously held that pollution that is predominantly extra-provincial and international in its character and effects is a matter of national concern that is subject to Parliament's "residual power" under the *Constitution Act, 1867* (*R. v. Crown Zellerbach Canada Ltd.*, [1988] 1 S.C.R. 401, cited in *Oldman River Society*, at p. 64). However, in the present case, the parties do not submit, nor is there any evidence, that the air contaminants emitted from the Facility are predominantly extra-provincial and international in their character and effects. Moreover, the Bylaw and the relevant portions of the *Act* are clearly aimed at regulating air emissions within the Metro Vancouver area only, and not air pollutants that may cross provincial or international borders.

[190] Even if the Panel assumed that the Bylaw does not apply to the air column directly above the federally-owned land (despite the fact that Harvest has no right to that air space, given that Section II of Schedule A of the Lease states that the Leased Premises shall not include "any air space rights … appurtenant to the Leased Premises, all of which rights are expressly reserved to the [Port] Authority"), the Panel finds that the Bylaw clearly applies to the air contaminants emitted from the Facility once those substances travel to municipalities beyond the boundaries of the air column directly above the federally-owned land.

[191] For all of these reasons, the Panel concludes that Harvest has failed to establish that the permitting scheme in the *Act*/Bylaw creates an operational

conflict with the federal powers under the *CEPA*, or frustrates the purpose the *CEPA*, with respect to the regulation and control of air emissions.

[192] In conclusion, the Panel finds that the *Act* and/or Bylaw do not trigger the doctrine of paramountcy in this case.

## DECISION

[193] The Panel has considered all the submissions and arguments made, whether or not they have been specifically referenced herein.

[194] For the reasons stated above, the answer to the constitutional question posed by Harvest is "no". The Panel finds that the application of the Bylaw and the relevant provisions in the *Act* to Harvest's Facility do not impede upon the use and development of federal lands under the exclusive jurisdiction granted to Parliament under section 91(1A) of the *Constitution Act, 1867*.

"Alan Andison"

Alan Andison, Chair
Environmental Appeal Board

May 12, 2017