

e-document		T-330-21-ID 1	
F	FEDERAL COURT	D	
I	COUR FÉDÉRALE	É	
L		P	
E		O	
D		S	
		É	
February 19, 2021 19 février 2021			
Abigail Grimes			
TOR		1	

Court File No.

FEDERAL COURT

BETWEEN:

REGIONAL MUNICIPALITY OF HALTON, THE CORPORATION OF THE TOWN OF MILTON, THE CORPORATION OF THE TOWN OF HALTON HILLS, THE CORPORATION OF THE CITY OF BURLINGTON, THE CORPORATION OF THE TOWN OF OAKVILLE and THE HALTON REGIONAL CONSERVATION AUTHORITY

Applicants

- and -

CANADA (MINISTER OF THE ENVIRONMENT), ATTORNEY GENERAL OF CANADA, and CANADIAN NATIONAL RAILWAY COMPANY

Respondents

NOTICE OF APPLICATION

Application for Judicial Review under Sections 18 and 18.1 of the Federal Courts Act

TO THE RESPONDENTS:

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

THIS APPLICATION will be heard by the Court at a time and place to be fixed by the Judicial Administrator. Unless the Court orders otherwise, the place of hearing will be as requested by the applicants. The applicants request that this application be heard at Toronto, Ontario.

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

Copies of the [Federal Courts Rules](#), information concerning the local offices of the Court and other necessary information may be obtained on request to the Administrator of this Court at Ottawa (telephone 613-992-4238) or at any local office.

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

Date: February 19, 2021

Issued by:

(Registry Officer)
Address of local office:
Federal Court
180 Queen Street West
Suite 200
Toronto, Ontario
M5V 3L6

TO: The Minister of Environment
Fontaine Building 12th floor
200 Sacré-Coeur Blvd
Gatineau QC K1A 0H3

AND TO: Attorney General of Canada
Department of Justice
Ontario Regional Office
400-120 Adelaide Street West,
Toronto, Ontario M5H 1T1
Attention: Joseph Cheng

AND TO: Canadian National Railway Company
935, rue de la Gauchetière Ouest
16th Floor
Montreal, Quebec H3B 2M9

APPLICATION

This is an Application for judicial review pursuant to sections 18 and 18.1 of the *Federal Courts Act* to quash and set aside Decisions communicated within and by a Decision Statement issued by the Minister of the Environment (the “Minister”) pursuant to section 54 of the *Canadian Environmental Assessment Act, 2012* (“CEAA 2012”) on January 21, 2021.

The Decisions deal with the environmental effects of a Designated Project proposed by the Canadian National Railway Company (“CN”) to construct and operate an intermodal logistics hub (the “Logistics Hub”) in the Town of Milton (“Milton”), in the Regional Municipality of Halton (“Halton Region”). The Logistics Hub consists of a large outdoor 24/7 low-tech, low-employment container transfer facility for trucks and railcars to load, store and transfer approximately 450,000 containers per year, in an area that is designated instead for intensive industrial development, investment and employment.

In a report issued in January 2020, a federal-only panel constituted under CEAA 2012 (the “Review Panel”) concluded that the Logistics Hub, if permitted to proceed, is likely to cause six unmitigable significant adverse environmental effects, including harm to human health. Without notice or reasons provided to the Applicants, the Minister rejected the Review Panel’s conclusion that the Designated Project is likely to cause unmitigable harm to human health, but agreed that the Project is likely to cause five unmitigable significant adverse environmental effects. The Minister referred to the Governor in Council the matter of whether these five significant adverse environmental effects are “justified in the circumstances”.

Instead of adhering to its statutory mandate to only consider the matter of justification, the Governor in Council considered “additional measures [that] will be implemented to mitigate” the

unmitigable significant adverse environmental effects referred by the Minister. The Governor in Council further decided that the significant adverse environmental effects “are justified in the circumstances”. The Minister then issued a Decision Statement pursuant to section 53(2) of CEAA 2012 that established 325 conditions with which CN must comply.

In exercising his authority under sections 47 and 52 of CEAA 2012 to determine if the Project is likely to cause significant adverse environmental effects, and if so, to refer such effects to the Governor in Council, the Minister determined that the Project will not result in unmitigable risks to human health, and therefore did not refer this effect. The Minister made this Decision notwithstanding the Review Panel’s findings and despite accepting that the Project is likely to result in unmitigable risks to air quality due to the emission of several pollutants having no safe levels. The Minister’s section 52 CEAA 2012 Decision is arbitrary and disregards the statutory duty to protect human health.

Additionally, the Minister’s section 52 Decision relies on a fundamentally flawed environmental assessment process and Review Panel report that, contrary to CEAA 2012 and the Review Panel’s clear mandate, excluded any assessment of the significance of several environmental effects impacting the Applicants and their residents. Absent this failure of the Review Panel, the Minister may have determined that there were additional and different significant adverse environmental effects for referral to the Governor in Council.

Pursuant to section 52(4) of CEAA 2012, the Governor in Council issued an Order in Council on January 20, 2021 (PC Number 2021-0008). The Order in Council exceeds the Governor in Council’s statutory authority to determine whether the significant adverse environmental effects referred by the Minister are “justified”. Instead, the Order in Council re-determines the Minister’s

Decision that the Project is likely to have five unmitigable significant adverse environmental effects, and concludes that such effects are in fact mitigable. Further, the Governor in Council's section 52(4) Decision fails to justify the approval of the Project, in view the significant health effects on the 34,000 residents who will live within one kilometre of the Project and will breathe its changes to ambient air quality, as well as the other acknowledged harms to the environment.

In exercising his authority under section 53 of CEAA 2012 to establish conditions, the Minister purports to mitigate twenty-five additional significant adverse environmental effects identified by the Review Panel by imposing numerous conditions on CN. These effects are significant "but for" mitigation measures identified by the Review Panel. Despite the importance of ensuring mitigation is fully implemented, the Minister fails to identify any federal department or agency with authority to implement and enforce such conditions, as required by sections 53 and 54(1)(b) of CEAA 2012.

THE APPLICANTS MAKE APPLICATION FOR:

1. An Order in the nature of *certiorari* quashing or setting aside:
 - (a) the Minister's Decision regarding significant adverse environmental effects of the Project made pursuant to sections 47 and 52(1) of CEAA 2012;
 - (b) the Governor in Council's Decision in the Order in Council (PC Number 2021-0008), dated January 20, 2021, made pursuant to subsection 52(4) of CEAA 2012;
 - (c) the Minister's Decision establishing conditions that CN must comply with made pursuant to sections 52 to 54 CEAA 2012 as set out in and by the Decision Statement.

Collectively, the “Impugned Decisions”.

2. An Order declaring that:

- (a) the Minister erred in law, acted contrary to law, and failed to discharge a statutory obligation by failing to cooperate and consult with the Applicants, the Regional Municipality of Halton and The Corporation of the Town of Milton, as “jurisdictions” within the meaning of CEAA 2012;
- (b) the Impugned Decisions are unreasonable and unlawful in their reliance on a materially flawed and deficient Review Panel process and report that failed to fully and properly assess all environmental effects impacting the Applicants and their residents, or to assess the significance of such effects by reference to all relevant provincial and municipal standards;
- (c) the Minister’s Decision under sections 47 and 52(1) of CEAA 2012 is arbitrary and perverse in its failure to decide that the Project is likely to cause significant adverse environmental effects to human health;
- (d) the Governor in Council acted *ultra vires* or beyond its statutory authority under section 52(4) of CEAA 2012 in deciding that the unmitigable significant adverse environmental effects referred to the Governor in Council by the Minister pursuant to paragraph 52(1)(b) of CEAA 2012 are mitigable through “additional measures[that] will be implemented”;
- (e) the Governor in Council’s Decision under subsection 52(4) of CEAA 2012 is unlawful, unreasonable, arbitrary, perverse and capricious, and made without

regard for the material before it, in that it approved the Logistics Hub contrary to the Review Panel's and Minister's findings that the Project is likely to result in significant adverse environmental effects that cannot be mitigated;

- (f) the Minister's Decision under sections 52 to 54 of CEAA 2012 is arbitrary, unreasonable, and *ultra vires* by purporting to impose conditions on CN to mitigate many adverse environmental effects of the Project that would be significant "but for" mitigation, without identifying any federal authority with powers to implement and enforce such conditions as required by subsection 53(2) of CEAA 2012;
 - (g) the Impugned Decisions lack intelligibility and transparency: (1) by failing to justify the Minister's arbitrary rejection of the Review Panel's finding of unmitigable Project effects on human health; (2) by failing to provide the basis for deciding that five significant adverse environmental effects (found by the Review Panel and the Minister himself as unmitigable) are "justified in the circumstances"; (3) by failing to identify the basis in federal law for implementing the 325 conditions considered necessary and sufficient to avoid all significant adverse effects;
 - (h) in rendering the Impugned Decisions, the Minister and the Governor in Council failed to observe principles of natural justice, procedural fairness, and other procedures that they were required by law to observe.
3. If required, leave pursuant to section 302 of *Federal Courts Rules* to seek relief with respect to more than a single order;
 4. Costs of the within Application;

5. Such further and other relief as counsel may advise and this Honourable Court may deem just and appropriate.

THE GROUNDS FOR THE APPLICATION ARE:

A. INTRODUCTION

6. Milton is one of Canada's fastest growing municipalities. It is located within the Greater Golden Horseshoe, a region of 10 million people expected to grow by over 3 million in the next 20 years. Milton and Halton Region are required to follow, and CN is obligated to comply with, a legally binding provincially mandated Regional Official Plan to address the significant challenges posed by such rapid urban growth.

7. CN participated in the planning process that led to the adoption and approval of Regional Official Plan Amendment 38. In 2008, CN expressly represented to the Halton Region that it would not construct and operate a Logistics Hub on its lands. Halton Region developed and obtained provincial approval for its Regional Official Plan Amendment 38 on this basis. In 2015, CN reneged on its representation that it would not construct a Logistics Hub and proposed the construction and operation of the Logistics Hub in issue. From the outset, the Halton Region and Milton were concerned that the Logistics Hub would have unmitigable significant adverse environmental effects, including air quality, wildlife, agriculture, land use compatibility with residential neighbourhoods, regional and local employment, and municipal services.

8. The conduct of the CEAA 2012 environmental assessment process was materially flawed. Under CEAA 2012, the Minister was required to consult and cooperate with Milton and Halton Region as "jurisdictions" having powers, duties and functions in relation to the environmental assessment. The Applicants requested that the Minister undertake a Joint Federal-Municipal Panel

Review. This request was ignored, ultimately leading to a Minister's Decision under sections 52 to 54 of CEAA 2012 that is *ultra vires* and invalid, in its imposition of conditions on this Project without identifying the federal department or agency having authority, expertise or resources to implement and enforce them. Numerous conditions purport to deal with matters that the Province of Ontario, Halton Region, and its municipalities extensively regulate.

9. In December 2016, the Minister and the Chair of the Canadian Transportation Agency entered into an Agreement to establish a federal-only Review Panel to conduct the CEAA 2012 environmental assessment, which included the Terms of Reference. The fundamental failure to acknowledge the extensive authority of Halton Region and Milton to assess and regulate the many environmental effects of this Project was perpetuated throughout the Review Panel process. The Environmental Impact Statement Guidelines and Terms of Reference for the Review Panel required that the assessment of environmental effects expressly consider effects of concern to Halton Region and Milton, including regional and municipal land use planning, truck traffic and demand for community services and infrastructure. The Environmental Impact Statement Guidelines also required the Panel to assess the significance of all effects by reference to relevant provincial and municipal standards. The Panel did neither, resulting in a flawed and materially deficient Review Panel report that did not provide a lawful basis for the Minister to make fully informed conclusions about all of the significant adverse environmental effects of the Project. The Minister therefore could not properly exercise his authority under sections 47 and 52(1) of CEAA 2012.

10. The Minister's Decision under sections 47 and 52(1) of CEAA 2012 is fundamentally flawed in its failure to comply with the Minister's statutory mandate to protect human health. Although the Review Panel failed to properly consider all effects impacting upon the Applicants'

residents, the Review Panel did clearly conclude that the Project will result in unmitigable significant adverse environmental effects on human health. This finding was unprecedented in federal environmental assessments. Without notice, consultation or rationale, the Minister rejected the Review Panel's finding of significant adverse environmental effects on human health.

11. By Order-in-Council (PC Number 2021-0008) dated January 20, 2021, the Governor in Council decided that the unmitigable effects determined by the Review Panel and the Minister can in fact be mitigated, based on "additional measures [that] will be implemented." This Decision is *ultra vires* the authority of the Governor in Council, whose statutory authority under subsection 52(4) of CEEA 2012 is expressly limited to a determination as to whether the significant adverse environmental effects referred to it by the Minister are "justified in the circumstances". The Applicants were not provided an opportunity to review, assess and evaluate the "additional measures [that] will be implemented" and have no knowledge of those additional measures.

12. Further, after determining that the significant adverse environmental effects referred to it are mitigable, the Governor in Council nonetheless then proceeded to conclude that the significant adverse environmental effects are "justified in the circumstances". The "justification" set out in the Order in Council is the "contribution to Canada's prosperity", "regional economic activity, including the creation of jobs for Canadians", and its support of "environmentally sustainable trade and shipping in Canada."

13. Neither the Decision Statement nor any other document provide any reasoned, intelligible or transparent basis to explain the Impugned Decisions given the unmitigable significant adverse environmental effects of this Project on the environment and the health of the population of Milton and surrounding residents, as assessed by the Review Panel and determined by the Minister.

14. The Minister and Governor in Council have a statutory duty under the CEAA 2012 to exercise their environmental assessment powers to protect the environment and human health. In their disregard for that duty, the Impugned Decisions are unlawful, unreasonable, *ultra vires*, without jurisdiction and beyond jurisdiction, a breach of natural justice and fairness, and must be set aside.

B. THE APPLICANTS

15. The Regional Municipality of Halton (“Halton Region”) is the regional government for a rapidly growing area of southwestern Ontario that is comprised of the other four Applicant municipalities, with a combined population of approximately 600,000 residents.

16. The Corporation of the Town of Milton (“Milton”) is a town within Halton Region. Halton Region projects that the population of Milton will grow from 98,000 in 2014 to 238,000 by 2031. Through this rapid growth, more than 34,000 Milton residents will reside within 1 km of the proposed Logistics Hub, along with 12 schools, 2 long-term care homes and a hospital.

17. The Corporation of the City of Burlington (“Burlington”), The Corporation of the Town of Halton Hills (“Halton Hills”) and The Corporation of the Town of Oakville (“Oakville”) are the other three municipalities in Halton Region affected by the proposed Logistics Hub. Burlington and Oakville are geographically close to the proposed Logistics Hub and concerned with several broad Project impacts including new heavy-duty truck traffic. Halton Hills is located between the proposed Logistics Hub and CN’s existing road rail intermodal terminal in Brampton, and would be affected by new truck and rail traffic between the two locations.

18. The Halton Regional Conservation Authority (“Conservation Halton”) is a conservation authority established as a body corporate by the Province of Ontario under the *Conservation*

Authority Act. Its mandate is to provide watershed management and regulate development in hazardous lands, wetlands, and lands affected by flooding. The CN Project proposes changes to watercourses within Conservation Halton's geographic jurisdiction, specifically within the Indian Creek sub-watershed of Bronte Creek.

C. CN'S LANDS IN ISSUE

19. The Canadian National Railway Company is a privately owned railway company. Through the enactment of the *CN Commercialization Act* in 1995, CN's legal status changed from a federal Crown corporation to a federally incorporated private company.

20. Following privatization, CN purchased approximately 400 hectares (1000 acres) of land on or beside the existing single mainline rail track within Halton Region and Milton that it has operated for approximately 100 years.

21. When purchased, all of these CN lands were zoned and used primarily for agriculture. Following purchase, they have been leased to local farmers and residents.

D. CN'S PARTICIPATION IN HALTON REGION'S PLANNING PROCESS FOR REGIONAL OFFICIAL PLAN AMENDMENT 38

22. Since 2008, CN has participated in and benefitted from the Halton Region's land use planning process that resulted in Halton's legally binding Regional Official Plan Amendment 38.

23. In 2001, CN first advised of its land holdings when it communicated to Halton Region its intention to use 100 acres (40 hectares) of its lands to establish an intermodal container transfer facility involving 500 trucks per day. This triggered intense public opposition, and by 2003, CN ceased advancing this proposal.

24. CN communicated its second proposal to the Applicants in 2008, during the Halton Region's development of Regional Official Plan Amendment 38. This second proposal was for high-density employment industrial park for businesses wanting direct rail access. During this planning process, CN expressly represented that its Milton lands were ideally suited intense employment use rail-serviced industrial lots. CN specifically represented that it did not intend to construct an intermodal facility in Milton and that such services would be provided out of their existing intermodal terminal in Brampton.

25. Halton Region considered CN's proposal in its planning process in good faith, based on the perceived economic and employment benefits offered by an industrial park as well as the minimal adverse impacts of the proposal, which would involve largely indoor industrial activities and rely on the existing mainline railway for the transport of goods rather than substantially increasing truck traffic.

26. Based on the perceived benefits of the proposal presented by CN, Halton Region accommodated CN's proposal in Regional Official Plan Amendment 38, by expanding its urban boundary to include a portion of the CN lands and designating this as new "urban" land for high-density employment uses, phased into municipal servicing after 2021. Other CN lands were identified as future strategic employment lands, deferred for future development until after 2031. These designations remain in force today.

E. CN RENEGED ON ITS REPRESENTATION THAT IT WOULD NOT CONSTRUCT AN INTERMODAL FACILITY IN MILTON

27. In a reversal of its representations made to Halton Region in 2008, CN advised Halton Region and Milton in January 2015 that it intended to propose the "Milton Logistics Hub", a development that would use 400 acres (160 hectares) of the CN lands in issue for an intermodal

terminal to transfer containers between railway trains and trucks. This is the use that CN had previously disavowed.

28. CN's proposal is for the Logistics Hub to handle approximately 450,000 containers per year at full operation, equivalent to 1,600 truck trips per day. CN stated that approximately 2.7 percent of those containers will contain dangerous goods.

29. The Logistics Hub is proposed for construction adjacent to the existing CN mainline, and includes realigning and doubling a portion of the mainline. It will necessitate construction of new service tracks, a large outdoor container loading and unloading pad, an administration building and maintenance garage, new entrance gates, and internal roads and a bridge to accommodate the new heavy-duty truck volumes and queuing.

30. CN's Logistics Hub will also require the development of a storm water management system, the realignment of two watercourses, relocation of existing petroleum pipelines, vegetation clearing, grading and berms, naturalization and restoration, the replacement of the existing grade crossing with a grade-separated rail over road underpass, and new electrical and communications infrastructure.

31. The Logistics Hub is larger and more intrusive than the terminal CN proposed in 2001 for these lands. Its outdoor train movements, truck movements, container loading and unloading activities will all burn diesel fuel (and thus emit dangerous air contaminants) and cause noise. Its high-intensity night-time lighting on 30 m poles will be visible for up to 8 km and occur immediately adjacent to a residential area that was planned and approved for major growth since the late 1990s. The greatly increased number of daily truck trips will affect multiple modes of urban transportation on municipal roads and right of way in the area. The Logistics Hub will

provide low-density employment, rather than achieving the high-density employment represented by CN and included by Halton Region in Regional Official Plan Amendment 38 to meet binding provincial targets.

F. CEEA ASSESSMENT

32. CN's notification in March 2015 of its intention to proceed with the Logistics Project triggered a screening process under CEEA 2012 to determine whether an environmental assessment of the project was required under CEEA 2012.

33. As part of its review, the then Canadian Environmental Assessment Agency (now the Impact Assessment Agency of Canada) requested submissions on CN's proposal, as outlined in a Project Description Report submitted by CN to the Canadian Environmental Assessment Agency. In April 2015, the Applicants advised that an extensive municipal and provincial planning review made no provision for this kind of project at this location and that CN personnel had specifically advised the Region that CN had no intention to ever locate the Project at this location.

34. The Applicants also submitted that a CEEA 2012 environmental assessment should be required and noted that CN had failed to identify required federal approvals for the project. The Applicants emphasized the importance of identifying all required federal approvals, given that under CEEA 2012, the environmental changes and effects that must be taken into account in the assessment are inextricably linked to such approvals.

G. HALTON REGION AND MILTON'S EFFORTS TO BE RECOGNIZED AS "JURISDICTIONS"

35. Pursuant to section 18 of the CEEA 2012, the responsible authority for an environmental assessment under CEEA 2012 (in this case the Canadian Environmental Assessment Agency) must offer to consult and cooperate with defined "jurisdictions".

36. In June 2015 the Applicants informed the Agency that each of Halton Region and Milton are a “jurisdiction” within the meaning of sections 18 of CEAA 2012. The Halton Region and Milton are agencies or bodies “established under an Act of the Legislature of a province,” and have “powers, duties or functions in relation to assessing the environment effects” of the Logistics Hub, including under Ontario environmental assessment law, Ontario planning law and Ontario municipal law.

37. The Applicants submitted to the Agency that CN’s federal legal status does not apply to the entire Project, and Halton Region and Milton have the authority to assess and regulate the environmental effects of what CN proposes or owns that is not vital to its proposed railway and transportation works. The Applicants requested a meeting with the Agency which did not occur.

38. In June 2015, the Applicants again raised the issue of the non-compliance with section 18 of the CEAA 2012 with the Agency and the failure of the draft Environmental Impact Statement Guidelines to identify the federal statutory “powers, duties or functions” triggered by the project. This is a necessary precondition to a proper assessment under section 5 of CEAA 2012 of the scope of environmental “changes and effects” that must be taken into account.

39. In June 2015, the Applicants requested the Minister to refer the environmental assessment to a review panel pursuant to section 38 of CEAA 2012 and again requested a Joint Federal-Municipal review. The Applicants submitted that, absent Federal-Municipal cooperation, the federal environmental assessment would be limited and result in an incomplete and deficient review of Project’s impacts on environmental and socio-economic conditions, locally and regionally. The Applicants repeated that the Project gives rise to many potentially significant

adverse environmental effects that are not federally regulated but rather subject to extensive provincial and municipal authority.

H. ENVIRONMENTAL IMPACT STATEMENT GUIDELINES

40. In July 2015, the Minister concluded that the public interest required that a panel carry out the environmental assessment of the proposed Project. In explaining this conclusion to the Applicants, the then-Minister responded that the Environmental Impact Statement Guidelines include requirements to assess effects on municipal land use, including present and approved land uses. The Environmental Impact Statement Guidelines set the scope of the environmental effects to be assessed by identifying the “valued components” of the environment (the environmental, biophysical or human features that may be impacted by a project). Effects on present and approved land uses and land use planning were specifically included under the socio-economic conditions.

I. THE REVIEW PANEL AND THE TERMS OF REFERENCE

41. In December 2016 the Minister released an Agreement with the Chair of the Canadian Transportation Agency “To Establish a Joint Process for the Review of the Milton Logistics Hub Project”. The Agreement did not establish a joint Federal-Municipal review panel as requested by the Applicants. Rather, the Agreement established a federal-only joint process involving the Minister of the Environment and the Canadian Transportation Agency.

42. The Agreement attached the Terms of Reference for the Review Panel, according to which the Review Panel was to take into account enumerated factors listed in subsections 19(1) and 19(3) of CEAA 2012, the scope of which were outlined in the Environmental Impact Statement Guidelines.

J. THE “HALTON BRIEF”

43. The Applicants filed a detailed Brief on December 2016 (the “Halton Brief”) regarding the CEAA 2012 environmental assessment and Review Panel process, with a view to ensuring that the Review Panel would gather and properly assess all relevant effects set out in the Environmental Impact Statement Guidelines. The Halton Brief followed the Environmental Impact Statement Guidelines by: (a) setting out all relevant effects that required assessment, including land use effects; and (b) informing the Review Panel of the broad array of municipal standards applicable to the Project pursuant to Regional Official Plan Amendment 38, which, as noted above, was altered prior to approval to accommodate CN’s land use requests.

44. The Halton Brief identified that Regional Official Plan Amendment 38 contained twenty objective, effects-based standards for assessing significant adverse environmental effects. These standards addressed the Project’s anticipated effects on six broad topics: water, natural heritage, transportation, agriculture, residents, and employment.

K. THE REVIEW PANEL’S FLAWED ASSESSMENT OF EFFECTS AND THE LIMITS OF FEDERAL AUTHORITY OVER MITIGATION MEASURES

45. The Review Panel misapprehended and misapplied the framework applicable to environmental assessments under CEAA 2012. This led to a fundamentally flawed and deficient Review Panel report that (1) failed to take proper account of all relevant environmental effects; (2) failed to apply all applicable provincial and municipal standards relevant to assessing all effects, and (3) proposed mitigation measures without regard to whether such measures were within the scope of federal authority to implement and enforce.

46. The Review Panel is not a decision-making body but rather is mandated solely to provide non-binding conclusions and recommendations. A federal environmental assessment panel is required to gather information on all Project “environmental effects” within the meaning of sections 5 and 19 of CEAA 2012. However, under CEAA 2012, in considering whether adverse environmental effects of a project would be significant “but for” mitigation, the Minister can only take into account mitigation measures that are within the authority of the federal government to enforce and control. The Minister must be able to ensure implementation of such measures. The Minister has no power to delegate compliance and responsibilities to other parties.

47. The *Report of the Review Panel, Canadian National Railway Company Milton Logistics Hub Project*, issued on January 27, 2020 was flawed and deficient in failing to discharge its information-gathering mandate and in identifying mitigation without identifying requisite federal authority to implement such mitigation.

48. In this case, the scope of the environmental effects to be considered by the Review Panel using the framework set out in CEAA 2012 were set out in the 2015 Environmental Impact Assessment Guidelines and the 2016 Terms of Reference, and clearly included effects of the Project on approved land uses (i.e. uses approved by Regional Official Plan Amendment 38). However, contrary to its legal mandate, the Review Panel wrongly excluded consideration of the significance of numerous environmental effects, including effects on land use, municipal servicing, municipal revenues and road transportation. While the Review Panel commented on such matters, it considered these to be outside of the scope of the federal environmental assessment and not assessable for the significance of their effects under its framework.

49. The Review Panel also failed to consider all relevant objective standards in its evaluation of environmental effects. The Applicants emphasized to the Review Panel that its evaluation must consider the standards of general application set out through provincial and municipal laws and approvals. Instead, notwithstanding the Review Panel's recognition that it was not empowered to decide on "the matters of constitutional debate concerning this Project", the Review Panel *de facto* accepted CN's submissions that no provincial or municipal laws and approvals apply to the Milton Logistics Hub. In describing the "regulatory framework" for the project, the Review Panel cited only federal approvals and federal laws and ignored Regional Official Plan Amendment 38.

50. The Review Panel report concluded that the vast majority of the subsection 5(2) CEAA 2012 effects it did assess would be significant "but for" the mitigation measures it recommended. However, in recommending such mitigation, the Review Panel disregarded the issue of federal implementation and enforceability. This was a fundamental flaw. Had the Review Panel taken into account the limits of federal authority, the Review Panel would have concluded that many of the effects that it had identified were in fact "significant", because it had no information providing assurance that they could be mitigated federally. Had this occurred, the Minister would have been required to consider whether such effects were significant adverse environmental effects, warranting a referral of those additional effects to the Governor in Council.

L. THE REVIEW PANEL'S FINAL REPORT - THE MILTON LOGISTICS HUB WILL CAUSE SIGNIFICANT ADVERSE ENVIRONMENTAL EFFECTS TO HUMAN HEALTH THAT CANNOT BE MITIGATED

51. Subsection 4(2) of CEAA 2012 mandates the federal government to protect human health and the environment. The Review Panel was mandated under subsection 5(2) of CEAA 2012 and the Environmental Impact Statement Guidelines to assess the Project's effects on human health arising from changes to the environment, including changes to air quality. In its report, the Review

Panel concluded that the Project would result in six significant adverse environmental effects assessed under subsection 5(2) of CEAA 2012, regardless of any mitigation measures that may be undertaken. The six unmitigable significant adverse environmental effects were:

- (1) air quality.
- (2) cumulative effect on air quality.
- (3) cumulative effect on wildlife and wildlife habitat.
- (4) human health: air quality.
- (5) human health: air quality - cumulative effect.
- (6) cumulative effect on agriculture.

52. The Review Panel's conclusion that the proposed Project would be likely to cause significant unmitigable adverse effects on human health was unprecedented in the history of federal environmental assessments. Across more than 100 federal panel reviews conducted since 1973, no other panel had concluded that the Designated Project under review was likely to cause significant adverse effects on human health that could not be mitigated.

53. The significant adverse environmental effects identified in relation to human health flow directly from the Project's effect on air quality. The Review Panel found that Project operations would generate increases in several "no-threshold" pollutants, resulting from the use of diesel fuel by trains, on-site equipment, and container trucks. "No-threshold" pollutants comprise substances that are unsafe at any level.

54. The "no-threshold" pollutants that will increase because of the Project include (a) particulate matter less than 10 microns in size ("PM10") and (b) particulate matter less than 2.5 microns in size ("PM2.5"). There is a pyramid of known health effects from PM10 and PM2.5, including premature death, hospitalization, respiratory events, as asthma attacks. The effects of the

proposed Project's emissions on residents' health are 17 times the Canadian *de minimis* respiratory cancer risk level.

55. In accordance with section 52 of CEAA 2012, the Minister determined that the significant adverse environmental effects identified in the Review Panel's report required referral to the Governor in Council of the matter of whether these significant adverse environmental effects "are justified in the circumstances". It was not until publication of the January 20, 2021 Order in Council that the Applicants learned that the Minister had at some point concluded, contrary to the Review Panel report, that the Project was not likely to cause a significant adverse environmental effect to human health. There is no indication that the Minister exercised his power to request additional information from the Panel before ignoring its conclusion on this significant effect.

M. THE APPLICANTS' SUBMISSIONS REGARDING CONDITIONS

56. Following the release of the Review Panel's report, the Impact Assessment Agency of Canada (which replaced the Canadian Environmental Assessment Agency) invited comments on the potential environmental conditions it was contemplating recommending to the Minister for inclusion in the Decision Statement. The Impact Assessment Agency's consultation document indicated that the conditions it was proposing would become "legally binding" on CN if the Minister ultimately issued a Decision Statement that the Milton Intermodal Logistics Hub could proceed.

57. CEAA 2012 does not provide any authority for the Canadian Environmental Assessment Agency to enforce conditions that mitigate subsection 5(2) effects. No authority exists under CEAA 2012 for the Agency to ensure that CN abides by such conditions. By contrast, the Province and municipalities have broad legislative authority to implement and enforce mitigation measures

relevant to many Project effects, including effects on air pollution, water resources, wildlife habitat (including habitat for migratory birds and species at risk), health effects, physical and cultural heritage, archaeology, and agriculture.

N. THE JANUARY 20, 2021 ORDER IN COUNCIL

58. Pursuant to subsection 52(2) of CEAA 2012, when the Minister determines that a Designated Project is likely to cause significant adverse environmental effects, the Minister must refer to the Governor in Council the matter of whether those effects are “justified in the circumstances.”

59. The Order in Council (PC Number 2021-0008) issued on January 20, 2021 states that the Minister had decided that the Project is likely to cause significant adverse environmental effects on air quality and significant adverse cumulative environmental effects on air quality, human health, wildlife and the availability of agricultural land. The Minister therefore referred the matter of whether those unmitigable effects are justified in the circumstances to the Governor in Council.

60. Pursuant to subsection 52(4) of CEAA 2012, upon receipt of such a referral, the Governor in Council can only decide if the significant adverse environmental effects that the Designated Project is likely to cause are or are not justified in the circumstances. The Order in Council does not adhere to this statutory limitation. Instead, the Order in Council provides, in part:

“Whereas the Governor in Council, having considered the project-specific mitigation measures proposed by the Canadian National Railway Company, is satisfied that additional measures will be implemented to mitigate the significant adverse environmental effects identified by the Minister of the Environment.”

61. The Governor in Council has no power to assess whether the significant adverse environmental effects referred by the Minister are mitigable. Further, the Applicants are not privy

to the “additional measures [that] will be implemented” to mitigate the significant adverse environmental effects identified by the Minister,” and the Applicants had no opportunity to review, evaluate or comment upon the sufficiency of the “additional measures” to mitigate significant adverse environmental effects that both the Review Panel and the Minister determined to be unmitigable.

62. Although the Order in Council determines (without statutory authority) that the unmitigable significant adverse environmental effects identified by the Minister can in fact be mitigated, the Order in Council nevertheless proceeds to consider whether such effects are “justified in the circumstances”. As to whether the Project is “justified in the circumstances,” the Order in Council provides no substantive justification, stating only that: “the project would contribute to Canada’s economic prosperity, provide regional economic activity, including the creation of jobs for Canada, and support environmentally sustainable trade and shipping in Canada”. These assertions are starkly contradicted by the Project’s low-employment profile, failure to satisfy the Region’s employment, investment and tax expectations for these lands (based on CN’s 2008 proposal), and its serious adverse environmental impacts. These vague assertions do not justify allowing the Project to proceed.

O. THE MINISTER’S DECISION STATEMENT

63. CEAA 2012 requires that all mitigation necessary to avoid a significant effect be included in the Decision Statement. The Minister issued his Decision Statement pursuant to section 54 of CEAA 2012 on January 21, 2021, which includes 325 conditions. The Decision largely accepts the Impact Assessment Agency’s proposed conditions but ignores the Applicants’ repeated concerns regarding federal enforceability. The Decision itself does not address enforceability.

64. No provision in CEAA 2012 provides the Canadian Environmental Assessment Agency (or its successor the Impact Assessment Agency) with any power to enforce conditions respecting subsection 5(2) environmental effects. Nor are there any existing federal statutes or other instruments that create any viable framework to implement and enforce the broad array of effects and associated conditions. Nothing in the federal Acts that are stated to have application to the Project (the *Fisheries Act*, *Canada Transportation Act*, and *Radiocommunication Act*) provides any federal agency or body with statutory authority, expertise or staff resources to regulate or monitor the many subsection 5(2) environmental effects found by the Review Panel to require extensive mitigation.

65. Given that the Review Panel found that there would be an additional twenty-five significant adverse environmental effects “but for” mitigation, the Project will be likely to result in many additional significant adverse environmental effects absent an ability to implement and enforce conditions to address such affects. However, all of these effects appear to have been determined “mitigable” and thus never presented to the Governor in Council for consideration as to whether the Project is “justified in the circumstances”.

66. Regarding the six unmitigable significant adverse environmental effects likely to be caused by the Project (five of which were referred by the Minister to the Governor in Council), the Decision Statement only indicates that the Governor in Council decided that such significant adverse environmental effects “are justified in the circumstances”. The Decision provides neither a factual basis nor legal rationale for why, in the circumstances, the Project’s significant adverse environmental effects “are justified in the circumstances.” Nor does the Decision explain how such

a conclusion comports with the duty and mandate of the federal government under CEAA 2012 to protect the environment and human health.

P. REVIEWABLE ERRORS

(a) The Minister Failed to Cooperate and Consult with the Applicants as “Jurisdictions” as required by the CEAA 2012

67. The Minister erred in law, acted contrary to law, and failed to observe the principles of natural justice and procedural fairness by refusing to accept the status of Halton Region and Milton as “jurisdictions” pursuant to sections 18 and 2(1)(d) of CEAA 2012.

68. Section 18 of the CEAA 2012 is not discretionary. It imposes a mandatory obligation on the Minister to consult and cooperate with respect to the environmental assessment of a Designated Project with:

“any jurisdiction referred to in paragraphs (c) to (h) of the definition jurisdiction in subsection 2(1) if that jurisdiction has powers, duties or functions in relation to an assessment of the environmental effects of the designated project.”

69. The Applicants Halton Region and Milton each meet the definition of a “jurisdiction” set out in paragraph 2(1)(d) of CEAA 2012, as agencies or bodies established under an Act of the Legislature of a province having powers, duties or functions relevant to “assessing the environmental effects” of the whole or part of the Logistics Project. This included assessments required or authorized under Ontario environmental assessment law, Ontario planning law and Ontario municipal law.

70. Neither the Minister nor the Canadian Environmental Assessment Agency as the “responsible authority” for the Designated Project provided any explanation for their refusal to

recognize the Applicants' repeated requests prior to the establishment of the Review Panel that they were "jurisdictions" with a formal right to consultation and cooperation.

71. The Minister and the Canadian Environmental Assessment Agency did not accede to the Applicant's request for a Joint Federal-Municipal Review Panel. The Minister's Agreement with the Chair of the Canadian Transportation Agency established a federal-only process between the Canadian Environmental Assessment Agency and the Canadian Transportation Agency, in which the Applicants were treated as mere participants in the process, and as localities whose "comments" would be considered.

72. This federal-only process fell well short of the fulfillment of a legal obligation to consult and cooperate with the Halton Region and Milton. It stands contrary to the longstanding federal environmental assessment practice of multi-jurisdictional panel reviews.

73. The Minister's failure to discharge his section 18 CEAA 2012 statutory obligation to treat the Halton Region and Milton as "jurisdictions" with formal rights of participation denied the Applicants statutorily mandated rights and procedural fairness which resulted in a cascade of errors that led to legally deficient, *ultra vires*, unlawful and unreasonable Decisions.

74. These cascade of errors include the Review Panel's apparent acceptance of CN's position regarding the non-applicability of provincial and municipal law to its proposed Logistics Hub and Panel's failure to properly assess effects impacting the Applicants and their residents. The errors include the Minister's arbitrary Decision Statement (under sections 52 to 54 of CEAA 2012) that the Project's many adverse environmental effects can be mitigated by imposing conditions for which there is no identified or known federal statutory or other authority to implement and enforce.

(b) The Minister’s Decision is Invalid in its Reliance on a Flawed and Materially Deficient Panel Report

75. Pursuant to section 51 of CEAA 2012, the decision-making processes of the Minister and the Governor in Council to approve a Designated Project are contingent upon the Minister “taking into account the report with respect to the environmental assessment of the Designated Project that was submitted by the [CEA] Agency”. Under CEAA 2012, the Minister can act under subsection 52(1) of CEAA 2012 only if he has a “report” before him. A materially deficient report that falls short of legislative standards does not qualify as such a “report”. A Decision of the Minister that is based upon a materially flawed and deficient report may be set aside on that basis. The Governor in Council’s decision-making authority under subsection 52(4) of CEAA 2012 in turn is exercised based on the Minister’s determination under subsection 52(1) of CEAA 2012 and his subsequent referral to the Governor in Council.

76. The Review Panel’s report is materially deficient in its failure to properly assess the significance of all relevant environmental effects, as required by paragraph 19(1)(b) of CEAA 2012. The Environmental Impact Statement Guidelines established by the former Minister of the Environment required the Review Panel to consider “effects to municipal and regional land use planning, including present and approved land uses,” and other effects impacting the Applicants and their residents including effects on municipal servicing, municipal revenues and road transportation. Through the adoption of the Environmental Impact Statement Guidelines and the incorporation by reference of the Guidelines within the Terms of Reference providing the Panel’s mandate, the former Minister of the Environment exercised her authority under subsection 19(2) of CEAA 2012 to determine the scope of factors to be taken into account within the federal

environmental assessment. The Review Panel was required under subsection 19(1) CEAA 2012 to evaluate these Project effects, and the significance of such effects.

77. Further, the Review Panel's report failed to assess the significance of all effects as against all relevant provincial and municipal standards, guidelines and objectives set out in the Halton Brief, as also required by the Panel's mandate. Notwithstanding the Review Panel's recognition that it was not empowered to decide constitutional matters, the Review Panel in effect accepted CN's submissions that no provincial or municipal approvals applied to the Logistics Hub. Through this acceptance, evident on the face of the report, the Review Panel engaged in a legal decision making exercise that it was unauthorized to undertake, in essence jettisoning the fundamental presumption of constitutionality and the presumed applicability of provincial and municipal laws.

78. The Review Panel's disregard for provincial and municipal laws was contrary to its mandate under CEAA 2012, the Environmental Impact Statement Guidelines, and the Terms of Reference. Subsection 5(2) of CEAA 2012 applies where a Designated Project requires approval from a federal regulator and the consideration of the environment is directly linked or necessarily incidental to the regulator's mandate. The Project requires approval under section 98 of the *Canada Transportation Act*, which requires consideration of the "interests of the localities that will be affected by the line". Those interests included the broad array of potential environmental impacts as set out in the Halton Brief, which the Review Panel was required to assess by reference to standards set out in applicable provincial and municipal laws. The Review Panel did not undertake a proper assessment of such environmental effects.

79. Finally, when considering whether mitigation would be effective to prevent the twenty-five adverse environmental effects identified by the Review Panel that it would have considered

to be significant “but for” the recommended mitigation measures, the Review Panel considered all “feasible” mitigation measures, without assessing whether such measures would be federally enforceable. The Review Panel’s failure to recognize the limits of federal authority resulted in the issuance of a Decision Statement by the Minister that is arbitrary and unreasonable in its conclusion that significant adverse environmental effects have been avoided through mitigation, notwithstanding the failure to identify the federal authority necessary to implement or enforce such conditions.

80. These errors and omissions in the Review Panel report are foundational. The Review Panel engaged in an unauthorized law-making function by accepting CN’s constitutional position, and then proceeded to disregard its mandate under CEAA 2012, the Environmental Impact Statement Guidelines, and the Terms of Reference to properly assess the significance of relevant effects with reference to appropriate provincial and municipal standards. The Review Panel report thereby falls short of legislative requirements, does not qualify as a “report” required to be taken into account by the Minister under section 51 of CEAA 2012, and cannot be relied upon by the Minister or the Governor in Council to render the Impugned Decisions at issue in this Application.

(c) The Minister’s Decision under section 52 of CEAA 2012 is arbitrary and perverse in its failure to consider that the proposed Project is likely to cause significant adverse effects to human health

81. The Review Panel’s conclusion that the proposed Project is likely to cause unmitigable significant adverse effects on human health was unprecedented in federal environmental assessment. Across more than 100 federal panel reviews since 1973, no other panel had concluded that the project under review would be likely to cause significant adverse effects on human health.

82. The Minister's determination under section 52 of CEAA 2012 that the Project would not be likely to cause significant adverse environmental effects on human health is inexplicable, arbitrary and perverse. The Review Panel determined that there would be significant unmitigable adverse environmental effects on human health due to significant unmitigable adverse effects on air quality, including increases in pollutants identified as "no-threshold" because they are harmful to health at any level. The Minister could not reasonably decide that there were significant adverse environmental effects to air quality while at the same time deciding that there was no significant adverse environmental effect on human health in light of the 34,000 residents who will be living within 1 kilometre of the Project.

83. The Minister's discretion under section 52 of CEAA 2012 is not unbounded. Discretion must be exercised in a manner that complies with the rationale and purview of the statutory scheme under which it is adopted and with the statutory principles that prescribe the exercise of discretion. Foundational to CEAA 2012 and the federal environmental assessment process is the statutory mandate to exercise authority under the Act in a manner that protects human health as well as the environment. The Minister failed in his duty to do so by arbitrarily rejecting the Review Panel's conclusion that the proposed Project is likely to result in significant unmitigable adverse environmental effects on human health.

(d) The Governor in Council acted *ultra vires* and beyond its statutory authority under subsection 52(4) of CEAA 2012 and exercised its authority to approve the Project in an arbitrary, perverse and capricious manner

84. Pursuant to subsection 52(4) of CEAA 2012, upon receipt of a referral from the Minister to determine whether the significant adverse environmental effects of a Designated Project are justified, the Governor in Council only has authority to decide whether the significant adverse environmental effects are justified in the circumstances. The Order in Council issued January 20,

2021 (PC Number 2021-0008) does not adhere to this statutory limitation, but instead determines that the significant adverse environmental effects that the Minister found to be unmitigable can be mitigated by “additional measures [that] will be implemented,” thereby overturning the Minister’s decision that the Project is likely to cause five significant adverse environmental effects that are unmitigable.

85. The Governor in Council has no statutory authority to reconsider, let alone reverse, the Minister’s decision providing the referral. Nor do sections 52 to 54 of CEAA 2012 provide the Governor in Council with any powers to request or review additional information to decide for itself that significant adverse environmental effects are in its view mitigable. The Minister’s Decision Statement establishing the conditions to be complied with by CN is therefore predicated on a determination by the Governor in Council made without jurisdiction or in excess of its jurisdiction under CEAA 2012.

86. The January 20, 2021 Order in Council further determines that the significant adverse environmental effects of the Project are “justified in the circumstances”. This Decision is unlawful, unreasonable, perverse, and capricious, and made without regard for the material before the Governor in Council, in that it approves the proposed Logistics Hub contrary to of the Review Panel and Minister’s findings that the proposed Project is likely to cause significant adverse environmental effects that cannot be mitigated. The Governor in Council’s decision disregards the Federal Government’s duty and mandate under CEAA 2012 to protect human health and the environment.

(e) **The Minister’s Decision under sections 53 and 54 of CEAA 2012 is Arbitrary, Unreasonable and *Ultra Vires***

87. The Minister determined that the Project was likely to cause five significant adverse environmental effects referred to in subsection 5(2) of CEAA 2012 that could not be mitigated, and referred the matter of whether those significant adverse environmental effects were justified to the Governor in Council. Based on the Governor in Council’s decision that the significant adverse environmental effects are justified in the circumstances, the Minister established the “conditions” requiring CN’s compliance to avoid adverse environmental effects arising under subsection 5(2) of CEAA 2012 that would be significant “but for” mitigation.

88. CEAA 2012 provides no authority for the Minister or the Canadian Environmental Assessment Agency (currently the Impact Assessment Agency of Canada) to enforce conditions arising in relation to subsection 5(2) CEAA 2012 effects. Rather, pursuant to subsection 53(2) of CEAA 2012, conditions in relation to the environmental effects referred to in subsection 5(2) must be “directly linked or necessarily incidental to the exercise of a power or performance of a duty or function by a federal authority that would permit a designated project to be carried out, in whole or in part.” As specified in subsection 5(2), the exercise of a power, duty or function means its exercise under an Act of Parliament “other than” CEAA 2012. This exercise of a power, duty or function cannot involve the Canadian Environmental Assessment Agency because it has no authority under any federal Act other than CEAA 2012. It does not involve the Minister as the Decision Statement references no approvals or other law administered by the Minister.

89. The conditions that the Minister purports to impose on CN through the Decision Statement do not comply with subsection 53(2) of CEAA 2012. The only federal Acts identified in the Decision Statement are the *Fisheries Act*, the *Canada Transportation Act* and the

Radiocommunication Act. Despite repeated requests by the Applicants to the Review Panel and the Impact Assessment Agency, neither the Panel Report nor the Decision Statement address the authority in these Acts (or in any other federal law applicable to the Decision under CEEA 2012) for federal authorities to impose and enforce conditions sufficient to mitigate all of the subsection 5(2) CEEA 2012 adverse effects identified by the Review Panel that are unmitigable or would be significant “but for” mitigation.

90. Consequently, in purporting to impose conditions without addressing their foundation in any known federal statute or other legislative instrument, the Minister has acted arbitrarily, unreasonably, and without or beyond jurisdiction, rendering the Decision governing conditions a nullity.

(f) The Impugned Decisions Lack Intelligibility and Transparency

91. The Impugned Decisions provide no factual basis and provide no explanation for allowing the Project to proceed in the face of the unmitigable significant adverse environmental effects found by the Review Panel. These include the significant adverse effects to human health (a finding which, for inexplicable reasons, the Minister rejected) as well as significant adverse effects to air quality and cumulative environmental effects on air quality, human health, wildlife and the availability of agricultural land (which were accepted by the Minister).

92. The Minister and Governor in Council have not disclosed to the Applicants the rationale for the unprecedented determination to allow the Project to proceed notwithstanding its serious harm to human health and the environment. The Impugned Decisions furthermore fail to identify the federal laws that authorize the implementation and enforcement of each of the conditions considered necessary to mitigate the numerous adverse environmental effects of the Project.

93. Where a decision maker's rationale for an essential element of the decision is not addressed in the reasons for decision and cannot be inferred from the record, the decision will fail to meet the requisite standard of justification, transparency and intelligibility. There is simply no line of analysis nor logical basis for allowing the Project to proceed if significant adverse effects cannot be mitigated. The Minister and Governor in Council have provided no line of analysis that could lead from the evidence before them to a conclusion that the significant adverse environmental effects are "justified in the circumstances" allowing the Project to proceed. The Minister and the Governor in Council bear the burden of explaining their reasons for these unprecedented Decisions. The Impugned Decisions do not provide any explanation, fail to address this burden, and therefore are unreasonable.

(g) The Applicants were denied Procedural Fairness and Natural Justice throughout the proceedings and Decision-making process

94. Throughout the environmental assessment process, the Applicants repeatedly raised serious flaws in the manner in which the process was being carried out. These concerns, expressed to the Minister, the Review Panel and the Canadian Environmental Assessment Agency (now, the Impact Assessment Agency of Canada), were repeatedly and consistently ignored. The significant procedural deficiencies oftentimes led to the substantive errors identified in this Notice of Application:

- a. the Minister and Review Panel's complete disregard for the Applicants' assertions that the Halton Region and Milton were "jurisdictions";
- b. the Review Panel's failure to properly consider the subsection 5(2) CEAA 2012 effects identified by the Applicants, contrary to its mandate and the legitimate expectations of the Applicants;

- c. the Review Panel's failure to respond to the Applicants' requests that it identify the source of the federal authority to implement and enforce the mitigation measures considered necessary by the Review Panel, which failure was repeated by the Impact Assessment Agency of Canada, and ultimately by the Minister and the Governor in Council;
- d. The Minister's reliance on a Review Panel report that was the product of a procedurally deficient hearing process in which the Review Panel: disregarded relevant effects and relevant factors; ignored the Applicants' repeated objections to the manner in which CN was permitted to submit last-minute evidence with little or no opportunity for the Applicants and its experts to respond; failed to address the lack of independence in CN's expert testimony; and denied full transparency by its failure to post documents and other information on the Registry;
- e. The Impact Assessment Agency's proposal of conditions that were not recommended by the Review Panel nor considered within the hearing process and the Agency's post-Review Panel request that CN provide additional information on matters of direct relevance to the Applicants, without notice to the Applicants;
- f. the Minister's rejection of the Review Panel's finding of significant adverse effects to human health without notice or reasons, or an opportunity to respond;
- g. the Governor-in-Council's consideration of "additional measures [that] will be implemented" to mitigate the five significant adverse environmental effects that the Minister of the Environment had decided were unmitigable, without providing any

opportunity for the Applicants to consider, evaluate and respond regarding the feasibility and adequacy of such “additional measures”;

- h. the Minister’s failure to provide the Applicants with any advance notice and opportunity to respond to the unprecedented decision that the Project is justified notwithstanding the Review Panel’s finding of serious adverse environmental effects, including to human health.

STATUTORY PROVISIONS AND RULES

- 95. Sections 18 and 18.1 of the *Federal Courts Act*, and the *Federal Courts Rules*.
- 96. The CEAA 2012, including sections 2, 4, 5, 18, 19, 38, 47, 52-54.
- 97. The *Canada Transportation Act*, including section 98.
- 98. Such further and other grounds as counsel may advise and this Honourable court may permit.

THIS APPLICATION WILL BE SUPPORTED BY THE FOLLOWING MATERIALS:

- 99. Affidavits to be filed.
- 100. The materials requested pursuant to Rule 317 of the *Federal Courts Rules*.
- 101. Such further and other material as counsel may advise and this Honourable Court may permit.

THE APPLICANTS REQUEST THAT THE MINISTER AND THE GOVERNOR IN COUNCIL SEND CERTIFIED COPIES OF THE FOLLOWING MATERIAL THAT IS NOT IN THE POSSESSION OF THE APPLICANTS BUT IS IN THE POSSESSION OF THE MINISTER AND THE GOVERNOR IN COUNCIL TO THE APPLICANTS AND TO THE REGISTRY:

- (1) the records relating to the Minister of the Environment’s Decision under sections 47 and 52 of CEAA 2012 (taking into account the Review Panel’s report and the implementation of any mitigation measures) that the Designated Project (the Milton Intermodal Logistics Hub) is likely to cause significant adverse environmental effects;
- (2) the records relating to the Minister of the Environment’s Decision under section 52 of CEAA 2012 to refer to the Governor in Council the matter of whether the significant adverse environmental effects likely to be caused by the Milton Intermodal Logistics Hub are justified in the circumstances. These materials would include the Minister of the Environment’s communications exchanged with the Governor in Council regarding: (1) the significant adverse environmental effects found by the Review Panel that were accepted by the Minister of the Environment and referred to the Governor in Council; (2) the implementation of mitigation measures that the Minister of the Environment considered appropriate; and (3) the adverse environmental effects that would be significant but for mitigation measures;
- (3) the communications and other records exchanged between the Governor in Council and the Minister of the Environment and/or the Minister of Transport relating to the matter of whether the significant adverse environmental effects likely to be caused by the Milton Intermodal Logistics Hub are justified in the circumstances. These records would include “the recommendation of the Minister of the Environment” referred to in the Order in Council (PC Number 2021-0008) dated January 20, 2021;

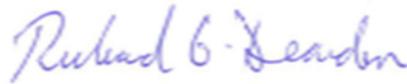
- (4) the records relating to the Governor in Council’s Decision under paragraph 52(4) of CEAA 2012 that the significant adverse environmental effects likely to be caused by the Milton Intermodal Logistics Hub are justified in the circumstances. These records would include the Governor in Council’s consideration of “the project specific mitigation measures proposed by the Canadian National Railway Company” referenced in the Order in Council (PC Number 2021-0008) dated January 20, 2021; the records relating to the “additional measures” that the Governor in Council is satisfied “will be implemented to mitigate the significant adverse environmental effects identified by the Minister of the Environment” referenced in the Order in Council (PC Number 2021-0008) dated January 20, 2021; the communications and other records exchanged between the Governor in Council, the Canadian National Railway Company (and its agents), the Minister of Transport, and/or the Minister of the Environment prior to the issuance of the Order in Council (PC Number 2021-0008) dated January 20, 2021.
- (5) the communications and other records relating to the Minister’s Decision Statement dated January 21, 2021 issued to the Canadian National Railway Company under section 54 of CEAA 2012. These records would include: the justification for all of the significant adverse environmental effects; the conditions established by the Decision Statement under subsection 53(1) of CEAA 2012; the conditions established by the Decision Statement under subsection 53(2) that are directly linked or necessarily incidental to the exercise of a power or performance of a duty or function of a federal authority that would permit the Milton Intermodal Logistics Hub to be carried out;
- (6) the communications and other records exchanged between any of the Minister of the Environment, the Canadian National Railway (and its agents), the Minister of Transport

and/or the Governor in Council relating to the issuance of the Minister's Decision Statement dated January 21, 2021 issued to the Canadian National Railway Company under section 54 of CEAA 2012;

- (7) the communications and other records exchanged between the Minister of the Environment and the Impact Assessment Agency (or its predecessor the Canadian Environmental Assessment Agency) relating to: the significant adverse environmental effects; the referral to the Governor in Council under section 52 of CEAA 2012; and/or the conditions established by the Decision Statement;
- (8) the communications and other records exchanged between the Governor in Council and the Impact Assessment Agency (or its predecessor the Canadian Environmental Assessment Agency) relating to the significant adverse environmental effects likely to be caused by the Milton Intermodal Logistics Hub and whether those significant adverse environmental effects are justified in the circumstances;
- (9) any communications and other records exchanged between the Minister of the Environment, the Minister of Transport and/or the Governor in Council with the three federal authorities referred to in the Decision Statement that may be required to exercise a power or perform a duty or function conferred on them, namely, the Canadian Transportation Agency, the Minister of Fisheries and Oceans, and the Minister of Industry;
- (10) the communications and other records exchanged between the Canadian National Railway Company (and its agents) and any of the Governor in Council, the Minister of the Environment, the Minister of Transport and/or any other Cabinet Minister relating to: the Review Panel's report; the Minister's referral of the significant adverse environmental

effects likely to be caused by the Milton Intermodal Logistics Hub to the Governor in Council; the Governor in Council's Decision (PC Number 2021-0008) that the significant adverse environmental effects likely to be caused by the Milton Intermodal Logistics Hub are justified in the circumstances; and/or the Minister's Decision Statement issued to the Canadian National Railway Company dated January 21, 2021.

Dated at Toronto, Ontario: February 19, 2021



GOWLING WLG (Canada) LLP
160 Elgin Street, Suite 2600
Ottawa, Ontario
K1P 1C3

Richard G. Dearden
Tel: (613) 786-0135
Email: richard.dearden@gowlingwlg.com

Wendy Wagner
Tel: (613) 786-0213
Email: wendy.wagner@gowlingwlg.com

Rodney Northey
Tel: (416) 369-6666
Email : rodney.northey@gowlingwlg.com