ID 1

Court File No. A- 121 -24
(T-330-21)

FEDERAL COURT OF APPEAL

BETWEEN:

CANADIAN NATIONAL RAILWAY COMPANY

Appellant

- and -

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

- and -

CANADA (MINISTER OF THE ENVIRONMENT)
and ATTORNEY GENERAL OF CANADA

Respondents

NOTICE OF APPEAL
OF THE CANADIAN NATIONAL RAILWAY COMPANY

TO THE RESPONDENTS:

A LEGAL PROCEEDING HAS BEEN COMMENCED AGAINST YOU by the appellants. The relief claimed by the appellants appears below.

THIS APPEAL will be heard by the Court at a time and place to be fixed by the Judicial Administrator. Unless the Court directs otherwise, the place of hearing will be as requested by the appellants. The appellants request that this appeal be heard at Toronto where the Federal Court of Appeal ordinarily sits.

IF YOU WISH TO OPPOSE THIS APPEAL, to receive notice of any step in the appeal or to be served with any documents in the appeal, you or a solicitor acting for you must prepare a notice of appearance in Form 341A prescribed by the *Federal Courts Rules* and serve it on the appellant's solicitor or, if the appellant is self-

represented, on the appellant, WITHIN 10 DAYS after being served with this notice of appeal.

IF YOU INTEND TO SEEK A DIFFERENT DISPOSITION of the order appealed from, you must serve and file a notice of cross-appeal in Form 341B prescribed by the *Federal Courts Rules* instead of serving and filing a notice of appearance.

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 APPEAL, JUDGMENT MAY BE GIVEN IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU.

March 27, 2024

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REGISTRY OFFICER
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APPEAL

THE APPELLANT, THE CANADIAN NATIONAL RAILWAY COMPANY (CN) APPEALS to the Federal Court of Appeal from the order of Justice Brown dated March 1, 2024 ("Judgment") by which he granted the Respondents' (Halton) application for judicial review, and set aside and remanded for redetermination the following decisions:

1. the Minister of the Environment's (Minister) decision made under s. 52(2) of the *Canadian Environmental Assessment Act, 2012*, (CEAA 2012) to refer to the Governor in Council certain significant adverse environmental effects (the "Referral Decision"); and

2. the Governor in Council's decision (Order in Council PC Number 2021-0008 dated January 20, 2021) under s. 52(4) of CEAA 2012 that the significant adverse environmental effects were justified in the circumstances (the "Order in Council").

THE APPELLANT CN ASKS for:

3. an order setting aside the Judgment and dismissing the application for judicial review;

4. an order granting CN the costs of this appeal and the application in the Federal Court; and

5. such further and other relief as this Honourable Court deems just.

THE GROUNDS OF APPEAL are as follows:

The decisions under review

1. In 2015, CN sought approval to construct and operate an intermodal railway terminal on its land in Milton (Project). An intermodal railway terminal is a railway depot that is used to transfer standard-sized (intermodal) containers between rail cars

and trucks. The Project is located on CN-owned land next to its century-old mainline.[1]

2. ***The environmental assessment.*** In order to construct and operate the Project, CN required an environmental assessment and approval under CEAA 2012. Under the statutory scheme, the Minister of the Environment (Minister) determined that the environmental assessment of the Project be conducted by an expert panel (Panel). After four years of information gathering and a public hearing involving multiple stakeholders, the Panel released a report with its findings (Panel Report).

3. The Panel concluded (among other things) that the Project was likely to cause significant adverse environmental effects on human health because of air quality. But – contrary to the application judge's conclusions – this was not because of the effects of the Project on their own. Rather, the Panel concluded that "the effects of the Project air emissions on human health in isolation would be low, but become significant when combined with baseline exceedances." Moreover, the Panel concluded that the Project would have significant environmental benefits from the replacement of millions of truck kilometers with train trips.

4. ***The environmental approval.*** CEAA 2012 assigns decision-making on environmental approvals to the federal executive. This ensures that the Governor in Council – cabinet – makes the final determination about whether the risks of a project are justified in the circumstances. In this case, the decision making occurred exactly in accordance with what CEAA 2012 requires:

(a) ***The Minister's Referral Decision.*** The Minister (with the assistance of the Impact Assessment Agency of Canada, or IAAC) reviewed the Panel report and decided that the Project was likely to cause certain significant adverse environmental effects, including on human health because of air quality. As a result, CEAA 2012 required him to refer

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[1] Panel Report, pp. 9, 14-15, Certified Tribunal Record – Exhibit 1 to the Affidavit of Anne Big-Canoe, sworn May 4, 2023 (CTR), Applicants' Record (AR), Vol. 1, Tab 6, pp. 96, 101-102.

to the Governor in Council the question of whether those effects are justified in the circumstances. The Minister's Referral Decision – including extensive reasons – is set out in IAAC's September 2020 memorandum, which the Minister approved. The Minister referred to the Governor in Council all of the effects that the Panel found to be significant.

(b) ***Cabinet's Order in Council.*** After receiving the referral, the Governor in Council issued an Order in Council, deciding that the significant adverse environmental effects are justified in the circumstances. The Order in Council explains the basis for the decision, stating that the Project "would contribute to Canada's economic prosperity, provide regional economic activity, including the creation of jobs for Canadians, and support environmentally sustainable trade and shipping in Canada."

(c) ***The Minister's Decision Statement.*** As CEAA 2012 requires, after the Governor in Council made its decision, the Minister issued his "Decision Statement," which advised CN that the Project was approved, and imposed hundreds of binding conditions to mitigate the environmental effects of the Project. This included conditions – such as a limit on the number of daily or annual trucks at the site – that had not been considered by the Panel.

5. The respondents to this appeal (Halton) sought judicial review of all three of these decisions.

The Federal Court's decision

6. The application judge quashed both the Referral Decision and the Order in Council as unreasonable. Halton asked him to quash the Decision Statement, but he declined to do so.

7. The application judge held that the Minister's Referral Decision was unreasonable because (1) the Minister did not expressly mention the Project's

significant direct adverse environmental effects on human health because of air quality, and (2) The Minister allegedly failed to take account of s. 4(2) of CEAA 2012 (because the Referral Decision did not expressly mention that section). He quashed the Order in Council because it was based on what he concluded was an unreasonable Referral Decision.

8. It is clear from the Referral Decision and the Order in Council, respectively, that the Minister referred, and the Governor in Council considered, all of the Project's effects on human health from air quality that were discussed by the Panel. The application judge concluded that "cumulative effects" are the sum of what the application judge called "significant direct adverse environmental effects" and "other pre-existing and other circumstances physical activities carried out not likely to be caused by the Project itself." But the application judge nevertheless decided that the Minister failed to refer and the Governor in Council failed to consider the "direct" effects (as opposed to "cumulative" effects).

The application judge improperly conducted reasonableness review

9. This Court is required to step into the shoes of the application judge and determine whether he selected the right standard and applied it correctly.

10. The application judge's decision contains numerous errors. Most notably, he failed to appreciate the scope and limits of reasonableness review, and the deference it requires to (particularly) members of the executive and the decision-making of the Governor in Council. They are listed below.

11. ***Using a "yardstick" instead of a "reasons first" approach.*** Instead of reviewing what the decision-makers did, the application judge conducted his own (incorrect) interpretation of CEAA 2012, and found that the decisions were unreasonable for taking a different approach.

12. ***Misconstruing the statutory scheme.*** The application judge held that the Minister's decision was unreasonable for failing to expressly consider "direct" effects on human health from air quality, and only considering "cumulative" effects.

But CEAA 2012 does not draw this distinction: neither the concept of "direct" effects nor the word "direct" are in the relevant statutory provisions. Rather, CEAA 2012 requires decision-makers to consider all environmental effects (including cumulative effects, which result from a project in combination with other physical activities that have been or will be carried out) and determine whether they are "significant." Yet the application judge's decision contains dozens of references to "direct" effects.

13. ***Ignoring the purpose of CEAA 2012.*** Having erroneously imported the concept of "direct" effects into the statutory scheme, the application judge's analysis became a treasure hunt for whether that word was used by the administrative decision makers. This caused him to ignore why the scheme exists, which is to have the Minister (taking into account the Panel Report) identify the relevant risks that will be "significant" once mitigation measures are taken into account, and for the Governor in Council to then make a decision as to whether those effects are justified in the circumstances. The scheme is focused on the presence or absence of significant adverse environmental effects – not distinguishing between effects that are "direct" and effects that are "cumulative."

14. ***Mischaracterizing the Panel Report.*** A central tenet of the application judge's decision was that the Panel had concluded that "the Project's addition of toxic diesel pollutants to the already degraded local airshed will likely cause significant *direct* adverse environmental effects on human health as it related to air quality in the local area." But this is incorrect, and reveals the application judge's misunderstanding of the Panel's assessment of significant adverse environmental effects.

15. The Panel's conclusion was that the significance of the adverse effects came from the combination of the Project itself together with other effects unrelated to the Project. But the Panel did not call this combination a "significant *direct* adverse environmental effect." The application judge's conclusion to the contrary (and his description of a portion of the Referral Decision as "misleading" even though it is

perfectly consistent with the Panel's conclusions) is a palpable and overriding error of fact and, in any case, inconsistent with reasonableness review.

16. ***Failing to review the record holistically and contextually***. The application judge overemphasized IAAC's use of the phrases "direct" and "cumulative" significant adverse environmental effects on health from air quality, and ignored that IAAC did not consistently draw this distinction. Rather, consistent with CEAA 2012, IAAC's focus is on the significant adverse environmental effects, including the relevant contaminants (most notably diesel exhaust, including particulate matter, benzene and benzo(a)pyrene) and their health effects, not the distinction between "direct" and "cumulative" made by the application judge.

17. ***Emphasizing form over substance***. The application judge's decision hinges almost entirely on drawing a distinction between "direct" and "cumulative," and ignores the central questions, which are (i) whether the Minister referred the relevant significant adverse effects to the Governor in Council; and (ii) whether the Governor in Council decided they were justified in the circumstances.

18. It is clear from the respective decisions that they did. There was extensive discussion in the Minister's Referral Decision of each of the non-threshold contaminants and their health effects. Similarly, there is no dispute that the Governor in Council decided that benefits of the Project made it justified in the circumstances (even if, in combination with other previous and planned projects and the already degraded airshed, it was likely to cause a significant adverse environmental effect to human health from air quality). In other words, the application judge ignored the question of whether the decision-makers made any material errors.

19. ***Failing to consider materiality***. The application judge did not consider whether the purported errors in the decision-making process were sufficiently serious to justify invalidating any of the respective decisions. The information before the Minister justified his referral decision. And both he and the Governor in Council gave reasons that were justified, transparent and intelligible. The purported errors

identified by the application judge had no material impact on the outcome and were thus not sufficiently serious to invalidate any of the respective decisions.

20. ***Misapplying "heightened responsibility"***. The application judge held that the reasons in the Referral Decision and the Justification Decision were subject to a "heightened responsibility" because it has "potential for significant personal impact or harm." This was an error of law – the reason that Parliament granted the ultimate decision-making authority to the executive is because it is a decision that requires balancing the interests of local residents with the interests of Canadians across the country. But the application judge failed to recognize the polycentric nature of this decision.

21. ***Failing to appreciate what s. 4(2) of CEAA 2012 requires***. The application judge's decision on s. 4(2) was essentially based on his failure to refer to that section in the Referral Decision and the Justification Decision, respectively. This too is a form over substance approach. What s. 4(2) requires is that powers be exercised with certain considerations in mind, which was done in this case. This provision does not require that it be expressly mentioned in any determination and the failure to specifically refer to it is not a basis to conclude that the Minister' Referral Decision and the Order in Council are unreasonable. Moreover, having regard to the requirement to read s. 4(2) harmoniously with the overall scheme of CEAA 2012, it does not and cannot require any particular decision be exercised in any particular way.

22. The application judge also made other errors of law and palpable and overriding errors of fact.

23. The Appellant pleads and relies upon the following:

(a) *The Canadian Environmental Assessment Act, 2012*;

(b) *Federal Courts Rules*, SOR/198-106, Part 6;

(c) *The Federal Courts Act*, R.S.C., 1985, c F-7. ss. 27, 52.

24. Such further and other grounds as counsel may advise and this Honourable Court may permit.

March 27, 2024

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I HEREBY CERTIFY that the above document is a true copy of the original issued out of / filed in the Court on the

day of MAR 2 7 2024 A.D. 20 ____

Dated this ____ day of MAR 2 7 2024 20 ____

MANSHU LI
REGISTRY OFFICER
AGENT DU GREFFE