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Federal Court of Appeal File Number:
(Federal Court File No. T-330-21)

FEDERAL COURT OF APPEAL

B E T W E E N :

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

Appellants

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**

Respondents

NOTICE OF APPEAL

TO THE RESPONDENTS:

A LEGAL PROCEEDING HAS BEEN COMMENCED AGAINST YOU by the appellant. The relief claimed by the appellant 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 appellant. The appellant requests 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.

April 2, 2024

Issued by: _____
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NOTICE OF APPEAL

THE APPELLANTS APPEAL to the Federal Court of Appeal from the Judgment of the Honourable Mr. Justice Henry S. Brown dated March 1, 2024 (the “Judgment”), in which he granted the application for judicial review, set aside and remanded for redetermination:

1. The decision of the Minister of the Environment (“Minister”), made pursuant to s. 52(2) of the *Canadian Environmental Assessment Act, 2012*, SC 2012, c 19, s 52 (“*CEAA 2012*”), dated September 1, 2020; and
2. The decision of the Governor in Council’s decision (Order in Council PC Number 2021-0008), made pursuant to s. 52(4) of *CEAA 2012*, dated January 20, 2021

THE APPELLANTS ASK that:

1. The Judgment be set aside;
2. The Respondents’ application for judicial review be dismissed;
3. The Appellants be granted their costs of the appeal and of the application in the Federal Court; and
4. Such further and other relief as counsel may advise and this Court deems just.

THE GROUNDS OF APPEAL are as follows:

1. This is an appeal from a Judgment of the Federal Court allowing an application for judicial review of two decisions made under *CEAA 2012* in respect of the Canadian National Railway Corporation's ("CN") proposal to build a multi-modal logistics hub in Milton, Ontario (the "Project"):

- a. The Minister's decision under ss. 47 and 52(1) of *CEAA 2012*, made on September 1, 2020, that the Project is likely to cause significant adverse environmental effects; and
- b. The Governor in Council's decision, pursuant to subsection 52(4) of *CEAA 2012*, recorded in Order in Council, PC 2021-0008, dated January 20, 2021, that the significant adverse environmental effects that the Project is likely to cause are "justified in the circumstances".

The environmental assessment of the Project

2. The challenged decisions are the by-product of a joint review process undertaken pursuant to the provisions of *CEAA 2012* and the *Canada Transportation Act*. That process began in 2015 and culminated in 2020 with the issuance of a 444-page Review Panel report on the Project's anticipated environmental effects.

3. On March 31, 2015, CN submitted to the Impact Assessment Agency of Canada ("Agency") a Project Description for a proposed construction of the Project. Following screening by the Agency, the environmental assessment of the Project was referred to a Review Panel. The Review Panel issued its report on the Project on January 27, 2020.

4. For most of the potential environmental effects considered, the Review Panel found that the Project will not have a significant adverse environmental effect, or, with respect to greenhouse gas emissions, that the Project will have an ameliorative impact.

5. The Review Panel found that the Project will have significant adverse impacts on human health due to air quality. In this respect, the Review Panel concluded “that the effects of Project air emissions on human health would be low on their own, but significant when combined with existing and anticipated background exceedances”.

6. Sections 51 and 52 of *CEAA 2012* provide that after taking into account the Review Panel’s final report, the Minister must render a decision as to whether the designated project is likely to cause significant adverse environmental effects, as defined by s. 5 of *CEAA 2012*.

7. On September 1, 2020, the Minister issued a decision pursuant to s. 52(2) of *CEAA 2012*. The Minister agreed with the Review Panel that the Project is likely to cause significant adverse environmental effects as defined in s. 5(2) of *CEAA 2012*. Accordingly, the Minister referred the matter of whether the Project’s significant environmental effects are justified in the circumstances to the Governor in Council.

8. With respect to the Project’s effects on human health due to air quality, the Minister agreed with the Review Panel that “the effects of Project air emissions on human health would be low on their own, but significant when combined with existing and anticipated background exceedances.”

9. The Governor in Council's decision was communicated on January 20, 2021 by Order in Council 2021-2008. The Governor in Council determined that the significant adverse effects that the Project is likely to cause are justified in the circumstances.

10. The Order in Council notes, among other things, that the Project will "contribute to Canada's economic prosperity, provide regional economic activity...and support environmentally sustainable trade and shipping in Canada".

11. On January 21, 2021, the Minister issued a decision statement pursuant to s. 54(1) of *CEAA 2012*, recording the above decisions and establishing conditions for the Project with which CN must comply.

The Federal Court's decision

12. The Federal Court set aside both the Minister's decision that the Project will have significant adverse environmental effects and the Governor in Council's decision that those effects are justified in the circumstances. The Court found both decisions unreasonable because, in the Court's view, they do not: (a) address the Review Panel's findings that the Project will have significant "direct" adverse environmental effects on human health as it relates to air quality; and (b) give adequate consideration to the protection of human health in accordance with s. 4(2) of *CEAA 2012*.

13. With respect to the Minister's decision, the Court found the decision unreasonable on the grounds that it does not mention the Project's "direct" adverse environmental effect on human health as it relates to air quality. Instead, the Court

found that the decision references only the Project’s “cumulative” effects on human health as it relates to air quality. The Court characterized this absence as an “implicit” decision to not refer the Project’s “direct” adverse environmental effects on human health to the Governor in Council.

14. With respect to the Governor in Council’s decision, the Court found the decision unreasonable on the grounds that the Governor in Council did not consider the Project’s “direct” adverse environmental effects on human health as it relates to air quality because that issue had not been referred to the Governor in Council.

The Federal Court erred in finding the decisions unreasonable

15. On appeal from a decision on judicial review, the Federal Court of Appeal “steps into the shoes” of the Federal Court and determines a) whether the Federal Court selected the appropriate standard of review and b) whether the Federal Court applied that standard correctly. This is a non-deferential standard.

16. While the Federal Court correctly selected reasonableness as the appropriate standard of review, it committed several errors when applying this standard to the decisions of the Minister and the Governor in Council:

- a. **The Federal Court erred in failing to appreciate the relevant context for reasonableness review of the Decisions:** The Court’s review failed to adequately take into account the context of the decisions, including the totality of the record that was before the Minister and the statutory

decision-making functions assigned to the Minister and the Governor in Council under *CEAA 2012*.

- b. **The Federal Court erred in finding that the Minister failed to grapple with and/or implicitly disagreed with the Review Panel’s findings regarding the Project’s adverse impacts on human health due to air quality:** The evidentiary record plainly establishes that the Minister agreed with the Review Panel’s conclusions on the significant adverse effects of the Project, including that with respect to air quality, “the effects of Project air emissions on human health would be low on their own, but significant when combined with existing and anticipated background exceedances.”
- c. **The Federal Court conducted an incorrect and improperly formalistic review of the decisions:** The Court failed to consider the substance of the Minister’s decision and the uncontroverted evidence that the Minister agreed with and adopted the findings of the Review Panel. Instead, the Court engaged in a formalistic hunt for inconsequential error, focusing on whether the decision uses the word “direct” in reference to human health effects due to air quality.
- d. **The Federal Court misconstrues the relevant statutory scheme:** In focusing on whether the impugned decisions employed the word “direct”, the Court imposed requirements on the Minister and Governor in Council that do not appear in the relevant statutory scheme – *CEPA*. The relevant

provisions of *CEPA* require the Minister and the Governor in Council to consider whether a project is likely to cause “significant adverse environmental effects” and whether these effects are justified in the circumstances.

- e. **The Federal Court erred in finding that the Governor in Council failed to consider the Project’s adverse effects on human health due to air quality as found by the Review Panel:** The evidentiary record establishes that this issue was referred by the Minister and considered by the Governor in Council, who found that the effects are justified in the circumstances.

- f. **The Federal Court erred in finding that the decisions do not “pass muster” under s. 4(2) of *CEAA 2012*:** The Court’s decision is inconsistent with the text and purpose of *CEAA 2012*, including the text and purpose of s. 4. The Court incorrectly found that the Minister and Governor in Council failed to give adequate consideration to the Project’s human health impacts contrary to s. 4(2).

17. The Appellants rely on the the following:

- a. The *Canadian Environmental Assessment Act, 2012*, SC 2012, c 19;

- b. The *Federal Courts Act*, RSC 1985, c F-7, ss. 27, 52;

- c. The *Federal Courts Rules*, SOR/198-106, Part 6.

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

April 2, 2024

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