Federal Court  Cour fédérale

Date: 20240301

Docket: T-330-21

Citation: 2024 FC 348

Ottawa, Ontario, March 1, 2024

PRESENT: The Hon Mr. Justice Henry S. Brown

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 REGION CONSERVATION AUTHORITY**

Applicants

and

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

Respondents

JUDGMENT AND REASONS

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I. Nature of the matter and conclusions

[1] This matter involves three applications for judicial review pursuant to sections 18 and 18.1 of the *Federal Courts Act*, RSC 1985, c F 7 [*Federal Courts Act*] of three decisions:

i. Referral decision dated September 1, 2020 of the Minister of the Environment to the Governor in Council made pursuant to subsection 52(2) of *Canadian Environmental Assessment Act, 2012*, SC 2012, c 19, s 52, Repealed, 2019 c 28, s 9) [*CEAA 2012*] [Minister’s Referral Decision];

ii. Governor in Council's justification decision (Order in Council PC Number 2021-0008 dated January 20, 2021) made pursuant to subsection 52(4) of *CEAA 2012* [Cabinet Justification Decision];

iii. Minister's Decision Statement dated January 21, 2021 establishing conditions with which Canadian National Railway Company [CN] must comply under subsections 53(2) and 54(1) of *CEAA 2012*.

[2] At issue is a very large $250 million intermodal container transfer facility [the Project] adjacent to CN's main line and a highway, through and at which containers may be loaded and offloaded from trucks to rail cars, and from rail cars to trucks.

[3] Stripped to its essentials and for the purposes of this litigation, the Project will be used 24/7 by a great number of diesel powered trucks (800 round trips, 1,600 one way trips daily) in addition to four intermodal trains daily powered by multiple diesel locomotives, two of which are already moving along the Halton Subdivision mainline. The diesel exhaust produced will contain pollutants, some of which are known to be toxic to human health, in respect of which there is no safe level of human exposure: 1) particulate matter less than 10 microns in size ("PM10"), 2) particulate matter less than 2.5 microns in size ("PM2.5"); and 3) nitrogen dioxide ("NO2"). Exposure to diesel particulate matter may exacerbate existing diseases such as asthma, which affects about 10% of the general population. The effects of diesel small particulate matter relate largely to cardiovascular and respiratory disease but may also include premature non-cancer deaths.

[4] In this connection, an expert Review Panel appointed under the *Canadian Environmental Assessment Act, 2012* (S.C. 2012, c.19, s.52) [*CEAA 2012*] concluded the Project, after taking mitigation into account, would likely cause six (6) significant adverse environmental effects, two

"direct" and four cumulative. The two instances in which the Review Panel found the Project itself will likely cause significant *direct* adverse environmental effects are on: 1) air quality and 2) human health as it relates to air quality. The expert Review Panel also found four instances of significant adverse *cumulative* environmental effects on: 3) air quality, 4) human health, 5) wildlife and habitat, and 6) agricultural land. Total: six.

[5] Inexplicably, neither the Minister's Referral Decision nor the Cabinet Justification Decision consider or refer to the second finding above, namely that the Project will likely cause significant *direct* adverse environmental effects on human health as it relates to the air quality of local residents.

[6] That is, of the six significant adverse effects likely caused by the Project, only five are addressed by the Minister. Missing is the Review Panel's finding the Project will likely cause significant *direct* adverse environmental effects on human health. No explanation for its absence is provided in the Minister's Referral Decision.

[7] Likewise only five significant adverse effects are addressed by Cabinet, which also makes no mention of the Project's significant *direct* adverse environmental effects on human health of local residents.

[8] While other points are raised, a central issue is whether the Minister and Cabinet meaningfully grappled with the expert Review Panel's undisputed determination that the Project, even after taking into account mitigation measures, will likely cause significant *direct* adverse environmental effects on human health as it relates to the air quality of local residents.

[9] While of course all significant adverse environmental effects are important, including adverse effects on wildlife, wildlife habitat and agricultural lands, it is obvious to me, was not disputed by any party, and is self-evident as a matter of common sense that significant *direct* adverse environmental effects related to human are of very considerable importance in the decision-making under review. Moreover, consideration of the protection of human health is specifically required by subsection 4(2) of the *CEAA 2012*.

[10] In this respect, the Court finds the Minister's Referral Decision is flawed because it does not meaningfully grapple with what the Court considers a central and important issue, namely the Project's significant *direct* adverse environmental effects on human health. In my respectful opinion, the Minister's Referral Decision does not reasonably reflect the high stakes raised by this specifically identified threat to the human health of local residents. In addition, the Court concludes the Minister's Referral Decision does not reflect the heightened responsibility the Minister had to ensure his reasons demonstrate he considered this negative direct human health consequence in referring this Project to Cabinet to decide if it is justified in the circumstances, as required by *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65, [2019] 4 S.C.R. 653 [*Vavilov*] at paragraphs 133 and 135. The outcome is also not justified in the reasons by the decision-maker to those to whom the decision applies, contrary to *Vavilov* at paragraph 126. In this respect, the Minister's Referral Decision is unreasonable.

[11] For the same reasons the Cabinet's failure to meaningfully grapple with the Project's significant *direct* adverse environmental effects on human health is a fundamental flaw in the Cabinet's Justification Decision. It too is unreasonable.

[12] Another central issue is whether the Minister and or Cabinet in making their decisions are required to consider the protection of human health. The Court concludes both are under a duty to consider human health. Protection of human health is a required consideration imposed on the Minister and Cabinet by the express terms of subsection 4(2) of the *CEAA 2012* which provides:

> **(2)** The Government of Canada, the Minister, the Agency, federal authorities and responsible authorities, in the administration of this Act, must exercise their powers in a manner that protects the environment and human health and applies the precautionary principle.
>
> [Emphasis added]

[13] The Court finds the Minister and Cabinet did not consider this duty. In this respect both decisions are also unreasonable.

[14] Therefore, and with respect and viewed holistically and not as a treasure hunt for error, the Court finds both the Minister's Referral Decision and the Cabinet Justification Decision are unreasonable because a) neither grapples in a meaningful way with the finding of the Review Panel that the Project itself will result in significant *direct* adverse environmental effects on human health as it relates to air quality, and b) neither considers the protection of human health under subsection 4(2) of the *CEAA 2012*. Both are therefore set aside and remanded for redetermination in accordance with these Reasons.

[15] I note the Minister's Referral Decision is now a public document on the Federal Court's file. In keeping with general principles of more openness and transparency, the Court suggests the Minister make public the Referral Decision, if any, following redetermination.

II. Partial procedural history

[16] Pursuant to Rule 383 of the *Federal Court Rules*, SOR/98-106 [*Federal Court Rules*], Associate Judge Molgat was assigned as Case Management Judge, who among other things granted leave under Rule 302 of the *Federal Court Rules* to apply for judicial review of these three decisions in one proceeding. The Court thanks Associate Judge Molgat for preparing this complex matter for hearing.

[17] The parties filed affidavits. Affidavits are not generally accepted on judicial review because a) judicial review is a review by the Court of the record that was before the decision maker, not an opportunity to re-litigate a case by adding new material at different levels of review, b) it is not fair to fault a decision maker for failing to consider material the parties did not put before them. While there are exceptions, they apply where new evidence is filed to prove procedural unfairness or to provide background information: see *Association of Universities and Colleges of Canada v Canadian Copyright Licensing Agency (Access Copyright)*, 2012 FCA 22 at paragraph 20.

[18] CN and the Applicants each objected to certain statements and or exhibits of the other on the basis they were impermissible argument or new evidence. This dispute was assigned by the case management judge to this Court to decide.

[19] After a productive hearing management conference, counsel for CN and the Applicants consulted with each other and consented to mutually acceptable orders removing contested new evidence, which orders were issued at the start of the three-day hearing in Toronto. The Court

commends experienced counsel for working collaboratively thus allowing this matter to focus on the issues.

III. Issues

[20] The Applicants raise three issues:

1. Whether the Minister's Referral Decision made pursuant to subsection 52(2) of *CEAA 2012*:

    i. is unreasonable, arbitrary, and/or perverse;

    ii. failed to protect human health in breach of subsection 4(2) of *CEAA 2012*;

2. Whether the Governor in Council's justification decision made pursuant to subsection 52(4) of *CEAA 2012*:

    i. exceeded the statutory authority conferred by subsection 52(4) of *CEAA 2012* by considering additional measures that will be implemented to mitigate the significant adverse environmental effects identified by the Minster of the Environment;

    ii. failed to protect human health in breach of subsection 4(2) of *CEAA 2012*;

    iii. is unreasonable, arbitrary, and/or perverse;

3. Whether the Minister of the Environment's Decision Statement made pursuant to sections 53(2) and 54(1) of *CEAA 2012*:

    i. failed to comply with subsection 53(2) of *CEAA 2012* by establishing conditions that were not directly linked or necessarily incidental to the exercise of a power or performance of a duty or function by a federal authority;

    ii. is unreasonable, arbitrary, and/or perverse.

[21] The Respondent, the AGC and Minister, raise two issues:

1. The applicable standard of review for the decisions is reasonableness; and

2. The impugned decisions are reasonable.

[22] The Respondent CN, raises five issues:

1. Are the decisions unreasonable for purportedly failing to consider the "direct significant adverse environmental effect on human health caused by air quality"?

2. Are the decisions unreasonable under section 4(2) of *CEAA 2012*?

3. Is the Governor in Council's approval decision unreasonable for considering additional mitigation measures?

4. Is the Minister's Decision Statement unreasonable because of the conditions that it imposed?

5. Are the decisions unreasonable because of deficiencies in the CTR and the claim to privilege under the *Canada Evidence Act*?

[23] Respectfully, the issues on this application are whether any of three impugned decisions are unreasonable, and whether the Minister and Cabinet appropriately considered subsection 4(2)'s in terms of the protection of human health.

IV. Standard of review is reasonableness

[24] I am setting out the standard of review at the outset of these Reasons because the Court refers to these tests before and during its Analysis.

[25] Judicial review is a review of the record for reasonableness.

[26] The Supreme Court of Canada instructs judges that a reasonable decision is one that meets the tests of justification, transparency and intelligibility. As to what constitutes reasonableness, the Court relies on *Canada Post Corp v Canadian Union of Postal Workers*, 2019 SCC 67 [*Canada Post*], issued at the same time as the Supreme Court of Canada's decision in *Vavilov*.

[27] In *Canada Post*, which teaches courts in a practical manner how to apply *Vavilov*, the majority per Justice Rowe explains what is required for a reasonable decision, and what is required from a court reviewing a decision on the reasonableness standard:

> [31] A reasonable decision is "one that is based on an internally coherent and rational chain of analysis and that is justified in relation to the facts and law that constrain the decision maker" (*Vavilov*, at para. 85). Accordingly, when conducting reasonableness review "[a] reviewing court must begin its inquiry into the reasonableness of a decision by examining the reasons provided with 'respectful attention' and seeking to understand the reasoning process followed by the decision maker to arrive at [the] conclusion" (*Vavilov*, at para. 84, quoting *Dunsmuir*, at para. 48). The reasons should be read holistically and contextually in order to understand "the basis on which a decision was made" (*Vavilov*, at para. 97, citing *Newfoundland Nurses*).
>
> [32] A reviewing court should consider whether the decision as a whole is reasonable: "what is reasonable in a given situation will always depend on the constraints imposed by the legal and factual context of the particular decision under review" (*Vavilov*, at para. 90). The reviewing court must ask "whether the decision bears the hallmarks of reasonableness – justification, transparency and intelligibility – and whether it is justified in relation to the relevant factual and legal constraints that bear on the decision" (*Vavilov*, at para. 99, citing *Dunsmuir*, at paras. 47 and 74, and *Catalyst Paper Corp. v. North Cowichan (District)*, 2012 SCC 2, [2012] 1 S.C.R. 5, at para. 13).

> [33] Under reasonableness review, "[t]he burden is on the party challenging the decision to show that it is unreasonable" (*Vavilov*, at para. 100). The challenging party must satisfy the court "that any shortcomings or flaws relied on ... are sufficiently central or significant to render the decision unreasonable" (*Vavilov*, at para. 100).
>
> [Emphasis added]

[28] The Supreme Court of Canada in *Vavilov* at paragraph 86 instructs that it is not enough for the outcome of a decision to be justifiable. Where reasons for a decision are required, the decision must also be justified, by way of those reasons, by the decision-maker to those to whom the decision applies:

> [86] Attention to the decision maker's reasons is part of how courts demonstrate respect for the decision-making process: see *Dunsmuir*, at paras. 47-49. In *Dunsmuir*, this Court explicitly stated that the court conducting a reasonableness review is concerned with "the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes": para. 47. Reasonableness, according to *Dunsmuir*, "is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process", as well as "with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law": *ibid*. In short, it is not enough for the outcome of a decision to be *justifiable*. Where reasons for a decision are required, the decision must also be *justified*, by way of those reasons, by the decision maker to those to whom the decision applies. While some outcomes may be so at odds with the legal and factual context that they could never be supported by intelligible and rational reasoning, an otherwise reasonable outcome also cannot stand if it was reached on an improper basis.

[29] Notably, *Vavilov* at paragraphs 133 and 135 confirms that the reasons of a decision maker must "reflect the stakes" where the decision involves the potential for significant personal impact or harm. In my view that is the case here. The Supreme Court of Canada instructs that where

decision makers has power over the lives of ordinary people, they may have a "heightened responsibility" to ensure that their reasons demonstrate that they have considered the consequences of a decision and that those consequences are justified in light of the facts and law:

> [133] It is well established that individuals are entitled to greater procedural protection when the decision in question involves the potential for significant personal impact or harm: *Baker*, at para. 25. However, this principle also has implications for how a court conducts reasonableness review. Central to the necessity of adequate justification is the perspective of the individual or party over whom authority is being exercised. Where the impact of a decision on an individual's rights and interests is severe, the reasons provided to that individual must reflect the stakes. The principle of responsive justification means that if a decision has particularly harsh consequences for the affected individual, the decision maker must explain why its decision best reflects the legislature's intention. This includes decisions with consequences that threaten an individual's life, liberty, dignity or livelihood.
>
> …
>
> [135] Many administrative decision makers are entrusted with an extraordinary degree of power over the lives of ordinary people, including the most vulnerable among us. The corollary to that power is a heightened responsibility on the part of administrative decision makers to ensure that their reasons demonstrate that they have considered the consequences of a decision and that those consequences are justified in light of the facts and law.
>
> [Emphasis added]

[30] Also importantly, *Vavilov* at paragraph 128 requires a reviewing court to assess whether the decision meaningfully grapples with the key issues:

> [128] Reviewing courts cannot expect administrative decision makers to "respond to every argument or line of possible analysis" (*Newfoundland Nurses*, at para. 25), or to "make an explicit finding on each constituent element, however subordinate, leading to its final conclusion" (para 16). To impose such expectations would have a paralyzing effect on the proper functioning of administrative bodies and would needlessly compromise important values such as efficiency and access to justice. However, a

> decision maker's failure to meaningfully grapple with key issues or central arguments raised by the parties may call into question whether the decision maker was actually alert and sensitive to the matter before it. In addition to assuring parties that their concerns have been heard, the process of drafting reasons with care and attention can alert the decision maker to inadvertent gaps and other flaws in its reasoning: *Baker*, at para. 39.
>
> [Emphasis added]

[31] *Vavilov* also instructs at paragraph 102 that judicial review is not a "line-by-line treasure hunt for errors", but rather a reviewing court must be able to trace the decision maker's reasoning without encountering any fatal flaws in its overarching logic.

[32] *Vavilov* at paragraph 97 endorses *Komolafe v Canada (Citizenship and Immigration)*, 2013 FC 431 [*Komolafe*] at paragraph 11, where Justice Rennie (as he then was) sets out where and when a reviewing court may "connect the dots", i.e., give reasons or decide a matter on the basis of reasoning the decision maker did not give:

> [11] *Newfoundland Nurses* is not an open invitation to the Court to provide reasons that were not given, nor is it licence to guess what findings might have been made or to speculate as to what the tribunal might have been thinking. This is particularly so where the reasons are silent on a critical issue. It is ironic that *Newfoundland Nurses*, a case which at its core is about deference and standard of review, is urged as authority for the supervisory court to do the task that the decision maker did not do, to supply the reasons that might have been given and make findings of fact that were not made. This is to turn the jurisprudence on its head. *Newfoundland Nurses* allows reviewing courts to connect the dots on the page where the lines, and the direction they are headed, may be readily drawn. Here, there were no dots on the page.

[33] The statutory framework in *CEAA 2012* is set out in Schedule "A" to these Reasons.

V. The Parties

A. *The Applicants*

[34] The Regional Municipality of Halton is a regional government in Ontario comprised of the four Applicant municipalities: The Corporation of The Town of Milton, The Corporation of the City of Burlington, The Corporation of the Town of Halton Hills and The Corporation of the Town of Oakville. They have a combined population of approximately 600,000 residents. The Halton Regional Conservation Authority is a conservation authority established by Ontario's *Conservation Authority Act*, RSO 1990, c. C 27.

B. *The Respondents*

[35] The Minister of the Environment and the Governor in Council (Cabinet) are the Respondents. They are represented by the Attorney General of Canada who is named as a Respondent per the *Federal Courts Rules*.

[36] CN is a commercial railway company. Prior to the enactment of the *CN Commercialization Act*, SC 1995, c 24 in 1995, CN was a federal Crown corporation. CN comes under federal authority by virtue of subparagraphs 92(1)(10)(a) and (c) (at least) of the *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, reprinted in RSC 1985, App II, No 5 [*Constitution Act, 1867*].

VI. Important note on nomenclature: "direct" and "cumulative" significant adverse environmental effects

[37] There are two main kinds of significant adverse environmental effects in this proceeding: 1) those that are "direct", and 2) those that are "cumulative." The starting points are paragraphs 19(1)(a) and (b) of *CEAA 2012*:

> **Factors**
>
> **19 (1)** The environmental assessment of a designated project must take into account the following factors:
>
> **(a)** the environmental effects of the designated project, including the environmental effects of malfunctions or accidents that may occur in connection with the designated project and any cumulative environmental effects that are likely to result from the designated project in combination with other physical activities that have been or will be carried out;
>
> **(b)** the significance of the effects referred to in paragraph (a);
>
> [Emphasis added]

[38] Both the Impact Assessment Agency of Canada ["IAAC" or "Agency"], which assisted the Minister in the *CEAA 2012* review of the Project, and the Minister distinguish between "direct" and "cumulative" significant adverse environmental effects. They do this in the IAAC's Memorandum to the Minister dated September 1, 2020, which once concurred in became the Minister's Referral Decision. This document on its first page refers to 1) "significant direct adverse environmental effects" and 2) "significant adverse cumulative environmental effects."

[39] The Review Panel did not use that language, referring instead to 1) "significant adverse environmental effects" (*without* the modifier "direct"), and "significant adverse cumulative environmental effects." The *CEAA 2012* does not use the modifier "direct" either but does refer

to significant adverse cumulative environmental effects. The *CEAA 2012* refers to "cumulative environmental effects" in describing what must be identified by the Review Panel (paragraph 19(1)(a) of *CEAA 2012*).

[40] What the Minister and IAAC refer to as "significant direct adverse environmental effects" and what the *CEAA 2012* means in findings of "significant adverse environmental effects" (without the modifier cumulative), in my view, are the same.

[41] The Minister and Agency were obviously of the view that adding the word "direct" clarified matters to better distinguished between direct and cumulative impacts.

[42] Like the IAAC and the Minister, I have decided to refer to significant *direct* adverse environmental effects and significant adverse *cumulative* environmental effects.

[43] Significant *direct* adverse environmental effects are adverse "environmental effects of the designated project" (in this case, the Project), including the environmental effects of malfunctions or accidents that may occur in connection with the Project. By this, I understand "environmental effects of the designated project" are those likely to be caused by the Project itself (see paragraph 19(1)(a) of *CEAA 2012*).

[44] The *CEAA 2012* also recognizes "cumulative environmental effects that are likely to result from the designated project in combination with other physical activities that been or will be carried out" (paragraph 19(1)(a)). Where such cumulative effects are significant and adverse, they are the sum of the "significant direct adverse environmental effects" of the project itself

(i.e., the "direct" results of the Projects) plus other pre-existing and other circumstances physical activities carried out not likely to be caused by the Project itself (i.e. that are unrelated to the project itself).

VII. The Project's environmental assessment process

[45] In March 2015, CN gave notice of its intention to proceed with the Project. This triggered a screening process under the *CEAA 2012* to determine whether an environmental assessment of the Project was required under the legislation.

A. *Establishment of expert Review Panel and its report*

[46] In July 2015, the Minister concluded the public interest required an expert Review Panel be established to conduct an environmental assessment of the proposed Project, per subsection 38(1) of *CEAA 2012*:

> **Referral to review panel**
>
> **38 (1)** Subject to subsection (6), within 60 days after the notice of the commencement of the environmental assessment of a designated project is posted on the Internet site, the Minister may, if he or she is of the opinion that it is in the public interest, refer the environmental assessment to a review panel.

[47] 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 attached Terms of Reference for the Review Panel, including that the Review Panel take into account the enumerated factions listed in subsections 19(1) and 19(3) of

the *CEAA 2012*, the scope of which were outlined in the Environmental Impact Statement Guidelines.

[48] Under section 19 of *CEAA 2012* the Review Panel's assessment must consider the "environmental effects" of the project (that is, *direct* environmental effects) in addition to any "cumulative environmental effects" that are likely to result. Cumulative effects are those that result from the combination of the project itself with "other physical activities that have been or will be carried out" (i.e. that are unrelated to the project itself).

[49] The environmental assessment must also consider the "significance" of these effects and must also consider any "mitigation measures that are technically and economically feasible" that would mitigate any significant adverse environmental effects of the project.

[50] In this connection, subsection 4(2) of the *CEAA 2012* mandates ("must") the Government of Canada, and the Minister, agency (and federal authorities and responsible authorities) to exercise their powers "in a manner that protects human health and the environment." Specifically 4(2) provides: "The Government of Canada, the Minister, the Agency, federal authorities and responsible authorities, in the administration of this Act, must exercise their powers in a manner that protects the environment and human health and applies the precautionary principle" [emphasis added].

[51] Under subsection 5(2) of *CEAA 2012* and the Environmental Impact Statement Guidelines, the Review Panel was required to assess the Project's effects on human health arising from changes to the environment.

[52] The Project's impact on human health in my view was a significant, central and important aspect of the Review Panel's impact assessment. There are other impacts, of course, but the Review Panel's finding with respect to the Project's significant *direct* adverse environmental effects on human health is the focus of this proceeding.

[53] The environmental impact process focused on two subsets of environmental effects. The first, set out in subsection 5(1) of *CEAA 2012*, relates to changes to the environment within federal legislative authority such as fisheries, species at risk, migratory birds per paragraph 5(1)(a), changes on federal lands per 5(1)(b), and with respect to Aboriginal peoples per 5(1)(c).

[54] The second subset of environmental effects, important for this case, is set out in subsection 5(2) and includes human health in subparagraph 5(2)(b)(i): "health and socio-economic conditions." Subsection 5(2) effects are those that arise from activities authorized by another federal authority, which in this case is the Canadian Transportation Agency which has jurisdiction over federal railways under subsection 98(1) of the *Canada Transportation Act,* SC 1996, c 10 [*Canadian Transportation Act*].

[55] The expert Review Panel process included four years of information-gathering, during which CN submitted an Environmental Impact Statement (over 400 pages, without the appendices) and provided thousands of pages of answers to information requests made by the Canadian Environmental Assessment Agency and the Review Panel, including responses to issues raised by the Applicants.

[56] Public hearings were conducted in Milton over several weeks in the summer of 2019. The Review Panel heard 88 presentations, including 17 from the Applicants. Expert witnesses discussed topics such as air quality, greenhouse gases, light, noise, health effects, fish, wildlife and soil. The Review Panel gathered information on topics that were relevant to CN's *Canadian Transportation Act* approval, such as municipal planning and finances.

(1) Review Panel Final Report, January 27, 2020

[57] The expert Review Panel's report is more than 400 pages long. It recognizes the Project would "provide needed logistics infrastructure that would support economic development through the timely movement of goods" and the environmental benefits of the modal shift of long-haul transportation of intermodal goods from road to railway, with the potential to reduce greenhouse gases and other air pollutants at a regional or greater level.

[58] In summary, the expert Review Panel concluded the Project, after taking mitigation into account, would likely cause six (6) specific and significant adverse environmental effects, two "direct" and four "cumulative". The two instances where the Review Panel found the Project itself will likely cause significant *direct* adverse environmental effects are: 1) in relation to air quality and 2) on human health as it relates to air quality. The expert Review Panel also found four instances of significant adverse *cumulative* environmental effects on: 3) air quality, 4) human health related to air quality, 5) wildlife and habitat, and 6) agricultural land. Total: six. Specifically the Panel concluded:

> [T]he Panel has concluded that the Project is likely to cause significant adverse environmental effects on air quality and on human health as it relates to air quality, and significant adverse

> cumulative environment effects on air quality, human health, wildlife habitat, and the availability of agricultural land.

[59] Of the six adverse environmental effects identified, the one at issue here is the Review Panel's conclusion 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. These arise because diesel exhaust, from the 800 (1,600 one way) daily round trip truck trips and additional train movements involving multiple additional diesel locomotives, contain pollutants that are toxic to human health without any safe level of human exposure.

[60] In fact, the Review Panel found three contaminants caused by the Project's increase increase in diesel exhaust would exceed relevant Canadian ambient air quality criteria: Benzo(a)pyrene (would exceed standards by 2600 percent), benzene (would exceed standards by 128 percent) and very small particulate matter (less than PM10) (would exceed standards by 112 percent), resulting in a high magnitude effect. Some predicted diesel exhaust pollutants (diesel particulate matter, formaldehyde, acetaldehyde, benzene, 1, 3-butadiene, and polycyclic aromatic hydrocarbons) are carcinogenic or known to cause cancer.

[61] Health Canada advised that exposure to diesel particulate matter may exacerbate existing diseases such as asthma, which affects about 10% of the general population. Health Canada also noted the effects of diesel small particulate matter relate largely to cardiovascular and respiratory disease but may also include premature non-cancer deaths.

[62] Notably the Project's boundary is within 100 metres of a residential neighbourhood.

[63] The Review Panel's finding the Project will likely cause significant *direct* adverse environmental effects on human health related to air quality is one of the two "direct" significant adverse environmental effects caused by the Project after taking into account mitigation. The other category of "direct" significant adverse environmental effect is the Project's significant *direct* adverse environmental effects on local air quality.

[64] Notably, these two "direct" negative impacts are separate and specific findings by the expert Review Panel.

[65] No one disputes the expert Review Panel's conclusion the Project itself will likely cause significant *direct* adverse environmental effects on human health as it relates to air quality in the area.

[66] As discussed later, the Review Panel's finding of significant *direct* adverse environmental effects on human health is not only found in the Panel's report, but is also specifically noted in two separate sets of material prepared by IAAC for the Minister's consideration, dated February 10, 2020 and August 9, 2020.

[67] These Reasons deal with the expert Review Panel's conclusions the Project will likely cause significant *direct* adverse environmental effects on 1) air quality and 2) human health, and will likely cause significant adverse *cumulative* environmental effect on both 3) air quality and 4) human health.

[68] These Reasons do not deal with the Review Panel's findings that the Project will cause significant adverse cumulative effects on wildlife, wildlife habitat, and agricultural land because they are not in issue.

(a) *Significant direct adverse environmental effects on local air quality*

[69] Section 5.1.3 of the expert Review Panel's report states this conclusion on p.52:

> The Panel concludes that the Project is likely to cause a significant adverse environmental effect on local air quality because it would further contribute to degraded baseline air quality conditions.
>
> The Panel considers that, even with mitigation, the Project will add to the predicted baseline exceedances of ambient air quality standards for benzene and benzo(a)pyrene and cause new exceedances for PM10 and PM2.5, resulting in a high magnitude effect that, without improvements to general emissions technology, would be long-term.
>
> [Emphasis added]

(b) *Significant adverse cumulative environmental effect on air quality*

[70] In the same section, under cumulative effects, the Review Panel conclude at p.54 of its report:

> The Panel concludes that the Project, in combination with other projects and activities that have been or will be carried out, is likely to cause a significant adverse cumulative environmental effect on air quality.
>
> The Panel finds that baseline air quality standard exceedances and the Project emissions would combine with emissions from planned future developments in the area, and these are expected to cumulatively result, at minimum, in a continuation of the predicted air quality standard exceedances for benzene, benzo(a)pyrene and new exceedances of PM10 and PM2.5.
>
> [Emphasis added]

(c) *The Project's significant direct adverse environmental effects on human health*

[71] On p.182 the expert Review Panel concludes, even with the recommended mitigation, that the Project is likely to cause a significant *direct* adverse environmental effects on human health as it relates to air quality. This is one of the two *direct* impacts of the Project:

> The Panel concludes that the Project, even with the recommended mitigation, is likely to cause a significant adverse environmental effect on human health caused by air quality because it would contribute to exceedances of health-based exposure standards.
>
> The Panel finds that the effects of Project air emissions on human health in isolation would be low, but become significant when combined with baseline exceedances and exposure ratios that are at or near the maximum acceptable level, and when considering there are no safe exposure limits established for non-threshold air contaminants and that some predicted exceedances are known human carcinogens.
>
> [Emphasis added]

[72] In section 11.1.1, the Review Panel discusses the Project's effects on human health and at p.179 summarizes Health Canada's human health advice:

> Health Canada stated that CN had not adequately characterized the health risks associated with exposure to the carcinogenic components of diesel exhaust. It noted that diesel particulate matter and NO_2 are the predominant contaminants of concern associated with diesel exhaust. Health Canada stated that certain contaminants in diesel exhaust (diesel particulate matter, formaldehyde, acetaldehyde, benzene, 1,3-butadiene, and polycyclic aromatic hydrocarbons) are carcinogenic or known to cause cancer. Health Canada noted that CN only provided the cancer risk, calculated as the incremental lifetime cancer risk, for benzene and benzo(a)pyrene, as a surrogate for polycyclic aromatic hydrocarbons.
>
> Health Canada stated that the incremental lifetime cancer rate for diesel particulate matter should be calculated using the unit risk provided by the California Environmental Protection Agency

> (CalEPA, 2015). Health Canada reviewed CN's discussion document on the relative risk of lung cancer mortality from exposure to diesel particulate matter, noting that it was based on an approach described in a single paper, Vermeulen et al. (2014). Health Canada noted that benzene and benzo(a)pyrene also form part of the diesel exhaust mixture, and that baseline concentrations are or will be at levels higher than provincial health-based standards.
>
> Health Canada maintained that an assessment of the carcinogenicity of diesel exhaust should be conducted by calculating the incremental lifetime cancer risks of diesel particulate matter using the California Environmental Protection Agency's unit risk or by providing a robust qualitative assessment. Health Canada recommended that if a relative risk approach was used, the results should be presented in a meaningful manner, such as by comparison to Health Canada benchmarks. In this way, an incremental lifetime cancer risk of less than 1 in 100,000 would be defined as essentially negligible risk. Since CN's assessment did not include any of these options, Health Canada was of the view that CN had not adequately characterized the human health risk associated with exposure to the carcinogenicity of diesel exhaust.
>
> Health Canada also noted that diesel particulate matter is a very complex mixture and there is extensive literature on occupational health studies (miners, truckers) going back decades. Health Canada stated that CN should have evaluated a much wider range of studies and literature to understand the range of potential effects and risks.
>
> Health Canada stated that exposure to diesel particulate matter may exacerbate existing diseases such as asthma, which affects about 10% of the general population. In its view, exposure to diesel particulate matter could cause people to develop new symptoms. Health Canada noted that the effects of diesel particulate matter relate largely to cardiovascular and respiratory disease but can also include premature non-cancer deaths. Halton Municipalities and a resident also raised concerns regarding the non-lethal effects of diesel particulate matter.
>
> [Emphasis added]

[73] Notably, the Review Panel identifies three toxic components of diesel exhaust in respect of which there are "no human health thresholds." In simple terms these pollutants have no safe

exposure limits for human beings. As the Court understands it, these diesel exhaust components are toxic to humans at all levels. The three toxic at any levels diesel exhaust pollutants caused by the Project would exceed the relevant Canadian ambient air quality criteria: benzo(a)pyrene (would exceed standards by 2600 percent), benzene (would exceed standards by 128 percent) and particulate matter10 (would exceed standards by 112 percent).

(d) *The Projects even with the recommended mitigation is likely to cause a significant adverse cumulative environmental effect on human health*

[74] In section 11.1.6, the Review Panel discusses the Project's *cumulative* significant adverse effects on human health. The Panel's "concerns regarding cumulative effects on human health centred around the health effects of air quality." On p.193 of the report, the Panel's concludes:

> The Panel concludes that the Project, even with the recommended mitigation, in combination with other projects and activities that have been or will be carried out, is likely to cause a significant adverse cumulative environmental effect on human health caused by air quality, because it would further contribute to the existing degraded air quality conditions and associated human health risks.
>
> [Emphasis added]

[75] Following the release of the Review Panel's report, the IAAC (which replaced the Canadian Environmental Assessment Agency) invited comments on the potential environmental conditions that might be imposed on the Project in the Minister's Decision Statement to be issued if Cabinet approved the Project i.e. found it justified in the circumstances, notwithstanding its significant direct and cumulative adverse environmental effects.

(2) IAAC Memorandum to the Minister, February 10, 2020

[76] Following release of the Review Panel's report, IAAC sent a Memorandum to the Minister informing him of the expert Review Panel's key findings, and outlining next steps in the review process. The Memorandum included four attachments.

[77] IAAC's Memorandum confirmed the Review Panel found six (6) significant adverse environmental effects of the Project. None were omitted. On p.3 under the heading *Summary of Key Findings*, IAAC's Memorandum reiterates the Review Panel found two (2) significant *direct* adverse environmental effects, and four (4) significant adverse *cumulative* environmental effects for a total of six (6). Human health is again the second of the two "direct" significant adverse environmental effects as it was in the Review Panel's report.

[78] In addition, the Memorandum repeated that the Project is likely to cause significant adverse *cumulative* environmental effects on human health (in addition to air quality, wildlife habitat, and the availability of agricultural land):

> *Significant Adverse Effects*
>
> However, the Panel has concluded that the Project is likely to cause significant adverse environmental effects on air quality; and, human health as it relates to air quality.
>
> The Panel also concluded that the Project is likely to cause significant adverse cumulative environment effects on air quality; human health; wildlife habitat; and the availability of agricultural land.
>
> [Emphasis added]

[79] On the first page of Annex 1, titled *Summary of Key Significance Findings*, under the heading air quality, IAAC's Memorandum confirms the Review Panel found three contaminants produced by the increase in diesel exhaust caused by the Project would exceed the relevant Canadian ambient air quality criteria: benzo(a)pyrene (would exceed standards by 2600 percent), benzene (would exceed standards by 128 percent) and particulate matter$_{10}$ (would exceed standards by 112 percent). In this connection, particulate matter refers to very small particles contained in diesel exhaust fumes referred to as Particulate Matter$_{10}$ and Particulate Matter$_{2.5}$:

> The Review Panel found that three contaminants would exceed the relevant ambient air quality criteria: Benzo(a)pyrene (by 2600 percent), Benzene (by 128 percent) and Particulate Matter$_{1-0}$ (by 112 percent). In the Milton area, transportation and other activities have had an effect on air quality that the Review Panel considers to be already significant, as reflected in the existing baseline air quality data. The Review Panel concluded that although the Project contribution would be limited, it would increase benzene, benzo(a)pyrene and cause new exceedances for Particulate Matter$_{10}$ and Particulate Matter$_{2.5}$, and, therefore, be likely to result in a significant adverse environmental effect. Similarly, because residential, industrial and commercial development in Milton will continue, the Panel concluded that the Project, in combination with other projects and activities, is likely to cause a significant adverse cumulative environmental effect to air quality.

[80] Further, at the bottom of page 1 of Annex 1:

> Health Canada pointed out that there is <u>no human health threshold</u> for certain air quality parameters, and stated that CN had not adequately assessed the health risks from diesel exhaust.
>
> [Emphasis added]

(3) Executive Summary of Crown Consultation and Accommodation Report, August 9, 2020

[81] The Minister received a further memorandum dated August 9, 2020 from IAAC along with three annexes, including of a copy of the Crown Consultation and Accommodation Report [CCAR], an Executive Summary of the CCAR, and a Whole of Government Response. These documents were sent to inform the Minster in making upcoming decisions under *CEAA 2012*.

[82] On p.3 of the Crown Consultation and Accommodation Report, IAAC correctly notes six (6) significant adverse environmental effects, two (2) being *direct* including significant *direct* adverse environmental effects on human health, and four (4) being cumulative, again including human health. None of the six adverse impacts were missing. This document states under the heading 'Panel Findings and Conclusions on Areas of Interest to Indigenous Nations':

> However, the Panel concluded that the Project is likely to cause significant adverse environmental effects on air quality and on human health as it relates to air quality, and significant adverse cumulative environment effects on air quality, human health, wildlife habitat, and the availability of agricultural land.

[83] On p.6 of the Crown Consultation and Accommodation Report, IAAC states in the section on human health:

> The Panel identified that the effects of Project air emissions on human health in isolation would be low, but become significant when combined with baseline exceedances and exposure ratios that are at or near the maximum acceptable level, and when considering there are no safe exposure limits established for non-threshold air contaminants and that some predicted exceedances are known human carcinogens.

VIII. Minister's Referral Decision pursuant to subsection 52(2) of *CEAA 2012* / IAAC Memorandum dated September 1, 2020

[84] Under subsection 52(2) of the *CEAA 2012*, the Minister must decide and refer to the Cabinet any aspect of the Project that is likely to cause significant adverse environmental effects. The Cabinet is to decide if such adverse effects are "justified in the circumstances":

> **Referral if significant adverse environmental effects**
>
> **52 (2)** If the decision maker decides that the designated project is likely to cause significant adverse environmental effects referred to in subsection 5(1) or (2), the decision maker must refer to the Governor in Council the matter of whether those effects are justified in the circumstances.
>
> [Emphasis added]

[85] To assist the Minister in deciding whether and what should be referred to Cabinet, the Minister received a Memorandum from the President of the IAAC dated September 1, 2020.

[86] The referral decision was the Minister's to make. It is not disputed the Minister could agree or disagree with the IAAC. The Minister could also agree or disagree with the expert Review Panel. However, the Minister's discretion is not unfettered: it is not disputed that his decision is subject to the constraints of judicial review by this Court. It is not disputed his decision is also subject to constraining legislation.

[87] The IAAC Memorandum is the central document in this case because it is also the Minister's Referral Decision.

[88] The Memorandum requests a decision pursuant to subsection 52(1) of *CEAA 2012* on the significance of the adverse environmental effects of the Project. In my view, by signing the Memorandum the Minister agreed with IAAC's recommendations.

[89] The Memorandum also asks the Minister to approve IAAC's proposed next step, including sending the Project's direct and cumulative significant adverse environmental effects to Cabinet for its decision on whether the Project was "justified in the circumstances."

[90] The Minister concurred in IAAC's recommendation by signing the last page.

[91] In my view, IAAC's Memorandum of September 1, 2020, once concurred in by the Minister, constitutes the Minister's Referral Decision. While originally the September 1, 2020 IAAC Memorandum to the Minister was simply that, the Minister's concurrence transformed it into the Minister's Referral Decision. In coming to this conclusion, I adopt the submissions of CN and AGC that the Minister's Referral Decision and its rationale are set out in IAAC's September 1, 2020 Memorandum, which the Minister approved. Indeed, there is nothing unusual in a Ministerial Decision being evidenced through concurrence by a Minister on the face of a memorandum from a subordinate agency or public official. That is the way Ministerial decisions may be made: *Taseko Mines Limited v Canada (Environment)*, 2019 FCA 320 at paragraph 79.

[92] I will henceforth refer to IAAC's Memorandum as the Minister's Referral Decision.

[93] The Minister's Referral Decision is inexplicably different from the expert Review Panel's report of January 27, 2020, and from the two IAAC Memoranda to the Minister dated February 10, 2020 and August 9, 2020 just discussed.

[94] In making the Minister's Referral Decision, the Minister decided what significant adverse environmental effects would go to Cabinet.

[95] In my view, the Minister implicitly decided the Project's significant *direct* adverse environmental effects on human health would not go to Cabinet.

[96] I use the word inexplicably because the Minister's Referral Decision discusses only five (5) significant adverse effects and not the six (6) found by the expert Review Panel. For the first time, instead of referencing two significant *direct* adverse environmental effects and four significant adverse *cumulative* environmental effects, the Minister's Referral Decision makes no mention of the Review Panel's conclusion the Project would likely cause significant *direct* adverse environmental effects on human health as it relates to air quality.

[97] A careful review of the Minister's Referral Decision and all its supporting material confirms it contains no discussion or mention of the expert Review Panel's conclusion that the Project would likely cause significant *direct* adverse environmental effects on human health as it relates to air quality. While the Court could review the Minister's Referral Decision in detail, the Court sees no reason for doing so because the point was essentially conceded and I find there this decision has no specific reference to or consideration of the expert Review Panel's conclusion

that the Project would likely *direct* "significant adverse environmental effects on human health as it relates to air quality."

[98] Specifically, the Summary has no such reference or consideration:

> In its Report submitted to you on January 27, 2020, the Review Panel (the Panel) concluded that the Project is likely to cause significant direct adverse environmental effects on local air quality (generally limited to the Municipality of Halton), and significant adverse cumulative effects on air quality and related human health, wildlife habitat and wildlife, and availability of agricultural land (Annex I).

[99] The fact is, but for reasons unknown, the Project's *direct* consequences for human health as it relates to air quality in the local environment is not mentioned or discussed. It is simply deleted without explanation, even though a human health assessment is required by subsection 5(2)(b)(i) of *CEAA 2012*) that "if you decided that the Project is likely to cause significant adverse environmental effects referred to in subsection 5(2), you must then refer the matter to the Governor in Council for a decision as to whether any such significant adverse environmental effects are justified in the circumstances."

[100] Notably the relevant provision of *CEAA 2012* mandating consideration of human health provides:

> 5(2) However, <u>if the carrying out of the physical activity, the designated project or the project requires a federal authority to exercise a power or perform a duty or function conferred on it under any Act of Parliament</u> other than this Act, the following environmental effects are also to be taken into account:
>
> > (a) a change, other than those referred to in paragraphs (1)(a) and (b), that may be caused to the environment and that is directly linked or necessarily incidental to a federal authority's

> exercise of a power or performance of a duty or function that would permit the carrying out, in whole or in part, of the physical activity, the designated project or the project; and
>
> (b) an effect, other than those referred to in paragraph (1)(c), of any change referred to in paragraph (a) on
>
> (i) **health** and socio-economic conditions…
>
> [Emphasis added]

IX. Cabinet's Justification Decision made pursuant to subsection 52(4) of *CEAA 2012*, (PC Number: 2021-0008 January 20, 2021)

[101] The Cabinet decided under paragraph 52(4)(a) of *CEAA 2012* that: 1) "having taken into account the implementation of mitigation measures that the Minister of the Environment considered appropriate, the Minister has 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", and that 2) these significant adverse affects are justified in the circumstances.

[102] Notably and immediately apparent is that Cabinet made no formal or express decision on the Project's significant *direct* adverse environmental effects on human health as it relates to air quality of those living near the Project.

[103] Like the Minister's Referral Decision, the Cabinet dealt with only 5 of the 6 significant adverse effects of the Project.

[104] The Cabinet decided not to make public any of the documents sent to it by the Minister or anybody else, by invoking section 39 of the *Canada Evidence Act*, RSC 1985, c C-5 [*Canada Evidence Act*]. The Applicants did their best but were unsuccessful in bringing two motions to compel disclosure, but both were dismissed by Associate Judge Molgat. Therefore, the Court has no express record of what the Cabinet considered in terms of the Project's significant *direct* adverse environmental effects on human health as it relates to air quality.

[105] Given no reference in the Cabinet's Justification Decision, the Court finds the Project's significant *direct* adverse environmental effects on human health as it relates to air quality was not considered by Cabinet. The Minister's failure to grapple with this issue flawed his Referral Decision and, as will be seen in the analysis section of these Reasons, fatally flaws the Cabinet Justification Decision.

[106] Specifically, the Order in Council (which is the record of Cabinet's decision) states:

> Whereas the Canadian National Railway Company has proposed the development of the Milton Logistics Hub project in Milton, Ontario;
>
> Whereas the project was subject to an environmental assessment conducted by a review panel under the *Canadian Environmental Assessment Act, 2012* ("Act") and, in accordance with subsection 183 (1) of the Impact Assessment Act, the environmental assessment is continued under the Act as if the Act had not been repealed;
>
> Whereas, after having considered the environmental assessment report of the review panel in respect of the project and having taken into account the implementation of mitigation measures that the Minister of the Environment considered appropriate, the Minister has 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;

> Whereas, after having made that decision, that Minister has, in accordance with subsection 52 (2) of the Act, referred to the Governor in Council the matter of whether those effects are justified in the circumstances;
>
> 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;
>
> Whereas the Governor in Council, having considered the concerns and interests of Aboriginal peoples that were identified in the consultation process, including the project's potential impacts to Aboriginal rights, is satisfied that the consultation process undertaken is consistent with the honour of the Crown and that the concerns and interests have been appropriately accommodated;
>
> And whereas 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;
>
> Therefore, Her Excellency the Governor General in Council, on the recommendation of the Minister of the Environment, pursuant to subsection 52 (4) of the Canadian Environmental Assessment Act, 2012, decides that the significant adverse environmental effects that the Milton Logistics Hub project, proposed by the Canadian National Railway Company in Milton, Ontario, is likely to cause are justified in the circumstances.
>
> [Emphasis added]

[107] The Cabinet was satisfied that additional measures would be implemented to mitigate the significant adverse environmental effects of the Project "identified by the Minister of the Environment." However the Minister only identified 5 of the 6 adverse environmental effects identified by the expert Review Panel. The Cabinet did not consider mitigation of the Project's significant *direct* adverse environmental effects on human health.

X. Minister's Decision Statement made pursuant to subsections 53(2) and 54(1) of *CEAA 2012* (January 21, 2021)

[108] The Minister's Decision Statement is a 49-page document, issued January 21, 2021, the day following the Cabinet's Justification Decision. The Minister's Decision Statement established conditions pursuant to subsection 53 (1) of *CEAA 2012* in relation to the environmental affects referred to in subsection 5(1) of *CEAA 2012* with which the Project must comply. There are 325 conditions imposed on the Project in the Minister's Decision Statement.

XI. Analysis

A. *The Minister's Referral Decision is unreasonable*

(1) The Minister failed to meaningfully grapple with the Project's significant *direct* adverse environmental effects on human health

[109] The Applicants submit there is no rational basis in the evidentiary record for the Minister to reject the significant *direct* adverse environmental effects on human health caused by air quality found by the Review Panel.

[110] However, generally it is no part of the Court's role on judicial review to reweigh or reassess the evidence: see *Doyle v Canada (Attorney General)*, 2021 FCA 237 at paragraphs 3-4:

> [3] In doing that, the Federal Court was quite right. Under this legislative scheme, the administrative decision-maker, here the Director, alone considers the evidence, decides on issues of admissibility and weight, assesses whether inferences should be drawn, and makes a decision. In conducting reasonableness review of the Director's decision, the reviewing court, here the Federal Court, can interfere only where the Director has committed fundamental errors in fact-finding that undermine the acceptability

> of the decision. Reweighing and second-guessing the evidence is no part of its role. Sticking to its role, the Federal Court did not find any fundamental errors.
>
> [4] On appeal, in essence, the appellant invites us in his written and oral submissions to reweigh and second-guess the evidence. We decline the invitation.

[111] Nor does the Court need to reweigh or reassess the evidence in order to grant judicial review in this case; it will grant judicial review in part because the Minister did not grapple in any meaningful way (or at all) with the expert Review Panel's significant and important finding that the Project will likely cause significant *direct* adverse environmental effects on human health. This aspect of the Minister's Referral Decision fails the test of reasonableness, for the following reasons.

[112] In this connection, to recall, the expert Review Panel concluded the Project, after taking mitigation into account, would likely cause six (6) significant adverse environmental effects, two "direct" and four cumulative. The two instances in which the Review Panel found the Project itself will likely cause significant *direct* adverse environmental effects on: 1) air quality and 2) human health as it relates to air quality. The expert Review Panel also found four instances of significant adverse *cumulative* environmental effects on: 3) air quality, 4) human health, 5) wildlife and habitat, and 6) agricultural land. Total: six.

[113] Inexplicably and unreasonably, neither the Minister's Referral Decision consider or refer to the 2nd finding above, namely that the Project will likely cause significant *direct* adverse environmental on human health as it relates to air quality of the local residents because of the increase in diesel exhaust pollutants in the local airshed.

[114] The only reference to human health that comes even close in this respect is found at the top of p.6 of the Minister's Referral Decision under "human health (linked to air quality)":

> The Panel found 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. Health Canada recommended to the Panel that CN reduce emissions of contaminants associated with diesel exhaust that may exhibit health effects even at low levels (i.e., non-threshold contaminants in diesel PM_{10}, PM2.5, and nitrogen dioxide).

[115] However this discussion is inadequate because it does not refer to the Review Panel's finding of significant *direct* adverse environmental effects on human health as it relates to air quality in the local area. Instead, this portion of the Minister's Referral Decision unreasonably implies that the Project's only impact on human health is cumulative, i.e., the Project effects in combination with non-project effects. While the Review Panel did find significant *cumulative* adverse environmental effects on human health, it also found significant *direct* adverse environmental effects on human health, which is simply not discussed or explained.

[116] Furthermore, p.4 of the Minister's Referral Decision contains what I consider a misleading commentary:

> While CN is proposing mitigation measures to reduce the adverse effects of the Project on air quality and, subsequently, human health, there are no measures that can be taken to entirely reduce the effects of the Project on local air quality.
>
> The Panel found that, although the Project's impacts on human health from air pollution emissions would be relatively low, when combined with existing air pollution levels, increased emissions of diesel exhaust from the rail and truck traffic are anticipated to result in a significant adverse cumulative effect on human health, which may include an increase in population-level respiratory illnesses and heart problems, increased cancer risk and associated increased risk of premature mortality.

[Emphasis added]

[117] This speaks of “adverse effects.” With respect, this is inadequate given the expert panel found the Project’s effects were “significant.” This commentary states no measures are available to “entirely reduce” air quality effects. This is misleading because the *direct* human health issue has never been about whether measures may “entirely reduce” the Project’s adverse effects on human health. Importantly again, the commentary does not refer to the Review Panel’s conclusion the Project will likely cause significant *direct* adverse environmental effects on the human health of local residents.

[118] No explanation is provided as to why the Minister did not refer to Cabinet the Project’s undoubted significant *direct* adverse environmental effects on human health in this respect.

[119] The issue therefore arising is whether the Minister meaningfully grappled with the expert Review Panel’s finding that the Project, even after taking into account mitigation measures, will likely cause significant *direct* adverse environmental effects on human health.

[120] While of course all significant adverse environmental effects are important, including adverse effects on wildlife, wildlife habitat and agricultural lands, it is obvious to me, was not disputed by any party, and is self-evident as a matter of common sense that significant *direct* adverse environmental effects related to human health are of very considerable and central importance in this case.

[121] Moreover the protection of human health is a required consideration imposed on the Minister and Cabinet by subsection 4(2) of the *CEAA 2012*, to be considered shortly.

[122] Given the Project's significant *direct* adverse environmental effects on human health is not explained, justified or dealt with in the Minister's Referral Decision, the Respondents advanced their own theories to explain its absence. It was submitted the significant *direct* adverse environmental effects on human health finding of the Review Panel were merged with the Panel's findings with respect to the Project's significant *direct* adverse environmental effects on air quality related to human health. This is conjecture. It was submitted this absence of consideration of the direct human health consequences was a matter of nomenclature. Notably the Minister's Referral Decision does not come to that conclusion.

[123] It was submitted the Minister merged the Review Panel's finding of significant *direct* adverse environmental effects on human health with the expert Review Panel's separate specific finding that the Project would have significant adverse *cumulative* environmental effects on human health. This again is conjecture because the Minister made no such finding nor was any such finding even offered to him by the IACC.

[124] It was also suggested that the Project's *cumulative* effects on human health included all *direct* effects. Notably the Minister's Referral Decision does not come to any such conclusion, nor indeed did the IAAC offer that conclusion to the Minister for consideration.

[125] It was also argued that the Review Panel's finding of significant *direct* adverse environmental effects on human health was subsumed in the Minister's overall conclusions and didn't need to be mentioned at all.

[126] There is no merit in this submission which would be contrary to the instructions set out in *Vavilov* in paragraphs 133 and 135 given to the central importance of this human health issue. There, *Vavilov* holds that reasons must "reflect the stakes" where a decision involves the potential for significant personal impact or harm. Where the decision maker has power over the lives of ordinary people, they may have a "heightened responsibility" to ensure their reasons demonstrate that they have considered the consequences of a decision and that those consequences are justified in light of the facts and law:

> [133] It is well established that individuals are entitled to greater procedural protection when the decision in question involves the potential for significant personal impact or harm: *Baker*, at para. 25. However, this principle also has implications for how a court conducts reasonableness review. Central to the necessity of adequate justification is the perspective of the individual or party over whom authority is being exercised. Where the impact of a decision on an individual's rights and interests is severe, the reasons provided to that individual must reflect the stakes. The principle of responsive justification means that if a decision has particularly harsh consequences for the affected individual, the decision maker must explain why its decision best reflects the legislature's intention. This includes decisions with consequences that threaten an individual's life, liberty, dignity or livelihood.
>
> …
>
> [135] Many administrative decision makers are entrusted with an extraordinary degree of power over the lives of ordinary people, including the most vulnerable among us. The corollary to that power is a heightened responsibility on the part of administrative decision makers to ensure that their reasons demonstrate that they have considered the consequences of a decision and that those consequences are justified in light of the facts and law.

[Emphasis added]

[127] Moreover, in making these submissions the Respondents ask the Court itself to furnish an explanation for why the Minister decided not to send this direct human health finding to Cabinet. They ask the Court to make decisions on this human health issue which the IAAC did not ask the Minister to make, and which the responsible Minister did not address, explain or seek to justify.

[128] I decline their invitation because the assessment of the Project's significant *direct* adverse environmental effects on human health as identified by the expert Panel is assigned by Parliament to the Minister and, with respect, is not properly a matter for this Court to decide on judicial review.

[129] Put another way, the Respondents ask the Court to connect the dots, and supply reasons the Minister did not give, and which the IAAC did not offer. The 'connect the dots' rule is set out in *Vavilov* at paragraph 97 where the Supreme Court of Canada endorses *Komolafe*, in which Justice Rennie (as he then was) determined when a reviewing court may "connect the dots", i.e., give reasons or decide a matter on the basis of reasoning the decision maker did not give:

> [11] *Newfoundland Nurses* is not an open invitation to the Court to provide reasons that were not given, nor is it licence to guess what findings might have been made or to speculate as to what the tribunal might have been thinking. This is particularly so where the reasons are silent on a critical issue. It is ironic that *Newfoundland Nurses*, a case which at its core is about deference and standard of review, is urged as authority for the supervisory court to do the task that the decision maker did not do, to supply the reasons that might have been given and make findings of fact that were not made. This is to turn the jurisprudence on its head. *Newfoundland Nurses* allows reviewing courts to connect the dots on the page where the lines, and the direction they are headed, may be readily drawn. Here, there were no dots on the page.

[Emphasis added]

[130] It seems to me on this critical issue, the Respondents ask the Court to impermissibly speculate what reasons might have been made or to speculate as to what the Minister (and or IAAC) "might have been thinking." That is not allowed on judicial review, particularly as here where the reasons are silent on this important issue.

[131] If the Minister decided the Project would not likely cause significant *direct* adverse environmental effects on human health it relates to air quality, as he did, in my respectful view he could and should have said so and provided his reasons. This issue could and should have been meaningfully addressed and grappled with in the Minister's Referral Decision. It is not a matter that was completely ignored.

[132] I find, as Justice Rennie did in *Komolafe*, that I am impermissibly asked "to supply the reasons that might have been given and make findings of fact that were not made. This is to turn the jurisprudence on its head. *Newfoundland Nurses* allows reviewing courts to connect the dots on the page where the lines, and the direction they are headed, may be readily drawn. Here, there were no dots on the page."

[133] With respect, I also disagree with CN's submission that the absence of any mention, let alone any explanation for the Minister's decision on this human health issue is a "treasure hunt for error", particularly given the stakes involved concerning the threat to human health posed by diesel exhaust pollutants including known carcinogens, toxic chemicals and very small particulate matter.

[134] In the result, the Court finds the Minister's Referral Decision is flawed because it does not meaningfully grapple with what the Court considers a central and important issue, namely the Project's significant *direct* adverse environmental effects on human health.

(2) The Minister failed to consider the protection of human health in breach of subsection 4(2) of *CEAA 2012*

[135] The Applicants submit that in failing to refer to Cabinet the direct significant adverse environmental effect on human health caused by air quality, the Minister exercised his powers under subsection 52(2) of *CEAA 2012* in a manner that did not protect human health, in breach of subsection 4(2) of *CEAA 2012*.

[136] Subsection 4(2) of *CEAA 2012* provides:

> **(2)** The Government of Canada, the Minister, the Agency, federal authorities and responsible authorities, in the administration of this Act, must exercise their powers in a manner that protects the environment and human health and applies the precautionary principle.
>
> [Emphasis added]

[137] Neither the language nor import of subsection 4(2) is considered or referred to in the Minister's Referral Decision.

[138] To reiterate, considerable human health information was provided to the Minister in the Review Panel's report, including its finding that the Project's direct and cumulative significant adverse environmental effects on human health related to air quality and air quality itself will include increases in three "no safe limits" or "no threshold" pollutants: 1) particulate matter less

than 10 microns in size (“PM10”); 2) particulate matter less than 2.5 microns in size (“PM2.5”); and 3) nitrogen dioxide (“NO2”). All three are well-known diesel exhaust pollutants that will be emitted by the great number of diesel trucks and diesel railway locomotive planned to use the Project. And as already noted these pollutants are harmful to people with asthma and those susceptible to various cancer and cardiovascular and respiratory diseases but may also include premature non-cancer deaths.

[139] CN submits the Applicant’s position invites an untenable interpretation of subsection 4(2) that is not consistent with the text, context, or purpose of *CEAA 2012*. As I understand it, CN says the Applicant’s submission that the Minister and Cabinet are required to protect human health (and apply the precautionary principle) by subsection 4(2) would if treated literally become a complete bar to approving any project that could result in significant adverse environmental effects related to air quality or human health. CN submits this section of the statute provides guidance, but does not specify outcomes.

[140] With respect, the first part of CN’s argument is a floodgate argument which I reject. The second part of CN’s submissions is in my view an acceptable description of the import of subsection 4(2): the subsection provides guidance, but does not specify outcomes. In coming to this conclusion I consider that subsection 4(2) is a relevant legal constraint on the Minister, but one that must be construed in light of the principles of statutory interpretation enunciated by the Supreme Court of Canada in *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 SCR 27, at paragraph 21: “the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.”

[141] With respect and with this in mind, I conclude that subsequent statutory provisions in and the scheme of *CEAA 2012* setting out a referral process to the Review Panel (subsection 38(1)), Ministerial consideration of the panel report (subsection 47(1)), and a Cabinet Decision on whether significant adverse environmental effects are nonetheless "justified in the circumstances" (paragraph 52(4)(a)), all illustrate Parliament's decision that subsection 4(2) is not a complete bar. It seems to me subsection 4(2)'s reference to the protection of human health must be considered by a Minister in making a referral decision.

[142] That said, nothing suggests subsection 4(2) was considered by the Minister in making his Minister's Referral Decision.

[143] The AGC submits the Minister acted within the legislative authority set out in sections 52 to 54 of *CEAA 2012*. The AGC submits this includes the Minister's ability to decide on the significance of environmental effects and consider mitigation measures he deems appropriate under section 52, to establish conditions under section 53, and to ultimately issue a decision statement under section 54.

[144] While I agree the Minister was free to disagree with the Review Panel in terms of the Project's adverse effects on human health, in my respectful view and to comply with *Vavilov* at paragraph 128 the Minister was also obliged in this case to meaningfully grappled with the Review Panel's human health findings, and in addition to consider the protection of human health as required by subsection 4(2), particularly given the stakes involved in terms of human health, none of which occurred here. I am not persuaded the Minister met the requirements of *Vavilov* at paragraph 135 which requires that his "… reasons demonstrate that they have

considered the consequences of a decision and that those consequences are justified in light of the facts and law."

[145] The Minister's Referral Decision in respect of subsection 4(2) of *CEAA 2012* does not pass muster.

(3) An adverse inference will not be drawn

[146] The Applicants submit the Certified Tribunal Record [CTR] does not include the Minister's Referral Decision, and does not indicate the records the Minister provided to Cabinet. As to the first part, that might have been the case but the parties and the Court had the Minister's Referral Decision before it, as previously concluded: the Minister's concurrence with the IAAC's Memorandum of September 1, 2020 constitutes it as the Minister's Referral Decision.

[147] In this case, every record submitted to Cabinet was withheld from the parties and the public. Cabinet deliberated this matter in secret, which it was entitled to do because of the Certificate under section 39 of the *Canada Evidence Act*. In this connection the Applicant's brought a Rule 317 motion to compel disclosure of additional records regarding the Minister's Referral Decision. They also brought an additional motion to amend the Schedule to the section 39 *Canada Evidence Act* Certificate and provide additional details about the records before Cabinet. Both motions were dismissed by Associate Judge Molgat.

[148] In requesting the Court to draw an adverse inference, the Applicants rely on *Canada (Citizenship and Immigration) v Canadian Council for Refugees*, 2021 FCA 72, where at paragraphs 111-112 Justice Stratas states:

> [111] Assertions of privileges over a challenger's constant and firm objection can lead to adverse inferences being drawn against the party asserting the privilege—and sometimes the adverse inference can be pivotal in the outcome of the judicial review.
>
> [112] The assertion of privileges over a challenger's constant and firm objection can also lead to serious gaps in the evidentiary record that either leave the administrator unable to demonstrate the reasonableness of its decision to the reviewing court or undermine the requirement that there be a reasoned explanation for an administrator's decision. Either can lead to the quashing of the administrative decision.
>
> [Citations omitted]

[149] The Respondent CN submits there is no evidence of selective disclosure in the CTR, and that Associate Judge Molgat's Order dated January 17, 2023 is a complete answer to the Applicant's argument. With respect, I agree. Paragraphs 66-67 of the Order states:

> [66] The CTR transmitted containing documents relevant to the application that are in the possession of the Minister is organized by category with reference to the Applicants' numbered Requests for categories of documents. Given the broad and non-specified nature of the Applicants' Rule 317 requests, the generality of the response received ought not to come as a surprise.
>
> [67] The burden is on the Applicants to demonstrate that more complete disclosure is justified in the circumstances of the case. Although the Applicants submit that the Minister has withheld materials or otherwise not provided complete disclosure, they seek further production without providing any evidence as to whether the requested documents exist. Based on the materials before me, I am unable to conclude that the CTR transmitted is not fully responsive. Accordingly, I decline to make an order for the transmission of further or additional materials in response to the Applicant's Rule 317 requests.

[Emphasis added]

[150] In my view Cabinet lawfully refused public access to its records, a point already decided in two separate decisions by Associate Justice Molgat. There was no finding of improper selective disclosure before Associate Judge Molgat, nor is there any evidence to support such a finding before me. Therefore this line of argument does not succeed.

B. *Cabinet's Justification Decision is unreasonable*

(1) Cabinet did not exceed statutory authority under paragraph 52(4)(a) of *CEAA 2012*

[151] The Applicants submit Cabinet improperly took into account extraneous considerations by relying upon "additional mitigation measures." With respect and for the following reasons, I conclude these submissions are without merit.

[152] The Applicants submit Parliament vested the Minister with the sole authority to take into account mitigation measures under the *CEAA 2012*, and that paragraph 52(4)(a) of *CEAA 2012* does not confer any statutory authority on the Governor in Council to take into account additional mitigation measures, yet this is what occurred in the Cabinet's Justification Decision. The Applicants submit upon receipt of the Minister's Referral Decision, the Governor in Council is only provided authority under subsection 52(4) to decide if the significant adverse environmental effects referred by the Minister are or are not "justified in the circumstances." The Cabinet Justification Decision is therefore *ultra vires*, and the Applicants submit it must be set aside.

[153] The Applicants rely on the *Impact Assessment Act*, SC 2019, c 28, s 1 [*Impact Assessment Act*] which replaced the *CEAA 2012*. Subsection 63(c) of the *Impact Assessment Act* states the Governor in Council may consider the implementation of the mitigation measures that it considers appropriate. The Applicants submit Parliament did not confer statutory authority in the *CEAA 2012* on the Governor in Council to take into account additional mitigation measures, as it subsequently has done expressly in the *Impact Assessment Act*.

[154] CN argues subsection 52(4) does not limit the circumstances Cabinet may consider. CN submits, and with respect I agree it was reasonable for Cabinet to consider additional mitigation measures as but one of many relevant "circumstances." With respect there is no obstacle to Cabinet considering mitigation measures as part of its consideration of whether the Project is "justified in the circumstances." The phrase "in the circumstances" on any plain reading includes mitigation measures in addition to those considered by the Review Panel. While the Applicants invite the Court to read in textual constraints on Cabinet, I will not do so. Amending legislation is a job for Parliament, not this Court on judicial review.

[155] In this connection, I agree with Justice Stratas in *Canada v South Yukon Forest Corporation*, 2012 FCA 165, where he states at paragraph 61:

> [61] The fact that the authority to decide whether or not to grant a Timber Harvesting Agreement is vested in the Governor in Council sheds some light on the breadth of the discretion. The Governor in Council is "a body of diverse policy perspectives representing all constituencies within government": *League for Human Rights of B'Nai Brith Canada v. Odynsky*, 2010 FCA 307 at paragraph 78. Undoubtedly, in deciding whether to grant a Timber Harvesting Agreement, the Governor in Council is to take into account an array of policy considerations, in this case, the very sort of policy considerations that the Department was investigating in the 1999-2001 period.

> [Emphasis added]

[156] In this connection, the Court also agrees that Cabinet decisions under the *CEAA 2012* are owed considerable deference, although they are of course subject to judicial review. The Court relies on the Federal Court of Appeal in *Raincoast Conservation Foundation v Canada (Attorney General),* 2019 FCA 224 at paragraphs 18-19:

> [18] In reviewing the reasonableness of the Governor in Council's approval decision, the Court must give the Governor in Council the "widest margin of appreciation" over the matter: *Gitxaala Nation,* at paragraph 155; *Tsleil-Waututh Nation,* at paragraph 206. The level of deference is high.
>
> [19] The Governor in Council's approval decision is a "discretionary [one] … based on the widest considerations of policy and public interest assessed on the basis of polycentric, subjective or indistinct criteria and shaped by its view of economics, cultural considerations, environmental considerations, and the broader public interest": *Gitxaala Nation,* at paragraphs 140–144 and 154; see also *Tsleil-Waututh Nation,* at paragraphs 206–223. Only the Governor in Council—not this Court—is equipped to evaluate such considerations with precision: *Gitxaala Nation,* at paragraphs 142–143, citing *League for Human Rights of B'Nai Brith Canada v. Canada*, 2010 FCA 307, [2012] 2 F.C.R. 312, at paragraphs 76–77. Thus, only arguments that can possibly get past a high level of deference can qualify as "fairly arguable".
>
> [Emphasis added]

[157] Likewise, I agree with *Mikisew Cree First Nation v Canadian Environmental Assessment Agency,* 2023 FCA 191, per Justice Gleason at paragraph 118:

> [118] Further, decisions that can be considered executive in nature—because they involve public interest determinations based on wide considerations of policy and public interest, assessed on "polycentric, subjective or indistinct criteria and shaped by the administrative decision makers' view of economics, cultural considerations and the broader public interest"— are very much unconstrained: *Vavilov* at para. 110; *Raincoast Conservation Foundation v. Canada (Attorney General)*, 2019 FCA 224, [2020]

> 1 F.C.R. 362 at paras. 18–19, leave to appeal to SCC refused, 38892 (5 March 2020) [*Raincoast Conservation Foundation*]; *Canadian National Railway Company v. Emerson Milling Inc.*, 2017 FCA 79, [2018] 2 F.C.R. 573 [*Emerson Milling*] at paras. 72–73; *Gitxaala Nation* at para. 150; *Dr. Q v. College of Physicians and Surgeons of British Columbia*, 2003 SCC 19, [2003] 1 S.C.R. 226 at paras. 30 and 31.
>
> [Emphasis added]

[158] I agree with CN that the Applicants' reliance on the *Impact Assessment Act* to interpret the *CEAA 2012* is contrary to the *Interpretation Act*, RSC 1985, c I-21 [*Interpretation Act*]. I reach this conclusion because subsection 45(3) of the *Interpretation Act* legislates:

> Repeal does not declare previous law
>
> (3) The repeal or amendment of an enactment in whole or in part shall not be deemed to be or to involve any declaration as to the previous state of the law.

[159] In this connection, I find *R v Breault*, 2023 SCC 9, per Justice Côté at paragraph 42 applies in this case to defeat the Applicants' submissions:

> [42] First, subsequent legislative history, that is, the amendments made to the version of a provision in force at the relevant time, "can cast no light on the intention of the enacting Parliament or Legislature" with respect to that version predating the amendments (*United States of America v. Dynar*, 1997 CanLII 359 (SCC), [1997] 2 S.C.R. 462, at para. 45; see also *Bank of Montreal v. Marcotte*, 2014 SCC 55, [2014] 2 S.C.R. 725, at para. 78). As stated by s. 45(3) of the *Interpretation Act*, R.S.C. 1985, c. I-21, "[t]he repeal or amendment of an enactment in whole or in part shall not be deemed to be or to involve any declaration as to the previous state of the law." In the same vein, s. 45(4) of the *Interpretation Act* adds that "[a] re-enactment, revision, consolidation or amendment of an enactment shall not be deemed to be or to involve an adoption of the construction that has by judicial decision or otherwise been placed on the language used in the enactment or on similar language."
>
> [Emphasis added]

(2) Cabinet failed to grapple with the Project's significant *direct* adverse environmental effect on human health

[160] The Applicants submit the Cabinet Justification Decision fails to provide any analysis or explanation for the Governor in Council's decision that the Project's significant *direct* adverse environmental effects are justified in the circumstances.

[161] This is undoubtedly the case: Cabinet's Justification Decision is silent on this significant and important issue.

[162] In my view the end product, namely the Cabinet Justification Decision, is simply a reflection of the flawed Minister's Referral Decision and is equally flawed by it. In this respect, the Cabinet Justification Decision is unreasonable for the same reasons the Minister's Referral Decision is unreasonable, namely that it failed to meaningfully grapple with the important finding of the expert Review Panel that the Project will likely cause significant *direct* adverse environmental effect on the human health of local residents. It does not pass muster in this respect.

(3) Cabinet failed to consider the protection of human health in breach of subsection 4(2) of the *CEAA 2012*

[163] The Applicants submit Cabinet breached its mandatory obligation under subsection 4(2) of *CEAA 2012* to exercise its powers under subsection 52(4) of *CEAA 2012* in a manner that protects human health.

[164] As already noted, the expert Review Panel assessed considerable human health information resulting it its separate findings that the Project will likely cause both direct *and* cumulative significant adverse environmental effects on human health as it relates to air quality due to the Project's increase diesel exhaust pollutants by the great number of diesel trucks and diesel railway locomotive using the Project. And as already noted these pollutants put people with asthma and those susceptible to various cancer and cardiovascular and respiratory diseases at risk, and may also include premature non-cancer deaths.

[165] CN submits that the *CEAA 2012* contemplates projects that may be likely to cause significant adverse environmental effects may still be approved by the Governor in Council where it is determined such projects are "justified in the circumstances."

[166] With respect, I agree because that is the very purpose of subsection 52(4): Cabinet has the final say notwithstanding the views of the Review Panel or of the Minister, and notwithstanding a designated project's direct or cumulative significant adverse environmental effects.

[167] In this connection and for the reasons set out above concerning the Minister's Referral Decision, I find subsection 4(2) provides guidance but does not determine results. The duty to consider subsection 4(2) is a legal constraint on Cabinet in deciding if the Project is "justified in the circumstances."

[168] However, just as the Minister's Referral Decision reveals nothing of any consideration of the protection of human health under subsection 4(2), Cabinet's Justification Decision reveals nothing of any Cabinet consideration of subsection 4(2).

[169] Therefore, and essentially for the reasons given above in relation to the Minister's Referral Decision, I find Cabinet failed to consider subsection 4(2). The Cabinet Justification Decision in these respects does not pass muster either.

(4) An adverse inference will not be drawn

[170] The Applicants raise the same argument here with respect to the Court drawing an adverse inference as it did with respect to the Minister's Referral Decision. The Court rejected those submissions with respect to the Minister's Referral Decision, and for the same reasons rejects their re-iteration here.

C. *Conditions in the Minister's Decision Statement*

[171] It is not necessary for the Court to express a view on the conditions set out in the Minister's Decision Statement, having found that both the Minister's Referral Decision and the Cabinet's Justification Decision are fundamentally flawed in relation to their consideration of the Project's adverse effects on human health and under subsection 4(2) of the *CEAA 2012*. It may be, for example, that grappling with the Project's *direct* significant adverse environmental effects on human health and considering subsection 4(2) will result in changes.

[172] That said, the Court address will address the conditions as they currently stand on the record before the Court, and in the circumstances does so in *obiter*.

[173] The Applicants submit the Minister's Decision Statement is unreasonable in that it fails to comply with subsection 53(2) of *CEAA 2012* by imposing conditions not directly linked or

necessarily incidental to the exercise of a power or performance of a duty or function by a federal authority. The Applicants submit the wording of subsection 53(2) constrains the Minister in establishing conditions. In this I agree. Subsection 53(2) of *CEAA 2012* provides if the Governor in Council decides that the significant adverse environmental effects that the Project is likely to cause are justified in the circumstances, the Minister of the Environment "must establish the conditions – that are directly linked or necessarily incidental to the exercise of a power or performance of a duty or function by a federal authority that could permit a designated project to be carried out in whole or in part – in relation to the environmental effects referred to subsection 5(2) of *CEAA 2012*."

[174] That said, carrying out the Project may require the following three federal authorities to exercise a power or perform a duty or function conferred on them under an Act of Parliament other than the *CEAA 2012*:

1. The Canadian Transportation Agency may approve the construction of a railway line under section 98(1) of the *Canada Transportation Act*;

2. The Minister of Fisheries and Oceans may issue authorization(s) under paragraph 35(2)(b) of the *Fisheries Act* in force as of August 27, 2019; and

3. The Minister of Industry may approve a communications system under subsection 5(1)(f) of the *Radiocommunication Act*.

[175] Notably, subsection 98(1) of the *Canadian Transportation Act* provides:

> No construction without Agency approval
>
> **98 (1)** A railway company shall not construct a railway line without the approval of the Agency.

[176] In his respect section 87 in the *Canadian Transportation Act* defines a "railway" as:

> ***railway*** means a railway within the legislative authority of Parliament and includes
>
> > (a) branches, extensions, sidings, railway bridges, tunnels, stations, depots, wharfs, rolling stock, equipment, stores, or other things connected with the railway, and
> >
> > (b) communications or signalling systems and related facilities and equipment used for railway purposes;

[177] The Applicants submit numerous conditions imposed by the Minister's Decision Statement are not directly linked or necessarily incidental to the exercise of a power or performance of a duty or function by a federal authority under these three federal Acts. They argue – and the Court agrees – that if such conditions are not directly linked or necessarily incidental to the exercise of a power or performance of a duty by a federal authority, the Minister would have exceeded his statutory authority under subsection 53(2).

[178] An example the Applicants refer to condition 4.19 in the Minister's Decision Statement, which requires CN to manage the number of container trucks entering the Project's Development Area such that the monthly average daily number of container trucks entering the Area from municipal roads does not exceed 800 trucks and that the maximum daily number of container trucks entering the Area does not exceed 880 trucks. The Applicants submit this condition is not directly linked nor necessarily incidental to the exercise of a federal authority's powers, duties or functions.

[179] I disagree. In my view this condition is directly linked or necessarily incidental to the exercise of a federal authority's powers. Nor am I persuaded any of the other conditions imposed are *ultra vires* the legislation. With respect, in my respectful view this aspect of the Applicants' case was faintly pressed, and properly so.

[180] I also note some of the Applicants' arguments verge on or are in the nature of constitutional challenges. However, the Applicants stated they were not challenging the Minister's Decision Statement on constitutional grounds. Moreover, no Notice of Constitutional Question as would have been required by Rule 69 of the *Federal Courts Rules* was served and filed by any party.

[181] The Applicants also submitted the Minister has no authority under subsection 53(2) to establish conditions that constitute mitigation measures that fall within the powers of provincial or municipal authorities. The Applicants submit the Minister's Decision Statement imposes conditions regarding terrestrial endangered species (conditions 8.5 to 8.33.6) and these conditions purport to govern terrestrial species at risk on privately owned lands that are subject to Ontario's *Endangered Species Act*, 2007, SO 2007, c 6. The Applicants contend by the terms of the federal *Species at Risk Act*, SC 2002, c 29 that Act only applies to "federal land." The Applicants submit this is not a reasonable exercise of the Minister's authority under subsection 53(2).

[182] With respect, I disagree. The Project is in relation to and involves the construction of a railway line under subsection 98(1) of the *Canadian Transportation Act.* I am not persuaded

these conditions are not reasonably and directly linked, and or necessarily incidental to powers and duties on the Canadian Transportation Agency under subsection 98(1).

[183] Nor am I persuaded any other condition is unreasonable, given this finding coupled with the broad and specialized expertise of the Canadian Transportation Agency in matters of railway regulation. Indeed, without the Agency's approval, CN could not build or operate the Project at all, and the anticipated truck and railway traffic would never materialize.

XII. Conclusion

[184] With respect and viewed holistically and not as a treasure hunt for error, both the Minister's Referral Decision and the Cabinet Justification Decision are unreasonable because a) neither grapples in a meaningful way with the finding of the Review Panel that the Project itself will result in significant *direct* adverse environmental effects on human health as it relates to air quality, and b) neither considers the protection of human health under subsection 4(2) of the *CEAA 2012*. Both are therefore set aside and remanded for redetermination in accordance with these Reasons.

[185] I note the Minister's Referral Decision is now a public document on the Court's file. In keeping with general principles of more openness and transparency, the Court suggests the Minister make public their Referral Decision, if any, following redetermination.

XIII. Costs

[186] At the hearing, the parties agreed that if the Applicants were successful, they would be awarded $20,000.00 all inclusive costs, if the Respondent CN is successful, it would be awarded $20,000.00 all inclusive costs, and if the Respondent AGC is successful, it would be awarded $18,000 at inclusive costs. The Applicants have succeeded and having found the same reasonable and in my discretion, I will order the Respondents to pay the Applicants $20,000.00 as their all-inclusive costs.

JUDGMENT in T-330-21

THIS COURT'S JUDGMENT is that:

1. The Application is granted.
2. The Minister's Referral Decision dated September 1, 2020, and Cabinet Justification Decision (Order in Council PC Number 2021-0008 dated January 20, 2021), are aside and remanded for redetermination in accordance with the foregoing Reasons.
3. The Respondents shall pay the Applicants the sum of $20,000.00 as the Applicants' all-inclusive costs.

"Henry S. Brown"
Judge

Schedule "A" Statutory Framework *CEAA 2012* with comments

The statutory framework applicable to the decisions under review is set out in the *CEAA 2012*. Subsection 4(1) outlines the following statutory purposes of the Act:

> **(a)** to protect the components of the environment that are within the legislative authority of Parliament from significant adverse environmental effects caused by a designated project;
>
> **(b)** to ensure that designated projects that require the exercise of a power or performance of a duty or function by a federal authority under any Act of Parliament other than this Act to be carried out, are considered in a careful and precautionary manner to avoid significant adverse environmental effects;
>
> **(c)** to promote cooperation and coordinated action between federal and provincial governments with respect to environmental assessments;
>
> **(d)** to promote communication and cooperation with aboriginal peoples with respect to environmental assessments;
>
> **(e)** to ensure that opportunities are provided for meaningful public participation during an environmental assessment;
>
> **(f)** to ensure that an environmental assessment is completed in a timely manner;
>
> **(g)** to ensure that projects, as defined in section 66, that are to be carried out on federal lands, or those that are outside Canada and that are to be carried out or financially supported by a federal authority, are considered in a careful and precautionary manner to avoid significant adverse environmental effects;
>
> **(h)** to encourage federal authorities to take actions that promote sustainable development in order to achieve or maintain a healthy environment and a healthy economy; and
>
> **(i)** to encourage the study of the cumulative effects of physical activities in a region and the consideration of those study results in environmental assessments.

Subsection 4(2) of the Act states:

> **(2)** The Government of Canada, the Minister, the Agency, federal authorities and responsible authorities, in the administration of this Act, must exercise their powers in a manner that protects the

environment and human health and applies the precautionary principle.

A “designated project” is defined in subsection 2(1) as:

2(1) ***designated project*** means one or more physical activities that

(a) are carried out in Canada or on federal lands;

(b) are designated by regulations made under paragraph 84(a) or designated in an order made by the Minister under subsection 14(2); and

(c) are linked to the same federal authority as specified in those regulations or that order.

It includes any physical activity that is incidental to those physical activities.

Subsections 5(1) and 5(2) lists environmental effects that must be taken into account:

Environmental effects

5 (1) For the purposes of this Act, the environmental effects that are to be taken into account in relation to an act or thing, a physical activity, a designated project or a project are

(a) a change that may be caused to the following components of the environment that are within the legislative authority of Parliament:

(i) fish and fish habitat as defined in subsection 2(1) of the Fisheries Act,

(ii) aquatic species as defined in subsection 2(1) of the Species at Risk Act,

(iii) migratory birds as defined in subsection 2(1) of the Migratory Birds Convention Act, 1994, and

(iv) any other component of the environment that is set out in Schedule 2;

(b) a change that may be caused to the environment that would occur

(i) on federal lands,

(ii) in a province other than the one in which the act or thing is done or where the physical activity, the designated project or the project is being carried out, or

(iii) outside Canada; and

(c) with respect to aboriginal peoples, an effect occurring in Canada of any change that may be caused to the environment on

(i) health and socio-economic conditions,

(ii) physical and cultural heritage,

(iii) the current use of lands and resources for traditional purposes, or

(iv) any structure, site or thing that is of historical, archaeological, paleontological or architectural significance.

Exercise of power or performance of duty or function by federal authority

(2) However, if the carrying out of the physical activity, the designated project or the project requires a federal authority to exercise a power or perform a duty or function conferred on it under any Act of Parliament other than this Act, the following environmental effects are also to be taken into account:

(a) a change, other than those referred to in paragraphs (1)(a) and (b), that may be caused to the environment and that is directly linked or necessarily incidental to a federal authority's exercise of a power or performance of a duty or function that would permit the carrying out, in whole or in part, of the physical activity, the designated project or the project; and

(b) an effect, other than those referred to in paragraph (1)(c), of any change referred to in paragraph (a) on

(i) **health** and socio-economic conditions,

(ii) physical and cultural heritage, or

> (iii) any structure, site or thing that is of historical, archaeological, paleontological or architectural significance.

Pursuant to subsection 38(1), the Minister may refer an environmental assessment to a Review Panel if it is in the public interest. Then, pursuant to subsection 43(1), the Review Panel must prepare a report that sets out its conclusions and recommendations, including any mitigation measures, and submit its report to the Minister.

Subsection 47(1) states:

> **Minister's decisions**
>
> **47(1)** The Minister, after taking into account the review panel's report with respect to the environmental assessment, must make decisions under subsection 52(1).

Sections 51 and 52 provide that after taking into account the Review Panel's report, the Minister must render a decision as to whether the designated project is likely to cause significant adverse environmental effects, as defined by subsections 5(1) and (2). In making this determination, subsection 52(1) requires the Minister to take into account the implementation of any mitigation measures that the Minister deems appropriate.

Decisions of decision maker

> **52 (1)** For the purposes of sections 27, 36, 47 and 51, the decision maker referred to in those sections must decide if, taking into account the implementation of any mitigation measures that the decision make considers appropriate, the designated project
>
> > **(a)** is likely to cause significant adverse environmental effects referred to in subsection 5(1); and
> >
> > **(b)** is likely to cause significant adverse environmental effects referred to in subsection 5(2).

In accordance with subsection 52(2), if the Minister decides that the 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."

> **Referral if significant adverse environmental effects**
>
> **52 (2)** If the decision maker decides that the designated project is likely to cause significant adverse environmental effects referred to in subsection 5(1) or (2), the decision maker must refer to the Governor in Council the matter of whether those effects are justified in the circumstances.

Paragraph 52(4)(a) dictates that when a matter has been referred to the Governor in Council, "the Governor in Council may decide that the significant adverse environmental effects that the designated project is likely to cause are justified in the circumstances."

> **Governor in Council's decision**
>
> **52 (4)** When a matter has been referred to the Governor in Council, the Governor in Council may decide
>
> > **(a)** that the significant adverse environmental effects that the designated project is likely to cause are justified in the circumstances; or
> >
> > **(b)** that the significant adverse environmental effects that that designated project is likely to cause are not justified in the circumstances.
>
> [Emphasis added]

If the Governor in Council determines that the effects are justified in the circumstances, subsection 53(1) provides that the Minister must then establish conditions in relation to the subsections 5(1) and 5(2) environmental effects with which the proponent must comply:

> **Conditions – environmental effects referred to in subsection 5(1)**
>
> **53 (1)** If the decision maker decides under paragraph 52(1)(a) that the designated project is not likely to cause significant adverse environmental effects referred to in subsection 5(1), or the Governor in Council decides under paragraph 52(4)(a) that the significant adverse environmental effects referred to in that subsection that the designated project is likely to cause are justified in the circumstances, the decision maker must establish the conditions in relation to the environmental effects referred to in that subsection with which the proponent of the designated project must comply.
>
> **Conditions – environmental effects referred to in subsection 5(2)**
>
> **(2)** If the decision maker decides under paragraph 52(1)(b) that the designated project is not likely to cause significant adverse environmental effects referred to in subsection 5(2), or the Governor in Council decides under paragraph 52(4)(a) that the significant adverse environmental effects referred to in that subsection that the designated project is likely to cause are justified in the circumstances, the decision maker must establish the conditions – that are 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 – in relation to the environmental effects referred to in that subsection with which the proponent of that designated project must comply.

Finally, subsection 54(1) provides the Minister must issue a decision statement to the proponent of the designated project that informs the proponent:

> **Decision statement issued to proponent**
>
> **54 (1)** The decision maker must issue a decision statement to the proponent of a designated project that
>
> > **(a)** informs the proponent of the designated project of the decisions made under paragraphs 52(1)(a) and (b) in relation to the designated project and, if a matter was referred to the Governor in Council, or that decision made under subsection 52(4) in relation to the designated project; and
> >
> > **(b)** includes any conditions that are established under section 53 in relation to the designated project and that must be complied with by the proponent.

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-330-21
STYLE OF CAUSE:	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 REGION CONSERVATION AUTHORITY v CANADA (MINISTER OF THE ENVIRONMENT), ATTORNEY GENERAL OF CANADA, AND CANADIAN NATIONAL RAILWAY COMPANY
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	DECEMBER 11-13, 2023
JUDGMENT AND REASONS:	BROWN J.
DATED:	MARCH 1, 2024

APPEARANCES:

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